Houthi Attacks on Merchant Vessels in the Red Sea

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The Red Sea has seen a rise in attacks on merchant ships since 19 October 2023. Although the number of ships having been attacked differs depending on the sources used, the number has by now at the very least exceeded 50 (see here and here).

Beyond injuries to crew, material damage, and a rise in the costs of the products transported due to many ships sailing around the southern tip of Africa, there may also be severe environmental consequences. This is illustrated by the 18 February attack on M/V *Rubymar*, which sank on 2 March 2024 in the Red Sea. Oil and its cargo of fertilizers may interact harmfully with marine ecosystems, including local fishing areas (see here).

Nearly any definition of maritime security would cover these attacks and the international response has rightly been one of condemnation, even by the UN Security Council in its Resolution 2722 (2024) of 10 January 2024.

Multiple aspects of international law are of relevance here. A mere few of these are considered below.

Piracy

On 19 November 2023, the Houthis undertook a vertical insertion with an ensuing hijacking of M/V *Galaxy Leader*. The group recorded the act, later releasing the film on the Internet. Based on the film, the Houthis used a helicopter to bring their soldiers onboard. These fighters then took control of the vessel. Additionally, it would seem several small fast boats intercepted the *Galaxy Leader* prior to the boarding (see here). The vessel and its crew are still in Houthi hands.

Article 101 of the UN Convention on the Law of the Sea defines piracy as, *inter alia*, the following (omitting *litras* b and c):

(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;

Although there have been few instances of piracy through the use aircraft, that means remains a technical possibility, especially by sea planes.

Most of the above criteria are rather easy to satisfy, but an issue arises in relation to “private ends.” Some claim that this is merely a question of whether the actor represents a State or not (Guilfoyle p. 36-37 and to some extent Papastavridis). Applied to the Houthis, this approach would be satisfied. However, based on *inter alia* the deliberation leading to the 1958 Convention on the High Seas (see here p. 29, para. 19, and p. 78, para. 33) and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) (Ronzitti p. 2), it is submitted that the more correct view, regretfully, is that private individuals may also evade the definition of piracy if they act on political and perhaps also on philosophical or religious grounds. A regulation in line with the first mentioned approach would be easier to enforce, but State practice would still seem to be aligned with the latter. Some case law, especially in relation to Somali piracy, makes this assessment today somewhat more uncertain.

1988 SUA Convention

Yemen is party to the 1988 SUA Convention, but has not become party to the 2005 Protocol that expands upon the regime in the 1988 Convention.

The most relevant offence that individual Houthis may be held to have committed unlawfully and intentionally is found in Article 3, No. 1 (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.” This provision presumably applies to all vessels that have been hit by antiship missiles from the Houthis. The attack of M/V *Ruby Mar* with ensuing consequences is an example.

Also, Article 3(2) prohibits threatening “a physical or juridical person to do or refrain from doing any act, to commit any of the offenses set forth in paragraphs 1(b), (c), and (e), if that threat is likely to endanger the safe navigation of the ship in question.” That provision covers Houthi threats as they demand, *inter alia*, the owners of these vessels to abstain from calling at Israeli ports lest their vessels be attacked in such a manner that the safe navigation of the vessel is likely to be endangered.

Beyond granting jurisdiction to Yemen and the flag State under Article 6(1), Article 6(4) might also be helpful, as Djibouti, Sudan, Egypt, Jordan, and Saudi-Arabia are all parties to the 1988 SUA Convention. To the extent that any one of these States has an alleged offender in its territory, they are obliged to “take such measures as may be necessary to establish its jurisdiction over the offences” if they decide “not to extradite the alleged offender to any of the States parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of [Article 6].”

Are the Attacks Part of a Non-International Armed Conflict?

Much may be said on this issue, but an important aspect is the seeming lack of a *nexus* between the attacks on merchant vessels and the intra-Yemen fight for power that fueled the non-international armed conflict (NIAC) in Yemen (leaving aside the issue of the possible multiplicity of NIACs there before 19 October 2023). The NIAC related to the fight for power in Yemen has admittedly been put on hold since 2022 due to a largely upheld ceasefire. Thus, it seems more plausible that there are at least two NIACs in Yemen, the one already mentioned and one (or more) new one(s) between the Houthis and foreign States.

To the extent that the Houthis attack foreign naval vessels, there is little problem with identifying the State party to a potential NIAC. Regarding the non-State party, the requirement of organization is clearly fulfilled by the Houthis, whereas the requirement of intensity/protraction of the hostilities may be more difficult to establish (more generally on these issues, see International Committee of the Red Cross, p. 13-15). With the *continuing* targeting of U.S. military assets and the corresponding U.S. response, however, that threshold would be fulfilled (for the same view, see Professors McLaughlin, Kraska, and Papastavridis).

More problematic is identifying when such attacks are to be considered a NIAC in relation to attacks on only merchant vessels. One can hardly group the plethora of flag States together as whole, and the issue will then be whether there is sufficient intensity/protraction for a

NIAC between the said flag State and the Houthis. So far, the damage inflicted seldom makes the vessel unseaworthy, and fortunately sailors are seldom injured or killed, although this outcome of the attacks may be a result of mere luck, not to mention naval interception of inbound weapons. Nevertheless, the issue remains as to the "organization" of the non-Houthi party to this NIAC when only merchant vessels are attacked.

The Right to Use Force Against Houthi Infrastructure in Yemen

The United States and the United Kingdom attacked 60 targets on sixteen different locations in Yemen on 12 January 2024 (see here). Both argued these attacks were undertaken in self-defense (see here and here), where both attacks on naval vessels and merchant vessels are mentioned.

Before considering the issue further, are there any other relevant exceptions from the general prohibition on the use of force in Article 2(4) of the UN Charter (UNC) that could be of relevance here?

Although the UN Security Council (UNSC) has condemned the Houthi attacks, Resolution 2722 (2024) does not refer explicitly to UNC Chapter VII, nor is there language to the effect that use of force has been authorized, including the "all necessary measures" or similar passages (see also here). That the UNSC established an arms embargo of Yemen in Resolution 2216 (2015) and that it designated the Houthis as a group subject to this embargo in Resolution 2624 (2022) are not enough. Neither is the finding of the Council's Panel of Experts that there are large-scale violations of that embargo (see here).

As regards invitation by the *de lege* government of Yemen, President Hadi invited a foreign military presence in 2015 to fight the Houthis. But presumably that invitation ended with the ceasefire in 2022 and Hadi's transfer of his powers to the Presidential Leadership Council. The Presidential Leadership Council could issue a new invitation, but so far it would at best seem that a tacit acceptance/invitation was granted *after* the fact for the attacks in January (see here).

As regards the attacks on 12 January 2024, the legality under the *jus ad bellum* must be sought in self-defense. Not to be considered in this brief post are the issues of whether an armed attack may be undertaken by a non-State entity, and how those attacks may be "attributed" to the territorial State from which they originate.

That said, there is overwhelming agreement that an armed attack on a naval vessel constitutes an armed attack on its flag State and thus activates the flag State's right to act in self-defense within the limits of the principles of immediacy, necessity, and proportionality (for a counter-view, see here). Somewhat more disputed, however, is the issue of whether a similar attack on a merchant vessel constitutes an armed attack on its flag State.

Attack on a Flag State's Merchant Vessel as an Armed Attack?

The usual place to begin would be UNC Article 51, which holds that the right of self-defense is activated when “an armed attack occurs against a Member of the United Nations . . . .” However, the Charter is silent on what instances constitute such an attack. As is well known, binding decisions of the UNSC obligate every member of the UN, thus making it necessary to also consider whether the UNSC has voiced a view. Admittedly, the UNSC—using its powers under the UNC—has muddied the waters somewhat with the formulation used in Resolution 2722 (2024). Paragraph 3 of the resolution “takes note of the right of the Member States, in accordance with international law, to defend their vessels from attacks, including those that undermine navigational rights and freedoms.”

A key term here is “in accordance with international law.” Judging by the discussion at the UNSC, it would seem that the Russian Federation—which abstained from voting presumably as a consequence of its own suggested amendments not gaining sufficient support—does not accept that States may defend their merchant vessels from attack and would thus have vetoed a resolution with clear language to that effect.

As regards other international agreements, one candidate could be the 1949 North Atlantic Treaty that refers, in Article 6(2), to collective self-defense covering an armed attack “on the forces, vessels, or aircraft of any of the Parties . . . .” The latter two words of the listing would presumably have some relationship to the first word (“forces”) meaning that the reference would then be to naval and air force assets. The fact that the original version of Article 6 referred to “occupation forces” would seem to align with this view (see here on Article 6 more generally). Even so, this interpretation of these terms is not determinative for other treaties, nor for customary international law.

The UN General Assembly Definition of Aggression from 1974 holds that a *prima facie* example of an act of aggression is “[an] attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State (art. 3(d)). Identical wording is also used in Article 8 *bis*, para. 2, *litra* d on the crime of aggression in the 2001 International Criminal Court Statute. Its inclusion there supports the status of this part of the Definition of Aggression as customary international law (Dinstein, p. 147-148).

UN General Assembly resolutions may to some extent be used as evidence of both State practice and *opinio juris* (here conclusions 6 and 10). For our purpose, the reference to marine fleets of another State is the relevant part. Set alongside reference to “sea forces,” “marine fleets” must relate to merchant vessels registered with the said State. Merely looking at the wording used (“fleets”), the attack on one or a few ships would not seem to suffice to constitute an attack on a fleet (Ruys, p. 210), but the wording provides little guidance as to how many vessels must be attacked. At the very least, considering an attack on one vessel to be equated with an attack on the whole fleet as an integral unit is not convincing.

Some light may nevertheless be cast on the choice of words by looking at the negotiation process. It would seem that the formulations used resulted from the need to address fishing fleets due to their vital economic interest to many States, although these fishing vessels were not excluded from ordinary enforcement measures by coastal States in resource management (see here para. 20, here para. 10, and Ruys, p. 204-05). Also, a need was felt to exclude cases "arising from a less important incident" (Ruys, p. 205).

In establishing the customary law position on this issue, it is natural to ask how States have argued when the issue has been raised. Here, Mexico referred to an entitlement to act in self-defense (that was not acted upon) in relation to a 1958 machine gun attack by the Guatemalan Air Force against three shrimp boats from Mexico on the high seas (Brownlie, p. 305). Similarly, the United States held the temporary seizure of the merchant vessel *Mayaguez* by naval units of Cambodia in 1975 as constituting an armed attack on the United States (Ruys, p. 211). During the Gulf War of the 1980s, the United States regarded itself as entitled to act in self-defense of merchant vessels (for the current U.S. position see here p. 3-8, para. 3.10.1). Somewhat similar views were held by the UK and France during the Gulf War of the 1980s, although it might seem that they rather referred to the right to on-the-spot self-defense (Gray, p. 425-26 and Fleck, p. 197).

In the *Oil Platforms* case at the International Court of Justice (ICJ), the United States argued that an attack on the U.S.-flagged merchant vessel *Sea Isle City* "was an armed attack giving rise to the right of self-defence" (see here p. 130, para. 4.10). Whereas Iran maintained in the same case that "[t]he word 'fleets' was deliberately chosen in order to make clear that only massive acts of violence against the merchant shipping of a State, attacking whole fleets, would amount to an act of aggression" (see here p. 146, para. 7.38). Alas, the ICJ did not throw much light on this issue as it merely held that the missile fired at the relevant U.S.-flagged merchant vessel "could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters" due to the distance to the ship and the precision of the relevant weapon (see here p. 195, para. 64).

Admittedly, the Court nevertheless undertook a more careful assessment of the evidence regarding who fired the missile that hit the *Sea Isle City.* Some see this as somewhat supporting the U.S. view. Also, the Court did "not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the inherent right of self-defence" (see here, p. 195, para. 72), although this was held unnecessary to decide upon due to the inclusiveness of Iran's potential responsibility.

Later analysis has interpreted the Court's observation as indicating a certain flexibility in relation to the assessment of the lowest threshold for an armed attack (see Corten, p. 400). The Court had earlier held in its the 1986 *Paramilitary Activities* case that armed attacks are the "most grave forms of the use of force" (see here, p. 101, para. 191). It is submitted, however, that there is a major difference between the Court's reference to an attack on a naval vessel possibly being sufficient to constitute an armed attack and any analogous

inclusion of an attack on a single merchant vessel similarly being sufficient. In essence, the former represents the State—even the sharp edge of its enforcement powers (military)—whereas the latter can only be seen to do so in a very diminished sense (being private property). These are major differences, with the consequences for the flag State of an attack on its naval vessels being normally more profound in relation to its ability to defend itself than would be the case in relation to a merchant vessel (see Fink for a similar view).

Also, some emphasis is given in the literature to the Court's mention in paragraph 64 that the ship in question"whatever its ownership, was not flying a United States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State." Some feel that this and a later statement in paragraph 72 "implicitly confirm" the U.S. view (Ruys, p. 208). However, it is rather submitted that one should be careful about reading too much between the lines of the judgment.

Here, a systematic comparison may also be helpful. To the extent that an attack on a merchant vessel constitutes an attack on its flag State, then the well accepted entitlement of a belligerent party to use reasonable force when merchant vessels refuse visit and search, or seek to run a blockade would sit uneasily with the regime of the UN Charter. A routine use of the rules of naval warfare would then at the same time be a grave violation of the UN Charter.

The views in academic literature differ on whether an attack on one merchant vessel suffices. Professor Grey finds that "[t]here is considerable doubt as to whether a single attack on a merchant vessel (as opposed to a military vessel) could constitute an armed attack on a state and the Court itself did not directly address this issue" (Gray, p. 151). It is submitted that the better view is that the attack on one merchant vessel does not constitute an armed attack for the purpose of self-defense, as also held by Professors Bothe (pp. 208-209) and Papastavridis.

As to the required threshold, Professor Ulfstein holds that "attacks on commercial vessels only qualify as armed attacks if they are of such gravity that they threaten the state's security interests." Professors Nolte and Randelzhofer find that the threshold is reached where essential parts of the fleets are attacked, and very clearly so when the whole of its fleet is assaulted (p. 1412, para. 27).

That said, such non-State vessels may be of different categories. Professor Dinstein thus held that "one cannot rule out the possibility of an armed attack consisting of the deliberate sinking of a single foreign private vessel (especially a passenger liner) on the high seas" (p. 219). This view should not be easily dismissed, but it would seem to be inherently linked to the discussion on whether an attack on citizens of a State abroad may amount to an armed attack on the State of those citizens.

As a side note, this is different from saying that warships may not defend merchant vessels when under attack. This is allowed *inter alia* for under on-the-spot self-defense, especially when the merchant vessel flies the same flag as the naval vessel; even Iran agreed to the legality of such self-defense during the *Oil Platforms* case (p. 147, para. 7.41).

Under the *jus ad bellum*, unless naval vessels have also been attacked, it would thus seem that the better option when it comes to the entitlement to use force against Houthi assets on Yemeni territory beyond on-the-spot self-defense, is gaining a clear invitation by the current *de lege* government of Yemen. UNSC mandates are not forthcoming, and the threshold for how many merchant vessels of a flag State must be attacked before they activate the right to self-defense of the flag State under UNC Article 51 is high.

Concluding Thoughts

State responses to the ongoing attacks will generate State practice and *opinio juris* that may help clarify some of the many issues of international law that these attacks raise, perhaps even lead to adjustments of the rules. As to the attacks themselves, their termination depends presumably to a large extent on the outcome of the peace process in Yemen, where no end is yet in sight.

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