



# Maritime Safety and Security Law Journal

2022

*Issue 10*



# Operation EUNAVFOR MED IRINI: The Implementation of the United Nations Arms Embargo at Sea by the European Union

*Ioannis STRIBIS\**

## Abstract

The article presents the legal framework of EUNAVFOR MED IRINI, a naval force established by the EU to contribute to the implementation of the arms embargo on Libya by UNSC Resolution 1970 (2011). The legal basis of IRINI is to be found both in the EU Council's Decision establishing it, and the UNSC Resolution it aims to implement. The coexistence of two distinct sets of rules, the collective security mechanism (Ch. VII UN Charter and the EU law, poses legal challenges. The main issues that have arisen from the operation of IRINI and that will be studied in this article are the interpretation and application of the rule of the exclusive flag State jurisdiction and the issue of the sovereign immunity of vessels.

**Keywords:** European Union Naval Force Mediterranean IRINI, arms embargo, Libya, flag State, high seas, sovereign immunity, UN Security Council, UNSC Resolution 1970 (2011).

**First published online:** 13 October 2022

## 1. Introduction

This article addresses the legal framework of the European Union Naval Force Mediterranean IRINI (hereinafter EUNAVFOR MED IRINI or IRINI),<sup>1</sup> established by the Council of the European Union (EU Council) primarily to contribute to the implementation of the arms embargo on Libya decreed by the United Nations Security Council (UNSC) Resolution 1970 (2011).<sup>2</sup> The legal foundation of Operation IRINI is found both in the EU Council's Decision and the UNSC Resolution. This double legal foundation is generating legal challenges due to the coexistence of two distinct though interconnected (in this respect) sets of rules: the UN Charter Chapter VII collective security mechanism, mandatory for all UN members,<sup>3</sup> and EU law, binding upon the Union and its Member

---

\*Ioannis Stribis, Ass. Professor, Department of Mediterranean Studies, University of the Aegean.

1 Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (EUNAVFOR MED IRINI), [2020] OJ L101/4.

2 In addition to the above primary duty, IRINI has been assigned with some additional tasks, namely to prevent the illicit export of petroleum products, including crude oil and refined petroleum products, from Libya and to monitor and gather information on such illicit exports, to contribute to the capacity building and training of the Libyan Coast Guard and Navy in law enforcement tasks at sea, and to contribute to the disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling, *ibid.*, respectively arts 3, 4 and 5.

3 Charter of the United Nations (adopted 26 June 1945, entered into force on 24 October 1945) art 25.



States. The main issues that have arisen from the operation of IRINI relate to the interpretation and application of the rule of exclusive flag State jurisdiction on the high seas and the exceptions to and limitations of this rule in the operation of IRINI as well as the issue of the sovereign immunity of vessels on the high seas. These two themes also involve wider issues of public international law as well as admiralty law, further complicating the legal challenges to the operation of IRINI. This complexity becomes greater by the - not unusual - practice of States to submit the participation of their national assets in international military operations to additional legal and operational requirements imposed by their domestic law. This article analyses the challenges involved in the interpretation and application of rules originating in different legal orders. The understanding of these challenges necessitates situating IRINI in its political and legal context and in particular understanding the objectives pursued by the main actors (|EU, UN, EU Member States, actors in the Libyan conflict(s)), as these objectives may shed light through a teleological approach to the interpretation and application of the relevant applicable legal rules.

## 2. EUNAVFOR MED IRINI

The launching of Operation IRINI to contribute to the implementation of the arms embargo on Libya occurred nine years after the UN decision imposing the embargo. It is important, therefore, to understand the general political and legal background of the decision and the process that led to the launch of IRINI in the form and with the aims and means with which it was endowed by EU Council decision 2020/472.

### 2.1. Launch of EUNAVFOR MED IRINI

In the process of consultation on Libya (launched by the UN and Germany), the German Government in January 2020 hosted in Berlin an international conference to address the situation in Libya: a failed State afflicted by a civil war with numerous competing factions, holding parts of the territory of the country in its pre-2011 extent. The participants of the Berlin Conference<sup>4</sup> acknowledged that the situation in the country was deteriorating to a critical point and required urgent action.

The EU and those of its Member States present at the Berlin Conference committed to support a political process aimed at bringing peace to the war-torn country. The EU has repeatedly underscored that it 'has a strong interest in a stable, secure, united and prosperous Libya' and that '[t]hrough diplomatic action and bilateral support, [it] seeks to assist the country and the Libyan people to return to peace and resume the transition to democracy.'<sup>5</sup> The particular interest and commitment

---

<sup>4</sup> The permanent members of the UN Security Council (China, France, Russian Federation, UK, USA), Algeria, Egypt, Germany, Italy, Turkey, Congo (Republic of the), United Arab Emirates, along with representatives of the UN, including the Secretary-General and his Special Representative for Libya, the African Union, the European Union, and the League of Arab States.

<sup>5</sup> European External Action Service (EEAS), 'EU-Libya relations Factsheet' (EEAS, 2 March 2021) <[https://eeas.europa.eu/headquarters/headquarters-homepage/19163/eu-libya-relations-factsheet\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/19163/eu-libya-relations-factsheet_en)> accessed 20 November 2021.



of the EU is explained by the fact that Libya is an immediate neighbour to three EU Member States: Greece, Italy and Malta, and is therefore a priority for the EU for many reasons, including migration.<sup>6</sup>

The participants at the Berlin Conference recognised ‘the implementation of the United Nations arms embargo ... as a failure and as a priority’<sup>7</sup> and underscored their commitment, *inter alia*, to ‘unequivocally and fully respect and implement the arms embargo established by United Nations Security Council (UNSC) Resolution 1970 (2011) and the Council’s subsequent Resolutions [at the time of the Berlin Conference, on 19 January 2020, resolutions 2292 (2016) and 2473 (2019)], including the proliferation of arms from Libya’<sup>8</sup> and ‘call[ed] on all international actors to do the same.’<sup>9</sup>

Against this background, the EU Council on 17 February 2020 reached a political agreement to launch a new Common Security and Defence Policy (CSDP) military operation in the Mediterranean, aimed at implementing the UN arms embargo on Libya.<sup>10</sup> By this initiative the EU and its Member States underscored their determination to increase their efforts to enforce the UN arms embargo on Libya and thus to contribute to the peace process in this war-torn and lawless country.<sup>11</sup>

For the implementation of the above political accord the EU Council on 31 March 2020 adopted

6 The EU is one of the largest providers of assistance in Libya. In addition to the EUNAVFOR MED IRINI, the topic of the present paper, the EU has set up the Integrated Border Assistance Mission in Libya (EUBAM Libya) to support the Libyan authorities in their efforts to disrupt organised criminal networks involved in smuggling of migrants, human trafficking and terrorism. EUBAM works with the Libyan authorities on border management, law enforcement and criminal justice, and facilitates donor coordination in these areas. The EU operates also the EU Liaison and Planning Cell (EULPC) to provide key security, intelligence and planning expertise to the EU and to the UN Support Mission in Libya (UNSMIL).

7 Josep Borrell Fontelles, EU High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission, ‘Operation Irini: Speech by High Representative/Vice-President Josep Borrell at the Sigonella Naval Air Station Airport’ (EEAS, Speech at the Sigonella Naval Air Station Airport, Sicily, 19 March 2021) <[https://eeas.europa.eu/headquarters/headquarters-homepage/95365/operation-irini-speech-high-representativevice-president-josep-borrell-sigonella-naval-air\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/95365/operation-irini-speech-high-representativevice-president-josep-borrell-sigonella-naval-air_en)> accessed 19 November 2021.

8 The Berlin Conference on Libya, ‘Conference Conclusions, 19 January 2020’, Annex I to the letter dated 22 January 2020 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council (22 January 2020) UN Doc. S/2020/63, 4, para 18.

9 *ibid.*

10 Council of the EU, Foreign Affairs Council (Meeting n 3747) ‘Outcome of the Council Meeting’ (17 February 2020) Brussels <[www.consilium.europa.eu/en/meetings/fac/2020/02/17/](http://www.consilium.europa.eu/en/meetings/fac/2020/02/17/)> accessed 3 November 2021: ‘The Council was debriefed about the outcome of the recent follow up meeting on the Berlin process in the margins of the Munich Security Conference, and had an exchange of views on Libya. In this context, ministers reached a political agreement on the launch of a new operation in the Mediterranean, aimed at implementing the arms embargo imposed by the UN Security Council. Secondary tasks may include fighting the organised crime responsible for migration, and training the Libyan coast guard and navy. The new operation will comprise aerial, satellite and maritime assets and its area of operations will be defined in accordance with the agreed mandate. Ministers agreed that the potential impact on migration flows would be monitored carefully and could, in some cases, lead to the withdrawal of maritime assets from the relevant area’.

11 EU institutions have repeatedly called for an immediate cessation of hostilities and urged all Libyan parties and international actors to refrain from military action that could further exacerbate the conflict. In addition to the establishment of IRINI, the EU adopted complementary measures for promoting the end of conflict and the stabilization in Libya, including sanctions against spoilers of the political process in that country, violators of human rights and international humanitarian law as well as people involved in trafficking and smuggling.



Decision 2020/472 launching EUNAVFOR MED IRINI as an EU military crisis management operation in the Mediterranean. On this occasion the High Representative of the Union for Foreign Affairs and Security Policy and President of the Foreign Affairs Council (EU HR), Josep Borrell, declared that ‘Only political solutions and the full respect of the UN arms embargo will bring a solution to the Libyan crisis. But diplomacy cannot succeed unless it is backed by action. This operation will be essential and a clear contribution to promoting peace in our immediate neighbourhood through a permanent ceasefire.’<sup>12</sup>

IRINI is closely scrutinised by EU Member States, which exercise political control and strategic direction through the Political and Security Committee (PSC), under the responsibility of the EU Council and the EU HR. The PSC is authorised with the powers to amend the planning documents, including the Operations Plan, the Chain of Command and the Rules of Engagement (ROE), and to appoint the Operation Commander and the Force Commander.<sup>13</sup>

## 2.2. Mission and Means of EUNAVFOR MED IRINI

IRINI shall be deployed on the high seas off the coast of Libya.<sup>14</sup> To allow maximum flexibility, the exact extent of its Area of Operation (AOO) in the above wide geographical space is left to the decision of the EU Council.

Operation IRINI’s initial annual mandate expired on 31 March 2021. On 26 March 2021 the EU Council extended the mandate of the Operation until 31 March 2023. Announcing the planned extension one week before its formal adoption, the EU HR underlined the success of IRINI as ‘a unique and impartial instrument to support the implementation of the United Nations arms embargo and to support the peace process’ and its uniqueness in ‘carrying out this task’. Taking stock of the track record of IRINI he added that ‘We [the EU] can be criticised for not doing enough, but we do a lot. And, in any case, we are the only ones acting. One year later, it is fair to say that Operation Irini has achieved remarkable results. ... Operation Irini is not only delivering on its task of securing the Central Mediterranean, but also delivering to the United Nations, reporting on all the cases it has been observing and following up.’<sup>15</sup>

In order to fulfil its core task (implementation of the UN arms embargo on Libya) IRINI is entitled to carry out inspections of vessels on the high seas off the coast of Libya suspected to be carrying arms or related materiel to and from Libya. Operation IRINI can use, in addition to maritime, also aerial and satellite assets. 24 EU Member States are contributing assets to the Operation,<sup>16</sup>

---

12 Council of the EU, Press release ‘EU launches Operation IRINI to enforce Libya arms embargo’ (31 March 2020) <[www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/](http://www.consilium.europa.eu/en/press/press-releases/2020/03/31/eu-launches-operation-irini-to-enforce-libya-arms-embargo/)> accessed 22 November 2021.

13 Council Decision 2020/472 (n 1) art 8.

14 Council Decision 2020/472 (n 1) arts 2(3) and 6. See UNSC Res 2292 (2016) UN Doc S/RES/2292, para 3.

15 EU HR Borrell, Operation Irini (n 7).

16 *ibid.*



which commenced at-sea operations on 4 May 2020. Full operational capability was declared on 10 September 2020, the date on which the first boarding activity took place.

Many practical issues of crucial importance for IRINI operations are regulated in its ROE.<sup>17</sup> The relevant provisions of the ROE are technical and may appear long-winded.<sup>18</sup> For the purposes of this article it suffices to refer to some points of general importance which are relevant for the subsequent developments.

The ROE specify the measures that can be taken for the vessel inspections. These include, in an increasing scale of intervention against a foreign ship: instructions, challenges, warning, open display of weapons, physical obstruction, use of riot control means, use of warning shots, non-disabling fire, disabling fire, and other escalatory steps, including deadly force. Boarding includes the right to visit and, if suspicion remains after checking vessel documentation, the right to search the vessel. Furthermore, the ROE provide for the possibility of temporary restriction of freedom of the crew of the vessel (either on board the intercepted and inspected vessel or on board the inspecting IRINI vessel), when necessary for inspecting or diverting a suspected vessel and commensurate to this necessity. The ROE authorise also the seizure of arms and related materiel trafficked in breach of the UN arms embargo on Libya. As an overall requirement, the action of IRINI in taking the above measures shall be always directed by the guiding principles of proportionality, necessity and minimum force.

### 3. Superposition of Legal Regimes Applicable to operation IRINI

IRINI as an EU military operation is subject to EU law, in particular Council Decision (CFSP) 2020/472 of 31 March 2020. IRINI is also subject to relevant provisions of the primary (in particular art. 42(2) and (4) and 38 of the Treaty on European Union) and secondary EU law, that is the relevant planning documents approved by the EU Council (including the Operations Plan, the Chain of Command, the ROE).

In addition, IRINI has to operate in full conformity and compliance with the UNSC Resolutions which regulate its core mission, the implementation of the UN arms embargo on Libya. These include the aforementioned Resolution 1970 (2011) and all its subsequent resolutions<sup>19</sup> concerning the strict implementation of the arms embargo on the high seas off the coast of Libya. Equally binding upon IRINI are the UNSC Resolutions on combating migrant smuggling and human trafficking into, through and from the Libyan territory and off the

---

<sup>17</sup> An edited version of IRINI's ROE is in file with the author.

<sup>18</sup> The importance, however, of detail in documents regulating the conduct of military operations, which may involve the use of lethal force, cannot be overestimated.

<sup>19</sup> UNSC Res 2292 (2016) UN Doc S/RES/2292; UNSC Res 2357 (2017) UN Doc S/RES/2357; UNSC Res 2420 (2018) UN Doc S/RES/2420; UNSC Res 2473 (2019) UN Doc S/RES/2473; UNSC Res 2526 (2020) UN Doc S/RES/2526 ; and UNSC Res 2578 (2021) UN Doc S/RES/2578.



coast of Libya<sup>20</sup> or enacting measures related to the illicit export from Libya of oil and petroleum products.<sup>21</sup>

It should be underlined that the EU has been so far the sole regional actor implementing the arms embargo on Libya (as well as other measures supporting the Libyan peace process) enacted by the UNSC, and that EUNAVFOR MED operation IRINI is the only arrangement acting under the relevant UNSC authorisations.<sup>22</sup>

With regard to the legal regime applicable to IRINI, the most relevant from the above UNSC Resolutions is Resolution 2292, adopted on 14 June 2016, whose duration has been extended annually,<sup>23</sup> authorising in paragraph 3: 'Member States, acting nationally or through regional organizations [...] in order to ensure strict implementation of the arms embargo on Libya, to inspect, without undue delay, on the high seas off the coast of Libya, vessels bound to or from Libya which they have reasonable grounds to believe are carrying arms or related materiel to or from Libya.'

The superposition of applicable legal regimes becomes more conspicuous when taking into account that the conduct of IRINI, as a military maritime operation on the high seas, shall abide by the international law of the sea, as codified in the 1982 UN Convention on the Law of the Sea (UNCLOS). In addition, the rules of general international law apply. These include rules on self-defence, sovereign immunity or the contents of indeterminate concepts like good faith.

Another layer of regulation that equally applies to EU military operations is the domestic one, that is, the particular rules (enacted in their respective municipal legal orders), to which EU Member States contributing to IRINI subject the conduct of their assets. These domestic rules are included in the national caveats and limitations, specific to each asset-contributing nation. The concerned national troops and units operating under the IRINI ensign, are bound to act in accordance with the normative texts adopted at EU level, in particular the ROE of IRINI, and also the domestic provisions applicable to them (pursuant to the international obligations, national legislation, as well as regulations and practices of the individual contributing EU Member State). This is a practice applied already by those EU Member States that participate in the North Atlantic Treaty Organization (NATO) with respect to their contribution to NATO operations, and is expressly provided for in IRINI's ROE.

---

20 UNSC Res 2240 (2015) UN Doc S/RES/2240; UNSC Res 2312 (2016) UN Doc S/RES/2312; UNSC Res 2380 (2017) UN Doc S/RES/2380; UNSC Res 2437 (2018) UN Doc S/RES/2437; UNSC Res 2491 (2019) UN Doc S/RES/2491; UNSC Res 2546 (2020) UN Doc S/RES/2546; UNSC Res 2598 (2021) UN Doc S/RES/2598.

21 UNSC Res 2146 (2014) UN Doc S/RES/2146; UNSC Res 2441 (2018) UN Doc S/RES/2441; UNSC Res 2473 (2019) UN Doc S/RES/2473.

22 See Report of the Secretary-General 'Report on the Implementation of Security Council resolution 2526 (2020)' (5 May 2021) UN Doc. S/2021/434, paras 16 and 17, 'I would like to express my appreciation for the efforts of the European Union, through operation IRINI, acting under the authorizations renewed by the Security Council in resolution 2526 (2020). The contribution of operation IRINI to the implementation of the arms embargo by sharing information on potential violations with the Panel of Experts on Libya can help enhance its support to the Council and the Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya. [...] I reiterate my call upon all Member States to complement the efforts of operation IRINI'.

23 UNSC Res 2357 (2017) UN Doc S/RES/2357 ; UNSC Res 2420 (2018) UN Doc S/RES/2420; UNSC Res 2473 (2019) UN Doc S/RES/2473; UNSC Res 2526 (2020) UN Doc S/RES/2526 ; and UNSC Res 2578 (2021) UN Doc S/RES/2578.



Dual regulation exists for example with respect to the conditions for the use of lethal force by IRINI assets: while this issue is regulated in detail in the IRINI's ROE,<sup>24</sup> additional restrictions have been stipulated by certain contributing EU Member States, which do not allow their forces to use lethal force when there is no risk to human life. Consequently, the requirements for the use of lethal force by IRINI assets may differ, though operating in the same incident. More crucial for the effectiveness of IRINI and the consistent implementation of its task, some contributing Member States do not, in any case, allow their assets to proceed to non-consensual interdiction of foreign vessels on the high seas, though the IRINI's ROE authorise and regulate, in accordance with the relevant UNSC Resolutions, non-cooperative inspections. In such cases the concerned national assets shall inform the IRINI command of the existence of a national caveat and abstain from the specific operation.

For an operation with power to affect international maritime navigation and transport (through vessel interdiction on the high seas), admiralty law should be added as a further layer of regulation applicable to IRINI operations, to the extent it provides the normative tools for the determination of some issues of jurisdiction on vessels and operation of vessels, in particular when the question of sovereign immunity of vessels is raised.

The operation of IRINI provides concrete examples of the issues arising from this situation of parallel layers of regulation of activities at sea: These challenges concern the application of the rule of the exclusive flag State jurisdiction on the high seas and of the rules on sovereign immunity of vessels in the operational activities of IRINI.

### 3.1. Exclusive Flag State Jurisdiction

Exclusive flag State jurisdiction on vessels sailing on the high seas is a general rule of international law of the sea, provided in Article 92(1) UNCLOS. The same provision stipulates that in exceptional cases expressly provided for in UNCLOS or other international treaties, a derogation can be made. One such derogation is envisaged by the Chapter VII of the UN Charter, through the legally binding actions of the UNSC.

IRINI operates precisely in such a normative framework: the aforementioned UNSC Resolution 2292 (2016) stipulates in its paragraph 3 of the operative part that the UNSC:

*Decides, with a view to addressing the threat posed by unsecured arms and ammunitions in Libya and their proliferation, to authorize, in these exceptional and specific circumstances ... Member States, acting nationally or through regional organizations, ... in order to ensure strict implementation of the arms embargo on Libya, to inspect, without undue delay, on the high seas off the coast of Libya, vessels bound to or from Libya which they have reasonable grounds to believe are carrying arms or related materiel to or from Libya, directly or indirectly, in violation of ... resolution 1970 (2011), as modified ..., provided that those Member States make good-faith efforts to first obtain the consent of*

---

<sup>24</sup> ROE (n 17) rules 132, 162, 992(B).





the vessel's flag State prior to any inspections pursuant to this paragraph, and calls upon all flag States of above-mentioned vessels to cooperate with such inspections.

By this decision, the UNSC authorises the interdiction of vessels suspected to violate the arms embargo on Libya instituted by Resolution 1970 (2011).

In the context of IRINI three further elements are critical: Firstly Resolution 2292 (2016) defines the scope of the authorisation to interdict vessels on the high seas: *ratione loci*, the geographical area is 'the high seas off the coast of Libya'; *ratione materiae*, the reason justifying the interdiction is the existence of 'reasonable grounds to believe' that there is a case of breach of the UNSC imposed arms embargo on Libya; and finally *ratione personae*, all vessels 'bound to or from Libya' are concerned, as the relevant paragraph 3 does not contain any other qualification in this respect except from the port of departure or destination.

The second crucial element contained in the above paragraph 3 of Resolution 2292 (2016) is the derogation from exclusive flag State jurisdiction provided that the intervening force 'make[s] good-faith efforts to first obtain the consent of the vessel's flag State prior to any inspections'. The UNSC coupled this authorisation with a call 'upon all flag States of above-mentioned vessels to cooperate with such inspections'.

The acceptance of the above derogation had been contentious during the negotiations among UNSC members in view of the adoption of Resolution 2292 (2016): permanent members China and Russia were cautious about the omission of the requirement of flag State consent, which, in their opinion, would be against the general principle of exclusive flag State jurisdiction, as well as against the principle of freedom of navigation. Several other UNSC members argued that the Resolution should not subject the implementation of the arms embargo on Libya to the requirement of flag State consent, as attaining flag State cooperation could at times be difficult and that the inclusion of that requirement in the Resolution would hinder the timeliness and effectiveness of interdictions.<sup>25</sup> The 'good-faith efforts' solution above has been the compromise that allowed the adoption of Resolution 2292 (2016).

The requirement of flag State consent for the inspection of vessels pursuant to Resolution 2292 (2016) is envisaged as a procedural obligation: an obligation of conduct, not an obligation of result. Hence, should the good faith efforts of the requesting State (acting nationally or through a regional organisation, as is the case for IRINI) be unsuccessful, the inspection can proceed, in derogation of the rule of the exclusive flag State jurisdiction.<sup>26</sup>

The fulfilment of the above obligation of conduct raises the question of the meaning and extent of the 'good-faith efforts' that troop-contributing states need to deploy in order to obtain the consent of the suspected vessel's flag State prior to proceeding to the inspection. The concept of good faith - originally

---

25 Security Council Report 'Vote on a Resolution on Maritime Interdiction to Implement the Arms Embargo on Libya' (14 June 2016) <[www.securitycouncilreport.org/whatsinblue/2016/06/vote-on-a-resolution-on-maritime-interdiction-to-implement-the-arms-embargo-on-libya.php](http://www.securitycouncilreport.org/whatsinblue/2016/06/vote-on-a-resolution-on-maritime-interdiction-to-implement-the-arms-embargo-on-libya.php)> accessed 16 November 2021.

26 Ioannis Stribis, 'Maritime repercussions of Security Council resolutions on terrorism', in Kiara Neri (ed), *United Nations Security Council and the Sea* (Editoriale Scientifica 2018) 209-211.



to be found in international law in the law of treaties - is highly dependent on the particulars of each incident and can be subjective:<sup>27</sup> the command of the operation as well as the requesting State in a given case could interpret and assess differently the response/non-response of the flag State as performed in good faith or not. By its very nature, as an indeterminate legal concept as good faith unavoidably leaves a wide margin of discretionary power to parties involved.<sup>28</sup> The exact conditions of the fulfilment of the good faith requirement is thus fact-dependent and varies depending on circumstances. The practice of IRINI showcases also this general principle, as discussed further below.

The third relevant principle included in Resolution 2292 (2016) paragraph 3 gives an indication of the time frame necessary in order to determine the above good faith requirement: the text limits the margin of discretion of the parties involved with respect to the time between the start of the 'good-faith efforts' to obtain flag State consent and the reaction of the latter by stipulating that the inspection shall be done 'without undue delay'.

In drafting the operational documents for IRINI, the competent EU authorities integrated the above mentioned general principles. In particular IRINI's ROE sought to avoid diverging or conflicting interpretations of the requirement of good-faith efforts to obtain the consent of the concerned flag State before proceeding to inspect a suspected vessel, and to instill objectivity and uniformity in the Operation's actions: IRINI's ROE specify that good-faith efforts will be considered to have been exhausted if there is no decision in response to a request for consent within four hours from the time of the request. In so doing, the ROE follow what the command of IRINI qualifies as 'a widely recognised model in international maritime practice',<sup>29</sup> and, with reference to a number of

<sup>27</sup> For a panorama of the issue, see Robert Kolb, *Good faith in international law* (Hart 2017), a revised and shortened version of the author's doctoral thesis (University of Geneva) published as *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Presses Universitaires de France 2000).

<sup>28</sup> In this respect there is abundant literature in domestic law, which may enlighten also the discussion in public international law, see, among many others, Reinhard Zimmermann, Simon Whittaker, *Good Faith in European Contract Law* (CUP 2006); Eduardo T. Filho, *O Princípio da Boa-fé no Direito Civil* (Almedina 2020); Roberto Llorente Infante, *De buena fe* (Círculo Rojo 2018); Judith Martins-Costa, *A boa-fé no direito privado: Critérios Para a sua Aplicação* (2<sup>nd</sup> edn, Saraiva 2018); Fabrizio Piraino, *La buona fede in senso oggettivo* (Giappichelli 2015); Paolo Gallo, *Contratto e buona fede. Buona fede in senso oggettivo e trasformazioni del contratto* (Utet Giuridica 2014); Joan Picó I Junoy, *El principio de la buena fe procesal* (Vallirana 2013); Bawar Bammarny, *Treu und Glauben und UN-Kaufrecht (CISG). Eine rechtsvergleichende Untersuchung mit Schwerpunkt auf dem islamischen Rechtskreis* (P Lang 2011); Camila de Jesus Mello Gonçalves, *Princípio da Boa-fé* (Elsevier 2008); Andrea D'Angelo, Giuseppe Monateri P., Alessandro Somma, *Buona fede e giustizia contrattuale. Modelli cooperativi e modelli conflittuali a confronto* (Giappichelli 2005); Klaus Peter Berger, Thomas Arntz, 'Good faith as a general organising principle of the common law', [2006] LCIA 167; G. Robin, 'Le principe de bonne foi dans les contrats internationaux', [2005] IBLJ 695; Nudrat Majeed, 'Good Faith and Due Process: Lessons from the Shari'ah', [2004] LCIA 97; Roger Brownsword, Norma J. Hird, Geraint G. Howells, *Good Faith in Contract: Concept and Context* (Ashgate 1999); Bernhard Pfister, *Die neuere Rechtsprechung zu Treu und Glauben im Zivilprozess* (P Lang 1998).

<sup>29</sup> EUNAVFOR MED IRINI, Report 2526 (2020) (n 22); (Reporting period 31 March 2020 – 18 February 2021) - EUNAVFOR MED IRINI contribution to SG report on the implementation of UNSCR 2526 (2020) 3.



international agreements containing the four-hour rule,<sup>30</sup> as ‘a consolidated interpretation of the concept of good-faith efforts mentioned in the UNSC Resolution 2292 (2016).’<sup>31</sup>

In this respect, the EU regulation complements the UNSC Resolutions, which did not provide a time limit for good-faith efforts; however, the question of potential non-conformity of the four-hour rule with the UNSC Resolution can and has been raised.

With regard to seeking flag State consent, two options can be envisaged: consensual and non-consensual inspection. In the former case, the requested consent can be explicit (expressly given by the flag State or the master) or tacit, in case there is no response to the request for consent within four hours from the time the request has been sent to the flag State. When it comes to the non-consensual inspection, ROE distinguish between two variants, on the basis of the likelihood of use of force by the suspect vessel in case of boarding. This distinction is very important for the type of response of IRINI assets. Thus, the ROE consider ‘non co-operative’ inspection the situation when the master of the suspected vessel fails to comply with legitimate instructions by IRINI asset or declares that they will attempt to prevent the boarding by manoeuvre or non-provision of means of access or when physical barriers can be expected to be employed against boarding. When however the master of the suspected vessel is expected, or has explicitly stated, that they will use force to prevent the boarding party gaining access to the vessel, the ROE qualify the situation as ‘opposed boarding.’<sup>32</sup>

In fact, for purposes other than the intensity of the measures to be adopted in a situation where a suspected vessel denies inspection by IRINI asset, ‘non co-operative’ ‘opposed’ boarding are two sides of the same coin. In both cases, the IRINI ROE authorise the use of (minimum) force in order to board the vessel.<sup>33</sup>

Nevertheless, the reality proved to be more nuanced, as has been shown through a November 2020 incident with the Turkish-flagged vessel *Roseline A*. At the time of the incident this merchant vessel was sailing from Turkish port Ambarlı toward the Libyan port Misurata. Given the pattern of navigation of *Roseline A*, Operation IRINI had reasonable grounds to suspect that she could be acting

---

30 *ibid.* The referred to international convention are: Council of Europe Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Strasbourg) (adopted 31 January 1995, entered into force 1 May 2000) ETS No. 156; Agreement concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (San José) (adopted 10 April 2003, entered into force 18 September 2008), Registration Number 55538 (no UNTS volume number has yet been determined for this record); 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (London) (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc. LEG/CONF.15/21.

31 See Letter of Minister of Foreign Affairs of Turkey Mevlüt Çavuşoğlu to UNSG António Guterres (29 November 2021) UN Doc. S/2020/1156, 2 December 2020, 2.

32 Respectively ROE (n 17) 172 and 173.

33 In these cases, commensurate force may be used also in order to restrict the freedom of master and crew of the boarded vessel (on board that vessel or an IRINI asset) during the visit and inspection and also for the seizure of illegally trafficked arms and related material in breach of the SC arms embargo on Libya.



in breach of the UN arms embargo.<sup>34</sup>

Acting on these grounds, an IRINI asset (a helicopter from the German frigate *Hamburg*) undertook the inspection of *Roseline A*. The inspection took place on 22 November 2020, five and a half hours<sup>35</sup> after the lack of response by the Turkish authorities to the request addressed to them by IRINI headquarters, and following the cooperative approach of the *Roseline A*'s master and crew.<sup>36</sup> More than thirteen hours after the consent request had been sent to Turkey and while the inspection was in progress for six hours (and no prohibited items had been found), Turkish authorities protested the boarding, and, acting on this protest, IRINI Headquarters instructed the German helicopter and staff to cease the inspection and leave the vessel,<sup>37</sup> which continued towards Misurata.

This incident gave rise to an exchange of letters between the Minister of Foreign Affairs of Turkey Mevlüt Çavuşoğlu and the EU HR Josep Borrell. It also triggered communications by Turkey to the UN Secretary-General and to the International Maritime Organization (IMO).

In these documents Turkey qualified the boarding of *Roseline A* as 'blatant violation of international law'<sup>38</sup> and supported that position with two main points: the rejection of any possibility of non-consensual intervention on foreign flagged vessels on the high seas and the rebuff of the four-hour rule in the assessment of the good-faith efforts to obtain the flag State's consent for the intervention.

With regard to the first point, the Turkish Ministry of Foreign Affairs (MFA) states that 'neither UNSC Resolution 2292 (2016) nor any other UNSCR grants the right to member States or to regional organizations, to arbitrarily board any vessel on the high seas, without the clear consent and authorization of the flag State.'<sup>39</sup> This statement goes against the unambiguous language of paragraph 3 of UNSC Resolution 2292 (2016) and disregards the 'good-faith efforts' compromise. Thus, by its protest against IRINI and the EU, Turkey actually attacked the compromise solution reached at a unanimous UNSC not to render the consent of the flag State a prerequisite for the inspection on the high seas of vessels suspected of violating the UN arms embargo on Libya. The Turkish argument

---

34 *MV Roseline A* has been known to behave in a suspicious manner at sea. For example, as of 20 October 2020 from 09:51 she was not shining the Automatic Identification System (AIS) for a period of 59 hours. She also had her AIS off for a period of 128 hours starting 5 July 2020 at 02:50. Based on the information gathered by IRINI from various sources and also provided by EU Member States, *Roseline A* was included on 16 June 2020 in the IRINI OHQ Vessels of Interest list (vessels fulfilling several indicators that lead to suspect a possible involvement in arms trafficking and requiring further investigations). *Roseline A* undertakes frequent port callings in Libya and in countries suspected of illegal arms trafficking or military support to factions involved in the Libyan conflict. EU Satellite Centre (SatCen) imagery had confirmed that *Roseline A* was at the Libyan port Misurata on 12 June 2020 where she possibly unloaded two armoured vehicles.

35 An additional hour was provided by IRINI to the flag state without however receiving a positive or negative answer to the request for inspection.

36 Turkey contested the cooperation of the master of *Roseline A*, MFA Turkey to UNSG, 29 November 2021 (n 31) 3.

37 Due to weather conditions the inspecting team remained on board *Roseline A* and left her early in the next morning.

38 MFA Turkey to UNSG, 29 November 2021 (n 31) 2 and 3.

39 *ibid* 2.



endeavours to ‘undo the [Security] Council’s actions.’<sup>40</sup> This point has been made explicitly by Turkey in a document relating to the *Roseline A* incident, submitted in May 2021 to the Legal Committee of the IMO. In this document, the Turkish government asked the IMO Legal Committee to address the question ‘whether the United Nations Security Council has the mandate to lay down a rule which is in clear contradiction to the law of the sea, including the SUA Convention and UNCLOS, such as those requiring clear consent of the flag State for the boarding of its vessel by foreign war ships.’<sup>41</sup>

In his reaction to Turkey’s protest, the EU HR did not miss the opportunity to highlight to the Turkish Foreign Minister that ‘Resolution 1970 (2011) and subsequent resolutions are legally binding on all Member States of the United Nations, including the Republic of Turkey.’<sup>42</sup> Further, the EU HR rejected the Turkish complaint, underlining that ‘Operation IRINI fully complied’ with the obligations out of the applicable UNSC Resolutions and reminded Turkey that ‘pursuant to paragraph 3 of resolution 2292 (2016), all Member States of the United Nations have a duty to cooperate with inspections undertaken in that framework.’<sup>43</sup>

In a broader perspective, the language of the relevant provisions of UNCLOS (arts. 92, 110) that Turkey invokes in support of its rejection of the possibility of non-consensual interventions in foreign-flagged vessels on the high seas, as well as the existence of other international treaties providing for ‘consent by default’ or ‘implicit consent’ procedures<sup>44</sup> leave no doubt that the rule of the exclusive jurisdiction of the flag State on the high seas is not a peremptory rule (*ius cogens*) of the international law of the sea and can be derogated from in case such derogation is allowed by provisions of UNCLOS or by any other international treaty. Article 92(1) reads ‘Ships shall sail under the flag of one State only and, *save in exceptional cases expressly provided for in international treaties or in this Convention*, shall be subject to its exclusive jurisdiction on the high seas’ and Article 110(1) reiterates this principle stipulating that ‘*Except where acts of interference derive from powers conferred by treaty*, a warship which encounters on the high seas a foreign ship, (...), is not justified in boarding it unless there is reasonable ground for suspecting that(...)’.<sup>45</sup>

The authority therefore of IRINI to inspect foreign vessels on the high seas is founded on the aforementioned UNSC Resolutions adopted under Chapter VII UN Charter, which not only are

---

40 *Aerial Incident at Lockerbie (Libya v. USA)* (Preliminary Objections) [1998] ICJ Rep 129, para 40.

41 IMO Legal Committee, 108th session (21 May 2021) Doc. LEG/108/5/3, 3, para 16.

42 Letter of 4 December 2020 from Josep Borrell, High Representative/Vice-President of the European Commission, addressed to Mr. Çavuşoğlu, (8 December 2020) UN Doc. S/2020/1178, 3; EU HR Borrell also wrote in this respect that the ‘common objective should be to ensure that the arms embargo on Libya imposed by the United Nations Security Council, acting unanimously under Chapter VII of the Charter of the United Nations, is fully *implemented*’.

43 *ibid* 3.

44 See n 31 and n 55.

45 Emphasis added.



binding upon all States, by virtue of the UN Charter itself,<sup>46</sup> but also prevail, in accordance with Article 103 UN Charter, over obligations under any other international agreement.<sup>47</sup>

While the situation with regard to the legality of the inspection of *Roseline A* being clear from the point of view of the relevant UNSC Resolutions, the legal office of IRINI gave two contradictory pieces of advice: Shortly before, and at commencement of boarding it stated to Turkey that the lack of opposition by the flag State within four hours after the relevant request for consent had been addressed to the flag state, gave the right to IRINI assets to board and inspect a foreign ship: 'Also without the flag State consent, fulfilling the good-faith efforts, an inspection can be undertaken.'<sup>48</sup> Yet, the very next day, after the interruption of the inspection following Turkey's protest, the same legal office submitted that 'the operation was suspended due to not having received any form of consent, explicit or otherwise, from the flag State',<sup>49</sup> a consent that the previous day was deemed by the same office not to be required. Turkey did not miss the opportunity to underscore this inconsistency.<sup>50</sup> The above contradictory statements bring confusion into the mandate of IRINI and its execution in concrete cases: the second statement constitutes a direct challenge, by a subordinate EU body, to the four-hour rule decreed by the competent EU legislator, as at any time any flag State can deny or withdraw its consent. Yet, rendering the consent of the flag State a requirement for the boarding obstructs the effective implementation of the relevant UNSC Resolutions, adding a condition which is deliberately not in the Resolution text. It may be assumed that the contradictory opinions of the IRINI legal office are due to political and not legal reasons. This is one of the detrimental effects of the impact of politics on international law. It is suggested that the command of IRINI did not wish to create friction with Turkey; therefore, the first legal opinion, based on the applicable international and EU law, was set aside by the second, politically motivated, opinion, disregarding the UNSC Resolutions on the strict implementation of the arms embargo on Libya and the EU rules on IRINI. One may understand the political constraints of a military operation such as IRINI, yet in this case the credibility of the Operation and consequently of the EU as a whole is at stake.

The second point of the Turkish protest consisted in the contention that 'the four-hour notice' within which the requested flag State must reply, so that the condition of the good-faith efforts is fulfilled as provided for in UNSC Resolution 2292 (2016), 'is not applicable as far as Turkish-flagged ships are

---

46 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 54, 'when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter' (para 116).

47 *Aerial Incident at Lockerbie (Libya v. UK)* (Provisional Measures) [1992] ICJ Rep 15, para 39; comp. *Nicaragua v. USA* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 107.

48 Letter 14 December 2021 of Minister of Foreign Affairs of Turkey Mevlüt Çavuşoğlu to EU HR Josep Borrell (17 December 2020), UN Doc. S/2020/1240, 3.

49 *ibid.*

50 The two contradictory legal advices were given within 24 hours.



concerned<sup>51</sup> because '[t]he imposition of arbitrary deadlines and self-proclaimed extensions are not acceptable and cannot be considered as an act of good faith.'<sup>52</sup>

The four-hour notice rule is not to be found in UNSC Resolution 2292 (2016), or in other relevant resolutions. It has been adopted by the EU organs with reference to IRINI. In this respect, the EU regulation complements the UN one, providing for a practical guide for the application of the relevant paragraph of Resolution 2292 (2016). The EU decision-makers who devised the IRINI rules, adopted the four-hour notice rule justifying this choice as 'a widely recognised model in international maritime practice',<sup>53</sup> representing 'a consolidated interpretation of the concept of good-faith efforts mentioned in the UNSCR 2292 (2016) related to the arms embargo on Libya'<sup>54</sup> and referred to international agreements providing for the four-hour period after which the consent of the flag State is, under concrete modalities, deemed given.<sup>55</sup>

In addition to 'the standard practice' and 'default rule' of the four-hour period<sup>56</sup> invoked by the EU authorities, a significant consideration in favour of this rule is provided by the language of UNSC Resolution 2292(2016) paragraph 3, which stipulates that the inspection of vessels suspected to violate the arms embargo on Libya shall be done 'without undue delay': the UNSC recognises that there is a sense of urgency imposed by the necessity of strict implementation of the arms embargo. Therefore, a short period of time between the request to the flag State and the reply/non-reply, is both justified and required.

In any case, Turkey did not provide an alternative time frame that would not be considered arbitrary: on the contrary, it claimed that its consent as flag State is always necessary for the inspection of vessels on the high seas, in disregard of UNSC Resolution 2292(2016) and the 'good-faith efforts' rule in its paragraph 3. This effort to move the framework for the assessment of the IRINI's actions from the implementation of the relevant UNSC Resolutions (and the there envisaged non-consensual boarding of foreign vessels violating the arms embargo on Libya, after exhaustion of good-faith efforts) to another set of rules, Turkey brought the case of *Roseline A* also to IMO, in particular its Legal Committee, under the agenda item 'Advice and guidance in connection with the implementation of IMO instruments', as an issue relating to the implementation of the Convention

---

51 MFA Turkey to UNSG, 29 November 2021 (n 31) 2.

52 *ibid* 3.

53 EUNAVFOR MED IRINI, Report 2526 (2020)(n 22) 3.

54 See MFA Turkey to UNSG, 29 November 2021 (n 31) 2, quoting the reply of 'Operation IRINI officials' to Turkey.

55 From the three cited agreements in the EUNAVFOR (MED IRINI, Report 2526 (2020) (n 22) 3), more relevant are the 2005 Protocol to the SUA Convention (art 8*bis* (5)(d)) and the 2003 Regional Caribbean Regional Maritime Agreement (art 16(3)). On the provided for in these agreements simplified 'consent by default' or 'implicit consent' procedures, see Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 137, 177-181; Kiara Neri, *L'emploi de la force en mer* (Bruylant 2013) 166, 172-174.

56 Fabio Caffio, 'Challenges for cooperation in the Mediterranean after the global pandemic', in EU Headquarter EUNAVFOR MED IRINI, CJE Branch and Media Cell (ed), *Challenges for cooperation in the Mediterranean after the global pandemic, Shared Awareness and Deconfliction in the Mediterranean SHADE MED, 26-27 November 2020 Rome – Italy, Conference Book* (L'Armadillo editore 2021) 30.



for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), as amended by the 2005 Protocol).<sup>57</sup> This attempt did not achieve its objective, as the SUA Convention and its 2005 Protocol are not relevant for, let alone applicable to, the *Roseline A* incident, and the legal basis for the boarding of the vessel was the UNSC resolutions regarding the arms embargo on Libya.

Turkey contested also the appropriateness of the method of communication of the request for its consent to the inspection of *Roseline A*.<sup>58</sup> The EU rejected this grievance, stating that IRINI sent an official request for consent to relevant points of contact in the Turkish MFA, listing the Turkish officials contacted,<sup>59</sup> which request was then transferred to, and handled by, the Head of the Maritime Department of Turkey's MFA.<sup>60</sup> This way of communication has been a standard practice for IRINI (and also for its predecessor Operation SOPHIA), to which no protest had ever been raised by any contacted flag State or by the UN sanctions committee.<sup>61</sup>

A noteworthy point arising from the perusal of the correspondence exchange with respect to the *Roseline A* incident is that Turkey, which is not currently a party to UNCLOS, relies explicitly on UNCLOS for its arguments relating to the boarding of *Roseline A* and elaborates on the interpretation of its provisions. This explicit reference to UNCLOS departs from the older position of the government of Turkey to avoid in its documents any reference to UNCLOS and to refer exclusively to customary law, lest such reference be used as an argument in favour of the universal application of UNCLOS.

### 3.2. The Question of Vessels Entitled to Sovereign Immunity

Critical for the issue of intervention on vessels is also the question of the sovereign immunity. This issue is regulated by UNCLOS in Articles 95 ('Immunity of warships on the high seas') and 96 ('Immunity of ships used only on government non-commercial service'). In accordance with the former 'Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.'

The EU rules on IRINI, following the relevant UNSC Resolution provision (2292 (2016), paragraph 7), specifically provide that the consent procedure does not apply to vessels entitled to sovereign immunity under international law.<sup>62</sup>

With regard to the immunity of ships, other than warships, Article 96 UNCLOS stipulates that 'Ships

<sup>57</sup> IMO 2021 (n 41).

<sup>58</sup> MFA Turkey to UN SG, 29 November 2021 (n 31) 2 and 3.

<sup>59</sup> Director General for Bilateral Political Issues, Maritime and Aviation; Head of Department for Arms Control and Disarmament; Mission of Turkey to the European Union and Turkish Embassy in Rome (where IRINI is headquartered).

<sup>60</sup> EU HR/VP to MFA Turkey (4 December 2020) (n 42) 3. Turkey did not contest that the said request was sent to the Turkish Embassy in Rome and the Permanent Delegation of Turkey to the EU in Brussels, MFA Turkey to UNSG, 29 November 2021 (n 31) 2.

<sup>61</sup> EU HR/VP to MFA Turkey (4 December 2020) (n 42) 3. Turkish authorities were moreover invited to designate new or additional contact points if they so wish.

<sup>62</sup> ROE, Rule GENTEXT 18.





owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.' While the notion of ownership can be in most cases relatively straightforward, the concept of 'operation of a vessel by a State' as a condition for the entitlement to sovereign immunity, and its application, raises complex issues of interpretation.<sup>63</sup> To the uncertainty as to the exact scope of the application of the above provision is added the further requirements provided for in Article 96 UNCLOS: the exclusive governmental character of the service and the exclusive non-commercial nature of the service.

Such a situation arose in June 2020 with respect to the Tanzania-flagged MV *Cirkin*, which was escorted by three Turkish warships, sailing from Istanbul (Turkey) to Misurata (Libya). While *Cirkin* was on the high seas, she was hailed by an IRINI naval asset (the Greek frigate *Spetsai*), which had reasonable grounds to believe that *Cirkin* was transporting items prohibited under the arms embargo, to provide information about her cargo and voyage plan. No reply was received, instead, one of the Turkish warships escorting her stated that she was 'under control and protection of the Republic of Turkey'. Later, the Turkish warship specified that '*Cirkin* was chartered by Turkey' to carry medical supplies to Libya. Upon these statements by the Turkish naval officers escorting the *Cirkin*, the IRINI command concluded that the Tanzanian-flagged vessel enjoyed sovereign immunity and, thus, instructed the Greek frigate to allow her to continue her voyage unhindered.<sup>64</sup>

The lawfulness of the decision of IRINI HQ to consider the *Cirkin* immune on the high seas as a vessel 'operated by a State and used only on government non-commercial service' raised serious doubts. The question was whether the 'charter' by a State fulfils the criteria of Article 96 UNCLOS, so that a chartered vessel could also be entitled to sovereign immunity.

The response to the above question required the determination of whether the 'charter' of a commercial vessel by a government satisfies the condition of the operation of the said vessel by the charterer State. In accordance with admiralty law (another layer of legal regime applicable to seagoing vessels), 'charter' is a concept covering many types of relationship between the vessel and the charterer: it can be for example for a time, for a voyage, bare-boat.<sup>65</sup> This variety of types of charter leads to question whether

---

63 When the International Law Commission was considering the notion of State-operated aircraft (in another framework, the Draft articles on Jurisdictional Immunities of States and Their Property), 'Some [of its] members raised the question of State-owned or State-operated aircraft engaged in commercial service .... The Commission, while recognizing the importance of the question, felt that it called for more time and study', ILC 'Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries' (1991) ILC Yearbook, vol. II, part two, 13, para 24.

64 EU HR Borrell, 'Answer given to European Parliament – Question E-003726/2020 by Özlem Demirel (GUE/NGL)' (European Parliament, 19 October 2020) <[www.europarl.europa.eu/doceo/document/E-9-2020-003726-ASW\\_EN.html](http://www.europarl.europa.eu/doceo/document/E-9-2020-003726-ASW_EN.html)> accessed 11 December 2021; Claudio Bertolotti, 'EUNAVFORMED'S 'Irimi' Operation: Constraints and two critical issues' (START InSight, 25 September 2020) <[www.startinsight.eu/en/eunavformed-irini-operation-constraints-and-two-critical-issues/](http://www.startinsight.eu/en/eunavformed-irini-operation-constraints-and-two-critical-issues/)> accessed 9 September 2021.

65 Evi Plomaritou, Anthony Papadopoulos, *Shipbroking and chartering practice* (8<sup>th</sup> edn, Informa Law 2018); Yvonne Baatz, *Maritime Law* (3rd edn, Informa Law 2014) 117ff; Stephen Girvin, *Carriage of Goods by Sea* (2nd edn, OUP 2011); Julian Cooke and others, *Voyage Charters* (4th edn, Informa Law 2014).



any charter or a type thereof constitute 'operation of a vessel' in the terms of Article 96 UNCLOS.

The question is not new: States have previously tended to invoke this rule in order to claim jurisdictional immunity for commercial vessels they have chartered. Already in the first decades of twentieth century the exact scope of application of the immunity of state-operated vessels created difficulties that required the adoption of specific normative guidance: the International Convention for the Unification of Certain Rules relating to the Immunity of state-owned Vessels (Brussels, 10 April 1926)<sup>66</sup> provided that 'craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, ... shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem.' (Article 3(1)). The interpretation and application of this provision gave rise to disagreements among the parties and lead them to adopt an authoritative interpretation through an Additional Protocol to the convention, signed at Brussels on 24 May 1934.<sup>67</sup> Article I of this Additional Protocol states the interpretative predicament created by the condition of the operation of a vessel by a State:

it has been doubted whether, and to what extent, the expression '*exploités par lui*' ['operated by a State'; French is the only original language of the 1926 Brussels Convention] in Article 3 of the Convention extends or could be construed as extending to ships chartered by a State, whether for time or voyage,

and it continues by the adoption of an interpretative declaration in the following terms:

it is hereby declared for the purpose of removing such doubts, as follows: Ships on charter to a State, whether for time or voyage, while exclusively engaged on governmental and non-commercial service, and cargoes carried therein, shall not be subject to any arrest, seizure or detention whatsoever, but this immunity shall not prejudice in any other respect any rights or remedies accruing to the parties concerned. A certificate given by a diplomatic representative of the State concerned in manner provided by Article 5 of the Convention shall be conclusive evidence of the nature of the service on which the ship is engaged.

A similar approach has been advanced with respect to Article 16(2) of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property extending jurisdictional immunity to 'vessels owned or operated by a State and used, for the time being, only on government non-commercial service'. In its commentary under this provision in 1991, the International Law Commission suggested that '[t]he concept of the operation of merchant ships or ships engaged in commerce is given some clarification by way of illustration in paragraph 3. The expression 'a State which operates a ship' covers also the 'possession', 'control', 'management' and 'charter' of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.'<sup>68</sup> Not only does this passage confuse

---

66 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, (signed at Brussels, April 10<sup>th</sup>, 1926) 176 LNTS 200.

67 *ibid* 214.

68 ILC 'Draft articles on Jurisdictional Immunities of States and Their Property' with commentaries (n 63) 52, para 9.



ownership and operation, by stating that the latter covers ‘possession’, also it proposes an excessively wide interpretation of the term, not warranted by State practice and departing from the understanding of the concept of charter in admiralty law.

Be that as it may, the 2004 Convention on Jurisdictional Immunities of States and Their Property, let alone the commentary on it, could not be usefully invoked in the *Cirkin* incident, as the 2004 Convention has not entered into force. Equally, the 1926 Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its 1934 Protocol are not relevant or applicable in the case, as Tanzania (the flag State of *Cirkin*) is not a party to the 1926 Convention and its Protocol.

More importantly, the value of the above documents for the interpretation of Article 96 UNCLOS is doubtful. A commentary to a convention that has not entered into force offers little to no guidance for the interpretation of an UNCLOS provision. As to the Brussels Convention and its Additional Protocol, they are probably obsolete and, in any case, superseded by the relevant provisions of UNCLOS. In this respect it is significant to note that in its order in the *ARA Libertad* case (*Argentina v. Ghana*, 2012), the International Tribunal for the Law of the Sea, in a dispute where the point at issue was precisely the immunity of a vessel, relies on the UNCLOS provisions, without any reference whatsoever to the 1926 Convention and its Protocol.<sup>69</sup>

In view of the above, and with respect to IRINI which is tasked with contributing to the implementation of UNSC Resolutions explicitly requiring the ‘strict implementation’ of an arms embargo, for a vessel to be operated by a State (as required by UNCLOS) it is not enough to be chartered by the said State or to be under its protection. Interpretative attempts to broaden the number of vessels that may enjoy immunity on the grounds that are operated by a State, infringe upon the objective of the arms embargo on Libya and ultimately erode the effectiveness of the strict implementation of such embargo.

Later developments in the case of the *Cirkin* show that the EU authorities did not accept the claims that *Cirkin* was operated by Turkey and thus entitled to sovereign immunity under UNCLOS Article 96. The EU Council imposed sanctions on the private Turkish shipping company Avrasya Shipping (headquartered in the Black Sea coast Turkish city Samsun), which ‘operates a vessel called *Cirkin* found to have violated the arms embargo in Libya established in UNSCR 1970 (2011) and transposed in Article 1 of Decision (CFSP) 2015/1333.’<sup>70</sup> In accordance with the above EU Regulation 2020/1309, at the time the cause of action arose (June 2020), *Cirkin* was operated by a private maritime company and not by a State. Therefore, the legal basis for the abstention of IRINI to inspect the *Cirkin* cannot

---

<sup>69</sup> *ARA Libertad (Argentina v. Ghana)* (Provisional Measures) [2012] ITLOS Rep 332.

<sup>70</sup> Council Implementing Regulation (EU) 2020/1309 of 21 September 2020 implementing Article 21(2) of Regulation (EU) 2016/44 concerning restrictive measures in view of the situation in Libya, [2020] OJ, Annex, L3051/4, ‘Avrasya Shipping is a maritime company which operates a vessel called *Cirkin* found to have violated the arms embargo in Libya established in UNSCR 1970 (2011) and transposed in Article 1 of Decision (CFSP) 2015/1333. In particular, the *Cirkin* has been linked to transports of military material to Libya in May and June 2020. 21.9.2020’.



be found on Article 96 UNCLOS.<sup>71</sup>

The issue of a non-state, commercial vessel under the escort of a third State warship is specifically addressed by the IRINI rules.<sup>72</sup> In accordance with these provisions, in case a suspected vessel is escorted by a third-party warship, the IRINI ROE provide that an IRINI asset purporting to inspect the suspected vessel shall inform accordingly the escorting warship and observe the four-hour rule. Should the escorting warship obstruct the boarding through disruptive behaviour, the concerned IRINI asset shall stop the boarding and limit its action to the collection of information on the event with a view to reporting the situation to the UN via the IRINI command. In addition, the IRINI ROE rule out any use of force to compel compliance with the order to divert to suitable port or to stop any suspected vessel escorted by third-party warship; in this case also the only envisaged action by IRINI is to collect information and report the incident to the UN (specifically the UNSC Libya Sanctions Committee).

#### 4. Conclusion

Since its inception, Operation IRINI has been functioning as a laboratory where different layers of norms coexist and guide the conduct of its military assets. This symbiosis has not been always an easy enterprise. It requires skill and flexibility from the commanders and the decision-makers at the EU level. In addition, the political climate in Libya and international reactions are not conducive to unimpeded operation of this EU Naval Force, because the implementation of the arms embargo on Libya remains a divisive issue in international relations.

The results to date of IRINI warrant prudent optimism for its contribution to the implementation of the UN arms embargo on Libya. Despite the challenges to the fulfilment of its core mission, from political, legal and operational perspectives, IRINI's record shows that most flag States, when requested, give their consent or do not oppose boarding and inspection by IRINI assets of their commercial vessels. With these means, IRINI gathers extensive and comprehensive information on the trafficking of arms and related materiel and shares this information with relevant partners and agencies.

From the legal point of view, the main challenges stem from Turkey, whose authorities protest the legitimacy of IRINI and its basic rules (e.g. the authorisation by the UN SC to proceed, after exhaustion of the good-faith efforts, to non-cooperative inspections or the four-hour rule), and seek to circumvent the application of rules, by means such as escorting commercial vessels by warships. It seems that Turkey, through its proxies a party to the war in Libya, has engaged also in lawfare against EU's operational involvement, through IRINI, in the implementation of the UN policy for a peaceful solution in Libya. The latest Communication Strategy

---

<sup>71</sup> It seems that initially IRINI HQ tended to adopt such an interpretation of Article 96 UNCLOS, which was not however retained, in view of the facts of the incident.

<sup>72</sup> ROE (N 17) Rules GENTEXT 16 and 17.



of IRINI (July 2021) names Turkey as the only State opposing inspection of vessels under its flag.<sup>73</sup> In this respect, we should not underestimate the challenge originating from the contradictory legal advice provided by IRINI headquarters, as the two decisions in the *Roseline A* incident demonstrate.<sup>74</sup>

There are, however, some encouraging signals from Russia, another State that expressed initially scepticism of the legal authority of IRINI. On the occasion of the yearly renewal of Resolution 2292 (2016) in May-June 2020, Russia expressed doubts whether Operation IRINI's mandate was within the scope of the UNSC's authorisation and attempted (unsuccessfully) to limit the time frame of the extension of Resolution 2292 (2016).<sup>75</sup> When considering the further one-year renewal of the said Resolution, in May and June 2021, Russia avoided expressing criticism of the Operation IRINI or obstructing the smooth adoption of the relevant UNSC Resolution 2578 (2021)<sup>76</sup>, which was adopted unanimously.<sup>77</sup> In the most recent extension of the authorization of IRINI by UNSC Resolution 2635 (2022) of 3 June 2022, Russia abstained from the vote<sup>78</sup> justifying the abstention by the 'very low levels of effectiveness' of the EU naval operation 'in assisting the implementation of the provisions of the Libyan arms embargo'.<sup>79</sup>

---

73 The Communication Strategy attests the systematic refusal to consent referring to the incidents of a number of Turkish flagged vessels: *Parpali* (February and June 2021), *Kosovak* (February 2021) *Inga A* (April 2021), *Mathilde A* (May 2021) *Mehmet Kahveci* (June 2021) (EEAS, 31 October 2021) <[https://eeas.europa.eu/headquarters/headquarters-homepage/106727/results-report-october-2021\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/106727/results-report-october-2021_en)> accessed 29 November 2021.

74 On the importance of communication for the effectiveness of CSDP missions see Anna Molnár, Lili Takács, Anna Urbanovics, 'Strategic communication of EU CSDP missions – measuring the EU's external legitimacy' [2021] TGPPP, 319.

75 Security Council Report 'Libya Sanctions: Vote on a Resolution' (4 June 2020) <[www.securitycouncilreport.org/what-sinblue/2020/06/libya-sanctions-vote-on-a-resolution.php](http://www.securitycouncilreport.org/what-sinblue/2020/06/libya-sanctions-vote-on-a-resolution.php)> accessed 11 November 2021, 'It seems that Russia was the only Council member showing fundamental skepticism around the renewal of the authorisation. At different Council meetings, Russia had apparently raised the question of whether operation Irini's mandate was still within the scope of the Council's authorisation. The EU and its member states argued that it is, and so did the Secretary-General. It appears that during the 27 May meeting, Russia suggested the authorisation be renewed for six instead of twelve months'. The adopted Resolution 2526 (2020) retained the renewal of the authorisation for twelve months.

76 The negotiations on the draft resolution appear to have been smooth. During the negotiations on resolution 2526 (2020's renewal of 2526 (2020)), Russia was apparently the only member that expressed scepticism around whether IRINI's mandate is within the scope of the Council's authorisation. It seems that during this year's negotiations, Russia was not as vocal in raising such concerns, 'Libya Sanctions: Vote on a Resolution' (n 75).

77 This change of stance of Russia makes a school of thought suggesting to consider Turkey a more important challenger to Western values and leadership in the Mediterranean than Russia, see Pascal Ausseur, 'Challenges for cooperation in the Mediterranean after the global pandemic', in EU Headquarter EUNAVFOR MED IRINI, Challenges for cooperation in the Mediterranean after the global pandemic (n 56) 15: 'we are now entering into a destabilizing period of the Mediterranean, waiting for a new balance of power. The two major strategic players are Russia and Turkey. Both wish to resume their historical imperial position; so, the question is: which one among them poses a real threat to Europe? The traditional answer would be Russia, but the position of Turkey towards its neighbors in the south, its socio-economic characteristics, its religious ideology and its revanchist power could raise new issues'. (emphasis in the text).

78 UNSC Res 2635 (2022) was adopted by a vote of 14 in favour with one abstention

79 UNSC 9053<sup>rd</sup> meeting, 3 June 2022, UN Doc. S/PV.9053, 2, 'We greatly regret that the EU Naval Force Mediterranean Operation IRINI has, over recent years, demonstrated very low levels of effectiveness in assisting the implementation of the provisions of the Libyan arms embargo. During the entire period of its action, there has been no successful seizure of any contraband goods'.



The current deterioration of the relations between EU and its Member States on the one hand and Russia on the other (in particular due to the armed conflict in Ukraine), may create additional hindrances in the operations of IRINI, or threaten its continuation. The current extension of the authorisation by the UNSC shall expire on 3 June 2023<sup>80</sup> and, at its end, IRINI may be judged not (or not only) on its merits, its actual contribution to the implementation of the UN arms embargo on Libya.

As the only regional arrangement acting under authorisations given by the UNSC in resolution 2292 (2016) for member States to inspect vessels bound to and from Libya, which they have reasonable grounds to believe are carrying arms or related material, IRINI is of paramount importance, not only for the UN, which has found through it an operational arm it lacks in the region, but foremost for the EU in its venture to enhance its strategic autonomy and strengthen its role as a regional actor in safeguarding peace and stability in its immediate vicinity. It is however this particular endeavour and role that may generate objections from challengers of the political and strategic role of the EU. The 'lawfare' against IRINI analysed in this article is undoubtedly part of this wider challenge and geopolitical design.<sup>81</sup>

---

80 UNSC Res 2635 (2022) UN Doc S/RES/2635 (2022), para 1.

81 See in this regard the explanation of vote of Russia UNSC Res 2635 (2022) (n 80); 'In the coming year, we will continue to closely monitor the work of Operation IRINI to ensure full compliance with the arms embargo. The focus of our attention will be whether it is effective in combating flows of illegal weapons and whether it is in line with the law of the sea and the mandate stipulated in resolution 2292 (2016). We will also provide a legal assessment of the actions of the EU Naval Force.'