

interpretive theory that it is sufficient if corroboration by the defendant (an energy company) in civil litigation to prohibit nuclear power plant operation conforms to the approval standards set by the Nuclear Regulation Authority. And because this corroboration method is identical to and duplicates that applied in nuclear power administrative litigation, it reverts consequently to the argument for nuclear power civil litigation exclusion that considers civil litigation to be meaningless.

Moreover, the exclusion of civil prohibition litigation under the Nuclear Energy Act of Germany and its practical exclusion in other industrialized countries are considered to be authoritative grounds for theoretical justification of the argument for civil litigation exclusion. And through revisions to nuclear power-related laws made since the Fukushima Nuclear Power Plant Accident (formation of the Nuclear Regulation Authority, legislating regulatory standards, etc.), a national system that allots authority and responsibility to administrations, not to judicatory power, to ensure the safety of nuclear power production in Japan has been adopted, so judicial reviews should be constrained.

But the argument for exclusion is, at this time, criticized as lacking persuasive force because it ignores differences in administrative systems and legal systems that are the foundation of the exclusion systems in other countries. Even regarding adoption of a “national system,” such discussions have not reached the legislation stage.

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4. So-called “Kaketsuke-keigo” in PKO

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1. The definition of “kaketsuke-keigo”

On 15 November 2016, Japanese Government decided to assign the

duty of so-called “kaketsuke-keigo” to the Self-Defense Force (SDF) engineering unit to be deployed for UNMISS. According to the explanation of Government, “kaketsuke-keigo” is coming to the aid of geographically distant unit or personnel under attack.

Since the use of weapons by SDF has been strictly limited under Act on Cooperation for United Nations Peacekeeping Operations and Other Operations (hereinafter referred to as the “PKO Act”) adopted in 19992, such duties could not be assigned so far. However, amended Act, a part of the Security Legislation 2015, made it possible for the SDF to carry out such extended mission as “kaketsuke-keigo”. The amended Act of 2015 provides that SDF personnel engaged in the duties of “prevention and deterrence from harm to the lives, bodies or properties of inhabitants, victims and other people who need the protection, and observation, stationing, patrol, inspection and guard for the security of specific area (Art. 3, para. 5 (g))” may use weapons within the limits judged reasonably necessary according to the circumstances, “when reasonable grounds are found for the unavoidable necessity to protect the lives, bodies or properties of others or themselves, or to remove the act of obstructing those duties (Art. 26, para. 1)”. Furthermore, SDF personnel engaged in the duties of “rescue of the lives or bodies of persons who are serving or assisting [PKO or other activities], which is held in response to the urgent request when unexpected infringement or danger to life or body is occurring or likely occurring (Art. 3, para. 5 (u))” may use weapons within the limits judged reasonably necessary according to the circumstances, “when reasonable grounds are found for the unavoidable necessity to protect the lives, bodies of persons to rescue, who are involved in [PKO or other activities], or themselves (Art. 26, para. 2)”.

It has been argued so far that an extended mission of SDF unit like “kaketsuke-keigo” to protect persons who are not in the near distance from that unit since some Japanese civilian personnel were killed in the past PKO activities. The amendments above is a result of such argument. However, the term of “kaketsuke-keigo” itself is not used in the amendments, and above all its legal definition is not so clear.

2. The arguments on the SDF’s use of weapons in

As the SDF was established only to defend Japanese territory and its

nationals, Japanese Government had taken the position for a long time that it could not send the SDF unit to the PKO activities. Taking the Gulf War as an opportunity, however, the Government made it possible to send the SDF unit to PKOs by legislating the PKO Act in 1992 with some strict conditions of its activities. The Government decided the following five principles for PKO activities by SDF and then coordinated the use of weapons with the Constitution of Japan.

1. the existence of a cease-fire agreement among the parties to armed conflict;
2. the existence of the consent of the host countries and the parties to armed conflict on the undertaking of peace-keeping operations by the United Nations and also to Japan's participation in such operations;
3. the impartiality of peace-keeping operations;
4. should any of the above requirements cease to be satisfied, the Government of Japan may withdraw its contingents or personnel; and
5. use of weapons shall be limited to the minimum necessary to protect personnel's lives or persons.

Under the Japanese legislations, the use of weapons is clearly distinguished from the use of armed force. The use of armed force is defined as the acts of hostilities between the State or quasi-State organization and the Japanese entities. In contrast, the use of weapons means merely using small arms or equipment which have killing or wounding ability. The use of weapons permissible to SDF is classified to two types. One is the "use of weapons for the purpose of execution of missions" and the other is for the "self-preservation". The former includes public security operations, maritime security operations, maintenance of defense capacity. The latter is permitted in the case that the SDF personnel protect the lives or bodies of themselves or other personnel who are with them on the scene. The SDF units had been strictly prohibited, by its inherently limited mission, using weapons to injure persons with the exception of public security operations, maritime security operations, self-defense and the avoidance of a clear and present danger for them.

In this respect, the use of weapons permitted to the SDF under the

PKO Act of 1992 was rather limited as compared with the broader meaning of self-defense under the Principles of UN Peacekeeping. The Principles of UN Peacekeeping provides “Non-use of force except in self-defense and defense of the mandate” as one of its basic rules, but it is widely understood that UN peacekeeping units may use force at the tactical level, with the authorization of the Security Council, if acting in self-defense and defense of the mandate (United Nations Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008), p.34).

However, after the Japanese Government and the SDF have experienced some PKO activities, and the PKO Act has gradually extended the range of the use of weapons. The amendment in 2001 allowed the SDF personnel to use the weapons for the purpose of protecting weapons or equipment, other than individuals who have come under their control. The amendment of the PKO Act in 2015 allowing “kaketsuke-keigo” is in line with such movements for extending the possible use of weapons.

3. The significance and issues

The “kaketsuke-keigo” under the PKO Act is intended to prevent harm to the lives, bodies of inhabitants, victims and other persons involved in PKOs who need the protection with weapons. As the result of this possible new mission, the Japanese Government changed Principle 5 of the five Principles for PKOs as the following.

5. use of weapons is based on the minimum necessary to protect personnel’s lives or persons. Where the consent of the host countries is maintained stably, it may use the weapons exceeding the self-preservation type or protection of weapons as far as it implements the duties of safety ensuring and so-called “kaketsuke-keigo”.

This means that, despite it is still limited, it is permitted to use the weapons “for the purpose of execution of missions”.

This change has significance in the context of recent PKOs. After 2000, the UN extended the mandate of PKO to the disarmament, demobilization

and reintegration of ex-combatants, security sector reform, support for a field of election, human rights, rule of law, promotion of political process and protection of civilians. Then UN has authorized PKO units to use all necessary means in order to ensure effective implementation of such mandates. In light of the fact that one of the important mandates UN focuses assume is to protect civilian persons from illegal attacks in armed conflict, it seems significant that Japan can contribute to such mandate of the PKOs by the “kaketsuke-keigo” of SDF with weapons. Nonetheless, the Japanese Government takes the stance that it does not adopt the interpretation of self-defense in broader meaning as the UN does. According to it, the use of weapons for the purpose of execution of missions shall not be directed to the State or quasi-State organizations and, in this respect, it is different from the conception of self-defense that the UN has adopted. This means even under the PKO Act of 2015 that the SDF cannot engage in the military operations by using weapons against the State or quasi-State organization in the situation of armed conflict.

However, the present interpretation is currently causing a political controversy in terms of the SDF’s mission in South Sudan. The SDF has contributed the protection of civilian persons in UNMISS through the development of infrastructure as of yet. There are some criticism, however, that a cease-fire agreement among the parties to armed conflict has not been maintained any longer and hence it is incompatible with the Principles for PKOs. In fact, the daily reports of the SDF unit deploying in Juba, the capital of South Sudan, described the situation there in July 2016 as acts of hostilities. In terms of this, Minister of Defense, Tomomi Inada, stated that it had not been the acts of hostilities from a legal point of view because alleged killings or acts of ravage did not take place as a part of the international armed conflict. However, if the SDF personnel uses weapons in implementation of the duty of “kaketsuke-keigo” assigned by the PKO Act in UNMISS, it will surely lead to further arguments about its lawfulness.

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