THE ARTICLE 9 PACIFISM CLAUSE AND JAPAN'S PLACE IN THE WORLD

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> 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.
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> 第九条日本国民は、正義と秩序を基調とする国際平和を誠実に希求し、国権の発動たる戦争と、武力による威嚇又は武力の行使は、国際紛争を解決する手段としては、永久にこれを放棄する。
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> 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.
>
> 前項の目的を達するため、陸海空軍その他の戦力は、これを保持しない。国の交戦権は、これを認めない。
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> — Chapter II Renunciation of War, Constitution of Japan

The United States and Japan have been intertwined for a century and a half. This long embrace has been a complicated one—oscillating between enmity, neutrality, and friendship. When Commodore Matthew Perry appeared in Tokyo Bay with his American gunships in 1853 and returned the next year to conclude a treaty ending Japan's isolation from the Western world, the Tokugawa regime that had kept Japan locked in feudalism for the prior two and a half centuries was nearing its end. Japan was close to transforming itself into a nation-state. A decade later, Shogun rule was on a demise from which it would not recover, and by 1868, the Meiji transformation had begun.[1]

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Japan's rise as a Great Power was fueled by the creation of a national army and navy, destruction of the feudal system, integration of capitalist thought, development of print media, construction of railroads, and the centralization of a governing bureaucracy that could manage these massive changes.[2] Embarking upon the global stage during the First World War, Japan wisely threw its lot in with the Allied Powers—suffering little or no negative consequences by way of casualties or money yet gaining prestige and land concessions in China.[3]

The U.S.-Japan relationship was a wary one during the inter-war years and, of course, grew to enmity during World War II, resulting most dramatically in the atomic bombing of Japan by the United States. A second U.S. military commander, General Douglas MacArthur, re-defined the U.S.-Japan relationship after the war as the military governor of Japan in the post-war years. It is MacArthur's constitutional legacy that the twenty-first century Japanese governments are dealing with today. A key part of this friendly relationship was the Japanese renunciation of war.

Article 9 of the Japanese constitution is famously known as the "pacifism clause." Certainly, the renunciation of war and the means of war is a unique constitutional feature not found in other polities. General MacArthur had the notion of a pacifism clause in mind for the country as early as February 1946.[4] What became the Japanese constitution was drafted within a week, debated, and amended over a period of months, ultimately agreed to by the Emperor, and entered into force on May 3, 1947.[5]

The Japanese, however, were very much a part of this process, despite the common myth perpetuated by many that "the American

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of co-panelists Lawrence Beer, University of Colorado, Tom Ginsberg, University of Illinois College of Law, Craig Martin, University of Pennsylvania School of Law, and Chris Gerteis, Creighton University.

1 LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY 7-17 (2002). The Shogun were the generals of the Emperor and, as rulers of the samurai, became, over time, the functioning national government of Japan during the feudal period. There were three shogunates in Japan: Kamakura Shogunate (1192-1333), Muromachi Shogunate (1338-1573), and Tokugawa Shogunate (1602-1868). In 1868, Tokugawa Yosinobu, the fifteenth Shogun of the Tokugawa Shogunate, relinquished his office, ending Shogun rule in Japan as well as the feudal system of government. *See* GEORGE SANSOM, A HISTORY OF JAPAN 1334-1615 (1961); GEORGE SANSOM, A HISTORY OF JAPAN 1615-1867 (1963).

2 BEER & MAKI, *supra* note 1, at 15.

3 *See* MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 322-34 (paperback ed. 2003).

4 BEER & MAKI, *supra* note 1, at 79, 114.

5 *Id.* at 79.

authorities drafted a constitution and essentially rammed it down the throats of the Japanese."[6] In fact, those who were involved in the process characterized it as a collaboration rather than an imposition.[7] In addition, more recent constitutional scholars have explained the dynamic as "collusion" between Japanese policymakers and American occupation forces—describing a grand bargain within the Japanese ranks of left and right, the left gaining the pacifism clause of Article 9 in exchange for the right gaining the retention of the Emperor, albeit stripped of his divinity. This half-century old *quid pro quo* has been sealed in equilibrium under a high threshold for amendment of the Japanese constitution.[8]

That equilibrium held fast for over sixty years, buttressed by the U.S. guarantee of Japan's security under its nuclear umbrella.[9] But on May 14, 2007, the Diet, Japan's parliament, passed procedures for holding Japan's first referendum on revising the constitution—a central goal of the conservative Liberal Democratic Party (LDP), which has sought to soften the impact of Article 9 and enhance the role of the military.[10] The Japanese have never approved an amendment to the 1947 constitution, which requires a two-thirds majority in both houses of the Diet, along with a successful majority vote in a national referendum.[11] An important precursor to amendment is ensuring that referendum procedures that will take effect in three years are put in place.[12] This essay seeks to shed light on where Japan is heading with regard to revising Article 9 of its constitution and what it can expect with regard to push-back or acceptance from the region and the world.

First, why is it important for Japan to change Article 9? The pacifism clause of the constitution, in conjunction with the United States' firm guarantee of Japanese security, has served Japan well since 1945,

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6 Lawrence M. Friedman, *Roads to Democracy*, 33 SYRACUSE J. INT'L L. & COM. 51, 55 (2005); *see also* Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 859 (2005).

7 BEER & MAKI, *supra* note 1, at 77-93. For example, "[a] leading Japanese historian of the drafting events and a key participant, Sato Tatsuo, maintained that the Americans showed respect for Japanese preferences, refrained from applying pressure during the Diet deliberations, and approved almost all changes recommended by the Japanese." *Id.* at 85.

8 Zachary Elkins, Tom Ginsburg, & James Melton, Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States and the Japanese Case 16-22 (Feb. 20, 2007) (unpublished manuscript presented at the Conference on Current Trends in Japanese Law & the Legal Profession, May 11-13, 2007 (citing RAY MOORE & DONALD ROBINSON, PARTNERS IN DEMOCRACY (2005)) (on file with the author).

9 *See* W.G. BEASLEY, THE RISE OF MODERN JAPAN 236-37 (1990).

10 Linda Sieg, *Japan Takes Step Towards Revising Constitution*, REUTERS, May 14, 2007, http://www.reuters.com/article/worldNews/idUST27556720070514 (last visited Nov. 2, 2007).

11 *Id.*

12 *Id.*

freeing it from the international commitments of other states and allowing it to focus on economic expansion. The LDP, which has effectively ruled Japan continuously since its inception in 1955, has articulated many reasons for altering this part of the constitution. Most recently emphasized by Prime Ministers Yasuhiro Nakasone, Junichiro Koizumi, and Shinzo Abe, the list of justifications—aside from popular domestic consumption and playing to the party-base—is persuasive:

1. The demonstrable danger that Japan now faces from North Korea;
2. The importance of off-setting the rise of China in the region;
3. The American desire that Japan take greater control over its own security;
4. The ability to demonstrate that Japan is ready to assume the full range of responsibilities incumbent upon a permanent member of the United Nations Security Council, including military deployment.

This last justification is, perhaps, the most important. Japan very much thinks of itself as a Great Power. That status certainly existed prior to the Second World War and in Tokyo's view, just as in Berlin's view, the only thing standing in the way of its legitimate assertion today is the universal legal and political recognition of that status through permanent membership on the Security Council.[13] The methodology of making that happen is problematic, and highly conditional on the politics at the United Nations Headquarters in New York, resistance from Beijing, and the particular grouping of powers ascending to permanent membership, which would include Japan in the ascending class.[14]

Japan pragmatically believes that it cannot assert this status unless it actually possesses the *potential* to assert this status (e.g., deploy troops, sustain military action, and enforce U.N. Security Council resolutions). Article 9 of the constitution handcuffs Japan in this regard. In fact, according to the Japanese Cabinet Legislation Bureau, Japan has the right of collective self defense under the U.N. Charter, but cannot exercise that right under the current Japanese constitution.[15] The

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[13] *See generally* Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319 (2000).

[14] *See id.* at 357-59.

[15] Hiroko Nakata, *Constitutional Conundrums: New Panel to Debate Collective Defense*, JAPAN TIMES, Apr. 26, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070426a3.html (last visited Nov. 10, 2007). A May 2007 poll conducted by the Kyodo news agency found that 62 percent of Japanese surveyed wanted the current interpretation to remain intact. That was up 7.4 percent from an April 2007 poll. Seig, *supra* note 10; *cf.* Craig Martin, *Collective Self-Defense and*

contradictory nature of this interpretation restricts Japan from coming to the aid of an ally.[16] That legal conundrum, however, has not stopped Tokyo from deploying troops in non-combat roles—specifically on U.N. missions. To understand the context of Article 9's significance for Japan as a state seeking to reassert its strength on the world stage, one must properly understand the psychology of the state (to the extent that states have psychologies) in its interaction with other states.

The *hubris* of superiority is a common affliction shared by Great Powers. Japan is not immune from this. The United States and Japan firmly joined the ranks of Great Powers in the aftermath of World War I.[17] Indeed, at that time, Canadian Prime Minister Borden declared that there were "only three major powers left in the world: Britain, the U.S. and Japan."[18]

What happens when that *hubris* of superiority continues beyond the time of a state's status as a Great Power and into its new capacity as a diminished power? As exemplified by France, the rest of the world understands that this is the case, but it would be impolite to point it out to the state in question.[19] Some states, such as Britain, have successfully adjusted downward their conveyance of that behavior to match their diminished capacity. In the case of the United States, America is in the process of being humbled in Iraq—but that experience will probably not affect its superiority complex, as it will not likely diminish American power that much.

States can sometimes adjust this behavior when the change in their circumstance is gradual. But when a Great Power suffers abrupt state collapse, the effect is an immediate switch between a superiority

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Collective Security: What the Differences Mean for Japan, JAPAN TIMES, Aug. 30, 2007, http://search.japantimes.co.jp/cgi-bin/eo20070830a3.html (discussing the implications of collective self-defense and collective security for Japan) (last visited Nov. 10, 2007).

[16] Nakata, *supra* note 15; s*ee generally Hawks in a Dovecote*, ECONOMIST, Nov. 25, 2006, at 41

> [A] North Korean long-range missile . . . headed for Hawaii might [pass over Japan]. In practice, Americans want to know whether Japan would shoot down missiles overflying Japan: current constitutional interpretations seem to forbid it. Japanese policymakers worry that if Japan cannot come to America's help in a crisis, Congress might one day wonder why on earth Americans should be committing so much to defend Japan.

[17] MACMILLAN, *supra* note 3, at 307; Michael J. Kelly, *Pulling at the Threads of Westphalia*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 365 (2005).

[18] MACMILLAN, *supra* note 3, at 306.

[19] *See generally* Shiva Eftekhari, *France and the Algerian War: From a Policy of "Forgetting" to a Framework for Accountability*, 34 COLUM. HUM. RTS. L. REV. 413, 420 (2003) (discussing the psycho-social consequences of decolonization on France).

complex and an inferiority complex accompanied by inexorable tendencies to reassert itself and regain Great Power status, assuming it retains, under the surface, a healthy dose of that *hubris* of superiority. We see this today in the case of Russia—struggling mightily with an inferiority complex that it is not used to dealing with in the wake of the Soviet collapse. Russian President Putin is aggressively using oil, weapons sales, nuclear technology, and political methods to accomplish the task of reasserting Russian strength on the world stage.[20] His efforts are completely transparent, displaying Russia's famous penchant for subtlety and nuance; thus, they are unconvincing. A rather dramatic example came in May 2007 when Russia intimidated Estonia by cutting off oil and trade because that tiny country relocated a Soviet war memorial from a town square to a cemetery.[21]

In the case of Germany and Japan, both powers suffered abrupt state collapses following World War II, leading to sudden inferiority complexes. That underlying *hubris* of superiority, however, continued to percolate beneath the surface. The Germans fell off a similar psychological cliff following defeat in the First World War with the imposition of the Treaty of Versailles.[22] The prescribed remedy sold by Hitler and his gang was National Socialism. Writing for *The Nation* in 1936, M.W. Fodor, the stalwart European correspondent of the *Chicago Daily News*, observed, "No race has suffered so much from an inferiority complex as has the German. National Socialism was a kind of Coué method of converting the inferiority complex, at least temporarily, into a feeling of superiority."[23] Japan, on the other hand, did not have this prior experience.

Both states underwent extensive periods of post-World War II foreign occupation and, in fact, continue to harbor significant U.S. military presences; however, the extent to which Germany and Japan continue to defer to the United States in foreign and security policy differs dramatically. This is a direct outgrowth of how each country dealt with its wartime legacy and how each country responded to its

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[20] *A Bear at the Throat*, ECONOMIST, Apr. 14, 2007, at 58; *The Bear is Happy to Be Back*, ECONOMIST, Feb. 10, 2007, at 45; *Dangerous Times: Bad Things Often Happen to Critics of the Russian Authorities*, ECONOMIST, Mar. 10, 2007, at 46.

[21] Steven Lee Myers, *Friction Between Estonia and Russia Ignites Protests in Moscow*, N.Y. TIMES, May 3, 2007, at A3; *How to Fight Back: Responding to Russia's Inept Bullying*, ECONOMIST.COM, May 10, 2007, http://www.economist.com/world/europe/displaystory.cfm?story_id=9142057 (last visited Nov. 2, 2007).

[22] Treaty of Peace with Germany, June 28, 1919, 225 Consol. T.S. 189.

[23] M.W. Fodor, *The Spread of Hitlerism*, 142 NATION 156, 156 (1936).

security needs. For Germany, there was no similarly restrictive text in its Basic Law concerning pacifism or military constraints.[24] There are a few references that diminish the government's latitude in this area. Article 26 prohibits preparations for "aggressive war" and acts that would "disturb[] the peaceful relations between nations."[25] Article 24 allows Germany to enter "a system of mutual collective security" to "bring about and secure a lasting peace in Europe and among the nations of the world."[26] Article 87(a), which was added in 1956, allows the use of German armed forces only for defensive purposes or, apart from defense, only "to the extent explicitly permitted by this Basic Law."[27]

After the end of the Second World War, no German troops had been deployed outside of Europe except for humanitarian missions.[28] In the 1994 AWACS decision, the German Constitutional Court ruled that peacekeeping deployment was permissible.[29] On the question of deploying German troops to assist in U.N. peacekeeping activities in Somalia and the former Yugoslavia, the Court decided that German armed forces could be deployed in U.N.-style peacekeeping operations outside the North Atlantic Treaty Organization ("NATO") area, but only with approval on a case-by-case basis with a majority voting in favor of the operation in the Bundestag.[30] Since then, Germany has participated in several U.N. operations as well as NATO operations in Afghanistan.[31]

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[24] *See* GRUNDGESETZ [GG] [Constitution] (F.R.G.), *translated in* THE BONN CONSTITUTION: BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Department of State 1949).

[25] *Id.* at art. 26.

[26] *Id.* at art. 26; *see* Victor Gray, *Germany: The "Reluctant Power" Turns East*, PARAMETERS, Autumn 1994, http://www.carlisle.army.mil/usawc/parameters/1994/gray.htm (discussing the debate over constitutional constraints to German military power) (last visited Nov. 10, 2007).

[27] GRUNDGESETZ [GG] [Constitution] art. 87(a) (F.R.G.), *translated in* G.H. Flanz, *Germany*, *in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 133-34 (A.P. Blaustein & G.H. Flanz, eds.) (permanent ed. 1971 & Supp. 1994).

[28] Karl-Heinz Börner, *The Future of German Operations Outside NATO*, PARAMETERS, Spring 1996, at n.5, http://carlisle-www.army.mil/usawc/parameters/96spring/borner.htm ("The restrictive interpretation of the Basic Law did not prohibit the use of military forces for humanitarian purposes. German soldiers have been providing humanitarian support for more than 30 years, comprising over 120 missions in 53 countries all over the world.") (last visited Nov. 10, 2007).

[29] *See* Bundesverfassungsgericht [BVerfG] [Fed. Constitutional Court] July 12, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286, (F.R.G).

[30] Manfred H. Wiegandt, *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-Of-Area Deployment of German Troops*, 10 AM. U.J. INT'L L. & POL'Y 889, 904-914 (1995).

[31] *See, e.g., More German Troops for Afghanistan*, BBC NEWS, Nov. 26, 2002, http://news.bbc.co.uk/2/low/south_asia/2513547.stm (last visited Nov. 2, 2007).

Germany's flexible, yet restrained, approach was simply not available for Japan textually, since the Japanese constitution was much more explicit with regard to military capabilities. Furthermore, Japan has not changed its constitution since it was adopted; whereas, the German Basic Law has been altered over forty times.[32] Nevertheless, while there may be stasis in the text of the Japanese constitution, it belies the flexibility which successive LDP governments have built into the actual creation and use of the Self-Defense Forces ("SDF")—Japan's functional military.[33]

Moreover, Germany, unlike Japan, opted for security within a system of collective defense under the NATO banner and integrated its armed forces within that framework.[34] However, Japan's bilateral

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[32] Hisane Masaki, *Culture Day and the Constitution*, JAPAN TODAY, Nov. 2, 2006, http://www.japantoday.com/jp/comment/1020 (last visited Nov. 2, 2007).

[33] James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, LAW & CONTEMP. PROBS., Spring 1990, at 171, 171-72.

[34] In 1952, the British government hosted a diplomatic conference that cleared the way for the rearmament of Germany over the initial objections of France:

> Three topics were on the agenda: terminating the state of occupation in [West Germany]; revising the Brussels Treaty of 1948 and inviting [West Germany] and Italy to accede to it; and admitting [West Germany] to NATO.
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> Understandably, France insisted on safeguards against unwelcome developments in Germany, while the [West Germans] wished to be treated equally and not to be discriminated against. The Brussels Treaty offered a solution. By using its automatic assistance clause, the treaty was developed into a system of collective security in Europe, the Western European Union (WEU), into which German rearmament could be embedded. The WEU also provided a framework for establishing limits on German rearmament as had the EDC Treaty. . . . As a gesture to France, the United Kingdom committed itself to stationing four divisions and a tactical air fleet on the European mainland and not to withdraw them against the wishes of the other members. The United States had already in 1951 committed additional divisions to the European continent.
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> UK assurances together with similar U.S. guarantees were of great importance to Paris, which saw in the Anglo-American forces a counterweight to a German army. The German government was not only granted admission to NATO as an equal member, but a revision of the General Treaty was also agreed and a number of controversial clauses eliminated. The presence of foreign troops in West Germany was also contractually regulated in a Convention on the Rights and Obligations of Foreign Forces (Force Convention). [West Germany] further complied with the request publicly to renounce any production of atomic, biological and chemical weapons. In return, the Three Powers stated that they supported the restoration of a united, free Germany. Bonn committed itself to search for reunification only by peaceful means . . . .

alliance with the United States in a lop-sided arrangement relies completely on the United States for its security.[35] As the Cold War began, Prime Minister Shigeru Yoshida developed this pragmatic strategy to provide for Japan's security.[36] The Yoshida Doctrine, as it came to be known, "called for Japan to adopt the U.S. stance on international politics in exchange for military protection."[37] That doctrine, although eroded somewhat recently, remains intact under the pacifist constitution.

Finally, on the question of establishing an environment of regional trust and a solid groundwork for reintegration of military structures, Germany has spent the last sixty years literally prostrated before its regional neighbors in anguished apology for, and highly detailed acknowledgement of, the atrocities committed under Hitler.[38] Indeed, Germany recently undertook fresh payments through its companies to slave laborers forced to work during the war.[39]

In contrast, Japan is widely regarded by its regional neighbors, who were victims of Japanese aggression, to still be in denial over atrocities committed by its government and Imperial Army during the war.[40] Japan has undergone nowhere near the level of self-flagellation on this issue that Germany has, and this too may be comparatively on the minds of officials in East Asian capitals. The evidence demonstrating a lack of contrition that suspicious neighboring states can point to is extensive and has, ironically, been committed by the very LDP leaders

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Helga Haftendorn, *Germany's Accession to NATO*, NATO REVIEW, Summer, 2005, http://www.nato.int/docu/review/2005/issue2/english/history.html, last visited Nov. 2, 2007.

35 BEASLEY, *supra* note 9, at 225-26.

36 Richard J. Samuels, *Japan's Goldilocks Strategy*, WASH. Q., Autumn 2006, at 111, 112, *available at* http://web.mit.edu/polisci/research/samuels/Japan's%20Goldilocks%20Strategy.pdf.

37 *Id.*

38 Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 434 n.2 (2006) ("In a famous incident, West German Chancellor Willy Brandt, in a dramatic act of contrition**,** dropped to his knees before the monument to the Warsaw Ghetto uprising of 1943 during a December 1970 visit to Poland.").

39 Stuart Eizenstat, Keynote Address at the Fordham International Law Journal Symposium: Holocaust Restitution (Nov. 1, 2001), *in* 25 FORDHAM INT'L L.J. (SYMPOSIUM) S-205, S-216 (2001)

> The German initiative was that they would pay every worker, every surviving worker—not just a few thousand, but ultimately we know now over a million—who were employed by any German company, whether that Germany company is now defunct after the war, whether it was a SS company, whether it was a German public company, whether it was a company that had been in business since the war . . . .

40 Canon Pence, Comment, *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N.C.J. INT'L L. & COM. REG. 335, 343 (2006).

who are pressing for more independence in the security realm. For instance, Prime Minister Abe is chief among the protagonists in this regard committing the following:

- Whitewashing school textbooks to downplay atrocities committed during the Second World War, including most recently, references to the mass suicide of Okinawa residents engineered by the military;[41]
- Continual state visits and offerings to Yakusuni War Shrine, where the remains of several Imperial Army war criminals are interred;[42]
- Downplaying of Japan's involvement in and denial of responsibility for the use of comfort women (sex slaves) during the war;[43]
- Policy of non-compensation for foreign slave laborers, recently backed by the courts – as if to emphasize this point strongly;[44]
- Reinstituting nationalistic patriotic education in Japanese schools over the objections of teachers, who are docked pay if they do not comply with the government's wishes.[45]

In the absence of adequate contrition for their wartime atrocities, neighboring states have at least been able to look to Article 9 as an enshrined apology.[46] So, from the perspective of countries Japan invaded during the war, now Tokyo wants to take that away as well. The legacy of the Second World War is still very much alive in this region of Asia, where old Japanese land mines are still being unearthed in northern

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[41] Norimitsu Onishi, *Japan's Textbooks Reflect Revised History*, N.Y. TIMES, Apr. 1, 2007, § 1, at 14, *available at* http://www.nytimes.com/2007/04/01/world/asia/01japan.html.

[42] Hiroko Nakata, *Abe Made Offering to Yasakuni Shrine Instead of Visiting*, JAPAN TIMES, May 9, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070509a2.html (last visited Nov. 10, 2007); *see generally* Martin Fackler, *Small Gift to Shrine Has Bigger Implications*, INT'L HERALD TRIB., May 9, 2007, at 1 ("Junichiro Koizumi, the previous prime minister, outraged many in Asia by making annual visits to the shrine.").

[43] Norimitsu Onishi, *Japan's 'Atonement' to Former Sex Slaves Stirs Anger*, N.Y. TIMES, Apr. 25, 2007, at A3, *available at* http://www.nytimes.com/2007/04/25/world/asia/25japan.html. Tokyo's refusal to go further on this issue prompted the introduction of a U.S. House of Representatives resolution calling on Japan to acknowledge the atrocity and apologize. Norimitsu Onishi, *A Congressman Faces Foes in Japan as He Seeks an Apology*, N.Y. TIMES, May 12, 2007, at A4, *available at* http://www.nytimes.com/2007/05/12/world/asia/12honda.html.

[44] *See Statute Used to Overturn Slave Labor Redress*, JAPAN TIMES, Mar. 15, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070315a1.html (last visited Nov. 10, 2007).

[45] Paul Wiseman, *Nationalism Gains Strength in Japan*, USA TODAY, July 27, 2007, at 6A, *available at* http://www.usatoday.com/printedition/news/20070727/a_japan27.art.htm.

[46] Pence, *supra* note 40, at 346.

China.[47] History has not been put to rest in Asia and Tokyo's efforts to atone for the atrocities it committed have been too little and now are too late.

Tokyo has simultaneously backtracked on other issues, elevated the defense forces to a cabinet level ministry, and approved new patriotism laws designed to relight nationalist sentiment, which of course drove Japan toward war sixty years ago.[48] Taking into account Abe's July 2006 proposal, when he was Chief Cabinet Secretary, that Japan study the possibility of a pre-emptive strike against North Korea, one can fully understand why other governments in the region are wary if not outright nervous of Japan's motives.[49] It is hard to believe that LDP leaders do not realize that their actions, designed to play to their hardened political base, actually and actively undermine the very goal that they proclaim to be seeking.

To the extent that Japan opts to revise Article 9, which practically will not occur until the LDP can achieve a two-thirds threshold in both houses of the Diet and survive a majority public referendum, it must be revised within the context of a non-threatening posture.[50] Japan's neighbors continue to be fearful of a resurgent Japanese military, unchecked by international constraints, and rising domestic Japanese nationalism stoked by conservative political leaders in Tokyo.[51] Thus, a revision of Article 9 must be accompanied by measures aimed at ameliorating those fears. For instance, an explicit commitment in the revised Article to foreswear nuclear arms and aggressive war would be advisable. Japan could even go a step further and declare itself a "nuclear-free zone" along the lines of New Zealand. Successive Japanese cabinets ritually endorse Japan's three non-nuclear principles,

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[47] Jim Yardley, *Cleaning Up the 20th Century*, N.Y. TIMES, Mar. 18, 2007, § 4, at 1, *available at* http://www.nytimes.com/2007/03/18/weekinreview/18yardley.html.

[48] Anthony Faiola, *Japan Upgrades Its Defense Agency*, BOSTON GLOBE, Dec. 16, 2006, at A15, *available at* http://www.boston.com/news/world/asia/articles/2006/12/16/japan_approves_patriotism_laws_elevates_defense_agency/.

[49] Anthony Faiola, *Japan's Abe, Poised to Lead, Offers Nation Vision of Pride*, WASH. POST, Sept. 19, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/09/18/AR2006091801312.html.

[50] See Brad Glosserman & Ralph A. Cossa, *Abe's Challenge: Getting the Alliance, and Relations with Japan's Neighbors, Right*, PACNET (Pacific Forum CSIS, Honolulu, Haw.), Sept. 26, 2006, *available at* http://www.glocom.org/debates/20060927_gloss_abe/index.html.

[51] Michael Richardson, *Neighbors in Asia Alarmed at Threat to Balance of Power*, INT'L HERALD TRIB., Aug. 15, 1995, at 1, *available at* http://www.iht.com/articles/1995/08/15/nippon.php; Martin Fackler, *New Premier Seeks a Japan with Muscle and a Voice*, N.Y. TIMES, Sept. 27, 2006, at A3, *available at* http://www.nytimes.com/2006/09/27/world/asia/27japan.html.

but these are not even enshrined in law.[52] Elevating them to the constitution would be an advisable counterbalance to tinkering with Article 9.[53]

Simultaneous transition into a framework of collective defense is also advisable. This could take several forms, but the basis could build on the existing bilateral Security Consultative Committee between the United States and Japan, and the more informal security triangle between the United States, Japan, and South Korea. Russia and Canada could be added to create a North Pacific Treaty Organization ("NPTO") loosely analogous to NATO, that explicitly restrains Japan's use of its military to operating only in connection with NPTO undertakings, such as collective self-defense, peacekeeping missions, group-sanctioned humanitarian interventions, or disaster relief. It would also allow Japan to participate in the deployment of a ballistic missile shield within the framework of an NPTO project, much as NATO is proceeding along similar lines.[54]

Many impediments remain to hinder such a framework. The Koreans would require a more specific and sincere acknowledgement of atrocities committed by Tokyo against them during the colonial period and the war.[55] And the Russians would require final resolution of the Kuril Islands territorial dispute and a formalized peace treaty, since the Soviets refused to sign the Treaty of San Francisco.[56]

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[52] Robyn Lim, Op-Ed., *So Much for Japan's Nuclear Taboo*, INT'L HERALD TRIB., June 13, 2002, at 8, *available at* http://www.iht.com/articles/2002/06/13/edlim_ed3_.php.

[53] *Id.*

[54] *See generally* Thom Shanker, *Russia Cool to U.S. Call for Cooperation on Missile Defense*, N.Y. TIMES, Apr. 24, 2007, at A6, *available at* http://www.nytimes.com/2007/04/24/world/europe/24gates.html (discussing cooperation between the United States and Europe over missile defense).

[55] After the Russo-Japanese war ended, Russia ceded influence over the Korean peninsula to Japan. The primacy of Japan's interest in Korea was later acknowledged by the United States in the secret Taft-Katsura Agreement of July 27, 1905. Shortly thereafter, Korea became a Japanese protectorate and eventually, by 1910, a colony of the Japanese Empire. Multiple liberation and opposition movements in Korea were violently suppressed during the pre-war period. Forced conscription of men for military duty and women as sex slaves during the wartime period only compounded Korean resentment toward Japan. Many are still calling for further Japanese contrition for its treatment of Korea. William Horsley, *Korean WWII Sex Slave Fight On*, BBC NEWS, Aug. 9, 2005, http://news.bbc.co.uk/2/hi/asia-pacific/4749467.stm (last visited Nov. 2, 2007).

[56] The Soviet Union occupied the entire Kuril Islands chain that runs North/South between Japan and Russia. Japan never acknowledged the legitimacy of the occupation of the four southernmost islands and still claims them as its Northern Territories. *Kuril Islands Dispute Deadlocked*, BBC NEWS, Sept. 5, 2000, http://news.bbc.co.uk/2/hi/asia-pacific/910648.stm (last visited Nov. 2, 2007).

The Chinese, however, may present the most intractable obstacle given their political hostility toward Japan even in the face of greater economic cooperation.[57] To allay Chinese paranoia about its own security, a statement regarding Taiwan must accompany Japanese assurances of non-nuclearization and restraint of military operations.[58] Indeed, an informal three-way dialogue among Washington, Moscow, and Beijing would go a long way toward making the Chinese feel as if they were consulted adequately throughout the process. Moreover, China must be made to understand that the NPTO would not be arrayed against it as NATO was arrayed against the USSR.[59] In fact, NATO now exists beyond the original threat that it was designed to counter and undertakes the types of humanitarian functions that are typically undertaken by U.N. forces.[60] Indeed, as a point of gravity for arms control and arms reduction initiatives, non-proliferation policies, and a counterweight to terrorist activity in East Asia, an NPTO could actually work to better secure China, which would mean a safer regional environment to induce greater economic expansion—the very rocket that China is now riding to Great Power status.

Worries about North Korea's reaction to a newly formed NPTO would also be legitimate. To induce the North Koreans not to re-arm or react militarily, more direct assurances regarding their own security would be required, as well as more direct aid and energy guarantees. Japan and South Korea have shown willingness to provide this in the past, but it would have to be backed by Russia and the U.S. explicitly.[61] Russian oil, together with American military guarantees, would certainly be necessary.

In sum, it is understandable that Tokyo wants to move away from the Yoshida Doctrine of Japan relying on U.S. protection in exchange for backing the U.S. stance on international policy—especially with regard to security issues. But it is not at all clear that this is needed

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[57] *See generally* Wu Xinbo, *The End of the Silver Lining: A Chinese View of the U.S.-Japan Alliance*, WASH. Q., Winter 2005-06, at 119 (discussing concerns that the Japanese alliance with the United States is propelling, rather than constraining, military development in Japan).

[58] *China Warns Against Taiwan Ties*, BBC NEWS, Mar. 6, 2005, http://news.bbc.co.uk/2/hi/asia-pacific/4322919.stm (last visited Nov. 2, 2007) (reporting that China would not tolerate the inclusion of Taiwan in a new security arrangement with Japan and the United States).

[59] Francis A. Gabor, *NATO's New Paradigm for European Security: International Legal Issues in Ethnic Self-Determination*, 26 SUFFOLK TRANSNAT'L L. REV. 39, 45 (2002).

[60] *Id.*

[61] Steven R. Weisman, *State Dept. Pushes for Return of North Korea to Negotiations*, N.Y. TIMES, Aug. 24, 2005, at A9, *available at* http://www.nytimes.com/2005/08/24/politics/24diplo.html.

now. Despite Article 9, Japan already has a large military;[62] it already does U.N. peacekeeping work in places like Cambodia, the Golan Heights, and Mozambique;[63] it has already expanded its operational area of defense to include "areas surrounding Japan;"[64] and it is already participating in coalition operations in Afghanistan and Iraq.[65] What more does it need to do at this point?

The answer, of course, is not much from a practical standpoint. From a political standpoint, the domestic political needs of the LDP to make these arguments do pay dividends, because the rhetoric for strengthening Japan's military role plays to the right-wing base of the party. And from a legal standpoint, the argument has been raised that amending the constitution to reflect reality instead of continuing to allow the government to interpret its way out of Article 9's constraints is the only honest thing to do. Even possessing a military is unconstitutional according to strict constructionists.[66]

Richard Samuels, a leading Japan scholar at MIT, correctly diagnoses the current strategic predicament of Japan by characterizing it as locked in a triangle of insecurity:

> North Korea, China and Japan all have legitimate concerns. Pyongyang's is existential; the regime fears for its survival in a world in which the lone remaining superpower has identified it as a cancer. China borders more states than any other and perceives, no doubt correctly, that the United States and Japan share designs on containing its rise. The response to these concerns in each country has been predictably excessive: each state is overinsuring against perceived risk. North Korea acquires nuclear weapons; China compensates for a decade of relative military decline by funding a rapid and opaque force modernization; and, with the United States cheerleading, Japan acquires missile defense and force-projection capabilities that it long had denied itself. As each country acts to increase its own security, it makes the others less secure.[67]

Instead of breaking this cycle of insecurity, Abe's government, driven by the *hubris* of superiority, seeks to exacerbate it. The LDP has not laid the groundwork during the past sixty years that needed to be laid for

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[62] Karen Piotrowski, Note, *Keeping Pace with the Progress of the World: Article 9 of the Japanese Constitution*, 83 WASH. U.L.Q. 1653, 1654 (2005).

[63] *Id.*

[64] Samuels, *supra* note 36, at 113.

[65] *Id.*

[66] Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127, 127 (2005).

[67] Samuels, *supra* note 36, at 114.

regional, international acceptance of the policies it is pursuing. Moreover, the government has demonstrated that it has a tin ear politically on re-militarization with regard to how its actions are perceived in foreign capitols. Even inside Japan, public opinion polls show that support for changing Article 9 is slipping considerably.[68]

Consequently, Abe's move to amend Article 9 will fail, as it should. Japan has not undertaken the degree of post-war demonstrable contrition with its geographic neighbors that Germany undertook with its own neighbors and is still undertaking. Humility is the gold standard for acceptable contrition, and Japan has simply failed to achieve this—Tokyo's repeated apologies are not convincing and do not match the government's actions—which ironically and inexplicably work to actively undermine Japan's "normalization" as a country.[69] The time is not right, the provocation is not worth the perceived benefit, and the homework has simply not yet been done for Japan to renounce the pacifism clause of its constitution.

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[68] *Constitution Turns 60; Abe Wants Change: Polls Find Public Split, Protective of Article 9*, JAPAN TIMES, May 4, 2007, http://search.japantimes.co.jp/cgi-bin/nn20070504a1.html (last visited Nov. 10, 2007).

[69] *Drawing Yasukuni's Sting*, ECONOMIST, Aug. 19, 2006, at 10.