A Case of Miscommunication Between Constitutional Lawyers and International Lawyers[1)]

—— In the Case of "Threat of Force" ——

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Introduction

At its very core of Pacifism, the Japanese Constitution borrows similar language from the United Nations Charter and the liberal philosophy which it embodies. This can be particularly found in Art. 9 of the Constitution, which utilizes terms as "use of force," "threat of force," and

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1) An earlier version of this paper has been released at the 12th Annual Conference of the Japan Chapter of the Asian Society of International Law with the same title. https://asiansil-jp.org/english/20210413/

“force”; as found in Art. 2(4) of the UN Charter. This is no surprise considering the history of the drafting the Japanese Constitution. However, after decades of debate framed within internal logic, Japanese Constitutional lawyers seem to have deviated from the interpretation from that of international lawyers[2)] and that of the Japanese government on some issues. Most of these issues, particularly regarding the “use of force” and the “right of self-defense” have been dealt with extensively during the deliberation of the 2015 Legislation on Peace and Security. However, the author believes there is still room for debate regarding other notions. This article explores the concept of “threat of force” for analysis in cases deliberated in the Japanese National Diet[3)].

This article shall attempt to reconcile the miscommunication between disciplines regarding the concept of “threat of force” by (1) sketching out the differences in both disciplines and (2) examining some cases which this concept has been deliberated in the government. Also, it must be stressed that this article shall mainly cover discourses within Japanese academia.

Though the issue itself may be theoretical, the implications are

2) Another issue where Constitutional Law and International Law employ similar terms, but different contents is the concept of State. For example, the typical Japanese Constitution textbook employs 1. nation, 2. territory, and 3. sovereignty as elements of a State. This is said to be influence by the German tradition of *Staatsrecht*; particularly that by Georg Jellinek. In International Law, it is standard procedure to cite the Art.1, the Montevideo Convention (1933) with the elements: 1. a permanent population 2. a defined territory 3. government and 4. capacity to enter into relations with the other states.

3) The author has employed the Japanese National Diet search system to cover deliberations within the government. https://kokkai.ndl.go.jp/#/

practical. As the classical International Relation theorist Hans Morgenthau has stressed, threats of force have often been utilized as tools of diplomacy in international relations[4]. Also, Japan has faced internal/external accusations or criticism of such threats from the region[5]. Examining the concept may shed light on potential "flash points" in the region and accompanying legal arguments.

The Puzzle

Though prohibited both in the Japanese Constitution and UN Charter, the definition of threat of force is lacking in both texts. Also, elaborations by courts both domestic and international have also been relatively scarce; not to mention academic articles as well[6]. Thus, the Japanese government has been influenced by praxis, and discourse of both the Ministry of Foreign Affairs (hereafter: MOFA) and the Cabinet Legislation Bureau (hereafter: CLB). The two agencies represent the standpoint of International Law and Japanese Constitution, respectively.

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4) Morgenthau, Hans, *Politics Among Nations*, 1949. See also Tarzi, Shan M., "The threat of the use of force in American Post-Cold War Policy in the Third World", *Journal of Third World Studies*, 18.1 (2001): 39–64.

5) For example, during a strain of confrontational exchange with South Korea in 2019, the JSDF was accused of "threatening flight patterns by patrol aircraft" aimed toward the Korean side. See「レーダー照射以降、日韓防衛相初会談　主張は平行線のまま」朝日新聞2019年６月２日。

6) Notable exceptions include: Sadurska, Romana, "Threats of Force", *American Journal of International Law*, 82(1988): 239–268; Stürchler, Nikolas, *The Threat of Force in International Law*, Cambridge University Press, 2007; Grimal, Francis, *Threats of Force: International law and strategy*, Routledge, 2013.

Deliberation in the Japanese government has clarified that both ministries agree on the definition[7], as “perceived as when force has not been used, but a state is threatened, by intent or attitude, to use force if a proposition or request is not met[8].” This standard definition has been repeated numerous times with three main components: intent, readiness, and coercion. Of these, the government seems to have valued the “intent” criteria as the main factor to distinguish threats of force from other state practice. As found in the responses of DM Onodera, “the following must be comprehensively taken into account; overall background of the situation, the intent or objective of the parties, how the parties recognized the act[9].” The intent criteria has served well to assert certain actions from the Japanese side as not threats of force[10].

However, if one steps back and examine cases involving threats of force, we may find differences in terms of nuance between International

7）　末松義規議員の質問に対する秋山収（内閣法制局長官）発言（第160回国会衆議院国際テロリズムの防止及び我が国の協力支援活動並びにイラク人道復興支援活動等に関する特別委員会第２号平成16年８月４日）。https://kokkai.ndl.go.jp/txt/116004304X00220040804/107

8）　金田誠一衆議院議員の提出の質問主意書に対する答弁（平成14年５月24日）（「武力による威嚇」とは、現実にはまだ武力を行使しないが、自国の主張、要求を入れなければ武力を行使するとの意思、態度を示すことにより、相手国を威嚇することをいうと考える。」）My translation.

9）　https://kokkai.ndl.go.jp/txt/118305261X00520130213/152

10）　Another case where the intent criteria was employed to evade criticism was the case of joint military exercises between the JSDF and U.S. Military Forces. According to Yusuke Yokota (then Director-General of the CLB), “this joint exercise is intended for the enhancement of JSDF in terms of tactical skills and strengthened cooperation with US Forces. Therefore, it is does not constitutes a threat of force.”（第193回国会参議院外交防衛委員会第20号平成29年５月23日）。https://kokkai.ndl.go.jp/txt/119313950X02020170523/73

Law and Constitutional Law. Put in general terms, the discourse of CLB is influenced by Japanese Constitutional Lawyers such as Toshiyoshi Miyazawa and Isao Sato[11]. Though the modern textbook on the Constitution often lacks examples or discussion of the concept in general, those influenced by this school take the 1895 Tripartite Intervention toward Japan, and the 1915 Twenty-One Demands by Japan to China as examples of Threat of Force[12]. Both are pre-Charter examples of ultimatum, heavily stressing state intent, which are exceedingly difficult to find in contemporary international relations. In addition, it must be stressed that such examples describe State practice or policy instead of individual incidents or operation. Japanese textbooks of International Law have also been quiet on this issue. However, highly influential texts such as Soji Yamamoto's *International Law* lists examples as; ultimatums, military exercises to place political pressure, mobilization of forces in disputed border areas, deployment of military vessels to coastal sea areas of other States[13]. These include individual incidents or acts which may stress readiness towards the "use of force." Such difference in backgrounds have caused miscommunication in the past.

By miscommunication, this article shall address a situation where

11） See following statement by CLB D-G Kudo（第122回国会衆議院国際平和協力等に関する特別委員会第５号平成３年11月20日）。https://kokkai.ndl.go.jp/txt/112204306X00519911120/192;（第123回国会参議院国際平和協力等に関する特別委員会第13号平成４年５月29日）。https://kokkai.ndl.go.jp/txt/112314306X01319920529/184

12） For example, see 芦部信喜『憲法（第７版）』岩波書店, 2019年, 57頁; 芦部監『注釈憲法（1）』有斐閣, 2000年。

13） 山本草二『国際法（新版）』有斐閣，1994年，706頁。

questions and answers do not match due to different disciplinary background and agenda.

The following case may be set as a typical example to display an episode of miscommunication between the two disciplines.

2015 Discussion regarding the Legislation for Security and Peace

During a special session for the Legislation at the House of Councilors, a member for the oppositional party questioned the relationship between the threat of force and deterrence.

Ryo Shuhama（Liberal Party）

> I would like to ask Speaker Hamada about this question. The expression “threat of force” can be found in Art. 9.1 of the Japanese Constitution. This is also to be forever renounced. I would like to have your thoughts on the relationship between the threat of force and deterrence, which this legislation hopes to achieve. Please give us your insight if you have any[14].

Judge Kunio Hamada（Speaker, former judge of the Supreme Court）replied as below:

14）　主濱了（第189回国会参議院我が国及び国際社会の平和安全法制に関する特別委員会公聴会第１号平成27年９月15日）。https://kokkai.ndl.go.jp/txt/118913930X00120150915/156

> The logic referring to deterrence. Though I am not sure whether you can call it logic or not. Under Art. 9.2, the interpretation of force has been consistent under the LDP governments. Under this interpretation, the SDF does not amount to forces. Thus, the right of belligerency is not even mentioned. It means that this right does not exist. The underlying assumption is that it (the SDF) is not a military force. Foreign states may see it as one, but it's not. Japan has argued so far that the SDF is not a (military) force. I believe this issue relates to whether this boundary may be transcended or not[15].

As displayed above, a former judge of the Supreme Court was unable to sufficiently answer a question regarding international relations (deterrence), international law and constitutional law. Judge Hamada merely repeats a standard explanation in constitutional law and implies that the status quo may be altered. Thus, the assumption of the question (whether the SDF is a military force capable of threats of force) does not fit the mainstream disciplinary framework of "renouncement of war, non-maintenance of force, and the SDF being unconstitutional."

Though a uniform definition may assist to ascertain state practice[16], the fact remains that a non-coherent background of nuance may result

15） 濱田邦夫答弁（第189回国会参議院我が国及び国際社会の平和安全法制に関する特別委員会公聴会第1号平成27年9月15日）。https://kokkai.ndl.go.jp/txt/118913930X00120150915/157

16） On various occasions, the government definition has functioned to deny accusation of Japan's actions perceived as threats of use by focusing on intent and objective element of the act. For example, see 稲田大臣答弁（第193回国会参議院外交防衛委員会第17号平成29年5月11日）米空母カールビンソンとの共同訓練に関する答弁。https://kokkai.ndl.go.jp/txt/119313950X01720170511/132

in an unfruitful deliberation.

The next two sections shall explore the logic and background of the two disciplines in terms of threat of force. It shall give attention to influential textbooks of Constitutional Law.

The Traditional Interpretation by Constitutional Lawyers

There is no mention of threat of force in the so-called MacArthur Notes. It is obvious that the drafters of the Japanese Constitution had the UN Charter in mind. However, most of the work in terms of interpretation of Art. 9 were left to the Japanese side.

Though Art. 9 has received extensive attention from Constitutional Lawyers, textbook discussions usually revolve around issues such as the definition of war, forces, the right of belligerency, self-defense, and the status of SDF. Threat of force is usually explained along with war（*de facto* and *de jure*）and the use of force. These three concepts are explained on the same scale.

As Isao Sato writes in 1996:

> Compared to the constitutions of other states, Art. 9 of the Japanese Constitution has thorough regarding pacifism and the prohibition of war.
>
> Thus, Art. 9 first renounces not just wars of invasion but all wars. Second, it renounces not only “wars,” but “use of force” and “threats of force.” Third, along with this, forces, as well as other war potential, will never be maintained, and the right of belligerency of the state will not be recognized.

Thus, threat of force is a part of a continuum which Art. 9 prohibits all together. The threat of force is at the periphery of this continuum; used to emphasize the severity of commitment to pacifism. It should also be mentioned that "use of force" interpreted in mainstream constitutional law is presumed to be a "more than combat, but less than war[17]." This interpretation is in agreement with International Law to include de facto war (war without declaration) in the realm, but different in terms of differentiating it from war (whether for defense 自衛戦争, aggression侵略戦争, or sanction制裁戦争) and combat.

However, another point to be mentioned in understanding the constitutional interpretation is its seemingly connectiveness to the UN Charter. For example, in an entry of an encyclopedia of constitutional law, Toshihiro Yamauchi corelates the term in both contexts.

"Though they may not amount to the use of force, because such threats may likely endanger the maintenance of international peace and security, the UN Charter prohibits threats of force along with the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. The Japanese Constitution also prohibits the threat of force along with the use of force to settle international disputes[18]." Thus, it can be roughly stated that Art. 9.1 (whether the schools may differ in terms of which phrase is decisive) categorically renounces war, use of force and threats of force. As it is well documented, such interpretation of the mainstream has caused significant problems for the government, particularly the CLB. Thus, the language found in various legislation is

17) On this point, see 水島朝穂「第９条」『基本法コンメンタール（別冊法学セミナー）』1997年，43頁。

18) 山内敏弘「武力による威嚇」『憲法辞典』三省堂，2001年，424頁。

carefully crafted to evade any collision, and retain Art.9. Examples include “cooperation協　力” instead of “participation” in PKOs, and “inspection検査” instead of “visitation臨検” in “*jyuyoeikyojitai*重要影響事態（Situations that Gravely Affect the Peace and Security of Japan)”, and “*shuhenjitai*（Situations in Areas surrounding Japan)”. Some of these terms, as “*ittaika* 一体化[19]”, “*shuhenjitai* 周辺事態”, “*kaketsukekeigo* 駆けつけ警護”, and “*senshuboei* 専守防衛”（the doctrine of exclusively defense-oriented posture）are all employed in government documents without proper English translation. In the case of threats of force, the concept seems to have taken a turn during the PKO Cooperation Act（1992). In this act, Art. 2.2 states that such cooperation assignments “shall not constitute the threat or use of force.” However, Art. 25.1 asserts the “use such small arms and light weapons within reasonable limits given the circumstances.” The “use of weapons”, “use of force”, and “threat of force” are different concepts. Use of weapons are generally attributed to individual use of weapons during assignments, while use of force is an organized act as a state. The “threat of force” was mentioned during deliberation as below.

1992 Deliberation between the threat of force and the use of weapons

During the deliberation of the International Cooperation Act, Koichiro Ueda（JCP）questioned about the so-called B-type use of weapons（usage of weapons to pursue the objective of PKO missions）in terms of

19）The Japanese government has employed this criteria ever since the statement by CLB D-G Hayashi on 19 May 1959.

firing warning shots to the adversary. The following is an occasion where the CLB described the threat of force as a preparatory phase of use of force.

Atsuo Kudo (Director-General of CLB)

> As mentioned earlier, the threat of force can be conceived, when force has not been used, but to show intent or attitude to use force if the demand is not met. Thus, it should be taken as a phase prior to the use of force.
> From this perspective, the "relationship between use of weapons and use of force" can be given another phase, where… we will do these if you do not comply with our requests or demands, I believe this is the relationship between the use of force and use of weapons.

Another point can be drawn from the government's answer to Kenichi Mizuno's (Member of House of Councilors) question regarding the use of weapons. His question was whether "the use of weapons" includes situations where the weapons are used as tools to coerce (威圧) (by pointing or displaying its presence) though it has not been discharged yet.

Government Answer

> Though the expression "to coerce (威圧) (by pointing or displaying its presence)" lacks clarity, in general, pointing the weapon toward an adversary may be understood as "use of weapons[20]."

Read together, it seems that the government has reorganized the issue of threats (along with use of force) to that of "use of weapons." This confusion of "use of force" and "use of weapons" was criticized explicitly in the 2014 *Report of the Advisory Panel on Reconstruction of the Legal Basis for Security*[21].

In addition, it is interesting to point out that with the same line of thought above, some have implied the *ittaika* of some activities with the threat of force. For example, Masasuke Omori (Director-General of CLB) made the following statement in 1997 regarding the *ittaika* theory.

> ... I believe the question you posited regards acts which do not involve the use of force but may conflict with the Constitution. In such a case, how may we evaluate with what criteria? I believe this is a question about the theory of *ittaika*.
>
> Thus, according to pre-existing answers ...acts which by itself may not directly be a use of force, whether these acts may be permissible under Art.9 of the Constitution may be considered whether it is *ittaika* with the use of force by a foreign state, or under the Constitution this is the same with threat of force. ...[22] (emphasis added)

This so-called "*ittaika* with the threat of force" theory has never been

20） 平成27年７月９日水野賢一（参議院議員）提出自衛隊員の武器の使用に関する質問に対する答弁書。

21） 安全保障の法的基盤の再構築に関する懇談会『安全保障の法的基盤の再構築に関する懇談会報告書』平成26年５月15日，27–29頁。

22） 大森政輔答弁（第140回国会衆議院予算委員会第12号平成９年２月13日）。https://kokkai.ndl.go.jp/txt/114005261X01219970213/110

actively debated in the Diet. It appeared once in 1996, when Minister of Foreign Affairs Yukihiko Ikeda declared that "*ittaika* theory with the threat of force has not been clarified by statements of previous government[23]." However, this case may also represent the CLB's traditional approach to the subject.

Interpretations of International Law

As in the Japanese Constitution, the definition of "threats of force" is not stated in the UN Charter or any other document[24]. Thus, other than the text of the Charter itself, a handful of international cases and state practices are the scarce material left for analysis and argumentation.

Contemporary debates include (1) whether to treat threats and the use of force differently (2) how to distinguish permissible threats and impermissible threats[25] (3) whether the implicit (or non-verbal) threats may be illegal (4) the typology of threats. Cases which might shed light on these issues include the Corfu Channel case (1949), the Nicaragua Case (1984), Nuclear Weapons Advisory Opinion (1996), and the Guyana and Suriname Award (2007). Also, the work of authors as Nikolas Stürchler and Francis Grimal provide a vast list of incidents for

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23) 池田行彦答弁（第136回国会参議院外務委員会第９号平成８年５月７日）。https://kokkai.ndl.go.jp/txt/113613968X00919960507/169

24) Other international documents which include reference to "threats of force" are the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States and the 1987 Declaration on the Enhancement of the Effectiveness of the Principles of Refraining from the Threat or Use of Force in International Relations.

25) Barker, Craig, *International Law and International Relations*, London: Continuum, 2000. pp129–34.

analysis[26]. One can notice the difference of issues debated and the date of reference（i.e., post-Charter events）which the debates draw upon.

Some of the international cases seem to have shed light on these questions. For example, the Nuclear Weapons Advisory Opinion states that “if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal[27].” Thus, the ICJ seems comfortable coupling the two norms as one process[28]. The same case also made clear that the mere possession of nuclear weapons does not constitute an illegal threat unless its use is “directed against the territorial integrity or political independence of as State, or against the Purpose of the United Nations....” The Guyana v. Suriname Award took an interesting approach to assess the incident as “akin to a threat of military action rather than a mere law enforcement activity.” This case seems to deviate from the traditional image of an ultimatum to that of individual incidents with readiness to use force. A similar incident may be the 2013 incident between the JSDF and a Chinese naval vessel.

2013 Fire-Control Radar Incident with Chinese Naval Vessels

On 30 Jan. 2013, the JSDF Vessel *Yudachi* was reported to have been locked on by a Chinese Navy Vessel with fire-control radar（FCR）.

26）Stüchler, Nikolas, *The Threat of Force in International Law*, Cambridge: Cambridge Univ. Press, 2007; Grimal, Francis, *Threats of Force: International Law and Strategy*, London: Routledge, 2013.

27）*Legality of the Threat or Use of Nuclear Weapons*（Advisory Opinion）1996, ICJ Rep. 226, para.47.

28）For an approach to recognize “threats” and “use” as different norms, see Sadurska, Romana, “Threats of Force,” *American Journal of International Law*, 82（1988）: 239–68.

Regarding this incident, DM Itsunori Onodera asserted the possibility of "threat of force under the United Nations Charter."

> Generally speaking, does the usage of fire-control radar fall under the category of threat of force; prohibited by international law, under the UN Charter? On this point, I believe it is possible. (Emphasis added)

DM Onodera goes on to describe the Japanese "intent test" and its difficulty to apply in this situation.

> ... However, to ascertain the act as threat of force, the following must be comprehensively taken into account; overall background of the situation, the intent or objective of the parties, how the parties recognized the act. That is why I spoke openly of my thoughts[29].

Onodera comments proceeds to the assessment of individual acts or readiness of use of force.

> One thing is certain. There was a usage of FCR in the incidents last year. However, at the same time, movement of firearms...meaning whether firearms were directed toward the vessel... This was not the case. It was not up to that point...[30]

Several points may be observed in this case. First, it may be observed that the threat is an implicit, individual act of a vessel. Thus, the application of traditional intent test is rather difficult. Also, it seems the

29) 小野寺答弁（第183回国会衆議院予算委員会第５号平成25年２月13日）。https://kokkai.ndl.go.jp/txt/118305261X00520130213/152

30) 小野寺答弁（第186回国会衆議院予算委員会第18号平成26年７月14日）。https://kokkai.ndl.go.jp/txt/118605261X01820140714/272

be pointed out that the international side of the norm is emphasized rather than applying the government definition. Though there are not enough cases to draw any general conclusion, it may be plausible to assume that strategies of definition may differ in terms of domestic/international context.

Conclusion

This article has explored the differences of International Law and Constitutional Law regarding a single concept. Though the government definition is agreed upon by both MOFA and CLB, several points differ in background; the date of reference which they draw their examples, the emphasis on state policy or individual incidents, and the language employed. Though on rare occasion, such differences have resulted in a miscommunication within government discussion. This article calls for further dialogue within academia.

Shinya Murase, a member of Advisory Panel on Reconstruction of the Legal Basis for Security, expressed his astonishment of how the disciplines have not conversed, or how the dialogue regarding security has "deviated from the common sense of International Law".

> Collective right of self-defense, collective security, "use of force," "armed attack," "peace keeping operations," "international disputes," these are all concepts and institutions of international law where a common understanding to a certain point have been achieved. However, there has hardly been any discussion based upon accurate understanding[31].

On the other hand, government interpretations by the CLB have also been criticized by constitutional law.

As previously mentioned, most of the contested concepts were discussed during the 2015 legislation. However, as this article has expressed, issues regarding “threats of force” and their relationships with Japanese conceptions as *ittaika*, *jyuyoeikyojitai*, “Grey Zone situations” may remain open to debate. If this is the case, instances of miscommunication due to lack of dialogue should be resolved with care. This dialogue is not in praxis, but at the theoretical and academic level.

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31) 村瀬信也『国際法論集』信山社, 2011年, 223頁; As an exception to this argument, constitutional lawyers as Toshihiro Yamauchi, Asaho Mizushima, Masanari Sakamoto have published their work on national security.