

(Translation)

**Report of the Advisory Panel on Reconstruction
of the Legal Basis for Security**

May 15, 2014

The Advisory Panel on
Reconstruction of the Legal Basis for Security

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Introduction

In May 2007, then-Prime Minister Shinzo Abe established the Advisory Panel on Reconstruction of the Legal Basis for Security. Until that time, despite the fact that Japan possesses the right of collective self-defense as clearly stipulated under Article 51 of the United Nations (U.N.) Charter and the Japan-U.S. Security Treaty, the Government has maintained the position that such a right cannot be exercised. The “four cases” that Prime Minister Abe presented to the Advisory Panel at the time comprised scenarios that are subject to particularly significant constitutional constraints, and yet, unless Japan is able to respond appropriately to such scenarios, these constraints would be likely to obstruct the maintenance of Japan’s security, the trust in the Japan-U.S. alliance, and Japan’s proactive contribution for international peace and stability. These cases posed a question, given the changes in the security environment surrounding Japan, what measures would need to be taken for Japan to respond effectively when there is a situation in which a response required recourse to the right of collective self-defense etc., which Japan cannot exercise, while examining whether the Government’s constitutional interpretation to date continues to be appropriate. The “four cases” were: (1) Defense of U.S. naval vessels on the high seas, (2) Interception of a ballistic missile that might be on its way to the United States, (3) Use of weapons in international peace operations and (4) Logistics support for the operations of other countries participating in the same U.N. PKOs and other activities.

The Panel at that time engaged earnestly in discussions about what Japan should do in order to respond to these situations effectively under the current security environment surrounding Japan; whether such policies can be implemented based on the legal interpretations held to date by the Government, including its constitutional interpretation; what restrictions exist that hinder policy implementation; and what measures can be taken to resolve such legal issues with a view to ensuring Japan’s security. The Panel submitted its report in June 2008. The report included concrete issues relating to the “four cases,” and derived a conclusion including that it had become difficult to respond appropriately to important issues that arise under the contemporary security environment if the interpretation of the Government to date continued to be upheld. The report concluded that there would be situations in which it would not be possible to respond as the exercise of the right of individual self-defense and law enforcement powers etc. that are permitted under existing legislation such as the Self Defense Forces Law (SDF Law), and called for changes to be made to constitutional interpretation, so as to permit the exercise of the right of collective

self-defense and participation in the collective security measures. Specifically, the recommendations on each of the four cases were submitted as follows:

(1) Defense of U.S. vessels on the high seas: For the maintenance and strengthening of mutual trust between the allies, it is essential that Japan be able to protect U.S. naval vessels when the latter face danger during joint operations. The current constitutional interpretation and the provisions of relevant laws explain that the defense of U.S. vessels is possible by exercising the right of individual self-defense, or by a “reflex effect” of a Self-Defense Force (SDF) personnel protecting oneself or in “defense of the SDF’s weapons and other equipment under Article 95 of the SDF Law”. However, under these interpretations, the SDF can defend U.S. naval vessels only in very exceptional cases and cannot respond effectively to the actual situations of missile attacks against those vessels. Therefore, the exercise of the right of collective self-defense needs to be permitted to prepare for such a case.

(2) Interception of a ballistic missile that might be on its way to the United States: Japan cannot respond effectively enough to such missiles if it continues to maintain the hitherto held concept of the right of self-defense and current domestic procedures. It would be detrimental to the Japan-U.S. alliance, a basic prerequisite for Japan’s security, if Japan did not shoot down a ballistic missile that might be on its way to the United States even though Japan was capable of doing so; thus such a situation must absolutely be avoided. As this issue cannot be solved by the current approach that relies on exercising the right of individual self-defense or law enforcement powers, this also needs to be dealt with by exercising the right of collective self-defense.

(3) Participation in U.N. PKOs and other international peace operations: Article 9 of the Constitution should be interpreted as not prohibiting participation in international peace operations. It should be deemed that the Constitution permits SDF personnel’s use of weapons to protect themselves, as well as to come to the aid of geographically distant unit or personnel participating in the same operations who are under attack (so-called “kaketsuke keigo”) and to remove obstructive attempts against its missions.

(4) Logistics support for the operations of other countries participating in the same U.N. PKOs and other activities: Japan should abandon the concept of “ittaika” with the use of force held to date, and should deal with this as a matter of policy appropriateness.

In the above recommendations, the Panel suggested that the interpretation of the Constitution should be changed to permit Japan to exercise the right of collective self-defense and participate in the collective security measures of the U.N., and that

such a change of interpretation can be introduced by the Government by presenting a new interpretation in an appropriate form, and an amendment to the Constitution is not necessary.

The security environment surrounding Japan has changed dramatically even in the few years since the Panel submitted its previous report. North Korea continues to develop and proliferate missiles and nuclear weapons. Also noteworthy are the prominent shifts in global power that have unfolded, which are transforming the situation in the East China Sea and South China Sea near Japan. This has necessitated serious consideration on Japan's security policy towards the maintenance and building of peace in the international community. Moreover, the Japan-U.S. alliance, the linchpin of stability and prosperity in the Asia-Pacific region, is faced with an even greater responsibility.

In view of these changes in the situation, Prime Minister Abe resumed the meetings of the Panel in February 2013. The Panel was instructed to reexamine the legal basis for security, what Japan should do in order to maintain the peace and security of Japan, including for the most effective operation of the Japan-U.S. security arrangements, taking into account the changes over the past four and a half years as well as potential changes in the security environment in the future.

This examination was not limited to the "four cases" described in the 2008 report. Recognizing that other cases which Japan must deal with may arise under the new environment, the Panel was instructed to examine what concrete actions Japan should take to maintain the peace and security of Japan and to ensure its survival, what ideas should underlie the Government's constitutional interpretation, how the Constitution should be interpreted, and how the domestic legal system should be structured.

In consideration of the above, this report begins by providing an overview of the development of the Government's interpretation of the Constitution in Chapter I below. The report then clarifies the fundamental principles of the Constitution of Japan pertaining to the interpretation of Article 9, and examines the changes which transpired in the security environment surrounding Japan. Then, it will lay out concrete cases where Japan is deemed to be unable to respond adequately under the current constitutional interpretation and legal system. On this basis, in Chapter II, the report presents how the Constitution should be interpreted to maintain the peace and security of Japan, and realize peace and stability in the region and the international community. Finally, in Chapter III, the report provides recommendations regarding the key elements that should be explored for improving domestic laws and taking other measures in this context.

I. The Current Constitutional Interpretation and Its Limits

1. Development of the Constitutional Interpretation and Fundamental Principles

(1) Development of the Constitutional Interpretation

Before discussing how the constitutional interpretation should be, it is necessary to see that the interpretation of Article 9 of the Constitution was not consistent throughout the postwar period amidst the changing international situation.

In June 1946, then-Prime Minister Shigeru Yoshida made the following remarks at a session of the Imperial Diet under the former Constitution that deliberated and enacted the new Constitution: “Regarding the question concerning the right of self-defense, the provision pertaining to the renunciation of war in this draft does not deny the right of self-defense directly. However, as a result of not recognizing any war potential and the right of belligerency of the state in paragraph 2 of Article 9, Japan renounced both war as an exercise of the right of self-defense and the right of belligerency”¹ (Plenary Session of the House of Representatives (June 26, 1946)). In the same year, Prime Minister Yoshida stated, “If Japan becomes a member of the U.N. as an independent nation, Japan will be prima facie protected by the U.N. Charter.”² These debates at the

¹ At a meeting of the Committee on Cabinet of the House of Representatives on May 6, 1954, when asked whether he still held the view expressed in the said answer or changed his view, Prime Minister Yoshida answered, “I do not fully recall how I worded the statement that you noted. However, the point was that Japan would not remilitarize in any way under the name of self-defense and that Japan would not have a military with war potential. In addition, my point was that Japan would not use forces as means in international disputes under the name of self-defense. This point remains unchanged. This is why I said that Japan would not remilitarize. Japan will not remilitarize and use it for international disputes. Or Japan will not reorganize a military which leads to war potential. This point still remains unchanged.”

² Answer by Prime Minister Shigeru Yoshida at a meeting of the Committee on the Draft Revision of the Imperial Constitution of the House of Representatives (July 4, 1946)
“Your question of how Japan would defend itself against an aggressor without force in the case when a peace treaty is concluded and Japan restores its independence is a point well taken. However, the United Nations Organization (UNO) has been established. Following its establishment, if so-called the objective of the UNO is achieved, according to the provisions of Article 43 of the U.N. Charter, UNO member states have an obligation to provide forces. The Article provides that the UNO itself, with these forces, would, through a world-wide effort, contain and constrain the aggressor that is impairing world peace. In ideal terms, or perhaps representing nothing more than an ideal, or perhaps representing nothing but empty words even, the Article provides that as an organization established for the purpose of maintaining international peace, UNO in this way will have such special forces as provided for in the Charter, which should be regarded as its constitution. In particular, the UNO will have special forces and impose sanctions against any country that disrupts world peace or threatens world peace. My understanding is that according to this Charter, or if Japan becomes a member of the U.N. as an independent nation, Japan should be protected by this Charter.”

Imperial Diet suggest that at the time of the enactment of the Constitution of Japan, the Government anticipated that, at least conceptually, it would entrust the security of Japan to the collective security system of the U.N. which had been established merely one year earlier in 1945.

Nevertheless, subsequently, this concept changed dramatically. That is, as the Cold War started to progress, the U.N. did not function as was anticipated. The Korean War broke out in June 1950. Japan restored its sovereignty in April 1952, and Japan and the United States concluded the Security Treaty between Japan and the United States of America (former Japan-U.S. Security Treaty). In July 1954, the SDF were established. By then, the Government demonstrated a considerably modified interpretation of the Constitution, as is represented in the following answer by Director-General of the Defense Agency Seiichi Omura: “The Constitution, while renouncing war, has not renounced fighting for self-defense. (Abridged) To repel armed attack in the event of such an attack from other countries is self-defense itself, and is essentially different from settling international disputes. Hence, the use of force as an instrument for defending national territory when an armed attack has been launched against the nation does not violate the Constitution. (Abridged) It is not a violation of the Constitution for Japan to set up an armed force such as the SDF having a mission for self-defense and to possess military force to the extent that is necessary for that purpose.”(Budget Committee of the House of Representatives (December 22, 1954))

Furthermore, the fact that the grand bench of the Supreme Court issued the following ruling on the so-called Sunagawa case in December 1959 deserves special attention: “The Article (Article 9 of the Constitution) renounces the so-called war and prohibits the maintenance of the so-called war potential prescribed in the Article, but there is nothing in it which denies the inherent right of self-defense of Japan as a sovereign nation. Pacifism in our Constitution by no means stipulated defenselessness or nonresistance. As is clear from the Preamble of the Constitution, we, the Japanese people, desire to occupy an honored place in an international society striving for the preservation of peace and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth, and recognize that we have the right, along with all peoples of the world, to live in peace, free from fear and want. Therefore, it is only natural for our country, in the exercise of powers inherent in a state, to take measures of self-defense necessary to maintain its peace and security, and to ensure its survival.”³

³ Chief Justice of the Supreme Court Kotaro Tanaka in his supplementary opinion stated: “To express this thought in other words; in this day and age, the concept of self-defense in its strictest

This grand bench ruling is significant as it was the first time for the judiciary to clarify its judgment that the right of self-defense is not denied by Article 9 of the Constitution and that it is only natural for our country, in the exercise of powers inherent in a state, to take measures of self-defense necessary to maintain its peace and security and to ensure its survival. Moreover, the fact that the ruling did not distinguish the right of individual self-defense from the right of collective self-defense in terms of the inherent right of self-defense that Japan has, and accordingly, that the ruling did not prohibit the exercise of the right of collective self-defense should be taken heed of.

On the other hand, the debate on the right of collective self-defense arose in 1960 when the Security Treaty between Japan and the U.S. was revised. At first, the discussion was made in the context of prohibiting overseas deployment of the SDF as was stated by then-Prime Minister Nobusuke Kishi in the Budget Committee of the House of Councillors in March of that year that “In the case in which a country with which Japan shares especially close relations is subjected to an armed attack, under the Constitution Japan does not possess the right of collective self-defense in the sense of Japanese forces going to the attacked country and protecting that country,” and “The most typical scenario under the right of collective self-defense would be to go to another country to protect that country, but we do not believe that is all that the right of collective self-defense entails. In that sense I believe that it would be an overstatement to say that Japan does not possess any right of collective self-defense under the Constitution.”⁴ Then, it went on to renounce the right of collective self-defense in general.

The Government, referring to both the Preamble and Article 13 of the Constitution,

sense no longer exists. The only formula of correlation that exists today is: self-defense equals "the defense of another"; the defense of another, equals self-defense. Consequently, whether it be for self-defense or for extending cooperation for the defense of another, it is now an accepted fact that each nation is charged with the duty of assuming its share of responsibility. In the realm of domestic problems, for one to defend the right of oneself and of others against imminent unlawful infringement is commonly termed as "struggling for one's rights" which is a natural demand of justice. This refers to the protection of the entire system of law and order. This tenet is the same in the realm of international relationships...it is incumbent upon us to interpret the principle of pacifism professed in the Constitution not only from the standpoint of one nation, but also in such a way to be in harmony with the legal conviction of the democratic, peace-loving nations of all the world, bringing it into the realm of the dimension of world law, transcending above the interests of one nation. An attitude which completely disregards one's own defense, and that which assiduously considers only its own defense, having no enthusiasm or interest in the defense of other countries are both equally guilty of international egoism, within the meaning of the Preamble of the Constitution which states, "no nation is responsible to itself alone," and cannot be said to be faithful to the concept of true pacifism.

⁴ Answer by Prime Minister Nobusuke Kishi, in the Budget Committee of the House of Councillors (March 31, 1960)

then went on to articulate that Japan could take measures of self-defense necessary to maintain its peace and security and to ensure its survival. At the same time, the Government came to express the opinion that such measures should be limited to the minimum extent necessary and thus the exercise of the right of collective self-defense is not permitted under the Constitution. In the document submitted to the Committee on Audit of the House of Councillors in October 1972,⁵ the Government stated, “The Constitution, in Article 9, renounces the so-called war and prohibits the maintenance of the so-called war potential prescribed in the Article. However, the Constitution recognized in the Preamble that ‘all peoples of the world have the right to live in peace,’ and set out in Article 13 that ‘Their (all the people’s) right to life, liberty, and the pursuit of happiness shall...be the supreme consideration...in...governmental affairs.’ It is evident on this basis as well, that the Constitution has not gone so far as to renounce even Japan’s right to ensure its survival and the people’s right to live in peace and that the Constitution cannot possibly be interpreted to prohibit Japan from taking measures of self-defense necessary to maintain its peace and security and to ensure its survival.” Then the document continues as follows; “Nevertheless, that does not mean that the Constitution, which makes pacifism its fundamental principle, can be interpreted as permitting such measures for self-defense unlimitedly. These measures are permitted only when they are inevitable for dealing with imminent unlawful situations where the people’s right to life, liberty, and the pursuit of happiness is fundamentally overturned due to an armed attack by a foreign country, and for safeguarding these rights of the people. Hence, these measures should be limited to the minimum extent necessary for repelling these situations.” and “If so, the use of force under our Constitution is permitted only in cases dealing with imminent unlawful infringements against Japan. Accordingly, it follows that the exercise of the so-called right of collective self-defense, which entails repelling armed attacks against other countries, cannot be permitted under the Constitution.” The Government in essence presented the view that the exercise of the right of collective self-defense is not permitted under the Constitution.

Similarly, in May 1981, the Government presented the following view in its written answer to a written question submitted by a Diet member: “It is only natural for our country to hold the right of collective self-defense under international law as it is a sovereign nation. The Government nevertheless takes the view that the right of self-defense permitted under Article 9 of the Constitution is limited to the minimum

⁵ “Relationship between the Right of Collective Self-Defense and the Constitution” (Document requested by the Committee on Audit of the House of Councillors) (October 14, 1972)

extent necessary for the defense of the country. The Government believes that the exercise of the right of collective self-defense exceeds that extent and is not permitted under the Constitution.”⁶ In addition, in the answer the Government stated that “the fact that the exercise of the right of collective self-defense cannot be permitted under the Constitution would not cause any detriment.” This interpretation of the Constitution held by the Government, that the exercise of the right of collective self-defense is not permitted at all under the Constitution, has not been changed until today.

In the first place, any organization must achieve self-transformation in response to the changes in the external world, within the limit of preserving its identity, in order to accomplish its fundamental purpose. An organization which fails to achieve this cannot avoid deteriorating or may eventually collapse. This is also true with states. The most important purpose of a state is to protect the security of its people. For this purpose, a state must achieve self-transformation in response to external changes within range of basic rules. Moreover, if a constitutional theory shown under a specific situation at some given point in time takes hold and security policies become inflexible under that theory despite significant changes of the security environment, there is a possibility that the security of the people could be compromised because of a constitutional argument. This goes against the very basis of constitutionalism, whereby the constitution is formulated by the people themselves, for the protection of the people with whom sovereign power resides.

Amid the rapid advancements in military technology and in view of the existence of powerful military powers near Japan, the security environment surrounding Japan is becoming increasingly severe. Under these circumstances and taking into account the potential change in the security environment and military technology in the future, it needs to be borne in mind that whether Japan can truly protect the lives of its people through only the right of individual self-defense, as the limit of the minimum extent necessary, has not been demonstrated. Moreover, the reason for the literal interpretation that individual self-defense and collective self-defense are clearly divided and only the right of individual self-defense is permitted under the Constitution has not been presented. This point is reexamined in the chapter, “II. How the Constitution Should Be Interpreted.”

With regard to the participation in the international peace operations conducted by the U.N. etc., the Cabinet Legislation Bureau in the 1960s had considered that there is

⁶ Written answer to the written question submitted by House of Representatives member Seiichi Inaba (May 29, 1981).

no constitutional problem for Japan to provide units including those which exercise the use of force to formal U.N. forces.⁷ However, later on the Government maintained that acts that have the possibility of leading to the use of force violate Article 9 of the Constitution,⁸ as shown in the following answers. For example, in the written answer to

⁷ In the document the Cabinet Legislation Bureau prepared in 1965 entitled, “The So-called U.N. Forces and the Constitution of Japan (September 3, 1965, Cabinet Legislation Bureau)” (Note: These are the views of the Cabinet Legislation Bureau recorded in the “Document Concerning the Draft Law on the U.N. Cooperation” prepared by the Ministry of Foreign Affairs of Japan in 1968; its confidential status has since then been lifted), the Cabinet Legislation Bureau considered that there was no constitutional problem for Japan to provide units accompanying the use of force to formal U.N. forces. The document stated: “In order for the provision of units to the so-called U.N. forces to become permitted constitutionally, the armed operations by the so-called U.N. forces must constitute the use of force for maintaining international peace and security within the U.N. community as a supranational operation conducted by a supranational political organization called the U.N. Accordingly, to shed light on this point with respect to individual concrete cases, the cases must be reviewed against the following three points. (1) Whether the use of force by the so-called U.N. forces is executed based on the will of the U.N. itself. For the use of force to be executed according to the will of the U.N. itself, this naturally requires a resolution of its bodies, the General Assembly or the Security Council. Rather than the resolutions of these bodies stating that the use of force would be executed by themselves, if the content of the resolutions recommend that force should be used based on the will of each of the U.N. member states, then force which is used based on such recommendations constitutes the use of force by the said member states and cannot be said as the use of force by the U.N. (2) Whether the use of force in reality is conducted by the U.N. itself. In order for this to be positively acknowledged, the so-called U.N. forces must be appointed by the U.N. or its bodies and also commanded by a commander under its control. Its expenses must be directly under the administration of the U.N., as when expenses are borne by the U.N. (3) In the case that a situation which arose between U.N. member states or within U.N. member states that impedes the peace and security of the U.N. community, whether the use of force by the so-called U.N. forces is aimed at repelling this impediment. In the case that these three points are positively acknowledged, even if units as a component of the so-called U.N. forces are maintained and contributed on a voluntary basis, it is not denied under our Constitution, which includes Article 9, leaving aside the issue of whether or not it conforms to policy.”

⁸ Answer by Director-General of the First Department of the Cabinet Legislation Bureau Osamu Akiyama, in the Committee on Security of the House of Representatives (May 14, 1988) “Your question was on how Chapter VII of the U.N. Charter or how the PKOs which were actually established on the basis of the U.N. Charter would have any issue with Article 9 of the Constitution if Japan participates in the operations. In international law, collective security is a measure stipulated in the U.N. Charter. While generally prohibiting the use of force on the one hand, the U.N. Charter provides that disputes shall be settled peacefully. The concept is, if peace is threatened or destroyed or there is an act of aggression that goes against the U.N. Charter, then it calls on the international community to work together and restore peace by taking appropriate measures against the perpetrators of the acts. Japan acceded to the U.N. taking into account pacifism and the principles of international cooperation in the Constitution. Embedded in the U.N. Charter is this kind of framework of collective security, and activities of the PKOs, which have become actually established, are being conducted.

Accordingly, Japan will fulfill its duties under the U.N. Charter in accordance with paragraph 2 of Article 98 of the Constitution to the extent that they do not conflict with the supreme law, the Constitution. In this case, Japan takes the view that out of the various activities related to collective security or PKOs, Japan is not allowed to conduct activities that entail the use or threat of force prohibited under Article 9 of the Constitution.”

a written question submitted by a House of Representatives member, Seiichi Inaba (October 28, 1980), the Government answered that “The purposes and missions of the so-called ‘U.N. forces’ (note: ‘U.N. forces’ here refers to forces formed for PKOs by the U.N.) vary on an individual, case-by-case basis. Therefore, the question of whether the SDF should or should not join the ‘U.N. forces’ cannot be discussed in any uniform way. However, the Government takes the view that if the purpose and mission of the ‘U.N. forces’ involves the use of force, then the SDF’s participation in the ‘U.N. forces’ is not permitted under the Constitution.” Furthermore, Director-General of the First Department of the Cabinet Legislation Bureau Osamu Akiyama answered in the Committee on Security of the House of Representatives on May 14, 1988, “out of the various activities related to collective security or PKOs, Japan is not permitted to conduct activities that entail the use or threat of force which is prohibited under Article 9 of the Constitution.” Nevertheless, the Government did not consider the SDF’s participation in the so-called “regular U.N. forces” as violating Article 9 of the Constitution and maintained the position that this question was “being studied” (Answer by Director-General of the Cabinet Legislation Bureau Atsuo Kudo in the Budget Committee of the House of Representatives (October 19, 1990)), and that “unless a special agreement is made, no decisive evaluation can be made in this regard.” (Answer by the Director-General of the Cabinet Legislation Bureau Masasuke Omori in the Budget Committee of the House of Representatives (March 18, 1998)).⁹

(2) Fundamental Principles of the Constitution Pertaining to the Interpretation of Article 9 of the Constitution

⁹ (1) Answer by Director-General of the Cabinet Legislation Bureau Atsuo Kudo in the Budget Committee of the House of Representatives (October 19, 1990)

“With regard to how Japan would be involved or participate in the so-called formal U.N. forces formed under the U.N. Charter, this is still being studied. At this stage, I am not yet able to provide a clear answer regarding the results of the study.”

(2) Answer by Director-General of the Cabinet Legislation Bureau Masasuke Omori in the Budget Committee of the House of Representatives (March 18, 1998)

“Regarding the U.N. forces provided for in Articles 42 and 43 of the U.N. Charter, as we have been stating, based on what we infer from the accumulation of the interpretations and past applications of Article 9 of the Constitution, we believe that Japan’s participation in the U.N. forces is constitutionally questionable. (Abridged) In other words, there is no doubt that at the basis of participating in the U.N. forces is Japan’s sovereign action. However, on this ground, the questions of how the Japanese units that participate in the U.N. forces would be positioned within the forces, how the Japanese units would be commanded, or how the conditions and procedures of withdrawal would be stipulated will have a determining influence on the evaluation of whether the activities of the Japanese units that participate in the U.N. forces constitute the use of force. Accordingly, unless a special agreement is made, no evaluation can be made conclusively in this regard.”

Next, recognizing the development of the constitutional interpretation to date mentioned in (1) above and recalling the changes in the security environment surrounding Japan which will be described in 2. below, we will confirm the fundamental principles of the Constitution which should be the most important foundation in considering the interpretation of Article 9 of the Constitution.

A. Right to Live in Peace, Right to Life, Liberty and the Pursuit of Happiness, as the foundation of Basic Human Rights

As was stated in the aforementioned Government's view of 1972, the Preamble of the Constitution of Japan, which sets out "We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want," recognizes the right to live in peace. Moreover, Article 13 of the Constitution, which stipulates "Their (all the people's) right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs," provides for the people's right to life, liberty, and the pursuit of happiness. These are rights which should be regarded as forming the foundation of other basic human rights. The protection of these rights requires as a precondition that Japan is not invaded and maintains its independence, and is incumbent on the maintenance and exercise of appropriate force for self-defense for repelling attacks and threats from the outside. The maintenance and exercise of force for self-defense are also the consequence of the logic inherent in the Constitution.

B. Popular Sovereignty

The Preamble of the Constitution of Japan identifies popular sovereignty as "a universal principle of mankind," and stipulates that, "We reject and revoke all constitutions...in conflict herewith." The "principle of popular sovereignty," similar to "basic human rights," is understood as so to speak fundamental principle which cannot be denied by any means. The "principle of popular sovereignty" cannot be realized unless the survival of the sovereign people is ensured. This requires that the peace and security of Japan is maintained, and its survival is ensured. Peace is what people aspire towards. At the same time, the lives of the sovereign people and the survival of the state must not be placed at risk even from such perspective of the Constitution. The interpretation of the Constitution by the Government which exercises its sovereign right must not place the security of the people and of the state at risk.

C. Principle of International Cooperation

The Constitution of Japan, in its Preamble, expresses the principle of international cooperation as follows: “We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.” Article 98 of the Constitution sets forth the faithful observation of laws of nations, describing that, “The treaties concluded by Japan and established laws of nations shall be faithfully observed.” Based on this spirit of the principle of international cooperation as expressed in the Constitution, it is natural that participation in international operations is an area in which Japan should engage in most proactively.

D. Pacifism

Pacifism is one of the fundamental principles of the Constitution and must be firmly maintained. As will be stated later, pacifism of the Constitution is historically closely related to the trends of international law since the early 20th century including the development of the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact, 1928), and the U.N. Charter (1945). As the Preamble states that “We, the Japanese people...resolved that never again shall we be visited with the horrors of war through the action of government,” pacifism of the Constitution which is based on the pledge never to wage a war again of ourselves takes shape in Article 9 which forever renounces wars of aggression and use of force for the resolution of international conflicts. Nevertheless, the Constitution upholds the principle of international cooperation in the Preamble that “We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want,” and that “We believe that no nation is responsible to itself alone.” Therefore, Japan’s pacifism must be interpreted as based on the principle of international cooperation which is also the fundamental principle of the Constitution. Accordingly, pacifism in the Constitution should be interpreted from an international perspective and not from a self-centered view and thus is beyond the passive form of pledging not to disturb peace, and demands proactive actions to realize peace. In the National Security Strategy adopted on December 17, 2013 by Cabinet Decision, the Government expressed its resolve to contribute even more proactively in securing the peace, stability and prosperity of the international community, while achieving its own security as well as the peace and stability in the Asia-Pacific region, as a “Proactive Contributor to Peace” based on the principle of international cooperation. Pacifism of the Constitution

can be said as the very foundation of this policy of “Proactive Contribution to Peace” based on the principle of international cooperation.

2. Changes in the Security Environment Surrounding Japan

The security environment surrounding Japan has become ever more severe. This trend is more notable compared with the time when the Panel compiled its 2008 report.

The first change is technological progress and the changing nature of threats and risks. Today, as a result of technological innovation and the advancement of globalization, weapons of mass destruction and their means of delivery are proliferating, becoming increasingly sophisticated, and becoming smaller. Cross-border threats have also increased, raising concerns about the spread of international terrorism. For instance, North Korea, neglecting repeated U.N. Security Council resolutions of condemnations and sanctions, has already deployed ballistic missiles with a range that covers the whole of Japan and is developing ballistic missiles that would reach the United States. North Korea furthermore has conducted three nuclear tests, is working to develop smaller nuclear warheads, and seems to possess biological and chemical weapons. Another development which currently poses a major threat and risk to society at large is cyber-attacks carried out by a variety of agents. The targets of cyber-attacks have moved beyond the level of nation states, companies, and individuals, and become increasingly multi-layered and integrated, demanding a unified and prompt response of the international community. An outbreak of a cyber-attack in any region of the world could have influence on the peace and security of Japan immediately. This has made it difficult to distinguish clearly between inside and outside of the border as in the past. Outer space is another domain which demands the strengthening of further international cooperation, including the cooperation with the United States, such as in monitoring in normal circumstances as well as rulemaking, to ensure stable use, because of the expanded uses for both civilian and military purposes.

The second change is the change in the inter-state power balance. Drivers of the change in the balance of power are countries which have been gaining national power, including China, India and Russia following its revival after the Cold War. The change has significantly influenced the dynamics of international politics. Tensions have been rising especially in the Asia-Pacific region. Territorial and other destabilizing elements exist. The rise of China’s influence is evident. The amount of China’s nominal defense spending, as disclosed by the country, increased by approximately 4 times in the past 10

years and by approximately 40 times in the past 26 years. Against the background of the increase in military budget, China has installed and quantitatively expanded its arsenal of latest weapons such as modern combat aircraft and new types of ballistic missiles in a dramatic manner. While there still exist many non-transparent parts in its military budget, China's official military budget in 2014 exceeded twelve trillion yen, nearly triple the defense budget of Japan. If this trend continues it will lead to the emergence of a further mighty Chinese military. In addition, there have been attempts to unilaterally change the status quo by force based on their own territorial assertions. This makes it imperative that Japan fulfills an even greater role for ensuring peace and stability in the region, as the risks have been increasing.

The third change is the deepened and expanded Japan-U.S. relationship. Since the 1990s, the importance of Japan-U.S. cooperation on the operational front has further increased for addressing diverse situations, including ballistic missile attacks and international terrorism; the bilateral security and defense cooperation has expanded considerably. As its concrete manifestation, sharing of various resources, including equipment and information, has been facilitated, and this tendency is expected to continue. At the Japan-U.S. Security Consultative Committee ("2+2") held in October 2013, it was agreed to revise the Guidelines for U.S.-Japan Defense Cooperation, and Japan and the United States are to discuss the strengthening of bilateral security and defense cooperation, including role-sharing of concrete bilateral defense cooperation between Japan and the United States. It is clear that, without the Japan-U.S. alliance, Japan alone would not be able to adapt to the changes in security environment, such as those explained in the first two changes, and ensure the security of Japan. At the same time, Japan can no longer unilaterally expect the United States to provide sanctuary as it did in the immediate aftermath of World War II more than a half century ago. Now is the era in which both Japan and the United States and relevant countries must cooperate to contribute to the peace and security in the region. In order to maintain and further deepen the vitality of the alliance, tireless efforts should be made to realize fairer burden sharing. While strengthening the Japan-U.S. alliance in all areas of security is essential, Japan needs to also build trust and cooperative relations with partners inside and outside the Asia-Pacific region who play important roles in ensuring regional peace and stability.

The fourth change is developments in the region related to regional frameworks, including multilateral security cooperation frameworks. In addition to the Association of Southeast Asian Nations (ASEAN) which was established in 1967, a variety of cooperation frameworks have developed in a multi-layered manner following the end of

the Cold War and the expansion of common security issues. These are not limited to Asia-Pacific Economic Cooperation (APEC, 1989) in the field of economy and the ASEAN Regional Forum (ARF, 2005) in the field of diplomacy. The frameworks also include those in the areas of politics, security and defense, such as the establishment and expansion of the East Asian Summit (EAS, 2005) and the creation of the ASEAN Defense Ministers' Meeting Plus (ADMM-Plus, 2010). In light of these circumstances, Japan is required to develop and improve its institutional, financial, and personnel bases to enable Japan to participate more proactively in a wide range of cooperation activities and fulfill a leading role.

The fifth change is the increasing number of serious incidents that the whole international community ought to address, including reconstruction assistance in Afghanistan and Iraq, state-building in South Sudan and anti-piracy operations in the Gulf of Aden, which threatens sea lanes. U.N. PKO activities, for example, now have more diverse missions compared to traditional missions focused on ceasefire monitoring. In recent years, U.N. PKO missions encompass an increasingly diverse range of operations that require military forces, expanding to include reconstruction assistance, humanitarian assistance and anti-piracy operations. U.N. PKO activities today require greater promptness, seamlessness and comprehensive approaches in response to incidents occurring in any region of the world. The importance of such activities including conflict management, peace building and reconstruction assistance with the U.N. at the core is increasing, and international cooperation is further required.

Lastly, the sixth change is the SDF's operations in the international community. Since the minesweeping operation in the Persian Gulf in 1991, the SDF has to date participated in 33 international operations, including the ongoing activity in South Sudan and accumulated achievements. Other operations include the U.N. PKO in Cambodia in 1992, the U.N. PKO in Mozambique in 1993, humanitarian international relief activities for refugees of Rwanda in then-East Zaire in 1994, refueling operations in the Indian Ocean for the vessels participating in Operation Enduring Freedom following the terrorist attacks in the United States in 2001 and humanitarian and reconstruction assistance activities in Iraq from 2003 to 2009. Furthermore, in response to large-scale natural disasters overseas, the SDF has engaged proactively in disaster relief activities by leveraging its functions and capabilities in recent years. Recent examples include the deployment of roughly 1,200 SDF personnel in response to the damages caused by a typhoon which swept through the Philippines in November 2013. The SDF personnel conducted an array of activities, including medical examinations for those affected by the disaster, vaccination, epidemic control, air-transport of supplies,

and air-transport of affected people. In 2007, international peace cooperation activities including disaster relief activities were identified as one of the “primary missions” of the SDF. The achievements and capabilities of the SDF are highly appreciated inside and outside the country. It is necessary that the SDF fulfill an even greater role in such areas as reconstruction assistance, humanitarian assistance, education, capacity-building and plan formulation.

In short, the situation surrounding Japan’s diplomacy, security and defense has changed dramatically. The recent changes in the strategic environment have been notable even compared to the past in both scale and speed, giving further rise to unpredictable situations. It is the fact that in many areas, the Government responded to situations as they arose by examining the Government’s constitutional interpretation and adopting new individual policies. Nevertheless, considering the scale and speed of the changes, Japan is now facing a situation where adequate responses can no longer be taken under the interpretation of the Constitution to date in order to maintain the peace and security of Japan and realize peace and stability in the region and in the international community.

3. Case Examples of Concrete Actions Japan Should Take

The 2008 report presented the Panel’s recommendations on four cases, respectively (1. The defense of U.S. naval vessels on the high seas, 2. The interception of a ballistic missile that might be on its way to the United States, 3. Use of weapons in international peace operations, 4. Logistics support for the operations of other countries participating in the same U.N. PKO and other activities). In addition to these cases, this time the Panel raised the following cases in light of the changes in the security environment surrounding Japan as explained in the previous section. The panel shared the view that in the following cases the constitutional interpretation and legal system to date could prevent Japan from taking adequate responses even while Japan may be pressed to respond, and that there is a need to examine the question of what the appropriate interpretation of the Constitution and legal system would be to allow Japan to take concrete actions in response to these cases. Much like the previous four cases, the cases below are concrete examples for demonstrating the need for reviewing the constitutional interpretation and legal system, and are not intended to suggest that these are the only cases that should be permitted under the Constitution.

(1) Case 1: Measures to be taken in case of contingency in Japan’s neighboring areas,

namely ship inspections, and repelling of attacks against U.S. vessels etc.

— In a situation where an armed attack against another country occurs in Japan's neighboring area and the United States is exercising the right of collective self-defense in support of said country, if a vessel is navigating near an MSDF escort ship to supply critical weapons to the attacking country, Japan cannot stop this vessel and carry out an on-the-spot inspection of the vessel in a mandatory manner or bring the vessel to Japan when necessary in the absence of an armed attack against Japan, even when the attacked country and the United States make a request. This is because, in the current interpretation of the Constitution, such activities are may constitute the "use of force." However, if such a situation is left untouched, the conflict would enlarge, and eventually, Japan itself would be affected by the conflict. This would affect the security of Japan, and the lives and property of the Japanese people would be directly threatened.

— If the vessels etc. of the United States and other countries that are supporting the attacked country are being attacked, Japan needs to cooperate to repel such attacks. In this regard, under the existing Law Concerning the Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan (Situations in Areas Surrounding Japan Law), the SDF can provide rear area support or rear area search and rescue activities only in the rear area, that is, "Japanese territory as well as high seas surrounding Japan, and airspace over the high seas surrounding Japan, where no combat operations are being conducted and where it may be deemed that no combat operations will take place throughout the period of activities carried out by Japan."¹⁰ Furthermore, the SDF's support to the United States is limited, as neither provision of arms, including ammunition, nor refueling and maintenance of aircrafts preparing to take off for military

¹⁰ The Law Concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan (Law No. 60 of May 28, 1999)

"Article 3 In this law, the meanings of the terms listed in the following items shall be as prescribed respectively in those items:

(i) 'Rear area support' means the provision of supplies and services, facilitative assistance, or other support by Japan in a rear area to the armed forces of the United States of America (hereinafter referred to as the 'U.S. armed forces') carrying out operations that contribute to achieving the objectives of the Japan-U.S. Security Treaty in the event of a situation in area surrounding Japan.

(ii) 'Rear area search and rescue activities' mean activities (including transport services of those rescued) conducted by Japan in a rear area for searching and rescuing combatants missing in combat action (meaning the act of killing or wounding humans or destroying objects in an international armed conflict; hereinafter the same shall apply) carried out in the event of a situation in area surrounding Japan.

(iii) 'Rear area' means Japanese territory as well as high seas surrounding Japan (including exclusive economic zones as prescribed in the United Nations Convention on the Law of the Sea; hereinafter the same shall apply), and airspace over the high seas surrounding Japan, where no combat operations are being conducted and where it may be deemed that no combat operations will take place throughout the period of activities carried out by Japan."

combat operations are included, since it was deemed that there was no requirement raised by the U.S. forces for such support at the time of legislation. Furthermore, it is impossible for the SDF to provide support for countries other than the United States because the Law does not have such provisions in the first place.

— It is necessary to develop the legal basis appropriately in order for “deterrence” to function sufficiently, and then to lower the possibility of a contingency of Japan as much as possible.

(2) Case 2: Support to the United States when it is under an armed attack

— The United States is not immune to infringements from outside. In the terrorist attacks against the United States in 2001, for example, suicide attacks were executed by hijacked commercial aircraft which successively crashed into buildings that symbolized the U.S. economy and military. Nearly 3,000 people, including Japanese nationals, were victims of the attacks.¹¹ In circumstances where an armed attack against the United States takes place in such form as a surprise attack by a ballistic missile, and subsequently, the United States is exercising the right of self-defense jointly with other allies against the attacking country, what Japan can do is significantly restricted under the current interpretation of the Constitution, because Japan is not directly attacked.

— Countries considering an attack against Japan tend to refrain from doing so, largely because they would think that the United States is highly likely to counterattack based on its obligations under the Japan-U.S. Security Treaty. If Japan cannot respond adequately in the event of an attack against the United States, even when it is necessary, the confidence of the United States in its ally, Japan, would be lost and this may have enormous impacts on the Japan-U.S. alliance. If the Japan-U.S. alliance were undermined, the survival of Japan would be affected.

— In the case where Japan’s neighboring country carries out an armed attack against the United States, such as a surprise attack by a ballistic missile, as described in Case 1 for example, not only is it the case that the SDF cannot participate in a military operation by U.S. forces for the defense of the United States, Japan cannot, in a mandatory

¹¹ In the wake of the terrorist attacks against the United States in 2001, the United Kingdom, Canada, Germany, the Netherlands, Australia, New Zealand, France, and Poland sent a letter to the U.N. Security Council explaining that measures would be taken based on the right of individual and collective self-defense. Furthermore, for the first time since its founding, the North Atlantic Treaty Organization (NATO) invoked Article 5 of the North Atlantic Treaty, which is an article invoked in the case of an armed attack on member states. Meanwhile, theoretically, there exists a view that since the terrorist attacks against the United States were not conducted by a nation state, the incident was basically a criminal case which concluded in the United States and the measures taken by countries in response did not constitute an exercise of the right of self-defense but were law enforcement activities.

manner, stop a vessel that is navigating the sea in order to supply weapons to the attacking country or carry out an on-the-spot inspection of the vessel. Without the consent of the flag state, Japan also cannot tow the vessel to Japan even when necessary, under the current interpretation of the Constitution, as this may constitute the “use of force.” While ship inspections are clearly different from activities such as combat on land, they are important activities that prevent the transfer and carriage of weapons to the attacking country on the sea. Thus the Panel takes the view that the implementation of these activities should be made available. In addition, certain situations may require Japan to coordinate with countries other than the United States, and thus, Japan should become able to provide support to these countries as well.

(3) Case 3: Minesweeping in maritime areas (e.g., straits) where navigation of Japanese ships is significantly affected

— During the Gulf War, Iraq laid numerous mines in the Persian Gulf. These mines interfered significantly with the navigation of vessels, including Japanese tankers, in the Persian Gulf, one of the main transportation routes for crude oil in the world. Should an armed attack ever occur on a major strait, etc. through which a large portion of the crude oil imported by Japan passes and thus the sea lanes of communication are closed off due to mines that the attacking country has laid down, the transportation of a large portion of the oil supply to Japan would be interrupted. Neglecting this situation would have critical consequences on the Japanese economy and on the lives of the people, and affect the survival of Japan.

— It is anticipated that according to the situations of the armed conflict, countries concerned would undertake joint mine sweeping operations. However, under the existing interpretation of the Constitution, Japan would not be able to participate in mine sweeping operations until the mines are assessed to be “abandoned mines” through the official signing of a ceasefire agreement or by other means. This situation needs to be reviewed.

(4) Case 4: Participation in activities based on a U.N. decision when an armed attack which significantly affects the maintenance of international order occurs, e.g., Iraqi invasion of Kuwait

— If an armed attack which significantly affects the maintenance of international order occurs, for example, the Iraqi invasion of Kuwait, resulting in infringement of international justice and destabilization of the international order, Japan’s peace and security will not be unscathed. Terrorism could flourish, and indiscriminate attacks could occur on the entire international community, including Japan. This in turn would wreak untold damage on the security of Japan and on the lives and property of the

people.

— Under the existing interpretation of the Constitution, Japan cannot take measures, such as protecting the naval vessels of countries supporting the country being attacked, and is able to provide support only in rear areas and to a limited extent, even when the U.N. Security Council unanimously adopts a resolution authorizing all necessary means. In addition, in the absence of domestic laws, a new law, such as a special measures law, must be established each time Japan engages in support activities.

— Cooperating with the measures of the U.N. Security Council for maintaining and restoring international peace and security is a duty of U.N. members specified in the U.N. Charter. Unless Japan makes the necessary contribution to safeguarding the order of the entire international community, Japan would in effect erode the platform on which its security rests.

(5) Case 5: Measures to be taken when foreign submarines continue sailing submerged in the territorial sea of Japan do not follow the request to leave the territorial sea and continue wandering

— In November 2004, a P-3C patrol aircraft of the MSDF confirmed a Chinese nuclear submarine navigating submerged in Japan's territorial sea near the Sakishima Islands. In May 2013, P-3C patrol aircraft of the MSDF detected a succession of submerged submarines navigating in contiguous zones, while the submarines did not intrude into the territorial sea. Under the existing law, without an "armed attack" (= generally the use of force in an organized and planned manner) against Japan, the SDF cannot use force under Defense Operation. If a foreign submarine navigating submerged intrudes into Japan's territorial sea, the SDF may request the submarine to leave the waters through Maritime Security Operations and by other means based on law enforcement powers (in the case in 2004). However, if the situation is not acknowledged as an "armed attack situation" even when the submarine continues navigating around relentlessly, the existing authority granted for Maritime Security Operations and other operations does not permit the SDF to expel the submarine by using force. Situations of this nature must not go neglected.

(6) Case 6: Response in the event an armed group conducts an unlawful act against a vessel or civilian in a sea area or remote island, etc. where it is difficult for Japanese authorities, including the Japan Coast Guard, to respond promptly

— In such a case, in response to an incident on the sea, SDF units may engage in Maritime Security Operations under the order of the Minister of Defense with the consent of the Prime Minister, if the incident is deemed to constitute "cases when special measures are deemed necessary to protect lives and property or maintain order at

sea” as provided for in Article 82 of the SDF Law. Furthermore, in response to an incident on land, SDF units may engage in Public Security Operations under the order of the Prime Minister, if the incident is deemed to constitute “cases when it is deemed that the public security cannot be maintained by the civilian police forces” as provided for in Article 78 of the SDF Law. In cases where the situation has intensified and the order for defense operation is likely, the Minister of Defense may order Establishment of Defense Facilities in the intended deployment area of SDF units, etc., with the consent of the Prime Minister.

— Risk of missing the opportunities to respond must be avoided at any time when taking the procedures for issuing orders such as for the Maritime Security Operations Public Security Operations and Establishment of Defense Facilities. However, the prompt deployment of units has a high procedural threshold, and therefore, there needs to be some arrangements to allow for quicker and preliminary responses.

— In order to allow the Government to take responses tailored to the various situations, including infringements that do not amount to armed attacks as shown in Cases 5 and 6, it needs to be examined upon clarifying what use of force is possible, while referring to international law.

— Under the current legal system, there is a risk that the SDF would not be able to deter the opponent due to gaps arising in the authority granted to the SDF between the Defense Operation and other operations.

II. How the Constitution Should Be Interpreted

Based on the recognition stated in I. above, this Panel hereby makes the following recommendations with regard to how the constitution should be interpreted.

1. Paragraphs 1 and 2 of Article 9 of the Constitution

(1) Article 9 of the Constitution stipulates: “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.” It makes no mention of the right of self-defense or collective security. However, the Treaty of Peace with Japan (San Francisco Peace Treaty), which entered into force in April 1952, thus restoring sovereignty to Japan, recognizes Japan’s possession of the inherent right of individual or collective self-defense and its participation in collective security arrangements.¹² Similarly, at the time of Japan’s admission to the U.N. in September 1956, Japan claimed no reservations with regard to collective security arrangements stipulated in the U.N. Charter, nor the provision in the Charter recognizing the inherent right of individual or collective self-defense of member states (Article 51).¹³

Furthermore, looking back at the historical development of international law such as

¹² Treaty of Peace with Japan (Signed at San Francisco on September 8, 1951, entered into force on April 28, 1952):

Article 5 (c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Also, for example, the right of collective self-defense is mentioned in the same context in the Joint Declaration by Japan and the Union of Soviet Socialist Republics (Signed at Moscow on October 19, 1956, entered into force on December 12, 1956), the former Japan-U.S. Security Treaty (Signed at San Francisco on September 8, 1951, entered into force on April 28, 1952), and the Japan-U.S. Security Treaty (Signed at Washington on January 19, 1960, entered into force on June 23, 1960).

¹³ The U.N. Charter (Signed at San Francisco on June 26, 1945, entered into force on October 24, 1945):

Article 51 Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

the Kellogg-Briand Pact and the U.N. Charter, as well as the background to the formulation of the Constitution, it is not appropriate to interpret paragraph 1 of Article 9 of the Constitution as prohibiting without exception the threat or use of force by Japan. The Constitution of Japan, which was promulgated in 1946, was significantly influenced by the pacifism of the early 20th century and trends in international law relating to outlawing war. The provisions of Article 9 of the Constitution were profoundly affected by the international pacifism which had become a firm trend in the 20th century and were not isolated from the trends in the international community. By condemning the “recourse to war for the solution of international controversies,” and renouncing “(war) as an instrument of national policy,” the Kellogg-Briand Pact provided for renouncement of wars of aggression among signatories. The U.N. Charter, which was drafted in this trend towards outlawing war, was adopted one year prior to the promulgation of the Constitution of Japan. Although the U.N. Charter in principle prohibited “use of force” by members in their international relations, it permitted military measures undertaken as collective security measures of the U.N. and the exercise of the inherent right of individual or collective self-defense (Article 51) as exceptions to the “use of force”. Furthermore, in the background of drafting the Constitution of Japan, the second of the three “basic principles” of General Douglas MacArthur (February 3, 1946), states that “Japan renounces it (war) as an instrumentality for settling its disputes.”¹⁴ In 1946 then-Prime Minister Yoshida already stated the Government of Japan’s position (as noted above) regarding the draft of the new Constitution, “the provision pertaining to the renunciation of war in this draft does not deny the right of self-defense directly (abridged)” (Plenary Session of the House of Representatives, June 26, 1946). Furthermore, in the answer to Diet questions about the Government’s position upon the establishment of the SDF, he stated, “Renouncing the threat of war and force and the use of force means renouncing them ‘as means of settling international disputes.’” To counter an armed attack in the event of such an attack by another country is self-defense itself, and is essentially different from settling international disputes. Hence, the use of force as an instrument for defending national territory when an armed attack has occurred against Japan does not constitute a breach

¹⁴ “War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection. No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.” However, in the draft of the General Headquarters Supreme Commander for the Allied Powers of February 13, the phrase “and even for preserving its own security” was deleted.

of the Constitution.” (Answer by Director-General of the Defense Agency Seiichi Omura, as noted above.)

Based on these facts, the provision of paragraph 1 of Article 9 of the Constitution (“Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.”) should be interpreted as prohibiting the threat or the use of force as means of settling international disputes to which Japan is a party. The provisions should be interpreted as not prohibiting the use of force for the purpose of self-defense, nor imposing any constitutional restrictions on activities that are consistent with international law, such as participation in U.N. PKOs etc. and collective security measures.

It should be noted here that imposing limitations on the use of weapons in U.N. PKOs and other activities by reason of paragraph 1 of Article 9 is a doubly inappropriate interpretation of the Constitution, firstly in that it imposes restrictions on participation in U.N. activities, and secondly because it confuses the “use of weapons” with the “use of force” as will be explained later in 5.

(2) Given that paragraph 1 of Article 9 renounces the threat or the use of force as “means of settling international disputes,” paragraph 2 stipulates that “in order to accomplish the aim of the preceding paragraph,” war potential will never be maintained. Accordingly, paragraph 2 should be interpreted as prohibiting the maintenance of war potential that could be employed in the threat or use of force in order to settle international disputes to which Japan is a party but not the maintenance of force for other purposes, namely self-defense (regardless of whether it be individual or collective) or so-called international contributions to international efforts. Ideas similar to (1) and (2) were also taken in the Panel’s 2008 report.

(3) The stance of the report of the previous Advisory Panel, particularly the concepts stated in (2) above that the maintenance of force for the purposes of self-defense, regardless of whether it be individual or collective, and the maintenance of force for the purpose of so-called international contributions are constitutional, have been interpretations that have attracted attention in view of the process behind the drafting of Article 9 of the Constitution, during which the opening phrase of the second paragraph “In order to accomplish the aim of the preceding paragraph” was inserted in the latter stages of drafting (the so-called “Ashida Amendment”). However, the Government has not adopted such an interpretation to date. If we look back once again on Government

interpretations,¹⁵ as noted above, notwithstanding the fact that in 1946, in the Diet sessions in which the formulation of the new Constitution was discussed, then-Prime Minister Yoshida had provided a clear answer that Japan had even renounced war in self-defense, from 1954 onwards an interpretation was announced that the maintenance of self-defense force to the minimum extent necessary for the protection of the nation and its people was the inherent right of a sovereign nation. This interpretation has never been rejected by the Supreme Court. However, in answers given by the Government in the Diet, the Government has come up with an interpretation that while the right of individual self-defense falls within the limit of the right of self-defense at the minimum extent necessary and is constitutional, the right of collective self-defense does not. This interpretation bounds the Government to this day. In initial Diet discussions, when the concept of the right of collective self-defense had not yet been settled, discussion on the non-exercise of the right of collective self-defense was framed in the context of self-restraint on overseas deployment of troops which was considered to be central to the concept. Eventually, this discussion has coalesced into one on the non-exercise of the right of collective self-defense in general. As set out in Chapter I. 1. (1) above regarding development in the constitutional interpretation, hardly any arguments have been put forward concerning the critically important question of why the exercise of the right to minimum extent necessary self-defense in order to secure the security of Japan and its people should be limited to the exercise of the right of individual self-defense, or, to put it the other way, how it can be possible for Japan to ensure the security of Japan and its people only with the use of the right of individual self-defense. In other words, the Government, while maintaining its position that: “These measures are permitted only when they are inevitable for dealing with imminent unlawful situations where the people’s right to life, liberty, and the pursuit of happiness is fundamentally overturned due to an armed attack by a foreign country, and for safeguarding these rights of the people. Hence, these measures should be limited to the minimum extent necessary for repelling these situations.” (View of the Government as submitted to the Committee on Audit of the House of Councilors, October 1972), determined that the non-exercise of

¹⁵ The proposal for amendment was submitted in July 1946 by the sub-committee of the House of Representatives Committee on Amendment of the Imperial Constitution. In December 1957, Hitoshi Ashida, who had served as the chairman of the abovementioned sub-committee, stated in the Commission on the Constitution that, “Inserting the phrase ‘In order to accomplish the aim of the preceding paragraph,’ meant that the unconditional undertaking to not possess war potential as detailed in the original draft became an undertaking to not possess force of arms under certain conditions. It is clear that Japan does not unconditionally renounce force of arms. (Abridged) In so doing, the amendment substantively influenced the original draft, and therefore any discussion that the substance of Article 9 is unchanged, even with the amendment in place, is clearly mistaken.”

the right of collective self-defense does not present any inconvenience, and neglected the detailed argumentation on whether it is actually possible for Japan to ensure the security of Japan and its people without exercising the right of collective self-defense.

A state can protect its security better by collaborating with trustworthy countries and assisting each other. Enabling the exercise of the right of collective self-defense would strengthen relations with other trustworthy countries and would lead to preemptively diminishing the potential for conflict by enhancing deterrence. Furthermore, if a country was to protect its security by permitting only the right of individual self-defense, massive military force would be necessary. Such a situation may lead to a large-scale arms race. Accordingly, the exercise of the right of collective self-defense may ensure that military levels as a whole are kept at a low level. Taking the realities of the international community into consideration, therefore, an attempt by a country to protect itself by standing alone is nothing other than an exercise in dangerous isolationism.

First of all, it is necessary to recollect here the background to the drafting of the provision concerning the right of collective self-defense in the U.N. Charter. At the time when the Charter was drafted in 1945, as a result of incorporating veto powers into the voting procedures for the U.N. Security Council, there were concerns that the functions of the Council itself would be endangered. Reflecting such concerns, Central and South American signatory nations to the Chapultepec Pact proposed to incorporate a provision on the right of collective self-defense, based on the recognition that their survival could not be accomplished by the right of individual self-defense alone. The proposal was duly approved.

In the U.N. Charter, while Article 2(4) prohibits the use of force in international relations, Article 51 stipulates that the Charter shall not impair the right of members to use force for the purposes of individual or collective self-defense. This is because, as provided in the same Article, the right to self-defense is an inherent (natural) right of a country (regardless of the existence of such provision).¹⁶ Today, the right of collective self-defense is considered a right in customary international law. The International Court of Justice has also made this point clear in its rulings (*Military and Paramilitary*

¹⁶ The official French language text of Article 51 (see note 13) of the U.N. Charter, which was ratified by Japan in accordance with constitutional procedures and entered into force in Japan on December 18, 1956, refers to “aucune disposition de la présente Charte ne porte atteinte au droit naturel de légitime défense, individuelle ou collective.” The English language text refers to an “inherent right” and the Japanese language text is translated as “*koyu no kenri*” (also “inherent right”). It is clear from reading the official French text of the U.N. Charter that “inherent right (*koyu no kenri*)” and “droit naturel” are synonyms, both meaning the rights inherently and naturally possessed by humankind. The official Chinese language text also uses the term “natural right” (*zi ran quan li*).

Activities in and against Nicaragua (*Nicaragua v. United States of America*), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986).¹⁷ Considering the differences in national strength among the countries of the international community and the veto system in the U.N. Security Council, as well as its functions and practices, small and medium sized countries would not be able to ensure their self-defense and wait for the collective security system of the U.N. to function. This is why member states are permitted to exercise the right of self-defense collectively, assuming an attack on another member state as an attack against themselves, in addition to when the member states themselves are actually under attack. Considering the security environment today, it can be said inevitably that to view the right of collective self-defense as obviously being more dangerous than the right of individual self-defense is to ignore the basic security principle of deterrence and to ignore the drafting process of the U.N. Charter. Based on the above discussion, even from the abovementioned view of the Government to date that “these measures (necessary for self-defense) should be limited to the minimum extent necessary,” the Government’s interpretation of the Constitution which excluded the right of collective self-defense from “the minimum extent necessary,” while including the right of individual self-defense is inappropriate as it attempts to formally draw a line on “the minimum extent necessary” by an abstract legal principle. As a matter of fact, it is hard to believe that the security of Japan today can be ensured by only the exercise of the right of individual self-defense. Therefore, it should be interpreted that the exercise of the right of collective self-defense is also included in “the minimum extent necessary”, and the exercise of the right of collective self-defense should be permitted.

(4) If the interpretation described in (3) is to be adopted, “war potential” and the “right of belligerency” in paragraph 2 of Article 9 of the Constitution should be interpreted in the following ways.

“War potential” was at one time defined as the “capability to execute modern warfare,”¹⁸ during the transition of the constitutional interpretation leading up to the

17 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p.14. Paragraph 193: “...the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or ‘droit naturel’) which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law.”

¹⁸ Answer by Minister of State Tokutaro Kimura, in the Foreign Affairs Committee of the House of

period of post-independence and establishment of the SDF, when an interpretation that the exercise of the right of self-defense was constitutional was first taken. Thereafter, it has been considered to be the force which exceeds the “minimum extent necessary.” In November 1972, then Director-General of the Cabinet Legislation Bureau Mr. Ichiro Yoshikuni stated clearly that “Since December 1954, the Government has stopped defining “war potential” in paragraph 2 of Article 9 of the Constitution as capability to execute modern warfare.” Today, the actual limit of the “minimum extent necessary” for self-defense is considered to be examined in the course of debate in the Diet on issues relating to defense capability, while gaining the support of the people of Japan.¹⁹ The idea of allowing the maintenance of the capability necessary for the use of force permitted under the Constitution in light of objective assessment on the international situation should be continued in the future.

With regard to the “right of belligerency,” in the Diet there have been answers made that the use of force for self-defense is a “different matter” to the right of belligerency prohibited under the Constitution.²⁰ Amidst a situation in which war as means of executing national policy is generally prohibited by the U.N. Charter as an issue of *jus ad bellum* (a norm that disciplines engaging in war itself), the use of the right of individual and collective self-defense and the collective security measures of the U.N. that are in accordance with international law, including the U.N. Charter, and also the use of force permitted under the Constitution, should continue to be considered as a “different matter” to the exercise of the right of belligerency as prohibited by Article 9. However, it is obvious that even the legal use of force is subject to international humanitarian law as an issue of *jus in bello* (a norm which disciplines the means and

Representatives (January 30, 1952).

“I believe that war potential should be interpreted as being the so-called powerful military force capable of executing so-called warfare.”

¹⁹ Written answer to a question submitted by House of Representatives member Eisei Ito (July 15, 2003).

“With regard to the concrete limitations on the “minimum extent necessary force required for self-defense,” maintenance of which is permitted under Article 9 of the Constitution, it is impossible to deny that such limitations possess relative aspects that may be influenced according to the various conditions such as the international situation and science and technology at that time. Accordingly, it is believed that there is no other way but for the Diet, the representative body of the people of Japan, to make a decision, through deliberations in each fiscal year on the budget and other matters.”

²⁰ Written answer to a question submitted by House of Representatives member Kiyoshi Mori (September 27, 1985).

“Japan possesses the right of self-defense under international law and this naturally permits the exercise of force to the minimum extent necessary for defending the nation. The killing or wounding or destruction etc., of the military forces of the other country as part of the exercise of the right of self-defense is a different concept to the killing or wounding or destruction etc., of the military forces of the other country in the exercise of the right of belligerency.”

ways in engaging in war.)

2. Right of Self-Defense Permitted under the Constitution

(1) As for the exercise of the right of individual self-defense, it is the established view of the Government that Article 9 of the Constitution permits the use of force as an exercise of self-defense if the following three requirements are met; (1) there is an imminent unlawful infringement against Japan; (2) there is no other appropriate means available to repel this infringement; and (3) the use of force is limited to the minimum extent necessary. As long as these three requirements are fulfilled, there are no restrictions on the exercise of the right of individual self-defense, but its actual exercise requires a decision based on careful and speedy judgment on necessity and proportionality (Response to an infringement that does not amount to an armed attack is discussed later.)

(2) The right of collective self-defense is generally interpreted in international law as the right to use force to repel an armed attack against a foreign country that is in a close relationship with one's country although one's own country is not under attack. The right of collective self-defense is required to be exercised when an armed attack occurs (Note: this also includes commencement of the attack)²¹ and a request or consent is made by the country under attack, and by fulfilling the requirements of necessity and proportionality.

In Japan, with regard to the right of collective self-defense, when a foreign country that is in a close relationship with Japan comes under an armed attack and if such a

²¹ (1) The SDF Law

“(Defense Operations) Article 76 When there is an armed attack on our nation from the outside (hereinafter referred to as “armed attack”) or when it is considered that there is an imminent and clear danger of an armed attack, the Prime Minister, when he or she considers it necessary from the standpoint of defending the nation, may order the whole or part of the Self-Defense Forces into operation.”

(2) Answer by Director-General Reiichi Miyazaki of the First Department of the Cabinet Legislation Bureau, in the Special Committee on Responses to Armed Attacks of the House of Councillors (May 28, 2003).

“The Government’s interpretation to date of an armed attack on our nation, which is a condition to the exercise of our nation’s right of self-defense, is satisfied when another country has commenced an armed attack against Japan, but does not require Japan to be actually suffered damage. In the case in which it is judged that a ballistic missile launched from another country is in flight with Japan as the target, the act of shooting down that ballistic missile would be permissible as the exercise of the right of individual self-defense.”

situation has the potential to significantly affect the security of Japan, Japan should be able to participate in operations to repel such an attack by using force to the minimum extent necessary, having obtained an explicit request or consent of the country under attack, and thus to make a contribution to the maintenance and restoration of international peace and security even if Japan itself is not directly attacked. With regard to whether a certain situation would fall under such a case, the Government should take responsibility for making a decision, taking the following points into consideration comprehensively whether there is a high possibility the situation could lead to a direct attack against Japan, whether not taking action could significantly undermine trust in the Japan-U.S. alliance, thus leading to a significant loss of deterrence, whether international order itself could be significantly affected, whether the lives and rights of Japanese nationals could be harmed severely and whether there could otherwise be serious effects on Japan. In the case that Japan would pass through the territory of a third country when exercising the right of collective self-defense, the Government should make it a policy to obtain the consent of that third country. The exercise of the right of collective self-defense should require the approval, either prior or ex post facto, of the Diet as is required when exercising the right of individual self-defense.

Given that the right of collective self-defense is a right and not an obligation, it is obvious that even in cases where that right could be exercised, after a comprehensive assessment of what degree of significance the exercise of the right would have and other factors, a policy decision not to exercise it could be made. The exercise of the right of collective self-defense by Japan should be discussed and approved by the National Security Council under the leadership of the Prime Minister, and the Cabinet is required to make the decision in the form of a Cabinet Decision. Although there is some debate about Japan being drawn into endless wars engaged by the United States if the right of collective self-defense were to be permitted, given that the right of collective self-defense is in the first place a right and not an obligation, the exercise of the right is ultimately an issue for Japan to determine on its own initiative. In this regard, it is not appropriate to set out geographical limitations on the location for activities of SDF units that exercise the right of individual or collective self-defense in terms of the constitutional interpretation. There is some debate about Japan going to the “other side of the earth,” but that is just an unproductive and abstract discussion. Japan should make its own decision according to the specific cases, taking comprehensive consideration on whether a situation has the potential to significantly affect the security of Japan and to what extent actions by Japan would be effective. As already mentioned, it should be noted that, given that the right of collective self-defense is a right and not

an obligation, there should be cases when this right is not exercised as a result of a policy decision described above.

(3) It could constitute a violation of international law to justify cases that should originally be subjects of exercise of the right of collective self-defense by “expanding” the concept of the right of individual self-defense or law enforcement powers, based on a concept unique to Japan. For example, if an SDF vessel were to protect a U.S. vessel as the exercise of its right of individual self-defense when engaging in joint actions on the high seas, there would be an obligation for Japan to report its measure taken under Article 51 of the U.N. Charter to the U.N. Security Council. However, if Japan were to report the measure to the U.N. Security Council as an exercise of individual self-defense even though in fact there was no armed attack against Japan, Japan might be criticized for violating the U.N. Charter. In addition, if each country in its own idea claimed the “expansion” of the right of individual self-defense, it would allow spreading “justice” that is unilaterally defined by each country and not in conformity with international law; therefore, such expansion is in practice a dangerous idea.

(4) Along with the development of information and telecommunication technology, today cyberspace has become indispensable for people’s lives. Cyberspace is a virtual space created by the development of the internet. In terms of security, it could be characterized as the new domain which follows land, maritime, airspace and outer space. However, its legal aspects are still under debate. Once a cyber-attack occurs, every corner of the society from the governmental agencies to enterprises will be severely affected. The seriousness of the issue is now recognized. In reality, in recent years efforts by the Governments and international discussion are taking place as cyber-attacks on the governmental agencies and militaries of various countries are increasing.

Cyber-attacks backed by ever-evolving technology are different from typical traditional armed attacks in many aspects. For instance, in cyber-attacks, prediction of an attack as well as identification of the aggressor is difficult and methods of attacks vary. Because of such characteristics, it is difficult to state the legal positioning of a cyber-attack in general terms. So far, seemingly, many cases of cyber-attacks are not identified as armed attacks. However, in certain cases, cyber-attacks could fulfill the three requirements for exercising the right of self-defense, including “an imminent unlawful infringement against Japan.” In any case, it is necessary to continue examining on which cases would fulfill such a requirement and what kind of institutional

framework would be necessary to respond to a cyber-attack from the outside, taking note of debates in the international community.

3. Participation in Collective Security Measures of the U.N. Entailing Military Measures

In terms of participation in collective security measures of the U.N. which entail military measures, as noted in I. above the constitutional interpretation of the Government to date is that while research is being conducted on participation in formal U.N. forces (See Footnotes 7 and 9 above), participation in so-called U.N. multinational forces has the possibility of violating Article 9 of the Constitution as that would lead to the use of force. However, as noted in II., 1., (1) above, it is not appropriate to interpret Article 9 as prohibiting even Japan's participation in collective security measures of the U.N. Such measures will not constitute the use of force as means of settling international disputes to which Japan is a party and therefore they should be interpreted as not being subject to constitutional restrictions. Because participation in collective security measures under resolutions of the U.N. Security Council etc., is a duty in the international community²² and given that the Constitution itself is premised on the fundamental principle of international cooperation and that Article 98 stipulates that the treaties concluded by Japan and established laws of nations shall be faithfully observed, Japan should make proactive contribution, based on its own decision. In recent years Japan has been steadily expanding the scope of its activities for the purpose of maintaining the international order, in areas other than the use of force, including logistics support. As noted above, following the series of terrorist attacks in the United States in September 2001, in November of the same year the "Law Regarding Special Measures Concerning Measures Taken by Japan in Support of the Activities of Foreign Countries Aiming to Achieve the Purposes of the Charter of the United Nations in Response to the Terrorist Attacks Which Took Place on September 11, 2001 in the United States of America and Subsequent Threats as well as concerning Humanitarian Measures Based on Relevant Resolutions of the United Nations or Requests Made by International Bodies" (Anti-Terrorism Special Measures Law) was formulated, under

²² Article 2(5) of the U.N. Charter

"All Members shall give the U.N. every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

which SDF vessels were dispatched to the Indian Ocean to engage in supply assistance activities. Furthermore, in 2003, under the "Law Regarding Special Measures Concerning the Conduct of Humanitarian and Reconstruction Assistance, Activities and Support Activities for Ensuring Security in Iraq" (Iraq Special Measures Law) the SDF engaged in humanitarian and reconstruction assistance for the first time in postwar history in the territorial land of another country under occupational administration by multinational forces.

The collective security measures of the U.N. under Chapter VII of the U.N. Charter include both military and non-military measures. With regard to participation in economic sanctions based on Article 41 of the U.N. Charter, which covers non-military measures, to date Japan has provided active cooperation based on the relevant Security Council resolutions of the U.N., including the implementation of measures to freeze the assets of those involved in nuclear, and other weapons of mass destruction and ballistic missile-related programs of North Korea. Even though Japan upholds the principle of international cooperation in the Preamble of the Constitution and places cooperation with the U.N. as one of the pillars of its security policy, Japan is unable to provide any cooperation whatsoever to enforcement measures which involve the use of military force despite the fact that such measures are also collective security measures based on U.N. Security Council resolutions for the same purpose of protecting the international order. This current situation needs to be amended.

A collective security system as originally envisaged by the U.N. Charter, including the formation of U.N. forces, has yet to be realized. There are various stages in peace cooperation operations based on Security Council resolutions of the U.N. The causes of such operations as well as formats for U.N. participation varies depending on each individual case. Therefore, even if it is interpreted that there are no constitutional restrictions on international peace operations conducted by the U.N., it is obvious that participation in such operations should be decided carefully, based on comprehensive examination on each individual case and the degree of political significance Japan's participation would have.

Of course, participation in collective security measures of the U.N. entailing military measures should require approval, either prior or ex post facto, by the Diet.

4. Theory of So-called "Ittaika" with the Use of Force"

As mentioned in the 2008 report of this Advisory Panel, "ititaika" with the use of force is a concept unique to Japan, whereby support is provided in such a manner that it

forms an “integral part” of the use of force. Discussion on this issue reached a particular crescendo in the 1990s from around the time of the Gulf War, and has since been elaborated. Prior to the 1990s there were few answers in the Diet concerning the issue of “ittaiika” with the use of force.²³ However, there is no clear basis in positive law, either

²³ (1) Answer by Director-General of the Cabinet Legislation Bureau Shuzo Hayashi, in the Budget Committee of the House of Representatives (March 19, 1959).

“...In the case in which we are currently engaged in negotiations on the revision of the U.S.-Japan Security Treaty, Japan’s stance, and the obligation Japan has is to engage in negotiations within the scope of the Constitution of Japan and therefore any items that are not permissible constitutionally cannot expect to be incorporated into this treaty. The contents of refueling operations that you have just mentioned are, as the Prime Minister stated a moment ago, in actual fact unclear, but in economic terms the selling or loaning of fuel, or the provision of hospitals are not recognized as military actions and these types of actions were also implemented by Japan at the time of the Korean War. I believe it to be natural, therefore, that these items are not prohibited by the Constitution of Japan. However, refueling operations that would form an integral part of deployment by U.S. forces for the purpose of the peace and safety of the Far East, would, in my opinion be unconstitutional. I believe that such points must of course be clearly set out in the treaty.”

(2) Answer by Director-General of the Cabinet Legislation Bureau Reijiro Tsunoda, in the Foreign Affairs Committee of the House of Councillors (April 20, 1982).

“...in response to the direct question about whether or not there are other matters that also are not permitted constitutionally in addition to the use of force, at the current stage I believe that this is an issue that must be finalized at a point when there is a little more specificity regarding the use of force.” “Although what is written here refers to the conducting of refueling operations that form an integral part of actions, this refers not to an issue that is viewed from the concept of refueling, but is one that is directly concerned with refueling being integrated with the content of the use of force. Such an (integrated) action could conversely be deemed to constitute the use of force and in that sense would violate the constitution. That is what was said by former Director-General Hayashi and in that sense I do not believe it is basically any different from what I have just stated myself.”

(3) Answer by Director-General of the Treaties Bureau Shunji Yanai, Ministry of Foreign Affairs, in the Special Committee on U.N. Peacekeeping Operations of the House of Representatives (October 29, 1990).

“I believe that armed conflicts that actually arise come in a great many different forms and sizes. Accordingly, I believe that this issue is one that ultimately requires a decision to be made on a case-by-case base that takes into account the specific conflict in question. One extremely typical case of this that has been raised before is a situation in which, for example, a battle is being engaged on land, to which an airborne unit supplies ammunition. The actual act of the airborne unit dropping the ammunition on the battlefield probably constitutes the act of supply, however, I believe that in this case it could be viewed as an integral part of the use of force. However, as I said at the beginning, armed conflicts arise in various situations and formats and are characterized by diverse circumstances. Accordingly, I believe it to be necessary to make a decision on a case-by-case basis, taking into account such conditions.”

(4) Answer by Director-General of the Cabinet Legislation Bureau Atsuo Kudo, in the Special Committee on U.N. Peacekeeping Operations of the House of Representatives (October 29, 1990).

“...For example, if weapons and ammunitions were being supplied or transported to the frontlines of an actual battle field, or if medical care was being provided to a medical unit also on an actual field of battle in an embedded format, these kinds of actions would likely present a problem. Conversely, if medical and food supplies were being transported in a location that was somewhat removed from the location where the conduct of hostilities was taking place, these kinds of actions would naturally not be likely to present problems in terms of the present judgment criteria based on Article 9 of the Constitution. Accordingly, I believe that both ends of the argument could be stated.”

in international law or domestic law for such theory, and neither have any judicial rulings by the Supreme Court been made on the subject, even though, the scope of “ittaiika” with the use of force has been expanded through the course of Diet discussions and has presented significant obstacles to actual security-related operations.

The concept whereby even Japan’s logistics support, which does not in itself constitute the use of force, including supply, transportation and medical services, could be deemed to constitute the use of force prohibited under Article 9 of the Constitution if the logistics support forms an integral part of the use of force by the other countries to which the support is provided (“ittaiika” with the use of force), has been discussed originally in connection with the Japan-U.S. Security Treaty (See Footnote 23(1) Answer by Director-General of the Cabinet Legislation Bureau Shuzo Hayashi). Following this concept through in a logical sequence could in fact lead to the unreasonable conclusion that the Japan-U.S. Security Treaty itself constitutes a breach of the Constitution. For example, although the Government’s position is that granting the use of facilities and areas to U.S. forces currently done under the Japan-U.S. alliance does not constitute “ittaiika” with the use of force by the U.S., if in the event of contingency in the Far East, U.S. forces actually began to use the facilities in Japan under Article 6 of the Japan-U.S. Security Treaty for military combat operations, granting the use of these facilities would constitute “ittaiika” with the use of force by the U.S. forces.

In addition, as often pointed out in Diet discussions of the U.N. Peace Cooperation Law (later withdrawn), the Law Concerning Cooperation for United Nations Peacekeeping Operations and Other Operations (PKO Law), the Situations in Areas Surrounding Japan Law and the Iraq Special Measures Law, the theory of “ittaiika” with the use of force provoked debate such as in what circumstances logistics support is deemed to form an integral part of the use of force by other countries; who makes the decision about whether it is deemed or not; and what the criteria is for “combat areas” and “non-combat areas.” In the first place, it is unrealistic and very difficult to apply the theory of “ittaiika” with the use of force, which appears to be sophisticated as a conceptual discussion, to actual situations on the ground, which are ever changing. For example, in the current situation where military technologies such as missiles have been rapidly developed, it has become unrealistic to qualitatively define where “non-combat areas” are.

It cannot be said that Japan is sufficiently prepared to ensure its security, if, for example, it is conceivable that contingency planning between Japan and the United States could also be obstructed by the logic of “ittaiika” with the use of force. This

problem is related to both the implementation of the Japan-U.S. Security Treaty and Japan's participation in international peace operations. The theory of "ittaiika" with the use of force has arisen out of discussions that are based on a strict view that errs on the side of caution with regard to new activities, mindful of constitutional restrictions. Accordingly, in today's world, where Japan has accumulated experience in international peace cooperation activities, the theory of so-called "ittaiika" with the use of force has now served its purpose and should be discontinued. Instead it should be dealt with as a matter of policy appropriateness. It goes without saying that decisions on what logistics support is to be provided under what circumstances should be carefully considered by the Cabinet.

5. Cooperation and the Use of Weapons in U.N. PKOs etc.

(1) Since the enactment of the PKO Law in June 1992, a total of approximately 10,000 personnel (as of the end of March 2014) have been dispatched overseas to take part in U.N. PKOs etc.,²⁴ in accordance with the provisions of the Law. Over time achievements and experience have been steadily accumulated, receiving the support of the Japanese people as well as the high regard of the international community. Cooperation for U.N. PKOs etc. is one of the most effective methods of fulfilling Japan's responsibilities to the peace and stability of the international community and the further dispatch of personnel to participate in U.N. PKOs etc. should continue to be actively implemented.

On the other hand, Japan's participation in U.N. PKOs etc. to date has been implemented cautiously in operational aspects in accordance with so-called Five Principles on Japan's participation in U.N. PKOs, reflecting the mode of U.N. PKOs etc. at the time the PKO Law was enacted which focused on peacekeeping operations to support the implementation of ceasefire agreements among the parties involved, and in accordance with a system that was constructed restrictively, mindful of domestic opinion at the time.²⁵ Whereas the U.N. establishes PKO missions on the basic principle

²⁴ In accordance with the PKO Law, Japan provides cooperation in the following three activities conducted by the U.N. and other bodies: international peacekeeping operations, international humanitarian relief operations and international election observation operations.

²⁵ The three basic principles of U.N. PKOs are given as: consent of the parties (Note: main parties to the conflict), impartiality and non-use of force except in self-defense and defense of the mandate ("United Nations Peacekeeping Operations Principles and Guidelines" (Capstone Doctrine, January 18, 2008)). In the case of Japan, under the current PKO Law the so-called Five Principles on Japan's

that consent from the “main parties to the conflict” is obtained, Japan, under the current PKO Law requires that “all parties” to the conflict must have given their consent. Furthermore, with regard to ceasefire agreements, whereas the U.N. establishes PKO missions based on a de facto cessation of hostilities, even without an actual ceasefire agreement in place, Japan’s Law requires an actual ceasefire agreement between the parties to the conflict. Such situation is not in conformity with contemporary realities, where the nature of conflicts has changed from interstate conflicts, in which all “parties to the conflict” were easily specified and it was easy to confirm a clear ceasefire agreement between those parties, towards domestic or complex disputes in which it may be difficult to specify the “parties to the conflict.” The roles and forms of U.N. PKOs etc. are also diversifying and there are also increasing cases in which “robust PKOs” are dispatched, which are authorized with a certain degree of coercive force under Chapter 7 of the U.N. Charter.

Given such discrepancies with the actual situation of U.N. PKOs and the diversifying nature of missions and actors of U.N. PKOs, the so-called Five Principles on Japan’s Participation in U.N. PKOs also needs to be examined in view of its revision from the perspective of what is necessary in enabling Japan’s more active participation in international peace cooperation.

(2) The operations of U.N. PKOs are by their character not enforcement measures like the “use of force;” they are activities in which countries cooperate under the authority of the U.N to maintain a ceasefire agreement between parties to a conflict or to assist the new state building of a territorial state. The use of weapons to come to the aid of geographically distant unit or personnel participating in the same operations who are under attack (so-called “kaketsuke-keigo”) or to remove obstructive attempts against its missions do not in the first place constitute the “use of force” and should therefore be interpreted as not being restricted constitutionally.

However, with regard to the use of weapons for the purpose of so-called “kaketsuke-keigo” or removing obstructive attempts against its missions, the Government’s interpretation to date has been that it is not possible to call such use of weapons as constituting the inherent right (in a sense, a natural right) to protect oneself,

Participation in U.N. PKOs set out the legal conditions for Japan’s participation in PKOs ((1) agreement on a cease-fire shall have been reached, (2) consent shall have been obtained from the host countries as well as the parties to armed conflict, (3) the operations shall maintain impartiality, (4) should any of the requirements in the above-mentioned principles cease to be satisfied, the Government of Japan may withdraw, and (5) the use of weapons shall be limited to the minimum necessary to protect the lives of personnel etc.).

and, in the case in which the attacker is “a state or ‘quasi-state organization,’” such actions are not permitted under the current interpretation of the Constitution, as they could constitute the “use of force” prohibited under the Constitution.²⁶ For example, Director-General of the First Department of the Cabinet Legislation Bureau Reiichi Miyazaki stated the following to the Committee on Foreign Affairs and Defense of the House of Councillors on May 15, 2003: “I believe that your question is based on the premise that the use of weapons by the SDF to come to the aid of a unit or personnel of other countries, who are located in a place very distant from where the SDF unit is, and there is no danger to the lives or person of the SDF personnel themselves. (Abridged) In such a case it would not be possible to explain the use of weapons to go to the aid of the other unit or personnel as the inherent or natural right to protect oneself. (Abridged) It is possible that the situation in which actions were taken to go to the aid of the unit or personnel or subject of the attack is “a state or ‘quasi-state organization’”. In which case, (Abridged) there is a possibility that such actions may constitute the use of force as means of settling international disputes, and there is a possibility that this could constitute the use of force prohibited under Article 9 of the Constitution.”

However, as noted in the 2008 Report of the Advisory Panel, U.N. PKOs are activities conducted on the premise that armed conflict has concluded (or activities for the purpose of preventing the initiation or reoccurrence of an armed conflict), and there is no country that interprets the use of weapons recognized by the international standards of U.N. PKOs as use of force in international relations prohibited under the U.N. Charter. Therefore, the use of weapons by the SDF should be regarded as not constituting the use of force prohibited under Article 9 of the Constitution, even if the weapons are used for so-called “kaketsuke-keigo” or to remove obstructive attempts against its missions in accordance with relevant international standards, regardless of whether or not the attacker is a mere criminal group or “a state or ‘quasi-state organization.”” Moreover, in complex U.N. PKOs in recent years, such activities as maintenance of security and protection of civilians have become increasingly important to deal with domestic conflicts and fragile states. Thus, when making concrete

²⁶ “With regard to the use of weapons for the purpose of so-called “kaketsuke-keigo” or removing obstructive attempts against its missions, in cases such as one in which it is clearly the case that the opposing party is simply a criminal group, where it is possible to assume that there would be no concerns about the use of weapons constituting the “use of force” as means of settling international disputes, then the position is that constitutionally it cannot be said that there is no leeway to approve such use of weapons.” (Answer by Director-General of the First Department of the Cabinet Legislation Bureau Reiichi Miyazaki, in the Committee on Foreign Affairs and Defense of the House of Councillors (May 15, 2003))

considerations in addition to enabling the use of weapons for so-called “kaketsuke-keigo” or to remove obstructive attempts against its missions, the implementation of such activities should also be legally made possible.

What is important is that such use of weapons is conceived to be a different concept from the “use of force” in international relations as clearly prohibited under Article 2(4) of the U.N. Charter. U.N. PKOs are activities that possess the characteristic of impartiality and are carried out with the consent of the main parties to a conflict. Their mission is to engage either in activities to prevent occurrences of the use of force or in peacekeeping or humanitarian and reconstruction assistance following the cessation of the use of force. In that sense, U.N. PKOs are not activities that involve the “use of force” in international relations as prohibited under the U.N. Charter for member states. U.N. PKOs are distinct from peace enforcement, which could entail large-scale military activities by so-called multi-national forces authorized by a U.N. resolution. Furthermore, “robust peacekeeping,” which involves certain enforcement force under Chapter VII of the U.N. Charter, also does not fall out of the category of a U.N. PKO in its nature, and is distinct from peace enforcement.²⁷

6. Protection and Rescue etc. of Japanese Nationals Abroad

Following the terrorist incident against Japanese nationals in Algeria in January 2013, in November of the same year the Government amended the SDF Law in respect to the transportation of Japanese nationals etc. by the SDF (Article 84-3), expanding the scope of those eligible to be transported and enabling the vehicular transportation of such people etc., in order to make it possible to more appropriately respond to various emergency situations overseas. However, the right of the SDF personnel engaged in such duties to use weapons remained unchanged, limited to so-called self-preservation type,²⁸ and the amendment did not go as far as to permit the use of weapons for rescue

²⁷ In the “United Nations Peacekeeping Operations Principles and Guidelines” (Capstone Doctrine, January 18, 2008), it is stated that, “Although on the ground they may sometimes appear similar, robust peacekeeping should not be confused with peace enforcement, as envisaged under Chapter VII of the Charter. Robust peacekeeping involves the use of force at the tactical level with the authorization of the Security Council and consent of the host nation and/or the main parties to the conflict. By contrast, peace enforcement does not require the consent of the main parties and may involve the use of military force at the strategic or international level, which is normally prohibited for Member States under Article 2(4) of the Charter, unless authorized by the Security Council.”

²⁸ The act stipulates that when SDF personnel assigned to transportation work are engaged in that work, “In the case that there are probable grounds to recognize it to be of unavoidable necessity to

activities or for removing obstructive attempts against its missions. Under the current constitutional interpretation, SDF personnel cannot come to rescue Japanese nationals abroad, because such SDF personnel will not be assured of the necessary right to use weapons.

Under international law the protection and rescue of nationals abroad are permitted as activities based on the consent of the territorial state, in cases where such consent has been granted. Similarly, the use of weapons when engaging in rescue activities or removing obstructive attempts against its missions as a part of the protection and rescue of nationals abroad are not in the first place the “use of force” in cases where the territorial state has given its consent and are no more than efforts to supplement or substitute security activities of the territorial state and therefore should be interpreted as not being restricted constitutionally.

Also, even when such consent has not been given, in cases when the hosting country does not have the intent or the ability to repel the infringement upon a foreigner despite significant and imminent infringement on the body and life of that foreigner, and if there is no other way to rescue them, protection and rescue of nationals abroad may be permitted as the exercise of the right of self-defense under international law.²⁹ In contrast, it can be seen that discussions in the Diet about the use of force as the exercise of the right of self-defense permitted under the Constitution have denied the exercise of the right of self-defense for the purpose of protecting and rescuing Japanese nationals

protect the lives and persons of the SDF personnel themselves, or unit members engaged together with the SDF personnel themselves in transportation work, or transportation workers or those working under their management in the course of the transportation work, then in response to such a situation it shall be possible for weapons to be used to the extent that is judged to be rational and necessary.”

²⁹ Answer by Legal Division Director Ichiro Komatsu, Treaties Bureau, Ministry of Foreign Affairs, in the Special Committee on Security of the House of Representatives (March 13, 1991).

“There are obligations under international law for a country to extend protection to foreigners who are present within its territories. However, in cases in which the country where foreigners are located does not have the will or the capacity to eliminate infringements against foreigners in its territories and there are severe and imminent infringements against the persons and lives of those foreigners, and there are no other means of relief, there are cases in which the use of force to the minimum extent necessary by the country of which the foreigners in question are nationals could be recognized for the purpose of protecting and rescuing those foreigners. Speaking purely from discussions on international law, there are also instances in which use of the right of self-defense could be recognized. However, such instances are limited to cases where infringements against nationals of the country in question are sufficiently severe enough to justify infringement of the territory and sovereignty of the country where those nationals are located. In addition, the use of force must be the necessary and minimum force required for the purpose of protecting and rescuing those nationals. That is the conventional view that has been stated to date.”

abroad.³⁰ However, against a backdrop in which many Japanese people are engaged in activities abroad and there is the potential for a situation similar to the terrorist incident in Algeria in January 2013 to occur, the interpretation that the Constitution limits the protection of the lives, persons and assets etc. of Japanese nationals abroad is not appropriate, and the protection and rescue of Japanese nationals within the scope permitted by international law should be made possible. Protecting the lives and bodies of its nationals is also the responsibility of a state.³¹

7. International Security Cooperation

Under international law, in addition to protection and rescue of nationals abroad, international security cooperation, such as activities that are based on the consent of the territorial state and that are conceived as supplementing a part of the activities of the police or other authorities of that state which should be conducted as part of their mandate to restore or maintain law and order, and anti-piracy activities based on universal jurisdiction, are not collective security measures of the U.N. nor constitute the “use of force” in international relations prohibited under Article 2(4) of the U.N. Charter. Such activities, therefore, do not in the first place constitute the “use of force”, and should be interpreted as not being restricted constitutionally. There are cases when such activities may be required by a U.N. resolution, may be conducted under the consent of or a request of a territorial state, or may be voluntarily for maintenance of order in international domains like the high seas. The anti-piracy activities in the Gulf of Aden could be regarded as a straightforward example of such cases. Various countries

³⁰ Answer by Director-General of the First Department of the Cabinet Legislation Bureau Masasuke Omori, in the Special Committee on Security of the House of Representatives (March 13, 1991).

“In response to your question about the case in which the lives, persons and assets of Japanese nationals abroad, or Japanese Government organizations were facing a crisis, when viewed from the standpoint of whether the three conditions I have just enumerated could at all be fulfilled and in particular the first condition of there being an imminent unlawful infringement against Japan, although I believe that there would be cases in which it would not be possible to make a categorical response, in general I believe that it would be difficult to imagine that such conditions would apply. Accordingly, to the extent that these conditions do not apply, a conclusion is reached that the overseas dispatch of the SDF would not be constitutional.”

³¹ Constitutions in other countries prescribe the duty of the state to protect its nationals abroad and the right of the nationals to be protected by the state during a stay abroad (The Constitution of the Republic of Korea (1987); Article 2(2), “It shall be the duty of the State to protect citizens residing abroad as prescribed by Act.”

The Constitution of the Republic of Poland (1997); Article 36, “A Polish citizen shall, during a stay abroad, have the right to protection by the Polish State.”)

are participating in the activities, including the countries of the European Union (EU), which launched “Operation Atalanta,” as well as the countries of the North Atlantic Treaty Organization (NATO), Japan, China, Iran and the Republic of Korea. Under U.N. Security Council Resolution 1816 etc., the U.N. is requesting the cooperation of the member states. Japan’s participation began in 2009, with the cooperative participation of the SDF and the Japan Coast Guard.

As such security cooperation is not the “use of force” in international relations prohibited under Article 2(4) of the U.N. Charter, but is a security activity accompanied with the use of weapons, in principle there should be no constitutional issues and a basis for the activities can be granted by laws. The Government stated in the Diet deliberations over the draft Law of Punishment and Countermeasures against Piracy upon the dispatch of the SDF that: “Activities conducted by a state or ‘quasi-state organization’ are by definition excluded from piracy. Accordingly, the view is that this would not become the use of force prohibited under Article 9 of the Constitution, which was your point of concern.” (Answer by Director-General of the Second Department of the Cabinet Legislation Bureau Yusuke Yokobatake in the Committee on Foreign Affairs and Defense of the House of Councillors, June 4, 2009).

8. Response to an Infringement that Does Not Amount to an Armed Attack

Under general international law, requirements for the exercise of the right of self-defense include “imminent unlawful infringement” against a country or its people. However, in Diet discussions, such an “imminent unlawful infringement against Japan,” is explained in the extremely limited context of an “armed attack,” or in other words, “generally, the organized and planned use of force against Japan.” In addition, under current domestic laws such as the SDF Law, a “Defense Operation Order” under which the use of force as the exercise of the right of self-defense may be permitted is premised on an “armed attack,” or the organized and planned use of force against Japan. Given this situation, the response to an infringement that does not amount to an “armed attack” does not resort to the exercise of the right of self-defense, but stops at the exercise of “law enforcement powers” in accordance with the principle of police proportionality. However, in cases in which a situation has arisen where it is difficult to determine whether an “organized and planned use of force” is being employed, it is impossible to deny that a sporadic situation may arise or a sudden escalation of a situation may occur. Even in the case of an infringement which cannot be judged whether it constitutes an

“organized and planned use of force,” action to the minimum extent necessary by the SDF to repel such an infringement should be permitted under the Constitution. Under international law the actions that would be taken by the SDF may be classified as the right of self-defense or as law enforcement activities etc. permitted under international law depending on the situation or its characteristics. But in any case, these actions should be permitted to the extent it is legal under international law.³²

The types of actions conducted by the SDF exercising law enforcement powers include the Public Security Operations, the Guarding Operations and the Maritime Security Operations, and the SDF also has the authority to use weapons for the Protection of the SDF’s Weapons and Other Equipment. However, when responding to situations by the SDF’s action as the exercise of law enforcement powers including Public Security Operations, in some situations there is a possibility that the factual gaps may be created in terms of responsive actions during the time when the Government is assessing the situation and taking steps to issue an order. As a result of this gap, difficulties may arise against bringing a situation under control and furthermore, it may not be possible to deter an attacker. In addition, SDF units can be mobilized prior to

³² (1) The concept has not been denied that also in cases where individual acts of infringement may not amount to an “armed attack” by itself, if such infringements were to “accumulate,” they may then be viewed as an “armed attack” and that in this scenario it would be possible under international law to exercise the right of self-defense.

(2) Answer by Director-General of the Treaties Bureau Hisashi Owada, Ministry of Foreign Affairs, in the Special Committee on Security of the House of Representatives (May 19, 1986).

“Speaking in terms of the theory of general international law, when determining if an infringement is urgent, imminent and unlawful, if it is the case that the situation is ongoing and similar kinds of acts occurs in frequent succession without any prospect of cessation, and that the right of self-defense must be exercised in order to halt such measures, then I think it can be said that from a general perspective it is established in international law for justifying the exercise of the right of self-defense.

However, with regard to this case (abridged), if, in the course of a series of ongoing circumstances the United States is faced with imminent danger and a judgment needs to be made on whether it is a situation in which measures need to be taken immediately to repel such imminent danger, Japan would not be a direct party to the situation and would not be fully apprised of the various details relating to it. Accordingly, I would state that in such a situation Japan would refrain from making a definite judgment.”

responding to a situation, in accordance with the provisions regarding Information-gathering Duties Before Public Security Operation Order (the SDF Law Article 792) and Establishment of Defense Facilities (the SDF Law Article 772) etc., but the requirements to issue an order are that “it is anticipated that a public security operation order will be issued and that illegal actions will take place,” and “it is anticipated that a defense operation order will be issued,” respectively; thus there exist high procedural hurdles before an actual order can be issued. Accordingly, under the current provisions of the SDF Law there is a possibility of facing difficulty in bringing a situation under control due to gaps arising in authority or time between peacetime and situations where respective actions are taken or a Defense Operation Order is issued. It is therefore necessary to take comprehensive measures for the SDF Law to ensure a seamless response.

Examples of cases that pose problems are as follows. As for the measures to be taken when foreign submarines continue sailing submerged in the territorial sea of Japan do not follow the request to leave the territorial sea and continue wandering, for example, while this would primarily be responded by the Maritime Security Operations, under current domestic law, at a stage at which the situation cannot be recognized as an “armed attack situation,” not only is it impermissible to exercise the “use of force,” it would be difficult for the SDF to forcibly expel the submarines through the use of weapons in a way that does not constitute the use of force. Accordingly, it is necessary to consider domestic legislation with reference to standards in international law about the degree to which the use of weapons is permitted as means of stopping foreign military or government vessels regardless of the scope of the provisions of the Law Concerning Execution of Duties of Police Officials.

Moreover, in a situation in which a special unit etc. had made a surprise landing on remote islands on Japan’s borders etc., even if a response were to be made exercising law enforcement powers, the SDF is not invested with such powers in peacetime, let alone under a Defense Operation Order at the stage when an “armed attack situation” is yet to be recognized. If remote islands were to come under attack a response to repel such an attack would require a sizeable force and time. Similarly, looking at the example of the defense of important facilities such as nuclear power stations, if a situation occurred in which an attack or destructive activities by terrorists or armed agents etc. exceeded police capabilities, the SDF would only be able to respond after having ordered a Public Security Operation. Swift and sufficient activities by the SDF from the early stage are effective in minimizing casualties in the Japanese side due to attacks or destructive acts that exceed police capabilities. However, if time for response

is lost waiting for procedures to issue a Public Security Operation Order, there is a possibility that acts of terrorism as well as sabotage could magnify and cause a serious impact.

As seen on the examples above, there is a growing need for the response to infringements that do not amount to an armed attack in the current international community, and thus it is necessary to enhance the legal system within a scope permitted under international law to enable a seamless response including the use of force proportionate to various situations. Furthermore, in addition to developing laws, it is also necessary to enhance the operations and training of the SDF accordingly.

Sometimes, the right to take measures against infringements that do not amount to an armed attack is referred to as “minor self-defense rights”; however, the use of this term is not advisable as it has not been established in international law, and could also invite criticism from at home and overseas that Japan is expanding the concept of the right of self-defense under Article 51 of the U.N. Charter.

III. Structure of Domestic Legislation

In order to give actual meaning to the new concepts stated above, it is essential to develop corresponding domestic legislation etc. Here, the major elements that should be considered are set out.

Domestic legislation needs to be developed in such a way as to enable the exercise of the right of collective self-defense, participation in collective security measures of the U.N. that entail military measures, and a more proactive contribution to U.N. PKOs in accordance with the Constitution. Furthermore, in addition to ensuring a seamless response in any given situation and sufficiently ensuring the justness of procedural aspects, including the confirmation of civilian control, it is necessary to be able to adequately respond by prioritizing procedures depending on the nature of the situation, in particular those situations that require a rapid issuance of orders for actions.

For this purpose, broad examination of a number of laws must be implemented, including the SDF Law, which stipulates the actions of the SDF, and the Law Concerning the Maintenance of the Peace and Independence of Japan and Security of the Nation and Nationals in a Situation of Armed Attack (Law Regarding the Response to Armed Attacks), which stipulates basic items relating to response situations, and the related laws such as Situations in Areas Surrounding Japan Security Law, the Law Concerning Ship Inspection Operations in Situations in Areas Surrounding Japan (Ship Inspection Operations Law), the Law Concerning the Treatment of Prisoners etc., in the Event of Armed Attack (Treatment of Prisoners Law), and the PKO Law. Such examination will also have to take into account the provisions of various special measures laws that relate to the activities etc., of the SDF, the current security environment, and requirements in line with U.N. standards.

As for the SDF Law, improvement in such matters as mission, activities and authority could be envisaged. Although revisions of the structures of the SDF Law have been introduced to date in response to various situations arising from changes in the security environment, it is necessary to reconsider whether there is further scope in these structures to enable responses that are swifter and more substantial than now, while maintaining the justness of procedural aspects. Furthermore, examination is also required from the perspective of what response by SDF personnel on the ground can be permitted at a point at which an operation order has not been issued. In addition to examining what kind of mission should be newly granted to the SDF when they participate in U.N. PKOs etc., examination must also be conducted on how the existing authority to use weapons, currently limited to the “so-called inherent (or natural) right

to protect oneself” could be revised. In doing so, based on general cases in the forces of other developed democratic countries and in U.N. PKO missions etc., examination needs to be conducted to whether it is possible to comprehensively grant authority relating to the use of weapons for the purpose of “unit self-defense”³³ and execution of mission as permitted under international law, while ensuring civilian control through the development of “unit action guidelines” which correspond to the rules of engagement (ROE) of other countries.

In terms of the PKO Law, necessary revisions should be made in line with U.N. standards such as the implementation of action based on the agreement of the main parties to the conflict, review on the requirement of ceasefire agreement, and the use of weapons based on U.N. PKOs standards. Since it can be anticipated that not only the U.S. forces but forces of other countries may respond in Situations in Areas Surrounding Japan, examination also needs to be conducted to the Situations in Areas Surrounding Japan Security Law, so that the provision of support is not limited to U.S. forces from rear areas, but that the necessary support can be provided in broader areas, to the forces of other countries. Furthermore, examination should also be conducted to the conclusion of the necessary international agreements, including the conclusion of Acquisition and Cross-Servicing Agreements (ACSA) with other countries in addition to the United States and Australia.

³³ Measures taken based on the decision of a unit commander to defend the unit etc. from outside infringement are widely recognized internationally.

IV. Conclusion

The Constitution of Japan affirms in the preamble of the Constitution, the “right to live in peace,” and stipulates in Article 13 the “right to life, liberty, and the pursuit of happiness” of the people. These are rights which essentially form the foundation of other basic human rights and in order to protect these, ensuring the survival of the sovereign people and the survival of the state are the precondition. Furthermore, the Constitution also expresses the principle of international cooperation. Peace is what people aspire towards. Pacifism of the Constitution of Japan, which is a presumption of the principle of international cooperation, should continue to be firmly maintained in the future. Meanwhile, the lives of the sovereign people and the survival of the state must not be placed at risk even from the perspective of such Constitution.

The security environment surrounding Japan has become ever more severe, due to various factors including technological progress, expansion of cross-border threats, and changes in the inter-state power balance. In addition, the deepened Japan-U.S. alliance and the broadening of regional security cooperation mechanisms, together with the increasing number of cases that ought to be addressed by the whole international community, Japan needs to fulfill an even greater role in a host of areas. Considering the remarkable scale and speed of the changes occurring in the security environment, Japan is now facing a situation where adequate responses can no longer be taken under the constitutional interpretation to date in order to maintain the peace and security of Japan and realize peace and stability in the region and in the international community.

The interpretation of Article 9 of the Constitution has been established as a result of many years of discussion. There are opinions that any changes to it would not be permissible and that if changes are required, it will be necessary to amend the Constitution. However, the method of constitutional interpretation of this Panel has been derived from a literal interpretation of the provisions of the Constitution. In other words, the provision of paragraph 1 of Article 9 should be interpreted as prohibiting the threat or the use of force as means of settling international disputes to which Japan is a party. The provisions should be interpreted as not prohibiting the use of force for the purpose of self-defense, nor imposing any constitutional restrictions on activities that are consistent with international law. The provision of the paragraph 2 of Article 9 should be interpreted as stipulating that “in order to accomplish the aim of the preceding paragraph,” war potential will never be maintained. The paragraph should therefore be interpreted as not prohibiting the maintenance of force for other purposes, namely self-defense or so-called international contributions to international efforts. Even from

the view of the Government to date that “these measures (necessary for self-defense) should be limited to the minimum extent necessary,” the interpretation which excluded the right of collective self-defense from “the minimum extent necessary,” while including the right of individual self-defense is inappropriate as it attempts to formally draw a line on “the minimum extent necessary” by an abstract legal principle, and it should be interpreted that the exercise of the right of collective self-defense is also included in “the minimum extent necessary.”

With regard to views on the right of individual self-defense, as long as the three requirements are fulfilled, there are no restrictions on the right of individual self-defense, but its actual exercise requires a decision based on careful and speedy judgment on necessity and proportionality. With regard to the right of collective self-defense, when a foreign country that is in a close relationship with Japan comes under an armed attack and if such a situation could pose a serious impact on the security of Japan, Japan should be able to participate in operations to repel such an attack by using force to the minimum extent necessary, having obtained an explicit request or consent from the country under attack, and thus to make a contribution to the maintenance and restoration of international peace and safety, even if Japan itself is not directly attacked. With regard to whether a certain situation would fall under such a case, the Government should take responsibility for making a decision, taking the following points into consideration comprehensively whether there is a high possibility the situation could lead to a direct attack against Japan, whether not taking action could significantly undermine trust in the Japan-U.S. alliance, thus leading to a significant loss of deterrence, whether the international order itself could be significantly affected, whether the lives and rights of Japanese nationals could be harmed severely and whether there could otherwise be serious effects on Japan. In the case that Japan would pass through the territory of a third country when exercising the right of collective self-defense, the Government should make it a policy to obtain the consent of that third country. The exercise of the right of collective self-defense should require the approval, either prior or ex post facto, of the Diet. The exercise of the right of collective self-defense by Japan should be discussed and approved by the National Security Council under the leadership of the Prime Minister, and the Cabinet is required to make the decision in the form of a Cabinet Decision. However, given that the right of collective self-defense is a right and not an obligation, it is obvious that after a comprehensive assessment, a policy decision not to exercise it could be made.

In terms of participation in collective security measures of the U.N. which entail military measures, such measures would not constitute the “use of force” as means of

settling international disputes to which Japan is a party and they should therefore be interpreted as not being subject to constitutional restrictions. Naturally, participation in such measures should be decided carefully, based on comprehensive examination on each individual case, and participation in collective security measures of the U.N. entailing military measures should require approval, either prior or ex post facto, by the Diet.

The theory of so-called “Ittaika’ with the use of force” has presented significant obstacles to actual security-related operations; and thus the concept itself should be discontinued, and it should be dealt with a matter of policy appropriateness. With regard to U.N. PKOs, the protection and rescue of Japanese nationals abroad, and international security cooperation, none of these constitute the “use of force” as prohibited under Article 9 and therefore the use of weapons in the course of such activities for the purpose of coming to the aid of geographically distant unit or personnel under attack (so-called “kaketsuke-keigo”) or removing obstructive attempts against its missions should be interpreted as not being restricted constitutionally.

In addition, with regard to response to infringements that do not amount to an armed attack, even in the case of an infringement in which a determination cannot be made about the “organized and planned use of force,” action to the minimum extent necessary by the SDF to repel such an infringement should be permitted under the Constitution. Furthermore, with regard to the actions of the Self-Defense Forces, as there is a possibility that gaps arise in authority or time between peacetime and situations where respective actions are taken or a Defense Operation Order is issued, it is therefore necessary to take comprehensive measures for the SDF Law to ensure a seamless response. In order to give actual meaning to the new concepts stated above, it is essential to develop corresponding domestic legislation.

Looking back, it can be seen that the Constitution makes no express provisions with regard to the right of individual self-defense or the right of collective self-defense. The exercise of the right of individual self-defense has also in the past been recognized, not by the Government’s amendment of the Constitution, but by the adjustment of constitutional interpretations.

In view of these facts it should also be possible, by the Government setting out a new interpretation in an appropriate manner, to make a decision recognizing that the exercise of the right of self-defense to the minimum extent necessary encompasses the right of collective self-defense in addition to the right of individual self-defense. The observation that the amendment of the Constitution is necessary therefore does not apply. Similarly, with regard to Japan’s participation in collective security measures of

the U.N., this also could be enabled by clarification of a new interpretation of the Constitution by the Government in an appropriate way.

The above represents the recommendations of the Advisory Panel on Reconstruction of the Legal Basis for Security. It goes without saying that it is the Government that will ultimately decide on how these recommendations are treated and what specific measures will be taken with regard to the reconstruction of the legal basis for security. It is, nonetheless, the strong expectation of the Panel that the Government will consider this report earnestly and proceed to take necessary legislative measures.

References

(Translation)

Advisory Panel for Reconstruction of the Legal Basis for Security

February 7, 2013

Prime Minister's Decision

Revised on September 17, 2013

1 Purpose

In light of the increasingly severe security environment surrounding Japan, it is necessary to reconstruct the legal basis for security so that Japan can take appropriate responses to these changes. The “Advisory Panel for Reconstruction of the Legal Basis for Security” (hereafter referred to as “the Panel”) will be convened under the Prime Minister to examine issues of the Constitution, including those related to the right of collective self-defense.

2 Composition of the Panel

- (1) The Panel will consist of experts listed in the attachment and the Prime Minister will convene its meetings.
- (2) The Prime Minister will request one of the experts to be a chairperson.
- (3) Where necessary, the Panel may request attendance of concerned parties other than the members.
- (4) Administrative affairs of the Panel will be managed by the Cabinet Secretariat.

Note: Attachment omitted

Members of “Advisory Panel for Reconstruction of the Legal Basis for Security”
(As of May 15, 2014)

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Chairman, Self Defense Force Veterans Association

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Yuichi Hosoya

Professor, Keio University

Shinya Murase

Professor Emeritus, Sophia University

Shunji Yanai

President, International Tribunal for Law of the Sea

Former Vice-Minister for Foreign Affairs

Meetings of “Advisory Panel for Reconstruction of the Legal Basis for Security”

First meeting, February 8, 2013

Topics: (1) Remarks by Prime Minister (2) Submission of the June 2008 Report to Prime Minister by Chairperson Yanai (3) Remarks by Chairperson Yanai (4) Discussions (5) Remarks by Chief Cabinet Secretary, Minister in charge of Strengthening National Security (6) Remarks by Prime Minister

Second meeting, September 17, 2013

Topics: (1) Remarks by Prime Minister (2) Remarks by Deputy Chairperson Kitaoka (3) Discussions (4) Remarks by Prime Minister

Third meeting, October 16, 2013

Topics: (1) Remarks by Prime Minister (2) Remarks by Deputy Chairperson Kitaoka (3) Discussions

Fourth meeting, November 13, 2013

Topics: (1) Remarks by Prime Minister (2) Remarks by Deputy Chairperson Kitaoka (3) Discussions

Fifth meeting, December 17, 2013

Topics: (1) Remarks by Prime Minister (2) Remarks by Chairperson Yanai (3) Remarks by Deputy Chairperson Kitaoka (4) Discussions

Sixth meeting, February 4, 2014

Topics: (1) Remarks by Chairperson Yanai (2) Remarks by Deputy Chairperson Kitaoka (3) Discussions (4) Remarks by Prime Minister (5) Discussions (continued)

Seventh meeting, May 15, 2014

Topics: (1) Remarks by Chairperson Yanai (2) Remarks by Deputy Chairperson Kitaoka (3) Remarks by Prime Minister (4) Discussions

Submission of the Report, May 15, 2014