

## **Enactment of the Coast Guard Law of the People's Republic of China and Japan's Response**

SAKAMOTO Shigeki  
Professor Emeritus, Kobe University

### **Introduction**

The Standing Committee of the Thirteenth National People's Congress of the People's Republic of China passed the Coast Guard Law on January 22, 2021, which took effect on February 1. In 2013, China created the "China Coast Guard Bureau" to unite the previously separate maritime law enforcement agencies known as the "Five Dragons": the China Coast Guard, the China Maritime Patrol, the China Marine Surveillance, the Fisheries Law Enforcement Command, and the General Administration of Customs. The China Coast Guard (hereinafter referred to as the "CCG") was further reorganized in 2018 into the "People's Armed Police Force Coast Guard Corps" and came under the command of the People's Armed Police Force. The CCG, like the People's Liberation Army, is now a military organization under the unified command of the CPC Central Committee and the Central Military Commission.

The fact that military organizations are responsible for maritime law enforcement can be seen in the implementation of various countries, and this is not a problem in itself. Elsewhere in the world, in the United Kingdom, the navy performs coast guard duties, and in some countries, such as Italy's *l'Arma dei Carabinieri* and France's *Gendarmerie maritime*, the military assumes maritime police duties. The United States, for example, has the Coast Guard; although this organization is tasked with maritime law enforcement, it is considered the fifth branch of the armed forces under U.S. federal law, after the Army, Navy, Air Force, and Marine Corps.<sup>1</sup> Meanwhile, there are similar organizations in other countries, such as Japan's Coast Guard, regarding which Article 25 of the Coast Guard Act, entitled "Interpretation Provisions," stipulates "Nothing in this Act shall be construed as authorizing the Coast Guard or its personnel to be organized, trained, or to perform military functions." Some countries have specified that the respective body is a civilian maritime police force. Thus, it can be said that CCG is a maritime law enforcement agency that does not deny that it is a military force under international law. Considering the foreign defense mission newly assigned to the CCG under the China's Coast Guard Law enacted on January 22, 2021, it must be said that the CCG has become even more of a military organization as well as a maritime law enforcement agency.

While China's reform of the CCG into an armed police force is said to have been decided by the Party Central Committee to proceed in a process of "first transfer, then reorganization,"<sup>2</sup> the enactment of the Coast Guard Law means that the "reorganization" has been completed. Wang Wenbin, deputy press secretary of China's Ministry of Foreign Affairs, stated that the recently passed Coast Guard Law "is in line with international conventions and state practices of many countries, and there has been no change in China's policy."<sup>3</sup> However, closer scrutiny of the text of the law reveals that it differs from the provisions of the United Nations Convention on the Law of the Sea (UNCLOS), to which China is a party, and from the national implementation of many countries.<sup>4</sup>

### **1. Additional defense missions and China's jurisdictional waters**

Article 1 of the Coast Guard Law stipulates its purpose: "This Act is enacted to establish norms and rules for the CCG organization to fulfill its responsibilities, to protect the sovereignty, security, and maritime interests of the nation, and to protect the legitimate interests of the public, corporations, and other organizations." Article 2 of the law states that, "The People's Armed Police Force Coast Guard Corps, that is, the CCG organization, shall perform the responsibilities of protection of maritime interests and law enforcement in a unified manner. The CCG Organization includes the CCG Bureau, its ocean sector bureaus, direct subordinate bureaus, provincial-level CCG bureaus, municipal-level CCG bureaus, and CCG offices." Stated differently, the Coast Guard is a maritime armed force that protects national sovereignty and is positioned as an organization that acts to advance the maritime interests and law enforcement-related activities of the PRC.

With regard to the waters in which the CCG operates, Article 3 stipulates that "the CCG Organization shall conduct law enforcement operations for the protection of maritime interests in the waters under the jurisdiction of the People's Republic of China (hereinafter referred to as 'waters under

PRC jurisdiction’) and in the airspace above the waters under PRC jurisdiction.” Under the UNCLOS, the waters under the jurisdiction of a state are the internal water, territorial water, contiguous zone, exclusive economic zone, and water of the continental shelf (including the extended continental shelf). However, China is claiming the nine-dash line as a historical right in the South China Sea. Article 14 of the Exclusive Economic Zone and Continental Shelf Law (1998), China’s domestic law, stipulates that, “the provisions of this Law shall not affect the historical rights of the People’s Republic of China” and recognizes the existence of waters over which China exercises jurisdiction other than the exclusive economic zone and continental shelf. Article 2 of the “Regulations on the Protection and Utilization Management of Uninhabited Islands” (2003) stipulates that it “shall apply to activities for the protection and utilization of uninhabited islands in the internal waters, territorial seas, exclusive economic zones, continental shelf, and other jurisdictional waters of the People’s Republic of China” and adds historical waters other than those recognized by the UNCLOS in the phrase “other jurisdictional waters” as waters under PRC jurisdiction.<sup>5</sup>

However, the 2016 South China Sea Arbitration Award “concludes that China’s claim to historical rights to the living and nonliving resources within the ‘nine-dash line’ is incompatible with the Convention to the extent that it exceeds the limits of China’s maritime zones as provided for by the Convention” (Paragraph 261), and “Accordingly upon China’s accession to the Convention and its entry into force, any historical rights that China may have had to the living or nonliving resources within the ‘nine-dash line’ were superseded, as a matter of law and as between the Philippines and China by the limits of the maritime zones provided for by the Convention” (Paragraph 262).<sup>6</sup> However, China refuses to implement this judgment, calling it illegal and invalid.

The new CCG Law still uses the phrase “waters under PRC jurisdiction” and clearly states that the CCG will conduct law enforcement operations to protect maritime rights and interests in waters over which it originally could not exercise jurisdiction under the UNCLOS (waters within the nine-dash line in the South China Sea). Conflicts with Vietnam and the Philippines in the South China Sea seem inevitable. Although China has exercised its legislative jurisdiction and established territorial waters around the Senkaku Islands, which are Japanese territory, based on the “Territorial Waters and Contiguous Zone Law” of 1992, it is now guaranteed under Chinese domestic law that China can claim the waters as Chinese territorial waters or “waters under PCR jurisdiction” and exercise enforcement jurisdiction over Japan.

A further article in the CCG Law that should not be overlooked is Article 83, which stipulates that “the Coast Guard Bureau shall carry out defense operations and other missions in accordance with the ‘National Defense Law of the People’s Republic of China, the People’s Armed Police Law of the People’s Republic of China, and other relevant laws, military regulations, and orders of the Central Military Commission.” Thus, the CCG is described as an organization with dual functions: the function of a navy conducting defensive operations in waters under its jurisdiction (military activities) and the function of a maritime law enforcement agency (law enforcement activities).<sup>7</sup> This same law has transformed the CCG into an organization with a foreign defense mission.

Such cooperation between the CCG and the Chinese Navy has already begun, and in July 2020, a joint exercise was held between the CCG and the Chinese Navy on Woody Island (Yongxing Island) in the Paracel Islands. In this exercise, the Chinese Navy’s Type 071 landing craft and other vessels participated, and CCG troops supported by the Navy landed on the island and trained to subdue resisting civilians. An explanation was issued that the exercise was not intended to be an attack on the armed forces of another country.<sup>8</sup>

## **2. The impact of the CCG Law on the Senkaku Islands Dispute**

Article 12 of the CCG Law states the responsibilities of the CCG

Organization as follows: “(1) In the waters under PCR jurisdiction, the CCG Organization shall patrol and keep vigilance, provide on-duty security for guarding key islands and reefs, manage and protect maritime boundaries, and prevent, restrain, and eliminate acts that threaten the sovereignty, security, and maritime interests of the nation; (2) to take charge of the safety and security of key maritime targets and major activities, and to take necessary measures to protect the security of guarding key islands and reefs, as well as artificial islands, facilities, and structures in the exclusive economic zone and continental shelf.” Article 20 stipulates, “In the event that foreign organizations or

individuals construct buildings or structures or install various types of fixed or floating devices in the waters and islands under PCR jurisdiction without the permission of the competent authorities of PCR, the CCG Bureau shall have the right to order the suspension or timely improvement of the illegal activities. In the case of refusal to stop illegal activities or refusal to remedy them within the time limit, the CCG Organization may, when necessary, carry out enforcement actions in accordance with the law.”

With the increasing movement of Chinese government vessels in the proximity of the Senkaku Islands, if Japan abandons its current policy of empty islands, and develops ports, builds facilities where civil servants are stationed, and engages in other measures to strengthen its effective control of the islands, the CCG will have established ground rules for intervening under its domestic law.

### **3. The CCG Law lowers hurdles for the use of force**

Furthermore, Article 22 of the Coast Guard Law states, “When the sovereignty, sovereign rights, and jurisdiction of a State are confronted with an imminent danger of unlawful infringement or unlawful violation by foreign organizations and individuals at sea, the CCG Organization shall have the right, in accordance with this Law and other laws or regulations, to take all necessary measures, including the use of weapons, to control the infringement and eliminate the danger at the scene.” In addition, Article 46 stipulates that “CCG personnel may use suppression equipment or other equipment and tools in the field if any of the following situations occur...”; however, it includes the provisions: “(2) when a vessel is deported or forcibly detached in accordance with the law, and (3) when CCG personnel encounter obstacles or obstructions in the course of performing their duties in accordance with the law.” Article 49 stipulates that “CCG personnel may use weapons in accordance with the law, and may engage in use of force directly if warnings are not issued timely or if there is a possibility of further serious harm after such warnings have been issued.”

To date, the CCG’s use of weapons has been conducted in accordance with Articles 10 and 11 of the People’s Police Law, Articles 2, 4, and 9–11 of the People’s Police Regulations on Security Equipment and Use of Weapons, and Article 9 of the Regulations on Maritime Law Enforcement Activities of Public Security Organizations.<sup>9</sup> The regulations state, “Law enforcement personnel on CCG vessels may fire only when necessary. When firing shots, a verbal warning or a warning to fire must generally be issued first. Personnel shall not fire unnecessarily and shall not shoot at the vessel under investigation unnecessarily. The use of weapons should be limited to subduing the other party.”<sup>10</sup>

In comparison, Article 22 of the CCG Law expands the scope of the use of weapons to include foreign organizations, and Articles 46 and 49 of the same law can be read as provisions that allow for more aggressive use of weapons. Article 19 does not exclude the possibility that a Chinese government vessel, which calls the waters around the Senkaku Islands its own territorial waters under its sovereignty and makes pursuit of Japanese fishing vessels, may use weapons, although there is a requirement in Article 19 for “unlawful infringement of individuals” as well as “in the face of imminent danger.” In addition, the provision in Article 46, Item 3, “In the event that CCG personnel encounter obstacles or obstructions in the course of carrying out their duties in accordance with the law,” means that when a Japanese Coast Guard patrol vessel interrupts a Chinese government vessel’s pursuit of a Japanese fishing boat in the waters surrounding the Senkakus, the possibility of the use of weapons by the Chinese government vessel is not excluded as an “act of obstruction” under CCG Law. It is necessary for Japan to be prepared to respond to these new developments by China.

However, in the case of private vessels such as fishing boats, the International Tribunal for the Law of the Sea (ITLOS), in its ruling on the “Saiga” case, stated the following three requirements: (1) the use of weapons must be avoided as much as possible, (2) the use of weapons must not exceed the limit of necessity and must be reasonable, and (3) the use of weapons must not endanger human life. Thus, if a Chinese government vessel were to respond to a Japanese fishing vessel in a manner differing from these three requirements,<sup>11</sup> it would be a violation of international law.

The background to the creation of these CCG Law provisions is that at an important Party meeting on the “rule of law” held in Beijing on November 16 and 17, 2020, Chinese President Xi Jinping stated that in order to protect sovereignty and security interests, “we must wage a comprehensive struggle using legislative, law enforcement, judicial, and other means. China must accelerate the strategic deployment of the rule of law in foreign affairs.”<sup>12</sup> In the future, China is expected to accelerate its

strategy to develop laws in line with its own claims and to counter the United States, Japan, and other countries.

#### **4. Legal status of the Japan Coast Guard in emergencies**

With regard to the Japan Coast Guard patrol vessels confronting the China Coast Guard, which have been assigned defense missions under the CCG Law, the situation may be the same as in the past during normal times, but there are some points that should be kept in mind during emergencies.

According to Article 80, Paragraph 1 of the Self-Defense Forces Act, in the event of a defense deployment based on Article 76, Paragraph 1 or a security deployment based on Article 78, Paragraph 1, the Prime Minister “may bring all or part of the Japan Coast Guard under the control of the Minister of Defense if deemed specially necessary.” In addition, Paragraph 2 of the same article stipulates that in such cases, “the Minister of Defense shall command the Coast Guard in accordance with the provisions of a Cabinet Order.”

Being under the command of the Minister of Defense is not the same as stated in Article 43, Paragraph 3 of Additional Protocol I to the Geneva Conventions: “Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agencies into its armed forces.” If they are placed under the command of the Minister of Defense but are allowed to concentrate on maritime police duties as before, they can be considered non-military. This means that the legal status of the Japan Coast Guard patrol vessels and the nature of their activities will change depending on what missions the Minister of Defense assigns to the Japan Coast Guard under his command. Therefore, Article 103 of the Self-Defense Forces Law Enforcement Order stipulates that “the Minister of Defense’s command of all or part of the Japan Coast Guard under the provisions of Article 80, Paragraph 2 of the Act shall be given to the Commandant of the Japan Coast Guard.”

As required by Article 6 of the Hague Convention VII of 1907 (Convention relating to the Conversion of Merchant Ships into WarShips), which has become customary international law, the conversion of a non-warship vessel, including auxiliary vessels, to a warship would require a “fast-track” “entry in the list of war-ship” procedure. In such a case, it may be necessary to take measures under Article 80, Paragraph 1 of the Self-Defense Forces Act and report the incident under the Additional Protocol I to the Geneva Conventions, to which Japan is a party. If the Coast Guard exercises its right of belligerency without reporting the incident, it would be a violation of international law. This point should be kept in mind in the event of an unforeseen incident and its subsequent development between the maritime police agencies of the two countries.

#### **5. Conclusion**

With the enactment of the CCG Law, if Chinese government vessels (CCG vessels) take a more aggressive stance toward “maintenance of rights and interests and law enforcement” (Article 2), the possibility of collisions with Japan Coast Guard patrol vessels is expected to increase further. In addition, if Chinese state vessels become more heavily armed due to the addition of defensive preparations in conjunction with their Coast-Guard-related functions (Article 83), the Japan Coast Guard may not be able to adapt to such changes. At such time, Japan could consider issuing a maritime security action under Article 82 of the Self-Defense Forces Act. However, even if a Japan Maritime Self-Defense Force destroyer were to take a maritime patrol action, it would be necessary to have the Chinese side understand in advance that it is merely performing maritime law enforcement in lieu of the Coast Guard’s mission. Moreover, even if this is Japan’s intention, it will be difficult to distinguish externally the stage at which the CCG vessels are shifting from law enforcement to defensive operations. As Junichi TAKEDA points out, “there is a concern that the escalation ladder will be raised without mutual communication.”<sup>13</sup> The Japan-China Maritime and Aerial Communication Mechanism, agreed upon at the Japan-China Summit in Tokyo on May 9, 2018 (by former Prime Minister Shinzo Abe and Premier of the Chinese State Council Li Keqiang), to avoid unforeseen collisions in the maritime and air space and to prevent unforeseen situations from developing into military conflicts, did not include maritime law enforcement agencies of both China and Japan in its scope. However, it can be said that the need for their inclusion has further increased.<sup>14</sup>

The communiqué issued on the last day of the Fifth Plenary Session of the 19th Central Committee of the Communist Party of China (CPC) stated, “We will carry out Xi Jinping’s strong military

ideology and the military strategic policy of the new era.....the goal of reaching the 100th anniversary of the founding of the armed forces will be secured in 2027.”<sup>15</sup> It will be necessary to keep a close eye on whether the “strenuous goals” referred to here are policy goals related to Taiwan and the Senkakus other than the strengthening and modernization of the People’s Liberation Army. Presumably, in this year, China will be aware that it has prepared a force capable of countering the use of weapons as a police action by Japan’s Coast Guard in the Senkaku Islands and the defensive capabilities of Japan’s Self-Defense Forces.

In the future, a more realistic scenario would involve the manner of response the Japan Coast Guard and the Self-Defense Forces could pursue if, during peacetime, maritime militias secretly landed on the uninhabited Senkaku Islands, raised the Chinese flag, and refused to comply with the Japanese Coast Guard’s request to leave. With the enactment of the CCG Law, it would seem that the time to seriously consider such a scenario is approaching. The U.S., now under the Biden administration, reaffirmed that Article 5 of the Japan-U.S. Security Treaty, which stipulates joint defense obligations, applies to the Senkaku Islands in a telephone conversation between Japan’s Defense Minister Nobuo Kishi and U.S. Secretary of Defense John F. Austin on January 24, 2021. However, in response to China’s occupation of the uninhabited islands, which in the previous scenario would not result in a single death, the United States is faced with a difficult choice—the so-called “Senkaku Paradox”—regarding the extent to which it will participate in a risky operation to recover the islands under circumstances that might lead to a Sino-American war. In the first instance, Japan would need to fortify its own response capabilities.<sup>16</sup>

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<sup>1</sup> Takakazu KUMAGAI “Military Organization of the Command Structure of the China Coast Guard” at <https://www.mod.go.jp/msdf/navcol/SSG/topics-column/col-097.html> (Last accessed on: January 17, 2021)

<sup>2</sup> Junichi TAKEDA, “China Coast Guard Bureau (Armed Police Force Coast Guard Corps) and the Japan Coast Guard: Some Comparisons on the Maintenance of Maritime Interests and Maritime Law Enforcement,” *Review of Island Studies*, Vol. 8, No. 2 (2019), p. 83.

<sup>3</sup> *The Mainichi Shimbun*, November 19, 2020, Tokyo Edition, p. 7.

<sup>4</sup> For an analysis of the draft China Coast Guard Law, see: Satonari MATSUO, “Publication of the China Coast Guard Draft - Unique Provisions on the Use of Force against Foreign Warships, etc.” [https://www.mod.go.jp/msdf/navcol/assets/pdf/column182\\_01.pdf](https://www.mod.go.jp/msdf/navcol/assets/pdf/column182_01.pdf) (Last accessed on: January 31, 2021).

<sup>5</sup> See: Shigeki SAKAMOTO, “An Analysis of China’s Domestic Law Concerning the Sea,” in *Japan’s Maritime Policy and the Law of the Sea* [Supplemented Second Edition] (Shinzansha, 2019), pp. 405–429.

<sup>6</sup> The South China Sea Arbitration Award of 12 July 2016, p. 111, paras. 261–262.

<sup>7</sup> The International Tribunal for the Law of the Sea, in its Order on Provisional Measures in the Case of the Detention of the Ukrainian Fleet (Ukraine v. Russia) of 25 May 2019, in which the interpretation of “military activity” in Article 298(1)(b) of the UNCLOS was at issue, stated that the criteria for distinguishing between military and law enforcement activities are (1) Whether the vessel engaged in the activity is a naval vessel or a law enforcement vessel is a relevant factor in distinguishing between military and law enforcement activities, but it is not the only criterion (para. 64). (2) The distinction between military and law enforcement activities does not consist solely in the determination of their nature by the parties to the conflict (para. 65), but must be based on an objective assessment of the nature of the activity in question (para. 66). (3) The need to examine the sequence of events that gave rise to Russia’s capture and detention of the Ukrainian ship and its crew, and to determine whether the capture and detention occurred in the context of military or law enforcement activities (para. 67). Both parties to the conflict, Russia and Ukraine, had declared that disputes concerning “military activities” were excluded from the compulsory dispute settlement procedure. With regard to the dispute raised in this case, Russia argued that it was a dispute concerning “military activities.” By contrast, Ukraine argued that this was a dispute about “law enforcement activities” and the declaration was not applicable. ITLOS, Case Concerning the

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Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures Order, May 25, 2019, paras. 64–67.

<sup>8</sup> “China Launches Naval Exercise in South China Sea,” *Radio Free Asia*, July 1, 2020 at <https://www.rfa.org/English/news/china/exercise-southchinasea-07012020194330.html>

<sup>9</sup> For further details on Article 10 of the People’s Republic of China People’s Police Law and Article 9 of the Regulations of the People’s Republic of China on Use of Police Implements and Arms by the People’s Police, see: SAKAMOTO, *supra* note 5, p. 449, note (46).

<sup>10</sup> Japan-China Maritime Safety Dialogue Report, Sasakawa Peace Foundation, Peking University School of International Relations (Revised May 27, 2014) pp. 38–39.

<sup>11</sup> *M/V Saiga (Merits)*, Judgment, 1999, paras. 153–159.

<sup>12</sup> See: *Mainichi Shimbun*, November 19, 2020, note 3.

<sup>13</sup> TAKEDA *supra* note 2, p. 97. As TAKEDA points out, at the 14th Pacific Naval Symposium (WPNS) held in Qingdao, Shandong Province, China, on April 22, 2014, China agreed to the Code for Unplanned Encounters at Sea (CUES), which it had previously abstained from, and agreed in following with the Japan Maritime Self-Defense Force and the commanders of the navies of 21 countries, *ibid.*.

<sup>14</sup> Japan Ministry of Foreign Affairs website. “Visit of Premier Li Keqiang of the PRC State Council to Japan: Japan-China Summit and Dinner Meeting” at [http://www.mofa.go.jp/mofaj/a\\_o/c\\_ml/cn/page1\\_000526.html](http://www.mofa.go.jp/mofaj/a_o/c_ml/cn/page1_000526.html) [Last accessed on: January 31, 2021].

<sup>15</sup> See: Katsuya YAMAMOTO, “China’s Coast Guard is also an army of the Chinese Communist Party,” p. 2, at [https://www.spf.org/iina/articles/yamamoto\\_05.html](https://www.spf.org/iina/articles/yamamoto_05.html) (Last accessed on: January 31, 2021).

<sup>16</sup> Michael O’Hanlon, Director of Foreign Policy at the Brookings Institution, discusses the so-called “Senkaku Paradox,” the risk of a war of superpowers over a matter of little importance to the United States. Cf. Michael E. O’Hanlon, *The Senkaku Paradox: Risking Great Power War Over Small Stakes*, The Brookings Institution, 2019, pp.40-43. See also: Tsuneo WATANABE, *The World Order after 2021: 20 Angles for Reading International Affairs*, Shinchosha (2021), pp. 56–57.