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EDITED BY

MARC
WELLER

The Oxford Handbook of
THE USE OF FORCE IN

The Oxford Handbook of
THE USE OF FORCE IN
INTERNATIONAL LAW

OXFORD

The Oxford Handbook of THE USE OF FORCE IN INTERNATIONAL LAW

- This *Oxford Handbook* provides the most comprehensive, authoritative, and detailed study into the use of force in international law yet available
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- II Collective Security and the Non-Use of Force
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LAW

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MARC WELLER

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PREFACE AND ACKNOWLEDGEMENT

It is every child's dream: to enter a sweetshop and be allowed the freedom to pick the best and most tasty treats on offer. Putting together this *Handbook* has been a somewhat similar experience. Over the years, many issues of the law on the use of force were neglected throughout. Others have remained contested, leaving the status of the law on key issues unresolved. And, of course, since the end of the Cold War, the old certainties underpinning this field of study have been shaken to the core. This book offered the opportunity to address these issues, and to address them through a cast of the most highly qualified and sought-after contributors. Indeed, in most cases, our first choice of author responded favourably to the invitation to contribute on the topic proposed to them. I am most grateful for their cheerful collaboration over a period that turned out to be somewhat longer than expected.

The list of actual or imagined recent challenges to the established law on the use of force is long. First, there is the changing role of non-state entities as agents of conflict, including the ability of terrorist movements to mount armed attacks on a scale previously reserved for regular armed forces maintained by states. Then, there is the availability of new weapons technologies and their effects on warfare, exemplified by the debate about targeted killings, drones and autonomous weapons systems. The concept of 'cyber war' has gained some currency in the debate. The increased availability of weapons of mass destruction to a broader range of states, and even to non-state actors, was a prominent factor in the controversies surrounding the use of force against Iraq in 2003.

There were also claims that 'rogue states' and others have placed themselves outside of the legal framework on the use of force, or that a 'global war on terror' might be waged without specific reference to the well-established criteria relating to self-defence in each individual instance of the use of force. Moreover, significant pressure for forcible humanitarian action emerged in relation to circumstances of overwhelming humanitarian emergency, in part driven by the shock caused by the international failings in responding to the horrors of the situations in Bosnia and Herzegovina and Rwanda.

These developments had an impact on the discussion of legal doctrines relating to the use of force. The idea of negative exceptionalism concerning so-called rogue states was matched by a concept of positive exceptionalism. This would hold that certain states have to shoulder a disproportionate load of military operations to

maintain international peace and security. Hence their actions should be considered according to differing standards, chiefly informed by the supposedly beneficial aims of such operations for the international community as a whole, rather than judged according to the established legal criteria. Both types of exceptionalist explanations, negative and positive, threaten the universality of the very rules of the international system that have hitherto been regarded as indispensably universal.

The debate about forcible humanitarian action added a further conceptual challenge. The majority of commentators found, in the wake of the Kosovo operation of 1999, that forcible humanitarian action may not be strictly legal, but it is nevertheless legitimate. At least at first sight, this approach appeared to strain the view that one of the key conditions for political legitimacy must be compliance with law, or in this instance, with the legal rules on the use of force.

In addition, the content of some well-established rules on the use of force was challenged. This included, for instance, the criteria for self-defence. Over the decades since the advent of Article 51 of the UN Charter, a consensus had stabilized in practice and scholarly evaluation concerning the doctrine of anticipatory self-defence. This consensus was threatened by the argument that new threats require new measures and associated legal doctrines to counter them. In the ensuing debate the old controversy about preventative or pre-emptive uses of force was reopened. The debate carried over from the political/strategic level onto the tactical plane. The conditions for the use of self-defence shifted in the tactical rule of operation of some countries in certain instances of conflict from the protection of soldiers, air-planes or other assets from immediate, deadly threats to more abstract challenges that might manifest a latent threat.

Another aspect that appeared reminiscent of pre-UN Charter practice concerned, more generally, the apparently resurgence of the use of force as a means of national, or perhaps at least, international policy. 19th century concepts such as ultimatums, threatening the use of force unless a state or other actor engages in certain conduct, resurfaced. In part, such ultimatums were administered by the UN Security Council, for instance when it gave Iraq a certain number of days before the authorization to evict its forces from Kuwait would become operational. However, ultimatums were also used in cases that were only loosely covered by a UN mandate, as was the case in relation to forcible operations concerning Bosnia and Herzegovina. In relation to Kosovo, a Contact Group composed of a small number of states, and NATO, threatened the use of force without formal cover from the Council.

There was also a return to arguments that force might be a means to enforce international obligations—an assertion of forcible self-help that had been thought to have been long overcome. The most famous case of this assertion was of course the US argument that it would be empowered to enforce militarily the obligations agreed to by Iraq when it accepted the cease-fire with coalition forces at the conclusion of the Kuwait conflict in 1991.

Other developments somewhat blurred important distinctions among legal categories determining what is and what is not lawful. Hence, it is clear that forcible reprisals or retaliation are no longer permitted in international law. Instead, unilateral forcible action requires the application of self-defence in relation to an actual or imminent armed attack. However, on several occasions force was used in response to past events, rather than current or imminent armed actions, sometimes with considerable delay. While justified as self-defence, the actions seemed more akin to forcible retaliation. An example is the 1993 US bombing of the Iraqi Intelligence Service headquarters that seemed like payback for an alleged plot to assassinate former US President George H.W. Bush.

Even where the right of self-defence could be applied, important additional issues arose. For instance, what is a proportionate response to an outrage like the attack on the World Trade Centre on 9/11? How far, and for how long, does the right of self-defence extend? How do we judge when a future attack mounted by a non-territorial terrorist group, operating underground, is imminent, and how can such a claim be internationally validated? And to what extent can self-defence be applied in relation to terrorist groups based in foreign states? Does that state have to be implicated in terrorist attacks at the very high level of attribution established by the International Court of Justice in the *Nicaragua* case before force can be used against terrorist actors based on its territory?

According to that test, self-defence could only be invoked against a state that is exercising overall control over an armed movement. In other words, the group must be virtually an agent of that state. Or does a state expose itself to the use of force by another by merely failing to remove such a group from its territory, or suppressing its activities. Or is there after all a kind of middle ground test, taking account the level of support granted to such a group falling short of the exercise of overall control?

To some, these kinds of questions seemed too difficult to answer within the known and accepted legal standards. A whole series of new exceptional doctrines were proposed, which, if accepted, would have significantly weakened the prohibition of the use of force. However, both in practice and in scholarship, cooler heads prevailed. At the 2005 United Nations World Summit, the organized international community committed itself to the existing legal framework on the use of force established in the UN Charter. It determined that this framework does provide the necessary flexibility to accommodate new challenges, while retaining the strong presumption against the use of force in international relations.

The challenge therefore is how the existing legal rules can be construed to reflect this balance in relation to specific situations. This book hopes to offer a range of perspectives addressing most of the well known, but unresolved areas of controversy in this area of international law, alongside those that have emerged in more recent practice.

As the dimensions of this work indicate, this has been a significant effort which has taken several years from inception to completion. In view of the high quality of

contributors, and their various other commitments, it is not surprising that there was a considerable gap between the first submissions of chapters, and the very last ones.

Some authors who submitted according to the original deadline have taken the opportunity to update their chapters in the final editorial round, which brought us up to September 2014. Others were unable to do so, leaving their contributions current as to the point of initial submission and the first round of editing, as may be evident from the footnotes.

I am most grateful to the two Assistant Editors who have borne a large element of the work involved with great efficiency and engagement. Ms Alexia Solomou supported the initial editorial rounds. She was replaced by Mr Jake Rylatt, who helped to steer the project through its final rounds of editing and proofing. Ms Rumiana Yotova contributed as well, most ably bridging the period between the tenure of the two. At the Lauterpacht Centre, the project also benefitted from the wonderful support provided, as ever, by Ms Anita Rutherford and Ms Karen Fachechi.

We are also very grateful for the steady support for this venture on the part of Oxford University Press. This includes in particular Mr John Louth, Ms Merel Alstein and Mr Anthony Hinton, who commissioned the work and kept faith with it, Ms Emma Endean who offered additional support, the production editor, Ms Catherine Cragg, and Ms Kumudhavalli Narasimhan and Ms Deepikaa Mercileen.

Marc Weller
Cambridge, November 2014

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framed by accepted understandings of the techniques of interpretation and the conventions of legal discourse.⁸⁸ This discourse includes not only Security Council members, but also other countries affected by what the Security Council and the broad constellation of intergovernmental and non-governmental actors who participate in or find a way of impacting what the Security Council does. The process, as I have argued elsewhere, is more inclusive than meets the eye.⁸⁹

Viewing the Security Council in this way does not lead to any particular conclusion about the merits of narrow versus broad readings of Council acts and failures to act. A broad, purposive approach to Charter interpretation can cut both ways. It may remove any vestige of predictable behaviour that rules on the use of force are meant to provide. Or it may cushion the impact of deep political divisions over when the use of force is justified. The former perspective sees rigid adherence to explicit rules as the only way of protecting the law from subjective interpretation, hypocrisy, and irrelevance. The latter sees legal discourse as a vehicle for problem-solving—a way of managing the tensions and competing normative claims that characterize any pluralistic society. From either perspective, discourse in and around the Security Council about when the use of force is legal and appropriate reinforces the value of the institution rather than undermines it.

⁸⁸ See generally Johnstone, *The Power of Deliberation*; Henderson, *The Impact of the United States upon the Jus ad Bellum*; Stahn, 'Enforcement of the Collective Will After Iraq', 806, 808, 822; Stromseth, 'Law and Force After Iraq', 632–3.

⁸⁹ Johnstone, *The Power of Deliberation*. See also Reisman, 'Kosovo Antinomies', 862.

CHAPTER 11

UNITED NATIONS SECURITY COUNCIL PRACTICE IN RELATION TO USE OF FORCE IN NO-FLY ZONES AND MARITIME EXCLUSION ZONES

ROB MCLAUGHLIN

I. INTRODUCTION

In terms of authorizations and justifications for use of force, the United Nations Security Council (UNSC) has been, on the whole, fairly reticent to either approve or condemn no-fly zones (NFZs) and maritime exclusion zones (MEZs) asserted by states.¹ They have

¹ eg the Cuban Quarantine of Oct 1962; see US Department of State, *Foreign Relations of the United States, 1961–1963*, Vol XI: *Cuban Missile Crisis and Aftermath*, available at <<http://www.state.gov/www/>>

been less reticent, however, to employ these operational air and ocean space control mechanisms under the cover of Chapter VII mandates. This is not to say that the UNSC utilizes NFZs and MEZs routinely—it does not. But there is a sufficient body of practice in relation to these two mechanisms to allow some assessment of the use of force contours of their utilization by the UNSC, and some analysis of the uncertainties that remain.

NFZs and MEZs, on their face, are sibling concepts in that both are targeted at regulating access to ocean and/or airspace in order to achieve a particular operational objective. These objectives range from the relatively benign (surface or airspace picture simplification), through defensive (force protection), to offensive (effectively, delineating 'engagement zones').² Understanding the UNSC's relationship with both NFZs and MEZs is at core a function of three interlinked questions:

- (1) Is the law governing the zone law of armed conflict (LOAC) or non-LOAC-based?
- (2) Is the law on use of force inside the zone fundamentally the same as the law on use of force applying outside the zone?
- (3) Has the UNSC's act of declaring or acquiescing in the zone altered the law normally applicable in the ocean or airspace enclosed by the zone?

There is, however, one ongoing debate which is fundamental to the issue of UNSC use of force with respect to NFZs and MEZs, the relevance of which I will note at certain points. This is the broader issue of whether the UNSC can authorize use of *lethal* force for a mandate-enforcement purpose, even where there is no LOAC authorization available, and the situation is not one of immediate individual or unit self-defence (or defence of others), as understood by most national legal systems. This debate is complicated by uncertainty with respect to two fundamental and

about_state/history/frusXI/index.html>; 'Presidential Proclamation Announcing Quarantine of Cuba, 23 October 1962' (in Richard Jaques (ed), *Maritime Operational Zones* (Newport, RI: US Naval War College, 2006), C-2-C-3). The Kennedy administration considered declaring a limited blockade, recognizing that this would constitute 'an act of war' (eg Doc 27, 'Memorandum by Director of Central Intelligence McCone', 17 Oct 1962) but ultimately settled on the 'quarantine' concept—partially so as to avoid any legal implication of blockade, and thus a state of armed conflict; Doc 38, 'Minutes of 506th Meeting of the National Security Council', 21 Oct 1962. See generally, Errol Henriques, 'Zones in Crisis Conditions—Control of Sea and Airspace During Times of National Emergency and Enforcing Collective Security' in Jaques, *Maritime Operational Zones*, 3-5-3-12. In relation to the TEZ (total exclusion zone) declared during the Falklands conflict by the UK on 28 Apr 1982 (to come into effect on 30 Apr 1982, thereby upgrading the 7 Apr 1982 'MEZ'), see generally: 'Declaration of United Kingdom Total Exclusion Zone (TEZ) 28 April 1982', in Jaques, *Maritime Operational Zones*, C-11; Lawrence Freedman, 'The War of the Falklands Islands, 1982' (1982) 61 *Foreign Affairs* 196; Anthony Parsons, 'The Falklands crisis in the United Nations, 31 March–14 June 1982' (1983) 59 *International Affairs* 169; Nicholas J. Watkins, 'Disputed Sovereignty in the Falklands Islands: The Argentina–Great Britain Conflict of 1982' (1984) 11 *Florida State University Law Review* 649.

² During the Falklands crisis, for example, neither SC Res 502 (3 Apr 1982) nor SC Res 505 (26 May 1982) mentioned the British or Argentinian declared exclusion zones. A range of factors could have influenced this outcome: the UNSCs recognition of the legitimacy of declaring exclusion zones during armed conflict at sea; the UK veto; and the fact that both parties had declared similar zones.

closely linked concerns. The first is the existence (or otherwise) of a 'third paradigm' for use of lethal force (individual and unit self-defence and defence of others; in accordance with LOAC; and as a third paradigm, to implement a Chapter VII 'all necessary means' authorized mandate). It is assumed in this chapter that such a third paradigm for use of lethal force does not exist.³ The second concern is the broad scope of the concept of 'self-defence' to which the UNSC (and, indeed, the UN generally) subscribes. There is a good deal of UNSC practice supporting an approach to 'self-defence' for UN-authorized or sanctioned forces which includes the capacity to use force—including lethal force—to 'defend' the mandate and/or achieve mandate purposes.⁴ This debate will simply be outlined, but my view is that this broad UN conception of use of *lethal* force in 'self-defence' is at the least intensely problematic, and most likely (for many states) unlawful. It is important to recognize the legal distinction between mandate enforcement (for which lethal force—outside LOAC-governed situations—is not available), and self-defence/defence of others (which generally permits lethal force only in situations where there is a degree of imminent threat to life or of serious injury).

II. OUTLINE

In order to examine UNSC practice in relation to NFZs and MEZs, it is useful to adopt differentiated approaches to each. With respect to UNSC-mandated NFZs, because practice is concisely centred upon three examples, it is instructive to examine each in turn and to then draw general conclusions. MEZs, on the other hand, are a more regular feature of UNSC action, but in a broader array of guises. As a consequence, greater clarity in relation to UNSC MEZ practice is arguably achieved through a more thematic or 'typological' approach. This chapter reflects this analytical premise.

³ Rob McLaughlin, 'The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means"' (2008) 12 *Journal of Conflict and Security Law* 389.

⁴ eg Report of the Secretary-General on the Implementation of Security Council Resolution 425, S/12611 (1978) (on the establishment of the United Nations Interim Force in Lebanon (UNIFIL))—the force 'shall not use force except in self-defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council...' (para 4d); January 2000 Rules of Engagement for the United Nations Transitional Administration in East Timor (UNTAET), rule 1.9: 'Use of force, up to and including deadly force, against any individual or party who limits or intends to limit the freedom of movement of UNTAET personnel, is authorized' (in Australian Defence Force Military Law Centre/Asia Pacific Centre for Military Law, *Law and Military Operations in East Timor (UNTAET) Feb 2000–May 2002*; Annex Y); see generally Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford: SIPRI/Oxford University Press, 2002).

III. UNSC-ENDORSED OR MANDATED NO-FLY ZONES

A. General Description

Descriptions of air exclusion zones, or NFZs, are relatively consistent. Timothy McIlmail describes the purpose of NFZs as 'prohibit[ing] the entry of unauthorised aircraft into airspace over specified territory'.⁵ Michael Schmitt defines NFZs as 'a *de facto* aerial occupation of sovereign airspace in which, absent consent of the entity authorising the occupation, only aircraft of the enforcement forces may fly'.⁶ The essence of a NFZ in UNSC practice, consequently, is that it is declared over sovereign airspace (ie the airspace above all or part of the landmass and territorial sea of the state of concern), purports to exclude certain classes of aircraft from that airspace, and is enforceable by UNSC-authorized or sanctioned forces from both within and outside that airspace.

To date, UNSC practice in relation to NFZs is essentially limited to three sets of NFZs: in Iraqi airspace (PROVIDE COMFORT/NORTHERN WATCH and SOUTHERN WATCH); in the airspace of Bosnia and Herzegovina (DENY FLIGHT); and in Libyan airspace (UNIFIED PROTECTOR, once it evolved into a single North Atlantic Treaty Organization (NATO) operation). The UNSC-mandated International Security Assistance Force (ISAF) operation in Afghanistan also exerts some regulatory and exclusory control over Afghan airspace, but this measure is not generally referred to in terms of a UNSC-mandated NFZ—it is conceptualized almost exclusively in terms of airspace controls routinely permissible under LOAC and also as consented to by the government of Afghanistan. As such, it does not presage any requirement for a specific UNSC head of authorization in relation to a NFZ.

B. Iraq NFZs

The NFZ declared in northern Iraq was, as Schmitt observes, 'a product of the way the Gulf War [of 1991] ended'.⁷ As a component of the ceasefire, Iraqi military

⁵ Timothy P. McIlmail, 'No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq' (1995) 17 *Loyola LA International and Comparative Law Journal* 35, 36.

⁶ Schmitt notes that use of the term 'occupation' in this sense does not necessarily presage 'occupation' in terms of LOAC: Michael N. Schmitt, 'Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement' (1998) 20 *Loyola LA International and Comparative Law Journal* 727, 729. This is similar to the UN Charter Art 41 reference to the UNSC's power to 'blockade'—another term of art in LOAC which needs to be distinguished from the UN Charter's usage of the term in a more general sense.

⁷ Schmitt, 'Clipped Wings', 733.

aircraft—with the exception of helicopters in certain areas—were prohibited from flying in Iraqi airspace.⁸ As Kurdish and Shia populations rebelled in northern and southern Iraq respectively, the Iraqi regime used helicopters to suppress the rebels and target associated populations. In UNSC Resolution 688, the UNSC expressed its grave concern at this repression and called upon Iraq to facilitate humanitarian relief.⁹ By 10 April 1991 a NFZ was established (excluding all Iraqi aircraft, including helicopters, unless they had received prior authorization), relief flights had commenced, and a force comprising elements from 13 states entered northern Iraq. The NFZ was enforced with Turkish, UK, US, and (initially) French aircraft. By August 1991, the situation in the north was further complicated by conflict between two Kurdish factions, one of which was supported by the Iraqi regime. Although singling out the Kurdish areas in northern Iraq for specific humanitarian assistance, the general tenor of Resolution 688 was equally applicable to the Shia in southern Iraq. However, it was not until August 1992 that the UK, the US, and France implemented and enforced a NFZ over southern Iraq.¹⁰

For those who consider the northern Iraq NFZ lawful, its UNSC authority was derived implicitly, as opposed to expressly, from the interaction between Resolution 688 (demanding an end to repression and mandating humanitarian assistance, but not explicitly authorizing a NFZ), interpretations of the post-conflict UNSC resolutions permitting further coalition force actions where ceasefire conditions were not observed, and lingering Chapter VII authorizations attendant upon the general Iraq-Kuwait UNSC resolutions and the ceasefire UNSC resolutions (most specifically Resolutions 678 and 687).¹¹ This provenance is not without controversy. On one view, these zones were effectively enforced, but illegally imposed.¹² On another, the northern Iraq NFZ was appropriately authorized, but the southern NFZ's authority was perhaps more tenuous. Further, given the absence of an explicit Resolution 688 linkage, its extension in September 1996 (from latitude 32N to 33N) was even more problematic than its establishment.¹³ The UN itself did not condemn the NFZs, but its public statements upon their legality are equivocal at best—for example (as Boileau notes), a formal UN reference to a group of states enforcing the NFZs as acting

⁸ See generally SC Res 686 on Iraq-Kuwait (2 Mar 1991), operative para 3: 'Also demands that Iraq (a) cease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft...'

⁹ SC Res 688 on Iraq (5 Apr 1991), operative paras 1 and 4 (noting the general repression of, and requirement for humanitarian assistance for, the population in general, but with specific reference to the Kurdish population).

¹⁰ See generally Schmitt, 'Clipped Wings'; McIlmail, 'No-Fly Zones'; Alain Boileau, 'To the Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone' (1997) 3 *ILSA Journal of International and Comparative Law* 875; Alan D. Surchin, 'Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad' (1995) 5 *Duke Journal of Comparative and International Law* 457.

¹¹ The debate focusing on almost identical legal issues and interpretations in the lead-up to renewed action in 2003 was not, it will be evident, fundamentally unique.

¹² See generally: McIlmail, 'No-Fly Zones'; Surchin, 'Terror and the Law'.

¹³ See generally: Schmitt, 'Clipped Wings'; Boileau, 'To the Suburbs of Baghdad'.

'in what they stated was an effort to enforce and monitor compliance with resolution 688'.¹⁴ Perhaps the best that might be said is that there remains significant debate as to the existence of a clear UNSC authority for both Iraq NFZs.

There is also debate as to the precise nature of the legal regime actually governing enforcement of the Iraq NFZs. Schmitt—who was a legal adviser to the Iraq NFZ operations—characterizes the applicable law generally in terms of self-defence and mandate enforcement.¹⁵ McIlmail, on the other hand, refers extensively to the aerial components of LOAC in his assessment of *jus in bello* conduct in support of NFZ enforcement.¹⁶ Given the uncertainty surrounding the parent UNSC authority for these NFZs, this debate is very difficult to settle—claims to non-LOAC or LOAC-based use of force rights in enforcement will always be at the mercy of overarching uncertainty as to the preliminary authority and mandate of the NFZs. Thus, although a seminal instance of UNSC NFZ enforcement in terms of actual operational practice, the Iraq NFZs—whilst significantly more effective in implementation than the next instance (Bosnia)—are of problematic provenance in terms of drawing lessons for 'UNSC-authorized' NFZ practice with respect to use of force.

c. Bosnia and Herzegovina NFZ

Whilst debate as to the provenance of the Iraq NFZs complicates their status as a UNSC precedent, there is no debate as to the clear UNSC-mandated status of the Bosnia and Herzegovina NFZ. In the face of routine flouting of an earlier flight ban, Resolution 781 formalized this flight ban, but limited enforcement measures to tracking and monitoring (as opposed to use of force). In March 1993, Resolution 816 implemented a NFZ under Chapter VII and granted the UN force the 'all necessary measures' authority it required to use force in implementing the NFZ.¹⁷ Authority and responsibility for enforcing the NFZ then paralleled the evolution of UN operations in the Federal Republic of Yugoslavia (FRY), passing through the United Nations Protection Force (UNPROFOR), NATO, the Implementation Force (IFOR), and the Stabilization Force (SFOR).

In terms of scope, the Bosnia NFZ was in practice directed at military flights in Bosnian airspace. It remains an elusive precedent, however, for whilst the *jus ad bellum* authority permitting use of force was ironclad, the *jus in bello* authorizations detailing how, when, and at what level of lethality that force could be used remain problematic. First, questions as to precisely which sorts of military flights can be targeted—only combat capable aircraft? intelligence and surveillance flights? logistics support flights?—will always need to be resolved on an operation-by-operation/

¹⁴ Boileau, 'To the Suburbs of Baghdad', 881, quoting from UN and the Iraq-Kuwait Conflict 1990-1996, S/23295.

¹⁵ Schmitt, 'Clipped Wings', 753-66.

¹⁶ McIlmail, 'No-Fly Zones', 71-80.

¹⁷ SC Res 816 on Bosnia and Herzegovina (31 Mar 1993), operative para 4.

case-by-case basis. Additionally, any implementation of a NFZ must necessarily take account of suppression of ground-based anti-aircraft capabilities which can threaten the NFZ-enforcing force's own aircraft and freedom of manoeuvre within the NFZ. Such assessments will always need to consider the nature of the threats the NFZ is designed to neutralize, the mandated tasks the NFZ is anticipated to support, and the legal context of the NFZ-enforcer's engagement—primarily in terms of whether the force is a UNSC-sanctioned belligerent with access to LOAC authorizations such as attack, or as a UNSC-mandated stabilization agent which is not a belligerent in the armed conflict, and thus has no *de jure* access to LOAC authorizations.

In this sense, the Bosnia NFZ is a lacklustre use of force precedent, precisely because of such confusions. At first glance, it appears generally safe to assert that successive Bosnia NFZ enforcement agents understood their general role to be that of stabilization and mitigation, not as a belligerent party to the armed conflict. This is a threshold issue because it removes from the outset any *de jure* access to LOAC authorizations in enforcing the NFZ. Thus, use of force in enforcing the Bosnia NFZ has to be assessed against, and understood in terms of, non-LOAC authorizations and law. At this point, however, we return to uncertainty, for there are several types of 'use of force' which must be considered. The first is use of force in self-defence. There is little argument that the UNSC authorized or sanctioned force could use force against delinquent military aircraft, in self-defence of force aircraft enforcing the NFZ, force units on the ground, and civilians. This is well encapsulated in Schmitt's analysis of self-defence in NFZ enforcement in terms of a NFZ-enforcing aircraft being illuminated by a missile guidance radar from a ground installation: Under 'self-defence' (as generally understood), the aircraft has an immediate option to neutralize that threat with force, or to exit the radar's envelope or its associated missiles' range. But at that point the hostile act/hostile intent is ended. There is no:

'self-defence' option for the aircraft to exit the area, plan an attack, and then return some time later to destroy the ground threat (unless it again lights the aircraft up, thus creating a new hostile intent/hostile act and, consequently, an immediate self-defence situation).¹⁸

That the UN conceived of this form of 'use of force' as a distinct sub-category in the Bosnia and Herzegovina operation appears clear from the operational distinction the UN drew between 'close air support' for situations of self-defence, and 'air strikes' for other situations.¹⁹ Use of force in self-defence in this sense is not geographically

¹⁸ Schmitt, 'Clipped Wings', 761-2.

¹⁹ See Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The fall of Srebrenica, A/54/549 (15 Nov 1999), paras 185-9, 277-96, 480-3; see eg the confusion inherent in the UNSC's mixing of self-defence and mandate enforcement in operative paras 5, 9, and 10 of SC Res 836 on Bosnia and Herzegovina (4 June 1993), and the attempt to differentiate 'air strikes' (for enforcement) and 'close air support' (for self-defence) in Letter from the Secretary-General to the President of the UNSC, S/1994/94 (28 Jan 1994).

constrained by the NFZ—if an enforcing force aircraft were to encounter (for example) a Serb military aircraft outside the NFZ, and that aircraft engaged in a hostile act or demonstrated hostile intent against the UNSC-authorized aircraft, there is absolutely no doubt that the latter could engage the former in self-defence regardless of the fact that the event was taking place outside the NFZ. The two issues are not legally linked—self-defence as a legal right exists and operates to the same extent both inside and outside the NFZ. Where the NFZ may serve a self-defence purpose it is only in the form of an additional self-defence trigger, in that crossing into a lawful, notified, and well-publicized NFZ is an additional hostile-intent indicator which is not readily available in other airspace.

However, the Bosnia NFZ also raises a further legal conundrum with respect to use of force in NFZ enforcement outside LOAC—namely, the degree to which lethal force can be used to enforce a NFZ where there is no imminent threat such as to create a 'self-defence' situation. In short, the question is: what level of force can be employed to achieve the mandate aims (eg ensuring access for humanitarian assistance or reducing potential air threats to 'safe areas') which the NFZ was established to support? Put another way, what level of force is permissible to enforce the NFZ? This legal conundrum is particularly acute in relation to NFZ enforcement against delinquent aircraft, in that once standard signalling and escalation of force procedures (proximity, wagging of wings, radio interrogations, and so on) are exhausted, the options tend to narrow to two—continue to monitor, or shoot it down and almost certainly kill the occupant(s) and potentially others on the ground. This conundrum is not generally as sharp in escalation of force procedures against vessels and vehicles where targeted disabling fire can be a less than lethal option. I submit that a Chapter VII 'all necessary means' authorization does *not* provide a general authority to use lethal force solely to 'implement' or 'enforce' the mandate, unless the UNSC-sanctioned or authorized force is acting in immediate individual or unit self-defence or defence of others, or is a belligerent party in the conflict and is thus able to access LOAC authorizations. This is a highly contentious issue with respect to NFZs precisely because—in relation to delinquent aircraft—there is no readily available middle ground in terms of use of force options between warnings and lethal force. The consequence is that NFZ enforcement is faced with a particularly acute, but not insurmountable, credibility problem in that where a delinquent military aircraft continues its transit through a NFZ, but in a non-threatening manner, the only legal option is to continue to escort it through until it exits the NFZ. This is not as parlous a problem as it appears, for the option of lethal force in self-defence is always available in the background. Should a delinquent aircraft—which has been subject to the full range of non-lethal warning and escalation of force measures—deviate from its non-threatening transit such that it commits a hostile act or demonstrates hostile intent against forces or others on the ground, or against the monitoring aircraft, then lethal force may be justified in self-defence.

d. Libya NFZ

The 2011 'unprecedentedly robust'²⁰ Libya NFZ was expressly established by the UNSC through a Chapter VII 'all necessary means' authorization, and in this sense shares an unimpeachable *jus ad bellum* authority with the Bosnia NFZ.²¹ Beyond this point, however, the Libya NFZ does not necessarily clarify any of the problems associated with understanding use of force options arising out of the Bosnia NFZ. This is because the Libya NFZ in many respects returns us to the broader confusion evident in the Iraq NFZs (leaving aside their underpinning legality) as regards the *jus in bello* of use of force within the NFZ being based in LOAC authorizations, or in non-LOAC-based mandate-enforcement and self-defence.

The Libya NFZ, established in Resolution 1973, was clearly focused on protection of civilians, and (via its caveats) was targeted at (essentially) Libyan military aircraft.²² At this level, it is uncontroversial—protecting civilians in situations such as the Libya conflict is clearly within UNSC competence, and establishing a NFZ in relation to military aircraft which threaten those civilians is clearly a legitimate UNSC response enjoying at least one clear precedent. The problem, however, is the confusion or obfuscation which surrounds the precise legal characterization of individual NFZ-enforcement tasks, and protection of civilian tasks. The first issue is whether the UNSC-sanctioned NATO force implementing the NFZ was a party to the armed conflict between Libyan government forces and rebel groups. NATO statements were equivocal, and vacillate between explaining that Libyan government installations and forces were prosecuted from the air as 'legitimate military targets', or 'in self-defence'.²³ Clearly, self-defence

²⁰ Michael Schmitt, 'Wings over Libya: The No-Fly Zone in Legal Perspective' (2011) 36 *Yale Journal of International Law Online* 45, 46, available at <<http://the-beacon.info/blog/wp-content/uploads/2011/05/wings-over-libya.pdf>>.

²¹ SC Res 1973 on Libya (17 Mar 2011), operative paras 4, 6–9; as adjusted by SC Res 2009 on Libya (16 Sept 2011), operative paras 20–1.

²² The SC Res 1973 NFZ is stated to apply to 'all flights' in the airspace of Libya, but then grants a standing approval for 'humanitarian' flights (broadly defined to include extracting third party nationals from the conflict), other flights 'deemed necessary by States acting under the authorisation conferred in paragraph 8 to be for the benefit of the Libyan people' (operative para 7), flights that are targeted at the protection of civilians (operative para 4), and flights otherwise approved under the approval mechanisms established in operative paras 8–9.

²³ eg 'By maintaining a high operational tempo and carrying out precision strikes against legitimate military targets, we have seriously degraded the ability of the Qadhafi regime to attack civilians and relieved the pressure on civilian populated areas such as Misratah' (NATO, 'Statement on Libya Following the Working Lunch of NATO Ministers of Defence with non-NATO Contributors to Operation Unified Protector', 8 June 2011, available at <http://www.nato.int/cps/en/natolive/news_75177.htm>); compared with (25 Mar 2011) '[NATO Spokesman]: ... What I am saying is if you are threatened by say a surface to air missile system that's stopping you enforcing the NFZ, you have the right of self defence ... The NFZ does not give you the right to just go if you like, as you put it, bomb targets on the ground ...' (<http://www.nato.int/cps/en/natolive/opinions_71781.htm>); (26 July 2011) 'We are ... acting where it is required to prevent attacks on civilians or to prevent a build-up of military capabilities that could stop humanitarian aid, for example. So we are not a party in that conflict, and we have no intent to be' (<http://www.nato.int/cps/en/natolive/opinions_76680.htm>)—emphasis added.

remains a legal option for forces engaged in armed conflict, but when those forces are engaging 'the adversary' the proper criterion against which to assess use of force is LOAC, not the law of self-defence. As Additional Protocol I makes clear, even when a combatant force takes defensive action against an attack by the adversary, its conduct is still governed by LOAC 'attack' rules.²⁴ If NATO were engaged as a belligerent, and its attacks on Libyan targets were thus governed by LOAC, then the existence of a specific authority to enforce the NFZ is relatively inconsequential in terms of providing authority for the actions of NATO aircraft against both legitimate military targets on the ground and in the air. Schmitt, discussing the Libyan NFZ, finds it clear that the fact '[t]hat a no-fly zone may be established pursuant to a Security Council mandate has no effect on the applicability of the law of armed conflict'²⁵—the two issues are subject to different legal thresholds.

This issue is closely linked to the second complication in distilling clear use of force guidance from the Libya NFZ—the argument that the NFZ was exploited for other purposes.²⁶ The essence of this argument is that the UNSC-mandated NFZ was narrowly concerned with aerial threats to civilians in Libya, but that it was used to justify much more wide-scale operations against Libyan government forces on the ground. If UNSC-sanctioned NATO forces operating to enforce the mandate were in fact belligerents in the armed conflict (which is my view) then in many respects the NFZ authorization is irrelevant to the question, for once approved to intervene, it was LOAC authorizations which were utilized.²⁷ In these terms, conducting attacks against Libyan government forces and other legitimate military targets was clearly lawful *jus in bello*; the broader question is whether this was what the UNSC was actually authorizing the NATO force to do.

E. Conclusions as to UNSC Use of Force Practice

1. *Is the law governing the zone LOAC- or non-LOAC-based?*

Practice on use of force in relation to UNSC-authorized NFZs is mixed, and coherence between the two or three sets of precedents (depending upon one's view of the Iraq NFZs) is elusive. Whilst the context of the Bosnia NFZ clearly evidenced that the UNSC-sanctioned enforcing force was not a belligerent in the armed conflict attending the establishment of the NFZ, it is less clear that this

²⁴ Additional Protocol I of 1977 to the Geneva Conventions of 1949, Art 49(1).

²⁵ Schmitt, 'Wings over Libya', 50.

²⁶ See eg Letter dated 9 November from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, A/66/551-S/2011/701, para 11, which (although relating to the issue of 'responsibility while protecting') has been broadly understood as a critique of NATO's use of force in implementing the 2011 Libya mandate.

²⁷ The corollary at sea is the furore over the 1982 sinking of the Argentinian warship *General Belgrano* outside the Falkland Islands TEZ—an entirely legitimate act under LOAC regardless of the existence of that TEZ.

was the case with respect to the Libya NFZ. What can be said is that UNSC NFZs (including the contested Iraq NFZs) have in practice focused upon military aircraft and ground-based military anti-aircraft capabilities inside or proximate to the NFZ. In that sense, UNSC NFZ practice is consistently limited to concern with military capabilities—making it quite distinct from UNSC MEZ practice, which focuses much more broadly upon delinquency in non-military (primarily merchant) vessels.

2. *For UNSC non-LOAC-based NFZs, is the law on use of force inside the zone fundamentally the same as the law on use of force applying outside the zone?*

As UNSC NFZ practice appears to be concerned with military capabilities, there is no indication—nor any reason—to assume that civil air traffic which breached a UNSC NFZ should or would be treated by the NFZ-enforcement force other than in accordance with Article 3bis of the Chicago Convention. This rule—civilian aircraft should only ever be shot down as a last resort in grave self-defence situations—is widely considered to be customary international law, including by the UNSC.²⁸ Consequently, one's position on the trumping power of Article 103 of the UN Charter, and its effect (if any) in relation to customary international law, is central to interpreting the *legality* of such an action. However, shooting down a delinquent civilian aircraft which enters a UNSC NFZ on the basis of 'mandate enforcement' would be a radical act, and would indeed represent a distinct challenge to the coherence of the law on use of force within and without the NFZ. I suspect that should such an incident ever occur it would only ever arise in a hostile act or hostile intent scenario, and would thus be understood in terms of the legally safer justification of self-defence, rather than a use of lethal force for mandate enforcement. It is important to note, however, that this is a highly contentious question upon which there is little practice. Views will inevitably differ: Schmitt, for example, argues that:

However, enforcement of a Security Council-authorized no-fly zone applying to all aircraft, such as that over Libya, necessarily alters the equation. A civilian aircraft violating a no-fly zone forfeits its civilian status and becomes a 'military objective,' because it is making an 'effective contribution to military action' and its 'destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage' to the states enforcing the no-fly zone. Were this not the case, the establishment of a no-fly zone prohibiting all flights would be meaningless.²⁹

²⁸ See eg SC Res 1067 on the shooting down of two civil aircraft on 24 February 1996 (26 July 1996)—concerning the shooting down of two US civil aircraft by the Cuban Air Force, resulting in four deaths—operative para 6: 'Condemns the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in article 3 bis of the Chicago Convention, and the standards and recommended practices set out in the annexes of the Convention...' (emphasis added).

²⁹ Schmitt, 'Wings over Libya', 51.

3. Has the UNSC actually altered the law normally applicable in the airspace enclosed by the zone?

When imposing a NFZ in sovereign airspace (or, indeed, in international airspace) as a Chapter VII 'all necessary means' measure, the UNSC clearly alters the law normally applicable in the airspace enclosed by the NFZ. As McIlmail notes, NFZs effectively 'deprive [a] state ... of a large measure of its territorial sovereignty'.³⁰ Although there is no practice on point, it follows that the UNSC's imposition of a NFZ in international airspace could also lawfully alter the routine airspace rights normally applicable in the enclosed area.

IV. UNSC-ENDORSED OR MANDATED MARITIME EXCLUSION ZONES

A. General Description

There is no settled general legal definition of a 'MEZ'. The start point is to note a general definition of 'maritime operational zone' and to refine the concept by reference to this parent context. The US Naval War College's 2006 publication *Maritime Operational Zones* asserts that such zones comprise 'designated ocean areas and superjacent airspace in which a nation [or the UNSC] purports to restrict the freedom of navigation and/or overflight of other users or otherwise impact the exercise of those freedoms'.³¹ Another related description is that for 'exclusion zone' in the International Institute of Humanitarian Law's *Rules of Engagement Handbook*: 'A zone established by a sanctioning body to prohibit specific activities in a specific geographic area'.³² Historically, terms such as cordon sanitaire, quarantine, warning zone,³³

³⁰ McIlmail, 'No-Fly Zones', 36.

³¹ Dennis Mandsager, 'Foreword' in Jaques, *Maritime Operational Zones*, xiii.

³² Alan Cole et al, *Rules of Engagement Handbook* (San Remo: International Institute of Humanitarian Law, 2009), 82.

³³ See generally, Henriques, 'Zones in Crisis Conditions' in Jaques, *Maritime Operational Zones*; Henriques has described a non-LOAC-based 'warning zone' as 'an identified area of the ocean in which a State is conducting or intends to conduct lawful activities which might pose a hazard to or interfere with other use of the oceans' (at 2-1). Whilst there is considerable debate about the lawfulness or otherwise of such zones, advocates do not in general assert that the mere declaration of a warning zone actually generates or enlivens a different law applicable within the zone. At most, the legal effect of a warning zone is to offer a defined tripwire for assessing hostile intent: if a vessel ignores warnings and continues to close the unit, the order to engage is still only valid if it is an exercise of self-defence, informed by the hostile intent indicator of crossing the line and continuing to close in a heightened threat environment. There is no 'zone of death' argument available—the infringing vessel could not be engaged simply because it crossed the line.

security zone,³⁴ safety zone,³⁵ blockade zone,³⁶ and exclusion zone have been used with little distinction in terms of linking particular terms with differentiated powers. For the purposes of this analysis, a UNSC-authorized or sanctioned MEZ is conceived of as follows: a maritime area or zone in which the UNSC, or an agent acting under its authority or with its sanction, asserts a legal right to prohibit entry, or to regulate the conditions of entry, and to enforce that prohibition or those conditions by force as necessary.

There are, arguably, only two types of MEZ—LOAC MEZs and non-LOAC MEZs. The distinction between them is important on two levels. First, LOAC-based MEZs are centred upon the potential for use of offensive force (targeting; attack) in that certain conduct breaching the regulatory scope of a blockade zone, or a visit and search zone, creates a rebuttable LOAC-based right to attack the delinquent vessel.³⁷ Breaching a non-LOAC-based MEZ does not automatically enliven a right to use

³⁴ Some forms of 'security zone' are anticipated in UNCLOS—eg the right of the coastal state to temporarily suspend innocent passage through a part of its Territorial Sea, for security purposes, as long as it is not discriminatory amongst foreign vessels in either form or fact: Art 25. Some states also claim 'security zones' in areas analogous to the contiguous zone (where additional fiscal, immigration, sanitary, and customs powers coexist with the EEZ rights already available in the 12–24 nautical mile zone). Such claims are contentious, to say the least. See also Frederick C. Leiner, 'Maritime Security Zones: Prohibited Yet Perpetuated' (1984) 24 *Virginia Journal of International Law* 967—this analysis focuses more narrowly upon security zones that are contiguous to the territorial seas of the states asserting them. On use of maritime warning and exclusion zones during the Iran/Iraq 'Tanker War' and the 1990–1 Gulf War, see (inter alia) John H. McNeill, 'Neutral Rights and Maritime Sanctions: The Effects of Two Gulf Wars' (1991) 31 *Virginia Journal of International Law* 631; Ross Leckow, 'The Iran–Iraq Conflict in the Gulf: The Law of War Zones' (1988) 37 *International and Comparative Law Quarterly* 629; Lois E. Fielding, 'Maritime Interception: Centrepiece of Economic Sanctions in the New World Order' (1993) 53 *Louisiana Law Review* 1191; Maxwell Jenkins, 'Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals' (1985) 8 *Boston College International and Comparative Law Review* 517; George K. Walker, 'The Tanker War 1980–1988: Law and Policy' (2000) *International Law Studies* 74.

³⁵ eg the 500-yard safety zone coastal states may assert around an installation in their EEZ or over their continental shelf: See UNCLOS, Art 60(5) via Art 80.

³⁶ Most recently by Israel in relation to the Gaza Strip, as was at issue in relation to the *Mavi Marmara* incident. See: 'Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident' (Palmer Report), July 2011; 'The Public Commission to Examine the Maritime Incident of 31 May 2010: Report Part I' (Turkel Report), released 23 Jan 2011, available at <<http://www.turkel-committee.gov.il/files/wordocs/8707200211english.pdf>>; 'Report on the Israeli attack on the humanitarian aid convoy to Gaza on 31 May 2010' (Turkish National Commission of Inquiry), Feb 2011.

³⁷ Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: International Institute of Humanitarian Law/Cambridge University Press, 1995), rule 98 (blockade), rule 60(e) (activities which may render enemy merchant vessels military objectives, and thus liable to attack), and rule 67(a) (neutral merchant vessels may not be attacked unless believed on reasonable grounds to be, inter alia, carrying contraband, and, after prior warning, intentionally and clearly refuse to stop or resist visit, search, or capture). Note, however, that a third LOAC-based authority—the power to control (including in some cases to exclude) neutral vessels and aircraft 'in the immediate vicinity of naval operations' (rule 108) does not necessarily carry with it a rebuttable presumption for attack. In fact, however, the actual operational effect can be the same, for a neutral vessel which ignores repeated warnings to depart the immediate area of operations may then be reassessed in terms of belligerent conduct (under LOAC) or hostile intent (as a trigger for unit self-defence).

offensive force, however—if there is no armed conflict then LOAC does not apply, and the attack rules are not available. This does not mean that no force can be used in such zones—clearly force in individual and unit self-defence is always available where the preconditions that enliven this right are manifest. Similarly, non-lethal force in a ‘constabulary’ or ‘law enforcement’ context is also routinely available to support stopping, boarding, searching, detaining, and diverting vessels which transgress the regulatory purpose of a lawful MEZ.

B. Sanctions Enforcement Generally

Within this broader LOAC/non-LOAC bivalency, there are three forms of MEZ which the UNSC has utilized in practice. The first is the zone associated with Chapter VII compulsory sanctions-enforcement operations, and is an ‘exclusion’ zone insofar as it supports discriminatory regulation—the exclusion of only a particular class of vessels (ie vessels carrying sanctioned cargoes) as opposed to all vessels generally. By this, I mean those sanctions regimes where the UNSC has used the necessary form of words to temporarily displace or alter the general international law regime applicable to boarding, searching, detaining, and diverting vessels on the high seas, and indeed in territorial seas. It is important to note, however, that not all Chapter VII sanctions regimes are of this nature. Some regimes—such as that established in response to the Democratic People’s Republic of Korea (DPRK) nuclear test—avoid using the necessary phrases. The enforcement consequence is that use of force remains or becomes available only in each state’s own ports and sovereign waters, on its own flagged vessels, and with flag state consent for all other shipping.³⁸

In practice, consequently, it is only when the UNSC employs the form of words first utilized in Resolution 665 in relation to the Iraq–Kuwait sanctions regime, that it consciously and explicitly empowers mandated forces to conduct such operations without the need to gain flag state consent, even though the purpose of the operation is unrelated to Article 110 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) five routine exceptions to the requirement to seek flag state consent (the ‘right of visit’),³⁹ or to any other (non-UN Charter) treaty-based waiver of the requirement to seek or confirm positive flag state consent.⁴⁰ The form of words used in Resolution 665 was:

Calls upon those member states cooperating with the government of Kuwait... to use such measures commensurate to the specific circumstances as may be necessary under the

³⁸ SC Res 1718 on Non-proliferation / Democratic People’s Republic of Korea (14 Oct 2006), operative para 8(f).

³⁹ In relation to vessels suspected of being engaged in piracy, slave trading, unauthorized broadcasting, being without nationality, or despite the visible flag (or even no flag) the vessel is suspected of being of the same nationality as the warship engaging the right of visit.

⁴⁰ eg Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons

authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)...⁴¹

This phraseology has been repeated in subsequent UNSC maritime sanctions regimes—for example, in relation to the former Yugoslavia (see the following section), Haiti, and Sierra Leone.⁴² Such sanctions regimes are buttressed by an actual—if not always specifically declared—MEZ to which entry is regulated by the terms of the UNSC mandate. In general, this regulation is narrow, specific, and discriminatory in that vessels not carrying or suspected of carrying sanctioned cargoes will generally be permitted to transit through the MEZ (often on the basis of a standing authority for vessels of certain classes to proceed). However, this power to regulate entry and grant standing approvals is always read in the context of the overarching power to enforce the sanctions regime, and thus it may be a precondition of entry that even non-suspect vessels undergo basic prior vetting—generally through radio interrogation and, if necessary, board and search where radio interrogation, or the vessel’s conduct, generate suspicion as to its true cargo and/or intentions.

C. UNSC Non-LOAC-Based MEZs

Practice related to UNSC-approved MEZs that go beyond routine sanctions enforcement is very limited. In effect, there is only a single clear instance where the UNSC has gone one step beyond a sanctions enforcement regime—whereby shipping is permitted to pass through the designated zone as long as it has been checked, or it is not liable to the sanctions regime—to actually prohibiting entry into and transit through the relevant MEZ. This was the MEZ which the UNSC imposed in relation to the Territorial Sea of Serbia and Montenegro during the conflict in the former Yugoslavia.

Following the descent into widespread conflict as the FRY broke apart from September 1991, the UNSC implemented a general embargo on military equipment entering the FRY,⁴³ followed by a broader sanctions regime over FRY exports which states were called upon to implement within their territory and in relation to their

of Mass Destruction, Their Delivery Systems, and Related Materials by Sea 2004 (entered into force 24 Nov 2004); Art 4(3)(d) ‘If there is no response from the Competent Authority of the requested Party within four hours of its acknowledgment of receipt of the request, the requesting Party will be deemed to have been authorized to board the suspect vessel for the purpose of inspecting the vessel’s documents, questioning the persons on board, and searching the vessel to determine if it is engaged in proliferation by sea’—available at <<http://www.state.gov/t/isn/trty/35237.htm>>.

⁴¹ SC Res 665 on Iraq–Kuwait (25 Aug 1990), operative para 1.

⁴² See eg SC Res 875 on Haiti (16 Oct 1993), operative para 1; SC Res 1132 on Sierra Leone (8 Oct 1997), operative paras 6 and 8.

⁴³ SC Res 713 on the Socialist Federal Republic of Yugoslavia (25 Sept 1991), operative para 6; SC Res 724 on the Socialist Federal Republic of Yugoslavia (15 Dec 1991), operative para 5.

flagged vessels.⁴⁴ On 16 November 1992, the UNSC further expanded the sanctions regime by reference to specified prohibited imports into the FRY and transformed its enforcement by reference to the form of words underpinning the Resolution 665 Iraq–Kuwait authorization.⁴⁵ In April 1993, Resolution 820 further expanded the sanctions regime to cover ‘all commodities and products’ being imported into or exported from the FRY, with the exception of specified humanitarian supplies.⁴⁶

What sets the UNSC’s FRY sanctions MEZ—and, indeed, Resolution 820—apart from the general course of UNSC non-LOAC-based MEZs in support of sanctions enforcement is that Resolution 820 transformed a *regulated* entry MEZ into a *prohibited* entry MEZ in a portion of the maritime area of operations—the Serbia and Montenegro Territorial Sea. Prior to Resolution 820, commercial traffic which indicated it was merely transiting through this Territorial Sea was permitted to proceed, whilst traffic reporting (or suspected to have as its actual aim) an intention to enter a Serbia and Montenegro port was subject to board and search in line with the sanctions regime. The effect of Resolution 820, however, was to prohibit even non-Serbia and Montenegro destined commercial traffic from transiting this area, unless it had received prior sanctions committee permission, or was facing a situation or *force majeure*.⁴⁷ This prohibitive (as opposed to more permissively regulatory) form of UNSC non-LOAC-based MEZ is evidence that declaring and enforcing such a MEZ is certainly within the UNSC’s Chapter VII powers.

D. UNSC LOAC-Based MEZs

It is not routine for UNSC-authorized forces to descend into the arena as belligerents in an armed conflict. In general, UNSC-authorized forces stand apart from the belligerents and attempt to act as a stabilization force in the midst of the armed conflict, whilst not being a party to that armed conflict. UNPROFOR is one example: the parties to the armed conflict were Serb, Croat, and Bosniac states/entities; the UN force was not a party to the armed conflict and thus did not have access, *de jure*, to LOAC authorizations.⁴⁸ On occasion, however, the UNSC effectively authorizes a force to engage as a party in the armed conflict (eg ISAF in Afghanistan⁴⁹) or the UN force ends up as a party through circumstance (eg the United Nations Operation in the Congo (ONUC)⁵⁰ and perhaps—very temporarily—the United Nations Operation

⁴⁴ SC Res 757 on Bosnia and Herzegovina (30 May 1992), operative para 4.

⁴⁵ SC Res 787 on Bosnia and Herzegovina (16 Nov 1992), operative paras 9 (expanded sanctions regime) and 12 (crossing the ‘Iraq–Kuwait line’ in terms of enforcement authority).

⁴⁶ SC Res 820 on Bosnia and Herzegovina (17 Apr 1993), section B.

⁴⁷ SC Res 820 on Bosnia and Herzegovina (17 Apr 1993), operative paras 28–9.

⁴⁸ Hence the previously noted tortuous ‘mandate enforcement’ and ‘self-defence’ language used in, *inter alia*, SC Res 836 on Bosnia and Herzegovina (4 June 1993).

⁴⁹ eg SC Res 1510 on Afghanistan (13 Oct 2003), operative paras 1–2.

⁵⁰ See generally, Findlay, *Use of Force in UN Peace Operations*, ch 3.

in Côte d’Ivoire (UNOCI) in 2011⁵¹ or the Intervention Brigade in the Democratic Republic of the Congo under SC Res 2098 (2013)). In terms of the former, given that the Afghanistan conflict is not accompanied by any related armed conflict at sea, there has been no potential for a coexisting UNSC LOAC-based MEZ authorization. In terms of the latter, such instances have centred upon unanticipated and transient operations ashore and there has been little time, need, or opportunity to implement a relevant LOAC-based MEZ.

This leaves us with a single clear, but highly contentious, instance of an alleged use of a LOAC-based MEZ under the authority of a Chapter VII mandate (Iraq 2003), and a more recent incident of potential use which is obscured by continuing uncertainty as to the status of UNSC-authorized forces involved in the conflict (Libya 2011). I shall examine the Iraq context first. Leaving aside the *jus ad bellum* debate as to a claimed rejuvenation of the mandate attendant upon the initial ceasefire in 1991, there is no legal reason why a UNSC-mandated or authorized force cannot access LOAC-based MEZ powers in the same way and for the same reasons as UNSC-mandated or authorized forces ashore can access LOAC powers when they are a party to the armed conflict. In this sense, it is thus useful to briefly explore how this occurred in Iraq in 2003.

In essence, at the time of the invasion, there were two MEZ regimes in operation in the north Arabian Gulf. The first was the continuing sanctions-enforcement regime which had been underway since Resolution 665 in 1990.⁵² The second was the belligerent right of visit and search claimed by coalition naval forces as an adjunct to the armed conflict against Iraq.⁵³ Each regime is governed by separate ‘rules’ in relation to use of force, and governs different ‘scopes’ in relation to infringing conduct. Thus, whilst the visit and search regime was available to deal with contraband (as defined in LOAC) and the option of attack was available in relation to certain vessels which breached the visit and search regime, this regime could not be readily applied to ‘neutral’ merchant shipping exiting Iraq. The coexisting UNSC sanctions regime, however, could be applied to shipping exiting Iraq (specifically in relation to the regulated cargoes), but the available options for use of force in enforcement did not extend to LOAC-based attack. The lesson, it is clear, is that whilst the UNSC may authorize a force to engage in LOAC-based operations whilst at the same time continuing to implement a pre-existing sanctions regime, it is vital—both legally and operationally—to be

⁵¹ See eg ‘Pro-Gbagbo forces attack on Ouataras HQ’, 10 Apr 2011, available at <<http://www.thisdaylive.com/articles/pro-gbagbo-forces-attack-on-ouataras-hq/89357/>>; ‘Côte d’Ivoire’s UN Peacekeepers’, *The Economist*, 10 June 2012, available at <<http://www.economist.com/blogs/baobab/2012/06/c%C3%B4te-divoires-un-peacekeepers>>.

⁵² This sanctions regime continued in force—albeit with some amendments, from 1990–2003, and in more limited form after mid-2003—eg SC Res 1546 on Iraq (8 June 2004), operative para 21.

⁵³ See eg ‘Special Warning 121 Persian Gulf’ (20 Mar 2003) available in Jaques, *Maritime Operational Zones*, C59.

clear which regime is being utilized in any given situation, as the legal boundary between the regimes is not necessarily permeable. It would be a grave error—and unlawful—to assume that the coexistence of the regimes also authorized the transference of powers between them. It would be legally questionable to assume that the UNSC had tacitly authorized use of LOAC attack rules in sanctions enforcement, or conversely that the visit and search regime could be used on exiting shipping in the same way that the sanctions regime could be so applied.

The second context is Libya in 2011. Although the tortuous mechanism of replacing an operative paragraph in Resolution 1970 (implementing a sanctions regime with limited enforcement mechanisms)³⁴ with a different operative paragraph from Resolution 1973 (implementing a fully enforceable sanctions regime)³⁵ is notable, the fundamental effect of Resolution 1973 was to institute a compulsory 'Iraq-Kuwait' style MEZ sanctions regime. The question raised by the Libyan maritime sanctions regime, however, is whether it was underpinned only by a non-LOAC-based UNSC-approved MEZ—in the same way as the FRY regime was—or whether it provides a second (more defensible) example of a UNSC-approved LOAC-based MEZ. It is clear that NATO maritime forces were engaged in a 'standard' UNSC sanctions-enforcement operation, and that the MEZ reflected this authority: 'NATO maritime assets stopped and searched any vessel they suspected of carrying arms, related materials or mercenaries to or from Libya'; 'By the end of the operation, NATO had conducted over 3,000 hailings at sea and almost 300 boardings for inspection, with 11 vessels denied transit to their next port of call'.³⁶ This is the public language of traditional Chapter VII 'all necessary means' sanctions enforcement with no LOAC overlay. Similarly, there was no LOAC-based Notice to Mariners or Special Warning of a nature similar to that promulgated in relation to operations against Iraq in 2003.³⁷ These tentative indications (at least until further details of the maritime operation emerge) tend towards the conclusion that NATO maritime forces involved in UNSC Libyan sanctions enforcement did not in fact rely upon LOAC-based MEZ authorizations (eg blockade or visit and search). At this stage, consequently, the Libyan MEZ operation is perhaps better viewed as yet another example of the Iraq 1990 and FRY non-LOAC-based

³⁴ SC Res 1970 on Peace and Security in Africa (26 Feb 2011), operative para 11.

³⁵ SC Res 1973 on Libya (17 Mar 2011), operative para 13. The sanctions regime was further adjusted by SC Res 2009 on Libya (16 Sep 2011), operative para 13. See generally, Martin D. Fink, 'UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector' (2011) 50 *Military Law and the Law of War Review* 237.

³⁶ 'NATO and Libya', available at <http://www.nato.int/cps/en/natolive/topics_71652.htm>.

³⁷ See eg NAVAREA III NAVWARN 395/11—'NATO is coordinating a maritime embargo operation in vicinity of LIBYA in accordance with UNITED NATIONS SECURITY COUNCIL RESOLUTIONS (UNSCR) 1970, 1973 and 2009', available at <<http://www.shipping.nato.int/operations/UP/Pages/NavWarn.aspx>>. NAVAREA III 445/2011 cancelled the NAVWARN on the Libyan maritime sanctions-enforcement operation in the Mediterranean Sea on 31 Oct 2011—available at <http://www.armada.mde.es/ArmadaPortal/page/Portal/ArmadaEspañola/ciencia_ihm_1/02_Productos/Servicios--02_NAVAREAS>.

MEZ approach than as a more legitimate example of the Iraq 2003 joint LOAC and non-LOAC-based MEZ approach.

E. Conclusions as to UNSC Use of Force Practice

1. *Is the law governing the zone LOAC or non-LOAC-based?*

This threshold paradigmatic question is vital for understanding the law applicable in enforcing the MEZ once the UNSC has authorized its creation, or a UNSC-sanctioned force has created such a zone as a component of its operational plan to implement the mandate the UNSC has conferred upon it. UNSC practice with LOAC-based MEZs is very limited and is indirect in that it is not the UNSC itself which declares a LOAC-based blockade or visit and search regime—rather, these are operational options which the UNSC-sanctioned or mandated force may employ amongst its suite of use of force options where it is actually participating as a belligerent in the armed conflict. In most cases, the UNSC's clear preference is to employ MEZs of varying scope via the mechanism of non-LOAC-based sanctions-enforcement regimes. These MEZs are generally of limited regulatory discrimination (targeted at specific vessels and cargoes, leaving all other maritime traffic free to transit the MEZ), but there is at least one instance of UNSC practice supporting a more general exclusionary power.

2. *For UNSC non-LOAC-based MEZs, is the law on use of force inside the zone fundamentally the same as the law on use of force applying outside the zone?*

This question must always be assessed at two levels—use of non-lethal force, and use of lethal force. In terms of use of non-lethal force, the law applicable inside a Chapter VII 'all necessary means' MEZ does change in that the UNSC has created an authority to use maritime law enforcement powers in situations where they generally are only available on the basis of flag or coastal state consent. In a second sense, however, the applicable law does not change in that the permission for authorized forces to employ routine law enforcement levels of force to implement the sanctions—that is, use of force to halt, board, search, detain, seize, and divert—is linked to a mandate purpose, not necessarily a closely defined geographic zone. Unless expressly limited to a particular geographic zone by the UNSC, this authority is general in that it is not expressly tied to a specific area of ocean space. In practice, the forces mandated to implement the sanctions regime will generally do so only within a defined area—the MEZ—but this is a self-imposed operational limitation as opposed to a legal one. If the sanctions regime is not expressly geographically confined, then there is no legal reason that a UNSC-mandated force could not undertake a sanctions-related boarding and seizure in ocean space outside the declared operational zone. In this sense, the law inside the MEZ and outside the MEZ is the same.

The same is so in terms of lethal force. In general, lethal force is available to UNSC-mandated or sanctioned forces, which are not engaged as belligerents in an armed conflict, only in circumstances focusing upon individual, unit, and force self-defence or defence of others. In terms of use of lethal force, declaring a 'line in the water' does not create a new legal regime inside the zone where lethal force is available merely by virtue of the fact that a vessel has crossed that line. As with the MEZs declared around the Iraqi oil platforms in the aftermath of the 2003 conflict, the line in the water did not create a new authority to engage vessels that crossed that line with lethal force merely *because they crossed the line*. What these lines in the water actually did was to create a tripwire which could then act as a significant indicator of hostile intent, which could in turn support (in conjunction with other available information) a decision to employ lethal force in self-defence.

3. *For non-LOAC-based MEZs, has the UNSC actually altered the law normally applicable in the ocean space enclosed by the zone?*

The declaration of a UNSC-authorized and compulsory MEZ does indeed create a legal option for the UNSC to alter the law normally applicable in the ocean space enclosed by the zone. The establishment of such an exclusory MEZ in international waters clearly anticipates that the routinely applicable law is temporarily displaced to the extent of any inconsistency with the UNSC-mandated regime. Thus, the default setting on freedom of navigation encapsulated in customary international law and in Article 87 of UNCLOS (the 'High Seas freedoms') can be legally curtailed in the MEZ to the extent necessary for such an exclusory regime to be effectively implemented. Similarly, in the territorial sea, the routine right of innocent passage can also be displaced where this is implicit in the UNSC mandate. This was the case with the MEZ created in the Territorial Sea of Serbia and Montenegro by Resolution 820—an MEZ for which the default setting was a prohibition on entry unless authorized. The general sanctions regime MEZ default, however, is for 'entry as usual' except for certain classes of vessels, which are generally defined by their declared cargo and destination or suspicions as to actual cargo and intentions.

V. CONCLUSION

UNSC practice with respect to use of force in relation to NFZs and MEZs is mixed, and only partially coherent. In a *jus ad bellum* sense, it is clear that in utilizing its Chapter VII powers the UNSC can and does impose NFZs and MEZs

in a variety of forms, albeit with practice on MEZs being both more regular and of broader scope. It is equally clear that in authorizing or acquiescing in the creation of NFZs and MEZs, the UNSC can and often does alter the legal regime within the zone in terms of both restricting or regulating entry and transit through the zone, and granting a general permission to authorized or mandated forces to use force in enforcing the purposes for which the zone is established. Beyond this point, however, as the NFZ or MEZ mandate is 'operationalized', there is significantly less coherence in practice. This is most evident in the variable interplay between legal contexts which governs each situation. One such context question is whether the zone is a LOAC or non-LOAC-based zone. In this regard, UNSC practice appears to endorse remaining silently acquiescent on the use of LOAC-based zones and their attendant authorizations, and this is nowhere more evident than in its practice in relation to NFZs. This is not inherently problematic, however, as LOAC authorizations draw their authority from a body of law that is not dependent upon the UNSC for its power, and such authorizations can and do coexist with related UNSC authorizations. However, the UNSC is much less reticent to give directions on the implementation and enforcement of non-LOAC-based exclusion zones—a logical and necessary requirement given that such zones may not rest upon any other authority than that of the UNSC. Another fundamental context question that is central to any analysis of UNSC NFZ and MEZ use of force practice—but which also contributes to the confusion still evident in this practice—is the issue of 'expanded' legal authorizations for use of lethal force for a mandate enforcement purpose that is linked neither to immediate individual self-defence or defence of others, nor to LOAC authorizations. Definitively describing or defining UNSC practice on use of lethal force in enforcing NFZs and MEZs will, however, remain an elusive task. Whilst debates as to the precise nature and legal authority of the UN's conception of 'self-defence', and the ambit of Chapter VII powers in relation to use of lethal force remain unresolved, tracing coherence within this disparate body of practice will continue to prove difficult.