Policy Forum 09-031: Japan’s MSDF Somalia Dispatch: Targeting Pirates or Pirating a Constitutional Reinterpretation?

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Japan's MSDF Somalia Dispatch: Targeting Pirates or Pirating a Constitutional Reinterpretation?

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I. Introduction

Sourabh Gupta, Senior Research Associate at Samuels International Associates, Inc., writes, "with each successive adjustment of the legal framework of Japan's security policy, an even greater separation has tended to set in between the original Article 9 aspiration of a force posture that is non-coercive and built around minimal use of force in defense of exclusively individual self-defense ends, and its actual practice on the ground."

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II. Article by Sourabh Gupta

- "Japan's MSDF Somalia Dispatch: Targeting Pirates or Pirating a Constitutional Reinterpretation?" By Sourabh Gupta

On Friday, March 13th, Japanese Defense Minister Yasukazu Hamada ordered the dispatch of two Maritime Self-Defense Force (MSDF) destroyers on an anti-piracy mission to the Gulf of Aden, the first such mission by the MSDF outside Japanese territorial waters. The deployment followed an equally historic dispatch a day earlier of a South Korean warship to the area, the first such dispatch by Seoul since independence six decades earlier. Earlier in January 2009, a Chinese naval patrol and escort mission, tasked additionally with the escort of Taiwanese commercial vessels, began operational duties off Somali waters - the first such out-of-area mission by Beijing since the 15th century.

As per the operational terms of its deployment, MSDF escort missions are to be restricted to the protection of Japan-registered vessels, foreign-registered vessels carrying Japanese nationals, and foreign-registered vessels managed by Japanese operators or carrying Japanese cargo. Though dispatched primarily in a deterrent capacity, MSDF forces may - consonant with the maritime policing operations provision of Article 82 of the Self Defense Forces Law - use necessary force in cases of individual self-defense or to avert an imminent danger.

Further, in terms of weapons use, MSDF personnel may - consonant with the arrest and detention provisions of the Police Execution of Duties Law - use force that may reasonably be judged to be necessary as per the circumstance at hand. MSDF forces must however confine all armed action to cases of individual self-defense and defense of Japanese nationals or assets. They are not allowed to come to the defense of unrelated third country or party vessels.

Though the March 13th dispatch order situates the MSDF mission securely within the baselines of Japan's Article 9 interpretation, a companion anti-piracy measures bill approved by the Japanese cabinet, also on March 13th, raises some altogether more troubling questions. While intended to place an expanded version of the anti-piracy mission on a more robust legal footing, the proposed bill, in its broadening of the eligibility criteria for MSDF protection to third-country vessels as well as its relaxation of rules on weapons use by MSDF personnel, is likely to be a lightning rod for controversy when submitted to the Diet.

Ostensibly intended to discharge Tokyo's global security obligations now that the vaguely-worded formulation of "international peace cooperation activities" has been elevated to the SDF's primary mission, the bill would allow the MSDF to protect all commercial vessels - regardless of their linkage

to Japan, Japanese nationals or Japan origin-or-bound cargo. Further, and notwithstanding certain constraints, the bill would allow MSDF personnel to fire at will, and not necessarily in cases of self defense only, to repel an attempted piracy attack.

Limited as the bill's focus is to anti-piracy actions, neither measure, as proposed, directly contravenes Article 9. Because piracy is deemed under international law to be a criminal act committed for private ends, as opposed to a politically motivated military act, anti-piracy measures entailing the use of force constitute policing (allowable) rather than military (non-allowable) actions. Both measures, however, blur the already fraying division between military and anti-criminal actions within Japanese security practices. Further, they add missions to the MSDF's remit, which if authorized militarily, would almost certainly involve breaching the constitution's use of force prohibition.

The proposed bill designates the Japan Coast Guard (JCG) in the first instance as the appropriate authority to confront the pirate vessel. MSDF personnel may however, under the provisions of its maritime policing powers, intervene and use lethal force if the immediate engagement is deemed to exceed the JCG's combat capabilities. Though JCG vessels are currently authorized - as per the amended Japan Coast Guard Law - to use force in excess of self-defense requirements to stop vessels/avert maritime intrusion, they currently lack the necessary weapons suite, armaments and sensor capabilities to engage moderate to heavily armed adversaries in naval combat.

On two instances, in fact, MSDF ships have been dispatched under such policing authority, and in aid of the JCG, to engage suspicious vessels - in 1999 to confront North Korean spy ships and thereafter in 2004 to check a Chinese submarine intrusion. Both episodes occurred however within Japan's territorial waters or its exclusive economic zone (EEZ). By way of the proposed anti-piracy measures bill, the MSDF is now sought to be authorized to pursue and confront maritime criminal activity beyond Japanese waters - authorized, in effect, to pursue and confront vessels unfettered by any geographic limits.

Likewise, the proposed anti-piracy bill also seeks to functionally loosen the restrictive criteria for weapons use that is currently imposed on SDF personnel and bring it on par with the prerogatives enjoyed by the JCG. As per the Koizumi-era revision of the Coast Guard Law, the JCG is now authorized to initiate armed combat with suspicious vessels under conditions that observers have noted are "vaguely defined and easily justifiable in retrospect." Indeed, in December 2001, such liberalized rules of engagement were put to use by the JCG to chase down and sink a North Korean trawler in the East China Sea. Ostensibly, such ability to bring its full complement of firepower to bear in situations that might reasonably be considered as beyond the scope of 'justifiable self-defense' is, in effect, also sought to be extended to Japan's self defense forces - under the proviso, no doubt, that such engagements be confined to policing actions that target private, trans-national criminality.

Together, this more permissive stance corresponds to the broad thrust evident in the evolving legal framework that underlies Tokyo's security posture: the expansion of the functional writ of uniformed fighting power, even as its security responsibilities extend beyond the territorial (Article V contingencies) and regional (Article VI contingencies) spheres to incorporate roles and missions designed to make Japan an active global security partner.

Cynically, further, it also corresponds to the specific recommendations on weapons use relaxation proposed by ex-Prime Minister Shinzo Abe's handpicked panel of hawkish experts - the Yanai Panel. Gathered together to study potential avenues for reinterpreting Article 9, the panel theorized that all actions employed in a post-conflict mode, as contrasted with conflict phase operations, be constitutionally reinterpreted as being not joined to the 'use of force'. Using such order of logic

thereafter, it recommended that the legal bind on weapons use in the case of post-conflict operations be liberalized beyond individual self-defense ceilings so as to facilitate Tokyo's participation in a broader range of activities, such as ship inspections, policing, peacekeeping and protective duties, etc.

Bending Article 9, Tampering with Constitutional Interpretations

In its most basic articulation, Article 9 of the Japanese Constitution prohibits the use of force by the state in a coercive context to settle an international dispute - be it militarily or even, arguably, as an adjunct to diplomacy. As interpreted by the Cabinet Legislation Bureau (CLB), Japan may only take recourse to the use of force for purposes of exercising the right to self-defense, the exercise of force in such context being tightly restricted by strict conditionalities (imminent and unjustified invasion; no other means of repulsing the invasion; minimum exercise of force necessary for defense).

Further, Japan may not exercise the right to collective security or collective self-defense, even though by reason of sovereignty it possesses such a right. Because the exercise of collective self-defense would, as per the CLB's extant interpretation, necessarily mean transgressing the 'minimality test' in the exercise of self-defense, only the right to exercise individual self-defense is constitutionally recognized. At its core, then, the Japanese government may not use armed force in defense of international collective interests and, equally, the government may not use armed force in a context that is not justifiably self-defense related.

On both counts, the proposed anti-piracy bill potentially opens the door to future violations of the cardinal tenets of Article 9. By broadening the eligibility criteria for MSDF protection to unrelated third-country vessels, it sets Japanese security practice on the slippery path to the front-line exercise of armed force in defense of collective interests. In permitting the use of arms by MSDF personnel beyond 'acts of necessity', it extends the baseline related to such arms use beyond any reasonable definition of minimality.

Though authorized, admittedly, in a policing - not military - capacity, misgivings exist that future such deployments might not be as easily distinguishable in terms of being military or anti-criminal -- in turn, leading to the SDF's injection, down the line, into unstable territorial zones in the course of post-conflict contingencies and in defense of (non-blue helmeted) multinational force personnel under trigger-happy rules of engagement.

Even more worrying, perhaps, is that with each successive adjustment of the legal framework of Japan's security policy, an even greater separation has tended to set in between the original Article 9 aspiration of a force posture that is non-coercive and built around minimal use of force in defense of exclusively individual self-defense ends, and its actual practice on the ground. And if that be the prevailing dynamic, then perhaps Japan might alternately be better served by determinedly moving ahead and raising a dedicated contingent within its Self-Defense Forces that is exclusively blue-helmeted and explicitly permitted to use necessary force in aid of collective self-defense ends in the course of post-conflict operations.

III. Nautilus invites your responses

The Northeast Asia Peace and Security Network invites your responses to this essay. Please send responses to: napsnet-reply@nautilus.org . Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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