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## Reinterpreting Article 9 of Japanese Constitutional Law from the International Law Perspective

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# Reinterpreting Article 9 of Japanese Constitutional Law from the International Law Perspective

## Abstract

This essay aims to demonstrate that the right of collective self-defense complements that of individual self-defense. Moreover, by exercising both rights of self-defense together, the ideals of the United Nations (UN) Charter and Japanese constitutional law can be implemented as stipulated.

However, this essay focuses on ensuring better consistency with the present time (synchronicity) rather than historical facts (historicity). Additionally, I have cited cases wherein the ideas and theories presented are controversial in academic circles. I cannot discuss them individually in this essay owing to space limitations, but I will consider them in a future opportunity. Finally, I would like to add that the views expressed in this essay are my own and not those of the academic society.

## Keywords

Article 9, Japanese Constitutional Law, International Law, Legal doctrine

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## Reinterpreting Article 9 of Japanese Constitutional Law from the International Law Perspective<sup>\*</sup>

Hiroshi Saito<sup>\*\*</sup>

### Abstract

From the logical process so far, the following points can be summarized.

- (1) Each country is granted by international law with the right of individual and collective self-defense.
- (2) Two possibilities exist for the meaning of “international dispute” in Article 9 of the Constitution.
- (3) If an “international dispute” does not include an armed conflict, the exercise of the right of self-defense in accordance with international law is based on Article 98, Paragraph 2, of the Constitution.
- (4) If an “international conflict” includes an armed conflict, it will be the exercise of the right of self-defense based on Article 9 of the Constitution.
- (5) Unless the rights of both individual and collective self-defense are complementarily combined, achieving the purpose of Article 9 of the Constitution and the UN Charter, which is to maintain peace, would become impossible.
- (6) Unless the right of individual self-defense and that of collective self-defense are complementarily combined, the function of the right of self-defense cannot be exercised (there is an obligation to exercise it).
- (7) Exercising the right of collective self-defense is appropriate by concluding a joint defense treaty and stipulating the requirements therein.

As described above, the conventional interpretations of Article 9 and constitutional legal theories do not accurately recognize the meaning of international disputes. Additionally, the right of self-defense used in the international community is fully incorporated into international law, which is the legal norm of that society. The right of self-defense has not been examined as identical to the right of self-preservation. This has given rise to extremely diverse interpretations of the rights of both individual and collective self-defense.

However, by recognizing and interpreting as in this article, having a univocal interpretation that allows individual and collective self-defense rights to be exercised without amending the Constitution and Article 9 should be possible. It is the role of so-called politics to determine specific matters and requirements within the framework of the Constitution. However, I believe that this essay has at least presented an interpretation that serves as the legal basis.

*Keywords : Article 9, Right of Self-Defense, International Dispute, Legal Theory, Legal Doctrine*

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<sup>\*</sup> This essay serves as a correction to the original one, “Dai 9 Jou no Kaishaku,” published on *Kenpo Kenkyu*, No. 39, (Kenpo Gakkai, 2007), pp. 51–73.

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1. Purpose
2. Basis for existence and function of the right of individual self-defense
3. Interpretation of “international disputes” in Article 9 of Japanese Constitutional Law
4. When “international disputes” do not include armed conflicts
5. When “international disputes” include armed conflicts
6. Legal issues related to the exercise of the right of collective self-defense

## 1. Purpose

This essay aims to demonstrate that the right of collective self-defense complements that of individual self-defense. Moreover, by exercising both rights of self-defense together, the ideals of the United Nations (UN) Charter and Japanese constitutional law can be implemented as stipulated.

However, this essay focuses on ensuring better consistency with the present time (synchronicity) rather than historical facts (historicity). Additionally, I have cited cases wherein the ideas and theories presented are controversial in academic circles. I cannot discuss them individually in this essay owing to space limitations, but I will consider them in a future opportunity. Finally, I would like to add that the views expressed in this essay are my own and not those of the academic society.

## 2. Basis for existence and function of the right of individual self-defense

### (1) Rights conferred on states by international law

As the rights of both individual and collective self-defense are common to all nations worldwide, they must be based on legal norms common to all nations. Hence, international law applies. Both rights of self-defense are granted to each state by international law.

Before the end of World War II, the idea of indiscriminate warfare (the use of force was legal and a means of diplomacy) meant that nations had the right of self-preservation. They could use a wide range of means to resolve international disputes. These included negotiation, mediation, arbitration, and use of force (e.g., colonization). However, after the end of World War II, the Tokyo Trials adopted the concept of “crimes against peace” (i.e., illegal view of war of aggression). The contents of the right of self-preservation were disassembled and reconstructed. The use of military force was then limited to UN activities and right of self-defense (individual or collective); other acts became illegal (acts of aggression). Use of force as a means of diplomacy became illegal and prohibited.<sup>1</sup>

Therefore, UN member states will be granted dual self-defense rights under the provisions of the UN Charter. Non-UN member states will be granted the same rights under the customary provisions of the UN Charter.<sup>2</sup>

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<sup>1</sup> Yasuaki ONUMA, *Senso Sekinin Josetsu* (University of Tokyo Press, 1975), Kisaburo YOKOTA, *Jiei-ken* (Yuhikaku, 1978), Susumu KASUYA, *Kenpo Dai 9 Jou to Jiei-ken* (new edition) (Shinzansha, 1992), Ryoichi TAOCA, *Kokusaiho jou no Jiei-ken* (Keiso Shobo, 1964), Wakamizu TSUTSUI, *Gendai Kokusaiho ron* (University of Tokyo Press, 1972), Wakamizu TSUTSUI, *Kokuren Taisei to Jiei-ken* (University of Tokyo Press, 1992), Kazuo SATO, and *Kenpo 9 jou/Shinryaku-senso/Tokyo Saiban* [Enlarged and Revised Edition] (Hara Shobo, 1985). Johji TAGAMI, “Shuken no Gainen to Bouei no Mondai,” Jiro TANAKA, editor-in-chief, *Nihon koku Kenpo taikē dai 2 kan sou-ron II* (Maruzen Planet, 1996), Kunihiko TATSUZAWA, ed, *Kokusai Kankei Ho* (Maruzen, 1996), Hiroshi Saito, “Kobetu-teki oyobi Shudan-teki Jiei-ken Sonritsu no Houteki Konkyo ni kansuru Ichi Kousatsu” *Heisei Hosei Kenkyu*, Vol. 2, No. 2 (March 1998). The UN Charter also provides for peaceful settlement (Article 33), nonmilitary measures (Article 41), military measures (Article 42), and the right to self-defense (Article 51). Thus, the conventional right of self-preservation has been dismantled.

<sup>2</sup> Different theories regarding the conversion of treaties into customary law exist, but the North Sea Continental Shelf Incident (1969) also refers to the conversion of treaties into customary law when certain requirements are met. We thus stand in a position to affirm the customary law.

## (2) Interpretation of “inherent rights”

Article 51 of the UN Charter stipulates that the rights of both individual and collective self-defense are inherent rights. “Inherent” means “born,” which in the context of international law, means that these rights are acquired after a state (a legal entity) is recognized. At that point, the state is considered to be “born.” “Inherent rights” in the UN Charter can be interpreted as the rights of sovereign states that have been recognized by the state. Therefore, the right of self-defense is a right granted to sovereign states under international law<sup>3</sup>. Additionally, there is also the view that, because “individuality” is a characteristic that arises between nations, it is based on legal norms that govern such relationships (i.e., international law).

## (3) Other views on the grounds for existence of the right of self-defense

Understanding that the meaning of “inherent rights” is found in the fact that a state exists as a state itself. The basis for the existence of the right of self-defense is not international law, but the state’s existence itself. Hence, each country should be able to freely exercise the right of self-defense as its own “inherent right.” The exercise is to be unlimited and the same as the former “right of self-preservation.”

A theoretical restraint can be added to this logical conclusion using the so-called social contract theory, as in Vattel’s theory of sovereignty (one of the ideas of state sovereignty under natural law). Essentially, members of the international community (states), through the UN Charter and by agreeing on the contents of the UN Charter as customary international law, add certain restrictions to the freely exercised right of self-defense, thereby ensuring safety and security in the international community. Hence, stability and peace have been secured.

Based on this understanding, the actual exercise of that right of self-defense will be governed by international law, which constitutes the contract among nations.

In the sense that the right of self-defense is exercised under international law, the result will be identical to the above view that seeks international law as the basis for the existence of this right. However, while the above (1) derives the right of self-defense from the disaggregation of the right of self-preservation, this view recognizes that the right of self-defense and that of self-preservation are formally different entities and rights. This is the difference between the two views. However, when the issues tackled in this essay are considered simultaneously, a significant difference is not a likely result. I proceed with the following argument.

## (4) Roles or functions of the rights of both individual and collective self-defense

In the post-World War II international community, no plans to settle disputes using the right of self-defense were made. Hence, should an illegal use of force occur, the right of self-defense is exercised for the purpose of restoring the situation to its original state or balancing and maintaining the state of armed conflict. The situation can then be resolved by peaceful means (Article 33 of UN Charter), including military (Article 42) and nonmilitary measures (Article 41) other than exercising the right of self-defense. If a country exercises the right of self-defense with greater force than that of the other country, it will constitute excessive defense. Hence, the state that exercised the right of self-defense will be considered to have committed an act of aggression (illegal act). Because whether or not the right of self-defense is

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<sup>3</sup> See above (1), SAITO.

exercised is a matter for the UN Security Council to decide. Moreover, the UN Charter also recognizes the right of self-defense until the UN takes appropriate measures. Hence, the right of self-defense is a right intended to maintain the state of armed conflicts and as opposed to resolving them.

### 3. Interpretation of “international disputes” in Article 9 of the Japanese Constitutional Law

#### (1) Theories in constitutional law

Constitutional theories concerning Article 9 can be roughly classified as follows.<sup>4</sup>

##### (A) Completely non-armed theory/complete denial theory

(a) The “means of settling international disputes” referred to in Paragraph 1 shall include not only wars of aggression but also wars for self-defense. The theory that it stipulated was not to maintain military strength (according to, e.g., Toshiyoshi MIYAZAWA, Shiro KIYOMIYA, Nobuyoshi ASHIBE).

(b) The “means of settling international disputes” referred to in Paragraph (1) do not include warfare in self-defense, but as a result of the provisions in Paragraph (2) not to maintain “arms” without reservation. This is a theory that renounces all warfare and denies all war potential (many such as Isao SATO).

(c) “National belligerence rights are not recognized,” in this theory, is interpreted as a unilateral declaration not to exercise various rights under international law.

##### (B) Reservation of self-defense capability theory/limited denial theory

(d) The “means of settling international disputes” referred to in Paragraph 1 does not include war for self-defense. This includes the theory that “strength” can be maintained (according to, e.g., Soichi SASAKI, Kiminobu HASHIMOTO).

(e) The “means of settling international disputes” referred to in Paragraph (1) shall be construed to refer to the “threat or use of force” rather than renunciation of “war.” However, this theory includes “the threat or use of force” for self-defense being permitted and “armed force” for self-defense being maintained even in Paragraph 2 (according to, e.g., Koji SATO, Toyoharu KAKUDO).

(f) On “national right of belligerence is not recognized,” this theory interprets the exercise of the right of belligerency to be limited to the minimum necessary for self-defense.

##### (C) Government view

(g) Anything exceeding the minimum level of strength necessary for self-defense (self-defense capability) is prohibited as “war potential.” The Japanese Self-Defense Forces are not included in this category.

(h) The phrase “to achieve the purpose of the preceding paragraph” at the beginning of Paragraph 2 does not constitute a denial of the “right of belligerency.”

##### (D) Others (minority theory)

(i) Political manifesto theory (by, e.g., Kenzo TAKAYANAGI, Teruya ABE, Ichiro ASANO).

(j) Political norm theory (Masami ITO).

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<sup>4</sup> Makoto OISHI, *Kenpo Kogi I* (Yuhikaku, 2004), pp. 51–55. Cf., Kenji NAYUKI, *Nihon-koku Kenpo* (Yushindo, 2002), Toshiyoshi MIYAZAWA (Author), Nobuyoshi ASHIBE (revised), *Zen-tei Nihon-koku Kenpo* (Nippon Hyoronsha, 2004), Masayasu HASEGAWA, “Kokka no Jiei-ken to Kokumin no Jiek-ken” FUKASE, ed. *Senso no Houki* (Sanseido, 1997).

## (2) “International conflicts” and armed conflicts in Article 9

These theories basically interpret “means of settling international disputes” as a single entity, but the meaning of “international disputes,” which is the object of settlement as stipulated in Article 9, is not clarified<sup>5</sup>. Hence, by using definitional theories in both traditional formal and modern logic (focusing on explanations of things and symbols, without using semiotics or dialectics)<sup>6</sup>, I will explore whether armed conflicts are included in “international disputes.” Due to the limits of this essay, only the following are examined:

## (i) When using a sign explanation (semantic analysis)

This is unclear because Article 9 of the Constitution does not define “international disputes.” The same term is not defined in constitutional theory, so it is unclear. Conversely, as armed conflicts are not included in “international disputes” under the law of international relations, “international disputes” are states of non-armed conflicts<sup>7</sup>.

## (ii) When using a description of things (empirical analysis)

Constitutional doctrine naturally assumes that “international disputes” include armed conflicts. In the actual situation of the international community, various forms of armed conflict frequently occurred. Moreover, the term “international conflict” is often used to collectively refer to these and non-armed conflicts<sup>8</sup>.

## (iii) “International disputes” and armed conflict in Article 9

Generally, a definition is a promise, decision, or proposal to use the symbol “*a*” to refer to the object “*a*.” Therefore, it does not have a truth value and becomes a reasonable sentence/oughtness. Based on this, definitions of scientific terms should consider sign descriptions and descriptions of things, be univocal, and reflect the reality as accurately as possible.

However, based on the previous description, a clear and unique definition is impossible. This essay does not seek to define international disputes. Hence, I focus on the cases of both sign (semantic analysis) and matter explanations (experience analysis), regarding whether or not international disputes include armed conflicts.

The former is the case where “international conflicts” do not include armed conflicts, and the latter is the case where “international disputes” include armed conflicts. Each is considered below.

<sup>5</sup> Takeshi ENOHARA, *Kenpo: Taikei to Soten* (Horus Bunkasha, 1997), pp. 43-52.

<sup>6</sup> Cf., Junichi AOUMI, *Hou Tetsugaku Gairon* (Kobundo, 1983), Kanji OTA, *Ronrigaku Gairon* (Showado, 2000), Hiroshi SAITO, “Uchu-hou ni okeru Uchu-butai no Teigi” Japan Society of Air Law, *Kuho*, No. 45 (Keiso Shobo, May 2004).

<sup>7</sup> Nihon Kokusaiho Gakkai, ed., *Kokusai-kankeihou Jiten* (Sanseido, 1995), pp. 692-693. According to the dictionary, “dispute” is a “fight” conducted through words, and is one aspect of a “fight.” Law is a means of expressing disputes, preventing escalation of “fights” into armed conflicts and resolving conflict situations. An “international dispute” is a dispute between governments representing nations. A “conflict” is a clash, contradiction, incompatibility, or confrontation itself between two or more parties regarding interests, roles, values, laws, etc. “Conflict” in the social sciences often means “fighting.” Conflicts and armed conflicts are expressions of “fight,” and the two are polar opposites.

<sup>8</sup> Cf., Yoshiyuki OYA “9 Jou to Kuni no Anzen-Hosho” Yoshio KEINO, Norichika SAEKI, Yoshiyuki OYA and Fumio OKUMURA, eds., *Kokka, Kenpo, Seiji* (Sagano Shoin, 1995), Makoto SATO and Tsugio ANDO, eds., *Ningen no Anzen-hosho* (Toshindo, 2004).

#### 4. When “international disputes” do not include armed conflicts

##### (1) Article 9 does not presuppose armed conflict

Before World War II, two methods of settling international disputes existed: coercive means (use of force) and noncoercive or peaceful means (e.g., negotiation, litigation). The former is prohibited. Therefore, if armed conflict is not included in the “international disputes” of Article 9, Article 9 renounces the final settlement (handling) of international disputes by force. Moreover, it denies the war potential and right of belligerence for that purpose. This clearly matches the postwar view of the illegality of wars of aggression and the UN Charter.

In this case, the other country does not use force either. If the other country does use force, in this case it will not be an “international dispute” but an “international armed conflict.” Article 9 clearly states that the use of force as an exercise of the prewar right of self-preservation is renounced and not permitted. Moreover, that the provision does not seem to presuppose the use of force or existence of armed conflict.

##### (2) Causes of diversity in constitutional theories

However, constitutional theory attempts to derive items that do not exist in the premise of the text, such as war potential, self-defense capability, or armament, from the text that presupposes the nonexistence of the use of force or armed conflict. This seems to be the cause of the diversity of constitutional theories. Hence, it is problematic in that it attempts to interpret matters (e.g., war potential, armed forces, use of force) that are not the premises of Article 9 (whether military strength, self-defense capabilities, and armed forces are constitutional or unconstitutional).

##### (3) Under Paragraph 2 of Article 98

If the “international conflict” in Article 9 does not include armed conflict, then Article 9 is a straightforward expression of a legal environment wherein war is illegal after World War II. Deriving matters related to force (strength) is no longer possible. Therefore, the right of individual and collective self-defense under international law is governed by Article 98, Paragraph 2.

Paragraph 2 of Article 98 itself is not a provision concerning the right of self-defense. However, it can be interpreted as explicitly stating that a constitutional deficiency of law will be supplemented by international law.

Hence, both the rights of both individual and collected self-defense will be interpreted and operated based on established international laws (the UN Charter and customary international law). In this case, the issue is whether or not there is an obligation to exercise both rights of self-defense.

##### (a) Obligation to exercise the right of individual self-defense

① Should an armed conflict occur, not exercising the right of individual self-defense constitutes a state’s self-denial. Therefore, this right must be exercised by the state.

② As a precondition for realizing the pacifism interpreted by Article 9 of the Constitution. In international relations theory, “peace” is defined as a state or condition wherein armed conflict does not occur. The right to maintain and limit the scale of armed conflict must then be exercised.

③ Article 12 of the Constitution (responsibility to preserve liberties and rights “by the constant endeavor of the people”), Article 13 (rights of the people to life, liberty, and the pursuit of happiness), and so on



reflect that the obligation to exercise the right of individual self-defense arises.

(b) Complementary obligation to exercise the right of collective self-defense

① Failure to exercise the right of collective self-defense in case of an armed conflict may violate the provisions of the UN Charter. Hence, participating in preventing escalation and maintenance of armed conflict in preparation for the peaceful settlement of disputes is to “join our forces in the maintenance of international peace and security, except in the common interest.” This is considered an obligation of the member states of the UN, which established and joined the UN, “to ensure, by the acceptance of principles and the institution of methods, that armed shall not be used” (Preamble to the UN Charter)<sup>9</sup>.

② Right of individual self-defense alone cannot sufficiently create conditions for the exercise of the right of self-defense (maintenance of armed conflict situations) owing to restrictive factors (e.g., three non-nuclear principles, upper limit of defense budget), so the right of collective self-defense must be exercised supplementarily to the right of individual self-defense.

However, limits of the right of individual self-defense and requirements for exercising the right of collective self-defense can be set in joint defense treaties and special agreements with the UN based on the domestic legal system or political principles. Matters can be controlled by their own countries without being solely governed by international law.

(4) A complementary relationship between the rights of individual self-defense and of collective self-defense under paragraph 2 of Article 98 (international law)

In this way, based on international law by Article 98, Paragraph 2, the right of individual self-defense is an obligatory right that guarantees the existence of the state itself. Conversely, the right of collective self-defense is not as obligatory as the right of individual self-defense. First, only the right of individual self-defense can fully create the condition of exercise of the right of self-defense. Second, the right of individual self-defense denotes inability to comply with the obligations of member states under the UN Charter. Therefore, the complementarity of the right of collective self-defense and its scope of obligation to exercise it can be found logically.

5. When “international disputes” include armed conflicts

(1) Problems and reconsideration of constitutional doctrines

Constitutional theories were originally discussed on the premise that international disputes included armed conflicts. However, the approach is based on the premise that no practical benefit can be gained in making a strict distinction between “war as a sovereign right of the nation” and “use of force.” Three categories of wars exist: aggressive, self-defense (war fought to eliminate aggression), and sanction (wars to impose sanctions on countries that have waged wars of aggression in violation of international

<sup>9</sup> The following provisions are considered applicable to the United Nations Charter. Paragraph 1 of Article 1 states that “[The purpose of the United Nations] is to take effective collective measures to...[suppress] acts of aggression or other breaches of the peace.” Paragraph 3 of Article 2; “All Member States shall settle their international disputes by peaceful means....” Paragraph 1 of Article 43; “[All Member States shall] undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities...necessary for the purpose of maintaining international peace and security.” Article 45: “[Member States] shall hold immediately available national air-force contingents for combined international enforcement action [(under Article 43)].”

law). They have been discussed as a “means of resolution” for international disputes<sup>10</sup>. However, the international dispute itself, the object of resolution, is rarely discussed. Therefore, the meaning of “international dispute” itself should be understood to include armed conflict, rather than as a means of solution.

(2) International disputes and the right of individual self-defense and its exercise

As the modern international legal society is based on the principle that the use of force is outlawed and war of aggression is illegal, the only permitted use of force includes UN activities and exercise of the right of self-defense (individually or collectively). International conflicts under these conditions range from non-armed clashes (e.g., cultural, economic, and trade frictions) to armed clashes (e.g., territorial disputes). However, the premise for the exercise of the right of self-defense is only the use of force (act of aggression) (Nicaragua case, 1984 ICJ judgment).

Furthermore, according to the previous description of the resolution of “international conflicts,” international conflicts can be broadly divided into non-armed and armed conflicts. The use of military power not being used for resolution is self-evident. This is because doing so would constitute an act of aggression (illegal act) regardless of the cause of the conflict.

Therefore, the use of armed force or war potential falls under armed conflicts. This pertains to conditions wherein a country is exercising the right of self-defense on the premise that the other country will use force. Furthermore, this includes conditions wherein both countries are using force. Hence, Japan exercising the right of self-defense would be in the case of international conflicts. From this, if Japan is assumed to never engage in armed aggression, for Japan, a situation wherein the right of self-defense is exercised would be considered an international conflict in the case of armed conflicts.

In that case, however, the right of self-defense must be exercised according to the UN Charter, and excessive defense is generally illegal. Hence, exercising the right of self-defense is aimed at restoring the original condition or maintaining a balanced one. In the meantime, the final dispute resolution will be attempted by other means specified in the UN Charter. Essentially, the right of self-defense is a right that cannot be used to settle international disputes. Its exercise (the use of force) is an international dispute itself. Therefore, the interpretation of Article 9 of Japanese Constitutional Law must be based on this exercise of the right of self-defense. In this case, the conditions of exercising the right of individual self-defense will be the basis. The exercise of the right of collective self-defense will be the next stage.

(3) Grounds for the obligation to exercise the right of individual self-defense as a premise for the exercise of the right of individual self-defense

Having the right of individual self-defense and exercising that right are two different things. However, each state has an obligation to logically “exercise the right of individual self-defense” based on the following grounds:

- (i) Should an armed conflict occur, not exercising the right of individual self-defense constitutes a state’s denial of self-defense. Therefore, this right must be exercised by the state.
- (ii) The pacifism of Article 9 aims at the peaceful settlement of international disputes (including the

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<sup>10</sup> *Supra* (5), EBARA, Kenpo: *Taikei to Soten*, pp. 86-87. *Supra* (4), Miyazawa et al. Yoichi HIGUCHI, *Shuken to Kokusai-shakai*, (Nihonhyoronsha, 1994), Kazuhiro NAGAO, *Nihon-koku Kenpo*, (Sekai Shisousha, 1995), etc.

use of force). In liberal society conflicts arise from the collisions with each justice—whatever the means. A non-violent society (e.g., peaceful society, rule of law) solves these problems without resorting to violence. Additionally, in the theory of international relations, peace means a state wherein armed conflict does not occur (realism).

The right of individual self-defense is intended to maintain the state of armed conflict. It is a principle of the postwar international community to attempt to resolve situations by peaceful means as stipulated in the UN Charter. Therefore, failure to exercise the right of individual self-defense would result in a denial of that principle, leading the state to exercise their right of individual self-defense.

(iii) Other articles of the Constitution—for example, Article 12 (responsibility to preserve liberties and rights “by the constant endeavor of the people”), Article 13 (regarding the rights of the people to life, liberty, and the pursuit of happiness), and Article 98, Paragraph 2 (compliance with international law)—can also serve as bases for the obligation to exercise the right of individual self-defense.

#### (4) Inclusion in constitutional theory and problems

By incorporating the understanding that “international disputes are conditions of exercising the individual self-defense” into the abovementioned constitutional theory, the following hold true:

##### (a) Completely non-armed theory/complete denial theory

① Refuse all “wars” by understanding that the “means of settling international disputes [or individual self-defense situations]” (Paragraph 1, Article 9) includes not only wars of aggression but also wars for self-defense. Additionally, the second paragraph stipulates that no war potential will be maintained.

② “[M]eans of settling international disputes [or individual self-defense situations]” referred to in Paragraph 1 do not include war in self-defense. However, in Paragraph 2, the maintenance of “war potential” is included without any reservations. This is a theory that renounces all warfare and denies all war potential as a result of stipulating not to do so.

##### (b) Reservation of self-defense forces/limitation denial

③ The “means of settling international disputes [or individual self-defense situations]” (Paragraph 1, Article 9) does not include warfare for self-defense. Then, in this theory, maintaining self-defense “strength” is possible despite excluding those for self-defense in Paragraph 2.

④ The “means of settling international disputes [or individual self-defense situations]” (Paragraph 1, Article 9) shall be construed as relating to “the threat or use of force” rather than “the renunciation of war.” “War” is generally renounced, but the “threat or use of force” for self-defense is permitted. Paragraph 2 also suggests that “armed force” for self-defense can be maintained.

##### (c) Japanese government’s view

⑤ The Japanese government’s views that anything exceeding the minimum necessary force for self-defense (self-defense force) is prohibited as “war potential.” However, the standard of the minimum necessary level is not realistic and concrete. Basically, from the legal logic, whether the maintenance of the status quo by exercising the right of individual self-defense is considered as the minimum level or whether this includes actions beyond is unclear. However, in principle, in the government of each country, differences are likely to arise between the judgments of the government and that of the UN Security Council relative to the first point. Hence, clearly distinguishing between the rights of both

individual and collective self-defense may become impossible.

(d) Other minority theories do not need to be discussed in this essay, as they themselves abandon both legal logic and interpretation.

Considering the results and problems of the insertion above, theory (a) of complete disarmament and total denial are logically inconsistent. Contradictions arise in Point ④ in Theory (b) of reserving self-defense capabilities and denial of limitation. This states that “the threat or use of force for self-defense is acceptable” as “means of solution.” Essentially, the use of force for self-defense cannot be a means of settling disputes.

In that case, ③ of theory (b) has the greatest validity. However, from the wording, it does not clearly establish that international disputes include states of exercising the right of individual self-defense. Basically, given the premise that the right of individual self-defense is being exercised, it is self-evident that armed conflicts for self-defense are not included in the solution and that self-defense forces can be maintained.

#### (5) Reconsideration of Article 9

When clearly conscious of “international dispute, namely, state of individual self-defense exercise,” the wording of Article 9 takes the following meaning.

##### (i) Interpretation of Article 9

The term “international disputes” in Paragraph 1 includes not only political and diplomatic clashes but also states wherein the right of individual self-defense is being exercised. “The Japanese people forever renounce... the threat or use of force” means that the state of exercising the right of individual self-defense will not be terminated by force.

The “the aim of the preceding paragraph” in Paragraph 2 means not to resolve the exercise of the right of individual self-defense [international dispute] by force and not to maintain the necessary excess military power (force that would result in excessive defense). This means “land, sea, and air forces...will never be retained.” Moreover, as a result, “no right to exercise excessive force (excessive defense)” means to not allow “the right of belligerency of the state.” Hence, Japan will not engage in any armed aggression or aggression that would favorably undermine the restoration of the original state or maintenance of a balanced state. It will not recognize the right of belligerence to conduct such aggression.

As mentioned above, these are the consequences of the view that the illegality of war of aggression has become a principle of the post-World War II international legal community.

##### (ii) Rewriting Article 9 based on (1) abovementioned: only expressions related to the right of individual self-defense

Article 9, Paragraph 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 to resolve the exercise of the right of individual self-defense, as a means of doing so, renounce it forever.”

Paragraph 2 of the same article states, “Since we do not seek to resolve the situation of exercising the right of individual self-defense by force, we do not maintain excessive military power, the right that would

result in excessive defense is not allowed.”

(iii) Problems with its interpretation

Based on this understanding and interpretation, on the right of individual self-defense and the force to implement it, Article 9 is considered to hold true with the abovementioned interpretation. However, under this interpretation, the degree to which the right of individual self-defense is exercised must be at the same level as that of the other country. Basically, as long as the right of individual self-defense is warranted, Japan's military power must always be at or above the same level as the other country (hypothetical enemy). However, this is impossible because of other legal and political principles such as the Three Non-Nuclear Principles and restrictions on defense spending. Therefore, as the next step, the right of collective self-defense will critically complement this right of individual self-defense.

(6) Complementary relationship between the right of individual self-defense and right of collective self-defense

The right of collective self-defense is generally understood today as the right to: “Even if one's own country is not directly attacked, if another country with which it has some form of alliance with is attacked, it has the right to regard it as an attack against its own country and conduct a counterattack”<sup>11</sup>.

(i) Classification of theories on the right of collective self-defense<sup>12</sup>

(1) The theory of joint exercise of the right of individual self-defense, wherein there is no need for a joint defense treaty. Each country then has the discretionary power to support the attacked country based on its own judgment after a specific infringement occurs.

(2) The theory of joint defense of one's vital interests relative to other countries. It attempts to impose certain restrictions on abuse (especially in the case of theory (1)).

(3) The theory of defending the rights of other countries (not based on the assumption that there is a certain treaty relationship between the attacked country and the military supporting country but based on the general interest in international peace and security. Owing to differences in interpretation, this is the same as (1)).

However, regardless of the theory, they have pledged to cooperate without conflicting with the UN Charter. Additionally, the UN Charter does not require a joint defense treaty or the like to exercise the right of collective self-defense.

(ii) Contemporary functions of the right of collective self-defense

If the exercise of the right of self-defense is conducted only by the right of individual self-defense, it will have to be covered by its own country. However, considering the right of collective self-defense from the perspective of supplementing the right of individual self-defense, the following functions can be defined:

(1) Force-sharing function: If the joint defense nation possesses a force that cannot be possessed by the

<sup>11</sup> Susumu TAKAI, *Kokuren Anzen-hoshou Josetsu*, (Naigai Publishing, 2005), pp. 61-64.

<sup>12</sup> Above (11), TAKAI. Cf., Takeo IGUCHI, “Kokusaihou ni okeru Shudanteki-Jieiken no Houri wo meguru Mondai to Saikin no Doukou”, *Shobi Gakuen Daigaku So-go Seisaku Kenkyu Kiyo*, No. 2 (October 2001).

country's constitutional law or policy, preparing that force on its own is not necessary.

(2) Budget reduction function: Military budget can be reduced (leading to a reduction in the national budget) along with the division of military forces in (1) abovementioned.

(3) Preventive function: Because of a type of international division of labor joint defense, attacking one specific country becomes difficult, and a preventive function is exhibited.

(iii) A complementary relationship between the right of individual self-defense and of collective self-defense in the Constitution of Japan

Even if the right of self-defense (individually and collectively) is granted to each state by international law or even if it is regulated by international law as an international social contract, it is considered excessive under international law and the Constitution of Japan. As defense (settlement of international disputes by force) is not possible, unless the right of individual self-defense and the right of collective self-defense are exercised in combination, the provisions of Article 9 of the Constitution cannot be implemented.

Basically, should an international dispute [state of self-defense] occur, resolving this conflict using other methods recognized by international law (the UN Charter and customary international law), keeping the state of self-defense [international dispute], requires that a balanced state is maintained along with the right of individual self-defense. What is needed at that time is the right of collective self-defense even if the specific requirements and content of military assistance are stipulated in the treaty.

Additionally, if the preventive function of the right of collective self-defense is to be used, it is necessary to conclude a joint defense treaty or the like that can clearly indicate the existence of joint defense to other countries. The very act of preventing pacifism is considered inconsistent with the purpose of the Constitution, which stipulates pacifism.

## 6. Legal issues related to the exercise of the right of collective self-defense

### (1) International disputes include the exercise of the right of collective self-defense

As mentioned above, when the "international dispute" in Article 9 is interpreted as a state of exercising the right of individual self-defense, the question of whether the dispute also includes a state of exercising the right of collective self-defense can be answered as follows. When an international conflict arises and a state of armed conflict cannot be maintained by exercising the right of individual self-defense alone, states must exercise the right of collective self-defense. Enforcement status will also be included.

### (2) Issues of support for the exercise of the right of collective self-defense

If the exercise of the right of individual self-defense precedes that of the right of collective self-defense, military support will be provided according to the requirements stipulated in joint defense treaties. A complementary force will be provided to the country. In these cases, a country that provides military support or a country that receives military support may be caught up in or dragged into the use of force and engage in excessive defense (i.e., aggression). This raises the issue of international responsibility.

#### (i) Meaning of support; Article 16 of the convention on state responsibility

Article 16 of the convention on state responsibility stipulates "assistance or assistance in the

commission of an internationally unlawful act” as follows. “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the would be internationally wrongful if committed by that State.”

In the commentary of the UN International Law Commission on the above treaties, “If the receiving country commits an illegal act, the supporting country is not responsible for the illegal act. It emphasizes that we take responsibility for the assistance itself that provided support”<sup>13</sup>. Therefore, the donor and recipient countries form an indivisible relationship and jointly take full responsibility. Instead, they are only responsible for supporting the illegal part.

### (3) Importance of joint defense treaties

The issues listed above will be decided while considering the conditions placed by each of the parties to the treaty (e.g., the support system, chain of command, support requirements, and scope) in joint defense treaties. In that sense, joint defense treaties function to clarify the requirements and limits for exercising the right of collective self-defense. Moreover, this is based on the abovementioned present-day function of the right of collective self-defense, even between parties to the treaty, by clarifying mutual rights, obligations, requirements, and so on. By being able to present the impossibility of support, substantially curbing armed conflict is possible. As a result, it is believed that it will lead to curbing the scope and extent of armed conflict.

Therefore, although the details will differ for each specific case, generally, the final decision-making authority on the advance or retreat of its own forces always rests with the country. A defense treaty is necessary for the exercise of the right of collective self-defense and is considered to have an important function.

<sup>13</sup> Sangiin Kenpo Chosakai (House of Councilors Research Commission on the Constitution), “Sangiin Kenpo Chosakai ni okeru Sankou-nin no Kicho-hatsugen” (April 2005), p. 362, source below.  
<<http://www.sangiin.go.jp/japanese/kenpou/houkokusyo/pdf/sankounin.pdf/>> (October 9, 2006). Also, cf., Shugiin Kenpo Chosakai, “Shugiin Kenpou Chosakai Houkoku-sho” (April 2006), sourced below.  
<[http://www.shugiin.go.jp/index.nsf/html/index\\_kenpou.htm/](http://www.shugiin.go.jp/index.nsf/html/index_kenpou.htm/)> (October 9, 2006).