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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CHAPTER 2

Some introductory remarks on naval operations

2.   Introduction

To understand the law applicable to maritime interception operations, one must grasp to a certain extent also the context in which maritime interception operations are undertaken. At least three separate but interwoven strings of evolution have had an effect on maritime interception operations. First is the evolution of the use of maritime power,[57] and more specifically, the role in which naval forces are used by States to pursue their national and international objectives. This evolution shows that MIO have gradually emerged as one of the most important means for States to preserve and protect national and international interests and objectives. Second is the evolution of actual operational practice of naval forces in a maritime interception role. This evolution demonstrates that the scope and purpose of interception operations have experienced changes throughout the last 25 years. And third is the subsequent development of applicable international law in the context of maritime interception operations. Very much in line and in reaction to the operational side, also the legal framework has seen evolution. Obviously, the focus of this thesis is on the legal aspects of MIO, but it is necessary to first briefly state a few remarks on the context of naval operations in general and give an short account of the evolution of maritime interception operations in particular (Chapter 3).

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[57] Maritime power in NATO (AJP 3.1. Allied Joint maritime operations para. 1010) is defined as military, political and economic power exerted through the use of the sea, and exercised by sea, air and land resource. It described a state's ability to implement its interests at sea through the use of political, economic and military activities in order to pursuit national objectives. The UK maritime doctrine uses words of a similar kind: 'The ability to project power at sea and from the sea to influ-
ʲiour of people or the course of events'. JDP 0-10 (British Maritime Doctrine), Augustus

2.1. Evolution of the role of naval forces in international peace and security at sea

Up until the end of the Cold War there had been a general idea that the primary focus for naval forces was on the naval fleet of the opponent, in support of a national defence role. This focus, in practice translated for Western navies into a focus on the Russian fleet during the period of the Cold War which, as Staley mentions, was one of the reasons why the UN did not make much use of naval forces.[58] Not that the UN did not use them at all, however. Staley mentions the 'thin record' of naval efforts under the UN-flag (albeit under US-command) during the Korean War as one example. The international security context of the 1990's after the Cold War moved towards cooperation between navies, rather than only within the perspective of a national defence role.[59] In particular, this new security reality pushed the view forward that naval forces could also be used to play a role in implementing international UN-mandates and act within the realm of international peacekeeping, referred to by some as 'naval peacekeeping'.[60] This use of naval forces in peace support operations provided new meaning for the use of naval forces after the Cold War. Seeking to find further purpose, next to this shift it was viewed that naval forces could also play a role in so called *constabulary tasks.*[61] This meant that naval forces could play a role in what are generally considered to be non-military policing tasks in support of minimizing criminal acts at sea, such as drug trafficking, illegal fisheries activities, illegal immigrants, or marine pollution. In a practical sense, the type of operation in which naval forces were used in naval peacekeeping overlapped with constabulary operations. Obviously, not so much in legal basis or authorities, but in the tactical actions that naval forces conducted during peacekeeping operations, very much at the low end of the use of force spectrum. In other

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[58] R.S. Staley, *The Wave of the Future: The United Nations and naval peacekeeping* (International Peace Academy, Occasional Paper series, Boulder & London, 1992), 13.

[59] T. Benbow, 'Maritime Power in the 1990-91 Gulf war and the Conflict in the Former Yugoslavia', in A. Dorman, M. Lawrence Smith, M.R.H. Uttley (eds.), *The changing face of maritime power* (1999), 107-125; M. Pugh, J. Ginifer, E. Grove, 'Sea power, security and peacekeeping after the Cold War', in M. Pugh (ed.), *Maritime security and peacekeeping. A framework for United Nations operations* (1998), 10-31.

[60] Pugh (1994); G. Carvalho de Oliviera,'Naval peacekeeping and piracy: Time for a critical debate', in *International peacekeeping*, vol. 19, no 1 (2012), 48-61.

[61] K. Booth, *Law, force and diplomacy at sea* (1985), 192; M.Pugh, F. Gregory,'Maritime constabulary roles for non-military security', in M. Pugh (ed.), *Maritime Security and peacekeeping. A framework for United Nations operations* (Manchester, University Press, Manchester and New York, 1994), 74-101.

words, the New World Order introduced navies to both peacekeeping and maritime policing.

Ten years later, by the time the attacks on the United States in 2001 had occurred, naval forces had firmly established a role in supporting UN-peace support operations from the sea, which they conducted from Iraq to the former-Yugoslavia to Haiti. States also moved to accept a role for naval forces in constabulary tasks, but as maritime strategist Geoffrey Till noted, constabulary operations were; '...regarded something that navies could do when nothing more important was occupying their attention'.[62] The 9/11 attacks and the subsequent focus of fighting maritime terrorism through enhancing maritime security, pushed towards a view for a larger role for naval forces in maritime security, a term without a definition but with ever growing content. Constabulary operations now developed from a peacetime 'nothing else to do' task to one of the important main tasks that navies are called upon to conduct. The notion of maritime security is not at all new, but its scope is, as said, first of all not well defined, and secondly, has expanded in the recent years to encompass more and more issues that are considered a threat to the security interest of States. Natalie Klein has aptly noted that maritime security is usually not defined by defining the term itself, but by stating what can threaten maritime security.[63] Illustratively, the UN-Secretary General, in his 2008 *Report on Oceans and the Law of the Sea,* did exactly that and identified a number of threats that can generally be perceived as threatening maritime security.[64] It lists issues as piracy, armed robbery against ships, terrorist acts, intentional and unlawful damage to the marine environment, illegal dumping and the discharge of pollutants from vessels, and depletion of natural resources, such as from illegal fishing. Although maritime security seems to focus on

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[62] G.Till, *Seapower. A guide for the twenty-first century* (3rd ed. Routledge, London and New York, 2013), 305.
[63] Klein (2011), 9.
[64] UN Doc A/63/63, 10 March 2008. Paragraph 131 reads:

> 39. There is no universally accepted definition of the term "maritime security". Much like the concept of "national security", it may differ in meaning, depending on the context and the users. At its narrowest conception, maritime security involves protection from direct threats to the territorial integrity of a State, such as an armed attack from a military vessel. Most definitions also usually include security from crimes at sea, such as piracy, armed robbery against ships, and terrorist acts. However, intentional and unlawful damage to the marine environment, including from illegal dumping and the discharge of pollutants from vessels, and depletion of natural resources, such as from IUU fishing, can also threaten the interests of States, particularly coastal States. Various approaches have been taken to maritime security, depending on the State's perspective of the interests that may be threatened, either directly or indirectly, by activities in the oceans and seas.

law enforcement orientated issues, it is not, however, limited to such matters, but includes the whole range of security matters of a State. This could include also armed conflict. The wide context of maritime security, in which conducting MIO plays an important role to operationalize its enhancement, includes a growing number of security threats that threaten both the exclusive and inclusive good order of the oceans.[65] Because of the globalization in which, using Geoffrey Till's words, 'everything is connected to everything',[66] it urges cooperation between States. In this context, the legal means of international agreements have become more important and opportune, as every State has an interest to enhance maritime security for its own good.

Security organizations such as NATO now also started to embrace the notion of maritime security, strengthening the view that countering these threats is also a military, naval, task. So-called maritime security operations (MSO) conducted as an operational result of the focus, has also changed, or rather, broadened the purpose of boarding operations; from stopping and searching for prohibited goods, to include boardings that are conducted to gathering information to support thwarting possible threats against issues of maritime security. Commodore (UK Navy) Neil Brown very broadly defines MSO as 'commonly used to describe the full range of naval operations outside of international armed conflict, including those which include an exercise of rights under Article 110 of the United Nations Convention on the Law of the Sea (UNCLOS)'.[67] It may, arguably, be not the 'full range of naval operations', but it underlines the point that MSO are conducted outside the situation of armed conflict. Using naval forces as means to police the seas also developed tactical level practices such as 'friendly approaches' or 'approach and assist visits' (of which its lawfulness will be discussed in Chapter 7) by warships, which may include stepping onto another vessel to communicate with the fellow seafarer. Such activities have become part of the standing operating procedures within MSO. Navies, therefore, have started to 'police the sea', by means

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[65] Maintaining exclusive good order of the oceans relates to issues that could affect the public order of the State, such as illegal immigrants and drug-trafficking. Maintaining the inclusive good order relates to secure the common use and richness of the oceans. Examples are counter-piracy, or illegal fisheries or marine pollution.
[66] Till (2011), 283.
[67] N. Brown, 'Jurisdictional Problems Relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner's Observations', in R. Ringbom (ed.) *Jurisdiction over ships* (2015), 69-82.

of engaging with the maritime community. The general view is that policing the seas, or in more military terms, enhancing maritime situational awareness (MSA),[68] as one author states: 'adds to warning time' and offers opportunities 'to engage adversaries well before they can cause harm (…)'.[69] Enhancing MSA is seen as the basis to successfully counter maritime threats at sea.[70] The wide context of maritime security and the acceptance that naval forces have a role to play in enhancing maritime security, opens the door more widely to the idea that naval forces should play an active role within the realm of law enforcement. Law enforcement, as Melzer states, refers to the exercise by state agents of police powers.[71] In the naval context, this would for instance occur when naval forces act against piracy. The focus on enhancing maritime security in the first decade of the 21st century also saw this focus translated in newly adopted national and international maritime strategies. Two important naval powers - the US and (the collective of States in) NATO- conceptualized the role for naval forces in maritime security in their maritime strategies. The US released its *National Strategy for Maritime Security* (NSMS)[72] in 2005,[73] NATO finished its new *Alliance Maritime Strategy* (AMS) in January 2011. Both maritime strategies in the first place starkly underline the notion of maritime security and list a number of threats to maritime security.[74] NATO, for the first, time added maritime security as a role its naval forces could play a part in. Also, in March 2014 the European Commission and the High representative of the European Union for Foreign Affairs and Security Policy, adopted a Joint Communication as a pre-step towards an EU maritime strategy: "For an open and secure global mari-

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[68] Maritime security awareness (MSA) is the term used by NATO. The US uses the term maritime domain awareness (MDA).

[69] J.M. Krajewski, 'Out of Sight, Out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Seas', Vol. 56 *NLR* 2008, p. 219.

[70] J.L. Nimmich & D.A. Goward, 'Maritime Domain Awareness: The Key to Maritime Security', in *ILS*, vol. 83 (2007), 57-65.

[71] N. Melzer, 'Conceptual distinction and overlaps between law enforcement and the conduct of hostilities', in T.D. Gill and D. Fleck (eds.), *The Handbook of international law of military operations* (2010), 33-50, 34.

[72] At: http://georgewbush-whitehouse.archives.gov/homeland/maritime-security.html.

[73] C.H. Allen, 'The influence on Sea Power Doctrines: The new maritime strategy and the future of the global legal order', in *ILS*, vol. 84 (2008), 3-3; Kraska & Pedrozo (2013), Chapter 2.

[74] The *NSMS* (2005) mentions: Nation-State threats, terrorist threats, transnational Criminal and piracy threats, environmental destruction and illegal seaborne immigration.

time domain: elements for a European Union maritime security strategy"[75] The EU-document is not a maritime strategy which centers around the role of naval forces in enhancing maritime security, but centers around issues of maritime security itself, in which naval forces within an EU context might play a role.[76] The EU security operations concept (EU MSO), providing an option on how maritime forces can contribute to maritime security. All the documents start from the classic idea that the importance of a focus on maritime security is supported by the view that the freedom of the sea remains of utmost importance for the security interests of States. Baroness Catherine Ashton stated to the Joint Communication that: *'The security and well-being of Europeans greatly depend on open and safe seas. It is therefore necessary for the EU to deal with maritime threats and challenges.'*[77] This was later repeated when the EU Maritime Security Strategy (EUMSS) was adopted in June 2015:

> The Sea is a valuable source of growth and prosperity for the European Union and its citizens. The EU depends on open, protected and secure seas and oceans for economic development, free trade, transport, energy security, tourism and good status of the marine environment.[78]

The freedom of the sea is ensured by protecting it against a wide range of possible threats in which naval forces would play have role to counter them at sea. In the AMS, NATO identified that: *The maintenance of the freedom of navigation, sea-based trade routes, critical infrastructure, energy flows, protection of marine resources and environmental safety are all in Allies' security interests.*[79] But apart from describing the maritime security environment, the AMS does not detail what exactly maritime security for NATO means and simply states that it may act against security

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[75] JOIN (2014) 9 final, Brussels, 6.3.2014. *Joint communication to the European Parliament and the council for an open and secure global maritime domain: elements for a European Union maritime security strategy.*

[76] It mentions for instance (at page 7) that the EU should plan, on a regular basis, 'EU-flagged' maritime exercises with third countries in the context of a common security and defense policy operation or EU exercise, in order to improve the visibility of the EU in the global maritime domain.

[77] Press release, European Commission,' Towards an EU integrated approach to global maritime security', Brussels 6 March 2014.

[78] Interestingly enough, the EU has taken a different approach as how to describe the term maritime security in the sense that the term is more defined as an endstate:

> Maritime security is understood as a state of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed and citizens, infrastructure, transport, the environment and marine resources are protected.

[79] AMS, paragraph 5.

threats arising in the maritime environment. Derived from NATO's actual maritime operations, next to Article 5 and non-Article 5 peace support operations, currently international terrorism and piracy are the only issues that NATO has expanded to in terms of enhancing maritime security.

Today, therefore, naval forces are expected to operate in many different contexts: Within the context of a national defence and warfighting role, in the context of supporting the maintenance of international peace and security, and in the context of maintaining good order of the oceans. Some even see the role for naval forces even more expanded to include support in humanitarian operations (or: maritime assistance operations, as the Netherlands maritime doctrine categorizes these tasks) to support other States with the effects of natural disasters, like earthquakes and help rebuilding a State after a devastating storm.[80] To summarize and underline the relationship between maritime security and maritime interceptions operations, it is submitted here that enhancing maritime security can manifest itself within the spectrum of armed conflict to collective security to maritime security operations. Maritime interception operations are a means to support the ends in this spectrum. And as noted in Chapter 1, maritime interception operations can be viewed broadly, to include all activities in the broadest sense that relate to the successful execution of maritime interception, and also more narrowly, which focuses on the activities that are performed at sea. The latter is the focus of this study.

2.2. Maritime geography

Naval operations take place in a geographical area that is often called the global commons.[81] As Chapter 4 will underline, the term global commons in legal terms signifies primarily that no one owns it; all States are equally authorized to make use of it and its resources and all have a responsibility to ensure those freedoms. The maritime environment brings with it a number of characteristics which also bear effect on naval operations.

Firstly, States can operate their naval forces in the commons without needing a further legal basis to deploy its forces to sea. This allows, for instance, for early deployment of military assets as contingency position-

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[80] J.J. Wirtz, 'Introduction', in J.J. Wirtz, J.A. Larsen, *Naval Peacekeeping and humanitarian operations. Stability from the sea* (2009), 1-13.
[81] E.g. B. Windsor-Smith, 'Securing the commons. Towards NATO's new maritime strategy', in *Research paper, NATO Defense College*, Rome, no. 49 (September 2009).

ing into or close to a theatre of conflict even though the UNSC has not (yet) mandated any military enforcement measures. Those assets can still be tasked with roles, such as monitoring measures that are taken by the UNSC short of military enforcement measures to gather information. Their presence in the area may have an influence on the political course of the conflict. The situation with regard to Libya in early 2011 can serve as an example where States first massed their fleet off the coast of Libya to support national non-combatant evacuation operations and at the same time pre-staged their forces in view of growing tension and subsequent action by the UNSC. Naval forces were on station to immediately start enforcement action against Libya when the UNSC authorized States to do so. Further back in history, NATO launched *Maritime Monitor* to monitor the implementation of UN-sanctions without the existence of an explicit enforcement mandate, but to support the UN in its efforts to deal with the conflict.

Secondly, operating in the global commons means that naval operations will occur in areas where other States' vessels have a freedom to navigate and make use of the ocean as they wish. Most of that use is economy-related. Naval operations can on the one hand support these activities by protecting the sea lanes of communication and by taking away the threats of criminal activity at sea, but it can also hamper the economy when, for instance, embargo operations or the existence of armed conflict allows interference with foreign flagged merchant vessels. The point to note, however, is that maritime interception operations include the military application of force that is generally not directly against the military opponent. Instead, MIO include mostly the stopping of merchant vessels, for instance to check their neutral status, whether an embargo is being breached, to keep vessels in- or outside a targeted State, or to arrest criminals at sea. Maritime interception may be part of a military campaign which can also consist of naval forces that both conduct hostilities and perform interception operations, but its addressee is primarily non-military persons. To put it in terminology of the law of armed conflict, MIO will deal mainly with civilians.

Operating in the global commons means, thirdly, that there is a possibility that navies could take up the task of policing the high seas. Basically, maritime security operations (MSO) that are conducted by standing multinational fleets, such as Combined Maritime Forces (CMF) or

NATO's SNMG's[82], to enhance maritime security at sea in general, are typically actions that would be considered as policing the seas. Although MSO, or policing the high seas to use the latter term, may be at the political-strategic level the way forward, conceptually, it does not sit well with the basic framework upon which the international law of the sea is built. This issue will be touched upon in Chapter 4. Be that as it may, maritime security on an operational level is viewed to be largely based on two legs. First is the increase of awareness of what happens at sea and second is to take action against threats. In both legs maritime interception operations play a role. In the first, by means of approaches of warships to other vessels to gather and exchange information adds to the maritime awareness. In the second, MIO are used to actually act against the threat.

A fourth point to note on the maritime geography and maritime interception operations is that naval operations with different legal basis and regimes may overlap each other in one geographical area. For example, when operation *Iraqi Freedom* (OIF) started in 2003, US forces were allowed to board suspect vessel as far away as the Mediterranean Sea, quite some distance away from the operational theatre in the Persian Gulf. At the same time, also NATO's operation *Active Endeavour* operated in the Mediterranean Sea, but different authorities were given to the participating warships. States can assign their warships to different ongoing operations in one area, which will lead to the complexity that warships from the same State operating in the same area, could theoretically have a different legal basis and authorities under which they perform their task. Or, one warship could be assigned to take part in more operations in one area. It is quite understandable, therefore, that merchant vessels that are stopped will also have a challenge to understand what the actual legal scope of the boarding could be.

The fifth and last point to note is that it appears that the different applicable frameworks of international law are sometimes viewed as a toolbox. In this view international law provides choices to a commander. If a vessel for example cannot be boarded because there is no reasonable suspicion that it has breached a UN-embargo, if opportune, it may switch to the legal basis of statelessness or use *ad hoc* consent as the basis to board the same vessel. While the legal toolbox is a welcomed instrument for a warship commander, the danger is that the toolbox is used in a too

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[82] Standing NATO maritime groups.

creative manner in which for instance a legal basis is misused to achieve something else than what it is meant for. Creative use might, theoretically, increase where the parameters of a visit are not detailed, such as *ad hoc* consent or statelessness as a ground for boarding a vessel.

2.3.   Maritime coalition operations

Maritime interception operations in the context of international peace and security are generally conducted as a multinational effort by a coalition of States. In terms of command structure, multinational operations can either be performed as a 'loose' coalition of individual States that form a coalition in a specific conflict, usually operationally led by a leading State, or under the command structure of an international organization, such as the UN, NATO or the EU. The choice of command structure will firstly have effect on the procedure in which way authorities are given to the participating warships, and can secondly have effect on the actual authorities itself. This is because of the fact that different organizations will work from their own political and legal perspective and will interpret and fulfill an authorizing mandate against the background of that perspective.[83] For example, authorities for warships operating in the counter-piracy operations in EU or NATO differ, although the overall UNCLOS and additional UNSC-mandate are the same for both organizations. States participating in multinational operations may also, in their own procedural manner, differ within the coalition on authority given to warships. This makes it difficult to determine exactly what kind of authorities participating warships within a certain operation may have. It is, therefore, not automatically said that one can take as a point of departure that all participating warships in one operation will have the same authorities.[84] How much it differs, depends also on the way the commanding organization allows for any differences in authorities. During the coalition operation *Enduring Freedom* the authorities -or rules of engagement (ROE)- differed between participating nations.[85] As such, the legal regime used for boarding operations in

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[83] See on the coalition challenges of ROE, D. Stephens, Coalition warfare – challenges and opportunities', in *IYHR*, vol. 36 (2006), 17-27.

[84] To overcome the multitude of authorities multinational commanders are usually forced to make all kinds of matrices in which states are asked to define their authorities or caveats for a specific operation.

[85] M. Houben, 'Making Waves and Building Bridges: Dutch Experiences in the Arabian Sea', in *RUSI Defence system* (June 2007), 82-85.

OEF is rather diffuse. As a last, different operations can also exist based on one legal basis. For example SC-Res. 1973 with regard to Libya prompted the coalition-operation *Odyssey Dawn*, the NATO-operation *Unified Protector* (OUP) and individual operations conducted by States. Where MIO are conducted in the context of law enforcement, maritime interception also asks for 'coalitions', in a number of others ways. As was underlined above, in the first place there is the view that enhancing maritime security in a globalized world means working together between States and organizations that have a specific focus on areas that coincide with issues of maritime security. On an operational level, it also needs coalitions between the military and other relevant government agencies, as the aftermath of an interception at sea is of equal importance as the interception itself to be successful in the overall mission.

2.4. Boarding operations

Warships' crews are trained to perform a number of roles, one of which is to perform boarding operations. Usually, the boarding-team will either consist of the warships' crew that is appointed a secondary task in the boarding-team, or added personnel will be attached to the warships' crew to perform the boarding-operations. The latter will be opportune when situations occur in which the boardings are the primary task within the operation and the use of the original warships' crew will put a strain on operating the warship itself, or when there is a chance that greater coercion and a higher level of force is needed to board a vessel for which specifically trained personnel may be needed.[86] For example, in cases of opposed boardings and in situations where personnel with specific legal authorities are needed which are not invested in military personnel. Military personnel may have authority to board a vessel when the boarding is based on a UN-resolution, but may not have authority when the boarding is part of stopping a criminal act at sea. With regard to the US naval forces Ivan Luke, for instance, explains that the US Coast Guard (USCG) has statutory law enforcement authority, whereas the US Navy does not.[87]

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[86] A Dutch shipboarding team will generally be trained to the level of conducting non-cooperative boardings.
[87] I. T. Luke, 'Naval operations in peacetime. Not just "warfare lite" ', in *NWCR*, vol. 66 no. 2 (spring 2013), 11-26.

The boarding of another vessel can be done in a number of ways, but is generally done through sending a boarding-team either on small boats (rhibs)[88] to the target vessel, or insert the boarding-team by helicopter on the deck of the vessel to be boarded. The boarding-team itself will generally consist of a security (or guard) team, a search team and a bridge team. The first team deals with force protection, the second to inspect the vessel and the third to stay in contact with the master and exert control over the vessel. The organization of the boarding-team, however, also depends on the actual circumstances of the case, such as available personnel and whether the situation might be threatening, or is a routine friendly approach-boarding.

2.5.   Maritime rules of engagement

In current naval operations, it is unusual if the authorities of the warships' crews during an operation are not laid down in so called rules of engagement (ROE). ROE regulate the use of force during military operations in the broadest sense and are based on a combination of legal, political and operational factors that need to be considered for a particular military campaign. Force in terms of ROE can either be the actual use of weapons, but also the threatening or de-escalating positioning of warships relative to the opponent or a State, the detention or seizure of persons and goods, or the boarding of foreign flagged vessels. There are also ROE that are typically used in the maritime dimension. In very general terms, for instance, to stop another vessel a warship can use warnings, graduated use of force against the vessel, boarding the vessel and subsequently seizing the vessel, goods and or persons and ultimately sailing the vessel to a port. Typical for maritime ROE are rules on positioning,[89] warnings(shots), (non-)disabling fire, boarding and diversion.[90] With regard to boarding ROE, from a tactical perspective, boarding operations can be divided into three levels. They can either be unopposed, non-cooperative or opposed.[91]

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[88] Rigid hull inflatable boats (rhibs).

[89] Positioning of naval vessels relates either to the geographical positioning of a warship, or the positioning of warship in relation to other vessels in the maritime area.

[90] Diversion relates to authority to divert a vessel off its original course, for instance to divert it from an area that is restricted by UN-mandate or where diversion of the vessel is needed to send it in-port for further inspection.

[91] See M. Houben, *Food for Life. De inzet van Hr. Ms. Evertsen ter ondersteuning van het VN Wereldvoedsel programma*. Working Paper Maritiem optreden nr. 1, Maritieme Doctrine en Tactieken Centrum (2008), 32.

These levels relate to the level of physical cooperation a boarding team can expect from the master and crew of the target vessel. In an unopposed situation the master of the vessel will cooperate with the boarding party in all aspects of the boarding-process. In a non-cooperative situation the master does neither comply nor obey given orders. This may result in passive resistance, such as not stopping the vessel or not answering the warships orders. In an opposed situation, it is expected that the master will actively oppose the boarding, which may include the use of force against the boarding party.[92] The Israeli boarding of the *Mavi Marmara,* for instance, is exemplary of a boarding that was clearly opposed by a number of persons on board the target vessel.

The level of physical cooperation of the master must be distinct from the legal basis to board a vessel, which is usually expressed in terms of either consensual or non-consensual boarding. A consensual boarding exists where the flag State has consented to the boarding of its vessel.[93] When taking these legal and operational circumstances together, a boarding can thus be for example consensual but opposed in the situation where the flag State has consented to the boarding but the master actively refuses to be boarded. This occurred for instance during the *MV Light* incident.[94] The issue of consent obviously does not appear in cases where a legal basis exists that allows the boarding of foreign flagged vessel, such as in cases where the UNSC has explicitly authorized the inspection of vessels, the belligerent right of visit applies, or where a treaty has authorized a boarding. In such cases, the ROE will only have to refer to the physical part of the boarding.

Diversion relates to an activity to divert a vessel off its original course, for instance to divert it away from a maritime area that is restricted by UN-mandate, or where diversion of the vessel is needed to send it in-port for further inspection. In many situations, diversion may be the better alternative to boarding and inspection at sea. For one reason, within the context

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[92] See also Papastavridis (2013), 67. The terminology is now quite settled part of naval (NATO) doctrine. Before, the terminology differed and the term (non-)compliant was also used. During the NATO and EU embargo operations in the Adriatic Sea and in the beginning of operation *Active Endeavour* the term compliant instead of consensual appears. In any case, the term compliant also refers to the physical levels of force that that may be expected against the boarding party.
[93] But see discussion on this point in Chapter 7.
[94] See Chapter 3 on this incident.

of UN-mandated embargo operations, because, and apart from the many practical challenges that arise with boarding and inspection,[95] the mandate is also be successfully upheld when ships with suspicious cargo do not arrive at the port of the State under sanctions.

Disabling and non-disabling fire relates to activity of using actual force against a ship by means of the use of weapons. This ROE-authority aims at coercing the vessel to stop and obey the apprehending warships' orders and is usually meant as another gradual step in a warning cycle against a vessel. Non-disabling will allow firing into parts of the ship that are not essential for navigational purposes. Disabling-fire will allow for aiming at parts of the vessel that will effect operating the vessel without endangering its seaworthiness. For instance, firing at the engine of a small boat. What part of the vessel can be targeted obviously depends on factors such as the type of available weapons, the type of the targeted vessel and the whereabouts of the people on board the vessel.

Depending on the command structure and the national political and legal guidelines warship commanders receive from their capitals, it is possible that naval forces in one and the same multinational operation may have different ROE. It must also be understood that, as mentioned earlier, ROE are not a legal regime, but a result of policy, legal and operational factors. Because of this combination of factors that weigh into the ROE, they may be more restrictive due to political or operational reasons than what is allowed on an extant legal regime. For example, a reason why a boarding may not be authorized even though there are legal grounds available, is due to a lack of specialized forces that can perform an opposed boarding. What is, therefore, important to note is that although the authorities (ROE) that warship commanders obtain to do their mission are a good indicator of the applicable law, it may not be the same as a reflection of the law itself.

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[95] Such as having to understand whether paperwork may or may not be falsified. This was one of the challenges during the Red Sea interception operations of the MIF. See Pokrant, *Desert Shield at Sea. What the Navy really did* (1999), 189-192.