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Constitutional Control of Military Actions: A Comparative Dimension

Lori Fisler Damrosch
Columbia Law School, damrosch@law.columbia.edu

pates. Rather, when Iraq withdraws, mountains of debt will remain and Iraq will appreciate the waste of that army and the use to which it was put.

Aside from the fact that states may be chary of eroding the concept of immunity, even if only in the case of Security Council action, the main danger to the community of a rule-of-law approach is loss of control. Once instituted, the claims will amass quickly and the threat to Iraq will be credible because control of the process to a significant degree will have moved to the claimants and the courts involved. The question thus becomes: Is it in the community's interest to hobble the people of Iraq for years with the consequences of Hussein's megalomania? In part, the question relates to the appropriateness of collective guilt. In part, the question reflects the need of any debtor to consolidate and schedule service of the debt. The answer to this problem lies in the retention of some control by the Security Council so that at a later date it can devise such mechanisms as it believes appropriate to govern and oversee the orderly satisfaction of judgments against Iraq.

A rule-of-law approach is not without costs or risks, but ultimately one must ask if it is not preferable to war. If armed force is used to liberate Kuwait, there will be both great human suffering and material loss. The oil-producing capabilities of Kuwait and Iraq may be devastated, disrupting the world economy. Similarly, the political and economic structure of the Middle East could be unsettled in unforeseeable ways. In contrast, unleashing the rule of law will not result in such waste. Moreover, since Iraqi industry would be left undamaged, its production after the embargo ends will be available to satisfy Iraq's debt to all those damaged by the invasion. In this way, true meaning could be given to the adage that aggression does not pay.

DAVID D. CARON*

CONSTITUTIONAL CONTROL OF MILITARY ACTIONS: A COMPARATIVE DIMENSION

Throughout history, decisions to go to war have been made by a handful of individuals in powerful positions. American constitutionalists from James Madison's day through our own have tried to establish a better system of deciding for war, by shifting the locus of responsibility from one person to a broadly representative group. The Persian Gulf crisis has shown all too vividly what dangers lie in the persistence of processes that put awesome amounts of force at the disposition of single individuals, and how much is at stake in developing and nurturing structures of deliberation and accountability.

Two sorts of legal and institutional safeguards can help ensure that any decision leading to combat is made as carefully and wisely as possible.[1] First is the safeguard of political control within states, as established in constitutional law or otherwise. Within the United States, for example, the prerogatives of Congress to decide on war are embodied in the Constitution and affirmed in the War Powers Resolution;

* Visiting Professor of International Law, Cornell University.

[1] In addition are the military rules of engagement that seek to mitigate the risk of inadvertent triggering of hostilities. *See, e.g., U.S. Must Get Saudi Permission in Most Cases to Fire on Iraqi Jets,* N.Y. Times, Sept. 10, 1990, at A11, col. 1.

other constitutional democracies have their own variants for ensuring civilian control over comparable decisions. The second is the safeguard of concurrence of the international community through the United Nations Security Council, which enjoys primary responsibility for the maintenance of international peace and security. Whether these two forms of safeguards should operate in parallel in the Persian Gulf case is an issue that others have addressed;[2] my own concern here is with internal constitutional or quasi-constitutional controls.

The purpose of this essay is to examine some aspects of the legal framework for military activity in the internal law of some of the world's most powerful states. The international community has a major stake in the constitutional evolution of member states as regards the authority to decide to go to war. That stake—or those interests, since they are plural (and hold some possibility for contradiction) —can be identified as follows:

(1) to strengthen trends toward constitutionalism generally, by which I mean the concept of governance based on law;

(2) to strengthen trends toward civilian control over military forces;

(3) to support the adoption of constitutional safeguards governing war powers, so as to reduce the possibility of international conflict;

(4) to ensure that states are in a position to fulfill their responsibilities under international treaties, including those concerning collective defense and collective security;

(5) to ensure that decisions concerning the use of force within an international system of collective security are made on a rational and responsible basis.

In recent years the international interest in the internal political organization of states has become more explicit than ever before, as illustrated by developments in human rights law toward consolidating guarantees of free elections and the right to participate in government.[3] The human rights initiatives of the Helsinki Final Act, which have had such momentous effects on the Soviet Union and Eastern Europe, have now expanded to include endorsement of representative government, accountability of the executive branch to the elected legislature or the electorate, and subordination of military forces to civilian control.[4] No aspect of a state's domestic order could be of greater international interest than the internal controls over war potential.

I have chosen the USSR, Germany and Japan for attention in this paper. These three states have been the principal adversaries of the United States in different periods of the twentieth century but are now indispensable partners in building a secure world order. For several reasons, the legal and institutional framework that shapes or constrains their participation in military activity is of special interest. As a major military power and a permanent member of the UN Security Council, the USSR is in a position to exert considerable influence over the legal framework for collective security. In the last few years, Soviet leaders have spoken out for the

[2] See the *Agora* essays by Franck & Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* *supra* p. 63, and Glennon, *The Constitution and Chapter VII of the United Nations Charter*, *supra* p. 74.

[3] *See, e.g.*, Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension (June 29, 1990), 29 ILM 1305, 1308 (1990) [hereinafter Copenhagen Document].

[4] *Id.*, paras. 5.2, 5.6.

primacy of law in both the domestic and the international policies of states.[5] Germany and Japan, while not permanent members of the Security Council, are major powers in virtually every respect. Both are prevented by the constitutions adopted in the aftermath of World War II from engaging in war or even from maintaining forces with the potential for offensive war, and both have cited these constitutional restrictions as inhibiting their ability to contribute to the multinational force in the gulf.[6] The Soviet Union and Germany, moreover, are in the throes of major political and constitutional reorganizations stemming from the disintegration of the Soviet empire (domestically and internationally) and the absorption of the former German Democratic Republic into the Federal Republic of Germany. In all three cases, proposals for significant constitutional change with respect to war powers have been under active debate during the Persian Gulf crisis. The brief treatment below will show a fading superpower groping toward structures that might help subordinate the military to civil authorities, and two other major powers whose constitutional renunciation of militarism may be under some strain from pressures exacerbated by the gulf crisis.

THE USSR

In this period of profound political change in the Soviet Union, an outsider approaches questions of constitutional reform with trepidation. The continued existence of the Union in anything like its present form is very much in doubt.[7] Together with the renegotiation of relations between the center and constituent parts, a massive political reorganization has been taking place at the national level. The Communist Party has lost the leading role that had been enshrined for it in the Soviet Constitution. A legislative branch with real decision-making responsibility has taken the place of the former rubber-stamp parliament, and at least some of its members have been chosen through contested elections. The office of the presidency has been given strong executive powers and emergency authority; yet popular dissatisfaction with how those powers have or have not been exercised is acute, and further reallocation is inevitable.

With these massive transformations in progress, no one issue of governmental authority or constitutional reform can be considered in isolation from any other. The treatment of war powers is inextricably linked with numerous other questions, including unprecedented demands by the people for accountability from their leaders, the first stirrings toward a political culture of pluralism and popular

[5] President Gorbachev made this point in his speech to the UN General Assembly in December 1988. 43 UN GAOR (72d plen. mtg.) at 2, UN Doc. A/43/PV.72 (1988).

As the leading Soviet scholar of international law has said:

> Beyond doubt a State in which democracy and legality predominate and respect for human rights is ensured can be expected to respect international law in the international arena more than a State in which arbitrariness predominates. Therefore, the existence of the greatest possible number of rule-of-law States which can set the tone of international life is an important prerequisite for the primacy of international law in politics.

Tunkin, *On the Primacy of International Law in Politics*, in PERESTROIKA AND INTERNATIONAL LAW 5, 9 (W. E. Butler ed. 1990).

[6] *See infra* text at notes 43–51.

[7] Among the possibilities are disintegration into separate states corresponding to the existing union republics; a splitting off of some, but not all, of the republics; recombination of groups of republics into new federal or confederal structures; or fragmentation into smaller units.

sovereignty, and the emergence of mechanisms for parliamentary oversight of executive activities.

Whatever the outcome of the reallocation of governmental powers, the military complex with formidable war-making capacity will not disappear. The political and constitutional reform is going on simultaneously with a thoroughgoing reassessment of the role of the military in domestic and foreign policy,[8] and it hardly seems likely that the military will emerge untouched by the clamor for fundamental structural changes that has overwhelmed every other aspect of Soviet life. Indeed, a significant result of the policy of *glasnost* has been the strong repudiation of past Soviet military policies, coupled with demands for constitutional safeguards against recurrences. Soviet governmental leaders, as well as scholars, have joined in condemning the interventions in Afghanistan, Czechoslovakia and Hungary as unlawful,[9] and it has been noted that the "antidemocratic, secret procedures" that produced these decisions contributed to serious breaches of the most important principles of international law.[10] In a landmark resolution adopted in December of 1989, the Congress of People's Deputies stated that "the decision on the introduction of Soviet troops into Afghanistan in 1979 . . . deserves moral and political condemnation";[11] the resolution further instructed the Constitutional Commission that is now preparing the draft of a new Soviet constitution to "spell out the basic principles of making decisions on the use of contingents of the USSR Armed Forces," with the apparent objective of providing constitutional guarantees against the illegitimate use of force.[12] It is therefore timely to consider what the constitutional reform process might mean for Soviet war powers, not only to be able to understand the internal decision-making processes of a long-term adversary, but possibly even to influence them, at a time when Soviet elites seem to be looking westward for ideas and approbation.

As for the first interest identified at the outset of this paper, many Western initiatives have aimed for a long time at strengthening trends within the Soviet Union toward governance based on the rule of law. The Helsinki process, which has long attempted to cultivate legal structures for the enforcement of human rights, has underscored "the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law."[13] The Soviet Union has endorsed the concept and even given it a Russian name—*pravovoe gosudarstvo*—which lacks a precise English equivalent[14] but is sometimes ren-

[8] *See generally* Fane, *The Demilitarization of the Soviet Union*, WASH. Q., Spring 1990, at 5.

[9] In a speech to the Supreme Soviet, Foreign Minister Eduard Shevardnadze acknowledged that the Afghanistan invasion violated both domestic and international law. *See Moscow Says Afghan Role Was Illegal and Immoral: Admits Breaking Arms Pact*, N.Y. Times, Oct. 24, 1989, at A1, col. 6; *see also* Vereshchetin & Mullerson, *International Law in an Interdependent World*, 28 COLUM. J. TRANSNAT'L L. 291, 297 (1990); Punzhin, *Vvod sovetskikh voisk v Afganistan: mezhdunarodno-pravovye problemy* (The Introduction of Soviet Troops into Afghanistan: International Legal Problems), SOVETSKOE GOSUDARSTVO I PRAVO [SOV. GOS. & PRAVO], No. 5, 1990, at 123.

[10] Vereshchetin, Danilenko & Mullerson, *Konstitutsionnaya reforma v SSSR i mezhdunarodnoe pravo* (Constitutional Reform in the USSR and International Law), SOV. GOS. & PRAVO, No. 5, 1990, at 13, 19.

[11] *See* Resolution of the Congress of People's Deputies of the USSR: On the Political Assessment of the Decision on the Introduction of Soviet Troops into Afghanistan in December 1979, 42 CURRENT DIG. SOV. PRESS, No. 10, 1990, at 18, *translated from* Izvestiia, Dec. 27, 1989, at 1, col. 3.

[12] *Id.*

[13] Copenhagen Document, *supra* note 3, para. 5.3; *see also id.*, para. 2.

[14] The German term *Rechtsstaat* could be mentioned in view of the intellectual antecedents of today's Russian/Soviet concept in 19th-century German legal thought. *See generally* Beissinger, *The Party and the Rule of Law*, 28 COLUM. J. TRANSNAT'L L. 41, 47–50 (1990).

dered as "law-based state" or "rule-of-law state."[15] Leading Soviet thinkers in constitutional law have elaborated various aspects of the concept, stressing the importance of constitutional and legal guarantees at all levels of the political structure.[16]

Although writings about a Soviet rule-of-law state have generally concentrated on the role of courts in ensuring enforcement of human rights and in applying legal control to activities of the state apparatus,[17] it would be a mistake to reduce either *pravovoe gosudarstvo* or constitutionalism to the sphere that might be appropriate for judicial action. After all, courts have so far had little involvement in enforcing the constitutional distribution of war powers in Western countries, but that fact does not detract from the importance those countries attach to the concept of constitutional control over war powers. Under the American system, Congress exercises control whenever it invokes its prerogatives under Article I, section 8 of the Constitution;[18] and if Congress shirks its responsibility, the people themselves can assert constitutional control through their rights of speech, petition, assembly and the vote. In the context of developing a Soviet law-based state, nonjudicial techniques for constitutional control over war powers could be of several kinds.[19] One such technique—legislative supervision of military activity—can illustrate concrete steps that are already being taken in the Soviet Union in response to the second interest identified at the outset of this essay, that of strengthening trends toward civilian control over the military.

The Soviet legislature is beginning to demand answers to the very questions that have long obsessed Western Sovietologists: Just how large is the Soviet military budget? How is the money being spent? Who is in charge of decisions within the military? With information may come power. Primitive forms of parliamentary oversight over the military have recently begun to take shape, including a legislative committee established in 1989 known as the Defense and State Security Com-

[15] For an exposition of many of the themes that have been pursued under the rubric of *pravovoe gosudarstvo*, see *id.* at 43–50. *See also* V. N. Kudryavtsev, *Towards a Socialist Rule-of-Law State*, in PERESTROIKA 1989, at 109 (A. Aganbegyan ed. 1988).

[16] *See, e.g.*, A. Iakovlev, *Constitutional Socialist Democracy: Dream or Reality?*, 28 COLUM. J. TRANSNAT'L L. 117 (1990).

[17] *See, e.g.*, Quigley, *Law Reform and the Soviet Courts*, 28 COLUM. J. TRANSNAT'L L. 59 (1990). In relation to the point made in the text, Quigley notes that the 1987 Soviet Law on Appeals (concerning suits to require official action to conform to law) originally did not permit citizens to bring suits involving "the defense capability of the country" or "State security," but that these limitations were eliminated in 1989. *Id.* at 61, 63.

[18] *See, e.g.*, U.S. CONST. Art. 1, §8, cl. 11 (war powers).

[19] A form of potential control that I have not discussed is the newly created Committee of Constitutional Supervision, which has the function of reviewing laws, regulations, treaties and other legal acts for conformity to the Soviet Constitution. This committee may eventually become involved in areas relevant to war powers.

Other forms of potential control include those deriving from the exercise of freedoms of expression and association. The right to demonstrate in public, for example, played a critical role in the mobilization of U.S. public opinion against the Vietnam War. Soviet laws governing demonstrations and other modes of expression have been liberalized, but more could be done in such areas as regulating the use of troops to keep order at demonstrations, not only to minimize the possibility of a Soviet-style Tiananmen Square massacre, but also to prevent lesser forms of harassment of antimilitary demonstrators. For a summary and critique of recent developments in this field, see HELSINKI WATCH, TOWARDS THE RULE OF LAW: SOVIET LEGAL REFORM AND HUMAN RIGHTS UNDER PERESTROIKA 75–80, 84–87 (1989); *see also* Iakovlev, *supra* note 16, at 124–25.

mittee of the Supreme Soviet.[20] Whether this committee will serve as a meaningful control is as yet unclear: the U.S. Attorney General has applauded its creation but has noted that "it is heavily dominated by members of the Soviet defense-industrial complex."[21] The Supreme Soviet has also begun asserting itself through its recently acquired responsibilities to confirm the appointment of the minister of defense and to approve the military budget.[22] It will be important to strengthen legislative oversight over executive actions generally and over military activity in particular, while working on making the legislative organ into one that is truly responsive to the people.

As the legislature consolidates its responsibility for oversight and supervision of military activities, it may become possible to develop confidence in the workability of new constitutional provisions concerning the role of the legislature in decisions to commit troops outside the Soviet Union. This prospect brings us to the third international interest suggested above, that of supporting the adoption of constitutional safeguards on war powers as a means of lessening risks of international conflict. There is, of course, a tendency in the Soviet Union for constitutional provisions to bear little correspondence to reality. Nonetheless, it is not impossible that the trends toward the creation of a rule-of-law state will lead to a climate in which a new constitution could be accepted as supreme law and given meaningful effect. It is thus perhaps worth noting, if only in passing, that Soviet constitutional reform has begun to touch on war powers directly. As already indicated, the Constitutional Review Commission has the issue on its agenda by virtue of a decision taken by the Congress of People's Deputies in connection with its political evaluation of the Afghanistan conflict.[23]

In constitutional amendments adopted in 1990, the Soviet legislature is given some powers concerning commitments of troops abroad, but these appear to be partial only. The most important are the following provisions, amending Article 113 of the Soviet Constitution:

> [The Supreme Soviet] (13) determines basic measures in the field of defense and ensuring state security; introduces martial law or a state of emergency throughout the country; proclaims a state of war when necessary to fulfill international treaty commitments providing for mutual defense against aggression;
>
> (14) makes decisions on the use of contingents of the USSR Armed Forces when necessary to fulfill international treaty commitments for the maintenance of peace and security.[24]

The limitation of both paragraphs to cases "when necessary to fulfill international treaty commitments" leaves open whether there is a constitutionally designated authority for making decisions on the use of armed forces in other cases. It is not reassuring that the same constitutional act confers defense powers on the Presi-

[20] *See generally* Fane, *supra* note 8, at 9–11. The Supreme Soviet is the standing body of the Soviet legislature. Its members are drawn from the larger Congress of People's Deputies.

[21] Thornburgh, *The Soviet Union and the Rule of Law,* FOREIGN AFF., Spring 1990, at 13, 20. Fane, *supra* note 8, at 10, points out some of its constructive activities but cautions that the parliamentary role in the budgetary area has hardly moved beyond rubber-stamping.

[22] Fane, *supra* note 8, at 9–10.

[23] *See supra* text at notes 11–12.

[24] Law on Establishing the Post of President of the USSR and Making Changes to the USSR Constitution (Fundamental Law), 42 CURRENT DIG. SOV. PRESS, No. 14, 1990, at 20, 22, *translated from* Pravda, Mar. 16, 1990, at 1, 3.

dent of the USSR in terms that could be given a generous interpretation at the expense of the powers of the Supreme Soviet. Article 127.3 states in relevant part:

> [The President of the USSR] (10) coordinates the activity of state agencies in ensuring the country's defense; is Supreme Commander in Chief of the USSR Armed Forces;
>
> . . .
>
> (14) proclaims general or partial mobilization; proclaims a state of war in the event of an armed attack on the USSR and immediately submits this question for consideration by the USSR Supreme Soviet.[25]

Furthermore, the USSR Council of Ministers, an executive organ, is given the power "[to take] measures to ensure the defense of the country and state security."[26]

Legal scholars in the Soviet Union have called for stronger legal mechanisms for the Supreme Soviet to exercise substantive involvement in matters of national defense. A recent article notes that the present Constitution, even as amended through 1990, does not go far enough toward ensuring that decisions concerning use of force would be made more democratically, by the most representative organs.[27] The article also makes proposals responsive to the fourth and fifth concerns identified at the outset, namely, the international interests in the fulfillment of treaty commitments and in a viable system of collective security. The authors recommend constitutional guarantees that decisions taken by the Soviet Union in the exercise of individual and collective self-defense will conform to the UN Charter, and they propose a framework under which the Soviet Union could provide contingents of armed forces for participation in international peacekeeping pursuant to Security Council decision.[28]

In a statement that has received considerable publicity in the West, the Soviet leadership pledged to seek advance approval by the Supreme Soviet before committing Soviet troops to the international force in the Persian Gulf. Foreign Minister Shevardnadze was quoted as having assured legislators: "Any use of Soviet troops outside the country demands a decision of the Soviet Parliament."[29] There may be less to this statement than meets the eye, but it should not be dismissed as insignificant either. While many in the West, including in the U.S. Congress,[30] have read it as an assurance that the Soviet Union has embraced the philosophy of the War Powers Resolution,[31] other interpretations are possible and perhaps more plausible. One should not draw the inference of meaningful democratic control from the fact of submission of a proposal to be rubber-stamped. The real test of the Supreme Soviet as an organ of constitutional control will come when it acts as a brake on action that the leadership would otherwise take. Perhaps its very existence is already beginning to serve as a brake, at least to the extent that the

[25] *Id.* at 21 (the law adds to the Soviet Constitution a new chapter 15.1 on the President of the USSR and it specifies certain of his powers in the new Article 127.3).

[26] *Id.* at 23 (amending Article 131(4)).

[27] Vereshchetin, Danilenko & Mullerson, *supra* note 10, at 18–19; *see also* Vereshchetin & Mullerson, *supra* note 9, at 299.

[28] Vereshchetin, Danilenko & Mullerson, *supra* note 10, at 19–20.

[29] *See* N.Y. Times, Oct. 16, 1990, at A18, col. 1.

[30] *See Senators Demand Role in Approving Any Move on Iraq,* N.Y. Times, Oct. 18 1990, at A1, col. 1.

[31] Apparently, some Soviet spokespersons have themselves made the comparison to the War Powers Resolution. *See, e.g., War Powers Curb on Kremlin Seen,* N.Y. Times, Oct. 28, 1989, at A6, col. 6; *Check Against Afghan-Style Involvement Proposed,* Reuters, Oct. 22, 1988 (LEXIS).

Government faces demands to justify its foreign policies publicly. In any event, Shevardnadze's acknowledgment of the legitimacy of the calls for parliamentary involvement in war-making decisions is a step in the right direction.

One should not underestimate the difficulties involved in attempting to cultivate legal and political concepts such as constitutional control over military activity in a culture that has historically had quite different attitudes from the West's toward law in general and constitutional law in particular. Even societies with strong rule-of-law cultures have had problems in ensuring the applicability of law to matters involving armed force. But in view of the international interests previously identified in strengthening constitutional control over military activity, it is worth pursuing initiatives in this direction. The Helsinki process is one appropriate forum for such initiatives, as are direct interparliamentary contacts and exchanges of lawyers and legal scholars with relevant expertise.

GERMANY AND JAPAN

Of the five international interests considered in this paper, the first three were principal objectives of the Allied occupations of Germany and Japan. Much has been written elsewhere about the intense Allied efforts to transform these states into demilitarized constitutional democracies.[32] There is no room to consider here how far the general objectives of constitutionalism and civilian control over the military have been achieved; rather, I will take as a starting point the consummation of the Allied efforts as regards constitutional control over war powers, embodied in the "Renunciation of War" clause of the Japanese Constitution and comparable provisions of the Basic Law (Grundgesetz) of the Federal Republic of Germany. Ironically, these clauses now constrain two major constitutional democracies in their contributions to the collective effort to resist the most shameless aggression since World War II.

As a historical matter, the general perception is that these constitutional restrictions on military activity were imposed by the Allies with a view toward preventing a resurgence of the German and Japanese militarism of the first half of this century.[33] Nonetheless, the clauses can be seen as reflecting authentic aspirations of the German and Japanese people then and now, despite the conditions of occupation in the historical moment that produced the respective constitutions. Within the complex political dynamics of each of the two states, there have certainly been periodic calls for the resumption of a greater measure of sovereignty with respect to war power than the Allies were willing to permit in the immediate postwar period,[34] but the basic antiwar philosophy behind the two clauses continues to enjoy widespread public approval. In both countries, evidence of a continuing preference for a constitutional commitment to pacifism can be found in the public's disenchantment with governmental proposals to enable military participation in the multilateral effort against Iraq, as detailed below.

[32] For a summary of the American role in the creation of the Japanese and German postwar constitutions, see Rapaczynski, *Bibliographical Essay*, in CONSTITUTIONALISM, DEMOCRACY, AND RIGHTS: THE INFLUENCE OF THE U.S. CONSTITUTION 405, 424–39 (L. Henkin & A. Rosenthal eds. 1990).

[33] *See generally id.* at 424–39 and sources cited therein.

[34] For a summary of some of these efforts in Japan, see Osamu Nishi, *The Constitution of Japan—Its Past Forty Years, With Emphasis on Discussion for Its Protection and Revision*, under *Japan*, in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 25 (A. Blaustein & G. Flanz eds. 1990) [hereinafter CONSTITUTIONS].

First, let us look at the constitutional provisions and how they have been interpreted. Article 9 of the Japanese Constitution, drafted by General MacArthur,[35] provides as follows under the heading "Renunciation of War":

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.[36]

As regards the Federal Republic of Germany, its Basic Law contains several provisions restrictive of German military activities. The two most important are as follows:

> *Article 26 (Ban on war of aggression)*
>
> (1) Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional. They shall be made a punishable offence.
>
> *Article 87a (Build-up, strength, use and functions of the Armed Forces)*
>
> (1) The Federation shall build up Armed Forces for defence purposes. Their numerical strength and general organizational structure shall be shown in the budget.
>
> (2) Apart from defence, the Armed Forces may only be used to the extent explicitly permitted by this Basic Law.[37]

In addition, Article 24 concerns Germany's participation in collective security:

> (1) The Federation may by legislation transfer sovereign powers to intergovernmental institutions.
>
> (2) For the maintenance of peace, the Federation may enter a system of mutual collective security; in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.[38]

Over the years certain recurrent themes have arisen in political and scholarly debate about the interpretation of these provisions. In the case of Japan, it has been argued that the Renunciation of War clause should bar even the maintenance of a defensive military capability;[39] but the Self-Defense Forces have been built up on the understanding that they will not undertake any activities beyond the defense of Japan itself.[40] Collective self-defense has been viewed with suspicion (at least to the extent that activities purportedly in "defense" of other countries might entail the projection of Japanese military power abroad). There is considerable ambivalence about the U.S.-Japanese Mutual Security Treaty, since some perceive U.S. activities in Japan as protecting Japan from its own militaristic tendencies, while others see potential constitutional difficulties in Japan's entangle-

[35] For references to literature on MacArthur's role, see Rapaczynski, *supra* note 32, at 429–33.

[36] 8 CONSTITUTIONS, *supra* note 34, at 15–16.

[37] 6 *id.*, *Federal Republic of Germany*, at 50, 71–72 (1985) (paragraphs following the basic prohibitions omitted).

[38] *Id.* at 50.

[39] *Naganuma* case, discussed in Osamu Nishi, *supra* note 34, at 30–31.

[40] The High Court has treated the issue as a political question. *Id.*

ment with a nuclear superpower. In the case of Germany, while German participation in NATO is accepted as constitutional, activities outside the NATO area are considered constitutionally suspect.[41] A further issue in debate is whether the clauses can be interpreted to allow participation of German and Japanese contingents in UN peacekeeping forces or observer missions.[42]

The growth of the German and Japanese economies has led to calls for the two states to take on greater responsibilities for international security. Their allies in mutual security relationships have long urged that they should shoulder a share of collective defense burdens commensurate with their economic strength. Private companies in competition with German and Japanese companies, as well as their governments, complain of unfairness when Germany and Japan are seen as "free riders" on other countries' defense budgets. Meanwhile, the two countries have been striving to enhance their influence in regional and international organizations. Suggestions that they be given permanent or quasi-permanent status in the UN Security Council are heard more and more frequently. They have sought to become involved, at least symbolically, in UN activities outside their own regions, such as in noncombatant observer missions to monitor elections and even for peacekeeping. Yet each such move has to proceed cautiously, with attention to domestic and international concerns about remilitarization, as well as to potential constitutional objections.

The Persian Gulf crisis and the end of the Cold War have focused sharp attention on the constitutional constraints on German and Japanese participation in the emerging system of collective security. The German Government of Chancellor Helmut Kohl interpreted the Grundgesetz as prohibiting the dispatch of troops outside the NATO area. In lieu of troop commitments, Germany therefore pledged military equipment and economic assistance worth approximately $2 billion, together with rights of access to military bases, transport, and logistical aid that are critical to the military supply effort.[43] Chancellor Kohl pledged that once an all-German parliament is elected, the Government will introduce constitutional reforms to give itself more flexibility in the future: "We very much regret that our Constitution does not allow us at the present to assume our full responsibility in the area . . . . I hope that right after the elections we will be able to initiate a change in our Constitution and fully assume our share of responsibility."[44]

The proposal to change this aspect of the Grundgesetz apparently enjoys little support among German voters.[45] It is not clear whether the completion of German reunification will change the political dynamics relevant to this possible constitutional change. In due course, however, if the Grundgesetz is changed or replaced with a new all-German constitution, the issue may be addressed.

As for Japan, when the Persian Gulf crisis arose, Japan's Government interpreted the constitutional provision not only as prohibiting the dispatch of Japa-

[41] *See infra* text at note 43.

[42] *See, e.g.*, Riedel, *Rechtliche Probleme einer Beteiligung der Bundeswehr an UNO-Friedenstruppen*, in LIBER DISCIPULORUM: FESTGABE FÜR PROFESSOR DR. DIETER BLUMENWITZ 207 (G. Gornig ed. 1989); Riedel, *Deutsche als UNO-Soldaten?*, 42 DIE ÖFFENTLICHE VERWALTUNG 890 (1989); *Japan's Chief and Rivals Agree on Plan for Civilian Gulf Force*, N.Y. Times, Nov. 9, 1990, at A13, col. 3.

[43] *See Germany Pledges $1.87 Billion to Aid Gulf Effort*, N.Y. Times, Sept. 16, 1990, at A16, col. 3; *Bonn, Heeding Critics in U.S., Will Provide Planes and Ships for Gulf Effort*, N.Y. Times, Sept. 15, 1990, at A5, col. 1; *Confrontation in the Gulf; Kohl Vows to Widen Role in Gulf Effort*, N.Y. Times, Sept. 14, 1990, at A11, col. 1.

[44] *Germany Pledges $1.87 Billion to Aid Gulf Effort, supra* note 43.

[45] *Kohl Vows to Widen Role in Gulf Effort, supra* note 43.

nese combat troops to the gulf, but also as barring the contribution of mine sweepers or other military equipment.[46] When Japan came under sharp criticism for offers that were perceived as merely token support for the multilateral force, Prime Minister Toshiki Kaifu's Government prepared legislation aimed at permitting contributions that had been considered barred. In an early version, this legislation would have created an unarmed civilian "United Nations cooperation force" to provide behind-the-lines support to the multinational effort.[47] This proposal was attacked from abroad as insufficient, and in Japan as unconstitutional. The Government flip-flopped several times on the interrelated issues of principle, policy and constitutionality. At one point Kaifu argued that previous constitutional interpretations rejecting the use of force for collective self-defense did not apply to collective security under UN auspices.[48] Within ten days Kaifu changed his mind under growing pressure spearheaded by the opposition Socialist Party, and he endorsed the view that Japan's Constitution bars any direct participation in UN security activities.[49] As of the present writing, Japan has agreed to contribute a small contingent of unarmed civilian technicians, together with more than $4 billion in indirect financial support, to the multinational force and to countries adversely affected by the embargo of Iraq.[50] The proposals for legislative or constitutional change to enable direct military participation have been abandoned.[51]

It is time for careful consideration of the international implications of the constraints that domestic constitutional law has apparently placed on the response of Germany and Japan to events in the gulf. In the first instance, of course, any reconsideration of basic tenets of constitutional law is for the German and Japanese people themselves, but it would be hard to deny the interests of the international community in the outcome. Here I refer back to the fourth and fifth international interests identified at the outset—in the fulfillment of treaty responsibilities and in rational and responsible decisions concerning the use of force in a collective security system—and will take them up separately. They are indeed analytically distinct concerns, and provisions of internal constitutional law that are perfectly satisfactory—possibly even mandatory—for the fulfillment of treaty obligations may work at cross-purposes with the interest in promoting a rational allocation of responsibilities in a viable system of collective security.

First, to what extent do the German and Japanese constitutional provisions fulfill treaty responsibilities or, alternatively, impair their fulfillment? The provisions may be seen as the reflection in domestic fundamental law of international undertakings not to permit renewal of the conditions that led to aggression. In a way, they are the "implementing legislation" for the renunciation of the use or

[46] *See Confrontation in the Gulf; Japan Defends Aid in Mideast Effort,* N.Y. Times, Sept. 14, 1990, at A1, col. 1.

[47] *See Confrontation in the Gulf; After Silence, Japan's Army Pushes for Armed Gulf Role,* N.Y. Times, Sept. 24, 1990, at A1, col. 4.

[48] *See Mideast Tensions; Japan's Leadership Backs Plan to Send Soldiers to the Gulf,* N.Y. Times, Oct. 17, 1990, at A1, col. 1.

[49] *See Mideast Tensions; Japan's Gulf Commitment Seems Endangered,* N.Y. Times, Nov. 6, 1990, at A14, col. 1; *Japanese in Disarray Over Sending Troops to Gulf,* N.Y. Times, Oct. 26, 1990, at A10, col. 3.

[50] *See Japan's Chief and Rivals Agree on Plan for Civilian Gulf Force, supra* note 42; *Why the Japanese Find It So Difficult to Unsheath Swords,* N.Y. Times, Nov. 4, 1990, at E2, col. 1.

[51] *See Japanese Fear of Militarism Fuels Opposition to Sending Troops to the Gulf,* N.Y. Times, Nov. 2, 1990, at A9, col. 2.

threat of force in the UN Charter and other international treaties.[52] Perhaps they go farther in enshrining the principle of demilitarization than has been thought required of other states parties to the same treaties; but in view of the specially painful history of German and Japanese militarism, the international community may well have an interest in the domestic law of these two states—both now and in the future—that goes beyond merely ensuring compliance with treaty obligations.

Do these constitutional provisions in any respect impair the fulfillment of German or Japanese treaty obligations? Probably not. Under general international law, states are free to demilitarize totally if they choose.[53] The UN system of collective security does not require any state to maintain an armed force.[54] Even the Cold War brand of mutual security treaty did not impose any legal obligation on alliance partners to act otherwise than "in accordance with their respective constitutional processes,"[55] and the allies of Germany and Japan well understood that the postwar constitutions of these countries were intended to restrict their military activities. Thus, the issue is not whether Germany and Japan have violated any international legal obligation in making such modest responses to the gulf crisis; rather, it is whether the current institutional system is optimally structured for the allocation of responsibilities for international security.

The answer to this question brings us to the fifth and final concern. To my mind, the greatest challenge lies in ensuring that decisions concerning the use of force within the international system of collective security are made on a rational and responsible basis. It is not necessarily irrational for two of the world's richest powers to contribute to collective security through money and materials rather than manpower. It is not even necessarily irrational that one day Germany or Japan might achieve a "permanent" seat on a revamped Security Council, despite their professed inability to go beyond indirect contributions to collective security. But as we proceed to redesign the collective security system, which is now suffering its first real test, we need to think seriously about the distribution of power and democratic values that will prevail in the 1990s. If certain of the great powers, for reasons of history or principle, are legally disabled from direct participation in collective security, it will be essential to devise effective structures for ensuring that they bear their fair share in other ways.

CONCLUSION

Legal and institutional structures are as critical as military might, both for the successful waging of a lawful war against aggression and for the preservation of the values for which civilized states must be ready to go to war. We must use the

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[52] Both Germany and Japan are parties to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 46 Stat. 2343, TS No. 796, 94 LNTS 57; *see also* Treaty of Peace with Japan, Sept. 8, 1951, 3 UST 3169, TIAS No. 2490, 136 UNTS 45; and Declaration by Japan with Respect to the Treaty of Peace, Sept. 8, 1951, 3 UST 3306, TIAS No. 2490, 136 UNTS 146, 160. Germany has just renewed its antiwar commitment and undertaken that the prohibition will be retained in the constitution of the united Germany. *See* Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, Art. 2, 29 ILM 1186, 1189 (1990).

[53] *Cf.* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 135, para. 269 (Judgment of June 27) (absent international undertaking, states may maintain any level of armaments that they choose).

[54] *See* Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509, 525–26 (1986).

[55] *Id.*

present moment to reflect on the legal and institutional structures that will best serve the rule of law, in war as well as in peace; and if the peacetime luxury of time for reflection has disappeared by the time this essay is printed, military exigencies will intensify, rather than obviate, the need for this inquiry.

LORI FISLER DAMROSCH*

PRISONERS OF WAR, CIVILIANS AND DIPLOMATS IN THE GULF CRISIS

Out of the long catalog of international law issues pertaining to prisoners of war, civilians and diplomats currently affected by the Persian Gulf crisis, I have selected for brief discussion a few that merit special attention.

I. KUWAITI PRISONERS OF WAR

The armed conflict between Iraq and Kuwait and the occupation of Kuwait have triggered the applicability of the four Geneva Conventions for the Protection of Victims of War to the war between Iraq and Kuwait.[1] Captured members of the Kuwaiti armed forces are prisoners of war under the third Geneva Convention.[2]

Presumably on the ground that it regards Kuwait as a part of its territory, Iraq has refused to account for these Kuwaiti POWs, in manifest violation of the latter Convention.[3] They have even been denied the right to notify their families immediately upon capture (to mail the so-called capture cards).[4] They have also been denied rights to correspondence,[5] relief shipments,[6] and, above all, the protection of the International Committee of the Red Cross (ICRC) since no protecting powers have been named.[7]

As a result, nobody really knows either how many members of the Kuwaiti military have been captured or what their fate has been. The international community's silence about these "disappeared" Kuwaitis—even the Security Council has not mentioned the third Geneva Convention—is deplorable.

A historical analogy might be of interest. When Nazi Germany occupied Poland in 1939, it captured about half a million Polish POWs. Despite the fact that it

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[1] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 2, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 2, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 2, 6 UST 3316, TIAS No. 3364, 75 UNTS 135 [hereinafter Geneva Convention No. III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 2, 6 UST 3516, TIAS No. 3365, 75 UNTS 287 [hereinafter Geneva Convention No. IV]. Iraq and Kuwait are both parties to the Conventions.

[2] Geneva Convention No. III, *supra* note 1, Art. 4.

[3] *Id.*, Arts. 12, 70, 122–25.

[4] *Id.*, Art. 70.

[5] *Id.*, Art. 71.

[6] *Id.*, Art. 72.

[7] *Id.*, Art. 10.