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Binding the Dogs of War: Japan and the Constitutionalizing of Jus ad Bellum

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BINDING THE DOGS OF WAR: JAPAN AND THE
CONSTITUTIONALIZING OF JUS AD BELLUM

CRAIG MARTIN*

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Japanese names in this Paper follow the Japanese convention of last names first, with the exception of formal citations of English works by authors with Japanese names.
1. INTRODUCTION

Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.

Carl von Clausewitz, *On War*

Article 9 of the Constitution of Japan famously renounces war and the threat or use of force to settle international disputes, prohibits the maintenance of armed forces or other war potential, and denies all rights of belligerency. Much has been written about this provision over the years, and it has received renewed attention due to recent debate over the need to amend the Constitution. But the significance of Article 9 from the perspective of international law, and in the context of the relationship between constitutional and international law, has not been the subject of much analysis, particularly in English.

This Paper examines the origins of Article 9 and the subsequent Japanese experience with this provision in order to assess the extent to which Article 9 constituted an incorporation of certain principles of international law on the use of armed force, the *jus ad bellum*, and the degree to which the principles so incorporated may have operated to effectively constrain Japanese defense and foreign policy during the sixty years that the Constitution has existed. It will suggest that the American drafters relied upon the renunciation of war provision in the Kellogg-Briand Pact, and the prohibition on the use of force from the newly signed U.N.
Charter, in designing Article 9(1) of the Constitution. Moreover, the source of the provision was understood, and its purpose embraced, during the ratification process in the Diet (the legislature). While it was often subsequently used by the government as a convenient and even cynical shield behind which to pursue a self-interested policy of avoiding Cold War involvement, it nonetheless operated at times as both a legal constraint and as the source of broader constitutive norms, which together shaped and restrained government policy.

It is argued here that if this account is accurate, that is, if it can be shown that Article 9 was designed to implement principles of *jus ad bellum* as a pre-commitment device to prevent the use of force, and that those principles successfully operated to later constrain government policy with respect to the use of force, then the Japanese experience provides evidence that it is feasible to use constitutional design for the purposes of incorporating and implementing in the domestic legal system the international law norms on the use of armed force.

Why does this matter? First, this conclusion, and particularly the richer explanation as to how Article 9 operated to constrain policy, is supportive of the theories on international law compliance, such as liberal international law theory and international legal process theory, which emphasize the importance of domestic implementation and internalization of international law norms to explain why states obey international law. In this sense, the experience of Japan with Article 9, and the “thick” case study that it provides, is more broadly significant than is suggested by the more typical treatment of Article 9, in which it is characterized as a somewhat esoteric provision that may reveal some insights into Japanese law and politics, but nothing more.

Second, the conclusion supports the inference that more widespread constitutional implementation of the principles of *jus ad bellum* could increase compliance with that regime—a regime that is the legal foundation for our modern system of collective security. That is significant, because despite the development of that system, as well as the increased interaction between international and domestic legal systems, and the spread of constitutional democracy and the ideas of democratic accountability in public governance, the fact remains that few democratic constitutions provide explicitly for the process by which governments are to decide to unleash the dogs of war, or the extent to which international legal principles should be considered
in arriving at such decisions. Moreover, the governments of constitutional democracies continue to make decisions to engage in armed conflict for reasons that are illegitimate. The conclusion that it is feasible to constitutionalize principles of *jus ad bellum* such that they will effectively operate to shape state policy provides an essential premise for a larger normative argument regarding constitutional control of the decision to engage in armed conflict.  

The objective of this Paper, then, is to establish that premise. It proposes to do so through a case study of the Japanese experience and the relationship between Article 9 and *jus as bellum*. Why the Japanese Constitution? There are a handfull of constitutions that contain provisions that specifically place some constraints on the government’s ability to use armed force, and a few among them that have provisions that reflect the non-aggression norms of the 20th century *jus ad bellum* regime. The war-renouncing Constitution of Japan, however, stands out as having made the pacifistic norm central to the constitutional framework, and Article 9 has arguably been the subject of more political debate, academic argument, constitutional litigation, and public discourse, than any other such constitutional provision in the world. More than any other, Japan’s provision on the use of force has become associated

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2 This Paper is part of a larger project to advance that broader normative argument, through an analysis of international and constitutional constraints on the use of armed force. In a nutshell, that argument will propose the use of constitutional provisions to govern the process of deciding to use armed force in two respects: first, that the decision must be made by both the legislative and executive branch, thus requiring legislative debate and approval of executive branch decisions; and second, that both branches are required by the constitution to engage in a serious assessment of whether the use of force under the circumstances would be consistent with the current understanding of the relevant principles of *jus ad bellum*. Depending on the state of *jus ad bellum* at the time, this could involve an assessment of whether the use of force in the circumstances was justified or legitimate, or, on the other hand, whether the use of force was required under some duty to protect or to intervene for humanitarian purposes. It will be argued that such domestic implementation would reduce the incidence of illegitimate decisions and increase compliance with international law.

with the nation’s sense of identity. As such, it is a good candidate for this analysis.

The account is not without its complications, however, as there are aspects of Article 9 that are inconsistent with international law, and disagreements over the meaning and significance of these inconsistencies have complicated the political and legal effect of the provision. Article 9(2) was cobbled together from a unique prohibition on all armed forces, and concepts of belligerency from a separate area of the laws of war (jus in bello), in a manner that created the inconsistencies and helped make Article 9 the focus of so much political conflict. The Paper will argue that it is crucial, in assessing the effective functioning of Article 9, to keep the distinction between the prohibition on the use of armed force in Article 9(1), and the prohibition on the maintenance of armed forces in Article 9(2), in sharp focus. In addition to these complications, for the purposes of demonstrating the extent to which Article 9 operated to truly bind the government to the mast in the fashion of a true pre-commitment device, it is also necessary to disentangle those episodes in which the government merely used Article 9 as pretext for fending off external pressure from those in which it strained mightily against the bonds to respond to the Siren song calling for military action.

The Paper begins, therefore, with a more detailed discussion of some of the theoretical foundations for the argument, including an explanation of the current jus ad bellum regime, the relationship between domestic and international law and how the relationship is important to the reasons for state compliance with international law, how constitutional incorporation of international law may operate in practice, and some of the theoretical justifications for using constitutional law to implement jus ad bellum. In Section 3, the Paper examines the history of Article 9 in terms of the drafting and ratification process, particularly focusing on the extent to which international law principles were relied upon, and the manner in which the ratification process embraced its purpose and began the process of making Article 9 into a powerful constitutive norm.

Section 4 provides an analysis of Article 9 from the perspective of international law, specifically looking at those aspects of the provision that are consistent with and operationalize modern jus ad bellum, how the provision is interpreted by the government, and whether either perspective is inconsistent with international law to a degree that would interfere with the operation of Article 9(1).
Aside from advancing the overall argument in the Paper, it is suggested that this Section may add some new perspectives on the proper interpretation of the provision, since it is rarely analyzed in a manner informed by international law theory. In Section 5, the Paper turns to the operation of Article 9, and examines the extent to which it may be said to have both operated as a narrow legal rule to constrain government policy, and shaped government policy more broadly as a powerful constitutive norm.

2. THEORY AND ARGUMENT

2.1. The Development of Jus ad Bellum

To begin, it is necessary to briefly explain the broad contours of *jus ad bellum*, and to briefly trace its development so as to be clear on where it stood in 1946 when Article 9 was being drafted, and how it has changed since. The laws of war are separated into two quite separate regimes, that of *jus ad bellum*, the laws that govern the entry into armed conflict or when a state can legally go to war, and that of *jus in bello*, now often referred to as the laws of international armed conflict (“LOIAC”), which constitute the laws that govern how armed forces may legitimately wage war. These two regimes are quite separate and distinct, such that the forces of a state that commenced an illegal aggressive war may nonetheless conduct themselves legally throughout the war, and conversely, the forces of a state that commenced fighting for legitimate reasons may engage in acts that are in violation of the LOIAC. In this Paper it is *jus ad bellum* that is of primary interest, though Article 9 quite strangely incorporates a principle of *jus in bello* for the purpose of achieving a *jus ad bellum* objective.

The international law on the use of armed force has developed considerably in the last eighty years. While the doctrine of “just war” had in early history governed the legitimacy of war, and purported to constrain monarchs from engaging in war that did not meet the criteria for just war, it lost its normative power with the rise of modern international law and the secularization of the concept soon after the Middle Ages.\(^4\) From that time until the end of the nineteenth century there was essentially no legal principle limiting the use of warfare as a legitimate tool of international

relations. It was, indeed, in this context that Clausewitz wrote on the “imperceptible limitations” of international law.

The Hague Conventions of 1899 and 1907 were the first steps in placing general legal limits on the use of armed force as a legitimate means of dispute resolution. But these merely bound state parties to resort to the good offices of friendly states prior to making “an appeal to arms.” The Covenant of the League of Nations, adopted in 1919 in the aftermath of the “war to end all wars,” advanced the project to reduce the incidence of war further, taking the first tentative steps towards the establishment of a collective security system. But it too only limited the rights of members to resort to war, prescribing cooling-off periods and arbitration procedures that had to be fulfilled prior to commencing war, but did not entirely prohibit even aggression. In 1928, however, the Pact of Paris, or the Kellogg-Briand Agreement as it came to be known (after the U.S. Secretary of State and French Foreign Minister), became the first multilateral treaty that purported to prohibit recourse to war. The key provision was in Article I, which read: “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.” Over forty states were party to the Kellogg-Briand Pact by 1929 when it came into force, and 62 parties ultimately signed it. While it failed to provide for any enforcement

5 Id. at 67.
6 CLAUSEWITZ, supra note 1, at 75.
8 Hague Convention I, supra note 7, art. 2.
9 League of Nations Covenant art. 10–17 (providing, in part, that “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. . .”).
mechanism, it was the first modern international law prohibition on the aggressive use of force.\textsuperscript{12}

Both the League of Nations system and the Kellogg-Briand Pact were discredited by their failure to prevent the mounting incidences of aggressive war, with the Japanese occupation of Manchuria and the Italian invasion of Ethiopia (then Abyssinia) being the earliest serious instances, which led to the complete breakdown of the system in World War II. Nonetheless, the prosecutions of the former leaders of Nazi Germany and Japan for the “crimes against peace” in the Nuremberg Trials and the Tokyo War Crimes Trials were based on the breach of the Kellogg-Briand Pact.\textsuperscript{13}

It was with the establishment of the United Nations in 1945 that the foundation for the current system of \textit{jus ad bellum} was developed. Article 2(4) of the U.N. Charter provided that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The only exceptions provided for were in the exercise of individual and collective self-defense upon the occurrence of an armed attack (Article 51), or such collective use of force by members as has been authorized by the Security Council upon a determination that there is a threat to the peace and security of the international community (Article 42).

There has been recent debate about the preventative use of force (the so-called Bush Doctrine), and over humanitarian intervention.\textsuperscript{14} Neither of these last two innovations are yet

\textsuperscript{12} As will be discussed below, the agreement was understood, pursuant to an exchange of collateral notes, not to prohibit states from using force in self-defense.


\textsuperscript{14} See \textsc{National Security Strategy of the United States of America} (2002) available at www.whitehouse.gov./nsc/nss.html (expounding the actual doctrine); see generally Eyal Benvenisti, \textit{The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies}, 15 \textsc{Eu. J. Int’l L.} 677 (2004) (describing the “Bush Doctrine” as an effort to respond to various security challenges but criticizing it as upsetting the existing UN regime and creating other risks to global stability); Peter Dombrowski & Rodger A. Payne, \textit{The Emerging Consensus for Preventative War} 48(2) \textsc{Survivor} 115 (2006); \textsc{International Commission on}
accepted as being part of the international law governing the war of armed conflict, though they have already been advanced as justifications for the actual use of force,\textsuperscript{15} and they suggest that there will be further developments in the \textit{jus ad bellum} regime that will require more sophisticated legal tests to determine the legitimacy of the use of armed force. That in turn requires thinking about how and where such tests will be applied, and particularly what mechanisms may be developed to ensure that such tests are employed prior to any final decision to engage in armed conflict.\textsuperscript{16}

In that context, the idea that the domestic legal system might be employed to assist in the implementation and application of the principles of \textit{jus ad bellum} might be increasingly attractive.

\subsection*{2.2. The Relationship Between International Law and Constitutional Law}

There is a history of ideas regarding limitations on the use of force migrating between international law and constitutional law.\textsuperscript{17} Early attempts to develop constitutional limits on the executive branch’s monopoly control over the use of armed force were important influences in the later development of the international law prohibition of war.\textsuperscript{18} Those developments have been traced back to the 1688 settlement between the British Parliament and the King, which established parliamentary control over the raising and funding of armies, through to the U.S. Constitution of 1787, which 

\begin{itemize}
\item \textsuperscript{15}Kosovo is the most striking example of an intervention that was justified by arguments for humanitarian intervention. While the invasion of Iraq in 2003 was narrowly grounded on U.N. Security Council Resolutions 678 and 687, with the notion of “continuing” the first Gulf War, the Bush Doctrine developed from the arguments that the United States had the right to use force to prevent a hostile nation such as Iraq from developing weapons of mass destruction.
\item \textsuperscript{16}See Benvenisti, supra note 14.
\item \textsuperscript{17}The metaphor of the migration of constitutional ideas between different constitutional systems, is developed by Sujit Choudhry in Sujit Choudhry, \textit{Migration as a New Metaphor in Comparative Constitutional Law}, in \textit{The Migration of Constitutional Ideas} 1–35 (Sujit Choudhry ed., 2006).
\end{itemize}
established legislative control over the declaration of war, and the French Constitution of 1791. It is from these constitutional ideas that the later Hague and Kellogg-Briand treaties derived their inspiration.

In turn, several modern constitutions were influenced by these emerging principles of international law on constraining the aggressive use of force. One of the first was that of the Philippines in 1935. Then, after World War II and the development of the modern international laws on the use of force, the constitutions of a number of countries, including Italy, Germany, and France under the Fourth Republic, in addition to that of Japan, all incorporated some form of constitutional limitation on the aggressive use of armed force.

Notwithstanding this history of the cross-pollination of ideas, the extent of domestic implementation of modern *jus ad bellum* principles or development of domestic legal mechanisms to assist in the enforcement of those principles remains very limited. This is somewhat surprising. As a purely descriptive matter, the last sixty years has witnessed the development of an ever-growing integration of international and domestic legal systems, with domestic law increasingly being employed to implement and enforce the provisions of international legal regimes, ranging from such technical areas as international trade and intellectual property, to that of human rights. Even international legal

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19 Id. at 42–43; see also 1791 CONST. ch. 3, § 2, ¶ 4 (Fr.) (going so far as to provide for criminal prosecution of any minister or agent of executive power for any part played in the commencement of hostilities that were subsequently determined to constitute aggression).


21 CONST. (1935), art. 11, § 3 (Phil.) (“The Philippines renounces war as an instrument of national policy, and adopts the generally accepted principles of international law as part of the law of the Nation.”). As discussed below, this may have been the initial source of MacArthur’s idea for Article 9, as he had been military advisor to the Philippine National Militia at the time their Constitution was promulgated, as part of the country’s transition to independence.

22 1949 CONST. pmbl. (Fr.); see also CONST. art. 12 (Costa Rica), unofficial English translation available at http://www.costaricalaw.com/legalnet/constitutional_law/engtit1.html (providing uniquely with Japan a constitutional prohibition on the maintenance of armed forces, while permitting the organization of forces for self-defense).

regimes that relate to areas of so-called “high politics,” such as the rules of *jus in bello*, arms control, and nuclear non-proliferation, have increasingly found expression in domestic legal systems.

This increasing interaction and overlap between the two systems, and the nature of that relationship, form the basis for some of the theoretical explanations for why states comply with international law. Whether states actually do “obey” international law at all, and if they do, why they should do so in the absence of strong international enforcement mechanisms, has been an area of intense debate for several hundred years.\(^{24}\) International legal process theory, one of the dominant theories among those strands that argue that states *do* comply with international law, explains such obedience by reference to the interaction between the international and the domestic systems, or the transnational legal process. It argues that such interaction results in the interpretation and internalization of international law norms within domestic legal systems, which in turn increases compliance with the international legal regime in question, due to the operation of the domestic law enforcement mechanisms, increased acceptance of the legitimacy of the norms, and internalization of the norms into the social and political systems.\(^{25}\)

International legal process theory also makes the normative claim that increasing such transnational processes is therefore one of the best means of increasing compliance with international law. It is particularly when international enforcement mechanisms are weak but the legal norms in question are clearly defined and peremptory, that the best way to increase compliance is through vertical strategies of increasing interaction with domestic systems to foster internalization of those norms into the domestic structures politically, socially, and legally.\(^{26}\)

Similarly, in the liberal theory of international law, another of the strands that supports the view that international law has real normative power, it is argued that the state actor has to be understood more in terms of its constituent institutions and political forces, and that compliance with international law should be understood in terms of the manner in which it operates to influence these constituent elements of the state. Normatively it is

\(^{24}\) See Koh, *supra* note 23 (presenting an excellent review of the theoretical development and debate among the different theoretical approaches).

\(^{25}\) *Id.* at 2634, 2655.

\(^{26}\) *Id.* at 2656–57.
argued that the international legal system has to better influence and harness such domestic institutions in order to be more effective in achieving the objectives of international law.\textsuperscript{27} Thus, international law, in more directly influencing domestic institutions, can seek to directly strengthen such domestic institutions, back-stop them, or compel them to act in compliance with international law.\textsuperscript{28} All three methods are examples of increased reliance on domestic enforcement mechanisms to enhance compliance with international law.

Given the trend of increasing integration of international and domestic legal systems one might have expected there to be a greater development of domestic mechanisms for the implementation of aspects of \textit{jus ad bellum}. Moreover, given the arguments that such interaction between international and domestic legal systems facilitates compliance with international law, and if one accepts that the maintenance of peace and security is a generally desirable objective and that enhancing compliance with the laws underpinning our collective security system would help achieve that end, then one would think that there ought to be greater domestic implementation of \textit{jus ad bellum} principles. If one were to consider how that might best be done, then constitutions, which usually occupy the position of highest law of the land within domestic legal systems, would likely be an area of particular interest.

2.3. Constitutional Incorporation of International Law

How would the incorporation of international law norms actually enhance compliance in practice, and how would such norms operate and be internalized as these theories contemplate? There are current theories with respect to such questions that both provide a useful framework for understanding the Japanese experience, and which are in turn supported by the manner in which the \textit{jus ad bellum} principles in Article 9 have operated over the last sixty years.

As a descriptive matter, it is well accepted that many of those constitutions promulgated or amended in the post-war years have incorporated the language and principles of international human

\textsuperscript{27} E.g., Anne-Marie Slaughter & William Burke-White, \textit{The Future of International Law is Domestic (or, the European Way of Law)}, 47 HARV. INT’L L.J. 327 (2006).

\textsuperscript{28} Id. at 333–46.
rights regimes. In the area of comparative constitutional law theory, there has been work to drill down and examine some of the theoretical reasons. It has been argued that modern constitutions, particularly in transitional democracies, have employed international law to lock in specific democratic principles and norms. One of the methods by which constitutions may lock in international law commitments is by directly incorporating the norms of either customary international law or treaty law into the language of the constitution. Such studies argue that these developments reflect examples of constitutional design being used to employ international law as a means of strengthening the pre-commitment mechanisms of the constitution.

Constitutions operate as a form of pre-commitment device, in that the drafters create constitutional provisions that will bind the government’s behavior in the future, motivated by expectations that there may be circumstances that, in the absence of such constraints, could cause the government of the day to act in a manner contrary to reason or the state’s interests. It is the concept of making arrangements when one is sober in order to prevent one from doing harm when drunk. It is captured in Elster’s use of the metaphor of Ulysses, who to protect himself from later jumping to his death while in thrall to the Sirens’ song, ordered his men to bind him to the mast, stop up their ears with beeswax, and refuse any subsequent order to release him.

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31 Id. at 724.


33 For a more recent discussion of some further nuances of the theory, see Jon Elster, Don’t Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment, 81 TEX. L. REV. 1751 (2003) (addressing, among other things, the difference between collective and individual pre-commitment, and the impact of the different permutations that the factors of passion, interest, and reason may take as between times T1 and T2).
Treaties may similarly operate as pre-commitment devices. To the extent that the motive is to create constraints on the state’s future conduct out of concern that it will otherwise behave in a manner that is contrary to its welfare (as opposed to being a strategy to constrain or otherwise influence other states’ behavior), the entry into a treaty constitutes a form of pre-commitment. Indeed, the use of international law as a pre-commitment device enjoys the advantage of not being susceptible to change by local actors, so that abrogation or violation are the only options available to avoid the pre-commitment in the future. The costs of doing so may be perceived by local actors as being high making the pre-commitment relatively strong.

The use of constitutions to incorporate the principles of treaties already entered into, however, serves to internalize the pre-commitment, and subject the commitment to domestic enforcement mechanisms, thereby increasing the costs and difficulty of violating the bonds. While Ginsburg focuses on this device as a means of strengthening the constitutional pre-commitment to democratic norms, it can be extended more generally, and employed in a normative argument in line with “liberal” and “legal process” theories of international law, to use domestic constitutional structures to incorporate international law rules for the purpose of strengthening the bind of the international pre-commitments, thereby enhancing compliance with international law. To put it another way, while Ginsburg and others argue that international law is used to strengthen the pre-commitment mechanisms of the constitution, the corollary that is being advanced here is that the pre-commitment devices of the constitution can be used to enhance compliance with international law.

The constitutionalizing of international law principles increases the probability of compliance because the difficulty and costs of non-compliance are thereby raised. The costs of non-compliance will not only be incurred in the international arena by reason of the violation of the international obligation, but also domestically as a

36 This raises questions as to why governments would choose to do so, and what incentives might be required to encourage such innovations, which will be dealt with in detail in other parts of the larger project.
result of the concurrent violation of the constitutional provision incorporated the international law norm. The costs of constitutional violation or difficulty of avoiding compliance can be much higher, or at least more immediate, than those associated with the corresponding violation of international law, particularly when the issue is subject to judicial review and other such constitutional enforcement mechanisms. To return to Elster’s metaphor, Ulysses himself not only had himself bound to the mast, but also instructed his crew not to obey any orders to release him until they had passed the danger posed by the Sirens.

Constitutional provisions crafted to incorporate or implement principles of international law will also operate on other levels, however, at which they may be more effective than that of legal rules enforced by the courts. As mentioned earlier, international process theory emphasizes the process of interpretation and internalization of international legal norms such that the norms begin to operate not only as legal norms, but also as political and social norms within the domestic system. Constitutional incorporation is not only the ultimate form of legal implementation, but the most powerful means of facilitating social and political internalization, for constitutions can, more than any other laws, generate and shape the contours of the norms that operate on the social and political level, and indeed shape culture and the collective identity of nation states.

The manner in which constitutional provisions operate as norms and shape the norms within the legal, political, and social

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37 The issue of what role the courts might play in the case of constitutionalizing *jus ad bellum* is left for a later segment of the larger project of which this Paper is a part. It is certainly a contentious issue for those who have argued in the context of the war powers debate in the United States against any judicial role in reviewing the executive decisions to use force, even in violation of international law. See Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 Harv. J.L. & Pub. Pol’y 73, 75 (2006) (arguing that the President is not, and ought not to be, constrained by international law as a constitutional matter in the United States); see also Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 Yale L.J. 2512 (2006) (suggesting that the President needs the power to initiate war and need to seek ex ante congressional authorization). But see John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 53–54 (1993) (arguing that it is legitimate for courts to review the process by which decisions are made and to ensure compliance with the constitutionally mandated procedure).


systems of the country is reflected in the Japanese experience with Article 9, and understanding how that process works is also important to understanding the extent to which Article 9 has influenced national policy. An institutional analysis of the extent to which different types of norms have operated to determine Japanese national security policy suggests that constitutive norms (which are defined as being those norms that are associated with national and collective identity, and which shape political conflicts over identity) are particularly powerful in Japan. Moreover, their influence tends to be underestimated by both liberal and realist approaches to understanding national security issues. This is particularly so for Japan because legal norms have long been understood to be subsidiary to social norms, playing a crucial role in defining and legitimating social norms, but remaining less effective as an instrument of coercive control than legal norms in other legal systems. This insight is particularly salient when it comes to constitutional norms.

In particular, the case study that is provided in this Paper examines how Article 9 became the source and locus of powerful constitutive norms, beginning with the process of constitutional ratification that embedded the concept of pacifism in the post-war national identity. Notwithstanding the sometimes bitter conflicts over competing narratives regarding Article 9, and the contested nature of the constitutive norms that Article 9 generated, those

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43 Mark Chinen’s relatively recent paper on Article 9 deals well with this notion of the two competing narratives of how Article 9 was created, and some of the ramifications of the competition. Mark A. Chinen, Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus, 27 MICH. J. INT’L L. 55 (2005). See also Maki Misaki, Nihon koku kenpō ni monogatari (Narrative)
norms operated to significantly shape public opinion and political behavior with respect to issues of national defense. An overly narrow focus on the operation of Article 9 as a legal norm, particularly on how it has been interpreted and enforced by the judiciary, would miss important aspects of its effects and understate its significance.

2.4. The Legitimacy of Domestic Implementation of Jus ad Bellum

Before turning to the Japanese experience itself, however, a few words should be said on the legitimacy of constitutionalizing principles of *jus ad bellum*. This is really a more significant aspect of the normative argument that will be advanced in the larger project of which this Paper is only the first installment, but some points can be made here to fend off the most obvious and immediate objections to the very notion of creating constitutional constraints on the use of force.

First, there is the objection that international law is developed and decided upon by institutions that are not in any way representative of the domestic constituency of any given state, and the process and procedures of international legal institutions are moreover lacking in transparency and accountability. Given this “democratic deficit” in international law, it is not legitimate (so the argument goes) to have it imposed on the domestic legal system, and states are justified in resisting such domestic implementation. But there are powerful arguments that suggest that there are times when it is not only legitimate for democracies to permit the operation of international law at the domestic level, but that in some circumstances liberal democratic values actually require that democracies implement such international law and develop institutions to enforce it.44

One such argument is for a “constitutionalist model” that democracies can use in analyzing the question of when they should recognize themselves as bound by international law and obliged to implement it domestically. It consists of a framework of four principles, the most important of which is the jurisdictional “principle of subsidiarity.” This is actually a presumption in favor of local autonomy (and against the implementation of international law).

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44 See Kumm, *supra* note 23, at 908–09, 915–16 (discussing the duty to obey international law).
law) unless any infringements of such autonomy by the enactment of pre-emptive rules at the international level can be demonstrably justifiable on substantive grounds.\textsuperscript{45} These substantive grounds cannot simply be appeals to the general welfare, but rather, there must be some demonstration of what harm or loss would result from leaving the policy formulation to national discretion. Arguments relating to collective action problems, externalized costs, and strategic standards setting, would be the type expected to demonstrate the need for international rather than individual national legal responses to certain problems, and thus rebutting the presumption.\textsuperscript{46} Moreover, the application of the principle of subsidiarity, which contains a proportionality test, allows constitutional democracies to employ well-established domestic institutions in making such assessments, and in so doing, strengthen the comparative legitimacy of international law.\textsuperscript{47} Where democracies do comply with international law in accordance with this model, they are acting consistently with and manifesting the values that underlie liberal democracy itself.\textsuperscript{48}

The international laws that comprise the modern regime of \textit{jus ad bellum} under the U.N. system satisfy this legitimacy test of the constitutionalist model.\textsuperscript{49} Aggressive use of armed force quite obviously creates severe externalized costs, not just for the victim of the aggression but for other states in the region that will suffer from the effects of armed conflict as well. Moreover, the threats to international peace and security that the collective security system under Chapter VII of the U.N. Charter was designed to address reflect the quintessential collective action problems that the model identifies as justifying higher-order law making.

\textsuperscript{45} Id. at 921–25 (arguing that the principle of subsidiarity is central to European constitutionalism and is in the process of replacing the concept of sovereignty as the core idea that divides the realm of the international from the domestic).

\textsuperscript{46} Id. at 921–22. International human rights regimes will not necessarily meet this test and Kumm simply exempts fundamental human rights from application, without further explanation. On the other hand, global warming caused by carbon emissions would be a classic example of a problem that involves both externalized costs of domestic activity and collective action difficulties, which would justify an international law response.

\textsuperscript{47} Id.

\textsuperscript{48} Id. at 928.

\textsuperscript{49} This argument will be developed further in a separate paper that is part of this larger project.
Another set of objections that can be anticipated focuses on the necessity of leaving the executive branch free from domestic legal constraints on its ability to make the appropriate decisions in the realm of national security. According to this view, the government may enter into an international convention that commits the state to observe certain obligations, but leaves the government free to breach those obligations in some future circumstance in which it is determined that the costs of breach are less than the benefits of doing so. To import the obligation into the constitution, however, would be to vastly complicate that option, and reduce the discretion of the government—which of course is the whole point of doing so, according to the arguments being advanced in this Paper. But for some, such binding of the hands of the executive in advance, and possibly invoking the involvement of the judiciary by embedding the international law principles into the constitution, would be to impermissibly interfere with the executive powers.50

These arguments are more complicated, and in the United States are intertwined with the war powers debate relating to the current constitutional distribution of authority on war-making decisions. Some of the arguments advanced within this debate are functionalist claims of more general application, arguing that the decision to use armed force ought to be governed by cost-benefit analyses based on assessments of national interests, and often excessively narrow and simplistic concepts of the costs and benefits of war.51 These arguments make the claim that not only is the executive the best positioned branch to make the determinations of what is in the national interest when it comes to war, and that involvement of other branches would interfere with the process, but that the executive also ought to be free from any domestic legal obligation to adhere to international law

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50 See Delahunty & Yoo, supra note 37, at 75 (arguing that the President is not, and ought not to be, constrained by international law as a constitutional matter in the United States); see also Nzelibe & Yoo, supra note 37, at 2536–38 (claiming that the argument that the President cannot order conduct that is inconsistent with international law “runs counter to the best reading of the constitutional text, structure, and the history of American practice”).

51 See Nzelibe & Yoo, supra note 37, at 2518 (discussing past wars in terms of wars “won,” “lost,” and “tied,” as a basis for assessing the relative merits of congressional approval of Presidential decisions to use force, which suggests an excessively simplistic and narrow understanding of the true strategic, political, economic, social, and human costs and benefits of going to war).
commitments when it is in the national interest to violate those commitments.\footnote{See, e.g., id., at 2535 (“[T]he executive branch needs the flexibility to act quickly, possibly in situations in which congressional consent cannot be obtained in time to act on the intelligence.”); Richard Posner & Cass Sunstein, Debate, \textit{Chevronizing Foreign Relations Law}, 116 \textit{Yale L.J.} 1170, 1205–06 (2007) (arguing for greater deference with respect to executive decisions related to foreign relations law, even decisions in violation of international law).}

Such functionalist claims have been criticized and dismissed elsewhere,\footnote{See, e.g., Paul F. Diehl & Tom Ginsburg, \textit{Irrational War and Constitutional Design: A Reply to Professors Nzelibe and Yoo}, 27 \textit{Mich. J. Int’l L.} 1239, 1259 (2006) (arguing that an expansion of executive power, as advocated by Nzelibe and Yoo, will “lead not to better war policy, but to more irrational wars”); Harold Hongju Koh, \textit{Setting the World Right}, 115 \textit{Yale L.J.} 2350, 2379 (2006) (“[W]e cannot be misled by unfounded claims that the executive constitutes a law unto itself. Once that [happens] . . . the executive itself becomes the most dangerous branch.”); Derek Jinks & Neal Kumar Katyal, \textit{Disregarding Foreign Relations Law}, 116 \textit{Yale L.J.} 1230, 1282 (2007) (arguing that “substantial deference to the executive is singularly inappropriate” in foreign relations law).} and there is not room here to engage them in detail. But at the most fundamental level it has to be said that the overarching argument that the state ought to be left free to violate international law whenever it is in the national interest to do so, without qualification, suggests an underlying refusal to take international law seriously. This reflects the “realist” view that states only comply with international law when it is convenient or beneficial to do so, which is obviously at odds with the assumptions of this entire project.\footnote{A more detailed discussion of the different perspectives on the issue of compliance with international law, and defending the position that international law “matters” and has real normative power, will be provided in a later paper that will make the full normative argument for greater constitutional control over the decision to use armed force.} But if one does accept the legitimacy of the collective security system and the \textit{jus ad bellum} regime, and one takes seriously the commitments that states have made to that regime in becoming party to the U.N. Charter and other treaties that underlie that regime, it is difficult to see how one can argue in a principled fashion that governments should avoid any domestic commitment to the regime in order to leave room for its violation at the international level. It is somewhat akin to arguing that one should join Alcoholics Anonymous, but ought not to tell anyone at home for fear that they might lock up the liquor cabinet. And when one considers the litany of armed conflicts engaged in by liberal democracies since the establishment of the
U.N. system, many in apparent violation of that regime, some form of an effective domestic mechanism to enhance compliance with the regime would seem desirable.

The final objection that can be anticipated is that it is not even possible to develop effective constitutional constraints on the use of armed force, for in moments of crisis such constitutional provisions will be simply ignored. This form of argument can be found in a number of variations. It is reflected in the U.S. war powers debate in which it is frequently argued that requiring Congressional approval for the use of armed force would not really provide for a sober second thought and thereby reduce the incidence of imprudent or illegitimate wars, because Congress would be just as prone as the executive to patriotic fervor or other passionate emotions in such circumstances. An analogous form of argument is to be found in much post-9/11 theoretical literature on the normative power of constitutional protections more generally in times of national crisis and emergency.

55 The Suez crisis of 1956, the 1967 Israeli-Arab war, the U.S. bombings of Cambodia and actions in Laos during the Vietnam war, the U.S. invasion of Panama and of Grenada, the U.S. intervention in Nicaragua, the NATO intervention in Kosovo, the second invasion of Iraq in 2003, not to mention smaller scale attacks by the United States, such as the recent operations against purported terrorists in Somalia in 2007, are just some examples.

56 There has been recent work suggesting that the international law of armed conflict informs the proper interpretation of any congressional approval conferred pursuant to the U.S. Constitution for the executive use of armed force, though they differ on the extent to which the international laws of war (primarily *jus in bello*) can thereby exercise a real constraint on executive power. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2119–20 (2005) (noting that, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court plurality looked to, *inter alia*, the international laws of war to determine the extent of congressional authorization for the President to use military force under the Authorization for Use of Military Force statutory enactment); Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 Harv. L. R. 2653, 2662 (2005) (claiming that the international laws of war should assume a more central role in the interpretation of the President’s powers under the Authorization for Use of Military Force). *But see* Delahunty & Yoo, *supra* note 37, at 75 (“[T]he Constitution does not require the President to obey international law.”).

57 See, e.g., Ely, *supra* note 37, at 8–9 (considering and then criticizing the argument that Congress will not “prove wiser on issues of war and peace than the president”); Nzelibe & Yoo, *supra* note 37, at 2524 (arguing that Congress will likely avoid difficult decisions in foreign affairs and national security by delegating to the executive branch).

The point to be made is that the rationales advanced for the use of armed force cover a spectrum, from protecting national interests as ephemeral as national prestige to desperate efforts to repulse a massive invasion of the homeland. When a state is suddenly confronted with an immediate existential threat, one that truly threatens the “life of the nation,” then it is unlikely that a constitutional provision prohibiting any use of armed force will effectively govern state behavior. Article 9 would not likely have exercised much influence over national policy in the event of a Soviet invasion of Hokkaido. And a carefully tailored constitutional provision consistent with international law would not purport to prohibit an appropriate response to such existential crises in any event. But few armed conflicts that have involved constitutional democracies in the last sixty years have been responsive to existential threats, ranging from such low-level operations as the U.S. invasion of Grenada at one end to such larger conflicts as the Korean conflict, the Vietnam war, the Falklands war, or the invasions of Afghanistan and Iraq since 2001. Some were consistent with international law, some were not, but with the possible exception of the invasion of Afghanistan in response to 9/11, none was a reaction to a national crisis of such a scale that constitutional provisions would necessarily be ignored. This case study suggests that even in moments of considerable pressure to use armed force, which reach the levels of perceived political crisis, constitutional provisions governing the involvement in armed conflict can retain their normative power over government policy making.

In the next Section, the Paper turns to an examination of the origins of Article 9, followed by a detailed analysis of how Article 9 can be understood in terms of international law, and how it

arguments, see Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029, 1030 (2004); Sanford Levinson, Constitutional Norms in a State of Permanent Emergency, 40 GA. L. REV. 699 (2006); Kim Lane Scheppele, We Are All Post-9/11 Now, 75 FORDHAM L. REV. 607, 608 (2006).


60 This is not to say that 9/11 did constitute a true existential threat to the United States, but it was certainly perceived as a national crisis, and the national response was one that clearly reflected some readiness to disregard certain constitutional provisions and international law commitments.
operated in practice over the last sixty years. In this sense, the Paper explores the history of some aspects of Article 9 in some detail, but it does so as a means of using the historical record as evidence for the more general theoretical inferences that the Paper seeks to draw.\(^61\)

3. **THE ORIGINS OF ARTICLE 9**

The story of the making of the constitution is truly remarkable, and this short account cannot do it justice.\(^62\) While the main focus here is on the drafting and ratification process, a few words on the context are necessary. The current Constitution of Japan is theoretically a revision of the original Meiji Constitution which was promulgated in 1889. The Meiji Constitution was modeled on the Prussian Constitution, with sovereignty and most nominal power in the hands of a transcendent Emperor. The militarism of the 1930’s was largely made possible by the lack of clarity in the Meiji Constitution on the exact locus of executive power and the operation of supreme command over the military.\(^63\) Even before

\(^61\) As a detailed historical analysis of one constitution for the purposes of developing general inferences that may tell us something about other constitutions, this Paper may be situated within the area of constitutional ethnology advocated in Kim Lane Sheplee, *Constitutional Ethnology: An Introduction*, 38 LAW & SOC’Y REV. 389 (2004).


the end of World War II, it was understood within the American administration that these characteristics of the Meiji Constitution and the structure of government that had developed under it had been instrumental in the failure of successive cabinets to control the military actions that had led to war in East Asia.  

This understanding was reflected in the final wording of the Potsdam Declaration, a joint declaration issued by the United States, Great Britain, and the Nationalist Chinese government, on July 26, 1945, setting out the terms of surrender that Japan would be required to accept in order to cease hostilities. Among other things, it called for the establishment of the basis for a democratic system and a peacefully inclined and responsible government established “in accordance with the freely expressed will of the Japanese people.” In signing the instrument of surrender in August 1945, Japan was deemed to have accepted these provisions. But there were differing interpretations of what the Potsdam Declaration would require by way of constitutional reform. To General MacArthur, Senior Commander Allied Powers (SCAP), and his senior advisors, it meant that fairly radical constitutional amendment would be required. The Japanese government, however, believed that the requirements could be achieved with limited constitutional revision, and that the words “in accordance with the freely expressed will of the Japanese people” meant that the reform was under its control.

MacArthur told representatives of the government in September that constitutional reform would be necessary and thereafter SCAP left the Japanese government to deal with the issue until the end of January of 1946. During that time there was considerable drama surrounding the Japanese efforts to grapple with reform, which need not concern us here. The upshot of it was

For the role of the Emperor, see HERBERT P. BIX, HIROHITO AND THE MAKING OF MODERN JAPAN (2000).

64 MOORE & ROBINSON, supra note 62, at 11–12.


66 Id. para. 12.

67 MOORE & ROBINSON, supra note 62, at 74–75.

68 SCAP is commonly used to refer to both General MacArthur and the occupation administration he commanded.
that the formal government efforts, undertaken by a committee under the chairmanship of Matsumoto Joji, did not take seriously the need for substantial reform of the Meiji Constitution, a fact that was dramatically made public on February 1, 1946 with a newspaper scoop of one of the committee’s drafts. It was at that point that SCAP re-entered the process.

SCAP had been studying a U.S. policy document, formally known as SWNCC 28, on the “Reform of the Japanese Government.” The final version had been sent to MacArthur on January 11, 1946. It set out a framework for the analysis of what amendments would be required to satisfy the Potsdam Declaration. In December the Far East Commission (FEC) had been established, and its terms of reference gave it jurisdiction over constitutional reform issues. SCAP had thus been developing its own ideas of what reforms were necessary. When the conservative Matsumoto draft was published MacArthur and others came to the conclusion that SCAP would have to become more actively involved. But the Government Section (GS) within SCAP also came to the conclusion that SCAP had only a short window of opportunity to seize control of the issue before the FEC would get involved.

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69 SWNCC was the acronym for State, War, Navy Coordination Committee. SWNCC 28 had been primarily drafted by Hugh Borton, a scholar of Japan, and it included a detailed analysis of the government structure and operation under the Meiji Constitution, followed by an explanation of reforms that would be necessary to redress its shortcomings and to comply with Potsdam. Moore & Robinson, supra note 62, at 84–85.


71 This was probably incorrect, but it was the governing view in SCAP and explains the nature of the subsequent amendment process and the need for complete secrecy. See Moore & Robinson, supra note 62, at 89–90 (describing the window of opportunity for SCAP to get involved in the constitutional process before the FEC took jurisdiction over the issue), and Shōichi, supra note 62, at 74–76 (describing the method of MacArthur’s “suggestions” on the constitution to the representatives).
3.1. The Constitutional Drafting Process

MacArthur directed General Whitney, head of GS, to come up with a model constitution that SCAP could provide to the Japanese cabinet as a basis for its drafting efforts. MacArthur provided Whitney with a one-page memo with the essential elements for the model he wanted. They related to four major points (though SCAP set them out as three principles): (1) the status of the Emperor and the locus of sovereignty; (2) the renunciation of war and armed forces; (3) the abolition of the feudal system; and (4) the adoption of a British style budget system. The second point, in its entirety, read as follows:

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.72

Whitney selected a group of twenty-four military and civilian members of the GS on February 4, under the direction of Col. Kades, and told them that they would form a secret constitutional convention to develop a new constitution for Japan. He gave Kades the MacArthur note and ordered them to have the draft ready by February 11, as a meeting was scheduled with cabinet members on February 12. Using SWNCC 28, draft proposals and studies that had been produced by various research groups in Japan, and such other constitutions and other texts that could be furtively borrowed from various university libraries around Tokyo, this young group produced in just six days the draft constitution that would, with few significant changes, become the new Constitution of Japan.

72 Three Basic Points Stated by Supreme Commander to be “Musts” in Constitutional Revision, National Diet Library, http://www.ndl.go.jp/constitution/e/shiryo/03/072/072_0021.html (last visited September 11, 2008) (containing the photographic image of the original memo). The original handwritten note, thought to have been written by Gen. Whitney as dictated to by Gen. MacArthur, has been lost. MCNELLY, supra note 62, at 115–116.
The group worked in utter secrecy. Washington and even senior members of SCAP outside of GS were entirely unaware of the constitutional drafting effort. MacArthur and GS were working on their own initiative, based on GS’s creative interpretation of the FEC’s terms of reference and MacArthur’s authority as Supreme Commander. The drafters relied heavily on SWNCC 28 as a guide, but given the secrecy they had no other input from other branches of government.

This fact is important in considering the extent to which the drafters were aware of or sufficiently considered recent developments in *jus ad bellum*, because the U.N. Charter had been opened for signature the previous summer and had entered into force in October of 1945. The U.S. State Department had been deeply involved in the negotiation and drafting of the U.N. Charter, and so obviously had a clear understanding of how *jus ad bellum* had been significantly advanced through the Charter, particularly with the development of the collective security system and the duty of U.N. members to contribute to such collective security efforts. The reference by MacArthur in his memo to Japan relying for its defense on “the higher ideals which are now stirring the world” was a reference to the fledgling U.N. system, and General Whitney is quoted as telling the initial “convention” meeting that in their approach to the drafting of the constitution “the principles of the [U.N.] Charter should be implicit in our thinking.” But Kades later stated that he did not have a copy of the Charter on hand during the drafting, and with no input from Washington at all combined with the time pressure they were working under, it is quite likely that Kades and his team had not fully appreciated the relationship between Articles 2(4) and Chapter VII of the Charter.

73 SHŌICHI, supra note 62, at 84–85.
74 Kades himself has left an account of the drafting process, published in 1989, in which he says very little about the extent to which he and the drafting team considered or had reference to the U.N. Charter. Charles L. Kades, *The American Role in Revising Japan’s Constitution*, 104 POL. SCI. Q. 215, 237 (Summer 1989). Kades himself died in 1990, but in an interview with Osamu Nishi in 1985, Kades indicated that he had inserted the words “and the threat or use of force” because he thought he had seen them in either the Kellogg-Briand Pact, or the U.N. Charter, but that he had neither documents on hand during the drafting itself. NISHI, DEFENSE LAW, supra note 62, at 86. In fact, Moore and Robinson’s collection of documents relating to the making of the constitution contained only one document from the American drafting session mentioning the U.N. Charter—a summary report on the meeting of the GS team when it received its orders from
The GS drafting group was divided into committees for the purposes of drafting the various sections of the constitution, with a steering committee of four members headed by Kades overseeing the entire process. The steering committee itself took on the role of turning MacArthur’s renunciation of war and armed forces principle into Chapter II of the draft constitution. It became Article 8 of the draft and read as follows:

Article VIII. War as a sovereign right of the nation is abolished.

The threat or use of force is forever renounced as a means for settling disputes with any other nation. No army, navy, air force, or other war potential will ever be authorized and no rights of belligerency will ever be conferred upon the State.\(^\text{75}\)

SWNCC 28, which was the guiding document in the drafting, contained no recommendations regarding this renunciation of war. There has been intense and voluble debate over where the idea first originated, fueled in no small measure by MacArthur later attributing the idea to Shidehara. The better view, it seems, is that it was MacArthur’s idea and that he was very likely drawing upon the Philippine Constitution of 1935 for part of it.\(^\text{76}\) But for the

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\(^\text{75}\) Constitution of Japan [Draft], ch. II, art. 8 (1946), available at http://www.cc.matsuyama-u.ac.jp/~tamura/makaskenpou.htm (last visited Sept. 11, 2008). It will be noted later that the notion of Japan relying on the “higher ideals now stirring the world” for its defense was left for the preamble.

\(^\text{76}\) MacArthur first made the comment about Shidehara in congressional hearings, and later repeated it in his memoirs, thus providing a basis for the later assumptions about Shidehara. See, e.g., ASHIBE NOBUYOSHI, KENPOGAKU [Study of the Constitution], vol. 1, at 253 (1992) (Japan) (advancing the notion of Shidehara proposing the concept). McNelly analyzes and rejects the argument that Shidehara proposed the concept, suggesting that it may have originated with Kades. MCNELLY, supra note 62, at 106–113, 118–119. Shōichi argues that it was much more likely to have been MacArthur, and he advances the notion that MacArthur would likely have been influenced by the Constitution of the Philippines, since he had been an advisor to the Philippine National Militia at the time the Constitution had been promulgated. SHŌICHI, supra note 62, at 83–86. Moreover, Yoshida Shigeru, foreign minister in Shidehara’s cabinet in January 1946, and later prime minister during the ratification process, dismisses the idea
purposes of this study it is not material who first proposed the concept. What is more important is how it was interpreted and understood in the process of its development and ratification.

In the drafting process itself, Kades has since stated that he was guided by the language of the Kellogg-Briand Pact in developing the first paragraph of the renunciation of war provision. One reason why Kades and the steering committee would likely have been significantly influenced by the Kellogg-Briand Pact is that feverish preparations were then underway for the convening of the International Military Tribunal for the Far East (the Tokyo War Crimes Trials) just a few blocks over, also being administered by SCAP. The Charter of the International Military Tribunal for the Far East had been promulgated by SCAP on January 19, 1946, just a couple of weeks before the GS constitutional drafting mission got started, and it created the authority of the tribunal to prosecute persons for “crimes against peace.” Crimes against peace were defined in part as the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, and the primary treaty upon which the charges under this provision were based was the Kellogg-Briand Pact.

Kades also added language to the first paragraph, however, that is not present in either the MacArthur memo or the Kellogg-Briand Pact, renouncing the threat or use of force. This echoes the prohibition on the threat or use of force in Article 2(4) of the new U.N. Charter and suggests that Kades and the steering committee that it originated with Shidehara. Yoshida Shigeru, The Yoshida Memoirs: The Story of Japan in Crisis 137 (Yoshida Kenichi trans., Greenwood Press 1961).

Kades repeats a comment made to him by “a high-ranking American official” on the subject, “Before the Korean war the author was our old man. After the Korean war the author was your old man,” and writes that this may be close to the truth. Kades, supra note 74, at 224.

77 See McNelly, supra note 62, at 113, 117 (stating that Kades had the Kellogg-Briand Pact in mind when drafting the constitution). See also Nishi, Defense Law, supra note 62, at 86 (quoting Kades, who also told Nishi that he had been in law school when the Kellogg-Brian Pact had been signed, and it had inspired him at the time).


79 Trial of Japanese War Criminals, supra note 13.
had the language of the U.N. Charter in mind. Yet, as will be examined in more detail below, the rest of the provision is inconsistent with other aspects of the Charter, specifically the collective security system it contemplates, and as suggested earlier, it is possible that the steering committee did not sufficiently appreciate the nature of that system as a whole. They also dropped the language in MacArthur’s memo that would have explicitly renounced the use of force for self-defense. Kades later claimed that he left the issue of self-defense ambiguous, thinking that denying the right would have made early revision by the Japanese more likely, while including the right explicitly would have provoked a backlash in both the United States and within the FEC.

In sum, the language of the first paragraph was lifted from international treaties governing the use of armed force. On the other hand, the second paragraph of the provision, renouncing the maintenance of armed forces and denying the rights of belligerency, was unique and seemed to make impossible the right to self-defense that the Kellogg-Briand Pact was understood to have permitted, and which had been made explicit in the new U.N. Charter. This provision was almost certainly not intended to implement any principle of international law, but rather to prevent Japan from posing a threat in the future and to reassure the FEC in that regard. Moreover, as will be examined in more detail below, the clause denying the rights of belligerency was a rather strange use of a concept from the *jus in bello* regime, apparently to further the objective of preventing Japan from ever again engaging in armed conflict, an objective associated with *jus ad bellum*. But while the drafters may have understood that they were denying Japan rights under international law, it is unclear what their thinking was in creating a provision that was inconsistent with emerging responsibilities in the international collective security system.

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80 SHÔICHI, *supra* note 62, at 84–85. *But see NISHI, DEFENSE LAW, supra* note 62, at 86 (noting that Kades did not actually have a copy of the U.N. Charter at hand).

81 See Chinen, *supra* note 43, at 95 (citing an interview Kades gave to Iokibe Makoto); see also John O. Haley, *Waging War: Japan’s Constitutional Constraints* 23 14(2) CONSTITUTIONAL FORUM 18, 23 (2005) [hereinafter Haley, *Waging War*] (citing an interview with Kades in which Kades said he was concerned about reactions back in the United States). Kades, in his own paper, simply wrote that he felt that he had omitted MacArthur’s clause because he thought it was unrealistic. Kades, *supra* note 74, at 236–37. *See also DOWER, supra* note 62, at 370.
3.2. Ratification: Embrace and Emergence of a Norm

The GS draft constitution was presented to a small delegation from the Japanese government, led by then Foreign Minister Yoshida and Minister Matsumoto Jōji, on February 12. It was greeted with shock and was seen as being revolutionary.\(^{82}\) In the days that followed the Japanese side tried to negotiate a compromise between the GS draft and the Matsumoto draft, but Whitney was firm that the government had to accept the GS draft in “form and principle.” SCAP threatened to put the draft to the people, and more importantly, suggested that only by acceptance of the GS draft could MacArthur stave off FEC interference and thus ensure the survival of the Imperial Institution.

It was difficult for the government to accept both the renunciation of war and the change of the locus of sovereignty, though the latter, which threatened the almost sacrosanct concept of *kokutai*,\(^{83}\) was the more revolutionary innovation and was the more fiercely resisted. When the cabinet met to make a final decision on the issue, Ashida Hitoshi, then Minister of Welfare, argued in favor of accepting the draft. On the issue of the renunciation of war, he pointed specifically to the similarity between the language of the provision and that of the Kellogg-Briand Pact and the Covenant of the League of Nations, to which Japan had already committed itself.\(^{84}\)

The provisions on the status of the Emperor were of course more problematic, but the argument that the FEC might abolish the Imperial Institution entirely won the day. On February 26, the cabinet agreed to accept the draft as the basis for a new constitution. There followed intense sessions of translation, revision, and negotiations with SCAP, all under great secrecy and

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\(^{82}\) YOSHIDA, *supra* note 76, at 133.

\(^{83}\) *Kokutai*, which is usually translated as the “national polity” (it is comprised of the characters for country and body), was an abstract concept that was at the center of the national ideology forged after the Meiji restoration, with the Emperor as the epicenter of a familial nation. Careers such as those of eminent constitutional scholar Minobe Takeuchi were destroyed in the 1930s by articulating theories perceived as being contrary to the *kokutai*, and yet as the Diet debates on the new constitution revealed, there was no clearly articulated or precise understanding of what it meant. See SHÔICHI, *supra* note 62, at 170-73 (discussing whether the new constitution altered Japan’s polity), and MOORE & ROBINSON, *supra* note 62, at 196-210 (touching upon the debate of whether “*kokutai*” will survive at all following implementation of the constitution).

\(^{84}\) MOORE & ROBINSON, *supra* note 62, at 114.
great time pressure, as SCAP wanted it published by March 6 to forestall FEC interference. After its publication, the negotiations and revisions continued, and a draft in colloquial Japanese was published on April 17. Throughout these negotiations the language of the renunciation of war provision was not changed materially, nor was it the subject of any significant disagreement.

The plan was to treat this draft constitution as an amendment to the Meiji Constitution according to its amendment procedure, which required that the amendment had to be first approved by the Privy Council, following which it had to be approved by each house of the Diet, and then finally approved in final form by the Privy Council before it would then be formally promulgated by the Emperor. That was the procedure followed in fact, with the deliberations commencing in the Privy Council on April 22 and ending on October 7 with a final vote in the House of Representatives in favor of the draft with only five abstentions. In both the House of Representatives and the House of Peers, there were special committees and smaller sub-committees established to assist in the analysis and consideration of the draft.

The renunciation of war provision, Article 8 in the GS draft, had become Article 9 in the draft that was submitted to the Privy Council for approval. There are two aspects of the long and intense process of ratification that unfolded over the course of the summer that are significant for our purposes. The first is that in all three bodies, the Privy Council, the House of Representatives, and the House of Peers, there were serious questions raised about the extent to which Article 9 precluded a right to self-defense, and whether the prohibition on the maintenance of armed forces would prevent Japan from entering into the U.N. or otherwise interfere with its obligations to contribute forces to the U.N. under Article 43 of the U.N. Charter. The second, and more surprising aspect, is the extent to which there emerged in the process strong expressions of

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85 The initial draft had been published in traditional formal Japanese used for all legal documents, and the publication of the next version in colloquial Japanese is considered a momentous event, beginning a revolution in creating greater accessibility to the law. See id. at 155 (discussing the conversion to colloquial Japanese), and SHÔICHI, supra note 62, at 133 (discussing the importance of the new constitution having been published in the vernacular).

86 To be fair, Matsumoto had suggested in an earlier meeting with Whitney that the provision would be better located in the preamble, which Whitney rejected out of hand. But Matsumoto had no apparent opposition to the principle itself or the substantive language used to express it. MOORE & ROBINSON, supra note 62, at 116.
support for the ideals articulated in Article 9. In both developments we see the origins of the subsequent debates over the proper interpretation of Article 9, an early recognition of the internal inconsistencies in the provision, and the birth of the powerful but contested constitutive norms that would develop around Article 9.

The questions over the right to self-defense and inconsistency with a future obligation to contribute to U.N. collective security forces arose from the very outset in the Privy Council and continued to be raised throughout the process. The responses of the government interpolators reveal something of their understanding at the time, and are also significant if one believes in looking to original intent in interpreting a constitution. On the question of self-defense, Yoshida Shigeru, then the prime minister, in May said that Article 9 was designed to demonstrate that Japan would become a peace-loving nation and that Japan would have to rely on the United Nations for its defense.87 Again in July, in the sub-committee of the House of Representatives, he stated that Japan would be permitted to have forces for the maintenance of internal security, but that “‘[i]f we undertake to maintain land, sea, and air forces of considerable size under the pretext of police power necessary for the maintenance of domestic peace and order, it will constitute a violation of article 9 of this Constitution.’”88 Yoshida stated on more than one occasion during the process that Article 9 precluded Japan’s ability to maintain any force for the purposes of self-defense.

It is interesting to see the extent to which the members were alive to the issue of the apparent inconsistency between Article 9 and the obligations that Japan would have to contribute to a U.N. collective security system if and when it joined, given the apparent failure of the American drafters to have considered the issue. The government representatives tried to parry the questions on this issue. During a meeting in May, Irie Toshio, then Director General of the Legislation Bureau (“LB”), acknowledged that it appeared that, under the terms of the U.N. Charter, member states would

87 Id. at 212. See also NISHI, DEFENSE LAWS, supra note 62, at 5, 100–02 (quoting Yoshida on the non-right to self-defense); compare with YASUZAWA KIICHIRO, KENPO DAICHIJO NO KASHAKU [INTERPRETATION OF ARTICLE 9 OF THE CONSTITUTION] (1981) (Japan) at 156, 186 (criticizing Yoshida’s comments and dismissing them as irrelevant).
88 MOORE & ROBINSON, supra note 62, at 215.
have to contribute forces, but he speculated that Japan might be able to receive an exemption from this requirement when it came time to join. When asked if Japan would seek to revise the provision, Irie made the telling comment that Article 9 represented “burning one’s boats.” Kanamori Tokuiro, the key interlocutor for the government, similarly acknowledged that there was a logical disconnect between Article 9 and the U.N. Charter, but he implied that the United States would resolve the problem when the issue came to a head. The responses of the government on both questions have been seen in retrospect as having been evasive, and at times disingenuous, but they can be explained in part by the complete secrecy that was still being maintained about the American role in the drafting. That made it difficult for a full and frank discussion of intended meaning and motives. As a result, however, the conflicts were never satisfactorily addressed.

The more surprising aspect of the process, however, was the extent to which members embraced the ideals they saw as animating Article 9. At the end of the Privy Council’s deliberations, Hayashi Hiroku, an esteemed diplomatic scholar, made the statement that with respect to the renunciation of war provision, Japan must go forward “on the royal road of justice” and suggested that other countries might well regard Japan’s innovation as a guide for the future, particularly in the context of the development of nuclear weapons. This characterization of Article 9, coupled with the view of its importance in protecting the state from again being dragged into war, was to find expression in speeches made in both houses of the Diet, and may be seen as the beginning of a process by which an important sector of the political elite came to embrace the concept of Article 9, and to fashion a new vision of Japan as a pacifist state.

Indeed, the most meaningful amendments to Article 9 were proposed and agreed to in order to better reflect the spirit of Japan’s embrace of an emerging new pacifism, and to replace the impression conveyed by the existing language of the draft, of a punitive constraint having been imposed on a defeated nation.

89 U.N. Charter art. 43.
90 MOORE & ROBINSON, supra note 62, at 170. This is somewhat ironic and prescient, given the use to which this metaphor is put in pre-commitment theory. See Elster, Don’t Burn Your Bridge Before You Come To It, supra note 33.
91 MOORE & ROBINSON, supra note 62, at 214.
92 Id. at 170.
The amendment, which came to be known as the Ashida amendment, was later the subject of considerable controversy, and ironically is often explained as having been motivated by a desire to create more room for a claim to the right of self-defense. The amendment became significant in later interpretations and competing narratives, and so it is necessary to examine it here briefly.

It was developed in the House of Representatives sub-committee meetings. The sub-committee was composed of only fourteen members and met in-camera. In telling the story of the amendment, it is perhaps best to begin at the end and work backwards. The language of the SCAP draft that was quoted above was relatively unchanged by the time it was being discussed in sub-committee. At the end of the process the Ashida amendment had added a clause to the beginning of each paragraph, as reflected in the current Article 9, as follows:

**Article 9.** 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.

There were other more minor changes, as will be apparent from a comparison of this language with that cited earlier, but it was the addition of the two clauses that has spawned so much controversy. The reason is that they provide a basis for the argument that Article 9 recognizes the right to maintain the military capability to defend itself. It is based on the view that paragraph one, in line with the understanding of the Kellogg-Briand Pact, did not prohibit the use of force for the purposes of

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93 It was unchanged in English—it had undergone some subtle changes in the Japanese translation in the various iterations since March 6, and some of those changes, it has been argued, were material. See, e.g., Kenneth L. Port, Article 9 of the Japanese Constitution and the Rule of Law, 13 CARDOZO J. INT’L & COMP. L. 127 (2005) (discussing the drafting process and the changing of language during the Japanese translation) and see generally KYOKO INOUE, MACARTHUR’S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING (1991) (analyzing the more complex linguistic and cultural issues of the drafting process).
self-defense. But while paragraph two in the initial draft seemed to make self-defense impossible by prohibiting all armed forces, the new introductory clause to paragraph two can be interpreted as qualifying it, limiting its restrictions to the aims of the first paragraph, which is the prohibition of aggression. Thus, under this interpretation, paragraph two only prohibits the maintenance of armed forces or other war potential that could be employed in the aggressive use of force.

Ashida himself later made the claim that his motive in suggesting the amendment was for just this purpose of providing a basis for Japan to claim a right to self-defense in the future.\textsuperscript{94} The problem is that the evidence does not support his claim.\textsuperscript{95} The amendment was actually prompted by a number of complaints, led primarily by Suzuki Kantaro of the Social Democratic party, that the provision was cast in an overwhelmingly negative and passive tone, and that it should be cast in the positive tones of a ringing proclamation. When Ashida first proposed the amendment to address this concern, he did so with the explanation that it shifted the construction to an active declaration of the Japanese renunciation of war, and articulated the pacifist ideals that animated it. There is absolutely no suggestion in the records from the sub-committee or his own diary that Ashida ever made any suggestion in all the discussions surrounding his proposed amendments that it would support a later claim to the right of self-defense.\textsuperscript{96} Moreover, the form in which he originally proposed the amendment would not have supported the “self-defense capability” interpretation that he later advanced.\textsuperscript{97} Ironically,
when the FEC saw the amendment the following month, there was concern expressed that it had in fact been adopted for just the purpose that Ashida would later proclaim—to give the government a basis to establish armed forces for self-defense in the future.98

When the amended draft returned to the full House of Representatives for the final debate and adoption, the speeches again reflected considerable pride in the amended Article 9. The amendments were explained as being to

clarify that our determination to renounce war and discard armaments is actuated solely by our sincere desire for the amicable cooperation of mankind and for world peace....

[Article 9 would] proclaim to the world [that the Japanese were] fervently endeavoring to create a peaceful world based on justice and order....99

In the full house, Ashida himself spoke eloquently of how unique the provision was in world history, and how Japan was now unique in its commitment to world peace, while Hayashi proclaimed that in the nuclear age the peace and survival of the world depended on the success of Japan’s historic initiative.100

same manner as the final amendment, which was qualifying the limitation on armed forces to offensive war potential. SHōCHI, supra note 62, at 198–99 and NISHI, DEFENSE LAW, supra note 61, at 105. As mentioned above, the sub-committee minutes were sealed in 1956, and not made public until 1995, so for four decades Ashida’s claims could not be conclusively refuted. But see McNELLY, supra note 62, at 126, and NISHI, TEN DAYS, supra note 62, at 50, 84–85 (suggesting that SCAP understood at the time that the Ashida amendment could allow for the development of defensive forces and tacitly endorsed that development), and Kades, supra note 74, at 237 (noting his recollection that he believed at the time that the Ashida amendment might permit Japan to have rudimentary defense forces such as “a home guard and a coast guard” and an armed force for contribution to U.N. operations).

98 Transcript of the 27th Meeting of the Far Eastern Commission 18–19 (Sept. 21, 1946), http://www.ndl.go.jp/constitution/e/shiryo/04/126/126_020l.html. The FEC responded by asking SCAP for a provision limiting cabinet positions to civilians. This would become Article 66 of the Constitution. Ironically, it would later provide the basis for arguments that if Article 9 had really meant that no military forces could ever be maintained, then Article 66 would not have been thought necessary. Contrary to that argument, it was in fact vehemently resisted in the Diet deliberations, both because it undermined the apparent autonomy of the process, and because it was clearly recognized from the outset as being inconsistent with Article 9.

99 MOORE & ROBINSON, supra note 62, at 275 (internal citation omitted).

100 Id. at 280.
This is important in terms of assessing the extent to which Article 9 was created in a manner consistent with pre-commitment theory, in which motive and the concept of self-binding is key. If Article 9 was merely imposed by external forces without a concomitant acceptance by the domestic government, for the purpose of constraining future behavior, then it would lack this self-binding character. But the ratification process suggests both that Article 9(1) was clearly understood to have incorporated the principles of international law, and that the provision as a whole was embraced as a means of ensuring that Japan would remain a pacifist nation, with institutional constraints to prevent a renegade military and weak government from ever again subjecting the nation to the horrors of war.

Moreover, the ratification process was the crucible in which the creation of powerful constitutive and social norms got under way. Even before the draft was voted on in the House of Representatives, polls revealed that seventy percent of the Japanese people supported the renunciation of war, and there were more speeches embracing the provision in the House of Peers to further the process. These speeches captured the vision that was coming to be shared by growing number of Japanese, that their country was at the vanguard of nations in creating a new constitutional constraint on the making of war. Moreover, once the Constitution was promulgated, the ideals that animated it were communicated and explained to the public in an extraordinary effort to have them take root in the Japanese body politic. The vision expressed in the process of ratification, both inspired by and used to rationalize Article 9, would in turn develop profound normative power in Japan, capturing the imagination of the public. As such, Article 9 would emerge from this process not only as a legal norm, but as a powerful social and constitutive norm as well.

101 Id. at 308.
102 In addition to creating a Committee to Popularize the Constitution, which educated middle and lower government officials around the country, the effort included the publication and highly organized distribution of twenty million booklets to virtually every household in Japan at that time. The booklets, *The New Constitution! A Bright Light!*, were simply an annotated version of the Constitution. The Ministry of Education also published *Story of the New Constitution* for use in schools. *SHÔICHI*, supra note 62, at 212–20. See also DOWER, supra note 62, at 402–04 (describing the “massive educational campaign” launched regarding Article 9); NISHI, DEFENSE LAW, supra note 62, at 6 (providing an excerpt from the Ministry booklets).
In concluding this discussion, it is important to note that while the drafters drew upon and incorporated principles of international law in the design of Article 9, it would be going too far to argue that there was any conscious intent to lock-in the norms of international law for the purpose of using the Constitution to enhance compliance with those international law principles. The primary concern was to constrain the perceived threat of the potential re-emergence of militarism in Japan, complicated by considerations of politics in the United States and managing FEC pressure. The failure to more faithfully model the constitutional provision on existing and newly established international law rules, and the blending of concepts from two separate regimes in international law, are themselves evidence that this was not motivated by a desire to ensure compliance with international law itself, but rather was the use of international law principles as a convenient tool to achieve more practical objectives.103

Nonetheless, the constitutional design did involve the deliberate incorporation of international law principles on the use of force, and how the provision operated thereafter is still important from the perspective of determining whether such incorporation is feasible and potentially effective. If there is evidence that such incorporation of jus ad bellum principles in a national constitution can operate to effectively constrain government action and policy, in a manner consistent with the international law principles, then it advances the normative argument that one could approach constitutional design with a view to deliberately implementing such principles in order to enhance compliance with international law.

103 Chinen, in his study of Article 9, discusses at some length the theories of J.M. Balkin regarding the notion of “bricolage,” the human tendency to use tools and concepts that are close at hand and with which the problem-solver is familiar, rather than developing specialized tools for the particular problem being confronted. Chinen applies this concept of “bricolage” in considering the characteristics of constitutional deliberation in the current Article 9 debates in Japan, but the concept would also help explain why Kades and his team would have latched on to and cobbled together principles that were familiar to them and available in order to achieve the objective they had in mind. Chinen also points out that the use of such jury-rigged solutions will typically give rise to unintended consequences, as they surely have in the case of Article 9. Chinen, supra note 43, at 71–73.
4. ARTICLE 9 AND INTERNATIONAL LAW

This Section turns to a more detailed analysis of the extent to which Article 9 reflects and is consistent with international law. In order to understand whether Article 9 constitutes a domestic implementation of principles of *jus ad bellum*, and whether its effective operation enhances compliance with those principles of international law, it is necessary to engage in a deeper analysis of the relationship between the provision itself and that international legal regime.

This requires first an examination of what Article 9 means, particularly when informed by the principles of international law from which parts of it were drawn. This cannot be a detailed foray into the massive interpretation debate that surrounds Article 9, a debate that is highly polarized and which has risen to “nearly theological levels” in Japan.104 The purpose here is not to advance an argument for the “best” interpretation in the context of that debate, but some principled analysis and development of a baseline interpretation is necessary in order for the following discussion to be properly grounded. In the process, this examination may incidentally provide some new perspectives on some of the issues germane to the larger debate.105

The second step, however, once having established some baseline understanding of the provision, is to examine the official or government interpretation of Article 9. It is this interpretation of Article 9 that informs how and to what extent Article 9 may be said to constrain and shape government policy and is thus essential to the argument in this Paper.

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105 There is a general tendency to pay insufficient attention to international law perspectives in the debate over Article 9 interpretation. Hatake, to his credit, devotes a chapter to the issue. HATAKE MOTOAKI, *KENPÔ 9 JÔ: KENKYÛ TO GIRON NO SAIZENSEN* [Article 9 of the Constitution: The Vanguard on Research and Arguments] ch. 6 (2006). See also FUJII TOSHIKO, *KENPÔ TO KOKUSAI SHAKAI* [The Constitution and International Society] chs. 12–14 (2d ed. 2005); Sakamoto Masanari, *Buryokukôshi ihôka gensoku no naka no kyûjûron* [The Article 9 Debate Within the Criminalization of the Use of Armed Force] 1334 JURISTO 50, 56 (2007); Nasu Hitoshi, *Article 9 of the Japanese Constitution Revisited in the Light of International Law*, 18 J. JAPAN L. 50 (2004); and Ando Nisuke, *First Session: War and Peace*, in *JAPAN AND INTERNATIONAL LAW, PAST, PRESENT AND FUTURE* (1999). In general, however, the international law considerations tend to be peripheral to most analyses of Article 9.
Third, it is necessary to consider the inconsistencies between this official interpretation and the relevant principles of international law. It will become apparent that there are significant differences between the interpretation as informed by both constitutional and international law principles, and the official government interpretation—but the key question is whether those differences have significance for the purpose of the argument about Article 9 effectively implementing international law principles of *jus ad bellum*. The final part of this Section takes up that question, and suggests that notwithstanding these differences and the significant problems in the government interpretation that they reveal, and which have long been the source of rabid scholarly criticism, there are not any significant inconsistencies between the official interpretation of Article 9 and the principles of *jus ad bellum* that Article 9(1) operationalizes.

4.1. Article 9 as International Law

Article 9, as it was finally promulgated in the 1947 Constitution, reads:

**Article 9** – (1) 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.

(2) 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 is again important to identify the distinction between the two sub-sections of the Article, and indeed the three distinct ideas in the provision. Article 9(1) renounces war and the use of armed force. Article 9(2) has two separate ideas—a prohibition on the maintenance of armed forces or other ‘war potential’, and the denial of rights of belligerency. As was discussed in the previous part, only Article 9(1) was drawn from principles of *jus ad bellum*, and it is with that provision that the analysis of this Paper is concerned. While it is important to consider and examine the relationship among the three ideas, it is also necessary to keep firmly in focus that, in the project that this Paper is trying to
advance, Article 9(1) is the key. Indeed, the controversy that perceived violations of Article 9(2) causes tends to obscure the important influence of Article 9(1).

As seen in the earlier discussion, there remains some ambiguity regarding the original intent and purpose of Article 9(1), on both the part of the drafters and those who ratified the Constitution. Kades stated in later years that he thought it unrealistic to leave Japan with no right to self-defense, and Ashida has written that he intended his amendment to provide Japan with the textual basis for just such a move. The evidence, explored earlier, suggests that much of this is revisionist history; the better interpretation is that the American drafters intended to leave Japan with no military capability, while the government itself, from the prime minister on down, stated in the ratification debates that, while Article 9 did not necessarily prohibit a right to self-defense, it precluded Japan from maintaining the armed forces that would make such defense possible. Nonetheless, the historical record is muddied enough to make it difficult to reach a definitive conclusion on the original intent and purpose, at least as it relates to the issue of self-defense. A further analysis of the concepts themselves, however, provides evidence on the issue of purpose and intent.

Turning to the text and its origins, beginning with Article 9(1), this Paper has already described how Kades specifically drew upon the language of the Kellogg-Briand Pact in drafting that provision. The language, however, is not identical. Under Article I of the Kellogg-Briand Pact, the state parties agreed to “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.” Thus, in several ways Article 9(1) went further than the Kellogg-Briand Pact. It did not simply condemn war as an instrument of national policy or as a means of settling international disputes, but rather was an absolute renunciation of war, without qualification, as a sovereign right of the nation. Moreover, Article 9(1) not only renounced

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106 Likely due to the fact that Kades and the steering committee did not have a copy of the treaty at the time. NISHI, DEFENSE LAW, supra note 62, at 86.
107 Kellogg-Briand Pact, supra note 11, art. I.
108 Strained interpretations of the Kellogg-Briand Pact have suggested that wars not waged for the purpose of “national policy,” such as wars for religious or ideological ends, might thus be legal. This was not, however, the accepted view or interpretation of the provision. DINSTEIN, supra note 4, at 84.
“war,” the definition and criteria for which had often been debated in international law, but it also incorporated language similar to that in Article 2(4) of the U.N. Charter, renouncing the “use or threat of use of force.” The renunciation of the “use of force” was qualified by the clause “as a means of settling international disputes,” clarifying that it was the use of force in international relations that was being constrained.

Did Article 9(1) thus drafted, however, thereby import the general understanding at the time that the Kellogg-Briand Pact did not exclude the use of force in self-defense? That understanding was not derived from the language of the treaty itself, but rather from a series of diplomatic notes, initiated by the United States and exchanged prior to the conclusion of the treaty, which expressed the view that the pact was not intended to deny the right of self-defense. There was nothing in the notes that provided for the conditions that had to be met to trigger the right of self-defense, or how it was to be limited, in contrast to the later U.N. Charter, which set out explicitly the right of individual and collective self-defense, and the specific conditions for its exercise.

While there is no question that Article 9(1) was drafted with the intent of incorporating the principle of renunciation of war from the Kellogg-Briand Pact, it is difficult to argue that in doing so it thereby incorporated by reference the exception to that principle, given that the exception was created by diplomatic notes collateral to the treaty. It is an argument that is often asserted but never explained in detail. The plain language of Article 9(1), which is

109 As such, Article 9(1) is broader in its scope than either the Italian Constitution, art. 11, which “repudiates war as an instrument offending the liberty of other peoples and as a means for settling international disputes,” or the German Basic Law, art. 26(1), which provides that “acts tending to and undertaken with the intent of disturbing the peaceful relations between nations, especially to prepare for a war of aggression, are unconstitutional.” Costituzione art. 11 (It.); Gundgesetz art. 26(1) (F.R.G.).

110 Some argue, unpersuasively in my view, that this clause limited the prohibition to “aggressive” wars. See infra note 113; NONAKA TOSHIHIKO & URABE NORIHO, KENPÔ NO KAISHAKU [Interpretation of the Constitution] vol. 1, 127 (1989).

111 DINSTEIN, supra note 4, at 83. The notes are reproduced in 22 AM. J. INT’L L. SUP. 109–13 (1928), with replies in 23 AM. J. INT’L L. SUP. 1, 1–13 (1929); see also DENYS P. MYERS, ORIGIN AND CONCLUSION OF THE PARIS PACT 34–56 (1929) (providing a history of the negotiations); U.S. DEP’T OF STATE, TREATY FOR THE RENUNCIATION OF WAR (1933) (containing reproductions of all the associated documents, including the U.S. note of June 23, 1928).

112 The District Court decision in the Naganuma Case, which will be discussed briefly below, has one of the most careful arguments, but it too makes an
not exactly the same as the Kellogg-Briand Pact even in that part of the provision that is modeled on the treaty, and which also goes significantly beyond the concepts of the Kellogg-Briand Pact, suggests that it forever renounces the right to engage in war of any kind and the use of force for the settlement of international disputes of any kind, without any qualification with regard to purpose. The prohibition on the use of force in the UN Charter from which this language was adopted has a very explicit exception for self-defense articulated within the same instrument, and Article 9(1) includes no such exception. The term “as a sovereign right of the nation,” not present in the language of the Kellogg-Briand Pact, must also be considered as providing some additional meaning to the provision—and indeed the only wars remaining as a legitimate sovereign right under the jus ad bellum regime of the U.N. system are wars of self-defense and wars authorized by the Security Council for the purposes of maintaining collective security. So that would suggest that it is precisely these types of war, as sovereign rights, that are renounced. The aggressive use of force is no longer a sovereign right of any nation; to interpret Article 9 as renouncing that which did not then exist in law is nonsensical.

As part of the assertion that the exception to the Kellogg-Briand Pact had been incorporated into Article 9(1), it is often claimed that the clause “to settle international disputes” is the language that specifically limits the prohibition to aggressive war. The notion that somehow armed force used in self-defense is conceptually distinct from the “use of force to settle international disputes” is also difficult to sustain. As a matter of constitutional construction the clause would more readily suggest a distinction between internal and external relations, and as matter of international law the clause “use of force for solving international disputes” is not in any way synonymous with the concept of aggression. Armed implausible leap from establishing how the Kellogg-Briand Pact excepted self-defense to asserting that Art. 9 must therefore incorporate the same understanding. The interpretation of constitutional provisions modeled on international law principles will, of course, be informed by the understanding of those principles in international law, but it is also governed by the principles of constitutional construction, in which the plain meaning of the text itself is of great importance.

113 Nonaka & Urabe, supra note 110, at 127.

114 The argument that the clause “as a means of settling international disputes” was traditionally understood in international law to refer to “aggressive war,” is common in Japanese scholarship. I have not come across the primary
conflicts are not only caused by, but also themselves constitute, international disputes, and armed force employed in self-defense is not any less aimed at resolving the dispute than the force used by the aggressor.\textsuperscript{115} The argument that is often made in Japanese scholarship is that this clause is actually drawn from the language of “as an instrument of national policy in their relations with one another” in the Kellogg-Briand Pact, and that that clause was understood to be the basis for limiting the Kellogg-Briand Pact to aggressive war.\textsuperscript{116} However, that is a mischaracterization of the basis for the exception for self-defense in the Kellogg-Briand authority relied upon for this claim, but it seems to stem, in part, from the following argument: since the clause was drawn from the language in the Kellogg-Briand Pact to “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy,” and the Kellogg-Briand Pact was understood to exclude war for the purpose of self-defense, then the clause must have taken that meaning, and the similar language in Article 9 must have been likewise invested with that meaning. See, e.g., HATAKE, supra note 105, at 68 (providing an example of this argument); NONAKA & URABE, supra note 110, at 127 (same). This argument, however, both mischaracterizes the international law and makes the fallacious assumption that language borrowed from an international treaty (even when the language is congruent, unlike this case) must have precisely the same meaning in the constitutional context into which it has migrated. The travail préparatoire for the Kellogg-Briand Pact demonstrates that the French initially proposed an explicit exception for “legitimate defense” in addition to the language of the clause in question. Other countries had also raised concerns about self-defense. The United States demurred, explaining that to provide for an explicit exception would again raise problems of definition. In circulating the proposed draft that ultimately became the treaty, the United States provided a long note of explanation in which it was stated that the United States did not mean for anything in its draft to restrict the right of self-defense, a right that “is inherent in every sovereign state and is implicit in every treaty.” Thus, it was not the language of the clause in question that was interpreted so as to limit the prohibition to wars of aggression, but rather a communication of an understanding separate from the words as written. This became the understanding under which the treaty was entered into, but it did not thereby become the “meaning” associated with the language of the provision; incorporating the concept of the provision in somewhat different language, in a time when there was an explicit right in international law with specific conditions for its exercise, does not somehow impart the understanding communicated in the separate U.S. note. See MYERS, supra note 111, at 34–56 (providing the historical background of this process); see generally U.S. DEP’T OF STATE, supra note 111 (collecting primary sources from this period).

\textsuperscript{115} The use of force employed by Great Britain in response to the Argentinean seizure of the Falkland Islands in 1982, widely viewed as a legitimate exercise of individual self-defense pursuant to Article 51 of the UN Charter, is a good illustration of a defensive use of force to settle an international dispute resulting in an international armed conflict meeting most definitions of “war.”

\textsuperscript{116} NONAKA & URABE, supra note 110, at 127; HATAKE, supra note 105, at 68–69.
Pact,\textsuperscript{117} as explained above, and cannot form the portal through which to import the self-defense exception into Article 9(1).\textsuperscript{118} Article 9(1) does not on its face, therefore, suggest any room for the use of force for any purpose, be it aggression, self-defense (individual or collective), or in collective security operations to restore international peace and security.

Turning to Article 9(2), this Paper has already explained that it contains two distinct ideas, and that the first, the non-maintenance of armed forces or “other war potential,” has no connection to international law. There is much less evidence regarding the source and origin of Article 9(2), but on the basis of the MacArthur memo alone it appears that MacArthur had in mind a device solely designed to prevent Japan from re-emerging as a military threat to the United States and its allies once the occupation ended. The Japanese military had been disbanded early in the occupation, and the non-maintenance of armed forces clause appears to have been aimed at ensuring that it would not be replaced or restored and that Japan could never again engage in armed conflict.\textsuperscript{119}

The argument that the Ashida amendment, specifically the “in order to accomplish the aim of the preceding paragraph” clause, qualifies the scope of the prohibition of maintaining “land, sea, and air forces, and other war potential” to mean only those forces that could be used in aggressive war, is thus difficult to sustain. As already seen from the drafting history examined above, such an interpretation was neither intended nor understood to be so intended by the ratifiers. Moreover, the argument depends entirely upon Article 9(1) being interpreted as prohibiting only aggressive war, which, as discussed above, is itself very difficult. Finally, as a practical matter it is simply impossible to meaningfully distinguish between military forces that are for the purpose of defensive as opposed to aggressive uses of force,\textsuperscript{120} and

\textsuperscript{117} DINSTEIN, supra note 4, at 83–84.

\textsuperscript{118} The English language text would also suggest a possible argument that the “as a means of settling international disputes” clause only qualifies the term “threat or use of force” and not the “war as a sovereign right of the nation,” but the Japanese version, which is controlling, less ambiguously qualifies both.

\textsuperscript{119} MacArthur later denied that this was his intention, but his denial must be viewed with some skepticism given that the revisionist perspective was first provided in congressional committee hearings, during a deepening Cold War, in which the United States was increasing pressure on Japan to re-arm.

\textsuperscript{120} This point is commonly and forcefully made in Japanese scholarship on this issue. See, e.g., ASHIBE, supra note 76, at 274–81 (discussing the difficulty in
it is difficult to impose upon a constitutional provision an interpretation that is not capable of enforcement. These arguments are, however, almost definitively supported by a careful consideration of the meaning of the clause on the rights of belligerency, which forms the second distinct idea in Article 9(2). Belligerency is a concept from the laws of international armed conflict ("LOIAC") or *jus in bello*, and it is on this point that an analysis informed by an understanding of international law can correct errors in interpretation that have been frequently committed through a failure to properly consider the significance of this concept within Article 9.121 Put simply, belligerency is a legal status that is assumed by a state upon the commencement of armed conflict. When, as a matter of law, international armed conflict may be said to have commenced, the states involved in that conflict assume the status of belligerent and thereby are subject to all the rights and obligations under the LOIAC, as defined in such conventions as the Hague Treaties and the Geneva Conventions. Thus, the armed forces of belligerent states may legally employ lethal force against the military forces of enemy belligerents, are protected in their treatment if captured, are limited in the types of weapons they may employ, the nature of the targets they may destroy, and so forth. Belligerent status not only triggers the LOIAC, but it suspends, or provides immunity from, the application of domestic law in various ways. Thus, members of belligerent forces are not subject to the domestic criminal laws differentiating between defensive and aggressive uses of force); NONAKA & URABE, *supra* note 110, at 127–30 (same).

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121 See, e.g., HATAKE, *supra* note 105, at 87–88 (providing a detailed account of both theories); ASHIBE, *supra* note 76, at 283–84; URABE NORIHO, *KENPOGAKU KYÔSHITSU* [A CLASS ON THE STUDY OF THE CONSTITUTION], 415–16 (2d ed. 2006); and NONAKA & URABE, *supra* note 110, at 130. Yet not only do many who write on Article 9 ignore the significance of the clause, but many accept the first theory in passing. That view is inconsistent with the international law concepts from which the clause clearly was drawn and violates normal rules of construction, since it would make this clause in Article 9(2) a redundant repetition of the purport of Art. 9(1). *But see* TAMURA SHIGENOBU ET AL., *NIHON NO BÔEIHÔSEI* [THE NATIONAL DEFENSE LEGAL SYSTEM OF JAPAN] (2008) (advancing the argument that the rights of belligerency are indeed the rights applying to combatant forces of belligerent states, but that the use of a minimum level of force necessary for self-defense, even where it involves the killing and destruction of enemy forces, involves a concept distinct from that of the rights of belligerency. That concept is not, however, more clearly defined). To its credit, the Cabinet Legislation Bureau ("CLB") did articulate an interpretation of the rights of belligerency clause in 1956 that reflected the *jus in bello* explanation, but this articulation is seldom referenced.
regarding murder and assault so long as they conduct themselves within the parameters of the LOIAC.\textsuperscript{122}

The language in Article 9(2), providing that the rights of belligerency will not be recognized, is therefore quite significant when considered in this context, both in terms of evidence of the drafters’ intent and its operation in practice. It makes very clear that the intent of the drafters, MacArthur and Kades foremost amongst them (and as both a lawyer and a military officer, Kades certainly would have understood quite clearly the legal meaning of the term),\textsuperscript{123} was that Japanese forces were to be forever denied the rights of belligerency under the LOIAC. If, as a matter of international law, Japanese forces could be denied the status of belligerency it would in essence deny Japan the ability to ever again engage in or be a participant in international armed conflict, whether it be in self-defense or as aggressor. This intent clearly belies the notion that the American drafters had intended only to prohibit Japan’s participation in wars of aggression.

The rather strange feature of the clause, however, is that on its face it would seem to aspire to govern the operation of international law with respect to Japan’s status under the LOIAC. But it is settled law that a national constitution cannot alter a state’s obligations under international law, and this would apply equally to its status and rights.\textsuperscript{124} Whether Japan became a belligerent under international law would be governed by the LOIAC, and if it did, all the rights and obligations vis-à-vis the other belligerents would be triggered regardless of the operation of Article 9. The enemy belligerents would be obliged, for instance, to treat captured Japanese forces pursuant to the requirements of the Third Geneva Convention, and would be fully justified in the expectation that Japan would equally observe its obligations under the LOIAC.

\footnotesize{
\begin{itemize}
  \item \textsuperscript{122} See Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict 27–33 (2004) (outlining the requirements for lawful combatancy).
  \item \textsuperscript{123} But see McNelly, supra note 62, at 117 (writing that Kades did not understand the clause, which seems highly unlikely). MacArthur’s understanding and intent is clear from the language in his original note, which reads, “no rights of belligerency will ever be conferred upon any Japanese forces.” (italics added). Id. at 116.
\end{itemize}
}
In this sense then, the belligerency clause of Article 9(2) can be said to be ineffective on the plane of international law. Indeed, when considered in the context of the drafters’ overall intent, it becomes apparent that this concept of *jus in bello* was being incorporated into the constitutional provision as a means of achieving objectives related to those of the *jus ad bellum* principles incorporated into Article 9(1), notwithstanding that these two regimes of international law are entirely separate and distinct.

This does not end the analysis, however, or mean that the clause is of no legal effect. In addition to providing important evidence of the intent of the drafters, the belligerency clause does have real legal significance in the area of Japanese domestic law, though this issue is seldom recognized or discussed. Consider, for instance, a situation in which members of the Self Defense Force ("SDF") use lethal force, either within Japanese territorial waters or on overseas deployment, in circumstances covered by the LOIAC.125 Normally combatants are immune from the application of domestic law.126 But where the constitution of the country denies the application of the rights of belligerency such immunity would not be available. The members of the armed forces would still be governed by their obligations and enjoy their rights, vis-à-vis the enemy, under *international* law, but they would have lost the protection that belligerent status would have provided as against the operation of the *domestic* criminal and civil laws. SDF actions could become the subject of civil suits for wrongful death and the like, requiring the courts to determine the basis for their actions in light of the constitutional denial of the rights of belligerency.127 In short, the belligerency clause in Article 9(2) is

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125 The Japanese Coast Guard, supported by the Maritime Self-Defense Force ("MSDF"), did fire upon and sink what was suspected to be a North Korean “spy vessel” in December 2001, with the loss of approximately fifteen lives. James Brooke, *Koizumi Calls for Vigilance After Japan Sinks Suspicious Boat*, N.Y. TIMES, Dec. 24, 2001, at A9. Japan was criticized for having failed to come to the aid of the initial survivors, who were all thought to have eventually perished.

126 See generally BROWNLIE, supra note 124, at 29–31, 37. One of the primary distinctions between lawful combatants, as defined under the LOIAC, and unlawful combatants, such as civilians who take up arms and become directly engaged in hostilities or members of the armed forces who disguise themselves as civilians, is this “right of belligerency,” this impunity under domestic law. Thus unlawful combatants, as defined under the LOIAC, may be prosecuted in the domestic courts of the enemy for crimes under domestic criminal law, including murder and assault.

127 When SDF forces were initially deployed under a reconstruction and humanitarian support mandate to Iraq in 2004, the authorizing law provided that
not insignificant, and it cannot be ignored in the interpretation of Article 9.

4.2. The Government Interpretation of Article 9

As was alluded to earlier, the government interpretation differs significantly from the interpretation that has been elaborated here, and it is the government interpretation that governs policy making. The government interpretation has been subject to some change over time, though it has remained fairly consistent in its essentials since 1954 as related to Article 9(1). It will be recalled that Prime Minister Yoshida Shigeru had taken the position during the ratification that Japan was not necessarily denied the right of self-defense, but that it was denied the right to maintain even the most limited military forces necessary for self-defense. His government maintained that position, against mounting pressure both inside the party and from the United States, until 1954, when the force that had been established as a National Police Reserve was transformed into the SDF. The Legislation Bureau was re-established by Yoshida as the Cabinet Legislation Bureau (CLB), and he turned to it for the supporting interpretation of Article 9.128

the troops could only use their weapons in a manner and in situations that would satisfy the domestic criminal law test for use of force in self-defense. This would be consistent with this understanding of Art. 9(2), and it is possible that the CLB insisted on the provision for this purpose. The legal limit itself can be found in Iraku ni okeru jindōfukkō shienkatsudō oyobi anzen kakuhi shienkatsudō no jikkō ni kansuru tokubetsu sochihō [The Special Measures Law Concerning the Conduct of Humanitarian Reconstruction Assistance Activities and Activities for Assisting in the Maintenance of Peace and Security in Iraq], Law No. 137 of 2003 [hereinafter Iraq SML], art. 27(4), (specifying that weapons could only be used in circumstances justified by Art. 36 and Art. 37 of the penal code). See HATAKE, supra note 105, at 260–63 (providing a detailed chart describing the circumstances under which SDF members may use weapons and the legal authority for each); TAMURA ET AL., supra note 121, at 211 (offering a detailed analysis of the relationship between the use of weapons and the use of force in current defense-related legislation). On the other hand, senior officials in both the Ministry of Defense (interview July 31, 2008) and Ministry of Foreign Affairs (interview Aug. 13, 2008), both involved in creating defense related legislation, suggested that the dominant view was that such limitations were driven by the perceived requirement to comply with the prohibition on the use of force in Article 9(1).

128 The Legislation Bureau had been disbanded by SCAP in 1947 but was restored as the CLB by Yoshida in 1952. See NISHIKAWA SHINICHI, SHIRAREZARU KANCHŌ: NAIKAKU HÖSEIKYOKU [THE UNKNOWN AGENCY: THE CABINET LEGISLATION BUREAU] ch. 2 (2000); see also NAKAMURA AKIRA, SENGOSEIJI NI YURETA KENPÔ KYŪJŌ – NAIKAKU HÖSEIKYOKU NO JISHIN TSUYÔSA [ARTICLE 9 OF THE CONSTITUTION ROCKED BY POST WAR POLITICS: THE STRENGTH AND SELF-CONFIDENCE OF THE CABINET LEGISLATION BUREAU] ch. 1 (1996); Richard J. Samuels, Politics, Security Policy, and
It would become the primary authority on the interpretation of Article 9, and the arbiter of what was consistent with that interpretation. It issued its first interpretation of the provision in December of 1954 in order to justify the creation of the SDF.

The CLB interpretation provided that while Article 9(1) renounced war and the threat or use of force as a means of settling international disputes, it was not understood to renounce Japan’s right, as a sovereign nation, of individual self-defense. Moreover, it was natural for a country with a right of self-defense to have the capability to defend its national territory in the event that it came under foreign attack, and thus it was natural that Article 9(2) was not to be understood to prohibit the maintenance of the defensive capability “necessary” for self-defense. As such, the “necessary” defense capability did not constitute the land, sea, and air forces or other war potential that was prohibited by Article 9(2).129 In 1957, the CLB refined and narrowed the interpretation further, opining that defense capability that was “the minimum necessary force” for the exercise of self-defense was not war potential,130 from which flowed the position that Japan was entitled not only to maintain but also use the “minimum necessary force” for self-defense.

It is understood that this interpretation—so as to permit an individual right of self-defense—was based on some of the ideas that were discussed above, particularly the fact that there had been a self-defense exception created for the Kellogg-Briand Pact. Moreover, the interpretation of Article 9(2) as permitting a level of capability necessary for self-defense was founded on the Ashida amendment. As will be discussed in more detail below, the interpretation was made in the context of extreme pressure on the government from the United States to re-arm. But while it has been viscerally assailed as being contrary to any reasonable interpretation of the provision, and castigated for beginning the process of emasculating Article 9, particularly as it relates to

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129 This interpretation was provided by Director Hayashi in the House of Representatives Budget Committee deliberations, on December 21, 1954. See NISHIKAWA, supra note 128, at 40; see generally Samuels, supra note 128, at 24–29 (tracing the development of the “minimum necessary force” doctrine).

130 Prime Minister Kishi provided this interpretation in the House of Councilors Cabinet Committee on May 7, 1957. NISHIKAWA, supra note 128, at 41.
Article 9(2), the CLB interpretation was also extremely significant in terms of the constraints that it entrenched. For while along with defining what was permissible, the interpretation made clear what was not, including collective self-defense, collective security operations, or indeed any dispatch of military forces overseas. These prohibitions flowed directly from the “minimum necessary force” construction. While debate has raged for decades over what, precisely, a “minimum necessary force” might mean in practical terms, whether the SDF has exceeded it, and what value the concept has as a constraint given that it is entirely relative and dependent on perceptions of foreign threat levels, the fact remains that the CLB has been remarkably consistent in its adherence to the fundamental interpretation of the “use of force” aspect of the interpretation. While there has been some whittling away of the prohibition on the overseas dispatch of troops, and the conditions under which Japan might be able to provide rear-area support to the United States in crisis circumstances in “areas surrounding Japan,” the fundamental prohibition on participation in collective self-defense or U.N.-authorized collective security operations has been assiduously maintained. Even when the limitations were relaxed with respect to the dispatch of troops for U.N. peacekeeping missions, and to provide logistical support for such operations as the post-9/11 coalition activities in Afghanistan and Iraq, stringent conditions on their operations were designed and

131 For the discussion in English, see Port, supra note 93, at 128. See generally James E. Auer, Article Nine: Renunciation of War, in JAPANESE CONSTITUTIONAL LAW 69, 74–80 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) (examining the extent to which Japan’s military development is inconsistent with Article 9(2)). There is a massive body of literature in Japanese criticizing the interpretation and government policy on Article 9.

132 This point is made quite forcefully by John Haley. See Haley, Waging War, supra note 81, at 29–33 (noting that the “prevailing view [is that] article 9 prohibits any deployment of combat forces for collective security measures in the absence of a direct threat to Japanese security,” and arguing that “Japan’s contemporary military establishment is, as a matter of capability, essentially defensive”); see also NISHIKAWA, supra note 128, at 46.

133 The “rear-area support” and “situations in areas surrounding Japan” are concepts articulated in the 1997 Guidelines, which are discussed in the next section.

134 The CLB reinforced its interpretation in 1981, explicitly stating that participation in collective self-defense was prohibited by Article 9(1). See Samuels, supra note 128, at 30–31 (providing a more complete account of the CLB interpretation).
implemented to keep their conduct within the scope of the broader constitutional interpretation.\textsuperscript{135}

It bears repeating again, therefore, that in considering the operation of Article 9, it is necessary to keep in sharp focus the distinction between the two subsections. While the official interpretation of Article 9(2) may strain credulity, and the size of Japan’s military budget and capability of its military is completely at odds with any reasonable interpretation of Article 9(2), those problems are separate and distinct from the question of how well Article 9 operationalizes the principles of \textit{jus ad bellum}. In order to address that question better, it is necessary to consider the extent to which Article 9(1), as interpreted by the government, continues to be consistent with international law.

4.3. Interpretations of Article 9(1) and Consistency with International Law

As explained earlier, concerns were raised in the ratification process about how Article 9 could be reconciled with the new U.N. system. There were two issues—two perceived conflicts—that were raised then, and have continued to be at the center of debate over the provision ever since. These were the right of self-defense, both individual and collective, and the obligation to contribute to the U.N. collective security operations. The issue of collective self-defense was further complicated with the assumption by Japan of treaty obligations under the U.S.-Japan Security Treaty.

Beginning with self-defense, the U.N. Charter, which came into effect in October 1945, provided in Article 51 that nothing in the Charter impaired the “inherent right” to individual and collective self-defense if an armed attack occurs against a member.\textsuperscript{136} This created one of the two exceptions to the general prohibition on the use of force set out in Article 2(4) of the Charter, and it thus

\textsuperscript{135} Details of these operations are provided below.

\textsuperscript{136} U.N. Charter art. 51. It is sometimes argued, both in the Article 9 debate and more broadly, that the use of the word “inherent” in the definition reflects the independent existence of the right of self-defense as a concept in customary international law; this implies that the right may be broader than what is provided for in the Charter. The better view is that Article 51 represents the codification of customary international law, and covers the entire scope of the right, including the conditions for its exercise. See, e.g., DINSTEIN, supra note 4, at 181 (“The allegation that the prerogative of self-defense is inherent in the sovereignty of State to such an extent that no treaty can derogate from it, cannot be accepted.”) (internal citation omitted).
codifies two distinct rights: the right of individual self-defense, and the right of collective self-defense. The former is quite simply the right of a member of the U.N. to use force individually against an aggressor in the event of an armed attack. The right of individual self-defense, it should be noted, may also be exercised collectively, in that a number of states may all end up defending themselves against a single aggressor or group of aggressors, but to the extent this right is primarily focused on a defense of one's own narrow interests in response to an attack on one's own forces or territory, it remains individual self-defense.\textsuperscript{137}

The right of collective self-defense is more complicated, as it involves a right to use force against an aggressor in the event of an armed attack by that aggressor on some other U.N. member or members. It does not require that there have been an attack on the state exercising the right, nor even that there be some immediate threat to the security interests of that state, but only that there have been an armed attack against another member of the U.N.\textsuperscript{138} Thus, if the Congo were to attack Rwanda, Canada (or any other member of the U.N.) would be entitled to use force against the aggressor as an exercise of the right of collective self-defense provided for in Article 51 of the Charter, regardless of the existence of any treaties or other relations between Rwanda and Canada. The underlying rationale for this framework is that there is a broader threat to international peace and security from any incidence of aggression, in that unchecked aggression has a propensity to spread and cause other external costs, and every state thus has a right to defend itself against such threats.\textsuperscript{139}

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\textsuperscript{137} For a sound review of the concepts, see Dinstein, supra note 4, at 175–277 (discussing the doctrines of individual and collective self-defense); see also Christine Gray, International Law and the Use of Force 95–158 (2d ed. 2004) (offering a similar background).
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\textsuperscript{138} There is disagreement over whether a request for assistance from the victim of aggression is also a necessary condition. The International Court of Justice, in Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), suggested that at a minimum it was a requirement that the victim make the determination that it had been the subject of an armed attack, and so declare. For further discussion, see Gray, supra note 137, at 138–41.
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\textsuperscript{139} See Dinstein, supra note 4, at 253–56 (discussing the doctrine and noting that “from the vantage point of minor Powers . . . their overall security is detrimentally affected when one of them is invaded by a potent aggressor.”).
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It will be noted, however, that this exception to the general prohibition on the use of force is a right, but not a duty. To the extent that Article 9 could be interpreted as denying the right of self-defense (whether individual, collective, or both) it would be inconsistent with the rights extended to Japan under international law, but it would not interfere with any general obligations or duties imposed upon Japan under the U.N. system. And one is always free to waive one’s rights. Thus, the government interpretation of Article 9—that it is entitled to exercise the right of individual self-defense, but is prohibited from exercising the right of collective self-defense—is not inconsistent with any obligation or duty under the international law of the U.N. system.

Where problems arise with respect to collective self-defense is with the treaty obligations that Japan has assumed in the 1952 U.S.-Japan Security Treaty. The 1952 U.S.-Japan Security Treaty itself recognized in its preamble that Japan lacked the “effective means to exercise its inherent right of self-defense,” but also adverted to its right to collective self-defense as a basis for the treaty. Then, in the Japan Mutual Defense Assistance Agreement of 1954 (an agreement designed both to institutionalize the treaty, and establish a framework for the provision of increased economic assistance to Japan), Japan undertook to take such action as was required to fulfill its “military obligations” under the treaty, and to increasingly contribute to the “development and maintenance of its own defensive strength and the defensive strength of the free world” (though in accordance with its constitutional constraints), thus putting pressure on Article 9(2).

140 There has been some suggestion, given expression by the ICJ in Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5), that the outlawing of aggression has created international obligations erga omnes, but the prevailing view is that self-defense is a right and not a duty. See DINSTEIN, supra note 4, at 254 (discussing the implications of Barcelona Traction); see also GRAY, supra note 137, at 135–58 (giving a detailed analysis of the conditions for collective self-defense and the debates surrounding the issue).


When the treaty was revised and renewed in 1960, the preamble of the amended treaty again recognized the right of collective self-defense as the basis for the agreement, and Japan made a more explicit undertaking to develop its defensive capability. But in the core of the bargain, Article V specified that both states agreed to act in the event that either of them were the subject of an armed attack “in the territories under the administration of Japan,” which at the time did not even include Okinawa. Thus, while the United States undertook to defend Japan in the event of an attack against Japan, Japan only agreed to use force in defense of the United States if U.S. forces were attacked within the territory of Japan—which would also constitute an attack on Japan, and thus trigger the right to individual self-defense. Nonetheless, there were a number of other institutional developments pursuant to the 1960 Security Treaty, such as the development of the Security Consultative Committee, which established and facilitated the high-level coordination of defense planning, and became the conduit for pressure upon Japan to do more to actively support U.S. security interests in East Asia.

It was through these institutional developments intended to implement and update the treaty relationship, and specifically within the Security Consultative Committee, that the so-called 1997 Guidelines were negotiated. The 1997 Guidelines were intended in general terms to clarify the responsibility of each side in the relationship. In its particulars, the responsibilities of Japan in the

144 Id. art V.
145 DROHAN, supra note 141, at 85.
147 DROHAN, supra note 141, at 143–45.
event of armed attack were far more detailed but remained consistent with the provisions of the 1960 Security Treaty. But at lower levels of crisis the 1997 Guidelines stipulated that the SDF would coordinate with and provide rear-area support for U.S. forces in the event that there were “[s]ituations in areas surrounding Japan [that] will have an important influence on Japan’s peace and security,” also referred to as “situations surrounding Japan.” The term “situations surrounding Japan” was explicitly described as being a “situational” concept, rather than geographic.

The 1997 Guidelines, and the legislation that was passed in 1999 to implement them, were highly controversial because they were seen (as they are still seen by many academics and policy makers today) as an effort to blur the lines between individual and collective self-defense. It is argued that “situations surrounding Japan” could include situations such as crises in the Middle East, and that once such a crisis is so defined, the SDF could be authorized to provide rear-area support for U.S. forces engaged in the use of force in response to the situation. The SDF activity in such circumstances could easily be integral to the U.S. use of force, thus constituting an exercise of collective self-defense and the use of force in violation of Article 9(1).

There is certainly some merit to these claims, and the arguments that the government has engaged in the use of highly ambiguous language to make incremental shifts in the understanding of the scope of permissible military activity. These are legitimate concerns for the domestic constitutional scholars, policy makers, and the citizens of Japan regarding the integrity of the constitutional provision. Yet the crucial point for the purposes of the analysis in this Paper is that even if there is a complete shift in the interpretation of Article 9 so as to permit collective self-

148 1997 Guidelines, supra note 146, Part V.
149 Id.
150 There are several laws that implemented aspects of the 1997 Guidelines, but the most important is the Shūhennjitai ni saishite wagakuni no heiwa oyobi anzen wo kakuhō suru tame no sochi ni kansuru hōritsu [Law Related to the Measures for the Guarantee of Peace and Security in Situations Surrounding Japan], Law No. 60 of 1999, as amended.
151 See, e.g., NISHIKAWA, supra note 128, at 48-50. The Nagoya High Court, in a decision that is discussed further below, made exactly such a determination in respect of Air Self-Defense Force (hereinafter ASDF) operations in support of coalition forces in Iraq in 2008.
defense, it would not make the government’s interpretation inconsistent with the principles of *jus ad bellum*—rather it would bring it more into conformity with the U.N. system. Such a shift would raise questions about how strong the bind of Article 9 can be if the government can re-interpret its way around the constraints, and that argument is addressed in the next section. The current interpretation, however, and the manner in which Article 9 operates, is not inconsistent with Japan’s international law obligations, and does not inhibit the operation of Article 9(1) so as to enhance compliance with *jus ad bellum*.

The second major issue in the ratification process was how Article 9 would affect Japan’s ability to join the U.N. if it precluded Japan from contributing to the collective security operations contemplated by Chapter VII. That issue—which, it will be recalled, was sidestepped at the time by the government as being a problem that could be dealt with later—has continued to be enormously problematic ever since. Chapter VII of the Charter sets out a collective security system that is the basis for the second exception to the general prohibition on the use of force. Under Article 39, the U.N. Security Council has the authority to make a determination that there exists a threat to the peace, a breach of the peace, or an act of aggression, and to make decisions and recommendations as to what measures shall be taken to address such situations. Under Article 42, it may take or authorize action by the land, sea, or air forces of its members, in order to restore and maintain international peace and security.

The concept of collective security operations is thus quite distinct from that of self-defense. The use of force as a collective security measure requires a Security Council determination that there exists a threat to international peace and security and a Security Council authorization to use force, whereas the use of force in self-defense is a right available to members without any further specific authority; but while collective security action is permitted when the Security Council, in its broad discretion, has determined there to be a threat to peace and security, the legitimate exercise of self-defense requires the satisfaction of specified conditions precedent, namely that an armed attack has occurred or is inexorably in motion.152

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152 See generally DINSTEIN, supra note 4, at 182–211 (laying out the guidelines for the use of self-defense under Article 51); GRAY, supra note 137, at 98–129 (examining the academic debate surrounding Article 51 and the role of the
At the time that the draft Constitution was being considered in the Privy Council and the Diet, it was still contemplated that U.N. members would be required to contribute armed forces to a U.N. collective security force under U.N. command if called upon to do so by the Security Council, in accordance with agreements that were to be entered into between each state and the U.N. Thus, there was concern among the Japanese legislators that if Japan was not able to contribute armed forces to this U.N. force, as required by Article 43 of the Charter, Japan would not be able to join the U.N. when its sovereignty was fully restored. Alternatively, there was concern that if Japan joined it would be forced to violate this obligation. However, the vision of a standing U.N. force as contemplated by Article 43 never came to pass, and instead the model of national armed forces acting jointly under U.N. Security Council authorization as collective security forces, was established with the U.S.-led response to the North Korean invasion of South Korea in 1950.

When Japan joined the U.N. in 1956, therefore, there was no obligation to contribute to a U.N. standing force. Moreover, notwithstanding the language of Article 43, the Security Council has never called upon any specific nation to contribute forces to any collective security operation, and the participation of member states is viewed as being voluntary. As such, it cannot be argued that Article 9 is inconsistent with the *jus ad bellum* regime as it is currently operating, or that Article 9 puts Japan in violation of its international law obligations within the U.N. system.

Certainly, as will be examined in more detail below, Japan came under increasing pressure after the end of the Cold War, particularly from the United States, to contribute militarily to such international efforts as those related to the first Gulf War, and the invasion of Afghanistan after 9/11 and the subsequent counterinsurgency operations in that country. To the extent that aspects of such conflicts were authorized by the U.N. Security

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Security Council under Article 51). There is of course considerable debate over precisely what are the pre-conditions to the exercise of self-defense, which became more vociferous after the invasion of Iraq and the assertion of the right to preventative war.

153 See U.N. Charter art. 43.

Council under Article 42, there was renewed debate in Japan over whether Article 9 really prohibited collective security operations, and if so, whether it ought not to be revised or reinterpreted. There was the increasing feeling that if it was not an obligation, it was certainly a responsibility of members of the U.N. (particularly prosperous and politically influential members with ambitions to become permanent members of the Security Council) to contribute to such efforts. But while there may be a perceived moral obligation and strong political reasons to participate in collective security operations, there is no legal obligation per se; as a result, this perceived inconsistency between Article 9 and international law does not directly impact on the operation of Article 9 as a prohibition on the use of force.

In essence, when one steps back from the minutiae of the endless debate over interpretation, it can be said without much controversy that to the extent that Article 9 incorporated principles from the laws of war, it was overly inclusive (or overly exclusive, depending on one’s perspective) in that the scope of its prohibition was greater than that of international law, both then and now. That over-breadth, and the penumbra that it has created beyond the core area that corresponds with international law, has been the source of many of the conflicts over the provision, and it may be a basis for justifiable criticism—but it does not invalidate the core area of the provision that corresponds with the *jus ad bellum* principles. The over-breadth may ultimately be the undoing of the

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155 Both the military response to Iraq’s invasion of Kuwait and the post-9/11 operations in Afghanistan were justified in terms of collective self-defense under Article 51, and (at least in some aspects) as collective security operations under Article 42. In the case of Afghanistan there was no U.N. Security Council resolution authorizing the initial invasion, but the use of force by the International Security Assistance Force (hereinafter ISAF) was authorized under Article 42 to restore and maintain security in Afghanistan thereafter. But see Dinstein, supra note 4, at 273–76 (arguing that the U.N. Security Council did not, in Resolution 678, transform Operation Desert Storm from an exercise of collective self-defense to one of U.N.-authorized collective security).

156 Many have argued that in fact Article 9 can be interpreted as allowing for the use of force in Security Council authorized security operations, on such grounds as that the “purpose” of such operations is not to resolve international disputes, or that the SDF units so participating would no longer be under Japanese command and control. See, e.g., Nasu, supra note 105, at 59–60 (“The Japanese SDF contingents deployed pursuant to U.N. Security Council resolutions are thus placed under the U.N. command and, therefore . . . cannot be considered to be the use of armed force by the Japanese Government.”). Based on the analysis in the previous section, such arguments are not persuasive.
provision, but as will be examined in the next section, the core of Article 9(1) has operated to effectively prevent Japan from participating in any use of armed force since World War II.

5. ARTICLE 9 AS A CONSTRAINT ON POLICY

We come then to an examination of the evidence of how Article 9(1) has actually operated to constrain government policy with respect to the use of armed force. The question of how effectively it has functioned is more complicated than might first appear. The general account illustrates very clearly that Japan has not used armed force, or deployed military forces as combatants in any form whatsoever, since World War II, even in the face of international criticism of its refusal to be drawn into either collective self-defense or collective security operations. The constitutional constraints of Article 9 have always been the primary publicly advanced reason for the policy decisions that were taken in the unfolding of that history. Yet the political subtext is more complicated, and one must try to disentangle the extent to which Article 9 was simply used cynically by the government as a convenient and powerful cover for more self-interested reasons for these decisions from those instances in which Article 9 operated to truly frustrate the policy objectives of government.

It cannot be argued that Article 9 has effectively operated to bind government policy, and thus that it provides a useful example of constitutional implementation of international law constraints on the use of armed force, if it was merely an excuse for the adoption of policy that was seen by the government of the day as furthering either national or more narrow party interests. And there were periods during the last sixty years in which that was the case. There is of course room to make the argument that even if this is so, Article 9 did nonetheless function effectively as a constraint, in that if Article 9 had not existed, the government would not have had the powerful tool that the provision provided, and thus might have been unable to resist the pressure to adopt a

157 Whether the SDF units deployed to the Indian Ocean in support of operations in Afghanistan and Iraq are combatants is not entirely unambiguous, and there are reasonable arguments that they could be treated as belligerents. The Nagoya High Court in April 2008 held that the ASDF operations in Iraq were so integrated with those of coalition forces engaged in the use of force that they also constituted the use of armed force. Nagoya High Court, Apr. 17, 2008 (unpublished decision), http://www.haheisashidome.jp/hanketsu_kousho [hereinafter Nagoya Decision].
policy which it was reluctant to follow. Those arguments are not without some merit, but it would obviously be more powerful to find evidence of Article 9 operating to frustrate and defeat genuine government efforts to move the nation toward the use of military force, for then we will have examples of a constitutional constraint on the use of armed force effectively binding government, even in a moment of crisis. Here we will find Ulysses straining against the bonds of pre-commitment in the full face of the Sirens’ song.

Such evidence will be explored in this Section of the Paper, but first it is important to examine the context, and explain the early policies that both used Article 9 as a cynical cover and inadvertently entrenched its norms further into the social and legal fabric of the nation.

5.1. The Yoshida Doctrine and Entrenchment of Pacifism

It will be recalled that the government had taken the position during the ratification process that Article 9(2) prohibited all military forces, and thus made the exercise of the right of self-defense impossible. The government continued to maintain that position, supported by strong pressure on the left, until well after the beginning of the Korean War. However, SCAP and the U.S. government had second thoughts about a disarmed Japan as the Cold War began to deepen, and began to bring increasing pressure to bear on the Yoshida government to rearm. Even when the government had complied with the SCAP directive to establish a 75,000 man National Police Reserve (“NPR”) in 1950, after the outbreak of the Korean War in June of that year, Yoshida maintained the position that military forces per se would violate Article 9. He maintained that position in the face of pressure from Dulles to re-establish a military.158 The question of Japan’s security and future posture were thus the subject of significant debate in

the run-up to the signing of the San Francisco Peace Treaty and the U.S.-Japan Security Treaty in September 1951.\textsuperscript{159}

Rather than any idealistic commitment to pacifism or the renunciation of armed forces in the Constitution, Yoshida’s broader national and foreign policy objectives animated this course. This would in time become known as the “Yoshida Doctrine,” and it involved a single-minded focus on economic recovery and growth, avoidance of Cold War entanglements, minimal possible defense spending, reliance upon a strong alliance with the United States to ensure Japanese security, and exploitation of the developing liberal trade regime to drive economic growth. Moreover, Yoshida was quite prepared to use the Constitution and the strong pacifist movement within Japan to aid in the development of his policies.\textsuperscript{160} As he remarked to his junior aid at the time (and future prime minister), Miyazawa Kiichi:

\begin{quote}
The day [for rearmament] will come naturally when our livelihood recovers. It may seem devious [\textit{zurui}], but let the Americans handle our security until then. It is indeed our Heaven-bestowed good fortune that the constitution bans arms. If the Americans complain, the constitution gives us a perfect justification [\textit{chanto shita riyu ni naru}]. The politicians who want to amend it are fools.\textsuperscript{161}
\end{quote}

Nonetheless, the Japanese government could not entirely resist American pressure.\textsuperscript{162} As discussed earlier, in the Japan Mutual Defense Assistance Agreement of 1954 (“the MDAA”), Japan

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{159} See TOGO, \textit{supra} note 146, at 46–51 (outlining the background history of the 1951 San Francisco Peace Treaty). Even MacArthur was opposed to Japanese rearmament until well after 1948, and resisted efforts by George Kennan, the then-head of the State Department Planning Staff, to have him authorize re-armament. SHÔICHI, \textit{supra} note 62, at 201.
  \item \textsuperscript{160} For more on the Yoshida Doctrine, see generally PYLE, \textit{Japan Rising}, \textit{supra} note 158, at 225–77 and RICHARD SAMUELS, \textit{Securing Japan: Tokyo’s Grand Strategy and the Future of East Asia} 38–59 (2007) (tracing the history and development of the Yoshida Doctrine).
  \item \textsuperscript{161} Pyle, \textit{Collective Security}, \textit{supra} note 158, at 102.
  \item \textsuperscript{162} This pressure was manifested in various ways, most publicly with then-Vice President Richard Nixon telling a crowd of 700 Japanese leaders that Article 9 had been a mistake and that the United States needed Japan to re-arm. WALTER LAFEBER, \textit{The Clash: U.S.-Japanese Relations Throughout History} 298 (1997). For more on U.S. pressure to rearm, see SAKAMOTO, \textit{supra} note 141, at 76.
\end{itemize}
\end{footnotesize}
explicitly undertook to increase its own defensive capabilities.\textsuperscript{163} The Yoshida government in that same year transformed what had initially been the NPR, and then the National Security Force, into a full-fledged Defense Agency and a tri-service SDF; although at 110,000 men it was less than half the size the Americans had pressed for.\textsuperscript{164}

This required a departure from the government’s earlier position on the meaning and import of Article 9. As was described earlier, Yoshida turned to the CLB for an interpretation of Article 9 that would support the shift.\textsuperscript{165} That interpretation provided the basis for establishing a self-defense capability. It also clearly articulated and thereby reinforced the understanding of the constraints of Article 9, namely that collective security operations and collective self-defense were prohibited.\textsuperscript{166}

In the midst of the issuance of these interpretations, and the fierce debates in the Diet and within the public over the establishment of the SDF, Japan was trying to join the U.N. This brought to a head the issues regarding Article 9 constraints on Japan’s ability to contribute to U.N. collective security operations.\textsuperscript{167} When Japan finally joined the U.N. in 1956, it did so with the reservation that its ability to meets its obligations was qualified.\textsuperscript{168} True to the CLB interpretation that no troops could be

\textsuperscript{163} MDAA, \textit{supra} note 142, art. VIII. The United States had helped cajole a reluctant Yoshida into the deal with $250 million in goods and purchases. \textit{LAFEBER, supra} note 162, at 299; \textit{see also PYLE, JAPAN RISING, supra} note 158, at 234–35 (describing the use of economic aid by the United States to leverage the establishment of a self defense force by the Yoshida government).

\textsuperscript{164} \textit{PYLE, JAPAN RISING, supra} note 158, at 234.

\textsuperscript{165} CLB Director General Masaki Takatsuji acknowledged in his memoirs that he gave in to the pressure from Yoshida in developing an interpretation in 1954. \textit{Samuels, supra} note 128, at 5.

\textsuperscript{166} \textit{See id.} at 7. \textit{See also PYLE, JAPAN RISING, supra} note 158, at 236 (emphasizing that Yoshida sought the interpretation not only as a justification for the formation of the SDF, but as a basis for resisting U.S. pressure). Haley also makes the point that this entrenched the constraints of Article 9. \textit{Haley, supra} note 81, at 22–23.

\textsuperscript{167} \textit{TOGO, supra} note 146, at 374.

\textsuperscript{168} The reservation was communicated somewhat cryptically in a letter from the Minister of Foreign Affairs, which stated that Japan “undertakes to honour [its obligations] by all means at its disposal,” which was interpreted to mean so far as its Constitution permitted. \textit{Id.} This position was reiterated by the Director General of the Treaties Bureau, in the House of Councilors Settlement Committee in 1990, and Foreign Minister Ikeda, in the House of Representatives Foreign Relations Committee in 1996. \textit{Id.}
deployed overseas, Japan refused the first request for observers for the U.N. missions in Jordan and Lebanon.\textsuperscript{169}

While these developments established the early government policies on defense and the official interpretation of Article 9, they were also the subject of considerable conflict in the latter half of the decade. The fight over the issues surrounding the normative values of Article 9 were reflected in direct conflicts over the Constitution itself, and in political struggles over the direction of the country and its place in the world. The struggle was very much centered on the pacifism that had been institutionalized in Article 9 and embraced by many as being a component of Japan’s new national identity. The conservative reactionaries who viewed the Constitution as an illegitimate imposition, and Japan’s dependency on the United States as shameful, sought to revise the Constitution and restore the military.\textsuperscript{170}

The constitutional struggle was focused in the deliberations of the Commission on the Constitution, established in 1957 (the ‘‘57 Commission’’), under the chairmanship of Takayanagi Kenzō. The political movement to create the commission began in 1954, and the law authorizing its formation was passed by the newly formed Liberal Democratic Party under Prime Minister Hatoyama in 1955.\textsuperscript{171} Hatoyama and his close allies, such as Kishi Nobusuke, were opposed to Yoshida’s approach to security and foreign policy, and sought a revision of the Constitution. In the run up to the convening of the ‘57 Commission, the various parties worked on developing their respective positions on constitutional revision and the issues received much publicity. Moreover, once the Commission began its deliberations all but the steering committee sessions were open to the public and were widely reported on in the press.\textsuperscript{172}

\textsuperscript{169} Id. at 376–77.

\textsuperscript{170} See Pyle, Japan Rising, supra note 158, at 237–38 (describing the role public opposition played in preventing efforts by Yoshida’s conservative opponents to rebuild Japan’s military); see also Katzenstein, supra note 40, at 115 (exploring the influence of this constitutional conflict); Togo, supra note 146, at 56–57 (summarizing the history of this period). See also Boyd & Samuels, supra note 104, at 17–26 (analyzing the political dynamics of Japan in the 1950s).

\textsuperscript{171} The LDP was formed through the merger of the Democratic Party with the Liberal Party, shortly after the Democratic Party itself had been formed through the merger of the Progressive Party with the Hatoyama and Kishi factions of the Liberal Party.

The deliberations of the ‘57 Commission lasted for seven years but it could come to no consensus on constitutional revision, and made no formal recommendations. Its massive final report was submitted to the Cabinet in 1964, but it was never placed before the Diet and no action was ever taken on it. While many on the ‘57 Commission clearly favored revision of Article 9, the conflict was fought to a stalemate in which the status quo of adherence to the principles of pacifism remained in place. In the final analysis, the work of the commission actually reinforced in the national psyche and public consciousness the constitutive norms articulated by Article 9.173

The ‘57 Commission was in a very real sense symbolic of the larger conflict being waged within the body politic.174 Between 1955 and 1960, the LDP, led first by Hatoyama and then by Kishi Nobusuke, tried to move Japan in a more conservative direction, emphasizing greater autonomy and a more independent foreign policy backed by a restored military, and of course a revised constitution to make this possible. Kishi became prime minister in early 1957, and his government ushered in the first Basic Policy on National Defense later that year, which called for “the development of an efficient defence capability.”175 Kishi also pushed hard for a revision to the Japan-U.S. Security Agreement, both to enhance the American guarantee of Japan’s security, and at the same time to increase the sovereign control Japan had over the operation of U.S. forces in Japan under the 1952 treaty. But all of these developments were highly controversial at the time, and the political opposition characterized the renewal of the security treaty as creating a significant risk of Japan being re-militarized and drawn into U.S. wars of aggression.176

173 See id. at 10, 271 (arguing that pacifism, along with the other two fundamental principles, are firmly embedded in the Japanese consciousness).
174 Maki, supra note 44, at 11.
175 TOGO, supra note 146, at 57. He also managed to pressure the CLB into issuing an interpretation that nuclear weapons would not be in violation of Article 9(2) so long as they were “defensive [in] character.” Samuels, supra note 128, at 6. This is perhaps the best illustration of just how absurd the attempts to categorize weapons systems as being “offensive” or “defensive” are for the purpose of determining their constitutionality. For more on the fallacy of such distinctions, see WATANABE YOZO, NICHIBEI ANPOSEIDO TO NIHONKOKU KENPO [THE JAPANESE-AMERICAN SECURITY SYSTEM AND THE JAPANESE CONSTITUTION] 129–30 (1991).
176 This perception was exacerbated by such incidents as the injury of the crew of a Japanese fishing vessel by an American nuclear weapons test on Bikini Atoll in 1954, increasing public discussion by Eisenhower and Dulles of the need
Even Kishi’s government could not ignore the norms of Article 9. The broader social and constitutive norms associated with Article 9 and the legal operation of the provision itself, as interpreted by the CLB, exercised considerable power over the precise parameters within which the treaty was negotiated. For, as was discussed earlier, the 1960 Security Treaty remained faithful to the CLB interpretation of the Article 9(1) prohibition on collective self-defense. The entire structure of the asymmetrical duties, in which the United States was obliged to defend Japan, but Japan only required to defend U.S. forces from any attack within Japanese territory, was in the words of a former senior diplomat “the direct result of Japan’s constitutional constraint.”

The treaty was not signed until January 1960, and it was debated in the Diet in the following months, during which the broad-based public opposition to Kishi’s security policies in general, and to the renewal of the treaty in particular, reached a climax. Hundreds of thousands of people demonstrated in the streets, often violently, with hundreds of demonstrators and police being injured and one student killed. Six million workers went on strike, and the government used the police to physically clear Socialist Party members obstructing the deliberations in the Diet. It reached a crescendo in the spring, and despite Japanese government pleas not to do so, President Eisenhower was forced to cancel his trip to Tokyo. Within days of the treaty coming into effect that summer, Kishi resigned.

The crisis was primarily a backlash against the reactionary conservative attempts to undermine Yoshida’s policies and the pacifist posture of Japan, and it ended those efforts and further solidified the Yoshida Doctrine. Ikeda Hayato, a protégé of Yoshida, succeeded Kishi. The LDP, recognizing the potential conflict and turmoil that would ensue if they continued to pursue national security issues, essentially reverted for the next several decades to a focus on economic growth and international trade, with those factions in favor of the Yoshida Doctrine becoming the

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177 TOGO, supra note 146, at 60.
178 See generally LAFEVER, supra note 162, at 319–21 (providing a good account of the crisis).
mainstream of the party. The mainstream remained dominant until the end of the century, with the exception of a short hiatus during the Nakasone years in the mid-1980s.179

The Yoshida doctrine became orthodoxy, and it did keep Japan out of Cold War entanglements. As American involvement escalated in Vietnam for instance, and other allies such as South Korea felt compelled to contribute troops, Japan was able to remain entirely uninvolved.180 Moreover, this doctrine that had become entrenched in part because of the pacifist norms of Article 9, further shaped and entrenched the identity of pacifism, which in turn contributed to the development of policies such as the capping of defense spending to 1% of GNP,181 the articulation of the three non-nuclear principles,182 and the ban on weapons exports.183

179 PYLE, JAPAN RISING, supra note 158, at 238. See also BOYD & SAMUELS, supra note 104, at 25–26 (describing the process by which supporters of the Yoshida Doctrine consolidated political power).

180 South Korea contributed some 300,000 troops to the U.S. war effort in Vietnam. Pyle, Collective Security, supra note 158, at 104. Of course, Japan was very much involved economically, and the war was a huge boon for Japanese economic growth.

181 This policy was established in 1978 by Prime Minister Miki Takeo in response to pressure from the pacifist political forces caused by the government’s 1976 National Defense Program Outline. TOGO, supra note 146, at 71–72. The 1% cap has been essentially maintained since. Prime Minister Nakasone ostentatiously announced his abandonment of the policy, but came under pressure as a result, and was only able to raise spending to 1.004% of GNP. His own ambitions to develop an “autonomous” defense policy were frustrated by the pacifist norms of Article 9. See KATZENSTEIN, supra note 40, at 117–18, (citing Odawara Atsushi, No Tampering with the Brakes on Military Expansion, 32(3) JAPAN QUARTERLY 248, 249 (1985)). See also, PYLE, JAPAN RISING, supra note 158, at 273–76 (providing an account of Nakasone’s failure to overcome pacifistic norms during his tenure as Prime Minister in the mid-80s).

182 These principles affirmed that Japan would not possess, produce, or permit the introduction of nuclear weapons into Japan. The background to this is more complicated of course, as the Satō government actually had commissioned a study to determine whether Japan ought to develop nuclear weapons, and Satō himself made an agreement with Nixon and Kissinger, in November of 1969, to permit United States introduction of nuclear weapons into Okinawa if necessary in a crisis. TOGO, supra note 146, at 63. Satō, a Yoshida disciple (notwithstanding that he was Kishi’s brother), may be seen as having developed the principles for cynical reasons, but his actions further embedded the pacifistic norms in any event. Somewhat ironically, Satō received the Nobel Peace Prize in 1974 for his efforts.

183 For a comprehensive analysis of the military and defense policy developments in this period, see HUGHES, supra note 146, ch. 3; CHRISTOPHER W. HUGHES, JAPAN’S SECURITY AGENDA: MILITARY, ECONOMIC & ENVIRONMENTAL DIMENSIONS, ch. 4 (2005) [hereinafter HUGHES, SECURITY AGENDA].
It was a virtuous circle (or vicious, depending on one’s point of view), in which policy re-enforced the constitutive norms flowing from Article 9, and the norms in turn shaped policy. Herein we see the internalization of the international law principles in the most fundamental way. The continued growth and development of Japan’s military capability ran against the grain of these norms, and was the subject of considerable conflict, but it did not belie the significance or influence of the norms in Japanese politics and policy making. It was not until the 1990s that the pacifistic norms began to be undermined by perceived changes in the international environment, and the political constellations that had provided the fertile context for them began to change.

While Article 9 operated as a powerful constitutive norm during this entire period, however, its operation as a legal norm was less obvious and more ambiguous, a subject to which this analysis turns next.

5.2. Article 9 as Legal Norm

In considering the operation of a legal norm, particularly one enshrined in a constitutional provision, a natural starting point would be the manner in which it has been interpreted and enforced by the courts. But in the case of Article 9, it is indeed the treatment of the provision by the Supreme Court that makes the question of its operation as a legal norm more complicated. To begin, it is worth recalling the role of the courts under the Constitution. The GS drafting team had included strong powers of judicial review in the Constitution, which survived the ratification process intact. Article 81 of the Constitution provided that the Supreme Court was the court of last resort, with the power to determine the constitutionality of any law, order, regulation or other official act. Article 98 provided that the Constitution was the supreme law of the nation, and that any law or other government act that was contrary to the provisions of the Constitution were invalid and of no force and effect. Finally, Article 76 provided for the authority of the courts, establishing that the judiciary was to be independent and bound only by the Constitution.

Article 9 was one of the very first constitutional issues to reach the Supreme Court, when the leader of the Socialist Party brought an application to the Supreme Court for a declaration that the newly established NPR was unconstitutional. The Supreme Court dismissed the case in 1952, interpreting Article 81 as limiting
constitutional challenges to concrete cases, conforming to the
American model of judicial review.\footnote{Case Concerning the National Police Reserve, 6 MINSHU 783 (Sup. Ct., Oct. 8, 1952), available at http://www.courts.go.jp/english/judgments/text/1952.10.8-1952.-Ma-.No..23.html (trans.). This case ended debate over whether the Supreme Court could exercise a role akin to that of the Constitutional Court in Germany, in receiving general constitutional questions, or that of the Supreme Court of Canada in hearing references. See Hidenori Tomatsu, Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories, in Five Decades of Constitutionalism in Japanese Society 253–54 (Yoichi Higuchi, ed., 2001) (detailing the Supreme Court’s denial of the possibility of a constitutional court). Dan Fenno Henderson, Japanese Judicial Review of Legislation: The First Twenty Years, in The Constitution of Japan: Its First Twenty Years, 1947–67, at 120–22 (Dan Fenno Henderson ed., 1968).} In doing so the Supreme Court narrowed the scope of its jurisdiction. But the next Article 9 case to come before the Supreme Court would be the most important, the only one in which the Court would offer any interpretation of the provision itself, and a judgment in which it further limited its own authority quite radically.

The case, commonly referred to as the Sunakawa case, arose in the context of the protests leading up to the renewal of the 1952 Security Treaty in 1959. Demonstrators who were prosecuted for trespassing on U.S. base property pursuant to a special law governing U.S. facilities, argued that the maintenance of U.S. forces in Japan, and the 1952 Security Treaty that was the basis for the law, were in violation of Article 9(2). In March of 1959, the Tokyo District Court handed down a judgment that held that the treaty and the presence of U.S. forces were unconstitutional.\footnote{Sunakawa Case, 89 HANREI TIMUZU 79 (Tokyo D. Ct., Mar. 30, 1959), abridged translation in Japanese Law in Context: Readings in Society, the Economy, and Politics (Curtis Milhaupt et. al. eds., 2001) [hereinafter Sunakawa DC].} The government made the unprecedented step of上诉ing directly to the Supreme Court, and the Supreme Court heard and granted the appeal with breathtaking speed, handing down its judgment in December of 1959.\footnote{In an extraordinary archival discovery in early 2008, it was revealed that the U.S. Ambassador to Japan met with both the Foreign Minister and the Chief Justice of the Supreme Court to impress upon them the need for haste and, presumably, a positive result in the case. U.S. Coerced Court in ’59 Base Case, JAPAN TIMES, May 1, 2008, available at http://search.japantimes.co.jp/cgi-bin/m20080501a5.htm.}

In addressing the central question of whether the 1952 Security Treaty constituted a violation of Article 9(2), the majority decision of the Court held that the treaty was “featured with an extremely
high degree of political consideration . . . having a direct bearing upon the very existence of our country [as a sovereign power],” and that as such “there is a certain element of incompatibility in the process of judicial determination of its constitutionality by a court of law which has as its mission the exercise of the purely judicial function.”187 It went on to explain that unless the treaty is “obviously unconstitutional and void” it was not within the scope of the judicial review power of the Court, and had to be left to the discretion of the executive and the legislature. Neither the majority nor the seven concurring supplementary opinions188 provided any criteria by which a court might assess the difference between laws or treaties that were unconstitutional and those that were “obviously” unconstitutional. The powerful and withering opinion of Justice Kotani, dissenting on this issue, excoriated the majority for what constituted an abdication of judicial responsibility over all cases that involved issues of national importance.189

All the opinions, including those of the three dissenting justices, accepted without any analysis that Japan had an inherent right of self-defense, and that nothing in Article 9 foreclosed the exercise of that right. This part of the judgment was not necessary to the decision, but it remains the only Supreme Court pronouncement on the issue of the right to self-defense. The Court also held that the U.S. forces, not being under the command and control of the Japanese government, did not constitute the armed forces or other war potential prohibited by Article 9(2). This left open the question of whether or not armed forces similar to the U.S. forces then stationed in Japan, would be prohibited if they were under the command and control of Japan. That question came before the Supreme Court in the Naganuma Case in 1982, the only other significant Article 9 case to reach the Supreme Court.

In Naganuma, the question of the constitutionality of the SDF itself was squarely in issue. The SDA had successfully requested the Forestry Ministry to cancel the designation of a forest so as to

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188 Including one by Irei Toshie, then a Supreme Court justice, who had been the Director General of the Legislation Bureau during the drafting process.
permit the construction of a missile base. Residents in the area commenced an application claiming that the decision of the Ministry canceling the designation was improper, in part because the SDF itself was unconstitutional, and thus the decision could not be said to have been for the public benefit (one of the necessary grounds for such decisions). They claimed that the construction of the site would harm the water table, and make the area a potential target for Soviet missiles. The Sapporo District Court, in very careful and rigorous reasons handed down in 1973, rejected the Supreme Court’s application in Sunakawa of a “political question doctrine” to such issues, and held that the SDF constituted land, sea and air forces, in violation of Article 9(2).190

On appeal, the Sapporo High Court agonized over the proper interpretation of Article 9, and applied the doctrine from Sunakawa to argue that such issues were in any event not within the scope of judicial review. 191 In the end, however, it actually decided the case on the basis of standing. It did so based on the fact that between the initial hearing and the appeal, the missile site had been constructed (the injunction had been stayed pending appeal), and the SDF had built a number of dikes and other structures to minimize the risk of harm to the water table. The High Court held that the narrow legal interest that had been the basis for the applicants’ standing to commence the claim in the first place had thus been extinguished. When the case was finally decided by the Supreme Court in 1982, the Court entirely avoided the issue of the constitutionality of the SDF, also deciding the case on the basis of the standing issue, holding that the type of legal interest that individuals might have in larger public interests, were not the type of interest that could ground a constitutional claim. Since the applicants had lost their basis for a claim, that is the risk to their individual proprietary interests, they lacked standing.192 In so doing, of course, the Court made Article 9 virtually unenforceable,
for aside from an SDF member ordered into combat, it would be difficult to envision the circumstances in which a violation of Article 9 would ground a narrow legal interest of the kind defined as providing standing here.\(^{193}\)

The *Sunakawa* decision has been interpreted by some as the Court deferring to the discretion of the executive and legislature while nonetheless reserving for itself the authority to intervene in the future, in the event that the political branches made a clear or obvious violation of Article 9.\(^{194}\) From the perspective of the decision being part of the dialogue between different branches of government, it is open to such an interpretation, but from a purely legal analysis, and in the context of the institution of judicial review, it can be characterized as the beginning of the process of the courts withdrawing from the field of interpreting and enforcing Article 9 as a legal norm. The decision in *Naganuma* can be seen as having completed the process.

In this sense it can be argued that Article 9 did not function as a strong legal norm, or at least was not given effect in a meaningful way, due to the judicial abdication of its authority to interpret and enforce the provision.\(^{195}\) And it must be acknowledged that the Supreme Court’s position thereby undermined and weakened the normative power of Article 9 in its entirety. But it is also important to note that both of these cases related to Article 9(2) and the constitutionality of maintaining “war potential” in Japan. The issue was not the use of force in Article 9(1), though the Supreme Court

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\(^{193}\) By way of comparison, Canadian courts will exercise their discretion to grant standing in constitutional cases where the applicant does not have a direct legal interest or exceptional prejudice, in which cases there is standing as of right, so long as the applicant can demonstrate that: 1) the issue is a serious one; 2) that the applicant has a genuine interest in the issue; and 3) there is no other reasonable and effective manner for the issue to come before the court. *Peter Hogg, Constitutional Law of Canada* 776–80 (5th ed., 2007).

\(^{194}\) See, e.g., Haley, *supra* note 81, at 24, 28 (describing the Supreme Court’s decision to leave all but clear violations of Article 9 to the discretion of political bodies). Iwaswa Yuji also argues that *Sunakawa* was significant in that the Court established that the substance of a treaty was subject to judicial review for constitutionality, which is an issue in the broader debate over the question of whether international law, pursuant to Article 98 of the Constitution, is the highest law of the land. *Yuji Iwasa, International Law Human Rights and Japanese Law: The Impact of International Law on Japanese Law* 100–02 (1998).

\(^{195}\) Another aspect of the larger project of which this Paper is a part will examine the extent to which the design of Article 9 may have contributed to the judicial response, and the extent to which Article 9 may have thereby played a role in undermining the institution of judicial review in Japan.
in *Sunakawa* did endorse without analysis the CLB view that Article 9(1) did not preclude the right to self-defense, and so while these decisions undermined the legal norms articulated in Article 9 generally, their impact can be said to have been much less significant on Article 9(1).

What is more, the emasculation of Article 9 in the courts did not mean that the provision ceased to exercise real influence as a legal norm, or even that the role of litigation became entirely insignificant in the continuing operation of Article 9. First, the abdication by the judiciary of its constitutional responsibilities left the field open for the CLB to exercise its institutional power in interpreting and enforcing Article 9. The early role of the CLB in establishing the official interpretation was examined earlier in this study, and it is indeed important to note that the Supreme Court in the *Sunakawa* judgment essentially conformed to the CLB interpretation of Article 9. And with the Supreme Court effectively insulating Article 9 from the scope of judicial review, the authority of the CLB as the official interpreter of the provision was greatly enhanced. Moreover, the CLB, which prides itself on its consistency, political independence, and ability to ensure that legislation conforms to its interpretation of constitutionality, vets all defense-related legislation before it becomes law. As will be seen when this examination turns to the events in the Gulf War, the CLB does indeed have the political power to enforce its will in ensuring that law and policy conform to the Constitution.

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196 See, e.g., NAKAMURA, *supra* note 128, at 3–6, at 11–18, and at 32–34; NISHIKAWA, *supra* note 128, ch. 2 (detailing the CLB’s role in interpreting Article 9, and arguing that its interpretations have constrained policy on the issue of collective self-defense and troop deployment); Haley, *supra* note 81, at 19, 28–29 (arguing that the stance of the judiciary on Article 9 opened the way for the CLB to become the principal authority on the question, and that the CLB has imposed a “lasting and politically effective constitutional constraint” on Japanese policy). See also Samuels, *supra* note 128, at 4 (similarly arguing that the CLB filled the void left by the Courts), and SAMUELS, *supra* note 160, at 51 (discussing the power of the CLB in vetting legislation, and its power vis-à-vis other ministries). Samuels has also argued that the influence of the CLB has declined somewhat since the 1990s, and particularly since the era of Koizumi and 9/11. *Id.* at 75–76. But in interviews with senior officials in the Ministry of Defense and Ministry of Foreign Affairs, both of whom were involved in the legislative process for defense legislation, I was advised that this was not the general view within either of those ministries. Interview with official at the Ministry of Defense in Ichigaya, Tokyo (Japan) (July 31, 2008); Interview with official at the Ministry of Foreign Affairs in Kumigaseki, Tokyo (Japan) (Aug. 13, 2008).
Second, with respect to the role of the courts, parties continued to use litigation to advance claims that government policy violated Article 9, notwithstanding the apparent futility of the exercise in light of the Supreme Court decisions in Sunakawa and Naganuma. It has been observed that this recourse to the courts is not so much an attempt to actually obtain the enforcement of Article 9 as a legal norm by the courts, but rather is a means of drawing attention to the contested nature of the issue and to trigger the powerful norm in Japan against overriding minority political views in a majoritarian fashion. In this sense then, the use of litigation is a means of reinforcing and highlighting the constitutive social norms inherent in and associated with Article 9 as a means of influencing policy.

This was most recently illustrated by the case in Nagoya, in which the plaintiffs sought an injunction against further deployment of troops to Iraq, damages, and a declaration that the activity of the SDF in Iraq was a violation of Article 9. On appeal, the Nagoya High Court dismissed their claims for lack of standing, following the Naganuma precedent, but in obiter opined that the operations of the ASDF were so integrated with the activity of coalition forces as to constitute a use of force in violation of Article 9(1). The plaintiffs, losers in the case, were jubilant at the outcome, while the government could not appeal and was left fuming at the “unnecessary” nature of the opinion. This practice of using litigation to achieve objectives indirectly illustrates the famous observation of Haley’s, that law in Japan “serves as a means for legitimating norms while it remains relatively ineffective as an instrument of coercive control.”

197 See KATZENSTEIN, supra note 40, at 31–32, 118–20; see also HALEY, supra note 42, at 188 (“Given the improbability of a Japanese Supreme Court decision invalidating Japan’s defense policy, the purpose of bringing these actions is reasonably assumed to be to keep the issue before the public.”); CHINE, supra note 43, at 110 (referencing Haley’s argument that litigation over the merits of Article 9 is often a political act).

198 Nagoya Decision, supra note 157.

199 KATZENSTEIN, supra note 40, at 44 (quoting John O. Haley, Consensual Governance: A Study of Law, Culture, and the Political Economy of Postwar Japan, in 3 The Political Economy of Japan: Cultural and Social Dynamics 32, 61 (Shumpei Kumon & Henry Rosovsky eds., 1992)).
5.3. The 1991 Gulf War Crisis and its Aftermath

It is difficult to overstate the profound impact of the Gulf War crisis on Japanese foreign policy. Japan came under intense pressure to participate in the war effort, but the government was unable to do so. Togo Kazuhiko writes that the events, often referred to as “Japan’s defeat in 1991,” were such that “[t]he crucial issue of security, Japan’s position in the global community and her relations with the US were shattered.” Even as the events were unfolding, there was a sense within the government of crisis and looming disaster for Japanese foreign policy, and yet the government could not respond militarily in a manner that would satisfy international expectations. This was no existential threat to the life of the nation, but it was perceived as a crisis requiring the use of force. To return to the Ulysses metaphor, the Siren song was here in full voice and the felt need to respond was huge, but the pre-commitment bonds of Article 9 and its associated norms operated to utterly constrain the government’s ability to act.

Japan initially moved quickly in August 1990 to impose economic sanctions and freeze Iraqi assets, as authorized by U.N. Security Council resolutions. Within weeks of the initial invasion of Kuwait, Japan announced its contribution of $1 billion to the effort that the United States was beginning to coordinate. But as the coalition began taking shape and other countries deployed military forces to the Gulf, U.S. frustration began to mount over the apparent reluctance of Japan to become directly involved in the international effort. Not only did Japan receive two-thirds of its energy from the region, but it was perceived in the United States as now refusing to assist its treaty partner after decades of American military protection, and the United States was no longer restrained by Cold War imperatives in its criticism of Japan. Outrage was expressed in the U.S. Congress through the passage of a resolution calling for the withdrawal of U.S. forces based in Japan. Japan announced a further $3 billion contribution in mid-September, but only after leaks in the press about internal tensions, which exacerbated the perception that the government

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201 TOGO, supra note 146, at 77.
203 PYLE, JAPAN RISING, supra note 158, at 290–91.
was simply responding under pressure and contributing as little as it could get away with.\textsuperscript{204}

The reality was that many in the Japanese government felt keenly the need for Japan to contribute more and in a more direct manner. Ozawa Ichiro, then an influential member of the younger generation of LDP politicians, led a delegation to Prime Minister Kaifu’s residence to press the argument for a Japanese contribution of troops to the coalition forces.\textsuperscript{205} Ozawa was of the view that a U.N.-authorized collective security operation was not inconsistent with the Constitution.\textsuperscript{206} Kaifu himself was also initially inclined to take action to provide more direct contributions to the coalition efforts, but his position changed after consulting with the CLB Director General, Kudō Atsuo. The CLB position was that it was constitutionally impermissible for Japan to deploy the SDF in support of the likely war in the Gulf, since it would constitute a use of force in settlement of an international dispute, and as part of either an exercise of collective self-defense or collective security, or both (the U.N. Security Council had not yet passed resolution 678, authorizing the use of force).\textsuperscript{207} The government tried to develop programs for civilian participation in support of coalition forces, but these were met with opposition within the public at home, and abroad it simply added to the growing perception of Japan as shirking its international treaty responsibilities.

The government then submitted the U.N. Peace Cooperation Bill to the Diet in October 1990, which contemplated the establishment of a “U.N. Peace Cooperation Corps” for dispatch to the Gulf in order to provide non-combat related logistical support

\textsuperscript{204} Togo, supra note 146, at 305.

\textsuperscript{205} Samuels, supra note 128, at 7.

\textsuperscript{206} Ozawa put his thoughts on the issue into his book: Ozawa Ichiro, Nihon kaizō keikaku [A PLAN FOR THE REORGANIZATION OF JAPAN] (1993). Part Two of the book outlines his views on what Japan had to do to become a “normal” country. Ozawa continues to hold the view today, in his position as leader of the JDP, that collective security is consistent with the Constitution. He points to the clause in the preamble of the Constitution: “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. We believe that no nation is responsible to itself alone . . . .” Id.

\textsuperscript{207} See Dinstein, supra note 4, at 274 (arguing that such action was an exercise of collective self-defense and not a collective security operation, notwithstanding the resolution).
for coalition forces. This “peace cooperation corps” was to be distinct from the SDF, but it would be primarily comprised of SDF “volunteers.” The bill was wrecked on the reefs of Article 9 objections. The government itself had in 1980 submitted a written statement to the Diet stipulating that the participation of the SDF in U.N. operations was unconstitutional and impermissible if the purpose of the U.N. forces was to use force. Since it was clear that the coalition forces gathering in the Gulf were there for the purpose of employing force in the event Iraq refused to withdraw from Kuwait, it followed that SDF troops, volunteers in a “peace corps” or otherwise, could not participate. There were tortured debates in which the government argued that the SDF would be “collaborating” but not “participating,” and the government consistently maintained in the debate that its interpretation of the constitution had not changed, and that this would not be an exercise of collective self-defense. By November, however, the government could not even get more than half of the LDP itself on board, and it had to withdraw the bill.208

It was not merely the CLB intransigence that stymied the government. Important members of the government took the position that Japan could not simply violate the constitutional principles because of the perceived need to meet international expectations. Miyazawa Kiichi, who would succeed Kaifu as Prime Minister, said at the time “[w]e must clearly state that we cannot change the Japanese Constitution at this time. Even if other countries say that having such a constitution is outrageous, we must maintain the position we decided on this and it’s not for others to interfere.”209 Moreover, not only were all the opposition parties lined up against the bill, but the majority of the public was also squarely opposed to it.210 And the opposition to the bill was fundamentally because of the widespread view that any contribution of troops to the looming conflict would constitute a violation of Article 9. The constitutionality of collective self-
defense and the contribution of troops to U.N. operations was the fundamental issue in the crisis, and the constraints imposed by the Constitution ultimately prevented the government from being able to develop and implement policies to meet U.S. and international expectations.\textsuperscript{211} The power of both the narrow legal rule and the broader constitutional and social norms of Article 9 were at work.

Notwithstanding the opinions of politicians such as Miyazawa regarding the necessity of respecting the constitutional constraints, the Gulf War crisis was indeed widely seen as a humiliating catastrophe for Japan. The government ended up having contributed over $13 billion, but the perception within the country was that Japan was being viewed with derision by the rest of the world for its so-called checkbook diplomacy. Much was made of the fact that when Kuwait took out a full page ad in the New York Times and the Washington Post to thank all the countries that had contributed to its liberation, Japan was conspicuously absent from the list.\textsuperscript{212} The sense of humiliation bit deep, and led to a sea change in both government and public views about Japan’s role in the world and the necessity to contribute more to international peace and security.\textsuperscript{213}

Nonetheless, notwithstanding the shift in attitudes following the crisis, Article 9 and its associated norms continued to exercise constraints on the government’s ability to move policy in the direction of making greater military contributions to international security efforts. The first step was in September 1991, while the wounds were still fresh, when the Law for Cooperation in Relation to United Nations Peacekeeping Activities,\textsuperscript{214} commonly known as

\textsuperscript{211} PYLE, JAPAN RISING, supra note 158, at 290; TOGO, supra note 146, at 305–06, 386–87. Academics, at the time and thereafter also raised other arguments against participation, including the need to maintain the support of the Arab world. See, e.g., WATANABE YÔZO, supra note 174, at 245–46.

\textsuperscript{212} TOGO, supra note 146, at 307.

\textsuperscript{213} See FUKUSHIMA, supra note 208, at 69–70 (describing the consensus that emerged regarding the role SDF forces should play in future U.N. missions in the wake of the 1991 Gulf War); see also TOGO, supra note 146, at 387, 427 (noting that “[t]here was awareness in Japan that something had to be done to remedy the situation” and that the SDF began “actively participating in UN peacekeeping operations” following the 1991 Gulf War); HUGHES, JAPAN’S RE-EMERGENCE, supra note 146, at 75 (discussing the passage of bills in the Diet which aimed at enhancing security cooperation between the United States and Japan through the grant of additional powers to the prime minister to command the SDF).

\textsuperscript{214} Kokusai rengo heiwa iji katsudo nado ni taisuru kyoryoku ni kansuru hôritsu [Law Concerning Cooperation for United Nations Peacekeeping Operations and Other Operations], Law No. 79 of 1992, as amended [hereinafter the PKO Law].
the PKO Bill (and when passed, the PKO Law), was submitted to the Diet. In contrast to the earlier bill, it limited the contemplated contributions to U.N. peacekeeping operations.

U.N. peacekeeping operations had evolved in the 1950’s as a U.N. sanctioned mechanism to create and maintain conditions of peace and stability in areas of regional conflict, when Cold War deadlocks in the Security Council precluded the authorization of collective security operations under Article 42 of the Charter.\footnote{For a good overview of this development, see Max Hilaire, United Nations Law and the Security Council (2005). Then Canadian Minister for External Affairs, Lester Pearson, received the Nobel Prize for Peace in 1957 for his part in developing the peacekeeping formula during the 1956 Suez Crisis.} The traditional U.N. peacekeeping formula as it operated during the Cold War was predicated upon there being a ceasefire in place, and there being mutual consent to the presence of U.N. peacekeeping forces to monitor and help maintain the ceasefire. Such operations did not involve the use of force in the sense contemplated by Article 42 of the Charter.\footnote{Indeed, there is no clear provision in the Charter for the peacekeeping formula as it developed in the Cold War years, but it came to be accepted practice, and it clearly was not seen as collective security pursuant to Article 42. See Gray, supra note 137, at 200–04 (describing the Cold War dynamic between the U.N. General Assembly and Security Council and the emergence of peacekeeping efforts); Hilaire, supra note 215, at 25 (discussing U.N. peacekeeping during the early years of the Cold War).} Generally, the principle governing U.N. peacekeeping operations was that force was only to be used by participating peacekeepers in self-defense.\footnote{Gray, supra note 137, at 203. The subject of peacekeeping itself is complex, and it has evolved in the post-Cold War world to include peace enforcement and other hybrids that complicate these principles. Even as early as 1960, the ONUC forces were authorized to use force to prevent civil war. But generally, PKO forces were limited by rules of engagement that restricted the use of force to self-defense.}

Japan had in fact contributed observers to such operations in the past, though typically election monitors and the like, and never members of the SDF.\footnote{In 1988 Japan had contributed a Foreign Ministry official as political counselor to UNGOMAP in Afghanistan, and another had been sent as an observer to UNIIMOG on the Iran-Iraq border in 1988-89. Togo, supra note 146, at 385. Election monitors were sent to Namibia, Nicaragua, and Haiti, in 1989-90. Caroline Rose, Japanese Role in PKO and Humanitarian Assistance, in JAPANESE FOREIGN POLICY TODAY: A READER 122, 124 (Inoguchi Takashi & Purnendra Jain eds., 2000). See also Hirose Yoshih, Kokuren no heiwaji katsudo— kokusaihō to kenpo no shiza kara [U.N. Peacekeeping Activity: From the Perspective of International Law and the Constitution] (1992).} But notwithstanding the fact that
peacekeeping operations did not constitute either collective self-defense or collective security operations, and were not authorized to use force other than in self-defense, and notwithstanding the shift in public opinion regarding direct contribution to some forms of international peace efforts (from 80% opposed to any deployment of the SDF in the Gulf War, to almost 60% in favor of some kind of PKO participation in 1991), the new PKO Bill was extremely narrowly framed, and it still met with heavy weather in the Diet.

The bill stipulated explicitly that the activities of SDF members participating in U.N. peacekeeping operations pursuant to the law were not to be construed as constituting the use of force. It also included five conditions to Japanese participation, the last two of which were unique and raised the bar for participation significantly, namely, that if any of the three previous conditions (ceasefire, consent, and impartiality) ceased to obtain, Japanese forces were to be withdrawn; and that the use of weapons by SDF personnel was to be strictly limited to that required for personal protection. The fifth condition meant that Japanese troops could not respond with force to defend other peacekeepers who might come under attack. Moreover, the fourth condition contemplated Japan pulling out of operations as soon as one side or the other withdrew its consent to Japanese forces being there, or the ceasefire agreement was breached. These strict restrictions, with their rather unpalatable ramifications, were directly attributable to the perceived limitations of Article 9, and were dictated by the CLB in accordance with its interpretation of Article 9.

Yet even those restrictions were not sufficient to satisfy the opposition, and the government had to agree to the provisions in the bill authorizing “core activities” of peacekeeping (cease-fire

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219 Rose, supra note 218, at 127.

220 The use of arms was provided for specifically in Article XXIV of the law, which limited the use of small arms under Section 1 to situations “if it is deemed that the unavoidable needs exist on reasonable grounds so as to protect their own lives or persons or those of other Corps Personnel present with them on the same spot,” and provided in Section 4 that such use would not cause harm to other persons “except for cases corresponding to the provisions of Articles 36 and 37 of the Penal Code (Law No. 45 of 1907).” Shunji Yanai, Law Concerning Cooperation for United Nations Peace-Keeping Operations and Other Operations, in 36 JAPANESE ANNUAL OF INT’L L. 33, 39 n.11 (Soji Yamamoto et al. eds., 1995).

221 TOGO, supra note 146, at 388; see also Yanai, supra note 220, NAKAMURA, supra note 128, at ch. 4.
monitoring, patrolling, checkpoint operation, etc.) being “frozen” *sine die*, with only the humanitarian and logistical support activity being immediately authorized.222 New legislation would be required to implement the “frozen” or suspended core activities, and thereafter, new legislation would be required for each and every deployment of SDF personnel for peacekeeping operations that would entail such core activity. Even so, the public and opposition party resistance was significant, but the bill passed in June of 1992 and came into effect in August.223

Japan was able to deploy peacekeepers shortly thereafter, with the establishment of UNTAC in Cambodia in March 1992. The mission was limited to SDF engineers and civilian police, and it came under international criticism for Japanese efforts to remain out of harm’s way, but it was the first significant and public deployment of SDF abroad since the war. 224 The mission was portrayed as a success, and Japan continued to contribute peacekeepers to U.N. missions throughout the 1990s, but always under the limitations of the five conditions, and never engaging in the “core activities” of military peacekeepers. Even as Japan nurtured growing ambitions to obtain a permanent seat on the U.N. Security Council, therefore, Article 9(1) constrained its operations in support of the U.N., and undercut its aspirations. 225

5.4. The Post-9/11 World

Along with the shifting attitudes about the need for Japan to contribute to international peace and security, there were also developments in the 1990’s that significantly affected the sense of insecurity and vulnerability in Japan. The rise of a North Korean nuclear threat in 1993 was soon followed by the Taiwanese straits crisis during 1995-1996, then the North Korean missile tests in 1998, and the increasing incidences of North Korean “spy ships” entering Japanese waters. These were coupled with the perceived

222 TOGO, supra note 146, at 388; Rose, supra note 218, at 128. The different operations are set out under the definition of “international peace cooperation assignments” in Article III(3) of the PKO Law. See also FUKUSHIMA, supra note 208, at 71-73.
223 TOGO, supra note 146, at 389.
225 TOGO, supra note 146, at 379-80.
inadequacies in the government’s response to the Kobe earthquake and the *Aum Shinrikyo* sarin gas attack, adding to a general sense of insecurity. The later disclosure that North Korea had abducted some thirteen Japanese nationals in the 1980’s further increased the public sense of vulnerability and created a heightened interest in national security. The government issued a new NDPO in 1995 and the 1997 Guidelines discussed earlier. Both of these expanded the scope of SDF operations while repeatedly pronouncing adherence to the Article 9 limitations.  

It was within this context that, in April 2001, Koizumi Junichiro became prime minister. He had come into the LDP under the wing of Fukuda Takeo (father of Fukuda Yasuo, who was prime minister during 2007-2008) and was very much a part of the anti-mainstream revisionist wing of the party. He would go on to become one of the most popular and politically powerful prime ministers in the post-war era. He used his power within the party to sideline the pragmatists of the Yoshida school and to significantly advance policy on security and constitutional issues during his five years at the helm.

The September 11th terrorist attack on New York City and Washington D.C. occurred just five months into his term. It was an opportunity to make amends for the failures in 1991 and to advance many of the issues on the revisionist agenda, and Koizumi seized the moment with great speed and determination. Within a week of the attack Koizumi announced a policy of unqualified support for the United States and the international effort against terrorism. Less than two weeks after that, he enacted the Anti-Terrorism Special Measures Law (ATSML), which authorized the

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228 Heisei 13 nen 9 gatsu 11 nichi no amerikagasshūkoku ni oite hasseishita terorisuto kōgekitō ni taiōshite okonowareru kokusairengōkensho no mokuteki tassei no tame no shōgaikoku no katsudō ni taiōshite waga kuni ga jishō suru sochi oyobi kanren suru kokusairengō ketsugi tou ni motozukuri jindōteki sochi ni kan suru tokubetsu sochihō [The Special Measures Law 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 11 September 2001 in the United
government to contribute to the efforts of the international community in the “prevention and eradication” of international terrorism. Specifically, the ATSML authorized the government to use the SDF in the provision of “Cooperation and Support Activities, Search and Rescue Activities, Assistance to Affected People, and other necessary measures.” 229 This provision consisted primarily of providing materials and services (such as medical services, transportation, and other logistical services) to the forces of other countries.

The ATSML was passed into law in record time for a bill of this nature, taking only ten days in a process that was characterized by little controversy. As Togo writes, “[w]hat the Kaifu government wanted to achieve in assisting the UN multinational forces during the Gulf War was basically accepted in relation to the common fight against international terrorism.” 230 Yet, even ten years after the 1991 defeat, in the midst of shifting attitudes on security and in the face of the terrorist attack that was widely perceived as world-altering, the ATSML reflects the constraints of, and is responsive to, the provisions of Article 9. Thus, it was specified that “these measures must not constitute the threat or use of force,” and measures were limited to “areas where combat is not taking place or not expected to take place while Japan’s activities are being implemented.” 231 Where such areas involved the territory of a foreign state (as opposed to international waters), consent of the state in question had to be obtained. 232 As with the PKO Law, it provided that if the implementation areas no longer met these criteria, the Minister of State for Defense was required to either alter the area designation or order the cessation of Japanese activities in the area. In the event that combat developed in the area, the on-scene commander was required to suspend activities

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229 ATSML, supra note 228, art. 3(1).
230 Togo, supra note 146, at 393.
231 ATSML, supra note 228, arts. 3(2), 3(3)(ii).
232 id. art. 3(3)(ii).

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...or evacuate the area pending such orders.\textsuperscript{233} The use of weapons was subject to the same restrictions as under the PKO Law, including the restriction that any bodily harm caused by the use of firearms was limited to situations that would meet the Japanese domestic criminal law requirements of self-defense and necessity.\textsuperscript{234}

The Japanese government acted quickly on the basis of the new law and dispatched five ships and approximately eight aircraft to participate in support operations in the Northern Indian Ocean related to the invasion of Afghanistan.\textsuperscript{235} At the same time, legislation was passed to finally “unfreeze” the core activities provided for in the PKO Law.\textsuperscript{236} Shortly thereafter the government passed a series of new laws for which conservatives had long been calling, which set out the mechanisms, procedures, and legal authority pursuant to which the SDF could respond in the event of an emergency. These created the legal basis for a range of military activity that had been missing due to the taboos associated with Article 9. But even with their implementation in the aftermath of an international crisis, their detail reflected the continued influence of Article 9(1).\textsuperscript{237}

With the U.S. invasion of Iraq in 2003, Koizumi again came to the support of the Bush administration, and again the restrictions of Article 9 made themselves felt. While Koizumi fully supported the U.S. position politically and made financial contributions to the humanitarian aspects of the occupation as soon as the war began, the norms against use of force still operating in Japan precluded

\textsuperscript{233} Id. arts. 7(3), 7(4).

\textsuperscript{234} Id. art. 10 (citing articles 36 and 37 of the penal code).

\textsuperscript{235} Though the dispatch of an Aegis destroyer as part of the contingent was delayed due to debate over the constitutionality of its participation in electronic warfare and intelligence gathering operations.

\textsuperscript{236} TOGO, supra note 146, at 394–95.

\textsuperscript{237} HUGHES, JAPAN’S RE-EMERGENCE, supra note 146, at 73–76; BOYD & SAMUELS, supra note 104, at 43–44. For a discussion of the three new laws for contingencies in the event of armed attack, see Isozaki Yōsuke, Buryoku kōgeki jūtai taishōhō tou yūji 3 pō [3 Emergency Laws for Response to Circumstances of Armed Attack and Other Matters], 1252 JURISTO 54 (2003) (Japan). For discussion of the seven additional laws passed in 2004, see Oishi Toshio, Kokuminhogaōō tou yūji kanren 7 hō [7 Emergency Laws for the Protection of Nationals and Other Matters], 1274 JURISTO 41 (2004) (Japan). For a further discussion and analysis of both sets of laws, see TAMURA, supra note 121, at ch. 9 and HATAKE, supra note 105, at ch. 3. The laws in part created legal authority for various SDF actions in the event of armed attack, but also provided for domestic implementation of aspects of LOIAC, such as the handling of prisoners of war.
Koizumi from offering any direct support until the initial military operation was complete and the “occupation” of Iraq was established by U.N. resolution.\textsuperscript{238} Even then, the bill the government submitted to the Diet to authorize the deployment of SDF troops to Iraq limited the purpose of the mission to strictly humanitarian and reconstruction assistance, and contained the same limitations and restrictions as the ATSML.\textsuperscript{239} The bill was passed into law in July 2003, but it was controversial. Even politicians such as Ozawa Ichiro, the champion of international cooperation, argued that the deployment of SDF troops to Iraq, although limited to humanitarian efforts, would be a violation of Article 9.\textsuperscript{240} Once again, lawsuits were brought to challenge the deployment, and remind the nation that the norms of Article 9 were not dead, notwithstanding that the cases would likely be dismissed by the district courts.\textsuperscript{241} When the four hundred SDF troops arrived in Iraq, the Japanese government informed other coalition members that Japanese troops could not use force to defend anyone other than themselves.\textsuperscript{242}

Koizumi brought the army contingent home from Iraq as the insurgent conflict deepened in 2006, though the air force contingent remained to continue to provide airlift support. The support for “anti-terrorist” activities in Afghanistan under the ATSML continued until late 2007, resulting in several extensions of the law. When it came up for renewal in November 2007, however, there was increasing debate over the legitimacy of Japan’s operations in the Indian Ocean and the extent to which its support might actually be aiding U.S. efforts in Iraq. Ozawa Ichiro, then the leader of the DPJ, opposed renewal of the ATSML on the grounds that operations in Afghanistan constituted collective self-defense rather than U.N.-authorized operations, and therefore

\textsuperscript{238} TOGO, supra note 146, at 309.
\textsuperscript{239} Iraq SML, supra note 127.
\textsuperscript{240} Samuels, supra note 128, at 11.
\textsuperscript{241} \textit{See, e.g.}, Injunction on the Dispatch of Self-Defense Forces to Iraq and Other Matters Case, Sapporo D. Ct., Nov. 19, 2007, (TKC Lex/DB No. 28140188), \textit{available at} http://www.courts.go.jp/hanrei/pdf/20071220100819.pdf (dismissing a claim that the Iraq SML was a violation of Art. 9); and Injunction on the Dispatch of Self-Defense Forces to Iraq and Other Matters Case, Kyoto D. Ct., Mar. 23, 2007, (TKC Lex/DB No. 28130979), \textit{available at} http://www.courts.go.jp/hanrei/pdf/20070405161112.pdf (similarly dismissing a claim that the Iraq SML was a violation of Art. 9).
\textsuperscript{242} Samuels, supra note 128, at 7.
violated Article 9. The debate again demonstrated the salience and normative power of Article 9. In the end, the issue led to Prime Minister Abe’s sudden and ignoble resignation and the government was unable to pass the bill renewing the law. A replacement law was enacted in early 2008, with much more stringent restrictions on the MSDF’s operations and the kind of support it could provide.

The exact lines delineating between collective self-defense and collective security operations continued to blur in domestic discourse, a process quite deliberately encouraged by the government with its use of vague terms such as “international cooperation.” Nonetheless, the prohibitions on the use of armed force abroad, on the deployment of SDF as combatants in an international armed conflict, and on the participation in collective self-defense and collective security (even as the scope of these concepts may be shrinking), continued to exercise real constraints on government policy. This was again reinforced in April 2008, when the Nagoya High Court stunned the government with its opinion that the operations of the ASDF in Iraq constituted a use of

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243 The debate reflected a rather confused understanding of the legal issues involved. For the Author’s view on the debate, see Craig Martin, Japan’s Antiterrorism Special Measures Law and Confusion Over U.N. Authority, JAPAN TIMES (Japan), Oct. 8, 2007, available at http://search.japantimes.co.jp/cgi-bin/eco20071008a2.html (last visited Oct. 20, 2008).


245 This term, which has no meaning in international law and could conceivably cover everything from collective self-defense to participation with a coalition in an aggressive war, is even used by the LDP in its proposed amendments to Article 9, made public in August 2005. The government, under Prime Minister Abe in 2007, raised the issue of “re-interpretation” Article 9, and it established an expert committee to study the issue of such “re-interpretation.” See ANZEN HOSHŌ NO HÔTEKI KIBAN NO SAIKÔCHIKU NI KAN SURU KONDANKAI HÔKOKUSHO, [REPORT OF “THE PANEL ON THE RECONSTRUCTION OF THE NATIONAL SECURITY LEGAL FOUNDATION”] (June 24, 2008), available at http://www.kantei.go.jp/jp/singi/anzenhosyou/houkokusho.pdf. Such “re-interpretation” is, in my view, entirely illegitimate, and the result-oriented approach taken by the panel further illustrated the illegitimacy of the process, but the perceived need to engage in such efforts is further evidence of the constraining power that the provision continues to exercise.
force in violation of both the Iraq SML and Article 9(1). The government was dismissive of the Court’s decision, but the judgment brought the issue back to the forefront of national debate and reminded the government that there are limits to its range of permissible conduct. While public opinion on the issues related to Japan’s identity as a pacifist state has evolved considerably over the last two decades, the bedrock principles of opposition to the use of force and any involvement in collective security activities, continue to receive broad public support.

In closing, a few words should be said about Article 9(2). This account has not examined the steady growth of the SDF and the military capability of Japan. In that regard Article 9 has clearly not operated as effectively to constrain policy, though even there it cannot be said to have been entirely without influence. Given the CLB’s consistent interpretation that Japan is permitted the minimum necessary military capability required to exercise the right of self-defense, the apparent constraint on military build-up in Article 9(2) was always the least effective component of the provision. Yet the unique prohibition on the maintenance of armed forces also helped shape the constitutive norms of Japan as a pacifist country, and formed the basis of much of the opposition to the SDF. At the same time, however, it was also the source of the most problems in dealing with Article 9 as a legal norm. The growing gulf between the reality of Japan’s sophisticated and very capable military and the clear prohibitions in Article 9(2) has made this issue the lightning rod for constitutional debate and conflict. As such it has also obscured the much more significant and effective normative power of Article 9(1), and the extent to which the international law principles on the prohibition of the use of force in Article 9(1) have operated to effectively constrain government policy.


6. CONCLUSIONS

The Japanese experience with Article 9 of its constitution has been rich and complicated. This Paper has only been able to touch on some of the features most relevant to the central inquiry, and much has had to be left unexplored. On the other hand, it has dwelt on some of the historical detail for the purpose of providing a “thick” account of the constitutional experience, as evidence in support of the conclusions being advanced. The breadth and complexity of the Article 9 narrative is indeed reflective of just how integral the issues surrounding this provision are to Japan’s politics, law, and broader history since the war. Nonetheless, it is suggested that the Japanese experience with Article 9 is not only important in terms of Japan’s own legal and political development, but also because it provides important lessons that are relevant to more general issues in constitutional law and the relationship between constitutional and international law. Indeed it is important to be clear that the analysis in this Paper has taken no position on whether the operation of Article 9 has, on balance, been beneficial or injurious to Japan’s national policy, or whether Article 9 ought to be amended and if so, how. It is not intended to be part of that debate, though its analysis of the international law perspective might be of some assistance in that national discourse.

The particular lesson of the Article 9 experience that this Paper has sought to establish is that it is feasible to incorporate international law principles on the use of armed force into national constitutions so as to effectively influence and constrain national policy regarding involvement in armed conflict. The evidence reviewed here suggests that the American drafters responsible for the initial design of Article 9 drew upon international law principles, specifically from the Kellogg-Briand Pact and Article 2(4) of the U.N. Charter, in drafting Article 9(1). That they had done so was clearly understood by the Japanese government and the legislators who deliberated on the draft during the ratification process. The provision was recognized in the process as being a device designed, at least in part, to prevent future governments from engaging in armed conflict and so may be characterized as a true self-binding pre-commitment device.

Moreover, the pacifist ideals underlying Article 9 were embraced during the ratification debates, and they became the locus of powerful social and constitutive norms such that the non-use of force and renunciation of military involvement became
closely bound up with the national identity. These norms were contested, it is true, and they continue to be the subject of debate, but they were internalized into the social and political fabric to such an extent that they significantly impacted national policy. Thus, Article 9 operated at several levels: as a legal norm, which was primarily articulated and enforced by the CLB and occasionally by the lower courts, and as a social and political norm, which manifested itself in political conflict and party platforms, public opinion, academia, and the media. In this sense, this history of the internalization and implementation of its principles on a number of domestic planes is consistent with and supportive of the transnational legal process theories of international law compliance.

It has been suggested here that the combined operation of these norms effectively shaped national policy, and in times of crisis effectively bound the government and prevented it from contributing more directly to international military operations. This function of Article 9 is not always obvious, given the periods when the government cynically used it as a convenient shield to ward off international and domestic pressure to become more involved and expend resources on international problems. But the binding power of Article 9 was certainly evident in the Gulf War of 1991, when the government sought desperately to contribute more to the coalition efforts but was stymied by CLB insistence that Article 9 prohibited such involvement, and the public itself used Article 9 as in the locus of its opposition to the war. The influence of Article 9 can be seen even now in the post-9/11 era. Moreover, the fact remains that Japan has not used force, been directly involved in any armed conflict, or deployed armed forces as combatants in a theatre of armed conflict since the promulgation of its constitution.

Of course the story is not a simple one and the “lesson” to be distilled from the experience is not without its complications. Article 9 did not simply incorporate principles of *jus ad bellum* in a straightforward manner. Article 9(2) grafted on to *jus ad bellum* principles a unique prohibition on the maintenance of all armed forces and a principle from *jus in bello* apparently intended to achieve *jus ad bellum* objectives. This jury-rigged provision thus contained internal conflicts that created inconsistencies with Japan’s treaty obligations and its perceived international responsibilities. These, in turn, are the primary reasons that Article 9 has been the lightning rod for such visceral political conflict, and
arguably why the judiciary has been so reluctant to enforce Article 9 as a legal norm.

Nonetheless, notwithstanding these complications, Japan’s experience with Article 9 still demonstrates that it is possible to incorporate principles of *jus ad bellum* into a national constitution and that those principles so incorporated can operate to effectively shape national policy on the use of armed force. Indeed, the Japanese experience, in which the principles of *jus ad bellum* were embraced and internalized as powerful norms at the political, social, and legal level and successfully operated at all three levels to shape policy in a manner consistent with international law, is powerful support for the international legal process theories on compliance with international law. Moreover, the incorporation of these principles in such a manner created a clear pre-commitment device. Evidence that the pre-commitment device thus designed operated to effectively constrain government policy in moments of perceived crisis supports not only the general theories of pre-commitment, but also the arguments being advanced here—namely, that it is possible to use constitutional pre-commitments to lock in and implement international law norms for the purpose of strengthening future compliance with the international law regime on the use of armed force.

Clausewitz wrote that the constraints that international law placed on the use of force were imperceptible and hardly worth mentioning, and at the time, bare century ago, that was all too true. Much has changed since then, however, and international law has developed to significantly limit the institution of war. As in other areas of international law, domestic implementation would likely further increase the effectiveness of the legal constraints on the use of armed force, and the pre-commitment mechanisms of constitutions could serve that purpose well. The details of that argument are left for another day, but Japan’s experience with Article 9(1) provides evidence that constitutional provisions can serve to bind the dogs of war.