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Role of International Law and an Evolving Ocean Law  
Richard B. Lillich & John Norton Moore (editors)

**INTRODUCTION TO VOLUME I**

**(The Role of International Law and An Evolving Ocean Law)**

**by**

**John Norton Moore\***

**International Law at the Naval War College**

For the past three decades some of the best writing on international law has appeared in the Naval War College Review. This is no accident. For the Naval War College has traditionally had one of the finest programs in international law in the United States. The core of the program is the Stockton Chair of International Law which has attracted top international legal scholars. In addition, the College regularly invites distinguished international jurists to deliver a series of lectures to the student body on basic aspects of international law. For many years the College also sponsored an "International Law Week" which brought together a group of twenty or thirty international lawyers from government and the private sector to discuss and teach about current international legal problems. The morning "briefing sessions" of this event were always exciting and were looked forward to eagerly by an entire generation of international lawyers in the United States. Indeed, with the possible exception of the Annual Meeting of the American Society of International Law, I know of no regular international legal meeting that rivaled these Naval War College sessions for intellectual excitement and high caliber discussion.

As if this were not enough, the War College is blessed with two other strengths that have greatly contributed to its success in international

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law. Like Mr. Jefferson's University to the South, the War College consistently has maintained the finest tradition of academic freedom. Those disagreeing with current policies have shared the platform with Assistant Secretaries and Admirals. For example, some of the finest debates that I have heard on the legal issues of the Indo-China War took place before the student body of the War College. On one occasion when I disagreed fundamentally with then current policy in the law of the sea negotiations I was privileged to be the beneficiary of this tradition. In short, the War College does not fit the stereotype of a rigid institution listening only to the official policy of the moment and ideologically aligned with Dr. Strangelove.

The second great strength of the War College is that as one of the senior service colleges, along with the National Defense University and the Army War College, the College attracts top senior officers and civil servants from every major foreign policy establishment in Washington. That includes the National Security Council, the State Department, the Navy, the Central Intelligence Agency, the Defense Department and many others. Since Naval War College assignments are viewed as a career step to the highest positions and are much sought after, the ability and experience of the students is exceptionally high. In a class discussion of "Mayaguez" or the Cuban Missile Crisis invariably a number of students participated in significant roles. These students in turn frequently turn out excellent work for publication.

### The Structure of Volumes I and II

With this rich tradition in international law it is not surprising that some of the classics of international law have appeared in the Naval War College Review and that the list of contributors reads like a Who's Who of International Law. Manley O. Hudson, Philip Jessup, Charles Fenwick, Myres McDougal, Richard Baxter, Louis Sohn, Richard Falk, Brunson McClesney, Oliver Lissitzyn, Leon Lipson, John Hazard, Harold Lasswell, Nicholas Katzenbach, Richard Lillich, Richard Bilder, Shabtai Rosenne, Colonel Draper, Rita Hauser, Fred Goldie, Howard Levie and many others have all written for the Review. In addition, many of the finest Navy lawyers have contributed including: Rear Admiral Dusty Miller, Rear Admiral Horace "Robbie" Robertson, Rear Admiral Joseph McDevitt and Captain John Brock. To read the list of contributors is to want to read what they have written. It is this interest in making these extraordinary contributions widely available that has motivated these two volumes of *Readings in International Law from the Naval War College Review 1947-1977*.

The writings group together around three major themes; first, the role of law in the international system; second, ocean law; and third, the law of conflict management (the use of force). In addition, in keeping with the times there have also been a significant number of excellent contributions on human rights and a few on classic international law topics such as jurisdiction, immunities, status of the armed forces abroad, recognition and trusteeship obligations. Unfortunately space considerations precluded our republishing all deserving

contributions, but in the interest of wide availability we have sought to include as many as possible, even if we felt that a piece was primarily of historical significance.

Volume I includes readings in the first two categories, the role of law and ocean law. Volume II centers on the law of conflict management but it also includes the human rights and miscellaneous articles.

### The Role of International Law

The role of international law is one of the most important and fundamental issues in international law. It is also one of the most misunderstood issues. It is gratifying, then, to see so much excellent attention to the subject in these readings.

There are a number of persistent misperceptions about international law and particularly about its utility in national security decisions. The principal ones that together might be called the extreme "realpolitic view" seem to be:

- there is no international legislature to make international law so there cannot be any such law;
- there are few areas where nations are subjected to compulsory jurisdiction in an impartial tribunal in the present international system and as a result there is little law;
- there is no sanction for violation of international law and as a result nations are not really constrained by international law;
- law is solely a restraint system and it cannot help decision makers concerned with solutions for complex national security decisions;
- international law is vague and indeterminate and as such is always only after the fact rhetoric;
- in the often messy and challenging real world it is superfluous to seek to appraise national conduct by reference to morality or legality; and
- as a matter of empirical observation law simply is not seriously considered in most key national security decisions and as such it is not important.

To be fair to the proponents of these views most would concede that law has a marginal impact but in their heart of hearts they do not believe it is really significant. As I<sup>1</sup> and many others have written elsewhere, and the contributors to this volume would agree, the proponents of these views are profoundly wrong and indeed naive, though priding themselves on their tough minded realism. Before briefly answering each of these misperceptions, however, it is only fair to have a look at a few misperceptions on the other side that might be called the extreme "legalist view." These include:

- attempting to demonstrate the relevance of law for national security decisions by demonstrating its relevance in broad areas of cooperative endeavor among nations;

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<sup>1</sup> See (e.g.) J.N. Moore, "The Legal Tradition and the Management of National Security," in *Toward World Order and Human Dignity*, 321 (Reisman and Weston, eds. 1976).

- overemphasizing the relevance of judicial process or compulsory third party dispute settlement as a modality of dealing with critical national security decisions;
- reliance on conceptions of international law which conceive of law as a static body of rules divorced from underlying community policies; and
- the automatic equating of lawful and unlawful policies with actions respectively consistent and inconsistent with the national interest and *vice versa*.

How are these misperceptions answered and what do the readings in this volume contribute on these points?

With respect to the classic “realpolitik” view a close reading of the articles in Part I answers these misperceptions well without falling into the counter errors of the extreme “legalists.” Thus it is pointed out that though there is no central legislature in the international system there is an effectively functioning “constitutive process” that makes binding prescriptions in as real a sense as the legislature of New York. This process includes treaty conferences, certain international institutions, and a more diffuse but no less real development of customary international law through state practice.

Similarly, it is pointed out that in some areas there exist today compulsory third party dispute settlement, some even close to the core of national power. These areas are growing all the time as the recent Soviet acceptance of compulsory dispute settlement machinery in the law of the sea negotiations illustrates. But more to the point, the international system simply has a looser and more diffuse process of invocation and application of legal norms. It does not solely depend on judicial application. Rather the more usual application machinery is the foreign office of affected states. That there is no court is not decisive by any sophisticated standards of jurisprudence though the absence of courts in key areas does contribute to difficulty in the application of law.

The “absence of sanction” problem is handled well in virtually all of the articles. As jurisprudence has become more sophisticated it has become evident that patterns of compliance with legal or “authoritative” norms are a more meaningful social indicator of the effectiveness of a legal system than sanction alone (which is but one factor in promoting compliance). This in turn has focused inquiry on other factors inducing compliance and “surprise” (or were you surprised) community expectations about the “authoritativeness” of norms is a major factor in the communities compliance with them. When community expectations of authoritativeness are low, as with the Supreme Court “Bible reading” decisions, compliance will be low despite reliable sanctions for violation. And when such expectations are high, as with rules concerning traffic lights, compliance will be high even when there is no policeman (or even any other cars). The moral, of course, is that to focus only on an absence of classic “big stick” sanctions is to miss much of the functioning of a legal system including the international legal system. Moreover, the assumption of no sanction may miss a more diffuse but nevertheless real process of interaction leading to imposition of real costs for violation of authoritative

community norms. Indeed, to make a really sophisticated analysis of international legal sanction, among other things we would even want to examine the costs of domestic dissent engendered by expectations that certain behavior is internationally unlawful.

One of the most common errors is to focus on law solely as a restraint system. That is to think only in terms of "the bad man" or "the bad nation" and the extent to which they will be restrained by law. As every modern legal philosopher has shown, however, law has many other functions including guiding the "puzzled nation" and enabling planning for cooperative behavior. Thus we need to examine the utility of law and the legal tradition for the national security manager. What role can law play in long-range planning to reduce crises (*i.e.*, a new law of the sea with guarantees of transit through straits or a new SALT agreement to freeze or reduce levels of strategic forces. We would hardly regard a national security planner as sophisticated if he ignored developments in SALT, the law of the sea, or the new Panama Canal treaties.) What role can law play in crisis management in assessing goals, analyzing and creating policy options and communicating reasons for the option chosen? And what role can it play in continuing review of national and third party conduct? When the inquiry is broadened in this way the temptation to think of law only as restraint begins to yield to more realistic assessment of the potential role of law.

As to the indeterminacy and vagueness of international law, like all law it has areas of clarity and areas of uncertainty. No lawyer familiar with national law harbors illusions as to its definiteness in all areas. International law may have more gaps and tears in the legal fabric but it is not fundamentally different. The real villain here is that the non-specialist in any field can easily equate adversary argument with indeterminacy. Because doctors, economists or lawyers disagree does not mean there is no medicine, economics or law. And the problem is compounded with law since "legality" or compliance with "authoritative expectation" is a source of power and as a result those on different sides of an issue are highly likely to make opposing legal arguments. But rather than indicating the futility of law such argument in fact demonstrates that "authoritative expectations" are taken sufficiently seriously as a source of power as to themselves be fought over.

The notion that states alone of all man's institutions should escape moral or legal judgment is baffling. Given a sympathetic interpretation, what may have been meant by George Kennan and others is that in those extreme situations where national survival is at stake we would predict that nations will give little weight to contrary considerations of international law. Though this may be an accurate empirical judgment, it still neither serves to avoid moral or legal judgment, nor accurately point out that costs for legal violation may still be incurred.

Finally, I and the writers in this volume have a tougher time with the observation that international law frequently is not significantly considered in key national security decisions. Unfortunately, this is too true no matter how many volumes are published on the role of law in national security decisions. There continues to be no international legal expert as such on the NSC staff and the State Department Legal Advisor may or may not become involved in key crisis. Frequently,

Congress seems to have even less regard for international law. The flaw in the argument, however, is to equate what is with what is desirable. It is easily demonstrable that when we have not taken international law into account we have sometimes paid significantly unnecessary costs. And in the instances (more than just a few) where there has been a significant international legal input (as in the Cuban Missile Crisis "quarantine" as opposed to "blockade") the actions have benefited. In the years ahead we as a Nation are going to need to find more effective ways to systematically include an international legal perspective in national security decisions. I am confident that we can and will.

The misperceptions of the extreme "legalists" are as set out largely self-explanatory. One point, though, deserves elaboration. It is an obvious sophistry to argue that just because something is in the national interest (or has just been done) that it is lawful. Similarly, we would not be impressed with an argument that just because a policy option is not in the national interest that it is illegal. The converse does not *automatically* follow either and I believe that international lawyers sometimes do adherence to law a disservice by implying that it does. That is, by either assuming that because something is lawful it is in the national interest or that a course of action is not in the national interest because it is unlawful. As is by now evident I strongly believe in the importance and utility of international law for national security decision makers. Naval or Coast Guard planners unaware of the law of the sea or the law of war would be poor planners. And as the Vigilant incident demonstrates if they are unaware of significant United States treaty obligations their career as planners may be short. Indeed, international law is so important that I can think of no real example where clear illegality should not be sufficient alone to have caused me to recommend against the action. I believe that international lawyers will be more effective, however, if in those settings they explain to national decision makers why it is important for our Nation to adhere to international law and what costs the Nation would bear for violation.<sup>2</sup>

As a final comment on the role of law, the Navy Regulations point the way and for the Naval Officer spell out clearly that international law will be followed. Commander Carlisle of the Navy Judge Advocate General's Office reminded his audience in 1953 that Section 0505 of Navy Regulations<sup>3</sup> reads:

In the event of war between nations with which the United States is at peace, a commander shall observe, and require his command to observe, the principles of international law . . . [and] when the United States is at war he shall observe and require his command to observe, the principles of international law . . .

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<sup>2</sup>For a fuller exposition of this point see Moore, "Comment on Professor Farer's Need for a Thesis: A Reply," in *Law and Civil War in the Modern World*, 565, 570-572 (J.N. Moore, ed. 1974).

<sup>3</sup>Under the 1973 Regulations, it is Section 0605 which reads: "At all times a commander shall observe, and require his command to observe, the principles of international law. Where necessary to fulfillment of this responsibility, a departure from other provisions of Navy Regulations is authorized."

And further that Section 1214<sup>4</sup> states: "All persons in the naval service, in their relations with foreign nations, and with the governments or agents thereof, shall conform to international law. . . ."<sup>5</sup> There is nothing nebulous about that reality! In fact it illustrates one of the most important ways in which international law is realized and receives sanction, that is through incorporation into national law. But as Part I of this volume shows, even without the Navy Regulations there are strong reasons why international law must be taken into account.

### An Evolving Ocean Law

It is only fitting that one of the subjects to receive greatest attention in the Naval War College Review has been the law of the sea. The writings reprinted in this volume cover nearly every aspect of ocean law. They are particularly interesting both for the timeless classics among them, such as the two McDougal articles or the Lissitzyn piece on the Pueblo incident, and because together they chronicle United States ocean policy through one of the most important and rapid evolutions in the history of ocean law. Articles included span the First and Second United Nations Conferences on Law of the Sea in 1958 and 1960 through the early days of the "Seabeds Committee," and down to the current sessions of the on-going Third United Nations Conference on the Law of the Sea (UNCLOS III). These last ten years, encompassing the work of the Conference to date, and the period of rapid 200-mile claims following the United States 200 mile fishery claim in 1977, have seen a virtual revolution in ocean law.

In 1960, following the unsuccessful conclusion of UNCLOS II, the three mile limit was still widely recognized as the maximum breadth of the territorial sea and it was disputed whether fisheries jurisdiction could be extended to twelve nautical miles. Transit through straits was not yet a hot issue; the Soviets were still primarily coastal in their orientation to oceans policy and manganese nodules were just an entry in the log of H.M.S. Challenger.

Today, less than twenty years later, the face of oceans law is radically different. More nations now recognize a twelve mile maximum breadth of the territorial sea, but in compensation there is broad agreement within UNCLOS III, embodied in the negotiating text of the Conference, that twelve is indeed the maximum permissible limit and that there is an unambiguous right of transit passage through, over, and under straits used for international navigation. This latter right is recognition for the first time in the history of ocean law that the right

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<sup>4</sup>Section 1214 has been replaced by Section 1124 of the 1973 Regulations, which reads in pertinent part: "Persons in the Department of the Navy, in their relations with foreign nations, and with the governments or agents thereof, shall conform to international law and to the precedents established by the United States in such relations."

<sup>5</sup>Carlisle, "Aspects of International Law Affecting the Naval Commander," at page 157 of this volume.

of transit through straits used for international navigation is different from and calls for greater protection than the regime of innocent passage in the territorial sea. In a logical extension of the same point the Conference has also tentatively recognized a right of mid-ocean archipelagoes but with the same transit rights of archipelagic passage through broad sealanes. At the same time the archipelagic doctrine has been limited to certain mid-ocean archipelagoes objectively defined by land-to-water ratios and maximum length of closing lines. The controversy over the 12 mile fishing zone has abated and in fact over 60 nations now claim at least fishery jurisdiction out to 200 miles over coastal species of fish. The United States itself led the way with the Magnuson Fishery Conservation Act of 1976, taking effect in March 1977. And the Informal Composite Negotiating Text of the Law of the Sea Conference recognizes a 200-mile economic zone in which coastal nations would have control of resources within a 200-mile area but simultaneously the complete high seas freedom of navigation overflight and other high seas uses traditionally recognized by international law would be retained in the area by the international community. The Soviets, who were so coastally preoccupied in 1960, have emerged as one of the major oceans powers on a global basis and not surprisingly their oceans policy has shifted accordingly. The major debates of the day are the extent of coastal state powers over marine scientific research and vessel-source pollution out to 200 miles and the regime for deep seabed mining in areas beyond national jurisdiction. This last issue, that of deep seabed mining, has now stalemated UNCLOS III for three sessions over two years. On the one hand, the Group of 77 developing countries has sought a powerful International Authority with an operating Enterprise to mine the deep seabed on behalf of the international community. They have indicated a willingness to permit individual nations or business entities sponsored by them to participate in joint ventures under tight controls until technology has been adequately transferred to the Enterprise. On the other hand, the developed nations, led by the United States, have insisted on a right of assured access to deep seabed minerals although they have reluctantly indicated willingness to accept a parallel system that would permit an international Enterprise on half of the seabed sites. At this writing the stalemate continues. In the meantime, the United States Congress is moving forward with legislation to regulate mining by United States firms. How this deep seabed issue is resolved over the next several years could have profound effects on whether a comprehensive treaty can be concluded and ultimately on the parameters of ocean law going well beyond the seabed issue alone.

For persons interested in the evolution of United States ocean policy over this crucial period the writings in this volume provide one of the best public records anywhere. The article by Captain John Brock on archipelagoes is still a classic. His strong emphasis on freedom of transit through archipelagic waters was a corner-stone of United States policy toward archipelagic claims during the course of UNCLOS III negotiations. Happily for both archipelagic nations and maritime nations, a compromise was worked out that recognizes certain mid-ocean archipelagoes but fully protects essential transit rights through archipelagic

waters. Similarly, the articles by Rear Admiral Joseph McDevitt, Robert Frosch, Captain Horace Robertson (who as a Rear Admiral subsequently served a distinguished stint as the Joint Chiefs (OJCS) representative for the Law of the Sea), and Colonel John Lewis set out clearly the options then being considered with respect to the deep seabed regime. Though they indicate a strong (and properly so) concern to avoid progressive extension of coastal state jurisdiction affecting navigational freedom, nowhere is there any basis for the often repeated (and I believe erroneous) charge of a trade-off of United States mining interests for naval interests in transit of straits. Indeed, a simple international registry system coupled with a flag state approach seems to rank high on their list of desirable options. For example Rear Admiral McDevitt wrote in 1968 after surveying options then being considered:

. . . Some form of international registry of claims in conjunction with a system of flag state jurisdiction and control deserves serious consideration. From the national security standpoint, such a system might even be advantageous for it might tend to reduce the risk of economic conflict or territorial claims and, at the same time, not materially interfere with or constrain peacetime military activities and deployments.<sup>6</sup>

Interestingly, this was also the approach recommended by the National Advisory Committee on Oceans and Atmosphere (NACOA) and the Senate Interior Committee. Had the United States begun the seabed negotiation closer to this recommendation the results might have been quite different, even though it is likely that any final agreement would have gone beyond this suggestion. Another indication of something wrong in our early seabed position is suggested in the article by Lieutenant Mark Janis on "The Soviet Navy and Oceans Law." Janis points out that three years after the elaborate 1970 United States seabed proposal, Admiral Gorshkov, the Soviet Naval strategist, was writing in opposition to a strong international authority for the deep seabeds.<sup>7</sup> Had the United States begun the seabeds negotiation with a fairly conservative registry proposal and worked with the Soviet Union to keep the deep seabed negotiation within bounds the final compromise might have been easier and more to our liking.

One message emerges as centrally important for United States ocean policy. The United States is today and has been for some years the most influential nation in the World in setting the legal regime for the oceans. What we do and say, our successes and our failures, will be multiplied many fold. Such a potential for influence calls for a unified foreign policy for the oceans and consistent high level consideration of ocean issues. We must take ocean policy seriously and we must firmly adhere to a vision that will both protect our own interests and promote the common interest. I believe that some of the enduring principles of such a policy as they affect security are as follows:

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<sup>6</sup>McDevitt, "New Issues and New Interest in the Law of the Sea," at page 250 of this volume.

<sup>7</sup>Janis, "The Soviet Navy and Ocean Law," at page 609 of this volume.

— we should continue to encourage development of ocean law along functional lines. The movement from a single territorial sea limit for all ocean purposes to multiple limits with full protection for navigational freedom and reasonable coastal state resource rights is a fundamentally important development in ocean law;

— we should continue to encourage development of ocean law through international agreement rather than unilateral claim. Illegal unilateral claims encourage every nation to make claims supportive only of their own interests. In such a scenario nations with ocean interests on a global basis, such as the United States, and ultimately mankind as a whole, will be losers. Moreover, a pattern of ocean law development through claim and counter-claim is less productive of a stable ocean investment climate and more prone to conflict;

— we should ourselves scrupulously avoid illegal unilateral ocean claims;

— we should continue to insist on freedom of navigation as a cardinal tenet of United States ocean policy including:

— an objective and liberal regime of innocent passage in the territorial sea;

— a maximum breadth of the territorial sea of twelve nautical miles (this is not to suggest we should adopt a twelve mile limit, at least not in the absence of a comprehensive law of the sea treaty guaranteeing transit of straits);

— transit passage through, over, and under straits used for international navigation and broad archipelagic sealanes;

— with the exception of specific coastal state resource rights, complete high seas freedom including navigation and overflight beyond a twelve nautical mile maximum territorial sea as well as within any “fishery” or “economic zone”;

— no coastal state standard-setting rights for vessel-source pollution within either straits, archipelagic sealanes or areas of coastal state resource jurisdiction. Rather standards should be set through the Intergovernmental Maritime Consultative Organization (IMCO);

— no greater navigational restrictions in the Arctic Ocean and enclosed and semi-enclosed seas than in other ocean areas (with the exception of the Arctic environment compromise for “ice-covered areas” contained in Article 235 and the dispute settlement text of the ICNT); and

— no arms or “zone of peace” limitations that in any way prohibit naval presence for nonlittoral nations as a matter of general ocean law. (This would not prevent selected bilateral obligations with other naval powers if considered desirable);

— we should continue to support efforts to encourage and facilitate third party mechanisms for peaceful resolution of ocean disputes; and

— we should continue to insist that the international regime for the area beyond national jurisdiction be confined to seabed mining and resource jurisdiction only.

Fortunately, with the possible exception of the last of these principles, this is as provided by the Informal Composite Negotiating Text of the

Law of the Sea Conference. If a comprehensive treaty can be concluded with these provisions so much the better. If not, then the challenge will be to shape ocean law on these subjects as it would be if the ICNT were a governing treaty.<sup>8</sup> In the meantime, the Executive branch and Congress must coordinate all ocean law proposals.

Ocean policy is an important part of national security planning. It is essential that we recognize that importance and act firmly and consistently to promote a viable legal order of the oceans. The writings on ocean law and policy in this volume are a valuable contribution in that goal.

### Introduction to Volume II

An introduction to the conflict management, human rights and miscellaneous materials in these volumes appears as an introduction by Professor Richard B. Lillich to Volume II.

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<sup>8</sup>In my judgment the present ICNT is not acceptable, however, with respect to deep seabed mining, marine scientific research, the balance of rights in the economic zone reflected in articles 56 and 58, the treatment of whales in article 65, and in several other respects.