

Iran-Israel ‘Shadow War’ in Waters around the Arabian Peninsula and Incidents near the Bab el-Mandeb

6.1 Legal Regime of the Bab el-Mandeb

The Bab el-Mandeb connects Djibouti's, Yemen's and Somalia's EEZs in the Gulf of Aden on the one hand, and the EEZs of Eritrea, Yemen, Sudan, Saudi Arabia, and Egypt in the Red Sea on the other hand. These States, except Eritrea, are States party to the LOSC.¹ Hence, similar to the legal regime of the Strait of Hormuz, the regime of transit passage applies in the Bab el-Mandeb (Art 37 of LOSC).

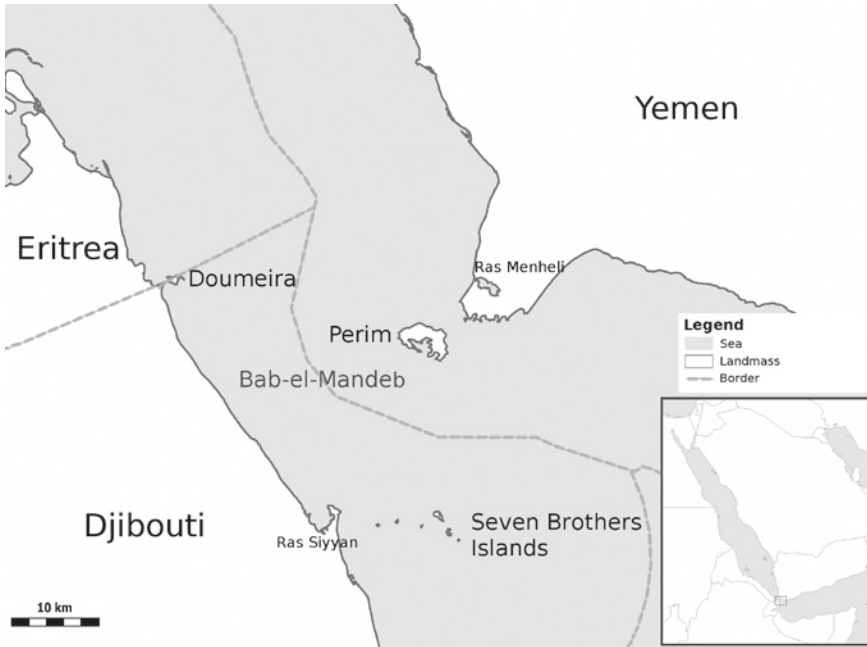
The Bab el-Mandeb strait is long (over 70 NM) and deep (mostly over 200 metres), but narrow. In two sections, between Yemeni Perim Island and Djibouti as well as between Eritrea's fringe of islands/rocks and the Yemeni Hanish Islands, the strait is less than 10 NM wide as measured from the relevant baselines (for a more detailed explanation, see below). This implies that ships that exercise their right of transit passage in the Bab el-Mandeb can relatively easily be targeted by missiles, mines, remotely controlled explosive-laden boats and other means of arms that have been frequently employed by terrorists, pirates, rebels and other armed forces for disrupting international trade and shipping in the region.

Since it is unclear whether the right of transit passage forms part of customary international law,² it is possible that Eritrea as a non-State-Party to the Convention might reject this liberal passage regime and instead respects the right of non-suspendable innocent passage in its waters leading to and from the Bab el-Mandeb. This might cause problems near the Eritrean Haycock Islands and South West Rocks where Eritrea's territorial sea is crossed by the international TSS.³

1 UNDOALAS, 'The United Nations Convention on the Law of the Sea of 10 December 1982: Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements', 28 May 2021.

2 See *infra* Chapter 8 of Part 3.

3 The TSS in the Strait of Bab el-Mandeb was adopted in 1973 by a resolution of the Inter-Governmental Maritime Consultative Organization (nowadays IMO) and initially consisted of two lanes and a 1-NM-wide separation zone. The TSS in the Strait of Bab el-Mandeb is



MAP 4 The Bab el-Mandeb proper

SOURCE: WIKIMEDIA COMMONS. THE MAP SERVES AN ILLUSTRATIVE PURPOSE ONLY AND IS NOT NECESSARILY COMPLETELY ACCURATE IN RELATION TO THE DELIMITATION OF MARITIME BOUNDARIES IN THE AREA. THE MAP IS TURNED INTO BLACK AND WHITE COLOUR BY THE AUTHOR.

The sea passage between the Red Sea and the Gulf of Aden is less than 24 NM wide not only in the area near Perim Island where the territorial sea of Djibouti and Yemen overlap (the Strait of Bab el-Mandeb proper, see Map 4), but also between the Yemeni Hanish Islands and the Eritrean mainland coast in the southern part of the Red Sea. Therefore, in this part of the sea passage, the territorial sea of strait states Yemen and Eritrea overlap, thus satisfying

one of the oldest TSS globally as the 1973 resolution was adopted only a year after the adoption of the International Regulations for Preventing Collisions at Sea, including its rule 10 on TSS. The 1973 Resolution established TSS also in numerous other international straits of the world, including the Strait of Hormuz, Øresund, the Strait of Dover, and the Strait of Gibraltar. Inter-Governmental Maritime Consultative Organization, Resolution A.284(VIII), "Routeing Systems", adopted on 20 November 1973, "In the Strait of Bab El Mandeb", 41 available [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.284\(8\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.284(8).pdf); accessed 5 April 2021. Convention on the International Regulations for Preventing Collisions at Sea, adopted 20 October 1972, entered into force 15 July 1977, 1050 UNTS 16.

the criteria of an international strait where the regime of transit passage applies.⁴ It can be considered as the northern limit of the strait of Bab el-Mandeb. It is located some 72 NM north of the southern limit of the Bab el-Mandeb near Perim Island.

Both Eritrea and Yemen claimed title over Hanish Islands in the arbitration proceedings between the two states. Eritrea maintained that after gaining its independence from Ethiopia in 1991, it acquired sovereign title to Hanish Islands and exercised authority over them.⁵ After examining all relevant historical, factual and legal considerations, the Arbitral Tribunal decided in 1998 that Hanish Islands belong to Yemen.⁶ In support of this, the Tribunal found that "these islands fell under the jurisdiction of the Arabian coast during the Ottoman Empire; and that there was later a persistent expectation reflected in the British Foreign Office papers submitted in evidence by the Parties that these islands would ultimately return to Arab rule".⁷

There is a fringe of Eritrean small islands/rocks located between the Yemeni Hanish Islands and Eritrean mainland coast. These islands/rocks include Harbi Island, Sayal Island, Flat Island, High Island, North East Haycock, South West Haycock, and South West Rocks.⁸ In the arbitration proceedings between Eritrea and Yemen, the Arbitral Tribunal decided that Eritrea has sovereign title over that fringe of islands/rocks.⁹ The distance from the closest of the Yemeni Hanish Islands to the Eritrean North East Haycock is only about 6.5 NM. In addition, the title over South West Rocks, situated only about 4 NM west of the Yemeni Hanish Islands, was awarded to Eritrea.¹⁰ South West Rocks and Haycock Islands are situated in the middle of the 7.5-km-wide buffer zone between the two traffic lanes of the TSS that has been established in this international waterway that is situated between the Eritrean fringe of islands/rocks and Yemeni Hanish Islands.¹¹

Thus, for the sake of clarity and simplicity, it may be concluded that the regime of transit passage applies in the strait of Bab el-Mandeb in an area

4 See *supra* Chapter 2 of Part 1.

5 Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (territorial sovereignty and scope of the dispute), Decision of 9 October 1998, para 29.

6 *Ibid.*, para 527.

7 *Ibid.*, para 508.

8 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), *op. cit.*, p 334.

9 Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (territorial sovereignty and scope of the dispute), *op. cit.*, para 527.

10 *Ibid.*

11 Navionics, *op.cit.*, 'Hanish Islands'.

which is about 72 NM long. It is less than 10-NM-wide in two sections. First, between Yemeni Perim Island and Djibouti, the strait is 9.5 NM wide. Second, between Eritrea's South West Rocks and the Yemeni Hanish Islands, the strait is only approximately 4 NM wide. In the latter part of the strait, there exists a roundabout route via the Abu' Ali Channel between Hanish Islands and the Yemeni mainland coast that is at least 15.5-NM-wide.

Therefore, in the maritime area around Hanish Islands, the TSS in the Bab el-Mandeb is divided into two alternative sections before reaching the EEZs in the Red Sea. This is significant because in case Eritrea would start impeding international navigation along the international shipping route in its territorial sea near the Haycock Islands and South West Rocks, then foreign ships and aircraft can use the alternative route to and from the Bab el-Mandeb via the Abu' Ali Channel. This maritime area comprises Yemen's territorial sea. Yemen appears not to have connected Hanish Islands by straight baseline segments with its mainland coast, as discussed below. In the Abu' Ali Channel, the Yemeni territorial sea is crossed by international sea lanes (including a TSS).¹²

At one of its narrowest points between the Red Sea and the Gulf of Aden, the Bab el-Mandeb is separated into two channels by the Yemeni Perim Island (13 km²). The narrowest channel is only about 1.5 NM wide and formed by Perim Island and the Yemeni mainland coast. Despite its narrowness, this channel is relatively deep (depths range from 10 to 31 metres). It is mainly used for local navigation, while the international sea lanes traverse the strait of Bab el-Mandeb proper.

The geographic features of the Bab el-Mandeb are generally favourable to international navigation: it is a wide, deep and straight strait which does not have many islets or rocks that would significantly decrease the safety of navigation.¹³ Between the Yemeni Perim Island and Djibouti's Kadda Dabali Island (part of Djibouti's Seven Brothers Islands),¹⁴ the strait is about 9.5 NM wide.

¹² Ibid.

¹³ For a detailed account of the geographical and physical features of the Red Sea and the Bab el-Mandeb, see R Lapidot-Eschelbacher, *The Red Sea and the Gulf of Aden* (Martinus Nijhoff, The Hague/Boston/London, 1982) 1–12.

¹⁴ Djibouti has connected its Seven Brothers Islands (also referred to as Sawabi or Seba Islands) with its system of straight baselines. The longest straight baseline segments, respectively about 6.5 NM and 10 NM long, connect the islands of Ounda Komaytou and Kadda Dabali with Djibouti's mainland coast. The internal waters regime applies within the limits of the straight baselines around the Seven Brothers Islands (Art 8 of LOSC), but this does not have much significance for the passage regime in the Bab el-Mandeb. The international vessel traffic that follows the TSS in the Bab el-Mandeb runs northwards of the Seven Brothers Islands through the territorial sea of Djibouti and Yemen. Decree No. 85-048 PR/PM, Defining Maritime Limits and Frontiers of Djibouti, adopted and entered

Measured from Yemeni Perim Island to the mainland coast of Djibouti, the Bab el-Mandeb is 11.5 NM wide. Even in this narrow section of the Bab el-Mandeb, the depth of the strait mostly stays close to 200 metres or above.¹⁵

Pursuant to the 1977 Act on its maritime zones, Yemen has applied the method of straight baselines for measuring the breadth of its territorial sea.¹⁶ The 1977 Act was repealed and replaced with a new Act on Yemen's maritime zones in 1991 following the unification of Yemen in 1990.¹⁷ In 2014, Yemen established the coordinates of 743 points that serve as the basis for measuring the breadth of its up to 12-NM-wide territorial sea in the Red Sea, the Gulf of Aden, the Arabian Sea, and the Indian Ocean.¹⁸ However, the 2014 law does not specify in which points around its coastline the method of straight baselines is used. In 2015, Yemen deposited a list of illustrative maps that depict its baselines in four maritime areas: Masamirit to Bab el Mandeb, Gulf of Aden, Ra's al Kalb to Ra's Marbāṭ, and Socotra Island.¹⁹ According to these maps, Yemen has drawn straight baselines around its coast in each of the afore-mentioned four maritime areas. Notably, however, Yemen appears not to have connected the islands located in the Bab el-Mandeb (Perim Island and Hanish Islands) by straight baseline segments with its mainland coast.

In effect, the 1.5-NM-wide maritime area in the Bab el-Mandeb between Perim Island and Yemen's mainland coast does not comprise Yemen's internal waters, but instead falls under the regime of territorial sea. In this narrow channel, foreign ships and aircraft enjoy the right of transit passage similarly to the Strait of the Bab el-Mandeb proper on the other side of the Perim Island.

into force on 5 May 1985. See [Marinerregions.org](http://www.marinerregions.org), 'Djibouti', available www.marinerregions.org; accessed 18 March 2021.

- 15 See Navionics ChartViewer, 'The Bab el-Mandeb', Garmin 2021, available <https://webapp.navionics.com/?lang=en>; accessed 15 April 2021.
- 16 See Section 5(f) of the Act No. 45 Concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and other Marine Areas, adopted on 17 December 1977, entered into force on 15 January 1978.
- 17 Republican Resolution on Law No. 37 of 1991 on the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf, adopted on 13 April 1991, entered into force on 13 April 1991 (published in the Official Gazette No. 7, 15 April 1991), accessible in Arabic: <http://extwprlegis.fao.org/docs/pdf/yem39356.pdf>; accessed 18 March 2021.
- 18 Law establishing the maritime baseline of the Republic of Yemen, adopted and entered into force on 23 November 2014, available https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/law_26_2014_e.pdf; accessed 18 March 2021.
- 19 See M.Z.N.112.2015.LOS of 7 January 2015, "Deposit of a list of geographical coordinates of points concerning the baselines for measuring the breadth of the territorial sea of the Republic of Yemen", List of illustrative maps, available https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/YEM_Deposit_MZN112.html; accessed 18 March 2021.

The so-called Messina exception of non-suspendable innocent passage (Arts 38(1) and 45(1)(a) of LOSC) does not apply to passage through this channel, since it provides for an exception to the regime of transit passage only in such straits that are formed by an island of a strait State and its mainland coast, if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. The Strait of Bab el-Mandeb proper does not include a high seas or EEZ corridor between Djibouti and Perim Island.

The area north of Perim Island is located in the unsettled trijunction point of the maritime zones of Djibouti, Yemen, and Eritrea.²⁰ Eritrea and Yemen agreed to an international arbitration on the disputed title over Red Sea islands and the delimitation of their maritime boundary line. The Arbitral Tribunal did not decide on the delimitation of the maritime boundary line near the Bab el-Mandeb in the trijunction point. The Arbitral Tribunal concluded in its 1999 award that the “line should stop short of the place where any influence upon it of Perim Island would begin to take effect.”²¹ The Tribunal made it clear that it did not have the competence and the authority to decide on the maritime boundary line between Yemen and Eritrea to the extent that it also needs to decide on the delimitation of the maritime boundary of a neighbouring state (Djibouti).²²

6.2 Geopolitical Characteristics of the Bab el-Mandeb

The strait of Bab el-Mandeb separates Africa from the Arabian Peninsula and is an important element in the connection of the Mediterranean Sea and the Red Sea with the Indian Ocean. While the Suez Canal interlinks the Mediterranean with the Red Sea, the Bab el-Mandeb connects the Red Sea with the Indian Ocean. In Arabic, *Bāb al-Mandab* stands for *the gate of tears*,²³ which in the present-day context is a fitting name for a sea passage in a region that has borne tragic sufferings: a protracted humanitarian crisis and armed conflicts in Yemen, Somalia, and the Ethiopian province of Tigray, a brutal dictatorship

20 For the location of the overlapping claim, see ‘Yemen’, *Marineregions.org*, available www.marineregions.org; accessed 18 March 2021.

21 Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, para 46.

22 *Ibid.*, para 136.

23 *Encyclopaedia Britannica*, ‘Bab el-Mandeb Strait’.

in Eritrea, and genocide in Sudan. Geopolitically, the Bab el-Mandeb is the most sensitive chokepoint of international navigation in the long waterway that comprises the Strait of Gibraltar, the Mediterranean, the Suez Canal, the Red Sea, and the Gulf of Aden (see Map 5).

At the same time, the Bab el-Mandeb is the world's third-largest maritime oil chokepoint after the Strait of Hormuz and the Strait of Malacca. The oil flow through the Bab el-Mandeb increased from 5.1 million barrels a day in 2014 to 6.2 million in 2018 which accounts for roughly a tenth of total seaborne-traded oil.²⁴ The Bab el-Mandeb bears particular strategic importance for Europe as most of its maritime commerce with Asia crosses this narrow sea passage.

The significance of the Bab el-Mandeb for the global economy was illustrated by a shipping accident in the Suez Canal in March 2021. This incident involved one of the world's largest container ships, a Suezmax-class *Ever Given* that beached the bank of the Suez Canal and caused a six-days-long blockage of the Suez Canal. The cost of this blockage for the global commerce was estimated at roughly six to ten billion dollars.²⁵

The free flow of maritime commerce via canals remains vulnerable to such incidents also in the future, particularly as the industry constructs ever bigger ships. It does not necessarily take a Suezmax-class of ship to block passage through the Suez Canal. Passage of ships through a canal can be blocked not only by means of grounding a vessel, but also due to scuttling a ship in the narrow fairway of a canal (the minimal width of the Suez Canal is about 200 metres). For example, in occupying Crimea in 2014, the Russian Federation blocked the passage of Ukraine's Navy ships from their naval base in Crimea to the Black Sea by means of scuttling a decommissioned cruiser *Ochakov* in the narrow channel that formed the port's fairway.²⁶

The route via the Bab el-Mandeb and the Suez Canal is about 8 to 9 days shorter than the alternative route around the Cape of Good Hope as calculated on the basis of a ship's average speed of 16.43 knots.²⁷ The *Ever Given* incident shows that it takes just one ship to significantly disrupt global commerce, particularly between Europe and Asia, reroute global commercial and military

24 'The Bab el-Mandeb Strait is a strategic route for oil and natural gas shipments', The United States Energy Information Administration, 27 August 2019.

25 MA Russon, 'The cost of the Suez Canal blockage', *BBC News* (29 March 2021).

26 SI Loiko, 'Russians sink a boat off Ukraine coast - their own', *Los Angeles Times* (5 March 2014).

27 Russon, *op. cit.*



MAP 5 The Bab el-Mandeb

SOURCE: MAP OF THE BAB EL-MANDEB STRAIT AND MARITIME AREAS AROUND THE ARABIAN PENINSULA, IN THE UNITED STATES ENERGY INFORMATION ADMINISTRATION 27 AUGUST 2019 RELEASE, *OP. CIT.*

shipping to alternative trajectories (e.g., the Cape of Good Hope and, in the future, increasingly the Northern Sea Route) and cause a rise in the global oil price. In the context of hybrid conflicts, this constitutes a potential threat. For example, should a State deem that such outcomes advance its strategic aims, it might be tempted carry out a clandestine operation, e.g., by blocking the canal using a commercial ship, to reach its aims without necessarily having to bear State responsibility for such actions.²⁸

28 In the case of the *Ever Given*, the Suez Canal Authority initially made a claim of 916.5 million dollars against the owner of the ship. Eventually, the two parties significantly reduced the amount of compensation in their agreement after which the *Ever Given* was released in July 2021. Such consequences will likely deter threats that emanate from potential clandestine operations aiming at blocking a canal. See Anonymous, 'Ship owner says Suez Canal was at fault over Ever Given grounding- lawyer', *Reuters* (22 May 2021). R Michaelson, 'Ever Given released from Suez canal after compensation agreed', *The Guardian* (7 July 2021).

6.3 Terrorism and Piracy in and Near the Bab el-Mandeb

Prior to the intensification of the Yemeni armed conflict in 2016, navigation through the Bab el-Mandeb was mainly under threat from terrorism and a widescale campaign of pirate attacks against international shipping in the Gulf of Aden and around Somalia's coast in the Horn of Africa. In October 2000, the naval destroyer *USS Cole* was attacked in the Yemeni port Aden, some 80 NM east of the Bab el-Mandeb, by militants who were associated with the terrorist organisation Al-Qaeda.²⁹ 17 members of the crew of *USS Cole* died and 39 more were wounded in the attack.³⁰ The suicide attack was carried out by two Yemeni nationals who were trained in terrorist training bases in Sudan and used a rubber boat carrying over 200 kg of explosives.³¹ Two years later, in October 2002, al-Qaeda launched a similar suicide attack against the French oil tanker *Limburg*; collision with the explosive-laden boat left the tanker's one crew member dead, 12 injured and the marine environment of the Gulf of Aden polluted with more than 90,000 barrels of oil.³²

Since 2005, pirate attacks against commercial shipping in the Gulf of Aden (the Bab el-Mandeb's eastern approach) surged and the attacks doubled each year from 2007 to 2009 and continued to increase until 2011, leading Clive Schofield to conclude that: "... in the 2009–2011 period Somali pirates were responsible for over half of global piracy attacks, making these waters the most dangerous in the world in terms of the threat of attacks against shipping."³³ In 2008, the EU established its anti-piracy operation *Atalanta* (ongoing) in the Gulf of Aden and off the coast of Somalia based on a series of UN Security Council resolutions.³⁴ This was followed by the establishment of the multinational Combined Task Force 151 (ongoing). In addition, NATO ran three

29 Encyclopaedia Britannica, 'USS Cole attack'.

30 Ibid.

31 Anonymous, 'USS Cole bombing: Sudan agrees to compensate families', *BBC News* (13 February 2020).

32 Anonymous, 'Yemen says tanker blast was terrorism', *BBC News* (16 October 2002). Anonymous, 'Guantanamo prisoner al-Darbi admits MV Limburg attack', *BBC News* (20 February 2014). J Saul, 'Boat that attacked gas tanker off Yemen carried explosives: ship-owner', *Reuters* (3 November 2016).

33 C Schofield, 'Securing the World's Most Dangerous Strait? The Bab-Al Mandeb and Gulf of Aden', in DD Caron and N Oral (eds), *Navigating Straits: Challenges for International Law* (Martinus Nijhoff, Leiden/Boston, 2014) 280.

34 UN Security Council Resolution 1816, adopted 2 June 2008 and Resolution 2316, adopted 9 November 2016.

anti-piracy operations in the Gulf of Aden: The Allied Provider (in 2008), the Allied Protector (in 2009), and the Ocean Shield (2009–2016).

The intervention of navies of international coalition forces (among others the United States, the EU, China, Japan, the Russian Federation, India) was successful. The rate of pirate attacks off the Somalian coast were reduced to 7 in 2013, while the number of total attacks was 24 in 2008, 163 in 2009, 174 in 2010, 176 in 2011, and 34 in 2012.³⁵ From 2014 to 2020, the number of total attacks ranged between 0 to 2 (with the exception of 7 attacks in 2017).³⁶ Thus, the threat of pirate attacks in the Gulf of Aden was minimized in 2014, only to be replaced with a new menace to the stability of international shipping through the Bab el-Mandeb – the intensification of the Yemeni armed conflict in 2015.

6.4 Armed Conflict in Yemen

The armed conflict between Yemen's Government and the Houthi forces has lasted nearly twenty years. It gained a new momentum when protests against Yemen's Government resulted in the ousting in 2012 of President Saleh. In 2012, Saleh's deputy Hadi was elected Yemen's new president. Yemen's domestic political situation entered turmoil when Houthi forces overtook Yemen's capital Sana'a in the end of 2014. Soon, the Houthi movement consolidated its control over much of the north-western part of Yemen bordering Saudi Arabia and the Red Sea. This region *grosso modo* overlaps with the area that formed the territory of the Arab Republic of Yemen, also known as North Yemen, between 1962–1990.

In March 2015, Yemen's internationally recognised President Hadi moved his offices to the port town Aden and declared it the new capital of Yemen. He soon became a president in exile in Saudi Arabia and invited an international coalition to intervene in the Yemeni armed conflict.³⁷ In 2017, with the backing of the United Arab Emirates, a new secessionist movement emerged in Yemen – the Southern Transitional Council. In 2018, with the military support of the United Arab Emirates, the Southern Transitional Council gained control

35 EU Naval Force – Somalia, Operation ATALANTA, 'Key Facts and Figures', available <https://eunavfor.eu/key-facts-and-figures/>; accessed 15 March 2021.

36 Ibid.

37 The coalition forces are led by Saudi Arabia and its other members include Egypt, the United Arab Emirates, Bahrain, Jordan, Kuwait, Morocco, Qatar, and Sudan. On the background of the conflict, see further WA Qureshi, 'The Crisis in Yemen: Armed Conflict and International Law' (2020) 45 *North Carolina Journal of International Law*, 230–231.

over the strategic port town Aden.³⁸ In 2021, the Southern Transitional Council actively campaigned for international support for holding a UN-mandated referendum on declaring the independence of South Yemen.

According to the United States' position, the Houthi forces are supported by Iran that provides Houthis with financial and material assistance, including small arms, missiles, explosives, and drones, complemented with military guidance and training.³⁹ In this context, the president of the Southern Transitional Council commented in 2021 that: "Without Iran's support the Houthis would have been defeated very early on."⁴⁰ Notably, Iran's support falls short of direct control over the Houthi forces.⁴¹ Nonetheless, it illustrates the extent of the influence that Iran has over some of the world's most important trade routes that pass through not only the Strait of Hormuz, but also the Bab el-Mandeb.

Soon after the intensification of hostilities in Yemen in the beginning of 2015, the UN Security Council adopted a resolution under which it imposed an arms embargo by calling on States to adopt measures for the prevention of any supply, sale or transfer to Yemen, "from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types."⁴² The UN Security Council also called upon States "to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to Yemen, in their territory, including seaports and airports" subject to reasonable doubt that such cargo breaches the arms embargo.⁴³

The UN Security Council resolution was implemented, *inter alia*, by the establishment of the UN Verification and Inspection Mechanism for Yemen, situated in Djibouti. Under this mechanism, commercial ships carrying cargo to the Houthi-controlled ports located on Yemen's Red Sea coast, e.g., Hodeidah and Saleef, are required to apply for a clearance and are subject to inspection.⁴⁴

38 See 'Yemen war: Who is the Southern Transitional Council?', Middle East Eye, 30 August 2019.

39 The United States Department of the Treasury, 'Treasury Sanctions Key Military Leaders of the Ansarallah Militia in Yemen', Press Release, 2 March 2021. See also J Drennan, 'The Gate of Tears: Interests, Options, and Strategy in the Bab-el-Mandeb Strait', Center for International Maritime Security, 30 January 2018.

40 P Wintour, 'Biden can help end Yemen civil war by backing referendum, say secessionists', *The Guardian* (1 March 2021).

41 Qureshi, *op. cit.*, 248.

42 UN Security Council Resolution 2216, adopted 14 April 2015, para 14.

43 *Ibid.*, para 15.

44 UN, 'About UNVIM', The United Nations Verification and Inspection Mechanism for Yemen webpage, available <https://www.vimye.org/about>; accessed 23 March 2021.

Nonetheless, reportedly most ships heading to the ports of Hodeidah or Saleef have been held for weeks by the warships of the Saudi Arabia-led international coalition irrespective of whether they have received the UN clearance.⁴⁵ The arms embargo is particularly relevant in the light of claims that Iran supplies the Houthi movement with anti-ship cruise missiles.⁴⁶ Such alleged supplies enable to effectively destabilize navigation in and around the Bab el-Mandeb.

From 2015 to 2020, the main threat to international navigation in the Red Sea, the Bab el-Mandeb and the Gulf of Aden stemmed from the Houthi movement. There have been numerous naval attacks from Houthi forces against the Saudi Arabian-led coalition forces in the Bab el-Mandeb and its approaches during the Yemeni armed conflict.⁴⁷ For example, in May and July 2018, two Saudi Arabian oil tankers, respectively, the *Abqaiq* and *Arsan*, were attacked near the Yemeni port Hodeidah and resulted in Saudi Arabia suspending its tankers from crossing the Bab el-Mandeb.⁴⁸

In addition, both warships and commercial ships under the flag of a neutral State have been repeatedly attacked near Yemen's coastline. In October 2016, attacks from the Yemeni mainland coast targeted the United States warships navigating in the Bab el-Mandeb. In the beginning of October 2016, the former United States Navy test ship *HSV-2 Swift*, operated by the National Marine Dredging Company of the United Arab Emirates under the control of the Saudi Arabia-led international coalition, was destroyed in the vicinity of the Bab el-Mandeb by a rocket attack from Yemen's mainland coast for which the Houthi rebels claimed responsibility.⁴⁹ In response, the United States sent three warships (*USS Mason* and *USS Nitze* accompanied with the amphibious

45 P Wintour, 'Saudi Arabia proposes ceasefire plan to Yemen's Houthi rebels', *The Guardian* (22 March 2021).

46 B Bowman, K Zimmerman, 'Biden Can't Bring Peace to Yemen While Iran Keeps Sending Weapons', *Foreign Policy* (4 March 2021). Y Bayoumy, P Stewart, 'Exclusive: Iran steps up weapons supply to Yemen's Houthis via Oman – officials', *Reuters* (20 October 2016).

47 See further C Weiss, 'Analysis: Houthi naval attacks in the Red Sea', *FDD's Long War Journal* (17 August 2019). For example, in 2017, three small explosive-filled and remote-controlled boats attacked a Saudi Arabian frigate *Al Madinah* west of the strategic Hodeidah Port and caused an explosion which killed two and wounded three crew members of the frigate. M Ghobari, A Abdelaty *et al.*, 'Yemen's Houthis attack Saudi ship, launch ballistic missile', *Reuters* (30 January 2017). CP Cavas, 'New Houthi weapon emerges: a drone boat', *Defense News* (19 February 2017).

48 M Knights, F Nadimi, 'Curbing Houthi Attacks on Civilian Ships in the Bab al-Mandab', *The Washington Institute for Near East Policy*, 27 July 2018.

49 Anonymous, 'Missile Attack Destroys Ex-Navy Ship off Yemen', *The Maritime Executive* (3 October 2016).

staging base *USS Ponce*) to secure the area near the Bab el-Mandeb.⁵⁰ Upon their arrival in the middle of October 2016, the United States warships were targeted by a round of attacks: first against the destroyer *USS Mason* and *USS Ponce*, followed by a cruise missile attack three days later against *USS Mason* and the amphibious transport dock ship *USS San Antonio*.⁵¹ The United States warships adopted defensive measures and did not suffer any major damage. The United States asserted that the attacks were launched from the Houthi-controlled regions in Yemen and responded with Tomahawk missile strikes against three radar sites on the Yemeni coast.⁵²

About two weeks later, in the end of October 2016, the Spanish-flagged LNG-tanker *Galicía Spirit* was approached in the Bab el-Mandeb, near the Yemeni Perim Island, by an apparent suicide boat carrying explosives that detonated approximately 20 metres away from the tanker, destroying the suicide boat, but causing no major harm to the tanker.⁵³ In the same week, the Tuvalu-flagged LNG-tanker *Melati Satu*, while on her voyage from the Black Sea to the Indian Ocean, was attacked by a rocket-propelled grenade near the Bab el-Mandeb, but was saved upon its distress call by a Saudi Arabian warship and later escorted through the Bab el-Mandeb.⁵⁴

Attacks against international navigation in or near the Bab el-Mandeb continued in the subsequent years. In addition to missile attacks and attacks carried out by small boats,⁵⁵ including remote-controlled and suicide boats, the international navigation through the Bab el-Mandeb is threatened by naval mines that are placed by Houthi forces in the Red Sea. From 2015 to 2018, the international coalition forces disarmed close to 90 naval mines in the Red

50 Anonymous, 'U.S. Navy Sends Warships to Secure Bab el-Mandeb', *The Maritime Executive* (4 October 2016).

51 E Slavin, 'Navy strikes radar sites in Yemen in response to missile attacks on ships', *Stars and Stripes* (13 October 2016). S LaGrone, 'CNO Richardson: USS Mason 'Appears to Have Come Under Attack'', *USNI News* (15 October 2016).

52 Ibid.

53 Saul, *op. cit.*

54 Anonymous, 'Pirates attack oil tanker near Bab al-Mandab', *Al Arabiya News* (27 October 2016).

55 For example, in May 2018, an explosion struck the Turkish-flagged vessel *Ince Inebolu* as she was transporting wheat to Yemen. Anonymous, 'Explosion damages vessel carrying wheat to Yemen', *Reuters* (11 May 2018). In February 2020, an unmanned boat laden with explosives was discovered and destroyed in the Red Sea by the Saudi Arabia-led international coalition. The boat was launched from the rebel-held Hodeidah province in Yemen. N Abdallah, D Nehme *et al.*, 'Saudi-led coalition says it foiled Red Sea attack by Yemen's Houthis', *Reuters* (23 February 2020).

Sea.⁵⁶ Some cargo ships have struck these mines in the Red Sea and they have also caused casualties among local fishermen.⁵⁷ In addition, some of the hundreds of floating mines that have been released by Houthi forces north of the Bab el-Mandeb have drifted southwards through the strait into the Gulf of Aden, causing explosions in commercial vessels.⁵⁸

As the Houthi forces advanced in their offensive in northern Yemen against the internationally recognised Hadi's government in 2021,⁵⁹ Saudi Arabia and the United States made ceasefire proposals to the Houthi rebels that involve the lifting of the blockade on the Houthi-controlled capital Sana'a and the Red Sea ports that they control.⁶⁰ In 2021, approximately 5 million Yemenis were on the brink of famine and there is no clear end in sight for the armed conflict; there is not much progress in the Yemeni peace process.⁶¹

Therefore, while the legal regime of the Bab el-Mandeb has not attracted much controversy and contributes to the stability of international navigation through the strait, the main threat to international commerce and navigation in the area stems from geopolitical factors. Currently, the prospects of the geopolitically turbulent waters of the Bab el-Mandeb for returning to times of tranquillity look distant.

As discussed next, in 2019 a new conflict between Iran and Israel has escalated in the region threatening international shipping in and near the Bab el-Mandeb. The Israeli-Iranian hybrid naval warfare has been marked by a series of missile and mine attacks mostly against commercial ships in the waters leading to the Bab el-Mandeb. The 3-years-long maritime hybrid warfare between Israel and Iran in the maritime areas around the Arabian Peninsula had a significant impact on international shipping in the straits of Bab el-Mandeb and Hormuz. Geopolitically, the maritime security in the Persian Gulf, the Arabian Sea and the Red Sea is interlinked. For example, attacks against foreign ships in the Strait of Hormuz can have repercussions in the

56 Anonymous, 'Arab coalition destroys 86 Houthi-planted naval mines in Red Sea', *Arab News* (25 November 2018).

57 Ibid.

58 Knights and Nadimi, *op. cit.* See also the US Department of the Treasury 2 March 2021 Press Release, *op. cit.* A Egozi, 'Houthis Lay Sea Mines In Red Sea; Coalition Boasts Few Minesweepers', *Breaking Defense* (14 June 2021).

59 Wintour, 1 March 2021, *op. cit.* P Wintour, 'Hopes for Yemen peace deal fade as 'obscene' Marib death toll rises', *The Guardian* (7 May 2021).

60 Wintour, 22 March 2021, *op. cit.*

61 Anonymous, 'No end to Yemen civil war on the horizon, senior UN official briefs Security Council', *UN News* (23 August 2021). P Wintour, 'New UN envoy to Yemen urged to broaden talks to end civil war', *The Guardian* (7 October 2021).

maritime security of the other parts of the region, e.g., the Red Sea and the Bab el-Mandeb. The field of operations of the armed forces of Israel and Iran spread throughout the long waterway from the Persian Gulf to the Arabian Sea, Red Sea, and the Mediterranean.

6.5 Background of the Iran-Israel Conflict

In the shadow of the armed conflict in Yemen, a hybrid naval conflict emerged between Iran and Israel in 2019. Reportedly, since 2019, Israel has carried out at least a dozen clandestine attacks in the Red Sea and other maritime areas around the Arabian Peninsula against Iranian-flagged oil tankers heading to Syria.⁶² In the summer of 2019, a series of attacks and intrusions against commercial ships were conducted in or near the Strait of Hormuz, for which Iran was widely held responsible.⁶³ The first Israeli attack against Iranian-flagged tankers occurred only a few months later, in October 2019, when the *Sabiti* tanker was subject to an apparent missile or limpet mine attack in the Red Sea near the mainland coast of Saudi Arabia, leaving two holes above the ship's waterline.⁶⁴

Iran has allegedly also carried out attacks against Israeli commercial ships in the waters around the Arabian Peninsula. For example, in late February 2021, an Israeli cargo ship *Helios Ray* sustained damage from explosions that hit her from both sides in the Gulf of Oman.⁶⁵ Israel's Prime Minister attributed this attack to Iran. Only a month later, an Iranian missile hit Israeli-flagged container ship in the Arabian Sea.⁶⁶

April 2021 marked the escalation of the hybrid naval warfare between Israel and Iran as an alleged Israeli clandestine operation targeted for the first time an Iranian military ship.⁶⁷ A United States' official confirmed to the media that Israel had notified the United States about the attack.⁶⁸ The limpet mine attack

62 G Lubold, B Faucon, F Schwartz, 'Israeli Strikes Target Iranian Oil Bound for Syria', *The Wall Street Journal* (11 March 2021).

63 See, e.g., Blair, *op. cit.* Graham-Harrison, *op. cit.*

64 Anonymous, 'Gulf tanker attacks: Iran releases photos of 'attacked' ship', *BBC News* (14 October 2019).

65 Anonymous, 'Netanyahu accuses Iran of attacking Israeli-owned ship in Gulf', *The Guardian* (1 March 2021).

66 F Fassih, E Schmitt, R Bergman, 'Israel-Iran Sea Skirmishes Escalate as Mine Damages Iranian Military Ship', *The New York Times* (7 April 2021).

67 Ibid.

68 Ibid.

left two holes below the water line of an Iranian freighter *Saviz* that, according to media reports, was used in the Red Sea at least since 2016 for military purposes, including purportedly for the support of the Houthi rebels.⁶⁹ According to Iran's Islamic Revolutionary Guards Corps, she was deployed in the Red Sea to combat pirates in and near the Bab el-Mandeb.⁷⁰ At the time of the attack, the *Saviz* was situated near the Eritrean Dahlak archipelago in the Red Sea.

In defiance of the United States and European Union-sanctioned oil embargo,⁷¹ Iran has continued to ship oil to Syria. This leaves Iran dependent on the safe passage of its ships through the Strait of Bab el-Mandeb and the Suez Canal. Iran could use the alternative route around the Cape of Good Hope for transporting oil to Syria, but this is not necessarily a safer trajectory for reaching the eastern Mediterranean. In July 2019, the tanker *Grace 1* that carried approximately 2 million barrels of Iranian oil to Syria in breach of the sanctions was seized by the United Kingdom's marines in the Strait of Gibraltar.⁷² *Grace 1* was released over a month later, in August 2019, on the condition that she will not travel to Syria which both the captain of the ship and the flag State (Iran) confirmed.⁷³ The April 2021 attack against the Iranian oil tanker near the Syrian province Tartus shows that Iranian oil tankers encounter also in the Mediterranean significant impediments to their passage to Syrian ports even if they have successfully transited the straits of Bab el-Mandeb or Gibraltar.⁷⁴

6.6 Problems with Attributing State Responsibility

In the Irani-Israeli 'shadow war', numerous mine attacks have been carried out mostly against commercial ships in or near the Strait of Hormuz and the Bab el-Mandeb Strait. These attacks demonstrate that it is possible for States to hamper international navigation in a busy waterway without necessarily having to

69 Ibid. See also Anonymous, 'Iranian ship thought to be used as military base attacked, says Tehran', *The Guardian* (7 April 2021).

70 Ibid.

71 Council of the EU, 'Syria: EU renews sanctions against the regime by one year', Press Release (17 May 2019). S Al-Khalidi, 'Syria says U.S. sanctions behind acute fuel crisis', *Reuters* (17 September 2020).

72 V Ratcliffe, J Lee, A Shahla, 'British Marines Seize Supertanker Carrying Iranian Oil to Syria, Causing Diplomatic Row', *Time* (4 July 2019).

73 J Marcus, 'Iran tanker row: US requests detention of Grace 1 in Gibraltar', *BBC News* (15 August 2019).

74 Anonymous, 'Three killed in attack on Iran fuel tanker off Syria after suspected drone attack', *Al Arabiya* (24 April 2021).

bear State responsibility for such measures. The flag State of a targeted ship may initiate legal proceedings against the State suspected of carrying out the mine attacks but will have to bear the burden of proof in demonstrating that the suspected State was in fact responsible for the relevant mining operation.

In the *Oil Platforms Case*, the United States was not able to sufficiently substantiate its claim that the damage to its warship USS *Samuel B. Roberts* was caused by an Iranian mine even though it provided evidence that these mines were manufactured in Iran and laid in a sea-lane that was usually navigated by the United States-flagged ships.⁷⁵ The ICJ found that, in principle, a mine attack against a single warship can constitute an armed attack in response to which a State may claim the right of self-defence under Article 51 of the UN Charter, but that there has to exist conclusive evidence that the suspected State was responsible for the mine attack.⁷⁶ In other words, as noted by Klein, whether a State is entitled to act in self-defence under Article 51 of the UN Charter, is an 'objective assessment' that does not necessarily call for the victim State's (subjective) perspective.⁷⁷

This illustrates that one of the legally most challenging aspects of hybrid naval warfare is the attribution of State responsibility for missile and mine attacks similar to those that were carried out in the Persian Gulf against the United States in 1987 and 1988, but which the ICJ was unable to categorize as an armed attack. When international navigation passes through an international strait that is made a theatre of war, such as in the cases of the Bab el-Mandeb and the Strait of Hormuz in the context of the current Yemeni armed conflict or the Iran-Iraq war (1980–1988), it is very difficult for a neutral flag State to provide conclusive evidence that the mines that its ship struck were deployed by a belligerent with the intention of specifically targeting that specific ship or ships of any other neutral State. It is rather easier for a belligerent to counter such claims by asserting that the relevant mines were laid against legitimate targets in an armed conflict and that it was an unfortunate accident that a ship of a neutral State struck a mine.

In the context of hybrid naval warfare, it is important that an aggressor State cannot evade responsibility for its mine and missile attacks against a neutral State. As examined above, as of 2019, commercial ships sailing in or near the Strait of Hormuz and the Bab el-Mandeb Strait have been repeatedly subject to limpet mine attacks allegedly carried out by Iran and Israel. Such mines can be deployed by professional military divers (so-called frogmen) since they are

75 *Oil Platforms Case*, Judgment, *op. cit.*, para 67.

76 *Ibid.*, para 72.

77 Klein, *op. cit.*, 299.

of relatively small size and attach to a ship by magnets. In hybrid naval warfare where States seek to evade international responsibility for their attacks, limpet mines have been often used, since apparently such attacks are easier to conceal as compared to mining by conventional naval mines.

On the other hand, should a limpet mine attack be discovered prior to the mine explosion, it is easier for the flag State of a ship that was targeted to satisfy the criteria set by the ICJ in the *Oil Platforms Case*. According to these criteria, it needs to be proved that the mine attack was aimed specifically at a particular State or that the mine struck by the ship was laid with the specific intention of harming that ship.⁷⁸ These criteria apply at least in the context where a State suspected of carrying out the mine attack is engaged in an armed conflict with another State in the region, but where mines have struck a ship of a neutral State, as in the case of the Iran-Iraq war. Taft has criticized the above-referred criteria which, arguably, can result in legally bolstering intentionally indiscriminate attacks against which the victim State would not be entitled to exercise its right of self-defence.⁷⁹ Likewise, Dominic Raab has questioned the suitability of the 'mental element' in the ICJ's understanding of the definition of armed attack. Raab argues that:

Any such requirement of a mental element might be found in the primary rules of international law, namely the substantive rules covering the subject matter in question, in this case the rules on self-defence. However, it is reasonably clear from the relevant primary rules, governing the exercise of the right of self-defence, that there is nothing in the customary law definition of 'armed attack' requiring intention or any other mental condition on the part of a state in order for an unlawful use of force by that state to constitute an 'armed attack'. Nor did the Court seek to demonstrate otherwise. The Court did not draw any support from state practice (or elsewhere) for such a view.⁸⁰

The on-going Yemeni armed conflict and its impact on international navigation through the Bab el-Mandeb has stressed the risk that accompanies so-called proxy wars in strait States where rebel groups may be supplied with naval mines that are deployed by non-State actors over whom the State that supplied the weapons does not have an effective control. The Houthis are not

78 *Oil Platforms Case*, Judgment, *op. cit.*, para 64.

79 For the United States critique on this position, see, e.g., Taft, *op. cit.*, 299–300, 303.

80 D Raab, 'Armed Attack after the *Oil Platforms Case*' (2004) 17(4) *Leiden Journal of International Law*, 728.

completely dependent on Iran to the extent that they would be considered as an 'agent' of the Iranian Government under the ICJ's standard in the *Nicaragua Case*,⁸¹ nor does Iran's support to the Houthis amount to an 'effective control'⁸² that could trigger Iran's responsibility for their activities.⁸³ Klein has observed that "[a]t most, the shipment of weapons to support a terrorist attack against another state is a threat of force."⁸⁴ This creates problems as the mine attacks that are carried out by such armed groups may significantly advance the strategic aims of a State that supplied irregulars with mines, but that State need not necessarily bear international responsibility for the irregulars' actions.⁸⁵ In hybrid naval warfare, aggressor States can effectively exploit such loopholes in the current laws regulating State responsibility.

Scholars have proposed to consider the prospect of lowering the threshold of State responsibility or introducing the concept of complicity into the law of State responsibility in view of circumstances "when the territorial States provide terrorists with support such as financial and military support, arms supplies and (military) training, although the requirement of the effective control is not satisfied."⁸⁶ Kanehara notes that "[j]udging from the ICJ jurisprudence in the *Nicaragua* case and the *Genocide Convention* case, various types of support, namely, financial and military support, training, and provision of personnel, etc., may not bring as a result the attribution of terrorist attacks to the supporting State."⁸⁷ Kanehara proposes to consider such instances as violations of the due diligence obligation that would entail a separate ground for State responsibility, particularly where it is not possible to directly attribute the acts of non-State actors to a particular State under the effective control test.⁸⁸

Thus, the lowering of the currently rather strict threshold of State responsibility for direct support to non-State actors that conduct attacks against other States, including their warships and commercial ships, is one possibility

81 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, paras. 109–112.

82 *Ibid.*, para 115.

83 L Alghoozi, 'The Houthi Attacks Against the UAE: Rules of Conflict and International Law of State Responsibility', *EJIL: Talk!*, 12 March 2022.

84 Klein, *op. cit.*, 270.

85 See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168, paras. 146–147.

86 A Kanehara, 'Reassessment of the Acts of the State in the Law of State Responsibility – A Proposal of an Integrative Theoretical Framework of the Law of State Responsibility to Effectively Cope with the Internationally Harmful Acts of Non-state Actors' (2019) 399 *Collected Courses of the Hague Academy of International Law*, 159.

87 *Ibid.*, 160.

88 *Ibid.*, 161–162.

to tackle the phenomenon of hybrid naval warfare within the existing legal framework. It would potentially allow holding States responsible for supplying irregulars with naval mines and other arms that are used by non-State actors for targeting neutral ships and disrupting vessel traffic through international waterways.

In the alleged Iran-Israel hybrid naval warfare it is not clear if the attacks against ships sailing around the Arabian Peninsula are carried out by States, non-State actors or a combination of both. In this context, it is relevant to assess the measures available for the State whose ship has been targeted by non-State actors to defend itself from such attacks.

6.7 Non-state Actors and Article 51 of the UN Charter

The concept of self-defence, as traditionally understood, applies to an armed response to an attack by a State.⁸⁹ It is notable that, despite the fact that the UN General Assembly Resolution 3314 *Definition of Aggression* did not intend to provide the definition of an ‘armed attack’,⁹⁰ its references to different acts of aggression in Article 3 are limited to inter-State attacks. According to the ICJ, this includes a State’s ‘substantial involvement’ in “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state”,⁹¹ in the event that “such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.”⁹²

In the *Palestinian Wall*, the ICJ established that an ‘armed attack’ under Article 51 is confined to States, either in direct or indirect terms,⁹³ and does

89 EPJ Myjer, ND White, ‘The Twin Towers Attack: An Unlimited Right to Self-Defence?’ (2002) 7 *Journal of Conflict & Security Law*, 7. See also A Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories in International Law’ (2001) 12 *European Journal of International Law*, 993.

90 T Ruys, S Verhoeven, ‘Attacks by Private Actors and the Right of Self-defence’ (2005) 10 *Journal of Conflict & Security Law*, 302–303.

91 Definition of Aggression, *op. cit.*, Art 3(g).

92 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, para 195.

93 See for the difference between the two concepts in TD Gill, ‘The Law of Armed Attack in the Context of the Nicaragua Case’ (1988) 1 *Hague Yearbook of International Law*, 49. See also General Assembly, *Report of the Secretary-General: Implementing the Responsibility to Protect* (2009, UN Doc. A/2211), 56. See also SM Schwebel, *Justice in International Law* (Cambridge University Press, Cambridge, 1994), 561.

not encompass actions by non-State actors which are not attributable to States.⁹⁴ This is problematic in the context of hybrid naval warfare because often attacks against commercial vessels or warships cannot be attributed to any State. For example, the Houthi rebels control much of Yemen's coastline in the Red Sea and have allegedly conducted attacks against neutral commercial vessels and warships in and around the Bab el-Mandeb Strait with the support of Iran.⁹⁵ In this context, the ICJ's judgment in the *Palestinian Wall* entails that under the restrictive approach to Article 51 of the UN Charter, the victim State cannot invoke the right of self-defence.⁹⁶ Previous research on this matter has concluded that "State practice has consistently upheld the need for a certain link with a state."⁹⁷ Furthermore, with reference to the principles of non-intervention and State sovereignty, it has been pointed out that a different conclusion would undermine the fundamental principles of State sovereignty and non-intervention.⁹⁸

However, in the immediate aftermath of the 11 September 2001 terrorist attacks, the conditions for invoking the right of self-defence were subject to extensive debate. It was argued that due to the scale and effects of the operations, an armed attack in terms of Article 51 of the UN Charter encompasses non-State actors.⁹⁹ In this context, the ICJ's opinion in the *Palestinian Wall* that Article 51 covers only States but not non-State actors, has been subject to criticism. It has been noted that "[t]his finding is inconsistent with the Court's own judgment in *Nicaragua* and state practice before and after 9/11."¹⁰⁰ It has also been underlined that Article 51, due to the inherent character of the right of self-defence, "must reflect the realities of the international system and the

94 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Reports 2004, p. 136, para 139. See also A Orakhelashvili, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction' (2006) 11 *Journal of Conflict & Security Law*, 125. See also NA Shah, 'Self-defence, Anticipatory Self-defence and Pre-emption: International Law's Response to Terrorism' (2007) 12 *Journal of Conflict & Security Law*, 97. See also K Oellers-Frahm, 'The International Court of Justice and Article 51 of the UN Charter', in K Dicke *et al.* (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (Duncker & Humblot, Berlin, 2005) 510.

95 See *supra* Chapter 6.4 of Part 2.

96 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, para 211.

97 Ruys and Verhoeven, *op. cit.*, 312.

98 *Ibid.*

99 R Müllerson, 'Jus Ad Bellum: Plus Ça Change (Le Monde) Plus C'est La Même Chose (Le Droit)?' (2002) 7 *Journal of Conflict & Security Law*, 176–178. See also T Gazzini, 'A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?' (2008) 13 *Journal of Conflict & Security Law*, 27.

100 Ruys and Verhoeven, *op. cit.*, 305.

aspirations of the international community.”¹⁰¹ Indeed, among the UN Member States, only Iran and Iraq challenged the legality of the 7 October 2001 military operation against Afghanistan.¹⁰²

Notably, Article 51 does not explicitly limit the scope of perpetrators of an ‘armed attack’ to States.¹⁰³ Hence, it is widely argued, contrary to the ICJ in the *Palestinian Wall* opinion, that Article 51 also includes attacks of sufficient scale and effects that have been committed by non-State actors.¹⁰⁴

The *Nicaragua*, *Palestinian Wall*, and *Oil Platforms* cases set a high threshold for an armed attack that triggers the right of self-defence under Article 51 of the UN Charter. This raises the question of the range of available measures for a conflicting side that has nevertheless been a victim of an unlawful use of force. This matter is important to address because the State that has been targeted by militias, in the case that the use of force has not reached the strict conditions of an armed attack in terms of Article 51 of the UN Charter, could not invoke the right of self-defence.

In this regard, it is relevant to recall that the prohibition on the use of force under Article 2(4) of the UN Charter, widely considered as a *jus cogens* rule, is subject to another exception under the UN Charter: the authorisation for the use of force by the UN Security Council under Chapter VII.¹⁰⁵ Due to a political impasse in the Security Council, its potential power to authorise measures under Article 2(4) often cannot provide any remedy to the counterparties. Hybrid naval warfare thus provides an illustrative example of the gap between Articles 2(4) and 51 of the UN Charter.

However, in regard to this gap in the UN Charter-based security regime, it is notable that the ICJ has introduced an innovative concept of countermeasures under its case law. The applicability of this “very controversial and contested concept”¹⁰⁶ to hybrid naval warfare thus merits further discussion. In particular, it needs to be examined whether States that are targeted in hybrid naval warfare are entitled to undertake proportional countermeasures in accordance

101 T Gill, ‘The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy’ (2006) *Journal of Conflict & Security Law*, 369.

102 Ruys and Verhoeven, *op. cit.*, 297.

103 See on *travaux préparatoires*, *ibid.*, 291.

104 See Shah, *op. cit.*, 104–105.

105 N Schrijver, ‘Challenges to the Prohibition to Use Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Gall Too Much?’, in N Blokker, N Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?* (Martinus Nijhoff, Leiden/Boston, 2005) 36.

106 Ruys and Verhoeven, *op. cit.*, 309. Despite referring to its controversiality, the authors adopted the concept in their substantive analysis. *Ibid.*, 318.

with Article 22 of the ILC Articles on State Responsibility as a means for redress when confronting unlawful use of force.¹⁰⁷

When employing countermeasures, States are still bound with the rules of attribution of State responsibility. This means that when a State is using countermeasures it will have to attribute that act to which the countermeasures are directed to a specific State and will have to bear the burden of proof. In some hybrid conflicts, this criterion can be relatively easily met, e.g., in relation to the Kerch Strait incident of 2018. Mostly, however, hybrid naval warfare involves clandestine operations. For example, the hybrid naval warfare between Iran and Israel, according to media reports, allegedly involves mine and missile attacks against Irani and Israeli ships sailing in the long waterway that stretches from the Strait of Hormuz to the Bab el-Mandeb Strait and onwards to the Red Sea and the Mediterranean.¹⁰⁸ In such clandestine maritime operations, the responsible State cannot be easily identified.

As generally understood, countermeasures exclude the responsibility of the actor and preclude the wrongfulness of the act *per se*.¹⁰⁹ This is further evidenced in the ICJ's judgments in *United States Diplomatic and Consular Staff in Tehran*,¹¹⁰ *Military and Paramilitary Activities in and Against Nicaragua*,¹¹¹ and in *Gabčíkovo-Nagymaros Project*.¹¹² The ILC Articles on State Responsibility under Articles 51 and 52 as well as the ICJ in its case law have limited the use of countermeasures to the preconditions of proportionality and necessity.¹¹³ Notably, the condition of proportionality is determined and evaluated on the basis of the aim of the countermeasures, which entails that, if necessary, the measures undertaken may exceed the limits of the unlawful action that is being repelled.¹¹⁴ For example, when British warships were denied the right of innocent passage through the Corfu Channel, then the United Kingdom's

107 H Lesaffre, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures', in J Crawford, A Pellet, S Olleson (eds), *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) 471.

108 See *supra* Chapter 6.5 of Part 2.

109 Lesaffre, *op. cit.*, 473.

110 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, p. 3, para 53.

111 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, para 248.

112 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ICJ Reports 1997, p. 7, para 82.

113 Shah, *op. cit.*, 108. Oellers-Frahm, *op. cit.*, 508. See also *Gabčíkovo-Nagymaros Project*, *op. cit.*, para 85. See also R O'Keefe, 'Proportionality', in Crawford, Pellet, Olleson, *op. cit.*, 1160, 1165–1166.

114 A Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff, Dordrecht/Boston/London, 1993) 57. See also E Cannizaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 *European Journal of International Law*, 910–912.

show of force by sending its warships with their servicemen on action stations through the Corfu Channel was considered as a legal measure by the ICJ.¹¹⁵

The ICJ has not addressed the question if States are allowed to use firearms under the concept of countermeasures for deterring unlawful use of force. Klein has argued that States may also employ proportionate countermeasures involving force.¹¹⁶ Van Logchem has discussed the substantive rules applicable to the use of countermeasures but did not elaborate on the permissibility of the use of force under the framework of countermeasures.¹¹⁷

As a rule, force cannot be used as a countermeasure against another (flag) State. Employing countermeasures that involve use of force outside the UN Charter system is superseded by Article 50(1)(a) of the ILC Articles on State Responsibility according to which: “Countermeasures shall not affect the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations.” Furthermore, the Annex VII Arbitral Tribunal has unequivocally found that:

It is a well established principle of international law that countermeasures may not involve the use of force. This is reflected in the ILC Draft Articles on State Responsibility at Article 50(1)(a), which states that countermeasures shall not affect “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”. As the Commentary to the ILC Draft Articles mentions, this principle is consistent with the jurisprudence emanating from international judicial bodies. It is also contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the adoption of which, according to the ICJ, is an indication of State’s *opinio juris* as to customary international law on the question.¹¹⁸

This is not without prejudice to the right of the crew of a ship that has been attacked by non-State actors to adopt protective measures under the law enforcement and criminal law paradigms. As discussed above (see *supra* Chapters 5.2–5.3 of Part 2), recourse to administrative law-based framework of law enforcement measures and criminal law-based concept of self-defence is available for the targeted crew on-board a government ship or warship. This

115 Corfu Channel Case, *op. cit.*, 30. See Klein, *op. cit.*, 267.

116 Klein, *op. cit.*, 267, 270.

117 Van Logchem, *op. cit.*, 46–47, 315–316.

118 Annex VII Arbitral Tribunal, *Guyana v. Suriname Award*, *op. cit.*, para 446.

right also applies in cases where the crew needs to deter the use of force against a ship flying its flag even if such aggression does not meet the gravity threshold for triggering the right of self-defence under Article 51 of the UN Charter as interpreted by the ICJ.

When countering an unlawful act under the law enforcement or criminal law framework, the person must not exceed the limits of self-defence that are mostly set by the principles of proportionality and necessity (see *supra* Chapters 5.2–5.3 of Part 2). Thus, for example, it is prohibited to cause intentionally clearly excessive damage to the attacker. The main problem in relation to the use of law enforcement or criminal law-based measures against such aggression is that the State vessel needs to comply with Article 2(4) of the UN Charter in its response to such unlawful use of force in hybrid naval conflicts. Consequently, its use of arms needs to strictly stay within the confines of the limits of proportionality that are much narrower in the law enforcement and criminal law paradigms as compared to the right of self-defence under Article 51 of the UN Charter and *jus in bello* (see *supra* Chapters 5.2–5.3 of Part 2). This is another factor that shows the disadvantages of the interpretation of the threshold of an armed conflict that relies on the 'gravity threshold' in situations of hybrid warfare.

The next chapter focuses on examples of incidents that can be qualified as an international armed conflict from a legal perspective, even though they have not been perceived as such by the public nor the States concerned. In particular, the focus of the study is next shifted to the illegal incursions of foreign submarines and military aircraft into the territory of the Viro Strait's coastal States.