

# The Use of Force in Maritime Security and the Use of Arms in Law Enforcement under the Current Wide Understanding of Maritime Security

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## Abstract

This paper examines maritime security, by reconsidering the distinctions between the use of force prohibited by international law and the use of arms in law enforcement. The difference between the use of force prohibited by law and the use of arms accompanying law enforcement is difficult but extremely important, due to current strong tendency to understand maritime security widely. With a presupposition that the nature of acts or measures, in principle, decides the nature of the use of force or arms used in the acts or measures, first, this paper reviews the discussion regarding the concept of “the use of force” under Article 2, Paragraph 4 of the UN Charter. Then, the relevant jurisprudence will be introduced, followed by an examination of use of arms that is not prohibited by international law. Consulting the relevant provisions under UNCLOS, it can be said that there exists two types of the use of weapons; “the use of force” defined by and prohibited by international law, and “the use of arms” defined and permitted by international law that provides for law enforcement at sea. Examining the wide understanding of maritime security within the recent scholarly writings and Japanese legislative acts, this paper finds the distinctions between the security or military acts and law enforcement flexible. Law enforcement measures at sea will be undoubtedly expected to fulfil more functions than ever in order to avoid the escalation of the situations concerned. Thus, this paper emphasizes that the critical point is not to allow such use of weapons to seriously undermine the solidly established principle of the prohibition of the use of force.

## Introduction

This paper will deal with the issue of maritime security. The focus is mainly placed upon the two recent discussions in the law of the sea: first, a wide understanding of maritime security;<sup>1</sup> second, the relationship between the use of force prohibited by international law and the use of arms accompanying law enforcement measures.<sup>2</sup>

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<sup>1</sup> Typical examples are as follows. D. Guilfoyle, “Maritime Law Enforcement Operations and Intelligence in an Age of Maritime Security,” *International Law Studies*, U. S. Naval War College, 93 (2017), 298 *et seq.*; N. Klein, *Maritime Security and the Law of the Sea*, (Oxford: Oxford University Press, 2011) A. Kanehara, “Japan’s Ocean Policy and Free and Open Indo-Pacific Strategy,” Lectures Delivered 25 through 29 of September, 2018, in India, Bangladesh, and Sri Lanka, [https://www.in.emb-japan.go.jp/itpr\\_en/00\\_000740.html](https://www.in.emb-japan.go.jp/itpr_en/00_000740.html); [https://www.bd.emb-japan.go.jp/itpr\\_en/PR20180927.html](https://www.bd.emb-japan.go.jp/itpr_en/PR20180927.html); [https://www.lk.emb-japan.go.jp/itpr\\_en/00\\_000678.html](https://www.lk.emb-japan.go.jp/itpr_en/00_000678.html), visited 10 April, 2019. Other works will be introduced at appropriate places in this paper.

<sup>2</sup> There are many works on this issue. See, for instance, T. Ruys, “The Meaning of ‘Force’ and the Boundaries of the Jus Ad Bellum: Are ‘Minimal’ Uses of Force Excluded from UN Charter Article 2

These two issues are closely related to each other in the following way. The possible distinction has been considered by scholars between the use of force prohibited by international law and the use of arms<sup>3</sup> that is not prohibited by international law.<sup>4</sup> As for the latter, mainly the use of arms for the purpose of effective law enforcement measures is principally presupposed.<sup>5</sup> Under this state of discussion, due to the current strong tendency to understand maritime security widely, the distinction is more and more difficult to make but extremely important.

Thus, in this paper, the possible distinction will be reconsidered between the use of force prohibited by international law and the use of arms permitted by international law under the wide reformulation of the concept of maritime security.

To make the arguments in this paper precise, an explanation of the presupposition adopted by this author is needed.

Theoretically, there exist two issues to be examined: first, the nature of the acts or measures<sup>6</sup> that are either military acts<sup>7</sup> or law enforcement measures in conjunction with which force or arms are used; and second, the nature of the use of force or arms in conjunction with those acts or measures. It is very difficult to answer whether there may be any difference between the nature of the acts or measures, on the one hand, and the nature of the use of force or arms in conjunction with those acts or measures, on the other hand. To put this differently, it is questioned whether the nature of the acts or measures necessarily determines the nature of the use of force or arms accompanying those acts or measures.

A case is imagined in which, while the acts or measures have the nature of law enforcement, the use of arms in the situations holds the nature of the use of force that is likely accompanying military acts, and that is prohibited by international law.<sup>8</sup> Vice versa, it might be possible that,

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(4)?," *American Journal of International Law*, 18 (2014), 159–210; T. Ruys and S. Verhoeven, "Attacks by Private Actors and the Right of Self-Defense," *Journal of Conflict & Security Law*, 10 (2005), 193–206; P. J. Kwast, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award," *Journal of Conflict & Security Law*, 13 (2008), 49–91; O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart Publishing, 2010); R. McLaughlin, "Authorizations for Maritime Law Enforcement Operations," *International Review of the Red Cross*, 98 (2) (2016), 465–490; K. Morikawa, "Kokusai Heiwakyoryoku Gaiko no Ichi Danmen—Kaijo Soshikodo he no Sanka/Kyoryoku wo Meguru Hoteki Shomondai [An Aspect of Diplomacy for International Cooperation and International Peace—Legal Issues with Respect to Participation in and Cooperation for Maritime Interdiction Operations]," *Nihongaiko to Kokusaihankei* [Japan's Diplomacy and International Relations], (Tokyo: Naigai Shuppan, 2009), 243–282; by the same author, "Gurei Zone Jitai Taisho no Shatei to Sono Hoteki Seishitsu [Coping with Grey Zones and Its Legal Implications]," *Kokusai Mondai* [International Affairs], No. 648 (2016), 29–38; by the same author, "Kaijo Hoshikko ni Tomonau 'use of force' no Gainen [The Concept of the Use of Force in Conjunction with Law Enforcement]," in *Kokusaiho no Dainamizumu* [Dynamism in International Law], in Memory of Professor Akira Kotera, (Tokyo: Yuhikaku, 2019), 651–677.

<sup>3</sup> Later in this **Introduction**, the terminology of "the use of force" and "the use of arms" will be defined. "The use of weapons" means physical uses of weapons.

<sup>4</sup> See, Ruys, *op. cit.*, *supra* n. 2, 171–188 and the citations thereto.

<sup>5</sup> For instance, see, Kwast, *op. cit.*, *supra* n. 2.

<sup>6</sup> The context in which the acts or measures are conducted or taken may be called "situations." To avoid confusion, solely at appropriate places, the term "situations" will be used.

<sup>7</sup> Typically the acts or measures are considered in which the use of force under Article 2, Paragraph 4 of the UN Charter is expected.

<sup>8</sup> In particular, when the scale of the use of weapons decides the nature of it, namely whether the use of force prohibited by international law, or the use of arms in conjunction with law enforcement measures, the nature of the acts or measures as law enforcement does not necessarily determine the nature of the use of weapons as the use of arms accompanying the law enforcement measures. This is because the use of weapons in connection with law enforcement measures could be defined as the use of force

while the acts are regarded as military acts, the use of weapons in connection with the acts is regarded as the use of weapons that has a different nature from the use of force that is expected in military acts, and that is prohibited by international law, unless justified as an exercise of the right of self-defense.

While this question will be succinctly touched upon at an appropriate place, “in principle,”<sup>9</sup> this author presupposes that the nature of the acts or measures decides the nature of the use of force or arms in the acts or measures.<sup>10</sup> The use of arms in the context of law enforcement has the nature of the use of arms accompanying the law enforcement measures concerned. The use of force in conjunction with military acts bears the nature of the use of force that is assumed typically by Article 2, Paragraph 4 of the UN Charter with possible justification as an exercise of the right of self-defense against violent aggression.<sup>11</sup>

By adopting this presupposition, two arguments will be clearly formulated. One is the argument on the nature of the acts or measures and the use of force or arms in conjunction with the acts or measures. The other is the argument on the logic according to which the distinction is made between military acts and law enforcement measures, on the one hand, and the use of force, in military acts and the use of arms accompanying law enforcement measures, on the other hand.

Under this presupposition, in order to determine the nature of the use of force or arms in acts or measures, the decision of the nature of the acts or measures becomes critically important. The nature of the acts or measures, either military acts or law enforcement measures, in principle, defines the nature of the use of force or arms in the acts or measures concerned.<sup>12</sup>

It is precisely in this context that the discussion of the definition of law enforcement<sup>13</sup> demonstrates its significance. If acts or measures are regarded as those of law enforcement in accordance with the definition, the use of weapons in the acts or measures, in principle, has the nature of the use of arms accompanying law enforcement measures. Certainly, the same holds true with military acts and the use of force in connection with military acts.

According to this line of argument, the structure of this paper is as follows.

First, the discussion will be reviewed regarding the concept of “the use of force,” particularly, the meaning of “force” under Article 2, Paragraph 4 of the UN Charter. For instance, it is questioned whether “the use of force” at a minor scale should be prohibited by the provision. There may be some uses of “force” that do not fall within the purview of the provision and, therefore, that are not prohibited by the provision.<sup>14</sup>

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prohibited by international law rather than the use of arms accompanying law enforcement measures, if the scale of the use of weapons reaches some designated scale. As explained later, this paper does not take such a position.

<sup>9</sup> The qualification of “in principle” means that the consideration of the relevant factors in deciding in each case the nature of the use of force or the use of arms is not excluded.

<sup>10</sup> As seen later, the theoretical distinction between the two issues is helpful also in analyzing the relevant jurisprudence.

<sup>11</sup> Kwast seems to take the same position as that of the presupposition set by this paper, although she does not clearly recognize the distinction between the two issues: the nature of the acts or measures, and the nature of the use of force or arms in connection with the acts or measures concerned. Kwast, *op. cit.*, *supra* n. 2, 62.

<sup>12</sup> While this paper focuses on the use of arms in conjunction with law enforcement measures, certainly, this holds true with military acts and the use of force in the military acts.

<sup>13</sup> The definition of law enforcement will be examined later in this paper with its inherent importance in accordance with the line of argument adopted by this paper.

<sup>14</sup> Actually, the discussion of the use of force prohibited by international law and that permitted by international law has been frequently conducted as the issue of the meaning of “force,” the use of which is prohibited by Article 2, Paragraph 4 of the UN Charter. In other words, in the discussion, the

To make the examination simple, the focus will be placed on the use of force, and the issue of threat by the force will be set aside for the time being.

Article 2, Paragraph 4 of the UN Charter is firmly recognized as reflecting customary international law. For this reason, the distinction between the provision and customary international law does not maintain very much meaning.<sup>15</sup> Therefore, in this paper, the expression will be used, such as the use of force prohibited by “international law,” as far as it is not inappropriate.

Second, the relevant jurisprudence will be briefly introduced with respect to the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures taken at sea. The cases are the *M/V Saiga* Case (No. 2), the Fisheries Jurisdiction Case, and the Guyana and Suriname Case.<sup>16</sup> They are all cases in the field of the law of the sea.

Third, the use of weapons that is not prohibited by international law will be focused on. The examination is conducted as that of the nature of the acts or measures in which weapons are used, as, according to the presupposition set by this paper, the nature of the acts or measures, in principle, determines the nature of the use of force or arms in conjunction with the acts or measures concerned. International law “positively” permits a certain category of the use of force or arms. It is different from admitting some room for the use of force or arms as being only “negatively” reflecting the non-prohibition by international law. It is necessary to legally define the nature of such use of force or arms.

For the analysis of the definition or the legal nature of the use of force or arms, a useful method is to consult the relevant provisions of international law. As this paper focuses on the distinction between the use of force prohibited by international law, and the use of arms for the purpose of effective law enforcement, principally the provisions regarding law enforcement at sea are relevant. Looked at from this perspective, the United Nations Convention on the Law of the Sea (UNCLOS) contains several important provisions.<sup>17</sup>

By consulting the relevant provisions under UNCLOS, it will become possible to define the use of arms accompanying law enforcement measures. As a result, there exist two types: “the use of force” defined and prohibited by international law, and the use of arms defined and permitted by international law that provides for law enforcement at sea. Such definitions set forth the logic or the legal frameworks under which the distinction is made between “the use of force” and “the use of arms.”<sup>18</sup>

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definition and nature have not been sufficiently discussed with regard to the use of weapons that is not prohibited or even permitted by international law. This point will be explained later.

<sup>15</sup> Here is not the place to examine the difference between Article 2, Paragraph 4 of the UN Charter and customary international law in detail as was questioned in the Nicaragua Case. Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, *ICJ Reports 1986*, para. 191.

<sup>16</sup> There are other incidents in which the use of weapons raised the issue of its legality, such as the *S. S. “Tm Alone”* Case and “*The Red Crusader*” Case. As for the dealing with of these cases in the *M/V Saiga* Case (No. 2), see, Kwast, *op. cit.*, *supra* n. 2, 56–57. The *M/V Saiga* (No. 2), (Saint Vincent and the Grenadines v. Guinea), the International Tribunal for the Law of the Sea, Judgment (Merits) of 1 July 1999, *International Legal Materials*, 38 (1999), 1323. The citations for the Fisheries Jurisdiction Case and the Guyana and Suriname Case will be introduced at appropriate places.

<sup>17</sup> There are other provisions that touch upon law enforcement at sea, such as those in the four 1958 Geneva Conventions on the Law of the Sea. Many of them are incorporated into UNCLOS, at least in terms of their substance, and they have come to gain the status of customary international law. Thus, the examination of the relevant provisions of UNCLOS may hold true with the customary international law that deals with the same matters.

<sup>18</sup> The logic or legal frameworks for making the distinction between the use of force prohibited by

Fourth, the wide understanding of maritime security will be confirmed within the recent scholarly writings and Japanese legislative acts. In this context, succinct examination is necessary regarding the concept of so-called “grey zones.”<sup>19</sup>

Fifth, this paper will reconsider the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures under the wide understanding of maritime security.

As for the terminology, the following clarification is necessary to avoid confusion.

First, the term “law enforcement” is used rather than the special parlance to describe measures taken at sea.<sup>20</sup>

Second, the expression “situations” will be used in a limited manner. There are “military situations” when the use of force prohibited by international law is expected in military acts.<sup>21</sup> The situations in which law enforcement measures are to be taken are called “law enforcement situations.” The nature of “situations” is always the same as that of the acts or measures to be conducted or taken in the situations.<sup>22</sup>

Fourth, different from the physical expression of a use of weapons, according to the relevant international law rules, “the use of force” and “the use of arms” obtain legal connotations.<sup>23</sup> When the use of weapons is discussed under the framework of the relevant international law that prohibits the use of force, the established expression “the use of force” will be used. The use of force connotes a legal meaning as a legal term.<sup>24</sup> This is because the term of “the use of force” or simply “force” is made part of Article 2, Paragraph 4 of the UN Charter and the customary international law that prohibits the use of force.

In the same way as the phrase “the use of force” acquires its legal connotation, after the relevant international law rules are identified that decide law enforcement, the use of arms exercised in law enforcement measures defined by the international law rules will gain the legal connotation.<sup>25</sup>

In order to avoid redundant repetition, when no confusion is expected, “the use of force” is used as meaning the use of force prohibited by international law, and “the use of arms” as meaning the use of arms accompanying (or, in conjunction with, and in connection with, etc.), law

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international law and the use of arms in conjunction with law enforcement measures would be blurred in facing the wide understanding of maritime security and the argument on the so-called “grey zones.” This critical point will be elaborated upon later in this paper, when it considers the possible impact by the wide understanding of maritime security on the distinction between the use of force prohibited by international law, and the use of arms accompanying law enforcement measures.

<sup>19</sup> The term “grey zones” has different meanings. In this paper, the term “grey zones” particularly means that which exists between military acts and law enforcement measures.

<sup>20</sup> There is special parlance in the law of the sea, such as the right to approach, the right to recognize the nationality of vessels, and the right to visit (boarding inspection). This paper uses the generic and general term “law enforcement.”

<sup>21</sup> To describe such situations, aggression, invasion into territories of foreign States, and the right of self-defense are the typical terms to use. However, it is not always easy to make the distinction between concrete acts and the context in which acts are conducted. Therefore, the distinction between “acts or measures” and “situations” indispensably becomes a relative one.

<sup>22</sup> Although it is not clearly demonstrated, Kwast seems to take the same position as that of this paper. Kwast, *op. cit.*, *supra* n. 2, 63.

<sup>23</sup> “Forcible acts” and violence also mean acts with weapons. This paper will use the physical expression of a use of weapons.

<sup>24</sup> As discussed next, “force” becomes a legal term to be defined by international law, which principally Article 2, Paragraph 2 of the UN Charter represents.

<sup>25</sup> With this explanation, hereinafter, the phrase “the use of arms” will be used in this sense.

enforcement measures.

## 1. The Discussion of the Use of Force That is Prohibited by International Law

### (1) The force under Article 2, Paragraph 4 of the UN Charter

As a starting point to examine the distinction between the use of force in military acts and the use of arms accompanying law enforcement measures, a review of the discussion of the meaning of “force” is useful. While the discussion regarding the “force” under Article 2, Paragraph 4 of the UN Charter does not clearly demonstrate the recognition of the two issues, namely, that of the nature of military acts and that of the nature of the use of force in military acts, it seems to be a discussion on military use of force in military acts.<sup>26</sup> Bearing this in mind, the following confirmation of the relevant discussion suffices here.

Regarding the “force” under Article 2, Paragraph 4 of the UN Charter, there are two opposite opinions.<sup>27</sup> One admits room mainly for the use of force at a small scale under the provision.<sup>28</sup> The other denies such room.<sup>29</sup> The reason for the denial of the room mainly for the use of force at a small scale is to avoid the abuse of such room and lack of established international practice.<sup>30</sup>

According to the widely recognized interpretation of the provision, economic coercion and the use of arms or weapons between parties not in their international relations are not the use of force prohibited by the provision.<sup>31</sup>

### (2) The use of force that is not prohibited by international law

The position that there is room for the use of force at a small scale under Article 2, Paragraph 4 of the UN Charter introduces the following examples: the abduction of Mr. Eichmann from the territory of Argentina; violations of territorial airspace by military aircraft; targeted killing of suspects of terrorism in the territory of a foreign country.<sup>32</sup>

With respect to these examples, the opposite position argues that the lack of mention by other States of the use of force prohibited by international law on the occasions of these cases does not guarantee the establishment of international practice to admit the room for such use of force.

Here is not the place to make a thorough examination of these arguments. It is not easy to derive a definite conclusion as to whether Article 2, Paragraph 4 of the UN Charter is “all inclusive” or not. For the discussion in this paper, the recognition of the following two points is significant.

First, there is not generally an agreed position with respect to the meaning of force under Article 2, Paragraph 4 of the UN Charter. Second, if the existence of the use of force (a physical use of weapons) that is admitted by the provision is presupposed, an explanation of the nature of

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<sup>26</sup> The presupposition set in the **Introduction** requires the distinction between the two issues. In this line of argument, in the following **Sections (2.–)** law enforcement and the use of arms in conjunction with law enforcement measures will be dealt with.

<sup>27</sup> Ruys, *op. cit.*, *supra* n. 2, 1 and citations thereto.

<sup>28</sup> A typical work is that of Corten, Corten *op. cit.*, *supra* n. 2, 55 and 77. Other examples of the use of force that may be permitted under Article 2, Paragraph 4 of the UN Charter, *ibid.*, 55 and 85.

<sup>29</sup> When room is discussed for some type of “force”, the term “force” connotes a physical use of weapons rather than “the use of force” as legal expression.

<sup>30</sup> Ruys, *op. cit.*, *supra* n. 2, 1, 163–171. In addition, according to Ruys, in a State-to-State context, even confrontation at a small scale comes within the ambit of the *jus ad bellum*. *Ibid.*, 171–187.

<sup>31</sup> These points are confirmed by Ruys, *ibid.*, 63.

<sup>32</sup> See the examples given by Ruys with reference to the threshold set by Corten to determine the use of force prohibited by Article 2, Paragraph 4 of the UN Charter, *ibid.*, 167–179.

such use of force or a definition of it will be required.

Very importantly, these two points lead to an approach that is separate from the definition of the use of force under Article 2, Paragraph 2 of the UN Charter. As a sort of “other side of the coin” argument, while the precise definition of the use of force is difficult, the definition or the nature of the use of force (a physical use of weapons) that is not prohibited or is allowed by international law can be sought.<sup>33</sup>

Mainly, a use of weapons that is allowed by international law is discussed in conjunction with law enforcement measures.<sup>34</sup> In order to begin the consideration, succinct analysis of the relevant jurisprudence is helpful.

## 2. The Jurisprudence That Admits Some Distinction between the Use of Force Prohibited by International Law and the Use of Arms Accompanying Law Enforcement Measures

### (1) The *M/V Saiga* Case (No.2)<sup>35</sup>

The judgment rendered by the International Tribunal for the Law of the Sea (ITLOS) reads:

In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on *the use of force in the arrest of ships*, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. These principles have been followed over the years in *law enforcement operations at sea* (emphasis added).<sup>36</sup>

### (2) The Fisheries Jurisdiction Case<sup>37</sup>

In the judgment the International Court of Justice (ICJ) said at paras. 81–84:

81. The Court notes that, following the adoption of Bill C-29, the *Coastal Fisheries Protection Act* authorized protection officers to board and inspect any fishing vessel in the NAFO Regulatory Area and “in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel,” if the officer “believes on reasonable grounds that the force is necessary for the purpose of arresting” the master or crew (Section 8.1) (emphasis added)....

82. *The Coastal Fisheries Protection Regulations Amendment of May 1994* specifies in further detail that force may be used by a protection officer under Section 8.1 of the Act only when he is satisfied that boarding cannot be achieved by “less violent means reasonable in the circumstances” and.... These limitations also bring the authorized use of force within the category familiar in *connection with enforcement of conservation measures* (emphasis added).

84. For all of these reasons the Court finds that the use of force authorized by the Canadian

<sup>33</sup> A similar position is taken by Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 661.

<sup>34</sup> *Ibid.*; Kwast, *op. cit.*, *supra* n. 2; K. Zou, “Maritime Enforcement of United Nations Security Council Resolutions: Use of Force and Coercive Measures,” *International Journal of Marine and Coastal Law*, 26 (2011), 235–261.

<sup>35</sup> *Op. cit.*, *supra* n. 16.

<sup>36</sup> *Ibid.*, paras. 155–156, and 159.

<sup>37</sup> The Fisheries Jurisdiction (Spain v. Canada), Judgment (Jurisdiction) of 4 December 1998, *ICJ Reports* 1998, 432.

legislation and regulations falls *within the ambit of what is commonly understood as enforcement of conservation and management measures* and thus falls under the provisions of paragraph 2 (d) of Canada's declaration. This is so notwithstanding that the reservation does not in terms mention the use of force. Boarding, inspection, arrest and minimum use of force for those purposes are all contained *within the concept of enforcement of conservation and management measures* according to a "natural and reasonable" interpretation of this concept (emphasis added).<sup>38</sup>

### **(3) The Guyana and Suriname Case<sup>39</sup>**

The award given by the arbitral tribunal reads:

The Tribunal accepts the argument that in international law force may be used in *law enforcement activities* provided that such force is unavoidable, reasonable and necessary. However in the circumstances of the present case, this Tribunal is of the view that the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere *law enforcement activity* (emphasis added).<sup>40</sup>

### **(4) The recognition of the category of the use of arms in connection to law enforcement measures**

In the jurisprudence introduced here, it is clearly confirmed that it has recognized the category of the use of arms accompanying law enforcement measures. It seems that this recognition is based upon the nature of the acts or measures in which the arms were used. Nonetheless, as is elaborated upon later, the courts and the tribunal did not clearly demonstrate the two issues, namely the issue of the nature of the acts or measures, and the issue of the nature of the use of weapons in the context of the acts or measures concerned.

With this reservation, the indication derived from the jurisprudence will be further examined later.

### **(5) The issue of the jurisdiction of the ITLOS and the arbitral tribunals established under Annex VII to UNCLOS<sup>41</sup>**

As a closely related issue to the examination thus far, there is the issue of the jurisdiction of the ITLOS and the arbitral tribunals established under Annex VII to UNCLOS. Also, the issue of the applicable laws is practically connected in the jurisprudence to the issue of jurisdiction.<sup>42</sup> This issue is not necessarily directly related to the examination of this paper. However, it is helpful to consider it to analyze the jurisprudence.

The ITLOS and the arbitral tribunals have jurisdiction over disputes concerning the interpretation or application of UNCLOS.<sup>43</sup> According to Article 293 of UNCLOS the court and

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<sup>38</sup> *Ibid.*, paras. 81–84.

<sup>39</sup> In the Matter of an Arbitration between Guyana and Suriname, in the Award of 17 September 2007.

<sup>40</sup> *Ibid.*, para. 445.

<sup>41</sup> This issue does not apply to the ICJ, in considering that it has "general" jurisdiction without limitation depending on the subject matters.

<sup>42</sup> It is not to mention that the issue of jurisdiction and that of applicable law are theoretically different from each other. Nonetheless, they are, in reality, in the jurisprudence related to each other, or, it might be said that they are wrongfully connected to each other.

<sup>43</sup> Article 288, Paragraph 1 reads:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.



tribunals shall apply international law that is not incompatible with UNCLOS.<sup>44</sup> Therefore, the court and tribunals apply not only UNCLOS but also international law with respect to the use of force, principally, Article 2, Paragraph 4 of the UN Charter. As a result, if the cases before the court and tribunals involve the use of force and/or the use of arms according to the terminology of this paper, the court and tribunals consider it in accordance with the relevant international law including international law rules other than UNCLOS.

However, applicable laws should not in any sense widen the jurisdiction of the court and tribunals.<sup>45</sup> Therefore, even if the cases before them involve the use of force and/or the use of arms, they may not decide the arguable violations of the prohibition of the use of force as such.<sup>46</sup> As far as it is inseparably related to the subject of the dispute concerned, which should be a dispute on the interpretation or application of UNCLOS, they inevitably decide the issue.

When the jurisprudence is analyzed later in this paper, it is necessary to bear in mind this limit of the jurisdiction of the ITLOS and the arbitral tribunals. As far as they adhere to the limit of their jurisdiction, the judgments and awards rendered by the ITLOS and the arbitral tribunals decide the issue of the use of arms in conjunction with law enforcement measures taken at sea. This is not the case with respect to the use of force prohibited by international law. It is not expected that sufficient suggestions will be derived from them regarding the use of force prohibited by international law, since the issue is out of their jurisdiction.<sup>47</sup>

### 3. The Use of Arms Accompanying Law Enforcement Measures

#### (1) An attempt to define the use of weapons that is not prohibited or is permitted by international law as the use of arms accompanying law enforcement measures

As confirmed above, it is difficult to find the precise meaning of “force” that is prohibited by international law. Authorities are not in accord in this regard.<sup>48</sup> As an outcome of this state of discussion, it is difficult to identify the category of the use of “force” or “arms” that is not prohibited or permitted by international law.

Then, as a different approach, by departing from the particular framework of arguments for the use of force prohibited by international law, mainly, by Article 2, Paragraph 4 of the UN Charter, a new line of argument may arise. Because the use of weapons that is not prohibited or permitted by international law, in many cases, accompanies law enforcement measures,<sup>49</sup> a

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<sup>44</sup> Article 293, Paragraph 1 reads:

A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

<sup>45</sup> As for this issue, see, for instance, P. Tzeng, “Jurisdiction and Applicable Law under UNCLOS,” *Yale Law Journal*, 126 (2016), 242–260. The issue has been addressed in the jurisprudence mainly with respect to the relationship between UNCLOS and the international law that prohibits the use of force.

<sup>46</sup> In comparison, as issues of interpretation or application of the relevant provisions of UNCLOS, the court and tribunals may have jurisdiction to decide the legality of the use of arms in conjunction with law enforcement measures, depending on the interpretation of the provisions concerned.

<sup>47</sup> This does not mean that there are no examples in which the court or arbitral tribunals overstepped the limit of their jurisdiction so as to decide, at least in some sense, the issue of the use of force, as such. This paper will not go into the issue, and here it suffices to point out that problem.

<sup>48</sup> **Section 1.**

<sup>49</sup> Strictly speaking, there may be differences between the use of arms that is not prohibited by international law, and the use of arms that is permitted by international law. With this reservation, from now on, for convenience, the expression “the use of arms that is permitted (allowed) by international law” will be adopted in order to mean both, unless confusion occurs.

reasonable way to define the use of weapons is by looking for the definition or justification of it in the relevant international laws with respect to law enforcement measures to be taken at sea.

The presupposition of this paper is that the nature of the acts or measures, in principle, decides the nature of the use of force, or the use of arms in conjunction with the acts or measures concerned. Therefore, to identify the nature of the use of arms accompanying law enforcement measures as such, it is required to determine the acts or measures in which the arms are used as those of a law enforcement nature.

Authorities have discussed the definition of “law enforcement.”<sup>50</sup> In line with the arguments of this paper, with its presupposition, the significance of the arguments regarding the definition of law enforcement resides precisely here. It bears the inherent weight of the presupposition set by this paper, as the definition of law enforcement defines the nature of the acts or measures, and, in principle, the nature of the use of arms in conjunction with law enforcement measures, as well.

## **(2) The relevant provisions regarding law enforcement**

Let us look at UNCLOS and confirm the relevant provisions with respect to law enforcement.<sup>51</sup> There sporadically exist such provisions under UNCLOS. They give the designated States the rights and also therefore the justification to take enforcement measures at sea.<sup>52</sup>

There are provisions to authorize the designated States to exercise enforcement jurisdiction.<sup>53</sup> They are, for example, Article 2, which prescribes sovereignty of coastal States of territorial sea, and Articles 25, which allows them to take measures against non-innocent passage. Regarding exclusive economic zones (EEZ), Article 73 allows coastal States to take enforcement measures in order to ensure the compliance of vessels with fishery regulations.<sup>54</sup> Looking at the high seas, Article 94 defines the flag State jurisdiction and Article 109 confers enforcement jurisdiction regarding unauthorized broadcasting on the designated States. In a more general manner, Article 110 forms an exception for the flag State principle on the high seas and it distributes enforcement jurisdiction to the designated States with respect to the limited number of acts on the high seas. Article 111, which deals with hot pursuit, also sets forth an exception for the flag State principle on the high seas. In the field of marine environmental protection, too, Part XII of UNCLOS has Section 6, which deals with enforcement measures for that purpose.

Among these provisions, some of them have acquired the status of customary international law rules.

In the end, it can be safely said that these provisions of UNCLOS and customary international law rules provide for the rights and therefore also the justification to take law enforcement

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<sup>50</sup> Kwast, *op. cit.*, *supra* n. 2, 53–57; Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko....), 655–659.

<sup>51</sup> It is not to mention that many provisions under UNCLOS regarding law enforcement at sea succeeded those of the four 1958 Geneva Conventions on the Law of the Sea, and they may have the status of customary international law. Therefore, the significance of the examination of the provisions of UNCLOS does not confine itself to the examination of solely the provisions of UNCLOS. It may have further general implications.

<sup>52</sup> Kwast also takes the same position as that of this paper in examining the rights and jurisdiction of States under the law of the sea. Kwast, *op. cit.*, *supra* n. 2, 53–55.

<sup>53</sup> As for a general review of UNCLOS in relation to its authorizations of law enforcement measures, see, R. McLaughlin, “Authorizations for Maritime Law Enforcement Operations,” *International Review of the Red Cross*, 98 (2) (2016), 465–490.

<sup>54</sup> While the coastal State of the EEZ has sovereign rights and jurisdiction on the matters other than the conservation and management of fishery resources, except for the jurisdiction under Article 73 and the jurisdiction on the marine environmental protection (the Part XII of UNCLOS), explicit provisions for enforcement jurisdiction do not exist in UNCLOS.

measures at sea on various occasions.<sup>55</sup> At the same time, according to the presupposition set by this paper, it should be emphasized that the rights and the justification defining the acts or measures, as their reflection, give the most important indication as to the definition or nature of the use of weapons in conjunction with the acts or measures. Such evaluation with respect to the nature of both the acts or measures, on the one hand, and the use of weapons accompanying them, on the other hand, ultimately depends on the interpretation of the provisions of UNCLOS and the relevant international law rules.<sup>56</sup>

As presupposed above, the nature of the acts or measures as law enforcement, in principle,<sup>57</sup> decides the nature of the use of weapons accompanying the acts or measures as the use of arms in conjunction with law enforcement measures. Even with the confirmation of this point, still the possibility is not totally denied, under certain conditions, that the use of arms would become the use of force which is expected in the context of “military acts or measures” depending on the consideration of factors inherent to the case concerned.<sup>58</sup>

It is totally natural to permit the designated States that are given enforcement jurisdiction to take forcible measures in order to make the enforcement measures effective. In this regard, the hot pursuit regime<sup>59</sup> itself finds its justification in the effective realization of the enforcement measures taken by coastal States of the territorial sea, on the one hand, and by the coastal States of the EEZs or continental shelf under certain conditions, on the other hand.

In other words, such use of weapons as that accompanying law enforcement measures taken at sea is allowed by international law. It is not because it does not fall within the purview of Article 2, Paragraph 4, but because such use of weapons is realized in conjunction with law enforcement that is defined by the relevant international law rules. It has its own nature and definition, separate from the permissible use of “force” under Article 2, Paragraph 4 of the UN Charter, or under customary international law, which reflects the prohibition of the use of force.<sup>60</sup>

Taking this basic stance, the next question to be considered is whether solely the relevant international law that deals with law enforcement may decide the nature of the use of weapons as the use of arms accompanying law enforcement measures taken at sea, even if it sets forth the principal indication for the decision. There might be other elements or factors to be considered

<sup>55</sup> After careful consideration of the possible categorization of law enforcement and similar measures that are indicated by several authorities, Morikawa, bearing in mind the enforcement jurisdiction of States under the law of the sea, concluded that for the purpose of the examination of the use of weapons, a wide understanding of law enforcement is appropriate. Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 655–659.

<sup>56</sup> This paper will not enter the issue of such interpretation. It suffices here to confirm that the legal work of the interpretation of UNCLOS and the relevant international law rules may identify law enforcement measures.

<sup>57</sup> As for the significance of this qualification “in principle,” see, *supra* n. 9.

<sup>58</sup> This paper does not take the position that the physical scale of violence critically decides the nature of a use of weapons: whether it is the use of force in military acts or measures, or the use of arms accompanying law enforcement measures. Nonetheless, the possibility is not denied that various factors need to be considered in order to ultimately decide the nature of a use of weapons. The point is, the most important and reliable indication is given by the relevant international law that deals with the rights and therefore also the justification to take law enforcement measures at sea. This paper takes this position.

<sup>59</sup> Article 111, Paragraph 1 and Paragraph 2 provide for the rights of hot pursuit of the coastal States of the territorial sea, and the EEZs and continental shelf.

<sup>60</sup> In other words, this is the way to determine, in a positive manner, the nature of the use of weapons accompanying the enforcement measures taken at sea by referring to the relevant international law. It is different from the determination, in a negative manner, of such use of weapons as that not prohibited by international law.

in finally making that distinction in each case.<sup>61</sup> The consideration of this question will follow the next examination of the relevant jurisprudence.

### **(3) The jurisprudence and the relevant international law in respect to the distinction between the use of force and the use of arms**

The jurisprudence is not sufficiently helpful to find the standard according to which the use of force and the use of arms are distinguished from each other.<sup>62</sup> The reason is as follows.

In the *M/V Saiga* Case (No. 2), the Fisheries Jurisdiction Case, and the Guyana and Suriname Case, the courts and the tribunal really made the distinction between the use of force under Article 2, Paragraph 4 of the UN Charter, and the use of arms accompanying law enforcement measures.<sup>63</sup>

However, unfortunately, they do not argue the two issues with a definite distinction between them. Namely, one is the issue of the nature and/or definition of the measures<sup>64</sup> that were taken against foreign vessels in the incidents before the courts and the tribunal, and the other is the issue of the nature and/or definition of the use of weapons in conjunction with the measures. The courts and the tribunal do not make clear their stance as to the relationship between the two issues.<sup>65</sup> Therefore, even if the jurisprudence makes a distinction between the use of force prohibited by Article 2, Paragraph 4 of the UN Charter and the use of weapons against foreign vessels in the cases concerned, it is not crystal clear whether the distinction is made as that between the military measures under the provisions of the UN Charter, and the law enforcement measures under, for instance, the provisions of UNCLOS, or as that between the use of force prohibited by the provision of the UN Charter, and the use of arms accompanying the law enforcement measures under the provisions of UNCLOS.<sup>66</sup> Considering this, from the jurisprudence, it is not possible to find a precise indication regarding the way the use of force and the use of arms are distinguished from each other.<sup>67</sup>

In relation to the standpoint of this paper, rather, the following two points in the jurisprudence should be recognized. They firmly support the standpoint of this paper.

First, the fact that the jurisprudence does not clearly demonstrate a distinction between the nature of the acts or measures, and the nature of the use of weapons, means and so supports the presupposition of this paper that, in principle, the nature of the acts or measures decides the nature of the use of weapons in conjunction with the acts or measures.

Second, the jurisprudence defines the use of weapons in the incidents before the courts

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<sup>61</sup> As explained later, the weight or the significance of these international law rules would change under the current wide understanding of maritime security.

<sup>62</sup> Regarding the distinction made by the ICJ in the Nicaragua Case between an armed attack and less grave use of force, and its significance in the Guyana and Suriname Case, see, Kwast, *op. cit.*, *supra* n. 2, 60–61.

<sup>63</sup> For the relevant parts of the decisions and the award, see, *supra* n. 35–40.

<sup>64</sup> From a wider perspective, in place of “acts or measures” they are called “military situations,” and “law enforcement situations.”

<sup>65</sup> In this paper, it is presupposed that the nature of the acts or measures, in principle, decides the nature of the use of force, or the use of arms, in conjunction with the acts or measures.

<sup>66</sup> As is pointed out next, a possible understanding of such a position taken by the jurisprudence is that it regards the two issues as the same, namely, the issue of the nature of the acts or measures, and that of the nature of the use of weapons.

<sup>67</sup> In other words, while the jurisprudence has made the distinction between the use of force under Article 2, Paragraph 4 of the UN Charter, and the use of arms accompanying law enforcement measures, it is not perfectly clear whether the distinction is with respect to (the nature of) the acts or measures, or with respect to (the nature of) the use of force or arms.

and tribunal as the use of arms accompanying the law enforcement measures by consulting the relevant international law<sup>68</sup> and the domestic laws.<sup>69</sup> It does not confine itself to the explanation that the use of armed force in the incidents before the courts and tribunal does not fall under the purview of Article 2, Paragraph 4 of the UN Charter. The importance of which is emphasized above,<sup>70</sup> departing from a sort of negative argument that the provision of the UN Charter does not prohibit certain use of weapons, setting a new positive argument is indispensable for gaining the nature and/or definition of the acts or measures, and that of the use of weapons in connection with the acts or measures.<sup>71</sup>

Then, given by the jurisprudence the distinction between the military acts and the law enforcement measures, and between the use of force in military measures and the use of arms in law enforcement measures, what are the standards that decide the legality of the use of arms in conjunction with law enforcement measures to be taken at sea?

#### **(4) Standards that decide the legality of the use of arms accompanying law enforcement measures taken at sea**

The relevant parts of the judgments and award read:

The *M/V Saiga* Case

[T]hat the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.<sup>72</sup>

The Fisheries Jurisdiction Case

...“in the manner and to the extent prescribed by the regulations, use force that is intended or is likely to disable a foreign fishing vessel,” if the officer “believes on reasonable grounds that the force is necessary for the purpose of arresting.”<sup>73</sup>

The Guyana and Suriname Case

...such force is unavoidable, reasonable and necessary.<sup>74</sup>

Among treaties, the 1995 Fish Stocks Agreement reads:

...avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.<sup>75</sup>

The 2005 SUA Protocol provides for:

Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.<sup>76</sup>

<sup>68</sup> In the *M/V Saiga* Case (No. 2) the ITLOS mentioned “applicable rule of international law” and “considerations of humanity (para. 155),” *op. cit., supra* n. 16. In the Guyana and Suriname Case, the tribunal referred to “(in) international law (force may be used in law enforcement activities) (para. 445),” *op. cit., supra* n. 39.

<sup>69</sup> In the Fisheries Jurisdiction Case the ICJ referred to Canadian domestic laws (paras. 81–82), *op. cit., supra* n. 37.

<sup>70</sup> **Section 1 (1)** and **Section 3 (1)**.

<sup>71</sup> A similar position is demonstrated by Morikawa, *op. cit., supra* n. 2 (Kaijo Hoshikko...), 661. As another way of approaching the issue of the use of arms accompanying law enforcement, under the framework of UN Security Council resolutions, Zou categorizes and examines law enforcement measures to be taken at sea and the legality of the use of arms accompanying them. Zou, *op. cit., supra* n. 34.

<sup>72</sup> *Op. cit., supra* n. 16, para. 155.

<sup>73</sup> *Op. cit., supra* n. 37, para. 81.

<sup>74</sup> *Op. cit., supra* n. 39, para. 445.

<sup>75</sup> Article 22, Paragraph 1 (f).

<sup>76</sup> Article 8 bis, (9).

From the jurisprudence and the treaties, as the standards that decide the legality of the use of arms, the following key concepts can be confirmed. They are: reasonability, necessity, and proportionality.<sup>77</sup>

These factors, particularly necessity and proportionality, are also the factors to be considered in order to decide the legality of the exercise of the right of self-defense. Here, it is not necessary to go into the detail of the standards according to which the use of arms or the exercise of the right of self-defense should be realized.

It is frequently pointed out that in cases of the right of self-defense, the extermination or annihilation of hostile entities is necessary and allowed. It is also assessed as being proportionate.

In comparison, in cases of the use of arms accompanying law enforcement measures, it is not usual to exterminate or annihilate the target of the law enforcement measures concerned. This is because, most importantly, the purpose of law enforcement is to ensure the observation of the law, and not to exterminate the target. This is also because the scale of violence, the legal interest to be infringed upon by the wrongful violence, and the involvement of subjects<sup>78</sup> are usually different between the exercise of the right of self-defense, and the use of arms in conjunction with law enforcement measures. In an extreme case, the use of arms by law enforcement entities reaching the largest scale so as to exterminate the target is not totally excluded.<sup>79</sup> Such an extreme use of arms has room to be permitted as being in accordance with the proportionality principle.

### **(5) The legal consequences of the illegal use of arms accompanying law enforcement measures**

The distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures is also reflected in the legal consequences of the illegal use of force, namely and mainly, the use of force that cannot be justified as an exercise of the right of self-defense, on the one hand, and the use of arms that is contrary to the standards that are confirmed here, on the other hand.

In cases of the use of force that is not justified as an exercise of the right of self-defense, the legal consequence is as follows. Such use of force will be reacted to by its target State with the use of force. Such reaction has the possibility to be justified as self-defense or countermeasures. In addition, the issue of State responsibility also arises, in cases of the use of force that is not justified as an exercise of the right of self-defense.

In comparison, in cases of the use of arms accompanying law enforcement measures that is contrary to standards such as reasonability, necessity, and proportionality, the issue of State responsibility is raised. There is no room for the issue of the use of force in military acts or an exercise of the right of self-defense to be involved.<sup>80</sup>

This illegal situation is totally the same as the situation, for instance, when a State takes law enforcement measures wrongfully at sea; it needs to take State responsibility for the illegal

<sup>77</sup> As for other guidelines for the use of arms in conjunction with law enforcement, see, the Code of Conduct for Law Enforcement Officials, UN Doc, A/34/169, Article 3, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 5. As for the examination of these provisions, see, Zou, *op. cit.*, *supra* n. 34, 250–251.

<sup>78</sup> These are among the factors to be considered in order to finally decide the nature of a use of weapons, whether it is the use of force prohibited by international law, or the use of arms accompanying law enforcement measures.

<sup>79</sup> In cases of law enforcement measures, targets to be annihilated should be strictly limited to the wrongdoers and wrongdoing vessels. Different from this, in cases of self-defense, according to proportionality, potential combatants could be exterminated.

<sup>80</sup> Ruys, *op. cit.*, *supra* n. 2, 202.

measure.<sup>81</sup> There are cases in which a State takes law enforcement measures against a foreign vessel at sea without legal justification that is given by UNCLOS. In addition, while a coastal State of a territorial sea has the right to protective measures against non-innocent passage of a foreign vessel, if based upon wrongful judgment on non-innocence it intercepts a foreign vessel actually conducting innocent passage, the coastal State should take State responsibility toward the flag State of the foreign vessel.

In sum, the critical point is as follows. If a State uses arms in conjunction with law enforcement measures, and if it is a violation of the standards, it is not categorized by the violation as such, as the use of force that is prohibited by international law.<sup>82</sup> Here, the difference between the use of force and the use of arms according to the terminology of this paper is kept by the difference between the legal consequences of the use of force prohibited by international law, on the one hand, and those of the use of arms contrary to the standards, on the other hand.

Thus far, examinations have been conducted with the presupposition that the nature of the acts or measures, in principle, decides the nature of the use of weapons in connection with the acts or measures. The remaining task is to consider whether flexible consideration of several factors is needed to finally determine the nature of the use of weapons on a case-by-case basis.

### **(6) A case-by-case approach to determine the nature of the use of weapons**

It is argued that various factors are to be considered in order to finally decide the nature of the use of weapons.<sup>83</sup> These factors include the scale of violence<sup>84</sup> on both the wrongdoer side and the subjects of the use of weapons,<sup>85</sup> the nature of the wrongdoer involved, the political intents of the wrongdoers, and the legal interests to be infringed upon by the violence of the wrongdoers.<sup>86</sup>

Considering the various cases in which the use of arms accompanying law enforcement measures is realized, the significance of such a flexible approach with the examination of various factors is not denied. Therefore, the presupposition set by this paper initially needs the qualification “in principle.” The nature of the acts or measures, “in principle,” determines the nature of the use of force or arms in connection with the acts or measures. By considering the factors, there might be cases in which there is a difference between the nature of the acts or measures and the nature of weapons used in those acts or measures, namely the use of force or the use of arms.

<sup>81</sup> There are the relevant provisions under UNCLOS, such as Article 110, paragraph 3, Article 111, Paragraph 8, Article 231, and, as a general provision, there is Article 304.

<sup>82</sup> The State that uses arms in conjunction with law enforcement measures needs to prove that the use of arms has that nature. As seen later, the burden of proof would be heavier with the impact caused by the current wide understanding of maritime security.

<sup>83</sup> Ruys, *op. cit.*, *supra* n. 2, 207.

<sup>84</sup> In the arguments regarding the meaning of “force” under Article 2, Paragraph 4 of the UN Charter, one of main factors is the scale of violence. Ruys, *op. cit.*, *supra* n. 2, 167, and 191; Corten, *op. cit.*, *supra* n. 2, 55 and 85.

<sup>85</sup> UNCLOS itself provides that military vessels may take law enforcement measures. These include the provisions of Article 110 and Article 111, Paragraph 5. The lack of law enforcement vessels in many countries substantiates the significance of these provisions. Kwast, *op. cit.*, *supra* n. 2, 63–64.

<sup>86</sup> If the subjects involved in the incident concerned are States, and if the legal interest to be infringed upon is a State’s interest, such as territorial integrity, the facts do not necessarily decide the nature of the use of weapons as the use of force. Chinese public vessels that were recently incorporated into the military sector frequently enter the Japanese territorial sea surrounding the Senkaku Islands. Japan’s sovereignty or territorial sovereignty could be violated. Nonetheless, the Japan Coast Guard has coped with such situations by taking law enforcement measures. The fact that the measures are taken by the Japan Coast Guard takes on critical importance, considering that law enforcement measures rather than military measures have been taken so as to avoid unnecessary escalation of the situations concerned.

The critical point to be emphasized is that this case-by-case evaluation is conducted under the legal frameworks that provide the nature of both military acts or measures and law enforcement measures, on the one hand, and the use of force in military acts or the use of arms in law enforcement measures, on the other hand. Therefore, the case-by-case approach is not a simple one to be conducted without any referential legal frameworks. Under the relevant legal frameworks, with the interpretation of the relevant provisions, the case-by-case approach, as a practical one, leads to a possible distinction between the use of force and the use of arms with allowance of flexible consideration of individual and concrete situations of the incident concerned. This point would be changed by the impact that is caused by the recent wide understanding of maritime security.

#### 4. The Recent Wide Understanding of Maritime Security

##### (1) The recent wide understanding of maritime security

There is a firm tendency to understand maritime security in a wide way.<sup>87</sup> According to this, “maritime security is understood by the measures combatting military threat, terrorism, weapons proliferation, transnational crime, piracy, environmental/resource destruction, and illegal seaborne migration.”<sup>88</sup> Another authority explains the reason for the recent wide understanding of maritime security.<sup>89</sup> According to this, not only sovereign States’ exclusive interests but also the inclusive interests (common interests) of the world define a wide array of threats such that maritime security is understood widely as that combatting the variety of threats.<sup>90</sup> The UN Secretary-General demonstrates a similar position by counting seven threats to maritime security: piracy, terrorist acts, illicit trafficking of narcotic drugs and psychotropic substances, smuggling and trafficking of persons by sea, IUU fishing, and damage to the marine environment.<sup>91</sup>

As a State practice, Japan recently, on the 15<sup>th</sup> of May 2018, adopted the Third Basic Plan on Ocean Policy<sup>92</sup> that provides for a wide range of policies and measures as those for maritime security.<sup>93</sup> It contains two categories of policies for maritime security: policies for maritime security, and policies forming the foundations for contributing to maritime security.<sup>94</sup> The former consists of measures such as those for maintaining the peace and order of the oceans by law enforcement, realization of the safety of marine traffic, and coping with ocean-oriented natural disasters.<sup>95</sup> The latter is divided into two types of measures: measures forming the basis of

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<sup>87</sup> A typical example is Guilfoyle, *op. cit.*, *supra* n. 1.

<sup>88</sup> *Ibid.*, 299.

<sup>89</sup> Klein, *op. cit.*, *supra* n. 1, 1–10.

<sup>90</sup> *Ibid.*, 8.

<sup>91</sup> UNGA, “Oceans and the Law of the Sea: Report of the Secretary-General” UN Doc A/63/63, cited by Klein, *ibid.*, 10.

<sup>92</sup> As a Cabinet Decision, the Japanese government enacted the Third Basic Plan on Ocean Policy (Basic Plan) on 15 May 2018. A provisional translation is available at [https://www8.cao.go.jp/ocean/english/plan/pdf/plan03\\_e.pdf](https://www8.cao.go.jp/ocean/english/plan/pdf/plan03_e.pdf), visited 10 April, 2019.

<sup>93</sup> This is referred to as “comprehensive maritime security.”

<sup>94</sup> In comparison with Klein’s position, the policies for combatting illegal acts at sea, such as IUU fishing, terrorism, environmental destruction and seaborne natural disaster, are not necessarily based upon “common” interests of international society. Sovereign States recognize these illegal acts as maritime threats to their “individual” (or according to Klein’s terminology, “exclusive”) interests.

<sup>95</sup> Basic Plan, 24–26.



maritime security,<sup>96</sup> and measures that support maritime security in a complementary manner.<sup>97</sup>

This wide understanding of maritime security includes not only the typical issue of the use of force against military threats, but also the issue of law enforcement to combat international wrongful acts committed at sea, such as piracy, terrorism, illegal migrants, and IUU fishing, etc.<sup>98</sup> It strongly urges the reconsideration of two demarcations: first, the demarcation between the natures of the acts or measures in which weapons are used is required to be reconsidered. There are military acts or measures, and law enforcement measures. Second, reconsideration is also needed regarding the demarcation between the prohibited use of force and the use of arms accompanying law enforcement measures.<sup>99</sup>

In the **Introduction**, the presupposition was set that the nature of the acts or measures, in principle, decides the nature of the use of weapons in acts or measures.<sup>100</sup> Therefore, it is appropriate to examine the impact of the wide understanding of maritime security from the viewpoint of the nature of the acts or measures, namely, military acts and law enforcement measures.

## (2) The arguments on so-called “grey zones”

The concept of grey zones has not acquired a precise definition among authorities.<sup>101</sup> It may designate various situations.<sup>102</sup> However, it can be safely said that this concept has as its main purpose the clarification of the existence of a grey zone<sup>103</sup> in-between military acts and law enforcement measures. As this paper deals with the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures, it is regarded as a term to describe the grey zone between military acts and law enforcement

<sup>96</sup> *Ibid.*, 26–27. Among them, weight is placed on the following two policies: the establishment of the structure for maritime domain awareness (MDA) and the preservation and management of remote islands that form national borders.

<sup>97</sup> These are measures for economic security and protection of the marine environment. Basic Plan, 28.

<sup>98</sup> According to the International Maritime Organization, with the distinction between maritime safety and maritime security, the latter is related to protection against unlawful and deliberate acts, cited by Klein, *op. cit.*, *supra* n. 1, 8, n. 23.

<sup>99</sup> Principally, self-defense sets forth the legality of the use of force to combat the violation of international law that prohibits the use of force, such as aggression and violent invasion of foreign territories. The legality of the use of arms in conjunction with law enforcement measures is evaluated in accordance with the standards that were confirmed above.

<sup>100</sup> Regarding the room for a case-by-case approach, see, **Section 3 (6)**.

<sup>101</sup> Regarding the concept of grey zones in Japanese acts, see, Morikawa, *op. cit.*, *supra* n. 2 (Gurei...).

<sup>102</sup> In the Cabinet Decision of 1 July 2014, Japan explained “grey zones.” According to this, the grey zones are: first, a situation where an infringement from the outside that does not amount to an armed attack occurs in areas surrounding remote islands, etc., and police forces are not present nearby or police agencies cannot respond immediately (including situations in which police agencies cannot respond because of the weapons possessed by the armed groups, etc.); second, a situation where an attack occurs against the units of the United States armed forces currently engaged in activities which contribute to the defense of Japan and such a situation escalates into an armed attack depending on its circumstances. A provisional translation is available at [http://japan.kantei.go.jp/96-abe/decisions/2014/\\_icsFiles/afieldfile/2014/07/03/anpohosei\\_eng.pdf](http://japan.kantei.go.jp/96-abe/decisions/2014/_icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf), visited 10 April, 2019. As for an examination of Japan’s understanding of “grey zones,” see, Morikawa, *op. cit.*, *supra* n. 2 (Gurei...), 29–30.

<sup>103</sup> In discussing grey zones, in some cases, a wider concept of “situation” may be used in place of acts or measures. Concerning the term situations, see, **Introduction**.

measures, and so the use of force and the use of arms, as well.<sup>104</sup>

Without entering the details of the arguments on “grey zones,” here, it suffices to point out only one thing. The presupposition set by this paper is that the nature of the acts or measures, in principle, decides the nature of the use of weapons in the acts or measures. Accordingly, the use of weapons in military measures in many cases has the nature of the use of force, irrespective of its possible legality as an exercise of the right of self-defense. The use of weapons in law enforcement measures in many cases has the nature of arms accompanying law enforcement measures.

If there is a zone that cannot be defined either as military acts or law enforcement measures, and it is a type of a grey zone, there would also be a grey zone in-between the use of force in military acts and the use of arms in law enforcement measures. Furthermore, the concept of a grey zone might make the presupposition itself even insignificant. The nature of the acts or measures would not decide the nature of the use of weapons in the acts or measures, even with the qualification of “in principle.” There would be the possibility of the use of weapons in military measures, which is different from the use of force, and the possibility of the use of weapons in law enforcement measures which is prohibited by international law.<sup>105</sup>

Bearing this in mind, next, the possible impact will be considered by the wide understanding of maritime security upon the logic according to which the distinction between the use of force prohibited by international law, and the use of arms accompanying law enforcement measures.

### **(3) The logic to make the distinction between the use of force prohibited by international law and the use of arms accompanying law enforcement measures**

The logic to make the distinction resides in applying the legal frameworks that define and deal with military acts and law enforcement, on the one hand, and the use of force or the use of arms on the other hand. In order to confirm the existence of the legal frameworks, the relevant international law rules need to be referred to. They are, for instance, Article 2, Paragraph 4 of the UN Charter, and the relevant provisions of UNCLOS.

It is true that if a flexible and case-by-case analysis has room to be applied, it is necessary to consider various factors in individual and concrete situations in order to make the final distinction between the use of force and the use of arms.<sup>106</sup> These factors include the scale of violence on both sides of wrongdoers and entities using weapons, the nature of the subjects involved in the situation, the legal interests to be infringed upon by the violence of wrongdoers, and the political intents of wrongdoers. The critical point to be precisely reaffirmed is that such a case-by-case approach is applied under or within the legal frameworks that are confirmed here. Therefore, the case-by-case approach does not mean a simple consideration of various factors without any reference to legal frameworks that definitely set certain and substantial guidelines and limits to the consideration.

In a sharp contrast to this, if the wide understanding of maritime security made the distinction between military acts and law enforcement measures meaningless, the result is as follows. It would render the legal frameworks applied for the distinction between the two acts or measures and two kinds of the use of weapons in conjunction with each act or measure less significant or even insignificant. Therefore, the distinction between the use of force prohibited by international

<sup>104</sup> As for the similar position, see, Y. Nishimura, “Kaiyo Anzenhoshō to Kokusaiho [Maritime Security and International Law],” *Mamoru Umi, Tsunagu Umi, Megumu Umi—Kaiyo Anzenhoshō no Shokadai to Nihon no Taiō* [Protecting Oceans, Connecting Oceans, and Producing Oceans—Maritime Security Agendas and Japan’s Efforts], (Nihon Kokusai Mondai Kenkyūsho, 2012), 91–104.

<sup>105</sup> The same outcome may take place by adopting the case-by-case approach explained above.

<sup>106</sup> According to the terminology of this paper, the use of force means that which is prohibited by international law, and the use of arms means that which accompanies law enforcement measures.

law, and the use of arms accompanying law enforcement measures would be made by applying “a simple case-by-case approach.” Without the legal frameworks to be referred to, and without any guidelines and limits to the consideration of various factors in individual and concrete situations, based upon the consideration of various factors, the distinction between the use of force and the use of arms would be argued for and justified. It would necessarily be a very difficult task to accomplish.

## 5. Concluding Remarks

The use of arms in conjunction with law enforcement measures is necessary to make the measures effective. At the same time, the legal regulation of such use of arms inevitably becomes a decisive agenda for international law.

The wide understanding of maritime security includes in it law enforcement such that the distinction between the military acts and law enforcement measures will be flexible. Under such circumstances, rather than military acts, law enforcement measures at sea will be undoubtedly expected to fulfil more functions than ever in order to avoid the escalation of the situations concerned.<sup>107</sup> Thus, the critical point is not to allow such use of arms to seriously undermine the solidly established principle of the prohibition of the use of force.

For that purpose, this paper attempted to set forth the basis for the inherent argument for the legal regulation of the use of arms in conjunction with law enforcement measures. With the recognition of the two issues, namely, the issue of the nature of the acts or measures, and that of the nature of use of force or arms in the acts or measures, it carefully evaluated the development of the relevant international law and the jurisprudence. It also considered the impact by the wide understanding of maritime security upon the framework of the argument for the legal regulation of the use of arms accompanying law enforcement measures.

On the one hand, in order to justify the use of arms accompanying law enforcement measures, sovereign States must convincingly prove that they have taken law enforcement measures with the use of arms for making them effective. It will be a heavy burden on them. On the other hand, international law is still strongly required to further develop sufficient regulation on the use of arms in conjunction with law enforcement measures.<sup>108</sup>

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<sup>107</sup> Basic Plan, 25; Kwast, *op. cit.*, *supra* n. 2, 52.

<sup>108</sup> As one development in this direction, Morikawa attempts to identify the weight of various factors to be considered in determining the nature of the use of armed force depending on the types of incidents. Morikawa, *op. cit.*, *supra* n. 2 (Kaijo Hoshikko...), 664–672.