

Implementation of the United Nations Convention on the Law of the Sea in Japan

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Abstract

This paper examines and summarizes the current conditions and issues with Japanese domestic laws for implementing the United Nations Convention on the Law of the Sea in Japan to grasp these in relation with the exercise of enforcement jurisdiction at sea. First we grasp the present conditions of the arrangement of domestic laws for implementing the United Nations Convention on the Law of the Sea (Section 1), generally examine and summarize the significance of arranging Japanese domestic laws for implementing the United Nations Convention on the Law of the Sea in Japan (Section 2), and clarify the significance that the arrangement of the concerned domestic laws has for Japan's exercise of its enforcement jurisdiction at sea (Section 3). We then clarify the significance of enacting the Japanese Piracy Act in Japan and the future issues (Section 4).

Keywords: the United Nations Convention on the Law of the Sea, the Japanese Piracy Act, treaty implementation

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Introduction

The bill for the Basic Act on Ocean Policy was passed into law by majority vote in a plenary session of the House of Councilors on April 20, 2007. The Basic Act on Ocean Policy was promulgated as Act No. 33 on April 27, 2007 and came into force on July 20, 2007 to establish a Headquarters for Ocean Policy in the Cabinet so the Government of Japan can advance ocean policy comprehensively across each ministry and agency, and for the unified promotion of ocean development, use and conservation. The Headquarters for Ocean Policy was subsequently established based on the Basic Act on Ocean Policy, and the Basic Plan on Ocean Policy was adopted by Cabinet decision on March 18, 2008. Additionally, a new Basic Plan on Ocean Policy was adopted by Cabinet decision on April 26, 2013 considering the changes in ocean conditions and other developments over the five years since the first Basic Plan was prepared.

Regarding the matters the government should consider in enforcement of the Basic Act on Ocean Policy, the bill for the Basic Act on Ocean Policy includes the resolution adopted when it was passed by the House of Representatives Committee on Land, Infrastructure, Transport and Tourism and the supplementary resolution adopted when it was passed by the House of Councilors Committee on Land and Transport. The contents of these two resolutions are basically the same. They both state that in the enforcement of the Basic Act on Ocean Policy, considering that “domestic laws have not well been arranged” (both resolutions) for implementing in Japan the United Nations Convention on the Law of the Sea (adopted April 30, 1982; entered into force November 16, 1994; entered into force in Japan July 20, 1996; hereafter “UN Convention on the Law of the Sea”), “in order to secure our country’s national interests concerning the sea and to fulfill our international obligations concerning the sea” (both resolutions), Japan should “urgently prepare

Implementation of the United Nations Convention on the Law of the Sea in Japan

the domestic legal system concerning the various systems stipulated by the UN Convention on the Law of the Sea and other international agreements” (both resolutions) and “devise appropriate measures” (House of Councilors Committee on Land and Transport).

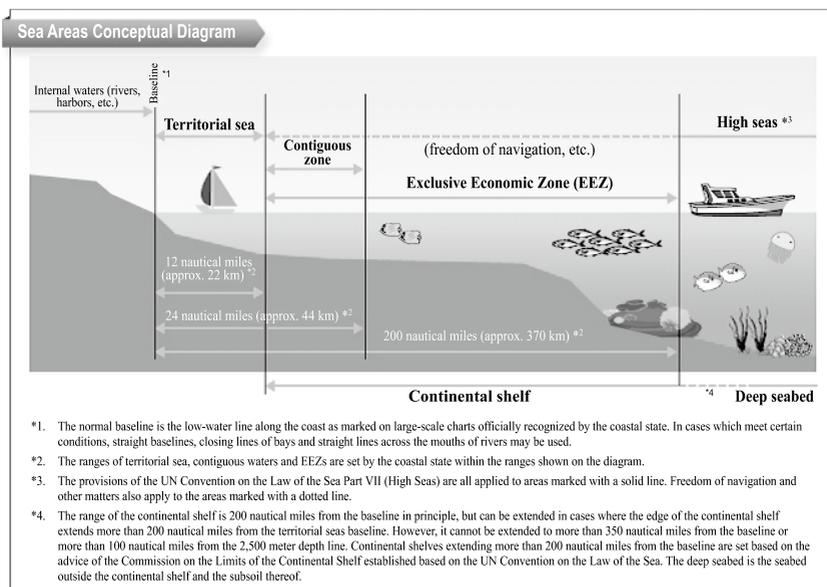
The Law on Punishment of and Measures against Acts of Piracy (Act No. 55 of 2009; hereafter “Japanese Piracy Act”) makes acts of piracy under international law listed in Article 101 of the UN Convention on the Law of the Sea crimes under Japanese domestic law as well, clarifies what types of acts under what conditions are crimes under Japanese domestic law and how they are punished, allows punishment of persons who commit acts of piracy regardless of their nationality as an exercise of universal jurisdiction permitted by Article 105 of the UN Convention on the Law of the Sea, and is a law which aims at facilitating international cooperation by expanding the category of the ships to be protected by Japanese government to include the ships of all nations. In Japan, the domestic law corresponding to the provisions of the UN Convention on the Law of the Sea related to acts of piracy truly “has not well been arranged” until the Japanese Piracy Act was passed in June 2009.

Section 1 Arrangement of Domestic Laws for Implementing the UN Convention on the Law of the Sea in Japan

The key domestic laws which Japan arranged when ratifying the UN Convention on the Law of the Sea in 1996 (enactment or revision of individual laws based on the provisions of the UN Convention on the Law of the Sea) include the revisions made to the Act on Territorial Sea and Contiguous Water Zone (Act No. 30 of 1977; hereafter “Territorial Sea Act”) (hereafter the revised Territorial Sea Act is referred to as the “New Territorial Sea Act”) and the enactment of the Act on the Exclusive Economic Zone

Implementation of the United Nations Convention on the Law of the Sea in Japan and the Continental Shelf (Act No. 74 of 1996; hereafter the “EEZ Act”). In accordance with the classification of sea areas by the UN Convention on the Law of the Sea, these two laws set the sea areas of territorial sea, the contiguous zone, the exclusive economic zone (hereafter, “EEZ”), and the continental shelf, and establish provisions on the application of domestic law to each sea area. As a result the sea areas inside and nearby Japan are comprised of internal waters (sea areas within the baseline), territorial sea (the sea area basically within 12 nautical miles from the baseline), the contiguous zone (the sea area within 24 nautical miles from the baseline, excluding territorial sea), the EEZ (the sea area within 200 nautical miles from the baseline, excluding territorial sea, the seabed and the subsoil under it), and the continental shelf (the seabed etc. within 200 nautical miles from the baseline, excluding the seabed of territo-

Conceptual Diagram of Sea Areas



(Source: Ministry of Foreign Affairs home page, “Japan and the UN Convention on the Law of the Sea”)

Implementation of the United Nations Convention on the Law of the Sea in Japan
rial sea) (refer to the figure “Conceptual Diagram of Sea Areas”).

The essence of the New Territorial Sea Act and of the EEZ Act, like that of the Territorial Sea Act before the revision, is basically to set the width of each sea area. For example, these acts lack provisions stipulating the definition and legal status of territorial sea, standards for deciding what does and does not constitute innocent passage in territorial sea, exercise of the right of protection by Japan as the coastal state of the territorial sea, and exercise of the right to control fishing in EEZ by Japan as the coastal state of the EEZ, so their character as legal basis for the exercise of enforcement jurisdiction in internal waters, the territorial sea and the EEZ, respectively, is weak. Fundamentally, the New Territorial Sea Act and the EEZ Act expect the arrangement of individual laws in each field on the preservation and control of fishery resources, the protection and conservation of the ocean environment, securing the safe navigation of ships, the management of immigration and emigration, the imposition and collection of tariffs, and the regulation of marine scientific research and, assuming the existence of the said laws, the exercise of enforcement jurisdiction based on the “enforcement of laws and regulations at sea,” “prevention and suppression of crimes at sea,” and “detection and arrest of criminals at sea” in the Japan Coast Guard Act (Act No. 28 of 1948) (hereafter, “JCG Act”). (This is explained in Section 3.)

The arrangement of individual laws conducted when Japan ratified the UN Convention on the Law of the Sea in 1996 regarding the preservation and control of fishery resources included the Act on the Exercise of the Sovereign Right for Fishery, etc. in the Exclusive Economic Zone (Act No. 76 of 1996; hereafter “EEZ Fishery Act”) and the Act on Preservation and Control of Living Marine Resources (Act No. 77 of 1996). The former was enacted to regulate fishing activities by foreigners within the EEZ, because the EEZ Act established the EEZ in adjacent

Implementation of the United Nations Convention on the Law of the Sea in Japan seas giving Japan the sovereign right to living and non-living natural resources in this sea area. The latter is a law to manage living marine resources based on fishing quotas.

Also regarding the protection and conservation of the ocean environment, the Act Relating to the Prevention of Marine Pollution and Maritime Disaster (Act No. 136 of 1970) was revised. Because Article 230 of the UN Convention on the Law of the Sea states that in principle “monetary penalties only” may be imposed with respect to violations by foreign ships of domestic laws set for the protection of the marine environment, the provisions for imprisonment with work and imprisonment without work regarding the concerned violations were abolished, the fines were increased, and a system for prompt release (a bond system) was adopted.

Additionally, the JCG Act was revised to clarify the requirements for invoking the exercise of enforcement jurisdiction at sea, and for conducting more flexible and appropriate measures to prevent crime.

Individual laws related to the sea arranged by Japan following the ratification of the UN Convention on the Law of the Sea include the “Act on Setting Safety Zones for Maritime Construction Etc.” (Act No. 34 of 2007) enacted together with the Basic Act on Ocean Policy in April 2007, the Act on Navigation of Foreign Ships through the Territorial Sea and Internal Waters (Act No. 64 of 2008) enacted June 2008 (hereafter, “Foreign Ships Navigation Act”), the Japanese Piracy Act enacted in June 2009, and the Act on Special Measures Concerning the Guarding of Japanese Ships in Pirate-Infested Waters (Act No. 75 of 2013) enacted in November 2013, which allows Japanese ships navigating sea areas with many cases of piracy to guard themselves using small arms.

To regulate navigation by foreign ships in Japan’s territorial sea that does not

Implementation of the United Nations Convention on the Law of the Sea in Japan

constitute innocent passage, the provisions in the Foreign Ships Navigation Act focus on “passage” as prescribed in Article 18 Paragraph 2 of the UN Convention on the Law of the Sea rather than on “innocence” as prescribed in Article 19 of the UN Convention on the Law of the Sea, and are aimed at maintaining the order of the navigation of foreign ships in Japan’s territorial sea, etc. Based on the provisions of Article 18 Paragraph 2 of the UN Convention on the Law of the Sea, “Passage shall be continuous and expeditious,” Article 3 of Foreign Ships Navigation Act states “The navigation of foreign ships in territorial waters, etc. …must be continuous and expeditious,” prescribing the general method of navigation, and Article 4 Paragraph 1 specifically stipulates that in territorial waters etc. the masters etc. of foreign ships may not conduct navigation that includes stopping, anchoring, mooring, wandering etc. (hereafter, collectively referred to as “stopping etc.”), except when necessary because of rough weather, maritime accident, or to avert other danger. An act partially revising the Foreign Ships Navigation Act was passed in 2012 (Act No. 71 of 2012) in response to the increase in recent years in the number of foreign ships conducting territorial claim activities in Japanese territorial sea etc. and navigating territorial sea etc. with the intention of landing illegally on remote islands.

In June 2010, the Act on Special Measures Concerning Cargo Inspections Etc. Conducted by the Government Taking into Consideration United Nations Security Council Resolution 1874, Etc. (Act No. 43 of 2010) was passed as the arrangement of domestic law for implementing Resolution 1874 adopted unanimously by the United Nations Security Council, which condemned the 25 May 2009 nuclear test by the Democratic People’s Republic of Korea (DPRK) and tightened sanctions against it by blocking funding for nuclear, missile and proliferation activities through targeted sanctions on additional goods, persons and entities, widening

Implementation of the United Nations Convention on the Law of the Sea in Japan
the ban on arms imports-exports, and calling on the United Nations Member States to inspect and destroy all banned cargo to and from that country on the high seas, at seaports and airports, if they have reasonable grounds to suspect a violation.

One may say that since the Basic Act on Ocean Policy was enacted, the arrangement of Japanese domestic laws regarding the “maritime safety and security” in a broad sense is being advanced.

Section 2 Significance of Arranging Domestic Laws for Implementing the UN Convention on the Law of the Sea in Japan

When countries that are signatories of the UN Convention on the Law of the Sea arrange some kind of individual laws to regulate specific activities of private individuals for implementing the rights and obligations of signatory countries recognized under the Convention, their administrative agencies can exercise enforcement jurisdiction based on the said individual laws. To implement them, signatory countries can exercise administrative enforcement jurisdiction of questioning and on-site inspections, and, when there are activities which violate the concerned domestic laws, they can also exercise criminal enforcement jurisdiction of investigation, arrest, confiscation, custody, referral and prosecution to recover legal interests that were violated.

For example, when foreign nationals conduct fishing activities in Japan’s territorial sea, the authorities can take measures against them based on the Act on Regulation of Fishing Operation by Foreign Nationals (Act No. 60 of 1967) which basically prohibits fishing activities etc. by foreign nationals etc. in Japan’s territorial sea etc. Also, in cases where foreign ships stop etc. in Japan’s territorial sea without prior notification to the Government of Japan, the authorities can take

Implementation of the United Nations Convention on the Law of the Sea in Japan
measures against them based on the Foreign Ships Navigation Act as explained
above.

Then what about domestic implementation in cases where individual laws corresponding to the individual rights and obligations granted to signatory countries by the UN Convention on the Law of the Sea have *not* been arranged?

For example, under Japanese domestic law, there are provisions of some laws and regulations which presume Japan has the right of hot pursuit under international law (Article 3 and Article 5 of the New Territorial Sea Act, Article 3 of the EEZ Act), as well as detailed provisions regarding exercising this right of hot pursuit (Article 14 of the Ordinance for Enforcement of the Law on the Exercise of the Sovereign Right for Fishery Etc. in the Exclusive Economic Zone [Cabinet Order No. 212 of July 5, 1996]), but there is no domestic law which prescribes that Japan has the right of hot pursuit under international law. Regarding this, Article 111 of the UN Convention on the Law of the Sea and Article 23 of the Convention on the High Seas (adopted in Geneva April 29, 1958; entered into force Sept. 30, 1962; acceded by Japan July 30, 1968) prescribes the details of the emergence of the right of hot pursuit, the policing authorities which can exercise the right, the sea areas from which the authorities can exercise the right, and the lapse of the right. Also, generally, in countries such as Japan where the Constitution incorporates international treaties into the domestic legal system (countries which adopt the doctrine of incorporation), treaties signed by Japan take legal effect as Japanese domestic law, just as they are, within the domestic legal system (as described below), so treaty provisions incorporated into Japan's legal system can be direct legal grounds for the exercise of enforcement jurisdiction and it is deemed unnecessary to copy the contents of treaty provisions into domestic laws. For example, in cases where the Government of Japan exercises the right of hot pursuit to arrest the master etc. of a for-

foreign ship caught in violation of laws to regulate fishing activities in Japan's territorial sea or EEZ and pursues the ship onto the high seas, the legal ground for taking these measures under domestic law comes from Article 212 and Article 213 of the Code of Criminal Procedure, but when the concerned foreign ship continues to escape and enters the territorial sea of the flag state or a third country, there is no law which serves as legal grounds for suspending the further pursuit because the right of hot pursuit lapses under Article 111 Paragraph 3 of the UN Convention on the Law of the Sea.

Also, Article 20 Paragraph 2 of the JCG Act, concerning identifying ships subject to the use of weapons under the provision, stipulates "passage that is not innocent passage as defined by the UN Convention on the Law of the Sea Article 19." Under Article 20 Paragraph 2 of the JCG Act, the subject ships are identified through interpretation and application of the UN Convention on the Law of the Sea incorporated into Japan's domestic legal system, and not through interpretation and application of individual laws enacted to regulate activities listed in Article 19 Paragraph 2 of the UN Convention on the Law of the Sea for passage that is not "innocent passage" in territorial sea.

Regarding the exercise of judicial jurisdiction, Article 97 Paragraph 1 of the UN Convention on the Law of the Sea prescribes that in the event of a collision or any other incident of navigation concerning a ship on the high seas, the exercise of judicial jurisdiction is permitted only for the flag state or the state of nationality of the master, etc. For example, as interpretation of the Penal Code (Act No. 45 of April 24, 1907), in a case where a Japanese ship collided with a foreign ship on the high seas, the Japanese ship sank and Japanese crew members died, even if the offense occurred inside the Japanese ship and even if professional negligence resulting in death is recognized from negligence by the master in the operation of

the ship, under international law (Article 97 of the UN Convention on the Law of the Sea), as long as the concerned master is not a Japanese citizen, even if the concerned master enters Japanese territory after the collision occurs, Japan has no criminal enforcement and judicial jurisdiction over the concerned master. Japan's courts are restricted by Article 98 Paragraph 2 of the Constitution of Japan (discussed below), and even if hypothetically a lawsuit were filed despite the lack of criminal enforcement and judicial jurisdiction under international law, the suit would be dismissed by judgment under Article 338 Item 1 of the Code of Criminal Procedure.

To be certain, regarding domestic measures for implementing international treaties, in Japan the Constitution of Japan takes the position that basically treaties shall be approved by the Diet (Article 73 Item 3 of the Constitution of Japan), and that approved treaties themselves are automatically promulgated by the Emperor (Article 7 Item 1), and furthermore states in Chapter X "Supreme Law" that "the treaties concluded by Japan and established laws of nations shall be faithfully observed" (Article 98 Paragraph 2). Because the Constitution of Japan recognizes the obligation to observe treaties and established laws of nations, they are immediately incorporated into the Japanese domestic legal system by their promulgation, and have legal effect under domestic legal system without taking any particular measures (adoption of the doctrine of incorporation). For that reason, even if laws for implementing treaty rights and obligations are not prepared, treaties which have been promulgated have legal effect as domestic law within the Japanese legal system just as they are. In other words, because Japan adopts the doctrine of incorporation, there is no need to enact domestic laws corresponding to the individual rights and obligations granted to Japan as a party by treaties and rewrite the contents of treaties into such laws as there is in countries that adopt the doc-

Implementation of the United Nations Convention on the Law of the Sea in Japan

trine of transformation under which concluding treaties and other international agreements does not make them effective as domestic law under the domestic legal system and domestic laws must be enacted based on the contents of the concerned treaties for them to become effective as domestic law.

For that reason, the meaning of arrangement of individual laws for implementing treaties within Japan can be understood either as a measure for cases where administrative agencies and courts cannot or find it difficult to directly apply and enforce treaty provisions to secure the domestic realization of the concerned treaty provisions, or as an expedient means of reinforcing the domestic implementation of the concerned treaty even when they can directly apply and enforce the treaty provisions.

Consequently, in the implementation of the UN Convention on the Law of the Sea in Japan, it becomes necessary to prepare some sort of laws for cases where administrative agencies exercise their authority to order or force private persons. If individual domestic laws were not prepared for the domestic implementation of the UN Convention on the Law of the Sea, the policing authorities of investigation, arrest, confiscation, custody, referral and prosecution could not be exercised, and fundamentally only administrative measures which counterparties voluntarily accept could be exercised within the range permitted by the UN Convention on the Law of the Sea and within the range permitted by the JCG Act, which is one of the laws providing legal grounds for the exercise of enforcement jurisdiction at sea (explained in the next section).

Section 3 Exercise of Enforcement Jurisdiction at Sea Based on the Japan Coast Guard Act

In this section, we examine what kinds of differences arise in the feasibility and

Implementation of the United Nations Convention on the Law of the Sea in Japan

methods of the exercise of enforcement jurisdiction at sea in cases where domestic laws are and are not prepared for implementing the UN Convention on the Law of the Sea in light of the JCG Act, which is a law providing grounds for the exercise of enforcement jurisdiction at sea.

The JCG Act is an act combining what are referred to as organizational law and functional law with stipulations on “purposes of establishment” in Article 1, “duties” in Article 2, and “affairs under its authority” in Article 5.

Article 2 Paragraph 1 of the JCG Act makes the following provisions regarding the “duties” of the Japan Coast Guard (hereafter, “JCG”).

“The Japan Coast Guard shall, for the purpose of ensuring safety and order at sea, perform the duties concerning enforcement of laws and regulations at sea, maritime search and rescue, prevention of maritime pollution, maintenance of the order of vessels’ navigation at sea, prevention and suppression of crimes at sea, detection and arrest of criminals at sea, regulation of vessels’ traffic at sea, services concerning waterways and aids to navigation, other services for ensuring maritime safety and the services concerning matters incidental thereto.”

In Article 2 Paragraph 1 of the JCG Act, it is the provision “perform the duties concerning enforcement of laws and regulations at sea” which provides grounds for the JCG to exercise administrative enforcement jurisdiction at sea. Here, “laws and regulations” broadly mean the domestic laws of Japan (however, they do not include the above-mentioned treaties and other international agreements *incorporated into Japan’s domestic legal system*). The specific acts of exercising administrative enforcement jurisdiction include the explanation of laws and regulations to concerned parties, and in cases where there are violations of laws or regulations, to point out that fact and give the necessary directions to rectify the violation. “Enforcement of laws and regulations at sea” is also included in the affairs under the au-

thority of JCG officers prescribed in Article 5 and this can be interpreted as a provision whereby JCG officers are comprehensively given the authority to enforce laws and regulations. This type of provision arises from the history whereby the JCG Act was enacted using the US Coast Guard as the model, and adopts the framework used by the US Coast Guard for the enforcement of laws.

Also, the “prevention and suppression of crimes at sea” in Article 2 Paragraph 1 of the JCG Act corresponds to exercising administrative enforcement jurisdiction in order to prevent the emergence of crimes in advance, and, when crimes have occurred, to minimize their harm and prevent their expansion.

Furthermore, “detection and arrest of criminals at sea” in Article 2 Paragraph 1 of the JCG Act corresponds to exercising criminal enforcement jurisdiction of detection of crimes and arrest of criminals, and the exercise of these authorities is regulated by the Code of Criminal Procedure. Article 31 Paragraph 1 of the JCG Act states “In regard to crimes committed at sea, JCG officers and assistant officers shall, as prescribed by the Commandant of the Japan Coast Guard, perform the duties of a police official as provided by the Code of Criminal Procedure.” The “crimes committed at sea” which are subject to the exercise of criminal enforcement jurisdiction by JCG officers are limited to crimes committed “at sea,” but no limitations are placed on the contents of the “crimes.” This exercise of enforcement jurisdiction is the same as when a police officer carries out duties as a policing officer with no limitations on the subject crimes.

Consequently, in cases where individual laws are arranged for implementing the UN Convention on the Law of the Sea, the arrangement of the concerned domestic laws has the significance of enabling the exercise of enforcement jurisdiction at sea with the clear basis in organizational law and functional law of “enforcement of laws and regulations at sea,” “prevention and suppression of crimes

Implementation of the United Nations Convention on the Law of the Sea in Japan
at sea,” and “detection and arrest of criminals at sea” in Article 2 Paragraph 1 of the JCG Act.

Then how should we view the feasibility and methods of exercising enforcement jurisdiction at sea in cases where individual laws are not arranged based on the UN Convention on the Law of the Sea?

In recent years, there have been many cases where foreign government ships enter Japanese territorial sea, where foreign government marine research ships conduct marine scientific research (hereafter, “MSR”) inside Japan’s EEZ without prior notification, and where MSR is conducted in sea areas or using methods that differ from those on the prior notification. In cases where the Government of Japan requests that such foreign government ships being operated for the non-commercial purposes of foreign governments leave Japan’s territorial sea or cease MSR inside Japan’s EEZ, such exercise of enforcement jurisdiction could not be based on the provisions “enforcement of laws and regulations at sea,” “prevention and suppression of crimes at sea,” and “detection and arrest of criminals at sea” in Article 2 Paragraph 1 of the JCG Act. That is because the foreign government ships enjoy the immunity under international law, and there were no laws prepared directly regulating MSR in the EEZ in Japanese domestic law. Moreover, many Japanese laws which regulate ships explicitly exclude foreign warships and other government ships in the definition of “ships” with such provisions as “except for warships and other ships owned and operated by the government of each foreign country” (Article 2 of the Japanese Piracy Act).

The partial revision to the JCG Act in August 2012 added provisions regarding duties in Article 2 and regarding affairs under its authority in Article 5. The provision “maintenance of order of ships’ navigation at sea” was intended to clarify the grounds under organizational law and functional law for the exercise of enforce-

Implementation of the United Nations Convention on the Law of the Sea in Japan

ment jurisdiction to demand that the foreign government ships depart to outside Japanese territorial sea or cease research activities inside Japan's EEZ without prior notification. In other words, the activities of the foreign government ships are legally assessed not based on individual laws enacted and revised based on the UN Convention on the Law of the Sea or other treaties or international agreements, but rather based on the UN Convention on the Law of the Sea and other treaties and international agreements incorporated into Japan's domestic legal system, and the revision was designed to clarify that the JCG can exercise enforcement authority over the public ships of foreign governments based on the provision "maintenance of order of vessels' navigation at sea" in Article 2 and Article 5 of the JCG Act in cases where the exercise of enforcement jurisdiction corresponding to this legal assessment is permitted under international law (for example, exercise of the "right of protection" based on Article 25 Paragraph 1 of the UN Convention on the Law of the Sea by a coastal state against a foreign ship whose conducts in territorial sea are assessed as not "innocent" based on Article 19 of the UN Convention on the Law of the Sea, and demands by a coastal state against a foreign ship conducting MSR in the EEZ without prior notification and without fulfilling obligations under Article 246 Paragraph 2 of the UN Convention on the Law of the Sea Article to cease the concerned acts violating international law based on the responsibility of states).

Section 4 Significance and Challenges of Enacting the Japanese Piracy Act

Incidents where ships navigating in waters off Somalia, in the Gulf of Aden, the Red Sea, the Arabian Sea and the Indian Ocean, and offshore Oman were attacked by acts of piracy and armed robbery at sea (hereafter, "acts of piracy etc.") suddenly increased from 2008 through 2009. According to a report by the International Chamber of Commerce International Maritime Bureau, one of the spe-

cialized departments of the International Chamber of Commerce, which is a private-sector body engaged in the unification of trading practices for international trade, the number of incidents of acts of piracy etc. in these sea areas suddenly increased from 22 in 2006 and 48 in 2007 to 111 in 2008 and 218 in 2009. Subsequently, there were 219 incidents in 2010 and 237 in 2011, but the number has been declining from 2012 as a result of international efforts, with 75 incidents in 2012, 15 in 2013 and 11 in 2014.

These sea areas are important maritime transportation routes linking Japan with Europe and the Middle East (imports from the Middle East account for about 90% of Japanese crude-oil imports), and are navigated by over 2,000 “ships connected with Japan” (ships registered in Japan and ships registered in foreign countries operated by Japanese shipping companies) each year. Acts of piracy etc. are also threatening the safe navigation of ships connected with Japan. For example, in April 2008 the oil tanker *Takayama* registered in Japan and owned and operated by NYK Line was hit by a rocket-propelled grenade fired by a small boat in the Gulf of Aden, and in July 2010 the oil tanker *M. Star* registered in the Marshall Islands and owned by Mitsui O.S.K. Lines suffered damages from an explosion believed to be caused by an outside attack in the Straits of Hormuz. Additionally, in March 2011, the oil tanker *Guanabara* registered in the Bahamas and owned by Mitsui O.S.K. Lines was illegally boarded and taken over by four self-proclaimed Somali pirates on the high seas in the Arabian Sea. The US Navy warship *Bulkeley* received a distress signal from the *Guanabara*, rushed to its location, rescued the *Guanabara* with assistance from the Turkish Navy, and arrested the four pirates. The JCG received a warrant for the arrest of the four suspects for violations of the Japanese Piracy Act, dispatched JCG officers to Djibouti to take custody of the four suspects, who were being held by U.S. Navy personnel, and arrested them

Implementation of the United Nations Convention on the Law of the Sea in Japan
aboard a destroyer of the Maritime Self Defense Force (hereafter “JMSDF”) on the high seas in the Gulf of Aden. The four were subsequently transported to Japan, prosecuted respectively for violations of the Japanese Piracy Act, sentenced to between 9 and 11 years in prison, and are presently serving their sentences in Japan.

Following the frequent occurrence and increasing severity of acts of piracy etc. offshore Somalia and in the Gulf of Aden, based on Article 82 of the Self-Defense Forces Act (Act No. 165 of June 9, 1954), on March 13, 2009 the Government of Japan ordered Maritime Security Operations for the purpose of protecting ships related to Japan from acts of piracy in these sea areas, and dispatched the JMSDF units to these areas on the following day March 14. The ships eligible for security under the concerned dispatch were limited to “ships related to Japan,” which include “ships registered in Japan,” “foreign ships with Japanese aboard” and “foreign ships operated by Japanese shipping companies and foreign ships carrying Japanese freight which are important ships for the stable economic activities of Japanese citizens”, and this was because of the commonly accepted interpretation that “life and property” in Article 82 of the Self-Defense Forces Act, which was the basis for the dispatch, basically refers to the life and property of Japanese citizens.

The bill for the Law on Punishment of and Measures against Acts of Piracy (the Japanese Piracy Act) was approved by Cabinet decision on March 13, 2009, submitted to the 171st Diet, approved by a plenary session of the House of Representatives on April 23, but voted down in a plenary session of the House of Councilors on June 19. On the same day, based on Article 59 Paragraph 2 of the Constitution of Japan, the bill was reapproved by the House of Representatives, promulgated as Act No. 55 on June 24, 2009, and came into force on July 24. On the same day, the Minister of Defense received approval from the Prime Minister and ordered

Anti-Piracy Response Operations under Article 7 of the Japanese Piracy Act. With this, the response to piracy by the JMSDF offshore Somalia and in the Gulf of Aden switched on July 28, 2009 from maritime security operations based on the Self-Defense Forces Act to anti-piracy activities based on the Japanese Piracy Act, and the ships subject to protection were expanded to the ships of all nations, regardless of the country of the registration. In addition from December 10, 2013, the Maritime Self Defense Forces has been participating in Combined Task Forces 151 (CMF CTF-151), and implementing zone defense.

The Japanese Piracy Act is a law enacted to make acts of piracy under international law stipulated in Article 101 of the UN Convention on the Law of the Sea crimes under Japanese domestic law as well, clarify what acts under what conditions constitute crimes under Japanese domestic law and how they are punished, enable the punishment of persons who commit acts of piracy regardless of their nationality as an exercise of universal jurisdiction permitted by Article 105 of the UN Convention on the Law of the Sea, and facilitate international cooperation by expanding the ships which can receive protection from the Government of Japan to the ships of all countries.

In the process of enacting the Japanese Piracy Act, there was a lot of discussion regarding the use of weapons accompanying the exercise of the enforcement jurisdiction against acts of piracy and the involvement of the Diet when the JMSDF units conduct anti-piracy activities (Article 7 of the Japanese Piracy Act). Hereafter, by discerning the limits on the response to acts of piracy prior to the enactment of the Japanese Piracy Act and focusing on how the Japanese Piracy Act handles responses to acts of piracy and punishments of acts of piracy, we show the significance of enacting the Japanese Piracy Act and review the outstanding issues.

Implementation of the United Nations Convention on the Law of the Sea in Japan

The definition of piracy in Article 101 of the UN Convention on the Law of the Sea can be summarized as follows: “any illegal acts of violence etc. committed for private ends by the crew or the passengers of a private ship etc. on the high seas against another ship.” So under the UN Convention on the Law of the Sea, “piracy” is an illegal act of violence or plunder etc. which meets the four conditions: location (on the high seas), actor (the crew or passengers of a private ship), object (against another ship), and purpose (for private ends).

Also Article 105 of the UN Convention on the Law of the Sea stipulates that as an exception of the flag state principle on the high seas, as an exercise of universal jurisdiction, every state is allowed to exercise criminal enforcement and judicial jurisdiction—for example, to seize ships used for acts of piracy (hereafter, “pirate ships”), arrest the persons who committed acts of piracy, prosecute and punish them. In principle, ships on the high seas are under the exclusive jurisdiction of the countries where they are registered, but for ships which have committed acts of piracy the provisions of Article 105 of the UN Convention on the Law of the Sea permit all states, not just the state of registration, to exercise the enforcement jurisdiction of seizure, arrest and confiscation. The same article has the effect that even if a given country certifies acts of violence etc. on the seas as acts of piracy under international law, and arrests, prosecutes and punishes the person who committed the concerned acts, the concerned exercise of jurisdiction by the country will not be regarded as illegal under international law by any other country and its state responsibility will not be pursued.

Before the enactment of the Japanese Piracy Act, under Japanese domestic law there was no particular law to respond to acts of piracy under Article 101 of the UN Convention on the Law of the Sea, so the issue was whether these constituted crimes under the Penal Code, specifically homicide (Article 199 of the Penal Code),

injury (Article 204), capture and confinement (Article 220), intimidation (Article 222), robbery (Article 236), etc. That is to say, before the enactment of the Japanese Piracy Act, among the acts of piracy under the UN Convention on the Law of the Sea, only those to which the Penal Code could be applied could be handled as crimes under domestic law. The response to acts of piracy under Japanese domestic law prior to the enactment of the Japanese Piracy Act can be summarized as follows from the perspective of the application of the Penal Code.

In cases which occurred on the high seas, the Penal Code could be applied to crimes which correspond to crimes onboard Japanese flag ships (Article 1 Paragraph 2 of the Penal Code), crimes committed outside Japan (Article 2), crimes committed by Japanese nationals outside Japan (Article 3), crimes committed by non-Japanese nationals outside Japan (Article 3-2), and crimes committed outside Japan governed by a treaty (Article 4-2).

In cases where the persons committing acts of piracy are foreigners, because homicide, attempted homicide, injury, injury causing death, capture and confinement, intimidation and robbery, which are considered to be the main components of piracy, are not included as subject crimes in Article 2 of the Penal Code, this Article cannot be applied. However, even in cases where the person committing acts of piracy is a foreigner, if the victim is a Japanese national, the Penal Code can be applied to the crimes of homicide, attempted homicide, injury, injury causing death, capture and confinement, and robbery under Article 3-2 of the Penal Code, but cannot be applied to the crime of intimidation.

On the other hand, in cases where the party committing acts of piracy is a Japanese national, the Penal Code can be applied to the crimes of homicide, attempted homicide, injury, injury resulting in death, capture and confinement, and robbery under Article 3 of the Penal Code, but cannot be applied to the crime of

Implementation of the United Nations Convention on the Law of the Sea in Japan
intimidation.

Article 4-2 of the Penal Code prescribes “In addition to the provisions of Article 2 through the preceding article, this Code shall also apply to anyone who commits outside the territory of Japan those crimes prescribed under Part II which are governed by a treaty even if committed outside the territory of Japan.” The application of this article is interpreted to be limited to crimes for which treaty signatory nations are required to impose punishments. Regarding this point, Article 105 of the UN Convention on the Law of the Sea prescribes “Every State may seize... a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed...” This only allows, and does not oblige, the punishments of seizure, arrest and confiscation, and therefore lies outside the application of Article 4-2.

To date, the JCG has not sent patrol ships offshore Somalia and to the Gulf of Aden because 1) the distance from Japan (the JCG presently has only two patrol ships capable of long-term continuous navigation in these sea areas), 2) the weapons possessed by persons committing acts of piracy in these sea areas (they are armed with RPG-7s and other heavy firearms), and 3) other countries have dispatched navy warships and military aircraft. There are JCG officers on board the two JMSDF destroyers that have been dispatched to these sea areas on order to exercise criminal enforcement jurisdiction. Regardless, if the JCG patrol ships were dispatched to offshore Somalia and to the Gulf of Aden, what contents would be within their range of “response”?

As stated above, under the JCG Act, which is its organizational and functional law, the JCG has the duty to “secure safety and order at sea” (Article 2 Paragraph 1). The term “at sea” as used here is interpreted to have no geographical limitations,

Implementation of the United Nations Convention on the Law of the Sea in Japan and includes not only Japan's territorial sea and EEZ but also the high seas where acts of piracy occur. As for whose "safety," the interpretation is also that there are no particular restrictions. The JCG's duties include the exercise of administrative enforcement jurisdiction such as "perform the duties concerning enforcement of laws and regulations at sea" and "prevention and suppression of crimes at sea," as well as the exercise of criminal enforcement jurisdiction such as "detection and arrest of criminals at sea." Under Article 5, the affairs under the mission of the JCG also include "matters concerning suppression of riots and disturbances at sea" (Article 5 Item 14) and "matters concerning the detection and arrest of criminals at sea" (Article 5 Item 15). For pirate ships, a JCG officer may "stop, visit and inspect the ship... or question the crew and passengers on matters necessary for the performance of his duties" (Article 17 Paragraph 1), and may also stop pirate ships and restrain acts of piracy "when a Japan Coast Guard officer witnesses a crime about to be committed at sea, or when there are concerns over loss of human life or injury or serious property damage in a dangerous situation such as a natural disaster, disaster at sea, structure collapse or explosion of an explosive, and immediate action is needed" (Article 18 Paragraph 1).

In this way, even prior to the enactment of the Japanese Piracy Act, JCG officers have been able to exercise administrative enforcement jurisdiction over incidents of piracy broadly on the high seas based on the JCG Act such as stopping and boarding pirate ships for the purposes of eliminating their danger, suppressing acts of piracy, and rescuing the crew of ships that are victims of piracy.

However prior to the enactment of the Japanese Piracy Act, because in Japan's domestic law, there were no laws responding to acts of piracy under the UN Convention on the Law of the Sea, the structure which had to be followed was to assess whether acts which occurred on the high sea constituted "acts of piracy"

Implementation of the United Nations Convention on the Law of the Sea in Japan

based on the provisions of Article 101 of the UN Convention on the Law of the Sea incorporated into the Japanese legal system and, in cases where the said acts did constitute “acts of piracy,” to exercise enforcement jurisdiction in response to that assessment in order to exercise enforcement jurisdiction based on Article 105 of the UN Convention on the Law of the Sea under international law and Article 17 and Article 18 of the JCG Act under Japanese domestic law.

Furthermore, after responding to acts of piracy administratively, prior to the enactment of the Japanese Piracy Act, as for the arrest, investigation and other judicial procedures for persons committing piracy, arrests could only be made when the piracy cases involved Japanese ships or Japanese nationals. Under Japanese domestic law, prior to the enactment of the Japanese Piracy Act, because there was no particular law corresponding to acts of piracy under the UN Convention on the Law of the Sea, as stated above, Japanese authorities could respond to acts of piracy under domestic law only when cases corresponded to homicide, injury, capture, confinement, intimidation, robbery and other crimes under the Penal Code. What is more, the range of application of the Penal Code is limited. While the Penal Code can be applied to piracy cases involving Japanese ships or Japanese nationals in some way, such as cases where Japanese ships or Japanese nationals are damaged from acts of piracy, it cannot be applied in cases where a foreign ship on the high seas with only foreigners on board is attacked by foreigners. Since this does not constitute a “crime” under Japanese domestic law, Japanese authorities were not able to exercise criminal enforcement jurisdiction such as investigation, arrest and confiscation. In such cases, at the sea location where the act of piracy was encountered, the persons committing the act of piracy would have to be turned over to the authorities of another country, or when they could not be turned over to any other country, they “have to be re-

leased” at the location.

Regarding the punishment of acts of piracy, there was a case in 1934 where German nationals committed acts of piracy in the East China Sea, attacked a Chinese ship, and then entered the territorial sea of Kwantung. The court ruled, “This act [this case] is a crime committed by foreigners against foreigners on the high seas outside Japan’s territorial sea, and there are no provisions for punishment under Japan’s present criminal law, so the prosecution is dismissed by applying the *then* Code of Criminal Procedure” (April 26, 1934 ruling of the Kwantung District Court; *Horitsu Shimibun* No. 3696, p. 13). The point that Japanese domestic law could not be applied to acts of piracy on the high seas in cases where a foreign ship with only foreigners onboard (including foreign flag ships operated by Japanese shipping companies) is attacked by foreign nationals remained unchanged until the Japanese Piracy Act was enacted in 2009.

With the enactment of the Japanese Piracy Act, even for cases of piracy when a ship with only foreign nationals onboard is attacked by foreign nationals on the high seas, JCG officers can not only suppress acts of piracy, eliminate their danger and otherwise exercise administrative jurisdiction, but also investigate and arrest persons who commit acts of piracy and otherwise exercise criminal enforcement jurisdiction.

With the enactment of the Japanese Piracy Act, when Japanese authorities take measures against incidents of piracy, for example, persons caught in the act of committing acts of piracy at sea no longer “have to be released.”

Nevertheless, while punishments can now be broadly applied, as for whether punishments are actually broadly applied, hypothetically, if the exercise of jurisdiction to impose punishments were limited only to cases where Japanese ships or Japanese nationals are harmed by acts of piracy, then the range of application

Implementation of the United Nations Convention on the Law of the Sea in Japan

of the Penal Code to date was sufficient and regarding punishment the enactment of the Japanese Piracy Act would be meaningless. As for the “taking measures” against piracy by the JMSDF units for cases where foreign ships with only foreign nationals onboard are attacked by a foreign national on the high seas, having Japanese domestic law criminalize such acts and making them punishable was only possible as “prevention and suppression of crimes at sea,” and one may say it was necessary to make broad punishment possible in order to broadly punish acts of piracy.

Japanese domestic legislation to address the crime(s) stipulated by international treaties has hitherto been enacted in such a manner as to make Japanese domestic laws widely applicable to the cases happening outside Japan, by including provisions such as “in accordance with Article 2 of the Penal Code.” However, the enforcement of these wide-applicable provisions had been taken in a “passive” manner, whereby the obligation to “extradite or prosecute” (*aut dedere aut judicare*) that a treaty imposed on its contracting States was performed only in such a case that the wrongdoers of the crime(s) stipulated by the international treaty had themselves sneaked into Japan. On the other hand, the Japanese Piracy Act may not only be widely applied to cases happening outside Japan, but also be actively enforced on the high seas.

With the enactment of the Japanese Piracy Act, the application of the Act to the acts of self-proclaimed Somali pirates against foreign ships on the high seas in the *Guanabara* incident, and the prosecution and punishment of them under Japan’s criminal justice procedure, how to exercise jurisdiction based on Japanese domestic laws concerning cases happening outside Japan has entered into a new phase.

It has to be well examined when and how the universal jurisdiction adopted by

Implementation of the United Nations Convention on the Law of the Sea in Japan
the Japanese Piracy Act should be exercised, taking into consideration that the
exercise of such jurisdiction is only exceptional to the flag state's exercising of ju-
risdiction on the high seas.