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 9

The right of visit

The belligerent right of visit is not a substantive and independent right, it is a means justified by the end.
-A.P. Higgins[504]

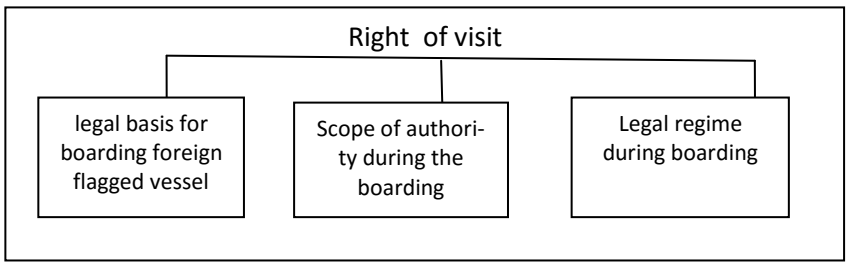
9. Introduction

The right of visit is of key importance to maritime interception operations. It is at the very heart of maritime interception. Traditionally, the right of visit is generally separated into peacetime right of visit and the right of visit during international armed conflict. With the first, the right of visit codified in Article 110 UNCLOS is meant. The latter refers to the belligerent right of visit and search,[505] which is part of the law of naval warfare. In line with the view that there are several legal bases for MIO, it is argued here that the right of visit has more applications than the traditional separation into peacetime and wartime rights and may include manifestations arising different legal bases. For example, a right of visit is now also accepted to exist through authorization by the UNSC, derived from *ad hoc* consent or based on international agreements.

The right of visit in this chapter is defined as the legal framework that regulates the authorities during the visit of a foreign flagged vessel by a

[504] A.P. Higgins, 'Visit Search and detention', *BYBIL*, no. 43 (1926), 43-53, at 43.
[505] Generally, the peacetime rights of visit are called " the right of visit", whereas the right to visit during international armed conflict appear under names as "the right of visit and search" or "the belligerent right of visit and search", or even more extensively "the belligerent right of visit, search and capture".

warship. In principle, the right of visit contains three aspects, which relate to both the legal basis and applicable legal regime: the legal basis to board, the authorities possessed during the visit, and the legal regimes that apply during the execution of the visit. To illustrate, if a boarding is based on an international agreement, the agreement itself is the legal basis which will also detail the scope of the authorities that can be conducted during the boarding. Added to this detailed scope, the manner in which way force is used or persons are detained will depend on constraint that are in place during the boarding, which are, among other factors, based upon the applicable legal regime. These three aspects together make up the complete scope of authority that a boarding team has during the boarding of a vessel. Separating these aspects of a visit is helpful to understand that within all the legal bases for MIO, all three aspects need to be considered. This is relatively easy for existing rights of visit, or for visits that are derived from an international agreement. But for visits during a MIO that do not have a pre-existing framework that addresses the scope of authority during the visit, this is less clear. For example, when an *ad hoc* consent is the legal basis for the boarding, the scope of consent given should also detail the scope of authority for the boarding. The additional legal regimes that apply depend on the factual situation, which can be either IRHL or LOAC. In the same manner, a UN-resolution can be the legal basis for the boarding, which details some of the scope of authority for the boarding itself. The manner in which such authority is enforced depends rather on the applicable legal regime. The above mentioned definition of the right of visit used in his chapter excludes the legal basis element, which has already been discussed in Part 2. This chapter will focus on the second aspect; the scope of authority, or in other words, the rights *during* the visit. The third aspect of the visit, the applicable legal regime, is studied in Chapters 10 and 11. This chapter will first start with two brief and general remarks on the right of visit during maritime interception operations and then proceed into an analysis of the different manifestations of the right of visit.



9.1. Three general remarks on the right of visit during naval operations

Before embarking on the different legal frameworks for the right of visit, it is important to underline two general notions of the use of the right of visit during naval operations. First, although the different manifestations of the right of visit during naval operations are alternative and separate to each other, they may well be carried out simultaneously in one military campaign. As pointed out in Chapter 2, during one military operation warship commanders can be authorized to act based on different types of right of visit. For example, a warship that takes part in an international armed conflict, will have the authority to exercise the belligerent right of visit and search, but can at the same time also be authorized to act against piracy[506] or a SUA-offence.[507] This was the case during the Netherlands contribution to *CTF 150*, in which Netherlands warships assigned to the operation had both the authority to use the belligerent right of visit against possible terrorists at sea, and the authority to act against piracy off the coast of Somalia, based on the UNCLOS right of visit. The maritime operating area of TF 150 was both an area of interest for terrorists and at the same time was being used on a regular basis for activities relating to pirates. To mention one other example, the fact that a warship is, for instance, assigned to a multinational UN-mandated maritime embargo operation does not preclude that it may also be authorized to board vessels that

[506] Ministerie van Defensie, *Eindevaluatie CTF 150*, 18 September 2006.
[507] Interestingly, Article 2*bis* sub 2 of the SUA-Protocol mentions that the Convention does not apply to the activities of armed forces during an armed conflict, but does not exclude that the convention applies also during armed conflict.

are stateless or suspected of piracy. It may, however, have impact on the command and control of contributing warships. Where an international commander can order a visit in line with the mandate, other authorities stay, in principle, with the warships' State, unless it has delegated its authority to an international commander.

Second, from a geographical perspective, different manifestations of the right of visit can exist simultaneously within one area of operations. During the US/UK naval operations in the Persian Gulf in March 2003 against Iraq (OIF) in which the belligerent right of visit and search applied, the UNSC-based right of visit to enforce the maritime embargo against Iraq still existed in the area of the Persian Gulf.[508] Moreover, these rights can be applied in the same area *and* conducted by warships of the same State, if the State has assigned ships to both operations.[509] As this chapter will show, there are significant differences between these different manifestations of the right of visit. It is, therefore, important for a warship commander to know which right of visit applies to a particular situation, even though the execution of the right from an operational perspective may be quite similar. The rules of engagement for the operation may provide some assistance in this regard, but it will not always be the case.

Third, it must be underlined that the quote by A.P. Higgins in the heading of this chapter signals an important point with regard to the nature of the right of visit. The activity of visiting a foreign flagged vessel by a warship is not an *end* to itself, but a *means* that serves another specific purpose. The right exists to enable States by means of a visit of another vessel to verify and, if needed, subsequently stop an illicit activity, a breach of a UN-resolution, or exercise an authority under the law of naval warfare. It is not a right that is meant for the sole purpose to gain access to a foreign flagged vessel, after which a range of new opportunities may, however practically, arise from the fact that a State is physically on board the vessel. The right of visit is a means to support something else, which must be sufficiently concrete so that lawful access to a vessel cannot be

[508] See also, R. McLaughlin, 'United Nations Security Council Practice in relation to the use of force in no-fly zones and maritime exclusion zones', M. Weller (ed.) *The Oxford Handbook on the international law on the use of force* (2015), 251-271, at 267-268.

[509] In this context McLaughlin refers to an interesting situation during the 2003 operations against Iraq, in which the belligerent visit and search does not allow a warship to visit a vessel that comes from the enemy state, (based on the fact that contraband needs to have an enemy destination) and where the coexisting resolution does provide the authority to stop merchant vessels for inspection of prohibited goods. McLaughlin (2015), 267.

used for other purposes. In this regard, the right of visit cannot be separated from the reason why a visit is undertaken and its lawfulness will also depend on this reason. To illustrate the operational challenge this comment raises, I will sketch the following dilemma:

> During an international armed conflict a neutral vessel suspected of carrying contraband to the enemy is sailing from (not to) enemy territory to a neutral destination. The latter information bars a commander from using the right of visit based on the law of naval warfare, as this authority is limited by a suspicion of carrying contraband and (ultimate) enemy destination of the vessel. The commander has, however, noticed that the vessel does not fly a flag and therefore views the vessel to be stateless, which allows him, based on the peacetime right of visit, to board the vessel. Whilst checking for nationality on board the vessel, his suspicion of the vessel carrying contraband appeared to be correct. But because the lawful capture of contraband still depends on the condition of destination, it means that in this case, although access to the vessel was gained lawfully, it is still not lawful to seize the goods.[510]

9.2. Ad hoc-consent based right of visit

As Chapter 7 has noted, consent between States is a legal basis for visiting a foreign flagged vessel. The scope of this type of visit must usually be sought within the realm of law enforcement, for instance for the purpose of stopping illicit activities on board a foreign flagged vessels. When authority to board is given through consent this does not, however, also automatically makes clear the scope and authority of the visit without further specifications; there is no specific legal framework that automatically comes into play when *ad hoc* consent to board the vessel is given by a State. Important to note is that a legal basis to board based on *ad hoc* consent does not automatically include the authority to perform jurisdictional enforcement. As Gill mentions; 'The intervention will be subject to any conditions posed by the consenting State'.[511] Through consent a State can waiver the exclusive enforcement jurisdiction, but only to the extent the waiver permits. As Kraska notes: 'Permission to board may be narrowly circumscribed, however, and does not necessarily entail consent to in-

[510] Albeit not a strict legal answer, an operational decision is imaginative where the goods are still captured and where the capture will ultimately not be considered as a lawful prize in a prize court, which may lead to compensation. Be that as it may, within the operational arena the action is successfully frustrated.

[511] T.D. Gill, 'Military intervention at the invitation of the government', in T.D. Gill, D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (2010), 229-234.

spect, search or seize the vessel'.[512] The purpose and the range of the enforcement measures during the visit, therefore, depend on what is agreed between the States, which, as a guideline, must also be sufficiently concrete. The latter point has also been illustrated in the *Medvedyev*-case. The Cambodian diplomatic note of consent included the authority to intercept, inspect and take legal action against the *Winner*.[513] The ECtHR accepted the diplomatic note as the legal basis but opined, however, that the fate of the crew was not sufficiently covered by the note and therefore did not establish that the deprivation of liberty the crew was subject to an agreement between France and Cambodia.[514] The enforcement jurisdiction of France to arrest and detain the persons on board the vessel was not considered to be granted by the Cambodian authorities. In this case, the legal certainty that had to arise from the note also emerged from human rights standards on deprivation of liberty, which will be elaborated upon in Chapter 11. At this point it is enough to conclude that in general the conditions of consent must be made sufficiently clear to ensure clarity on the scope of authority applicable to the boarding.

Based on Article 92 UNCLOS the flag State will have exclusive jurisdiction over the vessel. The boarding State might also have jurisdiction when for instance the persons who are either the suspected criminal or the victims of the crime on board have the same nationality as the boarding State, through the (passive) nationality principle, or that a State has granted universal jurisdiction on a crime through its domestic laws. In other words, situations of concurrent jurisdiction can exist. As the flag State has exclusive jurisdiction over the vessel, primary jurisdiction is with the flag State, unless the waiver of consent allows the boarding State to enforce its own jurisdiction. The consenting State can therefore choose to either allow the boarding State to enforce jurisdiction on behalf of the flag State, or decide to waive its primary enforcement jurisdiction in favour of enforcement jurisdiction of the boarding State. The first situation is the situation that is foreseen also, albeit agreed in an international agreement, in the SUA-Protocol boarding provisions and the bilateral ship-boarding agreements between the US and other States. It is, furthermore, unlikely that a State will give consent to a boarding of one of its flagged vessels

[512] Kraska, 'Broken taillight' (2010), 11.
[513] *Medvedyev*, paragraph 10.
[514] *Medvedyev*, paragraph 98-99.

without any reasons given by the requesting boarding State. The boarding State will have to make clear to the flag State that there are grounds for suspicion that a certain criminal or prohibited act is taking place on board against which actions must be taken. It would seem logical therefore that the threshold to board the vessel will be that there must a reasonable ground for suspicion that the vessel is engaged in something illicit.

9.3. International agreements and the right of visit

Chapter 8 has noted first that a legal basis for MIO exists when States agree to conclude international agreement between them on this subject. When the visit finds its legal basis in an international agreement, the scope of the visit is detailed in the agreement itself. It will detail the purpose and what authorities exist for the visiting State during the boarding. In the following paragraphs the UNCLOS, the SUA-provisions and the bilateral boarding agreements between the US and others States will be touched upon as illustrative examples of such agreements.

9.3.1. The limited character of the UNCLOS peace time rights of visit

Primarily,[515] Article 110 UNCLOS deals with the peacetime right of visit on the high seas, which has been subject to much analysis, especially after piracy off the coast of Somalia became a much debated issue. The purpose of the right of visit is limited to piracy, slave trade, stateless vessels and unauthorized broadcasting. It is explicitly stated that warships may exercise this right. Klein notes on this right is; 'The fact that these exceptions are narrowly construed reflects that the preference of States still accords with the overarching construct of *mare liberum'*.[516] The right of visit under UNCLOS follows both the notion that the right of visit must be considered as an exception to the exclusive jurisdiction of a flag State, and the notion that States do not have general policing rights on the high seas. Apart from the fact that Article 110 UNCLOS characterizes these rights as

[515] Other peace time rights of visit may be found in article 111 UNCLOS, which regulates hot pursuit. Arguably also article 98 implies a right of visit to secure the safety of persons in distress at sea. Also, outside the realm of international peace and security, more implicit rights of visit exist, for example, a right of visit that is implied in other authorities in which a state asserts their rights in the different maritime zones. The practical side to conduct the authorities given under article 33 UNCLOS in the contiguous zone implies such a right for certain specific purposes.
[516] Klein (2005), 302.

acts of interference, the exceptional character of this right is in general manifested in a number of specific limitations.

First, it explicitly puts up the threshold of 'reasonable grounds to suspect' for the application of the right.[517] The information of the suspicion itself may either come from the commander of the visiting warship itself via on the spot verification at sea, or via other channels, such as received intelligence. To underline this threshold UNCLOS also States that boardings that are based on suspicion that later appeared to be unfounded shall be compensated for any loss of damage.[518] Obviously, this signifies that losses or damages which result from a boarding that is undertaken without any suspicion at all, must also be compensated. All in all, as Wendel states: 'Object and purpose of Art. 110 para. 3 LOSC is to prevent abusive interference and to increase the degree of diligence exercised by the naval officers considering a boarding.'[519]

Second, as mentioned previously, the purpose of the visit it is limited to certain types of situations, namely in the cases of piracy, slave trade, stateless vessels and unauthorized broadcasting. The purpose for these manifestations of the right of visit are, in other words, well defined. It does not leave room to apply the right of visit to, for instance, drug-trafficking or suspected terrorist boarding operations.

Third, the authorities are limited to visit and search only, and do not expressly possess authority to attain seizures, or exercise enforcement jurisdiction. This authority still lies with the flag State.[520] Article 110 UNCLOS only allows to board for the purpose of determining whether one of the four situations are indeed ongoing. The article does not mention what happens after the moment the warship's crew has found that its suspicion was right. This indicates also that the right of visit is very limited in the sense that well founded suspicion and which after inspection seems correct still does not give any further authorities for the boarding warship to

[517] Article110 UNCLOS (excerpt) reads:

> 1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

[518] Art. 110 sub 3 UNCLOS reads:

> 3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained

[519] Wendel, 113.

[520] Guilfoyle, *Shipping interdiction*, 78. Papastavridis (2013), 80.

act against it and the persons on board. The one exception to this is piracy. Article 105 UNCLOS[521] states explicitly that enforcement jurisdiction exists for other States over vessels that are suspected of piracy. As such, Article 105 provides that piracy is a crime over which every State has (universal) jurisdiction. In order to effect this possibility, domestic legislation must, however, also be in place.[522] Whereas some authors, such as Guilfoyle and Papastavridis adhere to the strict approach of authorities based on Article 110, Von Heinegg takes a step further and states that also for the other rights in Article 110 that, based on the precedent of the piracy articles, 'There are good reasons to assume that those measures may also be taken against a vessel if the suspicions that they are engaged in any of the other activities prove to be well founded'.[523] His view appears to ensure, for instance in the case of statelessness of a vessel, that enforcement jurisdiction is ensured.

Fourth, the geographical limitation of Article 110 UNCLOS is the high seas. Via Article 87 UNCLOS, the Article 110 authority also applies in the EEZ. For operational purposes during military operations the limits given to warships for conducting these authorities can be further limited to a specific operational area. It does not mean, however, that outside that operational area acting against for instance piracy becomes unlawful, but it does mean that a commander will act outside his given military orders. To illustrate this in an international setting, the EUNAVFOR counter-piracy operation *Atalanta* has limited its operational area to up to 500nm from the Somali coast, which was expanded in 2009 to the Seychelles.[524] If a State wishes to capture and prosecute pirates outside the EU-

[521] Art. 105 UNCLOS reads:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

[522] The Netherlands Criminal Code has made piracy (zeeroof) punishable under Articles 381-385. The Netherlands Criminal Procedural Code in article 359d opens the possibility that commanders of Netherlands warships are authorized to act against piracy. See on the Dutch criminal code on piracy (in Dutch); M.D. Fink, 'Zeeroof', in *MRT* (2006), 225-233.

[523] Heintschel von Heinegg, (2010), 389.

[524] Art. 1 of the EU Council Joint Action 2008/851/CFSP states:

> 2. The forces deployed to that end shall operate, up to 500 nautical miles off the Somali coast and neighbouring countries, in accordance with the political objective of an EU maritime operation, as defined in the crisis management concept approved by the Council on 5 August 2008.

operational area, it would have to do it outside the EU-ROE, on national ROE.

9.3.1.1. Statelessness

The jurisdictional consequence of a stateless vessel with regard to the exercise of jurisdiction by other States is not entirely clear in international law. Most authors take the view that the fact that a vessel is without nationality does not breach international law. The notion of statelessness of vessels on the high seas, however, does not sit well with the basic concepts of the international law of the sea. Statelessness goes against the public order of the oceans because no State can exert jurisdiction and take responsibility over such vessels. It is also not an automatism that a stateless vessel is subject to the universal jurisdiction of all States. UNCLOS in this respect goes as far as a right to board and identify a stateless vessel, but does not mention what to do next, if indeed no State can be attached to the vessel. Obviously, jurisdiction on board can be established on other points than only the flag of the vessel, for instance be focusing on the persons and establish jurisdiction based on the nationality principle, or domestic laws that make a certain crime extraterritorially punishable. Even though this still does not solve the issue of (the lack of) jurisdiction on the vessel itself, the fact is that the chances that a State will object to actions against a stateless vessel are less probable. One school of thought based on this notion is as Den Heijer mentions:

> '…the school of thought that ships without a nationality do not enjoy the protection of any State and that, in the absence of competing claims of State sovereignty, any State can apply its domestic laws to a stateless vessel and to that purpose proceed with the boarding, searching and seizure of that vessel.'[525]

A balance, therefore, ought to be struck based on the specific circumstances of the case between the totally unwanted consequence of statelessness in which stateless vessels become effectively immune because no one can exert jurisdiction, and automatically applying the boarding State's jurisdiction as a standard consequence of statelessness.

[525] M. Den Heijer, *Europe and extraterritorial asylum* (2011), 236

Apart from the issue whether statelessness implies that the boarding State can assert jurisdiction over a vessel,[526] another point to note is the purpose behind the authority to board under circumstances of statelessness. Interestingly, in both *Medvedyev* and *So San* the ultimate aim of the boarding of both vessels was not to check whether or not the vessel was in fact stateless, but to stop something else from happening; a criminal act and a weapons delivery. One cannot escape the feeling that the legal framework of statelessness is not used in the scope for what this framework has been set-up to do, namely a very restrictive authority to check the nationality of the vessel. In a restrictive approach, the consequence of statelessness can be that the vessel and crew detained in order to further determine who is responsible over the vessel. If the crew is suspected of any criminal acts it would fall to the scope of checking nationality but should be referred to the State once it is established which State has responsibility over the vessel or otherwise via the nationality of the crew. Statelessness should, however, not be used to gain access on board a vessel for the purpose of other actions that may not be allowed, but for which there is no legal ground to board at hand.

9.3.2. The SUA-provisions

The SUA-provisions are quite detailed regarding the scope of authority during the visit. The purpose of the visit within the SUA-framework is to act against the offences stated in Article 3 SUA-Convention and Article 4 sub 5 SUA-Protocol. The latter article has been added to make punishable acts by *any* person from or with a ship (the ship used as a weapon) which also involves WMD.[527] Article 5 of the SUA-Protocol requires States to

[526] Guilfoyle notes that this issue remains unclear. He concludes that some states, including the US, take the approach that jurisdiction may be asserted over a stateless vessel, which is a practice that, as he states, is unprotested. Guilfoyle (2009), 341-342.

[527] In art. 4 sub 5 article 3bis is added, which reads:
Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
(iii) uses a ship in a manner that causes death or serious injury or damage; or

make these SUA-offences punishable under their domestic laws and Article *3quater* mentions *any* person, the State who acts on the basis of the SUA-Convention will have enforcement jurisdiction on the basis of their domestic laws. Also, the SUA-framework requires reasonable suspicion to be able to exercise the right, which is codified in Article 8*bis* sub 4 of the SUA-Protocol. Article 8*bis* sub 5 of the SUA-Protocol allows a State to take appropriate measures with regard to that ship which may include the stopping, boarding and searching the ship, its cargo and persons on board and questioning the persons on board, *only* in order to determine if an offence is being is about to be committed. Article 8*bis* sub 5 therefore merely authorizes another State to determine whether a SUA-offence has taken place, but does not authorize primary enforcement jurisdiction. In this respect, the article follows the same construct of Article 110 UNCLOS. When an offence has indeed taken place, with regard to jurisdiction over the offenses Article 8*bis* sub 6 to 8 of the Protocol are of importance. Once it is found that such an offence as indeed taken place, sub 6 then goes on to state that the flag State may authorize the requesting party to detain the ship, cargo and persons pending receipt of disposition instructions from the flag State. Sub 8 underlines that the flag State has primary jurisdiction, but can waive its jurisdiction to allow for taking measures by another State. In summary, in the SUA-framework the flag State stays in charge of the issue, but has through the means of an international agreement quickened the process for boarding to consent to boarding under specific circumstances.

(iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or

(b) transports on board a ship:

(i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or

(iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

(iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

The geographical limitation of the SUA-right of visit is connected with Article 4 of the SUA convention, which is not very easily understandable in just one read-through. Paragraph one reads: This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States. The article suggests that it not only applies in the maritime zones outside the territorial sea but also applies to vessels that are within the territorial sea of another State and are scheduled to navigate into other maritime zones.

9.3.3.Bilateral ship-boarding agreements between US and other States

As Chapter 3 has noted, bilateral shipboarding agreements (BSA) between the US and other States are pursued in the context of PSI and SC-Res. 1540 (2004). Its scope, therefore, is related to the suppression of activities related to WMD, and its purpose is to engage in operational agreements that authorize boarding of foreign flagged vessels to interdict WMD-cargo in order to disrupt the trafficking of WMD.[528] So far, as of 2015, the US has concluded agreements with 11 different States.[529] That does not seem much, but it is argued by the US that these eleven States account for 60 percent of the world's tonnage. The authorities under which a boarding can take place differ per agreement. As mentioned in Chapter 8 Kraska and Pedrozo State that the BSA's make use of three different models with regard to the authorization to board the vessel.[530] First is that the State will have to give consent. Second is that consent is presumed to have been given, when there is no reaction of the flag State within a certain period after the request. And third is the model that boarding authority is presumed within a certain period of time only if the State cannot confirm the registry of the vessel. The BSA's list a number of conditions that forges the right during the visit in these circumstances. Firstly, boarding is only allowed outside the territorial sea of any State. Secondly, the threshold of reasonable grounds is introduced. There must be a reasonable ground to suspect that the vessel is engaged in illicit trafficking of WMD. The

[528] Kraska & Pedrozo, 785-787.
[529] Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama,
St. Vincent and the Grenadines. See www.state.gov/t/isn/c27733.htm. All the BSA's have also been published on this website.
[530] Kraska & Pedrozo, 788.

BSA's mention in Article 1 (definitions) that: "Suspect vessel" means a vessel used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is engaged in proliferation by sea. Third, the BSA's also consider the jurisdiction over detained vessel, cargo, other items or persons on board the vessel. The principle is that primary jurisdiction remains with the flag State and the boarding party effectively operates on behalf of the flag State. It is for the flag State, therefore, to decide how to proceed once action has been taken.

9.4. Self-defence and the right of visit

Chapter 7 has noted two approaches of how self-defence is argued as a legal basis for MIO. First, the traditional approach in which the use of force in self-defence triggers the situation of an armed conflict, to which the law of armed conflict applies. And second, the approach in which self-defence is argued as a legal basis to stop vessels that carry WMD or terrorists. The following paragraphs will first go into the right of visit regulated by the law of armed conflict, the law of naval warfare in particular. It will then place some remarks in the context of the second use of self-defence, a so called 'self-defence' or 'NIAC-right of visit'.

9.4.1. The belligerent right of visit and search

The law of naval warfare consists of a number of specialized rules that apply during international armed conflict. These specialized rules contain rules on issues such as blockades, contraband, hospital ships and the protection of wounded and shipwrecked at sea and includes the law of maritime neutrality. The law of naval warfare also provides for the belligerent right of visit and search. There is no modern treaty[531] that explicitly codifies this right, although it is implied in some provisions of the law of naval warfare.[532] The belligerent right of visit and search is, however, a

[531] It is mentioned, however, in historical treaties. Heintschel von Heinegg mentions a few of those in his Article 'Visit, search and capture – conditions for applicability', W. Heintschel von Heinegg (ed.), *Reports and Commentaries of the Round-Table of experts on international humanitarian law applicable of armed conflicts at sea. Buchumer Schriften zur Friedessicherung und zum Humanitarischen Volkerrecht*, 24 (1995), 1-92.

[532] In, for instance, provisions of the (albeit unratified) London Declaration of 1909, the Hague Convention (XI) relative to certain restriction with regard to the exercise of the right of capture in naval war of 1907 and the Paris Declaration of 1856, there is mentions of capture, rather than explicitly

longstanding and accepted right of States during international armed conflict. Pyke, in his treatise on the law of contraband in 1915 states that: 'The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation'…the right is equally clear in practice, for practice is uniform and universal upon the subject'.[533] Also Colombos mentions that the belligerent right of visit is uncontested.[534] The practice in the 1980-1988 Iran-Iraq war, as Gioia and Ronzitti mention; 'has clearly demonstrated that belligerents still enjoy the right to visit and search neutral merchant vessels in order to ascertain whether they are carrying contraband of war'.[535] During the Iraq War of 2003, US naval forces operated under the law of naval warfare and relied upon the belligerent right of visit and search.[536] Point 3 of *Special Warning no. 121* for the Persian Gulf promulgated by the US on 20 March 2003 also used wording that indicates such a use[537]:

> 3. Vessels operating in the Middle East, Eastern Mediterranean Sea, Red Sea, Gulf of Oman, Arabian Sea, and Arabian Gulf are subject to query, being stopped, boarded and searched by US/Coalition warships operating in support of operations against Iraq. Vessels found to be carrying contraband bound for Iraq or carrying and/or laying naval mines are subject to detention, seizure and destruction. This notice is effective immediately and will remain in effect until further notice.[538]

In short, the belligerent right of visit and search is a longstanding right and has certainly not become an obsolete means to exercise maritime interception operations. With regard to the scope and purpose of the belligerent right of visit and search, a number of remarks can be made.

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expressing that there is a belligerent right of visit and search. Article 63 of the London Declaration (resistance to search) specifically mentions search.

[533] H.R. Pyke, *The law of contraband of war* (1915), 196-197.

[534] C.J. Colombos, *The international law of the sea* (5th edition, Longmans, 1962), 712.

[535] A. Gioia, N. Ronzitti, 'The law of neutrality: Third states' commercial rights and duties', in I.F. Dekker, H.H.G. Post, *The Gulf War of 1980-1988* (1992), 221-242, at 232.

[536] It appears also that the US Coast Guard vessels during OIF have made use of the right. See B. Tripsas, P. Roth, R. Fye, *Coast Guard Operations during Operation Iraqi Freedom* (Center for Naval Analyis, 2004).

[537] Special warnings are warnings issued by the US to alert the maritime community of risks for maritime shipping in maritime zones. It can also contain information on what to expect when a merchant vessel is entering an operational area.

[538] *Special Warning no. 121 Persian Gulf* is printed in Kraska & Pedrozo, at 95.

First, the belligerent right of visit and search is a procedural right to enforce the law of contraband and un-neutral service and is primarily applicable to neutral merchant vessels.[539] Arguably, this right also exists in relation to enemy merchant vessels and against all vessels that are breaching a blockade. The position that enemy merchant vessels and blockade-runners can be captured implies inevitably that as matter of practical circumstances, they can also be visited, although they don't need to be searched.[540] The same point of view is taken in the *San Remo Manual*, that in its basic rule 118 on the right of visit and search does not distinguish between neutral and enemy merchant vessels, and adds in the commentary that its drafters did not hesitate to acknowledge the right to 'visit and search all merchant vessels, be they enemy or neutral'.[541] First, to be able to effectively enforce a blockade. As such, one could opine that two different types of belligerent rights of visit can be distinguished. The first is explicit and against neutral merchant vessels for the purpose of finding contraband or to determine whether a vessel is engaged in un-neutral services. The second is implied in the fact that enemy merchant vessels and blockade runners can be captured, which implies that a visit may be necessary to take control over the vessel.

Second, the belligerent right of visit and search is a right for belligerent warships only and is only applicable in international armed conflicts. With regard to the latter point, it is still the general consensus that the law of naval warfare is only applicable in interstate conflicts.[542] Interestingly, this legal point of departure immediately puts a stop to the application of this right in most of the contemporary conflicts, which tend to be non-international in character. Paragraph 9.4.3. will further consider the issues of a (lack of) right of visit in the context of a non-international armed conflict.

Third, the belligerent right of visit and search is not a right that can be used in general, but is a right connected to the seizure of contraband or in relation to un-neutral service. And when one agrees that in the context

[539] Colombos, para. 870.
[540] Heintschel von Heinegg states that: Enemy merchant vessels may not be attacked unless there is sufficient proof that they serve a function that renders them legitimate military objectives. They are, however, subject to visit, search and capture, unless they are in neutral waters. W. Heintschel von Heinegg, The protection of navigation in case of armed conflict', in *The international journal of marine and coastal law*, vol. 18, no. 3 (2003), 401-422, at 407.
[541] SRM, Commentary, p. 196.
[542] Heintschel von Heinegg (2010), 325-371; J. Kraska,'Rule selection in the case of Israel's naval blockade of Gaza: Law of naval warfare or law of the sea?' in, *YIHL*, vol. 13 (2010), 367-395.

of capturing blockade-runners and enemy merchant vessels such a right is implied, it is only limited to those purposes. It is, as Higgins states; 'not a substantive and independent right, it is a means justified by the end.'[543]

Fourth, and most important for the legal challenge of maritime interception, the operational advantage of this right is that the belligerent does not need prior authorization from the flag State to board the vessel. The underlying rationale of this right is based upon the consideration that States do not take responsibility over the trade in which their nationals are engaged.[544] A vessel that carries contraband, therefore, also does not, in principle, endanger the neutrality of the flag State itself.

Fifth, the threshold to use this right is that the commander of the visiting warship needs to have a *reasonable ground for suspicion* that a vessel is not neutral, either by carrying contraband or by flying the enemy's flag, or by breaching a blockade. The SRM notes in its Chapter V, rule 118, that in order to exercise the right of visit during a conflict, reasonable grounds for suspicion must exist.[545] The commentary to Rule 118 adds to this that; 'The right of visit and search may not be exercised arbitrarily. An unrestricted practice of visit and search has never been considered to be in accordance with international law.'

Sixth, the capture of goods or vessels is subject to a further judicial scrutiny by a prize court or an equivalent competent judiciary body. Many of the doctrines and military manuals still mention that the fruits of the visit and search must be put before a prize court. Whether national legislation will still have prize court regulations, however, may be less obvious today. A prize court adjudicates the lawfulness of the seizure of the confiscated vessel and goods. Only after the prize court has given its judgment, will the goods or vessels change ownership. As there is still no international prize court, all prizes are brought before a national court.[546] Although the Helsinki Principles on the law of maritime neutrality have adopted a principle which states that: confiscation without a prize court

[543] A.P. Higgins, 'Visit Search and detention', *BYBIL*, no. 43 (1926), 43-53, at 43.
[544] Colombus, para. 866
[545] Rule no. 118 SRM reads:

> In exercising their legal rights in an international armed conflict at sea, belligerent warships and military aircraft have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.

[546] Although Hague Convention no XII (1907) was supposed to establish an international prize court to adjudicate prizes in appeal, the Convention has never come into working.

decision is prohibited,[547] some States appear to deviate from this position.[548]

As a last and seventh point to note here, as has been said many times in the above paragraphs, the belligerent right of visit and search, is a *right*. This means that there is no obligation to use it. If, politically or operationally, it may be more opportune to decide otherwise and instead use the peace-time right of visit or perhaps an extant right of visit based on a UN-Security Council mandate, a State is free to do so. Examples from practice of this are mentioned in Chapter 3 in relation to the right of visit during operation *Iraqi Freedom*.[549]

In sum, although it appears that the belligerent right of visit and search may in first instance be a far reaching authority in the sense that it does not need the consent of the flag State to be applied to foreign flagged vessels, which makes it a very effective tool for warships to use, it is also restricted to a number of above mentioned limitations. When one delves deeper into the legal weeds of the law of naval warfare, even more limitations may become apparent.[550]

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[547] Para 5.2.2. Helsinki Principles.

[548] The *UK Manual on the Law of Armed Conflict* (2005) mentions that:

> The United Kingdom has not used prize courts for many years and unlikely to do so in the future. Where a vessel or aircraft is captured by United Kingdom armed forces it will normally be deemed to be the property of Her Majesty's government UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, 2005), para. 12.78.1. It is, however, remarkable that this paragraph is not repeated in the chapter on maritime operations.

The US and Israel still appear to accept the validity of having prize courts. Israel has submitted the Finnish vessel *Estelle*, captured while trying to breach the Gaza blockade in 2012, before a court (see http://opiniojuris.org/2014/01/13/lieblich-guest-post-yet-another-front-israelipalestinian-lawfare-international-prize-law/). According to Brown, during the Iraq War in 2003, the US prepared for prize taking and assigned competent court to do so. In 2002, The Netherlands has deleted from its domestic laws the competency of the *Hoge Raad (the supreme court of Netherlands)* to judge prize cases, even though the Netherlands Maritime doctrine of the Netherlands Navy still recognizes the need for prize courts. See more elaborately on the current state of Dutch prize law, M.D. Fink, 'Toute prise doit être jugée. Opmerkingen over het Nederlandse prijs(proces)recht', in *MRT*, vol 106. no. 6 (2013), 211-219. The Hoge Raad (The Supreme Court of the Netherlands) has only once made use of its prize law competency. This took place in the *Nyugat*-case (1956) which concerned the capture made by the Netherlands Navy during the beginning of the Second World in the Far East.

[549] See Chapter 3, paragraph 3.1.2.4.

[550] For instance with regard to convoying neutral merchant vessels by neutral warships and the position that reasonable suspicion must exist that a vessel is carrying contraband at that very moment, not a reasonable suspicion that the vessel *has* carried contraband but is now empty and is already on its way back to a neutral port. Additionally, the right can only be used in seas where military operations are allowed. The *ius ad bellum* may also have an effect on the use of ius in bello authorities in the context of maritime interception operations. During the Iran-Iraq War (1980-1988) this 'blurring' between legal basis and legal regime in self-defence operations at sea emerged in the context of the authority for a right of visit. Back then, Ronzitti argued that the belligerent right of visit and search itself is also governed by the conditions of self-defence as extra condition to be taken into account.

9.4.2. The subregimes of the law of naval warfare

As mentioned, the belligerent right of visit and search is a means to ascertain other rights of the law of naval warfare. As such, the right of visit is connected to a number of subsets of the law of naval warfare: the law of contraband, the law of un-neutral service, the law of blockade and the law that regulates the capture of enemy merchant vessels. What these subsets have in common is that they primarily aim to limit the opponents economic manoeuvre space during international armed conflict, and are therefore also known as the legal regime that supports economic warfare at sea. In a simplified manner, which however captures the essence of the differences between these three subsets, would be to say that blockade and the capture of enemy merchant vessels aims to stop vessels, the law of contraband aims to stop goods and un-neutral service focuses on stopping persons and communication. The following paragraphs very briefly touch upon the essence of these different subsets.

Ronzitti suggested this view in 1988, questioning how the law of naval warfare was influenced by the law of self-defence. He stated that:

> 'one can say that the measures of economic warfare are not in themselves inconsistent with the right of self-defense, but they are lawfully exerted in so far as they meet the test of necessity and proportionality….It is reasonable to state that in a larger scale conflict, measures of economic warfare are justified, while in a small conflict they are less justified or not justified at all".

His line of thought may have been influenced by the Iran-Iraq War and the question how neutral shipping could best be protected, and by the UK's view after the Barber Perseus was boarded in January 1986 by Iranian warships some miles outside the Iranian territorial waters The UK Minister of Foreign Affairs stated this much quoted answer to a parliamentary question on the incident:

> The UK upholds the principle of freedom of navigation on the high seas and condemns all violations of the law of armed conflicts including attacks on merchant shipping. Under Article 51 of the UN Charter, a state actively engaged in armed conflict (as in the case of Iran and Iraq) is entitled in exercise of its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there is reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicion proves to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay. (Quoted from, C. Gray, 'The British position in regard to the Gulf Conflict', in *International Law and Comparative Law Quarterly*, vol. 37 (1988), 420-428, at 423.)

Heintschel von Heinegg, in 2007, stated that this British position should not be regarded as to reflect customary law for the reason that the ius ad bellum and ius in bello must be regarded as separate areas of law. W. Heintschel von Heinegg, '"Benevolent" third states in international armed conflicts: The myth of the irrelevance of the law of neutrality', in M.N. Schmitt and J. Pejic (eds), *International law and armed conflict: Exploring the faultlines* (2007), 543-568, at 262-265.

9.4.2.1. The law of contraband

Neutrality is breached when a neutral vessel carries goods that are considered to be contraband by one of the belligerent parties *and* is bound for the enemy.[551] To capture a neutral ship or goods, these two conditions need to be considered. The latter condition of destination has been developed into the notion of continuous voyage, which accepts that goods that *ultimately* end up in enemy hands can be captured. Interestingly, the condition of destination excludes capturing vessel that sail *from* enemy territory. With regard to the first condition relating to contraband, belligerent parties should make public which goods they view to be contraband, although the practice of publishing contraband-lists and the distinction between different types of contraband seems to be under debate.[552] The law of contraband does not focus on persons. When during the inspection the vessel's cargo appears to be contraband, the belligerent warship can capture the goods and vessel and bring them before a prize court that adjudicates the status of captured goods and vessel. The consequence of carrying contraband, therefore, is the loss of goods and possibly vessel.[553]

Inspecting neutral vessels for contraband is, in principle, not geographically limited under the law of naval warfare, other than that it is only allowed in the maritime areas where military operations can take place, which are the maritime areas outside the territorial waters of a neutral State. Visit and search by belligerent is not allowed in neutral waters. In practice, the belligerent right of visit and search could for operational and political reasons be limited to the proximity of the theater of operations. Furthermore, the *ius ad bellum* may have a limiting impact in the sense that the proportionality principle could limit, for instance, the extent as to which visit and search could be conducted in waters far removed from the actual theatre of operations.[554] Lastly, a number of exceptions to the belligerent right of visit and search against certain particular vessels

[551] The conditions of contraband and destination is also underlined in paragraph 5.2.1. and 5.2.3. of the Helsinki Principles on the law of maritime neutrality (1997).

[552] Gioia & Ronzitti (1992), 232. They mention that legal writers opine that the belligerent practice of enlarging contraband lists to comprise all goods considered to be useful for the enemy makes the difference between absolute and conditional obsolete.

[553] 'The Persian/Arabian Gulf Tanker War: International Law and international chaos', in *ODIL*, vol. 19 (1988), 299-321, at 306.

[554] See on the effect of *ius ad bellum* on *ius in bello*, T.D. Gill, 'Some consideration concerning the role of ius ad bellum to targeting', in P.A.L. Ducheine, M. N. Schmnitt, F.P.B. Osinga (eds.), *Targeting. The challenges of modern warfare* (2015), 101-120.

exist. One such rule is when neutral vessels are sailing under convoy of a neutral warship.[555]

9.4.2.2. The law of un-neutral service

Whereas the law of contraband focuses on goods, the law of un-neutral service focuses on persons and dispatches carried for one of the belligerents.[556] An example is the carrying of persons or troops by a neutral merchant vessel who belong to the armed forces of the enemy State.[557] The scope of activities, and there with the whole concept, by a vessel that is considered un-neutral aimed to aid a belligerent party is however unclear. The line between un-neutral service and taking part in hostilities may, therefore, also be hard to draw.[558] The difference is significant because in the first situation a vessel may not subject to direct attack, where in the latter this may be possible. It thus depends on the nature of the service that is rendered by the neutral vessel. Articles 45 to 47 of the (unratified) London Declaration give examples of what can be viewed as un-neutral service by a neutral vessel. These articles do not resolve the former question, but at least underline that as a minimum belligerents can take action (including boarding and seizure of the vessel) against neutral vessels that display assistance to the enemy.

9.4.2.3. The law of blockade

A right of visit is also implied in the law of blockade. A blockading belligerent force can stop and capture vessels that breach or attempt to breach a belligerent blockade, under the conditions that the blockade is lawfully established. To lawfully establish a blockade, it must be notified, conducted impartially and be effective.[559] Apart from the one rule in the Declara-

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[555] Rule 120 SRM, Art. 61 LD; W. Heintschel von Heinegg, 'The current of international prize law', in H.H.G. Post (ed.), *International Economic Law and Armed conflict* (1994), 5-34.
[556] R.W. Tucker, *The law of war and neutrality at sea* (1955), 318.
[557] In the *Asama Maru* incident (1940) the UK took the position that even persons that were not yet military, but were returning to their homeland and could possible take up military service could also be taken prisoner. The Japanese Government protested against this view. C.G. Dunham, *The Asama Maru incident of January 21, 1940,* paper prepared for the thirteenth annual Ohio valley history conference (October 1997).
[558] Tucker mentions that the use neutral merchant vessels for troopships or mine laying would be taking part in hostilities.
[559] See generally on the conditions of establishing belligerent blockades, M.D. Fink, 'Contemporary views on the lawfulness of naval blockades', in *Aegean Review of the Law of the Sea and Maritime*

tion of Paris (1856) on effectiveness,[560] the law of blockade is not codified, but rather based on customary law. The *London Declaration* (1909) attempted to codify the rules on blockade,[561] but the Declaration remains unratified. Although no codified and specific rule exists that expresses the belligerent right of visit within the context of blockade, because vessels that breach or attempt to breach a blockade are liable to capture,[562] the right of visit must be implied in order to stop a vessel from breaching the blockade. Captured vessels are brought before a competent court that can deal with prize-cases. During the legal aftermath of the Gaza blockade that produced several reports and many scholarly articles, although the application of the law of blockade in the Gaza situation was widely contested, the right to visit a foreign flagged vessel within the context of blockade law was not.[563]

9.4.2.4. Enemy merchant vessels

The law of naval warfare still accepts enemy merchant vessels as subject to capture.[564] Once a vessel can be characterized as an enemy vessel, it can be captured. This, again, implies the authority to board the vessel to enable the capture of the vessel. A number of exemptions relative to capture exist, such as, hospital ships, vessels (under conditions agreed to by the belligerent parties) that carry relief goods for the civilian population or carry cultural property, cartel ships, vessels charged with a religious or non-military scientific activities, and small coastal fishing vessels employed in local trade, all under the condition that they do not misuse their exempted status to support military operations.[565] Even though an enemy merchant vessel may be exempt from capture, the vessel can still be visit-

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Law; vol. 1, no. 2 (2011), 191-215; W. Heintschel von Heinegg, 'Naval blockade', in M.N. Schmitt, W. Heintschel von Heinegg (eds.), *The conduct of hostilities in International Humanitarian Law, vol. 1* (2012), 203-228.

[560] Which, in rule number 4, states that a blockade must be effective for it to be establishes lawfully.

[561] One attempt of codifying the law of blockade can be found in the first 21 articles of the London Declaration (1909).

[562] SRM, rule 126 (f), art. 14, 17, 20 LD.

[563] A/HRC/15/21, for instance in paragraph 56, by stating that "Thus, if there is no blockade, the only lawful basis for intercepting the vessel would be …" implies that a right of visit is accepted within the context of blockade.

[564] See W. Heintschel von Heinegg, 'The law of armed conflict at sea', in D. Fleck (ed.), *The handbook of international humanitarian law* (3r ed. Oxford University Press, 2013), 486-498; SRM, section IV.

[565] See Article 4 Hague Convention no. XI (1907), Article 25 GCII, and section 136 SRM.

ed and searched.[566] In the event that there is no certainty as to the character of the vessel, the right of belligerent visit and search allows for inspection of the vessel to ascertain its neutral character or its exempted status from capture.

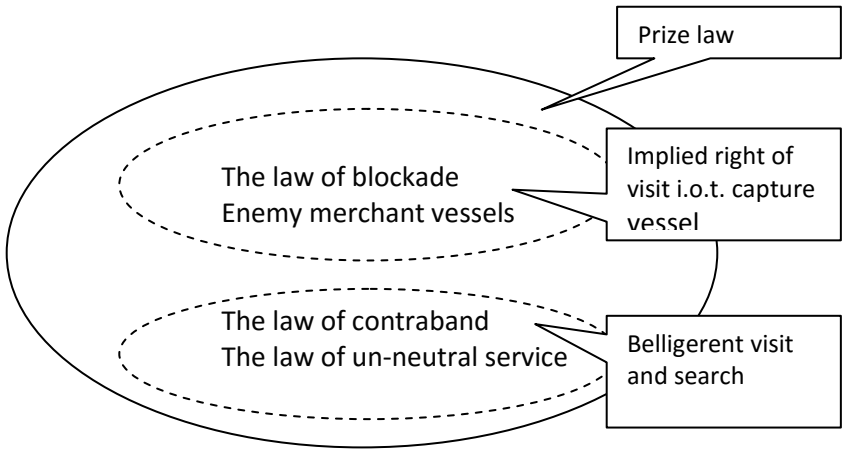

Figure 9.3. Relationship between prize law, belligerent visit and search and implied belligerent right of visit and search

9.4.3. Non-international armed conflicts

As mentioned above, the general point of view is that the law of naval warfare does not apply to non-international armed conflicts. Against the background of adapting maritime operations to counter contemporary threats, however, we see that some authorities are beginning to propose its applicability to non-international armed conflicts, albeit with certain modifications. McLaughlin for instance already noted that: "I think it uncontentious, for example, that a State may impose a blockade…against territory substantially controlled by a terrorist group which is also an OAG [organized armed group, MDF] engaged in an armed conflict with that State…'.[567] Even Heintschel von Heinegg, who usually appears to be

[566] SRM, section 135. Based on certain enemy merchant vessels are exempted from capture, such as hospital ships and small coastal fishing vessels. They are, however, not exempt from the belligerent right of visit. Von Heinegg (2013), 495.

[567] R. McLaughlin, 'Terrorism' as a Central Theme in the Evolution of Maritime Operations Law Since 11 September 2001.', in *YIHL*, vol. 14, (2011), 391-409, at 403.

straightforward in his non-applicability of the law of naval warfare to NIAC, has stated that the law of naval warfare can be applied in a NIAC; 'albeit modified, between parties to the conflict'.[568] As such, one can maybe find a trend towards applying the law of naval warfare in situations other than international armed conflicts. The *San Remo Manual* noted the possible application of the law of naval warfare in NIAC as follows:

> 'Although the provisions of this Manual are primarily meant to apply to international armed conflicts at sea, this has intentionally not been expressly indicated…in order not to dissuade the implementation of these rules in non-international armed conflicts involving naval operations'.[569]

Apart from academic opinions spurred by the evolving nature of conflict and discussion of practice derived from the Gaza blockade and more historical cases[570], the view of non-application in NIAC's remains the starting point in recent debates on application of the law of naval warfare.[571] The Israeli blockades against Hezbollah in the Summer War of 2006 and against Hamas since 2009 did trigger some debate on the applicability of the law of naval warfare, in particular the law of blockade to be more precise, to NIAC's[572], but it has not yet matured in any way that we can solidly conclude that the traditional standpoint has actually changed. The most

[568] Heintschel von Heinegg (2011), 213.
[569] SRM, p. 73.
[570] During the Algerian Crisis of 1955-1962 in which France, based on self-defence, controversially used the belligerent visit and search during a NIAC. See Papastavridis (2013), 95-97.
[571] The non-applicability of the law of naval warfare *in toto* in NIAC's also depends on the question of the scope of what belongs to the body of "the law of naval warfare". There is a specific set of subjects that form the core of the law of naval warfare, such as prize law and maritime neutrality. But if these maritime warfare rules are complemented by the more protective Geneva rules, such as the law regarding hospital ships or the protection of shipwrecked, which are also standard topics within the law of naval warfare, it starts getting more difficult to deny that certain parts of the law of naval warfare do not apply in a NIAC. Although the ICRC study on customary international customary law did not look at the law applicable to naval warfare, it has included a number of rules on the protection of medical transports and of protection of shipwrecked that apply (also) to the maritime dimension and that may overlap the law of naval warfare. See H.M. Henckaerts, L. Doswald-Beck (eds), *Customary international humanitarian law* (2005), e.g. rule 29 on the protection of medical transports. Hospital ships are specifically mentioned. Rule 109-111 deal with the protection of shipwrecked. On other words, the broader the scope of subjects that are considered to be the law of naval warfare, the less ground the traditional view has to remain intact as a whole.
[572] Obviously, questions as to whether Israel invoked the right of self-defence against the Hezbollah or Lebanon, or how symbiotic Al-Qaida and the Taliban were considered all play a role. See on these issues; Ruys (2010), 450-457; Ducheine and Pouw,'Operation Change of Direction: A short survey on the legal basis and applicable legal regimes', in *NL ARMS* (2009), 51-96; T.D. Gill,'The Eleventh of September and the Right of Self-Defense',
in: W.P. Heere, N.N.G. International Society for Military Law and the Law of War (eds.), *Terrorism and the military: international legal implications*, (The Hague: T.M.C. Asser Press, 2003), 23-37, 26.

important conclusion that follows for the issue of maritime interception, is that the belligerent right of visit and search does not apply in this type of conflict. This obviously poses challenges in modern conflict that is often characterized by a NIAC-nature and which is not restricted to the land territory only, but extends also out to sea. As such, naval forces can be confronted with a situation that is characterized as a NIAC and a non-state opponent, in which there is no generally accepted right to visit a foreign flagged vessels in order to take action against these non-state actors at sea. Two examples from practice are the naval dimension of Operation *Enduring Freedom*, operating in the Indian Ocean to find and deter Al Qaida and Taliban members, and Operation *Active Endeavour*, the NATO anti-terrorist operation in the Mediterranean Sea.

9.4.3.1. Operation Enduring Freedom

The situation at sea with regard to operation *Enduring Freedom* is interesting because States have reacted differently on both the issue of the legal characterization of the conflict at sea and its consequences for the right of visit. It is widely viewed that the legal character of the conflict in Afghanistan changed after the Taliban had been brought to a fall and the *Loya Jirga* was convened in June 2002. The military operations were then in support of a newly chosen Afghan Government. From that point onwards, the status of the armed conflict changed from an international to a non-international armed conflict.[573] If indeed an international armed conflict existed before June 2002, it was during a period of only about 7 months.[574] From the point of view of the limited application of the law of naval warfare only in international armed conflict, the naval dimension would lose a valuable tactical tool for deterring terrorists at sea if the conflict were to be considered a non-international armed conflict.

Participating warships in the OEF-coalition boarded and searched merchant vessels for possible terrorists. States, however, had different views on which right of visit applied, which is connected to the question of applicable legal regime. The UK viewed that the legal basis for military force as a reaction to 9/11 was based on Article 51 of the UN-Charter, but considered only the land operations in Afghanistan to be conducted under

[573] See e.g. Pejic (2007), 345.
[574] From October 2001 to June 2002.

the law of armed conflict. The approach was taken that the factual situation at sea was not considered an armed conflict situation. Because the UK chose this position, it meant that the belligerent right of visit could not be applied by British warships and that any persons captured would not be prisoners of war. The UK thus considered that parts of the same military campaign that operated in a completely different geographical area and contextual situation can be governed by a different legal regime. Brown indicates that the authorities for British warships were (therefore) not beyond what was authorized under peacetime visit and search.[575] By reliance upon peacetime right of visit, the change of conflict status did not have any effect on the right used.

The Netherlands considered itself to be in an armed conflict with Al Qaida and the Taliban.[576] In contrast to the UK, the Netherlands did not distinguish between land and sea operations and viewed the conflict *as a whole* as an armed conflict. As such, it also considered the law of naval warfare applicable, which opened the door to the belligerent right of visit and search.[577] The Netherlands government in its documents did not explicitly distinguish between an international and a non-international armed conflict. It also did not change the boarding authority after June 2002.[578] The belligerent authority was, however, watered down in the sense that - as a matter of policy rather than law- master's consent was asked before a vessel was boarded. In practice, therefore, a certain watering down of the authorities was made to avoid possible unnecessary controversy.[579] The

[575] Brown, Panel III, Commentary – maritime and coalition operation', in *ILS*, vol. 79 (2003), 303-307.
[576] Letters to parliament, 27 September 2004, Inzet Nederlands fregat in operatie Enduring Freedom.
[577] Eindevaluatie CTF 150, *Ministerie van Defensie*, 18 September 2006, p. 4.
[578] The *Eindevaluatie CTF 150* (18 September 2006) mentions:

> *'De status van gewapend conflict heeft tot gevolg dat op het maritieme deel van OEF het zeeoorlogsrecht van toepassing is. Dit vormt dan ook de juridische grondslag voor het kunnen uitvoeren van boarding operaties, dat een wezenlijk onderdeel is van het maritieme optreden. Onder het zeeoorlogsrecht zijn combattanten bevoegd om neutrale scheepvaart te controleren, om vast te stellen of zij ook daadwerkelijk neutraal zijn. Daarbij wordt onder andere gekeken naar de scheepspapieren en de lading, zodat kan worden bezien of er geen mensen of goederen worden vervoerd ter ondersteuning van de tegenpartij. …[…]…Zoals gebruikelijk bij deelname aan OEF heeft Nederland de ROE voor de Nederlandse militairen zelf geschreven en ter beschikking gesteld aan de andere coalitiepartners. Hoewel CTF 150 deel uitmaakt van OEF en derhalve, zoals gesteld, deelneemt aan een gewapend conflict is alleen het mogen boarden van scheepvaart daarvan een weerslag in de ROE.*

[579] During the beginning of the operation The Netherlands first did not authorize participating warships to board other vessels, but this changed during the course of the operation. See M. Leijnse, J.E.

Netherlands appears not to be the only State who thought it could use the belligerent right of visit. According to the Canadian Rear-Admiral Bob Davidson the Canadian naval contribution to OEF was also able to board vessels based on the law of naval warfare.[580]

With no sufficiently official public source available, it is hard to determine which right of visit the US used for its boardings in OEF. Although the general guidance for the US in OEF was that hostilities in Afghanistan were to be in accordance with the law of war, the US did not – systematically, it appears[581]- articulate the legal regime under which the boardings conducted under OEF took place. It kept underlining that its operations were based on the right of self-defence.[582] Also the *Special Warning no. 120*, published shortly after the 11 September attacks, underlined that US forces were to exercise appropriate measures of self-defence if warranted by the circumstances. It did not use any law of naval warfare terminology.[583] Views on the legal regime applied by the US range from a right of visit directly based on self-defence,[584] to assumptions that the belligerent visit and search was used, primarily because the US considered itself in a state of armed conflict.[585] One reference to the actual authorities for US warship on visits is found with Van Dyke, who states: "Attempts have been made to undertake these boarding operations with the consent of the masters of the vessels, but "the US notification made to the mari-

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Weijne, 'De bijdrage van de Koninklijke Marine aan de strijd tegen het terrorisme', in *Marineblad* (May 2002), 149-154. Also, in the *Letters to Parliament* of 27 September 2004 it is stated that:

> *Bij inspecties treden overigens alle maritieme eenheden van de operatie Enduring Freedom zoveel mogelijk op met instemming van de vlaggenstaat van het te onderzoeken schip.* [Inspections will be conducted as far as possible with the consent of the flag State, MDF]

[580] B. Davidson,' Modern naval diplomacy - a practitioner's view', in *Journal of Military and Strategic Studies,* vol. 11, issues 1 and 2 (Fall and Winter 2008/9), 1-47, at 18. But see also Papastravidis (2012, at 92) who appears to opine the belligerent right of visits continues to apply in a NIAC.

[581] See also K. Tabori-Szabo, 'Self-defence and the policy of drone strikes', in *JCSL*, vol. 3 (winter, 2015), 381-413.

[582] Klein, 274. Interestingly, with regard to this operation Klein refers to the specific legal basis for action, whereas in fact the specific legal regime may be meant, as the legal basis for the military operation has been clear from the outset.

[583] *Special Warning no. 120* is printed in Kraska & Pedrozo, at 95. They also explain that *Special Warnings* are used by the US to publish information about potential hazards that are caused by the political climate (at p. 88).

[584] K. O'Rourke, 'Commentary – Maritime & Coalition operations', *ILS* no. 79.

[585] Hodgkinson (2007) mentions that LIO's are legitimate as an exercise of self-defence as part of armed conflict. My assumption is that the latter part of the phrase implies the use of the law of naval warfare. Also in discussing the issue with several US Navy JAG's this point hasn't become any clearer.

time industry made it clear that vessels suspected of transporting or assisting bin Laden and senior al Qaeda leadership would be subject to the use of force to compel a boarding."[586] If this is an accurate statement, one interpretation could be that (and leaving aside for the moment debate on master's or flag state consent) the US interception operations in OEF appear firstly not to overstep the peace-time right of visit, but in situations where Al Qaida is actually spotted, the fact that the person is on board foreign vessel does not stop US military in what is viewed as a necessary and proportional action of self-defence.[587] Here, it seems that the right to visit is, interestingly enough, derived from the *ius ad bellum* itself.

9.4.3.2. Operation Active Endeavour

The 9/11 attacks induced NATO to take naval action. In the early stages of OAE, the NATO's naval forces were not authorized to board vessels. This authorization was, however, acquired at a later stage of the operation, in 2004.[588] Interestingly, NATO's anti-terrorist operation OAE, although based on the collective self-defence provisions of Article 5 of the NATO-Treaty, authorized participating warships only to board when both flag State and master consent existed. The following text is found in a NATO-report on the visits-regime of OAE:

> 105. Once a suspicious ship is identified, OAE assets could hail the ship, request to board, and eventually track the ship into territorial waters where a properly alerted national maritime authority would take appropriate action. Boarding takes place only with the compliance of the captain of the ship and the flag State, in accordance with international law. If the captain of the suspicious ship does not wish to be boarded, NATO forces will follow the vessel and alert the port in which it is coming to rest, whose authorities will have the legal right to examine it.[589]

[586] J.M. von Dyke, 'Balancing Navigational Freedom with Environmental and Security Concerns', *in Colorado Journal of international environmental law and policy* vol. 19 (2004), 19-28, at 25.
[587] This view is also coined by Wendel. Wendel (2007), 32.
[588] NATO parliamentary Assembly, Committee Reports 2008 Annual Session (158 DSC 08 E bis) - NATO Operations: Current Priorities and Lessons Learned. (At: www.nato-pa.int/default.asp?SHORTCUT=1476). Para. 105.
[589] 158 DSC 08 E BIS - NATO operations: current priorities and lessons learned, at paragraph 105. Available at: http://www.nato-pa.int/default.asp?SHORTCUT=1476.

Lieutenant Ioannis Kizanis (Hellenic Navy) mentions the visits regime in OAE:

> Initially the main task of NATO's naval units was to "hail" merchant vessels transiting their patrolling areas (i.e., to call them on a VHF channel, ask questions about the ships' identity, cargo, and activity, visually identify them, and monitor their movement for as long they were in sensor range). In other words, NATO's activities were limited to the right of approach. This information was then related to CCMAR Naples, Italy and NATO's shipping center in Northwood, UK. In April 2003 the mission was modified to include compliant boarding operations on suspect vessels, "compliant" in this case meaning with the prior consent of the ships' masters and flag States, which gives the boarding full legitimacy under international law.[590]

Vice-Admiral Cesaretti, commander of OAE in 2005, in his article in the *NATO Review* underlined also that inspection of foreign flagged vessels were conducted with the consent of both flag and master.[591] There is, however, no official public record available regarding the legal framework on the legal regime used in OAE. The relevant question would be whether NATO considered itself to be in an armed conflict. Possibly, NATO considered that the visits were based on the law of naval warfare, but for various political reasons opted for a very restrictive use of the belligerent right of visit and search. Another reason can be that, despite the fact that Article 5 was invoked, against the background of the actual situation at sea and that NATO actions were an act of solidarity rather than acts of war or the start of actual hostilities against terrorists, it would be problematic to consider that participating States in this NATO-operation were engaged in an armed conflict. Furthermore, even if this would have been the case that NATO-states considered themselves to be in an armed conflict, the status of the conflict would have been non-international after June 2002. This bars the possibility of making use of the belligerent right of visit and search.

Whatever decision NATO made in the past to decide not to use the belligerent right of visit and search during OAE, it subsequently fell back

[590] I. Kizanis, 'Probable cause" for maritime interdictions involving illicit radioactive materials', Thesis for the Naval Postgraduate School, California (2008).
[591] R. Cesaretti, 'Combating terrorism in the Mediterranean', *NATO Review* (Autumn 2005).

upon the peacetime visit and search framework. One legal possibility of boarding of foreign flagged can be to get consent of the flag State. The multitude of participating States within NATO, however, has generated another discussion which is focused on the master/flag state consent issue. Because individual States within NATO have different opinions on this issue, it may be that the only politically acceptable way within NATO was to authorize visits through consensual boarding with both flag State and master consent. Be that as it may, the approach taken by NATO meant that they did not have to change their ROE because of the changing character of the conflict in 2002.[592]

9.4.5. A NIAC-right of visit?

The preceding paragraphs on non-international armed conflict and the challenge of the non-existence of a right of visit in NIAC's may have given rise to a phenomenon that could be called a 'self-defence, or NIAC right of visit'. Chapter 6 has noted that self-defence is also argued as a direct legal basis to board a foreign flagged vessel, in which the conditions and characteristics of self-defence serve as the legal basis to board the vessel. Chapter 6 notes that either the characteristics of self-defence (not dependent of the will of another State and the emerged view that acting against non-state actors is, under conditions, is not limited to one's own territory or territory that support those non-state actors) is balanced against the sovereignty of a State to allow for crossborder operations in situations where a NIAC exists. The consequence of an evolving right of self-defence for maritime interception could be that when the right of self-defence applies to armed attacks conducted by non-state actors and potentially opens the door to take action on the territory of a State where the non-state actor is located and operating from, it seems counter-intuitive to say that no right of visit would be available to counter seaborne (threats) of attack. This would, arguably, be both necessary and proportionate if there were clear indications that the vessel was transporting members of the opponent armed group under the flag of a vessel where the group has a

[592] Different than OEF, OAE is a NATO operation with a set of rules of engagement (ROE) that has been drafted according to the usual NATO process of ROE-drafting. Instead of coalition ROE, such as in OEF where in principle all states bring their national ROE, NATO ROE are usually one set that applies to all participating states, but with possible caveats attached if states for political, legal or operational reasons cannot concur with the ROE.

substantial presence, or where the vessel itself had come under the control of the armed group or otherwise posed a threat of attack. It would, however, not in principle apply to the vessels of third States, since the right of self-defence does not apply to the territory of third States. If one would take yet one step further in this line of reasoning, to accept that there are, in principle, no geographical boundaries when combating non-state actors, this step would be that if the flag State is unwilling and/or unable to take action against a situation where its vessel was used for or by a non-state actor. Another possible argument to circumvent flag State jurisdiction is that, rather than considering the non-state actor as passenger on board the vessel, the use of the vessel by the non-state actor could be such that the non-state actor has complete and factual control over the vessel and uses it solely for the purpose of its military operations. In this scenario it might be argued that the vessel has lost its link with the flag State, which has *de iure* jurisdiction, but is *de facto* completely under the control of the non-state actor. If the vessel is under the factual control of members of an organized armed group, it becomes a military objective. When self-defence is the legal basis, the character of the conflict amounts to a non-international armed conflict and the vessel can lawfully be considered a military objective, attacking is would arguably not be a wrongful act against the flag State.

Different than consent, in which the State waives its exclusive jurisdiction over a vessel and also sets the scope of authority for the boarding State, this is not needed in the case in a self-defence visit. Authorities and limitations are mainly regulated by LOAC applicable to non-international armed conflict. Therefore, although such a boarding cannot make use of the more elaborate law of naval warfare, which allows the boarding State to seize goods or vessels, it does require the State to act in accordance with NIAC-regulations when on board the vessel. Although the US asserted that in the war between the US and Al Qaida and its affiliates the Geneva Conventions would not apply because it fitted neither the regime applicable to international armed conflicts nor that of a non-international armed conflict, it is well known that this approach was later overturned by the US Supreme Court in the *Hamdan v. Rumsfeld* case (2006) to at least apply the mini-convention of Common Article 3 GCI-IV. Accordingly, Common Article 3 would also apply during a 'NIAC-rights of visit'.

Important to note is that the purpose for boarding a foreign flagged vessel is different than the primary purpose of why the right of visit and search exists in an international armed conflict. In that perspective the legal means exists, simply said, to pursue economic warfare against an opponent. In the traditional sense, the belligerent right of visit and search is meant to be a means for the purpose of enforcing the rules on prize, such as the capture of contraband that is destined for the enemy. Quite differently the above mentioned right of visit applies the means of a right of visit to be able to act against the non-state actor itself or it instruments, such as WMD or the vessel as a military objective. In other words, the right is used directly to be able to act against the opponent. Remotely, it may possibly resemble an implied right of the belligerent in an international armed conflict to board an enemy merchant vessel in order to capture it. Taken this different purpose of the right of visit in non-international armed conflict it might not be wholly appropriate to start from the point of view to question whether the existing belligerent right of visit and search in an international armed conflict should apply to a non-international armed conflict, as they are incomparable in purpose.

9.5. The right of visit conferred through the UN-collective security system

The collective security system can be a legal basis to authorize maritime interception operations. Interestingly, the resolutions have never *explicitly* mentioned that vessels can be boarded and searched to enforce sanctions. This must be read from the word "inspect" that will in a practical sense include the boarding of the vessel for physical inspection of papers, vessel and cargo. In order to be effective in enforcing sanctions, ultimately, it also means that any illicit goods may be seized. What the exact authority is during a MIO that is conferred through the UN-collective security system will depend on the applicable resolutions in the specific conflict. Additionally, where such measures involve persons, human rights law will also be applicable. And where the factual situation of an international armed conflict may arise, the law of naval warfare would start to play a part. As the scope, purpose and content depend on the extant UN-resolution, measures may vary per operation. In the early maritime embargo operations since the MIF, a standard phrase was introduced in the

resolutions that mandate the scope of the authorities. The resolutions relating to the embargoes of Iraq, Former Yugoslavia, Haiti and Sierra Leone all authorized measures "*to halt all inward and outward*[593] *maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation*" of applicable resolutions. The embargo with regard to Lebanon and Libya used other language, which related more specifically to the respective situation in those conflicts.

The above mentioned phrase in the early resolutions did not contain any threshold of suspicion. This would seem logical, because naval commanders were to halt *all* inward and outward bound shipping in the operational area. The phrase "all inward and outward shipping" implied that every vessel in the given area could be stopped, even if there was no suspicion. Interestingly, the Libya resolution 1973 (2011), did adopt through the use of different wording, a reasonable suspicion standard.[594] In the case of the Libyan embargo, the enforcement power conferred by the Council was therefore different than the 'blanket authority' to halt every vessel, as provided in earlier resolutions. Vessels were not totally denied from entering or leaving Libyan ports. In practice, the reasonable suspicion standard is derived from different factors and may even be satisfied by the fact that vessels were sailing into the direction of one of the Libyan ports.[595] Additionally, the purpose of the visit depends entirely on the text of the resolution. The UNSC can choose from a wide range of sanctions, from sanctioning the influx of arms[596] or oil,[597] to a comprehensive trade embargo,[598] to all types of commodities. In the case of Former-Yugoslavia the embargo started as an arms embargo[599] and then expanded to an export embargo of the import of all commodities and products originating from Serbia and Montenegro.[600] SC-Res. 2146 (Libya), on the other hand, was

[593] In the case of Sierra Leone the resolution only authorized inward, not outward bound traffic. See SC-Res. 1132 (1997).
[594] See paragraph 13 of SC-Res. 1973.
[595] In general vessels will be hailed for inspection and directed to a waiting area to await inspection at sea. For different reasons such as that inspection at sea is not opportune due to weather circumstances, because the suspicion endures but needs more thorough inspection, or that prohibited items are found that need to be of leaded, vessels can be diverted to a port.
[596] E.g. MTF UNIFIL, Libya, Former-Yugoslavia and Haiti.
[597] E.g. Libya, after the 2011 conflict, with SC-Res 2146 (2014).
[598] E.g. Iraq. The UNSC established a trade embargo of all products exported from Iraq and Kuwait and sale and supply to Iraq and Kuwait. SC-Res. 678 relaxed embargo to allow humanitarian supplies. SC-Res. 688 ended embargo against Kuwait.
[599] SC-Res. 713 (1991).
[600] SC-Res. 757 (1992).

very limited in its purpose. It only allowed the boarding of vessels that illicitly exported crude oil from Libya and only consisted of vessels that had been designated by the UN-Libya Sanctions Committee.

The operational level challenge is that there is often a level of uncertainty relating to the goods that can be stopped and taken, which is derived from the text of the resolutions. Resolutions that allow stopping for instance "arms related material" leave a margin to commanders to decide within the context of the conflict what can be considered as arms related material. To illustrate, if the State under sanctions uses a specific type of civilian vehicle to support its military operations, then arguably these are arms related material. But it leads to complex questions. If fuel is not sanctioned, can fuel than still be stopped if there a reasonable certainty that the fuel is used for military vehicles or aircraft? This obviously leads to a need for more detailed understanding of the situation in order to make these decisions. Interestingly also is that, whereas maritime embargo operations have always focused on goods, SC-Res. 1973 also expanded this to include stopping mercenaries at sea that were bound for the conflict.[601] As such, persons have come into the maritime embargo operations arena.

As mentioned, effective enforcement of such resolutions implies that items can also be confiscated. However, notwithstanding this authority, this is a challenge from an operational perspective, because usually the ultimate mission aim is to stop the traffic of sanctioned items, and confiscation at sea poses many logistical challenges, confiscation of goods is not automatically the *modus operandi*. Vessels can instead also be diverted to a port for inspection of simply turned back so that sanctioned goods will not arrive at the State under sanctions. In the case of MTF UNIFIL, UNIFIL's website mentions that since the operation has started, it hailed 42.500 vessels and referred 1.670 to the Lebanese authorities for further inspection; no mention is made of any boardings that have taken place. Instead: 'All merchant vessels classified "suspect" are monitored and, if inbound to a Lebanese harbor, are referred for inspection to LAF authorities.'[602] Apart from the discussion on the legal basis for the MIO in UNIFIL, a practical reason for this is that it may be easier to let the suspected vessel come into port where it can to be fully inspected in port and where

[601] SC-Res. 1973 (2011), paragraph 13.
[602] http://unifil.unmissions.org/Default.aspx?tabid=1523.

all the technical and legal facilities are present, rather than a potentially high risk visit and search at sea.

Unlike the belligerent or peacetime manifestations of the right of visit, there is no procedure that regulates the confiscation of the goods at sea in these types of operations. Under the law of naval warfare a prize court will judge whether the prize was lawfully taken. In peacetime circumstances a criminal court may judge whether a suspected individual is criminally punishable and the person itself can instigate civil actions against the State. On land, States will have adopted national laws to enforce the UN-sanctions. Such laws may apply at sea, but often will not have specific language to that effect making it essentially a discretionary matter for the operational commander as to how sanctions can be enforced. Article 110 UNCLOS includes a compensational clause for losses and damages if suspicion is determined to be unfounded. Such procedures are not automatically existent in relating to maritime embargo operations when goods are confiscated at sea. If legal proceedings with regard to the confiscation are instigated, one legal avenue to take would be against the State of the intercepting warship. The only known legal case to this author is the *Lido II*-incident, which occurred during the Former-Yugoslavia embargo and came before an Italian court, as the vessel was brought within the geographical jurisdiction of Italy.[603] During that court case, the European Court of Justice (ECJ) was asked to advise on the incident, in particular whether a breach of the embargo had actually taken place now that the vessel had not enter the territorial sea of Montenegro but was stopped just before.[604]

The resolutions usually do give some guidelines as the geographical limitations of the embargo authorities. When it mentions that it allows the inspection of inward and outward bound shipping, it implies a certain proximity to the target State is the operational area in order to be able to separate the inward and outward shipping from the rest of the maritime traffic. The geographical and operational circumstances obviously will have an impact on the naval operational areas in which the embargo will take place. In the MIF-operation, for example, maritime interception opera-

[603] See Chapter 3 on this incident.
[604] *ECJ*, case. no. C-177/95, 27 February 1997.

tions were conducted in the Gulf of Aqaba to ensure that no prohibited products were indirectly shipped to Iraq.[605] In the case of Libya the resolution was explicit as to geographical limitations by stating that the enforcement authority existed on the high seas,[606] which, as a result, meant that the territorial waters of Libya were outside the embargo zone. NATO, therefore, dedicated a maritime area of operations in the Southern Mediterranean Sea close to Libya itself, but outside the territorial waters.[607] The area is usually also published so that maritime traffic is made aware of in what location they can expect warships to enforce an embargo.[608]

Absent specific limitations derived from the specific resolution, Chapter VII maritime enforcement measures can be conducted both inside and outside the territorial sea of the targeted State. They cannot be conducted within the territorial waters of other States without the permission of the coastal State.[609] In early MEO that resembled maritime peacekeeping operations questions were raised on operating inside the territorial seas of the State under sanctions. In essence because of the fact that one of the conditions of peacekeeping operations is that the forces operate under the consent of a State within its territory. MIO conducted under Article 42 are

[605] Fielding (1993), 1220-1221. The area of operations for the MIF was established by special warning no. 80 (1990).

[606] Although this could have resulted into a completely different enforcement model, military planners derived from the resolution a military activity that resembled traditional maritime embargo operations off the coasts of the targeted State. That decision- makers had a traditional maritime-arms-embargo-type operation in mind when the resolution was adopted, can perhaps be deduced from the fact that there was no opposition against the implementation of these military activities; not even by the Sanctions Committee. In the end, NATO's maritime operation was conducted only in the central Mediterranean Sea off the coasts of Libya. An established Maritime Surveillance Area (MSA) tied the actual maritime operations area to the Libyan coast. Notifications were sent out to inform the shipping community of the embargo's existence and to establish a reporting system for vessels that were sailing to or from Libya.

[607] SC-Res. 1973 (2011) and 2146 (2014). In the Libyan conflict the UNSC did not so much focus on the area of crisis, but authorized measures that could be taken on the territory of each member State. Before revising some paragraphs of Resolution 1970 through the adoption of Resolution 1973, the Council seemed to consider member States' territory as the main geographical starting point for the embargo. Resolution 1973 then extended to the high seas the powers of member States with regard to the arms embargo (which had already been established by Resolution 1970). For naval enforcement operations at sea, this different 'expanded authority' approach brought the operational effect that the embargo could be enforced in the Libyan territorial sea. See more elaborately on this point: M.D. Fink, UN-Mandated Maritime Arms Embargo Operations in Operation Unified Protector', in *Military law and the law of war review* 50/1-2 (2011).

[608] See for instance in the case of Libya: NAVAREA III 170/11 (081415 UTC Apr 11). Following the adoption of SC-Res. 2009, NAVAREA III 170/11 was replaced by NAVAREA III 395/11. With NAVAREA 445/11, the MSA was terminated.

[609] During the MIF operations this led to oil smugglers that tried to reach Iranian territorial waters and then proceed to the Strait of Hormuz during which time the MIF was not able to stop them. T.P. Shaw, 'Arabian Gulf Maritime interception operations: balancing the ends, ways, means and risks', in *Naval War College paper* (1999), 5.

coercive peace enforcing operations and need not to have the consent of a State. As said, a-typical in this respect are the UNIFIL and Libya operations. The latter because it explicitly stated that the embargo could be enforced on the high seas, which was interpreted by NATO to the effect that enforcement of the embargo could not take place within the territorial sea of Libya.[610] The former because the resolution is construed on a double legal basis in order to support to Lebanese authorities. Chapter 5 has touched upon the discussion on the exact legal basis (either a Chapter VI or VII resolution, in combination with a consent of the Lebanese Government) for MTF UNIFIL, which in practice is not challenged because apparently no vessels are boarded but information on suspect vessels is transferred to the Lebanese authorities to deal with the ship in port. Because the Area of Maritime Operations (AMO) of UNIFIL lies both in the territorial sea and on the high seas (43nm wide from the coastline and 110nm long).[611] UNIFIL and Lebanon have made detailed arrangements where within the AMO UNIFIL is allowed to take measures, which has divided the AMO into different zones. UNIFIL units only operate within the zones that are in the territorial sea on request of Lebanon.[612] Under these circumstances the requirement of coordination with the Lebanese authorities for UNIFIL naval forces to conduct operations in the territorial seas of Lebanon signified that UNIFIL naval forces were only top conduct operations within the Lebanese territorial sea at the request of the designated authorities.

[610] In the case of Libya, the restriction to the high seas resulted in an operational gap in which vessels could move prohibited materiel from one city to another through the territorial sea only, or entered the Libyan territorial sea through the territorial seas of the neighboring States. When, however, one looks at the geographical limitation of the arms embargo in a wider perspective, including the whole mandate of Resolution 1973, one also ends up bringing to light some discrepancy with other authorized operations. The mandate to protect civilians under Paragraph 4 of the same resolution, for instance, does not state that enforcement operations have only to take place outside the Libyan territory. On the contrary, this part of the mandate solely focuses on the territory of Libya, which also includes the territorial sea. Maritime operations carried out under this part of the mandate – as long as they would not turn into occupation operations – were thus allowed to be implemented in the Libyan territorial waters too. Since Paragraph 4 of Resolution 1973 authorized all necessary means to protect civilians and civilian-populated areas, arguably this could have also been an authority to enter the Libyan territorial sea. However, for the interception operations to be legitimately carried out, the latter should be aimed at stopping a threat to civilians and civilian-populated areas, and not at enforcing UN sanctions.
[611] U. Haussler, Crisis response operation in maritime environments', in M. Odello, R. Piotrowicz (eds.), *International Military Missions and International Law* (2011), 161-211. A picture of the AMO can be found at: Ministerie van Defensie, *Eindevaluatie UNIFIL maritiem*, 25 April 2008.
[612] Kamerbrief inzake beantwoording schriftelijke vragen over de maritime bijdrage aan UNIFIL (Letters to parliament answering written questions on the maritime support to UNIFIL), 11 October 2006.

9.5.1. ‘All necessary means’

More challenging in terms of understanding the scope of authority during visits that are authorized by the collective security system, is when the UNSC does not explicitly authorize the enforcement of sanctions at sea, but when a MIO is based on the wording of *all necessary means*. As was discussed in Chapter 5, it is widely accepted that the phrase *all necessary means* implies that the mandate includes using military force to fulfill the mission as an ultimate means. On the level of coercive measures all necessary means can also be translated into the need to visit and search vessels in the pursuit of the mandate. One argument to support this is that because lethal means are ultimately possible, lesser means such as maritime interception operations may arguably also fall within the scope of the mandate. But in contrast to explicitly authorized enforcement, in these cases there is no detailed guidance at all on how and against whom maritime interception operations may be conducted. The filling in of the detailed purpose, scope and content of authority is basically left to the State or the commander that is interpreting the mandate, against the further legal environment of applicable legal regimes. If the operational situation necessitates the authority to stop fuel from coming into a State which will end up to supporting the fighting capacity of the opponent, or to stop individuals that would likely take part in the conflict, would *all necessary means* suffice to take those measures? This example could lead to indirect economic sanctions, which are usually provided for through a resolution that adopts such sanctions. Such action could therefore go beyond the scope of the mandate. If, however, the vision behind the mandate is to authorize such actions against the target State, this could well include actions, or even the applicability of the law of naval warfare including blockade. In other words, the scope, purpose and content of authority of visits based on *all necessary means* must be read in context of the aim and purpose of the resolution itself. Also here, and as will be discussed more elaborately in Chapter 11 on detention at sea, further conditions apply in cases where visits based on *all necessary means* are used to detain persons to which human rights law apply.

9.5.3. The law of blockade and Article 42 of the UN-Charter

Article 42 of the UN-Charter explicitly mentions the possibility of authorizing a blockade. Whether this also means that the law of blockade applies to this blockade is not entirely clear. Different options as how to interpret the use of a blockade within the context of the collective security system were already discussed in Chapter 5.[613] Historically seen, Article 42 was focused on large scale military operations in which the factual situation amounted to an international armed conflict (see Korea and Iraq (1990)). There is, therefore, some logic from an historical perspective in assuming that the purpose was that authorising a blockade as a military enforcement measure under Chapter VII of the UN-Charter would coincide with applying also the law of blockade to enforce it in practice. But nowadays, however, military operations that are authorized under Article 42, arguably, firstly do not automatically rise above the threshold of an armed conflict. And if they did, these conflicts are often characterized as non-international in character. Blockade as a method of warfare to which the law of blockade applies can only exist in cases where there is an international armed conflict. These points basically put an end to any assumption that the law of blockade automatically applies where the UNSC authorizes a blockade as a military enforcement measure. Following this line of argument, it still leaves the UNSC, however, with the possibility of using the *method* of blockade, without the *law* of blockade to automatically fill in the authorities. The scope, purpose and content of such a blockade would then depend on the text of the resolution, in which the UNSC can tailor the law of blockade in such a way to fit the specific circumstances. The advantages of a blockade based on Article 42, is in the first place that a blockade would not become unlawfully established when it does not fulfil all the conditions in order to legally establish a blockade.[614] Secondly, an Article 42-blockade could also be established in circumstances that can be characterized as a NIAC in which the UNSC could decide that the relevant legal features of the law of blockade apply in the given situation. At this stage, however, there appears to be no practice that could underline this view.

[613] See Chapter 5, paragraph 5.8.1.
[614] Notification, impartiality and effectiveness.

9.6. Final remarks

This chapter has examined the different manifestations of the right of visit that can apply during maritime interception operations. As the scope, purpose and content differs per type of visit, it is, obviously, of importance that warship commanders must ensure to keep them apart. Some manifestations are detailed because they are part of either international agreements, or its details have been widely accepted in customary international law, such as the belligerent right of visit and search. Some are, however, less clear and must either be detailed in the State's consent that waives the flag state authority, or must be interpreted through the actual texts and background of UN-resolutions. Generally, however, the different types of right of visit require a threshold (a reasonable ground for suspicion) before a boarding can take place. The exception is the early maritime embargo operations, which authorized the halting of all vessels for inspection. Although during the Libya-operations the threshold was also introduced for maritime embargo operations it is not unthinkable that the early resolution of resolutions will be used in future conflicts as this depends on the possible future need in conflicts. Second, a right of visit does not mean that once on board, automatically enforcement jurisdiction exists whenever it becomes clear that the suspected ship or person is in breach of law or a mandate. As Guilfoyle already noted in this sense: 'The general position is that authority to visit and inspect a vessel does not automatically extend to a right of arrest and prosecution. Unless relinquished or waived, a flag State has 'primary jurisdiction' to conduct any subsequent prosecution.'[615] One challenge with regard to the right of visit lies in the fact that contemporary conflicts are often characterized as non-international armed conflicts. Whereas regulations related to international armed conflict allow the use of the right of visit and search which is longstanding and accepted as customary international law, this right does not exist in non-international armed conflicts. From an operational point of view, it is quite unsatisfying that existing rules related to the belligerent right of visit and search do not always fit current conflict in the sense that the means are not available to effectively act against non-state actors at sea. Possible legal solutions to what seems to be a gap have been suggested, through the

[615] Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters', C.R. Symmons (ed.), *Selected Contemporary Issues in the Law of the Sea* (2011), 83,-104, 84.

argument of a self-defence or NIAC right of visit. In this approach the legal basis for the actual boarding of the vessel is regulated by the *ius ad bellum* and the scope of the boarding authorities by NIAC-regulations or self-defence itself.