

How to Ensure the Safety of the Japan Coast Guard While Maintaining Its Nature as a Police Organ When It Conducts Missions in Collaboration with the Japan Maritime Self-Defense Force under the Control Guidelines

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Abstract

This article will examine how to ensure the safety of the Japan Coast Guard when it conducts missions designated in the Control Guidelines that Japan adopted on the 28th of April 2023. For that purpose, this contribution will conclude with some proposals.

Under Article 80 of the Self-Defense Forces Law of 1954, the Minister of Defense may place the Japan Coast Guard under its control when there are armed attacks against Japan. The Japan Coast Guard has been ceaselessly conducting monitoring and surveillance of Chinese vessels that have periodically entered Japan's territorial sea surrounding the Senkaku Islands for more than two decades, over which both China and Japan have claimed territorial sovereignty. Due to the provocative conduct of such Chinese vessels, the tension in the sea area has been seriously heightened. Against this background and other factors, the Japanese government adopted three strategic documents on Japan's security on the 16th of December 2022. In line with this, for the implementation of the control of the Minister of Defense over the Japan Coast Guard under Article 80 of the Self-Defense Forces Law, the Japanese government adopted the said Control Guidelines. The said Control Guidelines designate various missions which the Japan Coast Guard will conduct in collaboration with the Japan Maritime Self-Defense Force.

A key characteristic of the Japan Coast Guard is that it must maintain its nature as a police organ or law enforcement organ under Article 25 of the Japan Coast Guard Law. Without specific legal grounds, any "interchangeability or duplication," either between defense missions and police ones, or defense organs and police ones, is strictly prohibited by Japanese law. As a result, the use of weapons by the Japan Coast Guard, as a police organ, is rigidly limited to the extent that is needed for the purpose of accomplishing its police function. The Japan Coast Guard is not allowed to use weapons for defense or military operations. Such situation is very different from the State practice of other countries around the world in terms of the relationship between military organs and coast guards including their missions.

The critical issue is how, when the Japan Coast Guard conducts missions under the Control Guidelines in collaboration with the Japan Maritime Self-Defense Force, it can ensure its safety. When an armed conflict is taking place, can operating in the battlefield or in the sea areas near to it, with significantly limited use of weapons, be safe? If so, how would the safety be ensured?

This paper will consider this confounding issue that is inherent to the Japan Coast Guard from various aspects. It will conclude with this author's proposals to ensure the Japan Coast Guard's safety.

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Introduction

The Japanese government finalized the three official documents on Japan's security¹ by a Cabinet decision on the 16th of December 2022. Part of the background to this lies in the serious consideration that the tense situation has been significantly exacerbated in recent years, particularly in relation to China in the East China Sea.² Based upon the same consideration, on the 28th of April 2023, the Japanese government adopted the Control Guidelines for the Japan Coast Guard (Guidelines)³ under Article 80 of the Self-Defense Forces Law.⁴

Article 80 reads:⁵

1. In the event the whole or part of the Self-Defense Forces is ordered into operation under the provisions of Paragraph 1, Article 76 (limited to No. 1), or Paragraph 1, Article 78, the Prime Minister may, if deemed especially necessary, place the whole or part of the Coast Guard under the control of the Minister of Defense (slightly corrected).⁶

2. In the event, the whole or part of the Coast Guard has been placed under control according to the provisions of the preceding paragraph, the Prime Minister shall place it under the command of the Minister of Defense as prescribed by Cabinet Order.

3. When the control under the provisions of Paragraph I has been deemed no longer necessary, the Prime Minister shall immediately remove such control.

After the Self-Defense Forces Law was enacted in 1954, for almost 70 years, concrete ways for how the Japan Coast Guard (JCG) and the Japan Maritime Self-Defense Force (JMSDF) are to take collaborative measures under the control by the Minister of Defense have not been designated. Against the background of the heightened tension in the East China Sea, the implementation of the Guidelines has become reality.

The most important factor to be emphasized is that, under domestic law,⁷ the JCG must maintain its nature as a law enforcement organ or a police organ with strict limitation on its use of weapons to the extent that allows it to accomplish its police function.⁸ The Guidelines will be issued in accordance with a decision under Japan's domestic law that an armed attack against

¹ These are the National Security Strategy of Japan, the National Defense Strategy, and the Defense Buildup Program.

² Atsuko Kanehara, "Refining Japan's Integrative Position on the Territorial Sovereignty of the Senkaku Islands," *International Law Studies*, Vol. 97 (2021), 1597–1600, 1625–1630.

³ https://www.mod.go.jp/j/press/news/2023/04/28b_02.pdf (in Japanese).

⁴ Law No. 165 of 1954.

⁵ An unofficial translation is given in Robert D. Eldridge and Musashi Katsuhiko eds., *The Japan Self-Defense Forces Law: Translation, History, and Analysis*, (Cambridge Scholars Publishing, 2019).

⁶ Article 76 prescribes defense operations and Article 78 does so for public security operations.

⁷ The relevant domestic laws will be introduced later.

⁸ Regarding the difficult distinction between the use of force prohibited by international law, particularly by Article 2, Paragraph 4 of the United Nations Charter, on the one hand, and the use of weapons allowed by international law for the purpose of law enforcement, on the other hand, see Atsuko Kanehara, "Reconsideration of the Distinction between the Use of Arms in Law Enforcement and the Use of Force Prohibited by International Law—With an Analysis of the Inherent Significance of This Issue to Japan—," *Japan Review*, Vol. 5 (2022), 13–48.

Japan is occurring and that it has occurred.⁹ In that case, under international law, an armed conflict is very likely taking place. In facing such a situation, the JCG must be a law enforcement or police organ and is strictly prohibited from using weapons as explained here. It cannot use weapons to respond to an armed attack, namely, to combat enemies.

Then, is it possible for the JCG to protect itself from being attacked? How can the safety of the JCG be ensured when it is discharging the designated missions in collaboration with the JMSDF under the Guidelines ?

This paper will look for possible ways to ensure the safety of the JCG in such a situation and will strongly propose safety as an issue of critical importance. In proceeding with this examination, it is assumed that under domestic law, an armed attack against Japan is defined, and that under international law, there exists an armed conflict to which Japan is a party. In accordance with the Guidelines, in an armed attack against Japan under Japanese domestic law, and with the existence of an armed conflict between China and Japan under international law, the JCG will discharge the duties designated by the Guidelines. In order to conduct a substantial examination of the Guidelines, it is useful to put them into these concrete contexts. This contribution will look for a way to ensure the safety of the JCG when it operates under the Guidelines in accordance with the applicable laws.

This paper, after the Introduction, will proceed as follows. First, it will provide a succinct explanation of the background for the Guidelines. Second, the relevant domestic law rules regarding the nature of the JCG as a law enforcement or a police organ, and its strictly limited use of weapons will be explained. Third, as the basis for finding the most effective way to ensure the safety of the JCG vessels and its personnel, considering the duties that the Guidelines expect the JCG to discharge, this paper will put the Guidelines into two concrete contexts: first, the context of coast guard activities in Japan's territorial sea as a duty of the JCG; second, the context of the duties of protecting nationals and conducting rescue operations for mass evacuations. Fourth, while limited from the perspective of this contribution, it will analyze the applicable laws of international law to the situation that is assumed in this paper. Fifth, a separate section will focus upon the principle of distinction as a fundamental limitation on hostile acts. Some concluding remarks with proposals will follow to emphasize the critical importance of the safety of the JCG which could be achieved by thorough research and prudent consideration of the relevant international law rules.

I. The Background for the Guidelines for the Japan Coast Guard Based on Article 80 of the Self-Defense Forces Law

1. The Tense Situation in the East China Sea in Relation to China

The Japanese government finalized the three official documents on Japan's security on the 16th of December 2022. One of the main background factors to this is the serious consideration that the tense situation has been significantly exacerbated in recent years, particularly in relation to China in the East China Sea. Based upon the same consideration, on the 28th of April 2023, the Japanese

⁹ The precise definition of such a situation is given under Article 76 of the Self-Defense Forces Law. The former part of Paragraph 1 of the provision reads:

When considered necessary from the standpoint of defending the nation against Armed Attack from the outside (including the case where armed attack from the outside is imminent), the Prime Minister may order part or the whole of the Self-Defense Forces into operations (slightly corrected).

Unofficial English translation, *supra* n. 5.

government adopted the Guidelines to reflect Article 80 of the Self-Defense Forces Law.¹⁰

The issue of the Senkaku Islands¹¹ is closely related to this tense situation. Japan's position is: There is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.¹²

Thus, Japan does not admit any existence of a dispute with China on the sovereignty of the Senkaku Islands.¹³ Nonetheless, as a matter of fact, there is a difference of opinions between China and Japan, since China also has claimed its sovereignty over the Senkaku Islands.

Since the beginning of the 21st century, China has dispatched government vessels, warships, and fishing boats to the sea areas surrounding the Senkaku Islands.¹⁴ These sea areas are Japan's territorial sea and contiguous zone. Particularly from 2012, when the Japanese government acquired ownership of the Senkaku Islands, such provocative entries by Chinese vessels into Japanese sea areas has become rampant.¹⁵ In this regard, the JCG has made public, in a periodical manner, information on such activities by Chinese vessels.¹⁶ Far beyond the simple entry of Chinese vessels into Japan's territorial sea, recently, cases have occurred in which Chinese government vessels persistently pursued Japanese fishing boats in the sea areas. On the Chinese side, *in arguendo*, such behavior is justified as the exercising of its law enforcement jurisdiction, because the sea areas concerned, as well as the Senkaku Islands, are under Chinese sovereignty.¹⁷

2. The Chinese Coast Guard Law of 2021

In addition, the event that really exacerbated the tense situation was China's enactment of the Chinese Coast Guard Law (CCGL) in January of 2021¹⁸ and its entry into force on the 1st of February of the same year. The CCGL astounded not only the Japanese authorities but also others across the world. Experts on international law and the law of the sea in particular have

¹⁰ As to the specific provision, see the Introduction.

¹¹ The islands are called "Diaoyu Dao" in Chinese.

¹² Ministry of Foreign Affairs of Japan, About the Senkaku Islands (Apr. 13, 2016), <https://www.mofa.go.jp/region/asia-paci/senkaku/index.html>.

¹³ Here, the concept of a dispute under international law is not discussed. Regarding it and Japan's position, see Kanehara, *op. cit.*, *supra* n. 2, 1591, and footnote 6.

¹⁴ For an overview of the situation, see Ministry of Foreign Affairs of Japan, Status of Activities by Chinese Government Vessels and Chinese Fishing Vessels in Waters Surrounding the Senkaku Islands (Aug. 26, 2016), <https://www.mofa.go.jp/files/000180283.pdf>.

¹⁵ As for the details of such Chinese conduct, see Atsuko Kanehara, "Maritime Security in the East China Sea: Japan's Perspective," *Issues & Insights*, Vol. 21 (2021), <https://pacforum.org/wp-content/uploads/2021/07/Issues-and-Insights-Vol-21-SR2-ver-3.pdf>, 16–17; and Atsuko Kanehara, "International Law as a Tool to Combat China," *Japan Review*, Vol. 4, No. 1 (2020), 18.

¹⁶ <https://www.kaiho.mlit.go.jp/mission/senkaku/senkaku.html>.

¹⁷ Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference on June 4, 2021, https://www.mfa.gov.cn/eng/xwfw_665399/s2510_665401/2511_665403/202106/t20210604_9170759.html; Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on July 13, 2021, https://www.mfa.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202107/t20210713_9170784.html.

¹⁸ An unofficial English translation of the Chinese Coast Guard Law is available on the U.S. Air University web site: https://www.airuniversity.af.edu/Portals/10/CASI/documents/Translations/2021-02-11%20China_Coast_Guard_Law_FINAL_English_Changes%20from%20draft.pdf.

repeatedly criticized several points in the CCGL.¹⁹ However, for Japan, which is actually facing the tense situation with China, and from the viewpoint of this paper, the most important provision therein is Article 83.²⁰

Under the CCGL, law enforcement and defense really seem to be “interchangeable.” Article 83 provides that coast guard organizations perform defense operations and other tasks 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.²¹

In the sea areas surrounding the Senkaku Islands, periodically and almost permanently, Chinese vessels and JCG vessels are confronting each other.²² The JCG has taken measures against Chinese vessels that are entering Japan’s contiguous zone and territorial sea surrounding the Senkaku Islands in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). The JCG has repeatedly required Chinese government vessels to leave Japan’s territorial sea.²³

In such an actual confrontation between Chinese government vessels and JCG vessels, when Chinese vessels immediately change their mission from law enforcement to defense operation on site in accordance with Article 83 of the CCGL, that would doubtlessly realize the circumstance where JCG vessels come to stand face to face with Chinese “warships.” As the interchangeability given under the CCGL between law enforcement and defense operation enables Chinese government vessels to actually turn into “warships,”²⁴ at least in terms of their function,²⁵ they would confront JCG vessels as warships.

Here is where the issue of rigid non-interchangeability between law enforcement and defense²⁶ for the JCG arises, which will be examined in Section II.

¹⁹ For instance, see Brig Vinod Anand, “Implications of China’s New Coast Guard Law,” *Vivekananda International Foundation* (Feb. 26, 2021), <https://www.vifindia.org/2021/february/26/implications-of-chinas-new-coast-guard-law>; and Tomohisa Takei, “How Japan Should Deal with China’s New Coast Guard Law,” *Asia Pacific Initiative* (Apr. 8, 2021), <https://apinitiative.org/en/2021/04/08/23360/>.

²⁰ As to the impacts of the CCGL on Japan’s coast guard activities, see Atsuko Kanehara, “The Impact on Japan’s Coast Guard and Maritime Security Caused by China’s Coast Guard Law of 2021,” *Japanese Yearbook of International Law*, Vol. 65 (2022), 320–335.

²¹ For an unofficial English translation of the CCGL, see *supra* n. 18.

²² As to the measures that the JCG has taken toward Chinese vessels, see *supra* n. 14 and 15.

²³ As, according to the law of the sea, Chinese government vessels enjoy immunity from the enforcement jurisdiction of foreign countries, the JCG cannot take law enforcement measures against them, and so it repeatedly requests Chinese government vessels to leave Japan’s territorial sea. Regarding such immunity, see Article 32 of UNCLOS. Relating to warships’ refusal to comply with such requests, Article 30 provides for a request to leave by a coastal State of the territorial sea.

²⁴ Under UNCLOS, Article 29 sets a definition of warships. Therefore, Chinese law enforcement vessels that change their function from law enforcement to defense operation under Article 83 of the CCGL need to satisfy the requirements given by the provision of UNCLOS in order to enjoy rights and privileges under international law. Here, it is enough to recognize that, as a matter of fact, Chinese vessels may immediately change their function from law enforcement to defense, such as becoming warships.

²⁵ Regarding warships in armed conflicts, see Wolff Heintschel von Heinegg, “Warships,” *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e443?rskey=Q0ctQU&result=1&prd=MPIL>, article last updated: October 2015.

²⁶ Unless otherwise explained, in this paper, “defense” means that under international law, different from “defense” or self-protection under domestic criminal law.

II. The JCG as a Law Enforcement or a Police Organ under Article 25 of the Japan Coast Guard Law

1. Article 25 of the Japan Coast Guard Law

Even if standing face to face with Chinese warships in Japan's territorial sea around the Senkaku Islands, the JCG is strictly obliged to maintain its nature as a law enforcement organ or a police organ. Article 25 of the Japan Coast Guard Law²⁷ prescribes for that. It reads:

Nothing contained in this Law 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.²⁸

To this rigid non-interchangeability between law enforcement and defense, or military operations, both the background for enacting the law and Japan's inherent history after World War II are closely related.²⁹ This is also the case with Article 9 of the Constitution of Japan,³⁰ in which Japanese people forever renounce war as a sovereign right of the nation.³¹ Here it is enough to point out this fact without going into the details. This background and Japan's history impose so severe a prohibition on such an interchangeability without specific legal grounds between a law enforcement or police organ, on the one hand, and a defense organ, on the other hand.³² This non-interchangeability is not only a matter of organizational demarcation between them, but also a matter of the missions and function that each of them discharges. In any case, the JCG must maintain its being a police organ, and must not take any roles of defense.

2. The Strict Limits Placed on the Use of Weapons by the JCG as a Police Organ

As the JCG is a police organ, its use of weapons is strictly limited to the extent that allows it to accomplish its police function. The former part of Article 7 of the Police Duties Execution Act provides for this. It reads:

In the event that there is probable cause to deem it necessary for the arrest of a criminal or the prevention of a criminal's escape, for self-protection or the protection of others, or for suppression of resistance to the performance of public duty, a police official may use a weapon within the limits judged reasonably necessary in the situation.³³

²⁷ Law No. 28 of 1948.

²⁸ An unofficial English translation of the Japan Coast Guard Law is given at <https://nippon.zaidan.info/seikabutsu/2001/00500/contents/00021.htm>.

²⁹ Rekizo Murakami and Masato Mori, "Kaijohoanchoho no Seiritsu to Gaikoku Hosei no Keiju (Enactment of the Coast Guard Law and Reception of Foreign Laws)," Soji Yamamoto *et al.* eds., *Kaijohoan Hosei—Kaiyoho to Kokunaiho no Kosaku (Legal System on Coast Guard—Interplay between the Law of the Sea and Domestic Law)*, (Sanseido, 2009), 26–33.

³⁰ The Constitution of Japan, November 3, 1946.

³¹ Article 9 reads:

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.

In order to accomplish the aim 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.

For an unofficial English translation of this provision, see <https://www.japaneselawtranslation.go.jp/ja/laws/view/174>.

³² Hereinafter, this paper will use the term "police organ," which can also mean "law enforcement organ," unless the term "law enforcement organ" is more appropriate depending on the context. JMSDF, which is a defense organ, may discharge police function in accordance with the Self-Defense Force Law. For instance, its Article 82 provides for the maritime police action conducted by JMSDF.

³³ For an unofficial English translation of this provision, see <https://www.japaneselawtranslation.go.jp/ja/laws/view/4043/tb>.

Thus, as a police organ, the JCG and its personnel may only use weapons when it deems this to be necessary for the arrest of a criminal or the prevention of a criminal's escape, for self-protection or for the protection of others. In other words, even when Chinese vessels that come to be warships, at least in terms of their function, in accordance with Article 83 of the CCGL, are conducting armed attacks against the JCG vessels in Japan's territorial sea around the Senkaku Islands, the JCG can only respond to them strictly within the limit placed on its use of weapons by the Japan's Police Duties Execution Act. Even though international law permits the JCG, as a Japanese governmental organ, to respond by exercising the right of self-defense, while issues under *jus in bello* are remaining, this legal fact of Japanese domestic law would never release the JCG from the duty of compliance with the limitation on its use of weapons and the responsibility for a violation thereof under Japan's domestic law. Or, even if there exists an armed conflict under international law, the JCG could never conduct a hostile act with the use of weapons. Broadly speaking, it could not fight an armed conflict.

In addition, the JCG vessels have a lightweight construction such that they can discharge the JCG's principal mission of maritime search and rescue in a speedy manner. They are not durable at all against an armed attack.

Thus, the JCG is, when operating according to the Guidelines under the situation that this paper assumes, a police organ with strict limitation on its use of weapons. Its vessel structure does not fit armed conflicts. Bearing this in mind, next, the duties that the guidelines expect the JCG to discharge will be confirmed. This forms a useful presupposition for finding the most effective way, in concrete contexts, to ensure the safety of the JCG under international law.

III. The Duties That the Guidelines Expect the JCG to Discharge

1. The Contents of the Guidelines

(1) The Guidelines read:

For the JCG to exercise its abilities, its main roles under contingency are taking measures to protect nationals and to protect lives at sea, particularly being able to play to its strength as a police organ. Such a discharge of the JCG's roles of saving lives and evacuating residents at a maximum is useful for the JMSDF as it allows the JMSDF to further concentrate on its frontal strategy.³⁴

As concrete missions that both the JCG and the JMSDF may conduct in collaboration, the Guidelines indicate, for instance, the following: evacuation and rescue of residents, providing information and support for rescue to vessels, search and rescue and saving lives, monitoring and surveillance to protect port facilities from terrorist attacks, and response measures for mass evacuations.

(2) The Guidelines confirm the non-military nature of the JCG. They read:

Under the control of the Minister of Defense, there may be no changes in the duties, functions, competences, and non-military nature of the JCG. Such control over the JCG does not amount to "incorporation of the JCG into the JMSDF" and "para-militarization of the JCG."³⁵

(3) While the Guidelines purport to clarify the meaning of the cooperation and collaboration between the JCG and the JMSDF when the Guidelines are issued under Article 80 of the Self-

³⁴ *Supra* n. 3.

³⁵ *Ibid.*

Defense Forces Law, and while the Guidelines designate the concrete missions with such cooperation and collaboration, still, ambiguity remains to a significant degree. It is ambiguous, for instance, as to where, in what sea areas, the JCG will operate, and as to how the JCG will precisely discharge its function that the Guidelines expect.

This paper is putting the Guidelines into context, for the sake of seeking the most effective way to ensure the safety of the JCG under international law when it is discharging its duties under the Guidelines. By doing so, it may also form a useful basis for the examination of the applicable laws of international law to the situation that this paper assumes.

2. Putting the Guidelines into Concrete Contexts

Two concrete situations as the contexts into which the Guidelines are put may be practically presupposed based upon the actual duties that the JCG is discharging.

In the first context, when the JCG is conducting its guarding of Japan's territorial sea surrounding the Senkaku Islands, an armed conflict takes place between China and Japan.

Such a context is not mentioned in the Guidelines. However, this is the situation that will most likely happen considering Article 83 of the CCGL as explained above. Chinese coast guard vessels entering Japan's territorial sea around the Senkaku Islands may immediately change their missions from law enforcement to defense operation. Chinese coast guard vessels may change themselves into "warships" at least in terms of function.³⁶ To cope with the growing tense situation in the sea area, the JCG has ceaselessly continued its monitoring and surveillance activities. Therefore, realistically, it is most predictable that JCG vessels that are conducting such monitoring and surveillance of Chinese coast guard vessels in the sea area will immediately come to confront the Chinese warships. The safety of the JCG in this situation is doubtlessly the most pressing agenda.

Second, there might be a large number of evacuees coming toward Japan via the sea from neighboring countries, such as Taiwan.³⁷ In fact, the JCG and the JMSDF have conducted a joint drill assuming an issue envisaged by the Guidelines, on the 22nd of June 2023.³⁸ While the details have not been publicly released, according to the media,³⁹ the joint drill supposed that the patrol ships were evacuating Japanese residents. In such an evacuation operation, evacuees from neighboring countries may also be included. Therefore, this second situation is also likely to come true.⁴⁰

Bearing in mind these concrete contexts into which the Guidelines are put, the next section will examine the applicable international laws to the situation that this paper assumes, namely, one when an armed conflict under international law is taking place, and when, under Japanese laws, an armed attack is being conducted against Japan. After giving an overview of some issues

³⁶ This nature as a warship is not necessarily a legal one. Vessels must satisfy the requirements under Article 29 of UNCLOS to legally become warships. See *supra* n. 24.

³⁷ Japan has not given recognition to Taiwan as a sovereign State. Therefore, here, this paper does not intend to define Taiwan as a sovereign State.

³⁸ <https://www.mod.go.jp/j/press/news/2023/06/22a.html>, (in Japanese).

³⁹ Jiji Press News, Japan Holds 1st Drill Based on SDF-JCG Emergency Manual, 2023.06.22 <https://sp.m.jiji.com/english/show/26979>; The Japan Times, MSDF and coast guard hold joint drill under defense minister control scenario, June 23, 2023 <https://www.japantimes.co.jp/news/2023/06/23/national/coast-guard-msdf/>.

⁴⁰ As for a thorough examination of this issue, see, for instance, Raul (Pete) Pedrozo, "Duty to Render Assistance to Mariners in Distress During Armed Conflict at Sea: A U.S. Perspective," *International Law Studies*, Vol. 94 (2018), 102–126; and Natalie Klein, "Assessing Australia's Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants," *Melbourne Journal of International Law*, Vol. 15, No. 2 (2014), 414–443.

relating to the applicability of “the laws of war” in the next section, the subsequent section will focus mainly upon the principle of distinction.

IV. Applicable Laws to the Situation That This Paper Assumes

1. The Applicability of “the Laws of War” under the Prohibition of the Use or Threats of Force

(1) Regarding the applicable laws to the situation which this paper assumes, there are two critical issues that require examination: the applicability of “the laws of war” under the prohibition of the use or threats of force by Article 2, Paragraph 4 of the United Nations (UN) Charter; and the relationship between the laws of war, if applicable, and the law of the sea.⁴¹ Such a general consideration of the issue of the applicable laws is meaningful before a detailed examination of the principle of distinction in the next section.

(2) To avoid any confusion, some clarification of the terminology is useful. There are “laws of war,” “laws of armed conflicts,” and international humanitarian law. Depending on the period concerned, that is to say before or after the UN Charter came into force, there may or may not exist a distinction between the laws of war and the laws of armed conflicts. By the prohibition of the use of force and the threat of force under Article 2, Paragraph 4 of the UN Charter, “legal” wars ceased to exist. Here, it is not necessary to discuss in detail the requirements for the existence of a war, such as the declaration of a war. Whatever the requirements may be, it is enough to presuppose the existence of war.⁴² When every violent act is falling within the use of force, and when the laws of “war” presuppose the existence of a war, after the UN Charter came into force, there would be no room, at least theoretically, for any application of the laws of “war” that were valid before it. After the UN Charter came into force, in place of the laws of war, the term “armed conflicts,” “the laws of armed conflicts” began to be used to designate the body of laws that regulate violent acts.⁴³

Nonetheless, this distinction between the laws of war and the laws of armed conflicts depending on the time of application is not necessarily so meaningful.⁴⁴ This is because after the

⁴¹ It is necessary to examine the relationship between the laws of armed conflicts, or the laws of war, and the law of the sea. Later, this paper will succinctly outline this issue.

⁴² On this issue, particularly from the perspective of the application of the laws of war as a legal effect of the concept of war, see Christopher Greenwood, “The Concept of War in Modern International Law,” *International and Comparative Law Quarterly*, Vol. 36 (1987), 283–306.

⁴³ While many treaty provisions which this section will introduce provide for “armed conflicts,” there is no established legal definition for the term, and it is an expression that describes a certain factual situation. Article 1, Paragraph 4 of the 1977 Additional Protocol I to the 1949 Geneva Conventions mentions armed conflicts, but it does not give any definition thereof. Hans-Peter Gasser, “Humanitarian Law, International,” *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e488?rskey=Dk4m8X&result=1&prd=MPII>, article last updated: December 2015, para. 5; James Kraska *et al.*, “Newport Manual on the Law of Naval Warfare,” *International Law Studies*, Vol. 101 (2023), 2.1.2.1. Even when there was a distinction between wartime and peacetime, there was not an established concept of war. Greenwood, *op. cit.*, *supra* n. 42, 284–287.

⁴⁴ For an analysis of this issue from the view point of the right of self-defense, see Akira Mayama, “Jieiken Koshi ni Okeru Buryokuhunsoho no Tekiyo—Senjikkokusaiho to Buryoku Hunsoho no Renzokusei · Hirenzokusei (Application of the Laws of Armed Conflicts in Exercise of the Right of Self Defense—Continuity and Discontinuity between the Laws of War and the Laws of Armed Conflicts),” *Kokusai Mondai (International Affairs)*, No. 556 (2006), 33–34, 42–43.

UN Charter came into force, many treaties regulating violent acts by force have been concluded. They are called the laws of armed conflicts. They incorporate the content of the laws of war that were applied before the UN Charter's existence, albeit partially rather than totally, and they do not necessarily abolish such laws of war. In other words, even if the development and changes of the laws of war that were applied before the UN Charter in this course of time are significant, the distinction between the laws of war and the laws of armed conflicts may not be so significant, as the latter has incorporated into it the former with the development and changes.

Bearing this in mind, this paper will hereinafter use the term "the laws of war" and will do so without excluding development and changes thereto, particularly after the UN Charter came into force.

In addition, there is a distinction between "the Hague Law" and "the Geneva Law," and between the laws of war and international humanitarian law. In this regard too, unless confusion would occur, this paper will use the term "the laws of war" and do so without necessarily excluding from it the meaning of international humanitarian law.

(3) Article 2, Paragraph 4 of the UN Charter prohibits the use or threats of force.⁴⁵ The focus is placed on the use of force not the threat of force.⁴⁶ Under this prohibition, therefore, legally, or, if it might be said, theoretically, there must not exist a "war"⁴⁷ if any violent act that amounts to a war is to fall under the use of force. Contrary to such a theoretical conclusion, from a practical standpoint, there have, as a matter of fact, been "wars" or, in other words, instances of the use of force in the world after the UN Charter came into force.

If legally, or theoretically, a war must not exist, there would be no room for "the traditional laws of war," which presuppose the distinction between peacetime and wartime, to apply.⁴⁸ To this, the traditional distinction between *jus ad bellum* and *jus in bello* relates.⁴⁹ As far as the rules in the laws of war regulate the means and method of operations in armed conflicts, they may have applicability to the use of force after the UN Charter came into force. In that case, however, the prohibition of the use of force by the UN Charter, which means prohibition in *jus ad bellum*, should have some impact on *jus in bello*, the laws of war. A complete analysis of this difficult issue

⁴⁵ It reads:

All Members shall refrain in their international relations from the threat or 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.

⁴⁶ There are opposing views on whether the phrase in Article 2, Paragraph 4 "against the territorial integrity or political independence of any State" sets some limits on the prohibition of the use of force by the provision. The important point here is to confirm that, under the situation that the provision prohibits, regardless of whether "the use of force" is qualified by the phrase or not, a war must not exist.

⁴⁷ *Supra* n. 42, 287–288.

⁴⁸ A.V. Lowe, "The Laws of War at Sea and the 1958 and 1982 Conventions," *Marine Policy*, Vol. 12, Issue 3 (1988), 286. Lowe wisely uses the term "traditional laws of war" to designate the laws that were valid when, before the UN Charter came into force, there was a distinction between wartime and peacetime. This paper, according to the terminology mentioned above, uses the term "the laws of war," which embodies both the traditional laws of war that Lowe refers to, and the modern laws of armed conflicts after the UN Charter came into force, unless any confusion were to occur from such use.

⁴⁹ For a detailed analysis of this issue, see Christopher Greenwood, "The Relationship between *Jus ad Bellum* and *Jus in Bello*," *Review of International Studies*, Vol. 9, No. 4 (1983), 221–234.

is far beyond the examination of this paper.⁵⁰

For the examination in this paper, it is enough to presuppose the applicability of the laws of war after the UN Charter came into force. This is because this paper adopts the term “the laws of war” without making a distinction between the laws of war that applied prior to and after the UN Charter’s existence for the reason explained above. As far as presupposing such applicability, the next issue would be raised, namely the issue of the relationship between the laws of war and the law of the sea. The law of the sea consists of the 1958 Four Geneva Conventions, UNCLOS, and customary law. While it is not only the law of the sea but also other fields of law, such as human rights law, that require a relationship with the laws of war, this paper, from its perspective, will concentrate on the relationship between the laws of war and the law of the sea.⁵¹

2. The Relationship between the Laws of War and the Law of the Sea

Regarding the relationship between the laws of war and the law of the sea,⁵² as a general consideration, for instance, there is an argument that “international law” in the phrase “subject to

⁵⁰ One authority makes a detailed examination of the applicability of the “traditional” (i.e., pre-UN Charter) laws of war following the coming into force of the UN Charter. Lowe, *op. cit.*, *supra* n. 48, 287–288. According to him, there are persuasive arguments for the continued applicability of the traditional laws of war. First, under the prohibition of the use of force by Article 2, Paragraph 4, the use of force is allowed as an exercise of the right of self-defense. The principles of the traditional laws of war, such as the duty to avoid casualties among non-combatants and belligerent rights of visit and search on the high seas, might remain applicable as rules mediating or setting the limits on the proper exercise of the right of self-defense. Second, as Article 2, Paragraph 4 of the UN Charter is interpreted as allowing the use of force such as that in self-defense and that under the authorization by the UN, these types of the use of force may both in fact and in law amount to a war. Thus, the traditional laws of war would apply to these types of the use of force. Considering these arguments and an examination of the Falklands conflict, the authority referred to here came to the conclusion that there remains a role for the traditional laws of war, and he sought to re-establish their role. *Ibid.*, 287–288.

⁵¹ Lowe describes this effort of consideration as looking for “a new law of war.” *Ibid.*, 289.

⁵² There are many works on this issue. Horace B. Robertson, Jr., “The ‘New’ Law of the Sea and The Law of Armed Conflict at Sea,” *The Newport Papers, Third in the Series* (1992); Rüdiger Wolfrum, “Military Activities on the High Seas: What Are the Impacts of the U. N. Convention on the Law of the Sea?,” *International Law Studies*, Vol. 71 (1998), 501–513; A.V. Lowe, “The Commander’s Handbook on the Law of Naval Operations and the Contemporary Law of the Sea,” *International Law Studies*, Vol. 64, Horace B. Robertson, Jr. ed., *The Law of Naval Operations*, Chapter V (Naval War College Press, 1991), 109–147; A.V. Lowe, “Some Legal Problems Arising from the Use of the Seas for Military Purposes,” *Marine Policy*, Vol. 10, Issue 3 (1986), 171–184; Lowe, *op. cit.*, *supra* n. 48; “Straight Baselines in International Law: A Call for Reconsideration,” A Seminar with Its Moderator, W. Michael Reisman, *Proceedings of the Annual Meeting of the American Society of International Law*, Vol. 82 (1988), 260–277; Wolff Heintschel von Heinegg, “Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality,” *Israel Yearbook on Human Rights*, Vol. 34 (2004), 151–178; Dale G. Stephens, “The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations,” *California Western International Law Journal*, Vol. 29, No. 2 (1999), 283–312; Robin Churchill and Vaughan Lowe, *The Law of the Sea*, Third ed., (Manchester University Press, 1999), 421–432; Tullio Treves, “Military Installations, Structures, and Devices on the Seabed,” *The American Journal of International Law*, Vol. 74, No. 4 (1980), 808–857; D.P. O’Connell, *The International Law of the Sea*, Vol. II (Clarendon Press, 1984), Chapter 29; D.P. O’Connell, “International Law and Contemporary Naval Operations,” *British Year Book of International Law*, Vol. 44 (1970), 19–86. Regarding the relationship between the laws of war, the right of self-defense, and interventions against a foreign vessel on the high seas from the perspective of the law of the sea, see Laurent Lucchini, “Un aspect des mesures de surveillance maritime au cours des opérations d’Algérie,” *Annuaire français de droit international*, Vol. 8 (1962), 920–928.

other rules of international law” of Article 87, Paragraph 1 of UNCLOS refers to the laws of war.⁵³

While not specifically concerning the relationship between the laws of war and the law of the sea, the International Court of Justice (ICJ) declared a “special law” status of the laws of war in relation to human rights law in the particular context of a case before it.⁵⁴

In addition, as a certain general argument on the relationship between the laws of war and the law of the sea, attention has been paid to the significance of the legal zone system, particularly that of exclusive economic zones (EEZs), under UNCLOS due to its inherent meaning to the laws of war.

The coastal States of EEZs have sovereign rights and jurisdiction solely on the matters designated by UNCLOS under its Article 56. In relation to other matters, the freedom of the use of the high seas is applied to EEZs in accordance with Article 58. For the latter matters, the legal status of the sea zones within 200 nautical miles from coasts maybe interpreted as either EEZs or the high seas while Article 58 mentions EEZ.⁵⁵ This may have an inherent significance to the laws of war. When the laws of war apply, the military operations of the naval forces of the parties to armed conflicts are permitted in limited sea areas. In this context, whether the sea areas within 200 nautical miles from coasts are EEZs or the high seas has some importance.⁵⁶

However, these general considerations on the relationship between the laws of war and other fields of international law have not solidified an established understanding. Rather, special issues with respect to the relationship between the laws of war and the law of the sea have developed to a certain degree. In this regard, there are discussions on the issues relating to, for instance, the concept of “peaceful use” of the sea, seabed, structures, installations and other devices, innocent passage of foreign warships, rights of navigation in relation to territorial seas,⁵⁷ internationally used straits, high seas, and military activities in EEZs. In addition, there are issues relating

⁵³ United States Naval War College, International Law Department, Center for Naval Warfare Studies, *Maritime Operational Zones*, Chapter 4, <https://dnnlgwick.blob.core.windows.net/portals/0/NWCDepartments/Stockton%20Center%20International%20Law/2013-Zones-Manual.pdf?sr=b&si=DNFileManagerPolicy&sig=sWrSUKeqZaEKhaVvWPx0bCSByt6FQn6k3YHkszLx9I%3D>, (2013), 4-16; George K. Walker, “The Tanker War, 1980–88: Law and Policy,” *International Law Studies*, Vol. 74 (2000), 487–489.

⁵⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July, 1996, *ICJ Reports 1996*, para. 25. The same opinion is voiced by James Kraska *et al.*, *op. cit.*, supra n. 43, 1.1.

⁵⁵ This issue occurs also for the matters under Article 59 of UNCLOS, which are not attributed to coastal States or foreign States by UNCLOS. Lowe, *op. cit.*, supra n. 52 “The Commander’s Handbook...,” 113–114.

⁵⁶ W.J. Fenrick, “The Exclusion Zone Device in the Law of Naval Warfare,” *Canadian Yearbook of International Law*, Vol. 24 (1986), 93 and footnote 5; Robertson, Jr., *op. cit.*, supra n. 52, 23–25. See also J. Ashley Roach, “The Law of Naval Warfare at the Turn of Two Centuries,” *The American Journal of International Law*, Vol. 94, No. 1 (2000), 67–68. In the context of naval warfare, one authority deals with all contiguous zones, EEZs, and the high seas under the same category of “international waters”, see United States of America Department of Defense, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, June 2015 (Updated December 2016), <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf#page=921,13.2.3>.

⁵⁷ Depending on the legal regimes of sea zones under UNCLOS, States have the rights of navigation or passage.

to maritime zones.⁵⁸ Nonetheless, even for these special issues, too, the arguments have not necessarily reached an accord.

Considering the state of the arguments on the relationship between the laws of war and the law of the sea, it is very difficult to find a definitive answer regarding the question of the relationship. For the analysis in this contribution, it is not necessary to do so. From this contribution's perspective, it is enough to recognize such an issue regarding the relationship. The most important point is to emphasize that it would place a heavy burden on the JCG to have to prove the applicability of the rules of the laws of war and its relationship with the rules of the law of the sea, in terms of needing to convincingly justify its position for ensuring its safety. Thus, it may not be inappropriate for this paper to examine the safety of the JCG under the Guidelines by presupposing the application of some rules of the laws of war without excluding the application of the law of the sea at the same time, as has been argued by a number of authorities.

Based upon this principle of examination, this section and section V below will conduct the following analysis. However, before moving onto section V, it is first necessary to succinctly consider the applicability of the laws of war to naval warfare.⁵⁹ More precisely, the question as to which rules of the laws of war are to apply to naval warfare must be clarified as much as possible.

3. The Applicable Rules of the Laws of War to Naval Warfare

(1) Regarding naval warfare, first, authorities frequently say that there are few treaty rules to

⁵⁸ There are practices of setting maritime zones in armed conflicts, and the names are various, such as exclusion zones and maritime defense zones. The location of these zones is in territorial seas, contiguous zones, EEZs and high seas. Wolff Heintschel von Heinegg, "War Zones," *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e436?rskey=oUiyIT&result=1&prd=MPIL>, article last updated: October 2015; Fenrick, *op. cit.*, *supra* n. 56, 91–126; United States Naval War College, International Law Department, Center for Naval Warfare Studies, *op. cit.*, *supra* n. 53, Chapter 4; R.P. Barston and P.W. Birnie "The Falkland Islands/ Islas Malvinas Conflict: A Question of Zones," *Marine Policy*, Vol. 7, Issue 1 (1983), 14–24. As a similar issue, blockades have also been discussed in the context of the relationship between the law of the sea and the laws of war. Wolff Heintschel von Heinegg, "Blockade," *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e252?rskey=P4e2sC&result=1&prd=MPIL>, article last updated: October 2015; Wolff Heintschel von Heinegg, "Naval Blockade," *International Law Studies*, Vol. 75 (2000), Michael N. Schmitt ed., *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L. C. Green, On the Occasion of His Eightieth Birthday*, Chapter VIII; James Kraska, "Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?," *Yearbook of International Humanitarian Law*, Vol. 13 (2010), 367–395. For an analysis of the usage of sea zones from the perspective of combating international terrorism at sea, see Wolff Heintschel von Heinegg, *op. cit.*, *supra* n. 52, 159–162.

⁵⁹ This paper follows the general definition of naval warfare, and it denotes the tactics of military operations conducted on, under, or over the sea. ICRC Databases, Naval warfare, Introductory text, at https://casebook.icrc.org/law/naval-warfare#footnote1_1813h2o, 1, and footnote [1]. Regarding naval roles, see, for instance, Steven Haines, "War at Sea: Nineteenth-Century Laws for Twenty-First Century Wars?," *International Review of the Red Cross*, Vol. 98, No. 2 (2016), 421–426.

apply to naval warfare.⁶⁰ As the other side of the coin, one frequently voiced opinion is that the applicable laws to naval warfare are mainly based upon customary international law.⁶¹

The Second 1949 Geneva Convention (GCII) on naval warfare is certainly applicable to naval warfare. In comparison to this, the First 1949 Geneva Convention (GCI) does not apply to naval warfare. Regarding the Third and Fourth 1949 Geneva Conventions (GCIII and GCIV) and the 1977 Additional Protocol I to the 1949 Geneva Conventions (API),⁶² it is not always an easy task to identify the provisions that are applicable to naval warfare.⁶³ On this, the opinion mentioned above is frequently heard, namely that there are few treaty rules to apply to naval warfare, and that the applicable laws to naval warfare are mainly based upon customary international law.⁶⁴

There is, second, another opinion that the regulation by the laws of naval warfare is decided depending on the place of targets of attacks or objects of protection from attacks, and when they

⁶⁰ W. Michael Reisman and William K. Leitzau, "Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict," *International Law Studies*, Vol. 64, Horace B. Robertson, Jr. ed., *The Law of Naval Operations*, (Naval War College Press, 1991), Chapter I, 8; *San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Prepared by International Lawyers and Naval Experts. Convened by the International Institute of Humanitarian Law. Adopted in June 1994* (hereinafter referred to as "the San Remo Manual"), Introductory Note. For an analysis of the San Remo Manual, see Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea," *The American Journal of International Law*, Vol. 89, No. 1 (1995), 192–208. Yasuyuki Yoshida, "Gendai no Kaijo Sakusen kara Mita Kaisenhoki no Kadai (Agenda of the Laws of Naval Warfare from the Perspective of Modern Naval Operations)," *Kokka Anzenhoshō (National Security)*, Vol. 34, No. 2 (2006), 81; Manabu Oginome, "Kaisen ni Okeru Bunminhogo nado no Koryō (Some Consideration of Civilian Protection and Others in Naval Warfare)," *Kaikankō Senryaku Kenkyū (JMSDF Command and Staff College Strategic Studies)*, Vol. 4, No. 1 (2014), 105–106; *Kaijo Buryoku Hunsoho—Sanremo Manyaru Kaisetsusho (The Law on Naval Warfare—Explanation Book on the San Remo Manual)*, Translated by Masayuki Takemoto, Akira Mayama *et al.*, (Toshindo, 1997), iii.

⁶¹ For such a position and similar ones, see Natalino Ronzitti, "Naval Warfare," *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e342?rskey=uBaeSM&result=1&prd=MPIL>, article last updated: June 2009, para. 2; and W.J. Fenrick, "Legal Aspects of Targeting in the Law of Naval Warfare," *Canadian Yearbook of International Law*, Vol. 29 (1992), 239–241.

⁶² For a detailed analysis of the applicability of API to naval warfare, see *ibid.*, 264–267. It is clear that the provisions under API that reflect GCII, which is Part II, are to apply to naval warfare. However, Article 49, Paragraph 3, which is in Section One of Part IV and not in Part II, confounds the determination of the applicability of Section One of Part IV (from Article 48 to Article 67) of API. The title of Article 49 is "Definition of Attacks and Scope of Application." Paragraph 3 reads:

The provisions of this Section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land *but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air* (Emphasis added).

For one interpretation of Article 49 that Article 52 applies to naval bombardment through Article 49, see Ronzitti, *op. cit.*, *supra* n. 61, para. 21.

⁶³ Considering the assumed situation of this paper, the 1977 Additional Protocol II to the 1949 Geneva Conventions is not within the coverage of this paper's examination.

⁶⁴ There are treaties concluded prior to World War II that apply to naval warfare. This paper will focus mainly upon the 1949 Geneva Conventions (GCI can be omitted) and API.

exist at sea, the laws to regulate them are the laws of naval warfare.⁶⁵ According to this opinion,⁶⁶ it is necessary to decide whether the rules concerned designate the place of the targets of the attacks or the objects of protection from the attacks as the sea, and whether the operation concerned has its targets of attacks at sea and its objects of protection at sea.

Among the authorities mentioned first, one authority clearly writes that naval bombardment is subject to API, since Article 49 renders Article 52 applicable to naval warfare.⁶⁷ Naval bombardment can include bombardment from sea against targets on land. According to the second type of opinion, as long as the target of bombardment exists on land, such bombardment is not subject to the laws of naval warfare. This is because the targets of bombardment do not exist at sea. Therefore, the first and second opinions differ from each other.

(2) However, it is not necessary to fully examine the applicable laws to naval warfare and consider the difference of opinions regarding them. From the perspective of this paper, the most important point is that if the JCG, to ensure its safety, were to rely on some rules of the laws of war and adopt a certain interpretation thereof, the burden placed on it would become very heavy. This is because, as shown by the abovementioned authorities, there remains a certain flexibility as to the applicability of the rules to naval warfare, whether treaty rules or customary rules, and their interpretation needs to be truly well grounded for them to be convincing. Otherwise, the conflicting party to Japan would have enough room to apply different rules from those that the JCG does, and a different interpretation of the same rules as those the JCG presupposes are applicable.

The result is that the JCG would run a serious risk of being in danger, such as being a target of attacks by the conflicting party to the armed conflict, as the latter could choose different applicable rules and a different interpretation as explained here. To firmly ensure its safety, the JCG would need to prepare flawless and perfect arguments on the applicable laws and the interpretation thereof.

Bearing in mind this legal situation of the applicable laws to the situation that this paper assumes, in the next section, an examination of the relevant rules on the principle of distinction will be given. The principle of distinction should be the most important principle in considering the safety of the JCG when it discharges its missions under the Guidelines.

V. The Principle of Distinction⁶⁸

1. Basic Rules for Methods and Means of Warfare

(1) As a basic rule for the methods and means of warfare, Paragraph 1 of Article 35 of API prescribes the principle that the methods or means of warfare are not unlimited. It reads:

In any armed conflict, the right of the Parties to the conflict to choose methods or means of

⁶⁵ Akira Mayama, “Junevu Shojoyaku to Tsuika Giteisho (Geneva Conventions and the Additional Protocols),” in the Japanese Society of International Law ed., *Nihon to Kokusaiho no Hyakunen (100 Years for Japan and International Law)*, (Sanseido, 2001), Vol. 10, 177.

⁶⁶ While there is some ambiguity, in focusing on the place of the targets as being at sea, a similar opinion may be voiced by an authority as saying “(a)s a matter of convenience, if Additional Protocol I is not applicable to attacks directed against objects on, under, or over the seas, Article 48 of that document may be used as a statement of the principle of distinction,” Fenrick, *op. cit.*, *supra* n. 61, 263.

⁶⁷ Ronzitti, *op. cit.*, *supra* n. 61, para. 21 and paras. 7–8.

⁶⁸ This is also called “the principle of identification” and “the principle of discrimination.” Michael N. Schmitt, “The Principle of Discrimination in 21st Century Warfare,” *Yale Human Rights and Development Law Journal*, Vol. 2 (1999), 143–182. This paper will use the term “the principle of distinction.”

warfare is not unlimited.

Article 48 further clarifies such limits in relation to the protection of civilians as follows:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

This is the principle of distinction. The distinction should be made between civilians and combatants, and also between civilian objects and military objectives. It is required to make the distinction between objects or persons that may be attacked and those that may not be attacked. Paragraph 3, Paragraph 4, and Paragraph 5 of Article 51 provide for the details of the principle of distinction. They read:

Paragraph 3

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

Paragraph 4

Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Paragraph 5

Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
- (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

These provisions belong to Part IV of API. As far as Part II of API reflects GCII and applies to naval warfare, it is not totally clear which provisions from Parts other than Part II of API apply to naval warfare. As a confounding provision, Article 49, in its Part IV, contains the phrase that the provisions of this section apply to all attacks from the sea or from the air against objectives on land *but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air* (Emphasis added).⁶⁹

Nonetheless, as long as the principle of distinction has customary law status in relation to naval warfare,⁷⁰ the applicability of the provisions of API would not require a detailed examination.⁷¹ It remains to identify the detailed contents of the principle and examine their possible status as customary law based upon State practice.

(2) It may be said that the principle of distinction is not only a treaty rule but also a customary

⁶⁹ *Supra* n. 62.

⁷⁰ Yoram Dinstein, "Legitimate Military Objectives under the Current *Jus In Bello*," *Israel Yearbook on Human Rights*, Vol. 31 (2001), 1. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July, 1996, *op. cit.*, *supra* n. 54, 257.

⁷¹ For a detailed analysis, see Mayama, *op. cit.*, *supra* n. 65, 178–181.

law rule. This is the case with naval warfare.⁷² As relevant State practice,⁷³ the military manuals of States have confirmed the principle.⁷⁴ If the relevant treaty rules that apply to naval warfare are few in number, then customary international law and State practice take on greater significance.⁷⁵ As will be explained later, in terms of the concrete application of the principle, there is some difference of opinion regarding the standard for making the distinction between military objectives and others.⁷⁶ The critical issue is how to define military objectives.

2. The Standard for Determining Military Objectives

(1) Even if the principle of distinction is solidly established, the remaining and daunting issue is how to define military objectives. For the JCG, it is indispensable for its safety to completely prove that its vessels and personnel are not military objectives.⁷⁷

There are two ways of determining military objectives. One is to make a list of military objectives depending on categories of objects. The other is to provide a general definition of military objectives by describing the functions of objects.⁷⁸ In the treaty practice relating to naval warfare, the former way, involving the making of a list, was adopted.⁷⁹

For naval warfare, in the past, the former method was dominant, and, principally, warships, auxiliary vessels and merchant vessels were considered. This history of the development of the standard for identifying military objectives is different from that for land warfare, where the standard for identifying military objectives depending on function was adopted earlier than for naval warfare.⁸⁰

(2) By the State practice in place through two world wars and the present day, the way of identifying military objectives by a list of categories, in relation to naval warfare, has become

⁷² In addition to the authority cited at *supra* n. 70, see Robert W. Tucker, "The Law of War and Neutrality at Sea," *International Law Studies*, Vol. 50 (1955), 365. For a very prudent attitude toward customary rules in this regard, see Lowe, *op. cit.*, *supra* n. 52 "The Commander's Handbook..." 130.

⁷³ On the significance of military manuals as State practice and various types of manual, see, for instance, Earle A. Partington, "Manuals on the Law of Armed Conflict," *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e326?rskey=a8hA9D&result=1&prd=MPIL>, article last updated: August 2016. It has been pointed out that States prefer not to stand alone on the law of armed conflict, para. 25. See also Reisman and Leitzau, *op. cit.*, *supra* n.60.

⁷⁴ For instance, the San Remo Manual, Part III, Section I; United States of America Department of Defense, *op. cit.*, *supra* n. 56, 5.5. and 5.6.; and James Kraska *et al.*, *op. cit.*, *supra* n. 43, 5.4.

⁷⁵ Ronzitti, *op. cit.*, *supra* n. 61, para. 42.

⁷⁶ Mayama, *op. cit.*, *supra* n. 65, 178–181; Akira Mayama, "Kaisenhoki ni Okeru Mokuhyo Kubetsu Gensoku no Shintenkai (New Development of the Principle of Distinction in the Laws of Naval Warfare)," (1), *Kokusaiho Gaiko Zasshi*, (*The Journal of International Law and Diplomacy*), Vol. 95, No. 5 (1996), 539–578, (2) in the same journal, Vol. 96, No. 1 (1997), 25–57, particularly (1) 540–541, 546–552.

⁷⁷ The following part of this paper will give an analysis based upon the Guidelines being put into concrete contexts. Before that, here, the legal arguments on the principle of distinction and related issues will be examined.

⁷⁸ In this regard, including several types of ways to explain military objectives, see Fenrick, *op. cit.*, *supra* n. 61, 242–243.

⁷⁹ For instance, the 1936 London Submarine Protocol indicates that a merchant vessel may not be sunk on sight. Article 4 of the 1907 Hague Convention XI suggests that vessels charged with religious, scientific, or philanthropic missions are exempt from capture. *Ibid.*, 243.

⁸⁰ Mayama, *op. cit.*, *supra* n. 76, (1) 546–552.

useless. In applying the standard for identifying military objectives depending on categories, the most confounding issue has been when merchant vessels, enemy or neutral, become military objectives, while in principle, they are not so.⁸¹ The requirements for merchant vessels to amount to military targets have been discussed for a long time.

This is not the place to examine the development of State practice in detail. Here, it suffices to outline that, irrespective of great efforts to set forth the requirements for merchant vessels to become military objectives, in practice, the distinction between merchant vessels that are immune from attacks and those that may be the targets of attacks has become seriously blurred. The standard for the distinction is not reliable. As far as this is the reality with respect to the most critical matters, namely, the inviolability of merchant vessels, the way of identifying military objectives depending on categories loses its usefulness.⁸²

As recent international rules on this issue, Article 52 of API of 1977 is interpreted as adopting the way of identifying military objectives by providing a general definition, which means a general definition depending on the function of the objectives concerned.⁸³ It describes such function as “their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” As for the civilian population that Article 51 of API deals with,⁸⁴ in terms of the requirements for civilian populations to become military objectives, an important factor is taking a direct part in hostilities.⁸⁵ It could be said that Article 51, too, defines the civilian population as being immune from attack by its type of function.

Considering the development of State practice in this way, as mentioned here, and as far as Article 51 and Article 52 of API apply to naval warfare as well as land warfare, these provisions, as treaty rules, have brought into the principle of distinction for naval warfare the way of identifying military objectives by a general definition, which means definition depending on the function of the objectives concerned.⁸⁶ If this is the case, the remaining and further difficult question is how to identify military objectives depending on their function, not category. From the perspective of this paper, it is necessary to examine how to prove that JCG vessels and personnel should be immune from attacks.

While for naval warfare, as well as for land warfare, the way of identifying military objectives according to their function is said to be important, still, there may be significance in considering the possibility for JCG vessels to become military objectives in accordance with the way of identifying such objectives depending on their category. Thus, in the following, examinations will be given both from the perspective of the category of JCG vessels and from that of their function.

⁸¹ On this issue, there are many works. Including examination of State practice in the past and the modern time, see, for instance, Fenrick, *op. cit.*, *supra* n. 61, 244 *et seq.*; Mayama, *op. cit.*, *supra* n. 65, 179–181; Mayama, *op. cit.*, *supra* n. 76, (1) 548–578, (2) 25–42; Laurie R. Blank, “Taking Distinction to the Next Level: Accountability for Fighters’ Failure to Distinguish Themselves from Civilians,” *Valparaiso University Law Review*, Vol. 46, No. 3 (2012), 765–777; and Yoram Dinstein, *op. cit.*, *supra* n. 70, 1–26.

⁸² For a detailed analysis, see Mayama, *op. cit.*, *supra* n. 76, (1) 556–571, (2) 26–31.

⁸³ Paragraph 2 of Article 52 reads:

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

⁸⁴ Article 51 provides for the protection of the civilian population. Paragraph 3 of it reads:

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

⁸⁵ This factor will be examined later in this section.

⁸⁶ Mayama, *op. cit.*, *supra* n. 65, 179–181.

In such examinations, a concrete analysis is useful in the context of the duties that the JCG will discharge under the Guidelines, which were confirmed above in Section III of this paper.

3. Categories under Which JCG Vessels May Fall

(1) When considering the categories under which JCG vessels fall, the important element is the “control” by the Minister of Defense over the JCG under the Guidelines. This is in accordance with Article 80 of the Self-Defense Forces Law.⁸⁷ Based upon this provision, the Guidelines⁸⁸ read:

Under an integrative and unitary command that is issued based upon information aggregated in the Ministry of Defense and the JMSDF, the JMSDF and the JCG should cope with the situation concerned by swift and accurate allocation of roles in a more cooperative manner than usual.

As confirmed in Section III, the Guidelines make clear that such control does not mean the incorporation of the JCG into the JMSDF, nor does it make the JCG a paramilitary organ, either.

This position is based upon Japan’s domestic laws and a domestic document, and therefore, they have their validity within Japan. However, it is a totally different issue whether Japan’s position is comprehensible and convincing to international society, particularly to the conflicting party, China. For that to be the case, it is, above all, indispensable for Japan’s position to be in accordance with international law.

(2) According to the way of identifying military objectives by their category, it goes without saying that warships are military objectives. As far as JCG vessels do not satisfy the requirements for warships, such as Article 29 of UNCLOS, Japan might be able to prove that they are not warships. The International Committee of the Red Cross (ICRC) also confirms the definition given by Article 29 of UNCLOS.⁸⁹ In addition, regarding incorporation into armed forces, there is the notification requirement under Article 43, Paragraph 3 of API.⁹⁰

(3) As related consideration, it is significant to recognize the recent tendency to understand “military” with a wider scope. This is of critical importance for the JCG in proving that it does not fall under armed forces. This is because they are State vessels as well as warships and auxiliary vessels in many cases, and their police function can be discharged by warships and auxiliary vessels.

⁸⁷ Introduction.

⁸⁸ *Supra* n. 3.

⁸⁹ International Commission of the Red Cross, Commentary of 2017 to Article 14 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-14/commentary/2017?activeTab=undefined>, para. 1520, [30] reads:

Article 29 of the 1982 UN Convention on the Law of the Sea, which reflects customary international law on this point, defines ‘warship’ as a ‘ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline’.

⁹⁰ Article 43, Paragraph 3 reads:

Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

In this regard, in relation to a State vessel serving a police function,⁹¹ the distinction between military activities and police operations has been blurred.⁹² Furthermore, the category of vessels, whether military ships or police vessels, does not always reflect the nature of their activities. Military ships may conduct police activities, as police vessels do military operations.⁹³ These discussions demonstrate that, in relation to the standard for the distinction under the principle of distinction, the issue of category of vessels and that of their function may substantially overlap. The same may hold true with the consideration of the factors and function that merchant vessels hold, when they lose their immunity from attacks, which will be later examined.

The ICRC points out the wide scope of the term “military.” In relation to “military hospital ship,” it adopts a wide definition of the term “military.”

Its commentary on Article 22 of GCII reads:

Positively defined, the term ‘military’ means that the hospital ships must be operated by, or under the exclusive control of, the armed forces of a State Party. This requirement is met if they qualify as either ‘warships’ or ‘auxiliary vessels’ as defined in international treaty law and customary law. ‘Military’ is to be understood as ‘relating to ... armed forces’. This term is broad enough to apply equally to ‘warships’ and to ‘auxiliary vessels’, as long as they are in fact operated by, or under the exclusive control of, the armed forces (reference numbers omitted).⁹⁴

In addition, recent jurisprudence has repeatedly recognized that the distinction has been blurred between military activities and law enforcement. The Ukraine Naval Vessels Detention Case, (Provisional Measures,⁹⁵ and Preliminary Objections⁹⁶), the Coastal Rights Case (Preliminary Objections)⁹⁷ are examples of such jurisprudence. In these instances, the International Tribunal for the Law of the Sea (ITLOS) and the Arbitral Tribunal considered Article 298, Paragraph 1 (1)

⁹¹ Regarding a State vessel under UNCLOS, see Gil Carlos Rodríguez Iglesias, “State Ships,” *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1224?rskey=3cfU6A&result=1&prd=MPIL>, article last updated: 1989.

⁹² For a similar position, see A.V. Lowe, “Ships,” in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni eds., *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, (T.M.C. Asser Press, 2013), 297. From the perspective of the use of force and the use of arms for law enforcement, this author has dealt with the issue previously. Atsuko Kanehara, *op. cit.*, *supra* n. 8, regarding the relevant jurisprudence, 28–34, and footnotes thereto.

⁹³ This point will be touched upon again later.

⁹⁴ International Commission of the Red Cross, Commentary of 2017 to Article 22 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949, <https://ihl-databases.icrc.org/en/ihl-treaties/gcii-1949/article-22/commentary/2017?activeTab=undefined>, para. 1943.

⁹⁵ Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Request for the Prescription of Provisional Measures, Order of 25 May 2019, https://www.itlos.org/fileadmin/itlos/documents/cases/26/published/C26_Order_20190525.pdf, paras. 64–65.

⁹⁶ In the Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between Ukraine and the Russian Federation, in respect of a Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen, Award on the Preliminary Objections of the Russian Federation, 27 June, 2022, <https://pcacases.com/web/sendAttach/38096>, paras. 107–109

⁹⁷ The arbitral tribunal, in another case, too, mentioned a similar thought to that of the International Tribunal for the Law of the Sea in the Detention Case. In the Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between Ukraine and the Russian Federation, in respect of Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, <https://pcacases.com/web/sendAttach/9272>, paras. 333–335.

(b) of UNCLOS⁹⁸ to determine whether they had jurisdiction to entertain the cases before them.⁹⁹

Furthermore, the discussion in the drafting process of Article 43 on “armed forces” under API is also significant. The commentary by the ICRC reads:

During the discussions on Article 43 a proposal was made by a delegation to specify that police forces should be excluded from the armed forces, unless national legislation has otherwise provided and the other Parties to the conflict have been notified accordingly. A long discussion followed, relating on the one hand to the meaning of the term “police force” (which can cover uniformed units as well as plain clothes policemen) and, on the other, to *the incompatibility of any possible duplication of the function of internal lawkeeping and that of combatant*; even the relevance of the proposed notification procedure and whether there should be any provisions on this subject were discussed. Finally the terms “para-military” and “armed law enforcement agency” were substituted for the expression “police forces”, particularly to take into account the differences in internal organization in many States. The problem of any possible duplication of functions referred to above was not explicitly solved, though some may consider that such duplication is impossible (emphasis added, and note number omitted.)¹⁰⁰

While the relationship between military forces and police organs differs depending on the country, as a matter of fact, it is true that there is duplication between the two organs.¹⁰¹ This is the same understanding as the ICJ and the Arbitral Tribunal have indicated, namely that the distinction between military acts and law enforcement and that between the military forces and law enforcement organs has been blurred.¹⁰²

⁹⁸ Article 298, Paragraph 1 (1) (b) reads:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

.....

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

⁹⁹ For a detailed examination of the jurisprudence, see Kanehara, *op. cit.*, *supra* n. 8, 29–34.

¹⁰⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Commentary of 1987, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-43/commentary/1987?activeTab=undefined>, para. 1682.

¹⁰¹ In this regard, the US experience on *Posse Comitatus* is interesting. It demonstrates a different consideration from that of Japan in making a distinction between military forces and police organs. Captain (N) Laurence M. Hickey, “Enhancing the Naval Mandate for Law Enforcement: Hot Pursuit or Hot Potato?,” *Canadian Military Journal*, Vol. 7, No. 1 (2006), 47. For an introduction to the US practice, see Murakami and Mori, *op. cit.*, *supra* n. 29, 38–40. As to *Posse Comitatus*, see, for instance, Major Craig T. Trebilcock, U.S. Army Reserve, “The Myth of Posse Comitatus,” October 2000, <https://aldeilis.net/english/the-myth-of-posse-comitatus/>; and Rutherford B. Hayes, “The Posse Comitatus Act and Using Military as a Police Force,” <https://www.rbhayes.org/scholarlyworks/the-posse-comitatus-act-and-using-military-as-a-police-force/>.

¹⁰² ITLOS and the Arbitral Tribunal recognized that the question of which organ, a military or a police one, is acting is not decisive in determining the nature of the act concerned, i.e., whether it is a military act or one of law enforcement.

(4) State practice¹⁰³ also endorses the tendency that both the jurisprudence and the ICRC demonstrate.¹⁰⁴ For instance, US Coast Guard Vessels designated as “USCGC” under the command of a commissioned officer are warships.¹⁰⁵ Ships belonging to the French Gendarmerie, the Spanish Guardia Civil, or the Italian Carabinieri are also qualified as warships if under the command of a commissioned officer.¹⁰⁶ When the JCG is to prove its vessels’ non-military nature as police vessels under the control of the Minister of Defense, it should recognize that international society has such a history of having no strict distinction between military forces and police organs. In other words, the burden of proof that is placed on the JCG is very heavy indeed.

(5) It is possible for JCG vessels to fall under the category of auxiliary vessels.¹⁰⁷ Auxiliary vessels are also military objectives.¹⁰⁸ It has been pointed out that there are various definitions of an auxiliary vessel.¹⁰⁹ In the context of the limitation of armament, treaties such as the 1930 Treaty for the Limitation and Reduction of Naval Armament, in a different way, deals with auxiliary vessels.¹¹⁰ The ICRC also gives a definition of an auxiliary vessel with comparison to a merchant

¹⁰³ Regarding State practice with some focus upon Canadian practice, see Hickey, *op. cit., supra* n. 101, 41–47.

¹⁰⁴ From a different perspective, the existence of some relationship between police acts and the exercise of the right of self-defense on the high seas has been discussed. Lucchini, *op. cit. supra* n. 52, 923–926; Vaughan Lowe and Antonios Tzanakopoulos, “Ships, Visit and Search,” *Max Planck Encyclopedias of International Law*, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e406?rskey=IgPTAy&result=1&prd=MPIL>, article last updated: March 2013, para. 20.

¹⁰⁵ There is substantial duplication of function between military forces and police organs in European countries. It is sufficient to note the explanation of one authority that, “Fisheries protection has long been a traditional role for European naval and coast guard forces. Britain’s naval experience in this role dates back to the 16th century. At present, the Royal Navy undertakes quarantine enforcement, fishery protection, contraband operations, drug interdiction, oil and gas field patrols, anti-piracy operations, support for counterinsurgency operations and maritime counter-terrorism. Moreover, the Royal Navy maintains a Fishery Protections Squadron, equipped with six offshore patrol vessels and four mine counter-measures vessels. Looking at other parts of Europe, the French Navy, for example, acquired patrol vessels several years ago for policing duties. Farther north, the Norwegian Coast Guard forms part of the Royal Norwegian Navy, whereas Denmark has no coast guard. However, the Danish Navy exercises police authority for enforcement of sovereignty issues. European navies generally furnish law enforcement services directly to national authorities through MOUs. Usually what these navies provide are naval platforms and facilities. In some cases, such as the Danish model, the navy carries out constabulary and traffic-police duties, whereas the appropriate civil authority conducts the criminal investigations. From a European perspective, naval participation in law enforcement is a significant contribution to good governance at sea.” Hickey, *op. cit., supra* n. 101, 46–47.

¹⁰⁶ Von Heinegg, *op. cit., supra* n. 25, para. 9.

¹⁰⁷ As for the meaning of “an auxiliary vessel” in past State practice in the former part of the 20th century, see “Auxiliary Vessels,” *Digest of International Law*, Vol. 11 (1968), 299–301.

¹⁰⁸ Mayama, *op. cit., supra* n. 76, (1) 548; Ronzitti, *op. cit., supra* n. 61, para. 7.

¹⁰⁹ Mayama, *op. cit., supra* n. 76, (1) footnote 20. Kraska *et al., op. cit., supra* n. 43, 2.1.2.2. and 3.4. Article 236 of UNCLOS is interpreted as adopting the same definition. It reads:

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

¹¹⁰ The treaty limited the tonnage of auxiliary ships.

vessel.¹¹¹ It reads:

An ‘auxiliary vessel’ is a ‘vessel, other than a warship [i.e. non-commissioned], that is owned or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service’ and a ‘merchant vessel’ is a ‘vessel, other than a warship, an auxiliary vessel, or a State vessel such as a customs or police vessel, that is engaged in commercial or private service...’

According to this definition, on the one hand, an auxiliary vessel is owned or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service. On the other hand, a State vessel such as a customs or police vessel is different from a warship, an auxiliary vessel, and a merchant vessel.¹¹²

As confirmed above, under the Guidelines, JCG vessels are “under an integrative and unitary command” by the Minister of Defense, and therefore, with strong provability, they amount to auxiliary vessels.¹¹³ However, as far as JCG vessels are State police vessels under Japan’s domestic laws, the possibility that they are not regarded as auxiliary vessels cannot be totally denied. However, this should be a very narrow case. In addition, as examined above, the concept of “military” now has a wider scope and the distinction between military vessels and police vessels has been blurred in both the jurisprudence and international practice.¹¹⁴ This should have an impact on the identification of auxiliary vessels.

Furthermore, from a different point of view, several doubts have been raised against the argument that under the Guidelines, JCG vessels are not auxiliary vessels but police vessels.

It is understandable that there is a category of customs or police vessels that function even during an armed conflict, and the ICRC discusses, in its commentary to GCII, such a category of vessels.¹¹⁵ Nonetheless, in considering the situation assumed by this paper, namely, a situation when there is an armed attack against Japan, and when there is an armed conflict between China and Japan, it is difficult to understand and even not convincing that, in an abstract way, State vessels, such as JCG vessels, “under an integrative and unitary command” of the Minister of Defense in accordance with the Guidelines and Article 80 of the Self-Defense Forces Law, should be discharging a customs or police function. It might be said that in the sea areas far enough from those of the theater of the armed conflict, if it is taking place in a limited sea area, JCG vessels might conduct customs or police missions. In such a case, it is not actually useful to regard those JCG vessels, as auxiliary vessels, to be military objectives, since there is rarely necessity and

¹¹¹ *Supra* n. 89.

¹¹² The San Remo Manual also adopts this definition, 13. (g), (h), (i).

¹¹³ As a useful discussion regarding the definition of an auxiliary vessel, one opinion is that in a general or total war, it is very difficult to find “merchant vessels” in a pure sense. This is because, in a general or total war, all merchant vessels are likely to be under the national/military control of their own States, and therefore, they are at least converted to *de facto* auxiliary vessels. William J. Fenrick, “The Merchant Vessel as Legitimate Target in the Law of Naval Warfare,” in Astrid J.M. Delissen and Gerard J. Tanja eds., *Humanitarian Law of Armed Conflict Challenges Ahead*, (Martinus Nijhoff Publishers, 1991), 437–438; Fenrick, *op. cit.*, *supra* n. 56, 106; Fenrick, *op. cit.*, *supra* n. 61, 246, 253–254.

¹¹⁴ Sub-section 3. (4).

¹¹⁵ There are no concrete rules for determining the status of police organs at sea. This is because in many countries, the navy also discharges coast guard activities, and because, as in the case of US Coast Guard Vessels, the designated “USCGC” under the command of a commissioned officer is a warship with a duty to conduct coast guard activities. Thus, there has not been much necessity to discuss the status of police organs at sea during armed conflicts. Akira Mayama, “Kaijo Hoancho to Buryoku Hunsoko (The Japan Coast Guard and the Laws of Armed Conflict),” *Ocean Newsletter*, Vol. 77 (20 October, 2003). As for the State practice of the duplication of duties between military organs and police organs at sea, see *supra* n. 105.

merit in attacking the vessels.¹¹⁶

Rather considering the matter in an abstract way,¹¹⁷ it would be much more meaningful to examine this issue by putting it into a further concrete context, since this paper has already presupposed two concrete situations¹¹⁸ as the contexts for its consideration: first, when the JCG is conducting its coast guard activities on Japan's territorial sea surrounding the Senkaku Islands, an armed conflict takes place between China and Japan; second, there may be a large number of evacuees coming toward Japan via the sea from neighboring countries, such as Taiwan.

(6) Regarding the first situation presupposed, it is not understandable that the JCG should continue its duty of territorial guarding as police function in Japan's territorial sea surrounding the Senkaku Islands. While "territorial guarding" may include various measures, the critical one is surely monitoring and surveillance of the confrontational Chinese vessels entering Japan's territorial sea surrounding the Senkaku Islands in a tense situation that is almost shifting to an armed conflict. When the tense situation really is on the verge of an armed conflict, and when an armed conflict is actually taking place, could the monitoring and surveillance as police function regarding confrontational Chinese vessels be meaningful? No positive answer is difficult to be expected.

As a logical result, it is not meaningful, either, to discuss whether the JCG vessels enacting their territorial guarding duties in the presupposed situation can be regarded as police vessels rather than auxiliary vessels. It necessarily brings the conclusion that when an armed conflict is breaking out, JCG vessels should retreat from the scene. This element will be included in the proposals in the concluding remarks of this paper.

(7) Another proposed situation is that there might be a large number of evacuees coming toward Japan via the sea from neighboring countries, such as Taiwan. The duties that the Guidelines expect the JCG to fulfil in collaboration with the JMSDF are, for instance, the following: evacuation and rescue of residents, providing information and support for rescue to vessels, search and rescue and saving lives, monitoring and surveillance to protect port facilities from terrorist attacks, and response measures for mass evacuations.¹¹⁹ As for the large number of evacuees coming toward Japan via the sea from neighboring countries, the JCG should take response measures for their mass evacuation.

In taking such measures for their mass evacuation, even "under an integrative and unitary command" of the Minister of Defense in accordance with the Guidelines and Article 80 of the Self-Defense Forces Law, it is possible for JCG vessels to be regarded as police vessels providing civilian protection rather than as auxiliary vessels. In that case, JCG vessels would have immunity from attacks.

To examine such a possibility, it is useful to consider the following issues. One is the issue of the requirements for merchant ships to lose their immunity from attacks such that they become military objectives. Another is the issue of when the civilian population constitutes

¹¹⁶ Under Article 80 of the Self-Defense Forces Law, mentioned above in the Introduction, control by the Minister of Defense may cover solely part of the JCG, not its entirety. JCG vessels functioning in remote sea areas far from those of the armed conflict could be out of the scope of said control. This point will be raised again later.

¹¹⁷ It is recognized that even during an international armed conflict, States may conduct maritime law enforcement operations to suppress crime, such as maritime piracy. Kraska *et al.*, *op. cit.*, *supra* n. 43, 2.3. However, this does not give any concrete suggestion as to how a vessel maintains its status as a law enforcement vessel and how it ensures its safety during an international armed conflict.

¹¹⁸ Section III. 1. (3), and III. 2.

¹¹⁹ Section III. 1. (1).

military objectives in accordance with the way of identifying military objectives depending on the function of the object itself. These issues are said to be those of the function of the object itself, irrespective of its category as a merchant vessel and the civilian population. As mentioned above, the issue of the category of objects, namely, a merchant vessel and the civilian population, and that of their function may substantially overlap. In discussing the requirements for these categories to lose their immunity from attacks, focus is placed mainly on their function.

Thus, the sub-section 4 below will consider succinctly the arguments that have been made on these issues, and move onto a consideration of the possibility for JCG vessels taking response measures for a mass evacuation to avoid being regarded as auxiliary vessels, and to be immune from military attacks.

4. Factors and Requirements That Make Merchant Vessels and the Civilian Population Become Military Objectives

(1) Merchant Vessels¹²⁰

Merchant vessels, belligerent or neutral,¹²¹ are not military objectives. When they become military objectives has been discussed over the long history of the laws of naval war.¹²² The immunity of merchant ships from unwarned attack was explained with their inability to attack or endanger a warship.¹²³ In addition, the economic aspect of ocean trade inherently existing in naval warfare, and the nature of a general war or total war particularly in modern wars, have formed an important consideration in discussing the immunity of merchant ships.

This is not the place to comprehensively trace the development of the treatment of merchant vessels in naval warfare.¹²⁴ Here, it is enough to find some suggestions for the JCG to ensure its safety during the discharging of its relevant duties under the Guidelines.

The requirements for merchant vessels, enemy and neutral, to become military objectives are, for instance, as follows:

During an international armed conflict:

1. Any merchant vessel may be attacked:

(a) if it engages in acts of war on behalf of the enemy; (b) if it acts as an auxiliary to the enemy's armed forces (c) if it is incorporated into or assists the enemy's intelligence system;

¹²⁰ As for a definition of a merchant vessel, it is said that a merchant vessel is a cargo-carrying vessel not formally incorporated as an auxiliary vessel into an enemy's naval fleet. Fenrick, *op. cit.*, *supra* n. 113, 425. The San Remo Manual defines a merchant vessel as "a vessel, other than a warship, an auxiliary vessel, or a State vessel such as customs or police vessel, that is engaged in commercial or private service." The San Remo Manual, 13 (i).

¹²¹ Under the prohibition of the use or threat of force by Article 2, Paragraph 4 of the UN Charter, the validity of the terms "belligerency" and "neutral" require serious consideration. Such a consideration is out of the scope of this paper's examination. This paper will use, if necessary, "belligerent" States and "neutral" States to describe respectively those States that are involved in an armed conflict, and those that are not taking part in the armed conflict. Horace B. Robertson, Jr., *op. cit.*, *supra* n. 52, 2–3; Lowe, *op. cit.*, *supra* n. 48, 286–289. For an analysis of the concept of war with a similar viewpoint, see Greenwood, *op. cit.*, *supra* n. 42, 283–284, 303–306.

¹²² Many works have dealt with this issue. Fenrick, *op. cit.*, *supra* n. 61, 243; Dinstein, *op. cit.*, *supra* n. 70, 24–27; Lowe and Tzanakopoulos, *op. cit.*, *supra* n. 104, paras. 10–13; Fenrick, *op. cit.*, *supra* n. 113, 425–443; Ronzitti, *op. cit.*, *supra* n. 61, paras. 8–11. In the context of exclusion zones, see Fenrick, *op. cit.*, *supra* n. 56, 94 *et seq.*

¹²³ For a discussion in the interwar period, see, for instance, Edwin Borchard, "Armed Merchantmen," *The American Journal of International Law*, Vol. 34, No. 1 (1940), 107–112.

¹²⁴ An analysis of the State practice is given by Mayama, *op. cit.*, *supra* n. 76, (1) 556–578, (2) 1–43; Fenrick, *op. cit.*, *supra* n. 61, 244–264.

or (d) if it sails under convoy of enemy warships or military aircraft.

2. Any enemy merchant vessel may be attacked:

(a) if it is armed to an extent that it could inflict significant damage to a warship; or (b) it refuses an order to stop or actively resists visit, search, or capture.

3. A neutral merchant vessel may be attacked if it is believed on reasonable grounds that the vessel is carrying contraband or breaching a blockade and, after prior warning, the vessel intentionally and clearly refuses to stop or resists visit, search, and capture.¹²⁵

The San Remo Manual prescribes the following¹²⁶ regarding enemy merchant vessels in Paragraphs 40, 59 and 60:

40. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

59. Enemy merchant vessels may only be attacked if they meet the definition of a military objective in paragraph 40.

60. The following activities may render enemy merchant vessels military objectives:

(a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;

(b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;

(c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;

(d) sailing under convoy of enemy warships or military aircraft;

(e) refusing an order to stop or actively resisting visit, search or capture;

(f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as chaff; or

(g) otherwise making an effective contribution to military action, e.g., carrying military materials.

As to neutral merchant vessels, paragraphs 67–69 of the San Remo Manual read:

67. Merchant vessels flying the flag of neutral States may not be attacked unless they:

(a) are believed on reasonable grounds to be carrying contraband or breaching a blockade, and after prior warning they intentionally and clearly refuse to stop, or intentionally and clearly resist visit, search or capture;

(b) engage in belligerent acts on behalf of the enemy;

(c) act as auxiliaries to the enemy's armed forces;

(d) are incorporated into or assist the enemy's intelligence system;

(e) sail under convoy of enemy warships or military aircraft; or

(f) otherwise make an effective contribution to the enemy's military action, e.g., by carrying military materials, and it is not feasible for the attacking forces to first place passengers and crew in a place of safety. Unless circumstances do not permit, they are to be given a warning, so that they can re-route, off-load, or take other precautions.

68. Any attack on these vessels is subject to the basic rules in paragraphs 38–46.

69. The mere fact that a neutral merchant vessel is armed provides no grounds for attacking it.

¹²⁵ *Ibid.*, 272.; Fenrick, *op. cit.*, *supra* n. 113, 438.

¹²⁶ *Supra* n. 60.

In these opinions relating to merchant vessels, there are some helpful indications for the JCG to avoid becoming military objectives.¹²⁷

First, the scale of weapons that JCG vessels are equipped with is to be considered when determining whether they become military objectives.¹²⁸ In the former opinion above, any enemy merchant vessel may be attacked, “if armed to an extent that it could inflict significant damage to a warship.” According to the San Remo Manual, enemy merchant vessels can be attacked if they are armed to an extent that they could inflict damage to a warship. In contrast to this, in the case of a neutral merchant vessel, the mere fact that it is armed provides no grounds for attacking it.

Second, sailing under “convoy” of enemy warships or military aircraft is also a factor for merchant vessels to be regarded as military objectives. As long as the JCG vessels are discharging their mission under the Guidelines in the sea area of or near to those where military operations are taking place, they could be sailing under convoy of JMSDF vessels. Therefore, this is a significant factor to be considered for the JCG to ensure its safety through immunity from attacks.

Third, the San Remo Manual includes a similar factor of so-called “direct participation in hostilities,” which will be examined next. Paragraph 40 of the San Remo Manual mentions “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹²⁹

Before moving onto an analysis of the concept of “direct participation in hostilities,” some points deserve attention for the JCG in avoiding becoming military objectives. Among the requirements for merchant vessels to lose their immunity from attacks are factors such as being “incorporated into or assisting the enemy’s intelligence gathering system.”¹³⁰ It has been argued that merchant vessels that are incorporated into war efforts are excluded from those merchant vessels with immunity from attacks.¹³¹ Also “incorporation” may include that into the military effort in general and is not confined to the intelligence gathering system.¹³²

One of the missions that the Guidelines expect the JCG to conduct is providing information to vessels.¹³³ If such information-sharing contains information that is advantageous for the JMSDF’s military operation, it will amount to direct participation in hostilities.¹³⁴

Furthermore, the factor of “incorporation into military effort” requires serious attention, when, in terms of their category, JCG vessels deny having the status of auxiliary vessels. It is indispensable for the JCG to prove that the “control” by the Minister of Defense under the Guidelines does not amount to such control as giving JCG vessels the status of auxiliary vessels.¹³⁵

The consideration here concerns merchant vessels when they satisfy the requirements

¹²⁷ As for State practice, in this regard, by military manuals and other means, see Mayama, *op. cit.*, *supra* n.76, (2) 48–49.

¹²⁸ This is an issue that has been discussed for a long time. For instance, a distinction was considered between “offensive” or “defensive” armament. Borchard, *op. cit.*, *supra* n. 123, 107–112.

¹²⁹ See *supra* n. 60.

¹³⁰ According to the opinion of Fenrick introduced above, 1. (c); the San Remo Manual, 60 (c), 67 (d).

¹³¹ As to State practice in this regard, see Fenrick, *op. cit.*, *supra* n. 61, 272. Regarding “war-fighting/war-sustaining effort,” *ibid.*, 274.

¹³² This is dealt with by, for instance, Fenrick, *op. cit.*, *supra* n. 56, 112, 123. With the example of the U.S. Military Manual, see Von Heinegg, *op. cit. supra* n. 58, para. 54.

¹³³ See Section III.

¹³⁴ This is also an issue whereby civilians lose their protection from attacks, which will be examined next.

¹³⁵ This section, sub-section 3. (5).

for losing their immunity from attacks. It is true, at least to a certain degree, that such a consideration may offer some suggestions for the JCG to avoid becoming military objectives. Nonetheless, the JCG should carefully recognize the inherent difference between JCG vessels, namely, police vessels, and merchant vessels. It needs to precisely understand that police vessels may be more likely regarded as being auxiliary vessels or being incorporated into military forces, considering that they are State vessels and the tendency of State practice, as mentioned above, in the world in this regard.¹³⁶ JCG vessels are operating in collaboration with JMSDF vessels under the Guidelines.¹³⁷

(2) Direct Participation in Hostilities

Under Article 51, Paragraph 3 of API,¹³⁸ “direct participation in hostilities”¹³⁹ has been intensely discussed in terms of the requirements for the civilian population¹⁴⁰ to become military

¹³⁶ Regarding the duplication of function between military forces and police organs, see *supra* n. 105.

¹³⁷ This careful reservation is entirely true, as will be shown with the next examination of the concept of “direct participation in hostilities” by civilians. There is also an inherent difference between civilians and JCG vessels, which are police vessels of a State equipped with weapons under national authorization.

¹³⁸ It reads:

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

¹³⁹ There is a large volume of works on this issue. Akira Mayama, “Bunminhogo to Buryoku Hunsoho—Sekijūji linkai Kaishaku Shishin no Kento (Protection of Civilian Population and the Laws of Armed Conflicts—Some Analysis on the ICRC Interpretative Guidance on the Concept of Direct Participation in Hostilities),” *Sekaiho Nenpo (Yearbook of World Law)* No. 31 (2012), 138–151; D.A. Jeremy Telman, “The Geneva Conventions in 21st Century Warfare: How the Conventions Should Treat Civilians’ Direct Participation in Hostilities—Introduction: Targeting in an Asymmetrical World,” *Valparaiso University Law Review*, Vol. 46, No. 3 (2012), 697–728; Michael N. Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements,” *New York University Journal of International Law and Politics*, Vol. 42, No. 3 (2010), 697–740; Michael N. Schmitt, “Direct Participation in Hostilities’ and 21st Century Armed Conflict,” in Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, und Christian Raap, Hrsg., *Krisensicherung und Humanitärer Schutz—Crisis Management and Humanitarian Protection—Festschrift für Dieter Fleck*, (BWV · Berliner Wissenschafts-Verlag, 2004), 505–530; Emily Camins, “The Past as Prologue: the Development of the ‘Direct Participation’ Exception to Civilian Immunity,” *International Review of the Red Cross*, Vol. 90, No. 872 (2008), 853–881; Eva Kublbeck, “The Immunity of Civilians—A Moral and Legal Study of Attacks on the Civilian Population,” *International Humanitarian Legal Studies*, Vol. 4, No. 2 (2013), 262–295; W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect,” *New York University Journal of International Law and Politics*, Vol. 42, No. 3 (2010), 769–830; Kenji Iwata, “Guntai ni Zuihansuru Bunmin no Tekitaikoi ni Tsuite—Dai1 Tsuikagiteisho Dai51jo Dai3ko ni Okeru ‘Tekitaikoi heno Chokusetsu no Sanka’ wo Chushin ni—(Hostilities of Civilians Accompanying Military Forces—With Focus upon ‘Direct Participation in Hostilities’ under Article 51, Paragraph 3 Additional Protocol I),” *Kokka Anzenhosho (National Security)*, Vol. 35, No. 2 (2007), 119–149; Oginome, *op. cit.*, *supra* n. 60, 105–125; Laurie R. Blank, *op. cit.*, *supra* n. 81, 765–802.

¹⁴⁰ “Civilian” has solely a negative definition under the 1949 Geneva Conventions and API. For instance, Article 50, Paragraph 1 of API reads:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

objectives.¹⁴¹ While for naval warfare, vessels as units are focused upon rather than individuals, at least to a certain degree, such arguments may offer suggestions for the JCG to prove that when it is conducting its missions under the Guidelines, it does not directly participate in hostilities.¹⁴² The commentary of the ICRC of 1987 to the provision explains as follows.¹⁴³

Paragraph 1942

Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.

Paragraph 1944

Thus “direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.¹⁴⁴

The ICRC commentary points to two factors. First, an act that negatively impacts the enemy’s military effort or in which harm was intended usually qualifies. Second, a relatively direct nexus between that action and the resulting harm should exist. In other words, direct participation must be distinguishable from indirect participation.¹⁴⁵

As to the significance of the arguments on the meaning of “direct participation” for the JCG to prove that its vessels are not taking part in hostilities under the Guidelines, the following may set forth strong reservations to it.

First, regarding “direct participation in hostilities,” the ICRC convened several conferences to build some consensus among States and published the result.¹⁴⁶ However, substantial agreement could not be reached. Several authorities have also voiced severe criticism.¹⁴⁷ Second, the determination of “direct participation in hostilities” should ultimately be done on a case-by-case basis.¹⁴⁸ Before the consideration by the ICRC and the said conferences, the jurisprudence also

¹⁴¹ The ICRC convened international conferences to discuss the issue of “direct participation of civilians in hostilities.” The result is as follows: International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (May 2009)*, <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>. Strong criticism has been voiced on this by, for instance, Schmitt, *op. cit., supra* n. 139 “Deconstructing...”; Parks, *op. cit., supra* n. 139.

¹⁴² One authority points out the following. Unlike the law applicable to land conflicts, the law of naval warfare has a slightly broader interpretation of the principle of distinction. The requirements of “active” and “direct” participation for loss of civilian status in land conflict are broadened, in the naval context, to conduct which more generally relates to the war fighting capacity. United States Naval War College, International Law Department, Center for Naval Warfare Studies, *op. cit., supra* n. 53, 4–23.

¹⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Commentary of 1987, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-51/commentary/1987?activeTab=undefined>, paras. 1942 and 1944.

¹⁴⁴ The ICRC distinguishes direct participation in hostilities from participation in the war effort. Its commentary to Article 51, Paragraph 3 of API reads:

There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.

Ibid., para. 1945.

¹⁴⁵ Schmitt, *op. cit., supra* n. 139 “Deconstructing...,” 712.

¹⁴⁶ *Supra* n. 141.

¹⁴⁷ *Supra* n. 141.

¹⁴⁸ Schmitt, *op. cit., supra* n. 139 “Deconstructing...,” 705–710; Schmitt, *op. cit., supra* n. 139 “Direct Participation...,” 508–509.

demonstrated the same understanding.¹⁴⁹

As was explained in Section II and Section III, under the Guidelines and under Article 25 of the Japan Coast Guard Law,¹⁵⁰ the JCG will maintain its nature as a police organ, not a military organ, and thus, it must not take part in hostilities. This is an argument derived from Japan's domestic law. Even if such an argument has a certain convincingness domestically, there is no guarantee that the JCG can persuade foreign States, particularly the conflicting State, China, that it is discharging a police function and not taking part in hostilities. For that purpose, arguments under international law and proof that is firmly based upon State practice are indispensable.

Furthermore, also applicable here is the reservation mentioned above while seeking possible suggestions for the JCG to have immunity from attacks that may be derived from the discussion on the requirements for merchant vessels to lose their immunity from attacks. The JCG should recognize the inherent difference between JCG vessels, namely, police vessels, and civilians and the civilian population.¹⁵¹ It needs to precisely assume that police vessels may be more likely regarded as auxiliary vessels or as being incorporated into military forces, and taking part in hostilities, considering that they are State vessels. They are operating in collaboration with JMSDF vessels under the Guidelines.

In this regard, while it is in the context of non-international armed conflicts, there could be some suggestions for how the JCG could prove its status of being a non-military objective from the fact that some armed groups consider that the police or the civil forces are targetable.¹⁵²

(3) The JCG May Carry an International Distinctive Sign to Indicate Its Civil Defense Missions Under the Guidelines, the JCG will conduct missions for the evacuation and rescue of residents and evacuees from neighboring countries, search and rescue, and saving of lives.¹⁵³

The JCG and the JMSDF held a joint drill on the 22nd of June 2023, under the scenario of control by the Ministry of Defense in accordance with the Guidelines.¹⁵⁴ During the joint drill, the JCG vessel flew special flags that carry the international distinctive sign of an equilateral blue triangle on an orange background. Article 66, Paragraph 4 of API prescribes the distinctive sign. It reads:

¹⁴⁹ Prosecutor v. Dusko Tadić, Case ICTR IT-94-I-T, Opinion and Judgement of 7 May 1997, *International Legal Materials*, Vol. 36, Issue4 (1997), para. 616.

¹⁵⁰ Section II. 1. And Section III. 1. (2).

¹⁵¹ As to the negative definition of civilians, see *supra* n. 140. As to the particular situation of civilians in recent years, see, for instance, Camins, *op. cit.*, *supra* n. 139, 154; Schmitt, *op. cit.*, *supra* n. 139 “Deconstructing...”, 699–700; Schmitt, *op. cit.*, *supra* n. 139 “Direct Participation...”, 512–519. Separate from this, in the case of a vessel, the vessel itself forms a fighting unit. Therefore, hostilities by vessels include not only shooting and launching missiles which cause actual damage, but also the operation of the vessels, such as vessel operations under the captain's order in hostilities, which are reasonably regarded as closely related acts to hostile acts. Iwata, *op. cit.*, *supra* n. 139, 134.

¹⁵² These groups include the National Democratic Front of the Philippines, the Fuerzas Armadas Revolucionarias Colombianas-Ejército Publico (FARC-EP), the Ejército Zapatista de Liberación Nacional of Mexico, which specifically refers to the “policía política que hayan recibido cursos y que hayan sido asesorados, entrenados, o pagados por extranjeros, sea dentro de nuestra nación o fuera de ella, acusados de traición a la Patria” and the Kurdistan Workers Party, which refers to “village guards” and “members of the gendarmerie.” The Kosovo Liberation Army also includes among the forces of the Former Republic of Yugoslavia the “border police,” the “military police” and “local, special, riot and anti-terrorist police.” With further examples, see Camille Marquis Bissonnette, “The Definition of Civilians in Non-International Armed Conflicts,” *Journal of International Humanitarian Legal Studies* Vol. 7, No. 1 (2016) 146–147.

¹⁵³ Section III. 1. and 2.

¹⁵⁴ The media reported on the joint drill. See *supra* n. 39.

The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and matériel and for civilian shelters.

According to the media,¹⁵⁵ the JCG has never previously used the sign in its missions. A coast guard official said, “If a country (attacking Japan) thinks that the coast guard has resorted to armed force, it would give them an excuse to launch a (further) attack,” and “In order to prevent such a situation, we need to clearly show the division of roles with the SDF¹⁵⁶ and send out a message to people in and outside Japan that the coast guard is not a military organization.”

Without adequately demonstrating the said division of roles and the JCG’s non-military duties *toward international society and particularly vis-à-vis a “country attacking Japan,”* such a sign would not have any effect for ensuring the safety of JCG vessels in discharging their roles under the Guidelines.

Actually, the flags that the said JCG vessel flew in the joint drill were in accordance with Article 66, Paragraph 4. It is possible for the JCG, while conducting missions for the evacuation and rescue of residents and evacuees from neighboring countries, search and rescue, and saving of lives, to be regarded as a “civil defence organization” in accordance with Article 61 of API.¹⁵⁷

As explained above in this paper,¹⁵⁸ the applicability of Article 66, Paragraph 4 to naval warfare is not without dispute. This is because of Article 49, Paragraph 3, which contains the confounding phrase “do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.” How this phrase is interpreted would determine the applicability of Article 66, Paragraph 4, which prescribes the international sign. If the provision does not apply to naval warfare, the possibility for the provision to have a customary rule status might not be denied. Nonetheless, even the Japanese authorities have clearly demonstrated their doubt in respect to the awareness of the sign.¹⁵⁹

The fundamental problem is not the flexibility of the application of Article 66, Paragraph 4, nor the possible customary status of the international sign. The critical point is that the international distinctive sign must be truly internationally distinctive. Without a solid recognition of it in international society, particularly by an attacking country, the sign will never guarantee the safety of the JCG during its missions under the Guidelines. This means that the JCG could run the risk of being militarily attacked, and its personnel could lose their lives.

¹⁵⁵ *Op. cit.*, *supra* n. 39 (Japan Times).

¹⁵⁶ Here, “SDF” means the Japan Self-Defense Force.

¹⁵⁷ It reads:

(a) “civil defence” means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

...

(b) “civil defence organizations” means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under sub-paragraph (a), and which are assigned and devoted exclusively to such tasks;

¹⁵⁸ Section IV. 3.

¹⁵⁹ Haruko Arimura, a member of the House of Councilors, who, in the said joint drill, took the role of Minister of Land, Infrastructure, Transport and Tourism voiced this point. “Risuku wo Keigen Surutameni Gutaiteki ni Kentou Shitai Koto (Matters that Require Concrete Examination for Reducing Risks),” *Nihon Senryaku Kenkyu Foram (JFSS Quarterly Report)*, Vol. 98, Oct, 2023, 36–37. The JCG is under the Ministry of Land, Infrastructure, Transport and Tourism. Past Chief of Staff, JMSDF, Tomohisa Takei demonstrates the same point. “Yuji ni Okeru Hojin Yuso wa Shinan- ‘Seihu Kosen’ Katsuyo ni Kai wo Miidase (Usage of ‘State Vessels’ as a Possible Resolution for Coping with the Tremendous Difficulty of Transportation of Japanese Nationals),” *Wedge (Wedge)*, 2023, No. 11, 72.

Conclusion

This contribution has examined how to ensure the safety of the JCG during its missions under the Guidelines from various aspects. To achieve this goal, as far as maintaining its non-military nature under Article 25 of the Japan Coast Guard Law, the JCG must prove that it is conducting the missions as a police organ, not as a warship or an auxiliary vessel, and that it is not taking direct participation in hostilities. This is principally for the JCG to avoid becoming military objectives. The JCG should recognize that such a “burden of proof” imposed on it is tremendously heavy. Several points set forth the reasons.¹⁶⁰

First, there still remains flexibility in the applicable laws to the situation that this contribution assumes, namely, an armed attack is taking place against Japan and an armed conflict exists. After the UN Charter came into force, legally, and theoretically, there should not exist the use of force. Under this legal situation, it is necessary to identify with enough justification what part of the laws of war applies to the use of force, in other words, military operations in naval warfare, if such applicability itself is approved.¹⁶¹ Second, there are different views on the determination of the particular applicable rules of the laws of war to naval warfare.¹⁶² Third, even after identifying the applicable rules on the laws of war, what relationship there is between them and the relevant rules of the law of the sea remains unanswered question.¹⁶³

Fourth, whichever argument the JCG may adopt for proving what it needs to do, under the legal situation explained here, support by State practice is indispensable as evidence and justification for what the JCG contends. The importance of State practice is, in general, inherent in the field of the laws of war.¹⁶⁴ In addition, in particular, the following situation in State practice all over the world requires serious consideration. In many States, the “interchangeability or duplication” between military organs and police organs, and between their missions is actually the practice.¹⁶⁵ The JCG presents an entirely different and remarkable example in comparison to such State practice, as it is to keep its non-military nature during its missions under the Guidelines in collaboration with the JMSDF.¹⁶⁶ This will inevitably bring the result that the JCG will face serious difficulty in convincing international society, and particularly the conflicting country, China. International society, considering the State practice confirmed here, likely has the tendency to regard the relationship between coast guards and military organs as having some duplication in missions and in organizational structures. Above all, in China, Article 83 of the CCGL clearly endorses the interchangeability between police operations and defense, or military operations. The JCG needs to convince international society, which bears such a tendency, and China, which has such a domestic law. This will no doubt be a highly daunting task.

Fifth, the most fundamental point is as follows. The purpose of what the JCG needs to prove

¹⁶⁰ Atsuko Kanehara, “Jieitaiho to Tosei Yoryo no Motodeno Kaijohoancho no Ninmusuiko ni Okeru Anzen Kakuho (Securing the Safety of the Japan Coast Guard during Its Missions under Article 80 of the Self-Defense Forces Law and the Control Guidelines),” *Jurisuto (Jurist)*, No. 1593 (2024, February), 72–77.

¹⁶¹ Section IV. 1.

¹⁶² Section IV. 3.

¹⁶³ Section IV. 2.

¹⁶⁴ Section V. 3. (3) and (4). For the significance of military manuals, see, *supra* n. 73.

¹⁶⁵ This fact can be also readily understood if one considers the discussion on the issues of so-called “grey zones” between law enforcement and defense, and the seamless response to the radically changing situation from law enforcement to defense. On this issue, see Koichi Morikawa, “Gurei Zone Jitai Taisho no Shatei to Sono Hoteki Seishitsu (Coping with Grey Zones and Its Legal Implications),” *Kokusai Mondai (International Affairs)*, No. 648 (2016), 29–38; and Atsuko Kanehara, “The Use of Force in Maritime Security and the Use of Arms in Law Enforcement under the Current Wide Understanding of Maritime Security,” *Japan Review*, Vol. 3, No. 2 (2019), 51–52.

¹⁶⁶ Section V. 3. (3), (4), and (5). *Supra* n. 105.

is ensuring its safety, principally by avoiding becoming military objectives. Flawless and perfect arguments are strongly required. Otherwise, the conflicting country, China, could militarily attack the JCG, since China could take a different position from that of the JCG such that it regards the JCG as a military objective.

It is possible for the JCG, relying on its own interpretation of the relevant international law rules, to criticize the illegality of such attacks and claim the State responsibility of China for the illegal attacks. Nevertheless, preliminary measures to prevent such attacks should be sought, separate from “*ex post facto* relief.” This is definitely a maxim, in general, for all the legal rules. Not only that, but there is also a special reason for the JCG to exclusively rely on preliminary measures. This is because “*ex post facto* relief” could never recover the fatal and irreversible damage, including the loss of the lives of JCG personnel, that would be caused by the armed attacks.¹⁶⁷ In the issue that the JCG is facing, there would never be room for “trial and error” given the irreversible damage that would be caused.

As has already been proposed above,¹⁶⁸ JCG vessels should retreat immediately from Japan’s territorial sea surrounding the Senkaku Islands when and even before the control by the Minister of Defense is issued under Article 80 of the Self-Defense Forces Law. Coast guard activities would be fatally meaningless in the situation that this paper assumes.

In place of it, the JCG may take the roles of monitoring and surveillance in the northern sea areas of Japan.¹⁶⁹ When the JMSDF is concentrating on the East China Sea, the northern sea areas should become a gap of warning, thus requiring more monitoring and surveillance than usual. The control by the Minister of Defense over the JCG may only be partial.¹⁷⁰ JCG vessels conducting such monitoring and surveillance can be outside the control by the Minister of Defense such that they are police vessels and are not regarded as warships or auxiliary vessels.

The tremendous difficulty that the JCG is facing for avoiding becoming military objectives demonstrates the reckless risk that the JCG could run during its missions under the Guidelines. Then, what is the justification for such a reckless risk? In this regard, the Guidelines explain the advantage that when the JCG is in charge of missions for the rescue of lives and evacuation of residents at the maximum, the JMSDF can further concentrate on the operational front.¹⁷¹ Even if that is the case, in reality, how and to what extent such an advantage is realized should be fully scrutinized in a concrete manner. That might set forth some justification for the JCG’s missions under the Guidelines.

¹⁶⁷ The critical importance of ensuring compliance with the laws of war on site, on the battlefields, has precisely been pointed out in Masahiro Kurosaki, “Senjo ni Okeru Buryoku Hunsoho no Shihai—Gunjiteki Hitsuyosei to Jindosei no Hikaku Koryo to Guntai Shikikan no Jizenhyoka (The Control by the Laws of Armed Conflicts on the Battlefields—Comparative Consideration between Military Necessity and Humanity, and Prior Assessment by Military Commanders),” *Hogaku Kyoshitsu (Legal Learning)*, No. 509 (2023), 21–22, 24.

¹⁶⁸ Section V. 3. (6).

¹⁶⁹ In the northern sea areas, there are islands over which Russia and Japan have claimed territorial sovereignty and have a dispute. There is also a tense situation in these sea areas.

¹⁷⁰ Article 80 of the Self-Defense Forces Law clearly provides for this; see the Introduction.

¹⁷¹ *Supra* n. 3.