

The Houthi Rebels' Attack against Japan-Related Vessel in the Red Sea

—An Idea of “the Right to Protect Uses of Sea”—

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I. Introduction

On November 19, 2023, M/V Galaxy Leader (Galaxy), a vehicle carrier, was attacked by Houthi rebels' helicopter while it was transiting the Red Sea.¹ Galaxy is a “Japan-related vessel”² as follows. It is a Bahamian-flagged merchant ship operated by the Japanese NYK line. Its British owners are associated with Ray Car Carriers, a company founded by an Israeli businessman. The ship and its twenty-five-member crew are still being held hostage in Yemen following the attack.³ The sea area where the incident took place was 50 miles away from the Yemeni Al Hudaydah port and outside of Yemeni territorial sea, and thus, the freedom of navigation is applied. Since the end of 2023, similar violent incidents have taken place in the Red Sea and its neighbouring sea areas.⁴ These incidents raised many issues that deserve detailed examination, such as those of the law of the sea and the use of force.

This paper will mainly take up the former issues, touching upon the latter issues as far as they are related to the former in an inseparable manner. In addition, as Galaxy is a Japan-related vessel, this incident requires Japan to take its own positions in relation to both the special issue for handling Galaxy's damage, on the one hand, and the general issues of the law of the sea, on the other hand.

This paper will proceed with the following structure. Section II will make a general survey on the stances of Japan and the foreign States by focusing upon the

*All URLs were accessed on the 27th of November, 2024.

¹ As for a succinct report on this incident, <https://www.theguardian.com/world/2023/nov/20/yemen-houthi-rebels-seize-cargo-ship-galaxy-leader-red-sea-israel>.

² Regarding this concept, with its difference of a vessel flying under Japan's flag, Japan's position will be explained later.

³ At the time of writing this, at the beginning of December, 2024, there has been no reports on its release.

⁴ As a useful introduction of many of these incidents, see, Raul (Pete) Pedrozo, “Protecting the Free Flow of Commerce from Houthi Attacks off the Arabian Peninsula,” *International Law Studies*, Vol. 103 (2024), pp. 50-58.

arguments relating to resolution 2722 adopted by the United Nations Security Council (SC) on the 10th of January 2024.⁵ Based upon such a survey, Section III analyses in detail “the right to protect”⁶ to provide a possible theoretical framework thereon under the law of the sea. Some concluding remarks will follow.

II. Stances of Japan and Foreign States in Relation to Responses to the Red Sea Situation

1. Resolution 2722 Adopted by the SC on the 10th of January of 2024

Paragraph 3 of the resolution reads as follows:

3. *Affirms* the exercise of navigational rights and freedoms by merchant and commercial vessels, in accordance to with international law, must be respected, and *takes note* of the right of Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine navigational rights and freedoms

While this is not the place to make thorough examination of its interpretation,⁷ relating to the meaning of “the right to defend,” confirmation of the following key factors is significant. First, its preamble mentions international peace and security. In addition, in a

⁵ Resolution 2722 adopted by the Security Council at its 9527th meeting, on 10 January 2024, The Security Council, S/RES/2722 (2024)

<https://documents.un.org/doc/undoc/gen/n24/009/28/pdf/n2400928.pdf>.

⁶ This paper will define the right to protect in Section III.

⁷ For instance, Marko Svcevic, “Strikes against the Houthis: The Relationship between Resolution 2722 (2024) and the Right of Self-Defense,” Lieber Institute, Articles of War (Feb 6, 2024), <https://lieber.westpoint.edu/strikes-against-houthis-relationship-resolution-2722-right-self-defense/>, pp. 1-6; Leonie Brassat, “The Lawfulness of Military Strikes against the Houthis in Yemen and the Red Sea,” EJIL: Talk! (Mar 19, 2024), <https://www.ejiltalk.org/the-lawfulness-of-military-strikes-against-the-houthis-in-yemen-and-the-red-sea/>, pp. 3-4; Efthymios Papastavrides, “Red Sea Attacks and the International Response: An International Law Insight,” ELIAMEP | Insights #2/2024, <https://www.eliamep.gr/wp-content/uploads/2024/01/Insights-2-Red-Sea-EN.pdf>, pp. 4-5, 16-17; Stefan Talmon, “Germany Supports Expansive Interpretation of the Right to Self-Defence Against Attacks by the Houthis on Commercial Shipping in the Red Sea,” GPIL – German Practice in International Law, (Jan 23, 2024), <https://gpil.jura.uni-bonn.de/2024/01/germany-supports-expansive-interpretation-of-the-right-to-self-defence-against-attacks-by-the-houthis-on-commercial-shipping-in-the-red-sea/>; Aurel Sari, “Maritime Incidents in the South China Sea: Measures of Law Enforcement or Use of Force?,” *International Law Studies*, Vol. 103 (2024), pp. 505-506.

parallel manner, it also mentions the United Nations Convention on the Law of the Sea (UNCLOS). Thus, the resolution does not, at least apparently, focus upon either the use of force or the measures under the law of the sea. The preamble reads:

Reaffirming its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, as well as its commitment to uphold the purposes and principles of the Charter,

Reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to activities in the oceans, including countering illicit activities at sea,

Second, the word “decide” is not present in the resolution, particularly in Paragraph 3 which begins with “affirms.”⁸ “Decide” implies a binding force of SC resolutions.⁹ Third, Chapter 7 and Article 39 of the UN Charter, which deal with international peace and security, are not touched upon. Fourth, it does not provide for the phrase “all necessary means” according to which SC resolution 678 can be interpreted such that, in the Iraqi War, the SC authorized the member States to take measures including the use of force.¹⁰

In addition, in focusing upon the “right to defend” in the resolution, three further points are important. First, the resolution says “takes note” of the right. Second, it does not indicate what constitutes international law in saying “in accordance with international law.” In this regard, the fact has some relevance that the preamble mentions both the maintenance of international peace and security and UNCLOS. The right to defend is that “to defend their vessels from attacks, including those that undermine navigational rights and freedoms.” Third, who are the States to exercise the right — the flag States of the

⁸ Paragraph 11 begins with “decides” and followed by “to remain actively seized of this matter.”

⁹ Article 25 of the UN Charter provides for this. The provision reads:

The Members of the United Nations agree to accept and carry out the *decisions* of the Security Council in accordance with the present Charter (emphasis added).

¹⁰ Resolution 678 (1990) / adopted by the Security Council at its 2963rd meeting, on 29 November 1990. Paragraph 2 reads:

2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use *all necessary means* to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area (emphasis added)

<https://digitallibrary.un.org/record/102245?v=pdf>.

vessels attacked, or also other States?¹¹

On the 11th of January 2024, the US and UK began military attacks against the Houthi bases in the Houthi-controlled areas in Yemeni territory.¹² It was immediately after SC resolution 2722 was adopted on the 10th of January 2024. They justified such armed attacks by invoking the right of self-defence.¹³ Against this background, particularly the question has been discussed within the SC and among authorities as to the interpretation of “the right to defend their vessels from attacks, including those that undermine navigational rights and freedoms” in the resolution. Also, it has been discussed whether the right means and/or includes the right of self-defence under Article 51 of the UN Charter and customary international law. If it does not, what the right is, and what legal basis there is for the right remain as important questions.

From this perspective, next, a succinct survey of the opinions voiced in the SC should be significant. An examination of the opinions of authorities will follow, which mainly deals with the right of self-defence.

2. Opinions of States Voiced in the SC

(1) Japan’s Position

Japan sponsored resolution 2722 jointly with the US.¹⁴ Its statement reads:
Only two days ago, the Security Council adopted resolution 2722 (2024), demanding that the Houthis immediately cease their attacks against commercial vessels and reaffirming navigational rights and freedoms in the Red Sea. To date, we have exerted all possible diplomatic efforts to resolve this issue. Regrettably, however, the Houthis have ignored the calls by the international community, including the unequivocal pronouncement by the Council. In response, the United States and the United Kingdom have conducted joint strikes against a number of targets in Houthi-controlled areas yesterday to degrade the Houthis’s capacity to make additional threats. Japan supports the determination of the United States, the United Kingdom and relevant countries to fulfil our

¹¹ In this regard, this relates to the issues of what “Japan related vessels” are. It is among the issues to be examined relating to the right to defend, as being conducted later in this paper.

¹² Regarding response measures taken at sea by the US and other States with the use of force to protect vessels transiting the Red Sea from Houthi’s attacks, see, Pedrozo, *op. cit. supra* n. 4, pp. 50-58.

¹³ Later the positions of the US and UK will be introduced.

¹⁴ Talmon, *op. cit., supra* n. 7.

responsibility to ensure the free and safe navigation of vessels. To that end, we understand that those measures are aimed at preventing the further deterioration of the situation. Japan remains firm in its commitment to not tolerate any action that could disturb the inalienable freedom of safe navigation and will take the necessary steps to put an end to Houthi threats while continuing to closely cooperate with relevant countries.¹⁵

While this position of Japan supports the determination of the US and UK and other States to fulfill their responsibility to ensure the free and safe navigation of vessels, it cannot be safely interpreted that this support is for military actions as the exercise of the right of self-defence, as this point remains unclear in Japan's remarks.

As introduced later, there are multilateral operations and joint statements that exercise and support military operations and military strikes. Japan does not participate in any of them. Considering this fact, while Japan with the US jointly sponsored resolution 2722, and while Japan's statement in the SC is not totally clear, it can be assumed that Japan does not support the military strikes by the UK and US, particularly those against the Houthi's military targets in Yemeni territory. Whether Japan admits the use of weapons at sea for repelling the attacks against vessels is not clear, either. It may recognize such a use of weapons like the position of Switzerland uttered in the SC below.

(2) Positions of Foreign States

There are apparently three categories of opinions voiced in the SC. First, there is a voice that "the right" means and/or includes the right of self-defence.¹⁶ Second, there is an opinion to deny the right of self-defence to be exercised in the Red Sea situations. Third, not only denying the right of self-defence as the second category of opinion, some States explain what they can do under international law, including the law of the sea.

The UK and US are in the first category. The US said:

The aim of those strikes was to disrupt and degrade the Houthis's ability to continue their reckless attacks against vessels and commercial shipping in the Red Sea and the Gulf of Aden. The strikes were necessary and proportionate, as

¹⁵ Security Council, U.N. Doc. S/PV.9532, (Jan 12, 2024), pp. 7-8. As an interpretation that Japan supports the exercise of the right of self-defence by the US and UK immediately after the adoption of the resolution 2722, Himanil Raina, "Attacks on Merchant Shipping: Which State Has the Right to Respond in Self-Defence?," Lieber Institute, Articles of War, (Apr 15, 2024), p.4.

¹⁶ The issue regarding the right of self-defence will be succinctly dealt with later as far as it relates to this paper's argument.

we just heard from my British colleague. They were consistent with international law and in exercise of the United States' inherent right to self-defence, as reflected in Article 51 of the Charter of the United Nations. They were taken only after non-military options proved inadequate to address the threat.¹⁷

It cited resolution 2722, which, the US said, refers to the inherent right of a Member State to defend their vessels.¹⁸ The US' second statement against Russia's second one which is introduced below was as follows:

We carried out this action under Article 51 of the Charter of the United Nations. And this comes down simply to freedom of navigation and the free flow of commerce and, yes, for the United States, but also for more than 50 nations that have been affected by those attacks, whose ships have been rerouted thousands of miles to avoid violence; crews have been held hostage — some to this day; and vessels have been fired on and, frankly, would have been hit without its intervention.¹⁹

By echoing the US position above, the UK said:

Last night, we took limited, necessary and proportionate action in self-defence — alongside the United States and with the non-operational support of the Netherlands, Canada, Bahrain and Australia. The United Kingdom Royal Air Force carried out targeted strikes against military facilities used by Houthi rebels in Yemen. The operation took particular care to minimize risks to civilians. We have published a summary of our legal position on last night's strikes and have reported to the Council in writing in accordance with Article 51 of the Charter of the United Nations.²⁰

As the second category of opinion, opposing against the first category, several States clearly denied the right of self-defence. The Russian Federation (Russia) said:

Contrary to what our Western colleagues are saying, the mass strikes by the United States and the United Kingdom against the territory of Yemen have nothing to do with the right to self-defence under Article 51 of the Charter of the United Nations. Article 51 does not apply to the situation of commercial vessels. The right to self-defence cannot be invoked to ensure the freedom of navigation, and our American colleagues are well aware of that. Besides, there was no authorization by the Security Council under Chapter VII of the Charter to use

¹⁷ *Op. cit.*, *supra* n. 15, pp. 4-6.

¹⁸ Resolution 2722 does not mention the "inherent" right of self-defence.

¹⁹ *Op. cit.*, *supra* n. 15, p. 11.

²⁰ *Ibid.*, pp. 4 and 11.

force.... May I remind members that the “freedom of navigation” is regulated by the United Nations Convention on the Law of the Sea of 1982.... But even if we were talking about pirates, the Convention gives the right to detain a pirate vessel and bring the crew to trial rather than bomb yet another country back into the Stone Age.²¹

Russia also said:

Let me underscore that there is no legal basis for their attacks on sovereign Yemen. What right to self-defence could London and Washington refer to while being thousands of miles away from their own borders? Since when did that right extend to commercial vessels — especially when those vessels fly the flag of a third country, as was confirmed by the Permanent Representative of the United States herself?²²

Mozambique stated:

Mozambique is deeply concerned about the recent developments in Yemen, occurring less than a day after the Council adopted resolution 2722 (2024). While we abstained in the voting on the resolution, it is unfortunate that the Council’s decision could be misinterpreted as sanctioning the use of force.²³

Observing that the latest military actions in Yemen destroyed infrastructure, caused civilian casualties, heightened security risks in the Red Sea and risked undermining the ongoing political process in Yemen, China emphasized that the Council never authorized any State to use force.²⁴ It said:

It warrants underscoring that the Security Council has never authorized any State to use force against Yemen. The military actions taken by the countries concerned run contrary to recently adopted resolution 2722 (2024). China reiterates that no country shall misinterpret or abuse international law and Security Council resolutions and create new tensions in the Red Sea.

As the third category of opinion, Switzerland, not only denied the right of self-defence but also pointed out concretely possible measures to be taken under the resolution as follows:

Switzerland shared its legal assessment of the resolution’s operational paragraph 3, referring to: “the right of Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine navigational

²¹ *Ibid.*, pp. 2-4.

²² *Ibid.*, p. 11.

²³ *Ibid.*, p. 8.

²⁴ *Ibid.*, pp. 6-7.

rights and freedoms”. In our view, that right is strictly limited to military measures to intercept attacks against merchant vessels and warships in order to protect said vessels and the persons on board. In that context, any military operation that goes beyond the immediate need to protect said vessels and persons is disproportionate and therefore not covered by the aforementioned resolution.²⁵

Russia’s opinion is also categorized in the third one, in that it included a suggestion of the application of UNCLOS.²⁶ Slovenia’s position has similar significance, and it said as follows:

What is also clear is that any action to defend vessels from attacks must be undertaken in full compliance with international law, including international humanitarian law and international human rights law. That means that the principles of distinction, necessity, proportionality and precaution should be upheld at all times.²⁷

Multilateral operations and joint statements are also the demonstrations of opinions. On the 18th of December 2023, the US established Operation Prosperity Guardian, a new multinational security initiative under the umbrella of the Combined Maritime Forces and the leadership of its Task Force 153, which focuses on security in the Red Sea. The US explains that it is bringing together multiple countries to include the United Kingdom, Bahrain, Canada, France, Italy, Netherlands, Norway, Seychelles and Spain, to jointly address security challenges in the southern Red Sea and the Gulf of Aden, with the goal of ensuring freedom of navigation for all countries and bolstering regional security and prosperity.²⁸

After the UK and US initiated their strikes against Houthi’s military targets in Yemen, several joint statements were issued to support them. One is the joint statement of 22nd of January 2024, the signatories of which are Albania, Australia, Bahrain, Canada, Croatia, Czech Republic, Denmark, Estonia, Germany, Guinea-Bissau, Hungary, Italy, Kenya, Latvia, Lithuania, Montenegro, Netherlands, North Macedonia, Poland, the Republic of Korea, Romania, the UK, and the US.²⁹ Further, in February, the additional military strikes against the Houthis in Yemen by the UK and US was supported by the

²⁵ *Ibid.*, p. 9.

²⁶ See *supra* n. 21.

²⁷ *Op. cit.*, *supra* n. 15, p. 6.

²⁸ <https://www.defense.gov/News/Releases/Release/Article/3621110/statement-from-secretary-of-defense-lloyd-j-austin-iii-on-ensuring-freedom-of-n/>

²⁹ <https://www.gov.uk/government/news/joint-statement-on-strikes-against-houthi-military-targets-22-january-2024>

joint statement of 3rd of February 2024, in which Australia, Bahrain, Denmark, Canada, the Netherlands, New Zealand, the UK, and the US participated.³⁰ Japan does not participate in any of these operations and statements. This fact is useful to precisely understand Japan's position, which was discussed above.³¹

In contrast, there are several joint statements that do not mention the military attacks by the UK and US in which Japan participated. They are, for instance, "Joint Statement on Houthi Attacks in the Red Sea (Dec 19, 2023),"³² "A Joint Statement from the Governments of the United States, Australia, Bahrain, Belgium, Canada, Denmark, Germany, Italy, Japan, Netherlands, New Zealand, Republic of Korea, Singapore, and the United Kingdom (Jan 03, 2024),"³³ and Apulia G7 Leader's Communiqué (June 14 2024).³⁴

(3) Scholars' Opinions

A relatively large number of authorities deny that the SC resolution authorizes an exercise of the right of self-defence.³⁵ Germany is among the supporting countries for

³⁰ [https://www.gov.uk/government/news/joint-statement-from-australia-bahrain-denmark-canada-the-netherlands-new-zealand-united-kingdom-and-united-states-on-additional-strikes-against#:%7E:text=Today%2C%20at%20the%20direction%20of,tar%20across%2013%20locations%20in](https://www.gov.uk/government/news/joint-statement-from-australia-bahrain-denmark-canada-the-netherlands-new-zealand-united-kingdom-and-united-states-on-additional-strikes-against-%7E:text=Today%2C%20at%20the%20direction%20of,tar%20across%2013%20locations%20in)

³¹ II. 2. (1)

³² US Department of State, Office of the Spokesperson, "Joint Statement on Houthi Attacks in the Red Sea," Media Note, (Dec 19, 2023), <https://www.state.gov/joint-statement-on-houthi-attacks-in-the-red-sea/>.

³³ The White House, "A Joint Statement from the Governments of the United States, Australia, Bahrain, Belgium, Canada, Denmark, Germany, Italy, Japan, Netherlands, New Zealand, Republic of Korea, Singapore, and the United Kingdom," (Jan 03, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/03/a-joint-statement-from-the-governments-of-the-united-states-australia-bahrain-belgium-canada-denmark-germany-italy-japan-netherlands-new-zealand-and-the-united-kingdom/>.

³⁴ Apulia G7 Leader's Communiqué, <https://www.g7italy.it/wp-content/uploads/Apulia-G7-Leaders-Communique.pdf>, p. 7.

³⁵ Following authorities are critical against the right of self-defence that US and UK claim its exercise as justification for their use of force in the Red Sea incidents. Martin Fink, "Protecting Commercial Shipping with Strikes into Yemen: Do Attacks against Merchant Shipping Trigger the Right of Self-Defence?," EJIL: Talk!, (Jan 26, 2024), <https://www.ejiltalk.org/protecting-commercial-shipping-with-strikes-into-yemen-do->

the military strikes against Houthi's military targets in Yemen.³⁶ Even a German authority criticizes the military strikes by the UK and US.³⁷ Contrary to this, there are also authorities that endorse the military strikes by the US and UK.

Here is not the place for a detailed examination on interpretation of the resolution 2722.³⁸ When the right to defend in the resolution is the right of self-defence, the use of force is justified as its exercise. Different from this, as many States, including Japan albeit with ambiguity, suggested in the discussion in the SC, when this right is not the right of self-defence, then what is it? What is the legal basis for it? When a use of weapons accompanies an exercise of the right, its justification also should be considered in such a context.

Next section will examine "the right to defend" in SC resolution 2722 by placing it under the law of the sea.

III. "Right to Protect" under the Law of the Sea

1. The Law of the Sea as the Governing Law

Russia's remark in the SC is significant. It said "the mass strikes by the United

[/attacks-against-merchant-shipping-trigger-the-right-of-self-defence/](#); Christian Henderson, "A Reply to Brassat: The Military Strikes Against the Houthis in Yemen and the 'Fourth Problem' of Necessity and Proportionality," EJIL: Talk!, (Apr 1, 2024), <https://www.ejiltalk.org/a-reply-to-brassat-the-military-strikes-against-the-houthis-in-yemen-and-the-fourth-problem-of-necessity-and-proportionality/>; Brassat, *op. cit.*, *supra* n. 7; Papastavrides, *op. cit.*, *supra* n. 7, pp. 17-19; Svcevic, *op. cit.*, *supra* n. 7, pp. 3-6. On the contrary, there are authorities supportive an exercise of self-defence in the Red Sea situation and its exercise by US and UK. Raul (Pete) Pedrozo, "Securing the Maritime Domain in the Red Sea," Lieber Institute, Articles of War (Dec 8, 2023), <https://lieber.westpoint.edu/securing-maritime-domain-red-sea/>, pp. 8-9; Russell Buchan, "The Law of Self-Defense and the U.S. and UK Strikes against the Houthis," Lieber Institute, Articles of War (Jan 31, 2024), <https://lieber.westpoint.edu/law-self-defense-us-uk-strikes-against-houthis/>, p. 7; Shani Friedman, "Does breaching UNCLOS invoke the right of self-defence?," 9 February 2024 <https://cil.nus.edu.sg/blogs/does-breaching-unclos-invoke-the-right-of-self-defence/><https://lieber.westpoint.edu/attacks-merchant-shipping-which-state-has-right-respond-self-defence/>; James Kraska, "Attacks on U.S. Warships Justify Self-Defense Against Houthi Forces Ashore," Lawfare, (Jan 2, 2024), <https://www.lawfaremedia.org/article/attacks-on-u.s.-warships-justify-self-defense-against-houthi-forces-ashore>; Pedrozo, *op. cit.*, *supra* n. 4, pp. 61-66; Raina, *op. cit.*, *supra* n. 15.

³⁶ See *supra* n. 29.

³⁷ Talmon, *op. cit.*, *supra* n. 7.

³⁸ As succinct examination of the interpretation of the resolution 2722, see, II. 1.

States and the United Kingdom against the territory of Yemen have nothing to do with the right to self-defence under Article 51 of the Charter of the United Nations. Article 51 does not apply to the situation of commercial vessels. The right to self-defence cannot be invoked to ensure the freedom of navigation.” In addition, the opinion of Switzerland is also significant. It said “that right is strictly limited to military measures to intercept attacks against merchant vessels and warships in order to protect said vessels and the persons on board.” Noting that any military operation that goes beyond this immediate protection would be disproportionate — and not covered by the resolution.”³⁹

Based upon these opinions, the following right is assumed under the law of the sea: “the right to protect” against obstruction to uses of sea, including obstruction with violence, whether it is at high seas or in a jurisdictional sea area of a State. With this assumption, the legal basis for the right to protect, the subject of the right, and the permissible forcible measures to exercise the right with justification will be examined in this order.

2. The Legal Basis for the Right to Protect

(1) To Protect Uses of Oceans⁴⁰

Paragraph 3 of SC resolution 2722 reads:

3. *Affirms* the exercise of navigational rights and freedoms by merchant and commercial vessels, in accordance to with international law, must be respected, and *takes note* of the right of Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine navigational rights and freedoms;

The here assumed right to protect is a reflection of the right to defend their vessels from attacks, including those that undermine navigational rights and freedoms in the resolution. The object of “the right to protect” is navigational rights and freedoms. In other words, these rights and freedoms are the rights to use the sea.⁴¹

³⁹ See *supra* n. 21 and 25.

⁴⁰ From a perspective of legal interests to use oceans, see Atsuko Kanehara, “The Protection of Submarine Cables and Pipelines in Armed Conflict in the Indo-Pacific, in Lieber Study book series edited by Douglas Guilfoyle and Jennifer Maddocks, forthcoming, (hereinafter referred to as Kanehara, “Protection of Submarine Cables and Pipelines.”)

⁴¹ In relation to the Red Sea situation, frequently security of international trade via ocean and ocean shipment are also mentioned. They are included in the rights and freedoms of use of sea.

Recently, destruction of undersea infrastructures⁴² has acquired keen interest from the world.⁴³ For instance, the Nord Stream incident of 2022,⁴⁴ the Balicconnector incident of 2023,⁴⁵ frequent cuts by Chinese fishing boats of the communication cables

⁴² Undersea infrastructure includes submarine cables and pipelines. In some cases, and depending on interpretation of Article 60, it falls under structures, installation under the provision.

⁴³ There have been many works on this issue. For instance, As a general survey of this issue, Douglas Guilfoyle, Tamsin Phillipa Paige and Rob Mclaughlin, “The Final Frontier of Cyberspace: The Seabed Beyond National Jurisdiction and the Protection of Submarine Cables,” *International and Comparative Law Quarterly*, Vol. 71 (2022), pp. 657-696; International Law Association, Submarine Cables and Pipelines under International Law, [Third] Interim Report 2024, at <https://www.ila-hq.org/en/documents/ilathi-1>. As for the development of international conventions regarding regulations on them, for instance, Douglas Burnett, Tara Davenport, and Robert Beckman, “Overview of the International Legal Regime Governing Submarine Cables,” in Douglas R. Burnett, Robert Beckman, and Tara M. Davenport eds., *Submarine Cables: The Handbook of Law and Policy* (Brill, 2013), pp. 69 *et seq.* Stuart Kaye, “The Protection of Platforms, Pipelines and Submarine Cables under Australian and New Zealand Law” in N Klein, J Mossop and D Rothwell eds., *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge 2010), pp. 186-201; Tara Davenport, “Intentional Damage to Submarine Cable Systems by States,” Aegis Series Paper No. 2305 (Hoover Institution) October 26, 2023 <https://www.hoover.org/research/intentional-damage-submarine-cable-systems-states>, p. 1, *et seq.* As an overview of domestic laws of Asian and Indo-Pacific countries, see, Yoshinobu Takei, “Law and Policy for International Submarine Cables: An Asia-Pacific Perspective,” *Asian Journal of International Law*, Vol. 2, No. 2, (2012), pp. 205-234; Alexander Lott, “The Baltic Sea Cable-Cuts and Ship Interdiction: The C-Lion Incident,” Lieber Institute, Articles of War (Nov. 26, 2024), <https://lieber.westpoint.edu/baltic-sea-cable-cuts-ship-interdiction-c-lion1-incident/>; Kanehara, “Protection of Submarine Cables and Pipelines.”

⁴⁴ Melissa Eddy, “Pipeline Breaks Look Deliberate, Europeans Say, Exposing Vulnerability,” *New York Times* (Sept. 27, 2022), <https://www.nytimes.com/2022/09/27/world/europe/pipeline-leak-russia-nord-stream.html?searchResultPosition=1>. For a legal analysis on this incident, principally from the perspective of LOAC, see William H. Boothby, “Attacking a Pipeline: Legal Issues for Consideration,” Lieber Institute, Articles of War (Oct. 25, 2024), <https://lieber.westpoint.edu/attacking-pipeline-legal-issues-consideration/>.

⁴⁵ For reports on this incident, see, for instance, Anne Kauranen and Terje Solsvik, “Finland Says ‘Outside Activity’ Likely Damaged Gas Pipeline, Telecoms Cable,” *Reuters* (Oct. 11, 2023), <https://www.reuters.com/markets/commodities/finnish-government-hold-news-conference-suspected-pipeline-leak-media-2023-10-10/>; Jari Tanner, “Damage to gas pipeline, telecom cable connecting Finland and Estonia caused by ‘external activity’,” *AP News* (Oct. 11, 2023), <https://apnews.com/article/finland-estonia-pipeline-24d6623cf2778464fdb4ef1d85c70d91>; Céline Bayou, “Balticconnector: the vulnerability of critical infrastructures in the Baltic Sea,” *Read sur*

in the Taiwan Strait,⁴⁶ and Houthi's attack against submarine cables have also been reported.⁴⁷ In the arguments on legal responses against such destructions of undersea infrastructure, a right to protect uses of sea seems to be assumed.⁴⁸ In addition, the request for the extradition of the founder of the Sea Shepherd has been considered by Denmark.⁴⁹ He led the violent acts against Japan's research whaling at high seas. Those violent acts are also among the obstruction to uses of sea.⁵⁰

L'est (Oct. 16, 2023), <https://regard-est.com/balticconnector-the-vulnerability-of-critical-infrastructure-in-the-baltic-sea>.

⁴⁶ "Taiwan Suspects Chinese Ships Cut Islands' Internet Cables," *The Mainichi* (Mar 8, 2023), <https://mainichi.jp/english/articles/20230308/p2g/00m/0in/038000c>; Sarah Wu and Yimou Lee, "Angle: Taiwan's Communications Infrastructure at Risk of Crisis, High Hurdles for Maintenance," *Reuters* (Mar 18, 2023), <https://www.newsdirectory3.com/angle-taiwans-communications-infrastructure-at-risk-of-crisis-high-hurdles-for-maintenance-reuters/>.

⁴⁷ As for cutting submarine communication cables in the Red Sea, see Assaf Gilead, "Houthis Hit Submarine Communications Cables," *Globes* (Feb 26, 2024), <https://en.globes.co.il/en/article-houthis-hit-underwater-communications-cables-1001472165>; Zachary Folk, "Four Fiber Optic Cables Damaged In Red Sea: Here's What We Know," *Forbes* (Mar 4, 2024), <https://www.forbes.com/sites/zacharyfolk/2024/03/04/four-fiber-optic-cables-damaged-in-red-sea-heres-what-we-know/?sh=1326234355b1>; Nicholas Rakoncza and Carter Palmer, "Red Sea Internet Cables Severed; Satellites Picking up the Slack," *Forecast International* (Mar 7, 2024), https://flightplan.forecastinternational.com/2024/03/07/red-sea-internet-cables-severed-satellites-picking-up-the-slack/?utm_source=rss&utm_medium=rss&utm_campaign=red-sea-internet-cables-severed-satellites-picking-up-the-slack.

⁴⁸ Kanehara, "Protection of Submarine Cables and Pipelines," III.; As a similar thought, International Law Association, *op. cit.*, *supra* n. 43, paras. 51, 53, 63. Para. 53 touches upon the resolution 2722 of the SC in relation to the Red Sea situation.

⁴⁹ Atsuko Kanehara, "Japan's Request of Extradition of the Founder of Sea Shepherd: Recovery and Maintenance of the Common Interests of International Society and the Inherent Interests of Japan, a Sovereign State," https://cigs.canon/en/article/20240826_8292.html.

⁵⁰ When the violent acts were conducted, the decision of 2014 by the International Court of Justice (ICJ) was not yet rendered that Japan's whaling was not the research whaling under the International Convention for the Regulation of Whaling (ICRW). Whaling in the Antarctic (*Australia v. Japan: New Zealand intervening*), Judgment, *I. C. J. Reports 2014*, p. 226. Even after the decision, and even though Japan's whaling was illegal under ICRW, an individual State, and a private entity, such as the Sea Shepherd does not have any competence to unilaterally determine that Japan's whaling is illegal.

Thus, considering these recent international practices and arguments on the legal responses to obstruction to uses of sea, it is convincing and legally justifiable that any States need not endure any obstruction to their rights and freedoms without response. To reflect this commonsense, this paper uses the terms “the right to protect” uses of sea. As confirmed later, UNCLOS provides for the rights and jurisdiction to cope with such hindrances and distributes jurisdiction to the States concerned. Nonetheless, it does not cover all possible hindrances to the rights and freedoms that have their bases under UNCLOS. Therefore, including the rights and jurisdiction that UNCLOS distribute, the right to protect uses of sea signifies a right to cope with any hindrances to the rights and freedoms under UNCLOS. There are not always explicit provisions under UNCLOS that provide for such a right to protect. Nonetheless, as explained here, such a right should be recognized as convincing and legally justifiable. The following is a possible theoretical framework for the right to protect to use sea.

First, what is the legal basis for such a right?

(2) UNCLOS and Customary International Law of the Sea as the Basis for the Right to Protect to Use Sea

The Houthi’s attacks against commercial vessels⁵¹ have been conducted in the sea areas where the freedom of navigation is recognized.⁵² At high seas, every vessel irrespective of its type — commercial vessels, tankers, warships — enjoys the freedom of navigation. It is in accordance with Article 87, Paragraph 1 of UNCLOS and the freedom of navigation is also guaranteed by customary international law. Thus, the right to protect is that to protect the freedom of high seas, and in the Red Sea incidents, the

Irrespective of even illegality of a use of sea, any prevention of it with violence is itself illegal under international law. Therefore, there is no justification for the violent acts by the Sea Shephard against Japan’s whaling at high seas by arguing that the whaling was contrary to ICRW.

⁵¹ There have been military attacks against warships, too. As for a survey of the incidents, see Pedorozo, *op. cit., supra* n. 4.

⁵² As explained in the Introduction, the sea area of the Galaxy incident was 50 miles away from the Yemeni Al Hudaydah port and outside Yemeni territorial sea. In comparison, in the incidents of attacks against oil tankers in the Strait of Hormuz, the legal regime of the strait is the important issue. As an analysis of this, see, for instance, Alexander Lott, Shin Kawagishi, “The Legal Regime of the Strait of Hormuz and Attacks Against Oil Tankers: Law of the Sea and Law on the Use of Force Perspectives,” *Ocean Development & International Law*, Vol. 53, Nos. 2-3 (2022), pp. 126-134. There is an opinion that Bab al-Mandeb Strait is used for international navigation, Friedman, *op. cit., supra* n. 35. In that case, the transit passage regime under Articles 37, 38 and 44 of UNCLOS are applied to the sea area.

right to protect the safety of the freedom of navigation.

The following analysis will be conducted based upon the assumption that the freedom of high seas is obstructed. It will contain some arguments on uses of exclusive economic zone (EEZ). To the cases in which the right to protect is exercised in a jurisdictional sea area of some State, the following analysis regarding high seas can be applied, at least, *mutatis mutandis*. Regarding navigation, for instance, as to EEZ, there is the freedom of navigation in accordance with Article 87, Paragraph 1 that is applied to EEZ under Article 58, Paragraph 1 of UNCLOS. As to territorial seas, foreign vessels enjoy the right of innocent passage under Article 17. In accordance with the relevant provisions of UNCLOS, the freedom and right to use sea areas are conducted, and they should be protected from obstruction.

When UNCLOS has the provisions for the freedom and the right to use oceans, such provisions set forth the legal bases for the right to protect them. If the freedom of navigation and its safety are threatened and obstructed by violent acts, for instance, the provisions of UNCLOS that provide the freedom and the rights make the bases for the right to protect the use of oceans from the obstruction. Article 87, Paragraph 1⁵³ and Article 58, Paragraph 1 fall under such provisions with respect to the freedom of navigation. This is true for the freedom of other uses of high seas and EEZ, such as overflight, fishing, scientific research, being subject to the inherent rules thereon.

Some possible development of interpretation deserves attention regarding submarine cables and pipelines. It may also provide a concrete example of a legal basis for the right to protect uses of sea.

After the adoption of UNCLOS, thanks to the development of technology, new

⁵³ Article 87, Paragraph 1 provides for the freedom of high seas as follows:

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:
 - (a) freedom of navigation;
 - (b) freedom of overflight;
 - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
 - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
 - (e) freedom of fishing, subject to the conditions laid down in section 2;
 - (f) freedom of scientific research, subject to Parts VI and XIII.

uses of oceans have come to fall under the freedom of use of high seas and EEZ.⁵⁴ Among them, there is new utilization of submarine cables and pipelines.⁵⁵ Protection of submarine cables and pipelines can be based upon the freedom of laying them as its legal basis. In addition, with regard to submarine cables and pipelines that provide connectivity from facilities in the EEZ, as a different possibility, a coastal State may have a sovereign right (and not merely jurisdiction) over such submarine cables and pipelines. It has a sovereign right under Article 56(1)(a) “with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.” When offshore facilities are for the purpose of conducting activities, such as producing energy, the connecting submarine cables and pipelines are to be regarded as incidental to that purpose. Thus, a coastal State can have a sovereign right over such undersea infrastructure. The sovereign right demonstrates the legal interest for a State in laying such submarine cables and pipelines.⁵⁶ To protect the legal interests, a coastal State should have a right to protect submarine cables and pipelines from destruction.

Regarding continental shelf, Article 79 of UNCLOS provides special rules on undersea infrastructure on continental shelf.⁵⁷ A coastal State has special discretion on the course of the pipelines on its continental shelf under Article 79(3). In addition, Article 79(4) confirms the right of a coastal State “to establish conditions for” submarine cables and pipelines “entering its territory or territorial sea” and “its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.”⁵⁸ This is interpreted as meaning that a coastal State has

⁵⁴ Article 87, paragraph 1 which provides for the freedom of high seas reads “It comprises, *inter alia* (emphasis added),” and so uses of high seas other than the designated ones under the provision can also come under the freedom of high seas.

⁵⁵ As to works on this, see, *supra* n. 43.

⁵⁶ Kanehara, “Protection of Submarine Cables and Pipelines,” III. As a similar thought, Kaye, *op. cit.*, *supra* n. 43, p. 192.

⁵⁷ In this regard, the relationship between the legal regime on continental shelf and that on EEZ is an issue to be discussed, as Article 56, Paragraph 3 provides for “[T]he rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.” Here it is enough to point out that.

⁵⁸ “Submarine cables and pipelines entering its territory or territorial sea” mean,

rights or jurisdiction over undersea infrastructure *accompanying* the exploration of continental shelf and the exploitation of resources, or the operation of artificial islands, installations, and structures. This idea is the same as the rights of a coastal State over undersea infrastructure that is incidental to the production of energy in EEZ.

Furthermore, all States have the freedom of laying cables and pipelines under Article 58(1) UNCLOS. Such freedom is the same as that relating to the high seas. So, the arguments above will apply to the freedom of laying submarine cables and pipelines on the high seas, at least *mutatis mutandis*.

(3) Distribution of Jurisdiction by UNCLOS as a Basis for the Right to Protect Uses of Sea

In some cases, UNCLOS distributes to the States concerned, prescriptive, enforcement, and judicial jurisdictions to cope with harmful acts against the designated uses of high seas and jurisdictional sea areas of coastal States. The right to protect uses of sea is exercised as an exercise of these jurisdictions. If harmful acts are conducted against the designated uses, then the coastal State or other States that UNCLOS designates can exercise the jurisdiction in accordance with it. For instance, coastal States of territorial seas have sovereignty thereon in general.⁵⁹ In EEZ, coastal States have enforcement jurisdiction regarding fishing activities⁶⁰ and artificial islands, installations and structures.⁶¹ In relation to some uses of sea, there has been an argument as to whether UNCLOS confers on coastal States enforcement jurisdiction, such as the enforcement jurisdiction in the safety zone surrounding installations and structures.⁶²

“incoming” submarine cables and pipelines to a coastal State. A similar thought is found, for instance, under Article 18. Simply speaking, a coastal State has a stronger right and jurisdiction over ships and submarine cables and pipelines than over those transiting its jurisdictional sea areas.

⁵⁹ Article 2 and Article 25 provide for this. The right of innocent passage of foreign vessels limits the right of a coastal State of territorial sea. In addition, Article 27 and Article 28 do so in relation to the criminal and civil jurisdiction of a coastal State.

⁶⁰ Article 73.

⁶¹ Article 60.

⁶² Regarding the enforcement jurisdiction of a coastal State of EEZ in relation to a safety zone surrounding artificial islands, installations, structures, see the Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), List of Cases: No. 22, Provisional Measures Order of 22 November 2013,

At high seas, because of the flag State principle which admits the exclusive jurisdiction of flag States on vessels at high seas,⁶³ only for limited cases are States other than flag States allowed to exercise jurisdiction over foreign vessels. Piracy⁶⁴ is the typical example and Article 110 provides for several matters for which enforcement jurisdiction on foreign vessels is permitted.

Regarding piracy, while not many authorities deal with this, there have been some arguments as to whether the Houthi's attacks fall under piracy.⁶⁵ Some possibilities for

https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf, paras. 62-65. Joint Separate Opinion of Judge Wolfrum and Judge Kelly, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Wolfrum_Kelly_221113.pdf, paras. 13-14; Dissenting Opinion of Judge Golitsyn, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Golitsyn_221113.pdf, para. 23.

⁶³ Article 94 of UNCLOS.

⁶⁴ Articles 100 to 105.

⁶⁵ Rob McLaughlin, "Houthi Operations in the Red Sea and LOAC?," Lieber Institute, Articles of War (Jan 8, 2024), <https://lieber.westpoint.edu/houthi-operations-red-sea-loac/>; Abaad Studies & Research Center, "A Competition Puts Politics and International Security at Risk: Houthi-Iran Relationship with African Pirates," 14 Jun 2024, <https://abaadstudies.org/en/strategies/topic/60116>; Connor Lahey, "Houthi interdictions in the Red Sea: Piracy or permissible? The Criminal Law Practitioner," March 2, 2024 <https://www.crimlawpractitioner.org/post/houthi-interdictions-in-the-red-sea-piracy-or-permissible>; Christian Bueger, "Coordinating and Deconflicting Naval Operations in the Western Indian Ocean," RUSI, 9 February 2024 <https://rusi.org/explore-our-research/publications/commentary/coordinating-and-deconflicting-naval-operations-western-indian-ocean> Pedrozo, *op. cit.*, *supra* n. 35, pp. 5-6; Pedrozo, *op. cit.*, *supra* n. 4, pp. 58-61; Krask, *op. cit.*, *supra* n. 35, Papastavridis, *op. cit.*, *supra* n. 7, pp. 8-12; Friedman, *op. cit.*, *supra* n. 35.

this are recognized. Among around 70 incidents,⁶⁶ solely some can be said to be piracy.⁶⁷ Some phase(s) within one incident may fall under piracy.⁶⁸ Some focus is laid upon the “for private ends” requirement under Article 101 of UNCLOS.⁶⁹ This requirement was to make distinction between piratical ships and privateers in the past, and so as to be obsolete. Whether violent acts with some political ends are regarded as piracy has been discussed, for instance in the case of violent acts by the Sea Shepherd against Japan’s whaling.⁷⁰

⁶⁶ It is said that since the Galaxy incident in November of 2023, until February of 2024, around 70 incidents took place. International Maritime Organization Report, “Communication from the Secretary-General to Member States’ Representatives (Updated version – 11 September 2024),”

<https://wwwcdn.imo.org/localresources/en/MediaCentre/Documents/Red%20Sea%20Incidents%20Report%20for%20Member%20States%2012%2009%202024.pdf>. As a

detailed analysis of the impacts on Japan and international shipping by the Houthi’s attacks on commercial vessels, see, Susumu Nakamura, “How should Japan Protect the International shipping Routes-The Response by International Society to Houthi’s Attacks against Commercial Vessels [Nihon ha Koksai no Hogo ni Do Mukiaunoka],” Part 1, *International Information Network Analysis [Kokusai Joho Nettowaku Bunseki IINA]*, 29 March, 2024,

https://www.spf.org/iina/articles/nakamura_11.html; Part 2, *ibid.*, 30 August, 2024,

https://www.spf.org/iina/articles/nakamura_13.html.

⁶⁷ As authorities evaluating at least some incidents in the Red Sea as piracy, see, for instance, U.S. Department of State, Matthew Miller, Department Spokesperson, “Houthi Attacks on International Shipping,” February 21, 2024 <https://www.state.gov/houthi-attacks-on-international-shipping/>; Buerger, *op. cit.*, *supra* n. 65; Lahey, *op. cit.*, *supra* n. 65; Pedrozo, *op. cit.*, *supra* n. 4, pp. 60-61; Pedrozo, *op. cit.*, *supra* n. 35, p. 6.

⁶⁸ As such opinions, see, for instance, McLaughlin, *op. cit.*, *supra* n. 65, p. 7; Papastavridis, *op. cit.*, *supra* n. 7, pp. 8-11. As an analysis of the interpretation of the relevant provisions of UNCLOS on piracy, see, Douglas Guilfoyle, “Article 101,” Alexander Proelss ed, *The United Nations Convention on the Law of the Sea* (Hart Publishing, 2017), 737-744; Douglas Guilfoyle, “Article 102,” *ibid.*, pp. 744-746.

⁶⁹ Article 101 (a) reads:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (emphasis added):

As an opinion that Houthi’s attacks do not fall under piracy of Article 101, as it does not satisfy the requirement of “for private ends”, Friedman, *op. cit.*, *supra* n. 35.

⁷⁰ Atsuko Kanehara, “So-called 'Eco-piracy' and Interventions by NGOs to Protect

Here it is enough to confirm that as far as the Houthi's attacks fall under piracy, in accordance with Article 105, States can take measures against the piratical vessel and its crew.⁷¹

In cases in which UNCLOS does not prescribe jurisdictions for protecting the uses of sea, States should be given the right to protect their uses of sea from threat and obstruction to it. It goes without saying that the uses of sea to be protected should be legal ones. The legality or illegality must be determined by an entity with the authority to do so, principally by international courts and arbitral tribunals.⁷²

(4) Regulation on the Right to Protect

The exercise of the right to protect uses of sea should obey the obligation of paying due regard to other States' uses of sea. This is in accordance with Article 56, Paragraph 2 in EEZ,⁷³ and Article 87, Paragraph 2 at high seas.⁷⁴ With respect to the jurisdictions that UNCLOS provides, it also, in some cases, includes particular regulations on them. Any exercise of the jurisdictions must be subject to the regulations.⁷⁵

against Scientific Research Whaling on the High Seas: An Evaluation of Japanese Position," in C. R. Symmons ed., *Selected Contemporary Issues in the Law of the Sea* (2011), pp. 195-220.

⁷¹ Even if so, the following suggestion is so important. "The Red Sea patrol is based on the U.S. experience with piracy, but two notes of caution are in order. First, the Houthi threat is orders of magnitude greater than the threat from Somali piracy. Somali pirates used small arms to capture ships and hold their crews for ransom. The Houthis are using ballistic missiles and drone swarms to strike ships. Second, contrary to popular belief, a decade ago warships had a relatively muted effect in reducing maritime piracy in the Western Indian Ocean." Karask, *op. cit.*, *supra* n. 35. As to the difference between Somali piracy and the Houthi's attacks, see also Abaad Studies & Research Center, *op. cit.*, *supra* n. 65.

⁷² In the case of Japan's research whaling at high seas, at the material time when the violent acts were conducted against it by the Sea Shepherd, the decision by the ICJ had not been rendered yet that it was not "research" whaling under ICRW. In addition, even *arguendo*, Japan's whaling was "illegal" as being contradict to ICRW at that time, NGO, even a State, does not have any competence to unilaterally evaluate the legality or illegality of one State's use of sea. The violent act against a State's use of sea based upon such a unilateral evaluation has no justification at all. See *supra* n. 50.

⁷³ Reciprocally, foreign States using EEZ have the due regard obligation toward coastal States of EEZ under Article 58, Paragraph 2.

⁷⁴ As to the obligation to have due regard, see, Atsuko Kanehara, [Double Aspects of Being a Sovereign State: Positive and Passive Aspects | The Canon Institute for Global Studies \(cigs.canon\)](#), pp. 47-55.

⁷⁵ The obligations to obey in using weapons and using force that accompany to an exercise of the right to protect will be succinctly touched upon later.

Then who is the subject of the right to protect?

3. Subjects of the Right to Protect

Paragraph 3 of the SC resolution 2722 reads:

3. *Affirms* the exercise of navigational rights and freedoms by merchant and commercial vessels, in accordance with international law, must be respected, and *takes note* of the right of Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine navigational rights and freedoms;⁷⁶

As to “member States...to defend their vessels” that have the right to defend, with respect to high seas, it is without doubt that flag States are among them in accordance with the flag State principle with exception based upon the provisions of UNCLOS, such as Article 110.⁷⁷ Nonetheless, as a matter of fact, in the Red Sea incidents, in many cases of Houthi’s attacks, States other than flag States of the victim vessels concerned have reacted.⁷⁸ In this regard, there are national and international practices that may support some diversion from the flag State principle.

First, there is international practice of port State jurisdiction mainly in the fields of marine environmental protection and illegal fishing, at least, to complement the flag State jurisdiction.⁷⁹ Article 218 of UNCLOS, which confers enforcement jurisdiction on port States with respect to pollution of marine environmental protection at high sea, is among such international practice. Second, doubt has been voiced with regard to the States of flag of convenience regarding their efficient exercise of exclusive jurisdiction as flag States. Third, in relation to the specific situation of the Red Sea, coalitions have been established to protect vessels, such as the Operation Prosperity Gurdian⁸⁰ and

⁷⁶ See *supra* n. 5.

⁷⁷ In case of piracy, not only UNCLOS but also customary international law admits jurisdiction to cope with piracy to States other than flag State.

⁷⁸ As to details of the various incidents, see Pedrozo, *op. cit.*, *supra* n. 4, pp. 50-58.

⁷⁹ Atsuko Kanehara, “An International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction: From a Perspective of Developments of the High Seas Regime [Kokka Kankatsugai no KaiyoSeibutsu Tayosei ni Kansuru Shinkyotei-Kokai Seido no Hatten no Kanten Kara],” [Nihon Kaiyo Seisaku Gakkaishi], *Journal of Japan Society of Ocean Policy*, Vol. 6 (2016), pp. 9-10 and footnotes thereto.

⁸⁰ See *supra* n. 28.

EUNAVFOR,⁸¹ and ASPIDES.⁸² Under these coalition operations, when a distress call is received, it is totally natural that vessels flying flags other than that of victim vessels would come to the site to rescue and provide help for the victim vessels. Otherwise, “coalition” would lose its significance to a great degree. Fourth, regarding Japan’s practice, Japan has demonstrated its strong concern relating to the Galaxy incident.⁸³ This may be based upon the cabinet decision on the 27th of December, 2019,⁸⁴ which declared its policy to protect “Japan-related vessels” in the Middle East. “Japan-related vessels” include vessels flying the Japanese flag, foreign vessels that have Japanese crew, and foreign vessels with importance to Japan’s economy, which are operated by Japan’s shipping companies or carrying Japan’s cargo. Japan declared the critical importance of protecting the safety of navigation of these Japan-related vessels.⁸⁵ The cabinet decision authorizes the Japan Self-Defense Force to gather information in the regions including the Bab el-Mandeb Strait.⁸⁶

The flag State principle is one of the most fundamental principles of the law of the sea. Its exception needs to have enough and convincing justification. In this regard, considering the national and international practice confirmed here, at least as a special law relating to the Red Sea situation, it could be safely said that an exception to the flag State principle may be admitted.

The next question is what measures are allowed to be taken as an exercise of the right to protect, particularly measures using weapons.

⁸¹ <https://eunavfor.eu/>.

⁸² https://www.eeas.europa.eu/eeas/eunavfor-operation-aspides_en. As an analysis of the operation by EUNAVFOR ASPIDES in the Red Sea, see Matteo Tondini, “The Legality of ASPIDES Protection Activities in the Framework of the Collective Countermeasures Doctrine,” EJIL: Talk!, (May 24, 2024), at <https://www.ejiltalk.org/the-legality-of-aspides-protection-activities-in-the-framework-of-the-collective-countermeasures-doctrine/>. As the “Sounion” incident for which the EUNAVFOR ASPIDES operation was conducted, see EUEUNAVFOR Operation ASPIDES, “Oil Tanker ‘Sounion’ Towed to Safety by Operation EUNAVFOR ASPIDES,” (Sept 20, 2024), https://www.eeas.europa.eu/eunavfor-aspides/oil-tanker-sounion-towed-safety-operation-eunavfor-aspides_en?s=410381.

⁸³ As to Japan’s remarks at SC, see *supra* n. 15.

⁸⁴ Since then, it was several times updated, https://www.cas.go.jp/jp/siryou/pdf/20241105_tyuto_senpaku_anzen.pdf.

⁸⁵ Paragraph 1, of the cabinet decision.

⁸⁶ Paragraph 3 (3).

4. Measures That May Be Taken as an Exercise of the Right to Protect

(1) Measures with a Use of Weapons

Measures that may be taken as an exercise of the right to protect can vary depending on the situation. Here, the focus is placed on the Red Sea situation and the use of weapons accompanying the measures to be taken in exercising the right to protect. In this regard, the Swiss remarks in the SC are significant.

Switzerland shared its legal assessment of the resolution's operational paragraph 3, referring to: "the right of Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine navigational rights and freedoms". In our view, that right is strictly limited to military measures to intercept attacks against merchant vessels and warships in order to protect said vessels and the persons on board. In that context, any military operation that goes beyond the immediate need to protect said vessels and persons is disproportionate and therefore not covered by the aforementioned resolution.⁸⁷

According to this opinion, in exercising the right to protect, a use of weapons is allowed, unless it does not go beyond the interception of the attacks to protect vessels and the persons onboard. It is not sufficiently clear whether Switzerland admits the right of self-defence as far as it is subject to the standard of proportionality. It may discuss the right to protect uses of sea rather than the right of self-defence.

When examining the use of weapons that is allowed in exercising the right to protect, the nature of the right is an important factor to be considered.

As discussed above, the right to protect uses of sea may be exercised as that of enforcement jurisdiction that UNCLOS provides for. In that case, the use of weapons accompanying the right to protect is the same as that accompanying law enforcement measures. If that is the case, for the purpose of repelling the attacks against vessels, the use of weapons is permitted as far as it is in accordance with international rules on it, such as, necessity, reasonableness, and proportionality.⁸⁸ Here it is not necessary to examine

⁸⁷ See *supra* n. 25.

⁸⁸ These standards are found in the relevant jurisprudence. Atsuko Kanehara, "The Use of Force in Maritime Security and the Use of Arms in Law Enforcement under the Current Wide Understanding of Maritime Security, *Japan Review*, Vol. 3, No. 2 (2019), https://www.jiia-jic.jp/en/japanreview/pdf/JapanReview_Vol3_No2_05_Kanehara.pdf, pp. 47-48; Atsuko Kanehara, "Reconsideration of the Distinction between the Use of Arms in Law Enforcement and the Use of Force Prohibited by International Law

the standards for the use of weapons that accompany law enforcement measures issues in detail.

When the right to protect uses of sea is different from enforcement jurisdiction under UNCLOS, the use of weapons accompanying the right to protect requires further examination. Here also comes the issue of the right of self-defence.

(2) The Nature of Measures and the Nature of the Use of Weapons Accompanying the Measures

The author discussed this issue in detail elsewhere,⁸⁹ and so the gist will be reproduced succinctly.

The limits set by international law on the use of force have been argued particularly relating to the distinction between the use of force prohibited by international law, under Article 2, Paragraph 4 of the UN Charter, and the use of weapons relating to law enforcement measures. Considering the relevant jurisprudence, it can be presupposed that the nature of measures and the nature of the use of weapons accompanying measures are, in principle,⁹⁰ the same.⁹¹ Weapons for the purpose of law enforcement are allowed as far as they are subject to the standards of necessity, reasonableness, and proportionality.⁹²

While law enforcement has not been clearly defined under international law,⁹³ measures are taken in situations, such as factual situations in which violations of law are expected and in which legal responding measures are to be taken against the wrongdoing entities.⁹⁴ Law enforcement is not special only to the law of the sea, and as mentioned here, law enforcement measures and military measures are placed in contrast, in examining an allowable use of weapons under international law. Therefore, the argument

—With an Analysis of the Inherent Significance of This Issue to Japan —,” *Japan Review*, Vol. 5, No. 2 (2022), https://www.jiia-jic.jp/en/japanreview/pdf/JapanReview_Vol5_02_%20Kanehara.pdf, pp. 28-34, (hereinafter referred to as Kanehara, “Reconsideration.”)

⁸⁹ Kanehara, *op. cit.*, *supra* n. 88; Kanehara, “Reconsideration.”

⁹⁰ The significance of this qualification of “in principle,” is explained, Kanehara, “Reconsideration,” p. 21; Kanehara, *op. cit.*, *supra* n. 88, p. 37.

⁹¹ Kanehara, “Reconsideration,” pp. 20-21; Kanehara, *op. cit.*, *supra* n. 88, p. 37.

⁹² The jurisprudence repeatedly declared these standards, *ibid.*, pp. 47-48.

⁹³ *Ibid.*, pp. 44-46.

⁹⁴ Kanehara, “Reconsideration,” pp. 38-39; Atsuko Kanehara, “A Proposal of Legislative Measures Required on Coast Guarding of Territorial Sea [Ryokai Keibi ni Kakaru Ho Seibi no Teigen],” *Sophia Law Review [Jochi Hogaku Ronshu]*, Vol. 65, No. 4 (2022), pp. 22-23.

of Russia that the exercise of the right to self-defence does not apply to commercial shipping, as freedom of navigation is governed by the United Nations Convention on the Law of the Sea, is not totally convincing, if it intends to categorically deny application of the right of self-defence in the law of the sea.⁹⁵ The law of the sea does not set forth a standard to make a distinction between an allowable use of weapons and a prohibited use of force under international law. The almost established standard is the distinction between law enforcement measures and military measures.

While the right to protect has the same meaning as law enforcement jurisdiction, at least partly, it can have a different meaning. Therefore, it cannot be said that the right of self-defence is not applied to the right to protect. It is not necessary and convincing to deny application of the right of self-defence to violations of the law of the sea. In other words, there is room for the right to protect to be exercised as military measures. In that case, the use of force accompanying military measures could be justified only when it satisfies the requirements for legality of the right of self-defence.⁹⁶

The remaining issue is how to determine a “situation” for military measures where the use of force takes place with possible justification by invoking the right of self-defence. At this stage now, it could be determined considering the facts in concrete incidents.⁹⁷ In addition, specific issues regarding the possibility of justification for the use of force as self-defence can be discussed as follows.

The discussed issues are: whether an attack against a warship triggers the right of self-defence; what is the interpretation of “fleet” under Article 3 (d) of the Definition of Aggression;⁹⁸ whether even an attack against a commercial vessel triggers the right of

⁹⁵ As a similar position to Russian opinion, Friedman, *op. cit.*, *supra* n. 35.

⁹⁶ The 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) includes self-defence among the factors that preclude illegality. The text is reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

⁹⁷ As mentioned above, it is almost the case with a situation in which law enforcement measures are taken. As UK’s position on the UK and US strikes in 2023 and 2024, House of Commons Library, *UK and International Response to Houthis in the Red Sea 2024*, by Library Specialists, 30 July 2024

<https://researchbriefings.files.parliament.uk/documents/CBP-9930/CBP-9930.pdf>, pp. 20-25. As a detailed examination of the conditions of self-defence, Tom Ruys, “‘Armed Attack’ and Other Conditions of Self-Defence,” in *‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), Chapter 2, pp. 53-125.

⁹⁸ Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX)

self-defence;⁹⁹ whether the right of collective self-defence can be exercised for military attacks against the Houthi controlled areas in Yemeni territory.¹⁰⁰ As to the limits on the right of self-defence, proportionality and necessity are well recognized.¹⁰¹

This is not the place to thoroughly examine the requirements for the legality of the right of self-defence and that of collective self-defence. Including the jurisprudence,

of 14 December 1974,
h.https://documents.un.org/doc/resolution/gen/nr0/739/16/pdf/nr073916.pdf.

Article 3 (d) reads:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

...

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

⁹⁹ Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, Judgment, *I. C. J. Reports 2003*, para. 72. Authorities have discussed this issue in relation to the Red Sea situation. Fink, *op. cit., supra* n. 35, pp. 3-7; Brassat, *op. cit., supra* n. 7, pp. 6-8; Raina, *op. cit., supra* n. 15, pp. 3-4; Tondini, *op. cit., supra* n. 82, pp. 4-5; Lott and Kawagishi, *op. cit., supra* n. 52, p. 135; Pedrozo, *op. cit. supra* n. 35, “Protecting...,” pp. 65-66. It could be argued, when armed attacks against warships and commercial vessels trigger the right of self-defence, whether it is reasonable and practical to strictly require that only flag States of targeted warships and commercial vessels can exercise the right of self-defence, in such a situation in the Red Sea where military coalition operations have been deployed. It is totally natural that upon a receipt of a distress call from a commercial vessel flying a flag of State A, a warship of a State different from State A will come to rescue the commercial vessel. See, also, Oil Platform Case, *ibid.*, para. 64; Raina, *op. cit., supra* n. 15, pp. 3-4; Fink, *op. cit., supra*. 35, p. 4. In addition, when a warship is escorting a commercial vessel, and when the latter is the precise target of an armed attack, the reasonability and appropriateness could be argued to admit the right of self-defence only to the case in which a warship is the target of a military attack. Such a requirement could be flexibly interpreted depending on context, while any abuse of the right of self-defence must be prohibited also with strict adherence to the standards of necessity and proportionality.

¹⁰⁰ When Yemen does not confer consent to the UK and US, the so-called elements of willingness and capacity will be considered. In this regards, as international practice, Elena Chachko, Ashley Deeks, Which States Support the 'Unwilling and Unable' Test?, *LAWFARE*, October 10, 2016, at <https://www.lawfaremedia.org/article/which-states-support-unwilling-and-unable-test>. Authorities have discussed this issue in relation to the Red Sea situation. Talmon, *op. cit., supra* n. 7; Kraska, *op. cit., supra* n. 35.

¹⁰¹ UK repeatedly emphasizes the proportionality and necessity of its attacks, see *supra* n. 20. As the UK’s position in this regard, *op. cit., supra* n. 97, p. 21. Buchan, *op. cit., supra* n. 35, pp. 5-6; Henderson, *op. cit., supra* n. 35. Switzerland in the SC denied the proportionality of the military attacks by the UK and US, *supra* n. 25.

such as the 1986 ICJ judgment on the Nicaragua case¹⁰² and the 2003 ICJ judgment on the Oil Platform case,¹⁰³ many authorities have discussed this issue.¹⁰⁴

IV. Concluding Remarks

This paper examined possible legal responses to obstructions to uses of sea, considering the serious incidents that are taking place in the Red Sea. In constructing a theoretical framework for the legal responses, it is of critical importance to seek an appropriate balance between the following two opposite requirements.

On the one hand, victim States should be allowed to take response measures to any obstruction to their uses of sea, as far as they are legal uses of sea. It is totally unreasonable to impose on victims tolerance and endurance for obstruction to their uses of sea. Therefore, even without explicit provisions under UNCLOS that confer jurisdiction on States for the purpose of such response, they should have the right to protect their uses of sea, and the provisions of UNCLOS prescribing the freedom and right to use sea can set forth the legal basis for such response.

On the other hand, any abuse of the right to protect must be denied. Particularly, any use of force without justification by the right of self-defence is strictly prohibited. Even in cases of an exercise of enforcement jurisdiction, its accompanying use of weapons needs to be subject to the almost established standards of necessity, proportionality, and reasonability.

This paper tried to construct a theoretical framework on the right to protect uses of sea. Still, its refinement is required by considering and reflecting international and State practices for it to be both effective and convincing.

¹⁰² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, Judgment, *I.C.J. Report 1986*, p. 14, paras. 191 and 195.

¹⁰³ *Op. cit.*, *supra* n. 99, para. 51.

¹⁰⁴ As authorities discussing this issue in the context of the Red Sea situation, for instance, Brassat, *op. cit.*, *supra* n. 7; Buchan, *op. cit.*, *supra* n. 35, p. 3; Kraska, *op. cit.*, *supra* n. 35; Tondini, *op. cit.*, *supra* n. 82, pp. 4-5; Pedrozo, *op. cit.*, *supra* n. 4, pp. 62-63; Raina, *op. cit.*, *supra* n. 15, p. 3.