

**Something More Than a Three-Hour Tour:
Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships**

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Maritime forces will work with others to ensure an adequate level of security and awareness in the maritime domain. In doing so, transnational threats—terrorists and extremists; proliferators of weapons of mass destruction; pirates; traffickers in persons, drugs, and conventional weapons; and other criminals—will be constrained.¹

I. Introduction

United States naval warships travel the seas executing missions vital to U.S. national interests. During periods of armed conflict and in peacetime, U.S. naval warships may occasionally detain persons in order to accomplish the mission and to provide security on the seas. For example in May 2009, when Somali pirates attacked a container vessel, the *Maersk Alabama*, and held the ship's captain, Richard Phillips hostage on a small lifeboat.² In response, the United States sent an amphibious assault ship, the USS *Boxer* (LHD-4), a destroyer, the USS *Bainbridge* (DDG-96),³ and a frigate, the USS *Halyburton* (FFG-40) to rescue the hostage.⁴ A U.S. Navy SEAL team from the USS *Boxer* killed three of the pirates. The remaining pirate surrendered and was detained aboard the *Bainbridge*.⁵

Piracy on the high seas is not the only peacetime scenario which can lead to detaining persons at sea. Illegal narcotics trafficking, international terrorism, asylum-seekers, and refugees are on the rise and can present similar challenges for our naval forces.⁶ These circumstances

require a thorough understanding of the rules for detention of persons at sea for the judge advocate advising commanders within the sea services.

During contingency and routine operations, U.S. warships⁷ may have to detain various classes of individuals. Detaining persons at sea carries broad political and legal implications which require a comprehensive understanding of the laws for detention at sea. Part II of this primer will discuss the historical background of detaining prisoners during armed conflict, and provide an overview of the current law as it pertains to detention of enemy prisoners of war (EPWs) and civilians on board a U.S. warship during armed conflict.⁸ Although this primer primarily addresses the rules, regulations, sources of authority, and legal precedent concerning detaining persons in non-armed conflict situations, an understanding of the detention authority within the law of armed conflict (LOAC) will serve as a reference point for the reader. Part II will also briefly address the basic care and treatment requirements of persons detained at sea within LOAC.

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¹ U.S. NAVY, U.S. MARINE CORPS, & U.S. COAST GUARD, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWERS (2007), available at <http://www.navy.mil/maritime/MaritimeStrategy.pdf>. (last visited Mar. 5, 2010).

² Zane Verje et al., *Hostage Captain Rescued; Navy Snipers Kill 3 Pirates*, Apr. 12, 2009, <http://www.cnn.com/2009/WORLD/africa/04/12/somalia.pirates/index.html>.

³ Interestingly, the USS *Bainbridge's* namesake, William Bainbridge, had a prominent role in U.S. relations with the Barbary pirates from 1800 until 1811. In 1800, William Bainbridge begrudgingly negotiated tribute payments with the dey [rulers] in Algiers, and later commanded the vessel USS *Philadelphia* which he surrendered to Tripolitan pirates upon running the ship aground. See MICHAEL B. OREN, POWER, FAITH AND FANTASY (W.W. Norton & Co., Inc., N.Y. 2007).

⁴ Mike Mount & Barbara Starr, *More Pirates Searching for Lifeboats, Official Says*, Apr. 10, 2009, <http://www.cnn.com/2009/WORLD/africa/04/10/somalia.u.s.ship/index.html>.

⁵ See Verje et al., *supra* note 2.

⁶ See, e.g., U.N. High Commission on Refugees, *Conflicts in Afghanistan and Somalia Fuel Asylum Seekers*, 24 Mar. 2009, <http://www.unhcr.org/49c>

8a8d62.html (reporting on the large increase of asylum applications in industrialized nations and attributing the increase of applications to persons migrating from Afghanistan, Somalia, and other countries experiencing turmoil or conflict). See also *Hostile Shores, Abuse and Refoulement of Asylum Seekers and Refugees in Yemen*, available at <http://www.hrw.org/en/reports/2009/12/21/hostile-shores-0> (detailing the harsh conditions of asylum-seekers and refugees from Somalia and Ethiopia transiting the African coast in overcrowded boats).

⁷ U.N. Convention on Law of the Seas, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS III] (Article 29 of UNCLOS III defines a "warship" as a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.). *Id.* art. 29 See also U.S. DEP'T OF THE NAVY, NAVAL WARFARE, PUB. 1-14M/U.S. MARINE CORPS MCPW 5-2.1, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 2.2.1 (June 2007) [hereinafter NWP 1-14M]. *Id.*

⁸ For ease of distinction, I will refer to those prisoners detained by U.S. or Coalition authorities as enemy prisoners of war (EPWs) and Americans captured as prisoners of war (POWs) will be referred to as POWs. See U.S. DEP'T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. E.2.1.2 (5 Sept. 2006) [hereinafter DODD 2310.01E] ("Any EPW Individuals under the custody and/or control of the Department of Defense according Reference (g), Articles 4 and 5.").

Part III of this primer steps outside of LOAC and classifies certain types of persons who may be detained at sea during non-armed conflict situations into two major categories: criminal (conduct-based) and non-criminal (status-based). Within the criminal category, the primer analyzes the rules for detention of pirates, terrorists, and drug traffickers. Within the non-criminal category, the primer will analyze the rules for holding asylum-seekers/refugees and mariners in distress on board the naval warship, which under some circumstances may be construed as “detention.” Part III will also detail the general treatment and care requirements for these non-armed conflict situations. The intent of this primer is to provide the judge advocate a synthesized reference to the multiple sources of authority for detaining persons at sea.

II. Detention of Persons at Sea within the Law of Armed Conflict

The authority to detain persons during armed conflict has been exercised in wars from the time of our nation’s beginning to the most recent operations in Afghanistan and Iraq.⁹ Yet, because of the history of abuse and the difficulty in monitoring conditions, human rights organizations and the United Nations take a close interest in detention of prisoners of war aboard naval warships.¹⁰

Given the politically sensitive nature of sea-based detentions, judge advocates must be able to quickly identify and distinguish the requirements for detention and treatment during peacetime and armed conflict. This section will briefly examine the historical examples of placing detainees and EPWs on warships during periods of armed conflict. Also examined are the applicable rules for detention of EPWs and enemy civilians within LOAC. This section will conclude by describing the basic care and treatment requirements for those detained persons within LOAC.

⁹ See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57834 (Nov. 13 2001) (President Bush issued an order to the Secretary of Defense authorizing detention of persons captured by the U.S. military.); JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31367, TREATMENT OF “BATTLEFIELD DETAINEES” IN THE WAR ON TERRORISM 1-10 (2007), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31367.pdf>.

¹⁰ Duncan Campbell & Richard Norton-Taylor, *U.S. Accused of Holding Terror Suspects on Prison Ships*, GUARDIAN, Jun. 2, 2008, <http://www.guardian.co.uk/world/2008/jun/02/usa.humanrights> (reporting on complaints from human rights’ lawyers alleging that the United States used “floating prison” detaining an unknown number of prisoners in unknown locations). See also *U.S. Holding Prisoners of Warships: UN Official*, ARAB NEWS, June 29, 2005, <http://www.arabnews.com/?page=4§ion=0&article=66127&d=29&m=6&y=2005> (reporting that United Nations learned of “very, very serious” allegations that the United States is using “prison ships” to hold detained terror suspects).

A. Historical Background of Internment and General Rules for Internment

For centuries, sea-faring nations placed prisoners on warships during periods of armed conflict.¹¹ During the American Revolution, England imprisoned over 11,000 American soldiers on board prison “hulks” including the HMS *Jersey* anchored in New York’s East River.¹² Over 160 years later, during World War II (WWII), the Japanese transported and interned American prisoners of war on merchant ships and warships. The cramped, horrific living conditions on board vessels resulted in a high risk of disease and exposed prisoners to unnecessary risk of death.¹³ In one of the great tragedies of WWII, U.S. naval warships destroyed at least five Japanese ships unknowingly killing thousands of American prisoners of war (POWs) on board those vessels.¹⁴ The extremely negative experiences of WWII POWs/EPWs interned on Japanese naval vessels led the drafters of the Third Geneva Convention (GC III) to ensure that POWs/EPWs were not permanently interned on vessels at sea.¹⁵ Thus, as a general rule, Articles 22 and 23 of the GC III prohibit the internment of EPWs at sea, internment of EPWs in an injurious climate, and the exposure of EPWs to hostile fire.¹⁶ Further, while the Fourth

¹¹ See DENIS SMITH, *THE PRISONERS OF CABRERA: NAPOLEON’S FORGOTTEN SOLDIERS, 1809–1814* (2001) (describing the horrid conditions of French prisoners placed aboard Spanish warships from 1809 – 1814.). See JOHN LEHMAN, *ON SEAS OF GLORY, HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY 15–18* (2001). The British military housed American POWs on board “hulks” converted from older warships used as floating prisons during the American Revolutionary War. The HMS *Jersey*, one of the most notorious of the British prison ships, held American prisoners after the British captured New York. The wretched living conditions of the prisoners resulted in the deaths of thousands of prisoners.

¹² See LEHMAN, *supra* note 11, at 15.

¹³ In World War II, the Japanese interned American prisoners of war on warships and freighters dubbed “Hell Ships.” On these ships, American POWs were made to perform slave labor and were exposed to harsh sanitary conditions. Additionally the POWs were placed in substantial risk of harm from attack by the American Pacific Fleet. See GARY K. REYNOLDS, CONGR. RESEARCH SERV., RL30606, U.S. PRISONER OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION BY JAPAN 12 (2002), available at <http://www.fas.org/man/crs/RL30606.pdf>.

¹⁴ *Id.* at 13, 13–14 (describing accounts of five POW ships that were sunk by U.S. ships and planes resulting in over 5000 deaths).

¹⁵ See 1 REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR 248 (1946); HOWARD LEVIE, *TERRORISM AND WAR: THE LAW OF WAR CRIMES* 9 (1992) (Oceana Publications ed., 1948); see also ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11–14 n.67 (Oceans Law and Policy Department, Center for Naval Warfare Studies, Naval War College (15 Nov 1997)) [hereinafter ANNOTATED SUPPLEMENT]; Lieutenant Commander Edward J. Cook et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1 (2004) (analyzing the lawfulness of placing prisoners of war on naval vessels).

¹⁶ Geneva Convention Relative to the Treatment of Prisoners of War art. 21 Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Article 22 states, “Prisoners of War may only be interned only in premises

Geneva Convention (GC IV) does not specifically mention detaining civilians on warships, there are some important limitations on the detention of civilians aboard naval warships which will be discussed later in this section.¹⁷ In light of this general rule prohibiting the internment of EPWs aboard naval warships, one must explore other authorities for the detention of prisoners aboard U.S. naval warships. This exploration begins with identifying the authority for detaining combatants during armed conflict.

B. General Rules for Detaining Prisoners at Seas During LOAC

The authority of our nation and the Commander-in-Chief to detain enemy combatants during armed conflict is well-settled under the law of war and supported by judicial decision.¹⁸ In *Ex parte Quirin*, the Supreme Court held that:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.¹⁹

Article 21 of the GC III provides that “the Detaining Power may subject prisoners of war to internment.”²⁰ The LOAC establishes straightforward guidance for detaining persons at sea. As previously mentioned, GC III strictly prohibits the internment of POWs on naval war vessels.²¹

In certain armed conflict situations, the temporary detention of EPWs on naval vessels cannot be avoided. Although Articles 22 and 23 of GC III prohibit internment of

located on land affording guarantee of hygiene and healthfulness.” Article 23 states, “No prisoner of war . . . may be exposed to hostile fire.” *Id.* at 22.

¹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC IV] (Article 42 also provides that the civilian “internee” may also be assigned a residence.). *Id.* art. 42.

¹⁸ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev’d* 413 F.3d 33 (D.C. Cir. 2005), *rev’d* 548 U.S. 557, 558 (2006), *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁹ *Quirin*, 317 U.S. at 29.

²⁰ See GC III, *supra* note 16, art. 21.

²¹ *Id.* arts. 22–23 (Specifically, Article 22 provides, “[p]risoners of war may only be interned on land and affording every guarantee of hygiene and healthfulness.” Article 22 further states, “[p]risoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate” and “[n]o prisoner may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone” and “[p]risoners of war shall have the shelter against air bombardment and other hazards of war address the internment land-based location requirement and conditions of internment.”) *Id.* arts. 22, 23.

EPWs on board naval vessels,²² Article 16 of the Second Geneva Convention (GC II) provides the authority for detention and treatment of “wounded, sick, and shipwrecked members” of the armed forces sea.²³ Article 16 provides that combatants at sea who are *hors de combat*, and fall into enemy hands will be treated as prisoners of war.²⁴ Jean Pictet, in his commentary to GC II, writes that a person’s GC II status takes precedence over GC III status where both Conventions may apply.²⁵ The Second Geneva Convention most often applies with regard to detaining sailors after a naval engagement; however, GC II applies regardless of how the wounded, sick, or shipwrecked belligerent falls into the hands of the opposing party.²⁶ Thus, a wounded EPW brought aboard a naval warship would fall within the guise of GC II. Article 16 of GC II also allows the warship commander detaining prisoners to determine whether it is “expedient to hold them, or to convey them to a port in the captor’s own country, to a neutral power, or even to a port in enemy territory.”²⁷ In addition to the “wounded, sick, and shipwrecked” under GC II, other classes of EPWs or detainees may be detained aboard warships in certain circumstances.

One such circumstance could occur during land-based kinetic operations involving high-tempo maneuvers inserting ground forces into forward areas with a rapid advance. During these fast-paced operations, a ground commander may not want to retard the advance or potentially endanger prisoners by halting to construct internment facilities. Instead, the ground commander may desire to safely and expediently hold the detainees or prisoners on board a nearby naval warship on a temporary basis. Such a detention must be distinguished from an “internment.”

Army Regulation 190-8 (AR 190-8), a joint service regulation, provides authoritative guidance for U.S. forces regarding the temporary sea-based detention of EPWs, detainees, and civilians.²⁸ In accordance with GC III, AR

²² *Id.* art. 23. Article 23 states, “Prisoners of War may only be interned only in premises located on land affording guarantee of hygiene and healthfulness.” Article 23 states, “No prisoner of war . . . may be exposed to hostile fire.” *Id.* at 23.

²³ Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II].

²⁴ *Id.* art. 16.

²⁵ See COMMENTARY, II GENEVA CONVENTION RELATIVE TO THE WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA (Jean Pictet., 1960) [hereinafter PICTET COMMENTARY GC II].

²⁶ *Id.*

²⁷ *Id.* art. 16; see also *id.* at 115–16. The Article 16 commentary provides the limits of the captor’s decision to temporarily hold on board one its ships the enemy wounded, sick and shipwrecked pending transfer to land, (2) land them in neutral territory, and (3) returned the wounded to their home country.

²⁸ U.S. DEP’T OF ARMY, ARMY REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Nov. 1997) [hereinafter AR 190-8] (also published as a multi-service

190-8 requires detainees and EPWs to be interned on land, yet allows the *temporary* detention of EPWs and civilians on board naval vessels. The regulation places no specific time constraint on the detention; however, AR 190-8 provides that the sea-based detention is “limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.”²⁹ Thus, the temporary detention of enemy combatants aboard naval warships is permitted; however, the advising judge advocate must recognize the limited nature of the detention, and distinguish it from the longer-term detention permitted in a land-based internment facility.

Having discussed the detention authority for sea-based detention of enemy combatants, the next section will address the authority for detaining civilians and unprivileged belligerents on naval warships during armed conflict.

C. Detention of Civilians At Sea—Protected Persons and Unprivileged Belligerents

Not all civilians are alike, and numerous authorities exist for the detention of civilians within the framework of LOAC. These authorities for detention and requirements for treatment of civilians during armed conflict vary based upon the status and classification of the civilian. This section will address the authority for detention and treatment of civilians

regulation as MCO 3461.1, OPNAVINST 3461.6, AFJI 31-30). The regulation provides:

Special policy pertaining to the temporary detention of EPW, CI [Civilian Internee], RP [Retained Person] and other detained persons aboard United States Naval Vessels:

(1) Detention of EPW/RP on board naval vessels will be limited.

(2) EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to another vessel for transfer to a shore facility.

(3) EPW/RP may be temporarily held aboard naval vessels while being transported between land facilities. They may also be treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.

(4) Holding of EPW/RP on vessels must be temporary, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.

(5) Use of immobilized vessels for temporary holding of EPW/RP is not authorized without Secretary of Defense approval.

Id. para. 2-1(f)(2)(b).

²⁹ *Id.*

who are considered “protected persons” under GC IV as well as those individuals considered “unprivileged belligerents.”³⁰

1. Detaining the Civilian in LOAC—Protected Persons

Article 78 of GC IV allows civilians from an enemy nation who fall under the control of a belligerent to be interned if necessary for security purposes.³¹ Article 2 states that GC IV provisions on civilian internees apply only when two parties are engaged in international armed conflict and in cases of total or partial occupation of the territory of a party to the convention.³² When considered “protected persons,” the captor may not remove the civilians from the occupied territory in which they reside unless the “security of the population or imperative military reasons demand.”³³ When considered “protected persons” under Article 4 of GC IV, detained enemy civilians will receive certain protections.³⁴ Such protections include prohibiting internment “in areas particularly exposed to the dangers of war.”³⁵ Further, GC IV provisions may not apply to all civilians detained during armed conflict, such as Al-Qaeda terrorists or persons who engage in hostilities against the

³⁰ See GC III, *supra* note 16, art. 4. GC IV, *supra* note 17, arts. 4, 5 (Article 4 defines “protected persons” and Article 5 contains derogations from requirements of GC IV for various civilians including spies and persons hostile to the security of the State) (establishing limitation providing categories of persons including of POW status). Analysis of detention of civilians within GC III is beyond the scope of this primer. For further information on this matter, see Colonel K.W. Watkins, *Combatants, Unprivileged Belligerents, and Conflicts in the 21st Century* 18 (June 2004) (Int’l Humanitarian Law Research Initiative, Harvard Program on Humanitarian Policy and Conflict Research, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge), available at <http://ihl.ihlresearch.org/index.cfm?pageId=2069>.

³¹ GC IV, *supra* note 17, art. 78.

³² *Id.* art. 2. Article provides that GC IV applies (1) “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” (2) in “cases of partial or total occupation of the territory of a High Contracting Party” or (3) when in the case where one of the parties to the conflict is not a High Contracting Party, but “accepts and applies the provisions thereof.”

³³ *Id.* art. 49.

³⁴ *Id.* art. 4, arts. 79–135. An analysis of the extent of these protections is beyond the scope of this primer.

³⁵ *Id.* art. 4, at 83. Article 4 states:

Persons protected by the Convention are those who, at any given moment and in any manner whatsoever, find themselves, in case of a conflict or occupations, in the hands of a Party to the conflict or occupations, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Id. art. 4; see also AR 190-8, *supra* note 28, at 32 (“A civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.”).

occupying power, as they may be considered unprivileged belligerents.³⁶

2. Detaining the Unprivileged Belligerent during LOAC

Like the name implies, unprivileged belligerents are persons who engage in unlawful combatant acts and may be prosecuted under the domestic laws of the captor.³⁷ This individual is labeled “unprivileged” because he will not receive the privileges normally afforded to prisoners of war.³⁸ This “unprivileged belligerent” class is defined as “persons who are not entitled to treatment either as peaceful civilians or as prisoners of war because they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949.”³⁹

The 2009 MCA defines an unprivileged belligerent as an individual (other than a privileged belligerent) who—

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) was a part of Al-Qaeda at the time of the alleged offenses under this chapter.⁴⁰

The term “unprivileged belligerent” as defined in the 2009 Military Commissions Act (MCA) replaces the previous term “unlawful enemy combatant.”⁴¹

³⁶ GC IV, *supra* note 17, art. 5. See also Memorandum from Jack L. Goldsmith, III, Assistant Attorney Gen. to the President, subject: Protected Person Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), available at <http://www.justice.gov/olc/2004/gc4mar18.pdf> (analyzing GC IV’s applicability to civilians during Operation Iraqi Freedom to determine “protected person” status of certain civilians and issuing controversial opinion that captured Al-Qaeda do not receive protected person status under GC IV).

³⁷ GARY. D. SOLIS, *THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR* (Cambridge, 2010).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.

⁴¹ See U.S. DEP’T OF DEF., DIR. 2310.01E, *THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM* (5 Sept. 2006) [hereinafter DODD 2310.01E].

Unlawful enemy combatants are persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

Within LOAC, a “terrorist” is often considered to be an unprivileged belligerent because of his hostile acts committed outside of a combatant status.⁴² The United States’ authority to detain an unprivileged belligerent is found within the laws of war as well as the inherent right of self-defense contained in the U.N. Charter.⁴³ Domestically, the power is vested with the President in his authority as Commander-in-Chief.⁴⁴ Additionally, if an unprivileged belligerent is a person the President “determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons” such as a member of Al-Qaeda, then the 2001 Congressional Authorization to Use Force (AUMF) will permit the detention.⁴⁵

Army Regulation 190-8 as previously discussed will also apply to civilians, including unprivileged belligerents.⁴⁶ Considering the unprivileged belligerent would fall within the category of a “detained person” under AR 190-8, the detention must still be temporary in nature.⁴⁷ Thus, a naval

Id. See also Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (using the term “unlawful enemy combatant”).

⁴² Watkins, *supra* note 30, at 10.

Exclusion of a group from combatant status is perhaps most easily applied in respect of terrorist organizations that by definition do not respect the fundamental distinction between combatants and civilians in their actions and sometimes overtly reject any requirement to do so.

Id. See SOLIS, *supra* note 37, at 206–11 (providing further analysis on unprivileged belligerents/unlawful combatants as it pertains to Taliban and Al-Qaeda).

⁴³ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense”); see also Watkins, *supra* note 30, at 4.

⁴⁴ U.S. CONST. art. II, § 2. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01b, *STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES* encl. A, para. 1(D) (June 13, 2005) [hereinafter CJSI 3121.01b]; Watkins, *supra* note 30, at 18.

⁴⁵ Authorization to Use Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. The AUMF states:

[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

⁴⁶ AR 190-8, *supra* note 28, para. 2-1(f)(2)(b) (“Special policy pertaining to the temporary detention of EPW, CI, RP and other detained persons aboard United States Naval Vessels”). In the author’s opinion, detained unprivileged belligerent may be considered “other detained” persons under AR 190-8.

⁴⁷ *Id.*

commander has the legal authority in international law, domestic law, and service regulations to temporarily detain civilians and unprivileged belligerents on board the warship during armed conflict. The advising judge advocate should also be aware of historical examples of sea-based *temporary detentions* of belligerents during armed conflict.

E. Examples of Temporary Detention at Sea within LOAC

History provides a few examples of permissible temporary detentions of EPWs at sea. During the Falklands War in the early 1980's, the United Kingdom housed Argentine prisoners aboard the British warships based on practical concerns of being able to provide safer and more habitable temporary detention facilities.⁴⁸ Likewise, during Operation Enduring Freedom (OEF), the United States placed Taliban and Al-Qaeda detainees on board amphibious assault ships for temporary detention and transit to more permanent land-based internment facilities.⁴⁹ Later, during Operation Iraqi Freedom (OIF), due to operational exigencies on the battlefield, the amphibious assault ship USS *Dubuque* served as a temporary detention facility for captured Iraqi EPWs.⁵⁰ These detentions exemplify situations in which modern forces needed to temporarily place EPWs and detainees during armed conflict on board naval warships. Acknowledging that LOAC and service regulations permit temporary detentions on warships, the advising judge advocate must take the next step of identifying the legal requirements for care and treatment of these detained persons during armed conflict.

F. Treatment of Detained Persons at Sea Within LOAC

The standards of treatment for persons detained within LOAC will vary based upon the person's status. The Third and Fourth Geneva Conventions articulate multiple standards of treatment for POWs/EPWs, civilians, and detainees.⁵¹ In an international armed conflict between two

State parties, a detained person falling within the requirements of Article 4 to GC III for POW status will receive the specified protections provided under GC III.⁵² Persons detained within a "conflict not of an international character" are afforded the protections of Article 3 to GC III, which requires that detained persons will be "treated humanely."⁵³ "Protected persons" as defined by Article 4 of GC IV will receive protections identified in Articles 79-135 of GC IV.⁵⁴ These specified protections provide due process and treatment requirements for detained civilians

At a minimum, regardless of the status of the detainee, all persons detained on board a U.S. warship will be treated humanely and receive the protections afforded in Common Article 3 to the Geneva Conventions.⁵⁵ The Detainee Treatment Act of 2005 provides the minimal treatment standards for all detainees under the control of Department of Defense (DoD) personnel, stating that "[n]o individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."⁵⁶ The definition of "[c]ruel, inhuman, or degrading treatment or punishment" under the Detainee Treatment Act "means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."⁵⁷ Department of Defense Directive 2310.01E (DoDD 2310.01E) and AR 190-8 also require humane treatment and medical care for detainees.⁵⁸ The advising judge advocate should also review other regulations pertaining to certain actions (such as interrogation) that are allowed while the detained person is in U.S. custody.

⁴⁸ During the war, the British captured over 10,000 Argentine POWs and thousands of POWs were placed on British vessels. MAX HASTINGS & SIMON JENKINS, *THE BATTLE FOR THE FALKLANDS* (1991). See also MARTIN MIDDLEBROOK, *TASK FORCE: THE FALKLANDS WAR* 247, 381, and 385 (1982) (recording that "13,000 Argentine soldiers surrendered, winter was fast approaching, and the tent shelters the British had sent were lost in the sinking of the ATLANTIC CONVEYOR.").

⁴⁹ See Eric Schmitt, *U.S. Captures Senior Al Qaeda Trainer*, N.Y. TIMES, Jan. 6, 2002, at A1, available at <http://www.nytimes.com/2002/01/06/international/asia/06DETA.html?ex=1156824000&en=e90aaf17230648ec&ei=5070> (discussing detainees including American Taliban John Walker Lindh and former Taliban ambassador to Pakistan, Mullah Abdul Salam Zaeef detained aboard the USS *Bataan*).

⁵⁰ Cook et al., *supra* note 15, at 16. The author conducted a series of interviews and also posits that the government of Kuwait's refusal to allow detention facilities contributed to the need to temporarily detain the EPWs on board the naval vessel. *Id.*

⁵¹ See GC III, *supra* note 16; GC IV, *supra* note 17.

⁵² GC III, *supra* note 16.

⁵³ *Id.*

⁵⁴ GC IV, *supra* note 17, arts. 79-135.

⁵⁵ See, e.g., Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 [hereinafter Detainee Treatment Act], Memorandum from Deputy Sec'y of Def. to Secretaries of the Military Dep'ts, subject: Application of Common Article 3 of the Geneva Conventions to the Treatment of Detainees in the Department of Defense (7 July 2006) [hereinafter England Memo], available at <http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf>. After the Supreme Court's ruling in *Hamdan v. Rumsfeld*, Deputy Secretary of Defense issued new guidance to Department of Defense in regards to individuals detained in the Global War on Terrorism. *Id.* (citing 548 U.S. 557 (2006)); U.S. DEP'T OF DEF., DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. E2.1 (5 Sept. 2006) [hereinafter DoDD 2310.01E]; AR 190-8, *supra* note 28.

⁵⁶ Detainee Treatment Act, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ DoDD 2310.01E, *supra* note 55, at E4; AR 190-8, *supra* note 28, at 2.

Given the previous hostile acts of EPWs or other detained persons, the commanding officer may desire to question that individual for intelligence or other military purposes. The judge advocate should be advised that interrogations, debriefing, or tactical questioning is only permitted under certain limited circumstances.⁵⁹ Army Field Manual 2-22.3 (FM 2-22.3) contains the only authorized interrogation techniques.⁶⁰ In addition to FM 2-22.3, the judge advocate should review DoDD 3115.09, *Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, for further guidance pertaining to questioning the detained person.⁶¹ Having discussed detentions and basic treatment requirements within LOAC, this primer will now address the rules for detentions at sea during non-armed conflict situations.

III. Detention of Persons at Sea During Situations Not Involving Armed Conflict

The legal basis for peacetime detention of persons at sea will vary based upon the classification of the person being detained or the circumstances surrounding the detention itself. Rarely is the legal authority for such detention neatly spelled out. As previously discussed, LOAC applies to those unprivileged belligerents, EPWs, and enemy civilians detained during periods of armed conflict, but LOAC is not an applicable detention authority for peacetime detention of civilians. Through a series of vignettes pertaining to typical peacetime detentions at sea, Section A, *infra*, will identify the authority for conduct-based detentions arising from a suspicion of criminal activity. Section B, *infra*, will identify the authority for status-based detentions of a person who engages in no criminal conduct, yet may be detained based upon their status or circumstances. Finally, Section C will address the basic care and treatment requirements for those persons detained during these non-armed conflict situations.

⁵⁹ U.S. DEP'T OF THE ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTION OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3]; DoDD 2310.01E *supra* note 55, para. E2.1., U.S. DEP'T OF DEF., DIR. 3115.09, DOD INTELLIGENCE, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING (9 Oct. 2008) [hereinafter DoDD 3115.09]; Exec. Order No. 13,491, 74 Fed. Reg. 4893 (2009) [hereinafter EO 13,491].

⁶⁰ See § 1002, 119 Stat. 2680 (“No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation”); see also EO 13,491, *supra* note 59 (a detainee “shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3”); FM 2-22.3, *supra* note 59.

⁶¹ See DoDD 3115.09, *supra* note 59; see also EO 13,491 *supra* note 59, § 74.16 (A detainee “shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.”).

A. Criminal (Conduct-Based) Detentions

Even though the world’s oceans are vast open spaces with no single government, they are not lawless places where criminal activity can be carried out with impunity. When criminal conduct occurs, U.S. naval forces have the authority to take action on the high seas, to include detaining criminals to allow further action against them by the U.S. Government or its allies. This sub-section will focus on those criminal acts involving piracy, terrorism, and drug-trafficking.

1. Detaining the Pirate

Scenario: You are the Staff Judge Advocate aboard the USS *Wasp* (LHD-1) assigned to a Combined Task Force, which is conducting anti-piracy operations. The ship has responded to a pirate attack on an Indian-flagged cargo ship. The attack was thwarted by shipboard forces, ten pirates are under U.S. control, but are still on board the Indian cargo vessel.⁶² The *Wasp*’s commanding officer (CO) turns to you and asks, “Can we bring the pirates aboard the *Wasp* and lock ’em up?”

Both the Law of the Sea and international law encourages repression of piracy and permits the detention of pirates on board a U.S. naval warship. The primary treaty for detention of pirates is found in the U.N. Convention on the Law of the Sea (UNCLOS III).⁶³ Article 100 of UNCLOS III provides a basis for detaining suspected pirates by requiring states to “cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”⁶⁴ Article 105 of

⁶² Press Release, Commander, U.S. Naval Forces Cent. Command/5th Fleet Pub. Affairs, More Suspected Pirates Apprehended in the Gulf of Aden (Feb. 12, 2009), available at <http://www.cusnc.navy.mil/articles/2009/028.html> (providing a similar historical account of this fictional vignette).

⁶³ Although the United States is not a party to UNCLOS III, it views the navigation and overflight provisions as customary international law and, except for the deep seabed mining provisions, adheres to the provisions of UNCLOS III. See UNCLOS III, *supra* note 7; U.S. Oceans Policy, Statement by the President, Mar. 10, 1983, 19 WEEKLY COMP. PRES. DOC. (1983); NWP 1-14M, *supra* note 7, at 1.3.

⁶⁴ UNCLOS III, *supra* note 7; see also *id.* art. 101. The U.N. Law of the Sea Convention defines piracy as consisting of any of the following acts

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

UNCLOS III provides that “[o]n 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.”⁶⁵ Providing further authority for the detention, Article 107 of UNCLOS III states that only “warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service authorized to that effect” are authorized to seize vessels on account of piracy.⁶⁶

United Nations Security Council Resolutions (UNSCRs) pertaining to piracy operations which are routinely issued and renewed will also serve as legal authority authorizing detention. Pursuant to Chapter VII, Article 39 of the UN Charter, the Security Council has authority to identify “the existence of any threat to peace, breach of the peace, or act of aggression” and to determine which measures should be employed to address the threats.⁶⁷ Article 25 of the U.N. Charter binds the decisions of the Security Council to members of the U.N. Charter.⁶⁸ The Security Council will often issue its determinations made in accordance with Article 39 through a council resolution.⁶⁹ If the above vignette occurred in the Gulf of Aden near Somalia, then there are a number of UNSCRs which call upon states to combat piracy in that region and which serve as international legal authority to detain the pirates on board

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Id.

⁶⁵ *Id.* art. 105. See also Convention on the High Seas, art. 19, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter 1958 High Seas Convention] (Article 19 states, “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 taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.” The United States is a party to the 1958 High Seas Convention.).

⁶⁶ UNCLOS III, *supra* note 7, art. 107. See also International Maritime Organization Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter SUA Convention]; Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) [hereinafter SUA Protocol], available at <http://www.state.gov/t/isn/trty/81727.htm>. Similar to UNCLOS III, the SUA Convention and its 2005 Protocol (SUA protocol) also prohibit certain acts which affect the safety of maritime navigation. Certain pirate-type acts may not fall within Article 101 of UNCLOS III (i.e., because of political motive), but may be prohibited under the SUA Convention and SUA protocols.

⁶⁷ U.N. Charter art. 39 (measures to be employed shall be “taken in accordance with Articles 41 and 42, to maintain and restore international peace and security”).

⁶⁸ *Id.* art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”). *Id.*

⁶⁹ See NATIONAL SECURITY LAW 220–221 (John N. Moore & Robert F. Turner, eds., Carolina Press 2005) (analyzing the UN’s authority to act under Article 39 and the methods and language of its resolutions).

the naval warship.⁷⁰ The advising judge advocate should also consider other sources of authority for detention of the pirates such as U.S. domestic law, service regulations, rules of engagement, and operational orders.

United States domestic law provides authority for detaining pirates beginning with the U. S. Constitution. Article 1, Section 8 states that “[t]he Congress shall have Power, . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”⁷¹ Through 18 U.S.C. § 1651, Congress exercised its constitutional authority and criminalized acts of piracy on the high seas.⁷² Congress has also authorized the President

to instruct the commanders of the public armed vessels of the United States to *subdue, seize, take*, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.⁷³

As a matter of policy, the unclassified Standing Rules of Engagement (SROE) also address repression of piracy, stating that “U.S. warships and aircraft have an obligation to repress piracy on or over international waters directed against any vessel or aircraft, whether U.S. or foreign flagged.”⁷⁴ In addition, the practitioner will likely have

⁷⁰ S.C. Res.1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res.1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res.1846, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res.1814, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res.1910, U.N. Doc. S/RES/1910 (Jan. 28, 2010) (all resolutions calling on States to participate in defeating piracy and armed robbery off Somalia’s coast by deploying naval vessels and military aircraft, and through seizure and disposition of boats and arms used in the commission of those crimes).

⁷¹ U.S. CONST. art. I, § 8, cl.10.

⁷² 18 U.S.C. § 1651 (2006) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”). *Id.*

⁷³ 33 U.S.C. § 382 (2006)(emphasis added).

⁷⁴ CJCSI 3121.01b, *supra* note 44, at A-4. This unclassified version of the SROE also provides:

For ship and aircraft commanders repressing an act of piracy, the right and obligation of unit self-defense extend to the persons, vessels or aircraft assisted. Every effort should be made to obtain the consent of the coastal state prior to continuation of the pursuit if a fleeing pirate vessel or aircraft proceeds into the territorial sea, archipelagic waters or airspace of that country.

access to classified material and should review the classified version of the SROE as well as any additional theater-specific rules of engagement provided by the chain-of-command. The practitioner should also reference any regional, fleet, or command operational orders pertaining to detainee practices and treatment.

Through UNCLOS III, UNSCRs, U.S. Constitution, U.S. Code § 1651, applicable SROE and operational orders, the judge advocate should advise the CO in the above scenario that he may detain the pirates.⁷⁵ The next subsection will present another scenario involving a different group of criminals who operate on the seas: *terrorists*.

2. Detaining the Terrorist

Scenario: After the pirates have been transported to authorities for subsequent prosecution, the USS *Wasp* continues its operations. Intelligence reports indicate that a Panamanian-flagged cargo vessel departed from the Philippines heading for Yemen. The Panamanian vessel's cargo contains bomb-making material, including suspected chemical weapons material. The *Wasp* was tasked with intercepting the cargo vessel and a boarding team discovers suspected chemical weapons material. The vessel's crew has been assembled and corralled aboard the Panamanian vessel. Some are suspected of being members of Abu Sayyaf, a terrorist organization based in the Philippines. The *Wasp* CO turns to you and asks, "I want to detain the suspected terrorists on board *Wasp*. Are there going to be any legal problems with that?"

UNCLOS III does not address terrorism or suspicion of terrorism as a basis for interception or detention.⁷⁶ However, international law provides a variety of legal bases for interception of vessels at sea, which may also lead to the requisite legal authority to detain a suspected terrorist at sea.⁷⁷ 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.⁷⁸ Depending upon

Id.

⁷⁵ The judge advocate should make appropriate arrangements with the State Department via the chain of command in order to ensure proper transfer of the pirates. In recent years, U.S. warships have temporarily detained pirates on board vessels pending disposition and transfer to various countries for subsequent prosecution. See also Eva Strickmann, *EU and NATO Efforts to Counter Piracy off Somalia: A Drop in the Ocean?*, INT'L SEC. INFO. SERV. (Europe) (Oct. 2009), http://www.isis-europe.org/pdf/2009_artrel_332_esr_46-eu-nato-counterpiracy.pdf; Jacquelyn S. Porth, *Kenya Accepts Seven Alleged Pirates from U.S. Navy for Trial*, AMERICA.GOV, Mar. 5, 2009, http://www.america.gov/st/peacesec-english/2009/March/20090305170025_sjhtrop0.3772089.html.

⁷⁶ UNCLOS III, *supra* note 7, art. 101. Article 101 requires the piratical acts to be "committed for private ends."

⁷⁷ NWP 1-14M, *supra* note 7, at 4-7.

⁷⁸ See David Wilson, *Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign*

the circumstances and authorization, the naval warship may conduct either a permissive or non-permissive interdiction. Article 110 of UNCLOS III allows a non-permissive boarding if the suspect ship is not entitled to complete immunity in accordance with Articles 95 and 96 of UNCLOS, is engaged in piracy, slave trading, unauthorized broadcasting, or is without nationality.⁷⁹ Thus, UNCLOS will not provide authority for a *non-permissive* boarding based (solely?) upon suspicion of terrorism or transporting terrorists.⁸⁰

The naval warship, however, may conduct a boarding pursuant to "flag state consent" in which the suspect vessel's flag state has either provided *ad hoc* consent or prior consent to the requesting State.⁸¹ Under the latter approach, nations may negotiate and reach agreements to obtain advanced consent to board under certain circumstances.⁸² The naval warship may also board the suspect vessel with "Master's Consent," in which the suspect ship's master consents to the boarding, and could also include consensual search of the vessel.⁸³ In other scenarios, however, a master's consent to board or search will not automatically result in authority to arrest or detain suspects without consent of the flag state.⁸⁴

As an example of the flag state consent regime, the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention)⁸⁵ and its 2005 Protocol (SUA Protocol) may serve as authority for the interception and subsequent detention of terrorists in a maritime environment.⁸⁶ Articles 3, 3*bis*, 3*ter*, and 3*quater* of the SUA Protocol prohibits certain acts of terrorism that involve executing, or providing assistance to, an attack on a ship, causing an explosion, hijacking a vessel, or transporting weapons of mass destruction (WMD) intended for terrorist purposes.⁸⁷ The 2005 SUA Protocol expands on the 1988 SUA Convention by providing a procedure for state vessels to board suspect

Warships, 55 NAVAL L. REV. 157, 164-65 (2008) ("However, unlike piracy, once a foreign warship boards and finds evidence of slavery, it does not have the legal authority to seize the ship or arrest its crew."); UNCLOS III, *supra* note 7, art. 110.

⁷⁹ UNCLOS III, *supra* note 7, art. 110. Articles 95 and 96 pertain to warships and state-owned or operated ships in non-commercial service; NWP 1-14M, *supra* note 7, at 4-7.

⁸⁰ UNCLOS III, *supra* note 7, art. 110.

⁸¹ NWP 1-14M, *supra* note 7, at 4-7.

⁸² *Id.* at 3-12, 4-7.

⁸³ *Id.* at 3-12.

⁸⁴ *Id.* at 3-12.

⁸⁵ SUA Protocol, *supra* note 66. The 1988 adoption of the SUA Convention in Rome was intended to improve maritime safety in the aftermath of the 1985 hijacking of the *Achille Lauro*.

⁸⁶ SUA Convention, *supra* note 66.

⁸⁷ *Id.*

vessels from another state.⁸⁸ Upon receiving flag state consent either via *ad hoc* consent, implied consent, or advanced consent, Article 8*bis* of the SUA Protocol permits the boarding of a suspect vessel when the requesting party has “reasonable grounds” to suspect that the vessel has or is about to engage in acts prohibited by Articles 3, 3*bis*, 3*ter*, and 3*quater* of the SUA Protocol.⁸⁹ When evidence of such prohibited conduct is discovered, the flag state “may also authorize the detention of the ship, cargo and persons on board.”⁹⁰ In the above scenario, since the terrorist suspects were transporting chemical weapons materials in violation of Article 3, 3*bis*, 3*ter*, and 3*quater* of the SUA Protocol, the detention will be permitted so long as the flag state of Panama consents to the detention.⁹¹

Another potential authority for the detention of a suspected terrorist transporting WMD on the seas is a bilateral agreement stemming from the Proliferation Security Initiative (PSI).⁹² Although the PSI is not a treaty, the PSI is a cooperative initiative between the United States and over ninety nations designed to limit the illicit trade and transport of WMD.⁹³ The PSI in itself will not establish authority for detention of the terrorist, but provides the means to board the suspected vessel based on the PSI’s individual authorizations from bilateral agreements between the United States and the suspect vessel’s flag state.⁹⁴ In detaining persons as part of this cooperative agreement, the U.S. naval warship would initially notify the vessel’s flag state via U.S. diplomatic channels prior to boarding.⁹⁵ Absent exigent circumstances,

the U.S. warship would have the opportunity to coordinate efforts or obtain the authorization for detention of suspected terrorists if necessary.⁹⁶

In the above scenario, the judge advocate should consider any applicable operational agreement from the flag state of the vessel (Panama) which permits boarding or inspection. A bilateral operational agreement may also give general or specific authority for detention of the suspected terrorist.⁹⁷ Thus, detention of terror suspects grounded in consent (via flag state, bilateral agreement, or master’s consent) is key to establishing the authority to detain the terror suspect. However, these forms of consent are not the only mechanisms for the warship commander to legally detain terrorist suspects.

In the absence of direct detention authority from a bilateral agreement, treaty, or flag state consent, the naval warship may detain based upon self-defense. Depending on the imminence of the threat, the detention could be supported as a matter of self-defense under Article 51 of the U.N. Charter, or the SROE.⁹⁸ Terrorists are often considered unprivileged enemy belligerents, and would fall within the authorities for detention as previously discussed in Part II concerning detention within LOAC. However, terrorists are

⁸⁸ *Id.*

⁸⁹ *Id.* at 8*bis*(5). See also Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DENV. J. INT’L L. & POL’Y 287, 288 (2007) (analyzing the changes to the 2005 SUA Protocol and the shipboarding procedures under the SUA Protocol, 8*bis*).

⁹⁰ SUA Protocol, *supra* note 85, at 8*bis*(6).

⁹¹ See also *id.* at 8*bis*(8). Should the flag state fail to provide consent, the flag state may choose to exercise jurisdiction over the suspect ship. “For all boardings pursuant to this article, the flag state has the right to exercise jurisdiction over a detained ship, cargo, or other items and person on board, including seizure, forfeitures, arrest, and prosecution.”

⁹² U.S. Dep’t of State, Proliferation Security Initiative, <http://www.state.gov/t/isn/c10390.htm> (last visited Mar. 5, 2010) [hereinafter PSI]; see also Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, ARMS CONTROL TODAY (June 2004), http://www.armscontrol.org/act/2004_06/Joseph (providing a more in depth historical background on the PSI).

⁹³ PSI, *supra* note 92.

⁹⁴ See Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT’L L. 507 (2005) (analyzing the PSI for implications on boarding a detention of vessels, cargo, or persons). A detailed analysis of the shipboarding provisions of the PSI, as well as the intricacies of the multiple bilateral agreements for shipboarding and detention of persons transporting WMD, is beyond the scope of this primer.

⁹⁵ U.S. DEP’T OF NAVY, SEC’Y INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT 5 (26 Jan. 2006) (Acknowledging that the DoD policy prohibits direct involvement in law enforcement even though the Possee Comitatus Act (PCA) does not encompass the Navy and Marine

Corps). See also U.S. DEP’T OF DEF., DIR 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. E4.3 (16 Jan. 2009) [hereinafter DODD 5525.5].

⁹⁶ DODD 5525.5, *supra* note 95, at E4.

⁹⁷ PSI, *supra* note 92 (stating that the United States has operational agreements with Panama and the Philippines pertaining to the PSI). See also Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice of Article XV, para. 3 (May 12, 2004), available at <http://www.state.gov/t/isn/trty/32858.htm> (last visited Mar. 5, 2010).

Boardings and searches pursuant to this Supplementary Arrangement shall be carried out by law enforcement officials from law enforcement ships or aircraft, or from technical support vessels of a Party or of third States, and, in emergencies and under exceptional circumstances, may be assisted by designated auxiliary personnel from technical support vessels or aircraft of a Party or of third States. However, when law enforcement officials are not readily available, boardings and searches undertaken pursuant to Article X of this Supplementary Arrangement to suppress proliferation by sea may, upon advance notice to the other Party, also be carried out by designated auxiliary personnel. These personnel shall in such cases be subject to the provisions in this Supplementary Arrangement governing the conduct and operations of law enforcement officials

Id.

⁹⁸ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense”); CJSI 3121.01b, *supra* note 44, at A-4.

often detained and prosecuted under a criminal regime as well.⁹⁹ The “criminal” versus “combatant” classification of a “terrorist” can sometimes be confusing.¹⁰⁰ The advising judge advocate should determine if higher authority has clarified the parameters of “criminal” or “combatant” classification in advance of detaining the suspected terrorist.

The U.S. Code defines the federal crime of terrorism by criminalizing certain activities, but there is not a specific crime of “terrorism.”¹⁰¹ Through 18 U.S.C. § 2332a and 18 U.S.C. § 2332b, the U.S. Code criminalizes acts of terrorism and unlawful use or possession of WMD.¹⁰² Prior interagency coordination through the chain of command is advised in order to proceed under either a criminal-based detention or LOAC-based detention.¹⁰³ If the incident occurs within U.S. territorial jurisdiction, then the constraints of DoD Regulation 5525.5 pertaining to the Posse Comitatus Act (PCA) may prohibit the detention of the suspect by the naval warship.¹⁰⁴ However, if a U.S. Coast Guard Law Enforcement Detachment (LEDET) is available to support the initial arrest of the terrorists, further detention on board the naval vessel for transport may be permitted.¹⁰⁵ Additionally, emergency circumstances may permit continued detention via request by the U.S. Attorney General to the Secretary of Defense.¹⁰⁶ Assuming that any of the international treaties, domestic statutes, or regulations apply, further detention of the terrorist will be warranted,

⁹⁹ SOLIS, *supra* note 37, at 164–67 (detailing the complexities of the dual approach to combating terrorism through the criminal justice and military models).

¹⁰⁰ *Id.* at 164.

¹⁰¹ 18 U.S.C. § 2332b(g)(5) (2006). See also *Terrorist Financing*, U.S. ATTORNEY’S BULL., vol. 51, no. 4 (July 2003), available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5104.pdf (analyzing various U.S. criminal statutes pertaining to terrorist activity); ELIZABETH MARTIN, CONGRESSIONAL RESEARCH SERV., RS21021, TERRORISM AND RELATED TERMS IN STATUTE AND REGULATION: SELECTED LANGUAGE (2006), available at <http://www.fas.org/sgp/crs/terror/RS21021.pdf> (compiling various definitions of terrorism within the U.S. Code).

¹⁰² 18 U.S.C. § 2332a (2006); *id.* § 2332b.

¹⁰³ See Nat’l Sec. Presidential Dir.-41/Homeland Security Presidential Directive-13 (NSPD-41/HSPD-13) (Mari. Sec. Policy) (Dec. 21, 2004).

¹⁰⁴ The PCA will likely have no extraterritorial application. See *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948), *cert. denied*, 226 U.S. 918 (1949); *D’Aquino v. United States*, 192 F.2d 338, 351, *cert. denied*, 343 U.S. 935 (1952); Memorandum from Office of the Assistant Attorney Gen., to General Brent Scowcroft, subject: Extraterritorial Effect of the Posse Comitatus (3 Nov. 1989). See UNCLOS III, *supra* note 7, art. 2 (“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”).

¹⁰⁵ 10 U.S.C. § 379 (2006) (requiring assignment of Coast Guard personnel to naval vessels for law enforcement matters); *id.* § 374; NWP 1-14M, *supra* note 7, at 3.11.3.2.3, ANNOTATED SUPPLEMENT, *supra* note 15, at 3.11.3.2.3. See also Douglas Daniels, *How to Allocate Responsibilities Between the Navy and Coast Guard in Maritime Counterterrorism Operations*, 61 U. MIAMI L. REV. 467 (Jan. 2007).

¹⁰⁶ 10 U.S.C. § 382 (Section 382 pertains to DoD assistance to law enforcement during emergency situations involving chemical or biological WMD).

and the warship would continue its operations until able to coordinate with appropriate authorities for the hand-over of the terrorist for prosecution.

Thus, deciphering the appropriate authority for detention of the terrorist is complex. The practitioner may have to maneuver through volumes of legal authority prior to arriving at the appropriate source for the detention. The next criminal conduct scenario involves counter-drug operations, which are frequently conducted by the U.S. Coast Guard and U.S. naval warships.

3. Detaining the Illegal Drug Trafficker

Scenario: Having successfully completed the counter-piracy mission and thwarted a terrorist operation, the USS *Wasp* was en route to homeport when it was routed to the Caribbean Sea for counter-drug operations. A U.S. Coast Guard LEDET has arrived on board and held meetings and briefings. New to drug interdiction operations, you begin contemplating the requisite authority for detaining drug smugglers and the requirements for their treatment on board the *Wasp*.

International law and the law of the sea require all nations to counter illegal drug-trafficking.¹⁰⁷ However, the law of the sea generally leaves the high seas jurisdiction and authority to interdict vessels suspected of drug trafficking with the suspect vessel’s flag state.¹⁰⁸ This means that U.S. vessels conducting drug interdiction on the high seas will do so with flag state or master’s consent. The DoD is the lead agency for U.S. monitoring of maritime illegal drug trafficking.¹⁰⁹ Maritime law enforcement is primarily conducted by the U.S. Coast Guard.¹¹⁰ Unconstrained by the PCA, the Coast Guard has the authority to detain, inspect, search, seize and arrest suspected drug traffickers.¹¹¹

¹⁰⁷ UNCLOS III, *supra* note 7, art. 108; see also U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, art. 17, Dec. 20, 1988 (entered into force Nov. 11, 1990), 28 I.L.M. 497 (1989), implemented by the United States in 46 U.S.C. app. § 70504 (2006) (“The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.”). See also *The Single Convention on Narcotic Drugs*, 1961, N.Y. (Mar. 30, 1961), 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204, including the protocol amending the Single Convention on Narcotics Drugs, 1961, Geneva (Mar. 25 1972), 26 U.S.T. 1439, T.I.A.S. 8118, 976 U.N.T.S. 3, is implemented by the United States in 22 U.S.C. § 2291 (2006).

¹⁰⁸ UNLCOS III, *supra* note 7, art. 108.

¹⁰⁹ 10 U.S.C. § 124(a)(1) (2006) (“The Department of Defense shall serve as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.”).

¹¹⁰ 14 U.S.C. § 2 (2006).

¹¹¹ *Id.* § 89 (“The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and water over which the United States has jurisdiction . . . [and] may at any time go on board of any vessel subject to the jurisdiction, or operation of any law, of the United States.”).

United States law and DoD regulations require a U.S. Navy warship engaging in drug interdiction operations to have a U.S. Coast Guard personnel or attached LEDET to supervise drug interdiction operations regardless of whether the ship is operating in international waters or United States domestic waters.¹¹² This requirement for LEDETs is in place so that the naval warship can execute this law enforcement action without violating the PCA (if operating in domestic U.S. waters) and to support the prosecution of the suspects by ensuring the operation is conducted by personnel with sufficient expertise and who will be available for trial. When the naval warship's commander is contemplating the detention of drug traffickers in international waters without having a U.S. Coast Guard LEDET supervise the operation, then the naval warship should coordinate efforts with the vessel's flag state by obtaining consent and acting in accordance with any standing agreement with the flag state prior to detaining the traffickers.¹¹³

The U.S. Navy warship (with U.S. Coast Guard LEDET presence) may also detain the traffickers under the authority of the Maritime Drug Law Enforcement Act provided the vessel is subject to the jurisdiction of the United States within the meaning of 46 U.S.C. § 70502(c).¹¹⁴ The detention of any drug traffickers will be authorized until the persons are transported to appropriate civilian authorities for disposition and prosecution.¹¹⁵

Conduct-based detentions present a number of challenges for the advising judge advocate in determining the appropriate legal basis for the detention. The judge advocate must not only consider the person's conduct which prompts the commander to seek detention, but also the location of the vessel, flag state of the vessel, agreements with the flag state, and even service regulations requiring certain personnel to participate in the operation. The legal issues are further complicated when the warship commander must "detain" innocent persons who are associated with criminal conduct (i.e. held hostage) or merely because of one status from perilous conditions. The next section will address the legal authority for detaining a person based upon his status or perilous condition.

¹¹² 10 U.S.C. § 379 (2006). See also DODD 5525.5, *supra* note 95, at E.4.1.3., enclosure E.4.

¹¹³ NWP 1-14M, *supra* note 7, at 3.8.

¹¹⁴ Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70502(b) to (c), 70503(a)(1) (2006) (Section 70502(c) identifies various categories of vessels subject to U.S. jurisdiction.).

¹¹⁵ See CTR. FOR LAW & MILITARY OPERATIONS, U.S. COAST GUARD—OPERATIONS LAW GROUP, GUIDE TO COUNTERDRUG OPERATIONS (2d ed. July 2010) (providing an excellent synopsis of U.S. Coast Guard counterdrug operations and legal bases for drug interdiction, detention, and prosecution) (on file with the author).

B. Non-Criminal (Humanitarian or Status-Based) Detentions

During peacetime operations on the high seas, U.S. warships are frequently called upon by individuals for rescue or assistance. When interdicting unsafe vessels, or responding to acts of terrorism, drug trafficking, or piracy, commanders of naval warships may have reason to hold certain persons, restrict their movements, and transport them to a specific location, even if the individual did not engage in nefarious activities. The next vignette describes two classes of persons that a naval warship may detain as a result of humanitarian or status-based concerns.

Scenario: While conducting counter-piracy operations, the USS *Wasp* encountered a small, overcrowded vessel containing more than seventy-five people on board. The vessel's seaworthiness was questionable, so the *Wasp* CO sent a small boat to investigate. The boat reported that the small vessel's engines have failed, and it appears to be slowly taking on water. The *Wasp* CO decides that all persons on board the vessel will be brought to *Wasp* for their safety. Once on board the *Wasp*, forty passengers from the boat seek asylum status; the remaining passengers are considered refugees. Additionally, five members of the crew are suspected of illegally trafficking the passengers. The CO wants to know the legal authority for holding the asylum-seekers/refugees and the crew members, his obligations for their treatment, and whether he needs to immediately transport the asylum-seekers/refugees back to shore. Sub-sections 1 and 2 will address the legal authority while Section C will address treatment requirements.

1. *The Mariner in Distress*

The CO has the authority to bring on board passengers and crewmembers as a result of distress conditions. Customary international law recognizes the duty of a mariner to come to the assistance of a vessel in distress at sea.¹¹⁶ Article 98 of UNCLOS III states:

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so

¹¹⁶ NWP 1-14M, *supra* note 7, at 3.2 ("The obligation of mariners to provide material aid in cases of distress encountered at sea has long been recognized in custom and tradition.").

far as such action may reasonably be expected of him;

(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.¹¹⁷

Articles 18(2) and 45 of UNCLOS III further authorize a ship to stop and anchor in the territorial sea of another State if necessary to render assistance to persons or aircraft in danger or distress.¹¹⁸ Section 0925 of the Navy Regulations imposes the same duty to render assistance to mariners in distress.¹¹⁹ Likewise, Coast Guard regulations impose a duty for assistance to distressed mariners and passengers.¹²⁰

Acting within customary international law and service regulations, the U.S. Navy has historically assisted mariners of all nationalities in times of distress.¹²¹ Thus the CO, in accordance with longstanding tradition and customary international law, has the authority to come to the aid of the mariners in distress and, if necessary, hold the distressed mariners aboard the naval warship. Restrictions on liberty and freedom of movement placed on such mariners will be discussed in Part C.

2. *The Asylum-Seeker/Refugee Taken Aboard the Naval Warship*

In international law, detaining asylum-seekers and refugees involves an analysis of non-refoulement and domestic immigration policies.¹²² Non-refoulement is the principle that asylum-seekers or refugees should not be expelled or returned to a location in which they may suffer persecution on account of that person's "race, religion,

nationality, membership of a particular social group or political opinion."¹²³ Immigration policies and laws are determined by each nation. As such, the authority to detain the asylum seeker will be governed by U.S. domestic law, policy and service regulations.¹²⁴ The naval warship commander is not authorized to grant asylum, but can grant the status of "temporary refuge."¹²⁵ The Customs and Immigration Service, Department of Justice may process and grant requests for asylum within the U.S., Puerto Rico and U.S. possessions.¹²⁶ Additionally, DoD personnel are not permitted to "directly or indirectly invite persons to seek asylum or temporary refuge."¹²⁷ Service regulations require different responses to asylum-seekers based on the location in which the asylum-seeker makes his request.¹²⁸

When the request for temporary refuge or asylum occurs in international waters or territories of exclusive U.S. jurisdiction, the applicant, at his request, will be received on board the naval vessel.¹²⁹ Should the request for temporary refuge or asylum occur in foreign territory such as another State's territorial seas, then "temporary refuge shall be granted for humanitarian reasons" on board the vessel "wherein life or safety of a person is put in imminent danger."¹³⁰ An asylum-seeker that makes a request for asylum to a U.S. warship in port or in foreign waters but is not in imminent danger would be referred to the nearest American embassy or U.S. Consulate.¹³¹ If "temporary refuge" is granted, the CO is not permitted to surrender the asylum-seeker to a foreign jurisdiction absent approval from the Secretary of the Navy (SECNAV) or higher authority.¹³²

In the above scenario, if the refugees/asylum-seekers were brought on board in international waters, and sought asylum from the United States, the CO should grant them

¹¹⁷ UNCLOS III, *supra* note 7, art. 98. See also 1958 High Seas Convention, *supra* note 65, art. 12.

¹¹⁸ UNCLOS III, *supra* note 7, arts. 18, 45, 52.

¹¹⁹ See also U.S. DEP'T OF NAVY, REG. 0939, GRANTING OF ASYLUM AND TEMPORARY REFUGE (1990) [hereinafter NAVY REGULATIONS 1990].

¹²⁰ U.S. COAST GUARD REGULATIONS (COMDTINST M5000.3 (Series B)), art. 4-2-5 (1992).

¹²¹ See, e.g., *JFK Rescues Iranian Mariners in Persian Gulf*, http://www.navy.mil/search/display.asp?story_id=14737 (last visited Jan. 20, 2010). On 14 August 2004, the USS *John F. Kennedy* rescued six Iranian mariners from a cargo dhow. The naval warship brought the Iranians aboard, provided medical treatment, and returned the Iranians to appropriate Iranian representatives.

¹²² See also U.S. DEP'T OF DEF., INSTR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE para. 3a (May 13, 2010) (C1, 17 May 1973) [hereinafter DoDI 2000.11]; 2 RESTATEMENT (THIRD), § 711 Reporters' Note 7, at 195-96, and 1 *id.*, § 433, Reporters' Note 4, at 338-39 (non-refoulement is by 8 U.S.C. § 1231(b)(3) (2006)).

¹²³ Convention Relating to the Status of Refugees art. 33 (1951) T.S. No 2545, 189 U.N.T.S. 150 [hereinafter 1951 Convention]. See also Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89-171 (Erika Feller, Volker Türk & Frances Nicholson ed., 2003), available at <http://www.unhcr.org/419c75ce4.html> (analyzing the principle of non-refoulement).

¹²⁴ See NAVY REGULATIONS 1990, *supra* note 119; U.S. DEP'T OF NAVY, SEC'Y, INSTR. 5710.22A, POLITICAL ASYLUM AND TEMPORARY REFUGE para. 5a(2)(d) (29 Dec. 2005) [hereinafter SECNAVINST 5710.22A].

¹²⁵ SECNAVINST 5710.22A, *supra* note 124, para. 5a(2)(d).

¹²⁶ DoDI 2000.11 *supra* note 122, para. 4a.

¹²⁷ See NAVY REGULATIONS 1990, *supra* note 119, para. 0939; SECNAVINST 5710.22A, *supra* note 122, para. 5; DoDI 2000.11 *supra* note 122, para. 4(b)(2)(c).

¹²⁸ SECNAVINST 5710.22A, *supra* note 124, para. 5.

¹²⁹ *Id.* para. 5.

¹³⁰ *Id.* para. 5(2)(a).

¹³¹ *Id.* para. 5(2)(e).

¹³² *Id.* para. 5(2)(a) - (b). For further information concerning processing requests for asylum, see NWP 1-14M, *supra* note 7.

“temporary refuge” until higher authority determines disposition.¹³³ The next section will discuss the care and treatment required for the refugees/asylum-seekers, as well as the permissible restrictions on their liberty while on board the warship.

C. Treatment Requirements for Peacetime Detention Situations Outside of LOAC

This section provides the practitioner with the requirements for treatment of the persons detained in the scenarios discussed in sections A and B above. For all classes of persons detained or held in the non-armed conflict scenarios, the basic treatment requirements remain the same. As in detentions during armed conflict, the Detainee Treatment Act of 2005 applies on warships during non-armed conflict situations.¹³⁴ The Detainee Treatment Act requires humane treatment for all persons under custody or control of DoD personnel.¹³⁵ However, the Detainee Treatment Act and service regulations do not specify the authorized liberty restrictions that warship’s CO may place on the detained person.

Commanders are “responsible for the satisfactory accomplishment of the mission and duties assigned to their command.”¹³⁶ In bringing aboard civilian passengers and detainees, the commanding officer may need to take appropriate safeguards to maintain the safety and security of the vessel and crew. Such security measures may involve limiting access to certain parts of the warship and segregating detainees as needed.¹³⁷ As previously mentioned, the minimum standard of treatment for detained persons under U.S. custody is humane treatment.¹³⁸ In addition to the general requirement of humane treatment for those persons detained or held, there are certain treatment guidelines pertaining to suspects detained pursuant to the SUA protocol, refugees, and Article 10 of the 2005 SUA protocol requires that “[a]ny person who is taken into

custody, or regarding whom any other measures are taken or proceeding are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.”¹³⁹

In detaining the asylum-seekers, the CO is also required to afford “every reasonable care and protection under the circumstances.”¹⁴⁰ The regulations provide no further guidance on what constitutes “reasonable care and protection.”¹⁴¹ The CO may also return the asylum-seekers to their home country, so long as it does not violate the principle of refoulement as discussed in the previous section. Coordination with higher authority will be required in accordance with service regulations.¹⁴²

Certain provision under the Safety of Life at Sea Convention (SOLAS) may serve as guidance during operations which pertain to detention of pirates, asylum-seekers, or refugees.¹⁴³ During counter-piracy operations, often suspected pirates are released due to insufficient evidence for prosecution. Further, persons detained during such operations may be innocent persons such as asylum-seekers, refugees, or a vessel’s crew held hostage. All of the classes of persons may be held aboard the U.S. warship prior to their release. Upon the release of the “innocent” person, SOLAS requires certain measures to be taken prior to their release, such as ensuring they are returned to seaworthy vessels and/or safe conditions.¹⁴⁴ Additionally, practitioners should seek out the latest practical techniques for care and in-processing of detained pirates, distressed mariners, or asylum-seekers such as photographing, categorization, seizing personal effects, and preliminary health examinations.¹⁴⁵

¹³³ SECNAVINST 5710.22A, *supra* note 124, para. 5(2)(a)–(b). *See also* NWP 1-14M, *supra* note 7 (providing further information concerning processing requests for asylum).

¹³⁴ Detainee Treatment Act, *supra* note 55 (“[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”).

¹³⁵ *Id.*

¹³⁶ NAVY REGULATIONS 1990, *supra* note 119, at 0702.

¹³⁷ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, AFTER ACTION REPORT, OPERATION ENDURING FREEDOM, MARITIME SECURITY OPERATIONS, COUNTER-PIRACY OPERATIONS, 28 MAY 2009–21 OCTOBER 2009, at 3 (18 Dec. 2009) [hereinafter USS RONALD REAGAN AAR] (Recommendation by Carrier Strike Group Judge Advocate for preparation and training for holding detainees.).

¹³⁸ Detainee Treatment Act, *supra* note 55 (prohibiting “[c]ruel, inhuman, or degrading treatment or punishment”).

¹³⁹ SUA Protocol, *supra* note 66, art. 10.

¹⁴⁰ SECNAVINST 5710.22A, *supra* note 124, para. 5(a)(1)(b).

¹⁴¹ DoDD 2000.11, *supra* note 122, at 4.1.1.2; SECNAVINST 5710.22A, *supra* note 124, para. 5.

¹⁴² SECNAVINST 5710.22A, *supra* note 124, para. 5(a)(3); *see also* UN High Comm’n on Refugees, Int’l Mari. Org., *Rescue at Sea: A Guide to Principles and Practice as Applied to Migrants and Refugees* (Jun. 12, 2009), available at <http://www.unhcr.org/450037d34.html> (providing a useful pamphlet on refugee law and contact information for international organizations).

¹⁴³ International Convention for the Safety of Life at Sea, Nov. 1, 1974 (as amended), 32 U.S.T. 47, 1184 U.N.T.S. 276 [hereinafter SOLAS].

¹⁴⁴ *Id.* ch. V.

¹⁴⁵ E-mail from Lieutenant Tracy Reynolds, Judge Advocate Gen. Corps, U.S. Navy, Staff Judge Advocate, to CTF-151 (May 11, 2010 08:49 EST) [hereinafter Reynolds e-mail] (detailing the complexities of distinguishing hostile pirates from innocents such as fishermen and providing details of in-processing of suspected pirates and mariners in distress) (on file with author).

Thus, the basic care and treatment standards for person detain during non-armed conflict situations are similar to the requirements for detained persons during armed conflict. The level of security required will be based on the commanders needs to preserve safety and security of the vessel, crew, and persons detained, but the CO must also comply with international law and regulations requiring humane treatment.

V. Conclusion

International law, domestic law, and service regulations provide the legal requirements for detention, care, and treatment for the scenarios discussed in this primer. The authorities are both numerous and wrought with intricacy. The need to understand detention authority and treatment requirements for persons detained outside of armed conflict was illustrated in May 2009, when the U.S. captured and detained the sole surviving pirate from the May 2009 *Maersk Alabama* pirate attack, Abduwali Abdukhadir Muse.¹⁴⁶ During this high-profile operation, the naval commander of the USS *Bainbridge*, presumably after consulting with the task forces' legal counsel, detained the injured Muse and later transferred him to New York for prosecution.¹⁴⁷ This historical pirate attack highlighted the existence of a cancerous threat to the American shipping industry in the Gulf of Aden. The operation displayed America's resolve to counter that threat by use of naval

force. As evidenced by the increasing number of pirate attacks in 2009, piracy on the seas will likely continue in the near future, and naval force will be employed to counter acts of piracy.¹⁴⁸ Other criminal acts on the high seas, such as terrorism and illegal drug trafficking, will continue to pose threats to our nation's peace and security as well. As long as people continue to traverse the oceans, U.S. naval ships must be prepared for maritime detentions both during armed conflict and peacetime.

Judge advocates, particularly in the sea services, should be familiar with the commander's detention authority and the general treatment requirements for persons detained at sea in both armed and non-armed conflict situations. Before deploying, judge advocates must know how to implement these principles in advance of the next at-sea detention in order to prevent U.S. naval forces from engaging in unauthorized detentions, which could erupt into international incidents or increased public scrutiny. In addition to the legal authorities mentioned in this primer, judge advocates also need to review brig regulations and assist in determining safe and secure locations to detain persons should the brig facilities prove inadequate or even unnecessary. Finally, judge advocates should assist in developing standard operating procedures, training, or exercises for detaining persons at sea.¹⁴⁹ The judge advocate who properly advises his commander on those persons detained at sea will surely be a valuable asset to the commander by assisting him in complying with the law.

¹⁴⁶ Justin Fishel, *Navy Seals Kill Pirates, Rescue American Hostage*, FOXNEWS.COM (Apr. 12, 2009), <http://www.foxnews.com/politics/2009/04/12/navy-seals-kill-pirates-rescue-american-hostage/>; Hussein Saddique, *Accused Somali Pirate Arraigned in Federal Court*, CNN.COM (May. 21, 2009), <http://www.cnn.com/2009/CRIME/05/21/ny.somali.pirate.arraigned/index.html>.

¹⁴⁷ Fishel, *supra* note 146; Saddique, *supra* note 146.

¹⁴⁸ INT'L CHAMBER OF COMMERCE (ICC), INT'L MARL. BUREAU, PIRACY AND ROBBERY AGAINST SHIPS, 2009 ANNUAL REPORT (Jan. 2010), available at <http://www.icc-ccs.org/>. See also *Unprecedented Increase in Somali Pirate Activity*, ICC COMMERCIAL CRIME SERVS., Oct. 21, 2009, http://www.iccccs.org/index.php?option=com_content&view=article&id=376:unprecedented-increase-in-somali-pirate-6activity&catid=60:news&Itemid=51 (last visited Jan. 13, 2010).

¹⁴⁹ USS *RONALD REAGAN* AAR, *supra* note 137, at 3.