

**DEFINITIONS FOR THE 1982
LAW OF THE SEA CONVENTION**

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“WORDS, WORDS, WORDS”: DEFINITIONS FOR THE 1982 LAW OF THE SEA CONVENTION

GEORGE K. WALKER

“Words, words, words,” Audrey Hepburn’s familiar line in *My Fair Lady*, bespoke a problem of pronunciation. The International Law Association’s American Branch Law of the Sea Committee¹ has begun analyzing the 1982 U.N. Convention on the Law of the Sea² to try to clarify words or phrases that the Convention does not define.³

This project will continue for several years. The 2002 *Interim Report* that follows this introduction is the result of the LOS Committee chair’s draft as modified after a Committee meeting at the American Branch annual meeting in New York.⁴ Attendance was slight, perhaps in part due to the September 11 attacks; this *Report* and a draft of this article have been circulated to Committee members for further consideration. As the *Report’s Introduction* says, the definitions are not in final format, which may come after further study. Developments external to the project, e.g., new court decisions or developing State practice, may influence Committee analysis. New terms that are proposed may affect thinking on definitions previously tentatively approved. In this regard the project will follow the path of the ALI *Restate-*

1. The American Branch of the International Law Association [hereinafter ILA] includes lawyers, judges, or academic lawyers in the United States. The Association, founded in 1873, has its headquarters in London and undertakes studies through international and branch committees, e.g., the American Branch Law of the Sea Committee, that produce reports analogous to the work of the American Law Institute, which publishes the *Restatements of the Law*, including the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), cited in this article [hereinafter RESTATEMENT (THIRD)]. ILA reports have influenced treaty language and customary or general principles norms. E.g., ILA, *Budapest Articles of Interpretation: Final Text*, in REPORT OF THE 38TH CONFERENCE 66-67 (1934), reprinted in *Rights and Duties of States in Case of Aggression*, 33 AM. J. INT’L L. 819, 825-26 n.1 (1939) [hereinafter ILA *Budapest Articles*] (interpreting the Pact of Paris, also known as the Kellogg-Briand or Briand-Kellogg Pact, Treaty Providing for Renunciation of War as an Instrument of National Policy, Aug. 28, 1928, 46 Stat. 2343, 94 L.N.T.S. 57). The *Budapest Articles* and the *Harvard Draft Convention on Rights & Duties of States in Case of Aggression*, 33 AM. J. INT’L L. 819 (1939), were partial justification for U.S. Lend-Lease aid to the Allies opposing the Axis before the United States entered World War II. See generally GEORGE K. WALKER, *THE TANKER WAR 1980-88: LAW AND POLICY*, 74 NAV. WAR C. INT’L L. STUD. 182-84 (2000).

2. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

3. UNCLOS defines some terms. See, e.g., UNCLOS art. 1(1).

4. The *Interim Report* also appears in 2000-2001 PROC. AM. BRANCH INT’L L. ASS’N 154 (John E. Noyes ed.).

ments, whose *Tentative Drafts* are subject to revisions approved at ALI annual meetings and conformation before publication in final hard copy.

Committee member John Noyes submitted a draft critique at the 2001 meeting; as revised, the critique follows the *Interim Draft*. I offer a few comments on the project and his critique in the Conclusion. As the foregoing suggests, this article and the *Interim Draft* are not the end of the story. The Committee welcomes comments, which will be incorporated in future phases of the project.

**DEFINING TERMS IN THE 1982 LAW OF THE SEA
CONVENTION (SEPT 4, 2001, INITIAL DRAFT)
(REV. 1, JAN. 22, 2002)⁺**

George K. Walker^{*}

I. INTRODUCTION

This is the first submission, of perhaps several, of proposed definitions for terms not otherwise defined in the 1982 U.N. Convention on the Law of the Sea,⁵ to be considered at International Law Association (American Branch) (ILA AB) annual meetings starting in 2001. After conferring with the ILA AB Director of Studies and others, I have decided that this may be an appropriate initial project for the Committee.

The proposed procedure is the Committee Chair's circulating each initial draft (Initial Drafts) among ILA AB Law of the Sea Committee (LOS Committee, or Committee) members and perhaps other interested persons (e.g., other ILA AB members not LOS Committee members wishing to participate) for comments before the meeting. ILA AB LOS Committee member meeting attendees will consider an Initial Draft and these comments at a Committee meeting during the annual meeting. The Committee Chair will then circulate a Proposed Tentative Draft among Committee members and perhaps other interested persons for further comments. The resulting Final Draft may be published in, e.g., ILA materials, for consideration by the general ILA membership and others, with an invitation to submit more comments. The Committee Chair will file the resulting Tentative Draft for final consideration and possible amendments, perhaps suggested by additional research on other terms, for adoption as a Final Draft. If, at the end of this stage, the Committee wishes to revisit and discuss a term at the next meet-

⁺ Previously published, with variations in footnote form, in 2000-2001 PROC. AM. BRANCH INT'L L. ASSN 154.

^{*} Chair, International Law Association (American Branch) Law of the Sea Committee.

5. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994). The Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, July 28, 1994, 1836 U.N.T.S. 3, modified UNCLOS in respects not relevant to this analysis.

ing, it will be placed on the Committee agenda for the next ILA AB annual meeting. However, in general a Tentative Draft, once approved by the Committee, will not be subject to general discussion and wholesale revision until the end of the process, unless the Committee wishes to do so for a particular term.

As with all ILA projects, the Final Draft will not necessarily represent any State's or international organization's practice, views, or policy, unless that State or international organization chooses to adopt it in whole or part.

Draft formats will follow an English alphabetical order, e.g., "mile" ahead of "ocean space." After reciting a term for definition, a Discussion and Analysis will follow, including reference to UNCLOS provisions, other treaties, e.g., the 1958 law of the sea (LOS) conventions,⁶ treatises, cases, articles, etc. Comments will summarize correspondence, those who propose terms to simplify correspondence, etc. Conclusions will end each entry.

This method of analysis is similar to that employed by the ILA in drafting the *Helsinki Principles of Maritime Neutrality*,⁷ the American Law Institute in developing the *Restatements*, and the International Institute of Humanitarian Law in preparing the *San Remo Manual*.⁸

The project will not revisit terms defined in UNCLOS;⁹ it will not enter debates on what are customary norms that require no definition of terms¹⁰ or the wisdom of ratifying UNCLOS.¹¹

6. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 [hereinafter Continental Shelf Convention]; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285 [hereinafter Fishery Convention]. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention]; 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], referred to collectively as the 1958 LOS Conventions.

7. International Law Association Committee on Maritime Neutrality, *Final Report: Helsinki Principles on Maritime Neutrality*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA, MAY 24-30, 1998, at 496 (1998) [hereinafter *Helsinki Principles*].

8. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL].

9. UNCLOS art. 1(1). See also 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 1.14-1.15 (Satya N. Nandan & Shabtai Rosenne eds., Myron H. Nordquist ed.-in-chief, 1993) [hereinafter 2 COMMENTARY].

10. E.g., the now largely resolved debate on the customary maximum width of the territorial sea. See generally WALKER, *supra* note 1, at 260-68.

11. See *id.* at 305-06.

II. DEFINITIONS

A. "Applicable" and "Generally Accepted"

1. Discussion and Analysis

The terms "applicable" and "generally accepted" are related, for reasons that follow.¹² "Applicable" appears in UNCLOS, Articles 42(1)(b), 94(4)(c), 211(6)(c), 213, 217(1), 218(1), 219, 220(1), 220(2), 220(3), 222, 226(1)(b), 226(1)(c), 228(1), 230(1), 230(2), 293, and 297(1)(c). The term also appears in Annex III, Basic Conditions of Prospecting, Exploration and Exploitation, Article 21; Annex VI, Statute of the International Tribunal for the Law of the Sea, Articles 23 and 38.

"Generally accepted" appears in Articles 21(2), 21(4), 39(2), 41(3), 53(8), 60(3), 60(5), 60(6), 94(2)(a), 94(5), 211(2), 211(5), 211(6)(c), and 226(1)(a). In all instances "generally accepted" modifies words or phrases like "international rules or standards" (Article 21(2)), "international rules and standards" (Articles 211(2), 211(5), 211(6)(c), 226(1)(a)), "international regulations" (Articles 21(4), 41(3), 53(8), 94(2)(a), 94(5)), "international regulations, procedures and practices" (Articles 39(2)(a), adding "for safety at sea, including the International Regulations for Preventing Collisions at Sea;" 39(2)(b), adding "for the prevention, reduction and control of pollution from ships"), "international standards" (Articles 60(3); 60(5); 60(6), adding "regarding navigation in the vicinity of artificial islands, installations, structures and safety zones").

In titles to UNCLOS, Article 293; Annex III, Article 21; and Annex VI, Articles 23 and 28, "applicable" modifies "law." Annex VI, Articles 23 and 28 refer to UNCLOS, Article 293. Article 293(1) says that "A court or tribunal having jurisdiction under this section [UNCLOS, Articles 286-296] shall apply this Convention and other rules of international law not incompatible with this Convention."¹³ Annex III, Article 21, referring to contracts for prospecting, exploring, and exploiting the Area, says such contracts "shall be governed by the terms of the contract, the rules, regulations and procedures of the Authority, Part XI [UNCLOS, Articles 133-191] and other rules of international law not incompatible with this Convention." The negotiating history record is sparse¹⁴ on what "applicable law" means other than the su-

12. This analysis relies, in part, on International Law Association Committee on Coastal State Jurisdiction Relating to Marine Pollution, *Second Report*, in INTERNATIONAL LAW ASSOCIATION, *supra* note 7, at 372 [hereinafter *Second Report*]; International Law Association Committee on Coastal State Jurisdiction Relating to Marine Pollution, *First Report*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-SEVENTH CONFERENCE HELD AT HELSINKI, FINLAND, AUG. 12-17, 1996, at 148 (1996) [hereinafter *First Report*].

13. UNCLOS art. 293(2) allows the tribunal or court to decide a case *ex aequo et bono* if the parties so agree.

14. See generally 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 293.1-293.5, A.VI.131-32, A.VI.198-200 (Shabtai Rosenne & Louis B.

premacY of UNCLOS, at least where U.N. Charter decision issues are not at stake.¹⁵ The principle of the Convention's supremacy over other agreements appears in, e.g., UNCLOS, Articles 311(2)-311(4). There is no point in recommending a further definition for "applicable" where it modifies "law."¹⁶

In vessel-source rules of reference, UNCLOS, Articles 94(3)(b), 213, 217(1), 218(1), 219, 220(1), 220(2), 220(3), 222, 226(1)(b), 226(1)(c), 228(1), 230(1), 230(2), and 297(1)(c), "applicable" qualifies "international rules and standards" with respect to ocean environment matters. UNCLOS, Article 94(4)(c) requires:

4. Such measures [for ships flying its (a registry State's) flag] shall include those necessary to ensure: . . .

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

In UNCLOS, Article 42(1)(b), however, the word "applicable" is employed in a different context:

1. Subject to the provisions of this section [relating to straits transit passage], States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

. . . .

(b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

In its declaration upon signature of the Convention, Spain insisted that "applicable" in Article 42(1)(b) should have been replaced by "generally accepted." Spain's declaration upon ratification submitted that strait States can "enact and enforce in straits used for international navigation its own regulations, provided that such regulations do not interfere with the right of transit passage."¹⁷ The ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (the ILA Pollution Committee) "suggests that flag States should not have to submit to the enforcement of rules and standards that they have not somehow accepted[, but that] it would not be correct to transpose conclusions arrived at there to a more general enforcement perspective."¹⁸

There is no record in the Convention negotiating history of the origin or intention of "applicable." The UNCLOS Drafting Committee English lan-

Sohn eds., Myron H. Nordquist ed.-in-chief, 1988) [hereinafter 5 COMMENTARY].

15. U.N. CHARTER arts. 25, 48, 103. See also *infra* note 66 and accompanying text.

16. See *infra* notes 59-72 for analysis of "other rules of international law" and how it relates to the Convention.

17. *Second Report*, *supra* note 12, at 373 n.6.

18. *Id.* at 373-74.

guage group had recommended that the words “generally accepted” be substituted for “applicable” in Articles 42(1)(b), 94(4)(c), 218(1), and 219. There is no formal attitude of States toward the concept of “generally accepted.”¹⁹ For Article 21(4), the “generally accepted” international regulations, practices and procedures means those adopted within the International Maritime Organisation (IMO) framework.²⁰ The same is true for Articles 39(2), 41(3), and 53(8),²¹ and perhaps Articles 94(2)(a) and 94(5),²² for the “generally accepted international rules or standards” of Articles 21(2), 211(2), 211(5), and 211(6)(c),²³ and for “international standards” requirements of Articles 60(3), 60(5), and 60(6).²⁴ On the other hand, analysts cite other international agreements, but also the possibility of IMO action, for the “generally accepted rules and standards” to which Article 226(1)(a) refers.²⁵ In view of Convention Articles 311(2)-311(4), prohibiting any treaties with standards incompatible with the Convention, “generally accepted” must mean that any international law, rule, regulation, or other standard allowed or required by the Convention cannot be incompatible with it.²⁶ This would appear to take into account differing views of commentators: (1) “generally accepted” means whatever customary international law is on the point; (2) “generally accepted” means whatever norms a State has accepted through ratification of treaties, a position taken by States during the Ship Registration Convention negotiations; (3) “generally accepted” refers to standards of IMO conventions in force, whether or not a State is a party to the conventions; or (4) for States party to UNCLOS, ratification means they have agreed to be bound by a less strict standard than those postulated by advocates of options (1), (2), or (3).²⁷ The ILA Pollution Committee rejected options (1), (2), and (3), advocating adoption of State practice, as distinguished

19. *Id.* at 373, 378.

20. 2 COMMENTARY, *supra* note 9, ¶¶ 21.11(g)-21.11(i). *See also* 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 211.15(c)-211.15(d) (Shabtai Rosenne & Alexander Yankov eds., Myron H. Nordquist ed.-in-chief, 1991) [hereinafter 4 COMMENTARY]; *First Report*, *supra* note 12, at 169.

21. 2 COMMENTARY, *supra* note 9, ¶¶ 39.10(i), 41.9(c), 53.9(l). *See also First Report*, *supra* note 12, at 169.

22. 2 COMMENTARY, *supra* note 9, ¶¶ 94.8(b), 94.8(i). *See also First Report*, *supra* note 12, at 169.

23. 2 COMMENTARY, *supra* note 9, ¶¶ 21.11(g)-21.11(i); 4 COMMENTARY, *supra* note 20, ¶¶ 211.15(c)-211.15(d). *See also First Report*, *supra* note 12, at 169.

24. 2 COMMENTARY, *supra* note 9, ¶ 60.15(f). *See also First Report*, *supra* note 12, at 169.

25. *See generally* 4 COMMENTARY, *supra* note 20, ¶ 226.11(b) & n.6. *See also First Report*, *supra* note 12, at 169.

26. *See also* 5 COMMENTARY, *supra* note 14, ¶¶ 311.1-311.8, 311.11.

27. *First Report*, *supra* note 12, at 170-71, *inter alia* referring to U.N. Convention on Conditions for Registration of Ships, Feb. 7, 1986, U.N. Doc TD/RS/CONF/23, 26 I.L.M. 1229, 1236 (1987) (not in force) [hereinafter Ship Registration Convention]. Eleven States are party. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 2000, at 42, U.N. Doc. ST/LEG/Ser.E/19 (2001) [hereinafter Multilateral Treaties].

from customary international law with a possibility of the persistent objector and the time over which custom must mature, for “generally accepted.”²⁸ The Pollution Committee adopted this definition in the context of UNCLOS maritime pollution issues, where many (but not all) uses of “generally accepted” appear. There is risk of inapposite results if the ocean pollution definition is applied to other uses of the term, particularly if “applicable” is equated to “generally accepted.” This requires careful consideration.

Under the circumstances it seems appropriate to formulate a special definition for “applicable law” wherever appearing in the Convention, a special definition for “applicable” in Article 42(1)(b), and another, more general definition for other provisions using “applicable.” It would seem appropriate to adopt the ILA Committee approach for “generally accepted” wherever the phrase appears in the Convention.

2. Comments

A committee member suggested “applicable” and “generally accepted” for definition; he concurs with John Noyes’ recommendation that the ILA Committee *Reports*’ analysis be accepted. The Chair distilled these materials and others for recommended definitions.

3. Conclusions

These definitions are proposed:

a. “Applicable” when modifying “law” in the LOS Convention is governed by the particular article in which the phrase “applicable law” appears.

b. “Applicable regulations” in the LOS Convention, Article 42(1)(b), means the same as “generally accepted regulations,” but no such regulations may have the effect of interfering with straits passage as provided in the Convention.

c. “Applicable” means the same as “generally accepted” where the word “applicable” modifies “international rules and standards” in LOS Convention, Articles 94(3)(b), 213, 217(1), 218(1), 219, 220(1), 220(2), 220(3), 222, 226(1)(b), 226(1)(c), 228(1), 230(1), 230(2), and 297(1)(c), and where “applicable” modifies “international regulations” in LOS Convention, Article 94(4)(c).

d. “Generally accepted,” as employed in the LOS Convention, Articles 21(2), 21(4), 39(2), 41(3), 53(8), 60(3), 60(5), 60(6), 94(2)(a), 94(5), 211(2), 211(5), 211(6)(c), and 226(1)(a), means those international rules, standards, or regulations that bind States party to the LOS Convention through international agreements, or bind States through customary law, or reflect State practice that has not necessarily matured into custom, that reflects LOS Convention standards. In many cases these will be those in-

28. *First Report*, supra note 12, at 174-77.

ternational rules, standards, or regulations the International Maritime Organisation establishes.

The Convention declares few, if any, specific international rules and standards or international regulations. However, since Articles 311(2)-311(4) do not allow agreements contrary to the Convention, the result should be that generally accepted standards cannot differ from the Convention or implementing treaties, e.g., regional conventions establishing pollution standards. The foregoing formulation, ¶ d, would limit generally accepted customary standards to those declared as treaty-based standards under the Convention, but would also allow State practice in the absence of a treaty or customary norm, as the ILA Pollution Committee advocated.

In law of armed conflict (LOAC)-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.²⁹

B. “Coastal State”

1. Discussion and Analysis

UNCLOS does not explain this phrase. “It is that State from the coast or baselines of which the breadth of the territorial sea is measured”³⁰

2. Comments

The Chair researched this proposed definition.

3. Conclusions

This definition of “coastal State” is proposed:

“Coastal State” is that State from the coast or baselines of which the breadth of the territorial sea is measured, those baselines themselves being determined in accordance with the 1982 LOS Convention, Articles 5-7, 9-10, 47.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.³¹

29. See *infra* notes 59-73 and accompanying text.

30. 2 COMMENTARY, *supra* note 9, ¶ 1.29.

31. See *infra* notes 59-73 and accompanying text.

C. "Flag State"

1. Discussion and Analysis

UNCLOS does not define "flag State," although its meaning can be deduced from UNCLOS, Articles 91, 94.³² The Ship Registration Convention Articles 1-2, not in force, define "flag State" as "a State whose flag a ship flies and is entitled to fly" and indicate that the flag State must "exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters."³³

2. Comments

The Chair researched this proposed definition.

3. Conclusions

This definition of "flag State" is proposed:

"Flag State" is a State whose flag a ship flies and is entitled to fly under terms of the 1982 LOS Convention.

Since the Ship Registration Convention is not in force, its additional qualifications ("a State . . . social matters.") have been omitted. If the Convention comes into force, these qualifications will govern States party and will govern all except persistently objecting States if Convention standards are accepted as custom. Until that time, nonparty registry States may choose to apply definitions different from the Ship Registration Convention, Article 2, so long as they are consistent with obligations under the conventional or customary law of the sea.

In LOAC-governed situations under the "other rules of international law" clauses in the Convention, a different definition may apply. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.³⁴

32. 2 COMMENTARY, *supra* note 9, ¶ 1.30.

33. *Id.*; 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶ 91.9(e) (Satya N. Nandan & Shabtai Rosenne eds., Myron H. Nordquist ed.-in-chief, 1995) [hereinafter 3 COMMENTARY]; 4 COMMENTARY, *supra* note 20, ¶ 217.8(j) (citing Ship Registration Convention, *supra* note 27, arts. 1-2). See also Robin R. Churchill, The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships § 1, at 6, § 5.1.1, at 60 (Oct. 2000), available at <http://www.oceanlaw.net/hedley/pubs/ITF-Oct2000.pdf>.

34. See *infra* notes 59-73 and accompanying text.

D. "Genuine Link"

1. Discussion and Analysis

"Genuine link" appears in UNCLOS, Article 91(1):

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

Article 94(1), carrying over language from the High Seas Convention, Article 5(1), declares: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag." Ensuing Article 94 provisions elaborate on these requirements.³⁵ Article 217 imposes environmental enforcement requirements on registry States.³⁶ The High Seas Convention, Article 5(1), has similar language:

Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must be a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

Neither Convention defines "genuine link." A principal difference between the Conventions is their scope; UNCLOS applies its Article 91/94 terms in all ocean areas, while the High Seas Convention governs only on the high seas.³⁷ Both Conventions leave it to States to fix specific registry requirements in their discretion.³⁸

Among the High Seas Convention languages, translation of the Spanish text suggests the same meaning as "genuine link" in the English language version. The French language version translates to "substantial" or "significant" link, which suggests some difference of meaning. The same distinction appears true for UNCLOS, Article 91(1).³⁹

The High Seas Convention preparatory works the International Law Commission developed suggest that mere administrative formality, i.e., registry only or grant of a certificate of registry without submitting to registry State control, does not satisfy that Convention's "genuine link" requirement. States would be free to establish their own conditions for registration, how-

35. High Seas Convention, *supra* note 2, art. 10, was a source for UNCLOS arts. 94(3), 94(5). Churchill, *supra* note 33, at 6, §§ 3.3.2, 4.1, 4.3, 4.6; 3 COMMENTARY, *supra* note 33, ¶¶ 91.9(c), 94.2.

36. See also Churchill, *supra* note 33, § 4.6; 4 COMMENTARY, *supra* note 20, ¶¶ 217.8(a)-217.8(j).

37. 3 COMMENTARY, *supra* note 33, ¶¶ 91.9(f), 94.8(l).

38. *Id.* ¶ 91.9(b).

39. Churchill, *supra* note 33, § 3.2, at 11, § 4.2, at 42 (confessing lack of ability in other official Convention languages).

ever.⁴⁰ The 1958 U.N. Conference on the Law of the Sea added the “particularly . . .” language, but there was disagreement on whether the requirement of effective exercise of jurisdiction and control was “an indispensable, if not necessarily the only, element of the genuine link (the traditional maritime States’ view), or whether the requirement was independent of the genuine link (flag of convenience States’ view).⁴¹ Preparatory work leading to the 1982 Convention does not explain why the High Seas Convention Article 5(1) “particularly” language was dropped, to be reinserted in similar language in UNCLOS, Article 94(1). There is no explanation of how this shift affects the meaning of “genuine link.”⁴²

Nevertheless, one observation may be made and a possible conclusion drawn. It would not seem permissible to deduce from the difference between Article 5 . . . and Article 91 . . . that the effective exercise of flag State jurisdiction is no longer an element in the genuine link. It does not seem that the drafters of the 1982 Convention had any intention, when deleting the effective exercise of jurisdiction phrase, of affecting the meaning of . . . “genuine link.”⁴³

The negotiating history confirms this view. The transfer appears to have been a drafting decision, so that the same language would not appear in Article 91 and in Article 94(1).⁴⁴ The Ship Registration Convention would give substance to a definition genuine link, but its low ratification rate suggests that it would not be appropriate to copy that Convention’s terms into a definition now.⁴⁵

Most but not all international court decisions considering the High Seas Convention, Article 5(1) appear to support a view that mere registry is not enough for a genuine link.⁴⁶ Commentators divide on the issue, but the more recent analyses say that more than just registry is necessary to establish a genuine link.⁴⁷

Whether more than pro forma registry is necessary to establish a genuine link under the 1982 Convention is not free of doubt. However, because of transfer of High Seas Convention, Article 5(1)’s “particularly” language from UNCLOS, Article 91 to Article 94, and elaboration of requirements in

40. *Id.* § 3.3.1, at 19; 3 COMMENTARY, *supra* note 33, ¶¶ 91.9(b)-91.9(c).

41. Churchill, *supra* note 33, § 3.3.2, at 20-21.

42. *Id.* § 4.3, at 45-46.

43. *Id.* § 4.3, at 46-47.

44. 3 COMMENTARY, *supra* note 33, ¶¶ 91.9(c), 94.8(b).

45. Churchill, *supra* note 33, § 5.1.1; 3 COMMENTARY, *supra* note 33, ¶ 91.9(e); 4 COMMENTARY, *supra* note 20, ¶ 217.8(j) (citing and discussing Ship Registration Convention, *supra* note 27).

46. National court decisions were not considered in the analysis. Churchill, *supra* note 33, §§ 3.4-3.4.2, 4.4-4.4.2. *See also* WALKER, *supra* note 1, at 293.

47. Churchill, *supra* note 33, §§ 3.5, 3.6, 4.5, 4.6, Pt. 6 (genuine link requirement has same meaning as in High Seas Convention, *supra* note 6). *See also* WALKER, *supra* note 1, at 293-95 (supporting the view that satisfying genuine link requirement imposes more obligations on States than mere registry).

Articles 94(2)-94(7), some of which were derived from the High Seas Convention, Article 10, and what seems the weight of recent decisional and commentator authority, it would appear that a “genuine link” requires more than nominal registry. What is enough for satisfying the genuine link must be considered on a case-by-case basis.

2. Comments

A Committee member submitted this phrase for definition; the Chair researched this proposed definition for “genuine link.”

3. Conclusions

This definition of “genuine link” is proposed:

“Genuine link” in the LOS Convention, Article 91, means that a flag State under whose laws a ship is registered must effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.

This recombines standards in the High Seas Convention, Article 5(1), as restated in UNCLOS, Articles 91 and 94(1). It leaves to practice pursuant to the Convention, Article 94, to decide what is effective exercise and control of a ship’s administrative, technical, and social matters. What is appropriate exercise and control is a matter of national laws, but in any case it must be effective exercise and control. In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.⁴⁸

E. “Mile”

1. Discussion and Analysis

UNCLOS does not define “mile.” According to one commentary, the Convention negotiators understood that a nautical mile of 1852 meters or 6080 feet was meant, i.e., 60 nautical miles per degree of latitude.⁴⁹ (O’Connell notes, however, that although the U.S. figure was 6080.2 feet, this equals 1853.248 meters.⁵⁰) Although “absence of a formal definition may be more in accord with modern marine cartography,”⁵¹ lack of any definition may sow seeds of claims well beyond the contemplation of UNCLOS

48. See *infra* notes 59-73 and accompanying text.

49. 2 COMMENTARY, *supra* note 9, ¶ 1.27.

50. 2 DANIEL P. O’CONNELL, THE INTERNATIONAL LAW OF THE SEA 644 (Ivan A. Shearer ed., 1984).

51. 2 COMMENTARY, *supra* note 9, ¶ 1.27.

because of different definitions of “mile”⁵² and resulting protests,⁵³ even though differences can be relatively minute.⁵⁴ Since 1959 the current international nautical mile has been 6076.115 feet or 1852 meters.⁵⁵ On balance, absent a more precise definition than the developing international rule, a re-statement of the current international rule is recommended.

2. Comments

The Chair researched this proposed definition.

3. Conclusions

This definition of “mile” is proposed:

“Mile,” wherever appearing in the 1982 LOS Convention, means the international nautical mile, i.e., 1852 meters or 6076.115 feet, corresponding to 60 nautical miles per degree of latitude.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, a different definition may apply. The same may be the situation if the Charter supersedes the Convention, or if *ius cogens* norms apply.⁵⁶

F. “Ocean Space” and “Sea”

1. Discussion and Analysis

UNCLOS does not define “sea” or “ocean space.”⁵⁷ Because UNCLOS includes sea areas ranging from the high seas to internal waters, UNCLOS measures “ocean space” or the “sea” from given distances from land, regard-

52. 2 O’CONNELL, *supra* note 50, at 643-45 (listing six different possibilities for the definition of “mile”).

53. Protests have been numerous before and after ratification of UNCLOS. *See generally* J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996).

54. *E.g.*, 0.237 kilometers over 200 miles is the difference between the U.K. Admiralty measurement and the measurement using 1852 meters to the nautical mile. 2 O’CONNELL, *supra* note 50, at 644. Nevertheless, Murphy’s Law of Measurements suggests that if there will be a dispute, it will be within those 237 meters. *Id.*

55. Spain uses 1850 meters, and the United Kingdom would seem to use 1855 meters, based on a marine Admiralty league of 20 leagues to a degree of latitude, or 5565 meters and 3.4517 English statute miles per league. The Scandinavian league of 7420 meters is based on 15 leagues per degree of latitude, the French metric equivalent, 1852 meters to the mile, is gaining currency in legislation and in international organizations. *Id.* at 644-45. Any measurement is inexact for all of the Earth; it is an oblate spheroid and not a perfect sphere. *See generally id.* at 639-43.

56. *See infra* notes 59-73 and accompanying text.

57. 2 COMMENTARY, *supra* note 9, ¶ 1.26.

less of the technical legal or physical classification of those ocean spaces. A “saltiness” or salinity definition is not useful; some “ocean space” or “sea” areas, e.g., some internal waters covered by UNCLOS may be brackish or largely freshwater in nature. Under the circumstances, the best definition is:

“Ocean space” or “sea” in the 1982 LOS Convention means those areas, including the water surface and water column as those water areas are regulated by Convention provisions. Depending on a particular ocean space or sea area, “ocean space” or “sea” may also include the seabed. “Ocean space” or “sea” may include the air column and outer space superjacent to a given water surface of an ocean space or sea area governed by the Convention; the law of the air column and outer space over these ocean spaces or sea areas is governed in part by the Convention (e.g., high seas overflight as a freedom of the seas) and in part by other law, e.g., the law of outer space or air law.

The second sentence covers situations of a seabed outside the Area, *see* UNCLOS, Article 1(1), where, e.g., a coastal State has not claimed to the limit for a continental shelf UNCLOS, Article 76 permits, and the seabed off a coastal State between the edge of Article 76’s limit and the seabed within the Area. The third sentence declares applicability of air and space law where UNCLOS does not apply.

2. Comments

The Chair researched these proposed definitions.

3. Conclusions

“Ocean space” or “sea” where found in UNCLOS should be defined:

“Ocean space” or “sea” in the 1982 LOS Convention means those areas, including the water surface and water column as those water areas are regulated by Convention provisions. Depending on a particular ocean space or sea area, “ocean space” or “sea” may also include the seabed. “Ocean space” or “sea” may include the air column and outer space superjacent to a given water surface of an ocean space or sea area governed by the Convention; the law of the air column and outer space over these ocean spaces or sea areas is governed in part by the Convention (e.g., high seas overflight as a freedom of the seas) and in part by other law, e.g., the law of outer space or air law.

In LOAC-governed situations under the “other rules of international law” clauses in the Convention, different definitions may apply. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.⁵⁸

58. *See infra* notes 59-73 and accompanying text.

G. "Other Rules of International Law"

1. Discussion and Analysis

This phrase, sometimes stated slightly differently, appears throughout UNCLOS, i.e., in the Preamble and in Articles 2(3) (territorial sea); 19, 21, 31 (territorial sea innocent passage); 34(2) (straits transit passage); 52(1) (archipelagic sea lanes passage; incorporation by reference of Articles 19, 21, 31); 58(1), 58(3) (exclusive economic zone); 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"); 87(1) (high seas); 138 (the Area); 293 (court or tribunal having jurisdiction for settling disputes must apply UNCLOS and "other rules of international law" not incompatible with the Convention); 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"); Annex III, Article 21(1).

The phrase is also in the High Seas Convention, Article 2, and the Territorial Sea Convention, Article 1. Although it does not appear in other 1958 LOS Conventions, the Continental Shelf Convention, Articles 1, 3 say the Convention does not affect status of waters above as high seas, and the Fishery Convention, Articles 1-8, declares it does not affect other high seas rights. The implication from these two treaties is that except as the Shelf or Fishery Conventions derogate from High Seas or Territorial Sea Convention rules, those treaties' terms must be read into the Shelf and Fishery Conventions.

The High Seas Convention⁵⁹ and UNCLOS' navigational articles,⁶⁰ i.e., those dealing with navigation through the territorial sea, high seas, etc., restate customary law. The increasing number of UNCLOS ratifications strengthens a view that its navigational articles restate custom.⁶¹ The result is

59. See, e.g., High Seas Convention, *supra* note 6, pmbl. (declaring it restates custom); ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 9 (Rev. A)/FMFM 1-10) ¶ 1.1 at 1-2 n.4 (1989); cf. 1 DANIEL P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 385, 474-76 (Ivan A. Shearer ed., 1982).

60. RESTATEMENT (THIRD), *supra* note 1, Part V, *Introductory Note*, at 3-5 (1987); Naval War College Oceans Law and Policy Department, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M/MCWP 5-2.1/COMDT PUB P5800.1) ¶ 1.1 (1997) [hereinafter NWP 1-14M ANNOTATED]; cf. John Norton Moore, *Introduction to 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY* at xxviii (Myron H. Nordquist ed.-in-chief, 1985); Bernard H. Oxman, *International Law and Naval and Air Operations at Sea*, in THE LAW OF NAVAL OPERATIONS, 64 NAV. WAR C. INT'L L. STUD. 19, 29 (Horace B. Robertson ed., 1991) [hereinafter Robertson].

61. Multilateral Treaties, *supra* note 27, at 206-09 (listing 135 States as parties to UNCLOS); 100 States have ratified the 1994 Agreement, *supra* note 5; 120 States have declared it provisionally applicable. *Id.* at 240-42.

that these provisions bind States as custom, even if they are not parties to the 1958 LOS Conventions or UNCLOS. For those countries that are parties to either,⁶² they are bound by treaty and customary norms.⁶³

Most authorities agree that the phrase, "other rules of international law," refers to the LOAC.⁶⁴ This being the case, the phrase means that the LOS is subject to the LOAC in situations where the latter applies. At the same time, as between, e.g., neutrals engaged in merchant ship navigation far from an area of armed conflict on, over or under the sea, the LOS continues in effect. UNCLOS, Article 88, declaring that the high seas are reserved for peaceful purposes, is not to the contrary. Like the 1958 LOS Conventions,

That provision does not preclude . . . use of the high seas by naval forces. Their use for aggressive purposes, which would . . . violat[e] . . . Article

62. See UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2000, at 383-84, 414-15 (2000) [hereinafter TIF] (58 States party to Continental Shelf Convention, 36 parties to Fishery Convention, 63 parties to High Seas Convention, 51 parties to Territorial Sea Convention, *supra* note 6); Multilateral Treaties, *supra* note 27 (135 States party to UNCLOS).

63. Statute of the International Court of Justice, June 26, 1945 (entered into force Oct. 24, 1945), 59 Stat. 1031, U.S.T.S. No. 993, art. 38(1) (1945), available at <http://www.un.org/Overview/Statute/contents.html>. [hereinafter I.C.J. Statute]; RESTATEMENT (THIRD), *supra* note 1, §§ 102-103.

64. *Report of the International Law Commission on the Work of Its Eighteenth Session*, [1966] 2 Y.B. Int'l L. Comm'n 169, 267-68, U.N. Doc. A/6309/Rev. 1; 2 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 376-77 (5th ed. 1967); WALKER, *supra* note 1, at 191-92; Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea*, 20 OCEAN DEV. & INT'L L. 359 (1989); Carl Q. Christol & Cdr. Charles R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962*, 57 AM. J. INT'L L. 525, 539-40 (1963); Scott Davidson, *United States Protection of Reflagged Kuwaiti Vessels in the Gulf War: The Legal Implications*, 4 INT'L J. ESTUARINE & COASTAL L. 173, 178 (1989); William J. Fenrick, *Legal Aspects of Targeting in the Law of Naval Warfare*, 1991 CAN. Y.B. INT'L L. 238, 245; Alan V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in Robertson, *supra* note 60, at 109, 132; 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, 811 (1984); Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 15 (Natalino Ronzitti ed., 1988); Francis V. Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 OCEAN DEV. & INT'L L. 381, 384 (1988); A.G.Y. Thorpe, *Mine Warfare at Sea—Some Legal Aspects of the Future*, 18 OCEAN DEV. & INT'L L. 255, 257 (1987). Cf. Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51 (1974); Rudiger Wolfrum, *Reflagging and Escort Operations in the Persian Gulf: An International Law Perspective*, 29 VA. J. INT'L L. 387, 388-98 (1989). *Contra* 2 O'CONNELL, *supra* note 50, at 1112-13; Luan Low & David Hodgkinson, *Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War*, 35 VA. J. INT'L L. 405, 421 (1995) (discussing environmental protections in the LOS context but saying nothing about the clauses, although they elliptically seem to recognize the principle); Margaret T. Okorodudu-Fubara, *Oil in the Persian Gulf War: Legal Appraisal of an Environmental Disaster*, 23 ST. MARY'S L.J. 123, 195-97 (1991).

2(4) of the [U.N.] Charter . . . is forbidden as well by Article 88. See also [UNCLOS] Article 301, requiring parties, in exercising their rights and p[er]forming their duties under the Convention, to refrain from any threat or use of force in violation of the Charter.⁶⁵

(U.N. Charter Article 103 applies to UNCLOS, like any treaty; U.N. Security Council decisions⁶⁶ or States' individual or collective self-defense responses⁶⁷ can supersede inconsistent LOS treaty provisions. The same analysis applies to *jus cogens* norms, although there is a recurring debate on what principles, if any, have ascended to *jus cogens* status.⁶⁸)

It might be argued that UNCLOS, Article 293(1) and Annex III, Article 21(1) subordinate other rules of international law to UNCLOS. Those provisions read:

Article 293
Applicable Law

1. A court or tribunal having jurisdiction under this section [UNCLOS, Articles 286-96] shall apply this Convention and other rules of international law not incompatible with this Convention.

Article 21
Applicable Law

1. The contract shall be governed by the terms of the contract, the rules, regulations and procedures of the Authority, Part XI [UNCLOS, Articles

65. RESTATEMENT (THIRD), *supra* note 1, § 521, cmt. b (citing U.N. CHARTER art. 2(4); UNCLOS arts. 88, 301 and referring to RESTATEMENT (THIRD) § 905, cmt. g); *accord* Legality of Threat of Nuclear Weapons, 1996 I.C.J. 226, 244 (advisory opinion); 3 COMMENTARY, *supra* note 33, ¶¶ 87.9(i), 88.1-88.7(d); Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAV. L. REV. 1, 8 (1992); *see also* *Helsinki Principles*, *supra* note 7, princ. 1.2, at 499; Boczek, *supra* note 64; Oxman, *supra* note 64, at 814; John E. Parkerson, Jr., *International Legal Implications of the Strategic Defense Initiative*, 116 MIL. L. REV. 67, 79-85 (1987). UNCLOS arts. 19(2)(a), 39(1)(b) forbid activity during a foreign ship's innocent passage or straits transit passage that is a threat or use of force against coastal state sovereignty, territorial integrity, or political independence.

66. U.N. CHARTER arts. 25, 48, 103. *See also* LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 614-17 (3d ed. 1969); BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS 1116-25 (1994); George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1128-29 (2000).

67. U.N. CHARTER arts. 51, 103. *See also* sources cited in George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321 (1998).

68. *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, pmbl., arts. 53, 64, 1155 U.N.T.S. 331, 332, 344, 347 [hereinafter Vienna Convention]; IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4, 19, 514-17 (5th ed. 1998) (*jus cogens*' content uncertain); TASLIM O. ELIAS, THE MODERN LAW OF TREATIES 177-87 (1974); RESTATEMENT (THIRD), *supra* note 1, §§ 102-103, 331, 338(2); 1 OPPENHEIM'S INTERNATIONAL LAW § 2 (Robert Jennings & Arthur Watts eds., 1992); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 17-18, 218-26 (2d ed. 1984) (Convention principles progressive development); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 64-67 (1978); 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).

191-233] and other rules of international law not incompatible with this Convention.

The negotiating history is sparse on the point.⁶⁹ However, part of the Convention to which these provisions refer are the other rules clauses. It seems, therefore, that the ultimate result is that a court, tribunal or other decision maker must apply the LOAC as part of the law of the Convention incorporated by reference in appropriate situations through the other rules clauses.

An illustration of the difference between LOAC and LOS standards is the LOAC rule that the flag flown determines whether a merchant ship operates as a neutral or enemy vessel.⁷⁰ UNCLOS, Articles 91, 94 follow genuine link principles for determining a merchantman's nationality, following the High Seas Convention, Article 5(1), today a customary⁷¹ LOS rule.⁷²

2. Comments

The Chair submitted the "other rules of international law" phrase for Committee consideration, based on prior research.⁷³

3. Conclusions

The Committee should adopt the prevailing view that the phrase, "other rules of international law," means the law of armed conflict:

"Other rules of international law" and similar phrases in the 1982 LOS Convention restate a customary rule that the phrase means the law of armed conflict, including the law of naval warfare and the law of maritime neutrality as components of the law of armed conflict.

Although the law of naval warfare and the law of neutrality are usually the only branches of the LOAC considered applicable to war at sea, other LOAC components may apply in some situations, e.g., land-based aircraft engaged in combat or attacks over the sea, after which the aircraft return to bases on land.

69. 5 COMMENTARY, *supra* note 14, ¶¶ 293.1-293.5.

70. SAN REMO MANUAL, *supra* note 8, ¶¶ 112-113; NWP 1-14M ANNOTATED, *supra* note 60, ¶ 7.5.

71. *See supra* note 59 and accompanying text.

72. *See supra* notes 59-60 and accompanying text.

73. *E.g.*, WALKER, *supra* note 1, at 191-92.

H. "Seaworthiness"

1. Discussion and Analysis

"Seaworthiness" appears in UNCLOS, Articles 94(3)(a), 219, 226(1)(c). It is also a term with different meanings in countries' admiralty and maritime law jurisprudence. Even within a particular State's admiralty and maritime law, seaworthiness may be defined differently, depending on the admiralty claim at issue, e.g., in U.S. practice, there are different seaworthiness standards for mariner tort claims and cargo damage claims.⁷⁴ It is therefore risky to try to provide an elaborate definition.⁷⁵

2. Comments

The Chair proposed this term for definition.

3. Conclusions

This definition for "seaworthy" is proposed:

"Seaworthy" refers to a ship in fit condition to undertake voyages, including perils of the sea that it might reasonably encounter on those voyages.

LOAC definitions would apply through the "other rules of law" provisions for armed conflict situations. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.⁷⁶ For example, seaworthiness is a concept in the law of maritime neutrality; a ship considered seaworthy under the LOS might or might not be considered seaworthy in LOAC situations. A ship considered seaworthy under the LOS or the LOAC might or might not be considered seaworthy with respect to a particular situation also governed by a State's admiralty and maritime law jurisprudence.

74. See generally 1 & 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 6-25 to 6-27, 10-24 (3d ed. 2000).

75. See 2 COMMENTARY, *supra* note 9, ¶ 1.31.

76. See *supra* notes 59-73 and accompanying text.

I. "Ship" or "Vessel"

1. Discussion and Analysis

The UNCLOS English text uses "ship" or "vessel" interchangeably throughout the text; the French, Russian, and Spanish language versions use one word.⁷⁷ "[A]s far as concerns [UNCLOS], there is no difference between the two English words."⁷⁸ There is no consensus on the definition of "ship";⁷⁹ three treaties, one of them not in force, offer similar definitions. The 1962 amendments to the 1954 Oil Pollution Convention say a ship is "any sea-going vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage."⁸⁰ The MARPOL 73/78 definition is similar: "a vessel of any type whatsoever operating in the marine environment . . . includ[ing] hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms."⁸¹ The Ship Registration Convention, not in force, defines a ship as "any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both . . ." ⁸² National legislation occasionally supplies varying definitions, most of which are in accordance with the Registration Convention statement.⁸³ General as they are, the 1962 and MARPOL definitions are more inclusive; most seafaring States have accepted them, although MARPOL's reference to platforms seems inappropri-

77. See 2 COMMENTARY, *supra* note 9, ¶ 1.28.

78. *Id.*

79. 2 O'CONNELL, *supra* note 50, at 747-50.

80. 1962 Amendments to the 1954 Convention for Prevention of Pollution of the Sea by Oil, Apr. 11, 1962, Annex, art. 1(1), 17 U.S.T. 1523, 1524, 600 U.N.T.S. 332, 334. International Regulations for Preventing Collisions at Sea, June 17, 1960, Rule 1(c)(1), 16 U.S.T. 794, 796 (not yet in force for a few States, but similarly defines "ship"); TIF, *supra* note 62, at 418.

81. Protocol of 1978 Relating to International Convention for Prevention of Pollution from Ships, 1973, Feb. 17, 1978, art. 1 & Annex: Modifications & Additions to the International Convention for the Prevention of Pollution from Ships, 1973, Annex I, 1340 U.N.T.S. 61, 63, 66 (incorporating by reference International Convention for Prevention of Pollution from Ships, Nov. 2, 1973, art. 2(4), 1340 U.N.T.S. 184, 185). By 1995 MARPOL 73/78 had been accepted by countries, including the United States, representing 92 percent of world merchant fleets, measured in gross registered tons (GRT). M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 292-93 (11th Cum. Supp. 1995); TIF, *supra* note 62, at 411-12.

82. Ship Registration Convention, *supra* note 27, art. 2(4), (excluding vessels under 500 GRT). See also RESTATEMENT (THIRD), *supra* note 1, § 501 reporters' note 1; *supra* note 27 and accompanying text.

83. See, e.g., 16 U.S.C. § 916(e) (1994); 33 U.S.C. §§ 1471(5), 1502(19) (1994); 46 U.S.C. § 23 (1994) (includes seaplanes on the water); 2 O'CONNELL, *supra* note 50, at 747-50.

ate to include in an UNCLOS definition,⁸⁴ given UNCLOS' separate treatment of them.⁸⁵

2. Comments

The Chair proposed this definition.

3. Conclusions

This definition of "ship" and "vessel" is proposed:

"Ship" or "vessel" have the same, interchangeable meaning in the English language version of the 1982 LOS Convention. "Ship" is defined as a vessel of any type whatsoever operating in the marine environment, including hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms. Where, e.g., "ship" or "vessel" is modified by other words, or prefixes or suffixes, as in the Article 29 definition of a warship, those particular definitions apply.

LOAC definitions would apply through the "other rules of law" provisions for armed conflict situations. The same may be the situation if the Charter supersedes the Convention, or if *jus cogens* norms apply.⁸⁶

III. CONCLUSIONS

These proposed definitions may only scratch the surface of UNCLOS terms that should be considered. Many may be terms readily easily susceptible of acceptance without great difference of opinion. The 2001 LOS Committee meeting should provide an opportunity to formulate a standard procedure for the future as well as discussing and perhaps accepting these terms, or some of them, for Final Draft status.

84. See also WALKER, *supra* note 1, at 285-86.

85. See generally UNCLOS arts. 1(1)(5)(a), 1(1)(5)(b)(i), 11, 56(1)(b)(i), 60, 79(4), 80, 87(1)(d), 208(1), 214, 246(5)(c).

86. See *supra* notes 59-73 and accompanying text.

**TREATY INTERPRETATION AND DEFINITIONS IN THE LAW
OF THE SEA CONVENTION: COMMENTS ON *DEFINING
TERMS IN THE 1982 LAW OF THE SEA CONVENTION*⁺**

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Professor George Walker deserves many thanks for tackling the important and difficult project of defining terms in the 1982 United Nations Convention on the Law of the Sea.⁸⁷ He has produced a well-researched Initial Draft⁸⁸ to which members of the Law of the Sea Committee of the American Branch of the International Law Association, and others, can react. My initial comments are general ones about the enterprise of interpreting treaties and defining treaty terms. Specific comments about some of the Initial Draft's proposed definitions follow, in Part II.

I. TREATY INTERPRETATION AND DEFINITIONS OF TREATY TERMS

Why define terms in the Law of the Sea Convention? The goal of the Initial Draft is not to propose amendments to the Law of the Sea Convention,⁸⁹ or even formal modifications to the Convention among some of its parties.⁹⁰ The proposed definitions are not put forward in connection with an effort to negotiate a new law of the sea treaty. Any effort to reopen issues in the Convention could not realistically be limited to "definitions" or "clarifications," and there appears to be no enthusiasm for a Fourth U.N. Conference on the Law of the Sea. This project most profitably can *interpret* some of the undefined terms in the Law of the Sea Convention, seek to ascertain commonly held understandings concerning those terms, and then propose definitions that reflect those shared understandings. The definitions and their accompanying commentary may well be useful to decision makers or scholars who use the Convention. At the core of the endeavor is the question of how to interpret (or read) treaty texts.⁹¹

⁺ Previously published, with variations in footnote form, in 2000-2001 PROC. AM. BRANCH INT'L L. ASS'N 175.

87. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994).

88. George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention (Sept. 4, 2001 INITIAL DRAFT) (REV. 1, Jan. 22, 2002)*, 2001-2002 PROC. AM. BRANCH INT'L L. ASS'N 154, reprinted *supra* notes 5-86 and accompanying text.

89. See UNCLOS arts. 312-314.

90. See *id.* art. 311(3).

91. The literature about interpretation is vast. For discussion of interpretation in general, see, e.g., GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000). For

It is appropriate to consider what a text “means,” or what underlying reality words describe, from the perspectives of both a present-day interpreter and the drafter of the text. The meaning of a text cannot be determined exclusively by appeal to the intended meaning of its author. Any interpreter of a treaty (or any other text) brings his or her own world view—his or her own sense of the relative importance of competing values, his or her own sense of the background framework of law and legal process—to the task of interpretation. Any treaty interpreter will also usually have in mind concrete current problems, because he or she must either argue or decide that certain behavior is or is not legal. These problems are not always within the purview of the author, and they therefore “color” what the text means beyond what the author intended. Even when, as in the Initial Draft, definitions are discussed in the abstract, today’s readers inevitably have in mind certain current or potential applications and disputes. The definitions are significant because of the situations in which they may be applied.

Saying that someone who is interpreting a treaty today necessarily brings his or her own understandings and views to the task of interpretation does not mean, however, that the views of the drafters of a treaty are entitled to no weight. Indeed, a reader/interpreter of a treaty typically finds it desirable to try to determine the understandings of the drafters *as expressed in the treaty text*. Many treaty interpreters find this rather conservative interpretive focus to be valuable. Someone interpreting a treaty today usually values respecting a past political bargain that can provide a relatively stable framework for the future. The reader therefore chooses to give considerable weight to the drafters’ carefully negotiated compromises as expressed in the treaty text. These compromises were designed to resolve—or at least frame—certain controversies and to provide guidance for the future. In general, the act of treaty interpretation is a search for a common understanding between the treaty interpreter and the treaty drafters. If the treaty text is being applied to some unanticipated problem or to some problem about which the drafters had no precise intention, attention to the text may at least help to insure a reading that is not inconsistent with the drafters’ general goals. The focal point of this search for a common understanding is therefore the treaty text. “Fidelity to the text” is a way to signal that the compromises and views of the authors not be disregarded.

But the words in a treaty text alone can never solve all interpretive disputes. The “ordinary meaning” of words is at some level inevitably (if not usefully) vague. There will be disputes about “what words mean” in concrete situations—disputes about whether the words refer to one thing or conception, or to another. The disputes may be particularly sharp when words or phrases are not defined—the category of issues in the Initial Draft. It is important to emphasize the “may” in the preceding sentence, for definitions

discussion of standard approaches to treaty interpretation, see, e.g., SINCLAIR, *supra* note 68, at 114-59.

cannot completely cure indeterminacy. Furthermore, the meaning of some undefined terms may be relatively more determinate than some defined terms. Concerns about the indeterminacy of words may also be particularly prominent when the treaty negotiators, because of their inability to agree on more determinate formulations, purposefully chose ambiguous phrases.

Treaty interpreters, faced with words whose meanings are in dispute, typically seek other evidence of what the words mean. They may seek direct evidence of drafters' intent. For four reasons, however, it is particularly difficult to determine drafters' intent in the case of the Law of the Sea Convention, which was negotiated at the Third U.N. Conference on the Law of the Sea (UNCLOS III).⁹² First, we have the familiar difficulty—some would say impossibility—of trying to determine the “intent” of a collegium.⁹³

Second, particular words or phrases in the Convention had different origins. The same word or phrase may have emerged from more than one of the three main Committees at UNCLOS III, or may have emerged from the Drafting Committee as a result of its efforts to reconcile slightly different verbal formulations.⁹⁴ It is not always clear that each Committee had in mind the same meaning of a term or phrase. Furthermore, some phrases, such as “genuine link,” had their origins in the work of the International Law Commission leading up to the 1958 conventions.⁹⁵ In short, more than one collective entity may have contributed words or phrases to the 1982 Convention.

Third, some of the sources we traditionally use to try to determine the intent of treaty drafters are lacking. There are no detailed written records of the proceedings or collective views of the three main Committees at UNCLOS III. UNCLOS III relied heavily on informal negotiations, not preserved in written form. The occasional statements of delegates from many different countries often reflected general political stances and did not purport to relate an understanding of a particular word or phrase.

Fourth, some of the words and phrases in the Law of the Sea Convention were in fact intentionally left ambiguous.⁹⁶ They were formulated to paper over slight (or sometimes significant) differences in views, in order not to have the whole complex negotiating process founder. UNCLOS III dele-

92. For discussion of the negotiating process at UNCLOS III, see EDWARD L. MILES, *GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 1973-1982* (1986).

93. See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930).

94. For example, the phrase “other rules of international law,” which is discussed *infra* notes 112-131 and accompanying text, is used in articles that emerged from different Committees at UNCLOS III.

95. See, e.g., *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/3159, in [1956] 2 Y.B. Int'l L. Comm'n 253, 278-79, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

96. See, e.g., Erik Franckx, *Coastal State Jurisdiction with Respect to Marine Pollution—Some Recent Developments and Future Challenges*, 10 INT'L J. MARINE & COASTAL L. 253, 254 (1995) (discussing the requirement in UNCLOS Articles 74(1) and 83(1) that maritime boundaries be delimited “to achieve an equitable solution”).

gates doubtless thought that some of the papered-over differences would be resolved later, through subsequent international agreements, state practice, or judicial decisions. With respect to these purposefully vague phrases, it would be particularly hard to find the drafters' intended substantive meaning. In sum, although some valuable resources provide insights into the drafters' intent at UNCLOS III,⁹⁷ there are problems in pinning down this intent. These problems include the difficulty in ascertaining the intent of a collective, the origins of words or phrases with different Committees or groups, the lack of a detailed written negotiating record, and the fact that some formulations in the Convention were purposefully left ambiguous.

What should we do, then, in our search for some common understanding among authors and readers, among treaty drafters and treaty interpreters? When the text is ambiguous, the recourse is to "context." Article 31 of the Vienna Convention on the Law of Treaties,⁹⁸ which contains the most commonly invoked approach to treaty interpretation, says that treaties should be construed "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The reference to "object and purpose" here is linked to the treaty text and preamble,⁹⁹ and does not invite the sort of teleological interpretation, the resort to "fundamental" values, that could lead an interpreter to disregard altogether the terms of a treaty.¹⁰⁰ Overall, the context includes: the text of the treaty; the treaty preamble and annexes; any agreement relating to the treaty "made between all the parties in connexion with the conclusion of the treaty;"¹⁰¹ and any instrument made by parties "in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."¹⁰²

The Vienna Convention also authorizes recourse to other sources that we might colloquially label "context," although the Vienna Convention confines its definition of "context" to the sources just noted. In particular, the Vienna Convention provides in article 31(3):

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

97. See, e.g., 1-5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Myron H. Nordquist ed.-in-chief, 1985-1995).

98. Vienna Convention, *supra* note 68, art. 31.

99. See SINCLAIR, *supra* note 68, at 118, 130-38.

100. See MYRES S. MCDUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE 42 (1967); Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?*, 65 AM. J. INT'L L. 358 (1971).

101. Vienna Convention, *supra* note 68, art. 31(2)(a).

102. *Id.* art. 31(2)(b).

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

We thus have, in our search for common understanding, a list of materials to consult: treaty text; treaty preamble; treaty annexes; agreements relating to the treaty that are made in connection with its conclusion; instruments accepted by other parties that are made in connection with the conclusion of a treaty and that are related to it; subsequent agreements regarding interpretation or application of the treaty; subsequent practice, at least if it “establishes the agreement of the parties regarding” interpretation of the treaty; and other relevant rules of international law. In addition, Article 32 authorizes recourse to “supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”¹⁰³

An interpreter, a decision maker faced with a particular dispute, must exercise judgment. Deciding what method of treaty interpretation to use is a threshold matter of discretion or judgment. If a treaty interpreter follows the approach of the Vienna Convention on the Law of Treaties, judgment is still needed, in order to apply the words of a treaty in their context (as defined in the Vienna Convention) and in light of the other items that the Vienna Convention suggests should be taken into account. Judgment is required to apply these materials in light of a current set of facts or a current dispute. Particularly when treaty terms are applied to novel historical circumstances, treaty interpretation necessarily becomes a somewhat fluid process. When the words of a legal text are brought to bear on some new problem, the scope of application of those words and thus their “meaning” expand in compass. Meaning is historically contextual, influenced not just by the past, but by the present as well.

These reflections on treaty interpretation suggest four points about the project of defining treaty terms. First, to define, by definition, means to limit or set boundaries.¹⁰⁴ A definition of a word limits its possible meanings. The core issue is whether and when it is appropriate to try to narrow the range of possible meanings.

Second, a definition should conform to the term being defined. A definition’s degree of conformity depends on how closely it reflects a generally shared interpretation of the defined term. If a definition does reflect a widely shared interpretation, it will gain wide acceptance. When various treaty interpreters follow the same interpretive methodology, they increase the chances that they will reach a common understanding of the “meaning” of

103. Recourse to the *travaux préparatoires* is limited, however, to confirming “the meaning resulting from the application of article 31,” or to “determining the meaning when interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.” *Id.* art. 32.

104. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 672 (1971).

terms and phrases in a text. A commonly used method of treaty interpretation, such as that in the Vienna Convention on the Law of Treaties, may reveal an understanding of a term common to drafters and present interpreters. And if the definition truly conforms to and reflects that shared understanding, it will be generally well-regarded and perhaps can help clarify and stabilize meaning for future interpreters. If, however, a definition of a treaty term does not reflect a shared, common understanding, then it may appear to be a highly politicized effort to confine, limit, or distort the treaty text.

Third, no definition can “pin down” meaning perfectly or exactly. As noted above, meaning is, inevitably, historically contextual. Our understanding of the meaning of words, defined or not, will continue to be shaped by new problems and new events. That fact suggests that we should have a healthy skepticism about the prospects for clarifying and stabilizing the meaning of treaty terms through definitions.

Fourth, a discussion about what particular words mean can lead to important knowledge about a situation to which the words apply and about our reactions to that situation. Considering the question, “What should we say here?” may tell us a lot about the complexities of a situation, revealing points of agreement and disagreement concerning the concept or thing to which the words refer. When we consider that question, we are not just, or perhaps not at all, concerned to know about words themselves. We are concerned about the phenomena at issue, about the broader political and legal realities and controversies to which the words relate. Disagreements about the “meaning of words” may in essence be disagreements over substance that will not disappear just by collecting data concerning drafters’ intent or the context of a treaty. The discussion about definitions may lead to valuable ideas about why various observers disagree and about what, if anything, should be done about the disagreements. Indeed, one significant value of the Initial Draft is that it can sharpen our perception of some fundamental controversies.

II. DEFINITIONS IN THE LAW OF THE SEA CONVENTION

Let me turn to some specific comments about three of the words and phrases defined in the Initial Draft. These words and phrases—“mile,” “other rules of international law,” and “genuine link”—deserve comment because they raise different conceptual problems, and because in my view the definitions of the last two of them should be modified.

A. “*Mile*”

The effort to define “mile” is an effort to define a term that refers to some physical reality, rather than to some purely juristic or political reality. The need for a precise definition is important, because so many of the Law

of the Sea Convention's rules relate to different zones, which are determined according to their distance in miles from the baseline. The Initial Draft does define "mile" precisely, as "the international nautical mile, *i.e.*, 1852 meters or 6076.115 feet, corresponding to 60 nautical miles per degree of latitude."¹⁰⁵

Is the Initial Draft's definition of "mile" appropriate? That a "mile" should be conceived of as a nautical mile rather than a geographic mile creates no controversy. The community of maritime and international lawyers, oceans policy makers, and users of the seas have long shared the view that a mile on the ocean is a nautical mile. The number of suggested possible meanings of "[nautical] mile" is relatively small, and it makes no political difference, *ex ante*, which definition is chosen. It is not important whether we agree on 1850 meters or 1852 meters or 1853.248 meters.¹⁰⁶ It is important, however, given what Professor Walker calls "Murphy's Law of Measurements,"¹⁰⁷ that we agree on one definition. It is also important that the definition be set in terms of a fixed distance, rather than in terms of an arc of one minute of latitude, a measurement that will vary depending on the particular latitude.¹⁰⁸

There is considerable support for the use of 1852 meters as the relevant distance. The negotiators at UNCLOS III apparently understood that 1852 meters was the length of the nautical mile,¹⁰⁹ and subsequent practice has reinforced the use of 1852 meters.¹¹⁰ The definition proposed in the Initial Draft is appropriate, although the last phrase ("corresponding to 60 nautical miles per degree of latitude") may be unnecessary. I note in passing that disputes may still arise in the application of the 1852-meter definition, because the Earth is an ellipsoid rather than a perfect sphere and because it is possible to use different coordinate systems in marking locations.¹¹¹

105. See *supra* text accompanying note 56.

106. See also Bruce E. Alexander, *The Territorial Sea of the United States: Is It Twelve Miles or Not?*, 20 J. MAR. L. & COM. 449, 450 n.10 (1989) (noting definitions of "nautical mile" in addition to those noted *supra* notes 54-55 and accompanying text).

107. See *supra* note 54.

108. See Comm'n on the Limits of the Continental Shelf, *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf*, CLCS/11, ¶ 3.2.2 and Fig. 3.1 (1999), available at http://www.un.org/Depts/lostempclcs/docs/clcs/CLCS_11.htm [hereinafter *CLCS Guidelines*].

109. 2 COMMENTARY, *supra* note 9, ¶ 1.27.

110. *E.g.*, *CLCS Guidelines*, *supra* note 108, ¶ 3.2.1.

111. See *supra* note 55; Alan Dodson & Terry Moore, *Geodetic Techniques, in CONTINENTAL SHELF LIMITS: THE SCIENTIFIC AND LEGAL INTERFACE 87* (Peter J. Cook & Chris M. Carleton eds., 2000).

B. "Other Rules of International Law"

The phrase "other rules of international law" poses a different type of interpretive problem. Here the reference is to a purely juridical, rather than a physical, concept. The Initial Draft defines the phrase in terms of the law of armed conflict (LOAC): "'Other rules of international law' . . . means the law of armed conflict, including the law of naval warfare and the law of maritime neutrality as components of the law of armed conflict."¹¹² Implicitly (and properly), the focus of the Initial Draft is on the word "other;" the meaning of "rules of international law" is the subject of much jurisprudential controversy.

Use of the phrase "other rules of international law" in the Convention raises several important questions, but it is doubtful whether a definition of that phrase can or should answer all of them. Some of the questions have to do with hierarchy of sources, should the Convention's articles conflict with other rules. When such other rules will have priority, and when the Convention's rules will have priority, must be ascertained in light of Articles 293 and 311, Annex III's Article 21, and international law concepts affecting hierarchy (e.g., *jus cogens*). The proposed definition does not itself answer those hierarchy questions.

The proposed definition of "other rules of international law" does, however, implicitly respond to other important questions, having to do with *which* "other rules" might apply and whether the "other rules" formulation provides a way to take into account new, post-Convention legal developments. In specifying that "other rules" means the LOAC, the Initial Draft's definition narrows the apparent ordinary meaning of "other." According to the ordinary meaning of "other," "other rules of international law" could simply mean "rules of international law not found in the Law of the Sea Convention."

It is important to inquire into the context of a treaty to confirm whether the apparent plain meaning of a term is in fact the appropriate meaning.¹¹³ Professor Walker, examining the history of the "other rules" clauses in several of the Law of the Sea Convention's articles, has marshaled evidence to support the argument that "the other rules clauses in the [1958 and 1982] LOS Conventions refer to the LOAC, which includes the law of naval war-

112. See *supra* text accompanying note 73.

113. SINCLAIR, *supra* note 68, at 116.

Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve. The *conclusion* which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation.

Id. (emphasis in original). Accord ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 188 (2001).

fare.”¹¹⁴ It seems clear that rules of the LOAC may sometimes apply. The critical question is whether “refer to the LOAC” should mean “refer *exclusively* to the LOAC.” If it should not, then defining “other rules of international law” solely in terms of the LOAC would exclude other appropriate rules of international law from consideration.

An examination of Article 293, which is found in the Convention’s Part XV concerning dispute settlement, supports the plain meaning of “other”—a meaning not confined to the LOAC. Article 293(1) provides: “A court or tribunal having jurisdiction under [Part XV, Section 2] shall apply this Convention and other rules of international law not incompatible with this Convention.”¹¹⁵ The Initial Draft’s restrictive definition of “other rules of international law” seems inappropriate when this Article is construed in the context of Part XV. First, an international court or tribunal will use rules of treaty interpretation in construing the Law of the Sea Convention, and rules of treaty interpretation—arguably one example of “other rules of international law”—are not themselves stated in the Convention.

Second, even if we restrict our inquiry to rules of decision (i.e., not rules of treaty interpretation), a nonrestrictive interpretation of the “other rules” clause in Article 293(1) appears appropriate. The issue could arise in a case in which the jurisdiction of a court or tribunal is not based directly on the Law of the Sea Convention, but on another international agreement. According to Article 288(2) of the Convention, a specified international court or tribunal shall “have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.”¹¹⁶ For example, the Straddling Stocks Agreement incorporates by reference the dispute settlement provisions of the Law of the Sea Convention, thus authorizing the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS)—an institution created by the Law of the Sea Convention—or another court or tribunal in cases involving the interpretation or application of that Agreement.¹¹⁷ The Straddling Stocks Agreement contemplates recourse

114. WALKER, *supra* note 1, at 242. *See id.* at 191-92, 242-44.

115. *Accord* UNCLOS Annex VI, art. 23 (providing that the International Tribunal for the Law of the Sea (ITLOS) “shall decide all disputes and applications in accordance with article 293”). *See also* UNCLOS art. 293(2) (authorizing decisions *et aequo et bono*, “if the parties so agree”); *id.* Annex III, art. 21 (referring to “other rules of international law not incompatible with this Convention”).

116. UNCLOS art. 288(2). *See also id.* Annex VI, art. 21 (referring to “any other agreement which confers jurisdiction” on the ITLOS). Article 288(1) provides for jurisdiction with respect to disputes “concerning the interpretation or application” of the Law of the Sea Convention itself. The courts and tribunals referred to in Article 288 are those listed in Article 287, namely the ITLOS, the International Court of Justice, an arbitral tribunal established pursuant to Annex VII of the Convention, and a special arbitral tribunal established pursuant to Annex VIII of the Convention.

117. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec.

to a wide array of rules of international law that have no apparent relation to the LOAC. Article 30(5) of the Straddling Stocks Agreement provides:

Any court or tribunal to which a dispute has been submitted under [the Agreement] shall apply the relevant provisions of the [Law of the Sea] Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

Article 30(5) refers to the application of “other rules of international law not incompatible with the Convention,” and also to “provisions” of the Agreement and of other fisheries agreements, and to “generally accepted standards for the conservation and management of living marine resources”—the latter categories encompassing rules of international law.

In light of Article 30(5), how should we read Article 293(1), and Article 23 of Annex VI, of the Law of the Sea Convention? Those Convention articles specify the law that the ITLOS and other tribunals are to apply (i.e., the Law of the Sea Convention “and other rules of international law not incompatible with [the] Convention”). Consider three possibilities. First, Article 293(1) might refer solely to the Convention and, through the “other rules” clause, to the LOAC, with consideration of different rules of international law—such as those referred to in Article 30(5) of the Straddling Stocks Agreement—being precluded. Such a conclusion would undercut the purposes of that Agreement and of Article 288(2) of the Law of the Sea Convention. Second, Article 293(1) might refer solely to the Convention and to the LOAC, with the authority to refer to different rules of international law being somehow derived elsewhere. For example, one might, I suppose, argue that Article 293(1) applies literally only when the jurisdiction of a court or tribunal is based directly on the Convention itself. That is, a court or tribunal whose jurisdiction is based on another international agreement, pursuant to Article 288(2), could perhaps rely on that agreement as authority to use the sources of law specified in that agreement. If the ITLOS were to adopt this view in applying the sources of international law laid down in Article 30(5) of the Straddling Stocks Agreement, however, the Tribunal would appear to exceed its literal constitutional authority as provided in Annex VI, Article 23 of the Convention. Third, Article 293(1)’s reference to “other rules of international law not incompatible with this Convention” could encompass the sources set forth in Article 30(5) of the Straddling Stocks Agreement. This last, straightforward reading corresponds to the ordinary meaning of the phrase, and fully accords with the view that the Law of the Sea Convention is a framework agreement, looking to compatible sources of international

4, 1995, arts. 7(4)-(6), 27-32, U.N. Doc. A/CONF.167/37, 34 I.L.M. 1542, 1553, 1569-70 (1995) (entered into force Dec. 11, 2001).

law to help flesh out its content. Accounts of the negotiating history of Article 293(1) also do not indicate that its “other rules” clause is limited to the LOAC.¹¹⁸

Two more litigation examples also suggest concerns about defining Article 293(1)’s “other rules of international law” clause exclusively in terms of the LOAC. First, the ITLOS has been called on to determine what constitutes a “reasonable bond” in applications seeking the prompt release of a vessel or its crew.¹¹⁹ The Tribunal has invoked “other rules of international law” in determining what constitutes a reasonable bond.¹²⁰ In particular, the ITLOS has referred to measures taken under the Convention for the Conservation of Antarctic Marine Living Resources¹²¹ in evaluating the gravity of the alleged offense by a flag State vessel; gravity of the offense is a judicially developed factor relevant to determining the amount of a reasonable bond.¹²² The Law of the Sea Convention does not define “reasonable bond,” thus requiring judges to give specific content to the general concept of reasonableness in deciding on bonds.¹²³ Reference to non-LOAC “other rules of international law” is appropriate in that context.

Second, the ITLOS or another tribunal could hear cases involving one State’s unauthorized boarding of a flag State’s vessel that result in the serious mistreatment of crew members. In such a case, the court or tribunal

118. According to one reference, the phrase “other rules of international law not incompatible with this Convention” in Article 293(1) served several purposes. First, the phrase was chosen over “any other rule of law,” a formulation that might have led to controversies concerning the relevance of national legal instruments in law of the sea disputes. Second, the phrase “other rules of international law” was chosen for its conciseness, in order to avoid possible theoretical debates in spelling out the sources of public international law. Third, the “not incompatible with” portion of the “other rules” clause emphasized “[t]he primacy of the Law of the Sea Convention as the main rule of law applicable to disputes.” Raymond Ranjeva, *Settlement of Disputes*, in 2 A HANDBOOK ON THE NEW LAW OF THE SEA 1333, 1376 (René-Jean Dupuy & Daniel Vignes eds., 1991). See *id.* at 1377. Professor Ranjeva does not mention the LOAC as a consideration relevant in the development of Article 293(1). *Accord* 5 COMMENTARY, *supra* note 11, ¶¶ 293.1, 293.3.

119. See UNCLOS art. 292. For a discussion of the “reasonable bond” requirement, see Erik Franckx, “Reasonable Bond” in the Practice of the International Tribunal for the Law of the Sea, 32 CAL. W. INT’L L.J. 303 (2002).

120. “Monte Confurco” Case (Sey. v. Fr.), Prompt Release, 2000 ITLOS No. 6, ¶ 75 (Judgment, Dec. 18), available at http://www.itlos.org/start2_en.html.

121. Convention for the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, 19 I.L.M. 841 (1980), available at http://www.ccamlr.org/English/conv/e_conv_intro.htm#Top%20of%20Page.

122. “Monte Confurco” Case, at 2000 ITLOS at ¶ 79. See also “Camouco” Case (Pan. v. Fr.), 2000 ITLOS No. 5, ¶ 67, 39 I.L.M. 666, 679 (2000) (Judgment, Feb. 7).

123. Franckx, *supra* note 119, at 309.

[T]he founders of the 1982 Convention left it up to the competent courts and tribunals that would be faced in the future with prompt release cases to give concrete content to the reasonableness criterion. Furthermore, because the drafters bestowed the ITLOS with compulsory residual jurisdiction in this respect, it is to be expected that the relevant case law will mainly be found there.

Id. (footnotes omitted).

should be able, by virtue of the “other rules” clause in Article 293(1), to consider rules of international human rights law to supplement the human rights provisions in the Convention.¹²⁴ To prohibit such consideration would isolate the court or tribunal from current rules that are fully consistent with the Convention and would mean that the court or tribunal could not decide all the international law issues presented in the case that use the phrase.

Concerns about defining “other rules of international law” exclusively in terms of the LOAC are also apparent when one considers some other articles of the Law of the Sea Convention. For example, Article 303(4) provides that Article 303, on underwater cultural heritage, “is without prejudice to other . . . rules of international law.” One leading commentator, Professor Anastasia Strati, found that “Article 303(4) should be interpreted . . . to refer to *future international agreements and rules of international law regarding the protection of archaeological objects*.”¹²⁵ Another leading authority rather more obliquely concluded that “[p]resumably . . . this incipient new branch of law will be completed by the competent international organization, above all UNESCO, and by State practice.”¹²⁶ Article 303’s reference to “other rules” thus seems to encompass rules not related to the LOAC—in this case, rules concerning underwater cultural heritage. Furthermore, this reference to “other rules” contemplates use of rules of international law developed after UNCLOS III.¹²⁷

Finally, and more controversially, it is possible that the precautionary principle¹²⁸ may become accepted as a norm of international law applicable to shipments of radioactive materials. International actors could come to accept a rule requiring prior notification to a coastal State from a vessel carrying radioactive materials in coastal zones, and consultation with a coastal State with respect to the precise route to be followed and contingency plans for emergencies.¹²⁹ The references to “other rules of international law” in Article 19(1) (on innocent passage) and 58(2) (on rights and duties in the EEZ) should not preclude reference to such a new rule.

124. See generally Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT’L L. 399 (1997).

125. ANASTASIA STRATI, *THE PROTECTION OF UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA* 176 (1995) (emphasis added).

126. 5 COMMENTARY, *supra* note 11, ¶ 303.10, at 162. On Nov. 2, 2001, UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage, available at http://www.unesco.org/culture/laws/underwater/html_eng/convention.

127. Cf. SINCLAIR, *supra* note 68, at 140 (arguing that in construing Article 31(3) of the Vienna Convention on the Law of Treaties, “there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary approach”).

128. See generally THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION (David Freestone & Ellen Hey eds., 1996).

129. See Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT’L L. 379 (1996).

My fundamental concern is that the Law of the Sea Convention not be narrowly construed to preclude recourse to other Convention-consistent norms. The Convention serves, at least in part, as a constitution, establishing institutions and broad principles to stabilize and govern a wide range of oceans issues. The use of other rules of international law that are consistent with the Convention's principles may be necessary to flesh out those principles, and to allow them to be applied in conjunction with other bodies of international law.

Different routes certainly may be available towards this end. The conclusion that tribunals operating under the Convention may apply non-Convention rules is fortified by several considerations. The Convention itself explicitly refers to some non-Convention rules of international law. For example, UNCLOS Article 304 states: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law." Reference to principles of international law is found in Articles 295 (on exhaustion of local remedies) and 300 (on good faith and abuse of rights). Article 311 recognizes the applicability of certain other international agreements that are consistent with the Convention. The Convention also obliquely may bring into play the operation of non-Convention rules of international law through its "applicable" and "generally accepted" clauses.¹³⁰ The Preamble to the Law of the Sea Convention affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law." In addition, certain "trumping" rules not stated in the Law of the Sea Convention may apply. These include Article 103 of the U.N. Charter, decisions of the U.N. Security Council, and *jus cogens*.¹³¹

The "other rules of international law" clauses could also, however, authorize the use of some Convention-consistent, non-LOAC rules of international law to clarify or complement Convention provisions. Reliance on the ordinary meaning of "other" is one appropriate way to accomplish these ends. The plain meaning of "other" would not, of course, preclude reference to the LOAC in matters relating to armed conflict.

130. See *supra* text accompanying notes 12-29.

131. See *supra* notes 66-68 and accompanying text. In addition, note the authority of the International Court of Justice (ICJ) to use various sources of international law pursuant to Article 38(1) of its Statute. The ICJ may have jurisdiction in some cases involving the Convention or "an international agreement related to the purposes of th[e] Convention." UNCLOS arts. 287(1)(b), 288(1)-(2).

C. "Genuine Link"

The words "genuine link," like the words "other rules of international law," reflect a juristic concept. Unlike the words "other rules of international law," however, the words "genuine link" have no determinate ordinary meaning. "Genuine" is a term of evaluation. The Initial Draft defines "genuine link" in functional terms, to mean "that a flag State under whose laws a ship is registered must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."¹³² This is a bold (i.e., restrictive) definition of a concept about which there is little or no agreement.

A lack of agreement concerning the meaning of "genuine link" is not surprising given the political context. States and commentators disputed whether the "genuine link" concept, taken from the *Nottebohm Case*¹³³ with respect to links between an individual and his State of nationality, should be transposed to apply to vessels at all. Some observers thought it should not.¹³⁴ They stressed the need to assure there was one certain, clearly identifiable State of nationality of a vessel, whose laws would apply to a vessel. One clearly identifiable flag State was necessary to preserve order on the oceans, to guard against interference with the freedom of navigation, and to prevent vessels arguably lacking a "genuine link" from being treated as stateless. Critics of "genuine link" thought such a requirement could undercut those values. And once the International Law Commission decided to use the words "genuine link" in its drafts¹³⁵ (which led to the incorporation of the words into Article 5(1) of the 1958 Convention on the High Seas¹³⁶), proposals to give the words specific content revealed a huge political rift. On the one hand, flag of convenience States feared that detailed requirements might cut into an important source of revenue, and shipowners desired the lower taxes, cheaper manning costs, and, sometimes, lax inspections that came with registering in a flag of convenience State. On the other hand, those concerned with safe working conditions for sailors, and those concerned with the environmental risks of oil spills and accidents, favored giving some teeth to the "genuine link" requirement. (So did some developing States that were not prepared themselves to develop open registers.) In terms of values, the conflict was often phrased in terms of economic sovereignty versus concerns for safety and the environment.

The end product of the debate was a lack of agreement, and an extremely soft treaty norm. No precise meaning of "genuine link" was specified or agreed on in 1958 or in 1982. UNCLOS III really did not focus on

132. See *supra* text accompanying note 48.

133. *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

134. See, e.g., MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 1013-35 (1962).

135. See *supra* note 95 and accompanying text.

136. High Seas Convention, *supra* note 6, art. 5(1).

the issue, and the Conference gave little consideration to most of the high seas articles that were carried over from the 1958 Convention on the High Seas. Although Article 94 of the Law of the Sea Convention was new, providing extensive provisions concerning the responsibilities of flag States, many other high seas articles—including Article 91, the article on nationality of vessels, which contains the “genuine link” requirement—simply carried over language from 1958.¹³⁷ The negotiators at UNCLOS III, facing a slew of new and controversial matters relating to the exclusive economic zone, the continental shelf, transit passage through straits, innocent passage, archipelagoes, the sea bed beyond the limits of national jurisdiction, landlocked and geographically disadvantaged States, marine scientific research, and dispute settlement, chose not to open another controversial issue by debating the meaning of “genuine link.” Post-1982 efforts to agree on even general formulations of “genuine link” have also foundered—witness what has happened with the 1986 Registration Convention.¹³⁸ That Convention, which contains a broadly worded attempt to specify the meaning of “genuine link,” has received little support and is not in force. State practice regarding the conditions necessary for the granting of nationality to ships is also extraordinarily diverse,¹³⁹ suggesting a lack of consensus about the meaning of “genuine link.”

The “genuine link” norm is soft, too, from a process perspective. Considerable authority suggests that a vessel’s lack of a genuine link with a flag State does not entitle another State to refuse to recognize the vessel’s nationality.¹⁴⁰ The only recourse, apparently, is a protest to the flag State.

The Initial Draft’s definition of “genuine link” is not likely to reflect any shared understanding, and—with respect to the important goals of improving safety on vessels and reducing environmental risk—appears less likely than other avenues to contribute to those ends. Indeed, the struggle to insure safe vessels and safe working conditions on board ships has taken other tacks. The efforts have been to specify in detail the obligations of a flag State¹⁴¹ and to expand the authority of coastal States and port States (e.g., coastal State authority to prescribe and enforce environmental laws;¹⁴²

137. Article 91 tracks Article 5(1) of the 1958 Convention. The last clause of Article 5(1), referring to a state’s obligation to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag,” *id.*, was omitted from Article 91; that clause became the basis for Article 94(1).

138. Ship Registration Convention, *supra* note 27. See Moira L. McConnell, *Business as Usual: An Evaluation of the 1986 UN Convention on Conditions for Registration of Ships*, 18 J. MAR. L. & COM. 435 (1987).

139. Churchill, *supra* note 33, § 4.2 at 43.

140. *E.g.*, The M/V “Saiga” No. 2 Case (St. Vincent v. Guinea), 1999 ITLOS No. 2, ¶¶ 79-86, 38 I.L.M. 1323, 1342-43 (1999) (Judgment, July 1).

141. *E.g.*, UNCLOS arts. 94, 211(2), 217.

142. See generally, *e.g.*, ERIK JAAP MOLENAAR, COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION (1998); VESSEL-SOURCE POLLUTION AND COASTAL STATE JURISDICTION (Erik Franckx ed., 2001).

port State inspections coordinated through Memoranda of Understanding¹⁴³). Such detailed requirements, which are often coupled with mechanisms to promote compliance, appear better tailored to promote improved safety standards and environmental protection than does a restrictive definition of “genuine link.”

The definition in the Initial Draft, which stresses that “genuine link” means “that a flag State . . . must effectively exercise its control,” does not, in my opinion, reflect a consensus view. The “political context” outlined above is not, it is true, an interpretation of “genuine link” pursuant to the approach in the Vienna Convention on the Law of Treaties. But Robin Churchill’s careful study of the meaning of “genuine link” in its context (as that term is used in the Vienna Convention), in a work prepared for the International Transport Workers’ Federation,¹⁴⁴ concluded that there is no consensus as to the meaning of “genuine link.”¹⁴⁵ The underlying political controversies make his conclusion all the more understandable. Churchill found that:

A State has a discretion as to how it ensures that the link between a ship having its nationality and itself is genuine, be it through requirements relating to the nationality of the beneficial owner or crew, its ability to exercise its jurisdiction over such a ship, or in some other way.¹⁴⁶

A flag State’s effective exercise of jurisdiction and control over its ships, he continued, “is not an obligatory criterion for establishing the genuineness of a link.”¹⁴⁷ Furthermore, “effective exercise of flag State jurisdiction” really connotes only that a flag State “must be *in a position* to exercise effective jurisdiction and control over a ship *at the time that it grants its nationality to that ship*.”¹⁴⁸ This conception is not as bold as the one adopted in the Initial Draft’s definition, according to which “genuine link” means the actual effective exercise of jurisdiction and control. The Initial Draft’s definition would be difficult to apply because it would mandate “constant examination of how the flag State is exercising its jurisdiction in practice” and would focus on continuing behavior rather than on links that exist at the time nationality is obtained.¹⁴⁹ For these reasons, it would be preferable to conceptualize “genuine link” in terms of “ability to exercise jurisdiction and control” rather than in terms of “effective exercise of jurisdiction and control.”

143. *E.g.*, Memorandum of Understanding on Port State Control in the Caribbean Region, 36 I.L.M. 231 (1987). *See* Tatjana Keselj, *Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding*, 30 OCEAN DEV. & INT’L L. 127 (1999).

144. Churchill, *supra* note 33.

145. *Id.* § 3.5, at 37, § 6, at 68.

146. *Id.* § 6, at 70 (footnote omitted).

147. *Id.*

148. *Id.* § 6, at 71 (emphasis added).

149. *Id.*

Should we even be that specific in the definition? Granted, “genuine link” should mean something more than “link.” But application of the Vienna Convention’s approach to treaty interpretation, along with consideration of the associated political controversies, reveal no unified understanding as to what that “something more” is. In contrast to the phrase “other rules of international law,” the words “genuine link” carry no evident plain meaning. Consensus on the meaning of “genuine link” might, in theory, develop in the future and be reflected in State practice. At present, however, it may only be appropriate to suggest a nonexclusive range of options, e.g., “‘genuine link’ means more than a mere link, requiring, by way of example, connections between the flag State and the vessel such that the flag State has the ability to exercise effective control over the vessel when nationality is granted, or connections between the flag State and the vessel’s crew, or connections between the flag State and the vessel’s officers, or connections between the flag State and the vessel’s beneficial owners.” Any more concrete definition may not be widely accepted as legitimate. Any more concrete definition also may not serve well the apparent functional goals of promoting vessel safety and combating environmental degradation. Those goals are better addressed through international legal rules specifying the duties of flag States and the rights of coastal States and port States, and through processes designed to enable such rules to be invoked, publicized, and given effect.

III. CONCLUSION

The Initial Draft and my comments seek to understand and define concepts in the Law of the Sea Convention that will be used in many situations. The Initial Draft is a significant work. Any definition narrows or confines meaning, and the Initial Draft forces us to evaluate when such narrowing is appropriate with respect to some issues in the Law of the Sea Convention. The Initial Draft forces us to think about the appropriateness of defining words and phrases that have an apparent natural or ordinary meaning, as well as words and phrases that do not. Interpreting a treaty in accordance with a standard interpretive methodology perhaps may reveal shared, common understandings and may lead to definitions that conform to those shared understandings. The process of debating proposed definitions is in itself valuable, even if the process reveals points of significant disagreement, because the process can sharpen our perceptions of controversies and indeed of reality.

CONCLUSIONS: “WORDS, WORDS, WORDS”: DILEMMAS IN DEFINITIONS⁺

GEORGE K. WALKER

Professor Noyes has illustrated problems in defining words or phrases in the Convention. He notes the problem of controversial terms, e.g., “genuine link;”¹⁵⁰ the issue of new usages of established principles, e.g., “other rules of international law;”¹⁵¹ and less concern about seemingly uncontroversial words, e.g., “mile.”¹⁵² A few closing remarks in mild rebuttal may be useful.

First, defining even the most uncontroversial terms may expose differences of view on their meaning; “mile” is a case in point. Relations among States being what they are in a multipolar world and Murphy’s Law of Measurements reflecting the possible future reality of conflicting claims, even defining these terms may raise differences. If a dispute over sovereignty or jurisdiction under the law of the sea as reflected in UNCLOS will arise, it is likely that it will involve claims over areas within the minimum and maximum meanings of “mile.”¹⁵³ One risk, even here, is that a decision maker may apply a definition “outside the box,” to the chagrin of many.

Justice Oliver Wendell Holmes once wrote that a word is the skin of a living thought.¹⁵⁴ The *Introduction*’s reference to *My Fair Lady* is a commonplace illustration of the point; although Audrey Hepburn was pictured in the film, her singing was dubbed in. What was the reality, Ms. Hepburn on the screen, the dubbed song, the lyrics as they appeared in print, the memory of a film with a happy ending, or some combination of the foregoing? What is the “thought,” or idea or concept, that the Committee should convey?

There are opposing policies in the law of the sea as in all systems of jurisprudence. Advocates of original intent would counsel static content to the Constitution of the United States; others say it is a living document, designed to meet issues not dreamed of when the Framers met in Philadelphia,

⁺ Previously published under the title “Dilemmas in Definitions: Conclusions on *Defining Terms in the 1982 Law of the Sea Convention (Sept. 4, 2001 Initial Draft) (Rev. 1) Jan. 22, 2002*,” with variations in footnote form, in 2000-2001 PROC. AM. BRANCH INT’L L. ASS’N 195.

150. Compare *supra* text accompanying notes 35-48 with text accompanying notes 132-49 (“Genuine Link”).

151. Compare *supra* text accompanying notes 59-73 with text accompanying notes 112-31 (“Other Rules of International Law”).

152. Compare *supra* text accompanying notes 49-56 with text accompanying notes 105-111 (“Mile”).

153. See *supra* notes 52-54 and accompanying text.

154. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

or the First Congress and the states approved the Bill of Rights a few years later. In 1789 Thomas Jefferson wrote James Madison that “*the earth belongs in usufruct to the living*,”¹⁵⁵ a philosophical support for the latter view. Or, as James Russell Lowell wrote a century later, new occasions teach new duties; new truth makes ancient good uncouth.¹⁵⁶ On the other hand, the Constitution and the Bill of Rights are fairly precise about some matters, e.g., that criminal trials by jury may be heard only in the state and district where the crime shall have been committed.¹⁵⁷ But how precise is “state” or “district”? The Constitution leaves these matters to statute,¹⁵⁸ and, in the case of judicial districts for the federal courts, boundaries can and have been amended from time to time. Some terms, e.g., two Senators for each state, fixed at two despite size or population of a state, are immutable, but even here the method of election has changed.¹⁵⁹ If the 1982 Convention is a “constitution” for the law of the sea because of its trumping provisions, it has the same kind of problems inherent in interpretation.¹⁶⁰

There is also the problem, inherent in new occasions perhaps teaching new duties, of the balance between these and meanings established in custom, general principles, decisions of tribunals, and perhaps the weight of scholarly opinion.¹⁶¹ An example in the Initial Draft is the debate over the meaning of “other rules of international law,” which formerly had a fairly consistent definition,¹⁶² however obscure to some. Justice Holmes would counsel that a page of history is worth a volume of logic;¹⁶³ how should history, i.e., relatively established custom, principles, or commentators’ views, be weighed in the balance? The issue is sure to arise in other contexts.

Professor Noyes has urged caution where opinion on a term has divided sharply, i.e., on “genuine link,” to leave resolution to the future.¹⁶⁴ He would have support from constitutional law commentators who say that “fuzziness”

155. Letter of Thomas Jefferson to James Madison, Sept. 6, 1789, mailed Jan. 9, 1790, 15 THE PAPERS OF THOMAS JEFFERSON 392 (Julian P. Boyd ed., 1958) (emphasis in original). See also *id.* at 396; 2 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON AND THE RIGHTS OF MAN 179 (1951).

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

157. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

158. *Id.* arts. I, § 8, cl. 9; § 8, cl. 18; III, §§ 1-2; IV, § 3, cl. 1.

159. *Id.* art. I, § 3, cl. 1-3; *id.* amend. XVII.

160. Cf. George K. Walker, *Oceans Law, the Maritime Environment, and the Law of Naval Warfare, in PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT*, 69 NAV. WAR C. INT’L L. STUD. 185, 189, 203 (Richard J. Grunawalt et al. eds., 1996). The Initial Draft recognizes U.N. CHARTER art. 103 trumping provision, which might come into play in Security Council decision or self-defense situations. See *supra* text accompanying notes 66-67. See also U.N. CHARTER arts. 25, 48, 51, 103.

161. See, e.g., I.C.J. Statute, *supra* note 63, arts. 38(1), 59; RESTATEMENT (THIRD), *supra* note 1, §§ 102-103. See also *supra* text accompanying notes 41-47, 59-64.

162. See *supra* note 64 and accompanying text.

163. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

164. See *supra* text accompanying notes 132-49.

in judicial decision making is in the nature of human language, and that fuzzy logic can help judges do their work more intelligently.¹⁶⁵ Madison, recipient of Jefferson's letter,¹⁶⁶ called language a "cloudy medium"¹⁶⁷ at about the same time as Jefferson wrote him. The problem for LOS issues is that disputes involving the oceans can be frequent, extraordinarily expensive, and dangerous, perhaps leading to armed conflict; e.g., counterclaims over ocean boundaries, overflight rights, fishing rights, EEZ issues, high seas confrontations, islands, and archipelagoes are many and need no lengthy citation.¹⁶⁸ If workable definitions emerge from the Committee project and forestall or contribute to just and fair resolution of a few of these disputes in the future, the Committee's work should be deemed a success.¹⁶⁹ To the extent the Committee product may stray from demands of new occasions, its definitions are but secondary sources and can be superseded by other, primary sources.¹⁷⁰

How should the Committee proceed? The Chair's vote is to go forward, attempting to achieve as much definition as possible. The Committee reports should recite majority-minority or differing views, so that those who use ILA definitions will have the benefit of Committee research and the basis of its decisions. However, as Justice Benjamin Cardozo said in 1936 in another definitional context,

What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation. . . . To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.¹⁷¹

The Committee should set its course by this compass.

165. Beverly Blair Cook, *Fuzzy Logic and Judicial Decision Making*, 85 JUDICATURE 70, 99 (2001).

166. See *supra* note 155 and accompanying text.

167. THE FEDERALIST No. 37 (James Madison).

168. For a survey of such disputes, see, e.g., ROACH & SMITH, *supra* note 53.

169. Compare *supra* text accompanying notes 5-11 with ILA *Budapest Articles*, *supra* note 1.

170. I.C.J. Statute, *supra* note 63, art. 38(1); RESTATEMENT (THIRD), *supra* note 1, §§ 102-103.

171. *Gully v. First Nat'l Bank*, 299 U.S. 109, 117-18 (1936) (citations omitted).