

Issues Concerning Command and Order in Military Organizations: Advancing Japan's International Peace Cooperation

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Abstract

The command and order relationship between superiors and subordinates in organizations executing military functions is the foundation of the military services relationship. The duties of Self Defense Forces (SDF) personnel are more rigorous than those of regular civil servants, as is the case with military organizations in other countries. At present, new tasks such as security dialogues, defense exchanges, and international missions are increasing for military organizations, and the SDF in Japan is also assuming an increasingly important role in the field of international peace cooperation following the Cold War. This paper clarifies the special characteristics of command and order relationships in multinational forces, which have different aspects from the command and order relationships of participating countries, and compares them with the international peace cooperation command and order relationships in Japan. Since requests for international activity can be expected to increase in the future, Japan needs to examine how to proceed with SDF participation in multinational international peace cooperation activities, including sending personnel to multinational force headquarters from the perspective of both international law and domestic law. Moreover, one of the important issues for investigation is a review of the legal system so that Japan can better fulfill its international responsibilities as a major power.

Introduction

This paper examines the command and order relationship between superiors and subordinates (hereafter called the “command and order relationship”) in military organizations (armed forces, the SDF), and references the military legal systems of major countries in considering legal issues regarding the SDF in Japan's defense law.

Military law regulates uniformed personnel and items related to military service. The service-related items include the rights and obligations of uniformed personnel, the command and order relationship, disciplinary action, punishment, etc. Of these items, the command and order relationship underlies the very essence of the military as an organization. The military puts lives on the line and engages in battle to attain the objective of protecting the nation, and in so doing superiors must on occasion order subordinates into life-threatening situations. For superiors, this is a powerful right of command, and carries with it heavy responsibilities. In

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considering the duties of uniformed personnel, an examination of command and order relationship has significance because it reveals the very essence of the military.

As an organization executing military functions, the command and order relationship is the foundation of SDF. The duties of SDF officials are regulated under the Self Defense Forces Law (1954 Law No.165), etc., and are more rigorous in content than regular public employee relationships, as is the case with military organizations in other countries. Therefore, the first objective of this paper is to examine and compare the command and order relationships in certain major countries with those of the SDF.

In addition, security dialogues and defense exchanges are currently increasing in frequency among the world's military forces, and international missions are increasing. Japan's SDF, as well, have come to implement international peace cooperation activities, particularly since the end of the Cold War, and roles in this field are of increasing importance. In particular, revisions to the Ministry of Defense Establishment Law (1954 Law No.164) and the SDF Law (that accompanied the transition of the Defense Agency to the Ministry of Defense in 2006) positioned international peace cooperation activities as one of the SDF's core missions.¹ In other countries as well, the command and order relationships within their military organizations have aspects that differ somewhat from the command and order relationships in multinational units. The second objective of this paper is to clarify their characteristics, and to draw comparisons with the philosophy of the command and order relationship in Japan's international peace cooperation, and then consider associated problems. In this regard, as a research case, this paper examines problems arising with the SDF participation in humanitarian and reconstruction assistance activities in Iraq based on the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq (2003 Law No.137).

The third objective of this paper is to draw implications, based on the above studies, for a potential revision of defense law in relation to Japan's command and order relationships.

Section 1 of this paper is a survey of Japan's defense law, with an overview of the legal system underlying the SDF command and order relationship. Section 2 is a survey of military law in major countries (Germany, France, and the UK), and clarifies the characteristics of command and order relationships in their military organizations. These should be useful for considering the principles of command and order relationship. Section 3 reviews recent progress in international cooperation, examines Japan's thinking behind legal systems for command and order relationship in regards to military activities in multinational organizations, and then looks at the

¹ The main mission of the SDF is the defense of Japan against direct or indirect invasion, with a secondary mission of maintaining of public order as necessary (Self Defense Forces Law, Article 3, Paragraph 1). Other secondary missions (Self Defense Forces Law Article 3, Paragraph 2) are to serve as rear area support, etc. based on the Law Concerning Measures to Ensure the Peace and Safety of Japan in Situations in Areas Surrounding Japan (1999 Law No. 60), international peace cooperation activities (including international disaster relief activities, etc., UN peacekeeping operations, activities based on the Anti-Terrorism Special Measures Law, activities based on the Replenishment Support Special Measures Law, and activities based on the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq). These are all original missions of the SDF. Subordinate tasks are regulated by the Self Defense Forces Law, Chapter 8 (Miscellaneous Regulations).

characteristics of major countries. At the same time, the example of Japan's humanitarian and reconstruction assistance activities in Iraq is taken up, with examination of problems that arose in those command and order relationships. These should be useful for considering command and order relationship problems in international cooperation by military organizations. Finally, Section 4 builds on the foregoing studies to analyze basic principles of command and order relationship, and similarities and differences between Japan and other major countries in characteristics of their command and order relationships in international cooperation, and then considers issues of command and order relationship in Japan's international peace cooperation.

1. Overview of Japan's SDF Command and Order Relationship—Japan's Legal System

This section examines regulations related to the command and order relationship of Japan's SDF. First is a clarification of how regulations for SDF personnel are positioned in Japan's defense law. This is followed by an overview of regulations for the duties of SDF personnel, as regulated in the SDF Law. This is followed by consideration of the content and characteristics of regulations governing the command and order relationship for SDF personnel, the main issue of concern in this paper.

(1) Positioning of Laws Related to SDF Personnel in the Defense Law

Under the current Constitution of Japan, the government has interpreted that the right of self-defense in defense of Japan is recognized, and that this means that possession of the minimum force required for self-defense is allowed.² Based on this philosophy, Japan maintains the SDF and executes tasks related to national defense, etc. While the so-called "right of defense" resides in administrative power,³ the Constitution does not actually have any specific rules regarding defense, and it has been interpreted as being incorporated into "diplomatic relationships" and "administrative functions."⁴ The main mission of the SDF is the defense of the nation, and it possesses equipment equivalent to that possessed by the military forces of other countries. However, while the SDF are military forces under international law, they are restricted under domestic law,⁵ being positioned under domestic law as a "special organization" regulated by the National Government Organization Law (1948 Law No.120).⁶ In other words, the SDF are considered to be a "Civil Service" under domestic law.⁷ Therefore, laws related to national defense that regulate the SDF (defense law) reside in the administrative law sector, and their

² 21st Regular Diet, House of Representatives Budget Committee (December 22, 1954), Seiichi Omura, Director General of the Japan Defense Agency.

³ Supreme Court decision in the Sunagawa case (December 16, 1959).

⁴ Joji Okuhira, "Gun no Kodo ni Kansuru Hoki no Kitei no Arikata [A Study on Regulations Governing Military Action]," *NIDS Security Studies*, Vol.10, No.2 (December 2007), pp.78-79.

⁵ 119th Regular Diet, House of Representatives General Session (October 18, 1990), Minister of Foreign Affairs Taro Nakayama, etc.

⁶ The National Government Organization Law, Article 8-3, Ministry of Defense Establishment Law, Article 19, Paragraph 1, Self Defense Forces Law, Article 2, Paragraphs 2-4.

⁷ Joji Okuhira, "A Study on Regulations Governing Military Action," p.82.

content conforms to the basic principles of administrative law.⁸

As an administrative law, Japan's defense law can be demarcated into an administrative organization law, administrative civil servant law, administrative function law, administrative criminal law, etc.⁹ Persons comprising the SDF (SDF personnel), or in other words, SDF officials, administrative officials, and others, are Ministry of Defense personnel,¹⁰ and are considered to be "special officials" in the Government Official Law (1947 Law No.120).¹¹ The regulations of the Government Official Law are not applicable to special officials, and items related to Ministry of Defense personnel are instead regulated by the SDF Law and other laws.¹² As a result, SDF officials corresponding to the military personnel of other countries, and other SDF personnel, are regulated under the SDF Law, etc. Personnel-related regulations for SDF personnel cover such areas as rank, appointments and dismissals, service, disciplinary action, and punishment. This section focuses on the service regulations in particular, and summarizes its content.

(2) Overview of SDF Personnel Service Regulations in the SDF Law

SDF personnel service regulations are found in the SDF Law, Articles 52 to 65. These regulations include both content identical to regulations for civil servants under the Government Official Law, and content special to the SDF as an organization for performing military functions.

First, Article 52 states the purpose of service and the basic standard for SDF personnel service.¹³ Service disciplinary provisions in the SDF Law are all based on this regulatory foundation. While the Government Official Law includes regulations having the same import, the duties and responsibilities of SDF personnel are particularly emphasized due to the special character of the SDF. Moreover, a service oath is provided for persons pledging to perform service duties as SDF personnel (Article 53).

⁸ Ibid, pp.84-86. The basic principles of administrative law are "a nation ruled by law," "administration by rule of law," and "reserved to the law." When administrative organizations implement items related to rights and duties of the people, these items must have a basis in law.

⁹ Ibid, p.85.

¹⁰ Ministry of Defense Establishment Law, Article 2, Paragraph 5. The breakdown of SDF personnel is Administrative Vice Minister, Secretary, Deputy Director, SDF officials, administrative officials, technical and engineering officials, instructors, National Defense Academy students, National Defense Medical College students, ready reserve personnel, reserve personnel, candidates for reserve personnel, and part-time officials. Ministry of Defense personnel who are not SDF personnel include the Minister of Defense, Senior Vice-Minister of Defense, Parliamentary Secretary for Defense, Special Adviser to the Minister of Defense, and Private Secretary (special assistant) to the Minister. See Ministry of Defense, *Nihon no Bouei—Bouei Hakusho [Japan's Defense—Defense White Paper 2007]* (Gyosei, 2007), p.329 (Figure III 4-1-1 "Breakdown of Ministry of Defense Personnel"), etc. In FY2009, the Defense Counselor position was abolished and the new position of Special Adviser to the Minister of Defense was established.

¹¹ Staff members for Ministry of Defense personnel include regular administrative officials and part-time staff. Ibid, p.329.

¹² Government Official Law, Article 2, Paragraph 3, Item 16, and Paragraph 5.

¹³ "Personnel shall be aware of the SDF mission to protect the peace and independence of Japan, and shall aim to maintain unity, to strictly and impartially keep rules, to constantly cultivate virtue, to respect people, to renew mind and body, to polish skills, to execute duties with a strong sense of responsibility and dedication, to face events without regard for risk, to strive to the utmost to complete tasks, and to respond to the will of the people."

In regard to service readiness, “(SDF) personnel must be ready at any time to engage in their duties” (Article 54 Paragraph 1; items in quotes are citations from the SDF Law; items in parentheses are from the author; and the same below). This is based on the special character of SDF personnel missions, and there is no similar regulation in the Government Official Law. Service hours and holidays are regulated by the SDF Law Enforcement Regulation (Article 54, Paragraph 2). In addition, based on the special character of the service, SDF officials “must reside in locations specified by the Minister of Defense” (Article 55).

Specific service obligations and other obligations regulated in the Self Defense Forces Law are as follows.

a. Obligation to Execute Duties (Article 56)

“(SDF) personnel must follow the laws and faithfully execute their duties, and must not avoid risks or responsibilities related to duties, nor leave their duties without receiving permission from superiors.” Since they engage in work operations expected to be dangerous by the nature of their duties, SDF personnel are asked to do their utmost within the range of this obligation without shying away from danger.

b. Obligation to Obey Orders of Superiors (Article 57)

“(SDF) personnel must faithfully follow the orders of superiors in the course of duties, and in the execution of those duties.” The order should be within the legal duties of the person receiving the order, be a legal order, and be executable. If the order is understood to include a clear and serious violation of law, it is invalid.

c. Obligation to Maintain Dignity (Article 58)

“(SDF) personnel must always exemplify dignity, and must never engage in actions that tarnish trust as an SDF member or damage the prestige of the SDF.” They must conform to conventional wisdom and not engage in actions that damage the prestige of the SDF.

d. Obligation to Protect Secrets (Article 59)

“(SDF) personnel must not leak secrets learned in the course of duties. The same applies after leaving the service.” “If (SDF) personnel become witnesses, appraisers, etc., and are involved in legal proceedings that involve the revelation of items related to secrets in the course of their duties, the (SDF) personnel must obtain approval from the Minister of Defense. The same applies after leaving the service.” Secrets refer to facts not generally known, and that can objectively be considered an infringement of certain interests if generally known. In addition to secrets associated with duties, it also includes secrets learned in the course of duties that regard individuals, corporations, etc.

e. Obligation for Devotion to Duties (Article 60)

“Unless otherwise regulated by law, (SDF) personnel must devote all of their service time and attention to their duties.” “Unless otherwise regulated by law, (SDF) personnel cannot concurrently engage in work at government institutions other than the Ministry of Defense, or at special independent administrative institutions regulated under the Independent Administrative Institution General Rule Act (1999 Law No.103) Article 2, Paragraph 2, or at local government institutions.” “Even when (SDF) personnel are engaged in duties at the Ministry of Defense outside their own duties, or are concurrently engaged in work at government institutions other than the Ministry of Defense, or at special independent administrative institutions, or are working at local government institutions, they cannot receive wages unless regulated by the Ministry of Defense Ministerial Ordinance.”

f. Restriction on Political Activities (Article 61)

“(SDF) personnel must not seek or accept contributions or other benefits for political parties or political objectives regulated by government ordinance, become involved in political activity regardless of the method, or engage in political behavior regulated by government ordinance other than the exercise of voting rights.” “(SDF) personnel must not stand as candidates for public office in elections.” “(SDF) personnel cannot be executive officers of political parties, political groups, political advisors, or constituent members having similar roles.”

g. Distancing from Private-Sector Companies (Article 62)

“(SDF) personnel must not occupy any executive or advisor position at a company or other group with the objective of profit, or any equivalent position, nor themselves run a for-profit company.” “For two years after leaving the service, (SDF) personnel must not consent to or hold a position at a company or other group with the objective of profit, and which had a close relationship with the Ministry of Defense for five years before their retirement from the service.”

h. Restrictions on Involvement in Other Careers or Business (Article 63)

“When (SDF) personnel receive compensation for work at government institutions, special independent administrative institutions, and local government institutions regulated under the SDF Law Article 60, Paragraph 2, or for work or positions other than as noted in Paragraph 1 of the preceding article, or engage in business other than for-profit companies, they must obtain approval from the Minister of Defense in accordance with standards delineated in the Ministry of Defense Ministerial Ordinances.”

i. Prohibition on Formation of Groups, Etc. (Article 64)

“(SDF) personnel must not form unions or other groups for the purpose of negotiating with persons representing the interests of the state regarding service conditions, etc., nor join such

groups.” “(SDF) personnel must not engage in strikes, slow-downs, or other labor dispute actions, or engage in slow-down actions that degrade the efficiency of government activities.” “Personnel who engage in activities in violation of this regulation cannot use the right of appointment based on law to oppose the state when commencing activities in violation of this regulation.”

(3) Content and Characteristics of Regulations for SDF Personnel Command and Order Relationship

This section revisits the above service regulations to examine the content and characteristics of “obligation to execute duties” and “obligation to obey orders of superiors” in relation to the command and order relationship that is the main focus of interest in this paper.

a. Obligation to Execute Duties (Article 56)

SDF personnel execute duties in accordance with Japan’s laws. In addition, even if conditions expose themselves to serious risk to life and body, they must not use risk related to execution of duty as a reason to withdraw from duty.¹⁴ Furthermore, they must not withdraw from duty without approval from a person with command authority over that duty, and not just someone of superior rank.¹⁵

Note that the regulations in the Criminal Law (1907 Law No.45) Article 37 “Averting Present Danger” do not apply to SDF personnel subject to the regulations in SDF Law Article 56, as they are considered to be persons under a special professional obligation.¹⁶

b. Obligation to Obey Orders of Superiors (Article 57)

“(SDF) personnel must faithfully follow the orders of superiors in the course of their duties, and in the execution of those duties.” Government officials have an obligation to obey orders in order to achieve smooth top-down communications in the execution of official duties. Since the SDF are tasked with rapid and decisive operational conduct during emergencies and crises, and must faithfully implement government decisions under the principles of civilian control, a strict command and order relationship between superiors and subordinates is necessary. As a result, the SDF personnel obligation to obey orders must be enforced even more strictly than for other government officials.¹⁷

¹⁴ Kazuo Matsuura, “*Jieitaiin [SDF Personnel]*,” Osamu Nishi, et al, eds. *Nihon no Anzen Hosho Hosei [Japan’s Security Laws]*, (Naigai Shuppan, 2001), p.201.

¹⁵ Shigenobu Tamura, et al, eds., *Nihon no Boei Hosei [Japan’s Defense Law]*, (Naigai Shuppan, 2008), p.559.

¹⁶ Kazuo Matsuura, “*Jieitaiin [SDF Personnel]*,” pp.201-202. While the Criminal Law Article 37, Paragraph 1 delineates “Averting Present Danger” (“An act unavoidably performed to avert a present danger to the life, body, liberty or property of oneself or any other person is not punishable only when the harm produced by such act does not exceed the harm to be averted”). Paragraph 2 of that article states, “The preceding paragraph does not apply to a person under special professional obligation,” with the result that “Averting Present Danger” does not apply to police officers, firemen, and other civil servants engaged in dangerous duties. Since the SDF Law Article 56 classifies SDF personnel as “persons with special professional obligations,” the “Averting Present Danger” regulation does not apply to them.

¹⁷ *Ibid.*, pp.209-210.

Personnel follow the orders of superiors that are “duty-related orders.” This means that the orders must: (1) be issued by the superior responsible for that duty; (2) be related to the duties of subordinate personnel; (3) not be physically impossible to perform, or be considered impossible by conventional wisdom; and (4) not be in conflict with laws.¹⁸

Illegal duty orders consist of: (1) criminal orders; and (2) orders that infringe on the rights of the subordinate. Criminal orders are orders for which the content entails a criminal act, and if the content of a superior’s order is clearly illegal from the common-sense perspective of an ordinary person, the subordinate can refuse to obey, and, in fact must not follow such an order. If SDF personnel execute a criminal order despite being aware of the illegality of that order, or are in a situation in which the illegality of the order can be clearly known, they are criminally responsible.¹⁹

If the illegality of a duty order is not obvious or serious, yet there are questions about the legality of the order, proper procedures for its potential revocation should be taken to determine the order’s legality or illegality. If the proper procedures are not taken, the obligation to obey the order cannot be rescinded. However, if the order directly infringes on the rights of a subordinate, and the subordinate had no other recourse for protection against the rights infringement, there is leeway for withdrawing a charge of insubordination based on a refusal to obey an order through passive resistance, even if the refusal was based on a mistaken impression of illegality.²⁰

If an SDF official fails to follow a superior’s orders, the following penalties can be levied to enforce conformance (SDF Law Articles 119, 120, and 123).²¹

| Requirements | Penalties |
|--|--|
| 1) Oppose or disobey a superior’s duty orders | Public security operations: Prison term of up to 3 years Defense operations: Prison term of up to 7 years |
| 2) Multiple shared opposition to a superior’s duty orders | Normal conditions: Prison term of up to 3 years Public security operations: Prison term of up to 5 years Defense operations: Prison term of up to 7 years |
| 3) Issue commands to SDF units without proper authority, or in violation of a superior’s duty orders | Normal conditions: Prison term of up to 3 years Public security operations: Prison term of up to 5 years Defense operations: Prison term of up to 7 years |

Note: Persons who instigate and abet 1), or conspire, instigate, and abet 2) and 3) are subject to the same penalties.

¹⁸ Ibid, p.211.

¹⁹ Ibid, pp.211-212.

²⁰ Ibid, p.212.

²¹ Ibid, p.213.

If the authority for a superior to issue a duty order can be interpreted²² to incorporate a mandate to achieve this through direct compulsion,²³ the “obligation to obey orders of superiors” recognizes that subordinates are obligated to accept direct compulsion to obey the order, and that superiors have the necessary authority to execute the order. If a subordinate fails to follow an order during a defense operation or public security operation, the superior can compel the subordinate to obey the order²⁴ using measures based on the Police Duties Execution Law (1948 Law No.136),²⁵ within the range of authority allowed during operations.²⁶

2. Overview of Major Countries’ Military Command and Order Relationships—Major Countries’ Legal Systems

To gain a better understanding of command and order relationships in military forces, this section examines command and order relationships in the military forces of Western liberal democracies, and understanding of which may be of use for Japan. The targeted countries are Germany, France, and the UK. While both Germany and France are continental law countries, Germany has a titular president serving as head of state, with a chancellor selected by the parliament (Bundestag) holding the real political power in a parliamentary cabinet system, whereas France has a president holding powerful authority, but also a prime minister selected by the president who also answers to parliament, for a semi-presidential system with shared political authority. The UK, meanwhile, is an Anglo-American law country, with royalty serving as head of state and the prime minister holding actual power, in a constitutional monarchy system. These countries all differ in their national political systems and historical paths, which has also had an effect on their military command and order relationships. Here, in examining the military command and order relationships in each of these countries, I focus on: (1) command authority and the duty to obey; and (2) the relationship between superiors and subordinates.²⁷

²² This is the interpretation in military law in many countries. In military duties with multiple risks, refusal of a soldier to follow a command in wartime can result in failure of a military action, putting the military and the people at serious risk. Matsuura, “*Jieitain [SDF Personnel]*,” p.213.

²³ If a subordinate does not voluntarily execute an order, compulsion can be directly applied to the subordinate’s person or items, to obtain the same state as execution of the order. Methods for ensuring execution of an order in public law must conform to the principle of subrogation, and penalty imposition or direct compulsion methods cannot be implemented unless specifically recognized in law. Shuzo Hayashi, et al, eds., *Horei Yogo Shojiten [Legal Glossary Compact Dictionary]* (Gakuyo Shobo, 1978), pp.391-392.

²⁴ Matsuura, “SDF Personnel,” pp.213-214.

²⁵ According to the Police Duties Execution Law, police officers may take steps for protection of their own life, body, and property, maintenance of public security, execution of other laws, and anything else deemed necessary for execution of their authority and duties (Article 1, Paragraph 1). Necessary steps include questioning (Article 2), protection (Article 3), evacuation and other measures (Article 4), crime prevention and deterrence (Article 5), entry into premises (Article 6), and use of weapons (Article 7). For SDF officers ordered to engage in defense operations or security operations, all of these actions listed in the Police Duties Execution Law are applicable (Self-Defense Forces Law, Article 89, Paragraph 1, and Article 92, Paragraph 2).

²⁶ Self-Defense Forces Law, Articles 89 and 92.

²⁷ While the descriptions in Section 2 are laid out in the footnotes that follow, much of this information was obtained in George Nolte, ed., *European Military Law System* (Berlin: De Gruyter Recet, 2003).

(1) Command Authority, and the Duty to Obey

a. Germany

Commands: (1) must have a military purpose; (2) must not be illegitimate; and (3) must not violate the basic rules of international law.²⁸

While soldiers have an obligation to obey orders, they do not have to follow commands if they: (1) infringe on the soldier's human dignity; (2) do not have a military purpose; or (3) order a criminal act. If a soldier follows such a command either when in a position to know, or when it is clear, that following the order will constitute the commission of a crime, the soldier is criminally responsible. The legitimacy of an order is not the same as an obligation to obey an order. Since it is assumed that commands are binding, soldiers are allowed to avoid risk when following orders. While a soldier is not obligated to scrutinize the legitimacy of orders, if a command orders a criminal action, the soldier must not follow that order.²⁹

The following items have been asserted regarding the content of this command and order relationship. First, the concept of human dignity is vague as a legal term, being dependent on the specific environment and changeable as society develops. In the Constitution, a person is not just an individual, but should also live as a member of society with certain obligations. People should not use methods that treat persons as mere objects. Any action that treats a soldier with contempt, or that compels a soldier to act using methods that diminish a person's dignity, infringes on that soldier's human dignity. Moreover, commands that infringe the human dignity of third parties also have no binding force.³⁰

Second, military purposes refer to everything that might be necessary for the execution of the military's official tasks. Orders given for purposes that affect private actions, or for the fulfillment of private purposes, cannot be considered to have been for the execution of military purposes. Such commands are either not related to military tasks, or occur when soldiers are compelled to become involved in private financial affairs.³¹

Third, soldiers are not required to follow commands that make impossible demands. Commands that imply illegitimate hardships also have no binding force. For example, a command that puts a soldier in a life-threatening situation during peacetime is in infringement of that soldier's human nature, and deviates from the "principle of proportionality." In the same way, orders that infringe on basic rights that ought not to be restricted also have no binding force.³²

Fourth, orders demanding criminal behavior under regular criminal law, as well as special criminal laws, new international criminal laws, or other special laws specifically targeting soldiers, are commands ordering criminal actions.³³

While the above commands are all illegitimate commands, all other commands are considered

²⁸ George Nolte and Heike Krieger, "Military Law in Germany," Nolte, ed., *European Military Law System*, p.382.

²⁹ *Ibid.*, pp.382-383.

³⁰ *Ibid.*, p.383.

³¹ *Ibid.*, pp.383-384.

³² *Ibid.*, p.384.

³³ *Ibid.*

to have binding force, in principle. So even if superiors do not have the authority to issue illegitimate orders, soldiers must still follow orders that are recognized as merely illegitimate.³⁴

b. France

Soldiers must follow orders given by superior officers, and have a responsibility to execute the tasks assigned to them. However, orders for actions in violation of law, the Law of War, and international treaties, or for actions that violate the security and unity of the state, cannot be given, and subordinates must not follow them.³⁵

Subordinates must not execute orders that are clearly illegitimate, or that contravene the Law of War or international treaties. However, if a subordinate asserts that an order is illegitimate when in fact it was a legitimate order, merely to evade executing the order, that person could be subject to disciplinary action or sanctions under criminal law. As a result, issuing illegitimate orders is prohibited, and subordinates are under no obligation to follow such orders.³⁶

Moreover, if acting under the command of a person with legitimate authority, the actor bears no responsibility so long as the action is not clearly illegitimate.³⁷

c. The United Kingdom

Soldiers have an obligation to follow legitimate orders only. Persons subject to military law who fail to follow a legitimate order may be required to assume legal responsibility, including incarceration, based on the judgment of a court-martial. However, to prove guilt, the order must be shown to have been a legitimate order under British domestic law, international law, and the local laws of various foreign countries. Moreover, in addition to legitimacy, there needs to have been a military reason for the order.³⁸

The question of whether a soldier has committed an illegal act due to execution of an illegitimate order is a serious one for a superior's orders. In such cases, saying that the subordinate was merely following orders is not a reason to escape responsibility. To avoid responsibility under criminal law, the soldier must behave with wisdom and not follow the illegitimate order. This same principle applies to cases in which the ordered actions are either illegitimate or infringe on the rights of individual soldiers.³⁹

In regard to the content of these command and order relationships, the following points have been raised. First, superiors have the right to issue orders for the purposes of maintenance of

³⁴ Ibid., pp.384-385. An example of an order that is considered illegal and yet has binding force would be an order in contravention of military rules.

³⁵ Jorg Gerkrath, "Military Law in France," Nolte, ed., *European Military Law System*, p.309.

³⁶ Ibid.

³⁷ Ibid., pp.309-310.

³⁸ Peter Rowe, "Military Law in the United Kingdom," Nolte, ed., *European Military Law System*, pp.853-854.

³⁹ Ibid., p.854. Controversies over a number of issues related to limitations on soldier's rights have been raised in the media. These controversies include dismissal from service of female soldiers who have become pregnant, the role of homosexuals, the death penalty, drug and alcohol abuse, basic labor rights, absence without leave, dismissal from the service, recruitment at age 18 or younger, threats, racial harassment or discriminatory treatment, women in branches of the service, journalists, service discipline, uniformed personnel, etc. Ibid., p.856.

discipline, suppression of interference, execution of military obligations and regulations, and the unit's welfare. However, superiors must not use their rank to issue orders for the attainment of private objectives not related to military obligations and utilization. In the same way, orders issued by superiors for execution of unauthorized actions do not need to be followed.⁴⁰

Second, orders in violation of domestic law or international law are illegitimate orders. In general, the soldier does not need to know that the order is illegitimate. If it is not clear that the order is illegitimate, the soldier should be relieved of responsibility. Also, an order in contravention of military law is illegitimate, even if it completely diverges from criminal law or international law. Moreover, orders in violation of the local laws where a soldier is serving are illegitimate orders.⁴¹

Third, while infringement of a soldier's human dignity is not a concept existing in British law, charges can be leveled for vindictive handling of lower-ranking personnel.⁴²

Fourth, under military law soldiers can only be held responsible for criminal acts in violation of criminal law in England and Wales.⁴³ Refusal to obey orders for actions in violation of local laws is justified even if not in violation of England's criminal law.⁴⁴

Fifth, standpoints related to command authority have been confirmed. This issue of a soldier's obligation to follow the Rules of Engagement (ROE) has been argued in court. While ROE orders are issued according to policy, with the intent to regulate security policy, legal rights and obligations of members of the military are not defined in military law or customary law. This principle is applied to ROE wherever British soldiers are stationed for operations, anywhere in the world. According to this principle, military orders must conform to the criminal law and civil law of the location where the soldiers are serving.⁴⁵

(2) Relationship between Superiors and Subordinates

a. Germany

(i) Definition of Superiors

Superiors are persons with the authority to issue military orders.⁴⁶ Under German military law,

⁴⁰ Ibid.

⁴¹ Ibid., p.855.

⁴² Ibid.

⁴³ Criminal acts include crimes committed under the laws of England and Wales, the laws of Scotland and Northern Ireland, and the laws of other countries where soldiers are serving.

⁴⁴ Ibid., pp.855-856.

⁴⁵ Ibid., pp.856-857.

⁴⁶ Persons granted authority to issue orders are as follows: (1) Immediate superior: The immediate superior commanding a unit. Has authority to give orders both during service and while off-duty. Does not intervene with the technical service of soldiers who are subordinates under the command of a technical superior; (2) Technical superior: The technical superior of a technical unit. Holds authority to issue work orders to soldiers who are subordinates in special units. Refers to persons with expertise in such areas as medicine or engineering who are engaged in duties that are not originally military in character; and (3) Superior for special fields and special activities: Holds authority to issue orders for the attainment of capabilities in special fields, and in special activities. Also holds authority to issue orders to off duty soldiers, if necessary for the accomplishment of special activities. Nolte and Krieger, "Military Law in Germany," p.398. The authority of these superiors is based on the following functional rankings: (1) Superior due to rank: Ranking superiors hold the authority to issue orders to soldiers who are their subordinates, and

the command superior is differentiated from the service disciplinary superior. The service disciplinary superior is the superior granted the authority to exercise discipline over soldiers under command.⁴⁷

Command authority and disciplinary authority⁴⁸ is normally exercised by the same person. Commissioned officers hold disciplinary authority granted under the “Law on Military Discipline.” For disciplinary authority, the highest ranking superior is the Minister of Defense.⁴⁹ The existence of disciplinary authority depends on the rank. While command authority can be transferred to another person, discipline authority cannot be transferred.⁵⁰

(ii) Duties of Superiors

Superiors must serve as an exemplar for the execution of duties and work. In addition, superiors are responsible for the discipline of subordinates, and supervise the execution of duties by subordinates. Superiors must strive to ensure that subordinates do not do damage to military orders. Furthermore, superiors have an obligation to see to the needs of soldiers who are their subordinates.⁵¹

Superiors must not infringe the dignity and honor of subordinates. While this obligation applies to all government institution departments and agencies, it is also a basic military-related principle in the Constitution. In a military hierarchical structure, respect for human dignity is particularly important. The armed forces rely on the principal of command, obedience, and discipline, and since this is not based solely on the obedience of subordinates but also on the authority of superiors, the superior commissioned officers have a special obligation to act in an exemplary manner. If the dignity of subordinates is infringed, military discipline and efficiency is damaged. Cultivating mutual trust keeps the armed forces in compliance with its Constitutional role in a democratic state under the rule of law, and ensures efficiency in daily military tasks. Service tasks require mutual trust and mutual reliance, and if superiors infringe on the rights of subordinates, the armed forces’ sense of solidarity is damaged, functioning of service tasks is

hold command authority over all subordinates while on board naval vessels or on a base, whether they are on duty or off; (2) Superior due to special order: Superiors can order soldiers who are their subordinates to place themselves under the command of other soldiers for special work within the command authority of a new superior. Generally speaking, low-ranking soldiers are not ordered to become the superiors of higher ranking soldiers. Superiors due to special orders hold authority to issue commands to soldiers placed under them for the accomplishment of special work as necessary; and (3) Superior due to declaration: When there is a crisis requiring immediate assistance whether on duty or off, and immediate action is required to maintain discipline or security, or when the exercise of integrated command is required to handle a serious or temporary situation unrelated to the current soldier command structure, persons with superior rank such as a master sergeant or a commissioned officer can declare themselves to be the superior of soldiers with rank not higher than themselves. Superiors due to declaration can give orders to soldiers arbitrarily declared to be superiors when the situation requires it. *Ibid.*, p.399.

⁴⁷ *Ibid.*, p.398.

⁴⁸ While disciplinary authority is regulated by formal parliamentary law, command authority is defined by government ordinance, and the basic principles are regulated in the “German Law on the Rights and Duties of Soldiers (SG),” Article 10, Paragraph 5. *Ibid.*

⁴⁹ The Minister of Defense and Parliamentary Vice-Minister are the superiors in question. Orders signed by the Minister, or which are considered laws in the legal sense, are viewed as legitimate military orders. *Ibid.*, p.400.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

hindered, and unit functionality is damaged.⁵²

As long as they have a need to preserve trust in their position as superiors, whether on duty or off, commissioned officers and non-commissioned officers need to exercise restraint in asserting themselves.⁵³

(iii) Methods for Ensuring the Execution of Orders

When superiors execute commands, they must use methods that strike a suitable balance. There are no clear legal rules regarding whether superiors have been given the authority to use weapons for the execution of orders. Administrative rules prohibit the use of firearms for the execution of commands. In emergency situations, however, the use of weapons is permitted. Whether the right to use weapons is allowed or not is a subject of debate, and the legal situation is absolutely unclear. However, general principles of criminal law recognize the use of weapons for legitimate self-defense. The use of force to ensure execution of commands is not recognized.⁵⁴

b. France

French military organization is based on a foundation of hierarchical discipline and authority.⁵⁵ Adjustments between special hierarchical discipline and ordinary hierarchical discipline are determined by the special position of units. Exercise of authority normally follows rank and respects hierarchical discipline, unless authority is exercised by holders of a service letter or command letter, or when special instructions are given.⁵⁶

In regards to the obligations of superiors and subordinates, superiors use orders to execute and announce decisions, and take all responsibility for the orders and their execution. Naturally, the orders must not be illegitimate, and must respect the rights of subordinates. In addition, subordinates must faithfully execute orders received, and assume responsibility for their execution. If execution of a given order is found to be impossible, the subordinate is required to immediately report that to the superior.⁵⁷

c. The United Kingdom

Commissioned officers appointed to command units exercise command authority for all personnel serving in that unit, regardless of seniority. Obligations accompanying command all correspond to legitimately issued orders. The leader who assumes a central disciplinary role for persons under command is the commander. The commander maintains discipline, and has the

⁵² *Ibid.*, p.401.

⁵³ *Ibid.* This rule is an important case enabling restriction of freedom of expression.

⁵⁴ *Ibid.*, pp.400-401.

⁵⁵ For the conditions for exercise of military hierarchical discipline and authority, see the regulations in the “General Regulation on Discipline in the Armed Forces (RDGA).”

⁵⁶ Gerkrath, “Military Law in France,” p.316.

⁵⁷ *Ibid.*, pp.316-317.

responsibility to see to the welfare of subordinates under his command.⁵⁸

Superiors are not allowed to use weapons in ensuring faithful compliance with orders. However, reasonable compulsion may be used for the prevention of crimes.⁵⁹

Superiors are supposed to be commanders. Superiors play a critical role in all cases involving military justice and discipline, and determine whether to lodge charges with prosecuting authorities against soldiers.⁶⁰

3. Issues Concerning Command and Order Relationships—Problems in International Peace Cooperation

This section examines the current issue of the formation of multinational units and the joint execution of military operations that have become increasingly common as cooperative relationships in the international military sector have progressed, with particular attention on the command and order relationships that have arisen. First, I examine the government's policies for Japan's international peace cooperation, and then look at the situation in other major countries. Then, for a case study, I examine the problems associated with Japan's humanitarian and reconstruction assistance activities in Iraq.

(1) Legal System for Japan's Participation in International Peace Cooperation

After the end of the Cold War, in 1992, Japan enacted the International Peace Cooperation Law (1992 Law No.79), and in that same year commenced activities in United Nations (UN) Peacekeeping Operations (PKO) with participation in the UN Transitional Authority in Cambodia (UNTAC). Furthermore, the old Anti-terrorism Special Measures Law (2001 Law No.137) was utilized to enable resupply by Maritime Self Defense Force (MSDF) vessels of fuel and water to United States (U.S.), British and other countries' navy vessels in the Indian Ocean, and when that law expired in 2007 the supply activities continued under the Replenishment Support Special Measures Law (2008 Law No.1). However, the resupply support mission was ended in January 2010. In addition, under the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq of 2003, Ground Self Defense Force (GSDF) and Air Self Defense Force (ASDF) units engaged in humanitarian and reconstruction assistance activities in the Samawah area of Iraq, and in Kuwait. However the GSDF unit's mission ended in September 2006, followed by the ending of the ASDF activities in December 2008. At the outset of each of

⁵⁸ Rowe, "Military Law in the United Kingdom," pp.863-864.

⁵⁹ *Ibid.*, p.864.

⁶⁰ *Ibid.*, pp.864-865. Regular responsibilities of the commander are as follows: command, training, security, discipline, education, health and welfare, morale, general efficiency under command, efficient unit administration, preparation of recruitment plans and assurance of training, notifying all personnel of recruitment obligations, general welfare of soldiers' families, maintenance of friendly, correct relations with civilian authorities and local residents, prevention of outrages or problems caused by units under command, quick reporting to superior authorities of all cases involving mutiny or obstructiveness by units under command, granting of rights to military personnel to search for housing or assets, confirmation that unit personnel actions are always at a high standard, and issuing of orders for achieving these responsibilities.

these missions, the government has issued a statement to the Diet, etc., on whether participation in international peace cooperation activities is consistent with the Constitution of Japan. This section describes the Japanese government's view of Japan's participation in international peace cooperation, and the government perspective on the command and order relationship that arise.

a. Decision on Whether to Participate in UN Forces, Etc.

When a UN Forces is established under Chapter 7 of the UN Charter, "if the objective and mission of the UN Force involves the use of force, the SDF are not allowed to participate under the Constitution."⁶¹ "For SDF participation in a regular UN Forces where the mission cannot be said to be defense of the nation, some Constitutional issues remain." "UN Forces had not yet been established," and "nothing specific was stated for the content of special agreements" in the Charter of the UN Article 43, "which lists as contributions use of armed forces, assistance, and facilities, but this does not mean that all of them must be satisfied."⁶²

The UN forces for the Korean War were not a regular UN Forces, being a UN Forces in reality,⁶³ but with command rights held by a commander appointed by the U.S.,⁶⁴ "Since these so-called 'UN Forces' differ in objective and mission in each case, a blanket position cannot really be argued regarding whether to participate or not, but if the objective and mission of the UN Forces involves the use of force, the SDF are not allowed to participate under the Constitution,⁶⁵" and "in the case of Korea, since the UN Forces has the objective of taking military action, Japan's SDF cannot participate under the Constitution."⁶⁶

As to multinational forces formed by UN members states in the situation under Chapter 7 of the UN Charter which perform enforcement measures for Security Council (SC) resolutions, if

⁶¹ Response to question posed by House of Representatives Member Seiichi Inaba during Diet interpellations (October 28, 1980).

⁶² 119th Plenary Session of the Diet, House of Councillors Committee on the Budget (October 22, 1990), Atsuo Kudo, Director General of the Cabinet Legislation Bureau.

⁶³ In June 1950, the army of the Democratic People's Republic of Korea (North Korea) invaded the Republic of Korea (South Korea). The United Nations Security Council (UNSC) adopted a resolution certifying that the North Korean action constituted a "breach of the peace" and calling on all member states to render necessary assistance toward an immediate cessation of hostilities and withdrawal of North Korean troops (June 25), a resolution requesting the rendering of all necessary assistance to South Korea for repelling the armed attack (June 27), and a resolution recommending the establishment of the Korean Operations Command, allowing use of the UN flag, and calling on the U.S. to appoint a commander (July 7). The UN General Assembly adopted a "Uniting for Peace" resolution (November 3, 1950, 3rd General Assembly Session Resolution No.377), and the so-called "UN forces" consisting mainly of U.S. forces implemented enforcement against the Democratic People's Republic of Korea. Motoaki Hatake, *Kenpo 9-jo—Kenkyu to Giron no Saizensen* [Japanese Constitution Article 9—Front Lines of Research and Argument], (Seirin Shoin, 2006), pp.370-371.

⁶⁴ *Ibid.*, p.370. These resolutions were able to be adopted because the Soviet Union was boycotting the UN SC at the time over the issue of representation for China. After the Soviet Union returned to participation, no more resolutions were adopted. While these "UN forces" were not regular UN forces under Chapter 7 of the UN Charter, they were allowed to use the UN flag, and the U.S. Far East commander was appointed to be the UN forces commander, so that they could be considered special "UN forces." Masahiko Kido, *Senso to Kokusaiho* [War and International Law], revised edition (Sagano Shoin, 1996).

⁶⁵ Response to question posed by House of Representatives Member Seiichi Inaba during Diet interpellations (October 28, 1980).

⁶⁶ 55th Plenary Session of the Diet, House of Councillors Committee on the Cabinet (May 30, 1967), Masato Fujisaki, Director General, Bureau of Treaty, Ministry of Foreign Affairs.

the objective and mission involves the use of force, the SDF are not allowed to participate under the Constitution, “Japan’s participation should be determined based on the specific details of each situation, such as the content of the UN resolution, the multinational force objectives, mission, make-up, etc.”⁶⁷ For a multinational force such as was formed for the Gulf War in which the use of force was itself the mission and objective, Japan’s “participation” (entry under the command structure of the multinational force, and action as a member of that force) is not allowed under the Constitution. However, even in multinational forces for which the use of force is itself the mission and objective, “cooperation” that does not extend as far as participation and does not entail a joint use of force could be allowed under the Constitution.⁶⁸ In addition, if the multinational force involves both the use and non-use of force in its objective and mission, if Japan were to be able to preserve its subjective judgment to limit itself to missions not involving the use of force, and remain separate from the use of force by other countries, participation as a member in a broad sense would be allowed under the Constitution.⁶⁹

In regards to PKOs, “while it is impossible to generalize since there are so many diverse forms, participation would not be allowed if the objective and mission involves the use of force.”⁷⁰ If SDF participation in PKOs could be performed under the PKO five principles for participation incorporated into the International Peace Cooperation Law,⁷¹ it would not involve “use of force” and not be in violation of the Constitution.⁷² Since participation in PeaceKeeping Forces (PKFs) would also be based on the PKO five principles for participation, Japan would itself not participate in the use of force and remain separate even if the PKO was using force as an organization, so that it would therefore not be in violation of the Constitution.⁷³

⁶⁷ 131st Plenary Session of the Diet, House of Representatives Committee on Security (October 20, 1994), Tokuichiro Tamazawa, Director General of the Defense Agency.

⁶⁸ 153rd Plenary Session of the Diet, House of Councillors Committee on Diplomacy and Defense (December 4, 2001), Osamu Tsuno, Director General of the Cabinet Legislation Bureau, 125th Plenary Session of the Diet, House of Councillors Committee on the Cabinet (December 8, 1990, Masasuke Omori, Director General of the Cabinet Legislation Bureau, etc.

⁶⁹ 159th Plenary Session of the Diet, House of Councillors Special Committee on Iraq (June 1, 2004), Osamu Akiyama, Director General of the Cabinet Legislation Bureau.

⁷⁰ 119th Plenary Session of the Diet, House of Councillors Committee on the Budget (October 22, 1990), Director General Kudo of the Cabinet Legislation Bureau.

⁷¹ Refers to five principles that must be satisfied for Japan to participate in international peace cooperation operations, presented as “Basic Policy for Participation in Peacekeeping Forces,” and approved by the secretary-generals of three parties, the Liberal Democratic Party, Komeito party, and Democratic Socialist Party, in a meeting (on August 2, 2001) regarding the formulation of the International Peace Cooperation Law. These are: (1) the conflict parties have established a ceasefire agreement; (2) the conflict parties, including countries in the region where the peacekeeping force is to operate, agree to the peacekeeping force activities and to Japan’s participation in the peacekeeping force; (3) the peacekeeping force does not favor one specific party in the conflict, but maintains a strict neutrality; (4) if a situation arises in which any of the above principles cannot be satisfied, Japan is able to withdraw from participation in the force; and (5) use of weapons is limited to the absolute minimum required for defending the lives of personnel, etc. This was not merely a policy declaration, but was incorporated into the text of the International Peace Cooperation Law as specific definitions and conditions, etc. Tamura, et al., eds., *Nihon no Boei Hosei* [Japan’s Defense Law], pp.423-424.

⁷² Defense Agency, ed., *Nihon no Boei—Boei Hakusho, 2003* [Japan’s Defense—Defense White Paper], 2003 Edition (Gyosei, 2003), p.205.

⁷³ 123rd Plenary Session of the Diet, House of Representatives Special Committee on International Peace Cooperation, Etc. (April 28, 1992), Director-General Koto of the Cabinet Legislation Bureau, 121st Plenary Session of the Diet, House of Representatives Special Committee on International Peace Cooperation, etc. (September 25, 1991), Director-General Kudo of the Cabinet Legislation Bureau.

b. The Minister of Defense Command Supervision in PKOs, and the UN “Command”⁷⁴”

“While the local UN commander has the authority to issue instructions to units sent from contributor countries regarding the time, place, and type of operations, this is separate in kind from the command supervision of the Minister of Defense in relation to disciplinary authority, etc.” The head of the International Peace Cooperation Headquarters creates and changes implementation guidelines “so that they conform with UN instructions within the framework of the International Peace Cooperation Law incorporating the PKO five principles for participation,” and the “Minister of Defense commands and supervises the sent unit in conformance with these implementation guidelines.” “Personnel sent from Japan follow these implementation guidelines, and are placed under UN command in a stance that aligns with the so-called PKO five principles for participation.”⁷⁵”

(2) Command and Order Relationships in Major Countries’ Multinational Forces

This section first looks at any legal restrictions on participation in multinational forces in the three countries of Germany, France, and the UK, and then describes the command and order relationship conditions in their multinational units.⁷⁶

a. Legal Restrictions on Participation in Multinational Forces

(a) Germany

In Germany, action in concert with other countries is a natural stance for the armed forces in executing missions for the country’s defense or for collective security. The problem arises when the action in concert with other countries’ armed forces involves a domestic situation. There is neither rules in the Constitution nor precedent for this. The biggest point of consideration is whether indiscriminate use of foreign units would constitute exploitation of a loophole in the Constitution. Foreign units should not be used in situations in which German forces are not legally allowed to take action. Use of foreign units under the same conditions as German forces is not prohibited under the Constitution. However, if government authority is exercised over German citizens, it must be authorized under appropriate legislation.⁷⁷

(b) France

In France, there are no particular legal restrictions on joint operations with foreign units, so long

⁷⁴ The “command” regulated in Item 7 of the “Model Agreement” between contributor countries and the UN, created based on long years of PKO traditions, and the “instruction” regulated in the International Peace Cooperation Law, are deemed to have the same meaning. 123rd Plenary Session of the Diet, House of Councilors Special Committee on International Peace Cooperation (May 18, 1992), Minister of Foreign Affairs Michio Watanabe.

⁷⁵ Defense Agency, ed., *Nihon no Boei—Boei Hakusho, 2003*, [*Japan’s Defense*], 2003 Edition, p.206. 123rd Plenary Session of the Diet, House of Councilors Special Committee on International Peace Cooperation (May 18, 1992), Minister of Foreign Affairs Michio Watanabe.

⁷⁶ Regarding the descriptions in Section 3-(2), much of the information laid out in many of the footnotes that follow was inspired by the articles published in Nolte, ed., *European Military Law System*.

⁷⁷ Nolte and Krieger, “Military Law in Germany,” pp.354-355.

as there is no intention of subjugation or no violation of personal freedoms.⁷⁸

(c) The United Kingdom

In the UK, the positioning of military forces in foreign countries was for many years considered to be the normal stance for the military's role, and military conflicts encompassing the forces has always occurred in other countries' domains. On the other hand, the scale of foreign forces based in the UK during peacetime has been small. For this reason, the role of British forces has not been a point of strong public interest. In addition, since the UK is a permanent member of the UNSC, giving British forces a role in the pursuit of international peace and security is a basic policy of the government.⁷⁹

b. Command and Order Relationships in Multinational Forces

(a) Germany

Subjection of soldiers to a superior affiliated with a foreign army (hereafter called a "foreign military commander") is a problem under the Constitution. Restriction of a person's basic rights and freedoms must take place under specially conferred administrative regulations based on legislation passed by the parliament. This is to ensure democratic legitimacy and accountability for the placing of restrictions on the people's rights. However, when commands that do not originate with German authorities are issued to German forces, this regulation is adjusted by two special rules. According to Article 24 of the Constitution (Basic Law): (1) with the consent of the federal government, German states may transfer sovereign powers to "transfrontier institutions in neighboring regions;⁸⁰" and (2) Germany may enter into mutual collective security systems. As a result, transfer of public authority to a single foreign country or different foreign countries is prohibited.⁸¹

Under the Constitution, complete subordination of German soldiers under a foreign military commander requires transfer of government authority. In the North Atlantic Treaty Organization (NATO), only a limited command authority is transferred, and transfer of this kind of complete authority was never implemented. In order for German soldiers to follow the orders of a foreign military commander, they must receive an order from a superior.⁸² This order can be canceled at any time, and is limited in scope, as it does not cover all disciplinary authority. Transfer of disciplinary authority to international institutions is the most obvious case, requiring a special legal foundation.⁸³

⁷⁸ Gerkrath, "Military Law in France," p.292.

⁷⁹ Rowe, "Military Law in the United Kingdom," p.857.

⁸⁰ An "inter-state entity" must at the very least have an international corporate character, and public authority cannot be transferred to a multinational force that does not possess such a separate corporate character.

⁸¹ Nolte and Krieger, "Military Law in Germany," pp.402-403.

⁸² Orders received from superiors as defined in the "German Law on the Rights and Duties of Soldiers," Article 11, Paragraph 1.

⁸³ *Ibid.*, p.403. In other countries, a comparative model is used for soldiers to allow them to obey the commands of foreign superiors in NATO.

In NATO, the differentiation between “full command” and “operational command⁸⁴” is not just a sovereign and constitutional requirement for limiting transfer of command authority, it is also effective from the perspective of optimal military objectives. Regarding the transfer of operational command or operational control, there is no requirement at present for the special transfer of government authority that must satisfy special constitutional requirements. In general, only operational command and control can be transferred, and full command stops at the state authorities. In this case, the government has the authority to mandate soldiers to follow foreign commands even without obtaining parliamentary approval.⁸⁵

Studies on whether the exercise of transferred command authority extends to individual soldiers or extends to entire units have shown little progress to date. While the general view is that foreign commanders exercise command authority only over individual soldiers, a debate is continuing over whether it can be used with the commander of an entire unit, or can be used directly with the individual soldiers in that unit.⁸⁶

Transfer of command authority within units in multinational forces often occurs based on international treaties ratified in the parliament.⁸⁷

(b) France

Even when soldiers are placed under the command of foreign superiors, no serious problem arises under French military law. In the case of France, all command authority traces back to presidential authority, and is exercised by commanders with qualifications in the president’s name. The objective is achieved based on the president’s decision only.⁸⁸

In actuality, French soldiers have never been placed directly under the command of a foreign commander. There is always a French commander interposed at the operational level, so that only the French commander is positioned directly under the foreign command, receiving instructions to cooperate from the French “Chief of the Defense Staff” (CEMA). Only operational command is transferred.⁸⁹

As with rank authority, disciplinary authority in every case rests with the state authorities. The state cannot transfer authority to third countries or foreign organizations to grant ranks or take disciplinary action.⁹⁰

⁸⁴ “Full command” refers to command authority that encompasses all military commands. “Operational command” is a function of command for resident units, and its missions include: (1) assigning missions to directly subordinate commanders; (2) relocating or transferring part of the military force; and (3) using “operational control” or “tactical control” when necessary, or consigning that authority to others. Takao Shimizu, “*Doitsu Kinkyu Jitaiho no Seitei Katei to NATO Gun* [Enactment Process for the German Emergency Situation Law and NATO Forces],” National Diet Library Bureau of Research and Legislative Study, *Shuyokoku ni okeru Kinkyu Jitai e no Taisho – Sogo Chosa Hokokusho* [Responses to Emergency Situations in Major Countries – General Survey Report] (June 2003), p.214.

⁸⁵ Nolte and Krieger, “Military Law in Germany,” pp.403-404. However, this theory is a subject of dispute within Germany’s academic community. *Ibid.*, p.404.

⁸⁶ *Ibid.*, pp.404-405.

⁸⁷ *Ibid.*, p.405.

⁸⁸ Gerkrath, “Military Law in France,” p.317.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

Details are determined separately for each multinational operation based on the rules of engagement (ROE), status of forces agreements (SOFA), or special administrative agreements. There are no other special rules regarding the relationship of superiors to subordinates, or regarding command authority toward soldiers in other units in the country.⁹¹

(c) The United Kingdom

While regulation of rules in the Defense Council would theoretically make it possible for the superiors in military forces of countries not under British sovereignty to exercise command authority over soldiers in British forces when the command authority is exercised within a certain range, this has never actually happened. Where command is exercised, disciplinary authority follows.⁹² The commander may use standing orders to require some personnel or all units to obey the legitimate commands of foreign commanders. Soldiers who fail to follow these orders are in violation of British military law. However, foreign commanders do not hold disciplinary authority over British soldiers, and the soldiers follow British military law.⁹³

Since British soldiers are responsible for following the “1955 Armed Forces Act,⁹⁴” orders issued in violation of military law must not be followed even if legitimate under foreign military law. If the foreign soldiers are not members of Commonwealth forces, they are probably not subject to British military law.⁹⁵

There are no restrictions on British forces regarding cooperation with the military forces of other countries. Joint military operations are possible with either UN or NATO. British forces regularly conduct training exercises with the armed forces of many different countries. In none of these cases has there arisen a problem with command or discipline.⁹⁶

(3) Command and Order Relationship in Iraq Humanitarian and Reconstruction Assistance

This section looks at problems in the command and order relationship of Japan’s international peace cooperation, using the case of SDF participation in Iraq humanitarian and reconstruction assistance from 2003 to 2008 to examine the SDF relationship with the command authority of multinational forces.

⁹¹ Ibid., p.318.

⁹² As this kind of rule is not regulated, this position is similar to that of Germany.

⁹³ Rowe, “Military Law in the United Kingdom,” p.865.

⁹⁴ Under the Bill of Rights of 1689, possession of a standing army in peacetime is prohibited without the consent of Parliament. As a result, the 1955 Army Act, the 1955 Air Force Act, and the 1957 Naval Discipline Act, which regulate the organization of the Army, Air Force, and Navy, are ratified for a five-year period under the Armed Forces Act. Furthermore, every year the Privy Council presents an order to both Houses for approval of continuation of the Armed Forces Act. Hajime Ohta, “*Igirisu no Yuji Hosei* [the UK’s Military Emergency Legislation],” Japan Institute of Constitutional Law, ed., *Legal Times Supplement, Constitutional Law and Defense Legislation—Examining Military Emergency Legislation from the Viewpoint of Constitutional Law* (Nippon Hyoronsha, 2002), p.174.

⁹⁵ Rowe, “Military Law in the United Kingdom,” pp.865-866.

⁹⁶ Ibid., p.866.

a. SDF Participation in Iraq Humanitarian and Reconstruction Assistance

In March 2003, a coalition of UN member countries (the U.S., UK, etc.) commenced armed action against Iraq,⁹⁷ and after major military operations were completed, the international community acted in May of that year and later to assist in Iraqi reconstruction, based on such resolutions as UNSC Resolution No.1483.⁹⁸ Japan, as well, enacted the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq in July 2003, and dispatched SDF units to Iraq beginning in December to conduct humanitarian and reconstruction assistance activities. The GSDF was posted to Muthanna Province (Samawah) in Iraq, where it engaged in reconstruction and development of medical, water supply, and public facilities, while the ASDF engaged in activities ferrying personnel and supplies between Kuwait and Iraq.⁹⁹

Regarding the relationship between this law and the Constitution, the government explained that “Japan is a non-belligerent nation that is not exercising the use of force against Iraq,” and since “activities based on this [law] are not incorporated in the rights of belligerency,” it does not constitute a violation of the Constitution.¹⁰⁰ Since the measures based on this law centered on humanitarian and reconstruction assistance activities and did not involve the use of force or threat by force, and since the region of implementation was a so-called “no battle area” there was no risk of the use of force or of a joint use of force. Furthermore, the weapons to be carried by the SDF were limited to “what is required to assure the security of posted personnel, based on consideration of the operations being performed and the local security situation,” and “use of these weapons will be appropriate to the local conditions” and “in accordance with” law.¹⁰¹ With enactment of the law laying the foundation for activities within the bounds of the Constitution, the SDF were able to engage in humanitarian and reconstruction assistance operations.

After that time, the SDF activities proceeded to high acclaim from Iraq and the international

⁹⁷ While the U.S. had determined that Iraq missed its “last opportunity” as stipulated in UNSC Resolution No.1441 (December 8, 2002), and jointly submitted a new resolution on February 14, 2003 with the UK and Spain indirectly assenting to the use of armed force against Iraq, France and Germany announced their opposition, and because France showed determination to use its veto, there was no chance of the resolution being passed. On March 16, the leaders of the U.S., UK, and Spain had a summit meeting in which they released a communique effectively cutting off negotiations with France, Germany, and others. On March 17, U.S. President George Walker Bush issued a final ultimatum to Iraqi President Saddam Husayn Abd al-Majid al-Tikriti, and announced an invasion of Iraq based legally on UNSC Resolutions No.678 (November 29, 1990) and No.687 (April 3, 1991). President Husayn refused to flee the country, and on March 19 the battle known as “Operation Iraqi Freedom” was launched. Tomohito Shinoda, “*Kantei Gaiko—Seiji Riidaashippu no Yukue* [Prime Ministerial Diplomacy—Whither Political Leadership]” (Asahi Shimbunsha, 2004), pp.94-97.

⁹⁸ This confirmed the special authority and obligations of the U.S. and British forces as occupation “authorities” to promote the welfare of the Iraqi people through effective policies until an internationally recognized government could be established by the Iraqi people, and called on UN member countries to contribute to humanitarian assistance for the Iraqi people and to assistance for the reconstruction of Iraq, and to contribute to the stability and security of Iraq.

⁹⁹ Defense Agency, ed., *Nihon no Boe—Boei Hakusho, 2007* [Japan’s Defense—Defense White Paper, 2007 Edition], pp. 280-286. Note that in the interim period until the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq was passed, the SDF engaged in international peace cooperation efforts for Iraqi refugee relief, and international peace cooperation activities for Iraqi disaster relief.

¹⁰⁰ 156th Plenary Session of the Diet, House of Representatives General Session (June 24, 2003), Prime Minister Junichiro Koizumi.

¹⁰¹ Ibid.

community. In June 2006, however, the government concluded that the stage of emergency reconstruction assistance measures had basically ended, and that Iraq had moved on to a stage of independent reconstruction. As a result, the government decided to first withdraw the GSDF unit, and its activities were then ended in September of that year after a mission of about two and one-half years.¹⁰² Later, in December 2008, the mission of the ASDF unit also came to an end and it was withdrawn, ending the Iraq activity.¹⁰³

b. Relationship to Command Authority in Multinational Forces

UNSC Resolution No.1546 was passed on June 8, 2004,¹⁰⁴ ending the occupation of Iraq and restoring complete sovereignty to the country, and on June 28, the Coalition Provisional Authority centered on the U.S. and the UK handed over governing authority to the Iraqi Provisional Government. In addition, this resolution established a multinational force for support of Iraq, and the Iraqi Provisional Government requested the multinational force to perform security activities, and humanitarian and reconstruction assistance. Japan also, as a part of this multinational force acting at the request of the Iraqi Provisional Government, secured Iraq's agreement and a legal basis to continue humanitarian and reconstruction assistance activities.

Here, a problem arose over whether SDF activities within the multinational force were a violation of the Constitution. The points of dispute were: (1) did the SDF come under the command of the multinational force; and (2) did the command authority of the multinational force extend to the SDF. Regarding both of these points, the government expressed the following view:¹⁰⁵ "The SDF operate within the multinational force under an integrated command headquarters, and engage in communication and adjustment with this command;" however, they are "not under the command of this command headquarters." "The SDF continue to operate under the independent judgment of Japan, following Japan's orders based on the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq and its basic plans to perform humanitarian and reconstruction assistance activities in a form that is welcomed by the Iraqi Provisional Government." "Regarding this point," "an understanding has been reached between the government of Japan and both the U.S. and British governments." "The SDF are not engaged in activities that involve the use of force prohibited by the Constitution, but continue as before in activities in a so-called 'non-combat region' based on the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq, and are not engaged in a joint use of force with other countries."

¹⁰² Defense Agency, ed., *Nihon no Boei*, 2007, [*Japan's Defense, 2007 Edition*], pp.282, 284.

¹⁰³ "Comment by Minister of Defense Hamada in relation to the ending of the Air Self Defense Force activities <<http://www.mod.go.jp/j/2008/11/28ex.html>>, accessed February 3, 2009.

¹⁰⁴ The Resolution included: (1) endorsement of the Iraqi Provisional Authority; (2) welcome for the ending of the occupation and restoration of complete sovereignty for Iraq; (3) clarification of the UN's role; and (4) clarification of the missions for the multinational force, including humanitarian and reconstruction assistance.

¹⁰⁵ "On the Self Defense Forces' Humanitarian and Reconstruction Assistance Activities After Restoration of Sovereignty in Iraq" (June 18, 2004, Agreement by Cabinet).

c. Problems with Command and Order Relationships

Under current Constitutional law, Japan's participation in UN forces is regulated by the above-described government view, and the command relationship with the multinational force for activities in Iraq is also settled.¹⁰⁶ Since the multinational force is engaged in security activities alongside the humanitarian and reconstruction assistance activities, there are times when the use of force is required. Japan's SDF cannot participate in multinational forces with such missions, and will naturally not come under the command of such a multinational force command. However, since the SDF can provide necessary cooperation, and can engage in activities for humanitarian and reconstruction assistance that do not involve the use of force, its participation in Iraq reconstruction activities is accepted. But since it does not come under the command of the multinational force command, and its activities are based on Japan's own command authority, there is no problem with the SDF's command and order relationship with the multinational force.¹⁰⁷ In addition, as can be seen by the government view regarding PKOs, the problem of command supervision by the Minister of Defense versus the command of the multinational force does not apply in this case.

As can be seen here, legal adjustments viewed in relation to the Constitution, etc., have been fully adequate in regard to cooperation with multinational forces. On the actual operations front, the SDF have maintained close information exchanges with the multinational force command headquarters, and many adjustments have no doubt been made for the execution of missions. In addition, as with Japan, the various national forces are all said to retain their own independent command authorities separate from the multinational force.¹⁰⁸ While activities were performed as much as is possible within the range of international peace cooperation activities allowed under Constitutional law, as based on the government interpretation, mission execution would probably be more effective if the SDF were able to find a legal basis enabling activity under the command of the multinational force.

¹⁰⁶ In the foregoing Cabinet agreement (June 18, 2004), as well, it was asserted that "this is not a change from an earlier government's view regarding participation in so-called multinational forces, that SDF activity within a multinational force is not allowed under the relationship with Constitutional law." Regarding this point, Shigeru Ishiba, Director General of the Defense Agency, explained in a press conference on that same day that, unlike the multinational force at the time of the earlier government's view ("Unified Government View on Participation and Cooperation of Peace Cooperation Units in a So-Called UN Force," House of Representatives, Special Committee on the United Nations (October 26, 1990), Foreign Minister Taro Nakayama), this time it is a new type of multinational force in which the mission is "humanitarian assistance," and this mission is clearly demarcated as an activity based on the Special Measures Law for Humanitarian and Reconstruction Assistance in Iraq, and in any case, since independence without coming under a command has been maintained, there has been no change whatsoever in the government's position.

¹⁰⁷ In a press conference with Hajime Matsusaki, Chief of the Ground Staff Office (July 1, 2004), he explained that orders sent from multinational force command headquarters to units of participating countries in line with the transference of supremacy to Iraq were not being received by Japan in response to commands, but were merely being circulated "for reference." <<http://www2.asahi.com/special/jieitai/TKY200401010358.html>>, accessed January 27, 2009.

¹⁰⁸ "Japan's Self Defense Forces, as with the armed forces of Poland, the UK, and Italy, are clearly under their own country's command." Acknowledgement made by the U.S. White House Press Secretary Scott McLellan <http://www.jimin.jp/jimin/2004_seisaku/iraku/index.html>, accessed January 27, 2009.

4. Implications for Reconsideration of Defense Law—Regarding Japan’s International Peace Cooperation

The previous sections have been an overview of the basic principles of command and order relationships in military law and defense law, with section 1 describing the content of regulations for command and order relationship in Japan’s SDF Law, and section 2 looking at the content of regulations in Germany, France, and the UK. Section 3 pointed out problems encompassing command and order relationships in multinational units, with a background of steadily more international military cooperation. This section now turns to an investigation of the implications for reconsideration of Japan’s defense law.

(1) Basic Principles of Ordinary Command and Order Relationship

In the military, subordinate soldiers have an obligation to obey the orders of their commanding superiors, in principle. This is an essential principle for effective attainment of duty under the hierarchical disciplinary structure of the armed forces. While the obligation of obedience can also be seen in the relationships of ordinary public officials, this tendency is much stronger in the military. Subordinates who do not obey the legitimate orders of superiors may be subject to punishment or disciplinary action.

However, as hinted at by the phrase “in principle,” there will be cases when subordinates are not required to obey the orders of superiors. This will happen when an order is “illegitimate.” The factors that constitute legitimacy are: (1) alignment with military objectives; (2) maintenance of the human dignity of soldiers; and (3) legality under domestic and international law. Alignment with military objectives refers to orders that ask the armed forces to engage in activity within a necessary range for execution of missions, and orders generated for attainment of private objectives lack validity. Maintenance of the human dignity of soldiers means that orders infringing on the dignity of soldiers are not valid, and people need to be respected as individuals, and also as members of society. Legality under domestic and international law means that orders must not only be legal orders under domestic military law, but should also be in alignment with the rules of international humanitarian laws and other international laws.

Subordinate soldiers are therefore under no obligation to obey illegitimate orders even when the orders have been issued by a superior. The problem comes when a subordinate has followed an illegitimate order with the result that the subordinate has committed an illegitimate action. In this case, as well, soldiers basically cannot avoid responsibility for their actions. As a result, soldiers are expected to take care to avoid following illegitimate orders. However, there may be cases for which a soldier may not be able to adequately discern the legitimacy of an order. Therefore, soldiers are in principle bound to obey orders, but if the order is clearly illegitimate, soldiers should be released from the obligation to obey.

In addition, on the possibility of the use of “force” to ensure that orders are followed, use of weapons for such purposes is basically not allowed. The problem comes during emergency

situations, but even in these situations the use of weapons to ensure obedience is surely not acceptable. There are other methods of compulsion that could be used.

A superior's orders bind the subordinate, and burden the subordinate with heavy responsibilities. As a result, a superior also holds commensurate responsibility. A superior must issue legitimate orders within the range of the superior's own authority, and must not issue orders that infringe on a soldier's human dignity. A superior needs to use legitimate commands and orders to maintain discipline within a unit, in order to obtain service objectives.

This paper examined the basic principles of command and order relationships in Germany, France, and the UK and did not find major differences among the countries. It would appear that the content of command and order relationships in various armed forces share certain common elements. Even when compared with the command and order relationship of the SDF in Japan's defense law, no major differences stood out.

In the case of Japan, the "Obligation to Execute Duties" and the "Obligation to Obey Orders of Superiors" in the SDF Law regulate the basic principles for SDF command and order relationship. SDF personnel have an obligation to "faithfully" obey the "duty-related orders" of superiors, and this obligation is much stricter than for ordinary government officials. However, they do not need to follow orders that are not "duty-related orders." The content of this regulation is as described earlier in this paper, in Section 1-3-b. As was also seen in the armed forces of major countries, there is no obligation to follow illegitimate orders. If a soldier follows an illegitimate order, and commits an illegal action, that soldier bears criminal responsibility if the illegality of the order was known by the soldier or was obvious. If the illegality was not obvious or serious, there may be a need to go back over the offending procedures and to seek cancellation of the order procedures. Otherwise, the principle remains that an obligation to obey orders cannot be escaped. Measures that superior officers can take to ensure obedience are found in the disciplinary measures regulated in the SDF Law, and vary according to the situation, with prison or other punishment, or in the case of insubordination during defense operations or public security operations, "direct compulsion" based on the Police Duties Execution Law may be enforced to ensure that subordinates perform their duties.

As can be seen, the basic principles of command and order relationships in the armed forces of major countries are very similar to the command and order relationship in Japan's SDF. Such principles are used to maintain discipline within SDF units and to enable effective attainment of missions basically built on legitimacy in Japan as well.

(2) Command and Order Relationships in International Cooperation

As shown in the previous section, there are no significant differences between major countries in the command and order relationships for maintenance of discipline within their respective national armed forces, and their respective legal systems are well-developed. The problem instead lies with a more globalized world with increased opportunities for countries to pursue

joint missions. With countries joining to form multinational units, soldiers of differing nationalities and military forces will become engaged in multinational unit operations, and it may happen that superiors and subordinates from differing nationalities and military forces may become members of the same unit. In this case, various authority-related problems not seen in the well-established command and order relationships within individual states may occur.

The major countries studied in this paper drew a broad distinction between so-called “command authority” and “disciplinary authority.” The former authority can be exercised by any superior to any subordinate even if they are of differing nationality, with the superior issuing orders, and the subordinates basically obeying these orders. This is the same as within a national armed force. However, the disciplinary authority for maintaining unit discipline is normally considered to be the prerogative of state military authorities.

A look at some major countries reveals different mindsets in each country. In the case of Germany, under its Constitution regulations are issued under the assumption that the German armed forces will act under the command of an international mechanism, and that German soldiers will be placed under the command of foreign commanders. Even in this case, however, disciplinary authority is not transferred. In the case of France, command authority is exercised in the president’s name, and there is no actual example to date of French soldiers being placed directly under the command of foreign commanders. In the UK, while there are no actual examples of coming under the command of foreign commanders up to this time, such command would be allowed within the range of the law. On the other hand, there can be no foreign disciplinary authority over British soldiers.

While these major countries believe that formation of multinational units, and positioning soldiers from various armed forces into those units, is natural for the purpose of executing international missions, and have very little in the way of legal restrictions, a look at Japan finds huge Constitutional restrictions in place. Because of prohibitions on the use of force overseas, and prohibitions on the right of collective self-defense, the SDF when participating in UN forces and other multinational units cannot engage in the use of force or become entangled with others using armed force. As a result, as defined in the government view described in Section 3-1, participation within a range that does not violate the Constitution comes in the form of international peace cooperation. The command and order relationship is thus differentiated between the Minister of Defense’s command supervision and multinational force “commands” (by the UN, etc.), with the former including disciplinary authority and the latter being limited to the sector of operational commands. Participation in PKO, as well, is governed by the PKO five principles for participation, which serve to prevent the problem of a joint use of force.

Under the present Constitution, Japan must assume a restrained defense policy, and the fact that certain restrictions are placed on participation in international peace cooperation appears to be viewed with favor by the people. However, a report issued by the “Council on Reconstruction

of a Legal Basis for Security” (June 24, 2008)¹⁰⁹ indicated some reconsideration of the framework, including changes to Constitutional interpretation, is needed from the perspective of exercise of the right of collective self-defense and promotion of international peace cooperation. Since this topic is not directly related to the purpose of this paper, a detailed description is avoided here. Nevertheless, this is surely an issue that Japan cannot avoid if the Japan-U.S. alliance is to be strengthened or international peace cooperation efforts are to be further promoted.

The issue of interest in this paper is the command and order relationship. From this perspective, the following can be said about the command and order relationship in international peace cooperation.

(3) Issues Concerning Command and Order Relationship in Japan’s International Peace Cooperation

According to the government interpretation, when the SDF participate in a PKO, command supervision that includes disciplinary authority is differentiated from “command,” with the former held by Japan (the Minister of Defense), and the latter following the command of the United Nations. This thinking corresponds to the differentiation in major countries between “disciplinary authority” and “command authority,” with the former being held by the country’s own military authorities, and the latter assuming the following of commands and orders issued by the foreign commanders, and there is little difference between Japan and these major countries. Should a multinational force be formed and Japan’s Self Defense Forces be a participant, these rules would apply.

In Japan’s case, however, “participation” and “cooperation” are differentiated, and if the multinational force has the objective of the use of force, Japan can engage in cooperation but cannot engage in participation. The difference between participation and cooperation is that the former entails becoming a member of the multinational force, and acting under its command. As a result, the significance of the above differentiation between command supervision and “command” means that participation must be limited to multinational forces that do not have the normal PKO objective of using armed force. As examined in Section 3-3, even the Iraqi humanitarian and reconstruction assistance activities encountered problems in the relationship between the multinational force and the assigned SDF units following the restoration of Iraqi sovereignty, with the result that the SDF did not come under the command of the multinational

¹⁰⁹ The “Council on Reconstruction of a Legal Basis for Security” was chaired by former Ambassador to Washington Shunji Yanai, and provided advice to Prime Minister Shinzo Abe, studying a reconsideration of Constitutional interpretation, such as the prohibition of exercising the right to collective defense, with focus on four areas: (1) defense of US Navy vessels at sea; (2) defense against ballistic missiles aimed at the United States; (3) use of weapons in international peace activities; and (4) rear area support for PKOs, etc. The Council’s first meeting was held on May 18, 2006 during the period of the Abe Administration, and it met five times over a period lasting until August 30, 2007, submitting a report to Prime Minister Yasuo Fukuda on June 24, 2008. As Prime Minister Fukuda was not favorable to the idea of changing the government interpretation regarding the right of collective self-defense, and the political climate had changed since the time of the Abe Administration, the report was essentially shelved.

force command headquarters, and operated under Japan's own command and subjective judgment.

In addition, even when the SDF participated in a multinational joint exercise (Cobra Gold), there have been reports of Constitutional issues being raised.¹¹⁰ This is presumed to be related to command authority. Cobra Gold was originally a bilateral joint exercise run between the U.S. and Thailand, with the first one held in 1982. Run on an annual basis, the training exercises include command exercises, field exercises, and civilian support activities (medical and facilities support for civilians).¹¹¹ In 2000, Singapore joined the command exercise, to make it a multinational exercise, and after that time a number of countries began participating.

Japan's SDF also began participating as an observer in 2001, and commenced official participation in the command exercise in 2005.¹¹² While at first participation was limited to the command exercise in the PKO center, and the medical humanitarian civilian assistance activities, in 2008 the SDF participated in noncombatant evacuation operations and the evacuation of Japanese nationals residing abroad, and sent observers to a PKO field exercise and humanitarian and civilian assistance activities (construction) for training in many different types of activities in a variety of countries.¹¹³ In the 2009 training exercise, instructors participated in PKO field exercises for the first time.¹¹⁴

While Cobra Gold is just a training exercise, during which other countries' armed force can act under commands in cooperation with different countries' armed forces, the SDF must act under a separate command system. As a result, participation is limited to command center exercises, and participation of units in field exercises must proceed with caution. The current government interpretation of no participation in multinational forces that have the objective of the use of force, and of not coming under a multinational force command, is the main source of these restrictions.

These same issues will surely arise when a multinational force is formed in the future for the objective of the use of force. Japan cannot participate but will be able to cooperate. In this case, as well, while they cannot engage in activities involving a joint use of force, they could engage in rear area operations such as logistical support activities. Since Japan cannot come under the

¹¹⁰ Bangkok Shuho (July 15, 2003) <<http://bangkokshuho.com/archive/2003/daily/03archives/030715.htm>>, accessed February 3, 2009.

¹¹¹ Defense Agency, "On Participation in Multinational Joint Exercises (Cobra Gold 05)" <<http://www.mod.go.jp/j/news/2005/04/0419a.htm>>, accessed February 3, 2009.

¹¹² Ministry of Defense, ed., *Nihon no Boei—Boei Hakusho, 2005 [Japan's Defense—Defense White Paper 2005]* (Gyosei, 2005), p.274.

¹¹³ Jieitai News (June 1, 2008) <http://www.boueinews.com/news/2008/20080601_1.html>, accessed February 3, 2009.

¹¹⁴ The training exercise started on February 4, 2009, with participants including the U.S., Thailand, Japan, Singapore, and Indonesia, and also observers. About 80 personnel from the Ministry of Defense participated in the command exercises and field exercises, including from the Joint Staff Office, the Ground Staff Office, the Air Staff Office, GSDF (North Eastern Army Headquarters, Eastern Army Headquarters, Middle Eastern Army Headquarters, Western Army Headquarters, Central Readiness Force, and Military Intelligence Command), MSDF (Self Defense Fleet), ASDF (Air Defense Command, Air Support Command), the Defense Intelligence Headquarters, and Internal Bureaus. Asagumo News (January 21, 2009) <<http://www.asagumo-news.com/news/200901/090122/09012208.html>>, accessed on February 3, 2009.

command of the multinational force command headquarters, they could act under a separate command system to make communication adjustments. Without quite careful communication adjustments, it would probably be difficult to achieve the mission tasks.

This issue is rooted in the government's current Constitutional interpretation. Since exercise of the right of collective self-defense is prohibited, and SDF cannot be used for a purpose involving the use of force overseas, Japan cannot participate in multinational forces with the objective of the use of force. Participation in international peace cooperation is also viewed as a Constitutional problem, "since collective security and PKOs also use military force, we take the position that this is 'the use of force' prohibited under Article 9 of the Constitution, and cannot be allowed."¹¹⁵ On the other hand, there is also the contrasting view that Japan's "international peace cooperation activities are performed based on requests from UN and other international organizations, and are activities with a close affinity to collective security," and "completely different from the right of collective self-defense exercised by decision of individual states;" moreover the regulations in Article 9 of the Constitution do not apply, and SDF activities in such situations are separate from the "use of force as a means of settling international disputes" prohibited in the Constitution, or the "use of force" prohibited in Chapter 2, Article 4 of the UN Charter.¹¹⁶ "Use of military force for international peace activities is not 'use of force' performed by individual states, but is 'compulsory action' implemented through resolutions or requests from the UNSC or other authoritative institutions for the purpose of realizing the international benefit of maintaining international peace and safety, and such military activity requires differentiating between the 'use of weapons' and the 'use of force.'" This viewpoint concludes that these activities are not in violation of the UN Charter or of the Constitution.

As expediently changing the Constitutional interpretation would be problematic in terms of the legal stability of the Constitution, due to the need to adapt the government interpretation, a change in thinking may be one way to resolve the problem of the relationship between command authority in multinational forces and the SDF. The activities of the SDF may also include those which do not involve the use of force, such as, for example, rear area logistical support activities, even when participating in international peace cooperation activities with multinational forces with an objective of the use of force. The means for participation in multinational force headquarters should also be studied, to enable more efficient mission execution. However, this

¹¹⁵ Shinya Murase, "Anzen Hoshō ni kansuru Kokusaiho to Nihonho—Shudanteki Jieiken oyobi Kokusai Heiwa Katsudo no Bunmyaku de (Ge) [International Law and Japan Law in regard to Security – In the Context of Right to Collective Defense, and International Peace Activities (Lower)]," *Jurist*, No.1350 (February 15, 2008), pp.54-56. Government interpretation revealed during a response in the 142nd Plenary Session of the House of Representatives Committee on Security (May 14, 1998), Osamu Akiyama, Director General of the First Department, Cabinet Legislation Bureau, etc. Since Japan is prohibited by Article 9 of the Constitution from the "use of force," Japan is not allowed to engage in such operations even if it is a UN activity since: (1) as long as Japan accepts it under its own volition it will remain unchanged as a "Japan activity;" and (2) its use as a "means of settling international disputes" also remains unchanged.

¹¹⁶ Murase, "International Law and Japan Law in regard to Security (Lower)," pp.52-54.

would be a move toward coming under the multinational force operational commands, and it should go without saying that disciplinary authority, etc., would continue to remain with Japan.

Conclusion

Since the end of the Cold War, amid rapid globalization, international cooperation is a growing business. The military sector has been no exception, with multinational forces tasked with humanitarian assistance and other areas. The SDF, as well, have launched into the field of international peace cooperation following the end of the Cold War, accumulating a wealth of experience that includes participation in various PKOs, engagement in fuel and water replenishment activities for U.S. and British and other countries' navy vessels in the Indian Ocean, and participation in Iraqi humanitarian and reconstruction assistance activities.

One item of note currently being implemented is the anti-piracy measures being taken off the coast of Somalia and in the Gulf of Aden. At first, MSDF was dispatched in response to an announcement of the maritime security operations order,¹¹⁷ but then the Anti-Piracy Bill (2009 Law No.55) was enacted that relaxed the standards for the use of weapons and allowed MSDF vessels to go to the defense of the vessels of other nations, and activities based on this law are currently in progress.¹¹⁸ Japan can be expected to become increasingly involved in such international activities.

As a result, perhaps it would be more suitable to apply the principles of international law to areas in which multinational forces operate in response to UN resolutions. In other words, there is a need to adopt policies for handling these separately from the prohibition of the use of force overseas, prohibition of the exercise of the right of collective self-defense, or other Constitutional restrictions, so that SDF participation could come under the command of multinational force commands headquarters, activities could be integrated, and missions could be executed smoothly. Meanwhile, views on the need to respect existing Constitutional restrictions are being taken up by the government, centering on the Cabinet Legislation Bureau. It will be a future challenge for Japan to search for more effective means of participation in international peace cooperation efforts to meet its international responsibilities. This must be accomplished by a thorough examination of both the international and domestic legal aspects of international peace cooperation.

¹¹⁷ The maritime security operations order was announced on March 10, 2009, and an MSDF destroyer left port on the 14th. The MSDF vessel included Marine Safety Officers with powers of judiciary processing. In addition, on May 15th, an MSDF P-3C maritime patrol aircraft received orders to deploy, and left immediately thereafter to commence patrol activity off the coast of Somalia and in the Gulf of Aden.

¹¹⁸ The Anti-piracy Bill expanded the targets of protection to include foreign-registered ships, relaxed the standards for use of weapons, and allowed firing at vessel hulls. The law passed the House of Representatives on April 23, 2009, was rejected by the House of Councillors on June 19th, and then passed the House of Representatives again to be enacted into law. On July 24th, an enabling ordinance based on the law was announced, and the legal basis for deployment of MSDF vessels was switched to be covered by the new law on July 29th, to complete the establishment of anti-piracy policy.