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### Maritime interception and the law of naval operations

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

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# CHAPTER 11

## Detention at sea

*The practitioner should be cautioned that authority to intercept a vessel does not always equate to authority to detain the vessel, its contents, or its crew.*

-Winston G. McMillan, Major United States Marine Corps<sup>729</sup>

### 11. Introduction

In the land dimension of military operations, the legal aspects of detention are a much discussed topic. In particular in the context of the legal grounds for detention during non-international armed conflict. Traditionally, naval operations have been primarily cargo and vessel-focused, rather than person-focused.<sup>730</sup> Generally, UN-mandated maritime embargo operations concern themselves primarily with prohibited items, which are dealt with by either seizing the goods or diverting the vessels. During international armed conflict, and apart from taking prisoners of war, the law of naval warfare is primarily concerned with contraband goods or the capture of vessels that breach blockades. Belligerents and prize courts have generally no legal interest in persons. Detention at sea has, therefore, been rather an exceptional activity. Today's maritime security operations have, however, have put a renewed focus on the fact that the military at sea may encounter persons that may, for some reason, need to be detained. For ex-

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<sup>729</sup> W.G. McMillan, 'Something more than a three hour tour: rules for detention and treatment of persons at sea on U.S. naval warships', in *The Army Lawyer*, no. 31 (February 2011), 31-45.

<sup>730</sup> This is, however, not to say that at sea in general there has never been any attention to human beings. Obviously, within the context of maritime law enforcement, such as drug- or human trafficking, there is clear attention to human beings at sea. But within the context of conducting naval operations, persons at sea played a secondary role of importance to vessels and cargo.

ample, because the person is a criminal suspect or is part of an organized armed group. Counter-piracy operations have done much to surface challenges that come with detention at sea. During the Libya operation in 2011, the UNSC authorized measures to stop mercenaries, next to arms related materiel. Operation *Enduring Freedom* has searched for terrorists and, interestingly, within the context of armed conflict, the Israeli blockade operations have brought the fate of persons on board the target vessels under attention. A general outcry by States was heard to release the persons on board the *Mavi Marmara*, rapidly followed by a request of the UNSC to release the detained persons that had breached the blockade. These examples and the awareness that persons may be the subject of maritime interception operations have even prompted a change to the definition of MIO as mentioned in Chapter 1 to include persons next to objects.<sup>731</sup> In other words, situations may exist during maritime interception operations in which persons at sea may be deprived of their liberty. This chapter reflects on the issue of detention in the context of maritime interception operations. It will briefly introduce the notion of operational detention and will then discuss the particularities of detention in the maritime environment. It must, however, be said upfront that apart from certain specialized provisions on detention at sea, such as the provisions of the handling of prisoners of war at sea, there is no difference on the applicable law on detention applied to the maritime dimension.

### **11.1. Operational detention**

The term *operational detention* is now often used to describe detention in military operations. Kleffner has defined operational detention as: ‘the deprivation of physical liberty of a person in the context of a military operation, whether for reasons of security or law enforcement purposes.’<sup>732</sup> He states that this definition for the deprivation of physical liberty is intentionally broad, ‘to capture military operations in their entire variety’. Within the term operational detention, a threefold distinction is made in persons that can be detained, either for reasons of security (security detainees or administrative detainees), persons that are suspected of criminal

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<sup>731</sup> See Chapter 1, paragraph 1.3.

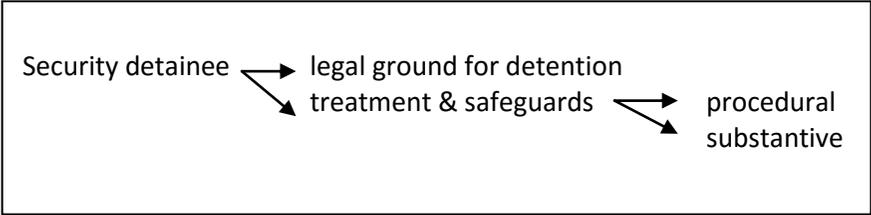
<sup>732</sup> J. K. Kleffner, ‘Operational detention and treatment of detainees’, in T.D. Gill and D. Fleck (ed.) *The Handbook of International Law of Military Operations* (2010), 465-480.

offenses (criminal detainees) and persons that can be detained because they fall within the category of prisoners of war (PW). Certain features separate security detainees from criminal detainees which is important to give some attention to at this stage. First, security detainees are detained for reasons of a possible *future* threat (although that can be based on possible past conduct), while criminal detainees are detained because of a suspected (criminal) action that has already taken place. A second difference concerns the authority to detain. Security detention is ordered by the executive branch -that is by the military themselves- while criminal detention is ordered by the judicial branch. A third difference is that security detention is usually aimed at enhancing the security of the military force, or the persons that are entitled to protection. Criminal detention takes place because a certain act may be punishable under criminal law. Detention in this case is, therefore, not because the person threatens the military itself. Security detention can, therefore, also be considered as defensive measures, whereas criminal detention is more of an active engagement towards suspected criminals.

Next to the three different categories of detainees, one can also distinguish between legal grounds<sup>733</sup> for detention and safeguard & treatment for detention. The first relates to the legal ground upon which a person can be detained. The general challenge with legal grounds for detention is that not under all circumstances a specific legal ground exist, but is argued through interpretation of other provisions. Be that as it may, it is underlined here that at all times as a fundamental requirement for detention a legal ground must exist, implied or explicit, for the detention of persons. The second, safeguards & treatment for detention, relates to the wellbeing of the detained individual. This is subdivided in a substantive (treatment) and procedural part (safeguards). For example; treatment relates to how detained persons must be physically treated. Safeguards relate to the individuals rights during detention in terms of legal process, such as to be brought promptly before a judge.

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<sup>733</sup> I am using the term legal *ground* as oppose to legal basis, to distinguish between the legal bases in general for maritime interception operations and the legal basis for detention in particular. The legal basis of a detention may for instance be a treaty and the legal grounds for detention are the provisions in the treaty that deal with detention.



*Fig. 11.1. How operational detention can be subdivided; example of a security detainee.*

**11.2. What constitutes detention during maritime interception operations**

Operational detention can also take place during maritime interception operations. In the broadest sense, detention is the deprivation of liberty. On the one hand, this goes beyond the classic detention situation after an arrest. On the other, a detention must also be sufficiently serious not to be merely a temporary restriction of movement. The obvious examples are persons that are being detained on board because they are suspected of having committed a crime, or are captured as enemy combatants. There are also situations, however, in which the answer to the question whether a person is in fact detained, is not so entirely obvious. Three examples to illustrate such situations:

*Example 1: small boat search*

The boarding team comes on board a small vessel for a search of cargo. They ask the persons on board to stay on one side of the vessel until the vessel is searched and the boarding team has left the vessel. If the crew is not cooperating they can also be forced to do what is ordered. The boarding team is carrying arms and the supporting warship has an armed overwatch on the small vessel. When the vessel is cleared and the boarding team has left, the crew is free to move over the vessel again.

*Example 2 : transit of a captured blockade runner*

A vessel is captured because it has tried to breach a blockade. The vessel is being escorted into a port. During the transit to port the vessel is under

military control by an escorting warship and a security team is on board the vessel itself. The captured vessel is still navigated by the original crew. The captain and crew of the vessel will have to stay on board until the vessel is anchored in port. In port, a further decision awaits to keep the captain and relevant crew available during the prize court procedures, or whether they are free to leave.

*Example 3: diversion of a suspected vessel to inspection port*

A large container-vessel is searched during an UN-mandated maritime embargo operation. During the search, the crew not essentially needed for navigating the vessel or assisting the search is asked to gather and stay in one room which is under control of a security team from the warship that is conducting the boarding. During the inspection the boarding team has gained suspicion that there may be forbidden items on board. The MIO-commander has decided to divert the vessel to a port for a further and more thorough inspection. Under convoy of a warship the vessel is ordered to navigate into port X for further inspection.

These three examples give rise to the question of when one can actually speak of detention of person on board a vessel that is under different levels of control by the visiting warship. Doswald-Beck offers that detention exists when persons are restricted to a place and cannot leave when he or she wishes to leave.<sup>734</sup> The European Court's guide on Article 5 ECHR mentions that: 'Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts'.<sup>735</sup> In the small boat example, there may be good reasons to argue that these persons are deprived of their liberty because during the search of the vessel they are not allowed to move and can also be forced to stay at their appointed place, under threat of force. These persons are under control of the boarding party. It is, however, different when the boarding party is on board the small boat as a so called 'friendly approach'-activity, and no one is restrained in their movements. In the blockade-runner example, the capture is focused on the vessel and not intended to detain the persons. As will be discussed in later sections of

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<sup>734</sup> Doswald-Beck (2011), 254.

<sup>735</sup> *ECtHR Guide on Article 5 of the Convention Right to liberty and security* (2014), paragraph 8.

this Chapter, the crew are not prisoners of war. The persons on board are not physically detained and are free to move on the ship in order to operate it, but they are still forced to sail it into port, while under military control. In the third example, the crew is also not physically detained and there is also no military control on board the vessel. Still, the vessel is asked to follow orders to be diverted to an inspection port. Their limitation in liberty is that they cannot sail the vessel elsewhere than ordered by warships that are enforcing a UN-mandate.

The situation of persons on board a captured *vessel* is in fact merely a practical or logistical one, in which the persons are not deprived of their liberty, but where there is simply no other possibility to let them leave until a port is reached. Persons on board are not held for reasons of security or because of criminal detention, but because they practically cannot leave the vessel and are usually needed to sail the vessel into a port.<sup>736</sup> Could, theoretically, the crew and passengers be transferred at an earlier stage to another vessel, they will be entirely at liberty when the possibility occurs. Moreover, it has never been argued that persons who were limited in their liberty through the execution of rules of the law of naval warfare because their vessel was captured or diverted were automatically detained. The vessel and goods will be brought before a prize court, but no juridical procedures are instigated against the persons on board that vessel. Persons on board a captured vessel can be released as soon as they reach the port. When it is expected that the persons will have to testify in court proceedings, it is more likely that they will be summoned by court order and may for the purpose of ensuring they will testify, be detained. But all this will happen under lawful court orders. In sum, the law of naval warfare takes the view that when capturing vessels, the persons are not also automatically detained. It is thus submitted here that the capture or visit of a vessel does not mean that persons on board are thereby automatically detained. The same can apply to a diversion to a port based on the need for further inspection of a vessel for sanctioned goods during a UN-mandated maritime embargo operation: no detention of the persons on board takes place in principle, unless the actual situation on board considered through objective factors lead must lead to the conclusion that persons are in fact de-

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<sup>736</sup> The alternative is to bring in a so called prize crew, which is a military crew that will take over the vessel.

tained. For instance, when during the transfer of the vessel persons are physically held on board, confined to a quarter under surveillance of an armed guard for reasons of security of the boarding crew.

### **11.3. Prisoners of war at sea and crews of enemy and neutral merchant vessels**

The first category of operational detainees is prisoners of war (PW). This category exists when there is an existence of an international armed conflict. Article 4 GC III and Articles 43 and 44 API define who can be considered as prisoners of war. The interesting point to note with regard to PW's at sea is that in Article 4 GC III, next to the regular combatants and all who fall within the scope of combatants, in subparagraph 5 also includes members of crews, including masters, pilots and apprentices, of the merchant marine of the parties to the conflict. This Article, therefore, opens the possibility that civilians on board enemy merchant vessels (as opposed to neutral merchant vessels) may be considered as prisoners of war. This provision must be read in conjunction with Articles 5 to 8 of HC XI *Relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*,<sup>737</sup> which deal with the status of persons on board an enemy merchant vessel. This group of provisions has basically three principles. First is that enemy merchant vessels are liable to capture. Second is that persons on board enemy merchant vessels are not to be made prisoners of war, *if* they formally promise not to take service on an enemy merchant vessel or take part in operations of war.<sup>738</sup> And the third principle is that when the ship takes otherwise engages in acts rendering the vessel a military objective, the second principle does not apply.<sup>739</sup> Consequently, they will be made prisoner of war.<sup>740</sup> Unlike crews of enemy merchant vessels, Article 4 GC III does not contain grounds to detain a crew of a neutral merchant vessel under PW-status. The *US Commander's Handbook on the law of naval operations* notes in this regard that:

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<sup>737</sup> *Hague Convention XI relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War*, The Hague 18 October 1907 (HC XI).

<sup>738</sup> Articles 5 to 7 HC XI.

<sup>739</sup> Art. 8 HC XI.

<sup>740</sup> Tucker opined that the practice in the Second World War has led to the obsolescence of releasing enemy merchant crews by written promise of not returning to operations of war (Tucker, 111-112). The practice during the Second World War, however, must be seen in the context that merchant vessels and crews were effectively integrated in the warfighting capacity of the belligerents and structurally constituted military objectives.

“The officers and crews of captured neutral vessels who are nationals of a neutral nation do not become prisoners of war and must be repatriated as soon as circumstances permit”.<sup>741</sup> The logic behind capturing the vessel but not the crew would be that the crew is in principle only the driver of the ship and is not automatically connected to the possible contraband they are carrying. Although it is not unthinkable that it might be otherwise, captains and crews of for example huge container-vessels that solely serve as transporters of containers will in principle not be connected to the cargo they are carrying.

### 11.3.1. Passengers

Passengers are a separate category of persons that can be on board a vessel. One must presume that a passenger is a civilian, until proven otherwise. The fact that a vessel is considered an enemy vessel does not also presuppose that the passengers on board should be considered as enemy, which can be detained under PW-status. The distinction is important because firstly, Article 8 HC XI refers to *ships* taking part in hostilities, not persons. Secondly, the point of view that passengers are not crew also matters in the proportionality considerations if a warship comes in the position that it has to use force against a merchant vessel. Passengers who are not part of the crew must be dealt with on their own individual merits. In line with this approach Von Heinegg mentions that: 'Passengers who are nationals of a neutral State will be released unless they have directly taken part in hostilities.'<sup>742</sup> As a point of departure, passengers cannot be detained, but their activity on board will determine whether there are grounds to detain them. A passenger can either be a security threat or directly take part in hostilities.<sup>743</sup> In the latter case, passengers will lose their

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<sup>741</sup> See paragraph 7.10.2 *US Commander's Handbook*.

<sup>742</sup> W. Heintschel von Heinegg, 'Maritime warfare', in A. Clapham, P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014), 145-181, 171.

<sup>743</sup> Historical cases exist in which passengers on board neutral vessels were deemed to be combatants by the visiting belligerent forces, such as the *Asama Maru* case in 1940. In 1940 *HMS Liverpool* received the order to board a Japanese flagged merchant vessel *Asama Maru*. The vessel was suspected of having German passengers on board the vessel, which they had. The Germans were taken as prisoners of war on the basis that these Germans were, although not in the military service, military aged men that could ultimately take service against England. Japan protested against this action. Later, it appeared that several of the captured men were 'relatively unsuitable for military service'. C.G. Dunham, *The Asama Maru Incident of January 21, 1940* (paper prepared for presentation at the Thirteenth Annual Ohio Valley History Conference, 1997); *The Canberra Times*, 8 February 1940, p. 4: 'Settlement of Asama Maru controversy. Anglo-Japanese understanding. Britain offers release of nine men'.

protection as a civilian. The following paragraphs will discuss the situation where a person becomes a security threat.

#### **11.4. Security detainees at sea**

Security detainees are persons that are detained for reasons of security. A core characteristic is that security detainees are civilians. This category is not limited to situations of armed conflict alone, but occurs also in situations outside such circumstances. The necessity to detain persons for reasons of security may exist within the whole range of military operations, from low to full scale naval operations, from international to non-international armed conflicts to outside armed conflict. Consequently, this means that both IHRL and LOAC might be applicable to security detention.

##### **11.4.1. Security detention under LOAC**

Security detention under LOAC during an international armed conflict is based on Article 42<sup>744</sup> and 78<sup>745</sup> of GCIV, in which there are possibilities to detain civilians for imperative reasons of security. What imperative reasons of security means, is not further defined,<sup>746</sup> but it does signal that security detention must be seen as an exceptional authority. Because GCIV applies in occupied territory, it poses a problem for the applicability of these articles on a vessel on the high seas. There are no equivalent provisions of Articles 42 and 78 GCIV for a maritime situation on board a ves-

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<sup>744</sup> Article 42 GC IV reads:

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

<sup>745</sup> Article 78 GC IV reads:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

<sup>746</sup> See a discussion on what security could mean in Pouw (2013), 391-393.

sel on the high seas. If a vessel is captured on the high seas there will not be a situation of an occupied territory. One could argue that a captured enemy vessel under the control of a belligerent State can be *de facto* occupied ‘territory’. This does, however, not sit well with the point of view that a vessel is legally not a territory. Taking the legal fiction of the occupied territory-argument just a bit further, one could also argue that the belligerent State that is an occupying power elsewhere on land can extend their occupying powers to vessels from the occupied State. This fictional occupied territory-theory only applies, however, to enemy merchant vessels and not to neutral merchant vessels.

Another argument could be that an implied authority for belligerent naval forces may exist in order to be able to ascertain rights under the law of naval warfare. There may be many different reasons why persons want to breach a blockade, ranging from economic reasons of not wanting to be stuck at a blockaded port, to acts that deliberately are challenging the blockading State. The *Flotilla*-incident is a good example of the latter. Although it may be argued that some persons can be detained on the basis of the fact that they have taken direct part in hostilities or acted in a criminal manner against the boarding team, there may be a need for others that did not take up arms against the boarding to be detained for reasons of security, so that the capturing power can get the vessel safely to port. This argument may be the maritime translation of the view that was submitted by the ICRC: “It flows from the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat”.<sup>747</sup> Although this view was expressed in the context of implied powers to detain in the context of a NIAC, its core underlines a view that implied authority can exist in LOAC to detain persons. The view is also found in the Turkel report, which states in paragraph 231: ‘Inherent in the authority to use force under international humanitarian law is the power to detain someone who poses a threat to the safety of military personnel or who is interfering with the conduct of a mission’. This argument, although fiercely debated,<sup>748</sup> is, as said, used also to find a

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<sup>747</sup> E. Debuf, ‘Expert meeting on procedural safeguards for security detention in non-international armed conflict’, *International Review of the Red Cross*, vol.91, no. 876 (December 2009), 859-881, at 863.

<sup>748</sup> See e.g. S. Aughey, A. Sari, Targeting and Detention in Non-International Armed Conflict: Serdar Mohammed and the Limits of Human Rights Convergence, in *ILS*, vol. 91 (2015), 60-118, and result-282

legal basis for detention in extraterritorial non-international armed conflict. The issue has surfaced because in the 'traditional' NIAC's fought on one's own territory detention can be based on domestic laws, but in an extraterritorial NIAC domestic laws cannot support the original set-up of the NIAC-framework. Although no explicit grounds for detention exists, proponents argue it implicitly, for instance through Common Article 3 of the Geneva Conventions, as a result of the principle of military necessity, or as a 'lesser means authority' derived from the authority to kill. The idea is that if one can lawfully kill the opponent, the lesser means -to detain- is also lawful.<sup>749</sup> This view does, however, exclude security detention of persons that cannot be killed in first instance, which still leaves a gap of authority to detain. Yet others remain reluctant to accept such a right, either to dismiss such right or stay in the middle by stating that it is not explicitly regulated. From a maritime perspective, security detention based on the domestic laws can only exist when the detention is within the sovereign waters of a coastal State, or when the vessel flies the same flag as the boarding belligerent warship, or when the persons are on board the belligerent warship.

#### **11.4.2. Security detention under human rights law**

Article 5 paragraph 1, a to f ECHR state the legal exceptions to the liberty of persons. It is generally accepted that none of the exceptions expressly allow for security detention.<sup>750</sup> The commonly used argument in which way this challenge is circumvented, is that a State derogates from its obligations, in the case of the European Convention, under Article 5 ECHR.<sup>751</sup> Derogation would suspend the obligations of the detaining power. For derogation to be possible Article 15(1) ECHR states that:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation,

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ing debate on *EJIL TALK!* At: <http://www.ejiltalk.org/ihl-does-authorize-detention-in-niac-a-rejoinder-to-rogier-bartels/>; G. Rona, Is there a way out of the non-International armed conflict detention dilemma?', in *ILS*, vol. 91 (2015), 32-59.

<sup>749</sup> Aughey & Sari (2015), 103-104.

<sup>750</sup> E.g. Doswald-Beck (2014), 263; Pouw (2013), 370-371.

<sup>751</sup> Doswald-beck, 263; Debuf, 867.

provided that such measures are not inconsistent with its other obligations under international law.

Firstly, there needs to be a time of war or other public emergency threatening the life of the nation. And secondly, a State can do so to the extent strictly required by the exigencies of the situation. Obviously, the Article was not set-up to fit situations on board foreign flagged vessels. Although, arguably, the capture of the vessel may be regarded as being during a time of war when it is captured during an international armed conflict, but whether the argument can be made that the situation at sea is such that it is required by the exigencies of the situation to derogate is yet another hurdle to take. Be that as it may, what it requires of a State, also in situations of extraterritorial application of human rights, is to derogate from Article 5 ECHR.

In sum, both LOAC and human right law do not give an explicit right for security detention in the situation of security detention on board a captured foreign flagged vessel. A solution to circumvent human rights law obligations is to derogate from it, which is an exception with stringent conditions attached to it. Possible implied grounds for security detention might be argued through customary LOAC, only if one accepts that detention of persons during an armed conflict is inherent to conflict and is done to ascertain one's right under the law of armed conflict. Another argument, albeit restricted to enemy merchant vessels, would be to apply the fiction of occupied territory to enemy merchant vessels. Faced by operational necessity in modern military operations, there is a strong feeling to accept that persons can be detained for security reasons. Although seen against the background of the environment in which naval forces operate, the need for security detention, however, is arguably less than in land-operations, situations may still exist where security detention is also needed during the interception of a foreign flagged vessel. In this sense, it is submitted here that in absence of an explicit ground, the implied grounds of detention to be inherent to conflict and the occupied territory fiction could serve as legal basis.

### 11.5. Criminal detention

The third and last category of detainees is the persons that are detained based on the fact that they are suspected of criminal offenses (criminal detainees). LOAC provides the possibility for an occupying Power to conduct criminal detentions. Article 43 of the annex to HC IV<sup>752</sup> (Hague Regulations) provides a legal authorization for an occupying Power to restore and ensure public order, which includes arresting persons for criminal acts.<sup>753</sup> Article 43 of the Hague Regulations reads:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Whereas Article 43 allows an occupying power to administer an arrest, the legal ground, however, to arrest is based on the laws in force on the occupied territory, which may be altered if strictly necessary by regulations of the occupying State. Here, again, the challenge is that the Hague Convention IV and its regulations do not apply on the high seas. No equivalent of Article 43 exists in the law of naval warfare. There is no legal ground, therefore, for criminal detention in LOAC at sea if no form of jurisdiction by the belligerent can be established on board a vessel. As a stretch, the occupying Power can amend the legislation in occupied territory to have its effect on the vessels of that State to allow enforcement jurisdiction to restore and ensure public order on board vessels of the occupying State. Usually also domestic criminal law will apply on the vessels of that State outside the sovereign waters of that State. This still leaves neutral merchant vessels outside the scope of the possibility. Additionally, however, but which is outside the realm of LOAC, if the criminal act is conducted against a service member of the boarding team, such jurisdiction may for instance be derived from the passive nationality principle. But, to name an example, over a fatal fight between two crew members on the vessel, the boarding party of the belligerent warship would not have the authority to detain them on the basis of criminal detention.

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<sup>752</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907.

<sup>753</sup> Pouw (2013), 395.

Whereas it can be submitted here that there is no direct LOAC-based legal ground for criminal detention on the high seas, outside the situation of armed conflict criminal detention can be based on domestic criminal law and international agreements. Exemplary in the latter category are persons detained for piracy, drugs or terrorist offences. The legal basis for such detention is international agreements and customary international law. The SUA-Convention does not allow a State to arrest persons suspected of SUA crimes. Instead, it poses an obligation for State parties to make punishable in national law those crimes that are listed in SUA. This would mean that enforcement jurisdiction exists, but it is still with the flag State to arrest and punish such persons, unless it agrees otherwise with the boarding State. Obviously, with the recent counter-piracy operations criminal detention of pirate suspects has been under attention. The starting point for the legal ground for arresting pirates on board foreign flagged vessels is found in Article 105 UNCLOS. It 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.

This Article allows every State to arrest of suspect pirates on board foreign flagged vessels. The challenge of Article 105 is that it establishes (or codifies the customary law of) universal jurisdiction over the crime of piracy, which allows States to impose the boarding State's jurisdiction onto the vessel and its individuals. But in order for universal jurisdiction to be effective, it still needs domestic laws for States to be able to legally prosecute suspect pirates, e.g. making the crime punishable under domestic laws (UNCLOS does provide that piracy is an internationally punishable act) and allowing warship commanders to legally act against pirates. A further legal basis therefore must be sought within domestic legal frameworks that will legally authorize a State to make use of the legal opportunity that is given by Article 105 UNCLOS. Quite logically, as Article 105 leaves the actual execution phase of apprehending pirates to States themselves, UNCLOS also does not contain any provisions on the treat-

ment of pirate-suspects. This is within the realm of domestic criminal law and will be subject to international human rights law. The UNSG-report on piracy (2013) reiterates that:

43. National authorities and courts should comply with international human rights obligations in all phases of counter-piracy operations, including apprehension, detention, prosecution, trial and transfer of suspected pirates and imprisonment of convicted pirates.<sup>754</sup>

### **11.6. Safeguards and treatment at sea**

Having touched upon the legal grounds for the three forms of detention at sea, a short remark will be made on safeguards and treatment. Safeguards and treatment of detainees at sea are in either regime as a matter of applicable rules no different than they are on land. Two points, however, can still be made.

First is to note the special regulations in GC III in case persons are detained at sea. Article 22 GCIII indicates that prisoners of war taken at sea should be put on land as soon as possible. The idea behind this article, besides the fact that prisoners should not be exposed to hostilities, comes from the circumstances in which prisoners during World War II aboard Japanese vessels suffered severely.<sup>755</sup> Today, however, with modern warships with fairly good conditions, this idea does not per se need to apply to modern warships. Rather, it is sometimes argued that placing prisoners temporarily on board a warship might be a better place for the care and protection of prisoner of war than on land.<sup>756</sup> The essence regarding prisoners of war seems rather to have moved to Article 19 GCIII, indicating that prisoner of war within the shortest possible time after their capture, are transported to camps, far enough out of the combat zone to be out of danger.<sup>757</sup> Nevertheless, the rule remains that prisoner of war should be

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<sup>754</sup> S/2013/21, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, October 2013. At paragraph 43.

<sup>755</sup> The so called 'hell ships'.

<sup>756</sup> This thought is also articulated by the ICRC, including in Frederic the Mulinen's *Handbook on the law of war for armed forces*, which states that: Prisoner of war camps shall be located on land except where clause there are better temporary conditions elsewhere (e.g. an advanced camp on heated ship rather than open tents on land unusually cold climate). F. de Mulinen, *Handbook on the law of war for armed forces* (1987), 151 (no. 674).

<sup>757</sup> Article 19 GC III reads:

Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situate

held on land, unless circumstances necessitate a different decision. Practice also exists. Both in the Falklands as the Iraq War of 2003, prisoners of war were temporarily held on board ships instead of on land.<sup>758</sup> During Operation *Iraqi Freedom* prisoners of war made by the United States were brought aboard US warships in the Persian Gulf. The American warship *USS Dubuque* served as a PW camp until the PW-camps were ready to be used on land.<sup>759</sup>

Second is the issue of promptness within the context of human rights law and detention. With regard to safeguards and treatment within the context of human rights law, there are no specific differences between the application on land or at sea. In terms of treatment, Pouw mentions a number of subjects to be dealt with within the context of human rights law when a person is detained, such as physical and mental integrity, dignity and respect, food and drinking water, hygiene and clothing, medical care, religion, personal belongings, public curiosity, and torture, cruel or degrading treatment or punishment.<sup>760</sup> With regard to safeguards Pouw mentions that detainees must not be held secretly, must be granted access to communicate with the outside world, must be notified on the reason for detention, must be compensated for unlawful detention, and additionally for criminal detainees, must be brought promptly before a judge.<sup>761</sup> Although these conditions for treatment and safeguards apply equally at sea, what does differ, however, is that the specific maritime dimension has its effects on the way how safeguards are filled in practice. In this context, it is in particular worth mentioning the safeguard of promptness in connection to maritime interception. With regard to promptness, Article 5(3) ECHR states that:

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a

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ed in an area far enough from the combat zone for them to be out of danger.

Only those prisoners of war who, owing to wounds or sickness, would run greater risks by being evacuated than by remaining where they are, may be temporarily kept back in a danger zone. Prisoners of war shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone.

<sup>758</sup> G.P. Noone, 'Prisoners of War in the 21st Century: Issues in Modern Warfare', in *Naval Law review* vol. 1, no. 50 (2004); Mordarai (2013), 817-838.

<sup>759</sup> See: <http://www.history.navy.mil/content/dam/nhnc/research/archives/command-operation-reports/ship-command-operation-reports/d/dubuque-lpd-8/pdfs/2003.pdf>.

<sup>760</sup> Pouw (2013), 381.

<sup>761</sup> Pouw (2013), 373-377.

reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The ECtHR has judged several times on the issue of promptness at sea (*Rigopoulos, Medvedyev*),<sup>762</sup> twice particularly with regard to piracy, in *Hassan and Ali Samatar*. With regard to the requirement that detained persons should be brought promptly before a judge the practical fact is that it can take time to bring a person before a judge when a person is detained somewhere on the high seas, where it could take days to sail into a port, to fly in an investigating judge, or where the technological means are sufficient enough to allow for a meeting in a digital manner. In different court cases the ECtHR has developed a “wholly exceptional circumstances”-view. In the *Rigopoulos*-case the Court stated that:

The Court nevertheless considers that a period of sixteen days does not at first sight appear to be compatible with the concept of “brought promptly” laid down in Article 5 § 3 of the Convention. Accordingly, only wholly exceptional circumstances could justify such a period. It must therefore examine whether there were such exceptional circumstances in the instant case.<sup>763</sup>

From the Courts’ judgment surfaces a main guideline of importance with regard to promptness in the context of maritime operations. As a key point ‘wholly exceptional circumstances’ must exist that necessitates to prolong appearance before a judge. Therefore, there is no use in identifying a maximum of days that will cover the term promptness, but rather specific and exceptional circumstances must exist which materially makes it impossible to bring an individual before a judge. Case law suggests that factors as place of detention (far away from the territory of a detaining State),<sup>764</sup> weather conditions, the State and capabilities of the vessel all play a role whether exceptional circumstances exist. From *Medvedyev* another guideline can be found in which the Court stated that it could not find indications that France did anything that would unnecessarily take more time than needed. Interestingly, the Court also indicated in *Medvedyev* that it was not for the Court to assess whether France had other means to make

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<sup>762</sup> In these cases persons were held respectively 16 (*Rigopoulos*) and 13 (*Medvedyev*) days on board the vessel.

<sup>763</sup> *Rigopoulos*, in “The law”-section.

<sup>764</sup> E.g. *Hassan*, paragraph 97.

the process go faster. Bodini concludes from this there is no *obligation* rising out of case law to transfer pirate suspect to other faster vessels or to airplanes in order to get the individuals before a judge.<sup>765</sup> In assessing promptness, the Court seems to make a separation between the situations at sea and the moment individuals arrive on the territory of the detaining State. At sea it seems to except the circumstances and limitations of the capabilities at hand (e.g. a vessel that needs to sail 500 miles to Spanish territory), whereas at the moment the detainee arrives on the territory of the State itself, the Court does not except any excuses anymore and orders nothing else than immediately, without any delay, taking into account that he individuals have already been detained for a significant period whilst at sea.<sup>766</sup> As happened in the *Hassan*-case, therefore, a two days period<sup>767</sup> to get Hassan and others from the plane in France before a judge without any justification proved to be a violation of the obligation of promptness in Article 5(3) ECHR.

In other instances during counter-piracy operations off the coast of Somalia the issue of promptness has lead the decision to release pirate suspects. In recent multinational counter-piracy operations the legal challenges start with the un-ability to find a State that would want to prosecute pirate-suspects. More political ideas, such as that pirate suspects should be tried regionally or that a State has a policy to only prosecute a pirate when there are national interests at stake (for instance that there were nationals on board or the vessel belonged to a certain State) hampers prompt criminal prosecution. But also legally, as the former NATO legal advisor Peter Olson mentions; ‘The reluctance for States in Ocean Shield to try persons for piracy...[...]...derives largely from the perceived risk that prosecution will fail due to procedural or evidentiary failures following from the operational circumstances in which they were detained’.<sup>768</sup> The EU-Council Joint Action (CJA) 2008/851/CFSP, in Article 12 states that:

‘...persons having committed, or suspected of having committed, acts of piracy or armed robbery in Somali territorial waters or on the high seas, who are arrest-

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<sup>765</sup> S.P. Bodini, ‘Fighting piracy under the European Convention on Human Rights’, in *EJIL*, vol. 22 no. 3 (2011), 829-848, 833.

<sup>766</sup> *Hassan*, paragraph 104.

<sup>767</sup> From 23 September to 25 September 2008.

<sup>768</sup> Olson (2014), 189.

ed and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:

- to the competent authorities of the flag Member State or of the third State participating in the operation, which took them captive, or
- if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.

The process to find a State that wants to prosecute takes time. And if it takes too long, human rights law safeguards will necessitate releasing the detained persons. One such example is the *BBC Togo*-incident in 2009, where the captured pirate-suspects were held on board the Netherlands warship *Hr. Ms. Evertsen* during participation in operation *Atalanta*. 13 persons suspected of attacking the Antigua and Barbados flagged *BBC Togo* and a Yemeni dhow were captured some 150 nautical miles from the coast of Oman. The Dutch prosecuting office decided not to prosecute because of a lack of Dutch interests, after which the EU took over the efforts to find a State that would prosecute. Ultimately, after about two weeks in which several States were approached, the persons were released as no State was willing to take up prosecution in a national court.<sup>769</sup>

### **11.7. Detention in UN-mandated maritime interception operations**

The fact that a maritime interception operation is mandated by the UN Security Council does not automatically also create any legal regime or grounds for detention. Operational detention within UN-mandated MIO must be viewed along the lines of the applicable legal regime as elaborated upon in this chapter. In UN-maritime embargo operations the main focus has always been with prohibited items so that detention of persons has never gotten to the foreground of attention. Only in SC-Res 1973 (Libya) did the Council State that mercenaries could be halted also,<sup>770</sup> which was the first time that individuals have been explicitly subject to an embargo operation. This implies that in order to enforce such an authority a person may be detained. More often, however, during embargo operations, per-

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<sup>769</sup> See more elaborately on this case, P. Verkroost and M.D. Fink, 'Juridische aspecten van de Nederlandse deelname aan anti-piraterij operaties rondom de Hoorn van Afrika', in *MRT*, vol 104, no. 1 (2011), 9-26; kamerstukken II, no. 29 521, 131, 7 January 2010, *Antwoorden op kamervragen van de leden Haverkamp, Knops (beiden CDA) en Peters (Groen links) over de vrijlating van Somalische piraten*.

<sup>770</sup> SC-Res. 1973 (2011), paragraph 13.

sons are only seen in the context of a possible threat to the boarding team. As mentioned above, whether one can actually speak of detention or whether the crew of the vessel is temporarily restricted in movement depends on factors such as duration, manner, effects and consent. Typical ROE in UN-mandated maritime embargo operations to enforce UN sanctions do not per definition also include detention ROE. Rather, it focuses on the vessel and its goods and authorizes for instance seizure of the goods or diversion of the vessel. Even so, one of the procedures of a boarding team to make sure that the crew of the vessel does not hamper or endanger the inspections and to ensure a level of control, crew and passengers that are not essential to operate the vessel are assembled as much as possible to an area during the search for a better control and observance of the crew and passengers.<sup>771</sup> Interestingly, NATO's *ATP 71* (2005), on tactical MIO-procedures has nothing particular on detention of persons. It has, however, recognized in its rephrased definition of MIO (see Chapter 1) that also persons can be the focus of MIO. Other than that UN-mandated maritime embargo operations that can be considered as part of the wider ongoing international armed conflict between the enforcing State and the targeted State opens to the door to PW-status, the activities of an embargo operation by itself will usually not pass the threshold of an armed conflict.

One particular point to note in the context of detention during UN-mandated MIO is the phrase *all necessary means*. Arguably, such wording in the resolution may provide an implied legal ground to detain for security reasons. Practice to that effect is found in the ISAF-operation in Afghanistan, was argued as a legal ground for detention during NATO operations in Kosovo (KFOR)<sup>772</sup> and is also sought as an implied ground for detention during counter-piracy operations. ICJ Judge Greenwood is quoted in the *Serdar Mohammed v. ministry of Defence*-case<sup>773</sup> to have said in this context:

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<sup>771</sup> See for example the practical 'to do'-list of the boarding team in *ATP 71*, p. 5-15. (e) Place a security team member in position above the assembled crew/passengers to observe the entire group, if possible. Furthermore, the *ATP 71* notes that one of the principles of crew control is to 'keep the crew together'.

<sup>772</sup> See e.g. T. Davidson, K. Gibson, 'Experts meeting on security detention report', in *Case Western Reserve University School of Law*, vol. 40 (2008), 323-380.

<sup>773</sup> *Serdar Mohammed v. ministry of Defence*, High Court of Justice, Queen's Bench Division, 2 May 2014.

That (or very similar) language has been employed by the UNSC when it wished to authorise the use of force and it was plainly intended to carry such a connotation in Afghanistan. It would be wholly illogical for the authorisation to extend to the use of lethal force against persons but not to include their detention.<sup>774</sup>

Others point out that in order for *all necessary means* to be a legal ground for detention, it must adhere to the principle of legal certainty. The ECtHR stated on this principle in the *Medvedyev*-case:

80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail.<sup>775</sup>

The qualitative and procedural requirements of detention must therefore be sufficiently defined, which in an *all necessary means* mandate as a legal ground is a challenge. Within the context of MIO, the multinational counter-piracy operations off the coast of Somalia may serve as an example. The counter-piracy operations based on a combination of UNCLOS, domestic laws and UN-resolutions. Petrig mentions that with regard to detention that a number of States<sup>776</sup> within the EU-operation *Atalanta* in fact have two different moments which need to be separated. The first moment is the capture and detention of the individuals and the second is the decision of a prosecutor to start criminal proceedings.<sup>777</sup> This separation, Petrig argues, is also needed in some States because the military are not authorized under the national criminal proceedings codes to act

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<sup>774</sup> *Serdar Mohammed*, paragraph 218.

<sup>775</sup> *Medvedyev*, paragraph 80.

<sup>776</sup> Petrig has studied the cases of Denmark and Germany, but also The Netherlands appears to have this view. See Verkroost & Fink (2011), 21-22.

<sup>777</sup> A. Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of piracy suspects* (2014).

against criminal acts. The legal basis for the first moment of detention is sought in Article 105 UNCLOS and the applicable resolution itself, which includes the *all necessary means* phrase.<sup>778</sup> As Article 105 does not apply in the territorial waters of Somalia, the only legal basis for that area is the extant resolution. Once a State's prosecutor decides to criminally prosecute the persons, they will come under the domestic criminal law proceedings and thus also the safeguard and treatment of domestic laws. Petrig has casted some doubt, however, over the question whether the *all necessary means* phrase by itself is sufficiently clear to meet the qualitative and procedural requirements of Article 5 ECHR. The rule must be sufficiently clear on what will happen after the moment of detention. As article 105 UNCLOS by itself does not hold any procedural text, and *all necessary means* does is not substantively sufficiently clear on rules and procedures of detention either, she argues that both cannot hold as a sufficient legal ground for detention.<sup>779</sup> This is not a wholly illogical view in light of the *Medvedyev*-case, where the diplomatic note was not sufficiently clear ("take legal action") to contain a sufficiently clear legal ground for detention and its subsequent procedures.<sup>780</sup> With regard to Article 105 this view is shared by Pierini, who states:

In my view, Article 105 of UNCLOS and the provision that the apprehending State "may" apply its laws, though not obliged to do so, represents an intrinsically contradictory element, weakening the assertion that article 105 provides itself legal certainty as to the existence of a cause for detention. The authorization vis-à-vis other States to capture pirate vessels and its crew and to apply its own criminal laws needs to be supported by proper and adequate provisions under domestic law in order to grant legal certainty.<sup>781</sup>

In my own view, Article 105 UNCLOS may be sufficient enough, firstly in terms of that it explicitly mentions the possibility of arrest and further-

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<sup>778</sup> See e.g. SC-Res. 1846 (2008)

<sup>779</sup> Petrig (2014), 228-230.

<sup>780</sup> *Medvedyev*, paragraph 99. See also on this point D. Guilfoyle, 'Current Legal Developments European Court of Human Rights. Mevedyev and Others v. France, European Court of Human Rights', in *The International Journal of Marine and Coastal Law* vol. 25 (2010), 437-442.

<sup>781</sup> J.P. Pierini, 'Apprehension, arrest, detention and transfer of suspected pirates and armed robbers within the legal framework of the European Security and Defence Policy (ESDP): The "mantra" of the existence of a proper legal base', in *I Quaderni europei* (March 2011), 1-10, 8.

more that the system of laws imposes that the details of the arrest and detention are meant to be filled by domestic legislation, and not dealt with on the level of international law. It does imply, however, that a State should have such legislation.

With regard to *all necessary means*, in December 2014, the ECtHR in the *Hassan*-case viewed that UN-resolution 1816, which included the *all necessary means*-phrase, under the circumstances might be construed as the legal basis for detention, but (at that time) lacked rules with regard to the conditions of deprivation of liberty imposed on the captured persons pending appearance before a court.<sup>782</sup> It, therefore, did not meet the qualitative requirement for a sufficient legal basis. As the resolution also explicitly emphasize the application of human rights, an *all necessary means* mandate cannot be used to sidestep human rights obligations based on article 103 UN-Charter.<sup>783</sup>

### 11.8. The *Freedom Flotilla* incident

As a last point in this chapter, the *Mavi Marmara* incident of May 2010 is interesting to note in the context of detention. The incident has some interesting points with regard to the relationship between to human rights law at sea and the application of the law of naval warfare, which is at this stage a completely uncharted area. As Eliav Lieblich has noted: “It is common knowledge, among those dealing with the nitty-gritty of IHL, that the process known as the “humanization of international humanitarian law” –as famously put by Theodor Meron– has generally not trickled to the law on maritime warfare. Prize law is perhaps a key example for this phenomenon”.<sup>784</sup> Interestingly, in this incident the issues dealt with go beyond the level of capturing ships and also deals with individuals on board during a boarding which purpose was to enforce the law of blockade. The incident is also interesting because apart from being recent practice, it was subject to several investigative reports. The three most important ones<sup>785</sup> are the report from the Human Right Committee (HRC),<sup>786</sup>

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<sup>782</sup> *Hassan*, paragraph 69.

<sup>783</sup> See also Guilfoyle (2010a), 152.

<sup>784</sup> E. Lieblich, 'Yet Another Front in Israeli/Palestinian Lawfare—International Prize Law', at: *Opinio Juris*, 13 January 2014. <http://opiniojuris.org/2014/01/13/lieblich-guest-post-yet-another-front-israelipalestinian-lawfare-international-prize-law/>.

<sup>785</sup> Another report was written by Turkish national authorities.

the report from the Israeli committee (Turkel-report)<sup>787</sup>, and the report written in assignment of the UN Secretary-General (Palmer report)<sup>788</sup>. All the reports have noted the application of both the law of naval warfare and human rights law and all have taken an interest in the detention issue that emerged from the capturing of the vessels. In short, the *Freedom Flotilla*-incident involved the following situation: while in international waters, the six vessels of so called *Freedom Flotilla* were hailed and warned by the Israeli Defence Forces (IDF) not to sail any further as they would breach the Israeli blockade of Gaza. When the vessels did proceed, the IDF boarded the vessels in order to take control over them. During their boarding of the vessels, one of which was the *Mavi Marmara*, they were met with resistance by the persons on board. The subsequent struggle on board between the IDF and the persons on board resulted in nine dead passengers and a number of wounded persons. The struggle ended in the IDF gaining control over the vessel and persons. Captured vessels and the persons on board were taken to the Israeli port of Ashdod. The HRC-report mentions that during this phase approximately 700 persons, passengers and crew from six vessels altogether, were detained, up to 12 hours, and a number of persons were handcuffed.<sup>789</sup> In Israel the persons were transferred to a detention facility.<sup>790</sup> Immediately after the capture of the *Freedom Flotilla*, the UN-Security Council (UNSC) requested the release of the vessels and persons on board the *Freedom Flotilla* vessels.<sup>791</sup> Several States called for the same through national statements. The persons that were on board were ultimately released.

With regard to the detention of persons on board the vessels, the reports have several things to say. The Palmer-report discusses the treatment of detained persons on board and during their stay in detention on land.<sup>792</sup> It

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<sup>786</sup> A/HRC/51/21, *Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance* (27 September 2010).

<sup>787</sup> *The Public Commission to Examine the Maritime Incident of 31 May 2010* (Turkel Commission). The Turkel Commission in fact produced also a second report. This second report (Part II) relates to *Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (February 2013).

<sup>788</sup> *Report of the Secretary-General's Panel of inquiry on the 31 May 2010 Flotilla incident* (September 2011).

<sup>789</sup> HRC, para 176. Turkel (para 164) mentions the same the number of persons.

<sup>790</sup> HRC, para's 195-196.

<sup>791</sup> S/PRST/2010/9.

<sup>792</sup> Palmer, para 135-145.

also discusses the general legal framework to include both LOAC, and the law of naval warfare in particular, and human rights law. According to the *Panel of Inquiry* the latter regime applied, ‘once the enforcing State of a blockade asserts physical control over the vessels and its passengers, regardless of the ship’s position on the high seas’.<sup>793</sup> Here, the report accepts that during the belligerent blockade both the law of naval warfare and human rights law co-existed. The report, however, does not tie this to the issue of detention and whether grounds for any kind of detention on board could be found in either LOAC or human rights law. The Palmer-report, therefore, stays in the dark on the exact legal grounds for detention of the civilians on board.

The HRC-report takes the view that, in general, the conduct on board the *Mavi Marmara* is also subject to human rights law during the blockade operations.<sup>794</sup> In concluding, however, that the blockade is unlawful because in the view of the HRC it inflicts disproportionate damage to the civilian population<sup>795</sup>, the HRC states the following on the legal basis for detention:

215. As stated above, Article 9, paragraph 1, of the International Covenant on Civil and Political Rights guards against arbitrary arrest or detention. Since the Israeli interception of the flotilla was unlawful, the detention of the passengers and crew from the seven vessels at Ashdod was also prima facie unlawful since there was no legal basis for the Israeli authorities to have detained and transported these people to Israel. The passengers found themselves in Israel on the basis of an unlawful act by the State of Israel. The Israeli authorities were therefore under an obligation to deal with these people in accordance with their international human rights obligations.<sup>796</sup>

Different than the Palmer-report, the HRC takes the view that the blockade itself was unlawful and concludes that firstly, no legal ground existed

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<sup>793</sup> Palmer, conclusion para 69.

<sup>794</sup> HRC, para 70.

<sup>795</sup> HRC, para 52-56. Interestingly, the HRC applies section 102(b) of the *San Remo Manual*. While the HRC is satisfied that the blockade impacts on a disproportionate manner on the civilian population, the Turkel-report finds it hard to conclude whether or not this is actually the case, also in light of the landcrossings-policy imposed on the Gaza. In fact it concludes that the blockade was in compliance with the proportionality requirement as it is written in the *San Remo Manual*. Turkel, para’s 62 and 97.

<sup>796</sup> HRC, para 215.

for detention based on the law of naval warfare. Secondly, any detention and treatment of persons must be viewed within the context of human rights law. Thirdly, it goes on to conclude that the detention within the context of human rights law was unlawful since there was no legal basis.

The Turkel Commission first takes the approach that the blockade was lawfully established.<sup>797</sup> Secondly, in discussing the applicability of human rights law, it concludes that, although it might be the case, the *lex specialis* of the law of armed conflict applied in this particular circumstance.<sup>798</sup> It also questions whether the IDF had effective control over the vessels before they had control over the bridge and subsequent cessation of resistance.<sup>799</sup> Turkel, therefore, accepts co-existence of both legal regimes, and in this particular case LOAC as the *lex specialis* applied and persons on board should be regarded within the context of the law of armed conflict. The report has categorized the passengers, who are in essence civilians, in those who took direct part in hostilities (DPH) and those did not.<sup>800</sup> The report mentions that if force were to be used against the latter group persons, the use of force was based on human right law standards of necessity and proportionality.<sup>801</sup> It appears to conclude that using force against the civilians on board that did not rise against the military boarding team must not be considered as hostilities, but as an action of law enforcement. Furthermore, the report notes that: “some of the flotilla participants were handcuffed, mainly young men who the forces were concerned would try to attack them or to cause a disturbance.”<sup>802</sup> It also states that: ‘195 passengers were under the supervision of members of this unit and were not handcuffed, and that only the “people with fighting potential” were handcuffed’.<sup>803</sup> This would signify that persons were detained for security purposes. When arrived in Ashdod port the report does not seem to State that there is any difference in processing the persons, whether DPH or security detainee. Each participant of the flotilla underwent the same process and arrest warrants were issued to each participant.<sup>804</sup> After the process, the report states that:

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<sup>797</sup> Turkel, para 112.

<sup>798</sup> Turkel, para 99.

<sup>799</sup> Turkel, para 186.

<sup>800</sup> Turkel, para 190.

<sup>801</sup> Turkel, para 191.

<sup>802</sup> Turkel, page 177.

<sup>803</sup> Turkel, para 144.

<sup>804</sup> Turkel, page 187.

Forty-five flotilla participants requested immediate deportation from the territory of the State of Israel, and thus they were escorted directly from the Ashdod port to Ben-Gurion airport by the Nachshon unit of the Prison Service, those persons that represented a potential security threat and others.<sup>805</sup>

Others, who rose against the military, were put under criminal investigation, until diplomatic pressure urged them to be released. After the request of the UNSC, to avoid any more diplomatic issues, the Israeli Attorney-General recommended to stop any legal proceedings against participants who had acted against the Israeli military, who subsequently decided to release those participants.

What can at least be concluded from the reports is the notion that the law of naval warfare and human rights law can co-exist during and armed conflict. It can also be concluded that there may in fact be situations where belligerent are ascertaining their rights under the law of naval warfare and where human rights law may play a complementary role. Interesting is also that different investigative bodies arrive to different conclusions. The Turkel-report is the most detailed and submits that some persons were detained based on LOAC and others were dealt with through human rights standards. The *Freedom Flotilla* situation is a good example in which circumstances may arise that persons must be detained for security reasons. As noted in this chapter, there is neither an explicit ground for security detention in LOAC, nor in IHRL on the high seas. As the vessels belonged to neutral States, the only implied legal ground left would have been to accept that the law of naval warfare in ascertaining these rights implies also an authority to detain.

### **11.9. Final remarks**

This final chapter of Part III has analysed detention at sea within the context of maritime interception operations. As the introduction of this chapter noted, individuals are now more in the centre of attention in the maritime dimension. It has been submitted here that the capture of a vessel

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<sup>805</sup> Turkel, para 153.

does not, in principle, mean that the persons on board are automatically detained. Whether persons are detained will still depend on the specific circumstances of the case. In terms of legal grounds for detention at sea, it appears that there are lesser explicit grounds to detain on the high seas, as GCIV does not directly apply to the maritime environment. Applying the rules of occupation law to vessels on the high seas may partly close this gap, but only for vessels that fly the flag of the occupied territory. Furthermore, the same challenge of (a lack of) an existing legal ground for security detention in an extraterritorial NIAC applies at sea. An *all necessary means*-mandate may provide a legal basis for detention during MIO, but needs to meet the principle of legal certainty. Qualitative and procedural requirements of a sufficient legal basis must however be fulfilled. Some authors have argued that an *all necessary means*-mandate, therefore, may not be sufficient to provide such legal basis for detention. Finally, the *Freedom Flotilla* incident is a good example of the complexity of operational detention on the high seas. The incident, underlines that although the law of naval warfare does not concern itself with individuals on board, it may be necessary to look beyond the hull of the vessel and deal separately with individuals on board. It furthermore, underlines that discussion on co-existing legal regimes can arise also in the maritime dimension. And lastly, it underlines that the need for security detention exists also on the high seas, during maritime interception operations.