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### Maritime interception and the law of naval operations

*A study of legal bases and legal regimes in maritime interception operations, in particular conducted outside the sovereign waters of a State and in the context of international peace and security*

Fink, M.D.

#### Publication date

2016

#### Document Version

Final published version

[Link to publication](#)

#### Citation for published version (APA):

Fink, M. D. (2016). *Maritime interception and the law of naval operations: A study of legal bases and legal regimes in maritime interception operations, in particular conducted outside the sovereign waters of a State and in the context of international peace and security*. [Thesis, fully internal, Universiteit van Amsterdam].

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# CHAPTER 5

## The UN-collective security system and maritime interception operations

*The only prediction that can be made with assurance is that the lower the level of conflict, the more localized the situation and the more restrictive the objectives, the more predominant will be the element of law in the governing of naval conduct.*

D.P. O'Connell – The influence of law on sea power<sup>245</sup>

### 5. Introduction

This chapter will consider the UN-collective security system as a legal basis for maritime interception operations. The collective security system providing the framework for MIO has for a while been the primary legal basis connected to the term maritime interception operations. Despite the emergence of other legal frameworks for MIO, the collective security system remains one of the most important legal bases for MIO. Most recently, the system has provided for a legal basis for operation *Unified Protector* (2011) with regard to the operations against the Qaddafi-regime in Libya,<sup>246</sup> and is still partly facilitating counter-piracy operations off the coast of Somalia. Maritime enforcement measures mandated by the UNSC can be divided into two types. The first type is the authorization of UN-mandated maritime *embargo* operations (MEO). MEO are specifically focused on the enforcement of economic sanctions at sea which are adopted by the UNSC. In the second type of maritime enforced measures, the UNSC authorizes the use of armed force that is not related to economic sanctions under Article 41. An example is the case where the UNSC au-

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<sup>245</sup> D.P. O'Connell, *The influence of law on sea power* (Manchester University Press, 1975), 3.

<sup>246</sup> More recently with regard to Libya, in March 2014, the UNSC adopted another resolution (SC-Res. 2146) that allowed for stopping crude oil that is illicitly being exported from Libya.

thorizes *all necessary means* to enforce a UN-mandate, which translated to actual military operations, could involve a MIO. These two types may also exist concurrently in one military campaign. An example from practice is the 2011 Libya-operation. During this operation, maritime forces were used both as MEO-assets and for the mandate to *use all necessary means* to protect civilians.

Maritime enforcement measures mandated by the UNSC are often referred to as “UN-mandated” maritime interception operations. In fact, ‘UN-mandated’ refers to the command and control under which the operations are carried out. Carvalho de Oliveira has made a clear distinction between so called UN-mandated and UN-controlled naval operations. With the first, he refers to the fact that; ‘The UN issues the resolutions but leaves the operational control in the hands of States, regional organizations or international coalitions’. With the latter, he refers to operations in which, ‘The Secretary-General assumes direct control of operations.’<sup>247</sup> Maritime interception operations based on the UN-collective security system can include both UN-mandated and UN-controlled operations. To illustrate, the 2011 Libya-operations were UN-mandated because the UNSC authorized military operations that were operationally controlled by NATO<sup>248</sup> and also for a short time by a coalition of States<sup>249</sup>. The MIO conducted in the context of UNIFIL is UN-controlled as it is under the operational control of the UN itself. Interestingly, this is the only naval operation that has have ever been directly controlled by the UN itself.<sup>250</sup> Although MIF-operations are sometimes also called ‘UNMIF’ and parts of the Korea War naval operations have been referred to as ‘UNBEF’,<sup>251</sup> neither of them were under operational control of the UN itself. These names, however, must be seen in the context of the period in which they were conducted and merely referred to the fact that they were in fact sanctioned by the UN through a UN-resolution. This thesis will follow Carvalho de Oliveira’s framework of distinction with regard to the command and control of MIO undertaken within the collective security system.<sup>252</sup> This

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<sup>247</sup> Carvalho, 53.

<sup>248</sup> Operation *Unified Protector*.

<sup>249</sup> Operation *Odyssey Dawn*.

<sup>250</sup> Rather uniquely for naval operations, the UN-beret is worn by the military on board the MTF-UNIFILwarships.

<sup>251</sup> United Nations Blockading and Escorting Force.

<sup>252</sup> Rothwell and Stephens introduce the term “UN-sanctioned naval operations” to refer to all the naval operations authorized by the UNSC Although a good term to encapsulate all, the term may be

chapter will first briefly introduce the UN-collective security system and will then consider the two types of maritime enforcement measures that can be mandated by the UN-Security Council.

### **5.1. The UN-collective security system**

The UN-collective security system is the legal basis for the UNSC to exercise its powers under Chapter VII of the UN-Charter. The system takes as the obvious point of departure the use of force prohibition ex Article 2(4) of the UN-Charter and provides for a stepped approach of non-military and/or military measures to restore international peace and security.<sup>253</sup> The system centralizes around Chapters VI and VII of the UN-Charter. Chapter VI concerns the peaceful settlement of disputes and Chapter VII includes taking coercive measures including the use of armed force. The essential difference between Chapter VI and VII is that measures taken under Chapter VI do not include coercive powers, whereas measures taken by the UNSC under Chapter VII, through Article 25 of the UN-Charter, are coercive in nature.<sup>254</sup> The key articles in Chapter VII are Articles 39, 41 and 42. Article 39 of the Charter is the obligatory stepping stone for taking coercive measures under Chapter VII. When a threat to peace, breach to peace or act of aggression exists, this article opens the door to the authorities that are contained in Articles 41 and 42 of the UN-Charter.<sup>255</sup>

Based on Article 41, the UNSC can take non-military measures, such as economic sanctions. If these measures prove to be or would be inadequate under the circumstances to deal with the issue at hand, the UNSC can decide to take measures based on Article 42, which provides authority to make use of armed force to restore international peace and security. Although only Article 42 allows for the use of armed force, that is not to

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somewhat confusing, as part of these UN-sanctioned naval operations could also be naval operations to enforce UN-sanctions. D. R. Rothwell, T. Stephens, *The international Law of the Sea* (2010), at 262-263.

<sup>253</sup> T. Gazzini, *The Changing rules on the use of force in international law*, (2005), 7.

<sup>254</sup> Article 25 UN-Charter reads:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

<sup>255</sup> Article 39 reads:

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.

say that under Chapter VI and the other articles of Chapter VII no military *forces* can be deployed. Clearly, this has often been the case. Therefore one cannot say that the deployment of military forces by itself amounts to an Article 42-operation. Forces that are deployed under Chapter VI are usually called upon within the context of UN-peacekeeping operations and have particular features in their authorities and mandate. In particular, such forces need the consent of a nation to operate on their territory, are required to adhere to the principle of impartiality, and are restricted to self-defence in their use of force.<sup>256</sup> Force deployed under Chapter VII of the UN-Charter are often categorized as peace-enforcing operations that bear a different legal feature than Chapter VI operations in the sense that they do not need the consent of the target state, can be authorized to use force and are not necessarily impartial.

## 5.2. Maritime embargo operations

In seven situations the UNSC has authorized maritime embargo operations to enforce economic measures at sea: Southern Rhodesia,<sup>257</sup> Iraq,<sup>258</sup> The Former Yugoslavia,<sup>259</sup> Haiti,<sup>260</sup> Sierra Leone,<sup>261</sup> Lebanon<sup>262</sup> and Libya.<sup>263</sup> Maritime embargo operations aim at implementing economic sanctions adopted by the UNSC at sea. That the enforcement of the embargo physically takes place at sea, distinguishes it from UN-sanctions adopted by the UNSC that do not also authorize enforcement at sea, and which are restricted to implementation under national jurisdiction. Rather than only relying on national implementation of sanctions by member-states within their respective jurisdictions, maritime embargo operations add another, physical, dimension at sea directly against a sanctioned State and within the theater of conflict itself. Arguably, maritime embargo operations can be considered as a step between economic sanctions and military en-

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<sup>256</sup> T.D. Gill, 'Peace operations', in T.D. Gill, D. Fleck (eds.), *The handbook of the international law of military operations* (2010), 135-142. With regard to the term self-defence within the context of UN-peacekeeping operations it must, however, be noted that an evolution of the notion of self-defence has taken place in which it has gained a much broader meaning than that of the strict self-defence in the context of criminal law.

<sup>257</sup> SC Res. 217 (1965), 221 (1966), 232 (1966) and 460 (1979).

<sup>258</sup> SC Res. 661 (1990), 665 (1990), 670 (1990), 687 (1991) and 1483 (2003).

<sup>259</sup> SC Res. 713 (1991), 757 (1992), 787 (1992) and 820 (1993).

<sup>260</sup> SC Res. 841 (1993), 861 (1993), 873 (1993), 875 (1993) and 944 (1994).

<sup>261</sup> SC Res. 1132 (1997) and 1940 (2010).

<sup>262</sup> SC Res. 1701 (2006).

<sup>263</sup> SC Res. 1970 (2011), 1973 (2011), 2009 (2011) and 2040 (2012).

forcement operations in order to more pressure on the target state. But it can also be seen as a part of the military enforcement measures. Which one it may be or draws closes to, obviously depends on the actual circumstances in which the UNSC has authorized such activity. Since the UNSC authorized military means to implement economic sanctions at sea debate has arisen on whether these military operations, and the use of force used in pursuit of the mission, is based on either Article 41 (economic enforcement measures) of the UN Charter, or should be positioned within the context of Article 42 (military enforcement measures).<sup>264</sup> The '41/42' debate first arose during the imposition of economic sanctions against Iraq, after the Iraqi invasion of Kuwait in 1990. Sanctions against Iraq and their implementation at sea by the maritime interception force (MIF) lasted until the UNSC adopted, in May 2003, SC-Res 1483 (2003) that ended the sanctions regime.<sup>265</sup> In the years following the Iraqi experience interception operations were also conducted during the conflicts in the former Yugoslavia, Haiti and Sierra Leone. Although these maritime embargo operations made the implementation of economic sanctions at sea an accepted practice, it continued to stir the discussion on the legal basis for the naval enforcement of economic sanctions. In the maritime embargo operations that followed, during the conflicts in Lebanon and Libya, the debate did not, however, resurface. Klein has also briefly touched upon the issue but has not added a contemporary view of her own.<sup>266</sup>

The debate on the legal basis for naval enforcement at sea is especially relevant from a naval operator's perspective. At the operational level the core issue is whether naval forces that are deployed in maritime embargo operations to oversee and implement economic sanctions imposed at sea can resort to coercive measures, including the use of force. Do commanders of warships need flag State authority to board a vessel, or can they base their powers on the mandate of the UNSC? Can so-called disabling

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<sup>264</sup> See Soons; G.P. Politakis, 'UN-Mandated Naval Operations and Notion of Pacific Blockade: Comments on Some Recent Developments', 6 *Revue Africaine de Droit International et Comparé* (1994), 173-208; N.J. Schrijver, 'The Use of Economic Sanctions by the Security Council: An International Law Perspective', in H.H.G. Pos (ed.), *International Economic Law and Armed Conflict* (1994), 153-154; L.E. Fielding, 'Maritime Interception: Centrepiece of Economic Sanctions in the New World Order', 53 *Louisiana L Rev.* (1992-1993), 1191-1241; R. McLaughlin, 'United Nations Mandated Naval Interdiction Operations in the Territorial Sea?', 51 *ICLQ* (2002), 249-278.

<sup>265</sup> J. Goldrick, 'Maritime Sanctions Enforcement against Iraq, 1990-2003', in B.A. Elleman and S.C.M. Paine, (eds.), *Naval Blockades and Seapower. Strategies and Counter-strategies, 1805-2005* (London, Routledge 2006), 201-214.

<sup>266</sup> Klein (2011), 276-280.

fire be used when a vessel refuses to comply with the warship's crew who are executing a UN mandate, or are actions only limited to monitoring and reporting? These are just a few examples of practical questions which make understanding the legal basis and legal regime under which they operate a significant issue for military practitioners. As McLaughlin states: 'It is thus essential that we understand how Article 40, 41 and 42 interact, because it is this interaction which defines the spectrum with which UN mandated interdiction can take place.'<sup>267</sup>

The next paragraphs consider the question of the legal grounds for maritime embargo operations that are utilized to implement economic measures adopted by the UNSC. To analyse this question this Chapter will first argue that maritime embargo operations can broadly be categorized into two types of operations, namely *implied* and *explicit* maritime embargo operations. Second, it reassesses the main arguments of the 41/42 debate, primarily against the background of the present-day application of Article 42. It will argue that the applicability of Article 42 has evolved in such a manner that the existing reluctance in the mid-1990s concerning the possibility to position maritime embargo operations within Article 42 may now be less strong. Lastly, a few remarks are made concerning the question of whether or not the use of force within the realm of Article 41 is possible in the context of maritime embargo operations.

### **5.2.1. Two types of maritime embargo operations**

The UNSC has made much use of the ability to impose sanctions based on Article 41 of the UN Charter. The first sanctions ever to be adopted by the UNSC were the sanctions against Southern Rhodesia in 1966, which was also the first time that a maritime interdiction operation, the so-called Beira Patrol, supported the implementation of sanctions.<sup>268</sup> Article 41 reads as follows:

'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,

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<sup>267</sup> McLaughlin (2002), 253.

<sup>268</sup> V. Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN-Charter', in V. Gowlland-Debbas, ed., *National Implementation of United Nations Sanctions. A Comparative Study* (Leiden, Martinus Nijhoff Publishers 2004), 3-33, at 7.

telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’

Many of the sanctions imposed by the UNSC have coincided with the conduct of military peace support operations. Although some authors have suggested that the effectiveness of sanctions also depends on the willingness of States to use coercive measures, such as the use of military force,<sup>269</sup> most<sup>270</sup> of the UN-sanctions are adopted without implementation instruments that include the use of military means. Following the traditional division between Article 41 and 42 UN Charter, sanctions imposed through Article 41 have in fact very little to do with the use of military means, but form a crucial and mandatory pre-step in restoring international peace and security to what is considered to be the *ultimum remedium*: action through military means as is provided for in Article 42. Maritime strategist Geoffrey Till has argued that imposing maritime operations to enforce economic sanctions does not force the targeted State to change its policy. He claims that the relevancy of MEO on a political level is gained rather by the fact that it shows that everything possible has been undertaken to avoid to compelling compliance through the use of military force.<sup>271</sup> On a number of occasions States have decided to deploy naval assets at sea to support the economic sanctions, either at the express authorization of the UNSC, but also without express authorization. Broadly speaking, two types of maritime embargo operations can be distinguished: *Implied* maritime embargo operations and *explicit* maritime embargo operations. The key difference between these two types is whether the UNSC has explicitly authorized the implementation of economic sanctions at sea. These two types of embargo operations will be considered in more detail below.

#### 5.2.1.1. *Implied maritime embargo operations*

In the past, the UNSC has adopted a number of resolutions that were based on Article 41 in the context of which the international community

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<sup>269</sup> C. De Jonge Oudraat, ‘Making Sanctions Work’, 42 *Survival* (2000), 105-127 at 112.

<sup>270</sup> Some implementations of sanctions also relied on the presence of a peace support operation for their implementation. See, e.g., SC Res. 1609 (2004), para. 2(m), concerning Cote D’Ivoire, in which French forces were also authorized to monitor and inspect, without notice, the cargo of any transport vehicle breaching the imposed sanctions.

<sup>271</sup> Till (2013), 237.

took the initiative to deploy naval forces.<sup>272</sup> Although the political developments in these cases may have been such that States or regional organizations were politically expected or even asked by the UN to deploy military means to support the decisions of the UNSC, the point to note in these resolutions is that the UNSC did not specifically adopt military measures to implement sanctions from the sea. These military operations, launched without express authorization from the UNSC to support adopted economic sanctions from the sea, can be called implied maritime embargo operations. From the wording of the resolutions it does not become apparent that the UNSC actually seeks, or authorizes any enforcement of economic sanctions at sea. The target audiences of the resolutions are the member states which, pursuant to Article 25 of the UN Charter, are obliged to take measures to implement the decisions of the UNSC. These resolutions aim to seek implementation through national procedures, rather than through military means at sea. Two examples of implied maritime embargo operations can be given:

In the case of Southern Rhodesia the UNSC adopted SC resolution 217 (1965), shortly after SC resolution 216 (1965) condemning the unilateral declaration of independence by the Ian Smith Government. Although with SC-resolution 217 the UNSC did not as yet take the step of mandatory economic measures under Chapter VII, the UK (the former colonial power) launched the Beira Patrol.<sup>273</sup> Mobley mentions that the resolution '[w]as to serve as the original (if flimsy) legal justification for later British maritime intercept operations, giving the United Kingdom reason to expect the cooperation of the flag States of suspect tankers'.<sup>274</sup>

In the second example, during the crisis in the former Yugoslavia, in July 1992 NATO and the Western European Union (WEU) decided to launch Operation *Maritime Monitor* and *Sharp Vigilance* in support of SC resolu-

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<sup>272</sup> SC Res. 713 (1991) and SC Res. 757 (1992) on the former Yugoslavia; SC Res. 217 (1965) on Southern Rhodesia. In the case of SC Res. 661 (1990) it was disputed whether naval forces were operating under this resolution, or that the authorities were based on the legal regime applicable in cases of self-defence.

<sup>273</sup> SC Res. 460 (1979) ended the sanctions with regard to Southern Rhodesia, just before Zimbabwe emerged as a new state in 1980.

<sup>274</sup> R. Mobley, 'The Beira Patrol. Britain's Broken Blockade', 55 *NWCR* (2002), 64-84. Mobley also mentions that: 'in the early weeks of the operation London was required in that time to approach the tankers' flag countries and arrange to stop and board the ships, if necessary; with the passage in April of Security Council Resolution 221, Britain would no longer have to secure this approval'. See also p. 71 on which he states that specific flag state consent was needed within the context of SC Res. 217 before an interception took place.

tions 713 (1991) and 757 (1992) to contribute to the monitoring of sanctions adopted by the UNSC.<sup>275</sup> Neither resolution contained any explicit authority for naval enforcement, but merely decided (713) that under Chapter VII ‘all States shall ... immediately implement a general and complete embargo on all the deliveries of weapons and military equipment to Yugoslavia’. Resolution 757 added the mandate for States to implement SC-res. 713, but only within their jurisdictional powers.

In 2011, a third example almost came into being: during the early stages of the Libya crisis NATO Secretary-General Rasmussen announced that NATO would set up an embargo operation to monitor UN-sanctions that were adopted in SC-Res. 1970 (2011). This resolution was expressly based on Article 41<sup>276</sup> and did not contain any explicit authority to deploy naval forces to enforce the embargo with the use of armed force at sea.<sup>277</sup> As the situation developed, however, NATO actually started its military operations only after the UNSC adopted SC-res. 1973 (2011) that authorized explicit enforcement authority on the high seas.<sup>278</sup> If SC-resolution 1973 would not have contained this authorization and if NATO would have gone ahead with the deployment of naval forces off the coast of Libya, then deploying warships at sea to support a UN-resolution would have been a case of implied maritime embargo operations.

### 5.2.1.2. *Legal basis for implied maritime embargo operations*

If the maritime implementation of economic sanctions is not mentioned in the resolution, the question arises as to whether implied maritime embargo operations are actually *mandated* by the UN, or are set up in order *to support* UN decisions. It seems hard to see how a resolution can be a legal basis for maritime embargo operations if there is no mandate in the first

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<sup>275</sup> NATO Operation Maritime Monitor, available at:

<[www.manp.nato.int/NAVSOUTH/OperationMaritimeMonitor.htm](http://www.manp.nato.int/NAVSOUTH/OperationMaritimeMonitor.htm)> (visited February 2013).

<sup>276</sup> UNSC Res. 1970 (2011) reads: ‘Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41’.

<sup>277</sup> E. MacAskill and I. Traynor, ‘Libya: NATO defence ministers agree on minimal intervention.

Victory for US as agreement to move warships closer to Libya falls far short of measures called for by Britain and France’, *The Guardian*, 10 March 2011. At:

[www.guardian.co.uk/world/2011/mar/10/libya-gaddafi-nato-us-minimal-intervention](http://www.guardian.co.uk/world/2011/mar/10/libya-gaddafi-nato-us-minimal-intervention).

<sup>278</sup> See more elaborately on the Libya maritime embargo operation: M.D. Fink, ‘UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector’, 50 *Military Law and the Law of War Rev.* (2011) pp. 1-24.

place. If States take the initiative to deploy naval forces in support of measures taken under an Article 41 resolution that has no wording indicating that economic sanctions can also be implemented at sea, and secondly, for which the UNSC usually decides that States shall take steps to prevent by *their nationals* or from *their territory* or using *their flagged vessels* certain embargoed actions that do not go beyond the jurisdictional reach of a State and excludes foreign flagged vessels,<sup>279</sup> the resolution itself may not actually be the proper legal basis, but might only serve as an argument to politically justify or to legitimize the presence of naval forces off the coast of a State which is subjected to sanctions. The decision to deploy naval forces to sea should then be sought outside Chapter VII of the UN Charter, such as the decision of a regional organization to deploy military means, made possible because of the notion of freedom of navigation on the high seas. This allows States to deploy naval forces at sea on their own initiative without any further decisions from the UNSC, or the consent of a State and without crossing third-state boundaries. The actual presence of naval assets is made possible because of the rules applicable to the different maritime zones, but is not based on explicit authorization by the Council or the consent of a State. Consequently, no enforcement authority is given to naval forces to implement economic sanctions at sea. In the absence of explicit authorization, their powers are basically restricted to monitoring and reporting. Still, however, even in a diplomatic coercion role, as Booth mentions, warships are in support of foreign policy, ‘but by means of signaling rather than shooting’.<sup>280</sup> Zeigler mentions that the information that was reported by NATO and the WEU maritime operations during the Yugoslavia conflict ‘provided sufficient information about violations to enable ... the Security Council ... to pass resolution 787’,<sup>281</sup> which gave explicit authority to enforce sanctions at sea. McLaughlin views implied maritime embargo operations, which he calls ‘passive naval action’, more as a form of diplomatic coercion which is ‘encompassed in a modern form by the peaceful settlement provisions of UN Chapter VI’.<sup>282</sup>

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<sup>279</sup> See e.g. SC-Res. 757 (1992), para. 4(c); SC-Res. 1701 (2006), para. 15; SC-Res. 1970 (2011), para. 11.

<sup>280</sup> K. Booth, *Law, Force and Diplomacy at Sea* (London, George Allen & Unwin 1985), 137.

<sup>281</sup> Zeigler (1996), 33.

<sup>282</sup> R. McLaughlin, *United Nations Naval Peace Operations in the Territorial Sea* (Leiden, Martinus Nijhoff Publishers 2009) p. 128.

### 5.2.2. Explicit maritime embargo operations

Explicit maritime embargo operations are maritime interception operations that are explicitly mandated by a UN-resolution to enforce an embargo. A clear indication of an explicit mandate to implement economic measures at sea exists when the UNSC uses wording that resembles: ‘to hold all inward and outward shipping in order to inspect and verify their cargo and destinations and to ensure strict implementation of...’. This wording has been used in a number of UN resolutions and opens up the possibility to physically stop and board vessels at sea.<sup>283</sup>

SC-res. 665 (1990), with regard to Iraq, for the first time contained the express mandate with the above-mentioned wording that, as McLaughlin notes: ‘is [thus] the fundamental conceptual precedent for modern UN naval interdiction operations’.<sup>284</sup> The UNSC used the ‘explicit authority’-phrase possibly also to end the ongoing debate on the question as to whether naval enforcement actions against Iraqi merchant vessels were taken based on SC-res. 661 that imposed economic sanctions, or were based on Article 51 of the UN Charter.<sup>285</sup> The Iraqi example was followed in the former Yugoslavia crisis when the UNSC adopted economic measures in which the UNSC explicitly authorized maritime embargo operations in SC resolution 787.<sup>286</sup> The NATO and WEU operations, already present in the Adriatic Sea, changed their type from implicit to explicit with the adoption of explicit authority. Subsequently, NATO and the WEU changed their names for the embargo operations into *Maritime Guard* and *Sharp Fence* to reflect their new authorities. Both operations were later combined into Operation *Sharp Guard*.<sup>287</sup> In the cases of

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<sup>283</sup> SC-Res. 665 (1990), 787 (1992), 875 (1993) and 1132 (1997).

<sup>284</sup> McLaughlin (2002), 261.

<sup>285</sup> See, e.g., T.D. Gill, ‘De Golf crisis. De volkenrechtelijke regels inzake het gebruik van militair geweld’ (The Gulf crisis. The public international law rules concerning the use of military force), 38 *NJB (Nederlands Juristenblad)* (1990), 1475-1487; D.L. Peace, ‘Major Maritime Events in the Persian Gulf between 1984 and 1991’, 31 *VJIL* (1991), 545-566 at pp. 560-561.

<sup>286</sup> SC-Res. 787 (1992) reads:

‘12. acting under chapter VII and VIII of the Charter of the United Nations, calls upon States, acting nationally or through regional agencies of arrangements, to such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping in order to inspect and verify their cargoes and destinations and to ensure implementation of the provisions of resolutions 713 (1991) and 757 (1992); ...’

<sup>287</sup> D.A. Leurdijk, *The United Nations and NATO in Former Yugoslavia. Partners in International Cooperation* (The Hague, Netherlands Institute of International Relations ‘Clingendael’, 1996), 24-30.

Haiti<sup>288</sup> and Sierra Leone<sup>289</sup> the language adopted by the UNSC more or less followed the structure of SC-Res. 665.

### **5.3. Between implied and explicit**

In three more recent situations, Lebanon (2006), Iran (2010) and Libya (2011), the UNSC did not use the above mentioned boilerplate phrase. The resolutions are arguably less explicit in the wording used to authorize maritime embargo operations. In the case of Iran, it may be argued that although the possibility of embargo operations is mentioned, it does not actually mandate anything at all.

#### **5.3.1. Lebanon**

After the Israeli-Hezbollah war in the summer of 2006, during which Israel also established a belligerent blockade off the coast of Lebanon, the UN established a maritime taskforce to help the Lebanese authorities to stop arms that were meant for Hezbollah. SC-Res. 1701 (2006) provides the mandate for the Maritime Task Force to UNIFIL (MTF UNIFIL) off the coast of Lebanon. Paragraph 15 imposes an arms embargo, but without any explicit enforcement authority for enforcement at sea. No explicit authorization was included that an UN-naval force was to set up a maritime arms embargo, using the boilerplate wording from SC-Res.665, or any other similar wording. The embargo operation and its authority must be read between the lines of paragraphs 11(f), 12, 14 and 15 of the resolution. Moreover, it establishes an arms embargo without mentioning that the

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<sup>288</sup> SC-Res. 875 (1993) reads:

‘1. Calls upon Member States, acting nationally or through regional agencies or arrangements, cooperating with the legitimate Government of Haiti, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to ensure strict implementation of the provisions of resolutions 841 (1993) and 873 (1993) relating to the supply of petroleum or petroleum products or arms and related matériel of all types, and in particular to halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations; ...’

<sup>289</sup> SC. Res. 1132 (1997) para. 8 reads:

‘Acting also under Chapter VIII of the Charter of the United Nations, authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related matériel of all types, including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations, and calls upon all States to cooperate with ECOWAS in this regard; ...’

measures taken are based on Article 41, and without stating expressly that the measures were taken under Chapter VII, although wording indicating a Chapter VII resolution is included.<sup>290</sup> The political background, however, made it clear that this paragraph was to be read as mounting an arms embargo operation in support of the Lebanese authorities which did not have the sufficient capacity to close their maritime border in order to prevent arms smuggling. Also, as this embargo operation is mounted under the command of the UN itself, by broadening the existing UNIFIL operation with a maritime dimension conducting an embargo operation, one cannot say that *another* organization authorized to act may have interpreted the resolution too broadly.

The actions taken in the territorial waters of Lebanon are subject to a request of the Lebanese authorities, which to some authors made it more a peacekeeping operation rather than a peace enforcing operation<sup>291</sup>. According to those authors the authorities on Lebanese territory were not derived from the resolution but from the Lebanese Government consenting to UNIFIL operating within its territorial waters. Even if this would be the proper way to construe UNIFIL's authorities within the territorial sea, the area of maritime operations of the UNIFIL MTF stretches outward to 43nm from the Lebanese coast and thus outside Lebanese territory. The question, therefore, remains on what authority UNIFIL visits vessels outside the territorial sea. In 2009, the commander MTF UNIFIL wrote that: 'If requested by the Lebanese Armed Forces-Navy (LAF-Navy), MTF may also board and inspect a suspect vessel'.<sup>292</sup> It is however unclear if this is the procedure for both inside and outside territorial waters and what legal ground the LAF would have to authorize visits outside territorial waters. The Netherlands government had a different approach and took the position that SC-Res. 1701 authorized 'all necessary action' (para.12), which would also include to board vessels suspected of breaching SC-Res. 1701.<sup>293</sup> This being the Netherlands view, interestingly, UNIFIL's website mentions that since the operation has started, it has hailed 42.500 vessels

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<sup>290</sup> SC-Res. 1701 (2006) reads:

'Determining that the situation in Lebanon constitutes a threat to international peace and security'.

<sup>291</sup> J. Weingarter, 'Das Unifil-mandat der Bundeswehr – politische und rechtliche Aspekte', in *Journal of international law of peace and armed conflict*, vol. 20, no. 2 (2007), 116-119.

<sup>292</sup> P. Sandalli, 'Maritime task force's role in UNIFIL', in *Al Janoub*, no. 6 (January 2010), 6.

<sup>293</sup> Kamerbrief inzake beantwoording schriftelijke vragen over de maritime bijdrage aan UNIFIL (Letters to parliament answering written questions on the maritime support to UNIFIL), 11 October 2006.

and referred 1.670 to the Lebanese authorities for further inspection; no mention is made of any boardings that have taken place. Instead: ‘All merchant vessels classified “suspect” are monitored and, if inbound to a Lebanese harbor, are referred for inspection to LAF authorities.’<sup>294</sup>

### 5.3.2. Iran

In a number of resolutions the UNSC has addressed the situation with regard to Iran and the non-proliferation of nuclear weapons. Interesting to note with regard to shipboarding is SC-res. 1929 (2010), which states:

‘15. *Notes* that States, consistent with international law, in particular the law of the sea, may request inspections of vessels on the high seas with the consent of the flag State, and *calls upon* all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, for the purpose of ensuring strict implementation of those provisions.’<sup>295</sup>

In this resolution the UNSC only ‘notes’ (as opposed to authorizes) the opportunity to embark on maritime interdiction operations on the high seas, but at the same time underlines the limits of the authorities only to what is allowed under general international law and the international law of the sea in particular. With this language, the Council, in this sensitive dossier, seems to have wanted to give States a certain justification *if* they would decide to start embargo operations against vessels that are suspected of carrying prohibited items, but at the same time made it clear that the resolution does not contain any additional authority. Besides the fact that the EU has taken this resolution to be the basis for subsequent implementation measures,<sup>296</sup> there has not been any international initiative to launch an actual maritime embargo operation. One can nevertheless imagine that this resolution will play an important role in *ad hoc* cases when intelli-

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<sup>294</sup> <http://unifil.unmissions.org/Default.aspx?tabid=1523>. A practical reason to come to arrive at this operational decision could be that it may be easier to let the suspected vessel come into port where it is received to be fully inspected and where all the technical and legal facilities are present, rather than a potentially high risk visit and search at sea and having subsequent (legal) challenges of what to do with such persons and material.

<sup>295</sup> SC Res. 1929 (2011), para. 15.

<sup>296</sup> P.E. Dupont, ‘Countermeasures and Collective Security: The Case of the EU Sanctions against Iran’, 17 *Journal of Conflicts & Security Law* (2012), 301-336.

gence suggests a breach of a resolution and States decide to act upon this. The resolution could, for instance, ease the path for acquiring the consent of the flag State as the resolution calls upon all States to cooperate with such a request.

### 5.3.3. Libya

The resolution on Libya is a case where it can easily be argued that it contains an explicit authority. In this case, however, the UNSC did not make use of the boilerplate phrases. Instead, Paragraph 13 of SC-Res 1973 (2011) took the approach of expanding the measures adopted earlier in UN-resolution 1970 to allow for the inspection of vessels on the high seas. The UNSC took the rather unique approach of replacing the paragraph in resolution 1970 with the following:

‘13. *Decides that* paragraph 11 of resolution 1970 (2011) shall be replaced by the following paragraph : “Calls upon all Member States, in particular States of the region, acting nationally or through regional organisations or arrangements, in order to ensure strict implementation of the arms embargo established by paragraphs 9 and 10 of resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, *calls upon* all flag States of such vessels and aircraft to cooperate with such inspections and authorises Member States to use all measures commensurate to the specific circumstances to carry out such inspections”;  
...<sup>297</sup>

The mentioning of the high seas in this resolution are reason enough to consider the text to have explicitly authorized a maritime embargo operation, albeit not in the sense that it has used the standard phrases. The Libya-resolutions underline that the language that expresses or indicates maritime interdiction operations is now more diverse, the reasons for which may be manifold and driven by the particular circumstances of the conflict. Either the clarity of the language in the resolution may be subject to political aims and challenges which may require vagueness for the pur-

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<sup>297</sup> SC-Res. 1973 (2011), para. 13.

pose of political progression, or it is chosen in such a way that it better applies to the actual conflict rather than the standard phrases. Indeed, it underlines that the wording of the resolution must be contextualized in the political situation to understand whether or not a maritime embargo operation is authorized or at best legitimized.

#### **5.4. Legal basis for explicit maritime embargo operations: Article 41 or 42?**

Even when the UNSC uses phrases that explicitly state a mandate to implement economic sanctions at sea, it does not, however, clarify the applicable legal basis under which the mandate is implemented. The core problem of determining between Article 41 and 42 with regard to explicit maritime embargo operations is that the aim is to impose Article 41 sanctions, but by using Article 42 means. The debate is not whether military means may be deployed under Article 41 or 42, but whether these forces can use coercive measures to implement economic sanctions.

The 41/42 debate has developed several lines of thought as to the legal basis for using military means to enforce economic measures at sea. One line centralizes its main arguments around a reluctance to place the naval enforcement of economic sanctions at sea wholly within Article 42. This line accepts that the enforcement of economic sanctions at sea with military means in principle falls outside the scope of Article 41, as it involves the use of armed force, but at the same time having reservations on placing it under 42. The arguments range from the intended scope and nature of Article 42, to the conditions under which Article 42 can be invoked and the level of force that is actually used during maritime embargo operations. Another line of thought is the view that the use of armed force in sanctions enforcement at sea could also be seen within the evolving scope of Article 41.<sup>298</sup> Military means and the use of force may be used to enforce economic measures when the purpose of the operation and the limited level of force used are such that it falls within the evolving parameters of Article 41. A last line of thought concludes that maritime embargo

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<sup>298</sup> V. Gowland-Debbas, 25. Papastravidis also mentions that the UNSC has authorized maritime interdiction based on Art. 41, but offers no further explanation for this statement. E. Papastavidis, 'The Right of Visit on the High Seas in a Theoretical Perspective: Mare Liberum versus Mare Clausum Revisited', 24 *LJIL* (2011), 45-69 at 60.

operations plainly fall within the context of Article 42.<sup>299</sup> This line focuses on the use of force as the essential dividing line between Article 41 and 42. The following subsections will argue that in view of the evolved scope of Article 42 there may be less reluctance to position the military enforcement of economic sanctions at sea within the scope of Article 42 of the UN Charter.

#### **5.4.1. The evolving scope of Article 42**

Many of the arguments against Article 42 were put forward in the second half of the 1990s. Since then the applicability of Article 42 has evolved. Article 42 of the UN Charter reads:

‘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 and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.’

For the positioning of maritime embargo operations three particular points in this evolution can be highlighted. First, the scope of Article 42 operations has developed into a more and broader use of Article 42. Second, the evolution of Article 43 has crystalized. And third, the element of ‘inadequate measures under article 41’ has had more practice to determine how the UNSC deals with this phrase.

#### **5.4.2. Large-scale military operations**

The view that Article 42 was reserved for large-scale military enforcement operations, like those in Korea (1950) and Iraq (1991) that resemble traditional warfare, has been put forward as to why the naval enforcement of economic sanctions could not fit within Article 42. It was considered that maritime embargo operations are a completely different type of operation; small and limited in scale and purpose, with potentially a very low level of the use of force. Along the same lines, it has also been argued that the naval enforcement of economic sanctions could not be part of Article 42 because the article already has the option of authorizing a blockade, which

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<sup>299</sup> E.g. H.B. Robertson (1991), 296.

must be distinct from the more limited maritime embargo operations.<sup>300</sup> As such, as Fielding mentions, in terms of scope, maritime embargo operations were more closely associated with Article 41 than Article 42.<sup>301</sup> In the cases of the former Yugoslavia and Haiti, Soons argues that: ‘There was no situation of armed conflict between the enforcing States and the target State(s), and there was no alternative for article 41 as the basis for the resolutions, underlining the nature of article 42.’<sup>302</sup> Apparently Soons at that stage considered military operations only to be within Article 42 if they went beyond the threshold of an armed conflict.

The present-day application of Article 42 has however changed. First, the decisions of the UNSC have more frequently included the phrase ‘all necessary means’. This is generally accepted as the authority given by the UNSC to implement the mandate with the use of force when necessary, and has been accepted to imply that the authorization is based on Article 42.<sup>303</sup> The scope of application of Article 42 has broadened to include more types of military operations beyond large-scale military operations, usually referred to as peace enforcement operations, which may not all escalate to a situation of armed conflict. The practice of peace enforcement operations has created a broader, but more moderate view of the use of armed force that can be used under Article 42. In cases where the UNSC has authorized the implementation of economic sanctions at sea, it has done so with the phrase ‘to use measures commensurate to the circumstances as may be necessary’. This phrase is, strictly seen, not the same as ‘all necessary means’, but as McLaughlin notes, it is the equivalent of ‘all necessary means’ for sanctions enforcement at sea.<sup>304</sup> In the

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<sup>300</sup> The use of the term ‘blockade’ in a non-legal manner is often referred to where maritime embargo operations are in fact meant. A blockade in a legal sense is all-encompassing and entirely seals off a coast or part of a coast without discrimination, whereas in maritime embargo operations usually vessels can still pass after inspection, provided that they are not breaching the UN-resolutions.

<sup>301</sup> Fielding (1993), 1241.

<sup>302</sup> Soons, 213.

<sup>303</sup> N. Blokker, ‘The Security Council and the Use of Force – On Recent Practice’, in N. Blokker and N. Schrijver, eds., *The Security Council and the Use of Force. Theory and Reality – A Need for a Change?* (Leiden, Martinus Nijhoff Publishers 2005) p. 22; R. McLaughlin, ‘The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising “All Necessary Means”’, 12 *Journal of Conflict and Security Law* (2007) pp. 389-417; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester, Manchester University Press 2005), 43, fn. 70.

<sup>304</sup> McLaughlin (2007), 391.

case of Libya SC-Res. 1973 uses a combination between the two and states: 'to use all measures commensurate to the specific circumstances'.

Explicit maritime embargo operations also have the characteristics of peace enforcement operations: they are not designed to pose a classic military solution and can proactively use force beyond self-defence when vessels are not compliant. All vessels can be halted for inspection without any further requirement and no flag State consent is needed to board vessels.<sup>305</sup> Inspection and verification to ensure strict implantation of the resolution, implies such authority. The legal ratio of these powers is that the UNSC through Chapter VII of the UN-Charter can take coercive measures that all States, pursuant to Article 25 of the Charter need to comply with. What follows is that flag States cannot object to the boarding of their flagged vessels. Furthermore, it is argued that Article 103 of the UN-Charter trumps the exclusive jurisdiction of the flag State. Neither practice nor literature on the subject records any protests against this way of interpreting the resolutions. In the Yugoslavia-embargo the standard phrase was adopted in SC-Res. 787 (1992). Leurdijk mentions that this resolution was interpreted by NATO, in close coordination with the UN, as 'permitting the boarding and searching of all merchant traffic entering the Adriatic...'.<sup>306</sup> The commander of the Netherlands warship *Hr. Ms. Kortenaer*, who participated in the embargo in the Adriatic, wrote in line with Leurdijk's comments that boarding operations were only authorized after the adoption of SC 787.<sup>307</sup>

Secondly, apart from the broader scope of military operations conducted under Article 42, Blokker mentions an evolving tendency of defining the mandate in more detail, as opposed to the broad authorization of Iraq in UNSCR 678 (1990), to gain more control over the use of force, also arguably limiting the use of force.<sup>308</sup> It minimizes the possible political fear that too much force is unleashed in a particular situation. Interestingly, in this context, Weller comments with regard to SC-resolution 665 that Article 42 was specifically not included in the resolution to '[p]reclude an expansive interpretation of the authority that was grant-

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<sup>305</sup> Soons, 214.

<sup>306</sup> D.A. Leurdijk, *The United Nations and NATO in Former-Yugoslavia, 1991-1996. Limits to diplomacy* (1996), 25.

<sup>307</sup> M.A. van Maanen, 'Embargo operaties in de Adriatische zee', in *MRT* (1994), 15-18, at 15.

<sup>308</sup> Blokker, (2005), 24.

ed.<sup>309</sup> Explicit maritime embargo operations to enforce economic sanctions at sea are precisely the kind of balanced and controlled actions towards which the UNSC has been moving. Maritime embargo operations are, in other words, a good example of how the powers of Article 42 can be used. In that sense, the wording of Article 42 which states: ‘such action ... as maybe necessary’, may now be interpreted to include limited military operations using force to implement economic sanctions. Article 42 authorizes the ultimate and broadest authority in terms of the use of force, but does not preclude the lesser.<sup>310</sup> Maritime embargo operations may generally be considered as low scale operations in terms of the use of force. But how can one characterize a maritime embargo operation if it is an integral part of a military peace enforcement operation as a whole? This was the case in the NATO-led operation Unified Protector in Libya, generally viewed as an operation that was conducted under Article 42 that also rose up to the level of an armed conflict. The overall campaign, of which the embargo operation was part, was not a low-scale operation.

Additionally, apart from the arguments mentioned above, one other argument according to which maritime embargo operations could fit Article 42 is that nothing in Article 42 suggests that the measures taken on that basis cannot also involve economic measures that are enforced by military means. In fact, the use of a blockade, specifically mentioned in Article 42, is a method of naval warfare that traditionally falls under economic warfare. As Conforti noted, ‘the forces mentioned in article 42 ought to be set up and employed not only for military action but in furtherance of measures under article 41’.<sup>311</sup>

### 5.4.3. Article 43 UN Charter

During the Iraq conflict, a case for the impossibility of Article 42 to be invoked was made as Article 43 of the UN Charter has remained dormant. No arrangements had yet been made for UN standing forces.<sup>312</sup> As the evolution of the working of the UN collective system on this point had not

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<sup>309</sup> M. Weller, ‘The United Nations and the *Ius ad Bellum*’, in P. Rowe, ed., *The Gulf War 1990-1991 International and English Law* (London, Routledge 1993) pp. 29-54 at p. 36.

<sup>310</sup> See also Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge, Cambridge University Press 2003) p. 250.

<sup>311</sup> B. Conforti, ‘Non-coercive Sanctions in the United Nations Charter: Some Lessons from the Gulf War’, 2 *EJIL* (1991) 110-113, at 113.

<sup>312</sup> Schrijver, 153-154.

yet reached fruition in that period, this argument was then highly relevant.<sup>313</sup> At present, however, the argument has lost its strength. The practice of the UNSC has developed in a different way, authorizing the use of force through other agencies pursuant to Article 53 UN Charter. This practice has been accepted by the member states as a legitimate way for the UNSC to operate.<sup>314</sup> Member states are authorized to implement the decision of the Council taken on the basis of Article 42. Gazzini concludes on the connection between Article 42 and 43: ‘Although supported in the past by the Secretary General, this view is now rather marginal.’<sup>315</sup> Therefore, Article 43 does not preclude explicit embargo operations that authorize the use of force from being characterized as Article 42-measures.

#### **5.4.4. Inadequate measures under Article 41**

For Article 42 to be invoked, the UNSC must consider that measures under Article 41 ‘would be inadequate or have proved to be inadequate’. The wording suggests that Article 41 can also be skipped from the outset if the view is that economic measures will not provide the desired result. The Council does not first have to (as one author seems to suggest)<sup>316</sup> impose sanctions, wait for them to fail, and then move to military enforcement. Schrijver has noted particularly in the case of UNSC resolution 665 (Iraq) that the resolution cannot be considered an Article 42 resolution because the UNSC did not determine that the measures taken in SC resolution 661 were inadequate.<sup>317</sup> However, the Council’s practice appears to be that the UNSC only determines that the sanctioned State has failed to comply with the adopted obligations, but does not explicitly State that *therefore* those measures are inadequate before moving on to measures that involve the use of armed force.<sup>318</sup> Whether the condition of inadequacy is met must be

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<sup>313</sup> Which was underlined by Cuba during the Iraq-Kuwait crisis. UN Doc. S/PV.2938, 25 August 1990, 13-17.

<sup>314</sup> N. Blokker, ‘Is the Authorization Authorized? Powers and Practice of the Security Council Resolution to Authorize the Use of Force by “Coalitions of the Able and Willing”’, 11 *EJIL* (2000), 541-568, at 554.

<sup>315</sup> Gazzini, 35.

<sup>316</sup> L. Rosensweig, ‘United Nations Sanctions: Creating a More Effective Tool for the Enforcement of International Law’, 48 *Austrian Journal of international law* (1995), 161-195, at 173.

<sup>317</sup> Schrijver, 154.

<sup>318</sup> In UNSC Res. 665, the preamble mentioned that: ‘Iraq continues to refuse to comply with resolutions...’. UNSC Res. 678 was the basis for operation Desert Storm, in which states were authorized ‘to use all necessary means to uphold and implement resolution 660 and all subsequent resolutions...’

derived from wording that does not express the condition in detail, like ‘determining that the measures taken under such and such resolution have proven inadequate’. Interestingly, this approach also leaves open the opportunity for it to be repeated in subsequent resolutions without having to make the decision to move to military enforcement measures. Furthermore, if the UNSC decides from the outset of a conflict to use military enforcement measures, it is not likely that any mention or reasoning will be made with the view that measures under Article 41 would have been inadequate; this must be implied from the decision itself not to use economic measures.

### **5.5. Article 41 and the use of force**

It is not debated that military means can be deployed in both Article 41 and 42, nor is it debated that no consent is needed to board a vessel. Rather, the question is whether naval forces can actually take coercive measures when vessel is not compliant. As mentioned above, the UNSC must use language that indicates that armed force can be used. The question arises as to whether Article 41 could imply such use of force. Four points can be made.

First, Article 41 does not preclude the use of force *in toto*. When the Council adopts economic measures based on Article 41 the target audience to implement these measures is the member states. They are obliged pursuant to Article 25 of the UN Charter to implement the decisions of the UNSC. Although the UNSC takes economic measures, such as prohibiting trade or imposing an asset freeze, which by their nature are measures that do not involve the use of armed force, member states are obligated to take, as Gazzini mentions: ‘[w]ithin their respective jurisdiction, all necessary measures to implement the economic enforcement measures’.<sup>319</sup> The possibility to use force or coercive measures for the implementation does not directly flow from the resolution, but is based on national legislation, for

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Also in this resolution the preamble stated that Iraq refused to comply with its obligations despite all efforts by the UN. In UNSC Res. 787 (1992) the UNSC stated that it was deeply concerned about the continued violations of the embargo imposed by 713 (1991) and 724 (1991), and in the case of Haiti, the preamble of UNSC Res. 917 referred to UNSC Res. 783 (1993), in which the Council said that it was ready to take additional measures if Haiti continued to fail to comply in full with relevant resolutions. Finally, in the 2011 Libya crisis, the UNSC mentioned the failure to comply with Res. 1970 (2011) by the Libyan authorities.

<sup>319</sup> Gazzini, 16.

instance in the pursuance of an arrest of persons who have breached the embargo, or to stop a vessel in territorial waters that is believed to be carrying prohibited items. Whereas domestic laws would provide a basis to enforce within the States' jurisdictional areas, it, however, will not be sufficient to also enforce an embargo outside the States' jurisdictional areas.

Second, at a minimum what is necessary to imply the authorization for the use of force at sea is that the resolution uses language that actually mandates the implementation of economic sanctions at sea. Without this there is nothing at all to imply the use of force. In other words, at least what is needed is a maritime embargo operation that is explicitly mandated. Although States may take the decision to send warships to sea, it is a step too far to also derive authority for the additional use of force where the UNSC has not even authorized economic sanctions to be enforced at sea. Klein, in the context of SC resolution 733 (Somalia), argues that implying the use of force in cases where the UNSC did not give explicit authorization 'seems unwarranted in view of the Security Council's practice at the time of explicitly authorizing that ships be halted and cargo inspected and verified under Chapter VII'.<sup>320</sup> This line also appears to have been followed in practice. During operation *Maritime Monitor* and *Sharp Vigilance* no enforcement powers were given to warships as they 'merely monitored merchant shipping entering into the Adriatic'.<sup>321</sup> With regard to the Beira Patrol, the UK took the view that boarding a vessel and arresting persons and cargo could only be done with the consent of the flag State. No authority was derived from SC-resolution 217.

Third, current practice does not provide any examples in which maritime embargo operations were expressly based on Article 41, authorized an explicit mandate for naval forces to implement sanctions at sea, and also authorized the use of force to implement these sanctions.<sup>322</sup> In the

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<sup>320</sup> Klein (2011), 278.

<sup>321</sup> M. Pugh, 'Peacekeeping, Monitoring and Verification', in P.T. Haydon and A.L. Griffiths, eds., *Maritime Security and Conflict Resolution at Sea in the Post Cold War* (Halifax, NS, Centre of Foreign Policy Studies 1994) 207-224, at 208.

<sup>322</sup> The case of Southern Rhodesia has been confusing in the determination of whether the use of force was also possible under Art. 41. The Beira Patrol started as an implied maritime embargo operation based on SC Res. 217 (1965). The resolution only called upon, but did not decide under Chapter VII to impose sanctions. SC Res. 221 (1966), however, first reaffirmed in the preamble 'its call to all states to do their utmost to break off economic relations with Southern Rhodesia', and secondly, expressly authorized, with the use of force if necessary, the stopping of the Greek-flagged tanker *Joanna V*. The resolution clearly indicates that the *former* resolutions were taken with Art. 41 in mind, but not however SC Res. 221 itself that included the use of force against *Joanna V*. Uniquely, the UNSC first authorized force to stop the oil and petroleum flows, and then posed in SC Res. 232 (1966) for the

case of Sierra Leone and Iran it is clear that sanctions are taken under Article 41. In the first case, the UNSC also authorized maritime embargo operations, but it states that the implementation must be done in cooperation with the government of Sierra Leone and ‘in conformity with applicable international standards’.<sup>323</sup> The UNSC did not use the ‘necessary measures’ phrase that indicates that force can be used. In the case of Iran, Article 41 is explicitly mentioned and also has the slightest indication of possible implementation through maritime embargo operations in SC-resolution 1929 with regard to Iran.<sup>324</sup> This resolution at the same time underlines that there are no additional enforcement powers based on the resolution itself. In relation to the sanctions imposed against Iran, Gray makes an important point which underlines the importance of the division of Article 41 and 42. She mentions that the UNSC carefully specified that the sanctions against Iran are based on Article 41, ‘in order to ensure that no claim could be made that the Security Council was implicitly authorizing the use of force’.<sup>325</sup> Although she does not say whether force can be used under Article 41, she does point out the danger of blurring the dividing lines between 41 and 42.

Fourth, when explicit authority for a maritime embargo operation is given *and* the language also indicates the authority to use force, the actual level of force used has been an argument to place authority for enforcement still under Article 41. Politakis has argued that actions taken in practice – rare instances of using warning shots across the bow<sup>326</sup> – ‘have very little to do with what one would understand as use of force’.<sup>327</sup> This discourse could lead to the conclusion that very low-scale use of force should be implied in the enforcement of economic sanctions under Article 41.

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first time in the Council’s existence mandatory sanctions specifically based on article 41, whilst also reaffirming resolution 221. Since the adoption of SC Res. 232 it may seem as if force was authorized under a specific Art. 41 mandate. In fact, SC Res. 232 adopted a wide range of economic sanctions under article 41 without the use of force. Next to that, only the oil embargo could be enforced with the use of force if needed, which, as said, was based on a resolution that did not mention any article.

<sup>323</sup> SC Res. 1132 (1997), para 8.

<sup>324</sup> SC Res. 1929 (2010) states that: ‘Acting under Article 41 of Chapter VII of the Charter of the United Nations...’

<sup>325</sup> C. Gray, *International Law and the Use of Force* (Oxford, Oxford University Press 2008), 266.

<sup>326</sup> Morabito mentions that a warning shot was used during the Iraq conflict on 18 August (before SC Res. 665 was adopted). More interestingly, he considers a warning shot to be ‘[a]n accepted international signal by which a warship tells a merchant vessel to stop’. Morabito, 307. On warning shots, see also McLaughlin, who, although his phrasing is somewhat confusing as he refers to SC Res. 665, appears to opine that warning shots are a use of force that is not force in the sense of Article 42 of the Charter.

<sup>327</sup> Politakis (1994), 192.

Apart from the view by some that, for example, warning shots are a traditional and inherent authority for warships, it may not be completely accurate to draw conclusions solely on the view of what force *has been* used during maritime embargo operations. If one wants to derive conclusions from practice in terms of the use of force, more important would be the question of what force *can* be used to compel compliance in circumstances that require a step up in coercive measures. Even though the practice may have been that maritime embargo operations are usually of a very low scale on the use of force ladder, this may only mean that commanders of warships have not been confronted with situations in which more force was needed to compel the vessel to comply with the orders of an interdicting warship. The rules of engagement (ROE) may in fact provide for a more robust use of force. The question should, therefore, be raised, for example, whether the crew have ROE that contain the ability to escalate the use of force when necessary and may use disabling fire, detain persons, or use force to protect themselves against hostile acts or the intention to engage in such acts by the vessel's crew or passengers. When a commander of a warship has been given these types of coercive measures, it may be less logical to argue that the use of force is in fact so limited that it can be neglected and therefore positioned within Article 41. At the same time, one must however also keep in mind that coercive action in maritime embargo operations are actions against civilians who, even when they resist, do not take part in hostilities. As such, it limits the overall scope of military measures that can be taken under these circumstances.

### **5.6. Sub-conclusion maritime embargo operations**

Imposing economic measures against a State is not an unfamiliar task for navies. On the contrary, economic warfare has always been part of the operational oeuvre and the conditions under which the economy of the adversary can be targeted are for instance well presented in the law of naval warfare. Maritime embargo operations executed within the context of the collective security system have been another, and nowadays well established, step in the evolution of economic warfare at sea. In the past, authors have suggested that there is no strict separation between Article 41 and 42 of the UN-Charter when it comes to enforcing economic sanctions at sea. The different views in this debate have led to conclusions that

maritime embargo operations are based on '41½ resolutions'<sup>328</sup> or were found to be venturing in uncharted waters halfway between economic sanctions and military enforcement.<sup>329</sup> To envisage the relationship between Article 41 and 42 as a continuum would in the first instance indeed be a suitable view for the positioning of the naval enforcement of economic sanctions at sea. The heart of the UNSC decision to authorize naval assets to implement economic sanctions at sea clearly lies with Article 41, but the justification and authority to act with military means to enforce implemented economic measures seems more closely related to Article 42.

In determining whether or not maritime embargo operations fall under Article 41 or 42 of the UN Charter, this Chapter first tried to make clear that maritime embargo operations are not one of a kind and can largely be divided into implied and explicit maritime embargo operations. The latter can furthermore be divided into operations that are and are not authorized to use force. Consequently, the question as to whether or not maritime embargo operations fit Article 41 or 42 cannot therefore be answered in general, but must be reassessed per situation on every occasion. Secondly, the practice of maritime embargo operations shows that in cases in which the UNSC specifically adopted sanctions under Article 41, and maritime embargo operations were authorized or brought up as a possibility, the use of force was not authorized in the same resolution. In cases in which explicit maritime embargo operations were authorized, including the use of force to enforce the economic sanctions at sea, Article 41 is never explicitly mentioned. Whether Article 41 includes the use of force to implement economic sanctions at sea cannot be sufficiently answered through the current practice of maritime embargo operations because there has not been any situation in which the UNSC has specifically adopted an Article 41 resolution and also explicitly mandated a maritime embargo operation that was authorized to use force. The resolutions on Sierra Leone and Iran do however suggest that the UNSC is very reluctant to use wording that indicates the use of force to implement economic sanctions under Article 41. It is therefore tempting to conclude that only when a maritime embargo operation is based on all three conditions of the existence of economic sanctions, an explicit authority to implement at sea and

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<sup>328</sup> Blokker, 544.

<sup>329</sup> Politakis (1994), 197.

an authorization to use coercive measures can a maritime embargo operation fall under Article 42. In all other cases of explicit embargo operations it falls back on Article 41. In cases of implied maritime embargo operations the legal basis falls outside the scope of Chapter VII. This conclusion may be even more tempting within the context, as these paragraphs have argued, of the view that presently there are arguments which would take away the initial reluctance to base the use of force in maritime embargo operation under Article 42. Over past years Article 42 has evolved in such a way that it allows for a broader and more moderate scope of military operations within the context of Article 42, particularly military operations that are more limited in scope and the use of force. Furthermore, other restraints in the original set-up of the UN Charter, such as Article 43 and the condition of inadequate measures, no longer form an obstacle to positioning the military enforcement of economic sanctions in Article 42. With the experience we now have, explicit maritime embargo operations that fulfill the three mentioned conditions may well be positioned within Article 42 of the UN Charter.

### **5.7.UN-mandated interception operations under ‘all necessary means’**

The above section has analysed the legal basis for maritime embargo operations to implement economic measures adopted by the UNSC. Besides economic measures the UNSC can also decide to take other measures that can be enforced by naval assets based on Chapter VII of the UN-Charter. These measures can either be specific measures against specific threats, such as piracy, or to use a specific method, such as the method of blockade, but can also be more general to authorize the use of armed force to fulfil a mandate. In such cases the UNSC can *authorize all necessary means* to fulfill the mandate, which translated in operational conduct may lead to the need of conducting MIO.

#### **5.7.1. ‘All necessary means’**

When the UNSC adopts a resolution within a Chapter VII-context that authorizes the use of *all necessary means*<sup>330</sup>, it is generally accepted as

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<sup>330</sup> Interestingly, in UN-resolution 2249(2015), regarding the Council’s reaction to the terrorist attacks in Paris in November 2015, the UNSC used the *all necessary means*-phrase, but did not pre-worded it

giving authority for the use of military force based on Article 42 of the UN-Charter.<sup>331</sup> The phrase *all necessary means* is translated on an operational level into authorities for the military, such as the rules of engagement (ROE). Based on the circumstances of the conflict conducting maritime interception operations may be one of the means necessary and will therefore be granted through the specific mission ROE. Clearly, the phrase does not provide any specific methods, but rather very broadly sets the outer limits within which the military operations need to operate to fulfill its mandate. How far *all necessary means* to enforce a mandate can go, is highly contextual. One author has suggested this possibility within the context of maritime operations in East Timor.<sup>332</sup> Rogers, writes that in the East Timor case “all necessary means in SC-Res. 1264 (1999); “was arguably broad enough to encompass a right of approach and visit if required”.<sup>333</sup> Klein also states that *all necessary means*: ‘[m]ay be considered as sufficient authority for interdictions at sea to enforce the Security Council’s sanctions regime’.<sup>334</sup> Such a view has also been part of discussion during operation *Unified Protector* (OUP) with regard to Libya in 2011. The military operations with regard to Libya between March and November 2011 consisted also of a significant maritime element in which both a maritime arms embargo was enforced and naval forces were deployed to contribute to the protection of civilians based on UNSC-res. 1973 (2011). Paragraph 4 of UNSC Res. 1973 (2011) reads:

4. Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated

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with the term “authorize”. Instead, it “called upon” states, rather than it authorized states to use all necessary means. It led to discussion whether or not the resolution actually gave powers to use military force based on resolution 2249.

<sup>331</sup> R. McLaughlin (2007); E. Papastavridis, ‘Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis’, in *ICLQ* vol. 83 (2007), 83-118. Papastavrides notes that:

The example par excellence of that could not be other than the ritual incantation of the magic formula “to use all necessary means” from Resolution 678 (1990) onwards in every case of authorization to use force. The above phrase was accepted to have a different meaning than the ordinary and to denote the authority to use force, illustrating thus the common will of the Council to that effect. The existence of this formula in a Resolution is perhaps the most decisive factor as to whether the latter has authorized the use of force.

<sup>332</sup> F. Rogers, ‘The international force in East Timor – legal aspects of maritime operations’, in *UNSW Law Journal*, vol. 28, no. 2 (2005), 566-580, at 579.

<sup>333</sup> Rogers, 579.

<sup>334</sup> Klein (2010), 279.

areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council;

Because of the manner in way the text of resolution 1973 was construed, the arms embargo was limited to be enforced only outside the Libyan territorial waters. Paragraph 4 was, however, not limited in such a way. If necessary for the fulfilment of the mandate of protecting civilians, all necessary means could have been operationally translated into stopping and boarding vessel in the territorial sea. What matters in this is that the action taken must be in concordance with the purpose of the mandate. If, for instance, the general practice of the UNSC is to explicitly authorize oil embargo's against a State, discussion can emerge on whether an operation that practically result in an oil embargo and based on 'all necessary means' really is in line with the purpose of the mandate. Although such matters are at dependent upon the actual situation in a given conflict, it is submitted here that 'all necessary means' may include the use of naval forces to conduct MIO to enforce the mandate, if this is in fact in line with the purpose of the mandate.

## **5.8. Specific measures**

Apart from the general *all necessary means*-phrase, the UNSC can also adopt specific measures in which the Council authorizes interception operations for a specific aim and purpose, or through a specific method. Specific measures can be taken with regard to a wide range of subjects, such as piracy, or WMD's, but the Council can also decide to establish a naval blockade or take a specific measure to help support a State that is trying to stabilize internal unrest. These four will be briefly touched upon in the next paragraphs.

### 5.8.1. “Article 42”- blockade<sup>335</sup>

A type of maritime interception operations, albeit under a more traditional name, is explicitly mentioned in Article 42 of the UN-Charter. Article 42 mentions as an example of measures that can be taken under Article 42, the use of a blockade to enforce measures taken by the UNSC. By nature, a blockade is different than an embargo operation. Whereas the embargo is a control-mechanism to inspect inward and outward shipping where vessels may pass if it does not carry any of the prohibited items, a blockade closes the target port or coastal stretch completely and lets no one and nothing in or out, save a few specific exceptions.<sup>336</sup> In that sense, MEO are closer to contraband law than blockade law as they establish a selective barrier rather than a complete one. A blockade is impartial and not focused on certain goods or persons, but simply closes the sea routes to and from the targeted State completely.

A difference must be made between the UNSC specifically authorizing a blockade under Article 42 UN-Charter and the decision of military commanders to establish a blockade when the factual situation of the conflict and the given mandate allows them to resort to such a method. The first authorizes, as a legal basis, a *de facto* blockade operation under the authorities that will be determined in the resolution. The second is a method of the law naval warfare, which can be applied when the factual circumstances of the conflict rise to an international armed conflict, and allows for the law of naval warfare to be applied. A third option would be that an *all necessary means*-mandate is neither explicitly stating to use a blockade, nor does the conflict rise to an international armed conflict. A *de facto* blockade could in this case still be argued, but within limited purpose of the mandate.

At this stage, no resolution has ever been adopted by the UNSC in which it explicitly called for a blockade. Decisions by military commanders to resort to blockade operations under the law of naval warfare have, however, taken place. During the Korea War the method of blockade was used by the naval force, shortly after the North Korean invasion of South Korea in July 1950, which was made possible by SC-Resolutions 83 and

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<sup>335</sup> See also Chapter 9, paragraph 9.5.3. with regard to the question whether the law of blockade applies to an “Article 42”-blockade.

<sup>336</sup> See on these exceptions M.D. Fink, ‘Contemporary views on the lawfulness of naval blockades’, in *Aegean Review of the Law of the Sea and Maritime Law*; vol. 1, no. 2 (2011), 191-215.

84 (1950).<sup>337</sup> Taskforce 95 was called the *UN Blockading and Escort Force* (UNBEF). In this case, the UNSC declared that members of the UN may furnish such assistance that may be necessary to repel the attack of North Korea. The military operations resulting from this UNSC-authorization can be characterized as an international armed conflict, to which the law of war, including the law of naval warfare, applied. The operations came under unified command of the US, led by General MacArthur. US President Truman then ordered a naval blockade against North Korea.<sup>338</sup>

During the Iraq crisis in 1990, the media quickly moved to the use of the term blockade after the adoption of UNSC-res. 665.<sup>339</sup> Although the US and UK, still operating under the legal basis of article 51 UN-Charter, could have established a blockade, they did not. The measures taken by the Council could be seen as complementary measures to self-defence. The authorities given by Council, however, did not authorize a blockade and did not go beyond maritime embargo operations. At that stage of the conflict, a possible blockade would not have been connected to the measures taken by the Council. From the adoption of the ‘ultimatum-resolution’ SC-Res. 678 that led to *Operation Desert Storm* in January 1991, arguably, either these UNSC-measures can be seen as part of necessary measures within the context of self-defence, or as the Council taking measures within the collective security system.<sup>340</sup> Either way, the subsequent military operations rose to an international armed conflict, to which the law of naval warfare applied. Although not actually executed, one example of the third option can be mentioned here. During the Cyprus crisis in 1974, when Turkey decided to invade the island, a British Task Force set off to sail to Cyprus. The commander of these British forces in Cyprus suggested blockading the northern coast of Cyprus to stop the Turkish reinforcements on Cyprus on behalf of the UN. A UN-peacekeeping force (UNFICYP<sup>341</sup>) had been established on Cyprus since 1964. Although the UK naval Task Group went to position itself at sea, the initiative was

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<sup>337</sup> Baer (1993), 323.

<sup>338</sup> Politakis (1997), 64-66.

<sup>339</sup> See e.g. ‘Comprehensive mandatory sanctions imposed against Iraq - Kuwait: The Crisis - Cover Story’, in U.N. Chronicle, December 1990; J.E. Marolda and R.J. Schneller Jr., *Shield and Sword. The United States navy in the Persian Gulf War* (2001), 83-96.

<sup>340</sup> See discussion on this point for instance in T.D. Gill, ‘When does self-defence end?’, in M. Weller (ed.), *The Oxford Handbook of the use of force in international law* (2015), 737-751; Y. Dinstein, *War, aggression and self-defence* (2001), at 242-245.

<sup>341</sup> *United Nations Peacekeeping Force in Cyprus* (UNFICYP).

called off, amongst other reasons, because it was questionable whether UNFICYIP mandate would support such an action, when performed as an official declared part of UNFICYIP.<sup>342</sup>

### 5.8.1. Piracy

The UNSC adopted several UN-resolutions concerning the fight against piracy off the coast of Somalia.<sup>343</sup> Although piracy has been a long-standing issue in these and also other parts of the world, these resolutions brought the issue of piracy off the coast of Somalia onto the international peace and security agenda. Through its resolutions the UNSC has mainly served as a vehicle for international action with regard to piracy in the seas around the Horn of Africa. It has furthermore helped to enable to take measures against piracy within the Somali territorial sea and also even on land. The counter-piracy resolutions are adopted under Chapter VII of the UN-Charter and also include an *all necessary means*-mandate. SC-Res. 1816 (2008) mentions that States cooperating with the Somali Transitional Federal Government in the fight against piracy may:

- (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;<sup>344</sup>

A number of important limitations have, however, been brought into the resolutions. First, and as eluded to in the chapter on consent, to operate in the Somali territorial sea the Chapter VII authorities are restricted by the consent of the Somali authorities. Second, the authorities of the participating States must be consistent with action permitted on the high seas, which means that actions must be concordance with the law of the sea. Additionally, in terms of legal regime, the use of force is limited to force that is allowed within the context of human rights law standards.

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<sup>342</sup> J. Asmussen, *Diplomacy and conflict during the 1974 crisis. Cyprus at war* (2008), 133-134.

<sup>343</sup> SC Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011), 2015 (2011), 2020 (2011), 2077 (2012) and 2125 (2013) 2184 (2014).

<sup>344</sup> SC-Res. 1816 (2008), para 7(b).

### 5.8.3. Weapons of mass destruction and terrorism

The prohibitions regarding weapons of mass destruction, commonly regarded as chemical, biological, nuclear and radiological weapons, are regulated by treaties such as the BWC,<sup>345</sup> CWC<sup>346</sup> and the NPT.<sup>347</sup> In 2004, the UNSC adopted SC-Resolution 1540 with regard to non-proliferation of WMD, in which it decided that; ‘all States shall refrain from supporting by any means non-State actors that attempt to acquire, use or transfer nuclear, chemical or biological weapons and their delivery systems’.<sup>348</sup> Although it has been adopted under Chapter VII of the UN-Charter, this resolution does not authorize any maritime enforcement actions on the high seas.<sup>349</sup> For its enforcement it primarily relies on other treaties, all of which do not contain provision that allow non-consensual interception on the high seas of foreign flagged vessels by warships when the provisions of the treaties are breached. Just after the 9/11 attacks, the UNSC adopted SC-Res 1373(2001), determining that terrorists acts are a threat to international peace and security. Also this resolution does not contain a specific authority for enforcement of the adopted measures on the high seas.

The UNSC has the possibility to adopt military measures to enforce that States will comply with their WMD non-proliferation and disarmament obligations when it considers that breaching them is a threat to international peace and security. Apart from the non-proliferation resolution 1540, the UNSC has adopted a number of other resolutions with regard to specific States, such as North Korea<sup>350</sup> and Iran.<sup>351</sup> In these specific cases thus far, and although measures are taken under Chapter VII, the UNSC has not authorized any coercive enforcement measures *at sea* that would include the boarding of a foreign flagged vessel to stop WMD.<sup>352</sup> In fact, with regard to Iran under SC-res. 1747 (2007)<sup>353</sup> and 1929 (2010)<sup>354</sup> the

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<sup>345</sup> *The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972.

<sup>346</sup> *Chemical Weapons Convention*, 3 September 1992.

<sup>347</sup> *The Treaty on the Non-Proliferation of Nuclear Weapons*, 1968.

<sup>348</sup> Press release SC/8076. UN Security Council, 4956<sup>th</sup> Meeting (PM), 28 April 2004.

<sup>349</sup> See e.g. C. Dafrancia, ‘Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures’, in *Vanderbilt journal of transnational law*, vol. 45:705 (2012), 705-783.

<sup>350</sup> SC-Res. 1695 (2006) and 1718 (2006).

<sup>351</sup> SC-Res. 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1887 (2009) and 1929 (2010).

<sup>352</sup> See on North Korea, E. Yong-Joong Lee, ‘Legal Analysis of the 2006 U.N. Security Council Resolutions Against North Korea’s WMD Development’, in *Fordham International Law Journal* Vol. 31, no. 1 (2007), 1-33.

<sup>353</sup> Operative paragraph 5 of SC-Res. 1747 (2007) reads:

UNSC specifically adopted the wording that states that inspection measures on the high seas could only be taken based the consent of the flag States. As a last, in the context of acting against WMD, the failure of Iraq to comply with SC-Resolutions 678, 687 and 1441 was interpreted by the US and UK to invade Iraq and to overthrow Saddam Hussein in the Gulf War of 2003. The military operations also had a naval dimension which included MIO.<sup>355</sup> The justification for the start of military operations against Iraq based on these resolutions, however, has been very widely criticized.<sup>356</sup>

#### 5.8.4. Crude oil export: Libya 2014

The Libya-conflict of 2011 resulting in the overthrow and death of Qaddafi did not result in a further peaceful rebuilding of Libya. Internal struggles between striving local militias demanding autonomy and the government continued to be a challenge for the State. Local militias have kept their weapons and have taken control of some of the oil ports in parts of Libya.<sup>357</sup> This situation led to the adoption of SC-Res. 2146 (2014) that authorizes under Chapter VII the stopping, albeit with consent, of designated vessels that illicitly transported crude oil from rebel held ports. Days before the adoption of this resolution, US Navy SEALs stopped the tanker

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Decides that Iran shall not supply, sell or transfer directly or indirectly from its territory or by its nationals or using its flag vessels or aircraft any arms or related materiel, and that all States shall prohibit the procurement of such items from Iran by their nationals, or using their flag vessels or aircraft, and whether or not originating in the territory of Iran;

<sup>354</sup> SC-Res. 1929 (2010), paragraph 15 reads:

15. Notes that States, consistent with international law, in particular the law of the sea, may request inspections of vessels on the high seas with the consent of the flag State, and calls upon all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, for the purpose of ensuring strict implementation of those provisions;

<sup>355</sup> J. Kidd, 'Campaign analysis: Maritime forces', in P. Cornish (ed.), *The conflict in Iraq, 2003* (2004), 134-144.

<sup>356</sup> The US and participating states opined that the authority to use force derived from the earlier resolutions in the beginning of the 1990's could in 2003 still be used to use force after the failure of Iraq to comply with SC-Res. 1441. (see e.g. N. Rostow, 'International Law and the 2003 Campaign against Iraq', in *ILS*, vol. 80 (2006), 21-42.) Other states disagreed on this point of view and opined that a further resolution from the Council was needed to resort to the use of military force. See e.g. T.M. Franck, 'Iraq and the law of armed conflict', in *ILS*, vol. 80 (2006), 15-20; T. Gazzini, *The changing rules on the use of force in international law* (2005), 227-230.

<sup>357</sup> 'Libya asks UN and the world for help', in *Times of Malta*, 20 March 2014, p. 12.

*Morning Glory* that was trying to leave Libya to sell oil.<sup>358</sup> The UNSC-actions are a very specific action in a particular phase of state building and appears to be an attempt to canalize Libyan political developments for the better.

## **5.9. Conclusions**

The UN-collective security system provides a legal basis for maritime interception operations. Two types of MIO can be distinguished in this category. The first are the maritime interception operations that aim to enforce economic measures taken by the UNSC under Article 41 UN-Charter. These operations are called usually maritime embargo operations, which aim at enforcing economic sanctions at sea. The second are interception operations, based on Chapter VII, that do not specifically aim to enforce economic measures. This category can either authorize the use of armed force to fulfill a mandate through general indications such as all necessary means, which may include MIO, depending on the circumstances of the conflict, or can explicitly authorize MIO in relation to a specific subject, such as piracy or WMD. States can also mount maritime interception operations outside the Chapter VII-scope, but this will impact on the authorities that warships may have to support the UN efforts. Arguably, then, it must be questioned whether the UN-collective security systems is actually providing the legal basis, or that States make use of the freedom of the seas to support UN-efforts towards controlling a conflict. The bottom line is that it very much depends on the circumstances of the case and the manner in which way the UNSC chooses to deal with the issue.

Maritime embargo operations based on the UN-collective security system are, as noted in Chapter 3, the type of MIO that was first meant by the term MIO itself and have since their inception been used by the UNSC as an instrument to restore international peace and security. The legal parameters of this legal basis have now for the most been crystallized. Next to standard phraseology to indicate that embargo operations are authorized, even in the event that those phrases are not used, such as in the case of

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<sup>358</sup> US Department of Defense, press release, 17 March 2014, NR-126-14, 'DoD Statement on Boarding of Commercial Tanker *Morning Glory*'.

Libya and Lebanon, it has led to a standard maritime embargo operation, albeit matched to the details of the text of the resolution and other specific circumstances of the conflict.