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### Future Navies—Present Issues

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**T**he US Navy is transforming to deal with a wider range of missions than the traditional blue-water, major combat operations which it has traditionally been equipped to handle.<sup>1</sup> 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 US Navy is properly, and legally, organized, trained and equipped. This article will address five topics of interest for naval planners and legal advisors who are building the Navy of tomorrow.

#### *Civilian Mariners and Sea Basing*

The US Navy currently maintains a force of approximately 550,000 full-time personnel, about 35% of whom are civilians. At any given time, 130-plus of the Navy's 283 ships are underway. That constitutes about 45% of the total ship inventory.<sup>2</sup> In 2004, former Chief of Naval Operations (CNO) Admiral Vern Clark directed the

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Navy to maximize capabilities, minimize payroll, improve productivity and eliminate unnecessary billets.<sup>3</sup> One way to meet those goals is to remove sailors from billets that have little to do with warfighting, and replace them with civilians. At sea, sailors cut hair, serve meals, maintain the engineering plant, chip paint—all tasks that civilians are equally capable of performing, and do perform, at commands ashore. Placing civilians on warships to perform those tasks is a logical extension of the CNO's guidance and would free sailors to engage in combat-related activities.

The Navy's answer to the CNO's challenge is an experimental program to place federal civil service mariners onboard warships. These civilian mariners perform tasks sailors have traditionally performed onboard warships, but that civilian mariners have performed onboard auxiliary vessels for decades and onboard 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 US Sixth Fleet and North Atlantic Treaty Organization (NATO) command ship—one of the most sophisticated Command, Control, Communications, Computer, and Intelligence (C4I) ships ever commissioned.<sup>4</sup> *Mount Whitney* is manned by a hybrid crew consisting of 157 US Navy sailors and 143 civilian mariners employed by the Military Sealift Command. These 300 personnel represent a reduction of 276 people 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.”<sup>5</sup> *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 future combat operations if required.

In addition to placing civilian mariners on warships performing functions active-duty sailors have performed in the past, 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 that serves as a staging and sustainment area for ground forces to launch attacks ashore in a non-permissive 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 providing offshore artillery fire, air support, supplies and a secure home for troops fighting on land.”<sup>6</sup> 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.<sup>7</sup>

Of particular interest for this discussion is the role of the MPF-F cargo ship in sea basing operations. The MPF-F is designed as the replacement for today's prepositioning force cargo ships and would serve 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."<sup>8</sup> 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 ships and describes 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."<sup>9</sup>

If the MPF-F ship is manned similar to existing prepositioning ships, the 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 civilian mariners. In fact, these mariners have a recognized status under the Geneva Conventions as "civilians accompanying the force" and are entitled to prisoner of war status if captured.<sup>10</sup> 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 arise if *Mount Whitney*, with a hybrid crew of active-duty sailors and civilian mariners, is employed as a C4I ship in a future armed conflict.

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 could 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 1982 United Nations Convention on the Law of the Sea<sup>11</sup> and Article 8 of the 1958 Convention on the High Seas<sup>12</sup> 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 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. These characteristics originated in the 1856 Declaration of Paris<sup>13</sup> which abolished privateering, and the 1907 Hague Convention VII<sup>14</sup> which established the conditions for converting merchant ships into warships. The rules

served to distinguish bona fide warships from privateers, which operated from motives of personal gain, by clearly establishing that the warships operated 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 US Navy warships today have civilians onboard performing a variety of functions—technical representatives, science advisors, contractors. Under customary practice, warships have carried civilians onboard. 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.<sup>15</sup> 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 one-third or one-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.<sup>16</sup> Though there is no “bright line” rule that determines what percentage of a warship’s crew should be active-duty sailors, it is fair to say that the greater the percentage of civilians onboard performing functions traditionally accomplished by sailors, the less likely the warship will be able to maintain swift and effective discipline over its entire manning complement. The inability to effectively discipline a crew thus 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, as just discussed, implicates the warship’s ability to meet its international obligation to observe the laws and customs of war and to meet the criteria established for warships in conventional and customary law. The second issue is related to the civilian mariners themselves and to their status if they are captured during an international armed conflict. One of the basic principles of the law of armed conflict is that of “distinction”—combatants and noncombatants must be distinguished so as to spare noncombatants as much as possible from the exigencies of war.<sup>17</sup> 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.<sup>18</sup> Civilians accompanying the force certainly assume the risk of becoming casualties of war due to their 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 are entitled to prisoner of war status if captured.<sup>19</sup>

If the civilian mariners are employed onboard a warship engaged in combat operations, however, it is possible that questions could be raised as to their status. Unfortunately, there is no authoritative definition of “direct” or “active” participation in hostilities.<sup>20</sup> Purely collateral duties such as cutting hair, running the ship’s store and performing housekeeping functions may contribute to the quality of life onboard the warship, but are not necessary to its combat effectiveness. On the other end of the spectrum, firing weapons, maintaining the weapons systems or serving as members of belligerent boarding parties are more akin to actual participation. Running the engineering plant, navigating the ship and operating the small boats and cranes could be considered collateral functions or could be considered actual participation.

A sailor who needs a haircut can nevertheless man the weapons systems or serve on a boarding party. A ship that is not within its assigned Tomahawk Land Attack Missile (T-LAM) 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 the full crew complement is required for the weapons system to be effective. Civilian engineers running the propulsion plant, navigators plotting ship’s movement, and technicians working on the missile system all contribute to the war fighting effectiveness of the ship. It is difficult to argue that any of these personnel are not actively and directly contributing to the combat functions of the ship. It is conceivable that an opposing belligerent could perceive civilian mariners serving onboard a warship engaged in international armed conflict, particularly those engaged in engineering, navigation and deck seamanship, as having taken an active and direct part in hostilities. That same enemy belligerent would also be unlikely to grant the civilian mariners combatant immunity for such acts and could prosecute them for murder, arson and 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 those warships designated as command and control platforms such as *Mount Whitney*. The MPF-F ships are still in the planning stages and it is not 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<sup>21</sup> that would create a 5-year pilot program to

require civilian mariners employed by the Navy to affiliate with a special Navy Reserve component. If the legislation is enacted, the mariners will remain civilian federal employees unless the ship is ordered into combat operations in international armed conflict, at which time the mariners will be ordered to active duty. In their active duty status, the mariners will be subject to the Uniform Code of Military Justice, thus ensuring that the entire crew is subject to armed forces discipline. Further, if captured, they will be members of the active duty force entitled not only to prisoner of war status, but also to combatant immunity for any belligerent acts in which the warship engaged. Though there may be other ways to approach the international law concerns raised by placing hybrid crews on warships, 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*<sup>22</sup>

In April 2005, General John Jumper reported that there were over 750 unmanned aerial vehicles operating in Iraq.<sup>23</sup> At about the same time, the US Navy deployed its first operational unmanned undersea vehicle, a Remote Minehunting System (RMS), to identify and chart suspicious objects in Khwar Abd Allah channel at the Iraqi port of Umm Qasr.<sup>24</sup> Most readers are surely familiar with the use of the Predator as a precision weapon in Iraq, Afghanistan and Yemen.<sup>25</sup> There is even talk of a future unmanned aerial system which would track and engage targets without a “man in the loop.”<sup>26</sup> The relatively low cost, ease of transport, technological sophistication, and lack of manned crew combine to make unmanned systems the surveillance platform and armed weapon of choice for the foreseeable future,<sup>27</sup> even to the point of replacing F-16 and KC-135 aircraft in the current US Air Force inventory.<sup>28</sup>

The use of these unmanned systems, however, raises a primary legal issue: Should they 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? Are they required to comply with the International Regulations for the Prevention of Collisions at Sea (COLREGs)? Do they enjoy sovereign immunity? What is the legal framework for attacking an unmanned system? Unfortunately, developing a complete answer to most of these questions is beyond the scope of this article, and each could be the topic of a scholarly legal treatise. Some of the answers, however, are relatively intuitive and will be addressed below.

Take, for example, a carrier strike group transiting the Strait of Hormuz and employing an unmanned Scan Eagle intelligence, surveillance and reconnaissance vehicle<sup>29</sup> for a “channel sweep” mission. The Strait of Hormuz, as an international strait connecting the Arabian Gulf with the Gulf of Oman and the Arabian Sea, is subject to the regime of straits transit passage throughout the strait and its approaches.<sup>30</sup> Under that regime, all states enjoy the right of unimpeded navigation and overflight solely for the purpose of continuous and expeditious transit of the strait.<sup>31</sup> While exercising the right of transit passage, ships and aircraft “shall refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.”<sup>32</sup>

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,<sup>33</sup> but whether it is consistent with the strike group’s “continuous and expeditious transit” in its “normal mode” of operation. *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.”<sup>34</sup> The *San Remo Manual* addresses straits transit passage during armed conflict and concludes 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.”<sup>35</sup>

The Scan Eagle’s “channel sweep” mission is a surveillance mission designed 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 relatively close proximity to land, in high traffic areas such as the straits, where an asymmetric enemy such as a terrorist could strike without warning.<sup>36</sup> 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. It may be launched from the aircraft carrier or other surface platform. If it were an unmanned undersea vehicle, it could operate 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.

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 “solely for the purpose of continuous and expeditious transit of the strait,”<sup>37</sup> and 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.”<sup>38</sup> 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.”<sup>39</sup> 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. Such intelligence-gathering would not be inconsistent with the regime of transit passage since the “channel sweep” mission is related to safety of navigation and security of the force.<sup>40</sup>

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, ships may not launch or recover aircraft or any military device, and 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.<sup>41</sup> Accordingly, a carrier strike group engaged in innocent passage could not launch or recover the *Scan Eagle* or the *RMS* 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 1982 LOS Convention provides that “ships of all States . . . enjoy the right of innocent passage through the territorial sea.”<sup>42</sup> 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.”<sup>43</sup> 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 crew operating it is “manning” the vehicle. 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 dictionary distinguishes between ships, rather large vessels adapted for deep-water navigation, and boats, rather small, usually open, craft.<sup>44</sup> 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.”<sup>45</sup> 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” which must comply with the Regulations for the Prevention of Collisions at Sea (COLREGs). The COLREGs apply to “all vessels on the high seas,” and define a vessel to include “every description of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.”<sup>46</sup> The COLREGs definition is also found in US statutes<sup>47</sup> and is the generally accepted definition in admiralty law. The US Supreme Court has ruled on this subject, and continues to expand the type of watercraft encompassed by the term “vessel.”<sup>48</sup> Though the RMS system is incapable of transporting people, it does carry a payload of sensors, other instrumentation and equipment, has its own propulsion system of up to 16 knots, and is able to operate as far as 14 nautical miles from the launch platform.<sup>49</sup> If the RMS and similar systems are “vessels,” they must meet a number of design and operational requirements, such as being equipped with lookouts, sound, lighting, and dayshapes.<sup>50</sup>

Regardless whether 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<sup>51</sup> and the Law of the Sea.<sup>52</sup> The RMS system is currently equipped with a mast-mounted camera that allows the operator to safely 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.<sup>53</sup> Given the unsettled state of the law on the status of unmanned undersea systems,<sup>54</sup> the prudent course of action for the US Navy is to ensure these systems comply with all applicable COLREGs requirements or 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, are posing 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.<sup>55</sup> 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 their names and descriptions ten days before the ships are employed.<sup>56</sup> Hospital ships are entitled to

the aforementioned protections “unless they are used to commit . . . acts harmful to the enemy.”<sup>57</sup> 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.<sup>58</sup> Somewhat in contradiction, however, it is expressly forbidden for hospital ships to “possess or use a secret code for their wireless or other means of communication.”<sup>59</sup> 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,<sup>60</sup> which derived from a desire to conclusively prevent any further instances of hospital ships being used to signal and provide non-medical services to combatants, as occurred during the Russo-Japanese War of 1904–1905<sup>61</sup> and again during World War I.<sup>62</sup> Even as the Second Geneva 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 providing regulations for the use of “modern means of communication” between hospital ships and warships and military aircraft.<sup>63</sup> Unfortunately, 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<sup>64</sup> traffic, not to receive it. 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.<sup>65</sup> Additional Protocol I clearly takes a more realistic approach that recognizes the developments in communications technology since 1949. The French text of the 1949 Geneva Convention also appears to recognize the necessity for hospital ships to receive encrypted communications, at a minimum.

Professor Grunawalt’s article provides ample discussion of the problems inherent in the use of unencrypted communications by hospital ships, not the least of which is that US federal privacy standards require that patient medical information be transmitted over secure circuits if it is reasonable and appropriate to do so.<sup>66</sup> 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 onboard a hospital ship. Further, it has been reported that when *USNS Mercy (T-AH 19)*

deployed in support of Operation Iraqi Freedom in January 2003, it in fact was equipped with encrypted communications systems.<sup>67</sup> There is no need in this article to further belabor 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. Accordingly, this author joins with Professor Grunawalt<sup>68</sup> in recommending that the US Navy formally abandon adherence to this requirement, while reaffirming adherence to the underlying mandate that hospital ships may not be used for military purposes harmful to an adversary.

The second vexation facing hospital ships is the need to arm them for force protection against *USS Cole*-type attacks. 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, or for their own defense or the defense of the sick and wounded, does not deprive the ships of their protected status.<sup>69</sup> In this author’s opinion, 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 and 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 the very legitimate reasons one should be cautious about deploying hospital ships bristling with defensive armaments.<sup>70</sup> And 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.”<sup>71</sup>

Not only are chaff and flares ineffective against a determined suicide attack like that launched against *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, this author concurs with Professor Grunawalt that in addition to crew-served weapons like .50 caliber machine guns, hospital ships should be equipped with the Phalanx Close-In Weapons System or other state-of-the art defensive anti-air and anti-surface weapons systems.<sup>72</sup> While the Royal Navy concurs that encryption equipment may be fitted in hospital ships “to assist with the humanitarian mission,” they are 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.<sup>73</sup> The Royal Navy approach at present, apparently due to budgetary rather than legal considerations<sup>74</sup>—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 US Navy’s plans for sea basing.

As Dr. Arthur M. Smith pointed out in a recent edition of the *Naval War College Review*, “plans for afloat casualty care and strategic evacuation may be dramatically altered” under the Navy’s sea basing concept.<sup>75</sup> 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 could provide a more practical method to care for and evacuate the wounded than 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 considerations alone could dictate developing flexible, multi-mission platforms as substitutes for traditional white-hulled hospital ships. As Dr. Smith points out, combatant commanders will define their casualty care and evacuation requirements in the future, and those requirements might not include ships like *USNS Comfort* and *USNS Mercy*.<sup>76</sup>

#### ***The Law of the Sea Convention and the Future of Naval Warfare***

As the Navy looks to sea basing and the future, some have questioned whether Navy leadership’s long-standing support for United States accession to the Law of the Sea Convention continues to be in the best interests of the Navy and the United States. Some have asked 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 supports 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.”<sup>77</sup> Likewise, the current Chief of Naval Operations, Admiral Michael Mullen, follows a long line of distinguished predecessors in his support of United States accession to the Convention.<sup>78</sup> It is this author’s opinion that the Law of the Sea Convention preserves our ability to fully leverage use of the world’s oceans by providing a body of widely accepted and recognized law that protects navigational freedoms and our ability to operate on the high seas.

First, the Convention does not impair or inhibit the inherent right of self-defense. The Convention was negotiated under the auspices of the United Nations and the precepts of the Charter, Article 51 of which clearly recognizes and reflects the inherent right of self-defense. Second, the stipulation in the Convention that “The

high seas shall be reserved for peaceful purposes”<sup>79</sup> 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.<sup>80</sup> 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 seas that do not violate Article 2(4) of the United Nations Charter<sup>81</sup> are lawful under customary international law.

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.”<sup>82</sup> The “peaceful purposes” provision of the Law of the Sea Convention 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.”<sup>83</sup> It has long been the position of the United States that “peaceful purposes” means “nonaggressive” purposes. 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.<sup>84</sup>

Third, a word about innocent passage. 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 12 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 March 10, 1983, President 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 those provisions.<sup>85</sup> Further, the United States 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.”<sup>86</sup>

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 flag.<sup>87</sup> 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 sea-going nations from efforts by coastal States to regulate other types of conduct in the territorial sea. It denotes “any act aimed at collecting information to the prejudice of the defence or security of the coastal State” as inconsistent with innocent passage and prejudicial to the peace, good order or security of the coastal State.<sup>88</sup> Such activities are not deemed “illegal,” nor are they forbidden. The coastal State may have national laws prohibiting such activities, may take necessary steps to prevent passage which is not innocent,<sup>89</sup> and may require a warship to leave the territorial sea “immediately” if the warship disregards requests by the coastal State to comply with its national laws and regulations concerning passage through the territorial sea.<sup>90</sup> These provisions reflect the carefully crafted balance the United States sought 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 that becomes aware of such non-innocent passage may require the warship to depart the territorial sea immediately, and may 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—to prevent transfers of WMD-related items at sea, in the air, and on land. More than 60 countries around the world have indicated their support for PSI—most, if not all, of which are 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.”<sup>91</sup> Certainly the goal 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, and the initiative 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.<sup>92</sup>

*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."<sup>93</sup> Lieutenant General James Mattis, head of the Marine Corps Combat Development Command, says the idea is to minimize the need for the United States military to rely on allies to supply territory from which United States forces can operate abroad.<sup>94</sup> One hears phrases like "using the sea as maneuver space," exploiting the United States' "control of the seas," and, from a large display in the Pentagon in June 2005, the "command of the commons."<sup>95</sup> Carried to its logical conclusion, it will inevitably involve the staging of large, floating military bases off the coasts of other nations, probably in their contiguous or exclusive economic zones, from which joint forces and weapons could be projected ashore in a future conflict. Sea basing also has a more benign side. Former Naval Sea System Commander Vice Admiral Phillip Balisle pointed to the Navy's tsunami relief efforts in Indonesia as an example of sea basing in action. Relief efforts were launched and directed from a collection of ships stationed off-shore. "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."<sup>96</sup>

Will the sea base impact the sovereignty of other nations, threaten their security or convert the oceans to "non-peaceful" 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 P-3 incident off Hainan Island in the People's Republic of China and the difference of opinion between the United States and China 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.<sup>97</sup>

Because of these differing interpretations, particularly as between the United States and the People's Republic of China, one might ask whether it would be advisable for the United States to attempt to negotiate an agreement with China similar to the 1972 Incidents at Sea Agreement<sup>98</sup> or the 1989 Dangerous Military Activities Agreement<sup>99</sup> with the former Soviet Union. At the time of those agreements, both

the United States and the former Soviet Union had substantial blue-water navies. Several dangerous incidents had occurred between units of the two nations and the potential for unpredictable future confrontations existed around the world.

With China, the potential for confrontation exists primarily within China's exclusive economic zone due to China's objections to US military activities there such as surveillance and military surveys. An existing mechanism, the Military Maritime Consultative Agreement,<sup>100</sup> is available and is probably sufficient, given the limited area and scope of potential confrontations, to address these issues concerning military activities in areas where high seas freedoms apply. In fact, it was presumably under the auspices of this agreement that Ambassador Prueher proposed a meeting to discuss the EP-3 incident, and suggested that the agenda include a "discussion of causes of the accident and possible recommendations whereby such collisions could be avoided in the future."<sup>101</sup> However, this author would not rule out the value of a more comprehensive agreement, embodying special signals like those in the Incidents at Sea Agreement, for indicating one's intentions and operations, if the consultative mechanism proves unsuccessful in preventing future dangerous encounters.

It is certainly appropriate that the United States continue to communicate with our allies and potential competitors alike concerning plans for the Navy of the future. Concerning all five of the issues discussed in this article, it would be advisable to inform other nations of United States intentions and engage in a dialogue with them concerning the legal bases for our actions. A cooperative, consultative approach would be useful in obtaining the support and understanding of potential coalition partners, as well as alleviating the concerns of potential competitors. In a recent speech to the US Naval War College, Chief of Naval Operations Admiral Mullen stressed how important coalition partners will be to future naval operations.<sup>102</sup> And 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,"<sup>103</sup> the preferred *modus operandi* is to seek international support and international partnerships. The Proliferation Security Initiative, for example, is evidence that the President wants to work with multi-national partners to the maximum extent possible. The issues discussed in this article provide ample opportunities for collaboration and cooperation on the international level.

#### *Notes*

1. See, e.g., Jason Sherman, *Changing Vision*, SEA POWER (Mar. 2005), available at [http://www.navyleague.org/sea\\_power/mar\\_05\\_10.php](http://www.navyleague.org/sea_power/mar_05_10.php), quoting 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*, Sept. 2, 2005, available at <http://www.navy.mil>.

3. Admiral Vern Clark, Chief of Naval Operations Guidance 2004, Guidance for Leaders: Manpower, Jan. 4, 2004 (on file with author).

4. Commander, Naval Forces Europe/Commander, U.S. 6th Fleet Public Affairs, USS Mount Whitney Underway for NATO’s Allied Action, Chinfo News Clips, May 18, 2005, available at [www.navy.mil](http://www.navy.mil).

5. *Id.* These savings are accomplished in a number of ways: some civilian mariner billets onboard ship are manned (and paid) only when the ship is underway, while sailors fill their billets both at sea and in port; 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 while there must be sufficient active-duty billets to account for the absence/unavailability of a percentage of the crew at all times; and civilian mariners are trained to do one job proficiently—a mariner may serve as a deck seaman for 30 years—whereas active duty sailors are in an “up-or-out” system; as each sailor moves up in the ranks a new sailor must be trained to take his or her place.

6. Dale Eisman, *Sea Base: The Navy’s New Way to Fight*, THE VIRGINIAN-PILOT, Mar. 8, 2005, available at <http://home.hamptonroads.com/stories/print.cfm?story=101429&ran=138749>.

7. *Id.* For additional information on sea basing, see Sherman, *supra* note 1; Dale Eisman, *The Navy’s Changing Tide: Service Floats “Sea Base” Concept*, THE VIRGINIAN-PILOT, Mar. 8, 2005, available at <http://home.hamptonroads.com/stories/story.cfm?story=101390&ran=75707>; US Congress, Congressional Budget Office, *The Future of the Navy’s Amphibious and Maritime Prepositioning Forces*, ix–xiii (Nov. 2004).

8. Eisman, *supra* note 6.

9. Sherman, *supra* note 1; Congressional Budget Office, *supra* note 7, at xiii (follow-on assault echelons would assemble and deploy on the ships comprising the sea base, of which the MPF-F is the “linchpin”).

10. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art.4.A.(4), 75 U.N.T.S. 135, reprinted in DOCUMENTS ON THE LAWS OF WAR 243, 246 (Adam Roberts & Richard Guelff eds., 3d ed. 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 . . . .”

11. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter 1982 LOS Convention].

12. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, reprinted in NATIONAL SECURITY DOCUMENTS 570, 571 (John Norton Moore, Guy B. Roberts, & Robert F. Turner eds., 1995).

13. Declaration Respecting Maritime Law, Apr. 16, 1856, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 10, at 48.

14. Convention (VII) Relating to the Conversion of Merchant Ships into Warships, Oct. 18, 1907, arts. 1–4, reprinted in NATIONAL SECURITY DOCUMENTS, *supra* note 12, at 95, 97.

15. Women in Military Service for America Memorial, Highlights of Women in the Military, available at [curators@womensmemorial.org](mailto:curators@womensmemorial.org); The United States Navy, Women in the Navy (on file with author).

16. 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 only provides for jurisdiction over persons serving with or accompanying armed forces in

the field “in time of war.” 10 U.S.C. 802(a)(10) (2003). Courts have held that the phrase “in time of war” should be construed narrowly and only includes declared wars. *United States v. Averette*, 41 C.M.R. 363 (U.S.C.M.A. 1970). Although it is possible the law could be amended, that solution would address only one of the two issues related to civilian mariners onboard warships. The second issue, whether the civilian mariners would be afforded status as prisoners of war if they were to be captured, would be unaffected by an amendment to the UCMJ.

17. ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 8.1, at 401 (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED SUPPLEMENT].

18. See, e.g., Articles 50 and 51, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 10, at 419, 448. The United States is not a party to Additional Protocol I.

19. *Supra* note 10.

20. See THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 232 (Dieter Fleck ed., 1995) (“[A]ctivities . . . must be . . . directly related to hostilities or, in other words, to represent a direct threat to the enemy”). The International Committee of the Red Cross (ICRC) has embarked on a project to further define the phrase, but to date has not proposed a comprehensive description.

21. 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 Act considered by Congress. It is anticipated the proposal will be submitted in future years.

22. 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*, [www.DefenseNews.com](http://www.DefenseNews.com), Aug. 17, 2005.

23. Nathan Hodge, *Jumper: Military Must Reorganize UAV Efforts*, DEFENSE DAILY, at 7, Apr. 29, 2005.

24. Rowan Scarborough, *Special Report – Unmanned Warfare*, WASHINGTON TIMES, May 8, 2005, at A01.

25. *Id.*; Eric Schmitt, *U.S. Drones Crowding The Skies To Help Fight Insurgents In Iraq*, NEW YORK TIMES, Apr. 5, 2005, at 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 Defence, *Operations in Iraq: Lessons for the Future* 33 (Dec. 2003) 33, available at <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/Reports/ReportsForResearchers/OperationsInIraqLessonsForTheFuture.htm>.

26. Peter A. Buxbaum, *Shedding Ships and Sailors*, ARMED FORCES JOURNAL, Apr. 2005, at 20, 22 (citing Rear Admiral (select) William Rodriguez, 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.)

27. Katie Fairbank, *Unmanned Aircraft are Wowing Defense Industry*, DALLAS MORNING NEWS, June 14, 2005; Scarborough, *supra*, note 24.

28. *Air Force to Add Spy Plane Squadron*, LAS VEGAS REVIEW-JOURNAL, June 4, 2005, at 1B.
29. Scan Eagle was developed by Boeing and The Insitu Group as an affordable, runway-independent, long endurance, autonomous, unmanned vehicle and is designed to provide real-time intelligence, surveillance and reconnaissance. Scan Eagle carries either an inertially stabilized electro-optical or infrared camera. It is 4 feet long with a wingspan of 10 feet. Scan Eagle can remain on station for more than 15 hours and is capable of providing intelligence from high (above 16,000 feet) or low altitude. See US Air Force, Innovative Solutions for the Warfighter, Scan Eagle, available at <http://www.nellis.af.mil/UAVB/uavbspotlight.asp>; Boeing Integrated Defense Systems, Unmanned Systems, ScanEagle UAV, available at <http://www.boeing.com/defense-space/military/unmanned/scaneagle.html>.
30. Article 37 of the 1982 LOS Convention 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.” 1982 LOS Convention, *supra* note 11. The United States is not a party to the Convention. President Reagan announced, however, that the Convention “contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice” and declared that the United States would act “in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight.” White House Press Release, Statement of the President (on the 1982 LOS Convention), Mar. 10, 1983, reprinted in NATIONAL SECURITY DOCUMENTS, *supra* note 12, at 591.
31. 1982 LOS Convention, *supra* note 11, art 39.
32. *Id.*
33. 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., ANNOTATED SUPPLEMENT, *supra*, note 17, para. 2.1.1, at 109 (“... a warship [is] ... manned by a crew which is under regular armed forces discipline”) and para. 2.2.1, at 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.
34. ANNOTATED SUPPLEMENT, *supra* note 17, para. 2.3.3.1, at 125.
35. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA para. 30, at 106 (Louise Doswald-Beck ed., 1995). The *San Remo Manual* was prepared by a group of international legal and naval experts participating in their personal capacity 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.
36. International and Operational Law Division, Office of the Judge Advocate General of the Navy, Point Paper on the Use of Unmanned Aerial Vehicles (UAVs) while Transiting the Strait of Hormuz, Apr. 15, 2000 (on file with author).
37. 1982 LOS Convention, *supra* note 11, art. 38.
38. *Id.*, art. 39.
39. *Id.*
40. A recent note in DEFENSETECH 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. Available at <http://www.defensetech.org/archives> of March

1, 2005. 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 over-flown State, intelligence gathering is not forbidden by international law and has long been an accepted State practice. The cited article was rather cryptic and does not provide enough information to conduct a complete legal analysis.

41. 1982 LOS Convention, *supra* note 11, art. 19.

42. *Id.*, art. 17.

43. *Id.*, art. 29.

44. WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1075, 186 (2d ed. 1988).

45. *Id.* at 1075.

46. US Department of Transportation, US Coast Guard, “Navigation Rules, International – Inland,” COMMANDANT INSTRUCTION M16672.2D, Mar. 25, 1999 (containing the International Regulations for Prevention of Collision at Sea, 1972, also known as COLREGs 72), Rules 1a and Rule 3a.

47. 1 U.S.C. 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.”).

48. *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), holding that a dredge is a “vessel” under the Longshore and Harbor Workers Compensation Act.

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

50. Given the characteristics of the system, the COLREGs requirements might not be onerous. For example, it is possible the light requirements could be satisfied by the presence of a white all-round light with visibility of 3 nautical miles as required by Rule 22(d) for inconspicuous, partly submerged vessels. It is also possible, under Rule 1(e), to obtain a US Navy certificate of alternative compliance for some or all of the requirements under special circumstances where strict compliance is impossible.

51. COLREGs, *supra* note 46, Rule 2.

52. 1982 LOS Convention, *supra* note 11, art. 87.

53. Legal Review, *supra* note 49.

54. See, e.g., Stephanie Showalter, *The Legal Status of Autonomous Underwater Vehicles*, 38 MARINE TECHNOLOGY SOCIETY JOURNAL, Spring 2004, at 80, 81 (“ . . . it is unclear whether [autonomous underwater vehicles] are subject to the maritime regulations for vessels . . . .”); Michael R. Benjamin & 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, at 32, 34 (on file with author), (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).

55. Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 22, Aug. 12, 1949, 75 U.N.T.S. 85, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 10, 221, 230 (hereinafter Geneva II).

56. *Id.*

57. *Id.*, art. 34, at 233.

58. *Id.*, art. 35(2), at 233.

59. *Id.*, art. 34, at 233.

60. Richard J. Grunawalt, *Hospital Ships in the War on Terror – Sanctuaries or Targets?*, 58 NAVAL WAR COLLEGE REVIEW, Winter 2005, at 89.

61. 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.” *Id.* at 91.
62. 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.” *Id.* at 93.
63. *Id.* at 98.
64. The French text reads, “En particulier, les navires-hopitaux ne pourront 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](http://www.icrc.org/dih.nsf).
65. Additional Protocol I, *supra* note 18, at 436.
66. Health Insurance Portability and Accountability Act of 1996, Public Law 104-191, implementing regulations “Health Insurance Reform, Security Standards – Final Rule,” published in Federal Register, Vol. 68, No. 34, Feb. 20, 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.
67. Michael Sirak, *U.S. Navy Seeks to Revise Laws of War on Hospital Ships*, JANE’S DEFENCE WEEKLY, Aug. 27, 2003, at 29.
68. Grunawalt, *supra* note 60, at 109. It should be noted that the drafters of the *San Remo Manual* also concluded that the prohibition in Article 34 is unworkable, and recommended that hospital ships “should be permitted to use cryptographic equipment.” SAN REMO MANUAL, *supra* note 35, para. 171, at 236–237.
69. Geneva II, *supra* note 55, at 233.
70. Grunawalt, *supra* note 60, at 109–111 (discussing the traditional view that hospital ships found “safety in vulnerability”).
71. SAN REMO MANUAL, *supra* note 35, para. 170.3, at 235.
72. Grunawalt, *supra* note 60, at 112.
73. Sirak, *supra* note 67.
74. Richard Scott, *UK casualty ship project faces major surgery*, JANE’S DEFENCE WEEKLY, May 11, 2005, at 14. (“[B]udget 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.)
75. Arthur M. Smith, *Has the Red Cross-Adorned Hospital Ship Become Obsolete?* 58 NAVAL WAR COLLEGE REVIEW, Summer 2005, at 120, 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”).
76. *Id.* at 131. A recent news article reported that non-governmental organizations are operating white-hulled “Mercy Ships” which 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, Aug. 26, 2005, at 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, Aug. 29, 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, *supra* note 55, arts. 24–25, at

- 231, and Additional Protocol I, *supra* note 18, art. 22(2), at 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.
77. Admiral Vern Clark, Posture Statement, Testimony Before the Defense Subcommittee of the Senate Appropriations Committee 4–5 (Mar. 16, 2005), *available at* [www.navy.mil](http://www.navy.mil).
78. *See, e.g.*, “Advance Questions for Admiral Michael G. Mullen, USN, Nominee for the Position of Chief of Naval Operations,” 10–11, *available at* [www.navytimes.com/content/editorial](http://www.navytimes.com/content/editorial), (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”).
79. 1982 LOS Convention, *supra* note 11, art. 88.
80. *Id.*, art. 58.
81. Charter of the United Nations, *reprinted in* NATIONAL SECURITY DOCUMENTS, *supra* note 12, at 89, 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.”)
82. S. EXEC. RPT. NO. 108-10, at 17–18 (2004).
83. 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, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, *reprinted in* NATIONAL SECURITY DOCUMENTS, *supra* note 12, at 332, 333. By specific terms of the treaty other than the “peaceful purposes” provision, the United States agreed not to establish military installations, test weapons, or conduct military maneuvers on celestial bodies and not to station in outer space or place in orbit nuclear weapons or other weapons of mass destruction (Article IV). Importantly, these sorts of prohibitions do not appear in the Law of the Sea Convention.
84. COMMANDER’S HANDBOOK, *supra* note 17, at 149 n.114. *See also*, SAN REMO MANUAL, *supra* note 35, at 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.”)
85. Statement of the President, *supra* note 30.
86. Convention on the Territorial Sea and the Contiguous Zone, art. 14, Oct. 31, 1958, 15 U.S.T. 1606, *reprinted in* NATIONAL SECURITY DOCUMENTS, *supra* note 12, at 565.
87. 1982 LOS Convention, *supra* note 11, art. 20.
88. *Id.*, art. 19.
89. *Id.*, art. 25.
90. *Id.*, art. 30.
91. US Department of State, The Proliferation Security Initiative (PSI) (May 26, 2005), *available at* <http://www.state.gov/t/np/rls/other/46858.html>.
92. Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, THE WASHINGTON QUARTERLY, Spring 2005, at 129.
93. President George W. Bush, State of the Union Address, Jan. 20, 2004, *available at* [www.whitehouse.gov](http://www.whitehouse.gov).
94. *Naval Officials Focus on Broader Missions, Seabasing and Sea Shield*, Inside the Navy, INSIDE WASHINGTON PUBLISHERS, Jan. 17, 2005, *available at* [InsideDefense.com](http://InsideDefense.com).
95. *See also*, Barry R. Posen, *Command of the Commons*, 28 INTERNATIONAL SECURITY, Summer 2003, at 5 (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 US global power position).

96. John T. Bennett, *Notes from the Surface Navy Association's 2005 Annual Symposium*, Inside the Pentagon, INSIDE WASHINGTON PUBLISHERS, Jan. 20, 2005, *available at* InsideDefense.com.

97. On April 1, 2001, a United States EP-3 was conducting routine surveillance 80 nautical miles southeast of Hainan Island in the South China Sea. A Chinese fighter intercepted the EP-3, maneuvered close aboard and impacted the EP-3. The fighter broke up and ditched into the ocean; the pilot was not recovered. The EP-3's nose cone was sheared off, but the EP-3 pilot managed to land the aircraft safely at Langhui Airport. The Chinese held the 24-person American crew in "protective custody" for 11 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) "veered" into the Chinese fighter. The Chinese also took the position that surveillance is a threat or use of force against the coastal State and that the exclusive economic zone is sovereign air and sea space. This position is entirely inconsistent with Article 58 of the 1982 LOS Convention, which reserves to all States the freedom of overflight above the exclusive economic zone. 1982 LOS Convention, *supra* note 11. For additional information on the incident, *see generally*, USCINCPAC Virtual Information Center, Special Press Summary: China-US EP3 and J-8 Mid-Air Collision, Apr. 12, 2001, *available at* www.vic-info.org; and Margaret K. Lewis, Note: *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 NEW YORK UNIVERSITY LAW REVIEW 1404 (2002).

98. Agreement Between the Government of the United States of America and the Union of Soviet Socialist Republics on the Prevention of Incidents On and Over the High Seas, May 25, 1972, *reprinted in* 11 INTERNATIONAL LEGAL MATERIALS 778.

99. 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, Sept. 23, 1989, *reprinted in* 28 INTERNATIONAL LEGAL MATERIALS 877.

100. 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, Jan. 1998. *See generally*, William S. Cohen, Working Together is Best Avenue for U.S. and China, 13 DEFENSE ISSUES, No. 12, Jan. 19, 1998.

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

102. Admiral Michael Mullen, Remarks at the US Naval War College, Newport, R.I. Aug. 31, 2005, *available at* <http://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.").

103. State of the Union Address, *supra* note 93. "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."