

Essays on the Peace Constitution

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“The Peace Constitution” signifies the Japanese Constitution, which embodies the principles of pacifism. While these principles are now 46 years old and in danger of becoming an empty shell, I believe that they are well worth being studied by the new generation, as well as being applied to the situation not only in Japan, but also throughout the entire world in the post-Cold War era.

The three essays offered here were initially presented as papers on three different occasions. The preliminary draft of the first essay, “Reflections on the Right to Live in Peace,” was presented at the IX General Conference of the International Federation of Social Science Organizations (IFSSO), October 3–7, 1989 in Tokyo. The second essay, entitled “A Draft Bill for a Nuclear-Free Japan: An Aspect of the Right to Live in Peace,” was presented at the International Association of Lawyers Against Nuclear Arms (IALANA) International Colloquium on November 2–4, 1990 in Berlin. The third, entitled “How Should We Regard the Participation of the Self-Defense Forces in United Nations Peacekeeping Operations?” was presented at the Second Conference of Lawyers of Asia and the Pacific (COLAP II), September 26–28, 1991 in Tokyo.

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I. Reflections on the Right to Live in Peace*

I

The Constitution of Japan recognizes that all peoples in the world have the right to live in peace, free from fear and want. It denies the Japanese government's right to belligerency, renounces war, including war waged in self-defence, and declares that Japan will not maintain any kind of war potential. This pacifist Constitution is determined to preserve the security and existence of the Japanese people by trusting in the justice and good faith of the peace-loving peoples of the world. This pacifism declares the intention to end militarism, to prohibit the maintenance of any kind of weapon and to be dedicated to the principle of international solidarity and cooperation. This is closely linked with contemporary constitutionalism—a form of democratic government respecting human rights. It is this combination of democracy and pacifism that seems to me to characterize Japanese constitutional pacifism. Some of the features of this form of constitutionalism are:

1. Besides two categories of human rights—political and civil rights and social, economic and cultural rights—as a third category, the right to live in peace is clearly articulated. This right, in the face of the nuclear threat to civilization, is understood as the basis underlying the right to life and all other human rights and is construed as a new right underlying the other two categories of human rights.

2. All government policies and political and social systems are directed to guaranteeing the right to live in peace.

3. Should the right to live in peace be violated in any way, the courts have the obligation to examine any relevant laws that appear to be unconstitutional.⁽¹⁾

While, in practice, under the American occupation and within

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the framework of the Japan-U.S. Security Treaty, Japan has deviated from its declared constitutional pacifism, it can safely be said that what has been thought, argued, and urged by Japanese constitutional lawyers before the courts and has been accepted by the courts in specific cases concerning the Self-Defense Forces such as the Eniwa, Naganuma and Hyakuri cases is now fully established as the common property of "peace-loving peoples".⁽²⁾

II

The right to live in peace as a positive right is confirmed in the Constitution of Japan, but the theoretical basis of this right has yet to be fully studied, elucidated and established, be it natural law, the maturity of human rights consciousness of the people, or a combination of the right to resistance, the right to survive, and the right to participate in safeguarding peace. It was in the Eniwa case that the question of constitutionality of the Self-Defense Forces Act was presented for the first time in court and the basis, content and judicial enforceability of the right to live in peace began to be discussed.

Thereafter, in 1973, the judicial enforceability of this right was recognized and applied in the Naganuma Nike Base case (Nike being a weapons system with nuclear warhead-carrying potential) by the Sapporo District Court, for the first time in the history of Japanese courts. The Court held that the residents of Naganuma possessed this right and had legal standing to sue in this action. The Court then said that the order of the Minister of Agriculture, Forestry and Fishery permitting the felling of a forest reserve for headwaters at Maoiyama for the purpose of making the Self-Defense Forces's Nike Base violated the right of the residents to live in peace. Some constitutional lawyers hesitate to approve the decision of the District Court, saying that this right is so abstract that it is not possible for court to enforce it. As a matter of fact, the decision was overruled by the Sapporo Higher Court.⁽³⁾

On the 9th of September, 1982, the First Petty Bench of the Supreme Court handed down a judgment, upholding the conclusion of the Higher Court, but avoiding all reference to the Constitution.

From the viewpoint of constitutional interpretation, this judgment is of importance with respect to the following two points. First, the judgment said that it is the people who have the right to final interpretation regarding the constitutionality of the Self-Defence Forces and that this question had not yet been settled. Second, the judgment leaves open the possibility of the court's invoking its power to review unconstitutional laws and regulations, and in the case of a direct violation of the people's right to live in peace, to give relief.⁽⁴⁾

On June 20, 1989, the Third Petty Bench of the Supreme Court handed down a judgment after the eight-year proceedings of the Hyakuri Case, saying that the right to live in peace is not judicially enforceable in such a case, because the Government obtained the land under a private contract, even if the land is used for the construction of an Air Self-Defense Forces Base. The Court's opinion insists that the concept of peace is so abstract that the right to live in peace is not judicially enforceable. The Court also emphasizes the autonomous nature of private law in contrast to public law. But it is questionable whether the Supreme Court gave a persuasive interpretation of the law and succeeded in evading constitutional judgment on the matter. In addition, the question is raised whether the holding of this judgment is limited to similar cases (cases concerning private contract) and whether all possibility of judicial enforcement of the right to live in peace is necessarily excluded by this judgment. The question how and to what extent this right is to be judicially enforceable will be discussed in the future at lower-court level. However, as the crucial Supreme Court decisions have been made in the Naganuma and Hyakuri cases, the focus of discussion may be expected to move from judicial enforcement to other areas such as argument on Japan's allowable policy choices in accordance with constitutional pacifism.

III

In terms of the citizen's relationship with the government, the normative content of the right to live in peace can clearly be seen to have various characteristics such as the right to participate in

politics, the right to freedom from government interference, and the right to demand governmental action which may be realized through proper legislation. These include the right of an individual citizen of a state not to be killed in hostilities. The right to live in peace can be said to be a subjective right of the individual citizen vis-a-vis the state. Also, the right to live in peace can be seen as a basis of the people's right to create the conditions necessary for the world and humankind to live peacefully and with human dignity. In order to create the conditions necessary for peace, the right to passive resistance and the right to obtain peace with active involvement must be recognized.⁽⁵⁾

It seems appropriate to mention here the following three developments concerning the right to live in peace as illustrations of the present conditions of the right.

There is, firstly, the Preliminary Draft of a Basic Law for Implementing the Comprehensive Peace Strategy of the Japanese Constitution proposed by a group of constitutional law scholars.⁽⁶⁾ The Preliminary Draft of a Basic Law says that the guiding principle for a comprehensive peace strategy is to assure the right of the Japanese people and of all peoples of the world to live in peace free from fear and want and to assure that all may enjoy that right equally. The first of the three chapters deals with the organizing of diplomatic, economic, cultural, scientific and educational exchanges and cooperation as a basis of the right to live in peace.

Article 2 states that the Japanese people, freed from the obligation to cooperate in military defence and liberated from fear and want caused by war, armaments and preparations for war, are legally guaranteed the right to live in peace by virtue of the Peace Constitution (but violations of this right continue to exist in Okinawa and elsewhere by virtue of the Japan-U.S. Security Treaty), but that the Japanese people are not released from the responsibility and burden to secure the right of all the peoples of the world to live in peace by peaceful measures to achieve the aim of the strategy.

The second chapter deals with efforts for disarmament and the programme and the procedure for constitutionally reducing and reorganizing the Self-Defense Forces. The third chapter discusses the

contribution required of Japan for strengthening the peacekeeping function of the United Nations and the possibility of establishing a world organization for peace.

The characteristics of this Preliminary Draft of a Basic Law are that the right to live in peace is the guiding spirit of a Comprehensive Peace Strategy and that the measures for achieving it are all peaceful means combined together, especially strengthening the peacekeeping functions of the United Nations and general and complete disarmament and the ultimate abolition of war.

There is, secondly, the question of making the Three Non-Nuclear Principles part of the law of the land.⁽⁷⁾ These Principles, "not to produce nuclear weapons, not to possess nuclear weapons and not to permit the introduction of nuclear weapons into Japan," were established in deliberations in the 58th Session of the Diet in 1968, prior to the Sato-Nixon Joint Communiqué. Although the principle of "not to permit the introduction of nuclear weapons into Japan" has been emasculated, elevating these principles to firmer legal rules is of great significance. In April, 1979, a group of law professors presented a draft of a "bill to ban the manufacture, possession, maintenance, introduction, etc., of nuclear weapons".

Here we may consider the New Zealand Nuclear-Free Zone, Disarmament, and Arms Control Act of 1987 and its implementation and what it suggests to the Japanese people. A Japan Nuclear-Free Zone Bill, if proposed, should reflect the normative requirement of the right to live in peace provided in the Japanese Constitution. At this stage in history, it means this: the very existence of thermo-nuclear weapons, in ever-increasing numbers and functions, is a threat of the extinction of human life itself or, if not all human life, at least civilization as we know it, and there is an obligation on the part of government, as well as every individual, to help ward off this mode of extinction.

Thirdly, the task of enacting an Atomic Bomb Victims Relief Law, based on the principle of state compensation, has been raised for about two decades.⁽⁸⁾ When one seeks to construct a social and world order with due concern for the atomic bomb victims (*hibakusha*), one needs to be conscious that compensating *hibakusha*

is making a “pledge of peace.” This consciousness will have to be based on the right to live in peace, which means, *inter alia*, to make the pledge a reality. Nihon Hidankyo (The Japan Confederation of A- and H-Bomb Sufferers Organization) demands that the government pay a solatium to the bereaved families, as a one-time grant, and express condolences for those who were killed by the atomic bombs and the bereaved. I believe that the demand is most logically and effectively based on the idea of the right to live in peace. I believe that the idea of the right to live in peace is an expression of the determination “never to repeat that error” as “a pledge of peace” and a contribution to the defense of peace.

IV

The legal content of the right to live in peace must be given form creatively, as an ideal for forming a new international peace order.

The interdependence of peace and human rights was first creatively expressed in 1945 in the Statute and Proceedings of the Nuremberg Tribunal and later in Article 55 of the United Nations Charter.⁽⁹⁾ Several efforts to incorporate variations of the right of states to peace were expressed in several documents of the late 1940s.⁽¹⁰⁾ The right to peace can easily be seen to be implied in the Kellogg-Briand Pact, the U.N. Charter, the Declaration on Principles of Friendly Relations, the Final Act of Helsinki, and many other basic documents. The recognition of a right to peace as one of the human rights is, however, a recent phenomenon.⁽¹¹⁾ “The right of every nation and every human being to life” in peace was proclaimed by the United Nations General Assembly in its Declaration on the Preparation of Societies to Life in Peace, on December 15, 1978.⁽¹²⁾

The General Conference of the Agency for the Prohibition of Nuclear Weapons in Latin America proclaimed the right to peace as a human right in a resolution adopted on April 27, 1979.⁽¹³⁾ A Declaration on the Right of Peoples to Peace was adopted on November 12, 1984, by the United Nations General Assembly which “solemnly [proclaimed] that the peoples of our planet have a sa-

cred right to peace” and that the exercise of this right could only be achieved if: “The policies of States be directed toward the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations”.⁽¹⁴⁾ Then the United Nations General Assembly on November 11, 1985, adopted another “Right to Peace” Resolution which called upon “States and international organs to do their utmost to implement the provisions of the (1984) Declaration on the Right of Peoples to Peace”.⁽¹⁵⁾

Thus, the human right to peace has already had a certain degree of international recognition and is “one of the emerging human rights of the 1980s.”⁽¹⁶⁾ The problem with the emergence of a new human right is, however, that it is often difficult to distinguish between rules *lex lata* and rules *de lege ferenda*, between positive law and law in the making.⁽¹⁷⁾

As far as the question of whether the right to live in peace is a source of international law is concerned, it is worth considering the theory that the emerging right to peace is implicitly contained in Article 28 of the Universal Declaration of Human Rights. And it is an important point that most of the component element of the third generation of human rights are already present in the various provisions of the two existing International Covenants on Human Rights. The preparation of additional Protocols to the Covenants should be considered.⁽¹⁸⁾ Nevertheless, it is said seriously, “If we are vigilant and require that the proposed new rights be relevant to the basic concerns of mankind and do not impinge upon existing rights and may be followed up with appropriate implementation machinery, there should be no reason to resist a new generation of human rights.”⁽¹⁹⁾

II. A Draft Bill for a Nuclear-Free Japan: An Aspect of the Right to Live in Peace*

I

Let me say, first, on my own behalf and on behalf of the other Japanese delegates, how deeply grateful we are to the organizers of this international colloquium in Berlin, especially Dr. Becker and Dr. Biesen, for their efforts in preparing this colloquium.

Last year, I saw a film entitled “Der Himmel über Berlin” and found the director of this film, Wim Wenders, said that whole towns in Berlin still haunt this world. A few days ago, I visited the Berlin Reichstag and saw the historical exhibition, including Pufendorf’s book: *Grundriss Bericht*. I wonder where Berlin is going, after unification and remaining in NATO. Recalling yesterday’s discussion, I hope most sincerely that Berlin will overcome every difficulty and be a Nuclear-Free City.

Secondly, I must leave my paper which has been distributed to all the participants to be read by you. My focus, which I would like to talk about in this meeting, is the main points of a Draft Bill for a Nuclear-Free Japan (Three Non-Nuclear Principles Bill). The Draft is still in the process of completion by the Japan Association for a Non-Nuclear Government, Working Committee on a Nuclear-Free Bill, in which I have been working as a member and also as Honorary Secretary.

Thirdly, before talking about the Draft Bill, it is better to mention the following two points. One is the plan which calls for sending 2,000 lightly-armed members of the Japanese Self-Defense Forces to the Gulf in a non-combat support role for the U.S. -led multinational force. The relevant bill, now before the Diet, the title of which I might translate as United Nations Peace Cooperation Bill, has been attacked both by the Japanese opponents including

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practicing and academic lawyers, who see it as a violation of the Constitution, and by Asian countries, who see it as a return to Japan's militaristic past. *Reuters* reported from Tokyo that Prime Minister Toshiki Kaifu offered for the first time on Wednesday to compromise on his much criticized plan, saying "We need an alternative suggestion from the opposition parties, then we can match the two plans together and seek a solution."

Actually, the Japanese Government's explanation, which was once given by Prime Minister Kaifu before debates on the Bill began, that the troops would be sent to the Gulf, on the basis of the U.N. Security Council's Resolutions, not of the U.N. Charter Article 51, was critically assessed by law professors, including myself, from the viewpoint of the Peace Constitution of Japan.

Another issue is the campaign and struggle for establishing nuclear-free municipalities in the 1980s, both in Japan and elsewhere. One of the achievements of the campaign is that nuclear-free municipalities represent the specific defense of the right of the people to live in peace.

Well, let us next think about some of the issues relating to the Draft Bill for a Nuclear-Free Japan. I would say it was both important and meaningful that 45 years after their cities were atom-bombed, the Mayors of both Hiroshima and Nagasaki appealed independently in their declarations on August 6th and 9th this year, for the three non-nuclear principles to be held as "national policy" legislated into an act legally binding on the national and local governments. This appeal seems to me to demonstrate a clear expression of uniting and growing strength of all anti-nuclear forces in Japan and internationally.

II

The main points of the Draft Bill for a Nuclear-Free Japan, which I myself drafted and is currently being discussed in our Association for a Non-Nuclear Government, Working Committee of a Nuclear-Free Act, are the following:

Why do we need to embody the Three Non-Nuclear Principles in a law? The Three Non-Nuclear Principles ban the possession,

manufacturing, and bringing of nuclear weapons into Japan. There is, at present, no legal basis for the third principle, the prohibition of bringing nuclear weapons into Japan. Nor are there currently any legal provisions to ensure implementation of the first or second principles. The Nuclear-Free Law would eliminate these defectives.

What is the importance of the movement to make the Three Non-Nuclear Principles into law?

1) The Three Non-Nuclear Principles were adopted by the Diet as “national policy” in 1971. With regard to the third principle, the government has used an excuse not to confirm whether U.S. warships navigating in Japanese territorial seas carry nuclear weapons or not, using the pretext of the “prior consultation system,” though U.S. policy is that the U.S. neither confirms nor denies the carrying of nuclear weapons. *The guidelines of 1978* officially confirmed the policy of nuclear deterrence by the U.S., shelving the Three Non-Nuclear Principles. Afterward, testimonies by Laroque and Reischauer, the accident within the *Ticonderoga*, and recent declassified U.S. diplomatic secret documents have revealed that the Three Non-Nuclear Principles, which were adopted as national policy, have been used as a device to hide from the people’s eyes the bringing of nuclear weapons into Japan, a “smoke screen” to deceive the people. Now it is clear that we will not be able to free Japan of nuclear weapons if we leave national policy as it is, now used as nothing but a “smoke screen.”

2) To leave the “national policy” of the Three Non-Nuclear Principles reduced to a mere skeleton by the Government, seriously impairs the maintenance of parliamentary democracy. We hope that in dealing with this situation, the Diet will make the Three Non-Nuclear Principles effective by up-grading them into a law.

3) The legislation for such a law will not only be effective to make Japan a nuclear-free zone, but will also have a positive impact on the movements for a nuclear-free world. If the U.S. is denied the right to bring nuclear weapons into Japan, it will be forced to make a drastic change in the new framework of U.S. world strategy which centres on modernized nuclear strategy. If the setting-up of a nuclear-free zone is positioned as part of an overall framework of

measures for the urgent elimination of nuclear weapons, the enactment of a Three Non-Nuclear Principles Act would have considerable significance as a positive contribution to the development of anti-nuclear and peace movement in the world in the 1990s.

What are the most important points regarding the enactment of a Three Non-Nuclear Principles Act? The Nuclear-Free Act would make the Three Non-Nuclear Principles more than just a declaration. It would have concrete regulations necessary for the observance of the Three Non-Nuclear Principles, impose the duty of observance and could apply legal sanctions for violation. As the enactment would have been achieved through the movement of the people, on whom sovereignty rests, the Draft Bill should be understandable to the people. But at the same time, it should make effective the necessary regulations for the implementation of the Three Non-Nuclear Principles, with specific provisions for criminal sanctions to be applied.

Now, let us look at the most essential points of the Draft Bill. The Bill should have a preamble covering the next five points.

1) Through reflection on the experience of Hiroshima and Nagasaki, a firm concept for lasting peace in the nuclear era has emerged. The pacifism embodied in the Japanese Constitution represents this.

2) The pacifism of the Japanese Constitution is the prime ground for the enactment of the Nuclear-Free Act. The Peace Constitution of Japan provides for reduction of arms, renunciation of war potential and denial of the state's right of belligerency. It admits the people's right to live in peace free from fear and want, calling for all wars to be regarded as illegal and for all military alliances to be dissolved.

3) The second ground for the enactment of the Nuclear-Free Act is the "right to peace" guaranteed by international law. (Article 28 of the Universal Declaration of Human Rights is the basis.) This right justifies the trend of positive international law which prohibits weapons of mass destruction, the U.N. General Assembly resolutions which regard the pre-emptive use of nuclear weapons as illegal, and a number of treaties establishing areas as nuclear-free

zones.

4) The Nuclear-Free Act would not have the effect of making Japan a nuclear-free zone, but also have a positive impact on the movement not only for a nuclear-free Asia and the Pacific, but also a world free of nuclear weapons.

5) The enactment of a Nuclear-Free Act is an essential step for the prevention of nuclear war and the elimination of nuclear weapons, based on the recognition that these tasks should be achieved urgently.

I am aware that the key difficulties are how we should deal with the following four aspects. 1) Interpretation (or definition) of the terms, for example, nuclear weapons, manufacture, possession, transit, portcall and nuclear-free Japan. 2) What are to be the acts prohibited by the Act? Should we prohibit those acts, for example, entry of nuclear powered warships into nuclear-free Japan, and setting-up and deployment of a nuclear weapons system itself. 3) How should we provide for measures, or devices, for attaining the purposes of this Act? 4) Whether or not the Act should also create criminal offenses.

Those four points are now being given thorough consideration among the members of the working committee, which will take both of the following elements into careful consideration. One is that the Draft Bill should be clearly understandable for ordinary citizens, and obtain the support by a majority of members of the Diet. Another is that any provisions of the Draft Bill should be applicable and enforceable as those are provided.

Let me conclude this report by quoting parts of the *1990 Hiroshima Declaration*. "Already an increasing number of countries, backed by the movement of their people, have achieved nuclear-free constitutions, an anti-nuclear law or nuclear-free declaration. In Japan, the movement for the enactment into law of the Three Non-Nuclear Principles and a Hibakusha Aid Law, is making new progress."

III. How Should We Regard the Participation of the Self-Defense Forces in United Nations Peacekeeping Operations?

From the Standpoint of the Pacifism of the Japanese Constitution

I. What is the Pacifism of the Japanese Constitution?

1. On 19 September, 1991 the Japanese government, in a special Cabinet meeting, finalized the bill for the PKO Cooperation Law (Bill Concerning Cooperation with United Nations Peacekeeping Operations), and submitted it to the House of Representatives. After the Cabinet meeting, the government released its “unified opinion” as a statement by the Chief Secretary of the Cabinet. According to this statement, (1) PKO cooperation is in line with the pacifist philosophy of the Constitution; (2) participation in the peacekeeping forces would not constitute the “use of force” prohibited by Article 9 of the Constitution; and (3) previous government opinions are consistent with this opinion. However, this represents a new standpoint that is very dubious with respect to constitutional interpretation.

The controversy surrounding this bill addresses anew the meaning of the pacifism of the Japanese Constitution. Here, then, I would like to consider the pacifism of the Constitution, particularly the constitutionality of sending the Self-Defense Forces (SDF) abroad, and the issue involving Article 9 of the Constitution and participation in UN peacekeeping operations.

2. The basis of Article 9 is the Second Principle of the MacArthur Notes. This principle includes a concept for security based upon the renunciation of war, the abolition of weapons, the denial of the right of belligerency, and “the high ideals controlling human relationship” (specifically the United Nations). However, worth noting here is the suggestion of the then Prime Minister Shidehara Kijuro in the formulation of the MacArthur Notes’ second principle, a suggestion that had considerable influence. It would seem that MacArthur decided to incorporate the spirit of that sug-

gestion in the Constitution. Behind the Shidehara suggestion were the trend in thought toward absolute pacifism, and the aspiration of the Japanese people toward peace.

3. The Constitution's peace principle consists of three principles. Article 9 Paragraph 1 of the Constitution says: "Aspiring sincerely to an international peace based on justice and order," thus stating generally that the motive for the renunciation of war is based on the Japanese people's aspiration toward peace, and then goes on to renounce three things: "war as a sovereign right of the nation," "the threat of force," and "the use of force" (the first principle). "War as the sovereign right of the nation" is war subject to the application of international law in time of war (war in the formal sense). "The use of force" is differentiated from this as war in the actual sense, examples of which are the Manchurian Incident and the Sino-Japanese War. By contrast, the UN Charter does not prohibit "the use of force" in this sense, for its understanding is "the use of force is prohibited whether or not force is used as war." The interpretation is that the "force" in Article 9 Paragraph 1 of the Constitution means the same as the "war potential" in Paragraph 2.

The Constitution's Article 9 Paragraph 2 says, "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 second principle). The controversy regarding the meaning of "war potential" in this paragraph has divided public discourse into two camps. Additionally, the constitutionality of sending the SDF abroad has been discussed as an issue involving the limits of the right of, and capacity for, self-defense.

Furthermore, the Preamble of the Constitution, in addition to providing for the realization of the right to live in peace in international society, provides that Japan shall not become involved in wars and international disputes through acts of government (the third principle). In relation to this, the issue of Japan's participation in UN peacekeeping operations should be comprehensively discussed, not simply in connection with the SDF and "United Nations peacekeeping operations," but pursuant to the international

policy called for by the Peace Constitution, i. e., security and disarmament, which are to be attained by peaceful means wherein the peoples of all nations cooperate peacefully in an effort to eliminate war, and the principle of respecting the right to live in peace in international society.

II. How Has the Nation Seen the Issue of Sending the Self-Defense Forces Abroad?

1. The issue of sending troops abroad has first of all been discussed in relation to the extent of the right of self-defense.

When the Self-Defense Forces were formed, the Diet passed "A Resolution on Not Sending the Self-Defense Forces Abroad" (19th Diet session; June 2, 1954; House of Councilors). Since the government has limited the main mission of the SDF to "defending our nation" in case of an invasion (Article 3, Self-Defense Forces Act), it has maintained a position according to which sending troops abroad exceeds the limit of self-defense, runs counter to the spirit of Article 9 Paragraph 1 of the Constitution, and is prohibited by the Constitution. Thus, The government has maintained that "it would not be permissible to send the SDF to another country with the purpose of using force in order to rescue Japanese citizens abroad or protect foreign assets" (50th Diet session; December 2, 1965; House of Councilors; Special Committee on the Treaty on Basic Relations between Japan and the Republic of Korea). The deciding factor here was the presence or absence of the purpose to use force.

On the other hand, from the standpoint of cooperation with the United Nations in conjunction with Japan's membership in the UN, the sending of SDF troops abroad has in particular been an issue in relation to the so-called "UN forces." Since the rejection of the 1958 request for SDF participation in the "UN forces stationed in Congo," the government has maintained the position that although "SDF participation in 'UN forces' whose purpose of mission does not involve the use of force if not impermissible under the Constitution," The SDF can in no sense participate under the present Self-Defense Forces Act. The meaning of this position is

summarized in a written government reply (October 30, 1980; Prime Minister Suzuki Zenko) saying that if the purpose and mission of "UN peacekeeping operations" do not involve the use of force, then participation is not actually prohibited by the Constitution. However, this opinion is fraught with problems, for it is not rationally grounded in a view that the Constitution allows the SDF to exercise only the right of individual self-defense. Furthermore, since this opinion offers no positive reason for allowing the SDF to be sent abroad, it requires strict scrutiny in the light of the Constitution's peace principle.

By contrast, the majority opinion among constitutional scholars maintains that the Self-Defense Forces are constitutionally prohibited "war potential," that their very existence is unconstitutional, and that dispatching the SDF abroad is not allowed. They also maintain that while the question of whether sending SDF troops abroad is constitutional or not is closely related to the "non-combatant nature" of UN forces, we must not discuss this matter without considering the essential question of the SDF's constitutionality.

2. The government has been examining the matter of participation in UN peacekeeping operations since the basic report (July 1982) of the Second Special Administrative Inquiry Committee. As part of this examination, the Ministry of Foreign Affairs organized an investigative panel of private citizens, and had the panel conduct research on the UN's peacekeeping functions, but the panel's proposal made no mention at all of SDF participation. According to the report by the Japan-U.S. Commission (submitted in September 1984), Japan should participate not only in UN peacekeeping operations, but should also lend material support, and send non-uniformed personnel, to multinational peacekeeping operations (such as NATO), and if possible dispatch uniformed personnel.

The submission of the "United Nations Peace Cooperation Bill" last autumn was an emergency response to the Gulf War. Just at that time the government had been looking for a new way to create a military alliance in order to cope with Third World disputes. To

the United States, which was looking for a way to forge a new military alliance through the Soviet Union's policy of cooperation with the U.S., the Gulf war begun by Iraq presented the perfect opportunity to utilize the role of the United Nations, as seen in the UN Security Council's "Resolution Allowing the Use of Force." Under these international circumstances, the participation by the SDF "Peace Cooperation Corps" was proposed as one component of a "policy of international cooperation" (in practice, with the U.S. military and the forces of its allies).

III. How Should We See the Relationship Between Article 9 and UN Peacekeeping Operations?

1. UN "peacekeeping operations" have no clear basis written into the UN Charter, and have been instituted on the basis of repeated actual customary practice. However, in light of past experience, peacekeeping forces (PKF) that have interceded between the parties to a dispute, and served to disengage armies and prevent the reoccurrence of the conflict, have usually been armed military units, and have on occasion used force. Additionally, groups of cease-fire observers have been composed of armed and unarmed military personnel, and have in some instances been authorized to use force in self-defense.

Additionally, the question has been raised as to whether or not it is proper for election supervision and administrative monitoring to be included in PKOs. Thus, even though the rule says "the use of force is not a direct purpose," peacekeeping forces especially are in reality called upon to have the military capability "to respond to nuclear and chemical warfare" (*Tokyo Shimbun*, April 24, 1991).

It has been said that UN peacekeeping operations have been based on two fundamental principles: The agreement of the parties to the conflict, i. e., neutrality, and the non-use of force, i. e., non-coercion. But the permanent members of the UN Security Council, including the United States – which was involved in the war – are participating in the "peacekeeping operations" directed at Iraq. One is thus dubious about whether or not the fundamental principle of neutrality is being maintained.

2. As we have thus seen, there remain ambiguous points with regard to the realities of UN peacekeeping operations. Thus, there is all the more reason why the peace principle of the Constitution must be given adequate consideration with regard to not only the purpose and mission, but also to the nature of activities, of the “peacekeeping operations,” which have been conceived as what might be called Chapter Six-and-one-half of the UN Charter. In view of this fact, SDF participation in peacekeeping operations is, judged in the light of the Constitution’s peace principle, not allowed for either the main or supporting units of peacekeeping forces or cease-fire supervision forces.

3. The “Statement” concerning the issue of cooperation with UN peacekeeping operations recently issued by over 160 scholars of constitutional law was ignored by the media, but I will here offer a point made by the Statement. The illegitimate children of the East-West cold war – the Japan-U.S. military alliance and Japan’s SDF, which have become one of the largest military forces in the world – must, in light of a Constitution that renounces war and forbids the maintenance of a war potential, be squarely faced objectively and disinterestedly as basically being in contradiction. In recent years Japan has been pressed to make a “contribution to international society” commensurate with its position in the international society“ commensurate with its position in the international economy, and the substance of this contribution is a major subject of debate within Japan. However, although the Japanese government has concentrated on sending the SDF abroad as Japan’s contribution, Japan should be seriously considering alternatives.

The fundamental task before us is, on the basis of the Peace Constitution’s principles, to structurally reorganize or dismantle the SDF, and, in line with the Peace Constitution’s international guiding principle, convert the SDF into, or create a new, peace force that will contribute to world peace.

The majority opinion among constitutional scholars is that the Self-Defense Forces are “military potential” prohibited by the Con-

stitution, and that their very existence violates the Constitution. This view is based on a correct realization of what the SDF actually are. Even among precedents by the courts, which are the "caretaker of the Constitution," not a single decision has upheld the constitutionality of the SDF, and their constitutionality is thus still undecided. Now that "the Soviet threat" has disappeared with the end of the cold war, says the Statement, views that solidify the position of the U.S.-Japan Security Treaty, and recognize the constitutionality of the Self-Defense Force, are products of a past reality.

In my opinion, this statement now deserves serious consideration by a broad spectrum of the Japanese people, including lawyers.

NOTES

(1) Kenji Urata, "Pacifism in the Constitution of Japan—Freedom, Peace and Democracy," *International Review of Contemporary Law*, (1982), No. 2, pp. 17–37, 25.

(2) Kenji Urata, "Aspects of the Right to Live in Peace," *Law in East and West*, Waseda University Press, 1988, pp. 484–485.

(3) Kenji Urata, "Pacifism in the Constitution of Japan, 1946—The Meaning of the Right to Live in Peace," *Waseda Bulletin of Comparative Law*, (1981), pp. 7–9.

(4) *Supra* note 2, pp. 485–486.

(5) *Supra* note 2, p. 486.

(6) *AVANT-PROJET PROVISOIRE DE LA LOI DE BASE SUR L'ASSURANCE SYNTHETIQUE DE LA PAIX*, publie le 3 mai, 1987 par "Groupe de l'Etude constitutionnelle sur l'assurance synthetique de la paix; Traduction francaise provisoire par Tadakazu Fukase.

(7) *Supra* note 2, pp. 493–497.

(8) *Supra* note 2, pp. 490–493.

(9) Bernhard Graefrath, "Universality of Human Rights in a Pluralistic World," unpublished paper delivered at International Conference on the Bicentenary of the Declaration of the Right of Man and the Citizen, Its Topicality, Universality and Future, 9–11 March 1989, UNESCO, PARIS, p. 8.

(10) Philip Alston, "The Right to Peace," UNESCO Doc. SS-80/CONF. 806/7, in Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1990s," *Rutgers Law Review*, vol.33 (1981), p. 445.

(11) Marks, *Supra* note 10.

(12) G.A. Res. 33/73, Part I/para 1/33, U.N. GAOR/Supp. (No. 45) 55, 56, U.N. Doc. No. A/33/45 (1979).

(13) Agency for the Prohibition of Nuclear Weapons in Latin America, Resolution 128 (1979).

(14) U.N. GAOR A/39/51 (1984), Supp. 22.

(15) Colleen E. Dawes, "The Right to Peace," *The American Law Journal*, vol.60 (March 1986), p. 156.

(16) Marks, *Supra* note 10, p. 446.

(17) Marks, *Supra* note 10, p. 437.

(18) Philip Alston, "A Third Generation of Solidarity Right: Progressive Development or Obfuscation of International Human Rights Law?" *Netherland International Law Review*, vol. 29 (1982/3) p. 320, note 44.

(19) Marks, *Supra* note 10, p. 452.