

## US AND UK MILITARY STRIKES IN YEMEN AND THE *JUS AD BELLUM*

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**Abstract** The United States and United Kingdom have carried out a series of strikes upon Yemeni territory since January 2024. The acting States have justified these on the basis of the right of self-defence in response to the series of attacks that have been perpetrated by the Houthi group in Yemen against various commercial and military vessels in the Red Sea. On the face of it this was a relatively straightforward justification. Yet, when subjected to analysis it becomes evident that not only is the justification itself not clear, but that the law governing the actions—the *jus ad bellum*—is not sufficiently settled to provide clear parameters by which to assess the legality of the strikes. Furthermore, the strikes themselves, and the purposes for which they were undertaken, may have set a precedent with unforeseeable consequences.

**Keywords:** public international law, international humanitarian law, use of force, self-defence, armed attacks, United Nations Security Council, non-State actors.

### I. INTRODUCTION

On 11 January 2024 the United States (US) and United Kingdom (UK) armed forces bombed over a dozen sites in the territory of Yemen that, it was claimed, were being used by Iran-backed Houthi rebels to carry out a series of attacks on both commercial and State vessels in the Red Sea since the conflict broke out in Gaza on 7 October 2023.<sup>1</sup> The Pentagon stated that more than 60 targets at 16 locations used by the Houthis in Yemen had been struck, including radar systems, drone storage and launch sites, missile storage and launch facilities and Houthi command and control centres.<sup>2</sup> Strikes were reported in the

<sup>1</sup> BBC News, 'US and UK Strikes Target Houthi Rebels in Yemen' (*BBC News*, 12 January 2024) <<https://www.bbc.co.uk/news/world-middle-east-67954161>>.

<sup>2</sup> U.S. Air Forces Central, 'AFCENT Commander Statement on Strikes against Houthi Positions in Yemen' (11 January 2024) <<https://www.afcent.af.mil/News/Article/3643851/afcent-commander-statement-on-strikes-against-houthi-positions-in-yemen/>>.

Yemen capital Sanaa, which is controlled by the Houthis, as well as the Red Sea port of Hodeidah, Dhamar and the group's north-western stronghold of Saada.<sup>3</sup> Support for the mission was provided by Australia, Canada, Denmark, Germany, the Netherlands, New Zealand, Republic of Korea and Bahrain.<sup>4</sup> While the US had responded to actual and attempted attacks on both military and US flagged commercial ships in the Red Sea previously, including as part of Operation Prosperity Guardian,<sup>5</sup> the significance of this particular operation was that it was the first time that Houthi targets upon Yemeni territory had been struck.

A day later, on 12 January, the US engaged in a 'follow-on' strike against a radar site in Yemen involving Tomahawk missiles.<sup>6</sup> The US and UK have since engaged in a series of military operations in Yemen, mostly targeting anti-ship missiles that were being prepared to be launched against shipping in the Red Sea and were therefore identified as posing an 'imminent threat',<sup>7</sup> but which also targeted radars, underground storage facilities, command and control centres and drone sites.<sup>8</sup>

The White House issued several joint statements in which the acting States declared that they had 'conducted joint strikes in accordance with the inherent right of individual and collective self-defense, consistent with the UN [United Nations] Charter, against a number of targets in Houthi-controlled areas of Yemen', adding that '[t]hese precision strikes were intended to disrupt and degrade the capabilities the Houthis use to threaten global trade and the lives of international mariners in one of the world's most critical waterways' and

<sup>3</sup> J Beale and J Howard, 'What We Know about Strikes on Houthis and Strategy behind Them' (*BBC News*, 12 January 2024) <<https://www.bbc.co.uk/news/world-middle-east-67955727>>.

<sup>4</sup> The White House, 'Joint Statement from the Governments of Australia, Bahrain, Canada, Denmark, Germany, Netherlands, New Zealand, Republic of Korea, United Kingdom, and the United States' (11 January 2024) <<https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/11/joint-statement-from-the-governments-of-australia-bahrain-canada-denmark-germany-netherlands-new-zealand-republic-of-korea-united-kingdom-and-the-united-states/>>.

<sup>5</sup> E Cook, 'What is Operation Prosperity Guardian? US Announces New Red Sea Action' (*Newsweek*, 19 December 2023) <<https://www.newsweek.com/red-sea-us-military-centcom-operation-prosperity-guardian-houthi-attacks-yemen-ships-1853583>>. The European Union (EU) has also launched the defensive maritime security operation Aspides to safeguard freedom of navigation in relation to the Red Sea crisis. See EU External Action, 'EUNAVFOR Operation Aspides' (19 February 2024) <[https://www.eeas.europa.eu/eeas/eunavfor-operation-aspides\\_en#:~:text=The%20European%20Union%C2%B4s%20Naval%20Force%20%28EUNAVFOR%29%20OPERATION%20ASPIDES,the%20EU%20Common%20Security%20and%20Defence%20Policy%20%28CSDP%29.>](https://www.eeas.europa.eu/eeas/eunavfor-operation-aspides_en#:~:text=The%20European%20Union%C2%B4s%20Naval%20Force%20%28EUNAVFOR%29%20OPERATION%20ASPIDES,the%20EU%20Common%20Security%20and%20Defence%20Policy%20%28CSDP%29.>)>.

<sup>6</sup> D Sabbagh, 'US Launches Fresh Strikes on Houthi Rebels in Yemen, Military Says' (*The Guardian*, 13 January 2024) <<https://www.theguardian.com/world/2024/jan/12/houthi-threats-of-retaliation-and-mass-protests-in-yemen-after-us-uk-airstrikes>>.

<sup>7</sup> See, eg, Reuters, 'US Conducts Strikes in Self-Defense against Six Houthi Anti-Ship Cruise Missiles' (*Reuters*, 3 February 2024) <<https://www.reuters.com/world/middle-east/us-conducts-strikes-self-defense-against-six-houthi-anti-ship-cruise-missiles-2024-02-03/>>.

<sup>8</sup> See, eg, U.S. Central Command, 'CENTCOM Self-Defense Strike Against Houthi UAVs and Ground Control Station' (31 January 2024) <<https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/3662708/centcom-self-defense-strike-against-houthi-uavs-and-ground-control-station/>>.

that they would ‘not hesitate to defend lives and protect the free flow of commerce in one of the world’s most critical waterways in the face of continued threats’.<sup>9</sup> The UK Government’s published summaries of its legal position for the various strikes similarly stated that ‘[t]he UK is permitted under international law to use force in such circumstances where acting in self-defence is the only feasible means to deal with an actual or imminent armed attack and where the force used is necessary and proportionate’.<sup>10</sup> A meeting was held at the UN Security Council (UNSC) on 12 January 2024, in which the acting States repeated their justifications,<sup>11</sup> and both States submitted letters to the Council.<sup>12</sup>

Following the initial 11 January 2024 operation the Houthi group’s deputy foreign minister warned that the US and UK would ‘pay a heavy price’ for this ‘blatant aggression’,<sup>13</sup> while in a statement Iran’s foreign ministry ‘consider[ed] it a clear violation of Yemen’s sovereignty and territorial integrity, and a breach of international laws, regulations, and rights’.<sup>14</sup>

<sup>9</sup> The White House (n 4). See also The White House, ‘Joint Statement from the Governments of Albania, Australia, Bahrain, Canada, Croatia, Czech Republic, Denmark, Estonia, Germany, Guinea-Bissau, Hungary, Italy, Kenya, Latvia, Lithuania, Montenegro, Netherlands, New Zealand, North Macedonia, Poland, Republic of Korea, Romania, United Kingdom, and the United States’ (23 January 2024) <<https://www.whitehouse.gov/briefing-room/statements-releases/2024/01/23/joint-statement-from-the-governments-of-albania-australia-bahrain-canada-croatia-czech-republic-denmark-estonia-germany-guinea-bissau-hungary-italy-kenya-latvia-lithuania-montenegro-ne/>>.

<sup>10</sup> Prime Minister’s Office, 10 Downing Street, ‘Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 12 January 2024’ (12 January 2024) <<https://www.gov.uk/government/publications/summary-of-the-uk-government-legal-position-the-legality-of-uk-military-action-to-target-houthi-facilities-in-yemen>>; Prime Minister’s Office, 10 Downing Street, ‘Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 22 January 2024’ (23 January 2024) <<https://www.gov.uk/government/publications/summary-of-the-uk-government-legal-position-the-legality-of-uk-military-action-to-target-houthi-facilities-in-yemen-on-22-january-2024/summary-of-the-uk-government-legal-position-the-legality-of-uk-military-action-to-target-houthi-facilities-in-yemen-on-22-january-2024>>.

<sup>11</sup> UNSC, ‘Maintenance of International Peace and Security’ (12 January 2024) UN Doc S/PV.9532.

<sup>12</sup> UNSC, ‘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’ (15 January 2024) UN Doc S/2024/55; UNSC, ‘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’ (15 January 2024) UN Doc S/2024/56; UNSC, ‘Letter Dated 26 January 2024 from the Chargé d’affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council’ (27 January 2024) UN Doc S/2024/103; UNSC, ‘Letter Dated 3 February 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’ (6 February 2024) UN Doc S/2024/136.

<sup>13</sup> P Smolar, ‘US and UK Intervention in Yemen Marks Further Regionalization of Israel’s War against Hamas’ (*Le Monde*, 12 January 2024) <[https://www.lemonde.fr/en/international/article/2024/01/12/middle-east-conflict-us-and-uk-strike-houthis-in-yemen\\_6426449\\_4.html](https://www.lemonde.fr/en/international/article/2024/01/12/middle-east-conflict-us-and-uk-strike-houthis-in-yemen_6426449_4.html)>.

<sup>14</sup> Al Jazeera, ‘World Reacts to US, UK Attacks on Houthi Targets in Yemen’ (*Al Jazeera*, 12 January 2024) <<https://www.aljazeera.com/news/2024/1/12/world-reacts-to-us-uk-attacks-on-houthi-targets-in-yemen>>.

Meanwhile, the Iran-backed Lebanese armed group Hezbollah also condemned the strikes on Yemen as ‘aggression’.<sup>15</sup> The Turkish president, Recep Tayyip Erdoğan, described the strikes as a ‘disproportionate use of force’.<sup>16</sup> Other regional reactions, notably from Iraq, Egypt and Saudi Arabia, expressed concern that the strikes expanded the conflict between Israel and Hamas into the region,<sup>17</sup> while Russia requested an urgent UNSC meeting to discuss the strikes,<sup>18</sup> and claimed that the strikes showed a ‘complete disregard for international law’ while ‘escalating the situation in the region’.<sup>19</sup> In a detailed letter to the UNSC, in which it addressed several aspects of the acting States’ legal justification, Russia condemned the ‘illegal armed attacks on the Republic of Yemen by the United States and the United Kingdom’ which were ‘in violation of Article 2(4) of the Charter of the United Nations’ and which were justified by an ‘unwarranted reference to the right of self-defence under Article 51 of the Charter’.<sup>20</sup>

This was a clear invocation by the US and UK of the right of self-defence in the context of the law governing the use of force (the *ius ad bellum*), a right which under Article 51 of the UN Charter permits States to defend themselves in the face of an ‘armed attack’.<sup>21</sup> The purpose of this article, in light of both the support and criticism these States received for the military strikes, is to subject this justification to a ‘stress test’ through an analysis of its various aspects. Section II first addresses the rather ambiguous involvement of the UNSC, particularly the adoption of Resolution 2722 (2024) the day before the commencement of the strikes. Section III then focuses on the justification of self-defence, questioning, in particular, whether the Houthis were able to perpetrate an ‘armed attack’ for the purposes of this

<sup>15</sup> Reuters, ‘Hezbollah Says Security of All Shipping Harmed after US Strikes on Yemen’ (*Reuters*, 14 January 2024) <<https://www.reuters.com/world/middle-east/hezbollah-sees-all-maritime-navigation-danger-after-us-strikes-yemen-2024-01-14/>>.

<sup>16</sup> Reuters, ‘Erdoğan Accuses U.S., Britain of Trying to Turn Red Sea into “Sea of Blood”’ (*Reuters*, 12 January 2024) <<https://www.reuters.com/world/middle-east/erdogan-accuses-us-britain-trying-turn-red-sea-into-sea-blood-2024-01-12/>>.

<sup>17</sup> Al Jazeera (n 14).  
<sup>18</sup> G Faulconbridge and F Lebedev, ‘Russia Condemns US and UK for “Irresponsible” Strikes on Yemen’ (*Reuters*, 12 January 2024) <<https://www.reuters.com/world/russia-requests-un-security-council-meeting-after-us-britain-strike-yemen-2024-01-12/>>.

<sup>19</sup> The Moscow Times, ‘Moscow Blasts U.S.–British Strikes in Yemen’ (*The Moscow Times*, 12 January 2024) <<https://www.themoscowtimes.com/2024/01/12/moscow-blasts-us-british-strikes-in-yemen-a83699>>.

<sup>20</sup> UNSC, ‘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’ (22 January 2024) UN Doc S/2024/90.

<sup>21</sup> Art 51 of the Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) provides: ‘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.’

right. The section then addresses whether the attacks undertaken by the Houthis were of the nature of an armed attack rather than, in particular, acts of piracy, and, connected to this, both whether the targets of the attacks constituted manifestations of a State and whether the gravity and scale of the attacks could be said to constitute an armed attack providing for the invocation of the right of self-defence. Given that the Houthis were ostensibly targeting ships bound for, or connected to, Israel, the question of whether it was necessary for them to have specifically intended to target ships of the US and UK before the right of self-defence arose is also raised. Finally, the article addresses the issue of the extent to which the military strikes in self-defence met the twin customary criteria of necessity and proportionality, before offering some concluding remarks. While as a response to the notable campaign of attacks by the Houthis the invocation of self-defence may seem, on the face of it, to be relatively straightforward and uncontroversial, when the various elements of the justification are picked apart and seen in the context of the generally contested nature of the *jus ad bellum*, a picture emerges that is not quite as clear and reassuring as it may first appear.

## II. THE AMBIGUOUS INVOLVEMENT OF THE UNSC

The day before the initial wave of strikes by the US and UK the UNSC adopted Resolution 2722 (2024) in which it, inter alia, condemned the Houthi attacks on merchant and commercial vessels (para 1) and demanded that the group cease all such attacks (para 2) while

*Affirm[ing] 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.*<sup>22</sup>

This paragraph of the UNSC Resolution is notably vague as to what is meant by the reference to any action being ‘in accordance with international law’. While the Council may authorise military and enforcement action in the maritime context, and has indeed done so previously,<sup>23</sup> it is clear that it was not doing so on this occasion. The Resolution was not adopted—either explicitly or implicitly—under Chapter VII, which is not mentioned in the Resolution, nor did it refer to a threat to international peace and security, both of which would open the door to enforcement measures under Article 42 of the UN Charter.<sup>24</sup> Importantly, it also did not authorise the States to take ‘all necessary measures’ to put an end to the attacks that were occurring against the vessels in the Red

<sup>22</sup> UNSC Res 2722 (2024) (10 January 2024) UN Doc S/RES/2722 (2024), para 3 (second emphasis added).

<sup>23</sup> See, eg, UNSC Res 1846 (2008) (2 December 2008) UN Doc S/RES/1846 (2008).

<sup>24</sup> See C Henderson, *The Use of Force and International Law* (2nd edn, CUP 2023) 135–49.

Sea, the euphemism that has through the practice of the Council come to be recognised as it authorising States to resort to forcible measures to achieve its aims and demands.<sup>25</sup>

The Council did appear, however, to be providing its blessing to States taking military action to defend their vessels from attacks, and potentially, therefore, the justification of self-defence that was advanced by the US and UK the following day.<sup>26</sup> However, the legal basis, nature and extent of the defence that States were supposedly able to engage in to protect vessels from attacks which undermine the freedom of navigation were not clear and ‘[t]he Council deliberations during the adoption of Resolution 2722 (2024) paint a contradictory picture’ on this point.<sup>27</sup> Slovenia, for example, seemingly interpreted the Resolution and its reference to any military action being ‘in accordance with international law’ as a reference to the right of self-defence as found in Article 51 of the Charter.<sup>28</sup> Switzerland, on the other hand, expressed ‘concern ... about the military strikes carried out by the United States–United Kingdom coalition’ and appeared to understand the Resolution to be endorsing a form of military action that was ‘strictly limited to military measures to intercept attacks against merchant vessels and warships to protect said vessels and the persons on board’.<sup>29</sup> It was not, however, clear whether Switzerland was of the view that the permitted limited military action against the Houthi attacks came under the right of self-defence or whether the legal basis for the action was located elsewhere. Either way, it was clear that ‘any military operation that goes beyond the immediate need to protect said vessels and persons is disproportionate and therefore not covered by the aforementioned resolution’,<sup>30</sup> thus appearing to be of the view that any defensive military action did not extend to measures taken upon the territory of Yemen. For its part, the Russian Federation proposed an amendment to this paragraph in the Resolution which would have entirely removed any reference to the right of

<sup>25</sup> *ibid* 153–72.

<sup>26</sup> Brassat notes that ‘the reference to “international law” can be interpreted to mean that *if* there is a right in international law to exercise self-defence against attacks on vessels – a question that the Security Council’s member states could not agree on – such a right would be applicable here’. See L Brassat, ‘The Lawfulness of Military Strikes against the Houthis in Yemen and the Red Sea’ (*EJIL Talk!*, 19 March 2024) <https://www.ejiltalk.org/the-lawfulness-of-military-strikes-against-the-houthis-in-yemen-and-the-red-sea/> (emphasis in original).

<sup>27</sup> M Svicevic, ‘Strikes against the Houthis: The Relationship between Resolution 2722 (2024) and the Right of Self-Defense’ (*Articles of War*, 6 February 2024) <<https://lieber.westpoint.edu/strikes-against-houthis-relationship-resolution-2722-right-self-defense/>>.

<sup>28</sup> UNSC, ‘Maintenance of International Peace and Security’ (10 January 2024) UN Doc S.PV/9527, 8 (‘our interpretation of operative paragraph 3 provides that any response to attacks in the Red Sea must be in line with international law, in particular international humanitarian and human rights law, and within the strict conditions of the exercise of self-defence’.); UN Doc S.PV/9532 (n 11) 6 (‘What is also clear is that any action to defend vessels from attacks must be undertaken in full compliance with international law, including international humanitarian law and international human rights law. That means that the principles of distinction, necessity, proportionality and precaution should be upheld at all times.’).

<sup>29</sup> UN Doc S.PV/9532, *ibid* 9.

<sup>30</sup> *ibid*. See Section III.F on the necessity and proportionality of the military strikes.

States to 'defend their vessels from attack', which was, in its view, 'non-existent'.<sup>31</sup>

While neither the US nor the UK directly linked this reference to 'defence' in paragraph 3 of the Resolution with the right of self-defence contained within Article 51 of the UN Charter, the US Ambassador to the UN, Linda Thomas-Greenfield, did note that the Resolution 'referenced the inherent right of Member States to defend, in accordance with international law, their vessels from attacks'.<sup>32</sup> The right of self-defence as contained within Article 51 expressly provides that '[n]othing in the present Charter shall impair the *inherent right* of individual or collective self-defence if an armed attack occurs against a Member of the United Nations' (emphasis added), leading to the conclusion that the US understood the Resolution to be supportive of an invocation of the right of defence as found within Article 51 of the Charter.

While there was, therefore, some unhelpful ambiguity regarding the nature of the Resolution and its relationship to both the right of self-defence in international law and the specific invocation of it by the US and the UK on this occasion, it was clear nonetheless that the acting States were invoking the right in justification for their strikes upon the territory of Yemen.

### III. QUESTIONING THE RIGHT OF SELF-DEFENCE

#### A. *Were the Houthis Able to Perpetrate 'Armed Attacks'?*

At the time of the military operation the Houthis were in control of much of the territory and population of Yemen, and there were arguably some tentative signs of their gradual acceptance within the international community, including the US removing them from its list of terrorist groups.<sup>33</sup> If the Houthis are accepted as the *de facto* governmental representatives of Yemen, then the question as to whether they are able to perpetrate an armed attack for the purposes of triggering the right of self-defence upon Yemeni territory is arguably uncontroversial. States have previously invoked the right of self-defence in response to attacks by unrecognised governments, or their involvement in them.<sup>34</sup>

Yet problems potentially arise if we are to view the Houthis as non-State actors, either as a terrorist group or an opposition group that does not (yet, at

<sup>31</sup> UN Doc S.PV/9527 (n 28) 2.

<sup>32</sup> UN Doc S.PV/9532 (n 11) 5.

<sup>33</sup> U.S. Department of State, 'Revocation of the Terrorist Designations of Ansarallah' (12 January 2024) <<https://www.state.gov/revocation-of-the-terrorist-designations-of-ansarallah/>>. However, in response to the attacks on shipping since October 2023 the US has reversed this decision and again designated the Houthis as a terrorist organisation. See U.S. Department of State, 'Terrorist Designation of the Houthis' (17 January 2024) <<https://www.state.gov/terrorist-designation-of-the-houthis/>>.

<sup>34</sup> The fact that the US response to the attacks of 11 September 2001 took place on the territory of Afghanistan was due to the US attributing the attacks to the Taliban, which was at the time the unrecognised *de facto* government of Afghanistan. See Henderson (n 24) 407–8.

least) represent the State of Yemen. It might be argued that for the attacks to be relevant for the purposes of the *jus ad bellum* they would need to be attributable to a State actor,<sup>35</sup> that is, the non-State actors were at least acting on the instructions of, or under the direction or control of, a State in carrying out the attacks.<sup>36</sup> It is clear that Iran has provided weapons and satellite information confirming the positions of targets for the Houthi attacks, as well as financially and politically supporting the Houthis,<sup>37</sup> and the US made the claim that Iran had been ‘deeply involved’ in the attacks.<sup>38</sup> Yet while this level of support by Iran engages certain legal obligations it would not in itself be sufficient for the purposes of attributing the attacks to it.<sup>39</sup>

However, one may equally plausibly—and, preferably, in the present author’s view—take the position that whether or not the Houthis represent a government or State actor or whether the attacks can be attributable to a State is irrelevant, at least for the question of whether their actions can be classified as ‘armed attacks’ for the purposes of the right of self-defence.<sup>40</sup> Article 51 does not require that an armed attack emanates from a State, and many States have invoked self-defence in response to attacks purely by non-State actors.<sup>41</sup> It was also notable, in this respect, that UNSC Resolution 2722 (2024) spoke of the

<sup>35</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 139 (‘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.’) For a recent affirmation of this view, see African Union Peace and Security Council, *Common African Position on the Application of International Law to the Use of Information and Communication Technologies in the Cyberspace*, Communiqué 1196 (29 January 2024) para 43 (‘the African Union affirms that the right of self-defence is triggered solely if an armed attack is attributable to a State according to the applicable rules of customary international law of State responsibility.’)

<sup>36</sup> International Law Commission, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ (2001) art 8 <[https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)>.

<sup>37</sup> UK House of Commons Library, ‘UK and International Response to Houthis in the Red Sea 2024’ (6 February 2024) 8 <<https://researchbriefings.files.parliament.uk/documents/CBP-9930/CBP-9930.pdf>>.

<sup>38</sup> F Schwartz, ‘US Says Iran “Deeply Involved” in Houthi Red Sea Shipping Attacks’ (*The Financial Times*, 22 December 2023) <<https://www.ft.com/content/87325ffa-e1a7-4480-804b-1cc42f8f141>>.

<sup>39</sup> In the *Nicaragua* case the International Court of Justice held that ‘the provision of weapons or logistical or other support’ by a State to a non-State actor which is engaged in military action against another State was not sufficient by itself to constitute an ‘armed attack’ by the assisting State, although ‘[s]uch assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States’. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14, para 195. While the Court was discussing here the legal categorisation of State conduct rather than the circumstances under which the conduct of non-State actors may be attributed to a State, the provision of such support by Iran to the Houthis and the relationship between the two during the period of the attacks would mean that the conduct of the Houthis would not be attributable to Iran which would also not itself be responsible for an armed attack. However, on the basis of the *Nicaragua* case the support provided by Iran to the Houthis arguably constituted an unlawful use of force.

<sup>40</sup> See, eg, SD Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter’ (2002) 43 *HarvIntLJ* 41; Henderson (n 24) 262–6.

<sup>41</sup> Henderson *ibid*.



right under international law for States to ‘defend’ themselves in the context of the Houthi attacks. Under this view such attribution to a State is necessary only to the extent that the response in self-defence takes place on that State’s territory.<sup>42</sup> The actions taken here in self-defence have not (yet, at least) been extended to Iranian territory, meaning that attribution to Iran was unnecessary for the purposes of legally justifying the response taken.

What is of significance, however, is the fact that the military strikes are being taken upon Yemeni territory. It was notable in this respect that Yemen’s internationally recognised *de jure* government, the Presidential Leadership Council (PLC), while not appearing to provide its express consent for the strikes, blamed the Houthis for the UK and US strikes, and claimed that they bore responsibility for dragging Yemen into a conflict through their attacks in the Red Sea.<sup>43</sup> As will be discussed in Section III.F.2, whether or not this can be interpreted as consent for the strikes by the government of Yemen is of relevance in determining whether the invocation of the right of self-defence was necessary.

### *B. Were the Houthi Attacks of the Nature of an ‘Armed Attack’?*

It may, however, legitimately be questioned whether the activities of the Houthis in the Red Sea since 7 October 2023 have been of the nature of an ‘armed attack’ for the purposes of the international right of self-defence, or whether they should rather be considered as acts of piracy or other illicit activities, with the legal justification for any forcible response located elsewhere, in particular the 1982 UN Convention on the Law of the Sea (UNCLOS). It was significant, in this respect, that the Russian Federation ‘emphasized that the United Nations Convention on the Law of the Sea is irrelevant in this context as it does not concern issues of the use of force’ and that ‘countering “acts of piracy” cannot be legitimised under it.’<sup>44</sup> It is true that UNCLOS is vague as to the nature of, and degree to which, enforcement action can be taken under it, yet certain acts of interference by States in regards to acts of piracy are permitted.<sup>45</sup>

However, there are various reasons to conclude that the Houthi attacks went beyond acts of piracy, and that the US and UK’s response required a justification beyond any contained in UNCLOS.<sup>46</sup> While piracy is normally undertaken by

<sup>42</sup> *ibid* 401–28.

<sup>43</sup> Al Jazeera (n 14). For more on consent to intervention, see Henderson *ibid* 445–85.

<sup>44</sup> UN Doc S/2024/90 (n 20).

<sup>45</sup> The Convention talks generally of the ‘seizure’ of certain ships (eg art 105) and the ‘repression’ and ‘suppression’ of certain activities (eg arts 100, 108). United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

<sup>46</sup> Although the acting States did refer to the Houthis as ‘opportunistic pirates’. See P Wintour, ‘Houthi Strike Iran-Bound Grain Ship in First Red Sea Attack in Six Days’ (*The Guardian*, 13

small bands of private individuals,<sup>47</sup> the Houthis were, as noted in the section above, arguably acting as the *de facto* government and were in effective control of a large proportion of Yemeni State territory. In addition, piracy tends to take the form of acts carried out for ‘private ends’,<sup>48</sup> most often monetary gain, although there is at the same time nothing to preclude it being driven by hatred or political reasons. A statement issued by the Houthis indicated, however, that they would continue to target Israeli ships and interests until Israel’s ‘aggression against Gaza stops’.<sup>49</sup> This appeared to be more akin to a claim that the attacks were taken as a form of collective countermeasure or armed reprisal, supposedly in the name of Palestine, than an act of piracy. Countermeasures are, however, taken by State actors,<sup>50</sup> and it is unclear whether the Houthis can be said to represent such on the basis of their *de facto* effective control of much of Yemen. Yet, even if they can, countermeasures are not permitted to take the form of such forcible measures,<sup>51</sup> and it is unclear whether countermeasures could be taken in this instance against commercial ships as a proxy for the State concerned. Armed reprisals are unlawful in all circumstances.<sup>52</sup>

Furthermore, acts of piracy normally involve the use of small private ships or aircraft and relatively light weaponry to gain control of merchant ships.<sup>53</sup> While this was the *modus operandi* of some of the Houthi attacks, many involved the launching of ballistic missile and drone attacks from the territory of Yemen.

Finally, the response of the US and UK went beyond what is permitted in responding to piracy. Whatever the Council was actually referring to in Resolution 2722 (2024) when it ‘[r]eaffirm[ed] that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to activities in the oceans, including countering illicit activities at sea’, there is nothing within this treaty that expressly provides for the targeting of onshore

February 2024) <<https://www.theguardian.com/world/2024/feb/13/houthis-strike-iran-bound-grain-ship-in-first-red-sea-attack-in-six-days>>.

<sup>47</sup> UNCLOS (n 45) art 101(a).  
<sup>48</sup> *ibid.* The negotiating history of UNCLOS would appear to indicate that piracy is undertaken for economic gains. See, eg, Third United Nations Conference on the Law of the Sea 1973–1982, 31st Meeting (7 August 1974) UN Doc A/CONF.62/C.2/SR.31, para 61 <[https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_2/a\\_conf62\\_c2\\_sr31.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr31.pdf)>; Third United Nations Conference on the Law of the Sea 1973–1982, 45th Meeting (28 August 1974) UN Doc A/CONF.62/C.2/SR.45, para 11 <[https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_2/a\\_conf62\\_c2\\_sr45.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr45.pdf)>.

<sup>49</sup> H Britzkey, ‘Missiles Fired from Yemen toward US Warship that Responded to Attack on Commercial Tanker’ (CNN, 27 November 2023) <<https://edition.cnn.com/2023/11/27/politics/us-destroyer-missiles-distress-call-tanker-intl-hnk/index.html#:~:text=Two%20ballistic%20missiles%20were%20fired,the%20US%20military%20said%20Sunday>>.

<sup>50</sup> International Law Commission (n 36) arts 22, 49.

<sup>51</sup> *ibid.*, art 50(1)(a).

<sup>52</sup> See UN General Assembly, ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ (24 October 1970) UN Doc A/RES/2625(XXV), principle 1. While armed reprisals are formally unlawful, invocations of the right of self-defence often seem to blur the line between the two.

<sup>53</sup> UNCLOS (n 45) art 101(a).

State infrastructure, as has been the *modus operandi* of the US–UK strikes since 11 January 2024.<sup>54</sup>

### C. The Target(s) of the Houthi Attacks

On the basis of what has been discussed above, the Houthi attacks were conceivably of the *nature* of an armed attack. Yet, given that they did not take place on the territory of the US or UK one may question whether the targets of the attacks sufficiently represented manifestations of these States for the purposes of them invoking the right of self-defence. Prominent within the justificatory discourse of the States was the claim that they were responding to attacks upon both military *and* commercial vessels.<sup>55</sup>

Article 3(d) of the UN General Assembly's Definition of Aggression (1974) provides that, subject to what is said in the section below on gravity, attacks 'on the land, sea or air forces, or marine and air fleets of another State' may qualify as an act of aggression, and presumably an armed attack for the purposes of the right of self-defence.<sup>56</sup> The Houthis attacked both an American military aircraft on 30 December 2023 and American and British warships on 9 January 2024,<sup>57</sup> and within the UK government's summary of its legal position the drone attack on HMS Diamond which had taken place on 9 January 2024 was specifically highlighted.<sup>58</sup>

It might be questioned whether the reference in Article 3(d) to marine 'fleets' requires an attack on more than a single vessel before it can constitute an armed attack.<sup>59</sup> While each incident needs to be assessed individually taking into

<sup>54</sup> It is significant, in this respect, that UNCLOS (n 45) art 301 also states that '[i]n exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations'. This is an implicit affirmation of the right of self-defence given that it would not be seen to be 'inconsistent' with the prohibition or the UN Charter more generally.

<sup>55</sup> See nn 9–12.

<sup>56</sup> UN General Assembly Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX). See also Henderson (n 24) 108–9.

<sup>57</sup> S Jones, 'US Navy Down Missiles in Red Sea after Ship Attacked by Houthi Rebels' (*The Guardian*, 30 January 2023) <<https://www.theguardian.com/world/2023/dec/31/missile-hits-red-sea-container-ship-us-destroyers-shoot-down-two-more>>; P Wintour and D Sabbagh, 'Britain Warns of Severe Consequences after Houthi Attack in Red Sea Repelled' (*The Guardian*, 10 January 2024) <<https://www.theguardian.com/world/2024/jan/10/britain-warns-severe-consequences-houthi-attack-red-sea-repelled>>.

<sup>58</sup> See Prime Minister's Office, 10 Downing Street, 'Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 12 January 2024' (n 10); Prime Minister's Office, 10 Downing Street, 'Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 22 January 2024' (n 10).

<sup>59</sup> Raina argues that '[w]hile it is possible to have a legitimate difference of views on exactly what the term "fleet" denotes, one ship alone cannot constitute a fleet'. H Raina, 'Attacks on Merchant Shipping: Which State Has the Right to Respond in Self-Defence?' (*Articles of War*, 15 April 2024) <<https://lieber.westpoint.edu/attacks-merchant-shipping-which-state-has-right-respond-self-defence/>>.

account the specific circumstances, the International Court of Justice (ICJ) in the *Oil Platforms* case was not able to ‘exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”’,<sup>60</sup> meaning that it is possible for the limited attacks that had occurred against the acting States’ military vessels to, in principle, constitute armed attacks. Similarly, self-defence for the protection of a State’s nationals abroad, which played a further, albeit minor, part in the justificatory discourse of the defending States,<sup>61</sup> can in principle be incorporated under the general right of self-defence given that nationals represent a clear manifestation of a State,<sup>62</sup> although the circumstances under which self-defence can be invoked on this basis, particularly as a justification for extensive missile strikes on a State’s territory, is not settled.<sup>63</sup>

Less clear is whether—and, if so, to what extent—commercial vessels constitute targets for the purposes of the ‘armed attack’ requirement.<sup>64</sup> In particular, it may be questioned whether an attack on a non-military vessel flying the flag of a particular State could qualify as an ‘armed attack’ on that State.<sup>65</sup> The US Ambassador to the UN, Linda Thomas-Greenfield, appeared to be of the view that they could: ‘It is long-established that States have a right to defend merchant and commercial vessels from attacks.’<sup>66</sup>

It is plausible to argue that ‘since merchant ships are not external manifestations of the flag State, military action against an individual merchant ship may be an infringement on the rights of the flag State, but

<sup>60</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) [2003] ICJ Rep 161, para 72.

<sup>61</sup> For example, in the Joint Statement it was stated that the Houthi attacks threatened ‘the lives of international mariners’ and that the States would ‘not hesitate to defend lives’. See The White House (n 4).

<sup>62</sup> See C Greenwood, ‘International Law and the United States’ Air Operation against Libya’ (1986–1987) 89 VaLRev 933, 940–1.

<sup>63</sup> For discussion, see Henderson (n 24) 322–36.

<sup>64</sup> See M Fink, ‘Protecting Commercial Shipping with Strikes into Yemen: Do Attacks against Commercial Shipping Trigger the Right of Self-Defence?’ (*EJIL Talk!*, 26 January 2024) <<https://www.ejiltalk.org/protecting-commercial-shipping-with-strikes-into-yemen-do-attacks-against-merchant-shipping-trigger-the-right-of-self-defence/>>.

<sup>65</sup> The nationality of commercial vessels is determined on the basis of the State of the flag they are sailing under. As Raina points out: ‘The manner of nationality allocation to ships has long been a thinly-veiled secret of the shipping industry. Since at least the mid-twentieth century, the shipping industry has used open registries also called flags of convenience to affiliate with States with which it may share no genuine link at all. Under this system, a ship can acquire a State’s nationality merely because a State official declares that it is so. Consequently, a ship can obtain a State’s nationality irrespective of whether nationals of that State are involved in the ownership or manning of the ship, or whether the company that owns the ship has its principal place of business within that State. In a largely peaceful world, which has now experienced a multi-generational period without any general naval war ..., this system has come to represent the normal state of affairs.’ Raina (n 59).

<sup>66</sup> United States Mission to the United Nations, ‘Explanation of Vote Delivered by Ambassador Thomas-Greenfield on Russia’s Amendments to a UNSC Resolution Condemning Houthi Attacks in the Red Sea’ (10 January 2024) <<https://usun.usmission.gov/explanation-of-vote-delivered-by-ambassador-thomas-greenfield-on-russias-amendments-to-a-uns-c-resolution-condemning-houthi-attacks-in-the-red-sea/>>.

does not constitute an armed attack against that State triggering its right of self-defence'.<sup>67</sup> However, if the merchant ship is used as a proxy for attacking the flag State it is also plausible to argue that 'an attack on a single merchant ship may be an armed attack for which the flag State has a right of self-defence'.<sup>68</sup> In the *Oil Platforms* case, the ICJ did not directly address and resolve this issue, but there were indications in the jurisprudence of the Court that self-defence might have been permitted in the face of attacks on commercial vessels flying the flag of the US: 'the *Texaco Caribbean*, 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'.<sup>69</sup> As such, and although not an issue that has been clearly resolved, while commercial ships are not external manifestations of the flag State, as per marine fleets or embassies,<sup>70</sup> for example, they are arguably entitled to the protection of the State under whose flag they sail.<sup>71</sup>

However, in this instance the commercial vessels attacked by the Houthis were not flying under the flags of the US or UK.<sup>72</sup> The question therefore arises as to whether such a principle might be extended to the *collective* self-defence of commercial vessels carrying the flag of a third State or another State's nationals?<sup>73</sup> Indeed, there were references in the justifications advanced that suggested that this was included as a basis for the strikes by the US and UK.<sup>74</sup> If it is assumed that this is the case, on the basis of the conditions for the invocation of collective self-defence set out in the *Nicaragua* case the victim State would need to first declare that its flagged ships or nationals had been attacked,<sup>75</sup> but at the very least expressly request the assistance of the State acting in collective self-defence,<sup>76</sup> neither of which appeared to be present in the context of the Red Sea attacks.

<sup>67</sup> N Ochoa-Ruiz and E Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-Defence' (2005) 16 EJIL 499, 513. <sup>68</sup> *ibid.*

<sup>69</sup> *Oil Platforms* (n 60) para 64. <sup>70</sup> See Henderson (n 24) 267–71.

<sup>71</sup> See, further, Fink (n 64). UNCLOS (n 45) art 94 concerns the '[d]uties of the flag State' which are largely confined to technical and procedural issues and do not address this particular issue.

<sup>72</sup> A point made by the Russian Federation in its letter to the UNSC: '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.' UN Doc S/2024/90 (n 20). The possible exception to this is the *Swan Atlantic* which was flagged in the Cayman Islands. As a British Overseas Territory, the UK would have responsibility for the defence of the Cayman Islands meaning that it is possible to argue that the attack on this ship gave rise to the right of self-defence by the UK.

<sup>73</sup> The right of *collective* self-defence is also provided in art 51 of the UN Charter (n 21), on a par with the right of *individual* self-defence. On the concept of collective self-defence, see, in general, JA Green, *Collective Self-Defence in International Law* (CUP 2024).

<sup>74</sup> For example, in setting out the justification for the military action on 11 January 2024, the States referred to the fact that the attacks against shipping which were being responded to 'included' but were not limited to those against US and UK vessels. See The White House (n 4).

<sup>75</sup> *Nicaragua* (n 39) paras 195, 199.

<sup>76</sup> *ibid.* See, further, JA Green, 'The Additional Criteria for Collective Self-Defence: Request but not Declaration' (2017) 4 *JUse Force&IntL* 4.

D. *Were the Houthi Attacks of the Gravity of an 'Armed Attack'?*

While States are prohibited from using 'force' in Article 2(4) of the UN Charter, a longstanding debate exists as to whether an 'armed attack', for the purposes of triggering the right of self-defence in Article 51, requires a particular gravity or overall scale and effects, and if so at what point, and in which ways, the threshold between the two concepts is to be drawn. The 'gravity threshold' debate has been discussed at length,<sup>77</sup> and will not be engaged in here, suffice to say that whilst the ICJ has taken the view that one exists,<sup>78</sup> the US, in contrast, remains of the view that the right of self-defence 'potentially applies against *any* illegal use of force'.<sup>79</sup>

Accepting for the sake of argument what would appear to be the majority view that such a threshold exists, with armed attacks distinguished by their particular 'scale and effects',<sup>80</sup> it is difficult to perceive any of the Houthi attacks upon shipping within the Red Sea at the time the US–UK military strikes were launched as having crossed this gravity threshold.<sup>81</sup> There was relatively little reported damage to, or destruction of, the marine vessels, or the death of, or serious injury to, any nationals of any of the States involved resulting from any one of the attacks.<sup>82</sup> While the UK referred to the 'serious attacks' of the Houthis,<sup>83</sup> there was very little set out regarding the scale and effects of the attacks in the justificatory discourse of the defending States who, by contrast, spoke of the 'continued threat' from the

<sup>77</sup> See, for discussion, Henderson (n 24) 276–96.

<sup>78</sup> See *Nicaragua* (n 39) paras 191, 195.

<sup>79</sup> See U.S. Department of Defense, *Law of War Manual* (June 2015) 47 (emphasis added).

<sup>80</sup> *Nicaragua* (n 39) para 195.

<sup>81</sup> This is for the purposes of justifying extensive military measures within the territory of a State, as was the case with the strikes that were launched on 11 January 2024. It is, by contrast, unclear the extent to which a gravity threshold exists for the purposes of justifying 'unit' self-defence taken as a defensive response to more minor attacks within the direct vicinity of where the attacks take place. See, further, Section III.F.2.

<sup>82</sup> In this respect, Talmon argued that the Houthi attacks against the US and UK warships and aircraft were *not* sufficiently grave to qualify as armed attacks. See S Talmon, 'Germany Supports Expansive Interpretation of the Right of Self-Defence Against Attacks by the Houthis on Commercial Shipping in the Red Sea' (*German Practice in International Law*, 23 January 2024) <<https://gpil.jura.uni-bonn.de/2024/01/germany-supports-expansive-interpretation-of-the-right-to-self-defence-against-attacks-by-the-houthis-on-commercial-shipping-in-the-red-sea/>>. However, both the death of mariners and the sinking of a commercial vessel that had been the target of a Houthi attack were subsequently reported, although this was following the initiation of the military strikes in self-defence on 11 January 2024. See T Spender, J Cheetham and F Gardner, 'Three Killed in Houthi Missile Attack in Gulf of Aden' (*BBC News*, 7 March 2024) <<https://www.bbc.co.uk/news/world-middle-east-68490695>>; The Guardian, 'Rubymar Ship Attacked by Houthi Rebels Finally Sinks in Red Sea' (*The Guardian*, 3 March 2024) <<https://www.theguardian.com/world/2024/mar/02/stricken-ship-attacked-by-houthi-rebels-sinks-in-red-sea>>.

<sup>83</sup> See Prime Minister's Office, 10 Downing Street, 'Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 12 January 2024' (n 10); Prime Minister's Office, 10 Downing Street, 'Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 22 January 2024' (n 10).

‘harassment’ as well as the ‘international challenge’ this posed to the free flow of commerce.<sup>84</sup>

It was, however, notable that the invocation of self-defence on 11 January 2024 was clearly in response not to a single attack but rather to the Houthis having carried out ‘dozens of serious attacks on shipping in the Red Sea for a sustained period’.<sup>85</sup> This emphasis on there being a high volume of attacks, rather than any single large-scale attack, gives rise to the impression that the acting States were implicitly relying on the so-called ‘accumulation of events theory’, under which whilst any one of a series of attacks taken by itself might not be of sufficient gravity to constitute an armed attack, the series of attacks taken as a whole might be seen to be.<sup>86</sup> While this theory has been given some judicial support by the ICJ,<sup>87</sup> and has been implicitly invoked in the practice of States,<sup>88</sup> it is not a doctrine which has received the dedicated attention of States.

Applying this theory to the Houthi attacks is problematic due to the uncertainty, as discussed above, regarding which attacks were being considered by the US and UK for the purposes of the invocation of the right of self-defence, and in particular the fact that the vast majority of attacks had occurred against vessels sailing under neither US nor UK flags and with no request for collective self-defence by the flag States concerned. However, with these qualifications in mind, along with that regarding the extent to

<sup>84</sup> See The White House (n 4); U.S. Central Command (Twitter, 12 January 2024) <[https://twitter.com/CENTCOM/status/1745647248866738322?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1745647248866738322%7Ctwgr%5Ea946e214830ab92504ef88092e00dcd6942a417%7Ctwcon%5Esl1\\_ref\\_url=https%3A%2F%2Fwww.theguardian.com%2Fworld%2Ffliv](https://twitter.com/CENTCOM/status/1745647248866738322?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1745647248866738322%7Ctwgr%5Ea946e214830ab92504ef88092e00dcd6942a417%7Ctwcon%5Esl1_ref_url=https%3A%2F%2Fwww.theguardian.com%2Fworld%2Ffliv)>.

<sup>85</sup> Prime Minister’s Office, 10 Downing Street, ‘Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 12 January 2024’ (n 10); Prime Minister’s Office, 10 Downing Street, ‘Summary of the UK Government Legal Position: The Legality of UK Military Action to Target Houthi Facilities in Yemen on 22 January 2024’ (n 10). The British Prime Minister’s statement to the UK Parliament stated that ‘[s]ince 19 November, Iran-backed Houthis have launched over 25 illegal and unacceptable attacks on commercial shipping in the Red Sea, and on 9 January they mounted a direct attack against British and American warships’. See UK Parliament, ‘Defending the UK and Allies’ (*Hansard*, 15 January 2024) <<https://hansard.parliament.uk/commons/2024-01-15/debates/52945864-28EB-49AC-B933-33B546DF75B6/DefendingTheUKAndAllies>>.

<sup>86</sup> See, for discussion, Henderson (n 24) 290–6.

<sup>87</sup> See *Nicaragua* (n 39) para 231 (‘Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an “armed attack” by Nicaragua on either or both States’); *Oil Platforms* (n 60) para 64 (‘[e]ven taken cumulatively, ... these incidents do not seem to the Court to constitute an armed attack against the United States’).

<sup>88</sup> See Henderson (n 24) 290–6. For example, in invoking the right of self-defence in justification for the drone strike which led to the death of Iranian General Soleimani in January 2020, the US was keen to claim that its military action was ‘in response to an escalating series of armed attacks’. See UNSC, ‘Letter Dated 8 January 2020 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council’ (9 January 2020) UN Doc S/2020/20.

which the theory exists in international law, then based on the volume of Houthi attacks since 7 October 2023 the argument can plausibly be made that by 11 January 2024 a sufficient ‘accumulation’ of attacks had occurred for the purposes of the armed attack criterion, but also that the attacks formed part of a concerted continuing pattern of armed activity against shipping within the Red Sea. Consequently, on this basis alone, the invocation of the right of self-defence, in a form that might appear disproportionate if viewed solely in the context of any of the attacks taken individually, could arguably be justified.<sup>89</sup>

*E. Did the Houthis Intend to Perpetrate an ‘Armed Attack’ against the US or UK?*

In the *Oil Platforms* case, the supposedly indiscriminate nature of the attacks by Iran was held by the ICJ to discredit the claim of self-defence advanced by the US.<sup>90</sup> By slight contrast, the series of Houthi attacks in the Red Sea were not entirely indiscriminate in nature, but instead were stated as targeting ‘Israeli ships and interests’ and any ships travelling towards an Israeli port, although reports suggest that they were in fact more indiscriminate than this.<sup>91</sup> It might therefore be said that the Houthis lacked any intent to carry out an armed attack specifically against the US, UK or any other State other than Israeli flagged or owned ships or those that it was able to identify as travelling to Israel.

However, drawing such a fundamental *mens rea* requirement upon which many invocations of self-defence will stand or fall from these passages of the *Oil Platforms* case can be challenged. Whether or not a State is intentionally targeted, the right of self-defence can arguably be seen to exist for States to be able to take necessary action to defend themselves, sometimes *in extremis*, without first being required to ascertain the intentions of the attacker, and whether or not they were the intended target of the attacks.<sup>92</sup> To require otherwise would simply encourage the use of indiscriminate targeting, or for attacks against a specific State to be launched in the mix with others seemingly of a more indiscriminate nature, with the attacker then assured that any injured State would be left without a right to defend itself,<sup>93</sup> or at the very least having hindered the victim State in taking effective actions in self-defence by requiring investigations regarding intent to be conducted first. The specific aspect of intention is also not one that can be clearly derived from State practice and it is arguable that intention is at best of probative value, in that prior known

<sup>89</sup> See Section III.F for more on the necessity and proportionality of the military operations.

<sup>90</sup> *Oil Platforms* (n 60) para 64. On the basis of this, Malcolm Shaw has stated that ‘it is necessary to show that the State seeking to resort to force in self-defence has itself been intentionally attacked’. MN Shaw, *International Law* (9th edn, CUP 2021) 995.

<sup>91</sup> P Wood, ‘Have the Houthis Gone Rogue?’ (*The Spectator*, 12 January 2024) <<https://www.spectator.co.uk/article/have-the-houthis-gone-rogue/>>.

<sup>92</sup> O Corten, *The Law against War: The Prohibition of the Use of Force in Contemporary International Law* (2nd edn, Hart 2021) 89.

<sup>93</sup> JA Green, ‘Self-Defence: A State of Mind for States?’ (2008) 55 NILR 181, 205.



hostile intent can be useful in determining whether the invocation of the right of self-defence may be necessary in a particular situation. Of course, this is based on a State actually being the victim of an attack of the nature giving rise to self-defence, which in the situation under consideration here is, as discussed above, somewhat doubtful.

*F. Was the Response in Self-Defence Necessary and Proportionate?*

Much was made in the justificatory discourse of the acting States of the fact that the military action taken was both necessary and proportionate,<sup>94</sup> the twin criteria for self-defence that are located within customary international law.<sup>95</sup> Due mainly to their customary nature the precise meaning and requirements of either criterion are not entirely settled, but together they can be seen as broadly providing that the defending State must have no reasonable alternatives to military force to defend itself and that any ensuing military action in self-defence is taken—and restricted to that required—for its defence.<sup>96</sup>

*1. Necessity*

The acting States had issued warnings to the Houthis of consequences if the attacks persisted, and had taken the issue to the UNSC, which had strongly condemned, and demanded that the Houthis cease, the attacks.<sup>97</sup> The British Prime Minister explained that '[we] have attempted to resolve this through diplomacy ... [including] numerous international calls for the attacks to stop'.<sup>98</sup> The US also claimed to have delivered a 'private message' to Iran following some of the strikes.<sup>99</sup> There is, therefore, at least some support for the argument that the acting States had first resorted to reasonable non-forcible measures to put an end to the attacks.

Whether or not such efforts were required in this instance, however, is open to question. Indeed, it might be argued that such peaceful means are not required due to them not having 'any realistic prospect of success';<sup>100</sup> that is, they were not reasonable. This is based on the fact that the Houthis are designated as a terrorist organisation by certain States,<sup>101</sup> and were taking the actions in the

<sup>94</sup> See nn 9–12.

<sup>95</sup> See *Nicaragua* (n 39) para 176.

<sup>96</sup> Henderson (n 24) 296–322; see, in general, C O'Meara, *Necessity, Proportionality and the Right of Self-Defence* (OUP 2021).

<sup>97</sup> See, eg, UNSC Res 2722 (2024) (n 22) paras 1, 2.

<sup>98</sup> See UK Parliament (n 85).

<sup>99</sup> The Times of Israel, 'Biden Says US Sent Private Message to Iran about Houthi Attacks' (*The Times of Israel*, 13 January 2024) <<https://www.timesofisrael.com/biden-says-us-sent-private-message-to-iran-about-houthi-attacks/>>.

<sup>100</sup> R Buchan, 'The Law of Self-Defense and the U.S. and UK Strikes against the Houthis' (*Articles of War*, 31 January 2024) <<https://lieber.westpoint.edu/law-self-defense-us-uk-strikes-against-houthis/>>.

<sup>101</sup> See, eg, n 33.

Red Sea in support of Hamas, another proscribed terrorist organisation.<sup>102</sup> Attempts to negotiate were also arguably futile given that the Houthis had clearly stated that the attacks would continue as long as Israel was carrying out military operations in Gaza,<sup>103</sup> something that was outside of the direct control of the acting States.

Yet, while this may be correct, it may be argued that the acting States should have first at least attempted to work with the *de jure* recognised government of Yemen. In light of the reliance placed on the so-called ‘unable or unwilling’ doctrine of self-defence by the acting States in recent years,<sup>104</sup> it was notable that it was not uttered on this occasion. In particular, this doctrine supposedly provides that the invocation of self-defence can be deemed necessary when the government of the State within which the non-State perpetrators of an attack are located is either unable to take the action deemed necessary to cease the attack or series of attacks, or is unwilling to do so.<sup>105</sup>

Given its lack of control over large parts of the territory of the State, along with the fact that it was itself embroiled in a protracted civil war with the Houthis, the government might have reasonably been deemed ‘unable’ to act against the Houthis. Yet, this does not lead to the conclusion that any attempt to work with the government should be seen to be futile.<sup>106</sup> On the contrary, as noted above,<sup>107</sup> the Yemeni government had been critical of the actions of the Houthis and there were no indications to suggest that it was in any sense ‘unwilling’ to take the necessary action.

In this light, it must be questioned why the two acting States did not request—at least as far as is publicly known—the consent of the government to carry out the military action on Yemeni soil. It may have been that given the Houthi’s *de facto* status and control the acting States considered the role of the *de jure* recognised government irrelevant and, with that, also the ‘unable or unwilling’ doctrine. Or it may have been that given the *de jure* government’s lack of control the acting States considered the ‘unable’ arm of the doctrine to have been satisfied, thus providing sufficient grounds for the invocation of the right of self-defence.<sup>108</sup>

<sup>102</sup> See, eg, UK Government, ‘Proscribed Terrorist Groups or Organisations’ (26 April 2024) <<https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version>>.

<sup>103</sup> Al Jazeera, ‘Yemen’s Houthis “Will Not Stop” Red Sea Attacks until Israel Ends Gaza War’ (*Al Jazeera*, 19 December 2023) <<https://www.aljazeera.com/news/2023/12/19/yemens-houthis-will-not-stop-red-sea-attacks-until-israel-stops-gaza-war>>.

<sup>104</sup> See, eg, UNSC, ‘Letter Dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General’ (23 September 2014) UN Doc S/2014/695. See JD Ohlin, ‘The Unwilling or Unable Doctrine Comes to Life’ (*Opinio Juris*, 23 September 2014) <<http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/>>.

<sup>106</sup> As suggested in Buchan (n 100).

<sup>105</sup> For discussion, see Henderson (n 24) 414–28.

<sup>107</sup> See Section III.A.

<sup>108</sup> As Talmon (n 82) has observed, ‘[i]t is unclear whether the omission of the unwilling or unable doctrine in this case was just an oversight or whether, in case of stabilized local *de facto* authorities in parts of a State, it is automatically to be assumed that the State’s government is

Yet, in the case of unable yet willing governments, as the PLC arguably were in this instance, the invocation of self-defence is arguably unnecessary. In particular, if consent is provided it changes the legal basis of any military action from self-defence to that of consent by the territorial State, at least for action taken upon the territory of the consenting State. The invocation of self-defence provides an exception to the prohibition of force and constitutes a circumstance precluding wrongfulness in terms of the violation of a State's territorial integrity.<sup>109</sup> Yet, the presence of consent means that neither is violated *ab initio*.<sup>110</sup>

There is, however, no clearly defined obligation upon States to seek the consent of the governmental regime of the territory concerned, even if apparently willing to provide it. And there will be circumstances in which the seeking of consent will not necessarily be reasonable, in particular in emergency situations where a State finds itself under devastating attack requiring it to act without delay, which was not the case here. However, if there is the possibility for consent to be provided by the government of one State to that of another for the latter to undertake military action upon its territory then this is of probative value in the assessment as to whether the invocation of the right of self-defence is necessary.

In addition, within the context of the principle of necessity there are temporal issues to consider. In particular, military action in self-defence is difficult to justify if the armed attack to which it is responding is over.<sup>111</sup> However, in this instance while each of the attacks by the Houthis was discrete in nature, and there were short periods of time between them, they were also clearly ongoing, with the Houthis proclaiming that they would continue until Israel's actions in Gaza had ceased. It is on this basis difficult to characterise the military response as purely one of armed reprisal, as a clear defensive necessity could be perceived as existing in responding to ongoing attacks.<sup>112</sup> Yet, given that the Houthi attacks were against ships with links to, or sailing towards, Israel, neither the US nor UK could be certain that the next attack in the series would be against a US or UK ship or one of a State that had requested them to act in collective self-defence, raising question marks over the necessity of the strikes in self-defence. Furthermore, it was notable that the strikes against the anti-ship missiles that were being prepared to be launched were presented as being in response to an 'imminent threat', indicative of the fact that while the attacks were portrayed as ongoing the acting States nonetheless felt compelled to incorporate a restrictive temporal element in respect to the justifications for at

unable to prevent the territory under the control of the de facto authorities from being used for armed attacks on other States'.<sup>109</sup> International Law Commission (n 36) art 21.

<sup>110</sup> International Law Association Committee on the Use of Force, 'Final Report on Aggression and the Use of Force' (2018) 18 <[https://www.ila-hq.org/en\\_GB/documents/conference-report-sydney-2018-7](https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-7)>.

<sup>111</sup> Talmon (n 82).  
<sup>112</sup> D Akande and T Liefländer, 'Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defense' (2013) 107 AJIL 563, 564.

least some of their defensive strikes, although no evidence or support was provided for the claims regarding the imminent nature of the threat.

An additional question regarding the defensive necessity of the strikes arises in relation to the twin aims advanced by the acting States of ‘degrading’ the Houthi capabilities to carry out the attacks and ‘detering’ future attacks, which are two very different things. Undoubtedly the strikes degraded the capabilities of the Houthis to continue their attacks in some way. Yet, the extent to which self-defence extends more generally to *detering* action is a controversial issue, although it is possible to identify broadly a defensive aim in deterring continuing attacks. However, the fact that the Houthis doubled down in their belligerent rhetoric following the first wave of strikes by the US and UK,<sup>113</sup> as well as the domestic population in Yemen protesting against them,<sup>114</sup> arguably demonstrates that the aim of deterring future attacks had not been achieved, and was arguably unlikely to be achieved through military strikes, consequently placing question marks over both the defensive necessity and proportionality of any future strikes in self-defence by the US and UK with this as their aim. Indeed, the US itself acknowledged that the Houthis had not been deterred,<sup>115</sup> despite the fact that there were reports of a downturn in attacks in February.<sup>116</sup>

A somewhat overlooked, yet important, point was that the primary concern of the acting States in invoking self-defence appeared to be to ensure the freedom of navigation and, through that, the protection of global trade and the free flow of commerce, rather than repelling a clear attack on, and continued danger to, the States themselves.<sup>117</sup> The ICJ seemed to reject such a wide customary right

<sup>113</sup> P Wintour, ‘US Carries Out Fifth Strike against Houthis as Biden Admits Bombing Isn’t Stopping Attacks’ (*The Guardian*, 18 January 2024) <<https://www.theguardian.com/world/2024/jan/18/defiant-houthi-leader-mocks-biden-and-calls-for-boycott-of-israeli-goods-yemen>>.

<sup>114</sup> Al Jazeera, ‘“Until Israel Stops!”: Yemenis Rally for Houthis, Palestinians in Sanaa’ (*Al Jazeera*, 19 January 2024) <<https://www.aljazeera.com/gallery/2024/1/19/until-israel-stops-yemenis-rally-for-houthis-palestinians-in-sanaa>>.

<sup>116</sup> Wintour and Sabbagh (n 57).

<sup>117</sup> In the Joint Statement issued on 11 January 2024 it was stated that ‘[t]hese precision strikes were intended to disrupt and degrade the capabilities the Houthis use to threaten global trade ... in one of the world’s most critical waterways’ and that the States would ‘not hesitate to ... protect the free flow of commerce in one of the world’s most critical waterways in the face of continued threats’. The Statement also said that ‘[t]he Houthis’ more than two dozen attacks on commercial vessels since mid-November constitute an international challenge. Today’s action demonstrated a shared commitment to freedom of navigation, international commerce, and defending the lives of mariners from illegal and unjustifiable attacks.’ See The White House (n 4). In a statement soon after the strikes, the British Prime Minister, Rishi Sunak, in justifying the action taken in self-defence, seemed to place the focus almost entirely on this aspect: ‘In recent months, the Houthi militia have carried out a series of dangerous and destabilising attacks against commercial shipping in the Red Sea, threatening UK and other international ships, causing major disruption to a vital trade route and driving up commodity prices ... This cannot stand. The United Kingdom will always stand up for freedom of navigation and the free flow of trade.’ See The Rt Hon Rishi Sunak MP, ‘PM Statement on Strikes against Houthi Military Targets: 12 January 2024’ (12 January 2024) <<https://www.gov.uk/government/news/pm-statement-on-strikes-against-houthi-military-targets-12-january-2024>>.

<sup>115</sup> Wintour (n 113).

of self-defence in the protection of a State's interests when it stated that the right 'does not allow the use of force by a State to protect perceived security interests beyond [armed attacks]'.<sup>118</sup> If the purpose of the acting States' invocation of self-defence is to protect trade and commerce, rather than defend against an armed attack, then no amount of force can be necessary or proportionate.

This focus on the protection of freedom of navigation and commerce raises the question of why the UNSC arguably appeared to provide its blessing to the invocation of self-defence in this way, but did not authorise States to use 'all necessary means' to achieve these arguably non-defensive aims (although it is not hard to see the objections that would be raised to this by certain States within the Council). In particular, while the disruption to international commerce perpetrated in this way might legitimately be seen as a 'threat to the peace', thereby opening the door to Chapter VII measures at the disposal of the Council, it is far more difficult to see it as falling within the concept of an 'armed attack' and a response of self-defence being justifiable.

Nonetheless, although this broad (and un-self-defence-like) motivation was prominent within the discourse of the States in justifying their actions in self-defence (and the UNSC in seemingly providing its blessing to them) it remains the case that while a legitimate defensive necessity for military action needs to be present it does not need to be the sole aim of the action, with the presence of other non-defensive motives not necessarily discrediting a claim of, and action in, self-defence. That said, it remains unclear why the acting States placed this aspect so centrally within a justification of self-defence, other than perhaps to make the action one which the majority of States, who rely on, and have an interest in protecting, such freedom of navigation would find palatable. In this respect, and muddying the waters on this occasion, the legal basis within the notable support from other States that the US–UK military strikes received was not altogether clear or consistent.<sup>119</sup> The strikes were also met with relatively little express condemnation, this being restricted mainly to Iran, Turkey and Russia, with there also appearing to be arguably some

<sup>118</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 148.

<sup>119</sup> For example, Italy confirmed that it 'supports the operations of allied nations, which have the right to defend their vessels, in the interest of global trade flows and humanitarian assistance'. See Presidency of the Council of Ministers, 'Statement by Palazzo Chigi on Houthi Attacks in the Red Sea' (12 January 2024) <<https://www.governo.it/en/articolo/statement-palazzo-chigi-houthi-attacks-red-sea/24741>>; The Netherlands stated that '[t]he US–British action is based on the right of self-defence, aims to protect free passage and is focused on de-escalation'. See Al Jazeera (n 14); Germany was clear that in its view the strikes were carried out 'in accordance with the individual and collective right to self-defence of the United Nations Charter'. See Frankfurter Allgemeine, 'Bundesregierung stellt sich hinter Angriff auf Huthi-Rebellen' (*Frankfurter Allgemeine*, 12 January 2024) <<https://www.faz.net/aktuell/politik/ausland/baerbock-bundesregierung-stuetzt-angriffe-auf-huthi-rebellen-19443368.html>>; Australia, in its support, focused on the fact that the action was focused on 'maintaining freedom of navigation on the high seas'. See B Doherty and J Butler, 'Australia Supports US and UK Airstrikes on Houthi Targets in Yemen' (*The Guardian*, 12 January 2024) <<https://www.theguardian.com/australia-news/2024/jan/12/australia-military-support-yemen-airstrikes-us-uk>>.

support from the UNSC in Resolution 2722 (2024) which affirmed *pre facto* the right of ‘defence’ in response to attacks that ‘undermine navigational rights and freedoms’,<sup>120</sup> although it was unclear, as discussed above, exactly what the Council was referring to by this.

## 2. Proportionality

As noted above, the acting States both asserted that the actions were, and would continue to be, proportionate. It has been claimed that US (and by extension, UK) warships operating in the area had a right of so-called ‘unit’ self-defence following the attacks launched on them, and indeed acted on this basis in repelling previous Houthi attacks.<sup>121</sup> While it might be questioned whether, and if so the extent to which, this differs from other forms of self-defence, it is worth noting that other authors have referred to this as ‘on the spot’ self-defence,<sup>122</sup> indicating that it exists in this context for warships to repel an immediate attack in their locale, rather than a response, as was the case with the current strikes, at a time chosen by the targeted State and in a location far away from the place where the attack took place. In this respect it is notable that in relation to UNSC Resolution 2722 (2024) it has been claimed that the ‘precise and limited choice of wording suggests that the reference in the third paragraph is not one of self-defence, but merely that States may take certain immediate measures to counter attacks on their vessels’.<sup>123</sup> In other words, the Council was not endorsing the right of States to engage in self-defence extending to the territory of another State, as has been the case with the various defensive strikes undertaken since 11 January 2024, but was instead referring to a form of on-the-spot reaction. Indeed, many States in the UNSC emphasised the need for such a limited proportionate response.<sup>124</sup>

Yet it is not completely clear within the *jus ad bellum* what this limiting principle of self-defence stipulates, and on what basis proportionality is to be gauged. In this instance, given that at the time the military strikes were launched there had been no reported casualties from the Houthi attacks, as well as very little damage to the vessels concerned, the launching of a series of missile strikes upon the territory of a State leading to relatively extensive damage might be seen to be disproportionate. In this sense, the defensive force could be perceived as excessive when compared to the damage inflicted by the Houthis.<sup>125</sup>

<sup>120</sup> UNSC Res 2722 (2024) (n 22) para 3.

<sup>121</sup> J Kraska, ‘Attacks on U.S. Warships Justify Self-Defense Against Houthi Forces Ashore’ (*Lawfare*, 2 January 2024) <<https://www.lawfaremedia.org/article/attacks-on-u.s.-warships-justify-self-defense-against-houthi-forces-ashore>>.

<sup>122</sup> Y Dinstein, *War, Aggression and Self-Defence* (6th edn, CUP 2017) paras 685–90.

<sup>123</sup> Svicevic (n 27).

<sup>124</sup> See, eg, UN Doc S.PV/9532 (n 11) 9 (Switzerland 9), 11 (Russia). The acting States themselves also stressed the proportionality of their response. UN Doc S.PV/9532, *ibid* 4 (UK), 5 (US).

<sup>125</sup> Talmon (n 82).

Equating the proportionality of a defensive response to any harm suffered might seem to be reasonable. Yet the *jus ad bellum* principle of proportionality would seem to require instead that victim States do no more than is necessary to achieve the specific objective of defending themselves.<sup>126</sup> In the rather unique and in some ways extreme context of the Gaza conflict and Israel's defensive campaign, whereby its defence is perceived as only being realised through the destruction of Hamas, this perception of proportionality can be seen to have resulted in disastrous repercussions for the civilian population and wrought huge death and destruction.<sup>127</sup> Yet, applied in the context of the continuous Houthi strikes, including the fact that the US and UK had already taken more limited 'on-the-spot' military action which had proved unsuccessful in halting the attacks, extending defensive action to the source of the attacks in a bid to disrupt and end them was arguably a proportionate response, despite the extra-legal wider concerns regarding the potential broadening of the Gaza conflict and the potential for direct conflict with Iran. This is, of course, if it is possible to identify an armed attack giving rise to the right of self-defence by the acting States, along with a necessity to act on that basis, which are, as discussed above, far from certain.

#### IV. CONCLUSION

The fact that the US and UK felt the need to legally justify the military strikes under the *jus ad bellum* is, in many respects, to be welcomed. It demonstrates at least an acknowledgement that such actions are regulated by international law, with the justifications providing a focal point for assessment and reflection. Furthermore, given the stream of Houthi attacks and their widely disruptive global impacts, a military response might be seen to be entirely reasonable and necessary. Yet, the fact that the right of self-defence was invoked, and the manner in which it was invoked on this occasion, raises more questions than answers in regards to the integrity and coherence of both the right and the way international law regulates such situations more generally.

First, the justifications of the States themselves, whilst clearly advancing the right of self-defence and articulating Article 51 of the UN Charter, are vague on several key issues. It simply was not certain, for example, what the 'armed

<sup>126</sup> See the discussion in Henderson (n 24) 316–21. It is interesting to note in this respect, and taking this conception of the proportionality principle to its ultimate conclusion, that the ICJ in the *Nuclear Weapons* advisory opinion was of the view that '[t]he proportionality principle [does] not in itself exclude the use of nuclear weapons in self-defence in all circumstances', in particular 'in an extreme circumstance of self-defence, in which [a State's] very survival would be at stake'. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, paras 42, 97.

<sup>127</sup> AA Haque, 'Enough: Self-Defense and Proportionality in the Israel–Hamas Conflict' (*Just Security*, 6 November 2023) <<https://www.justsecurity.org/89960/enough-self-defense-and-proportionality-in-the-israel-hamas-conflict/>>.

attack' was that was being responded to, or even if such an attack is considered necessary for the purposes of invoking self-defence. Was it the strikes against the States' military vessels, or those of a commercial nature, that formed the basis of the invocation on this occasion? If it was the commercial vessels, to what extent had there been a request for assistance in collective self-defence from the States under whose flag those ships had been sailing? Or were the States somehow acting in the protection of the freedom of navigation and in defence of the free flow of commerce, as appeared to be emphasised in the justifications? In light of the overarching emphasis upon this latter particular aim, military action against the Houthi attacks might in some respects be more accurately categorised as a form of collective forcible countermeasure.<sup>128</sup> Indeed, if the principle of freedom of navigation in international waters is accepted as an obligation *erga omnes* then the fact that military action in this instance has been taken in response to attacks against the flagged vessels of other States would not necessarily be an issue.<sup>129</sup> Furthermore, any concerns regarding whether the Houthi attacks were armed attacks for the purposes of the right of self-defence would not arise. Given that the stated aims of the military strikes were to 'disrupt' and 'deter' the Houthi attacks, they would appear to fit within the aim of countermeasures being to induce compliance, on this occasion seeking to induce the Houthi's respect for the right of freedom of navigation.

Yet, there are problems with accepting this as the basis for the military strikes by the US and UK. In particular, the notion of proportionate collective forcible measures emerged as a means of plugging the gravity gap between the 'force' proscribed in Article 2(4) and the requirement for an 'armed attack' for the right of self-defence in Article 51 of the UN Charter. In this respect, not only did the acting States clearly claim to be acting in self-defence under Article 51, but the incursion into Yemeni State territory and away from the location of the attacks provides the circumstances under which a justification of self-defence would be required and would in all senses appear to be of the level used in response to an armed attack.<sup>130</sup>

<sup>128</sup> The ICJ appeared to an extent to leave open the question as to whether a State may resort to proportional forcible countermeasures 'in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force'. See *Nicaragua* (n 39) para 210. Along similar lines Judge Simma, in his separate opinion in the *Oil Platforms* case, also claimed that proportional countermeasures involving the use of armed force may be resorted to in response to 'smaller-scale use of force' that do not reach the gravity of an armed attack. *Oil Platforms* (n 60) Separate Opinion of Judge Simma, para 12. However, the legal basis for such measures remains unclear and the Court also stated in the *Nicaragua* case that 'States do not have a right of "collective" armed response to acts which do not constitute an "armed attack"'. *Nicaragua* (n 39) para 211.

<sup>129</sup> See E-E Fasia, 'No Provision Left Behind – Law of the Sea's Dispute Settlement System and Obligations *Erga Omnes*' (2021) 20 LPICT 519, 528–30.

<sup>130</sup> A form of collective forcible countermeasure might, however, be seen as the basis of the EU Operation Aspides and Operation Prosperity Guardian. Neither operation has advanced a clear legal basis for the action, although the purpose of both operations is to protect shipping and ensure



It is, however, unclear what the precise basis was for using force upon the territory of Yemen. Were the US and UK treating the Houthis as the *de facto* governmental authority of Yemen? Or, if treating them more as pirates or terrorists, was there consent provided by the *de jure* recognised government? Or, alternatively, was it being implicitly claimed that military action upon Yemeni territory was necessary due to the government being somehow 'unable' to take the necessary action? How can the success of the actions be determined, and, with that, whether further actions, perhaps outside of the territory of Yemen, will be deemed necessary, and proportionate?

Second, the involvement of the UNSC has muddied the waters rather than added any clarity. As noted above, it is unclear whether the UNSC was giving its blessing to the international right of self-defence and therefore potentially supporting the implementation of that right on State territory, whether it was instead referring to a more limited 'on-the-spot' version of the right whereby the acting States are restricted to defending discrete attacks within the vicinity of where the attacks have taken place, or whether it was providing its blessing to a limited form of forcible countermeasure as a response to violations of the freedom of navigation. Indeed, while the Council appeared to recognise the right of self-defence under international law, it also recognised the right of States to respond to illicit activities under UNCLOS, raising questions as to how the right of self-defence relates to any action that is permitted under UNCLOS.

Finally, the broader precedential impact of these military strikes is not clear. It is, in particular, difficult to see this incident as allaying the fears of those already concerned about both the use and abuse of the right of self-defence and the perceivably malleable limitations imposed by the *jus ad bellum* more generally. If it is understood that the Council provided its blessing to the invocation of the right of self-defence to protect broader navigational and economic interests, the precedential value of this cannot, as yet, be fully appreciated. As a point of policy, if invocations of the right of self-defence for the protection of 'interests', and in particular those of a commercial nature, begin to be accepted regardless of how vital the interests are deemed to be, the legal waters would become so muddied and open to unforeseeable abuse that any pretence that the *jus ad bellum* exists to restrict rather than enable military action would well and truly collapse. Ultimately, while it is possible to be critical of the actions and justificatory discourse of the acting States and the involvement of the Council, both might also be seen to be

freedom of navigation, and they have done so through immediate responses to attacks within the Red Sea. In addition, and importantly, there has been a general lack of condemnation of the operations. Collective forcible countermeasures might, in this sense, be seen as an alternative to 'unit self-defence', given that the conditions for self-defence may not have been met, particularly if one accepts the existence of a gravity threshold for an armed attack. See, further, M Tondini, 'The Legality of ASPIDES Protection Activities in the Framework of the Collective Countermeasures Doctrine' (*EJIL Talk!*, 24 May 2024) <<https://www.ejiltalk.org/the-legality-of-aspides-protection-activities-in-the-framework-of-the-collective-countermeasures-doctrine/>>.

operating within—albeit arguably stretching further—the margin of appreciation that this branch of international law seemingly provides.

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