

Houthi Operations in the Red Sea and LOAC?

lieber.westpoint.edu/houthi-operations-red-sea-loac

January 8, 2024

by [Rob McLaughlin](#) | Jan 8, 2024



CAPT (ret.) [Pete Pedrozo](#) has recently provided an excellent update on escalating maritime threats and operations by Houthi rebels in the Red Sea area. As he has noted, these attacks are asserted by the perpetrators as targeted against Israeli interests and in support of Hamas in its armed conflict with Israel in Gaza. The threat has evolved quite quickly and appears to be escalating. Several major [shipping companies](#) have stated that they will not use the Suez Canal and Red Sea route for the foreseeable future, adding one-to-two [weeks](#) in extra voyage time around the Cape of Good Hope. At least [ten States](#) are contributing naval units and personnel to support enhanced security operations in the Red Sea area.

For many of these States, this is not a new area of operations as they have long been engaged in counter-piracy and counter-drug missions in the broader region. However, the elevated kinetic nature of the threat is qualitatively different from this past focus. An air interdiction of a Houthi missile over the Red Sea by [HMS *Diamond*](#) on 16 December was “the first Anti-Air engagement of a Royal Navy vessel since the first Gulf War.”

In his post, Professor Pedrozo provides a concise assessment of the key applicable law concerning piracy and national and collective self-defence, including of merchant vessels; I agree with this assessment. However, in this post, I would like to address a further legal question evoked by the Red Sea situation, namely, whether, and if so how, there is any scope to assess Houthi actions in the Red Sea in the light of the law of armed conflict (LOAC). In this post, the key LOAC attribute I am concerned with is group status/character in terms of LOAC targetability.

Conflict Entanglement: Hortatory, Spillover, Aggregation, Concurrence?

There are many situations where, through fact, perception, or assertion, claims of a linkage between separate armed conflicts are made. This is not a new phenomenon. Witness, for example, the multiple declarations by terrorist groups, or factions thereof, in widely disparate contexts such as Somalia or Nigeria that their operations were linked to and mutually supportive of ISIS operations in Iraq and Syria.

Such assertions are political and ideological acts, but do not hold particular LOAC consequence. This is primarily because there are no common parties across the relevant armed conflicts, despite the claims of connection. For example, the fact that Boko Haram in Nigeria declared common cause and allegiance with ISIS did not mean that those States engaged in the non-international armed conflict (NIAC) with ISIS in Syria and Iraq (such as Australia, the United Kingdom, and the United States) were then automatically authorised to undertake LOAC governed operations against Boko Haram in Nigeria. That conflict remained separate and was (is) not one that any of the States fighting ISIS was engaged in as a belligerent party (although the United States provides assistance to Nigeria and other States in their conflicts with Boko Haram). I will call this “hortatory entanglement.” It differs from concurrence (below) because there are no parties common to both or all of the claimed entangled conflicts.

Some conflict entanglements, however, carry implications in terms of applicable LOAC. The first such situation is conflict spillover, where a single conflict punctures territorial boundaries and drags in other parties. In spillover entanglements at least some of the parties involved are engaged on both or all sides of the punctured boundary(s).

The Syrian Civil War, for example, spilled over into Lebanon, Iraq, and Türkiye, with some parties present in some or all venues (e.g., ISIS), whilst others were not originally engaged but were subsequently drawn in due to the transboundary effects (Türkiye). In terms of legal effect, however, there is little dispute that LOAC applies across the entire conflict area, regardless of whether the network of conflicts are considered as a single or multiple legal artefacts.

In terms of group status and targetability consequences, the significance of the spillover is that some parties carry their initial conflict characterisation (as a non-State armed group (NSAG) for example) across the punctured borders and into the expanded conflict with new parties. The Boko Haram conflicts are another example of this form of spillover entanglement, as the group has been engaged in at least four separate but concurrent NIACs, including with Nigeria, and then with Chad, Cameroon, and Niger. This does not mean that each of those States did not need to make its own determination as to the LOAC character of Boko Haram. Each still had to do that. But once done, it was clear that the same NSAG was subject to the same LOAC targeting liabilities across all four venues. I shall call this the Boko Haram situation.

Another concept is conflict aggregation. This is about situations, as identified by Jelena Nikolic and Thomas de Saint Maurice, where two or more ostensibly separate NSAGs have “objectively and effectively adopted a collective approach to fighting against a common enemy” (such as the territorial State). In this sense, conflict aggregation is a mechanism whereby the indicators required to reach the NIAC threshold—particularly organisation and intensity—are assessed as a whole across both or all the NIACs, rather than seeking to ascertain whether each separate potential NIAC individually meets the criteria alone.

An example of concurrent NIACs in a single territory against the same State authorities—although aggregation was not needed to reach the NIAC thresholds separately—was when the Philippines was simultaneously fighting Communist rebels and Islamist rebels in different (and sometimes overlapping) parts of the country. In relation to NSAG status and targeting liabilities, however, the consequence of this form of entanglement is the same as for spillover. The NSAG(s), even if organisationally separate, are each subject to the same LOAC characterisation because they are added together for threshold purposes. But the key is that aggregation only relates to NIACs, and only when these NIACs are both (or all) concurrent in the same territory. I shall call this the “Philippines situation.”

A fourth type of conflict entanglement is concurrence. There are two key types and they carry different LOAC consequences. The first is where an international armed conflict (IAC) and a NIAC exist in the same battlespace. This form of conflict concurrence was evident in Libya in 2011. However, despite territorial confinement, Libya situations are not Philippines type aggregation situations. This is because the IAC threshold is different to the NIAC threshold, and the criteria are nuanced for each. Consequently, the IAC and NIAC assessments are separate and the LOAC liabilities of an NSAG in a Libya situation must be separately assessed in light of each threshold and criteria.

This is not to say that the identification of an NSAG liable to LOAC-governed targeting necessarily differs as between IAC and NIAC. But it is to say that an NSAG involved in the NIAC is not automatically a party to the concurrent IAC. That is, even though the likely

outcome is that the NSAG is a party in both the IAC and NIAC, this question must be consciously assessed; simply assuming the NSAG is automatically a party in the IAC because it is a party to a concurrent NIAC could be problematic.

A second type of concurrency entanglement is where two geographically separate (albeit often adjacent) conflicts against separate NSAGs are nevertheless said to be a single legal artefact due to the level of entanglement. The key difference with hortatory entanglement is that there is a common party across the conflicts.

Such a situation of concurrency could evolve if an Israel-Hezbollah armed conflict escalates into Lebanon whilst the Israel-Hamas conflict continues in Gaza. I will call this “two-front entanglement.” The key in terms of NSAG LOAC characterisation is that this form of concurrency entanglement would not be a situation of aggregation as there would be two separate NIACs in separate territories, against mutually supportive but nevertheless separate NSAGs. Each conflict must be separately assessed as to the NIAC threshold, and each NSAG in each of those separate conflicts needs to be independently assessed in terms of its LOAC status and liability to targeting. Conflict aggregation is not available in this situation, regardless of the fact that there will be significant logistics, financing, recruiting, and sponsorship interdependencies.

The Red Sea Context?

The key issue in respect of Red Sea conflict entanglement is whether, in fact, claims of a link between the Red Sea and the Israel-Hamas armed conflict go beyond legally irrelevant hortatory entanglement. That is, if Hamas is in an armed conflict with Israel (which it is, although the precise classification of the conflict is contested), and then the Houthi NSAG, which is involved in a separate armed conflict in Yemen (which is complex and may or may not involve Iran as a party to the conflict) starts to attack ships under U.S. (which has happened) and other flags because the United States (and others) support Israel against Hamas, can Israel say that this Red Sea Houthi situation is a spillover, or an aggregation, or a concurrency that makes the Houthi NSAG subject to LOAC liabilities including Israeli LOAC governed targeting operations?

Pulling the Red Sea situation apart, we must first isolate the key points. First, the Houthi NSAG has clearly stated that they are conducting attacks against merchant vessels and warships in the Red Sea: (1) in support of Hamas in its conflict with Israel; (2) against Israeli interests; and (3) to harm, *inter alia*, the United States because of its support for Israel in the Israel-Hamas armed conflict. Second, the Houthi NSAG has also directed unmanned aerial vehicle (UAV) and missile attacks against Israel, which have been intercepted primarily by Saudi Arabian, U.S. and other States’ units in the area. Third, the Houthi NSAG is involved in several NIACs in Yemen against the Saudi coalition, and against other NSAGs in Yemen. Israel is not a party to the Yemen armed conflict(s), although they have occasionally been engaged in counter-UAV and counter-missile operations.

LOAC-Governed Operations by Israel?

Israel has said that it is prepared to take action against the Houthi NSAG in respect of the Red Sea attacks. By this, I assume the Israeli intention is to proactively target the Houthi NSAG using LOAC authorisations, as opposed to taking maritime law enforcement action in the Red Sea. Therefore, when considering what action Israel could take in relation to Houthi shipping attacks in the Red Sea, the fundamental question is whether there is a legally relevant entanglement between the Israel-Hamas armed conflict and the Houthi NSAG's actions in the Red Sea that provides additional LOAC authorisations to Israel. The answer is possibly yes, but it resides in the fact that Houthi rockets and UAVs have targeted Israel and that this might be sufficient to cross the NIAC threshold (although assessments can and will differ on this point). And if the Israel-Houthi NIAC threshold is crossed by the attempted missile strikes against Israel, then two issues relevant to the Red Sea situation follow.

First, Israel could indeed treat the Houthi NSAG as an enemy force and target it in accordance with the relevant LOAC. But this is a function of conduct directly against Israel crossing the applicable LOAC threshold (common Article 3), not of (hortatory) declarations about Houthi conduct against Red Sea shipping being in support of Hamas, or that these attacks generally affect Israeli interests. Indeed, these declarations are fairly irrelevant to this legal assessment.

Second, whilst the determination that an Israel-Houthi NIAC has commenced would authorise Israel to target Houthi weapons fired at shipping in the Red Sea, this would be because those capabilities are enemy military objectives *to Israel*, not because they are targeting foreign vessels with some link to Israel. Israel would not be authorised to employ LOAC based authorisations in respect of non-Israel flagged shipping in the Red Sea, the main Houthi targets.

This is because the LOAC authority relates to Houthis and their capabilities (the military objectives); it does not grant any additional LOAC powers to Israel in respect of third State shipping, including shipping that has been targeted by, or even taken over by, the Houthi NSAG. Nor does Israel gain any law of naval warfare rights in respect of "neutral" shipping as there are no neutrals at sea in a NIAC (unless the Houthi NSAG is granted recognition of belligerency).

Consequently, the Red Sea situation does not afford Israel any additional LOAC rights beyond what necessarily flows from the existence (if it does exist) of a NIAC against the Houthi NSAG more generally, based on the Houthi attacks against Israeli territory, forces, and civilians. That is, the Israel-Houthi conflict would be a two-front entanglement situation. It would not be a spillover (Boko Haram), aggregation (Philippines), or confined concurrency (Libya) situation.

The Israel-Houthi NIAC would therefore have to be assessed on its own facts, and the LOAC liabilities of the Houthi NSAG would depend solely upon the indicia and artefacts of that situation. Statements by either party about the Red Sea operations against third State shipping being targeted at Israel, in support of Hamas, or affecting Israeli interests (but not Israeli flagged vessels) are contextually significant, but not legally relevant.

U.S. Targeting of Houthi Missile and UAV Infrastructure Ashore?

As a consequence of the Red Sea attacks, as noted above, the United States is leading a new Red Sea merchant vessel protection operation in conjunction with other States (Operation Prosperity Guardian). One proposed component of this operation, it has been posed, could be counter-fires against Houthi NSAG missile and UAV launch sites and facilities, in addition to collective defence of merchant vessels from these attacks. The UK has said that it is considering “direct action” against Houthi targets ashore. The US has engaged Houthi boats that fired at USN helicopters. This means that there is a United States (or other State)-Houthi conflict entanglement risk that could emerge from the Red Sea context.

Taking the United States as a case study, the start point could be the Houthi attack on USS *Mason*, which is already sufficient to trigger the U.S. right of national self-defence, as the International Court of Justice has observed in the *Oil Platforms* case, and as plain common sense would attest. Pete Pedrozo has analysed this already. But that is a *jus ad bellum* question and whether that armed attack by the Houthis upon a U.S. warship also triggers an armed conflict between the United States and the Houthi NSAG is less clear. And, at any rate, such characterisation depends upon whether the United States wishes to see it as such. If it does, and the organisation and intensity criteria are met (and they could be), then the apparent U.S. intention to target Houthi rocket and UAV infrastructure ashore could be governed by LOAC, thus making the LOAC targeting rules applicable.

However, if the United States does not determine that there is a United States-Houthi NSAG NIAC in the Yemen and Red Sea area, then targeting the infrastructure ashore (which can no longer be labelled “military objectives” as LOAC does not *de jure* apply) becomes more problematic. At this point that hoary old interpretive issue that has so vexed some operations in the past—what, precisely, is the legal basis (if any) for proactive lethal targeting that is not LOAC based, but is also not founded in the “*Caroline*” requirements of self-defence—will inevitably raise its head once more. Another interesting question that could arise from the Operation Prosperity Guardian context is whether conflict aggregation can also work in reverse. That is, could a series of separate attacks on U.S., UK, French, and other warships be aggregated to meet (in particular) the intensity criteria in terms of Houthi conduct, to create a single NIAC between the Houthis, on one side, and the warship flag States (collectively) on the other.

Let us assume that the United States decides that the hortatory entanglement the Houthi NSAG is currently asserting has transformed into a legally meaningful form of entanglement through kinetic action. Let us further assume that the United States decides to avail itself of LOAC targeting rules against Houthi NSAG infrastructure ashore. On this basis, the United States could attack Houthi infrastructure ashore that was used to target third State shipping on the basis that this infrastructure is a military objective *to the United States*.

The fact that the target of any particular attack employing these Houthi capabilities was or was not a U.S.-flagged vessel would not be especially relevant. As for vessels pirated by the Houthi NSAG, again, if the U.S.-Houthi conflict were a NIAC, then no relevant rights in respect of neutral vessels accrue in the Red Sea. This means the United States could not use LOAC to assert a right to board a third State vessel, without consent, to neutralise the Houthi fighters. But the United States could still choose to board such vessels, without flag State consent, by using the right of visit as per the United Nations Law of the Sea Convention (LOSC), Article 110 in respect of piracy, with the authority to detain and prosecute/extradite Houthi rebels as the relevant jurisdictional remit.

Alternatively, if the United States did wish to employ LOAC authorisations against Houthi fighters who have taken over a third State vessel, the United States could seek the relevant flag State's consent to conduct operations to neutralise the Houthi attackers on board that vessel. But, of course, gaining flag State consent for executing a LOAC governed operation on one of their vessels is legally and politically quite a different (and more confronting) ask than engaging in a maritime law enforcement operation (regardless of flag State consent) against pirates. This remains so even if the way the operation is carried out, and the probable outcomes (killed or captured rebels/pirates) are likely to be quite similar.

Non-LOAC Based Piracy Jurisdiction?

The simplest, least contentious, and already available option for dealing with some of the Red Sea attacks is to leverage piracy jurisdiction. But to create access to the LOSC Article 110 right of visit and its piracy-related jurisdiction, an incident of piracy requires a two-ship interaction, or—as with the Galaxy Leader pirating—from aircraft to vessel. In other situations where the Houthis have only launched rockets from shore, this is not piracy. Intercepting these rockets in flight is a legally distinct issue involving unit, national, or collective self-defence, but not a response to piracy. This means that the expansive authority to seek out and detain pirates at sea and, if the legal and political assessment supports it, facilitators ashore, and to subject them to universal jurisdiction, is not enlivened in the case of shore to ship rocket or missile attacks.

By contrast, when the Houthis deploy UAVs to launch attacks, this could indeed be an incident involving an “aircraft” and a vessel, and thus could be piracy (LOSC, art. 101(a)). As such, it is possible that the operators and enablers of the UAV attack could be characterised as piracy facilitators (as per LOSC, art. 101 (b) or (c)). But again, piracy jurisdiction does not

grant foreign authorities the right to storm ashore in foreign territory to seize and remove piracy facilitators with the intention of then subjecting them to universal jurisdiction for a piracy offence. Such conduct would amount to a breach of sovereign territory in the absence of consent of an accepted Yemeni authority.

Conclusion

Conflict entanglement is only directly useful to thinking about LOAC if that entanglement is legally meaningful. Each conflict must be assessed on its own discrete contextual facts in order to determine whether and what relevant thresholds have been crossed, and who the belligerent parties are. Statements about Houthi support for Hamas, and the effects of Houthi Red Sea shipping attacks on Israeli interests (but not Israeli flagged vessels), are contextually informative but, in LOAC threshold terms, not relevant.

This said, it is entirely possible that Israel could determine that a LOAC-relevant, two-front entanglement (Israel-Hamas, Israel-Houthi) has emerged, and would carry with it certain LOAC authorisations in respect of Houthi military objectives, including those used in attacks on third State shipping in the Red Sea.

It is also probable that States contributing warships to Operation Prosperity Guardian in the Red Sea will be confronted with circumstances (that is, an attack directly on their warships) that could allow them, if politically desirable, to assert that this *jus ad bellum* trigger has also crossed the threshold for a NIAC between the warship's State and the Houthi NSAG. This would then open up the application of LOAC, including in terms of targeting Houthi military objectives ashore in Yemen. Otherwise, the focus will need to remain, as Professor Pedrozo has said, on the legal levers of piracy and vessel self-defence, neither of which affords clear authority to proactively target Houthi missile and UAV infrastructure ashore.

Rob McLaughlin is Professor of International Law at the Australian National Centre for Ocean Resources and Security, Honorary Professor at ANU, and a Senior Fellow at the Stockton Centre for International Law at the US Naval War College.

Photo credit: Pexels

[SUBSCRIBE](#)