# Maritime interception and the law of naval operations

*A study of legal bases and legal regimes in maritime interception operations, in particular conducted outside the sovereign waters of a State and in the context of international peace and security*

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**Publication date**
2016

**Document Version**
Final published version

# CHAPTER 1:

## Introduction: maritime interception and the law of naval operations

*There is no mystery about the war at sea, though like all science and art it can be obscured by skillful elaboration.*

Carlyon Bellairs (1871-1955), Commander Royal Navy[1]

### 1. Introduction

In 2006, on board the Netherlands warship *Hr. Ms. De Zeven Provinciën* operating in Operation *Enduring Freedom*,[2] a USCENTCOM[3] unclassified slide came to my attention which depicted a matrix that contained a number of legal bases for the different maritime interception operations that were conducted by US naval forces around the Arabian Peninsula. Whilst glancing over this matrix my thoughts were that it must really be a challenge for warship commanders to separate all these legal bases and subsequent authorities and apply them to the different situations they could potentially encounter at sea. At that moment, *Hr. Ms. De Zeven Provinciën* was operating in the Indian Ocean. The legal environment at

[1] C. Bellairs, *The battle of Jutland. The sowing and the reaping* (London, Hodder & Stoughton, 1919), 41.

[2] *Hr. Ms. De Zeven Provinciën* was then assigned to Taskforce 150 and operating in operation *Enduring Freedom*. Some states who participate with military forces in operations bring with them their own operation alias. To mention some examples, the Australian contribution to the maritime dimension of OEF was named 'operation Slipper', the Netherlands contribution to the multinational force in Iraq (MNF-I) was named SFIR (Stabilization Force Irak). The UK named its contribution operation TELIC. This thesis will follow the name that is the most familiar and internationally recognized alias, which is usually the US, NATO or EU-name for an operation.

[3] United States Central Command.

that time in the seas around the Arabian Peninsula was a complex situation as a multitude of operations were and had been conducted that had either a maritime dimension or were primarily a naval operation. Many of the conflicts with a maritime dimension in the Middle-East, Near East and Northern Africa come together in these seas; from counter-piracy operations off the coast of Somalia and the Gulf of Aden, to searching for terrorists as a result of the attacks on the United States on the 11th of September 2001. The Persian Gulf and the Red Sea have been a constant theatre for naval operations ever since the Iraq-Iran War (1980-1988), albeit with periodically changing legal frameworks, in step with the changing political situation of conflicts in the region. In the Persian Gulf, over the last twenty-five years warships of many different States have been tasked with a diverse range of operations, ranging from conducting convoy operations to ensure freedom of navigation, to enforcing UN-mandated embargo's, to executing the belligerent right of visit and search during the situations of armed conflict that occurred in the Gulf. In recent years, carrying out maritime security operations has been added to this list. This practice directed my attention to a study of the legal frameworks applicable to maritime interception operations because, in the words of Mark Janis, 'States may use their navies to demonstrate and enforce their perception of the proper law of the sea. If such naval operations are consistent, effective and accepted, customary international law of the sea may develop. But if such naval operations are inconsistent, ineffective, or resisted, chaos may result.'[4]

During the last few decades naval operations that have become known as maritime interception operations (MIO) have grown to become a well-established operational activity for navies all around the world. MIO have firmly established themselves as one of the roles for navies and found its way also to the maritime doctrines of States and international organisations. As Allen states, MIO are: "[A] familiar element in the daily routine of units assigned to the maritime component of combined and joint forces commands in some theaters".[5] Allen writes from a US-perspective, but clearly his observation can be applicable to many other navies. The estab-

[4] M.W. Janis, *Sea power and the law of the sea* (Lexington, 1976), 75.
[5] C.H. Allen,'A Primer on the non-proliferation regime for maritime security operation forces', in *NLR*, vol. 54 (2007), 1-28, 1.

lishment of a NATO training center especially for MIO (The NMIOTC)[6] in Crete, Greece in 2004[7] for States to be able to practice the many different aspects of MIO, from tactics to doctrine, is one of the examples that shows the increased attention to MIO in recent years.[8]

The legal aspects connected to maritime interception operations are manifold and will expand the more one considers maritime interception operations in a broader context. In the widest sense MIO are not a standalone activity at sea, but involve activities in the stage before the actual interception operations at sea and the aftermath of the interception. Examples of legal efforts in the first phase are the establishment of legal frameworks to form partnerships or mutual cooperation, collecting and exchanging information between States and organizations and adopting domestic laws that enable States through their naval forces to act, but also to confiscate UN-embargoed goods, or to enable a court of law to judge on a prize case. All of these activities are connected to the actual boarding operation at sea. Recent counter-piracy operations off the coast of Somalia have highlighted that also the aftermath of interception operations is important to be able to succeed in the overall mission of effectively countering piracy at sea. It has also raised many legal questions, such as what to do with persons and goods once they are intercepted at sea, and in particular firmly established the importance of international human rights law to maritime interception operations. Counter-piracy operations, therefore, have underlined the need to view MIO not solely as a naval activity, but as an activity that needs an interagency approach, with the involvement and cooperation of other governmental agencies, such as the departments of Justice and Foreign Affairs. As Brian Wilson mentions; 'the governance challenge is ensuring the existence of a process to acquire and validate information and align efforts across multiple agencies – or even nations. Effectively countering transnational criminal activities on the high

[6] NATO maritime interdiction operations training center. See homepage at: http://www.nmiotc.gr/#home_en.htm..
[7] G.B. Roberts,'Hostis Humani Generis: The threat of WMD terrorism and how NATO is facing the ultimate threat', in *Defence Against Terrorism Review*, vol. 2, no. 1 (2009), 1-13, at 10.
[8] Within the Royal Netherlands Navy, the importance of boarding operations lead to the establishment of a knowledge center for boarding operations: Kenniscentrum boarding operaties (Knowledgecentre boarding operations), which aims to educate, support and to serve as a centre of excellence for the Royal Netherlands Navy. See *Handboek boarding operaties, Commando Zeestrijdkrachten* (2010) para. 1.1.

seas imposes greater demand for integration.'[9] The core legal issues *at sea,* however, centralize around the notion that maritime interception operations include the boarding of foreign flagged vessels and a possible subsequent capture of ships, goods and detainment of persons. As Chapter 3 will underline, in this respect the term MIO has evolved in such a manner that it has moved away from the view that MIO has a distinct legal framework of its own. Rather, as MIO are nowadays conducted for instance as part of international armed conflicts, during counter-piracy operations or anti-terrorism operations and to implement UN-mandates, today MIO can be based on different legal frameworks.

### 1.1. Aim, central question and general set-up

This study examines the scope and content of the international law applicable to maritime interception operations. My aim in examining the laws applicable to maritime interception operations is to add to the theoretical academic debate on this topic and to provide warship commanders and other practitioners through a structural analysis of law and practice a better understanding of the legal environment in which maritime interception operations take place. This thesis will study the international law frameworks applicable to naval operations conducting a maritime interception role outside the territorial jurisdiction or functional of a State and within the context of international peace and security. This is analysed by focusing on two main themes of international law in the context of MIO. The first theme is the legal bases for MIO. The second theme relates to legal regimes applicable to MIO. This theme considers three specific activities during a MIO. It will focus on how applicable legal regimes will affect the conduct of visits, the use of force and detention by military forces during maritime interception operations. The two themes to be explored, therefore, divide the analysis of maritime interception operations into a study of legal bases and legal regimes applicable to MIO. The legal basis refers to the legal authority for military to conduct MIO. The legal regime refers to the bodies of international law that regulate the actions taken during an

[9] B. Wilson, 'The complex nature of today's maritime security issues. Why whole-of-government frameworks matter', in J. Krause, S. Bruns, *Routledge Handbook on naval strategy and security* (2016), 153-165, 154.

interception operation, for instance the use of force or the right to detain the vessel or persons found on board.

## 1.2. Delineations

This study is delineated by three general limitations. First, maritime interception operations will be analysed within the context of international peace and security. Second, the study is limited to operations outside the territorial sovereignity of a State or its functional jurisdiction in coastal areas which posses sovereign rights. Third, the study focuses on contemporary naval operations.

### 1.2.1. Naval operations and international peace and security

What law applies to MIO can be analysed from different angles of international law. Douglas Guilfoyle's study on *Shipping interdiction and the law of the sea* (2009) has focused on interception from primarily a law enforcement perspective.[10] Guilfoyle has used the term 'maritime policing' to cover a number of subjects that deal with interception on the high seas. These subject are for instance violence against shipping, piracy, smuggling, counter-proliferation, and human food security, which are all 'matters of State security interest'.[11] Natalie Klein's study *Maritime security and the law of the sea* has taken the notion of maritime security as the central matter, in which maritime interception operations play a significant role to enhance maritime security.[12] Another study that needs mentioning here in this context is Efthymios Papastravridis' *The interception of Vessels on the High Seas* (2013).[13] He has taken a more general and theoretical approach to maritime interception, centralizing the area of the high seas from which interception operations are considered.[14] Apart from these monographs, there are many studies that have analysed aspects of the laws applicable to maritime interception from a specific topic, such as the interception of weapons of mass destruction, piracy, armed conflict, or

[10] D. Guilfoyle, *Shipping interdiction and the law of the sea* (Cambridge University Press, 2009).
[11] Guilfoyle (2009), 24.
[12] Klein, *Maritime security and the law of the sea* (Oxford University Press, 2011), 9.
[13] E. Papastavridis, *The interception of vessels on the high seas* (Hart Publishing, 2013).
[14] One study from again a different perspective is Philip Wendel's study, who has partly looked at maritime interception from the perspective of state responsibility. P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in public international law* (2007).

UN-mandated embargo operations. This thesis focuses on naval operations undertaken by a State in support of international peace and security. The first part of this focus includes the term 'naval operations'. This term is used to focus in particular on operations conducted by the military at sea. Naval operations in the development of international law, as Mark Janis mentions; 'may play a vital role because naval activities are an authoritative and forceful expression of State interest and policy'.[15] The term naval operations is more limited than 'maritime operations' and excludes operations that are executed by State organs outside the military. 'Naval' refers to the use of military forces and assets at sea, whereas "maritime" encompasses also non-military operations at sea by a State, such as coastguard operations[16] or maritime police operations to deal with illegal fishing or customs issues. 'Maritime', therefore, is a broader term which encompasses all activities of a State in relation to the sea. The second part of the focus is 'international peace and security'. What constitutes international peace and security, or a threat or breach thereof, is determined by the UN-Security Council (UNSC) and is not pre-defined. It is, however, interpreted in an extensive manner, not just to include breaches of the prohibition of the use of force in international relations, but also to include serious and widespread violations of human rights or criminal acts that have large effects on the security interests of States.[17] As such, in the last decade the UNSC has determined that acts of terrorism[18] constitute threats to international peace and security[19] and has taken a similar approach with regard to piracy.[20] As a result of the scope of what the UNSC determines

[15] Janis (1976), 77.
[16] Although it is understood that in some states coastguard vessels can belong to the armed forces and may even by deployed expeditionary to theatres of conflict.
[17] N. Blokker, 'The security Council and the use of force – one recent practice ', N. Blokker, N. Schrijver, *The Security Council and the use of force. Theory and reality - A need for a change* (2005), 1-30, 13.
[18] SC-Res. 1368 (2001) notes the following:

> 1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security;

But see also SC-Res. 2249 (2015) adopted by the Council after the "Paris 2" terrorist attacks in Paris on 18 November 2015.
[19] Some operations, such as the maritime security operations that are conducted under CTF 152 include a mandate to acts against drug trafficking. It is however not an activity that has been determined by the UNSC as a breach of international peace and security.
[20] Although the piracy resolutions state that action is taken under Chapter VII of the Charter, the UNSC did not, however, explicitly determine piracy to constitute a threat to international peace and

as threats or breaches of international peace and security naval operations have also moved into the realm of operations that can be characterized as law enforcement operations. The law enforcement task for naval forces by itself is not a new phenomenon as, for example, acting against piracy has been a task for warships for centuries and outside the scope of international peace and security naval forces are deployed to intercept illegal activities of drug smuggling or illegal fishing patrols.[21] A Netherlands warship acting against piracy in the North Sea for example would be labelled as maritime policing, whilst that same warship deployed in operation *Atalanta* in the Gulf of Aden would perform its task within the context of international peace and security because the Security Council has determined the situation in Somalia as a threat to peace and security of which piracy is an aggravating factor.[22] Apart from the approach that the UNSC defines international peace and security, the focus on international peace and security in this thesis is viewed in a more general sense to mean subjects that may fall within the scope of international peace and security. Typically, what belongs to the spectrum of upholding or restoring international peace and security are maritime interception operations conducted during peace support operations (PSO) and armed conflicts.

### 1.2.2. Operations outside the territorial sovereignity of a State

The second limitation is that this thesis will primarily consider the activities of warships outside the territorial sovereignity of a State. This excludes, therefore, the internal and territorial waters of a State. In other words, the study will focus on naval operations on the high seas and the zones to which the regime of the high seas is made applicable. Article 86

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security. It rather continues to determine the situation in Somalia as such, of which piracy is a part of. The first piracy resolution, SC-Res. 1816 (2008), notes the following:

> Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region, Acting under Chapter VII of the Charter of the United Nations.

[21] P.J.J van der Kruit, *Maritime drug interdiction in international law* (2007), Chapter 2.

[22] With regard to types of counter-piracy operations, Zheng has noted two types of international cooperation between states on the issue of piracy; the Malacca-way, which relates to cooperation between coastal states, and the Somali way, which relates to the cooperation between flag states. H. Zheng, 'Confidence building measures and non-traditional security', in P. Dutton, RS. Ross, O. Tunsjo (eds.), *Twenty-First century seapower. Cooperation and conflict at sea* (2012), 298-314, at 304.

of the *United Nations Convention on the Law of the Sea* (UNCLOS)[23] firstly states that the high seas are those parts of sea that are not included in the exclusive economic zone, the territorial sea, the internal waters of a State, or in the archipelagic waters of an archipelagic State.

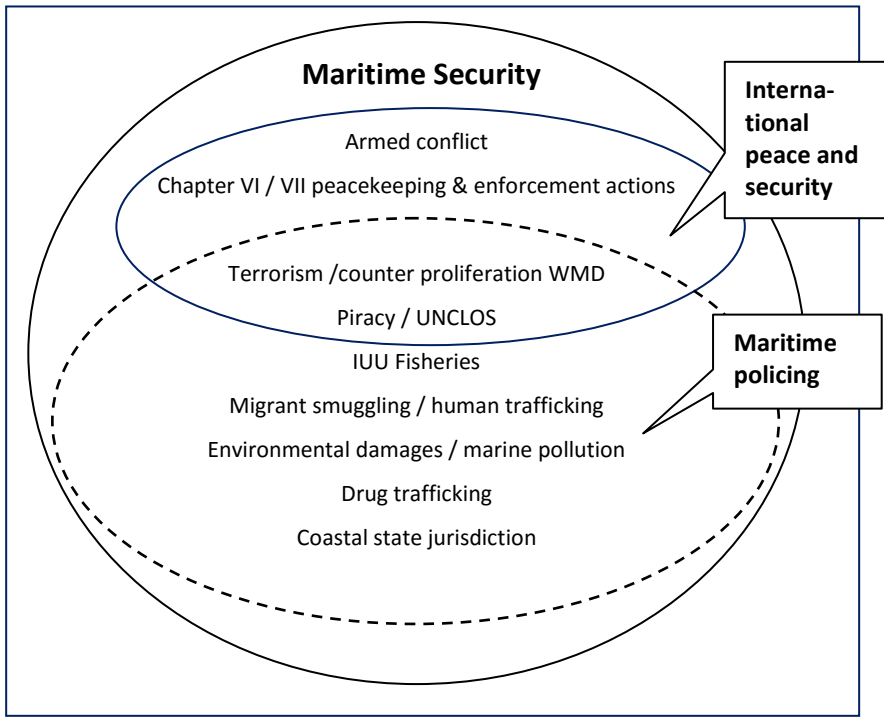


*Fig 1.1. Spectrums of maritime security, maritime policing and international peace and security.*

UNCLOS furthermore states that a number of rules of the high seas[24] which include the freedoms of the high seas and acting against piracy, also to be applicable in the EEZ of a State under the limiting condition of due regard.[25] The essence of this geographical delineation is that the thesis will not take a coastal State approach and will not consider how coastal

[23] *United Nations Convention on the law of the sea*, Montego Bay 10 December, 1982 (hereafter:UNCLOS).
[24] Articles 88 to 115 UNCLOS.
[25] Art. 58(2) UNCLOS.

States can conduct interception operations in or from their own territory.[26] It will, therefore, not analyse the seaward stretch of a State's jurisdiction and which legal frameworks are applicable in the maritime zones where coastal States have either complete or functional jurisdiction over maritimes zones. Instead, this thesis departs from the perspective of what legal possibilities exist for naval forces to conduct maritime interception operations in the maritime zones outside the jurisdiction of the coastal State.

### 1.2.3. Contemporary naval operations

The third delineation is a temporal limitation. Maritime interception operations are a current issue of which its historical roots could probably be traced back all the way to Roman or Greek naval history and its laws. Even Julius Caesar experienced his share of piracy in the Mediterranean Sea.[27] 'There was never a time when piracy was not practiced, nor may it cease as long as the nature of mankind remains the same', wrote the -rather prophetical- Roman consul Cassius Dio.[28] Centuries later, in the 16th century,[29] the Knights of St. John were occupied to rid the Mediterranean of Barbarossa's corsairs.[30] Clearly, we must also not forget the interception of the Portuguese vessel *Santa Catharina* in 1603,[31] the boarding and subsequent burning of the *Caroline* in 1837,[32] the fierce hand-to-hand fighting between the boarding party of *HMS Cossack* and the defenders of the German auxiliary vessel *Altmark* in 1940 in Norwegian territorial waters, or the Greek tanker *Joanna V* that ignored the orders to divert after

[26] For example, an interception operation that is conducted outside territorial waters based on a state's right to hot pursuit (see Art. 111 UNCLOS).
[27] Plutarch, *Levensbeschrijvingen van Alexander (den Groote) en Cajus (Julius) Caesar*. (Translated in Dutch by M.B. Mendes da Costa, 1924), 2; Suetonius, *The twelve Caesars* (translated by Robert Graves, 1957), 10; A. Goldsworthy, *Caesar. Life of a colossus* (Yale University Press, New Haven and London, 2006), 75-78.
[28] Referenced from A. Macartney *Shepard, Sea power in ancient history* (William Heinemann LTD, London, 1925), 177. The *Lex Gabina*, promulgated in 67 BC gave Cneius Pompey the possibility to build a large fleet to destroy the piracy threat in the Mediterranean Sea. See on the *Lex Gabina*, appendix E of H.A. Ormerod, *Piracy in the ancient world. An essay in Mediterranean history* (1924).
[29] It is noted here that there is a legal difference between pirates and corsairs (or privateers). The latter, as opposed to the first, are commissioned by a State to raid on the State's enemy. The Declaration of Paris (1856) declared for the signatories that 'privateering is and remains abolished'.
[30] E. Bradford, *The Shield and the Sword. The knights of St John* (1972), chapter 18.
[31] As a result of which Hugo de Groot took up his pen defining the fundamentals of the law of the sea for centuries to come.
[32] Which resulted in the famous *Caroline-criteria* for anticipatory self-defence.

being boarded by the UK warship *HMS Berwick* in 1966,[33] to name just a few interceptions that helped develop international law. However, as Chapter 3 will elaborate, the 'modern' use of the term MIO was only introduced and accepted after the Cold War, during the Iraq-Kuwait crisis in 1990. Logically, since then the term has also spurred authors to look back into history to look for comparable naval operations in the past, such as the naval operations during the Korean War (1950-1953), the Algerian crisis (1954), the India-Pakistan conflict (1974), the Cuban crisis (1961), or the Beira Patrol (1968-1975).[34] This thesis will, however, draw a temporal limitation by starting to follow the path that MIO has taken since the Iraq-Kuwait crisis to the present day. A few situations, however, that have occurred earlier and which cannot be left out of a proper analysis, will be given attention.

### 1.3. What are maritime interception operations?

While the term MIO is a well-accepted term within the military, there is no internationally and generally accepted definition of what MIO encompasses. Of course many definitions exist in military manuals or other governmental documents, but there is no generally recognized definition. There is not even agreement on what the acronym should stand for. Some refer to *interception* operations and others refer to *interdiction* operations.[35] Nuances may probably be argued to exist between these terms. It may also depend on the underlying subject and the common language used in that particular field of law.[36] Be that as it may, they are usually used in an intermixed manner for the purpose of expressing generally the same thing[37]. This thesis will do the same.

[33] During the Rhodesia crisis, in which the UNSC for the first time used its enforcement powers to authorize a maritime interception operation.
[34] See E.g. H.B. Robertson, Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf conflict', in *ODIL*, vol. 22 (1991), 289-299.
[35] Just to name a few examples of several states and international organizations: NATO refers to maritime interdiction operations. The EU appears to use maritime interception, mostly in the context of the refugees at sea issues. The Netherlands Maritime Doctrine (GMO) uses maritime interdiction operations. The UK refers in its *British Maritime Doctrine* (BR 1806, 3rd ed. 2004) to the NATO doctrines and thus refers to interdiction rather than interception.
[36] For instance 'maritime interception' is common language used in the issues of refugees at sea.
[37] E.g. Papastavridis (2013), 60-61; A.E. Carr, *Maritime interdiction operations in support of the counter-terrorism war*, Paper Naval War college (4 February 2002), 3.

To define what MIO are it is important to note from the outset that, as Von Heinegg has very rightly noted, instead of being a legal term, MIO can be considered an operational term of art which encompasses a certain activity at sea.[38] This basically means that the term does not come with a legal framework of its own. In the early days of the use MIO, when such operations were synonymous with maritime embargo operations that are conducted within the legal basis of the UN-collective security system, it was understandable to consider MIO to be a term with a specific legal framework. But as Chapter 3 will underline, today the term MIO is used in a much broader sense. The Royal Netherlands Navy most recent definition on MIO dates from 2014 and considers that the aim of MIO is to stop certain categories of goods or individuals that are in or pass through a certain sea area.[39] In 2005, NATO's main publication on MIO, *Allied Tactical Publication* (ATP) 71, defined MIO as: 'A maritime interdiction operation (MIO) encompasses seaborne enforcement measures to intercept the movement of certain types of designated items into or out of a nation or specific area'[40]. The Dutch definition submits that MIO can include persons. This is one of the important developments in conducting MIO, which will be elaborated upon in Chapter 3. Interestingly, having understood this development, NATO has included persons in its definition when it updated its MIO-publication in 2013. The current version of this publication now reads: 'An operation conducted to enforce prohibition on the movement of specified persons or materials within a defined geographic area'.[41] Several definitions exist in US-documents on MIO. The US-doctrine on command and control in maritime operations (2013)[42] understands MIO to be efforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations such as those in support of United Nations Security Council resolutions (UN-SCRs) and/or prevent the transport of restricted goods. The US *Joint Pub-*

[38] W. Heintschel von Heinegg'Maritime interception/interdiction operations', in *The Handbook of the International Law of Military Operations* (Oxford University Press, Oxford, 2010), 375-393, at 375.
[39] GMO (2013), 385. *In Dutch:* Een maritieme interdictie operatie (MIO) is een operatie die wordt uitgevoerd om het transport van bepaalde goederen of personen door of in een bepaald zeegebied te voorkomen.
[40] ATP 71, *Allied maritime interdiction operations* (2005), 1-1. At: http://www.navedu.navy.mi.th/stg/databasestory/data/laukniyom/ship-active/big-country-ship/United-States/ATP/ATP_71.pdf.
[41] ATP 71, *Allied maritime interdiction operations* (2013), 1-1.
[42] Joint publication 3-32 (7 August 2013).

*lication* (3-03)[43] on interdiction operations defines MIO in a number of ways, essentially, that its purpose is to interdict goods or persons prohibited by a lawful sanction. This may be done on the basis of a UN-resolution, through the use of belligerent visit and search and, according to the US doctrine, pursuant the right of self-defence.[44] As such, apart from the understanding that MIO can now include the interception of both goods and persons, this last remark also points out that different legal bases can apply to MIO.[45]

Some authors reserve the term MIO to naval operations outside the context of operations to which the law of naval warfare is applicable. Others use it in a broader sense, to include both warfare and law enforcement operations.[46] Von Heinegg makes a clear distinction between maritime interception operations that are conducted in the context of the law of naval warfare, and operations that are outside the legal regime of the law of armed conflict: 'It is important to note that MIO are naval operations which are not governed by the law of naval warfare'.[47] 'MIO', he states, 'are measures used in times of peace or of crisis only'. He does not appear, however, to disagree that on an operational level interception operations based on the laws of naval warfare or outside this framework may in some cases not be distinguishable from each other.[48]

The distinction to reserve the term MIO solely for situations outside armed conflict is, apart from it historical evolution, attractive in terms of its clarity. Arguments to define the scope of MIO in a different way, however, also exist. A more expanded view is that as an ultimate consequence of MIO being an operational term of art, this operational art of MIO can also be -and is- used in situations of armed conflict. Secondly, MIO undertaken, for instance, within the context of Chapter VII of the UN-

[43] Joint Publication 3-03 (Joint Interdiction), 14 October 2011.
[44] Joint Publication 3-03, at II-5.
[45] The EU, another actor within the realm of international peace and security, uses the term maritime interception. Although no definition appears to exist, maritime interception within the EU is primarily focused on persons trafficking by sea, such refugees, but also pirates.
[46] See e.g. D. Guilfoyle,'The use of force against pirates', in M. Weller (ed.), *The Oxford Handbook on the international law on the use of force* (2015), 1057-1076), at footnote 44.
[47] Heintschel Von Heinegg (2010), 376.
[48] Allen, for instance, also notes that MIO in US doctrine only applies to situations outside armed conflict (Allen, 2014), but also seems to generalize the term to a broader scope, as he uses the term 'peacetime MIO', to exclude MIO that are conducted under the law of naval warfare. The word "peacetime" is in fact redundant if there was absolute consistency that the term MIO is only used outside armed conflict.

Charter within an *all necessary means*-mandate could factually raise to a level of hostilities against another State where the law of naval warfare may become applicable. Some States argued during operation *Enduring Freedom* that the law of naval warfare applied, to which the term MIO by that time had expanded into. Furthermore, in military practice the term MIO is now used in the widest sense, including peace, crisis *and* armed conflict circumstances, in which possible a boarding operation could take place. This view of a broad use of the term is for instance also underlined in the 2013 *Netherlands Maritime Doctrine* that states that MIO can be conducted in a number of situations, ranging from armed conflict to illegal smuggling of drugs.[49] It is also underlined in the above mentioned US-description on MIO. Operationally, this makes sense, because MIO are an operational tool consisting of a certain activity that tactically does not differ much in how it is performed in armed conflict, crisis or peacetime circumstances. Therefore, there is merit not to focus on a legal divide in which the line of separation is whether or not the law of naval warfare applies, but to take the operational point of view as the starting point, which will lead us to include that MIO can also be conducted within the context of the law of naval warfare. That is, ultimately, the consequence of defining MIO as a term of operational art, rather than legal art. As a last, not wholly legal, argument but which can also not to be completely ignored, is that MIO in 'every day speak' within in the naval, defence and security organizations is simply used to define in general an activity in which the core is to board another vessel for certain purposes. In this context, although admittedly this was different during the early stages of understanding MIO, no military definition of MIO today limits its application to be applied only outside armed conflict. This thesis will take the broad view. As will be elaborated upon in Chapter 2, maritime interception operations should not be mischaracterized as being similar to maritime security operations (MSO). This term is indeed generally accepted to be reserved for naval operations that are outside armed conflict. To sum up, for the purpose of this thesis MIO will be defined as: Naval operations that include the boarding, search and seizure of goods and the detention of persons on a foreign flagged merchant vessel, outside the territorial jurisdiction of a State.

[49] GMO (2013), 386.

### 1.4. Maritime interception operations and the right of visit

Because the essence of maritime interception operations by warships involves the stopping of goods and persons at sea on foreign flagged vessels, there may be something to say for replacing the broadly taken title of *Maritime interception and the law of naval operations* and replace it by "The right of visit by warships on the high seas". Obviously, much of the literature concerning maritime interception operations takes the approach to analyse MIO from a right of visit perspective. The laws applicable to maritime interception and the right of visit are, however, not completely interchangeable. The different manifestations of the right of visit only partly consider the question concerning legal bases and regimes for maritime interception operations. Whereas a classic right of visit approach could touch upon, for instance, self-defence or an international agreement as a legal basis, and international the law of the sea and the law of naval warfare as applicable legl frameworks, it will not per definition consider other possible applicable legal bases and regimes, such as *ad hoc* consent as a basis or international human rights law (IHRL) as a regime. Although one would logically start by finding the legal framework for MIO within the laws that regulate activities at sea, centralizing maritime interception operations rather than centralizing one specific body of law allows to analyse the applicable law to maritime interception operations through more legal frameworks that might possible regulate MIO.[50] Exchanging the law applicable to MIO for the right of visit, therefore, does not grasp the complete scope of the law that could apply to it.

The law of naval operations with regard to maritime interception is still, however, more limited to, and may be seen as a subcategory of, what is nowadays by some authors described as 'the international law of maritime security'. Kraska and Pedrozo define what they call 'international maritime security law' as: 'legal authorities to counter traditional and conventional threats, as well as irregular and asymmetric dangers against the territorial integrity or political independence of flag, port, coastal and land-locked States'.[51] The scope of the law of naval operations with regard to maritime interception is more limited, because it firstly does not focus on legal authorities that coastal States may have in their maritime

[50] More practically, it helps practitioners to understand the law they need to apply and work with from their point of view.
[51] J. Kraska, P. Pedrozo, *International Maritime Security Law* (2013), 6.

zones, but approaches the law from the perspective of State authorities that warships can execute outside the sovereign territory of a State. It thus, for example, precludes the legal possibilities that States may have to enhance their port security. Secondly, in this thesis the law of maritime interception in naval operations is limited to issues within the context of international peace and security. Maritime *safety* aspects, which is obviously an intimate 'dancing-partner' with *security* in the sense that it aims to minimize danger in the maritime environment, which is part of the broader maritime security law, is not dealt with here.[52]

With others, like Papastavridis, I opine that a separate law of maritime interception operations does not exist. Maritime interception operations are subject to various rules of international law and not a separate category of its own.[53] While on the one hand, as Guilfoyle suggests, 'There may be a law that is generally applicable to how interdictions are conducted and to the consequences of wrongfully conducted interdictions before national tribunals,'[54] on the other hand, the challenges of these various rules when applied specifically to maritime interception may, however, surface a certain uniqueness as to how these rules interrelate. Therefore, there is certainly some merit in bringing together the various rules and areas of international law from the perspective of the law applicable to maritime interception operations.

[52] Aspects of maritime safety are those subjects that deal for instance with construction or equipment of the vessel, the labour conditions under which the crews operate, the manner in which way cargo is being shipped and navigational aspects of sailing a vessel. Maritime safety and security have the common objective of ensuring minimizing all possible dangers for vessel and crew. Maritime safety approaches that objective by trying to minimize accidents, whereas maritime security seeks to minimize the intentional damage or harm to vessel and crews.
[53] Papastavridis (2013), 82.
[54] Guilfoyle, (2009), 344.

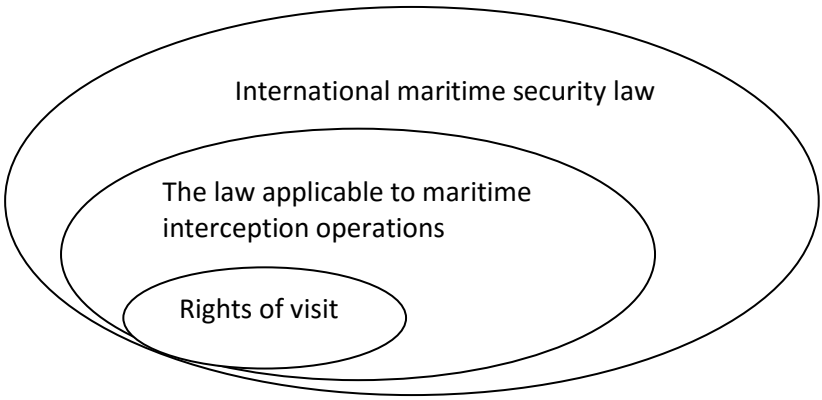


*Fig 1.2. Relationship of the rights of visit, the law applicable to maritime interception operations and international maritime security law*

## 1.5. Methodology

The research is a study of available literature, jurisprudence, relevant treaties and customary international law, which includes practice, and general principles of international law on the subject. Maritime interceptions operations will, therefore, be analysed from the traditional sources of international law, enumerated, but not limited to Article 38 of the ICJ-Statute. As mentioned above, it will consider the international law applicable to maritime interception operations via a functional approach, which puts maritime interception operations at the center, rather than a specific area of international law. Furthermore, where it is needed, it will address the context in which maritime operations take place in order to better understand in what unique environment the law needs to be applied.

Doing 'field research' in order to examine military operations on an operational level, and with naval operations in particular, is challenging as it is not a very easy accessible field to research. Much information on the actual policy and legal decisions and rules (of engagement) of military operations is classified and cannot be publicly accessed, nor is there much detailed information published in publicly accessible sources. The sentence one finds in the (Netherlands) mission evaluation reports on for instance the rules of engagement for warships is usually that they were 'clear and sufficed for the mission'. The research is therefore limited to

publicly available literature. Some 'field research', however, is done by means of the fact that as a legal officer in the Royal Netherlands Navy I have participated, or was involved in several operations.[55] Fortunately, the Royal Netherlands Navy has participated in many of the important MIO in the last decades and is part of and actively participates in the international forums relevant to naval operations, such as NATO and the EU. As such, I was able to act like a sort of anthropologist within the group and observe naval operators in their 'original habitat' of the planning cells, the legal and ROE-workshops, and the actual execution of the missions.

### 1.6. Structure

This thesis is divided into four parts. Part I consists of a general introduction and will start with brief sketch of the context of naval operations to better understand operational environment in which maritime interception operations are used (Chapter 2), and will also address contemporary maritime interception operations by means of a short history of the evolution of the term MIO in four strands (Chapter 3). This chapter will also introduce significant naval operations and incidents that occurred in which MIO has formed a part of the operation.[56] Chapter 4 will consider the two fundamental ground-rules of the international law of the sea as a legal point of departure and which are central to considering the law applicable to maritime interception operations. Part II consists of four chapters and will study the different legal basis for maritime interception operations. The legal bases for MIO can be found in a combination of the generally accepted exceptions on the use of armed force and in the notion of general international law where States can allow other States to conduct activities within their own area of jurisdiction, either by *ad hoc consent* or consent through treaties. Therefore legal bases for maritime interception operations will be analysed: the collective security system, self-defence, *(ad hoc)* consent and international agreements. Part III will examine the legal regimes applicable during maritime interception operations. As such, international human rights law and the law of armed conflict will play a central role in this part. It will do so through the lens of three particular

[55] I had the privilege of participating in OEF, OAE and OUP on the tactical and joint operational level. During my posting as a legal officer of the Netherlands Maritime Force (NLMARFOR) I was able to support the Netherlands maritime contribution to MTF UNIFIL.

[56] A shortlist of vessels and naval operations is provided in annex A and B.

subjects: the right of visit, the use of force and detention at sea. Lastly, part IV will consist of the conclusions and synthesis.