
George K. Walker*

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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

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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.


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 19586 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


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

\begin{itemize}
  \item \textsuperscript{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. 293, declaring that only flag state jurisdiction existed for those accused of crime on the high seas, superseding to that extent \textit{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.
  \item \textsuperscript{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 \textit{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).
  \item \textsuperscript{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, 1951, 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.
  \item \textsuperscript{14} See generally Hamburg Rules, supra note 5; Terminal Operators Convention, supra note 5 (for which Professor Sweeney was the U.S. Representative).
  \item \textsuperscript{15} The first multilateral agreement to go into force was Convention for the Unification of Certain Rules Respecting Collisions Between Vessels, Sept. 25, 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. Several treaties regulated, and continue to regulate, humanitarian principles, certain aspects of naval warfare, and maritime neutrality during war at sea.

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. Other states established flag of convenience regimes that left a legal muddle for regulating private orderings.

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.


19. See generally Boleslaw A. Boczek, Flags of Convenience: An International
International organizations, whether nongovernmental ("NGOs") or intergovernmental ("IGOs"), 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, and rules for neutrality and belligerent use of the oceans. The first half
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, e.g., with respect to governmental actions involving shipping (e.g., the act of state doctrine), immunity of government owned or operated ships, and standards for seafarers' working conditions and the like, on the sea. A further problem was acceptance of international law standards as rules for national law. Many of these issues beset us today.


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.


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.\textsuperscript{30} If the U.N. Security Council passes a resolution that is a "decision," Member States must obey its mandate.\textsuperscript{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.\textsuperscript{32} However, courts and commentators have espoused the view that these otherwise nonmandatory resolutions can ascend into customary international law.\textsuperscript{33} This was new, in terms of world order; the idea that an international organization could establish binding standards


\textsuperscript{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 \textit{jus cogens} derived independently of a treaty, however, unless Article 103 might be considered a \textit{jus cogens} norm itself, and a \textit{jus cogens} norm superior to other \textit{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, §§ 102-05; supra note 8 and accompanying text.

\textsuperscript{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, 256-37 (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.

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, analogous to the supremacy of Charter rules and Security Council decisions. 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. If other principles, e.g., human rights law stan-

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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.


35. See supra note 31 and accompanying text.

standards, 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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\(^{37}\) 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, 58, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{44} Because of U.S. objections to Part XI, deep seabed mining rules for the Area,\textsuperscript{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.\textsuperscript{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.\textsuperscript{47}

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

\begin{itemize}
\item \textsuperscript{43} Few States interposed reservations. See generally Multilateral Treaties, supra note 4.
\item \textsuperscript{44} Id.
\item \textsuperscript{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.
\item \textsuperscript{46} Agreement, supra note 2.
\item \textsuperscript{47} See supra note 7 and accompanying text.
\end{itemize}
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.\(^57\)

\(^{48}\) UNCLOS, \textit{supra} note 2, art. 3.
\(^{49}\) \textit{Id.} arts. 55-75.
\(^{50}\) \textit{Id.} arts. 46-54.
\(^{51}\) \textit{Id.} arts. 17-32, 45.
\(^{52}\) \textit{Id.} arts. 37-45.
\(^{53}\) \textit{Id.} arts. 76-85.
\(^{54}\) \textit{Id.} arts. 116-20.
\(^{55}\) \textit{Id.} arts. 192-265.
\(^{56}\) \textit{Id.} pmbl., art. 2(3) (territorial sea); \textit{id.} arts. 19, 21, 31 (territorial sea innocent passage); \textit{id.} art. 34(2) (strait transit passage); \textit{id.} art. 52(1) (archipelagic sea lanes passage; incorporation by reference of articles 19, 21, 31); \textit{id.} arts. 58(1), 58(3) (EEZ); \textit{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."); \textit{id.} art. 87(1) (high seas); \textit{id.} art. 138 (the Area); \textit{id.} art. 293 (court or tribunal having jurisdiction for settling disputes must apply UNCLOS and "other rules of international law" not incompatible with UNCLOS); \textit{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."); \textit{id.} annex III, article 21(1); \textit{see also} \textit{REPORT, supra} note 1, at 800-10.
\(^{57}\) U.N. Charter arts. 2(4), 103; \textit{see also} UNCLOS, \textit{supra} note 2, arts. 88, 301. Article 88 declares that states shall use the high seas for peaceful purposes. \textit{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. \textit{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. \textit{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 are superseded for states ratifying the Convention. 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. Thus, e.g., insofar as earlier agreements on international rules of the nautical road, i.e., International Regulations for Preventing Collisions at Sea ("COLREGS"), 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. Other treaties expressly permitted or preserved by the Convention remain in force; thus prior agreements for straits regimes remain in effect. Article 311(6) declares that states cannot amend "basic principles relating to the common heritage of 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]."


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 but declares that no reservations or exceptions may be made to the Convention unless it expressly allows them. 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." 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.

Thus this new "constitution for the oceans" 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. 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.
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

The Project began in early 2001 as the author began chairing the Branch Law of the Sea Committee. 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.

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. Terms already defined in the Convention were excluded from consideration. Research included other compilations of definitions, some published by the International Hydrographic Organization or government sources, and others by commentators. Persons other than

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.
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


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. They may be considered by analogy to subsequent practice under a treaty. If Committee definitions vary from other secondary sources, decision makers should weigh these definitions with other commentary to derive rules of law. 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. 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.


[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 UN-CLOS supplies a definition.  

There is also a possibility that a parallel but contradictory custom or other source of law, e.g., a general principle, may develop alongside UN-CLOS norms. The developing custom might be the same as, and thereby strengthen, the treaty norm. If in opposition, custom may weaken or dislodge a treaty norm. UN-CLOS seeks to deflect this possibility through its preamble, which inter alia "Affirm[s] that matters not regulated by [UN-CLOS] continue to be governed by the rules and principles of general international law." 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, is that the preamble must be considered along with a treaty’s terms. There is always a possibility, however, that a custom- or general principles-based norm might be held to totally outweigh an UN-CLOS rule under traditional source-balancing principles. For countries that are not UN-CLOS 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; BROWNLE, 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 82 and accompanying text.
89. Michael Akhurst, 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. UN-CLOS, 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 UN-CLOS, 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; BROWNLE, 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, §§ 102403; see also supra note 8 and accompanying text.
weigh an UNCLOS-based customary rule. This might be con-
trasted with a situation where UNCLOS as a treaty and UN-
CLOS-based custom face a claim of a new customary norm con-
tradicting 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 Author-
ity) 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 UN-
CLOS parties but which have accepted UNCLOS provisions as
customary law, a Committee definition might be cited to give
content to custom. If a custom or other source contrary to UN-
CLOS develops, the Committee definition might be cited to sup-
port the contrary custom or other source, to be thrown into the
analysis, or the definition on an UNCLOS term might be em-
ployed on the other side of the analysis to support UNCLOS. 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, UN-
CLOS-based but contrary custom and a definition related to that
custom, the UNCLOS general custom should also prevail. How-
ever, given relative weight that might be accorded sources under
international law analysis, the opposite result is possible.

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
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 re-
fect thinking during UNCLOS’ early drafting years. See Walker, supra note 7, at 506 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, a definition in a Council decision97 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.
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.
voked only after an armed attack.\textsuperscript{108} 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,\textsuperscript{104} a recom-

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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\textsuperscript{105} would almost always have primacy over a Committee definition, and certainly so if a resolution recites a \textit{jus cogens} or customary norm.\textsuperscript{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,\textsuperscript{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 . . ."\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
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  \item \textsuperscript{105} U.N. Charter arts. 10-11, 18-14, 38, 86-87, 39-41; see also supra note 32 and accompanying text.
  \item \textsuperscript{106} See supra notes 34-36 and accompanying text.
  \item \textsuperscript{107} Every definition includes this caveat in its \textit{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 \textit{Report}, supra note 1, at 300. The same may be the situation if the U.N. Charter supersedes UNCLOS or if \textit{jus cogens} norms apply. The exception is "other rules" clause analysis. \textit{Compare}, e.g., Report, supra note 1, at 135 with \textit{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 \textit{jus cogens}-governed situations. \textit{id.} at 305-06 supplies analysis demonstrating that different rules may apply during armed conflict.
  \item \textsuperscript{109} See supra note 21 and accompanying text.
\end{itemize}
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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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{118} See *supra* notes 30-36 and accompanying text.

\textsuperscript{119} See *supra* notes 75, 85 and accompanying text.

\textsuperscript{120} James Russell Lowell, *The Present Crisis*, in *1 James Russell Lowell, Poetical Works* 185, 190 (1890).