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Existential Threats and Deterrence: Japan's Legal Pathway to Enhanced Collective Security in Asia

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ARTICLES

EXISTENTIAL THREATS AND DETERRENCE: JAPAN'S LEGAL PATHWAY TO ENHANCED COLLECTIVE SECURITY IN ASIA

NOBUHISA ISHIZUKA*

With the Japanese Cabinet's decision in December 2022 to comprehensively upgrade Japan's security posture, and its rapid build-up of its defense capabilities, Japan's role in Asia's security architecture has been undergoing a fundamental shift. This article places Japan's 2015 Peace and Security Legislation in the context of the U.N. collective security system and argues that its most significant achievement has been to expand Japan's power to engage more proactively in the Asian collective security order. To date, commentators have focused on the legislation's role in expanding the Japanese constitution's limitations on the use of force to permit collective self-defense. This article argues that the legislation's true significance lies in Japan's strengthened deterrence capabilities resulting from an evolution away from its narrow focus on survival threats as a justification for permissible uses of force (a subject of constitutional interpretation), to broader legal justifications for the use of arms to counter lower order threats (a subject of legislative action). These enhanced capabilities have permitted Japan to undertake initiatives to build a new security architecture in Asia based

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on a significantly strengthened U.S. alliance and supplemental “minilateral” groupings. However, as deterrence activities grow, the line between “deterrence” and “survival” may start to blur, potentially taking the debates about permitted uses of force in new directions. The separate histories of the U.S. and Japan’s engagement with collective security suggest the directions in which these debates may lead.

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I. INTRODUCTION

In December 2022, the Japanese Cabinet announced landmark security and defense policies, marking a dramatic move towards an increased buildup of Japan's defense capabilities.¹ The 2022 Defense Policies call for unprecedented increases in the defense budget, the development of new long-range missile defenses, and a buildup of the country's industrial defense infrastructure.² They build upon the foundation established by legislation passed in 2015 to enhance Japan's defense capabilities (the "2015 Peace and Security Legislation"),³ and have drawn significant attention and commentary in light of an increasingly dangerous geopolitical landscape marked by continuing tensions with China in the East and South China Seas, an ongoing buildup of North Korean nuclear and missile capabilities, land wars in Europe and the Middle East, and increasing concerns about the security of Taiwan.⁴

1. The new policies, which the Japanese government released on December 16, 2022, consists of three pillars: the National Security Strategy, the National Defense Strategy, and the Defense Buildup Program (collectively, the "2022 Defense Policies"). See Adam P. Liff & Jeffrey W. Hornung, *Japan's New Security Policies: A Long Road to Full Implementation*, BROOKINGS INST. (Mar. 27, 2023), <https://www.brookings.edu/articles/japans-new-security-policies-a-long-road-to-full-implementation>.

2. See CABINET SECRETARIAT, NATIONAL SECURITY STRATEGY OF JAPAN 20 (2022) [hereinafter NATIONAL SECURITY STRATEGY], <https://www.cas.go.jp/jp/siryou/221216anzenhoshou/nss-e.pdf> (noting that Japan is "required to maintain a certain level of expenditure" to implement "unprecedented undertakings" that fundamentally reinforce its own defense capabilities); JAPANESE MINISTRY OF DEF., NATIONAL DEFENSE STRATEGY (2022) [provisional translation] [hereinafter NATIONAL DEFENSE STRATEGY], <https://japan.kantei.go.jp/content/000120033.pdf>; DEFENSE BUILDUP PROGRAM (2023) [provisional translation], https://www.mod.go.jp/j/policy/agenda/guideline/plan/pdf/program_en.pdf.

3. The legislation consists of partial amendments to ten separate laws (intended to "Ensur[e] [the] Peace and Security of Japan and the International Community"), a separate bill ("Concerning Cooperation and Support Activities and Other Activities to Armed Forces of Foreign Countries and to Others in Situations Where the International Community is Collectively Addressing for Peace and Security"), and three separate Cabinet decisions. See JAPANESE MINISTRY OF DEF., DEFENSE OF JAPAN 2015 317–24 (2015) [hereinafter DEFENSE WHITE PAPER] (outlining the legislation and setting forth the Cabinet decisions).

4. See, e.g., Martin Fackler, *Japan Moves to Scale Back Postwar Restrictions on the Use of Military Power*, N.Y. TIMES (May 15, 2014), <https://www.nytimes>

In the aftermath of its enactment, which was highly controversial at the time,⁵ commentators focused on the legislation's expansion of the interpretation of Article 9 of Japan's constitution⁶ to include recognition of the right to exercise collective self-defense on behalf of countries with which Japan has a "close relationship"—commonly understood as referring to the United States.⁷ Commentators also focused on the broadened scope of permitted overseas activities of Japan's Self Defense Forces (the "SDF") and the implications for the enhanced strengthening of the alliance with the United States.⁸ Very little discussion has focused on the implications of the legislation

.com/2014/05/16/world/asia/japan-moves-to-scale-back-postwar-restrictions-on-the-use-of-military-power.html (arguing that the legislation would "represent a fundamental shift in the stance of Japan's military"); Jonathan Soble, *Shinzo Abe Backs Big Shift in Japan's Military Role*, FIN. TIMES (May 13, 2014), <https://www.ft.com/content/4d05b348-da74-11e3-a448-00144feabdc0> (noting the legislation constitutes "the biggest shift in Japan's defence policy in decades"); Yuka Hayashi & Toko Sekiguchi, *Japan's Abe Takes Step to Enhance Military's Role*, WALL ST. J. (May 15, 2014), <https://www.wsj.com/articles/SB10001424052702304547704579563081192136124> (citing the recent standoff in disputed South China Sea waters between China and Vietnam, Mr. Abe said Japan needed "more freedom of action in overseas conflicts, despite its pacifist constitution").

5. See SHEILA A. SMITH, JAPAN REARMED 155 (2019) [hereinafter SMITH, JAPAN REARMED] (citing significant public backlash to the legislation); Reiji Yoshida, *Experts' Tongue-Lashing Rekindles Diet Debate on Reinterpreted Constitution*, JAPAN TIMES (June 5, 2015), <https://www.japantimes.co.jp/news/2015/06/05/national/politics-diplomacy/experts-blast-constitutional-reinterpretation-lower-house-session> (analyzing the views of different experts concerning Japan's need to amend its constitution to engage in legitimate collective self-defense).

6. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], May 3, 1947, art. 9, ¶ 2 (Japan).

7. It should be noted that the United States is the only country with which Japan has a security treaty, although that alone would not necessarily be required to meet the "close relationship" requirement. Other possible candidates which could be included in the list include Australia. Taiwan arguably would be excluded by virtue of its non-recognition by Japan as an independent state since 1972, although Japan has deliberately left this point ambiguous. See Adam P. Liff, *Policy by Other Means: Collective Self-Defense and the Politics of Japan's Postwar Constitutional Interpretations*, 24 ASIA POL'Y 139, 164 (2017).

8. See Ian E. Reinhart, *Collective Self-Defense and U.S.-Japan Security Cooperation*, East-West Center Working Papers (Politics, Governance, and Security Series, No. 24, Oct. 2013) (acknowledging institutional and legal constraints on Japan's defense expansion efforts).

within the context of international law⁹ and the larger significance of the legislation in Japan's move, driven by its increased sense of vulnerability, into the mainstream of the post-World War II collective security system embodied in the U.N. Charter.¹⁰

In light of the importance of Asia to geopolitical and economic stability, and the central role Japan plays in enhancing deterrence in the region with its allies and partners, it is important to examine more closely the legal basis of Japan's efforts to play a more prominent role within the regional security framework. The 2015 Peace and Security Legislation provides the means by which Japan can enable the U.N. collective security system to work more effectively through regional security groupings in Asia.¹¹ The evolution of Japan's legal

9. For those who have analyzed the legislation in the context of international law, the focus has been on the implications of collective self-defense (i.e., the degree of departure from historic interpretations in Japan of the permitted scope of use of force) and potential "gaps" between the legislation and international law. See Hitoshi Nasu, *Japan's 2015 Security Legislation: Challenge to its Implementation under International Law*, 92 INT'L L. STUD. 249, 279–80 (2016) (citing "gaps" between the 2015 security legislation and the laws of armed conflict under international law); Tadashi Mori, *Collective Self-Defence in International Law and in the New Japanese Legislation for Peace and Security* (2015), 60 JAPANESE Y.B. INT'L L. 158, 166–69 (2017) (noting the lack of express provisions in the 2015 Peace and Security Legislation setting forth the conditions for the use of force in collective self-defense under international law); Jaemin Lee, *Collective Self-Defense or Collective Security? Japan's Reinterpretation of Article 9 of the Constitution*, J. E. ASIA & INT'L L. 2, 380–81 (2015) (arguing that the expansive powers granted under the 2015 Peace and Security Legislation conflict with the authorization and delegation powers of the U.N. Security Council).

10. Collective self-defense is the use of force in aid of a state that is the victim of an unlawful use of force by another state. Collective security is the maintenance of international peace and security. The two may occur simultaneously. See RAMESH THAKUR, *THE UNITED NATIONS, PEACE AND SECURITY* 32–33 (2006) (citing the Korean War as an example and discussing the U.N.'s role in collective security). Collective defense arrangements are treaties of alliance and related pacts, also known as pacts of mutual assistance. ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* 182–86 (1962) (highlighting the incentive to enter collective defense arrangements, as well as the peculiarities that exist therein). The NATO alliance is one example of such a pact.

11. See Jeffrey W. Hornung, *America's Best Friend in Asia*, FOREIGN AFFS. (Apr. 10, 2024), <https://www.foreignaffairs.com/united-states/americas-best-friend-asia> (describing the U.S. strategy of multilateral networking in Asia, and the "minilateral" groupings in which Japan plays a central role). Hornung argues for a

interpretations of its constitutional limitations against the use of force is only one part of a larger picture that sheds light on potential future paths to Japan's greater and more effective involvement in maintaining regional security.¹²

A. COLLECTIVE SELF-DEFENSE AND SURVIVAL

The renunciation of war as the solution to international disputes among sovereign states has been embodied in the prohibition of the use of force in Article 2(4) of the U.N. Charter.¹³ In part modeled on this principle, Article 9 of the Japanese constitution expressly rejects "the threat or use of force as means of settling international disputes."¹⁴ However, Article 51 of the U.N. Charter sets forth an exception to the prohibition in cases of individual or collective self-defense against armed attack.¹⁵ Whereas the right of independent self-defense had long

U.S.-Japan-led networking of such groupings with the U.S.-Japan alliance as the hub, and "the rest of the Indo-Pacific countries and their many mini-laterals . . . [as] the spokes," in effect supplementing the existing post-war U.S. bilateral "hub and spokes" regional alliance structure. *See id.*

12. *See* Reinhart, *supra* note 8 (anticipating future legislative departures from historical interpretations on the operational, alliance, regional, and global levels).

13. U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

14. The text of Article 9 reads:

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], May 3, 1947, art. 9, ¶ 2 (Japan).

15. U.N. Charter, *supra* note 13, art. 51, ¶ 4 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

been established under international law,¹⁶ the right of collective self-defense was a relatively new concept at the time of its drafting.¹⁷

Instead of embracing the right to collective self-defense, since 1954 Japan had for decades chosen to limit its right to use force only to its individual self-defense.¹⁸ In doing so, it imposed strict conditions on the invocation of even that limited right.¹⁹ In contrast, while

16. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* 43, 44 (2017); Thomas H. Lee, *The United States and Individual and Collective Self-Defense in Northeast Asia*, in *STRENGTHENING THE U.S.-JAPAN ALLIANCE: PATHWAYS FOR BRIDGING LAW AND POLICY* 13–18 (N. Ishizuka, M. Kurosaki & M. Waxman eds., 2020); Matthew C. Waxman, *The Caroline Affair in the Evolving International Law of Self-Defense*, *LAWFARE* (Aug. 28, 2018), https://scholarship.law.columbia.edu/faculty_scholarship/2507. Controversy over invocations of the right often center around the scope of the right. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 120–26 (4th ed. 2018) (noting that self-defense is often invoked as justification for the use of force, regardless of whether the requirement of an armed attack has been met, and that debates often center around whether the concept encompasses broader justifications for the use of force, such as anticipatory self-defense).

17. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27, 1986); see also GRAY, *supra* note 16, at 179 (citing the drafting history of the U.N. Charter provisions on collective self-defense in the dissenting opinions of the Nicaragua case and noting that “there has been . . . controversy as to whether collective [self-defense] was a new concept when it was included in the Charter in 1945. . . . Whether or not collective [self-defense] was a totally new concept, the post-1945 practice has been crucial in its crystallization.”).

18. See Liff, *supra* note 7, at 148 (“For decades, the government did consider exercise of [collective self-defense] to be Japan’s sovereign right based on international law, yet judged it to be unconstitutional domestically based on [its] interpretation of Article 9.”); see also Nobuhisa Ishizuka, *Constitutional Reform in Japan*, 33 *COLUM. J. ASIAN L.* 5, 33–35 (2019) [hereinafter *Constitutional Reform*] (describing the administrative interpretations that permitted the use of force for individual self-defense, but not for collective self-defense, on the basis that the latter exceeded the “minimum necessary” force to ensure compliance with the restrictions of Article 9). 1954 was the year the Self Defense Forces Law was promulgated, resolving the debate over the self-defense exception to Article 9.

19. Prior to the 2015 Peace and Security Legislation, the conditions required (i) an unprovoked attack against Japan (*kyūhaku fusei no shingai*), (ii) no other means to repel such attack (*ta no tekisetsu no shudan ga nai*), and (iii) use of force limited to the extent “minimally necessary” (*hitsuyo saishogendo no jitsuryoku kōshi*). See SHIGENOBU TAMURA, *SHIN BŌEI HŌSEI [THE DEFENSE LEGISLATION]* 35 (3d ed. 2022); SAYURI UMEDA, *JAPAN: INTERPRETATIONS OF ARTICLE 9 OF THE CONSTITUTION* 16 (2015), <https://tile.loc.gov/storage-services/service/l1/llglrd/2016>

recognizing that it has an inherent right of collective self-defense, Japan's official position until 2014 was that Article 9 prohibited the exercise of the right.²⁰

After the enactment of the 2015 Peace and Security Legislation, Japan formally adopted the right to exercise collective self-defense.²¹ However, it has rested that right on the same theoretical framework as its right to exercise individual self-defense—in effect, it would only be permitted to exercise the right under the same strict conditions, as modified in light of the broader powers.²² Furthermore, the conditions for the use of force under Article 9 were further tightened for both forms of self-defense, requiring that Japan's own survival “clearly” be threatened before it can invoke the right.²³

295698/2016295698.pdf (describing the ways in which Japan imposed limitations on its own defense after the Second World War).

20. See UMEDA, *supra* note 19 (analyzing the transition from Japan's renunciation of war to Japan having greater responsibility for its defense).

21. Partial Amendments to the Law for Ensuring Peace and Independence of Japan and Security of the State and the People in Situations including Where an Armed Attack against Japan Occurs, art. 5, ¶¶ 2–3 [hereinafter Amendment to Armed Attack Law], in DEFENSE WHITE PAPER, *supra* note 3, at 319 (“[S]urvival-threatening situations’ shall refer to situations in which an armed attack against a foreign country that is in close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn people’s right to life, liberty, and pursuit of happiness.”).

22. See *Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan’s Survival and Protect its People*, MINISTRY OF FOREIGN AFFS. OF JAPAN (July 1, 2014) [hereinafter *Cabinet Decision*] [provisional translation], https://www.mofa.go.jp/fp/nsp/page23e_000273.html (explaining the Cabinet’s decision to revise the interpretation of Article 9); SHŪGIN KENPŌ SHINSAKAI JIMUKYOKU [STAFF OFFICE OF HOUSE OF REPRESENTATIVES CONSTITUTIONAL REVIEW COMMITTEE], “ANZEN HOSHŌ” NI KANSURU SHIRYŌ [MATERIALS RELATED TO SECURITY], SHŪ KEN SHI DAI 101 Go [HOUSE OF REPRESENTATIVES CONSTITUTIONAL MATERIALS NO. 101] (May 2022), at 39–40 [hereinafter LEGISLATIVE MATERIALS].

23. The revised three conditions are (i) an armed attack against Japan or a country in “close relationship” (*missetsu na kankei*) to Japan that threatens Japan’s survival (*sonritsu ga odokasare*) and constitutes a “clear threat” (*meihaku na kiken*) to “fundamentally overturn the people’s right to life, liberty and the pursuit of happiness”, (ii) there are no other means to repel the attack, maintain Japan’s existence (*wa ga kuni no sonritsu wo mattō*) and protect its people, and (iii) the use of force is limited to the extent “minimally necessary” (*hitsuyo saishogendo no jitsuryoku kōshi*). See *Cabinet Decision*, *supra* note 22, ¶ 3(3) (analyzing the

B. COLLECTIVE SECURITY AND DETERRENCE

In addition and complementary to the renunciation by signatory states of the unilateral use of force under the U.N. Charter, the U.N. functions as a law-enforcing, collective security organization which requires states to be “prepared to use force on behalf of, as directed by and for the goals of the U.N.” for the purpose of enforcing peace through the collective action of all states.²⁴ This is accomplished through the powers granted to the U.N. Security Council under Articles 39 and 42 of the U.N. Charter, which give it the power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”²⁵ Because of the anticipatory element of the right to take action to maintain peace after determining the existence of threats to the peace, there is a strong deterrence aspect to the power.²⁶

To address this level of threat below the threshold required to invoke its rights of individual and collective self-defense, prior to 2015

conditions under which Japan can invoke self-defense); *see also* TAMURA, *supra* note 19, at 35 (outlining the three conditions as well as the required elements to meet certain of them).

24. *See* THAKUR, *supra* note 10, at 32–33 (discussing the U.N.’s mandate).

25. U.N. Charter, *supra* note 13, ch. VII, arts. 39, 42. Under Article 43, “[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, 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, including rights of passage, necessary for the purpose of maintaining international peace and security.” “The Security Council has been extremely reluctant to find that there has been an act of aggression”; it has only done so on limited occasions. *See* GRAY, *supra* note 16, at 264 (citing Israel, South Africa and Rhodesia). “It has been only slightly readier to find a breach of the peace.” *Id.* (citing Korea, Iraq/Kuwait, Argentina’s invasion of the Falklands, and the 1980–1988 Iran-Iraq conflict). “However, the Security Council has passed many resolutions determining the existence of a threat to the peace.” GRAY, *supra* note 16, at 266 (“The action against Korea in 1950 was the only use of force recommended by the Security Council during the Cold War in response to a breach of the peace by a state.”).

26. *See* Jean D’Aspremont, *The Collective Security System and the Enforcement of International Law*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 150 (Marc Weller et al. eds., 2015) (“[T]he most common view is that, outside any finding of a violation of international law or of the Charter itself, the collective security system is only a peace enforcement regime.”).

Japan had passed numerous laws comprising a comprehensive quilt of defined actions it can take within Article 9 limits on its use of armed force.²⁷ These included restrictions on the ability of the SDF to use arms in order to ensure such use would conform to its doctrine on the use of force.²⁸ The 2015 Peace and Security Legislation expanded the scope of these permitted uses of arms, as well as its ability to engage in a wider range of support activities for the military operations of other countries, thereby strengthening Japan's ability to participate in security measures below the use of force threshold.²⁹ This included, for example, expanding the scope of the SDF's ability to integrate its activities with other nations engaged in military activities, permitting Japan more freedom to use arms in support of overseas peacekeeping operations, providing a wider range of supply and transport assistance to foreign forces, and permitting the use of arms to provide protection to the personnel and equipment of the U.S. and other nations.³⁰

C. IMPLICATIONS

With the perspective of almost a decade since its enactment and in light of the rapid acceleration of new defense initiatives currently being undertaken, the time is right to reassess the true impact of the 2015 Peace and Security Legislation.³¹ This article argues that the

27. See Takako Hikotani, *The Japanese Diet and Defence Policy-Making*, 94 INT'L AFFAIRS 800–04 (2018) (describing how the constitutional limitations of Article 9 required laws to be passed between 1990 and 2015 that take into account various bureaucratic interpretations of permitted actions as well as prior legislative enactments, resulting in a patchwork of legislation governing defense and security policy); see also TAMURA, *supra* note 19, at 44–56 (providing an overview of the substantive areas addressed by the new legislation).

28. See Hikotani, *supra* note 27, at 800–04 (discussing Japan's self-imposed ban on collective defense and its subsequent reinterpretation).

29. See TAMURA, *supra* note 19, at 44–45 (describing the guidelines for SDF participation in U.N. Forces and the multinational forces of member states under U.N. Charter Chapter VII).

30. See *id.* at 44–56.

31. The sheer scale and recent acceleration of Japan's defense build-up in the wake of the 2015 Peace and Security Legislation draws attention to its significance. See, e.g., Alastair Gale & Chieko Tsuneoka, *Japan to Send U.S. Missiles, Boosting Global Supply*, WALL ST. J. (Dec. 22, 2023), <https://www.wsj.com/world/asia/japan-to-send-u-s-patriot-missiles-creating-deeper-pool-for-ukraine-air-defenses-ac8d4316> (arguing that the decision to send Patriot missiles to the U.S. is “a landmark for

expansion of Japan's permitted use of force to include the exercise of collective self-defense, while pathbreaking, was insufficient to significantly bolster Japan's role in Asian security. Rather, it was Japan's ability to bolster deterrence by enabling more proactive engagement in the larger collective security system embodied in the U.N. Charter that transformed the security landscape of the region. It did so by supplementing the strict self-defense focus of its post-war policy, represented by its past interpretations of the constitutional limitations on the use of force, by greater legislative authority under the 2015 Peace and Security Legislation to broaden its ability to use arms in support of military activities under U.N.-sanctioned authority to enforce peace against lower-order threats *before* they can escalate to survival-level threats.³²

Japan"); Gabriel Dominguez, *Japan Starts 2024 with Flurry of Security Deals*, JAPAN TIMES (Feb. 2, 2024), <https://www.japantimes.co.jp/news/2024/02/02/japan/japan-security-deals-flurry> (citing multiple cooperation and arms deals with numerous partners at an "unprecedented" "pace without recent parallel", including Australia, Germany, the United Arab Emirates, and the United States). In December 2023 alone, Japan announced numerous security deals spanning an impressive range of geographic, technical, and military areas. *See, e.g., Japan and Malaysia Sign ¥400 Million Maritime Security Aid Deal*, JAPAN TIMES (Dec. 16, 2023), <https://www.japantimes.co.jp/news/2023/12/16/japan/politics/malaysia-japan-official-security-assistance> (enumerating examples of security deals from December 2023); *Japan Hands Over Air Radar System to Philippines*, JAPAN TIMES (Dec. 20, 2023), <https://japantoday.com/category/national/japan-hands-over-air-radar-system-to-philippines> (describing Japan's defense equipment and technology transfer deal with the Philippines); Gabriel Dominguez, *Japan's Next-Gen Fighter Project with U.K. and Italy Hits Milestone*, JAPAN TIMES (Dec. 14, 2023), <https://www.japantimes.co.jp/news/2023/12/14/japan/politics/japan-uk-italy-joint-fighter-jet-development> (noting a deal between Japan, Italy, and the U.K. to establish an intergovernmental organization to manage the Global Combat Air Program (GCAP)); *Japan-France Road Map to Boost Defense and Economic Security Ties*, JAPAN TIMES (Dec. 3, 2023), <https://web.archive.org/web/20231203075336/https://japantoday.com/category/politics/japan-france-unveil-new-road-map-to-boost-defense-economic-security> (describing the results from the Japan-ASEAN leaders summit to bolster defense cooperation between members); Gabriel Dominguez, *With China in Mind, Japan Expands Security Ties with ASEAN*, JAPAN TIMES (Dec. 18, 2023), <https://www.japantimes.co.jp/news/2023/12/18/japan/politics/japan-asean-security-cooperation-analysis> (noting measures to bolster security among ASEAN and Japan).

32. *See* Mori, *supra* note 9, at 165 (noting States' obligations to report to the U.N. Security Council and the limits on the right of collective self-defense under

Notwithstanding this shift, however, the theoretical framework of Japan's security policy governing the use of force continues to rest upon the narrow doctrine of self-defense, both individual and collective.³³ As a result, its move to a more proactive role in collective security through a broader use of arms doctrine does not represent a move towards full deterrence capabilities, which would require the ability to freely project force (and to credibly threaten the use of force).³⁴

Nevertheless, Japan's shift towards enhanced collective self-defense recognizes that only by combining it with the means to support the credibility of the U.N.-based collective security system can it increase the chances of reducing the risk of survival-level threats. In other words, a narrow and exclusive focus on individual or collective self-defense, because of the unacceptably high costs required to invoke the right, cannot be sufficient to ensure Japan's security. This is particularly significant in highlighting the need for increased means to deter threats before they escalate to the use of force threshold.

This article seeks to make several contributions to the discussion about the legal basis for Japan's security role in Asia. First, it provides an alternative perspective for understanding Japan's approach to its relationship with the United States and other partners in an elevated security risk environment. Second, it provides a conceptual framework for understanding the reorientation of Japan's strategy from the narrow constraints of its past constitutional interpretations to broader, more practical, and lower order means to contribute to enhanced security in Asia. Third, it suggests that Japan's constitutional constraints will continue to impede Japan's ability to become a full

Article 51 of the U.N. Charter "until the Security Council has taken measures necessary to maintain international peace and security").

33. See Tsuneo Watanabe, *What's New in Japan's Three Strategic Documents*, SASAKAWA PEACE FOUND. (Mar. 14, 2023), <https://www.csis.org/analysis/whats-new-japans-three-strategic-documents> ("The recent revision of the three strategic documents can be seen as an extension of the past defense policy, which has made steady progress, rather than a dramatic shift.").

34. See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1626 (2014) (examining the possibilities and outcomes of threatening force); THOMAS C. SCHELLING, *ARMS AND INFLUENCE* (1966) (analyzing how military strength is used to influence other states).

participant in the U.N. collective security system, relegating it to acting indirectly through supporting the U.S. and other partners. Such restrictions can only be overcome by a reorientation of Japan's self-defense doctrine to a true deterrence model.

Part II starts with an overview of Japan's pre-2015 policies, which were rooted in its interpretations of the constitutional limitations on the use of force and its associated restrictions on the use of arms. It explains how the changing security environment in Asia began creating pressures on those interpretations and outlines the policy response leading to the 2015 Peace and Security Legislation. Part III then sets forth the conceptual basis of the post-war collective security system embodied in the U.N. Charter and the international law doctrine supporting the system. This part explains how Japan, in response to its constitutional limitations, created the bureaucratic and legislative room it needed to expand its engagement and integration with the collective security system. Part IV sets forth the implications of this engagement in the context of Asia, and how it has been implemented through Japan's increased efforts to build a new regional security architecture based on "minilateralism" and official security assistance. Part V concludes by suggesting possible alternative pathways that may provide a legal basis for Japan's further enhanced participation in collective security.

II. BACKGROUND OF 2015 PEACE AND SECURITY LEGISLATION

Japan's post-war security and defense policies were defined by constitutional interpretations of prohibitions on the use of force, legislative constraints on the use of arms, and affirmative policy choices.³⁵ The constitutional interpretations centered on the limitations under Article 9, which permitted the use of force only for Japan's individual self-defense under certain conditions—i.e., in cases of a threat to the people's right to "life[,] liberty[,] and the pursuit of happiness," the absence of alternative means to meet the threat, and the deployment of force only to the extent "minimally necessary."³⁶

35. See *supra* text accompanying notes 18–20; see generally UMEDA, *supra* note 19, at 19–21 (discussing various interpretations of Article 9).

36. See UMEDA, *supra* note 19 (analyzing both historical constraints and the

The legislative constraints governing the use of arms were reflected in a number of laws passed between 1990 and 2015.³⁷ The policy choices were embodied in the Yoshida Doctrine,³⁸ which prioritized the allocation of national resources to post-war economic recovery and development over a buildup of defense capabilities.³⁹

Although the constitutional interpretations on the use of force for Japan's self-defense evolved during the immediate post-war years and eventually became settled law, the law on the use of force for collective self-defense of third countries remained unresolved.⁴⁰ As the security environment surrounding Japan changed after the end of the Cold War, however, a series of legal interpretations began culminating in an extensive web of Cabinet decisions, bureaucratic policies, legislation, and judicial decisions that governed the precise scope of Japan's ability to come to the aid of allies and partners.⁴¹ All

subsequent expansion of the interpretation of the use of force based on geopolitical considerations). The government's view is that the situations triggering the application of these conditions are limited to armed attacks (*buryoku kōgeki jitai*) and existential threats (*sonritsu kiki jitai*). Japan's participation in U.N. enforcement actions involving the use of force under Chapter VII of the U.N. Charter requires a determination by the Japanese government of the existence of either of these situations. Correspondence with Kurosaki Masahiro (May 4, 2024) (notes on file with author).

37. See *supra* text accompanying note 27.

38. See Kenneth B. Pyle, *Japan's Return to Great Power Politics: Abe's Restoration*, 13 ASIA POL'Y 69, 74–77 (2018) (noting the impact of historical alliances and pressure by the U.S. on Japan's policy on defense).

39. See *id.* (arguing that during this period Japan deferred to the U.S. on military and international political matters).

40. See *Constitutional Reform*, *supra* note 18, at 37. While legal justifications for the expansion of the interpretation of individual self-defense continued, the line continued to be drawn on the prohibition against the exercise of the right to collective self-defense.

41. See *Mōri v. Japan*, (Nagoya High Ct., Apr. 27, 2008) (unpublished decision) [hereinafter *Mōri v. Japan*], <http://www.courts.go.jp/hanrei/pdf/20080428151610.pdf>, in *Mōri v. Japan: The Nagoya High Court Recognizes the Right to Live in Peace*, 19 PAC. RIM L. & POL'Y J. 549, 554–56 (2010) (translated by Hudson Hamilton) (citing the Iraq Special Measures Act (Act No. 137 of 2003) and numerous government interpretations of Article 9 between 1980 and 2006 governing the permitted scope of overseas activities of the SDF); see also Tomohiro Mikanagi & Hirohito Ogi, *The Japanese Views on Legal Issues Related to Security*, 59 JAPANESE Y.B. INT'L LAW 360 (2016) (setting forth comparisons between the government responses to questions raised in Diet interpellations concerning the 2015

were driven by a growing awareness of the unsustainability of the restrictions on actively participating as a full partner in collective security efforts such as peacekeeping and operational support.⁴² However, rather than basing the interpretations on standard collective defense doctrine governing the permitted scope of state action under the U.N. Charter or international law, they were conceptually justified based on their importance to Japan's own defense.⁴³ Examples included the gradual evolution from the refusal to deploy the SDF to Kuwait during the Persian Gulf War (on the basis of Japan's own security not being deemed to be directly affected),⁴⁴ to the deployment of the SDF to Iraq during the Iraq War (on the basis of supporting humanitarian and security activities).⁴⁵

The foundation for Japan's position rested on a 1972 governmental interpretation of Article 9, which was developed against the backdrop of negotiations with the U.S. over the reversion of Okinawa to Japan

Peace and Security Legislation with historical related responses).

42. See YUKI TATSUMI, JAPAN'S NATIONAL SECURITY POLICY INFRASTRUCTURE 23 (2008), https://www.stimson.org/wp-content/files/file-attachments/Tatsumi_%20Japan's_Security_Policy_Infrastructure_Final_Version.pdf.

43. See *id.*

44. See KENPŌ KYU JŌ TO ANPŌ HŌSEI [ARTICLE 9 AND THE SECURITY LEGAL SYSTEM] 10 (Masahiro Sakata 2016) [hereinafter Sakata] (overseas participation in a multilateral force authorized by resolution of the Security Council, namely, the ability to participate in a collective security measure, does not fall within exemptions from the constitutional prohibition on the use of force). Although there was tremendous pressure on Japan to join the coalition effort to expel Iraq from Kuwait as part of coalition efforts to enforce U.N. Security Council Resolution 678 (1990), the legal basis for Japan's actions rested on its interpretation of the permitted scope of the use of force under its constitution. To place in context the significance of the pressure on Japan, the Iraqi invasion of Kuwait in 1990 "was only the second time that the Security Council had authorized armed action against an aggressor state." GRAY, *supra* note 16, at 266.

45. See Mōri v. Japan, *supra* note 41, at 555 (interpreting the Iraq Special Measures Act to provide that "our country shall conduct humanitarian reconstruction support activities and support activities maintaining security (hereinafter 'Response Measures') (Article 1), the implementation of which must not constitute the threat or use of military force (Article 2(2)), and such Response Measures shall only be conducted inside Japan and in designated areas where it is recognized that no acts of combat (acts of killing or destruction linked to an international military conflict) are being conducted, nor will any such act of combat be conducted for the duration of the activities (non-combat areas) (Article 2(3)).").

amidst Japanese apprehensions about the possibility of being drawn into the conflict in Vietnam.⁴⁶ Japan accordingly affirmed the position that while it had an inherent right to collective self-defense, it was prohibited from exercising such right.⁴⁷ This was a position it had consistently maintained since the negotiation of the San Francisco Peace Treaty⁴⁸ and the U.S.-Japan Security Treaty in 1951.⁴⁹

Although the 1972 statement did not contain any language contemplating a loosening of the restriction,⁵⁰ the government in

46. The presence of U.S. military bases in territory that would revert to Japanese sovereignty raised sensitive issues concerning the scope of continued use of the bases by the United States and the degree of Japanese administrative control over the territory that were the subject of intense debate not only between the United States and Japan, but also between the Liberal Democratic Party administration of Prime Minister Eisaku Sato and opposition parties. See Hong N. Kim, *The Sato Government and the Politics of Okinawa Reversion*, 13 *ASIAN SURVEY* 1021, 1030–31 (1973).

47. See Sangiin Kessan Iinkai Teishutsu Shiryo [Material Presented to the House of Councillors Budget Committee] (October 14, 1972), Shūdanteki Jieiken to Kenpō to no Kankei ni Tsuite (Showa 47 nen Seifu Kenkai) [Regarding the Relationship of Collective Self-Defense to the Constitution (1972 Views of the Government)], in Sakata, *supra* note 44, at 158–59 [hereinafter 1972 Interpretative Materials] (stating that although Japan's right of collective self-defense is recognized as a sovereign right under Article 51 of the U.N. Charter, Section 5(c) of the Peace Treaty with Japan, the preamble to the U.S.-Japan Treaty of Mutual Security and Cooperation, and Section 3, Paragraph 2 of the Japan-Soviet Union Joint Statement, Japan has consistently maintained that the exercise of such right contravenes the limitations on self-defense under its constitution, on the basis that while such limitations cannot be understood to require Japan to relinquish its right to defend itself, it does limit Japan to taking only the minimum defensive measures necessary to defend against urgent and illegal attacks on its people's right to "life, liberty and the pursuit of happiness", and therefore does not extend to defending attacks on other countries through the exercise of collective self-defense rights).

48. The San Francisco Peace Treaty formally ended hostilities between Japan and its other signatories. See Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 45.

49. *Bilateral Security Treaty Between the United States of America and Japan, September 8, 1951*; see also UMEDA, *supra* note 19, at 21–23 (describing the debates in the Diet at the time the Peace Treaty and U.S.-Japan Security Treaty were being considered, during which the government for the first time formally took the position that while Japan had a collective defense right, it "had decided against war potential under Article 9"—i.e., declines to exercise such right).

50. See *supra* note 47. The 1972 interpretation is set forth in materials provided

subsequent years began opening the door to possible expansions of the interpretation.⁵¹ In an official response to interpellations in the House of Representatives, the government stated that restrictions on collective self-defense would have to be based on general principles of constitutional interpretation, which are based on the intent of the relevant provision and its drafters, its history, general social conditions, and an interest in preserving the overall consistency of accumulated positions, with each interpretation being the product of a logical progression.⁵² Although the government is constrained by these considerations, it is “natural, that as conditions change, new factors that may arise must be considered.”⁵³ If, as a result of examination based on the foregoing principles, the government concludes it proper to change its interpretation, it must be free to do so.⁵⁴

In the domestic political context of 1972, however, the government had strong incentives to reassure opposition parties of its commitment to maintaining its position on the constitutional prohibition of collective self-defense.⁵⁵ While clearly acknowledging the existence of its rights under international law, it interpreted the constitutional limitations of Article 9 to only permit “measures that are necessary to protect the peace and security of the people and the country’s survival.”⁵⁶ Moreover, any use of force in such circumstances was proscribed by the three conditions that required urgent and imminent threats to the people’s lives, a lack of alternative measures to counter the threat, and use of the minimal level of force required to respond.⁵⁷ Because these standards for the use of force required a direct threat to

by the government to the Budget Committee of the House of Councilors on October 14, 1972. *Shūdanteki Jieiken to Kenpō to no Kankei* [Relationship Between Collective Self Defense and the Constitution].

51. See LEGISLATIVE MATERIALS, *supra* note 22, at 39–40 (noting that new factors must be considered in constitutional interpretation as conditions change).

52. *Id.* at 38 (citing “Official Government Response,” 159 House of Representatives Cabinet Questions No. 114, June 18, 2004).

53. *Id.*

54. *Id.*

55. Kim, *supra* note 46, at 1030–31 (describing tensions between the political parties over Okinawa reversion).

56. LEGISLATIVE MATERIALS, *supra* note 22, at 37 (citing the report of the House of Councilors Committee on National Defense, May 22, 2014).

57. *Id.*; see also UMEDA, *supra* note 19; *supra* text accompanying note 36.

the country, the government deemed coming to the aid of another country to counter an armed attack to be beyond permissible constitutional limits.⁵⁸

Subsequently, in response to a series of geopolitical developments that increased the threat environment around Japan, new interpretations—reflected in legislation that did not require a reinterpretation of use of force under Article 9—gradually started to loosen the restrictions.⁵⁹ This process, which began in the wake of the Gulf War and was reflected in legislation permitting the deployment of SDF troops during the Iraq War,⁶⁰ centered on Japan's permitted "use of arms," a concept related to, but distinct from, the prohibition on the "use of force."⁶¹ Whereas the latter is permitted only in situations of armed attack or existential threats that trigger the self-defense condition, the former is permitted in situations below the use of force threshold as part of the state's generally recognized police powers required for the maintenance of public order.⁶² However, all

58. See 1972 Interpretative Materials, *supra* note 47 (explaining the Japanese government's stance that a threat to another country does not qualify as a direct threat to Japan).

59. See *Constitutional Reform*, *supra* note 18, at 36 n.177 (citing the Gulf War in 1992, the North Korean missile launches in 1993 and its nuclear program build-up in 1994–1996, and the War on Terror in 2003 and 2004 in the wake of the 9/11 attacks). One commentator noted that by the time of the anti-terror legislation of 2003–2004, "[c]ollective defense effectively was a new 'fact on the ground'" given the scope of Japanese military activity abroad. Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau* 22 (Japanese Pol'y Res. Inst., Working Paper No. 99, 2004).

60. Iraku ni okeru jindō fukkō shien katsudō oyobi anzen kakuho shien katsudō no jisshi ni kansuru tokubetsu sochi hō [Special Measures Act on the Implementation of Humanitarian Reconstruction Assistance Activities and Security Assistance Activities in Iraq], Law No. 137 of 2003 (Shugiin), https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/housei/15620030801137.htm (Japan) [hereinafter Law No. 137 of 2003 (Japan)].

61. *Id.*; TAMURA, *supra* note 19, at 57 (explaining the distinction between "use of force" and "use of arms").

62. "Use of force" is action taken by the SDF under Article 88 of the Self Defense Forces Law to defend the nation against armed attack (or when an armed attack is clearly imminent), under orders issued by the Prime Minister and approved by the Diet under Article 76, Paragraph 1. It is "military action taken by the personnel and physical organizations of the country as part of international conflict." In contrast, "use of arms" encompasses weapons, equipment and facilities used as a

the interpretations stopped short of expanding permitted uses of force to encompass coming to the aid of other countries.⁶³ In other words, the threat environment had not yet reached the level of potentially threatening Japan's own survival such that a major reinterpretation was required.

A. HISTORICAL CONSTRAINTS

The gradual expansion of interpretations permitting the use of arms below the use of force threshold were developed within the conceptual framework of Japan's self-defense, and included legislation passed in response to the Korean War,⁶⁴ increasing threats from North Korea's ballistic missile testing,⁶⁵ the Gulf War,⁶⁶ and the War on Terror in the wake of the 9/11 attacks.⁶⁷

means of taking human life or destroying physical objects as part of armed struggle. Under Japan's constitutional interpretations, "use of force" is only permitted in cases where the three conditions are satisfied. "Use of arms" by SDF personnel as permitted under various legislation does not fall within the definition of "use of force." TAMURA, *supra* note 19, at 57.

63. See Law No. 137 of 2003 (Japan), *supra* note 60 (permitting use of arms, but not use of force).

64. Jieitai Hō [The Self-Defense Forces Act], Law No. 165 of 1954 (Shugiin), https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/houritsu/01919540609165.htm (Japan) [hereinafter Self Defense Forces Law] (reorganizing the National Police Force into the SDF and expanding its role to the defense of Japan from direct attacks); Bōeichō Secchihō [Defense Agency Establishment Law], Law No. 164 of 1954 (Shugiin), https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/houritsu/01919540609164.htm (Japan) (establishing the Japan Defense Agency as an external bureau of the Prime Minister's Office); see THE JAPAN SELF-DEFENSE FORCES LAW 2 (Robert D. Eldridge & Musashi Katsuhiro eds., 2019) (noting that the Korean War led Japan to identify a need for a self-defense military).

65. Shūhenjitai-hō [Contingency Legislation in Areas Surrounding Japan], Law No. 60 of 1999 (Shugiin), https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/housei/h145060.htm (Japan) (passed in response to North Korea's development of nuclear weapons and ballistic missiles in the 1990s).

66. International Peace Cooperation Law, Law No. 79 of 1992 (Shugiin), https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/houritsu/12319920619079.htm (Japan) (permitting overseas deployment of the SDF for the first time, limited to logistical support).

67. See Law No. 137 of 2003 (Japan), *supra* note 60 (authorizing the overseas deployment of the SDF for humanitarian reconstruction support activities and support activities maintaining security in designated areas where no acts of combat are being conducted).

In the lead-up to the 2015 Peace and Security Legislation, “gray zone” incidents involving China in the South and East China Seas, particularly in the vicinity of the Senkaku, or Diaoyu, islands generated significant concern and additional pressure to expand Japan’s ability to defend against attempts to alter the status quo.⁶⁸ One scenario of concern was the ability to come to the aid of U.S. vessels in the event of an attack.⁶⁹ In addition, the government remained highly sensitive to memories of international criticism of Japan’s failure to assist the Allied Coalition during the Gulf War.⁷⁰ Pressure started growing for clarification of Japan’s ability to act jointly with its partners to enforce common security interests,⁷¹ leading to a re-examination of the 1972 reinterpretation.

The Cabinet Legislation Bureau under the administration of Prime Minister Shinzo Abe affirmed the 1972 position that “measures that are necessary to protect the peace and security of the people and the country’s survival” are permitted, and that in such situations “minimum necessary force” can be used against such threats, recognizing that the use of such force could only be limited to direct attacks against Japan.⁷² However, in its key finding, it determined that:

68. Jennifer Lind, *Japan’s Security Evolution*, 788 CATO INST. POL’Y ANALYSIS 5–6 (Feb. 25, 2016), <https://www.cato.org/policy-analysis/japans-security-evolution> (citing concerns over China’s increasing assertiveness in territorial disputes, and 2014 polling indicating 82 percent of respondents considered territorial disputes a serious concern, with 96 percent saying that they viewed China’s growing military power negatively).

69. See SMITH, *JAPAN REARMED*, *supra* note 5, at 152 (describing the deliberations of an advisory panel convened by Prime Minister Shinzo Abe in May 2007 to consider Japan’s defense requirements and the right of collective self-defense: “Four specific scenarios guided their thinking: the defense of U.S. vessels on the high seas, the interception of ballistic missiles that might be heading to the United States, the use of weapons in international [peacekeeping operations], and the provision of logistic support for other militaries in U.N. [peacekeeping operations]”).

70. See Lind, *supra* note 68, at 5 (“ . . . after the first Iraq war, stung by global criticism of ‘free riding,’ Japan for the first time passed a peacekeeping (or ‘PKO’) law, which allowed unarmed Japanese peacekeepers to participate in U.N. peacekeeping operations under highly restrictive conditions. . .”).

71. See SMITH, *JAPAN REARMED*, *supra* note 5, at 152 (citing the effect China’s challenge to Japan’s control of the Senkaku Islands had on its military planners).

72. *Shin San Yoken no Jūrai no Kenpō Kaishaku to no Ronriteki Seigōsei tō ni tsuite* [Concerning the Logical Basis of the Revised Three Conditions in Relation to

... on the basis of a continuously changing situation where changes in power balances, rapid developments of revolutionary technologies and threats from weapons of mass destruction, where the security environment surrounding our country is fundamentally changing, even armed attacks on other countries could, depending on its purpose, scale and situation create a realistic threat to our own survival.⁷³

Accordingly, while maintaining the conceptual framework of the 1972 interpretation, the government reinterpreted the basic limitations of Article 9 to encompass armed attacks not only on Japan, but also “armed attacks on countries with which Japan has a special relationship, amounting to a clear danger that Japan’s survival and its citizens’ right to life, liberty and the pursuit of happiness will be fundamentally overthrown.”⁷⁴ It did so by revising the three conditions for the exercise of individual self-defense to include attacks on such countries.⁷⁵

In doing so, it drew an important distinction between its new policy and international law. It made clear that it was not adopting the generally accepted international law-based right of collective self-defense, which recognizes the right to use armed force to defend other countries who come under armed attack.⁷⁶ It specifically stated that it only recognizes its right to use armed force in situations where an armed attack against another country makes such use unavoidable to defend its *own* existence and to protect its *own* people, not to protect the country under attack (or, by implication, international peace and security generally).⁷⁷ Accordingly, the reinterpretation states that it maintains the logical consistency and legal stability of the prevailing standards for governmental interpretation of the constitution, and falls well within accepted bounds of existing policy.⁷⁸

Past Constitutional Interpretation], *Naikaku Kanbō* [Cabinet Secretariat], *Naikaku Hosei Kyoku* [Cabinet Legislation Bureau] (June 9, 2015), at 1–2 [hereinafter *Cabinet Legislation Bureau Reinterpretation*].

73. *Id.* at 2.

74. *See id.* The Cabinet Legislation Bureau Reinterpretation was adopted as the government’s official position in the Cabinet Decision on July 1, 2014.

75. *Id.*

76. LEGISLATIVE MATERIALS, *supra* note 22, at 35.

77. *Cabinet Legislation Bureau Reinterpretation*, *supra* note 72, at 2–3.

78. *Id.* at 3, 5; LEGISLATIVE MATERIALS, *supra* note 22, at 39–40.

The overall analytical framework of the 2015 Peace and Security Legislation therefore emerged in two basic parts, the first clarifying Japan's ability to use force in situations threatening its survival, and the second clarifying the scope of its ability to use arms in situations below such level. The analysis was developed by an advisory panel convened by Prime Minister Shinzo Abe in May 2007, which considered four potential scenarios.⁷⁹ It was subsequently expanded by a 2014 advisory panel which considered additional scenarios, including the use of arms in international security cooperation operations and in situations of territorial "infringement" not amounting to an armed attack.⁸⁰ The conclusions of the latter panel were set forth in recommendations that greatly expanded Japan's ability to use arms in defensive military activities in support of international peace and cooperation operations in territories far beyond its shores (*kaketsuke keigo*).⁸¹ These components of the legislation form the heart of Japan's increased freedom to engage more actively in the collective security regime established under the U.N. Charter.⁸²

Accordingly, the legislation addressed the range of Japan's powers to engage in permitted military activities from the most restrictive constitutional requirements for the use of force under Chapter VII of the U.N. Charter, to the broader permitted use of arms for both collective defense and U.N. collective security purposes as defined by domestic legislation.⁸³ The latter category encompasses peacekeeping

79. SMITH, JAPAN REARMED, *supra* note 5, at 152; *see supra* text accompanying note 69.

80. Shuji Yanai, *New Japanese Legislation for Peace and Security: Its Background and Salient Points*, 60 JAPANESE Y. B. INT'L L. 136, 148–49 (2017) (noting that the 2014 advisory panel recommended that the protection and rescue of Japanese nationals within the scope allowed by international law should be permitted).

81. *Id.*

82. *See* Lee, *supra* note 9, at 385–87 (arguing that the U.S.-Japan Defense Guidelines, implemented in concert with the 2015 Peace and Security Legislation, strengthen Japan's ability to implement her commitments under the U.S.-Japan military alliance, which in turn permits Japan to engage in a "wide range of military activities and cooperation in the global community. Collective self-defense merely explains one specific segment of the enhanced alliance.").

83. *Id.*

operations and “important influence” situations that affect Japan’s security and permits such actions as providing supply and transport support for U.S. forces without geographical restrictions, “asset protection” powers against attacks upon the military assets and personnel of the U.S. and other countries, and expanded powers to use arms in peacekeeping operations, among other security measures.⁸⁴

Recognizing that national security encompasses domains beyond military readiness, on the economic front Japan subsequently passed an Economic Security Promotion Act in May 2022 (the “ESPA”).⁸⁵ The ESPA seeks to counter coercion by other countries based on economic dependency in the wake of China’s attempts to link its territorial disputes with Japan to trade in rare earth minerals in the 2010s and Russia’s attempts to link the energy dependency of Europe with the invasion of Ukraine in February 2022.⁸⁶

84. Government of Japan, *Japan’s Legislation for Peace and Security 7* (Mar. 2016), <https://www.mofa.go.jp/files/000143304.pdf>; *Defense of Japan 2015* 317–20 (2015), https://warp.da.ndl.go.jp/info:ndljp/pid/11591426/www.mod.go.jp/e/publ/w_paper/2015.html.

85. Economic Security Promotion Act (ESPA), Law No. 43 of 2022 (Shugiin), https://www.shugiin.go.jp/internet/itdb_housei.nsf/html/housei/20820220518043.htm (Japan).

86. *Japan’s Economic Security Promotion Act and the Implications for Businesses*, 28 INT’L INST. FOR STRATEGIC STUD. (Dec. 2022), <https://www.iiss.org/publications/strategic-comments/2022/japans-economic-security-promotion-act-and-the-implications-for-businesses>. The legislation focuses on four main pillars: (i) ensuring a stable supply of key products; (ii) ensuring the stable supply of essential infrastructure services; (iii) enhancing development of advanced critical technologies; and (iv) non-disclosure of selected patent technologies. *Summary of Economic Security Promotion Act (Act for the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures)*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/sites/default/files/pdf/economic%20security%20promotion%20act%20%28summary%29%28English%29.pdf?utm_source=sendupdatelogo. This legislation has recently been supplemented by a new economic security clearance bill that grants certain individuals access to important information related to economic security and provides for penalties for those who leak important economic security information, including a prison sentence of up to five years. *See Japan’s Parliament Enacts New Economic Security Clearance Bill*, JAPAN TIMES (May 10, 2024), <https://www.japantimes.co.jp/news/2024/05/10/japan/politics/security-clearance-bill> (noting that information that could threaten the country’s security due to improper handling is considered important economic security information under the ESPA).

The December 2022 National Defense Strategy (the “National Defense Strategy”) builds upon the foundations created by the 2015 Peace and Security Legislation. The goals are clearly stated as follows: (1) “to strengthen Japan’s own architecture for national defense,” (2) “to further reinforce joint deterrence and response capability of the Japan-U.S. Alliance,” and (3) “to reinforce collaboration with like-minded countries.”⁸⁷ The emphasis on deterrence and networking effects aligns squarely with the 2015 Peace and Security Legislation’s overall shift away from an exclusive self-defense posture toward more active engagement (and providing the means for such engagement) with a much broader range of partners under a collective security framework.⁸⁸

B. COLLECTIVE SELF-DEFENSE

To understand how the 2015 Peace and Security Legislation expanded Japan’s powers to engage more fully in the U.N. collective security system, it is helpful to start by examining its perspectives on the basic theories supporting its position on collective self-defense. The Staff Office of the House of Representatives Constitutional Review Committee⁸⁹ has outlined three such theories as understood by Japanese lawmakers.⁹⁰ The first states that collective self-defense embodies the “right of a state to come to the aid of another state in

87. Hideshi Tokuchi, *Japan’s New National Security Strategy and Contribution to a Networked Regional Security Architecture*, CTR. FOR STRATEGIC & INT’L STUD. (June 23, 2023), <https://www.csis.org/analysis/japans-new-national-security-strategy-and-contribution-networked-regional-security> (quoting the National Defense Strategy of 2022).

88. Implementation of the new policies requires legislation and funding, a process that has been undertaken with the fiscal 2024 national budget negotiations. It is anticipated that it could take as long as five to ten years for political, economic, and fiscal stars to align to fully implement the policies. In the meantime, the 2015 Peace and Security Legislation will continue to govern the legal parameters of Japan’s defense posture and engagement. Adam P. Liff & Jeffrey W. Hornung, *Japan’s New Security Policies: A Long Road to Full Implementation*, RAND BLOG (Mar. 27, 2023), <https://www.rand.org/blog/2023/03/japans-new-security-policies-a-long-road-to-full-implementation.html>. See also Johnstone, *infra* note 217, at 167–76, 179–80 (favorably assessing Japan’s progress after one year of the budget process).

89. LEGISLATIVE MATERIALS, *supra* note 22, at 35.

90. *Id.*

situations where such other state has come under armed attack, *based on the common interest of all states in the maintenance of international peace and security*, and does not require treaties or other formal commitments between the states to do so.”⁹¹ The second theory states it is a “right of a state to come to the aid of another state with which it has a ‘special relationship’ in situations where such other state has come under armed attack, *such that the security and independence of such other state has grave consequences for the security and independence of the assisting state.*”⁹² The third theory cited by lawmakers states it is “a collection of independent rights jointly exercised by all states, where an attack on one state is deemed to be an attack on all, *such that each state collectively exercises its individual right of self-defense.*”⁹³ Japan endorses the second view,⁹⁴ a position that is consistent with its historical interpretations of the self-defense constraints of Article 9.

91. *Id.* (emphasis added) (citing Hans Kelsen. Kelsen’s theory of collective self-defense has been set forth in the context of his theory of collective security, which is based on his views of legal positivism as applied to international law); *see also* HANS KELSEN, *INTERNATIONAL LAW STUDIES: COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 61–62 (1954) (noting that collective self-defense is action by members of a security organization to come to the assistance of a victim despite the members not being attacked themselves).

92. LEGISLATIVE MATERIALS, *supra* note 22, at 35 (emphasis added); Philip C. Jessup & R.R. Baxter, *The Contribution of Sir Hersch Lauterpacht to the Development of International Law*, 55 AM. J. INT’L L. 97, 98–99 (1961) (observing that Lauterpacht’s theories of the role of international law are based on natural or moral law concepts for resolving disputes among states, in contrast to positivism, “which places the ultimate foundation of conventional international law in the will of the state.”).

93. LEGISLATIVE MATERIALS, *supra* note 22, at 35 (emphasis added); Leo Gross, *Review: D.W. Bowett, Self-Defense in International Law (1958)*, 54 AM. J. INT’L L. 199 (1960) (quoting Bowett: “The term ‘collective self-defense,’ does no more than recognize that members may exercise collectively what is their individual right; it does not create new rights, nor, by permitting the use of a legal fiction, convert action unauthorized by a competent organ of the United Nations into action in the exercise of the right of collective self-defense.”).

94. The Staff Office of the House of Representatives Constitutional Review Committee cites scholars Tabata Shigejiro and Tanaka Yuichi as endorsing this view, lending support for Japan’s position. LEGISLATIVE MATERIALS, *supra* note 22, at 35.

According to the Japanese interpretation, the third theory is a minority view incompatible with the fulfillment of state obligations under mutual assistance treaties, whereas the first two theories differ depending on whether a “close relationship” exists between the defending state and the assisting state. The first theory, to the Japanese, is deemed to be the most commonly accepted.⁹⁵

The Japanese view of collective self-defense affirms the U.N. Charter construct—i.e., that it functions as a supplementary security measure after an armed attack occurs until the collective security system under the U.N. Charter becomes operational.⁹⁶ However, in the view of the Japanese government, because the exercise of collective self-defense has the potential to trigger and expand conflict and undermine the collective security system as a whole, there is a clear recognition of the inherent danger that the exercise of the right is inconsistent with the aims of the collective security system.⁹⁷

In recognition of these dangers, in adopting the second theory of collective self-defense the Japanese position seeks to overcome the inherent conflict with the aims of collective security by focusing policy on the conditions for using force and imposing strict limits on its use, with an overlay of highly restrictive, self-imposed constraints centered on the doctrine of self-defense.⁹⁸

95. *Id.* (“*Daichi setsu ga tsūsetsu to sareru.*”).

96. See U.N. Charter, *supra* note 13, art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, *until the Security Council has taken measures necessary to maintain international peace and security.*” (emphasis added)).

97. LEGISLATIVE MATERIALS, *supra* note 22, at 35; see also THAKUR, *supra* note 10, at 33 (“Efforts to devise an operational collective security system have been thwarted by a fundamental tension in the concept. War between lesser states . . . cannot . . . endanger *world* peace. Only the prospect of war between powerful states directly, or their involvement on rival sides in a quarrel between minor powers, can threaten international order. Collective security, understood as the maintenance of international peace and security, is therefore superfluous in respect of small states. Equally, however, it is impossible to enforce against major powers. For any attempt to launch military measures against a great power would bring about the very calamity that the system is designed to avoid, namely a world war.”).

98. See LEGISLATIVE MATERIALS, *supra* note 22, at 35 (citing International Law: Practical Defense [*Bōei Jitsumu Kokusai Hō*] 236 (Kurosaki Masahiro et al. eds., 2021)).

C. EXISTENTIAL THREAT

A central concept of the 2014 reinterpretation is the requirement that an “existential threat” to Japan must exist to invoke the right to defend another country.⁹⁹ The reinterpretation clearly states that an armed attack against another country alone is not sufficient to trigger the right; the effects of any such attack would need to be serious and weighty enough in their impact on Japan’s people, equating to a direct attack on Japan itself.¹⁰⁰

In interpreting the above standard for the required effects on Japan, not only must Japan’s survival come under threat, there must exist a “clear danger” that the people’s right to “life, liberty and pursuit of happiness” will be “overturned.”¹⁰¹ The government’s position on the “clear danger” standard is that it must be assessed not subjectively based on conjecture, but must be objectively recognized “without doubt.”¹⁰² As for evaluating whether an attack on another country presents an existential threat to Japan, the following five factors will be “objectively and logically” evaluated to assess the threat: (i) the capabilities and intent of the attacking country; (ii) the location of the

99. The Cabinet decision officially approved the reinterpretation of the constitution on July 1, 2014. The Japanese government submitted the enabling security-related bills to the Cabinet on May 14, 2015, and the bills constituting the 2015 Peace and Security Legislation implementing the reinterpretation were passed by the House of Councilors on September 19, 2015. See HOSOYA, *infra* note 152, at 27.

100. *Cabinet Legislation Bureau Reinterpretation*, *supra* note 72, at 3 (“Not only would an armed attack on a third country be required, we make it clear that it would be a necessary condition that if an armed response is not taken, serious and material harm clearly would be inflicted on the people similar to if a direct armed attack was made against the country.”).

101. See TAMURA, *supra* note 19, at 35; see also SMITH, JAPAN REARMED, *supra* note 5, at 154 (describing the negotiations between representatives of the Liberal Democratic Party and its coalition partner Komeito, and the agreement between them that one of the three criteria under which Japan could exercise the right of collective self-defense would be “an armed attack against a foreign country that is in a close relationship with Japan . . . [that] threatens Japan’s survival and poses a clear danger to fundamentally overturn people’s right to life, liberty and pursuit of happiness. . .”).

102. See LEGISLATIVE MATERIALS, *supra* note 22, at 40 (citing the response of Cabinet Legislation Bureau Chief Yokobatake to the House of Representatives Budget Committee on July 14, 2014).

contingency; (iii) a comprehensive assessment of the scope, nature and fluidity of the situation; (iv) the probability of incurring damage from the hostilities (*wa ga kuni ni senka ga oyobu gūzensei*); and (v) the seriousness and weight of the sacrifices expected to be inflicted on the people.¹⁰³ The “probability of war damage” standard is not limited to damage from bombing or direct military attacks, but can also include situations where an attack on another country causes disruption of supplies to Japan, such as energy, and the basic necessities of life rising to the level of life or death for the people, not just economic effects.¹⁰⁴

During the debates on the 2015 Peace and Security Legislation, several participants offered examples of the threat levels that could potentially meet these thresholds, including “armed attack against U.S. vessels transporting Japanese nationals; armed attack against U.S. warships conducting ballistic missile surveillance in the vicinity of Japan; or armed attack against Guam, where . . . U.S. military bases critical for Japan’s security in East Asia are located.”¹⁰⁵

103. See *Cabinet Legislation Bureau Reinterpretation*, *supra* note 72, at 3.

104. See LEGISLATIVE MATERIALS, *supra* note 22, at 41 (citing the responses of Prime Minister Abe at the General Session of the House of Councillors on May 18, 2015). The government will be required to set forth the reasoning behind its assessment of the threat in a Basic Response Plan that includes:

(i) the background of the situation, recognition of the armed attack situation, the situation where an armed attack is anticipated, or the survival-threatening situation, and the facts that constituted the base of the recognition; and

(ii) in the case that the situation is recognized as an armed attack situation or a survival-threatening situation, the reasons why it can be deemed that there is no other appropriate means available to ensure Japan’s survival and protect its people and use of force is necessary to respond to the situation.

Amendment to Armed Attack Law, ¶ 6(2), in DEFENSE WHITE PAPER, *supra* note 3, at 319.

105. See Masahiro Kurosaki, *Legal Framework of Japan’s Self-Defense with the United States*, in STRENGTHENING THE U.S.-JAPAN ALLIANCE: PATHWAYS FOR BRIDGING LAW AND POLICY 34 (N. Ishizuka, M. Kurosaki & M. Waxman eds., 2020) (citing responses given by government representatives including Prime Minister Shinzo Abe and Defense Ministers Gen Nakatani, Itsunori Onodera and Takeshi Iwaya in Diet proceedings. Other examples included threats to critical

D. RELATIONSHIP TO U.N. PRINCIPLES

Through the foregoing process, and driven by the imperatives of the increasing deterioration in its regional security environment, Japan moved from a mere recognition of the right of collective self-defense to the legal ability to exercise the right under Article 51 of the U.N. Charter.¹⁰⁶ However, the legal basis for exercising the right is grounded not in the concepts of collective self-defense commonly recognized under international law, but in principles underlying the exercise of *individual* self-defense—i.e., situations that objectively equate to a direct attack on Japan.¹⁰⁷ For an armed attack on a “close relationship” country to trigger Japan’s right to use force to defend such a country, Japan’s own survival, as determined by an evaluation of the five objective factors,¹⁰⁸ would need to come under “clear danger.”¹⁰⁹

If the standard for exercising collective self-defense essentially mirrors the standard required for individual self-defense, it begs the question why separate grounds were deemed necessary for the ability to exercise a right of collective self-defense. If the requirements for invoking the right are the same as defending against a direct attack, why not just rely on the preexisting standards of the 1972 interpretation?

Part of the answer might be found in the legislative limits of coordinating defense activities with the United States under the previous interpretation.¹¹⁰ The Cabinet changed the interpretation of

energy lifelines, such as a blockade of the Strait of Hormuz. Standalone cyberattacks also could constitute existential threats.)

106. U.N. Charter, *supra* note 13, art. 51.

107. *Supra* text accompanying notes 90–95.

108. *Supra* text accompanying note 103.

109. *Supra* text accompanying notes 101–02; see also *Pacifist Principles Preserved*, KOMIEITO (July 2, 2014) [hereinafter Yamaguchi Comments], <https://www.komei.or.jp/en/policy/stands/20140702.html> (“The inclusion of the words “clear danger” provides the basis for objective, rational judgments, preventing the government from making arbitrary determinations that the use of force is justified. This is an extremely important point.”). Natsuo Yamaguchi, the author of the comments, was serving as chief representative of the New Komei Party, the Liberal Democratic Party’s governing coalition partner and counterparty at the time in intra-coalition negotiations on the 2015 Peace and Security Legislation.

110. Accepting the United States as the guarantor of its security and placing its

the constitution to pave the way for the 2015 Peace and Security Legislation to broaden the scope of cooperation with the United States and to create more opportunities for contingency planning.¹¹¹ In the wake of the 2015 Peace and Security Legislation, a significant leap in Japan's defense posture was made possible in the form of increased cooperation through significantly expanded defense guidelines.¹¹² Representatives of the United States viewed the guidelines, and in particular the language incorporating the new interpretation permitting the use of force in defense of another country, as "transformative," enabling the extension of bilateral defense cooperation to a number of domains and areas, which "clearly had an effect" on the implementing legislation that was eventually passed.¹¹³ The ability to expand cooperation in such a way represented a clear advancement of Japan's capabilities as a mutual security treaty partner.

In addition, the legislative process currently underway in the Japanese Diet in the wake of the 2022 guidelines clearly would not have been possible without the foundation laid by the 2015 Peace and Security Legislation.¹¹⁴ Basing a national defense strategy on the real

land at the disposal of U.S. armed forces in return, was a significant contribution in support of the alliance's purposes, while denying similar resources to adversaries. WOLFERS, *supra* note 10, at 192. But this is quantitatively and qualitatively different from actively contributing to a broader collective security system that is aimed more generally at enforcing peace.

111. See Watanabe, *supra* note 33 ("The Peace and Security Legislation changed the cabinet's interpretation of the constitution to allow Japan to partially exercise the right of collective self-defense, thereby broadening the scope of cooperation with the United States and creating more opportunities for contingency planning.").

112. See *The Guidelines for Japan-U.S. Defense Cooperation* (Apr. 27, 2015) [hereinafter *Defense Cooperation Guidelines*], <https://www.mofa.go.jp/files/000078188.pdf> (providing a general framework and policy direction for Japan-U.S. roles, missions, and cooperation to enhance bilateral security, deter conflict, support economic prosperity, and promote the alliance).

113. See *Joint Statement of the 2023 U.S.–Japan Security Consultative Committee* ("2+2"), DEP'T DEF. (Jan. 11, 2023) [hereinafter *DOD Joint Statement*], <https://www.defense.gov/News/Releases/Release/Article/3265559/joint-statement-of-the-2023-usjapan-security-consultative-committee-22>, (whereby the Ministers "confirmed unprecedented alignment of their vision, priorities, and goals"); Correspondence with Andrew Winternitz, Principal Director for East Asia, Office of the Secretary of Defense, who led the U.S. negotiating team at the time, June 3, 2023 (notes on file with the author).

114. See Watanabe, *supra* note 33 ("Another major turning point was the

possibility that Japanese territory could be militarily attacked represented a turning point in the mindset of Japanese policymakers,¹¹⁵ a posture with which public opinion has aligned.¹¹⁶ An express recognition under the constitution of the ability to exercise the right of collective self-defense also balanced (albeit not completely) the unequal obligations under the U.S.-Japan Security Treaty,¹¹⁷ which only permits the United States to defend Japan, with no corresponding obligation on the part of Japan.¹¹⁸

However, the exceedingly high bar created by the limitations on the actual ability to exercise the right suggests it does not represent a significant leap forward in Japan's greater integration into the global framework of the post-war U.N. security system,¹¹⁹ as distinct from increasing its ability to be a more effective security partner to its sole ally.¹²⁰ Within the narrow realm of collective self-defense scenarios as

Legislation for Peace and Security of 2015, which partially authorized the exercise of the right collective self-defense in anticipation of a peripheral contingency that could have a significant impact on Japan's security").

115. *See id.* (“[T]he Japanese government has begun to consider a realistic strategy for national defense based on the real possibility that the Japanese territory could be attacked militarily. This can be considered a turning point in Japan's defense policy.”).

116. *See id.*

117. Treaty of Mutual Cooperation and Security Between the United States of America and Japan art. VI, Jan. 19, 1960, 160 U.N.T.S. 247, 254.

118. The language of Article V of the U.S.-Japan Security Treaty expressly acknowledged the constitutional limitations on Japan's ability to come to the aid of the U.S. in support of the parties' interest “in the maintenance of peace and security in the Far East.” *See id.* pmb., art. V (“Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger *in accordance with its constitutional provisions and processes.*” [emphasis added]). Of course, this is not the only explanation for the qualification; the U.S. also has constitutional constraints on its ability to use force in aid of other countries, which accounts for similar language being included in its other mutual security treaties, including the NATO Alliance Charter.

119. *See Liff, supra* note 7, at 140 (“[U]nique, self-imposed conditions appear so strict that the use of force in support of allies or partners outside a defense-of-Japan scenario seems unlikely.”).

120. Becoming a more active participant in the collective security system at the same time it remains part of the collective defense alliance with the U.S. also raises the possibility of conflict with the U.S. in situations where the U.S. may decide, for policy reasons for example, to align with a party that has divergent interests from

defined by Japan under the 2015 Peace and Security Legislation, its ability to actually come to the aid of “special relationship” countries in situations that do not amount to open hostilities threatening Japan’s existence remain clearly prohibited.¹²¹

III. COLLECTIVE SECURITY AND INTERNATIONAL LAW

A. GENERAL PRINCIPLES

The real significance of the 2015 Peace and Security Legislation therefore goes beyond Japan’s ability to come to the aid of the United States and instead lies in its newly expanded powers at the level below the use of force threshold. In contrast to the concept of collective self-defense, collective security is a separate, broader concept focused on enforcing and maintaining the general peace among states.¹²² Whereas collective self-defense requires an armed attack against a victim state and can be exercised in the discretion of a single state or group of

Japan—e.g., a U.S. rapprochement with China. The new powers created under the 2015 Peace and Security Legislation may require Japan to come to the aid of the U.S. in similar situations to enforce collective security interests. *See, e.g.*, Japan’s ambiguous stance in the wake of the October 7, 2023 attack on Israel. Michael MacArthur Bostok, *Explaining Japan’s Nuanced Approach to the Israel-Hamas War*, JAPAN TIMES (Nov. 8, 2023), <https://www.japantimes.co.jp/commentary/2023/11/08/japan/japan-israel-hamas-war> (“Japan has stood apart from the other G7 members in pursuing a more nuanced approach to the Israel-Hamas war.”). *See* WOLFERS, *supra* note 10, at 186–88 (citing examples of situations where collective self-defense and collective security may clash, requiring a choice to be made between the two—e.g., the U.S. during the Suez Crisis of 1954 when it had to choose between the collective security system and its commitments to France, England, and Israel).

121. However, the “five conditions” do give some room for interpretation of what would constitute a grave enough threat to trigger the right. *See supra* text accompanying notes 103–04.

122. *See* Sir Michael Wood, *Self-Defence and Collective Security: Key Distinctions*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 650, n.2 (Marc Weller et al. eds., 2015) (“The term [collective security] does not have a clear legal meaning and is more popular in the discourse of international relations than of law. It is often used to refer to enforcement measures under the U.N. Charter, but the term is not used in the Charter and it is sometimes doubted—though nothing turns on it—whether the U.N. system is properly to be described as a collective security system.”).

states in aid of the victim state under Article 51 of the U.N. Charter (and is based on protection of the victim state), collective security operates on the basis of an institutional authorization to use force, through the U.N. Security Council, where there is a threat to the peace, breach of the peace, or act of aggression under Article 39 of the U.N. Charter (and is based on maintaining and restoring international peace and security).¹²³

Under international law, assistance rendered by a state to a victim of an armed attack under principles of collective self-defense supports not only the defending state, but a “cardinal principle” of the international legal order; the general prohibition against the use of force is founded upon the interest all states have in the compliance by all other states with the prohibition.¹²⁴ Therefore, notwithstanding the general prohibition on the use of force, such use is permitted when exercised in the common interest of maintaining peace.¹²⁵ In other words, peace is enforced by all states joining a “pledge of all members

123. See *id.* at 650 (quoting Dinstein, War, Aggression and Self-Defence 303, ¶ 806), and 652 (quoting Bowett, *Collective Security and Collective Self-Defence*, in RAMA MONTALDO, *EL DERECHO INTERNACIONAL* 430).

124. See Marc Weller, *Introduction: International Law and the Problem of War*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 21 (Marc Weller et al. eds., 2015). There has to be an “armed attack” against a victim state in order to invoke the right. Article 51, UN Charter. (“[The co-defending states] are, at the same time, defending one of the cardinal principles of the international legal order—the prohibition of the use of force, which has an *erga omnes* character. That is to say, all states have a legal interest in compliance by all other states with this rule . . . Article 51 is placed within Chapter VII of the Charter. This implies that it is seen as an element of the collective security architecture, rather than as its antithesis.”). This could be an attack not only on the state’s territory, but also on its land, sea, and air forces outside its territorial limits. See GRAY, *supra* note 16, at 121 (citing *The Charter of the United Nations: A Commentary* 1411 (Bruno Simma et al. eds., 3d ed. 2012), United Nations General Assembly Resolution 3314 (XXIX) (Dec. 14, 1974), and The North Atlantic Treaty, art. 6(1) (Apr. 4, 1949), among others). *But see* GRAY, *supra* note 16, at 134–175 (describing the debates about whether the right of self-defense can be triggered by events broader than an armed attack—e.g., by anticipation of an armed attack, or “grey zone” events).

125. See THAKUR, *supra* note 10, at 30 (noting the added prescription to use force in support of U.N. authority and that the U.N. Security Council was empowered to determine threats to international peace, impose sanctions, and, if necessary, authorize military force).

of the system to take common action against any state failing to comply with the prohibition of the use of force.”¹²⁶

As described above, the 2015 Peace and Security Legislation narrowly limits Japan’s ability to exercise its right of collective self-defense to cases where its own survival is threatened.¹²⁷ The exercise of such a right does not purport to be legally supported by principles that advance the larger interests of all states in maintaining international peace and security.¹²⁸ By expanding its ability under the constitution to engage in broader ranges of activities that formerly would have been construed as exceeding the limits of permitted uses of force, Japan has more leeway to support collective actions that seek to maintain international peace and security below the level of armed attack or survival threatening situations.¹²⁹ However, the scope of such

126. See Weller, *supra* note 124, at 8 (“While classical international law was focused on the advancement of the national or vital interests of states and their self-preservation as the ultimate aim of the system . . . the object of protection of the collective security mechanism was the integrity and credibility of that mechanism itself, which was aimed at achieving international peace and security for all.”); see also THAKUR, *supra* note 10, at 32 (“Predicated on the proposition that war can be prevented by the deterrent effect of overwhelming power being brought to bear against any state contemplating the use of force, collective security entails the imposition of diplomatic, economic and military sanctions against international outlaws.”); WOLFERS, *supra* note 10, at 183–84 (“ . . . in violating the peace and law of the community of nations it endangers, if indirectly, the peace and security of every nation.”).

127. See *supra* text accompanying notes 99–104.

128. See Interview by Komei Shimbun with Kazuo Kitagawa, Komeito Vice Representative and acting chair of the Ruling Coalition Committee on Security Legislation, (May 16, 2015) [hereinafter Kitagawa Interview], <https://www.komei.or.jp/en/policy/stands/20150516.html> (“[T]he core of the government’s existing interpretation of Article 9 that prohibits the use of force overseas is upheld. The right of collective self-defense for the purpose of defending another country as provided for in Article 51 of the Charter of the United Nations is not allowed”—i.e., it is only permitted for purposes of defending Japan from survival threats). Kitagawa was the primary negotiator on behalf of Komeito, the ruling Liberal Democratic Party’s coalition partner, during intra-coalition negotiations on the formulation of the 2015 Peace and Security Legislation. See SMITH, JAPAN REARMED, *supra* note 5, at 154 (Komeito viewed its role as a restraint on the Liberal Democratic Party’s push to expansively reinterpret Article 9).

129. See *supra* text accompanying notes 79–82.

actions is still constrained by the limits of Article 9 and remains subject to continuing legal scrutiny.¹³⁰

B. HISTORICAL CONSTRAINTS

There is no express provision in Japan's constitution that grants powers enabling the country to engage as an active participant in the U.N. collective security framework.¹³¹ However, the concepts of “peaceful cooperation with all nations” and responsible participation in the “preservation of peace” set forth in the preamble,¹³² as well as the prohibition on the “threat or use of force as a means of settling international disputes” set forth in Article 9, reflect a commitment to the resolution of international conflicts by peaceful means.¹³³ To the extent participation in collective security measures is not deemed to violate the Article 9 prohibition on the use of force, Japan is permitted to fulfill its obligations under the U.N. Charter.¹³⁴

Consistent with these principles, throughout the decades since the end of World War II Japan has gradually expanded the limits of its participation in the collective security framework.¹³⁵ It has done so, however, at levels below the threshold required for the use of force—i.e., below the level required to invoke its rights to individual and collective self-defense.¹³⁶ Therefore, in situations not constituting an

130. See Hideyuki Kakinuma, *Japan High Court Rules 2015 Security Laws Don't Violate Constitution*, MAINICHI SHIMBUN (Dec. 6, 2023), <https://mainichi.jp/english/articles/20231206/p2a/00m/0na/009000c> (noting that 25 lawsuits with a total of about 7,700 plaintiffs have been filed in 22 district courts and their branches across the country, with nine of those cases pending in the Supreme Court, while 10 are proceeding in high courts, and reporting the Sendai High Court's finding that stipulations in the security laws that set conditions for the use of force and defensive mobilization of the SDF must be strictly interpreted and applied, adding, “Those stipulations must be firmly abided by, respecting the gravity of the Constitution when the government takes action in the future.”).

131. See TAMURA, *supra* note 19, at 83.

132. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] May 3, 1947, pmbll., ¶¶ 1–2 (Japan).

133. *Id.* ch. 2, art. 9(1); see also TAMURA, *supra* note 19, at 83.

134. See TAMURA, *supra* note 19, at 44, 83; NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] May 3, 1947, ch. 10, art. 98(2) (Japan) (“The treaties concluded by Japan and established laws of nations shall be faithfully observed.”).

135. See *supra* text accompanying note 27.

136. See *supra* text accompanying notes 60–63

armed attack or other events posing an “existential threat” to it, Japan has relied on its interpretations of the permitted scope of military activity under Article 9 to determine the extent to which it can participate in collective security efforts.¹³⁷

The permitted scope of such activity has been defined by reference to the use of arms, as distinguished from the use of force, which falls within a distinct and separate analytical category.¹³⁸ This realm is defined by legislation enacted within permitted constitutional bounds.¹³⁹ Accordingly, the use of arms has been limited to the exercise of police powers (maintenance of public order), force preservation (protection of military and other assets required for the defense of the country), and self-defense (protection of individuals, including oneself, from bodily harm), each under general principles of “execution of duties” or natural law rights to self-protection (e.g., in the case of the personal self-defense of SDF peacekeepers).¹⁴⁰ However, extensive and detailed restrictions on the use of firearms apply to Japanese military forces deployed even in such situations.¹⁴¹

In the use of force realm, the integration of Japan’s military with those of other countries, which could lead to the actions of those other countries being attributed to Japan,¹⁴² has been deemed particularly troublesome from a constitutional perspective.¹⁴³ Japan therefore had placed significant limits on the integration of its military with those of other countries engaged in armed conflict (the principle of “*ittaiika*”), including the provision of supplies, transportation, and other support to such forces.¹⁴⁴ On the other hand, overseas participation in

137. See *supra* text accompanying notes 35–39.

138. See *supra* text accompanying note 64–65.

139. See TAMURA, *supra* note 19, at 57.

140. See *id.* at 59–62.

141. See Sakata, *supra* note 44, at 57–79; see also SMITH, JAPAN REARMED, *supra* note 5, at 130–39 (providing an overview of the evolution of the scope of permitted SDF activities in the years prior to the enactment of the 2015 Peace and Security Legislation).

142. See TAMURA, *supra* note 19, at 44–46.

143. See Sakata, *supra* note 44, at 10 (“[E]ven if the SDF does not directly use force, if its supporting activities are regarded as being integrated with the use of military force by a foreign country receiving such support, it will be legally deemed as a use of force by Japan, which will violate the constitution.”).

144. See TAMURA, *supra* note 19, at 48–49; see also *Bōei Sōbi Iten Sangensoku*

humanitarian and peacekeeping operations involving various types of assistance to the U.S. and other countries had been permitted.¹⁴⁵ Such participation had been limited to “rear areas” of conflict and non-combat zones, and were limited to supply, transport, repair, facilities support, medical assistance, and communications support.¹⁴⁶ Similarly, Japan’s support activities in the vicinity of Japan were limited to assisting only the U.S. under geographic and other restrictions.¹⁴⁷

By permitting a greater scope for SDF activities in collective security efforts, the 2015 Peace and Security Legislation expanded these limitations to permit Japan to provide enhanced aid to allies and other partners participating in U.N.-sanctioned operations.¹⁴⁸ The 2022 Defense Policies reaffirm this commitment and express Japan’s clear intent to significantly enhance its capabilities to do so.¹⁴⁹ This represents a move toward not only a more active role in the collective security framework, but fulfillment of the responsibilities required of member states by the U.N. Charter.¹⁵⁰ Before this shift, Japan had been

[Three Principles on the Transfer of Defense Equipment], *Kakugi Kettei* [Cabinet Decision], *Kokka Anzen Hoshō Kaigi Kettei* [National Security Council Decision], Apr. 1, 2014, ¶ 1(3) (prohibiting transfers of defense equipment to states engaged in hostilities—i.e., those engaged in armed attack or subject to measures enacted by the Security Council to maintain or restore international peace and security).

145. See TAMURA, *supra* note 19, at 49–52.

146. See *id.* at 495–96.

147. See Act on Measures to Ensure Peace and Security of Japan in the Event of Situations that Will Have an Important Influence on the Nation, Law No. 60 of 1999, art. 1 (Japan) (noting that the purpose of the act is to strengthen cooperation with foreign countries in situations impacting Japan’s peace and security to support the Treaty of Mutual Cooperation and Security with the United States); Sakata, *supra* note 44, at 62.

148. See *supra* text accompanying notes 82–84.

149. See NATIONAL SECURITY STRATEGY, *supra* note 2, at 11 (“Japan will join together with its ally, like-minded countries and others to achieve a new balance in international relations, especially in the Indo-Pacific region.”); NATIONAL DEFENSE STRATEGY, *supra* note 2, at 10 (“Japan’s defense objectives are . . . to further reinforce joint deterrence and response capability of the Japan-U.S. Alliance by further strengthening cooperation with our ally, the United States . . . [and] to reinforce collaboration with like-minded countries and others that cooperate in upholding and reinforcing a free and open international order.”).

150. See U.N. Charter, *supra* note 13, ch. VII, art. 43 (requiring member states to make available to the U.N. such “armed forces, assistance and facilities” as may be

much more doctrinally focused on individual self-defense as the basis for justifying any and all military engagements; it was able to mobilize the SDF only for activities under specific legislative authorization that ensured it would not become entwined in hostilities,¹⁵¹ and was permitted to use force only in situations in which it was directly subject to armed attack.¹⁵² Such an emphasis on self-preservation

necessary for the purpose of the authority granted to the Security Council under Article 42 to “take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security”). The objectives of the 2015 Peace and Security Legislation are more narrowly tailored to the assistance of countries with which Japan has a “close relationship” (e.g., in respect of the collective self-defense right), but that does not diminish the point that the legislation represents a significant step toward Japan’s deeper engagement with the collective security framework established by the U.N. Charter. *See infra* text accompanying notes 174–75.

151. *See, e.g.*, Act on Cooperation with United Nations Peacekeeping Operations and Other Operations (the International Peace Cooperation Act) (June 1992), which provide for the following conditions to be met for the dispatch of SDF personnel for U.N. peacekeeping operations: “(1) Agreement on a cease-fire shall have been reached among the parties to armed conflicts. (2) Consent for the undertaking of U.N. Peacekeeping Operations as well as Japan’s participation in such operations shall have been obtained from the host countries as well as the parties to armed conflicts. (3) The operations shall strictly maintain impartiality, not favoring any of the parties to armed conflicts. (4) Should any of the requirements in the above-mentioned principles cease to be satisfied, contingent dispatched by the Government of Japan may terminate International Peace Cooperation Assignments. (5) The use of weapons shall be limited to the minimum necessary to protect the lives of personnel, etc. When the consent for acceptance is deemed to be consistently maintained, the use of weapons in defense of the mission mandate is allowed in accordance with specific requirements.” *Outline of Japan’s International Peace Cooperation*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN (Feb. 27, 2024), https://www.mofa.go.jp/fp/ipc/page22e_000683.html.

152. *See* YUICHI HOSOYA, SECURITY POLITICS IN JAPAN: LEGISLATION FOR A NEW SECURITY ENVIRONMENT 105 (2019). This represents a policy that closely adheres to a literal reading of Article 51 of the U.N. Charter, which imposes an “armed attack” condition for the exercise of individual or collective self-defense. U.N. Charter, ch. VII, art. 51. There is extensive debate among scholars and policy makers as to whether the language should be interpreted to encompass anticipatory self-defense or other actions taken in response to perceived threats falling short of armed attack. *See* GRAY, *supra* note 16, at 124–26; Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 706–19 (2005). Japan’s position on this issue differs from the U.S., which has taken the position that the right of self-defense applies against imminent threats of armed attack. Masahiro Kurosaki, *The ‘Bloody Nose’ Strategy, Self-Defense and International Law: A View from Japan*,

works against the international system because it can undermine the “object of protection of the collective security mechanism,” which is “the integrity and credibility of that mechanism itself, which [is] aimed at achieving international peace and security for all.”¹⁵³

Seen in this light, the expansion of constitutional interpretation to permit collective self-defense, constrained as it is within the framework of Japan’s own self-defense, contributes little to the overall objective of enforcing peace for the benefit of the wider community of states.¹⁵⁴ On the other hand, by permitting a greater scope of action to aid states that are enforcing the collective security structure, Japan is able to more proactively contribute to a “defend forward” posture that promotes offshore defense, which is a vital self-interest.¹⁵⁵

C. 2015 PEACE AND SECURITY LEGISLATION

The expansion of Japan’s long-standing prohibition on the use of force to encompass collective self-defense by bringing the conceptual and legal basis for the exercise of the right under the same principles applicable to its individual self-defense (i.e., the existence of an existential threat) did not permit Japan to directly contribute to the collective security regime.¹⁵⁶ However, it did have the ancillary effect of creating more room within the bounds of its prevailing constitutional interpretations to expand the permitted limits of its participation in collective security activities.¹⁵⁷ In doing so, it

LAWFARE (Feb. 15, 2018), <https://www.lawfaremedia.org/article/bloody-nose-strategy-self-defense-and-international-law-view-japan>.

153. Weller, *supra* note 124, at 8.

154. “The foundations of international law have always been . . . reciprocity and enlightened self-interest.” Jon M. Van Dyke, *Introduction of Western International Law into Japan*, in *THE JAPANESE LEGAL SYSTEM: AN ERA OF TRANSITION* 47 (Tom Ginsburg & Harry N. Scheiber eds., 2012) (quoting WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* (2d ed. 1991)) (explaining that the effective functioning of international law requires states to sacrifice their national interests to an international interest).

155. See NATIONAL DEFENSE STRATEGY, *supra* note 2, at 15 (“Ministry of Defense/Self-Defense Forces . . . [will] promote cooperation with our ally and multilayered collaboration with like-minded countries and others to create a desirable security environment.”).

156. *Supra* text accompanying notes 153–54.

157. See Reinhart, *supra* note 8.

significantly enhanced its deterrence capabilities at a level below armed attack situations that would justify the use of force.¹⁵⁸

Because the concepts of “existential threats” and “threats to survival” are not formal constructs under international law,¹⁵⁹ any formal determination of such threats, in the view of experts and policymakers in Japan, falls more within the political as opposed to the legal realm.¹⁶⁰ Under the Japanese standard, in the absence of a direct attack that would trigger the right of individual self-defense, the threshold level of hostilities required to invoke the right to come to the aid of another country under the right of collective self-defense¹⁶¹ would be exceedingly high, amounting to a general state of armed hostilities encompassing multiple domains (e.g., air, land, sea, cyber, space, economy),¹⁶² and requiring an evaluation of multiple factors.¹⁶³ In other words, the question of whether Japan’s survival is at risk would require a broader evaluation of the threat posed to Japan rather than the application of a narrow, direct test; policymakers would be required to evaluate whether an armed attack or other threat exists that is proximate enough to constitute a clear threat to survival. Such a standard is suggested by the Cabinet Decision approving the 2015 Peace and Security Legislation, which stated “even an armed attack occurring against a foreign country could actually threaten Japan’s survival, depending on its purpose, *scale* and manner.”¹⁶⁴

158. *Supra* text accompanying note 155.

159. *See* Liff, *supra* note 7, at 161; Interview with Tadashi Mori, Professor of International Law, University of Tokyo (July 12, 2023) (notes on file with author).

160. Interview with Nobukatsu Kanehara, former Deputy National Security Advisor, National Security Council (July 12, 2023) [hereinafter Kanehara Interview] (notes on file with author).

161. The standards for determining what constitutes an “armed attack” for purposes of invoking the right of collective self-defense can be subject to different interpretations and controversy and is often the subject of extensive debate. *See* GRAY, *supra* note 16, at 182–84 (citing, among other examples, the U.S. in Lebanon in 1958, the U.S. in Vietnam in 1966, and the USSR in Afghanistan in 1979).

162. *See* Kanehara Interview, *supra* note 160; *see also* Yamaguchi Comments, *supra* note 109 (“Use of force [even under the 2015 Peace and Security Legislation] is permitted as a last-resort defensive measure to ensure the national survival of Japan and protect its people”).

163. *See supra* text accompanying notes 101–04.

164. *See Cabinet Decision, supra* note 22, at 7 (emphasis added).

To address this limitation, the 2015 Peace and Security Legislation sought to provide the means to address potential threats by expanding and bolstering the country's deterrence capabilities at levels below those which would require public engagement in lengthy and potentially divisive political debates.¹⁶⁵ One significant way it did so was by loosening an important element of the use of force prohibition—the prohibition against “integration” with the armed forces of other countries.¹⁶⁶ The new standards now allow supply, transport, and other support in *any* area where there are not *current* hostilities, in contrast to being limited to “rear areas” and non-combat zones,¹⁶⁷ thereby removing all geographical restrictions on such activities by the SDF.¹⁶⁸ Importantly, such activities are no longer limited to only assisting the U.S. under the framework of the U.S.-Japan Security Treaty, but are now extended to “other military forces of foreign countries which conduct activities that contribute to the achievement of the objectives of the United Nations Charter, and other similar organizations.”¹⁶⁹

In addition to loosening the use of force doctrine, the 2015 Peace and Security Legislation relaxed several restrictions on the use of arms in “important influence” situations affecting Japan's security. A wide range of potential threats to the peace, including threats to Japan, exists below the threshold of armed attack or other survival threats.¹⁷⁰ The ability of Japan to respond to such threats under its constitutional limitations depended in large part on legislation enacted in the face of public resistance and domestic political constraints¹⁷¹ that limited the

165. *Id.* at 7–8.

166. *Id.* at 3–5.

167. See TAMURA, *supra* note 19, at 46.

168. *Id.* at 51.

169. Partial Amendments to the Law Concerning Measures to Ensure Peace and Security of Japan in Situations in Areas Surrounding Japan, Article 3-2, Article 3-3(1), and Article 4(1), in DEFENSE WHITE PAPER, *supra* note 3, at 319.

170. Such incidents can include encounters on the seas or in the airspace around Japan, for example Chinese incursions into disputed waters or airspace or North Korean missile launches. See NATIONAL DEFENSE STRATEGY, *supra* note 2, at 3–4 (citing the threats from China, North Korea, and Russia).

171. See *generally* SMITH, JAPAN REARMED, *supra* note 5, at 152–61 (describing the domestic political process in the lead-up to the 2015 Peace and Security Legislation, including the role of public opinion); see also Lee, *supra* note 9, at 380–81. (“It may be the case that a joint military action, not satisfying the conditions governing the exercise of the right of self-defense, can still be claimed as justifiable

use of arms to situations where Japan was assisting the U.S. in “areas around Japan.”¹⁷² These restrictions were eliminated under the 2015 Peace and Security Legislation amendments.¹⁷³ The new law expanded Japan’s ability to assist other countries in “situations that have an *important influence or effect* on Japan’s peace and security, such as situations where there is fear it would develop into a direct armed attack against Japan if left alone.”¹⁷⁴ Examples of such situations include those having an

. . . important influence on the peace and security of the country, including, among others, (i) the imminent outbreak of armed hostilities in the region around Japan, (ii) the outbreak of actual hostilities in the region around Japan, (iii) internal disturbances or disorder in a country that expand internationally, [and] (iv) a U.N. Security Council determination that the actions of a foreign country threaten the peace or infringe or violate the peace, and such country becomes the subject of economic sanctions under U.N. Security Council resolutions.¹⁷⁵

In addition, whereas the use of arms was limited under pre-2015 laws to the protection of Japan’s own weapons and personnel, such permitted use was expanded to protect the weapons or personnel of the U.S. or other organizations protecting Japan (except in joint exercises or situations of armed attack against the U.S., where the use of arms would be covered under other legislation specific to such situations).¹⁷⁶ Accordingly:

SDF personnel shall be able to use weapons to the extent that is considered reasonably necessary based on the situation, when there are sufficient grounds for judging that the use of weapons is necessary to protect people

for the purpose of ‘maintaining peace and security’ within a particular region. In this case, however, such action should be either authorized by the Security Council acting under Chapter VII or taken by a regional organization pursuant to the authorization by the Security Council.”).

172. Partial Amendments to the Law Concerning Measures to Ensure Peace and Security Defense of Japan, in DEFENSE WHITE PAPER, *supra* note 3, at 318.

173. *Id.*

174. *Id.* (emphasis added).

175. See Sakata, *supra* note 44, at 62.

176. Partial Amendments to the Self-Defense Forces Law and Other Existing Laws for Ensuring Peace and Security of Japan and the International Community, in DEFENSE WHITE PAPER, *supra* note 3, at 317; Self Defense Forces Law, *supra* note 64; Cabinet Decision, *supra* note 22, at 3; TAMURA, *supra* note 19, at 60–61.

or weapons, etc. under the SDF's duty to protect the weapons, etc., of the military forces of the United States of America, the military forces of other countries, or other similar organizations . . . which are engaged in activities that contribute to the defense of Japan in collaboration with the SDF.¹⁷⁷

Finally, measures were adopted by Cabinet resolutions to facilitate responses to (i) unlawful navigation by foreign naval vessels through the territorial sea or internal waters of Japan,¹⁷⁸ (ii) illegal landings by armed groups (or those with a high probability of being armed) on a remote island or its surrounding seas,¹⁷⁹ and (iii) foreign ships committing illegal acts of violence or detention or acts of depredation (“acts of infringement”) against Japanese private ships on the high seas.¹⁸⁰

The passage of the 2015 Peace and Security Legislation, and associated secrecy legislation that established the National Security Council as well as a state secrets law, triggered a storm of criticism and “protests on a scale unprecedented since the 1960 demonstrations against the revision of the U.S.-Japan Security Treaty.”¹⁸¹ In contrast, the 2022 Defense Policies resulted in no significant public opposition to the new direction of security policy, indicating that “the public is much more aware of the security challenges facing Japan[, showing] there is support for the new defense strategy across the political spectrum.”¹⁸²

177. Partial Amendments to the Self-Defense Forces Law and Other Existing Laws for Ensuring Peace and Security OF JAPAN and the International Community, in DEFENSE WHITE PAPER, *supra* note 3, at 317; Self Defense Forces Law, *supra* note 64, art. 95(2).

178. Responses to Foreign Naval Vessels Carrying Out Navigation Through the Territorial Sea or the Internal Waters of Japan that Does Not Fall Under Innocent Passage in International Law, Cabinet Resolution May 14, 2015, in DEFENSE WHITE PAPER, *supra* note 3, at 323.

179. The Government's Responses to Illegal Landing on a Remote Island or its Surrounding Seas by an Armed Group, Cabinet Resolution May 14, 2015, in DEFENSE WHITE PAPER, *supra* note 3, at 323–24.

180. Responses to Acts of Infringement When Self-Defense Force Ships or Aircraft Detect Foreign Ships Committing Said Acts Against Japanese Private Ships on the High Seas, Cabinet Resolution May 14, 2015, in DEFENSE WHITE PAPER, *supra* note 3, at 324.

181. See SMITH, JAPAN REARMED, *supra* note 5, at 155 (observing that the controversy led to a nine-point drop in the approval rating of the Cabinet).

182. See Watanabe, *supra* note 33 (citing a December 2022 Nikkei Shimbun poll,

Such public support for Japan's security policies has two consequences. First, it provides greater assurance to policymakers of public acceptance of the potential exercise of the previously divisive concept of collective self-defense in situations where open hostilities are building or are imminent, when the use of force will become more of a political and less of a legal issue.¹⁸³ Second, it eases domestic political constraints on exercises of Japan's deterrence capabilities higher up on the conflict scale through increased assistance to partners and, if necessary, the use of arms in defensive actions to support the status quo.¹⁸⁴

For example, legislation passed with public support permits a significantly wider range of cooperation with the U.S. as contemplated by the 2015 U.S.-Japan Defense Guidelines¹⁸⁵ in the full range of domains spanning land, air, sea, cyber, and space, without geographical limitations.¹⁸⁶ The moves to adopt collective self-defense, together with legislation implementing the new policy, and then to establish a security policy on the scale of the 2022 Defense Policies,¹⁸⁷ represent a dramatic expansion of Japan's defense strategy, and were accomplished within the span of ten years in contrast to the

where 55 percent of respondents supported the plan to strengthen defense capabilities over the next five years compared to 36 percent who did not support the plan, a December 2022 poll by Asahi Shimbun, the principal liberal-leaning newspaper, where a majority (56 percent) supported acquisition of counter strike capability, and a November 2022 poll by Yomiuri Shimbun, the principal conservative-leaning newspaper, and NNN (Nippon News Network), where 80 percent of the public agreed that China will pose a greater threat to Japan's security as the Xi Jinping administration enters its third term in power, and 68 percent agreed that Japan should strengthen its defense capabilities). *But see infra* note 183 for a more nuanced view (Saruta).

183. *But see* Sayo Saruta, *Government and Society Are at Odds on National Security*, JAPAN TIMES (May 27, 2024), <https://www.japantimes.co.jp/commentary/2024/05/27/japan/japan-security-constitution-public-opinion> (“[A] deeper look at public sentiments tells a different story. While it seems that most Japanese people support the expansion of military strength, they wish to limit this to an exclusively defense-oriented policy.”).

184. *See id.*

185. *See Defense Cooperation Guidelines, supra* note 112, at 2–3.

186. *See id.* at 4–9, 21–22.

187. *See supra* sources cited note 2.

previous seventy years it took to adopt policies under its more bounded incrementalist approach to constitutional interpretation.¹⁸⁸

Japan's policy therefore focuses on increasing and enhancing Japan's ability to engage in more robust, forward-leaning deterrence activities that seek to curtail threats before they develop into armed attack or survival threats.¹⁸⁹ This reflects the recognition of Japanese policymakers that the collective self-defense right alone does not measurably enhance the country's ability to defend itself.¹⁹⁰ Rather, it is the increased range of activities contemplated under the new policies such as those articulated under the U.S.-Japan Defense Guidelines and the Joint Statement of the 2023 U.S.-Japan Security Consultative Committee,¹⁹¹ and the increased scope of permitted deterrence activities¹⁹² under the collective security system, that provide the greatest opportunity for effective defense.¹⁹³

188. See Liff, *supra* note 7, at 145–49, 167. (“For 70 years, elite contestation and popular opinion have powerfully shaped the debate about Article 9 and what is or is not acceptable.”); *Constitutional Reform*, *supra* note 18, at 5, 31–39. (“The longstanding and extensive debates surrounding Article 9 are prominent examples of the complex interaction of multiple aspects of the constitutional reform debate, and the struggle to reconcile interpretative conflicts arising from incremental adaptation.”).

189. See NATIONAL SECURITY STRATEGY, *supra* note 2, at 10 (“Japan will reinforce its own capabilities and roles, and together with its ally, the United States, and like-minded countries and others, deter contingencies and attempts to unilaterally change the status quo in Japan and its vicinity.”).

190. The 2014 Cabinet Decision devotes more pages to policies governing responses to infringements not amounting to armed attacks, logistics support, integration of forces and international peace cooperation activities than it does to the right of collective self-defense. See *Cabinet Decision*, *supra* note 22.

191. See generally DOD Joint Statement, *supra* note 113, at 29–31 (discussing the future role of self-defense forces, development of the SDF architecture, and reinforcement of the policy-making function).

192. Collective defense arrangements such as the U.S.-Japan Security Treaty are in themselves means of deterrence. See WOLFERS, *supra* note 10, at 183–84. The use of the term “deterrence” in this article, therefore, doesn’t intend to limit the concept to Japan’s actions under the 2015 Peace and Security Legislation under the collective security system. Deterrence can take different forms in different contexts.

193. There is a contrary view on the deterrent effect of collective security vs. collective self-defense. See WOLFERS, *supra* note 10, at 182–86 (“[T]here is one difference in the effects of collective action under the two systems . . . Few of even the most forceful exponents of collective security expect it to ensure deterrence of all aggressors at the outset. Instead, they place their hopes on the success of a kind

IV. IMPLICATIONS FOR JAPAN

In addition to the enhanced deterrence capabilities enabled by strengthening the U.S.-Japan alliance, the 2015 Peace and Security Legislation gave Japan the means to strengthen the regional Asian security architecture through enhanced, direct military cooperation with other partners.¹⁹⁴ Greater integration between armed forces across Asia has been cited as an important strategic objective by both the U.S. and Japan,¹⁹⁵ and is a critical element of enhanced collective security in the Asia region.

This is particularly significant in light of the fact that no collective security agreement exists in the Indo-Pacific equivalent to NATO's North Atlantic Treaty.¹⁹⁶ Historically, the security cooperation framework in the region was led by separate, bilateral partnerships anchored by the U.S. in a so-called "hub-and-spoke" system, consisting of the U.S. acting as the hub to its treaty alliances with Australia, Japan, the Philippines, South Korea, and Thailand.¹⁹⁷ Over time, these bilateral relationships became complemented by groupings such as the Quadrilateral Security Dialogue (the "Quad"), AUKUS,¹⁹⁸

of learning process in which the punishment of one or more actual aggressors will deter subsequent would-be aggressors . . . By itself this delay in the immediate effectiveness of the collective security system rules out any pre-stabilized harmony between collective defense and collective security.”; i.e., during this interval, nations may be attacked by adversaries because they have directed their strengths to address other security issues.).

194. See Kei Koga, *A New Strategic Minilateralism in the Indo-Pacific*, 17 *ASIA POL'Y* 27–34 (2022).

195. *War and Peace in Asia*, *THE ECONOMIST* (Apr. 13, 2024), at 26 (quoting Prime Minister Kishida as stating: “Working together with ‘like-minded countries’ on security issues ‘will lead to the establishment of a multilayered network, and by expanding that we can improve deterrence.”) Also, in referring to the bilateral treaty system between the U.S. and each of its Asian treaty allies as a “hub and spokes” system, commentators have noted that “[u]nder [President] Biden, America has sought to foster links between the spokes in the hope of countering China’s rise.” *Id.*

196. See Hornung, *supra* note 11, at 4. ASEAN is a multilateral framework focused on maintaining diplomatic neutrality between the great powers and keeping its centrality intact in order to play a leading role in regionalism. Koga, *supra* note 194, at 27, 33.

197. Hornung, *supra* note 11, at 2.

198. *Id.* at 4 (noting that the Quad is a diplomatic grouping composed of Australia, India, Japan and the U.S. AUKUS is a technological partnership composed of

and other informal or formal groupings of states that coordinate strategic agendas and facilitate functional cooperation.¹⁹⁹

These groupings began their rise in the 2000s due to the need to increase international cooperation in response to the rise of terrorism as a prominent international security issue, and were based on functional cooperation to address nontraditional security issues.²⁰⁰ During the 2010s, they evolved for the purpose of maintaining the regional status quo in response to China's growing assertiveness, driven by an increasing awareness that it was no longer sufficient to rely upon the traditional Asian security architecture, which was built around the U.S. hub and spoke alliance network, and ASEAN multilateralism.²⁰¹ Whereas the Quad is an example of a minilateral grouping²⁰² focused on shaping the regional order based on the existing U.S.-led regional order, AUKUS "seeks to ensure strategic stability within the various subregions of the Indo-Pacific, such as Southeast Asia, Northeast Asia, and South Asia."²⁰³

The expanded powers granted by the 2015 Peace and Security Legislation at the level below survival threats enabled Japan to actively engage in the type of cooperation exemplified by the

Australia, the United Kingdom and the U.S.); Koga, *supra* note 194, at 31–32 (noting further that the Quad is focused on regional order building in the Indo-Pacific through establishing international rules and norms for emerging issues and challenges, such as in the technological realm. AUKUS is focused on strengthening military capabilities through technical cooperation among its members).

199. Koga, *supra* note 194, at 28; *see also* Hornung, *supra* note 11 (recognizing that the Comprehensive and Progressive Partnership for Trans-Pacific Partnership, the Regional Comprehensive Economic Partnership and the Chip 4 semiconductor group are examples of trade and economic groupings).

200. Koga, *supra* note 194, at 29–30.

201. *Id.* *See also* *Japan is a Cuddler Friend to South-East Asia than America or China*, THE ECONOMIST (Dec. 14, 2023), <https://www.economist.com/asia/2023/12/14/japan-is-a-cuddler-friend-to-south-east-asia-than-america-or-china> (discussing the role of ASEAN, which has traditionally been outside the traditional U.S.-led security network in Asia).

202. Koga, *supra* note 194, at 28. Koga defines "minilateralism" as "an informal or formal grouping of three to five states that aim to coordinate their strategic agendas and facilitate functional cooperation in particular issue areas." They are distinct from multilateral groupings, of which ASEAN and the Shanghai Cooperation Organisation are examples.

203. *Id.* at 31.

foregoing arrangements through direct contributions, such as transfers of military equipment and technology to other countries,²⁰⁴ by supplementing the U.S. alliance and existing unilateral security groupings²⁰⁵ through the expansion of its own network of bilateral security agreements,²⁰⁶ as well as through other forms of functional

204. Such transfers required a loosening of Japan's historically restrictive policy on the export of military equipment and technology. The restrictions were significantly loosened by Cabinet resolution as part of the package of policy decisions enacted during promulgation of the 2015 Peace and Security Legislation. *Bōei Sōbi Iten San Gensoku* [Three Principles on the Transfer of Defense Equipment and Technology], *Kokka Anzen Hoshō Kaigi Kettei* [National Security Council Resolution], *Kakugi Kettei* [Cabinet Resolution] (April 1, 2014), <https://www.mofa.go.jp/files/000034953.pdf>; National Security Council, Implementation Guidelines (April 1, 2014, last amended March 8, 2022), <https://www.mofa.go.jp/files/000034954.pdf>. This enabled defense equipment transfer agreements with the Philippines, Malaysia, Vietnam, Thailand, Singapore and Indonesia. See *Japan and ASEAN: Cuddles with Intent*, THE ECONOMIST (Dec. 16, 2023) 29–30 (extensive Japanese investment, aid and diplomacy to ASEAN countries dating back to the 1977 policy of Prime Minister Fukuda Takeo has helped Japan to accumulate substantial goodwill, influence and trust in the region).

205. Hornung, *supra* note 11, at 3; Gabriel Dominguez, *As U.S. 'Minilateral' Diplomacy Grows, Japan Emerges as Key Actor*, JAPAN TIMES (Aug. 6, 2024), <https://www.japantimes.co.jp/news/2024/08/06/japan/politics/asia-us-minilaterals-japan>; see also JAPANESE MINISTRY OF DEF., DEFENSE OF JAPAN 18–20 (2020), https://www.mod.go.jp/en/publ/w_paper/wp2020/DOJ2020_Digest_EN.pdf (citing security cooperation as one of the three pillars of Japan's defense strategy, including defense cooperation and exchanges, multilateral security cooperation and capacity-building). Japan's increased cooperation with existing multilateral security groupings such as NATO illustrates additional dimensions of the expanding regional security framework.

206. Since the passage of the 2015 Peace and Security Legislation, Japan has upgraded its bilateral security arrangements. See U.S. Agreement between the Government of Japan and the Government of the United States of America concerning Reciprocal Provision of Logistic Support, Supplies, and Services between the Self-Defense Forces of Japan and the Armed Forces of the United States of America (Sept. 26, 2016), https://www.ilajapan.org/jyil/all/jyil/61/list/pdf/3_USA.pdf. In addition, it has entered into bilateral security agreements for the reciprocal provision of supplies and services, which includes joint training and exercises, with the armed forces of (i) the United Kingdom (see Agreement between the Government of Japan and the Government of the United Kingdom of Great Britain and Northern Ireland concerning Reciprocal Provision of Supplies and Services between the Self-Defense Forces of Japan and the Armed Forces of the United Kingdom of Great Britain and Northern Ireland (Jan. 26, 2017)), https://www.ilajapan.org/jyil/all/jyil/61/list/pdf/10_UK.pdf; (ii) Australia (see

and economic cooperation.²⁰⁷ Such actions have also aligned with the recognition that multilateral networking among the alliance spokes is a key pillar of the U.S.-Japan alliance.²⁰⁸

In addition to its continuing expansion of bilateral and minilateral security groupings, and as envisioned by its 2022 National Security

Agreement between the Government of Japan and the Government of Australia concerning Reciprocal Provision of Supplies and Services between the Self-Defense Forces of Japan and the Australian Defence Force (Jan. 14, 2017)), https://www.ilajapan.org/jyil/all/jyil/61/list/pdf/12_Australia.pdf); (iii) France (*see* Accord entre le gouvernement du Japon et le gouvernement de la République Française relatif à la fourniture réciproque de biens et de services entre les forces d'auto-défense du Japon et les forces armées de la République Française [Agreement between the Government of Japan and the Government of the French Republic concerning Reciprocal Provision of Supplies and Services between the Self-Defense Forces of Japan and the Armed Forces of the French Republic] (July 13, 2018)), https://www.ilajapan.org/jyil/all/jyil/63/list/pdf/1-5_France.pdf); (iv) Canada (*see* Agreement between the Government of Japan and the Government of Canada concerning Reciprocal Provision of Supplies and Services between the Self-Defense Forces of Japan and the Canadian Armed Forces (Apr. 21, 2019)), <https://www.mofa.go.jp/files/000356887.pdf>); and (v) India (*see* Agreement between the Government of Japan and the Government of the Republic of India concerning Reciprocal Provision of Supplies and Services between the Self-Defense Forces of Japan and the Indian Armed Forces (Sept. 9, 2020)), https://www.ilajapan.org/jyil/all/jyil/65/list/pdf/1-7_Japan-India.pdf). Japan subsequently entered into the Japan-Poland Memorandum on Defense Cooperation and Exchanges on February 21, 2022, Defense of Japan 2023, Ministry of Defense White Paper 269, the Japan-Thailand Agreement concerning the Transfer of Defense Equipment and Technology on May 2, 2024, *Id.* at 269, and the Japan-Sweden Agreement concerning the Transfer of Defense Equipment and Technology on December 19, 2022, *Id.* at 270.

207. *See, e.g., infra* note 208 (concerning significant expansion of economic assistance to the Philippines).

208. *Id.* at 4; *see also* *United States-Japan Joint Leaders' Statement*, THE WHITE HOUSE (Apr. 10, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/10/united-states-japan-joint-leaders-statement> (citing new trilateral military cooperation initiatives among the U.S., Japan and Australia, the United Kingdom, and Korea, respectively); *Joint Vision Statement from the Leaders of Japan, the Philippines, and the United States*, THE WHITE HOUSE (Apr. 11, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/11/joint-vision-statement-from-the-leaders-of-japan-the-philippines-and-the-united-states> (reaffirming a wide range of cooperation among the countries on peace and security initiatives, including joint exercises, capacity building and trilateral maritime dialogue).

Strategy,²⁰⁹ Japan established a new Official Security Assistance (“OSA”) framework.²¹⁰ It was aimed at deepening security cooperation with the armed forces and other related organizations of like-minded countries by providing materials and equipment, as well as assistance for infrastructure development, with a view of strengthening their security capacities and improving their deterrence capabilities.²¹¹ By doing so, OSA sought to “strengthen [Japan’s] own defense capabilities . . . in order to prevent unilateral attempts to change the status quo by force, ensure the peace and stability of the Indo-Pacific region in particular, and create a security environment desirable for Japan.”²¹² This framework was enacted in addition to its existing Official Development Assistance program, which is designed to enhance Japan’s influence, goodwill, and trust by focusing on supporting the economic and social development of developing countries.²¹³

OSA has combined and implemented many of the policy elements reflected in the 2015 Peace and Security Legislation, most notably addressing the continuing limitations of Article 9 by expressly limiting itself to “fields not directly relating to any international conflict.”²¹⁴ The field of cooperation, however, encompasses core elements of the legislation’s purpose in the collective security realm by expressly including (but not limiting itself to) (i) activities for ensuring peace, stability, and security based on the rule of law (e.g., monitoring and surveillance in territorial waters and airspace, counter-terrorism, counter-piracy, etc.); (ii) humanitarian activities (e.g., disaster response, search and rescue, medical care, transport of relief goods,

209. NATIONAL DEFENSE STRATEGY, *supra* note 2.

210. *Japan’s Security Policy: Official Security Assistance (OSA)*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Nov. 30, 2024), https://www.mofa.go.jp/fp/ipc/page4e_001366.html.

211. Official Security Assistance (OSA) (Oct. 2024) [hereinafter *OSA Concept Paper*], <https://www.mofa.go.jp/files/100737098.pdf>.

212. *Japan’s Security Policy: Official Security Assistance (OSA)*, *supra* note 210.

213. *Implementation Guidelines for Japan’s Official Security Assistance*, MINISTRY OF FOREIGN AFFS. OF JAPAN (Apr. 5, 2023), <https://www.mofa.go.jp/files/100487432.pdf>.

214. *OSA Concept Paper*, *supra* note 211.

etc.); and (iii) international peace cooperation operations (e.g., capacity building to participate in peacekeeping operations, etc.).²¹⁵

These unprecedented shifts in Japan's security posture within Asia and, arguably, globally,²¹⁶ demonstrate the significance of the 2015 Peace and Security Legislation's role in enabling Japan's active engagement in security affairs beyond its own self-defense. With the perspective of almost a decade since its enactment, and one year after the issuance of its new national security and defense strategies, it is clear that Japan is irrevocably committed to a fundamentally different defense strategy.²¹⁷

V. CONCLUSIONS

The "existential threat" condition for Japan's right to exercise collective self-defense, by imposing such strict legal limits on its ability to respond to higher-order threats as to limit its exercise only to instances of armed attack or survival threats amounting to war, renders it ineffective to respond to the current security environment in situations below that level. Although some room for interpretation has been created around the definition of a survival threat, the condition nevertheless requires a threat to the very survival of Japan and to the livelihood of its people before it can be invoked as justification for using force.²¹⁸ At a point when hostilities reach that stage, the exercise of the right of collective self-defense will become a political question, not a legal one. In other words, the condition focuses on higher-order threats that narrow potential applications of the right, requiring political judgments that consider the totality of the threat across multiple domains and modalities in the context of the overall

215. *Id.*

216. Jeffrey W. Hornung, *Japan's Alliance with the U.S. has Just Gone Global*, NIKKEI ASIA (Apr. 16, 2024), <https://asia.nikkei.com/Opinion/Japan-s-alliance-with-the-U.S.-has-just-gone-global>.

217. See Christopher B. Johnstone, *When Action Match Words: Japan's National Security Strategy at One Year*, 47 WASH. Q. 167–83 (2024) (assessing that Japan is following through strongly on the priorities set out in the 2022 Defense Policies but cautioning that the next phase of implementation in the areas of cybersecurity and the defense industry will encounter significant challenges).

218. SMITH, JAPAN REARMED, *supra* note 5, at 154.

environment within which the threat arises, before the right can be invoked.²¹⁹

The condition arose from negotiations to extend the interpretation of the permissible scope of self-defense under Article 9²²⁰ to permit the use of force to come to the aid of a country in “close relationship” with Japan.²²¹ By adopting the new five guidelines for invoking the right of collective self-defense,²²² policymakers were able to give themselves additional room to interpret whether hostile actions constitute survival threats. It is widely recognized by the negotiators, as well as commentators and scholars, that such extension is probably the limit of what can be achieved by interpretation, and that any broader authority (e.g., a blanket right to use force subject only to specific limitations) would require a constitutional amendment.²²³

Therefore, at the higher end of the threat spectrum any legal analysis of whether the right can be invoked will play a relatively subordinate role to political judgments.²²⁴ At that stage, it is probable that the security environment will be at, or close to, a state of open hostilities that by its nature would constitute a threat to the potential survival of Japan.²²⁵ In such a situation, the political analysis is unlikely to differ significantly from one required to use force for direct self-defense, which places the legal analysis comfortably within the bounds of constitutional interpretation.²²⁶

In contrast, the much broader range of rights enabled under the 2015 Peace and Security Legislation permits a greater range of discretion by Japanese policymakers to respond more effectively to lower-order

219. See *supra* text accompanying notes 103–04.

220. See Kitagawa Interview, *supra* note 128 (“The ruling coalition began discussion on security bills in May 2014. Discussions took place 25 times in total over the past year.”).

221. See *supra* text accompanying note 7; see also *supra* notes 21, 24, and 101.

222. See *Cabinet Legislation Bureau Reinterpretation*, *supra* note 72.

223. SMITH, JAPAN REARMED, *supra* note 5, at 155.

224. *Supra* text accompanying notes 159–60.

225. *Supra* text accompanying notes 162–65.

226. *Supra* text accompanying notes 68–78, 107–09; see also Yamaguchi Comments, *supra* note 109 (“So-called collective self-defense, in which the purpose is to defend *another* country, is not recognized now nor in the future. The Constitution limits the use of defensive measures *solely to the defense of Japan*.” (emphasis added)).

threats before they can escalate to the level of existential threats.²²⁷ This shift aligns Japan more closely with the post-war collective security framework established under the U.N. Charter, and moves it away from a self-defense orthodoxy that inhibits the proper functioning of such a system.²²⁸

At the lower end of the threat spectrum, legal analysis, as reflected in legislation, will continue to be a dominant consideration affecting decisions on the use of arms. The much broader range of rights capable of being exercised for deterrence under the 2015 Peace and Security Legislation permits Japan to engage in more robust military coordination, logistics support, and peacekeeping operations.²²⁹ This enables greater options for aiding the U.S. and other partners in the event of lower-level hostilities before they escalate.²³⁰ While this suggests the probability of continuing debates and political battles over constitutional interpretations of the scope of permitted actions, it more closely aligns Japan with the fundamental principles of collective security.

The other significance of the “existential threat” condition is the incentive it should create in Japan, the U.S., and their partners to resolve conflicts with adversaries at the lower end of the threat spectrum. If the cost of invoking such a right is so high as to implicate the very survival of the country, it should create an equally high incentive to subordinate self-interest to international interests.²³¹ For example, the momentum behind the 2015 Peace and Security Legislation had the immediate effect of accelerating coordination efforts to enhance security in Asia through the swift adoption of

227. *Supra* text accompanying notes 148–52.

228. *Supra* text accompanying 189–93.

229. *Supra* text accompanying notes 169–80. These activities include (i) international peacekeeping operations, (ii) multilateral operations and (iii) logistical support. *See* HOSOYA, *supra* note 152, at 107.

230. *Supra* text accompanying notes 169–80.

231. Van Dyke, *supra* note 154, at 47 (quoting WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION*, saying “For example, the increasing cost of war, or perhaps the infeasibility of a major war, makes a legal settlement of conflicting interests more attractive. At any rate, war costs diminish the types of interests over which states are willing to fight a war.”).

updated U.S.-Japan Defense Coordination Guidelines,²³² as well as its more recent cooperation agreements with other partners.²³³

The negotiators of the 2014 interpretive expansion to permit collective self-defense under Article 9 recognized that the incremental interpretation approach had reached its maximum point.²³⁴ In the collective security realm below the armed attack threshold triggering the right of self-defense, legislation will continue to evolve to define the permissible levels of actions under Article 9 and Article VII of the U.N. Charter.

However, at some point pressure could start to rise for the two to start converging. As military pressure from China and, possibly, North Korea or Russia, starts to grow in the form of threats to Taiwan, continuing or increased joint exercises near Japanese waters and airspace and in disputed areas, or increased cyber-attacks and missile overflights, the pressure to increase deterrence will grow.²³⁵ In a process reminiscent of Japan's incremental increases in defense activity starting in the 1990s,²³⁶ policymakers will be called upon to reinterpret policy guidelines in a gradually escalatory manner.²³⁷ The only room to continue meeting ever-increasing threats will be through legislation, supported by bureaucratic interpretations of the permissible scope of the use of force, that again pushes the limits of permitted action under Article 9 and Article VII of the U.N. Charter.

232. The Guidelines for Japan-U.S. Defense Cooperation were adopted on April 27, 2015, one month before the draft of the 2015 Peace and Security Legislation was presented to the Diet in May of that year, and five months before the 2015 Peace and Security Legislation was approved by the Diet on September 19, 2015. The legislation became effective on March 29, 2016.

233. *Supra* text accompanying notes 204–15.

234. See SMITH, JAPAN REARMED, *supra* note 5, at 154–55 (“[President] Yamaguchi [Natsuo] of the Kōmeitō noted that any further changes in Japan’s constitution would require a formal process of revision, ‘putting the government decision in front of the Japanese people.’ [LDP Vice President] Kōmura [Masahiko] concurred: ‘So long as we have Article Nine, this will be as far as we can go.’ If more significant legal changes are needed for Japan’s military, the constitution will need to be revised. . . .”).

235. *Id.* at 16–17.

236. *Constitutional Reform*, *supra* note 18, at 36–37.

237. See SMITH, JAPAN REARMED, *supra* note 5, at 16–17.

At some point, Japan's room to act below the "existential threat" level will need to increase and could start approaching a level of actions nearing an outbreak of general hostilities. In other words, at some point the line between "deterrence" and "survival" could start to blur, possibly in an evolutionary process that will be vulnerable to sudden and unpredictable leaps between an unstable peace at high tension to open hostilities. A conceptual leap mirroring this process at a much lower level has already occurred in the process leading up to the passage of the 2015 Peace and Security Legislation.²³⁸

In such an environment, events will move much faster than the ability of legal doctrine to respond; constitutional amendments will be too cumbersome and time-consuming to be effective. This could put Japan on a potential path to debates asserting *de facto* unconstitutionality unless it carefully manages decisions under the rubric of permitted self-defense.

This is a road already traveled by the U.S., which could provide lessons for Japan. The U.S. has long pushed the bounds of self-defense under expansive theories of international law to justify a number of its uses of military force overseas.²³⁹ Japan, a keen observer of international law, has consistently rejected theories such as anticipatory or preemptive self-defense as incompatible with its constitutional principles.²⁴⁰ An evolutionary process of the type described above, whereby Japan gradually moves towards U.S.-type positions, could be one potential way out of the unconstitutionality trap—i.e., by pushing constitutional interpretation in a different

238. *Supra* text accompanying notes 50–53.

239. *See, e.g.*, GRAY, *supra* note 16, at 134–75, 368 (citing numerous instances involving conflicts with Nicaragua, Syria, Turkey, Libya and Iran where the U.S. justified interventions based on claims of armed attacks and self-defense). In the case of Iraq, "the apparent determination of the USA to use force . . . led to questions how far, if at all, the USA was constrained by international law"; acknowledging, however, that the U.S. did offer legal justification for its use of force under a combination of Security Council resolutions.

240. *See* Kurosaki, *supra* note 152 ("[C]ontrary to the views of the United States, the Japanese government has repeatedly rejected the notion that the right to self-defense applies against imminent threats of armed attack. Japan's longstanding position on the issue is that 'the mere likelihood or threat of armed attack does not authorize the exercise of the right to self-defense . . . In other words, neither preemptive strike nor preventive war is permissible.'").

direction, not through constitutional amendment, but through government policy-making supported by increasingly sympathetic public opinion.

Currently, this appears highly unlikely, and events so far have not pushed Japan in that direction. At the time of the 1972 interpretation, no one thought Japan would ever adopt the principle of collective self-defense as policy.²⁴¹ However, although the push in that direction created significant public backlash in 2015,²⁴² the absence of any significant public objections to the 2022 Defense Policies illustrates the extent to which public opinion can change in light of serious deteriorations in the regional security environment.²⁴³

Nevertheless, at a certain point public opinion will define the line between acceptable levels of deterrence-based actions and unacceptable levels of the use of force. The level of public acceptance is gradually moving higher along the force scale, but it is unclear at what point the public will deem Japan's actions to have crossed an unacceptable line. At this time, no one is willing to discuss the prospect of crossing that line in the absence of clear public consensus, not even among the most conservative in Japan.

241. *Supra* text accompanying notes 46–53.

242. *Supra* text accompanying note 181.

243. *See supra* text accompanying note 182; *see also* Ken Moriyasu, *Japan's Opposition Parties Struggle to Dispute Defense Buildup*, NIKKEI ASIA (Jan. 25, 2023), <https://asia.nikkei.com/Politics/Defense/Japan-s-opposition-parties-struggle-to-dispute-defense-buildup> (citing poll numbers showing a majority of the public supports deterrence); Yoshitaka Isobe, *Survey: Record 64% of Japanese Want National Defense Bolstered*, ASAHI SHIMBUN (May 2, 2022), <https://www.asahi.com/ajw/articles/14612368> (citing the likelihood of the Russian invasion of Ukraine impacting Japanese views on defense). *But see* Saruta, *supra* note 183 (citing 2023 and 2024 polling data in asserting that while most people support strengthening Japan's defense forces, they wish to limit it to an exclusively defense-oriented policy that is limited to defending only the territory, territorial waters and people of Japan in and around its borders).