

Legal Problems of Fighting Piracy: The Japanese Perspective

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I. INTRODUCTION: ENACTMENT OF JAPAN'S ANTI-PIRACY ACT

On July 2009, Japan enacted the Act on Punishment of and Measures against Acts of Piracy (hereafter referred to as the Anti-Piracy Act), Act No. 55.¹

The direct motive for the enactment of this Act was the necessity for a legal basis to enable Japanese officers to contribute to international cooperative operations against

1 For a provisional English translation of this Act, please see *Japanese Yearbook of International Law*, Vol. 53 (2010), pp. 838-843. Extracts from the minutes of the discussions in the Diet can be found with A. KANEHARA, 'Japanese Legal Regime Combating Piracy: The Act on Punishment of and Measures against Acts of Piracy', *ibid.*, pp. 469-489. The backgrounds of the enactment of this Act and related legal issues are explained in M. OKANO, 'Is International Law Effective in the Fight against Piracy?', *ibid.*, pp. 178-201. See also in Japanese, K. AKATANI, *Kaizoku kōi no shobatsu oyobi kaizoku kōi hen o taishō ni kansuru hōritsu*, Jurisuto, No. 385 (2009), pp. 62-68.

piracy, in particular, those operations combating piracy in the waters off the coast of Somalia and the Gulf of Aden in accordance with the resolutions of the Security Council of the UN. However, this Act does not provide for a special legal grounds for the specific operations of the self-defense forces (hereafter referred to as the SDF) in the vicinity of Somalia. Instead, it provides for a general legal framework to enable Japanese officers to take measures against piracy in accordance with international law, in particular, the UN Convention on the Law of the Sea (hereafter referred to as the UNCLOS). Therefore, its contents take into consideration the special situations in the vicinity of Somalia and the contribution to the international community in general.²

When Japan ratified the UNCLOS, several legislative measures were needed to comply with the convention's obligations. The Japanese government found that it provides for only the obligation to cooperation as far as measures against acts of piracy are concerned and that it was not necessary at present to enable Japanese officers to take measures against piracy or to punish the act of piracy in accordance with the UNCLOS. Therefore, it decided not to enact a new legislation for the measures against piracy.³

Despite this decision at the time of the ratification of the UNCLOS, arguments continued about the necessity of maintaining the maritime security and enhancing the competence of Japanese officers in this area because of the seriousness of piracy or armed robberies at sea. The Basic Act on Ocean Policy, which came into being in 2005, emphasized the importance of maritime transportation and the maintenance of security and order at sea. The formulation of the Basic Plan on Ocean Policy pursuant to that act provides that 'necessary steps be taken for ensuring the peace and security of Japan and ensuring maritime order' and states the necessity of a regime for suppressing and regulating offending acts such as piracy on the high seas in accordance with international law.⁴

The seriousness of piracy in the waters off the coast of Somalia and the resolutions adopted by the Security Council⁵ have made the Japanese government consider even more seriously its contribution to international operations in that sea area. This area is of vital importance for the transportation of natural resources to Japan. Therefore in 2008, the Japanese government established a committee to examine a new act for combat against piracy in 2008.

2 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17 April 2009), pp. 2-3, No. 6 (22 April 2009), p. 2 and No. 7 (23 April 2009), p. 2.

3 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 2 and No. 7 (23 April 2009), p. 2.

4 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 13.

5 On 2 June 2008, the Security Council adopted the first resolution, resolution 1816 (2008), to authorize the interested members to take enforcement measures in this sea area (S/RES/ 1816 (2008)).

The committee recommended that, given the urgency of the situation, the government enact the Anti-Piracy Act and send the officers and fleets of the Maritime Self-Defense Forces (hereafter referred to as the MSDF) to the area off the coast of Somalia on a provisional basis pursuant to Article 82 of the Self-Defense Forces Act (hereafter referred to as the SDF Act). The difference between the operations under the Anti-Piracy Act and those pursuant to Article 82 will be examined later. Based on the basic principles presented by this committee, the Cabinet decided to enact a new law to form the legal basis for operations against acts of piracy.

In this paper, following a brief overview of the Japanese Anti-Piracy Act, some salient issues relating to this Act will be discussed.

II. MAIN PROVISIONS OF THE ANTI-PIRACY ACT

The Anti-Piracy Act contains thirteen provisions and six supplementary provisions. Here I will briefly examine the contents of its main provisions.

Article 1 provides for the purposes of this Act. The purposes are to prescribe punishment for acts of piracy under Japanese law, to provide necessary legal grounds for an appropriate and effective response by Japan to acts of piracy, and thereby to maintain public safety and order at sea.

As the Japanese economy relies heavily on maritime transportation for its imports and exports, the safety of maritime navigation is of vital importance for Japan's economy and the nation.

Article 2 provides for the definition of the acts of piracy under the present Act. This is a key provision outlining the actions to be taken by the Japan Coast Guard (hereafter referred to as the JCG) and the Self-Defense Forces (hereafter referred to as the SDF) under this Act. As the salient features of the definition in this provision will be discussed later, I should simply note here that the definition, in principle, corresponds largely to that provided by Article 100 of the UNCLOS.

Articles 3 and 4 provide for punishment for acts of piracy pursuant to this Act. Under the present Act, not only the commission of the act of piracy but also the attempt of that act constitute the crime of piracy. A person who commits an act of piracy shall be punished by imprisonment, and the punishment is graver than the ones for the crimes under the Criminal Code of Japan which are committed in the course of the act of piracy.

Articles 5 and 6 provide for the competence of the JCG to take measures against acts of piracy. Pursuant to Article 5, the JCG is designed to play the primary role in the operations against acts of piracy. In accordance with Article 6, a coast guard official and an assistant coast guard official may use their weapons, provided that the perpetrator disobeys the coast guard's commands to stop and continues the acts of piracy by navigating the ship, and that there are sufficient grounds to believe that there are no other means to stop the navigation of that ship, to the extent that is reasonably required in the circumstances.

Articles 7 and 8 provide for the competence of the SDF. Although the present Act accords the primary competence to take measures against acts of piracy to the JCG, it permits the SDF to take necessary actions against acts of piracy in cases where the situation requires more forceful measures. As the function of the SDF is considered to be complementary to the operations of the JCG, Article 7 provides for strict conditions for the operations of the SDF. First, an order by the Minister of Defense, with the approval of the Prime Minister, is required. Second, there is extraordinary necessity. Upon obtaining the approval of the Prime Minister, the Minister of Defense shall, after consultation with the heads of the relevant administrative organs, draw up and submit to the Prime Minister the guidelines for the response operations. Four items are normally required to obtain the approval of the prime Minister. However, in cases where there is an urgent need to take measures against an on-going (or imminent) act of piracy, it is sufficient for the Minister of Defense to provide only an outline of the necessary actions to the Prime Minister.

The four items required to obtain the Prime Minister's approval are: 1) necessity of the action set forth in the preceding paragraph (hereafter referred to as the Anti-Piracy Response Operations); 2) the area of the sea where the SDF undertake the Anti-Piracy Response Operations; 3) the scale, formation, equipment, and terms of the unit of the Self-Defense Forces which the Minister of Defense orders to take the Anti-Piracy Response Operations; and 4) other important matters relevant to the Anti-Piracy Response Operations.

Article 8 provides for the competence of the Maritime Self-Defense officials at the rank of petty officer 3rd class or higher of Maritime Self-Defense Forces that are ordered to take the Anti-Piracy Response Operations. The relevant provisions of the Japan Coast Guard Act (Article 16, paragraph 1 of Article 17, and Article 18) shall apply, *mutatis mutandis*, to the execution of these duties. Paragraph 3 of the same provision provides for the obligation of the Prime Minister to report to the Diet without delay the required information about the Anti-Piracy Operations undertaken with his/her approval.

Article 9 provides for the application of Japanese laws with regard to the execution of the duties by Japanese public officials outside of Japan related to measures against acts of piracy prescribed in Article 5 to Article 8.

Article 10 provides that the heads of the relevant administrative organs shall cooperate with the Commandant of the Japan Coast Guard and the Minister of Defense on measures against acts of piracy, so as to achieve the objective of Article 1.

These are the main provisions of the Anti-Piracy Act. At the end of this introduction of the Act's salient provisions, it is necessary to emphasize that all of the operations under this Act are designated as police operations and that it is primarily up to the JCG to take measures against acts of piracy with the MSDF deemed to play a complementary role in the operations against piracy.

III. PURPOSES OF THE ANTI-PIRACY ACT

There are four purposes of the Anti-Piracy Act:

First, cooperation with anti-piracy operations under international law, particularly the UNCLOS; second, protection of the vessels regardless of the flag; third, criminalization of acts of piracy and instigation of required legal grounds for an appropriate and effective response to such acts; and finally, maintenance of public safety and order at sea.

IV. DEFINITION OF 'ACTS OF PIRACY' IN THE ANTI-PIRACY ACT

Article 2 defines acts of piracy as follows: 'Acts committed for private ends on the high seas or in territorial seas, as well as in the internal waters of Japan, by the crew or the passengers of a ship (except for warships and other ships owned or operated by a government of State).'

1. *Importance of 'Private Ends' and Universal Jurisdiction Clauses*

As I have already pointed out, the definition provided in Article 2 is, in principle, formulated pursuant to Article 100 of the UNCLOS.

The 'private ends' clause is one of the most essential elements in the definition of acts of piracy both in the UNCLOS and in the Anti-Piracy Act. Moreover, this element plays a particularly important role in the Japanese legal system. As far as these acts of piracy are pursued for private ends, the persons engaging in those acts are never considered to be state organs, and the measures taken against them do not constitute the 'use of force' but can be considered as measures for law enforcement against private individuals.

In common with the UNCLOS's definition of acts of piracy, the Anti-Piracy Act makes no reference to the nationality of the vessels or of the victims or the nature of the cargos. This enables Japanese officers to exercise universal jurisdiction in response to acts of piracy.

2. *Differences from the Definition of Article 100 of the UNCLOS*

Although the basic formulation of the definition in the Anti-Piracy Act corresponds with that used by the UNCLOS, there are some differences that mainly reflect the attempts to establish a municipal legal system for the measures against acts of piracy.

a) *More Detailed and Concrete Specification of the Acts of Piracy*

One of the differences is that the definition in Article 2 is more detailed and specified in order to satisfy the strict requirement of the principle of *nulla poena sine lege* in the Japanese criminal law system. For such purposes, it was necessary to concretize the modalities of the acts that constitute the crime and the punishment responding to each modality in a strict way.

b) *Sea Areas and the Acts of Piracy under the Anti-Piracy Act*

While acts of piracy in the UNCLOS are limited to those undertaken on the high seas, such acts under the Anti-Piracy Act encompass ones undertaken in Japanese territorial waters and internal waters.

Three reasons underlie the decision for the present Act to apply to the territorial waters and internal waters. First, the government considered that Japan is under the obligation to take effective measures against piracy in its territorial waters and internal waters as it seeks to conform with international law. It took the view that measures taken in its territorial and internal waters constitute part of Japan's efforts to eliminate acts of piracy. Second, the application of this act to the territorial or internal waters was required to ensure the fairness of the punishments conferred for the crime of piracy under this Act and for the crimes provided in the Criminal Code. It is certain that the Criminal Code provides for the punishment for the respective acts amounting to acts of piracy – for example, murder, attempted murder or robbery. However, the punishments under the Anti-Piracy Act are more severe than the punishment for the responding crimes under the Criminal Code in consideration of the nature of pirates as *hostis humani generis*. It was necessary to ensure the balance, in terms of the gravity of the punishments, between the acts of piracy committed on the high seas and the equivalent crimes committed in the territorial waters and in the internal waters.⁶ Third, the present Act provides for the competence and conditions for the JCG and SDF officers to use arms during the course of their operations against acts of piracy. Those competences and conditions should be equivalent both on the high seas and in Japan's territorial or internal waters. One final point should be made with regard to the sea area covered under the Act. This Act is not applicable to acts committed in the territorial waters or internal waters of a foreign state. However, if a foreign state makes a request or provides consent to the Japanese government to pursue operations against acts of piracy in the sea areas of that state, Japanese officers are not precluded from taking measures pursuant to this Act.⁷

c) *Exclusion of the Act of Piracy by Airplanes*

Although the UNCLOS's definition of acts of piracy includes the acts undertaken by airplanes, the Anti-Piracy Act excludes these. The reasoning underlying their exclusion was that 1) there is no precedent for acts of piracy by airplanes and 2) it is assumed unlikely

6 In the Criminal Code of Japan, Article 1, paragraph 2 provides that the crimes committed in the vessels flying a Japanese flag on the high seas are punished pursuant to Japanese law. Article 3-2 provides for the application of Japan's Criminal Code to certain serious crimes committed on the high seas by a foreign national against a Japanese national. These provisions constitute the basis for the punishment of only a part of the act of piracy.

7 Minutes of the Committee on Diplomacy and Defense, House of Councilors, 171st Session, No. 16 (4 June 2009), p. 22.

that acts of piracy would be conducted by airplanes because of technical difficulties at the present stage.⁸

V. ANTI-PIRACY MEASURES UNDERTAKEN BY THE JCG AND THE SDF

One of the main features of the Anti-Piracy Act is that it has opened up the way for Japanese officers to take measures abroad. There were many discussions about which organ should undertake responsibility for the anti-piracy operations. In the end, the decision was based upon deliberate considerations of the competence of the relevant organs.

Generally speaking, there is fairly strong objection to sending SDF officers abroad because of the experience of World War II and Article 9 of the Constitution. Another important element was that the primary motive for the legislation of this Act was the necessity for Japan to contribute to the international operations against piracy off the coast of Somalia. It was obvious that the operations in this region would practically involve the protection of civil vessels navigating the area by crime deterrence and law enforcement measures.

In Japan, the operations for the prevention of crimes and law enforcement are mainly undertaken by the JCG. Therefore, it might be possible to argue that the JCG should be designated to have the competence to respond to the criminal acts even if they are committed in the area far from Japan. However, at the same time, it was fully appreciated that the areas requiring protection are some distance from Japan and that the pirates acting in these areas are heavily equipped with weapons. To respond to such extraordinary situations, fleets and aircrafts would have to be able to undertake long navigations and be sufficiently equipped. The resolutions of the Security Council and the response of interested states played an important role in the decision of the Japanese government to send the MSDF to the area.

In consideration of these elements, the Anti-Piracy Act confers the primary responsibility for anti-piracy measures on the JCG. The act also paved the way for the SDF to be deployed in exceptional circumstances where additional back-up is required.

The competence of the JCG and the SDF and their relationship will be discussed later with some reference to the basic functions of these two organs in the Japanese legal system.

1. *Competence of the JCG*

Article 5 of the Anti-Piracy Act provides that the primary responsibility for the policing operations against acts of piracy shall be undertaken by the JCG.⁹ It is necessary to see

⁸ Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 6 (22 April 2009), p. 11 and Minutes of the Committee on Diplomacy and Defense, House of Councilors, 171st Session, No. 16 (4 June 2009), p. 22.

the status of the JCG in Japan to understand the background of this provision. Article 2 of the JCG Act provides for the basic functions of the JCG.¹⁰ According to it, the principal function of JCG is to undertake law enforcement measures to maintain the order at sea. Although the JCG mainly operates in the vicinity of Japan, its operations are not limited legally or geographically pursuant to Article 2 of the JCG Act to a specific sea area.¹¹ Thus, the JCG is permitted to undertake compulsory measures during its policing operations pursuant to Article 18 of the JCG Act.¹² It should also be added that pursuant

9 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 11 and No. 4 (17 April 2009), p. 9.

10 Article 2 of the JCG Act provides as follows:

'The Japan Coast Guard shall, for the purpose of ensuring safety and order at sea, perform the duties concerning enforcement of laws and regulations at sea, maritime search and rescue, prevention of maritime pollution, prevention and suppression of crimes at sea, detention and arrest of criminals at sea, regulation of vessels' traffic at sea, services concerning hydrography and aids to navigation, and other services for ensuring maritime safety and the services concerning matters incident thereto' (translation by the author).

11 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 31 and No. 6 (22 April 2009), p. 19.

12 Article 18 provides as follows:

'When a Coast Guard Officer witnesses a crime being about to be committed at sea, or when human life or body is likely to be endangered, or property is likely to be seriously damaged in a dangerous situation such as a natural disaster, a disaster at sea, collapse of a structure or explosion of an explosive where immediate action is needed, he may take any of the following measures, besides those specified in other laws and ordinances

(1) To make a vessel start or stop proceeding, or suspend her departure;

(2) To make a vessel deviate from her pre-determined route, or to make her move to a designated place;

(3) To make the crew, passengers or other persons on board disembark the vessel or to restrict or prohibit their disembarkation;

(4) To cause the cargo to be discharged or to restrict or prohibit its discharge;

(5) To restrict or prohibit traffic between vessels or between vessels or between a vessel and shore;

(6) To stop any act that is likely to endanger human life or body, or seriously damage property at sea, besides the above itemized measures.

2. When a Coast Guard officer considers it obvious that a crime will be committed at sea, based on his reasonable judgment from the appearance of a vessel, the way she sails, the abnormal behavior of crew members, passengers or other persons on board or other circumstances, or when he considers that public order is likely to be considerably disturbed at sea and finds no other proper measures available, he may take the measure mentioned in item (1) or item (2) of the preceding paragraph.'

(There is no official translation for the JCG Act. This is the text translated by the Ship and Ocean Policy Foundation, <http://nippon.zaidan.info/seikabutsu/2001/00500/contents/00021.htm>, last visited on 20 August 2012.)

Professor KANEHARA translates this provision in a different way:

'1. When a crime is about to be committed, or when there exist dangerous situations, such as natural calamity, a disturbance, destruction of construction, explosion of dangerous substances, a JCG officer can take the following measures on the condition that there are ap-

to Article 31 of the JCG Act,¹³ a coast guard officer and an assistant coast guard officer (hereafter referred to as the JCG officer) are, as fixed by the Commandant of the Japan Coast Guard, permitted to perform the duties of a judicial police official under the Code of Criminal Procedure. The SDF Act does not contain an equivalent provision, and consequently it is only the JCG officers who are competent to perform this function. Therefore, when the SDF participate in operations under the Anti-Piracy Act, coast guard officers or assistant officers must be on board to apprehend, arrest or detain the suspects. The JCG has the competence to take law enforcement actions outside of the territorial jurisdiction of Japan, although its work is mainly undertaken in areas near the shore areas.

2. Competence of the SDF

The Anti-Piracy Act has opened the way to send the SDF to combat piracy. In fact, even in the absence of the Anti-Piracy Act, the SDF may undertake maritime policing operations under Article 82 of the SDF Act in order to protect Japanese nationals and their property. Under the measures taken pursuant to Article 82, the SDF has the competence to protect any vessels flying the Japanese flag, vessels flying a foreign flag with a Japanese crew, or vessels flying a foreign flag operated by Japanese companies or carrying Japanese cargos and playing an important role in the Japanese economy. In the operations pursuant to Article 82, it is very important to be able to protect vessels flying a foreign flag but having some relations with Japanese nationals. According to the data of

prehensions about risk to lives or bodies, or about serious damage to property, and that it is an emergency, in addition to the measures prescribed in other laws and regulations:

- (1) Order a vessel to start or stop, or prevent its departure;
- (2) Order a vessel to change its course, or prevent its departure;
- (3) Order the landing of the crew, passengers and those who are in the vessel, or prohibit or restrict their landing;
- (4) Order unloading, or prohibit or restrict unloading;
- (5) Prohibit or restrict communication with the land or another vessel;
- (6) Take restraining measures, in addition to the measures prescribed above in this paragraph, when there are apprehensions about risk to lives or bodies, or about serious damage to property.

2. A JCG officer can take measures prescribed above as (1) and (2) in paragraph 1 of this Article on the condition that there are no other appropriate measures, when judging from the appearance of a vessel, the manner of navigation and abnormal behavior of the crew, passengers and other on the vessel, and other circumstances, it is reasonably expected that a crime is clearly about to be committed or that there is apprehension about a serious disturbance to public order.'

(*op. cit.*, *supra* note 1, pp. 481-482)

13 Article 31 of the JCG Act provides as follows:

'In regard to crimes committed at sea, a Coast Guard officer and an assistant Coast Guard officer shall, as fixed by the Commandant of the Japan Coast Guard, perform the duties of a judicial police official as provided by the Code of Criminal Procedure (Law No. 131 of 1948).' (Text translated by the Ship and Ocean Policy Foundation, *op. cit. supra* note 12.)

2010, Japanese shipping companies operate 2,742 vessels in international transportation. However, only 119 vessels fly the flag of Japan.¹⁴ Therefore, to protect the interests of Japanese nationals and their property, it is necessary to extend the protection offered to vessels flying a foreign flag. It should be noted that Article 82 enables the SDF to take measures abroad solely to protect Japanese or Japan-related vessels. The operations under the Anti-Piracy Act are clearly demarcated from such measures, and the SDF is authorized to respond to any act of piracy committed against a vessel, regardless of its nationality.¹⁵ The operations are subject to strict conditions outlined in Article 7. Therefore, the last sentence of Paragraph 1 of Article 7 explicitly provides that ‘in this case, the provision of Article 82 of the Self-Defense Forces Act shall not apply’. The SDF Act was also amended and a new provision, Article 82-2, was inserted to provide the basis for the operations under the Anti-Piracy Act.¹⁶

The government expressed its view that

‘... the SDF operations under the Anti-Piracy Act will mainly be escorting convoys and patrols by airplane to suppress and make pirate ships disperse. In addition, the SDF is authorized to conduct boarding inspections in accordance with Article 17 of the Coast Guard Act that applies, *mutatis mutandis*, to it. The procedures for the boarding inspection generally involve issuing warning shots toward the target to stop the ship and approaching to it.’¹⁷

3. JCG and the SDF in the Operations against Acts of Piracy

In the conclusion, I should emphasize that the operations provided for by the Anti-Piracy Act are considered to be policing operations, which are clearly distinguished from military operations. The former are undertaken in accordance with the principles of international law, and the Anti-Piracy Act provides the basis for such operations in the Japanese municipal system. The characterization as policing operations plays an important role in the justification for the operations of the SDF and even of the JCG, and influences the scope of the use of arms by the officers in the course of operations pursuant to the present Act. Otherwise, it might have been very difficult to persuade the Japanese public and other neighbouring states to recognize the enactment of this Act.

14 NIHON KAIJI KŌHŌ-KAI, *Shipping Now, 2011-2012, Volume for the Data (2011)*, p. 14.

15 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17 April 2009), pp. 18-19 and No. 7 (23 April 2009), p. 2.

16 Minute of the House of Councilors, 171st Session, No. 16 (4 June 2009), p. 21.

Article 82-2 provides as follows:

‘The Minister for Defense may order units of the SDF to take measures to combat acts of piracy in accordance with the Act on Punishment and Measures against Acts of Piracy’ (translated by the author).

17 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17 April 2009), p. 13.

VI. USE OF ARMS

1. *Use of Arms by Officers and Assistant Officers of the JCG and in the Course of their Operations against Acts of Piracy*

Article 6 allows the JCG officers to use arms in the course of their policing operations. Under this provision, there are two cases where the officers may use arms. One relates to Article 7 of the Law Concerning the Execution of Duties of Police Officials where *mutatis mutandis* shall be applied pursuant to paragraph 1 of Article 20 of the JCG Act. The second is where ‘the perpetrator disobeys other measures to deter and continues the acts of piracy by navigating the ship and there are sufficient grounds to believe that there are no other means to stop the navigation of that ship, to the extent reasonably required in the circumstances’. The latter case is considered to be particularly important to take effective measures to stop a pirate vessel and to deter flagrant acts of piracy in an urgent situation.¹⁸

The expression regarding the second case for the use of arms follows the precedent of the modified expression of Article 20 of the JCG Act. Prior to the amendment of the Act in 2001, Article 20 simply provided for the use of arms pursuant to Article 7 of the Police Official Duties Execution Act,¹⁹ as applied, *mutatis mutandis*. In 1999, the SDF found two suspicious vessels in the Sea of Japan. The vessels failed to comply with an order to stop. The speed of navigation of the suspicious vessels was so high that the JCG fleets could not respond to the situation. As a result, the SDF took the measures pursuant

18 Minutes of the Plenary Meeting, House of Councilors, 171st Session, No. 24 (27 May 2009), p. 7; House of Representatives, 171st Session, No. 3 (15 April 2009), p. 16 and Minutes of the House of Councilors, 171st Session, No. 16 (4 June 2009), p. 29.

19 Article 7 of the Police Official Duties Execution Act provides as follows:
‘Police officers may use their weapons if there is a reasonable ground to deem it necessary for apprehension of a criminal or the prevention of the criminal’s escape, self-protection or protection of others or suppression of resistance to the execution of their official duty, within the limits judged reasonably necessary from the circumstances. They shall not cause harm to individuals except for self-defense provided in Article 36 of the Criminal Code, for averting present danger provided in Article 37 of the Criminal Code, or in the following cases:

1. A police officer has reasonable grounds to believe that there is no other measure to prevent the acts of the suspect or those of a third person; to apprehend the suspect when the suspect resists the execution of his/her official police duties or tries to escape; or when a third person resists him/her in order to assist the escape of that suspect in cases where that suspect is actually committing a serious crime corresponding to the death penalty, life imprisonment with work, or imprisonment with work or without work for more than three years; or there are reasonably sufficient grounds that the suspect has committed such a serious crime, or

2. the police officer has reasonable grounds to believe that there is no other measure to prevent the acts of the suspect or of a third person or to arrest the suspect when he/she arrests the suspect with the arrest warrant or executes a subpoena or a detention warrant and the suspect resists the execution of the official police duties or tries to escape, or a third person resists him/her to assist the escape of that suspect’(translation by the author).

to Article 82 of the SDF Act for the first time.²⁰ Although the SDF responded to the situation in this case, the experience made the government realize the serious situation in the territorial waters of Japan and the ineffectiveness of the use of arms by the JCG at sea only in accordance with the rules for the police on land.

Due to the unique features of official duties at sea, the strict requirements under the former Article 20 of the JCG Act cannot always be satisfied during operations responding to an urgent situation such as that which occurred in 1999 in the Japan Sea. Therefore, Paragraph 2 was newly inserted into Article 20 to enable JCG officers to use arms when responding to a special situation at sea is required. According to this paragraph, JCG officers may use arms to interrupt the navigation of a foreign vessel. The purpose of such an amendment is to ensure the effectiveness of the inspection with a view to preventing serious crimes in the future. This paragraph sensibly reflects the respect for the right of innocent passage of vessels flying a foreign flag.

I should repeat that the purpose of the latter part of Article 7 is to ensure the effectiveness of the use of arms in the face of flagrant acts of piracy. It is fundamentally different from the purpose of paragraph 2 of Article 20 of the JCG Act, which is aimed at preventing crimes in the future.²¹ At the same time, the use of arms pursuant to Article 6 of the Anti-Piracy Act is allowed only when necessary and reasonable in response to a specific situation. It does not allow the use of arms *ipso facto* against the acts of piracy. In reality, the use of arms is undertaken in the course of police operations; therefore, warning shots should first be fired and, in cases where the suspect vessel does not obey the order to stop, shots should be fired to disable the vessel.²²

2. Use of Arms by the SDF Officers

Article 8 of the Anti-Piracy Act provides that Article 6 of the same Act is applied *mutatis mutandis* to the use of arms by SDF officers. It should be noted that one particular paragraph refers to the use of arms by SDF officers. It should also be noted that Paragraph 3 of Article 8 provides that Article 82, Paragraph 2, of the SDF Act is applied to the use of arms pursuant to the present Act. Article 82, Paragraph 2 requires the order of a senior officer in cases where arms are used not for the purposes of self-defense or averting present danger under Articles 36 and 37 of the Criminal Code. This provision also stipulates the constraints on the use of arms by SDF officers.

20 The JCG pointed out the ineffectiveness of its equipment to respond to this case (<http://www.os-dream.com/jcg/hushinsentaisaku.html>, last accessed on 20 August 2012).

21 Minutes of the Committee on Diplomacy and Defense, House of Councilors, 171st Session, No. 16 (4 June 2009), p. 30.

22 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 31 and Minutes of the Committee on Diplomacy and Defense, House of Councilors, 171st Session No. 16 (4 June 2009), pp. 29-31.

3. *Use of Arms by the JCG Officers and by the SDF Officers*

The use of arms pursuant to Articles 6 and 8 is undertaken in the course of the exercise of policing jurisdiction of Japan and for the purposes of law enforcement measures against acts of piracy. I have already highlighted the importance of the private ends in the definition of the act of piracy, where armed private individuals undertake criminal acts for personal gain. Therefore, as far as arms are used for the purposes of policing operations under the Anti-Piracy Act, their use of arms does not conflict with Article 9 of the Constitution.²³ It should also be noted that the policing operations by JCG officers using arms are not considered to conflict with Article 25 of the JCG Act.²⁴ Although the JCG officers are permitted to use arms under basically the same conditions as the SDF officers, the use of arms by both organs are undertaken in the course of policing operations.²⁵

VII. APPREHENSION AND THE TRANSFER OF SUSPECTS

1. *Competence of JCG Officers for Apprehension or Arrest*

As I have already explained, only JCG officers have the authority to apprehend, arrest or detain a suspect; SDF officers do not have such authority. Although operations under the Anti-Piracy Act are mainly focused on the prevention and deterrence of acts of piracy, JCG officers may apprehend, arrest or detain offenders.

In relation to operations off the coast of Somalia, MSDF fleets are sent to combat acts of piracy. JCG officers are on board to assist should it be necessary to apprehend, arrest or detain suspects. The issue of apprehension or arrest and the decision to hand the suspects over to another interested state or to prosecute them in Japan may become a real problem.

23 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 29 and Minutes of the Committee on Diplomacy and Defense, House of Councilors, 171st Session, No. 16 (4 June 2009), p. 20.

Article 9 of the Constitution provides as follows:

'(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aims of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the State will not be recognized.'

24 Article 25 of the JCG Act provides as follows:

'Nothing in this Act shall be construed to permit the Japan Coast Guard or its personnel to be trained or organized as a military establishment or to function as such.'

(This is the text translated by the Ship and Ocean Policy Foundation, <http://nippon.zaidan.info/seikabutsu/2001/00500/contents/00021.htm>, last visited on 2 September 2011.)

25 These points were deliberately explained in the Special Committee on Combating Piracy and Terrorism of the House of Representatives (Minutes of that Committee, No. 3 (15 April 2009), p. 19.

2. *Treatment of Suspects*

The treatment of suspects apprehended by the JCG officers depends upon the gravity of the acts committed and the situations in which those acts were committed.²⁶

In cases where the suspect has committed a serious crime such as killing or causing the deaths of Japanese nationals, the person is transferred to Japan via Djibouti to be prosecuted in Japan. The transit of the person arrested and the escorting personnel is provided for in 15 (e) in the Exchange of Notes between the government of Japan and the government of the Republic of Djibouti concerning the status of the Self-Defense Forces of Japan, etc. in the Republic of Djibouti.²⁷ In situations where the suspect has committed other less serious crimes, the government may decide to extradite that person to another interested state. In such cases, the government takes into consideration issues such as the seriousness of the injuries to lives and property, the nature of the crime, the operations of the SDF and their impacts on acts of piracy, and others.²⁸

3. *Transfer of Criminals by the US Navy to Japan and Emerging Problems*

To highlight issues pertaining to the transfer of criminals, I will comment on the first case where four criminals were handed over by the US Navy to Japan on 9 March 2011. On 5 March 2011, these four criminals hijacked a tanker flying the flag of the Bahamas in the northeast off the coast of Somalia in the Indian Ocean. That tanker was operated by a Japanese company. No crew on board suffered any injury because they escaped into the shelter in that vessel. The US Navy and the Turkish Navy took measures against this crime and the offenders surrendered the following day. Japan sent a prosecutor to Oman who escorted them to Japan on an aircraft belonging to the JCG.²⁹

The Japanese government intends to prosecute those persons under the Anti-Piracy Act. As of 1 September 2011, however, several difficulties had prevented the prosecution from commencing.

26 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 4 (17 April 2009), p. 19 and Minute of the House of Councilors, 171st Session, No. 16 (4 June 2009), p. 21.

27 15 (e) of the Exchange of Notes between Japan and Djibouti provides as follows:
'The Personnel of the Forces and the Personnel of the Coast Guard transiting through the territory of the Republic of Djibouti to escort persons arrested by them shall be authorized to apply the necessary measures of restraint with respect to these persons. Such transit shall be carried out in close cooperation with the competent authorities of the Republic of Djibouti' (Japanese Yearbook of International Law, Vol. (2010), p. 717).

28 Minutes of the Special Committee on Combating Piracy and Terrorism, House of Representatives, 171st Session, No. 3 (15 April 2009), p. 8 and No. 6 (22 April 2009).

29 *Somaria oki de migara kakuho no kaizoku, nihon he iso he*, <http://www.asahi.com/international/update/0308/TKY20110308169.html> (last visited on 3 September 2011).

VIII. CONCLUDING REMARKS

In Japan, there is a strong objection regarding the operations undertaken by the SDF abroad. Therefore, the drafters of the Anti-Piracy Act took care of this issue in a very sensible way of characterizing the operations pursuant to that Act as a policing function. They also decided to accord the primary responsibility for the operations to the JCG and to restrict the role of the SDF only to cases where its contribution was extremely necessary. Moreover, these considerations were purportedly highlighted in the discussions in the Diet.

When Japan considered its contribution to the problems of piracy at sea in Southeast Asia – particularly in the Straits of Malacca and Singapore – it focused on seeking cooperation of the coastal states and enhancing their capacity for policing operations at sea under their jurisdiction. These efforts have been successful in that region. However, the government fully realized that the approach in Southeast Asia was not effective to respond to the problems off the coast of Somalia.

In the Basic Act on Ocean Policy of 2005, the importance of the safety of maritime transportation to Japanese society was emphasized. Since then, Japan has taken measures to enhance the operations at sea to ensure the safety and stability of maritime transportation. In addition to the importance of maritime transportation, the Basic Act also refers to the importance of maintenance of the order and security of the territorial waters of Japan. In these contexts, there are strong arguments for the enhancement of the capacity of the JCG. The JCG published a report on the issue of enhancement of the JCG on 26 August 2011, realizing, however, that the proposed enhancement will take time. Currently, the JCG is not sufficiently equipped to be able to take effective measures against acts of piracy in the vicinity of Somalia. Moreover, even after the JCG has attained a certain level of enhancement, there will be situations that require operations with measures that cannot be undertaken by the JCG in an effective way.

It should be admitted that combating piracy should not be restricted to operations with enforcement measures at sea. The actual cause of piracy is the poverty of the people on land, and we cannot find a real solution to the problem without addressing poverty. To prevent piracy, it is necessary to provide various types of aid to the people in Somalia. At the same time, we need effective measures to combat piracy.