

## **Enforcing UN Sanctions by Maritime Interdiction: Historical Overview and Legal Basis**

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### **Abstract**

In rare if important instances since the end of the cold war, the United Nations Security Council has resorted to maritime enforcement of its economic sanctions whereby Member States, acting nationally or through regional organizations or arrangements, are authorized to conduct maritime interdiction operations against foreign-flagged vessels suspected of carrying sanctioned cargo. This paper aims to provide a historical overview of such UN-mandated maritime embargoes so as to examine the Security Council's evolving policy on the maritime enforcement of its sanctions. Furthermore, in light of the legal constraints that the international law of the sea places on non-flag state interference with merchant shipping, the paper will also analyze the legal basis upon which the Security Council authorizes such embargoes in order to evaluate its legal and policy implications.

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### **I. Introduction**

Since the end of the Cold War, economic sanctions have been a key policy tool of the United Nations (UN) Security Council in responding to a wide variety of international peace and security issues, including: inter-state (international) and intrastate (non-international) armed conflicts, terrorism, proliferation of weapons of mass destruction (WMD), illegal change of government, etc. In fact, whereas during the Cold War the Security Council employed economic sanctions only twice,<sup>1</sup> in the three decades that have followed, it has established 28 sanctions regimes, 13 of which are active as of this writing.<sup>2</sup> To be sure, over the course of this period the design of the sanctions regimes has evolved as comprehensive “dumb” sanctions, such as those imposed against Iraq, the former Federal Republic of Yugoslavia (FRY) and Haiti in the 1990s, have been replaced by the so-called targeted “smart” sanctions that focus on specific individuals, entities, sectors and/or regions.<sup>3</sup> Nonetheless, the objective behind the implementation of UN sanctions regimes remains the same, namely, to compel the targeted state or non-state actor to change some policy or practice or otherwise comply with the demands

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1 Prior to 1989, only two states were subjected to mandatory economic sanctions by the Security Council, namely Southern Rhodesia in 1966 and apartheid South Africa in 1977.

2 For a list of current and past sanctions regimes imposed by the Security Council, see <https://www.un.org/securitycouncil/sanctions/information>

3 For further discussion, see e.g. Joanna WESCHLER, “The Evolution of Security Council Innovations in Sanctions” (2009–2010) *International Journal*, Vol.65, 31–44; Sue E. ECKERT “The evolution and effectiveness of UN targeted sanctions” in Larissa van den HERIK, ed., *Research Handbook on UN Sanctions and International Law* (Cheltenham, Northampton, MA: Edward Elgar Publishing, 2017), 52-70.

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of the Security Council. Indeed, from this point of view, economic sanctions by the UN are hardly any different from the coercive measures of “economic warfare” often used by states against other states in past and present.<sup>4</sup>

The key to the success of any sanctions regime, of course, lies in its effective enforcement. It is from this outlook, in fact, that the importance of maritime enforcement of UN sanctions can be understood. Historically, economic sanctions have often aimed to disrupt or restrict trade in the sense of exchanging or buying and selling of goods to or from the targeted state.<sup>5</sup> The Security Council, for its part, has profusely employed such trade sanctions. In addition to the sanctions against Southern Rhodesia and South Africa in the 1960s and 70s, the comprehensive sanctions regimes of the 1990s subjected the target states, namely Iraq, the former FRY and Haiti, to near total trade embargoes. Even in the context of targeted sanctions of recent decades, trade sanctions remain prevalent. Aside from individual/entity targeted sanctions such as travel bans and asset freezes, the Security Council continues to impose arms embargoes and so-called “sectoral sanctions” that often prohibit or restrict

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4 For further discussion on the concept and functions of economic sanctions, see Andreas LOWENFELD, *International Economic Law*, 2nd ed. (Oxford: Oxford University, 2008), 853- 926; also see Gary Clyde HUFBAUER, Jeffrey SCHOTT, and Kimberly Ann ELLIOTT, *Economic Sanctions Reconsidered*, 3rd ed. (Washington, DC: Peterson Institute for International Economics, 2007). For discussion on the legality of economic sanctions, see generally Ali Z. MAROSSI and Marisa R. BASSETT, eds., *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (The Hague: T.M.C. Asser Press, 2015); also see Tom RUYSS, “Sanctions, Retortions and Countermeasures: Concepts and International Legal Framework” in van den Herik, *supra* note 3, at 19-51. Specifically, on economic sanctions imposed by the Security Council, see W. MICHAEL REISMAN and Douglas L. STEVICK, “The Applicability of International Law Standards to United Nations Economic Sanctions Programs” (1998) *European Journal of International Law*, Vol.9, 86-141.

5 Hufbauer, Schott and Elliott, *supra* note 4, at 44-48.

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trade in high-value commodities such as diamond, timber, oil and petroleum products, charcoal, precious metals and minerals, and luxury goods. Similarly, some sanctions regimes such as those imposed against Iran and North Korea, restrict or prohibit the sale, transport or export of proliferation-related dual-use goods to the target state.<sup>6</sup>

It is also the case, on the other hand, that more than 90 per cent of world trade is carried by sea as seaborne carriage is and has always been by far the most cost-effective mode for transporting goods. For this reason, trade sanctions can best be enforced in the maritime domain where the transport of goods to or from the target state can be controlled.<sup>7</sup> This is especially true with respect to Security Council sanctions since their implementation essentially falls on individual UN Member States. Given the many obstacles that often hinder or complicate the national implementation of UN sanctions,<sup>8</sup> not to mention that many member states might be unwilling or uninterested in complying with sanctions, a proven tool to apply such economic sanctions is

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6 Thomas BIERSTEKER, Sue E Eckert, Marcos TOURINHO and Zuzana HÚDÁKOVÁ, “The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium,” Watson Institute of International Studies, Brown University, Occasional Paper, November 2013, at 15-17; also see Daniëlla DAM-DE JONG, “UN Natural Resources Sanctions Regimes: Incorporating Market-Based Responses to Address Market-Driven Problems” in van den Herik, *supra* note 3, 147-176.

7 Rob McLaughlin, “United Nations Mandated Naval Interdiction Operations in the Territorial Sea?” (2002) *International and Comparative Law Quarterly*, Vol. 51, at 249; also see George P. POLITAKIS, *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality* (London, New York: Routledge, 1998), at 1-3. For further discussion, see Tor Egil FØRLAND “The History of Economic Warfare: International Law, Effectiveness, Strategies” (1993) *Journal of Peace Research*, Vol. 30, 151-162.

8 See e.g. Clara PORTELA, “National Implementation of United Nations Sanctions: Towards Fragmentation” (2009–10) *65 International Journal*, Vol. 65, 13-30.

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to enforce them at sea.<sup>9</sup> This is why the Security Council's most important sanctions regimes have included a maritime enforcement component whereby the Council authorizes member states, as per Chapter VII of the UN Charter, to conduct maritime interdictions against merchant vessels suspected of carrying sanctioned cargo. Indeed, "UN-mandated maritime embargo operations have now become a well-accepted means to enforce UN sanctions at sea."<sup>10</sup>

The purpose of this two-part paper is to examine legal aspects of maritime interdiction operations to enforce UN sanctions. The first part consists of five sections including introduction and conclusion. After Section II which frames the concept of maritime interdiction, Section III provides a historical overview of UN-mandated maritime interdiction operations. Thereafter, Section IV analyzes the legal basis upon which the Security Council authorizes maritime interdictions to enforce its sanctions. Section V concludes the first part. The second part of the paper will examine issues relating to the geographical scope and extent of authority for UN-mandated maritime interdiction operations

## **II. The Concept of Maritime Interdiction**

The concept of maritime interdiction (or maritime interception) originates from and is often used in military contexts. In fact, in military

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9 Lois E. FIELDING, *Maritime Interception and U.N. Sanctions*, (San Francisco, London and Bethesda: Austin & Winfield, 1997), at 130 as cited in Martin D. FINK, "UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector," (2011) *Military Law and Law of War Review*, Vol. 50, at 238, fn. 9; also see George P. POLITAKIS, "Un-Mandated Naval Operations and the Notion of Pacific Blockade: Comments on Some Recent Developments," (1994) *African Journal of International and Comparative Law*, Vol. 6.

10 Fink, *supra* note 9, at 237.

terminology the word “interdiction”<sup>11</sup> is an omnibus term that covers different meanings depending on the context. As such it is necessary to first elaborate on the concept of maritime interdiction before examining the legal aspects of UN-mandated maritime interdiction operations.

### **A. Definition and Terminology**

From the outset it should be noted that the terms “maritime interdiction” and “maritime interception” are interchangeable and are used as such.<sup>12</sup> In this paper the term “maritime interdiction” is preferred since in recent years it has been used by the Security Council itself.<sup>13</sup> As noted above, maritime interdiction/interception is not a legal but a military term that is, in fact, often used as part of the phrase “maritime interdiction/interception operation”, best known by its military acronym “MIO”. Many definitions have been given of the term maritime interdiction/interception

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11 The word “interdiction” has been defined as: “the act of stopping [something] that is being transported from one place from reaching another place, especially by using force” (A.S. HORNBY, Oxford Advanced Learner’s English Dictionary, 8th ed., s.v. “interdiction”, Oxford: Oxford University Press, 2010). The US Department of Defense Dictionary of Military and Associated Terms, defines the term “interdiction” as: “1. An action to divert, disrupt, delay, or destroy the enemy’s military surface capability before it can be used effectively against friendly forces, or to otherwise achieve objectives. 2. In support of law enforcement, activities conducted to divert, disrupt, delay, intercept, board, detain, or destroy, as appropriate, vessels, vehicles, aircraft, people, and cargo.” (Department of Defense Dictionary of Military and Associated Terms, as amended through April 2010, s.v. “interdiction”, available at <https://jdeis.js.mil>) [Dictionary of Military and Associated Terms]

12 Wolff HEINTSCHEL VON HEINEGG and Martin D. FINK “Maritime Interception/Interdiction Operations” in TD Gill and D Fleck eds., *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2010), at 422.

13 See e.g. UNSC Resolution 2397 (2017) on Non-proliferation/ Democratic People’s Republic of Korea (22 December 2017), UN Doc. S/RES/2397 (2017), Sec. Maritime Interdiction of Cargo Vessels [UNSC Res. 2397]

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operation.<sup>14</sup> For instance, according to the US Department of Defense, maritime interception operations are “[e]fforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations such as those in support of United Nations Security Council Resolutions and/or prevent the transport of restricted goods.”<sup>15</sup> Heintschel von Heinegg and Fink suggest that: “[m]aritime Interception Operations . . . may range from querying the master of the vessel to stopping, boarding, inspecting, searching, and potentially even seizing the cargo or the vessel, or arresting persons on board.”<sup>16</sup> Separately, Fink understands maritime interception/interdiction operations to be “naval operations that include the boarding, search and seizure of goods and the detention of persons on a foreign-flagged vessel, outside the sovereign jurisdiction of a State.”<sup>17</sup>

Underlying the various definitions is the notion that maritime interdiction involves stopping, boarding, searching, diverting for in-port inspection or otherwise interfering with a foreign-flagged merchant vessel at sea by naval forces and/or law-enforcement officials of a non-flag state to prevent the illicit transport of goods or persons or other illegal activities. As such, maritime interdiction operations seem more akin to law enforcement-type “constabulary” rather than naval operations.

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14 For a review of various definitions, see Martin FINK, *Maritime Interception and the Law of Naval Operations* (The Hague: T.M.C. Asser Press, 2018), at 10-12. Efthymios PAPANASTAVRIDIS, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford/Portland, OR: Hart Publishing, 2013), at 60-1.

15 Dictionary of Military and Associated Terms, *supra* note 11, s.v. “maritime interception operations”.

16 Heintschel Von Heinegg and Fink, *supra* note 12, at 422.

17 Fink, *supra* note 14, at 13.

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Contrary to what is suggested in the above-mentioned definitions, maritime interdictions are not necessarily conducted in international waters.<sup>18</sup> When maritime interdiction operations are conducted to enforce economic sanctions, they are somewhat colloquially referred to as “maritime embargo operations”.<sup>19</sup>

As a general rule of law and practice, maritime interdiction operations can only be carried out by warships, other duly authorized government ships or military aircraft.<sup>20</sup> The physical act of interdicting/intercepting a vessel, typically includes approaching the suspect ship and hailing it on radio to ask questions about the ships’ nationality, cargo, last port of call and next port of call, etc. (approach and querying); stopping the vessel and sending a boarding party/team onto the ship for checking and confirming its documents (board and visit); conducting an inspection of the ship and its cargo by the boarding party/team in case suspicion remains after checking the documents (search); and potentially arresting the ship and/or seizing its cargo and even detaining persons on board (seizure). It is also standard practice to divert the suspect vessel to a port

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18 See generally, Rob MCLAUGHLIN, *United Nations Naval Peace Operations in the Territorial Sea* (Leiden, Boston: Martinus Nijhoff Publishers, 2009), at 141-52. A recent notable example of maritime interdiction in territorial waters is the Grace 1 incident, which occurred in July of 2019. In this case a Panamanian-flagged tanker carrying Iranian-owned oil was intercepted and detained within the territorial sea of the British overseas territory of Gibraltar on suspicion that it was shipping crude oil destined for Syria contrary to European Union sanction. For a detailed account, see e.g. <https://www.theguardian.com/world/2019/jul/04/royal-marines-gibraltar-tanker-oil-syria-eu-sanctions>

19 See e.g. Fink, *supra* note 14, *passim*.

20 See e.g. Heintschel Von Heinegg and Fink, *supra* note 12, at 441. The Security Council has reiterated this rule in its most recent resolutions authorizing maritime interdiction for sanctions enforcement. See e.g. UNSC Resolution 2292 (2016) on Libya (14 June 2016); UN Doc. S/RES/2292 (2016), Para. 6 [UNSC Res. 2292].



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for in-port inspection when search at sea is deemed hazardous or impracticable or further inspection is needed. In this case or in case the suspect vessel is arrested, it will be escorted to the nearest appropriate port or roadstead for administrative and/or judicial proceedings.<sup>21</sup>

### **B. The Scope of the Concept**

There is some debate as to the exact scope of the concept of maritime interdiction. As Corthay rightly points out, whereas stopping, boarding and searching a foreign – flagged vessel are all phases generally recognized as included within the umbrella of maritime interdiction operations, “the inclusion of other measures, such as seizure and forfeiture of the cargo or the vessel, arrest and detention of persons on board, and even prosecution of offenders, is more questionable.”<sup>22</sup>

More importantly, some scholars have argued that the concept of maritime interdiction is limited to peacetime measures and does not apply to naval operations that are directed against merchant vessels within the context of an armed conflict and under the rubric of the law of naval warfare.<sup>23</sup> More to the point, this view suggests that the concept of maritime interdiction does not encompass stopping, boarding and searching of foreign merchant vessels under the belligerent right of visit

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21 For further discussion, see e.g. Lois E. FIELDING, “Maritime Interception: Centerpiece of Economic Sanctions in the New World Order” (1993) *Louisiana Law Review*, Vol. 53, at 1213-7; Fink, *supra* note 14, at 27-30, 41, 177-8; James KRASKA, “Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, And Seizure” (2010) *Ocean and Coastal Law Journal*, Vol. 16, at 2-4.

22 Eric L. CORTHAY, “Legal Bases for Forcible Maritime Interdiction Operations against Terrorist Threat on the High Seas.” (2017) *Australian and New Zealand Maritime Law Journal*, Vol. 31, at 53

23 HEINTSCHEL VON HEINEGG and Fink, *supra* note 12, at 423.

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and search.<sup>24</sup> However, it seems that in current military practice the term maritime interdiction/interception operation is used in the widest sense, including peace and armed conflict circumstances<sup>25</sup> not least because “interception operations based on the law of naval warfare and interceptions outside this framework may not be distinguishable from each other on the practical operational level.”<sup>26</sup> Therefore, wartime naval operations that involve interference with merchant vessels for such purposes as contraband control and blockade enforcement are also qualified as maritime interdiction operations.

Lastly, it should be underlined that sanctions enforcement is only one of the purposes for which maritime interdiction operations are carried out. In fact, maritime interdictions are conducted to counter a variety of threats to maritime security such a piracy, drug trafficking, migrant smuggling, WMD proliferation, etc.<sup>27</sup>

### **C. Blockade and Contraband-Control**

In light of foregoing, however, it is necessary to distinguish between UN-mandated interdiction operations and law of naval warfare-based concepts of blockade and contraband both of which are implemented by maritime interdictions.

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24 On the belligerent right of visit and search, see *infra*, Sec. IV/A/2

25 Fink, *supra* note 14, at 13.

26 Fink, *supra* note 14, at 12.

27 See generally, Douglas GUILFOYLE, *Shipping Interdiction and the Law of the Sea* (Cambridge, New York: Cambridge University Press, 2009).

### **1. Blockade**

Naval blockade is a traditional method of naval warfare. “Blockade is the blocking of the approach to the enemy coast or ports for the purpose of preventing the ingress and egress of ships . . . of all States.”<sup>28</sup> It is true that when UN-mandated maritime interdiction operations are carried out to enforce a total embargo – as was the case with Iraq, the former FRY and Haiti – the actual result would be similar to a blockade. Yet, the two are conceptually different. A UN-mandated maritime embargo “is a control-mechanism to inspect inward and outward shipping” whereby vessels may pass if they do not carry sanctioned cargo. A maritime blockade, on the other hand, “closes the target port or coastal stretch completely and lets no one and nothing in in or out, save a few specific exceptions.”<sup>29</sup> More significantly, blockade is only permissible under the law of naval warfare whereas, UN-mandated maritime interdictions are based on Security Council authorization under Chapter VII of the UN Charter.

Of course, if an international armed conflict arises as a result of authorization to use force by the Security Council, then the belligerent states party to the conflict would have the right to employ blockade as legal method of naval warfare. The Korean War of 1950-3 illustrates this

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28 Louise DOSWALD-BECK, ed., *San Remo Manual on International Law Applicable at Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995), at 176 [San Remo Manual]; also see generally Phillip DREW, *The Law of Maritime Blockade: Past, Present, and Future* (Oxford: Oxford University Press, 2017)

29 Fink, *supra* note 14, at 98.

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point where UN allies led by the United States imposed a maritime blockade against North Korea after their intervention in the war to provide “assistance” to South Korea on the basis of Security Council Resolution 83 (1950).<sup>30</sup>

## 2. Contraband Control

Contraband control is also a traditional method of naval warfare. Contraband is defined as “goods which are ultimately destined for territory under the control of the enemy and which may be susceptible for use in armed conflict”<sup>31</sup> Although neutral states and their nationals and merchant ships are allowed to engage in commerce with the belligerents, neutral merchant vessels are prohibited from carrying contraband that is directly or ultimately destined for the enemy of a belligerent.<sup>32</sup> In order to control the carriage of contraband, belligerent warships and aircraft are allowed, under the right of visit and search,<sup>33</sup> to intercept all neutral merchant vessels suspected of carrying contraband anywhere in the ocean space beyond neutral territorial waters.<sup>34</sup>

Although UN-mandated maritime embargo operations and belligerent contraband operations are similar in that they both involve interdiction of merchant vessels to ascertain whether they are carrying prohibited cargo, they are notionally separate in terms of legal basis and consequences.

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30 See e.g. Fink, *supra* note 14, at 98-9; Politakis, *supra* note 7, at 64-6.

31 San Remo Manual, *supra* note 28, Para.148.

32 For further discussion, see *Ibid.*, p 213.

33 On the belligerent right of visit and search, see *infra*, Sec. IV/A/2.

34 San Remo Manual, *supra* note 28, Para.118 and 121.

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Like blockade, contraband control is based on the law of naval warfare. As such, only belligerent states are allowed to conduct maritime interdictions to control the carriage of contraband. But UN-mandated maritime embargo operations are based on Chapter VII authorization whereby the authority to conduct such maritime interdictions is delegated to all UN Member States. Moreover, if it is established that a neutral merchant vessel is carrying contraband both the vessel and the contraband cargo are liable to capture as prize subject to adjudication by a domestic prize court.<sup>35</sup> By contrast, if sanctioned items are discovered in UN-mandated maritime interdiction operations, Member States are only allowed to seize and dispose of such items within the terms and bounds of the authorization resolution.<sup>36</sup>

### **III. A Historical Overview of UN-Mandated Maritime Enforcement of Sanctions**

Security Council-authorized maritime interdiction operations have been a recurring feature of UN sanctions regimes. Yet, not all UN sanctions regimes include a maritime enforcement component. To date, as a matter of fact, only 11 sanctions regimes have had a maritime enforcement dimension and of these not all have led to actual maritime interdiction operations. This section will provide a historical overview of UN-mandated maritime embargoes.

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35 Ibid, Paras. 146 (a), 147 and 148.

36 UNSC Res. 2292, supra note 20, Para. 5.

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**A. First Experience: The Early Case of Southern Rhodesia (1966-1975)**

As noted before, in 1965 the Security Council imposed its first ever economic sanctions against the former British colony of Southern Rhodesia (now Zimbabwe) in response to the unilateral declaration of independence by the white-minority regime that had effectively usurped power from the British Government. In Resolution 217 (1965), the Council imposed an arms embargo as well as an embargo on oil and petroleum products on Southern Rhodesia.<sup>37</sup> However, landlocked Southern Rhodesia continued to import oil, especially through the port of Beira in the then Portuguese colony of Mozambique. Consequently, the Security Council adopted Resolution 221 (1966), which called upon the British Government, “to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia”<sup>38</sup> This was the beginning of the so-called Beira Patrol by the British Royal Navy whereby British warships patrolled the Mozambique channel and intercepted Beira-bound oil tankers suspected of carrying oil destined for Southern Rhodesia. The Beira Patrol continued until 1975 when Mozambique gained independence from Portugal and ensured that no oil would cross its territory to Rhodesia.<sup>39</sup>

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37 UNSC Resolution 217 (1965) on the Question Concerning the Situation in Southern Rhodesia, UN Doc. S/RES/2217 (1965), Para.8

38 UNSC Resolution 221 (1966) on the Question Concerning the Southern in Southern Rhodesia, UN Doc. S/RES/221 (1966), Para.5 [UNSC Res.221].

39 For further details, see McLaughlin, *supra* note 18, at 134-5; Richard Mobley, “The Beira Patrol” (2002) *Naval War College Review*: Vol. 55.

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## **B. Maritime Enforcement of Comprehensive Sanctions: Iraq, the former FRY, Haiti and Sierra Leon (1990s)**

As discussed previously, during the 1990s the Security Council imposed several comprehensive sanctions regimes all of which included a maritime enforcement dimension. The leading precedent, of course, was Iraq which was subjected to a devastatingly effectual maritime embargo following its invasion of Kuwait in 1990. Seemingly encouraged by its success against Iraq, the Security Council used the same maritime enforcement model three more times in the 1990s, first against the former FRY, then against Haiti and finally against Sierra Leon. In the following paragraphs these cases will be discussed in more detail.

### **1. Iraq (1990-2003)**

Following the Iraqi invasion and occupation of Kuwait in August of 1990, the Security Council imposed a comprehensive regime of sanctions that subjected Iraq and occupied Kuwait to a near total embargo under Resolution 661 (1990).<sup>40</sup> Shortly afterwards the Security Council adopted Resolution 665 (1990), which called upon “those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area” to:

use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such

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40 UNSC Resolution 661 (1990), on Iraq-Kuwait (6 August 1990); UN Doc. S/RES/661 (1990).

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shipping laid down in resolution 661 (1990) <sup>41</sup> Resolution 665 (1990) led to an extensive embargo operation which was carried out by the so-called Maritime Interception Force (MIF). The MIF was led by the US Navy but eventually included naval forces from 22 states. As per Resolution 687 (1991),<sup>42</sup> the MIF continued to enforce UN sanctions against Iraq until 2003, when following the US-led invasion and overthrow of Saddam Hussein, the Security Council lifted the sanctions regime against Iraq.<sup>43</sup>

**2.The Former FRY (1992-6)**

During the Yugoslav Wars of 1991-95, the Security Council imposed an almost full embargo on the then Federal Republic of Yugoslavia (Serbia and Montenegro) under Resolutions and 757 (1992) as it was seen as the main backer of Croatian and Bosnian Serbs in war.<sup>44</sup> Thereafter, the Council adopted Resolution 787 (1992), which under Chapters VII and VIII authorized the interdiction of shipping by “[s]tates, acting nationally or through regional agencies or arrangements” to enforce the sanctions regime against the FRY.<sup>45</sup> Soon after, the North Atlantic Treaty Organization (NATO) launched Operation Maritime Guard to implement

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41 UNSC Resolution 665 (1990), on Iraq-Kuwait (25 August 1990); UN Doc. S/RES/665 (1990), Para.1 [UNSC Res. 665].

42 Resolution 687 (1991) reinstated the comprehensive sanctions against Iraq until it complied with the Council’s demands in terms of WMD and ballistic missiles disarmament. See UNSC Resolution 687 (1991), on Iraq-Kuwait (3 April 1991); UN Doc. S/RES/687 (1991).

43 For further details, see Fink, *supra* note 14, at 36-7; McLaughlin, *supra* note 14, at 135-8; Politakis, *supra* note 9, at 176-80.

44 UNSC Resolution 757 (1992) on the Former Republic of Yugoslavia (30 May 1992); UN Doc. S/RES/757 (1992), Para. 4.

45 UNSC Resolution 787 (1992) on the Former Republic of Yugoslavia; UN Doc. S/RES/787 (1992), Para.12 [UNSC Res. 787]



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Resolution 787 (1992). Alongside NATO, naval forces of the Western European Union (WEU) also launched Operation Sharp Guard to enforce Resolution 787 (1992). Following the adoption of Resolution 820 (1993), which further tightened sanctions against the FRY and broadened the authority for their maritime enforcement, the NATO and WEU operations were combined into the more aggressive Operation Sharp Guard. Operation Sharp Guard lasted until 1996 when, following the Dayton Peace Accords, the Security Council lifted its sanctions against the FRY.<sup>46</sup>

### **3. Haiti (1992-4)**

While the wars in the former Yugoslavia were raging, a political crisis in Haiti led to another UN-mandated maritime embargo operation. In 1991 the democratically-elected president of Haiti, Jean-Bertrand Aristide, was overthrown in a military coup led by General Raoul Cédras. In order to restore the legitimate government, the Security Council, by Resolutions 841 (1993) and 873 (1993), imposed an oil and arms embargo on Haiti. These resolutions were followed by Resolution 875 (1993), which under Chapters VII and VIII authorized “[m]ember States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti” to conduct maritime interdictions to enforce the oil and arms embargo.<sup>47</sup> As the crisis continued into 1994, the

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<sup>46</sup> For further details, see Fink, *supra* note 14, at 37-8; McLaughlin, *supra* note 14, at 138-51; Politakis, *supra* note 9, at 180-7.

<sup>47</sup> UNSC Resolution 875 (1993) on Haiti (16 October 1993); UN Doc. S/RES/875 (1993), Para. 1 [UNSC Res. 875]

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Security Council adopted Resolution 917 (1994) which imposed comprehensive sanctions on Haiti and once again authorized maritime interdiction of vessels to implement the sanctions.<sup>48</sup> As part of the so-called Multinational Force (MNF), warships from the United States and several other states launched Operation Forward Action to conduct maritime interdictions to enforce UN sanctions against Haiti. Operation Forward Action lasted until September of 1994, when Aristide finally returned to power.<sup>49</sup>

#### **4. Sierra Leon (1997-2010)**

Another political crisis in the 1990s that lead to a UN-mandated maritime embargo operation arose in Sierra Leon. In this instance, after the overthrow of the democratically-elected president of Sierra Leon, Ahmed Tejan Kabbah, in 1991 a civil war broke out that continued until 1997. In October of that year the Security Council passed Resolution 1132 (1997), which imposed an oil and arms embargo on Sierra Leon so as to bring an end to the civil war. Moreover, Resolution 1132 (1997), under Chapter VIII of the UN Charter, authorized the Economic Community of West African States (ECOWAS) to ensure its implementation by conducting maritime interdictions of ships sailing to Sierra Leon.<sup>50</sup> The military arm of ECOWAS known as ECOMOG, which had a naval task force that patrolled Sierra Leon's coast, was tasked with carrying out shipping

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48 UNSC Resolution 917 (1994) on Haiti (6 May 1994); UN Doc. S/RES/917 (1994), Paras. 6-10.

49 For further details, see Fink, *supra* note 14, at 39; Politakis, *supra* note 9, at 187-91.

50 UNSC Resolution 1132 (1997) on the situation in Sierra Leone (8 October 1997); S/RES/1132 (1997), Para. 8 [UNSC Res. 1132]

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interdictions to enforce the oil and arms embargo on Sierra Leon. ECOMOG's maritime interdiction operations continued until 2010 when the legitimate government of Sierra Leon was finally reinstated and Security Council lifted its sanctions on Sierra Leon.<sup>51</sup>

**C. Maritime Arms Embargo under UN Command and Control: The Unique Case of Lebanon (2006-present)**

As will be discussed below, the established practice of the Security Council on maritime enforcement of its sanctions is to authorize UN Member States to conduct maritime interdictions using their naval forces. As a result, the UN has no operational control on such operations. An exception to this pattern, is the case of Lebanon after the 2006 war between Hezbollah and Israel. In the wake of this war, the Security Council passed Resolution 1701 (2006), which, inter alia, implicitly imposed an arms embargo against Hezbollah and called upon “the Government of Lebanon to secure its borders and other entry points to prevent the entry in Lebanon without its consent of arms or related materiel. . .”<sup>52</sup> The Council also requested the United Nations Interim Force in Lebanon (UNIFIL) – the long-standing UN peacekeeping force in Lebanon – to assist the Lebanese Government in this matter “at its

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<sup>51</sup> For further details, see Fink, supra note 14, at 39-40.

<sup>52</sup> UNSC Resolution 1701 (2006) on the situation in the Middle East (11 August 2006); S/RES/1701 (2006), Para. 14.

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request”.<sup>53</sup> Accordingly, at the request of Lebanon, UNIFIL Maritime Task Force (UNIFIL-MTF) was formed.<sup>54</sup>

Deployed since October 2006, UNIFIL-MTF supports the Lebanese Navy in monitoring its territorial waters to prevent the unauthorized entry of arms by sea into Lebanon. As such UNIFIL-MTF only operates within the territorial sea of Lebanon. During the period 2006 to 2019 “MTF has hailed 97,377 ships and referred 14,381 of those vessels to the Lebanese authorities for further inspections, at sea or land.”<sup>55</sup> As of this writing, UNIFIL-MTF maritime interdictions continue.

UNIFIL-MTF interceptions to enforce the arms embargo on Hezbollah is the only case of a maritime interdiction operation under the command and control of the UN. Nonetheless, as noted by Papastavridis, “the legal basis for the deployment of this multinational force and for the right of visit of vessels in the territorial waters of Lebanon lay with the consent of the latter state and not with the relevant Security Council Resolution.”<sup>56</sup>

#### **D. Maritime Enforcement of Targeted Sanctions: Libya, Somalia, Eritrea and Yemen (2010s)**

Leaving aside the unique case of Lebanon, from the late-1990s onwards the Security Council did not mandate any new maritime embargo operations. Yet, in past decade, the Council has regenerated its policy of enforcing economic sanctions at sea. This revival began in 2011, when the Council authorized

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<sup>53</sup> Ibid.

<sup>54</sup> Fink, *supra* note 14, at 40; Papastavridis, *supra* note 14, at 104.

<sup>55</sup> <https://unifil.unmissions.org/unifil-maritime-task-force>

<sup>56</sup> Papastavridis, *supra* note 14, at 104; also see Fink, *supra* note 14, at 74-5.

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maritime interdictions on the high seas to enforce an arms embargo against Libya. Indeed, it would seem that Libya has become the new standard model for UN maritime-interdiction authorizations.<sup>57</sup> Since then, the Security Council has authorized maritime interdiction operations to enforce sanctions against Somalia, Eritrea and Yemen. In contrast with the 1990s, the essential attribute of recent maritime sanctions-enforcement mandates is that their purpose is to enforce targeted sanctions, namely arms embargoes and sectoral/commodity sanctions. The following paragraphs, will provide a brief historical survey of UN-mandated maritime embargoes in the 2010s.

### **1. Libya (2011-Present)**

As noted above, Libya is the new template for UN maritime-interdiction mandates. Following the armed rebellion against the long-time Libyan dictator Colonel Muammar Gaddafi in February 2011, the Security Council adopted Resolution 1973 (2011) which authorized the use of force to protect the civilian population of Libya. Resolution 1973 (2011) also authorized maritime interdictions on high seas to enforce an arms embargo against Libya that was imposed earlier by Resolution 1970 (2011).<sup>58</sup> Resolution 1973 (2011) provided the legal basis for NATO's military intervention in Libya under Operation Unified Protector. As part of Operation Unified Protector, NATO also

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<sup>57</sup> For further discussion, see Fink, *supra* note 9, at 238-40.

<sup>58</sup> UNSC Resolution 1973 (2011) on Libya (17 March 2011); S/RES/1973 (2011), Para. 13 [UNSC Res. 1973].

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conducted interdiction operations off the coast of Libya for 8 months until the overthrow of Gaddafi in October 2011.<sup>59</sup>

Be that as it may, even after the removal of the Gaddafi Regime the conflict in Libya has continued as various armed factions have struggled for control and undermined the Libyan Government. With the increasing attempts to export oil by the armed groups, the Security Council adopted Resolution 2146 (2014) to prevent the illicit export of crude oil from Libya. Resolution 2146 (2014) authorizes UN Member States and regional organizations to inspect on the high seas oil tankers designated by the Sanctions Committee established under Resolution 1970 (2011).<sup>60</sup>

Furthermore, as Libya became the main transit country for migrant smuggling and human trafficking to Europe, the Security Council adopted Resolution 2240 (2015) which authorized for a period of one year UN Member States and “regional organizations that are engaged in the fight against migrant smuggling and human trafficking” to inspect on the high seas off the coast of Libya vessels suspected of being involved in migrant smuggling and human trafficking.<sup>61</sup> A year later, as the internal conflict in Libya intensified, the Security Council passed Resolution 2292 (2016) to ensure the implementation of the arms embargo against Libya imposed under Resolutions 1970 (2011) and 1973 (2011). Resolution 2292 (2016) authorized for a period of 12 months, maritime interdictions of vessels suspected of

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<sup>59</sup> For further discussion, see generally Fink, *supra* note 9; also see Papastavridis, *supra* note 14, at 105-6.

<sup>60</sup> UNSC Resolution 2146 (2014) On Libya (19 March 2014); UN Doc. S/RES/2146 (2014), Para. 5 [UNSC Res. 2146].

<sup>61</sup> UNSC Resolution 2240 (2015) on Maintenance of International Peace and Security (9 October 2015); UN Doc. S/RES/2240 (2015), Para. 7 [UNSC Res. 2240].

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carrying arms to or from Libya.<sup>62</sup> The implementation of Resolutions 2240 (2015) and 2292 (2016) has been primarily undertaken by the European Union (EU) naval force known as EUNAVFOR MED operation Sophia. As the maritime-interdiction authorizations of Resolutions 2240 (2015) and 2292 (2016) have been extended, EUNAVFOR MED operation Sophia continues to conduct interdiction operations in the Southern Mediterranean as of this writing.<sup>63</sup>

## **2. Somalia (2014-present) and Eritrea (2009-2018)**

22 years after the collapse of the Siad Barre Regime in Somalia which plunged that country into chaos, the Security Council passed Resolution 2182 (2014).<sup>64</sup> This Resolution authorized “[m]ember States, acting nationally or through voluntary multinational naval partnerships” to inspect vessels in Somali territorial waters and on the high seas to enforce an arms embargo that was originally imposed on Somalia by Resolution 733 (1992)<sup>65</sup> and a ban on the export of charcoal from Somalia pursuant to Resolution 2036 (2012).<sup>66</sup> Interdiction operations to enforce the arms and charcoal embargoes on Somalia have been conducted by the so-called “Combined Maritime Forces” (CMF), which is a multi-national naval partnership led by the United States.<sup>67</sup>

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62 UNSC Res. 2292, *supra* note 20, Para. 3.

63 For further details, see <https://www.operationsophia.eu/about-us/>

64 UNSC Resolution 2182 (2014) on the situation in Somalia (24 October 2014); UN Doc. S/RES/2182 (2014), Para.15 [UNSC Res. 2182].

65 See UNSC Resolution 733 (1992) on the situation in Somalia (23 January 1992); UN Doc. S/RES/2036 (2012), Para.5.

66 See UNSC Resolution 2036 (2012) on the situation in Somalia (22 February 2012); UN Doc. S/RES/2036 (2012), Para.22.

67 For further details, see <https://combinedmaritimeforces.com/>

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In this connection, it should also be noted that in 2009 the Security Council passed Resolution 1907 (2009), which imposed, inter alia, an arms embargo on Eritrea as it was accused of supporting the armed extremist group Al-Shabaab in Somalia. Resolution 1907 also called upon “all Member States to inspect, in their territory, including seaports and airports, . . . , all cargo to and from Somalia and Eritrea,” in case of suspicion that the cargo contains items prohibited by the arms embargo.<sup>68</sup> Thus, Resolution 1907 (2009) authorized UN Member States to inspect vessels within their sovereign waters and not in international waters. In any case, in 2018 the arms embargo against Eritrea was lifted by Resolution 2444 (2018).<sup>69</sup>

#### **4- Yemen (2016-present)**

After the overthrow of the Yemeni President Abdrabbuh Mansur Hadi by Ansari Allah/Houthi forces and loyalists of the former president Ali Abdullah Saleh, a coalition of Arab states led by Saudi Arabia intervened in Yemen to restore the ousted president. In this context, the Security Council passed Resolution 2216 (2015) which, inter alia, imposed an arms embargo on Yemen. Like Resolution 1907 (2009), Resolution 2216 called upon “[m]ember States, in particular States neighboring Yemen, to inspect, . . . , all cargo to Yemen, in their territory, including seaports and airports . . .” in order to enforce the arms embargo.<sup>70</sup> Nonetheless, as will be discussed below, the

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68 UNSC Resolution 1907 (2009) on Peace and Security in Africa (23 December 2009); UN Doc. S/RES/1907 (2009), Para.7 [UNSC Res. 1907].

69 UNSC Resolution 2444 (2018) on the situation in Somalia (14 November 2018); UN Doc. S/RES/2444 (2018), Para.4.

70 UNSC Resolution 2216 (2015) on the Middle East (Yemen) (14 April 2015); UN Doc. S/RES/2216 (2015), Para. 15 [UNSC Res. 2216].



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Saudi-led Coalition has implemented this mandate in a manner that has effectively resulted in a near total embargo on Yemen.

**E. Maritime Enforcement of Sanctions by Consent-Based High Seas Interdictions: North Korea (2009-present) and Iran (2010-present)**

Lastly, mention should be made of the particular approach of the Security Council to the maritime enforcement of counter-proliferation sanctions against North Korea and Iran. As is well-known, the first nuclear-related sanctions against North Korea were imposed by Resolution 1718 (2006). From then onwards, the Security Council has passed a plethora of sanctions resolutions against North Korea that have effectively established an almost comprehensive sanctions regime.<sup>71</sup> As for Iran, during the period 2006 to 2010, the Security Council adopted four sanctions resolutions against Iran culminating in Resolution 1929 (2010). These Resolutions were later terminated by Resolution 2231 (2015), which was adopted after the so-called Iran Nuclear Deal was concluded.<sup>72</sup> Still, Resolution 2231 effectively re-instated an arms embargo on Iran.<sup>73</sup>

What distinguishes the maritime aspect of sanctions regimes against North Korea and Iran is that in both cases the high-seas interdiction of vessels suspected of carrying sanctioned cargoes has been made conditional upon the

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71 For a detailed survey of these resolutions and the economic sanctions regime they have imposed on North Korea, see <https://www.un.org/securitycouncil/sanctions/1718>

72 For further discussion, see e.g. Dirk Roland HAUPT, "Legal Aspects of the Nuclear Accord with Iran and its Implementation: International Law Analysis of Security Council Resolution 2231 (2015)" in Jonathan L. BLACK-BRANCH and Dieter FLECK, eds., *Nuclear Non-Proliferation in International Law* (The Hague: Asser Press, 2016), 403-69

73 UNSC Resolution 2231 (2015) on Non – Proliferation (20 July 2015); UN Doc. S/RES/2231 (2015), Annex B, [UNSC Res. 2231].

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consent of the flag state.<sup>74</sup> Notwithstanding the political circumstances surrounding both cases, it would seem that this is why neither North Korea nor Iran have faced the kind of maritime embargo campaigns that characterized the sanctions regimes surveyed in the previous paragraphs.<sup>75</sup>

#### **IV. The Legal Basis for Maritime Sanctions-Enforcement mandates by the UN Security Council**

To understand the legal basis for UN-mandated maritime interdiction operations, it is first necessary to establish the legal framework that underlies maritime interdiction of merchant vessels in terms of the law of the sea as well as the law of naval warfare. Thus, this section will first explain the legal framework underpinning maritime interdictions. It will then proceed to examine how the Security Council, under Chapter VII of the UN Charter, authorizes maritime interdictions to enforce sanctions at sea.

##### **A. The Legal Framework Underlying Interdiction of Merchant Vessels**

As a point of departure, maritime interdictions of vessels are conducted either in time of peace or in time of war. Depending on these two contexts, maritime interdictions fall under different legal frameworks, namely: the law of the sea, which is applicable in time of peace and the law of naval warfare, which is applicable in time of war when the interdicting non-flag state is involved in an

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74 See UNSC Resolution 1874 (2009) on Non – Proliferation /Democratic People’s Republic of Korea (12 June 2009); UN Doc. S/RES/1874 (2009), Paras. 12-3[UNSC Res 1874] ; UNSC Resolution 1929 (2010) on Non – Proliferation (9 June 2010) ; UN Doc. S/RES/1929 (2010), Para. 15 [UNSC Res. 1929] ; UNSC Res. 2231, supra note 73, Annex B, Para. 7.

75 For further discussion, see Fink, supra note 14, at 85.

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international armed conflict and thus enjoys the special rights of a belligerent state. These frameworks will be examined in the following paragraphs.

### **1. The Law of the Sea**

The legal framework that underlies maritime interdictions in time of peace is the international law of the sea as reflected in the 1982 UN Convention on the Law of the Sea (Law of the Sea Convention or UNCLOS).<sup>76</sup> Maritime interdiction is essentially an exercise of enforcement jurisdiction over a foreign-flagged vessel. In the legal order of the oceans established by UNCLOS, the ocean space is divided into a variety of maritime zones with specific legal regimes. In terms of enforcement jurisdiction, these maritime zones fall into two main categories: maritime zones that are under the territorial sovereignty of coastal states and zones that are beyond the sovereignty of coastal states. The former includes Internal waters, territorial seas and archipelagic waters, which are collectively referred to as “sovereign waters”. The latter contains the contiguous zone, the exclusive economic zone (EEZ) and the high seas, which are collectively referred to as “international waters”.<sup>77</sup>

In addition to internal waters, the coastal state enjoys territorial sovereignty over its territorial sea and, in the case of an archipelagic State, its archipelagic waters.<sup>78</sup> These sovereign waters form part of the territory of the coastal state.

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<sup>76</sup> United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 396 (entered into force on 16 November 1994) [UNCLOS].

<sup>77</sup> The continental shelf and the International Seabed Area (the Area) are also among the maritime zones established by UNCLOS, but inasmuch as they encompass the seabed and subsoil, they are irrelevant in terms of enforcement jurisdiction over vessels.

<sup>78</sup> UNCLOS, *supra* note 18, Art. 2.

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Territorial sovereignty over these zones denotes comprehensive and exclusive jurisdiction. On the one hand, the coastal state exercises full prescriptive, adjudicative and enforcement jurisdiction over its sovereign waters, which means it can take any enforcement measures, including maritime interdiction, against foreign-flagged vessels situated in or navigating through such waters. On the other hand, the exclusive nature of the coastal state's sovereign jurisdiction means that no other state may exercise enforcement measures in the sovereign waters of the state in question.<sup>79</sup>

Nevertheless, the enforcement powers of the coastal state over its sovereign waters are qualified by the passage regimes of the territorial sea, international straits and archipelagic waters. First, ships of all States, enjoy the right of innocent passage through the territorial sea.<sup>80</sup> Consistent with Article 24 of UNCLOS, read together with Articles 19 and 25 therein, the coastal State may not hamper the innocent passage of foreign-flagged ships through the territorial sea unless they are involved in activities that render passage non-innocent. Also, the coastal state may exercise criminal or civil enforcement jurisdiction over foreign-flagged ships in innocent passage only within the terms of Articles 27 and 28 of UNCLOS.<sup>81</sup> More importantly, under the terms of Part III of UNCLOS ships of all states enjoy the right of transit passage through the territorial seas overlapping straits used for international navigation

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79 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1985, [1985] ICJ Rep., 14 at 112, para. 214; also see Yoshifumi TANAKA, *The International Law of the Sea* (Cambridge: Cambridge University Press), at 6.

80 UNCLOS, *supra* note 76, Art. 17; also see TANAKA, *supra* note 79, at 85-95.

81 For a full discussion, see Haijiang YANG, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Berlin, Heidelberg: Springer, 2006), at 185-262.

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as defined in Article 37 therein.<sup>82</sup> The prevailing view among legal commentators is that coastal states bordering “transit passage straits” have no enforcement jurisdiction over ships in transit passage through such straits except within the strict terms of Article 223 of UNCLOS.<sup>83</sup> The same is true with respect to the right of archipelagic sea lanes passage, which entitles ships of all states to “continuous, expeditious and unobstructed transit” through sea lanes designated by the archipelagic state.<sup>84</sup>

As regards international waters, the most important maritime zone in terms of spatial extent and legal regime is, of course, the high seas. The legal fabric of the high seas is based on the principle of the freedom of high seas, which is enshrined in Article 87 of UNCLOS.<sup>85</sup> The corollary of the freedom of the high seas is the principle the exclusive jurisdiction of the flag State, the so-called “flag principle”, as codified in Article 92(1) of UNCLOS.<sup>86</sup> According to this principle ships on the high seas are subject to the exclusive jurisdiction of the flag state. This means that as a general rule no state other than the flag state can take enforcement measures, such as maritime interdiction operations, against a flagged vessel on the high seas. More to the point, for enforcement measures by a non-flag state to be legal, the consent of the flag state, whether

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82 UNCLOS, supra note 18, Art. 37; also see Tanaka, supra note 79, at 96-107.

83 See e.g. Hugo CAMINOS, *The Legal Regime of Straits* (Cambridge: Cambridge University Press, 2014), at 280-97; Bing Bing Jia, *The Regime of Straits in International Law* (Oxford: Oxford University Press, 1998), at 161-3.

84 UNCLOS, supra note 76, Art. 53. On limitations to the enforcement jurisdiction of archipelagic states, see CAMINOS, supra note 83, at 281.

85 UNCLOS, supra note 76, Art.87(1); also see Tanaka, supra note 79, at 150.

86 UNCLOS, supra note 76, Art.92(1); *The M/V “Norstar” Case* (Panama v. Italy), Judgment of 10 April 2019, [2019] ITLOS Rep. (not yet reported), paras. 216-7.

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conferred by treaty or on an ad hoc basis, is needed.<sup>87</sup> There are, however, two long-established exceptions to this rule, that is to say, the “right of visit” and the “right of hot pursuit”. The right of visit, as codified in Article 110 of UNCLOS, means that warships or other duly authorized government ships and/or military aircraft have the power to board and search a foreign-flagged merchant vessel on the high seas if there are reasonable grounds for suspecting that the vessel is involved in activities listed in Paragraph 1 of Article 110, namely: a) piracy, b) slave trading, c) unauthorized broadcasting d) statelessness of the ship, or e) suspicious nationality of the ship.<sup>88</sup> The right of hot pursuit, on the other hand, means that within the terms of Article 111 of UNCLOS, a warship, duly authorized government ship and/or military aircraft of a coastal state can arrest a foreign-flagged merchant vessel on the high seas if the vessel was pursued from the maritime zones of that state when authorities of the pursuing state “have good reason to believe that the ship has violated the laws and regulations of that State”<sup>89</sup>

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87 The Arctic Sunrise Arbitration (The Netherlands v. the Russian Federation), Award on the Merits, Decision of 14 August 2015, [2019] XXXII Reports of International Arbitral Awards, 205 at 270, para. 231. Various bilateral and multilateral treaties have been concluded that either confer authority to non-flag states to board and inspect foreign vessels (see e.g. the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3, Art.21-2.) or establish expedited procedures for obtaining flag-state consent for boarding vessels on the high seas (see e.g. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Art 8bis added by the Protocol of 2005, 14 October 2005, IMO Doc LEG/CONF.15/21, Art. 8 (2).) But these treaties are restricted to specific purposes such as IUU fishing, drug trafficking or proliferation of WMD. Moreover, as per the pacta tertiis principle, such treaties are not applicable to states not party to them. For further discussion, see Natalie KLEIN, *Maritime Security and the Law of the Sea* (Oxford, New York: Oxford University Press, 2011), at 147-211.

88 UNCLOS, supra note 76, Art.110; also see Tanaka, supra note 79, at 159-62.

89 UNCLOS, supra note 76, Art.111; also see Tanaka, supra note 79, at 163-6.

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The principle of the exclusive jurisdiction of the flag state also applies to the contiguous zone and the EEZ as pursuant to Article 58 of UNCLOS the three main freedoms of the high seas, including freedom of navigation, apply to the EEZ<sup>90</sup> and “the contiguous zone is part of the EEZ where the coastal State claims the zone”<sup>91</sup> and where the coastal state does not claim an EEZ, the contiguous zone is presumed to be part of the high seas. What differentiates these two zones from the high seas in this regard is that in the contiguous zone the coastal state has the power to exercise its enforcement jurisdiction against foreign ships to prevent or punish violations of its customs, fiscal, immigration or sanitary laws and regulations as per Article 33 of UNCLOS,<sup>92</sup> whereas in the EEZ the coastal state has the power to exercise its enforcement jurisdiction against foreign ships for violations of its fisheries and environmental laws and regulations, respectively within the terms of Articles 73 and 220 of UNCLOS.<sup>93</sup>

Overlaying the jurisdictional regimes of the various maritime zones is the principle of the sovereign immunity of state vessels as enshrined in Articles 32, 95, 96 and 110 of UNCLOS. According to this principle, warships and other ships owned or operated by a state and used only on government non-commercial service, whether on the high seas or within the maritime jurisdictional zones of states, have complete immunity from the jurisdiction of

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90 UNCLOS, supra note 76, Art.58 (2); The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment of 28 May 2013, [2013] ITLOS Rep., 4 at 36, para. 109.

91 Tanaka, supra note 79, at 121.

92 UNCLOS, supra note 76, Art.33.

93 UNCLOS, supra note 76, Art.73.

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any State other than the flag State.<sup>94</sup> As a result, the maritime interdiction of foreign warships and other government ships, in time of peace as in war time, is legally out of question.

Overall, it is well-established in treaty and customary law of the sea that only merchant vessels can be subjected to interdiction measures and the legal bases under which such measures are permitted vis-a-vis foreign merchant vessels are severely restrained, on one hand, by passage regimes in sovereign waters and the principle of the exclusive jurisdiction of the flag state in international waters, on the other.

## **2. The law of Naval Warfare**

It is axiomatic, as reflected in the Preamble and Article 301 of UNCLOS, that the law of the sea applies in peacetime.<sup>95</sup> Thus, the aforementioned legal constraints on maritime interdictions only apply in times of peace. In contrast, in times of war interference with foreign-flagged merchant vessels is permissible under the general rubric of the so-called “right of visit and search”. The right of visit and search (not to be confused with the right of visit as contained in Article 110 of UNCLOS) is a long-established customary rule in the law of naval warfare.<sup>96</sup> As stated in the San Remo Manual:

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94 UNCLOS, supra note 76, Arts.32, 95, 96 and 110. The ARA Libertad case (Argentina v Ghana), Provisional Measures, Order of 15 December 2012, [2012] ITLOS Rep., 332 at 248, paras. 94-5.

95 See e.g. Bernard H. OXMAN, “The Regime of Warships Under the United Nations Convention on the Law of the Sea” (1984) Virginia Journal of International Law, Vol. 24, at 809.

96 See 1909 London Declaration Concerning the Laws of Naval War, Arts. 61-3, reprinted in Natalino RONZITTI, ed., The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries (Dordrecht: Martinus Nijhoff, 1988), at 223-57



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In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.<sup>97</sup>

Therefor belligerent warships and military aircraft are allowed to board and search all merchant vessels, whether enemy or neutral, anywhere in the ocean space outside the sovereign waters of neutral states. The purpose of belligerent visit and search is either to determine the enemy character of a suspect vessel or its cargo or, in case of neutral vessels, whether the ship is carrying contraband or breaching a naval blockade.<sup>98</sup> Still, it should be underlined that the right of visit and search is a belligerent right enjoyed by states that are party to an international armed conflict and can only be exercised while the armed conflict continues. As such, it must be seen as an exceptional rather than positive legal basis for interference with foreign merchant shipping.

### **B. Maritime Interdiction Operations under Chapter VII of the UN Charter**

In light of the legal framework underlying non-flag state enforcement actions against merchant vessels, the only sufficient legal basis for maritime interdictions to enforce UN sanctions lies in Chapter VII of the UN Charter.

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97 Para. 118

98 For a full discussion, see Wolff Heintschel von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I, the Traditional Law" (1991) *Canadian Yearbook of International Law*, Vol. 29; id., "Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945," (1992) *Canadian Yearbook of International Law*, Vol. 30(1992).

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The following paragraphs will analyze the legal basis upon which the Security Council authorizes maritime sanctions-enforcement operations.

### **1. The Necessity of Explicit Authorization under Chapter VII**

As explained in the previous section, within the framework of the law of the sea, interference with foreign-flagged merchant vessels is only justified under highly exceptional bases. On the other hand, with few exceptions, most UN-mandated maritime embargo operations are conducted in time peace in the sense that there is no armed conflict between the interdicting state and the sanctioned state. As such, if maritime interdiction operations by the naval forces of one state to enforce UN sanctions against another are to be legally and politically justifiable, they must be based on a solid legal basis. This is especially true with respect to maritime interdictions in international waters where the principle of the exclusive jurisdiction of the flag state is essential.

There is no doubt that only authorization by the Security Council under Chapter VII of the UN Charter can afford a sufficient legal basis for the enforcement of UN sanctions at sea.<sup>99</sup> To fulfil its primary responsibility to maintain international peace and security, the Security Council has the authority to decide on non-military and/or military measures under Chapter VII, or more precisely Articles 41 and 42 therein. The established practice of the Security Council is to delegate the implementation of these measures to UN Member States.<sup>100</sup> Not only are UN Member States obliged, pursuant to

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99 Fink, *supra* note 14, at 74-77; McLaughlin, *supra* note 14, at 129-133; Papastavridis, *supra* note 14, at 97-99.

100 For Further discussion see, e.g. Jochen FROWEIN and Nico KRISCH, "Introduction to Chapter VII" in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford

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Article 25 of the UN Charter, to accept and carry out the decisions of the Security Council, but more importantly pursuant to principle of the primacy of the UN Charter, the obligation under Article 25 prevails over any other rights and obligations under treaty or customary law including the Law of the Sea Convention and the customary rules it contains.<sup>101</sup>

Consequently, as noted by Sarooshi, “in order for the [Security] Council’s authorization to confer legality on States’ actions when carrying out a naval interdiction, the authorization will either have to override the State’s treaty law obligations or constitute a valid exception to both Article 2(4) of the [UN] Charter and Article 87 of the 1982 UNCLOS.”<sup>102</sup> Indeed, in its most recent resolutions authorizing maritime interdiction operations, the Security Council has been at pains to point out that the authorizations provided in the resolution apply only to the situation of the sanctioned state and:

shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, including the general principle of exclusive jurisdiction of a Flag State over its vessels on the high seas, with respect to any other situation, [the Security Council] underscores in particular that this resolution shall not be considered as establishing customary international law.<sup>103</sup>

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University Press, 2002), Vol. I, 1237-1271; also see Danesh SAROOSHI, *The United Nations and the Development of Collective Security* (Oxford: Oxford University Press, 1999).

101 For further discussion, see e.g. Andreas PAULUS and Johann Ruben LEISS “Article 103” in *ibid*, Vol. II, 2110-2137.

102 Sarooshi, *supra* note 100, at 194-5.

103 UNSC Res. 2182, *supra* note 64, Para.21; also see UNSC Res. 2240, *supra* note 61, Para 11; UNSC Resolution 2292 (2016) on the situation in Libya, UN Doc. S/RES/2292 (2016), para. 9.

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The point to underline, therefore, is that maritime interdiction operations for enforcing UN sanctions are only permissible if they have been explicitly authorized by the Security Council. Absent an authorization in explicit terms, states are not allowed to unilaterally take interdiction measures against foreign vessels to enforce UN sanctions in international waters or arguably sovereign waters if they are inconsistent with passage regimes. In fact, as we will discuss later, the Security Council has developed standard language to authorize maritime interdiction operations.<sup>104</sup> Furthermore, UN-mandated maritime interdiction operations must be carried out within the bounds set out in the Chapter VII resolution authorizing them. A case in point is the arms embargo against Yemen. As mentioned before, Resolution 2216 (2015) merely calls upon:

Member States, in particular States neighboring Yemen, to inspect, ..., all cargo to Yemen, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, or transfer of which is prohibited by paragraph 14 of this resolution.<sup>105</sup>

Accordingly, UN Member States are only allowed to inspect vessels suspected of violating the arms embargo within their sovereign waters. Yet, the Saudi-led Coalition has been conducting maritime interdiction operations in international waters. More importantly, instead of an arms embargo, the Coalition's interdiction measures have effectively resulted in a near total embargo of Yemen which has created a severe humanitarian crisis. This is clearly beyond the bounds of what has been authorized by the Security

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<sup>104</sup> Corthay, *supra* note 22, at 71-2; Papastavridis, *supra* note 14, at 106-111; but also see Fink, *supra* note 14, at 77-86.

<sup>105</sup> UNSC Res. 2216, *supra* note 70, Para. 15.

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Council and cannot be legally justified on this basis. Also, the maritime embargo against Yemen cannot be justified under the rubrics of blockade and contraband in the law of naval warfare as there is no situation of armed conflict between Yemen and Saudi Arabia or other members of the Coalition.<sup>106</sup>

## **2. The Article 41/42 Debate**

Since the early 1990s when the first UN-mandated maritime embargo operations were conducted, legal scholars have debated whether these operations are based on Article 41 or Article 42 of the UN Charter.<sup>107</sup> The reason for this debate is that the Security Council has never clarified the article or articles of the Charter upon which its maritime interdiction authorizations are based as to date these authorizations have been made by reference to Chapter VII - or Chapter VIII in cases involving regional organizations – at the end of the preamble or in the relevant operative paragraph of the resolution without invoking a specific article therein.<sup>108</sup>

The root of the problem lies in the traditional division between Articles 41 and 42 of the UN Charter. Pursuant to Article 41 the Security Council “may decide what measures not involving the use of armed force are to be employed

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106 For further discussion, see Phillip J. Drew, “Blockade? A Legal Assessment of the Maritime Interdiction of Yemen’s Ports” (2019) *Journal of Conflict & Security Law*, Vol. 0; Martin Fink “Naval Blockade and the Humanitarian Crisis in Yemen” (2017) *Netherlands International Law Review*, Vol. 64.

107 Fink, *supra* note 14, at 86-94; McLaughlin, *supra* note 14, at 129-133.

108 See UNSC Res. 665, *supra* note 41; UNSC Res. 787, *supra* note 45, Para.12; UNSC Res. 875, *supra* note 47, Preambular Para.8; UNSC Res. 1132, *supra* note 50, Para.8.

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to give effect to its decisions”<sup>109</sup> Article 41 provides a non-inclusive list of such non-military measures that may include “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”. The authority of the Security Council to impose economic sanctions is based on this Article. Pursuant to Article 42, on the other hand, if the Security Council considers that measures provided for in Article 41 would be inadequate or have proved to be inadequate, the Council may authorize forcible measures “as may be necessary to maintain or restore international peace and security”<sup>110</sup> The traditional either/or interpretation of the two Articles requires that measures decided by the Security Council be categorized either as a non-military measure under Article 41 or a military measure under Article 42.

With regard to maritime interdiction mandates by the Security Council the issue is that in such mandates the Council effectively authorizes military means to enforce non-military measures: on the one hand, by mandating maritime interdictions the Security Council is authorizing the use of force although in practical terms forcible measures used in interdiction operations, such as warning shots across the bow, are usually of low scale compared with the large scale military operations envisaged by Article 42. On the other hand, the purpose of use of force in this case is to enforce economic sanctions that are clearly based on Article 41. Hence the scholarly debate on the article under which maritime embargo operations could be authorized.

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109 For further discussion, see Simma, *supra* note 100, at 1305-29.

110 For further discussion, see *Ibid*, at 1330-50.

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Some have argued that the use of force in Article 42 denotes extensive use of military hardware to counter and disable enemy forces. As such, “[t]he forcible measures sometimes deployed during ... maritime [interdiction] operations amount to maritime police measures intrinsically distinct from military measures governed by the *ius contra bellum*. Per se, police measures fit more comfortably within the measures of Article 41.”<sup>111</sup> Others have argued that what counts is the intention of the Security Council expressed in its resolutions, which have repeatedly authorized the use of force to conduct maritime interdictions, and not the practical manner in which such resolutions have usually been implemented. Moreover, as noted by Fink, “over past years Article 42 has evolved in such a way that it allows for a broader and more moderate scope of military operations . . . , particularly military operations that are more limited in scope and the use of force.”<sup>112</sup>

It would seem that to resolve this debate the relationship between Articles 41 and 42 should be seen as continuum “so that the need for a clear-cut distinction between measures “not involving the use of armed force” (Article 41) and those involving “action by air, sea or land forces” (Article 42) does not become a debilitating threshold issue”<sup>113</sup> On this premise, maritime interdictions mandates are somewhere between Article 41 and Article 42 venturing, as Politakis remarks, “ in uncharted waters half-way between economic sanctions and military enforcement” since “[e]nforcing a maritime

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111 Corthay, *supra* note 22, at 73.

112 Fink, *supra* note 14, at 95.

113 McLaughlin, *supra* note 14, at 133.

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embargo simply shares elements of both, without being squarely identifiable with either”<sup>114</sup>

### **3. The Drafting Practices of the Security Council**

The well-established practice of the Security Council in drafting its resolutions is to use certain boilerplate phrases to communicate the content of its decisions. As Papastavridis points out, these standard phrases “reflect the collective will and the shared understandings of the interpretive community of the Council”<sup>115</sup> The often-quoted example is the famous formula “all necessary means”. First used in Resolution 678 (1990) to authorize the use of military force against Iraq in the Persian Gulf War of 1990-1, it has been generally accepted ever since that this phrase, or the phrase “all necessary measures”, denote authorization to use force to enforce a mandate under Article 42 of the UN Charter and have been used in numerous resolutions. <sup>116</sup>

#### **1.3. Authorization of Maritime Interdiction Operations**

The Security Council has also developed drafting practices that it uses to authorize maritime interdictions. The most prominent is, of course, the boilerplate phrase that was first used in Paragraph 1 of Resolution 665 (1990) to authorize the maritime enforcement of economic sanctions against Iraq,

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114 Politakis, *supra* note 9, at 197.

115 Papastavridis, *supra* note 14, at 108 also see *id.*, “Interpretation of Security Council Resolutions under Chapter VII in The Aftermath of the Iraqi Crisis” (2007) *International and Comparative Law Quarterly*, Vol. 56.

116 Niels BLOKKER, “Outsourcing The Use of Force: Towards More Security Council Control of Authorized Operations?” in Marc WELLER, ed., *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press, 2015), 202 at 211-3.



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namely “to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations . . .”<sup>117</sup> In the following years the same phrase was repeated in Resolutions 787 (1992),<sup>118</sup> 875 (1993)<sup>119</sup> and 1132 (1997),<sup>120</sup> except that in the last two, the words “or” and “outward” were struck out apparently because the sanctions regimes against Haiti and Sierra Leon were focused on commodity imports rather than exports.

In the past decade, however, the Security Council has developed a new phraseology with regard to authorizing maritime interdiction operations. Firstly, a new boilerplate phrase has emerged for mandating states to inspect vessels within their sovereign waters, whereby the Council:

[c]alls upon Member 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 [the target state], in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, or transfer of which is prohibited by [relevant paragraphs of the sanctions resolution (s)] for the purpose of ensuring strict implementation of those provisions;<sup>121</sup>

Interestingly, the phrase “in particular the law of the sea and relevant international civil aviation agreements,” was added in Resolution 1929 (2010) and has been used ever since. It is arguable that this phrase prohibits a UN Member State from interdicting vessels that are in innocent, transit or

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117 UNSC Res. 665, supra note 41, Para 1.

118 UNSC Res. 787, supra note 45, Paras 12 and 13.

119 UNSC Res. 875, supra note 47, Para 1.

120 UNSC Res. 1132, supra note 50, Para 8.

121 See e.g. UNSC Res 1929, supra note 74, Para. 14 ; UNSC Res 1874, supra note 74 Para. 11 ; UNSC Res. 2231, supra note 73, Annexe B, para.7.

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archipelagic-sea-lane passage. Moreover, with regard to maritime interdictions on the high seas, another boilerplate phrase has sprung up in recent years, which reads:

Authorizes/decides to authorize with a view to [purpose of the authorization] in these exceptional and specific circumstances for a period of 12 months/one year from the date of this resolution, Member States, acting nationally or through regional organizations, in order to ensure strict implementation of the [relevant sanction (s)], to inspect, without undue delay, on the high seas off the coast of [target state], vessels bound to or from [target state] which they have reasonable grounds to believe are carrying [prohibited items]

This convoluted wording has so far been used in Resolution 2182 (2014)<sup>122</sup> on Somalia and Resolutions 2240 (2015)<sup>123</sup> and 2292 (2016)<sup>124</sup> on Libya. As will be discussed in the second part of the paper, this new phraseology denotes geographical and temporal limits to the Security Council's mandate for maritime interdictions.

### **2.3. Use of Force in Maritime Interdiction Operations**

Even more important is, of course, the drafting practice of the Security Council as regards the use of force in connection with maritime interdictions. In this regard, the standard phrase used by the Council is to authorize UN Member States or other addressees of the resolution "to use such measures commensurate to the specific circumstances as may be necessary under the

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122 UNSC Res. 2182, supra note 64, Para 15.

123 UNSC Res. 2240, supra note 61, Para 7.

124 UNSC Res. 2292, supra note 20, Para. 3.

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authority of the Security Council”<sup>125</sup> The above phrase is the equivalent of the “all necessary means/measures” phrase for maritime interdiction operations.<sup>126</sup> It was originally coined in Resolution 665 (1990) because the drafters did not want to make a blunt reference to the use of force as was the case in Resolution 221 (1966).<sup>127</sup> Since then this boilerplate phrase has been used in every resolution that mandates maritime embargo operations, though in recent years it has been formulated differently, that is to say, “to use all measures commensurate to the specific circumstances to carry out such inspections, in full compliance with international humanitarian law and international human rights law, as applicable”<sup>128</sup>

## **V. Conclusion**

The maritime domain has for a long time been the main arena for economic warfare inasmuch as the disruption of seaborne trade is the most effective way to inflict economic pain on the target state or to strain its economic resources. UN sanctions are no exception to this pattern. Whether to enforce the comprehensive sanctions of the 1990s or the targeted sectoral and commodity sanctions of recent years, a recurring feature of UN sanctions regimes has been their maritime-enforcement dimension whereby the Security Council mandates UN Member States, acting nationally or through regional

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125 See UNSC Res. 665, supra note 41, Para 1 ; UNSC Res. 787, supra note 45, Paras 12 and 13 ; UNSC Res. 875, supra note 47, Para 1 ; UNSC Res. 1132, supra note 50, Para 8.

126 Rob MCLAUGHLIN, “United Nations Security Council Practice in Relation to Use of Force in No-Fly Zones and Maritime Exclusion Zones” in Weller, supra note 116, 251 at 264-5

127 Id., supra note 14, at 135.

128 UNSC Res. 2146, supra note 60, Para. 5 ; UNSC Res. 2182, supra note 64, Para. 16 ; UNSC Res. 2292, supra note 20, Para. 4.

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organizations or arrangements, to conduct maritime interdiction operations against foreign-flagged vessels carrying or suspected of carrying sanctioned cargo. Clearly, such operations can greatly strengthen the implementation of UN sanctions as rather than only relying on national implementation by UN Member States, sanctions would be physically enforced at sea directly against the target state

However, only a limited number of UN sanctions regimes have included a maritime-enforcement component. Notwithstanding the narrowly focused right of visit under UNCLOS and the belligerent right of visit and search, any interference with foreign-flagged vessels in international waters is contrary to the fundamental principle of flag-state exclusive jurisdiction and would arouse fierce opposition. Even the interdiction of foreign vessels passing through sovereign waters can be seen as inconsistent with the passage regimes of UNCLOS. As such, maritime interdictions to enforce UN sanctions are only permissible if they have been explicitly authorized by the Security Council under Chapter VII of the UN Charter. For its part, the Council has authorized maritime embargoes in rare and exceptional situations of extreme crisis.

Furthermore, it follows that maritime interdiction operations to enforce UN sanctions must be conducted within the bounds of the authorization granted by the Security Council in terms of geographical scope and extent of authority, especially with reference to use of force and flag-state consent. Thus, for example, it would seem that the Saudi-led de facto blockade of Yemen cannot be justified on the basis of a UN mandate.

More importantly, the fact that the Security Council has only made use of maritime embargoes in exceptional instances indicates that despite its effectiveness - or perhaps because of it - maritime enforcement of UN sanctions requires a certain degree of consensus in the Security Council and the wider international community as to the gravity of the threat to

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international peace and security. More to the point, the Council will not impinge on the law of the sea to mandate maritime enforcement of its sanctions unless there is a shared assessment, especially among the permanent members, about the nature and political circumstances of the underlying situation and the threats it poses. The sanctions regimes on North Korea and Iran illustrate this point inasmuch as the Council has refrained from granting the authority to inspect vessels on the high seas without flag-state consent to enforce these sanctions. This is despite the gravity the United States and its allies attached to the nuclear-proliferation threats from these two states.

Lastly, a historical survey of UN-mandated maritime embargo operations shows that to date almost all these maritime embargoes have been carried out by either a regional organization, such as NATO, ECOWAS, or the EU or by naval forces of a coalition or states such as the MIF, the MNF or the CNF. Leaving aside military considerations, this might at least in part be because from a political point of view, states by themselves are reluctant to interdict foreign vessels in support of UN sanctions and would prefer to be seen as acting within the frame of a collective international effort.

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