The International Law Studies “Blue Book” series was initiated by the Naval War College in 1901 to publish learned essays, treatises, and articles that contribute to the broader understanding of international law. This volume, the 81st of the series, contains papers addressing the issues discussed and debated at a colloquium hosted here at the Naval War College from June 23 to 25, 2004, entitled *International Law Challenges: Homeland Security and Combating Terrorism*.

This colloquium’s charter was to study and debate various international law issues affecting homeland security, homeland defense, and the combating of terrorism. Renowned international law scholars and practitioners of all stripes—academics, military officers, government officials, and those representing various political persuasions—participated in collegial but often spirited and always fruitful discussions and examinations of these issues. A vastly increased understanding and appreciation of the role of international law in the ever-changing 21st century resulted.

This colloquium received generous support from the Israel Yearbook on Human Rights; the Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island; the Lieber Society on the Law of Armed Conflict of the American Society of International Law; the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island; and the Naval War College Foundation. Without this much-appreciated support, this noteworthy and highly productive event would not have been possible.

On behalf of the Secretary of the Navy, the Chief of Naval Operations, and the Commandant of the Marine Corps, I extend our sincere thanks and appreciation to the participants, contributing authors, editors, and supporting organizations for their contributions to this successful gathering and to the publication of this outstanding addition to the historic “Blue Book” series.

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
Introduction

In June 2004, the Naval War College hosted a colloquium entitled *International Law Challenges: Homeland Security and Combating Terrorism*. This colloquium was made possible with the support of the Israel Yearbook on Human Rights; the Roger Williams University Ralph R. Papitto School of Law, Bristol, Rhode Island; the Lieber Society on the Law of Armed Conflict of the American Society of International Law; the Pell Center for International Relations and Public Policy of Salve Regina University, Newport, Rhode Island; and the Naval War College Foundation. Without the support and assistance of these organizations, this event would not have been the success that it was, and this volume would not be before you as it is. I sincerely appreciate their support.

As noted in the Introduction to Volume 79 of the “Blue Book” series, the events of 9/11 brought home to the United States that, perhaps unlike any time in the past, the “tyranny of distance” could not be relied upon to protect its citizens from harm. That volume, *International Law and the War on Terror*, contained the proceedings of a colloquium hosted by the Naval War College in June 2002.

This colloquium, held two years later, examined actions taken since then, e.g., the Proliferation Security Initiative, a response to the growing challenge posed by the proliferation of weapons of mass destruction, their delivery systems, and related materials worldwide; and measures initiated to increase the control and security of maritime borders. Additionally, with the growing insurgency and increasing terrorist acts in Iraq, issues of occupation law, which the United States had last applied following World War II, played a prominent role in the discussions of the colloquium participants.

I thank the editors—Captain Thomas Sparks, US Coast Guard and Commander Glenn Sulmasy, US Coast Guard—for their substantial efforts in the publication of this volume. I also would like to recognize two long-time supporters of the Naval War College and the International Law Department, whom they credit with completing “the lion’s share of the substantive editing of this volume”: Professor Emeritus Jack Grunwalt and Captain Ralph Thomas, JAGC, US Navy (Ret.). Without question, their dedication, conscientiousness, and perseverance were principally responsible for the production of this volume. Additionally, I thank the conference coordinator, Commander Glenn Sulmasy, US Coast Guard, for his superb efforts in organizing the event.
Additionally, a special thank you is necessary to Rear Admiral Jacob Shuford, President of the Naval War College; Dr. James F. Giblin, Jr., the College’s Provost; and Dr. Kenneth Watman, Dean of the Center for Naval Warfare Studies, for their leadership and support in the planning and conduct of the conference and the publication of this volume.

The “Blue Book” series is published by the Naval War College and distributed throughout the world to academic institutions, libraries, and both US and international military commands. This volume, *International Law Challenges: Homeland Security and Combating Terrorism*, is a fitting and necessary addition to the series as the United States and its coalition partners continue to wage this “long war.”

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Preface

In the summer of 2004, a sense of normalcy had returned to the homeland of the United States. One could say the “sleeping giant” that had awakened on 9/11 had fallen back “asleep.” Military victories in Afghanistan and in Iraq had been achieved. Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) were officially declared as examples of military successes. Domestically, the USA PATRIOT Act had been passed and was implemented. The reorganization of the government had occurred and the National Security Strategy of 2002 had become part of US strategic culture. US Northern Command (NORTHCOM) had been created. Establishment of the Department of Homeland Security resulted in the merging of 22 federal government agencies and a department staffed by over 177,000 personnel. Bringing the war on terror to the enemy overseas was seen as necessary to protect the homeland. This new war, one that mixes law enforcement and armed conflict, was the challenge of the 21st century and the United States was preparing for a long-term struggle. The Bush Administration clearly articulated its belief that in “taking the fight” to the terrorists overseas, our homeland would be more secure.

With this in mind, legal scholars, practitioners, judge advocates and warriors gathered in Newport, Rhode Island at the US Naval War College in late June to review, debate, and challenge the myriad legal issues surrounding the evolving reality of the Global War on Terror.

The need for a reasoned, rational legal regime to enhance domestic security became critical after 9/11. Jihadists, and the Global War on Terror itself, do not fit squarely into existing laws or custom. The predominant enemy we now fight is neither warrior nor criminal but a hybrid of both. In addition, the war being waged is at times against lawful combatants (e.g., the armed forces of Iraq) and at times against entities deemed illegal combatants. Some of these “enemy combatants” would have protections afforded by the law of armed conflict and some would not. A growing nexus between international law and the concept of homeland security had emerged. Ambiguity as to this intersection of international law and national security law (homeland security) provided a unique backdrop for two and a half days of intense debate and intellectual exchange on the seminal legal issues of our times.

The Honorable Ryan Stiles, Associate Counsel to the President and Deputy Counsel to the White House’s Homeland Security Council, initiated the debate
with a discussion of the relationships between international law and homeland security. He further articulated the need for the Global War on Terror to be viewed as warfare and one not suited for a law enforcement response—a different tack from pre-9/11 approaches to combating terror. His talk set the stage for what turned out to be a recurring, stimulating debate during the colloquium.

The case is made that it is critical for US (and Western) policy makers to understand that the Global War on Terror is in fact a war and not a law enforcement action. The events of 9/11 arguably displayed the manifest failure of employment of a law enforcement response to the threats of international terror. Some have gone so far as to claim that the West’s previous law enforcement only responses created, in large part, the bold actions taken by al-Qaeda at the end of the 20th century and the beginning of the 21st. The colloquium revealed, however, that considerable angst and cynicism remains regarding some of these assertions. Nonetheless, most agreed that the magnitude of the events of 9/11 and the repeated world-wide attacks and attempted attacks of the jihadists (primarily al-Qaeda) have demonstrated the relative weakness of past approaches and have fueled demands for new policies and tactics that continue today.

In its response, the US government offered new, sometimes controversial approaches. The colloquium brought together military and civilian experts, all leaders in their respective fields, to assess and debate these approaches and the legal issues that dominated the military liberation of Iraq and the regime change that was underway as the colloquium began, e.g.:

- Maritime border security issues;
- The law of the sea and the Proliferation Security Initiative (PSI);
- Application of the law of armed conflict to certain military operations and occupations;
- Lawfulness of the military commissions underway in Guantanamo Bay, Cuba;
- The new strategy of “pre-emption” and anticipatory self-defense; and
- The lawfulness of targeting individual terrorists which was the subject of a spirited debate between Mr. Kenneth Roth, Executive Director of Human Rights Watch and Professor Bob Turner of the Center for National Security of the University of Virginia School of Law.

A special highlight of the colloquium was an address by the Assistant Secretary of Defense for Homeland Defense, the Honorable Paul McHale. His description of the coordination between the combatant commander (NORTHCOM) and the
Department of Homeland Security was most informative and appreciated by the participants.

It was a privilege to have so many fine representatives from myriad perspectives present to challenge these critical issues. Assembling this international group over the previous year was certainly not an easy task, but when our distinguished panelists from around the world were gathered together the fruits of that effort were very apparent. Exploring the nexus between homeland security and international law made for an invigorating experience. Scholars and representatives from across the political spectrum made for lively discussions.

Sincere thanks must go to Professor Emeritus Jack Grunawalt and Captain Ralph Thomas, JAGC, US Navy (Ret.) for their tireless efforts on behalf of the Naval War College and this “Blue Book” in particular. Their knowledge of the issues and editing skills were critical in making this book a reality. Also, a special thanks to Professor Dennis Mandsager for his foresight in directing an exploration of this evolving area of the law.

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