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public law journal

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Vol. 11 No. 2
July 2024
e-publica.pt

ISSN 2183-184x

Com o apoio de:

Fundação para a Ciência e a Tecnologia

STATES' REACTIONS TO HOUTHI ATTACKS: A TESTBED FOR THE USE OF FORCE AGAINST NON-STATE ACTORS

REACÇÕES DOS ESTADOS AOS ATAQUES DOS HOUTHIS: UM BANCO DE ENSAIOS PARA O USO DA FORÇA CONTRA ACTORES NÃO ESTATAIS

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Abstract: Attacks perpetrated, since November 2023, by Houthis, in the Red Sea, against commercial and military vessels raise interesting questions on the qualification of the use of force. On-the-spot self-defence against Houthi armed attacks taking place in the high seas is lawful. Further action against inland Houthis revisits the much discussed admissibility of the use of force against non-State actors (under Article 51 of the Charter, self-defence is designed to be exercised against States) and the requirements of self-defence. The UN Security Council has been following the Yemeni civil war, but no authorisation was granted for the use of force against Houthis. No invitation to intervene was addressed by Yemen to any of the States claiming self defence against inland Houthis in response to recent naval attacks. Self-defence against inland Houthis, if unopposed by the territorial State, may be lawfully construed as an act against a *de facto* Government.

Keywords: Non-State Actors, use of force, self-defence, high seas, de facto regimes

Resumo: Os ataques levados a cabo pelos Hutis, desde Novembro de 2023, no Mar Vermelho, contra navios mercantes e de guerra, suscitam questões interessantes quanto à qualificação do uso da força. A legítima defesa imediata, contra ataques armados por parte dos Hutis e que ocorram no alto mar, é lícita. Outras acções dirigidas contra Hutis no território do Iémen revisitam a muito discutida admissibilidade do uso da força contra actores não estatais (a legítima defesa está desenhada no artigo 51º da Carta para ser exercida contra Estados) e os requisitos para a invocação da legítima defesa. O Conselho de Segurança da ONU tem acompanhado a guerra civil no Iémen mas não concedeu autorização para o uso da força, contra os Hutis. A legítima defesa contra os Hutis que se encontram no Iémen, se este não se opuser, pode ser defendida como um acto lícito contra um Governo *de facto*.

Palavras-chave: actores não estatais, uso da força, legítima defesa, alto mar, regimes de facto

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1. Introduction

Yemen's most recent and ongoing civil war began in 2014, fuelled by ethnic and religious feuds, and remains a bloody chapter in the proxy war between Iran and Saudi Arabia. At present, several entities effectively control large swathes of the Yemenite territory: the Republic of Yemen (recognised by the United Nations and acting through the Presidential Leadership Council) controls the northeast, encompassing two thirds of the country; the Houthis (a Zaidi Shi'an Islamist movement supported by Iran) control the western territory facing the Red Sea[2]; the Southern Transitional Council (comprising anti-Iranian secessionists) controls the southwestern coast bordering the Indian Ocean; the Hadrami Elite Forces (supported by the United Arab Emirates and Saudi Arabia) control the southeastern coast; the Yemeni National Resistance (comprising former members of the Yemeni Republican Guard) controls the southwestern tip facing the Red Sea; and Al-Qaeda in the Arabian Peninsula controls a minor landlocked parcel of territory.

In reaction to Israel's invasion of Gaza, launched on 27 October 2023, the Houthis attacked several vessels, both commercial and military, in the Red Sea using missiles, helicopters, unmanned aerial vehicles (UAVs), unmanned surface vessels and, most recently, unmanned underwater vehicles, all loaded with explosives.

The United Nations Security Council (UNSC) condemned "in the strongest terms the at least two dozen Houthi attacks on merchant and commercial vessels since November 19, 2023, when the Houthis attacked and seized the Galaxy Leader and its crew".[3] It affirmed "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".[4]

Since 11 January 2024, the US and UK have destroyed several UAVs and missiles, neutralised small boats and attacked inland military installations (radar stations, missile platforms, command, control and communication centres…) operated by the Houthis. Other States have sent naval assets to the Red Sea and claimed to have shot down Houthi missiles and UAVs.

2. Roughly corresponding to the territory of former Yemen Arab Republic or North Yemen (became independent on 1 November 1918 (from the Ottoman Empire). South Yemen became independent on 30 November 1967 (from the UK). The two merged on 22 May 1990 to become the Republic of Yemen. Houthi control of the territory is effective, "running a de facto government which collects taxes and prints money" (BBC, 12 June 2024, available at https://www.bbc.com/news/articles/cgxxlgevevwo) and being treated by UN organs and agencies as "de facto authorities" (UN News, 11 June 2024, available at https://news.un.org/en/story/2024/06/1150896).

3. UNSCR Resolution 2722 (2024), adopted on 10 January 2024, § 1.

4. Idem, ibidem, § 3.

The Red Sea crisis poses challenging legal questions on the use of force against a non-State actor.[5] This article will review possible legal arguments in favour of its use against the Houthis in the Red Sea and inland.[6]

2. Intervention authorised by the UN Security Council

UNSC Resolution 2722 (2024) was carefully drafted in order to avoid any possibility of explicit or implied authorisation for the use of force. There is no reference to Chapter VII of the UN Charter, no mention of "aggression" or the right to "self-defence" and talk of peace and security is relegated to the preamble, as an abstract formula, without subsumption: "*Reaffirming* its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, as well as its commitment to uphold the purposes and principles of the Charter." Nevertheless, the Russian Permanent Representative at the UNSC meeting unsuccessfully tried to add more cautionary wording to the Resolution: "all its provisions should not be seen as setting precedents or creating new norms of international law."[7] After the Resolution's adoption,[8] he referred to the "misinterpretations of the Council's resolutions",[9] taking Libya as an example.[10]

As a matter of principle, UNSC consent for the use of force should be interpreted restrictively. Notwithstanding, there is a substantial record of creative efforts to extract this consent from the preambular *formulae* in UNSC Resolutions,[11] namely on Iraq after invading Kuwait,[12] on Afghanistan

5. Though challenging, they come with some particular geographical and political circumstances that are not replicable and do not provide clear-cut solutions for the war of arguments on the general admissibility of the use of force against non-State actors. For a snapshot of the pros and cons, see, respectively, Tams (2019: 90 ff.); Brunnée and Toope (2018: 263 ff.).

6. Episodes of targeted killings associated with the improperly called "war on terror" are beyond the scope of this article. For a review of one such event in Yemen, see Lubell (2010: 173 ff.).

7. Record of the 9527th meeting of the Security Council, 10 January 2024 (S/PV.9527), p. 2.

8. The Resolution was approved by 11 States (Ecuador, France, Guyana, Japan, Malta, Republic of Korea, Sierra Leone, Slovenia, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America) with 4 abstentions (Algeria, China, Mozambique, Russian Federation). Idem, p. 5.

9. Idem, ibidem, p. 6.

10. UNSCR 1973 (2011), adopted on 17 March 2011, under Chapter VII of the UN Charter (Bosnia and Herzegovina, Colombia, Gabon, Lebanon, Nigeria, Portugal, South Africa, France, United Kingdom and the United States voted in favour, while Brazil, Germany, China and the Russian Federation abstained), authorised "all necessary measures [...] to protect civilians and civilian populated areas under threat of attack" (§4) and established a No-Fly Zone (§6). Russia's public reaction to the "expansive" implementation of UNSCR 1973 was highly critical, pointing to a violation of the Resolution, although an element of theatricality for its own domestic politics must be taken into consideration. For a contemporary comment on these (31 March 2011), see Cimino (2011). For a contemporary (March 2011) legal interpretation of UNSCR 1973, see Akande (2011). For a review of the legal arguments against the use of force for regime change in Libya, see Ulfstein and Christiansen (2013: 159 ff.).

11. See Johnstone (2015: 227 ff.). For an analysis of a specific example of ambiguous wording by the UNSC, see Akande and Milanovic (2015).

12. UNSCR 678 (1990), adopted on 29 November 1990 (Cuba and Yemen voted against, China abstained), "Authorizes Member States co-operating with the Government of

after the 11 September attacks against the US[13] and on ISIL after several attacks that took place in Tunisia, Turkey, Sinai, Beirut and Paris.[14]

For the time being, the UNSC has not adopted any Resolution containing an explicit or implied[15] authorisation for the use of force against the Houthis due to their attacks undermining the safety of navigation.[16] This absence of authorisation encompasses not only the Houthis operating in the Red Sea but also those in inland Yemen.

Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore International peace and security in the area" (operational § 2). At a later stage, the infringement of UNSCR 678 was invoked by several States as a basis for preventive self-defence: "It is well established that the authorization to use force given by the Security Council in 1990 may be revived if the Council decides that there has been a sufficiently serious breach of the conditions laid down by the Council for the ceasefire" (UK Representative at the UNSC meeting on 5 November 1998, S/PV.3939, p. 10, granting perpetuity to the factual qualification produced in 1990 by the Security Council and offering a convoluted exception of non-performance as cause for self-defence).

13. UNSCR 1368 (2001) of 12 September 2001, adopted unanimously, qualified the 11 September attacks "like any act of international terrorism, as a threat to international peace and security" (operational § 1), stressing "that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable" (operational § 3) and recognising in the preamble the "inherent right of individual or collective self-defence in accordance with the Charter". UNSCR 1373 (2001) of 28 September maintained the qualification of the attacks and the preambular reference to self-defence but went further, deciding "that all States shall: - Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; - Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens" (operational § 2 c) and d)).

14. UNSCR 2249 (2015), unanimously adopted on 20 November 2015 after the attacks perpetrated in Paris on 13 November 2015 by the Islamic State in Iraq and Levant (ISIL also known as Da'esh), whose operational § 5 is open to interpretation, especially on the definition of the perimeter for the use of force, "*Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council."

15. The implied (or revived) authorisation construction might harm the UNSC's future will to adopt Resolutions that could be extensively interpreted. Already in 2008, Gray (2008: 366)) anticipated this danger. The 4th edition, in 2018, added further examples favouring caution.

16. UNSCR 2624 (2022), adopted, under Chapter VII, on 28 February 2022 (Brazil, Ireland, Mexico and Norway abstained), extends the arms embargo to the Houthis on the basis of past actions described in its Annex: "The Houthis have conducted attacks on commercial shipping in the Red Sea using waterborne improvised explosive devices and sea mines. The Houthis have also perpetrated repeated cross-border terrorist attacks striking civilians and civilian infrastructure in the Kingdom of Saudi Arabia and the United Arab Emirates and threatened to intentionally target civilian sites."

3. Intervention by invitation

Another possibility for the use of force by States in Yemeni territory stems from its previous acceptance of such action by express invitation.[17] On 7 March 2015, Yemen's President Hadi requested Saudi Arabia, the United Arab Emirates, Bahrain, Oman, Kuwait and Qatar to intervene in response to Houthi attacks:

> I urge you, in accordance with the right of self-defence set forth in Article 51 of the Charter of the United Nations, and with the Charter of the League of Arab States and the Treaty on Joint Defence, to provide immediate support in every form and take the necessary measures, including military intervention, to protect Yemen and its people from the ongoing Houthi aggression, repel the attack that is expected at any moment on Aden and the other cities of the South, and help Yemen to confront Al-Qaida and Islamic State in Iraq and the Levant.[18]

By the time the request for intervention was formulated by President Hadi, his credentials as the effective ruler of Yemen were open to challenge after the government had been deposed by the Houthis, and he had resigned and fled the capital (Sana), before later withdrawing his resignation. These facts illustrate the need for a cautious approach when evaluating the adequacy of requests for intervention, wherein "[…] a government may only ask for external help from other States against a non-State party in a non-international armed conflict if (additional) considerations of legitimacy and representativeness are met" (Marahun, Ntoubandi, 2016: § 43).[19]

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17. For a systematic study of the "institution" of intervention by invitation, see Nolte (1999). Visser (2020), paraphrasing Tom Ruys's flipping between armed attack and aggression as two sides of the same coin (Ruys, 2010: 127), concludes that intervention by invitation is appealing when directed against non-State actors (2020: 292–316 at 315). Green (2024: 280 ff.) offers a third conceptual category, "military assistance on request", which is closer to the essence of the Yemeni 2015 request (assistance inside Yemen) and does not require invocation of Article 51 of the UN Charter. On the same topic *re* Yemen, Corten (2023: 115 ff. at 128) points out that the UNSC qualification prerogatives avoid "the impossibility of proving any military implication and, *a fortiori*, an armed attack by Iran, or lack of effective control by the President at the time he made the appeal". Fox (2023: 240 ff., at 249) comments on the intervention in Yemen (2015): "Yemen presented the Council with opportunities to reject the democratic legitimacy theory in favour of the traditional effective control test. The Council did not do so". On the discretionary powers of the Council, see Nußberger (2017: 110 ff., at 159).

18. From letters dated 26 March 2015 from the Permanent Representatives of the Kingdom of Bahrain, the State of Qatar, the Kingdom of Saudi Arabia and the United Arab Emirates and the *Chargé d'affaires* of the Permanent Mission of the State of Kuwait to the United Nations addressed to the Secretary-General and the President of the Security Council, UNSC S/2015/217, pp. 4–5. The invoking of Article 51 of the Charter by a territorial State against insurgents falls outside the "statehood" requirement for the operation of the self-defence regime (see *infra* § 6.3.). Article 51 could have been invoked if the Yemeni President had attributed the Houthi attack to Iran or any other State (see *infra* § 6.4.). The wording of the letter suggests the instrumental role of the Houthi rebels but does not specifically attribute the actions to them, let alone imply the involvement of an individual State: "committed by the Houthi coup orchestrators"; "They are also being supported by regional Powers that are seeking to impose their control over the country and turn it into a tool by which they can extend their influence in the region" (UNSC S/2015/217, pp. 3–4).

19. On the specifics of Hadi's legitimacy to request foreign intervention, see Green (2024: 198 ff.).

On 26 March 2015, Saudi Arabia launched an armed intervention in Yemen called "Operation Decisive Storm".[20] Eight other countries participated in the Saudi-led coalition, far more than the five member States of the Gulf Cooperation Council (GCC) which President Hadi invited to intervene.[21]

The UNSC, acting under Chapter VII of the Charter, adopted UNSCR 2216 (2015),[22] noting, in the preamble, the request made by President Hadi for the member States of the GCC to intervene. It also established an arms embargo and expanded the sanctions regime adopted under UNSCR 2140 (2014).[23] However, the UNSC did not endorse President Hadi's invitation to the members of the GCC.

As previously mentioned, several non-member States of the GCC decided to intervene in Yemen against the Houthis using direct force. Other States (US, UK, France, Canada) expressed support for Saudi Arabia's intervention, providing military equipment (arms and ammunition), logistics and intelligence. Questions could be raised with regard to the responsibility of the "supporting" States for the negative consequences of the use of the weapons and ammunitions provided to Saudi Arabia.[24]

Notwithstanding these consequences, at the beginning of Operation Decisive Storm there was no direct use of force by the "supporting" States based on an invitation made by President Hadi or a second-hand invitation

20. See Ruys and Ferro (2016: 61 ff.). The authors reject the justification of (collective) self-defence invoked by President Hadi and criticise the consequences of the intervention by invitation: "In the end, by failing to have the operation sanctioned by the UN Security Council, the intervening States (and the State approving of/condoning the operation) have undermined the primary role of the UN Security Council for the maintenance of international peace and security, and set a dangerous precedent." (2016: 98).

21. Egypt, Morocco, Jordan and Sudan. Senegalese mercenaries also participated in the military actions.

22. Adopted on 14 April 2015. Russia abstained.

23. Adopted unanimously on 26 February 2014. The UNSC, acting under Chapter VII, implemented a political transition programme, established travel bans and froze assets.

24. Of relevance for an evaluation of military support for a State accused of violating humanitarian law is the decision by the Netherlands" Court of Appeal (The Hague, 12 February 2024, ECLI:NL:GHDHA:2024:191), specifically § 5.16 ("In itself it is correct that a final judicial decision on the question of whether humanitarian law has indeed been violated in all these cases can only be given if a careful factual investigation has taken place, which also examines what information the commander who ordered the attack in question had gave and could dispose. However, such a definitive judgment is not necessary for an assessment of the "clear risk". The assessment of whether a clear risk exists concerns possible future use of the military goods to be supplied and there is a certain degree of uncertainty inherent in this. When assessing the likelihood of that future use, significance will be given, among other things, to the behaviour of the country of destination in the recent past. The requirement cannot be made that conduct in the recent past could only play a role in assessing the clear risk if it has been definitively established that this conduct violated international humanitarian law. That would make the condition that there must be a "clear risk" largely meaningless.") and § 6 (Decision: "orders the State to cease all (actual) export and transit of F-35 parts with final destination Israel within 7 days after service of this judgment.") www.prakkendoliveira.nl/images/Uploads_Brechtje/ECLI_NL_GHDHA_2024_191_CoA_The_Hague_200.336.130_01_F-35_Unoff.ENG.pdf (unofficial translation). For an example of the possible consequences of military support, see Nicaragua's initiation of proceedings against the Federal Republic of Germany at the International Court of Justice on the 1 March 2024 for breaching Article I of the Fourth Geneva Convention: "Germany has provided political, financial and military support to Israel fully aware at the time of authorization that the military equipments would be used in the commission of great breaches of international law by this State and in disregard of its own obligations" (application § 13, p. 6), icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf.

"re-gifted" by his invitees.[25] But, at a later stage, the US quoted Yemeni consent (not to be mistaken for an invitation) and "conducted missile strikes on radar facilities in Houthi-controlled territory in Yemen. These limited strikes were in response to anti-ship cruise missile launches perpetrated by Houthi insurgents that threatened United States Navy warships in the international waters of the Red Sea."[26]

An intervention by invitation in Yemeni territory, even if accepted as lawful, only concerns the addressees of President Hadi's letter of 7 March 2015. Future invitations may enlarge this universe of intervenors, but for the time being only GCC member States are entitled to intervene by way of the publicised Yemeni invitation.

4. Piracy, unlawful acts against the safety of maritime navigation, and law enforcement

The Houthis have been attacking commercial vessels and warships in the Red Sea since November 2023. According to article 101 of the United Nations Convention on the Law of the Sea (UNCLOS),[27] "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)."

25. As US Deputy Secretary of State Anthony Blinken Public stated in 2015: "We have expedited weapons deliveries, we have increased our intelligence sharing, and we have established a joint coordination planning cell in the Saudi operation centre." US support to Saudi Arabia was justified on the basis of existing defence cooperation agreements: "It's a combination of pre-existing orders made by our partner nations and some new requirements as they expend munitions" (Colonel Steve Warren, Pentagon spokesperson). Both quotations are available at www.aljazeera.com/news/2015/4/8/us-steps-up-arms-for-saudi-campaign-in-yemen

26. Letter dated 15 October 2016 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2016/869). In contrast to the action taken in 2024, in 2016 the US did not invoke Article 51 of the Charter when taking similar action, justifying its self-defence on the basis of *volenti non fit injuria*: "These actions were taken with the consent of the Government of Yemen. Although the United States therefore does not believe notification pursuant to Article 51 of the Charter of the United Nations is necessary in these circumstances, the United States nevertheless wishes to inform the Council that these actions were taken consistent with international law." No proof of Yemeni consent was produced.

27. Concluded on 10 December 1982 and entered into force on 16 November 1994. United Nations, *Treaty Series*, vol. 1833-I, 1994, p. 397.

Piracy requires a private motive and, as with robbery in British common law, must be committed with *animus furandi*.

The Houthis' behaviour is quite different from that of the Somali pirates who were driven by commercial gain (seizing ships and crews and asking for ransoms) and only by mistake and on a few occasions attacked warships.[28] The Houthis, on the contrary, employ traditional State language relating to the use of force – "war against the US", "aggression", "self-defence"[29] – and have announced, threatened, attempted, or committed attacks against US, British, Italian, German, Indian and Danish warships. The UNSC adopted several resolutions under Chapter VII authorising action against Somali pirates in Somalia's territorial waters (UNSCR 1816 (2008) of 2 June) and on Somali territory (UNSCR 1851 (2008) of 16 December). Both extensions of the territorial scope of the fight against piracy (*i.e.* beyond the high seas) were adopted with the consent or at the request of the Transitional Federal Government of Somalia, *i.e.* pirates were to be fought by invitation and with a specific disclaimer: such territorial extensions would only apply with respect to Somalia and would not affect the rights and obligations of other States under international law and could not be considered as establishing customary international law.[30]

The *animus furandi* requirement places politically or ideologically motivated violence against navigation outside the realm of piracy. Acts that are materially piratical but not committed for private ends fall outside UNCLOS's regime.[31] Considering the traditional political difficulties surrounding the conventional definition of terrorism, States decided to cover the loophole, evidenced by cruise ship seizures (most famously the Santa Maria in 1961[32] and the Achille Lauro in 1985[33]), and acting through the International Maritime Organisation negotiated the Convention for the Suppression of

28. See www.cbsnews.com/news/somali-pirates-fire-on-us-warship-lose/

29. See www.reuters.com/world/middle-east/houthi-leader-threatens-attack-us-warships-if-washington-targets-yemen-2023-12-20/; https://www.reuters.com/world/middle-east/yemens-houthis-say-they-will-target-us-british-warships-self-defense-al-massirah-2024-01-31/; https://www.reuters.com/world/middle-east/yemens-houthis-say-they-target-two-us-warships-red-sea-2024-03-05/

30. UNSCR 1816 (2008), unanimously adopted, § 9. The disclaimer has been repeated in subsequent Resolutions on piracy in Somalia.

31. In particular the prerogatives accorded to every State by UNCLOS's Article 105: "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. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith." See Guilfoyle (2015: 1057 ff.).

32. On seizure as a political act not covered by the piracy regime, see Green (1961: 496 ff.), and Franck (1961: 839 ff). For a comparison between the Santa Maria and Achille Lauro cases, see Halberstam (1988: 287).

33. On the emergence of non-State actors fighting a State's monopoly on the use of force, see Cassese (1989: 144 ff.). For lessons learned, see p. 125 and ff. of the same publication.

Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). [34]

The SUA Convention is applicable beyond the outer limit of the territorial waters (article 3) and sets a duty for State parties to punish unlawful acts (article 4) and to establish jurisdiction (articles 5 and 6) with regard to their territorial sea, as the flag State, against acts committed by or against its nationals or the State and when the alleged offender is present in its territory and is not extradited. It closely follows the Hague Convention of 1970 (Hague Hijacking Convention) on the dual obligation to criminalise and establish jurisdiction, which form the basis for the obligations to extradite or prosecute (*aut dedere aut judicare*) in order to limit impunity. Compliance with the SUA Convention poses difficulties since many States have constitutional clauses prohibiting the extradition of nationals or requiring from the State requesting extradition a guarantee that the death penalty or life sentence will not be applied. The availability of such guarantees, *per se*, may call into question the separation of powers and the independence of the courts in the guarantor State. The SUA Convention's article 3 [35] typifies unlawful acts:

> 1. Any person commits an offence within the meaning of this Convention 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; or
>
> d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship.

34. Signed in Rome on 10 March 1988 and came into force on 1 March 1992. United Nations, *Treaty Series*, vol. 1678-I, 1992, p. 222 (for the English version). The Convention is based upon the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (UNTS, vol. 974-I, 1975: 177) and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (UNTS, vol. 860, 1973: 105).

35. As amended by the 2005 Protocol to the SUA Convention, signed in London on 14 October 2005 (International Maritime Organisation, International Conference on the Revision of the SUA Treaties, agenda item 8, LEG/CONF.15/21, 1 November 2005). The Protocol addressed the politically motivated seizures adding Article 11bis to the SUA Convention: "None of the offences set forth in Article 3, 3bis, 3ter or 3quater shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives." This favouring of extradition should be balanced against the new Article 11ter: "Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in Article 3, 3bis, 3ter or 3quater or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons."

> […]
>
> 2. Any person also commits an offence if that person threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs 1 (b), (c), and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Confronted with Houthi attacks against the freedom of navigation, possible reactions based or inspired by the SUA Convention include:

- since even under the Convention boarding on the high seas remains a prerogative of the flag State,[36] action against unlawful acts relies on cooperation by the flag State of the vessels operated by the Houthis (in theory, Yemen, or, in the case of stateless vessels, no flag State authorisation would be required), or extradition of alleged offenders if a State has managed to establish jurisdiction against acts committed by or against its nationals or the State and if the alleged offenders are detained by a cooperating State;

- the UNSC's allowing of enforcement measures by non-flag States to fight unlawful acts against the safety of maritime navigation, following the route opened by the Resolutions passed against Somali pirates or, concerning the derogation of flag State jurisdiction, by UNSCR 2240 (2015) on migrant smuggling from Libya.[37]

Law enforcement activities by the coastal State (beyond its territorial waters), by the flag State for the inspection or the protection of the vessels flying its flag or by States protecting common values (such as freedom of navigation, the fight against terrorism, piracy, slavery, people smuggling and drug trafficking, environmental protection,…) and willing to accept inspections performed by non-flag States "confirm the emerging trend that activities permitted by international law for the enforcement of rights may include the use of force, provided such force is unavoidable, reasonable, and necessary" (Treves, 2009: 414).

Traditionally, creeping jurisdiction emanated from the coastal State and was resource driven (to gain natural resources, mainly fisheries, and recently

36. For a discussion on the Convention's limitations when fighting terrorism, even after the 2005 Protocol amendment, and on the omnipresence of flags of convenience, see Klein (2007: 329 ff.).

37. Adopted on 9 October 2015 (14 votes in favour with one abstention from Venezuela). See operational § 7: "*Decides*, with a view to saving the threatened lives of migrants or of victims of human trafficking on board such vessels as mentioned above, to authorise, in these exceptional and specific circumstances, for a period of one year from the date of the adoption of this resolution, Member States, acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking, to inspect on the high seas off the coast of Libya vessels that they have reasonable grounds to suspect are being used for migrant smuggling or human trafficking from Libya, provided that such Member States and regional organisations make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph." Also § 8: "*Decides* to authorise for a period of one year from the date of the adoption of this resolution, Member States acting nationally or through regional organisations to seize vessels inspected under the authority of paragraph 7." These authorisations have been renewed on a yearly basis, most recently by UNSCR 2698 (2023), adopted on 29 September 2023.

cloaked as environmental concerns).[38] However, creeping jurisdiction may emanate from non-coastal States[39] and be channelled through multilateral *fora*[40] for the protection of common interests (law enforcement of international standards on piracy, slavery, people smuggling, terrorism, drug trafficking, environmental protection and freedom of navigation) and assume a law enforcement dimension.[41] After 11 September, NATO and the European Union undertook several maritime operations in the Mediterranean (Active Endeavour, Sea Guardian, Sophia and Irini) based on voluntary boarding in full compliance with UNCLOS article 110 (right of visit). Some authors interpret UNSCR 1973 (2001) as authorising non-flag States to enforce antiterrorism measures through an unrestricted right of visit.[42] State practice shows evidence of a more cautious approach.[43] Opposed boarding on the high seas of vessels operated by non-State actors is no different from opposed boarding in general, in the absence of consent by the flag State or in the presence of flagless ships.

Under the Law of the Sea, there is a clear-cut distinction regarding the recipients of the use of force: "One is the self-defence exercised by a State against non-State actors to maintain public security as part of its police measures established by the 19th century. The other concept is self-defence exercised to defend against aggression by another state."[44] This article will take advantage of this dual approach to *minor* self-defence against non-State actors under maritime law enforcement operations (see *infra* under § 5) to review the traditional *major* self-defence under the Charter regime for the use of force (see *infra* under § 6).

5. Use of force on the high seas against armed attacks

An attack by a non-State actor originating from a zone beyond State jurisdiction (high seas, outer space) and consummated in that zone[45] does not require an immediate answer to the *vexata quaestio* of self-defence against non-State actors located in a State's territory.

38. See Kwiatkowska (1991: 159 ff.), and Oxman (2006: 83 ff.).

39. On the proposal for a balance between common and selfish interests driving creeping jurisdiction, see Franckx (2005: 117 ff.).

40. See Molenaar (2021: 5 ff.).

41. See Kaye (2006: 347 ff).

42. See Heintschel von Heinegg (2006: 211 ff.).

43. Martin Fink discusses the enlarged right of visit based on three possible modalities of self-defence and points to the dangerous transition from law enforcement to *jus ad bellum* (Fink, 2018a: 245 ff.). Fink also draws attention to the difficulties of invoking self-defence to justify boarding by a non-flag State (Fink, 2018b: 114 ff.).

44. Quotation from Mori (2018) cited in Ishii (2022: 351, footnote 75).

45. Attacks against ships can take place in the internal waters or the territorial sea of a State other than the flag State. However, since this does not apply to the Houthis for the time being, this article will not elaborate on this situation. For an episode of this kind, consider the attack against a US warship (the USS Cole) in the port of Aden, Yemen, carried out in 2010 and claimed by Al-Qaeda. See "Republic of Sudan v. Harrison et al.", US Supreme Court, March 26, 2019, *587 US 2019*, relevant facts on p. 3 and ff. The majority decided that the plaintiffs who sued Sudan, for complicity and provision of material support to the attackers, failed to comply with the service of legal documents. In 2020, Sudan announced a settlement with the families of the victims.

Attacks upon warships may easily be construed as attacks against a State, under the legal fiction of "floating territory".[46] However, this construct cannot be extended by the flag State to attacks against merchant ships flying its flag or any merchant ship that asks for or is entitled to protection against attacks. This does not mean that on-the-spot reactions to attacks on merchant ships are unlawful (see *infra*).

If a warship lawfully operating on the high seas is attacked by the Houthis using missiles, UAVs, helicopters, ships, unmanned underwater vehicles or mines, self-defence is lawful and should be conducted in accordance with the traditional elements of immediacy, necessity and proportionality. The "immediate"[47] destruction of missiles, UAVs and other unmanned surface vessels or underwater vehicles[48] looks, *prima facie*, compliant with necessity and proportionality requirements considering that such weapons as operated by Houthis have been armed with explosives and used against ships, causing casualties among crews and damage to or sinking of several ships. Self-defence against manned helicopters and vessels should follow traditional rules of engagement in maritime operations:[49] initial audible or visual stop signs, warning shots followed by shots aimed at rendering the attackers non-operational.[50]

State practice supports the intervention of the flag State "when one or more merchant vessels are under attack" (Ruys, 2010: 206)[51], allowing for an on-the-spot reaction including the reasonable use of force against unlawful attacks. Protection of third-State merchant vessels requires the consent of

46. See Article 3(d) of the annex to UN General Assembly decision 3314 (XXIX) containing the definition of an act of aggression: "d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State, qualifies as an act of aggression." State nature apart and taking into consideration the operational concept of "fleet", this definition is unhelpful in low-intensity attacks against one warship or one merchant ship at a time, as seems to be the case with the attacks by the Houthis. See *infra* § 6.2. for an analysis of the consequences of aggression beyond on-the-spot armed reactions by the victim State.

47. Immediate response against incoming deadly missiles or unmanned vehicles is not a proper form of anticipatory self-defence, since without the intercept the attack would immediately materialise. See Ruys (2010: 346 ff.).

48. See Paustin (2015: 1095 ff.). Reference to self-defence against weaponised drones employed by non-State actors on p. 1105.

49. See Rule 4 of the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, adopted on 12 June 1994, www.icrc.org/en/doc/resources/documents/article/other/57jmsu.htm: "The principles of necessity and proportionality apply equally to armed conflict at sea and require that the conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security." Rule 5 also states: "How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed."

50. For a summary of law enforcement with regards to a merchant ship, see "The M/V Saiga (no. 2) Case (Saint Vincent and the Grenadines v. Guinea)", judgement of 1 July 1991, International Tribunal for the Law of the Sea, *ITLOS Reports,* 1999, § 156, p. 10: "The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered."

51. Also acknowledging the State practice of using "force to protect merchant vessels flying their flag from attacks", see Greenwood (2011: § 23).

the flag State or the shipmaster.[52] Re-flagging operations, as carried out during the Iran-Iraq tanker war of 1984–1988, are a good example of such consent.

When transposing this analysis to the attacks carried out by the Houthis in the Red Sea and the Bab al-Mandab Strait, it is possible to conclude that warships are entitled to use reasonable force against vectors posing a serious security risk (anti-ship missiles, ballistic missiles, UAVs, helicopters, ships, unmanned underwater vehicles or mines) to themselves, to merchant vessels flying the same flag as the warship and to merchant vessels whose flag State or shipmaster have requested or authorised protective intervention.

For now, this article shall limit discussion of the use of force against the Houthis to the high seas and not dwell on the mysteries of self-defence against the Houthis on Yemeni territory (examined *infra* at § 6).

Such on-the-spot reactions to Houthi attacks taking place on the high seas is not questionable and has not been questioned.[53] On the contrary, there is abundant legal criticism[54] of inland attacks on the Houthis, tentatively justified as targeting the source of the attacks carried out on the high seas. Several reactions to armed aggressions are possible, not all of which condone self-defence against the territory where the aggression ultimately originated from:

> the gravity threshold may be different in every case, depending on the facts of the situation. In other words, it may not be merely the case that the scale of the activity must be considered in conjunction with contextual factors, but that other factors actually determine the gravity threshold necessary to trigger self-defence: in other words, "gravity" is context specific. (Green, 2009: 41)

Focusing on the maritime context and taking stock of the assessment of the International Court of Justice on the gravity threshold, The Oil Platforms case (Islamic Republic of Iran v. United States of America) should be mentioned.[55] In this case, the Court faced contradictory evidence provided by the parties in a theatre of war where Iran and Iraq were using similar weaponry.[56] Despite these stringent circumstances, under § 72 of the

52. See Ruys (2010: 211 ff.).

53. See Talmon (2024). Talmon qualifies the inland attacks on the Houthis as unlawful because "The right of self-defence in Article 51 of the UN Charter is limited to the use of force that is necessary and proportional to repel an "armed attack". It does not allow for the use of force by a State to protect its perceived security, economic or other interests. The protection of navigational rights and freedoms against illegal attacks, as worthy a cause as that may be, does not allow for the use of force in self-defence. There is no right of self-defence against attacks on international commercial shipping." See also the negative answer provided by Fink (2024) and Brassat (2024): "Overall, it would have thus been preferable – at least from a legal point of view – if the US and UK limited their actions to defensive strikes against attacks on their own ships, or to strikes that would be undertaken with the consent of the respective territorial states."

54. Some legal justification literature for inland attacks does exist, albeit on a minor scale. For example, see Kraska (2024).

55. The Oil Platforms case (Islamic Republic of Iran v. United States of America), Judgment, *I.C.J. Reports* 2003, p. 161.

56. Houthis, on the contrary, operate, at present, heavy weaponry that is not used by other contending parties in the Yemenite civil war. For examples regarding anti-ship

judgement of 6 November 2003, the Court produced a frequently quoted *dictum*: "The Court 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"." [57] When admitting that such a low threshold in a single incident may suffice in itself to justify action in self-defence (i.e. beyond the on-the-spot armed reaction to stop the attack), the Court emphasised the need for compliance with the requirements for necessity and proportionality. When assessing US claims for the right of self-defence in response to a missile attack against a US flagged oil carrier and a mine hitting a US warship, the Court stated the following: "In the case both of the attack on the Sea Isle City and the mining of the USS Samuel B. Roberts, the Court is not satisfied that the attacks on the platforms were necessary to respond to these incidents." [58] On the proportionality element, the ruling was even harsher: "As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life, neither "Operation Praying Mantis" as a whole, nor even that part of it that destroyed the Salman and Nasr platforms, can be regarded, in the circumstances of this case, as a proportionate use of force in self-defence." [59]

The use of force on the high seas against attacks is double-sided, accommodating on-the-spot armed action to end the aggression and also the possibility (ICJ *dixit*) of scaling up for full self-defence, targeting the ultimate inland source of the attack. In his separate opinion on The Oil Platforms case, Judge Simma clearly captured this Janus-like dimension to the use of force:

> In my view, the permissibility of strictly defensive military action taken against attacks of the type involving, for example, the Sea Isle City or the Samuel B. Roberts cannot be denied. What we see in such instances is an unlawful use of force "short of" an armed attack ("agression armée") within the meaning of Article 51, as indeed "the most grave form of the use of force". Against such smaller-scale use of force, defensive action – by force also "short of" Article 51 – is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter. [60]

missiles see Fabian Hinz, *Houthi anti-ship missile systems: getting better all the time,* International Institute for Strategic Studies, 8 January 2024, available at https://www.iiss.org/online-analysis/military-balance/2024/01/houthi-anti-ship-missile-systems-getting-better-all-the-time/

57. Oil Platforms, *cit.*, p. 195.

58. Ibidem, § 76, p. 198.

59. Ibidem, § 77, pp. 198–199.

60. Ibidem, § 12, pp. 331–332, footnotes omitted.

6. Self-defence against non-State actors located inland

As mentioned *supra,* the use of force in reaction to armed attacks on the high seas may give way to on-the-spot armed reactions limited to stopping the attack or, where proper grounds exist, to full self-defence targeted at the inland source of such attacks. If the attackers are non-State actors, [61] it becomes formidably challenging to close the gates of the Temple of Janus [62] to achieve peace.

Use of force against non-State actors as a reaction to an internationally wrongful act requires the construction of a primary rule that allows for such a reaction. The interstate approach on the use of force when pleading self-defence requires the mediation of a State entity, through attribution, complicity or the breach of due diligence by the territorial State. In the case of Houthi attacks, none of these options modalities for State mediation would work (see *infra*, § 6.4.). However, under Article 51 of the Charter, it is possible to glimpse self-defence as a secondary rule, under article 21 (self-defence) of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSWA). [63]

> […] while a state may be justified by self-defence to use force against a non-state actor (and thereby act compatibly with the prohibition of force), insofar as those non-state actors are located in the territory of a third state, self-defensive force in the latter's territory will impair that state's territorial sovereignty. (Paddeu, 2018: 178) [64]

The victim State, claiming self-defence (a justification for otherwise unlawful use of force), can act against a non-State actor on the territory of another

61. "Non-State actors" is a popular catch-all expression that encapsulates many situations with different connections to the international regime for the use of force. This article will use the expression literally while taking into consideration the different uses of the expression. It takes stock of the proposals by a relevant non-State actor, NATO, albeit one well connected via Article 52 of the UN Charter, which set out the following in its *2022 Strategic Concept* adopted by the Heads of State and Government at the NATO Summit in Madrid, 29 June 2022 (www.nato.int/nato_static_fl2014/assets/pdf/2022/6/pdf/290622-strategic-concept.pdf): "Non-state armed groups, including transnational terrorist networks and state supported actors, continue to exploit conflict and weak governance to recruit, mobilise and expand their foothold" (§ 10); "This situation provides fertile ground for the proliferation of non-state armed groups, including terrorist organisations. It also enables destabilising and coercive interference by strategic competitors" (§11); "We will invest in our ability to prepare for, deter, and defend against the coercive use of political, economic, energy, information and other hybrid tactics by states and non-state actors" (§ 27).

62. "Some scholars view Ianus Geminus as a guardian deity (*Wächtergott*) akin to Etruscan tutelary spirits; he retained the bifrontality of ordinary sentinels of entrances and roadways, but acquitted a particularly important apotropaic role in warfare. His image was felt to have tangible power, and for this reason his shrine was left open and immediate to the city's needs at all times of even modest military activity. In the rare event of absolute peace, his shrine was closed so that he could become, in Horace's words, *custos pacis*." (Taylor, 2000: 6), footnotes omitted.

63. "Articles on Responsibility of States for Internationally Wrongful Acts and Commentaries, Report of the ILC on the work of its fifty-third session", UN Doc A/ 56/ 10, *ILC Yearbook* 2001, vol II(2), UN Doc A/CN.4/ SER.A/ 2001/ Add.1 (Part 2), p. 20.

64. See also Paddeu 2017: 93 ff.

state and this breach of territorial sovereignty would be justified [65] under the umbrella of self-defence as a secondary rule, under Article 21 ARSWA.

6.1. Territorial integrity under the UN Charter

Article 2(4) of the UN Charter, building upon the then-recent and terrible experience provided by the global conflict, [66] sets the scenario for an interstate prohibition of the use of force:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. [67]

What is announced as exclusively prescribed for States takes on board non-State actors via the definition of aggression (see *infra* § 6.2) and the operational concept of armed attack for the purpose of self-defence (under Article 51 of the Charter, see *infra* § 6.3). There is open debate on the need for mediation via a territorial State or an aggressor State that would allow for attribution (see *infra* § 6.4.) of the aggression/armed attack by way of complicity or negligence (due diligence in the exercise of the sovereign rights over a territory from which non-State actors would operate against another State).

> Private individuals or groups do not fall under Art. 2 (4), nor under the customary prohibition of the use of force, even if they may dispose of the financial, military, and organizational capacities allowing them to commit acts of armed force against States which have the scale and effects of interstate operations. (Dörr, Randelzhofer, 2012; 213 § 31)

This *dictum* is consensual even if it ring-fences "private individuals or groups". Outside this boundary, there is some room for pre-State entities (see *infra* § 6.5.).

6.2. Aggression, old and new

For several decades, States discussed the desirability (or even the possibility) of ring-fencing a definition of aggression capable of facilitating the UNSC's work based on Article 39 of the Charter when determining the existence of an act of aggression. Many considered any definition of aggression to be detrimental to the Council's "political" capabilities to restore international peace and security. At the end, the will of those wanting

65. Further to Paddeu's arguments in favour of justification and not excuse, (2018: 205 ff.): "*because* the impairment was caused by a lawful measure of self-defence it is justified."

66. See the preamble to § 7: "We the peoples of the United Nations determined [...] to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest." UN Charter, 26 June 1945, United Nations, *Treaty Series*, vol. XVI, p. 1.

67. Idem.

to limit the leeway of aggressor States won out [68] and UNGA resolution 3314 (XXIX) was adopted by consensus on 14 December 1974. [69] The Annex to the Resolution, entitled "Definition of Aggression", takes regard of Article 2(4) of the Charter:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. (Article 1).

The mechanics of UNGAR 3314 operate on an interstate basis but the taxonomy of acts of aggression provided by Article 3 offers a beachhead for non-State actors, in particular for the Houthi attacks as previously described:

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> [...]
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;"
>
> [...]
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

This article will examine, in *infra* § 6.3, the admissibility of non-State actors contributing to "aggression" through the case law of the International Court of Justice.

Article 2 of Resolution 3314 is relevant to qualify Houthi attacks since it establishes a legal presumption for the identification of aggression and admits a *de minimis* threshold for the relevance of aggression:

> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

68. For detail on the negotiating positions and the high hopes of some, see Stone (1977: 224 ff.).

69. General Assembly Official Records, 29, Supplement (No. 31) 142, UN Doc. A/9631 (1974).

This article will not examine the exception to the taxonomy of aggression based on the right to self-determination,[70] because the Houthis have not claimed such a right when carrying out attacks in the Red Sea and the exercise of the right of self-determination, under present circumstances in Yemen, would have to be directed against the Yemen Republic and its supporters, not against flag States whose vessels transit in the Red Sea.[71]

The UNSC has the prerogative to appraise the gravity of any aggression. In the absence of a decision by the Council, States may feel tempted to downgrade certain modalities for the use of force, placing them under the threshold of aggression. On the dangers of such attempts, Tom Ruys's analysis and conclusions are apposite: "the wholesale exclusion of small-scale and/or "targeted" forcible acts from the scope of Article 2(4) UN Charter is (1) fraught with conceptual difficulties; (2) does not correspond to actual customary practice, and; (3) is equally undesirable from a more policy-oriented perspective" (Ruys, 2014: 159 ff., at 210).

Non-State actors tend to perform aggressive acts in an intermittent way – hit and hide – taking advantage of surprise and resorting to asymmetrical warfare. As such, it is not reasonable to submit non-State Actors to the full weight of the equivalent gravity threshold established under article 3 g) of the Annex to Resolution 3314 ("such gravity as to amount to the acts listed above"). When evaluating the aggressions of a non-State actor, two methodologies may be considered: the equivalent effects approach and the accumulation of events doctrine. The former builds upon the literal element of equivalency present in article 3 g).[72] The latter builds upon repetition of aggressive acts, the continuation of "minor" attacks that when combined breach the threshold for "aggression". The accumulation of events doctrine tends to anticipate the straw that will break the camel's back. By so doing, it becomes an open door to anticipatory self-defence and to fall prey to legal criticism based on the teleological and objective limits of the wording of Article 51.[73]

Houthi attacks against ships transiting the Red Sea so far include the use of anti-ship missiles, ballistic missiles, unmanned air and sea vehicles, sea mines

70. Article 7 of UNGA Resolution 3314 states: "Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of people forcibly deprived of that right and referred to in the declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration."

71. On the general inapplicability of the prohibition of the use of force in national liberation struggles, see Corten (2021: 145 ff.).

72. For analytical purposes, this article will restrict itself to the traditional definition of "armed force", i.e. that conducive to "armed attacks", and will not consider the weaponisation of other resources that might cause similar effects to those resulting from armed attacks. Cyberattacks are one obvious example of this. Since the Houthis have not yet resorted to cyberattacks, there is no need to deal with them. For a concrete example, see NATO's *2022 Strategic Concept* which endorses the equivalent effects approach: "A single or cumulative set of malicious cyber activities; or hostile operations to, from, or within space; could reach the level of armed attack and could lead the North Atlantic Council to invoke Article 5 of the North Atlantic Treaty" (§ 25, cit.).

73. For such a perspective, and providing convincing arguments, see Wilmshurst (2013: 368 ff.). The author gives the British attack on Yemen in 1964 (a response to Yemeni attacks on the Federation of South Arabia, that later would become South Yemen) as an example of a claim of the cumulative effect of "minor" attacks.

and armed helicopters. These are military weapons unavailable to the majority of States. Taking into account the seriousness and repetition of the attacks, the damage caused to ships, the casualties among crews and the serious risks posed by such heavy weaponry, these actions tend to qualify as armed attacks.

6.2.1. The day Caroline met Article 51

Article 51 of the UN Charter sets out the right of self-defence and deals with its procedural dimensions within the Charter's institutional architecture:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. [74]

Since this right is defined as inherent (*droit naturel* in the French version), is there room to accommodate pre-Charter State practice that would contribute density to the temporal and material requisites of the right of self-defence? By asking this question, no favour is given to pre-Charter customary laws that infringe the Charter. [75] The purpose of the exercise is to identify customary elements that could illuminate the material and temporal requisites for the exercise of self-defence.

By scrutinising historical case law, one case comes to mind not only because it dealt with anticipatory self-defence [76] (as is the case with most of the attacks against the Houthis located inland) and its material requisites but also because it involved an attack against non-State actors (although at the time both States involved claimed self-defence to be a prerogative of statehood, irrespective of the role played by individuals). In 1837, British forces destroyed an American flagged steamer, the *Caroline*, while it was in a US port. The *Caroline* was used by American supporters to provide arms and ammunition to rebels in Canada. After an American protest, several letters were exchanged and one included the sentence which made the *Caroline* a *cause célèbre*: "It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation […]" and "the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it." [77]

74. UN Charter, 26 June 1945, United Nations, *Treaty Series*, vol. XVI, p. 1.

75. The discussion among advocates of the primacy of customary pre-Charter rules over the Charter should be resolved in favour of the treaty law as present in the Charter. For a summary of the discussion, see Ruys (2010: 9 ff.).

76. See Paddeu (2018: 351 ff.). Paddeu uses the state of necessity defence to assess the *Caroline* case but recognises that it should be characterised as an example of self-defence.

77. "Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat

Necessity would have justified the anticipatory self-defence, the breach of territorial integrity, the destruction of the *Caroline* and the death of two people.

By referring to the circumstance "if an armed attack occurs", Article 51 does not include anticipatory self-defence, but, as mentioned before (*supra* § 5), it does not prohibit on-the-spot reactions against incoming potentially deadly or destructive missile attacks. The *on-the-spot* reactions are directed against *quasi*-attacks, benefiting from a lower threshold for immediacy than the *imminent* attacks associated with pre-emptive self-defence and much lower than the *probable* attacks in the case of preventive self-defence. [78] On-the-spot reactions against Houthi attacks, as carried out until now, would continue to happen in the high seas. For attacks against the Houthis located inland, the threshold associated with pre-emptive self-defence would require an imminent threat akin to the preparing of a missile launch or the radar illumination of targets normally associated with pre-launch activities.

A succession of attacks by the Houthis – an "ongoing attack" [79] – does not eliminate the need for a segmented analysis of each attack. Ongoing attacks are not a blanket justification for the temporal, causal and material requisites for self-defence.

6.2.2. Non-State actors: the ICJ method

The approach of the International Court of Justice (ICJ) to armed attacks potentially committed by non-State actors remains prudent. [80] The first encounter was anchored on a very cautious reading of the Law focusing on attribution (see *infra* § 6.4):

> There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description [...] may be taken to reflect customary international law. [81]

Caroline" [March, April 1841], *British and Foreign State Papers 1840-1841*, vol. XXIX, London, 1857, p. 1137 and ff.

78. For a taxonomy, see Distefano (2014: 560 ff.), who uses the concept "attack already launched" to describe the circumstances referred *supra* as allowing for on-the-spot self-defence.

79. As concerns the use of "ongoing attacks" as justification for continuous self-defence, see Buchan (2024).

80. See Rao (2016: 127 ff.), providing a review of the Court's case law at p. 145 and ff.

81. "Military and Paramilitary Activities in and against Nicaragua" (Nicaragua v. United States of America), Merits, Judgment, in *I.C.J. Reports*, 1986, p. 14, § 195 at p. 103. The Court states that assistance to rebels in the form of provision of weapons or logistical support may be regarded as a threat or use of force but not armed attack, *ergo* it does not trigger article 51 (ibidem).

Almost two decades later, the Court had the opportunity to analyse the behaviour of non-State actors not involving State mediation:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (200l), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case. [82]

One year later, in a contentious case, the Court clarified the difference between attacks against non-State actors and attacks against the sponsor State, considering that "Uganda did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC." [83] The Court notes that, rather, the armed attack which was purportedly the basis for the response of unilateral force was from a non-State actor – the Allied Democratic Forces (ADF) – and it thus stated a *non liquet*: [84]

> the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. [85]
>
> Article 51 of the Charter may justify a use of force in self-defence within the strict confines there laid down. It does not allow for the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including in particular, recourse to the Security Council. [86]

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82. "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", Advisory Opinion, in *ICJ Reports* 2004, p. 136, § 139 at p. 194. The *obiter dictum* was not repeated in other ICJ decisions. For a critical reading of the ICJ Wall decision and defending self-defence against non-State actors, see Canor (2006: 129 ff., at p. 132).

83. "Armed Activities on the Territory of the Congo" (Democratic Republic of the Congo v. Uganda), Judgment, in *I.C.J. Reports* 2005, p. 168, § 146 at p. 222. For an overview of the *jurisprudence constante* on attribution, see Kammerhofer (2007: 89 ff.). For a critical and parallel review of the Court's ruling on military activities in Nicaragua and Congo, see Trapp (2007: 141 ff.).

84. See Trapp (2015: 694): "The Court has, however, never ruled out defensive force against (and only against) NSAs operating from foreign territory in response to un-attributable armed attacks".

85. Idem, ibidem, § 147 at p. 223.

86. Idem, ibidem, § 148 at p. 223 and ff. In a separate opinion, Judge Simma defended a functional reading of Article 51, bypassing the statehood requisite: "if armed attacks

ICJ jurisprudence on self-defence in a maritime context was delivered in The Oil Platforms case, *supra* § 5, in which it repeated its focus on attributing the attacks to the State:

> in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as "armed attacks" within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary law on the use of force. [87]

6.2.3. Necessity

When assessing the lawful use of force against aggression committed by non-State actors, necessity is the first material requisite that must be fulfilled. Necessity operates in a negative way: were there, under the specific circumstances, "alternative (peaceful and diplomatic) mechanisms for protecting a State's fundamental interests"? (Trapp, 2011:141 ff., at 146). [88]

Returning to the Houthi attacks in the Red Sea, on-the-spot reactions in the high seas against incoming missiles, UAVs and other unmanned vehicles or armed attacks by helicopters or boats seem to comply with the necessity requisite: no other alternative was, under the time constraints, available. Negotiations with the Houthis seems futile under the succession of attacks. [89]

A similar approach can be taken against Houthi attacks from inland sites if the attack is already launched or imminent: no timely alternative exists. [90]

Attacks against inland-based Houthi military equipment used in the past and which will probably be used in the near future to attack ships crossing the

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are carried out by irregular forces from such territory against a neighbouring State, these activities are still armed attacks even if they cannot be attributed to the territorial State', and, further, that it "would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require", idem, ibidem, § 12 at pp. 337, quoting Judge's Kooijmans's separate opinion allowing for self-defence against non-State actors operating in "stateless" territories (§ 30 at p. 314: "the almost complete absence of government authority in the whole or part of the territory of a State.").

87. The Oil Platforms case, *cit.*, § 51, p. 186.

88. Pleas for necessity come in *formulae* that tend to anticipate the requisite of proportionality: '"the danger must be serious and imminent and any other method of prevention must be impossible. Permission should also be limited to such action as is barely necessary for the purpose of self-preservation'" (Rodick, 1928: 37–38). Necessity *formulae* sometimes encapsulate elements of proportionality: '"The necessity condition requires, among others, that the action targets the non-state actor and that only incidentally affects assets or persons belonging to the territorial state if engaging them is necessary for the effective exercise of this right against the non-state actor'" (Tsagourias, 2016: 823).

89. See the arguments put forward by Henderson (2024) against such a "diplomatic" approach.

90. This approach transposes State-based reasoning to attacks carried out by non-State actors: "When self-defense is used in immediate response to an ongoing attack by another state, practice indicates that a state is not required to seek or use alternative means." (Akande, Liefländer, 2013: 563 ff., at p. 564).

Red Sea may pass the necessity test if it is possible to demonstrate that this military equipment is used or will be used to carry out an ongoing attack. This construction is similar to the one employed under criminal law for continued crime, which is considered a single crime consisting of a series of acts but all arising from one criminal resolution.

In all three modalities (a materialised attack in the high seas, an incoming attack from inland or an imminent attack from inland), the *décalage* between the threat and the reaction allows reasonable time to mount a response.[91]

This *décalage* is broader for the third modality of self-defence against Houthi attackers located inland.

6.2.4. Proportionality

Since Yemen has lost control over the territory occupied by the Houthis and this loss was not caused by a breach of due diligence by the territorial State (see *infra* § 6.4 on Yemen not being a colluding State), the use of force for self-defence must be directed at the Houthis (and not the Yemeni government or its structures) and, in particular, at Houthi military and technical equipment and crews responsible for the attacks on ships crossing the Red Sea.

Self-defence has one, and only one, purpose: to repel an unlawful attack.[92]

In order to do so, the use of force must comply with the requirement of proportionality.[93] The degree of force used in response to the attack may be balanced in different proportions:

> First, proportionality may simply be used to describe the requirement that the defending state use no more force than is necessary. Second, proportionality might mean that the defensive action must be quantitatively "commensurate" either with the attack to which it is responding or with the threatened attack. Third, proportionality may require that the damage inflicted in self-defense not be disproportionate in comparison to the pursued objective. (Akande, Liefländer, 2013: 563 ff., at p. 566).

Whichever threshold of "proportionality"[94] is used when assessing the targeted bombing of Houthi weaponry and associated command, control and radar centres, the force used by the victim States must comply.

91. See Buchan and Tsagourias (2021: 66).

92. Contrary to reprisals, self-defence cannot be used for punitive purposes. See Gardam (2004: 157), who comments on the post-September 11 context and growing inconsistency in the *jus ad bellum* categories: "What in previous times may have been regarded as reprisal action by the United States and its allies has received significant State support as constituting legitimate self-defence in response to a prior armed attack and, moreover, not as pre-emptive in nature" (2004: 182).

93. See Henderson (2023: 316 ff.).

94. The balancing of force used by the attacker and the defender may entail "a quantitative conception of proportionality, that is, a conception requiring a balance between the damages caused and the military means used by the attackers and the damages caused and the military means used by the state acting in self-defence" or "a teleological conception of proportionality, that is, a conception requiring that the action in self-defence must be limited to what is necessary to achieve its objective – to defend the victim state." (van Steenberghe, 2010: 183–208, at p. 205). In most cases, the balance test for proportionality would include elements of both.

Proportional use of force was, *in casu*, that necessary to repel imminent and probable future attacks and, at the same time, represented a reasonable degree of equivalent force to that employed by the Houthis.

6.3. Attribution, complicity and due diligence

By following the interstate [95] approach to self-defence, one concludes that an attack against a non-State actor located in a territorial State requires mediation: either by another State or by the UNSC granting a State the use of force (see *supra* § 2). State mediation may occur via an invitation to intervene or consent by the territorial State (see *supra* § 3) or by attributing the non-State actor's behaviour to the territorial State.

"As a general principle, the conduct of private persons or entities is not attributable to the State under international law." [96] The relevance of a private actor's behaviour is set by the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) [97] under Article 8 (Conduct directed or controlled by a State):

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, [98] that State in carrying out the conduct.

When applying these standards to the Houthis [99] the Republic of Yemen cannot be seen as attributable for their actions unless a high standard of due diligence [100] is required. This high standard would be equivalent to

95. State-centric approaches are not limited to self-defence and *jus ad bellum* in general. State centricity also impregnates human rights law but not humanitarian law. For a critical overview, see Henckaerts and Wiesener (2020: 195 ff.). For a more optimistic view, see Nowak and Januszewski (2015: 113 ff.) For an analysis of case law based on complicity by States who provide aid or support to non-State actors, see Scott (2019: 1 ff.).

96. International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001, Commentary 1 to Article 8, *Report of the International Law Commission on the work of its fifty-third session*, p. 47.

97. International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA), UN Doc. A/56/83, 3 August 2001.

98. For an analysis of the jurisprudential threshold for the effective control to be exercised by the ordering State, see Henderson (2015: 88 ff.)

99. The Houthis rebelled in 2003, have effectively controlled a large swathe of Yemeni territory since 2014 and are at war with the Republic of Yemen (and other rebel groups inside the historical frontiers of Yemen).

100. See Lanovoy (2017: 563 ff.) This article correctly correlates due diligence and effective control: "in the case of due diligence obligations, the legal assessment is one of the capacity to prevent (that is, some form of control over the territory and/or actors), the ascertaining of complicity only requires knowledge of the wrongdoing and causal link between aid or assistance provided and the wrongdoing committed in the case of due diligence obligations, the legal assessment is one of the capacity to prevent (that is, some form of control over the territory and/or actors), the ascertaining of complicity only requires knowledge of the wrongdoing and causal link between aid or assistance provided and the wrongdoing committed" (at p. 584). For a broader comparison between due diligence and complicity, see, from the same author, Lanovoy (2016: 204), in which the author construes effective control as a condition for due diligence duties, a truism that predates the UN Charter. For direct attribution of non-State actors in situations of loss of control by the territorial State, see De Wet (2018: 91

establishing a factual prohibition of successful rebellion, fixing an obligation for results to be attained by the territorial State. Due diligence has a role to play as a standard to evaluate a territorial State's conduct with regard to the rebels. [101] If loss of effective territorial control was due to voluntary inaction or gross negligence, then due diligence may justify a softening of the sovereign claims of the territorial State. If, on the contrary, loss of effective territorial control was due to the overwhelming power exercised by the rebels, no due diligence duties were breached by the territorial State.

Due diligence does not successfully justify attribution of the attacks conducted by the Houthis to the Republic of Yemen (or consequently justify acts of self-defence in the territory of Yemen). However, the attacks could be attributed through Article 8 of ARSIWA to Iran, as a sponsor of Houthi attacks and provider of most of their heavy weaponry. [102] This line of argument would be compatible with interstate self-defence mechanisms but would not justify acts of self-defence on Yemeni territory.

Confronted with the difficulties of attributing non-State actions, some actors have tried to evade State mediation for a literal reading of the Charter. "Article 51 of the U.N. Charter says that the right of self-defense applies when an "armed attack occurs" without specifying *who* is responsible for the original attack." (Ohlin, May, 2016: 63) [103] This reading requires some qualification with regard to the effective territorial control exercised by the non-State actor in order to consider whether a derogation of territorial State sovereignty has occurred (see *infra* § 6.5.).

6.4. *De facto* regimes

When the conditions of statehood are degraded due to internal conflicts, the territorial State may lose effective control over a part of its territory. Concomitantly, other "internal" actors may replace the territorial State and effectively control the territory and from there promote armed attacks against other States. The intensity of that control, mostly the "State-like" control exercised by these other actors, if encompassed by the impossibility of the territorial State to prevent and deter the attacks, may be recognised by other subjects of international law and such recognition may have consequences affecting the legal regime for the use of force.

A sovereign State remains protected by the prohibition of the use of force, even if it loses its effective government and becomes a so-called failed or

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ff.). For a broader (not focused on *jus ad bellum*) construction of a secondary norm of due diligence, taking stock of the work of the ILC, see Scott (2022: 191 ff.). For a critical review of the attempts to establish due diligence as a primary rule along the principle of *sic utere tuo ut alienum non laedas*, commonly used in transboundary environmental litigation, see Paulina Starski (2015: 481 ff.). For an attempt to build due diligence as a secondary rule, taking stock of domestic law, see Scott (2022: 189 ff.).

101. The victim State included. Due diligence is conducive to procedural duties, as obligations of means and not obligations of results. See Trapp (2015: 695): "A refusal to cooperate, in circumstances where the host state is otherwise unable to prevent its territory from being used as a base of such activities, would equally amount to an internationally wrongful act for which the host state would bear responsibility."

102. For an analysis of the possibilities of attributing the Houthi attacks against Saudi Arabia and the United Arab Emirates to Iran, testing the applicability of ARSIWA Articles 4 and 8, see Alghoozi (2022).

103. For a similar methodology, interpreting the core of Article 51 as allowing States to respond to "attacks that seriously endanger their security", see Deeks (2012: 483 ff. at p. 493).

failing State. An exemption of those States from the scope of the prohibition by way of its teleological reduction, which is argued by some authors, has not been generally recognized in State practice and is, therefore, not part of the *lex lata*, apart from the risk that such a reduction could invite interested States to an abusive behaviour and is thus inadvisable as a matter of legal policy. It may be, however, that where States are unable to control private activities in their territory effectively, the right of self-defence would apply under more lenient conditions, so that the threat failed States might pose to international peace and security could be dealt with under one of the exceptions to the prohibition of the use of force (Dörr, 2019: § 26).

The admissibility of self-defence against *de facto* governments [104] (and not the territorial State, its military or agents [105]) controlling parts of the territory of a State may occur under four modalities that might, under certain conditions, arise in a combined, albeit successive, manner:

- authorisation by the UNSC (prior – the preferred lawful way – or subsequently; see *supra* § 2);

- an invitation from the territorial State to third-party States to intervene against the *de facto* government (see *supra* § 3);

- silent non-opposition by the territorial State to an intervention by third-party States invoking self-defence against a *de facto* government;

- recognition, by the victim State claiming self-defence, of the power grab exercised by the *de facto* government, thus becoming, vis-à-vis the recognizing State, a partial subject of international law.

From a *lege lata* perspective, the first two modalities do not pose difficulties. On the contrary, the last two are not consensual and require proof of a customary norm establishing a primary rule allowing for self-defence against *de facto* governments.

Several States have acted under Article 51 of the Charter against *de facto* governments and, accordingly, have notified the UNSC. On one occasion, the Federal Republic of Germany [106] invoked this possibility without the consent of the concerned territorial State, Syria:

> ISIL has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time

104. Houthis are also qualified by some authors as rebels who do not have effective control of Yemen and are not entitled to the use of force in self-defence against attacks from Saudi Arabia. On this line of reasoning, see O'Connell (2019b). Except for the limits of the effective control exercised by the Houthis (which includes a significant part of Yemen), this view is coherent with an unlawful invitation to intervene by President Hadi (see *supra* § 3), as argued by the same author (2019a: 230 ff.). For a more lenient view on possible legal interactions between victim States and rebels, see Paust (2015: 279 ff.).

105. Self-defence against *de facto* governments and not directed against the territorial State is easier to deal with in regard to the right to territorial integrity (see *supra,* § 6.3.2., for the opposite situation in military activities on the territories of Nicaragua and Congo, where both States were the direct target of aggressions and not only the non-State actors present on their respective territories).

106. The recognition of a *de facto* government puts some distance from discussion of the unwilling or unable test. On that line see Tladi (2019: 77), a strenuous critique of such a test, commenting on the German and Belgian declarations under Article 51. From the same author and along the same lines, see (2020: 227 ff.) (footnote 1 provides the author's extensive bibliography on this topic). For an overview of doctrine and State practice, also pointing to the permanence of the interstate legal regime for the use of force in self-defence, see Mahmoudi (2021: 251 ff.).

> exercise effective control. States that have been subjected to armed attack by ISIL originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic. Exercising the right of collective self-defence, Germany will now support the military measures of those States that have been subjected to attacks by ISIL. [107]

On the same matter and, like Germany, invoking UNSCR 2249 (2015), Belgium notified the UNSC, under Article 51, of "taking necessary and proportionate measures against the terrorist organization "Islamic State in Iraq and the Levant" (ISIL, also known as Da'esh) in Syria in the exercise of the right of collective self-defence, in response to the request from the Government of Iraq." [108] Iraq's request for intervention does not replace Syria's consent but had been used by Norway on a previous communication to the UNSC under Article 51: "The Government of Iraq requested the United States to lead international efforts to strike ISIL sites and military strongholds." [109] Iraq's request was formulated in a letter sent to the UNSC on 25 June 2014 noting that "ISIL has established a safe haven outside Iraq's borders that is a direct threat to the security of our people and territory," appealing for the "international community's support". It stated that "[we] believe that the provision of additional assistance for the specific purpose of targeting ISIL will further help the Iraqi people and the security forces to turn the tide in the struggle against the terrorists, and thereby restore security and stability in our territory." [110]

One requisite for the acceptability of self-defence against the Houthis located inland is the effective control of the territory and government-like behaviour, supported by the population, with an organized military force. At least since 2014, the Houthis have been a *de facto* government in western Yemen. "It is almost generally accepted that *de facto* regimes exercising their authority in a stabilized manner are also bound and protected by Art. 2 (4)" (Dörr, Randelzhofer, 2012: 211 § 29). [111]

A second requisite is the use of force against the Houthis and its military and weaponry, not against the Yemeni government, military, assets or population.

A third requisite is common to any claim of self-defence: necessity and proportionality of armed reaction.

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107. Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, S/2015/946.

108. Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, S/2016/523.

109. Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council, S/2016/513.

110. Letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691, updating the letter from 25 June 2014 (S/2014/440).

111. For a systematic analysis of the theme, using the broader, neutral concept of "*de facto* regimes", see Frowein (1968: 52 ff.). For subsequent case law, see Reymond (2013: 132 ff.). Considering the possibility of *de facto* regimes as *per se* contributors to the emergence of customary norms, see Berkes (2020: 377 ff.).

A fourth, less stringent requisite, would require tacit acquiescence by the territorial State. Any protest by the territorial State on behalf of self-defence against non-State actors is equivalent to a claim of violation of its territorial integrity and sovereignty. Such a protest inhibits the emergence of *opinio iuris* (*ex injuria non oritur jus*). Syria protested against acts of self-defence committed on its territory under UNSCR 2249. Yemen, on the contrary, has remained silent.

Two final notes on the use of force against *de facto* governments. First, under the requisites mentioned, self-defence encompasses land territory but also internal waters and the territorial sea:

> This view would also apply *a fortiori* in the case of a "failed State" where there is no effective government in power capable of policing its territorial waters. Moreover, the duty to render assistance to persons in danger or distress, contained in Art. 98 UN Convention on the Law of the Sea (and Art. 12 High Seas Convention) significantly imposes this duty "at sea", not as in other articles "on the high seas". (Shearer, 2010: § 33)

Second, treating non-State actors as *de facto* governments, for the sake of not requiring the territorial State's consent to the use of force, brings the law of international armed conflicts into focus. This is the consequence of by-passing territorial State sovereignty, which treats rebels according to the domestic law of the State concerned. [112] If the victim State reacts against non-State governments inside the territorial domain of a non-acquiescing State, the conflict becomes internationalised and a higher level of protection will be accorded to belligerents under international humanitarian law, replacing domestic law standards.

6.5. Self-defence straight from the horse's mouth

On 12 January 2024, two days after the adoption of UNSCR 2722 (2024), the US sent a letter to the UNSC informing:

> […] the United States, in the exercise of its inherent right of self-defence, as reflected in Article 51 of the Charter of the United Nations, has undertaken discrete strikes against Houthi facilities in Yemen in response to a series of armed attacks by Houthi militants over the last few months, including several attacks against United States Navy ships in the Red Sea. [113]
>
> […] on 11 January, the United States, as part of a multinational operation, [114] alongside the United Kingdom and with support from

112. For detailed reasoning supporting this conclusion, see Akande (2012: 136 ff.). Leaving the choice of regime open for States to agree upon in the future, see Marahun and Ntoubandi (2016: § 46).

113. 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, p. 1.

114. Operation Prosperity Guardian. See Statement from Secretary of Defense Lloyd J. Austin III on *Ensuring Freedom of Navigation in the Red Sea*, of 18 December 2023, www.defense.gov/News/Releases/Release/Article/3621110/statement-from-secretary-of-defense-lloyd-j-austin-iii-on-ensuring-freedom-of-n/: "to uphold the

> Australia, Bahrain, Canada and the Netherlands, conducted discrete strikes against Houthi facilities in Yemen that facilitate Houthi attacks in the Red Sea region, including air and coastal surveillance radar sites, as well as unmanned aerial system and missile facilities and launch sites. These necessary and proportionate strikes were taken after non-military options proved inadequate to address the threat. [115]

On the same day, the UK sent a letter to the UNSC invoking Article 51 of the Charter and the inherent right of individual self-defence and announcing:

> In view of the armed attack against HMS *Diamond* and the ongoing risk to British ships, the United Kingdom [on 11 January 2024] conducted precision strikes against Houthi military facilities used as unmanned aerial vehicle and missile launch sites. These strikes were necessary and proportionate measures taken in exercise of the individual right of self-defence. [116]

On 22 January 2024, the Russia Federation sent a letter to the UNSC commenting on the two previous ones:

> Security Council resolution 2722 (2024), adopted in the context of the situation in the Red Sea, did not change this legal situation. It did not create any "right to defend commercial vessels" by way of the use of force, in particular as it was not adopted under Chapter VII of the Charter and does not contain any language that may suggest authorization of the use of force. [117]
>
> Force used against commercial vessels in the Red Sea did not involve commercial vessels flying the United States or United Kingdom flags, which a priori cannot give any right to self-defence to the United States or the United Kingdom. [118]
>
> Accordingly, the United States and the United Kingdom actions are to be qualified as unlawful use of force in violation of Article 2 (4)

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foundational principle of freedom of navigation [we] must come together to tackle the challenge posed by this non-state actor." The European Union established a military maritime security operation (EUNAVFOR ASPIDES) limited to sea operations ("protect vessels against multi-domain attacks at sea, in full respect of international law, including the principles of necessity and proportionality, in a sub-area of the Area of Operation", Council Decision (CFSP) 2024/583 of 8 February 2024) but claiming the right to self-defence ("Forces deployed for the operation should act in compliance with applicable international law, including customary international law, including self-defence where conditions are met, to defend against an imminent or ongoing attack on their own, or third-party, vessels", idem, recital 8). The combination of these two elements (attacks at sea and self-defence against such attacks) seems to announce a self-restrained approach to self-defence, excluding attacks against Houthis located inland.

115. Ibidem, p. 2.

116. Letter dated 12 January 2024 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2024/55.

117. Letter dated 22 January 2024 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, S/2024/90, p. 1–2.

118. Idem, p. 2.

> of the Charter of the United Nations constituting an act of aggression, and notification addressed to the Security Council under Article 51 does not legitimize it. [119]

The use of force against inland Houti positions in Yemeni territory is qualified by the US and UK as self-defence, compliant with necessity and proportionality requirements, in reaction to armed attacks against US and British warships, US Navy helicopters and commercial vessels (without identifying the flag the latter were flying). Russia's reaction does not exclude the legitimacy of a claim for self-defence if evidence was to be produced of an armed attack against US or British warships or commercial vessels flying the US or British flags. In the absence of such evidence, Russia considers that force cannot be lawfully used (i.e. under Article 51 of the Charter) against inland Houthis. According to the Russian statement, "Massive airstrikes do not correspond to" necessity and proportionality criteria and must be qualified as a breach of Article 2(4) of the Charter.

Building on Russia's arguments, the flag State of an attacked warship or commercial vessel would be entitled to exercise the right of self-defence against inland Houthis. As far as available open-source information provides, US and British air strikes were adequately targeted against Houthi military installations and did not correspond to the Russian claim of "massive airstrikes".

The requirements of proportionality, necessity and timing for claims of self-defence against the Houthis were dealt with under § 6.3, *supra*.

7. Conclusion

States' reactions to attacks in the Red Sea promoted by the Houthis provide an interesting, albeit circumstance-specific, testbed for the use of force against non-State actors. Firstly, because such attacks take place in the high seas where traditional territorial jurisdiction is not relevant, replaced instead by flag State jurisdiction. Warships, merchant vessels flying the flag of the intervening warship or other vessels whose flag State or the shipmaster have requested or authorised protection are lawfully entitled to on-the-spot armed reactions in order to destroy missiles, unmanned vehicles and mines or to alert and render inoperative attacking manned airships or vessels.

The territorial State once requested the use of force by States against the Houthis located in Yemen, although the legitimacy of such invitations is debatable and the request was addressed only to the members of the Gulf Cooperation Council. Notwithstanding these circumstances, in the past the US has attacked the inland Houthis, which it justified by announcing it had been authorised to do so by the Republic of Yemen.

Although the UNSC has already condemned the Houthi attacks in the Red Sea, UNSCR 2722 (2024) does not offer authorisation for the victim States to use force against the inland Houthis.

Since 2014, if not before, the Houthis have exercised effective control of western Yemen, ruling the territory and managing a sizeable army with operational heavy and sophisticated weaponry. It is possible to qualify the Houthis as a *de facto* government. Armed attacks by such governments may

119. Idem, p. 3.

entitle flag States to resort to self-defence against the inland Houthi's military infrastructure responsible for attacks against ships in the Red Sea. If they do so, States will internationalise the conflict and the corresponding international law standards will become applicable to the Houthis.

The threshold for Houthi "aggression" and the requisites of immediacy, necessity and proportionality should be no different from those recognised by case law on the use of force. The Houthi attacks against vessels on the Red Sea using heavy weaponry capable of sinking, seriously damaging or causing a large number of casualties cross the threshold of aggression. Houthi attacks at sea require on-the-spot reaction and justify delayed use of force against inland equipment and crews responsible for such attacks if other attacks have been launched, are imminent or are highly probable. On-the-spot reactions at sea and inland attacks against said equipment and crews are necessary, since there is no timely alternative. The destruction of this equipment is a proportional reaction to the attacks.

Until now, there is tacit acquiescence by the Republic of Yemen to armed attacks against inland Houthis by flag States invoking self-defence. This circumstance positively differentiates the admissibility of self-defence against the inland Houtis from other cases of self-defence against non-State actors where the territorial State objects to intervention.

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