

Maritime Discussion Series #8

Rule of Law and Gray Zone Activities in the East and South China Seas

featuring Professor Yurika Ishii, Commander Jonathan G. Odom, and Dr. Jeffrey Ordaniel

— **Key Findings** —

Introduction

Pacific Forum, with support from the U.S. Department of State through the U.S. Embassy in Tokyo, and in partnership with the Yokosuka Council on Asia-Pacific Studies (YCAPS), organized the eighth session of the Maritime Discussion Series, on April 26, 2021, virtually through the Zoom platform. With the theme, “Rule of Law and Gray Zone Activities in the East and South China Seas,” the session was moderated by Dr. Jeffrey Ordaniel (Pacific Forum), and featured Professor Yurika Ishii (National Defense Academy of Japan) and Commander Jonathan G. Odom (Marshall Center for Security Studies). The following are the key findings from the session.

Tensions in maritime Asia have worsened over the past several years as Beijing continues its attempt to change the status quo of disputed features and maritime zones in the East and South China Sea. China does this, not through diplomatic or judicial process but through gray zone operations, such as the use of a maritime militia and Coast Guard vessels.

Maritime militia, disguised as ordinary fishermen are specifically tasked to operate in the waters claimed by China but are within the legitimate maritime entitlements of Southeast Asian littoral states.

Civil maritime law enforcement vessels are also used to normalize Chinese presence in other states’ EEZs and in wider disputed waters under the control of other parties.

Governments in the region are struggling to respond to these “grey zone activities” in the East and South China Seas. Gray zone operations not only weaken the applicability of international law in Asia but also pose a challenge to U.S. security alliances, in particular, Japan in the East China Sea, and the Philippines in the South China Sea.

While the Biden Administration has reaffirmed U.S. commitments to Japan over the Senkaku Islands, and to the Philippines over its presence in the South China Sea, the texts of the security treaties state that only an “armed attack” would oblige American intervention.

Gray Zone Activities

China’s maritime militia and Coast Guard tasked to operationalize Chinese claims are gray zone actors. The use of gray zone actors by states alone are not necessarily against international law. However, to argue that China is not escalating maritime tensions by sending out fishing vessels (militias) and white hulls, instead of PLA Navy vessels, is false.

Impact of Chinese Coast Guard Laws

The recently enacted Chinese Coast Guard (CCG) Law highlights a security gap for Japan.

CCG Law poses concerns to international law:

1. Excessive maritime claims: the CCG Law claims more jurisdictional maritime areas than what China is entitled to under UNCLOS.
2. Excessive use of force: the CCG Law permits the CCG to take coercive measures against foreign warships and government vessels used for non-commercial purposes. These measures may be of a different standard beyond what is permissible under international law.
3. The CCG Law increases the risk of standoff between the Chinese Coast Guard and Japanese Coast Guard (JCG), the primary organization for law enforcement in Japan’s territorial seas, within the territorial sea of the Senkaku Islands.

Japan’s Response to Gray Zone Activities in the East and South China Seas

Potential security gaps in Japanese national security law are highlighted by what is referred to as “use of weapons”. There are many conditions and restrictions under Japanese law attached to the use of weapons against humans. Under Japanese regulations:

1. State authorities must adhere to strict statutory regulations if weapons are used against humans within Japan's territory.
2. The use of weapons is referred to the use of machines, instruments, and devices such as firearms, explosive materials, and swords.
3. The use of weapons by the Japanese police are permitted if there are reasonable grounds to arrest a suspect or to prevent escape of the offender in self-defense or to protect others, or to deter resistance against the execution of official operations and duties.

Furthermore, Japanese Coast Guard Law mandates:

1. Guaranteeing freedom of navigation, safety and security at sea.
2. Authorization of JCG personnel to carry weapons but their use is governed by regulations that apply to Japanese police, *mutatis mutandis*.
3. Authorization for JCG personnel to use weapons against foreign non-sovereign vessels conducting non-innocent passage within Japanese territorial sea.
4. If circumstances escalate, the JCG is authorized to use self-defense against foreign government/non-government warships used for non-commercial purposes "when there is a specific necessity to protect human lives or properties at sea or maintain security" (Maritime Security Operation).
5. The Japanese government can act in self-defense measures, known as its Defense Operation. However, it requires that there must have been "an armed attack" which is defined by the law as "an organized and planned use of force done by a state or a quasi-state entity".

Potential gaps include:

1. The right to self-defense is triggered by an armed attack, but not other activities: a lower-level use of force by one state can be a violation of international law but may not justify the use of self-defense or collective defense rights.
2. How to deal with sovereign immune vessels such as Coast Guard vessels can be complicated.

Adversaries can exploit security gaps in Japan's national security legislation and the U.S.-Japan alliance when conducting gray zone operations aimed at reversing the status quo of disputed land features and maritime zones, without triggering a military response or U.S. intervention.

The asymmetry between JCG and CCG is also apparent. JCG possesses less surface assets and funding compared to their Chinese counterpart.

Moving Forward

Internally, JCG and SDF should develop mechanisms to closely collaborate in fulfilling their respective missions. Externally, rethinking escalation management and close cooperation with the United States are critical for Japan. Strengthening the US-Japan Alliance and other security partnerships are essential for the rule of law in maritime Asia to persist amidst these gray zone challenges.

This document was prepared by Dr. Jeffrey Ordaniel, Director, Maritime Programs, Pacific Forum. For more information, please contact maritime@pacforum.org. These preliminary findings provide a general summary of the discussion. This is not a consensus document. The views expressed are those of the speakers and do not necessarily reflect the views of all participants.

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