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Article

The UN Security Council and EU CSDP operations: exploring EU military operations from an outside perspective

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Abstract

This article examines European Union (EU) military operations from the perspective of the United Nations (UN) Security Council and UN collective security. The EU has supported UN peacekeeping missions through its own military operations within the Common Security and Defence Policy (CSDP), based on the authorisation of these operations by the UN Security Council. However, the EU's military operation on the Mediterranean Sea, Operation Sophia, was established in 2015 without such prior UN Security Council authorisation. Although the UN Security Council authorised the operation subsequently, it was received in a less positive light than previous operations and was criticised not only for the way in which it was established, but also for its performance. The article argues that this break with prior practice does not indicate a new direction being taken by the

EU as it has retreated from this approach and established a new military operation in the Mediterranean (Operation Irini), again firmly in line with a mandate issued by the UN Security Council in 2020. The assessment of EU military operations can be complex as there might be other EU agencies involved in the process such as Frontex, and their role in future operations, in particular in the field of migration, should be monitored. Yet this internal complexity does not alter their evaluation under international law. As soon as EU military operations are conducted on the territory of a third State, the EU needs to secure either a UN Security Council authorisation or State consent. Looking at this process from the perspective of the UN Security Council sheds light on the complexity of EU military operations and their position within UN collective security.

Keywords UN Security Council; CSDP operations; Operation Sophia; Operation Irini; Frontex

1. Introduction

'The European Union and the United Nations are natural partners.'¹ This statement can be found on the website of the EU's External Action Service describing the cooperation between the EU and the UN, among others in the area of international peace and security. In this area, the UN Security Council is the main actor on the UN side. This article addresses the relationship between the UN Security Council and EU military operations in the context of the UN system of collective security. A look at the EU's actions in the field of international peace and security from the outside, from the perspective of the UN Security Council, highlights the internal complexities on the EU level and their implications for cooperation: even 'natural partners' can have their difficulties.

According to Article 24 of the Charter of the United Nations (UN Charter), the UN Security Council is the key institution tasked with the maintenance of international peace and security. As laid down in Article 103 UN Charter, the Charter enjoys precedence over any other obligations UN Member States might have arising from international agreements. This includes the EU Member States and, at first sight, paints a rather clear picture: when it comes to international peace and security, the UN Security Council is the competent body. The UN has cooperated with regional organisations in responding to threats to international peace and security, resulting in UN peacekeeping missions being supported by a mix of regional and/or national forces, including, among others, the North Atlantic Treaty Organization (NATO), the EU, the African Union (AU) and the Economic Community of West African States (ECOWAS).² The EU has joined this forum and has supported UN peacekeeping missions on several occasions. In the EU external action framework, such missions are conducted under the Common Security and Defence Policy (CSDP) in the form of civilian missions and military operations. The focus here will be on military operations and their position within the UN's system of collective security through UN Security Council authorisation.

In the past, the UN Security Council has authorised the use of force under Chapter VII of the UN Charter in all cases where the EU brought forward its intention to deploy military operations under the CSDP outside its territory. However, this relationship was put to the test in the course of the establishment of the European Union Naval Force Mediterranean (EU NAVFOR Med) Operation Sophia (in short, Operation Sophia) in 2015, the EU's CSDP operation on the Mediterranean Sea, as it deviated from prior practice. Here, the EU established a military operation aimed at combatting human trafficking networks in the Mediterranean without prior UN Security Council authorisation. In response, the operation did not receive a warm welcome in the UN Security Council, as indicated by statements recorded in the meeting protocols described below. Furthermore, it could be argued that the reluctance of non-EU States to support Operation Sophia, which might have been influenced by this deviation from prior practice, affected its course of action and performance.

This article argues that considering the reactions to Operation Sophia in the UN Security Council and through its resolutions, the operation's shifts in focus as well as the developments after the operation was discontinued in March 2020, this deviation from prior practice might be just that: one deviation. EUNAVFOR Med Operation Irini (Operation Irini), which followed Operation Sophia, is thoroughly based on UN Security Council resolutions, not only in terms of an authorisation, but also in terms of a carefully delimited mandate. The article concludes with an outlook on challenges that might remain from this episode, in particular the increasing tasks and responsibilities taken on by EU law enforcement agencies such as Frontex in the context of migration and human trafficking and what that means for the relationship between the UN Security Council and the EU. Despite the complexities on the EU internal level, the authorisation of military operations on the territory of third States without their consent remains the responsibility of the UN Security Council and has to be in accordance with international law. The main question of this article is, in other words: How do EU CSDP operations fit into the UN system of collective security and under what circumstances do they require a UN Security Council authorisation? The focus here is on international law, in particular the UN Charter, as well as the political debates around Operation

¹European Union External Action Service, 'United Nations (UN)' (10 June 2020) https://eeas.europa.eu/diplomatic-network/united-nations-un/2342/united-nations-un_en (accessed 16 April 2021); European Union External Action Service, 'EU-UN: Global Partners – Factsheet' (February 2021) https://eeas.europa.eu/sites/default/files/eu_un_partnership_2021-02-16_0.pdf (accessed 16 April 2021).

²Moritz P Moelle, *The International Responsibility of International Organisations: Cooperation in Peacekeeping Operations* (Cambridge University Press 2017) 67ff.

Sophia in the UN Security Council. UN Security Council resolutions and meeting protocols highlighting different views are a main source, together with decisions of the Council of the EU on CSDP operations.³

The article starts with an overview of the relationship between the EU and the UN regarding collective security, continues with a review of past CSDP operations and their authorisation through the UN Security Council and then turns to the main section on Operation Sophia. The latter section discusses the operation itself and its mandate, the UN Security Council Resolution adopted after its establishment, the reactions to Operation Sophia in the UN Security Council after authorising parts of it and the current developments on the operation, meaning its suspension and the creation of a new operation, Operation Irini, and its mandate. The article concludes with an outlook on future cooperation, in particular in the field of migration and human trafficking, and perhaps other EU actors being involved more in UN collective security, such as the EU law enforcement agency Frontex.

2. EU military operations within the UN system of collective security

Before starting with the review of past and present CSDP operations and their UN Security Council mandates, some remarks on the general relationship between the UN and the EU in the field of peace and security are in order. The UN system of collective security builds on a network of actors.⁴ The EU features in this network as a regional organisation. Chapter VIII UN Charter addresses regional arrangements and agencies and their role in collective security. Article 53 UN Charter states that the UN Security Council can 'utilize such regional arrangements or agencies for enforcement action under its authority' and that no enforcement action can be taken without its authorisation.⁵

The EU's status as regional arrangement or agency has not been formalised so far and the EU has preferred a 'flexible and pragmatic' approach to cooperation instead.⁶ Different arguments have been put forward in favour of and against the EU's status as regional arrangement or agency. If the term 'regional' in Chapter VIII UN Charter is interpreted in a narrow sense, meaning that a regional organisation is not only defined through its Member States coming from the same geographical area and a set of agreed shared values, but that its operational scope is also determined by this region, meaning that action is only possible within the territory of its Member States, then, some argue, the EU would not qualify as falling under Chapter VIII UN Charter.⁷ Broader interpretations, also based on the historical development of the EU within the UN system, argue that the EU could be considered as falling under Chapter VIII UN Charter.⁸ In addition, UN and EU bodies have referred to the EU as falling under Chapter VIII UN Charter before, yet without formally settling the status.⁹ Apart from a clarification of the relationship between the EU and the UN, the status under Chapter VIII UN Charter would subject the EU to additional reporting obligations. According to Article 54 UN Charter, regional arrangements and agencies have to keep the UN Security Council fully informed about their activities relating to the maintenance of international peace and security. It has been argued that this additional

³Given that the focus is on the UN, and the UN Security Council perspective on CSDP operations in particular, a discussion of the legal processes and issues on the EU internal level goes beyond the scope of this article.

⁴See, e.g., Thierry Tardy, 'Hybrid Peace Operations: Rationale and Challenges' (2014) 20(1) *Global Governance* 95.

⁵There are some exceptions to this rule where regional arrangements do not depend on UN Security Council authorisation, but these are not directly relevant to the present article; see art 53(1) UN Charter: 'with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state'.

⁶Panos Koutrakos, 'The European Union in the Global Security Architecture' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013) 83.

⁷Julia Schmidt, *The European Union and the Use of Force* (Brill 2020) 150ff; Erika De Wet, 'Regional Organizations and Arrangements: Authorization, Ratification, or Independent Action' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 315ff.

⁸Natividad Fernández Sola, 'The European Union as a Regional Organization within the Meaning of the UN Charter' (2012) 32 *Polish Yearbook of International Law* 262; Moelle (n 2) 91ff; Nigel D White, 'The EU as a Regional Security Actor within the International Legal Order' in Martin Trybus and Nigel D White (eds), *European Security Law* (Oxford University Press 2007) 332ff.

⁹See, e.g., European Parliament Resolution: 'E. ...whereas the EU is part of the collective UN security system, also as one of the regional arrangements foreseen under Chapter VIII of the UN Charter'; European Parliament Resolution of 24 November 2015 on the role of the EU within the UN – how to better achieve EU foreign policy goals (2015/2104(INI)) (24 November 2015) https://www.europarl.europa.eu/doceo/document/TA-8-2015-0403_EN.html (accessed 16 April 2021); S/RES/713 (1991) Socialist Federal Republic of Yugoslavia (25 September 1991) Preamble; S/RES/727 (1992) Socialist Federal Republic of Yugoslavia (8 January 1992) Preamble; Moelle (n 2) 94.

oversight has influenced the (political) decision of some organisations not to declare themselves as falling under Chapter VIII UN Charter.¹⁰ Triggered by UN Security Council Resolution 1631 (2005) on the cooperation between the UN and regional organisations in maintaining international peace and security, there have been efforts to bring more clarity and delineate cooperation within Chapter VIII UN Charter from other forms, but the international community has not so far reached a consensus on the issue.¹¹ While the representatives of the Organization of American States and the AU were in favour of formalising cooperation,¹² the EU preferred the status quo, and with that, a flexible approach.¹³ Even though the statements in the meeting protocols of follow-up resolutions, often with a focus on the AU, show increased and closer cooperation on the ground on the part of the EU, they do not allow for a final settlement of the EU's status under Chapter VIII UN Charter.¹⁴

Irrespective of the EU's status under Chapter VIII UN Charter, military operations (meaning operations capable of using armed force) conducted by the EU have to be carried out in accordance with international law. In line with the UN Charter, this means that such operations have to obtain a UN Security Council mandate under certain conditions. Where an EU CSDP operation outside EU territory is established with the consent of the third State in question (intervention by invitation) or in the (rather unlikely) case that the operation is carried out in collective self-defence under Article 51 UN Charter, no UN Security Council authorisation is required.¹⁵ However, if the EU intends to establish a military operation on the territory of a third State outside these circumstances, such an operation requires UN Security Council approval. Despite the prominent role of regional organisations in enforcement action, any military intervention on the territory of a third State without this State's consent, or not in (individual or collective) self-defence, would go against the UN Charter if it were conducted without prior UN Security Council authorisation.¹⁶

It is important to differentiate between the legal framework governing the legality of such an operation, meaning the assessment of whether the operation was established in accordance with the UN Charter, and the legal framework(s) governing the conduct during the operation. Depending on the operation at hand, relevant provisions of international human rights law and humanitarian law, special regimes such as on transnational organised crime or the law of the sea, and operation-specific agreements such as status of forces agreements apply.¹⁷ This article focuses on the legality of the establishment of an operation and not on the conduct during the operation.

¹⁰Schmidt (n 7) 148.

¹¹S/RES/1631 (2005) Cooperation between the United Nations and regional organizations in maintaining international peace and security (17 October 2005); A/61/204/-S/2006/590 Report of the Secretary-General, 'A regional-global security partnership: challenges and opportunities' (28 July 2006).

¹²S/PV.5282, Cooperation between the United Nations and regional organizations in maintaining international peace and security (17 October 2005): Mr Ramdin (Organization of American States): 'We believe that a first critical step in establishing a division of labour – defining the roles and responsibilities of the regional organizations, the United Nations and other key actors in the region – is to adopt a shared agenda within the framework of the United Nations on issues of early conflict prevention, security and development' 7; Mr Olanyan (African Union): 'Cooperation between the United Nations and the African Union (AU) is provided for in Chapter VIII of the Charter of the United Nations and in the Constitutive Act of the African Union' 9; on the relationship between the UN and the AU see also: S/RES/1809 (2008) On Cooperation Between the United Nations and Regional Organizations, in Particular the African Union, in the Maintenance of International Peace and Security (16 April 2008); S/RES/2457 (2019) Cooperation between the UN and regional and subregional organizations in maintaining international peace and security (27 February 2019).

¹³S/PV.5282, Cooperation between the United Nations and regional organizations in maintaining international peace and security (17 October 2005): Sir Emyr Jones Parry (United Kingdom) (on behalf of the EU): 'We need to build an understanding of the comparative capabilities of different organizations and the knowhow to work together in a range of different circumstances and at short notice. That is not to say that there should be a strict division of labour. Rather, in order to be effective, the international community needs to know which organization can do what, and in what time frame' 23; Luk Van Langenhove, Tânia Felício and Ademola Abass, 'The UN and Regional Organisations for Peace: Tracking a Slippery Partnership' in Philippe De Lombaerde, Francis Baert and Tânia Felício (eds), *The United Nations and the Regions: Third World Report on Regional Integration* (Springer 2012) 91–106.

¹⁴See, e.g., S/RES/2167 (2014) United Nations peacekeeping operations (28 July 2014); S/PV.7228 United Nations peacekeeping operations (28 July 2014) Mr Popowski (Deputy Secretary General of the European External Action Service); S/RES/2457(2019); S/PV.8473 Cooperation between the United Nations and regional and subregional organizations in maintaining international peace and security (27 February 2019) Mr Vale de Almeida (EU).

¹⁵For collective defence in the EU context see, however, also the role of NATO as laid out in art 42(7) Treaty on European Union; Thierry Tardy, 'The European Union and UN Peace Operations: What Global-Regional Peace and Security Partnership?' in Cedric de Coning and Mateja Peter (eds), *United Nations Peace Operations in a Changing Global Order* (Palgrave Macmillan 2019) 237ff.

¹⁶De Wet (n 7) 318ff; Pia Hesse, 'UN Security Council Resolutions as a Legal Framework for Multinational Military Operations' in Heike Krieger and Robin Geiß (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2020); for pacific settlements by regional organisations, see art 52 UN Charter.

¹⁷Heike Krieger and Robin Geiß (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2020).

3. Past CSDP operations authorised by the UN Security Council

This section presents past military CSDP operations and how their establishment was preceded by UN Security Council resolutions 'inviting' or 'welcoming' such operations and authorising them under Chapter VII UN Charter, including the use of force.¹⁸ The CSDP operations discussed are ARTEMIS/DRC, ALTHEA/BiH, EUFOR RD Congo, EUFOR Tchad/RCA, EUNAVFOR Somalia Operation Atalanta and EUFOR RCA. Operation CONCORDIA/FYROM, which sought to consolidate the multi-ethnic society within Macedonia, will not be discussed here, as it was conducted with the Macedonian government's consent, and not UN Security Council authorisation.¹⁹ The interaction between the UN Security Council and the Council of the European Union (the Council) in the preparation of these operations indicates a certain degree of common understanding and established procedure: UN Security Council resolution first, Council decision establishing a CSDP operation second.

On 30 May 2003 the UN Security Council authorised under Chapter VII UN Charter the deployment of an 'Interim Emergency Multinational Force in Bunia in close coordination with MONUC' to stabilise security and improve the humanitarian situation in Bunia, Ituri Province, in the Democratic Republic of the Congo.²⁰ The UN Security Council furthermore authorised this multinational force to 'take all necessary measures to fulfil its mandate'.²¹ Six days later the Council followed suit and established Operation Artemis/DRC.²²

On 9 July 2004 the UN Security Council adopted Resolution 1551 on the conflicts in the former Yugoslavia.²³ Under Chapter VII UN Charter and with the authorisation to 'take all necessary measures' under certain circumstances, the Resolution 'welcomes the EU's intention to launch an EU mission to Bosnia and Herzegovina, including a military component'.²⁴ Three days later the Council created Operation ALTHEA/BiH.²⁵

With regard to the CSDP Operation EUFOR RD Congo, the UN Security Council 'welcomed' the EU's intention to support the UN mission and 'authorized' the deployment of a force under Chapter VII of the UN Charter on 25 April 2006.²⁶ Two days later, the Council established a 'military operation in the DRC in support of MONUC during the election process, named Operation EUFOR RD Congo, in accordance with the mandate set out in United Nations UN Security Council Resolution 1671 (2006)'.²⁷ This quick process was preceded by an invitation the UN extended to the EU in December 2005 to 'consider the possibility of deploying a military force'.²⁸ The mandate given to EUFOR DRC by the UN Security Council Resolution included the authorisation, under Chapter VII, to 'take all necessary measures' in order to fulfil the tasks set out in the Resolution, including the support of MONUC in stabilising the situation, the protection of civilians from physical violence, small extraction operations to rescue individuals who were in danger and airport protection.²⁹ Although these tasks sound rather broad, the Resolution limited their extent by making most of them conditional on a request from the Secretary-General or MONUC to the EU, meaning the EU could not act on its own initiative.³⁰

On 25 September 2007 the UN Security Council, '[w]elcoming the readiness of the European Union', authorised under Chapter VII UN Charter, the 'European Union to deploy, for a period of one year ... an operation ... and decides that this operation shall be authorized to take all necessary measures, within its

¹⁸See also Trineke Palm, *Normative Power and Military Means: The Evolving Character of the EU's International Power* (PhD thesis, Vrije Universiteit Amsterdam 2017) 150–67.

¹⁹S/RES/1371 (2001) The former Yugoslav Republic of Macedonia (26 September 2001) para 5: the UN Security Council 'strongly supports in that regard the establishment of a multinational security presence in The former Yugoslav Republic of Macedonia at the request of its Government'; on CONCORDIA/FYROM, see 2003/92/CFSP Council Joint Action 2003/92/CFSP of 27 January 2003 on the European Union military operation in the Former Yugoslav Republic of Macedonia.

²⁰S/RES/1484 (2003) Democratic Republic of the Congo (30 May 2003) para 1.

²¹Ibid, para 4.

²²2003/423/CFSP Council Joint Action 2003/423/CFSP of 5 June 2003 on the European Union military operation in the Democratic Republic of Congo.

²³S/RES/1551 (2004) Bosnia and Herzegovina (9 July 2004).

²⁴Ibid, para 10 (emphasis in the original) paras 13–15.

²⁵2004/570/CFSP Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina.

²⁶S/RES/1671 (2006) Democratic Republic of the Congo (25 April 2006) Preamble, para 8.

²⁷2006/319/CFSP Council Joint Action 2006/319/CFSP of 27 April 2006 on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process, art 1.

²⁸Ibid, Preamble (4).

²⁹S/RES/1671 (2006) para 8.

³⁰S/RES/1671 (2006) para 9.

capabilities and its area of operation in eastern Chad and the north-eastern Central African Republic'.³¹ The mandate included tasks such as the protection of civilians, facilitating the provision of humanitarian aid and protection of UN personnel and facilities.³² On 15 October the Council established EUFOR Tchad/RCA in order to fulfil the mandate given by the UN Security Council.³³

In 2008 the UN Security Council adopted a series of resolutions on the matter of piracy off the coast of Somalia, including the authorisation under Chapter VII UN Charter of States with naval and military assets in the area to use 'the necessary means ...for the repression of acts of piracy'.³⁴ The UN Security Council also 'commended' the EU for its plans to set up a naval operation.³⁵ In its last resolution in October, the UN Security Council 'call[ed] upon States interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft'.³⁶ In November 2008 the EU set up EUNAVFOR Somalia Operation Atalanta.³⁷ The mandate of the Council decision refers to all three UN Security Council Resolutions and includes the protection of vessels delivering food aid and merchant vessels and keeping watch over the area.³⁸ However it also included the power to 'take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present' and to 'arrest, detain and transfer' those responsible for or suspected of having committed acts of piracy.³⁹

In 2014 the EU launched another CSDP operation in the Central African Republic. It came after a detailed mandate by the UN Security Council on 28 January 2014, 'welcoming the strong engagement' of the EU, including an authorisation for 'the EU operation to take all necessary measures'.⁴⁰ This operation was established on 10 February as EUFOR RCA, a military bridging operation contributing to the stabilisation of the situation.⁴¹

All these decisions were the result of careful negotiations with a number of stakeholders, and relevant UN and EU actors were involved in the preparatory processes, for example through letters sent by the EU to the UN Secretary-General about the EU's intention to launch operations. The speed and the coordination between both actors indicate a well-established procedure for cooperation.⁴²

4. Break with prior practice: EUNAVFOR Med Operation Sophia

In the case of the EU's military operation on the Mediterranean Sea, however, the Council established Operation Sophia without prior UN Security Council authorisation. In its decision from 18 May 2015, it mentioned the operation's adherence to several international treaties such as the UN Convention on the Law of the Sea (UNCLOS) and that the operation would be carried out in accordance with 'any Security Council Resolution'.⁴³ This means that the practice of 'UN Security Council resolution first, Council decision second' was reversed and the UN Security Council, the central institution for upholding international peace and security, was put in the position of having to address a military operation already established by a different organisation. The following section starts with an overview of the operation and its mandate and then continues with the UN Security Council authorisation that followed after its

³¹S/RES/1778 (2007) Chad, the Central African Republic and the subregion (25 September 2007) Preamble, para 6(a) (emphasis in the original).

³²Ibid.

³³2007/677/CFSP Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic.

³⁴S/RES/1838 (2008) Somalia (7 October 2008) para 3; see also S/RES/1816 (2008) Somalia (2 June 2008) para 7(b).

³⁵S/RES/1838 (2008) Preamble.

³⁶S/RES/1838 (2008) para 2; other resolutions are S/RES/1814 (2008) Somalia (15 May 2008), S/RES/1816 (2008).

³⁷2008/851/CFSP Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.

³⁸Ibid, art 2(a), (b), (c).

³⁹Ibid, art 2(d), (e).

⁴⁰S/RES/2134 (2014) Central African Republic (28 January 2014) Preamble, paras 43–7, para 44 (emphasis in the original).

⁴¹2014/73/CFSP Council Decision 2014/73/CFSP of 10 February 2014 on a European Union military operation in the Central African Republic (EUFOR RCA).

⁴²See, e.g., EU letter prior to UN Security Council resolution: Letter dated 29 June 2004 from the Permanent Representative of Ireland to the United Nations addressed to the President of the Security Council (S/2004/522*); Letter dated 25 February 2014 from the Secretary-General addressed to the President of the Security Council (S/2014/45).

⁴³2015/778/CFSP Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED) art 1(1).

inception and the way in which the operation was discussed in the UN Security Council in follow-up meetings. The section concludes with an assessment of the newly established Operation Irini, which replaced Operation Sophia in April 2020.

4.1. Operation Sophia: mission and mandate

Operation Sophia is defined as a 'military crisis management operation' combatting human smuggling and trafficking networks in the Southern Central Mediterranean.⁴⁴ It was established in response to the increased use of the Mediterranean routes by migrants and refugees, accompanied by rising numbers of those dying at sea, exemplified in the death of more than 800 people in a shipwreck incident near Lampedusa in April 2015.⁴⁵ As stated in the Preamble to the Council decision establishing Operation Sophia, it was driven by the aim 'to prevent human tragedies resulting from the smuggling of people across the Mediterranean'.⁴⁶ The core activities of the operation were the identification, capture and disposal of vessels or other assets used by smugglers or traffickers (or suspected of being used by them). These activities were to be carried out 'in accordance with applicable international law, including UNCLOS and any Security Council Resolution'.⁴⁷

The operation was divided into three phases. Phase 1 was limited to the detection of suspicious vessels and monitoring of migration networks on the high seas by gathering information and patrolling. These activities were conducted on the high seas only and with reference to international law.⁴⁸

Phase 2 involved a broader range of activities. It gave the operation the mandate to board, search, seize and divert vessels 'under the conditions provided for by applicable international law, including UNCLOS and the Protocol against the Smuggling of Migrants'.⁴⁹ These measures cannot only be taken on the high seas (Phase 2-A) as Phase 2 also allowed for action in the territorial waters of a coastal State (Phase 2-B) with the State's consent or 'in accordance with any applicable Security Council Resolution'.⁵⁰

Phase 3 also relied on either the consent of the State in question or a UN Security Council authorisation and was described in language that strongly resembles the wording used in UN Security Council resolutions. The Council decision held that Operation Sophia should

in a third phase, in accordance with any applicable Security Council Resolution or consent by the coastal State concerned, take *all necessary measures* against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.⁵¹

Phases 1 and 2-A of the operation do not require UN Security Council authorisation as they are conducted on the high seas, following the applicable rules of international law. Such rules include the following instruments, which, to some extent, address similar concerns as Operation Sophia: UNCLOS; the United Nations Convention against Transnational Organized Crime (UNTOC) supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air, as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the International Convention for the Safety of Life at Sea (SOLAS); the International Convention on Maritime Search and Rescue (SAR); the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention); and the Geneva Convention.⁵² That Phases 1 and 2-A did not require authorisation was confirmed by the Council decision establishing Operation Sophia and

⁴⁴Ibid, art 1.

⁴⁵Anne Ingemann Johansen, 'Assessing the European Union's Strategic Capacity: The Case of EUNAVFOR MED Operation Sophia' (2017) 26(4) European Security 507, 516; Ruxandra-Laura Boșilcă, Matthew Stenberg and Marianne Riddervold, 'Copying in EU Security and Defence Policies: The Case of EUNAVFOR MED Operation Sophia' (2020) 30(2) European Security 218, 223.

⁴⁶2015/778/CFSP Preamble (1).

⁴⁷Ibid, art 1.

⁴⁸Ibid, art 2(2)(a).

⁴⁹Ibid, art 2(2)(b)(i).

⁵⁰Ibid, art 2(2)(b)(ii); in October 2015 Operation Sophia reached Phase 2-A: <https://www.operationsophia.eu/eunavfor-med-the-spanish-frigate-reina-sofia-conducts-a-boarding-operation/> (accessed 16 April 2021).

⁵¹2015/778/CFSP art 2(2)(c) (emphasis added).

⁵²United Nations Convention on the Law of the Sea (10 December 1982) UNTS 1833, 3; A/RES/55/25, United Nations Convention against Transnational Organized Crime (8 January 2001) UNTS 2225, 209; A/55/383, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) UNTS 2237, 319; A/55/383, Protocol against the Smuggling of Migrants by Land, Sea and

the ex post UN Security Council authorisation discussed below.⁵³ UN Security Council authorisation or State consent are only relevant for Phases 2-B and 3, which are conducted in the territorial waters of a coastal State. Even though the Council decision did not explicitly refer to any State, the coastal States in its operational area, the Southern Central Mediterranean, are Tunisia and Libya. Depending on State consent or UN Security Council resolution, the Council decision granted the operation the power to 'take all necessary measures', including the destruction of vessels used for human trafficking. The fact that parts of the operation's mandate (Phases 2-B and 3) were conditional on approval by third parties highlights that, in the case of this CSDP operation, the usual course of action (UN Security Council resolution first, CSDP operation second) was not followed.

4.2. Ex post UN Security Council authorisation

Reacting to these events, the UN Security Council adopted a Resolution on 9 October 2015 and authorised under Chapter VII UN Charter 'Member States acting nationally or through regional organisations to use *all measures commensurate to the specific circumstances*' with regard to migrant smugglers and human trafficking activities as further specified in the Resolution.⁵⁴ Although Resolution 2240 responding to the establishment of Operation Sophia did authorise the use of force, it limited the scope of this authorisation to specific circumstances which were less broad than the scope of action envisaged by the Council.⁵⁵

What was also interesting about this Resolution was that the EU's decision to establish Operation Sophia was not 'welcomed' as seen in the Preambles of previous resolutions discussed above; the UN Security Council was only 'taking note' of the Council decision to set up this CSDP operation. Furthermore, the operational part of the Resolution did not mention Operation Sophia explicitly, but only referred to 'Member States, acting nationally or through regional organisations'.⁵⁶ The authorisation to use 'all measures commensurate to the specific circumstances' referred to the high seas off the coast of Libya, meaning that it did not cover the full extent of Operation Sophia, in particular Phases 2-B and 3.⁵⁷ It covered the inspection of vessels if there were reasons to believe that they were engaged in migrant smuggling or human trafficking from Libya (and that only if they had tried to secure the consent of the vessel's flag State in advance).⁵⁸ In addition, the authorisation included the power to seize vessels after such an inspection. However, the measures that might be taken after the seizure are not defined in detail and should be taken 'in accordance with applicable international law with due consideration of the interests of any third parties who have acted in good faith'.⁵⁹

Despite invoking Chapter VII UN Charter, the Resolution did not mention, as have some previous resolutions related to EU CSDP operations, the use of force explicitly or the traditional phrase 'all necessary means/measures'.⁶⁰ Although one could argue that this is implied in the reference to Chapter VII, the choice to deviate from the usual language is apparent and it has been reported that the reference to 'all necessary measures' featured in an earlier draft of the Resolution but was removed from the final draft.⁶¹

Air, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000) UNTS 2241, 507; International Convention for the Safety of Life at Sea (1 November 1974) UNTS 1184, 1185, 2; International Convention on Maritime Search and Rescue (27 April 1979) UNTS 1405; Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention) (16 February 1976) UNTS 1102, 27; Geneva Convention relating to the Status of Refugees (28 July 1951) UNTS 189, 137; these instruments were explicitly named in Council Decision 2015/778/CFSP Preamble (6).

⁵³2015/778/CFSP Preamble (6) lists several additional international instruments which are applicable to the operation; S/RES/2240 (2015) Maintenance of international peace and security (9 October 2015) Preamble, para 16.

⁵⁴S/RES/2240 (2015) para 10 (emphasis added).

⁵⁵Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11(3) European Journal of International Law 541.

⁵⁶S/RES/2240 (2015) paras 7, 8.

⁵⁷Ibid, para 10; Marta Bo, 'Repressing Migrant Smuggling by the UN Security Council and EU Naval Military Operation Sophia: Some Reflections on Jurisdiction and Human Rights' *EJIL:Talk!* (2017) <https://www.ejiltalk.org/repressing-migrant-smuggling-by-the-un-security-council-and-eu-naval-military-operation-sophia-some-reflections-on-jurisdiction-and-human-rights/> (accessed 16 April 2021).

⁵⁸S/RES/2240 (2015) para 7.

⁵⁹Ibid, para 8; Graham Butler and Martin Ratcovich, 'Operation Sophia in Uncharted Waters: European and International Law Challenges for the EU Naval Mission in the Mediterranean Sea' (2016) 85 *Nordic Journal of International Law* 235, 255.

⁶⁰Niels Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 211.

⁶¹What's in Blue, 'Vote on a Resolution on Human Trafficking and Migrant Smuggling in the Mediterranean' <https://www.whatsinblue.org/2015/10/vote-on-a-resolution-on-human-trafficking-and-migrant-smuggling-in-the-mediterranean.php#>

In addition, the scope is also limited by the very clear reference in the UN Security Council Resolution to the high seas off the coast of Libya, whereas Operation Sophia established the entire 'Southern Central Mediterranean' as its operational area and mentioned 'countries of origin and transit' as cooperation partners.⁶² This limited authorisation could indicate that the UN Security Council did not fully approve of Operation Sophia's mission and mandate, as well as the way in which the operation was established.

Another source that illustrates how Operation Sophia was received and understood after its debut in the UN Security Council are the meeting protocols of subsequent UN Security Council sessions that discussed the situation in Libya. A short overview of the way in which Operation Sophia featured in these discussions is provided in the following.

4.3. Resolution 2240 and follow-up reactions in the UN Security Council

What is noticeable in the meeting protocols of the UN Security Council featuring Operation Sophia is the silence from non-EU States on the operation, whereas the United Kingdom (UK) and France, presenting the EU position, mention Operation Sophia the most and in reaffirming terms ('saving lives').⁶³ When non-EU States refer to the operation directly, they do so with more caution and often including the call for strict adherence to applicable international law and the mandate issued by the UN Security Council, which indicate concerns regarding compliance. The caution expressed by non-EU States reflects the limited mandate Operation Sophia received and might explain why the operation was not 'welcomed' but only 'taken note' of by the UN Security Council. Before looking at the meeting protocols in more detail, it is important to distinguish between two parallel lines of resolutions that have been extended several times over the years. There is Resolution 2240 authorising measures under Chapter VII with regard to human trafficking and there is Resolution 2292 authorising measures under Chapter VII with regard to the implementation of the UN arms embargo against Libya. The new Operation Irini is based on Resolution 2292 (and its subsequent renewals) and refers to Resolution 2240 and human trafficking only as a secondary task.⁶⁴

In the meeting on Resolution 2240, the representative for the UK described Operation Sophia and the mandate deriving from the UN Security Council Resolution just adopted:

Since June, European Union (EU) forces in the Mediterranean have worked tirelessly to help alleviate the human tragedy on the high seas off the coast of Libya. They have saved thousands of lives. But the situation is worsening, so today the Security Council has authorized the European Union military operation in the southern Central Mediterranean to begin interdictions against all migrant smugglers operating on the high seas.⁶⁵

Here, the representative for the UK limited the description of Operation Sophia's mandate to the high seas off the coast of Libya, but then framed the UN Security Council Resolution as addressing human trafficking on the high seas in the Southern Central Mediterranean in general.⁶⁶ While a broad understanding of the mandate also came from the representative for Chad, he indicated that obtaining consensus on the matter was not straightforward and that he hoped that the Resolution might only be used to combat human trafficking, not to infringe upon migrants' rights or the 'territorial integrity and sovereignty of African countries'.⁶⁷

Venezuela, the only country not voting in favour of the Resolution but abstaining, explained its decision with a rejection of 'the notion of making migrants, refugees and asylum seekers into a security

(accessed 16 April 2021); Marta Bo, 'Fighting Transnational Crimes at Sea under UNSC's Mandate: Piracy, Human Trafficking and Migrant Smuggling' *EJIL:Talk!* (2015) <https://www.ejiltalk.org/fighting-transnational-crimes-at-sea-under-unscs-mandate-piracy-human-trafficking-and-migrant-smuggling/> (accessed 16 April 2021).

⁶²2015/778/CFSP art 1, Preamble (2); further details on the scope are not accessible as the Operation Plan and the Rules of Engagement are classified: Council doc. 10448/16, 'I/A' ITEM NOTE From: General Secretariat of the Council To: Permanent Representatives Committee (Part 2)/Council Subject: Revised Operation Plan and Rules of Engagement Authorisation for EUNAVFOR MED SOPHIA.

⁶³See, e.g., S/PV.7531, Maintenance of international peace and security (9 October 2015) Mr Rycroft (United Kingdom of Great Britain and Northern Ireland) 2.

⁶⁴Human trafficking: S/RES/2240 (2015), S/RES/2312 (2016), S/RES/2380 (2017), S/RES/2437 (2018) and S/RES/2491 (2019); UN arms embargo: S/RES/2292 (2016), S/RES/2357 (2017), S/RES/2420 (2018) and S/RES/2473 (2019).

⁶⁵S/PV.7531, Mr Rycroft (United Kingdom of Great Britain and Northern Ireland) 2.

⁶⁶S/RES/2240 (2015) paras 7, 8.

⁶⁷S/PV.7531, Mr Cherif (Chad) 3.

issue' and held that authorising the use of force in this matter was 'a disproportionate action that sets a dangerous precedent'.⁶⁸ Russia reminded the members of the UN Security Council of its expectation that 'those who will be putting this resolution into practice to strictly comply with the relevant norms of international law, including the United Nations Convention on the Law of the Sea'.⁶⁹ In addition, it restated several times that the scope of the Resolution included only the high seas off the coast of Libya, in contrast to other speakers. The French contribution to the debate was very precise in what the Resolution authorised in its understanding, namely Phase 2-A of Operation Sophia, the inspection and stop and search of vessels on the high seas in the 'southern Central Mediterranean'.⁷⁰

In June 2016 the mandate of Operation Sophia was broadened to incorporate supporting tasks in ensuring the UN arms embargo against Libya.⁷¹ When the UN Security Council discussed this amendment and its authorisation, some members were sceptical (even though Resolution 2292 was adopted unanimously).⁷² The Russian representative gave some insights into the debate on the draft resolution and said: 'When matters of principle had to be addressed, which requires diplomacy, they instead relied on ultimatums. Indeed, some partners decided that they wanted to see the Brussels decision to broaden the mandate of the military maritime Operation Sophia approved at any price.'⁷³

Russia was particularly concerned about possible exemptions from the arms embargo, which could allow for the flow of weapons to some parties in Libya, thereby endangering a peaceful settlement. The statement quoted above highlights Russia's questioning of the neutrality of the drafters of the Resolution – the UK, France and Spain – in reaching a peaceful settlement in Libya.⁷⁴ Others, such as representatives from EU States as well as Ukraine, explicitly mentioned and welcomed the extension of the mandate of Operation Sophia.⁷⁵ The representative for Spain described the extension of the mandate in line with the EU's increasing commitments to Libya on multiple levels, including in the areas of humanitarian assistance and health care.⁷⁶

Resolution 2312 in October 2016 again 'took note' of the EU's decision to extend and expand Operation Sophia's mandate to include the implementation of the UN arms embargo against Libya.⁷⁷ Following that development, the Resolution also extended the mandate of Operation Sophia for another 12 months. The Resolution was adopted with 14 votes in favour and Venezuela abstaining. In addition to the concerns raised previously, the Venezuelan representative noted that since the inception of the military operation in the Mediterranean, the number of dead or missing people had not fallen. This was confirmed by a report of the UN Secretary-General that was circulated before the meeting on Resolution 2312.⁷⁸ As shown by some of the statements quoted here, the effectiveness of the operation was called into question several times in UN Security Council meetings. A brief assessment of the operation's performance will be provided below in Section 4.

The French representative reaffirmed that the effectiveness of Operation Sophia depended 'to a large extent' on the mandate given by the UN Security Council.⁷⁹ The representative for Uruguay stressed that Operation Sophia should be conducted in line with 'international law, international humanitarian law, refugee law and international human rights law', considering that the original Council decision envisaged a broader scope for Operation Sophia than authorised by the UN Security Council.⁸⁰

⁶⁸S/PV.7531, Mr Ramírez Carreño (Bolivarian Republic of Venezuela) 5.

⁶⁹S/PV.7531, Mr Zagaynov (Russian Federation) 6.

⁷⁰S/PV.7531, Mr Delattre (France) 6.

⁷¹2016/993/CFSP Council Decision (CFSP) 2016/993 of 20 June 2016 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA); S/RES/2292 (2016) The situation in Libya (14 June 2016).

⁷²S/PV.7715, The situation in Libya (14 June 2016); see Mr Liu Jieyi (China): 'It is China's hope that countries will fully and appropriately implement resolution 2292 (2016), comply with the related principles of international law, and respect the sovereignty, legitimate rights and interests of flag States.' 4; also Mr Méndez Graterol (Bolivarian Republic of Venezuela) 5.

⁷³S/PV.7715, Mr Safronkov (Russian Federation) 3.

⁷⁴S/PV.7715, Mr Safronkov (Russian Federation) 3f.

⁷⁵S/PV.7715, Mr Rycroft (United Kingdom of Great Britain and Northern Ireland) 2; S/PV.7715, Mr Yelchenko (Ukraine) 5; S/PV.7715, Mr Gasso Matoses (Spain) 5; Mr Delattre (France).

⁷⁶S/PV.7715, Mr Gasso Matoses (Spain) 5.

⁷⁷S/RES/2312 (2016) Maintenance of international peace and security (6 October 2016) 3.

⁷⁸S/PV.7783, Maintenance of international peace and security (6 October 2016), Mr Ramírez Carreño (Bolivarian Republic of Venezuela) 3; S/2016/766 Secretary-General Report pursuant to Security Council resolution 2240 (2015) (7 September 2016).

⁷⁹S/PV.7783, Mr Delattre (France) 5.

⁸⁰S/PV.7783, Mr Bermúdez (Uruguay) 4.

The next extension, a year later in October 2017, was not followed by a debate, and Resolution 2380 was passed unanimously.⁸¹ In the 2017 meeting, extending the authorisation to inspect and seize vessels as set out in Resolution 2292 for another year, France mentioned the effectiveness of Operation Sophia depending on UN Security Council authorisation, adding that it was also 'an important element in continuing to provide the necessary legitimacy and resources to act effectively and efficiently'.⁸²

In October 2018 the authorisation given in Resolution 2240 was renewed unanimously for another 12 months.⁸³ The French representative in the UN Security Council referred to Operation Sophia as playing a 'key role' in combatting human trafficking, but that this was only possible because of the UN Security Council Resolutions authorising it to assume this role: 'The authorization of the Council is a *sine qua non*, allowing the operation to have the appropriate means to effectively combat the smuggling of migrants'.⁸⁴

A year later another extension was approved.⁸⁵ However, the Russian representative questioned the effectiveness of Operation Sophia given its reduced operational capacity and urged the EU to re-deploy sufficient naval assets.⁸⁶ The effectiveness of Operation Sophia was also questioned in the debate on the extension of the mandate regarding the UN arms embargo in the same year.⁸⁷

Although non-EU States mentioned Operation Sophia by name only on a few occasions, their remarks were rather cautious, with an emphasis on Operation Sophia not overstepping the mandate given by the UN Security Council. Later on, criticism on the operational capacity and effectiveness of the operation added to their concerns. On the other hand, the statements of EU Member States, in particular France, shed light on a different understanding of Operation Sophia. At first, there is this positive affirmation of the operation as saving lives in the Mediterranean but, later on, the statements by the French representative highlight the function of the UN Security Council authorisation as giving weight to Operation Sophia as being a *sine qua non* not only for the legitimacy, but also for the effectiveness of the operation. That emphasis is interesting as Phases 1 and 2-A of Operation Sophia did not require UN Security Council authorisation and it stands in contrast to the action taken on the EU level in 2015 when the Council established Operation Sophia without a prior UN Security Council resolution. Whether or not this can be interpreted as a sign of the realisation that the course of action chosen in Operation Sophia might not have improved the relationship between the EU and the UN or the capacity and effectiveness of the operation, a clearer indication of this realisation is provided by the following developments around Operation Sophia.

4.4. Back to business as usual?

In April 2020 the UN Secretary-General reported to the UN Security Council on the implementation of Resolution 2491 (2019) on the smuggling of migrants and human trafficking off the coast of Libya. The report referred to Operation Sophia several times, relying on current data on vessels and strategies employed by smugglers. It confirmed the continued suspension of the operation's naval assets over the last months and the impact this had had on the search and rescue capacity of Operation Sophia.⁸⁸ The operation mainly upheld its tasks through air patrols, gathering information on traffickers and passing on information on vessels in distress to Maritime Rescue Coordination Centres. Although the report noted that more people had been rescued in the Mediterranean than in the year before, this could be seen as a result of the 20 per cent increase in arriving migrants and refugees in Europe, indicating a higher number of people taking the risk of travelling by sea.⁸⁹ Overall, the UN Secretary-General's assessment of the situation on migrant smuggling and trafficking on the Mediterranean expressed concern:

⁸¹S/RES/2380 (2017) Maintenance of international peace and security (5 October 2017); S/PV.8061, Maintenance of international peace and security (5 October 2017).

⁸²S/PV.7964, The situation in Libya (12 June 2017) Mr Delattre (France) 5; S/RES/2357 (2017) The situation in Libya (12 June 2017).

⁸³S/RES/2437 (2018) Maintenance of international peace and security (3 October 2018); S/PV.8365, Maintenance of international peace and security (3 October 2018).

⁸⁴S/PV.8365, Mr Michon (France) 2.

⁸⁵S/RES/2491 (2019) Maintenance of international peace and security (3 October 2019); S/PV.8631, Maintenance of international peace and security (3 October 2019).

⁸⁶S/PV.8631, Mr Safronkov (Russian Federation) 3; see also Mr Ndong Mba (Equatorial Guinea) 3; Mr Ipo (Côte d'Ivoire) 4.

⁸⁷S/PV.8540, The situation in Libya (10 June 2019) Mr Adom (Côte d'Ivoire) 4; S/RES/2473 (2019) The situation in Libya (10 June 2019).

⁸⁸S/2020/275 Report of the Secretary-General on the implementation of Resolution 2491 (2019) (6 April 2020) para 14.

⁸⁹Ibid, paras 3ff.

The Mediterranean Sea remains a high-volume and deadly thoroughfare for the smuggling of, and trafficking in, refugees and migrants. During the reporting period, hundreds of men, women and children have again perished or gone missing at sea on their way to Europe. Many more have been returned to situations where they were at risk of grave harm and human rights violations.⁹⁰

Although this was not a direct statement on the achievements of Operation Sophia during its five years of operation, it did paint a sobering picture of the current situation and the negligible improvements over the years. Riddervold argues that despite being launched with the aim of preventing loss of life at sea, Operation Sophia moved away from its humanitarian starting point, even being held in violation of human rights standards itself.⁹¹ Already during its active time, commentators had found that Operation Sophia contributed 'little' to the aim of disrupting human trafficking networks in the Mediterranean and that in some instances, it even had an adverse effect on the situation.⁹²

On 31 March 2020 Operation Sophia was discontinued. It was replaced by EUNAVFOR Med Operation Irini, essentially in line with the mandate that was provided by the UN Security Council Resolutions on the matter right from the start:

The main objective of the operation would be to contribute to enforcing the arms embargo imposed by the Security Council on Libya, which is a core objective of the Berlin Process and which was endorsed by the Security Council in its resolutions 2509 (2020) and 2510 (2020). The European Union reports that the new operation, through its supporting tasks, will continue efforts to disrupt the human smugglers' business model and to train the Libyan coastguard and navy.⁹³

Both the Council decision and the UN Security Council Resolutions refer back to a conference on Libya held in Berlin in January 2020.⁹⁴ This conference was part of the peace process and at its end a political declaration was reached.⁹⁵ These conclusions were endorsed by the UN Security Council.⁹⁶ In turn, the EU responded by setting up this new operation.

One day after Operation Sophia was repealed, Operation Irini was established. What becomes apparent right away is that the new operation is tailored to the preceding UN Security Council Resolutions. The mission statement, as well as the mandate, refer explicitly to UN Security Council resolutions and present the operation as contributing to the fulfilment of the UN mandate within a circumscribed scope and accepting the UN's lead in the overall operation. There is also no mention of other countries (or even the Mediterranean as such) as field of operation, as the mandate is limited to Libya. In terms of the substance, the mission is confined to enforcing the UN arms embargo. Combatting human trafficking is only a 'secondary task' (and also only in accordance with the relevant UN Security Council resolutions) among others such as preventing illicit petroleum exports and supporting capacity building of the Libyan Coast Guard.⁹⁷

Comparing Operation Sophia and Operation Irini, the scope and mandate of the latter are clearly delimited by UN Security Council resolutions. In line with the agreement reached at the Berlin conference, the focus shifted to the enforcement of the UN arms embargo against Libya and away from broader military tasks in the Mediterranean as envisaged in Operation Sophia. To be clear, Operation Sophia, in the way it was conducted, was not in violation of international law. Phases 1 and 2-A did not require a UN Security Council authorisation and Phases 2-B and 3 were not implemented as originally planned following the alignment of the operation with relevant UN Security Council resolutions and the

⁹⁰Ibid, para 3.

⁹¹Marianne Riddervold, 'A Humanitarian Mission in Line with Human Rights? Assessing Sophia, the EU's Naval Response to the Migration Crisis' (2018) 27(2) *European Security* 158; Boşilcă, Stenberg and Riddervold (n 45).

⁹²Johansen (n 45) 520; Eugenio Cusumano, 'Migrant Rescue as Organized Hypocrisy: EU Maritime Missions Offshore Libya Between Humanitarianism and Border Control' (2019) 54(1) *Cooperation and Conflict* 3.

⁹³S/2020/275 Report of the Secretary-General on the implementation of Resolution 2491 (2019) (6 April 2020) para 15.

⁹⁴2020/472/CFSP Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) Preamble (1).

⁹⁵Berlin Conference on Libya, Conference Conclusions, German Federal Press Office, Press release no. 31/20 (19 January 2020) https://unsmil.unmissions.org/sites/default/files/berlin_conference_communique.pdf (accessed 16 April 2021).

⁹⁶S/RES/2509 (2020) The situation in Libya (11 February 2020); S/RES/2510 (2020) The situation in Libya (12 February 2020).

⁹⁷2020/472/CFSP Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI) Preamble (4), art 5.

cooperation with Libyan authorities.⁹⁸ However, there is still the unanswered question of what might happen if a future CSDP operation in need of UN Security Council authorisation (for example due to its operational area reaching into the territory of a third State) were to act on its own without prior authorisation. Would the EU proceed in such a case, even without State consent, and how would the UN Security Council react? Although the situation was not as problematic in the case of Operation Sophia, its whole course of action sits uncomfortably with the UN–EU partnership, and perhaps the gradual decrease in capacity and the refocus of Operation Sophia on tasks set out in UN Security Council resolutions such as the arms embargo against Libya already indicated a return to the established procedure. This development is supported by Operation Irini now following the same line as previous CSDP operations before Operation Sophia: UN Security Council resolution first, Council decision establishing a CSDP operation second.

The timing of Operation Sophia and its mandate must be understood in the context of the migrant crisis, which reached a peak in 2015. It has been reported that Italy had pushed for an EU-wide response for some time by then.⁹⁹ But as highlighted by the Venezuelan delegate in the UN Security Council meeting discussed above, the whole story of Operation Sophia seems to confirm his point that ‘making migrants, refugees and asylum seekers into a security issue’ might not have been the best way to approach migration and human trafficking in the Mediterranean.¹⁰⁰

Summing up, one might conclude that Operation Sophia was only one episode deviating from the established procedure and now Operation Irini is back on track. However, there are some unresolved issues from this episode which could have an impact on cooperation between the UN Security Council and the EU on military operations in future, in particular in the fields of human trafficking and migration.

5. Outlook: CSDP operations and Frontex

Operation Irini is portrayed as replacing or following in the footsteps of Operation Sophia. However, Operation Sophia’s mandate was broader in terms of tasks and also geographical scope. Given that Operation Irini deals with human trafficking only as a secondary task, does that mean that the EU has now disengaged from broader human trafficking operations in the Mediterranean? This could be one answer, but another one could be that these tasks are now pursued on the internal level.¹⁰¹ What might be pointing towards that are the border operations the EU maintains under the framework of its law enforcement agencies, in particular Frontex. In contrast to the UN Security Council only ‘taking note’ of Operation Sophia, the support by Frontex was ‘welcomed’: ‘Welcoming support already provided by the most concerned Member States, including Member States of the European Union (EU), taking into account inter alia the role of FRONTEX and the specific mandate of EUBAM Libya in support of the Libyan Government, and by neighbouring States.’¹⁰²

After the mandate of Operation Sophia was extended in 2016 to include support for the UN arms embargo against Libya, the mandate of Frontex was extended as well.¹⁰³ The amended Regulation on the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) (Frontex Regulation) renamed the agency ‘European Border and Coast Guard Agency’ although it remained the same legal person.¹⁰⁴ However, the mandate of the agency was extended and its capacity increased.¹⁰⁵

⁹⁸See, e.g., 2016/993/CFSP adding capacity building and training of the Libyan Coastguard and Navy at the request of the Libyan authorities to the mandate of Operation Sophia.

⁹⁹Niklas Nováky, ‘The Road to Sophia: Explaining the EU’s Naval Operation in the Mediterranean’ (2018) 17 *European View* 197.

¹⁰⁰S/PV.7531, Mr Ramírez Carreño (Bolivarian Republic of Venezuela) 5; Boşilcă, Stenberg Riddervold (n 45).

¹⁰¹Roderick Parkes, ‘Reading the Runes: The Future of CSDP and AFSJ’ in Daniel Fiott (ed), *The CSDP in 2020: The EU’s Legacy and Ambition in Security and Defence* (European Union Institute for Security Studies 2020).

¹⁰²S/RES/2240 (2015) Preamble (emphasis in the original).

¹⁰³2016/993/CFSP; Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016, pp 1–76.

¹⁰⁴Regulation (EU) 2016/1624, Preamble (11).

¹⁰⁵Rapid reserve pool of at least 1,500 border guards: Council of the EU Press release, ‘Securing Europe’s external borders: Launch of the European Border and Coast Guard Agency’ (6 October 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/10/06/launch-ebcg-agency/> (accessed 16 April 2021). Current plans are to increase agency staff to 10,000 by 2027: European Council/Council of the EU, Policies, ‘Strengthening the EU’s external borders’ <https://www.consilium.europa.eu/en/policies/strengthening-external-borders/> (accessed 16 April 2021).

Article 1 of the Regulation illustrates the broad scope of the mandate:

This Regulation establishes a European Border and Coast Guard to ensure European integrated border management at the external borders with a view to managing the crossing of the external borders efficiently. This includes addressing migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights, while safeguarding the free movement of persons within it.¹⁰⁶

Compared to CSDP operations, the focus here is on the 'internal security within the Union', not external military operations. This is law enforcement. The mandate of this 'new' agency is broad and covers areas that have been at the heart of the mandate of Operation Sophia, namely combatting human trafficking and migrant smuggling in the Mediterranean.¹⁰⁷ Take, for instance, the broad scope of Frontex Joint Operation Themis operating from Italy, which replaced Joint Operation Triton in 2018: 'Its operational area spans the Central Mediterranean Sea from waters covering flows from Algeria, Tunisia, Libya, Egypt, Turkey and Albania.'¹⁰⁸ In addition, it has the ability to cooperate with third States, which 'constitute a country of origin or transit regarding illegal immigration'.¹⁰⁹

The Frontex Regulation was again reviewed and replaced in 2019 and the mandate and capacity of the agency were once more expanded.¹¹⁰ This included the incorporation of the European Border Surveillance System into the agency's framework, enhanced support in returns and more cooperation possibilities with third States.¹¹¹ Although Frontex operations are law enforcement, this does not mean that they do not have to comply with international law and, in particular, the UN Charter. This prompts two questions for Frontex operations and the role of the UN Security Council: Do operations conducted by Frontex together with other EU agencies need a UN Security Council authorisation if they include the conduct of inspection and seizure of vessels not only off the coast of the EU or on the high seas but within the territorial waters of third States? If they do not have such an authorisation, can CSDP operations (such as Operation Sophia, which has cooperated to a limited extent with Frontex Joint Operations Triton and Themis) delegate their authorisation from the UN Security Council to EU law enforcement agencies?¹¹²

If the nature of Frontex operations is similar to that of previous CSDP operations which needed UN Security Council authorisation, then the UN Security Council would have to authorise these operations as well. On the point of delegation, this might be possible if the UN Security Council's mandate were phrased in a more open way and the specific operation established by the EU were recognised in the subsequent UN Security Council resolutions on the matter, as seen in the case of several CSDP operations.¹¹³ The reason why the actions taken to combat human trafficking in the Mediterranean by Frontex and CSDP operations appear more complex and multi-layered can be found in the EU's institutional setup (the distinction between internal and external policy matters and competences) as well as the additional difficulties in assessing operations at sea instead of on land.¹¹⁴ Yet even though on the EU internal level there is a difference between the assessment of Frontex and CSDP operations, this should not change their evaluation under international law. Looking at the setup from the outside, from an international law perspective, this assessment has to be conducted according to the nature of

¹⁰⁶Regulation (EU) 2016/1624, art 1.

¹⁰⁷Graham Butler, 'EU Foreign Policy and Other EU External Relations in Times of Crisis: Forcing the Law to Overlap?' in Elzbieta Kuzelewska, Amy Weatherburn and Dariusz Kloza (eds), *Irregular Migration as a Challenge for Democracy* (vol 5, Intersentia 2018) 62ff.

¹⁰⁸European Border and Coast Guard Agency, Main Operations: Operation Themis (Italy) <https://frontex.europa.eu/we-support/main-operations/operation-themis-italy/> (accessed 16 April 2021).

¹⁰⁹Regulation (EU) 2016/1624, art 55(2); for an example of this cooperation, see EUBAM Libya, where a Frontex Liaison Officer has been involved on the ground since 2017: <https://frontex.europa.eu/partners/liaison-officers-network/> (accessed 16 April 2021).

¹¹⁰Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1, OJ L 295, 14.11.2019, pp 1–131.

¹¹¹Council of the EU Press release, 'European Border and Coast Guard: Council confirms agreement on stronger mandate' (1 April 2019) <https://www.consilium.europa.eu/en/press/press-releases/2019/04/01/european-border-and-coast-guard-council-confirms-agreement-on-stronger-mandate/> (accessed 16 April 2021).

¹¹²Sophie Dura, 'The EU in the Central Mediterranean: Impact and Implications of the Comprehensive Approach' (2018) 20 *European Journal of Migration and Law* 205, 209ff.

¹¹³See Section 3 above.

¹¹⁴For the legal frameworks relevant to military operations at sea, see, e.g., Anna Petrig, 'Multinational Military Operations at Sea' in Heike Krieger and Robin Geiß (eds), *The 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2020).

the operation, and if the operational area reaches into the territorial waters of another State, then the operation has to secure a UN Security Council authorisation or State consent.¹¹⁵ The EU internal division between military action and law enforcement might blur this line to some extent but does not change its assessment from the outside, from an international law perspective based on the UN Charter and the UN system of collective security.

As long as Frontex operations are conducted with the consent of third States whose territory might come within their operational area, there is no need for a UN Security Council authorisation and they would not interfere with the UN Security Council's responsibilities under UN collective security. However, given the broadening of the mandate of Frontex operations, this might be an issue that should be monitored.¹¹⁶ A cautious approach is also warranted, given the split in tasks that happened gradually, starting with Operation Sophia moving more towards enforcing the UN arms embargo and Frontex taking on more responsibility in tackling human trafficking.¹¹⁷ Operation Irini's mandate is first and foremost based on the UN arms embargo, and combatting human trafficking is only a secondary task, so this division of tasks is even more apparent with the new CSDP operation. The argument that law enforcement can use force if it is 'unavoidable, reasonable and necessary' would, in my opinion, also not free Frontex operations from the requirement of a UN Security Council authorisation if there is no State consent, as the situation should not be different simply due to the internal structure of the EU and rebranding tasks as law enforcement that have previously been tasks of a military operation outside EU territory.¹¹⁸

As this brief outlook shows, the issues that came up during Operation Sophia might not all be resolved by its successor, Operation Irini. The overlap between the tasks taken on by EU law enforcement agencies and CSDP operations in the Mediterranean have created questions as to which internal EU framework is applicable and how to disentangle operations where the competences might stem from multiple different policy areas. Yet this internal complexity does not change the assessment of EU operations on the international level and does not result in a split of tasks which might allow the EU to avoid international oversight on matters where the UN Security Council has the 'primary responsibility'.¹¹⁹

6. Conclusion

In the course of the EU CSDP Operation Sophia, the UN Security Council was confronted with an already established military operation by a regional organisation. Yet it is the UN Security Council's responsibility to authorise military operations on the territory of third States in case there is no State consent and no case of self-defence. This authorisation is necessary for such a military operation to comply with the UN Charter. The UN Security Council authorised the operation ex post but with a limited mandate and scope. As the meeting protocols of the UN Security Council have shown, the reactions to this operation were rather muted and cautious due to the way in which the operation was established and its focus on tackling migration as a security issue. After five years and continued issues with operational capacity and overall effectiveness, the operation was discontinued and a new operation based on a clear prior UN Security Council mandate has taken over, moving away from the migration angle and towards the enforcement of an arms embargo. However, there are still some open questions and it remains to be seen how the UN Security Council will address future EU military operations carried out by several EU agencies in its resolutions, in particular Frontex, which has taken over the migration agenda to some extent.

Whereas the EU's External Action Service has termed the relationship between the EU and the UN as one of 'natural partners', the UN's Department of Political and Peacebuilding Affairs described it in an even stronger way: 'The increasingly complex causes of crises, and their linkages to

¹¹⁵See Section 2 above.

¹¹⁶Peter Dombrowski and Simon Reich, 'The EU's Maritime Operations and the Future of European Security: Learning from Operations Atalanta and Sophia' (2019) 17 *Comparative European Politics* 860, 875ff.

¹¹⁷Mairi Zoi, 'Frontex Rebooted – The Securitization of Migration in the EU by the European Border and Coast Guard and Its Legal Implications in Terms of EU Competences and Social Legitimacy' in Dina Siegel and Veronika Nagy (eds), *The Migration Crisis? Criminalization, Security and Survival* (Eleven International Publishing 2018) 195.

¹¹⁸This refers to the discussion on the use of force in the maritime context, but goes beyond the scope of this article: Arbitral Tribunal constituted pursuant to Article 287, and in accordance with Annex VII, of the United Nations Convention on the Law of the Sea in the matter of an arbitration between: Guyana and Suriname (17 September 2007) para 445; MIV 'SAIGA' (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p 10, para 155; see also: Efthymios Papastavridis, "'Fortress Europe'" and FRONTEX: 'Within or Without International Law?' (2010) 79 *Nordic Journal of International Law* 75.

¹¹⁹UN Charter, art 24(1).

regional and international peace and security challenges such as terrorism and organized crime, make partnership between the two organizations not a choice, but an imperative.¹²⁰ Given this compelling characterisation of their partnership, the UN Security Council and the EU will continue to cooperate, but the strength of that partnership will depend on their actions. Operation Irini, as an EU military operation with prior UN Security Council authorisation, signals a return to stronger cooperation after the break with prior practice in Operation Sophia. What might be interesting to look out for is the scope of both Frontex and CSDP operations and how the UN Security Council will address those operations in future, specifically in the field of migration and human trafficking. Taking a step back and looking at EU military operations through the lens of the UN Security Council could help to see these operations from a different angle and put a renewed – and necessary – focus on their relationship with international law and UN collective security.

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Declarations and conflicts of interest

The author declares no conflict of interests with this work.

¹²⁰UN Department of Political and Peacebuilding Affairs, 'European Union' <https://dppa.un.org/en/european-union> (accessed 16 April 2021); European Union External Action Service, 'United Nations (UN)' (10 June 2020) https://eeas.europa.eu/diplomatic-network/united-nations-un/2342/united-nations-un_en (accessed 16 April 2021).