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CIVILIAN MARINERS ON WARSHIPS: PROGRESS OR PIRACY?

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ABSTRACT

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The U.S. Navy is considering several programs to place civilian mariners on warships to takeover some support functions traditionally manned by active-duty sailors. The purpose of civilianizing the fleet is to maximize capabilities, minimize payroll, and improve productivity. Civilian staffing on combatants also frees up active sailors to support other combat related activities necessary in the current security environment.

There are two international legal implications related to embarking civilians for duty on combatants. There is a substantial question as to whether civilians performing duty on combatants will change the character of a ship as a warship under international law. Second, civilian mariners that "directly participate in combat" could be considered "unlawful combatants" under international law, with exposure to criminal trial by a capturing belligerent.

This analysis posits that warship status is not jeopardized by embarking civilians for duty. Further, the Law of Armed Conflict should accommodate U.S. plans to place civilians on warships - without exposure to criminal prosecution in the event that civilian mariners are captured during hostilities. The key for the U.S. Navy is maintenance of disciplinary control and restricted employment of civilian mariners to ensure adherence to the laws of war.

CIVILIAN MARINERS ON WARSHIPS: PROGRESS OR PIRACY?

The U.S. Navy is considering several programs to place civilian mariners on warships to perform support functions traditionally manned by active-duty sailors. Civilian manpower is cheaper than active duty manpower, and in some cases civilian manpower is more efficient.¹ The Chief of Naval Operations' (CNO) guidance regarding manpower initiatives calls for reducing overhead, streamlining processes, improving productivity, and extracting the most from scarce resources.² One way to achieve efficiencies at a reduced cost is to replace sailors with civilians in some shipboard billets.³ This efficiency conforms to general guidance set forth in Government Office of Management and Budget (OMB) Circular A-76: it directs civilianization where possible to "ensure the American people receive maximum value for their tax dollars."⁴ The government has already outsourced many functions under the authority of OMB Circular A-76, and the Navy now has its sights on using civilians to perform specific jobs on its warships.

Besides efforts to create savings for recapitalization of the Navy, there are other good reasons to consider civilianizing some of the U.S. Navy's warship billets. Operations Iraqi Freedom and Enduring Freedom have exerted their own manning pressures. Currently, approximately 10,000 sailors are assigned to Joint Task Forces in Iraq and Afghanistan, engaged in support of land warfare. The Navy is also standing up new units, such as small boat and inshore warfare squadrons, to address emerging asymmetric threats in the littoral and riverine battlespace. Civilian staffing frees up active duty sailors to support other critical combat-related tasks in the current security environment. Moreover, because of the sophistication of modern navies, specialists must perform some functions on warships - as technicians, as operators of sophisticated equipment, and in other specialized capacities.⁵ By tapping into the civilian mariner labor pool, the U.S. Navy and the nation make better use of available manpower.

Manning warships with civilian mariners represents a major sea-change for the U.S. Navy. Not since the abolition of privateering over 100 years ago have U.S. warships been manned with civilian crews.⁶ The USS MOUNT WHITNEY (LCC/JCC 20) is one of the first modern warships to operate with a mixed crew of civilian and active duty mariners. MOUNT WHITNEY is a command ship for Commander Sixth Fleet and North Atlantic Treaty Organization operations. The ship has powerful command and control capabilities; it can control joint or combined operations at the headquarters level – thousands of miles from the battlefield if necessary. Since 2004, its civilian mariners and active duty sailors have worked side-by-side in engineering, deck, and logistics capacities. This is a significant departure from past U.S. Navy

manning practice. Previously, the U.S. Navy assigned mixed crews only to naval auxiliaries that support combat operations. Manning auxiliaries with civilians that have no offensive combat capability conforms with international law.

There are two international legal implications of strategic significance related to embarking civilians for shipboard duty on combatants.⁷ First, under the Law of the Sea, warships must be “manned by a crew which is under regular armed forces discipline.”⁸ Warship status conveys international comity with respect to sovereign prerogatives; most importantly, it assures belligerent rights under customary international law. However, there is a substantial question as to whether civilians performing duty on warships will change the character of a ship because civilians are not at all times subject to “regular armed forces discipline.”

A second issue of enormous consequence is the international status of civilian mariners assigned to warships: Are civilian mariners assigned to warships entitled to treatment as lawful combatants? Or will their civilian status expose them to trial by a capturing belligerent for participation as an “unlawful combatant,” as a spy, murderer or a pirate?⁹ Under customary international law, only members of the armed forces, militias, voluntary corps, and those who take up arms in *levee en masse* have the right to participate directly in hostilities.¹⁰ Others who participate in hostilities are unlawful combatants, subject to prosecution by the capturing state.¹¹

The next generation of Maritime Pre-positioning Force (MPF) ships - the MPF Future [F] ship - will have a combat role: command, control, and other direct support to the Amphibious Task Force in support of combat operations, fully capable of support and augmentation of Joint Forcible Entry Operations.¹² MPF ships in the current U.S. ship inventory are naval auxiliaries, manned with civilians. Current planning calls for MPF[F] ships – ships with offensive combat capability - to be manned by civilians. If MPF[F]’s are given a combat role, they must have combatant status as warships.

The timing is somewhat inopportune for the United States to claim before the world community that we have civilians manning our warships – either as part of the force or accompanying the force. Our construction of the Geneva Conventions in the Afghanistan conflict and denial of rights based upon Al Qaeda’s status as “unlawful combatants” does not afford us great latitude in this regard.¹³ The global human rights community would roundly reject a non-specific assertion of combatant privilege for civilians on warships. Indeed, human rights advocates might draw analogies to our position on unlawful combatants held at Guantanamo Bay, exposing such civilians to prosecution by a belligerent nation. Therefore, the U.S. should ensure in every way possible that employment of civilians on warships comports

with international law. The nation must transparently convey its intentions – to avoid exposure of such civilian mariners to trial and punishment by a belligerent as unlawful combatants.¹⁴

This analysis posits that warship status under international law is not jeopardized by embarking civilians for duty. Further, the Law of Armed Conflict (LOAC) should accommodate U.S. plans to place civilians on warships - without exposure to criminal prosecution in the event that civilian mariners are captured during hostilities. The key for the U.S. Navy is maintenance of disciplinary control and restricted employment of civilian mariners to ensure adherence to the laws of war.

The benefits, burdens, and requirements of warship status under the Law of the Sea

The distinguishing characteristic of a warship from other government and civilian vessels is that it may engage in belligerent activities as a lawful combatant.¹⁵ Those activities include engaging in combat, exercising the right of visit and search, participating in blockade and convoy escort operations.¹⁶ Further, like other government vessels, a warship enjoys sovereign immunity from interference by authorities of states other than the Flag State. Police and port officials may board a warship only with the permission of the commanding officer. Warships are immune from arrest and seizure, whether in national or international waters; they are exempt from foreign taxes and regulation; and they exercise exclusive control over all passengers and crew – but not necessarily disciplinary authority - for acts performed onboard.¹⁷

The Law of the Sea as codified under Article 29, United Nations Convention on the Law of the Sea (UNCLOS III), provides that a warship is a ship:

(1) belonging to the armed forces of a State; (2) bearing the external marks distinguishing such ships of its nationality; (3) 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, (4) manned by a crew which is under the regular armed forces discipline.¹⁸

Warship sovereign privilege under international law comes with burdens. First and foremost, warships are legitimate targets. In armed conflict they are subject to attack without warning, so warships of course do not enjoy civilian immunity from being objects of attack.¹⁹ As an additional obligation, warships - like all combatants - must operate in accord with the requirements of the LOAC. Thus the policy that undergirds the rule requiring warships to be manned with a crew subject to military discipline derives from the requirement to ensure civilians are not inadvertently made targets and the requirement that warship command authority is sufficient to ensure compliance with LOAC.

Warships are granted these specific, unique characteristics for two important reasons: to provide for target identification – that is, to distinguish warships that are combatant vessels from

civilian or merchant vessels; and to assure the compliance of warships engaged in belligerent operations with the LOAC. The requirement for command by a “duly commissioned” officer and for manning by a crew subject to “regular armed forces discipline” likewise assures that LOAC is observed.

Applicability of “regular armed forces discipline” to civilians assigned to warships

U.S. domestic law provides that only members of the armed forces may be subject to armed forces discipline during peacetime.²⁰ A 2006 change in the law makes civilians accompanying the U.S. military subject to the Uniform Code of Military Justice (UCMJ) during “time of declared war or contingency operation[s].”²¹ Prior law specified only that civilians accompanying the military would be subject to the UCMJ during “declared war.” Since World War II, the U.S. has fought undeclared wars in Korea, Vietnam, Lebanon (twice), the Dominican Republic, Grenada, Panama, Somalia, Bosnia, Kosovo, Afghanistan, and Iraq (twice) - as well as the 45-year-long nuclear stalemate with the USSR during the Cold War. Broadening the coverage of the law by adding “contingency operation[s]” brings a measure of control over civilians accompanying the force in operations other than declared wars.²²

A contingency operation is any military operation that the Secretary of Defense designates as an operation that “members of the armed forces are or may become involved in military actions . . . against an opposing force;” or an operation that results in a draft or reserve call-up during a national emergency declared by the President or Congress.²³ Because civilians assigned to warships are subject to the UCMJ during contingency operations, U.S. law now comports with the international Law of the Sea requirement for the crew of a warship to be subject to “regular armed forces discipline,” at least at times when the Secretary of Defense so designates for operations against an “opposing force” or during other national emergencies declared by the President or Congress. But the actual application of the UCMJ to civilians is another matter.

Although civilians accompanying the U.S. military are - for the time being - “subject to regular armed forces discipline” (the UCMJ), this change to the law is likely to come under constitutional attack.²⁴ Military court process provides for trial by active duty military judges and juries; therefore there is a question whether trial by an “impartial jury” will be possible as guaranteed by the 6th Amendment to the U.S. Constitution. Further, there is no “grand jury” indictment process in the military justice system as guaranteed by the 5th Amendment. As yet, there have been no prosecutions of civilians under the new UCMJ provision, and implementing regulations by the military have yet to be published.²⁵ Provided the Navy responds with

regulations that make civilians subject to the UCMJ, the issues related to ship status are eliminated. Whether that will be possible without further implementing legislation is questionable.

Warship targeting considerations and compliance with LOAC.

A primary purpose of the Geneva Conventions and the LOAC is to minimize the potential for civilian casualties on the battlefield, since they specify that only military targets may be the object of attack. Target identification for U.S. Navy warships remains satisfied for LOAC purposes, with or without civilians on board. All U.S. Navy warships bear the appropriate internationally recognized markings and are easily distinguished from civilian vessels. U.S. Navy warships are marked "USS (United States Ship)"; they fly the Jack forward, its pennant distinguishing it as a government vessel; the United States ensign is flown from its fantail. U.S. Navy warships are unmistakable.²⁶

Accordingly, because the warship itself becomes the object of targeting efforts in belligerent operations - without consideration of the status of the vessel operators or specific manning arrangements that a State has devised - civilian manning in whole or in part does not obscure a belligerent's targeting decisions or operations. It is the warship itself that is the target; the warship represents the hostile adversary. The crew that mans it thus becomes a lawful target because the warship itself is a lawful target. There can be no confusion about the belligerent character of a warship. Likewise, civilians embarked on such ships lose immunity from attack on warships because the warship itself is the object of the attack - civilian participation or non-participation in the operation of the vessel does not impact a belligerent's targeting decisions.²⁷

From a targeting perspective, there is no way to determine whether civilians are embarked on a warship; therefore the presence of civilians onboard is largely irrelevant to targeting considerations. Civilian casualties thus become the responsibility of the Flag State of the warship. From the belligerent State's perspective, these casualties would be collateral to legitimate targeting. Warships with civilians onboard in this regard are in the same position as Naval Auxiliaries; both are lawful targets.²⁸

The policy behind Article 29 UNCLOS III; Sovereign control of belligerent operations.

The requirements for a warship specified in the Law of the Sea evolved over time. Following the Crimean War in 1856, the "Declaration of Paris" [Paris Protocol] abolished "privateering," the practice of issuing commissions to private vessels to engage in belligerency. The Declaration's authors sought greater governmental control over belligerents in order to

ensure respect for neutral ships' exemption from seizure of enemy goods carried during that conflict.²⁹ Privateers had ignored the distinction between contraband and general cargo on neutral vessels; huge commercial losses ensued - unintended and unsanctioned by the States involved. Because there was little government control over private vessels and their wartime activities, the contracting parties to the Paris Protocol agreed that greater governmental control was necessary to ensure that profit was not an enticement for overlooking established law and principle of armed conflict. Accordingly, the first clause of the Declaration of Paris unequivocally proclaims that "privateering is abolished."³⁰

Further refinement in the law became necessary as states sought to supplement their navies in wartime by incorporating merchant ships into their fleets.³¹ Articles 1-6 of the Hague Convention VII of 1907 prescribed a legal scheme for conversion of merchant ships into auxiliary cruisers. The converted vessel must be placed "under the direct authority, immediate control and responsibility of the Power whose flag it flies"; it must bear the external distinguishing marks of the warships of their nationality; it must be commanded by an officer in the service of the State "duly commissioned by the competent authorities"; the conversion must be "announced as soon as possible"; and the cruiser must "be manned by a crew subject to military discipline, and observe the laws of war."³² Taken together, these general requirements as paraphrased in the 1958 Convention on the High Seas (Article 8) and UNCLOS III (Article 29) now reflect customary international law. State control over converted vessels as warships and the elimination of the motive of personal gain have removed the most undesirable features of privateering.³³ Conversion now fulfills the same purpose as privateering by providing for augmentation of warship fleets without recourse to the use of personnel unwilling or unprepared to follow the LOAC. Notice to other nations further limits potential targeting errors or recourse to unrestricted warfare.

The rules affirm the signing nation's paramount intention to set the conditions for target discrimination; they prescribe a command and discipline system for warships to ensure conformance with LOAC. In addition, the objective of the Paris Protocol to eliminate pecuniary motive from belligerent operations has been maintained. Thus, when a ship meets the requirement for distinguishing markings to ensure that warships contrast with merchant vessels and when its command functions are subject to military control and discipline, the specific intention of the international law is satisfied.³⁴ Command remains responsible and accountable for all actions of the ship, including belligerent acts. Accordingly, placing civilians on U.S. warships – so long as command functions are not civilianized – should have no impact on the status of a combatant vessel under international law.

Direct Participation in Hostilities. The U.S. Must Be Cautious of the Roles That It Assigns to Civilians on Warships

Derived from Common Article 3, the concept of "direct" or "active" participation in hostilities is found throughout of the Geneva Conventions, its protocols and attending commentary.³⁵ Protocol Additional I, Article 43.2, specifies that "[m]embers of the armed forces of a Party to the conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities." This article sets forth what has become known as "combatant privilege": As long as a "combatant has otherwise complied with humanitarian law, he or she may not be punished for directing acts of violence against the enemy."³⁶ Civilians who directly participate in hostilities lose their immunity from attack during the time of such participation.³⁷ Also, civilians who participate in hostilities – like pirates - may be prosecuted under the domestic law of the detaining state as criminals since civilians do not have combatant privilege.³⁸ Despite their exposure to serious legal consequences, there is no settled definition of what constitutes "direct participation in hostilities."³⁹

The Commentary on Protocol Additional I stipulates that "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."⁴⁰ At the minimum, this means that actually operating weapons systems or being responsible for command and control of such weapons would constitute direct participation. In shipboard operations, operation of the engineering plant on a ship, or deck equipment, or participation in logistics functions, or other shipboard support roles not involving the operation of weapons systems does not seem to constitute "direct participation" in hostilities.⁴¹ It remains clear, however, that a civilian embarked on a warship may be subject to attack as a collateral consequence of being embarked on board the ship. Nevertheless, a capturing state would have difficulty holding a civilian in a support role on a warship liable as an unlawful combatant. Certainly, such civilians on warships assume the principle burden of combatant status – they are subject to attack. If they are not responsible for command and control, for weapons release or other direct combatant roles, there is no overarching reason to treat them under the law as criminals or "unlawful combatants."

Arguably, Prisoner of War status should attach to civilians that are assigned to non-combat roles. The Geneva Conventions generously grant a rebuttal presumption of POW status "whenever [a] person claims such status, appears to be entitled to it, or the adverse Party asserts the status for him or her."⁴² Protocol Additional I provides a mechanism under Article 84 to advise other "High Contracting Parties" of "laws or regulations" that ensure proper application

of the LOAC. The United States could provide such notice in the case of civilians accompanying the U.S. Navy in non-combatant roles, affirming their POW status as merchant marines “accompanying the armed forces,” a category recognized under Geneva Convention III, Article 4. This would also comply with the notice requirement contained in the Hague Convention referenced above relating to ship conversion. Notice of the recent change to the UCMJ statute that makes civilians accompanying the military in contingency operations subject to the UCMJ is an example of notice that should be made to preserve U.S. warship status when civilians are employed aboard, and likewise to protect the status of combatants.

Advocates of broad interpretation of “direct participation” in hostilities assert that such broad construction provides the maximum protection to the civilian population. In other words, innocent civilians are less likely to be targeted if there is an expansive definition. For example, a broad construction would hold that any individual who performs “an indispensable function . . . making possible the application of force against the enemy is directly participating.”⁴³ But this broad assertion undermines sovereign prerogative to allow civilians to accompany the force and best configure its military formations. Further, such a broad construction would scoop up all civilian mariners assigned to naval auxiliaries that deliver ammunition to a warship or other combatants as “unlawful combatants” - clearly in contravention of the law of naval warfare. Therefore, there is no compelling policy rationale for an expansive definition of “direct participation” that should apply to warships in the maritime context. Finally, state practice and international custom can be determinative on issues of international law. Accordingly, the U.S. position as the world’s preeminent maritime power is poised to shape the law as it integrates more civilians into the crews of its warships.⁴⁴

The U.S. Navy has a long history of bringing civilians in very small numbers aboard warships to provide expertise not resident within the active duty force. They perform duties collateral to the main functioning of the ship: These civilians provide technical support and troubleshooting of advanced equipment; or civilian college professors teach classes to the crew during a deployment; or members of the media report on the ship’s activities. International law specifically accommodates the state’s practice of bringing civilians to the battlefield in supporting roles. For example, they may work in non-belligerent categories such as “civilian members of aircraft crews”; “war correspondents”; “supply contractors”; “members of labor units”; or morale, welfare, and recreation personnel.⁴⁵ Civilians captured on the battlefield that “accompany the force” in such capacities are entitled to Prisoner of War status.⁴⁶ However, they do not have combatant privilege – the roles assigned to them are presumptively non-belligerent. They do not directly participate in combat.

Therefore, a practical solution to minimize the risk of a finding that U.S. civilian mariners acted as “unlawful combatants” “directly participating” in hostilities when a U.S. warship with civilian mariners engages in combat is to carefully restrict the billets that they are allowed to occupy. Although scholars disagree on what constitutes direct participation, the more removed they are in the causal chain in the application of force, the less likely that a capturing belligerent could find criminal culpability.⁴⁷ Certainly knowledge or intent would be central to a finding of criminal culpability; therefore any billet responsible for command and control should not be considered for civilianization. Also, billets requiring the handling of weapons systems, or responsibility for their operation, should not be eligible. Command and control, and weapons operation are belligerent *per se* and involve authority and accountability issues that are uniquely military. The requirements under international law for warships stipulate military control of those functions as they are inexorably tied to belligerency operations.

Even with the above precautions scrupulously observed, theoretically a belligerent could conclude that civilians captured on warships, because of their general contribution to the enterprise, are unlawful combatants. A warship can in theory be considered an integrated weapons system; thus all persons essential to its function might therefore be considered direct participants. This, however, in practice would be unlikely. POW status for both merchant mariners and other civilians accompanying the force – categories that apply to civilians that accompany the U.S. Navy on warships – is granted under Article 4, Geneva III.⁴⁸ The risk of trial following capture is remote so long as the warship comports itself within the requirements of LOAC, and so long as civilian crewmembers are relegated to non-command functions (including weapons systems operations). There would then be no sound policy justification to find such a captured civilian crewmember of a warship was an “unlawful combatant.”

Civilian Mariners assigned to Warships as lawful combatants under LOAC

There are a number of factors that suggest that under LOAC civilian mariners incorporated into the crew of a warship are part of the armed forces. The Geneva Conventions anticipate that the phrase “armed forces” can include people who are not part of the active duty forces. Protocol Additional I, generally regarded as a statement of customary international law, recognizes the incorporation paramilitaries and law enforcement agencies into the armed forces.⁴⁹ Under U.S. law, civilians accompanying the Armed Forces are subject to military discipline during declared war and contingency operations. It appears that when civilians are employed by or accompany the U.S. Navy on a warship, they become part of the U.S. Armed Forces for the purposes of the international law. They are not only subject to the UCMJ and to

the orders and discipline of the commanding officer, they are also subject to attack as part of the vessel crew. There is no requirement contained in the Geneva Conventions, Protocols, or accompanying Commentary for civilians in every case to actually “enlist” to become part of the armed forces. As one legal commentator observes “lawful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done in the field.”⁵⁰

The International Committee of the Red Cross’s (ICRC) Commentary to Article 43, Additional Protocol I lends some authority for treating civilians incorporated into the crew of a warships as combatants.⁵¹ The ICRC Commentary claims “[a] civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant throughout the duration of hostilities . . . whether or not he is a combatant, or for the time being armed.” The commentary concludes that “the conditions which should all be met to participate directly in hostilities are the following: a) subordination to a Party to the conflict . . . ; b) an organization of a military character; c) a responsible command exercising effective control over the members of the organization; d) respect for the rules of international law applicable in armed conflict.”⁵² What matters is that the civilian member displays respect for the rules of international law applicable in armed conflict. Accordingly, incorporation of civilian mariners into U.S. Navy ship structure on warships should confer on them combatant status as members of the armed forces with full combatant immunity to the extent that they in fact comply with the LOAC.

The Commanding Officer of a warship has a degree of disciplinary control over civilian mariners – sufficient for the purpose of ensuring management, discipline and compliance with LOAC. All persons aboard U.S. Navy ships are subject to the authority of the Commanding Officer.⁵³ He may take action necessary for the safety of the ship to include restraint of individuals – until circumstances permit delivery to proper authority.⁵⁴ In addition, for mariners who are directly employed by the U.S. Government, the fully panoply of remedies available under civil service regulations apply. Also, Department of Defense Regulations specify training for civilians that accompany U.S. forces, including law of war training; also the regulations specify uniform requirements, and procedures for permitting carrying weapons.⁵⁵ Failure of civilian mariners to follow the rules and regulations of a ship as promulgated through the Commanding Officer would likely result in the removal of the civilians from the ship. Certainly the Commanding Officer has the authority to remove anyone aboard at any time he directs. More importantly, during contingency operations and declared wars, civilian mariners are subject to the UCMJ, so they may be prosecuted under military law.

Further, criminal misconduct by a civilian aboard a U.S. Navy vessel would subject the offender to prosecution under the Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. 3261.⁵⁶ Although the case would be prosecuted in a U.S. Federal Court, the fact that jurisdiction attaches supports a contention that civilian mariners are subject to “armed forces discipline,” not only during wartime and contingencies but during peacetime. Indeed, initial responsibility for investigation of such shipboard criminal matters would fall on military personnel, under the authority of the Commanding Officer. More importantly, MEJA extends to violations of the LOAC.

Accordingly, a Commanding Officer has some control - arguably sufficient control - over civilian mariners at sea for ensuring compliance with LOAC. He can remove from his ship a civilian who does not comply with his orders or otherwise have the individual fired. Further, he can initiate criminal investigation and follow-on prosecution when necessary. In circumstances where the safety and security of the ship are implicated, a civilian mariner may be incarcerated until delivery to appropriate authority can be arranged. During wartime and contingency operations civilian mariners are subject to the UCMJ. An objective review of the authority of a U.S. commanding officer is sufficient to conclude that civilian mariners embarked on warships are subject to “armed forces discipline” in compliance with the requirements of the LOAC – thereby conferring full combatant immunity to them. For all intents and purposes, civilian mariners assigned to U.S. warships merge with the military crew, becoming part of it.

Conclusion

Transformation of the Navy by replacing active duty sailors with civilian mariners in some billets is supportable under LOAC, but not without some risk. The U.S. can proceed with confidence that the status of warships under LOAC will be preserved with civilians in billets unrelated to command or weapons handling roles. However, there is the potential of confusion with regard to the issue of “direct participation” and combatant immunity. Therefore the U.S. should take additional steps to mitigate risk.

First, to reduce potential confusion over the roles of such civilians, their duties and billets should be relegated to non-command and non-weapons handling roles. Rather, civilian mariners should serve only in those capacities traditionally manned on merchant vessels – for example, in deck, engineering, and logistics functions. Civilians should not be assigned roles on warships that involve them in weapons deployment or performance of command functions. Second, notice under Protocol Additional I, Article 84 is the proper mechanism to give notice of the change of status of civilian merchant marines to combatants as members of the force.

Finally, Navy planners should remain mindful that warfighting capacity diminishes as active duty personnel are replaced by civilians. Civilians should be kept out of functions that are belligerent per-se – leave these responsibilities for the active duty force. Accordingly, there are limits on the amount of civilian augmentation that can displace active duty personnel. Such augmentation should not jeopardize or critically diminish a warship's combat capabilities. By limiting the roles of civilians and by careful manning of warfighting functions on warships with the active duty force, the United States can better integrate its total seapower manning options, with greater efficiency.

Endnotes

¹ Navy Newsstand, Commander Naval Forces Europe/Commander, U.S. 6th Fleet Public Affairs, "USS Mount Whitney Underway for NATO's Allied Action," 17 May 2005, available from <http://www.globalsecurity.org/military/library/news/2005/05/mil-050517-nns01.htm>; Internet; accessed 11 December 2006.

² Department of the Navy, *Navy Transformation Roadmap*, 2003, available from http://www.onr.navy.mil/ctto/docs/naval_transform_roadmap.pdf, Internet; accessed 13 December 2006, 93-94. "It is also critical that our Sea Warrior manpower requirements reflect a well reasoned mix of Total Force Manpower (active, reserve, civilian, contractor) so that we not only deliver readiness, but also do so in the most economic manner. Moreover, manpower represents both an essential investment and an opportunity cost as well. By measures such as the replacement of non-military essential uniformed manpower in our infrastructure with civilians or contractors we can help make available the funds that will be necessary to enable transformation." *Ibid.*, 84.

³ The terms "civilians," civilian manpower" or "civilian mariners" in the context of this paper are all civilians, irrespective of their status as government employees or contractors, as distinguished from the regular military active duty force. Under international humanitarian law, "civilians" are those who are not part of the armed forces or "combatants." Article 50(1), Protocol Additional I to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 [hereinafter Protocol Additional I], in Roberts and Guelff, 2nd eds., *Documents on the Laws of War*, p. 415. The United States is a signatory to Protocol Additional I, but has not ratified the Convention due to the provisions of Article 44, which gives POW status to guerrilla fighters. *Ibid.* 411-412. Protocol Additional I is nevertheless is considered a statement of customary international law. *Ibid.* 4.

⁴ Circular A-76 directs federal agencies to rely on the commercial sector to the maximum extent possible except for those functions that are inherently governmental. U.S. Office of Management and Budget, OMB Circular No. A-76. revised, *Subject: Performance of Commercial Activities*, May 29, 2003. 1-2.

⁵ See Michael N. Schmitt, "Direct Participation in Hostilities" and 21 Century Armed Conflict, in *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* (Berlin: BWV, Horst Fischer et al eds., 2004), at 505-529, pointing out civilianization is occurring at a rapid pace in modern militaries because of cost pressures; downsizing some units to better address

21 Century threats; and technological requirements especially in command, control, communications, computers and intelligence. See also Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees," *Chicago Journal of International Law*, 511 (Winter 2004) 517-518.

⁶ Privateering was essentially state-sponsored piracy. The privateer obtained from the sovereign a permit ("letter of marquee") that allowed him to attack and take the cargo of belligerent flagged vessels and split his proceeds with his crew and the sovereign. See Gregory J. Sidak, "The Quasi War Cases - - And Their Relevance to Whether Letters of Marque and Reprisal Constrain Presidential War Powers," 28 *Harv.J.L.&Pub.Pol'y* 465 (Spring 2005) 471-473.

⁷ Jane G. Dalton, "Future Navies - Present Issues," *Naval War College Review*, Vol. 59, No.1, Winter, 2006, pp 2-4.

⁸ *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. 11

⁹ See Georg Schwartzenburger, *International Law as Applied by International Courts and Tribunals* (London 1968), 115-117. "Belligerents are free to apply to war criminals [unlawful combatants] any penalty they consider appropriate, including the death penalty." *Ibid.* 454.

¹⁰ Article 43, Protocol Additional I; Geneva Convention III Relative to the Treatment of Prisoners of War, 12 August 1949, Article 4, in Roberts and Guelff, 2nd eds., *Documents on the Laws of War*, p. 217-218 [hereinafter Geneva Convention III].

¹¹ "The rule is established that a civilian who aids, abets or participates in the fighting is liable for punishment as a war criminal under the laws of war. Fighting is legitimate only for combatant personnel of a country." *The Hostages Trial*, XV *Law Reports of Trials of War Criminals*, *United Nations Wartime Commission* (London 1947-48): 11

¹² MPF(F) Analysis of Alternatives, available from <http://www.globalsecurity.org/military/systems/ship/mpf-f-aoa.htm>, Internet; accessed 15 December 2006.

¹³ The Legal Advisor to the U.S. Department of State, Mr. John Bellinger, III recently remarked:

The distinction between lawful and unlawful combatants has deep roots in international humanitarian law – it can be traced back to The Hague Regulations of 1899 and 1907. Moreover, as a matter of law, al Qaida and Taliban detainees are simply not entitled to prisoner of war status. The Third Geneva Convention does not ensure that everyone who takes up weapons on a battlefield receives POW status.

John B. Bellinger III, "Reflections on Transatlantic Approaches to International Law," Remarks at the Duke Law School Center for International and Comparative Law, Washington, DC, November 15, 2006 available from <http://www.state.gov/s//rls/77279.htm>, Internet; accessed 17 December 2006. "Unlawful combatants" are "people who take active and continuous part in an armed conflict, and therefore should be treated as combatants, in the sense that they are legitimate targets of attack, and they do not enjoy the protections granted to civilians. However,

they are not entitled to the rights and privileges of combatants, since they do not . . . obey the laws of war. Thus for example, they are not entitled to the status of prisoner of war.” The Public Committee against Torture in Israel v. The Government of Israel, *The Supreme Court Sitting as the High Court of Justice*, HCJ 769/02, (paras 27-28), 13 December 2006.

¹⁴ Civilians who do not comply with the laws of armed conflict and take an active part in fighting are “unlawful combatants,” and are subject to trial by a capturing belligerent – the same as spies. Schwartzburger, 116.

¹⁵ “The exercise of belligerent rights at sea is limited to warships and military aircraft.” Schwartzburger, 376.

¹⁶ 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 Rhode Island, Naval War College, 1999, ch. 7 and 8. [hereinafter *Annotated Supplement*].

¹⁷ *Ibid.* 109-212.

¹⁸ *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], Article 29, p. 11; High Seas Convention, Article 8; Hague Convention VII Relating to the Conversion of Merchant Ships into Warships, The Hague, 18 October 1907, Articles 2-5, N. Ronzitti, *The Law of Naval Warfare, A Collection of Agreements and Commentaries*, 1988, p. 115.

¹⁹ Civilians under International Humanitarian Law are privileged as non-combatants, and are not subject to attack. The Geneva Conventions of 12 August 1949, Common Article III, in Roberts and Guelff, 2nd eds., *Documents on the Laws of War*, pp 172, 195, 217, 273.

²⁰ For the U.S., armed forces discipline equates to application of the Uniform Code of Military Justice (UCMJ). The UCMJ applies to members of the armed forces on active duty. It can also apply to persons “serving with, employed by, or accompanying the armed forces outside the United States” during a “declared war or a contingency operation”. 10 USC § 802(a); Reid v. Covert, 354 U.S. 1 (1957)

²¹ FY07 Defense Authorization Act, SEC. 552 CLARIFICATION OF APPLICATION OF UNIFORM CODE OF MILITARY JUSTICE DURING TIME OF WAR, amending Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), striking “war” and inserting “declared war or a contingency operation,” June 22, 2006.

²² Peter W. Singer, “The Law Catches Up to Private Militaries, Embeds,” *DefenseTech*, January 4, 2007, found on <http://www.brookings.edu/views/articles/psinger/20070104.htm>, Internet; 22 January 2007.

²³ 10 USC 101(a)(13).

²⁴ Griff Witte, “New Law Could Subject Civilians to Military Trial; Provision Aimed at Contractors, But Some Fear It Will Sweep Up Other Workers,” *The Washington Post*, 15 January 2007, sec. A, p.1.

²⁵ Ibid.

²⁶ The Navy publishes a complete list of active ships. The Naval Vessel Register is published online, available from <http://www.nvr.navy.mil>, Internet; accessed 14 December 2006.

²⁷ The military advantage would outweigh incidental loss of civilian life in an attack of a modern U.S. Navy warship by a belligerent nation. The law of proportionality prohibits an attack that “may cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.” Article 51.5b, Protocol Additional I.

²⁸ A. Ralph Thomas and James C. Duncan, *Annotated Supplement*, p. 402.

²⁹ The signatories to the Paris Protocol are Austria, France, Prussia, Russia, Sardinia, Turkey and the United Kingdom. The Protocol has achieved the status of customary international law – the United States considered the provisions of the Protocol binding on all states as early as the outbreak of the First World War. N. Ronzitti, *The Law of Naval Warfare, A Collection of Agreements and Commentaries*, 1988, pp. 67-68, 70.

³⁰ Ibid, 64.

³¹ Commentary, (H. Fujita), N. Ronzitti, *The Law of Naval Warfare, A Collection of Agreements and Commentaries*, 1988, p. 71.

³² 1907 Hague Convention VII Relating to The Conversion of Merchant Ships into Warships, Articles 1-6, N. Ronzitti, 114-115.

³³ Robert W. Tucker, *The Law of War and Neutrality at Sea* (1957), 41.

³⁴ “All naval enemy combat units . . . as well as auxiliary and supply vessels may be attacked immediately on the outbreak of war, without any preliminary visit or demand for surrender.” Julius Stone, *Legal Controls of International Conflict*, (1959), 585

³⁵ International Committee of the Red Cross, *Summary Report, Direct Participation in Hostilities under International Humanitarian Law*, Geneva, September 2003, p 3-4

³⁶ Michael N. Schmitt, “Direct Participation in Hostilities,” 506.

³⁷ Protocol Additional I, Article 51.3.

³⁸ Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” 519-520.

³⁹ International Committee of the Red Cross, *Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities*, 23-25 October 2005, p. 4; Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” 531.

⁴⁰ International Committee of the Red Cross (ICRC), Commentary to Protocol Additional I, p. 616, available from <http://www.icrc.org/IHL.nsf/FULL/471?OpenDocument>, Internet, accessed 14 December 2006.

⁴¹ Hostile acts “should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces,” while direct participation are “acts of war which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the enemy.” *Ibid.* 618-619.

⁴² Protocol Additional I, Article 45.1.

⁴³ Michael N. Schmitt, “Direct Participation in Hostilities” at 505-527, 529.

⁴⁴ “For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitates*)” and “should reflect the wide acceptance among the states particular involved in the relevant activity.” The American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Volume 1, (1987), p. 25.

⁴⁵ Geneva Convention III, Article 4; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, Article 13 [hereinafter Geneva Convention II] in Roberts and Guelff, 2nd eds., *Documents on the Laws of War*, p. 199; Protocol Additional I, Article 50.4(A)4.

⁴⁶ *Ibid.*

⁴⁷ Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” 533.

⁴⁸ Geneva Convention III, Article 4A(4)-(5).

⁴⁹ Protocol Additional I, Article 43(3).

⁵⁰ Michael N. Schmitt, “Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,” 529, citing Yoram Dinstein, *The Conduct of Hostilities Under the Laws of Armed Conflict*, Cambridge 2004, 39.

⁵¹ ICRC Commentary to Protocol Additional I, p. 515

⁵² *Ibid.* p. 517

⁵³ U.S. Department of the Navy, *U.S. Navy Regulations*, 1990, para 0842

⁵⁴ *Ibid.*

⁵⁵ U.S. Department of Defense, *Department of Defense Instruction 3020.hh*, 3 October 2006

⁵⁶ *Ibid.* p. 7.