
INTERNATIONAL LAW STUDIES

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Japan's 2015 Security Legislation: Challenges to its Implementation under International Law

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92 INT'L L. STUD. 249 (2016)

Volume 92

2016

Published by the Stockton Center for the Study of International Law

ISSN 2375-2831

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The thoughts and opinions expressed are those of the author and not necessarily of the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

I. INTRODUCTION

On September 19, 2015, the Upper House of the Japanese Diet passed two security bills introduced by Prime Minister Shinzo Abe amid fierce debate that divided the nation over their constitutionality.¹ This was the second time controversial security-related legislation had been enacted under the Abe administration. It followed enactment of the State Secret Protection Law in December 2013, again at a time public opinion was deeply divided.² In accordance with the “proactive contribution to peace” policy adopted by the Abe administration, the 2015 security legislation is designed to enable a “seamless response” to any security situation that may arise in order to secure the lives and peaceful livelihoods of Japanese nationals and to make a more proactive contribution to international peace and security.³

In Japan, the enactment of security-related legislation always faces controversy. The public debate over the most recent bills was further fueled by the decision made by Prime Minister Abe in 2014 to, in effect, reinterpret Article 9—the famous “war renunciation” clause⁴—of the Japanese Constitution, a reinterpretation that allows Japan to act in collective self-defense

1. Cabinet Bill No. 72 of 189th Diet Session (May 15, 2015); Cabinet Bill No. 73 of 189th Diet Session (May 15, 2015). For the public debate, see, e.g., Satoru Mori, *The New Security Legislation and Japanese Public Reaction*, THE TOKYO FOUNDATION (Dec. 2, 2015), <http://www.tokyofoundation.org/en/articles/2015/security-legislation-and-public-reaction/>; Peter Drysdale, *The Trouble with Japan's New Security Bills*, EAST ASIA FORUM (Aug. 3, 2015), <http://www.eastasiaforum.org/2015/08/03/the-trouble-with-japans-new-security-bills/>; Ben Ascione, *Storm Brews over Japan's New Security Laws*, EAST ASIA FORUM (Aug. 2, 2015), <http://www.eastasiaforum.org/2015/08/02/storm-brews-over-japans-new-security-laws/>.

2. Act on the Protection of Specified Secrets, Law No. 108 of 2013. For the public debate, see, e.g., Justin McDonnell, *Japan's State Secrets Bill Polarizes Society*, THE DIPLOMAT (Nov. 28, 2013), <http://thediplomat.com/2013/11/japans-state-secrets-bill-polarizes-society/>; Editorial, *Anti-Democratic Secrecy Bill*, JAPAN TIMES (Sept. 9, 2013), <http://www.japantimes.co.jp/opinion/2013/09/09/editorials/anti-democratic-secrecy-bill/>.

3. Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People (Provisional Translation), July 1, 2014, http://www.mofa.go.jp/fp/nsp/page23e_000273.html [hereinafter Cabinet Decision].

4. CONSTITUTION OF JAPAN, art. 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.”).

of key allies, such as the United States and Australia.⁵ This reinterpretation was controversial because the exercise of the right of collective self-defense has traditionally been considered prohibited by Article 9,⁶ notwithstanding the centrality of the 1960 Treaty of Mutual Cooperation and Security between Japan and the United States⁷ to Japan's security policy. While there is no express reference to the right of collective self-defense in the 2015 legislation, the deployment of the Japanese Self-Defense Forces (SDF) for military action when Japan itself is not subject to an armed attack was debated as an exercise of the right of collective self-defense during the enactment of this legislation.

The interpretation of Article 9 has been the subject of scholarly debate for many years;⁸ however, its interpretation by reference to relevant rules of

5. See, e.g., William Blum, *Shinzo Abe's "Reinterpretation" of the Japanese Constitution*, FOREIGN POLICY JOURNAL (July 15, 2014), <http://www.foreignpolicyjournal.com/2014/07/15/shinzo-abes-reinterpretation-of-the-japanese-constitution/>; David Letts & Hitoshi Nasu, *Japanese Constitutional Re-Interpretation: Much Ado about Nothing?*, SYDNEY MORNING HERALD (July 4, 2014), <http://www.smh.com.au/comment/japanese-constitutional-reinterpretation-much-ado-about-nothing-20140704-zsw7j.html>.

6. Naikaku Hosei Kyoku, Shuudanteki-Jieiken to Kenpou no Kankei ni tsuite [Cabinet Legislation Bureau, On the Relationship between the Right of Collective Self-Defense and the Constitution] (Oct. 14, 1972). This was a document submitted to the Budget Committee of the House of Councillors.

7. Treaty of Mutual Cooperation and Security between Japan and the United States of America, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632.

8. For English language literature, see, e.g., SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 233–48 (2010); Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus ad Bellum*, 30 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 267 (2008); John O. Haley, *Waging War: Japan's Constitutional Constraints*, 14 CONSTITUTIONAL FORUM, no. 2, 2005, at 18; Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICHIGAN JOURNAL OF INTERNATIONAL LAW 55 (2005); Hideo Nagano, *The Meaning of Article 9 of the Japanese Constitution*, in COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 239 (Kenneth L. Port & Gerald Paul McAlinn eds., 2d ed. 2003); Matthew J. Gilley, *Japan's Developing Military Potential within the Context of its Constitutional Renunciation*, 14 EMORY INTERNATIONAL LAW REVIEW 1681 (2000); Shotaro Hamura & Eric Shiu, *Renunciation of War as a Universal Principle of Mankind—A Look at the Gulf War and the Japanese Constitution*, 44 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 426 (1995); Sandra Madsen, *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, 3 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 549 (1993); James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW AND CONTEMPORARY PROBLEMS 171 (1990); OSAMU NISHI, THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN (1987).

international law rarely commands attention, even though the provisions of Article 98(2) of the Constitution refer to “faithfully observing”⁹ treaties and international law.¹⁰ Typifying this lack of attention, the Cabinet’s constitutional argument is based on a contextual interpretation by reference to the right to live in peace recognized in the preamble and the right to life, liberty and the pursuit of happiness in Article 13, rather than to the right of self-defense under international law.¹¹

Because of this controversy Japan has traditionally adopted a twisted meaning of the term “use of force” for the purpose of interpreting Article 9 to enable a limited degree of SDF activities. That is, the use of force subject to the Article 9 restrictions—in other words, being prohibited except for national self-defense and law enforcement—involves any deployment of SDF troops authorized to use weapons in combat situations. Conversely, support activities outside combat areas have been deemed not to constitute the “use of force” and therefore not restricted. This artificial distinction between different types of SDF activities is contrary to the general understanding of the term use of force under international law,¹² which encompasses the use of armed force in all forms whether it is directly or indirectly employed.¹³

The fixation with the constitutionality of use of force issues in the Japanese public debate calls into question whether, and to what extent, the international law issues that might arise with the implementation of the

9. The full text provides, “The treaties concluded by Japan and established laws of nations shall be faithfully observed.”

10. For an attempt by the author a decade ago to examine the constitutionality of the use of force in the exercise of the right of self-defense under international law, see Hitoshi Nasu, *Article 9 of the Japanese Constitution: Revisited in the Light of International Law*, 18 ZEITSCHRIFT FÜR JAPANISCHES RECHT [JOURNAL OF JAPANESE LAW] 50 (2004).

11. Cabinet Decision, *supra* note 3, § 3(2).

12. Akira Mayama, *Kenpo-teki Yousei ni yoru Shudan-Jieiken Genteiteki-Koushi no Hatsugen Keitai: Gaikoku Ryosui Soukai oyobi Gaikokugun Kouhou Shien* [The Manifestation of a Limited Exercise of the Right of Collective Self-Defense under the Constitutional Requirement: Minesweeping in the Territorial Sea of a Foreign State and Rear Support for Foreign Troops], 648 KOKUSAI MONDAI [INTERNATIONAL AFFAIRS] 16, 18–24 (2016).

13. See, e.g., Oliver Dörr and Albrecht Randelzhofer, *Article 2(4)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 200, 210-213 (Bruno Simma et al. eds., 3d ed. 2012). In order to avoid confusion, for the purposes of this article the term “use of force” under international law is referred to as the “use of armed force,” whereas the term “use of force”—or “use of weapons” as it appears in the relevant legislation—is used in the Japanese domestic law context. The term “use of physical force” is used to refer to other types of use of force such as the use of force by peacekeepers.

new security legislation have been scrutinized. This article examines how the SDF can respond with the use of force to contemporary security threats within the new legislative framework, while also complying with the relevant rules of international law. After briefly reviewing the historical background leading to the adoption of the new security legislation and its contents (Section II), it examines three different situations in which the SDF may find itself operating: “gray-zone” situations (Section III); peace-keeping operations with a mandate to protect civilians (Section IV); and collective self-defense (Section V).

II. JAPAN’S 2015 SECURITY LEGISLATION

The new security legislation package, which was enacted on September 30, 2015, consists of (1) the Law for Partial Amendments to the Self-Defense Forces Law and other Existing Laws for Ensuring Peace and Security of Japan and the International Community (Security Laws Amendment Law)¹⁴ and (2) the Law Concerning Japan’s Cooperation and Support Activities for Foreign Military Forces and other Personnel in Situations that the International Community is Collectively Addressing for Peace and Security (International Peace Support Law).¹⁵ The latter removed temporal and geographical restrictions previously imposed upon various peace support operations undertaken by the SDF overseas.¹⁶

The Security Laws Amendment Law is a collection of partial amendments to the following ten laws:¹⁷

14. Law No. 76 of 2015, http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g18905072.htm [hereinafter Security Laws Amendment Law]. For an English summary, see JAPAN MINISTRY OF DEFENSE, DEFENSE OF JAPAN 2015 ref. 6 (2015), http://www.mod.go.jp/e/publ/w_paper/pdf/2015/DOJ2015_reference_web.pdf [hereinafter 2015 DEFENSE WHITE PAPER].

15. Law No. 77 of 2015, http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g18905073.htm [hereinafter International Peace Support Law]. For an English summary, see 2015 DEFENSE WHITE PAPER, *supra* note 14, ref. 7.

16. For example, Law on Special Measures Concerning the Implementation of Humanitarian and Reconstruction Support Activities and Support Activities Ensuring Safety in Iraq, Law No. 137 of 2003 (which expired in 2009 having been extended once); Anti-Terrorism Special Measures Law, Law No. 113 of 2001 (which expired in 2007 having been extended three times).

17. In addition, technical amendments were made to ten other legislative instruments in the Annexes to the Law.

- Law Concerning the Self-Defense Forces (SDF Law);¹⁸
- Law Concerning Cooperation with United Nations Peacekeeping and other Operations (PKO Law);¹⁹
- Law Concerning Measures to Ensure Japan's Peace and Security in Areas Surrounding Japan (renamed as the Law Concerning Measures to Ensure Peace and Security of Japan in Situations that Constitute Grave Circumstances Affecting Japan) (Grave Circumstances Law);²⁰
- Law Concerning the Implementation of Ship Inspection Activities in Areas Surrounding Japan (renamed as the Law Concerning the Implementation of Ship Inspection Activities in Situations that Constitute Grave Circumstances Affecting Japan);²¹
- Law Concerning the Defense of Japan's Peace and Independence as well as National Security and the Safety of its Nationals in the Event of an Armed Attack against Japan (renamed as the Law Concerning the Defense of Japan's Peace and Independence as well as National Security and the Safety of its Nationals in the Event of an Armed Attack or an Existential Threat to Japan) (Defense against an Armed Attack Law);²²
- Law Concerning Measures to be Implemented During Military Action by the United States of America in the Event of an Armed Attack against Japan (renamed as the Law Concerning Measures to be Implemented During Military Action by the United States of America and other States in the Event of an Armed Attack or an Existential Threat to Japan);²³

18. Law No. 165 of 1954 [hereinafter SDF Law].

19. Law No. 79 of 1992 [hereinafter PKO Law].

20. Law No. 60 of 1999 [hereinafter Grave Circumstances Law]. The English translation in the 2015 Defense White Paper is the Law Concerning Measures to Ensure Peace and Security of Japan in Situations that Will Have an Important Influence on Japan's Peace and Security. 2015 DEFENSE WHITE PAPER, *supra* note 14, at 318–19.

21. Law No. 45 of 2000.

22. Law No. 79 of 2003. The English translation in the 2015 Defense White Paper is the Law for Ensuring Peace and Independence of Japan and Security of the State and the People in Situations including Where an Armed Attack against Japan Occurs and in Situations of an Armed Attack against a Foreign Country Resulting in Threatening Japan's Survival. 2015 DEFENSE WHITE PAPER, *supra* note 14, at 319.

23. Law No. 113 of 2004.

- Law Concerning the Use of Designated Public and other Facilities in the Event of an Armed Attack against Japan;²⁴
- Law Concerning the Regulation of the Marine Transport of Foreign Military Equipment and other Supplies in the Event of an Armed Attack against Japan (renamed as the Law Concerning the Regulation of the Marine Transport of Foreign Military and other Supplies in the Event of an Armed Attack or an Existential Threat to Japan);²⁵
- Law Concerning the Treatment of Prisoners of War and other Personnel in the Event of an Armed Attack against Japan (renamed as the Law Concerning the Treatment of Prisoners of War and other Personnel in the Event of an Armed Attack or an Existential Threat to Japan);²⁶ and
- Law Concerning the Establishment of the National Security Council.²⁷

The numerous changes in the 2015 legislation overhauled Japan's security law regime that had developed as a patchwork of technical amendments and special legislation,²⁸ addressing various strategic considerations that emerged over the last decade within the government and the security experts' community in response to Japan's changing security environment.²⁹ The Advisory Panel on the Reconstruction of the Legal Basis for Security, established in 2007 by Prime Minister Abe during his first term, was instructed to explore legal bases for the protection of U.S. Navy vessels on the high seas, the interception of a ballistic missile possibly directed at the United States, the use of force in international peacekeeping operations and logistical support for foreign forces participating in peacekeeping

24. Law No. 114 of 2004.

25. Law No. 116 of 2004.

26. Law No. 117 of 2004.

27. Law No. 71 of 1986.

28. For the history of legislative changes, see GLOBAL LEGAL RESEARCH CENTRE, THE LAW LIBRARY OF CONGRESS, JAPAN: INTERPRETATION OF ARTICLE 9 OF THE CONSTITUTION (Sept. 2015), <http://www.loc.gov/law/help/japan-constitution/japan-interpretations-article-9.pdf>.

29. The shifts in Japan's security policy have been explained in a variety of ways. *See, e.g.*, CHRISTOPHER W. HUGHES, JAPAN'S FOREIGN AND SECURITY POLICY UNDER THE "ABE DOCTRINE?": NEW DYNAMISM OR NEW DEAD END? (2015); BHUBHINDAR SINGH, JAPAN'S SECURITY IDENTITY: FROM A PEACE STATE TO AN INTERNATIONAL STATE (2013).

operations or other activities. The Advisory Panel's report was submitted to Prime Minister Fukuda in 2008,³⁰ recommending an interpretation of Article 9 of the Constitution that would permit the exercise of the right of collective self-defense and a more proactive engagement in United Nations collective security actions;³¹ however, no serious discussion took place within the government at that time and no action was taken on the report's recommendations.

The Council on Security and Defense Capabilities in the New Era, established under the center-left Democratic Party of Japan (DPJ) when it came to power in September 2009, conducted a review of Japan's security and defense policy in which it too addressed such issues as ballistic and cruise missile strikes and participation in international peace support operations.³² However, in contrast to the 2008 report, the Council's report emphasized the need to formulate defense capabilities in order to be able to "respond seamlessly" to developments in a "gray-zone" situation—a situation that lies "between peacetime and wartime."³³ It also advocated that Japan embrace a more proactive defense posture, observing that the traditional position that Japan could not exercise its right of collective self-defense under Article 9 of the Constitution "can be changed if Japan chooses to do so."³⁴ The revised National Defense Program Guidelines for FY 2011 and Beyond (2010 National Defense Program Guidelines), announced on December 17, 2010, focused on buttressing Japan's ability to respond to gray-zone situations.³⁵ This indicated a clear shift in defense policy resulting from growing concerns about the increased Chinese maritime activities near the Diaoyu/Senkaku Islands and "on water" incidents

30. ADVISORY PANEL, REPORT OF THE ADVISORY PANEL ON THE RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY (2008), http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf.

31. *Id.* at 22–31.

32. COUNCIL ON SECURITY AND DEFENSE CAPABILITIES IN THE NEW ERA, JAPAN'S VISIONS FOR FUTURE SECURITY AND DEFENSE CAPABILITIES IN THE NEW ERA: TOWARD A PEACE-CREATING NATION 25–34, (2010), http://www.kantei.go.jp/jp/singi/shin-ampobouei2010/houkokusyo_e.pdf.

33. *Id.* at 5, 36, 56.

34. *Id.* at 13.

35. MINISTRY OF DEFENSE, NATIONAL DEFENSE PROGRAM GUIDELINES FOR FY 2011 AND BEYOND 3–4, 6–7 (Dec. 17, 2010), http://www.tr.emb-japan.go.jp/T_06/files/National_Defense_Program_FY2011.PDF [hereinafter 2010 NATIONAL DEFENSE PROGRAM GUIDELINES].

that resulted from the Chinese actions.³⁶ It was also an attempt by the DPJ to achieve greater independence from the United States, reflecting, in particular, the controversy over the presence of U.S. Marine Corps Air Station Futenma in Okinawa.³⁷

After Prime Minister Abe took office to lead his second cabinet, the Advisory Panel was re-convened in February 2013, and submitted its final report on May 15, 2014.³⁸ The panel had been given a broader mandate than it had previously: to examine actions Japan should take to maintain its peace and security, and to ensure its survival in the new and emerging security environment.³⁹ The recommendations in this report provided the bases for the cabinet decision made on July 1, 2014, the objective of which was to develop a legal framework that would enable Japan to respond seamlessly to changing security circumstances in four areas: (1) gray-zone situations, (2) logistical support of foreign troops, (3) the use of force in peace support operations, and (4) the use of force in collective self-defense when there is an existential threat to Japan.⁴⁰

Each of these areas was subsequently addressed as follows. First, the cabinet pledged to address gray-zone situations by improving capabilities and coordination between government agencies, carefully examining relevant statutory provisions prior to national security and maritime security operations, and developing new legislation that would allow the SDF to carry out defensive and limited use of weapons to the minimum extent necessary to protect U.S. defense assets contributing to the defense of Japan.⁴¹ The 2015 legislation fulfilled this pledge with respect to the protection of U.S. defense assets,⁴² but did not directly address gray-zone situations. Instead, through a series of cabinet decisions, the government estab-

36. David Fouse, *Japan's 2010 National Defense Program Guidelines: Coping with the "Grey Zones,"* ASIA-PACIFIC PAPERS (Asia-Pacific Center for Security Studies, Honolulu), Apr. 2011, at 6–7, <http://apcss.org/wp-content/uploads/2011/12/Fouse-Japan-Final.pdf>.

37. See William T. Tow & Rikki Kersten, *Introduction*, in *BILATERAL PERSPECTIVES ON REGIONAL SECURITY: AUSTRALIA, JAPAN AND THE ASIA-PACIFIC REGION 1*, 4–5 (William T. Tow & Rikki Kersten eds., 2012).

38. ADVISORY PANEL, *REPORT OF THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY* (2014), http://www.kantei.go.jp/jp/singi/anzenhousou2/dai7/houkoku_en.pdf [ADVISORY PANEL REPORT].

39. *Id.* at 3.

40. Cabinet Decision, *supra* note 3.

41. *Id.* § 1(4).

42. SDF Law, *supra* note 18, art 95(2).

lished new communication procedures to expedite decision-making for national security and maritime security operations.⁴³

Second, the government adopted a new understanding under which support activities would not constitute the use of force unless they were conducted in places where combat activities were actually taking place. This replaced the previous position that limited the geographical scope where the SDF could operate to “rear areas.”⁴⁴ Based on this understanding, the new security legislation enables the SDF to provide logistical support (including ship inspections) to forces of other countries engaged in activities that contribute to Japan’s peace and security, or to international peace and security, with none of the temporal or geographical limitations (such as the areas surrounding Japan) of the previous understanding.⁴⁵ This means that the SDF is now allowed to engage in support activities anywhere in the world when the situation constitutes grave circumstances affecting Japan’s peace and security, for example, when Japan might be subject to an armed attack if the situation was left unaddressed,⁴⁶ or when foreign military forces are operating under UN authorization.⁴⁷ In both instances, however, the prohibition on providing support in an area where combat activities are taking place applies.⁴⁸

Third, although it was the least controversial aspect of the Advisory Panel report, a significantly progressive proposal was put forward to expand the scope of Japan’s cooperation with UN peacekeeping operations, enabling the SDF to use weapons to protect civilians under physical attack or for the purpose of executing the peacekeeping mission.⁴⁹ This proposal was incorporated into amendments to the PKO Law as part of the 2015 legislation, which also extended the types of missions in which the SDF

43. Responses to Foreign Naval Vessels Carrying out Navigation through the Territorial Sea or the Internal Waters of Japan that Does not Fall under Innocent Passage in International Law (May 14, 2015), 2015 DEFENSE WHITE PAPER, *supra* note 14 ref. 8; The Government’s Responses to Illegal Landing on a Remote Island or its Surrounding Seas by an Armed Group (May 14, 2015), *id.*, ref. 9; Responses to Acts of Infringement When Self-Defense Force Ships or Aircraft Detect Foreign Ships Committing Said Acts against Japanese Private Ships on the High Seas (May 14, 2015), *id.*, ref. 10.

44. Cabinet Decision, *supra* note 3, § 2(1).

45. Security Laws Amendment Law, *supra* note 14, arts. 3, 4.

46. Grave Circumstances Law, *supra* note 20, art. 1.

47. International Peace Support Law, *supra* note 15, art. 3.

48. Grave Circumstances Law, *supra* note 20, art. 2(3); International Peace Support Law, *supra* note 15, art. 2(3).

49. Cabinet Decision, *supra* note 3, § 2(2).

could participate, to include international peace and humanitarian operations undertaken by other international or regional organizations.⁵⁰ While the use of physical force by peacekeepers beyond their own personal self-defense (or, according to the Japanese official texts, “self-preservation”) was traditionally considered prohibited under Article 9,⁵¹ no serious objection appears to have been raised in the Diet during the legislative process or by the public at large.

Fourth, the government revisited its legal position on the legitimate use of force under Article 9 of the Constitution in light of the fact that Japan’s security environment had fundamentally changed and was constantly evolving as a result of the global power balance shift, rapid technological advances and various transnational threats.⁵² More specifically, the government proposed a revision to one of the three requirements for the legitimate use of force, “when an armed attack against Japan occurs,” to include situations where an armed attack occurs against a country that has a close relationship with Japan and, as a result, threatens Japan’s survival and poses a clear danger that fundamentally undermines the lives and freedoms of its nationals, and their right to pursue happiness (i.e., there is an existential threat).⁵³ This expanded authority for the use of force has been incorporated into the revised SDF Law and the Defense against an Armed Attack Law under the new security legislation.⁵⁴ It is important to note that the amendments expand the circumstances in which the legitimate use of force can be exercised within the ambit of Article 9, but do not justify them on the basis of the right of collective self-defense, although the Cabinet decision does refer to the right of collective self-defense as a potential legal basis under international law for actions taken in certain situations.⁵⁵

The fundamental philosophy that consistently underlies these security policy developments is the belief that Japan’s national security is better assured by creating a stable and predictable international environment and preventing the emergence of threats through international cooperation. This idea resonates with the doctrine of comprehensive security developed under former Japanese Prime Minister Masayoshi Ohira, which envisaged

50. Security Laws Amendment Law, *supra* note 14, art. 2.

51. Cabinet Decision, *supra* note 3, § 2(2) para. A; ADVISORY PANEL REPORT, *supra* note 38, at 37–38.

52. Cabinet Decision, *supra* note 3, § 3.

53. *Id.* § 3(3).

54. Security Laws Amendment Law, *supra* note 14, arts. 1, 5.

55. Cabinet Decision, *supra* note 3, §3(4).

the balancing of three approaches to national security: (1) self-help, (2) efforts to make the entire international environment more favorable to Japan's national security, and (3) coordination with States that share Japan's ideals and interests.⁵⁶ Prime Minister Abe's "proactive contribution to peace" policy response to the contemporary security environment surrounding Japan can be considered as a logical extension of this approach to national security. While the latest round of legislative updates goes some way to achieve the overall goal of enhancing Japan's national security, the devil remains in the details as to how the SDF can use the new legislative authority as the basis for the legitimate use of force, while still meeting the demands of the relevant rules of international law.

III. THE USE OF FORCE IN GRAY-ZONE SITUATIONS

The notion of gray-zone situations officially emerged in Japan with the 2010 National Defense Program Guidelines, which defined these situations as "confrontations over territory, sovereignty and economic interests that are not to escalate into wars."⁵⁷ Although it was the policy product of the previous DPJ government, the concept of the gray-zone appears in the new guidelines adopted by the Abe cabinet and also in the 2014 Defense White Paper, where it is noted that the number of gray-zone situations is increasing and where they are redefined as "neither pure peacetime nor contingencies over territory, sovereignty and maritime economic interests, etc."⁵⁸ Defined as such, the concept envisages disputes over territory, sovereignty and economic interests that will give rise to situations that can be categorized neither truly as peace nor war.

As discussed above, the 2015 legislation does not address gray-zone situations directly, but does expand the SDF's role in protecting U.S. de-

56. *Sougou Anzenhoshou Kenkyuu Group Houkokusho* [Comprehensive Security Study Group Report], in OHIRA SOURI NO SEISAKU KENKYUUKAI HOUKOKUSHO [POLICY STUDY GROUP REPORTS COMMISSIONED BY PRIME MINISTER OHIRA] 301, 309–13 (1980). For an English language commentary on Japan's comprehensive security policy at that time, see J.W.M. CHAPMAN, R. DRIFTE & I.T.M. GOW, JAPAN'S QUEST FOR COMPREHENSIVE SECURITY: DEFENSE—DIPLOMACY—DEPENDENCE (1983).

57. 2010 NATIONAL DEFENSE PROGRAM GUIDELINES, *supra* note 35, at 3.

58. MINISTRY OF DEFENSE, NATIONAL DEFENSE PROGRAM GUIDELINES FOR FY 2014 AND BEYOND 1 (2013), http://www.mod.go.jp/j/approach/agenda/guideline/2014/pdf/20131217_e2.pdf; MINISTRY OF DEFENSE, DEFENSE OF JAPAN 2014, Overview at 2 (2014), http://www.mod.go.jp/e/publ/w_paper/pdf/2014/DOJ2014_1-1-0_web_1031.pdf.

fense assets in certain circumstances, in the absence of an armed attack directed against Japan. These legislative changes therefore mean that the gray-zone situations in which the SDF is mandated to operate are broader than previously envisaged.⁵⁹ The introduction of two new concepts—grave circumstances affecting Japan and an existential threat to Japan—may make available more options under Japan’s domestic law in trying to find a way through gray-zone situations. However, these options must be considered in relation to relevant concepts of international law, namely the authority to use armed force (*jus ad bellum*) and the rules applicable when a situation amounts to an international or non-international armed conflict (*jus in bello*).

A. Jus ad Bellum Issues

Even though the SDF is authorized to use weapons to the minimum extent necessary for law enforcement purposes in gray-zone situations, various restrictions apply unless the situation amounts to an armed attack or poses an existential threat to Japan. The SDF Law authorizes SDF personnel to use weapons pursuant to the order of the command when reasonable in circumstances where there is an act of violence against, or a clear danger to, persons, equipment or facilities and when there is no other appropriate means to eliminate the threat. Specifically, weapons may be used to the extent considered necessary to maintain public order in an emergency situation,⁶⁰ to protect defense facilities⁶¹ or, under limited circumstances, to undertake maritime police action.⁶² The SDF can also employ weapons to the extent reasonable to protect weapons and other equipment, including, as provided for in the new security legislation, U.S. defense assets contributing to the defense of Japan.⁶³ However, the use of the weapons must not result in injury or death unless SDF personnel are acting in self-defense or with necessity under Articles 36 and 37 of the Criminal Code.⁶⁴ The use of weapons under these circumstances is considered a matter of law enforce-

59. Koichi Morikawa, *Gray Zone Jitai Taisho no Shatei to sono Houteki Seishitsu* [The Range of the Response to Gray Zone Situations and its Legal Nature], 648 KOKUSAI MONDAI [INTERNATIONAL AFFAIRS] 29, 29–30 (2016).

60. SDF Law, *supra* note 18, arts. 78, 81(1), 89–91.

61. *Id.*, arts. 81(2), 91(2).

62. *Id.*, arts. 82(1), 93(1).

63. *Id.*, art. 95(1)–(2).

64. Law No. 45 of 1907.

ment under Japanese domestic law and, therefore, is not considered to constitute a use of force subject to the restrictions of Article 9 of the Constitution.

On the other hand, actions that can be taken in national self-defense are regulated by the Defense against an Armed Attack Law. It establishes requirements that must be met in order for the prime minister to direct deployment of SDF units in the event of an armed attack under Article 76 with authority to use all necessary force under Article 88.⁶⁵

Certainly, however, the authorization for the use of weapons to protect U.S. defense assets does appear to go beyond the scope of what would normally be considered to be a law enforcement action under international law.⁶⁶ Indeed, Defense Minister Nakatani affirmed that in a gray-zone situation, the SDF could defend a U.S. Navy vessel engaging in a combined operation from an incoming missile attack with a defensive missile.⁶⁷ It is thus possible that the use of weapons authorized under Japanese domestic law could constitute a use of armed force in the sense of Article 2(4) of the UN Charter.⁶⁸

The question is whether Japan can justify such an action as an exercise of the right of national self-defense under international law. The issue arises because international law sets a relatively high threshold for the use of armed force to qualify as an armed attack for the purposes of exercising the right of self-defense under Article 51 of the UN Charter. As the International Court of Justice (ICJ) established in its *Nicaragua* judgment, the right of self-defense can only be exercised in response to the “most grave forms

65. Under Article 88 of the SDF Law, the SDF can use all necessary force in order to defend the nation when it is so authorized by Prime Minister in accordance with Article 76(1) of the SDF Law in the event of an armed attack or an existential threat to Japan. The use of armed force, however, must comply with the relevant rules and custom of international law and must not exceed what is considered reasonable under the circumstances. SDF Law, *supra* note 18, as amended by Law No. 76 of 2015, *supra* note 14, arts. 76, 88.

66. According to the ICJ, “[b]oarding, inspection, arrest and minimum use of force for those purposes” fall within the concept of maritime law enforcement. Fisheries Jurisdiction (*Spain v. Can.*), Judgment, 1998 I.C.J. 432, ¶ 84 (Dec. 4). *See also* Award in the Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname (*Guy. v. Surin.*), 30 R.I.A.A. 1, ¶¶ 425–45 (Perm. Ct. Arb. 2007).

67. Defense Minister Gen Nakatani, Remarks before the Special Committee of the House of Councillors on the Bills for Peace and Security of Japan and the International Community, 189th Diet Sess. Official Record of Proceedings, No. 11, at 5 (Aug. 21, 2015).

68. U.N. Charter art. 2(4) (“All 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.”).

of the use of force,” while use of force of a lesser degree of gravity (e.g., “mere frontier incidents”) limits the response to the taking of countermeasures not involving the use of armed force.⁶⁹ It is important to appreciate this judgment in its context, a dispute concerning armed bands sent by one State into the territory of another State, rather than the direct use of armed force by a State. Therefore, the judgment leaves room for justifying military action as self-defense under international law in a frontier incident involving the regular armed forces of another State.⁷⁰ The gravity standard nevertheless remains the law with respect to attacks launched by non-State armed groups, although State practice continues to evolve as the nature of the threat they pose changes due to technological advances.⁷¹

While the gravity standard is subject to different interpretation by States according to their perception of the threat to their national security, the deployment of the SDF under Articles 76 and 88 of the SDF Law in dealing with gray-zone situations could be problematic. In Japan, while an armed attack is interpreted as “an organized, premeditated use of force against Japan,”⁷² its action in national self-defense is subject to the political determination of an armed attack in accordance with Article 76 of the SDF Law. The official authorization for the deployment of the SDF in national self-defense may not be readily available, partly due to the high gravity threshold of an armed attack as informed by international law jurisprudence, but also due to the political considerations associated with recognizing the existence of an armed attack directed against Japan, particularly when the involvement of a foreign State in the attack is uncertain. The new concept of “an existential threat to Japan” could be a useful way to circumvent political risks involved in the official recognition of an armed attack directed against Japan; however, the concept, as it is currently defined un-

69. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 191, 195, 249 (June 27) [hereinafter *Nicaragua*].

70. See especially Judge Abdulqawi A. Yusuf, *The Notion of “Armed Attack” in the Nicaragua Judgment and Its Influence on Subsequent Case Law*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW 461, 463–70 (2012).

71. In the cyber context, see, e.g., Michael N. Schmitt, *Cyber Operations and the Jus ad Bellum Revisited*, 56 VILLANOVA LAW REVIEW 569, 583 (2011).

72. Prime Minister Junichiro Koizumi, Shuugiin Giin Kaneda Seiichi-kun Teishutsu Buryoku Kougeki Jitai ni kansuru Shitsumonsho ni taisuru Toubensho [Reply to the Questions Concerning an Armed Attack Submitted by Seiichi Kaneda, a Member of the House of Representatives] (May 24, 2003); SHIGENOBU TAMURA, KENICHI TAKAHASHI & KAZUHISA SHIMADA, *NIHON NO BOUEI-HOUSEI* [THE LAW OF DEFENSE IN JAPAN] 17 (2d ed. 2012).

der Japanese domestic law, still requires an armed attack against a foreign State in a close relationship with Japan and, in that respect, restricts its potential application as a ground for authorizing the deployment of the SDF in a gray-zone situation.

Accordingly, absent the recognition by the Japanese government of an armed attack against Japan or a close ally, any action taken to deal with a gray-zone situation is restricted, as far as the Japanese domestic law is concerned, to law enforcement which must comply with stringent regulation of the use of weapons. While under international law more forcible and effective action is justifiable,⁷³ institutionalizing the SDF's response according to the legal classification of situations under Japanese domestic law means that limited legal options are available to justify Japan's action in a gray-zone situation. This is particularly so where the action involves repelling threats to national security in a low intensity conflict that falls below the gravity threshold required to exercise the right of self-defense. For example, when a large fleet of fishing vessels, coordinated with the assistance of unmanned aerial vehicles for communication and intelligence collection, enters into a disputed maritime zone, the SDF can only respond by using weapons to the extent reasonable under the prevailing situation and under defined circumstances within the territorial sea that Japan claims.⁷⁴ However, limiting the SDF's response to the use of weapons to the extent reasonable under the prevailing situation may prevent it from taking effective action to suppress the incursion, for example, by destroying the unmanned aerial vehicles in order to disrupt communication, an action that would have been possible under Article 88 of the SDF Law. In other words, the strictures of the legislative framework for the use of force in Japan may expose its vulnerability to certain types of hostile conduct by external actors, especially when they engage in covert operations or surprise attacks.⁷⁵

73. Admittedly, its precise legal basis remains contentious. See Tom Ruy, *The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AMERICAN JOURNAL OF INTERNATIONAL LAW 159, 177–79 (2014).

74. SDF Law, *supra* note 18, art. 91; Maritime Safety Agency Law No. 28 of 1948 art. 20(2). Such action will be consistent with the relevant rules of international law: United Nations Convention on the Law of the Sea art. 25(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]; *M/V Saiga* (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10, ¶ 155.

75. Koki Sato, *Bouei-Houseido ni okeru "Kishuu Taisho no Mondai" no Genjou to Kongo no Kentou no Houkousei* [The Current Situation Concerning "the Issue of the Response to Surprise At-

This weakness can be exploited by hostile States and non-State actors capable of engaging in hybrid warfare.

Although there is no universally agreed definition of hybrid warfare, the term typically envisages a convergence or blending of regular and irregular warfare into multi-modal hostilities in terms of both their organization and the methods of warfare employed.⁷⁶ It involves a hierarchical command and control structure coupled with decentralized, networked units, combining conventional military capabilities with irregular tactics, cyberattacks, terrorist acts and other criminal activities that facilitate disorder and disruption in target State. The strategic rationale for engaging in hybrid warfare may vary; however, an important consideration from a legal perspective is that hybrid warfare exploits legal gaps that exist within the current international law framework in terms of the threshold for military response, attribution of conduct, and classification of the situation and personnel involved.⁷⁷ Hezbollah's engagement in hostilities in southern Lebanon with Israeli armed forces in the summer of 2006 demonstrated the group's ability to orchestrate State-like military operations in conjunction with decentralized cells employing adaptive tactics in ungoverned areas.⁷⁸ Russia's alleged employment of covert operations to seize government buildings in Crimea in February 2014, undertaken by unidentified armed groups wearing unidentifiable uniforms, arguably left NATO practically helpless to respond.⁷⁹ The concept of hybrid warfare also resonates in the Chinese concepts of "people's war" and "unrestricted warfare" which extend the potential battlespace into the civilian and non-military realm.⁸⁰ These concepts provide the philosophical foundation for using fishing ves-

tacks" in the *National Defense Legal System and the Future Direction of its Debate*], 32 BÔEIHÔ KENKYÛ [DEFENSE LAW REVIEW] 93, 96–97 (2008).

76. See generally FRANK G. HOFFMAN, *CONFLICT IN THE 21ST CENTURY: THE RISE OF HYBRID WARS* (2007); Sascha-Dominik Bachmann & Hakan Gunneriusson, *Hybrid Wars: The 21st-Century's New Threats to Global Peace and Security*, 43 SOUTH AFRICAN JOURNAL OF MILITARY STUDIES 77 (2014).

77. Christopher J. Borgen, *Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea*, 91 INTERNATIONAL LAW STUDIES 216, 268–71 (2015); Aurel Sari, *Legal Aspects of Hybrid Warfare*, LAWFARE (Oct. 2, 2015), <http://www.lawfareblog.com/legal-aspects-hybrid-warfare>.

78. HOFFMAN, *supra* note 76, at 35–42.

79. Bachmann & Gunneriusson, *supra* note 76, at 87–89.

80. See HOFFMAN, *supra* note 76, at 22–23.

sels as maritime militia to advance China's strategic interest in territorial and maritime claims without the risk of open conflict.⁸¹

While Japan's security policy to address gray-zone situations can be viewed as recognition of its vulnerability to hybrid warfare, the additional authorization of the use of weapons to protect U.S. defense assets contributing to the defense of Japan does not directly address this issue. Alternatively, the SDF can resort to the use of force under Article 88 of the SDF Law if the situation amounts to an armed attack because of its "scale and effect,"⁸² or because it poses an existential threat to Japan. However, official recognition that an armed attack has occurred may well be politically unpalatable because of the concern of a hostile reaction by a State supporting, or sympathetic to, the militia in the absence of clear evidence to prove that a foreign State is exercising effective control over the militia's activities.⁸³ The strictures in the Japanese security legislation thus leave a gap between the two options (one providing for the use of too little force, the other too great a force) that may prevent the desired proportionate seamless response.

B. Jus in Bello Issues

Even in cases where the force used does not reach the required threshold of gravity for the exercise of the right of self-defense under international law, the situation may nonetheless constitute or evolve into an armed conflict where the law of armed conflict (LOAC) applies. For example, a non-international armed conflict could arise with a militia for the purpose of Common Article 3 of the Geneva Conventions,⁸⁴ due to the intensity of

81. James Kraska & Michael Monti, *The Law of Naval Warfare and China's Maritime Militia*, 91 INTERNATIONAL LAW STUDIES 450, 451–57 (2015).

82. *Nicaragua*, *supra* note 69, ¶ 195.

83. For the evidentiary standard for attribution of conduct, see *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 146 (Dec. 19); *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶¶ 64, 71–72 (Nov. 3); *Nicaragua*, *supra* note 69, ¶ 109. For analysis, see, James A. Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 163 (2009).

84. Convention for The Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75

the conflict and the militia's level of organization.⁸⁵ In addition, if there is sufficient evidence that a foreign State's support and assistance of a militia amounts to an "overall control" over their activities, the situation would then be classified as an international armed conflict.⁸⁶ This is so even if the decentralized units are operating in the absence of clear evidence of a direct instruction or order from the foreign State that suggests the "effective control" required for attribution of the conduct to the State, and without which the State's involvement cannot therefore constitute an armed attack, under *jus ad bellum*, against Japan.⁸⁷ It means that the circumstances in which the SDF will be required to apply LOAC rules are not limited to the situations where the Defense against an Armed Attack Law applies, that is, in the event of an armed attack or an existential threat posed to Japan.

Whether they are engaging in an international armed conflict or a non-international armed conflict, the SDF is required to comply with the law of targeting under customary international law or under Additional Protocol I or II to the Geneva Conventions as applicable.⁸⁸ Even in a maritime context, an attack for the purposes of the application of LOAC rules means an act of violence, whether in offense or in defense,⁸⁹ which may well be un-

U.N.T.S. 135 [hereinafter GCIII]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

85. See generally SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 155–211 (2012); ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* 115–58 (2010).

86. See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 404 (Feb. 26) [hereinafter *Bosnian Genocide*]; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 100–101 (Int'l Crim. Trib. for the former Yugoslavia Mar. 3, 2000); Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶137 (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999).

87. In the context of the 2014 eastern Ukraine crisis, see, e.g., Patrycja Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, 34 POLISH YEARBOOK OF INTERNATIONAL LAW 39, 51–56 (2014).

88. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. Japan acceded to Additional Protocols I and II on August 31, 2004.

89. Additional Protocol I, *supra* note 88, art. 35(1); SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 13(b) (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

dertaken in order to protect a person or weapons and other equipment without necessarily causing death or injury. In other words, any act of violence employed by the SDF in an armed conflict situation must be interpreted in light of the applicable rules of LOAC. Thus, for example, a small fishing vessel engaging in hostile activities can only be targeted if it is, or may reasonably be assumed to be, a military objective where diversion or capture is not feasible and no other method is available for exercising military control.⁹⁰ As James Kraska and Michael Monti observe, however, when a large number of fishing vessels are involved, it is practically very challenging to distinguish vessels contributing in some way to the adversary's war efforts, from those engaged only in legitimate fishing, in implementing LOAC obligations applicable at sea.⁹¹

When the SDF has captured any foreign nationals—for example, members of militia on board the fishing vessels attempting an incursion into a disputed maritime zone—legal issues will arise regarding the treatment of and legal protection accorded to those captured. If they are civilians who took part in hostilities in a situation amounting to a non-international armed conflict, they can be detained for trial according to Japan's criminal law and procedure, as well as international human rights protection applicable in the country. On the other hand, if they are captured in an international armed conflict situation due to a foreign State's "overall control" of the militia, or if there are uniformed members of a foreign military force or government agents present among those captured, more careful examination is required as to whether they are entitled to prisoner of war status.⁹² This may pose problems to the determination of their status under Japanese law as the application of the Law Concerning the Treatment of Prisoners of War is premised upon the existence of an armed attack or an existential threat posed to Japan.⁹³

In gray-zone situations, the militia may deliberately sustain a low level of intensity in actual confrontation so as not to cross the intensity and organizational thresholds for a non-international armed conflict. State sup-

90. SAN REMO MANUAL, *supra* note 89, ¶ 52.

91. Kraska & Monti, *supra* note 81, at 465–66. The same practical challenge will confront the SDF even when they are acting under Article 88 of the SDF Law on the basis that the militia's hostile activities, due to their large scale and effect, amount to an armed attack or an existential threat to Japan.

92. GCIII, *supra* note 84, art. 4A.

93. Law concerning the Treatment of Prisoners of War and other Personnel in the Event of an Armed Attack against Japan or an Existential Threat to Japan, Law No. 117 of 2004 as amended by Law No. 76 of 2015, *supra* note 14, art. 2.

port may be clandestine so as not to provide sufficient evidence of “overall control” of the militia. On the other hand, as stated above, the application of LOAC obligations under the Japanese domestic law rests upon the existence of an “armed attack,” while under international law the existence of an armed conflict is a separate, factual question that does not depend on the legality of a State’s recourse to armed force. The Japanese Government may also be reluctant to recognize the hostile activities as an armed attack—as the domestic legal basis for applying their LOAC obligations—or the existence of an international armed conflict, particularly when a foreign State is suspected of being involved, for political considerations, so as to avoid a full-scale armed confrontation with the foreign power. However, in cases where SDF members are captured by the adversary, the denial of an international armed conflict situation by the Japanese Government will increase their risk of being subject to criminal prosecution without being granted the prisoner of war status owed them under international law.⁹⁴

Thus, there is a disjuncture in the current legal framework that attempts to regulate *jus in bello* issues such as targeting and the treatment of prisoners of war based on *jus ad bellum* criteria, creating a legal gap that can be effectively exploited by hostile actors in gray-zone situations. It remains to be seen if the newly created category of “an existential threat to Japan” could be invoked to fill this legal gap through its substitution for the classification of an armed conflict in the absence of an armed attack directed against Japan, with a view to the application of the Defense Against an Armed Attack Law and the Law Concerning the Treatment of Prisoners of War. The concept is, in its current form, restrictive in that it still requires an armed attack directed against a foreign State in a close relationship with Japan.

IV. THE USE OF FORCE IN PEACE OPERATIONS

The 2015 security legislation extends the right of self-defense of SDF personnel to use weapons to defend members of another State’s forces stationed in the same compound as SDF personnel,⁹⁵ and also in executing its mandates when engaged in international peace cooperation activities. More specifically, the SDF is authorized to use weapons to the extent reasonable under the prevailing situation when considered necessary for two purposes. The first of these is the protection of the lives and property of civilians

94. Mayama, *supra* note 12, at 23.

95. PKO Law, *supra* note 19, as amended by Law No. 76 of 2015, *supra* note 14, art. 25(7).

from harm and deterring threats to them, or the protection of a particular designated area (the civilian protection mandate).⁹⁶ The second purpose is where the SDF comes to the aid of geographically distant units or personnel engaged in UN peacekeeping or other international peace and humanitarian operations when those units or personnel are in imminent risk of harm (the “come-to-the-aid” mandate).⁹⁷ With respect to the latter mandate, the legislation reportedly emphasizes protection of Japanese nationals engaging in peacekeeping or humanitarian missions,⁹⁸ though it does not exclude aiding others. The authorization to use physical force under these mandates requires the SDF to be prepared to deal with the legal quagmire that has tormented UN peacekeepers engaged in the protection of civilians for many years, while acting within the constraints imposed by Japanese law and policy.

A. *The Legal Quagmire of Civilian Protection*

Japan's decision to add the civilian protection and come-to-the-aid mandates to the tasks Japanese peacekeepers can perform is premised upon the understanding that “in recent years, such activities as maintenance of security and protection of civilians have become increasingly important [in dealing] with domestic conflicts and fragile states.”⁹⁹ Indeed, the range of tasks conducted globally under peacekeeping mandates has expanded considerably since the 1990s to include electoral assistance, disarmament, demobilization and reintegration, security sector reform, rule of law activities and, most relevantly, protection of civilians.¹⁰⁰ Yet, despite the UN's increased experience in peacekeeping, problems have been encountered in developing and implementing some of these mandates. In particular, the use of

96. *Id.*, arts. 3(5)(g), 26(1).

97. *Id.*, arts. 3(5)(v), 26(2). When implementing this mandate, SDF personnel shall not take actions that cause injury to or death of a person unless they are acting in self-defense or necessity under Articles 36 and 37 of the Criminal Code. *Id.*, art. 26(3).

98. Masahiro Kurosaki, “*Kaketsuke-Keigo*” no Houteki Wakugumi: Jieigainen no Tagensei to Houteki Kiban no Tasousei [*The Legal Framework of “Come-to-an-Aid Protection”: The Pluralism in the Concept of Self-Defense and Multi-Layered Legal Grounds*], 648 KOKUSAI MONDAI [INTERNATIONAL AFFAIRS] 39, 42 (2015).

99. ADVISORY PANEL REPORT, *supra* note 38, at 38.

100. U.N. DEPARTMENT OF PEACEKEEPING OPERATION & U.N. DEPARTMENT OF FIELD SUPPORT, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 20–30 (2008).

physical force by peacekeepers to protect civilians has been a vexing issue since its first inclusion in a peacekeeping mandate in 1999.¹⁰¹

The mandate to protect civilians is typically crafted to specify the duties and responsibilities of the peacekeepers in providing protection for civilians. The civilian protection mandate given to the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), for example, tasks it, *inter alia*, to:

Ensure, within its area of operations, effective protection of civilians under threat of physical violence, including through active patrolling, paying particular attention to civilians gathered in displaced and refugee camps, humanitarian personnel and human rights defenders, in the context of violence emerging from any of the parties engaged in the conflict, and mitigate the risk to civilians before, during and after any military operation.¹⁰²

To determine which civilians are under threat of physical violence or within the area of operations under this or a similar mandate, the peacekeepers will be required to interpret the mandate with reference to the relevant provisions of the UN Charter; if it is not a UN peacekeeping operation, reference would be made to the constitutional and other relevant instruments governing the authorizing body. In UN-authorized operations, a civilian protection mandate must be interpreted in accordance with the basic humanitarian and human rights norms set forth in Article 1(3) of the Charter.¹⁰³ These basic norms arguably include the obligation to “ensure respect” for the rules of LOAC,¹⁰⁴ as well as an obligation to take feasible

101. For the author’s previous work in this area, see Hitoshi Nasu, *Peacekeeping, Civilian Protection Mandates and the Responsibility to Protect*, in *NORMS OF PROTECTION: RESPONSIBILITY TO PROTECT, PROTECTION OF CIVILIANS AND THEIR INTERACTION* 117, 119–21 (Angus Francis, Vesselin Popovski & Charles Sampford eds., 2012); Hitoshi Nasu, *Operationalizing the Responsibility to Protect in the Context of Civilian Protection by UN Peacekeepers*, 18 *INTERNATIONAL PEACEKEEPING* 364 (2011); Hitoshi Nasu, *Operationalizing the “Responsibility to Protect” and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict*, 14 *JOURNAL OF CONFLICT & SECURITY LAW* 209 (2009).

102. S.C. Res. 2147, ¶ 4(a)(i) (Mar. 28, 2014).

103. See especially ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 198–215 (2004).

104. See, e.g., GC I, *supra* note 84, art. 1. However, the scope of the obligation is controversial. See, e.g., SIOBHAN WILLS, *PROTECTING CIVILIANS* 100–106 (2009); Carlo Forearelli, *Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?*, 21 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 125 (2010); Laurence Boisson de Chazournes & Luigi Condorelli, *Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests*, 82

precautions to protect the civilian population from the dangers resulting from military operations.¹⁰⁵

Even though the mandate may require peacekeepers to use physical force to protect civilians in the circumstances specified, their range of action may be restricted by other provisions in the mandate and by other relevant rules of international law.¹⁰⁶ Political concerns about the danger of escalation, as well as uncertainty in interpreting the mandate and other applicable rules of international law, often discourage decision-makers from directing the use of physical force in carrying out the mandate.¹⁰⁷ Typifying this reluctance, the UN Mission in the Congo (MONUC, the predecessor of MONUSCO) was authorized to take “necessary measures” to fulfill its mandate “to protect civilians and humanitarian workers under imminent threat of physical violence.”¹⁰⁸ Notwithstanding this mandate, the force commander’s proposal to use physical force to deter the rebel forces’ approach to Bukavu in February 2004 was rejected by UN leadership due to the absence of backup support in the event of conflict escalation. That decision allowed the rebel forces to take over the city without resistance.¹⁰⁹

A more rigorous implementation of the civilian protection mandate with the use of physical force, on the other hand, risks compromising the ability of peacekeepers to maintain a key operational principle of peace-

INTERNATIONAL REVIEW OF THE RED CROSS 67 (2000); Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3 (1999).

105. Additional Protocol I, *supra* note 88, art. 58; 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 68–71 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

106. For discussion of potentially restrictive impacts of human rights obligations on the use of physical force, see, e.g., David S. Goddard, *Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon*, 91 INTERNATIONAL LAW STUDIES 402 (2015).

107. For the author’s analysis of this issue, see HITOSHI NASU, INTERNATIONAL LAW ON PEACEKEEPING: A STUDY OF ARTICLE 40 OF THE UN CHARTER 185–88, 190–91 (2009); Nasu, *Operationalizing the “Responsibility to Protect” and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict*, *supra* note 101, at 230–38 (2009).

108. S.C. Res. 1493, ¶ 25 (July 28, 2003).

109. For details, see VICTORIA K. HOLT & TOBIAS C. BERKMAN, THE IMPOSSIBLE MANDATE? MILITARY PREPAREDNESS, THE RESPONSIBILITY TO PROTECT AND MODERN PEACE OPERATIONS 172 (2007); Joshua Marks, *The Pitfalls of Action and Inaction: Civilian Protection in MONUC’s Peacekeeping Operations*, 16 AFRICAN SECURITY REVIEW, no. 3, 2007, 67, 74–75; Philip Roessler & John Prendergast, *Democratic Republic of the Congo: The Case of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC)*, in TWENTY-FIRST-CENTURY PEACE OPERATIONS 229, 258 (William J. Durch ed., 2006).

keeping—impartiality.¹¹⁰ After the 2004 Bukavu crisis, the UN Security Council reinforced MONUC’s mandate with clearer language and additional troops,¹¹¹ which resulted in a range of more proactive operations to protect civilians from rebel attacks, while facilitating a disarmament, demobilization and reintegration program that turned former rebels into members of the government armed forces. However, this offensive produced a backlash of increased hostile actions against UN personnel by rebel forces, including the killing of nine Bangladeshi peacekeepers.¹¹² All these considerations point to the difficulties that Japanese peacekeepers will encounter with regard to the use of physical force for the protection of civilians within the framework of a peacekeeping operation.

And there are other issues that will arise. Each national contingent contributing to a peacekeeping operation is subject to other rules of international law applicable to the contributing State. Under the Genocide Convention,¹¹³ for example, the duty to act would arise when “the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”¹¹⁴ Another issue is that of the extraterritorial application of human rights law. It remains to be seen how the issue will be dealt with by Japan—whether extraterritorial application will be denied in all instances,¹¹⁵ applied to a limited extent to individuals who come within the full protection of the SDF contingent, or applied more broadly under the notion of “effective (overall) control” as expansively interpreted by the European Court of Human Rights.¹¹⁶ Depending on the position adopted, there may be further legal questions to be addressed, such as attribution to Japan of any wrongful conduct committed by its forces and the concurrent application of LOAC and human rights law.

110. See Nasu, *Peacekeeping, Civilian Protection Mandates and the Responsibility to Protect*, *supra* note 101, at 123–24.

111. S.C. Res. 1565 (Oct. 1, 2004); S.C. Res. 1592 (Mar. 30, 2005).

112. U.N. President of the Security Council, Statement of Mar. 2, 2005, U.N. Doc. S/PRST/2005/10 (Feb. 17, 2006).

113. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

114. *Bosnian Genocide*, *supra* note 86, ¶ 432.

115. For an analysis of this position adopted by the United States, see Beth Van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INTERNATIONAL LAW STUDIES 20 (2014).

116. See especially MARCO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 127–73 (2011).

B. Constraints under Japanese Law and Policy

The intention behind the legislation providing for a more active contribution to international peacekeeping and other peace or humanitarian operations might have been that the SDF can avoid those difficulties by maintaining the traditional five principles that guide the SDF's participation in peacekeeping operations. They are (1) the existence of a ceasefire agreement between the belligerent parties, (2) the host State's consent, (3) impartiality, (4) withdrawal if any of the first three principles cease to be satisfied, and (5) minimum use of force. The last was modified by the new security legislation which allows the SDF to use weapons to the extent reasonable under the prevailing situation to protect civilians and during come-to-the-aid operations, but conditions it on continued host State consent to the peacekeeping operation and to the relevant tasks undertaken.¹¹⁷ However, these five guiding principles as revised are unlikely to avoid the difficulties that have confronted peacekeepers in the past as it is often the rebel forces or rogue members of the government forces who engage in atrocities against civilians even though a ceasefire agreement has been reached by their leadership.

It is also important to note that, unlike the SDF's support operations in grave circumstances affecting Japan or under the International Peace Support Law, SDF personnel can continue peacekeeping operations in areas where combat activities are taking place. This means that legislators assumed SDF peacekeepers would be present in combat areas or even engage in combat activities to protect civilians and humanitarian workers. The SDF leadership must, therefore, have advance planning on how they might reconcile competing legal requirements in operational terms so as to enable their personnel to use physical force lawfully and effectively in implementing their mandates in accordance with the Japanese government's security policy, and then to communicate that to its forces through rules of engagement.

The concern of Japanese policymakers, however, seems to have been focused on the issue of the use of physical force by peacekeepers in relation to the principle of non-use of force under Article 2(4) of the UN Charter, because of Japan's constitutional constraints. Illustrative is the following statement made in the 2014 Advisory Panel report:

117. PKO Law, *supra* note 19, as amended by Law No. 76 of 2015, *supra* note 14, art. 6(1).

[T]he use of weapons by the SDF should be regarded as not constituting the use of force prohibited under Article 9 of the Constitution. . . . U.N. PKOs are not activities that involve the “use of force” in international relations as prohibited under the U.N. Charter for member states. U.N. PKOs are distinct from peace enforcement, which could entail large-scale military activities by so-called multi-national forces authorized by a U.N. resolution. Furthermore, “robust peacekeeping,” which involves certain enforcement force under Chapter VII of the U.N. Charter, also does not fall [outside] of the category of a U.N. PKO in its nature, and is distinct from peace enforcement.¹¹⁸

The reference to “robust peacekeeping” indicates that, in the Advisory Panel’s view, even the proactive use of physical force by SDF personnel engaged in a peacekeeping operation is not constitutionally prohibited. It does not necessarily mean that the authorization to use weapons under the civilian protection and come-to-the-aid mandates provided for in the new legislation is to be interpreted as authorizing the proactive use of physical force, nor does it reflect the actual security policy adopted by the Abe administration. What it does suggest, however, is that the legislative development concerning the deployment of the SDF for peacekeeping and other peace or humanitarian activities centered upon the constitutionality of the use of force by the SDF, almost to the exclusion of all the other issues that may arise in connection with the use of physical force to protect civilians or humanitarian workers from attacks under relevant rules of international law, as discussed above.

V. THE USE OF FORCE IN COLLECTIVE SELF-DEFENSE

The most controversial aspect of the 2015 security legislation was the authorization of actions in collective self-defense. This was accomplished by introducing the concept of an existential threat to Japan as the basis for expanding the scope in which force can legitimately be used within the ambit of Article 9. Although there is no explicit reference to it in the legislation itself, the debate in the Diet centered upon the right of collective self-defense, consistent with the development of the idea by the Advisory Panel in its 2014 report:

118. ADVISORY PANEL REPORT, *supra* note 38, at 38–39.

In Japan, with regard to the right of collective self-defense, when a foreign country that is in a close relationship with Japan comes under an armed attack and if such a situation has the potential to significantly affect the security of Japan, Japan should be able to participate in operations to repel such an attack by using force to the minimum extent necessary, having obtained an explicit request or consent of the country under attack, and thus to make a contribution to the maintenance and restoration of international peace and security even if Japan itself is not directly attacked.¹¹⁹

The cabinet distanced itself from this approach in its July 1, 2014 decision by emphasizing that the reinterpretation of Article 9 was based on the threat to Japan's own survival posed by an armed attack against a State in a close relationship with Japan, rather than grounding the legal justification on the right of collective self-defense.¹²⁰

The Abe administration's emphasis on Japan's own survival resulting from an attack on another State considerably diminished the explanatory power of the distinction between individual and collective self-defense. This invited the opposition parties to question the need to rely upon the right of collective self-defense as the legal basis for the expanded scope of SDF deployments envisaged under the administration's security policy. Prime Minister Abe responded by explaining the difference between individual and collective self-defense in the context of minesweeping operations:

Certainly, if the sea surrounding Japan was mined for the purpose of attacking Japan, in that case we can exercise the right of individual self-defense. In my view, however, if the Strait of Hormuz was mined, our vessels could be hit but there is an issue of vessel nationality, many of our vessels are registered in a foreign state, and also foreign-flagged vessels can be targeted; clearing the mines laid is *ostensibly considered as an exercise of the right of collective self-defense under international law* and therefore we consider that as an exercise of the right of collective self-defense; however, it will be an extremely limited and receptive operation in my view.¹²¹

119. *Id.* at 29–30.

120. Cabinet Decision, *supra* note 3, § 3(4).

121. 189th Diet Sess., House of Representatives Budget Committee Official Record of Proceedings No. 13, at 9–10 (Mar. 3, 2015) (emphasis added).

It is unclear on what ground and in what context minesweeping is “ostensibly considered” as an exercise of the right of collective, as opposed to individual, self-defense. Blocking the passage of vessels through the Strait of Hormuz would interfere with the right of transit passage under the 1982 Law of the Sea Convention or, alternatively, the right of non-suspendable innocent passage under the 1958 Geneva Convention.¹²² This remains the case even when the coastal State is engaged in an international armed conflict,¹²³ though in that instance the passage can arguably be restricted.¹²⁴ If the strait were mined to block the passage of vessels, it would also constitute the use of force in violation of Article 2(4) of the UN Charter,¹²⁵ and may potentially amount to an armed attack against the States—including Japan—whose vessels use the strait.¹²⁶ Japan may choose to participate in minesweeping as the exercise of the right of individual self-defense “collectively” in cooperation with other States; however, that is to be distinguished from the exercise of the right of collective self-defense. Therefore, the rationale for invoking the right of collective self-defense in this scenario is not persuasively established.

Although minesweeping in the Strait of Hormuz is the only exceptional scenario currently envisaged for SDF deployment,¹²⁷ the Abe administration’s recognition of collective self-defense as legitimate under Article 9 of

122. LOS Convention, *supra* note 74, art. 38; Convention on the Territorial Sea and the Contiguous Zone art. 16(4), Apr. 19, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. For the U.S. view on the passage regime in the Strait of Hormuz, see James Kraska, *Legal Vortex in the Strait of Hormuz*, 54 VIRGINIA JOURNAL OF INTERNATIONAL LAW 323 (2014).

123. SAN REMO MANUAL, *supra* note 89, r. 26.

124. See, e.g., James Farrant, *Modern Maritime Neutrality Law*, 90 INTERNATIONAL LAW STUDIES 198, 219–20 (2014); Wolff Heintschel von Heinegg, *The Law of Naval Warfare and International Straits*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 263, 265–67 (Michael N. Schmitt & Leslie C. Green eds., 1998) (Vol. 71, U.S. Naval War College International Law Studies); Dietrich Schindler, *1907 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War: Commentary*, in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 193, 220 (Natalino Ronzitti ed., 1988).

125. Nilufer Oral, *Transit Passage Rights in the Strait of Hormuz and Iran’s Threats to Block the Passage of Oil Tankers*, ASIL INSIGHTS (May 3, 2012), https://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage#_edn16.

126. *Oil Platforms*, *supra* note 83, ¶ 72 (“The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence.’”).

127. 189th Diet Sess. House of Representatives Security Bills Special Committee Official Record of Proceedings No. 6, at 35 (June 1, 2015).

the Constitution will have significant implications for Japan's national defense and its efforts to contribute to international peace and security. This is particularly so when the right of collective self-defense is considered as the justification for involvement in combined security operations in another country, even where participation does not involve physical deployment of SDF troops, this latter scenario being the eventuality envisaged by the general public—even feared by some—in Japan. For example, Japan may contribute advanced facial recognition software, high-resolution satellite images and intelligence information, all critical to the identification of suspected terrorists, to a multinational military operation engaging in the targeted killings of suspected terrorists in another country. None of these contributions requires the SDF to employ physical force, but could, nevertheless, be considered as aiding or assisting in the use of force amounting to the commission of an internationally wrongful act.¹²⁸ While other States may justify their actions as an exercise of the right of collective self-defense, unless Japan were to do likewise, it could be held responsible for an internationally wrongful act on the grounds that, in providing assistance, Japan knowingly contributed significant support to the States engaged in the operation.¹²⁹

The full potential of the new security legislation cannot be harnessed to achieve the desired “seamless response” to the variety of security threats Japan may face without more directly addressing the issue of what constitutes the use of force for the purposes of Article 9. The twisted understanding of the term that has traditionally been adopted to circumvent the constitutional issues—namely, that the term and accompanying Article 9 restrictions are limited to the use of weapons in combat zones, while support activities are excluded—continues to underlie the structural foundation of Japan's security-related laws. This is reflected in the two new concepts introduced by the 2015 legislation: (1) the use of force in response to an existential threat to Japan and (2) the provision of support where there

128. Articles on Responsibility of States for Internationally Wrongful Acts art. 16, Report of the International Law Commission, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), *reprinted in* [2001] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

129. See Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW 471, 479–80 (2015); HELMUT PHILIPP AUST, *COMPLICITY IN THE LAW OF STATE RESPONSIBILITY* 214 (2011).

are grave circumstances affecting Japan, with the former being subject to the Article 9 restrictions, while the latter is not.

The conceptual misalignment has meant that the Article 9 analysis has focused exclusively on whether the operation in question would involve the use of weapons and combat operations, or be limited to logistical support. If the former, it would be prohibited except for national self-defense, but, if the latter, it would be permitted on the grounds that logistical support does not constitute an integral part of combat operations. This has led to the general domestic acceptance of the legal position that the SDF's participation in international military operations is permitted, as long as their activities do not involve the use of weapons in combat. However, this misses the point that, under international law, even the provision of logistical support may engage Japan's responsibility, and thus operations to which Japan provides logistical support must be underpinned by just as sound a legal basis as those operations in which Japan engages in combat.¹³⁰ Failure to grasp this point may leave Japan vulnerable to potential legal liability when it contributes logistical support to multinational military operations without the same scrutiny that would be applied to the legal basis if physical force were to be used by the SDF.

VI. CONCLUSION

Article 9 of the Japanese Constitution—the “war renunciation clause”—has meant Japan has had to develop a legal architecture that enables the SDF to use armed force within constitutional and political constraints. The result is a legal regime that has developed as a patchwork of technical amendments and special legislation that distorts the understanding of what constitutes the “use of force” for purposes of constitutional interpretation, and imposes unnecessarily restrictive limitations (and, in some instances, prohibitions) on the SDF's participation in peacekeeping and other multinational security operations. The new security legislation mends some of the unraveled seams left by previous legislation, and enhances Japan's national security by permitting the SDF to make a greater contribution to combined security operations with the United States, as well as increasing the ability to effectively participate in multinational operations. As explained in this article, however, there still remains a disjuncture between the

130. For the author's analysis of this issue, see Nasu, *Article 9 of the Japanese Constitution*, *supra* note 10, at 62–64.

new legislative regime and relevant rules of international law, leaving gaps and uncertainties that can be exploited by hostile actors.

First, the legislative framework for the SDF's military and policing action is structured according to the *jus ad bellum* criteria. This exposes Japan's vulnerability to effective, well-coordinated hybrid warfare that does not cross the gravity threshold required to constitute an armed attack, thus limiting the response only to law enforcement measures. This also means that the legislative regime is not well equipped to deal with *jus in bello* issues, such as targeting and the treatment of captives in an international or non-international armed conflict, when the hostile conduct does not reach the gravity threshold necessary to be an armed attack. However, creative use of new concepts such as "an existential threat to Japan" could prove to be useful in circumventing these legal gaps by allowing the SDF to apply the relevant rules of international law more flexibly.

Second, while it is encouraging that the civilian protection and the come-to-the-aid mandates have been added to the peacekeeping missions in which the SDF can participate, past and current operations illustrate the complexity of the issues that may arise. This is particularly so with respect to the scope of legal obligations to defend civilians and other personnel with the use of physical force under the authorizing mandate or other relevant rules of international law. Notwithstanding the recent revision to the five principles guiding the SDF's participation in peacekeeping operations, the SDF will still be challenged in reconciling competing legal requirements within the framework of the government's security policy.

Third, even though the policy rationale for reinterpreting Article 9 to allow Japan to exercise the right of collective self-defense was not convincingly presented and, in any event, too narrowly framed, the new official interpretation will have significant implications for Japan's efforts to achieve a truly seamless response to security threats. By more fully appreciating the role an exercise of the right of collective self-defense can play, Japan can take advantage of an essential legal defense to potential claims of State responsibility for aiding or assisting the commission of an internationally wrongful act when it engages in a multinational security operation, even in a situation that involves no employment of physical force by the SDF. However, Japan will not be able to harness the full potential of the reinterpretation of Article 9 until it addresses the conceptual misalignment inherent in Japan's traditional understanding that restrictions under Article 9 of the Constitution uniformly apply to any use of physical force in combat situations.