

THE DEMILITARIZATION OF PALESTINE: LESSONS FROM THE JAPANESE EXPERIENCE

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I. INTRODUCTION

Although there are few areas of agreement regarding the ultimate resolution of the Israeli-Palestinian conflict, all but the most extreme viewpoints are in accord that a two-state solution will be a necessary element.¹ However, many unresolved issues surround the nature and make-up of a Palestinian “state.” Specifically, critics wonder how a Palestinian entity capable of being described as a sovereign state can exist beside Israel without posing an unacceptable threat to either Israelis or the entire Middle East.

The idea of a demilitarized yet sovereign Palestinian entity existing alongside the Jewish state continues to be the focal point of consensus in recent negotiations. For example, Ariel Sharon hinted at the possibility of a demilitarized Palestinian state as a solution toward an “end-of-conflict” commitment during his successful campaign for Prime Minister.² In the context of the Roadmap solution, Sharon noted in his speech at the Aqaba Summit meeting that “Israel . . . has lent its strong support for President [George] Bush’s vision . . . of two states - Israel and a Palestinian state - living side by side in peace and security.”³

One of Israel’s reservations to the Roadmap and, consequently,

¹ The Roadmap solution proposed by the quartet of the United States, Russia, the European Union (EU), and the United Nations (UN) was formally named “A Performance-Based Roadmap To A Permanent *Two-State* Solution To The Israeli-Palestinian Conflict” (emphasis added), available at <http://www.un.org/media/main/roadmap122002.html> (last visited Feb. 16, 2005). Far earlier, the General Assembly’s Resolution on the Future Government of Palestine (Nov. 29, 1947) called for “Independent Arab and Jewish States and the Special International Regime for the City of Jerusalem.”

² Gerald M. Steinberg, *The New Diplomatic Agenda*, JERUSALEM POST, Feb. 7, 2001, News, at 2.

³ Ariel Sharon, Statement after the Aqaba Summit Meeting (June 4, 2003), at <http://www.mfa.gov.il/mfa/go.asp?MFAH0nfv0> (last visited Feb. 14, 2005).

Palestinian statehood, was that the state be demilitarized, with only a police force for internal security.⁴ Israel further stipulated that Palestine be prohibited from forming alliances with its Arab neighbors.⁵ In addition, Israel demanded complete control of Palestinian airspace.⁶ Thus, Israel conditioned acceptance of a Palestinian state as a “fully demilitarized [Palestine] with no military forces, but only with police and internal security forces of limited scope and armaments.”⁷

Many leading Palestinians support such an arrangement by which Palestinian forces will, if not “go barefoot and in bathing suits,” at least not constitute a threat to the political independence or territorial sovereignty of Israel.⁸ Although not explicitly part of the Palestinian negotiating position, Yasser Arafat implicitly recognized that part of any Palestinian state is to be demilitarized.⁹ Explicitly, the Palestinians agreed in the context of the Oslo Accords that “no other armed forces (except Israeli) shall be established or operate in the West Bank and the Gaza Strip.”¹⁰ Also noteworthy is the fact that the independently

⁴ Herb Keinon, *PM Offers Goodwill Gesture to Abbas*, JERUSALEM POST, Apr. 28, 2003, News, at 1.

⁵ *Id.*

⁶ *Id.* See also full text of the Israel’s Roadmap Reservations, *available at* <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=297230> (last visited Jan. 31, 2005):

[T]he character of the provisional Palestinian state will be determined through negotiations between the Palestinian Authority and Israel. The provisional state will have provisional borders and certain aspects of sovereignty, be fully demilitarized with no military forces, but only with police and internal security forces of limited scope and armaments, be without the authority to undertake defense alliances or military cooperation, and Israeli control over the entry and exit of all persons and cargo, as well as of its air space and electromagnetic spectrum.

⁷ Prime Minister’s Bureau, Statement in The Roadmap: Primary Themes of Israel’s Remarks, *in* Israel Government Press Office (May 25, 2003), *at* <http://www.likud.nl/ref31.html> (last visited Jan. 31, 2005).

⁸ Carol Cook, *A New Task for the Peace Movement: Beyond Talks with the PLO*, JERUSALEM POST, Apr. 9, 1989, Op-Ed (quoting Abu-Rahme); *see also Arafat Aide Proposes Demilitarized State*, BBC NEWS ONLINE, Jan. 13, 2002 (The demilitarized position has been adopted by Sari Nusseibeh, the top Palestinian official in East Jerusalem), *available at* http://news.bbc.co.uk/1/low/world/middle_east/1758116.stm (last visited Feb. 14, 2005).

⁹ Valerie Yorke, *Palestinian Self-Determination and Israel’s Security*, 8 J. PALESTINE STUD. 3, 5 (1979).

¹⁰ The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-Palestine, art. XIV, para. 3, *available at* <http://www.knesset.gov.il/pro>

negotiated Geneva Accords (Accords) contemplate a demilitarized state in Article 5.3.¹¹ In general, the Accords call for a non-militarized state in Palestine with weapons limited to an agreed upon list to be negotiated at a later point.

Fortunately for both Israelis and Palestinians, the idea of a demilitarized state is neither unique nor altogether uncommon in either international relations or international law. Unfortunately, the idea has never been thoroughly applied to the Israeli-Palestinian context via an in-depth study of precedent. One of the most prominent examples, with a rich background of legal and political analysis, concerns the demilitarization of Japan following its defeat in World War II.

cess/docs/heskemb_eng.htm (last visited Feb. 1, 2005).

¹¹ Geneva Accord, Draft Permanent Status Agreement, Oct. 2003, Isr.-Palestine, art. 5, ¶ 3, *available at* <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=351461> (last visited Feb.14, 2005):

Defense Characteristics of the Palestinian State

- i. No armed forces, other than as specified in this Agreement, will be deployed or stationed in Palestine.
- ii. Palestine shall be a non-militarized state, with a strong security force. Accordingly, the limitations on the weapons that may be purchased, owned, or used by the Palestinian Security Force (PSF) or manufactured in Palestine shall be specified in Annex X. Any proposed changes to Annex X shall be considered by a trilateral committee composed of the two Parties and the MF. If no agreement is reached in the trilateral committee, the IVG may make its own recommendations.
 - a. No individuals or organizations in Palestine other than the PSF and the organs of the IVG, including the MF, may purchase, possess, carry or use weapons except as provided by law.
- iii. The PSF shall:
 - a. Maintain border control;
 - b. Maintain law-and-order and perform police functions;
 - c. Perform intelligence and security functions;
 - d. Prevent terrorism;
 - e. Conduct rescue and emergency missions; and
 - f. Supplement essential community services when necessary.
- iv. The MF shall monitor and verify compliance with this clause.

This article will explore the lessons learned from the demilitarization of Japan and show how to apply these lessons toward the creation of a demilitarized Palestinian state, i.e. a state which exists in harmony with its Jewish and Arab neighbors and in conformity with international law. This central question of the article is: *how does the Japanese experience either support or undermine the Israeli desire to confine the Palestinian state to demilitarization consistent with international law?* Also, Israelis and Palestinians must reconcile areas where international law places limits on how far the Palestinian state can bind itself to demilitarization, and how related security goals can be accomplished using other means.

The Japanese experience adequately addresses the most powerful and fundamental legal arguments against a demilitarized state – that such an entity violates *jus cogen* norms¹² regarding a state's inherent right to self-defense and contravenes international prohibitions against the imposition of legal rules on occupied peoples (“non-imposition norms”). However, this example is a double-edged sword; the Japanese experience also shows that a state's unbridgeable right to collective self-defense, which is significantly unaltered by demilitarization obligations, poses troubling legal barriers for Israel's security goals. Where the Japanese experience leaves areas unaddressed, this article proposes legal solutions to mitigate Israeli and Palestinian security needs. Of course, the Japanese experience, and the history of demilitarization in general, cannot answer all the legal questions which surround such a regime. Nevertheless, the transformation of militaristic Japan into both a pillar of stability in Asia and a leader in the global movement against nuclear weapons constitutes the most powerful, yet non-legal argument for the inclusion of such a clause in any two-state solution.

A. Israel's Security Goals

Israel's desire for a demilitarized Palestinian entity is a function of its geo-strategic position in relation to the rest of the Arab world. Many Israelis believe that the armistice lines of 1967, standing alone, are indefensible and cannot serve as a viable border.¹³ The 1967 lines run through densely populated areas, neighboring fields and near militarily vulnerable areas in Israel, including the City of Jerusalem.¹⁴

¹² See discussion *infra* note 26.

¹³ One prominent supporter of this position is Benjamin Netanyahu. See Benjamin Netanyahu, *A Limited Palestinian State*, WASH. POST, June 20, 2003, Editorial, at A25.

¹⁴ Yorke, *supra* note 9, at 6.

Thus, the key for Israel's security is to interpose enough military separation between itself and any significant, hostile force to allow sufficient time to mobilize Israel's reserve citizen army.¹⁵ This is especially relevant when looking westward across the West Bank where a quick Arab strike can sever Israel at its narrowest point.¹⁶ Furthermore, the geographic proximity between Israel and Palestine makes the presence of artillery pieces in the previously occupied territories deeply troubling.¹⁷ As a result, artillery pieces over 75 millimeter, which would be in range of greater Israel, pose a strategic and humanitarian threat to large pockets of Israeli citizens.¹⁸

In addition, the West Bank's proximity to the Tel Aviv civilian/military airport makes the presence of anti-aircraft weaponry especially problematic for Israelis.¹⁹ Consequently, Israel insists on control of Palestinian airspace.²⁰ Finally and most importantly, mainstream Israelis believe that a Palestinian state must not be allowed to forge military arrangements with its Arab neighbors.²¹

B. *Palestinian Security Goals*

The discourse around a future demilitarized Palestinian state often has overlooked the minimal force needs of the future government in order to maintain general notions of law and order. Moreover, Palestinians believe that the country has the right to self-defense and the right to collective security in the form of a third or multilateral

¹⁵ This was the position of the Shtauber Document, a policy paper created by the IDF for security arrangements with Syria in the Golan. See Uri Sagie, *The Israeli-Syrian Dialogue: A One-Way Ticket to Peace*, Baker Institute Working Papers (Oct. 1999) (summarizing the Shtauber Document), available at http://www.bakerinstitute.org/Pubs/sagie_03.html (last visited Feb. 14, 2005); see also Yorke, *supra* note 9, at 7.

¹⁶ Lamia Lahoud, *PA negotiators head again to the US*, JERUSALEM POST, Sept. 25, 2000, News, at 2 (This assessment has led Israel often to insist on a military presence in the Jordan valley). If an Arab army were to sever Israel, it would cause a prolonged war against the Israeli policy of limited duration engagements. Cf. Lt. Gen. Yizhak Rabin, *After the Gulf War: Israeli Defense and its Security Policy*, Speech at the Begin-Sadat Center for Strategic Studies Bar-Ilan University (June 10, 1991), in BESA SECURITY & POL'Y STUD. No. 25, Jan. 1996, available at http://www.biu.ac.il/Besa/book_s/25/after.html; see also Ahmad S. Khalidi, *Security in a Final Middle East Settlement: Some Components of Palestinian National Security*, 71 INT'L AFF. 1, 6 (1995).

¹⁷ Yorke, *supra* note 9, at 15.

¹⁸ *Id.*

¹⁹ Cf. *id.* at 23.

²⁰ Israel's Roadmap Reservations, *supra* note 6.

²¹ This position was echoed in Israel's Roadmap Reservations. See generally *id.* See also Netanyahu, *supra* note 13.

party which can protect Palestine from external threats by Israel or its Arab neighbors.²² This type of collective protection is referred to as “external reinforcement.”²³ Specifically, two security concerns dominate Palestinian thought: 1) the ability to protect itself from external threats, whether Israel or other Arab nations, in the form of external reinforcement or the minimum number of weapons to constitute a credible Palestinian army; and 2) the need for sufficient weapons for internal policing to combat inter-factional disputes and prevent armed raids by extremists across the border with Israel.²⁴

A comparison of the Palestinian and Israeli positions highlights two points of contention. The first is the inevitable dispute over what amount and what type of weapons are suitable for Palestine’s internal security needs. The second point is structural, and concerns Palestinian calls for external reinforcement of any future peace agreement. Israel will not tolerate external reinforcement in the form of military alliances between Palestine and its Arab neighbors. Thus, an effective demilitarization regime must address these two points of contention: 1) practical limitations on armaments for internal policing; and 2) an acceptable form of external reinforcement in the form of collective defense.

C. The International Law Critique of a Demilitarized Palestinian State

Skeptics of demilitarization have identified numerous potential arguments to the effect that a treaty between the Palestinian Authority and Israel – or any agreement which establishes a demilitarized Palestinian state – neither binds Palestine nor promotes Israeli or Palestinian security interests. For example, Louis Beres and Zalman Shoval,²⁵ in a series of articles, offer a number of arguments against demilitarization. Their most fundamental contentions fall into two broad categories.

The first category consists of violations of *jus cogen* norms.²⁶

²² See generally Khalidi, *supra* note 16, at 4.

²³ *Id.*

²⁴ Yorke, *supra* note 9, at 17-18.

²⁵ See generally Louis R. Beres & Zalman Shoval, *Why a Demilitarized Palestinian State Would Not Remain Demilitarized: A View Under International Law*, 11 TEMP. INT’L & COMP. L.J. 347, 351 (1997).

²⁶ *Id.* Such a provision would violate Article 53 of the Vienna Convention, which states:

[A] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a

Beres and Shoval fear that: 1) Palestine might claim a violation of the *jus cogen* norm of self-defense because demilitarization is in tension with the right as understood in international law;²⁷ and 2) Palestine cannot be barred from inviting foreign, Arabic armies into its territory without violating international law, specifically the right to collective self-defense under the UN Charter.²⁸

The second category generally consists of international norms against the imposition of legal rules on an occupied population against their will (“non-imposition norms”). Here, Beres and Shoval contend that: 1) Palestine might claim duress in the formation of the treaty due to Israel’s previous use of force against the occupied territories;²⁹ and 2) Palestinians might contend that the laws of war (or humanitarian law), particularly the 1907 Hague Convention³⁰ and the Geneva

norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

1155 U.N.T.S. 332 (1969). For an in-depth discussion of what constitutes a *jus cogen* norm, see *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).

²⁷ See generally Beres & Shoval, *supra* note 25, at 351.

²⁸ Louis R. Beres & Zalman Shoval, *On Demilitarizing a Palestinian “Entity” and the Golan Heights: An International Law Perspective*, 28 VAND. J. TRANSNAT’L L. 959, 965 (1995). Palestine would be acting under Article 51 of the UN Charter, which states:

[N]othing in the present Charter shall impair the *inherent right of individual or collective self-defence* if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER, art. 51 (emphasis added).

²⁹ See generally Beres & Shoval, *supra* note 25, at 351. Duress, via the use of force, would make a treaty void under Article 52 of the Vienna Convention, which states: “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.” 1155 U.N.T.S. 332 (1969).

³⁰ Article 43 of the 1907 Hague Convention states:

[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Convention relative to the Protection of Civilian Persons in Time of War,³¹ forbid the imposition of demilitarization on an occupied population.³²

Hague Convention IV: Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. 539, 1 Bevans 631 (1907).

³¹ Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War imposes similar obligations on the occupying power with regard to imposing legal requirements.

[T]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill [sic] its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 2003 WL 22308861 (1949).

³² There are additional arguments based on potential flaws in the treaty process which stem from the relationship between Israel, a state under international law, and Palestine, an area under Israeli occupation. In this category are two highly related claims that 1) a Palestinian state, as an autonomous entity after statehood is bestowed, would not be bound by any pre-independence agreement made by the PA; and 2) because treaties can bind only states an agreement between the PA and any other actor would have no real authority. Beres & Shoval, *supra* note 25, at 349-50. Furthermore, there are arguments analogous to claims which could be seen in a domestic contract dispute. In this category are the claims that 1) Palestine could withdraw from the treaty because of anything it regards as a material breach of the end-of-conflict agreement; and 2) Palestine could point toward a fundamental change of circumstances (or *rebus sic stantibus* as it is commonly referred to in international law) to invalidate the treaty. For example, Palestine could declare itself vulnerable to previously unforeseen dangers, perhaps the forces of another Arab state threatening its border, and lawfully end its codified commitment to remain demilitarized. Beres & Shoval, *supra* note 25, at 350-51; Louis R. Beres, *A State that Wouldn't Stay Demilitarized*, JERUSALEM POST, Apr. 28, 1991, Op. Ed. Due to the fact-specific nature of such a claim and the fact that other precedents better address the issue, this article will not explore what implications the Japanese experience would have on such arguments in the Israel-Palestine context. However, this author believes that neither set of arguments would serve as a significant barrier against demilitarization given numerous other regimes have been created in accommodation with such concerns. For example, international law has begun to recognize contracts between states and non-state actors and the Vienna Convention on the Law of Treaties does not prejudice such contracts. In addition, *rebus sic stantibus*

D. Why Study Japan?

Japan serves as an important precedent for a future demilitarized Palestinian state because the country as a whole was demilitarized, rather than a specific area over a specific time, as is characteristic of most demilitarization plans. Historically, most demilitarized regimes are created for one of four reasons: 1) to secure sanctuary for noncombatants; 2) to provide a place for negotiations; 3) to maintain an interim solution over contending claims to sovereignty; and 4) to reduce tensions along a demarcation line.³³ Plans for Palestinian demilitarization are similar to the Japanese experience in that the term generally refers to demilitarization of the entire Palestinian state for an indefinite period of time after a two-state solution is negotiated. For example, Security Council Resolution 242, which calls for “guaranteeing the territorial inviolability and political independence of every state in the area, through measures including the establishment of demilitarized zones,” implies demilitarization in the context of a wider, permanent solution rather than a temporary status quo, characteristic of most demilitarized regimes.³⁴ Therefore, the all-encompassing nature of Japanese demilitarization makes the regime more applicable than many of the other demilitarization examples.

Admittedly, the Japanese experience is not wholly transferable to the Israeli-Palestinian conflict. For example, Japan fits into a larger pattern where successful demilitarization regimes involve islands rather than contiguous zones such as “Greater Israel.”³⁵ Although this criticism is valid, Japanese demilitarization has stood firm in the face of ballistic missile proliferation in North Korea and other threats, which have rendered the island distinction artificial.

Finally, some of the applicable legal instruments, such as the

and material breach are characteristic risks inherent in the treaty making process in general and are thus not specific to the Israeli-Palestinian conflict.

³³ Sydney D. Bailey, *Nonmilitary Areas in UN Practice*, 74 AM. J. INT’L L. 499, 502 (1980).

³⁴ S.C. Res. 242, U.N. SCOR, 22d Sess., U.N. Doc. S/8247 (1967). Previous UN resolutions envisioned the more limited form of demilitarization. The Partition Resolution instructed that “[t]he City of Jerusalem shall be demilitarized; neutrality shall be declared and preserved, and no para-military formations, exercises or activities shall be permitted within its borders.” G.A. Res. 181 (III) (1947).

³⁵ Out of the ten remaining demilitarized or neutralized zones in Europe, seven consist of islands or otherwise remote locations. Christer Ahlstrom, *Demilitarized and Neutralized Zones in a European Perspective*, in *AUTONOMY AND DEMILITARIZATION IN INTERNATIONAL LAW: THE ALAND ISLANDS IN A CHANGING EUROPE* 53 (Lauri Hannikainen & Frank Horn eds., 1997).

Vienna Convention on the Law of Treaties³⁶ (Vienna Convention) postdate the creation of the Japanese Constitution and its demilitarization clauses. Therefore, they may not directly apply. However, given that Israel is not a party to the Vienna Convention and, therefore, the Convention is only applicable to Israel as a reflection of customary international law, the importance of the Japanese experience as state practice remains highly relevant.

II. JAPAN

A. *Background of Japanese Demilitarization*

Following the use of two nuclear devices on the Japanese cities of Nagasaki and Hiroshima, the nation surrendered to the Allies on September 2, 1945. Japan's treaty of surrender left "[t]he authority of the Emperor and the Japanese Government to rule the state . . . subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."³⁷ This provision and its broad grant of power to the Allies led to General Douglas MacArthur's role in constructing Article 9 of Japan's post-war Constitution, which enshrines demilitarization into Japanese domestic law.³⁸

From an international perspective, Japan's instrument of surrender explicitly incorporated the Potsdam Agreement between the United States, Russia and Great Britain, which outlined the basic

³⁶ The Vienna Convention itself is non-retroactive. Article 4 states:

[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

1155 U.N.T.S. 332 (1969). Israel is not a party to the Vienna Convention, however much of the treaty is viewed as customary international law. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 130 (1997).

³⁷ Surrender by Japan, Terms between the United States of America and the Other Allied Powers and Japan, Sept. 2, 1945, U.S.-Japan, 59 Stat. 1733, 1945 WL 26994, E.A.S. No. 493 [hereinafter *Surrender by Japan*].

³⁸ This was not MacArthur's first encounter with a demilitarization clause in an area under his military control. The Constitution of the Republic of the Philippines, art. II, § 2 states: "[t]he Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

Allied demands for a full Japanese surrender.³⁹ Specifically, the Potsdam Declaration has two relevant terms regarding Japanese demilitarization: 1) “[t]he Japanese military forces, after being *completely disarmed*, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives;” and more importantly, 2) “Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those [industries] which would enable her to re-arm for war.”⁴⁰

Article 9 represents the domestic implementation of Japan’s external agreement. Article 9 of the Japanese Constitution states as follows:

[a]spir[ing] 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 a means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.⁴¹

The exact source, American or Japanese, of Article 9 is disputed.⁴² General MacArthur and Major General Courtney Whitney, Chief of

³⁹ Many members of the Japanese Commission on the Constitution supported the belief that Japan accepted the Potsdam Agreement in a traditional treaty-making context congruent with norms of international law. JAPAN’S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 62 (John M. Maki trans. ed. 1980) (quoting art. 2 of Law No. 140) [hereinafter COMMISSION ON THE CONSTITUTION]. Japan’s instrument of surrender noted:

[w]e, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United States, China, and Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

Surrender by Japan, *supra* note 37.

⁴⁰ Berlin (Potsdam) Conference, July 17-Aug. 2, 1945, art XXI, Annex II, ¶ 3(b)(9), (11), 3 Bevans 1207, *available at* <http://usa.usembassy.de/etexts/ga450801.pdf> (last visited Feb. 25, 2005).

⁴¹ JAPAN CONST. art. 9, *available at* <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html> (last visited Feb. 16, 2005).

⁴² Matthew J. Gilley, *Japan’s Developing Military Potential Within the Context of its Constitutional Renunciation of War*, 14 EMORY INT’L L. REV. 1681, 1695-96 (2000).

the Occupation's Government Section, both indicated that Article 9 came from Japan's Prime Minister Shidehara to demonstrate his nation's commitment to pacifism; however, (then) Foreign Minister Yoshida disputes this point, insisting that the idea came directly from MacArthur.⁴³ Regardless, the historical record demonstrates that Article 9 was the product of a give-and-take negotiation between the occupation forces and Japanese representatives.⁴⁴

After the war, MacArthur instructed the provisional Japanese government to begin writing a constitution consistent with the Potsdam Declaration.⁴⁵ The initial product, based heavily on Japanese culture and perspective, was rejected by MacArthur whose staff then took up drafting a model.⁴⁶ MacArthur proposed a version of Article 9 which read, "[w]ar as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security."⁴⁷ MacArthur's staff deleted the phrase "preserving its own security" before completing their draft.⁴⁸ MacArthur's revised draft was then sent to "government leaders, private individuals, and ad hoc citizens' groups and opposition parties for suggestions and revisions."⁴⁹

On July 20, 1946, the resulting draft was presented to the Japanese House of Representatives.⁵⁰ A Constitutional Amendment Committee formed to examine and make several changes to the proposed constitution.⁵¹ Bowing to popular support for the document,⁵² the committee ultimately recommended acceptance as amended and the Constitution took effect on May 3, 1947, after ratification by the sitting Japanese legislature.⁵³

⁴³ *Id.*

⁴⁴ Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.- Japan Defense Guidelines*, 32 CORNELL INT'L L.J. 393, 396 (1999).

⁴⁵ Sandra Madsen, *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 549, 554-56 (1993).

⁴⁶ *Id.*

⁴⁷ Edward J.L. Southgate, *From Japan To Afghanistan: The U.S.- Japan Joint Security Relationship, The War on Terror, and the Ignominious End of the Pacifist State?*, 151 U. PA. L. REV. 1599, 1607-08 (2003) (emphasis added).

⁴⁸ *Id.*

⁴⁹ Madsen, *supra* note 45, at 554-56.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Robert B. Funk, *Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions*, 25 CORNELL INT'L L.J. 363, 377 (1992).

⁵³ Madsen, *supra* note 45, at 554-56.

III. NON-IMPOSITION

A. *How the Japanese Experience Addressed Non-Imposition Norms*

The Japanese experience illustrates three possible arguments relating to the non-imposition critique: 1) the Allied powers argument; 2) the Japanese internal argument supporting their Constitution; and 3) the Japanese internal argument against Article 9.

B. *The Allied Argument and Its Similarity with Israeli Policy in the Occupied Territories*

The Allied powers argument, which serves to justify the Allies' important role in shaping the Japanese Constitution, and specifically Article 9, is of great contemporary relevance. There is significant similarity between the Allied argument concerning occupied Japan and the Israeli argument regarding the occupied territories. The post-World War II occupation of Japan claimed to be an exception to the Hague Convention's creation of non-imposition norms because the occupation occurred after the unconditional surrender of a defeated power, the Emperor, who would never return to true (absolute) authority.⁵⁴ Therefore, the Allies invoked the ancient customary international law doctrine of *debellatio*, or subjugation. This doctrine provides that under such circumstances occupiers are free to reshape occupied territory without regard for the prior sovereign or his law.⁵⁵ Using this doctrine and its rationale as a background rule of international law untouched by the Hague Conventions, MacArthur shaped what was to become Article 9.

Debellatio, as applied to Japan, has firm roots in its occupier's common law jurisprudence circa 1945:

[w]here the conquest is made complete – no matter how – the right to govern the acquired territory, follows as an inevitable consequence of the right of acquisition; and the character, form, and power of the government established over such conquered territory, are determined by the . . . laws of the State which acquires it.⁵⁶

⁵⁴ Suzanne Nossel, *Winning the Postwar*, 2003-JUN LEGAL AFF. 18, 19 (2003), available at http://www.legalaffairs.org/issues/May-June-2003/argument_nossel_mayjun03.html. Currently, the Emperor serves only as a ceremonial figure in the Japanese government.

⁵⁵ *Id.* The doctrine is of Roman origin.

⁵⁶ *H.A. Rutledge et al. v. F.B. Fogg, Ex'r of Mrs. S.S.M. Rutledge*, Dec'd, 43 Tenn.

Under American law, *debellatio* applies to a conquered people whose idea of sovereignty has dissolved, while *occupatio bellica* applies to a conquered people who persist and remain legal subjects under the law.⁵⁷ For example, because the United States Constitution recognizes the status of existing Indian tribes, they are deemed *occupatio bellica*. This distinction allowed Chief Justice Marshall, in *Worcester v. Georgia*, to declare tribes as “distinct political communities, having territorial boundaries, within which their authority is exclusive,” as opposed to entities which have lost their legal personality.⁵⁸ Thus, the United States, like contemporary Israel, distinguishes occupied territory based on the existence, destruction or absence of a prior existing sovereign.

Customary international law recognizes three ways to end a hostile situation: 1) the conclusion of a peace treaty; 2) the cessation of hostilities; and 3) the extinction of the belligerent sovereign (*debellatio*).⁵⁹ *Debellatio* remains a doctrine in international law to this day.⁶⁰ The power of the doctrine is immense; *debellatio* transfers full territorial sovereignty to the country moved in to fill the sovereignty gap.⁶¹ A sovereignty gap existed in post-war Japan because the Emperor was never returned to true power.

Scholars evaluate the legitimacy and legality of the occupation regime based on whether the acts of the occupier are motivated by sheer self-interest at the expense of the occupied, rather than by non-imposition norms.⁶² This approach fits with the general purposes behind the law of belligerent occupation: 1) to protect the sovereign

554, 1866 WL 1853, at 2 (1866) (citing HENRY WAGER HALLECK, INTERNATIONAL LAW 775, § 1 (1861)) (holding that the military authority can levy and collect taxes).

⁵⁷ Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 295 (1998), available at <http://www.comparativelaw.org/jour-curr-2.html#intro> (last visited Feb. 14, 2005).

⁵⁸ *Id.* at 295-96 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)).

⁵⁹ Brian F. Havel, *An International Law Institution in Crisis: Rethinking Permanent Neutrality*, 61 OHIO ST. L.J. 167, 173 n.18 (2000), available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/ohslj61&size=2&rot=0&collection=journals&id=179> (last visited Feb. 14, 2005).

⁶⁰ See generally James Ho, *International Law and the Liberation of Iraq*, 8 TEX. REV. L. & POL. 79, 84 (2003) (noting that “[w]hen an indigenous government is completely destroyed, the occupying nation has no choice but to start from scratch. International law recognizes this by granting such occupants full and complete discretion to rebuild the nation.”).

⁶¹ See, e.g., S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany*, 18 HOUS. J. INT'L L. 59, 94-95 (Fall 1995).

⁶² Nossel, *supra* note 54, at 19.

rights of the legitimate government of the occupied territories; and 2) to protect the inhabitants from being exploited for the prosecution of the occupant's war.⁶³ Since the first concern does not apply in the case of *debellatio*, the occupying power is governed by, at the least, "such rules of international law as limit the right of any Government to commit acts which constitute crimes against peace and crimes against humanity."⁶⁴ More progressively, *debellatio* is governed by a prohibition on acts in sheer self-interest.⁶⁵

C. *Debellatio in the West Bank*

The *debellatio* argument fits with the traditional Israeli position regarding the missing reversioner of sovereignty in the occupied territories. Israel argues that the fourth 1949 Geneva Convention is not formally (*de jure*) applicable to the occupied territories, while at the same time stipulating that it is willing to observe the humanitarian provisions of the Convention.⁶⁶ Israel contends that the occupied territories are not areas under "the territory of a High Contracting Party" within the meaning of Article 2 of the Geneva Convention since no state had legitimate control of the area prior to or subsequent to

⁶³ Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 48 (1990).

⁶⁴ *Id.* (quoting Theodor Schweisfurth in *Germany, Occupation After World War II*, 3 ENCYCLOPEDIA OF PUBLIC INT'L L. 191, 196-97 (1982)).

⁶⁵ Nossel, *supra* note 54, at 19.

⁶⁶ Roberts, *supra* note 63, at 62. Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War imposes similar obligations on the occupying power with regard to imposing legal requirements:

[t]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill [sic] its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 64, 75 U.N.T.S. 287.

partition.⁶⁷ Thus, Israel views the West Bank and Gaza as areas without a sovereign yet under the protection of a fundamental core of humanitarian law, much in the same way the Allies perceived Japan at the time of the creation of Article 9 and demilitarization. Under this reading, Israel has laid the groundwork for a *debellatio* argument for imposing a demilitarization requirement on a future Palestinian state. In doing so, Israel has laid the basis for countering the non-imposition argument in a manner fully consistent with past Israeli practice and statements.

American actions in Japan, predicated on a similar rationale as Israeli policy toward the occupied territories, were subject to evaluation along self-interest grounds. Similarly, the absence of a prior sovereign should require the international community to subject Israeli actions to a similar humanitarian litmus test: is the Israeli concept of a demilitarized state a function of sheer self-interest or one of give-and-take reciprocity?⁶⁸

D. Internal Japanese Arguments Supporting Demilitarization

Many scholars feel that the 1949 Geneva Convention, and even the laws of war in general, overrule the Roman doctrine of *debellatio*, by focusing less on notions of sovereignty and more on self-determination.⁶⁹ The difference between the Geneva Conventions and the Hague Regulations reflects this observation.⁷⁰ The latter stress the preservation of the sovereign's status quo, while the former places more emphasis on the protection of inhabitants and their rights under international law.⁷¹

One internal view of Article 9 in Japan, consistent with the above view yet still supportive of demilitarization, narrows the doctrine of *debellatio* as applied to Japan. Since the Allies never sought the complete destruction of the state, but rather that Japan retain its character as a nation, the international law ban on *debellatio* was not

⁶⁷ Roberts, *supra* note 63, at 64.

⁶⁸ Nossel, *supra* note 54, at 19. However, Israel's theory that non-imposition norms do not apply to the occupied territories because the areas lacked a pre-existing sovereign was rejected by the International Court of Justice. Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. General List No. 131, paras. 90-101 (July 9). Although the Court's opinion was advisory, it provides significant weight against the Israeli position.

⁶⁹ Nossel, *supra* note 54, at 20.

⁷⁰ *Id.*

⁷¹ Roberts, *supra* note 63, at 7.

applicable.⁷² In short, the United States never engaged in subjugation; rather, the Allies and Japan negotiated a give-and-take exchange as is common in international law.

This view, which is supported by American officials, largely relies on the existence of reciprocity and notes that the Potsdam Declaration and instruments of Japanese surrender also bound the Allies.⁷³ The Japanese Constitution formed through a process of give-and-take between MacArthur and Japanese officials.⁷⁴ Thus, demilitarization was not imposed per se under international law; it was simply part of a negotiation to end occupation and bring about the formal end to hostilities.

Therefore, the importance of reciprocity emerges as a key concept arising out of the Japanese reconstruction debate.⁷⁵ For example, in the *Sunakawa* case,⁷⁶ the Japanese Supreme Court noted the reciprocity aspect of the Potsdam Declaration, surrender by Japan and substantial guarantees from the Allies, as well as its legitimatizing force in the context of analyzing and upholding the legality of Article 9.⁷⁷ This would also be true in the Israeli-Palestinian context, assuming demilitarization emerges as part of a negotiated two-state solution.

E. The Internal Japanese Argument Applied to Israel-Palestine

The internal Japanese argument would validate an agreement between Israel and the Palestinian Authority, as Palestinians enjoy

⁷² COMMISSION ON THE CONSTITUTION, *supra* note 39.

⁷³ *Id.* As an example of the reciprocity aspect, the institution of the royal family was allowed to continue after surrender. See *Surrender by Japan*, *supra* note at 37 (noting that “[t]he authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.”).

⁷⁴ See *supra* Part II.A-B.

⁷⁵ This observation is not limited to Japan. From 1905 onwards, demilitarization and neutralization came to be viewed as confidence-building measures rather than punitive regimes. In short, demilitarization has evolved from being conceived as an imposed, punitive mechanism. As confidence-building measures, their legitimacy is a function of reciprocity. See generally Ahlstrom, *supra* note 35 at 50 (noting that “[f]or a regime to acquire a truly confidence-building effect, it should be the result of negotiations on a reciprocal basis where no party seeks to acquire a discriminating result.”).

⁷⁶ See discussion *infra* Part IV.A.

⁷⁷ *Sakata v. Japan*, 13 KEISHU 3225 (1976) (partially reproduced, translated and summarized in HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM 710 (1976)) [hereinafter *Sakata*]. The Supreme Court of Japan noted: “[T]o begin with, Article 9, as a result of the defeat of our country and in accordance with the acceptance of the Potsdam Declaration . . .” (Emphasis added).

more diplomatic privileges vis-à-vis Israel than occupied Japanese,⁷⁸ and the two sides can only resolve their dispute through a bargaining process. Furthermore, although Israel used force against Palestinians in the past, Israel lacks the ability simply to impose demilitarization in the same manner as General MacArthur. Thus, it is likely that the future demilitarized Palestinian state would be the result of a long, complicated negotiation. In comparison, Palestinians stand ready to judge demilitarization by the same criteria. Among Palestinians who favor demilitarization, supporters insist that it should be “voluntary”; demilitarization imposed by Israel would imply that Palestinians were being punished for their use of violence to resist Israeli occupation. This implication would be intolerable to them.⁷⁹

F. A Caveat: Japanese Internal Argument Renouncing Article 9

Not all Japanese agree that Article 9 is legitimate under international law. A minority view of the internal Japanese argument, based on a different reading of occupation that some Japanese historians perpetuate, holds that American actions were no different from the (presumptively) outlawed doctrine of *debellatio*, as they collectively represented the complete defeat and destruction of the Japanese state.⁸⁰ Proponents of this view note that under occupation Japan had no sovereignty, no diplomatic relations, and no Japanese citizens or officials were allowed to travel overseas until the occupation was near its end.⁸¹ Furthermore, some Japanese legislators even claim that Article 9 was imposed *exclusively* by General Douglas MacArthur and the Supreme Command for the Allied Powers absent negotiation and reciprocity.⁸² They note that two separate Japanese cabinets could not draft a constitution to satisfy MacArthur’s demands and, consequently, end occupation.⁸³ Under this view, the Japanese Constitution emerged in disregard of international law and its norms against non-imposition.

However, proponents of this position do not take the additional

⁷⁸ Japan had no diplomatic relations and no Japanese citizens or officials were allowed to travel overseas until the occupation was nearly concluded. See, e.g., Colonel Fred L. Borch III, *Embracing Defeat: Japan in the Wake of World War II*, 166 MIL. L. REV. 206 (2000).

⁷⁹ Naomi Weinberger, *The Palestinian National Security Debate*, 3 J. PALESTINE STUD. 16, 27 (1995).

⁸⁰ COMMISSION ON THE CONSTITUTION, *supra* note 39.

⁸¹ Borch, *supra* note 78, at 206.

⁸² Southgate, *supra* note 47, at 1602.

⁸³ *Id.* at 1607.

step of proposing that Japan renounce its international duties and begin a remilitarization campaign. Even the staunchest advocates of this view note that Article 9 remains valid under Japan's domestic laws.⁸⁴ Therefore, although a majority of Japan's Commission on the Constitution, a body created by the government to study the document, believed that the "imposed" Constitution should be altered to permit explicitly defensive armament, Article 9 has remained unchanged based on the difficulty of making amendments.⁸⁵

G. *Final Lessons for Non-Imposition from Japan*

Regardless of the rhetorical lessons one can gather from the Japanese experience to shape arguments for demilitarization, two practical lessons emerge. First, some individuals undoubtedly will argue that demilitarization is illegally imposed under international law, while many others will judge demilitarization through the lens of reciprocity. Second, the aforementioned group of critics widely can be neutralized, at least practically if not wholly legally, by relying on the domestication of the demilitarization clause into a constitutional structure with limited amendment potential. Japan solved the non-imposition dilemma by making the Japanese Constitution the "supreme law of the nation" with significant hurdles toward amendment.⁸⁶ Thus, those who believe Japan suffered under an illegal *debellatio* regime have not succeeded in nullifying Article 9, because non-imposition norms do not act domestically and cannot render an instrument illegal under domestic Japanese law.

IV. JUS COGENS

A. *The Relationship Between Demilitarization and Self-Defense*

The following section analyzes Beres and Shoval's argument that a demilitarized state violates international law by depriving Palestine of its *jus cogens* rights to self and collective defense. In short, the Japanese experience with demilitarization illustrates that the right to

⁸⁴ COMMISSION ON THE CONSTITUTION, *supra* note 39.

⁸⁵ Kempo Chosakai, Commission on the Constitution, KODANSHA ENCYCLOPEDIA OF JAPAN (on file with author). The Commission was created by an act of the Diet in 1956 to investigate the origins, operation, and possible amendment of the 1947 Constitution of Japan.

⁸⁶ Southgate, *supra* note 47, at 1602. Article 96 provides that amendments to the Constitution may only be made by a two-thirds affirmative vote in both houses of the Diet and with ratification by a majority of the electorate.

self-defense is conceptually and legally distinct from the right to have a standing military, or the right to militarization. This observation is important because it negates the argument that the right to maintain a military force is a *jus cogen* norm derived from the inherent right of self-defense under the UN Charter.⁸⁷ Much of the literature regarding a hypothetical demilitarized Palestinian state mistakenly equates militarization with self-defense.⁸⁸

The most explicit argument for conceptual de-linkage between militarization and self-defense is derived from Japan's post-surrender and post-Potsdam treaty obligations with the international community. Both treaty obligations explicitly allow for self-defense, yet they were part of the peace process with the United States, the very state which helped craft Article 9. Thus, the nation primarily responsible for demilitarization was also the leading supporter of Japanese self and collective defense. This shows a strong lack of both *opinio juris*⁸⁹ and state practice for tying self-defense to demilitarization.

For example, Article 5 of the 1951 Treaty of Peace with Japan is especially relevant. It provides in part:

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations:

....

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter

....

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.⁹⁰

Despite the explicit prohibition of Article 9, the Supreme Court of Japan held that Japan retains the natural law right of self-defense.⁹¹ In

⁸⁷ Beres & Shoval, *supra* note 25, at 351-52.

⁸⁸ See generally *id.*

⁸⁹ *Opinio juris* refers to the state's belief that a norm is a legal obligation.

⁹⁰ Treaty of Peace with Japan, Sept. 8, 1951, U.S.-Japan, 3 U.S.T. 3169.

⁹¹ Lawrence W. Beer, *Peace in Theory and Practice Under Article 9 of Japan's Constitution*, 81 MARQ. L. REV. 815, 821 (1998) (noting *Japan v. Sakata*, 13 KEISHŪ

the *Sunakawa* case, local citizens objecting to the expansion of a U.S. military base, which was established pursuant to the 1951 Security Treaty, were arrested for trespassing on the base but later acquitted on the grounds that the law under which the arrests were made was void.⁹² The lower court held that the treaty was unconstitutional because it was in contravention of Article 9.⁹³ The Supreme Court reversed the acquittal on appeal based on the rationale that self-defense was not denied by Article 9.⁹⁴

Noting that the original, rejected draft of Article 9 provided that, “Japan renounces [war] as an instrumentality for settling its disputes and *even for preserving its own security*,” the Court reasoned that preservation of security and self-defense are distinct concepts from the maintenance of war potential.⁹⁵ Thus, such potential can be banned without infringing on the natural or inherent right of self-defense.⁹⁶ The Court further stated:

[t]hus, the said article (Article 9) renounces what is termed therein war and prohibits the maintenance of what is termed war potential; naturally, the above in no way denies the inherent right of self-defense, which our country

3225 (Sup. Ct., G.B., Dec. 16, 1959) [hereinafter *Japan v. Sakata*], *translated in* JOHN M. MAKI, *COURT & CONSTITUTION IN JAPAN* 298 (1964)).

⁹² Southgate, *supra* note 47, at 1625-26. The trespass case would have been dismissed if the Security Treaty was invalid because the treaty itself made trespass on the base a crime. Under Japanese law, the treaty would be invalid if found in violation of Article 9.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1609. This point is strengthened when one notes what was deleted from Colonel Charles L. Kades and Commander Alfred R. Hussey, Jr.’s preliminary draft to General MacArthur. The rejected draft read:

The people of Japan, desiring peace for all time and fully conscious of the high ideals controlling human relationship now stirring mankind, have determined to rely for their security and survival upon the justice and good faith of the peace-loving peoples of the world. Japan desires to occupy an honored place in an international society designed and dedicated to the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance, for all time from the earth. To these high principles and purposes Japan pledges its national honor, determined will and full resources.

Dale M. Hellegers, *We, the Japanese People: World War II and the Origins of the Japanese Constitution*, vol. II, 579 (2001), *reprinted in* Draft of the Clause on the Renunciation of War by Colonel Charles L. Kades and Commander Alfred R. Hussey, Jr. (Michigan: Hussey Papers, 24-A).

possesses as a sovereign nation. The pacifism of our Constitution has never provided for either defenselessness or nonresistance.⁹⁷

The drafting history of Article 9 supports the Court's reasoning. Even MacArthur eventually adopted this position and noted that "Japan as a sovereign nation possessed the inherent right of self-preservation."⁹⁸ This history illustrates the conceptual distinction between the notion of sovereignty, which yields the right to self-defense, and the right to maintain war potential. Subsequently, Japan's Self-Defense Forces (SDF) was created in 1954 on the understanding that it will not undertake activities beyond the defense of undisputed Japanese territory.⁹⁹

However, demilitarization, even as interpreted by the Japanese Supreme Court, has led to tangible restrictions on the Japanese military. A similar Israeli step would be quite useful towards meeting Israeli security goals, especially those of instituting a cap on the acquisition of military equipment by Palestine. Furthermore, demilitarization limits the scope of the Japanese military beyond the mere possession of military equipment. For example, it is impermissible under Japanese law to send SDF troops into a foreign territory for a preventive attack.¹⁰⁰ This limitation is important because the doctrine of preventive attack could serve as an impetus behind Palestinian remilitarization, were Palestinians to argue the slightest Israeli provocation was the sign of an imminent attack. Hence, Article 9, and demilitarization in general, have produced practical limitations outside those restrictions that all states are bound to protect as principles in the Kellogg-Briand Pact and general international law under Article 2(4) of the UN Charter.¹⁰¹

⁹⁷ Sakata, *supra* note 77.

⁹⁸ Southgate, *supra* note 47, at 1612. This interpretation is consistent with Article 9's conceptual heritage with the Kellogg-Briand Pact which, similarly, made no explicit mention of a right to self-defense but was understood by all parties not to restrict acts of legitimate self-defense. John O. Haley, *Waging War: Japan's Constitutional Constraints* 8 (2003), available at http://law.wustl.edu/Academics/Faculty/Workingpapers/WagingWar10_03.pdf (last visited Feb. 14, 2005).

⁹⁹ Lori Fisler Damrosch, *Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L L. 92, 100 (1991). There is evidence that this observation is under stress, particularly in the context of Japanese peacekeepers deployment to Iraq. For an in-depth review of Japanese peacekeeping, see Akiho Shibata, *Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations*, 19 YALE J. INT'L L. 307 (1994).

¹⁰⁰ COMMISSION ON THE CONSTITUTION, *supra* note 39.

¹⁰¹ Haley, *supra* note 98, at 3.

A brief overview of Japanese military capability illustrates the point that demilitarization can produce tangible results.¹⁰² For example, Article 9 has kept the SDF, and the Japanese military in general, smaller than that of its neighbors, such as South Korea.¹⁰³ Article 9 has also kept the Japanese in Japan. Japan has interpreted the term self-defense as applicable to areas which are indisputably under Japanese sovereignty. Israel, which may have unresolved border disputes even after implementation of a two-state solution, should find this reassuring. Although the CIA Factbook lists numerous territorial disputes regarding the sovereignty of islands between Japan and its neighbors,¹⁰⁴ Japan refrains from using force to

¹⁰² However difficult a distinction between 'aggressive' and 'defensive' military action may seem, in terms of capability a military establishment can be reasonably characterized as offensive or defensive. James Auer thus makes a persuasive case that Japan's contemporary military establishment is as a matter of capability essentially defensive. In Auer's view, Japan 'has sincerely endeavored to live within the spirit of Article 9 . . . in building a meaningful but limited defense capability, clearly *complementary* to rather than *autonomously separate* from U.S. military power.' Current statistics confirm Auer's assessment of Japan military capacity. Japan's defense budget in 2000 was \$45.6 billion U.S. dollars. The Ground Self-Defense Force (army) had 148,500 active personnel, divided into 12 combat divisions, with 1,070 tanks, and 90 attack helicopters, with additional artillery/air defense guns and missiles. The Maritime Self-Defense Force, on the other hand, had 42,600 active personnel with 16 SSK submarines, 55 principal surface vessels, 31 minesweepers, and 9 carriers with a 12,000 person marine air arm with 80 combat aircraft and 80 armed helicopters. Finally, in 2000 the Air Self-Defense Force had 44,200 active personnel, 331 total combat aircraft with supporting air defense guns and missiles. With less than one-third of Japan's population, South Korea is reported to have about 560,000 army personnel, 2,250 tanks, 4,850 pieces of field artillery, 2,300 armored vehicles, 150 multiple rocket launchers, 30 missiles, and 580 helicopters. The South Korea navy has 67,000 personnel, 200 vessels, including submarines, and 60 aircraft. The South Korea air force has approximately 63,000 personnel and 780 aircraft including KF-16 fighters. North Korea in contrast is estimated to have 700,000 active military personnel, 2000 tanks and 1600 military aircraft, and navy of over 800 ships. In sum, in terms of personnel, Japan has the smallest military establishment in East Asia. However, in terms of budget and technology, the most costly, advanced and well equipped armed forces in the region, one whose defensive capacity is second only to the United States but whose ability to project military power beyond its shores is relatively weak.

Id. at 21.

¹⁰³ *Id.*

¹⁰⁴ The Factbook lists the following disputes: the islands of Etorofu, Kunashiri, and Shikotan, and the Habomai group occupied by the Soviet Union in 1945, now

press its territorial claims, despite the fact that its two biggest rivals, China and North Korea, are primarily land rather than naval powers.

Even the state-run Chinese press views the bounds of the SDF within levels it finds largely acceptable, noting areas of limitation that likely would appease Israeli concerns. Specifically, the Chinese press has noted that SDF's main constraints include:

[a] minimum self-defence force; non-possession of offensive weapons capable of threatening other countries, no pre-emptive attack against other countries, limited self-defence in the event of foreign armed aggression, confinement of the defence perimeter to Japanese territorial air, sea and surrounding maritime space, and no deep strategic reconnaissance or repulsion into the territory of other countries.¹⁰⁵

Again, Israeli proponents of demilitarization would find the aforementioned limits reassuring.

B. The Relationship Between Demilitarization and Collective Defense

The same rationale allowing Japanese self-defense to coexist with demilitarization also permits, from the Israeli perspective, the most troubling aspect of an internationally acceptable demilitarized regime – *collective* self-defense. Japan has concluded security treaties, specifically the Mutual Security Treaty with the United States, under the auspices of collective self-defense. Such treaties resulted in large amounts of military hardware being placed in Japan.¹⁰⁶ Under the first security treaty between the United States and Japan,¹⁰⁷

Japan grant[ed], and the United States of America accept[ed], the right . . . to dispose United States land, air and sea forces in and about Japan. Such forces may be utilized to contribute to the maintenance of international peace and security in the Far East and to the security of Japan against armed attack.

administered by Russia, the Liancourt Rocks (Take-shima/Tok-do) disputed with South Korea, and the Senkaku Islands (Diaoyu Tai) claimed by China and Taiwan. Central Intelligence Agency, *The World Factbook* (2001), available at <http://www.cia.gov/cia/publications/factbook/fields/2070.html> (last visited Feb. 14, 2005).

¹⁰⁵ *China: Defence Guidelines Lack Legal Foundation*, CHINA DAILY, Aug. 13, 1999, at 4, available at 1999 WL 17781583. However, the China Daily has criticized the recent internal emphasis on Japanese deterrence.

¹⁰⁶ Beer, *supra* note 91, at 816.

¹⁰⁷ Security Treaty, Sept. 8, 1951, U.S.-Japan, 3 U.S.T. 3329.

In the context of collective security, the United States concluded additional treaties, placing Hawk and Nike surface-to-air missile batteries inside Japan.¹⁰⁸ Furthermore, the United States concluded a treaty allowing the transfer of up to 100 state-of-the-art F-15 fighters to Japan.¹⁰⁹

This result derives from the Japanese government's view that stationing foreign troops in Japan does not constitute the maintenance of war potential under Article 9.¹¹⁰ The Japanese Supreme Court affirmed the government's view in the aforementioned *Sunakawa* case. The *Sunakawa* court ruled that the stationing of American forces in Japan, on the basis of the Mutual Security Treaty, was not impermissible under Article 9.¹¹¹ Under this rationale, the prohibition of the maintenance of war potential bans only the war potential over which Japan could exercise command and control.¹¹² Therefore, Article 9 was not applicable to foreign military forces, even those retained in mainland Japan.¹¹³ Furthermore, the Japanese government interpreted Article 9 to permit "mutual acts of assistance based on the right of collective self-defense set forth in Article 51 of the UN Charter [which] are also included in the scope of the right of self-defense as properly recognized in the Constitution."¹¹⁴

Perhaps even more troubling is the fact that Article 9 has been interpreted so as to free the war power from the restrictions that result from a strict interpretation of the conditions of Article 51. Thus, Japan was able to enter into a security arrangement with the United States because, as the Japanese Supreme Court reasoned:

[T]he insufficiency of our nation's defensive strength produced thereby is complemented by trusting in 'the justice and faith of the peace-loving peoples of the world' (a quote from the Preamble of the Japanese Constitution). Now, that is *certainly not . . . limited to such military security measures as are handled by the Security Council and other organs of the United Nations.*¹¹⁵

¹⁰⁸ See generally *Defense: Surface-to-Air Missile Battalions for Air Defense of Japan*, Apr. 26, 1963, U.S.-Japan, 14 U.S.T. 490.

¹⁰⁹ See generally *Defense: Acquisition and Production of F-15 Aircraft*, June 20, 1978, U.S.-Japan, 30 U.S.T. 1599.

¹¹⁰ COMMISSION ON THE CONSTITUTION, *supra* note 39, at 100.

¹¹¹ *Id.*; Sakata, *supra* note 77.

¹¹² Sakata, *supra* note 77.

¹¹³ *Id.*

¹¹⁴ COMMISSION ON THE CONSTITUTION, *supra* note 39, at 99.

¹¹⁵ Sakata, *supra* note 77 (emphasis added).

Through its interpretation, the Court defines collective security in two parts – one a pure function of collective security under UN and Security Council auspices, and the other a broader right to enter into military agreements. The Court ruled that Japan has a right to engage in both types of collective defense. Therefore, the Japanese experience, and specifically the decisions of the Japanese Supreme Court, illustrates that demilitarization provides two types of options for collective security regimes: 1) collective security actions under the auspices of the United Nations; and 2) bilateral, or even multilateral, arrangements under security agreements similar to the 1951 Treaty between the United States and Japan.¹¹⁶

C. Collective Self-Defense Applied to Israel-Palestine

Israel would not tolerate the stationing of Arab troops in Palestine for collective self-defense, nor would Israel accept a Palestinian state that could assist other Arab states in a conflict against Israel. Unfortunately for Israelis, the Japanese experience exhibits the breadth by which collective self-defense can serve as a justification for the transfer of military resources. As noted above, the Japanese Supreme Court conceptualized the right of self-defense in two aspects – one relating to a state's ability to enter into treaties with other countries and another relating to collective self-defense under UN auspices. Palestine's option to enter into treaties with its Arab neighbors must be limited to meet Israel's security needs.

Such a limitation on collective security appears to be at least broadly acceptable to the Palestinians. At the July 2000 Camp David summit, the Palestinians surprisingly indicated that they are willing to eschew signing defense pacts with countries that are in a state of war with Israel¹¹⁷ – a positive though insufficient first step. Furthermore, many Palestinian proponents of “external reinforcement” or “external guarantees” for Palestinian security frame their arguments in terms of calling for a UN or other international/multinational third-party presence rather than an Arab coalition.¹¹⁸ However, in the recent past, Israel has generally rejected UN “blue-helmets” in favor of US-backed multinational forces to police areas that pose a significant threat to “Greater Israel,” such as the Golan Heights.¹¹⁹ This fact, coupled with

¹¹⁶ Haley, *supra* note 98, at 10.

¹¹⁷ Gal Luft, *The Mirage of a Demilitarized State*, 8 MIDDLE EAST Q. (2001), available at <http://www.meforum.org/article/112> (last visited Feb. 14, 2005).

¹¹⁸ Khalidi, *supra* note 16, at 6-8.

¹¹⁹ David Makovsky, *PM: Report of a Breakthrough with Syria Baseless*,

the observation that the Israeli populace looks unfavorably upon UN troops,¹²⁰ makes a US-based force the likely focal point for any agreement on external reinforcement.

Thus, a reasonable agreement allowing Palestinian collective security under Article 51, limited exclusively to the scope of the clause and the “until the Security Council has taken measures necessary to maintain international peace and security” termination restriction, may appease the majority of Israeli fears while fulfilling external reinforcement needs of Palestinians. The key politically is to balance the role of the United States and its veto on the Security Council. However, a politically acceptable solution to external reinforcement faces two legal hurdles: 1) the text of Article 51 does not, on its face, give the Security Council such preemptive authority to control collective self-defense; and 2) Palestinians will likely take exception to the looming threat of an American veto if its security were tied to the Council. Nevertheless, current positions in international law could solve both these issues.

D. Creating an Acceptable Legal Regime to Restrict Collective Self-Defense

One such position – the so-called “German view” of Article 51 of the Charter – might allow architects to solve the collective security dilemma.¹²¹ This view holds that the Security Council can supersede, without a veto,¹²² a state’s right to collective self-defense by taking action and at the same time, effectively preempting the inherent right described in the beginning of Article 51.¹²³ According to this theory, as

JERUSALEM POST, Mar. 2, 1995, at 1.

¹²⁰ One writer to the Jerusalem Post argued:

[i]t is the height of suicidal folly to entertain the thought of UN troops in a supervisory capacity on the Golan Heights or anywhere else for that matter. The United Nations forces are totally incapable of achieving any security for anyone. The US and Israel must be aware that nothing can be done by UN troops in achieving peace at this time of history.

Toby Willig, *Folly*, JERUSALEM POST, Apr. 24, 1995, at 6.

¹²¹ The term comes from a group of German international lawyers who articulated the position as a critique of American actions against the Taliban in Afghanistan on the ground that since the Security Council had “acted” the United States was no longer allowed to engage in military operation in Afghanistan without explicit Security Council approval. See generally Thomas M. Franck, *Editorial Comment: Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 841-42 (2001).

¹²² The veto discussion is a separate issue and is addressed at *infra* Part IV.C.

¹²³ See generally Franck, *supra* note 121, at 841-42.

soon as the Security Council seizes control of the matter, security is turned over to the collective auspices of the Council.

In addition to scholarly support, this limitation has a basis in state practice. Elements of the idea are visible in the Treaty of Mutual Cooperation and Security between the United States and Japan. Article 51 of the treaty gives the Security Council the ability to terminate collective self-defense activities by the United States and/or Japan when the Council has “taken the measures necessary to restore and maintain international peace and security.”¹²⁴

Unfortunately, such a view is a controversial reading of Article 51. Thomas Frank has condemned such a reading as a *redactio ad absurdum* because it renders the *inherent* right of self-defense heavily dependent on Security Council action.¹²⁵ In order for the German view to hold Palestine to the limited interpretation of Article 51, both parties need to agree in advance. Given the lack of an authoritative source of interpretation for the Charter, and the fact that the argument is backed by legitimate scholars in the field, it is likely that such an interpretation could limit Palestinian collective self-defense to tolerable levels. This is especially true if the Security Council gave its blessing in the form of formal ratification of any peace plan. To meet Israeli and Palestinian concerns, the blessing should take the form of an American led security force subject to Security Council oversight.

Moreover, there are solutions to Palestinian concerns regarding the veto potential of the United States. One viable possibility is to authorize the Security Council to utilize the “procedural” vote mechanism in order to implement any agreed-upon security arrangement.” Franck argues that “such a veto-less vote is authorized by the Charter in Article 27(2). This provision states that ‘decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members’ without the veto.”¹²⁶

Furthermore, a procedural vote authorizing collective self-defense in Israel or Palestine is within the competency of the Security Council. Franck has articulated such a theory where the Permanent Member’s veto rights are respected during the design of a collective security regime, but the fact-finding necessary to trigger the implementation of the regime is subject to a majority vote.

By virtue of the ‘San Francisco Declaration’ (five) of the

¹²⁴ Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan, art. 5, 11 U.S.T. 1632.

¹²⁵ Franck, *supra* note 121, at 842.

¹²⁶ Thomas Franck, *Inspections and their Enforcement: A Modest Proposal*, 96 AM. J. INT’L L. 899, 900 (2002).

permanent members, agreed in 1945 concurrently with the endorsement of the UN Charter, (that) the decision whether a matter is procedural or not is to be taken by the Council in a vote that does require permanent-member unanimity. Thus, a permanent member could exercise its veto when the . . . regime (here; the agreed upon external reinforcement) was being designed, but not when it was being implemented or enforced. . . . This sort of institutional innovation is perfectly within the members' prerogative. Each of the principal organs has primary responsibility for interpreting its part of the Charter. For example, the members have already interpreted Article 27(3), the 'veto' clause—which literally requires the 'concurring votes of the permanent members'—as being satisfied despite a permanent member's abstention.¹²⁷

Under this model, the United States would be able to exercise its veto only at the design stage of the collective security regime. In contrast, only by a veto-less, majority vote can the Security Council make the fact-finding and implementation necessary to trigger action under Article 51. Although the United States still has a vote, it is devoid of its veto-power.

Such a plan can take shape by equating implementation with procedure, an argument which scholars like Franck articulated in the past in the context of inspection regimes,¹²⁸ and allowed under the aforementioned power of the Council to interpret its own powers and procedures. Given the Council's ability to interpret its own competency, such a solution to the Palestinian fear of an American veto is viable. Thus, the Security Council would agree, through a normal substantive vote subject to the veto, to endorse the Israeli-Palestinian peace plan and agree that any implementation of the collective security regime is a procedural vote not subject to the veto.

Moving from the strictly legal to the quasi-legal, political and social aspects of demilitarization, the Japanese experience demonstrates that demilitarization may have profound, non-legal affects on the identity of the society subject to demilitarization. It also illustrates additional questions which need answers, in order to solidify a demilitarized Palestinian state. Specifically, the Japanese demilitarization experience raises an interesting dilemma for Israel: should demilitarization be an international or domestic commitment?

¹²⁷ *Id.* Professor Franck spoke of his solution in the context of the search for weapons of mass destruction in Iraq.

¹²⁸ *Id.*

E. Should Demilitarization Be an International or Domestic Commitment?

The Japanese experience demonstrates that a domestic commitment to demilitarization provides great benefit and counsels against making the obligation purely international. In Japan, the most ardent internal opponents of demilitarization accepted the domestic constraints imposed by the constitutional nature of Article 9 while rejecting its international implication. From an Israeli perspective, these are reasons to make demilitarization part of the Palestinian state's constitution.¹²⁹ However, there are also intangible benefits that would arise from making demilitarization an international commitment, stemming from the political audience costs that demilitarization would have on any militaristic Palestinian government.

Although Japanese demilitarization as a function of Japan's acquiescence to the Potsdam Declaration is an ongoing international commitment, the international character of Japanese demilitarization has seemingly fallen out of public debate, especially outside of Japan. Accordingly, China, North Korea and other countries having a significant interest in preventing the re-emergence of Japanese militarism often do not object to (alleged) violations of Article 9 on international law grounds. This void arises from the fact that the Japanese guarantee is also a domestic constitutional obligation; it is neither viewed nor analyzed as an international commitment outside of Japan. Thus, the absence of international law based criticism removes a valuable mechanism of control and influence out of the arsenal of interested parties, primarily Japan's neighbors.

For example, the state-run China Daily has been conspicuous in its absence of criticism based on international law regarding Japan's recent decision to send SDF forces to help rebuild Iraq. Instead, the paper relied on internal or historical critiques.¹³⁰ Official Chinese

¹²⁹ See *supra* Part III.C-E.

¹³⁰ Hu Xuan, *Japan Mobilizes Its Military*, CHINA DAILY, July 30, 2003, available at 2003 WL 57559015. The only arguments China's state-run paper could muster were internal and based on Article 9. For example, the China Daily argued in the context of Iraq:

[B]ut is there any specific need to utilize the SDF in the rebuilding operations, which is banned under the peace principles of its own Constitution, not to mention the justification for the US-led invasion of Iraq, a still hotly contested issue? Under Article 9 of its post-World War II Constitution, Japan 'forever renounces war as a sovereign right of the nation and the threat or use of force.' . . . During the Diet – the

statements followed the general pattern of making criticism based on historical, rather than legal, rationales. For example, on March 20, 2003, Chinese Foreign Minister Kong Quan held a press conference at the United Nations where, in responding to the following question, said:

Question: The cabinet of Prime Minister Koizumi (of Japan) has announced its support to the US military actions against Iraq according to Japan-US Security Treaty. What is your comment?

Quan's answer: I have seen the statement by Prime Minister Koizumi. Due to historical reasons, we hope that Japan will exercise special prudence in playing its military role.¹³¹

Such historical justifications would likely not affect the domestic audience within Palestine to take actions protesting against remilitarization of the occupied territories given the populations' deep sentiment against demilitarization serving as a punishment for the use of violence.¹³²

Japan has failed to pay political costs derived from international law during the times when its policy has encroached on the values inherent in Article 9. This is because the international, as opposed to domestic, nature of Japan's commitment is not readily apparent. It takes a significant effort to tie Japan's acceptance of surrender to acceptance of the Potsdam Declaration, and also to the acceptance of an international commitment to demilitarization via incorporation of the Potsdam Agreement. Thus, most scholars view Japan's commitment only in domestic and historic terms and fail to critique Japanese

Japanese parliament – debate, Prime Minister Junichiro Koizumi said SDF troops will stay clear of combat zones and adhere to the rules of the non-use of force. With the US and allied casualties from guerrilla attacks in Iraq occurring almost daily, it will be difficult to distinguish combat from noncombat zones amid the volatile Iraqi situation. Furthermore, there is no assurance, for now at least, that the SDF personnel will not get bogged down in combat-like scenarios where lurking dangers could necessitate the use of force. Since the end of the Cold War Japan has been expanding its military role overseas, in particular under the banner of fighting terrorism, since the September 11 terrorist attacks on the US. To build confidence among its Asian neighbours, Japan needs to rethink its security policies on expanding its international presence.

¹³¹ Foreign Ministry Spokesperson's Press Conference (Mar. 20, 2003), *available at* <http://genevamismissiontoun.fmprc.gov.cn/eng/45572.html> (last visited Feb. 16, 2005).

¹³² Weinberger, *supra* note 79, at 27.

behavior through the perspective of international law. By contrast, Israel should make demilitarization an international (and domestic) aspect of any solution. In doing so, Israel empowers Palestinian moderates and creates a wedge into Palestinian internal debate through which the international community can increase the cost of defection.

International law can increase the audience costs of non-compliance with a demilitarization regime.¹³³ In general, international law increases the audience costs of commitments, making deviation less appealing for a rational actor.¹³⁴ Scholars note that audience costs can give domestic political opponents an opportunity to deplore the international loss of credibility.¹³⁵ This observation applies the argument to moderate Palestinian leaders. Hence, audience costs can be international and considered as a strategic part of any negotiation plan.¹³⁶ Finally, internationalization is consistent with most other demilitarization clauses, which are considerably more international in their dialogue than Japan's demilitarization clause. For example, the Philippines' Constitution explicitly incorporates "the generally accepted principles of international law" into the nation's renunciation of war clause.¹³⁷

F. The Power to Decide

The Japanese experience illustrates another important question confronting Israeli negotiators: what institution of the new Palestinian state has the power to interpret its demilitarization obligations? In the aforementioned *Sunakawa* case, the Supreme Court of Japan relied heavily on its version of the political question doctrine in upholding the constitutionality of stationing American forces in Japan under the Japanese-American Security Treaty.¹³⁸ Under the Japanese adaptation of the political question doctrine, the judiciary shows great deference to the executive's interpretation of Article 9. In general, Japanese

¹³³ Cf. James D. Monroe, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. 41 (2002) (noting that a state's executive may face audience costs for his violation of pre-war agreements, therefore such costs solidify the agreement).

¹³⁴ See Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 352 (1998).

¹³⁵ James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 581 (1994).

¹³⁶ *Id.*

¹³⁷ See *supra* note 38.

¹³⁸ HIDEO TANAKA, *THE JAPANESE LEGAL SYSTEM* 710 (1976).

courts do not overrule any interpretation of Article 9 pronounced by the government unless it constitutes a “clear” violation of the Constitution.¹³⁹

Japan’s history with demilitarization indicates that if the interpretation were left to the judiciary, without deference to the executive, the limitation would be more comprehensively enforced. Illustrative of this contention is the *Naganuma* case in which the Sapporo District Court, after rejecting the political question doctrine, ruled that the SDF and its link with the United States was unconstitutional.¹⁴⁰ The right to self-defense, the court ruled, can be met by “the countering of the invasion by the police, uprising of the people with arms, confiscation of property held by the nationals of the invading nation, deportation,” et cetera.¹⁴¹ The Supreme Court eventually overruled the case based on political question grounds.¹⁴² However, the case illustrated the differing persuasions of the politically controlled executive and the insulated judicial branch regarding the scope of any demilitarization commitment.¹⁴³

Israeli negotiators should realize that Palestinian courts would likely interpret any demilitarization obligations of a future Palestinian state in accordance with the wishes of the political apparatus, absent a negotiated alternative such as international adjudication, or a vibrant Palestinian court that would not heavily defer to the Palestinian Authority. In this regard, the Japanese experience demonstrates that courts are generally unwilling to constrain the executive’s interpretations of its demilitarization obligations. Clearly, the “default rule” of

¹³⁹ Haley, *supra* note 98, at 3.

¹⁴⁰ Ito v. Minister of Agriculture and Forestry, 712 HANREI JIHŌ 24, 298 HANREI TAIMUZU 140 (1973), *partially reproduced, translated and summarized in* HIDEO TANAKA, *THE JAPANESE LEGAL SYSTEM* 712-16 (1976). In the case, the Minister of Agriculture and Forestry re-designated an area of forest reserve in order to permit the construction of an Air Self-Defense Force Nike-Zeus missile base. In interpreting the Forest Act’s public interest provisions as a function of the Constitution, the Sapporo District Court was forced to interpret Article 9 of the Constitution.

¹⁴¹ *Id.*

¹⁴² Nicholas Rezanof Rinard, *MacArthur's Vision and the Reality of the Japanese Judicial System* (2000), at <http://www.dartmouth.edu/~nrrinard/writ/japan.shtml> (last visited Feb. 14, 2005).

¹⁴³ *Id.*

The *Naganuma* case was representative of the way the court system really was starting to lean, and Diet politicians began to worry about the preservation of their power in Japanese government. Many of these new judges belonged to the Young Lawyers Association (YLA) which promoted a literal, liberal reading of the constitution.

interpretation can be changed and it is a consideration which, if left to the judiciary, may result in better compliance.

G. Identity Politics and the Socialization Effects of Demilitarization

Considering the legal and political strength of a demilitarization regime, it is arguable that even the most airtight and accommodating legal regime may not be enough, standing alone, to keep Palestine effectively demilitarized. History shows that the political will to enforce such a regime will likely falter.¹⁴⁴ As David Bederman notes: “[P]olitical will to isolate a formerly atavistic country quickly fades. Without the effective occupation of the vanquished state . . . or its complete destruction . . . defeated states will always seek to regain the lost ground of sovereignty and unshackle themselves from imposed fetters.”¹⁴⁵

Although an in-depth sociological survey is beyond the scope of this article, modern day Japanese society and its norms and identity are the result of a major social transformation that occurred after occupation. Following occupation, “[n]early overnight, Japan was transformed from a militaristic state apparently hell-bent on self-destruction to a peaceful . . . partner” in the international community.¹⁴⁶ Moreover, Japanese society grew to embrace Article 9.¹⁴⁷ For example, former “U.N. Secretary General Boutros-Boutros Ghali was roundly booed when he suggested amendment of Article 9 during an appearance at a Japanese university.”¹⁴⁸

The relationship between the Japanese people and Article 9 stems from the observation that demilitarization is now a part of the Japanese identity. As one scholar has noted:

[I]n Japan’s situation, after 55 years, the public has come to identify with the non-belligerency implicit and explicit in their constitution. As a result, much of the public may consider Article 9 to be inviolable. This perspective indicates that the constitution cannot be amended as far as

¹⁴⁴ Especially in the context of Palestine, where only one country (Israel) is likely to maintain a concentrated interest in seeing the state remain demilitarized as opposed to Japan which is surrounded by states which have a historic impetus behind their utilization of the diplomatic process to oppose Japanese remilitarization at every turn.

¹⁴⁵ David Bederman, *Collective Security, Demilitarized and ‘Pariah’ States*, 13 EUR. J. INT’L L. 137 (2002).

¹⁴⁶ Kenneth Port, *The Genesis of the Japanese Foreign Investment Law of 1950*, 3 ASIAN-PAC. L. & POL’Y J. 9 (2002).

¹⁴⁷ See generally Gilley, *supra* note 42, at 1684.

¹⁴⁸ *Id.* at 1685.

Article 9 is concerned, and that Japan shall never have the right to maintain a military for anything other than self-defense, a characteristic many Japanese have come to see *as uniquely Japanese*.¹⁴⁹

Although I do not intend to conflate present day Palestinian identity and the terrorist acts of a minority of its constituents with Japanese militarism pre-1945, the drastic transformation of both Palestinian and Israeli social norms is a necessary ingredient to any peace process. Furthermore, this article does not intend to argue for correlation in changed Japanese social norms with Article 9 as evidence of causation. However, Israeli negotiators ought to note that Article 9 corresponds with a vast change in the very identity of Japanese society.

V. CONCLUSION

In the end, the strongest argument for a demilitarized state as a viable solution to the Israeli-Palestinian conflict is: “why not?” Demilitarization is a viable solution for a number of legal, quasi-legal and political reasons. Simply put, demilitarization raises the costs, in terms of political capital, of the creation and deployment of offensive weaponry. This observation is dependent on the reasonable assumption that both states, especially Israel, are fully aware of the limitations of demilitarization. Neither Israel, nor any nation, would naively rely on legal constraints as the sole guard for security. Therefore, there is no practical reason why demilitarization cannot serve as an aspect and focal point for an end-of-conflict solution. Demilitarization increases the possibility of maintaining Israeli security while transforming Palestine into a source of stability in the Middle East, similar to Japan in East Asia.

¹⁴⁹ Derek von Hofton, *Declaring War on the Japanese Constitution: Japan's Right to Military Sovereignty and the United States' Right to Military Presence in Japan*, 26 HASTINGS INT'L & COMP. L. REV. 289, 305 (2003) (emphasis added).