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FUTURE NAVIES—PRESENT ISSUES

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The U.S. Navy is transforming itself to deal with a wider range of missions than the traditional blue-water, major combat operations that it has traditionally been equipped to handle.[1] That emerging transformation has resulted in a number of new programs, technologies, and strategies that raise interesting, and sometimes complex, legal issues. Lawyers advising the Navy's leadership through this transformational process are analyzing these legal issues now, in the present, to ensure that the future U.S. Navy is properly, and legally, organized, trained, and equipped. This article will address five topics of interest for naval planners and legal advisers who are building the Navy of the future.

CIVILIAN MARINERS AND SEA BASING

The U.S. Navy currently maintains a force of approximately 550,000 full-time employees, about 35 percent of whom are civilians. At any given time, 130-plus of the Navy's 283 ships are under way, about 45 percent of the total ship inventory.[2] In 2004 the Chief of Naval Operations (CNO), then Admiral Vern Clark, directed the Navy to maximize capabilities, minimize payroll, improve productivity, and eliminate unnecessary billets.[3] One way to meet those goals is to remove sailors from billets that have little to do with war fighting and replace them with civilians. At sea, for instance, sailors cut hair, serve meals, maintain the engineering plant, chip paint—all tasks that civilians are equally capable of performing, and in fact do perform at commands ashore. Placing civilians on warships to perform those functions is a logical extension of the CNO's guidance and would free sailors for combat-related activities.

Accordingly, one of the Navy's answers to the CNO's challenge is an experimental program to place federal civil-service mariners on board warships. These

mariners perform tasks naval personnel have traditionally performed on board warships but that civilians have performed on board naval auxiliary vessels for decades and on board merchant vessels for centuries—navigation, engineering, and deck seamanship. For example, in early 2005 USS *Mount Whitney* (LCC/JCC 20) deployed to the European theater as the new U.S. Sixth Fleet and North Atlantic Treaty Organization (NATO) command ship.[4] One of the most sophisticated command, control, communications, computer, and intelligence (C4I) ships ever commissioned, *Mount Whitney* today is manned by a composite crew of 157 U.S. Navy sailors and 143 civilian mariners employed by the Military Sealift Command. These three hundred personnel represent a reduction of 276 from the previous all-active-duty Navy crew. "By supplementing the crew with civilian mariners," the Sixth Fleet Public Affairs Office reports, "the Navy is operating the command ship at a reduced cost and employing captured uniformed personnel billets on forward combatant vessels."[5] *Mount Whitney* will be engaged in NATO exercises and Standing Naval Forces Mediterranean maritime operations and will be available as a command and control ship for combat operations if required.

The Navy is simultaneously pursuing the concept of "sea basing" as a transformational initiative. Sea basing is the Navy's answer to the concern that access to bases in foreign territory will be less predictable and more ad hoc than in the past. This concern is not an idle or speculative one, as evidenced by Turkey's refusal during Operation IRAQI FREEDOM to permit the 4th Infantry Division to cross Turkish territory into northern Iraq.

The sea base is envisioned as a system of systems—a flotilla of ships serving collectively as a staging and sustainment area from which ground forces can launch attacks ashore in a nonpermissive environment—sometimes referred to as "forcible entry operations." Though no one knows exactly what the sea base will look like in any detail, it will probably consist of a "network of ships that would provide artillery fire, air support, supplies and a secure home for troops fighting on land."[6] The primary components of the sea base could include the Maritime Prepositioning Force–Future (MPF-F) cargo ship, the next-generation destroyer (DDX), the Littoral Combat Ship (LCS), and the Amphibious Assault Ship (LHA-R), in conjunction with existing guided-missile cruisers and destroyers, aircraft carriers, and submarines.[7]

Of particular interest for this discussion is the role of the MPF-F cargo ship. The MPF-F is designed as the replacement for today's logistics-force cargo ships and would act as a floating logistics center. One report notes that it would be "nearly as large as an aircraft carrier" and would "accommodate heavy-lift helicopters and perhaps cargo planes as large as the Air Force's C-130. It would be able to move supplies and equipment to those aircraft and other ships while at

sea."[8] Another report, however, depicts a role directly involved in combat operations. It refers to the MPF-F as a replacement for the big-deck *Tarawa*-class amphibious assault ships, describing it as a "fighting logistics ship with a flight deck big enough to send hundreds of Marines ashore in rotorcraft and launch Joint Strike Fighters."[9]

If the MPF-F is manned as prepositioning ships are today, its crew will consist entirely of civilian mariners. There is no legal prohibition against manning naval auxiliaries, such as oilers, ammunition ships, supply ships, and prepositioning ships, with civilians. In fact, these seamen have a recognized status under the Geneva Conventions as "civilians accompanying the force" and are entitled to prisoner-of-war status if captured.[10] Issues arise, however, if the MPF-F is indeed to become part of the "assault echelon"—if Marines or soldiers actually launch from the ship into combat operations ashore. Similar issues will arise if USS *Mount Whitney,* with its hybrid crew, is employed as a C4I platform in an armed conflict.

Civilians who assist in operating and maintaining a warship engaged in international armed conflict might be viewed as having lost their protected status.

The issues that arise are twofold. First, under conventional and customary international law, a warship is manned by a crew under regular armed forces discipline. Second, civilians who assist in operating and maintaining a warship engaged in international armed conflict might be viewed as participating actively or directly in hostilities and thus as having lost their protected status as civilians accompanying the force. These two issues will be addressed in turn.

Article 29 of the United Nations Convention on the Law of the Sea and article 8 of the 1958 Convention on the High Seas identify warships by four characteristics: they belong to the armed forces of a state; they bear external marks distinguishing warships of their nationality; they are commanded by officers who have been duly commissioned by the government of the state and whose names appear in the appropriate service lists or equivalents; and they are manned by crews under regular armed forces discipline.[11] These characteristics originated in the 1856 Declaration of Paris, which abolished privateering, and Hague Convention VII, which established the conditions for converting merchant ships into warships.[12] The rules served to distinguish bona fide warships from privateers, which operated from motives of personal gain, by clearly establishing that the warships operate on behalf of a state. They also furthered the requirement in Hague VII that warships are to observe the laws and customs of war. These four characteristics are so universally identified with warships throughout the world that they may be said to have attained the status of customary international law.

Left undefined, however, is what the phrase "manned by a crew" actually means in practice. Many U.S. Navy warships today have civilians on board in a variety of capacities—as technical representatives, science advisers, contractors. Under customary practice, warships have long carried civilians on board. In the War of 1812, for example, Commodore Stephen Decatur's ship, the frigate *United States,* embarked female contract nurses to care for the sick and wounded.[13] The mere presence of small numbers of civilians clearly does not deprive a warship of its status as a warship. But the issue takes on greater meaning if a third or half of a warship's complement is composed of civilians who, though subject to a civilian disciplinary system, are not subject to the Uniform Code of Military Justice.[14] There is no "bright line" rule that determines what percentage of a warship's crew should be active-duty sailors, but it is fair to say that the greater the percentage of civilians on board performing functions traditionally accomplished by sailors, the less likely that the warship will be able to maintain swift and effective discipline over its entire complement. Inability to discipline a crew effectively calls into question the ship's ability to "observe the laws and customs of war" as required by Hague VII.

The first issue concerning civilian mariners, then, implicates the warship's ability to meet its international obligation to observe the laws and customs of war and to satisfy the criteria established for warships in conventional and customary law. The second issue is related to the civilian mariners themselves and their status if they are captured. One of the basic principles of the law of armed conflict is that of "distinction"—that is, combatants and noncombatants must be distinguished so as to spare noncombatants as much as possible from the exigencies of war.[15] A corollary of the basic principle is that noncombatants (civilians) enjoy protections under the law of armed conflict unless and until they take a direct or active part in hostilities.[16] Civilians accompanying the force certainly assume the risk of becoming casualties of war through proximity to military operations. For example, civilian mariners manning oilers replenishing warships at sea are aware that the platforms on which they serve are legitimate military objectives. The mariners themselves, however, retain their status as "persons who accompany the armed forces without actually being members thereof." They carry identification cards reflecting their authority to accompany the force, and as noted, they are entitled to prisoner-of-war status if captured.[17]

However, questions could be raised as to their status if they are employed on board a warship engaged in combat operations. Unfortunately, there is no authoritative definition of "direct" or "active" participation in hostilities.[18] Purely collateral duties, such as cutting hair, running the ship's store, or performing other housekeeping functions, may contribute to the quality of life on board the warship, but they are not necessary to its combat effectiveness. On the other end

of the spectrum, firing weapons, maintaining weapons systems, or serving as members of boarding parties are more akin to actual participation. Running the engineering plant, navigating the ship, and operating small boats or cranes could be considered collateral functions, or they could be considered actual participation.

A sailor who needs a haircut can man the weapons systems or serve in a boarding party; however, a ship that is not within its assigned Tomahawk land-attack missile "launch basket" or is not properly heading into the wind for the launch of fighter aircraft cannot perform its combat function. Further, the warship itself is a weapons system, and its full complement is required if that system is to be effective. Civilian engineers running the propulsion plant, navigators plotting the ship's position and movement, and technicians working on the missile system all contribute to war-fighting effectiveness. It is difficult to argue that any of these civilians are not contributing integrally to the combat functions of the ship. It is conceivable that an opposing belligerent in an international armed conflict could perceive them, particularly those engaged in engineering, navigation, and deck seamanship, as taking active and direct parts in hostilities. That same enemy belligerent would be unlikely to grant the civilian mariners combatant immunity and might choose to prosecute them for murder, arson, or other violations of the belligerent's domestic law.

The above discussion posits the most extreme examples. To date, the only warships manned with civilian mariners have been designated command and control platforms, such as USS *Mount Whitney.* The MPF-F ships are still in the planning stages, and it has not been determined exactly how they will be employed in the sea-basing construct. As the Navy continues its transformational efforts, however, there will no doubt be continued pressure to contract out, or seek civilian substitution for, more and more administrative and support functions in order to free active-duty sailors for actual combat duties.

To address both issues raised by the potential "civilianization" of warship crews, the Navy has proposed legislation that would create a five-year pilot program under which civilian mariners employed by the Navy would affiliate with a special reserve component.[19] If the legislation is enacted, mariners will remain civilian federal employees unless their ships are ordered into combat operations in international armed conflict, at which time they would be ordered to active duty. In their active-duty status, the mariners will be subject to the Uniform Code of Military Justice, thus making the entire crew subject to armed forces discipline. Further, if captured, they would be members of the active-duty force, entitled as such not only to prisoner-of-war status but also to combatant immunity for any belligerent acts in which the warship had engaged. There may be other ways to approach the international law concerns raised by placing hybrid

crews on warships, but the proposed legislation is attractive in that it resolves both issues satisfactorily and provides the civilian mariners with the highest degree of protection under international law in the event they are captured during belligerent operations.

UNMANNED AERIAL AND UNDERWATER SYSTEMS

In April 2005, General John Jumper, U.S. Air Force, reported that there were over 750 unmanned aerial vehicles operating in Iraq.[20] At about the same time, the U.S. Navy deployed its first operational unmanned undersea vehicle, the Remote Minehunting System (RMS), to identify and chart suspicious objects in Khwar Abd Allah Channel at the Iraqi port of Umm Qasr.[21] Most are familiar today with the use of the Predator unmanned aerial vehicle as a precision weapon in Iraq, Afghanistan, and Yemen.[22] There is talk of a future unmanned aerial system that would track and engage targets without a "man in the loop."[23] The relative low cost, ease of transport, technological sophistication, and ability to operate without a crew combine to make unmanned systems the surveillance platform and weapon of choice for the foreseeable future;[24] this approach may extend even to replacing F-16 and KC-135 aircraft in the Air Force inventory.[25]

The use of these unmanned systems, however, raises a primary legal issue: Should these systems be treated under international law like their manned counterparts—airplanes and submarines? For example, do the regimes of innocent passage, straits-transit passage, and archipelagic sea lanes passage apply to them? Are they required to comply with "ColRegs," the International Regulations for the Prevention of Collisions at Sea? Do they enjoy sovereign immunity? What is the legal framework for attacking an unmanned system? A complete development of these questions is beyond the scope of this article—each could be the topic of a scholarly legal treatise—but some of the answers are fairly intuitive.

Take, for example, a carrier strike group transiting the Strait of Hormuz and employing an unmanned Scan Eagle intelligence, surveillance, and reconnaissance vehicle for a "channel sweep" mission.[26] The Strait of Hormuz, as an international strait connecting the Arabian Gulf with the Gulf of Oman and the Arabian Sea, is, along with its approaches, subject to the regime of straits-transit passage throughout the strait.[27] Under that regime, the right of all states to navigation and overflight solely for the purpose of continuous and expeditious transit of the strait is unimpeded.[28] While exercising the right of transit passage, however, ships and aircraft "shall refrain from any activities other than those incident to their normal modes of continuous and expeditious transit."[29]

Accordingly, in analyzing whether a carrier strike group may employ a reconnaissance vehicle during straits-transit passage, the question is not whether

the vehicle is manned or unmanned but whether it is consistent with the strike group's "continuous and expeditious transit" in its "normal mode" of operation.[30] The *Commander's Handbook on the Law of Naval Operations* provides that the normal mode of operation for surface ships includes "transit in a manner consistent with sound navigational practices and the security of the force, including formation steaming and the launching and recovery of aircraft."[31] The *San Remo Manual* holds, in connection with straits-transit passage during armed conflict, that belligerents "are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, and acoustic and electronic surveillance."[32]

A Scan Eagle "channel sweep" is a surveillance mission for force protection and navigational safety—normal operational concerns for all Navy vessels wherever they are transiting and whether the transit is in peacetime, in a period of heightened tensions, or during an armed conflict. The need for defensive, force-protection measures is particularly acute when transiting in proximity to land and in high-traffic areas, such as straits, where an "asymmetric" enemy (such as a terrorist) could strike without warning.[33] Accordingly, employment of the Scan Eagle in a force-protection and safety-of-navigation surveillance and reconnaissance mode is completely consistent with the regime of straits-transit passage. The vehicle may be launched from the aircraft carrier or another surface platform. An unmanned undersea vehicle could operate for the same purposes submerged, if that is consistent with its normal mode of operation. The same would apply if the strike group were operating in archipelagic-sea-lanes transit through an archipelagic nation.

Should unmanned systems be treated under international law like their manned counterparts?

It must be noted, however, that the Scan Eagle is also an intelligence-gathering platform. The rules concerning straits-transit passage provide that passage must be, as we have seen, "solely for the purpose of continuous and expeditious transit of the strait";[34] further, states are to "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress."[35] States are also to refrain from "the threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations."[36] Importantly, unlike the rules governing innocent passage through territorial seas, intelligence gathering is not identified as inconsistent with straits-transit passage. Indeed, some amount of photographic or electronic intelligence gathering may inevitably occur incidental to the "channel sweep"

mission. That would not be inconsistent with the regime of transit passage since the mission is related to safety of navigation and security of the force.[37]

Compare the transit-passage regime with that of innocent passage through territorial seas. When engaged in innocent passage, submarines are required to operate on the surface, and ships may not launch or recover aircraft or any military device; further, any act aimed at collecting information to the prejudice of the defense or security of the coastal state is considered inconsistent with the innocent passage regime.[38] Accordingly, a carrier strike group engaged in innocent passage could not launch or recover the Scan Eagle or the Remote Minehunting System underwater vehicle. Since there is no right of innocent passage through a nation's territorial airspace, an unmanned aircraft launched outside the territorial sea would not be entitled to innocent passage over the territorial sea.

Consider, though, whether an unmanned undersea vehicle launched *prior* to entry into the territorial sea is entitled to innocent passage on the surface, as other submarines are. The Law of the Sea Convention provides that "ships of all States . . . enjoy the right of innocent passage through the territorial sea."[39] The convention does not define "ship," but it does define "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."[40] Arguably, the RMS vehicle fits this definition if one considers that the commanding officer of the ship from which it is launched is in "command" of the RMS and the team remotely operating the vehicle is "manning" it. In any event, the RMS does not have to be a warship to be entitled to innocent passage, since the right applies to "ships" of all states. *Webster's II New Riverside University Dictionary* (1988) distinguishes between "ships"—rather large vessels adapted for deep-water navigation—and "boats," comparatively small, usually open, craft. But Webster's also notes that for legal purposes, a ship is "a vessel intended for marine transportation, without regard to form, rig or means of propulsion." Arguably, then, an unmanned undersea vehicle, if it is considered a ship, could engage in continuous, expeditious innocent passage, provided it transited on the surface, showed its flag, and did not engage in intelligence collection to the prejudice of the defense or security of the coastal state.

A related issue is whether unmanned systems like the RMS are "vessels" that must comply with the Regulations for Prevention of Collisions at Sea. The ColRegs apply to "all vessels on the high seas," and they define "vessel" as including "every description of watercraft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water."[41] The ColRegs definition is also found in American statutes and is generally accepted in admiralty

law.[42] The U.S. Supreme Court has ruled on this subject and continues to expand the type of watercraft encompassed by the term "vessel."[43] Though the Remote Minehunting System is incapable of transporting people, it does carry a payload of sensors, other instrumentation, and equipment; it has its own propulsion system capable of driving it at speeds up to sixteen knots; and it can operate as far as fourteen nautical miles from the launch platform.[44] If the RMS and similar systems are "vessels," however, they must meet a number of design and operational requirements regarding such matters as lookouts, sound signals, lights, and dayshapes.[45]

Whether or not the RMS is required to comply with the ColRegs requirements, those in command of the launching platform and the unmanned system have a duty to act with due regard for the safety of others on the high seas—a duty imposed by both the ColRegs (Rule 2) and the Law of the Sea.[46] The RMS is currently equipped with a mast-mounted camera that allows the remote operator to avoid surface objects; forward-looking sonar to alert the operator to submerged objects; and a mast-mounted strobe light to advise nearby vessels of its presence. A radar reflector may also be mounted on the mast.[47] The law on the status of unmanned undersea systems is unsettled;[48] the prudent course of action for the U.S. Navy would be to ensure that these systems comply with all applicable ColRegs requirements or to obtain appropriate exemptions.

HOSPITAL SHIPS

Military hospital ships are granted extraordinary protection under the Second Geneva Convention. Current technology and the threat of global terrorism, however, pose two vexing problems for navies of the future.

Military hospital ships are those ships built and equipped solely to assist, treat, and transport the wounded, sick, and shipwrecked.[49] They may "in no circumstances" be attacked or captured but shall "at all times be respected and protected," provided that the parties to the conflict are notified of the names of the ships and their descriptions ten days before they are employed.[50] Hospital ships are entitled to the aforementioned protections "unless they are used to commit . . . acts harmful to the enemy."[51] The presence on board hospital ships of "apparatus exclusively intended to facilitate navigation or communication" does not deprive the ships of the protections due them.[52] Somewhat contradictorily, however, it is expressly forbidden for hospital ships to "possess or use a secret code for their wireless or other means of communication."[53] It is this prohibition that proves difficult to implement in this day and age.

Professor Richard Grunawalt has conducted an in-depth analysis of the origins of this prohibition.[54] The rule derived from a desire to prevent conclusively any further instances of hospital ships being used to signal and provide nonmedical services to combatants, as had occurred during the Russo-Japanese

War of 1904–1905;[55] such episodes recurred during World War I.[56] Even as the convention was being negotiated, it was recognized that a prohibition on the use of secret codes by hospital ships would be difficult to implement in practice. So the Diplomatic Conference recommended that the high contracting parties draw up an international code regulating the use of "modern means of communication" between hospital ships and warships and military aircraft.[57] Unfortunately, of course, that code never came into being, and the high contracting parties are left with the prohibition as it was drafted in 1949.

Interestingly, the equally authentic French text of the Convention contains a prohibition only on the use of a secret code to transmit traffic, not to receive it.[58] In addition, Article 28(2) of Additional Protocol I of 1977, concerning medical aircraft, provides that such aircraft "shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes" but does not prohibit the use of a secret code or encrypted communications to further the humanitarian mission of the aircraft.[59] Additional Protocol I clearly takes a more realistic approach that recognizes the developments in communications technology since 1949. The French text of the 1949 Convention also appears to recognize the necessity for hospital ships to receive encrypted communications, at a minimum.

Professor Grunawalt's study provides ample discussion of the problems inherent in the use of unencrypted communications by hospital ships, not least the fact that U.S. federal privacy standards require that patient medical information be transmitted over secure circuits if it is reasonable and appropriate to do so.[60] There are also practical security issues with transmitting patient information, such as social security numbers, in the clear. With identity theft an ever-growing concern, it would be unfortunate if wounded and injured personnel were exposed to yet an additional risk as a consequence of being treated aboard a hospital ship. Further, it has been reported that when the hospital ship USNS *Mercy* (T-AH 19) deployed in support of Operation IRAQI FREEDOM in January 2003, it was equipped with encrypted communications systems.[61] There is no need to belabor here the point that the prohibition on use of a "secret code" by hospital ships is anachronistic, unrealistic, and unworkable in today's high-technology environment, where satellite communications are both routinely encrypted and routinely employed by military systems. Professor Grunawalt is correct in recommending that the U.S. Navy formally abandon adherence to this outdated requirement while reaffirming adherence to the underlying mandate that hospital ships not be used for military purposes harmful to an adversary.[62]

The second vexation facing hospital ships is the need to arm them for force protection against attacks like that against the destroyer USS *Cole* (DDG 67) in Aden Harbor in October 2000. Again, the Second Geneva Convention provides the baseline legal requirement—and in this instance the basic rule is far more

realistic than the one just discussed prohibiting the use of a secret code. Article 35(1) provides that arming the crews of hospital ships for the maintenance of order, their own defense, or the defense of the sick and wounded does not deprive the ships of their protected status.[63] That should end all debate, and the Navy should not hesitate to man its hospital ships with security teams armed with crew-served weapons—such as machine guns or grenade launchers for close-in defense against attacks by terrorists or others who do not comply with the law of armed conflict. Professor Grunawalt, however, aptly points out very legitimate reasons for caution in deploying hospital ships bristling with defensive armaments.[64] On this topic, the *San Remo Manual* has taken a decidedly anachronistic viewpoint by opining that hospital ships may be armed "only" with "deflective" means of defense (such as chaff and flares) and "not with means that could be used in offensive fashion, such as anti-aircraft guns."[65]

Not only are chaff and flares ineffective against a determined suicide attack like that launched against USS *Cole,* but the requirement as stated in the *San Remo Manual* is nowhere found in the Geneva Conventions and is an unnecessary and untimely restriction of the plain letter of the law. Accordingly, Professor Grunawalt rightly argues that in addition to crew-served weapons hospital ships should be equipped with the Phalanx Close-In Weapons System or other state-of-the art defensive antiair and antisurface weapons.[66] While the Royal Navy concurs that encryption equipment may be fitted in hospital ships "to assist with the humanitarian mission," it is not as supportive on the arming issue. A Royal Navy official told *Jane's Defence Weekly* that any armaments beyond small sidearms "would compromise the protected status of the vessels" under current international law.[67] The Royal Navy approach at present, apparently due to budgetary rather than legal considerations—to develop more versatile platforms that can accomplish other missions in addition to caring for the wounded and sick—may be more in line with the U.S. Navy's plans for sea basing.[68]

The Navy should not hesitate to man its hospital ships with security teams armed with crew-served weapons.

As Dr. Arthur M. Smith pointed out in a recent edition of this journal, "plans for afloat casualty care and strategic evacuation may be dramatically altered" under the Navy's sea-basing concept.[69] He suggests that commercially chartered cruise ships or Military Sealift Command logistics ships might deliver troops and equipment to the sea base and then be converted to casualty care. Further, given the terrorist threat worldwide, aeromedical evacuation might represent a more practical way to care for and evacuate the wounded than does evacuation by hospital ships. Given that potential terrorists could view white ships with large red crosses as attractive targets rather than as specially protected vessels,

force protection alone could dictate developing flexible, multimission platforms as substitutes for traditional white-hulled hospital ships. As Dr. Smith suggests, combatant commanders will be redefining their casualty care and evacuation requirements, and those requirements might not include ships like USNS *Comfort* and *Mercy*.[70]

THE LAW OF THE SEA CONVENTION AND THE FUTURE OF NAVAL WARFARE

Some have questioned whether the long-standing support of the U.S. Navy's leadership for American accession to the Law of the Sea Convention of 1982 continues to be in the best interests of the service and the United States. Some have asked in particular whether the convention helps or hinders the Navy's vision of sea basing. Throughout his term as Chief of Naval Operations, Admiral Clark never wavered from his strong position in favor of the convention. He testified before Senate committees on more than one occasion that the convention is congruent with sea basing and "provides the stable and predictable legal regime with which to conduct our operations today and in the future. Joining the convention will support ongoing U.S. military operations, including continued prosecution of the Global War on Terrorism."[71] The current CNO, Admiral Mullen, follows the lead of Admiral Clark and a long line of distinguished predecessors in his support of accession.[72] It is this author's opinion as well that the Law of the Sea Convention preserves the nation's ability to leverage fully the use of the world's oceans, providing as it does a body of widely accepted and recognized law that protects navigational freedoms and American ability to operate on the high seas.

First, the convention does not impair or inhibit the inherent right of self-defense. It was negotiated under the auspices of the United Nations and the precepts of the Charter, Article 51 of which clearly recognizes the inherent right of self-defense. Second, the stipulation in the convention that "the high seas shall be reserved for peaceful purposes" must be read in light of Article 58, which specifically reserves freedom of navigation and overflight and "other internationally lawful uses of the sea related to these freedoms" to be enjoyed by all states.[73] State practice over hundreds of years—by which the navies of the world have operated and trained in waters seaward of other nations' territorial seas, including what is now recognized as their contiguous and exclusive economic zones—confirms that military uses of the sea that do not violate Article 2(4) of the United Nations Charter are lawful under customary international law.[74]

The Law of the Sea Convention reaffirms this position by limiting military activities in only a few narrow circumstances, such as Article 19 regarding innocent passage through the territorial sea. Moreover, the Resolution of Advice and

Consent to Ratification approved by the Senate Foreign Relations Committee specifically provides that "the advice and consent of the Senate . . . is subject to the following . . . understandings: (1) The United States understands that nothing in the convention, including any provisions referring to 'peaceful uses' or 'peaceful purposes' impairs the inherent right of individual or collective self-defense or rights during armed conflict."[75] The "peaceful purposes" provision of the Law of the Sea Treaty creates no new rights or obligations and imposes no restraints on military operations or traditional uses of the seas, any more than does the equivalent provision in the Outer Space Treaty, which provides that the moon and other celestial bodies shall be used "exclusively for peaceful purposes."[76] It has long been the position of the United States that "peaceful purposes" means "non-aggressive" ones. Consequently, military activity not constituting the use of armed force against the sovereignty, territorial integrity, or political independence of another nation, and not otherwise inconsistent with the United Nations Charter, is permissible.[77]

The Law of the Sea Convention preserves the nation's ability to leverage fully use of the world's oceans.

Third, a word about innocent passage is in order. Some have argued that the Law of the Sea Convention would negatively impact national security because the innocent passage regime "prohibits" or makes "illegal" intelligence gathering or submerged submarine operations within a coastal nation's twelve-nautical-mile territorial sea. What the critics do not recognize or acknowledge is that the United States has been complying with the navigational provisions of the convention since 1983. In his Ocean Policy Statement of 10 March 1983, President Ronald Reagan announced that the Law of the Sea Convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all States" and that the United States would "accept and act" in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight."[78] Moreover, the nation is a party to the 1958 Convention on the Territorial Sea and Contiguous Zone, which contains innocent-passage provisions similar to those in the Law of the Sea Convention, including that submarines in innocent passage are "required to navigate on the surface and to show their flag."[79]

Like the Territorial Sea Convention, the Law of the Sea Convention requires that submarines engaged in innocent passage navigate on the surface and show their flags.[80] The Law of the Sea Convention, however, is an improvement over the Territorial Sea Convention, in that it specifically delineates those activities that may be considered prejudicial to the peace, good order, or security of the coastal state—thus shielding the United States and other seagoing nations from

efforts by coastal states to regulate other types of conduct in the territorial sea. It declares "any act aimed at collecting information to the prejudice of the defence or security of the coastal State" inconsistent with innocent passage and prejudicial to the peace, good order, or security of the coastal state.[81] Such activities are not, however, deemed "illegal," nor are they forbidden. The coastal state may have national laws prohibiting such activities and may take necessary steps to prevent passage that is not innocent;[82] it may require a warship to leave the territorial sea "immediately" if the ship disregards requests to comply with the state's laws and regulations concerning passage through the territorial sea.[83] These provisions reflect the carefully crafted balance that the United States sought in order to protect its own interests as both a coastal state and a flag state. Thus, if a warship or submarine transits through the territorial sea in innocent passage, it must comply with the requirements for innocent passage. If it does not do so, the coastal state, becoming aware of such non-innocent passage, may ask it to depart the territorial sea immediately and then address the matter through diplomatic channels.

Fourth, accession to the Law of the Sea Convention would in no way negatively affect the President's Proliferation Security Initiative (PSI). The PSI is a global effort to stop trafficking of weapons of mass destruction (WMD) and their delivery systems to and from states of proliferation concern. It is not a treaty or a formal organization. It is a cooperative effort to apply all the tools at the disposal of the PSI partner nations—intelligence, diplomacy, law enforcement, military, customs authorities, financial instruments—to prevent transfers of WMD-related items at sea, in the air, or on land. More than sixty countries have indicated their support for PSI—most, if not all, of them parties to the Law of the Sea Convention. While the goal is "to create a more dynamic, creative, and proactive approach" to preventing proliferation, "actions taken in support of the PSI will be consistent with national legal authorities and relevant international law and frameworks."[84] Certainly the intent is to strengthen existing authorities where they are weak or inefficient, but only within the bounds of national and international law, which includes the Law of the Sea Convention. Numerous multilateral exercises have taken place. The PSI partners had one publicly announced success, in the fall of 2003, when four nations (the United States, the United Kingdom, Italy, and Germany) cooperated to interdict and prevent a shipment of centrifuge parts to Libya.[85]

CONFLICT RESOLUTION IN THE EXCLUSIVE ECONOMIC ZONE

There is no doubt that the Navy's plans for sea basing could give pause to allies and potential competitors alike. After all, it is based on the notion that "America will never seek a permission slip to defend the security of our country."[86] Lieutenant General James Mattis, head of the Marine Corps Combat Development

Command, says the idea is to minimize the need for the U.S. military to rely on allies to supply territory from which its forces can operate abroad.[87] One hears phrases like "using the sea as maneuver space," exploiting "control of the seas," and, from a large display in the Pentagon in June 2005, the "command of the commons."[88] Carried to its logical conclusion, sea basing will inevitably involve the staging of large, floating military bases in the exclusive economic zones of other nations, from which joint forces and weapons could be projected ashore in a future conflict. Sea basing also has a more benign side. Vice Admiral Phillip Balisle, former commander of the Naval Sea Systems Command, has pointed to the Navy's tsunami-relief efforts in Indonesia, launched and directed from ships assembled offshore, as an example of sea basing in action: "We have always had a sea base, or at least for many years. What we're talking about now is the shaping of that sea base for [a] 21st-century environment."[89]

Will the sea base impact the sovereignty of other nations, threaten their security, or convert the oceans to "nonpeaceful" purposes? The answer is no.

Will the sea base impact the sovereignty of other nations, threaten their security, or convert the oceans to "nonpeaceful" purposes? The answer is no. Each sea base will be established consistent with principles of law applicable to the operation in question—whether it be humanitarian relief operations, international armed conflict, or United Nations sanctions enforcement. Is it possible that other nations may disagree with the United States over the applicable legal principles? Of course. Conflicts and disagreements will arise in the future, as they have in the past. One has only to recall the EP-3 incident off Hainan Island in the People's Republic of China and the difference of opinion between Washington and Beijing over the propriety of military activities conducted in a coastal state's exclusive economic zone to realize that there will often be differing interpretations of the applicable law.[90]

One might ask whether it would be advisable for the United States to attempt to negotiate an agreement with China similar to the Incidents at Sea or the Dangerous Military Activities agreements with the Soviet Union of 1972 and 1990.[91] At the time of those agreements, both the United States and the USSR had substantial blue-water navies. Several dangerous incidents had occurred, and the potential for unpredictable future confrontations existed around the world.

With China, in contrast, the potential for confrontation exists primarily within that nation's exclusive economic zone due to Chinese objections to such U.S. military activities there as surveillance and military surveys. An existing mechanism, the Military Maritime Consultative Agreement, is available, and it is probably sufficient, given the limited area and scope of potential confrontations, to address issues, concerns, and disagreements.[92] In fact, it was presumably

under the auspices of this agreement that Ambassador Joseph W. Prueher proposed a meeting to discuss the EP-3 incident, suggesting that the agenda include a "discussion of causes of the accident and possible recommendations whereby such collisions could be avoided in the future."[93] Nonetheless, this author would not rule out the value of a more comprehensive agreement, embodying special signals like those in the IncSea Agreement, for indicating intentions and operations, if the consultations under the existing agreement prove unsuccessful in preventing future dangerous encounters.

It is certainly appropriate that the United States continue to communicate with its allies and potential competitors alike concerning plans for the U.S. Navy of the future. Concerning all five of the issues discussed in this article, it would be advisable to inform other nations of American intentions and to engage in a dialogue with them concerning the legal bases for U.S. actions. A cooperative, consultative approach would be useful in obtaining the support and understanding of potential coalition partners, as well as in alleviating the concerns of potential competitors. In a recent speech to the Naval War College, the Chief of Naval Operations stressed how important coalition partners will be to future naval operations.[94] While President Bush has made it clear that the United States will not jeopardize its national security by acquiescing to "the objections of the few," it appears his preferred modus operandi is to seek international support and international partnerships.[95] The Proliferation Security Initiative alone is evidence that the president wants to work with multinational partners to the maximum extent possible. The issues discussed here represent ample opportunities for collaboration and cooperation on the international level.

NOTES

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1. See, e.g., Jason Sherman, "Changing Vision," *Sea Power* (March 2005), quoting the former Chief of Naval Operations, Admiral Vern Clark, that the Navy is not "correctly balanced and optimized for the future we're facing. . . . The Navy that we possess today must be reshaped to deal with the challenges that we [will] have in the future."
2. "Status of the Navy," 2 September 2005, available at www.navy.mil.
3. Admiral Vern Clark, "Guidance for Leaders: Manpower," 4 January 2004, on file with author.
4. Commander, Naval Forces Europe/Commander, U.S. Sixth Fleet, *USS* Mount Whitney *Underway for NATO's Allied Action,*

ChInfo News Clips, 18 May 2005, available at www.navy.mil.

5. Ibid. These savings are accomplished in a number of ways. Some civilian mariner billets on board ship are manned (and paid for) only when the ship is under way, while sailors fill their billets both at sea and in port. Also, sailors frequently have collateral duties, training requirements, and temporary additional-duty assignments that civilian mariners are not required to perform; thus civilian billets are matched only to the at-sea requirement, whereas there must be sufficient active-duty billets to account for the absence or unavailability of a percentage of the crew at all times. Further, civilian mariners are trained to do one job proficiently (a mariner may serve as a deck seaman for thirty years), whereas active-duty sailors are in an "up-or-out" system—each sailor moves up in rank, and new sailors must be trained to take his place.

6. "Sea Basing: The Navy's New Way to Fight," *Virginian Pilot,* 8 March 2005.

7. Ibid. For additional information on sea basing, see Sherman, "Changing Vision"; Dale Eisman, "Will 'Sea Base' Idea Float?" *Virginian Pilot,* 8 March 2005; Congressional Budget Office [hereafter CBO], *The Future of the Navy's Amphibious and Maritime Prepositioning Forces* (Washington, D.C.: November 2004), p. ix–xiii.

8. "Sea Basing."

9. Sherman, "Changing Vision"; CBO, *The Future of the Navy's Amphibious and Maritime Prepositioning Forces,* xiii (follow-on assault echelons would assemble and deploy on the ships constituting the sea base, of which the MPF-F is the "linchpin").

10. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, art. 4.A.(4), in *Documents on the Laws of War,* ed. Adam Roberts and Richard Guelff, 3d ed. (Oxford, U.K.: Oxford Univ. Press, 2000): "Prisoners of war . . . are persons belonging to one of the following categories, who have fallen into the power of the enemy: (4) Persons who accompany the armed forces without actually being members thereof" (p. 246).

11. *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea* (New York: United Nations, 2001) [hereafter UNCLOS], p. 31; Convention on the High Seas, 29 April 1958, in *National Security Law Documents,* ed. John Norton Moore, Guy B. Roberts, and Robert F. Turner (Durham, N.C.: Carolina Academic, 1995), p. 571.

12. "Declaration of Paris": Declaration Respecting Maritime Law, 16 April 1856, in Roberts and Guelff, eds., *Documents on the Laws of War,* p. 48. "Hague Convention VII: Convention Relating to the Conversion of Merchant Ships into War-ships, Articles 1–4," in Roberts and Guelff, eds., *Documents on the Laws of War,* p. 97.

13. Women in Military Service for America Memorial, *Highlights of Women in the Military,* www. womensmemorial.org; U.S. Navy Dept., *Women in the Navy*, on file with author.

14. Some might suggest that the most obvious solution to this dilemma is simply to subject the civilian mariners to the Uniform Code of Military Justice (UCMJ). As currently written, the code provides only for jurisdiction over persons serving with or accompanying armed forces in the field "in time of war" (10 USC 802[a][10] [2003]). Courts have held that the phrase "in time of war" should be construed narrowly and as including only declared wars (*United States v. Averette,* 41 CMR 363 [USCMA 1970]). Although possibly the law could be amended, that solution would address only one of the two issues related to civilian mariners on board warships. The second issue, whether the civilian mariners would be afforded status as prisoners of war if captured, would be unaffected by an amendment to the UCMJ.

15. A. Ralph Thomas and James C. Duncan, eds., *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, International Law Studies vol. 73 (Newport, R.I.: Naval War College, 1999), p. 401.

16. See, e.g., articles 50 and 51, Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in Roberts and Guelff, eds., *Documents on the Laws of War,* p. 448. The United States is not a party to Additional Protocol I.

17. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, art. 4.A.(4).

18. One source opines that taking a direct part in hostilities entails activities that must be "directly related to hostilities or, in other words, to represent a direct threat to the enemy." Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995), p. 232. The International Committee of the Red Cross has embarked on a project to further define the phrase but to date has not proposed a comprehensive definition.

19. *Pilot Program for the Employment, Use, and Status of Reserve Civilian Mariners*, on file with author. The legislation was proposed for the fiscal year 2006 National Defense Authorization Act but was not included in the bill considered by Congress. It is anticipated the proposal will be submitted in future years.

20. Nathan Hodge, "Jumper: Military Must Reorganize UAV Efforts," *Defense Daily,* 29 April 2005, p. 7. A recent news article announced that the Pentagon has begun informally referring to unmanned aircraft as "unmanned aerial systems" rather than "unmanned aerial vehicles" and that the change may soon become official. The reason for the shift in terminology is to connote that the aircraft are only one part of a "complex network of systems" rather than independently operated units. Vince Crawley, "Pentagon: Don't Call Them UAVs Anymore," DefenseNews .com, 17 August 2005.

21. Rowan Scarborough, "Special Report: Unmanned Warfare," *Washington Times,* 8 May 2005.

22. Ibid.; Eric Schmitt, "U.S. Drones Crowding the Skies to Help Fight Insurgents in Iraq," *New York Times,* 5 April 2005, p. A9. For a description of the synergy developed between manned and unmanned aircraft and between coalition partners to destroy a surface-to-air missile site during Operation IRAQI FREEDOM, see Ministry of Defense, *Operations in Iraq: Lessons for the Future* (London: December 2003), p. 33, available at www.mod.uk/publications/iraq_future lessons.

23. Peter A. Buxbaum, "Shedding Ships and Sailors," *Armed Forces Journal* (April 2005), p. 22 (citing Rear Admiral [select] William Rodriguez of the Space and Naval Warfare Systems Command, San Diego, who predicts that unmanned aerial vehicles may soon have the "cognitive ability" to detect hostile platforms and vector weapons against them, apparently without relying on commands from a human being controlling the unmanned system.) This capability, of course, raises significant legal issues that are beyond the scope of this article.

24. Katie Fairbank, "Unmanned Aircraft Are Wowing Defense Industry," *Dallas Morning News,* 14 June 2005; Scarborough, "Special Report."

25. "Air Force to Add Spy Plane Squadron," *Las Vegas Review-Journal,* 4 June 2005, p. 1B.

26. Scan Eagle was developed by Boeing and The Insitu Group as an affordable, runway-independent, long-endurance, autonomous, unmanned vehicle providing real-time intelligence, surveillance, and reconnaissance. Scan Eagle carries either an inertially stabilized electro-optical or infrared camera. It is four feet long with a wingspan of ten feet. Scan Eagle can remain on station for more than fifteen hours and is capable of providing intelligence from high (above sixteen thousand feet) or low altitudes. See U.S. Air Force Dept., "Innovative Solutions for the Warfighter, Scan Eagle," at www.nellis.af.mil/UAVB/uavbspotlight.asp, and Boeing Integrated Defense Systems, "Unmanned Systems, ScanEagle UAV," at www.boeing.com/defense-space/military/unmanned/scaneagle .html.

27. Article 37 of UNCLOS provides that the transit passage regime applies to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone" (p. 33).

28. UNCLOS, art. 39, p. 33.

29. Ibid.

30. Most definitions of ships and aircraft assume, if they do not explicitly state, that the vehicles are "manned by a crew," the assumption being that the crew is actually located within the vehicle. See, e.g., Thomas and Duncan, eds., *Annotated Supplement,* para. 2.1.1., p. 109 ("a warship [is] . . . manned by a crew which is under regular armed forces discipline"), and para. 2.2.1, p. 114 ("military aircraft . . .

include . . . aircraft . . . manned by a crew subject to regular armed forces discipline"). That the existence and employment of unmanned systems may not have been fully appreciated or contemplated when these definitions were developed does not prevent the incorporation of such systems into existing legal regimes. The definitions may, however, need to be updated to reflect current technology.

31. Quoted in Thomas and Duncan, eds., *Annotated Supplement,* p. 125.

32. Louise Doswald-Beck, ed., *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge, U.K.: Cambridge Univ. Press, 1995), art. 30, p. 581. The *San Remo Manual* was prepared by a group of international legal and naval experts participating in their personal capacities in a series of Round Tables convened by the International Institute of Humanitarian Law. The manual was intended to provide a contemporary restatement of international law applicable to armed conflicts at sea. As such, it is a useful document for analyzing general legal principles on various issues, though it is not dispositive as to the law on any particular subject.

33. International and Operational Law Division, Office of the Judge Advocate General, U.S. Navy, "Point Paper on the Use of Unmanned Aerial Vehicles (UAVs) while Transiting the Strait of Hormuz," 15 April 2005, on file with author.

34. UNCLOS, art. 38, p. 33.

35. Ibid., art. 39, p. 33.

36. Ibid.

37. It has been recently reported that the Central Intelligence Agency was operating unmanned aerial vehicles—the IGnat and Predator—in Iranian airspace searching for dispersed nuclear weapons development sites. If the article is correct, the legal rationale for such activity would have to be that while "spying" may be a violation of the domestic law of the overflown state, intelligence gathering is not forbidden by international law and has long been an accepted state practice. The rather cryptic report does not provide enough information for a complete legal analysis. *DefenseTech*, 1 March 2005, available at www.defensetech.org/archives.

38. UNCLOS, art. 19, p. 27.

39. Ibid., art. 17, p. 26.

40. Ibid., art. 29, p. 31.

41. U.S. Transportation Dept., U.S. Coast Guard, "Navigation Rules, International—Inland," Commandant [U.S. Coast Guard] Instruction M16672.2D, 25 March 1999 [containing the International Regulations for Prevention of Collisions at Sea, 1972, hereafter ColRegs], Rules 1a and 3a.

42. 1 USC 3 (2005) ("The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.")

43. *Stewart v. Dutra Construction Co.,* 2005 U.S. LEXIS 1397 (2005), holding that a dredge is a "vessel" under the Longshore and Harbor Workers Compensation Act.

44. International and Operational Law Division, Office of the Judge Advocate General, U.S. Navy, "Legal Review of the Remote Minehunting System AN/WLD-1(V)," 10 June 2005, on file with author.

45. Given the characteristics of the system, the ColRegs requirements might not be onerous. For example, the light requirements might be satisfied by the presence of a white all-round light with visibility of three nautical miles, as required by Rule 22(d) for inconspicuous, partly submerged vessels. It is also possible, under Rule 1(e), to obtain a U.S. Navy certificate of alternative compliance for some or all of the requirements under special circumstances where strict compliance is impossible.

46. UNCLOS, art. 87, pp. 53–54.

47. "Legal Review of the Remote Minehunting System AN/WLD-1(V)."

48. See, e.g., Stephanie Showalter, "The Legal Status of Autonomous Underwater Vehicles," 38 *Marine Technology Society Journal* 38 (Spring 2004), p. 81 ("it is unclear whether [autonomous underwater vehicles] are subject to the maritime regulations for vessels"); Michael R. Benjamin and Joseph A. Curcio, "ColRegs-Based Navigation of Autonomous Marine Vehicles," Proceedings of the Institute of Electrical and Electronics Engineers

(IEEE) Conference on Autonomous Unmanned Vehicles, 2004, p. 34 (concluding that autonomous marine vehicles "very likely" qualify as vessels and are subject to the ColRegs rules, though this conclusion has not been "clearly determined" through the judicial process). On file with author.

49. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 [hereafter Geneva II], art. 22, in Roberts and Guelff, eds., *Documents on the Laws of War,* p. 230.
50. Ibid.
51. Ibid., art. 34, p. 233.
52. Ibid., art. 35(2), p. 233.
53. Ibid., art. 34, p. 233.
54. Richard J. Grunawalt, "Hospital Ships in the War on Terror: Sanctuaries or Targets?" *Naval War College Review* 58, no. 1 (Winter 2005), p. 89.
55. In 1905, the Russian hospital ship *Orel* was captured and condemned by a Japanese prize court for "signaling" to the Russian fleet "in ways that amounted to use for military purposes." Ibid., p. 91.
56. In 1914, the German hospital ship *Ophelia* was captured and condemned by a British prize court for being "adapted and used as a signaling ship for military purposes." Ibid., p. 93.
57. Ibid., p. 98.
58. The French text reads, "En particulier, les navires-hôpitaux ne pourrant posseder ni utiliser de code secret pour leurs emissions par T.S.F. [wireless] ou par tout autre moyen de communication." Available at www.icrc.org/dih.nsf.
59. Additional Protocol I, p. 436.
60. Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, implementing regulations "Health Insurance Reform, Security Standards: Final Rule," *Federal Register* 68, no. 34 (20 February 2003), sec. 164.312. Granted, treaties to which the United States is a party are part of the supreme law of the land. Domestic law cannot serve to invalidate or override treaty obligations. Nonetheless, domestic law that is inconsistent with international treaty obligations presents problems of compliance that are not easy to resolve in practice. In this case, the implementing regulations permit the use of equivalent alternative measures if it is not "reasonable and appropriate" to encrypt medical information.
61. Michael Sirak, "U.S. Navy Seeks to Revise Laws of War on Hospital Ships," *Jane's Defence Weekly,* 27 August 2003, p. 29.
62. Grunawalt, "Hospital Ships in the War on Terror," p. 109. It should be noted that the drafters of the *San Remo Manual* of 1994 also concluded that the prohibition in Article 34 is unworkable and recommended that hospital ships "should be permitted to use cryptographic equipment." Doswald-Beck, ed., *San Remo Manual,* para. 171, pp. 236–37.
63. Geneva II, p. 233.
64. Grunawalt, "Hospital Ships in the War on Terror," pp. 109–11 (discussing the traditional view that hospital ships found "safety in vulnerability").
65. Doswald-Beck, ed., *San Remo Manual,* para. 170.3, p. 235.
66. Grunawalt, "Hospital Ships in the War on Terror," p. 112.
67. Sirak, "U.S. Navy Seeks to Revise Laws of War on Hospital Ships," p. 29.
68. Richard Scott, "UK casualty ship project faces major surgery," *Jane's Defence Weekly*, 11 May 2005, p. 14 ("Budget pressures have forced the [Minister of Defence] to reconsider the scope of its current requirement and look instead at a cheaper option" which involves equipping a medical facility onboard an auxiliary vessel with additional combat-related missions"). See also U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford, U.K.: Oxford Univ. Press, 2004), which adopts the *San Remo Manual* provisions recommending that hospital ships *should* be permitted to use cryptographic equipment, but limiting self-defense equipment to "purely deflective means of defence, such as chaff and flares," paras. 13.124 and 13.125, p. 373.
69. Dr. Arthur M. Smith, "Has the Red Cross–Adorned Hospital Ship Become Obsolete?" *Naval War College Review* 58, no. 3 (Summer 2005), p. 130 ("Hospital ships, as we have

come to know them, may no longer play a role in a military structured for rapid flexible response in asymmetric warfare").

70. Ibid., p. 131. A recent news article reported that nongovernmental organizations are operating white-hulled "mercy ships" that operate in the waters off developing countries providing medical care to those in need. The ships do not bear red crosses but in other respects appear similar to military medical ships; "Mercy Mission," *Wall Street Journal,* 26 August 2005, p. W2. Professor George K. Walker has raised a number of very good questions concerning how those vessels should be treated in the event of an international armed conflict (George K. Walker, e-mail to Naval War College, 29 August 2005, on file with author). The Second Geneva Convention and Additional Protocol I actually foresee and make provisions for hospital ships owned or operated by neutral states, private citizens, officially recognized relief societies, and impartial international humanitarian organizations; Geneva II, articles 24–25, p. 231, and Additional Protocol I, article 22(2), p. 434. One of the primary conditions for such ships to receive the same protections as military hospital ships is that they have to be made available to or under the control of a state party to the conflict. The presence of hospital ships not under the control of a party to the conflict would certainly complicate the targeting solution if they operate in waters near belligerent activities.

71. Admiral Vern Clark, *Posture Statement: Testimony before the Defense Subcommittee of the Senate Appropriations Committee,* 16 March 2005, pp. 4–5, available at www.navy.mil.

72. See, e.g., "Advance Questions for Admiral Michael G. Mullen, USN, Nominee for the Position of Chief of Naval Operations," Navytimes.com, www.navytimes.com/content/editorial, pp. 10–11 (the convention "codifies fundamental benefits important to our operating forces as they train and fight . . . *codifies essential navigational freedoms . . . supports the operational maneuver space . . . enhances our own maritime interests*"). [Emphasis original.]

73. UNCLOS, art. 88, p. 54, and art. 58, p. 40–41.

74. Charter of the United Nations, reprinted in Moore, Roberts, and Turner, eds., *National Security Law Documents,* p. 90, Article 2(4), provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

75. S. Exec. Rpt. No. 108-10, pp. 17–18 (2004).

76. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. IV, in Moore, Roberts, and Turner, eds., *National Security Law Documents,* pp. 332–33. In becoming a party to the treaty, the United States agreed not to establish military installations, test weapons, or conduct military maneuvers on celestial bodies and not to station in space or place in orbit nuclear weapons or other weapons of mass destruction (art. IV). Importantly, these sorts of prohibitions do not appear in the Law of the Sea Convention.

77. Thomas and Duncan, eds., *Annotated Supplement,* p. 149 note 114. See also *San Remo Manual,* para. 10.6, p. 82 ("With respect to the high seas, the Round Table wished to emphasize that it did not accept the interpretations of some publicists that the LOS Convention's Articles 88 and 301, reserving the high seas for peaceful purposes, prohibit naval warfare on the high seas").

78. "Statement of the President [on the UN Law of the Sea Convention]," White House press release, 10 March 1983, in Moore, Roberts, and Turner, eds., *National Security Law Documents,* p. 591.

79. Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606, art. 14, in Moore, Roberts, and Turner, eds., *National Security Law Documents,* p. 565.

80. UNCLOS, art. 20, p. 27.

81. Ibid., art. 19, pp. 27.

82. Ibid., art. 25, p. 29.

83. Ibid., art. 30, p. 31.

84. U.S. State Dept., *The Proliferation Security Initiative (PSI),* 26 May 2005, available at www.state.gov/t/np/rls/other/46858.html.

85. Andrew C. Winner, "The Proliferation Security Initiative: The New Face of Interdiction,"

Washington Quarterly 28, no. 2 (Spring 2005), p. 129.

86. President George W. Bush, State of the Union Address, 20 January 2004, available at www.whitehouse.gov.

87. "Naval Officials Focus on Broader Missions, Seabasing and Sea Shield," *Inside the Navy,* 17 January 2005, available at InsideDefense.com.

88. See also Barry R. Posen, "Command of the Commons," *International Security* 5 (Summer 2003), p. 28 (arguing that the United States enjoys command of the "commons"—that is, command of the sea, space, and air—which is a key military enabler of the U.S. global power position).

89. John T. Bennett, "Notes from the Surface Navy Association's 2005 Annual Symposium," *Inside the Pentagon,* 20 January 2005, available at InsideDefense.com.

90. On 1 April 2001, a U.S. EP-3 was conducting routine surveillance approximately seventy nautical miles southeast of Hainan Island in the South China Sea. A Chinese fighter intercepted the EP-3, maneuvered close aboard, and impacted it. The fighter broke up and crashed in the ocean—the pilot was not recovered. The EP-3's nose cone was sheared off, but the pilot managed to land safely at Lingshui Airport. The Chinese held the twenty-four American crew members in "protective custody" for eleven days before releasing them. The United States position was that the EP-3 was operating in international airspace in full accordance with all laws and regulations and did nothing to cause the accident. The Chinese claimed the EP-3 (which was flying on autopilot) had "veered" into the fighter. The Chinese also took the position that surveillance is a threat or use of force against a coastal state and that an exclusive economic zone is sovereign air and sea space. This position is entirely inconsistent with article 58 of UNCLOS (pp. 40–41), which reserves to all states the freedom of overflight above the exclusive economic zone. For additional information on the incident, see generally U.S. Commander in Chief, Pacific Command Virtual Information Center, "Special Press Summary: China—U.S. EP3 and J-8 Mid-Air Collision," 12 April 2001, www.vic-info.org; and Margaret K. Lewis, "Note: An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident," *New York University Law Review* (November 2002), p. 77 and ff.

91. The U.S.-U.S.S.R. Agreement on the Prevention of Incidents On and Over the High Seas (popularly referred to as the Incidents at Sea, or "IncSea," Agreement)—23 UST 1168, TIAS 7379 and its 1973 Protocol, 24 UST 1063, and TIAS 7624—was designed to minimize the potential for "harassing actions and navigational one-upmanship" between American and Soviet ships and aircraft operating in close proximity on the "high seas," a term that encompasses all international waters and airspace, including the exclusive economic zone and the contiguous zone (Thomas and Duncan, eds., *Annotated Supplement,* p. 147). The United Kingdom, Germany, Canada, France, and Italy concluded similar agreements with the Soviet Union between 1986 and 1989. The Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Dangerous Military Activities, also known as the DMAA, which entered into force on 1 January 1990, provided procedures for resolving incidents involving entry into the national territory, including the territorial sea, of the other nation, and for other special circumstances (Thomas and Duncan, eds., *Annotated Supplement,* p. 148). The DMAA appears in 28 ILM 879 (1989).

92. Agreement on Establishing a Consultative Mechanism to Strengthen Military Maritime Safety between the Department of Defense of the United States and the Ministry of National Defense of the People's Republic of China, January 1998. See, generally, Secretary of Defense William S. Cohen, "Working Together Is Best Avenue for U.S. and China," *Defense Issues* 13, no. 12 (19 January 1998), available at www.defenselink.mil/speeches.

93. Letter from Ambassador Prueher to Chinese Minister of Foreign Affairs Tang, 11 April 2001, available at www.whitehouse.gov.

94. Admiral Michael Mullen, "Remarks at the U.S. Naval War College, Newport, R.I.," 31 August 2005, available at www.navy.mil. ("Our vision is and ought to be to extend the peace through an inter-connected community of maritime nations working together. The enemy goes global. So should we.") See

also CNO Guidance for 2006, "Meeting the Challenge of a New Era," available at www.navy.mil. ("The vision we seek is . . . enduring national and international naval relationships that remain strong and true.")

95. State of the Union Address 2004. "From the beginning, America has sought international support for our operations in Afghanistan and Iraq, and we have gained much support. There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few."