明治学院大学

Legal Issues to Implement the SUA 2005 Protocol from Japanese Perspective (3)

TSURUTA Jun*

4 Japanese Implementation of the SUA Convention and the SUA 2005 Protocol

4.1 Japanese Implementation of the SUA Convention

The SUA Convention has a couple of features commonly observed in the so-called "counter-terrorism" conventions. Article 3 of the SUA Convention stipulates acts of offences, such as capture of ships, violence against people on ships, and destruction of ships. Article 5 obliges Party States to criminalise these acts under their domestic laws and impose their appropriate punishments on perpetrators taking their grave natures into account. Second, in order to prevent the perpetrators of acts of offences from being escaped from punishment, Article 10, paragraph 1, of the Convention obliges Party States to choose either prosecution in their State or extradition to another State (*aut dedere aut judicare*)[(1)]. A Party State, which a perpetrator of acts of offences set forth in the Convention enters into and is present within, is obliged to establish jurisdiction pursuant to Article 6, paragraph 4, of the Convention to prosecute them in their criminal

* TSURUTA Jun is an Associate Professor of International Law, Meiji Gakuin University, Tokyo, Japan. He may be contacted at jtsuruta@law.meijigakuin.ac.jp

court or extradite them to other State which has jurisdiction over the case based on principles on exercising legislative jurisdiction under international law, such as territoriality principle, flag state principle, nationality principle and passive nationality principle.

Japan acceded to the SUA Convention in April 1998, and the Convention came into force for Japan in July 1998. When Japan became a State Party to the Convention in July 1998, it did not take any measures to enact a new act and amend existing laws and in order to implement the Convention. Japan implements it through the application and enforcement of existing laws, for example, the Penal Code (Act No. 45 of 1907), the Code of Criminal Procedure (Act No. 131 of 1948), the Japan Coast Guard Act (Act No. 28 of 1948), etc.

Article 6, paragraph 1 , of the SUA Convention stipulates that a State Party is obliged to establish its jurisdiction over the offences set forth in Article 3, paragraph 1, of the Convention when the offence is committed:

(1) against or on board a ship flying the flag of the State at the time the offence is committed (Article 6, paragraph 1(a)),

(2) in the territory of the State, including territorial sea (Article 6, paragraph 1(b)), and

(3) by a national of the State (Article 6, paragraph 1(c)).

Among the above-mentioned three cases, the case of (1) can be covered by Article 1, Paragraph 2, of the Penal Code adopting the flag state principle, which stipulates the application of the Code to a crime committed on board a Japanese-registered ship. The case of (2) can be covered by Article 1, Paragraph 1, of the Code adopting the territorial principle, which stipulates the application of the Code to a crime committed within Japanese territory including Japanese territorial sea. With respect to the case of (3), an offence committed by a

Japanese national on a foreign ship outside Japanese territorial sea can be covered by Article 3 of the Code adopting the active-nationality principle, which stipulates the application of the Code to a crime committed by a Japanese national outside Japanese territorial sea. Article 3 of the Code covers siginificant and vicious crimes such as 'homicide', 'injury', 'injury causing death', 'capture' and 'confinement', but does not cover the offences of 'intimidation' and 'property damage' stipulated in Article 3, paragraph 1 , of the Convention. These two offences can be covered by Article 4-2 of the Code.

Article 4-2 of the Japanese Penal Code stipulates that; "In addition to the provisions of Article 2 through the preceding Article, the Code shall also apply to anyone who commits outside the territory of Japan those crimes proscribed under Part II which are governed by an international treaty even if committed outside the territory of Japan." Article 4-2 has been interpreted as that the Code is applicable on the basis of Article 4-2 only to the crimes which an international treaty stipulates as offences and obligates Japan as one of State Parties to punish. In this respect, Article 6, paragraph 1, of the Convention obligates Japan to establish its jurisdiction over the offences of 'intimidation' and 'property damage', and they can be covered by Article 4-2 of the Code[(2)].

And, Article 6 , paragraph 2(b), of the Convention allows its State Party to establish jurisdiction over an offence when a national of the State is seized, threatened, injured or killed by a non-national. In this case, the Penal Code can be applied to the offenders on the basis of Article 3-2 adopting the passive nationality principle, which stipulates the application of the Code to a crime committed by a non-Japanese national outside Japan.

Lastly, in the case where an offence set forth in the Convention is committed on a foreign ship on the high seas and both its offender and its victim are

foreigners, Japanese government may not exercise enforcement jurisdiction over it then and there, at the timing when and at the sea area where the offence was committed. However, Article 6, paragraph 4, and Article 10, paragraph 1, of the SUA Convention obliges Japan as one of State Parties to establish jurisdiction over it in the case where the perpetrator enters into and is present in Japanese territory after its commission. With regard to this case, Japan has the obligation to "extradite or prosecute" (*aut dedere aut judicare*) perpetrator under the Convention, which aims to close any possible jurisdictional gap and suppress his "non-punishment", and so the case can be covered by Article 4-2 of the Penal Code.

The SUA Convention stipulates the offences but does not obligate State Parties to exercise enforcement jurisdiction over them committed on a foreign ship outside Japanese territory then and there. Therefore, Japan can implement the Convention in a "passive" manner, that is to say, through the *ex post factum* application and enforcement of laws to the foreign perpetrator who committed it on the foreign ship outside Japanese territory, entered into it and was found to be prsent in it.

4.2 Implementation of the Boarding Inspection Procedure of the SUA 2005 Protocol

The boarding inspection procedure newly established under the SUA 2005 Protocol seems a challenge for Japanese domestic legal system. A State Party of the Protocol is expected to carry out a boarding inspection, *inter alia*, against a foreign ship navigating on the high seas tansporting or being well suspected of transportating the WMDs which is an offence set forth in the Protocol. A State Party needs to consider from a policy point of view, first of all, what measures

should be taken against such a foreign ship on the high seas, which includes stopping, boarding, and searching the ship, its cargo and crew on board, and questioning them, in order to determine if such an offence has been, is being or is about to be committed.

For example, law enforcement officers of the Japan Coast Guard (JCG) may stop, board and search such a foreign ship on the high seas on the basis of Art. 17, para. 1[3], of the Japan Coast Guard (JCG) Act (Act No. 28 of 1948) and, as the result of such measures, discover the BCN weapons[4]. However, the fact itself is not necessarily trigger for them to exercise enforcement jurisdiction, such as arrest foreign perpetrators of the transportation of the BCN weapons and seizure them then and there. As far as the case wherer foreign crew boarding a foreign ship on the high seas which transports or is suspected to do the BCN weapons is concerned, Japanese criminal laws would not be applicable to the transportation then and there. Therefore, it is taken into consideration the necessary to extend the scope of legislative jurisdiction in order to enable officers to exercise enforcement jurisdiction in such a case.

In this context, it is noteworthy that the SUA 2005 Protocol does not directly permit a State Party to exercise enforcement jurisdiction[5]. The structure of obligations in the Protocol may be summarized as follows:

(1) The Protocol requires each State Party to make offences set forth in the Protocol punishable by appropriate penalties under its domestic laws (Article 5).

(2) Upon being requested, the flag State confers the requesting State the permission to carry out such measures as stopping, boarding, searching the ship and questioning crew on board, which may be carried out as administrative measures. If the transportation of the BCN weapons is

found as the result of such measures, the other authorisation of the flag State is necessary to take judicial measures, such as arrest foreign perpetrators transportating the BCN weapons and seizure them (Article 8 *bis*).

(3) The Protocol stipulates both the compulsory jurisdiction, in which it *'obliges'* a State Party to exercise its jurisdiction over those offences set forth in the Protocol and the voluntary jurisdiction, in which it only *'permits'* a State Party to exercise its jurisdiction over those offences (Article 6).

It is highlighted that there are the two separate authorizations for a State Party to exercise jurisdiction. Firstly, a State Party needs to obtain the authorisation of the flag State to carry out a boarding inspection against a foreign ship in accordance with Article 8 *bis*, paragraph 5. Secondly, when law enforcement officers found an offence set forth in the Protocol, they could take further enforcement measures, such as arrest and seizure[6], upon the other separate and explicit authorization of the flag State[7].

It is essential to consider these requirements, analysing the relationship between the above-mentioned (1), (2), and (3). With regard to (1), it is needed to ensure the relevant domestic laws either to be newly adopted or covered by the existing laws to criminalise offences set forth in the Protocol. With regard to (2), however, the Protocol does not oblige a State Party to take any measures against a foreign ship navigating on the high seas tansporting or being suspected of the transportationof the WMDs. Therefore, a State Party has the discretion on the following two points: (a) whether a State Party should inspect a foreign ship suspected of transporting the BCN weapons on the high seas in accordance with Article 8 *bis*, paragraph 5, and (b) when a State Party decide to carry out a

boarding inspection on the high seas, whether he takes a boarding inspection only as an administrative measures or an administrative and judicial measures. In other words, a State Party may decide to exercise a boarding inspection only, and when law enforcement officers or other authorized officers find the BCN weapons on board a foreign ship on the high seas, which may constitute an offence under the Protocol, it may leave the flag State or other States having the will and ability to exercise jurisdiction to take the further measures, such as arrest the perpetrtors transporting the BCN weapons and seizure them.

When the Government determines that it carries out boarding inspections on the high seas, firstly, it is prerequisite the scope of domestic laws, which criminalise offences set forth in the Protocol, applicable to a foreign ship on the high seas. For example, ship inspection may be carried out in accordance with Art. 17, para.1, of the JCG Act, which provides domestic legal basis for boarding inspections over foreign ships. Pursuant to the Article, JCG officers may visit a ship when it is deemed necessary to perform its duties, *inter alia*, to ensure observance of laws at sea and to prevent crimes at sea[8]. It is a prerequisite that Japanese domestic laws and regulations are applicable to foreign, and, in turn, foreign ships observe those laws and regulations in the territorial sea and on the high seas. In this case, officers may take further judicial measure to arrest and seize upon the authorisation of the flag state.

Secondly, when Japan determined to exercise only its administrative boarding inspection over foreign ships on the high seas, it is necessary to establish cooperative systems with other States. Art. 12 of the Protocol requires a party State to provide the maximum assistance in the collection and provision of evidence when another party State initiates criminal proceedings. In this regard, the International Criminal Investigation Assistance Act (Act No. 69 of 1980), JCG

officers, upon the request of the government of a party State to the Protocol, may collect and provide evidences to the State, carry out provisional detention of suspects, and cooperate in criminal investigations for the initiation of the criminal case. Therefore, the establishment of cooperation mechanisms through an agreement, memorandum, or another document is arguably necessary for taking measures as well as satisfying requirements of the Protocol.

In case where the Japanese Government is not authorized by the government of flag State of the ship to take judicial enforcement measures such as arrest and seizure after the boarding inspection, it needs to choose to either transfer suspects to another State, which has jurisdiction over the case, or release them immediately. If it chooses the former option, the Japanese government would provide findings of the inspection through international assistance to the State to which it transfer the suspects and which can exercise criminal jurisdiction in accordance with its domestic laws. By doing so, one can say that boarding inspections conducted by the Japanese authority is meaningful as a measure that contributes achieving the object and purpose of the Protocol to stop and prevent acts of terrorism at sea and the proliferation of the WMDs.

4.3 Criminalisation of Illicit Transportation of the BCN Weapons by Foreign Ships

The Protocol defines new acts of offenses, which may become an issue to criminalise such acts in domestic laws of a party State. Such offences are, *inter alia*;

(1) the use of the BCN Weapons against or on board a ship (Art. 3-2, para. 1 (a) (i)),

(2) the act of discharging oil, liquefied natural gas, or harmful or hazardous

substances from a ship (Art. 3-2, para. 1(a)(ii)),

(3) the transportation by a ship of the BCN Weapons (Art. 3-2, para. 1(b)), and

(4) the transportation by a ship of a person who committed an offense set forth in the nine conventions on the prevention of terrorism listed in the Protocol and annexed documents (Art. 3-3, para. 1).

Art. 5 of the Convention obliges party States to criminalise acts of offences set out in the Protocol as such in the domestic laws and to impose an appropriate punishment taking its gravity into account. Among the listed new offenses, transportation of the BCN Weapons described in (3) above would be one of the most challenging. Apparently, there is no provision clearly prohibits transportation of the BCN Weapons by ships, as far as they are only steaming without being landed on Japanese territory, yet a couple of laws may afford to analyze the possibility to apply to such tranportation.

4.3 (1) Possibility of Application of Japanese Existing Laws

One possibility to apply Japanese existing laws could be Foreign Exchange and Foreign Trade Act (Act No. 288, 1949), under which it is a crime to import or export items that are prohibited by laws and regulations. It defines completion of 'import' when a cargo is landed on the bonded area, including temporary landing, and 'export' when a cargo is loaded onto a ship. Therefore, the passage of a foreign ship carrying the BCN weapons as prescribed in Art. 3-2, of the Protocol cannot be deemed as completion of import or export under Japanese Legal system. In addition, an attempt to export items is punishable (Art. 69-6, para. 2), while an attempt to import is not. Therefore, in applying the Act to control the transportation of the BCN weapons by ships, it is necessary to create new

provisions, by which the transportation of the BCN weapons is an offence as attempted *imports*. It would be, however, not easy to prove the *mens rea* of imports, as far as merely a ship is steaming off the Japanese coast and not intended to bring cargoes onto the Japanese territory.

Another possibility could be to apply a crime under the Customs Act (Act No. 61, 1954), which also criminalise import or export of items prohibited under laws and regulations. It seems, however, difficult to deem the passage of a foreign ship carrying the BCN weapons as 'import' under the Act. The Customs Act defines import as receiving either a cargo into Japan that has arrived from overseas or a cargo, which has been permitted to export to Japan, through bonded areas in the case of items that have to go through bonded areas (Art. 2, item 1). There are various interpretations on the time of completion of import under the Customs Act, but the Act suggests[9], it is when the cargo is released from the control of Customs Act effectively and becomes domestic one, which is under free domestic circulation. From this perspective, completion of import is interpreted when the cargo is unloaded from a ship when it comes by sea or when cargo is received from a bonded area and enters Japan, if it goes through the area. Therefore, it is difficult to criminalise the transportation of the BCN weapons on board a ship as import under Customs Act. Similarly, it would not be assimilated as export under the Act. It defines export as sending out domestic cargo to a foreign State (Art. 2, item 2). There are also various interpretations of the time of completion of export. A cargo to export may be carried to the bonded area, inspected, permitted to export, passed the customs line, and loaded to a ship or an aircraft bound for foreign states. A couple of judgements found the time of accomplishment of the violation of the export regulation when a cargo is loaded onto a ship or an airplane bound for a foreign State because it leaves the control of customs

officials. For this reason, the transportation of the BCN weapons by a ship passing off the Japanese coast would not constitute the violation of the export regulation under the Act.

It could be possible to deem the transit of a foreign ship carrying the BCN weapons as an attempt or preparation of the violation of the import regulation under the Customs Act. There are also various interpretations on the time of accomplishment of an attempted import under the Customs Act. Since import is an act of receiving a cargo into Japan that has transported from overseas, it may be appropriate to interpret attempt of import is committed when the cargo begins to receive. In addition, the majority believe that committing an attempt requires a certain degree of imminent and a close link to actual harm. Therefore, in order to assume the commencement of *actus reus*, it is necessary that the ship has reached the shore with its cargo under the condition, in which it can be landed at any time, or if the importer intended to circumvent customs procedures, the ship carrying the cargo is about to reach the shore for smuggling. For these reasons, a person on board a foreign ship carrying the BCN weapons, which has entered or is merely sailing in Japanese territorial sea, has not committed an attempt of import at this stage, even if the person has an intention to smuggle the cargo into Japan. Second, preparations of import could cover acts that do not fall an attempt of import under the Customs Act. There are, however, only a few judgements found the time when the act has been constituted the preparation. Since preparations of import can sufficiently be proven even if the degree of danger is not as imminent as that of an attempted import, it might be possible to consider carrying the BCN weapons on board a ship in territorial waters to smuggle into Japan constitutes the preparation of import. It is, however, also difficult to prove *mens rea*, as far as the ship is steaming on the territorial sea without intention to

land its cargoes.

As a result, in order to implement the Protocol in Japan, it is necessary to arrange domestic laws in order to regulate passages of ships carrying the BCN weapons.

4.3 (2) The Right of Innocent Passage of a Foreign Ship Carrying the BCN Weapons in the Territorial Sea

When a coastal State desire to intervene a foreign ship in the territorial sea of the State, it is necessary to consider if the ship can enjoy the right of innocent passage or not. A coastal State has an obligation not to hamper the right of innocent passage of foreign ships[10]. A coastal State, however, may assert jurisdiction over a foreign ship if a foreign ship loses the right since the sovereignty of the State extends to the territorial sea. The UNCLOS defines the innocent passage "so long as it is not prejudicial to the peace, good order or security of the coastal State," and provide the list of non-innocent activities.[11] In this regard, the UN Security Council Resolution 1540 (2004) recognises the proliferation of the BCN weapons as a threat to international peace and security[12]. Thus, these ships may not have the right of innocent passage.

However, the resolution, *ipso facto*, may not always assume that a foreign ship carrying the BCN weapons on territorial sea of a coastal State falls into the category of activities that are harmful to the peace, good order, and security of that State. The UNCLOS is often considered that it set out the criteria of the innocence by activities and manner of ships, which can be observed externally, rather than by types of a ship or kinds of a cargo and equipment. In fact, the condition of cargoes or equipment on board a ship is not included in the twelve types of activities listed in Art. 19 , para. 2, of the UNCLOS. For this reason,

coastal States are not allowed to evaluate 'innocence' of a ship through carrying or suspected of carrying the BCN weapons in their territorial sea[13]. It will be a breach of the coastal State' obligation set forth in the UNCLOS if the coastal State intervenes a foreign ship passage for this reason[14].

Another possibility to deem ships carrying the BCN weapons as not innocent since it would be prejudicial to the peace, good order, and security of the coastal State. In case of Japan, when the Japanese government became a party State to the Convention on the Territorial Sea and Contiguous Zone in 1968, it expressed its opinion in deliberations at the Diet that the passage of Japanese territorial sea by submarines and other warships equipped with nuclear weapons would not be considered innocent because it would be prejudicial to the peace, good order, and security of Japan, and that the Government reserved the right, in principle, not to permit for these ships to exercise the right of innocent passage[15]. In fact, when a nuclear-powered submarine of the former USSR Navy, which had broken out a fire, passed through Japanese territorial sea between *Okinoerabu* and *Yoron* Islands on August 1980 , the Japan Coast Guard warned it not to enter the territorial sea since it would not be deemed as innocent passage. In addition, the Ministry of Foreign Affairs of Japan protested to the Government of the former USSR that the submarine had passed through Japanese territorial sea ignoring repeated warnings of the Japanese government without guaranteeing that the passing of the submarine would not cause radioactive contamination and violate the 'Three Non-nuclear Principles' steadfastly maintained by the Japanese government[16]. The incident clearly suggests that the Japanese government considers a passage of warships with nuclear weapons in the Japanese territorial sea as a non-innocent passage. It is, however, not the BCN Weapons in general, but restricting only nuclear weapons that constitute non-innocent passage.

Therefore, it would not always mean that a ship carrying the BCN weapons is non-innocent.

Finally, even if the Japan determines to legislate a new laws to control the passage of ships carrying the BCN weapons in territorial sea, there remain other legal issues. Since Art.9 of the SUA Convention clearly stipulates that it does not confer the right of investigation to States other than the flag State, exercise jurisdiction over foreign ships within the territorial sea of a coastal State needs to follow the rules of Art. 27, para. 1, of the UNCLOS[17]. According to the provision, it is prerequisite to assert jurisdiction by the coastal State that the offenses should fall under one of the following categories;

(a) the consequences of the crime extend to the coastal State;

(b) the crime is of a kind to disturb the peace of the State or the good order of the territorial sea;

(c) the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

(d) such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Therefore, it may be necessary that an illegal act under the domestic laws be considered one of these categories.

In addition, it needs to consider carefully to establish jurisdiction, *inter alia*, the geographical scope of the application of the new laws. One possible solution is to apply Art. 2 or Article 4-2 of Japanese Penal Code. However, if the former is applied, as discussed, the Penal Code covers a wider range of scope than the Protocol since it may include offences committed on ships flying under non-party States. When the latter is applied, the new law can be applied only cases in which an alleged offender was found in the territory of Japan. Therefore, a carriage of

the BCN weapons by foreign nationals on board a foreign ship on the high seas would be out of scope of the law. In this case, the officers cannot take enforcement measures even they find the BCN weapons on board.

Conclusion

Acts of terrorism at sea and the effects of the proliferation of the WMDs cannot be underestimated, and the best strategy is avoidance and deterrence. The question is "who should take what measures and how".

The significance of the introduction of the boarding procedures in the Protocol is that it enable to interdict by a State other than the flag State as swiftly as possible while maintaining the flag State principle.

There are examples in which States other than the flag State may exercise jurisdiction over a piracy and ships without nationality, for example, which have long been recognized as exceptions to the flag State principle, and the adoption of the Protocol does not mean to modify the principle.

Flag States remain the *prima facie* actor of maintaining the order of the high seas. Flag States, particularly flags of convenience, however, cannot always be expected to exercise jurisdiction effectively to prevent acts of terrorism at sea and deter the proliferation of the WMDs although the prevention and interdiction at sea are issues to be addressed urgently. Therefore, the Protocol seeks the way to ensure and enhance the effectiveness of measures taken for the prevention and interdiction by modifying the exclusiveness of flag State's enforcement jurisdiction on the high seas and sharing the right of exercising enforcement jurisdiction with other party States of the Protocol.

Nevertheless, it would not be easy to implement the Protocol in a party

State[18]. In order to ratify the Protocol, the Japanese government needs to arrange domestic laws to, *inter alia*, criminalise acts set out in the Protocol, such as the transportation of the WMDs, and conduct boarding inspections against foreign ships on the high seas upon authorisation of the flag State.

Japan has implemented international treaties for countering international terrorism, hijacking, and other crimes by adding provisions to existing domestic laws, such as "following examples set forth in Article 2 of the Penal Code", in order to extend jurisdiction over foreigners committed outside of Japanese territory since they obliges party States either to extradite or to prosecute perpetrators. Such legislation could be considered as 'passive' rather than active since Japanese domestic laws would be applied only when perpetrators were found in Japanese territory. On the other hand, the Protocol requires party States to take measures actively even outside of their territory. the Protocol enables party States to seek a foreign ship carrying the BCN weapons, apply domestic laws, board for an inspection, and further to take enforcement measures upon authorisation of the flag State. In this regard, one can say that the implementation of the Protocol in Japan, coupled with the application and enforcement of Act on the Punishment of and Measures against Piracy (Act No. 55 of 2009)[19], which establishes universal jurisdiction over piracy under interational law, adds a new dimension to Japanese exercising criminal jurisdiction against extra-territorial cases. It is necessary to reconstrcut law and policy related to maritime law enforcment activities in Japan, while taking into account the fact that ship inspection procedures are strictly an exception to the flag State principle on the high seas and are authorized only by the Protocol, unlike exercising the enforcemnet jurisdiction angaint piracy authorized not only by the UNCLOS but also international customary law.

(1) Halberstam, M., 1982, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *American Journal of International Law*, Vol. 82 , pp. 291–309; Joyner, C., 1988, The 1988 IMO Convention on the Safety of Maritime Navigation: Towards a Legal Remedy for Terrorism at Sea, *German Yearbook of International Law*, Vol. 31, pp. 230–262; Francioni, F., 1988, Maritime Terrorism and International Law, The Rome Convention of 1988, *German Yearbook of International Law*, Vol. 31, pp. 263–288; Plant, G., 1990, The Convention for the Suppression of Unlawful Acts agaisnt the Safety of Maritime Navigation, *The International and Comparative Law Quarterly*, Vol. 39, No. 1, pp. 27–56.

(2) On the other hand, Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) stipulates that; "…… 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 provision means that the UNCLOS does not obligate but only allows every State party to seize ships, arrest the wrongdoers, seize their property and punish them. Therefore, the perpetrators of piracy defined in Article 101 of the UNCLOS is not covered by Article 4-2 of the Japanese Penal Code. Cf. Tsuruta Jun, 2011, "The Japanese Act on the Punishment of and Measures against Piracy", *The Aegean Review of the Law of the Sea and Maritime Law*, Vol. 1, p. 240.

(3) Art. 17, para.1, of the JCG Act stipulates that "JCG officers can order the captain of a ship or a person who commands the ship on the captain's behalf to submit documents that the ship must have on board under laws and ordinances, stop and inspect the ship to confirm the ship's identity and port of registry, the captain's name, the port from which the ship came directly and the port for which it is destined, the nature of cargo or whether the ship has cargo, and other matters they deem as important with respect to the ship, its cargo, and its voyage, and question crew members and passengers if it is necessary to do so in order to perform their duties."

(4) The ships of the Japanese Government authorized to exercise enforcement jurisdiction at sea are the patrol vessels of the JCG. The JCG Act is the law for the purpose of establishing the JCG and enabling the JCG to exercise the application and enforcement of Japanese domestic laws at sea. Article 1 of the JCG Act generally stipulates the establishment and purpose of the JCG. Article 2 also ascertains the purpose of the JCG of "ensuring safety and order at sea." As a result of the

interpretation of the term "at sea" of the Article, the scope of application of the JCG Act has been interpreted to have no geographic limitation. Therefore, the JCG Act has been interpreted to apply not only to Japanese internal waters, territorial sea, contiguous zone and exclusive economic zone, but also to all waters, including the high seas. The JCG is authorized to exercise administrative enforcement jurisdiction on the basis of the "enforcement of laws and regulations at sea" under Article 2 , paragraph 1.

Moreover, the JCG could exercise criminal enforcement jurisdiction on the basis of the "prevention and suppression of crimes at sea" and the "detection and arrest of criminals at sea" under the same article.

Law enforcement officers of the JCG may inspect the ship suspicious of committing a crime on the high seas in accordance with Article 17, Paragraph 1, of the JCG Act. The JCG officers are authorized to exercise three authorities; (1) the authority to order the production of the official papers on the ship, (2) the authority to stop, visit and inspect the ship, and (3) the authority to question the crew and passengers of the ship. Article 17 is an enforcement procedure for the JCG officers to ascertain the compliance of Japanese domestic laws.

Furthermore, the JCG officers is authorized to stop proceeding of a ship committing a crime and any act that is likely to endanger human life or body etc., "when a (Japan) Coast Guard Officer witnesses a crime being about to be committed at sea, or when human life or body is likely to be endangered, or property is likely to be seriously damaged in a dangerous situation such as a natural disaster, a disaster at sea, collapse of a structure or explosion of an explosive where immediate action is needed." (Article 18, paragraph 1, of the JCG Act)

The officers may, in ascertaining a crime under Japanese domestic laws, exercise criminal enforcement jurisdiction in accordance with the Code of Criminal Procedure (Act No. 131 of 1948).

(5) Article 9 of the Protocol stipulates, "(n) othing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag."

(6) Art. 8 *bis*, para. 6, of the Protocol.

(7) Art. 8 *bis*, para. 8, of the Protocol.

(8) Art. 2, para. 1, and Art. 5, of the JCG Act.

(9) Art. 2, item 1, of the Customs Act.

(10) Art. 24(1) of the UNCLOS.

(11) Art. 19(1) of the UNCLOS.

(12) Available at https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1540%20 (2004) (accessed on May 3, 2020)

(13) K Hakapaa and E J Molenaar, 1999, Innocent passage – past and present, *Marine Policy*, Vol. 23(2), pp. 131–133., Logan, S.E., 2005, The Proliferation Security Initiative: Navigating the Legal Challenges, *Journal of Transnational Law and Policy*, Vol. 14, pp. 258–260., Ticy V. Thomas, 2009, The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS? An Indian Perspective, *Chinese Journal of International Law*, Vol. 8(3), pp. 669–671.

(14) Lehrmen, T.D., 2004, Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture, *Virginia Journal of International Law*, Vol. 45. pp. 231–232., Von Heinegg, W.H., 2005, The United Nations Convention on the Law of the Sea and Maritime Security Operations, *German Yearbook of International Law*, Vol. 48. pp. 181–182., Timothy Perry, 2018, The PSI as a Shared Good: How the Proliferation Security Initiative Both Challenges and Reinforces a Prevailingly Mare Liberum Regime, *Ocean Development & International Law*, Vol. 49 (4), pp. 346–348.

On the other hand, Daniel H. Joyner points out that such intervention is "relatively unproblematic" from the legal and political viewpoint, stating that "In the modem climate of concern regarding the proliferation of WMD and the transit of WMD-related materials as threats to the security of both the coastal state and--drawing upon the particular language of Article 19-other states as well, it should be relatively unproblematic for coastal states to legitimize overcoming the right of innocent passage through their territorial waters of seagoing vessels regarding which there is a reasonable basis to suspect involvement in these activities. Short of an egregious abuse of this discretion, such a determination would likely not be found in excess of a coastal state's rights to safeguard its security." (Daniel H. Joyner, 2005, The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law, *The Yale Journal of International Law*, Vol. 30, p. 507). *See also* Michael Byers, 2004, Policing the High Seas: The Proliferation Security Initiative, *The American Journal of International Law*, Vol. 98(3), pp. 542–543.

(15) Statement by Mr. Miki Takeo, the then Minister of Foreign Affairs at the deliberation of the House of Representatives Foreign Affairs Committee during the 58th Diet session (Minutes No. 12 of the House of Representatives Foreign Affairs Committee

during the 58th Diet Session, pp. 8-10 and 17). See Akaha Tsuneo, 1989, Internalizing international law: Japan and the regime of navigation under the un convention on the law of the sea, *Ocean Development & International Law*, Vol. 20(2), pp. 122-127.

(16) There are several views regarding the response by the Japanese government. One is that because there is no provision under international law stating that nuclear-powered submarines and warships equipped with nuclear weapons lose the right of innocent passage solely because they carry nuclear weapons. Therefore, the response of the Japanese government exceeds the rights generally granted to coastal States under international law. *See* Nakamura Ko, 1981, On the passage of territorial sea by submarines equipped with nuclear weapons (in Japanese), *Hougakukyousihitsu*, No. 13, p. 98. The other is that it is difficult to determine under international law whether warships temporarily equipped with nuclear weapons which pass through Japanese territorial sea are also naturally recognized as harmful to the peace and security of the state as stipulated in Art. 19 , para. 2 , of the UNCLOS. See Yamamoto Soji, 1992, *Law of the Sea* (in Japanese), pp. 140-141.

(17) Heinegg 2005, *supra note 14*, pp. 179-182., Kaye, S., 2006, Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction, in Freestone, D. et. al. (eds.), *The Law of the Sea; Progress and Prospects*, Oxford University Press. pp. 359-360.

(18) James Kraska points out the low rate of compliance for designation of a competent authority of the flag State, stating that "Each state is to make the designation to the IMO secretary-general, who promulgates it among member states. 34 However, out of forty states, such notification has been made by only four: Latvia, San Marino, Sweden, and the United States." (James Kraska, 2017, Effective Implementation of the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *Naval War College Review*, Winter 2017, Vol. 70(1), p. 18).

(19) Tsuruta Jun, 2011, The Japanese Act on the Punishment of and Measures against Piracy, *The Aegean Review of the Law of the Sea and Maritime Law*, Vol. 1(2), pp. 237-245., Tsuruta Jun, 2013, The Guanabara Case – The First Prosecution of Somali Pirates under the Japanese Piracy Act, *International Journal of Marine and Coastal Law*, vol. 28(4). pp. 719-728.