International Law Studies - Volume 68 Readings on International Law From the Naval War College Review 1978-1994 John Norton Moore & Robert F. Turner (Editors)

FOREWORD

The International Law Studies "Blue Book" series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the sixty-eighth volume of the series, consists of writings on international law which have appeared in the Naval War College Review during the period 1978–1994.

This compilation of articles, essays and reviews follows an earlier two-volume work published in 1980 which comprised readings appearing in the Review from 1947 to 1977. Those two volumes, 61 and 62 of this "Blue Book" series, were edited by Professor John Norton Moore (who had recently served as U.S. Ambassador to the Third United Nations Conference on the Law of the Sea) and Professor Richard Lillich (a former Charles H. Stockton Professor of International Law at the Naval War College), both of the University of Virginia School of Law. Professors Moore and Lillich compiled those readings in a cogent and readily accessible format for use by students and practitioners of international law.

Volume 68 continues in that tradition, bringing together some of the best writings on international law from the Naval War College Review in the intervening seventeen years. Professor Moore again serves as coeditor for this volume and is once more joined in that effort by a University of Virginia colleague—Professor Robert F. Turner—also of the School of Law. Professor Turner occupied the Stockton Chair of International Law at the Naval War College during the 1994–95 academic year.

The readings in Volume 68 reflect an era of profound change, both in international law and in the world community; and the important field of oceans law has perhaps typified that trend. Indeed, as the articles in Part Two will demonstrate, the clarification and codification of the law of the sea during this period has proceeded more rapidly than during any comparable period in history. Considerable progress has also been made in the struggle against terrorism, in the law of war, and in other areas addressed in the material which follows.

The articles are conveniently arranged under general headings in six Parts (although several articles address more than one subject and have been assigned by our editors to the one thought most appropriate); and in order to give the reader a sense of the evolutionary process that has occurred in several of these areas, they are arranged chronologically within each Part. Particularly in the law of the sea area, some of the earlier articles may seem dated today—but they reflect important thinking that will be of interest to readers seeking to understand the profound geopolitical dynamics that have occasioned recent changes in the law.

The Naval War College takes pride in its commitment to academic freedom. Writings that have appeared in the Naval War College Review and the "Blue Book" series hew to no official policy agenda. Indeed, the value of an article or essay may reside particularly in its articulation of positions quite at odds with the conventional wisdom. As a consequence, it should be understood that while the opinions expressed in this volume are those of the individual authors and not necessarily those of the United States Navy nor the Naval War College, they collectively provide a valuable contribution to the study of international law.

On behalf of the Secretary of the Navy, the Chief of Naval Operations and Commandant of the Marine Corps, I extend to the editors and the contributing authors of this informative and provocative compilation our gratitude and thanks.

James R. Stark Rear Admiral, U.S. Navy President, Naval War College

PREFACE

By coincidence, today marks the 110th anniversary of the beginning of the first class of students at the Naval War College in 1885. As the small group gathered in a structure originally designed to serve as Newport's poorhouse and "deaf and dumb asylum," lacking money—not only for books and furniture, but even for heat and light—Acting Rear Admiral Stephen B. Luce noted that the building would at least provide "shelter" and declared: "Poor little poorhouse, I christen thee the United States Naval War College." It was the austere beginning of something very important—an event of landmark significance for the profession of international law.

The Naval War College's Contribution to International Law

Rear Admiral Stark notes in his foreword that international law has long played a central role in the Naval War College curriculum. But, with characteristic modesty, he neglects to make the corollary observation that the Naval War College has played a very important role in the development both of substantive international law and the teaching thereof. From our perspective, such a conclusion is clearly warranted. Some brief history may be useful to illustrate that observation.

Lacking funds in its infancy, the War College was dependent upon visiting lecturers who would volunteer to travel to Newport at their own expense to teach the first class of students. The first such lectures were by Professor James Soley—then the Librarian in the Department of the Navy, but soon to become Assistant Secretary of the Navy—who addressed the important topic of international law.

According to the centennial history of the Naval War College,² by 1894 the curriculum had expanded to include seven parts, the very first of which included "lectures on professional subjects, including international law." This series of twenty-two international law lectures was delivered by Professor Freeman Snow, of Harvard Law School, who brought with him the "case method" of study which he was helping to pioneer at Harvard at the time—an approach that was later to become a standard tool of legal education in America.

When Professor Snow passed away during the 1894 War College term, Rear Admiral Henry C. Taylor entrusted Commander Charles H. Stockton with the task of editing and expanding Professor Snow's lectures into a text on international law. Published in 1895, it was to be the first of many War College books on the subject. Along with Professor Snow's 1893 Cases on International Law, the new War College volume provided an important teaching tool for law schools around the country.

In 1898, Stockton had risen to the rank of Captain and was named Naval War College President. The following year he was charged by the Secretary of the Navy with drafting a Code of the Law and Usages of War at Sea—a document that served as an early effort to codify the law of the sea. Captain Stockton represented the United States at the Hague Peace Conference of 1907, which played an important role in the development of conventional law governing armed conflict.

In 1901 the study of international law at the Naval War College was under the direction of the legendary John Bassett Moore (no relation to the undersigned) of Columbia University, who went on to become a judge of the Permanent Court of International Justice and is viewed by many as perhaps the finest international lawyer ever produced by the United States. One of Professor Moore's many contributions was to initiate the series of "Blue Books," of which the present volume is the sixty-eighth. Moore was succeeded by Professor George Grafton Wilson, one of the co-founders of the American Society of International Law, who divided his efforts between teaching at the War College and at Brown (and later at Harvard) University. Under Professor Wilson's guidance, another 7,000-pages of "Blue Books" were produced by 1937.

Another enhancement to the Naval War College's international law program occurred following World War I, when Admiral William B. Sims—an internationally-acclaimed war hero who was expected to receive his choice of any senior position in the Navy—requested instead to return to the presidency of the War College. Because of his great prestige, Admiral Sims was able to secure increased funding to attract "leading authorities on international law" to the War College. Many of the nation's foremost scholars in the field were drawn to Newport during the years which followed, including Professor Manley O. Hudson of Harvard (who also served as a World Court judge).

Up until that point, however, distinguished scholars like John Bassett Moore and Manley Hudson would divide their time between their War College responsibilities and teaching at leading universities in the region such as Harvard, Columbia, and Brown. In July, 1951, Professor Hudson was succeeded by Professor Hans Kelsen, of the University of California at Berkeley, who became the first full-time occupant of what in 1967 was to become known as the Charles H. Stockton Chair of International Law. It remains the oldest and is widely viewed as the most prestigious chair at the Naval War College.

While Admiral Stark is certainly correct in noting the importance placed on international law in the curriculum of the College, one can only add that during its proud history the Naval War College has attracted some of the Nation's foremost scholars of international law—and those of us in the profession today are deeply indebted to the Naval War College for the contributions its scholars have made over the years. To give just one contemporary example, The Commander's Handbook on the Law of Naval Operations (NWP 9), produced

under the leadership of Professor Jack Grunawalt, Director of the Oceans Law and Policy Department, remains the seminal work on the subject and has been translated into several other languages for use by foreign navies.

Today, there are more international lawyers assigned to the Naval War College than during any period in its history. In addition to the Stockton chairholder and Professor Grunawalt, the Oceans Law and Policy Department includes uniformed international/operational lawyers from the Navy, Army, Marine Corps and Coast Guard. An Air Force representative will join the Department next year. Still another full-time international lawyer is assigned to the Joint Military Operations Department, as the holder of the Howard S. Levie Chair of Operational Law. The Naval War College clearly remains committed to this distinguished tradition of furthering the teaching and development of international law, and we commend Admiral Stark and his colleagues for the College's many important contributions over the years.

Readings from the Naval War College Review

In 1948 the Naval War College began publishing the Naval War College Review as a forum for discussion of public policy matters of interest to the maritime services. The Review has provided yet another vehicle for the dissemination of information and ideas concerning international law. Indeed, over the years a number of landmark articles on the subject have appeared in the Review.

In 1980, volumes 61 and 62 of the Blue Book series were devoted to Readings in International Law from the Naval War College Review 1947-1977. Edited by former Stockton chairholder (1968-69) Richard B. Lillich and John Norton Moore (one of the current editors), these two volumes compiled a wealth of valuable material on oceans law, the use of force, international human rights, and a number of other important topics.

The present volume is a sequel to those Blue Books, bringing together under one cover the most important contributions on international law published in the Review between 1978 and 1994. It also includes one short monograph of particular importance that was originally published by the Naval War College as part of its "Newport Papers" series.

The articles are organized chronologically under six headings. Part I addresses the role of law in the international system. We would in particular call the reader's attention to the contribution entitled "Contemporary International Law: Relevant to Today's World?," by Rear Admiral Horace B. Robertson, Jr., JAGC, USN (Ret.) from the Summer 1992 issue of the Review. After his retirement as Judge Advocate General of the Navy, Admiral Robertson distinguished himself as an educator on the law faculty of Duke University. In 1990-91, he occupied the Stockton Chair at the Naval War College. It should

be noted that Professor Alfred P. Rubin, of the Fletcher School of Law and Diplomacy at Tufts University, who has authored two articles to Part I, is also a former Stockton chairholder (1981-82).

Part II brings together articles on oceans law, a field of obvious interest to the Naval War College. The period during which these articles were written was one of great transition in connection with the 1982 United Nations Convention on the Law of the Sea. Some of the articles written before the treaty was concluded may seem somewhat dated, but we have included them because they provided valuable insight into the important debates that produced the landmark treaty. This section concludes with Admiral Robertson's "Newport Paper," which provides a very useful overview of "The 'New' Law of the Sea and the Law of Armed Conflict at Sea."

Part III examines "use of force" law (jus ad bellum), and focuses primarily upon a series of "case studies" ranging from Grenada and Libya to Panama. Of particular interest may be the contribution by former Secretary of the Navy James H. Webb, Jr., from the Winter 1988 issue of the Review, which, while not primarily a "legal" analysis, provides an interesting insight of senior service leadership on when and how force should be used combined with recollections of the frustrations faced by an Infantry officer in Vietnam in the 1960s. Originally delivered as a lecture to the War College's 1987 Current Strategy Forum, we thought the piece likely to be of sufficient interest to the international law community as to warrant inclusion despite its lack of "legal" focus.

Part IV looks at terrorism. The eight articles making up this section could have been included in parts III or V, but given the interest in this problem reflected by the number of articles published on the subject in the Review, we thought it better to group them together. Particularly noteworthy, perhaps, in this section are the overview of United Nations efforts to respond effectively to international terrorism by the late Professor L.F.E. (Fred) Goldie, a former Stockton chairholder (1970–1971), and the concluding article on "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," by Colonel James P. Terry, USMC—who retired earlier this year after serving three years as Legal Adviser to the Chairman of the Joint Chiefs of Staff.

Part V consists of articles on the law of war (jus in bello). It begins with an analysis of the 1977 Protocols to the 1949 Geneva Conventions written by W. Hays Parks, a former Stockton Professor (1984–1985), followed by an excellent discussion of rules of engagement by J. Ashley Roach (now with the Office of the Legal Adviser to the Department of State). This section concludes with a discussion of international environmental law and Operation Desert Storm by Colonel Terry, and a piece on "The Obligation to Accept Surrender" by Admiral Robertson.

Finally, part VI collects three additional articles which we believed warranted inclusion in this volume but which did not fit conveniently under any of the

earlier headings. Two of these deal with treaty relationships—the U.S.-Japan alliance and the impact of the INF Treaty on European security.

A concluding note may be in order. In writing the introduction to volume 61 of the Blue Book series in March, 1979, one of us (Professor Moore) lamented that "international law frequently is not significantly considered in key national security decision," noting that "[t]here continues to be no international legal expert as such on the NSC staff...." He had made this point writing earlier in the January 1973 issue of Foreign Affairs. We are pleased to note that considerable progress has been made toward assuring that international and other legal issues will be considered at the highest levels of the policy process by the establishment in 1982 of a Legal Adviser on the National Security Council staff.

If the recent past is any guide, the years ahead will produce still further advances and developments in international law; and many of these will be of great importance to the Naval War College and the military officer. For a period of nearly half-a-century, the Naval War College Review has made an invaluable contribution to the development and understanding of international law that has left all of us in its debt. We are honored to be able to bring some of these articles to a wider audience, and we look forward to a continuation of this tradition of excellence in the years ahead.

John Norton Moore

Robert F. Turner

Charlottesville, Virginia

4 September 1995

Notes

^{1.} For an excellent hisotry of the War College, see JOHN B. HATTENDORF, B. MITCHELL SIMPSON, III, & JOHN R. WADLEIGH, SAILORS AND SCHOLARS: THE CENTENNIAL HISTORY OF THE U.S. NAVAL WAR COLLEGE (1984).

^{2.} Id.