

Publication of a draft of the China Coast Guard Law - the use of force against foreign warships, etc. -

On November 4, the National People's Congress (NPC), China's legislature, released a draft of the coast guard law that would serve as the basis for the activities of 中国海警局 which means China's Coast Guard.¹

The China Coast Guard (CCG) was incorporated into the People's Armed Police (PAP) under the command of the Central Military Committee (CMC) in July 2018, and as a result of the revision of the Armed Police Law in June this year,² CCG was given the following functions: protection of maritime rights and interests, and enforcement of law.³ The law noticed that details would be specified in another legislature.⁴ The draft of the CCG law is believed to be a concrete legal basis for the protection of maritime rights and interests and the enforcement of the law. However, the draft of the CCG law announced by the NPC deviates from international norms and the U.N. Convention on the Law of the Sea (UNCLOS),⁵ which has been established as a general law of the maritime legal order. In particular, from the viewpoint of security, there are concerns about the use of force against vessels of sovereign immunity, such as foreign warships and government vessels, and the establishment of “jurisdictional waters” and “temporary maritime warning zones” that could restrict freedom on the high seas.

Compulsory measures against foreign warships, etc.

Article 18 of the draft CCG law, which is shown below, clearly states that in the event that foreign military vessels and government vessels for non-commercial purposes violate Chinese laws and regulations in the waters under Chinese jurisdiction, the CCG authorities shall have the right to restrain them and order them to leave the waters immediately, and also stipulates that the CCG shall have the right to take measures such as deportation or enforced tugging against those who refuse to leave and pose

¹ The NPC website, 中国人大网, had published and public comments was solicited by December 3, 2020.

<http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff80808175265dd4017590ca6b00587c>

² On June 20, 2020, the 19th Meeting of the Standing Committee of the 13th National People's Congress adopted the revised People's Armed Police Law (武警法) consisted of 51 articles, and is available on the NPC website.

<http://www.npc.gov.cn/npc/c30834/202006/2a45f544fcfb49a39fb8d0824ec5e9c7.shtml>

³ Armed Police Law Article 4.

⁴ *Ibid*, Article 47.

⁵ United Nations Convention on the Law of the Sea (Adopted in 1982). The People's Republic of China is a signatory to the treaty.

serious danger or threat.

第十八条 对外国军用船舶和用于非商业目的的外国政府船舶在我国管辖海域违反我国法律、法规的行为,海警机构有权采取必要的警戒和管制措施予以制止、责令其立即离开相关海域;对拒不离开并造成严重危害或者威胁的,海警机构有权采取强制驱离、强制拖离等措施。

(Underlined by author)

The Convention on the Law of the Sea allows a coastal state to take certain restrictive measures in its territorial waters where the territorial sovereignty of the coastal state is recognized. UNCLOS Article 25 (1) provides that "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent." It allows the coastal state to exercise the right of protection to take compulsory measures within the scope of "necessary measures" against foreign vessels that pass through the territorial waters in a way that is not innocent. However, there is controversy as to whether or not this provision allows compulsory measures to be taken against warships and government ships of sovereign immunity.⁶

The treaty only allows the coastal state as a possible measure to request a foreign warship to leave the territorial sea immediately when a warship does not comply with the laws and regulations of the coastal state in the territorial sea and disregards any request for compliance (UNCLOS Article 30). In the first place, warships and government ships are distinguished from ordinary ships and are granted special legal status of sovereign immunity even within the territorial sea of another country.⁷ Its origin lies in the principle of sovereign equality that is, "equals have no authority over equals (*per in parem non habet imperium*)" and it derives from the fundamental principle of modern international law established as the crystal of wisdom to maintain the peace of the international community after the 17th century. The provisions of the draft law deliberately alter existing rules on sovereign immunity, which is a challenge to the Westphalia Paradigm⁸ which forms the basis of international law.

⁶ SAKAMAKI Shizuka "Measures that may be taken against non-innocent passage of warships and other public ships," *Journal of Japan Society of Ocean Policy* (November 2015) No. 5, p. 49 -50.

⁷ UNCLOS Art. 32 provides that the provisions relating to the territorial sea do not affect sovereign immunity which is accorded to warships and government vessels for non-commercial purposes. Sovereign immunity on the high seas is provided in Art.96.

⁸ The Treaty of Westphalia of 1648 laid the foundation for a sovereign state as a subject of international law. A sovereign state is considered to be externally independent that is not subject to foreign control, and establish a noninterference obligation for a state not to forcibly engage in or intervene into a domestic jurisdiction of other countries.

Security regulations in "jurisdictional waters"

The term "jurisdictional waters" (管辖海域), which frequently appears in the draft as the space in which CCG's duties are performed, includes the unique area of "Other sea areas under the jurisdiction of the People's Republic of China" in addition to the inland sea, territorial waters, contiguous zone, exclusive economic zone and continental shelf (Paragraph 2 of Article 74).⁹ It is true that the UNCLOS allows a coastal state to have limited functional jurisdiction in waters outside territorial waters where territorial sovereignty is recognized. In the contiguous zone, for example, it allows for necessary regulations on customs, fiscal, immigration or sanitary (UNCLOS Article 33), and in the Exclusive Economic Zone (EEZ), it allows for limited rights to natural resources and the like to the coastal State (UNCLOS Article 56). However, with regard to jurisdiction in the contiguous zone, in the process of establishing the 1958 Territorial Sea and the Contiguous Zone Treaty, national security activities such as reconnaissance and intelligence-gathering were failed to be included,¹⁰ and Peru's proposal to add "refrain from activities by warships and military aircraft not directly related to navigation" was rejected at the third conference on the Law of the Sea.¹¹

From these discussions, it is obvious that security regulations do not conform to the meanings of the contiguous zone, and it is against international law to enact a domestic law that enables the regulation against warships in the contiguous zone. The same is true in the EEZ in the far sea than in the contiguous zone. Furthermore, the legal order created independently by the draft of the CCG law, which is called the "other sea areas under the jurisdiction of the People's Republic of China" is extremely unreasonable as a ground for affirming compulsory measures against warships and equivalents.

A system unique to the draft of the CCG law, called temporary maritime warning zone

The draft of the CCG law provides for the establishment of "temporary maritime warning zones" (海上临时警戒区) in the jurisdictional waters where passage of ships and

⁹ 第七十四条 (二) 中华人民共和国管辖海域,是指中华人民共和国内海、领海、毗连区、专属经济区、大陆架,以及中华人民共和国管辖的其他海域;内海,是指中华人民共和国领海基线向陆地一侧的 海域;内水,是指中华人民共和国领海基线向陆地一侧的水域, 包括内海、内河、内湖。The term "inland sea" used in the legal text refers to the water areas on the land side from the baselines of territorial waters of the People's Republic of China, other than rivers, lakes and marshes, distinguishing from "internal water" which includes rivers, lakes and marshes.

¹⁰ SAKAMOTO Shigeki, *Nihon no Kaiyoseisaku to Kaiyoho (Japan's Ocean Policy and Law)*, Shinzansha, 2018, p. 154.

¹¹ Nordquist, Myron H. *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II, Brill Nijhoff, 2003, p 244.

aircraft can be restricted or prohibited (Article 22).¹² It is not clear whether this law only specifies for restriction or prohibition of entry into the jurisdictional waters, or whether it involves enforcement in order to actually enforce the restriction or prohibition. However, in light of the bold attitudes toward enforcement measures seen in the draft of the CCG law as a whole, it is difficult to consider that the Chinese legislator intends to impose restrictions or prohibition without enforcement power.

For example, when a warning zone is established around an island over which China claims territorial rights, if the restrictions or bans on the passage of fishing vessels of other countries or vessels of foreign governments are not actually implemented, it will undermine the prestige of the Chinese government that has declared it, with which the Chinese Communist Party cannot tolerate. In addition, if the situation in Taiwan becomes tense and a warning zone is declared in the surrounding international waters, China should not only aim at the threat but also take a step-by-step measure to enforce the warning in case it does not work. Is it possible to seek appropriate grounds in international law to set a security zone or a defense zone on the high seas and use this as a basis for interfering with ships of other countries.

Under international law of war, a belligerent declares a blockade with a view to stopping the flow of military goods into the enemy, and has the legal authority to interfere with the ships of other countries on the high seas.¹³ However, the activities of the CCG are mainly police activities, and the CCG draft law should be applied from peacetime. The principle applied to ships on the high seas in peacetime is the flag state principle. As indicated in the 1927 Lotus case, foreign vessels on the high seas should not be interfered basically, by the principle of freedom on the high seas.¹⁴ The treaty also states that vessels are subject to the exclusive jurisdiction of the flag state on the high seas (UNCLOS Article 92).

The scope for interference with foreign vessels on the high seas is limited to cases in which exceptions to the flag state principle are allowed. Exceptions to the flag state principle include the UN embargo to ensure the effectiveness of economic sanctions pursuant to Chapter 7, Article 41 of the Charter of the United Nations, and treaties such

¹² 第二十二条 有下列情形之一的,省级海警局以上海警机构 可以在我国管辖海域划定海上临时警戒区,限制或者禁止船舶、人员通行、停留 :

¹³ For the general nature of capture at sea, SHINOBU Junpei, *Kaijyo Kokusaihouron (Maritime international law)*, Yuhikaku, 1957, pp.121 -128. The Paris Declaration of 1856 and the London Declaration of 1909 are treaties that stipulate the capture at sea.

¹⁴ MIZUKAMI chiyuki, *Senpaku no Kokuseki to Bengichisekisen (Ship's Nationality and Flag of Convenience)*, Yushindo, 1994, pp. 25 -26.

as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). However, actions under SUA are authorized on the basis that the flag state's consent should be obtained for the inspection of suspected vessels.¹⁵ The draft CCG law does not stipulate that the flag state's consent should be obtained.

Another possibility that cannot be ruled out is regulation of ships based on the right to self-preservation in peacetime or the right to self-defense as security measures.¹⁶ In the 1873 case of *Virginius*, a United States ship that was involved in the support of rebels in Spanish-controlled Cuba, seized by Spanish warships in international waters and took to the port, the U.S. government said that Spain had no right to capture this ship on the high seas. Contrary, the British government, whose citizens were also suffered, said that it could be seen as an unavoidable means of self-defense.¹⁷ But British government's rhetoric should be evaluated by discounting the influence of the background that British claimed the right of self-defense in the *Caroline* case settled in 1842. Examples of maritime interdictions based on the right of self-defense in recent years include "Operation Enduring Freedom,"¹⁸ which began after the 9.11 terrorist attacks in 2001, and "Operation Active Endeavour (Operation Sea Guardian)."¹⁹ NATO's Operation Active Endeavour is conducted with the consent of the flag state or the captain.²⁰ About measures based on the right of self-defense for security measures, it is believed that it is possible to interfere with other countries' vessels on the high seas only when there are specific and imminent threats directed at the state, and the measures are appropriate for the necessity of coping with them. Therefore, it is argued that interference with third country vessels is not permissible simply because vessels are suspected of being transporting WMD to al-Qaeda or its affiliates.²¹

Based on the above, it can be concluded that the foreseen measures to restrict or prohibit entry into the temporary maritime warning zone based on the draft of the China Coast Guard law cannot be justified under international law.

¹⁵ 2005 Protocol of SUA Convention, Article 8-2, Clause 5 (b) (c) (d).

¹⁶ ISHII Yurika "Self-Defense on the High Seas against a Third Party Which Poses Security Threat," *yearbook of world law* (2017), No. 36, p. 140.

¹⁷ TAOKA Ryoichi, *Right to self-defense under international law* (new edition)' Keiso Shobo, 2014, pp. 51-61.

¹⁸ CTF 150: Maritime Security, Combined Maritime Forces (CMF), <https://combinedmaritimeforces.com/ctf-150-maritime-security/>

¹⁹ Operation Active Endeavour ended in 10 2016 and was superseded by "Operation Sea Guardian." Operation Sea Guardian, Combined Maritime Forces (CMF), <https://mc.nato.int/missions/operation-sea-guardian>.

²⁰ J. Kraska, R. Pedrozo, *International Maritime Security Law*, Leiden: Brill Nijhoff, 2013, p. 55.

²¹ ISHII, p.146.

Conclusion

The Chinese government claims that the draft law "consistent with international practice and national practice."²² However, the draft of the CCG law goes beyond the norms in light of the UNCLOS, which was established based on the customs and practices of the law of the sea for generations. The designation of compulsory measures for warships and government ships poses a danger of shaking up the sovereign immunity, one of the fundamental principles and the bedrock of the order of modern law of the sea.

There are also provisions that enable the jurisdictional waters or the temporary maritime warning zone which are not subject to territorial sovereignty. In spite of being outside territorial waters, the CCG law openly declares its special powers in those area, and this runs counter to international consensus standing on the history of development of law of the sea which has been trying to ensure the international public interest of freedom on the high seas as much as possible.

If the CCG Law is enacted in accordance with this draft, it will not be welcomed by the international community, which has spun out a modern maritime law order through a series of historical cooperative efforts. On December 3, the public comment gathering on the draft had ended. It is hoped that the China Coast Guard Law will be transformed into a law that conforms to existing international legal norms.

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(Views expressed in this column is author's personal one as a part of research in the Maritime Command and Staff College, and not those of the MOD or JMSDF.)

²² 「草案有关内容符合国际惯例和各国实践。」2020年11月13日外交部发言人汪文斌主持例行记者会。 https://www.fmprc.gov.cn/web/fyrbt_673021/jzhs1_673025/t1832213.shtml