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Abstract

The Law of the Sea Committee ("LOS Committee" or "Committee") of the International Law Association's American Branch ("ABILA") will complete its project, Terms in the 1982 U.N. Convention on the Law of the Sea or in Convention Analysis that the Convention Does Not Define ("Report"), in 2009. If the U.S. Senate gives advice and consent, and President Barack Obama exchanges ratifications, the U.N. Convention on the Law of the Sea ("UNCLOS" or "Convention") and its 1994 protocol will, belatedly in the view of many, become law for the United States, as they already are for much of the world. It is hoped that this group project, like those in which Professor Joseph C. Sweeney has participated, will contribute to a better world governed by the rule of law. Part I gives a short history of the movement from custom and other sources international law to treaty law affecting ocean space. Part II discusses the 1958 and 1982 law of the sea conventions. Part III traces the history of the definitions project and offers observations on the utility of the project, whether the United States becomes a Convention partner or not.

FILLING SOME OF THE GAPS: THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) LAW OF THE SEA DEFINITIONS PROJECT

*George K. Walker**

INTRODUCTION

The Law of the Sea Committee ("LOS Committee" or "Committee") of the International Law Association's American Branch ("ABILA") will complete its project, *Terms in the 1982 U.N. Convention on the Law of the Sea or in Convention Analysis that the Convention Does Not Define* ("Report"), in 2009.[1] If the U.S. Senate gives advice and consent, and President Barack Obama exchanges ratifications, the U.N. Convention on the Law of the Sea ("UNCLOS" or "Convention") and its 1994 protocol[2] will, belatedly in the view of many,[3] become law for the United States, as they already are for much of the world.[4] It is hoped that this group project, like those in which Professor Joseph C. Sweeney has participated,[5] will contribute to a better world governed by

* Professor of Law, Wake Forest University School of Law. B.A., University of Alabama, 1959; LL.B., Vanderbilt University, 1966; A.M., Duke University, 1968; LL.M., University of Virginia, 1972. Member, Virginia and North Carolina bars. My thanks to the *Fordham International Law Journal* for inviting me to join colleagues and friends to honor my longtime colleague and friend, Joseph C. Sweeney.

1. PROCEEDINGS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 2007-2008, at 46-367 (Jeffery Atik ed., 2008), *reprinted in part in* INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) LAW OF THE SEA COMMITTEE, TERMS IN THE 1982 U.N. CONVENTION ON THE LAW OF THE SEA OR IN CONVENTION ANALYSIS THAT THE CONVENTION DOES NOT DEFINE (2008) [hereinafter REPORT].

2. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 3, 397 [hereinafter UNCLOS]; Agreement Relating to the Implementation of Part II of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3, 42 [hereinafter Agreement].

3. A panel discussion I chaired, "Implications of U.S. Acceptance of the 1982 Law of the Sea Convention," on October 18, 2008 at the American Branch of the International Law Association annual meeting in New York City was unanimously of this view.

4. As of January 17, 2009, 157 States were party to U.N. Convention on the Law of Sea ("UNCLOS"), *supra* note 2; 135 were party to the Agreement, *supra* note 2. United Nations, Office of Legal Affairs, Treaty Section, United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary General, *available at* http://treaties.un.org/Pages/ParticipationStatus.aspx [hereinafter Multilateral Treaties].

5. Professor Sweeney was U.S. Representative and Chair of Delegation to the Hamburg, Germany diplomatic conference that produced the U.N. Convention on Car-

the rule of law.

Part I gives a short history of the movement from custom and other sources international law to treaty law affecting ocean space. Part II discusses the 1958[6] and 1982 law of the sea conventions. Part III traces the history of the definitions project and offers observations on the utility of the project, whether the United States becomes a Convention partner or not.[7]

I. *FROM CUSTOM AND OTHER SOURCES TO TREATY LAW FOR THE LEGAL ORDER OF THE OCEANS*

When Professor Sweeney began law practice in the late Fifties, sources for the legal order governing the sea in peace and war was a mix of customary law, general principles, court decisions, and publications of researchers.[8] Treaties as a primary source of law, perhaps reacting to rules established through

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riage of Goods by Sea. *See* U.N. Convention on Carriage of Goods by Sea, Mar. 31, 1978, 1695 U.N.T.S. 3 [hereinafter Hamburg Rules]. Professor Sweeney was also U.S. Alternate Representative to the Vienna, Austria Conference that produced the U.N. Convention on Liability of Terminal Operators in International Trade. *See* U.N. Convention on Liability of Terminal Operators in International Trade, Apr. 19, 1991, U.N. Doc. A/CONF/152/13 (1991) [hereinafter Terminal Operators Convention] (not in force). The United States signed both but is not a party to either.

6. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S 205 [hereinafter Territorial Sea Convention]; Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 478, 499 U.N.T.S. 311 [hereinafter Continental Shelf Convention]; Convention on Fishing & Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter Fishing Convention]; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention].

7. Consistent with the nonpartisan position of the International Law Association (American Branch), and the author's chairing its Law of the Sea Committee, I take no view on whether the United States should become an UNCLOS party. However, George K. Walker, *The Tanker War, 1980-1988: Law and Policy*, 74 U.S. NAVAL WAR C. STUD. 1, 163-4 (2000) advocated U.S. ratification. The U.S. Senate Committee on Foreign Relations has twice recommended advice and consent. *See generally* S. EXEC. REP. No. 110-9 (2007) (Convention on the Law of the Sea) (110th Cong., lst Sess.); S. Exec. Rep. No. 108-10 (2004) (United Nations Convention on the Law of the Sea) (108th Cong., 2d Sess.). When Congress adjourned in 2008, UNCLOS returned to Committee jurisdiction for possible reporting out in 2009 or later. Standing Rules of the Senate, S. DOC. No. 106-15, Rule 30(1) (2000).

8. *Compare* Statute of the International Court of Justice arts. 38(1), 59, June 26, 1945, 59 Stat. 1055 [hereinafter I.C.J. Statute] (listing primary, secondary sources of international law, declaring that International Court of Justice decisions are not precedent beyond the parties, issues involved in a particular case), *with* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102-03 (1987) [hereinafter RESTATEMENT [THIRD]]. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1, cmt. c (1965); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNA-

other sources,[9] to confirm customary rules,[10] or as a reaction to events (some tragic in terms of loss of human life)[11] and others to decimation of wildlife,[12] destruction of the ocean environment through pollution,[13] improvement of the legal regime for ocean trade,[14] or the need for international navigational rules[15]

TIONAL LAW ch. 1 (6th ed. 2003); ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW §§ 8-17 (9th ed. 1996).

9. *See, e.g.*, International Convention for Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, May 10, 1952, 439 U.N.T.S. 233, declaring that only flag state jurisdiction existed for those accused of crime on the high seas, superseding to that extent *The Case of S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 25, which had held that the state whose victims were aboard a vessel flying that state's flag, could prosecute an accused. UNCLOS, *supra* note 2, art. 94(1), declares that penal proceedings may only be instituted before courts of the flag state or of the state of the accused's nationality.

10. *See, e.g.*, Convention Relative to Certain Restrictions on the Exercise of the Right of Capture in Maritime War (Hague XI) art. 3, Oct. 18, 1907, 36 Stat. 2396 [hereinafter Hague XI] (confirming the holding of *The Paquete Habana*, 175 U.S. 677, 686-714 (1900), which had accepted a customary rule that small coastal fishing vessels were immune from seizure if they were not contributing to an enemy's war effort).

11. *See, e.g.*, International Convention for Safety of Life at Sea, Jan. 20, 1914, 219 Consol. T.S. 177 (reacting to loss of R.M.S. Titanic); *see also* Oceanic Steam Navigation Co. v. Mellor, 233 U.S. 718, 730 (1914); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 951 (4th Cir. 1999). The Convention's successor is the International Convention for Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2, 278, for which there are many amendments, including Protocol of 1978 Relating to International Convention for Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, 1226 U.N.T.S. 237. *See generally* UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA ON JANUARY 1, 2007, at 400-01, 405-06 (2007) [hereinafter TIF]; CHRISTIAN L. WIKTOR, MULTILATERAL TREATY CALENDAR 1648-1995, at 1041-42, 1128 (1998).

12. See, *e.g.*, treaties related to whaling, which by the early twentieth century had hunted some of these leviathans close to extinction. *See generally* Convention for Regulation of Whaling, Sept. 24, 1931, 49 Stat. 3079, 155 L.N.T.S. 349 (still in force but modified by later treaties and schedules); *see also* TIF, *supra* note 11, at 470-71. The whaling issue remains alive today.

13. See, *e.g*, International Convention for Prevention of Pollution of the Sea by Oil, May 12, 1954, 12 U.S.T. 2989, 327 U.N.T.S. 3, *superseded by* International Convention for Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184, and Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships of November 2, 1973, Feb. 17, 1978, 1340 U.N.T.S. 61, the latter two in force today. There have been many modifications. *See* WIKTOR, *supra* note 11, at 1127-28; TIF, *supra* note 11, at 396-97.

14. *See generally* Hamburg Rules, *supra* note 5; Terminal Operators Convention, *supra* note 5 (for which Professor Sweeney was the U.S. Representative).

15. The first multilateral agreement to go into force was Convention for the Unification of Certain Rules Respecting Collisions Between Vessels, Sept. 23, 1910, 212 Consol. T.S. 178. The Convention on the International Regulations for Preventing Collisions at Sea, 1972, with International Regulations ("COLREGS"), Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16, as modified by amendments to the Regulations, re-

operated (and continue to operate) in specialized areas. However, there was no general, overarching treaty establishing general peacetime legal order standards for over two-thirds of the Earth's surface.[16] Several treaties regulated, and continue to regulate, humanitarian principles, certain aspects of naval warfare, and maritime neutrality during war at sea.[17]

States also relied on national laws that could affect or claim to affect wide areas of the ocean well beyond the territorial sea, the border of which was then almost universally set at three miles off their coasts.[18] Other states established flag of convenience regimes that left a legal muddle for regulating private orderings.[19]

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placed International Regulations for Preventing Collisions at Sea, June 17, 1960, 16 U.S.T. 794, which superseded International Regulations for Preventing Collisions at Sea, June 10, 1948, 4 U.S.T. 2956, 191 U.N.T.S. 20. See also TIF, *supra* note 11, at 403-04, noting that a few states are not parties to the 1972 treaty.

16. The Convention on Civil Aviation arts. 1-2, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, which declared the airspace above a state's territorial sea as part of that state's sovereign territory, was an exception. This dovetails with UNCLOS, *supra* note 2, art. 2; Territorial Sea Convention, *supra* note 6, art. 1.

17. The most important today is Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Second Convention), replacing Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (Hague X), Oct. 18, 1907, 36 Stat. 2371, in force as the humanitarian law standard during World Wars I and II. Other treaties include Convention Relating to Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI), Oct. 18, 1907, 205 Consol. T.S. 305, never in force for the United States; Convention Relating to Conversion of Merchant Ships into War-Ships (Hague VII), Oct. 18, 1907, 205 Consol. T.S. 319, also never in force for the United States; Convention Relative to Laying of Automatic Submarine Contact Mines (Hague VIII), Oct. 18, 1907, 36 Stat. 2332; Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX), Oct. 18, 1907, 36 Stat. 2351; Hague XI, *supra* note 10; Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), Oct. 18, 1907, 36 Stat. 2415; Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989; Procès-Verbal Relating to Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 3 Bevans 298, 173 L.N.T.S. 353.

18. See, *e.g.*, the Truman proclamations claiming sovereignty of the continental shelf off U.S. coasts and a less well known claim for a fishing zone. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12303 (1945), 3 C.F.R. 67 (1943-48); Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, Proclamation No. 2668, 10 Fed. Reg. 12304, 3 C.F.R. 68 (1943-48). Other countries followed suit, sometimes expanding the claim to include a territorial sea outward hundreds of miles from their coasts. *See* Walker, *supra* note 7, at 249-52, 260-62. *But see* Convention on Civil Aviation, *supra* note 16, art. 1 (declaring the rule for airspace above the territorial sea).

19. *See generally* BOLESLAW A. BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL

International organizations, whether nongovernmental ("NGOs")[20] or intergovernmental ("IGOs"),[21] operated within their charter parameters but made important contributions.

There were also issues of the relationship among the law of peacetime oceans use, the rules during naval warfare,[22] and rules for neutrality and belligerent use of the oceans.[23] The first half

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LEGAL STUDY (1962); ROBERT CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE (1981).

20. Two nongovernmental organizations ("NGOs") that are quite active today are the Comite Maritime Internationale, headquartered in Brussels, Belgium, which with its national affiliates like the U.S. Maritime Law Association, has promoted treaties like the International Convention for the Unification of Certain Rules Relating to Bills of Lading for Carriage of Goods by Sea, Aug. 25, 1934, 51 Stat. 233, 120 L.N.T.S. 155, implemented for the United States today by 46 U.S.C. §§ 30701-16 (2009), and the International Law Association, headquartered in London, which has published rules affecting oceans law. *See, e.g., Helsinki Principles on the Law of Maritime Neutrality, in* INT'L L. ASS'N, REPORT OF THE 68TH CONFERENCE, TAIPEI, 1998, at 496 (1998). The International Law Association more recently has debated standards for the outer continental shelf. A third is the International Institute of Humanitarian Law, sited in San Remo, Italy, which has published the *San Remo Manual. See* INTERNATIONAL LAWYERS AND NAVAL EXPERTS CONVENED BY THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter *San Remo Manual*].

21. Two intergovernmental organizations ("IGOs") with a history of developing rules affecting the legal order of the oceans are the International Labor Organization ("ILO"), governed by Instrument for Amendment of the International Labor Organization, Oct. 9, 1946, 62 Stat. 3485, 15 U.N.T.S. 35, and the International Maritime Organization ("IMO") formerly the International Maritime Consultative Organization ("IMCO"), chartered under Convention on the Intergovernmental Maritime Consultative Organization, 9 U.S.T. 621, 289 U.N.T.S. 48. The ILO predates the United Nations; IMCO/IMO was organized under U.N. auspices as a specialized agency. The ILO sponsors treaties dealing with working conditions for mariners, e.g., Convention Concerning Minimum Requirement of Professional Capacity for Masters & Officers on Board Merchant Ships, Oct. 24, 1936, 54 Stat. 1683, 40 U.N.T.S. 153; Convention Concerning Liability of the Shipowner in Case of Sickness, Injury or Death of Seamen, Oct. 24, 1936, 54 Stat. 1693, 40 U.N.T.S. 169 [hereinafter Shipowner Liability Convention]; Convention Fixing Minimum Age for Admission of Children to Employment at Sea, 54 Stat. 1705, 40 U.N.T.S. 205; Convention Concerning Certification of Able Seamen, June 29, 1946, 5 U.S.T. 605, 94 U.N.T.S. 11. IMO is responsible for promoting agreements governing safety at sea, e.g., COLREGS, *supra* note 15. Some NGOs whose work affects oceans law have become IGOs, e.g., the International Hydrographic Organization, May 3, 1967, 21 U.S.T. 1857, 751 U.N.T.S. 41, first informally established in 1919 as the International Hydrographic Bureau. WIKTOR, *supra* note 11, at 205, 848.

22. Most of today's law of naval warfare relies on customary law and general principles standards, although there are early treaties, many of which are in *desuetude* or which cover obsolete methods of sea warfare. A major exception is humanitarian law, exemplified by the Second Convention. *See supra* note 17 and accompanying text.

23. Most of today's law of maritime neutrality relies on customary law and general principles standards, although there are early treaties, still in force, but which are obsolete in some respects. *See supra* notes 17 and accompanying text.

of the Twentieth Century had experienced two conflicts involving all of the Earth, the Great War and World War II where there were few neutrals operating on the high seas. After 1945 and the beginning of the U.S.-USSR Cold War deadlock (1947-91), the prospect of issues involving small wars, including civil wars, and neutral rights remained.

There were also private sector ordering problems, i.e., in admiralty and maritime law. Even with respect to the latter there was intersection between private international law and public international law,[24] e.g., with respect to governmental actions involving shipping (e.g., the act of state doctrine),[25] immunity of government owned or operated ships,[26] and standards for seafarers' working conditions and the like, on the sea.[27] A further problem was acceptance of international law standards as rules for national law.[28] Many of these issues beset us today.[29]

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24. The U.S. Congress recognized the jurisdictional relationship in the statute conferring exclusive admiralty jurisdiction on the U.S. District Courts. *See* 28 U.S.C. § 1333(1) (2006). The statute also gives them exclusive prize case jurisdiction, an aspect of naval warfare and neutrality. *See* 28 U.S.C. § 1333(2) (2006).

25. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-24 (1964), today displaced in part by 22 U.S.C. § 2370(e)(2) (2006), a case that wound through the federal courts and straddled the Cuban Missile Crisis and the most serious risk of nuclear conflict during the Cold War. *See generally* ABRAM CHAYES, THE CUBAN MISSILE CRISIS (1974); ROBERT A. DIVINE, THE CUBAN MISSILE CRISIS (1971); ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (1969).

26. As to government-owned or operated foreign flag merchantmen, the United States observed the absolute theory of sovereign immunity until the 1952 Tate Letter. *See* Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Philip B. Perlman, Acting Attorney General, May 19, 1952, 25 DEP'T ST. BULL. 984 (1952) and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-11 (2006), which aligned the United States with most of the rest of the world with the restrictive theory, where, with exceptions (e.g., terrorist activity) State-owned foreign flag merchantmen engaged in typical commercial activity are subject to litigation and liability like those owned or operated by private companies. *See* UNCLOS, *supra* note 2, arts. 42(5), 95, 96, 110(1), 236, declares rules for immunity of government aircraft, government operated ships, and warships.

27. *See supra* note 21 and accompanying text for ILO's influence around the world. *Warren v. United States*, 340 U.S. 523, 525-29 (1951) held U.S. law applied a better standard of relief for mariners than general customary law and that the Shipowner Liability Convention, *supra* note 21, brought the world up to U.S. law.

28. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900), whose principles for receiving custom into U.S. law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004), repeated.

29. *Sosa*, 542 U.S. at 734 n.12, is an example. *Sosa* declined to accept Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/217 (Dec. 8, 1948), as part of U.S. customary international law because the then U.S. U.N. Permanent Representative, Eleanor Roosevelt had declared the Declaration was not a binding standard. *Filar-*

The U.N. Charter, today in force for nearly every State, has established a new and superior regime of law for all U.N. Members, at least with respect to treaties, and perhaps for other sources of international law. The Charter specifically declares that it is supreme over all international agreements.[30] If the U.N. Security Council passes a resolution that is a "decision," Member States must obey its mandate.[31] This should be distinguished from Council resolutions recommending or calling for action, which by the majority view are recommendatory in nature, like U.N. General Assembly resolutions.[32] However, courts and commentators have espoused the view that these otherwise nonmandatory resolutions can ascend into customary international law.[33] This was new, in terms of world order; the idea that an international organization could establish binding standards

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tiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) had reached the opposite conclusion. *Medellin v. Texas*, 128 S. Ct. 1346, 1358-60 (2008) reached a similar conclusion for International Court of Justice ("I.C.J.") cases, stating, however, that they were entitled to great respect, but relying in part on I.C.J. Statute, art. 59. *See* I.C.J. Statute, *supra* note 8, art. 59. *Medellin*, 128 S. Ct. at 1356-60, following *Sanches-Llamas v. Oregon*, 548 U.S. 331, 347 (2006), also held that U.N. Charter art. 94 was non-self-executing, i.e., Congress must implement it by legislation.

30. *See* U.N. Charter art. 103; *see also* LELAND F. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 614-17 (3d & rev. ed. 1969); JENNINGS & WATTS, *supra* note 8, § 592; 2 THE CHARTER OF THE UNITED NATIONS 1292-1302 (Bruno B. Simma ed., 2d ed. 2002) [hereinafter SIMMA].

31. U.N. Charter arts. 25, 48, 94(2), 103; *see also* GOODRICH ET AL., *supra* note 30, at 207-11, 334-37, 555-59, 614-17; 1 & 2 SIMMA, *supra* note 30, at 454-62, 776-80, 1174-79, 1292-1302; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 87 (1993) (principles flowing from Council decisions pursuant to U.N. Charter arts. 25, 48, 103 are treaty law binding U.N. Members and override other treaty obligations). Article 103 does not apply to custom or *jus cogens* derived independently of a treaty, however, unless Article 103 might be considered a *jus cogens* norm itself, and a *jus cogens* norm superior to other *jus cogens* norms, or its principles might be considered a norm that is superior to conflicting custom. *See also* I.C.J. Statute, *supra* note 8, art. 38(1); RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *supra* note 8 and accompanying text.

32. U.N. Charter arts. 10-11, 13-14, 33, 36-37, 39-41; *see also* SYDNEY D. BAILEY & SAM DAWS, THE PROCEDURE OF THE UN SECURITY COUNCIL 18-21, 236-37 (3d ed. 1998); BROWNLIE, *supra* note 8, at 14; JORGE CASTENADA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 78-79 (Alba Amoia trans., 1969); GOODRICH ET AL., *supra* note 30, at 111-29, 133-44, 257-65, 277-87, 290-314; JENNINGS & WATTS, *supra* note 8, § 16; RESTATEMENT (THIRD), *supra* note 8, § 103(2)(d) & r.n.2; 1 SIMMA, *supra* note 8, at 257-87, 298-326, 583-94, 616-43, 717-49.

33. *See, e.g.*, W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. INT'L L.J. 57, 72-73 (2007) (citing the Uniting For Peace Resolution, G.A. Res. 377, ¶ 1, U.N. Doc. A.1775 (Nov. 3, 1950), employed during the Korean War to continue U.N. operations); Legal Consequences of Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136,

for all its members to follow. Other international organizations may have similar rules, binding or nonbinding according to their charters, in place.

There was a second development, little noticed among all but commentators, the growth of the concept of *jus cogens*, i.e., fundamental norms that trump international custom and treaties,[34] analogous to the supremacy of Charter rules and Security Council decisions.[35] The debate has ensued as to what are *jus cogens* norms. The *Legality of Threat or Use of Nuclear Weapons ("Nuclear Weapons")* and *Military & Paramilitary Activities (Nicar. v. U.S.) ("Nicaragua")* cases have held that Charter Article 2(4), prohibiting the use of force to undermine the territorial integrity or political independence of a State, approaches *jus cogens*, and the case has been made that Article 51, preserving the inherent right to individual and collective self-defense, also has *jus cogens* status.[36] If other principles, e.g., human rights law stan-

148-51 (July 9); Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163-71 (July 20); *see also* Walker, *supra* note 7, at 175-77.

34. *See* Vienna Convention on the Law of Treaties pmbl., arts. 53, 64, 71, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. *Jus cogens* has uncertain contours. *See* BROWNLIE, *supra* note 8, at 5, 488-90, 597-98 (*jus cogens*' content uncertain); T.O. ELIAS, THE MODERN LAW OF TREATIES 177-87 (1974) (same); JENNINGS & WATTS, *supra* note 8, §§ 2, 642, 653 (same); LORD MCNAIR, THE LAW OF TREATIES 214-15 (1961) (same); RESTATEMENT (THIRD), *supra* note 8, §§ 102 r.n. 6, 323 cmt. b, 331(2), 338(2) (same); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 281-88 (1989); 1 SIMMA, *supra* note 30, at 62 (dispute over self-determination as *jus cogens*); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 17-18, 218-26 (2d ed. 1984) (Vienna Convention principles considered progressive development in 1984); GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus cogens in Contemporary Law*, 172 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL (R.C.A.D.I.) 219, 262-63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL. 9, 25-29 (1977); Jimenez de Arechaga, *International Law in the Last Third of a Century*, 159 R.C.A.D.I. 9, 64-67 (1978); *see generally* Mark Weisburd, *The Emptiness of the Concept of Jus cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995). An International Law Commission study acknowledged primacy of U.N. Charter art. 103-based law and *jus cogens* but declined to catalogue what are *jus cogens* norms. Int'l Law Comm'n, *Report on Its Fifty-Seventh Session*, UN GAOR, 60th Sess., Supp. No. 10, pp. 221-25, UN Doc. A/60/10 (2005) (ILC Rep., 2005); *see also* Michael J. Matheson, *The Fifty-Seventh Session of the International Law Commission*, 100 AM. J. INT'L L. 416, 422 (2006).

35. *See supra* note 31 and accompanying text.

36. Legality of Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 245 [hereinafter Nuclear Weapons]; Military & Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100-01 [hereinafter Nicaragua case] (U.N. Charter art. 2[4] approaches *jus cogens* status); Int'l Law Comm'n, *Report on the Work of Its Fifty-Third Session*, U.N. GAOR, 55th Sess., Supp. No. 10, U.N. Doc. A/56/10, art. 50 & Commentary ¶¶ 1-5, at 247-49 (2001) [hereinafter *2001 ILC Rep.*], *reprinted in* JAMES CRAWFORD, THE INTERNATIONAL LAW

dards, whether in a treaty or a customary rule, enjoy that status, are among the current debates on the breadth of the concept of *jus cogens*.

A third issue has been the growth of "soft law," i.e., standards, perhaps coming from an international organization or a nonbinding agreement, that deserve consideration, even though they have not yet ascended to the status of a source of law.[37]

II. *THE 1958 AND 1982 LAW OF THE SEA CONVENTIONS*

It was within this muddle (or milieu) of law, about when Professor Sweeney began service as a U.S. Navy Judge Advocate,[38] that drafting and negotiations under U.N. auspices started for the first general treaties governing the law of the sea. Signed in 1958, the Territorial Sea Convention, Continental Shelf Convention, Fishing Convention, and High Seas Convention have had fair ratification success among states, the Continental Shelf and High Seas Conventions attracting the most parties.[39] One significant but vague principle was introducing "other rules" clauses in the Territorial Sea and High Seas Conventions;[40] the term meant that the law of the sea was subject to the law of armed conflict ("LOAC").[41] There were defects, however. The territorial sea's maximum breadth was not stated; not

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COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 288-89 (2002) ("fundamental substantive obligations"); JENNINGS & WATTS, *supra* note 8, § 2 (Art. 2[4] is a fundamental norm); RESTATEMENT (THIRD), *supra* note 8, §§ 102, cmts. h, k; 905(2) & cmt. g (same); Carin Kaghan, *Jus cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 823-27 (1997) (U.N. Charter art. 51 represents *jus cogens* norm). The *2001 ILC Report*, *supra* note 36, art. 21 & Commentary, at 177-80, *reprinted in* Crawford, *supra*, at 166, resolves the issue of conflict between U.N. Charter Articles 2(4) and 51 by saying that no Art. 2(4) issues arise if there is a lawful self-defense claim. This appears to give Article 51 the same status as Article 2(4).

37. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 52-53 (2d ed. 2007).

38. Professor Sweeney began active service as a Navy lawyer after graduation from the Boston University Law School in 1957; he left active service in 1962 but continued as a Navy Reservist until retiring in 1993 as a Captain.

39. Territorial Sea Convention, *supra* note 6; Continental Shelf Convention, *supra* note 6; Fishing Convention, *supra* note 6; High Seas Convention, *supra* note 6. On January 17, 2009, Multilateral Treaties, *supra* note 4, reported 52, 58, 38, and 63 states parties to these treaties respectively. Most are UNCLOS parties, but these treaties govern law of the sea relations with the United States and other countries not party to UNCLOS.

40. High Seas Convention, *supra* note 6, art. 2; Territorial Sea Convention, *supra* note 6, art. 1.

41. *See* REPORT, *supra* note 1, at 302 n. 739; *id.* at 300-07 (noting that a broader meaning for the phrase under UNCLOS, *supra* note 2, may emerge).

many fishing rights were delimited. A 1958-60 U.N. effort to resolve these issues failed.[42] There were other problems with these treaties, e.g., no standards for claims for exclusive economic zones ("EEZs"), no rules for waters in and around archipelagic states, too-generalized rules for territorial sea innocent passage and straits passage, no rules for environmental protection, no declared limit on the outer continental shelf, and no rules for successive treaties on the same subject or the Conventions' effect on prior treaties. They were silent on reservations; the majority presumption was that reservations and interpretive declarations were permissible.[43]

After over a decade of drafting and negotiations, another U.N.-sponsored treaty was signed in December 1982. UNCLOS became effective for treaty partners in 1994 when the sixtieth signatory ratified it.[44] Because of U.S. objections to Part XI, deep seabed mining rules for the Area,[45] the United States did not sign UNCLOS. However, during the William J. Clinton administration, the United States and other countries negotiated and signed a protocol amending UNCLOS to answer U.S. objections.[46] President Clinton sent the treaties to the Senate, recommending advice and consent, but they remained in the Senate Foreign Relations Committee until 2004, when they were reported out favorably, although with many declarations and statements. Congress adjourned before the Senate acted, and the treaties returned to the Committee. They were reported out again favorably in 2007 with the same declarations and statements. They returned to the Committee when Congress adjourned in 2008, where they remain for possible Committee, Senate and presidential action.[47]

This Article does not analyze in depth the substantive improvements that UNCLOS makes in the 1958 regime, noting

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42. John Norton Moore, *Introduction to* 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY xxv (Myron H. Nordquist ed., 1985) [hereinafter 1 COMMENTARY].

43. Few States interposed reservations. *See generally* Multilateral Treaties, *supra* note 4.

44. *Id.*

45. UNCLOS, *supra* note 2, art. 1(1) defines the Area as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." *See also id.* arts. 133-91 (principles for Area governance); REPORT, *supra* note 1, at 153.

46. Agreement, *supra* note 2.

47. *See supra* note 7 and accompanying text.

that UNCLOS defines the permissible outer limits of the territorial sea as twelve miles,[48] establishes an EEZ regime including rules for fishing,[49] provides for archipelagic seas passage,[50] clarifies innocent passage rules,[51] establishes straits transit passage rules while providing for existing treaty regimes and other straits situations,[52] declares rules for the continental shelf, including the outer shelf,[53] recites rules for high seas fishing and species conservation,[54] and has marine scientific research, technology transfer and environmental protection rules,[55] among many innovations, amendments, and improvements.

There are other clarifications and improvements more centrally related to the Definitions Project. The Convention preserves the "other rules" distinction between the law of the sea and the LOAC, with recognition that the term may have other meanings under UNCLOS.[56] UNCLOS recognizes the relationship between UNCLOS as a treaty and the Charter's prohibition against the use of force against states' territorial integrity or political independence.[57]

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48. UNCLOS, *supra* note 2, art. 3.

49. *Id.* arts. 55-75.

50. *Id.* arts. 46-54.

51. *Id.* arts. 17-32, 45.

52. *Id.* arts. 37-45.

53. *Id.* arts. 76-85.

54. *Id.* arts. 116-20.

55. *Id.* arts. 192-265.

56. *Id.* pmbl., art. 2(3) (territorial sea); *id.* arts. 19, 21, 31 (territorial sea innocent passage); *id.* art. 34(2) (straits transit passage); *id.* art. 52(1) (archipelagic sea lanes passage; incorporation by reference of articles 19, 21, 31); *id.* arts. 58(1), 58(3) (EEZ); *id.* art. 78 (continental shelf; coastal State rights do not affect superjacent waters, i.e., territorial or high seas; coastal State cannot infringe or unjustifiably interfere with "navigation and other rights and freedoms of other States as provided in this Convention."); *id.* art. 87(1) (high seas); *id.* art. 138 (the Area); *id.* art. 293 (court or tribunal having jurisdiction for settling disputes must apply UNCLOS and "other rules of international law" not incompatible with UNCLOS); *id.* art. 303(4) (archeological, historical objects found at sea, "other international agreements and rules of international law regarding the protection of objects of an archeological and historical nature."); *id.* annex III, article 21(1); *see also* REPORT, *supra* note 1, at 300-10.

57. U.N. Charter arts. 2(4), 103; *see also* UNCLOS, *supra* note 2, arts. 88, 301. Article 88 declares that states shall use the high seas for peaceful purposes. *See id.* art. 88. Article 301 requires that when states exercise rights or perform duties under the Convention, they must refrain from any threat or use of force against the territorial integrity or political independence of any State, "or in any other manner inconsistent with" international law principles embodied in the Charter. *See id.* art. 301. These provisions are consonant with the Charter, art. 103, as they do not forbid legitimate military activities, e.g., naval exercises, which are among high seas freedoms. *See* UNCLOS, *supra* note 2,

UNCLOS also lays down rules from the law of treaties to clarify its status relative to earlier treaty regimes. The four 1958 conventions[58] are superseded for states ratifying the Convention.[59] If other earlier agreements are compatible with UNCLOS and do not affect other Convention parties' rights or obligations under UNCLOS, rights and obligations under those earlier treaties are not affected.[60] Thus, e.g., insofar as earlier agreements on international rules of the nautical road, i.e., International Regulations for Preventing Collisions at Sea ("COLREGS"),[61] do not affect UNCLOS, they remain in full force and effect. States may conclude agreements modifying or suspending operation of UNCLOS' provisions, applicable only to relations between them, provided that these agreements do not relate to a Convention provision, and so long as this derogation is not incompatible with "the effective object and purpose of" UNCLOS. Furthermore, these agreements must not affect application of basic UNCLOS principles, or other states' enjoyment of their rights or performance of their obligations under it.[62] Other treaties expressly permitted or preserved by the Convention remain in force;[63] thus prior agreements for straits regimes remain in effect.[64] Article 311(6) declares that states cannot amend "basic principles relating to the common heritage of [hu]mankind in Article 136[, in the provisions regulating the Area,] and that they shall not be party to any agreement in derogation of [this principle]."

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art. 87(1) ("*inter alia*") preserves. Charter rights and duties to which Article 301 refers includes a right of self-defense. *See* 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 87.9(I)-87.9(j), 88.1-88.7(d) (Myron H. Nordquist ed., 1995) [hereinafter 3 Commentary]; 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 301.1-301.5 (Myron H. Nordquist et al. eds., 1989). Action pursuant to UNCLOS, *supra* note 2, could not purport to curtail the inherent right of individual and collective self-defense any more than it could trench on the political independence or territorial integrity of a state. U.N. Charter arts. 51, 103.

58. *See supra* notes 6, 39-43 and accompanying text.

59. UNCLOS, *supra* note 2, art. 311(1).

60. *Id.* art. 311(2).

61. *See supra* note 15 and accompanying text.

62. States wishing to conclude such agreements must notify state parties of their intention to conclude these agreements and the Convention modification or suspension to which it relates. UNCLOS, *supra* note 2, arts. 311(3), 311(4). There are special rules for marine environmental protection and preservation treaties. *Id.* art. 237.

63. *Id.* art. 311(5).

64. *Id.* art. 35(c); *see also supra* note 52 and accompanying text.

The Convention provides for amendments to UNCLOS[65] but declares that no reservations or exceptions may be made to the Convention unless it expressly allows them.[66] On the other hand, states signing, ratifying, or acceding to UNCLOS may make "declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of [their] laws and regulations with the provisions of [the] Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the . . . Convention in their application to that State."[67] The result has been a flood of statements and declarations and examination of the rules, such as they are under the law of treaties, for applying them.[68]

Thus this new "constitution for the oceans"[69] is a package deal except insofar as UNCLOS allows modifications, amendments and the like. Ongoing negotiation of agreements related to general oceans law, which began before the 1958 Conventions, continued during their time, and has been a feature of the law of the sea since the 1982 Convention, persists to this day.[70] Unlike the regime of the 1958 Conventions, which had no trumping clause and which, by default of no clause prohibiting reservations, experienced a mild run of reservations, under UNCLOS agreements are subject to its terms.

Questions might be asked: Where does the Definitions Project fit into the analysis of the Convention? Is the Project research product useful as UNCLOS has moved to acceptance around the world? The short answers are that the Project will have a useful role in applying the Convention and will also be useful in filling gaps and in analysis of the 320 articles of the Convention and its nine Annexes.

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65. *Id.* arts. 312-14.

66. *Id.* art. 309.

67. *Id.* art. 310.

68. *See generally* George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461 (2007). For a current compilation of UNCLOS statements, declarations, etc., see Multilateral Treaties, *supra* note 4.

69. Tommy T.B. Koh, *Statement: A Constitution for the Oceans*, *in* 1 COMMENTARY, *supra* note 42, at 11.

70. Professor Sweeney has been a participant in this continuum. *See supra* note 14 and accompanying text.

III. *THE DEFINITIONS PROJECT: GENESIS, DEVELOPMENT AND PLACE IN UNCLOS ANALYSIS*[71]

The Project began in early 2001 as the author began chairing the Branch Law of the Sea Committee.[72] The September 11, 2001 terrorist attacks in New York City, Washington, and Pennsylvania came a month before the Branch Annual Meeting in the city. Convening members could see a smoke plume still emerging from the towers site as they flew into the city. The Committee convened its first panel discussion at the meeting. The ultimate result was the first round of draft definitions, which was circulated to Committee membership, persons in private and government sectors, and academic commentators.[73]

Through the next seven years, the Committee sponsored panel discussions and circulated more drafts, usually every year, with new definitions, to interested persons in government, academia, and the practicing bar.[74] Terms already defined in the Convention were excluded from consideration.[75] Research included other compilations of definitions, some published by the International Hydrographic Organization[76] or government sources,[77] and others by commentators.[78] Persons other than

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71. Part III is a partial extract of REPORT, *supra* note 1, pts. II.B and II.C.

72. J. Ashley Roach, of the U.S. Department of State Office of the Legal Adviser and a longtime Committee member, suggested researching terms that UNCLOS, *supra* note 2, did not define. Like all government-related participants, he contributed in his private capacity. REPORT, *supra* note 1, at 73.

73. Unlike most projects of this kind, the chair served as reporter as well as heading the Committee. Committee membership is and has been small; it was thought useful to eliminate a step of sending drafts through a chair before distribution.

74. Occasionally Branch Annual Meeting attendees requested copies, and these persons remain on the correspondence list for future drafts. Committee membership changed through the years, but all active members received drafts while part of the Committee. The drafts were also published in the biennial Branch Proceedings and in law journals. *See* REPORT, *supra* note 1, at 53, 68-70.

75. *Id.* at 71-72.

76. 1 INTERNATIONAL HYDROGRAPHIC ORGANIZATION, HYDROGRAPHIC DICTIONARY: GLOSSARY OF ECDIS-RELATED TERMS; SPECIAL PUBLICATION NO. 32, app. 1 (2007), *available at* http://ohi.schom.fr (last visited June 1, 2008); *See Glossary, in* INTERNATIONAL HYDROGRAPHIC ORGANIZATION INTERNATIONAL HYDROGRAPHIC BUREAU, TECHNICAL ASPECTS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA - 1982, app. 1 (Special Pub. No. 51, 4th ed. 2006), *available at* http://ohi.schom.fr/publicat/free/files/S-51_Ed4-EN.pdf [hereinafter *Glossary*]; *see also supra* note 21 and accompanying text.

77. *See, e.g.*, 73 ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, annex A1-5 (A.R. Thomas & James C. Duncan eds., 1999) (currently under revision for a new edition), *reprinting in part* International Hydrographic Organization Technical Aspects of the Law of the Sea Working Group, *Consoli-*

lawyers, e.g., oceanographers, hydrographers, geographers, and social scientists, authored some sources. The goal was to be as inclusive as possible, both as to persons receiving drafts and as to sources. The goal has been to synthesize sources and produce a workable term that might be accepted as a secondary source of law.

When the project began, there was hope that the Convention would be reported out of the U.S. Senate Committee on Foreign Relations soon, and that the results of the project would be useful within the United States as well as abroad. Because of 9/11, that was not the case; the Congress was necessarily occupied with national security and other issues. It was not until 2004 that UNCLOS emerged from the Committee; after recommittal to the Committee when Congress adjourned, it emerged again in 2007 but returned to the Committee when Congress adjourned in 2008.[79] The economic crisis took center stage in late 2008; this occupied Senate time and continues to do so to this day. With the new presidential administration and a different Senate membership, there is renewed hope among UNCLOS supporters that the Convention and its companion Agreement will win advice and consent, followed by exchange of ratifications.

Whether the United States ratifies the Convention or not, results of the Project will have impact on the law of the sea, whether in treaty format for most of the world or in customary international law for a few states.[80]

Definitions that commentators research and publish as their

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dated Glossary of Technical Terms Used in the United Nations Convention on the Law of the Sea, in INTERNATIONAL HYDROGRAPHIC BUREAU SPECIAL PUBLICATION NO. 51, app. 1 (1989) and UNITED NATIONS OFFICE FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, BASELINES 46-62 (1989) [hereinafter *Consolidated Glossary*], the predecessor to *Glossary, supra* note 76.

78. *Glossary of Technical Terms, in* CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE 321-30 (Peter J. Cook & Chris M. Carleton eds., 2000). Besides the *Consolidated Glossary, supra* note 77, Annex 1, contains various sources. *See* AM. GEOLOGICAL INST., DICTIONARY OF GEOLOGICAL TERMS (Robert L. Bates & Julia A. Jackson eds., 3d ed. 1984); AM. GEOLOGICAL INST., GLOSSARY OF GEOLOGY (Julia A. Jackson ed., 4th ed. 1997); ASS'N FOR GEOGRAPHIC INFO. & EDINBURGH UNIV., ONLINE DICTIONARY (1996, rev. 2003), *available at* www.agi.org.uk/public/gis.resources/index.htm (last visited Feb. 10, 2003; server failure noted June 1, 2008).

79. *See supra* note 7 and accompanying text.

80. The United States has recognized the navigational articles of UNCLOS as customary international law. President Ronald Reagan, *United States Oceans Policy,* 19 WEEKLY COMP. PRES. DOC. 383 (No. 10, 1983).

work are a secondary source of law. They can provide content to primary sources, e.g., treaty, customary rules, general principles of law, or other secondary sources like court or arbitral decisions.[81] They may be considered by analogy to subsequent practice under a treaty.[82] If Committee definitions vary from other secondary sources, decision makers should weigh these definitions with other commentary to derive rules of law.[83] If a primary source, e.g., a treaty definition in custom or practice under a treaty, or in the treaty itself, recites a different definition, the latter source(s) should have priority.[84] This is a reason why the

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81. I.C.J. Statute, *supra* note 8, arts. 38, 59; RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *see also supra* note 8 and accompanying text.

82. Vienna Convention, *supra* note 34, art. 31(3)(b) declares subsequent practice is an interpretation principle along with other factors. *See also* AUST, *supra* note 37, at 238-41; BROWNLIE, *supra* note 8, at 602-05; JENNINGS & WATTS, *supra* note 8, § 632, at 1274-75; MCNAIR, *supra* note 34, at 424 (parties' relevant conduct after conclusion of treaty has "high probative value" of parties' intention when treaty concluded); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223-25 (1957); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 20-21 (1951) (subsequent practice "superior" source to determine meaning); Jimenez de Arechaga, *supra* note 34, at 42-43. Int'l Law Comm'n, *Report on the Work of Its Eighteenth Session*, U.N. Doc. A/6309/Rev. 1 (1966), *reprinted in* 2 (1966) Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/Ser.A/1966/Add. 1, at 236 (1966) notes that Vienna Convention Conference negotiators rejected a proposed provision: "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions." *See id.*; *see also* BROWNLIE, *supra* note 8, at 601 (Conference rejected provision); RESTATEMENT (THIRD), *supra* note 8, § 325(2) & cmt. c (rule that subsequent practice can modify treaty conforms to U.S. practice); SINCLAIR, *supra* note 34, at 135-38 (subsequent practice can modify treaty terms); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 523-25 (1970).

83. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (Souter, J., joined by Stevens, O'Connor, Kennedy, Ginsburg, Breyer, JJ.), cites *Paquete Habana*, 175 U.S. 677, 700 (1900), for cautionary use of scholars' opinions, as evidence of the law where there is no treaty or custom:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of what their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Sosa, 542 U.S. at 734 (citing *Paquete Habana*, 175 U.S. at 700).
This is the U.S. view of the matter. *Restatement (Third)*, *supra* note 8, does not mention this aspect of *Habana*.

84. I.C.J. Statute, *supra* note 8, art. 38(1); RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *see also supra* note 8 and accompanying text.

Committee did not attempt to research terms for which UNCLOS supplies a definition.[85]

There is also a possibility that a parallel but contradictory custom[86] or other source of law, e.g., a general principle,[87] may develop alongside UNCLOS norms. The developing custom might be the same as, and thereby strengthen, the treaty norm.[88] If in opposition, custom may weaken or dislodge a treaty norm.[89] UNCLOS seeks to deflect this possibility through its preamble, which *inter alia* "*Affirm*[*s*] that matters not regulated by [UNCLOS] continue to be governed by the rules and principles of general international law."[90] The standard view on a treaty preamble's worth in interpreting the law of the agreement relates to its object and purpose, the second pillar behind a treaty's "ordinary meaning" for its terms,[91] is that the preamble must be considered along with a treaty's terms.[92] There is always a possibility, however, that a custom- or general principles-based norm might be held to totally outweigh an UNCLOS rule under traditional source-balancing principles.[93] For countries that are not UNCLOS parties, a new customary norm might be held to out-

85. *See supra* note 75 and accompanying text.

86. Vienna Convention, *supra* note 34, pmbl., arts. 38, 43; AUST, *supra* note 37, at 260-61, 303; BROWNLIE, *supra* note 8, at 6-15; JENNINGS & WATTS, *supra* note 8, §§ 10-11; SINCLAIR, *supra* note 34, at 6, 9-10, 103-04.

87. *Cf.* I.C.J. Statute, *supra* note 8, art. 38(1); RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *see also supra* note 8 and accompanying text.

88. Nicaragua Case, 1986 I.C.J. at 14, 31-38, 91-135; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9); BROWNLIE, *supra* note 8, at 6-15; JENNINGS & WATTS, *supra* note 8, §§ 10-11; RESTATEMENT (THIRD), *supra* note 8, § 102 cmt. j.

89. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 49-52 (1974). Depending on circumstances, this could cut against the Vienna Convention, *supra* note 34, art. 31(3)(b). *See supra* note 82 and accompanying text.

90. UNCLOS, *supra* note 2, pmbl (emphasis added). By contrast, High Seas Convention, *supra* note 6, pmbl: "Recognize[ed] that the United Nations Conference on the Law of the Sea . . . adopted the following provisions as generally declaratory of established principles of international law[.]" *See id.* For those states still parties to this treaty, the result is a confluence of custom and treaty rules as recited in the Convention. *See* Vienna Convention, *supra* note 34, arts. 31(3)(a) - (b); *see also supra* notes 82, 89 and accompanying text. Once these states ratify UNCLOS, *supra* note 2, under Vienna Convention art.1(1), the customary rules support will be lost. The other 1958 Conventions do not have such preamble language.

91. Vienna Convention, *supra* note 34, arts. 31(1) - (2).

92. AUST, *supra* note 37, at 236, 424-27; BROWNLIE, *supra* note 8, at 604-05; JENNINGS & WATTS, *supra* note 8, § 632, at 1273; MCNAIR, *supra* note 34, at 365; RESTATEMENT (THIRD), *supra* note 8, § 325(1) & cmt. b; SINCLAIR, *supra* note 34, at 128.

93. I.C.J. Statute, *supra* note 8, arts. 38(1), 59; RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *see also supra* note 8 and accompanying text.

weigh an UNCLOS-based customary rule. This might be contrasted with a situation where UNCLOS as a treaty and UNCLOS-based custom face a claim of a new customary norm contradicting UNCLOS and the UNCLOS-based norm.

These UNCLOS treaty-trumping provisions raise issues for the place of Report definitions if UNCLOS or a treaty subordinate to UNCLOS does supply a definition. Assuming subordinate treaty compatibility, etc. with UNCLOS, a definition ancillary to a subordinate treaty cannot operate to destroy that compatibility. If, e.g., an authoritative decision maker (e.g., a court or perhaps an UNCLOS institution like the Area Authority) accepts a Committee definition, that definition applies to the subordinate treaty to insure compatibility with UNCLOS.

For countries like the United States that are not yet UNCLOS parties but which have accepted UNCLOS provisions as customary law,[94] a Committee definition might be cited to give content to custom. If a custom or other source contrary to UNCLOS develops, the Committee definition might be cited to support the contrary custom or other source, to be thrown into the analysis, or the definition on an UNCLOS term might be employed on the other side of the analysis to support UNCLOS.[95] If a treaty subordinate to UNCLOS faces a general, UNCLOS-based but contrary custom and the proponent of a Committee definition for that subordinate treaty's term is faced with the general UNCLOS custom, the UNCLOS general custom should prevail. If a treaty subordinate to UNCLOS faces a general, UNCLOS-based but contrary custom and a definition related to that custom, the UNCLOS general custom should also prevail. However, given relative weight that might be accorded sources under international law analysis,[96] the opposite result is possible.

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94. *See generally* Reagan, *supra* note 80. Commentators have agreed with the U.S. view. *Introduction* to RESTATEMENT (THIRD), *supra* note 8, at 3-5; THOMAS & DUNCAN, *supra* note 77, ¶ 1.1; Moore, *supra* note 42, at xxvii; Bernard H. Oxman, *International Law and Naval and Air Operations at Sea*, *in* 64 THE LAW OF NAVAL OPERATIONS 19, 29 (Int'l L. Stud., Horace B. Robertson, Jr. ed., 1991). *But see* R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 24 (3d ed. 1999); 1 D.P. O'CONNELL, INTERNATIONAL LAW OF THE SEA 48-49 (I.A. Shearer ed., 1982). The latter, researched through 1978, may reflect thinking during UNCLOS' early drafting years. *See* Walker, *supra* note 7, at 306 n.3.

95. I.C.J. Statute, *supra* note 8, arts. 38(1), 59; RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *see also supra* note 8 and accompanying text.

96. I.C.J. Statute arts. 38(1), 59; RESTATEMENT (THIRD), *supra* note 8, §§ 102-03; *see also supra* note 8 and accompanying text.

Overarching UNCLOS and its internal trumping provisions are U.N. Charter Article 103 and the principle of *jus cogens*. Where there is a conflict between a definition in the Charter (admittedly a rare possibility), a definition in a U.N. Security Council decision or a *jus cogens*-supported definition and a commentator definition, the Charter,[97] a definition in a Council decision[98] or a *jus cogens*[99]-supported definition has priority. To be sure, commentators say *jus cogens* "has little relevance to the law of the sea,"[100] but that may change in the future. At least two Charter provisions, Articles 2(4) and 51, have been said to approach, or to have attained, *jus cogens* status.[101] Disputes continue as to these provisions' content, e.g., a longstanding argument on whether individual and collective self-defense includes anticipatory self-defense,[102] or whether self-defense can be in-

97. Although U.N. Charter, art. 103 declares Charter primacy over treaties and not custom or other sources, Charter definitions should prime secondary-source definitions like those the REPORT, *supra* note 1, proposes. *See also supra* note 30 and accompanying text.

98. U.N. Charter arts. 25, 48, 94, 103; *see also supra* note 31 and accompanying text.

99. *See supra* notes 34-36 and accompanying text.

100. CHURCHILL & LOWE, *supra* note 94, at 6.

101. U.N. Charter arts. 2(4), 51, 103; *see also supra* notes 30-31 and accompanying text. UNCLOS, *supra* note 2, art. 88, declares that states shall use the high seas for peaceful purposes. UNCLOS, art. 301, requires that when states exercise rights or perform duties under the Convention, they must refrain from any threat or use of force against the territorial integrity or political independence of any state, "or in any other manner inconsistent with" international law principles embodied in the U.N. Charter. These provisions are consonant with the Charter, U.N. Charter art. 103; they do not forbid legitimate military activities, e.g., naval exercises, which are among high seas freedoms UNCLOS Art. 87(1) ("*inter alia*") preserves. Charter rights and duties to which art. 301 refers include a right of self-defense. UNCLOS could not purport to curtail the right of individual and collective self-defense. U.N. Charter arts. 51, 103; *see also supra* note 57 and accompanying text.

102. United Nations, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change* ¶¶ 188-92 (2004) (citing WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 259-60 (1964)); LOUIS HENKIN, HOW NATIONS BEHAVE 143-45 (2d ed. 1979); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-34 (1984) (stating that the U.N. Charter art. 51 allows a threatened State, "according to long-established international law," to take military action "as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate." However, a state cannot purport to act in anticipatory self-defense, not just preemptively but also "preemptively." The latter cases should be brought to the U.N. Security Council for possible action. Article 51 should not be rewritten or reinterpreted.)

This approach is in line with advocates of a right of anticipatory individual and collective self-defense based on the Charter and customary law. *ILC Draft Articles on State Responsibility*, art. 25 & cmt. 5, *in 2001 ILC Rep.*, *supra* note 36, at 194, 196, *reprinted in* Crawford, *supra* note 36, at 178-79, recognize anticipatory self-defense under the

necessity doctrine. *See also* Nuclear Weapons, 1996 I.C.J. at 245; Military & Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 347 (Schwebel, J., dissenting); STANIMAR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 296 (1996); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187-93 (1958); 49 HANS KELSEN, COLLECTIVE SECURITY UNDER INTERNATIONAL LAW 27 (Int'l L. Stud., 1957); TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR 122-24, 238-39, 253-84, 302 (1996); MYRES S. MCDOUGAL & FLORENTINO FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 232-41 (1961); WALTER GARY SHARP, SR., CYBERSPACE AND THE USE OF FORCE 33-48 (1999) (real debate is scope of anticipatory self-defense right; responses must be proportional); JENNINGS & WATTS, *supra* note 8, § 127; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 152-55 (1991); JULIUS STONE, OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES 3 (1974); ANN VAN WYNEN THOMAS & A.J. THOMAS, THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 127 (1972); Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?*, 35 HOUS. J. INT'L L. 223, 231, 248 (2000); Louis Rene Beres, *After the Scud Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 71, 75-77 (1992); George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAV. WAR C. REV. 69-70 (May-June 1986); James H. Doyle, Jr., *Computer Networks, Proportionality, and Military Operations*, *in* MICHAEL N. SCHMITT & BRIAN T. O'DONNELL, COMPUTER NETWORK AND INTERNATIONAL LAW 147, 151-54 (2002); Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 68 (2001); Christopher Greenwood, Remarks, *Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 82 PROC. AM. SOC'Y INT'L L. 158, 160-61 (1988); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1 DUKE J. COMP. & INT'L L. 57, 65-84, 122 (1991); A.V. LOWE, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS AND THE CONTEMPORARY LAW OF THE SEA 127-30 (Horace B. Robertson ed., 1991); James McHugh, *Forcible Self-Help in International Law*, 25 NAVAL WAR C. REV. 61 (1972); Rein Mullerson & David J. Scheffer, *Legal Regulation of the Use of Force*, *in* BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA 93, 109-14 (Lori Fisler Damrosch et al. eds., 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 241 (1991); W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 25, 45 (1991); Horace B. Robertson, Jr., *Self-Defense Against Computer Network Attack under International Law*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 121, 140 (1991); Michael N. Schmitt, Bellum Americanum: *The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1071, 1080-83 (1998); Abraham D. Sofaer, *Sixth Annual Waldemar A. Solf Lecture: International Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 95 (1989); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World*, *in* LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 43, 62-80 (Alberto R. Coll et al. eds., 1995); Claude Humphrey Meredith Waldock, *The Regulation of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 496-99 (1952) (anticipatory self-defense permissible, as long as principles of necessity, proportionality observed); George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1122-24 (2000); Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 566 (1999). My article, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 536 (2003) says preemption "seems" equivalent to anticipatory self-defense, citing contradicting views of the day. "Seems" is not the same as saying preemption and prevention are interchangeable, as William C. Bradford, *"The Duty to Defend Them": A*

voked only after an armed attack.[103] Articles 2(4) and 51 are as relevant for LOS issues as for confrontations entirely on states' land territory. Because of Charter requirements that U.N. Members agree to carry out their Charter obligations,[104] a recom-

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Natural Law Justification for the Bush Doctrine of Preemption, 79 NOTRE DAME L. REV. 1365, 1368 n.13 (2004) wrote that I said. Anticipatory self-defense and preemption may be the same, as Abraham D. Sofaer, *Iraq and International Law*, WALL ST. J., Jan. 31, 2003, at A10, *cited in* George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489 536 n. 198 (2003), thought, and for which my page proofs cited him. I also cited Richard Falk, *Pre-Emptive War Flagrantly Contradicts the UN's Legal Framework: Why International Law Matters*, THE NATION, March 10, 2003, at 19, 20, to illustrate an opposing view. The *Valparaiso University Law Review* editors did not insert my qualifying phrase for Sofaer, "thought so," as I indicated in final page proofs. Letter of the author to *Valparaiso University Law Review* Editor-in-Chief, Mar., 2003 (copy in author file). In any event I did not say that preemption and prevention are the same. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses, supra*, at 536 & n.198, tried to present differing sides of a developing issue not directly relevant to allied and coalition operations in Afghanistan. The preemption issue will be resolved after a time of interactive claim and counterclaim, *cf.* Myres S. McDougal, *The Hydrogen Bomb Tests*, 49 AM. J. INT'L L. 357-58 (1955), much as the dispute over the territorial sea's breadth has been resolved. Jane Gilliland Dalton, *The United States National Security Strategy: Yesterday, Today and Tomorrow*, 52 NAV. L. REV. 60, 68-75 (2005) takes the view that preemption and anticipatory self-defense are not necessarily different, but national strategy should adhere to the anticipatory self-defense doctrine.

103. Some argue that anticipatory self-defense is unlawful in the Charter era. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257-61, 275-78, 366-67 (1963); ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 32 (1987); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 159-85 (3d ed. 2001); LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 121-22 (1995) (a change in view from Henkin, *supra* note 102, at 143-45, in 1979); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166-67 (1948); D.P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 83, 171 (1979); 2 LASSA OPPENHEIM, INTERNATIONAL LAW § 52aa, at 156 (Hersch Lauterpacht ed., 7th ed. 1952); AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 126 (1974); NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 4 (1985); 1 SIMMA, *supra* note 30, at 803-04; Tom Farer, *Law and War, in* 3 CYRIL E. BLACK & RICHARD A. FALK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 30, 36-37 (1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism, and Drug Trafficking, in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 232, 234 (1991); Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); Rainer Lagoni, *Remarks, Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 82 PROC. AM. SOC'Y INT'L L. 161, 162; Jules Lobel, *The Use of Force to Terrorist Attacks*, 24 YALE J. INT'L L. 537, 541 (1999); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951); *see also* Robert W. Tucker, *Reprisals and Self-Defense*, 66 AM. J. INT'L L. 586 (1972) (states may respond only after being attacked). Recent commentary supports an expanded view of reactive self-defense to include preparations for attack. *See, e.g.*, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 130, 133 (2d ed. 2004); Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 894 (2002).

104. U.N. Charter arts. 2(2), 2(5); *see also* GOODRICH ET AL., *supra* note 30, at 40-41, 56-58; 1 SIMMA, *supra* note 30, at 91-101, 136-39.

mendatory Council or General Assembly resolution[105] would almost always have primacy over a Committee definition, and certainly so if a resolution recites a *jus cogens* or customary norm.[106] On the other hand, if a resolution does not restate positive law, it should be seriously considered along with secondary sources like the ABILA LOS Committee research. The Report underscores its recognition of Charter superior norms,[107] as does UNCLOS: "In exercising their rights and performing their duties under this Convention, states parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter . . ."[108] These principles for U.N. resolutions should also apply to pronouncements of other intergovernmental organizations whose resolutions apply to the law of the sea, e.g., IMO.[109] If a resolution is mandatory, like Security Council decisions, such a resolution defining a term trumps a commentary definition. If the resolution is nonmandatory but restates a customary, treaty or general principles norm, it will also have primacy. If

105. U.N. Charter arts. 10-11, 13-14, 33, 36-37, 39-41; *see also supra* note 32 and accompanying text.

106. *See supra* notes 34-36 and accompanying text.

107. Every definition includes this caveat in its *Comment*: In Law of Armed Conflict ("LOAC")-governed situations under the "other rules of international law" clauses in UNCLOS, a different definition may apply. *See* REPORT, *supra* note 1, at 300. The same may be the situation if the U.N. Charter supersedes UNCLOS or if *jus cogens* norms apply. The exception is "other rules" clause analysis. *Compare, e.g.*, REPORT, *supra* note 1, at 135 *with id.* at 300. This may seem a bit of overkill, but having the warning after every definition should alert hurried researchers, e.g., in a self-defense or armed conflict situation, that the definitions are for the law of the sea and not necessarily for other law, i.e., Charter-governed, law of armed conflict-governed or *jus cogens*-governed situations. *Id.* at 305-06 supplies analysis demonstrating that different rules may apply during armed conflict.

108. UNCLOS, *supra* note 2, art. 301; *see also id.* art. 88; RESTATEMENT (THIRD), *supra* note 8, § 521, cmt. b (citing U.N. Charter art. 2(4)); UNCLOS, *supra* note 2, arts. 88, 301 (referring to RESTATEMENT (THIRD), *supra* note 2, § 905, cmt. g; *accord* Nuclear Weapons, *supra* note 36, 1996 I.C.J. at 244; 3 COMMENTARY, *supra* note 57, ¶¶ 87.9(I), 88.1-88.7(d); 5 COMMENTARY, *supra* note 57, ¶¶ 301.1-301.6; *see, e.g.*, Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEVEL. & INT'L L. 359 (1989); *Helsinki Principles*, *supra* note 20, princ. 1.2, at 499; Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 814 (1984); John E. Parkerson, Jr., *International Legal Implications of the Strategic Defense Initiative*, 116 MIL. L. REV. 67, 79-85 (1987); Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAV. L. REV. 1, 8 (1992); *see also* REPORT, *supra* note 1, at 300-10 ("other rules of international law").

109. *See supra* note 21 and accompanying text.

the resolution does not do so, it should be considered along with other secondary sources like the Report. If a definition emerges from a nongovernmental organization ("NGO"), an NGO definition should be given weight according to principles for commentators' competing claims.[110]

The Report is also sensitive to the possibility of another definition for a term in law of armed conflict situations, e.g., when UNCLOS and the 1958 Conventions declare a separate standard of international law through their "other rules" clauses,[111] which traditionally have meant that these law of the sea treaties are subject to the LOAC in armed conflict situations.[112] Since the LOAC, and the law of naval warfare and the law of neutrality in particular, rely in large part on primary sources, i.e., treaties, custom and general principles,[113] a LOAC-based definition will have primacy over a Committee definition for UNCLOS, although circumstances might call for borrowing an LOS definition.[114] Similarly, self-defense situations might also call for a different definition that will have primacy because of the status of the right of individual and collective self-defense as a customary, Charter, and perhaps *jus cogens* norm.[115] Like LOAC-governed situations,[116] however, an LOS-based definition might be borrowed. The Report does, however, note a possibility of another meaning in LOAC situations, where it analyzes "other rules of international law."[117]

The result is a *Comment* for every definition that warns a researcher that a definition, even if acceptable for law of the sea

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110. *See supra* note 83 and accompanying text.

111. *See supra* notes 40-41, 56 and accompanying text.

112. The Committee settled on a definition for "other rules of international law" that includes a possibility that the phrase may mean law other than the LOAC, including the law of neutrality, in some situations. *See supra* notes 40-41, 56, 107-08 and accompanying text.

113. Some of these treaties may be obsolete or in *desuetude*. *See supra* notes 17, 22-23 and accompanying text.

114. *See, e.g.*, San Remo Manual, *supra* note 20, ¶¶ 12, 34, 44, 88, 106(c) & cmts. (applying the UNCLOS "due regard" principle in law of naval warfare situations); *see also* Thomas & Duncan, *supra* note 77, ¶ 8.1.3; Walker, *supra* note 7, at 536-46; Horace B. Robertson, Jr., *The "New" Law of the Sea and the Law of Naval Warfare*, *in* READINGS ON INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW ch. 19 (John Norton Moore & Robert F. Turner eds., 1995). For analysis of and definitions for "due regard" in UNCLOS, see REPORT, *supra* note 1, at 220-28.

115. U.N. Charter arts. 51, 103; *see also* note 57 and accompanying text.

116. *See supra* notes 40-41, 56, 107-08 and accompanying text.

117. REPORT, *supra* note 1, at 300-10.

situations, may not apply where the Charter, *jus cogens* or the law of armed conflict supplies rules for a situation.[118]

As noted earlier, with respect to terms defined in UNCLOS itself, the Committee chose to minimize those kinds of conflicts by declining to redefine these terms.[119]

CONCLUSION

The Project should close in 2009, at least for the first round of terms proposed as definitions for UNCLOS. It is hoped that it will be published in a widely available source, perhaps on line as well as in print. Undoubtedly there will be future editions; new terms have already been suggested for analysis in a supplement, perhaps leading to a second edition. Terms already in publication may change in meaning through practice accepted as law by States, as interpretations of treaties, whether UNCLOS or agreements subordinate to UNCLOS, or through application of general principles. As James Russell Lowell wrote over a century ago, new occasions teach new duties; new truth makes ancient good uncouth.[120] So may well it be with the law of the sea, as unchanging and yet changing as the oceans themselves.

Professor Sweeney, among many, has been at a laboring oar in this course of change in the law of the sea. May he continue to serve on board with us as its principles are charted in the twenty-first century. My personal congratulations on his anniversary and my thanks to him for his friendship and his many contributions to the rule of law.

118. *See supra* notes 30-36 and accompanying text.

119. *See supra* notes 75, 85 and accompanying text.

120. James Russell Lowell, *The Present Crisis*, *in* 1 JAMES RUSSELL LOWELL, POETICAL WORKS 185, 190 (1890).