

THE LEGALITY OF THE DEFENSIVE MEASURES TAKEN BY THE USA AND THE UK IN RESPONSE TO THE HOUTHJI ATTACKS

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Abstract The article delves into the legality of defensive actions taken by the USA and the UK in response to the Houthji attacks in the Red Sea. Despite assertions that such actions are justified under the right to self-defence, legal ambiguities persist in international law. The authors argue that while attacks on merchant vessels by non-state actors may constitute armed aggression, clarity is lacking on whether they meet the criteria for self-defence. The USA and UK stress that attacks on their warships validate their defensive measures, framing them as necessary responses to significant threats. However, the authors contend that the principle of proportionality may have been disregarded, urging restraint in the use of force to safeguard ships while respecting Yemen's sovereignty. The article underscores the need for a nuanced approach to assessing the legality and necessity of military actions in complex conflict scenarios.

Keywordsdefensive measures,
Houthji attacks,
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self-defence,
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sovereignty,
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vessels

1 Introduction

In the last year the international community has been presented with problems relating to international armed conflict in the Israel-Hamas war and closely related to it is the crisis in Yemen and the Red Sea. The Iranian-backed Houthi movement, which controls large parts of Yemen, has been showing its support for Hamas in its fight against Israel by attacking international shipping in the Red Sea and the Gulf of Aden since November 2023. The Houthis declared that their targets were Israeli-owned, flagged or operated ships, or those which were heading to Israel. It has been reported that the Houthis have attacked vessels in the Red Sea on more than a few dozen occasions, which had destructive consequences on international shipping given the importance of the shipping route in the Red Sea disturbance of which forced international vessels to pass through the Cape of Good Hope rather than sail through the Red Sea and the Suez Canal (Talmon, 2024). On 9 January 2024, the Houthis launched their biggest attack in the Red Sea to date which included 18 drones, two anti-ship cruise missiles, and one anti-ship ballistic missile, which were intercepted by the USA and the UK (Stark, 2024). As a result, on 10 January 2024, the USA and Japan submitted a draft resolution in the United Nations Security Council (hereinafter: UNSC) condemning the Houthi attacks in the Red Sea and demanding cessation of the attacks. Despite some controversy, the Resolution 2272 (2024) was adopted and only one day later, on 11 January 2024, the USA and the UK, with the support of Australia, Bahrain, Canada and the Netherlands, launched airstrikes against the Houthi forces and positions across Yemen. Both States justified their actions with the right to self-defence codified in Article 51 of the UN Charter¹. However, there have been some controversies in the international community about their actions complying with all the conditions needed for a lawful exercise of the use of force under the rules of *jus ad bellum*.

The *jus ad bellum* is based on the *jus cogens* prohibition of the use of force codified in Article 2(4) of the UN Charter and allows recourse to force only in exceptional cases, one of which is self-defence. Therefore, in order to justify their military operation, the USA and the UK would have to demonstrate that all the conditions for the use of self-defence are met. This article will focus on four key issues relating to the crisis

¹United Nations, Charter of the United Nations, 24 October 1945, XV U.N.C.I.O. 335, amendments in 557 U.N.T.S. 143, 638 U.N.T.S. 308 and 892 U.N.T.S. 119.

in Yemen, namely the definition of ‘armed attack’ as understood in Article 51 of the UN Charter under the *ratione personae* aspect, the standard for determining the nature of the target of an ‘armed attack’ together with the *ratione materiae* aspect of ‘armed attack’ and an examination of the principle of proportionality.

2 The *ratione personae* aspect of ‘armed attack’

The first question that needs to be answered is who the author of the attack must be for it to qualify as an ‘armed attack’ for the purposes of the right to self-defence. Put in other words, can a non-state actor like the Houthis execute an ‘armed attack’. While it is undisputed that a State can use force in response to armed attacks by other States (Shaw, 2008: 1134), the question remains concerning the possibility of using self-defence against armed attacks carried out by non-state actors whose actions are not attributable to a State under the current rules of attribution provided in the ILC Draft Articles on State Responsibility and elaborated in the case law of the ICJ.

This question has sparked a lot of controversy, especially in light of the fight against terrorism. Regarding this, particular attention must be drawn to the UNSC Resolutions 1368 and 1373 (2001),² which were adopted after the 9/11 attacks. In their preambles the UNSC emphasised the inherent right of self-defence of States and recognized that terroristic attacks endanger international peace and security. Therefore, some are of the opinion that the mentioned resolutions as well as the international response to them and the USA’s military operation Enduring Freedom show the emergence of a new rule of customary law, which expands the right to self-defence (Gray, 2008: 31).³ This is further supported by the actions of various States, which justify their extraterritorial use of force against terrorists with the right to self-defence. The practice involves the operation of States as diverse as the USA when it initiated the incursion in Afghanistan after 9/11, Russia’s military operation in Georgia in 2002,⁴ Israel’s use of force in Lebanon in 2006,⁵ Turkey’s incursion into Iraq in 2008 (Ruys, 2010: 457), Columbia’s use of force in Ecuador in 2008 (Ruys,

²UN Security Council, Resolution 1368 (2001), 12 September 2001, S/RES/1368 (2001); UN Security Council, Resolution 1373 (2001), 28 September 2001, S/RES/1373 (2001).

³See also Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005, p. 168, Separate Opinion of Judge Simma, §11.

⁴UN Doc. S/2002/1012, 11 September 2002.

⁵UN Doc. S/2006/515, 12 July 2006.

2010: 486), the use of force of several States in 2015 in Syria against ISIS,⁶ India against terrorists in Pakistan in 2016 and 2019 (Burra, 2020: 118), Egypt also invoked its right to self-defence in May 2017 in the neighbouring State of Libya⁷ etc. Although the number of States resorting to or supporting such unilateral use of force is rising, States which condemn such actions should not be overlooked. While the USA's operation in 2001 was almost universally supported, all the other mentioned military operations were criticized by some States, including the operations against ISIS (Couzigou, 2017: 95; Tladi, 2022: 139-142). It can also be noted that certain States such as Russia, the USA and international organisations, such as the OAS, do not always maintain the same position and depart from their own practice (Ruys, 2010: 466).⁸ Therefore, while it can undoubtedly be said that the regime of the right to self-defence against non-state actors is changing, its scope is not yet fully crystallized.

The different views adopted in the international community can be categorized into three major categories. The first view is the most restrictive and maintains the ICJ's position in the *Nicaragua case* in which it was established that a State has a right to self-defence if the actions of non-state actors are attributable to a State under the '*effective control test*'.⁹ However, considering the aforementioned developments after the judgement, especially fight against terrorism, this narrow interpretation has been widely criticized (Green, 2009: 48).¹⁰ Furthermore, following this test in the case concerning the Houthis would lead to the conclusion that the USA and the UK did not have the right to self-defence, since there is no indication that the Houthis are acting '*on the instructions of, under the direction or control of*'¹¹ Yemen when executing their attacks.

⁶UN Doc. S/2014/695, 23 September 2014 (USA); UN Doc. S/2014/851, 25 November 2015 (UK); UN Doc. S/2015/745, 8 September 2015 (France); UN Doc. S/2016/523, 9 June 2016 (Belgium); UN Doc. S/2015/946, 10 December 2015 (Germany); UN Doc. S/2015/221, 31 March 2015 (Canada); UN Doc. S/2015/693, 9 September 2015 (Australia).

⁷UN Doc. S/2017/456, 1 June 2017.

⁸For example, compare Organization of American States, Resolution, 5 March 2008, CP/RES. 930 (1632/08) and Organization of American States (OAS), Resolution on Terrorist Threat to the Americas, 2001, 40 ILM 1273, id. (2001).

⁹Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 14, §115. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, §139; *Armed Activities*, §146.

¹⁰See also *Wall Advisory Opinion*, Separate Opinion of Judge Kooijmans, §35; *Armed Activities*, Separate Opinion of Judge Simma, §§11-12.

¹¹International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4, Article 8.

Contrarily, the second view completely abandons the attribution requirement, meaning that a State may use force in response to armed attacks by non-state actors, whose actions are not attributable to the State in whose territory defensive force is being used (Murphy, 2002: 50). The third view represents a sort of middle ground and is connected to the emergence of new tests and doctrines such as the ‘*unwilling or unable*’ doctrine or the ‘*harbouring*’ doctrine (Starski, 2015: 457; De Wet, 2019: 12).¹² Similarly, some States, like Germany and Belgium, have even maintained the position that self-defence is possible against *de facto* regimes.¹³

Following the second and the third approach might lead to the conclusion that the Houthis can be considered the perpetrators of the ‘*armed attack*’ for the purpose of the invocation of the right to self-defence. Firstly, it may be claimed that Yemen was unable to prevent strikes by the Houthis, who also have effective control over certain parts of Yemen. Secondly, this also aligns with the position of States that argue that the *de facto* system triggers the right to self-defence. However, it would be difficult to apply the harbouring doctrine by asserting that Yemen is harbouring the Houthis and providing them with a safe haven, exactly because Yemen lacks authority over parts of its territory controlled by the Houthis.

Therefore, whether the Houthis can be the authors of the ‘*armed attack*’ under the *ratione personae* aspect, depends on which approach one takes regarding this controversial question. If one adopts the narrower approach, then it is no longer necessary to consider other conditions for the right to self-defence. However, if one accepts the broader approach, then it is necessary to analyse other controversies relating to the legality of the USA’s and the UK’s use of force.

3 The target of an ‘*armed attack*’

One of the most pressing questions relating to the current conflict in Yemen and the right to self-defence concerns the nature of the target of the ‘*armed attack*’. While it is clear that States have a right to use self-defence when their territory is being attacked, the law is not clear when it comes to attacks on external manifestations of a State. Ruys separates those external manifestations into four categories, namely

¹²See also Armed Activities, Public sitting held on Monday 18 April 2005, CR 2005/7, §80.

¹³UN Doc. S/2015/946, 10 December 2015; UN Doc. S/2016/523, 9 June 2016.

military units and military installations abroad, embassies and diplomatic envoys, civilian aircraft and merchant vessels and the protection of nationals in a third State (Ruys, 2010: 199-213). To this end, one must analyse whether the attacks on commercial and merchant ships in the Red Sea triggered the UK's and the USA's right to self-defence. In this sense, it is firstly necessary to distinguish between attacks on naval or military vessels and those on commercial ships.

3.1 Attacks on naval or military vessels

It is generally undisputed that attacks on naval or military vessels of a State trigger the right to self-defence (Brownlie, 1963: 305; Gazzini, 2006: 136; Nolte and Randelzhofer, 2012: 1411). This is also supported by the text of Article 3(d) of the General Assembly Resolution 3314 (XXIX) stipulating that '*an attack by the armed forces of a State on the land, sea or air forces, [...] of another State*' constitutes an act of aggression. The same rule is also enshrined in Article 8 *bis* of the Rome Statute of the International Criminal Court.¹⁴ Furthermore, the ICJ in the *Oil Platforms case* did not exclude the possibility of invoking the right to self-defence against an attack on a single military vessel.¹⁵ In the present case, both the USA and the UK have in their letters to the President of the Security Council stated that the Houthis have attacked their naval vessels.¹⁶ The USA merely provided that there have been several attacks on its navy ships, while the UK stated that specifically its warship Royal Navy destroyer HMS Diamond was attacked. This could in principle mean that because their warships were attacked, they have the right to exercise self-defence against the Houthis. However, a problem arises if one considers the factor of the aim of the attack, which was emphasised by the ICJ in the *Oil Platforms case*. Regarding the aim of Iran's attack, the ICJ raised the question of whether the missile that was fired from more than 100 km away was '*aimed at the specific vessel*' or '*simply programmed to hit some target in Kuwaiti waters*.'¹⁷ With this dictum the Court apparently signified that an attack by a mine or missile only constitutes an '*armed attack*' if it is specially aimed at a third State, however, the matter was not elaborated upon and it remains unclear whether this was only a requirement in that particular set of circumstances (Gray, 2008: 145-146). If the condition of intent is applied, it is necessary to take into

¹⁴UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, 2187 U.N.T.S 3.

¹⁵*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C. J. Reports 2003, p. 161, §72.

¹⁶UN Doc. S/2024/56, 15 January 2024; UN Doc. S/2024/55, 15 January 2024.

¹⁷*Oil Platforms*, §64.

account that the Houthis declared that their targets were ships owned, flagged or operated by Israel and ships providing support to Israel. Therefore, the Houthis could claim that during their attack on 9 January 2024 their targets were not directly military ships, which were only there for defensive purposes, but commercial ships heading for Israel. If the above elaborated doctrine from the *Oil Platform case* is applicable the USA and the UK would have to prove that the Houthis were not just targeting ‘*some target*’ in the Red Sea, but specifically their warships. This is a high standard, which is probably difficult to meet in a case like this. Moreover, given the ICJ’s emphasis on distance in the *Oil Platforms case*, another factor that could potentially influence the determination of the existence of the intent and thus the legality of the used defensive force is the distance from which the Houthi attacks were launched. However, even if we accept that the requirement of intent is not necessary or that it was met, the fulfilment of the *ratione materiae* threshold of an attack remains questionable, which will be addressed in the next chapter. But before that, it is necessary to consider whether a State’s right to self-defence also arises when merchant vessels are attacked.

3.2 Attacks on merchant vessels

Contrary to military ships, there is a lot more controversy regarding attacks on merchant vessels, since they cannot be regarded as quasi-territorial manifestations of a State as they are only private ships, often located far from their flag State or their State of registration (Ruys, 2010: 204). Therefore, it is disputed whether attacks on such ships constitute an ‘*armed attack*’ for the purpose of the right to self-defence.

The preparatory works demonstrate that the formulation of Article 3(d) of the General Assembly Resolution 3314 (XXIX) regarding the definition of aggression was prompted by the desire of some States to safeguard their commercial vessels, particularly those engaged in fishing, since they constitute a significant economic interest.¹⁸ Therefore, the States decided to include that an act of aggression is also an attack on ‘*marine and air fleets of another state.*’ This dictum suggests that fleets, including merchant vessels, can be protected with the use of military force. However, in order for a State to resort to such military force, the attacked merchant vessel must carry the flag of the State using force, which means that the victim of the ‘*armed*

¹⁸UN Doc. AC.134/SR.106-108, 29 August 1973, p. 30.

attack' is not determined by the nationality of the vessel's the owner, operator, crew, or cargo (Talmon, 2024). This was also reiterated in the *Oil Platforms case* in which the ICJ considered that the attack on Texaco Caribbean, no matter its ownership, could not be considered as an attack on the USA because the ship was not flying a USA flag.¹⁹ Accordingly, Brownlie and Gray argue that the use of reasonable force by the flag State is generally accepted (Brownlie, 1963: 305; Gray, 1991: 469). Ruys, further supports this position by providing some cases of State practice, for example in 1959 Mexico broke off diplomatic relations with Guatemala following an incident in which the Guatemalan Air Force attacked three Mexican shrimp boats. While Mexico did not use force, its president stated that the use of force to repel the attacks would have been authorized by Article 51 of the UN Charter. Furthermore, the USA Commander's Handbook on the Law of Naval Operations lists that self-defence may be employed when necessary for the protection of US flag vessels that are subjected to unlawful attacks in international waters. Another example was also during the 1980–1988 'Tanker War' in the Persian Gulf during which many States sent their warships to protect their merchant vessels under the presumption of lawfulness of using force (Ruys, 2010: 206-207).

3.3 The adoption of the UNSC Resolution 2722 (2024) and the subsequent practice

Despite the above listed practice supporting the use of defensive force against attacks on merchant vessels, States expressed different views regarding this issue when the UNSC Resolution 2722 (2024) was being adopted. Russia was against the formation in operative clause 3 of the Resolution, which allows States to '*defend their vessels from attacks, including those that undermine navigational rights and freedoms*' in accordance with international law, as it believed that no such right to defend a State's vessels exists in international law.²⁰ Therefore, Russia proposed that the Resolution should not include the reference to the right to defend one's vessels and should emphasise that it does not set a precedent or create new rules of international law.²¹ However, the proposed amendments were not adopted, as four States (Algeria, China, Russia and Sierra Leone) voted in favour, two against (the USA and the UK)

¹⁹Oil Platforms, §64.

²⁰UN Doc. S/PV.9527, 10 January 2024, p. 2.

²¹Ibid.

and 9 abstained, including Slovenia.²² During its statement, the USA clearly stated that it believed that it was ‘*long established that States have a right to defend merchant and commercial vessels from attacks*’.²³ While no other State provided such an explicit approval of this understanding, they nonetheless (at least implicitly) endorsed it by voting in favour of the draft resolution, which was adopted with 11 votes in favour, none against and 4 abstentions.²⁴ However, some States, such as Switzerland and Slovenia, emphasised that the strict condition of the exercise of the right to self-defence must be respected.²⁵

What must be noted when analysing the Resolution, is that it was not adopted under Chapter VII, normally used when authorizing the use of force, and that it only ‘*takes note*’ that Member States can ‘*in accordance with international law, defend their vessels from attacks*.’ The wording thus suggests that the Resolution was not meant to decide upon or authorize the use of force by Member States, but merely to note their certain already existing rights. This is further supported by the fact that the Resolution emphasises that the actions of the Member States must be taken ‘*in accordance with international law*’ implying that the Resolution depends on pre-existing laws and does not broaden or restrict the rights of States (Brassat, 2024).²⁶ It follows that the Resolution does not by itself provide a legal justification for military action against the Houthis but rather simply supports actions that are already allowed by international law even in the absence of the Resolution. What must then be noted is that the Resolution stipulates that the Member States have the right to defend ‘*their vessels*’, which can be understood as correlating to the requirement that the merchant vessel must be carrying the flag of the State using force.

The next day after the adoption of the Resolution, the USA and the UK launched military strikes against the Houthis. In their letters to the President of the UNSC following their military action they made recourse to the previously discussed operative clause in the Resolution, indicating that they both perceived the Resolution as providing (at least further) legal justification for their actions. Furthermore, while

²²Ibid., p. 3.

²³Ibid., p. 4.

²⁴Ibid., p. 5.

²⁵Ibid., p. 7-8.

²⁶With regard to similar wording in Resolution 2249 (2012) see Akande, D. and Milanović M. (2015) The Constructive Ambiguity of the Security Council’s ISIS Resolution, EJIL:Talk!, <https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/>.

emphasizing that their naval ships have been attacked, they further stressed that the Houthis also targeted commercial ships. By using such language both States showed the view that their decision to launch the military strikes was not only a response to the attacks on their military but also on (other) commercial ships. What is especially concerning in this regard is that neither the USA nor the UK have in their letters claimed that *'their'* commercial vessels have been attacked, but merely commercial vessels in general. Talmon provides that the targeted vessels were sailing under the flags (of convenience) of Panama, Liberia, Singapore, the Bahamas, or the Marshall Islands (Talmon, 2024). As attacks on *'their'* commercial vessels were not claimed by the USA or the UK, it becomes doubtful whether the attacks on the merchant vessels could even be considered as *'armed attacks'* when analysing the USA's and the UK's exercise of self-defence. Ruys explains that the use of force to protect third State merchant vessels is excluded, unless the flag State consents so that the defensive measure could be regarded as an act of collective self-defence or if the unique circumstances call for such a conclusion, for example, if the warship itself is positioned between the attacker and the victim (Ruys, 2010: 212-213). In the present case, it does not seem that the first possibility is fulfilled, given that there is no indication that the USA and the UK had the consent of the vessel's flag States, further supported by the fact that they did not rely on the right to collective self-defence. However, one could potentially argue, as the Prime Minister of the Netherlands did,²⁷ that the specific set of circumstances, together with the importance of the freedom of navigation, meet this requirement.

Following the strikes in Yemen, the UNSC had another meeting to discuss the actions taken by the USA and the UK. It was reported that the military operations included over 50 air strikes and missile strikes on targets across Yemen., including on several cities.²⁸ Both the USA and the UK once again defended their actions with the inherent right to self-defence. However, Russia characterized the military operations as *'blatant armed aggression against a sovereign country'* and reiterated its position that Article 51 of the UN Charter cannot be invoked to protect commercial vessels and ensure the freedom of navigation.²⁹ The actions of the USA and the UK

²⁷The US-British action is based on the right of self-defence, aims to protect free passage and is focused on de-escalation. The Netherlands, with its long history as a sea-faring country, places significant importance on the right of free passage and supports this targeted operation.⁷

²⁸UN Doc. S/PV.9532, 12 January 2024, p. 1.

²⁹Ibid., p. 2-3.

were also criticized by China³⁰ and by Iran in its letter to the UNSC³¹, while Switzerland raised the issue of disproportionality of the taken actions³². In contrast, nine States (Australia, Bahrain, Canada, Denmark, Germany, Netherlands, New Zealand, the Republic of Korea, the UK and the USA) issued a joint statement supporting and justifying the military strikes in Yemen with the inherent right of individual and collective self-defence, consistent with the UN Charter.³³

4 The *ratione materiae* aspect of ‘armed attack’

The next question which presents itself is whether the Houthi attacks on the USA’s and the UK’s ships (whether on only warships or also merchant ships) meet the necessary threshold to be considered as an ‘armed attack’. What must first be noted, is the relationship between Article 2(4) of the UN Charter prohibiting the ‘use of force’ and Article 51 of the UN Charter allowing a State to resort to self-defence in case of an ‘armed attack’. The different terminology shows the need for a distinction to be made between the two concepts and the existence of a gap between them (Nolte and Randelzhofer, 2012: 1401; Dinstein, 2011: 207). The difference between the thresholds was also affirmed in the *Nicaragua case* in which the ICJ recognized that a distinction must be made between the most grave forms of use of force, which constitute an armed attack, and other less grave forms,³⁴ such as mere frontier incidents³⁵. The ICJ reaffirmed this decision in the *Oil Platforms case* in 2003, where it held that self-defence can only be used in response to ‘the most grave forms of the use of force.’³⁶ Similarly, the Eritrea–Ethiopia Commission, in its partial ruling regarding the *jus ad bellum* questions, determined that incidental clashes between small units that occur in a geographically confined area, even if involving loss of life, do not constitute an ‘armed attack’ for the purposes of Article 51 of the UN Charter.³⁷ However, at the same time Ruys points out that the ICJ has never actually excluded

³⁰Ibid., p. 6-7.

³¹UN Doc. S/2024/64, 15 January 2024.

³²UN Doc. S/PV.9532, 12 January 2024, p. 9.

³³Government of the Netherlands, Joint Statement from the Governments of Australia, Bahrain, Canada, Denmark, Germany, Netherlands, New Zealand, Republic of Korea, United Kingdom, and the United States, Diplomatic statement (January 2024), <https://www.government.nl/documents/diplomatic-statements/2024/01/12/joint-statement-from-the-governments-of-australia-bahrain-canada-denmark-germany-netherlands-new-zealand-republic-of-korea-united-kingdom-and-the-united-states>.

³⁴Nicaragua, §191.

³⁵Ibid., §195.

³⁶Oil Platforms, §51.

³⁷Eritrea–Ethiopia, Partial Award, Jus Ad Bellum Ethiopia’s Claims 1–8, 19 December 2005 VOLUME XXVI pp. 457-469, §§11-12.

the possibility that small-scale border incursions could '*singly or collectively*' amount to an armed attack (Ruys, 2010: 520), on the contrary in the *Oil Platforms case* the ICJ did 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*'.³⁸

If one follows the logic in the *Oil Platforms case*, it would be possible to argue that solely the attack on the USA's and the UK's naval ships already satisfied the threshold to be considered as an '*armed attack*' thereby triggering the right to self-defence, a view also shared by Brassat (Brassat, 2024). This also seems to be in line with the perception of the UK, since its Prime Minister emphasised that the Houthis executed '*the single biggest attack on a British navy warship [...] in decades*' (Mason, Walker and Quinn, 2024). On the other hand, Talmon contended that, in light of the vague claims of attacks on USA's and UK's warships and the fact that no ship had been destroyed or sailor hurt, the *ratione materiae* criteria is not fulfilled in this situation (Talmon, 2024).

If the attacks on the USA's and the UK's warships respectively do not reach the threshold of an '*armed attack*', the question then becomes whether the attacks on the merchant vessels should be taken into account. If one accepts the view that only the attacks on merchant vessels flagged by the USA and the UK, could give the right to self-defence, then the answer is no, given that no State specifically claimed that its merchant vessels were targeted. However, if one accepts the broader view that self-defence is possible for the general protection of the right to freedom of navigation or if the conditions for the protection of third States' vessels would be fulfilled, then the question becomes whether the attacks by the Houthis correlate with the understanding of Article 3(d) of the General Assembly Resolution 3314 (XXIX) making reference to '*fleets*'. According to the ordinary meaning of the provisions, the term '*fleet*' should be understood as '*a group of ships*'.³⁹ Solely following this definition leads to the conclusion that an attack on a single merchant vessel cannot be considered as enough to trigger the right to self-defence. Based on that some authors argue that the necessary threshold is only met in case of a massive attack directed against a State's merchant fleet. For example, Dinstein argues that the wording in Article 3(d) was deliberate with the aim to exclude the use of force in self-defence

³⁸Oil Platforms, §72.

³⁹Cambridge Dictionary (Cambridge: CUP, 2020).

against an attack on a single or a few commercial vessels (Dinstein, 2011: 407). This was also the view of Iran in the *Oil Platforms case*, where it stated that ‘*military action against an individual merchant ship may be an infringement of the rights of the flag State, but it does not constitute an armed attack triggering that State’s right of self-defence*’ which could only be triggered in case of massive attacks against whole fleets.⁴⁰ The USA naturally maintained an opposite view,⁴¹ which is also shared by some scholars who argue that an attack upon commercial vessels constitutes an ‘*armed attack*’ regardless of the number of attacked vessels (Ruys, 2010: 205). Unfortunately, the ICJ did not elaborate on this question in the *Oil Platforms case*, as it rejected the USA’s claim due to its failure to prove that the attack was attributable to Iran.⁴² The Houthi attack on 9 January 2024 consisted of 18 drones, two anti-ship cruise missiles, and one anti-ship ballistic missile, however, the attacks were intercepted by the USA and the UK, meaning that there was no actual damage to the crew or the ships (Liebermann, 2024). Therefore, it is questionable whether that single attack meets the necessary *de minimis* threshold.

However, a different conclusion can be reached if one adopts the ‘*accumulation of events theory*’ which has started to evolve due to the special *modus operandi* of non-state actors, which usually consists of smaller attacks, often due to their size and capabilities (Henderson, 2014: 86). Under this theory, incidents that would in themselves only constitute ‘*less grave uses of force*’, can transform into an ‘*armed attack*’ triggering the right of self-defence, when forming part of a chain of events linked in time, cause and source (Ruys, 2010: 168, 175). While the ICJ has never directly applied this theory, it has implicitly endorsed it. For example, in the *Oil Platforms case*, the ICJ put forward the question of whether an attack or a combination with the rest of the ‘*series of attacks*’ can be categorized as an ‘*armed attack*’.⁴³ Following this theory would allow us to take into account all of the attacks on commercial shipping since November 2023 when assessing whether the Houthi attacks constitute the ‘*the most grave forms of the use of force*’ thereby establishing a stronger argument that the threshold has been met. It also seems that the USA has adopted this view in the present case, since it provided in its letter that its actions were ‘*a response to a series of*

⁴⁰*Oil Platforms*, Reply and defence to counter-claim submitted by the Islamic Republic of Iran, 10 March 1999, §§7.63-7.38.

⁴¹*Oil Platforms*, Counter-memorial and counter-claim submitted by the United States of America, 23 June 1997, §§4.19, 5.16–5.20.

⁴²*Oil Platforms*, §59.

⁴³*Oil Platforms* §64; *Nicaragua*, §232; *Armed Activities*, §146.

armed attacks by Houthi militants over the last few months.' Similarly, the UK emphasised that the *'Houthi militants have carried out a series of attacks on vessels'* since November 2023.

5 Proportionality

As has been consistently held in the ICJ jurisprudence, for example in the *Nuclear Weapons Advisory Opinion*,⁴⁴ in the *Nicaragua case*⁴⁵ and in the *Oil Platforms case*⁴⁶, to be lawful, self-defence must *inter alia* comply with the prerequisite of proportionality, established in customary international law. Therefore, even if the attacks of the Houthis triggered the USA's and the UK's right to self-defence, the lawfulness of their actions still depends on the further analysis of compliance with the proportionality criterium.

Proportionality serves as a constraint on the gravity of defensive action (Ruys, 2010: 110) and must be assessed based on the scale of the whole operation taken in self-defence⁴⁷. To this end, a preliminary question, what must the force used in self-defence be proportional to, must be answered. In assessing proportionality, the ICJ has in the *Nicaragua case*⁴⁸ and in the *Oil Platforms case*⁴⁹ assessed whether the victim State's response was proportionate to the '*armed attack*'. The ICJ's dictum implies a quantitative approach, which presumes that the defensive response must be proportional to the gravity of the attack. However, most scholars favour the functional approach, which evaluates proportionality by reference to the purpose of defensive measures (Ruys, 2010: 111-112). Accordingly, the response in self-defence must only include actions necessary to stop the '*armed attack*' and eliminate the possibility of further attacks that are reasonably foreseeable (Schmitt, 2003: 7-10), which seems to be more appropriate in the context of the fight against terrorism. (Tams, 2013: 400). Furthermore, from the statements of the USA and the UK it seems, that their actions also had a preventative goal as both States stressed that they are also protecting the ships from future attacks, thereby raising additional questions

⁴⁴Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, §41.

⁴⁵Nicaragua, §176.

⁴⁶Oil Platforms, §76.

⁴⁷Ibid., §77.

⁴⁸Nicaragua, §237.

⁴⁹Oil Platforms, §77.

of the legality of the use of force relating to the *ratione temporis* aspect, which will however not be discussed in the present article.⁵⁰

If one adopts the quantitative approach, then there should have been a balance between the previous Houthi attacks and the USA's and the UK's attacks on 11 January 2024. However, even in such cases what is considered as proportional depends on whether one takes into account only the Houthi attack on 9 January 2024 or all the attacks since November 2023 under the '*accumulation of events theory*'. Even if one considers all of the attacks, it must be noted that the Houthi attacks have resulted in a relatively small damage to the vessels involved and no injuries. Rather the States have mainly raised concerns regarding the interference with the free flow of commerce. In this context, it is reasonable to question the proportionality of repeatedly firing missiles into the territory of another sovereign State, which has resulted in comparatively large-scale infrastructural damage (Henderson, 2024). What could be for example considered as proportionate, would be the use of on-the-spot defensive measures taken by the flag State to protect merchant vessels (Ruys, 2010: 209). This was also the view expressed by Switzerland during the adoption of the Resolution 2722 (2024) as it emphasised that operative clause 3 is strictly limited to military measures aimed at intercepting attacks against ships.⁵¹ After the USA's and the UK's military operations in Yemen, Switzerland raised additional concerns by stating that '*any military operation that goes beyond the immediate need to protect said vessels and persons is disproportionate*'.⁵² This restrictive view also seems to align with the EU's opinion, as it established a defensive maritime operation, which has a very limited defensive mandate providing maritime situational awareness as well as accompanying and protecting vessels.⁵³

On the other hand, following the functional approach allows States to use a higher gravity of force. Therefore, Ruys argues that in case of a series of attacks against merchant vessels, a possible *post facto* defensive response could also be considered proportionate (Ruys, 2010: 210). Consequently, as Henderson explains, when

⁵⁰Generally on this matter see: Green, James A. (2009) The *ratione temporis* elements of self-defence, *Journal on the Use of Force and International Law*, 2(1), p. 97-118; Sadoff, David A. (2009) A Question of Determinacy: The Legal Status of Anticipatory Self-Defense, *Georgetown Journal of International Law*, 40(2), p. 523-584.

⁵¹UN Doc. S/PV.9527, 10 January 2024, p. 8.

⁵²UN Doc. S/PV.9532, 12 January 2024, p. 9.

⁵³Council of the EU (2024) Security and freedom of navigation in the Red Sea: Council launches EUNAVFOR ASPIDES, <https://www.consilium.europa.eu/en/press/press-releases/2024/02/19/security-and-freedom-of-navigation-in-the-red-sea-council-launches-new-eu-defensive-operation/>.

considering the ongoing attacks by the Houthis and the previous unsuccessful attempts to stop the attacks with on-the-spot defensive measures, the actions of the USA and the UK could be seen as proportionate (Henderson, 2024).

6 Conclusion

In conclusion, the difficulties of international law surrounding armed attacks by non-state actors and the interpretation of the right to self-defence remain subject to ongoing debate and interpretation. While the USA and the UK emphasise the legality of their actions based on the principle of self-defence, the use of force by the USA and the UK in the Red Sea is nonetheless connected with many controversies, which cast doubt on the legality of their military operations. Even if one accepts the preliminary assumption that *'armed attacks'* can be carried out by non-state actors, there are still many questions that remain unresolved in international law. It seems that the USA and the UK are also aware that the law is not clear whether attacks on merchant vessels themselves meet the conditions that would give the right of self-defence. Thus, it can be seen from their letters to the President of the UNSC that they aptly emphasised that their warships were also attacked, since they represent external manifestations of a State and thereby trigger the right to self-defence. The emphasis by the USA and the UK that there are attacks on both naval and commercial ships further helps to understand the Houthi attacks as constituting *'more grave forms of the use of force'* meeting the necessary *de minimis* threshold. Likewise, the accumulation of all attacks plays a certain role in assessing the proportionality and necessity of military operations against the Houthis. However, it is the view of the present authors that in such cases, a fair balance must be struck between on one hand the right of States to defend themselves from unlawful attacks and on the other hand the obligation to respect the sovereignty of another State, which is not involved in the attacks. Thus, States should only resort to such use of force that is needed to intercept the attacks in order to at one hand protect its ships from being attacked and at the same respect the sovereignty of Yemen. Therefore, even if we accept that all other conditions are fulfilled, we believe that at least the principle of proportionality has not been respected in the present case. Ultimately, the delicate balance between protecting maritime interests and respecting the sovereignty of Yemen underscores the complexity of addressing such conflicts within the framework of international law. Such conflicts need to be addressed holistically,

while keeping in mind that unilateral use of force is not necessarily the best solution, especially in such complex, politically charged situations.

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