

ONLINE ARTICLE

The Mediterranean Migrant Crisis: Key Considerations for the UN Security Council

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The [worsening migrant](#) crisis in the Mediterranean has been called the [greatest humanitarian crisis of our time](#). Thousands have perished on maritime transits occurring in overcrowded, unsafe boats, and the United Nations estimates that as many as [850,000 people](#) may attempt to cross the Mediterranean en route to Europe in 2015-2016. Until the complex land-based issues related to this crisis are resolved, naval assets will be called on to conduct boardings, rescues, and as appropriate, take law enforcement action. Unfortunately, there is no consensus regarding whether existing authorities, essentially the international legal framework, to address mass migration is sufficient, and if not, what action should be taken.

International instruments that are relevant in response maritime operations include the UN Law of the Sea Convention, the Search and Rescue (SAR) Convention, the Salvage Convention, SOLAS, the UN Convention Against Transnational Organized Crime and its 2000 Protocol Against the Smuggling of Migrants by Land, Air, and Sea (Palermo Protocol), and a number of human rights treaties. Any amendment to these documents, for example, to explicitly distinguish between SAR and mass migration, develop procedures for disembarkation of migrants, or identify conditions when those in the private sector that conduct a rescue would enjoy legal immunity, would likely take years. To best position States conducting maritime operations on the water today, the United Nations Security Council is uniquely positioned to take immediate action.

UN Security Council Resolutions provide innovative legal tools and a broader basis under international law to confront humanitarian and maritime security challenges, complementing land-based responses. At least 25 Security Council resolutions since 1966 have authorized the enforcement of embargoes, cargo verification, and boarding foreign flagged vessels on the high seas. There are limits, however, to Security Council action. Discussions in New York may very well center on whether [proposals at the Security Council](#) to authorize interdictions within Libya's territorial sea, or on the high seas, will unintentionally undermine internationally recognized, time-honored law of the sea principles related to authorities of the coastal and flag state.

The arcane issue of flag state authority may never dominate diplomatic headlines. Yet this area of international law represents a lynchpin to global trade, ensuring cargo moves quickly, efficiently, and without interference. Thus, under the law of the sea, a vessel on the high seas, even if operated by criminal smugglers, would generally only be subject to the jurisdiction of the country in which the ship is registered. That poses a significant obstacle to meaningfully conducting interdiction operations and holding those who commit illicit acts legally accountable. The UN Security Council has the ability to authorize boardings of foreign flagged vessels when such measures are necessary to maintain or restore international peace or security, but has

judiciously employed such action over the past 50 years. While no one questions something must urgently be done to address the migrant crisis, securing agreement on next steps, particularly on the water, has proven difficult.

Over the past five years, the frequency of resolutions with a maritime focus has dramatically increased. That is not bad thing. However, strict reliance on text adopted by the UN Security Council in the past year on maritime threats in Yemen and Somalia would be misplaced, as those resolutions include vague, imprecise text. These recent efforts are in contrast to Security Council resolutions spanning five decades that provided toolkits to address an array of threats in the maritime environment that include Hezbollah, North Korea, al Qaida, Iran, Al-Shabaab, and Somali piracy, but a lack of awareness regarding these authorities may limit their use during the next crisis.

The Security Council has adopted resolutions that led to [operational challenges of more than 12,000 ships](#) along with the pursuit of the German-flagged vessel, *Hansi India*, transporting arms from Iran to Hezbollah in Lebanon, the North Korean-flagged freighter *M/V Kang Nam I* believed to be carrying missile components, the Belize-flagged *M/V Light* suspected of shipping missile components and technology from a North Korean port, blockading and diverting Cyprus-flagged *M/V Vento Di Ponente* suspected of carrying proscribed arms and related material into Libya, and [counter piracy operations on the high seas, in the Somali territorial sea, and on land](#).

When assessing options for the Mediterranean migration crisis, there are four general categories of maritime-focused Security Council resolutions:

- **Authorization to enter the territorial sea of a coastal state**: The Somalia counter piracy model (in varying forms from 2008-2014), based in part on a request from the coastal/affected State, where authorization is provided to enter the territorial sea along with, potentially, entry into the country, along with authority to scuttle a vessel engaged in illicit or proscribed activity;
- **On the high seas, Flag State consent not required**: Boardings (or blockading or diverting) of vessels are authorized without flag state consent, generally similar to Resolution 1973 (2011) on Libya, though such action may occur only when reasonable grounds exist to suspect the proscribed conduct;
- **On the high seas, Flag State consent to be sought, though not required**: The hybrid construct of Resolution 2182 (2014) on Somalia, where flag state consent is to be sought (“good faith effort”) prior to boarding vessels suspected of engaging in proscribed conduct, but if authorization is not obtained (as opposed to the request being denied), then a boarding – and potentially, seizure – may occur; and
- **On the high seas, Flag State consent required**: Boardings or enforcement action are authorized only with flag state consent, comparable to, among other resolutions, 1874 (2009) on North Korea, and 1929 (2010) on Iran.

Of course, Security Council action is not limited to the above four categories; subsequent resolutions could provide broader authority to conduct operations. And, provisions related to the use of force could be an element of the Resolution. Authorizing action within a State’s territorial sea [without the coastal state’s consent](#), for example, would represent an extraordinary action.

Efforts in the past year at the United Nations are in addition to earlier action against piracy and armed robbery in the Gulf of Guinea and the Western Indian Ocean, underscoring the Security Council's prominent role in the development of normative and operational responses to transnational threats at sea.

It is not surprising the United Nations has focused on maritime security, either directly or indirectly, to support broader security concerns; the oceans represent an essential component of transnational trade and the cargo and people that move on the water daily are frequently linked to national security interests. The general principle of exclusive flag state jurisdiction, articulated in the [Law of the Sea Convention](#), is not absolute, and several [exceptions exist, including UN Security Council Resolutions](#). Absent an identified exception, vessels are largely free from interference on the high seas, a freedom that legitimate shipping thrives upon to expeditiously move millions of containers annually along with tons of cargo and goods.

The recent frequency of Security Council adopted resolutions with a maritime focus has prompted commentators to note there now exists "[a new exception to the freedom of the high seas](#)."

Separate from policy and diplomatic considerations, [the United Nations](#) has the legal ability to, among other things, [authorize the use of force](#). Security Council resolutions addressing high seas interdictions are tethered to Chapter VII, articles 39, 41, and 42 of the UN Charter, and are therefore binding on all member states. Though the Law of the Sea Convention represents the authoritative instrument for the oceans, UN Charter article 103 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The current era of maritime-focused resolutions began with [665 \(1990\)](#) in which the Security Council called on States cooperating with Kuwait "to use such *measures commensurate to the specific circumstances*...to halt all inward and outward maritime shipping...to inspect and verify their cargoes and destinations..." (emphasis added). While resolutions on maritime threats had previously been adopted, Resolution 665 signified the benchmark for Security Council action over the next 25 years. This resolution adeptly provided expanded interdiction authority while not including explicit details best left to naval commanders and national-level/task force direction.

Also in the 1990s, the Security Council adopted resolutions on Yugoslavia, Haiti, and Sierra Leone, recognizing humanitarian intervention as a legitimate international basis for action. In a resolution on Yugoslavia, for instance, the Security Council prohibited the transshipment of crude oil, petroleum products, coal, [and] energy-related equipment [among other items]...unless such transshipment is specifically authorized...calling on States to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations..." The resolution provided authorization to inspect and verify the cargo on ships on the high seas, provided reasonable grounds exist to suspect the transit included proscribed cargo, without requiring flag state consent, similar to Resolution 665. Another resolution extended the enforcement operations to within the territorial waters of the former Yugoslavia (Serbia-Montenegro). [NATO's](#)

[Operation Sharp Guard](#) challenged thousands of ships, stopping 803, and diverting 176 ships for inspection, resulting in the detection of 9 violations of Security Council Resolutions. Extending an interdiction mandate into a nation's territorial sea is an extraordinary action that would be repeated in Somali piracy actions (at the request of the Transitional Federal Government).

[Resolution 1132 \(1997\)](#), which was adopted to address Sierra Leone security challenges, called upon States to cooperate with ECOWAS (Economic Community of West African States). Recognition of the importance of ECOWAS, a regional organization, to positively shape the security response in West Africa, would be repeated in resolutions on piracy and armed robbery in the Gulf of Guinea, among others (2018 [2011] and 2039 [2012]).

The security challenge posed by Somali piracy led the [Security Council](#) to adopt Resolution 1816 (2008), one of twelve on the threat spanning six years, authorizing “entry into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law...” Resolution 1816, among other things, sought to ensure that pirates did not evade capture by hugging the coast of Somalia, and was adopted with the consent of the Transitional Federal Government. In subsequent resolutions, the Security Council authorized entry into Somalia to pursue piracy threats, again consistent with the Transitional Federal Government's request, and further authorized the scuttling of vessels reasonably suspected of being used to commit acts of piracy. On entry into Somali territorial sea, the Security Council noted it “shall not be considered as establishing customary international law (CIL),” a comment repeated in Resolution 2146 (2014) regarding the illicit export of crude oil from Libya.

The continued security threat in North Korea led the Security Council to adopt [Resolution 1874 \(2009\)](#), calling upon “all Member States to inspect vessels, *with the consent of the flag State*, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited...for the purpose of ensuring strict implementation of those provisions...and to cooperate with inspections...and, if the flag State does not consent to inspection on the high seas, decides that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities...” (emphasis added). A significant limitation, of course, is the ability to pursue, under this resolution, North Korean-flagged vessels.

[Security Council Resolution 1929 \(2010\)](#) addressed security threats posed by Iran, calling on States “to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all [proscribed] cargo to and from Iran, in their territory, including seaports...” for the purpose of ensuring strict implementation of those provisions.” The [Resolution further noted](#), “consistent with international law, in particular the law of the sea, [that States] may request inspections of vessels on the high seas *with the consent of the flag State*, and called upon all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying proscribed items.” (emphasis added). Similar to 1874 (North Korea), a limitation with 1929 is the ability to pursue under this resolution, Iranian-flagged vessels.

To combat the illicit export of crude oil from Libya, which the Security Council asserted constituted “a threat to international peace and security,” [Resolution 2146 \(2014\)](#) was adopted. This resolution authorized member states to conduct high seas inspections of specifically designated vessels only after seeking the consent of the vessel’s flag state, but did not explicitly require consent prior to a boarding. The resolution also provides that member states conducting an inspection shall submit a report that includes “efforts made to seek the consent of the vessel’s flag state.” Security Council Resolution 2146 emphasized the authority it provided “shall not be considered as establishing customary international law.”

[Resolution 2182 \(2014\)](#), which sought to ensure implementation of the arms embargo on Somalia and the charcoal ban, called on States to inspect, “without undue delay, in Somali territorial waters and on the high seas off the coast of Somalia extending to and including the Arabian sea and Persian Gulf, vessels bound to or from Somalia which they have reasonable grounds to believe are carrying, among other things, charcoal from Somalia in violation of a ban and carrying proscribed weapons.” The Federal Government of Somalia, in correspondence with the Security Council, signaled their support for operations within the Somali territorial sea to prevent the export of charcoal and the import of weapons in contravention of the embargo.

Resolution 2182 further called “upon all Flag States of such vessels to cooperate with such inspections, requests Member States to *make good-faith efforts to first seek the consent of the vessel’s Flag State prior to any inspections...*” (emphasis added). The “good-faith efforts” standard effectively authorizes enforcement action on the high seas without flag state consent. Though the Security Council is authorized to take such action, the text of the resolution is problematic. While a UN Security Council Resolution should not be expected to provide operationally specific details, imprecise wording creates enforcement/interdiction challenges, including whether there is an expected time to allow for a flag response, whether a request needs to be in writing, and who is authorized to make and receive such requests.

In 2015, the Security Council adopted [resolution 2216](#), calling upon Member States, “to inspect, in accordance with their national authorities and legislation and *consistent with international law, in particular the law of the sea* and relevant international civil aviation agreements, all cargo to Yemen...on the high seas...if the State concerned has information that provides reasonable grounds to believe the cargo contains” proscribed items. (emphasis added). Because the resolution did not explicitly use the words “with the consent of the flag State,” instead calling upon “all flag States of such vessels...to cooperate with such inspections,” and further required states conducting inspections to report the results to the United Nations, including whether cooperation was provided, the resolution most likely authorizes action without flag state consent, though such direction is not explicit. Perhaps such wording was necessary to secure consensus among Security Council members, though greater fidelity and greater precision would benefit, and increase the potential for, operational responses.

Going forward, text that is diplomatically and operationally precise will be the most effective, particularly with respect to the migration crisis. The United Nations is empowered with an unusually wide ambit of authority. Revisiting principles of flag state authority in limited circumstances may be necessary, though unambiguous, decisive, and timely direction should be the aim. Resolutions that are imprecise do little but confuse, and in so doing, limit Naval

responses. As diplomats debate the text of resolutions on maritime migration or piracy, it is clear that UN actions over the past five decades have current relevance and more broadly, that the Security Council will likely remain influential in shaping the global order of the oceans.

- **221** (1966): *Rhodesia*: called on States to ensure the diversion of their vessels reasonably believed to be carrying oil destined for South Rhodesia...”
- **418** (1977): South Africa: “...a mandatory arms embargo needs to be universally applied against South Africa...”
- **665** (1990): *Iraq/Kuwait*: “halt all inward and outward maritime shipping, in order to inspect and verify their cargoes...”
- **757** (1992): *Yugoslavia*: “prevent [proscribed] dealings by their nationals or their flag vessels...” and **787**: *Bosnia and Herzegovina*: “halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations...” and **820**.
- **875** (1993): *Haiti*: “halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations...”
- **1132** (1997) *Sierra Leone*: “in conformity with applicable international standards...halting inward maritime shipping in order to inspect and verify their cargoes and destinations...”
- **1390** (2002) *Al-Qaida*: “All States shall prevent the use of...their flag vessels to supply, sell, or transfer to Al Qaida individuals, groups, and entities identified by the ‘Committee’.”
- **1540** (2004) *Counterproliferation*: “Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat...illicit trafficking (of proliferation related material)... consistent with international law...”
- **1718** (2006) *North Korea*: “...take, in accordance with their national authorities and legislation, and consistent with international law, cooperative action including through inspection of cargo to and from the DPRK, as necessary...”
- **1747** (2007): *Nonproliferation and Iran*: “...exercise vigilance and restraint in the supply, sale, or transfer...using their flag vessels...of any battle tanks, armoured combat vehicles...missiles...[among others] to Iran.”
- **1816*** (2008) *Somalia*: “States cooperating with the TFG in the fight against piracy...may enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law...” (*extended in subsequent resolutions; the Security Council adopted more than 10 resolutions on the Somali piracy threat); *See also*, **2018** and **2039** (Gulf of Guinea)

– **1874** (2009) *North Korea*: “Calls upon all States to inspect, in accordance with their national authorities and legislation, and consistent with international law...[and] ...Calls upon all Member States to inspect vessels, with the consent of the flag State, on the high seas...[and] if the flag State does not consent to inspection on the high seas, decides that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities...”

– **1929** (2010) *Iran*: “inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea...”

– **1973** (2011) *Libya*: “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 [proscribed] items...” (see also, **1970**)

– **2146** (2014) *Libya*: authorized inspections of designated vessels involved in the illicit export of crude oil from Libya to occur on the high seas and the use of “all measures commensurate to the specific circumstances...”

– **2182** (2014) *Somalia*: “inspect in Somali territorial waters and on the high seas off the coast of Somalia extending to and including the Arabian sea and Persian Gulf, vessels bound to or from Somalia which they have reasonable grounds to believe are violating an arms embargo, carrying charcoal in violation of the charcoal ban, or designated resolutions; [But...] calls upon all Flag States of such vessels to cooperate with such inspections, [AND] requests Member States to make good-faith efforts to first seek the consent of the vessel’s Flag State prior to any inspections...”

– **2216** (2015) *Yemen*: “inspect, in accordance with their national authorities and legislation and consistent with international law, and in particular the law of the sea...all cargo to Yemen, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items prohibited.”

Update:

– **2240** (October 9, 2015)

After months of discussions, on October 9, 2015, the United Nations Security Council approved a resolution to address the Mediterranean migration crisis. Valid for one year, [UNSCR 2240](#) contains three operative elements: (1) Inspections are authorized *on the high seas* (outside of the 12-mile territorial sea) off the coast of Libya, provided there are reasonable grounds of migrant smuggling and “good faith efforts” are made to first contact the flag state for consent; (2) Disposal of vessels involved in migrant smuggling or human trafficking interdicted is authorized only if “in accordance with applicable international law;” and (3) Member states may “use all measures commensurate to the specific circumstances...” in confronting migrant smugglers consistent with “international human rights law.”

Of the four general categories of UNSC resolutions with application to the maritime environment discussed in the Article, 2240 falls within the “*On the high seas, Flag State consent to be sought, though not required.*”

This UNSC action importantly addresses an urgent humanitarian, security, and governance crisis. However, the resolution’s vague, imprecise text fails to provide clear direction. Resolution 2240 continues the misplaced use of “good faith efforts” regarding the requirement to first contact the flag state prior to boarding a foreign flagged vessel on the high seas and in fact, adds even more ambiguity with its provision on scuttling, or the “disposal,” of vessels interdicted on the high seas engaged in proscribed conduct.

Paragraph 8 of Resolution 2240 provides that where a vessel is confirmed as being used for migrant smuggling or human trafficking from Libya, further action, including “disposal” will be taken in accordance with “applicable international law,” but provides no amplifying guidance regarding which documents apply. By identifying the issue of disposal, but not providing explicit direction, Resolution 2240 causes confusion. In contrast, though also not a model of precision, Resolution 2184 (2014) on Somalia called on States to take part in the fight against piracy by, among other things, seizing and disposing of boats (“*consistent with this resolution and international law.*”)

Regardless of clarity issues with text, operational implementation of 2240 is key. Towards that end, States are requested to inform the Security Council on the “progress of actions undertaken in exercise of the authority provided...” every three months. A clear picture of 2240’s impact will come into focus in September 2016 when the Secretary-General provides the Security Council with a report documenting implementation. These reports will provide insight into how each State interprets 2240 by showing how each state implemented the authority granted therein and provide considerations for subsequent resolutions.

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