# Jus ad Bellum Implications of Japan's New National Security Laws

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Far-reaching revisions to Japan's national security laws became effective at the end of March 2016. Part of the government's efforts to « reinterpret » Japan's war-renouncing Constitution, the revised laws authorize military action that would previously have been unconstitutional. The move has been severely criticized within Japan as being a circumvention and violation of the Constitution, but there has been far less scrutiny of the international law implications of the changes.

The war-renouncing provision of the Constitution ensured compliance with the *jus ad bellum* regime, and indeed Japan has not engaged in a use of force since World War II (*jus ad bellum* is the regime of international law that governs the use of force – it essentially prohibits all use of force against other states, with two exceptions, namely the exercise of the right of individual or collective self-defense, and collective security operations authorized by the U.N. Security Council). But with the purported « reinterpretation » and revised laws – which the Prime Minister has said would permit Japan to engage in minesweeping in the Straits of Hormuz or use force to defend disputed islands from foreign « infringements » – Japan has an unstable and ambiguous new domestic law regime that could potentially authorize action that would violate international law.

By way of background, Article 9 of Japan's Constitution provides, in part, that the Japanese people « forever renounce war as a sovereign right of the nation and the threat or use of force in the settlement of international disputes. » It was initially drafted by a small group of Americans during the occupation, and they incorporated language and concepts from the Kellogg-Briand Pact of 1928, and Article 2(4) of the U.N. Charter that had been concluded just months earlier. Thus, Article 9 incorporated concepts and language from the *jus ad bellum* regime for the purpose of imposing constitutional constraints that were greater than those imposed by international law, and waiving certain rights enjoyed by states under international law. While drafted by Americans, it was embraced by the government and then the public, such that it became a powerful constitutive norm, helping to shape Japan's post-war national identity. (For the full history, see Robinson and Moore's book *Partners for Democracy*; for a shorter account and analysis, see my law review article « Binding the Dogs of War: Japan and the Constitutionalizing of *Jus ad Bellum*« ).

Soon after the return of full sovereignty to Japan in 1952, the government interpreted this first clause of Article 9 as meaning that Japan was entitled to use the minimum force necessary for individual self-defense in response to an armed attack on Japan itself. It also interpreted it as meaning that Japan was denied the right to use force in the exercise of any right of collective self-defense, or to engage in collective security operations authorized by the U.N. Security Council. These were understood to be the « sovereign rights of the

nation » under international law that were waived by Japan as a matter of constitutional law.

All branches of government have consistently adhered to this interpretation ever since. Factions within the LDP have for decades wanted to amend Article 9, but for complex reasons relating to the constellation of political forces both within the LDP and between it and the various opposition parties, it has never been able to do so. Prime Minister Abe similarly sought to amend Article 9, and initially tried to first amend the amending formula itself, but the public and political opposition stymied these efforts. In 2014, frustrated in its efforts to formally amend Article 9,the Abe government circumvented the formal amendment procedure and purported to « reinterpret » the provision. It did so by issuing a Cabinet Decision that articulated significant shifts in the national defense policy, and asserted that such changes would be deemed constitutional pursuant to a new understanding of Article 9.

In the summer of 2015 the government submitted two bills to the Diet that implemented these changes to policy. They effected revisions to ten existing national security laws and established one new law (a document containing the revisions and new law, can be found here, while a very brief summary of the key changes can be found in a document here (both in Japanese)).

This process, which circumvented the formal constitutional amendment procedure, as well as the substance of the « reinterpretation » and subsequent legislation, has been condemned within Japan as being unconstitutional – by constitutional scholars, former Directors of the Cabinet Legislation Bureau, a former Supreme Court Judge, and tens of thousands of protesters in the street (for more on this, see this essay in JURIST). But leaving those issues aside, several of the changes also raise international law issues, which have been subject to far less scrutiny within Japan, and have gone virtually unnoticed outside of Japan.

One such change is to authorize the use of force in response to « an infringement that does not amount to an armed attack. » This is a potentially radical change to the domestic law threshold for use of force in self-defense. The traditional interpretation of Article 9 as permitting Japan to use force in the exercise of individual self-defense has consistently and explicitly defined a direct armed attack upon Japan (actual or imminent) as the condition precedent for exercising the right. The « reinterpretation » authorizes the use of force in response to « infringements » that do not amount to an armed attack, such as « unlawful » foreign incursions into territory surrounding « remote islands ».

This change has been implemented through revisions made to a series of inter-related provisions in a number of different national security laws, most significantly the *Self-Defense Force Law*, the re-named*Response toSituations ofImportant Influence Law*, and the *Response to Situations of Armed Attack and Existential Threats Law (the new formulation for collective self-defense, discussed below, for example, is implemented in Art. 2(4) of the Response to Situations of Armed Attack and Existential Threats Law, and in Art. 76 of the Self-Defense Force Law, among others)*. It is also reflected in some less remarked Cabinet Orders (such as the *Government Response to Unlawful Landing of Armed Groups on Remote Islands*,Cabinet Order of May 14, 2015).

Without getting too deeply into the details of these provisions, however, the key point is that the overall effect of the changes would appear to lower the threshold for the use of force, as that term is understood in Article 2(4) of the U.N. Charter, below the level of

« armed attack » that is the required pre-condition for the justified use of force in self-defense, pursuant to both Article 51 of the U.N. Charter and customary international law. In short, the change raises the concern that in some situations the government of Japan could now use force in accordance with its « reinterpretation » of the Constitution and its revised legislation, in a manner that would constitute a violation of the prohibition against the use of force in international law.

A second change is the elimination of the long-standing interpretation of Article 9 as prohibiting the use of force for purposes of collective self-defense. This change has been widely viewed within Japan as being impossible to square with the long-standing understanding of Article 9. But while unconstitutional, given that a use of force for purposes of collective self-defense is explicitly permitted under Article 51 of the U.N. Charter, this change should not be expected to raise any international law issues.

The problem is that the government did not simply incorporate the international law concept of collective self-defense. In order to mollify its coalition partner, the government introduced language that would ostensibly further limit the conditions under which Japan could engage in collective self-defense. But while purporting to narrow the scope of the right, this clause of the Cabinet Decision itself created considerable ambiguity and uncertainty. Depending on how it is interpreted this clause of the « reinterpretation » may again lower the threshold for the use of force below that required by the *jus ad bellum* regime.

The formulation adopted, in both the Cabinet Decision and the implementing provisions of the revised*Self-Defense Force Law* and the *Response to Armed Attack and Existential Threat Law* (among others), suggests that Japan may use « the minimum force necessary » when « an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn [the] people’s right to life, liberty and pursuit of happiness. » On one possible interpretation this somewhat collapses the distinction between individual and collective self-defense, in that Japan would only be permitted to exercise the right of self-defense if the armed attack on another country also constituted an immediate existential threat to Japan. That should create no obvious international law issues. But the problem is that this is not how the government itself appears to understand the clause.

In discussing the operation and scope of the new right of collective self-defense, Prime Minister Abe and Defense Minister Nakatani have both made comments about the possibility of Japan conducting mine-sweeping operations in the Straits of Hormuz if it were mined by Iran. Taking the statements at face value, that the authority relied upon for such action would be the right of collective self-defense as defined (rather than on other international law principles that might authorize the clearing mines from international straits), the comments are revealing about the government’s interpretation of its unique definition of collective self-defense.

First, Abe’s comments suggest that the armed attack on a country in close relations with Japan may be uncoupled from the threat to Japan’s survival and the people’s rights to the pursuit of happiness, such that each is a separate trigger for exercising the right of collective self-defense. In his several public comments Abe has made no reference to how Iran’s mining the straits of Hormuz might constitute an armed attack on another country (far less one in a close relationship with Japan), but has instead asserted that the justification for the exercise of collective self-defense would simply be the threat to the livelihood of the Japanese people posed by such a blockade – a threat to the « people’s right to life, liberty,

and the pursuit of happiness » in the language of the clause.

This not only uncouples the exercise of collective self-defense from an armed attack on another country, but even from a threat to the survival of Japan, and rather conditions it solely upon a threat to the livelihood of the people of Japan – however, that might be measured or defined. And since the contemplated minesweeping is justified as an exercise of self-defense, it is presumably understood as itself constituting a use of force, conducted in the territorial waters of Iran. If this is how the Japanese government understands its own definition of collective self-defense, it suggests that it may consider itself entitled to use force for « infringements that do not amount to an armed attack », consistent with its new position on the exercise of individual self-defense.

There are other changes reflected in the « reinterpretation » and in the revised legislation that similarly raise potential questions about compliance with international law, which there is no room to discuss here. The risk that such changes could permit unlawful action will depend on how the new legislation is interpreted and implemented in practice, as is true of the two examples discussed above. But the key point is that while the Japanese Constitution previously helped ensure compliance with the *jus ad bellum* regime, and indeed was one of the few constitutional systems that imposed limits on the international use of force, the « reinterpretation » and revised laws have created an unstable and ambiguous regime that could actually provide domestic legal authority for action that would violate international law. What is more, with the floodgates now opened on constitutional « reinterpretation » by unilateral executive fiat, there is no telling how long it will be before these changes are themselves again revised, further relaxing the domestic legal constraints on internationally unlawful action.

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