

LE CONSEIL DE SÉCURITÉ
DES NATIONS UNIES ET LA MER

UNITED NATIONS SECURITY COUNCIL
AND THE SEA

Sous la direction de

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EDITORIALE SCIENTIFICA

NAPOLI

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THE ROLE ACCORDED TO HUMAN RIGHTS
IN SECURITY COUNCIL MARITIME RESOLUTIONS

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Introduction: What possible roles for human rights in maritime security resolutions?

If we consider the role the United Nations Security Council has played in the field of maritime safety and security throughout its existence, the last ten years are of particular interest. Over the past decade, the number of resolutions with maritime safety and security at their core has increased dramatically,¹ and this development fits perfectly into the

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¹ The first resolution having Somali piracy at its core was UNSC Res 1816 (2 June 2008) UN Doc S/RES/1816, which was followed by more than a dozen resolutions, the latest being UNSC Res 2383 (7 November 2017) UN Doc S/RES/2383. The Security Council also issued resolutions pertaining to piracy in the Gulf of

broader picture of international security. The concept of maritime security began to emerge as a result of the maritime terrorism incidents that took place in the wake of 9/11,² and the rise of Somali-based piracy after 2006 ultimately brought it to the forefront. The adoption of maritime security strategies by various actors in recent years reflects how the maritime dimension of security has risen in rank on security agendas,³ including that of the United Nations. In its 2008 Report on Oceans and the Law of the Sea, the Secretary General identified seven specific threats to maritime security⁴ – and the Security Council took a particularly active

Guinea, albeit not using its Chapter VII powers: UNSC Res 2018 (31 October 2011) UN Doc S/RES/2018, followed by UNSC Res 2039 (29 February 2012) UN Doc S/RES/2039. With UNSC Res 2240 (9 October 2015) UN Doc S/RES/2240, the Council issued its first resolution on human trafficking and migrant smuggling into, through and from Libya, which was recently renewed for the second time with UNSC Res 2380 (5 October 2017) UN Doc S/RES/2380. As regards the enforcement of embargos through the authorization of maritime interdiction operations, the Security Council issued resolutions in rather regular intervals since the 1990s (for an overview, see Magne Frostad, 'United Nations Authorized Embargos and Maritime Interdiction: A Special Focus on Somalia' in Gemma Andreone (ed), *The Future of the Law of the Sea: Bridging Gaps Between National, Individual and Common Interests* (Springer 2017) 214-17). However, in more recent resolutions, the readiness to deviate from the jurisdictional rules under the law of the sea increased; UNSC Res 2182 (21 October 2014) UN Doc S/RES/2182 and UNSC Res 2292 (14 June 2016) UN Doc S/RES/2292, e.g., no longer require flag state consent for the inspection of suspicious ships on the high seas but simply 'good-faith efforts' to obtain flag state consent.

² For a brief overview on incidents, see Patricia Schneider, 'Maritime Terrorism: Governance and Non-State Actors' in Anja P. Jakobi and Klaus Dieter Wolf (eds), *The Transnational Governance of Violence and Crime Non-State Actors in Security* (Palgrave Macmillan 2013) 172; Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 148-49.

³ Christian Bueger and Timothy Edmunds, 'Beyond seablindness: A new agenda for maritime security studies' (2017) 93(6) *International Affairs* 1293, 1294 and 1297-98, mention the adoption of maritime strategies by various states (US, UK, France and India) and international actors, notably the EU Maritime Security Strategy (2014), NATO's Alliance Maritime Strategy (2011), the G7 declaration on maritime security, Africa's Integrated Maritime Strategy (2014) and Charter on Maritime Security, Safety and Development (2016).

⁴ UNGA, 'Oceans and the law of the sea: Report of the Secretary-General' (2008) UN Doc A/63/63, paras 54-113: piracy and armed robbery; terrorist acts involving shipping, offshore installations and other maritime interests; illicit trafficking in arms and weapons of mass destruction (WMD); illicit traffic in narcotic drugs and psychotropic substances; smuggling and trafficking of persons by sea; illegal,

role, granting enforcement powers to states that go beyond those generally available under the international law of the sea in three areas: piracy and armed robbery at sea, human trafficking and smuggling of migrants, and enforcement of embargos relating to arms and weapons of mass destruction and other objects, such as Somali charcoal. These resolutions are referred to as ‘maritime resolutions’ in the following.

The contribution at hand analyses these maritime resolutions from a human rights perspective specifically, and thus involves an examination of the role the Security Council accords to human rights in these maritime resolutions. Put differently, for what purpose does the Security Council refer to and invoke human rights, and how much weight does it confer to human rights in the context of maritime security? The analysis proceeds in three steps.

Since the bulk of maritime resolutions have been adopted under Chapter VII of the UN Charter, this contribution first addresses whether the Security Council has ever qualified human rights violations occurring at sea as ‘a threat to the peace’ – the most widely invoked reason for triggering its Chapter VII powers.⁵ It will be concluded that the Security Council has not. This is due to the obvious reason that maritime resolutions, which deal with either criminal phenomena (piracy and armed robbery at sea as well as human trafficking and migrant smuggling) or illegal acts at sea (embargo violations), centre on criminal conduct by private individuals – that is, conduct that violates individual interests rather than human rights (Part I).

Given that maritime resolutions deal with the suppression of criminality at sea, it is necessary to then ask, as a second step, whether the Security Council refers to human rights as strictures on the exercise of the enforcement measures it authorizes (such as arrest, detention, and transfer of suspects; or seizure and disposal of *corpora delicti* or paraphernalia to commit the offence). Hence, the focus is on the traditional dimension of human rights, which are negative obligations requiring states not to

unreported and unregulated fishing; and intentional and unlawful damage to the marine environment.

⁵ Nico Krisch, ‘Article 39’ in Bruno Simma and others (eds), *The United Nations Charter: A Commentary*, vol II (3rd edn, OUP 2012) 1278, MN 12 (‘Threat to the peace is the broadest, most indistinct, but also the most important concept in Art. 39. In practice, it is almost the only one used by the SC; the Council usually does not explicitly determine breaches of the peace or acts of aggression.’).

interfere with the exercise of rights.⁶ It will be demonstrated that early maritime resolutions are silent on human rights as a means of confining the enforcement powers authorized by the Security Council, and only later did it start mooring authorizations of enforcement measures with human rights. However, thus far, the Council has only referred to ‘applicable’ international human rights law and has therefore pursued a purely *referential approach*. This approach is problematic because of the intricacies surrounding whether, under what conditions, and to what extent human rights apply in at-sea enforcement scenarios (Part II).

As a last step, the analysis turns to victims of criminality at sea addressed by the maritime resolutions. At the example of assistance to victims, it analyses the stance taken by the Security Council, if any, vis-à-vis positive human rights obligations – that is, the layer that imposes a duty on the state to take action.⁷ The analysis finds that the Security Council takes a *mirroring approach*: the bolder and more established specific victims’ rights are under international (human rights) law, the firmer its references to states’ (legal) obligations to assist victims of maritime criminality (Part III).

This contribution will conclude that the Security Council has shown much reluctance in its maritime resolutions and thus consider why the Security Council’s engagement in terms of the human rights of suspects and victims of maritime criminality is not bolder; and why the Council simply references or mirrors the applicable law – instead of setting its own standard (Part IV).

I. Are human rights violations occurring at sea a threat to the peace?

The bulk of maritime resolutions have been adopted under Chapter VII of the UN Charter, which leads to an inquiry of whether the Security Council has referred to human rights violations occurring at sea to substantiate that a ‘threat to the peace’ exists. The idea that not only a

⁶ Dinah Shelton and Ariel Gould, ‘Positive and Negative Obligations’ in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 562-63.

⁷ *ibid*; Jean-François Akandji-Kombe, ‘Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights’ (CoE Human Rights Handbooks No. 7, 2007) 5 and 11.

(potential) violation of state interests, but also of individual rights, may trigger the enforcement powers of the Security Council was already being discussed during the drafting of the UN Charter. France proposed to anchor, in what is currently Chapter VII, the statement that ‘the clear violation of essential liberties and of human rights constitutes in itself a threat capable of compromising peace’.⁸ This avant-garde position did not gain a majority of votes at the time, but it found a partial break-through in the post-Cold War practice of the Security Council, which exhibited increased readiness to expand the concept of ‘threat to the peace’ beyond classical state security threats to threats endangering human security.⁹ Yet, absent (the risk of) an armed conflict, the Security Council has been reluctant to qualify human rights violations as a threat to peace.¹⁰

Even if the Security Council were ready to qualify (massive) human rights violations as a threat to peace, this would be irrelevant for the maritime resolutions under consideration here because the conduct threatening individual security does *not* emanate from state actors but rather from private actors – ‘pirates’, ‘traffickers’, ‘smugglers’ and other criminals – and they cannot commit human rights violations as such. As an obvious consequence, the Security Council does not have recourse to human rights in order to justify that there is a threat to the peace in the sense of Article 39 UN Charter.

However, it is worth noting here that the violation of *individual interests* plays (an increasingly) important role for triggering the application of Chapter VII in the context of maritime security: in Resolution 2240 (2015), the Security Council qualified a criminal phenomenon in itself as a threat to the peace when ‘[a]ffirming the necessity to put an end to the recent proliferation of, and endangerment of lives by, the smuggling of migrants and trafficking of persons in the Mediterranean Sea off the coast of Libya, and, for these specific purposes, acting under Chapter

⁸ ‘Summary Report of Sixteenth Meeting of Committee I/1’ (14 June 1945) Doc 976, I/1/40, in *Documents of the United Nations Conference on International Organization*, Vol VI (1945) 498.

⁹ Krisch (n 5) 1278-91, MN 12-34.

¹⁰ *ibid* 1284, MN 22 (‘If the protection of State security was long seen as the core of the UN’s collective security system, the protection of individuals has increasingly emerged as an additional goal.’), and 1287, MN 27 (‘UN practice so far does not reflect a sufficiently broad consensus to extend the notion of a threat to the peace to grave violations of HR as such, in the absence of the risk of armed conflict.’).

VII of the Charter of the United Nations'.¹¹ Arguably, the fact that the criminal conduct 'endangers the lives of thousands of people'¹² may have been decisive in the Council's decision to qualify it as a threat to the peace. With this resolution, the Council went beyond its approach in the context of Somali-based piracy where the state-centric view still dominated and piracy was seen as a factor contributing to the instability in Somalia – that is, the criminal phenomenon in itself (and its negative impact on seafarers) did *not* amount to a threat to the peace.¹³ Rather, the interests of (potential) victims of a criminal phenomenon only emerged as a threat to the peace with Resolution 2240 on human trafficking and migrant smuggling in the Mediterranean. Whether this resolution is an isolated occurrence or the start of an emergent pattern of considering private criminal conduct as a threat to the peace in the sense of Article 39 UN Charter remains to be seen.¹⁴

II. Human rights of suspects: from initial silence to a referential approach

In light of the traditional function of human rights as a constraint on state action – notably in the field of law enforcement – the following sections analyse whether and how the Security Council has made reference to human rights as a limitation of the enforcement action it authorizes in its maritime resolutions.

¹¹ UNSC Res 2240, preambular para 14.

¹² UNSC Res 2240, para 1.

¹³ See UNSC Res 1846 (2 December 2008) UN Doc S/RES/1846, preambular para 14: '*Determining* that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region'; and recently UNSC Res 2383, preambular para 34: '*Determining* that the incidents of piracy and armed robbery at sea off the coast of Somalia, as well as the activity of pirate groups in Somalia, are an important factor exacerbating the situation in Somalia, which continues to constitute a threat to international peace and security in the region'.

¹⁴ Kiara Neri, *L'emploi de la force en mer* (Bruylant 2013) 230, correctly notes that 'la nature du système collective semble, en théorie, faire obstacle à son déclenchement pour régir et réagir (à) un acte illicite perpétré par une personne privée. La question de qualification est alors délicate.'

A. Authorized enforcement measures and their potential to infringe human rights

Without going into explicit detail here, it suffices to recall that the Security Council has authorized states and regional organizations to take enforcement measures that go beyond what is generally available under the international law of the sea. It has done so for different maritime zones (namely territorial waters and the high seas) and thereby deviated in varying degrees from the ordinarily applicable jurisdictional rules (notably as regards the foregoing of consent of the generally competent state).¹⁵ Depending on the type of illegal conduct to counter, the Security Council has allowed for different types of enforcement measures. In the field of embargo enforcement, it has generally authorized the inspection of vessels to ascertain whether they carry prohibited cargo, the collection of evidence related to the carriage of prohibited cargo in the course of such inspections, and the seizure and disposal of items covered by the respective embargo.¹⁶ In resolutions aimed at the suppression of piracy and armed robbery at sea, the Council has not explicitly named the different types of enforcement measures but has rather referred to those available under the law of the sea (most notably under the UNCLOS) to counter piracy on the high seas – which are primarily arrest, detention, and transfer for prosecution of suspects.¹⁷ For countering human trafficking and migrant smuggling, the Council has authorized the inspection of vessels suspected of engaging in these offences, and the seizure and disposal

¹⁵ As regards piracy, e.g., the Security Council authorized with UNSC Res 1846 and successor resolutions to take enforcement measures in the territorial waters of Somalia (para 10); and stressed that the consent of the Somali Transitional Federal Government has been obtained by the TFG. In order to suppress human trafficking and migrant smuggling, the Council authorized states and regional organizations with UNSC Res 2240, para 9, to inspect suspicious vessels on the high, provided that the intercepting state or regional organization has made good faith efforts to obtain the consent of the vessel's flag state prior to using this authority. In UNSC Res 2182, it authorized inspections of ships in Somali territorial waters and on the high seas off the coast of Somalia suspected of breaching the arms and charcoal embargo (para 15), and requested Member States to make good faith efforts to first seek the consent of the vessel's flag State (para 16).

¹⁶ See, e.g., UNSC Res 2182, paras 15 and 17.

¹⁷ UNSC Res 1846, para 10; see Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 77-78.

of vessels where such suspicion was confirmed.¹⁸ In order to carry out these different types of enforcement measures, the Security Council generally allows using ‘all necessary means’¹⁹ or ‘all measures commensurate to the specific circumstances’ to carry out the respective enforcement measures²⁰ – thus adopting so-called robust mandates to enforce the law at sea.

It is stating the obvious that in the exercise of these enforcement powers, the human rights of persons they are directed at – that is, persons suspected of engaging in the respective illegal conduct – may be violated. In addition, the human rights of third persons may be at stake, be it persons who are in the vicinity of the enforcement theatre, such as fishermen,²¹ or persons who have a legal link with the object of the enforcement measures, such as owners of inspected vessels.²²

Looking at the different phases of maritime law enforcement operations, the following rights, *inter alia*, may be at stake: prior to interdiction, intelligence measures taken to collect information must be considered in light of the right to private life; during interdiction, when gaining access to the ship and its cargo (by potentially using force), the right to property, the right life and physical integrity become relevant. Ultimately, upon boarding – when searches, arrest and transfers of persons occur – yet another set of rights must be considered, notably the right to liberty, various procedural safeguards, and the prohibition of *refoulement*; and if the cargo and/or vessel is destroyed or disposed of in another way (e.g. sold), the right to property attaches.²³

¹⁸ UNSC Res 2240, paras 7 and 8.

¹⁹ UNSC Res 1846, para 10(b).

²⁰ In relation to inspections: UNSC Res 2292, para 4; UNSC Res 2146 (19 March 2014) UN Doc S/RES/2146, para 5. UNSC Res 2182, para 16, reads slightly different: ‘all necessary measures commensurate with the circumstances to carry out such inspections’.

²¹ E.g. UNSC Res 2312 (6 October 2016) UN Doc S/RES/2312, para 12, where the Security Council urges the enforcers ‘to have due regard for the livelihoods of those engaged in fishing or other legitimate activity’.

²² E.g. UNSC Res 2240, para 8 where the Security Council ‘underscores that further action with regard to such vessels inspected (...), including disposal, will be taken in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith’.

²³ Dimitrios Batsalas, ‘Maritime Interdiction and Human Rights’ in Efthymios D. Papastavridis and Kimberley N. Trapp (eds), *La criminalité en mer / Crimes at sea* (Martinus Nijhoff 2014) 437-50.

B. Initial silence on compliance of enforcement measures with human rights

Given the rather broad enforcement powers authorized by the Security Council in its maritime resolutions and their potential to encroach upon various human rights, it is necessary to ask whether and to what extent the Council has invoked human rights as a stricture – a *garde-fou* – on the exercise of these powers. If we were to look at maritime resolutions on a timeline, it comes into view that *today* the Security Council is more inclined to make a reference to international law in general or human rights law specifically than it has been in the past.

The Security Council's early authorizations of maritime interdiction operations to enforce embargos were not limited in any way. This holds true, for example, in the case of Resolution 665 (1990) on the enforcement of the oil embargo imposed on Iraq following its occupation of Kuwait. In this resolution, the Council authorized states deploying maritime forces to the area 'to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping'.²⁴ Other embargo enforcement authorizations issued by the Council in the 1990s contain similar language and do not restrict the broad enforcement powers in any way.²⁵ Yet, with Resolution 1132 (1997), the Security Council authorized ECOWAS to ensure strict implementation of the embargo against Sierra Leone 'including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping'.²⁶ However, the reference to 'international standards' is arguably not one to international human rights law. Rather, the Council seems to refer to general principles of international law limiting the use of force, such as proportionality. Such a reading is supported by the fact that the Security Council mentions in the same breath the principle of necessity, which is another cardinal principle limiting the use of force.²⁷

²⁴ UNSC Res 665 (25 August 1990) para 1.

²⁵ See UNSC Res 875 (16 October 1993) UN Doc S/RES/875, para 1, concerning the situation in Haiti; UNSC Res 787 (16 November 1992) UN Doc S/RES/787, para 12, concerning the situation in the Republic of Bosnia and Herzegovina.

²⁶ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132, para 8.

²⁷ *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, para 155.

Moreover, the Security Council's authorizations of measures to contain the proliferation of nuclear, chemical and biological weapons have not been accompanied by a reference to international human rights law. For example, in Resolution 1874 (2009), the authorization to seize and dispose of items violating the embargo, which notably encompasses materials and technologies that could contribute to North Korea's WMD programmes, was not accompanied by a reference to international law in general or international human rights law specifically.²⁸

Finally, the initial authorization contained in Resolution 1846 (2008) to use 'all necessary means to repress acts of piracy and armed robbery at sea' within Somali territorial waters did not refer to human rights as a stricture on enforcement action.²⁹ The reference to use all necessary means 'in a manner consistent with such action permitted on the high sea with respect to piracy under relevant international law' only imposes a limitation on the *types* of enforcement measures allowed (i.e. those available under UNCLOS),³⁰ not how they are to be exercised (i.e. in respect of human rights).³¹ While the Security Council did not tie up the authorizations granted by Resolution 1846 with a reference to human rights, it requested states contributing to the counter-piracy efforts by deploying forces to ensure that their activities 'do not have the practical effect of denying or impairing the rights of innocent passage to the ships of any third State'.³² In its subsequent resolutions, the Security Council simply renewed the authorizations granted under Resolution 1846 without,

²⁸ UNSC Res 1874 (12 June 2009) UN Doc S/RES/1874, para 14.

²⁹ UNSC Res 1846, para 10(b).

³⁰ Geiss and Petrig (n 17) 77-78.

³¹ The same holds true for the reference to 'relevant international law' in UNSC Res 1846, para 9, which calls upon states to only take such enforcement measures that are authorized under the resolution or by international law; hence, the reference to international law pertains to the *types* of enforcement measures allowed rather than how force is used when taking them; see similar call in UNSC Res 2383, para 12. The reference to UNCLOS in the preamble of UNSC Res 1846 does not alter the finding that the Security Council is silent as regards compliance of enforcement measures with international human rights law because the counter-piracy provisions of UNCLOS (Arts 101-107) do not feature a human rights dimension: see Irini Papanicopolulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) 27 *The International Journal of Marine and Coastal Law* 867; and Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill Nijhoff 2014) 225.

³² UNSC Res 1846, para 13.

however, mooring the enforcement powers to a request that they conform with human rights law. Meanwhile, the request not to disturb innocent passage continued to appear in all successor resolutions. Hence, the focus is on the free flow of movement, rather than the individual rights of persons subjected to enforcement measures.³³

C. Mooring authorized enforcement powers to human rights law

In some fields, not only was the Security Council initially silent in terms of human rights as a stricture on enforcement authorizations, but it continued to be in later resolutions renewing (and, at times, expanding) these authorizations. As previously shown, this holds true for counter-piracy resolutions as well as the various resolutions conferring powers to implement the sanctions against North Korea, including the most recent, adopted in September 2017.³⁴

However, in several newer resolutions, the Security Council moored the permission to take certain measures with strictures of a different type. In its resolutions on human trafficking and smuggling of migrants into, through and from the Libyan territory, the Security Council authorized states and regional organizations to inspect suspicious vessels on the high seas off the coast of Libya.³⁵ In addition, it empowered them to seize such vessels and underscored ‘that further action with regard to such vessels inspected (...), including disposal, will be taken in accordance with applicable international law with due considerations of the interests of any third parties who have acted in good faith’.³⁶ On the one hand, this restriction, which only pertains to inspected vessels, is broader than a reference to human rights law because it references international law in general; on the other hand, it is partly non-legal because it refers to ‘interests’ rather than ‘rights’ of persons. The Security Council further dispels any doubt that human rights law shall limit the granted enforcement powers when it authorizes ‘to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out activities under para-

³³ See, e.g., the latest counter-piracy resolution: UNSC Res 2383, paras 14 and 17.

³⁴ UNSC Res 2375 (11 September 2017) UN Doc S/RES/2375, para 22.

³⁵ UNSC Res 2240, para 7.

³⁶ UNSC Res 2240, para 8.

graphs 7 and 8 and in full compliance with international human rights law, as applicable'.³⁷

Similarly, recent embargo enforcement authorizations have entailed a reference to bodies of law limiting enforcement powers. In Resolution 2182 (2014), the Security Council authorized the inspection of specific vessels in order to implement the arms embargo and charcoal ban imposed on Somalia.³⁸ It allowed states conducting such inspections 'to use all necessary measures commensurate with international humanitarian law and international human rights law, as may be applicable' and urged Member State doing so 'without causing undue delay to or undue interference with the exercise of the right of innocent passage or freedom of navigation'.³⁹ Yet, the Council did not attach a reference to human rights to the authorizations to seize and dispose of items identified during such inspections, instead imposing another stricture by requesting that that seized charcoal, weapons or military equipment is disposed 'in an environmentally responsible manner'.⁴⁰

With Resolution 2292 (2016), the Security Council allowed for the inspection of vessels suspected of breaching the arms embargo on the high seas without prior consent.⁴¹ It authorized states 'to use all measures commensurate to the specific circumstances to carry out such inspections, in full compliance with international humanitarian law and international human rights law, as applicable' and urged them 'to do so without causing undue delay to or undue interference with the exercise of freedom of navigation'.⁴² Meanwhile, the Council did not limit the

³⁷ UNSC Res 2240, para 10. The Security Council in UNSC Res 2312, para 7, not only renews the authorizations for another year but also 'otherwise reiterates the content' of these authorization paragraphs, i.e. endorses mentioned strictures; it follows the same approach in UNSC Res 2380.

³⁸ UNSC Res 2182, para 15.

³⁹ UNSC Res 2182, para 16. In UNSC Res 2317 (10 November 2016) UN Doc S/RES/2317, para 25, the Security Council decided 'to renew the provisions set out in paragraph 15 of resolution 2182 (2014) until 15 November 2017', i.e. the authorizations, but did not so for UNSC Res 2182, para 16, which contains the reference to international human rights law. However, this is arguably not necessary because paragraph 16 was not limited in time as was paragraph 15.

⁴⁰ UNSC Res 2182, para 19.

⁴¹ Rather, as per UNSC Res 2292, para 3, it suffices to 'make good-faith efforts to first obtain the consent of the vessel's flag State prior to any inspections'; if these efforts remain unsuccessful, the interdicting vessel can proceed.

⁴² UNSC Res 2292, para 4.

authorization to seize and dispose of prohibited items and to collect evidence in the course of inspections, but it did urge states engaged in such activities ‘to avoid causing harm to the marine environment or to the safety of navigation’.⁴³

What emerges from these examples is that, on the one hand, the Security Council requests respect for core concerns of the law of the sea – freedom of navigation, innocent passage and safety of navigation – and the protection of the marine environment when enforcing the law at sea, without, however, clearly specifying the legal bases protecting these interests. On the other hand, the Council refers to various bodies of law limiting enforcement action: international law, human rights law, and including at times a reference to international humanitarian law. Not only does the Security Council refer to different sources, but it does so in a rather arbitrary manner.⁴⁴ Despite this variability in terms of when and what legal strictures are referenced, one consistency remains: in all the maritime resolutions, the Security Council refers to the ‘applicable’ law. Yet the Council does not identify what the applicable law is, let alone set a standard, thus pursuing a (patchy) referential approach.

D. The reference to ‘applicable’ international human rights law is loaded with uncertainty

This referential approach is problematic because of the intricacies surrounding whether, under what conditions, and to what extent human rights apply in at-sea enforcement scenarios. In short, it is far from clear what the ‘applicable’ international human rights law is in the context of enforcement action at sea, and thus the following discusses some of the factors contributing to this uncertainty.

1. Simultaneous reference to international humanitarian law

The first uncertainty stems from the fact that, in various resolutions, the Security Council not only requests full compliance with applicable international human rights law but also with applicable international hu-

⁴³ UNSC Res 2292, para 5.

⁴⁴ See the examples of UNSC Res 2292 and UNSC Res 2182 above where the power to inspect, but not the power to seize and dispose and to collect evidence were accompanied by such limitation.

manitarian law (IHL). The relationship between these two bodies of law, which is vividly discussed in doctrine⁴⁵ and the subject of a growing body of case law,⁴⁶ is complex and multifarious. Yet, one thing can be said with certainty: in specific situations, IHL norms will take precedence as the *lex specialis* over international human rights law and thus set aside more protective norms of this body of law – such as those regarding the use of force, which is regulated differently under human rights law and IHL.

In the respective maritime resolutions, the Security Council does not specifically state that IHL applies to the situation under consideration, instead insinuating the potential applicability of IHL. The resolutions containing such reference to IHL pertain to states with ongoing armed conflicts: Somalia and Libya. However, this in itself does not suffice to subject enforcement measures to IHL; rather, it would be necessary that the enforcers are a party to the armed conflict in question and that the measures taken feature a link with the armed conflict. This is neither the case for enforcement measures aimed at suppressing Somali piracy,⁴⁷ nor for the enforcement of the embargo taken vis-à-vis Somalia and Libya respectively.⁴⁸ It can only be speculated why the Security Council nevertheless chose to refer to IHL in these resolutions. Arguably, the intention was simply to emphasise that certain legal strictures attach when acting upon its authorizations. Yet, references to IHL are unfortunate in the contexts at hand because they unnecessarily spread doubts about the role to be accorded to international human rights law when taking enforcement action at sea.

2. Extraterritorial application of human rights in the maritime context

Even if the Security Council only refers to *applicable* international

⁴⁵ See, e.g., Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 269-74.

⁴⁶ See, e.g., *Banković v Belgium and Others* App no 52207/99 (ECtHR, 12 December 2001) and *Hassan v United Kingdom* App no 29750/09 (ECtHR, 16 September 2014).

⁴⁷ UNSC Res 1851 (16 December 2008) UN Doc S/RES/1851, para 6, contained such simultaneous reference to IHL and IHRL; see Geiss and Petrig (n 17) 132-36, on why IHL is not applicable when countering Somali-based piracy (on land and at sea).

⁴⁸ On the unnecessary reference to IHL in UNSC Res 2182 pertaining to the enforcement of the embargo against Somalia, see Frostad (n 1) 226.

human rights law (without mentioning IHL), a number of questions remain, one of which pertains to the extraterritorial application of human rights. Enforcement measures are taken extraterritorially, both in the legal and metaphorical sense. The bulk of maritime enforcement measures are taken in an area either under no jurisdiction (the high seas) or under the jurisdiction of a third state (e.g. in a third state's territorial waters), and thus, from an enforcer's perspective, extraterritorially in the legal sense. Also metaphorically speaking, the enforcement takes place outside the territory – that is, at sea – which adds to the legal complexity because the requirements for the extraterritorial application of human rights in the maritime context specifically is much less developed as compared to operations of states on foreign soil.

The question whether human rights law applies extraterritorially can be answered in a fairly straightforward manner if enforcement measures are carried out on board a warship or state ship, such as in the case of detention. In this situation, human rights (being a component of the state's legal order) apply by virtue of the flag State principle. When intercepting a ship (which may necessitate the use of force) or when taking enforcement measures on board a foreign ship (e.g. inspecting it), however, the jurisdictional link necessary to trigger the application of human rights must be found elsewhere. The obvious starting point is the criteria developed for at-land scenarios, which are effective control over persons and territory.⁴⁹ Yet, their transposition to the at-sea context is far from clear and the corpus of judicial pronouncement on the matter remains limited.⁵⁰ We are thus left with two open questions: Does the concept of 'control over territory' imply control over a vessel, the operational radius of a warship, or a densely-patrolled area in law enforcement operations at sea? Is 'control over persons' more easily established at sea where escape is virtually impossible?

The extraterritorial application of human rights in the maritime context has, thus far, mainly been established on an *ex post* case-by-case basis

⁴⁹ For the ECHR specifically, see William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 100-04.

⁵⁰ In recent years, the amount of scholarship on the issue has grown: see, e.g., Batsalas (n 23) 432-38; Kiara Neri, 'The Applicability of the European Convention on Human Rights to State Enforcement and Control at Sea' in Gemma Andreone (ed), *Jurisdiction and Control at Sea: Some Environmental and Security Issues* (Giannini Editore 2014) 155-61; Petrig (n 31) 139-46.

– most notably in the context of liability – rather than in a general and abstract way. A more pronounced statement of the Security Council that international human rights law actually *applies* (extraterritorially) rather than a mere reference to the *applicable* law, would certainly help states engaged in law enforcement operations abroad to determine the standards by which they have to abide. In addition, such a statement would allow overcoming the patchy protection that results from the current application of the various effective control-criteria. In short, it would help realize the underlying idea of human rights law: that state power – against whomever, in whatever form and circumstances it is exercised – is not unlimited.

3. Permissibility and justification for modified maritime standards

Once it is established that a specific instrument of international human rights law applies extraterritorially, another question ensues: Can the substance of specific rights be adapted to the specificities of the maritime environment? That is, can a standard be lowered because the specific right is being applied at sea? And what justifies such a modification?

The discussion on the right of piracy suspects to be brought promptly before a judge is exemplary in this respect, from which various questions arise: Can the deadlines be exceptionally longer than those developed for law enforcement at land? Must the person be brought before a judge in person or does it exceptionally suffice to establish contact by means of video-link or even to rely on a written procedure? And is the obligation incumbent on the arresting state or the state to which the person is transferred for proceedings?⁵¹ When answering these types of questions, the main difficulty lies in drawing the following line: Is full protection not granted due to a lack of willingness and/or absent arrangements (ranging from putting in place the respective legal bases to equipping ships accordingly)? Or is a lower standard unavoidable because of the specificities of the operational environment? The example of France, to which we will turn at the end of this contribution,⁵² illustrates that a human-rights based approach to arrest and detention of piracy suspects is feasible.

⁵¹ In detail, see Petrig (n 31) 265-87.

⁵² See below, text relating to n 99-101.

Already in 2011, the Security Council⁵³ invited states ‘to examine their domestic legal frameworks for detention at sea of suspected pirates to ensure that their laws provide reasonable procedures, consistent with applicable international human rights law’.

Arguably, the Security Council cannot go beyond this type of statement and cannot clarify detailed questions on the substance of specific rights at the level of its maritime resolutions. Yet, a firmer statement that international human rights law indeed applies to any type of enforcement measure taken at sea would certainly make it more difficult for states to easily depart from well-established standards by a simple reference to ‘operational constraints’ or similarly vague reasoning.

E. The referential approach: any added value or pure symbolism?

It has been shown that the Security Council’s reference to ‘applicable’ international human rights law as a stricture on the enforcement powers authorized in the respective maritime resolutions is loaded with uncertainty. This raises the question whether such reference has any added value – or could it be left away altogether?

In this context, it is in order to recall that the maritime resolutions under consideration were adopted under Chapter VII of the UN Charter. They are thus decisions within the meaning of Article 25 UN Charter, which has at least two implications: first, such decisions are binding upon Member States⁵⁴ and they are obliged to carry them out;⁵⁵ second, such resolutions are ‘obligations of the Members of the United Nations under the present Charter’ in the sense of Article 103 UN Charter and thus prevail – in case of conflict – over ‘obligations under any other international agreements’, notably international human rights law.⁵⁶ Various commentators argue that such conflict not only exists if a state is bound by two contradictory obligations, but also covers incompatibility between obligations and permissions. Hence, it covers situations where the Security Council *authorizes* states under Chapter VII of the Charter

⁵³ UNSC Res 1976 (11 April 2011) UN Doc S/RES/1976, para 14.

⁵⁴ Anne Peters, ‘Article 25’ in Simma and others, vol I (n 5) 792, para 8 and 793, para 11.

⁵⁵ *ibid* 795, para 18.

⁵⁶ *ibid* 850-51, paras 200-01.

to take enforcement measures rather than *obliging* them to do so.⁵⁷ As a consequence, one *could* argue that, by virtue of Article 103 UN Charter, the human rights obligations of a state step back if they are not compatible with the taking of ‘all necessary means’ to suppress a specific criminal phenomenon by that state based upon a maritime resolution.

By its reference to applicable international human rights law, the Security Council put a stop to that undesirable result for at least two reasons. First, the Security Council would hardly refer to the *applicable* international human rights law if it deemed it to be in principle *inapplicable* as a result of the conflict rule enshrined in Article 103 UN Charter. Second, and more importantly, by requesting respect of the applicable international human rights law in the resolution itself, a state’s obligation to respect its treaty obligations becomes part of the resolution and is thus an ‘obligation[] of the Members of the United Nations under the present Charter’ – and is no longer simply an ‘obligation[] under any other international agreement’.⁵⁸

In sum, the Council’s references to applicable international human rights law do not add a layer of protection and do not clarify the many open questions relating to the applicability of human rights in maritime enforcement operations. However, by equipping its authorizations with a reference to applicable international human rights law, the Council prevents a potential conflict between such authorization and states’ human rights obligations, which otherwise – in application of Article 103 UN Charter – would potentially be solved in favour of unlimited enforcement action at sea.

III. Human rights of victims: a mirroring approach

In the previous part, the focus was on traditional function of human rights as a stricture on state (enforcement) action. We now turn to a more recently developed facet of human rights law: positive obligations that place a duty to take action upon states.⁵⁹ At the example of assistance

⁵⁷ Ibid 850-851, para 201; Andreas Paulus and Johann Ruben Leiss, ‘Article 103’ in Simma and others, vol II (n 5) 2122, para 31.

⁵⁸ Art 103 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

⁵⁹ See generally Shelton and Gould (n 6) and Akandji-Kombe (n 7).

to victims, the following will examine the stance taken by the Security Council, if any, vis-à-vis positive obligations.

It will be demonstrated that the Security Council pursues a *mirroring approach*: its pronouncements on assistance to victims of maritime criminality by states largely reflect international (human rights) law on the matter as it stands. For the time being, international law does not protect victims of transnational crimes equally. Absent an instrument governing assistance to victims of transnational crime specifically, it is necessary to revert back to the various legal instruments governing the suppression of various crimes committed (also) at sea, which vary greatly in terms of obligations placed on states to provide assistance to victims. Of the crimes under consideration here, assistance to victims of human trafficking is, comparatively speaking, heavily regulated, followed closely by assistance to smuggled migrants. The legal instruments relevant to the suppression of piracy, however, lack a human rights dimension and are thus silent on the matter.

A. UN Protocols on Human Trafficking and Migrant Smuggling: following a rights-based approach

We start with an offence addressed by the Security Council in its maritime resolutions and for which the legal framework relating to victim assistance is, comparatively speaking,⁶⁰ well-developed: trafficking in human beings. The UN Protocol on Human Trafficking⁶¹ – the primary and most specific instrument aimed at suppressing the offence of human

⁶⁰ In this article, the various legal instruments relevant to suppressing crimes addressed in maritime resolutions are compared in terms of victims' assistance. Even if an instrument, such as the UN Protocol on Trafficking, ranks high, it does not mean that victim assistance is in *absolute* terms bold. Article 6 of the UN Protocol on Trafficking, for example, which sets out the various obligations of states vis-à-vis victims is not throughout formulated in a very compelling fashion; paragraph 1, for example, starts with the words 'In appropriate cases and to the extent possible under its domestic law (...)', and paragraph 5 uses the words 'Each State Party shall endeavour to provide (...)'.

⁶¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (UN Protocol on Human Trafficking).

trafficking⁶² – mentions victims' assistance prominently in its purpose article,⁶³ while Article 6 specifies the type of assistance owed to victims by state parties.⁶⁴

The UN Protocol is the first instrument dealing with human trafficking specifically to adopt a rights-based approach. A clear victim dimension was absent in predecessor treaties, which almost exclusively focused on criminalization of trafficking. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 1949 – concluded in the wake of the UN General Assembly's adoption of the Universal Declaration of Human Rights in 1948 – invoked human dignity in its preamble but otherwise followed the tradition of earlier treaties concentrating on the repression of the crime. It was only due to the concurrence of several key developments that led to the introduction of a rights-based victim component in instruments dealing with human trafficking: the adoption of major human rights treaties (notably the two UN Covenants and the ECHR), the progressive conceptualization and specification of positive human rights obligations by treaty bodies, and the recognition that human rights may apply extraterritorially.⁶⁵

As a result, instruments on human trafficking, which were adopted rather recently, feature a victim component and contain specific provisions devoted to victim assistance. This holds true, as mentioned, for the UN Protocol on Trafficking of 15 November 2000, but also for the UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000,⁶⁶ and the Council of Europe Convention on Action against Traf-

⁶² UNSC Res 2380, preambular para 5.

⁶³ Art 2(b) UN Protocol on Human Trafficking.

⁶⁴ Art 6 UN Protocol on Human Trafficking.

⁶⁵ On the historical evolution of the legal framework on trafficking and how it became increasingly human rights-based, see John Cerone, 'Human Trafficking', *Max Planck Encyclopedia of Public International Law* (March 2007) <<http://opil.ouplaw.com/home/epil>> accessed 1 November 2017, paras 13-30, and Roza Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v Cyprus and Russia*' (2011) 29 *Boston University International Law Journal* 79, 104-126. See also OHCHR, 'Human Rights and Human Trafficking' (Factsheet no. 36, 2014) <www.ohchr.org/Documents/Publications/FS36_en.pdf> accessed 1 November 2017, 7-8 (on the rights-based approach to trafficking pursued today) and 9-53 (specifying the various (positive) obligations of states vis-à-vis victims of trafficking).

⁶⁶ Arts 8 and 9 Optional Protocol to the Convention on the Rights of the Child

ficking in Human Beings of 16 May 2005.⁶⁷ The OHCHR has gone so far as to conclude that ‘an international consensus has developed around the need for a *rights-based* approach to trafficking’.⁶⁸

In its resolutions on Libya, the Security Council not only addresses the offence of human trafficking, but also the (arguably even more relevant) offence of migrant smuggling.⁶⁹ The UN Protocol on Migrant Smuggling of 15 November 2000, the primary legal instrument to address the phenomenon, is also rooted in a rights-based approach. Similar to the instruments dealing with trafficking in human beings, the UN Protocol on Migrant Smuggling mentions assistance to victims in its purpose article,⁷⁰ and sets out in Article 16 specific obligations of states in relation to victims’ assistance.⁷¹ The UN Model Law against the Smuggling of Migrants provides further guidance for states on the content and meaning of the various obligations set out in Article 16 of the UN Protocol on Migrant Smuggling.⁷²

One may argue that the obligations on states vis-à-vis victims of human trafficking and migrant smuggling are not formulated in a particularly compelling fashion and leave considerable leeway for states – and there is some truth in it.⁷³ Yet, compared with the legal instruments rele-

on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) 2171 UNTS 227.

⁶⁷ Art 1 (stating the purposes of the Convention, which are notably ‘to protect the human rights of the victims of trafficking’ and to ‘design a comprehensive framework for the protection and assistance of victims and witnesses’), and Arts 12 and 18 (specifying obligations in relation to assistance to victims) of the Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197.

⁶⁸ OHCHR (n 65) 7-8.

⁶⁹ In UNSC Res 2240, preambular para 5, the Security Council stresses that these are distinct crimes.

⁷⁰ Art 2 Protocol against the Smuggling of Migrants by Land, Sea and Air, Implementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (UN Protocol on Migrant Smuggling).

⁷¹ Art 16 Protocol on Migrant Smuggling; see also Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 556-59.

⁷² UNODC, ‘Model Law against the Smuggling of Migrants’ (2010) Chapter III: Protection and assistance measures <www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf> accessed 1 November 2017.

⁷³ See above, footnote 60.

vant for the suppression of piracy (most notably the UNCLOS, the SUA Convention, and the Hostage Convention), which are silent on victims of the respective crimes, the UN Protocols nevertheless exhibits such a dimension.

B. Legal instruments on the suppression of piracy: lacking a human rights dimension

For the suppression of Somali-based piracy, a wide range of legal instruments are relevant. The primary legal framework is the UNCLOS,⁷⁴ yet its provisions on piracy do not contain human rights considerations despite being adopted in the 1982 – that is, at a time when the idea of law enforcement powers being restricted by human rights was already quite well-established.⁷⁵ Considering that not even negative obligations of states under human rights law found their way into the counter-piracy provisions of the UNCLOS, it should not come as a surprise that it is also silent on positive obligations of states vis-à-vis victims of piracy.

There are two further instruments of relevance given the *modus operandi* of Somali-based pirates – the SUA Convention of 1988⁷⁶ and the Hostage Convention of 1979 – both of which are silent on the victims of the offences they define.⁷⁷ The only insinuation to individual rights is found in Article 7(3) SUA Convention and Article 6 Hostage Convention granting *suspects* a right to consular assistances similar to Article 36(1) VCCR.⁷⁸ Article 16(5) UN Protocol on Migrant Smuggling requests states to comply with its obligations under the VCCR in cases of detention of a *victim* of migrant smuggling. Yet, such a provision would

⁷⁴ Arts 100-107 and Art 110 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS); this is also the view of the Security Council, see UNSC Res 1846, preambular para 4.

⁷⁵ On why this may be the case, see Petrig (n 31) 225.

⁷⁶ UNSC Res 1846, para 15.

⁷⁷ Art 3 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (SUA Convention); and Art 1 International Convention against the Taking of Hostages (adopted 17 November 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostage Convention).

⁷⁸ On whether these provisions apply to persons arrested and detained at sea: Petrig (n 31) 310-12.

not make sense in the context of piracy, where victims are generally not detained by the intercepting state.

In sum, the SUA and Hostage Conventions lack a victim dimension. This can arguably be explained by the fact that both the Hostage and SUA Conventions are instruments dealing with terrorist offences. And – somewhat surprisingly – until today, there is no international instrument⁷⁹ defining the status of victims of terrorism.⁸⁰ There is no explicit reference to the right of victims of terrorism in any of the 19 counter-terrorism conventions and protocols negotiated by the UN;⁸¹ not even the Draft Comprehensive Convention against International Terrorism fills this obvious gap in international law.⁸² While some progress is being made in this regard, it largely takes the form of soft law guidelines.⁸³

Overall, victims of Somali-based piracy are not addressed in the international instruments that the Security Council deems of particular

⁷⁹ An exception constitutes a regional instrument: Council of Europe Convention on the Prevention of Terrorism (adopted 16 May 2005, entered into force 1 June 2007) CETS 196. It contains a provision on the protection, compensation and support for victims (Art 13); however, a state owes assistance only to ‘victims of terrorism that has been committed *within its own territory*’ (emphasis added). Arguably, this includes victims of maritime terrorism. See also Directive (EU) 2017/541 of the European Parliament and the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, paras 27–30, which states that Member States should, *inter alia*, adopt measures of protection, support and assistance responding to the needs of terrorism victims and their family members; assist with victims’ compensation claims; ensure a comprehensive response to the needs of terrorism victims; and ‘ensure that all victims of terrorism have access to information about victims’ rights, available support services and compensation schemes in the Member State where the terrorist offence was committed’.

⁸⁰ Theo Van Boven, ‘Victims’ Rights’, *Max Planck Encyclopedia of Public International Law* (August 2007) <<http://opil.ouplaw.com/home/epil>> accessed 1 November 2017, para 18. See, e.g., Carlos Fernández de Casadevante Romani, *International Law of Victims* (Springer 2012) 82–83 (discussing ‘a lack of a concept of “victim of terrorism”’).

⁸¹ UNODC, ‘Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework’ (2005) 5 <www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf> accessed 1 November 2017.

⁸² Draft Comprehensive Convention against International Terrorism (2005) UN Doc A/59/894, Appendix II.

⁸³ See the UNODC’s ‘Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework’ (n 81).

relevance: the UNCLOS, the SUA Convention, and the Hostage Convention. As a consequence, obligations of states to assist victims of piracy – notably hostages – can only be based on general international human rights treaties. So far, however, international courts and bodies have had limited opportunity to set out what measures states must take vis-à-vis victims of maritime criminality specifically. The Djibouti Code of Conduct, which mentions assistance to victims of illegal activities at sea among its purposes, does not clarify what kind of assistance is owed to victims of piracy because it refers to assistance ‘[c]onsistent with (...) applicable rules of international law’.⁸⁴ By referring to applicable international law – which is silent as regards victims of piracy specifically – the Djibouti Code of Conduct does not provide much guidance.⁸⁵

It has briefly been demonstrated that international law protects victims of crimes to varying degrees, depending on the offence committed against them. Looking at the offences relevant in the Security Council’s maritime resolutions, it is palpable that the legal framework on assistance to victims of human trafficking is best equipped, followed by that on migrant smuggling. Both instruments are clearly based on a rights-based approach and list assistance to victims among their purposes. Meanwhile, the rights of victims of Somali-based piracy – that is, victims of the crimes defined in the SUA and/or Hostage Conventions or fulfilling the definition of piracy set out in Article 101 UNCLOS – do not find explicit mention in these instruments.

C. Maritime resolutions reflect the lex lata

The maritime resolutions of the Security Council reflect the differences in international law regarding the state’s obligation to assist victims of crime. As regards victims of violence against ships and crew, which qualify as piracy or maritime terrorism offences, the Security Council pursues a very cautious approach. In the preamble of its 2016 resolution on Somali-based piracy, the Council stressed ‘the need for States to consider possible methods to assist the seafarers who are victims of pirates’; however, such language is noticeably absent from the 2017 suc-

⁸⁴ Art 2(1)(d) The Jeddah Amendment to the Djibouti Code of Conduct 2017 (emphasis added) (DCoC 2017).

⁸⁵ See Art 5(3), read together with Art 2(1)(d), DCoC 2017.

cessor resolution, which nevertheless commends various international actors, notably the International Seafarers Welfare and Assistance Network (ISWAN) and the CGPCS Piracy Survivors Family Fund (PSFF), for their work in victim assistance.⁸⁶ And the operative parts of both the 2016 and 2017 resolutions call upon all states ‘to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such as victims, witnesses, and persons detained as a result of operations conducted under this resolution’.⁸⁷ Vagueness in terms of the type of assistance to be provided (‘disposition and logistics assistance’) and restraint regarding the level of commitment (a call ‘to consider possible methods to assist’) resonate not only with this latest resolution on Somali-based piracy but also with all predecessor resolutions. A reference to a potential legal obligation of states to assist victims of Somali-based piracy is not to be found in these resolutions. In sum, the Security Council does not frame assistance to victims of Somali-based piracy as *legal* obligations of states. Hence, the Security Council simply mirrors international law, which exhibits a gap in terms of assistance to victims of (maritime) terrorism and piracy specifically.⁸⁸

By contrast, the Security Council takes a bolder stance as regards victims of human trafficking and migrant smuggling by referring to the *legal* obligations of states to assist victims of these crimes taking place (at least partly) at sea. This accrues from the following preambular paragraph shared by all three resolutions relating to migrant smuggling and human trafficking through and from Libya: ‘*Bearing in mind* the obligations of States under applicable international law (...) to identify and provide effective assistance to victims of trafficking and migrants’.⁸⁹ In the operative part of the resolutions, the Security Council urges Member States to render ‘assistance to migrants and victims of human trafficking recovered

⁸⁶ UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316, preambular para 27; UNSC Res 2383, preambular para 27.

⁸⁷ UNSC Res 2316, para 18; same language in UNSC Res 2383, para 18.

⁸⁸ General international human rights treaties may entail positive obligations of states to assist victims of piracy; however, it is far from clear what they exactly encompass. See also Sofia Galani, ‘Somali Piracy and the Human Rights of Seafarers’ (2016) 34 Netherlands Quarterly of Human Rights 71, 77-82 (discussing the human rights obligations of states and the human rights gaps in counter-piracy operations).

⁸⁹ UNSC Res 2380, preambular para 24; identical wording in UNSC Res 2312, preambular para 24, and UNSC Res 2240, preambular para 23.

at sea, in accordance with international law'.⁹⁰ Similar to the negative dimension of human rights,⁹¹ the Security Council simply refers to the applicable international law (referential approach) and does not bring to bear its own standard in terms of positive obligations of states vis-à-vis victims of human trafficking and migrant smuggling. Yet, compared with its resolutions on Somali-based piracy, the Security Council recognizes that specific *legal* obligations of states towards victims of crimes committed by traffickers and smugglers of human beings exist. It thus mirrors the international legal landscape on victim assistance and the fact that state obligations towards victims of these two offences are regulated in a (comparatively) detailed manner in binding legal instruments.

Overall, in its maritime resolutions, the Security Council mirrors international law on assistance to victims of crimes as it stands – rather than setting its own standard by requesting (or at least urging) states to assist victims in a certain way. By simply mirroring existing international law on victim assistance, the Security Council perpetuates the disparities and inequalities this body of law carries and fails to level the (hardly justifiable) differences between victims of different transnational crimes. Hence, the Security Council does not actively contribute to the progressive recognition of victims' rights on the international plane, but merely reflects this development, which goes hand in hand with the trend in international law to perceive individuals not as mere objects but as subjects with certain rights and duties.⁹²

⁹⁰ UNSC Res 2380, para 3; similar wording in UNSC Res 2312, para 3; and UNSC Res 2240, para 3. The French text makes it clear that the Council urges States to render assistance (and not only to cooperate in providing assistance): '*Demande instamment aux États Membres et aux organismes régionaux de coopérer avec le Gouvernement d'entente nationale et entre eux dans un esprit de solidarité internationale et de responsabilité partagée, notamment en échangeant des informations sur les actes de trafic de migrants et de traite d'êtres humains dans les eaux territoriales libyennes et en haute mer au large des côtes libyennes, et de venir en aide aux migrants et aux victimes de la traite d'êtres humains secourus en mer, conformément au droit international*'.

⁹¹ See above, Part II.

⁹² See Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2011) 343: 'The shift from a system which conceived of individuals as mere objects to a system in which individuals have a certain status and capacity has been traced in Part (...)'.

IV. Conclusion: why no bolder role?

The contribution at hand was devoted to examining the role the Security Council accords to human rights in its maritime resolutions. The result is rather sobering: the Security Council mentions human rights in its resolutions dealing with illegal acts committed at sea, be it breaches of embargos, human trafficking, migrant smuggling or piracy. However, as regards the negative dimension of human rights law – that is, a state's duty to respect human rights when taking (enforcement) action – the Security Council merely references the *applicable* international human rights law. It has been demonstrated that this referential approach is problematic because the issue of applicability of human rights in the maritime context is fraught with uncertainty. As regards states' positive obligations, the example of assistance to victims of maritime criminality has shown that the Security Council resolutions simply reflect international (human rights) law as it stands. By and large, the Security Council refrains from setting its own human rights standard that would apply to states engaging in law enforcement operations authorized by the maritime resolutions.

This finding prompts the question of why the Security Council shows such restraint and does not act in a bolder way to strengthen the human rights regime at sea? One may argue that – within the sharing of competences between the different organs of the United Nations – the realization of human rights is the responsibility of the General Assembly rather than the Security Council.⁹³ Yet, the Security Council, when carrying out its primary function, which is the maintenance of international peace and security,⁹⁴ must act in accordance with the purposes and principles enshrined in Articles 1 and 2 of the UN Charter.⁹⁵ Article 1(3) UN Charter lists the achievement of international cooperation 'in promoting and encouraging respect for human rights and for fundamental freedom' among the purposes; while the protection of human rights today amounts to a principle, which the Security Council must respect.⁹⁶ Hence, the Security Council is not only allowed but rather obliged to give human rights due

⁹³ See, e.g., Art 13(1)(b) UN Charter.

⁹⁴ Art 24(1) UN Charter.

⁹⁵ Art 24(2) UN Charter.

⁹⁶ Peters (n 54) 789, MN 57 [citing Evelyne Lagrange, 'Le Conseil de Sécurité peut-il violer le droit international?' (2004) 2 RBDI 568-91, 570].

weight when enforcing peace and security – for example, through resolutions granting enforcement powers to suppress illicit acts at seas.

A better explanation of why the Security Council keeps such a low profile in terms of human rights in its maritime resolutions may be that it is nothing more than the long arm of (certain) states. Admittedly, it can be argued that the Security Council is an independent organ, which acts on behalf of a legal person (the UN) and not on behalf of the members of which the organ is composed.⁹⁷ Yet, it seems too legalist an approach to ignore the members composing the organ.⁹⁸ The attitude of states represented permanently or temporarily in the Security Council will (to a greater or lesser extent) always shimmer through in the Council's actions. Hence, the fact that within most states, the concept of human rights in the maritime context is still in its infancy – a concept not yet firmly anchored and just slowly gaining acceptance and its contours in the last decade – will show through in the Security Council.

The example of France, one of the five permanent members of the Security Council, is illustrative in this respect. In its preliminary observations in the *Medvedyev* case before the European Court of Human Rights, France stressed that arrest and detention 'had taken place on the high sea, so that it was necessary to take into account the specificities of the maritime environment and of navigation at sea'. It further argued that 'for want of any provisions in the Convention (...) concerning maritime matters' the ECHR is inapplicable *ratione materiae*.⁹⁹ In the alternative, it suggested 'that freedom to come and go on board a ship has more restrictive limits, which were the confines of the ship itself' and, therefore, holding persons on board a ship does not amount to deprivation of liberty.¹⁰⁰ Not even one year after the final decision of this case by the Grand Chamber, France enacted a law pertaining to counter-piracy operations and the exercise of enforcement powers at sea – a rather exemplary law that grants various procedural rights to suspects deprived of their liberty at sea and in which France clearly takes a human rights-based approach to law enforcement at sea.¹⁰¹

⁹⁷ *ibid* 776, MN 45.

⁹⁸ *ibid* 776, MN 46.

⁹⁹ *Medvedyev and Others v France* App no 3394/03 (Grand Chamber, ECtHR, 29 March 2010) para 49.

¹⁰⁰ *ibid* para 50.

¹⁰¹ Loi français n° 2011-13 du 5 janvier 2011 relative à la lutte contre la pirate-

The example of France demonstrates that the concept of human rights at sea needs to be further explored, specified and consolidated – this holds true even for states known for their human rights abundance in domestic and land-based law enforcement operations. Once the idea that human rights apply anywhere the state takes action – be it at land or at sea – gains ground at the state level, the likelihood grows that the Security Council will accord a bolder role to human rights in its maritime resolutions.

rie et à l'exercice des pouvoirs de police en l'Etat de mer (2011) (Loi française n° 2011-13); on the content of the whole act, see Luc Briand, 'Lutte contre la piraterie maritime: la France renforce son arsenal législatif. À propos de la loi n° 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et à l'exercice des pouvoirs de police en l'État en mer' [2011] *Gazette du Palais* 8, 8. In English: Petrig (n 31) 120-21.