

# CONSTITUTIONAL PROBLEMS OF THE NEW SECURITY ARRANGEMENTS

Takashi NARUSHIMA\*

This article is based on a paper entitled "Japan's Security Issues" which was presented at the Asia-Pacific Conference on Canadian Studies held on March 27-28, 1998 at the Meiji University.

At the turn of the 20th century, the author will examine today's peace and security issues in Japan mainly focusing on the current "redefinition" of Japan's security system and then will try to find a desirable path Japan and its people should follow in the coming century.

## 《CONTENTS》

- I PEACE AND SECURITY ISSUES IN JAPAN'S MODERN HISTORY
- II THE JAPANESE RESPONSE TO THE PERSIAN GULF WAR
- III THE "REDEFINITION" OF JAPAN-U.S. SECURITY ARRANGEMENTS
- IV A DESIRABLE COURSE FOR JAPAN
- V CONCLUSION

## I PEACE AND SECURITY ISSUES IN JAPAN'S MODERN HISTORY

### 1. The Japanese Constitution

To consider peace and security issues in the present situation,

we must look back on the modern history of Japan. Since the 1930s, Japan has waged several invasive wars against neighbouring Asian countries. These wars took about 20 million Asian victims and more than 3 million Japanese victims. After the defeat of Japan in the Asia-Pacific War (World War II) in 1945, Japan fell under the occupation of the U.S.-led Allied Powers pursuant to the Potsdam Declaration. It is as a result of this situation that the famous pacifist Constitution was enacted and promulgated. The Japanese Constitution declared its solemn commitment to world peace in its Preamble :

We, the Japanese people, ..., determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, .....

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. 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. ....

More significantly, the Constitution contains the now world-famous war-renunciation clause. Its Article 9 stipulates :

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a 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.

## 2. Controversy over the Constitution

Since the promulgation of the Constitution in 1946, Article 9 has constantly been the focus of vigorous debates in both political and academic circles. In the controversy over the interpretation of the Constitution, the most problematic issue has been: "Whether it renounces all wars, whether invasive, sanctional or in self-defense or whether it renounces only invasive war." Broadly speaking, the majority of constitutional scholars have maintained the view that the Constitution renounces all types of war "as a sovereign right of the nation." Such an interpretation seems quite persuasive considering the plain wording of the Constitution or the lack of provisions which assume that Japan will eventually wage a "defensive war." (*i.e.*, provisions for the declaration of war or the conclusion of peace treaties.) To make a point of this, it would be helpful to cite comments by two scholars:

The text of Article 9 provides that the Japanese people forever renounce war as a sovereign right of the nation. Considering that by becoming a signatory to the Paris Pact of 1928 Japan has renounced invasive wars, it would be unnecessary for it to renounce an invasive war by denying its legal character. This suggests that Article 9 goes beyond the provisions of the Paris Pact .... and renounces Japan's right to self-defence by military force as well.<sup>(1)</sup>

Article 9 denies the state the right to establish or use military force. The language of both the English and Japanese version is perfectly clear. It does not say, "except for self-defense", and therefore it does not mean that. The notion that the clear renunciation of the right of belligerency is not a renunciation of the right to establish a military for self-defense is absurd. Ag-

gressive warfare is prohibited under international law: technically, the right of belligerency applies *only* to self-defense. It is precisely *that* right that the Japanese Constitution renounces.<sup>(2)</sup>  
[Emphasis original]

Then what has been the position of the Japanese government? During a short period which followed the promulgation of the Constitution, the government's interpretation of the Constitution was almost the same as that of the majority legal scholars. In fact, throughout the latter 1940s, "successive Japanese cabinets maintained that armed force, even for self-defense, was not permitted."<sup>(3)</sup> However, with the outbreak of the Korean War in 1950, the Japanese government turned its direction toward "rearmament" by establishing the National Police Reserve (NPR). Since then, "the Japanese government, ..., has taken an increasingly pragmatic, flexible approach to Article 9."<sup>(4)</sup> For example, the NPR was justified as a "police power" aimed at maintaining internal security. After the NPR was converted into the National Safety Forces (NSF) in 1952, the government put forward a new interpretation that the NSF were not unconstitutional because they were not capable of waging "modern warfare." Next, with the establishment of the Self-Defense Forces (SDF) in 1954, the government's interpretation of Article 9 was revised again. Thus the government view on the Constitution was formulated as follows:

As long as Japan is a sovereign state, it is recognized beyond doubt that the provision in the article [Article 9] does not deny the inherent right of self-defense that Japan is entitled to maintain as a sovereign nation.

Since the self-defense right is not denied, ..., the Constitution does not prohibit the possession of the minimum level of armed strength necessary to exercise that right.<sup>(5)</sup>

Resting on this basic position, the government has further developed its interpretation of the Constitution as far as saying:

"[S]peaking in terms of legal interpretation of the Constitution there is nothing to prevent the maintaining of the minimum amount of nuclear weapons for self-defense."<sup>(6)</sup>

### 3. The Japan-U.S. Military Alliance

It was under such circumstances that Japan concluded the Japan-U.S. Security Treaty in 1951, thereby entering into an intimate military alliance with the United States. Events thereafter have been characterized by the continuing growth in military potential which has recently become the third largest in the world.<sup>(7)</sup>

It is worth indicating that, even in its desire to become a military super power subject to the U.S., at least until the 1990s the Japanese government has "ostensively" been saying that under the Constitution it was prohibited to exercise the right of collective self-defense<sup>(8)</sup> or to dispatch the SDF troops abroad. Such an explanation relates to Article 5 of the Security Treaty (revised in 1960) which limits Japan-U.S. joint operations to the circumstances of "an armed attack against either party in the territories under the administration of Japan." Article 6 also provides that the U.S. is granted the use of military facilities in Japan "for the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East." Then we must keep in mind that until recently the Japanese government has ostensibly observed a sort of constitutional restriction on its defense policy.

## II THE JAPANESE RESPONSE TO THE PERSIAN GULF WAR

### 1. Tentative Commitment

The outbreak of the Persian Gulf War, which followed the Gulf Crisis in 1990, brought about substantial changes in Japan's commitment to world security issues.

First, prior to the Gulf War the Japanese government submitted the "U.N. Peace Cooperation Bill" to the Diet. The bill was aimed at permitting Japan to cooperate with U.N. peacekeeping efforts in the Middle East. Confronted with a strong opposition of the Japanese people however, the bill failed to pass the Diet after lengthy deliberations. Second, Japan contributed \$13 billion in financial aid to the U.S.-led Allied Coalition called "Multinational Forces" as its share of the burden. This "financial contribution," although generally accepted by the Japanese people as "a face-saving response," had a serious implication. As one constitutional scholar says, this financial aid meant at least one fifth of Iraqi people became the victims of Japan's commitment.<sup>(9)</sup> Third, caused by a strong campaign calling for "a personnel contribution to the international peace," a favorable climate for dispatching the SDF abroad was created. Under such circumstances, four minesweepers of the Maritime SDF were sent to the Persian Gulf after the war was officially over. This caused strong antipathy and anxiety among Asian countries.

## 2. A Substantial Commitment to U.N. Peacekeeping Missions

Finally, as a substantial response to international security requirements, the Japanese government prepared a second bill which would allow Japan to participate in the United Nations peacekeeping operations. The new bill provided five conditions on which the SDF may be allowed to participate in the U.N. activities:

- (1) agreement on a cease-fire has been reached among the parties to the conflict,
- (2) the parties to the conflict, including the territorial State[s], have given their consent to deployment of the peace-keeping force and Japan's participation in the force,
- (3) the peace-keeping force is to maintain strict impartiality, not favouring any party to the conflict,

- (4) should any of the requirements above cease to be satisfied, the government of Japan may withdraw its force,
- (5) use of weapons is limited to the minimum necessary to protect the lives of the personnel, etc.<sup>(10)</sup>

In June 1992 the new law entitled "The International Peace Cooperation Law" was passed by the Diet and became effective in August that year. Under this law, SDF units have already been sent to five U.N. peacekeeping missions: (1) United Nations Angola Verification Mission (UNAVEM), (2) United Nations Transition Authority in Cambodia (UNTAC), (3) United Nations Operation in Mozambique (ONUMOZ), (4) United Nations Observer Mission in El Salvador (ONUSAL) and (5) United Nations Disengagement Observer Force (UNDOF, Golan Heights). Three other SDF units were also sent for humanitarian international relief operations in Rwanda (United Nations Assistance Mission in Rwanda, UNAMIR), Zaire and Honduras.

### III THE "REDEFINITION" OF JAPAN-U.S. SECURITY ARRANGEMENTS

#### 1. Preparation of the "Redefinition"

Since 1995 there has been a serious move in the field of security: The so-called "redefinition" of Japan-U.S. security arrangements.

In February 1995 a document entitled "The U.S. East Asia Strategy Report" was released by the U.S. government. "The document positioned the Japan-U.S. security relationship as the core of U.S. security policy for the Asia-Pacific region and described the Japan-U.S. alliance as the principle factor for securing the peace and security of not only the two countries but also the Asia-Pacific region."<sup>(11)</sup> This announcement was followed by Japan's "New National Defense Program Outline" formulated in November 1995. Then in April 1996, after the Japan-U.S. summit

meeting, then Japanese Prime Minister Ryutaro Hashimoto and U.S. President Bill Clinton issued "The Japan-U.S. Joint Declaration on Security." The Declaration reaffirmed "that the Japan-U.S. security relationship based on the Japan-U.S. Security Treaty remains the cornerstone for maintaining a stable and prosperous environment for the Asia-Pacific region as the world enters the 21st century."<sup>(12)</sup> To be noted here is that the Joint Declaration made the Japan-U.S. military alliance more aggressive than before (1)by expanding the coverage of the Security Treaty from the "Far East" to the "Asia-Pacific region" and (2)by removing restrictions on Japan-U.S. joint operations which had previously been limited, as seen before, to the circumstances of direct armed attack on Japanese territories. The Declaration also suggested that the 1978 Guidelines for Japan-U.S. Defense Cooperation should be reviewed.

## 2. The New Guidelines

Thus in September 1997, the new Guidelines were made public. Reporting on this, a newspaper precisely characterized the new document as a "war manual" saying: "[The new arrangements] would give Tokyo its highest military profile in the Asia-Pacific region since World War II."<sup>(13)</sup> As indicated here, the new Guidelines marked a substantial change in Japan's security policy. For instance, the newly introduced concept of "emergencies in areas surrounding Japan" raises a serious question as to what it means. According to the government's explanation, the concept is "not geographical but situational." If this is the case, "emergencies" which may occur somewhere in the Asia-Pacific region or elsewhere in the world can easily be estimated to be within the scope of Japan-U.S. defense cooperation. There remain other troublesome questions too. A newspaper editorial points them out: "The guidelines acknowledge that the Peace Constitution governs Japan's participation in a crisis. Thus, Japan will maintain its exclusively defense-oriented policy. But the guidelines call for the Self-Defense Forces to provide rear area support, search

and rescue operations, as well as evacuations. Similarly, activities for ensuring the effectiveness of economic sanctions for the maintenance of international peace and security', such as inspecting ships on the high seas, may oblige Japanese forces to take actions that are no longer strictly 'defensive-oriented'.<sup>(14)</sup> It is to be underscored that under current international law, all activities mentioned above may amount to war action, meaning that Japan will become a belligerent nation. Furthermore, the new Guidelines call for the U.S. forces to use civilian airports and seaports in Japan during "emergencies." Other provisions related to rear area support and the use of facilities in Japan could also have an impact on ordinary private citizens. Thus we can conclude that the new Guidelines pave the way for Japan's automatic involvement in war which may be unilaterally designated as an "emergency" by the United States.

### 3. Related Legislation

On April 28, 1998, the Japanese government approved two controversial bills to be submitted to the Diet. The first bill concerns new legislation on measures to ensure the security of Japan in case of military emergencies in surrounding areas. And the second addresses the revision of the SDF law, so that the SDF can be dispatched to evacuate Japanese civilians overseas.<sup>(15)</sup> The two bills have not yet cleared the Diet after its three sessions (the 142nd ordinary session, the 143rd extraordinary session and the 144th extraordinary session) and are now under deliberation in the 145th ordinary Diet session.

These bills raise various problems with regard to the constitutionality. For instance, the concept of "situations in areas surrounding Japan" is still ambiguous even followed by a phrase "that will severely affect the security of Japan." Nor are the items stipulated as necessary for Japan to implement in order to deal with the "emergencies." As for the meaning of the "rear area," it is defined only as "where combat is not taking place and not expected." Provisions concerning cooperation from local

governments in emergencies are also problematic. A top defense agency was saying on this: "As for private sectors, we would just ask for cooperation. But with local governments, a simple request is not enough. The state should seek cooperation from local governments in a way that makes them take an action in concert with the national government, unless there is a reasonable excuse for refusing to cooperate."<sup>(16)</sup> This remark shows that the new legislation is aimed at providing the central government with legal ground for mobilizing not only private sectors but local administrations as well. As one constitutionalist says, such a scheme is far more inclusive than that of the pre-war National Mobilization Law.<sup>(17)</sup> Another controversial issue is that under government bills a basic plan for cooperation with the U.S., including SDF operations, must be reported to the Diet only after emergencies took place. During lengthy deliberations that followed the proposal of bills, this point has been a major issue in the Diet and opposition parties have demanded that the government amend the bills so that the plan requires Diet approval as well.

#### 4. Ongoing Implementation of the New Guidelines

What is more serious is that the situations which the new Guidelines suppose are not merely "hypothetical" but are actually "ongoing." There are plenty of facts that indicate the new Japan-U.S. security arrangements have gradually and steadily been implemented.

First, we must reflect on the problems caused by the heavy concentration of U.S. military bases in Okinawa Prefecture. On these small islands, which take up only 0.6 per cent of the whole Japanese territories, about 75 per cent of the U.S. military facilities in Japan are located. Quite naturally, there has been a strong campaign by the Okinawan people calling for realignment and reduction of the U.S. bases. As a recent move, a referendum on whether to accept the government's plan for constructing a U.S. Marine heliport off the coast of the northern city of Nago

was held in that city. The government's project, based on an agreement made by the Japan-U.S. Special Action Committee (SACO) in December 1996, was aimed at relocating the U.S. Futenma Air Station in the central city of Ginowan. The outcome of the referendum showed a majority of the city's voters were in opposition to the heliport plan. However, the central government has until recently been adhering to its original plan of constructing the sea-based heliport, disregarding the will of local residents.<sup>(18)</sup>

Second, there have been many times of U.S. military exercises at the Japanese SDF Training Sites on mainland since 1997. A typical case shows that in the training, 155 mm howitzer live-shell exercises, which had until then been carried out in Okinawa, has been carried out on a larger scale than in Okinawa. This means that the functions of the U.S. military facilities in Okinawa are being partly taken over by mainland facilities. In parallel with U.S. military training, several Japan-U.S. joint exercises are also carried out: air exercises in air space over the Japan Sea and the Pacific between the U.S. and Japan's air forces, ground exercises at Sekiyama Training Site (Niigata Pref.) between the U.S. Marines and the Ground SDF, and ground exercises at Aibano Training Site (Shiga Pref.) between the U.S. Army stationed in Hawaii and the GSDF, etc.

An important thing is that in these exercises some Japanese civilian ports, airports and transport are used by the U.S. troops. For example, the U.S. troops used Kansai International Airport, Japanese civilian buses and trucks. This means that the cooperation item specified in the new Guidelines, namely the use of civilian facilities in Japan, has been put into operation for these exercises.

Recently, we perceived the essential danger which the new Guidelines might cause. On the occasion of the Iraq crisis in January 1998, sudden and intensified Night Landing Practice (NLP-"touch-and-go" landings) by U.S. Navy aircrafts was held at the U.S. air stations in Iwakuni (Yamaguchi Pref.), Atsugi (Kanagawa Pref.) and Yokota (Tokyo) ignoring requests to stop by lo-

cal governments and complaints by local residents. On this practice, U.S. Navy officials explained that "the sudden move was necessitated by an urgent operational need for the aircraft carrier Independence."<sup>(19)</sup> This remark was proved to be true when Independence hastily left its homeport Yokosuka for the Persian Gulf on the next day after the NLP was over.

This event reminds us of a precedent on the occasion of the U. S.-launched missile attack on Iraq in 1996. At that time also, the U.S. military bases in Japan played a key role as "the U.S. sortie bases."

All these facts clearly show that even now the whole of Japan is almost completely integrated in the Japan-U.S. military framework represented by the new Guidelines.

## IV A DESIRABLE COURSE FOR JAPAN

### 1. The Constitutional Mandates

In 1954, a decision adopted by the House of Councillors, the upper house of Japan's Diet, prohibited the dispatch of the SDF abroad. Two years later, when Japan entered the United Nations, then Foreign Minister made it clear that Japan could not participate in the U.N. collective security system as provided under Article 39 or Articles 40-43 and 53 in Chapter VII of the U.N. Charter as far as it might involve military activities. Japan also refused to send troops overseas for the right of collective self-defense as provided for in Article 51 of the Charter. As seen before, all these "self-restrictions" have outrageously been undermined in the course of Japan's militarization thereafter.

Nevertheless we must never forget that these restrictions are solemnly imposed on Japan by its own fundamental law: the Constitution. Should Japan be a "constitutional state," it would have strictly to follow the constitutional mandates. Sadly enough however, there have been many deviations from the Constitution. The most recent example may be the fact that in the course of

the "redefinition" referred to above, there has been no participation of the Diet in the new security arrangements. The setup of the new Guidelines clearly amounts to a revision of the current Security Treaty. Then it must previously or afterward be submitted to the Diet for its approval according to Article 73-3 of the Constitution. This time however, the Diet, which is the highest organ of state power, was given no chance to take part in the process. As for the right to decide the launching of an armed operation in "emergencies in areas surrounding Japan" under the new Guidelines, the decision-making actually belongs to the United States, as the Japanese government admitted in the Diet. There is no such mechanism for any other U.S. allies, including the NATO members in Europe.

## 2. The Importance of Issues related to the Redress of War

As previously said, Japan has launched an invasive war against neighbouring Asian countries under the pretext of it being a "defensive" war or a "holy" war aimed at liberating Asian nations from the colonialism of European imperial powers. Historical fact entirely contradicted this. Moreover, some of the conduct of the Japanese military before and during the Asia-Pacific War evidently constituted that of war crimes or crimes against humanity. As a constitutional scholar asserts: "We must never forget the tremendous sufferings we caused our Asian neighbors, in incidents such as the Nanking Massacre and the 'comfort women' forced into prostitution to serve the Imperial Army."<sup>(20)</sup>

Since Japan, in addition to being the victim of the atomic bombs, was also an aggressor, it must faithfully compensate foreign World War II victims. However, the Japanese government has always been reluctant and passive in this regard.

In many lawsuits which had been filed by such victims as those forced to be military sex slaves, those who suffered forced labour at mines or factories in Japan, or those whose relatives had been victimized by the satanic medical experiments con-

ducted by the Imperial Japanese Army's infamous germ warfare unit (Unit 731), the Japanese government has been trying to evade its responsibility for redress. For example, in recently held court hearings on a class-action suit against the Japanese government brought by Chinese nationals demanding an official apology and damages for germ warfare Japan waged during the Asia-Pacific War, the government asked the court "to dismiss the suit on the grounds that the plaintiffs are not eligible to sue because the so-called statute of prescriptions [statute of limitations], according to Japanese civil law, runs out after 20 years." In addition, lawyers for the government said "there is no reason for the government to state its position on germ warfare."<sup>(21)</sup> It sounds very curious that the Japanese government, while criticizing Iraq's suspected development of chemical and biological weapons, does not officially own up to its own involvement in germ warfare in the past. It can be said that the attitude of the Japanese government towards war responsibility constitutes one of the reasons for discredit cast on Japan by her Asian neighbours.<sup>(22)</sup>

### 3. Conditions for Participation in the PKO

In relation to Japan's continued participation in the U.N. peacekeeping missions since the International Peace Cooperation Law was passed, it is said that Japan's commitment is favorably accepted by both the Japanese public and the international community. For example, Mr. Shunji Yanai, Director-General of the Foreign Policy Bureau, Ministry of Foreign Affairs, says as follows:

An issue of great importance for continued Japanese support of peacekeeping activities is the perception and understanding by the Japanese people of peacekeeping. The first impression which the Japanese public had of Japan's role in peacekeeping was formulated by media reports from Cambodia, some of which were unflattering. After this inauspicious beginning, there is now greater understanding of peacekeeping amongst

the Japanese public.

....

Of equal, if not greater importance, to Japanese domestic understanding and perception of our peacekeeping activities, are the perceptions of our neighbours in Asia of our recent activities. The governments of Thailand and the Philippines were extremely helpful during our first peacekeeping mission in Cambodia. JSDF aircraft, on their way to and from Cambodia, were able to use Philippine and Thai facilities.<sup>(23)</sup>

A similar appreciation is given to Japan's commitment. Mr. Alex Morrison, President of the Pearson Peacekeeping Centre, comparing Canadian experience in the peacekeeping missions, highly appreciates the performance of the Japanese military in the PKO and advocates Japan's further involvement in this mission :

Japan has made tremendous strides in peacekeeping over the past few years. Its achievements include: the education of the public, with the subsequent rise in the opinion poll ratings on the subject; the International Peace Cooperation Law has been passed; and Japan has participated in four peacekeeping missions, has deployed to Africa and will be participating in peacekeeping in the Middle East. The country has assumed a leading role in international discussion of peacekeeping matters, through articles in learned journals, the opinion leader programme, a guest lecture series at the National Institute for Defence Studies and the staging of educational conferences. It is necessary to build a solid foundation and to move forward from there, which Japan has done recently. I am confident that Japan will play an ever-expanding role in the maintenance of international peace, security and stability in the years to come.<sup>(24)</sup>

In light of these appreciations, the author would nevertheless like to make the point that there should be certain constitutional restrictions on Japan's participation in the PKO missions.

First, we must at least keep the five conditions provided for in the International Peace Cooperation Law for Japan's participation in the missions.<sup>(25)</sup> In this regard, we must realize that, faced with completely different situations in the recent regional conflicts, the very nature of the PKO has largely changed. As a matter of fact, in "An Agenda for Peace" proposed by the former U.N. Secretary-General Boutros Boutros-Ghali in 1992, new measures to promote peace were proposed: "peace enforcement" and "preventive deployment." It is to be noticed that the proposed "peace enforcement" necessarily involves "the use of peace-enforcement units, which need to be more heavily armed than peace-making forces."<sup>(26)</sup> This being the case, there is no assurance that Japan's participation in the PKO missions, although so far it may have been done within the legal limitations, will remain the same in the future.

Second, we must consider that, compared to the Canadian experience where the constitutional framework for participating in the PKO missions is established,<sup>(27)</sup> Japan's scheme lacks such constitutional control devices as the Diet's prior approval for sending the SDF, the strict civilian control on the SDF activities, and so on. This means there may eventually be a government acting contrary to the majority will of the people, as represented by the Diet.<sup>(28)</sup>

#### 4. Japan's Role in Disarmament Efforts

As the SIPRI yearbook says, "the end of the cold war brought the political marginalization of nuclear weapons" and "significant reductions in nuclear potentials became possible."<sup>(29)</sup> The international community has certainly begun to make steady steps toward a nuclear-free world. The yearbook also enumerates the results recently achieved in the field of nuclear disarmament:

- (1) Considerable progress in implementing the 1991 START Treaty (Strategic Arms Reduction Treaty);
- (2) Some progress in the bilateral reduction of strategic nu-

- clear weapons under the 1993 US-Russian START Treaty ;
- (3) The 1995 decision to extend the 1968 NPT (Non-Proliferation Treaty) indefinitely ;
  - (4) The 1996 CTBT (Comprehensive Nuclear Test-Ban Treaty), which "brings the international community of states closer towards achieving the ultimate goal of a totally denuclearized world" ;
  - (5) Signing of the Treaty of Pelindaba (African Nuclear-Weapon-Free Zone Treaty) in April 1996.<sup>(30)</sup>

We can mention two other results in addition :

- (6) An advisory opinion issued on July 8, 1996 by the ICJ (International Court of Justice) on the problem of "legality of the threat or use of nuclear weapons." In its opinion, the Court concluded that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law"<sup>(31)</sup> ;
- (7) The adoption in the U.N. General Assembly in December 1996 of four resolutions demanding a total abolition of nuclear weapons within a set time-frame, two of which called for the start of negotiations on a nuclear weapons abolition treaty within 1997.

Thus the international community is now on the way to totally abolishing nuclear weapons. This step however, is not without obstacles. In parallel with the progress mentioned above, we find many barriers which in various ways prevent and reverse the move to denuclearization. At the bottom of this reversion lies a tendency of some nuclear powers to cling to the so-called "nuclear deterrence theory" which is now said to have been ruined. Nuclear super powers, while putting forward their cause for retaining nuclear forces under the pretext of "self-defense," have continuously carried out nuclear tests even after they became unnecessary in essence. For instance, France and China have

carried out several undersea or underground nuclear tests in 1995-1996 against an overwhelming protest from all over the world. In June 1998, another two countries (India and Pakistan) have also conducted underground nuclear tests. Meanwhile the U.S. (in 1997 and 1998) and Russia (in 1996 and 1997) have conducted a series of underground subcritical nuclear tests. It is to be noted here that the subcritical nuclear test, although it does not cause a nuclear explosion, still constitutes a "test" (aimed at maintaining the capability of the weapons and thereby maintaining the nuclear advantage of the state) which is prohibited under the CTBT.

A crucial point which must never be overlooked is that under these circumstances, the Japanese government, which ought to protest against the "pro-nuclear" strategies as the government of the world's only A-bombed country, does not dare to take charge of this noble vocation. On the contrary, it is rather willing to support the hegemonistic strategy of a nuclear super power that is, again, the U.S. For example, on occasion of the ICJ's ruling over the legality of nuclear weapons, the Japanese government gave its view that the use of nuclear weapons in armed conflicts was not against international law, even though it was contrary to the spirit of humanity. This view was just the same as that of the U.S. which also insisted on the "legality" of using nuclear weapons in "self-defense."

Now it seems clear that in order to achieve the total abolition of nuclear weapons, the people of each country must organize a strong campaign pressing each government to follow this lofty imperative. For the Japanese people, this is just the way which the Constitution commands us to follow by saying "never shall we be visited with the horrors of war through the action of government."

In relation to the present issue of disarmament, the author would refer to another topic which is also of great importance: the total ban on anti-personnel landmines. The international community in 1997 reached "the first step"<sup>(32)</sup> in the total abolition of this deadly weapon by the signing by no less than 120 countries

of a treaty which bans the use, production, stockpiling and transfer of anti-personnel landmines.

It is widely known that in accomplishing this hard task of abolishing landmines, two actors have played a leading role: One is Canada which had been constantly advocating this aim; and another is an NGO named the "International Campaign to Ban Landmines (ICBL)," which had also been struggling for years to achieve a treaty banning landmines. The Canadian initiative can be seen in that Canada was the first (on January 17, 1996) to declare "a comprehensive unilateral moratorium on the production, export and operational use of anti-personnel land mines," that Canada has been taking "practical steps to mitigate the existence of land mines" and that "Canada has been very active in trying to promote international norms against the utilization of land mines in the UN, the OAS and elsewhere."<sup>(33)</sup> Announcing its firm pledge to ban landmines, Canada destroyed its last stockpile of 96 anti-personnel landmines on November 3, 1997.<sup>(34)</sup>

Compared to this significant contribution of Canada, Japan's attitude to the issue still seems insufficient. Although the Japanese government finally joined the above treaty in December 1997, this was not voluntary but rather with reluctance. In fact, even when then Prime Minister Hashimoto officially pledged to sign the treaty, "the Defense Agency has been reluctant to do so because it considers land mines an effective way to defend Japan's long coastline."<sup>(35)</sup>

This unwillingness seen among the Japanese government officials reflects the government's concern "to maintain good relations between Tokyo and Washington" which is still "reluctant to sign the treaty."<sup>(36)</sup>

## V CONCLUSION

Although Japan is restricted by the Constitution in respect to involvement in armed conflicts outside Japan, it can and must contribute to international peace and security in such ways as diplo-

matic efforts or humanitarian relief of victims in the conflicts. In so doing, Japan must always keep an independent and neutral stance vis-à-vis any party to the conflict. In light of this perspective, Japan's current attitude to world security issues, which actually is "U.S.-oriented," must be changed.

In this regard, Japan must learn a lot from the stance of Canada which, in spite of being located closest to the U.S., firmly maintains an independent and "multilateral"<sup>(37)</sup> foreign policy. Japan must in the first place get away from the U.S.-governed world strategy. Then the next matter would be to establish a "multilateral" stance in the Asia-Pacific region. It is also necessary for Japan to recover a trust which has been lost in the past decades owing to its unfaithful dealing with war redressal issues.

As the author has repeatedly said, to achieve the above purpose, it is undoubtedly crucial to follow the constitutional mandates. In this regard, we must consider a certain assertion that the options which the Japanese Constitution presents are "too idealistic to be acceptable under the circumstances today," or rather "selfish" and "egoistic" because the Constitution considers the security of Japan only (criticism of "one-country pacifism.")

To the latter criticism, we must reply by pointing that the Constitution, as shown at the head paragraph of this paper, maintains a virtually international or interpopular stance. There is another objection to the criticism of "one-country pacifism":

[T]he Japanese constitution creates an affirmative political, if not legal, duty to promote world peace through assistance to persons around the world suffering from fear and want, without expectation of reward. If the Japanese government had been faithful to its constitution, it would have taken the initiative on arms control, human rights, world hunger, disease and other international problems, despite the fact that Japan cannot play a military role in settling international disputes. Unfortunately, however, Japan has not been earnest in helping to resolve these problems by means other than sending money.

Moreover, Japan's foreign aid has been repeatedly attacked for providing almost nothing of use to the people receiving such aid. It has been Japanese foreign policy, which has been unfaithful to dictates of Japanese pacifism, not the pacifism itself that has been "selfish".<sup>(38)</sup>

As to the criticism of the Constitution being "idealistic," an American political scientist rebuts as follows:

It is slander to say that Japan's pacifism is naive and not grounded in the realities of modern politics. It was born among a people who came face-to-face with the realities of modern politics in an encounter of devastating intensity, people standing up from the rubble of cities that had been carpet-bombed, fire-bombed, and atom bombed, and choosing a different life. They knew more about modern political reality than any bomber pilot looking down from the sky.<sup>(39)</sup>

Sharing the same perspectives, the author would finally conclude that the pacifist principle of the Japanese Constitution is to be regarded, as was the case with the Universal Declaration of Human Rights, as one universal criterion which the international community should pursue.

\* Professor of Law, Faculty of Law, Niigata University

#### 《NOTES》

- (1) Shotaro Hamura and Eric Shiu, "Renunciation of war as a universal principle of mankind - A look at the Gulf War and the Japanese Constitution," *International and Comparative Law Quarterly*, Vol. 44, April 1995, p. 439.
- (2) Charles Douglas Lummis, "Japan's radical constitution," in *The Constitution of Japan*, 1993, p. 168.
- (3) James E. Auer, "Article Nine: Renunciation of War," in Percy R. Luney, Jr., and Kazuyuki Takahashi eds., *Japanese Constitutional Law*, 1993, p. 74.

- (4) *Ibid.*, p. 80.
- (5) The Defense Agency, *Defense of Japan 1996* (Japan Times trans. 1996), p. 58.
- (6) Statement of Prime Minister Kishi Nobusuke in 1959, cited in Auer, *supra* note 3, at p. 76.
- (7) "According to tables and analyses in part two of Military Balance (1995-1996) outlining international comparison of defense spending and military strength, national defense expenditures for FY 1994 are \$278,730 million for the United States, \$33,861 million for Britain, \$34,848 million for Germany, \$42,724 million for France, \$106,927 million for Russia, \$27,680 million for China and \$44,660 million for Japan." (The Defense Agency, *supra* note 5, at p. 301.)
- (8) "[T]he right [of a state] to use force to stop armed attack on a foreign country with which it has close relations, even when the state itself is not under direct attack." (The Defence Agency, *supra* note 5, at p. 59.)
- (9) Youzou Watanabe, *Kenpou To Kokuren Kenshou* (The Constitution and the U.N. Charter), 1993, p. 150.
- (10) The Defense Agency, *Defense of Japan 1993*, p. 128.
- (11) The Defense Agency, *supra* note 5, at p. 64.
- (12) *Ibid.*, p. 65.
- (13) *The Japan Times*, September 24, 1997.
- (14) Editorial for September 25, 1997, *The Japan Times*.
- (15) Along with the two bills, another proposal to revise the Japan-U.S. Acquisition and Cross Servicing Agreement (ACSA) was made on the same day. "The revised ACSA will enable Japan's Self-Defense Forces to provide the U.S. Armed Forces with rear-area support in the event of military conflicts in areas surrounding Japan." (*The Japan Times*, April 28, 1998.)
- (16) *The Japan Times*, April 16, 1998.
- (17) Ryuichi Ozawa, "Syuhon-Jitai-Hou No Ronri To Kouzou" (Logic and Structure of the New Guidelines Bill), *Houritsu Jihou* (Law

Journal), Vol. 70, No. 10, p. 73.

- (18) After the Okinawa gubernatorial election held in November 1998, the central government is reportedly waiting for an alternative proposal from the newly elected Okinawa governor, Kei-ichi Inamine, who "has said he is ready to discuss building a new airfield for both military and commercial use in northern Okinawa to take over Futenma's functions." (*The Japan Times*, November 1998.)
- (19) *The Japan Times*, January 11, 1998.
- (20) Setsuko Norimoto Tsuneoka, "Pacifism and some misconceptions about the Japanese Constitution," in *The Constitution of Japan, supra* note 2, at p. 142.
- (21) *The Japan Times*, February 16, 1998.
- (22) In 1998 several court decisions concerning war redress were delivered. Among others, two district court rulings on sex slave suits present a strong contrast. On April 27 the Yamaguchi District Court (Shimonoseki Branch) ordered the government to pay 300,000 yen each to three Korean former "comfort women" for failing to enact legislation aimed at compensating the suffering of women taken to wartime brothels and forced to provide sex to Japanese soldiers before and during World War II. The government's negligence was found in that it "illegally neglected its constitutional duty to pass a law awarding compensation" following an August 1993 admission by then Chief Cabinet Secretary Yohei Kono that "in many cases," the women were recruited by force and that Japanese military and administrative authorities were directly involved. (*The Japan Times*, April 28, 1998.) On the other hand, the Tokyo District Court on October 8 rejected claims by 46 former "comfort women" from the Philippines who were seeking compensation from the Japanese government for forcing them to provide sex for Japanese soldiers. The court dismissed the suit invalidating the plaintiffs' argument that they are entitled to individual compensation based on international laws

that regulated behavior of military forces at that time. "In contrast with the first ruling in April by the Yamaguchi District Court, Friday's Tokyo District Court decision was a total defeat for the plaintiffs. The court refused to even confirm if the women suffered the damage they claim they did, supporting the defendant's argument that individual victims of war do not have a right to demand redress from a state." (*The Japan Times*, October 9, 1998.) The difficulty for individual war victims to seek compensation from a state is shown in another case. On November 26, the Tokyo District Court dismissed claims by former prisoners of war (POWs) and civilian internees from four countries for compensation by the Japanese government over brutal treatment during World War II. The plaintiffs' argument was that such behavior violated Article 3 of the 1907 Hague Convention and international customary law. The court's ruling, however, was that the article does not provide for compensation to individuals who are injured through illegal state acts. It also rejected the plaintiffs' argument that international customary law had been in effect between 1942 and 1945, when the alleged treatment took place. "The decision, the first judgment by a Japanese court on the interpretation of the Hague Convention, is expected to affect other war damages suits." (*The Japan Times*, November 27, 1998.)

- (23) Shunji Yanai, "UN peace operations and the role of Japan: The Japanese view," in Alex Morrison and James Kiras eds., *UN Peace Operations and the Role of Japan*, 1996, p. 75-76.
- (24) Alex Morrison, "Observations on peacekeeping and Japan's role," in the above reports, p. 90.
- (25) The fifth condition for the participation in PKO missions was revised in June 1998 by a disputable amendment to the PKO law. The revision was aimed at allowing SDF commanders taking part in UN peacekeeping operations to order defensive fire if deemed necessary.

- (26) Hamura and Shiu, *supra* note 1, at p. 442.
- (27) Through experience of involvement in the Boer War, the two World Wars, the Korean War and the Gulf War, Canada has established a political convention which requires a prior parliamentary approval for a declaration of war. (Gerald L. Gall, "Canadian law and war," in the symposium "From War Responsibility toward International Peace" held on July 5, 1996 at the Niigata University.)
- (28) Since November 1998, there has been a debate over constitutionality of SDF's role in UN operations. On television program, Liberal Party leader Ichiro Ozawa argued that the SDF can take part in armed operations led by the U.N. if its Security Council passes a resolution approving such operations. In rebuttal to this, Chief Cabinet Secretary Hiromu Nonaka maintained the government's traditional interpretation of the Constitution that it bars Japan from engaging in collective defense including joining U.N. combat operations. The debate is still ongoing. (*The Japan Times*, November 24, December 9, 1998.)
- (29) Stockholm International Peace Research Institute (SIPRI), *SIPRI Yearbook 1997: Armaments, Disarmament and International Security*, 1997, p. 2.
- (30) *Ibid.*
- (31) The Court's opinion, however, has shown its passive stance as follows: "However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." (International Court of Justice, 8 July 1996, General in No. 95.)
- (32) At the signing ceremony of the landmine treaty held in December 1997 in Ottawa, Canada's Foreign Minister Lloyd Axworthy stated: "This is just a beginning. We've got lots of work to do."

(*CNN World News*, December 4, 1997.)

- (33) George Alexandrowicz, "Discussion notes on Canada's commitment to international peace," in the same symposium as *supra* note 27, p. 15-16.
- (34) *Asahi Shinbun*, November 5, 1997.
- (35) *The Japan Times*, October 21, 1997. Japan has finally ratified the treaty in late September 1998 by the Diet endorsement and related domestic legislation in line with the treaty. "The newly enacted legislation prohibits, without exception, the production of land mines within the nation, while allowing only entities with government permission to possess them." (*The Japan Times*, September 30.)
- (36) *Ibid.* The United States has reportedly said "it could sign the mine-banning treaty only if exemptions were made to protect its troops in South Korea and allow continued use of its anti-tank munitions." (*The Seattle Times*, December 4, 1997.) On the other hand, it is reported that "[r]etired American generals just laughed when the U.S. said that its troops stationed along the border between North and South Korea would be endangered if it had to remove the one million land mines it has there." (Editorial for December 8, 1997, *The Montreal Gazette*.)
- (37) Professor Mitsuru Kurosawa of Osaka University highly appreciates the Canadian "multilateral" principle in its foreign policy, urging on the other hand that Japan should shift its foreign policy attitude from "bilateralism" to "multilateralism." (Mitsuru Kurosawa, "Kokusai Heiwa E No Nihon No Torikumi (The commitment of Japan to the international peace)," in the same symposium as *supra* note 27.)
- (38) Norimoto Tsuneoka, *supra* note 20, at p. 144.
- (39) Douglas Lummis, *supra* note 2, at p. 188.