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Donald DeKieffer

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# Exercise of Force by the Japanese Self-Defence Force

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Exercise of Force by the Japanese Self-Defense Force†

*Donald deKieffer\**

## I. Introduction

Recent events in the Middle East have focused attention on the willingness and ability of various countries to enforce the United Nations embargo of Iraq.<sup>1</sup> Japan has been the subject of frequent criti-

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\* Partner, Pillsbury, Madison & Sutro, Washington, D.C. The author gratefully acknowledges the indispensable assistance of Mr. Takashi Shimokado of Yanagida & Nomura, Tokyo, Japan.

<sup>1</sup> Security Council Resolution 665 of August 25, 1990, reads:

The Security Council:

Recalling its resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and demanding their full and immediate implementation;

Having decided to impose sanctions under Chapter VII of the Charter of the United Nations;

Determined to bring an end to the occupation of Kuwait by Iraq which imperils the existence of a member state and to restore the legitimate authority, and the sovereignty, independence and territorial integrity of Kuwait which requires the speedy implementation of the above resolutions;

Deploring the loss of innocent life stemming from the Iraqi invasion of Kuwait and determined to prevent further such losses;

Gravely alarmed that Iraq continues to refuse to comply with resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and in particular at the conduct of the government of Iraq in using Iraqi flag vessels to export oil;

1. Calls upon those member states co-operating with the government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the security council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990);

2. Invites member states accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) with maximum use of political and diplomatic measures, in accordance with paragraph one above;

3. Requests all states to provide in accordance with the Charter such assistance as may be required by the states referred to in paragraph one of this resolution;

4. Further requests the states concerned to co-ordinate their actions in pursuit of the above paragraphs of this resolution using as appropriate mechanisms of the Military Staff Committee and after consultation with the secretary-general to submit reports to the security council and its committee

cism for not bearing its share of the load for the multinational forces.<sup>2</sup> Although most legal commentators and the popular press are generally aware that the Japanese Constitution significantly limits Japan's ability to provide military support, the specific provisions of the Japanese Constitution forbidding the use of force are less well understood. This Article considers two questions relevant to Japanese constitutional limitations on the exercise of military power:

1. If Japanese ships are attacked or threatened by another country's armed forces in the open sea far from the territory of Japan, can the Japanese government constitutionally send the Self-Defense Force (hereinafter "SDF")<sup>3</sup> to protect the Japanese ships?

2. Assuming that the proximity of U.S. and Japanese forces is sufficiently close to secure the open sea in question, if U.S. ships are attacked or threatened by another country's armed forces in the open sea far from Japan, can the Japanese government constitutionally send the SDF to protect the U.S. ships?

The purpose of this Article is to examine the fundamental Japanese constitutional limitations on the existence of the SDF and the exercise of force in the open sea. With regard to the first question, this Article will discuss: (1) the constitutionality of the SDF, (2) targets which the SDF may defend from attack by another country's armed forces, (3) geographic limitations on the exercise of force by the SDF, and (4) conditions under which force may be exercised by

established under resolution 661 (1990) to facilitate the monitoring of the implementation of this resolution;

5. Decides to remain actively seized of the matter.

S.C. Res. 665, *reprinted* in *The Times* (London), Aug. 27, 1990, at 2, col. 5.

<sup>2</sup> Critics of the Japanese role include: Sen. Lloyd Bentsen (D-Tex.) ("So far, Japan has done little [in the Gulf] to uphold its interest, and even that has been done quite grudgingly."), *U.S. Critics Not Satisfied With Japan's \$4 Billion Gulf Contribution*, *Washington Post*, Oct. 6, 1990, at A24, cols. 1, 2; the late Sen. John Heinz (R-Pa.) ("[T]he Japanese need to formulate a clear idea of what their responsibility to the rest of the Free World is."), *id.*; and Rep. Byron Dorgan (R-N.D.) ("Even though [Japan] imports 70 percent of its oil from vulnerable sources in the Middle East—and almost twice as much as the United States—Japan is not willing to contribute a commensurate share to the cost of the operation."), 136 CONG. REC. E 2860 (daily ed. Sept. 14, 1990). Compare, however, the views of former Secretary of Defense Caspar Weinberger:

It is indeed true that Japan can afford to do more to share the responsibilities for the vitally necessary actions in the Gulf. But it is also true that Japan is now spending more on its own defense, and that this enables the U.S. to use more of its own forces to help block Saddam Hussein's aggression. Japan could, and should, increase its capability to carry out its self-imposed mission of defending its sea lanes as far out as 1,000 nautical miles and air lanes 200 nautical miles.

Weinberger, *Japan's Role in the Gulf Crisis*, *FORBES*, Oct. 29, 1990, at 60.

<sup>3</sup> The strength of the SDF is estimated as follows:

Armed Forces Personnel	247,000
Battle Tanks	1,200
Submarines	15
Major Warships	63
Combat Aircraft	362

*Boston Globe*, Feb. 20, 1990, at 6, cols. 1, 2.

the SDF. With regard to the second question, this Article will discuss whether, assuming the right of individual self-defense is constitutional, the Constitution nevertheless forbids the use of the SDF in the context of *collective* self-defense.

## II. Does the Constitution Permit the Right of Individual Self-Defense?

### A. Constitutionality of the SDF

There have been bitter arguments in Japan on the constitutionality of the SDF. To understand why the Japanese people, including the government, are so sensitive to the exercise of force by the SDF, it is important to understand the constitutional arguments and the inconsistent judicial decisions regarding the existence of the SDF.

Pacifism is one of the foundations of the Japanese Constitution. Article 9 prohibits the nation from making war, using force, or maintaining armed forces.<sup>4</sup> Indeed, until the end of the 1940s, the Japanese government interpreted the Constitution as banning a war even in self-defense, and prohibited the nation from maintaining any armed forces.<sup>5</sup> The birth of the People's Republic of China in 1949 and the outbreak of war between North and South Korea in 1950 forced the Japanese government to change its view and establish the SDF in 1954.<sup>6</sup> Since then the government has taken the view that Article 9 neither prohibits war for self-defense nor prevents the nation from maintaining the minimum armed strength<sup>7</sup> necessary for self-defense.<sup>8</sup> Whether the existence of the SDF is constitutional has not been considered by the Supreme Court of Japan, although the court has held that the Constitution does not deny the right of self-defense.<sup>9</sup>

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<sup>4</sup> Article 9 of the Constitution provides:

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.

KEMPŌ (Constitution) art. 9 (Japan). For the English text of the Constitution of Japan, see 2 A. PEASLEE, CONSTITUTIONS OF NATIONS 415 (rev. 4th ed. 1985).

<sup>5</sup> Yamauchi, *Nihon koku kempō to jieiken kannen* (The Japanese Constitution and the Idea of the Right of Self-Defense), 47 HORITSU JUHO (No. 12) 88, 115 (1975).

<sup>6</sup> *Id.*

<sup>7</sup> The government avoids using the term "force" because the second paragraph of Article 9 prohibits "forces." The government, however, interprets "forces" in the second paragraph as the forces which exceed the level of minimum necessity for self-defense. JAPAN TIMES, LTD., DEFENSE OF JAPAN 74-75 (1988). Under this interpretation, there is no difference between "minimum armed strength necessary for self-defense" and "minimum forces necessary for self-defense."

<sup>8</sup> See KEMPŌ 9 JO: IMA FUTATABI HEIWA O KANGAERU TOKI (Article 9 of the Constitution: It's Time to Think About Peace Again) 76-80 (Yuhikaku ed. 1983) [hereinafter KEMPŌ 9 JO].

<sup>9</sup> Japan v. Sakata, Judgment of Dec. 16, 1959, Saikōsai (Supreme Court), 13 Keishū

The argument opposing the constitutionality of the SDF is premised upon the view that the first paragraph of Article 9, without reservation, prohibits all wars and the threat or use of force, even for self-defense.<sup>10</sup> This view points out that with the principle of pacifism declared in the preamble, the Constitution makes no provision for the organization of armed forces. Furthermore, the first paragraph of Article 9 prohibits "war as means of settling international disputes," which is necessarily difficult to distinguish from other war.<sup>11</sup>

A similar view suggests that, although the first paragraph may not prohibit war or the use or threat of force for the purpose of self-defense, such war or use or threat of force is renounced by the Constitution because the second paragraph of Article 9 prohibits the nation from maintaining armed forces and renounces the right of belligerency.<sup>12</sup> One district court adopted this view and concluded that the SDF was unconstitutional on the ground that the SDF had sufficient weapons and personnel to be a "force."<sup>13</sup>

On the other hand, proponents of the view that Japan may maintain sufficient forces for self-defense sees the first paragraph of Article 9 as not prohibiting wars for self-defense, and the second paragraph as not prohibiting the nation from maintaining forces necessary for self-defense.<sup>14</sup> This view interprets Article 9 as follows:

In the interpretation of the Japanese original text of the first paragraph of Article 9, it is natural to read the phrase "as means of settling international disputes" as related both to "war as a sovereign right of the nation" and "the threat or use of force." In accordance with a widely accepted interpretation of public international law and other countries' constitutions, "as means of settling international disputes" means actions for the purpose of invading another country. Furthermore, the second paragraph of Article 9 prohibits the nation from maintaining forces "in order to accomplish the aim of the preceding paragraph." The "aim of the preceding para-

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3225. In this case, the constitutionality of the U.S. forces in Japan under the Security Treaty between the U.S. and Japan was argued. The court decided that the first paragraph of Article 9 did not deny Japan's right of self-defense and that the forces prohibited by the second paragraph of Article 9 did not include forces of a foreign country. *Id.*

<sup>10</sup> KIYOMIYA, *KEMPŌ I (Constitution I)* (Horitsugaku zenshu (Collected Jurisprudence), no. 3) 112 (3d ed. 1979); *Japan v. Sakata*, Judgment of Mar. 30, 1959, Tokyo Dist. Ct., 1 *Kakeishū* 776.

<sup>11</sup> KIYOMIYA, *supra* note 10, at 112.

<sup>12</sup> I. SATO, *NIHON KOKU KEMPŌ GAISETSU (Survey of Japanese Constitution)* 72-73 (1978); I HOGAKU KYOKAI, *CHUKAI NIHON KOKU KEMPŌ (Commentary on Japanese Constitution)* 117-22 (1950).

<sup>13</sup> *Ito v. Minister of Agriculture and Forestry*, Judgment of Sept. 7, 1973, Sapporo Dist. Ct., 712 *HANJI* 24, 89, *rev'd*, Judgment of Aug. 5, 1976, Sapporo High Ct., 27 *Gyōshū* 1175.

<sup>14</sup> Another view which permits the government to maintain forces for self-defense states that Article 9 is merely a political manifestation which has no judicial enforceability. Takayanagi, *Heiwa, 9 jo, sai-gunbi (Peace, Article 9, and Rearmament)*, 25 *JURISUTO (Jurist)* 2, 5 (1953).

graph" shall be interpreted as the aim of prohibiting wars and threat or use of force for the purpose of invading another country. The second paragraph prohibits the nation from maintaining forces only for the purpose of invading another country.<sup>15</sup>

One district court adopted this interpretation, and stated that Article 9 did not prohibit wars for self-defense, but declined to decide whether the SDF was constitutional because the issue was highly political.<sup>16</sup>

Proponents of this view also cite the second paragraph of the preamble of the Constitution which states that "we have determined to preserve our security and existence" and that "all people of the world have the right to live in peace."<sup>17</sup> Proponents argue that to guarantee such a right for the people, the Constitution allows the nation to exercise the right of self-defense against aggressors.<sup>18</sup>

If accepted, this view does not inevitably lead to the conclusion that the current SDF is constitutional; whether the current SDF is within the extent of the forces necessary for self-defense remains to be determined.<sup>19</sup> Some scholars state that the extent of the forces necessary for self-defense should be determined by the people themselves.<sup>20</sup> The *Ishizuka v. Fujioka*<sup>21</sup> decision was based on this view. In *Ito v. Minister of Agriculture and Forestry*,<sup>22</sup> the high court reversed the district court's conclusion that the SDF was unconstitutional, stating that the question of whether the SDF violated Article 9 of the Constitution was a highly political issue which should be resolved initially by the Diet and the Cabinet and ultimately by the people.<sup>23</sup>

With respect to the interpretation of Article 9, it seems clear that the Constitution does not prohibit Japan from maintaining forces necessary for self-defense. The nation may, therefore, maintain forces necessary to exercise the right of individual self-defense because the Constitution does not deny this right. The problem is to determine the extent of what is "necessary" to exercise the right of self-defense. It is reasonable to view the Constitution as restricting the range of "necessity" because the Constitution explicitly provides for pacifism based upon great regret that the nation had previously

<sup>15</sup> S. SASAKI, *KAITEI NIHON KOKU KEMPŌ RON* (Revised Arguments on Japanese Constitution) 231-34 (1954).

<sup>16</sup> *Ishizuka v. Fujioka*, Judgment of Feb. 17, 1977, Mito Dist. Ct., 842 HANJI 22, 65.

<sup>17</sup> A. PEASLEE, *supra* note 4, at 414.

<sup>18</sup> O. NISHI, *KUNI NO BOEI TO HO* (National Defense and Law) 35 (1975). Professor Nishi also states that the enactment process of Article 9 supports the proposition that Article 9 does not prohibit wars for self-defense and maintaining forces for self-defense. Nishi, *The Enactment Process of Article 9 of the Japanese Constitution*, in *THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN* 71, 121 (1987).

<sup>19</sup> O. NISHI, *KUNI NO BOEI TO HO*, *supra* note 18, at 40.

<sup>20</sup> *Id.*

<sup>21</sup> Judgment of Feb. 17, 1977, Mito Dist. Ct., 842 HANJI 22.

<sup>22</sup> Judgment of Aug. 5, 1976, Sapporo High Ct., 27 Gyōshū 1175, *rev'g* Judgment of Sept. 7, 1973, Sapporo Dist. Ct., 712 HANJI 24.

<sup>23</sup> *Id.* at 1231.

abused the right of self-defense. In terms of this view, the government's standard of "minimum necessity" for self-defense is reasonable as a general standard. Whether the current SDF is within minimum necessity, however, cannot be stated with certainty without more study on the status of the current SDF. The discussion below will assume that the current SDF is permitted under the Constitution.

*B. Targets Which the SDF May Defend from Attack by Another Country's Armed Forces*

The Japanese government has taken the position that, under the Constitution, the SDF can exercise force only in the face of an imminent and unjust invasion of Japan proper.<sup>24</sup> According to the government's interpretation of Article 76(1) of the Self-Defense Force Law,<sup>25</sup> the subjects of an armed attack from the outside shall be limited to the territory of Japan and to nearby Japanese ships and aircraft.<sup>26</sup> This interpretation is based upon the assumption that an attack on ships or aircraft near the territory is deemed to be an attack on the territory itself. As a matter of the interpretation of the Constitution, an attack against ships or aircraft which are in the open sea, whether they are near or far from the territory, may justify Japan's exercise of the right of self-defense if such an attack of ships or aircraft threatens the existence of Japan.

With respect to what target must be attacked to justify the exercise of a nation's right of self-defense, there are several interpretations of public international law. One view insists that targets of attack must be in the "nation's general benefit" to be within the protection of public international law.<sup>27</sup> These targets include its people and property in foreign countries and the rights of commerce, aviation, fishing, and development in the open sea. Another, more restrictive, view holds that targets of attack must be in the "nation's fundamental benefit" to be within the sphere of self-defense allowed by public international law. Under this view, self-defense is limited to the protection of the nation's territorial integrity and political independence.<sup>28</sup>

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<sup>24</sup> O. NISHI, KUNI NO BOEI TO HO, *supra* note 18, at 224.

<sup>25</sup> Article 76(1) of the Self-Defense Force Law provides:

The Prime Minister may order the SDF to move in the case of an occurrence of an armed attack from the outside when he or she decides that it is necessary for the defense of Japan.

Jieitai ho (Self-Defense Force Law), art. 76(1), Law No. 165 of 1954.

<sup>26</sup> O. NISHI, KUNI NO BOEI TO HO, *supra* note 18, at 224.

<sup>27</sup> Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 548 (1971); Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 828-29 (1970).

<sup>28</sup> Franck, *supra* note 27, at 819. *Cf.* J. STONE, AGGRESSION AND WORLD ORDER 94-95 (1958) (International law does not necessarily require an armed attack as a precondition for the use of force; otherwise grave wrongs could be committed without vindication. Furthermore, this interpretation is difficult to reconcile with the goals of establishing condi-

The position of the Japanese government is in accordance with this latter view of public international law, which is understandable given the limitations of the Japanese Constitution. The principle of pacifism under the Constitution also requires this more restrictive interpretation.

An attack on ships or aircraft far from Japanese territory, however, could in fact threaten the territorial integrity or political independence of Japan, especially considering that maritime transport is vital to Japan's existence. The idea that an attack on ships or aircraft could threaten the existence of a nation which depends upon maritime transport was accepted by the General Assembly of the United Nations in 1974.<sup>29</sup> In the Definition of Aggression Resolution, "aggression" was defined to include "the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State,"<sup>30</sup> and "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State."<sup>31</sup>

During the drafting procedure, a Japanese delegate pointed out that the provisions of the Definition of Aggression Resolution concerning an attack on marine and air fleets are important because such an attack on his country's fleets would be equivalent to a blockade of Japan's coast.<sup>32</sup> An analyst of the Draft Declaration stated that, taking into consideration that marine transport is vital to Japan's existence, there could be a case where an attack against Japanese ships would be just as devastating and therefore just as much an act of aggression as an invasion or blockade.<sup>33</sup>

Therefore, in the event that Japanese ships in the open sea far from the territory of Japan are attacked by another country's armed forces, it seems reasonable that Japan may send the SDF to protect them if such an attack threatens the existence of Japan.

### C. *Geographical Limitations on the Exercise of Force by the SDF*

With respect to the issue of the exercise of force in the open sea,<sup>34</sup> the Japanese government has taken the view that the SDF may

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tions under which justice and respect for the obligations arising under international law can be maintained).

<sup>29</sup> Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 143, U.N. Doc. A/9631 (1974).

<sup>30</sup> *Id.* art. 1.

<sup>31</sup> *Id.* art. 3(d).

<sup>32</sup> *Report of Special Committee on the Question of Defining Aggression*, 29 U.N. GAOR Supp. (No. 19) at 16, U.N. Doc. A/9619 (1974), reprinted in 2 B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION, THE SEARCH FOR WORLD PEACE* 571 (1975).

<sup>33</sup> B. FERENCZ, *supra* note 32, at 36.

<sup>34</sup> Another issue is whether the government may send the SDF to the territory of another country. The Japanese government has emphasized that the Constitution prohibits the government from sending the SDF to the territory of another country because doing so goes beyond the limitation of the minimum extent necessary. JAPAN TIMES, LTD.,

exercise force only in the open sea near Japanese territory.<sup>35</sup> Like the issue of "targets of attack," there could be a situation in which an attack in the open sea far from Japan would threaten the existence of Japan. It may be constitutional to send the SDF to protect ships in the open sea, wherever located, if the attack on such ships threatens the existence of Japan.

*D. Conditions Under Which Force May Be Exercised by the SDF*

The principle of pacifism under the Constitution requires the restrictive exercise of the right of self-defense. The Japanese government has taken the position that there are three conditions for the exercise of force by the SDF under the right of self-defense: (1) there must be an imminent and unjust invasion against Japan; (2) there must be no other proper means of defense; and (3) force must be exercised to the minimum extent necessary.<sup>36</sup> These conditions are reasonable under the principle of pacifism of the Constitution.

**III. Does the Constitution Permit Not Only a Right of Individual Self-Defense but Also a Right of Collective Self-Defense?**

A right of collective self-defense is defined as a right of one country to use its own armed forces in the defense of a second country from attack by a third country.<sup>37</sup> The United Nations Charter recognizes the right of collective self-defense,<sup>38</sup> which was adopted to make the United Nations collective security system effective where a standing member of the Security Council exercises its veto.

Although Japan has a right of collective self-defense as a member of the United Nations,<sup>39</sup> the Japanese government has taken the view that the Constitution does not recognize the right of collective self-defense. The government stated:

Under the Constitution's principle of pacifism, Article 9 allows the nation to exercise forces only to the minimum extent necessary to defend Japan itself. Exercising the right of collective self-defense under which a nation may exercise forces to defend another country from another country's armed attack is beyond the extent of the ex-

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*supra* note 7, at 75. See also KOGO BOEIHO (Defense Law in Spoken Language) 340 (Utsunomiya ed. 1976).

<sup>35</sup> KOGO BOEIHO, *supra* note 34, at 341.

<sup>36</sup> JAPAN TIMES, LTD., *supra* note 7, at 75; KEMPŌ 9 JO, *supra* note 8, at 84-85.

<sup>37</sup> I. S. TABATA, KOKUSAI HO (Public International Law) (Horitsugaku zenshu (Collected Jurisprudence), no. 55) 359 (1979). There is disagreement on the definition of the right of collective self-defense.

<sup>38</sup> Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." U.N. CHARTER art. 51.

<sup>39</sup> Article 5(c) of the Treaty of Peace with Japan provided that the Allied Powers recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the U.N. Charter. Treaty of Peace with Japan, Sept. 8, 1951, art. 5(c), 3 U.S.T. 3169, 3174, T.I.A.S. No. 2490, 136 U.N.T.S. 45, 52.

ercise of force which the Constitution allows.<sup>40</sup>

Considering that the adoption of pacifism was based on the great regret that Japan had previously abused the right of self-defense, and may be subject to further abuse, the government's view is reasonable.

Recently, some scholars have insisted that the Japanese Constitution posits the right of collective self-defense. This view reasons that, except for the things explicitly prohibited by Article 9, the Constitution does not expressly prohibit the exercise of the right of collective self-defense, or for that matter, any other actions permitted by public international law and the U.N. Charter.<sup>41</sup> This view cannot be accepted because it fails to consider the reason why the Constitution provides for unconditional pacifism and ignores the restrictions necessitated by the principle of pacifism.

#### IV. Conclusion

The restrictive interpretations of the Japanese Constitution with respect to the exercise of force by the SDF all follow from the constitutional principle of pacifism. The Constitution did not declare it as a flowery word— pacifism was adopted based upon Japan's great regret for causing World War II and involving the people of Japan and other nations in war disaster. During the forty-five years since World War II, Japan's position and role in international society has changed dramatically. Today, Japan should make its best efforts to satisfy the demands of international society to the extent permitted by its Constitution.

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<sup>40</sup> Mizushima, *Kempō 9 jo to shudan-teki jieiki ken* (Article 9 of the Constitution and the Right of Collective Self-Defense), 32 HOGAKU SEMINAR (No. 5) 38, 39 (1987).

<sup>41</sup> Kobayashi, *Jieiken to jieiryoku* (The Right of Self-Defense and the Self-Defense Force), in *KEMPŌ NO SOTEN* (Constitutional Arguments) 47, 49 (1985).

