



# SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



## Red Sea Crisis Raises Complex Legal Questions

Complex legal questions arise out of the launch of Operation Prosperity Guardian – the international response to protect shipping in the Red Sea area from Houthi attacks, delegates at the MLAANZ New Zealand Branch conference were told.

Commander Chris Griggs, a barrister who stressed he was giving his view in a private capacity, explained the geographic reality of the area, where the Bab el-Mandeb Strait separating the Red Sea from the Gulf of Aden is only 20 nautical miles wide and adjoins rebel-held territory. The territorial waters of several states overlap.

The governing legal framework for the strait is the United Nations Convention on the Law of the Sea (UNCLOS), but neither the bordering state of Eritrea nor the United States are states parties, whereas Yemen, Djibouti and most flag states (including New Zealand) are.

The People's Democratic Republic of Yemen ratified UNCLOS in 1987, however, the reality is that Yemen is a divided country, with parts under rebel control.

Under a declaration it made when ratifying UNCLOS, Yemen requires that it gives prior permission for the entry or transit of foreign warships, or of submarines or ships operated by nuclear power, or carrying radioactive materials through its territorial sea. The United States protested that declaration and it is not generally observed by naval forces operating in the Red Sea.

UNCLOS article 17 establishes that ships (not aircraft) may conduct innocent passage through the territorial sea of any state. It must be continuous and expeditious with no loading or discharging of cargo or passengers. The coastal state may regulate innocent passage to ensure limits under UNCLOS are observed and it may temporarily suspend innocent passage, without discrimination according to flag, if essential for security.

However, the coastal state must not hamper the innocent passage of foreign ships through the territorial sea.

Mr Griggs raised the issue of self-defence under international law. United Nations (UN) Charter, article 51, states that: "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."



Commander Chris Griggs

He then posed three legal questions that arise due to the legal complexities involved in Operation Prosperity Guardian.

Question 1 is: Can article 51 self-defence be exercised in response to attack by a non-state actor?

Opinion is divided. The International Court of Justice (ICJ) issued an advisory opinion that it could not, but with dissent by Judges Buergenthal and Higgins, and a separate opinion by Judge Kooijmans: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ, 2004). Judge Kooijmans also gave a separate opinion to the same effect in *Democratic Republic of Congo v Uganda* (ICJ, 2005).

Mr Griggs indicated that UN Security Council (UNSC) resolution 1373 (2001), issued in the wake of “9/11”, combined with the practice of a large number of states in exercising collective self-defence of the United States in Afghanistan, suggest that customary international law is more aligned with the dissenting and separate opinions of Judges Buergenthal, Higgins and Kooijmans.

Question 2 is: Does an attack against a merchant vessel flagged to a state constitute an attack against that State? The answer is yes – reference *Oil Platforms (Iran v US)* (ICJ, 2003) paragraphs 61-64.

Complicating factors, however, are that the merchant vessels attacked by the Houthis in November and December 2023 were not flagged to either the United Kingdom or the United States, except the British-flagged Swan Atlantic. The flag states do not appear to have requested a response by way of collective self-defence, hence the United Kingdom and United States were giving protection to states which had not asked for it.

A game changer came on 9 January 2024 when Houthi forces mounted a direct attack against British and American warships. The UNSC then affirmed the right of member states to defend their vessels from attack. UNSC resolutions are binding on UN member states.

Mr Griggs’ third question was: Did the attack on United States and Royal Navy warships justify a military response against shore-based targets in Yemen? The relevant international law is explained in the ICJ’s *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986). The measures adopted must be “proportional to the armed attack and necessary to respond to it” (paragraph 176). Mr Griggs mused whether permission might have been obtained from the *de jure* Yemeni Government, given that the areas under attack are controlled by forces hostile to that Government.

As for New Zealand’s position, he said this country signed a joint statement made by a number of countries which called for the immediate end of illegal attacks and warned that malign actors would be held accountable should they continue to threaten lives, the global economy and free flow of commerce in the region’s critical waterways.

On 10 January this year, the UNSC adopted resolution 2722 (2024), which also condemned these attacks and demanded that they cease. The resolution took note of the right of member states, in accordance with international law, to defend their vessels from attack.

New Zealand then signed a second statement confirming the legitimacy of strikes against Houthi targets, and has contributed personnel to assist in the identification of such targets.

New Zealand is therefore at the forefront of Operation Prosperity Guardian.

June 2024

