JAPAN REVIEW

Vol.5 2022

ISSN 2433-4456

Japan-India at 70: The Early Origins of a Relationship that Defines Asia's Future
Monika Chansoria

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—
Atsuko Kanehara

Japan's responsibility in the international community: Reflections on the Asia-Pacific War, 1931–1945
Kitaoka Shinichi

The Franco-German reconciliation model does not correspond to the challenges of the Japan-PRC relationship
Valérie Niquet

THE JAPAN INSTITUTE OF INTERNATIONAL AFFAIRS

JIIA

The Japan Institute of International Affairs (JIIA), founded in 1959, is an independent nonpartisan policy thinktank specializing in foreign affairs and security policy. On top of a wide range of research programs, the institute promotes dialogues and joint studies with other institutions and experts at home and abroad, and makes foreign policy proposals to the government, and disseminates information on international relations to the public. The institute, together with a large network of affiliated scholars, aims to serve as an indispensable resource on international affairs in a complex world.

Publisher : Kenichiro Sasae, President, JIIA
Editor in Chief : Masao Kochi, Director, Japan Information Center, JIIA

The opinions expressed in the articles in *Japan Review* do not necessarily reflect the opinions or positions of the Japan Institute of International Affairs. No article or any part thereof may be reproduced without the express permission of JIIA.

For subscription (subscription fee may apply) and any other inquiries, please write to:
Japan Review, the Japan Institute of International Affairs,
3rd Floor Toranomon Mitsui Building, 3-8-1 Kasumigaseki Chiyoda-ku, Tokyo Japan 100-0013

ISSN 2433-4456

Published by the Japan Institute of International Affairs
Designed and Printed in Japan by Taiheisha.Ltd

JAPAN REVIEW

Vol.5 2022

1 **Japan-India at 70: The Early Origins of a Relationship that Defines Asia's Future** ……03
Monika Chansoria
Dr. Monika Chansoria is a Tokyo-based Senior Fellow at the Japan Institute of International Affairs (JIIA) since 2017. Previously, Dr. Chansoria has held many senior research appointments, including, at the Fondation Maison des Sciences de l'Homme (FMSH, Paris); at the Cooperative Monitoring Centre, Sandia National Laboratories (Albuquerque, U.S.); and, at the Hokkaido University (Sapporo, Japan). She has solely authored five books on Asia's security affairs, including China, Japan, and Senkaku Islands: Conflict in the East China Sea Amid an American Shadow (Routledge © 2018) and Nuclear China: A Veiled Secret (© 2014) among others. Dr. Chansoria is also a Senior Contributing Author & Analyst at Japan Forward Inc., Tokyo, where she writes a regular column on Asia's geopolitics and history.

2 **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—** ……13
Atsuko Kanehara
Professor of International Law at Sophia University. Former President of the Japanese Society of International Law. Member of the Governing Board of IMO International Maritime Law Institute. Advocate for the Government of Japan in "Southern Bluefin Tuna" Cases. Counsel for the Government of Japan in "Whaling in the Antarctic" Case. Policy Adviser for the Japan Coast Guard. Member of the Committee on Submarine Cables and Pipelines under the International Law Association. Councilor for the Sasakawa Peace Foundation, Trustee for Nippon Communications Foundation.
She delivered a course of lectures at The Hague Academy of International Law in 2017.

3 Japan's responsibility in the international community: Reflections on the Asia-Pacific War, 1931–1945 ······························ 49

Kitaoka Shinichi

Dr. Kitaoka Shinichi is Emeritus Professor of the University of Tokyo, specializing in modern Japanese politics and diplomacy, and Special Advisor to the President of the Japan International Cooperation Agency (JICA). His career includes President of JICA, President of the International University of Japan, Japan's ambassador to the United Nations, and Professor of the University of Tokyo. He served on a variety of government panels, including as deputy chair of the Advisory Panel on the History of the 20th Century and on Japan's Role and the World Order in the 21st Century in 2015. He has numerous books and articles including *The Political History of Modern Japan: Foreign Relations and Domestic Politics* (Routledge, 2018). He received many honors and awards including the Medal with Purple Ribbon in 2011.

4 The Franco-German reconciliation model does not correspond to the challenges of the Japan-PRC relationship ······························ 56

Valérie Niquet

Valérie Niquet, Ph.D. (Sorbonne University) is Head of the Asia department at FRS (Fondation pour la recherche stratégique), and senior fellow at the Japan Institute of International Affairs (JIIA). She was a a lecturer at Keio University (Tokyo) on Sino-Japanese relations from 2014 to 2021. She has published extensively on strategic issues in Asia, Japan's foreign policy as well as the evolutions of the Chinese political system. Valérie Niquet is also a consultant for the French ministry of Foreign Affairs Center for prospective and strategy (CAPS). Her latest publications include Le *Japon en 100 questions*, Tallandier, 2021 and *Taiwan face à la Chine*, Tallandier, 2022. Her latest media contributions include AFP, Le Monde, The Diplomat, the Japan Times as well as Radio programs such as Radio France Internationale, France Culture or the Voice of America. Valérie Niquet is Chevaier de l'ordre national du mérite.

Japan-India at 70:
The Early Origins of a Relationship that Defines Asia's Future

Monika Chansoria*

Abstract
This paper tracks the trajectory of Japan's relations with India from the time when the latter remained peripheral as far as Tokyo's postwar "Asia vision" was concerned. From being part of the "other Asia" for Japan, India has come a long way in figuring more prominently in Japanese foreign policy thinking, formulation, and posture, be it economic, political, or strategic. This paper chronicles the journey of Indo-Japan ties since their nascent beginnings in history and outlines the conceptual underpinnings of this equation as *political realism* which prioritizes national interest and security. India's presence in Japan's economic diplomacy and technological aid and assistance schematic capitalizes on strategic necessities as the sub-continent exhibits its competitive and conflictual sides correspondingly, especially in terms of the struggle for regional significance and power. In the past 70 years, Tokyo's relationship with New Delhi has traveled a distance whereby it is no longer possible to separate economics from politics (*seikei bunri*). Today, Japan's comprehensive security (*sogo anzen hosho*) strategy seeks to revolve more acutely around active politico-diplomatic involvement, for which its policy interests and approaches, traditionally limited to East Asia and Southeast Asia prior to the Cold War, have increasingly shifted towards the Indian Ocean region, of which India remains the nucleus.

The year 2022 is momentous for Indo-Japanese relations as the two countries mark the 70th anniversary of establishing diplomatic relations. Indeed, it has been a seven-decade long journey of significant milestones and shared visions for the future. The foundation of the contemporary Indo-Japan Special Strategic and Global Partnership was laid by Japanese PM Yoshiro Mori when he visited India in 2000 and established the Global Partnership in the 21st Century with Indian PM Atal Behari Vajpayee. Subsequently, Vajpayee's successor Manmohan Singh paid an official visit to Japan in 2006, during which the India-Japan Strategic and Global Partnership was inked. The Indo-Japanese relationship remains firmly rooted in history with common values being its mainspring for advancing shared strategic objectives and progress for the benefit of the entire Indo-Pacific region.

The Historical Connect and Context of Japan's Ties with India

When India declared its independence from British colonial rule and governance in August 1947, Japan was among the first nations to recognize India's sovereignty. India, on its part, declined attending the San Francisco Peace Conference in 1951, arguing against the limitations being placed on Japan's sovereignty. New Delhi also pointed out that the United States was failing to give due recognition to the wishes of the Japanese people. Instead, India chose to enter a bilateral peace treaty with Japan in 1952, as part of which the former waived all reparation claims against

* Dr. Monika Chansoria is a Senior Fellow at The Japan Institute of International Affairs (JIIA) in Tokyo, and a Senior Contributing Author on Asia's geopolitics for the JAPAN Forward Association, Inc., Tokyo.

Japan. Moreover, India also became among the first Asian nations to establish diplomatic ties with Tokyo in 1952.

It was in that same decade that Japanese PM Nobusuke Kishi visited India in 1957. Kishi, who served in office from January 1957 to July 1960, became the first-ever Japanese PM to visit New Delhi and it was following this visit that he launched Japan's first postwar overseas Official Development Assistance (ODA) to India with the grant of international yen loans that Tokyo began providing in 1958. Japan also began providing loans to India in 1958, the first Japanese yen loan aid extended by the Japanese government. While development assistance and aid ideally should be separated from foreign policy objectives, the former tends to focus on the security concerns of developed nations in the politically fragile regions where aid is to be granted. Specifically, the geostrategic importance and vulnerabilities of South Asia make it almost impossible for a donor country to keep politics out of its development aid agenda to further the politico-diplomatic goals of the donor, along with ensuring the developmental objectives of recipient nations.[1]

Since then, Japan has gone on to become India's largest bilateral lender and largest humanitarian assistance provider, both directly and indirectly, through multilateral agencies.[2] The Japan International Cooperation Agency (JICA)—the primary governmental agency that coordinates and delivers the bulk of Japan's ODA to developing countries—views the stability and development of India and South Asia as critical since it is a strategic region linking ASEAN with the Middle East and Africa. Developing economic foundations and improving connectivity, especially in India, Bangladesh, and Sri Lanka, in line with relevant intergovernmental joint statements, JICA is implementing programs and projects that contribute to developing transport infrastructure (railways, roads, and ports) that are essential elements for sustainable regional growth.

In a display of decades-old personal ties with India, when Japan's longest-serving prime minister Shinzo Abe visited India in 2017, he recalled his family's links with India's first prime minister Jawaharlal Nehru. "My grandfather, Prime Minister Kishi, loved India. He was introduced personally by Prime Minister Nehru to the Indian people. Like my grandfather, I also hope to have strong ties with the Indian people." Abe said while addressing an audience as large as the one that greeted his grandfather. During Prime Minister Kishi's 1957 visit to India, PM Nehru introduced his guest in a public rally saying, "This is the prime minister of Japan, a country I hold in greatest esteem."[3] "My grandfather visited India in the 1950s and, as you know, we were [then] still recovering from the defeat in the war," said Abe, indicating that Nehru's gesture had created a personal connect between the two prime ministers of postwar India and Japan. Earlier as well, Abe recalled during his 2011 visit, "As a young boy seated on his knee, I would hear grandfather telling me that PM Nehru introduced him to the biggest audience he had ever seen in his lifetime—that of a hundred thousand people."[4]

The South Asian sub-continent remained peripheral as far as Japan's postwar "Asia vision"

---

[1] For details on the subject see, A. Estache, "Emerging Infrastructure Policy Issues in Developing Countries: A Survey of the Recent Economic Literature," *Background Paper*, Meeting of the POVNET Infrastructure Working Group, October 2004; also see, S. Jones, "Contribution of Infrastructure to Growth and Poverty Reduction in East Asia and the Pacific," *Background Paper*, Oxford Policy Management, October 2004; and see, Stephen Jones, "Infrastructure Challenges in East and South Asia," *IDS Bulletin*, vol. 37, no. 3, May 2006, Institute of Development Studies, p. 29.

[2] Sunil Chacko, "Japanese Investment to India: Possibilities and Constraints," *The Sunday Guardian*, May 2, 2020.

[3] "Shinzo Abe recalls grandfather's ties with Nehru," *The Hindu*, September 15, 2017, available at https://www.thehindu.com/news/national/abe-recalls-grandfathers-ties-with-nehru/article19685815.ece

[4] Ibid.

was concerned, especially in comparison to its far profounder engagement with East Asia and Southeast Asia. During that period, South Asia professedly was the "other Asia" for Japan. In Japan's foreign policy strategy after World War II, Southeast Asia was considered to include South Asia. The mid-1960s marked the beginning of an era in which South Asia inclusive of India was omitted from what Japan considered as Asia.[5] Besides, India's pursuit of an insular economic system during that period was much in contrast to Japan's open market economy, which stymied the development of close bilateral economic ties. A systemic dissection of the Asian continent into its many sub-regions revealed that Japan's presence and influence in South Asia, be it economic, political, or strategic, came nowhere close to the effect it wielded in the other sub-regions mentioned above. Despite its dense population of 1.97 billion, which constitutes 24.9 percent of the globe's humanity, South Asia's widespread poverty, limited industrialization, and inward-looking economic policies placed limits on Japan's economic and diplomatic penetration of the region.[6] Furthermore, Japan's limited influence in South Asia was also reflected in the inadequate coverage given the sub-region in books, special editions of academic journals, and magazines that dealt with Japan's relations within Asia. For instance, a 1996 *Far Eastern Economic Review* article on the changing role of Japanese *sogo shosha* (Japan's prominent companies involved in trade and business) in Asia did not even mention South Asia.[7]

The three areas which remained particularly underdeveloped in Japan-South Asia ties were aid, trade, and investment-commercial ties. South Asia and the South Pacific constituted two sub-regions where Japan was not involved in any striking conflicts, so both remained of lesser geo-economic status. Foreign policymaking in Japan leans principally towards responding to external developments and gravity. Since the start of the postwar period, Japan and South Asian nations were best defined as distantly estranged Asian neighbors with a conventional view that Japan came to act under external determinant factors *(gaiatsu)*. It remained the case that *gaiatsu* did, at times, play a critical role in bringing key Japanese foreign policy initiatives to fruition.[8] Tokyo's postwar foreign policy between 1952 and 1973 followed a "separation of economics and politics" *(seikei bunri)* strategy, whereby it avoided involvement in almost all international issues. This phase abruptly ended in late 1973, however, with the Organization of the Petroleum Exporting Countries' (OPEC's) quadrupling of oil prices and the oil embargo by the Arab states. It was here when Japan arrived at comprehending that it was no longer possible to separate economics from politics, a consequence of which was its "comprehensive security" *(sogo anzen hosho)* strategy entailing active diplomatic involvement.[9]

Rising from the aftermath of 1945, Tokyo's exponential growth miracle rendered it an economic superpower enabling it to master a neo-mercantilist strategy that lasted from 1973 until 1990. The period saw Japan's foreign economic presence throughout the Third World (including South Asia) expand rapidly as Tokyo confronted a range of issues in its quest for diversified

5 Hiroshi Sato, "New Relationship between Japan and India in the Postwar Period," in Toshio Yamazaki and Mitsuru Takahashi, eds., *A History of India-Japan Relations*, (Institute of Developing Economies, 1993) p. 165.

6 William R. Nester, *Japan and the Third World: Patterns, Power, Prospects*, (New York: St. Martin's Press, 1992) pp. 271–274, as cited in, Monika Chansoria, "Japan's Relations with South Asia," in Šumit Ganguly and Frank O'Donnell (eds.) *Routledge Handbook of the International Relations of South Asia*, (London: Routledge, 2022).

7 "Tokyo's Deal Makers," *Far Eastern Economic Review*, February 1, 1996, cited in Purnendra Jain, "Japan's Relations with South Asia," *Asian Survey*, vol. 37, no. 4, April 1997, (as cited in Chansoria, n. 6.)

8 Tanaka Akihiko, "Domestic Politics and Foreign Policy," in Inoguchi Takashi and Purnendra Jain, eds., *Japanese Foreign Policy Today: A Reader* (New York: Palgrave Macmillan, 2000), as cited in Chansoria, n. 6.

9 Nester, n. 6, p. 15, (as cited in Chansoria, n. 6.)

sources of markets, raw materials, cheap labor, and energy.[10] The first signs of change in this situation emerged in the 1980s when Prime Minister Indira Gandhi, who had visited Japan earlier in 1969, made another visit in 1982.[11] This was followed by Prime Minister Yasuhiro Nakasone's visit to India in 1984. This was the first visit in 23 years by a Japanese PM since Hayato Ikeda had traveled to India in 1961. Nakasone's trip was regarded as the starting point for Japan-India relations and marked the revival of sustained political contacts.[12] Japan's policy toward the Third World became a foundational strategy through which Tokyo employed foreign aid as a diplomatic tool to spread its influence across the Third World, including South Asia. Interestingly, in February 1989 Thailand's Prime Minister Chatichai Choonhavan commented, "The world economic war is over; Japan has won."[13] That notwithstanding, Japanese investments in South Asia were minuscule between 1979 and 1986, which could be gauged from the fact that it constituted less than 0.1 percent of its total foreign investments globally during the period, and less than 0.5 percent of its total investments in Asia.[14] Japan's interest in South Asia [particularly India] grew very gradually post-1991 following several high-profile investment missions, including one by officials from the Federation of Economic Organizations (*Keidanren*) and a first-ever visit from Ministey of International Trade and Industry (MITI) in 1995.[15]

Japan-India Relations Post–Cold War

It was the end of the Cold War that provided the real impetus for a further development of Japan-India relations. Japan-India relations after World War II can be broadly divided chronologically into two phases: the first phase lasting until the end of the 1980s and the second phase beginning in the 1990s.[16] The decade of the 1990s saw relations between the global economic power (Japan) and South Asia (particularly India) improve dramatically.[17] The primary factors behind this were Japan's ambition to re-emerge as an international actor with former premier Yasuhiro Nakasone's repeated call for the "internationalization of Japan." His successor Noboru Takeshita, too, echoed the view that Japan needed to revive and widen the ambit of its ties with other nations, and not singularly deal with the West, which included the US. This approach seemingly stemmed from the friction that Japan was experiencing with Washington and Europe over matters pertaining to trade, tariffs, and investments that were seen as a serious challenge to Japan's economic growth. In its search for newer markets and partners, South Asia as a region emerged as a natural contender with its enormous size and potential.

A highly symbolic tour of South Asia (India, Bangladesh, Pakistan, and Sri Lanka) was undertaken by Prime Minister Toshiki Kaifu in April–May 1990. This visit resulted in India developing a more positive understanding of Japan. Successive Japanese PMs from Nakasone to Toshiki Kaifu, who undertook a defining visit to South Asia in April 1990, reinforced the thought

---

10 Ibid., p. 18.

11 Takenori Horimoto, "Japan-India Rapprochement and Its Future Issues," cited in *Japan's Diplomacy Series, Toward the World's Third Great Power: India's Pursuit of Strategic Autonomy*, (Iwanami Shoten Publishers, 2015).

12 Sato, n. 5, p. 176.

13 Bruce Koppel and Michael Plummer, "Japan Ascendancy as a Foreign-Aid Power," *Asian Survey*, vol. 29, no. 11, 1989, (as cited in Chansoria, n. 6.)

14 Ibid., pp. 271–274.

15 Jain, n. 7.

16 Horimoto, n. 11

17 Badar Alam Iqbal, "Indo-Japanese Economic Relations in the 1990s," *India Quarterly*, vol. 52, no. 1/2 (January-June 1996); also see, Rajesh Mehta, "Indo-Japanese Trade: Recent Trends," *RIS Discussion Papers*, no. 12, May 2001, (as cited in Chansoria, n. 6.)

that "...peace and stability in Asia is a matter of great concern to Japan... the development of this region inhabited by... one fifth of all mankind, is in itself one of the major interests of the whole world..."[18] Kaifu also made a keynote speech at the Indian Parliament covering Japan's Asia policy[19] and stressed that Japan would seek to deepen engagement on issues without limiting these to agenda items on bilateral or Asian issues alone.[20] It was for these reasons that, despite the fact that Japanese premiers had previously visited the region in 1957, 1961, and 1984, the visit of Prime Minister Kaifu to four South Asian countries in 1990, namely, India, Bangladesh, Pakistan, and Sri Lanka, became a landmark in the history of Japan–South Asia ties. By means of this visit, Japan sought to convey that, having achieved "Asian economic powerhouse" status, Tokyo's policy interests and approach, traditionally limited to East and Southeast Asia, were increasingly making a shift towards South Asia.

Subsequently, in 1991, Japan provided an emergency foreign exchange loan to India, given that the Gulf crisis and other factors had caused India's foreign exchange reserves to plummet to US $1.1 billion.[21] Of all the countries asked by India for emergency assistance, only Japan responded. Indian experts in Japan-India economic relations lauded Japan's emergency support.[22] The emergency assistance was also a manifestation of Japan's proactive India policy. The speaker of Japan's Lower House, Yoshio Sakurauchi (1990–1993), responded to Ministry of Foreign Affairs' call for assistance to India with a view of placing greater priority on Asian diplomacy. Sakurauchi later served as chairman of the Japan-India Association for many years (1997–2002) and poured considerable effort into improving Japan-India relations based on India's rising strategic importance. India's objective, on the other hand, was to garner more direct investment from Japan as part of its economic liberalization policy launched in 1991. Alongside this economic liberalization, India also announced its "Look East" foreign policy initiative in 1993, and had high expectations from Japan vis-à-vis investment, trade, and technology.

The sub-continent was increasingly assuming greater significance for Japan's economic and political interests, which stemmed from the fact that 70 percent of its oil imports from the Middle East came via sea crossing the Indian Ocean. It was thus in Japan's interest that regional security and stability be maintained by means of providing economic/development assistance. By this time, Japan had already established its credentials in so far as investment and aid across the Third World was concerned. South Asia, for its part too, was seeking Japan's technological and economic development assistance as well as its foreign aid, which was the largest in absolute dollar terms. Being a net creditor nation soon led to Japan becoming the leading single donor to the development of this region.[23] There came about a seeming convergence of Japan's overall regional politico-economic strategies with South Asia per se in that the region (especially and most notably India) was pursuing an economic liberalization and deregulation agenda.

Further, India in particular (and South Asia as a whole) began deriving benefits from Japan's economic and technological assistance and acknowledged the imperatives of its economic interdependence with Tokyo in view of the prevailing global economic realities. Economic

---

18 Speech by PM Toshiki Kaifu, *Japan and South Asia: In Pursuit of Dialogue and Cooperation for Peace and Prosperity* (Parliament House, New Delhi) April 30, 1990.

19 "Japan's Kaifu Starts South Asian Visit," *Los Angeles Times* Archives, April 29, 1990, https://www.latimes.com/archives/la-xpm-1990-04-29-mn-530-story.html

20 Speech by Kaifu, n. 18.

21 Makoto Kojima, "An Analysis of the Indian Economy," *KOMEI*, May 1993, pp. 199–200.

22 Srabani Roy Choudhury, "India-Japan Economic Partnership: Scope and Prospect," in Takenori Horimoto and Lalima Varma, eds., *India-Japan Relations in Emerging Asia*, (Manohar Publishers & Distributors, 2013) p. 223.

23 Saburo Okita, "Japan's Quiet Strength," *Foreign Policy*, no. 75, Summer 1989, (as cited in Chansoria, n. 6.)

assistance was an area where responsibility was[24] and continues to be shared widely by various ministries in Japan. The formation of the basic policy of ODA is made by the coordinated efforts of Japan's Ministry of Foreign Affairs (MOFA), Ministry of Finance, Ministry of Economy, Trade and Industry (METI) and Economic Planning Agency (EPA). The influence of METI remains the most pronounced among these in terms of yen loans, with MOFA playing a decisive role in determining grant aid. MOFA divided Japan's aid policy regime into four[25] different stages: firstly, a system development period (1954–76); secondly, a system expansion period (1977–91); thirdly, a policy and philosophy enhancement period (1992–2002); and finally, a period for meeting the challenges of a new era (2003 onward). Notably, the ODA Charter of 1992 stipulates few principles for such political use.[26] In the case of South Asia, official aid has been a more dominating feature of relations with Japan, given that the latter remains a top aid donor to most of the sub-continent's nations.

Despite the gradually ascending and reassuring graph of regional ties illustrated above, the end of the decade of the 1990s witnessed a steep decline and acrimony in Japan's ties with India and Pakistan in particular following the nuclear tests conducted by both nations in May 1998 that led to the nuclearization of the sub-continent. Given Japan's commitment to the Nuclear Non-Proliferation Treaty, its censure came in the form of an immediate freeze on all grant aid and subsequently on new yen loans.[27] In addition, Japan became the first Organization for Economic Cooperation and Development (OECD) nation to impose a range of economic sanctions on both India and Pakistan.[28]

Subsequently, the period 2000–2010 began witnessing a gradual thawing of ties between Japan and India, with the two having traveled a long distance together since the mid-1960s when South Asia (including India) was omitted from what Japan considered "Asia." This embrace seemingly mirrors the regional and global geopolitics and geostrategies at play that had been impacted by the strategic shifts in policy thinking and approaches occurring within Asia. Japan and India by now shared similar perceptions of the evolving environment in the region and the world at large; recognized their common commitment to democracy, human rights, and the rule of law for promoting stability and development in Asia and beyond; acknowledged their common interest in the safety of sea lines of communications; committed to jointly fight against terrorism and recognized each other's counter-terrorism efforts; and sought to establish a "Strategic and Global Partnership" driven by converging long-term political, economic and strategic interests, aspirations and concerns.[29]

Theoretical and Conceptual Basis of Indo-Japanese Dynamics

India's evolution as a playing field in the Asian geostrategic landscape has transited multiple phases. Beginning essentially as a reluctant player who achieved independence from many decades of British colonial rule following the end of World War II, it emerged as a nation right in the middle of the Indian Ocean—a lifeline water body connecting the Far East with the Atlantic.

---

[24] Purnendra Jain, "Japan and South Asia: Between Cooperation and Confrontation," in Inoguchi Takashi et al., n. 8, (as cited in Chansoria, n. 6.)

[25] Japan Ministry of Foreign Affairs on ODA, available at https://www.mofa.go.jp/policy/oda/cooperation/anniv50/pamphlet/index.html

[26] Tanaka Akihiko, n. 8, (as cited in Chansoria, n. 6.)

[27] "Nuclear Anxiety: The Allies; Japan Freezes Some Grants; Other Nations Seem Doubtful," *The New York Times*, May 14, 1998.

[28] Tanaka Akihiko, n. 8, (as cited in Chansoria, n. 6.)

[29] "Joint Declaration on Security Cooperation between India and Japan," Ministry of External Affairs, India, October 22, 2008.

This added to New Delhi's significance in a remodeled multipolar regional architecture with a blend of foreign policy approaches and strategies cited in the context of historical and current influences and motivations. The conceptual underpinnings of this finds roots in realism (*political realism* to be more precise) that prioritizes national interest and security. The notion is often tantamount with power politics to a large extent, including extended variables such as the drive for regional status, ambitions, and applied strategies including economic statecraft.[30] In the realist paradigm, security is primarily based on the principle of balance of power, as state-centric approaches are placed in the traditional realist framework of security that essentially center around the concept of power. India's, and for that matter South Asia's, political realism exhibits its competitive and conflictual sides equally, especially in terms of the struggle for regional significance and power.[31]

While great powers often produce theories of international relations (IR), in the case of Japan and from a Japanese perspective, being embedded in a global governance system governed by the US has inhibited theoretical advancement.[32] This, combined with the relatively strong tradition of descriptive work, has tended to discourage the development of a Japanese IR theory.[33] For Japan, its style and form of integration holds three distinctive features that have developed step by step on a domestic, regional, and global scale. Japan's approach to IR theories, among other planes, needs to be identified and understood through the prism of *identity* as a key concept.

Nishida Kitaro has attempted to address the issue of Japanese identity in IR as Japan juggles to fit in a space that lies somewhere between the East and the West. Nishida as an innate constructivist makes identity the thrust of his philosophy.[34] The constructivist analysis of IR states that the notion of identity is ideational, shaped by complex factors such as history, way of life, values, and interests. This seems to be particularly useful for analysis in East Asia as it affects policy decisions, particularly in the case study of Japan. The latter seeks to approach regional politics and statecraft through regional economic integration. When combined with sustainable development, this places regional integration theories higher than state sovereignty as economist Hirano Yoshitaro has argued.[35] There are two competing ideological factors at work in Japan's approach to the regional economic integration theory. The first is the desire for historical rapprochement with Japan's neighbors in Asia based on the postwar Franco-German model. The other factor is a new nationalism in Japan, designated as the desire for greater "assertiveness" in foreign (especially Asian) affairs. This includes the desire for a stronger Asian role in world affairs (if not Japanese dominance of that role). In the short term, Asian economic

---

[30] Roger D. Spegele, *Political Realism in International Theory*, (Victoria: Cambridge University Press,1996); for related reading on the subject see, R. Harrison Wagner, *War and the State: The Theory of International Politics*, (The University of Michigan Press, 2007), (as cited in Chansoria, n. 6.)

[31] The theoretical roots of South Asia as a sub-region in terms of its strategic thinking and orientation can be traced back in history to the end of fourth century BCE, when the Indian treatise *Arthashastra* (meaning the "Science of Material Gain" or the "Science of Polity")—a voluminous seminal masterpiece written in Sanskrit, delineating theories of statecraft, diplomacy, strategy, and prerequisites of politics and power—was penned by Kautilya. *Arthashastra* became a trailblazing document that contains a realist vision of politics. It is considered unique and defining in Indian literature (and erstwhile united South Asia) owing to the forthright advocacy of its cardinal virtue, *realpolitik*.

[32] Inoguchi Takashi, "Why are there no non-Western theories of international relations? The case of Japan," in Barry Buzan and Amitav Acharya, eds., *Non-Western International Relations Theory: Perspectives on and beyond Asia*, (Oxon: Routledge, 2010), (as cited in Chansoria, n. 6.)

[33] Ibid.

[34] Kitaro Nishida, *Intelligibility and the Philosophy of Nothingness: Three Philosophical Essays*, (International Philosophical Research Association of Japan, and East-West Center Press, Honolulu, 1958).

[35] Inoguchi Takashi, n. 32.

integration appears to have served both ideologies.[36] It required Asian neighbors to put their past relationships with Japan behind them in significant ways, it reoriented Japanese policy initiatives towards Asia (away from the United States), and finally it placed Japan in the position of being a vital player in the region.[37]

The classical theories on regionalism have focused on regional integration processes explained via geostrategic rationality, realism, and economic interdependence, and through traditional material factors such as security, economic flows, and geostrategic choices.[38] Substantively, Japan's international relations have evolved to a stage of developing its own Japan-centric world order, where Japan was envisaged as part of Asia but somewhat separate from Asia.[39] Based on these concepts and theories, wherein identity, norms, and interaction of personalities remain vital components, the evolving equation and geostrategic dynamics between Japan and India were evaluated, amidst contesting systemic conditions and states' priorities, to shape a future geopolitical and economic order of Asia that could well be a new prospective dawn of an alternative regional Asian dynamic.

Japan's Free and Open Indo-Pacific Framework: Influence of the 1655 Text "Majma-ul-Bahrain" (Confluence of the Two Seas)

Originally a geographic concept comprising the Indian Ocean and Pacific Ocean that shaped linkages between the United States and East Asia, a free and open Indo-Pacific maritime zone has evolved into a geostrategic concept and strategy. When stretched beyond the Indian Ocean, it paved the way for what more commonly came to be known by the new framework of the "Indo-Pacific". At its heart, a strategic system can be understood as a set of geopolitical power relationships among nations where major changes in one part of the system affect what happens in the other parts.[40]

The US policy pronouncements of "pivot" and later "rebalance" in Asia were almost concurrently followed by PM Shinzo Abe's proposed Indo-Pacific concept and strategic framework in 2012. When Abe penned his book *Utsukushii kuni e* (Towards a Beautiful Country) in 2006, he publicly advocated the concept of a "broader Asia" consisting of nations in the Pacific and Indian Oceans. Abe appeared to have anticipated Asia's geostrategic future exclusively through the prism of political realism, and rightly so.[41] The concept of a "broader Asia" appears to have transcended geographical boundaries, with the Pacific and Indian Oceans' mergence becoming far more pronounced and evident than ever. To catch up with the reality of broader Asia, the Abe administration rehabilitated its focus on South Asia in general, and India in particular, within the ambit of Japan's *Free and Open Indo-Pacific Strategy* launched and pushed during the second tenure of the Abe administration in December 2012. Abe's bid to forge this vision, in fact, began during his first term as Japan's PM, when he addressed the Indian Parliament in August 2007.

---

36 Adam S. Posen, "Japan's Distraction by Regional Economic Integration," State Department INR Roundtable on Northeast Asian Regional Economic Integration, Peterson Institute for International Economics, June 2002.

37 Ibid.

38 Sergio Caballero Santos, "Regional Integration Theories: The Suitability of a Constructivist Approach," Paper 383, *Session on Globalization and Governance*, IPSA-Chile, July 2009.

39 Inoguchi Takashi in Buzan, et al., n. 32, (as cited in Chansoria, n. 6.)

40 Rory Medcalf, "The Evolving Security Order in the Indo-Pacific," in David Brewster, ed., *Indo-Pacific Maritime Security: Challenges and Cooperation*, (National Security College, Crawford School of Public Policy, Australian National University, July 2016); also see, Rory Medcalf, "The Indo-Pacific: What's in a Name?" *The American Interest*, vol. 9, no. 2, Nov/Dec 2013, pp. 58–66.

41 Monika Chansoria, "Modi-Abe Personality Impacts Foreign Policy," *The Sunday Guardian*, September 20, 2014.

During this visit, he famously cited and quoted *Majma-ul-Bahrain* (*Confluence of the Two Seas* published in 1655), a work authored by Mughal prince Dara Shikoh. This book is said to have been the inspiration, foundation, and title of Abe's vision to nurture an open and transparent Indo-Pacific maritime zone as part of a broader Asia.[42]

Analyzing these past decades of Asian politics and policies brings to the fore certain momentous developments that have redefined Asian geopolitics, expectedly impacting South Asia and the Indian Ocean Region (IOR). By 2030, Asia will contribute most of the global growth,[43] thus underscoring its importance and that of the Indo-Pacific. These security realities have driven Japan's policies and approaches on operating in the IOR as they underwent a major transformation. The first signal of this was the lifting of the ban on overseas deployments to enable its Self-Defense Forces to dispatch armed troops to Iraq in 1992.[44] From that period, the transition and evolution has reached a point when today, notably, nearly 40 percent of all Japan's Self-Defense Forces' missions have occurred in the IOR, and nearly half of Japanese ODA goes to IOR countries.[45]

Conclusion

Japan's engagement with India symbolizes acknowledgment of the economic and strategic dependence of developments across a much wider maritime region, at the heart of which lies the Indian Ocean. The Indo-Pacific concept has been embraced, with many nations enunciating their strategies and outlook for the region, as witnessed by the creation of partnerships and mechanisms as the opportunities, concerns, and stakes of these nations intersect with those of southern Asia.[46]

Since the time India along with other sub-regions came up on Japan's foreign policy radar, it started becoming increasingly clear that Tokyo's "Third World policy" would serve as a vital component of its overall comprehensive security thinking and approach.[47] Despite the significance of Japanese aid to India and South Asia, the rationales and results of development cooperation activities that Japan has executed in the region remain underexplored.[48] It would further be reasonable to argue that, in formulating its foreign policy for India, Japan will likely position itself in favor of closely engaging with India to achieve strategic deliverables. There is a concurrence of thought in Tokyo that, in a world where it is no longer possible to separate economics from politics (*seikei bunri*), Japan's new comprehensive security (*sogo anzen hosho*) strategy should revolve more acutely around active politico-diplomatic involvement. Tokyo's policy interests and approach, traditionally limited to East Asia and Southeast Asia prior to the Cold War, have increasingly shifted towards the Indian Ocean region, with India still at its nucleus. Completing 70 years of bilateral relations, the India-Japan *Special Strategic and Global Partnership* remains

---

42 Ibid.

43 Praneeth Yendamuri and Zara Ingilizian, "In 2020 Asia Will Have the World's Largest GDP. Here's What That Means," *World Economic Forum,* December 20, 2019, available at https://www.weforum.org/agenda/2019/12/asia-economic-growth/

44 John Hartle, "The Normalization of Japanese Policy in the Indian Ocean Region," *Policy Report*, Analysis and Policy Observatory, Australia's Global Interests, June 21, 2018, (as cited in Chansoria, n. 6.)

45 Peter Wyckoff, "Making Waves: Japan and the Indian Ocean Region," *Commentary,* The Stimson Center, May 1, 2017.

46 For further reference and reading on this view, see remarks by V. Muraleedharan, Minister of State for External Affairs, International Workshop on "Quad in the Indo-Pacific," MEA, New Delhi, April 29, 2021.

47 Nester, n. 6, p. 279, (as cited in Chansoria, n. 6.)

48 Sojin Shin, "Japan's Foreign Aid to South Asia: Addressing a Strategic Need," NUS-ISAS *Working Paper*, no. 318, March 8, 2019, (as cited in Chansoria, n. 6.)

firmly rooted in history with common values being the mainspring for advancing shared strategic objectives and progress for the benefit of the entire Indo-Pacific region.

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—

Atsuko Kanehara*

Abstract

This article examines the distinction between the use of arms in law enforcement and the use of force prohibited by international law with some analysis thereof having inherent significance to Japan in its particular context in the East China Sea. Following on from the previous work by this author, entitled "The Use of Force in Maritime Security and the Use of Arms in Law Enforcement under the Current Wide Understanding of Maritime Security," published in this Journal, reconsideration of the distinction is strongly required. This is because the already wide understanding of maritime security is expanding even further. As a result, two kinds of distinctions tend to be blurred, namely, the distinction between security or military acts and law enforcement, on the one hand, and also, the distinction between the use of arms in law enforcement and the use of force prohibited by international law, on the other hand. This is typically the case with Japan, which has been facing, as an inherent circumstance, the continued tension in the East China Sea.

The structure of this article is as follows. After clarification of the terminology of this author, the Introduction will provide, in the particular circumstance surrounding Japan, concrete reflection of the issue of the two distinctions mentioned here. Then, Section I will, based upon said previous work by this author, succinctly confirm the presupposition that the nature of acts or measures, in principle, decides the nature of the use of force or arms accompanying said acts or measures. Some complementary arguments will follow. Section II will consider several issues arising from the presupposition that this article maintains. Within the framework of the analysis thus provided, Section III will explore how to prove a use of weapons as a use of arms in law enforcement. For this purpose, this article will examine the relevant jurisprudence, mainly focusing on those recently entertained rather than those traditionally discussed, and will list up as many critical factors as possible that need to be carefully considered, together with their possible categorization. In Section IV and Section V, as an examination of a special issue, some analysis will follow regarding law enforcement measures with weapons implemented by Japan to cope with Chinese vessels in the East China Sea. Finally, some conclusion will be given.

---

* Atsuko Kanehara is Professor of Public International Law at Sophia University.
** All URLs were last accessed on the 24th of December 2022.

Introduction

1. Terminology

At the beginning of this examination, some explanation of the terminology is necessary to avoid any confusion. Different from the expression "the physical use of weapons,"[1] according to the relevant international law rules, "the use of force" and "the use of arms" have legal connotations. The expression "the use of force" is used as a legal term to connote a legal meaning. This is because the term "the use of force" or simply "force" is part of Article 2, Paragraph 4 of the United Nations Charter (UN Charter), and the rule in this provision has been established as a customary international law rule.

In the same way, the term "the use of arms," as exercised in law enforcement measures that could be defined by international law rules, may gain a legal connotation.[2] There is special parlance in regard to the law of the sea, such as the right to approach, the right to recognize the nationality of a vessel, and the right to visit (boarding inspection). In place of them, this article uses the generic and general term "law enforcement."

When appropriate and necessary, the expression "situation" will be used in the manner defined as follows. "Situations" refer to various sorts of scenes or stages in law enforcement measures and military acts. There is a "self-defense situation," where military acts are expected with the use of force prohibited by international law.[3] The situation in which law enforcement measures are to be taken is called a "law enforcement situation." The nature of a particular situation is presupposed to be the same as that of the acts or measures to be conducted or taken in said situation.[4] It is not always easy to make the distinction between concrete acts and the context thereof, namely, the "situation" in which the acts are conducted. Therefore, the distinction between "acts or measures" and the "situation" inevitably becomes a relative one.

In order to avoid redundant repetition, when no confusion is expected, in this article, "the use of force" means the use of force prohibited by international law unless being justified principally as an exercise of the right of self-defense, and "the use of arms" means the use of arms accompanying (or, in conjunction with, and in connection with, etc.) law enforcement measures.

With this terminology, then, the remaining part of the Introduction will explain the circumstance inherent to Japan. In doing so, given the wide understanding of maritime security, the concrete definition of the issues of the two kinds of distinctions mentioned above will be clarified, and its significance will be proven.

2. Concrete Definition of the Two Issues of the Two Kinds of Distinctions under the Wide Understanding of Maritime Security

It is well recognized that the idea of maritime security has expanded to include combat, in addition to military threats, various threats including terrorism, weapon proliferation,

---

1 "Forcible acts" and violence also mean acts with weapons. This paper will use the expression "the physical use of weapons" or simply "the use of weapons."

2 A clear and established definition of law enforcement is difficult to find under international law. This article will take up this issue later.

3 "Aggression," "invasion into territories of foreign States," and "the right of self-defense" are the typical terms used to describe such a situation. Under the law of armed conflict, a certain circumstance is defined as an armed conflict. In that case, the circumstance is legally defined as an armed conflict, and there is no need for the term "situation."

4 While it is not clearly demonstrated, one author seems to take the same position as that of this article: Patricia Jimenez Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award," *Journal of Conflict & Security Law*, 13 (2008), 63.

transnational crimes, piracy, environmental/resource destruction and illegal seaborne migration, and so on.[5] There would be no argument that this tendency has developed further, considering the fact that recently, there have been international conflicts regarding the seizure of foreign vessels,[6] and serious incidents such as illegal, unreported and unregulated (IUU) fishing, marine environmental harm, and piracy and armed robbery. So, it may be useful here to (re-)examine the significance of the wide understanding of maritime security. This point can be explained in a context particular to Japan.

First of all, in 2018, Japan enacted the Third Basic Plan on Ocean Policy (Basic Plan)[7] and adopted as its main pillar the idea of comprehensive maritime security.[8] The reason for the adoption of such an idea as comprehensive maritime security is set forth as follows.[9]

Substantively speaking, various ocean policies are closely related to each other, and they should form an essential part of the comprehensive policy of maritime security.[10] In addition, as a background unique to Japan, the idea of comprehensive maritime security was and still is expected to push forward the procedural development of the organizational structure of the bureaucracy for both drafting and realizing Japan's ocean policy. In order to enact such comprehensive ocean policies, an integrated structure of ocean policy-making should be established that is apart from the traditional vertically segmented organizational structure of the bureaucracy in Japan.[11]

Regarding the content of comprehensive maritime security, the Basic Plan contains two categories of policies for maritime security: policies for maritime security, and policies forming the foundation for contributing to maritime security.[12] The former, in addition to self-defense measures, consists of measures such as those for maintaining the peace and order of the oceans by law enforcement, the realization of the safety of marine traffic, and coping with ocean-oriented

---

[5] Typical examples are as follows. Douglas Guilfoyle, "Maritime Law Enforcement Operations and Intelligence in an Age of Maritime Security," *International Law Studies*, U.S. Naval War College, 93 (2017), 298 *et seq*.; Natalie Klein, *Maritime Security and the Law of the Sea*, (Oxford University Press, 2011); Atsuko Kanehara, "Japan's Ocean Policy and Free and Open Indo-Pacific Strategy," Lectures Delivered 25 through 29 of September, 2018, in India, Bangladesh, and Sri Lanka, https://www.in.emb-japan.go.jp/itpr_en/00_000740.html, https://www.bd.emb-japan.go.jp/itpr_en/PR20180927.html, https://www.lk.emb-japan.go.jp/itpr_en/00_000678.html; 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*, 3 (2), Fall (2019), https://www.jiia-jic.jp/en/japanreview/pdf/JapanReview_Vol3_No2_05_Kanehara.pdf (hereinafter referred to as "Maritime Security").

[6] This article will subsequently examine the recent jurisprudence in which the seizure of Ukraine military vessels by the Russian authorities raised the issue of the distinction between the use of arms in law enforcement and the use of force accompanying military activities.

[7] As a Cabinet Decision, the Japanese government enacted the Third Basic Plan on Ocean Policy (Basic Plan) on 15 May 2018. A provisional English translation is available at https://www8.cao.go.jp/ocean/english/ plan/pdf/plan03_e.pdf.

[8] Atsuko Kanehara, "Dai Sanki Kaiyo Kihon Keikaku ga Egaku Anzenhosho no Sugata [Maritime Security That the Third Basic Plan on Ocean Policy Provides for]," *Komei* 152 (2018), 22–28.

[9] "Maritime Security," 50–51.

[10] Prior to the Basic Plan, in 2007, Japan enacted the Basic Act on Ocean Policy. A provisional English translation is available at, https://www.cao8.go.jp/ocean/policies/law/pdf/law_je.pdf.

[11] Regarding the particular significance of the idea of comprehensive maritime security from the viewpoint of Japan's organizational structure for ocean policy-making, see the lectures by the author, *supra* n. 5.

[12] The policies for combatting illegal acts at sea, such as IUU fishing, terrorism, environmental destruction, and seaborne natural disaster, are not necessarily based upon the "common" interests of international society. Sovereign States recognize these illegal acts as maritime threats to their "individual" interests.

natural disasters.[13] The latter is divided into two types of measures: measures forming the basis of maritime security and measures that support it in a complementary manner.[14] Such content is sufficient proof of the wide coverage of comprehensive maritime security.

The Basic Plan actually includes not only the typical issue of the use of force against military threats, but also the issue of law enforcement to combat illegal acts committed at sea, such as piracy, terrorism, illegal migration, IUU fishing, etc.[15] From the perspective of this article, the point is that both sets of policies, for coping with military threats and with illegal acts, are included together in the policies on maritime security. This fact reflects Japan's position that self-defense and law enforcement are connected to each other in a unique manner.[16] Beyond that, the actual circumstance surrounding Japan in the East China Sea inevitably causes the two issues to be more closely connected. This forms the second point of the circumstance inherent to Japan.

Second, Japan has been facing, for more than a decade, the seriously tense circumstance caused by China in the East China Sea.[17] The principal background for it is the difference of opinions between the two countries regarding the territorial sovereignty of the Senkaku Islands.[18] To demonstrate its territorial sovereignty over the islands, China has persistently dispatched its vessels, such as government vessels, military ships, and fishing boats, to the contiguous zone and the territorial sea of Japan surrounding the Senkaku Islands.[19]

To cope with the tense circumstance, the Japan Coast Guard (JCG) has unceasingly been on duty guarding the territorial sea of the Senkaku Islands. This is due to Japan's position that the tense circumstance should, at least, be primarily coped with by police measures or by law enforcement measures taken by the JCG. Avoidance of escalation forms the main reason for that position.[20] In actuality, however, it is likely that the circumstance will easily grow to the point of creating a military threat to Japan, one that could not effectively be handled by the JCG. The Japan Maritime Self-Defense Force (JMSDF), meanwhile, is in charge of maritime self-defense. When it is necessary and the legal requirements under the domestic laws are satisfied, the JMSDF should take action at the scene. In this regard, under Japanese law, the distinction between law enforcement measures and self-defense ones must be rigidly maintained. In particular, under Article 25 of the Coast Guard Law (CGL),[21] the JCG is never considered

---

[13] The Basic Plan, 24–26.

[14] These are measures for economic security and protection of the marine environment. The Basic Plan, 28.

[15] According to the International Maritime Organization, with regard to the distinction between maritime safety and maritime security, the latter is related to protection against unlawful and deliberate acts, as cited by Klein, *op. cit., supra* n. 5, 8, n. 23.

[16] This article will elaborate on this point later when it examines Japan's position when coping with Chinese warships and government ships that enjoy immunity.

[17] As a detailed explanation for this tense situation, see Atsuko Kanehara, "International Law as a Tool to Combat China," *Japan Review*, 4 (1), Summer (2020), https://www.jiia-jic.jp/en/japanreview/pdf/04JapanReview_4-1_summer_Kanehara.pdf, 1-3; Atsuko Kanehara, "Refining Japan's Integrative Position on the Territorial Sovereignty of the Senkaku Islands," *International Law Studies*, 97 (2021), https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2990&context=ils, 1954–1957 (hereinafter referred to as "Japan's Integrative Position").

[18] As Japan's official position does not admit the existence of a dispute, this article does not use the word "dispute." See "Japan's Integrative Position," 1591, 1610–1612.

[19] A statistical analysis is provided and continuously updated by the Japan Coast Guard, https://www.kaiho.mlit.go.jp/mission/senkaku/senkaku.html.

[20] Kanehara, *supra* n. 17, 19.

[21] An unofficial English translation of the CGL is available at https://nippon.zaidan.info/seikabutsu/2001/00500/contents/00021.htm.

a military organ.[22] In addition, the JMSDF takes not only defense measures but also police measures under Article 82 of the Self-Defense Force Law.[23] The use of weapons by both the JCG and the JMSDF, as far as it is for police measures, is restricted as such by Article 7, Paragraph 1 of the Police Duties Execution Law.[24]

Irrespective of the legal and theoretical distinction between the two issues, law enforcement and self-defense, the reality is that, very naturally and unavoidably, the two issues co-exist and are almost inseparable in the same circumstance. As a result, it becomes very difficult to make the distinction between the use of arms in law enforcement and the use of force prohibited by international law. In other words, if Japan, under its laws,[25] tries to strictly maintain the distinction between the law enforcement measures and self-defense measures, and also between the use of weapons accompanying each of these two measures, and if Japan insists on the distinction not only domestically but also internationally, too, it bears the heavy burden of proving, by itself, the nature of the use of weapons, whether it is the use of arms in law enforcement or the use of force in self-defense.

Such a reality has been further strengthened by China's recent enaction of its Coast Guard Law (CCGL) in 2021.[26] Article 83 reads:

> 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.

This provision enables Chinese law enforcement vessels which are dispatched to Japan's

---

[22] Article 25 of the CGL 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 to function as such.

[23] This is called a "maritime police operation." Regarding maritime police operations, see Koichi Morikawa, "Kaijo Keibi Kodo no Kokusaiho Jo no Konkyo ni Tsuiteno Ichi Kosatsu—Kaijo Jieitai no Chuto Chiiki Haken wo Meguru Giron wo Tegakarini—[An Analysis of the Maritime Police Operation under International Law—with the Example of the Discussion on Japan's Dispatch of the JMSDF to the Middle Eastern Region]," in Masaharu Yanagihara, Koichi Morikawa, Atsuko Kanehara, Taro Hamada eds., *Gurobaru Keizai to Kokusaiho Chitsujo, Mamiya Isamu Sensei Tsuito Kinen* [International Law Order and the Global Economy, Memory of Professor Isamu Mamiya], (Shinzansha, 2021), 33 *et seq*.

[24] The provision 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;
> Provided, however, that the police official must not inflict injury upon any person except in a case falling under Article 36 (Self-Defense) of the Penal Code (Act No. 45, 1907) or Article 37 (Averting present Danger) of the same Act, or a case falling under one of the following items:

An unofficial English translation is available at: https://www.japaneselawtranslation.go.jp/ja/laws/view/4043/tb. As for4 Article 25 of the CGL, see *supra* n. 22.

[25] Article 9 of the Constitution of Japan and Article 25 of the CGL form the principal part of the relevant laws. Article 9 of the Constitution of Japan 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.

An official English translation is available at: https://japan.kantei.go.jp/constitution_and_government/frame_01/html.

[26] An unofficial English translation of the CCGL is available at 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.

territorial sea surrounding the Senkaku Islands to easily change their function from law enforcement to self-defense.[27] In the circumstance of these sea areas, from the practical perspective of an effective response by Japan, the distinction between law enforcement and self-defense would become significantly fruitless.[28]

In addition, relating to the distinction between the use of arms and the use of force, while a detailed examination will be given later, here, it is useful to point out the special issue that Japan has been facing. For more than a decade, China has periodically sent its government vessels and military ships to Japan's territorial sea surrounding the Senkaku Islands.[29] They enjoy immunity under Article 32 of the United Nations Convention on the Law of the Sea (UNCLOS). The JCG has been incessantly watching Japan's territorial sea around the Senkaku Islands, and coping with Chinese government vessels and military ships on the spot. It is always performing a law enforcement function, and coast-guarding is an exercise of Japan's sovereignty over the islands with the territorial sea thereof according to the law of the sea, namely, Article 2 of UNCLOS.

If Japan takes coercive measures that are beyond a request to leave under Article 30 of UNCLOS,[30] in some cases even using weapons, many authorities indicate that the stage would change from one under the law of the sea to one regulated by the law relating to the use of force.[31] Therefore, here, also, the issue becomes complicated with respect to the distinction between the use of arms in law enforcement and the use of force prohibited by international law.

Thus far, focusing on the inherent circumstance which Japan has been facing, in a concrete manner, the Introduction has clarified the wide understanding of maritime security. In that circumstance, the distinction between the use of arms in law enforcement and the use of force prohibited by international law can be easily blurred in reality. Japan needs to effectively cope with the circumstance by taking law enforcement measures and self-defense measures with the legal justification under both its domestic laws and international law.[32]

Next, Section I will formulate a theoretical framework under which the distinction between the use of arms in law enforcement and the use of force prohibited by international law is appropriately discussed.

This author has already proposed a theoretical framework in that sense.[33] Here, after confirmation of the framework, some complementary explanation will be provided.

I. A Theoretical Framework for the Analysis of the Distinction between the Use of Arms in Law Enforcement and the Use of Force Prohibited by International Law

1. Formulation of the Issues to Be Discussed

The distinction between the use of arms and the use of force has begun to attract attention in

---

27 As to other criticism against the CCGL, see "Japan's Integrative Position," 1625–1626.

28 Regarding the impact of the CCGL on Japan, 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), forthcoming.

29 See "Japan's Integrative Position," 1594–1595.

30 Here, the issues of the interpretation of the relevant provisions of UNCLOS and their relationship to each other, such as Article 30 and Article 32, are not touched upon. This article will do so succinctly later.

31 The relevant works will be introduced later as appropriate.

32 Sections IV and V will thoroughly examine this point, particularly from the perspective of international law.

33 "Maritime Security," 40–49.

relatively recent days. As for early examples of such jurisprudence, there are the 1998 Fisheries Jurisdiction Case (jurisdiction)[34] entertained by the International Court of Justice (ICJ), and the 1999 M/V Saiga Case (No. 2)[35] dealt with by the International Tribunal for the Law of the Sea (ITLOS).[36] In these cases, with regard to the use of weapons by the law enforcement organs of the defendant, its nature was discussed, that is to say the nature of the use of arms in law enforcement, not the use of force that falls under Article 2, Paragraph 4 of the UN Charter.

A thorough examination of the relevant jurisprudence will be conducted later, in Section III. Prior to that, to provide an example of the formulation of the issues to be dealt with in this article, the following remarks by the court and the tribunal are helpful.

In the Fisheries Case, the ICJ said:

> 84. For all of these reasons the Court finds that *the use of force*[37] *authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures* and thus falls under the provisions of paragraph 2 (d) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained within the concept of enforcement of conservation and management measures according to a "natural and reasonable" interpretation of this concept (emphasis added).[38]

In the Saiga Case, ITLOS said:[39]

> 155. In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on *the use of force in the arrest of ships*, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.
>
> 156. *These principles have been followed over the years in law enforcement operations at sea* (emphasis added).

By carefully reading these remarks, there appear two issues: first, the nature of the measures,[40] and second, the nature of the use of weapons (in the expression by the court and the tribunal, "use of force"). In these cases, the nature of the measures is law enforcement, and the nature of the use of weapons is, too, the nature of the use of arms in law enforcement according to the terminology of this article.[41] Beyond that, in these remarks of the jurisprudence, it is difficult

---

[34] Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment of 4 December 1998, *I.C.J. Reports 1998*, 432 (hereinafter referred to as "the Fisheries Jurisdiction Case").

[35] The M/V "Saiga" (No.2) Case (Saint Vincent and The Grenadines v. Guinea), Judgment of 1. July, 1999, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf (hereinafter referred to as "the Saiga Case").

[36] Other cases will be introduced later, in Section III, 2.

[37] The ICJ and ITLOS may use the expression "use of force" as meaning the physical use of weapons without necessarily connoting a legal nature. It is important to interpret the judgments depending on the context of whether or not the expression means the use of force as that falling under Article 2, Paragraph 4 of the UN Charter.

[38] The Fisheries Jurisdiction Case, para. 84.

[39] The Saiga Case, paras. 155–156.

[40] Hereinafter, where appropriate, to avoid redundancy, "measures" will mean both measures and acts.

[41] The court and the tribunal do not make clear these two issues.

to find a useful theoretical framework for the analysis of this article regarding the distinction between the use of arms and the use of force. For such an analysis in particular, a theoretical framework should be required to regulate the relationship between the two issues, namely, the issue of the nature of the measures and the nature of the use of weapons in the measures.

2. Presupposition on the Relationship between the Nature of the Measures and That of the Use of Weapons: The Presupposition Confirmed

Above all, as to the theoretical framework, this author does not take the position of a sort of case-by-case approach of making distinction between the use of arms and the use of force.[42]

A case is imagined in which, while measures have the nature of law enforcement, the use of weapons holds the nature of the use of force that is likely to accompany military measures, and is therefore prohibited by international law. *Vice versa*, it might be possible that, while the measures are regarded as military ones, the use of weapons in connection with them is regarded as the use of weapons that has a different nature from the use of force that is prohibited by international law, unless justified mainly as an exercise of the right of self-defense. These possibilities do, in reality, exist.

Then, simply reflecting such possibilities in a theoretical framework would produce four patterns of the use of weapons and the measures that the use of weapons accompanies: first and second, when the nature of the measures is law enforcement, the use of weapons has either the nature of the use of arms or the use of force; and third and fourth, when the nature of the measures is self-defense,[43] the use of weapons has either the nature of the use of arms or the use of force. Such a framework may be called a theoretical framework based upon a case-by-case approach in the sense that there is no qualification with respect to the relationship between the nature of the use of weapons and the nature of the measures that the use of weapons accompanies. It admits no relationship between the nature of the measures, on the one hand, and the nature of the use of weapons that accompanies them, on the other hand. Different from this, a more qualified approach is to set the presupposition that this author has proposed in her previous work.

As a way to relate or not to relate the two issues to each other, logically speaking, there are two possibilities. First, the nature of the measures decides the nature of the use of weapons, and second, the nature of each issue is not related to the other. The second means a theoretical framework based on a case-by-case approach, as explained here.[44] It may not be reasonable to

[42] Regarding a case-by-case approach, see “Maritime Security,” 49–50.

[43] In comparison to the expression “law enforcement,” it is difficult to find an established expression to describe the nature of the measures that the use of force is likely to accompany. “Measures of self-defense” is most likely presupposed. Another candidate is “measures for security.” However, as the concept of maritime security has been expanding, “security” might cause confusion. Thus, without excluding other possibilities, when it is appropriate, this article will use, to express the nature of such measures, “measures for self-defense.”

[44] There may be two different case-by-case approaches: the first type is under some defined framework for the consideration of factors, and the second type is a simple one without any reference to a framework. See “Maritime Security,” 49–50. When the “framework” is substantial, the first type comes close to the presupposition that will be set forth below.

think that the nature of the use of weapons decides the nature of the measures.[45] This author, by taking the first possibility, has proposed[46] the presupposition that "in principle," the nature of the measures decides the nature of the use of force or arms in the measures. The qualification of "in principle" signifies that the consideration of the relevant factors in each case is not excluded for deciding the nature of the use of force or the use of arms.[47] In other words, by considering the particular factors in individual cases, the nature of the measures and the nature of the use of weapons could be different from each other. With such a qualification, it is appropriate to maintain this presupposition for the following reasons.

First, the case-by-case approach might cause chaos not only for the theoretical analysis, but also for the actual operation at the scene. Theoretically, it would be solely descriptive, listing up all possible patterns of the nature of the measures and that of the use of weapons, without any analysis. Practically, it is almost impossible for the subjective entity exercising the use of weapons to think through, on site, all possibilities for the nature of its use of weapons. The fundamental purpose of the examination of this issue is above all to prevent violations of international law, which prohibits the use of force and regulates the use of weapons depending on its nature. Thus, to provide a theoretical framework with some guidelines is appropriate and useful mainly for the subjective entities exercising the use of weapons, rather than for providing a comprehensive catalogue of the nature of the measures and the nature of the use of weapons.

Second, the presupposition can retain a level of flexibility with the qualification "in principle." This flexibility may replace, at least, to a certain degree, the significance that is expected for the case-by-case approach. Therefore, while maintaining the aforementioned presupposition, next, this article will examine various works on the meaning of the use of weapons.

3. Discussion of the "Force" under Article 2, Paragraph 4 of the UN Charter

While the issue of the distinction between the use of arms and the use of force has attracted attention in relatively recent days, discussion of "force" has a longer history.[48] Since the drafting

[45] The subjective entity implementing the measures uses weapons provably with its own judgment that the use of weapons has the same nature as that of the measure, while such a subjective judgment is not necessarily convincing nor objectively correct. On the contrary, apart from the nature of the measures in which the use of weapons accompanies, the use of weapons itself does not bear the intent or judgment as to its nature of the subjective entity who uses the weapons. Therefore, it is not reasonable to think that the nature of the use of weapons may decide the nature of the measure that the use of weapons accompanies. There may be a position that the nature of the use of weapons is determined based upon its scale, but it might determine the nature of the use of weapons, not the nature of the measures.

[46] "Maritime Security," 34–37.

[47] Tom Ruys, "The Meaning of 'Force' and the Boundaries of the Jus Ad Bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?," *American Journal of International Law*, 108 (2014), 207.

[48] Here the issue of the threat of force and that of economic coercion are not touched upon.

process of the UN Charter, a significant number of works have been produced on this issue,[49] and the ICJ, in the 1986 Nicaragua Case (merits),[50] declared an important definition of "armed attack," setting a substantial limitation on the exercise of the right of self-defense.[51]

In the works on this issue, generally speaking, there are two opposite opinions. One interprets the prohibition of the use of force by Article 2, Paragraph 4 as all-inclusive. The other admits a type of use of weapons that the provision does not prohibit. It provides room mainly for the use of weapons at a small scale under the provision.[52] In addition, it is said that in a State-to-State context, even confrontation at a small scale comes within the ambit of the *jus ad bellum.*[53] An interesting position from the perspective of this article is that Article 2, Paragraph 4, as an all-inclusive provision, applies to the use of weapons at sea, even that accompanying law enforcement with legal grounds.[54]

Here it is not necessary to look into the detail of the discussion. The point is that there is not a generally agreed opinion on the meaning of "force." Furthermore, the reason for the denial of the existence of the room mainly for the use of weapons at a small scale is to avoid the abuse of such room, and the lack of established international practice.[55] This would seriously deprive the prohibition, by international law, of the use of force of its significance. Therefore, as

---

49 See, for instance, Ruys, *op. cit., supra* n. 47, 159–210; Tom Ruys and Sten Verhoeven, "Attacks by Private Actors and the Right of Self-Defense," *Journal of Conflict & Security Law,* 10 (2005), 193–206; Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); Rob McLaughlin, "Authorizations for Maritime Law Enforcement Operations," *International Review of the Red Cross*, 98 (2) (2016), 465–490; Koichi Morikawa, "Kokusai Heiwakyoryoku Gaiko no Ichi Danmen—Kaijo Soshikodo he no Sanka/Kyoryoku wo Meguru Hoteki Shomondai [An Aspect of Diplomacy for International Cooperation and International Peace— Legal Issues with Respect to Participation in and Cooperation for Maritime Interdiction Operations]," *Nihongaiko to Kokusaikankei* [Japan's Diplomacy and International Relations], (Naigai Shuppan, 2009), 243–282; by the same author, "Gurei Zon Jitai Taisho no Shatei to Sono Hoteki Seishitsu [Coping with Grey Zones and Its Legal Implications]," *Kokusai Mondai* [International Affairs], 648 (2016), 29–38; by the same author, "Kaijo Hoshikko ni Tomonau 'Use of Force' no Gainen [The Concept of the Use of Force in Conjunction with Law Enforcement]," in *Kokusaiho no Dainamizumu* [Dynamism in International Law], in Memory of Professor Akira Kotera, (Yuhikaku, 2019), 651–677; Kwast, *op. cit., supra* n. 4, 49–91.

50 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, *ICJ Reports 1986* (hereinafter referred to as "the Nicaragua Case (merits)").

51 *Ibid.*, para. 191.

52 Regarding these positions, see "Maritime Security," 40 and the footnotes thereto. Corten, *op. cit., supra*, n. 49, 55 and 77. Other examples of the use of weapons that may be permitted under Article 2, Paragraph 4 of the UN Charter, *ibid.*, 55 and 85, 163–171. The position that there is room for the use of force at a small scale under Article 2, Paragraph 4 of the UN Charter introduces the following examples: the abduction of Mr. Eichmann from the territory of Argentina; violations of territorial airspace by military aircraft; targeted killing of suspects of terrorism in the territory of a foreign country. Ruys, *op. cit., supra* n. 47, 167–179.

53 Including other examples of the small scale of the use of weapons, Ruys, *op. cit., supra* n. 47, 171–187. As examined above, Japan has been coping with Chinese government vessels and warships that are periodically entering Japan's territorial sea surrounding the Senkaku Islands. As far as coercive measures are necessary to effectively cope with the circumstance and actually taken by the JCG, this point has a critical meaning, as it is in the context of a State-to-State confrontation. This issue will be considered later in Section IV and Section V.

54 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, (Cambridge University Press, 2009), 272–277: Morikawa, *op. cit., supra* n. 49 (Kaijo Hoshikko Katsudo), 659–661.

55 Ruys, *op. cit., supra* n. 47, 1, 163–171.

far as effective law enforcement requires, on some occasions, the use of weapons,[56] the critical importance resides in the prevention of the aforementioned abuse. For that purpose, the use of arms in law enforcement should be clearly defined so as to establish its legal justification backed up by international practice.[57] To achieve that goal, as in Section III, clarification of the meaning of law enforcement and identification of factors that reflect law enforcement become the indispensable starting point.

Before moving onto such an examination, some consideration of the issues regarding the presupposition of the theoretical framework is useful. One is the issue related to the flexibility in the distinction between the use of arms and the use of force. In particular, focus will be placed on the impact of the wide understanding of maritime security on said flexibility. The other issue is the legal effect of the distinction. Concretely speaking, this is the issue of the legal consequence of the cases in which the actual use of weapons violates the relevant international law rules regulating it. If the use of weapons in law enforcement breaches the international rules that regulate them, would the nature of the use of weapons as "the use of arms in law enforcement" change? These two issues will be dealt with in Section II in this order.

II. Issues Arising from the Theoretical Framework Thus Set Forth for an Examination of the Relationship between the Nature of the Measures and the Nature of the Use of Weapons Accompanying Them

1. Flexibility in the Distinction between the Use of Arms and the Use of Force: The Qualification "in Principle"

The presupposition of this article is that the nature of the measures, in principle, decides the nature of the use of weapons that accompanies them. The qualification "in principle" allows this presupposition to be disproved in some cases.[58] Generally speaking, individual cases should have particular circumstances and factors that should be considered when deciding the nature of the measures and that of the use of weapons accompanying them.[59] There might be examples in which the nature of the measures and the nature of the use of weapons are not identical, even if only as exceptions.

In this regard, the wide understanding of maritime security likely has a significant impact.[60] There has been a firm tendency to understand maritime security in a wide way,[61] whereby "maritime security is understood by the measures combatting not only traditional military threats, but also terrorism, weapons proliferation, transnational crimes, piracy, environmental/resource

---

[56] In the two cases introduced above, the court and the tribunal admitted the use of weapons in law enforcement.

[57] The main purpose of this article is to provide a way to identify the use of arms in law enforcement so as to enable States to prove its use of weapons as such. At the same time, doing so enables, at least to a certain degree, the prevention of the abuse of weapons that eludes prohibition by Article 2, Paragraph 4 of the UN Charter.

[58] This does not necessarily entail admitting a case-by-case approach for the decision concerned. However, as mentioned above (*supra* n. 44), if a case-by-case approach is realized under some defined framework for consideration of the relevant factors, it could not be denied that such a case-by-case approach would come close to the presupposition of this article.

[59] The factors are, for example, the scale of the violence on both the side of the wrongdoers and entities of the use of weapons, the nature of the wrongdoers involved, the political intents of the wrongdoers, and the legal interests being infringed upon by the violence of the wrongdoers. Ruys, *op. cit., supra* n. 47, 207.

[60] "Maritime Security," 50–51.

[61] A typical example is Guilfoyle, *op. cit., supra* n. 5. As for other authorities, see *supra* n. 5.

destruction, and illegal seaborne migration."[62] Another authority explains a unique reason for the recent wide understanding of maritime security.[63] According to this position, not only the exclusive interests of sovereign States but also the inclusive interests (common interests) of the world define a wide array of threats such that maritime security is understood widely as that combatting the variety of threats to these interests.[64] As maritime security is acquiring a wider meaning so as to include all measures for combatting such various incidents, self-defense measures and law enforcement ones have inevitably come to be closely related to each other and even intertwined.

In recent cases, as will be analyzed later, both ITLOS and the arbitral tribunal declared that the distinction between military measures[65] and law enforcement measures has been blurred.[66] This tendency likely also reflects the wide understanding of maritime security.

The tribunals made their decisions with respect to the nature of the measures and the use of weapons accompanying them by considering those implementing the measures (navy or coast guard, and military vessels or other government vessels), the characterization of the organs involved (military or law enforcement organs), the series of facts constituting the context of the event concerned, and the dominant factors in the aforementioned context.[67] Such decisions are ones based upon an objective evaluation.[68] In the litigations, "objective" evaluation connotes an evaluation based upon facts and one that is made by the authoritative third parties independent of the subjective evaluation by the parties to the disputes.

As the distinction between the natures of the measures, namely those for law enforcement and those for self-defense, becomes flexible, so too does the distinction between the natures of the use of weapons, namely those constituting the use of arms and those constituting the use of force. This might be said to be the logical result of applying the presupposition that the nature of the measures decides, in principle, the nature of the use of weapons. On the other side of a coin, there could be a case in which even the qualification "in principle" would lose its significance, and a definite relationship between the principle and an exception to it could not be identified. If so, the nature of the measures and the nature of the use of weapons would be determined independently, which means a case-by-case approach in deciding the nature of the measures and

---

62 Guilfoyle, *op. cit., supra* n. 5, 299.

63 Klein, *op. cit., supra* n. 5, 1–10.

64 *Ibid.*, 8.

65 This article uses the term "measures for self-defense," *supra* n. 43. The expression "military" used here is according to the parlance of ITLOS. That is also the parlance of UNCLOS, as its Article 298, Paragraph 1 (b) contains the expression "military activities."

66 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/fileadmini/itlos/documents/cases/26/published/C26_Order_2019025.pdf, (hereinafter referred to as "the Detention Case"), para. 64. The arbitral tribunal, too, expressed a similar thought. 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 the 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, (hereinafter referred to as "the Coastal State Rights Case"), paras. 333–335.

67 For a detailed examination of the cases, see Section, III 2.

68 For a detailed examination of the cases, see Section, III 2.

that of the use of weapons.[69]

2. Legal Consequences of Violations of the Legal Standards to Be Applied to the Use of Arms and the Use of Force[70]

This article focuses upon the distinction between the use of arms and the use of force. It does not deal with the legal standards regulating the use of arms or the use of force, nor the issue of the legal consequences of violations of these international legal standards.[71] Solely in relation to the unavoidable flexibility in the distinction mentioned here, and the furtherance of the flexibility that is expected due to the continued expansion of the already wide understanding of maritime security, the following remarks may be useful.

One authority suggests that in the case of violations of the international law rules that regulate the use of arms or the use of force, the facts of the violations thereof do not impact on the nature of the use of arms or the use of force.[72] This means that even if the use of arms in law enforcement breaches the legal standards of unavoidability, reasonableness, and necessity, it would not bear, as a result of the violation, the nature of the use of force prohibited by international law. The legal consequence of such violations is the incurrence of State responsibility for the reason of violating international law, namely, international wrongful acts.[73] In the same way, a case can be assumed in which the use of force, as an exercise of the right of self-defense, violates international rules such as proportionality and necessity. However, it is unreasonable and unthinkable that such a use of force would change into a use of arms that accompanies law enforcement. This is because the discussion here is conducted under the fundamental prohibition of the use of force by international law. For admitting a legal use of weapons, room is sought for a use of weapons in law enforcement with carefully preventing the abuse of the room. If the use of force, as the right of self-defense that violates the international regulation would change to the use of arms in law enforcement, this would really cause an abuse of the room. Thus, the issue to be assumed is whether the use of arms in law enforcement, if it breaches the rules that govern it, such as unavoidability, reasonableness, and necessity, becomes the use of force prohibited by international law.

The position that violations of the relevant international law rules would not bring about a change in the nature of the use of arms to that of the use of force would likely be approved if it is based upon the presupposition of this article, namely, the presupposition that the nature of the measures, in principle, decides the nature of the use of weapons. According to said presupposition, without special circumstances that justify an exception to the "principle," the nature of the use of arms would not change, even when it breaches the legal regulations that govern it. Only in cases in which a violation of the relevant international law rules on the use of arms sets forth "special circumstances" to justify the "exception" would that very breach change the nature of the use of arms from the use of arms in law enforcement to the use of force prohibited by international law. However, it is not necessary to admit such a result, as from the

[69] This author has previously emphasized a "simple" case-by-case approach. This does not have any referential legal frameworks under which the determination is given regarding the natures of the measures and the use of weapons. In comparison, there could be a case-by-case approach that is conducted under some defined reference framework, such as the relevant legal provisions that regulate law enforcement measures and self-defense measures. See "Maritime Security," 49–50. The difference between the two case-by-case approaches might be a matter of the degree of flexibility in deciding the natures of the measures and the use of weapons. See also *supra* n. 44.

[70] "Maritime Security," 47–49.

[71] As for this issue, see "Maritime Security," 48–49.

[72] Ruys, *op. cit., supra* n. 47, 202.

[73] Articles on State Responsibility, Article 2.

perspective of the remedy for injuries, the incurrence of State responsibility for the violation of the international rules would suffice as the legal consequence of the violation of the relevant international law rules.

Rather, the necessity of such an exception to the "principle" according to which the use of arms in law enforcement becomes the use of force prohibited by international law should be examined with a consideration of the object and purpose of the strict position that the prohibition of the use of force by Article 2, Paragraph 4 of the UN Charter is "all inclusive."[74] This position denies the existence of any room for the use of weapons in order to prevent the abuse of such room.[75] The importance of the prevention of such abuses could also be approved by the other position that the provision admits some use of weapons. Therefore, whether there do exist special circumstances that form an exception to the "principle" and whether the use of arms in law enforcement changes to the use of force prohibited by international law should be decided in order to avoid these abuses.

Beyond this general remark, it could be difficult to identify all concrete cases in which violations of the international law rules would change the nature of the use of weapons from the use of arms in law enforcement to the use of force prohibited by international law. Rather, it would be helpful to provide, as comprehensively as possible, the factors to be examined in order to determine the use of arms in law enforcement. Under the clear tendency toward the wide understanding of maritime security and, as its result, the increased flexibility in the distinction between the use of arms and the use of force,[76] clarification of those factors as comprehensively as possible is strongly needed both for theories and practice. Thus, as the main part of this article, Section III will conduct such an examination.

III. Identification and Proof of the Use of Arms in Law Enforcement

1. An Attempt to Define the Use of Weapons That Is Not Prohibited or Is Permitted by International Law as the Use of Arms Accompanying Law Enforcement Measures

As examined above, it is not easy to identify the precise meaning of "force" that is prohibited by international law. Authorities are not in accord in this regard.[77] The serious concern of those authorities taking the strict position that Article 2, Paragraph 4 of the UN Charter prohibits the use of force in an all-inclusive manner is the abuse of the room that would otherwise be afforded by the provision. If one seriously considers this concern, it becomes necessary to clarify as much as possible what the use of arms in law enforcement is, as it is indispensable for effective law enforcement. In this regard, the use of weapons for effective law enforcement is commonly admitted.[78]

Then, as a useful approach, by departing from the particular framework of arguments for the use of force prohibited by international law, mainly Article 2, Paragraph 4 of the UN Charter, a

---

74 See Section I, 3.

75 Regarding the positions by the relevant authorities, see Section I.

76 In this regard, when the flexibility of the distinction between the use of arms and the use of force significantly increases, such increased flexibility might require continuous reconsideration of the issue discussed here.

77 See Section I, 3.

78 Strictly speaking, there may be differences between the use of arms that is not prohibited by international law and the use of arms permitted by international law. With this reservation, hereinafter, such a phrase as "the use of arms that is permitted (allowed) by international law" will be used to mean both, if there is not expected to be any confusion.

new line of argument may arise. A reasonable way to define the use of weapons is by looking for the definition or justification thereof. In addition to the relevant international laws with respect to law enforcement measures to be taken at sea, various candidates will be taken up as many as possible.[79] This is the way to determine, in a "positive" manner, the nature of the use of weapons accompanying the law enforcement measures taken at sea based upon the relevant international law. It is different from the determination, in a "negative" manner, of such use of weapons as that is not prohibited by international law.

The presupposition of this paper is that the nature of the measures, in principle, decides the nature of the use of weapons. Therefore, to identify the nature of the use of arms accompanying law enforcement measures as law enforcement, it is necessary to determine that the measures for which the arms are used are those of a law enforcement nature. As the qualification "in principle" indicates, there are exceptions to the "principle" that the nature of the measures decides the nature of the use of weapons. Two logical possibilities are: first, while the nature of the measures is law enforcement, the use of weapons accompanying them has the nature of the use of force; second, while the nature of the measures is self-defense, the use of weapons has the nature of the use of arms in law enforcement. It is so difficult to determine in an abstract way such exceptions as causing the difference between the nature of the measures and the nature of the use of weapons accompanying them. Accordingly, it is not possible to provide a complete analysis of every pattern of the use of weapons under that presupposition of this article.

In place of such a complete analysis, the following part of this Section will rather conduct the thorough examination of the use of arms in law enforcement. Considering the prohibition of the use of the force by the fundamental international law, and as far as the use of weapons should be allowed for effective law enforcement, as the room that escapes from the prohibition, prevention of any abuse of the room is critical. By providing the solid understanding of the use of arms with rich proof thereof, the thorough examination of the use of arms should contribute to the maintenance of the fundamental restriction of the force of international law.

Several authorities and the jurisprudence have discussed the definition of "law enforcement."[80] Nonetheless, a precise definition has not been firmly established. Therefore, it is helpful to consult the relevant provisions of UNCLOS that are interpreted as both overtly and covertly dealing with law enforcement.[81] This author has already conducted such an examination[82] and will not repeat this here. It can be safely said that the provisions of UNCLOS and customary

[79] This is the method that this author has taken in her previous work, "Maritime Security," 43–44.

[80] See, for instance, Rekizo Murakami and Masato Mori, "Kaijo Hoancho Ho no Seiritsu to Gaikoku Hosei no Keiju—Kosutogado Ron [The Establishment of Japan's Coast Guard Law and Succession of Foreign Laws—Coast Guard—]," in Soji Yamamoto ed., *Kaijo Hoan Hosei–Kaiyo Ho to Kokunai Ho no Kosaku* [Laws on Coast Guard—Interplay between the Law of the Sea and Domestic Law], (Sanseido, 2009), 30–31; see also *infra* n. 83; Kwast *op. cit., supra* n. 4, 53–57. Regarding the relationship between maritime law enforcement and other related concepts, see Craig H. Allen, "Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives," *International Law Studies*, 81 (2006), 77 *et seq*.; Nils Melzer and Gloria Gaggioli Gasteyger, "Conceptual Distinction and Overlaps between Law Enforcement and the Conduct of Hostilities," in Terry D. Gill and Dieter Fleck eds., *The Handbook of the International Law of Military Operations*, 2nd ed., (Oxford University Press, 2015), Chapter 4.

[81] That is not to mention that many provisions under UNCLOS regarding law enforcement succeeded those of the four 1958 Geneva Conventions on the Law of the Sea, and they may have the status of customary international law. It has been pointed out that due to the sensitive nature of the matters concerned, except for Article 73 on exclusive economic zones, UNCLOS has provisions that merely assume or imply law enforcement with respect to territorial seas, archipelagic waters and contiguous zones; see Ivan Shearer, "The Development of International Law with Respect to the Law Enforcement Roles of Navies and Coast Guards in Peacetime, *International Law Studies*, 71 (1998), 435.

[82] "Maritime Security," 44–45.

international law rules provide for the rights and therefore also the justification to take law enforcement measures.[83] The point is that the relevant international law rules on law enforcement set forth the strong evidence that measures taken in accordance with them have the nature of law enforcement.[84] In the remaining part of this Section, after a succinct analysis of the recent jurisprudence, other factors to be considered in order to determine the nature of the measures will be proposed.

2. Recent Jurisprudence Regarding the Distinction between Law Enforcement Measures and Military Measures

(1) Traditional and Preceding Jurisprudence

In terms of traditional cases that can be interpreted as touching upon the issue of the use of weapons in the context of law enforcement, there are the I'm Alone Case,[85] the Red Crusader Case,[86] the Fisheries Jurisdiction Case,[87] the Saiga Case,[88] and the Guyana and Suriname Case.[89] This author has already examined some of them elsewhere,[90] and this article introduced the relevant parts of the Fisheries Jurisdiction Case and the Saiga Case above.[91] Therefore, here, it may suffice to solely provide some complementary remarks.

Based upon the jurisprudence, the authorities are mostly in accord that the rules on the use of weapons in law enforcement[92] are those of "unavoidability," "proportionality,"[93] and "necessity."[94] The ICJ admits the use of weapons in law enforcement in the Fisheries Jurisdiction Case. It reads:

> (I)f the officer "believes on reasonable grounds that the force is necessary for the purpose of arresting" the master or crew (Section 8.1). Such provisions are of a character and type to be

[83] After careful consideration of the possible categorization of law enforcement and similar measures that have been indicated by several authorities, Morikawa, bearing in mind the enforcement jurisdiction of States under the law of the sea, concluded that for the purpose of the examination of the use of weapons, a wide understanding of law enforcement is appropriate. Morikawa, *op. cit., supra* n. 49 (Kaijo Hoshikko), 655–659.

[84] As for a general review of UNCLOS in relation to its authorizations of law enforcement measures, see McLaughlin, *op. cit., supra* n. 49, 465–490.

[85] The I'm Alone Case, *Report of International Arbitral Awards,* 3 (1935), 1609. For a detailed analysis of this case, see Gerald. G. Fitzmaurice, "The case of the I'm Alone," *British Year Book of International Law,* 17 (1936), 82–111.

[86] The Red Crusader Case, *International Law Reports*, 35 (1962), 499.

[87] *Supra* n. 34.

[88] *Supra* n. 35.

[89] In the Matter of an Arbitration between Guyana and Suriname in the Award of 17 September 2007, https://pcacases.come/web/sendattach/902/.

[90] "Maritime Security," 41–43.

[91] See Section I, 1.

[92] Precisely speaking, none of the cases clearly define the circumstance as that of law enforcement before the court and tribunals. Nevertheless, it is useful, here, to confirm the rules that can be derived from the decisions and judgments.

[93] One authority opines that no use of weapons (according to him, the expression is "force") beyond proportionality could ever be one of last resort. Guilfoyle, *op. cit., supra* n. 54, 280–281.

[94] Regarding the arbitral decision in the I'm Alone Case, it is said that intentional bombardment and sinking are not allowed in cases of usual crimes, and that this would become the use of force as self-defense, not law enforcement. Here, the scale and/or intent of the bombardment and sinking may be factors that could change the nature of the use of weapons from that of law enforcement to that of self-defense.

found in legislation of various nations dealing with fisheries conservation and management, as well as in Article 22 (1) (f) of the United Nations Agreement on Straddling Stocks of 1995.[95]

The ICJ confirmed the practice of not only domestic laws but also the UN Agreement on Straddling Stocks, Article 22, Paragraph 1 whereby the use of weapons (according to the ICJ, the expression is "force") is allowed if it is necessary for the purpose of arrest based upon reasonable grounds.

This evaluation by the authorities of the jurisprudence reflects their recognition of the law enforcement measures and the category of the use of arms in law enforcement, while all the court and tribunals did not necessarily determine it.

The circumstances in which weapons were used were different in each case. In this regard, the Guyana and Suriname Case is of interest. In this case, while it is not crystal clear, the arbitral tribunal seems to define the military action as being wider than law enforcement, and so the former includes the latter.[96] This seems to be similar to the interpretation of Article 2, Paragraph 4 of the UN Charter that the prohibition of the use of force is all-inclusive, as far as both do not admit a special category of the use of weapons for the purpose of law enforcement. Here, it is enough to confirm that the arbitral tribunal and the ICJ permit the use of weapons for the purpose of law enforcement, under certain conditions.

(2) Recent Jurisprudence

① The Ukraine Naval Vessels Detention Case (Provisional Measures and Preliminary Objections)

In the Detention Case,[97] the interpretation of "military activities" in Article 298, Paragraph 1 (b) of UNCLOS was discussed.[98] The crux of the discussion is centered on whether the dispute concerns military activities or not. If the answer is yes, ITLOS cannot have jurisdiction over it.[99] After its confirmation of the positions of the parties,[100] ITLOS rendered its decision, the gist of which is as follows.

First, the entity engaging in the acts, whether military vessels or law enforcement vessels, does not decide the nature of the measures, although this is a factor to be considered. The traditional distinction between naval vessels and law enforcement vessels in terms of their

---

95 *Supra* n. 34, para. 81.

96 Guilfoyle, *op. cit., supra* n. 54, 275.

97 *Supra* n. 66.

98 Article 298, Paragraph 1 (b) reads:

> 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;

The key part is the expression "sovereign rights or jurisdiction." Precisely speaking, these terms do not apply to territorial seas, as the coastal States of territorial seas have sovereignty, not "sovereign rights" or "jurisdiction." As a logical conclusion, this exception under Article 298, Paragraph 1 (b) does not apply to any activities taking place in territorial seas. See F. David Froman, "Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea," *San Diego Law Review*, 21 (1984), 671–672. In the jurisprudence, maybe due to the special circumstance regarding Crimea, the tribunals did not touch upon this issue.

99 *Supra* n. 66, para. 50.

100 *Ibid.*, paras. 51–53 (Russia), paras. 54–62 (Ukraine).

roles has become considerably blurred.[101] Second, the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.[102] Such an "objective" evaluation is in contrast to the "subjective" claim by the parties to the dispute.[103] Therefore, it is understood that "objective" may have two significances: an objective evaluation should be based upon the facts; and the evaluation should be conducted by neutral and authoritative third parties, which means the tribunal. Third, the series of events need to be examined, and consideration is necessary as to whether the specific acts such as arrest and detention in the case concerned took place in the context of a military operation or a law enforcement operation.[104] The context may consist of a series of events, and the usage, by the tribunal, of "context" is similar to this author's usage of "situations," as explained above.[105]

In addition, the tribunal considered the particular circumstances of the case concerned: the passage of the Ukrainian naval vessels through the Kerch Strait;[106] the core of the dispute was the parties' differing interpretation of the regime of passage through the Kerch Strait;[107] the force[108] was used by the Russian federation in the process of arrest, and the context of the use of force has particular relevance.[109]

As its conclusion, the tribunal decided that the sequence of events constituted the context of a law enforcement operation rather than a military operation, and that Article 298, Paragraph 1 (b) of UNCLOS does not apply.[110]

Thus, the tribunal determined the nature of the use of weapons by Russia by considering the sequence of events or the context, which is, according to this author, the situation. By this author's terminology, the nature of situations is the same as the nature of measures. The tribunal's terminology of the "context" seems to be the same as this author's terminology of the "situations." The tribunal does not clarify the following two issues: the issue of the nature of the measures and that of the nature of the use of weapons. Nonetheless, the tribunal's position is the same as that

---

[101] *Ibid.*, para. 64. The same position is heard by authorities such as David H. Anderson; see "Some Aspects of the Use of Force in Maritime Law Enforcement," in Nerina Boschiero, Tullio Scovazzi, Cesare Pitea, and Chiara Ragni eds., *International Courts and the Development of International Law—Essays in Honour of Tullio Treves*, (Springer, 2012), 141. It has even been pointed out that the distinction between warships and merchant vessels has been called into question, see Vaughan Lowe, "Ships," in *ibid.*, 297. Furthermore, to cope with piracy, for the purpose of vessel protection, armed military personnel are on board merchant vessels; see Valeria Eboli and Jean Paul Pierini, "Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The Enrica Lexie case," *Military Law and Law of War Review*, 51 (1) (2012), 118–122. See also Wolff Heintschel von Heinegg, "The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities," *International Review of the Red Cross* 98 (2) (2016), 449–453.

[102] *Supra* n. 66, para. 66.

[103] *Ibid.*, para. 65.

[104] *Ibid.*, para. 67.

[105] For the terminology used in this article, see the Introduction, 1.

[106] *Supra* n. 66, para. 68. According to the tribunal, it is difficult to state that the passage of naval ships *per se* amounts to a military activity.

[107] *Ibid.*, paras. 71–72.

[108] The tribunal uses the term "force." Here it means the physical use of weapons according to the terminology of this author.

[109] *Supra* n. 66, para. 73.

[110] *Ibid.*, paras. 74–75. In addition, the tribunal mentioned that the subsequent proceedings and charges against the servicemen further support the law enforcement nature of the activities of Russia. *Ibid.*, para. 76.

of this author, in that the nature of the measures, in principle, decides the nature of the use of weapons, if the tribunal admits the possibility that the nature of the context and the nature of the use of weapons may be different depending on the individual factors of each case, although this would be exceptional. At least in some sense, the tribunal's thorough consideration of the three special factors[111] to the dispute might endorse such a possibility. Such thorough consideration of inherent factors to the case concerned might bring about the conclusion that the nature of the measures in the given context and the nature of the use of weapons are different from each other.

Regarding the later decision by the tribunal at the preliminary objections stage of this case,[112] the following points deserve attention. First, the tribunal emphasized the importance of the relevant circumstances in each case for the objective evaluation of the nature of the activities concerned.[113] Different from Ukraine's position,[114] the tribunal denied the "either-or" proposition regarding the distinction between military activities and law enforcement ones. According to the tribunal, activities that initially have a law enforcement character may become activities with a military character, and *vice versa*.[115] After thorough consideration of the material facts, which the tribunal divided into three phases, regarding the second phase, it left its decision as to whether or not there were military activities to the merits stage.[116]

② The Coastal State Rights Case (Preliminary Objections)

The same parties opposed each other in an arbitration case, the Coastal State Rights Case (preliminary objections).[117] In this case, too, "military activities" under Article 298, Paragraph 1 (b) were discussed. The gist of the decision is as follows.

First, the tribunal did not place weight on the entity that engaged in the activities of concern. It said that military activities need not necessarily be carried out by military vessels and aircraft, but can, instead, equally be performed by "government vessels and aircraft engaged in non-commercial service."[118] Second, while it is a factor to be considered, the mere involvement or presence of a military vessel is not sufficient to trigger the military activities exception of Article 298, Paragraph 1 (b).[119] The tribunal said that this is the meaning of Paragraph 1158 of the decision rendered by the arbitral tribunal on the South China Sea Dispute (merits).[120] Third, there is no consistent State practice as to the scope of activities to be regarded as being exercised

---

[111] *Ibid.*, paras.68–75.

[112] 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.

[113] *Ibid.*, para. 109.

[114] *Ibid.*, para. 89.

[115] *Ibid.*, para. 121.

[116] *Ibid.*, para. 125.

[117] *Supra* n. 66.

[118] *Ibid.*, para. 333.

[119] *Ibid.*, para. 334.

[120] In the Matter of the South China Sea Arbitration, an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between the Republic of the Philippines and the People's Republic of China, Award of 12 July, 2016, https://pcacases.com/web/sendAttach/2086, (hereinafter referred to as "the South China Sea Dispute"). This paragraph was invoked by Russia, *supra* n. 66, para. 308.

by "military" vessels, aircrafts, and personnel.[121] Use of "physical force" is not enough to conclude that an activity is military in nature. The broader context in which the alleged event took place should be considered.[122] Fourth, the mere involvement of military vessels or personnel in an activity does not *ipso facto* render the activity military in nature.[123]

These points almost echo those determined by ITLOS in the Detention Case. In addition, the following point deserves attention. The tribunal said that law enforcement forces, for example, are generally authorized to use physical force without their activities being considered military for that reason.[124] The tribunal clearly admits the use of weapons in law enforcement. While it is not entirely clear, the position of the tribunal seems to be different from that taken by the tribunal in the Guyana and Suriname Case. As confirmed above, in the latter, the tribunal seems to define military action as being wider than law enforcement, and so the former includes the latter. This seems to be similar to the interpretation of Article 2, Paragraph 4 of the UN Charter that the prohibition of the use of force is all-inclusive, as far as both do not admit a special category of the use of weapons for the purpose of law enforcement.[125] Separately, while some uncertainty remains, the tribunal in the Coastal State Rights Case instead admits a different category of the use of weapons from the use of force under Article 2, Paragraph 4 of the UN Charter, and the use of weapons in law enforcement and the use of force prohibited by international law form different categories from each other.

In the Coastal State Rights Case, the tribunal considered the "law enforcement activities" exception under Article 298, Paragraph 1 (b) of UNCLOS.[126] By taking the position that the status and the sovereign rights should be established beforehand for the purpose of the application of the "law enforcement activities" exception, the tribunal rejected Russia's objection.[127] This is because the sovereignty over Crimea and the status of the sea area concerned as an exclusive economic zone cannot be determined.[128]

Two points should be well considered before deriving general conclusions from the jurisprudence. First, the examination of Article 298, Paragraph 1 (b) of UNCLOS above all relates to the issue of judicial and arbitral jurisdiction.[129] Therefore, for instance, the issue of the interpretation of "concerning" not "arising from" in the provision does not have a direct relation to

---

[121] *Supra* n. 66, para. 335.

[122] *Ibid.*, para. 336. The tribunal considered the broader context in which the alleged event took place, and determined that the use of physical force alleged by Ukraine does not turn the dispute into one concerning military activities.

[123] *Ibid.*, para. 340.

[124] *Ibid*, para. 336.

[125] *Supra* n. 54.

[126] *Supra* n. 66, paras. 353–358.

[127] In this regard, Ukraine states that when a State is alleged to have violated UNCLOS in respect of another State's exclusive economic zone, the "law enforcement exception" does not apply; *ibid.*, para. 349. It relies on the rulings on the South China Sea Dispute and the Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation). *Infra* n. 138.

[128] *Supra* n. 66, paras. 356–358.

[129] It is interesting to consider what the impact of the CCGL is, which placed Chinese coast guard vessels under military control. Are the activities by Chinese coast guard vessels easily admitted as "military activities" under Article 298, Paragraph 1 (b) of UNCLOS? In this regard, one authority points out that the CCGL makes it difficult for rival claimants to overcome China's military activities exception in respect of future UNCLOS dispute settlement proceedings; see Alex P. Dela Cruz, "Marching towards Exception: The Chinese Coast Guard Law and the Military Activities Exception Clause of the Law of the Sea Convention," *The Journal of Territorial and Maritime Studies*, SUMMER/FALL 2021, Vol. 8, 5 and 17.

the issues that this article is examining. Second, from a broader perspective, in the background of the jurisprudence, there is more or less motivation of either widening or reducing judicial or arbitral jurisdiction. Third, that is not to mention that each case has its own inherent facts.

With serious reservation on these points, particularly from the analysis of the recent jurisprudence, nonetheless, we can derive useful guidance to treat the issues that this article is examining.

From the jurisprudence, it can be safely said that the tribunals recognize the use of weapons for the purpose of law enforcement. It is not clear whether such use of weapons forms an exception to the prohibition of the use of force under Article 2, Paragraph 4 of the UN Charter with the same rule of customary international law. The use of arms in law enforcement may set forth a different and sort of parallel category to the category of the use of force that comes under Article 2, Paragraph 4 of the UN Charter with the same customary international law. In this regard, some differences can be found between the explanation by the tribunal in the Guyana and Suriname Case and that by the tribunal in the Coastal State Rights Case. For the definite establishment of the use of arms in law enforcement, it would be more appropriate to admit an inherent category of the use of arms in law enforcement and to refine the international regulation thereon.[130]

The jurisprudence makes the distinction between the use of weapons in law enforcement and that in a military act. Nonetheless, it is not certain whether the tribunals understand this as two issues: the nature of the measures, and the nature of the use of weapons. Regarding the possibility of the difference between the nature of the measures and the nature of the use of weapons, is there a use of weapons accompanying law enforcement measures that is characterized as the use of force that Article 2, Paragraph 4 assumes? *Vice versa*, is there a use of weapons accompanying self-defense measures that is characterized as the use of arms in law enforcement?

This article sets the presupposition that the nature of the measures, in principle, decides the nature of the use of weapons. In what case would the qualification “in principle” be applied so as to admit an exception to the presupposition? It is difficult to answer this question in an abstract way. In individual cases, some factors might justify the exception. The jurisprudence declared the existence of flexibility in the distinction between law enforcement activities and military activities.[131] In addition, the tribunals took a position of conducting thorough consideration of the material facts, particularly in the Detention Case. In its preliminary objection stage, the tribunal even left its decision as to whether or not there were military activities to the merits finding. Considering these stances of the tribunals, they might admit the potential for the occurrence of a difference between the nature of the measures and the nature of the use of weapons accompanying them, depending on the individual factors in each case.

With respect to “military activities,” whereas the tribunals have a tendency to take a restrictive position on admitting the “military activities exception” under Article 298, Paragraph 1 (b) of UNCLOS, in contrast to this, there is a position of defining military vessels widely.[132] According to this position, the existence of military vessels is admitted even if they are not militarily equipped, not conducting military activities,[133] nor even carrying members of the navy or marines

---

[130] This is the “positive” position that this author has taken in examining the legal status of the use of weapons for the purpose of law enforcement. See “Maritime Security,” 43–44.

[131] See the analysis of the two cases above.

[132] Article 29 of UNCLOS provides for a definition of military vessels.

[133] This position is suggested by Lori Fisler Damrosch, “Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS,” *AJIL Unbound*, 110 (2016), 275.

on board.[134] As far as the jurisprudence examined above considers the entity implementing the measures and the use of weapons accompanying them, the wide understanding of military vessels may have some impact on the determination of "military activities." Such a wide definition of military vessels may relate to the interpretation of "non-innocent" passage of foreign vessels in territorial seas by this kind of vessels.[135] Here, it suffices solely to point this out.

Thus far, from the jurisprudence, some guidance has been derived to make the distinction between the use of arms in law enforcement and the use of force prohibited by international law unless justified mainly as self-defense. Based upon the above examination, the next part of this Section will look for possible tools to prove the nature of the use of arms in law enforcement. There are various tools for this, such as rules, rights, factors, and so on. A certain categorization will be provided, albeit a tentative one.

3. Possible Tools for Proving the Nature of the Use of Arms in Law Enforcement

(1) Provisions on Law Enforcement under UNCLOS and Other Relevant Treaties

As explained above, this author has examined the relevant provisions of mainly UNCLOS and the relevant treaties on law enforcement at sea elsewhere.[136] In addition to said examination, the following complementary consideration deserves attention.

First, UNCLOS and other treaties do not always have adequate provisions on law enforcement. Some provisions implicitly designate law enforcement, such as Article 2, Article 25, and Article 111 of UNCLOS. In addition, while Article 73 prescribes law enforcement on the conservation and management of living resources,[137] regarding structures[138] and marine scientific research in exclusive economic zones, UNCLOS does not clearly provide for law enforcement. Considering such facts, it is critical to precisely interpret all provisions that possibly set forth justification for law enforcement. Second, international law has not firmly established the definition of law enforcement, and similar activities may have the same function as law enforcement. One example is Article 21, Paragraph 1 of the 1995 Fisheries Stock Agreement, which provides for measures similar to but different from those of law enforcement at sea.[139] Third, even the various authorities' opinions are not in accord in relation to rights or right holders of law enforcement in cases of, for example, marine scientific research[140] and any uses of oceans in the disputed sea

---

[134] Bernard H. Oxman, "The Regime of Warships under the United Nations Convention on the Law of the Sea," *Virginia Journal of International Law*, 24 (1984), 813.

[135] See Article 19 of UNCLOS. In particular, Paragraph 1 may be interpreted as meaning that "non-innocence" is established based upon the kind of foreign vessels in question.

[136] "Maritime Security," 44–46.

[137] Coastal States of exclusive economic zones have jurisdiction on the protection and preservation of the marine environment, and Part XII of UNCLOS provides for precisely the distribution of the jurisdiction of law enforcement depending on sources of pollution and the sea areas where pollution occurs.

[138] In this regard, while Russia took law enforcement measures against the foreign vessel in the safety zone, the tribunal in the Arctic Sunrise Case (merits) did not take up the issue of the right of law enforcement with respect to structures of coastal States of exclusive economic zones; see In the Matter of the Arctic Sunrise Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (The Kingdom of the Netherlands and The Russian Federation) Award on Merits, 14 August 2015, paras. 242 *et seq*., https://pcacases.com/web/sendAttach/1438.

[139] Morikawa, *op. cit., supra* n. 49 (Kaijo Hoshikko), 657.

[140] Alfred H. A. Soons, "Law Enforcement in the Ocean—An Overview," *WMU Journal of Maritime Affairs,* 3 (2004), 5.

areas.[141] Therefore, in the following examination, a broad and thorough search of the possible tools is surely the most appropriate way of finding proof of the use of arms in law enforcement.[142]

(2) The Legal Nature of the Sea Areas Concerned and Rights in Relation Thereto

Several authorities have opined that the legal nature of the sea areas concerned and the coastal State's rights may provide, at least, the factors to be considered in order to prove that the nature of the measures and the use of arms accompanying them are law enforcement.[143] In addition to the provisions of UNCLOS and other treaties[144] that expressly and implicitly admit the right to take law enforcement measures to coastal States, sovereignty over territorial seas,[145] sovereign rights and jurisdiction over exclusive economic zones[146] may form the ground for law enforcement by coastal States.[147] In this regard, the difference of the object and purpose of these rights and the legal status of the sea areas should be carefully considered.

Coastal States exercise sovereignty over territorial seas and internal waters to protect their peace, good order and security.[148] By contrast, coastal States of exclusive economic zones exercise sovereign rights and jurisdiction. Exclusive economic zones are not high seas nor territorial seas, either.[149] When Article 25 and Article 30 regarding territorial seas apply *mutatis mutandis* to exclusive economic zones, depending on the territorial sea or exclusive economic zone, different considerations are needed regarding the relationship between the rights of the coastal States, on the one hand, and the right of navigation of foreign vessels[150] and the immunity that they enjoy,[151]

[141] *Ibid.* That is not to mention that Article 74, Paragraph 3 and Article 83, Paragraph 3 provide for the obligations of the State concerned with respect to maritime delimitation for exclusive economic zones and the continental shelf. However, these provisions do not make clear which of the States concerned has the right of law enforcement on which use of oceans and the seabed, and to which States the State concerned owes the obligations: the other party to the dispute on delimitation, third States, or both. See Atsuko Kanehara, "Marine Scientific Research Conducted in Disputed Sea Areas Including Seabed Where Delimitation Is Not Agreed—An Analysis from General and Particular Perspectives of the East China Sea," in Keyuan Zou and Anastasia Telesetsky eds., *Marine Scientific Research, New Marine Technologies and the Law of the Sea*, (Brill/Nijhoff, 2021), 206–223.

[142] Regarding the competence of law enforcement, a special case is the I'm Alone Case. In this case, it was the license or faculty to take measures provided for by the Convention concluded between the U.S. and the UK; see Fitzmaurice, *op. cit., supra* n. 85, 96.

[143] Mainly in relation to exclusive economic zones; Rob McLaughlin, "Coastal State Use of Force in the EEZ under the Law of the Sea Convention 1982," *University of Tasmania Law Review*, (1999), 13–19.

[144] Certainly, customary international law rules should never be excluded.

[145] While UNCLOS does not have explicit provisions on this, there is no argument that coastal States have sovereignty over internal waters.

[146] In reality, law enforcement on the continental shelf is, from a physical standpoint, difficult to assume.

[147] McLaughlin, *op. cit., supra* n. 143, 13–19.

[148] Regarding territorial seas, Article 19, Paragraph 1 of UNCLOS clearly provides for them.

[149] Rüdiger Wolfrum "Restricting the Use of the Sea to Peaceful Purposes: Demilitarization in Being?," *German Yearbook of International Law*, 24 (1981), 237; A. V. Lowe, "Some Legal Problems Arising from the Use of the Seas for Military Purposes," *Marine Policy*, 10 (3) (1986), 178.

[150] For territorial seas, it is the right of innocent passage, and for exclusive economic zones, it is the freedom of navigation. On the high seas and in exclusive economic zones, regarding the legal interests on the side of the vessels targeted by the law enforcement, stateless ships would raise particular issues. See Allyson Bennett, "That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act," *Yale Journal of International Law,* 37 (2) (2012), 433–462; Ted L. McDorman, "Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference," *Journal of Maritime Law and Commerce,* 25 (4) (1994), 531–556.

[151] Lowe, *op. cit., supra* n. 149, 180–181.

on the other hand.

Coastal States of exclusive economic zones exercise their sovereign rights and jurisdiction for their own interests and/or the common interests of international society. For instance, while coastal States of exclusive economic zones have jurisdiction over marine environmental protection, such protection is not only in the interest of the coastal State but also that of international society. With respect to the sovereign right over the fishery resources of exclusive economic zones, ITLOS implicated that it should be exercised for the common interest of international society in its advisory opinion on the request for an advisory opinion submitted by the SRFC.[152] The following points reflect such a position by ITLOS. ITLOS emphasizes not the sovereign "right" of coastal States for the purpose of exploring and exploiting, conserving and managing the natural resources, but their responsibility for it.[153] Furthermore, it declared that the conservation and management of fishery resources form part of the marine environment.[154]

These examinations are based upon the ocean zone system under the law of the sea that forms the legal bases of the rights and jurisdictions of coastal States. There are even cases that depart from the ocean zone system.

First, when law enforcement is internationally authorized by, for instance, the resolutions of the UN Security Council, the "law" may become international law, rather than the domestic laws of the States taking the enforcement measures concerned.[155] With international authorization, even in foreign territorial seas where such law enforcement is conducted, the legal status of the territorial seas will change to international sea areas rather than the territorial seas of coastal States.[156] Second, when the coastal States of internal waters are allowed to take enforcement measures against foreign vessels beyond internal waters, their justification would not consist of the legal status of sea areas based upon the ocean zone system.[157] In addition, law enforcement according to Article 111 of UNCLOS in the high seas and foreign exclusive economic zones is an exercise of the right of the coastal State of a territorial sea, contiguous zone, exclusive economic zone, and continental shelf, depending on the place where the violations of the domestic laws of the coastal State occur. The pursuit regime itself departs from the ocean zone system. Third, in respect to the same right of coastal States and the rights of coastal States on the same matter (ocean use), the legal interests to be protected by these rights are various. For instance, regarding submarine cables and pipelines, the relevant interests may be natural resources and/or security.[158] Thus, when justifying the law enforcement by coastal States, the rights of coastal States may form the justification, but, in addition to that, the legal interests to be protected by the law enforcement may further substantiate the justification.

As to the legal interests of coastal States, when the security of coastal States is concerned, this

---

[152] Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) Advisory Opinion of 2 April 2015, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-adop.E.pdf.

[153] *Ibid.*, para. 104.

[154] *Ibid.*, para. 120.

[155] McLaughlin, *op. cit., supra* n. 49, 481.

[156] Regarding this issue, see, for instance, Rob McLaughlin, "United Nations Mandated Naval Interdiction Operations in the Territorial Sea?" *International and Comparative Law Quarterly*, 51 (2002, April), 264–267; by the same author, "The Continuing Conundrum of the Somali Territorial Sea and Exclusive Economic Zone," *International Journal of Marine and Coastal Law*, 30 (2015), 305 *et seq.*; Martin D. Fink, "UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector," *Military Law and The Law of War Review*, 50 (2011), 245–258.

[157] Regarding the cases of internationally authorized operations, see, for instance, *ibid.*, 248–249.

[158] As a similar consideration, see Lowe, *op. cit., supra* n. 149, 179–180.

raises the issue of the relationship between the right of self-defense under Article 51 of the UN Charter and general international law, on the one hand, and the right of coastal States under the law of the sea, on the other hand. This will be examined later, particularly in relation to coastal States' measures against foreign vessels that enjoy immunity.[159]

(3) Factors to Be Considered as the Proof of the Nature of the Use of Arms in Law Enforcement

Different from legal rights and the legal status of sea areas, there are factors that are useful for proving the nature of the use of arms in law enforcement. A number of authorities have suggested various factors. They are the same, to a significant degree, as the factors that several authorities have discussed for deciding the precise coverage of the prohibition of the use of force under Article 2, Paragraph 4 of UN Charter.[160]

① Actors

Actors are, in two ways, a factor to be considered: as actors of law enforcement and as the target thereof. They may be both vessels and individuals. In dealing with law enforcement at sea, it is not unreasonable to focus upon vessels.[161]

Regarding actors of law enforcement and the use of weapons concerned, one authority opines that without authorization, any boarding measures (by any actors) against foreign vessels mean the threat of force (under Article 2, Paragraph 4 of the UN Charter). This could be justified principally as an exercise of the right of self-defense.[162] This position is understandable if it is based upon the rigid interpretation of Article 2, Paragraph 4 of the UN Charter such that the provision applies to law enforcement at sea.[163] As explained above,[164] this article does not take such a position. Rather this article is of the position that this provision does not prohibit any use of weapons in an all-inclusive manner, and that it allows some room for the legal use of weapons. Nevertheless, seriously taking into consideration the concern over the potential abuse of such room, as claimed by the aforementioned rigid interpretation, this article seeks to clarify the use of arms in law enforcement as much as possible, and to propose any possible tools for thoroughly proving the nature of the use of arms in law enforcement.

Regarding actors that are the target of the law enforcement, these are commercial vessels, warships and other government ships operated for non-commercial purposes.[165] Later, Section IV and Section V will conduct a special examination of the issue of vessels that enjoy immunity.

---

[159] Section IV and Section V.

[160] The factors are, for instance, the scale of the violence on both the side of the wrongdoers and those subjected to the use of weapons, the nature of the wrongdoers involved, the political intent of the wrongdoers, and the legal interests being infringed by the violence of the wrongdoers; see "Maritime Security," 49 and the footnote thereto.

[161] Depending on domestic laws, ships and/or individuals are the targets of law enforcement.

[162] Guilfoyle, *op. cit., supra* n. 54, 293.

[163] See *supra* n. 54.

[164] Section I, 3.

[165] If the actors are militia, it may raise an inherent question. While this article does not go into detail on this question, see, for instance, Andrew Erickson and Conor Kennedy, "Countering China's Third Sea Force: Unmask Maritime Militia before They're Used Again," *The National Interest,* 6 July 2016, https://nationalinterest.org/feature/countering-chinas-third-sea-force-unmask-maritime-militia-16860?page=0%2C1; James Kraska, "China's Maritime Militia Vessels May Be Military Objectives During Armed Conflict," July 07, 2020, *The Diplomat* https://thediplomat.com/2020/07/chinas-maritime-militia-vessels-may-be-military-objectives-during-armed-conflict/.

② Character of the Actors

Frequently, when warships are involved either as actors of law enforcement or as the targets of law enforcement, the question arises as to whether the character of the actors, or the character of the organs to which they belong, decides the nature of the measures and the nature of the use of weapons accompanying them. In this regard, as confirmed above, the recent jurisprudence denies that the involvement of warships or military vessels alone determines that the measures and the use of weapons are military in nature, although it admits that character is a factor to be considered.[166]

This issue relates to the definition of warships.[167] ITLOS did not have the opportunity to consider Article 298, Paragraph 1 (b) of UNCLOS in the ARA Libertad Case (provisional measures),[168] which dealt with a case in which Argentinian naval vessels entered Ghanaian waters on a training mission. Whether the naval vessels *per se* enjoy immunity can be questioned.[169] One authority opined that warships enjoy immunity, even if they are not militarily equipped, and even if they are not conducting military activities.[170] As explained above, this position may have an impact on the determination of "military activities," as far as the tribunals consider the entity with its character implementing the measures and the use of weapons accompanying them.[171]

It is indispensable to remember that the jurisprudence examined above entertained the cases before them in the special context of the alleged application of the "military activities" exception for the compulsory jurisdiction under UNCLOS. It considered this issue as an interpretation of Article 298, Paragraph 1 (b).[172] Different to that, this article is searching for any tools for proving the use of arms in law enforcement. For that purpose, it is important to take note of the wide definition of warships with their military nature. This means that, depending on individual cases, law enforcement conducted by warships without military equipment and without members of the navy or marines on board may be alleged to be military activities and the use of force.[173]

③ Factors that Decide the Nature of Situations

This article adopts the terminology "situations," the nature of which is the same as that of the measures involved. Therefore, in some sense, in a circular manner, self-defense situations are those under which the use of force takes place,[174] and law enforcement situations are those under which law enforcement measures are taken.[175] A number of authorities have suggested various factors that indicate the nature of situations.

These are the interests that the measures are aimed at protecting, such as safety, the good

[166] The Detention Case (provisional measures), *supra* n. 66, para. 64. The Coastal State Rights Case, *supra* n. 66, para. 334.

[167] Article 29 of UNCLOS provides for this.

[168] The "ARA Libertad" Case (Argentina v. Ghana), (provisional measures), Order of 15 December 2012, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf (hereinafter referred to as "the ARA Libertad Case").

[169] Damrosch, *op. cit., supra* n. 133.

[170] Oxman, *op. cit., supra* n. 134.

[171] This Section, 2.

[172] *Supra* n. 98.

[173] One authority has pointed out the lack of law enforcement vessels in many countries, and that, thus, military vessels are used for law enforcement; see Kwast, *op. cit., supra* n. 4, 63–64.

[174] Also, they may be described as situations under which Article 2, Paragraph 4 and/or Article 51 of the UN Charter apply.

[175] Also, they may be described as situations under which the law enforcement provisions of UNCLOS, such as Articles 25, 73, and 110 apply.

order of oceans, national security, conservation and management of natural resources, and marine environmental protection. Not only the national interests of the law enforcement States, but also the common interests of international society are to be protected by law enforcement measures that are taken in accordance with, for instance, the resolutions of the UN Security Council. There could be a case in which the UN Security Council decides and even changes the nature of situations by the collective intention of international society.[176] Such indications of certain interests are very similar to those that are reflected by the rights and the legal status of the sea areas as tools for proving the use of arms in law enforcement.[177]

Those interests may, to a certain degree, provide indications for identifying the character of a particular situation. Nonetheless, as the aforesaid jurisprudence suggests, thorough consideration of the facts and factors in each case is critical for finally determining the nature of situations, and, thus, the nature of the measures and the nature of the use of weapons accompanying them. In this regard, the use of the expression "violent acts at sea" reflects the same line of thinking as this. "Violence" can have a wide meaning, spanning a violent act in committing a crime at sea and the use of force, and it may change from one to the other with there even being violence in-between.[178]

Thus far, this Section has examined the jurisprudence and various tools for proving the use of arms in law enforcement. The next Sections will analyze, as a special issue, the legal nature of the measures and the use of weapons accompanying them to be taken by coastal States in their territorial seas against foreign vessels that enjoy immunity. This is an issue that may relate to the relationship between the *jus ad bellum* and the law of the sea. In addition, this issue has troubled Japan for a long time as it has faced Chinese government vessels and warships that periodically enter Japan's territorial sea surrounding the Senkaku Islands.[179] After a succinct general examination, a particular consideration of Japan's case will follow.

IV. Measures by Coastal States against Foreign Vessels That Enjoy Immunity: General Examination of the Issue Concerned

As for the immunity of government vessels and warships in foreign territorial seas, Article 32 of UNCLOS reads:

> With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

Thus, warships and government ships operated for non-commercial purposes (hereinafter

---

[176] Regarding piracy and international terrorism, setting aside the issue whether the common interest of the international society and/or the national interest of the victim States are in danger, the traditional idea is to combat them through a law enforcement function. However, depending on the scale and seriousness of the circumstances, the UN Security Council has determined certain situations in which international peace and security are threatened. On this issue, see Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia," *The European Journal of International Law*, 20 (2) (2009), 400–401.

[177] See this Section III, 3. (2).

[178] Koichi Morikawa "Kaijo Boryoku Koi [Violent Act at Sea]," in Soji Yamamoto ed., *Kaijo Hoan Hosei–Kaiyo Ho to Kokunai Ho no Kosaku* [Laws on Coast Guard—Interplay between the Law of the Sea and Domestic Law], (Sanseido, 2009), 294.

[179] See the Introduction, 2.

referred to as "government ships") enjoy immunity.[180] The phrase "With such exceptions as are contained in subsection A and in articles 30 and 31," has raised complicated interpretative and even confusing issues regarding the coverage of the immunity. Here, the purpose is not to consider in detail such interpretative issues, while some will be examined. Rather, it will be simply presupposed that warships and government ships enjoy immunity under Article 32.[181] Measures by coastal States of territorial seas may have different implications and impacts on the targets, depending on whether they are warships and government ships.[182]

Article 30 of UNCLOS reads:

> If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately.[183]

As far as warships hold immunity, when they violate the laws and regulations of the coastal State of a territorial sea, the latter can solely require them to leave the territorial sea.[184] As far as this limits the measures that coastal States are allowed to take, it can be said that Article 25[185] does not apply to warships, or that "the necessary steps" under Article 25, Paragraph 1 are confined to asking the warships to leave the territorial sea. This is one of the interpretative issues that the phrase "Wits such exceptions as are contained in subsection A and in article 30 and 31" of Article 32 may raise. While under Article 30, there is no mention of government ships, this restriction on the measures that the coastal State may take should be the same as in cases of warships.[186]

When warships are not violating the laws and regulations of the coastal State of a territorial

---

180 As an examination of the significance of the immunity of warships, see Ingrid Delupis, "Foreign Warships and Immunity for Espionage," *The American Journal of International Law*, 78 (1) (1984), 53–57. Another authority discusses how the immunity of warships is derived from law enforcement jurisdiction but not from prescriptive jurisdiction; see Isabelle Pingel, "L'immunité des navires de guerre," in *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec,* (A. Pedone, 2003), 296, footnote, n. 29.

181 Regarding Article 32 in the context of the ARA Libertad Case, see Massimo Lando, "State Jurisdiction and Immunity of Warships in the ARA Libertad case," *Japanese Yearbook of International Law*, 58 (2015), 348–353.

182 As for consideration of this issue in a detailed manner, see Naoya Okuwaki, "Ryokai ni Okeru Gaikoku Kosen ni Taisuru Shikko Sochi [Law Enforcement against Foreign Government Vessels]," in *Kaiyo Keneki no Kakuho ni Kakaru Kokusai Hunso Jirei Kenkyu (Dai 2 Go)* [Case Studies on Maintenance of National Interest at Sea (No. 2)], (Kaijo Hoan Kyokai, 2010), 1–4. As confirmed in the Introduction, under Article 83 of the CCGL, Chinese coast guard ships perform defense operations. In this sense, when coping with Chinese vessels, the distinction between warships and government ships may lose its significance. For instance, in predicting the impact of measures taken by Japan with the use of weapons, the issue whether they are against Chinese warships or government ships is not substantially significant. Whichever the target of the measures may be, a serious and tense circumstance will inevitably occur.

183 While this article will not elaborate on the issue, Article 236 of UNCLOS provides for the immunity from law enforcement measures for protecting the marine environment. See Oxman, *op. cit., supra* n. 134, 819-820. Regarding the use of weapons in law enforcement for marine environmental protection, see Jinxing Ma and Shiyan Sun, "Restrictions on the Use of Force at Sea: An Environmental Protection Perspective," *International Review of the Red Cross: War and Security at Sea,* 98 (2) (2016), 515–541.

184 Some States have detailed rules for this requirement of leaving; see Tian Shichen, "The Legal Status of Foreign Warships in Territorial Seas," *China Oceans Law Review*, 2007 (2), 365–366.

185 Paragraph 1 of Article 25 reads:

> The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.

186 Regarding the possible different treatments of warships and government ships, see Okuwaki, *op. cit., supra* n. 182, 2–3.

sea, there is a case in which their activities are prejudicial[187] to the peace, good order or security of the coastal State.[188] In such a case, what measures could the coastal State take?[189] Would Article 25 that allows coastal States to take "necessary steps" apply without the restriction being set forth by Article 30? A literal interpretation of Article 30 would allow such an interpretation, whereby Article 30 applies solely to the case in which foreign warships violate laws and regulations. However, the issue regarding the relationship between the immunity of the warship and the coastal State's right to take the necessary steps remains. Is it possible for the coastal State to take measures beyond asking the warship to leave, without infringing upon its immunity? Even if the answer is positive, this would inevitably lead to heightened and aggravated tension between the States concerned.[190]

As far as the immunity means immunity from any exercise of law enforcement measures, irrespective of the degree of its coerciveness, even asking a warship to leave might be an infringement of its immunity. If so, Article 30 is interpreted, as an exception, as allowing the coastal State to ask the warship to leave, even though this is an infringement of its immunity. Here comes the issue of the interpretation of Article 32, in respect to its phrase "With such exceptions as are contained in subsection A and in articles 30 and 31." Without going into the detailed examination, solely the confirmation of the following points is useful. On the one hand, the coastal State may take the measures under Article 30 as an exception of the immunity. In other words, the measures under Article 30 do violate the immunity, but the coastal State is allowed to take them as an exception. On the other hand, it could be said that the measures under Article 30 do not violate the immunity due to their non-coercive nature.

Even according to the interpretation of immunity in the strongest way, against a warship that does not violate the laws and regulations of the coastal State, as is the case that Article 30 assumes, but whose acts[191] are prejudicial to the peace, good order, or security of the coastal State, the coastal State could, at most, ask the warship to leave the territorial sea. Article 30 might apply, in some sense, *mutatis mutandis*, to such a case. If a request to leave does not violate the immunity, there would be no problem of the violation of the immunity by such a request. Then, can the coastal State take more coercive measures?

From this article's perspective, the point is not the coverage or applicability of the immunity, but the nature of the use of weapons accompanying the measures, if the measures of the coastal State infringe upon the immunity of warships. In other words, the question is whether there is any justification for the coercive measures even with the use of weapons and, therefore, whether the nature of the measures can remain that of law enforcement, with the nature of the use of weapons

---

[187] The existence, itself, of warships may be prejudicial. This is the traditional issue regarding the meaning of "non-innocence," and the issue of the relationship between Paragraphs 1 and 2 of Article 19 of UNCLOS. However, all ships have the right of innocent passage under Article 17 of UNCLOS, and according to several authorities, "non-innocence" should be determined by the concrete activities under Paragraph 2 of Article 19, not by the kinds of vessels involved. This article will not go into the details of this. Here, it is enough to confirm that the activities of warships can be presupposed to be prejudicial to the peace, good order or security of the coastal State.

[188] As for a detailed analysis of this issue, see Froman, *op. cit., supra* n. 98, 660–665.

[189] Regarding this point, see Francesco Francioni, "Use of Force, Military Activities, and the New Law of the Sea," in A. Cassese ed., *The Current Legal Regulation of the Use of Force,* (Martinus Nijhoff Publishers, 1986), 264.

[190] As will be examined later, if the use of weapons accompanies the measures by the coastal State, the nature of the use of weapons should be considered in such a tense circumstance.

[191] Depending on the interpretation of Article 19, Paragraph 1, and of the relationship between Article 19, Paragraph 1 and Paragraph 2, the presence or existence of foreign warships may be prejudicial to the peace, good order, or security of the coastal State.

being the use of arms in law enforcement. It is not to mention, however, that the possibility of the worst-case scenario is not denied, which means the change of the situation from that of law enforcement to that of self-defense.

As for the justification for the use of weapons in law enforcement, in such a case, the balance of interest is to be considered.[192] On the side of the warship, an infringement of its immunity would breach its dignity and sovereignty.[193] On the side of the coastal State, the activities of the warship, which are prejudicial to the peace, good order or security, would infringe upon those interests and the coastal State's sovereignty over the territorial sea and cause potential harm to its security.[194] If the coastal State is not allowed to take any enforcement measures against the warship other than a request to leave from its territorial sea, these interests and sovereignty would be infringed upon. In addition, even if the warship should be allowed to maintain its immunity, there still remains the issue of the potential abuse of its immunity.[195]

In contrast, as a different position, in such a case, the immunity could be denied. The sovereign immunity is based upon the most fundamental principle of respect for sovereignty under international law. In the case concerned, the activities of the warship are prejudicial to the peace, good order, or security of the coastal State, which means posing a risk to its sovereignty. When the coastal State's sovereignty is in danger of or in fact being infringed upon, it is not reasonable for it to be imposed with respecting the immunity of the warship. The sovereignty of the warship and that of the coastal State are evenly at stake. Considering this, it is not fair to require the coastal State to respect the immunity of the warship, and accordingly the sovereignty of the warship.[196]

The same could be said for cases in which the warship violates the laws and regulations of the coastal State and at the same time poses a risk to the peace, good order, or security of the coastal State, thus, a risk to its sovereignty.[197] In such cases, beyond the restriction under Article 30, the coastal State should be allowed to take measures to protect its sovereignty.

---

[192] It is necessary to precisely examine immunity at sea under the law of the sea, and that under general international law. Furthermore, immunity at sea may have different meanings depending on the sea areas concerned, as the interests of the States that take law enforcement measures may change depending on the sea area concerned, such as their territorial seas, exclusive economic zones, or high seas. Therefore, Article 32, on the one hand, and Articles 95 and 96, on the other hand, require different considerations when examining the interests at stake of the States concerned. For such an analysis, see Francioni, *op. cit., supra* n. 189, 362–373.

[193] In the Detention Case (provisional measures), ITLOS, referring to the ARA Libertad Case, said:

> "(A) warship, as defined by article 29 of the Convention, 'is an expression of the sovereignty of the State whose flag it flies'. This reality is reflected in the immunity it enjoys under the Convention and general international law. The Tribunal notes that any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security."

Ibid., para. 110. It deserves attention that the tribunal mentions both immunity under UNCLOS and that under general international law. It might recognize the difference between the immunity under UNCLOS and that under general international law.

[194] Regarding the interests of the coastal States of territorial seas, see Soji Yamamoto, "Mugai Tsuko ni Ataranai Ryokai Shinpan [Invasion of Territorial Seas by Non-Innocent Passage]," in *Wagakuni no Shin Kaiyochitsujo* [New Maritime Order of Japan], (Kaijo Hoan Kyokai, 1990), 72–76.

[195] Roma Sadurska, "Foreign Submarines in Swedish Waters: The Erosion of an International Norm," *Yale Journal of International Law*, 10 (1984), 55.

[196] "Japan's Integrative Position," 1626–1630.

[197] As for a similar position, see Soji Yamamoto, "Mugai Tsuko Ken to Engankoku no Kankatsuken Koshi no Genkai [Innocent Passage and the Limits on the Exercise of the Coastal State Jurisdiction]," *Wagakuni no Shin Kaiyochitsujo* [New Maritime Order of Japan], 2 (Kaijo Hoan Kyokai, 1989), 84.

Then, the critical remaining issue is whether such measures of the coastal State, even with the use of weapons, could retain the nature of law enforcement, and whether the use of weapons could also retain the nature of the use of arms in law enforcement.

In this regard, a number of authorities mention the right of self-defense, particularly in relation to the use of weapons accompanying the measures that are assumed, here, to be taken by coastal States.[198] As a similar issue, authorities refer to non-innocent passage of a foreign submarine in territorial sea,[199] and an onboard measure by a State against foreign government vessels and warships suspected of engaging in piracy in exclusive economic zones.[200] In addition, the following question is raised: When a warship conducts marine research but it is not "marine scientific research" that falls under UNCLOS,[201] what is the nature of the measures that can be taken against it by the coastal State of the exclusive economic zone?[202]

In a comparative analysis of these various facts and cases, not to mention a thorough examination thereof, not only the interests at stake of the States concerned, but also the following points should be carefully considered in a detailed manner. These are the scale of the coerciveness of the measures and that of the use of weapons accompanying them on the side of the coastal State that takes the measures and, on the side of the warships, the persistent nature of the violations of the laws and regulations of the coastal State,[203] and the continuous existence of the warship in the territorial sea irrespective of the request for it to leave.[204]

Thus, several authorities have discussed the right of self-defense of the coastal State[205] that takes measures with the use of weapons against warships and government ships enjoying immunity.[206] Is such a use of weapons solely characterized as an exercise of the right of self-

---

198 As for discussing such an issue, see the following authorities: Oxman, *op. cit., supra* n. 134, 815; Delupis, *op. cit., supra* n. 180, 72; Lowe, *op. cit., supra* n. 149, 176 and 180. As for a prudent position on this point, see Okuwaki, *op. cit., supra* n. 182, 6.

199 Sadurska, *op. cit., supra* n. 195, 34–38.

200 Oxman, *op. cit., supra* n. 134, 824.

201 It is problematic that UNCLOS does not give any clear definition of "marine scientific research."

202 Oxman, *op. cit., supra* n. 134, 846. A hypothetical case is mentioned in which activities that are disguised as "marine scientific research" could be conducted by Chinese government vessels and said research activities may mean preparation for a war, which would infringe upon the territorial integrity of Japan; see Okuwaki, *op. cit., supra* n. 182, 10.

203 R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., (Juris Publishing, Manchester University Press, 1999), 99; McLaughlin, *op. cit., supra* n. 143, 19; Sadurska, *op. cit., supra* n. 195, 55.

204 In that case, the warship should lose its immunity; see Akira Mayama, "Ryokai ni Aru Gaikoku Gunkan ni Taisuru Kyoryokuteki Sochi ni Kansuru Oboegaki [Memorandum on Forcible Measures against Foreign Warships in Territorial Sea]," *Kokusai Anzenhosho [International Security]*, 35 (1) (2007), 46. Mayama examines the coercive measures against warships as those holding the nature of law enforcement, *ibid*., 47.

205 In addition to the authorities cited at *supra* n. 198 above, see Shearer, *op. cit., supra* n. 81, 441.

206 In a different context, the use of force is discussed in cases in which there are threats from the global commons, Stuart Kaye, "Threats from the Global Commons: Problems of Jurisdiction and Enforcement," *Melbourne Journal of International Law*, 8 (1) (2007), 185 *et seq*.

defense?[207] Is there a different possibility to explain such a use of weapons?[208] It may be unreasonable to require the coastal State to satisfy the requirements for an exercise of the right of self-defense.[209] Herein lies the issue of the relationship between the law of the sea and the law of the use of force.[210] It is far beyond this article's examination to thoroughly discuss such a difficult issue.[211] However, the following points could be mentioned.[212]

If such a use of weapons is an exercise of the right of self-defense, it needs to satisfy the requirements for exercising said right.[213] Rather, as an issue under the law of the sea, such a use of weapons could be characterized in a different manner from the right of self-defense under the *jus ad bellum*. It could be defined as a sort of right of coastal States to take law enforcement measures with a use of weapons for protecting their sovereignty, peace, good order, or security in relation to their territorial seas. Such a right of coastal States does not necessarily go beyond the sphere of the law of the sea, but is instead under it, or it might be called the right existing in-between or in the gap between the law of the sea and the *jus ad bellum*.[214] Furthermore, persistent violations of the laws and regulations of coastal States and repeated disregard for requests to leave on the side of warships and government ships are not only infringements of these values of the coastal States, but also challenges against the regime itself of the territorial sea as a core pillar of the law of the sea, as well as territorial sovereignty as a core pillar of international law.[215]

If one takes this position that admits certain justification for such a use of weapons, the critical issue is how to prevent the abuse of such a right to use weapons in order to maintain the important significance of the prohibition of the use of force, which has fundamental value for international law. Providing a direct and perfect solution to this issue would be tremendously difficult. There are standards for evaluating the legality of the way to use of arms in law enforcement, such as the standards of reasonableness, necessity, and proportionality that international practice, including the jurisprudence, has established. These standards regulate the way to use weapons, and they do not provide direct justification for the use of weapons

---

[207] One authority sets forth the categorization of the laws applicable to the use of force depending on the legal basis for actions in the limited context of interception under the Proliferation Security Initiative; see Craig, *op. cit., supra* n. 80, 96–110.

[208] Regarding the Pueblo incident and similar ones, see George H. Aldrich, "Questions of International Law Raised by the Seizure of the U.S.S. Pueblo," *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)*, 63 (1969), 2–6; Francioni, *op. cit., supra* n.189, 365–366; Sadurska, *op. cit., supra* n. 195, 34–38.

[209] Regarding this point, see Mayama, *op. cit., supra* n. 204, 48–50; Delupis, *op. cit., supra* n. 180, 72; Froman, *op. cit., supra* n. 98, 674 and 683; Francioni, *op. cit., supra* n. 189, 364.

[210] This article does not touch upon the legal standards that regulate the way to use of weapons either as law enforcement or self-defense. The latter belongs to *jus in bello*. Thus, here, this law can be said to be *jus ad bellum*.

[211] For instance, see Lowe, *op. cit., supra* n. 149; Wolfrum *op. cit., supra* n. 149.

[212] As a related issue, there is discussion of whether the use of weapons against a commercial ship without legal justification or without proportionality, would become the use of force against the flag State of the target ship; see Wolff Heintschel von Heinegg, *op. cit., supra* n. 101, 460–426.

[213] The ICJ dealt with the requirements for the exercise of the right of collective self-defense in the Nicaragua Case (merits), *supra* n. 50, para. 232. This article will not go into the details of the requirements to be satisfied for an exercise of the right of self-defense, both under Article 51 of the UN Charter and under general international law.

[214] Francioni, *op. cit., supra* n. 189, 363–367; Dale G. Stephens, "The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations," in Donald R. Rothwell ed., *Law of the Sea*, (Edward Elgar Publishing Limited, 2013), 294–296.

[215] "Japan's Integrative Position," 1624.

itself. Nonetheless, it could be reasonably expected that they should have a certain degree of significance for preventing the abuse of such a right to use weapons exercised by coastal States in taking measures against warships and government ships that enjoy immunity.[216] In addition, based upon a comparative analysis of similar facts and cases that have been already suggested by various authorities as seen above, and by balancing the interests at stake of the States concerned and thoroughly considering the various facts in each case, it could be possible to determine the legality of such a use of weapons. These existing standards and possibly the accumulation of actual practice could be expected to discharge the function of preventing the abuse of such a use of weapons.

This article is examining the law enforcement measures and the use of arms in law enforcement. From this perspective, here, it has sought for the justification for a use of weapons, as that accompany law enforcement measures, against foreign warships and government vessels that infringe the sovereignty and security of the coastal State. It is not to mention that as the worst-case scenario, the situation would change from that of law enforcement to that of self-defense, and in that case, the coastal State would exercise the right of self-defense.

The next and last Section will succinctly introduce Japan's position in relation to this issue.

V. Japan's Position with Respect to Measures to Be Taken against Warships and Government Ships That Enjoy Immunity[217]

The Introduction of this article succinctly explained the circumstance in which Japan has been facing China's warships and government ships in Japan's territorial sea surrounding the Senkaku Islands.[218]

For more than a decade, China has periodically sent its government vessels and warships to Japan's territorial sea surrounding the Senkaku Islands.[219] These vessels enjoy immunity under Article 32 of UNCLOS. As examined above, if Japan takes coercive measures, in some cases even using weapons,[220] authorities indicate that the scenario would change from one under the law of the sea to one to be regulated by the law on the international peace and security. Based upon the analysis in the previous section, various considerations are needed to legally evaluate such a possible use of weapons.

What has China conducted in Japan's territorial sea surrounding the Senkaku islands? China has, as a matter of fact, frequently dispatched its coast guard vessels and military ships to these sea areas.[221] There, China has taken law enforcement measures against Chinese fishing boats and even against Japanese fishing boats.[222] This is based upon its understanding that the sea areas

---

216 Stephens, *op. cit., supra* n. 214, 309; Francioni, *op. cit., supra* n. 189, 363–365.

217 This author has already introduced Japan's position elsewhere, in a full manner, and the gist of it will be given in the coming Section. See also Kanehara, *op. cit., supra* n. 28.

218 As for coast guarding of Japan's territorial sea, see Atsuko Kanehara, "Ryokai Keibi ni Kakaru Ho Seibi no Teigen [A Proposal on Indispensable Legislative Measures for Coast Guarding of Japan's Territorial Sea]," *Sophia Law Review*, 65 (4) (2022), 11–57.

219 See "Japan's Integrative Position," 1594–1595.

220 Some measures, such as shouldering, do not necessarily accompany the use of weapons but are coercive.

221 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* (26 August 2016), https://www.mofa.go.jp/files/000180283.pdf.

222 Jun Kitamura, "Tracking Japanese Fishing Boats off the Coast of the Senkaku Islands, Making a New Established Fact that China has Struck," *The Asahi Shimbun Globe,* 18 June 2020, https://globe.asahi.com/article/13461863.

surrounding the islands concerned are its territorial sea.[223] In addition, Chinese fishing vessels also come to these sea areas. Their number has even reached a few hundreds.[224] Furthermore, it is said that these fishing vessels are, in some cases, also militia vessels.[225]

With respect to the interests at stake, Chinese warships and government ships (where appropriate, they will be designated as "Chinese vessels") enjoy immunity under Article 32 of UNCLOS. On the one hand, if Japan takes measures against them beyond that which it is allowed to take under Article 30, and, as long as Chinese vessels maintain said immunity, it would infringe upon China's sovereignty. On the other hand, the activities of the Chinese vessels have violated Japan's sovereignty,[226] as they have conducted law enforcement in Japan's territorial sea. The huge number of Chinese fishing boats are said to be militia, in which case, Japan's peace and security are seriously endangered.

Setting aside the issue of the compatibility of the activities of Chinese vessels with Japan's laws and regulations, there is no doubt that they are prejudicial to the peace, good order or security of Japan under Article 19, Paragraph 1 of UNCLOS. In addition, Chinese vessels have entered Japan's territorial sea "periodically,"[227] and their activities and disregard for Japan's requests to leave have been persistent.

Japan has thus far repeated its requirement that the Chinese vessels leave Japan's territorial sea.[228] No further measures have been taken by the JCG. Japan made a cabinet decision on 14 May 2015[229] to cope with foreign vessels conducting non-innocent passage in Japan's territorial sea through maritime police operations by the JMSDF.[230] Considering the interests at stake, as well as the facts of the persistent nature of the activities of Chinese vessels and their persistent disregard for Japan's request to leave according to Article 30 of UNCLOS, Japan could take more coercive measures, even those with the use of weapons, depending on the concrete circumstances. As Chinese vessels are seriously infringing upon Japan's sovereignty, the immunity of these vessels could be denied. The principle of immunity is based upon respect for sovereignty. As long as the Chinese vessels disregard, vis-à-vis Japan, this fundamental value of sovereignty under international law, immunity should not be conferred upon them.

---

[223] China insists that Japanese fishing boats entered the territorial sea of the Diaoyu Islands; see Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi Reiterates Stance on Diaoyu Islands* (25 Nov 2020), http://ch.china-embassy.gov.cn/ger/zgxw/202011/t20201127_3208257.htm. ("The fact is that recently some Japanese fishing boats of unknown origin have repeatedly entered the sensitive waters off the Diaoyu Islands, and China has to make necessary response. On this issue, China's position is clear. The Chinese side will continue to firmly safeguard its sovereignty and at the same time proposes three hopes.")

[224] For instance, according to a report issued by the JCG, two hundred to three hundred Chinese fishing boats have entered the territorial sea surrounding the Senkaku Islands. See Ministry of Defense of Japan, slideshow, "China's Activities in the South China Sea," (March 2021), https://www.mod.go.jp/en/d_act/sec_env/pdf/ch_d-act_b_e_210421.pdf.

[225] Regarding the serious issue that militia vessels would cause, see *supra* n. 165.

[226] Kanehara, *op. cit., supra* n. 28.

[227] See *supra* n. 19.

[228] As for the possible impact of these measures on Japan's position that there is no dispute over the territorial sovereignty of the Senkaku Islands between China and Japan, see "Japan's Integrative Position," 1616–1618, 1623–1624, 1629–1630.

[229] https://www.cas.go.jp/jp/gaiyou/jimu/pdf/gaikokugunkantaisho/pdf (in Japanese).

[230] See *supra* n. 23. Thus far, except for one example, no maritime police operation has been realized in accordance with the decision. Regarding the functions of the navy and the coast guard in the U.S., see Douglas Daniels, "How to Allocate Responsibilities between the Navy and Coast Guard in Maritime Counterterrorism Operations," *University of Miami Law Review*, 61 (2) (2007), 467–508.

With respect to the measures that Japan could take, Japan's position has been unclear. For instance, Japanese authorities gave interesting remarks in the Diet. When the possible use of weapons against foreign government vessels and warships was discussed, a question was asked as to whether such a use of weapons would become harmful shooting, and if that were the case, whether such a use of weapons constitute a hostile act. Without mentioning the meaning of law enforcement under domestic law and that under international law and the relationship between the two, Mr. Masataka Okano, the then Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs, answered:

> From the perspective of international law, such an act is defined as law enforcement in Japan's territorial sea.[231]

When it was asked whether law enforcement acts can cope with such a case of an infringement of Japan's sovereignty in which, for instance, the crew of the vessels of China's Coast Guard land on the Senkaku Islands (in the Diet, such a case was previously recognized as an infringement of Japan's sovereignty by the Minister for Foreign Affairs), again, without any explanation of law enforcement under domestic law and that under international law, Mr. Masataka Okano, the then Director-General, International Legal Affairs Bureau, Ministry of Foreign Affairs, said:

> What is important here is whether Japan conducts activities in conformity with *international law*. The basic point is that Japan conducts *law enforcement activities that are permitted by international law* (emphasis added).[232]

As mentioned above, this article is examining the law enforcement measures and the use of arms in law enforcement. Thoroughly under this framework of examination, it has sought for the justification for a use of weapons against foreign warships and government vessels that infringe the sovereignty and security of the coastal State. In addition, at least, for the prevention of escalation, law enforcement measures are preferable to self-defense measures.[233] Nonetheless, as the worst-case scenario, it could not be denied that the situation would change from that of law enforcement to that of self-defense, and in that case, Japan, as the coastal State, would exercise the right of self-defense. The remarks reproduced here mentioned law enforcement by Japan. Nonetheless, there is no clarification of the reason why such a use of weapons in the context concerned has the nature of the use of arms in law enforcement, not that of the use of force of the right of self-defense. More fundamentally, they do not indicate any understanding of the importance and difficulty for Japan to maintain the nature of law enforcement of the measures to be taken by it, in seriously considering the possible change of the situations from the law enforcement to the self-defense that is, in reality, strongly expected.

Conclusion

This article re-considered the distinction between the use of arms in law enforcement and the use of force prohibited by international law unless justified mainly by the right of self-defense. Since this author's previous work on this distinction, further re-examination has come to be required. This is because the wide understanding of maritime security has been, in reality, firmly established, thereby making it tremendously difficult to make said distinction.

Nonetheless, as long as the difference in the international rules is maintained, depending on the two kinds of the use of weapons under international law, this distinction still very much deserves continuous analysis.

---

231 *Minutes of the Committee on Foreign Affairs and Defense, House of Councillors, the 204th Session*, No. 7 (15 April 2021), 8. For its English translation by this author, see Kanehara, *op. cit., supra* n. 28, [II-4-a].

232 *Minutes of the Committee on Foreign Affairs and Defense, House of Councillors, the 204th Session*, No. 7 (15 April 2021), 8–9. For its English translation by this author, see Kanehara, *op. cit., supra* n. 28, [II-4-b].

233 See *supra* n. 20.

In addition, while this article left some issues for future works, the issue of the firm establishment of the international regulation remains with respect to the use of arms in law enforcement and the use of force prohibited by international law unless principally being justified as an exercise of the right of self-defense.[234] Furthermore, it would be indispensable to conduct a more detailed examination regarding the relationship between the law of the sea regulating law enforcement at sea, on the one hand, and the law on the international peace and security,[235] on the other hand.

As a special issue, if a coastal State of a territorial sea takes coercive enforcement measures, even with the use of weapons, against warships and government ships that are enjoying immunity, several authorities have pointed out that the scenario would change from one under the law of the sea to one under the law on the international peace and security.

In this regard, as this article focused upon the use of arms in law enforcement, it examined the justification for the use of weapons against foreign warships and government ships, as the use of arms in law enforcement. It does not exclude the worst-case scenario of the change of the situation from that of law enforcement to that of self-defense. However, without going into the self-defense situation, Japan, as the coastal State, should have possibility to legally use weapons as the use of arms in law enforcement. This article sought for the justification for such a use of arms in law enforcement. For prevention of escalation also sets forth the justification for the forcible enforcement measures. As indicated above in the previous Section IV, there should be other similar examples to this example of law enforcement with the use of weapons against foreign vessels enjoying immunity. The accumulation of international practice and its theoretical analysis are strongly expected. That will help to derive the international rules that regulate the use of weapons in such incidents so as to avoid, as much as possible, the abuse of the use of weapons under the fundamental principle of international law to prohibit the use of force.

This issue of law enforcement against foreign warships and government vessels has troubled Japan almost every day in relation to China in the East China Sea. Under the particular legal circumstance with Article 9 of the Constitution of Japan, and the strict distinction between law enforcement and self-defense,[236] how to most effectively protect its sovereignty and territorial integrity has continued to be an urgent agenda for Japan to cope with.[237] As introduced above, judging from the discussion in the Diet, the official position of the Japanese government has not been adequately determined, yet. The Japanese government needs to justify its measures against Chinese warships and government ships, not only under its domestic laws but also under international law.

In this regard, the fact that the CCGL of 2021, under Article 83,[238] enables Chinese coast guard vessels to take defense measures, and the fact that the scenario of law enforcement under the law of the sea can immediately change to that of *jus ad bellum*, are serious sources of concern. This is the very reality that Japan has been facing.

---

[234] See, for instance, Dieter Fleck, "Rules of Engagement for Maritime Forces and the Limitation of the Use of Force under the UN Charter," *German Yearbook of International law,* 31 (1988), 165–186.

[235] When focusing on the justification of such a use of force, it is an issue of *jus ad bellum*.

[236] Thus, the issue of so-called "grey zones" is dealt with in this inherent framework of Japan's domestic laws. As for the discussion on grey zones in Japan, see Koichi Morikawa, *op. cit., supra* n. 49 (Gurei Zon) 29–38; "Maritime Security," 51–52.

[237] Kanehara, *op. cit., supra* n. 28, and 217.

[238] See the Introduction, 2.

Japan's responsibility in the international community: Reflections on the Asia-Pacific War, 1931–1945*,**

Kitaoka Shinichi***

Without understanding and reflecting properly on the last war, Japan will never gain the trust of the international community. At the same time, history also teaches that Japan should make more of a contribution to international security.

In March 2015, I spoke at a symposium, where I said that Japan had clearly committed aggression against other countries before and during World War II and called on Prime Minister Abe Shinzō to acknowledge this fact by saying unambiguously that "Japan had committed aggression." My remarks were widely reported in the press.

My comments came in for several criticisms. First, some people felt that as the acting chairman of an advisory committee convened to consider Prime Minister Abe's statement on the anniversary of the end of World War II, it was inappropriate for me to make personal remarks of this kind. But the Advisory Panel on the History of the 20th Century and on Japan's Role and the World Order in the 21st Century, of which I am a member, was established on the occasion of the seventieth anniversary of the end of World War II as a forum for specialists to review the history of the twentieth century and consider the international world order in the twenty-first century from that perspective. The purpose of the panel was not to consider the Abe Statement directly. I did not suggest that the word "aggression" should necessarily be included in the prime minister's statement. I merely said that I would like to see Mr. Abe speak clearly along these lines in one setting or another. Mr. Abe has said: "I have never said that Japan has not committed aggression, and have never denied the fact of its colonial rule." Rather than a vague expression like this, a more direct statement would be better received by the international community. My hope when I spoke was that the prime minister would create an opportunity for a clear statement.

Correcting fallacious arguments on the "aggression" issue

More problematic is the kind of criticism that claims there is no agreed definition of the term "aggression" in international law, and that the absence of such a definition would make it wrong to argue that Japan carried out aggression. That this kind of faulty reasoning still crops up repeatedly in the media is regrettable enough, but I was astonished to see this kind of argument leveled at me by a respected historian like Itō Takashi, professor emeritus at the University of Tokyo. (For Itō's criticisms, see: "Kitaoka-kun no oungōru hatsugen o shikaru" [A Critique of Kitaoka's Own-Goal Comments], *Rekishi-tsū*, May 2015.)

I fully understand that there are difficulties with the definition and legality of what constitutes an act of "aggression" in international law. No universally agreed definition exists that can be used in all circumstances to decide immediately whether a given military action is an act of

---

* The majority of Japanese historians now refer to the war from the Manchurian Incident through Sino-Japanese War to the Pacific War as the Asia-Pacific War.

** This essay is a translation of an article published in *Gaiko* [Diplomacy], Vol. 32, July 2015. The information in this essay is current as of July 2015.

*** Kitaoka Shinichi is Emeritus Professor of the University of Tokyo and Special Advisor to the President (former President) of the Japan International Cooperation Agency (JICA).

aggression. If Hezbollah carries out a terrorist attack on Israel from Lebanon, for example, and Israel responds with a counterattack, to what extent does this constitute self-defense and to what extent should it be considered aggression against Lebanese territory? Questions like this do not have quick-and-easy answers. Since in today's world defining a military action as "aggression" often means condemning it as illegal and imposing sanctions, these decisions call for care and precision. Naturally, a certain amount of time is required.

Another factor is that it is the United Nations Security Council that is responsible for deciding whether a given military action constitutes aggression, and whether to apply sanctions. Any permanent member of the Council can block a motion and ensure that the military action in question is not described as an act of aggression. This means there is a degree of arbitrariness to the definition and the decisions that flow from it. This much is certainly true.

But this does not imply that no such definition exists. And in any case, the argument that the lack of an effective definition in international law of "aggression" would rule the topic off-limits for academic discussion in history or political science is absurd. No strict definitions exist for the terms "war" and "peace" either. Does that mean we cannot discuss these subjects? Of course not. The Japanese word translated here as "aggression" is *shinryaku*. If we look this up in two widely used Japanese-language dictionaries, we find the following definitions. In the *Kōjien*, the word *shinryaku* is defined as: "Entering another country and seizing that country's territory and assets." In the *Daijirin*, the same word is defined as follows: "When one country uses military force to infringe on the sovereignty, territory, and political independence of another country." Almost no scholar of history or political science would argue that definitions like this are mistaken. Academic debate has proceeded for years along this kind of commonsense understanding of the term.

The "aggression" debate often focuses on the Manchurian Incident and the expansion of the Japanese presence in Manchuria that followed. Japan's recognized interests at the time were restricted to southern Manchuria and consisted of non-contiguous "dots and lines" centered on the Kwantung Leased Territory and the South Manchuria Railway. Despite this, Japan ended up controlling an area three times larger than mainland Japan, including the north of Manchuria where Japan had no interests whatsoever. To insist despite these facts that this did not constitute an act of "aggression" is absurd. It was clearly an aggression by any definition under international law.

If my critics contend that we should not use the term "aggression" because no clear and uncontroversial definition of the term exists, then how should we refer to the Soviet Union's incursions into Manchukuo in August 1945? Perhaps my critics believe that Hitler and Stalin never carried out aggression either.

In the article I have mentioned, Professor Itō says he feels "betrayed," since he says he advised me when I accepted the position as Japanese chairman for the Japan-China Joint History Research Committee that the Chinese wanted to press the Japanese side to use the term aggression (*shinryaku*), and that we should not submit to this demand at any cost. Professor Itō accuses me of being a "*kyokugaku asei no to*."[1] I was taken aback by his use of such language, which is more like a brazen insult than reasonable academic criticism. Even before the joint history research project, my position has always been that Japan's military actions during and following the Manchurian Incident constituted an act of aggression and led to an avoidable war that caused the deaths of millions of people, including some three million Japanese people. I said as much to Professor Itō and disagreed with his views when I accepted the position as chairman.

---

1 "*Kyokugaku asei no to*" means someone who twists academic learning to win the favor of certain people.

The political implications of the San Francisco Peace Treaty

Professor Itō's arguments are not the only erroneous ones I would like to respond to here.

Some people believe that recognizing Japan as an aggressor nation would make it impossible for Japanese people to feel proud of their country's history. But this term "aggressor nation" is not one I have used. I merely say that Japan has committed aggression in the past. It is Professor Itō who has decided for his own purposes to use the expression "aggressor nation." In any case, almost every one of the world's major powers has committed aggression at some stage in the past. Merely admitting this fact does not make a country good or bad. Japan too has committed aggression in the past, but of course this does not alter the fact that Japan today is an admirable country in many respects.

Another view claims that if we admit that Japan committed aggression, this admission will be used to castigate and berate Japan forever. In fact, the opposite is more likely to be true. Once a country loses a war, international borders are redrawn, reparations are imposed, and war crimes are punished. These processes bring war issues to a conclusion. There are deep-rooted criticisms to be made of the Tokyo War Crimes Tribunals, for example. I also have reservations about many aspects of these tribunals. But it was by accepting the findings of the tribunals that the conditions for peace were put in place, and Japan has not faced further accusations or been required to shoulder additional responsibilities. Admitting the fact of committing aggression is part of accepting this legal and political process. To argue that Japan did not commit aggression is tantamount to challenge to the Tokyo Tribunals and the San Francisco Peace Treaty. The likely result would be to bring to the surface a whole host of arguments relating to the war, including, but not limited to issues of reparations, compensation, and apologies. Prime Minister Abe says that he has no intention of disputing the terms of the Peace Treaty.

Some people argue that Japan had no bad intentions when it established Manchukuo, and that Japan was responsible for good things too. But aggression is aggression, regardless of whether it was done maliciously or whether the aggressor country did good things. To argue this way is to fundamentally misunderstand the nature of the issue. It is not a question of feelings and intentions.

On a related note, some people argue that South Manchuria remained as Chinese territory at the time only because Japan had been victorious in the Russo-Japanese War. If Japan had not defeated Russia, Manchuria would have become Russian territory. This is probably true, but that does not provide a case for claiming that the territory was Japan's to do with as it pleased. In the closing years of the Edo shogunate, Russia tried to occupy the island of Tsushima by sending its warship *Posadnik*, only for Britain to come to Japan's aid by chasing the Russians from the island. Using this logic, these events would make Tsushima a British possession. It is a ludicrous argument.

Some people also argue that the Japanese effectively had run Manchuria before Manchurian Incident, but this gives too much credit to Japan. Around 200,000 Japanese had traveled to Manchuria as settlers and developers before the Manchurian Incident, and most of these were restricted to the Kwantung Leased Territory and areas along the South Manchuria Railway. By comparison, there were more than 15 million Chinese in Manchuria. It was only after Manchukuo was established that Japanese immigration increased substantially. Most of the Japanese arguments against the "aggression" position can only be described as immature and half-baked: a distorted mixture of emotional rhetoric and appeals to poorly understood points of law.

Why did the internationalist mood of the 1920s collapse?

For professional historians, the question of whether the Manchurian Incident was an act of aggression is essentially settled. The questions we should be asking ourselves now, 70 years after the end of the war, are these. Why did the Manchurian Incident happen? Why did it lead to war

with the United States and Great Britain, despite numerous opportunities after the Incident to halt the slide into war? What lessons can we learn from this history that will serve us well in the present?

The main significance of the Manchurian Incident in international political history is that it marked a clear infringement of the Nine-Power Treaty (1922) and the General Treaty (1928) for the Renunciation of War as an Instrument of National Policy (or the Kellogg-Briand Pact), and was the initial blow stuck against the international order that had developed in the 1920s.

The 1920s were a relatively stable period compared to those that came before and after. It was a decade in which, reflecting on the lessons of World War I, significant progress was made in international cooperation toward outlawing war and placing restraints on colonial policy. War was officially outlawed with the Kellogg-Briand Pact of 1928, the spirit of which lives on in Article 9.1 of the current Constitution of Japan. Changes also happened in attitudes to colonial rule. Although the principle of national self-determination was initially limited to Europe, it inspired the March First Movement in Korea and the May Fourth Movement in China. India and African countries also began to demand greater rights from their colonial rulers in return for the contributions they had made to the war effort. These demands eventually persuaded the colonial powers to take steps. The Nine-Power Treaty, signed at the Washington Naval Conference in 1922, included an agreement on the so-called Open Door Policy in China and guaranteed the territorial integrity of China. Even if these moves did not lead to independence, they represent clear evidence of a new international mood to end any further attempts to expand colonial empires or spheres of influence.

These developments also affected Japan. The Nine-Power Treaty and the Naval Limitation Treaty signed at the Washington Naval Conference had an impact on the way in which Japan administered its own colonies. Japan saw that it needed to move away from rule by the *kempei* military police in Colonial Korea during the eras of Terauchi Masatake and Hasegawa Yoshimichi. Accordingly, the government decided to give the post of Governor-General of Korea, which had previously been reserved for a serving army general, to Saitō Makoto (in office 1919–27, 1929–31), who was then a naval reserve officer. When sending him off to his post, Saionji Kinmochi is supposed to have exhorted him with the words, "Civilized politics, please, Your Excellency."

The job of Governor-General of Taiwan went to the civilian Den Kenjirō (1919–23). Japan had accepted the shift from a direct to a less heavy-handed style of colonial rule, and from military expansion to a pursuit of economic interests. In Japan, cabinets dominated by political parties became the norm, and internationally minded leaders with a focus on the economy, like Hara Takashi and Shidehara Kijūrō, became increasingly influential.

So why did the internationally minded Washington Treaty system of the 1920s collapse?

Domestically, there was growing distrust of the political party cabinets that came to dominate politics during the 1920s. The public became disillusioned by what it saw as the self-interested squabbling and competition among political parties. Another factor was that the Diet was not supreme under the Meiji Constitution. The armed forces maintained a large degree of autonomy, and the political parties sowed the seeds for a situation in which powers outside the Diet held substantial power, which was used by the Seiyūkai to criticize the Minseitō-led Hamaguchi cabinet for its acceptance of the London treaty on arms limitations.

Internationally, the Great Depression clearly had a decisive impact. The Great Depression caused a drastic fall in Japanese exports to the United States and led to the collapse of the trade-based development model. Even before this, the voting down of Japan's Racial Equality Proposal at the Paris Peace Conference, and the enactment of the "Japanese Exclusion Act" banning Japanese immigration to the United States also weakened the influence of the internationalists and economic-minded factions.

Their influence faded amidst a growing lust for land in Manchuria, as the focus shifted

from trade to acquiring new agricultural land. The threat to Japan's interests in Manchuria from an increasingly powerful Soviet Union led to a sense of crisis that was exacerbated by the radicalization of Chinese nationalism. These were the factors that led to the Manchurian Incident, a precipitous decision by Japan's Kwantung Army to seize Manchuria for Japan.

One other point I would make in this context is that between the Manchurian Incident and the full-blown outbreak of war with China, there were still several opportunities to halt the expansion of the fighting. After the Manchurian Incident, Finance Minister Takahashi Korekiyo successfully got Japan's economy back on its feet again, and the Tanggu Truce brought a lull in military hostilities in 1933. But Japan failed to use this respite to deescalate the situation. Instead, a series of foolish decisions, from the North China Buffer State Strategy of 1935 to the February 26 Incident of 1936, led to the full-fledged outbreak of the Sino-Japanese War in 1937.

It would have been possible to prevent war with the United States even after the submission of the Hull Note on November 26, 1941. Japan could have used the Hull Note as a starting point for negotiations on the lines behind which it would withdraw its troops. Although the United States would surely have insisted on a Japanese withdrawal from China, Japan could have made a case for the continued existence of Manchukuo. The Japanese cabinet might well have collapsed during these negotiations, but that would have been infinitely preferable to war with the United States. Right up until the final moment there were opportunities to change national policy. It is essential that we understand this fact correctly, as well as the circumstances that led to the repeated mistakes of those decisions (or lack of decisions) .

Lessons for the present

What lessons can today's Japan learn from the history of the Manchurian Incident and the events that followed? I believe the main lessons should be these: first, that the international community must not allow any attempt to change the status quo by force. We must not remain silent in the face of what is happening in the South China Sea or Ukraine. Second, Japan should fully cooperate in imposing sanctions on any country that carries out illegal actions. Japan has regularly made contributions since the Gulf War in 1991, but these remain inadequate in some respects. It will be essential to ensure that the proposed security legislation is approved and comes into effect. Third, we should learn from the way in which the world increasingly turned inward after the Great Depression, as countries turned to policies that put their own national interests first. To prevent this from happening again, the maintenance and further development of an open and liberal free trade system will be essential. In the postwar era, Japan has benefited from these three points—the renunciation of war, the strengthening of international systems, and the establishment of a free trade system—and has demonstrated some commitment toward these developments. But there is room for Japan to be more active in this regard.

If I were to add one more thing, Japan should play an active role in eradicating the poverty that is the root cause of conflicts. In the postwar era, Japan has supported the economic development of Asian countries, chiefly through Official Development Assistance. As a result, Southeast Asia, which was as poor as Sub-Saharan African countries, has gradually become more prosperous. And Japan has taken its own approach, which prioritizes economic stability. Japan does not generally have a lot to say about political systems. Once economic stability is achieved, next comes economic development. As a result of economic development, democratization occurs. Japan has done well to encourage this kind of virtuous cycle.

For Western countries and the United Nations, human rights and political democratization inevitably come first. The case of sanctions against Myanmar is one good example. In other cases, UN peacekeeping missions might be sent into a conflict area, and elections might be held, but that is often the end of it. Sometimes, however, elections lead to further confusion and unrest, and it is after the elections that support is needed most.

Japan understands the conditions in developing countries as well as the universal values of the West. At least since the Fukuda Doctrine, Japan has worked to support countries in Asia not from a position of superiority but as a partner. Henry Kissinger said that an economic power inevitably becomes a political and a military power, but Japan has built a presence in the international community in a different way. I think we should value this unique approach as one of the accomplishments of the 70 years of the postwar era.

What then are the inadequacies in Japan's current policies? The biggest shortfall has to do with Japan's international contributions in the area of security. Japan prides itself on being a peace-loving nation that has renounced war and adopted a peace constitution. But for the most part, this consists merely of not doing anything bad. Even in the context of peacekeeping operations, countries with fewer national resources than Japan—including Scandinavian countries and Canada, among others—are more engaged in peacekeeping missions and have made larger sacrifices than Japan, which by comparison is bearing an insufficient share of the burden.

Even in the context of the proposed national security legislation currently being debated in the Diet, the arguments of the opposition parties tend to focus exclusively on the relationship between the constitution and collective security, as well as checks on the use of force. There has not been any deep discussion on the real issues.

If people contend that a single administration cannot be allowed to alter the interpretation of the constitution, does this imply that we should scrap the interpretation of 1954, which determined that the constitution permitted the minimum and necessary forces for self-defense? Should we return to the original interpretation of 1946, which held that Japan could not possess any war capability whatsoever?

Okada Katsuya, President of the Democratic Party of Japan, has insisted that if US naval ships operating alongside Japanese vessels came under attack, Japan would already be able to respond under the existing right to individual self-defense if the attack took place in waters adjacent to Japan. But this interpretation deviates from the understanding on individual self-defense of the Cabinet Legislation Bureau, which holds that Japan can use military force only if the country itself comes under attack. He is criticizing attempts to change interpretations in one area, while demanding separate changes in others. Surely double standards of this kind cannot be conducive to constructive debate.

The biggest check on the use of force is civilian control. The essence of civilian control is the support and trust placed by the people in civilians (politicians). In a democratic and pacifist country like Japan, any ill-considered decision by politicians that led to the loss of lives might easily lead to the government being voted out of office. This sense of trepidation is what acts as the greatest check. In any case, I hope that there will be realistic discussions, based on the starting point that the international situation is changing drastically from a national security perspective.

The historian's mission: Establishing the facts

Finally, I would like a few words about the state of historical research. Toward the end of 2014, it was reported that the Japanese embassy in the United States asked for a correction when a textbook published by McGraw Hill claimed that Japan had forcibly recruited up to 200,000 young women to serve in military brothels during the Asia-Pacific War. The publisher refused to make a correction, criticizing the request as "interference in academic freedom." But is this really a question of academic freedom? Whatever the facts of the matter, 200,000 young women were not forcibly recruited.

Hata Ikuhiko and Ōnuma Yasuaki held a press conference to address the issue in Japan, during which Professor Ōnuma said, "If someone pointed out a mistake in something I had written, I would write that person a thank you letter." This is an admirable attitude to take.

The ideal stance, surely, would be to say: If you disagree, let's work on a joint research project together. To date, historical research of this kind has already been carried out between Japan and China, as well as Japan and South Korea. If possible, I would like to see more collaborative international research involving historians from the United States, Southeast Asia, Germany, France, and other countries. The aim of research should not be to assign blame but to establish the facts.

The Franco-German reconciliation model does not correspond to the challenges of the Japan-PRC relationship

Valérie Niquet*

Abstract
The People's Republic of China (PRC) recurrently uses the argument of the Franco-German model of reconciliation. Germany's "moral" position is systematically opposed to that of Japan, which is always denounced as the only party responsible for the lack of reconciliation with China.
This analysis is often repeated without distance outside China. However, behind this discourse, the reality is much more complex and the comparison of the two situations is particularly hazardous. The real question is indeed that of strategic incentives, which, from the immediate aftermath of the Second World War to the present day, are divergent. This paper will look into the complexities of the reconciliation process, beyond an idealized Franco-German model.

The People's Republic of China (PRC) recurrently uses the argument of the Franco-German model of reconciliation. Germany's "moral" position is systematically opposed to that of Japan, which is always denounced as the only party responsible for the lack of reconciliation with China because—according to Beijing—it refuses to look back and apologize for its actions during the Second World War.

This analysis is often repeated without differentiation outside China, particularly in Western countries, both by non-specialist experts in Asia and by politicians. Thus, in his speech to the Diet during his visit to Japan in June 2013, President François Hollande of France was able to put forward the example of Franco-German reconciliation, without contextualizing it or making a distinction in the process between West Germany (formerly BRD) and East Germany (formerly DDR).[1]

However, the reality behind this discourse is much more complex and the comparison of the two situations is particularly hazardous. The real question is indeed that of strategic incentives, which, from the immediate aftermath of the Second World War to the present day, are divergent. In the case of the Franco-German relationship, as we shall see, West Germany yesterday, Germany today, and France were both parts of the same liberal democracies grouping. In the case of the Sino-Japanese relationship, the People's Republic of China and its Party-State system have not shared Japan's interests and strategic vision since 1949. The onus is therefore on a China whose leaders have a direct interest in maintaining Japan in a state of subordination that limits its re-emergence on the international scene as a "normal" power. It is in this context that the impossible reconciliation between Tokyo and Beijing must be analyzed, and the main factor remains China's willingness—today non-existent—to accept a true permanent reconciliation with

* Valérie Niquet, Ph.D. (Sorbonne University) is Head of the Asia department at FRS (Fondation pour la recherche stratégique), and senior fellow at the Japan Institute of International Affairs (JIIA).

1 "Statement by Mr. François Hollande on Franco-Japanese relations, June 7, 2013," speech delivered to the Diet, Tokyo at https://www.vie-publique.fr/discours/188124-francois-hollande-07062013-relations-franco-japonaises

Japan after 1945. Indeed, contrary to a commonly accepted position, it is not the capacity to look back on a difficult history that precedes reconciliation but, as in the Franco-German or Japanese-American case, the will to reconcile that constitutes the first condition. In the case of Germany, France wanted this reconciliation for reasons that had little to do with the most recent past; all the more easily, no doubt, because France itself had difficulty, until the end of the 1970s, in coming to terms with its own experience as a collaborationist state under the regime of Marshal Pétain (1940–1944).

The Chinese position on taking Germany as a model

For Beijing, this constant reference to the Franco-German model and Germany's just attitude is a valuable foreign policy tool, mobilized against a Japan whose legitimacy today is no more questioned in the whole of Asia except, for different reasons, in the PRC and the Republic of Korea. In 2013, China's ambassador to Germany published an op-ed in the *Frankfurter Allgemeine Zeitung* denouncing Prime Minister Abe's visit to Yasukuni Shrine as a demonstration of revisionist nationalism as opposed to Germany's ability to repent.[2] China thus constantly uses the example of Germany as opposed to that of Japan, which is always denounced as solely responsible for the lack of "trust" and reconciliation between the two countries.[3] President Weizsäcker's speech to the German Parliament on May 8, 1985, is often cited as a model of acknowledgment of an inexcusable past.[4] However, the incongruity of this rapprochement by a regime that has made the expurgation of history and its most painful episodes a mode of social control is never mentioned.[5]

Like historians, Chinese editorialists condemn Japan by using this misguided comparison with Germany. For the *Global Times*, both Japan and Germany were defeated nations, but only Germany was able to completely liquidate its past Nazi crimes. The author emphasizes the role of the Franco-German axis as a factor of peace, prosperity, and stability in Europe, "an example of resolving disputes through compromise and cooperation." On the other hand, according to this article, Japan has not learned the lessons of its war of aggression; Tokyo must learn from Germany.[6]

Far from history: China's geostrategic motivations

Several objectives explain this positioning of the PRC vis-à-vis Japan on questions of history. At the bilateral level, there is a twofold objective of legitimizing the Communist Party within China by constantly reactivating the memory of the war of resistance against Japan and by glorifying the role of the Communist Party during the Second World War. On the international scene, the PRC tries to deny Tokyo any legitimacy, particularly in its demand for reform of the UNSC. As a defeated nation like Germany in 1945, Japan, in the eyes of the Chinese leadership, must be maintained in this status. This is all the truer since the perception of the People's Republic of China as a source of opportunity is deteriorating globally, including in Asia.

---

[2] In Stanley Crossick, "Can China and Japan ever Forgive and Forget?" *Politico*, 09-11-2015.

[3] Nicole Colin, Claire Demesmay, *Franco-German Relations Seen from Abroad, Post-war Reconciliation in International Perspectives*, (Springer, 2020).

[4] Speech by Federal President Richard von Weizsäcker during the Ceremony Commemorating the 40th Anniversary of the End of War in Europe and of National-Socialist Tyranny on 8 May 1985 at the Bundestag.

[5] In China, topics such as the Tiananmen Square massacre cannot be discussed and there is a crime of "historical nihilism" which condemns any criticism of the ruling Communist Party.

[6] 孙海潮 , " 中日关系愈发的关系比较 "(Comparison between Sino-Japanese relations and Franco-German Relations), 环球网, 30-04-2019.

Defending the Party's image of dominance, especially against Japan during the Second World War, is in effect contributing to the Party's posture of power today. To control and rewrite the history of the anti-Japanese struggle before 1949 is also to mask by an abundance of discourse on this period the total absence of authorized critical discourse on the history of the post-1949 period, which was particularly painful and costly in human lives for the Chinese people. The contemporary legitimacy of the Communist Party's undivided power has been increasingly based since the end of the 1980s on historical reconstruction.

This instrumentalization of history in China takes place at various levels, notably in the writing of school textbooks and in the commemoration and promotion of memorial sites, the list of which has grown very recently.

In France, attempts by the Parliament to "guide" the history curriculum in 2006 sparked a heated debate that led to the withdrawal of the contested project. Contrarily, Yang Dongliang, former head of the Ministry of Education's expert committee on Japanese issues, believes that "all countries in the world encourage young people to study history to nourish their patriotism."[7] These are two radically different conceptions of history education that demonstrate the ideological gap that continues to exist with the Chinese system.

The rules governing the writing and selection of authorized textbooks in China, especially history textbooks, are defined by the Communist Party authorities, who are exclusively responsible for ideological control, and their implementation is entrusted to the PRC's Ministry of Education. The mission of the Ministry is thus officially "to analyze and present educational materials used in elementary and secondary schools, to organize the review and approval of such educational materials."[8] In 1986, taking into account the policy of reform and the opening up of the country, the production of history textbooks was decentralized, but the requirement to respect the principles defined above was maintained. The textbooks are no longer composed by a single centralized commission but by provincial or municipal departments of education, by educational institutions themselves, and by individual experts or scholars. The system of text review and post-proofing by a "state textbook review and approval commission" has been maintained to take into account "the ideological content, scientific spirit and suitability of the textbooks for the relevant audience." History, as it is taught to children and youth today, and more so under Xi Jinping, is thus an instrument of official control and mobilization in the hands of the Chinese powers-that-be.

A textbook used in secondary schools in accordance with official guidelines is particularly illuminating in this respect.[9] The chapter on "the war of resistance against Japan" highlights several essential and recurrent points in the process of constructing an eternally guilty Japan.

The presentation intends to highlight the "immense heroism of the struggle against the Japanese aggression."[10] The chapter on the "heroic actions of the 8th Route Army (Communist forces)" stresses the major and leading role of the Communist Party alone in the struggle and victory over the "Japanese oppressor." It is thus repeatedly noted that the Party was the driving force of the struggle against Japan, that it constituted the main element, and above all that it

---

7 *Xinhua*, 17-05-2005.

8 Samuel Guex, "Les manuels d'histoire chinois vus du Japon," *Ebisu*, Année 2008, 39.

9 Renmin jiaoyi chubanshi kecheng jiaocai yanjiusuo lishi kecheng jiaocai yanjiu kaifa zhongxin (History Curriculum Materials Production and Study Center of the Institute of Curriculum Materials of People's Educational Publishing), *Lishi* (History), (Beijing: Renmin jiaoyi chubanshe, 2004).

10 *Ibid.*

was by winning this victory thanks to the Communist Party that China took its place alongside the great powers at the end of the conflict, conflating the Communist Party with the Republic of China. This was also the main theme of the 2015 parade organized for the first time to celebrate the victory against Japan in China.

The chapter on the war of resistance against Japan also includes paragraphs, accompanied by graphic photographs of war crimes, whose sources are never indicated.[11] With such images, forgiveness is impossible, and the aim seems to be to maintain in the youth an imprescriptible feeling of hatred.

The aim is also to demonstrate, through these schoolbooks, the legitimacy of the leadership role of the Chinese Communist Party "which has awakened the country to the urgent need to build a united front of national unity." The Chinese authorities thus proceeded to equate "China" with the Communist Party, even though the role the latter played at the time was far from the centrality it is given today in official mainland history.

This reconstruction of history, this insistence on highlighting the major, almost unique role played by the Communist Party during the anti-Japanese war, is, in fact, all the more vital for the government since, for the Communist apparatus that took refuge in Yanan in 1937, the priority seems to have been, on the contrary, to conform to the strategic interests of the USSR in the war against Japan and to give priority to the fight against the nationalist forces of the Republic of China.

Thus, to preserve the legitimacy of the Communist Party, historical "nihilism" is denounced; the "justice" of past struggles must be prolonged in the present through a delegitimization of today's Japan, which implies the constant reminder of "past crimes" that prevent any long-term reconciliation whatever the number of excuses expressed by Tokyo.

The perpetuation of the past in the service of the interests of today's Chinese regime is also nourished by the multiplication of monuments and commemorations, all phenomena which are relatively recent in scope. The three "stations" of Chinese martyrdom against Japan—Shenyang, the capital from 1931 of Manchukuo, a protectorate of Japan at the head of which the last emperor Pu Yi had been installed; the Marco Polo Bridge, the site of the "incident" of July 7, 1937, which marked the beginning of the offensive by Japanese troops towards the south; and finally Nanjing, the capital of the Chinese government abandoned by government troops after a siege of a few weeks and also the site of the 1937 massacre—have only relatively recently been provided with huge museums. The "Memorial for the Patriotic Victims of Japanese Militarism" in Nanjing dates from 1985 and was restored on a larger scale in 2005. The Marco Polo Bridge Museum was conveniently built in 1989 as an instrument of national harmony after the events in Tiananmen Square and renovated in 2005 to even greater dimensions, with the aim of "refreshing visitors' memories of the war" by highlighting "courage, heroism, resistance, patriotism and atrocities" which should not be forgotten. As elsewhere in the museum, an engraved plaque placed at the entrance in August 2005 once again proclaims the leading role of the Communist Party in the war of resistance against Japan and the anti-fascist war.[11]

To maintain this memory and a sense of revenge, new websites were also created with the blessing of the authorities in a vast movement of "web nationalism." With the same objective, dozens of television programs, films and war series are constantly aired.

Japan cannot, therefore, cease to be confronted—in the terms defined by China—with its history and no apology can be sincerely accepted despite Deng Xiaoping's 1979 call to look to the

[11] This is also the case in museums where no source is indicated, fuelling Japanese critics who denounce the fabrication of documents.

future. Japan is also asked to "translate its remorse into action so that the feelings of the Chinese people will never again be violated" and "to adopt a conscientious and serious attitude towards history."

Denouncing a "Cold War mentality"

Behind this desire to maintain Japan in a status of illegitimacy also lies the Chinese ambition to weaken the system of bilateral alliances around the United States in Asia, of which the Japan-US alliance is the cornerstone. The PRC constantly denounces a system "inherited from the Cold War" that could be replaced by a Chinese-centric regional system. Beijing therefore denounces the "Cold War mentality" displayed by both the media and political circles in Japan when discussing defense issues, which is always equated with a so-called rise in "militarism." Similarly, the greater interest shown in Japan in strategic issues since the beginning of the 2010s, which has not disappeared with former Prime Minister Shinzo Abe, is also the subject of constant criticism in the People's Republic of China.

The Franco-German reconciliation: A counterexample

The process of reconciliation between France and Germany, far from being the model that China puts forward, appears on the contrary as in a mirror, the reverse of the situation that characterizes the relationship between Japan and China. The reconciliation between France and Germany after 1945 was only possible because of a dual will in Paris as well as in Berlin, despite a particularly difficult history. Since the end of the 19th century, Germany had been considered by France the "hereditary enemy" and, after France's defeat in 1871 ending the Franco-Prussian War and leading to the loss of Alsace-Lorraine, it was the motive of all nationalist discourses in France. This tension continued during the first half of the 20th century with the two world wars. However, after the German defeat in 1945, a complete reversal of this situation took place.

The movement in favor of reconciliation with Germany manifested itself early after the Third Reich's defeat in France. This movement, contrary to what one often hears, far preceded the movements to re-evaluate history and responsibilities both in Germany and in France. It is only from the 1970s onwards that, in both countries, real questioning of the compromises and responsibilities during the Second World War occurred, notably in Germany with the *Vergangenheitbewältigung* (*Coping with the past*) movement and in France with the shock provoked by the publication of Robert O. Paxton's book, *La France de Vichy*, in 1973.

Unlike the PRC, Gaullist France sought this Franco-German reconciliation. The first meeting between General de Gaulle, who had just been appointed President of the Council on June 1, 1958, and Chancellor Adenauer, who initiated the process of Franco-German reconciliation, took place on September 14, 1958, when the German chancellor was symbolically invited to La Boisserie, General de Gaulle's private residence. The stated objective was to try to reverse the course of history, to reconcile the two peoples, and to combine their efforts and their capacities. We find on both sides, and particularly on the French side, the same desire to establish direct and preferential relations in all areas. This meeting marks the reconciliation between the two countries and the beginning of a cooperation that led to the Elysée Treaty signed on January 22, 1963. When he went to Germany, where he gave ten speeches in German in September 1962, de Gaulle did not insist on a necessary apology but a necessary reconciliation.

The weight of strategic interests

The situation between the PRC and Japan was also mirrored by the strategic stakes and the role of the United States beyond the French desire for reconciliation. For President Truman and George Marshall in the United States, it was a question of not repeating the errors of the Versailles Treaty (1919) and risk precipitating a move by the new "West Germany" into the communist camp while

the Cold War was taking hold in Europe. France as well as the Federal Republic of Germany were part of the same "camp" and this has been a crucial factor in the reconciliation between the two countries. The Franco-German cooperation treaty, known as the Elysée Treaty, signed on January 22, 1963, provides for quarterly meetings between the ministers of defense, bi-monthly meetings between the chiefs of staff, and consultations on all matters relating to defense and important foreign policy issues "to reach a similar position" on East-West relations, European cooperation or NATO as well as on all armaments issues.[12]

At the level of civil society, exchanges were encouraged through the teaching of German in French high schools, school trips, and later the creation of a Franco-German television channel, Arte, in 1991.

The role of NATO and European construction

West Germany (Federal Republic of Germany), like France, was also a member of NATO, which anchored their membership in the same alliance despite the Gaullist desire to preserve France's strategic autonomy. The Federal Republic of Germany joined NATO on May 6, 1955, one year after the Paris Agreement, which put an end to the occupation of Germany by the Allied powers.[13] It is within this framework, and within that of the European construction, that all the debates on the rearmament of Germany took place, contrary to the situation that prevails in Asia, where the People's Republic of China and Japan are not part of the same bloc, neither during the time of the Cold War nor since the fall of the USSR.

At the same time, the process of European construction, inaugurated in 1952 with the Communauté européenne du charbon et de l'acier (CECA) that had been proposed by Robert Schuman to Konrad Adenauer as early as 1950, then followed by the Treaty of Rome (March 25, 1957) that created the European Economic Community on January 1, 1958, bringing together Belgium, Germany, France, Italy, Luxembourg, and the Netherlands, also facilitated the process of reconciliation between France and Germany. The objective at the European level was "to establish a closer union" between the European peoples and to uphold, by the constitution of this set of resources, the safeguarding of peace and freedom in the context of a world divided into two blocs.

The Franco-German reconciliation and friendship is therefore taking place within the framework of multilateralism and European construction, which does not exist in Asia, where the People's Republic of China, like the Soviet Union of yesteryear, shares neither the values nor the strategic objectives of Japan and its allies. On the other hand, despite these irreducible differences, the choices made by Beijing at the end of the 1970s for economic reform and the Sino-Soviet conflict were able to mask these fundamental differences and give the illusion of a possible reconciliation, forgetting that, until the reunification of the two Germanys, East Germany, which was part of the Warsaw Pact, had never been involved in this process.

On the other hand, the Treaty of Peace between Japan and the Republic of China (ROC) signed in Taipei on April 28, 1952, can be compared to the reconciliation process between France and West Germany in the 1950s. The text of the treaty indicates "a mutual desire for good neighborliness given their historical and cultural ties and geographical proximity."[14]

When Japan decided to recognize the PRC in 1972 and then to sign the Treaty of Peace and Friendship in 1978, Beijing was very much in favor of this rapprochement, again for strategic reasons, particularly in the face of the Soviet threat perceived as existential in Maoist China, but also for economic reasons. Japan contributed massively to the economic development of the PRC

---

[12] https://www.france-allemagne.fr/Traite-de-l-Elysee-22-janvier-1963.html

[13] Reunified Germany joined NATO on October 3, 1990.

[14] http://www.taiwandocuments.org/taipei01.htm

by participating in the strategy of opening up launched by Deng Xiaoping. The PRC was then little concerned with the past, officially refusing, as the Republic of China had done, to claim any reparations.

Unlike the situation between France and Germany, though, any progress can only be regarded as tactical by the Chinese regime and can be called into question according to Beijing's strategic priorities. As such, any rapprochement can only be temporary, depending on the priorities defined by the regime in Beijing and not on a real desire to resolve the tensions inherited from history as seen in Europe.

In this respect, the Franco-German reconciliation cannot serve as a model for a hypothetical reconciliation between Japan and the People's Republic of China. Japan must also agree to revisit its history, notably by encouraging an education system that is conducive to a more critical spirit, including on historical issues. It must develop an approach that takes into account all perspectives, as do the history books published in France and Germany, without seeking refuge in a form of neo-nationalism that is very far from the orientation of the great contemporary democracies. However, the primary responsibility for the tensions that remain lies with China, ruled by a regime for which history is not an object of study but an instrument, a weapon at the service of its strategic interests and its survival.

Published by the Japan Institute of International Affairs
3rd Floor Toranomon Mitsui Building, 3-8-1 Kasumigaseki Chiyoda-ku,
Tokyo Japan 100-0013

Tel: +81-3-3503-7261 (International)
Fax: +81-3-3503-7292 (International)

More information about the Institute's activities and publications available at: https://www.jiia.or.jp/en/

THE JAPAN
INSTITUTE OF
INTERNATIONAL
AFFAIRS