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Red Sea Attacks and the International Response: An International Law Insight

SECURITY & FOREIGN POLICY

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Summary

The ongoing crisis in the Red Sea, involving attacks by the Houthis to international shipping in the region as well as forcible measures by the US and its allies against Houthis' targets in Yemen, entails a host of legal, political, financial challenges to the international community, as evinced, amongst others, by the adoption of UN Security Council Resolution 2272 on 10th January 2024. Amongst others, it is evident that it gives rise to important questions under international law, including on the legal classification of the attacks in question and the legality of the measures that third States are taking. It is the purpose of this *Insight* to address these questions under international law.

In so doing, the *Insight* avers that the proper qualification of the current situation in terms of the law of armed conflict is that of a non-international armed conflict (NIAC) between Yemen and other States, including the US, and a non-state armed group, the Houthis. Under international law, Houthis' attacks, depending on the means and against whom they have been committed, can be classified as: i) acts of piracy; ii) acts regulated by the laws governing NIACs at sea; and iii) acts of 'maritime terrorism', or more aptly, acts falling under the scope of the 1988 SUA Convention. Accordingly, States fighting Houthis and protecting the safety of navigation in the Red Sea may indeed take many measures in accordance with international law, including the UNCLOS Articles 105 and 110 vis-à-vis acts of piracy, or Article 92 in respect of the protection of vessels flying their flags, as well as the laws governing NIAC at sea, as applicable to the parties to the conflict in question.

Introduction

Houthis have been targeting vessels in the Red Sea since November 2023 to show their support for Hamas. Carried out mainly, but not exclusively, in the Bab el-Mandeb Strait, the attacks have prompting major shipping companies to avoid the Suez Canal.

On 18 December 2023, United States Secretary of Defense Lloyd Austin announced the establishment of *Operation Prosperity Guardian*, ‘a new multinational security initiative under the umbrella of the US Combined Maritime Forces and the leadership of its Task Force 153, which focuses on security in the Red Sea’.¹ This initiative was prompted by the recent escalation in Houthi attacks launched from Yemen against international maritime commerce heading or related to Israel in the context of the ongoing Israel–Hamas conflict. Houthis have been targeting vessels in the Red Sea since November 2023 to show their support for Hamas. Carried out mainly, but not exclusively, in the Bab el-Mandeb Strait, the attacks have prompting major shipping companies to avoid the Suez Canal in favour of the longer and costlier route around the Cape of Good Hope. Indeed, various giant oil or maritime shipping companies, like BP,² Denmark's Maersk and its German rival Hapag-Lloydor,³ have paused shipments of oil or cargo through the Red Sea.

The Red Sea is the entry point for ships using the Suez Canal, and ‘nearly 15 percent of global seaborne trade passes through the Red Sea, including 8 percent of global grain trade, 12 percent of seaborne-traded oil and 8 percent of the world’s liquefied natural gas trade’.⁴ As stated, ‘redirecting ships around the southern tip of Africa is expected to cost up to \$1 million in extra fuel for every round trip between Asia and northern Europe’.⁵

As of 22 January 2024, there have been 34 attacks on shipping in the Red Sea since 19 November 2023.⁶ Houthis employ various methods to attack shipping in the Red Sea, including ballistic missiles,⁷ one-way uncrewed aerial vehicles (UAVs),⁸ and uncrewed surface vessels,⁹ as well as conventional attacks by small boats.¹⁰ There have also been several instances of hijacking: first, on 19 November 2023, the *Galaxy Leader*, flagged to the Bahamas, was hijacked by ten armed Houthi hijackers who used a military helicopter

¹ See at <<https://www.defense.gov/News/Releases/Release/Article/3621110/statement-from-secretary-of-defense-lloyd-j-austin-iii-on-ensuring-freedom-of-n/>>

² See at <https://www.reuters.com/world/middle-east/maersk-continues-schedule-suez-journeys-despite-houthi-attack-2024-01-02/> (2/12/2024).

³ See at <https://www.bbc.com/news/business-67748605> (18/12/2023).

⁴ A Joint Statement from the Governments of the United States, Australia, Bahrain, Belgium, Canada, Denmark, Germany, Italy, Japan, the Netherlands, New Zealand, the Republic of Korea, Singapore, and the United Kingdom (03/01/2024); available at <https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/03/a-joint-statement-from-the-governments-of-the-united-states-australia-bahrain-belgium-canada-denmark-germany-italy-japan-netherlands-new-zealand-and-the-united-kingdom/>

⁵ See Reuters (n 2).

⁶ See at <<https://apnews.com/article/us-navy-houthi-attacks-red-sea-shipping-iran-8e55669e4d18cbc7007654640fa5fdc1>> (22/01/2024). For a legal overview of the maritime incidents, see P. Pedrozo, ‘Protecting the Free Flow of Commerce from Houthi Attacks off the Arabian Peninsula’, 103 INT’L L. STUD. 49 (2024), pp. 50-57.

⁷ For example, as reported: ‘On Jan. 18 at approximately 9 p.m. (Sanaa time), Iranian-backed Houthi terrorists launched two anti-ship ballistic missiles at M/V Chem Ranger, a Marshall Island-flagged, U.S.-Owned, Greek-operated tanker ship. The crew observed the missiles impact the water near the ship’; US Central Command, ‘Third Houthi Terrorists Attack on Commercial Shipping Vessel in Three Days’ (18 January 2024); see at <<https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/3649828/third-houthi-terrorists-attack-on-commercial-shipping-vessel-in-three-days/>>

⁸ See e.g. at <<https://www.bbc.com/news/world-middle-east-67878906>> (04/01/2024).

⁹ As reported by CNN on 4/1/2024, ‘Houthis launched an unmanned surface drone against commercial shipping lanes in the Red Sea early Thursday morning [...] The attack with the unmanned surface vessel (USV) marks the first time the Houthis have used this type of weapon since they began targeting merchant vessels in the southern Red Sea following the beginning of the war in Gaza. The USV traveled from Yemen into international shipping lanes “clearly with the intent to do harm” before detonating, said Vice Admiral Brad Cooper, the commander of US Naval Forces Central Command’; at <<https://edition.cnn.com/2024/01/04/politics/houthis-drone-attack-red-sea/index.html>> (04/01/2024).

¹⁰ For example, on 1 January 2024, it was reported that ‘the US military says it killed 10 Houthi fighters and sank three of the Yemeni armed group’s vessels after a clash in the Red Sea. In more detail, on 31/12/2023 at 6:30am Yemen time (03:30 GMT), the container ship Maersk Hangzhou issued a second distress call in a day, reporting being attacked by four “Houthi small boats”. In response to the distress call, US Central Command (CENTCOM) said, the USS Gravelly shot down two anti-ship missiles fired at the Maersk vessel then helicopters from the Gravelly and the USS Eisenhower were dispatched towards the Maersk Hangzhou where they killed the Houthis’; <https://www.aljazeera.com/news/2024/1/1/us-sinks-houthi-boats-in-the-red-sea-how-did-the-fight-unfold> (01/01/2024).

to board the vessel. After seizing the vessel, they sailed it to the Yemeni port city of Hodeida, where it is still being held.¹¹ A second pirate attack occurred a week later, when an armed group of men seized the *M/V Central Park* thirty-five miles off the coast of Yemen. As reported: ‘USS Mason (DDG 87) responded to the Liberian-flagged tanker’s distress call and demanded that the pirates immediately release the ship and its twenty-two crew members. The pirates attempted to flee the scene but were apprehended by the U.S. destroyer.’¹²

It goes without saying that these incidents have been the cause of great concern among the international community, as demonstrated, inter alia, by the launching of *Operation Prosperity Guardian*,¹³ the associated Joint Statement by the participating Governments,¹⁴ and the United Nations Security Council (UNSC) Press Statement.¹⁵ Moreover, on 10 January 2024, the UN Security Council adopted Resolution 2722 (2024),¹⁶ which demanded that the Houthis release the *Galaxy Leader* and its crew immediately. It also took “note” of the right of Member States “in accordance with international law, to defend their vessels from attacks, including those that undermine navigational rights and freedoms”. The Resolution was adopted by a vote of 11 in favour and four abstentions (including Russia and China). On 12 January 2024, a spokesperson for UN Secretary General António Guterres released a statement reiterating that the Houthi attacks are unacceptable and must stop, as set out in UN Security Council Resolution 2722 (2024). He also called on all parties to act in accordance with international law when defending their vessels and to ensure that progress towards a political settlement in Yemen does not lose momentum.¹⁷

As of 22 January 2024, there have been 34 attacks on shipping in the Red Sea since 19 November 2023.

Notably, this is not the first time that Houthis have attacked navigational interests in the region,¹⁸ nor is the first time the international community has responded to maritime security concerns therein.¹⁹ However, the scale of the current attacks and the political, financial, and human repercussions are clearly unprecedented.

The purpose of this *Insight* is not to address all the dimensions or potential ramifications of the ongoing crisis in the Red Sea. Rather, it seeks to shed light on the international legal facets of the crisis, and primarily those facets that concern the international law of the sea and the international law of armed conflict. Evidently, the current attacks—as noted, too, by the UN Security Council—threaten ‘the navigational rights and freedoms of all vessels in the Gulf of Aden and Red Sea, in accordance with international law’,²⁰ which is one of the foundational principles of the contemporary law of the sea. However, these attacks

¹¹ See at <<https://www.reuters.com/world/middle-east/seized-galaxy-leader-ship-yemens-hodeidah-port-area-owner-2023-11-20/>>

¹² Pedrozo (n. 6), p. 51.

¹³ See n.1.

¹⁴ See n. 4.

¹⁵ UN Security Council Press Statement on Houthi Threats to Security at Sea, SC/15513 (1 DECEMBER 2023); available at <<https://press.un.org/en/2023/sc15513.doc.htm>>

¹⁶ UN Security Council Resolution 2722 (2024); available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N24/009/28/PDF/N2400928.pdf?OpenElement>>

¹⁷ UN, Statement attributable to the spokesperson for the Secretary General, 12 January 2024; available at

<<https://www.un.org/sg/en/content/sg/statement/2024-01-12/statement-attributable-the-spokesperson-for-the-secretary-general-airstrikes-yemen>>

¹⁸ As stated, ‘[t]his is actually the Houthis’ fourth wave of attacks in the waterway, which is the conduit for at least one-tenth of world seaborne trade. In the first, between 2015 and 2016, the Houthis relied on shelling from the shoreline after they won control of the western Red Sea coast and captured the old Yemeni army stockpile of anti-ship missiles. From 2017 onward, the Houthis began relying more on water-borne improvised explosive devices, known as WBIEDs. Then in 2020, and peaking in 2021, the Houthis expanded the use of WBIED attacks, followed by a truce in 2022’; <<https://acleddata.com/2024/01/05/ga-why-are-yemens-houthis-attacking-ships-in-the-red-sea/>> (05/01/2024).

¹⁹ See e.g. EMASoH - European Maritime Awareness in the Strait of Hormuz, which was launched on 20th January 2020 with a joint European declaration of support and was fully operational on 25th February 2020; see at <<https://www.emasoh-agenor.org/>>

²⁰ See n. 16.

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are occurring in the context of a conflict in Yemen and *a propos* another ongoing conflict in Gaza, which inevitably prompts the question of the applicability of the law of armed conflict at sea.

Also, notably, after attacking Houthi targets in Yemen on 11 January 2024, the UK said these were “limited, necessary and proportionate in self-defence” and that the UK Government will inform the UN Security Council of its actions in self-defence as provided for under Article 51 of the UN Charter.²¹ The US said they were “defensive”, and it was prepared to take other measures “as necessary”.²² Such actions prompt questions regarding, inter alia, the *jus ad bellum*.

Accordingly, the remainder of this *Insight* is organized thus: first, a short overview of the Houthis and the legal status of the relevant conflicts (Section II); second, a discussion of the legal qualification of the Houthi attacks and an analysis of the legality of the responses by third States in the region under international law (Section III). The attacks in question could be assessed as follows: a) acts of piracy; b) acts related to non-international armed conflict at sea; c) acts that are against the safety of navigation (‘maritime terrorism’); and d) acts of ‘armed attack’. Section IV concludes with some thoughts on the legal regime of the ongoing crisis.

Historical and Legal Context

Starting in January 2011 against the backdrop of the Arab spring, peaceful protests began to spread across Yemen; the protestors sought the resignation of President Saleh. The Houthis, originally founded to promote Zaidi Islam (a variant of Shi’a Islam), and tribal leaders supported the protests. After dozens of protestors were reportedly killed and many more injured during a demonstration in Sana’a on 18 March 2011, President Saleh declared a state of emergency.²³ On 21 February 2012, President Saleh agreed to step down and was replaced by Vice-President Hadi.²⁴ By September 2014, the Houthis had aligned with forces which supported Saleh and gained control over a substantial portion of Yemen, including the capital Sana’a.²⁵

On 21 September 2014, the Hadi government and the Houthis signed the Peace and National Partnership Agreement (PNPA), which conceded to Houthi demands for the formation of a more inclusive government.²⁶ In February 2015, the Houthis compelled Hadi’s resignation and established a new ‘Revolutionary Council’ government, thus breaching the PNPA.²⁷ Hadi fled the country in March 2015 after the Houthis advanced towards Aden.

²¹ UK PM statement on strikes against Houthi military targets: 12 January 2024; available at <<https://www.gov.uk/government/news/pm-statement-on-strikes-against-houthi-military-targets-12january-2024>>

²² See Letter dated 12 January 2024 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2024/56), available at <<https://digitallibrary.un.org/record/4034249?ln=en>>

²³ See at <<https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse5accord>>

²⁴ See B. Nußberger, ‘Military Strikes in Yemen in 2015: Intervention by Invitation and Self-Defence in the Course of Yemen’s “Model Transitional Process”’ (2017) 4(1) *Journal on the Use of Force and International Law* 110, 113.

²⁵ Letter dated 20 February 2015 from the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014) addressed to the President of the Security Council, UN Doc S/2015/125 (20 February 2015) 23–4.

²⁶ I. Wong, ‘Authority to consent to the use of force in contemporary international law: the Crimean and Yemeni conflicts (2019) 6 *Journal on the Use of Force and International Law*, 52, 74.

²⁷ T. Ruys and L. Ferro, ‘Weathering the Storm: Legality and Legal Implications of the Saudi-led Military Intervention in Yemen’ (2015) 65 *International and Comparative Law Quarterly* 61, 64.

...the conflict between the government and the Houthis, which remains ongoing, is considered a 'non-international armed conflict' (NIAC).

On the request of President Hadi, an international coalition led by Saudi Arabia—and comprised of Saudi Arabia, the United Arab Emirates, Bahrain, Qatar, and Kuwait—launched airstrikes against Houthi rebels in Yemen in what was called *Operation Decisive Storm* (later *Operation Renewal of Hope*).²⁸ The Coalition received military support from Egypt, Morocco, Jordan, and Sudan and the endorsement of the Arab League and Western states including the US, the UK, France, and Canada.²⁹ On 14 April 2015, the UN Security Council passed Resolution 2216, which reaffirmed its support of Hadi's legitimacy and expressed concern about the 'destabilizing actions' taken by the Houthis and Saleh.³⁰ The coalition's main objective was to retake Aden from the Houthis with the support of Southern Resistance forces. After an intense battle, they succeeded in doing so on 17 July 2015.

Since then, fighting has continued between the Yemeni government, supported by the coalition, and the Houthis. More than 150,000 people are reported to have been killed between the coalition's intervention in March 2015 and June 2019. By the end of 2021, the fighting has escalated between the Houthis and the Saudi-led coalition. In the context of their attempt to capture Marib, the Houthis have carried out direct attacks on Saudi Arabia and, for the first time, on the UAE. In response, the coalition conducted airstrikes on Yemen. On 1 April 2022, Yemen's warring parties agreed to a two-month ceasefire, starting with the Muslim holy month of Ramadan.

Following the outbreak of the 2023 Israel– Hamas war, the Houthis began to fire missiles at Israel and attack ships off Yemen's coast in the Red Sea. They say they are acting in solidarity with the Palestinians and aiming to facilitate the delivery of humanitarian aid to the Gaza strip.³¹

As to the legal classification of the conflict in Yemen, it has been observed that 'there are currently multiple parallel and overlapping non-international armed conflicts taking place in Yemen, most notably between the government and respectively the Houthis, al-Qaeda in the Arabian Peninsula, and the Southern Transitional Council, as well as between armed groups'.³² Most importantly, for present purposes, the conflict between the government and the Houthis, which remains ongoing, is considered a 'non-international armed conflict' (NIAC).

Under international law, two criteria need to be met for a situation of armed violence to be judged to amount to a NIAC: First, the level of armed violence must reach a degree of intensity that goes beyond internal disturbances and tensions. Second, in every NIAC, at least one side in the conflict must be a non-state armed group, which must exhibit a certain level of organization in order to qualify as being party to the NIAC.³³

It is evident that the conflict between the government and the Houthis meet both the above criteria, as the latter qualify as a non-State armed group.³⁴ Moreover, as stated, the

²⁸ Nußberger (n 24) 116–7

²⁹ Zachary Vermeer, 'The jus ad bellum and the airstrikes in Yemen: double standards for decamping presidents?', EJIL: Talk! (30 April 2015) www.ejiltalk.org/the-jus-ad-bellum-and-the-airstrikes-in-yemendouble-standards-for-decamping-presidents/ (accessed 14 March 2019)

³⁰ UNSC Res 2216, UN Doc S/RES/2216 (14 April 2015).

³¹ The Economist, "Who are the Houthis, the group attacking ships in the Red Sea?" (12 December 2023); at <<https://www.economist.com/the-economist-explains/2023/12/12/who-are-the-houthis-the-group-attacking-ships-in-the-red-sea>>

³² See at <<https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse5accord>>

³³ The International Criminal Tribunal for the Former Yugoslavia (ICTY) has stated that a non-international armed conflict exists when there is 'protracted armed violence between government authorities and organized armed groups or between such groups within a State' ICTY, The Prosecutor v Dusko Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, §70; ICTY, The Prosecutor v Dusko Tadić, Trial Chamber, Judgment, IT-94-1-T, 7 May 1997, §562.

³⁴ See also relevant analysis at RULAC (n 32).

government is supported by an international coalition led by Saudi Arabia. Yemen has, however, consented to the intervention by foreign forces through the request made by President Hadi, and it is therefore submitted that this does not affect the classification of the conflict as a NIAC.³⁵

Interestingly, the Saudi-led coalition had claimed that, prior to Hadi's invitation, Iran had been cultivating a relationship with the Houthis and providing them with political and military support. Nevertheless, the extent of the alleged Iranian interference remains uncertain, at least at the time the Saudi-led coalition commenced its intervention in March 2015.³⁶

In any event, if there are proofs of such material support by Iran to Houthis, 'a fragmentation theory is applied: fighting between the intervening state's [Iran] and the territorial state's forces [Yemeni Government] is an international armed conflict, while there continues to be a non-international armed conflict between the territorial state's forces and the armed group', provided that the requisite criteria of intensity and organization are fulfilled, as they are here.³⁷ When there are several states intervening on different sides (Saudi-led coalition in support of Hadi and Iran per the Houthis), each conflict has to be assessed individually and qualification will depend on whether it is two states or a state and a non-state armed group that are opposed.

Such assessment is beyond the scope of this *Insight*; in any event, this does not change the legal paradigm in respect of the clashes between Houthis, whether they are supported by Iran or not, and Israel, since there is no armed conflict between the armed Houthi groups and the armed forces of Israel under international law.³⁸ On the other hand, the legal regime applicable between the Houthis and other military forces involved in the recent maritime incidents, such as the US, may include rules governing NIACs, to the extent that the US is considered a party to the NIAC.³⁹ Evidently, in view of the recent strikes (11/01/2023) by the US and the UK against Houthi targets in Yemen,⁴⁰ it could reasonably be argued that there is also an 'internationalized' NIAC between the Houthis and the US and the UK.

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³⁵When one or more foreign states fight alongside the armed forces of the territorial state against one or more armed groups with the consent or upon invitation of the territorial state, the situation is still classified as a non-international armed conflict. For an opposing view, see G. Aldrich, 'The Laws of War on Land' (2000) 94 *American Journal of International Law* 42, 62–3.

³⁶ On 26 January 2018, the Panel of Experts on Yemen determined that Iran was in non-compliance with paragraph 14 of Security Council Resolution 2216 'in that it failed to take the necessary measures to prevent the direct or indirect supply, sale or transfer of ... ballistic missiles, field storage tanks ... and ...unmanned aerial vehicles to the then Houthi-Saleh alliance', letter dated 26 January 2018 from the Panel of Experts on Yemen mandated by Security Council resolution 2342 (2017) addressed to the President of the Security Council, UN Doc S/2018/68 (26 January 2018) 2.

³⁷ See D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press, 2012), 36.

³⁸ See the criteria under n 33.

³⁹ As stated by the RULAC, '[s]ince 2009, the United States has conducted drone strikes against AQAP (Al-Qaeda) with the consent of the government of Yemen, which raises the question whether, in particular after 2011, they became a party to the non-international armed conflict between the Yemeni government and al-Qaeda in the Arabian Peninsula. The United States claimed that their drone strikes took place to pursue their own counter-terrorism efforts, targeting high level operatives, and that the United States 'was not working with the Yemeni government in terms of direct action or lethal action as part of that insurgency'. Yet, against the background of the insurgency in Yemen, the United States' drone strikes, and the scope of their mission more generally broadened to include wider support to the government against the insurgency by al-Qaeda in the Arabian Peninsula Hence, the United States is considered a party to the conflict' (n 32).

⁴⁰ See at <<https://edition.cnn.com/2024/01/11/politics/us-strikes-houthis-yemen/index.html>>

The Legal Nature of the Houthis' Attacks and the States' Response Under International Law

Houthis have been engaged in different forms of attacks against shipping in the Red Sea.⁴¹ These attacks are not subject to the same classification under international law and cannot be addressed in the same manner by the target or third States. In the remainder of this Section, all potential classifications and their repercussions in respect of States' responses will be addressed in turn:

Houthis have been engaged in different forms of attacks against shipping in the Red Sea. These attacks are not subject to the same classification under international law and cannot be addressed in the same manner by the target or third States.

a) Piracy

The first potential classification of such attacks under international law is inevitably piracy. Indeed, as reported, there has been various incidents, namely the hijacking of the *Galaxy Leader* on 19 November 2023 after it was attacked by Houthi helicopters,⁴² the boarding of *M/V Central Park* on 26 November 2023,⁴³ and the attack on the *Maersk Hangzhou* on 30 December 2023 by small boats,⁴⁴ which resemble the traditional crime of piracy under international law.

The crime of piracy is regulated both by the UN Convention on the Law of the Sea (UNCLOS)⁴⁵ and customary international law.⁴⁶ It is considered one of the oldest crimes in international law and it was the first crime that was subjected to the universal jurisdiction of all States pursuant to both treaty and customary law.⁴⁷

As per the definition, UNCLOS and customary law define piracy broadly as any illegal act of violence or depredation committed for private ends by one ship against another ship in all maritime areas beyond the territorial sea.⁴⁸ In the definition of piracy, the following stand out as key elements: i) the location of the crime: international waters. i.e. waters beyond the territorial sea; ii) the "two ships requirement", and iii) the "private ends" requirement.

In applying the said criteria to the above attacks by Houthis against foreign ships (both private or public ships, including warships) in the Red Sea, it is readily apparent that illegal

⁴¹ See n. 7-12.

⁴² See n 11.

⁴³ See n 12.

⁴⁴ See n 10.

⁴⁵ UN Convention on the Law of the Sea (Montego Bay, 10 December 1982, came in force 16 November 1994) 1833 UNTS 3, (hereinafter referred to as UNCLOS).

⁴⁶ On piracy in general, see inter alia A. Petrig, 'Piracy' in D. Rothwell et al (eds) (n 6), 843-865; A Rubin, *The Law of Piracy* (2nd edn Transnational Publishers New York 1998) and on piracy off the coast of Somalia R. Geiss and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counterpiracy Operations in Somali and the Gulf of Aden* (Oxford University Press, 2011) and E. Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in A. Abass (ed.), *Protecting Human Security in Africa* (Oxford: Oxford University Press, 2010), pp. 122-154.

⁴⁷ See ICJ, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, Separate Opinion of President Guillaume, ICJ Reports (2002), 37, 38, para. 5 and Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports (2002), 81, para. 61. See also A Van Zwanenberg, 'Interference with Ships on the High Seas' (1961) 10 *International & Comparative Law Quarterly* 785, 805.

⁴⁸ Article 101 UNCLOS defines piracy as follows: 'Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).' See further discussion in D. Guilfoyle, 'Article 101' in A. Proelss (ed.), *UN Convention on the Law of the Sea: Commentary* (Beck/Hart. 2016), 737, and id, 'Piracy and Terrorism', in P. Koutrakos and A. Skordas (eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart, 2013), 33– 52.

...illegal acts of violence such as those committed against the *M/V Central Park* and *Maersk Hangzhou*, which occurred beyond the territorial sea and involved two vessels, i.e., the Houthis' vessels and the vessel under piracy attack, could qualify as piracy under Article 101 UNCLOS and customary international law.

acts of violence such as those committed against the *M/V Central Park* and *Maersk Hangzhou*, which occurred beyond the territorial sea and involved two vessels, i.e., the Houthis' vessels and the vessel under piracy attack, could qualify as piracy under Article 101 UNCLOS and customary international law. A similar conclusion could be drawn in respect of attacks that have been committed by Houthi helicopters against *M/V Galaxy Leader*, since the definition of piracy under UNCLOS includes acts of violence committed by 'the crew or the passengers of a private ship or a *private aircraft*'.⁴⁹

It is questionable whether attacks committed by 'uncrewed surface vessel'⁵⁰ or 'uncrewed aircrafts' ('drones') can also be designated as piracy. On its face, Article 101 UNCLOS refers to 'any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft', which makes it hard for attacks of this sort by uncrewed ships or aircrafts to qualify as piracy. However, arguably, there is room for an evolutive interpretation of this provision, first in respect of the terms 'ship' or 'aircraft' so as to include 'uncrewed vessels', like the one which engaged in an attack against international shipping lanes on 4 January 2024,⁵¹ and drones; and second, in respect of the term 'crew or passengers' so as to include persons remotely involved in the operation of the uncrewed asset.

In discussing this issue, Petrig convincingly contends that 'a purpose and object-based interpretation suggests a narrow reading'.⁵² In her words, 'the definition of piracy in Article 101 LOSC [UNCLOS] has various limitative (and thus protective) functions: it aims to clearly delimit the conduct for which a person can be prosecuted and punished for the offence of piracy and to precisely define the scope of the enforcement and adjudicative jurisdiction. If the definition of piracy is construed too broadly, it cannot fulfil its limitative function and thus fails to live up to its object and purpose, which is to ensure the rule of law at sea concretely so as to 'protect liberty interests by defining and deterring 'excessive zeal' in the suppression of piracy'.⁵³ Accordingly, excluding unlawful acts of violence by uncrewed vessels or aircrafts from the scope of the definition of piracy would seem to be on a safer legal footing. In the context of the present enquiry, this would mean that only attacks by Houthi-crewed vessels or aircrafts, and not by uncrewed assets, could qualify as piracy under international law.

In any event, even in relation to the attacks committed by Houthi vessels and aircraft against other vessels beyond the territorial sea, there is another requirement that must be met, albeit one that is admittedly called into question in the present context: i.e., that acts must be committed for 'private ends', as opposed to 'public ends'.⁵⁴ In more detail, the concept of 'private ends' may not necessarily denote the classic element of *animus furandi*, i.e., the intention to plunder, which is no longer considered as *sine qua non*,⁵⁵ though, arguably, it still excludes acts motivated purely by politics.⁵⁶ According to the Harvard Research Draft Convention on Piracy, '[it] excludes from its definition of piracy all case of wrongful attacks on person or property for political ends, whether they are made

⁴⁹ Ibid (emphasis added).

⁵⁰ See n 9.

⁵¹ Ibid.

⁵² A. Petrig, 'The Commission of Maritime Crimes with Unmanned Systems: An Interpretative Challenge for the United Nations Convention on the Law of the Sea', in M. Evans and S. Galani (eds), *Maritime Security and the Law of the Sea: Help or Hindrance?* (Elgar 2020), 104, 128.

⁵³ Ibid, 129.

⁵⁴ See in this regard S Davidson, 'International Law and the Suppression of Maritime Violence', in R Burchill et al (eds), *International Conflict and Security Law* (Cambridge: Cambridge University Press, 2005) 265, 271.

⁵⁵ See the Commentary of the International Law Commission to Draft Article 39, reprinted in YbILC (1956-II) 282.

⁵⁶ For relevant arguments per and contra this view see, inter alia, B Bornick, 'Bounty Hunters and Pirates: Filling in the Gaps of the 1982 UNCLOS' 17 *Florida Journal of International Law* (2005) 259; T Garmon, 'International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th' 27 *Tulane MLJ* (2002) 257

on behalf of states or of recognized belligerent organizations or of unrecognised revolutionary bands'.⁵⁷

Historically, the requirement that an act of piracy had to be committed for 'private ends' had its origin in the distinction between piracy and privateering.⁵⁸ The Declaration of Paris abolished privateering in 1856,⁵⁹ but the distinction between 'private' and 'public ends' was maintained because courts and states wanted to differentiate between piracy and acts of maritime depredation carried out by insurgents or rebels.⁶⁰ Consequently, as stated, 'it is regretted that the League of Nations Committee and its successors chose this formulation and not the one that stems most logically from the pirate-privateer distinction, that is to say piracy is an act undertaken without due authority. After all, the insurgents that customary law and in turn the Committee and then the Group sought to protect were bodies that had won some form of recognition or whose acts would have been legal if they had been recognized, and who directed their depredations solely against the vessels of the country whose government they sought to overthrow'.⁶¹

...the attacks by Houthis against vessels not flagged to the States with which they are opposing parties in the ongoing NIAC.

In accord with this argument, Guilfoyle writes that the words 'for private ends' ... were originally included to acknowledge the historic exception for civil-war insurgencies who attacked only the vessels of the government they sought to overthrow'.⁶²

Extrapolating from this, the present author has argued elsewhere as follows: 'there will be cases of maritime violence, where, despite the political ends involved, the lack of 'a due authority' and 'legitimate targets' will be decisive for the designation of the acts concerned as *acta pirata* under customary law. For example, any such act by a recognised belligerent or rebel group against vessels of third states and not of the state towards which they are in revolt, regardless of its motive, would not fall within the 'political ends' exception and thus if the other requirements of Article 101 of UNCLOS exist, it could be considered piracy. Accordingly, the words 'for private ends' must be construed broadly, and all acts of violence lacking 'due authority' and legitimacy, according to international law, are acts undertaken 'for private ends'.⁶³

In light of the above, it is submitted that the attacks by Houthis against vessels *not* flagged to the States with which they are opposing parties in the ongoing NIAC, or against vessels that are not carrying contraband to the latter States,⁶⁴ are committed for 'private ends' and could thus be considered acts of piracy under international law. Such acts include those against Israeli-flagged or Israeli-owned vessels, since there is no armed conflict between the Houthis and Israel. On the other hand, in my view, all attacks committed

⁵⁷ Harvard Research in International Law, Draft Convention on Piracy, reprinted in 26 AJIL Supp (1932) 743, 786. On the historical debate over the belligerent naval rights of insurgencies see L Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002) Ch 1

⁵⁸ On privateering see D Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail* (Anapolis: Naval Institute Press, 1999) and F Stark, *The Abolition of Privateering and the Declaration of Paris* (New York: Columbia University Press, 1897).

⁵⁹ See Declaration Respecting Maritime Law, 16 April 1856, published in 1 AJIL (Supp 1907) 89. The Paris Declaration is given an exhaustive treatment in F Piggot, *The Declaration of Paris 1856* (London, 1919).

⁶⁰ M Murphy, 'Piracy and UNCLOS' in P Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism* (London: Routledge, 2007) 155, 160

⁶¹ *Ibid*, 160 (emphasis added).

⁶² D Guilfoyle, 'Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts' 57 ICLQ (2008) 690, 693. See also Harvard Draft (n 56), 798 and 857.

⁶³ E. Papastavridis, *Interception of Vessels on the High Seas* (Hart, 2014), 165. See also Colombos: 'if a warship rebels and confines her attentions to solely political acts done for political ends against the State towards which she is in revolt, principle and practice require such ships to be left unmolested by the ships of war of other States'; C Colombos, *International Law of the Sea* (London: Longmans, 1967), 450. See also, inter alia, the *Huascar* case (1877) and *Montezuma* case (1887) in WP Cobbett, *Leading Cases on International Law* (London: Sweet & Maxwell, 1922) 299, 301.

⁶⁴ 'Contraband' is any item that may be of use to the enemy in waging war and which is ultimately destined for the enemy. In principle, any goods can amount to contraband, unless they are goods serving a purely humanitarian function for victims of armed conflict', see The Newport Manual on the Law of Naval Warfare (2023), 9.6.2.1 (hereinafter Newport Manual).

...all attacks committed against vessels flagged to one of the parties to the NIAC, including the Government of Yemen, Saudi Arabia, the US or UK, are not committed for 'private ends' and thus do not amount to piracy under international law. The legal framework governing such attacks is the international law applicable to NIAC at sea.

against vessels flagged to one of the parties to the NIAC, including the Government of Yemen, Saudi Arabia, the US or UK, are not committed for 'private ends' and thus do not amount to piracy under international law.⁶⁵ The legal framework governing such attacks is the international law applicable to NIAC at sea.⁶⁶

In conclusion, under international law, acts of piracy would be restricted to those that are committed by crewed Houthi assets (ships or aircrafts) beyond the territorial sea and directed against other ships, including warships, of States that do not belong to parties opposed to the Houthis in the current NIAC, i.e., that are committed for private ends. All other incidents could be qualified based on whether they are directed against parties opposing the Houthis ('b'), or against third States' vessels, in which case they would fit neatly under the definition of SUA offences ('c').

In the event of attacks that qualify as acts of piracy, as notes above, international law provides for the universal prescriptive and enforcement jurisdiction of all States.⁶⁷ Indeed, it has been customarily recognized and codified under UNCLOS that those on board a pirate vessel may be arrested by the seizing vessel and may be subsequently tried by any State before whose courts they are brought and be subject to penalties imposed by its laws (Article 105 UNCLOS).⁶⁸ Universal jurisdiction over pirates applies to both civil and criminal proceedings. It follows that under international law, all States may enact legislation concerning the crime of piracy and bring before their national courts and try the suspected pirates without the need to establish any other jurisdictional link with the pirate act.⁶⁹

Also, indubitably, according to Article 110 of UNCLOS, all warships and other duly authorized vessels are entitled to board and search vessels suspected of being engaged in such activity. The only requirement that Article 110 of UNCLOS sets out is that there are "reasonable grounds to suspect" that the vessel has been engaged in the proscribed activity, namely that the vessel is suspected of being engaged in piracy *jure gentium*, as it is defined in Article 101.⁷⁰

In light of the foregoing, all States, including the States participating in *Operation Prosperity Guardian*, are entitled to take all necessary measures to protect not only ships of their own nationality, but all ships that are threatened by, or subject to, piracy attacks by Houthis in the region. Also, significantly, they are entitled to take further enforcement measures against Houthi pirates, including arresting and prosecuting them according to their national legislation.

It must be noted that any such counter-piracy operation must adhere to the requirements under general international law concerning enforcement jurisdiction. It has been consistently held by international courts and tribunals that the exercise of enforcement powers by any State in the maritime context is also governed by certain rules and principles of general international law, in particular the principle of reasonableness,

⁶⁵ For a different view see Pedrozo (n 6), pp. 59-60.

⁶⁶ See *infra* (b).

⁶⁷ See n 46. It must be noted that when reference is made to "jurisdiction" in international law, as here to "criminal jurisdiction", a distinction must be drawn between mainly i) prescriptive or legislative jurisdiction, i.e., the power to make laws, decisions, or rules, and ii) enforcement jurisdiction, that is the power to take executive action in pursuance of or consequent to the making of decisions or rules. See *inter alia* J. Crawford (ed.), *Brownlie's Principles of Public International Law* (9th edn, Oxford: Oxford University Press, 2015), 440.

⁶⁸ Article 105 UNCLOS sets forth that 'On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board'.

⁶⁹ See D Guilfoyle, 'Combating Piracy: Executive Measures on the High Seas' (2011) 53 *Japanese Yearbook of International Law* 149.

⁷⁰ See E. Papastavridis (n 63), 166-168.

...all States, including the States participating in Operation Prosperity Guardian, are entitled to take all necessary measures to protect not only ships of their own nationality, but all ships that are threatened by, or subject to, piracy attacks by Houthis in the region.

including the principles of necessity and proportionality.⁷¹ Further, States are bound by the rules governing the use of force at sea, as framed by ITLOS in the *M/V Saiga II* (1999) and confirmed in the *Virginia G case* (2014). According to the Tribunal, '[a]lthough 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'.⁷² Finally, any enforcement operation at sea shall ensure the safety of navigation and the protection of the marine environment as provided for under Article 225 UNCLOS.⁷³

Having concluded on which acts committed by Houthis could qualify as piracy, and what would be the permissible response of States in this regard, the next question would be how to qualify attacks that are not piracy under international law. In my view, such attacks would either be acts subject to the law governing NIACs ('b'), or acts falling under the SUA Convention ('c'). However, it is the opinion of this author that claims of self-defence ('d') are misplaced here.

b) Acts related to Non-International Armed Conflict at Sea

While there is an abundance of literature and scholarly opinions considering the developing law of NIAC, there is hardly any on the possible developments in the law of naval warfare during NIACs. With respect to the applicability of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (SRM) to NIAC, the Manual points out that: 'Although the provisions of this Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated... in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations.'⁷⁴ Which is to say the Manual is clearly well disposed towards its possible application to the law of armed conflict at sea.

A position expressly in favour of the existence of rules governing NIAC at sea has also recently been taken by the Newport Manual on Naval Warfare at Sea.⁷⁵ As stated, 'there is no indication that the law governing NIACs ceases to apply if the hostilities extend to the sea. Accordingly, in their relations, the parties to a NIAC will be bound by the principles and rules on the conduct of hostilities and on the protection of victims of armed conflict. Customary LOAC [law of armed conflict] rules that are applicable in all armed conflicts

⁷¹ See inter alia PCA, *Duzgit Integrity Arbitration* (Malta v. São Tomé and Príncipe), Case No 2014-17, Award of 5 September 2016, para 209 and PCA, *Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits of 14 August 2015, PCA, para. 198.

⁷² *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea) Judgment*, ITLOS Reports 1999, p. 10, para. 155. See also ITLOS, The *M/Virginia G case* (Panama v Guinea-Bissau) List of Cases: No 19, Judgment of 14 April 2014, paras 359-60. On the issue of use of force at sea see inter alia K. Neri, 'The Use of Force by Military Vessel Protection Detachments' (2012) 51 *Revue de droit militaire et de droit de la guerre* 73.

⁷³ 'The Tribunal observes that, although article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application, as it states that "[i]n the exercise under this Convention of their powers of enforcement against foreign vessels", States shall observe the requirement of this article, namely: not to endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk. It follows from article 225 that all these requirements are applicable to enforcement activities undertaken pursuant to 73, paragraph 1, of the Convention...'; *Virginia G case*, *ibid*, para 372.

⁷⁴ L. Doswald-Beck, *San Remo Manual on the law applicability to international armed conflicts at sea* (1995), 73, commentary on scope of application.

⁷⁵ Newport Manual (n 64), Chapter 12,

(such as the principle of distinction) will also apply in NIACs at sea'.⁷⁶ Indeed, this is supported by sufficient State practice,⁷⁷ including attacks by Houthis in Yemen.⁷⁸

As for the threshold for the application of the law of NIAC at sea, the threshold for the existence of a NIAC must be met. The threshold is no different from that applied in the land domain and should meet, broadly speaking, the criteria of protracted armed confrontations occurring between government forces and an organized armed group, that also rises to the level of intensity and organization at which it can be considered a NIAC situation. Based on the relevant State practice, the most common scenario would be that of one party (usually the State party) having brought naval assets to deal with a conflict that is considered a NIAC on land from the sea also. In other words, the NIAC situation on land is taken out to sea and applied to the naval means directed at the conflict. This is patently the case with the Houthis and State parties to the NIAC in Yemen, including the US.

Having ascertained that the laws governing NIAC at sea are applicable to the current NIAC between the Houthis and, amongst others, the US, the next question is what rules do apply and whether they justify recent incidents. In replying to this, the following remarks are in order:

First, in respect of the geographical scope of NIAC at sea, it is true that, according to the wording of Common Article 3 of the Geneva Conventions,⁷⁹ a NIAC must take place within the territory of a state. Insofar as hostilities at sea take place within that State's territorial waters, this criterion does not pose any problems. However, if the hostilities take place in international waters, i.e. outside the territorial waters of any state, the applicability of Common Article 3 may be rendered unclear.⁸⁰ Still, in State practice, the requirement for a NIAC to be confined to the territory of a given State has lost significance over the years. For example, the armed conflict in 2006 between Hezbollah and Israel was definitely not confined to the territory of either Israel or Lebanon, but given the status of the parties, it was arguably a NIAC. Moreover, in comparison with Common Article 3, Additional Protocol II (AP II) does not distinguish between armed conflicts in land and at sea armed conflict at sea.⁸¹ Hence, it is safe to conclude that, in the context of the present enquiry, laws governing NIAC may apply beyond the territorial sea of Yemen.

Second, in respect of targeting, as stated by the Newport Manual, 'it is generally recognized that the principle of distinction as found in the law of armed LOAC applicable in IAC also applies in situations of NIAC as customary international law. Accordingly, the parties to the conflict shall at all times distinguish between the civilian population and members of State forces or non-State organized armed groups and between civilian and

⁷⁶ Ibid, 240.

⁷⁷ Heintschel von Heinegg has listed practice he found on the subject of this paper. He lists six examples: the American Civil war (1860-1865), the Spanish Civil War (1936-1939), Algeria (1956), Sri Lanka (1983-2009), Gaza (since 2008) and Libya (2011); Heintschel von Heinegg, *Methods and Means of Naval Warfare in Non-International Armed Conflicts*, 88 INTERNATIONAL LAW STUDIES 211 (2012).

⁷⁸ See Newport Manual (n 64), 243.

⁷⁹ See inter alia International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <<https://www.refworld.org/docid/3ae6b36c8.html>>

⁸⁰ Interestingly, however, the new commentary to CA3 argues that alongside traditional NIACs within the territory of a State, CA3 can also be considered to be applicable in NIACs that are not confined to the territory of a State; see ICRC, *Commentary On The First Geneva Convention: Convention (I) For The Amelioration Of The Condition Of The Wounded And Sick In The Armed Forces In The Field*, 471ff. (2016), at <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/2016?activeTab=undefined#_Toc465169872>

⁸¹ See International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, available at: <<https://www.refworld.org/docid/3ae6b37f40.html>>

US warships on the high seas, as well as missile systems and other military equipment belonging to Houthis in Yemen, are lawful targets under the rules applicable to NIAC at sea and are therefore liable to attack.

military objectives.⁸² The definition of military objectives applies in situations of NIAC as customary law, according to which military objectives are those objects that “by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”⁸³ Military objectives would clearly be the warships and military aircraft of the State party to the NIAC. In addition, as put forth inter alia by the Newport Manual: ‘the vessels and aircraft in possession of a non-State organized armed group are liable to be attacked even if they are not, at the time, used for military purposes; [as are] command, control, and communication equipment of the regular armed forces and of the non-State organized armed group; and all other military equipment’.⁸⁴

It follows that US warships on the high seas, as well as missile systems and other military equipment belonging to Houthis in Yemen,⁸⁵ are lawful targets under the rules applicable to NIAC at sea and are therefore liable to attack. Insofar as foreign ships are concerned, ‘it is an unsettled issue whether and to what extent foreign vessels outside the territorial sea qualify as lawful military objectives’.⁸⁶ It must be noted that during the Spanish Civil War, attacks on foreign-flagged vessels and aircraft were assimilated to acts of piracy by the Nyon Arrangement.⁸⁷ Nonetheless, it could be contended that vessels flying the flag of a foreign State will qualify as lawful targets if they support the party to the conflict by transporting military equipment destined to that enemy.⁸⁸

In any event, in the present context, none of the foreign-flagged vessels that have been attacked so far were transporting military equipment to the enemy, be this the Government of Yemen and its allies, and they have thus fallen short of qualifying as lawful targets under the laws governing NIAC. As stated above (under ‘a’), if these attacks were conducted by boats beyond the territorial sea, they would qualify as piracy under international law.

In conclusion, it is submitted that attacks that have been committed on the one hand by Houthis against warships of the US and its allies,⁸⁹ and on the other by the latter States

⁸² Newport Manual (n 64), 246.

⁸³ See Article 52 (2) of the International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 <available at: <https://www.refworld.org/docid/3ae6b36b4.htm>>

⁸⁴ Newport Manual (n 64), 247.

⁸⁵ For example, as reported on 23 January 2024, ‘As part of ongoing international efforts to respond to increased Houthi destabilizing and illegal activities in the region, on Jan. 22 at approximately 11:59 p.m. (Sanaa / Yemen time), U.S. Central Command forces alongside UK Armed Forces, and with the support from Australia, Bahrain, Canada, and the Netherlands, conducted strikes on 8 Houthi targets in Iranian-backed Houthi terrorist-controlled areas of Yemen. The targets included missile systems and launchers, air defense systems, radars, and deeply buried weapons storage facilities’; CENTCOM, U.S. Forces, Allies Conduct Joint Strikes in Yemen (23/01/2024); at <<https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/3652569/us-forces-allies-conduct-joint-strikes-in-yemen/>>

⁸⁶ Newport Manual (n 64), 248.

⁸⁷ Nyon Agreement, Sept. 14, 1937, 181 L.N.T.S. 137; Agreement Supplementary to the Nyon Arrangement, Sept. 17, 1937, 181 L.N.T.S. 151. In the Nyon Agreement, the nine States parties condemned attacks by “submarines against merchant ships not belonging to either of the conflicting Spanish parties” as “violations of international law” (i.e., of the London Protocol of 1936).

⁸⁸ This is the argument of the Newport Manual; however, remarkably and controversially in my view, it is limited to foreign vessels supporting the non-State party to the conflict and not the State party; see Newport Manual (n 64), 248.

⁸⁹ For example, as was reported, a French guided-missile frigate on patrol in the Red Sea was targeted by two drones launched from Houthi-controlled Yemen. FS Languedoc (653) fired Aster 15 missiles in self-defense to protect the ship and its crew, successfully downing the two drones in international airspace’; Pedrozo (n 6), 53. Also, it was reported that a ‘British warship shot down seven drones launched by Iranian-backed Houthi fighters in the Red Sea in an operation with US forces to repel the largest drone and missile attack to date. Grant Shapps, the defence secretary, said the drones had been heading towards HMS Diamond, a Type 45 destroyer deployed by the UK to help protect shipping in the region, as well as commercial vessels on Tuesday night’ (10/01/2024); at <<https://news.sky.com/story/largest-houthi-attack-to-date-in-red-sea-repelled-by-hms-diamond-grant-shapps-says-13045115>>

and their allies against Houthi bases in Yemen, are lawful under the laws governing NIAC (on both land and sea).

That said, it is true that neither the US nor the UK are officially invoking NIAC as the applicable legal framework governing their attacks on the Houthis; rather, they claim to be acting in self-defence.⁹⁰ In fact, States often prefer not to invoke the law of naval warfare as the legal basis for their operation for various reasons;⁹¹ here, these reasons include not legitimizing the Houthi attacks on, for example, US or UK warships. This does not mean that these operations are not subject to the law of armed conflict at sea. As this author has claimed elsewhere,⁹² the invocation of self-defence and, generally, the *jus ad bellum* (the laws governing the recourse to force under international law) is not decisive as to whether the same conduct could also be subject to laws governing armed conflict (*jus in bello*) at sea, since these categories of law have a distinct content.

c) Acts of Maritime Terrorism or SUA Offences

The final category in which Houthi attacks on international shipping could be included, according to international law, is maritime terrorism. So far, this *Insight* has argued, first, that attacks by crewed Houthi boats or aircraft against foreign vessels not belonging to the opposing parties in the ongoing ‘internationalized’ NIAC may qualify as piracy under international law, and second, that Houthi attacks launched by any means against military objectives, such as US or UK warships, fall under the scope of the law of armed conflict at sea. But what about attacks on non-warring parties’ vessels that are committed either by missiles or non-crewed assets, like drones? Obviously, they are neither piracy nor acts justified by NIAC at sea.

It is submitted that these acts fall under the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (‘SUA Convention’).⁹³ The SUA Convention was concluded in the aftermath of the hijacking of the *Achille Lauro*,⁹⁴ and aimed to regulate acts that threatened maritime navigation, but fell short of qualifying as piracy under international law. Indeed, as stated by the IMO, ‘the main purpose of the Convention is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.’⁹⁵ This historical background to the SUA Convention has often resulted in it being perceived as a “counterterrorism” treaty. While the preamble of the SUA Convention does expressly condemn “international terrorism” alongside “unlawful acts against the safety of maritime navigation”, Article 3 of the treaty defines the treaty’s targeted offence in terms of acts that “endanger the safe navigation of a ship”.

...what about attacks on non-warring parties’ vessels that are committed either by missiles or non-crewed assets, like drones? Obviously, they are neither piracy nor acts justified by NIAC at sea. It is submitted that these acts fall under the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (‘SUA Convention’).

⁹⁰ For example, ‘the UK Government said these the strikes are “limited, necessary and proportionate in self-defence”. Speaking in the Commons, the Prime Minister, Rishi Sunak, said the UK had acted “in self-defence” following Houthi attacks on Royal Navy ships, and in a manner “consistent with the UN charter, and to uphold freedom of navigation”. He said the UK successfully destroyed the targeted sites and had not seen evidence of civilian casualties “which we took great care to avoid”; House of Commons, UK and international response to Houthis in the Red Sea 2024, Research Briefing (23/01/2024); <<https://researchbriefings.files.parliament.uk/documents/CBP-9930/CBP-9930.pdf>>

⁹¹ See discussion in Papastavridis (n 63), 85-97.

⁹² See *ibid*, 96.

⁹³ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), entered into force on March 1, 1992 (hereinafter: SUA Convention’). As of 23 January 2024, the SUA Convention has 166 contracting parties; see at <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/StatusOfTreaties.pdf>

⁹⁴ See *inter alia* C. C. Joyner, ‘Suppression of Terrorism on the High Seas: the 1988 IMO Convention on the Safety of Maritime Navigation’ (1989) 19 *Israel Yearbook on Human Rights* 341.

⁹⁵ See at <<https://www.imo.org/en/About/Conventions/Pages/SUA-Treaties.aspx>>

Under Article 3 of the SUA Convention,

‘1. any person commits an offence if that person unlawfully and intentionally: a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship’...

2. Any person also commits an offence if that person: a) attempts to commit any of the offences set forth in paragraph 1; or b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence...’.⁹⁶

Nevertheless, it is interesting that the UN SC Resolution 2722 (2024), while falling short of authorizing Member States to take forcible action against the Houthis or to interdict suspected vessels on the high seas, does still affirm [...]: the right of Member States, in accordance with international law, to defend their vessels from attacks.

It is readily apparent that many actual or attempted attacks against foreign shipping in the Red Sea either by Houthi missiles or uncrewed assets fall under the scope of Article 3 of the SUA Convention.

Significantly, under Article 4 (1) ‘this Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States’.⁹⁷ This means that the SUA Convention also applies in respect of attacks committed against foreign vessels within the territorial sea of Yemen.

Pursuant to Article 6 (1) SUA Convention, ‘each State party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 when the offence is committed: a) against or on board a ship flying the flag of the State at the time the offence is committed; or b) in the territory of that State, including its territorial sea; or c) by a national of that State’.⁹⁸ Accordingly, Houthi attacks on foreign ships would be subject, first, to the jurisdiction of Yemen, the latter being a party to the SUA Convention, and second, to that of the flag States of the vessels the Houthis have attacked or attempted to attack. Notably, the SUA Convention provides for the *aut dedere aut judicare* (‘either extradite or prosecute’) principle under international law.⁹⁹

The SUA Convention does not, however, justify any enforcement measure as such against such acts of ‘maritime terrorism’ at sea.¹⁰⁰ Nevertheless, it is interesting that the UN SC Resolution 2722 (2024), while falling short of authorizing Member States to take forcible action against the Houthis or to interdict suspected vessels on the high seas,¹⁰¹ does still affirm that “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’.¹⁰²

⁹⁶ Article 3 SUA Convention (n 93).

⁹⁷ Article 4 (1), *ibid.*

⁹⁸ Article 6 (1), *ibid.*

⁹⁹ ‘Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article’; Article 6 (4), *ibid.*

¹⁰⁰ See on maritime terrorism and the enforcement measures of States E. Papastavridis, ‘Terrorism and Maritime Security’ in B. Saul (ed.), *Handbook on Terrorism and International Law* (Edward Elgar Publishers, 2014), 74-99.

¹⁰¹ See e.g. SC Res 2240/2015 on Libya, which authorized the interdiction of vessels on the high seas suspected of being engaged in the smuggling of migrants off the coast of Libya.

¹⁰² SC Res 2722 (n 16), para 3 (emphasis added).

This 'right to defend' 'in accordance with international law' can only mean that flag States are entitled to take preventive measures against Houthi attacks, either by deploying armed guards or vessel protection detachments on board their vessels, as they do in defence against piracy off Somalia, or by escorting the vessels concerned by military assets.

This 'right to defend' 'in accordance with international law' can only mean that flag States are entitled to take preventive measures against Houthi attacks, either by deploying armed guards or vessel protection detachments on board their vessels, as they do in defence against piracy off Somalia,¹⁰³ or by escorting the vessels concerned by military assets. This is actually one of the primary objectives of *Operation Prosperity Guardian* in the region.¹⁰⁴ All these are lawful measures that flag States are entitled to take under international law subject to the principle of exclusive jurisdiction on the high seas. As Article 92 sets out, "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".¹⁰⁵

That said, as the SC Res 2272 sets out, the 'right to defend' by flag States 'in accordance with international law' applies in respect of the vessels flying their flag. The question is what about foreign vessels? Certainly, all States are entitled to take measures to repress acts of piracy against any vessels beyond the territorial sea in the region, as explained above. However, in respect of attacks against third States' vessels that do not fall within the ambit of piracy, it is questionable whether warships in the region can take such measures in respect of foreign-flagged vessels. The only possible justification, in the absence of an SC authorization under Chapter VII of the UN Charter to this effect, is that the flag States of those vessels have delegated that jurisdiction to the States participating in *Operation Prosperity Guardian*. And indeed, many States have expressed their support for the said operation, which could arguably be construed as an endorsement of the measures in question per the vessels of their nationality.

To sum up, it is submitted that some of the attacks committed by the Houthis against foreign shipping in the Red Sea which are neither acts of piracy nor acts against parties at which they are at war justified by the rules on NIAC at sea, could qualify as acts against the safety of navigation falling within the ambit of the SUA Convention. In response to these acts, the latter Convention does not provide for enforcement action at sea; however, as acknowledged by the recent SC Resolution, all States are entitled to protect their flagged vessels on the high seas in accordance with international law, an entitlement which can be delegated to third States operating in the region.

d) Claims of self-defence

A final point that merits discussion is the arguments put forward by the US and the UK that their acts against the Houthis, both in Yemen and at sea, can be justified by the right of self-defence.¹⁰⁶ As explicated above, it is the view of this author that many acts that are designated as 'self-defence' by the respective States are, as a matter of law, actually attacks against military objectives of the non-State party to the current NIAC in Yemen. However, if the States concerned were to recognize the application of NIAC at sea, they should equally admit that the Houthis are entitled to launch attacks against their warships and military aircraft. 'Self-defence' would seem therefore to be a more convenient justification.

¹⁰³ See inter alia G.M. Farnelli, *Vessel Protection Detachments and Maritime Security: An Evaluation of Four Years of Italian Practice* (2015) 1 *Maritime Safety and Security Law Journal* 16

¹⁰⁴ See n 1.

¹⁰⁵ See Article 92 (1) UNCLOS (n 45), and D. Guilfoyle, 'Article 92', in A. Proelss (ed.), *UN Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017), 702-703. See also generally DP O'Connell, *The International Law of the Sea Vol II* (ed. IA Shearer) (1984), 796; R Jennings and A Watts, *Oppenheim's International Law*, 9th edn, 1992) 737.

¹⁰⁶ See n 21 and 22.

However, if the States concerned were to recognize the application of NIAC at sea, they should equally admit that the Houthis are entitled to launch attacks against their warships and military aircraft. 'Self-defence' would seem therefore to be a more convenient justification.

As argued by Pedrozo, reflecting the US position in this regard, 'U.S. commanders have the inherent right and obligation to exercise unit self-defence in response to a hostile act or demonstrated hostile intent. This right includes the defense of other U.S. military forces in the vicinity. When authorized by the President or Secretary of Defense, U.S. commanders may also defend designated non-U.S. military forces and/or designated foreign nationals and their property from a hostile act or demonstrated hostile intent. A hostile act is defined as an attack or other use of force against the United States, U.S. forces, or other designated persons or property (e.g., launching a missile). Hostile intent is defined as the threat of imminent use of force against the United States, U.S. forces, or other designated persons [...] When responding to a hostile act or demonstration of hostile intent, U.S. forces may use all necessary means available and all appropriate action to respond decisively to the hostile act or hostile intent'.¹⁰⁷

According to Pedrozo, the US is thus entitled to exercise 'unit self-defence' to deter not only armed attacks against their own warship, but also against foreign private vessels in the vicinity of that warship, including in such warning zones as may be created by international notice to airmen (NOTAM) in the region.¹⁰⁸ Similarly, according to the same author, 'the doctrine of collective self-defence authorizes U.S. forces to use proportionate force necessary to protect foreign-flagged vessels and foreign nationals and their property from unlawful violence (including terrorist and piratical attacks) at sea when requested by the flag State, as well as in cases where the necessity to act immediately to save human life does not allow time to obtain flag State consent'.¹⁰⁹

It is beyond the scope of this *Insight* to dwell on controversial questions of self-defence under international law, including whether the right to self-defence exists against non-state actors under international law.¹¹⁰ However, suffice it to note here that, as per Article 51 of the UN Charter, "[n]othing 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".¹¹¹ On the face of this provision, it is readily obvious that the right of self-defence is triggered by the occurrence of an 'armed attack'.¹¹²

Under Article 3 (d) of the UN General Assembly Resolution on the 'Definition of Aggression' (3314/1974),¹¹³ attacks by a State's armed forces against the land, sea or air forces, or marine and air fleets, of another State belong to the category of 'acts of aggression'. In each of these cases, an 'armed attack' is involved as well, provided that the use of force is not insignificant. 'Thus it is undisputed, for instance, that warships and combat aircraft, when assaulted by foreign forces on the high seas or in international airspace respectively, have the right to defend themselves by means of military force'.¹¹⁴ Indeed, the ICJ cautiously noted in the *Oil Platforms case* that it 'does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the "inherent right of self-defence"'.¹¹⁵

¹⁰⁷ Pedrozo (n 6), 63.

¹⁰⁸ See *ibid*, 64.

¹⁰⁹ *Ibid*, 65-66.

¹¹⁰ On this see *inter alia* A. Peters and C. Marxsen (eds), *Self-Defence against Non-State Actors: Impulses from the Max Planck Dialogues on the Law of Peace and War* (MPEPIL Research Paper Series No 2017-07) and O. Corten, *The Law against War* (Hart, 2021), Chapter 3.

¹¹¹ Article 51 of the United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. For commentary see G. Nolte, A. Randelzhofer 'Article 51', in B. Simma et al (eds), *The Charter of the UN: A Commentary* (3rd edn, OUP, 2012), 1397.

¹¹² See *inter alia* T. Ruys, *Armed Attack and Article 51 of the UN Charter* (CUP 2010).

¹¹³ UN Doc A/RES/3314(XXIX). See Broms, 'The Definition of Aggression' (1977-I) 154 *Rec des Cours* 298,

¹¹⁴ Nolte/Randelzhofer (n 111), 1412.

¹¹⁵ ICJ. *Oil Platforms* (Islamic Republic of Iran v United States of America) [2003] ICJ Rep 161, para 72.

In light of the foregoing, it is arguable that drone and missile attacks launched directly against warships may qualify as 'armed attacks'. Notably, it has been argued that several smaller attacks, none of which passes the gravity threshold in itself, can under certain circumstances cumulatively trigger the right to self-defence under Article 51.¹¹⁶

...it is arguable that drone and missile attacks launched directly against warships may qualify as 'armed attacks'.

On the other hand, 'coercive military measures against commercial vessels and aircraft outside the territory of their home State cannot be equated with attacks on that State itself and are therefore not to be regarded as 'armed attacks'.¹¹⁷ In the *Oil Platforms case*, the Court avoided addressing this issue and decided instead to deal with the specific allegation under review on evidentiary grounds, by carefully assessing the evidence regarding who fired a missile on a particular commercial vessel.¹¹⁸ It is the view of this author that attacks against a single commercial vessel and not the whole fleet of a particular State on the high seas fall short of qualifying as an 'armed attack'.

It follows that, assuming for the sake of argument that a non-state actor can launch an armed attack in terms of Article 51 UN Charter, the US and other States may act in self-defence ('unit self-defence') in response to direct attacks against their warships. On the contrary, no such right of individual or collective self-defence exists in support of attacks on commercial vessels, be they their own or foreign-flagged vessels, since sporadic attacks against commercial vessels do not qualify as armed attacks under international law. In any event, this author subscribes to the view that Article 51 of the UN Charter applies only to the inter-state use of force,¹¹⁹ and is hence of the view that none of the attacks launched by the Houthis in the Red Sea can trigger the right of self-defence under international law.¹²⁰

Concluding Thoughts

Admittedly, the ongoing crisis in the Red Sea, which at the time of writing (24/01/2024) continues unabated, entails a host of legal, political and financial challenges to the international community, as evinced, inter alia, by the adoption of UN Security Council Resolution 2272 on 10th January 2024. At the outset, this crisis, triggered by Houthi attacks against Israeli-related targets, was considered as another manifestation of the ongoing war in the Gaza strip. However, it soon evolved into an independent source of concern, due mainly to the overwhelming threat it poses to international shipping in the Red Sea and its concomitant repercussions on the world economy.

Besides the political and financial analysis which it has inevitably sparked, it is evident that there is also room for a thorough legal analysis of the ongoing crisis—an analysis this *Insight* has endeavoured to undertake. The Houthis' attacks against various targets in the Red Sea (more than 34 attacks have been recorded to date) and the robust response from States, including the launch of the US-led *Operation Prosperity Guardian*, in which it is very likely Greece will soon be an active participant, gives rise to significant questions under international law.

¹¹⁶ See T. Ruys (n 110), 169. The ICJ has not excluded such a possibility, but has also not actively pursued such a concept in ICJ *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168, para 146.

¹¹⁷ Nolte/Randelzhofer (n 111), 1413.

¹¹⁸ *Oil Platforms case* (n 115) paras 50–56; see also N Ochoa-Ruiz and E Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-Defence' (2005) 16 *EJIL* 499.

¹¹⁹ See Corten (n 110), 203.

¹²⁰ See also M. Fink, Protecting commercial shipping with strikes into Yemen: Do attacks against merchant shipping trigger the right of self-defence? *EJILTALK* (26/01/2024), <https://www.ejiltalk.org/protecting-commercial-shipping-with-strikes-into-yemen-do-attacks-against-merchant-shipping-trigger-the-right-of-self-defence/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2>

In its effort to address them, this *Insight* has arrived at the following tentative conclusions:

At the outset, this crisis, triggered by Houthi attacks against Israeli-related targets, was considered as another manifestation of the ongoing war in the Gaza strip. However, it soon evolved into an independent source of concern, due mainly to the overwhelming threat it poses to international shipping in the Red Sea and its concomitant repercussions on the world economy.

First, the proper qualification of the current situation in terms of the law of armed conflict is that of a non-international armed conflict (NIAC) between Yemen and other States, including the US, and a non-state armed group, the Houthis.

Second, the Houthi attacks, depending on the means by which and against whom they have been and will be committed, can be classified as: i) acts of piracy; ii) acts regulated by the laws governing NIACs, which, as argued, are also applicable to the sea; and iii) acts of ‘maritime terrorism’ or, more aptly, acts which fall under the scope of the 1988 SUA Convention.

Finally, States fighting Houthis and protecting the safety of navigation in the Red Sea may indeed take many measures in accordance with international law to defend the freedom of navigation therein, as acknowledged by UN Security Council Resolution 2272 (para 3). Such measures find their legal basis in the UNCLOS—e.g., under Articles 105 and 110 vis-à-vis acts of piracy, or Article 92 in respect of the protection of vessels flying their flags—, as well as the laws governing NIAC at sea, as applicable to the parties to the conflict in question. However, the legal grounds supporting claims relating to self-defence are tenuous and, in any event, not needed to justify the response against the Houthis.

This can only be a tentative analysis, however, given that the crisis is ongoing and new developments—a future UN Security Council Resolution authorizing further action, for instance, or Iran’s direct participation in hostilities—could alter the legal paradigm. In any case, it is certain that this crisis will prompt numerous scholarly studies in the future which will affirm the relevant rules of international law or seek to change them.