

# 國際海洋資訊

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SUMMER

海洋之聲、耀眼國際

Voice of the Ocean,  
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國際與國內海底電纜事件

International and Domestic  
Submarine Cable Incidents

海域安全與海域意識

Maritime Security and  
Maritime Domain Awareness

海底電纜  
Submarine  
Cables

海域意識  
Maritime Domain  
Awareness (MDA)

# 目錄 CONTENTS

## 序

### 03 發行人語

海洋委員會主任委員 管碧玲

### 04 總編輯的話

海洋委員會副主任委員 黃向文

## 專題 人物

### 05 海洋之聲、耀眼國際

編輯部

## 科技 脈動

### 13 解密海底電纜

賴昆祺

## 關鍵主題 1

## 海底 電纜

### 19 保衛水下的數位生命線 - 海底電纜

江雅綺

### 25 海底戰與臺灣海底電纜的威脅

John F. Bradford、Mingi Hyun

### 29 從臺灣海峽到波羅的海：中國在海上行動的歷史

Benjamin Blandin

### 33 歐盟的海底電纜保護政策與行動 \*

海洋委員會國際發展處

## 關鍵主題 2

## 海域 意識

### 39 強化海域意識的具體戰略認知與國民共識

蘇紫雲

### 45 解鎖印太地區海域意識潛力：聚焦菲律賓 「全面群島防禦概念」

Renato Cruz De Castro

## 放眼 全球

### 51 放眼全球

Forum Dvorah / YCAPS / RARE

## 活動

### 57 2025 海洋大事記

編輯部

\* 只有中文版本

Foreword

**59 Publisher's Foreword**

Bi-ling Kuan

**60 Editor's Note**

Hsiang-wen Huang

People  
Stories

**61 Voice of the Ocean, Shines in the World**

Editorial Team

Tech  
Waves

**69 Uncovering the Submarine Cables**

Kun-Chi Lai

Key Topic1  
Submarine  
Cables

**77 Safeguarding Digital Lifeline Beneath the Ocean:  
Submarine Cables**

Ya-chi Chiang

**85 Seabed Warfare and the Threat to Taiwan's  
Subsea Cables**

John F. Bradford, Mingi Hyun

**89 From the Taiwan Strait to the Baltic: A History of  
China's Maritime Actions**

Benjamin Blandin

Key Topic2  
MDA

**93 Strengthening Maritime Awareness:  
Specific Strategic Cognition and National Consensus**

Tzu-Yun Su

**101 Unlocking the Potential of Indo-Pacific-Pacific Marine  
Domain Awareness: A Focus on the Philippine'  
Comprehensive Archipelagic Defense Concept (CADC)**

Renato Cruz De Castro

**107 Factors Producing "Grey Zones" in Maritime Security\***

Atsuko Kanehara

Think  
Global

**113 Think Global**

Forum Dvorah / YCAPS / RARE

Activity

**119 2025 Ocean Events Calendar**

Editorial Team

\*only English version





# Factors Producing “Grey Zones” in Maritime Security

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Maritime Security, Grey Zones, Armed Attack, Self-defense, State Responsibility.

## Introduction

“Grey zone” has different meanings. A grey zone may, in a wide sense, refer to something between a security situation and a tense situation. In the latter situation, even with lack of an armed attack by use of force, there is a threat to States by, for instance, invasive acts, cyber attacks, and information manipulation. The commonly shared meaning of a grey zone is that between a (military) security situation and a law enforcement situation. The organs which are in charge of taking responding measures are both self-defense organs and law enforcement organs. This article examines grey zones by assuming this type of grey zone: a grey zone between a (military) security situation and a law enforcement situation.

From the perspective of international law this article discusses the factors that contribute to producing a grey zone, with examples of relevant concrete incidents. After establishing the international legal framework governing grey zones, this paper considers two primary contributing factors: violent acts that may fall under an “armed attack” as an element to trigger an exercise of the right of self-defense, and shift in subjects of violent acts from non-State actors to States.

## International Law Regulating a Grey Zone

There may be a grey zone between a (military) security situation and a law enforcement situation. For both situations the regulation by the current international law is as follows.

First, with respect to the international law rules on a (military) security situation, there are *jus ad bellum* which regulates (il)legality of use of force, and *jus in bello* which regulates hostile acts in armed conflicts. As to the former, the 1945 United Nations Charter (UNCH) under its Article 2, Paragraph 4 prohibits use of force. It reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Since this epoch-making prohibition of use of force after the long history of wars in international society, the distinction between war time and

peace time vanished in a legal sphere. In place of the term “war”, that of “an armed conflict” is used. When armed attacks are conducted, under Article 51 of UNCH member States may exercise their right of self-defense. The provision reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if *an armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).

Regarding the conditions to be met for the exercise of the right of self-defense, the provision refers to an armed attack. Aggression is defined under the resolution 3314 which was adopted in 1974 by the United Nations General Assembly. This is the fundamental structure of *jus ad bellum* which regulates the (il)legality of use of force.

As to *jus in bello*, while legally a war does not have any room to exist, in reality, armed attacks and aggression with use of force take place. When such armed attacks and aggression fall under an armed conflict, the law of armed conflicts will apply. This is *jus in bello* that regulates hostile acts in armed conflicts.

Second, in respect to the international law rules on a law enforcement situation, it has not established a clear definition of law enforcement. In individual fields of international law, however, concrete law enforcement measures are provided for and tacitly assumed. For instance, under the United Nations Convention on the Law of the Sea

(UNCLOS), law enforcement measures against vessels at sea include an order to stop, approaching for confirming the nationality of vessels, chasing, visit (on board inspection), and seizure (Kanehara, 2019b, pp. 44-46).

## Different Responding Measures to Cope with a (Military) Security Situation and a Law Enforcement Situation

In case of an armed attack and armed aggression, the responding measure with use of force that is allowed for State to take under the current international law, is an exercise of the right of self-defense. In addition, member States to the UN can be authorized to use force by the resolutions adopted by the Security Council of the UN under Chapter 7 of UNCH. The focus here is on the right of self-defense.

As a measure of self-defense, States may use force, while international law after UNCH prohibits it. Assumed subjects of conduct of armed attacks and armed aggression are States. It is also States that exercise the right of self-defense. This is a natural result of the fact that international law has as its legal subjects sovereign States, even without excluding exceptions. As a matter of fact, non-State entities, such as NGOs and individuals, do conduct violent acts in an international sphere, and the scale of that violence conducted can be equivalent to use of force by States and even more than that. This point will be discussed later.

In comparison, when international crimes with violent acts are committed, the responding measures to take are law enforcement measures. Various international treaties deal with international crimes, particularly international crimes at sea. These maritime offenses include piracy, cutting submarine cables, and violent acts against the safety of navigation (Kanehara, 2024, December 24, pp11-15). Subjective entities that commit international crimes are non-State actors, such as individuals, and NOGs.

While international law prohibits use of force, it allows use of weapons accompanying law enforcement measures. The prohibition of war/use of force is the achievement of international law after a very long history of human kind of waging wars. Therefore, the keenest issue is the distinction between the use of force that is prohibited by international law, and the use of weapons that international law allows (Kanehara, 2019b, pp. 40-41; Kanehara, 2022, pp. 18-20). If this distinction blurs, the historical achievement of international law on the prohibition of war/use of force would lose its significance to a great degree.

This author has examined this issue in detail elsewhere (Kanehara, 2019b, Section 3; Kanehara, 2022, Section I), and so in the following sections, other issues that closely relate to the distinction between use of force and use of weapons will be dealt with. It is an examination of the factors that contribute to producing grey zone(s): violent acts that may fall under an “armed attack” as an element to trigger an exercise of the right of self-defense; shift in subjects of violent acts from non-State actors to States. In such an examination, as concrete situations, the following will be taken up: international terrorism, sabotage against submarine pipelines and cables, and violent acts against commercial vessels in the Red Sea. They are really urgent issues to coped with in the East China Sea and in the world as well.

## **Factors Producing Grey Zones in Maritime Security**

### **Requirement for an Exercise of the Right of Self-Defense: Armed Attack**

According to Article 51 of UNCH, “an armed attack” is among the requirements for an exercise of the right of self-defense. There have been discussions among authorities and the international jurisprudence on the scale and magnitude of “an armed attack” that triggers an exercise of the right of self-defense. Here it is enough to confirm this point.

UNCH, as an international treaty, assumes States as its subject of the rights and obligations. Armed attacks are to be conducted by States, not by non-State actors. Nonetheless, in recent incidents, authorities have discussed the possibility that violent acts by non-State actors can meet the requirement of “an armed attack” under Article 51 of UNCH.

First, the typical example is international terrorists’ violent acts. Under international treaties, international terrorism and some other violent acts are international crimes committed by individuals, non-State actors. Among the international treaties that deal with international crimes, the 1884 Paris Convention for the Protection of Submarine Telegraph Cables is among the oldest ones.

There is the possibility that such international crimes (terrorist attacks) committed by individuals are regarded as a threat to international peace and security as well as use of force by States. On the occasion of the synchronized September 11 terrorist attacks in the United States in 2001, the UN Security Council declared these attacks to be a threat to international peace and security. In paragraph 1 of Resolution 1368 (2001) the Security Council:

Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security[.]

In addition, its preamble refers to the right of self-defense, “[r]ecognizing the inherent right of individual or collective self-defense in accordance with the Charter.”

While an armed attack is, in general, expected to be conducted by a State, in some cases, violent acts by individuals could be regarded as “an

armed attack,” when imminent and serious danger is anticipated (Bethlehem, 2012, p. 770). In this sense, it is said that in relation to self-defense, there is a sort of a “shift” when violent acts by individuals rise to the level of armed attacks usually conducted by a State. This point closely relates to the next discussion below.

Second, considering this precedent on international terrorist attacks, there is the possibility that sabotage against submarine cables and pipelines could similarly be regarded as a threat to international peace and security and that it should justify an exercise of the right of self-defense in response (Shepherd, 2021, pp. 216-219). Such sabotage is an international crime under the 1884 Paris Convention for the Protection of Submarine Telegraph Cables. Here also the sabotage may fall under “an armed attack” that triggers an exercise of the right of self-defense.

Third, regarding the Houthis rebels’ attacks against commercial vessels mainly in the Red Sea, in the UN Security Council, States are divided whether the violent acts can trigger an exercise of the right of self-defense (Kanehara, 2024, December 24, pp. 2-10). The Security Council of the UN adopted resolution 2722 on the 10th of January 2024. Its Paragraph 3 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* (emphasis added).

The UK and US have initiated military attacks against Houthi’ s bases within Yemeni territory. They interpret “the right of Member States, in accordance with international law, to defend their vessels from attacks” as the right of self-

defense. To this, States and authorities in the world have opined different voices (Kanehara, December 24, pp. 2-10).

### **Acts of Individuals to Be Regarded as Acts of States: Attribution and Complicity under the Law of State Responsibility**

In accordance with the law of State responsibility, acts of individuals are regarded those of States. There is also the possibility that individuals and States conduct violent acts by complicity between them.

First, when the requirements are satisfied under the law of State responsibility, violent acts by individuals are attributed to States and they become acts of States. Such violent acts may fall under “an armed attack” and they may place a threat to international peace and security. Attribution of an act of an individual to a State is an issue of the law of State responsibility (Kanehara, 2019a, Ch.I). The law of State responsibility is reflected in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) which was drafted by the International Law Commission and was adopted by the General Assembly of the UN. Articles 4, 5 and 8 to 11 of ARSIWA are the main provisions that regulate questions of attribution (Milanovich, 2024, August 16). While ARSIWA is not a treaty, international courts and arbitral tribunals have applied its provisions on attribution as customary international law.

In cases of sabotage against submarine cables and pipelines, there is frequently difficulty in identifying the wrongdoers. This is also the case regarding the determination as to whether the wrongdoers are individuals or States or both. Thus, it would also generally be very difficult to attribute acts of sabotage to a State.

Second, there can be complicity between an individual and a State. In such a case, both the individual and the States are the subjective entities of the violent act concerned.



Article 16 of ARSIWA deals with complicity between States, not between a State and an individual. There have been arguments on several important issues with regard to complicity, such as the possibility of complicity between an individual and a State, the requirements for complicity, and the possible distribution of responsibility among accomplices, and so on (Kanehara, 2019a, Ch.V). Traditionally, under the positivist theory of international law, an individual and a State belong to different legal spheres, namely, domestic law and international law. Therefore, complicity between an individual and a State is not possible. Complicity has been discussed mainly regarding terrorist attacks, not necessarily in general for all international wrongful acts. Considering this theoretical status quo, complicity is not said to be firmly established under the law of State responsibility.

In both cases of the attribution of a violent act by an individual to a State, on the one hand, and the complicity in a violent act between an individual and a State to another State, on the other hand, the violent act can be regarded as that of the State and that of both the State and the individual. This is the shift in the subject of violent acts from non-State actors to States. When such a violent act forms a threat to

international peace and security, and it falls under “an armed attack” under Article 51 of UNCH, it would trigger an exercise of the right of self-defense.

## Concluding Remarks

This article examined factors that contribute to producing grey zones from the perspective of international law. As the grey zone, it assumed that between a (military) security situation and a law enforcement situation.

When grey zones grow to become either a (military) security situation or law enforcement situation, legal responding measures are to be taken in accordance with the existing international law rules that are addressing each of them. However, grey zones remain to exist unchanged, and inherent responding measures to cope with such grey zones are required, for maintaining security and order. Also, the legal basis for the measures is indispensable.

In any case, an examination of the factors that contribute to producing grey zones is critically important. This is the reason why this short article devoted itself to such an examination.

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