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## The Turtle Bay Pivot: How the United Nations Security Council Is Reshaping Naval Pursuit of Nuclear Proliferators, Rogue States, and Pirates

Brian Wilson

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# THE TURTLE BAY PIVOT: HOW THE UNITED NATIONS SECURITY COUNCIL IS RESHAPING NAVAL PURSUIT OF NUCLEAR PROLIFERATORS, ROGUE STATES, AND PIRATES

Brian Wilson\*

## ABSTRACT

*Multinational action at the United Nations to combat illicit activity represents the most consequential sanctions period involving the maritime environment since the Athenian Empire's Megarian Decree. From its inception, the Security Council has authorized measures that have led to naval approaches or boardings of more than 50,000 ships, the destruction of 3,500 vessels, and the maritime rescue of 40,000 people in the pursuit of transnational security threats. While the Security Council has addressed maritime challenges over the past seven decades, a diplomatic renaissance began in 2008 with decisions impacting naval engagements unfolding with unparalleled frequency: From 1946 to 2007, resolutions were adopted about once every 1.7 years, and since, are now approved every 2.5 months. The Turtle Bay pivot is emblematic of an increased emphasis in collaborative responses to contemporary transnational security threats, yet questions remain, such as whether the Security Council is diluting their unique authority and the vitality of law-of-the-sea principles including freedom of navigation, innocent passage, and the general concept of exclusive flag State jurisdiction. Varied interpretations of resolutions, ensuring compliance, and overcoming challenges inherent in conducting at sea boardings further complicate the coordinated pursuit of illicit activity. This Article surveys hundreds of Security Council decisions to identify six categories of resolutions that could involve the maritime environment, examines their influence and intersection with one another, discusses potential future focus areas, and concludes with recommendations to improve the utility of these mandates.*

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## INTRODUCTION

The United Nations Security Council, hereinafter referred to as the Security Council or U.N.S.C., has become the venue of choice for states seeking expanded authority to counter maritime security threats, recently adopting dozens of resolutions that are both broad in scope and legally transformative. Recent multilateral decisions in New York represent a lengthy journey from an Athens trade embargo in 432 B.C.,<sup>1</sup> yet the passage of almost 2,500 years highlights the enduring role of sanctions in the maritime environment to impose operational or economic consequence, diplomatically condemn activities, or publicly signal disfavor of illicit actions.<sup>2</sup> From evicting Iraq from Kuwait and repressing Somali piracy to seeking to shut down North Korea's illegal nuclear program, the Security Council has become increasingly influential in naval operations. The threats addressed highlight the urgency of multilateral cooperation in an operating space that is vast, vulnerable to exploitation, and economically critical.

Over the past decade, the Security Council has authorized the naval pursuit of rogue states, nuclear proliferators, pirates, and migrant smugglers with unparalleled frequency. From 1946 to 2007, the Security Council adopted approximately thirty-six resolutions with a direct or indirect impact in the maritime environment.<sup>3</sup> In the following decade, from 2008 to 2017, the Security Council approved more than fifty such resolutions.<sup>4</sup> What previously occurred about once every 1.7 years at Turtle Bay for six decades—the adoption of a resolution with a direct or indirect maritime impact—now is routine, transpiring every 2.5 months. The issue is not of interest solely to those in diplomacy or academia: operations by naval forces in venues across the globe are being

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<sup>1</sup> DONALD KAGAN, *PERICLES OF ATHENS AND THE BIRTH OF DEMOCRACY* 207 (1998) (the decree “barred the Megarians from the harbors of the Athenian Empire and from the marketplace in Athens.”); *see also id.* (“The use of economic embargoes as a diplomatic weapon is common in the modern world . . . [and in this case, the decree . . . ] became the sole issue on which peace or war depended.”).

<sup>2</sup> *See generally* Alexander Orakhelashvili, *The Impact of Unilateral Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria*, in *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW* 3 (Ali Z. Marossi & Marisa R. Bassett eds., 2015).

<sup>3</sup> *See generally* S.C. Res. 1718 (Oct. 14, 2006) (The Democratic People's Republic of Korea); S.C. Res. 1540 (Apr. 28, 2004) (non-proliferation); S.C. Res. 1132 (Oct. 8, 1997) (Sierra Leone); S.C. Res. 875 (Oct. 16, 1993) (Haiti); S.C. Res. 787 (Nov. 16, 1991) (The former Yugoslavia; Bosnia and Herzegovina); S.C. Res. 661 (Aug. 2, 1990) (Iraq and Kuwait); S.C. Res. 552 (June 1, 1984) (Iran); S.C. Res. 221 (Apr. 9, 1966) (South Rhodesia); S.C. Res. 181 (Aug. 7, 1963) (South Africa); S.C. Res. 95 (Sept. 1, 1951) (the Suez Canal); S.C. Res. 19 (Feb. 27, 1947) (the Corfu Channel).

<sup>4</sup> *See generally* S.C. Res. 2253 (Dec. 17, 2015) (terrorism); S.C. Res. 2240 (Oct. 9, 2015) (migrant smuggling and human trafficking); S.C. Res. 2216 (Apr. 14, 2015) (Yemen); S.C. Res. 2018 (Oct. 31, 2011) (piracy and armed robbery at sea in the Gulf of Guinea); S.C. Res. 1973 (Mar. 17, 2011) (Libya); S.C. Res. 1929 (June 9, 2010) (Iran); S.C. Res. 1816 (June 2, 2008) (Somali piracy).

planned, approved, and conducted under the aegis of Security Council direction.<sup>5</sup>

The expanded maritime focus that generally began in 2008 parallels a spike in Security Council decisions following the end of the Cold War,<sup>6</sup> with more than ninety-three percent of all U.N.S.C. decisions occurring after 1990.<sup>7</sup> The Turtle Bay<sup>8</sup> pivot reflects both a transformed political environment and a contemporary diplomatic recognition that whereas the process of developing or amending a treaty is usually lengthy, the Security Council is exclusively positioned to act swiftly to address transnational security threats. The considerable authorities possessed by the U.N.S.C., the primary organ of the United Nations and discussed *infra*, are correctly characterized as giving it latitude “like no other body in history.”<sup>9</sup>

Security Council resolutions have led to queries, boardings, and diversions, among other naval enforcement measures, of more than 50,000 ships in the past twenty-five years.<sup>10</sup> Since the inception of the United Nations, measures taken

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<sup>5</sup> See S.C. Res. 1540, *supra* note 3; S.C. Res. 2253, *supra* note 4.

<sup>6</sup> See Peter Wallensteen & Patrik Johansson, *Security Council Decisions in Perspective*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21<sup>ST</sup> CENTURY 17 (David M. Malone ed., 2004); see also Frank Berman, *The Authorization Model: Resolution 678 and Its Effects*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21<sup>ST</sup> CENTURY 153 (David M. Malone ed., 2004) (referring to forty-five resolutions authorizing the use of force adopted by the Security Council between 1990 and 2000) (“Although the end of the Cold War predictably led to a burst of activity by the Security Council, it was not easily foreseeable that the Council would maintain such a pace, or that it would contemplate mandating the use of force under its authority.”).

<sup>7</sup> Wallensteen & Johansson, *supra* note 6, at 19. One study of Security Council decisions adopted from 1946 to 2002 concluded that 93% of all Ch. VII resolutions were adopted since 1990. *Id.*

<sup>8</sup> See generally JAMES ROMAN, CHRONICLES OF OLD NEW YORK: EXPLORING MANHATTAN’S LANDMARK NEIGHBORHOODS (Museyon ed., 2d ed. 2016) (noting that the United Nations Headquarters, which includes the Security Council, resides in an area of New York City referred to as Turtle Bay). The Turtle Bay area was given its name when British naval officer Sir Peter Warren owned the property in the 1600s. *Id.* at 76 (“The original land grant referred to the property as ‘Deutal,’ the Dutch word for bent blade, in reference to the shape of the land. In 1664, when the British captured New Amsterdam, ‘Deutal Bay’ was anglicized into Turtle Bay.”).

<sup>9</sup> DAVID L. BOSCO, FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 3 (2009).

<sup>10</sup> John Kriendler, *NATO’s Changing Opportunities and Constraints for Peacekeeping*, 41 NATO REV. 16, 20 (1993) (demonstrating that to implement Resolution 816 (1993) with respect to Bosnia-Herzegovina within a three-month period in 1993 “over 12,000 ships had been challenged of which 803 were stopped; of these, 176 were diverted and subsequently inspected and nine violators were detected.”); see also Stephanie M. Smart, *Maritime Interception Operations*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 735–36 (Geoffrey S. Corn, Rachel E. VanLandingham, & Shane R. Reeves eds., 2016) (explaining that the enforcement of U.N. sanctions against Saddam Hussein and Iraq over twelve years (1991–2003) resulted in “42,000 ships being queried, 3,000 [boardings], and 2,200 [ship diversions]. . . . [And,] during Operation Iraqi Freedom . . . the United States and allies queried 5,000 ships, boarded 2,600 vessels, and diverted another 400.”); Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LA. L. REV.

under the authority of a U.N.S.C. resolution have led to the destruction of more than 3,500 vessels.<sup>11</sup> And separately, implementation of U.N.S.C. resolutions between 2015 and 2017 has led to the maritime rescue of approximately 40,000 people.<sup>12</sup>

U.N.S.C. authorization has also supported the naval pursuit of the *Hansa India*, illegally transporting “tons of bullet casings” from the Islamic Republic of Iran<sup>13</sup> and the *Francop*, carrying “36 containers of arms and related materiel, including . . . 12,000 anti-tank and mortar shells, more than 20,000 fragmentation grenades, and more than half a million rounds of ammunition.”<sup>14</sup> Other noteworthy naval engagements conducted under the authority of a U.N.S.C. resolution include the North Korean-flagged freighter M/V *Kang Nam I*,<sup>15</sup> believed to be carrying missile components, and of the Belize-flagged M/V *Light*<sup>16</sup> suspected of shipping missile components and technology from a North Korean port; the blockading and diversion of the Cyprus-flagged M/V *Vento Di*

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1191, 1192 (1993) (“The coalition naval force [in the Persian Gulf following adoption of U.N.S.C. Resolutions 661, 665, and 670] was composed of more than 100 ships and 25,000 personnel contributed from about twenty countries.”).

<sup>11</sup> MALCOLM W. CAGLE & FRANK A. MANSON, *THE SEA WAR IN KOREA* 294, 532 (1957). The number of vessels destroyed under the authority of a Security Council resolution is based on the Korean War, Somali counter-piracy efforts, and Mediterranean migration operations. Action taken by the “United Nations Blockading and Escort Force,” among others, pursuant to U.N.S.C. Resolutions 82-84 (1950) destroyed 2,464 “enemy vessels” from June 25, 1950–June 8, 1953 and an additional 824 “vessels and small craft” from June 25, 1950–May 31, 1953. *Id.*; see also U.N. Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 2240*, ¶ 15, U.N. Doc S/2016/766 (Sept. 7, 2016) (that the European Union “disposed of 241 vessels” as part of their mission to implement U.N.S.C. 2240 (2015) on Mediterranean migration) [hereinafter Secretary-General on S.C. Resolution 2240]; Letter from Frederica Mogherini, Vice President of the European Commission, to Baroness Verma, Chair of the EU External Affairs Sub-Committee (July 26, 2017) (noting that by July 26, 2017, the vessels *neutralized* under Operation Sophia expanded the number to 463) (emphasis added).

<sup>12</sup> See, e.g., Secretary-General on S.C. Resolution 2240, *supra* note 11, ¶ 13. Resolutions that address safety of life at sea have not altered existing obligations to assist those in distress, though U.N.S.C. mandates have supported national- and regional-level decisions to prioritize the deployment of naval assets to implement its provisions. *Id.* (“As at 31 August 2016, the operation had rescued more than 25,400 men, women and children at sea and contributed through its assets to many more.”); see also CAGLE & MANSON, *supra* note 11, at 69 (describing that in an operation on August 16, 1950, navy ships supporting the U.N. mission to implement the U.N.S.C. resolutions in Korea evacuated more than 7,000 people); Letter from Frederica Mogherini, *supra* note 11 (stating that more than 39,000 lives had been “saved by Operation Sophia’s personnel since its launch in 2015.”).

<sup>13</sup> See Rep. of the S.C., at 192, U.N. Doc. A/65/2 (2010); see also Press Release, Susan E. Rice, U.S. Representative to the United Nations (Dec. 10, 2009); see also EFTHYMOS PAPASTAVRIDIS, *THE INTERCEPTION OF VESSELS ON THE HIGH SEAS* 108–11 (2013).

<sup>14</sup> U.N. SCOR, 65th Sess., 6235th mtg. at 3, U.N. Doc. S/PV.6235 (Dec. 10, 2009).

<sup>15</sup> Choe Sang-Hun, *Test Looms as U.S. Tracks Korean Ship*, N.Y. TIMES (June 21, 2009), <https://www.nytimes.com/2009/06/22/world/asia/22korea.html>.

<sup>16</sup> David E. Sanger, *U.S. Said to Turn Back North Korea Missile Shipment*, N.Y. TIMES (June 12, 2011), <https://www.nytimes.com/2011/06/13/world/asia/13missile.html>.

*Ponente*,<sup>17</sup> suspected of carrying proscribed arms and related material into Libya; counterpiracy operations on the high seas, in the Somali territorial sea, and on land;<sup>18</sup> the seizure of M/V *Jin Teng*, a Sierra Leone-flagged, North Korean-owned cargo ship;<sup>19</sup> and the seizure by the French frigate F/S *Provence* in the northern Indian Ocean of a dhow illegally transporting to Somalia “several hundred machine guns, anti-tank weapons and AK[-]47 assault rifles[.]”<sup>20</sup> Moreover, naval forces from Australia, France, and the United States seized more than 8,000 AK-47 assault rifles between 2015 and 2018 in multiple interdictions of vessels carrying illicit weapons to Yemen.<sup>21</sup>

Naval measures conducted across the globe addressing a diverse array of threats underline the utility of U.N.S.C. resolutions and the complexity of maritime enforcement. There are limits, however, to Security Council decisions.<sup>22</sup> Regarding high seas interdictions, there are well-established law-of-

<sup>17</sup> *Tarros v. United States*, 982 F. Supp. 2d 325, 327 (S.D.N.Y. 2013).

<sup>18</sup> See Terry McKnight & Michael Kirsh, *Preface to PIRATE ALLEY: COMMANDING TASK FORCE 151 OFF SOMALIA* xiii–xiv (2012); Terry McKnight & Michael Kirsh, *Prologue to PIRATE ALLEY: COMMANDING TASK FORCE 151 OFF SOMALIA* xiii–xx (2012); Jim Miklaszewski, *Foreword to Terry McKnight & Michael Kirsh, PIRATE ALLEY: COMMANDING TASK FORCE 151 OFF SOMALIA* ix–xii (2012) (detailing the challenges of combatting transnational security threats with a firsthand account of commanding a multilateral maritime task force).

<sup>19</sup> Doug Stanglin, *Philippines to Seize N. Korean Cargo Ship under U.N. Sanctions*, USA TODAY (Mar. 5, 2016, 5:38 PM), <http://www.usatoday.com/story/news/world/2016/03/05/philippines-korean-cargo-ship-un-sanctions/81359670/>; see also VESSEL FINDER, <https://www.vesselfinder.com/vessels/JIN-TENG-IMO-9163166-MMSI-667001458> (last visited Sept. 19, 2018).

<sup>20</sup> *French Warship Seizes Somalia-Bound Weapons*, NAVAL TODAY (Mar. 29, 2016), <http://navaltoday.com/2016/03/29/french-warship-seizes-somalia-bound-weapons> (“Provence boarded the vessel and determined that it was not registered in any country. The ship’s boarding team then searched it and discovered the weapons. As illicit weapons were deemed to be destined for Somalia, they were seized under the United Nations Security Council mandated arms embargo in accordance with UNSCR 2244(2015).”).

<sup>21</sup> U.S. 5th Fleet Pub. Affairs, *Jason Dunham Counts 2,521 AK-47s Seized*, U.S. NAVAL FORCES CENTRAL COMMAND (Sept. 6, 2018), <http://www.cusnc.navy.mil/Media/News/Display/Article/1621512/jason-dunham-counts-2521-ak-47s-seized/>. The article also noted that, “[b]ased on an analysis of all available information, including crew interviews, a review of onboard records and an examination of the arms aboard the vessel, the United States concluded that the arms from the four interdictions in 2015 and 2016 originated in Iran and were intended to be delivered to the Houthis in Yemen in contravention of [U.N.S.C.] Resolution 2216.” *Id.*

<sup>22</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Order, 1993 I.C.J. ¶ 100 (Sept. 1993) (separate opinion by Lauterpacht, J.) [hereinafter Lauterpacht Opinion]; see also Johann Ruben Leiae & Andreas Paulus, *Ch. XVI Miscellaneous Provisions, Article 103*, 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY [hereinafter U.N. CHARTER COMMENTARY] 2119–20 (Bruno Simma et al. eds., 3rd ed., 2012) (“it appears widely accepted in international doctrine that conflicts between Charter law . . . and *ius cogens* result in the nullity of the Charter law in question. As Judge Elihu Lauterpacht explained in his Separate Opinion in the *Genocide Case*: ‘the concept of *ius cogens* operates as a concept superior to both customary international law and treaty. . . . Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.’”). Judge Lauterpacht further stated, “[n]or should one overlook the significance of the provision in Article 24 (2) of the Charter that, in discharging its duties to maintain

the-sea<sup>23</sup> principles crucial to global commerce, such as freedom of navigation and the general concept of exclusive flag State jurisdiction, that must be considered,<sup>24</sup> and departed from where necessary in the pursuit of threats to the peace. Fundamental law-of-the-sea principles are reflected in the Convention on the Law of the Sea (LOS Convention), the seminal document for maritime issues.<sup>25</sup> Development spanned nine years of negotiations on issues such as the breadth of the territorial sea, innocent passage, transit passage rights, dispute resolution, fisheries, and the 200-nautical mile exclusive economic zone, among other issues. This comprehensive instrument—adopted in 1982 and entered into force in 1994—includes 320 articles and nine Annexes.<sup>26</sup>

Debate over almost every word between 1973 and 1982 resulted in a treaty that balanced the rights of coastal States with navigational freedoms. That said, contemporary threats such as the use of semi-submersible vessels to transport illicit cargo, Global Positioning Systems (GPS) interference, and Automatic Identification System (AIS) spoofing did not exist when the LOS Convention was drafted. Moreover, an effort to interpret more than 200 undefined terms in the LOS Convention is almost the same length as the treaty itself.<sup>27</sup> Regardless of limitations, the 1982 accord is recognized as the foundational source of law for high seas enforcement measures,<sup>28</sup> global mobility, and is the starting point for discussions in Turtle Bay regarding threats to the peace involving or impacting the maritime environment.

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international peace and security, the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” Lauterpacht Opinion, *supra* note 22, ¶ 101.

<sup>23</sup> See U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N.T.S. 31363 [hereinafter LOS Convention]. In discussions over the first U.N.S.C. resolution to address the contemporary threat posed by Somali piracy, for example, members signaled their disapproval over actual or potential deviations from recognized law-of-the-sea principles. S.C. Res. 1816 (June 2, 2008). Hoang Chi Trung (Viet Nam) remarked, “the resolution shall not be interpreted as allowing any action that is contrary to international law, the Charter and the 1982 United Nations Convention on the Law of the Sea to be taken within the maritime areas under the jurisdiction of a coastal State.” U.N. SCOR63d Sess., 5902d mtg., at 4, U.N. Doc S/PV.5902 (June 2, 2008). And Baso Sangqu of South Africa similarly asserted, “the resolutions of this Council must respect the United Nations Convention on the Law of the Sea.” *Id.*

<sup>24</sup> See S.C. Res. 1816, *supra* note 4, at ¶ 4 (“Affirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 . . . sets out the legal framework applicable to combatting piracy and armed robbery, as well as other ocean activities.”); see also S.C. Res. 1838, ¶ 14 (Oct. 7, 2008); S.C. Res. 1846, ¶ 15 (Dec. 2, 2008); S.C. Res. 1851 (Dec. 16, 2008).

<sup>25</sup> LOS Convention, *supra* note 23. The 1982 accord is not the only treaty focused on the maritime environment in peacetime though it represents the foundational instrument of such matters.

<sup>26</sup> See LOS Convention, *supra* note 23, Table of Contents.

<sup>27</sup> See DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION (George K. Walker ed., 2012).

<sup>28</sup> LOS Convention, *supra* note 23. This Article refers to measures taken by naval, coast guard, and constabulary forces to implement U.N.S.C. resolutions as *maritime enforcement vice maritime law enforcement* primarily because the former term more appropriately characterizes the action.

Security Council resolutions involving the oceans—similar to addressing other security challenges—generally focus on a specific threat, for example: repressing piracy, stopping nuclear proliferation, or preventing the deadly smuggling of migrants and trafficking in persons.<sup>29</sup> The response to each threat is geographically, operationally, and politically unique. Further, some of the resolutions with an impact on naval operations are incidental to the sanctions they impose, while others primarily focus upon the maritime environment, and almost all impose measures with extraterritorial application. Unfortunately, existing alongside this appropriately diverse attention to the spectrum of security threats is a stunning lack of attention to the unifying thread of *all* resolutions with a maritime focus, a blindness that, albeit unintentional, deprives diplomats of the collective lessons of their work. While the frequency of U.N.S.C. decisions following the end of the Cold War has generated considerable attention, little notice has been taken of the combined body of resolutions with relevance to the maritime environment.

This Article distills common themes—and examines the impact—of approximately ninety resolutions that have either directly or indirectly authorized the use of naval power to confront a transnational security threat. More broadly, this Article seeks to chronicle the expanded use of U.N.S.C. resolutions, evolving threats to the peace in the maritime environment, and the ongoing struggle to balance existing authorities with contemporary security challenges.

Following an introduction, Section I explores the United Nations concept, the U.N. Charter, the distinctive Security Council status, the law of the sea, and the earlier resolutions with a maritime nexus. While the U.N. Charter expressly recognizes the role of the sea<sup>30</sup> in addressing threats to the peace, the Security Council infrequently adopted resolutions with a maritime focus over its first six decades. Section II discusses increased Security Council attention on threats and illicit activity occurring on the ocean, including the Democratic People's Republic of Korea nuclear and ballistic missile program; the maritime transport of weapons of mass destruction; Somali piracy; migrant smuggling and trafficking in persons in the Mediterranean Sea; enforcement of embargos; and

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<sup>29</sup> See United Nations Documents on Piracy, OCEANS & LAW OF THE SEA UNITED NATIONS, [https://www.un.org/depts/los/piracy/piracy\\_documents.htm](https://www.un.org/depts/los/piracy/piracy_documents.htm) (last visited Sept. 20, 2018); UN Security Council Resolutions on North Korea, ARMS CONTROL ASSC., <https://www.armscontrol.org/factsheets/UN-Security-Council-Resolutions-on-North-Korea> (last visited Sept. 20, 2018); Security Council Extends Authorization to Intercept Vessels Suspected of Smuggling Migrants through Libya for Third One-Year Period, U.N., <https://www.un.org/press/en/2017/sc13015.doc.htm> (last visited Sept. 20, 2018).

<sup>30</sup> U.N. Charter arts. 41–42.

violence in the Gulf of Guinea. Section II further examines how these resolutions intersect with one another and impact boarding authorities on the high seas.<sup>31</sup> Section III discusses judicial opinions involving naval enforcement measures taken in accordance with a U.N.S.C. resolution, and this Article concludes with recommendations for the Security Council in addressing future maritime threats.

## I. THE UNITED NATIONS SECURITY COUNCIL

### A. *Background, Overview, Legal Considerations, and the Law of the Sea*

There are 193 Member States to the Charter of the United Nations—a “greater Magna Carta.”<sup>32</sup> The concept of “collective security” is not new, but the United Nations forged a distinctive path, remaining relevant, impactful, and at times imperfect for more than seven decades.<sup>33</sup>

The U.N. construct for global order has sparked uncertainty and criticism since its entry into force in 1945.<sup>34</sup> The second U.N. Secretary-General, Dag Hammarskjöld—who, called the greatest statesman of the twentieth century,<sup>35</sup> tragically died in office in 1961—explained the United Nations concept with a concise metaphor that remains relevant today: “Everything will be alright—you know when? When people, just people, stop thinking of the United Nations as a weird Picasso abstraction and see it as the drawing they made themselves.”<sup>36</sup>

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<sup>31</sup> The use of the term “high seas” in this Article refers to the maritime area seaward of a coastal State’s twelve nautical mile territorial sea. *See* LOS Convention, *supra* note 23; *see also* United States v. Beyle, 782 F.3d 159 (4th Cir. 2015) (affirming a conviction for piracy and murder, among other charges and holding that “the high seas includes areas of the sea that are outside the territorial seas of any nation.”).

<sup>32</sup> *See* U.N. MEMBER STATES (Dec. 1, 2017), <http://www.un.org/en/member-states/index.html>; James Traub, *The Best Intentions*, N.Y. TIMES (Dec. 10, 2006) (noting that John Foster Dulles believed the United Nations [could] be “a greater Magna Carta”).

<sup>33</sup> BOSCO, *supra* note 9, at 5 (“The doctrine of collective security, which has influenced generations of diplomats, insists that international security is indivisible: a breach of the peace anywhere threatens the peace everywhere. After all, it was a clash in the Balkans that produced the First World War and the invasion of Poland that sparked the second”). [

<sup>34</sup> *See* BOSCO, *supra* note 9, at 6 (“Too often, the conversation about the council ends with a rueful acknowledgement of its limitations. For all of its shortcomings, however, the council has been a qualified success as a loose concert of the most powerful states. It has created a space and process through which the world’s great powers struggle to contain conflicts and achieve compromise”).

<sup>35</sup> ROGER LIPSEY, HAMMARSKJÖLD: A LIFE 585 (Univ. Mich. Press 2015) (quoting U.S. President John F. Kennedy) (“I realize now that in comparison to him [Hammarskjöld], I am a small man. He was the greatest statesman of our century.”).

<sup>36</sup> *See* Dag Hammarskjöld: A Man of the Next Generation, UNESCO, (Dec. 13, 2011), [http://www.unesco.org/new/en/media-services/single-view/news/dag\\_hammarskjoeld\\_a\\_man\\_of\\_the\\_next\\_generation/](http://www.unesco.org/new/en/media-services/single-view/news/dag_hammarskjoeld_a_man_of_the_next_generation/); THOMAS M. NICHOLS, EVE OF DESTRUCTION: THE COMING AGE OF PREVENTIVE WAR 120 (2008) (noting that Henry Cabot Lodge remarked that the United Nations was “created to prevent you from going to hell. It [wasn’t] created to take you to heaven.”); *see also* U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy*,

Even the development of the site on which the U.N. resides, the Turtle Bay neighborhood of Manhattan,<sup>37</sup> parallels that of the institution: circuitous, uneven, and inspired.

A central element of the United Nations framework is the Security Council, a body vested with astonishing authority.<sup>38</sup> The fifteen-member<sup>39</sup> U.N.S.C. includes five permanent members (the P5), each of whom has veto power over resolutions.<sup>40</sup> The creation of the P5 underscores the importance drafters attached to securing the support of major powers. With “primary responsibility for the maintenance of international peace and security,”<sup>41</sup> the Security Council authorizes the use of force to ensure compliance under Chapter VII of the U.N. Charter.<sup>42</sup> Though the issue of whether an event constitutes a threat to the peace has sparked vigorous debate,<sup>43</sup> it is well settled that the decision resides with the

*Peacemaking and Peace-Keeping*, ¶ 2, U.N. Doc. A/47/277-S/24111 (Jan. 31, 1992) (“The United Nations is a gathering of sovereign States and what it can do depends on the common ground that they can create between them.”).

<sup>37</sup> See ROMAN, *supra* note 8, at 76–78 (demonstrating that the near 400-year journey to develop the area known as Turtle Bay overcame multiple setbacks to forge the community that now exists in this Manhattan enclave).

<sup>38</sup> U.N. Charter, *supra* note 30, art. 39, ¶ 1 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security.”). Article 41 provides, “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These 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.” *Id.* at art. 41, ¶ 1; see also Rossana Deplano, *The Use of International Law by the United Nations Security Council: An Empirical Framework for Analysis*, 29 EMORY INT’L L. REV. 2085, 2085–2112 (2015); Alfred H.A. Soons, *A ‘New’ Exception to the Freedom of the High Seas: The Enforcement of U.N. Sanctions*, REFLECTIONS ON PRINCIPLES AND PRACTICES OF INTERNATIONAL LAW (Terry D. Gill & Wybo P. Heere eds., Martinus Nijhoff, 2000).

<sup>39</sup> U.N. Charter, *supra* note 30, art. 23, ¶ 1 (“The Security Council shall consist of fifteen Members of the United Nations.”).

<sup>40</sup> See ANDREW BOYD, FIFTEEN MEN ON A POWER KEG: A HISTORY OF THE U.N. SECURITY COUNCIL 69 (Stein and Day 1971); see also Stephen C. Schlesinger, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 270 (2003) (listing the People’s Republic of China, France, Russia, the United Kingdom, and the United States as the permanent members of the Security Council); see generally, LORAINIE SIEVERS & SAM DAWES, THE PROCEDURE OF THE UN SECURITY COUNCIL, 295 (Oxford University Press 4th ed. 2014) (examining voting protocols, among other procedural issues).

<sup>41</sup> U.N. Charter, *supra* note 30, art. 24, ¶ 1.

<sup>42</sup> *Id.* art. 42, ¶ 1 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate . . . it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

<sup>43</sup> See U.N. SCOR, 72nd Sess., 8130th mtg. at 2–3, U.N. Doc. S/PV.8130 (Dec. 11, 2017). Evgeniy Zagaynov (Russian Federation), along with colleagues from the People’s Republic of China and Egypt, opposed the U.N.S.C. discussion of human rights. *Id.* “We believe they are not within the Council’s remit [and] the Security Council has never been part of the United Nations toolkit for protecting and promoting human rights.”

Security Council.<sup>44</sup> Because Member States “agree to accept and carry out the decisions of the Security Council. . . ,”<sup>45</sup> their decisions “impose binding obligations on all States.”<sup>46</sup>

While the vast majority of resolutions discussed in this Article have a maritime nexus, legal opinions involving the land- and air-based enforcement of U.N.S.C. measures are instructive. Courts in multiple venues have assessed Member State obligations, interpreted resolutions, and sought to reconcile potentially conflicting obligations. The International Court of Justice (ICJ) in 1971, for instance, authored an advisory opinion of Resolution 276 (1970) specifically regarding the continued presence of South Africa in Namibia, and generally whether Member State compliance was compulsory, an issue that has relevance to contemporary maritime enforcement. In accordance with Security Council direction, Peace Palace jurists opined that:

The continued presence of South Africa in Namibia being illegal, South Africa is *under obligation* to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory . . . [and that] States Members of the United Nations are

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*Id.* Nikki Haley (United States) disagreed, stating, “We continue to think there is a separation between peace and security and human rights, and there is not.” *Id.* at 2.

<sup>44</sup> U.N. Charter, *supra* note 30, arts. 24, 25, 48; *see* Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.) 1998 I.C.J. 9, at 75, 76, 79 (Feb. 27) (dissenting opinion of President Schwebel) (“The drafters of the Charter above all resolved to accord the Security Council alone extraordinary power . . . . The very heart of the Charter’s design for the maintenance of international peace . . . . It may be finally recalled that, at San Francisco, it was resolved ‘to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression.’”); *see also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 284 (Cambridge University Press 3d ed. 2007) (the decision regarding whether a threat warrants United Nations intervention “is completely within the discretion of the Security Council.”).

<sup>45</sup> U.N. Charter, *supra* note 30, art. 25, ¶ 1 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”) U.N. Charter, *supra* note 30, art. 48, ¶ 1 (“The action required to carry out the decisions of the Security Council for the maintenance of international peace and security *shall be taken* by the all the Member of the United Nations or by some of them, as the Security Council may determine”) (emphasis added); *see also* U.N. Charter, *supra* note 30, art. 24, ¶ 1.

<sup>46</sup> *See* Counter-Memorial of the United Kingdom, Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie ( Libya v. U.K.), 1999 I.C.J. Pleadings 1 (Mar. 1999); *see also* Vera Gowlland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT’L COMP. L.Q. 55, 85 (1994) (“Sanctions adopted by the Security Council under Article 41 may be assimilated to non-self-executing treaty obligations; as such they require domestic implementation. It is the duty of the members of the UN to adapt their municipal law to their international obligations, although not many have enacted special legislation to give effect to UN decisions.”).

*under obligation* to recognize the illegality of South Africa's presence in Namibia. . . .<sup>47</sup>

The scope of Security Council authority would again be raised at the Peace Palace. In the *Lockerbie* proceedings involving Libya and the United Kingdom—and separately, the United States—the ICJ examined, among other issues, whether the Security Council exceeded its remit in Resolution 748 (1992) by directing that “all States shall . . . deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya.”<sup>48</sup> A fundamental question was “whether the ICJ was precluded from dealing with a case of which the Security Council was already seized.”<sup>49</sup> The U.N.S.C. imposed sanctions and other enforcement measures on Libya as a result of the terrorist bombing of Pan Am Flight 103, which killed 270 people.<sup>50</sup>

Libya claimed Resolutions 748 and 883 (1993) were unlawful because they were inconsistent with provisions of a multinational aviation treaty and more broadly, violative of international law.<sup>51</sup> A preliminary issue focused on whether the ICJ had competence over the dispute in view of the Security Council's resolutions.<sup>52</sup> The United Kingdom emphasized:

[E]ven if the Montreal Convention did confer on Libya the rights it claims, they could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention.<sup>53</sup>

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<sup>47</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 133 (June 21) (emphasis added).

<sup>48</sup> S.C. Res. 748 (Mar. 31, 1992), ¶ 4. The Security Council included a humanitarian exception. *Id.*; see, e.g., S.C. Res. 731 (Jan. 21, 1992); see also Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objection, 1998 I.C.J. 9 (Feb. 1998) [hereinafter *Lockerbie Preliminary Objections* of 27 February 1998].

<sup>49</sup> Anne Peters, *Ch. V Functions and Powers, Article 24, 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* [hereinafter U.N. CHARTER COMMENTARY] 762–86, (Bruno Simma et al. eds., 3d ed., 2012).

<sup>50</sup> See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, 1995 I.C.J. 17 (June 1995). “On 21 December 1988 a Boeing 747 aircraft of Pan American Airways exploded in flight over the town of Lockerbie in southern Scotland. The aircraft crashed, killing all 259 passengers and crew and eleven residents of Lockerbie.” *Id.* ¶ 2.28.

<sup>51</sup> See *Lockerbie Preliminary Objections* of 27 February 1998, *supra* note 48, at 9, ¶ 14.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 18, ¶ 37.

The Court did not dismiss the complaint, basing their holding on unnecessarily narrow analysis that purportedly sought to avoid a substantive matter—the preeminent status of Security Council resolutions<sup>54</sup>—in a preliminary proceeding.<sup>55</sup>

By not declining jurisdiction in the provisional measures stage (against the objections of the United Kingdom and the United States which had argued the [Libyan] request should be qualified as inadmissible because of the risk of contradiction between the resolution and the provisional measures) the Court implicitly gave a negative answer and implicitly confirmed the Libyan claim of an absence of hierarchy between the two organs.<sup>56</sup>

The *Lockerbie* proceedings were subsequently discontinued with prejudice by agreement of the parties,<sup>57</sup> “so the merits of the two parallel cases were never reached.”<sup>58</sup> And while the “proceedings triggered a wealth of scholarship on the question of the relationship between the Security Council and the ICJ,”<sup>59</sup> ICJ President Stephen M. Schwebel provided a powerful legacy of this case, and in his dissent persuasively explained:

However understandable that complaint [of Libya] may be, it cannot furnish the Court with the legal authority to supervene the resolutions of the Security Council. The argument that it does is a purely political argument; the complaints that give rise to it should be addressed to and by the United Nations in its consideration of the reform of the Security Council. It is not an argument that can be heard in a court of law.<sup>60</sup>

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<sup>54</sup> Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151, 167 (July 20) (regarding the broad scope of U.N.S.C authority, Ch. VII “speak[s] of situations as well as disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement against a State.”).

<sup>55</sup> *Lockerbie* Preliminary Objections of 27 February 1998, *supra* note 48, at 24, ¶ 53. “In the view of the Court, this objection does much more than ‘touch[ing] upon subjects belonging to the merits of the case’ . . . it is ‘inextricably interwoven’ with the merits.” *Id.* at 23, ¶ 49 (citations omitted). Further, “[i]f the court were to rule on that objection, it would therefore inevitably be ruling on the merits.” *Id.*

<sup>56</sup> Peters, U.N. CHARTER COMMENTARY, *supra* note 49, at 770.

<sup>57</sup> Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Order, 2003 I.C.J. 17 (Sept. 10, 2003).

<sup>58</sup> Peters, U.N. CHARTER COMMENTARY, *supra* note 49, at 770.

<sup>59</sup> *Id.* at 770, n.41.

<sup>60</sup> *Libya v. U.K.*, *supra* note 44, at 81. “The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council’s powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter . . . .” Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Order, 1992 I.C.J. Rep. 3, at 65 (Apr. 14, 1992) (dissenting opinion by Weeramantry, J.).

Another fundamental issue is Security Council authorization to employ “all necessary measures” or “all necessary means” in resolutions adopted under Chapter VII.<sup>61</sup> Regarding the Security Council’s distinctive role to authorize force, then-U.N. Secretary-General Kofi Annan remarked, “While such action should only be taken when all peaceful means have failed, *the option of taking it is essential to the credibility of the United Nations as a guarantor of international security.*”<sup>62</sup>

While U.N.S.C. members have extensively discussed the use of force during debate on resolutions to combat Somali piracy,<sup>63</sup> among other threats, operative provisions generally do not include express references to the use of force or explicit standards.<sup>64</sup> Though the phrases *all necessary means* and *all necessary measures* in Security Council resolutions are commonly understood to include the use of force, the European Union (EU), for instance, clarified “all necessary measures” includes the “use of force.”<sup>65</sup> The issues of whether Security Council authorization is a necessary prerequisite to the use of force, and separately, of the impact of U.N. Charter articles 2(4)<sup>66</sup> and 51 are largely outside the scope of this Article. That said, the Court of Justice of the European Union in *Yusuf v. Council of the E.U.* acknowledged Security Council primacy in determining

<sup>61</sup> U.N. Charter, *supra* note 30, art. 42. The ability of the Security Council under U.N. Charter Chapter VII to maintain “international peace and security” and decide “what measures shall be taken” is based on Articles 24, 25, 39, 40–42, and 48. *Id.* arts. 24, 25, 39, 40–42, 48; *see also, e.g.*, S.C. Res. 2295, ¶ 17 (June 29, 2016) (“all necessary means”); Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EJIL 399, 412 (2009).

<sup>62</sup> U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, ¶¶ 42–43, U.N. Doc. A/47/277 (Jan. 31, 1992) (emphasis added) [hereinafter *Agenda for Peace*].

<sup>63</sup> U.N. SCOR, 63 Sess., 6036 mtg. at 4, UN. Doc. S/PV.6046 (Dec. 16, 2008). David Miliband (United Kingdom) asserted that “any use of force must be both necessary and proportionate [including . . . ] an assessment that the measures taken must be appropriate.”

<sup>64</sup> *See* S.C. Res., 1816 ¶ 7 (June 2, 2008). Operative paragraph 7 authorized “*all necessary means* to repress acts of piracy and armed robbery,” within the territorial waters of Somalia. *Id.* (emphasis added). While U.N. Charter arts. 39–42 uses the term “measures” regarding the Member State actions which may be authorized by the Security Council under Chapter VII, there is no legal difference between “measures” and “means.” *But see* S.C. Res. 221, ¶ 5 (Apr. 9, 1966) (addressing Southern Rhodesia authorized “*the use of force if necessary*”) (emphasis added).

<sup>65</sup> Council Joint Action 2008/851/CFSP, art. 2, 2008 O.J. (L 301) 33 (EU) (discussing a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast). “Under the conditions set by the relevant international law and by UNSC Resolutions 1814 (2008), 1816 (2008) and 1838 (2008), Atalanta shall, as far as available capabilities allow . . . take the *necessary measures, including the use of force*, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present. . . .” *Id.* (emphasis added); *see also* Treves, *supra* note 61, at 412.

<sup>66</sup> U.N. Charter, *supra* note 30, art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

threats to international peace and security is “subject only to the inherent right of individual or collective self-defence mentioned in Article 51 of the UN Charter.”<sup>67</sup>

Following Iraq’s invasion of Kuwait in 1990, for instance, British Prime Minister Margaret Thatcher maintained that the “right of self-defense—safeguarded in Article 51 of the Charter—was more than enough.”<sup>68</sup> French president Francois Mitterrand, however, sought a U.N.S.C. resolution. “Article 51 doesn’t mind public opinion. . . . Fifty-five million French people are not international lawyers.”<sup>69</sup> Following adoption of Resolution 2240 (2015) addressing human trafficking and migrant smuggling in the Mediterranean Sea, U.N.S.C. President Oyarzun Marchesi (Spain) remarked, “[a]ll EU member States contributing to the operation now have the authority to interdict them and their boats on the high seas.”<sup>70</sup> Separately, while piracy is a universal crime,<sup>71</sup> Security Council resolutions to counter the Somali threat were hailed as providing a “legal basis” to commence operational efforts, and a U.S. Government report released by President Barack Obama noted the “United States . . . used force pursuant to a U.N. Security Council resolution under Chapter VII . . . to combat piracy in and off the coast of Somalia. . . .”<sup>72</sup>

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<sup>67</sup> Case T-306/01, *Yusuf v. Council*, 2005 E.C.R. II-3533, ¶ 270; U.N. Charter, *supra* note 30, art. 51.

<sup>68</sup> BOSCO, *supra* note 9, at 160. Thatcher further remarked, “I did not like unnecessary resort to the UN, because it suggested that sovereign states lacked the moral authority to act on their own behalf. If it became accepted that force could only be used—even in self-defense—when the United Nations approved, neither Britain’s interests nor those of international justice and order would be served.” *Id.* at 156. *Contra* ALEXANDER PROELSS, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 58 (2017) (noting that “no state participating in anti-piracy operations off the coast of Somalia has ever relied upon its right of self-defense in terms of Article 51 U.N. Charter or under customary international law, and that right has not been mentioned once.”).

<sup>69</sup> BOSCO, *supra* note 9, at 160. Mitterrand’s caution would prove prescient. “Polls suggest that many Europeans view Security Council approval as a prerequisite to the legitimate use of force.” *Id.* at 254; *see also* U.N. Charter, *supra* note 30, art. 2(4) (“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political interdependence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); BENN STEIL, THE MARSHALL PLAN: DAWN OF THE COLD WAR 392 (2018) (commenting on the NATO engagements in Serbia in 1999, Russian President Mikhail Gorbachev asserted the military action was conducted “against a sovereign country without authorization by the UN Security Council, in violation of the U.N. Charter and international law.”).

<sup>70</sup> U.N. SCOR 70th Sess., 7531 mtg. at 2, U.N. Doc. S/PV.7531 (Oct. 9, 2015).

<sup>71</sup> *U.S. v. Hasan et al.*, 747 F. Supp. 2d 642 (E.D. Va. 2010) (“Piracy is well-established and specifically and clearly codified in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the United Nations Convention on the Law of the Sea of 1982. . . . [T]his definition is both reflective of customary international law and universally accepted by states.”).

<sup>72</sup> WHITE HOUSE, REP. ON THE LEGAL AND POL’Y FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MIL. FORCE AND RELATED NAT’L SECURITY OPERATIONS 8, 51 (Dec. 2016); *see also* European Union Naval Force Press Release, European Union Marks Eight Years of Counter-Piracy Commitment to Protect World Food Programme Vessels and Deter Pirate Attacks off Coast of Somalia, but Warns No Room for Complacency (Dec. 13, 2016) (noting the “UN Security Council Resolutions in place”) (emphasis added); James Kraska &

Thus, regardless of whether LOS Convention provisions, for example, supporting piracy repression,<sup>73</sup> “presupposes that force may be used to reach these objectives,”<sup>74</sup> there is diplomatic, legal, and operational value in a U.N.S.C. resolution. Security Council authorization to employ force in the maritime domain, however, has not always been welcomed. In discussions on Resolution 2240 (2015), for instance, addressing smuggling migrants and human trafficking, U.N.S.C. member Rafael Ramírez (Venezuela) remarked, “[T]he use of military force to deal with the humanitarian situation of migrants is a serious mistake.”<sup>75</sup>

The scope of Security Council authority has also been examined in the context of resolutions that might conflict with *other* treaties, agreements, or international obligations, discussed briefly above in the Libya proceeding at the ICJ.<sup>76</sup> Provisions that vary from the LOS Convention on navigational rights or flag State authorities, for example, could trigger a challenge regarding the preeminence of the U.N. Charter in relation to separate instruments. On this matter, Member States opted to elevate the U.N. Charter to a superior status in international law with article 103,<sup>77</sup> which provides: “In the event of a conflict between the obligations of the Members of the United Nations...and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>78</sup> This ostensibly well-settled issue has

Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 43 STAN J. INT’L L. 202, 284 (2009).

<sup>73</sup> LOS Convention, *supra* note 23, § 105 (“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize . . . a ship . . . taken by piracy and under the control of pirates, and arrest the persons and seize the property onboard.”).

<sup>74</sup> Treves, *supra* note 61, at 412–13; *see also* LOS Convention, *supra* note 23, §§ 105, 110.

<sup>75</sup> U.N. SCOR 70th Sess., *supra* note 70, at 4–5. Ramírez further stated “Venezuela . . . rejects the notion of making migrants, refugees and asylum seekers into a security issue, as has been done on this occasion. The resolution adopted authorizes the use of force, which, in our view, is a disproportionate action that sets a dangerous precedent for the treatment of the issue in the future.” *Id.* Cherif Mahamet Zene (Chad), remarked, “. . . we dare to hope that the reference in the text to Ch. VII of the Charter of the United Nations authorizing the use of armed force will not give rise to extensive interpretations, as has unfortunately been the case in the past.” *Id.* at 3. Dmitry Polyanskiy (Russia), remarked, “While we believe that climate change is a grave threat to us all, the [Security] Council has neither the specialized expertise nor the tools to put together viable solutions for effectively combating climate change.” U.N. SCOR 73d Sess., 8307 mtg. at 16, U.N. Doc. S/PV.8307 (July 11, 2018). Polyanskiy asserted the Security Council meeting “is yet another attempt to link the issue of preserving the environment to threats to international peace and security.” *Id.* at 15.

<sup>76</sup> *See* Vienna Convention on the Law of Treaties art. 29, 31–33, May 23, 1969, 1155 U.N.T.S. 331; VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 532–33 (Oliver Dorr & Kirsten Schmalenbach eds., 2012).

<sup>77</sup> U.N. CHARTER COMMENTARY, *supra* note 22, at 2112.

<sup>78</sup> U.N. Charter, *supra* note 30, art. 103.

nevertheless triggered enormous judicial, academic, and diplomatic attention.<sup>79</sup> The Covenant of the League of Nations included a comparable provision, though the 1919 instrument provided a more powerful declaration regarding its authoritative force in relation to other legal responsibilities.<sup>80</sup> The Covenant abrogated *all* inconsistent obligations whereas the U.N. Charter prevails *only* in the event of conflict with an international agreement.<sup>81</sup> Contemporary judicial attention has centered on reconciling obligations under the Charter with potentially contradictory legal commitments.

UN Charter article 103 is

[B]est regarded as an admonition to preserve the unity of international law under the umbrella of the Charter and to deal with its different actors and legal instruments by way of reciprocal respect instead of incurring the risk of harming the authority of both the UN and international law in general by engaging in an unhelpful confrontation.<sup>82</sup>

Judicial approaches such as a *presumption of compatibility* and *systemic integration* have been employed to avoid conflict with the U.N. Charter.<sup>83</sup>

An Ottawa federal court in *Abdelrazik v. Canada* examined a government decision<sup>84</sup> not to renew the passport of a citizen because the applicant was

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<sup>79</sup> U.N. CHARTER COMMENTARY, *supra* note 22, at 2111–12 (citing more than fifty articles that examined article 103).

<sup>80</sup> League of Nations Covenant art. 20; *see also* U.N. CHARTER COMMENTARY, *supra* note 22, at 2115–16.

<sup>81</sup> U.N. CHARTER COMMENTARY, *supra* note 22, at 2115–16 (“A formula according to which the U.N. Charter would have prevailed over any other international obligations to which they are subject was not adopted. Pursuant to this provision, the Charter would have superseded all other international obligations. The drafters were reluctant to explicitly include customary international law and other legal sources in the prevalence of the Charter.”). The Article 103 formulation “that obligations inconsistent with the Charter would not be automatically abrogated but that the Charter would only prevail in the case of a conflict, suggests that the authors of the Charter preferred suspension rather than outright nullification of conflicting obligations.” *Id.*

<sup>82</sup> *Id.* at 2114.

<sup>83</sup> *Id.* at 2118; *see also* Vienna Convention on the Law of Treaties, *supra* note 76, art. 29, 31–33; VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 76, at 541–43. While the elements of interpreting a treaty are not identical to interpreting a U.N.S.C resolution, “[t]he first element of the general rule of treaty interpretation requires giving ordinary meaning to the ‘terms of the treaty’ . . . . [And] the terms of a treaty have to be interpreted ‘in their context.’” *Id.* Along with examining the “object and purpose,” the Vienna Convention on the Law of Treaties “requires every treaty be interpreted in “good faith.”” *Id.* at 545–49. The LOS Convention provides that “States Parties shall fulfill in good faith the obligations assumed under this Convention . . . .” LOS Convention, *supra* note 23, art. 300.

<sup>84</sup> *Abdelrazik v. Canada* (Minister of Foreign Affairs) (2009), [2010] 1 F.C.R. 267, 268–69 (“The applicant travelled to Sudan in 2003 with a valid Canadian passport but his passport expired during his time there and was not renewed. This fact and other circumstances prevented his return home to Canada. In Sudan, he was arrested, detained and allegedly tortured by the Sudanese authorities.”).

identified by the U.N. 1267 Committee as an associate of Al-Qaida and, as such, subject to a global travel ban. This U.N. entity was tasked with implementing “Security Council Resolutions aimed at controlling international terrorism.”<sup>85</sup>

*Abdelrazik* considered the 1267 Committee regime, as applied to the appellant, a denial of basic legal remedies<sup>86</sup> and directed that the government issue an emergency passport but did not base its judgment on resolving a conflict between the U.N.S.C. resolution and other legal obligations.<sup>87</sup> Rather, after acknowledging that the Charter confers on the Security Council primary responsibility for the maintenance of international peace and security and that Canada is obligated to “implement and observe” its decisions, the judge opined that the sanction as interpreted by the court, “presents no impediment to Mr. Abdelrazik returning home to Canada.”<sup>88</sup> The principle of *systemic integration*<sup>89</sup> provides judges with a framework to support compatibility, but as applied in *Abdelrazik* it enables jurists to subjectively circumvent Security Council direction.

In contrast, the Court of Justice of the European Union in *Yusuf* held that Security Council resolutions

fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of [European] Community law. On the contrary, the Court is bound so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.<sup>90</sup>

In what was characterized as a *subordination approach* to balancing Security Council resolutions with national legal obligations, the court in *Yusuf* held that a review could be conducted only in extraordinary instances “with regard to *jus cogens*, understood as a body of higher rules of public international law binding

<sup>85</sup> *Id.* at 282, ¶ 23. The *Abdelrazik* court considered S.C. Res. 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), and 1822 (2008). *See id.*

<sup>86</sup> *Id.* at 293, ¶ 51.

<sup>87</sup> *Id.* at 321–22, ¶¶ 128–29. The court avoided a conflict, in part, by asserting “the 1267 Committee seems to have wisely recognized that if it is to permit a citizen to return home, it cannot require countries to prevent his transit through their territory.” *Id.* at 321, ¶ 128.

<sup>88</sup> *Id.* at 322, ¶ 129 (“This interpretation is consistent with the objective of the travel ban as stated by the 1267 Committee in its document ‘Travel Ban: Explanation of Terms.’”).

<sup>89</sup> *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3) (C) of the Vienna Convention*, 54 INT’L & COMP. L.Q. 279, 290 (2005); CARLOS IVAN FUENTAS, *NORMATIVE PLURALITY IN INTERNATIONAL LAW: A THEORY OF THE DETERMINATION OF APPLICABLE RULES* (2016), Ch. 4: Human Rights as a New Paradigm.

<sup>90</sup> *Yusuf*, *supra* note 67, ¶ 276.

on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.”<sup>91</sup> The court did not find “any *jus cogens* violation and firmly applied article 103 of the Charter as a conflict and superior rule.”<sup>92</sup> The *Yusuf* judgment provides a persuasive, lucid, and objective judicial approach for analyzing resolutions grounded on a presumption of Security Council supremacy and the overarching principle of *jus cogens*.

The European Court of Human Rights in *Al-Jedda v. United Kingdom* prominently focused on U.N. Charter article 103.<sup>93</sup> Even though *Al-Jedda* did not involve the maritime environment, determining the primacy of potentially conflicting international instruments has relevance to naval enforcement measures that involve law-of-the-sea principles and the LOS Convention.<sup>94</sup> *Al-Jedda* involved an applicant that was detained in Iraq for approximately three years for “reasons of security” who claimed that his detention breached the European Convention on Human Rights (ECHR).<sup>95</sup> The United Kingdom responded that the ECHR “did not apply to the applicant because his detention was authorized by United Nations Security Council Resolution 1546, and that, as a matter of international law, the effect of the Resolution was to displace [ECHR] Article 51.”<sup>96</sup>

An earlier review of this issue by the House of Lords in the United Kingdom “unanimously held that article 103 of the Charter of the United Nations gave primacy to resolutions of the Security Council, even in relation to human rights agreements.”<sup>97</sup> Lord Bingham stated that the reference in article 103

to any other international agreement leaves no room for any excepted category. . . . Thus, there is a clash between on the one hand a power or duty to detain exercisable on the express authority of the Security Council and, on the other, a fundamental human right which the UK has undertaken to secure to those (like the appellant) within its jurisdiction. How are these to be reconciled[?] . . . By ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorized by UNSCR 1546 and successive resolutions, but must ensure that the detainee’s rights under

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<sup>91</sup> Kushtrim Istrefi, *The Application of Article 103 of the United Nations Charter in the European Courts: The Quest for Regime Compatibility on Fundamental Rights*, 5 EUR. J. LEG. STUD. 81, 91–93 (2012–2013); see also *Yusuf*, *supra* note 67, ¶ 277.

<sup>92</sup> Istrefi, *supra* note 91, at 84.

<sup>93</sup> *Al-Jedda v. United Kingdom*, Eur. Ct. H.R. (App. No. 27021/08), July 7, 2011; see also Istrefi, *supra* note 92, at 84.

<sup>94</sup> *Al-Jedda*, *supra* note 93.

<sup>95</sup> *Id.* at 3–5, ¶¶ 11, 16.

<sup>96</sup> *Id.* at 5, ¶ 16.

<sup>97</sup> *Id.* at 9, ¶ 20.

[European Convention on Human Rights] Article 5 are not infringed to any greater extent than is inherent in such detention.<sup>98</sup>

The resolution did not expressly authorize detention but sanctioned the use of all necessary measures.<sup>99</sup> Clearly troubled by the length of detention but not seeking to declare a U.N.S.C. resolution invalid, the Strasbourg jurists reductively concluded there was not a conflict, finding instead, “there must be a presumption that the Security Council does not intend to impose any international obligation on Member States to breach fundamental principles of human rights.”<sup>100</sup>

The *Al-Jedda* opinion further held that the “court does not consider that the language used in [1546] indicates unambiguously that the Security Council intended to place the member States . . . under an obligation to use measure of indefinite internment without charge and without judicial guarantees, in breach of their undertakings under international human rights instruments, including the Convention.”<sup>101</sup> *Al-Jedda*’s reliance on perceived ambiguity in Resolution 1546’s text<sup>102</sup> essentially endorses a problematic—and misguided—requirement that the Security Council detail every military activity where human rights might potentially be implicated.

On the issue of whether a U.N.S.C. resolution has primacy in relation to other treaties, notably the ECHR, the partly dissenting opinion of Judge Poalelungi persuasively reasoned that “to conclude otherwise would seriously undermine the effectiveness of the United Nations’ role in securing world peace and would also run contrary to State practice.”<sup>103</sup> The U.N.S.C. resolution decided that the multinational force “shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq . . . .”<sup>104</sup> Judge Poalelungi further noted, “It is unrealistic to expect the Security Council to spell out in advance, in detail, every measure which a

<sup>98</sup> *Id.*

<sup>99</sup> S.C. Res. 1546, ¶ 10 (June 8, 2004) (“[T]he multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq . . . including by preventing and deterring terrorism . . .”).

<sup>100</sup> *Al-Jedda*, *supra* note 93, ¶ 102.

<sup>101</sup> *Id.* ¶ 105. *But see Yusuf*, *supra* note 67, ¶ 231 (“From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and for those that are also members of the [European] Community, their obligations under the EC Treaty.”).

<sup>102</sup> *Al-Jedda*, *supra* note 93, at 60, 63, ¶¶ 102, 109

<sup>103</sup> *Id.* at 67 (separate opinion Poalelungi, J.).

<sup>104</sup> S.C. Res. 1546, *supra* note 99.

military force might be required to use to contribute to peace and security under its mandate.”<sup>105</sup> Judge Poalelungi correctly concluded that the solution to legal challenges does not lie in the Security Council’s providing express operational details.<sup>106</sup> *Al-Jedda, Abdelrazik, and Yusuf* could have resonance in planning for, and judicial review of, naval enforcement measures. Application of the *Al-Jedda* analysis, for example, to maritime interdictions could result in operational uncertainty, degraded impact, or diminished support. Though damages have been sought following naval measures to enforce Security Council resolutions,<sup>107</sup> Judge Poalelungi is unaware of a court that expressly held a conflict exists between obligations under the LOS Convention and U.N.S.C. direction.<sup>108</sup>

Resolutions authorizing enforcement measures without the consent of the flag State—and extraterritorially—are tethered to Chapter VII, articles 39, 41, and 42 of the U.N. Charter.<sup>109</sup> Whether a conflict could even exist between the U.N. Charter and the LOS Convention will likely be a foundational judicial inquiry. The 1982 maritime instrument specifically references the U.N. Charter, and in article 110 acknowledges the controlling influence of *other instruments* on the right of visit.<sup>110</sup> Moreover, the LOS Convention’s Preamble states in part:

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<sup>105</sup> *Al-Jedda, supra* note 93, at 67 (separate opinion Poalelungi, J.) (“The point at which the majority part ways with the domestic courts is in finding that the language used in Resolution 1546 did not indicate sufficiently clearly that the Security Council authorized member States to use internment. I regret that I find the judgment of the House of Lords more persuasive on this issue . . . Internment is a frequently used measure in conflict situations, well established under international humanitarian law, and was, moreover, expressly referred to in the letter of Colin Powell annexed to Resolution 1546.”)

<sup>106</sup> *Id.*

<sup>107</sup> *See* Wu Tien Li-Shou v. United States, 777 F.3d 175, 179 (4th Cir. 2015), *aff’d*, 997 F. Supp. 2d 307, 308–09 (D. Md. 2014); Tarros, 982 F. Supp. 2d at 330.

<sup>108</sup> U.N. CHARTER COMMENTARY, *supra* note 22, at 2135. Another area of judicial inquiry with article 103 involves the legal consequences of a conflict. *Id.* “The wording of Art. 103 only provides that the Charter shall ‘prevail’ and leaves open the legal consequences of a conflict. It does not expressly state whether the ‘other international arrangement’ is ‘void, voidable, suspendable, or unenforceable’ and to what extent the other arrangement should be superseded or nullified.” *Id.*

<sup>109</sup> DINSTEN, *supra* note 44, at 282. (“Conceptually, Article 41 may be viewed as an outgrowth of the [1919] Covenant of the League of Nations. However, the framers of the [UN] Charter were not content with non-forcible sanctions. A far-reaching leap forward was made in Article 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace or security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations . . . [U]nder Article 42, the Council may exert force, either on a limited or on a comprehensive scale.”); *see also* Gowlland-Debbas, *supra* note 46, at 61 (quoting H. Kelsen, *The Law of the United Nations* (1950), 294) (“[T]he purpose of the enforcement action under Article 39 is not to maintain or restore the law, but to maintain or restore the peace, which is not necessarily identical with the law.”). “Security Council resolutions also require that States apply the measures extraterritorially.” Gowlland-Debbas, *supra* note 46, at 86.

<sup>110</sup> LOS Convention, *supra* note 23, at 25, 31, 37, 63, 70, 129, 138.

[b]elieving that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace [and] security...and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter. . . .<sup>111</sup>

The direct reference in the LOS Convention to the U.N. Charter creates an important connection between these two instruments.<sup>112</sup> Regarding their intersection for purposes of analysis under an article 103 challenge, the maritime accord is recognized as “subsidiary to the UN Charter.”<sup>113</sup> Agreement on the LOS Convention was reached because of extraordinary multilateral cooperation. Tommy Koh, President of the Third United Nations Conference on the Law of the Sea (1980–82), foresaw the LOS Convention’s strategic importance, stating it would “promote the maintenance of international peace and security because it [replaced] a plethora of conflicting claims by coastal States with universally agreed limits on the territorial sea, on the contiguous zone, on the exclusive economic zone, and on the continental shelf.”<sup>114</sup>

Multinational agreement, in the maritime environment, had never been reached on the numerous topics included in the LOS Convention.<sup>115</sup> Importantly, diplomats prohibited reservations unless expressly permitted by the LOS Convention, thus forcing States Parties to accept all of the terms within the document.<sup>116</sup> This “package deal”<sup>117</sup> highlights the imperative for navigational consistency across the oceans, a consideration that remains essential in U.N.S.C. development of resolutions that involve law-of-the-sea principles. Summaries of the negotiating history of the Third United Nations Conference on the Law of the Sea, including a contemporary analysis of its provisions, span more than

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<sup>111</sup> *Id.* at 25. The LOS Convention’s Preamble also provides that “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.” *Id.*

<sup>112</sup> PROELSS, *supra* note 68, at 15. Commentators agree that the LOS Convention’s preamble “establishes a kind of systemic link between the Convention and the Charter.” *Id.*

<sup>113</sup> *Id.* referencing *Shirley v. Scott, The LOS Convention as Constitutional Regime for the Oceans, STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* (Alex G. Oude Elferink, ed.) (2005), at 19–20 (citations omitted).

<sup>114</sup> Statement by TOMMY T. B. KOH, A CONSTITUTION FOR THE OCEANS, reprinted in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 1, 11 (Myron H. Nordquist, ed., Center for Oceans Law and Policy, 1985) (also referred to as the Virginia Commentary).

<sup>115</sup> *Id.* at 12.

<sup>116</sup> LOS Convention, *supra* note 23, art. 309 (“No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.”).

<sup>117</sup> C.A. Stavropoulos, *Procedural Problems of the Third Conference on the Law of the Sea*, reprinted in Nordquist, *supra* note 114, vol. 1, at lxx.

7,000 pages.<sup>118</sup> These strikingly detailed compilations further confirm an operating environment that benefits from consistency.

Judge Vladimir Golitsyn, then-President of the International Tribunal for the Law of the Sea (ITLOS), emphasized the 1982 maritime accord, however, “cannot and has never been intended to provide an answer to every issue arising in connection with the use of the oceans and their governance.”<sup>119</sup> As a peacetime instrument, the preamble to the LOS Convention recognized, “matters not regulated by this Convention continue to be governed by the rules and principles of general international law.”<sup>120</sup> And, because the LOS Convention, as characterized by Judge Golitsyn, “is a ‘living’ instrument . . . subject to an ongoing process of change and adaptation to new challenges.”<sup>121</sup>

The LOS Convention codified the concept of exclusive flag state jurisdiction,<sup>122</sup> which provides ships are generally subject only to the jurisdiction of the country of their registry, though this concept is not absolute.<sup>123</sup> Article 110 entitled “right of visit” in the 1982 maritime accord states that a warship is not justified in boarding a foreign flagged ship on the high seas “*except where acts of interference derive from powers conferred by treaty . . .*” “or when reasonable grounds exist to believe an act of piracy, slave trade, or unauthorized broadcasting has occurred or the vessel is without nationality.”<sup>124</sup> Because Security Council enforcement measures are authorized by the U.N. Charter, such action is based on *powers conferred by treaty*.<sup>125</sup>

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<sup>118</sup> Summaries of the LOS Convention are available at, for example, PROELSS, *supra* note 65.

<sup>119</sup> PROELSS, *supra* note 68, at V.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> See LOS Convention, *supra* note 23, art. 92 (Statute of Ships). See also, the Convention on the High Seas, 450 U.N.T.S. 11 (entered into force September 30, 1962), art. 6 (“ships shall sail under the flag of one State only and save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.”); U.N. GAOR, 11th Sess., 21st plen. mtg., U.N. Doc. A/CONF.13/L.58 (Apr. 27, 1958).

<sup>123</sup> See generally James Kraska, *Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search, and Seizure*, 16 OCEAN & COASTAL L.J., 1–45 (2010) (examining recognized exceptions to the general concept of flag State jurisdiction, which includes Security Council resolutions). The ability to board a foreign-flagged vessel on the high seas without flag State consent is separate from the issue of asserting jurisdiction over a foreign flagged vessel. *Id.*

<sup>124</sup> *Id.* (emphasis added); see also PROELSS, *supra* note 68, at 768 (quoting MYRES MCDUGAL/WILLIAM BURKE, THE PUBLIC ORDER OF THE OCEANS (1962)) (“The suggestion in the Convention that treaties provide the only instances in which one state may apply authority to the ships of another is seriously misleading.”); LOS Convention, *supra* note 23, art. 27(1)(c) (regarding the ability of a master to consent to a boarding).

<sup>125</sup> See U.N. Charter, *supra* note 30, arts. 24, 25, 39–42.

Rüdiger Wolfrum, then-President of ITLOS, affirmed the significance of a Security Council resolution—adopted under Chapter VII of the U.N. Charter—either explicitly or implicitly authorizing naval action in stating that “[f]lag [s]tates may not object to ships under their flags being investigated by warships of other States, as long as the measures taken are proportionate.”<sup>126</sup> More than simply representing a judicial or academic interpretation, U.N.S.C. members have similarly acknowledged that “the Charter of the United Nations, including in its Articles 25 and 103, grants resolutions of the Security Council priority over the obligations of States under [other] international agreements,”<sup>127</sup> and that compliance is compulsory.<sup>128</sup>

The primacy of a U.N.S.C. resolution in relation to the LOS Convention is generally settled. Regardless of a perceived conflict, courts will likely continue to be asked whether the resolution was sufficiently clear regarding its operational impact as well as whether its execution was negligent, disproportionate, or exceeded the scope of the Security Council’s direction. It is also probable that courts will continue to be asked to examine (or revisit rulings on) compliance with human rights obligations in maritime enforcement actions.<sup>129</sup>

Separate, though complementary, issues involve the collective impact of authority to conduct high seas boardings without flag state consent, to enter a coastal state’s territorial sea to take enforcement measures, or to sink a vessel engaged in illicit activity, among other actions. When the U.N.S.C. authorized entry into the Somali territorial sea to defeat piracy, for instance, the mandate expressly declared it “shall not be considered as establishing customary international law.”<sup>130</sup> Importantly, this authority was provided because of a request by Somalia as the coastal state. Discussions on Resolution 1816 (2008) included its impact on the law of the sea, with members asserting that the resolution:

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<sup>126</sup> International Tribunal for the Law of the Sea: Freedom of Navigation: New Challenges (statement of Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea (ITLOS)) (Jan. 8, 2008) [hereinafter Wolfrum].

<sup>127</sup> U.N. SCOR, 69th Sess., 7286th mtg. at 3, U.N. Doc. S/PV.7286 (Oct. 24, 2014).

<sup>128</sup> See U.N. Charter, *supra* note 30, arts. 24, 25, and 48.

<sup>129</sup> See Brian Wilson, *Human Rights and Maritime Law Enforcement*, 52 STAN. J. INT’L L. 243, 246, 252, 295 (2016).

<sup>130</sup> S.C. Res. 1816, *supra* note 4, ¶ 9; see also S.C. Res. 1846, *supra* note 25, ¶ 11; S.C. Res. 1851, *supra* note 25, ¶ 10 (among others).

- shall not be interpreted as allowing any action that is contrary to international law, the Charter, and the 1982 United Nations Convention on the Law of the Sea;<sup>131</sup>
- must respect the United Nations Convention on the Law of the Sea;<sup>132</sup> and
- should apply only to the territorial waters of Somalia and not be expanded to cover other regions.<sup>133</sup>

Within a year of the adoption of four resolutions addressing piracy in 2008, however, Judge Tullio Treves of the International Tribunal for the Law of the Sea wrote, “[o]f course, it cannot be ruled out that, if authorizations similar to those granted as regards the Somali situation were to be routinely granted in other situations, the possible formation of a customary rule could be at least discussed.”<sup>134</sup> That is exactly what has transpired for approximately a decade.

From 2008 to 2017, resolutions that implicated law-of-the-sea principles would be routinely granted—more than once per year—by the Security Council to address Somali piracy, as well as: other threats that ranged from the illicit transport of crude oil from Libya, instability in Libya, the movement of charcoal from Somalia to support Al-Shabaab, North Korea’s illicit nuclear program, and migrant smuggling or trafficking in persons.<sup>135</sup> The Security Council approved more resolutions, involving law of the sea principles in this decade than in the previous sixty-one years combined. In each mandate adopted from 2008 to 2017, the Security Council noted that the authority provided would not be considered as establishing customary international law as reflected in the LOS Convention.<sup>136</sup> The resolution addressing the illicit movement of Libyan crude oil, for example, states the authorization

*[S]hall not affect the rights or obligations or responsibilities of Member States under international law, including rights or obligations*

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<sup>131</sup> U.N. SCOR, 5902d mtg., *supra* note 23, at 4.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 5.

<sup>134</sup> Treves, *supra* note 61, at 405.

<sup>135</sup> See S.C. Res. 2383, ¶ 15, U.N. Doc. S/RES/2383 (Nov. 7, 2017); S.C. Res. 2375, ¶ 12, U.N. Doc. S/RES/2375 (Sept. 11, 2017); S.C. Res. 2292, at 1–2, U.N. Doc. S/RES/2292 (June 14, 2016); S.C. Res. 2182, at 2–3, U.N. Doc. S/RES/2182 (Oct. 24, 2014); S.C. Res. 2146, at 1, U.N. Doc. S/RES/2146 (Mar. 19, 2014) (Security Council members expressly noting, during debate on resolutions with a maritime impact, that such resolutions were either consistent with LOS Convention principles or were adopted solely to address the identified security challenge and would not have application to any other threat).

<sup>136</sup> See S.C. Res. 2383, *supra* note 135; S.C. Res. 2375, *supra* note 135; S.C. Res. 2292, *supra* note 135, ¶ 9; S.C. Res. 2182, *supra* note 135, ¶ 21; S.C. Res. 2146, *supra* note 135, ¶ 9.

under the United Nations Convention on the Law of the Sea, including the general principle of exclusive jurisdiction of a flag state over its vessels on the high seas, with respect to other vessels and in any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law.<sup>137</sup>

Debate regarding Resolution 2240 (2015), which dealt with migrant smuggling and trafficking in persons, prompted Security Council member Christian Barros (Chile) to declare that:

the resolution just adopted grants [s]tates or regional organizations, under exceptional circumstances and for a limited period of time, the right to intercept vessels on the high seas, along the coast of Libya, only in those cases in which there exist reasonable grounds to suspect trafficking in migrants or human trafficking and always within the legal framework of the norms established by United Nations Convention on the Law of the Sea.<sup>138</sup>

During discussions of Resolution 2292 (2016) regarding an arms embargo involving Libya, Security Council President Francois Delattre noted that it was “carefully set out” for “very specific contexts” and was guided by the principle of flag state consent.<sup>139</sup>

Notwithstanding repeated assertions by Security Council members that resolutions adopted will not disrupt general law-of-the-sea principles, there has been no holistic examination of the impact of approximately two-dozen such mandates over a decade (2008–2017). Turtle Bay debates concerning Somali security challenges, Al-Shabaab, unsecured arms, and the illicit maritime movement of charcoal are emblematic of the struggle to reconcile law-of-the-sea principles with providing timely sufficient measures to confront an emergent threat.

Resolution 2182 (2014) authorizes Member States to “inspect . . . on the high seas . . . vessels bound to or from Somalia which they have reasonable grounds to believe” are engaged in proscribed activity.<sup>140</sup> This mandate also called on state forces intending to board a foreign-flagged vessel on the high seas first to make “good faith efforts” to obtain the consent of the flag state, but it did make acquiescence compulsory.<sup>141</sup> Mahmoud Hmoud (Jordan) accurately recognized,

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<sup>137</sup> S.C. Res. 2146, *supra* note 135, ¶ 9 (emphasis added).

<sup>138</sup> U.N. SCOR7531st mtg., *supra* note 70, at 6–7.

<sup>139</sup> U.N. SCOR, 71st Sess., 7715th mtg. at 7, U.N. Doc. S/PV.7715 (June 14, 2016) (calling for the enforcement of the arms embargo as a response to the situation in Libya).

<sup>140</sup> S.C. Res. 2182, *supra* note 135, ¶ 15.

<sup>141</sup> *Id.* ¶ 16.

“[t]he [LOS] Convention specifically addresses the matter of the interdiction of vessels on the high seas, yet the provisions of [R]esolution 2182 (2014) go beyond those of the Convention.”<sup>142</sup> Despite the resolution’s operative provisions, Security Council member Wang Min (China) asserted, “[a]ny inspection of such vessels needs the prior consent of the flag [s]tates concerned.”<sup>143</sup> Varied understandings of imprecise terms inevitably will have a deleterious impact on operation, and a 2015 report to the Security Council acknowledged “it is understood that among the challenges [of implementation] is the question of how to interpret and apply certain provisions of the authorization . . . .”<sup>144</sup>

The text of a single resolution will not change customary international law.<sup>145</sup> Expansive authority granted in Security Council resolutions over a sustained period, coupled with continuous naval engagements by Member States for a decade (2008–2018) implementing those resolutions, among other actions, are influential considerations.<sup>146</sup> While potential deviations from the general concept of exclusive flag state jurisdiction following Security Council resolutions, for example, are not “sufficiently widespread [or] representative” to establish that customary international law in the maritime environment is evolving, their “consistent”<sup>147</sup> employment across a diverse array of threats has, albeit unintentionally, firmly made this issue a reasonable question.

Judicial review of naval measures taken under the aegis of a Security Council resolution underscores the clarity imperative, a key consideration that

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<sup>142</sup> U.N. SCOR, 7286th mtg., *supra* note 127, at 3. The resolution, Mahmoud Hmoud added, authorized “any State to inspect ships not only off the coast of Somalia but also on the high seas is subject to legal and political constraints and limitations . . . [and may] be open to abuse and threaten the maritime trade on the high seas in one of the world’s most sensitive regions . . . giving such authorization to any State raises many questions. Allowing any State to undertake such inspections on the basis of ‘reasonable grounds’ is no guarantee against abuse of that authorization or obstruction of maritime navigation.” *Id.*

<sup>143</sup> *Id.* at 4.

<sup>144</sup> U.N. Chair of the S.C. Committee pursuant to Resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, Letter dated Oct. 9, 2015 from the Chair of S.C. Committee to President of the Security Council, U.N. Doc. S/2015/801 (Oct. 19, 2015). The U.N.S.C. report noted the uncertainty extended into “dealing with individuals found on board interdicted vessels, and the documentation and disposal of weaponry, including in the context of European Union legal requirements.” *Id.*

<sup>145</sup> See U.N. GAOR, 68th Sess., Identification of Customary International Law mtg. at 4, U.N. Doc. A/CN.4/L.872 (May 30, 2016).

<sup>146</sup> *Id.* Hasan Kleib (Indonesia), who remarked, “the draft resolution [1816] shall be consistent with international law, particularly the United Nations Convention on the Law of the Sea (UNCLOS) of 1982, and shall not envisage any modification of the existing, carefully balanced international law of the sea, which is encapsulated in the constitution of the ocean, that is, UNCLOS, which was brought into being after decades of negotiation.” U.N. SCOR, 5902d mtg., *supra* note 23, at 2. Moreover, “A burden of responsibility rests upon us all to maintain the Convention’s integrity and sanctity.” *Id.*

<sup>147</sup> U.N. GAOR, 68th Sess., Identification of Customary International Law, *supra* note 145, at 3.

also exists in other international instruments.<sup>148</sup> European Union guidance on drafting legislation emphasizes the importance of text that is “clear, simple, concise, and unambiguous.”<sup>149</sup> Because U.N.S.C. mandates may authorize naval measures, language that is not clear, simple, concise, and unambiguous can have adverse operational implications well beyond the diplomatic deliberations of Turtle Bay. In part, the process of drafting a document with fifteen co-authors is tremendously unwieldy as just one member of the Security Council could have dozens of comments, and more than fifty edits from a single nation would not be unusual. Resolutions are not the only instruments with ambiguity—in fact, diplomats frequently choose ambiguous terms *intentionally*<sup>150</sup>—but unlike treaties, U.N.S.C. decisions don’t typically possess extensive and documented negotiating histories.<sup>151</sup> Statements made by Security Council members during debates indicate varied, and at times, conflicting, understandings of the authority being provided.<sup>152</sup>

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<sup>148</sup> See generally Susan Biniarz, *Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime*, Working Paper: Sea-Level Rise and Changing Times for Florida Local Governments, SABIN CTR. CLIMATE CHANGE, COLUM. L. SCH. (2016) (discussing why intentionally ambiguous text is used in multilateral instruments). “It may seem counterintuitive to the outside world that negotiators would ever deliberately draft a formulation that admits of two different interpretations. After all, they should in theory be aiming for clarity, particularly when preparing a legal instrument. However, clarity is not always an option, and the alternative to ambiguity may be failure to reach agreement. In some cases, negotiators may consider no agreement preferable to the risks inherent in perpetuating opposing interpretations. In those cases where ambiguity is preferable, though, its use is considered ‘constructive.’” *Id.* at 2.

<sup>149</sup> 1993 O.J. (C 166) 1, ¶ 1. “Unnecessary abbreviations, community jargon and excessively long sentences should be avoided.” *Id.* And, “the rights and obligations of those to whom the act is to apply should be clearly defined.” *Id.* at ¶ 4; see also Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N.L. 73, 81–82 (1998) (“There is no equivalent resolution of the Security Council. In an ideal world, each [S.C.] resolution would be internally consistent, consistent with earlier Council action on the same matter, and consistent with Council action on other matters. Each resolution would be concise, and avoid superfluous or repetitive material. Consistency and conciseness are elements of clarity, but the latter also requires, more generally, the precise and unambiguous use of language. It is, of course, only possible to use clear language when the policy is clear.”).

<sup>150</sup> See Dean Peter F. Krogh, *Foreword* to HUGH FOOT CARADON, U.N. SECURITY COUNCIL RESOLUTION 242: A CASE STUDY IN DIPLOMATIC AMBIGUITY (1981).

<sup>151</sup> See David M. Malone, *Conclusion*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21<sup>ST</sup> CENTURY 641 (David M. Malone ed., 2004). The Security Council’s “reliance on informal consultations rather than open meetings as the locus for decision making remains marked.” *Id.*

<sup>152</sup> See S.C. Res. 2182, *supra* note 135. One example of several, discussed in more detail *infra*, which advanced a formula to address high seas boardings of foreign flagged vessels that included a requirement to first make “good faith” efforts to obtain flag state consent. *Id.* ¶ 16. The resolution does not define “good faith,” though it requires a report be sent to the United Nations with “the results of the inspection” along with details of “efforts made to seek the consent of the vessel’s [f]lag [s]tate.” *Id.* ¶ 20. Based on the entirety of the resolution, it is apparent that flag state consent must be sought prior to a boarding, but it is most reasonable to conclude that approval is not a prerequisite to a boarding. *Id.* But see U.N. SCOR, 7286th mtg., *supra* note 127, at 4 (“Any inspection of such vessels needs the prior consent of the flag [s]tates concerned.”). Mahmoud Hmoud (Jordan)

The International Court of Justice in an Advisory Opinion on U.N.S.C. Resolution 276 (1970) remarked, “The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.”<sup>153</sup>

Regardless of interpretive challenges, resolutions are the primary decision-making lever of the Security Council and the principal focus of this Article. In addition, its President may issue a statement, and the General Assembly,<sup>154</sup> as well as the U.N.S.C., can direct a report, among other actions.<sup>155</sup> Panels of Experts, when commissioned by the Security Council, have effectively documented Member State implementation and assessed its impact. The three intersecting elements discussed *supra*—the ability to authorize sanctions, diplomatic action, or military operations; compulsory Member State support; and express recognition that obligations under the Charter, which include U.N.S.C. resolutions, have a preeminent status<sup>156</sup>—provide the Security Council

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conceded the resolution included ambiguous provisions which, “may . . . be open to abuse and threaten the maritime trade on the high seas in one of the world’s most sensitive regions.” *Id.* at 3.

<sup>153</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia, *supra* note 47, ¶ 114.

<sup>154</sup> BOSCO, *supra* note 9. When designing the permanent United Nations headquarters in the early 1950s, architect Wallace K. Harrison and his team sought clarification on the roles and primacy of the Security Council and General Assembly. *Id.* at 64–65. They were told, “In practical terms, the Security Council is undoubtedly the most important. . . . It meets constantly, with two or three hundred in attendance and full press coverage. However, while the Assembly meets only twice a year it is symbolically the most important organ.” *Id.*

<sup>155</sup> See Press Release, Security Council., Security Council Condemns Democratic People’s Republic of Korea’s Missile Launches; Unanimously Adopting Resolution 1695, U.N. Press Release SC/8778 (July 15, 2006) (statement of U.S. Ambassador to the United Nations, John Bolton who noted requirements under S.C. Resolution 1695 (2006) to “prevent missile and missile-related items, materials, goods and technology [from] being transferred to DPRK’s missile or WMD programmes,” sent “a much stronger signal than the weak and feckless response of the Council in 1998, which had only issued a press statement.”).

<sup>156</sup> U.N. CHARTER COMMENTARY, *supra* note 22, at 2120 (discussing secondary United Nations Charter law, which includes Security Council (SC) resolutions). “Secondary law as contained in SC resolutions is also to be interpreted in line with [U.N. Charter] Purposes and Principles. With regard to possible conflicts between secondary UN law and international agreements, not only shall every treaty be interpreted in harmony with secondary UN law under the presumption that a conflict was not intended, but the secondary UN law itself is also to be interpreted in this way.” A contrary interpretation would result in a situation where “States acting under SC authorization would always be in risk of violating other international legal agreements while carrying out action on behalf of the UN. Such legal uncertainty could reduce the willingness of member States to provide means for implementing resolutions, in particular by contributing troops, for fear of violating conflicting

with extraordinary capabilities and unequaled versatility to address threats in the maritime environment. The initial employment of these authorities at Turtle Bay, discussed below, has resonance today as the foundation for multilaterally confronting contemporary maritime threats.

### *B. The Earlier Years: The U.N.S.C. and the Maritime Environment*

The United Nations Charter, as well as the earliest Security Council decisions, recognized the role of the maritime environment in maintaining international peace and security.<sup>157</sup> A conflict over the right to transit through a strip of water strategically positioned between the Ionian and Adriatic Sea emerged in 1946 between the United Kingdom, which deployed warships to Greece to support its fight against communism, and Albania.<sup>158</sup> Tirana contended that the eastern side of the Corfu Channel, which constituted an essential portion of the Royal Navy's route to Greece, was within its territorial sea and that accordingly it could restrict movement in this area as well as place mines.<sup>159</sup> The British correctly asserted the channel met the elements of an international strait entitled to navigational freedoms.<sup>160</sup> The deadly crisis had multilateral implications, but an initial inquiry arose for the Security Council, a newly formed institution, involving whether addressing the Corfu Channel dispute was within its mandate.

The U.N.S.C. decided that Corfu Channel was appropriate for consideration and for the first time addressed a maritime threat.<sup>161</sup> Although actions at Turtle Bay consisted primarily of directing a report and recommending referral to the International Court of Justice,<sup>162</sup> the involvement of the Security Council in this

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obligations under other agreements. Thus, authorizations of the SC would be in danger of remaining unenforced." *Id.* at 2123.

<sup>157</sup> U.N. Charter art. 41, ¶ 1. In part, art. 42 provides, "[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by . . . sea . . . as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by . . . sea . . . of Members of the United Nations." *Id.* art. 42, ¶ 2.

<sup>158</sup> *Corfu Channel (U.K. v. Alb.)*, Merits, 1949 I.C.J. Rep. 4 at 12–15 (Apr. 9, 1949); *see also* Other Documents Submitted, *Corfu Channel (U.K. v. Alb.)* 1949 I.C.J. Documents 5 at 65 (regarding the U.K. mission in Greece) <http://www.icj-cij.org/files/case-related/1/10913.pdf>.

<sup>159</sup> *U.K. v. Alb.*, 1949 I.C.J. Rep., *supra* note 158, at 12.

<sup>160</sup> *Id.* at 10, 36.

<sup>161</sup> S.C. Res. 19, ¶¶ 1–2 (Feb. 27, 1947) (appointing a committee "to examine all the available evidence . . . and to make a report"); *see also* S.C. Res. 22 (Apr. 9, 1947) (recommending the dispute be referred to the International Court of Justice).

<sup>162</sup> The International Court of Justice resolved this conflict in *The Corfu Channel case. U.K. v. Alb.*, 1949 I.C.J. Rep., *supra* note 158, at 4.

case presaged its influential role in confronting security threats with a maritime nexus.

Member States turned to the U.N.S.C. following the invasion of the Republic of Korea. At the time, U.S. Senator Tom Connally (Texas) remarked that the institution's response against unlawful aggression represented "the clearest test case that the United Nations has ever faced."<sup>163</sup> The Security Council recommended that Member States "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."<sup>164</sup> Though the Security Council did not specifically reference naval measures in its resolutions on Korea, warships were appropriately and significantly involved.<sup>165</sup>

President Harry Truman stated that United States action was in support of, and in conformity with, United Nations Security Council resolutions,<sup>166</sup> including an order to U.S. military commanders to conduct a naval blockade.<sup>167</sup> The importance of the U.N. mandate to support national-level action was recognized by President Truman and Secretary of State Dean Acheson, who "assured" congressional leaders that U.S. "reliance must be...upon the commitments of the entire civilized world under the Charter of the United Nations."<sup>168</sup> More than 100 warships from ten countries deployed in support of

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<sup>163</sup> *Id.*; Notes Regarding Meeting with Congressional Leaders (June 27, 1950) (on file with Elsey Papers, Harry S. Truman Administration File), [https://www.trumanlibrary.org/whistlestop/study\\_collections/koreanwar/documents/index.php?documentdate=1950-06-27&documentid=ki-2-40&pagenumber=1](https://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-06-27&documentid=ki-2-40&pagenumber=1) (Sen. Connally added, "[i]f the United Nations is ever going to do anything, this is the time, and if the United Nations cannot bring the crisis in Korea to an end, then we might as well wash up the United Nations and forget it.").

<sup>164</sup> S.C. Res. 83, ¶ 6 (June 27, 1950); *see also* S.C. Res. 82, ¶ 8 (June 25, 1950) (calling upon Member States "to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities.").

<sup>165</sup> *See* Press Statement, White House (June 30, 1950) ("In keeping with the United Nations Security Council's request for support to the Republic of Korea in repelling the North Korean invaders and restoring peace in Korea, the President announced that he had . . . ordered a Naval blockade of the entire Korean coast.") (on file with Elsey Papers, Harry S. Truman Administration File), [https://www.trumanlibrary.org/whistlestop/study\\_collections/koreanwar/documents/index.php?documentdate=1950-06-30&documentid=ki-4-23&pagenumber=1](https://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-06-30&documentid=ki-4-23&pagenumber=1).

<sup>166</sup> *Id.*

<sup>167</sup> Army Department Message, Joint Chiefs of Staff to Douglas MacArthur (July 1, 1950) (on file with Elsey Papers, Harry S. Truman Administration File Korea). "In keeping with the United Nations Security Council's request for support to the Republic of Korea in repelling the Northern Korean invaders and restoring peace in Korea the [U.S.] President announced that he had ordered a Naval blockade of the entire Korean coast . . . . To implement this order [sic] you are authorized to use such means and forces as are available to you to deny unauthorized ingress and egress from the Korean coast." *Id.*

<sup>168</sup> *Id.*; Remarks by Dean Acheson Before the National Press Club (1950) (on file with Elsey Papers, Harry S. Truman Administration File Korea).

the United Nations mission.<sup>169</sup> U.S. Navy Admiral Arleigh Burke stated “[we] had absolute control of the sea . . . . It was never contested in Korea.”<sup>170</sup> Naval supremacy included the destruction of 3,288 ships,<sup>171</sup> the continuous, uninterrupted maritime transport of essential logistics, and the deployment of military personnel to the Korean Peninsula.<sup>172</sup>

Maritime engagements decisively advanced the broader Security Council goal of repressing North Korean aggression, underscoring the intersection of naval power and the maintenance of peace.<sup>173</sup> Notably, U.N.S.C. resolutions on Korea did not provide explicit operational details, an approach that would be replicated in subsequent mandates.

Another early security challenge with a maritime nexus involved the partial closure of the Suez Canal by Egypt and its targeting of vessels flying Israeli flags or calling on Israeli ports. The Security Council found that Egyptian interference with goods destined for Israel was “an abuse of the exercise of the right of visit, search and seizure.”<sup>174</sup> Resolution 95 (1951) called on Egypt to “terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself and the observance of the international conventions in force.”<sup>175</sup> This decision did

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<sup>169</sup> See KOREAN WAR PROJECT, <http://www.koreanwar.org/> (last visited Sept. 2, 2018) (listing deployed U.S. battleships, carriers, cruisers, destroyers, destroyer escorts, radar picket destroyers, fleet flagships, fleet oilers, frigates, dock landing ships, medium landing ships, rocket landing ships, tank landing ships, minesweepers, and Coast Guard cutters); see also CAGLE & MANSON, *supra* note 11, at 6 (noting that other countries providing “combatant vessels” to the UN mission as part of “United Nations Blockading and Escort Force,” included Australia, Canada, Colombia, France, Thailand, Great Britain, Netherlands, New Zealand, and the Republic of Korea.).

<sup>170</sup> STEPHEN HOWARTH, *TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY 1775–1991* 491 (1991).

<sup>171</sup> CAGLE & MANSON, *supra* note 11, at 532. Action taken by the “United Nations Blockading and Escort Force” destroyed 2,464 “enemy vessels” from June 25, 1950 to June 8, 1953 and an additional 824 “vessels and small craft” from June 25, 1950 to May 31, 1953. *Id.* at 294, 532.

<sup>172</sup> *Id.* at 491–92 (“Six of every seven person who went to Korea went by sea [and] fifty-four million tons of dry cargo, 22 million tons of petroleum products went to Korea by ship.”).

<sup>173</sup> *Id.* at 493–94. U.S. Navy Vice Admiral C. T. Joy described his impressions of the Korean War’s legacy, “[a]s for the future, it should be clear that there is nothing inevitable about the onward and upward progress of the United States or the United Nations. In fact, there is nothing inevitable about our survival. History is littered with the graves of civilizations that assumed all is well. All is *not* well. We will survive and progress to the extent that we are aware of the enemy who threatens us, and to the extent that we stay strong enough to meet him in the arena of his choosing. . . . But if Korea has taught us that in unity lies the strength that will preserve our freedom, then Korea has not been in vain . . . .” *Id.*

<sup>174</sup> S.C. Res. 95, ¶ 7 (Sept. 1, 1951).

<sup>175</sup> *Id.* at ¶ 10.

not authorize the use of force to compel compliance, and Egypt's failure to implement this resolution significantly limited its impact.<sup>176</sup>

Resolution 95 also stated that under the circumstances, interference with vessels—visit, search, and seizure—*could not* be “justified on the ground that it is necessary for self-defense.” This action provides the first explicit U.N.S.C. recognition, though stated in the negative, of the right of self-defense in the maritime environment. The conflict would span several decades. Aside from intractable political issues, Egyptian action sparked a new crisis by nationalizing the Suez Canal Company in 1956.<sup>177</sup> While transits had always provided financial benefits, today the Suez Canal is an economic powerhouse recording revenues in 2017 in excess of \$5.3 billion U.S. dollars.<sup>178</sup> With the belief that United Kingdom property was seized and its economic and security interests challenged, U.K. foreign minister Selwyn Lloyd acknowledged, “[t]he Canal is geographically part of Egypt. It is under Egyptian sovereignty. . . . [However,] that does not mean the absence of international rights.”<sup>179</sup> With military interventions by Israel, Britain, and France, a volatile situation was poised to explode. Following extensive interventions by Dag Hammarskjöld, the U.N.S.C. adopted Resolution 118 (1956), which endorsed six principles to guide Canal

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<sup>176</sup> See Leo Gross, *Passage Through the Strait of Tiran and in the Gulf of Aqaba*, 33 L. & CONTEMP. PROBS. 125, 134–35 (1968) (“Egypt’s non-compliance with this resolution is a matter of record. When Israel on January 28, 1954, complained to the Security Council about illegitimate interference with shipping passing to and from Israel through the Gulf of Aqaba, it was not contested by Egypt that the 1951 resolution applied to that waterway as well. Egypt on that occasion rejected again the 1951 resolution as well as the proposed resolution on the Israeli complaint, which in any event failed of adoption as a permanent member of the Council, the Soviet Union, voted against it.”), <http://scholarship.law.duke.edu/lcp/vol33/iss1/9>. Further, a U.S. representative to the United Nations called the navigational provisions of S.C. Resolution 95 (1951) a “fundamental principle.” *Id.* at 135.

<sup>177</sup> A key issue with the Suez Canal crisis involved its nationalization. United Kingdom foreign minister Selwyn Lloyd conceded that the Egyptian actions were “legal and not a sufficient argument for the use of force. . . . [Moreover, Colonel Nasser’s actions] amounted to more than a decision to buy out shareholders. Our case must be presented on wider international grounds.” RADHIKA WITHANA, *POWER, POLITICS, LAW: INTERNATIONAL LAW AND STATE BEHAVIOR DURING INTERNATIONAL CRISES* 141 (2008). The legal adviser to the United Kingdom Foreign Office, Sir Gerard Fitzmaurice, agreed on the issue of the use of force: “[w]e are already on an extremely bad wicket legally as regards using force in connection with the Suez Canal. Indeed, whatever illegalities the Egyptians may have committed in nationalizing the Suez Canal Company, these do not in any way . . . justify forcible action on our part.” *Id.* at 142.

<sup>178</sup> *Mamish: Suez Canal revenues hit dlrs 5.3 bln in 2017*, STATE INFORMATION SERVICE: YOUR GATEWAY TO EGYPT (Jan. 5, 2018, 1:42 PM) (citing to information provided by Mohab Mamish, Chairman of the Suez Canal Authority and the Suez Canal Economic Zone), <http://www.sis.gov.eg/Story/123091?lang=en-us>.

<sup>179</sup> BOSCO, *supra* note 9, at 73 (quoting Selwyn Lloyd).

operations.<sup>180</sup> The compromise at Turtle Bay avoided an escalation, though the situation remained uneasy for years.<sup>181</sup>

The significance of the Security Council in the maritime environment was again demonstrated in the Cuban missile crisis of 1961. Dozens of Soviet-flagged ships approached Cuba apparently carrying ballistic missiles for deployment there; American warships ringed the island, forming a blockade line.<sup>182</sup> Debate on this issue yielded some of the most spirited exchanges in the history of the Security Council, but members did not adopt a resolution. Secretary of State David Dean Rusk remarked in 1961, “[a]lthough the Cuban missile crisis was directly resolved between Washington and Moscow, it was very important that the Security Council [took] it up. Prolonged discussion lessened the chance that one side would lash out in a spasm and do something foolish. The [U.N.] earned its pay for a long time to come just by being there for the missile crisis.”<sup>183</sup>

Resolution 221 (1966) represented the first Security Council enforcement measure to reference expressly the maritime environment. The U.N.S.C. addressed the deteriorating security situation in Rhodesia, which included “the unilateral declaration of independence made by a racist minority,”<sup>184</sup> by calling on states to divert their vessels reasonably believed to be carrying oil destined for Southern Rhodesia and on the United Kingdom to conduct maritime interdictions.<sup>185</sup> Resolution 221 specifically called on the United Kingdom to “prevent . . . the arrival at Beira of vessels reasonably believed to be carrying oil

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<sup>180</sup> S.C. Res. 118, ¶ 2 (Oct. 13, 1956) (providing that “any settlement of the Suez question should meet the following requirements: (1) There should be free and open transit through the Canal without discrimination. . . . (2) The sovereignty of Egypt should be respected; (3) The operation of the Canal should be insulated from the politics of any country; (4) The manner of fixing tolls and charges should be decided by agreement between Egypt and the users; (5) A fair proportion of the dues should be allotted to development; [and] (6) In case of disputes, unresolved affairs between the Suez Canal Company and the Egyptian Government should be settled by arbitration. . . .”).

<sup>181</sup> LIPSEY, *supra* note 35, at 293. Some diplomats at the Security Council were “adamant . . . that only war could solve the problem.” *Id.*

<sup>182</sup> BOSCO, *supra* note 9, at 94.

<sup>183</sup> *Id.* at 97.

<sup>184</sup> S.C. Res. 216, ¶ 1 (Nov. 12, 1965).

<sup>185</sup> S.C. Res. 221, ¶ 4 (Apr. 9, 1966). The Resolution also called upon the “Government of the United Kingdom of Great Britain and Northern Ireland 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, and empowers the United Kingdom to arrest and detain the tanker known as *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there.” *Id.*

destined for Southern Rhodesia . . . .”<sup>186</sup> Its adoption sparked divergent views on the fundamental role of the Security Council, with comments ranging from “unique” to “unlawful.”<sup>187</sup>

The resolution supported an interdiction by the Royal Navy *Rothesay*-class frigate HMS *Plymouth* of the tanker *Manuela* destined for the Port of Beira.<sup>188</sup> The master of *Manuela*, carrying 16,000 tons of oil, upon receiving the boarding officer and an “armed escort of two seamen . . . refused [an order] . . . not to proceed to Beira.”<sup>189</sup> The master diverted from the Port of Beira only after the United Kingdom boarding team was augmented by twelve armed seamen, who remained on the vessel until the next day to ensure compliance.<sup>190</sup> A use-of-force policy was also developed nationally for the Royal Navy mission.<sup>191</sup>

Resolution 221 contained unusual elements, notably its reference solely to United Kingdom enforcement measures on the high seas,<sup>192</sup> and it omitted the authority relied upon, yet the British naval interdiction was rightly branded a landmark in international law.<sup>193</sup> Resolution 221 also highlighted that U.N.S.C. *authorization* to use force is not tantamount to its *employment*. Regarding impact, the “naval blockade to enforce the Rhodesia sanctions regime . . . rapidly failed once it became clear that force would not be used to back it up.”<sup>194</sup> It is not surprising that one of the Security Council’s earlier resolutions that authorized the use of force involved the maritime environment: the oceans are pivotal to security, resources, and global trade, and also, unfortunately, a venue for conflict and illicit activity.

<sup>186</sup> S.C. Res. 221, *supra* note 3, ¶ 4. This paragraph further authorized the United Kingdom to “arrest and detain the tanker known as *Joanna V* upon her departure from Beira in the event her oil cargo is discharged there.” *Id.*

<sup>187</sup> J. E. S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT’L L. 103, 118 (1965–66).

<sup>188</sup> Richard Mobley, *The Beira Patrol, Britain’s Broken Blockade against Rhodesia*, 55 NAVAL WAR C. REV. 63, 71 (2002). Though S.C. Resolution 221, ¶ 4 expressly identified the *Joanna V*, the Resolution authorized the United Kingdom to prevent “by the use of force if necessary,” other vessels transporting oil to Southern Rhodesia. *Id.* at 72 (quoting S.C. Res. 221, ¶ 4).

<sup>189</sup> H. L. Cryer, *Legal Aspects of the “Joanna V” and “Manuela” Incidents*, 1966 AUSTL. Y.B. INT’L L. 85, 85, 91 (April 1966).

<sup>190</sup> *Id.* at 91.

<sup>191</sup> *Id.* at 97 (“The amount of force used by the Royal Navy appears to have been carefully controlled to ensure that proportionate means only were employed to ensure compliance with the resolution . . . .”).

<sup>192</sup> S.C. Res. 221, *supra* note 3, ¶ 4 (calling upon “the Portuguese Government not to receive at Beira oil destined for Southern Rhodesia . . . .”).

<sup>193</sup> CRYER, *supra* note 189, at 95. “[F]or the first time, the Security Council authorized a single member of the United Nations to act in its own right with United Nations authority.” *Id.*

<sup>194</sup> David M. Malone, *Introduction*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21<sup>ST</sup> CENTURY 10 (David M. Malone ed., 2004).

Security Council Resolution 242 (1967) affirmed the necessity of protecting freedom of navigation through such international waterways as the Suez Canal, the Strait of Tiran, and the Gulf of Aqaba.<sup>195</sup> The Italian representative to the United Nations highlighted the issue was relevant to “the whole world and particularly those countries which, like Italy, are separated from the oceans by canals and straits.”<sup>196</sup> Sir Paul Hasluck, Australian Minister for External Affairs, agreed that “the question of freedom of passage [is too important] to be left out of any permanent and lasting settlement.”<sup>197</sup>

Navigational freedoms represent a predominant focus area of Resolution 242, which sought to resolve a conflict between Israel and neighboring Arab States.<sup>198</sup> Called both “remarkably simple” and “perhaps the most famous resolution in the council’s history, [Resolution 242] has been the starting point for discussions on Middle East peace.”<sup>199</sup>

Resolutions 242 and 221 provided a platform for extensive law-of-the-sea discussions in Turtle Bay and closely followed the entry into force of the 1958 Geneva maritime conventions.<sup>200</sup> Diplomatic sentiments regarding the importance of freedom of navigation would remain a key theme in Security Council discussions over the next fifty years.

The hijacking of the Italian-flagged *Achille Lauro* and the murder of an American Leon Klinghoffer by members of a terrorist organization posing as passengers on the cruise ship exposed gaps in international law, piracy, and

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<sup>195</sup> S.C. Res. 242, ¶ 5 (Nov. 22, 1967); see also Gross, *supra* note 176, at 145.

<sup>196</sup> Gross, *supra* note 176, at 144 (“In addition, there is one most urgent and most dangerous issue of all: the question of the right of passage for shipping of all nationalities through the Strait of Tiran. The maintenance of the provisions of the Geneva Convention on the Territorial Sea dealing with international navigation between the high seas and territorial waters is of the gravest concern to my Government, as it must be to all engaged in international trade.”).

<sup>197</sup> U.N. GAOR, 5th Sess., 1542d plen. mtg. at 9, U.N. Doc. A/PV.1542 (June 29, 1967).

<sup>198</sup> Gross, *supra* note 176, at 137. On May 23, 1967, U.S. President Lyndon B. Johnson remarked, “[t]he purported closing of the Gulf of Aqaba to Israeli shipping has brought a new and very grave dimension to the crisis. The United States considers the Gulf to be an international waterway and feels that a blockade of Israeli shipping is illegal and potentially disastrous to the cause of peace. The right of free, innocent passage of the international waterway is a vital interest of the entire international community.” *Id.*

<sup>199</sup> BOSCO, *supra* note 9, at 110. Henry Kissinger remarked “what [Resolution 242] lacked in precision, it made up for in flexibility. It was well suited for beginning a negotiation in which reconnecting the different interpretations of the parties would be one of the objectives.” *Id.*

<sup>200</sup> The four conventions agreed to at Geneva on April 29, 1958 include: The Convention on the Territorial Sea and Contiguous Zone (entered into force September 22, 1964); the Convention on the High Seas, 450 U.N.T.S. 11 (entered into force September 30, 1962); the Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 U.N.T.S. 285 (entered into force March 20, 1966); and the Convention on the Continental Shelf, 499 U.N.T.S. 311 (entered into force June 10, 1964). U.N. GAOR, 11th Sess., 21st plen. mtg., U.N. Doc. A/CONF.13/L.58 (Apr. 27, 1958).

maritime law enforcement. A U.N.S.C. Presidential Statement deplored the attack and endorsed the U.N. “Secretary-General’s statement of 8 October 1985, which condemns all acts of terrorism.”<sup>201</sup> The Security Council subsequently adopted Resolution 579 (1985), urging the development of “effective measures . . . to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism.”<sup>202</sup> Over the course of approximately three years, Member States at the International Maritime Organization (IMO)—the specialized agency of the United Nations responsible for the safety and security of shipping—drafted and completed an anti-terrorism criminal law treaty that addressed several legal gaps in maritime response authorities.<sup>203</sup> While the Security Council’s response to the *Achille Lauro* attack essentially amounted to a condemnation and exhortation for others to take action, this limited approach was appropriate under the circumstances, as a criminal prosecution in Italy would soon take place along with diplomatic action at the IMO. The U.N.S.C. would adopt a more forceful approach to enhanced authorities, the pursuit of illicit financing, and collaboration in the context of terrorist activity following the attacks of September 11, 2001.<sup>204</sup>

Strikes on vessels during the Iran-Iraq War began in 1984 and subsequently rose to a scale such that on of its engagements represents the “world’s largest naval battle since World War II.”<sup>205</sup> Approximately 441 ships were hit, and of those ships, 239, or fifty-eight percent, were tankers.<sup>206</sup> Often referred to as the Tanker Wars, the conflict in the Persian Gulf spanned about four years (1984–1988); approximately 400 people were killed, 115 ships were sunk or effectively destroyed, and losses were estimated at more than \$2.5 billion.<sup>207</sup> The conflict

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<sup>201</sup> S.C. Note by the President of the Security Council S/17554 (Oct. 9, 1985).

<sup>202</sup> S.C. Res. 579, ¶ 5 (Dec. 18, 1985).

<sup>203</sup> International Maritime Organization, Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 1992. Member State efforts at the International Maritime Organization (IMO) culminated in the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 1, 1992, 1678 U.N.T.S. 221, 27 I.L.M. 668 [hereinafter SUA Convention], which entered into force on March 1, 1992, and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 1, 1992, 1678 U.N.T.S. 304 [hereinafter SUA Protocols 1988], which also entered into force on March 1, 1992.

<sup>204</sup> See S.C. Res. 1373, ¶ 8 (Sept. 28, 2001). The Security Council also decided that States shall “take the necessary steps to prevent the commission of terrorist acts . . . deny safe haven [and] prevent those who finance, plan, facilitate or commit terrorist acts from using their . . . territories.” *Id.* ¶ 10.

<sup>205</sup> HAROLD LEE WISE, *INSIDE THE DANGER ZONE: THE U.S. MILITARY IN THE PERSIAN GULF, 1987–1988* xiii (2007) (referencing Operation Praying Mantis, a naval battle that occurred in April 1988).

<sup>206</sup> LEE ALLEN ZATARAIN, *AMERICA’S FIRST CLASH WITH IRAN, THE TANKER WAR 1987–1988* 386 (2008). See generally WISE, *supra* note 205, at xiii (concerning the conflict included protecting tankers operating in the Persian Gulf).

<sup>207</sup> ZATARAIN, *supra* note 206, at 386; WISE, *supra* note 205, at xiii.

resonated globally, as the disruption of fuel from this key venue affected virtually every State and its respective economies.

The Security Council addressed the Tanker Wars first with Resolution 552 (1984).<sup>208</sup> “Convinced that these attacks constitute a threat to the safety and stability of the area and have serious implications for international peace and security,” the Security Council reaffirmed the right of free navigation in international waters and sea lanes for shipping.<sup>209</sup> The U.N.S.C. demanded that such attacks cease “forthwith” and declared that in the “event of non-compliance [it would] . . . consider effective measures that are commensurate with the gravity of the situation in order to ensure the freedom of navigation . . . .”<sup>210</sup>

Initial U.N.S.C. mandates addressing the Iran-Iraq War, which did little to alter the conflict favorably, were criticized. For instance, “[i]n 1985 the Security Council looked as if it would be forever ineffective as a mechanism for diplomacy. Efforts to end or limit the fighting had failed—the Security Council gave the war only sporadic attention, Iran and Iraq rejected all offers of mediation, and both insisted on unreconcilable terms . . . .”<sup>211</sup> Change would shortly come. Resolution 598 (1987) again deplored “attacks on neutral shipping” and demanded an immediate cease-fire and halt to all military action.<sup>212</sup> But this time, unexpectedly, a new period in diplomacy emerged in Turtle Bay: “According to [U.S.] Secretary of State [George] Shultz, never before had the Soviet Union and the United States cooperated at the United Nations on a security issue of such importance and complexity.”<sup>213</sup>

The Iran-Iraq conflict ended approximately one year after the adoption of Resolution 598.<sup>214</sup> For an institution frequently charged with inadequately

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<sup>208</sup> See S.C. Res. 552, pmb. (June. 1, 1984); see also S.C. Res. 598, ¶¶ 1–7 (July 20, 1987). Importantly, the “United Nations Security Council acknowledged the rights of neutral nations to engage in shipping when the Security Council has not denominated an aggressor . . . and [secondly,] the right of visit and search was reaffirmed.” Fielding, *supra* note 10, at 1228.

<sup>209</sup> S.C. Res. 552, *supra* note 208, pmb., ¶ 2.

<sup>210</sup> *Id.* ¶¶ 5–6.

<sup>211</sup> CAMERON R. HUME, THE UNITED NATIONS, IRAN, AND IRAQ: HOW PEACEMAKING CHANGED 4 (1994).

<sup>212</sup> S.C. Res. 598, *supra* note 208, pmb., ¶ 1.

<sup>213</sup> HUME, *supra* note 211, at 71–72 (“The entry into the gulf of Western naval forces, particularly the U.S. Navy, to protect shipping changed the fighting to Iran’s disadvantage . . . . The Soviet Union proposed forming a naval peacekeeping force; the United States, backed by Britain and France, argued for an arms embargo against Iran. Whether or not they agreed to adopt such measures, the permanent members were consolidating the practice of collaborating among themselves and preparing for any subsequent crisis in which they might decide to use the Security Council’s enforcement powers.”).

<sup>214</sup> Resolution 598 was adopted on July 20, 1987. S.C. Res. 598, *supra* note 208, pmb. The Iran-Iraq War ended on August 20, 1988. SPENCER C. TUCKER, A GLOBAL CHRONOLOGY OF CONFLICT: FROM THE ANCIENT WORLD TO THE MODERN MIDDLE EAST 2584 (2009). “By 1987, both Iran and Iraq were exhausted” and had lost

addressing threats,<sup>215</sup> such collaboration amongst the permanent members portended a transformed environment. “In 1987 the council’s permanent members cooperated to seek an end to the Iran-Iraq War. By 1990, such cooperation was an established practice, making possible for the first time the use of the [U.N.] Charter’s progression of steps for collective security.”<sup>216</sup>

The first test of this new collaboration was Iraq’s illegal aggression in 1990. The U.N.S.C. goal was the eviction of Baghdad from Kuwait and achieving it would involve a significant maritime focus. Resolution 665 (1990) called, “upon those Member States . . . 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 shipping laid down in resolution 661 (1990).”<sup>217</sup>

Resulting naval operations were “successful in that virtually all commercial maritime traffic to Iraq and occupied Kuwait ceased.”<sup>218</sup> The sanctions “aided the success of the [U.N.] disarmament mission; helped convince the [Iraqi] regime to accept [a] redrawn border with Kuwait; [and] contributed to military containment of the Baghdad government.”<sup>219</sup> Resolution 665 became a model for Security Council enforcement measures on the water: “The objectives [i.e.,

interest in pursuing the war. BOSCO, *supra* note 9, at 153 (“It is possible that Tehran and Baghdad would have reached an understanding even without a push from the [Security Council] . . . . There were few structural reasons for the conflict to continue, but until the council initiative, there was no ready mechanism for ending it. A diplomatic push by one of the great powers alone would have aroused the suspicion of the others, and the council’s involvement allowed the diplomacy to appear as a joint initiative.” U.S. diplomat Cameron Howe remarked that the Security “[C]ouncil managed to capture latent cooperation in the international system.”).

<sup>215</sup> See *Agenda for Peace*, *supra* note 62, at ¶ 14 (“Since the creation of the United Nations in 1945, over 100 major conflicts around the world have left some 20 million dead. The United Nations was rendered powerless to deal with many of these crises because of the vetoes—279 of them—cast in the Security Council, which were a vivid expression of the division of that period.”).

<sup>216</sup> HUME, *supra* note 211, at 3; see also *Agenda for Peace*, *supra* note 62, at ¶ 3 (U.N. Secretary-General Kofi Annan remarked, “an opportunity has been regained to achieve the great objectives of the Charter[;] . . . this opportunity must not be squandered.”).

<sup>217</sup> S.C. Res. 665, ¶ 1 (Aug. 25, 1990).

<sup>218</sup> See Fielding, *supra* note 10, at 1228–36. “The success of the maritime interception operations has been attributed to ‘the professionalism of all the navies, innovative communications plans, and frequent coordination meetings.’” *Id.* at 1193 (citation omitted). On the use of force, which is outside the scope of this Article, the U.S. Navy reported, “Even though a total of 12,468 vessels have been challenged [between 1990 and November 1, 1991], disabling fire has never been used and no ships have been disabled.” *Id.* at 1220; see also Malone, *supra* note 194, at 5 (“The success of the coalition’s military campaign against the Baghdad regime, in retrospect, appears to have induced an era of euphoria in the Council, an era that could not have arisen during the Cold War. . . . Having successfully tackled a conceptually straightforward challenge to international peace and security in the form of Saddam Hussein’s attack on Kuwait, the Council now waded into the murkier waters of civil wars and intercommunal strife, with which it had little experience.”).

<sup>219</sup> David Cortright et al., *UN-Authorized Sanctions*, in *THE UNITED NATIONS SECURITY COUNCIL & WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* app. 679 (Vaughan Lowe et al. eds., 2010).

required actions] designated were short, quickly attainable, and within the power of Iraq, the target state. [Moreover,] there was a clear relationship between the sanction and the remedy, with the onus clearly upon the target state.”<sup>220</sup>

The Security Council’s innovative approach regarding which Member States could take action under the resolution would be replicated in subsequent decisions. The key was to be flexible enough to encompass the coalition members but not politically unacceptable states. For example, “[t]he ingenious phrase ‘Member States co-operating with the Government of Kuwait’ served both purposes admirably and built on the formula already deployed in Resolution 665.”<sup>221</sup>

Addressing threats to the peace and acts of aggression that either occur in the maritime environment or exploit its vast expanse has been a fundamental concern of the Security Council since its creation and not simply a secondary focus. Many of the U.N.S.C.’s greatest achievements from 1947 to 1990 vindicated security interests in, or related to, the maritime environment. Notably, the U.N.S.C. institutionally overcame dozens of vetoes and scores of diplomatic impasses during the early years to protect both sovereignty interests and core law-of-the-sea principles. Turtle Bay collaboration would expand, and measures adopted after 1990—in particular those beginning in 2008—to confront illicit activity in the maritime environment represent the most prolific in the history of the Security Council on such matters. Challenges in this new period both paralleled earlier considerations (e.g., integrating freedom of navigation and flag state authorities with the need to expeditiously provide enforcement authority) as well as previously unexplored considerations (e.g., deceptive navigational actions, ensuring a legal end-state, vessel destruction, and the maritime transport of chemical, biological, and nuclear material, among others). The next section examines how the U.N.S.C. approached these new considerations, lessons drawn from earlier resolutions, and assesses their impact.

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<sup>220</sup> See Fielding, *supra* note 10, at 1236.

<sup>221</sup> Berman, *supra* note 6, at 160.

## II. UNITED NATIONS SECURITY COUNCIL RESOLUTIONS WITH AN IMPACT OR POTENTIAL IMPACT IN THE MARITIME ENVIRONMENT<sup>222</sup>

The increased frequency of resolutions with a maritime impact following the Cold War includes a decisive spike that began in 2008<sup>223</sup> The Turtle Bay pivot reflects a dramatically altered political landscape: “The Council initially viewed its role as preventing a third world war. As the Cold War came to define global politics, the Council moved to tackle prevention of regional conflicts . . . from spilling into a global conflagration.”<sup>224</sup>

This section discusses varied approaches to contemporary security threats with each resolution model addressing a threat to the peace, breach of the peace, or act of aggression.<sup>225</sup>

- **DPRK counterproliferation model:** *Largely eviscerating a Flag State’s maritime capabilities; broad restrictions imposed on insurance, registration, crewing services, classification services, and port entry for designated vessels ;*<sup>226</sup>
- **1540 model:** *Addressing an existential threat with comprehensive requirements for Member State action to prevent the acquisition, possession, or transfer of chemical, biological, or nuclear weapons, including their means of delivery;*<sup>227</sup>
- **Somali piracy model:** *Providing wide-ranging maritime- and land-based authorities to defeat a security threat within a designated geographic area; employed when local capabilities are exceedingly*

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<sup>222</sup> While many U.N.S.C. mandates provide authorization to conduct embargoes, primarily for brevity, this Article focuses on resolutions that directly address the maritime environment and naval enforcement action.

<sup>223</sup> DINSTEIN, *supra* note 44, at 292 (“The record of the Security Council over a period of forty-five years, from the inception of the United Nations to the outbreak of the Gulf War, was disappointing in the extreme.”); *see also* WALLENSTEEN & JOHANSSON, *supra* note 6, at 17–18 (“The end of the Cold War has been the single most formative experience in the existence of the Security Council. . . . For the period 1946–1989 the annual average number of passed resolutions was fifteen; since then the average has been more than sixty. The Council has moved from roughly one decision per month to one per week.”); Andrea Bianchi, *Assessing the effectiveness of the UN Security Council’s anti-terrorism measures: the quest for legitimacy and cohesion*, 17(5) E.J.I.L. 881, 889 (2006) (noting that the increase in the number of resolutions adopted under Chapter VII is based on an expanded interpretation of what constitutes a “threat to the peace.”).

<sup>224</sup> Malone, *supra* note 194, at 4.

<sup>225</sup> U.N. Charter, *supra* note 30, art. 39.

<sup>226</sup> This model references U.N.S.C. Resolutions 2397 (2017), 2375 (2017), 2371 (2017), and 2270 (2016), among others.

<sup>227</sup> This model references U.N.S.C. Resolution 1540 (2004).

*limited or nonexistent and the affected State formally requests assistance;*<sup>228</sup>

- **Mediterranean migrant-smuggling and trafficking-in-persons model:** *Addressing a catastrophic humanitarian challenge and transnational security threat with significant maritime measures;*<sup>229</sup>
- **The embargo model:** *Preventing the maritime transport of illicit weapons and technology by expressly authorizing an embargo and implicitly authorizing high seas boardings of foreign flagged vessels without flag State consent;*<sup>230</sup>
- **Gulf of Guinea model:** *Hortatory declarations to cooperate in the response to maritime security threats; resolutions in this category call for enhanced cooperation and coordination, but provide no additional enforcement, sanctions, or boarding authority.*<sup>231</sup>

#### A. Democratic Republic of Korea Model

On December 22, 2017, the Security Council adopted Resolution 2397 to combat the DPRK's illegal counter proliferation activities.<sup>232</sup> This Resolution, the tenth over approximately a decade, sought to restrict the DPRK's ability to acquire resources central to the development of intercontinental ballistic missiles.<sup>233</sup> Providing a construct that globally bans designated ships, among other mandates, highlights the crucial role of the maritime environment in Turtle Bay action regarding the DPRK threat. A fundamental consideration included overcoming the challenging chemical, biological, radiological weapons threat in the maritime environment: ships generally do not transport fully assembled weapons of mass destruction (WMD), rather, they carry component parts,

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<sup>228</sup> This model references U.N.S.C. Resolutions 1816 (2008), 1851 (2008), 1950 (2010), 2316 (2016), and 2383 (2017), among others.

<sup>229</sup> This model references U.N.S.C. Resolutions 2240 (2015), 2312 (2016), 2380 (2017), and 2437 (2018).

<sup>230</sup> This model references U.N.S.C. Resolutions 1970 (2011) and 1973 (2011) as well as 2146 (2014) and 2292 (2016), among others.

<sup>231</sup> This model references U.N.S.C. Resolutions 2018 (2011) and 2039 (2012).

<sup>232</sup> The U.N.S.C. has approved mandates in more than ten Resolutions to address illicit actions by the DPRK, including Resolutions 1718 (2006), 1874 (2009), 2087 (2013), 2094 (2013), 2270 (2016), 2321 (2016), 2356 (2016), 2371 (2017), 2375 (2017), and 2397 (2017). *See* S.C. Res. 2407, ¶ 1 (Mar. 21, 2018) (extending the mandate of the Panel of Experts to April 24, 2019); U.N. SCOR, 8151st mtg. at 3, U.N. Doc. S/PV.8151 (Dec. 22, 2017) (referencing a statement made by the United Kingdom that Security Council efforts were designed to end North Korea's "illegal nuclear and ballistic missile programmes").

<sup>233</sup> S.C. Res. 2397, ¶ 4 (Dec. 22, 2017) ("[A]ll Member States shall prohibit the direct or indirect supply, sale or transfer to the DPRK . . . using their flag vessels . . . of all crude oil, unless the Committee approves in advance on a case-by-case basis. . . ."); *see also id.* ¶ 5 (prohibiting the use of Member State flag vessels to supply, sell, or transfer to the DPRK "all refined petroleum products").

potentially buried beneath thousands of pounds of ostensibly legitimate cargo.<sup>234</sup> Moreover, ship-to-ship transfers of illicit material on the high seas can occur hundreds of miles from land or any naval asset, reducing the likelihood of detection and enforcement action. Providing authority to seize a foreign flagged vessel and dispose of thousands of pounds of coal, for example, could prove logistically difficult. Regardless of complexities, Member State compliance with resolution provisions is legally required and essential to effective implementation.

A think tank report released in 2017, however, concluded forty-nine countries “[were] complicit in various forms of alleged or proven violations of [U.N.S.C.] sanctions resolutions on North Korea.”<sup>235</sup> Between 2014 and 2018, efforts to identify Member States that were complicit or that actively disregarded DPRK Resolution provisions as well as highlight Member States that had taken positive measures to implement U.N. obligations was unprecedented.

Following adoption of Resolution 2397, the government of South Korea seized O/T *Lighthouse Winnore* while in port for previously transferring fuel to a North Korean ship.<sup>236</sup> The seizure was based on operative paragraph nine, which provides “Member States *shall* seize . . . any vessel in their ports . . . if the Member State has reasonable grounds to believe that the vessel was involved

<sup>234</sup> See generally Report of the Panel of Experts established pursuant to Resolution 1874 (2009), U.N. President of the S.C., Letter dated March 3, 2014 from the Coordinator of the Panel of Experts to the President of the Security Council, U.N. Doc. S/2014/147 (Mar. 3, 2014). “The incident involving the Chong Chon Gang revealed a comprehensive, planned strategy to conceal the existence and nature of the cargo.” *Id.* ¶ 124. The voyage of another DPRK-flagged and -owned vessel, O Un Chong Nyon Ho “presents a very similar pattern” and “switched off” its Automatic Identification System. *Id.* Annex VIII, ¶¶ 33–34.

<sup>235</sup> David Albright et al., *Countries Involved in Violating UNSC Resolutions on North Korea*, INST. SCI. & INT’L SECURITY (Dec. 5, 2017), [http://isis-online.org/uploads/isis-reports/documents/Countries\\_Involved\\_in\\_Violating\\_NK\\_UNSC\\_Resolutions\\_5Dec2017\\_Final.pdf](http://isis-online.org/uploads/isis-reports/documents/Countries_Involved_in_Violating_NK_UNSC_Resolutions_5Dec2017_Final.pdf); see also Stefanie Valta, *The International Court of Justice (ICJ) Should Have the Power to Review UN Security Council Resolutions Adopted Under the Aegis of Chapter VII of the UN Charter – An Article Drawing*, *Inter Alia, from the Scope of Judicial Review in Germany*, 2 CAMBRIDGE STUDENT L. REV. 62, 64 (2006) (“Certainly, the League of Nations failed, *inter alia*, because of the disloyalty of its members. But for what reasons do states comply with their [current] obligations [to United Nations Security Council resolutions], given the fact that they have the power to do otherwise? The determinative factor of allegiance is neither a cost-benefit analysis, nor the expectation to be favoured with similar assistance in case of need, but the ‘political-moral pressure’ which ‘depends to a considerable degree on the members’ conviction of the legality and legitimacy of the Council’s action’ . . .”) (citations omitted).

<sup>236</sup> See, e.g., Jake Kwon & James Griffiths, *South Korea Seizes Ship After It Claims Transferred Oil to North Korea*, CNN (Dec. 29, 2017), <http://www.cnn.com/2017/12/29/asia/north-korea-hong-kong-oil-intl/index.html> (“South Korea has seized a Hong Kong-registered ship that allegedly transferred oil to a North Korean vessel in violation of United Nations sanctions. The South Korean Foreign Ministry said the *Lighthouse Winnore* left the port of Yeosu in South Korea carrying refined oil which was then transferred to a North Korean ship in international waters . . . [One of the ships receiving oil was identified] as a sanctioned North Korean vessel, the *Rye Song Gang 1* . . .”).

in [prohibited activities].”<sup>237</sup> While the seizure of vessels engaged in proscribed activities is compulsory when in port, Resolution 2397 provides that such seizures are discretionary when a suspect vessel is plying a state’s territorial sea.<sup>238</sup>

This Resolution, particularly operative paragraph 9, is not a model of clarity, and likely will confuse as it encourages Member State consultation with the flag state of the vessel seized. Regarding disposition options, there is a waiting period for states to take further action (after impounding a vessel) based on operative paragraph 9, which asserts “after six months from the date such vessels were frozen (impounded), this provision shall not apply if the [1718] Committee decides, on a case-by-case basis and upon request of a flag [s]tate, that adequate arrangements have been made to prevent the vessel from contributing to future violations of these resolutions . . . .”

Member State enforcement action includes the Tanzanian president temporarily banning the registration of foreign ships and “ordered over 400 vessels to be investigated for allegations of involvement in criminal activity.”<sup>239</sup> President John Magufuli’s decision was made “after at least five foreign-owned ships flying Tanzania’s flag were seized in various parts of the world carrying illegal consignments of weapons and narcotics.”<sup>240</sup> Additionally, the United States prohibited the entry of more than one hundred North Korean flagged vessels, among other actions.<sup>241</sup>

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<sup>237</sup> *Id.*; see also S.C. Res. 2397, *supra* note 233, ¶ 9.

<sup>238</sup> See S.C. Res. 2397, *supra* note 233, ¶ 9 (“Member States . . . may seize, inspect, and freeze (impound) any vessel subject to its jurisdiction in its territorial waters if the Member State has reasonable grounds to believe that the vessel was involved in activities, or the transport of [proscribed] items . . . .”) (emphasis added).

<sup>239</sup> Fumbuka Ng’wanakilala, *Magufuli Bans Registration of Foreign Ships in Tanzania, Orders Probe*, REUTERS (Jan. 19, 2018), <https://www.reuters.com/article/us-tanzania-maritime/magufuli-bans-registration-of-foreign-ships-in-tanzania-orders-probe-idUSKBN1F8221>; see also Leo Byrne & James Byrne, *Sierra Leone Registers North Korea Linked Vessels in Potential Sanctions Breach*, NK NEWS (Feb. 28, 2018), <https://www.nknews.org/2018/02/sierra-leone-registers-north-korea-linked-vessels-in-potential-sanctions-breach/> (“Several vessels recently removed from Panama’s registry have since been reflagged to Sierra Leone and are still operating . . . . On February 18, the Panama Authority released a circular saying that it had deleted 20 vessels from its registry because of their ties to North Korea . . . .”).

<sup>240</sup> Fumbuka Ng’wanakilala, *Magufuli Bans Registration of Foreign Ships in Tanzania, Orders Probe*, REUTERS (Jan. 19, 2018), <https://www.reuters.com/article/us-tanzania-maritime/magufuli-bans-registration-of-foreign-ships-in-tanzania-orders-probe-idUSKBN1F8221>.

<sup>241</sup> See generally *List of Prohibited Vessels*, NATIONAL VESSEL MOVEMENT CENTER (Jan. 18, 2018), [https://www.nvmc.uscg.gov/nvmc/\(S\(ruh5axvoagd0mxp3cdvbpwjp\)\)/CAATSA.aspx](https://www.nvmc.uscg.gov/nvmc/(S(ruh5axvoagd0mxp3cdvbpwjp))/CAATSA.aspx) (including seven pages of vessels “prohibited from entering the navigable waters of the United States . . . published pursuant to the North Korea Sanction and Policy and Enhancement Act of 2016 and the Ports and Waterways Safety Act (PWSA) as amended by the Countering America’s Adversaries Through Sanctions Act (CAATSA).”); see also U.S. DEPARTMENT OF TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, ADVISORY ON NORTH KOREA’S USE OF THE INTERNATIONAL FINANCIAL SYSTEM (Nov. 2, 2017), <https://www.fincen.gov/sites/default/files/>

Maritime considerations in DPRK-focused measures began with Resolution 1718 (2006), which directed Member States to prevent “the direct or indirect supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their *flag vessels* . . . whether or not originating in their territories of [proscribed]. . . materials, equipment, goods and technology.”<sup>242</sup> The continued security threat in North Korea led the U.N.S.C. to adopt Resolution 1874 (2009), which called “upon all [s]tates to inspect . . . all cargo to and from the DPRK, in their territory, including seaports” if there were reasonable grounds to believe it was proscribed.<sup>243</sup> The Resolution further called upon “all Member States to inspect vessels, with the consent of the flag [s]tate, on the high seas” if they have reasonable grounds and upon flag states that do not consent to inspection to “direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities . . .”<sup>244</sup> While 1874 unambiguously condemned the DPRK nuclear program, it surprisingly failed to provide equally unambiguous authority to interdict vessels without flag state consent on the high seas. This is particularly disconcerting where there are reasonable grounds to believe cargo is being transported on a vessel registered by a non-supportive flag state.

The Chairman of the U.S. Joint Chiefs of Staff, Admiral Michael Mullen, U.S. Navy, responded to a question from the press regarding high seas boardings in view of the Turtle Bay mandate, saying:

[W]e intend to vigorously enforce the United Nations Security Council Resolution 1874 . . . . But the United Nations Security Council resolution does not include an option for an opposed boarding or a noncompliant boarding with respect to that. And if we get to that point with a vessel that we suspect has material which is counter to—unauthorized in accordance with UNSCR, that’s a report that goes back to the United Nations . . . .<sup>245</sup>

Thus, the Security Council, likely in an effort to secure consensus on the Resolution, failed—and has continued to fail—to authorize boardings on the

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advisory/2017-11-02/DPRK%20Advisory%20FINAL%20508%20C.pdf. (“North Korean schemes being used to evade U.S. and United Nations (UN) sanctions, launder funds, and finance the North Korean regime’s weapons of mass destruction (WMD) and ballistic missile programs.”) See generally U.S. DEPARTMENTS OF TREASURY, STATE, & HOMELAND SECURITY, NORTH KOREA SANCTIONS & ENFORCEMENT ACTIONS ADVISORY (July 23, 2018), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/dprk\\_supplychain\\_advisory\\_07232018.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/dprk_supplychain_advisory_07232018.pdf) (regarding Risks for Businesses with Supply Chain Links to North Korea).

<sup>242</sup> S.C. Res. 1718, *supra* note 3, ¶ 11 (emphasis added).

<sup>243</sup> S.C. Res. 1874, ¶ 11, U.N. Doc. S/RES/1874 (June 12, 2009).

<sup>244</sup> *Id.* at ¶ 13.

<sup>245</sup> News Transcript, Press Conference with Secretary Gates & Adm. Mullen (June 18, 2009), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4435> (emphasis added).

high seas without flag state consent. While seizures may occur in port or in internal waters, this authority is limiting because those engaged in illicit activity have wide latitude to select their destinations and avoid states where a seizure is likely. This latitude, however, is not insurmountable.

Resolution 1718 and subsequent affirmations, including U.N.S.C. Resolution 1874 (2009), provided authority that led to Panama's interdiction of the North Korean-flagged *Chong Chon Gang* in 2013.<sup>246</sup> Approximately 480,000 pounds of "arms and related materiel" on twenty-five shipping containers was hidden under 220,000 sacks—more than twenty-one million pounds—of sugar.<sup>247</sup> Proscribed cargo found included:

- Various components of SA-2 (C-75 Volga) and SA-3 (C-125 Pechora) surface-to-air missile systems;
- Various parts for three SA-2 and six SA-3 missiles;
- Two MiG-21 jet fighters . . . [both of which] had been disassembled and . . . packed into several containers; and
- [Ten] lots of shell casings . . . for various purposes (fragmentation, high explosive, armour piercing and or tracer).<sup>248</sup>

A U.N. Report concluded that *Chong Chon Gang*'s deception amounted to "extraordinary and extensive efforts to conceal the cargo of arms and related materiel, and the contingency instructions found onboard the vessel for preparing a false declaration for entering the Panama Canal, if required for transit, point to a clear and conscious intention to circumvent the resolutions."<sup>249</sup>

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<sup>246</sup> See Billy Kenber, *North Korean Ship Seized in Panama Canal Carried Suspected Missile-System Components*, WASH. POST (July 16, 2013), [https://www.washingtonpost.com/world/national-security/north-korean-ship-seized-in-panama-canal-carried-suspected-missile-system-components/2013/07/16/0234ad22-ee4f-11e2-9008-61e94a7ea20d\\_story.html?utm\\_term=.62493160c9d3](https://www.washingtonpost.com/world/national-security/north-korean-ship-seized-in-panama-canal-carried-suspected-missile-system-components/2013/07/16/0234ad22-ee4f-11e2-9008-61e94a7ea20d_story.html?utm_term=.62493160c9d3); see also Rep. of the Panel of Experts established pursuant to resolution 1874 (2009), in Note by the President of the Security Council, U.N. Doc. S/2014/147 (Mar. 3, 2014); *N Korean Ship Seized with Cuban Weapons Returns to Cuba*, BBC NEWS (Feb. 15, 2014), <http://www.bbc.com/news/world-latin-america-26210187>; Mary Beth Nikitin, Specialist in Nonproliferation, Statement before the House Committee on Foreign Affairs Subcommittee on the Western Hemisphere Hearing on "A Closer Look at Cuba and Its Recent History of Proliferation," (Sept. 26, 2013), <http://docs.house.gov/meetings/FA/FA07/20130926/101353/HHRG-113-FA07-Wstate-NikitinM-20130926.pdf>.

<sup>247</sup> U.N. Panel of Experts, *supra* note 246, at 4, 26, 70.

<sup>248</sup> *Id.* at Annex VIII, at 71–76.

<sup>249</sup> *Id.* A U.S. nonproliferation specialist noted the importance of *Chong Chon Gang* extended beyond the interdiction: "All UN member states are authorized to stop and seize suspicious shipments to or from North Korea and report them to the U.N. Security Council for inspection, but these measures are not always followed . . . [and] implementation has been uneven . . ." Nikitin, *supra* note 246. Nikitin added, "The Panamanian government, however, did follow these procedures and this case may be considered a model for other interdictions." *Id.*; Security Council Committee established pursuant to Resolution 1718 (2006), the

The Panama Canal Authority released *Chong Chon Gang* after receiving approximately \$700,000 from Pyongyang for “failing to accurately disclose the cargo and putting the canal and canal workers at risk.”<sup>250</sup> The Panamanian response, along with measures conducted by other states, highlighted DPRK exploitation of the maritime environment as well as the necessity for comprehensive Member State support.<sup>251</sup>

On March 2, 2016, the U.N.S.C. expressed its “gravest concern that the DPRK’s ongoing nuclear, and ballistic missile-related activities have further generated increased tension in the region and beyond” and determined “that there continues to exist a clear threat to international peace and security . . . .”<sup>252</sup> Resolution 2270 included requirements that:

[A]ll [s]tates . . . inspect the cargo within or transiting through their territory, including in their . . . seaports . . . that has originated in the DPRK, or that is destined for the DPRK, or has been brokered or

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Implementation Assistance Notice No. 5. *The M/V Chong Chon Gang Incident*, July 28, 2014 [hereinafter UNSC Implementation Assistance Notice].

<sup>250</sup> *Panama Canal Authority Fines Detained North Korea Ship Smuggling Cuban Arms*, REUTERS (Sept. 26, 2013), <https://www.reuters.com/article/us-panama-northkorea-ship/panama-canal-authority-fines-detained-north-korea-ship-smuggling-cuban-arms-idUSBRE98Q01720130927>; *N Korean Ship Seized with Cuban Weapons Returns to Cuba*, *supra* note 246.

<sup>251</sup> U.N. Panel of Experts, *supra* note 246; *see also* MARY BETH NIKITIN, ET AL., CONG. RESEARCH SERV., *North Korea’s Second Nuclear Test: Implications of U.N. Security Council Resolution 1874* (Apr. 15, 2010), <https://fas.org/sgp/crs/nuke/R40684.pdf> (“The first test case of sea-borne traffic (under S.C. 1874) was the North Korean ship, the *Kang Nam*. The *Kang Nam* was shadowed by the U.S. Navy as it headed from North Korea, hugging the coast of China as it approached the South China Sea. South Korean officials believed that the *Kang Nam* was bound for Burma with a shipment of arms. However, before reaching the international waters of the South China Sea, the *Kang Nam* turned back and returned to North Korea on July 7, 2009. . . . [And, also in 2009,] three vessels were intercepted, which contained North Korean weapons . . . [believed to be] bound for Hezbollah and Hamas. . . . All three ships reportedly contained North Korean components for 122 mm Grad rockets and rocket launchers [and one] shipment intercepted in Dubai contained 2,030 detonators for the Grad rockets and related electric circuits and solid fuel propellant for rockets.”).

<sup>252</sup> S.C. Res. 2270, pmb. (Aug. 2, 2017). Following adoption of S.C. Resolution 2375 on September 11, 2017, global media coverage was again significant. BBC characterized the sanctions as “an attempt to starve the country of fuel and income for its weapons programmes.” *North Korea Threatens US with “Greatest Pain” After UN Sanctions*, BBC NEWS (Sept. 12, 2017), <http://www.bbc.com/news/world-asia-41242992>. In part, the U.N.S.C. Resolutions sought to counter extensive acts of deception that includes “a complex scheme that depended on stealth, falsified documents and the heavily choreographed participation of officials and businesses in at least three countries.” Joby Warrick, *High Seas Shell Game: How a North Korean Shipping Ruse Makes a Mockery of Sanctions*, WASH. POST (Mar. 3, 2018), [https://www.washingtonpost.com/world/national-security/high-seas-shell-game-how-a-north-korean-shipping-ruse-makes-a-mockery-of-sanctions/2018/03/03/3380e1ec-1cb8-11e8-b2d9-08e748f892c0\\_story.html?utm\\_term=.9de0e38578c9](https://www.washingtonpost.com/world/national-security/high-seas-shell-game-how-a-north-korean-shipping-ruse-makes-a-mockery-of-sanctions/2018/03/03/3380e1ec-1cb8-11e8-b2d9-08e748f892c0_story.html?utm_term=.9de0e38578c9). “At least four different flags showed up in August and September (2017) to dump anthracite onto a pile near [a Russian] harbor’s southern tip . . . . Then, six other ships arrived to pick up coal from the same spot and deliver it to foreign markets. Between the voyages, the harbor was witness to a kind of magic trick: Illicit North Korean coal was transformed into Russian coal, which can be legally sold anywhere.” This scheme allowed, according to a Western diplomat, the North Koreans to “literally ‘launder[]’ the coal,” by using, “the same tactic criminals use to launder ill-gotten cash.” *Id.*

facilitated by the DPRK or its nationals, or by individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them, or by designated individuals or entities, or that is being transported on DPRK flagged aircraft or maritime vessels, for the purposes of ensuring that no items are transferred in violation of [operative] resolutions . . . .<sup>253</sup>

Member States were required to prohibit their nationals from insuring or registering DPRK vessels, and to deny port entry to vessels reasonably suspected of carrying proscribed cargo. U.N.S.C. Resolution 2270 further required that Member States inspect proscribed “cargo within or transiting through their territory . . . .”<sup>254</sup> Most likely, this provision authorizes a coastal state to stop, board, and search a vessel within its territorial sea if it reasonably believes a vessel began its journey in, or is destined for, the DPRK, or is carrying proscribed items, among other bases, but does not expressly so state.<sup>255</sup> Resolution 2397 (2017) clarified that Member States “may seize, inspect, and freeze (impound) any vessel *subject to its jurisdiction* in its territorial waters, if the Member State has reasonable grounds to believe that the vessel was involved in activities, or the transport of [proscribed] items . . . .”<sup>256</sup> Not addressed are the significant costs on a state taking enforcement action, such as impounding a vessel for a sustained period of time. While Resolution 2397 improves the series of measures on the DPRK, its construct of compulsory action (in port), discretionary measures (in the territorial sea), and limited authority on the high seas (flag state consent or designation by the U.N.S.C. 1718 Committee) has led to differing views on enforcement capabilities.

The potential for varied understandings of the Resolution prompted the Chinese Government to assert it “does not favour the arbitrary interpretation of . . . sanctions.”<sup>257</sup> Uneven application is likely with imprecise text, and DPRK resolutions do not provide sufficient clarity on the parameters of innocent

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<sup>253</sup> S.C. Res. 2270, ¶¶ 18–19 (Mar. 2, 2016).

<sup>254</sup> *Id.* at ¶ 18.

<sup>255</sup> National-level implementation provides an instructive gauge regarding interpretation. Seoul, for example, provided in correspondence with the United Nations that “[t]he Korean Government prohibits all vessels flagged by the Democratic People’s Republic of Korea from entering the ports or passing through the maritime jurisdictional area of the Republic of Korea.” S.C. Comm. established pursuant to resolution 1718, Letter Dated 13 February 2017 from the Permanent Representative of the Republic of Korea to the United Nations Addressed to the Chair of the Committee, ¶ 12, U.N. Doc. S/AC.49/2017/4 (Feb. 13, 2017).

<sup>256</sup> S.C. Res. 2397, *supra* note 233, ¶ 9 (emphasis added). This resolution also includes potentially confusing terminology, such as the following three words in the same sentence in the context of a vessel: “seize” “freeze” and “impound.” *Id.*

<sup>257</sup> S.C. Comm. established pursuant to resolution 1718, Note Verbale Dated 20 June 2016 from the Permanent Mission of China to the United Nations Addressed to the Chair of the Committee, ¶ 5, U.N. Doc. S/AC.49/2016/34 (June 20, 2016).

passage, for instance, or, more broadly, whether this key law-of-the-sea concept even exists amidst repeated violations of international law. LOS Convention article 19 provides that:

[P]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in...[a] violation of the principles of international law embodied in the Charter of the United Nations . . . .<sup>258</sup>

Challenges with varied interpretations over innocent passage have existed since the LOS Convention was adopted, prompting the United States and the Soviet Union, for example, to promulgate a joint statement on this issue.<sup>259</sup> With regard to inspections conducted within a Member State's territorial sea, Seoul officials noted in correspondence to the United Nations:

Korean maritime authorities can inspect a vessel when there are reasonable grounds to believe that the vessel is carrying weapons of mass destruction, other weapons or related materiel in accordance with the Coast Guard Act. Such inspections shall be carried out in conformity with the treaties to which the Republic of Korea is a party and with generally recognized rules of international law.<sup>260</sup>

The French representative to the Security Council cogently noted in 2017 “the North Korean threat is a threat to everyone’s safety, because every country is now affected by the range of North Korean missiles.”<sup>261</sup> The Italian representative in the same hearing asserted that the provocative acts by the DPRK deserved a “strong and unified response in defending our collective security and the integrity of the non-proliferation regime, as well as the authority of the Council.”<sup>262</sup> An explicit assertion by the Security Council that vessels reasonably suspected of violating U.N.S.C. resolutions on the DPRK are not entitled to innocent passage would provide necessary clarity.<sup>263</sup> Resolution 2397, operative paragraph 9, for example, only provides Member States may

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<sup>258</sup> LOS Convention, *supra* note 23, arts. 19(1), 19(2)(a).

<sup>259</sup> See Joint Statement with Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., Sept. 23, 1989, 28 I.L.M. 1444 [hereinafter Jackson Hole Agreement].

<sup>260</sup> S.C. Comm. established pursuant to resolution 1718, Letter Dated 5 June 2013 from the Charge d’Affaires of the Permanent Mission of the Republic of Korea to the United Nations Addressed to the Chair of the Committee 6, U.N. Doc. S/AC.49/2013/8 (June 5, 2013).

<sup>261</sup> U.N.S.C., 72nd Sess., 8151st mtg. at 5–6, U.N. S/PV.8151 (Dec. 22, 2017).

<sup>262</sup> *Id.* at 7.

<sup>263</sup> LOS Convention, *supra* note 23, art. 19(2) (a).

seize, inspect, and freeze (impound) any vessel subject to its jurisdiction in its territorial waters. While expressly providing that vessels reasonably suspected of engaging in proscribed conduct are not entitled to innocent passage may be diplomatically challenging, such a provision is legally within the remit of the Security Council.

Resolution 2397 (2017) also reaffirmed provisions of earlier mandates that Member States “shall prohibit its nationals . . . from providing insurance or re-insurance services to vessels it has reasonable grounds to believe were involved” in proscribed activities.<sup>264</sup> Resolution 2397 further affirmed that Member States “shall de-register any vessel it has reasonable grounds to believe was involved in activities, or the transport” of proscribed items.<sup>265</sup> U.N.S.C. direction to de-register leaves unaddressed due process considerations, naval enforcement, actions against stateless vessels, and law-of-the-sea issues. Immediately de-registering a vessel, for instance, on the high seas would result in the ship being without nationality and thus subject to the jurisdiction of any state. The Panama Maritime Authority in January 2018 began the process of “cancelling” and/or rescinding the registration of *Glory Hope 1* and *Koti* for suspected violations of U.N.S.C. sanctions regarding fuel transfers to the DPRK, and other registries have taken similar action.<sup>266</sup> There is no internationally recognized process by which a flag state may rescind or cancel registration, though a flag state may seek to contact the owner of a vessel prior to de-registration as well as wait for the vessel to be in port. Alternatively, a flag state could immediately de-register a vessel upon receipt of information regarding illicit activity. Separate inquiries could include whether domestic regulations permit compelling a vessel under its registry to change its course or to abstain from taking action.

The U.N.-commissioned Palmer Report in 2011 examined the scope of flag state authority in the context of a vessel under its registry seeking to breach a

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<sup>264</sup> S.C. Res. 2397, *supra* note 233, ¶ 11; *see also* S.C. Res. 2321, ¶ 22 (Nov. 30, 2016). This section further provides that Member States shall prohibit persons subject to its jurisdiction and entities incorporated in its territory or subject to its jurisdiction. *Id.*

<sup>265</sup> S.C. Res. 2397, *supra* note 233, ¶ 12; S.C. Res. 2321, *supra* note 263, ¶ 24.

<sup>266</sup> Michele Labrut, *Panama Cancelling Registration of Two Vessels Linked to North Korea Trading*, SEATRADE MAR. NEWS (Jan. 5, 2018), <http://www.seatrade-maritime.com/news/americas/panama-cancelled-registration-of-two-vessels-linked-to-north-korea-trading.html>; *see also* Leo Byrne, *St Kitts and Nevis Deregisters Sanctioned North Korean Ship*, NORTH KOREA NEWS (Oct. 19, 2017), <https://www.nknews.org/2017/10/st-kitts-and-nevis-deregisters-sanctioned-north-korean-ship/> (discussing the *Hao Fan 6*). Panama, in 2017, also “began the process of deregistering the vessel *Lian De*.” S.C. Comm. established pursuant to resolution 1718, Note Verbale Dated 1 December 2017 from the Permanent Mission of Panama to the United Nations Addressed to the Chair of the Committee, U.N. Doc. S/AC.49/2017/128 (Dec. 1, 2017).

blockade.<sup>267</sup> On this issue, the report concluded “[w]e think States have a duty to take active steps to warn their citizens of the risks involved in running a blockade and to endeavour to dissuade them from doing so, *even though they may not have the legal power to stop the conduct.*”<sup>268</sup> Compliance with a Security Council mandate, in contrast, imposes a superior legal obligation on the flag state to affirmatively prevent violative conduct, and along with issuing an order to the vessel, other measures include de-registration, similar to action taken by Tanzania, or the initiation of criminal prosecutions consistent with national-level authorities.

The adverse financial, logistical, and potentially environmental consequences following the seizure of a vessel in port for violating a U.N.S.C. resolution initially resides with the state taking enforcement measures, a potentially disproportionate burden that could exceed one million dollars in environmental remediation, storage, and maintenance fees.<sup>269</sup> In this regard, the Security Council has repeatedly missed opportunities to more effectively support Member State compliance by not explicitly authorizing that vessels seized for engaging in illicit activity may be disposed of—including being scuttled—similar to authority provided in Somalia piracy, migrant smuggling and human trafficking resolutions.<sup>270</sup>

Continued misuse of electronic systems designed to advance safety and security interests in the maritime environment was addressed in Resolution 2397. The Security Council expressed concern over “deceptive maritime practices” of DPRK-flagged, controlled, chartered, or operated vessels seeking to “evade UNSCR sanctions monitoring by turning off [their AIS] to mask their full movement history.”<sup>271</sup> Contemporary focus on AIS highlights the evolution of this technology from its use solely for collision avoidance to its current employment as both collision avoidance *and* a ship tracking system. AIS data acquired from ocean-going vessels in use across the globe is both voluminous and instructive; one study examined thirty-two billion AIS messages over a six year period.<sup>272</sup> Separately, a U.N.S.C.-directed panel of experts report detailed

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<sup>267</sup> U.N. Secretary-General, *Rep. of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶ 159 (Sept. 2011).

<sup>268</sup> *Id.* (emphasis added).

<sup>269</sup> Jim Bronskill, *Migrant Ship MV Sun Sea Now Sits Rusting, Toxic on B.C. Coast*, GLOBE & MAIL (July 11, 2018); Stephanie Joyce, *F/V Bangun Perkasa Finished Long Journey to Scrapyard*, ALASKA PUB. MEDIA (July 5, 2013).

<sup>270</sup> See S.C. Res. 2184, ¶ 11 (Nov. 12, 2014); S.C. Res. 2240, *supra* note 4, ¶ 8.

<sup>271</sup> S.C. Res. 2397, *supra* note 233, ¶ 13.

<sup>272</sup> Nathan A. Miller et al., *Identifying Global Patterns of Transshipment Behavior*, 5 FRONT. MAR. SCI. 240, 1 (2018).

the scope of DPRK deception and illicit activity in the maritime environment,<sup>273</sup> including North Korea's theft of confidential information on warships and submarines, including "cold launch" technology, which could be used for the submarine-launched ballistic missile programme of the Democratic People's Republic of Korea. The Panel views such activity as constituting evasion of the arms embargo, given that such technological information could directly contribute to the development of the operational capabilities of the armed forces of the Democratic People's Republic of Korea."<sup>274</sup>

In addition to *Chong Chon Gang*, other noteworthy naval engagements involving DPRK include the M/V *Kang Nam I*,<sup>275</sup> suspected of carrying missile components; and M/V *Light*,<sup>276</sup> believed to be transporting proscribed weapons. And, on March 5, 2016, the Philippine government impounded the North Korean-flagged cargo vessel M/V *Jin Teng*, which arrived in Subic Bay on March 3, 2016, one day after the approval of Resolution 2270.<sup>277</sup> Philippines Presidential Communications Undersecretary Manolo Quezon III remarked that his government's "obligation is essentially to impound the vessel and not allow it to leave port and that the crew must eventually be deported."<sup>278</sup> Further, Egyptian authorities seized the Cambodian-flagged *Jie Shun* in Ain Sukhna port, along with "30,000 rocket-propelled grenades of North Korean production, hidden under bins of iron ore."<sup>279</sup> And, on June 27, 2018, the Japanese Ministry of Foreign Affairs released a statement and photographs of the North Korean tanker *Yu Phyong 5* participating in activities that Japan "strongly suspects [were] ship-to-ship transfers banned by UNSCR."<sup>280</sup> Notably, the statement on *Yu Phyong* was one of ten by Japan on illegal ship-to-ship transfers between January and July of 2018.<sup>281</sup>

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<sup>273</sup> SCOR President, *Panel of Experts Letter*, S/2018/171, (March 5, 2018).

<sup>274</sup> *Id.* ¶ 121.

<sup>275</sup> Choe Sang-Hun, *Test Looms as U.S. Tracks North Korean Ship*, N.Y. TIMES (June 21, 2009), <https://www.nytimes.com/2009/06/22/world/asia/22korea.html>.

<sup>276</sup> William Wan & Craig Whitlock, *North Korean Ship Turned Back by U.S. Navy*, WASH. POST (June 13, 2011), [https://www.washingtonpost.com/national/national-security/north-korean-ship-turned-back-by-us-navy/2011/06/13/AG7wxLTH\\_story.html?noredirect=on&utm\\_term=.3bcd85db720](https://www.washingtonpost.com/national/national-security/north-korean-ship-turned-back-by-us-navy/2011/06/13/AG7wxLTH_story.html?noredirect=on&utm_term=.3bcd85db720).

<sup>277</sup> Stanglin, *supra* note 19.

<sup>278</sup> *Id.*

<sup>279</sup> Erofey Schkvarkin, *Chinese Freighter with North Korean Arms Seized in Egypt*, MAR. BULL. (October 2, 2017), <http://maritimebulletin.net/2017/10/02/chinese-freighter-with-north-korean-arms-seized-in-egypt/>.

<sup>280</sup> *Suspicion of illegal ship-to-ship transfers of goods by YU PHYONG 5, North Korean-flagged tanker, and small vessel of unknown nationality (June 21 & 22, 2018)*, JAPANESE MINISTRY FOREIGN AFF. (June 27, 2018), [https://www.mofa.go.jp/fp/nsp/page4e\\_000757.html](https://www.mofa.go.jp/fp/nsp/page4e_000757.html).

<sup>281</sup> *Japan-North Korea Relations; Suspicion of illegal ship-to-ship transfers of good by North Korea-related vessels*, JAPANESE MINISTRY FOREIGN AFF. (June 22, 2018), [https://www.mofa.go.jp/fp/nsp/page4e\\_000757.html](https://www.mofa.go.jp/fp/nsp/page4e_000757.html).

Implementation of obligations regarding the response to illicit DPRK activity frequently involves the integration of multiple agencies within a government including the Ministry of Foreign Affairs, Ministry of Justice, Maritime Administration, Ministry of Treasury, Ministry of Commerce, Coast Guard, and the Navy among other agencies.<sup>282</sup> National-level decisions could include, among others, whom a master or crewmember should notify that their vessel may be involved in a violation and separately, whether the U.N.S.C. mandates support criminal prosecutions against the master, crew-members, and owner for knowing violations.<sup>283</sup> Several States have conducted interagency table-top exercises to examine the aligned response by multiple agencies as well as to ensure there is national-level consensus on resolution terms and obligations.<sup>284</sup> Such engagements represent a best-practices approach to assessing resolutions with complex provisions, though there is no internationally provided guidance or a single recognized model in this regard.

Holistically, the Security Council has essentially decided that because of sustained violations of international law, disregard for U.N.S.C. resolutions, and repeated deceptive practices in the maritime environment, North Korea forfeited its right to be a fully functioning flag State. The Security Council did not explicitly state the DPRK's registry—ordinarily a right of “every State, whether coastal or land-locked”<sup>285</sup>—no longer exists, but restraints on insurance, registration and de-registration, crewing services, classification services, and port entry has eviscerated DPRK's flag state status.

While the Security Council has authorized expansive measures involving North Korean-flagged vessels based on the gravity of this threat, it is astonishing that DPRK resolutions do not explicitly authorize naval forces to conduct time-

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<sup>282</sup> The obligations of state governments are wide-ranging and include seizure and de-registration of DPRK vessels and freeze the assets of DPRK and DPRK nationals. *See* S.C. Res. 2397, *supra* note 233, ¶¶ 9, 12; S.C. Res. 1718, *supra* note 3, ¶ 8(d).

<sup>283</sup> *See* 22 U.S.C. § 287(c) (Economic and communications sanctions pursuant to U.N. SCOR Res.).

<sup>284</sup> *See* SCOR President, *Panel of Experts Letter*, S/2017/742, August 28, 2017; *see also* Note verbal dated 1 December 2017 from the Permanent Mission of Panama to the U.N. addressed to the Chair of Committee., S/AC.49/2017/128, (December 1, 2017) (“By Executive Decree No. 129, issued on 5 April 2017, Panama established a national inter-agency plan for preventing and responding to threats and incidents involving chemical, biological, radioactive, nuclear and explosive weapons and their means of delivery, under the leadership of the National Security Council. The aim is to build national capacity to respond to such incidents from a procedural and training perspective and through the acquisition of special equipment.”).

<sup>285</sup> LOS Convention, *supra* note 23, § 90 (“Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.”). “Nationality of ships, (1) Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. (2) Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.” *See id.* §§ 92, 94.

sensitive high-seas boarding without flag state consent.<sup>286</sup> Also, as noted above, express authorization that vessels suspected of violating resolutions on DPRK do not enjoy the right of innocent passage would be beneficial. A separate consideration is ensuring awareness of the various provisions of multiple resolutions that address a similar threat. Immediately prior to the adoption of Resolution 2397 (2017), the Security Council-drafted summary of DPRK measures spanned twenty-one pages, highlighting the varied, intersecting, and frequently complicated elements of mandates related to North Korea.<sup>287</sup> The U.N.S.C.'s approach to confront the illicit possession and transport of WMD involving DPRK by integrating multiple agencies within a government, and multinational cooperation, though inadequate on the issues of boarding authorities and innocent passage, has relevance in the pursuit of counter proliferation across the globe.

### B. U.N.S.C. Resolution 1540 Model

Resolution 1540 (2004) declared the Council's "resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery."<sup>288</sup> Though Resolution 1540 did not explicitly authorize naval interdictions or even mention the maritime environment, this resolution contributes to maritime security. The Security Council called upon states to "take and enforce effective measures to establish domestic controls" to those ends, "including by establishing appropriate controls over related materials."<sup>289</sup> The resolution, decided under Chapter VII of the United Nations Charter, has spawned considerable discussion, focus, attention, and the creation of a UN committee.<sup>290</sup> Rudiger Wolfrum, then-President of ITLOS, agreed that Resolution 1540 "provides that the proliferation of weapons of mass destruction constitutes a threat to international peace."<sup>291</sup>

A 2005 study, which examined nuclear weapon acquisition, delivery, responses, and the maritime environment, underscored the gravity of the

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<sup>286</sup> See S.C. Res. 2375, *supra* note 135, ¶¶ 8, 10; S.C. Res. 2087, ¶ 7 (Jan. 22, 2013).

<sup>287</sup> *Fact Sheet: Resolution 2375 (2017) Strengthening Sanctions on North Korea*, U.S. MISSION TO U.N. (Sept. 11, 2017), <https://usun.state.gov/remarks/7969>.

<sup>288</sup> S.C. Res. 1540, *supra* note 3, ¶ 4.

<sup>289</sup> *Id.* ¶ 3.

<sup>290</sup> See S.C. COMM. ESTABLISHED PURSUANT TO RES. 1540 (April 28, 2004), <http://www.un.org/en/sc/1540/>; see also Brian Finlay, *WMD, Drugs, and Criminal Gangs in Central America: Leveraging Nonproliferation Assistance to Address Security/Development Needs with UN Security Council Resolution 1540*, STIMSON CTR. & STANLEY FOUND. (2009).

<sup>291</sup> Wolfrum, *supra* note 126, at 9.

threat.<sup>292</sup> Describing a “simple” gun-type weapon, the report stated, “a mass of uranium highly enriched in the fissile isotope 235 (highly enriched uranium, or HEU) is shot down a tube (resembling an artillery tube) into another HEU mass, creating a supercritical mass and nuclear explosion.”<sup>293</sup> The study also discussed possible scenarios involving the maritime environment, including “smuggling a nuclear weapons in a shipping container” and “the use of an oil tanker to transport a nuclear weapon” (including challenges with masking radiation signatures).<sup>294</sup>

In 2017, the Chair of the 1540 Committee, Sacha Soliz, stated that the main purpose of the resolution was to keep illicit chemical, biological, and nuclear weapons and material “from falling into the hands of non-[s]tate actors, including terrorists. . . . [and] is unique in this regard as it is the only legally binding instrument dealing with preventing the proliferation of all three types of weapons of mass destruction. [And further, R]esolution 1540 (2004) has become one of the key components of the international regime to prevent the proliferation of weapons of mass destruction (WMD) and their means of delivery.”<sup>295</sup>

As background, Resolution 1540 included many distinctive elements. “To fully implement the resolution—a mere 4 pages and 12 clauses—states are required by the Security Council to adopt some 300 measures (specified by the 1540 Committee) in order to prevent proliferation, from export controls to physical protection around nuclear sites and materials.”<sup>296</sup> A comprehensive U.N. study reported that as of 2016, Member States had recorded 30,632 measures since the adoption of Resolution 1540.<sup>297</sup> One measure, for example, is the requirement “to adopt and enforce appropriate and effective laws which prohibit any non-State actor to [*sic*] manufacture, acquire, possess, develop,

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<sup>292</sup> JONATHAN MEDALIA, CONG. RESEARCH SERV., RL32595, CRS REPORT FOR CONGRESS: NUCLEAR TERRORISM: A BRIEF REVIEW OF THREAT AND RESPONSES (2005), <https://fas.org/irp/crs/RL32595.pdf>.

<sup>293</sup> *Id.* at 2. (noting that the Hiroshima bomb used the “gun-type” approach, asserting, “its designers had such high confidence in it that they did not test this type of weapon prior to using it.”)

<sup>294</sup> *Id.* at 7–9.

<sup>295</sup> Statement by the President, Ambassador Sacha Soliz, *The Global Effort to Prevent the Proliferation of Weapons of Mass Destruction to Non-State Actors*, U.N. SCOR OPEN DEBATE (June 28, 2017).

<sup>296</sup> Daniel Sallisbury & Ian J. Stewart, *After a Decade of UN Resolution 1540, Is the World a Safer Place?*, CONVERSATION (April 29, 2014), <http://theconversation.com/after-a-decade-of-un-resolution-1540-is-the-world-a-safer-place-26014>.

<sup>297</sup> Rep. of the S.C., *Comm. Established Pursuant to Resolution 1540*, ¶ 28, S/2016/1038 (2004).

transport, transfer or use nuclear, chemical, or biological weapons and their means of delivery.”<sup>298</sup>

The contentious path to a Security Council decision in 2004 prompted the U.N.S.C. President to acknowledge, “[t]he negotiation process was not easy.”<sup>299</sup> The debate over Resolution 1540 is emblematic of the challenges in collectively confronting the illicit possession and transfers of nuclear, biological, and chemical material and weapons. The United Kingdom representative at Turtle Bay stated that the resolution’s “Chapter VII legal base stresses that we are dealing with a clear threat to peace and security. It underlines the seriousness of our response and the binding nature on all States of the obligation it contains.”<sup>300</sup> The representative from Spain agreed, asserting, “[w]ith regard to Chapter VII, we believe that the resolution is not intrusive because it enables States to translate the obligations conferred by it into domestic law as they wish. My country believes that this resolution has been adopted under Chapter VII for two reasons: to make it legally binding in an unequivocal way and to send a strong political message.”<sup>301</sup> And the Romanian representative proclaimed, “[w]ith the adoption of this resolution, the Council lives up to its responsibilities, addressing one of today’s most ominous challenges to international peace and security.”<sup>302</sup>

Not all members, however, positively viewed the decision to take action under Chapter VII. Brazil “continue[d] to think that there was no need to put the whole resolution under the enforcement provisions of the United Nations Charter.”<sup>303</sup> Pakistan argued, “the Security Council cannot assume the stewardship of global non-proliferation and disarmament issues. The Council, composed of 15 States, is not a representative body. It cannot enforce the obligations assumed by five of its members which retain nuclear weapons, since they also possess the right of veto in the Council.”<sup>304</sup> Amidst disagreement in Turtle Bay regarding the Security Council’s approach to this transnational threat, a single word in the resolution, surprisingly, generated consensus.<sup>305</sup> The Pakistani representative welcomed “the insertion of the word ‘henceforth’ in the

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<sup>298</sup> *Id.* ¶ 54 (basing the requirements of paragraph 2 of Resolution 1540 (2004), also including prohibitions on non-state actor “attempts to engage in those [listed] activities [or] participate in them as an accomplice, assist or finance them.”).

<sup>299</sup> Gunter Pleuger (President of U.N. SCOR), *Non-proliferation of Weapons of Mass Destruction*, 9–10, S/PV.4956 (Apr. 28, 2004).

<sup>300</sup> *Id.* at 7.

<sup>301</sup> *Id.* at 8.

<sup>302</sup> *Id.* at 9.

<sup>303</sup> *Id.* at 8–9.

<sup>304</sup> *Id.* at 2–4.

<sup>305</sup> *Id.*; see also S.C. Res. 1540, *supra* note 3, ¶ 3.

fifteenth preambular paragraph,” maintaining this addition “makes it explicit that the provisions of the resolution are not retroactive, but would apply only to events from the date of the adoption of the resolution.”<sup>306</sup>

Though novel, Resolution 1540 wasn’t the first Turtle Bay mandate to address proliferation. Resolution 1373 (2001), among others, noted “the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials.”<sup>307</sup> Member State comments in a United Nations report from 2016 are instructive on the urgency of combatting WMD:

- “Effective national action and global cooperation on counter-terrorism, and on chemical, biological, radiological and nuclear terrorism issues, must continue to ensure terrorists do not acquire or use weapons of mass destruction[;]”<sup>308</sup>
- “Our country shares the deep concern about the risk of linkages between terrorism and weapons of mass destruction in the current international context[;]”<sup>309</sup> and
- “Terrorism is intrinsically associated with the proliferation of weapons of mass destruction.”<sup>310</sup>

Also in 2016, the Security Council favorably referenced Resolution 1540 in one of its mandates on the Democratic People’s Republic of Korea.<sup>311</sup> The Security Council reaffirmed Resolution 1540 “obligates all States to take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery . . . and *notes* that these obligations are complimentary to the obligations in [DPRK-focused] resolutions.”<sup>312</sup> And, an academic study from 2017 on supply system security and resilience recommended linking Resolution 1540 obligations with “the global port security requirements embedded in the [International Ship and Port Facility Security] code . . . .”<sup>313</sup>

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<sup>306</sup> *Non-proliferation of weapons of mass destruction*, *supra* note 299.

<sup>307</sup> S.C. Res. 1373, *supra* note 204, at 4.

<sup>308</sup> U.N. Secretary-General, *Measures to prevent terrorists from acquiring weapons of mass destruction*, ¶ 5, U.N. Doc. A/71/122 (July 8, 2016).

<sup>309</sup> *Id.* at 6.

<sup>310</sup> *Id.* at 12.

<sup>311</sup> S.C. Res. 2321, *supra* note 263, ¶ 37.

<sup>312</sup> *Id.* (emphasis in original).

<sup>313</sup> Stephen E. Flynn, *A New International Framework for Bolstering Global Supply System Security and Resilience*, NE. U. GLOB. RESILIENCE INST. 29 (October 2017) (explaining that linking 1540 obligations to the

Resolution 1540 has remained relevant through the ambitious work of the U.N.S.C.-directed 1540 Committee, which between 2011 and 2016, held “33 formal and 25 informal meetings, as well as a number of informal consultations.”<sup>314</sup> From compiling and disseminating national points of contact—names, organizations, phone numbers, and e-mail addresses—to documenting experiences, lessons learned, and effective practices, the Committee has built a durable framework. A thirty-seven-page submission to the Committee from the United States regarding national practices for the implementation of Resolution 1540 described several maritime and transport practices.<sup>315</sup> Thus, even if Resolution 1540 did not expressly reference the law of the sea or naval interdictions, it is an instructive construct in collectively approaching urgent, grave maritime security threats.

The Security Council decided Resolution 1540 under Chapter VII, as noted above, though it did not expressly authorize the employment of “all necessary measures” opting instead to affirm the “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery constitutes a threat to international peace and security,” and direct States to “develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items . . . .”<sup>316</sup> Resolution 1373 (2001), which addressed a substantively different threat, provided greater clarity on enforcement measures when it reaffirmed that “acts of international terrorism constitute a threat to international peace and security” and provided under its Chapter VII authorities that States shall “[t]ake the necessary steps to prevent the commission of terrorist acts . . . .”<sup>317</sup> Resolution 2249 (2015), among others, also condemned terrorism and reaffirmed that those committing terrorist acts “must be held accountable,” calling upon Member States that have a capacity to do so to take “all necessary measures” to prevent and suppress terrorist acts by designated individuals and groups.<sup>318</sup>

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ISPS Code would enable “global standards and procedures that ensure that containerized cargo is not wittingly or unwittingly being used to transport prohibited nuclear materials and contraband”).

<sup>314</sup> U.N. Chair of the S.C. Committee, Letter dated 9 December 2016 from the Chair of the Security Council Committee established pursuant to resolution 1540 (2004) addressed to the President of the Security Council, U.N. Doc. S/2016/1038 (Dec. 9, 2016).

<sup>315</sup> U.S. Miss. to the U.N., Letter to Amb. Oh Joon, Resolution 1540 Comm. Chair, *Effective U.S. National Practices for the Implementation of UNSCR 1540* (Sept. 29, 2014).

<sup>316</sup> S.C. Res. 1540, *supra* note 3, pmbl. and ¶ 3(c). The preamble of Resolution 1540 states that there is an “urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery[.]” *Id.* at pmbl.

<sup>317</sup> S.C. Res. 1373, *supra* note 204, pmbl. and ¶ 2(b).

<sup>318</sup> S.C. Res. 2249, ¶¶ 4, 5 (Nov. 20, 2015).

There is no consensus on whether maritime enforcement measures may be taken on the high seas under the authority of a resolution directing member states to take “all necessary measures” to address a threat that doesn’t expressly reference the maritime environment. Regardless of lack of unanimity on this issue, the most likely conclusion is that there is no legal impediment to such enforcement action if based on reasonable grounds of illicit conduct and the response is proportionate. Former ITLOS President Rudiger Wolfrum asserted in 2008,

Measures taken in the face of the threat of terrorism may result in a temporary limitation of the freedom of navigation. . . . [and U.N.S.C. resolutions may] form the necessary international law basis for maritime interception operations undertaken by various naval units in the Indian Ocean and off the coast of Somalia. Flag States may not object to ships under their flags being investigated by warships of other States, as long as the measures taken are proportionate.<sup>319</sup>

The context of the threat to the peace, urgency to take immediate action, and authority vested in the Security Council supports the conclusion that, similar to Judge Wolfrum’s position, “[t]here seems to be no reason why ‘necessary means’ could not cover the use of force directed at ships at sea in addition to the use of force on land and in the air, which are both clearly covered.”<sup>320</sup>

Key elements of the U.N.S.C.’s approach to combatting DPRK, WMD, and terrorism—sustained diplomatic, economic, and operational attention—would be crucial in effectively confronting transnational security threats in the Gulf of Aden.

### C. Somali Piracy Model

The response to the dramatic increase in strikes against merchant shipping by Somali pirates highlights the significance of maritime collaboration. A strategically important and narrow corridor,<sup>321</sup> the Bab El-Mandeb Strait, which connects the Mediterranean Sea and Indian Ocean, lies next to crushing poverty and instability and yet carries 3.3 million barrels of oil daily.<sup>322</sup> In a two year

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<sup>319</sup> Wolfrum, *supra* note 126, at 10.

<sup>320</sup> Robin R. Churchill, *Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution*, 84 INT’L L. STUD. 143, 145 (2008).

<sup>321</sup> See U.S. Energy Information Administration, *World Oil Transit Chokepoints*, July 25, 2017, at 11 (noting that the Bab El-Mandeb Strait is eighteen miles wide at its narrowest point.)

<sup>322</sup> U.N. Secretary-General, *Rep. of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, ¶ 28 (Jan. 24, 2011) [hereinafter Lang Report].

period—from December 12, 2008 to December 31, 2010—approximately 1,900 people were taken hostage by Somali pirates on more than one-hundred vessels.<sup>323</sup> Pirates exploited the difficulty of naval forces in protecting merchant shipping across an expansive sea area off a coastline spanning 3,333 kilometers,<sup>324</sup> as well as gaps in the law that allowed them to operate with apparent impunity within the Somali territorial sea.<sup>325</sup> To be sure, Somali challenges extend well beyond the water, and while meaningfully addressing land-based economic, development, and governance considerations represent a foundation to lasting improvements, those issues are outside the scope of this Article.

As a criminal endeavor that has existed for thousands of years, piracy is a universal crime expressly referenced in the LOS Convention,<sup>326</sup> yet there was not a strong interest by many states in prosecuting Somali pirates or even a national ability to do so.<sup>327</sup> At different times and in various geographic areas, piracy has ebbed and flowed, but the devastatingly effective Somali threat was unlike any other piracy in the modern period. This challenge required immediate regional action and international support. But the question arose as to whether the challenge should be addressed under the aegis of the U.N.S.C., and if so, what additional authorities it could provide.<sup>328</sup> When the Somali threat was taken up in Turtle Bay in 2008, the Security Council had adopted more than 1,800 resolutions since its inception on a variety of issues, but not one provided Chapter VII enforcement authority exclusively focused on piracy.

From 2008 to 2017, the Security Council ambitiously adopted sixteen resolutions that emphasized the importance of collaboration, legal authorities, and naval measures. More than thirty countries would deploy operational assets

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<sup>323</sup> *Id.* ¶ 29 (referring between December 12, 2008 and January 24, 2011).

<sup>324</sup> U.N. Secretary-General, *On the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, ¶ 4, U.N. Doc. S/2016/843 (Oct. 7, 2016) (“[T]erritories considered safe havens for pirates have shrunk from significant swathes of the 3,333km-long coastline of Somalia to a roughly 150km-long stretch between Xarardheere and Garacad.”).

<sup>325</sup> *See generally* Lang Report, *supra* note 321 (“The fight against [Somali] piracy has led to unprecedented operational solutions in an innovative legal context. The ‘reverse right of pursuit’ posited in Security Council resolution 1816 (2008) allows naval forces cooperating with the Transitional Federal Government to enter the territorial waters of Somalia in order to pursue and detain persons suspected of piracy.”). *Id.* ¶ 37.

<sup>326</sup> LOS Convention, *supra* note 23, arts. 100–107, 110.

<sup>327</sup> *See generally* Lang Report, *supra* note 321, ¶ 43 (referencing 2,000 Somali pirates that were apprehended between December 2008 and May 2010).

<sup>328</sup> *See, e.g.*, Int’l Maritime Org. [IMO], A.1025(26), *Code of Practice for the Investigation of Crimes of Piracy and armed Robbery Against Ships* (Dec. 2, 2009), <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/A.1025.pdf>. Noteworthy accomplishments by member States at the International Maritime Organization (IMO) are outside of the scope of this Article.

to the Gulf of Aden to implement U.N.S.C. mandates.<sup>329</sup> The impact was extraordinary: between 2012 and 2017, there were only three successful acts of piracy reported<sup>330</sup> in what was previously the most dangerous maritime space on earth.<sup>331</sup> Naval forces, as well as the use of private security and best management practices by merchant shipping, criminal prosecutions, and military engagements on land, among other actions, were also pivotal in a changed environment. Not all issues were sufficiently addressed during the first years of focus on Somali piracy—the financial pursuit of illicitly obtained ransom payments,<sup>332</sup> greater use of the Egmont Group, network disruption, and economic development on land, and others—but Security Council mandates contributed to the restoration of international peace.

The resolutions adopted by the Security Council are instructive for comprehensively addressing a security challenge geographically focused in a zone where local and regional capacity to do so is inadequate, with a backdrop of the enduring vulnerability of the maritime environment, legal difficulties, and the law of the sea. Despite contentions by some that the resolutions didn't provide enhanced legal authorities<sup>333</sup>—entry into the Somali territorial sea, for instance, was authorized by the Transitional Federal Government, and an internationally recognized ability to repress acts of piracy already exists—the mandates were fittingly characterized as providing “unprecedented operational solutions in an innovative legal context.”<sup>334</sup>

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<sup>329</sup> U.N. Secretary-General, *On the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, ¶ 40, U.N. Doc. S/2017/859 (Oct. 12, 2017).

<sup>330</sup> *Id.* ¶ 64 (“The achievements made demonstrate high levels of local, national, regional and international cooperation in addressing piracy, which remains a threat to international peace and security.”). That said, the report also noted concern “about the incidents of piracy that have occurred over the past eight months (2017), which were the first in five years. . . . The limited number of incidents, however, also demonstrates the at least partial effectiveness of counter-piracy measures, including international naval presence and escorts; multinational counter-piracy operations[.]” *Id.* ¶ 59; see also Colin Freeman, *Somali Pirates Hijack First Commercial Ship in Five Years*, TELEGRAPH (Mar. 14, 2017, 11:19 AM), <https://www.telegraph.co.uk/news/2017/03/14/somali-pirates-hijack-first-commercial-ship-five-years/>; INT'L CHAMBER COM. INT'L MAR. BUREAU (ICC IMB), *Piracy and Armed Robbery against Ships: 2017 Annual Report 20* (Jan. 2018), <https://www.icc-ccs.org/reports/2017-Annual-IMB-Piracy-Report.pdf>.

<sup>331</sup> Lang Report, *supra* note 321, ¶ 29. (demonstrating that from December 12, 2008 through the December 31, 2010, approximately 2,000 people were held hostage by Somali pirates).

<sup>332</sup> See, e.g., S.C. Res. 2383, *supra* note 135, pmb., ¶¶ 4, 11, 18. The U.N.S.C. focus on financial flows and those who “illicitly finance or profit” from piracy came in later resolutions. *Id.*

<sup>333</sup> PROELSS, *supra* note 68, at 56–60.

<sup>334</sup> Lang Report, *supra* note 321, ¶ 28.

Resolution 1816 (2008) represented the first Security Council measure solely focused on addressing the modern threat of Somali piracy,<sup>335</sup> authorizing “[entry] into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law[.]”<sup>336</sup>

Among other things, Resolution 1816 sought to ensure that pirates did not evade capture by exploiting gaps in the law or the incapacity of the Transitional Federal Government (TFG)—as of 2012, the Federal Government of Somalia (FGS)—to conduct interdictions in the Somali territorial sea. Some provisions, such as authorizing entry into Somali territorial sea, were adopted by TFG’s consent.<sup>337</sup> In 2008, four resolutions with a primary focus on defeating Somali piracy were adopted. Discussions that year addressed the use of force, the impact of the resolutions on customary international law, and enhancement of cooperation, issues that remain relevant today. Later resolutions would reaffirm the authority to enter the Somali territorial sea and meet other evolving security and governance challenges, such as private security; illegal, unregulated, and unreported (IUU) fishing; and linkage between terrorism and piracy.

Resolution 1838 (2008) called upon states “interested in the security of maritime activities” to take part in the “fight against piracy . . . by deploying naval vessels and aircraft.”<sup>338</sup> Warships and aircraft would deploy to the Gulf of Aden complement assets already in the area. In contrast to this positive security development is the inability of many states to criminally prosecute pirates. Without a legal end-state, the likely result would be capturing pirates only to have them return to Somalia, where they could reengage in piracy.

A potential legal option was the application of the Suppression of Unlawful Acts of 1988 (SUA) Convention against the Safety of Maritime Navigation,

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<sup>335</sup> S.C. Res. 2383, *supra* note 135; S.C. Res. 2316 (Nov. 9, 2016); S.C. Res. 2246 (Nov. 10, 2015); S.C. Res. 2184, *supra* note 270; S.C. Res. 2125 (Nov. 18, 2013); S.C. Res. 2077 (Nov. 21, 2012); S.C. Res. 2020 (Nov. 22, 2011); S.C. Res. 2015 (Oct. 24, 2011); S.C. Res. 1976 (Apr. 11, 2011); S.C. Res. 1950 (Nov. 23, 2010); S.C. Res. 1918 (Apr. 27, 2010); S.C. Res. 1897 (Nov. 30, 2009); S.C. Res. 1851, *supra* note 24); S.C. Res. 1846, *supra* note 25; S.C. Res. 1838, *supra* note 24; S.C. Res. 1816, *supra* note 4; *see also* S.C. Res. 733, ¶ 5 (Jan. 23, 1992) (stating that the Security Council was “gravely alarmed at the rapid deterioration of the situation in Somalia,” and under Ch. VII, decided that all States, “. . . immediately implement a general and complete embargo on all deliveries of weapons and military equipment. . .”).

<sup>336</sup> S.C. Res. 1816, *supra* note 4, ¶ 7(a).

<sup>337</sup> *Id.* at pmb1.

<sup>338</sup> *Id.* ¶ 2.

drafted by Member States at the International Maritime Organization.<sup>339</sup> As of July 2018, there were 166 States Parties to the SUA Convention, which proscribes unlawfully and intentionally seizing or exercising control of a ship, among other illicit activity, and requires extradition or prosecution.<sup>340</sup> Though some elements of SUA proscribe action not within the customary law of piracy, other provisions *could* apply to acts committed by Somali pirates, such as unlawfully, intentionally, and forcibly seizing or exercising control over a ship by force.<sup>341</sup> Capabilities provided by SUA, when combined with the LOS Convention, prompted a Security Council member to assert “the international community already has sufficient legal authority and available mechanisms to apprehend and prosecute pirates.”<sup>342</sup> But unanimity on the issue was lacking, with a minority view contending that SUA, as a counterterrorism convention,<sup>343</sup> was generally not applicable to acts of piracy.<sup>344</sup>

The uncertainty of the legal end-state could have tremendously damaged the nascent counterpiracy mission. The Security Council, in turn, could have deferred to international legal venues or allowed the legal disagreement to continue. Instead, the U.N.S.C. confronted this important issue and in Resolution 1846 (2008), among other mandates, declared SUA a viable legal

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<sup>339</sup> S.C. Res. 1846, *supra* note 24, ¶ 15; *see also* SUA Convention 1988, *supra* note 203; *see also, e.g.*, Kraska & Wilson, *supra* note 69, at 241 (“The SUA Convention was created in response to the hijacking, hostage taking, and murder committed on board the Italian-flagged passenger liner *Achille Lauro* in 1985. At the time of the attack on the cruise ship, many states did not have criminal legislation for extradition or prosecution for vessel hijacking. Over a three-year period, member states at the IMO developed and adopted SUA, which entered into force in 1992. A key SUA offense is to unlawfully and intentionally seize or exercise control over a ship by force or threat or other form of intimidation.”).

<sup>340</sup> Int’l Maritime Org. [IMO], *Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions* 428–32 (Dec. 8, 2017); *see also* SUA Convention (1988), *supra* note 203, art. 3.1.1.

<sup>341</sup> SUA Convention (1988), *supra* note 203, art. 3.1.1. This SUA Convention (1988) article also proscribes such actions if taken under threat or any other form of intimidation. *Id.*

<sup>342</sup> U.N. SCOR, 6046th mtg. at 10, U.N. Doc. S/PV.6046 (Dec. 16, 2008). Condoleezza Rice discussed the situation in Somalia that led to the adoption of Resolution 1851 (2008). *Id.* The authorities referenced included the LOS Convention, prior UNSC Resolutions, and the Convention for SUA against the Safety of Maritime Navigation (1988). *Id.* Rice continued that adopting a resolution was nevertheless necessary because “sometimes the political will and the coordination have not been there. . . .” *Id.*

<sup>343</sup> *International Legal Instruments*, UNITED NATIONS OFFICE OF COUNTER-TERRORISM, <http://www.un.org/en/counterterrorism/legal-instruments.shtml> (including SUA as one of “19 international legal instruments to prevent terrorist acts.”); *see also* SECURITY COUNCIL COUNTER-TERRORISM COMMITTEE, <http://www.un.org/en/sc/ctc/laws.html>.

<sup>344</sup> *See* Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia, *Piracy off the Somali Coast: Assessment and Recommendations* 26, Nairobi, Kenya (Nov. 10–21, 2008).

instrument in the fight against Somali piracy.<sup>345</sup> This clarification allowed counterpiracy discussions to move forward in other key areas as well, such as information sharing, operational collaboration, and the pursuit of illicit financing. Unfortunately, between 2008 and 2017 there was, to the Author's knowledge, only five prosecutions globally for SUA violations involving a criminal act that could meet the elements of both piracy and SUA (1988).<sup>346</sup> In part, a lack of use by Member States to prosecute under the SUA Convention is emblematic of challenges with maritime law enforcement, and the difficulties of conducting boardings at sea; responding to ships that may be registered in one country, ownership in another, and crewmembers from multiple other states; diplomatic relations regarding potential waivers of jurisdiction; ensuring the maintenance of a chain of custody for evidence seized on the high seas; detention conditions on a warship; judicial competency, investigative capacity, and promptly bringing suspects before a magistrate. Those challenges can all be overcome but require sustained attention by the Security Council as well as continued engagements by the United Nations Office on Drugs and Crime (UNODC) Global Maritime Crime Programme (GMCP), among others.

Resolution 1851 (2008) authorized Member States to take "all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea."<sup>347</sup> This extraordinary provision allowed military strikes on land, with six caveats: (1) the affected Member State requests such authority; (2) the resolution applies only to those States cooperating with the TFG; (3) advance notification is required; (4) authorization is for a limited time period; (5) authorization is for a limited purpose: to suppress piracy and armed robbery at sea; and (6) any use of force "shall be undertaken consistent with applicable international humanitarian and human rights law."<sup>348</sup>

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<sup>345</sup> See S.C. Res. 1846, *supra* note 24, ¶ 15 (noting that the SUA Convention (1988) "provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; *urges* States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia. . . .").

<sup>346</sup> See *United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013); *United States v. Salad*, No. 2:11cr34, 2012 WL 12953886 (E.D. Va. Nov. 16, 2012); *Muse v. Daniels*, 815 F. 3d 265 (7th Cir. 2016); see also *Beyle v. United States*, 269 F. Supp. 3d 716 (E.D. Va. 2017); *United States v. Salad*, 907 F. Supp. 2d 743 (E.D. Va. 2012). Since the adoption of the SUA Convention, the Author is aware of only one other criminal prosecution, unrelated to piracy, which also involved a U.S. proceeding. See *United States v. Shi*, 525 F.3d 709 (9th Cir. 2008). In total, as of November 2018, there have been six criminal convictions under national-level legislation that implemented the provisions of the SUA Convention (1988).

<sup>347</sup> S.C. Res. 1851, *supra* note 24, ¶ 6.

<sup>348</sup> *Id.*

Another issue addressed by the Security Council involved the destruction of ships reasonably suspected of being involved in piracy. There are only three recognized bases for intentionally sinking or destroying a vessel interdicted on the high seas suspected of engaging in illicit activity: enforcement of a U.N.S.C. resolution; safety, where a navigational hazard exists if the ship were to remain in its place; or where judicially/administratively ordered, if consistent with internationally recognized due process standards.<sup>349</sup> Without explicit Security Council mandates, could warships be exposed to claims for compensation if they scuttled vessels? In U.N.S.C. Resolutions 1846, 1851, 1897, 1976, 2184, and 2383, among others, the Security Council appropriately provided express authorization to seize and dispose of vessels when reasonable grounds existed to believe they had been used in piracy. U.N.S.C. Resolution 2184 (2014) provides an example of an operative provision on this issue, stating “*consistent with this resolution and international law*” Member States “take part in the fight against piracy . . . by seizing and disposing of boats . . . used in the commission of piracy . . . .”<sup>350</sup>

Along with extending authorization to conduct operations within the Somali territorial sea, Resolution 1897 (2009) invited consideration of special agreements with countries to take custody of pirates and urged states support investigations.<sup>351</sup> Resolution 1976 (2011) underlined the need to investigate those who “illicitly finance, plan, organize or unlawfully profit from pirate attacks” both on land and on the water; strengthen “anti-money-laundering laws[;]” and establish Financial Investigation Units.<sup>352</sup> Resolution 2077 (2012)

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<sup>349</sup> See WILSON, *supra* note 129, at 305–12.

<sup>350</sup> S.C. Res. 2184, *supra* note 270, ¶ 11(emphasis added); see also S.C. Res. 2383, *supra* note 135, ¶ 12 (“Renews its call upon States and regional organizations that are able to do so to take part in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and international law, by deploying naval vessels, arms, and military aircraft, by providing basing and logistical support for counter-piracy forces, and by *seizing and disposing of boats*, vessels, arms, and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use[.] . . .”) (second emphasis added).

<sup>351</sup> S.C. Res. 1897, ¶¶ 6, 15 (Nov. 30, 2009).

<sup>352</sup> S.C. Res. 1976, *supra* note 335, ¶¶ 15, 17 (Apr. 11, 2011). The issue of whether inciting or facilitating an act of piracy, consistent with LOS Convention art 101(c), occurring on land enjoys universal jurisdiction has not been addressed in Security Council resolutions. That said, the Netherlands noted “in 1956 that the ILC’s [International Law Commission] drafting – in omitting references to the high seas [in inciting or facilitating] – would allow this provision to provision to apply elsewhere.” PROELSS, *supra* note 68, at 743–44; see also U.S. v. Ali, 718 F.3d 929 (D.C. Cir. 2013).

encouraged flag States and port States to develop regulations for the deployment of privately contracted armed security personnel.<sup>353</sup>

Subsequent resolutions would extend the mandate to operation within the Somali territorial sea<sup>354</sup> and various other danger areas and recognition of those deploying and supporting collaborative efforts. Somali representative Abukar Dahir Osman welcomed acknowledgement in Resolution 2383 (2017) that “illegal, unreported and unregulated fishing in Somalia’s exclusive economic zone results in a loss of hundreds of millions of dollars in lost revenue and could lead to the destabilization of the coastal communities of Somalia.”<sup>355</sup> Fishing licenses issued by the Somali authorities will not be attractive to fishing companies, as they cannot compete in the market with those who get it free of charge—that is, illegally.<sup>356</sup> Resolution 2383 also noted that “piracy exacerbates instability in Somalia by introducing large amounts of illicit cash that fuels additional crime, corruption, and terrorism[;] . . .”<sup>357</sup> Unfortunately, it is unclear what information the Security Council relied upon for this assertion, as the resolution did not cite any study affirming a link between piracy and terrorism, nor has any U.N.S.C.-directed report expressly documented such a connection.

Diplomatic responses to the Somali piracy threat in Turtle Bay (as well as in London, at the International Maritime Organization) appropriately did not result in recommendations to develop a new treaty or amend an existing instrument.

<sup>353</sup> S.C. Res. 2077, *supra* note 335, ¶ 30. The Security Council called upon States to develop regulations “through a consultative process, including through the IMO [International Maritime Organization] and ISO [International Organization for Standardization].” *Id.*

<sup>354</sup> *See, e.g.*, S.C. Res. 1846, *supra* note 24, ¶ 10 (“States and regional organizations cooperating with the TFG . . . may . . . enter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law. . . .”).

<sup>355</sup> *See* U.N. SCOR, 8088d mtg. at 2–3, U.N. Doc. S/PV.8088 (Nov. 7, 2017); *see also* U.N. Secretary-General, *On the Situation with Respect to Piracy and Armed Robbery at Sea off the Coast of Somalia*, ¶ 6, U.N. Doc. S/2016/843 (Oct. 7, 2016) (“The complex linkage between piracy and illegal, unreported and unregulated fishing continues to be of concern. The rise in the number of seafarers held by pirates in 2015 is largely attributable to hijackings of small fishing vessels. Many local communities view ransom payments for hostages as compensation for what they perceive as fishing revenue lost through illegal, unreported and unregulated fishing by such vessels, and, to that extent, the perception and the reality of illegal, unreported and unregulated fishing activities can be a driver for piracy”).

<sup>356</sup> U.N. SCOR, 8088th mtg., *supra* note 355. The Somali representative added, “According to Kofi Annan, former Secretary-General and current Chairperson of the Africa Progress Panel, “natural resources plunder is organized theft disguised as commerce.” *Id.* at 3. Mr. Annan further asserted “commercial trawlers that operate under flags of convenience and unload in ports that do not record their catch are unethical and illegal.” *Id.*; *see also* S.C. Res. 2383, *supra* note 135, at pmb1. (referencing illegal, unregulated, and unreported fishing prominently).

<sup>357</sup> S.C. Res. 2383, *supra* note 135, ¶ 2.

Security Council resolutions, however, provided enhanced authorities—such as permitting naval interdictions within the Somali territorial sea, the intentional destruction of vessels reasonably believed to be engaged in prohibited activity, and engagements on land—and collectively represent a model that would, in part, be employed in response to migrant smuggling in the Mediterranean Sea for addressing subsequent transnational maritime threats where coastal State capabilities are extremely limited or nonexistent.

#### *D. Mediterranean Migrant-Smuggling and Trafficking-in-Persons Model*

Dangerous maritime journeys of people seeking entry into Europe have collectively been called the greatest humanitarian crisis of our time.<sup>358</sup> During discussions on Resolution 2240 (2015), Security Council member Cherif Mahamet Zene (Chad) noted somberly, “[t]he Mediterranean has become a cemetery for thousands of essentially African migrants, who leave their countries and take enormous risks to reach Europe in search of a better life.”<sup>359</sup> A predicate question at Turtle Bay was not whether the situation was horrific—it unquestionably was and remains so to date—but rather, whether Security Council involvement was appropriate and if so, whether approval of measures under Chapter VII was warranted.

The prohibitive majority of maritime transits occur on overcrowded and unseaworthy boats; the data between 2014 and 2017 are both stunning and disturbing: there were approximately 1,765,216 arrivals into Europe from the Mediterranean Sea and 15,486 dead and missing during transit.<sup>360</sup> In other words, *every day* on average over the four years more than 1,209 people crossed the Mediterranean seeking entry into Europe, and approximately ten perished or went missing.

Extensive criminal involvement with smuggling and trafficking is powering the situation. A U.N. Report estimated that the revenue generated from illicit transit is “between 5 billion and 6 billion euros in 2015.”<sup>361</sup> A subsequent U.N. Report noted, “[o]rganized transnational criminal networks continued to exploit the conflict and security situation in Libya to conduct their smuggling and

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<sup>358</sup> Zeina Karam, *Q & A: Syria's Civil War at the Root of Migrant Crisis*, ASSOCIATED PRESS (Sept. 3, 2015), <http://bigstory.ap.org/article/04477bebf2074f73ad56a0c5fabf444e/qa-syrias-civil-war-root-migrant-crisis>.

<sup>359</sup> U.N. SCOR, 7531st mtg. at 3, U.N. Doc. S/PV.7531 (Oct. 9, 2015).

<sup>360</sup> See *The Mediterranean Situation*, OPERATIONAL PORTAL REFUGEE (Dec. 31, 2017), <http://data2.unhcr.org/en/situations/mediterranean>.

<sup>361</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 2240*, *supra* note 11, ¶ 6.

trafficking operations, which in turn has fueled instability and undermined governance structures.”<sup>362</sup>

Three Security Council resolutions adopted between 2015 and 2017 focused on the Mediterranean situation, and the authorities they provide are case studies on impact and imprecision. The maritime domain is their predominant focus: until land-based security, governance, and development improve, naval assets will be called on to conduct boardings and rescues<sup>363</sup> and, as appropriate, to take law enforcement measures. U.N.S.C. decisions adopted under Chapter VII were not met with unanimous support. During debate on Resolution 2312 (2016) Venezuela expressed misgivings similar to those it had offered on Resolution 2240 (2015):

We reiterate our doubts that the resolution is an adequate instrument to comprehensively and appropriately address the tragedy being lived out by thousands of human beings . . . . The complexity and multidimensional nature of the phenomenon requires a comprehensive approach that goes beyond a merely military and security-oriented [approach], including recourse to Chapter VII of the Charter of the United Nations, as some States within this organ claim to encourage. Venezuela once again therefore rejects the security- and criminalization-oriented approach to the issue of asylum seekers, refugees and migrants.<sup>364</sup>

Despite the lack of consensus, the transnational security threats of smuggling migrants and trafficking in persons warranted Security Council intervention. The U.N.S.C. provided authorities to address both an emergent humanitarian crisis and a continuing security threat. Special Representative Martin Kobler, Head of United Nations Support Mission in Libya, convincingly described the intersecting humanitarian and security challenges, noting in 2017, “[f]ive hospitals have been bombed this year and humanitarian supplies cannot reach many regions of Libya due to insecurity[;]”<sup>365</sup> particularly “[w]ith respect to the

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<sup>362</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 2312*, ¶ 7, U.N. Doc. S/2017/761 (Sept. 7, 2017).

<sup>363</sup> See LOS Convention, *supra* note 23, art. 98 (“Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him . . . .”); see also RICK BUTTON, *International Law and Search and Rescue*, NAVAL WAR COLLEGE REV. 25–63 (2017) (providing a comprehensive analysis of search and rescue (SAR) background, context, and current operational considerations).

<sup>364</sup> U.N. SCOR, 7783d mtg. at 3–4, U.N. Doc. S/PV.7783 (Oct. 6, 2016).

<sup>365</sup> U.N. SCOR, 7961st mtg. at 2–4, 20–21, U.N. Doc. S/PV.7961 (June 7, 2017) (“[Kobler] floated the idea with the Chief Prosecutor of the International Criminal Court as to whether it would be possible to consider

illegal flow of arms, Libya has 20 million weapons. With a population of only 6 million people, that is really a problem.”<sup>366</sup> This resolution model—seeking to bridge safety and security considerations—represents a pioneering formula, but in this instance it brought textual ambiguity and imprecise guidance.

After months of discussion, the Security Council approved Resolution 2240 (2015), which contained three operative elements: (1) inspections are authorized *on the high seas* (outside of the twelve-mile territorial sea) off the coast of Libya, given reasonable suspicion of migrant smuggling and “good faith efforts” to contact the flag state for consent; (2) disposal of vessels involved in migrant smuggling or human trafficking interdicted is authorized only if “in accordance with applicable international law;” and (3) member states may “use all measures commensurate to the specific circumstances . . .” in confronting migrant smugglers, consistent with “international human rights law.”<sup>367</sup>

The authorities provided in U.N.S.C. Resolution 2240, along with Resolution 2312 (2016), and Resolution 2380 (2017), were unquestionably beneficial. Between June 2015 and August 2017, European Union Naval Force Mediterranean (EUNAVFOR Med) reported rescuing “39,818 persons in the southern central Mediterranean. . . . [and] estimate[d] that since October 2016 around 140,210 persons have been rescued by different vessels in the central Mediterranean Sea.”<sup>368</sup>

The three mandates had a positive operational impact, notwithstanding language that was in important instances vague and imprecise. One such example is the regrettable reference in Resolution 2240 to “good faith efforts” to obtain the consent of the flag state.<sup>369</sup> Even more ambiguity arises in their provision on the intentional sinking—disposal—of vessels interdicted on the

human trafficking as a crime against humanity, given the thousands of people who have drowned and the irresponsible behaviour and the lack of accountability of human traffickers operating in Libya.”)

<sup>366</sup> U.N. SCOR, 7927th mtg. at 2–4, 20-21, U.N. Doc. S/PV.7927 (April 19, 2017).

<sup>367</sup> S.C. Res. 2240, *supra* note 4, ¶¶ 5–8, 10.

<sup>368</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 2312*, ¶ 4, U.N. Doc. S/2017/761 (Sept. 7, 2017). (“As at 31 August 2017, some 99,105 people, originating largely from sub-Saharan African countries, had arrived in Italy in 2017.”).

<sup>369</sup> See S.C. Res. 2240, *supra* note 4, ¶ 7. *Contra* U.N. Convention against Transnational Organized Crime, *Protocol against the Smuggling of Migrants by Land, Sea and Air*, U.N. Doc. 2241 U.N.T.S. 507 (Nov. 15, 2000) (addressing criminal activity associated with the smuggling of migrants). Article 8(2) provides that a “[s]tate that has reasonable grounds to suspect that a vessel . . . flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag [s]tate, request confirmation of registry and, if confirmed, request authorization from the flag [s]tate to take appropriate measures with regard to that vessel.” *Id.* at 5. Article 8(5) provides that, “[a] State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.” *Id.*

high seas engaged in proscribed conduct. Resolution 2240 is confusing because it identifies the issue of vessel destruction but does not provide express directions resolving the issue.<sup>370</sup> In contrast, Resolution 2184 (2014) authorized states engaged in Somali counterpiracy operations to, among other things, seize and dispose of boats “consistent with this resolution and international law”<sup>371</sup> while Resolution 2240, vaguely provided such actions were authorized only “in accordance with applicable international law.”<sup>372</sup>

On the issue of good-faith efforts to obtain the consent of the vessel’s flag state, the Security Council called upon “flag States that receive such requests to review and respond to them in a rapid and timely manner . . . “ but provided no further direction.<sup>373</sup> A EU submission to the U.N. Committee on Resolution 2240 implementation “consider[ed] four hours a suitable time frame to qualify an effort to obtain consent by a flag State as being undertaken in good faith.”<sup>374</sup> The EU’s position of “good-faith” is judicious, and at least two international instruments<sup>375</sup> have addressed the presumption that may be taken when after the passage of four hours, a flag state has not responded to a request for a confirmation of registry. None, however, have asserted that consent could be presumed *without* the flag state’s prior agreement.

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<sup>370</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 2240*, *supra* note 11, ¶¶ 5–8, 10. Months after implementation of the resolution as well as a U.N. Report, no international authority was specifically identified to support vessel destruction: A European Union submission to the Resolution 2240 Committee noted that its military operation “towed or transported vessels to Italy, insofar as possible . . . in view of the potential value to investigations and prosecutions. Otherwise, it disposed of them to avoid any risk to the safety of seafarers, navigation and the marine environment, *in line with relevant international law and standards.*” *Id.* at ¶ 15 (emphasis added). The EU’s approach is prudent, though the likelihood of varied interpretations is not beneficial in responses that seek to involve naval forces from multiple countries. The Security Council missed an opportunity to unambiguously state with detail what action was authorized, and potentially identify documentation and evidentiary requirements; due process elements; and environmental considerations.

<sup>371</sup> S.C. Res. 2184, *supra* note 270, ¶ 11.

<sup>372</sup> S.C. Res. 2240, *supra* note 4, ¶ 8 (emphasis added).

<sup>373</sup> *Id.* ¶ 9.

<sup>374</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to Resolution 2240*, *supra* note 11, ¶ 17 (“To date (September 7, 2016), however, no such requests [to a flag State to confirm registry and conduct an inspection] have [been] made.”).

<sup>375</sup> See Int’l Maritime Org. [IMO], Doc. :EG/CONF.15/21, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Nov. 1, 2005) (2005 SUA Protocols, art. 8bis (5) (d), which provides a State Party may notify the IMO Secretary-General “with respect to ships flying its flag or displaying its mark of registry, [that] the requesting Party is granted authorization to and search the ship . . . if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.”); see also Maritime and air counter narcotics agreement in Caribbean, 2005 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, Ch. 3, § 21, <https://www.state.gov/s/l/c22824.htm>.

Also, the EU reported “that it could not board, inspect and seize all vessels suspected of being used for smuggling and trafficking off the coast of Libya for legal reasons, given that the Security Council, in its resolution 2240 (2015), did not address presumed places of departure other than Libya.”<sup>376</sup>

Resolutions 2312 (2016) and 2380 (2017) authorized measures against vessels suspected of illegal smuggling from Libya, providing high seas inspections of vessels could occur “with the consent of the flag State” where reasonable grounds exist to suspect proscribed conduct.<sup>377</sup> Resolutions 2312 and 2380 also renewed the operative provisions in Resolution 2240 that authorize boarding a foreign flagged vessel without flag state consent, provided *good faith* efforts are first made to obtain consent.<sup>378</sup> The inclusion of the “good faith” in the same paragraph that emphasizes the urgency of saving migrants and human trafficking victims under “exceptional and specific circumstances” combined with a requirement that Member States conducting naval measures “keep flag States informed of actions taken with respect to their vessels”<sup>379</sup> supports the conclusion that a boarding may occur without flag state consent (provided good faith efforts are made to first obtain approval). While this mandate can reasonably be interpreted to authorize a boarding without flag State consent on high seas, a lack of precision on a seminal law-of-the-sea issue has generated disparate enforcement measures and inevitably led to an uneven approach.<sup>380</sup>

These measures have supported naval engagements, again affirming the unique position and authoritative force of the Security Council in the maritime environment. This resolutions model could be applied to other threats involving both humanitarian and security issues, though the operative provisions warrant refinement to remove ambiguity and imprecise terms.

### *E. Embargo Model*

Resolutions 1970 (2011) and 1973 (2011), along with ten subsequent mandates adopted through 2017, sought to stem deteriorating security conditions

<sup>376</sup> U.N. Secretary-General, *Report of the Secretary-General pursuant to Resolution 2240, supra* note 11, ¶ 54 (“The European Union assesses that, with changing and emerging routes to Europe, its military operation is not able to counter the issue to the best extent possible. The operation is of the view that, while its presence and activities have limited the freedom of maneuver of migrant smugglers and affected their operations and tactics, effective measures have to be taken on land and at sea.”).

<sup>377</sup> S.C. Res. 2380, ¶ 6 (Oct. 5, 2017); S.C. Res. 2312, ¶ 6 (Oct. 6, 2016).

<sup>378</sup> S.C. Res. 2312, *supra* note 377, ¶ 7 (Oct. 6, 2016) (“*Decides* that, for a further period of twelve months from the date of adoption of this resolution to renew the authorizations as set out in paragraphs 7, 8, 9 and 10 of resolution 2240 (2015) . . . .”) (emphasis in original); *see also* S.C. Res. 2380, ¶ 7 (Oct. 5, 2017).

<sup>379</sup> S.C. Res. 2240, *supra* note 4, ¶¶ 7, 9 (Oct. 9, 2015).

<sup>380</sup> *Id.*

in Libya, in the midst of an unfolding humanitarian crisis, that allowed weapons transfers to the Islamic State in Iraq and the Levant (ISIL), also referred to as Da'esh, as well as other terrorist groups.<sup>381</sup> Other Security Council resolutions have sought to prevent the illegal export of oil from Libya.<sup>382</sup> The Security Council decided in Resolution 1970 that Member States immediately take necessary measures to block the movement of prohibited arms and materiel on their flagged vessels, by their nationals, and through their territories.<sup>383</sup> Resolution 1973 (2011) called on Member States “to ensure strict implementation of the arms embargo . . . [and] inspect in their territory, including seaports . . . and on the high seas, vessels . . . bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains [prohibited] items . . . .”<sup>384</sup>

Authorization to enforce an arms embargo involving Libya parallels direction provided to address other transnational security threats, discussed herein, which are unfortunately not models of precision from a law-of-the-sea perspective.

Resolution 1973 is emblematic of imprecision on the issue of high seas boarding authorities. This mandate called upon flag states “to cooperate with such inspections and authorizes Member States to use all measures commensurate to the specific circumstances to carry out such inspections.”<sup>385</sup> This provision is vague regarding whether flag state consent is required. However, additional resolution provisions requiring Member States to report the results of any inspection, including “*whether or not cooperation was provided,*” and provide the United Nations with details of the vessel inspection, seizure, and disposal of proscribed material reasonably supports concluding flag state consent is not required.<sup>386</sup> Resolution 2292 (2016), affirming the Libyan arms embargo, again employed the undefined “good faith efforts” standard with regard to obtaining flag state consent prior to boarding a foreign flagged

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<sup>381</sup> See S.C. Res. 2420 (June 11, 2018); S.C. Res. 2357 (June 12, 2017); S.C. Res. 2292, *supra* note 135; S.C. Res. 2278 (Mar. 31, 2016); S.C. Res. 2214 (Mar. 27, 2015); S.C. Res. 2213 (Mar. 27, 2015); S.C. Res. 2174 (Aug. 27, 2014); S.C. Res. 2144 (Mar. 14, 2014); S.C. Res. 2095 (Mar. 14, 2013); S.C. Res. 2040 (Mar. 12, 2012); S.C. Res. 2009 (Sept. 16, 2011). Further, while there are extensive legal issues associated with embargos, the focus of this section is solely on the impact of an embargo on law-of-the-sea principles.

<sup>382</sup> See S.C. Res. 2362 (June 29, 2017); S.C. Res. 2278, *supra* note 381; S.C. Res. 2213, *supra* note 381; S.C. Res. 2146, *supra* note 135.

<sup>383</sup> S.C. Res. 1970, ¶ 9 (Feb. 26, 2011).

<sup>384</sup> S.C. Res. 1973, *supra* note 4, ¶ 13 (Mar. 17, 2011).

<sup>385</sup> *Id.*

<sup>386</sup> S.C. Res. 1973, *supra* note 4, ¶ 15 (emphasis added).

vessel<sup>387</sup> (discussed above in the context of smuggling migrants and trafficking in persons). Resolution 2292, extended in Resolutions 2357 (2017) and 2420 (2018), also urged Member States “conducting inspections to do so without causing undue delay to or *undue interference* with the exercise of freedom of navigation.”<sup>388</sup>

Despite the operative provisions of Resolution 2292, the Chinese representative to the Security Council asserted, “The inspection of related vessels should be undertaken only with the consent of the flag States and in accordance with the resolution.”<sup>389</sup> The Venezuelan representative first agreed with the Chinese position, then acknowledged the Resolution’s expansive authorities applied only to Libya:

In authorizing the interdiction of ships on the high seas suspected of transporting arms to be used by [ISIL] . . . respect for international law must be upheld, which includes obtaining the consent of the vessel’s flag State prior to any inspections . . . . *We believe that the practice of interdicting vessels on the high seas off the coast of Libya with a view to combating the traffic in arms and related materiel should not be extrapolated to other possible cases.*<sup>390</sup>

Diplomatic focus of the dire situation in Libya was both appropriate and urgently needed. U.N.S.C. measures resulted in, among others, the U.S. Navy diversion of a ship containing, “laboratory items,” “chemicals,” “hardware,” “machines,” and “spare parts” in 2011,<sup>391</sup> and the Lebanese seizure in 2012 of rocket-propelled grenades and heavy caliber ammunition seized from the Sierra Leone flagged *Letfallah II*.<sup>392</sup> Further, on January 6, 2018, after Greek officials identified *Andromeda* operating near Crete, special forces boarded the Tanzania-

<sup>387</sup> S.C. Res. 2292, *supra* note 135, ¶ 3.

<sup>388</sup> *Id.* at ¶ 4 (emphasis added).

<sup>389</sup> U.N. SCOR7715th mtg., *supra* note 139, at 4. China in 2017 again asserted its position that the resolution did not provide authority to conduct a boarding without flag State consent. U.N. SCOR, 72d Sess., 7964th mtg. at 5, U.N. Doc. S/PV.7964 (June 12, 2017) (“States should . . . strictly abide by the relevant principles of international law and respect the sovereignty and legitimate rights and interests of flag States. Measures taken by States should not infringe upon the exclusive jurisdiction of flag States over their ships.”).

<sup>390</sup> U.N. SCOR 7715th mtg., *supra* note 139, at 5–6 (emphasis added).

<sup>391</sup> Reply in Support of the United States’ Motion to Dismiss at 2, *Tarros v. United States*, 982 F. Supp. 2d 325 (S.D.N.Y. 2013) (No. 13 Civ. 1932).

<sup>392</sup> Dominic Evans, *UPDATE 1-Lebanon Impounds Ship Carrying Libyan Weapons*, REUTERS (Apr. 28, 2012, 12:30 PM), <https://www.reuters.com/article/syria-lebanon-ship/update-1-lebanon-impounds-ship-carrying-libyan-weapons-idUSL6E8FS1CT20120428>.

flagged vessel and seized explosives, detonators, and other proscribed cargo destined for Libya in violation of U.N.S.C. mandates.<sup>393</sup>

Another security challenge in Libya, the illicit export of crude oil, prompted the Security Council to adopt Resolution 2146 (2014). This mandate authorized inspections on the high seas of designated vessels and the return of crude oil, with the consent of, and in coordination with, the Government of Libya provided the consent of the vessel's flag state is first sought.<sup>394</sup> Thus, designated vessels could be boarded without flag state consent so long as flag state approval was sought. The resolution then noted the authorization to address the Libyan threat, "shall not affect the rights or obligations or responsibilities of Member States under international law, including the general principle of exclusive jurisdiction of a flag state over its vessels on the high seas."<sup>395</sup>

Approximately one week before the Security Council adopted Resolution 2146, special forces from the United States, at the request of the Libyan Government, "boarded and took control of the commercial tanker *Morning Glory*."<sup>396</sup> Carrying 200,000 barrels of oil, this vessel was transiting the Mediterranean after escaping "a blockade of Sidra imposed by the government in Tripoli."<sup>397</sup> Initially sailing under the registry of North Korea, "following the revocation by the Democratic People's Republic of Korea of its flag" the *Morning Glory* was without nationality.<sup>398</sup> A U.N. panel of experts<sup>399</sup> concluded that because of "the cargo manifest and other relevant documents of the *Morning*

<sup>393</sup> Press Release, Ministry of Maritime and Island Policy, Greece, Detection and confiscation of a foreign flag ship with explosives at the port of Hereaklion, Crete (Jan. 2018), <https://translate.google.com/translate?hl=en&sl=el&u=https://www.yen.gr/&prev=search> ("It was revealed [during a preliminary investigation] that the master of the ship was instructed by his owner to go to the port of [Misrata] in Libya in order to unload and deliver the entire cargo . . .").

<sup>394</sup> S.C. Res. 2146, ¶¶ 5–9 (Mar. 19, 2014) (explaining, in ¶6, "that Member States, before taking measures authorized in paragraph 5, first seek the consent of the vessel's flag State . . .").

<sup>395</sup> *Id.*

<sup>396</sup> Jeanette Torres, *Navy SEALs Seize Oil Freighter "Morning Glory" in Mediterranean*, ABC NEWS RADIO (Mar. 17, 2014), <http://abcnewsradioonline.com/world-news/navy-seals-seize-oil-freighter-morning-glory-in-mediterranea.html>.

<sup>397</sup> *Id.*

<sup>398</sup> U.N. Security Council, Letter dated 23 February 2015 from the Panel of Experts established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, ¶ 234, U.N. Doc. S/2015/128 (Feb. 23, 2015); see also LOS Convention, *supra* note 23, arts. 92, 110. A ship without nationality is also referred to as stateless, and warships or other government vessels from all nations can board such a ship on the high seas and subject it to all appropriate law enforcement actions. *Id.*

<sup>399</sup> U.N. Security Council, Letter dated 23 February 2015 from the Panel of Experts established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, ¶ 235, U.N. Doc. S/2015/128 (Feb. 23, 2015) ("Although the [*Morning Glory*] dated from before the adoption of resolution 2146 (2014), the Panel decided to investigate the case in order to gain knowledge of the networks organizing these illegal exports, as well as their modus operandi.").

*Glory* . . . the smuggling network may have links with companies in different countries.”<sup>400</sup> Moreover, there were “allegations of a potential link between the oil smuggling network and the financing of arms transfers in violation of the arms embargo.”<sup>401</sup>

Resolution 2146 requires Member States to take “necessary measures to prohibit the provision by their nationals or from their territory of bunkering services” to designated vessels, and to “require their nationals and entities and individuals in their territory not to engage in any financial transactions with respect to such crude oil from Libya aboard” designated vessels.<sup>402</sup> Though this Resolution has not had a notable operational impact, it is a model for future U.N.S.C. action—Resolution 2146 provided authorities to support naval interdictions on the high seas of vessels illicitly smuggling oil while appropriately considering navigational freedoms and the interests of the affected state.<sup>403</sup>

The Security Council responded to an unrelated security threat in Resolution 1929 (2010), “[b]anning Iran from investing in nuclear and missile technology abroad, including investment in uranium mining[,]” and “[e]stablishing a complete arms embargo on Iran, banning the sale of ‘battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems’ to Iran.”<sup>404</sup> This effort represented one of eight U.N.S.C. resolutions aimed at Iran’s nuclear program, among other issues, adopted between 2006 and 2015 that also included demands that “Iran suspend its uranium enrichment program, as well as undertake several confidence-building measures[.]”<sup>405</sup>

In the maritime environment, Resolution 1929 (2010) called on states to “inspect . . . all cargo to and from Iran, in their territory, including seaports . . . if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is

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<sup>400</sup> *Id.* ¶ 236.

<sup>401</sup> *Id.* ¶ 237; see also *Libya to Release Crew of Oil Tanker*, VOICE OF AMERICA NEWS (Mar. 24, 2014 6:27 PM), <http://www.voanews.com/a/libya-to-release-crew-of-oil-tanker/1878353.html> (regarding why the Libyans opted not to prosecute the *Morning Glory* crew members).

<sup>402</sup> S.C. Res. 2146, *supra* note 135, ¶ 10.

<sup>403</sup> See S.C. Res. 2146, ¶¶ 5–9.

<sup>404</sup> Kelsey Davenport, *UN Security Council Resolutions on Iran*, ARMS CONTROL ASSOC. (Aug. 6, 2017), <https://www.armscontrol.org/factsheets/Security-Council-Resolutions-on-Iran>.

<sup>405</sup> *Id.*; see also S.C. Res. 2231, ¶ 3 (July 20, 2015); S.C. Res. 1835, ¶¶ 3–4 (Sept. 27, 2008); S.C. Res. 1803, ¶ 15 (Mar. 3, 2018); S.C. Res. 1747, ¶ 9 (Mar. 24, 2007); S.C. Res. 1737, ¶ 1 (Dec. 27, 2006); S.C. Res. 1696, ¶ 2 (July 31, 2006).

prohibited . . . .”<sup>406</sup> The resolution further noted, “consistent with international law, in particular the law of the sea [a state] *may request inspections* of vessels on the high seas with the consent of the flag State, and [*called*] upon all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying [prohibited] items . . . .”<sup>407</sup> Member States were directed to submit reports to the United Nations regarding the results of inspections and in particular, *whether flag state cooperation was provided*.<sup>408</sup> The most likely interpretation of this resolution is that flag state consent is required, though it is unquestionably imprecise.

Regardless of precision, measures imposed against Iran have had a blistering economic impact. As a result of U.N.S.C.-directed sanctions and embargos,

Iran’s oil exports had fallen to 700,000 barrels per day (bpd) by May 2013, compared with an average 2.2 million bpd in 2011. In January 2013, Iran’s oil minister acknowledged for the first time that the fall in exports was costing the country between \$4bn and \$8bn (£2.5bn-£5bn) each month. Iran is believed to have suffered a loss of about \$26bn in oil revenue in 2012 from a total of \$95 bn in 2011.<sup>409</sup>

The meaningful financial consequences of the resolutions are consistent with a U.N. report, the drafters of which had been “informed that some shipping companies and freight forwarders had adopted policies to refrain from business with the Islamic Republic of Iran, including transporting cargo to Iranian ports. A number of large cargo transportation firms announced over the past year a suspension or limitation in shipments involving Iranian ports.”<sup>410</sup>

Resolution 2182 (2014) focused on the continued security threat in Somalia and the enforcement of an arms embargo and charcoal ban. This mandate authorized inspections in Somali territorial waters and on the high seas of vessels bound to or from Somalia that a Member State had reasonable grounds to believe were: “(i) [c]arrying charcoal from Somalia in violation of the charcoal ban; (ii) carrying weapons or military equipment to Somalia, directly or indirectly, in violation of the arms embargo on Somalia; (iii) carrying [proscribed] weapons

<sup>406</sup> S.C. Res. 1929, *supra* note 4, ¶ 14.

<sup>407</sup> *Id.* ¶ 15 (first emphasis added).

<sup>408</sup> S.C. Res. 1929, *supra* note 4, ¶ 17.

<sup>409</sup> *Iran Nuclear Crisis: What Are the Sanctions?*, BBC NEWS (Mar. 30, 2015), <http://www.bbc.com/news/world-middle-east-15983302>.

<sup>410</sup> U.N. Security Council, Note by the President of the Security Council, ¶ 154, U.N. Doc. S/2012/395 (June 12, 2012) (quoting Jonathan Saul, *Sanctions Blowback Crippling Iran’s Shipping Trade*, REUTERS (Dec. 1, 2011), <http://www.reuters.com/article/us-iran-shipping-idUSTRE7B01PG20111201> (“Iran’s vital seaborne trade is suffering from escalating sanctions pressure as shipping companies scale down activities or pull out, with the Islamic Republic facing more hurdles in transporting its oil . . . .”).

or military equipment to [designated] individuals or entities.”<sup>411</sup> The illicit movement of charcoal may not enjoy “front page” media attention, but it is directly linked to terrorist groups. The United Kingdom representative to the Security Council noted, “Al-Shabaab has kept up to one-third of the revenues of the \$250-million annual trade. Charcoal is giving Al-Shabaab a lifeline.”<sup>412</sup>

The mandate regarding illicit Somali activity called upon flag states “to cooperate with such inspections” and requested that Member States “make good-faith efforts to first seek the consent of the vessel’s Flag State prior to any inspections . . . .”<sup>413</sup> Resolution 2182 further decided that “any Member State that undertakes an inspection . . . shall promptly notify the [United Nations] Committee and submit a report on the inspection containing all relevant details, including . . . efforts made to seek the consent of the vessel’s Flag State[.]”<sup>414</sup> Thus, the “good faith efforts” provision implicitly provides that boarding of foreign flagged vessels may occur without flag State approval, so long as consent is first sought. Because the provision on boarding wasn’t explicit, however, China unilaterally asserted that “any inspection of such vessels needs the prior consent of the flag States concerned,”<sup>415</sup> a position not supported by the text of the resolution.

The seizure of *MSV Raj Milan* is characteristic of the beneficial impact of Security Council resolutions involving the maritime environment.<sup>416</sup> The *Raj Milan* departed the Kismayo Port in Somalia in 2015 with false documents and almost 25,000 bags of charcoals.<sup>417</sup> Several days later, United Arab Emirate officials in Port Rashid confiscated the shipment and disposed of the charcoal “through resale at a public auction.”<sup>418</sup> And, in 2016 HMAS *Darwin*, an *Adelaide*-class guided-missile frigate in the Royal Australian Navy, interdicted a vessel en route to Somalia carrying proscribed weapons.<sup>419</sup> After searching the

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<sup>411</sup> S.C. Res. 2182, *supra* note 135, ¶ 15.

<sup>412</sup> U.N. SCOR 7286th mtg., *supra* note 127, at 2.

<sup>413</sup> S.C. Res. 2182, *supra* note 135, ¶ 16.

<sup>414</sup> *Id.* ¶ 20.

<sup>415</sup> U.N. SCOR 7286th mtg., *supra* note 127, at 4.

<sup>416</sup> U.N. Security Council, Letter dated 9 October 2015 from the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, Annex 8.3, ¶¶ 4-6, U.N. Doc. S/2015/801 (Oct. 19, 2015).

<sup>417</sup> *Id.*

<sup>418</sup> *Id.* “Data collected on the vessel’s Automatic Identification System (AIS) transmissions confirmed that it had docked off the coast of southern Somalia before sailing northwards to the United Arab Emirates.” *Id.* at 316 n.5.

<sup>419</sup> See HMAS *Darwin* Seizes Large Weapons Cache, COMBINED MARITIME FORCES (Mar. 6, 2016), <https://combinedmaritimeforces.com/2016/03/06/hmas-darwin-seizes-large-weapons-cache/> (“After assessing the vessel to be stateless, HMAS Darwin searched the vessel and discovered 1989 AK-47 assault rifles, 100

vessel, *Darwin* seized “1,989 AK-47 assault rifles, 100 rocket propelled grenade launchers,” as well as machine guns and mortar tubes.<sup>420</sup>

Along with condemning attacks by Al-Qaida in the Arabian Peninsula (AQAP) and “ongoing unilateral actions taken by the Houthis,” the Security Council authorized an arms embargo in Yemen that included weapons and ammunition.<sup>421</sup> This mandate was decided under Chapter VII and directed that Member States “immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to, or for the benefit of [identified individuals and entities.]”<sup>422</sup> Resolution 2216 further called 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 . . . all cargo to Yemen . . .”<sup>423</sup> Member State naval forces have seized more than 8,000 AK-47—also referred to as the Kalashnikov—assault rifles under authority provided by this resolution.<sup>424</sup>

Court documents from a civil proceeding in the United States involved the boarding of *M/T Androussa* off the Yemini coast by Coalition Forces enforcing the arms embargo authorized by Resolution 2216.<sup>425</sup> The vessel was confiscated along with both legitimate cargo and proscribed material that included three “ballast tanks contained traces of highly explosive materials primarily used for military purposes” [and] “a large quantity of steel pipes which been had modified to be used as firearm components for military purposes.”<sup>426</sup> The admiralty complaint filed in the United States that sought more than \$30 millions in damages further alleged “the vessel owners and crew tampered with the maps and navigation devices in the vessel by deleting evidence that the vessel called at the ports of Bandar Abbas and Lavan Island, in Iran,” and while the *Androussa* was berthed in those ports, “the Inmarsat C2 and Automatic Identification System were switched off, making it impossible to track the vessel’s position.”<sup>427</sup>

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rocket propelled grenade launchers, 49 PKM general purpose machine guns, 39 PKM spare barrels and 20 60 mm mortar tubes. These weapons were seized from the vessel that was heading towards the Somalia coast.”)

<sup>420</sup> *Id.*

<sup>421</sup> S.C. Res. 2216, *supra* note 4, ¶¶ 14–17.

<sup>422</sup> *Id.* ¶ 14.

<sup>423</sup> *Id.* ¶ 15.

<sup>424</sup> U.S. 5th Fleet Pub. Affairs, *supra* note 21.

<sup>425</sup> Verified Complaint at 5–7, 21, *Swaidan Trading Co. v. M/V Donousa*, 2018 WL 1226119 (D. Or. Mar. 7, 2018) (alleging negligence and fraud, among other things, in a civil complaint seeking \$32,948,417.30 in damages from the ownership group of *M/T ANDROUSSA*).

<sup>426</sup> *Id.* at 4–5.

<sup>427</sup> *Id.* at 5.

The diplomatic challenge in securing approval of a resolution in Turtle Bay,<sup>428</sup> particularly in the maritime environment, underscores why mandates may not expressly state that high seas boardings are authorized without flag state consent. Regardless of the reasons for constructive ambiguity, resolutions involving embargos represent a missed opportunity for the Security Council to provide explicit operational direction. Turtle Bay mandates have authorized embargos for decades. In 1992, the Security Council addressed “massive and systematic violations of human rights . . . and of the grave breaches of international humanitarian law” in Bosnia and Herzegovina.<sup>429</sup> In Resolution 787, the U.N.S.C. targeted vessels owned or operated by a “person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) . . . *regardless of the flag under which the vessel sails*”<sup>430</sup> and authorized diversions, calling on Member States “to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of [previous resolutions]”<sup>431</sup> without expressly requiring flag state notification or consent. Also in 1992, the Security Council focused on challenges in Somalia in a resolution decided under Chapter VII that directed “a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise.”<sup>432</sup>

In a subsequent resolution, the Security Council noted its desire to “promote free and unhindered navigation on the Danube . . . .”<sup>433</sup> Addressing violence and instability in Haiti, Resolution 875 (1993) similarly called upon Member States “to halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations[.]”<sup>434</sup> This resolution also encouraged Member

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<sup>428</sup> See U.N. SCOR, 72d Sess., 8151st mtg. at 11, U.N. Doc. S/PV.8151 (Dec. 22, 2017) (“Many hours are spent in the United Nations and the Security Council in discussions, and hundreds of documents are drafted in consideration of the importance of crafting realistic and implementable decisions that reflect the political concerns and mutual responsibilities of the parties. When we addressed the specific country situation in this case, such standards were overlooked. Consequently, the agreement reached comprises with artificial timetables while the wording was amended only minutes before the voting . . . . Such disregard constitutes a breach of the consensus-based agreements reached on the Council.”).

<sup>429</sup> Gowlland-Debbas, *supra* note 46, at 65; see also S.C. Res. 787, *supra* note 3, pmb. On the issue of adopting embargos and sanctions in the context of State responsibility, “It is clear from the Draft Articles [to the U.N. Charter], commentaries and debates . . . UN mechanisms for peace maintenance are encompassed as legal sanctions.” Gowlland-Debbas, *supra* note 46, at 58.

<sup>430</sup> S.C. Res. 787, *supra* note 3, ¶ 10 (emphasis added); see also S.C. Res. 757, ¶ 4 (May 30, 1992) (also decided under Chapter VII of the U.N. Charter).

<sup>431</sup> S.C. Res. 787, *supra* note 3, ¶ 12.

<sup>432</sup> S.C. Res. 733, *supra* note 335, ¶ 5.

<sup>433</sup> S.C. Res. 992, pmb. (May 11, 1995).

<sup>434</sup> S.C. Res. 875, *supra* note 3, ¶ 1; S.C. Res. 841 (1993); S.C. Res. 873 (Oct. 13, 1993); S.C. Res. 917 (May 6, 1994); S.C. Res. 944 (Sept. 29, 1994).

States conducting interdictions to cooperate with the Government of Haiti to support sanctions enforcement.<sup>435</sup> While these sanctions had limited impact, they convinced the “military junta to negotiate the return of civilian power, but the resulting Governors Island accord was not enforced and gave way to military intervention.”<sup>436</sup> And, the Security Council again focused on the maritime environment in Resolution 1132 (1997), which addressed instability and a military coup in Sierra Leone. This measure directed that the Economic Community of West African States (ECOWAS) halt “inward maritime shipping in order to inspect and verify their cargoes and destinations . . . .”<sup>437</sup>

The embargo model employed in U.N.S.C. resolutions regarding Libya, as well as in Iran and Somalia, among others, has application in future threats occurring in or near areas that are ungoverned or where State capacity is uncooperative, limited or nonexistent. U.N.S.C. resolutions of Libya authorizing an arms embargo, for instance, reasonably may be interpreted to include authorization, albeit implied, to conduct boardings without flag state consent (provided good faith efforts are first made to obtain consent), and resourcefully addressed a difficult security challenge and merits consideration in future Turtle Bay discussions. That same resourcefulness will be necessary for approaching transnational maritime challenges off the West Coast of Africa, where national capabilities and legal authorities are limited.

#### F. *Gulf of Guinea Model*

Increasing violence in the Gulf of Guinea prompted the Security Council to adopt Resolutions 2018 (2011) and 2039 (2012). The resolutions addressed an urgent maritime security and governance challenge, encouraged regional cooperation, but did not provide enforcement, sanctions, or boarding authorization. Complementary regional efforts produced a nonbinding Code of Conduct approved by twenty-five heads of state in 2013.<sup>438</sup> Zonal engagements

<sup>435</sup> S.C. Res. 875, *supra* note 3, ¶ 1.

<sup>436</sup> VAUGHN LOWE ET AL., *THE UNITED NATIONS SECURITY COUNCIL AND WAR, THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945* 678 (David Cortright, et al. eds., 2008).

<sup>437</sup> S.C. Res. 1132, *supra* note 3, ¶ 8.

<sup>438</sup> CODE OF CONDUCT CONCERNING THE REPRESSION OF PIRACY, ARMED ROBBERY AGAINST SHIPS, AND ILLICIT MARITIME ACTIVITY IN WEST AND CENTRAL AFRICA (2013) (Yaound. . . Code of Conduct) [http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code\\_of\\_conduct%20signed%20from%20ECOWAS%20site.pdf](http://www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf). Efforts to draft the Code, which began in 2010, predate U.N.S.C. Resolutions 2018 and 2039. As of December 2017, with the addition of Rwanda, 26 States (and three regional organizations: the Economic Community of West African States, ECOWAS, the Economic Community of Central African States, ECCAS, and the Gulf of Guinea Commission, GGC) have agreed to the Yaound. . . Code of Conduct. *See also Africa Center's Assis Malaquias Recognized for Work on Maritime Security*, AFRICAN CENTER FOR STRATEGIC STUDIES July 30, 2015 <http://africacenter.org/spotlight/malaquias-recognized-work-maritime-security/>.

have likewise resulted in collaborative maritime frameworks to enhance information sharing and an aligned response.<sup>439</sup> Resolutions 2018 and 2039 correctly recognized that the situation in West Africa—and thus solutions to it—warrant a different approach than in East Africa, the Gulf of Aden, Libya, or North Korea.<sup>440</sup> Kamal-Deen Ali, Executive Director of the Center for Maritime Law and Security, Africa (CEMLAWS) in Accra, Ghana, opined that Resolutions 2018 and 2039 “charted a course for cooperative international engagement in the Gulf of Guinea, and have explicitly sanctioned ongoing regional and global efforts as being fundamental for the operationalization of regional maritime security cooperation.”<sup>441</sup>

A U.N.S.C. Presidential Statement in April 2016 commended collaborative initiatives and called upon the Member States to transform the Code of Conduct into a binding instrument.<sup>442</sup> The statement further welcomed “the establishment of the Inter-regional Coordination Centre in 2014 in Cameroon.”<sup>443</sup> The visually impressive facilities in Yaoundé reside in a compound that is staffed and organized across five divisions: (1) legal and judicial cooperation; (2) education and training; (3) information management and communication; (4) political affairs and international cooperation; and (5) administration and finance.<sup>444</sup>

The prospect exists for the Inter-Regional Coordination Center to flourish, but will require increased, and sustained, support. Cameroon, Nigeria, and Ghana, among others, have contributed,<sup>445</sup> but assistance from other States is needed. Regardless of whether the Yaoundé Code of Conduct is transformed

<sup>439</sup> See generally the Multilateral Agreement on the Establishment of Maritime Zone E (Benin, Niger, Nigeria and Togo) to Eradicate Illegal Maritime Activities in West Africa, July 13, 2013. Article 8, Combined Maritime Operations (providing detailed ship rider provisions) (Copy on file with author).

<sup>440</sup> S.C. Res. 2018, *supra* note 4; S.C. Res. 2039 (Feb. 29, 2012) (Gulf of Guinea).

<sup>441</sup> KAMAL-DEEN ALI, MARITIME SECURITY COOPERATION IN THE GULF OF GUINEA, at 7 (2015) (This insightful book represents the most comprehensive study of maritime security in the Gulf of Guinea). “The maritime opportunities of the Gulf of Guinea are . . . being drowned in the waves of multiple maritime crimes epitomized by ravaging piracy . . . [and] decades of illicit transshipment and trafficking in narcotic drugs fuels crime and imperils governance institutions; illegal migration by sea frequently leads to maritime accidents and disasters; while trafficking in weapons has contributed to multiple internal conflicts and widespread instability.” *Id.* at 2–3.

<sup>442</sup> S.C. Pres., *Statement by the President of the Security Council*, at 2, U.N. Doc. S/PRST/2016/4 (Apr. 25, 2016).

<sup>443</sup> *Id.* at 3.

<sup>444</sup> For the Implementation of Regional Strategy for Maritime Safety and Security in Central and West Africa, INTERREGIONAL COORDINATION CTR., <http://cicyaounde.org/wp-content/uploads/2015/04/CodeofConduct-EN.pdf>.

<sup>445</sup> See Code of Conduct Concerning The Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa, INTERREGIONAL COORDINATION CENTRE, <http://cicyaounde.org/wp-content/uploads/2015/04/CodeofConduct-EN.pdf>.

into a binding instrument or remains a durable nonbinding political construct, the agreement provides a platform for, among others, information sharing and coordination in the response to piracy, armed robbery at sea, IUU fishing, and illegal bunkering.

Multistate collaboration in February 2016 of the pirated oil tanker MT *Maximus*, which culminated in a high seas interdiction conducted by the Nigerian Navy, demonstrates the benefits of a regional approach to maritime security in West Africa.<sup>446</sup> While notable, the response also highlighted that broader challenges exist, including the development of legal authorities and investigative prosecutorial as well as judicial capabilities and infrastructure.

Resolutions 2018 and 2039 are encouraging, appropriately avoided use-of-force authorization or a directive approach, and sagely seek to support a uniquely West African response to this threat. The Yaoundé Code of Conduct and the establishment of the Inter-Regional Coordination Centre were praised at the June 2018 U.N. *Arria-Formula* meeting that focused on maritime crime.<sup>447</sup> Inexplicably, however, from 2012 through July 2018 the Security Council has not adopted a resolution on this threat to the peace (issuing instead only a single Presidential Statement) despite ongoing security challenges. The development of national laws in multiple Gulf of Guinea States to support criminal prosecutions for acts of piracy, along with judicial capacity, for example, represents an urgent focus area. As primarily hortatory, Resolutions 2018 and 2039 cannot be measured against resolutions that provide express boarding authorities or enforcement direction. That being said, resolutions that encourage cooperation have merit in West Africa as well as in other geographic areas, particularly where a regional approach is the most appropriate response to security challenges. Further, this type of resolution has merit where capacity, capabilities, and legal authorities possibly exist but are limited and would benefit from international assistance.

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<sup>446</sup> Michael Faul, *Navies from the United States, Ghana, Togo and Nigeria Track Hijacked Tanker through Waters off Five Countries before Nigerian Naval Forces Storm Aboard*, US NEWS (Feb. 27, 2016), <http://www.usnews.com/news/world/articles/2016-02-26/us-nigerian-navies-ship-rescue-success-for-cooperation>. *Maximus* was carrying 4,700 tons of diesel fuel. *Id.* The Nigerian interdiction involved support from the Benin, France, Ghana, Sao Tome and Principe, Togo, and the United States. *Id.*

<sup>447</sup> Maritime Crime as a Threat to International Peace Security—United Nations Security Council Open Arria Formula Meeting, UN WEB TV (Jun. 13, 2018), <http://webtv.un.org/search/maritime-crime-as-a-threat-to-international-peace-and-security-1>; see also U.N. Office Drugs & Crimes, Concept Note on the “Arria-Formula” Meetings of the Security Council Members, [https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/qgR6SQjQBmKzIY5p0Xlc\\_180613pm-arria-maritime-crime.pdf](https://s3-eu-west-1.amazonaws.com/upload.teamup.com/908040/qgR6SQjQBmKzIY5p0Xlc_180613pm-arria-maritime-crime.pdf).

The resolution models discussed in this section are characteristic of a shared approach to transnational security threats, and the imperative of integrating diplomatic, judicial, economic, and operational integration. Importantly, the DPRK, 1540, Somali piracy, Mediterranean migrant-smuggling and trafficking-in-persons, Libya/embargo, and Gulf of Guinea models each reflect months, sometimes years, of collaborative development. While they individually addressed specific threats, collectively they provide a blueprint for approaching the next generation of maritime security challenges.

### III. JUDICIAL EXAMINATION OF U.N.S.C. RESOLUTIONS WITH A MARITIME NEXUS

In addition to an increased number of resolutions with a maritime focus beginning in 2008, the Turtle Bay pivot has resulted in both expanded naval engagements and opportunities for judicial review. The case of *Tarros v. United States* was a federal tort suit where the plaintiff sought damages for an interdiction that occurred pursuant to U.N.S.C. Resolutions 1970 (2011) and 1973 (2011).<sup>448</sup> The court dismissed the claim, filed under the Suits in Admiralty Act and Public Vessels Act, following action by USS *Stout* (DDG 55) that “blockaded and diverted” a vessel in furtherance of U.N.S.C. resolutions against Libya.<sup>449</sup>

Resolution 1970 expressed its “grave concern” about the situation in Libya, condemned “the violence and use of force against civilians,” and decided that Member States must immediately take the necessary measures to prevent the direct or indirect supply of weapons and ammunition to the Libyan Arab Jamahiriya.<sup>450</sup> Resolution 1973 called upon Member States “to ensure strict implementation of the arms embargo . . . [and inspect] on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya” transporting prohibited cargo.<sup>451</sup>

The United States’ pleadings asserted that “[t]here is no clear-cut standard of care, as if in a tort context, for a warship’s interception of a foreign-flagged merchant vessel bound for a war-torn nation under an international arms embargo imposed by the U.N. Security Council.”<sup>452</sup> Government pleadings

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<sup>448</sup> *Tarros*, *supra* note 17, at 327.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 330; S.C. Res. 1970, *supra* note 383, at 1.

<sup>451</sup> S.C. Res. 1973, *supra* note 4, ¶ 13.

<sup>452</sup> Brief for Petitioner at 8, *Tarros v. United States*, 2 F. Supp. 2d (2013) (No.13 Civ. 1932).

further noted the manifest of the diverted ship contained “broad descriptors such as ‘laboratory items,’ ‘chemicals,’ ‘hardware,’ ‘machines,’ and ‘spare parts.’”<sup>453</sup>

The *Tarros* court held:

The decision as to whether to divert a vessel bound for a wartorn nation in order to enforce an international arms embargo is a “delicately-calibrated [one] based on military judgment, experience, and intelligence-gathering.” Far from an “ordinary tort suit,” adjudication would require the Court to wade into the heart of military operations, “interjecting tort law into the realm of national security and second-guessing judgments . . . that are properly left to the other constituent branches of government[.]”<sup>454</sup>

The Court further held that U.N.S.C. resolutions “constitute international obligations,” but are not domestically enforceable obligations. In the *Vento* case, the plaintiff sought “a determination that the *Stout*’s officers and crew acted unreasonably under the circumstances.” However, the court held that a judicial review of “discretionary military decisions related to military operations” is generally precluded.<sup>455</sup>

A United States District Court in Maryland in 2014 also dismissed a tort suit that sought damages for naval measures that implemented a Security Council resolution.<sup>456</sup> The plaintiff in *Wu Tien Li-Shou v. United States (Li-Shou)* asserted that the rescue of a fishing vessel seized by Somali pirates led to the wrongful death of the fishing vessel’s master and the negligent destruction of his vessel. The mission was conducted by military forces embarked on the USS *Stephen W. Groves* (FFG 29), an element of NATO Task Force 508 in Operation Ocean Shield. The stated legal mandate of Ocean Shield is “relevant United Nations Security Council Resolutions relating to Somali-based piracy.”<sup>457</sup>

A government pleading in *Li-Shou* referenced the adoption of multiple U.N.S.C. resolutions, “urging Member States to take action to combat piracy . . . [and that] near the time of the incident alleged here, the U.N. Security Council adopted Resolution 1976, expressing grave concern about the growing threat of piracy off the coast of Somalia.”<sup>458</sup> The government pleading further referenced

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<sup>453</sup> Brief for Respondent at 2, *Tarros v. United States*, 2 F. Supp. 2d (2013) (No.13 Civ. 1932).

<sup>454</sup> *Tarros*, *supra* note 17, at 334 (citations omitted).

<sup>455</sup> *Tarros*, *supra* note 17, at 343.

<sup>456</sup> Wu Tien Li-Shou, *supra* note 107, at 186.

<sup>457</sup> *Operation Ocean Shield Fact Sheet*, N. ATL. TREATY ORG. (Nov. 2014), [https://www.nato.int/nato\\_static\\_files2014/assets/pdf/pdf\\_topics/141202a-Factsheet-OceanShield-en.pdf](https://www.nato.int/nato_static_files2014/assets/pdf/pdf_topics/141202a-Factsheet-OceanShield-en.pdf).

<sup>458</sup> Brief for Petitioner at 2, *Wu Tien Li-Shou v. United States*, 997 F.3d (2015).

U.N.S.C. Resolution 1976's call upon Member States "to take part in the fight against piracy,' through, among other things, 'seizures and disposition of boats used . . . in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use.'"<sup>459</sup>

The *Li-Shou* suit for damages was appropriately dismissed, "because allowing this action to proceed would thrust courts into the middle of a sensitive multinational counter-piracy operation and force courts to second-guess the conduct of a military engagement[.]"<sup>460</sup>

With the likelihood of more challenges in federal court, as well as in international judicial venues, regarding sanctions enforcement and other naval measures taken in accordance with U.N.S.C. direction, development of a consistent (national-level) judicial approach would be beneficial, particularly with respect to Article 103, human rights compliance, claims, and appropriate operational deference.

### CONCLUSION

The peaceful use of the oceans, which provide the connective thread for commerce, trade, and transit, is now being challenged in more geographic areas than any other period of the modern era. The narrative, however, is not one of violence or instability or the increased number of resolutions adopted by the Security Council. Rather, these multiple simultaneous threats are redefining the modern day role of the U.N.S.C. and prompting reexamination of existing law-of-the-sea principles.

Drafters of the U.N. Charter sagely identified a link between the stability of the maritime environment and global security with express references to the sea in Chapter VII. Within eighteen months of the first resolution adopted by the Security Council, the U.N.S.C. would address a maritime conflict. Over the following seven decades the Security Council confronted threats involving the maritime domain, more than once a year, on average. While some of the resolutions with an impact on naval operations were incidental to the sanctions they impose, others primarily focused upon the maritime environment.

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<sup>459</sup> *Id.* at 20; see S.C. Res. 1976, *supra* note 335, pbml.

<sup>460</sup> Wu Tien Li-Shou, *supra* note 107, at 180.

The Turtle Bay pivot, which took form after the Cold War, extends well beyond addressing threats on the water.<sup>461</sup> Though many diplomatic and operational factors contributed to the dramatically increased number of resolutions adopted between 2008 and 2017, responses to Somali threats (piracy, an arms embargo, and Al-Shabaab activity), instability in Libya, and the illicit DPRK nuclear program greatly contributed. The turn to the Security Council is not about an elastic interpretation of what constitutes a threat to the peace, breach of the peace, or an act of aggression. Rather, contemporary threats involve heightened levels of multistate involvement along with complexity, deception, and lethality. U.N.S.C. response measures in this ten-year period underscore that the maintenance of international peace is frequently tethered to maritime security, and that fundamentally, “our world is an ocean world.”<sup>462</sup> While the challenges are separate and are unfolding with unprecedented frequency, authorities provided by the Security Council have comparable elements. It is thus essential that there be greater recognition of the intersecting nature of resolutions involving maritime threats going forward, and where necessary, deviation from law-of-the-sea principles.

Since inception, Security Council decisions have led to naval approaches or boardings of more than 50,000 ships, the destruction of 3,500 vessels, and the maritime rescue of 40,000 people in the response to the transnational security threats. The extraordinary operational impact is not simply about naval engagements; resolutions have supported a rationale, structured approach to transnational security threats in the maritime environment. Awareness of the history of the United Nations Security Council, including diplomatic, legal and operational authorities previously provided, will be essential going forward.

Diplomats at Turtle Bay have not yet opted to singularly address maritime drug trafficking in a resolution. Future discussions in New York could examine the characterization of maritime drug trafficking in the context of international peace and security. States could be authorized to conduct, among other activities, a right-of-visit boarding on the high seas *without* flag State consent,<sup>463</sup> for

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<sup>461</sup> See WALLENSTEEN & JOHANSSON, *supra* note 6, at 17–19 (noting that in a study of all resolutions from 1946 to 2002, “The Council has moved from roughly one decision per month to one per week.” Moreover, “Ninety-three percent of all Chapter VII resolutions passed from 1946 to 2002 have been adopted since the end of the Cold War. . . .”).

<sup>462</sup> WILLIAM LANGEWIESCHE, *THE OUTLAW SEA* 3 (North Point Press, eds., 2004) (“Since we live on land, and are usually beyond sight of the sea, it is easy to forget that our world is an ocean world, and to ignore what in practice that means.”).

<sup>463</sup> See S.C. Res. 1373, *supra* note 204, ¶ 4 (noting “the close connection between international terrorism and transnational organized crime, illicit drugs . . . and in this regard, *emphasiz[ing]* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global

vessels reasonably suspected of transporting certain quantities of narcotics in known drug trafficking areas. The Security Council President in 2010 noted with concern the transnational security threat posed by “drug trafficking” and “the increasing link...between drug trafficking and the financing of terrorism.”<sup>464</sup> Over the next few years, the nexus between illicit narcotics and terrorist financing became a fundamentally *recognized* connection. On November 7, 2017, U.N. Secretary-General Antonio Guterres expressly noted in the context of Mediterranean migration that illicit narcotics is “generating deadly spillover effects, such as increased drug use and health crises.”<sup>465</sup> And, on June 13, 2018, the Security Council held an *Arria-Formula* meeting where the head of the U.N. Office on Drugs and Crime (UNODC) Global Maritime Crime Program (GMCP) Alan Cole accurately asserted maritime crime—including illicit narcotics—represents a threat to international peace and security.<sup>466</sup>

Laudable efforts by the UNODC’s GMCP have improved Member State capabilities and capacity to stem the flow of narcotic trafficking by sea. And, the continued implementation of the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the “Vienna Drug Convention,” specifically Article 17, which encourages cooperation between State Parties to combat narcotic trafficking by sea through the development of bilateral and multilateral agreements, is also beneficial.<sup>467</sup> More can be done.

In this regard, there is not a legal impediment to the Security Council adopting a resolution singularly focused on maritime crime, including drug trafficking, and deciding, potentially, that flag State authorization to conduct a boarding on the high seas is not required where reasonable grounds exist to suspect the vessel is engaged in smuggling illicit narcotics.<sup>468</sup> So too, the

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response to this serious challenge and threat to international security”); *see also* S.C. Res. 2253, *supra* note 4, pmb. (“Recognizing the need to take measures to prevent and suppress the financing of terrorism, terrorist organizations, and individual terrorists . . . including from the proceeds of organized crime, inter alia, the illicit production and trafficking of drugs and their chemical precursors. . . .”).

<sup>464</sup> S.C. Pres. Statement 2010/4, at 1 (Feb. 24, 2010). The statement “welcome[d] further briefings.” *Id.* at 2.

<sup>465</sup> U.N. SCOR, 72 Sess. 8106 mtg, at 2, U.N. Doc. S/PV.8106 (Nov. 17, 2017). Kairat Umarov (Kazakhstan) noted “organized crime involving arms, drugs and trafficking in persons . . . [among others] generate an atmosphere of fear, distrust and intense hostilities.” *Id.* at 16–17.

<sup>466</sup> UNODC CO-ORGANIZES SECURITY COUNCIL ARRIA-FORMULA MEETING TO DISCUSS MARITIME CRIME (2018), <http://www.unodc.org/unodc/en/frontpage/2018/July/unodc-co-organizes-security-council-arrria-formula-meeting-to-discuss-maritime-crime.html?ref=fs1>.

<sup>467</sup> *See* United Nations Conventions against Illicit Traffic in Narcotic and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en). As of June 2018, the United Nations Convention against Illicit Traffic in Narcotic and Psychotropic Substances has 190 states parties. *Id.*

<sup>468</sup> U.S.C.A § 841 (2010).

Security Council could clarify that enforcement action—and not solely a right of visit—against vessels that are stateless, whether through an invalid claim of nationality, no claim of nationality, or assimilation of a vessel as one without nationality is consistent with international law.<sup>469</sup> And, as recommended by the UNODC’s GMCP in June 2018 at the *Aria-formula* meeting, a U.N.S.C. Presidential Statement could spark the creation of a maritime-focused network of investigators and prosecutors to address gaps in capacity/capabilities.<sup>470</sup> The U.N.S.C. could explicitly declare maritime drug trafficking is a threat to the peace and direct specific Member State action. This continuing transnational security threat provides the U.N.S.C. with an opportunity from which to forge a new resolution model that recognizes freedom-of-navigation principles yet balances those considerations with expanded maritime enforcement authorities to enable expeditious boardings on the high seas of vessels suspected of engaging in illicit activity.

Another debate in Turtle Bay could include whether to more extensively authorize necessary measures to address maritime migration and human trafficking. Resolutions 2240 (2015), 2312 (2016), 2380 (2017), and 2437 (2018) were adopted to confront transnational criminal activity in the Mediterranean Sea as well as to stem the devastating loss of human life at sea occurring daily. While the adoption of measures that authorize the use of force, consistent with international law, in the context of maritime rescues would not be inconsistent with the U.N. Charter, U.N.S.C. authorities, or *jus cogens*, the broader policy question regarding whether Security Council action is prudent must be a central focus area. Some legal commentators have lamented “the fundamental humanitarian purpose of Search and Rescue (SAR) is under threat because of the securitization and, increasingly, the militarization of boat migration.”<sup>471</sup> The Security Council may also examine the viability of broadening the *responsibility to protect*<sup>472</sup> concept (currently discussed in the context of threats that include genocide, ethnic cleansing, and crimes against humanity)<sup>473</sup> to primarily maritime rescues. Regardless of the next steps at Turtle

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<sup>469</sup> See LOS Convention, *supra* note 23, art. 110.

<sup>470</sup> Maritime Crime as a Threat to International Peace Security, *supra* note 447.

<sup>471</sup> Daniel Ghezelbash et al., *Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia* 67 ICLQ 315, 349. The article also discussed an “increase in militarization, lack of transparency and accountability, developments relating to disembarkation and non-refoulement, criminalization, commodification, and impediments to effective cooperation.” *Id.* at 317.

<sup>472</sup> U.N. Secretary-General, *In larger freedom: towards development, security, and human rights for all, follow-up to the outcome of the Millennium Summit*, ¶ 132 A/59/2005 (Mar. 21, 2005). “We must also move towards embracing and acting on the ‘responsibility to protect’ potential or actual victims of massive atrocities.” *Id.* at 34–35.

<sup>473</sup> *Id.* at 59.

Bay on this issue, it will be critical that any resolution ensures that the priority to render assistance to those in distress at sea remains, and that the established global SAR system, including the safe disembarkation to a place of safety of those rescued, as well as the continued effectiveness of rescue coordination centers, are not disrupted.

Further issues at the Security Council could include addressing a 497% increase in “explosive-precursor liquid chemicals seized in international customs” over a recent three-year period<sup>474</sup> or separately, again, giving permission to enter another State’s territorial seas to pursue illicit activity.<sup>475</sup>

The global swath of the oceans underlines the imperative for consistent legal authority and multilateral collaboration. As noted in the preamble to the LOS Convention, “the problems of ocean space are closely interrelated and need to be considered as a whole . . . .”<sup>476</sup> Towards that end, nations are impressively cooperating to address security threats that include piracy, drug trafficking, and the illicit transport of biological, chemical, or nuclear weapons. Security Council actions complement, and at times expand, these efforts. The certainty of an evolving threat environment and speed with which the Security Council can adopt measures ensure that Member States will continue to turn to the U.N. with the frequency that began in 2008. Russian foreign minister Igor Ivanov fittingly summarized the pivot to the Security Council when he stated, “[t]here is no alternative to the United Nations.”<sup>477</sup>

Subsequent U.N.S.C. action would benefit from a greater emphasis in the strategic intersection of previous resolutions with a maritime focus. The models of U.N.S.C. resolutions examined in this Article can provide starting points for deliberations in Turtle Bay. Drafting considerations for resolutions with a maritime nexus should include continued acknowledgment of such law-of-the-sea principles as freedom of navigation<sup>478</sup> and the general concept of exclusive flag state jurisdiction<sup>479</sup> and deviation from those principles where necessary.

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<sup>474</sup> European Union Maritime Security Strategy, Responding Together to Global Challenges—A Guide for Stakeholders, EUROPEAN COMM’N (2014), [https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/leaflet-european-union-maritime-security-strategy\\_en.pdf](https://ec.europa.eu/maritimeaffairs/sites/maritimeaffairs/files/leaflet-european-union-maritime-security-strategy_en.pdf). The Strategy further asserted “€11.6 billion a year in damage to marine ecosystems from plastic waste.” *Id.*

<sup>475</sup> S.C. Res. 1816, *supra* note 4, ¶ 7(a).

<sup>476</sup> LOS Convention, *supra* note 23, pmb1.

<sup>477</sup> Andre Zolotov Jr., *Ivanov Plays Down Differences on Iraq*, MOSCOW TIMES (May 13, 2003); BOSCO, *supra* note 9, at 242.

<sup>478</sup> See JAMES KRASKA & RAUL PEDROZO, THE FREE SEA: THE AMERICAN FIGHT FOR FREEDOM OF NAVIGATION, (Naval Institute Press, eds. 2018) (representing the definitive examination of the topic).

<sup>479</sup> Alex G. Oude Elferink, *The Genuine Link Concept: Time for a Post Mortem?*, NETH. INST. L. SEA 1, 14 (1999) (discussing the “exclusive focus on the flag state . . . has [already] been progressively abandoned

In addition, textual precision should remain a priority. Perfect clarity need not be the goal, as there are frequently legitimate reasons for constructive ambiguity. That being said, the probative inquiry should not be whether there are valid reasons for constructive ambiguity, but rather, the deleterious effect of unclear text in naval operations. Thus, greater focus by the Security Council on removing ambiguity from provisions with an operational effect will be tremendously beneficial. Vigorous compliance<sup>480</sup> and the continuation of Panels of Experts working groups are key enablers to impactful resolutions.<sup>481</sup> Lastly, resolutions authorizing naval measures must avoid diluting the unique influence and impact of U.N.S.C. measures.

The Turtle Bay pivot is a positive security development. Security Council resolutions have provided an indispensable tool kit with which to address a multitude of maritime threats. Noted historian John Keegan writes, “[f]our times in the modern age men have sat down to reorder the world. . . .”<sup>482</sup> Applied in a maritime context, while many would point to Grotius’s *Mare Liberum* (1609), the Geneva Conventions (1958), and the LOS Convention (1982), it is now time to also include the U.N. Charter (1945) as a reordering of the global maritime security architecture, particularly in view of the tremendous influence of U.N.S.C. resolutions in the pursuit of rogue states, nuclear proliferators, pirates, and migrant smugglers among other transnational security threats.

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. . .”). In part, this article correctly notes, “coastal states and especially port states already have certain possibilities to act if ships do not comply with international standards.” *Id.*

<sup>480</sup> See U.N. Secretary-General, *High-level Panel on Threats, Challenges and Change: A More Secure World—Our Shared Responsibility*, A/59/565 (Dec. 2, 2004). “The United Nations was never intended to be a utopian exercise. It was meant to be a collective security system that worked.” *Id.* The U.N.S.C. has lamented a lack of enforcement of adopted resolutions. S.C. Res. 1851, *supra* note 24, ¶ 9 (noting with concern, “that the lack of enforcement of the arms embargo established by [a prior resolution] has permitted ready access to the arms and ammunition used by the pirates and driven in part the phenomenal growth in piracy”).

<sup>481</sup> S.C. Pres. Statement 2006/997 (Dec. 22, 2006). “One of the significant innovations in the work of the Security Council in recent years is the creation of independent expert groups to monitor the implementation of sanctions.” *Id.*

<sup>482</sup> John Keegan, *Book Review: Paris 1919 by Margaret MacMillan*, WASH. POST (Dec. 15, 2002), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/08/AR2009070802958.html>. The four events referenced by Keegan include “at the Peace of Westphalia in 1648 after the Thirty Years War, at the Congress of Vienna in 1815 after the Napoleonic Wars, in Paris in 1919 after World War I and in San Francisco in 1945 after World War II.” *Id.*