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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 3

A short history of maritime interception operations

There is no point in getting into the semantics; what matters is that the oil is being stopped

-Alleged quote by former US-president George Bush sr.⁹⁶

3. Introduction

Different authors suggest that it may have been the US-Secretary of State James A. Baker⁹⁷ that coined the term interception operations in its modern understanding during the early stages of the Iraq-Kuwait conflict in 1990.⁹⁸ Apparently he did so, according to Pokrant, to avoid ‘the words ‘blockade’ or ‘quarantine’, because under international law those terms can be interpreted as acts of war’, which were viewed to be inappropriate terminology at the time when the New World Order was trying to do away with the Cold War’.⁹⁹ Whether Baker, or maybe one of his legal or political advisors, is the actual founding father of the term interception operations may not be precisely traceable in history.¹⁰⁰ But what matters, how-

⁹⁶ J.J. Olson, ‘Naval Interdiction Considerations in the Use of Limited Naval Force In Operations Short of War’, in *Paper submitted to the Naval War College* (1993), 3.

⁹⁷ US-Secretary of State between 1989 and 1992.

⁹⁸ L. Freedman, E. Karsh, *The Gulf conflict 1990-1991. Diplomacy and war in the new world order* (1993), 144-145; R.E. Morabito, ‘Maritime interdiction: Evolution of a strategy’, in *ODIL*, vol. 22 (1991); D.L. Peace, ‘Major maritime events in the Gulf’, in *VJIL*, vol. 31 (1991), 545-566, 561; C.H. Allen, *Maritime Counter proliferation Operations and the Rule of Law* (2007), 84.

⁹⁹ Pokrant, 29; Morabito, 307.

¹⁰⁰ Pokrant mentions that the General Colin Powell (then Chairman of the Joint chiefs of staff) in August 1990 first issued orders for the Maritime *quarantine* force to begin operations, but soon after issued new orders which replaced the words quarantine with ‘interception’ and the name of the operation to Maritime Interception Force. Pokrant, 29.

ever, is that the term stuck and has since then become an accepted and much used acronym -MIO- in naval operations.

During the Iraq-Kuwait conflict, and through the conflicts that followed shortly after Iraq, such as the Former Yugoslavia and the crisis in Haiti, maritime interception operations became one of the means that the UNSC resorted to in order to restore international peace and security. Currently, MIO in all its different forms and shapes are conducted all over the world, for instance in the form of counter-piracy operations off the coast of Somalia and the Arabian Sea, as part of a friendly approach during maritime security operations, or as part of UN-mandated military operations in the Mediterranean Sea against Libya, that ultimately ousted Qaddafi. Today, the term MIO is not solely reserved for maritime operations that aim to enforce economic sanctions at sea adopted by the UNSC, as it has been the view for quite some years. On the contrary; its use in recent history shows an evolution that has significantly widened the use of the term. Naval strategist Milan Vego has noted that apart from UN-mandated economic enforcement measures; “MIOs can also be applied by a major naval power or group of powers to prevent maritime terrorism or illicit trafficking in narcotics, humans, and weapons”.¹⁰¹ Also, for example, the NMIOTC notes that MIO must be seen from a perspective in which the term is connected with, *inter alia*, counter-terrorism, piracy and counter-proliferation of weapons of mass destruction. Furthermore, in an even more expanded view, the term MIO has also been used in naval operations that have based their boardings on the law of naval warfare. In fact, during the very first use of the term in the 1990 Iraq-Kuwait crisis, it was the belligerent authority the US-led coalition used under the mask of MIO, which then ultimately transformed into UN-mandated operations.

3.1. Four strands of evolution

The evolution of the use of the term MIO can largely be sketched along the lines of four strands. First is the continued use by the UNSC of the tool of maritime embargo operations (MEO) to enforce economic sanctions at sea. The second and third strand starts with a changed security situation that came about after 9/11. As a reaction to the terrorist attacks

¹⁰¹ M.N. Vego, 'On Naval Power', in *Joint Force Quarterly*, issue 50, 3rd quarter (2008), 8-17, at 11.

on the United States, a number of States undertook to deploy warships to interdict terrorists that would make use of the sea. The 9/11 events also proved to be the start of several initiatives that shifted the use of naval forces more and more to naval activities under the umbrella of an expanded view of the notion of maritime security. The fourth and last strand of evolution started when the UNSC adopted SC- Resolution 1816 (2008), which signals the beginning of an active engagement of the Council and its member States in the fight against piracy and the protection of international trade in the Gulf of Aden and in the Somali basin. These strands are not alternative in the sense that one usage of the term MIO has taken over from the other. Rather, it has broadened the different ways in which way the term MIO is now used. This chapter introduces these four strands, the naval operations that were conducted in the context of these strands, and the relevant incidents that occurred in relation to each of them.

3.1.1. Strand 1: Enforcing UN Sanctions at sea

Charron notes that the number of sanctions imposed by the UNSC jumped from two (Southern-Rhodesia (1966-1979) and South-Africa (1977))¹⁰² during the Cold War to fourteen immediately after the Cold War, rising to a total of 27 in 2010.¹⁰³ Since then, the UNSC has continued to utilize the means of sanctions on a regular basis. Only a limited number have also included a naval enforcement dimension at sea. Already during the Cold War naval forces were used as a means to enforce the UN sanctions. During the Southern-Rhodesia crisis the UNSC in resolution 216 (1965) condemned Ian Smith's unilateral declaration of independence of Southern Rhodesia. After the *Joanna V* incident,¹⁰⁴ the UNSC, through subsequent resolutions, authorized the former colonial power, Great Britain, to take action and interdict oil tankers going into the port of Beira. This was the

¹⁰² V. Gowland-Debbas, 'Sanctions regimes under Article 41 of the UN Charter', in V. Gowland-Debbas (ed.) *National implementation of UN Sanctions* (Kluwer Law International, The Hague, London, Boston, 2004), 3-31.

¹⁰³ A. Charron, *UN Sanctions and conflict. Responding to peace and security threats* (2011), 5-6.

¹⁰⁴ O'Connell mentions that the Greek tanker *Joanna V* was boarded by the UK warship *H.M.S. Berwick* on 4 April 1966, after which it refused to divert from the port of Beira, without the UK being able to do something about it. After the incident the UNSC took measures that involved the authority to arrest the *Joanna V* upon departure and to stop vessels breaching the embargo going into Beira. D.P. O'Connell, *The influence of law on sea power* (1975), 174-175.

start of the so called *Beira Patrol*, which lasted until 1975.¹⁰⁵ The decision back then by the UNSC to authorize a State to stop oil tankers, is often seen as enforcing UN sanctions through a maritime embargo operation *avant la lettre*. After the Cold War, the UNSC started to use the naval dimension more frequently as an asset to enforce UN-sanctions. Sanctions that came immediately after the end of the Cold War which had a maritime dimension included Iraq, the Former-Yugoslavia, Haiti and Sierra Leone. Since the start of the 21st century the UNSC has resorted twice to the use of naval forces as a means to enforce UN-sanctions: Lebanon (2006) and Libya (2011). Including the *Beira Patrol*, to date seven naval operations have taken place to enforce economic measures at sea. A short description of these operations is given in the following paragraphs.

3.1.1.1. *Iraq (1990-2003)*

The Iraqi invasion of Kuwait started on 2 August 1990, at 01:00hrs.¹⁰⁶ The UNSC responded quickly that same day with the adoption of SC-Res. 660 (1990). In line with Article 39 of the UN-Charter the UNSC determined that the Iraqi invasion was a breach of international peace and security and demanded an immediate withdrawal of Iraqi forces. No mention was, however, made at that stage of the crisis of Article 51 of the UN-Charter. The affirmation that the situation was indeed considered to be a situation of self-defence followed four days later, on 6 August, when the Council adopted UNSC-res. 661 (1990).¹⁰⁷ In addition to this legal determination of the conflict, the UNSC also imposed a trade embargo on the import into the territories of all member nations of all the commodities and products originating in Iraq or Kuwait.¹⁰⁸ The US and UK that came to the assistance of Kuwait started maritime interception operations on 16 August 1990. The Chinese freighter *Heng Chung Hai* was the first vessel boarded by the *USS England* and released again after inspection.¹⁰⁹ With both the UN and individual States acting at the same time, at this stage the first

¹⁰⁵ See on this operation, R. Mobley, 'The Beira Patrol. Britain's Broken Blockade', 55 *NWCR* (2002), 64-84

¹⁰⁶ Freedman and Karsh, 67.

¹⁰⁷ The preamble of SC-Resolution 661(1990) notes:

affirming the inherent right of individual or collective self-defence, response to the armed attack by Iraq against Kuwait, in accordance with article 51 of the Charter.

¹⁰⁸ SC-Res. 661, para 2(a).

¹⁰⁹ Pokrant, 32.

discussions on the legal basis with regard to MIO took place.¹¹⁰ On August 25, the UNSC adopted SC-Res. 665 (1990). It was then accepted that the UNSC had authorized seaborne enforcement of the earlier adopted UN-sanctions. During the period between 16 and 25 August in which US naval assets deployed to stop commerce, only two vessels were diverted, of which only one was boarded.¹¹¹ States that had deployed their warships to the Persian Gulf and to other parts around the Arabian Peninsula now started to enforce UN-economic sanctions against Iraq in a multinational coalition operation. The participating warships that enforced the UN-sanctions were dubbed to be part of the *Maritime Interception Force* (MIF). The inspection area for the MIF ran from the Persian Gulf, to the Indian Ocean, to the Northern Red Sea, to Gulf of Aqaba, but was over time limited to the Persian Gulf and the Indian Ocean.¹¹² The MIF-operations lasted not less than thirteen years, until 2003, when the UNSC adopted SC-Res. 1483, in May 2003, taken in light of the new situation in Iraq. In March 2003, the military forces of a US-led coalition had entered Iraq to oust Saddam from its reign and to search for possible weapons of mass destruction.

3.1.1.2. *The Former Yugoslavia (1992-1996)*

The breakup of the Former Yugoslavia in the beginning of the 1990's continued breathing life into the maritime interception model that was set up by the MIF. While Yugoslavia was falling apart, in 1991 the UNSC adopted SC-Res. 713 (1991) under Article 41, establishing an arms embargo. The adoption of SC-Res. 757 (1992) in May 1992, which put Yugoslavia under a general export embargo of 'all commodities and products originating from the Federal Republic of Yugoslavia (Serbia and Montenegro)',¹¹³ prompted both NATO and WEU into examining the question whether the organizations could support the UN decisions by means of

¹¹⁰ See on this debate Chapter 6, paragraph 6.2.1. See also T.D. Gill, 'De Golf crisis. De volkenrechtelijke regels inzake het gebruik van militair geweld', in *NJB* vol. 38 (1990), 1475-1487.

¹¹¹ Robertson, 295. Marolda and Schneller (p. 86) mention only the boarding of Chinese freighter, the *Heng Chung Hai*.

¹¹² Sarah Graham-Brown states that the MIF stopped inspections in the Gulf of Aqaba in 1994 when Lloyds in Jordan started landbased inspections of cargo bound for Iraq. S.Graham-Brown, *Sanctioning Saddam. The politics of Intervention in Iraq* (London, New York, 1999), 96 note 43. See also, T.P. Shaw, 'Arabian Gulf maritime interception operations: balancing the ends, ways, means and risks', *Paper Naval War College* (1999), 1-16, 2.

¹¹³ SC-Res. 757 (1992), para. 4a.

maritime peacekeeping operations. For NATO, this was a landmark question because it meant that NATO would be extending its purpose from its primary role of a collective self-defence to so called 'out of area' activities. NATO ultimately defined its additional role to collective self-defence during the Oslo Summit in June 1992, in which it stated in its final communiqué¹¹⁴: '...we are prepared to support, on a case-by-case basis in accordance with our own procedures, *peacekeeping activities* [emphasis MDF] under the responsibility of the CSCE,¹¹⁵ including by making available Alliance's resources and expertise.'¹¹⁶

On 16 July 1992, NATO launched operation *Maritime Monitor*, which was the first 'out of area', or so called non-Article 5 operation, it ever conducted, albeit very close to the borders of the Alliance territory. It was also the first real naval *operation* NATO ever started.¹¹⁷ Alongside NATO, the WEU launched operation *Sharp Vigilance*. After the adoption of SC-Res. 787 in November 1992, in which the UNSC explicitly authorized naval enforcement of an arms embargo at sea, NATO and the WEU changed their operations names into *Maritime Guard* and *Sharp Fence*. Both operations were later in 1993, after the adoption of SC-Res. 820 combined into one: operation *Sharp Guard* (CTF 440). The operation was suspended in June 1996 and terminated on 1 October 1996, after the adoption of SC-Res. 1074 (1996). This resolution ended, after five years, all sanctions against the Former-Yugoslavia. During *Sharp Guard*, in 1994, also the *Lido II* incident occurred:

The *Lido II* incident involved a Maltese flagged vessel that in April 1994 left the Tunisia to sail for Croatia, with mainly petrol products as its cargo. After a first inspection by the NATO/WEU forces while entering the Adriatic it proceeded on its way to Croatia. The *Lido II* however changed course to the Albanian port of Durazzo, while repeating requests for assistance as the vessel started to take water into the engine room (which later turned to be untrue). The master then changed course again towards Montenegro, which was off limits under the SC-Res. 820 mandate. At the same time Serbian patrol boats came out to meet the *Lido II*. Dutch forces from *Hr.Ms. Van Kinsbergen* who were also on scene were inserted by helicopter to take control of the vessel before it entered the territorial

¹¹⁴ See on the development that lead to this decision Giovanna Bono, 'NATO's 'peace enforcement' tasks and 'policy community': 1990-1999 (Ashgate, 2003), Chapter 2.

¹¹⁵ Conference on Security and Cooperation in Europe. In 1995 the CSCE transformed into the (nowadays better known) OSCE (Organization for Security and Co-operation in Europe).

¹¹⁶ Ministerial Meeting of the North Atlantic Council in Oslo, 4 June 1992, para 11.

¹¹⁷ D.A. Ruiz Palmer, 'A maritime renaissance. Naval power in NATO's future', in J. Krause, S. Bruns, *Routledge Handbook on naval strategy and security* (2016), 364-380, 371.

waters of Montenegro. The *Lido II* was towed to Brindisi, Italy, to be dealt with by the Italian authorities.¹¹⁸

Although NATO and the EU were to get more and more militarily involved in the crises in the Balkans, which included also Kosovo from 1999 onwards, after 1996 no MIO were conducted as part of those military operations in the Adriatic Sea. During operation *Allied Force* (AFOR), naval forces were part of the operation, but despite SACEUR's wish to establish a blockade to cut off oil shipments to Serbia, the naval forces, ultimately, did not fulfill such a MIO-role.¹¹⁹ According Diego Ruiz Palmer, during the MIO conducted off the coasts of the Former-Yugoslavia, 'NATO forces, in cooperation with those of the Western European Union, challenged over 74,000 ships, boarded and inspected at sea nearly 6,000 and diverted for inspection in port nearly 1,500.'¹²⁰

3.1.1.3. Haiti (1993-1996)¹²¹

While the world was closely watching the Balkan crises develop, in Haiti General Raoul Cedras, commander of the Haitian Armed Forces, staged a

¹¹⁸ Zie on this incident (in Dutch), *Grondslagen van het maritiem optreden* (2013).

¹¹⁹ See A.L. Stigler, 'Coalition warfare over Kosovo', in B.E. Elleman, S.C.M. Paine (eds.), *Naval coalition warfare. From the Napoleonic War to operation Iraqi Freedom* (2008), 183-192. According to Ryan who comments on the reasons why ultimately the decision was made not to use belligerent blockades, firstly the NATO nations did not want to publicly recognize Operation Allied Force as an international armed conflict (let alone a war), which lead to reluctance to use belligerent rights. Second, he mention a rather strange argument that; 'even if participating NATO States were willing to recognize the Kosovo operation as an international armed conflict, Great Britain (as previously discussed relating to the Iran -Iraq Tanker War) refuses to recognize "visit and search" as a viable belligerent right existing independent of Article 51 of the U.N. Charter.' And thirdly, he mentions that NATO nations did not want get more trouble with opposing states, such as Russia, China, and India, especially in the event that vessels of those states were to be visited. M. Ryan, 'Some practical advice for a joint force commander contemplating the use of blockade, visit and search, maritime interception operations, maritime exclusion zones, cordon sanitaire, and maritime warning zones during times of international armed conflict', *Paper Naval War College* (2000), 1-44, 15.

¹²⁰ D.A. Ruiz Palmer, 'New operational horizons: NATO and maritime security', in *NATO Review* (winter 2007). At: www.nato.int/docu/review/2007/issue4/english/analysis4.html. The NATO fact-sheet mentions that during this operation 5.951 vessels were boarded and inspected and 1.480 vessels were diverted and inspected in port. 74.192 vessels were challenged. At: www.nato.int/ifor/general/shrp-grd.htm.

¹²¹ Information for this paragraph was mainly drawn from D. Malone, *Decision-Making in the UN Security Council. The case of Haiti, 1990-1997* (Clarendon Press, Oxford, 1998), Chapters 4-6; D.M. Malone, S. von Eindsiedel, 'Haiti', in M. Berdal and S. Economides (eds.), *United Nations Interventionism, 1991-2004* (2007), 168-191; L.E. Fielding, *Maritime interception and U.N. Sanctions* (1997), Chapters XV-XVII, and J.R. Ballard, *Upholding Democracy. The United States military campaign in Haiti 1994-1997* (1998).

coup against President Jean-Bertrand Aristide. In September 1991, Aristide had been elected in UN-monitored elections. The coup against his government would lead to a five year struggle to return to a democratically elected government. During this period, the UNSC also authorized maritime embargo operations in support of its efforts to reinstate the ousted president in the governmental saddle of Haiti.¹²² Pressure was put on Cedras with the imposition of economic sanctions by the Organization of American States (OAS), which was later followed by sanctions adopted by the UNSC in SC Res. 841 (1993) that embargoed oil, weapons and petroleum. Diplomatic negotiations lead to the so called *Governors Island Agreement* (GIA) that aimed at returning Aristide to the presidency.¹²³ The agreement also stated that when a new prime minister was installed, the sanctions against Haiti would be lifted. On 27 August 1993, the UN lifted the sanctions through SC-Res 861(1993), and not much later approved a UN-mission (UNMIH)¹²⁴ in SC-Res. 867 (1993). Sanctions were however reinstated again¹²⁵ after an incident that threatened US soldiers that were coming into Haiti, which, incidentally occurred only a few days after the Somali incident in which US soldiers lost their lives in Mogadishu.¹²⁶ The renewed sanctions in SC-Res. 873 were bolstered when the UNSC also adopted a maritime embargo operation through SC-Res. 875 (1993) and 917 (1994). A multinational, but primarily US-led,¹²⁷ force authorized by SC-Res. 940 was mounted that would execute Operation *Uphold Democracy* to remove the de facto regime and reinstate Aristide. When Cedras finally left Haiti in September 1994, the multinational force (MNF) handed over to UNMIH. UNMIH ended its operations in 1996 after held elections were observed to be free and fair.

¹²² Who was exiled to Venezuela.

¹²³ Malone, 87.

¹²⁴ United Nations Mission in Haiti (UNMIH).

¹²⁵ SC Res. 873 (1993).

¹²⁶ The incident involved to prevention of the physical landing of the troops on board the *USS Harlan County* whilst threatening that Haiti would become another Somalia.

¹²⁷ S.H. Kreps, 'The 1994 Haiti intervention: A unilateral operation in multilateral clothes', in *The Journal of Strategic Studies*, vol. 30, no. 3 (June 2007), 449-474.

3.1.1.4. Sierra Leone (1997-2010)¹²⁸

In yet another corner of the world, in 1991 civil war started in Sierra Leone. In general terms, the development in Sierra Leone initially followed the same pattern as Haiti. The elected president Ahmed Tejan Kabbah was overthrown by Johnny Paul Koroma in May 1997 who established the *Armed Forces Revolutionary Council* (AFRC). The regional organization ECOWAS reacted to this coup by adopting economic sanctions against Sierra Leone, by which it tried to restore the elected president. It also prepared also for military action in the event this scheme of coercion would fail.¹²⁹ The ECOWAS sanctions and subsequent deployment (ECOMOG)¹³⁰ were followed by UN-sanctions adopted by the UNSC in SC-Res. 1132, in October 1997. These sanctions implemented an oil and arms embargo and also a travel-ban on members of the AFRC and their families. Paragraph 8 of the resolution requested ECOMOG to halt all inward maritime shipping to Sierra Leone to implement the sanctions. In 1997, the *Conakry Agreement (1997)* was reached that aimed to reinstall the president, but the agreement was not honoured by the AFRC. This then led to military intervention by the ECOMOG that was able to oust the Junta in October 1998. ECOMOG operations included enforcing the sanctions of SC-Res. 1132, although they apparently lacked capabilities to effectively enforce a maritime embargo operation.¹³¹ In 1998 Kabbah was reinstated as president of Sierra Leone. A year later, the country fell back into conflict, during which time sanctions against Sierra Leone were not lifted. When the government finally re-established control over its territory in 2010, the UNSC adopted SC-Res. 1940 (2010) that ended the sanctions against Sierra Leone.

3.1.1.5. Lebanon (2006-present)

The maritime embargo operations off the coast of Lebanon came into being after the war of 2006, between Israel and the Hezbollah which largely took place on Lebanese territory. The military operations of Israel (opera-

¹²⁸ D. Cortright, G.A. Lopez, *The Sanctions decade. Assessing UN strategies in the 1990s* (2000), 167-181; A. Adebajo, D. Keen, 'Sierra Leone', in *United Nations interventionism, 1991-2004* (2007), 246-273. J. Hirsch, 'Sierra Leone', in D.M. Malone (ed.), *The UN Security Council. From the Cold War to the 21st Century* (Lynne Rienner Publishers, London, 2004), 521-536.

¹²⁹ Hirsch, 525.

¹³⁰ Economic Community of West African States Military Observer Group.

¹³¹ See on this S/1997/895.

tion *Change Direction*) against the Hezbollah in Lebanon started after an incident in which after the Hezbollah kidnapped two Israeli soldiers. A naval blockade was also part of Israel's operations.¹³² When on 11 August 2006, the UNSC adopted SC-Res 1701 (2006), which brought an end to this stage of the conflict, Israel refused to wind down the blockade until alternative measures were undertaken to ensure that the Hezbollah was not to receive any arms from outside Lebanon. Based on SC-Res. 1701 the UN in coordination with Lebanon expanded the longstanding and land-based UNIFIL-operation, which existed already since 1978, with a maritime dimension: Maritime Taskforce UNIFIL. It was the first time that a maritime operation came under the command and control of the UN. The MTF UNIFIL supports the Lebanese authorities in policing its maritime borders for illegal weapons coming into Lebanon.¹³³ The mission aims to be concluded when Lebanon has sufficient capabilities to control its maritime borders. As of 2016, the MTF UNIFIL is still ongoing. In a press release from February 2015, the UN stated that, 'Since the start of its operations on 15 October 2006, MTF has hailed around 63,000 ships and referred almost 6,000 suspicious vessels to the Lebanese authorities for further inspection.'¹³⁴

3.1.1.6. Libya (2011-present)

The most recent maritime embargo operation that the UNSC has authorized is part of a chapter in the tumultuous developments in Northern Africa, where the people of Egypt, Tunisia and Libya rose against their leaders, a development commonly known as the Arab Spring. In the uprising against the Libyan leader Qaddafi, the UNSC decided in February 2011 to impose economic sanctions against Qaddafi by adopting SC-Res. 1971. An arms embargo, an asset freeze and a travel ban were imposed by the UNSC to force Qaddafi to stop using violence against his population. After Qaddafi used fighter jets to try to stop the uprising, the international

¹³² In 2006, the UN Human Right Council installed a commission of inquiry to scrutinize the Israeli operations, including the blockade. See the report at A/HRC/3/2, 23 November 2006.

¹³³ M.D. Fink, 'De maritieme taakgroep UNIFIL', in *MRT*, vol. no. 4 (2008), 103-112. The Netherlands participation in MTF UNIFIL lasted from December 2006 to February 2008. Ministerie van Defensie, *Eindevaluatie UNIFIL Maritiem*, 25 April 2008.

¹³⁴ UNIFIL website, 'UNIFIL Maritime Task Force transfer of authority', 26 February 2015. At: <http://unifil.unmissions.org/Default.aspx?tabid=11552&ctl=Details&mid=15105&ItemID=24484&language=en-US>.

community's call for a no fly zone (NFZ) became louder. A few weeks later, on 17 March 2011, the UNSC adopted SC-Res. 1973 (2011), which authorized the use of force to protect the civilian population and also authorized the enforcement of the imposed sanctions at sea. SC Res. 1973 formed the basis two for military operations: operation *Odyssey Dawn* (OOD) and the NATO-led force *Unified Protector* (OUP). Part of the latter operations consisted of a maritime arms embargo operation off the coast of Libya.¹³⁵ NATO's factsheet mentions on the embargo operation's *modus operandi*:

8 Allies (Belgium, Canada, Greece, Italy, Netherlands, Spain, Turkey, and United Kingdom) are providing 18 ships and submarines to monitor and enforce the arms embargo mandated by the UN. They are supported by surveillance planes and fighter jets as required. The Task Force's ships enforcing the arms embargo will remain in international waters and will not enter Libyan territorial waters. While NATO cannot block all routes into the country, it has cut off the quickest, easiest and straightest route to Libya.

NATO ships will use surveillance to verify the activity of shipping in the region, separating out legitimate commercial and private traffic from suspicious vessels that warrant closer inspection. Suspicious traffic will be hailed by radio, and if they cannot give satisfactory information about their cargoes, the NATO ships are authorized to intercept them. As a last resort, the Task Force is empowered to use force.

If weapons or mercenaries are found, the vessel and its crew will be escorted to a secure port where international and national authorities will take charge. Suspected aircraft can be intercepted and escorted to an airport designated by NATO.¹³⁶

By the end of the operation, NATO published that 2862 vessels had been diverted and 293 vessels had been boarded. Eleven ships were denied en-

¹³⁵ M.D. Fink, UN-mandated maritime arms embargo operations in operation Unified Protector', in *Revue de Droit Militaire et Droit de la Guerre*, vol. 1-2 (2011), 237-260.

¹³⁶ NATO Factsheet (no date), Operation UNIFIED PROTECTOR NATO Arms Embargo against Libya. At: www.nato.int/nato_static/assets/pdf/pdf_2011_03/unified-protector-arms-embargo-factsheet.pdf.

try into Libyan ports, as they posed a risk to the civilian population.¹³⁷ The NATO operation ended eight months later, shortly after the death of Qaddafi on 20 October 2011,¹³⁸ when the Council stopped the authorization to use force with regard to the situation in Libya in SC-Res. 2069 (2011).

The ending of NATO's operations in 2011, however, did not prove to be the start of a calm state-rebuilding process. In March 2014, about three years after the conflict, and with Libya transiting through an internal struggle where local militias fight against the Libyan government and held oil ports while attempting to sell this oil at sea, the UNSC adopted another resolution, SC-Res. 2146 (2014) that authorized inspecting vessels on the high seas, when designated by the Sanctions Committee. The UN-resolution was adopted a few days after US Navy Seals operating from *USS Roosevelt* had stopped and boarded the *Morning Glory* in international waters in the vicinity of Cyprus, a vessel that was said to be stateless and which tried sell crude oil with a tanker that was stolen earlier.¹³⁹ The vessel was escorted back to the Libyan port of Es Sidra.

3.1.2. Strand 2: The 11 September attacks

The 11 September attacks on the United States in 2001 expanded the scope of using maritime interception into new waters. MIO became an important means in the fight against terrorism at sea. Although in the ten years before MIO grew to be firmly connected to the UN-collective security system, during the naval operations that followed the 9/11 attacks a definite step was taken away from the view that it was only related to UN-enforcement operations. It was now applied in a wider scope. Not only did it widen from UN-sanctions to terrorism, but it also widened from goods to persons.

The military reaction to the 11 September terrorist attacks resulted into two naval operations that started almost immediately after 11 September: Operation *Enduring Freedom* (OEF) and Operation *Active Endeavour*

¹³⁷ NATO Factsheet (October 2011), Operation UNIFIED PROTECTOR NATO-led Arms Embargo against Libya. At: http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_arms_embargo.pdf.

¹³⁸ The *International Herald Tribune* (IHT) heads it newspaper of Friday 21st October 2011 with: "Qaddafi's brutal end". Earlier that year the IHT headed its newspaper on the occasion of Osama Bin Laden's death with: "Bin Laden's bloody end".

¹³⁹ *US Department of Defense*, press release, no. NR-126-14; March 17, 2014, DoD Statement on Boarding of Commercial Tanker *Morning Glory*. At <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16582>.

(OAE). Both were predominantly interception operations. In the first phase of OEF, however, naval forces were supporting combat operations in Afghanistan from the sea. The purpose of both maritime interception operations was not to enforce economic measures imposed by the UNSC, but rather to locate suspected terrorists along with their support network and deny those terrorist to use the sea as a means. The subsequent focus on also weapons of mass destruction that followed after 11 September, led to a third military operation that included a maritime dimension. The perceived threat of WMD in the hands of terrorists moved the attention back to Iraq, which led to the military invasion of the Iraq, on 20 March 2003. This operation was called Operation Iraqi Freedom (OIF).

3.1.2.1. Operation Enduring Freedom

Even though Afghanistan does not have a coastline or a navy, the military campaign against the Taliban and Al Qaida in Afghanistan also had a maritime dimension. On 7 October 2001, naval forces of different States in a coalition operation¹⁴⁰ started to conduct interception operations in the seas around the Arabian Peninsula to deter, deny and disrupt the movement of terrorists, and also supported the war in Afghanistan from the sea, with strike and close air support operations as priority.¹⁴¹ As for the first aspect of the operation, the US coined the term *Leadership Interdiction Operations* (LIO) for the search for terrorists at sea. Tactically, LIO are similar to MIO but to a different end: persons instead of goods are the object of interception. The area in which the searches were undertaken was the sea-area between Pakistan and the Horn of Africa. Whereas the mission *Enduring Freedom* was firstly connected to military operations in relation to Afghanistan, it has over the years developed to be an overarching title for several different military efforts against terrorism, all of which may have different legal backgrounds.

¹⁴⁰ Schneller mentions that the order of battle on 7 October was 48 coalition warships in total: 23 US, 20 British, 2 French and 1 Australian. R.J. Schneller, 'Operation enduring Freedom. Coalition warfare from the sea and on the sea', in B.A. Elleman, S.C.M. Paine (eds.) *Naval Coalition Warfare. From the Napoleonic war to operation Iraqi Freedom* (Routledge, 2008), 193-207.

¹⁴¹ Schneller (2008), 196.

3.1.2.2. Operation Active Endeavour

NATO's involvement in Afghanistan since 2003 has not included a maritime dimension.¹⁴² There has never been a naval component within the ISAF-operation.¹⁴³ That is, however, not to say that NATO did not do anything at sea as a reaction to the 9/11 attacks. On the contrary, it started operation *Active Endeavour* (OAE). The operation was mounted by NATO on 26 October 2001 and aimed 'to help deter, defend, disrupt and protect against terrorism'.¹⁴⁴ The operation was unique in the sense that NATO for the first time ever invoked its cornerstone-article, Article 5 of the NATO-Treaty.¹⁴⁵ Launching OAE was one of the eight measures NATO took to support the US in its activities against terrorism.¹⁴⁶ The standing NATO maritime group (SNMG, then named STANAVFORMED¹⁴⁷) was assigned to patrol the Eastern Mediterranean Sea. In 2003, NATO expanded OAE to the Strait of Gibraltar in order to protect merchant shipping passing through the strait against possible attacks. The escort operations through the strait of Gibraltar (STROGOPS) were suspended in 2004, and have been dormant ever since. Although STROGOPS were suspended, in 2004, operations expanded to encompass the whole Mediterranean Sea.¹⁴⁸ Apart from the change in 2004 to include also non-NATO nations in OAE (which created another purpose to the operation, namely as a vehicle for regional military cooperation) a second significant change in 2009 moved the operation from a platform based to a so called network based operation.¹⁴⁹ With that, the focus of operations moved away from actual grey hulls patrolling the seas, to the direction of building networks between States and relevant organizations and interlinking data that is to enhance maritime situational awareness (MSA) at sea. As of 2016, OAE is still ongoing. NATO's Maritime Command in Northwood (UK) that leads OAE on an operational level, states that more than 100.000 vessels have been hailed and 155 vessels boarded during the

¹⁴² NATO deployed the International Security and Assistance Force (ISAF).

¹⁴³ Warships from several states did, however, apparently support ISAF with aircraft carriers in the Arabian Sea from several NATO-states, from where NATO-aircraft would take off to provide air support in Afghanistan. See D.A. Palmer (2016), 371-372. But ISAF never had an actual naval component command to command a naval force under the ISAF-mission.

¹⁴⁴ http://www.nato.int/cps/ar/natolive/topics_7932.htm.

¹⁴⁵ NATO press release 124, 12 September 2011. www.nato.int/docu/pr/2001/p01-124e.htm.

¹⁴⁶ See on these measures, P.H. Gordon, NATO after 11 September, in *Survival*, vol. 43, no. 4 (2001-2002), 1-18.

¹⁴⁷ Standing Naval Force Mediterranean.

¹⁴⁸ NATO Briefing paper, *Active Endeavour*, July 2006.

¹⁴⁹ http://www.nato.int/cps/en/natolive/topics_7932.htm.

course of its operations.¹⁵⁰ Up until today, however, no major interception incident has been highlighted in the public realm since the operations' existence that can be contributed to the efforts of OAE.

3.1.2.3. *Operation Iraqi Freedom*

On board the *USS Abraham Lincoln* on May 1, 2003 the US President George Bush announced that major combat operations against the Iraqi armed forces were over.¹⁵¹ Although the refocus to Iraq and the legal basis for the Iraqi invasion in 2003 were hotly debated, it is clear that the operation was undertaken within the context of the law of armed conflict. Whereas the US prepared for prize taking during OIF, the UK naval operations appears not to have been involved in any interception of vessels.¹⁵² After major combat ended, the US and UK became the occupying powers in Iraq (the so called *coalition provisional authority*, CPA), supported by other States. On 28 June 2004, the head of the CPA Paul Bremer III handed back the sovereignty to Iraq with SC- Res.1546 (2004). The US/UK and coalition military presence in Iraq, however, lasted until 2012. Unable to obtain sufficient legal guarantees against possible criminal prosecution of foreign service members in Iraq, the US, UK and NATO forces left Iraq before the first of January 2012.¹⁵³

3.1.2.4. *Multiple MIO's*

It is interesting to note that at one stage in 2003 multiple maritime interceptions operations with different legal backgrounds were conducted at the same time in the Persian Gulf and Arabian Sea region, which were carried out by warships of different States. During operation *Iraqi Freedom* the UN-sanctions imposed against Iraq were still operative and en-

¹⁵⁰ <http://www.mc.nato.int/ops/Pages/OAE.aspx>.

¹⁵¹ P. L. Bergen, *The Longest War. The Enduring Conflict between America and Al-Qaeda* (2011), 172.

¹⁵² N. Brown, 'Legal Considerations in Relation to Maritime Operations against Iraq', in *ILS* vol. 86 (2010). At p. 133 he states: 'During the international armed conflict in 2003, while it was determined by coalition partners that their naval forces could as a matter of law have exercised belligerent rights of visit and search against enemy and (in certain circumstances) neutral vessels, this never occurred'.

¹⁵³ See M.D. Fink, 'De ontwikkeling van de strafrechtelijke rechtsmacht over het personeel van de NAVO-trainingsmisssie in Irak (NTM-I)', in *MRT*, vol. 105, no. 6 (2012), 261-264.

forced by MIF-forces, until the UNSC adopted SC-Res. 1483 (2003).¹⁵⁴ At the same time OEF-interceptions were taking place in other maritime areas around the Arabian Peninsula in the context of operations with regard to Afghanistan. Therefore, different legal bases for MIO existed in roughly the same area. All operations were coordinated from the (since 2002)¹⁵⁵ US/UK-led naval headquarters in Bahrain,¹⁵⁶ which was tasked to coordinate all the naval operations around the Arabian Peninsula. The forces commanded by that headquarters were split in several different taskforces to keep a clear enough separation of the different mandates that were coordinated by the headquarters.¹⁵⁷ Yet, one can imagine the challenges of multiple MIO in the same area and coordinated by one headquarter. In his article, Crist relates to the following incident:

A boarding action was undertaken by a Canadian warship that boarded a vessel within the OEF-context, after which the vessel was released. The commander of the warship was asked, however, to board again to search for Iraqi agents. The Canadians declined a second boarding of the same vessel because Canada did not take part in OIF.¹⁵⁸

The existence of multiple and simultaneously ongoing maritime interception operations prompted States to politically decide to follow different

¹⁵⁴ Although SC-Res. 1483 ended the economic embargo as a result of the Iraq-Kuwait invasion, arguably, it did not lift the embargo for arms related material. With that, in the post conflict role it appears that still a ground for MIO against Iraq was left. Paragraph 10 of SC-Res. 1483 (2003) reads:

Decides that, with the exception of prohibitions related to the sale or supply to Iraq of arms and related materiel other than those arms and related materiel required by the Authority to serve the purposes of this and other related resolutions, all prohibitions related to trade with Iraq and the provision of financial or economic resources to Iraq established by resolution 661 (1990) and subsequent relevant resolutions, including resolution 778 (1992) of 2 October 1992, shall no longer apply;

¹⁵⁵ Before 2002, the headquarters was primarily a US naval headquarters.

¹⁵⁶ The Combined Forces Maritime Component Command (CFMCC).

¹⁵⁷ Throughout the years, the headquarters had to make several changes to its organizational structure to accommodate all the different mandates and politics that comes with it that occurred in the area around the Arabian Peninsula. Currently, the naval headquarters in Bahrain has a separate US (NAVCENT) and UK (UKMCC) and a coalition headquarters, the Combined Maritime Forces (CMF), existing of TF 150, 151 and 152. A detailed description (in Dutch) of the history of the headquarters is given by Commander (RNLN) D.J. Kuijper and Captain (RNLN) S.J.J. Both, 'Combined Maritime Forces. Het belang van deelname in een unieke maritieme coalitie', in *Militaire Spectator* (2010), 600-617.

¹⁵⁸ D.B. Crist, 'The formation of a coalition of the willing and Operation Iraqi Freedom', in B.A. Ellerman, S.C.M. Paine (eds.), *Naval coalition warfare. From the Napoleonic War to Operation Iraqi Freedom* (Routledge 2008), 208-217, at 210.

paths in the manner in which way they gave authority to their warships participating in these operations. An Australian military legal advisor, participating in both the MIF and *Iraqi Freedom* relates that, although the Iraq War of 2003 opened up another legal regime to be applied, namely LOAC and the law of naval warfare in particular, the Australian warships continued utilizing the UN-MIO regime, rather than switching to belligerent rights.¹⁵⁹ She states:

‘The coalition forces could have used the traditional laws of naval warfare as just outlined, or the long-standing and long-practised Security Council resolution regime. It was the latter legal framework that was utilised. Given that for the previous 13 years, the MIO forces had been using the sanctions resolutions regime — and importantly, that the neutral or friendly shipping in the Gulf was also familiar with the mechanisms of that regime — it was appropriate that those resolutions, rather than naval warfare, continued to be utilized.’¹⁶⁰

In that same respect, commodore (UK Navy, head of navy legal services) Neil Brown mentions:

‘...the United Kingdom decided to rely solely upon the UN Security Council resolutions that permitted the use of all necessary means to stop and search all inward and outward shipping, and to seize any goods breaking the comprehensive sanctions against Iraq. US naval forces, on the other hand, sought in addition to establish the necessary mechanisms to be able to exercise the belligerent rights of visit and search.’¹⁶¹

Be that as it may, by this time the term MIO had evolved and was generalized beyond UN-embargo operations alone. It had come to be understood as an operational term of art in which boarding operations of foreign flagged vessels was meant, irrespective of its legal grounds or purpose.

¹⁵⁹ See also commodore (Australian Navy) David Letts, who appears to imply that although a number of legal bases could have been used during the Iraq War, Australia settled with UNCLOS-authorities only. See. D. Letts, ‘Recent Australian Experience of the Law of the Sea and Military Operations’, in *Australian Yearbook on International Law*, vol. 24 (2005).

¹⁶⁰ P. Campbell, ‘Twenty five. Task Group Command Legal Officer SLIPPER Four, BASTILLE & FALCONER’, in J. Mortimer, D. Stevens (eds.), *Presence, Power Projection and Sea Control The RAN in the Gulf 1990-2009* (2009), 257-265, 264. The Netherlands stopped participating in the MIF in 2000, before the 9/11 attacks. It then started to participate in OEF.

¹⁶¹ Brown (2010), 133.

3.1.3. Strand 3: From Al Qaida and Taliban to enhancing maritime security

The third strand of evolution in MIO is the expansion of the applicability of MIO not only to Al Qaida, the Taliban and its supporters, but to various maritime threats of terrorism in general. Many initiatives have started since the so-called *Global War on Terror* (GWOT) focused the attention of military forces upon terrorism in general. In the maritime domain, the GWOT focused largely on possible terrorist acts against maritime security and threats of WMD by terrorists in particular. Directly connected to maritime interception operations three initiatives must be mentioned here: first, the expansion of maritime interception operations beyond Al Qaida and the Taliban and its supporters, ultimately resulting into so called maritime security operations (MSO). Second is the proliferation security initiative (PSI) and third is the updating of the SUA-Convention in 2005.

3.1.3.1. Expanded MIO and Maritime Security Operations (MSO)

Maritime embargo operations in support of economic sanctions have been called by some traditional, or limited MIO.¹⁶² The reaction to 9/11 expanded the use of MIO to hostilities, and subsequently introduced it as an instrument against wider terrorist threats beyond those of Al Qaida and its supporters and beyond Afghanistan. Although these operations against terrorism are generally understood by the US Government to be based on the right of self-defence, it is not the same self-defence as was used to start operation *Enduring Freedom*. The MIO conducted in this latter context were called ‘expanded MIO, abbreviated to EMIO.’¹⁶³ O’Rourke states that, ‘EMIO are authorized by the President and directed by the Secretary of Defence to intercept vessels identified to be transporting terrorists and/or terrorist-related materiel that poses an imminent threat to the United States and its allies.’¹⁶⁴ Allen adds that EMIO are, ‘designed to intercept

¹⁶² S.L. Hodgkinson, ‘Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap’, *American University International Law Review*, vol. 22 issue 4 (2007), 853- 671, at 589.

¹⁶³ Hodgkinson, 626.

¹⁶⁴ D. O’ Rourke, *Navy Role in Irregular Warfare and Counterterrorism: Background and Issues for Congress, Congressional research service report for congress* (4 June 2009), 3. See also the definition of EMIO in Joint Publication 3-03:

Expanded maritime interception operations (EMIO) are authorized by the President and directed by the Secretary of Defense to deter, degrade, and/or disrupt or gather intelligence to prevent attacks against the US and its allies. EMIO involves interception of vessels identified to be transporting terrorists and/or terrorist-related materiel that pose an imminent

targeted personnel or material that pose an imminent threat to the U.S. EMIO may involve multinational forces and may be implemented even when sanctions have not been imposed.’¹⁶⁵ Together with the strategic development of a focus on maritime security, this expansion of using MIO to wider terrorist threats moved to the international community to taking the path towards Maritime Security Operations (MSO): maritime policing of the seas with a view to enhance maritime security, which in the view of the US would mainly be threatened by terrorism.

3.1.3.2. *Proliferation Security Initiative (PSI)*

As the US expanded its military efforts, not only against the perpetrators of 9/11, but against terrorism in a wider sense, and in a broader geographical context, it also prompted new initiatives in the world of interception at sea by warships. At this point along with terrorists, weapons of mass destruction (WMD) became a focal point in the maritime dimension. NATO’s Deputy Assistant Secretary-General for weapons of mass destruction policy notes in 2009: ‘Looking at the past, together with the severe implications of using CBRN materials and coupled with the motivation of certain terrorists groups such as Al Qaida, we must acknowledge that WMD are a real and likely threat’.¹⁶⁶ In May 2003, US President George Bush, having closed the major combat operations phase in Iraq and in search of WMD, launched the *Proliferation Security Initiative* (PSI) with the aim to counter and minimize the threats of weapons of mass destruction (WMD) at sea. The PSI connects the arms control efforts of proliferation of WMD with the terrorist threat. The *So San* incident¹⁶⁷

threat to the United States and its allies. EMIO may be implemented without sanctions and may involve multinational forces or OGAs. The legal rationales required to permit boarding include those listed in subparagraph (4), above.

¹⁶⁵ G.H. Allen, ‘limits to the use of force in maritime operations in support of WMD counter-proliferation initiatives’, in T. Sparks, G.M. Sulmasy (eds.) *ILS* vol. 81 (Naval War College), 77-139.

¹⁶⁶ 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 1.

¹⁶⁷ The vessel *So San* was suspected of carrying scud-missiles from North Korea to Yemen. After the boarding by Spanish forces from the Spanish warship *Navarra* upon request of the US this suspicion proved to be true. The name *So San* was freshly painted on the stern while no name was registered under that name in North Korea. According to Roach after being queried, the master of the vessel replied that it was registered in Cambodia. The Cambodian authorities appeared to have confirmed that a vessel meeting the description was registered in Cambodia, but under the name of *Pan Hope* instead of *So San*. No legal ground was, however, found to seize the scuds. Nothing prohibited North Korea to ship scuds to Yemen. The *So San* was released to proceed to Yemen with its original cargo still aboard.

that occurred in December 2001 in the Arabian Sea has always been mentioned in this context as *the* example that underlined that the WMD threat was real and the legal possibilities were limited.¹⁶⁸ According to Davis, the PSI emerged from two major concerns. First, the history of the terrorist attacks against the *USS Cole*¹⁶⁹ in 2000 and the French Tanker *MV Limburg*¹⁷⁰ in October 2002 had heightened the fear of more terrorist attacks in the maritime domain. Second, terrorist groups would try to find weak spots in the international maritime traffic and transport systems to transport chemical, biological or nuclear weapons.¹⁷¹ The essence of PSI, as Klein mentions: ‘is its nature as a political and cooperative regime, which facilitates coordination between the States concerned and allows for the better flow of information and interaction at an operational level between the participants.’¹⁷² The PSI is neither an organization nor a treaty, but an initiative based on the willingness of States to cooperate in the non-proliferation of WMD. The PSI is based upon a set of four interdiction principles to which States as PSI-participants can sign up to. These principles rely on already existing legal frameworks for the proliferation of WMD and focused on interdiction of chemical, biological and nuclear weapons, their delivery systems and related material. Furthermore, to strengthen the legal grounds for actual interception within the context of PSI, the US sought bilateral shipboarding agreements with other States which were to strengthen the PSI through the ability to board foreign flagged vessels on the high seas.¹⁷³ There is hardly any public information on actual “PSI-interceptions”. The interception of the *BBC China* in 2003¹⁷⁴ and *M/V Light* in 2011¹⁷⁵ appear to be the two publicly known

¹⁶⁸ D. Guilfoyle, ‘The proliferation security initiative: interdiction vessels in international waters to prevent the spread of weapons of mass destruction’, in *Melbourne University Law Review*, vol. 29 (2005), 733-764, 735-736;

¹⁶⁹ In October 2000 the *USS Cole* suffered a small boat attack in the port of Aden in Yemen. 17 American sailors died in the attack. The attack was claimed by Al Qaida.

¹⁷⁰ The supertanker *Limburg* was attacked by a small boat full of explosives off the coast of Yemen which blew a hole in the hull of the oil-tanker.

¹⁷¹ I. Davis, ‘The Proliferation Security Initiative. Effective multilateralism or “smoke and mirrors”?’ in O. Meier and C. Daase (eds.), *Arms Control in the 21st Century* (2013), 146-166, at 147.

¹⁷² Klein, ‘Maritime Security’, 193.

¹⁷³ Kraska and Pedrozo have published in 2013 a list of eleven US-bilateral PSI shipboarding agreements. Kraska & Pedrozo, 794.

¹⁷⁴ The German flagged vessel *BBC China* was a vessel that carried centrifuge parts for the Libyan nuclear program. The vessel was ordered by Germany to divert to the Italian port Taranto in Southern Italy, where U.S. agents boarded the vessel for a search. C.H. Allen, *Maritime Counterproliferation Operations and the Rule of Law* (2007), 67; R. Wright, ‘Ship Incident May Have Swayed Libya’, in *Washington Post*, 1 January 2004. It appears, however, to be debated whether or not the *BBC China*

actual activities. Apart from the US-led efforts, also the UNSC adopted SC-Res. 1540 (2004) which also aims at WMD-proliferation.

3.1.3.3. *Updating International Agreements: The SUA-Protocol 2005*

Next to PSI and the UNSC putting the issue in the limelight by adopting SC-Res. 1540, other paths to enable actions against threats to maritime security were sought. One of these has been the path of international agreements. Treaties on maritime terrorism existed since the hijacking of the *Achillo Lauro*, in October 1985.¹⁷⁶ The *Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (SUA-Convention)¹⁷⁷ was created to make punishable such events that occurred on the *Achillo Lauro*, which could not be brought under the legal umbrella of acts of piracy, and entered into force on 1 March 1992. Some authors take the position that one of the major flaws of the SUA-Convention is that it does not create any authorities for non-flag States to board a foreign flagged vessel to stop and arrest persons.¹⁷⁸ The focus on terrorism after 9/11 and a need to find better instruments to take effective action spurred to address this lacuna. As a result, the SUA-Protocol (2005) was created.¹⁷⁹ This protocol aims at updating the SUA-Convention in two ways. First, it makes it possible to avoid time consuming procedures to be able to board a foreign flagged vessel so as to enhance maritime security and at the same time to adhere to the fundamental principle of exclusive flag

operation can actually be claimed as a PSI-operation and success. See: http://www.armscontrol.org/act/2005_07-08/Interdiction_Misrepresented.

¹⁷⁵ The Belize flagged vessel *M/V Light* from North-Korea on its way to Myanmar and suspected of carrying missile parts was forced to turn back by the US who dispatched the *USS McCampbell* to intercept the *M/V Light*. Although authority to board was given by Belize, based on the US-Belize shipboarding agreement the master refused. Instead it finally turned back to North Korea. D.E. Sanger, 'U.S. Said to Turn Back North Korea Missile Shipment', in *New York Times*, 12 June 2011. At: http://www.nytimes.com/2011/06/13/world/asia/13missile.html?_r=0; E. Graham, 'Maritime Counter-proliferation: the case of MV LIGHT', in *RSIS Commentaries*, no. 96/2011 (29 June 2011).

¹⁷⁶ A. Cassese, *Terrorism, politics and Law. The Achillo lauro affair*. (Polity press, 1989); T. Treves, 'The Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation', in N. Ronzitti (ed.) *Maritime terrorism and international law* (1990), 69-90, p. 69.

¹⁷⁷ *Convention on the suppression of unlawful acts against the safety of maritime navigation Rome, 1988*.

¹⁷⁸ S.D. MacDonald, 'The SUA 2005 Protocol: A critical reflection', in *The international Journal of marine and coastal law*, vol. 28 (2013), 485-516, at 492.

¹⁷⁹ There are in fact two protocols to the SUA-Convention. The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Whenever the 2005 Protocol is mentioned, the first protocol is meant.

State jurisdiction.¹⁸⁰ Second, a new set of offences was introduced that focus on the use of WMD in a terrorist manner. The SUA-Protocol (2005) has entered into force in 2010.¹⁸¹

3.1.4. Strand 4: Piracy¹⁸²

Carvalho divides the role of naval forces in peacekeeping after the Cold War in two main legs. The first is naval peacekeeping that supports land-based operations, and the second are naval forces that act autonomously from land operations. With the current focus on maritime security, he has noted a shift from land-based support operations to autonomous sea operations. Counter-piracy operations, he concludes, are; ‘in a certain way, the empirical achievement of an autonomous concept of peacekeeping operations at sea envisaged by scholars engaged in the naval peacekeeping debate.’¹⁸³ Countering piracy off the coast of Somalia has since 2008 become a major activity for navies. It also pushed NATO and the EU to go beyond their usual ‘maritime backyard’ of the Mediterranean Sea, into the seas around the Arabian Peninsula. Although piracy has been for years on the agenda of the Asian States adjacent to the Strait of Malacca¹⁸⁴, when the UNSC ultimately got involved in the issue of piracy off the coast of Somalia, the world’s focus turned to piracy, and more importantly, it also pulled the criminal act within the realm of a threat to international peace and security. Interestingly, however, as SC-Res. 2115 (2013) noted, piracy *by itself* is not considered as a threat to peace and security, but has linked the issue of piracy to the situation in Somalia, which continue to be a threat to peace and security. The crime of piracy is, therefore, by itself formally not strictly an issue of international peace and security, but it is very closely related to be included as a factor within the situation in Somalia, which *does* constitute a threat to in international peace and security

¹⁸⁰ MacDonald (2013), 509.

¹⁸¹ 10 July 2010.

¹⁸² Parts of this this paragraph is drawn from an article I wrote together with Colonel (US Army, Judge Advocate General) Richard Galvin, which was published in the *Netherlands International Law Journal* in 2009.

¹⁸³ Carvalho, 54.

¹⁸⁴ Bateman and Chan opine that piracy and armed robbery in the Asian regions is currently generally not a serious problem. The level is not of the sort that it needs operational involvement of non-regional actors. S. Batemen, J. Chan, ‘Piracy and armed robbery against ships in the South China Sea – Possible causes and solutions’, S. Wu and K. Zou (ed.), *Non-Traditional Security Issues and the South China Sea* (2014), 133-144, at 134-135.

in the region. When operations around the Arabian Peninsula started in the context of OEF, States were more and more also confronted with the Somali-piracy activities. With regard to the conflict in Somalia discussion arose whether terrorists and pirates were or could be linked to one another. Seeking to enhance possibilities to find ways to act against terrorists at sea the law of piracy was viewed upon as a possible framework. Piracy, hitchhiking on the back of the efforts to find more avenues to fight terrorism at sea, rose on the international agenda.¹⁸⁵ Also, already earlier, since 2006, the World Food Program (WFP) sought ways to protect their humanitarian shipping from being attacked and hijacked and reached out to navies pursuing their anti-terrorist task in that region. Whereas the attention to piracy may have surfaced through the debate on how to act against terrorists at sea, current counter-piracy operations are not conceived as anti-terrorism operations. As the former Legal Advisor to the NATO-Secretary General Peter Olson commented on the nature of NATO's counter-piracy operation *Ocean Shield*: 'Although designed for and conducted by military forces, Ocean Shield is neither conceived nor implemented as a counter-terrorism or combat operation.'¹⁸⁶

3.1.4.1. Counter-piracy operations¹⁸⁷

In August 2007, the UNSC adopted SC-Res. 1772 to extend the ongoing AMISOM-mission of the African Union in Somalia. This resolution also encouraged member States with naval units in the area to be vigilant against any act against piracy of the coast of Somalia and protect merchant shipping, in particular shipping with humanitarian aid. Somalia, already for years considered to be a failed state and now suffered attacks against the humanitarian relief shipping of aid moving into Somalia. France, Denmark, Canada and the Netherlands were the first individual States to send warships to protect merchant shipping that were carrying

¹⁸⁵ See on the legal differences between piracy and terrorism, D. Guilfoyle, 'Piracy and terrorism', in P. Koutrakos, A. Skordas, *The law and practice of piracy at sea: European and international perspectives* (2014), 33-52.

¹⁸⁶ P.M. Olson, 'Countering piracy off the coast of Somalia: A NATO perspective', in P. Koutrakos, A. Skordas, *The law and practice of piracy at sea: European and international perspectives* (2014), 183-194, 183.

¹⁸⁷ Some view that the term 'counter-piracy' should be distinct from 'anti-piracy'. Whereas counter-piracy relates to the states' activities to protect vessels from being pirated, is the latter term is reserved for practical activities of the vessel owner or master that minimize the risk that the vessel can be boarded.

humanitarian aid of the WFP. In 2008, the UNSC adopted SC-Res. 1816 (2008). This resolution marked the active involvement of the UNSC and its member States in the fight against piracy off the coast of Somalia.

Based on the Council's call to fight piracy, three different multilateral operations were set up to protect international trade and fight piracy. NATO started its counter-piracy operations in 2008 with operation *Allied Provider* (OAP). Its primary aim was to protect WFP-relief shipping. *Allied Provider* took place from mid-October to December 2008. This NATO operation was to help bridge the gap between the EU-decision on 8 December 2008 to send a naval force to the Somali region and the actual start of the EU-operation, which was to be named operation *Atalanta*.¹⁸⁸ NATO opined that next to the EU-operation it still could have a significant role in counter-piracy operations and therefore commenced with Operation *Allied Protector* (OAP II) in March 2009. The NATO mission was another short mission that was to be complementary to the EU-mission. In August 2009, NATO launched its longer term mission Operation *Ocean Shield* (OOS), which currently, at the time of writing, is still ongoing. Next to the EU and NATO initiatives, a US-led coalition was launched in January 2009 to counter piracy and brought under the command of Combined Maritime Forces (CMF).¹⁸⁹ One of the three taskforces (TF 151) of CMF is specifically set up to conduct counter-piracy operations. Apart from these multilateral initiatives, individual States also decided to send warships on a unilateral basis to the seas around the Horn of Africa and the Arabian Sea. States, such as India, Russia and China, deployed warships that started contributing to enhancing the safety of shipping in the region. As is often mentioned, these different naval operations, all with their own specific mandate, corporate and coordinate amongst each other in order to give the maximum effect to their presence in the region.¹⁹⁰

In SC-Res. 2067 (2012), the UNSC has noted the decline of number of vessels kidnapped by pirates. A CMF press release from June 2015 mentioned that since 2012, there were no successful pirate attacks in the operational area in which the combined naval efforts are operating, but

¹⁸⁸ EU-Council decision 2008/918/CFSP, 8 December 2008.

¹⁸⁹ CMF is an international partnership organization with around 30 states that contribute vessels and staff to its Headquarters in Bahrain and has three taskforces under its command: CTF 150, 151 and 152. CTF 150 focuses on maritime security and anti-terrorist operations at sea in the Arabian Sea, CTF 151 focuses on piracy and CTF 152 focuses on security and cooperation in the Persian Gulf.

¹⁹⁰ The *SHADE*-meeting (Shared Awareness & Deconfliction) is often mentioned in this context.

without an effective deterrent presence the threat could re-emerge again.¹⁹¹ As of 2016, naval efforts against piracy and protecting international trade have not declined in the area of the Indian Ocean.

The legal challenges with regard to piracy, as well as the legal literature on these challenges, are vast.¹⁹² One of the major reasons is that the fight against piracy also in particular focuses on the aftermath of what happens at sea. Counter-piracy operations above all have underlined the challenges that go with ultimately prosecuting pirates in a court of law. Challenges for instance lie with gaps in the existing international and national legal frameworks relating to piracy. These include the interacting of national and international law and challenges and in the practical application of law enforcement at sea. Counter-piracy operations have also shown that successfully conducting MIO goes beyond just the operational dimension at sea and the military, but requires intensive coordination with for instance public prosecutors and foreign ministries. As such, it underlines that MIO must be considered not as a stand-alone activity at sea, but as a comprehensive activity that has more phases and more involved agencies that need to work together for mission success.

The significance of counter-piracy operations to the applicable law framework in maritime interception operations is that since counter-piracy operations have started they have underlined the shift to law enforcement operations at sea. Douglas Guilfoyle aptly noted that pirates for a number

¹⁹¹ See <http://combinedmaritimeforces.com/2015/06/22/international-maritime-community-works-together-to-counter-piracy-at-sea/>

¹⁹² In the beginning of the 20th century the focal point of piracy was still on piracy in East Asia (e.g. R.C. Beckman, *Combating piracy and armed robbery against ships in Southeast Asia: The way forward*, in *ODIL*, vol. 33 (2002), 317-341; S.M. Menefee, *Foreign naval intervention in cases of piracy: Problems and strategies*, in *The international journal of marine and coastal law*, vol. 14, no. 3 (1999), 353-370). When the issue of maritime terrorism came more to the foreground, more focus was put on the relationship between piracy and terrorism (e.g. T. Garmon, *International law of the seas: reconciling the law of piracy and terrorism in the wake of September 12*, in *Tulane maritime law journal*, vol. 27 (2002), 257-275; H.E. Jose Luis Jesus, *Protection of foreign ships against piracy and terrorism at sea: legal aspects*, in *The international journal of marine and coastal law*, vol. 18 no. 3 (2003), 363-400; M. Mejia jr., *Maritime gerrymandering: dilemmas in defining piracy, terrorism and other acts of maritime violence*, in *Journal of international commercial law*, vol. 2 no. 2 (2003), 153-175. When the major naval operations began after the involvement of the UN the focus shifted to the challenges that arose with fighting pirates off the coast of Somalia. (e.g. E Kontorovich, *"A Guantanamo on the sea": The difficulties of prosecuting pirates and terrorists*, in *Northwestern University of Law, Public Law and Legal Theory, series 09-10*; D. Guilfoyle, *The laws of war and the fight against Somali piracy: combatants or criminals*, in *Melbourne Journal of international law*, vol. 11 (2010), 1-13; T. Treves, *Piracy, laws of the sea, and use of force: Developments off the coast of Somalia*, *EJIL*, vol. 20. No 2 (2009), 399-408.

of reasons can be seen as ‘agents of change’.¹⁹³ One of those changes was the shift to the law enforcement paradigm in counter-piracy operations within the context of a military response authorized by a UN-Security Council resolution. It also underlined a start of more serious thoughts as to the application of human rights law in naval operations. Several cases of piracy have now appeared before national courts in a number of States, such as Germany,¹⁹⁴ the United States,¹⁹⁵ The Netherlands,¹⁹⁶ Kenya and the Seychelles.¹⁹⁷ On a more practical level, counter-piracy operations extended the need for military also to be in the courtrooms after the arrest. Crews of Netherlands warships involved in counter-piracy operations went to make statements in courts in the Seychelles and Germany to contribute to the successful prosecution of pirates. In December 2014, the jurisprudence on piracy has been enriched by judgments of the European Court of Human Rights. The ECtHR judged in two piracy cases that emerged from French actions on and off the coast of Somalia.¹⁹⁸

¹⁹³ D. Guilfoyle, ‘Somali pirates as agents of change in international law making and organization’, in *Cambridge Journal of International and Comparative Law*, no. 1(3) 2012, 81-106.

¹⁹⁴ On 19 October 2012, the district court in Hamburg sentenced ten Somali pirates that had hijacked the German flagged vessel *Taipan*. The pirates were detained after a Netherlands boarding team from *Hr. Ms. Tromp* boarded the vessel in 2010 and detained the pirates.

¹⁹⁵ Domestic courts in the United States have had several cases against Somali pirates, among which the case of the Hijacking of the *Maersk Alabama* in 2009.

¹⁹⁶ District Court of Rotterdam: *Samanyulo* (Netherlands Antilles flagged), *Choizil* (South African flagged) and *Al Fedda*. The first case involved the capture of pirates by the Danish warship *Absalon*, where the suspect-pirates were transferred to the Netherlands. The third case involved an incident where the pirates opened fire on the marines that were in the conduct of approaching the dhow. The Public prosecutor attempted to press charges on account of murder or manslaughter against the approach marines, but they were acquitted of that charge.

¹⁹⁷ The UN-SG report on piracy (S/2013/623) mentions the following on Kenya and the Seychelles: 45. Countries in the region supported by the Counter-Piracy Programme continue to receive individuals suspected of piracy for prosecution. In total, 53 suspects remain on remand in Kenya, Mauritius and Seychelles, with the Programme supporting their trials. Another 153 convicted pirates are currently serving their sentences in Kenya and Seychelles. Prison conditions for these inmates continue to be monitored and improved where required.

¹⁹⁸ *Ali Samatar and other vs. France* (appl. no's 17110/10 and 17301/10) and *Hassan and others vs. France* (appl. no's 46695/10 and 54588/10), 4 December 2014. The first case (Samatar) related to the hijack of the French flagged vessel *Ponant* in 2007. The hijackers were arrested on land by French authorities. The second case (Hassan) is related to the French flagged yacht *Carre d'As* in September 2008. It was hijacked and subsequently freed by French commandos on board the French frigate *Courbet*.

	Operation Alias	Organization	Duration of operation
1	Operation Allied Provider (OAP)	NATO	24 October – 12 December 2008
2	Operation Allied Protector (OAPII)	NATO	24 March – 17 August 2009
3	Operation Ocean Shield (OOS)	NATO	17 August 2009 - present
4	Operation Atalanta	EU	8 December 2008 – present
5	Combined maritime forces (CMF) – CTF 151	US-led coalition of forces	January 2009 – present
6	Individual deployments of States	Individual States	Differs per State

Table 3.1. Counter-piracy operations off the coast of Somalia since 2008

3.2. The Israeli interception operations

The four strands on the evolution of maritime interception discussed all, in a certain way, are part of a very broad motion of unfolding developments in international affairs. Conflict in Iraq and Afghanistan are interconnected with weapons of mass destruction and terrorism. The latter again hooked into the confrontation with piracy off the coast of Somalia. Instability in the Northern African region was the breeding ground for the Arab Spring that brought the ultimate end of Qaddafi. Maritime interception operations during these developments played an operational level role. On a separate note, Israel has also contributed to MIO with some practice. The Israeli contribution lies both in large scale naval operations and single action against vessels. With regard to the first, operation *Change of Direction* (2006) and operation *Cast Lead* (2009) can be mentioned, both with a significant interception role for its naval forces. In 2006, Israel commenced military operations against Hezbollah, which included establishing a blockade off the coast of Lebanon. The blockade was, albeit in a different legal context, taken over by MTF UNIFIL. In 2009 Israel established a blockade off the coast of Gaza as part of operation *Cast Lead*. Although the naval blockade operations against Hezbollah and Hamas in a way were made more palpable by the prior legal debate that occurred with regard to military operations against Al Qaida (to which the acceptance that military force in a self-defence situation could be used not only

against States but also against non-state actors) it ran up against major protests when in May 2010, Israel boarded the *Mavi Marmara* which had attempted to breach the blockade off the coast of the Gaza. The action resulted in nine dead passengers of the vessel, followed by views of many legal commentators.¹⁹⁹ As of 2015, the Gaza blockade is still in force. Israel also intercepted the *Karine-A* (2002),²⁰⁰ the *MV Francop* (2009),²⁰¹ and the *Klos-C*²⁰² (in 2014), all of which were considered to be a threat to Israel.

3.3. Final remarks

In 1995 Zeigler wrote that, 'Multinational interception operations are a creature of the post-World War II era, and rely on the United Nations Charter for their justification'.²⁰³ Although maritime interception operations are now indeed firmly established as a means to enforce decisions of the UNSC, at this point in time it is clear that a different conclusion must be drawn with regard to the legal justifications for MIO. The term MIO has gradually outgrown its original meaning and undertook an evolution

¹⁹⁹ E.g. J. Farrant, 'The Gaza Blockade incident and the modern law of blockade', in *Naval War College Review*, vol. 66, no. 3 (summer 2013), 81-98; W. Heintschel von Heinegg, 'Methods and means of naval warfare in non-international armed conflicts', in *International law studies*, vol. 88 (2011), 211-236; D. Guilfoyle, 'The Mavi Marmara incident and blockade in armed conflict', in *British Yearbook of International Law*, Vol.81 (2010), 171-213; J Kraska, 'Rule selection in the case of Israel's naval blockade of Gaza: law of naval warfare or the law of the sea?', in In M.N. Schmitt (red.) *Yearbook of humanitarian International Law*, vol. 13 (2010), 367-395; R. J. Buchan, 'Determining the legality of Israel's interception of the peace flotilla on May 31 2010', in *International and Comparative Law Quarterly*, vol.61 no. 1 (2012), 264-273; G.M. Scott, 'Israel's seizure of the Gaza-bound flotilla: applicable laws and legality', in *Research paper no. 42/2010, Osgoode Hall Law School*.

²⁰⁰ In 2002, Israeli defense forces boarded the Tonga flagged vessel *Karine-A*, which carried 50 tons of weapons, suspected to be for the Palestine authority. See Hodgkinson, 623-625.

²⁰¹ On 3 November 2009, Israel boarded the *MV Francop* which sailed under the flag of Antigua and Barbuda. Israel found more than three hundred tons of weapons on board, according to Israel said to be meant for Hezbollah. The vessel was directed to Ashdod Port for further examination. The weapons shipment was said to originate from Iran. In a letter to the UNSG Israel stated that the shipment constituted a breach of SC-Res. 1747 and because of: "The intended route of the *Francop* - coupled with the types of weaponry found on board - raise serious concerns that this incident also constitutes a violation of UN Security Council Resolution 1701 and 1373." Letter to UNSG Ban Ki Moon by Ambassador Shalev, 4 November 2009. Available at: <http://mfa.gov.il/MFA/InternatiOrgs/Issues/Pages/Israel-submits-letter-of-complaint-to-UN-Secretary-General-5-Nov-2009.aspx>.

²⁰² In March 2014, Israel boarded the Panama-flagged *Klos-C* on suspicion of carrying a large bulk of weapons (surface-to-surface rockets) in the Red Sea on its way to the Sudan, ultimately destined for the Gaza in an operations codenamed operation *Full Disclosure*. The vessel was diverted to Eilat and the crew members released, who, according to an Israeli spokesman, were probably not aware of the cargo.

²⁰³ D. Zeigler, *Ubi Sumus? Quo Vadimus? Charting the Course of Maritime Interception Operations*, Newport, Naval War College Paper, 1995, p. 38 (see also *id.*, Vol. 43 *NLR* 1996, pp. 1-55).

from a term used for the legal framework of enforcing UN-economic sanctions to be used today in a much broader sense. It has, therefore, also lost its earlier specific legal meaning as being maritime interception operations that occur only in the context of an authorization of the UNSC. The legal justification for MIO must now also be sought in other sources of general international law. What this short history has also shown is that the scope of the MIO has broadened to include the interception of individuals. Persons have a legal impact on MIO because they bring with them another legal regime: international human rights law, together with its operational challenges at sea. Lastly, what may also be drawn from this short history is that in the maritime dimension different legal bases and subsequent applicable legal regimes may simultaneously exist in a certain maritime area, conducted by naval forces from sometimes the same State. It poses both challenges for the warship commander and the merchant vessels that are subject to interception to understand what is legally permissible in a specific interception situation at sea. Before Part II will examine the generally accepted legal bases for MIO, Chapter 4 will first underline the fundamentals of the international law of the sea that relate to MIO, which must be the starting point for any discussion on the legal aspects of maritime interception operations.

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*Fig. 2.1.: MIO conducted in the Western, Middle East and African Hemisphere*²⁰⁴

CMF MSO	Combined Maritime Forces Maritime Security Operations
MIF:	Maritime Interception Force
MTF UNIFIL:	Maritime Taskforce UNIFIL
OAE:	Operation Active Endeavour
OAE STROGOPS:	OAE Strait of Gibraltar operations
OAP:	Operation Allied Protector (I and II)
OCD:	Operation Change of Direction
OCL:	Operation Cast Lead
OEF:	Operation Enduring Freedom
OIF:	Operation Iraqi Freedom
OOS:	Operation Ocean Shield
OUP:	Operation Unified Protector

²⁰⁴ Source of the ground-map:
<http://facweb.bhc.edu/academics/science/harwoodr/geog105/study/nafrica.htm>.