

2015

## The First Great Common

George K. Walker

Follow this and additional works at: <http://digitalcommons.maine.edu/oclj>

 Part of the [Law Commons](#)

---

### Recommended Citation

George K. Walker, *The First Great Common*, 20 *Ocean & Coastal L.J.* 41 (2015).

Available at: <http://digitalcommons.maine.edu/oclj/vol20/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in *Ocean and Coastal Law Journal* by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

## THE FIRST GREAT COMMON

*George K. Walker\**

There are two, and perhaps three great common areas – outer space, the deep seabed, the Area;<sup>1</sup> and (at least philosophically) cyberspace – available to humankind today. The first great common<sup>2</sup> was, and remains in large part, the high seas.<sup>3</sup> Part I traces the early history of the law

---

\* Dean's Research Professor of Admiralty and International Law, Wake Forest University School of Law. This article was a basis of my opening remarks as co-moderator at a panel, Resource Management in Common (Non-Sovereign) Areas: Law of the Sea and Space Compared, at the New York City International Law Association (American Branch) annual meeting Oct. 26, 2012. My thanks to the panelists – Henry Hertzfeld, Research Professor of Space Policy and International Affairs, Space Policy Institute, George Washington University; John E. Noyes, Roger Traynor Professor of Law, California Western School of Law and co-moderator; Matthew Schaefer, Law Alumni Professor of Law and Director of the Space, Cyber and Telecommunications Law Program, University of Nebraska-Omaha School of Law LL.M. Program; and Frans von der Dunk, Harvey and Susan Perlman Alumni/Othmer Professor of Space Law in the University of Nebraska-Omaha School of Law's Space, Cyber and Telecommunications Law Program – for their review of an earlier draft and helpful comments. Thanks, also, to Professor Kate Irwin-Smiler of the Wake Forest University School of Law library for help in ferreting out sources. Errors and omissions are my responsibility.

1. United Nations Convention on the Law of the Sea, art. 1(1)(1), Dec. 10, 1982, 1833 U.N.T.S. 3, 397 [hereinafter UNCLOS]; *see also* DEFINITIONS FOR THE LAW OF THE SEA: TERMS NOT DEFINED BY THE 1982 CONVENTION 103-04 (George K. Walker ed., 2012).

2. *Cf.* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 25-26 (1690), who wrote that God had given the Earth to humankind in common. My thanks to Professor Jonathan Galloway for recalling this.

3. Another debate, now over for all practical purposes, was sovereignty over newly discovered major land areas of the Earth, i.e., terra nullius. However, border disputes and arguments over islands and the like continue. Once criteria for sovereignty, first developed through the Peace of Westphalia, Treaty of Peace of Munster, Fr.-Holy Roman Empire, Oct. 14-24, 1648, art. 64, 1 Consol. T.S. 198, 319; Treaty of Peace of Osnabruck, Swed.-Holy Roman Empire, Oct. 14-24, 1648, art. 9, *id.* at 119, 198, and with us today in, e.g., U.N. Charter art. 2 para. 1., were satisfied, these areas became subject to sovereign States. Today most of these areas are independent States. *See also infra* note 42 and accompanying text. Even Antarctica, with its lack of a permanent human population is potentially subject under the Antarctic Treaty, art. 4(1), Dec. 1, 1959, 12 U.S.T. 794,

of the sea, the customary law of the high seas, and the freedom of the seas principle from the Renaissance to the mid-twentieth century. Part II analyzes the freedoms of the high seas as negotiated in the 1958 and 1982 law of the sea conventions, with reference to similar concepts in space law and for certain land areas, notably Antarctica. Part III relates the law of the sea to the law of maritime warfare and neutrality, a *lex specialis* alongside general oceans law, discusses special treaty rules under the conventions, the impact of customary law and *jus cogens* on treaty and customary norms, and the place of the law of international organizations, in particular U.N. Security Council and General Assembly resolutions, contrasting lawmaking for space activities. Part IV notes other factors in law of the sea issues for this century: small wars, often noninternational in nature, e.g., insurgencies and civil wars; non-state actors like pirates or terrorists, the growing influence of nongovernmental organizations, and “lawfare,” often waged in instant media like the Internet. Part of my inquiry is to ask whether problems and issues that have come with high seas uses in past centuries might be revisited for space and seabed issues.<sup>4</sup> Justice Oliver Wendell Holmes, Jr. wrote that “a page of history is worth a volume of logic”<sup>5</sup> and that “the life of the law has not been logic; it has been experience.”<sup>6</sup> George Santayana warned that those who cannot remember the past are condemned to repeat it,<sup>7</sup> perhaps including past mistakes. Might these thoughts, among others that follow, be useful in analysis?

---

402 U.N.T.S. 71, to States’ prior claims. See also Walker, *supra* note 1, at 218-24; M.J. Peterson, *The Use of Analogies in Developing Outer Space Law*, 51 INT’L ORG. 245, 257-60 (1997), (noting that the Antarctic Treaty, *supra* was an early model for space law concepts. It is ironic that the United States was the first to propose a new law of the sea treaty to forestall competition for ocean resources, over a year before Ambassador Arvid Pardo’s 1967 address to the U.N. General Assembly, calling for negotiations that resulted in UNCLOS); Horace B. Robertson, Jr., *The 1982 United Nations Convention on the Law of the Sea: An Historical Perspective for US Accession*, 84 NAV. WAR C. INT’L L. STUD. 111 (2008). Today the United States is among the few countries that have not ratified or acceded to UNCLOS.

4. Peterson, *supra* note 3, at 253-55 (reporting use of the high seas model as another concept for developing space law).

5. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

6. OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881).

7. GEORGE SANTAYANA, THE LIFE OF REASON 284 (2d ed. 1922).

## I. THE PAST AS PROLOGUE

It is familiar ground that the seventeenth century debate between the English lawyer John Selden<sup>8</sup> and the Netherlands lawyer and diplomat Hugo Grotius<sup>9</sup> resulted in a victory for high seas freedoms,<sup>10</sup> including, most critically for that era, a right of high seas navigation.<sup>11</sup> (As The Netherlands' power declined and Great Britain's grew in the eighteenth and later centuries, Britain adopted a high seas freedoms policy.<sup>12</sup>) Other powers, including the young United States, followed the British lead.<sup>13</sup>

What was the territorial scope of the high seas with its freedoms? Up through the middle of the twentieth century, the cannon-shot, marine league or three-mile rule prevailed for most States for a territorial sea,<sup>14</sup>

---

8. JOHN SELDEN, *MARE CLAUSUM, SEU DE DOMINIO MARIS* (repr. 1972) (1615); *see also* D.P. O'CONNELL, *INTERNATIONAL LAW OF THE SEA* 5-6 (I.A. Shearer ed., 1982); DONALD R. ROTHWELL & TIM STEVENS, *THE INTERNATIONAL LAW OF THE SEA* 3 (2010); SAYRE A. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* 20-22 (1972); *see also supra* notes 2, 3 and accompanying text.

9. HUGO GROTIUS, *THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (Ralph Van Deman Magoffin trans., 1916) (1633); *see also* O'CONNELL, *supra* note 8, at 9-10; ROTHWELL & STEPHENS, *supra* note 8, at 3; SWARZTRAUBER, *supra* note 8, at 18-20. The 1494 Treaty of Tordesillas had drawn a line for colonization purposes between Portugal and Spain; it had been thought that this also applied to sea areas and was why Grotius wrote *Mare Liberum*. O'CONNELL, *supra* note 8, at 2; ROTHWELL & STEPHENS, *supra* note 8, at 2. *Cf.* SWARZTRAUBER, *supra* note 8, at 13-18.

10. Grotius affirmed his view in 1646. HUGO GROTIUS, *DE JURE AC PACIS: LIBRI TRES* 199 (Francis W. Kelsey trans., 1923) (1646).

11. O'CONNELL, *supra* note 8, at 10.

12. Tribunal decisions, treaties and the Royal Navy followed the trend. C. JOHN COLOMBOS, *INTERNATIONAL LAW OF THE SEA* § 66 (6th rev. ed. 1967); O'CONNELL, *supra* note 8, at 18-20. The Selden view held sway for 100 years, however. SWARZTRAUBER, *supra* note 8, at 22.

13. Freedom of the seas was one of President Woodrow Wilson's Fourteen Points that were proposed as principles for ending World War I. Woodrow Wilson, *Fourteen Points* (Jan. 8, 1918).

14. *See generally* O'CONNELL, *supra* note 8, at 124-65, (*inter alia* commenting on the "decisive step" of the U.S. Neutrality Act of 1794, Act of June 5, 1794, § 6, 1 Stat. 384, made permanent legislation by Act of Apr. 4, 1800, 2 Stat. 54, which blended the cannon-shot principle into a three-mile rule. The United States had claimed a three-mile zone a year before.); *U.S. Secretary of State Thomas Jefferson Letters to British Minister to the United States George Hammond, French Minister to the United States Charles Genet, Nov. 8, 1793*, in 6 *THE WRITINGS OF THOMAS JEFFERSON* 440-42 (Paul Leicester Ford ed., 1895) (The 1794 legislation thus confirmed what the Washington Administration had previously claimed. Congress had also enacted a 12-mile customs zone and a 9-mile licensed fishery zone, Act of Aug. 4, 1790, §§ 11-13, 31, 64, 1 Stat. 145, 156, 164-65, 175). *See also* SWARZTRAUBER, *supra* note 8, chs. 2-10 (explaining that in the eighteenth

considered part of coastal State sovereignty.<sup>15</sup> However, there have been dissenters as to the territorial sea's breadth, and therefore where the high seas begin, throughout the centuries.<sup>16</sup> A major development in the mid-twentieth century was evolving national claims to sovereignty over an offshore continental shelf, beginning with the Truman Proclamation of 1945.<sup>17</sup> That claim was formalized in treaty law in 1958<sup>18</sup> and refined and modified in UNCLOS.<sup>19</sup> Less well-recalled is a similar U.S. proclamation, also in 1945, relating to offshore fishing conservation outward 200 miles into the high seas. The proclamation carefully noted that these claims did not impact high seas navigation.<sup>20</sup>

## II. A CLOSER LOOK AT HIGH SEAS FREEDOMS

Beyond the offshore fishing zones, it was universally held that the principle of high seas freedoms prevailed. But then and now they were not unfettered freedoms. First, what were and are these freedoms? The 1958 High Seas Convention lists four, "*inter alia*" (among others): freedom of navigation, freedom of fishing, freedom to lay submarine

---

century the seaward thrust of littoral State jurisdiction, as distinguished from coastal State sovereignty, did not stop at the three-mile line. Some States claimed more than three miles). *See generally* GEORGE K. WALKER, *THE TANKER WAR: 1980-1988: LAW AND POLICY* 260-61 (Nav. War Coll. Int'l L. Stud. v. 74, 2000).

15. UNCLOS, *supra* note 1, art. 2; Convention on the Territorial Sea and Contiguous Zone, art. 1, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter Territorial Sea Convention]; Convention on International Civil Aviation, art. 2, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 1591 [hereinafter ICAO Convention]; *see also* R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 75-77, 81 (3d ed. 1999); 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 2.1-2.8(f) (Satya N. Nandan et al. eds., 1993) [hereinafter 2 COMMENTARY]; ROTHWELL & STEPHENS, *supra* note 8, at 58-69.

16. O'CONNELL, *supra* note 8, at 156-61; SWARZTRAUBER, *supra* note 8, at 89-108, 124-25, 131-51.

17. Proclamation No. 2667, Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, 3 C.F.R. 67 (1943-48); *see also* 2 COMMENTARY, *supra* note 15, ¶ VI.5; O'CONNELL, *supra* note 8, at 31-32, 456, 470-71, 483, 498, 553; SWARZTRAUBER, *supra* note 8, at 155-61.

18. Convention on the Continental Shelf, Apr. 26, 1958, 15 U.S.T. 471, 495 U.N.T.S. 311.

19. UNCLOS, *supra* note 1, arts. 76-85; *see also* CHURCHILL & LOWE, *supra* note 15, ch. 8; 2 COMMENTARY, *supra* note 15, ¶¶ 76.1-85.6; ROTHWELL & STEPHENS, *supra* note 8, ch. 5.

20. Proclamation No. 2668, 10 Fed. Reg. 12304 (Oct. 2, 1945); *see also* 2 COMMENTARY, *supra* note 15, ¶ V.5; SWARZTRAUBER, *supra* note 8, at 161-69; *supra* note 14 and accompanying text.

cables and pipelines, freedom to fly over the high seas.<sup>21</sup> UNCLOS added two more, also *inter alia*: freedom to construct artificial islands and other installations permitted under international law, subject to UNCLOS rules for the exclusive economic zone (EEZ) rules, and freedom of scientific research, subject to UNCLOS' marine scientific research (MSR) and EEZ rules.<sup>22</sup> The freedom to lay submarine cables and pipelines was explicitly subject to UNCLOS continental shelf rules; the freedom to fish was now subject to limits, recited within the UNCLOS high seas rules, for conserving and managing high seas living resources.<sup>23</sup> By contrast, outer space and other celestial bodies, while they are not subject to claims of sovereignty, are open to all States for exploration; there is a general freedom of scientific investigation in outer space and on celestial bodies.<sup>24</sup>

There are other important qualifications on high seas freedoms. The first is stated as "reasonable regard" or "due regard" in the High Seas Convention, and "due regard" in UNCLOS, for the rights of other high seas users.<sup>25</sup> This means that one high seas user cannot exercise its high

---

21. Convention on the High Seas art. 2, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 [hereinafter High Seas Convention] (The nonexclusive list and its qualifications in the High Seas Convention are considered customary law.); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. V, Intro. Note 3-5 (1987) [hereinafter RESTATEMENT]; cf. H. Shirley Amerisinghe, *The Third United Nations Conference on the Law of the Sea*, in 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 1, 7 (Myron H. Nordquist ed. 1985); Bernard H. Oxman, *International Law and Naval and Air Operations at Sea*, 64 LAW NAVAL OPERATIONS 19, 29 (1991). The High Seas Convention, *supra* was a model considered for developing the law of outer space. See *supra* note 4 and accompanying text.

22. UNCLOS, *supra* note 1, art. 87(1); see also CHURCHILL & LOWE, *supra* note 15, at 51, 170, 205-06, 296, 404, 427-8; 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 87.1-87.9(I), 87.9(m) (Satya N. Nandan & Shabtai Rosenne, eds. 1995) [hereinafter 3 COMMENTARY]; ROTHWELL & STEPHENS, *supra* note 8, at 145-58.

23. UNCLOS, *supra* note 1, art. 87(1); see also CHURCHILL & LOWE, *supra* note 15, at 51, 170, 205-06, 296, 404, 427-8; 3 COMMENTARY, *supra* note 22, ¶¶ 87.1-87.9(I), 87.9(m); ROTHWELL & STEPHENS, *supra* note 8, at 145-58.

24. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 1, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty]; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies arts. 3(1), 3(3)-3(4), 4-6, Dec. 5, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Agreement]. Cf. The Antarctic Treaty, *supra* note 3, arts. 2-3, 7, 9 (providing for a cooperative research system. The Antarctic Treaty art. 4 preserves all sovereignty claims while denying any new claim of sovereignty based on activities under the Treaty.).

25. UNCLOS, *supra* note 1, art. 87(2), (also declaring the principle for rights in the Area, governed by arts. 1(1), 133-91); High Seas Convention, *supra* note 21, arts. 2,

seas freedoms to frustrate another's freedoms. Sometimes the Conventions recite due regard principles;<sup>26</sup> in other cases they are formalized in separate agreements, *e.g.*, the Collision Regulations (COLREGS) for oceanic navigation, which spell out rules to allow safe passage at sea.<sup>27</sup>

UNCLOS further qualifies high seas rules in its EEZ standards:

In the . . . [EEZ], all States . . . enjoy, subject to the relevant provisions of . . . [UNCLOS], the freedoms . . . of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms. . . . States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State . . . [for the EEZ].<sup>28</sup>

---

26(3); *see also* CHURCHILL & LOWE, *supra* note 15, at 170, 206, 223-53; 3 COMMENTARY, *supra* note 22, ¶¶ 87.1-87.8, 87.9(j)-87.9(m). Due regard appears throughout UNCLOS. *See generally* WALKER, *supra* note 1, at 179-88 (It is the recommended rule for law of naval warfare contexts for certain situations.); INT'L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 12, 34, 36, 88, 106(c) (Louise Doswald-Beck ed., 1994).

26. *See, e.g., supra* note 24 and accompanying text. Other due regard standards lie deep within the treaties, *e.g.*, UNCLOS, *supra* note 1, art. 79(5); High Seas Convention, *supra* note 21, art. 26(3) (due regard for other States' preexisting undersea cables or pipelines when laying a newer cable or pipeline); *see also* CHURCHILL & LOWE, *supra* note 15, at 156, 174; 2 COMMENTARY, *supra* note 15, ¶¶ 79.1-79.7, 79.8(e)-79.8(f).

27. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16 [hereinafter COLREGS]; (replacing International Regulations for Preventing Collisions at Sea, June 17, 1960, 16 U.S.T. 794); *see* U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JAN. 1, 2013, at 427-28 (2013) [hereinafter TIF], and required by UNCLOS, *supra* note 1, art. 94(3)(c); *see also* High Seas Convention, *supra* note 21, art. 10(1)(a). The due regard principle also appears in the ICAO Convention, *supra* note 15, art. 3(d) as a rule for state aircraft operations around civil aircraft, the Outer Space Treaty, *supra* note 24, art. 9, the Moon Agreement, *supra* note 24, art. 4(1) (declaring, *inter alia*: "[d]ue regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living conditions of economic and social progress and development in accordance with the Charter of the United Nations.").

28. UNCLOS, *supra* note 1, art. 58 (Other lawful uses of the sea related to high seas freedoms, *e.g.*, operation of ships and aircraft, are allowed in the EEZ if compatible with other UNCLOS, *supra* note 1, provisions. Articles 88-115 and other pertinent rules of international law apply to the EEZ insofar as they are not incompatible with Articles 55-75. In exercising their UNCLOS rights and duties in the EEZ, States must have due regard for the coastal State's rights and duties and must comply with laws and regulations it adopts in accordance with UNCLOS and other rules of international law insofar as they are not incompatible with Articles 55-75. *Id.* art. 58); *see also* CHURCHILL & LOWE, *supra*

Thus States using a high seas area that a coastal State proclaims as part of its EEZ keep their high seas freedoms but must look over Neptune's shoulder to see how these fit within the UNCLOS EEZ rules.

It might be argued that UNCLOS Article 88 bars high seas military activity as a high seas freedom, e.g., for navies to conduct maneuvers. It does not. Article 88 reads: “[t]he high seas shall be reserved for peaceful purposes.”<sup>29</sup> However,

[t]hat provision does not preclude . . . use of the high seas by naval forces. Their use for aggressive purposes, which would . . . violat[e] . . . Article 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 performing their duties under the Convention, to refrain from any threat or use of force in violation of the Charter.<sup>30</sup>

The result is that the high seas may be used for military exercises as an, *inter alia*, high seas freedom, so long as they are not employed for aggressive purposes. The “peaceful purposes” requirement is also in UNCLOS provisions for MSR and the Area.<sup>31</sup> The interpretation should be the same throughout the Convention. The interpretation advanced

---

note 15, at 161-62, 170-74, 348; 2 COMMENTARY, *supra* note 15, ¶¶ 58.1-58.10(f); ROTHWELL & STEPHENS, *supra* note 8, at 84; *supra* note 24 and accompanying text.

29. UNCLOS, *supra* note 1, art. 88.

30. RESTATEMENT, *supra* note 21, § 521 cmt. b (citing U.N. Charter art. 2(4)); *see also* UNCLOS, *supra* note 1, arts. 88, 301 (referring to RESTATEMENT, *supra* note 21, § 905 cmt. g); *accord*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 244 (July 8); 3 COMMENTARY, *supra* note 22, ¶¶ 87.9(I), 88.1-88.7(d) (noting three views on the phrase's meaning during the UNCLOS drafting phase); Frank Russo Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAVAL L. REV. 1, 8 (1992); *see also* CHURCHILL & LOWE, *supra* note 15, at 170-71, 207, 411, 430-31; Int'l Law Ass'n Comm. on Mar. Neutrality, *Final Report: Helsinki Principles on Maritime Neutrality*, in INT'L LAW ASS'N., REPORT OF THE SIXTY-EIGHTH CONFERENCE HELD AT TAIPEI, TAIWAN, REPUBLIC OF CHINA 24-31 MAY 1998, Principle 1.2 (1998); ROTHWELL & STEPHENS, *supra* note 8, ch. 12; Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 VA. J. INT'L L. 809, 814 (1984); John E. Parkerson Jr., *International Legal Implications of the Strategic Defense Initiative*, 116 MIL. L. REV. 67, 79-85 (1987); *see generally* Boleslaw Boczek, *Peaceful Purposes Provisions of the United Nations Convention of the Law of the Sea*, 20 OCEAN DEVEL. & INT'L L. 359 (1989).

31. UNCLOS, *supra* note 1, arts. 141, 143(1), 147(2)(d), 155(2), 240(a), 242(1), 246(3); *see also* CHURCHILL & LOWE, *supra* note 15, ch. 16; MARTINUS NIJHOFF, 4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Shabtai Rosenne & Alexander Yankov eds., 1991); MARTINUS NIJHOFF, 6 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Myron Norquist et al. eds., 2002) [hereinafter 6 COMMENTARY]; ROTHWELL & STEPHENS, *supra* note 8, at 130.



above is buttressed by provisions in the space treaties, which recite the peaceful purposes language but also demilitarize space and other celestial bodies.<sup>32</sup>

The high seas today are a “managed common area”<sup>33</sup> in many respects. Movement of high seas areas into managed commons might offer thoughts for other commons. Development of ship collision avoidance rules is a commonplace example. Initially, the predominant high seas user, Great Britain, legislated rules; other States adopted them as customary norms.<sup>34</sup> The pattern of national legislation also spread. At one time, the United States had several sets of navigational rules for its inland waters but today has only one.<sup>35</sup> National legislation and customary law regulating collision avoidance have given way to multilateral treaties, the COLREGS,<sup>36</sup> first negotiated at conferences and today developed by an international governmental organization, the International Maritime Organization (IMO), a U.N. specialized agency.<sup>37</sup>

### III. OTHER LIMITS

There may be other limits on high seas freedoms, depending on circumstances. When does the law of the sea (LOS), conventional or customary, apply? It does not apply in armed conflict situations as

---

32. Outer Space Treaty, *supra* note 24, art. 4; Moon Agreement, *supra* note 24, arts. 3(1), 3(3)-3(4). *See* Antarctic Treaty, *supra* note 3, art. 1 (declaring that the continent “shall be used for peaceful purposes only,” and which prohibits militarization of Antarctica. The regime for Antarctica might be contrasted with the controversies involving the Arctic, now that global warming is upon us, the Arctic ice is receding, and formerly frozen straits and seas may become more open for navigation.). *See generally* ARCTIC SECURITY IN AN AGE OF CLIMATE CHANGE (James Kraska ed., 2013).

33. ROTHWELL & STEPHENS, *supra* note 8, at 146.

34. *Cf.* The Scotia, 81 U.S. 170, 180-89 (1871) (citing national collision statutes); *see also* JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 41 (Oxford Univ. Press 8th ed. 2012); ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW 74 (Oxford Univ. Press 9th ed. 1996).

35. Today’s U.S. Inland Rules are virtually the same as the COLREGS, *supra* note 27. THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 14-2 (5th ed. 2011) (citing 33 U.S.C. §§ 2001-38 (2006), repealed in 2010. The Inland Rules are now in 33 C.F.R. Part 83 (2012)).

36. *See supra* note 26 and accompanying text.

37. *See* Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48 (*inter alia*, amended by Amendments to the Convention on the Intergovernmental Maritime Consultative Organization, Nov. 14, 1975, 34 U.S.T. 497, 1276 U.N.T.S. 468, which changed the Organization’s name to International Maritime Organization (IMO)).

between belligerents.<sup>38</sup> This is the traditional meaning of the phrase “other rules of international law” in the 1958 and 1982 LOS conventions.<sup>39</sup> Today under UNCLOS “other rules of international law” may have a broader meaning in some contexts.<sup>40</sup> The law of armed conflict (LOAC) is a *lex specialis*, and as between and among belligerent States and neutral States, the LOAC rule, which may be different from the LOS rule, applies in both armed conflict and neutrality law situations.<sup>41</sup> The *lex specialis* principle holds regardless of whether the LOS rule is treaty-based or a customary norm;<sup>42</sup> the LOAC, whether in custom, general principles or treaties, applies. The difficult problem in today’s world of relatively small wars is determining when the LOAC applies.<sup>43</sup>

That said, it was, and remains, clear that the law of armed conflict recognizes the concept of the high seas, which like the high seas under the LOS is bounded by legitimately claimed territorial seas under the principle, in peace and war, of national sovereignty.<sup>44</sup>

---

38. The LOS continues to apply among states not party to a conflict; these states, and belligerents, must abide by the law of maritime neutrality, however.

39. See, e.g., UNCLOS, *supra* note 1, art. 87(1); High Seas Convention, *supra* note 21, art. 2. The phrase appears throughout UNCLOS. See Walker, *supra* note 1, at 267-68.

40. Walker, *supra* note 1, at 267 (defining “other rules of international law:” “[t]he traditional understanding is that ‘other rules of international law’ and similar phrases in UNCLOS means the law of armed conflict (LOAC), including its components of the law of naval warfare and the law of maritime neutrality. In some instances, however, e.g., UNCLOS Articles 293(1) and 303, the phrase may include international law other than the LOAC in situations where the LOAC does not apply.”).

41. For a partial list of different standards, see Walker, *supra* note 1, at 271.

42. This is the present situation for the United States, which declared it will follow UNCLOS navigational rules. See United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 14, 1983) (noting that the United States and its treaty partners remain bound by the 1958 LOS Conventions.). See TIF, *supra* note 27, at 390, 423-24.

43. For example, a problem in the Iraq occupation. See George K. Walker, *Occupation in Iraq: Issues on the Periphery and for the Future: A Rubik’s Cube Problem*, 86 NAVAL WAR COLL. INT’L L. STUDY 219 (2010).

44. See *supra* note 3. U.N. Charter art. 2(1) recognizes the principle of state sovereignty, traditionally interpreted to mean that, in the absence of governing law, States may act in their interest. National sovereignty, sometimes diminished or eroded, has been a fundamental principle since the Peace of Westphalia, *supra* note 3; see also CHRISTIAN L. WIKTOR, MULTILATERAL TREATY CALENDAR 1648-1995, at 3 (1998). The Peace of Westphalia began the modern State System. See Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT’L L. 20 (1948). Treaties and decisions invoking the sovereignty principle include UNCLOS, *supra* note 1, art. 157(3); Vienna Convention on the Law of Treaties, pmbl., May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 18 (Sept. 7); S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. No. 1, at 15, 25 (Aug. 17); see also Declaration on

There are “external” limits on the UNCLOS rules, or the customary law of the sea. Although UNCLOS forbids reservations<sup>45</sup> and requires most agreements to be compatible with its object and purpose,<sup>46</sup> it does allow older agreements to stand if the Convention permits it.<sup>47</sup> All other treaties, old and new, must be consistent with the Convention’s object and purpose.<sup>48</sup> The general space treaties do not have such clauses;<sup>49</sup>

---

Principles of International Law Concerning Friendly Relations & Co-Operation Among States in Accordance with the Charter of the United Nations, Principle 6, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970), *reprinted in* 9 I.L.M. 1292; Declaration on Inadmissibility of Intervention in Domestic Affairs of States & Protection of Their Independence & Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., U.N. Doc. A/RES/2131 (Dec. 21, 1965); U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the Secretary-General’s High-Level Panel on Threats, Challenges and Change*, ¶ 29, U.N. Doc. A/59/565 (Dec. 2, 2004) (states accepting U.N. Charter benefit of “privileges of sovereignty . . . [must] also accept its responsibilities”); U.N. Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/49/277, S/24111 (June 17, 1992), *reprinted in* 31 I.L.M. 956, 959; MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 21-23 (Brian Chapman ed., 3d ed. 1977); J.B. BRIERLY, THE LAW OF NATIONS § 2 (Andrew Clapham ed., 7th ed. 2012); CRAWFORD, *supra* note 34, ch. 20; LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 36-40 (3d rev. ed. 1969); HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 21-22, 235-37 (2001); JENNINGS & WATTS, *supra* note 34, §§ 37, 107; LORD MCNAIR, THE LAW OF TREATIES 754-66 (1961); RESTATEMENT, *supra* note 21, Part I, ch.1, intro. note, 16 & 17; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 135-65 (Bruno B. Simma et al. eds., 3d ed. 2012); R.P. Anand, *Sovereign Equality of States in International Law*, 197 R.C.A.D.I. 9, 22-51 (1986); Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF. 89, 98-99 (Winter 1992); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 539 (1993); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 R.C.A.D.I. 1, 49-50 (1957); Louis Henkin, *International Law: Politics, Values and Functions*, 216 R.C.A.D.I. 9, 46, 130 (1989); Oscar Schachter, *International Law in Theory and Practice*, 178 R.C.A.D.I. 9, 32 (1982); C.H.M. Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 1, 156-72 (1962).

45. UNCLOS, *supra* note 1, arts. 309-10 (permitting declarations and the like, so long as these do not purport to exclude or modify the legal effect of the Convention’s provisions or are otherwise allowed by the Convention); *see also* CHURCHILL & LOWE, *supra* note 15, at 20, 99, 129, 238; 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY ¶¶ 309.1-310.6 (Shabtai Rosenne et al. eds., 1989) [hereinafter 5 COMMENTARY]; ROTHWELL & STEPHENS, *supra* note 8, at 16-17.

46. UNCLOS, *supra* note 1, arts. 311(2)-311(4); *see also* CHURCHILL & LOWE, *supra* note 15, at 20, 98-99, 125, 191; 5 COMMENTARY *supra* note 45, ¶¶ 311.1-311.8, 311.11.

47. UNCLOS, *supra* note 1, art. 311(5) (governing passage through the Straits of the Dardanelles and Bosphorus.). *See also* 2 COMMENTARY, *supra* note 15, ¶¶ 35.1-35.6, 35.7(c); 5 COMMENTARY, *supra* note 45, ¶¶ 311.1-311.8, 311.11.

48. UNCLOS, *supra* note 1, arts. 311(2)-311(4); *see also supra* note 44 and accompanying text.

must there be reliance on law of treaties rules<sup>50</sup> for later agreements, perhaps subordinate in importance to the early, basic treaties? Chief among these would be use of a subordination clause.<sup>51</sup>

If a customary rule is at issue, e.g., for a State that has not ratified UNCLOS but relies on its rules as statements of custom, are there persistent objectors<sup>52</sup> to the customary norm? Would this principle apply in space law?

Will the Convention, or maybe custom based on UNCLOS, apply in an insurgency that progresses toward civil war and perhaps belligerency status, to a group challenging a recognized government? Will the

---

49. All of these general agreements have provisions for amendments or revisions; presumably these could resolve inconsistency issues by negotiation. *See* Outer Space Treaty, *supra* note 24, art. 15 (only a provision for amendment); Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space art. 8, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 (same); Convention on International Liability for Damage Caused by Space Objects arts. 25-26, June 29, 1971, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Space Liability Convention]; Convention on Registration of Objects Launched into Outer Space arts. 9-10, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention]; Moon Agreement, *supra* note 24, arts. 15-16. The only exception might be the Space Liability Convention, *supra*, art. 23 (declaring that it “shall not affect other international agreements in force in so far as relations between the States Parties to such agreements are concerned.”).

50. Vienna Convention, *supra* note 44, arts. 30, 39-41; *see also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 86, 192-204, 233-34, 240-42, 255, 258, 342-43 (3d ed. 2013); CRAWFORD, *supra* note 34, at 378, 386; JENNINGS & WATTS, *supra* note 34, §§ 590-91; IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 94-98, 106-09, 160, 183-85 (2d ed. 1984).

51. Vienna Convention, *supra* note 44, art. 30(2); *see also supra* note 48 and accompanying text.

52. *See* CRAWFORD, *supra* note 34, at 28; JENNINGS & WATTS, *supra* note 34, § 10, at 29; 73 ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 5.4.1 (A.R. Thomas & James C. Duncan eds., 1999); RESTATEMENT, *supra* note 21, § 102 cmts. b, d; Michael Akehurst, *Custom As a Source of Law*, 47 BRIT. Y.B. INT’L L. 1, 23-27; Waldock, *supra* note 44, at 49-52; *but see* Charney, *supra* note 44, at 538-41 (existence of persistent objector rule open to serious doubt); Maurice H. Mendelson, *The Formation of Customary International Law*, 272 R.C.A.D.I. 227-44 (1998) (doubting if persistent objector doctrine still exists); J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS (3d ed., 2012) (containing an exhaustive study of LOS claims protests, demonstrates that the persistent objector rule is alive and well, at least for LOS issues. Problems with empirical studies of States’ objections are that many lie buried in chancellery files because they may seem to have little publicity value when filed, they are subject to national security concerns, or States may have selective or non-publication policies like U.S. court rules on unpublished opinions.).

sometimes amorphous law of treaty succession apply if a new State emerges?<sup>53</sup> How does this apply in a space law context?<sup>54</sup>

Although there have been few claims<sup>55</sup> for *jus cogens*<sup>56</sup> standards in the LOS or space law, might that be a possibility in the future?

The law of self-defense, whether considered as a customary norm, a customary norm with *jus cogens* status, or governed by U.N. Charter principles based on Article 51, remains a relevant LOS issue. If is a

---

53. See generally Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 1946 U.N.T.S. 3; Committee on Aspects of the Law of State Succession, *Final Report*, in INT'L LAW ASS'N, REPORT OF THE SEVENTY-THIRD CONFERENCE HELD IN RIO DE JANEIRO, BRAZIL 17-21 AUGUST 2008, at 250, 360-62 (2008) (UN succession conventions' general acceptance; recent practice); JENNINGS & WATTS *supra* note 34, § 62, at 211-13; Symposium, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253 (1993); George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 TRANSNAT'L L. 1 (1993).

54. There still are substantial space assets of the former USSR in the Republic of Kazakhstan, which is not a party, except perhaps through the law of treaty succession, to major space agreements except Registration Convention, *supra* note 47. See TIF, *supra* note 27, at 475-77; Committee on Aspects of the Law of State Succession, *supra* note 51; JENNINGS & WATTS, *supra* note 34, § 62, at 211-13; Symposium, *supra* note 53; Walker, *Integration*, *supra* note 53.

55. Cf. CHURCHILL & LOWE, *supra* note 15, at 6 (explaining "States that had for many years claimed sovereignty over the waters did not at first claim sovereignty over the superjacent air space and sea bed in the zone").

56. See VIENNA CONVENTION, *supra* note 44, pmbl., arts. 53, 64, 71. *Jus cogens* has uncertain contours. See generally AUST, *supra* note 50, at 279-82, 319; CRAWFORD, *supra* note 34, at 389-90, 579, 594-97; T.O. ELIAS, THE MODERN LAW OF TREATIES 177-87 (1974) (contours uncertain); JENNINGS & WATTS, *supra* note 34, §§ 2, 642, 653 (same); MCNAIR, *supra* note 44, 214-15 (same); RESTATEMENT, *supra* note 21, §§ 102 r. 6, 323 cmt. b, 331(2), 338(2) (same); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986, at 281-88 (1989); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 44, at 313-33 (discussing U.N. Charter arts. 2(4), 55, likely a *jus cogens* norm today); SINCLAIR, *supra* note 50, at 17-18, 218-26 (Vienna Convention principles considered progressive development in 1984); GRIGORII I. TUNKIN, THEORY OF INTERNATIONAL LAW 98 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 R.C.A.D.I. 219, 262-63 (1981); John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL'Y 9, 25-29 (1977); Jimenez de Arechaga, *International Law in the Last Third of a Century*, 159 R.C.A.D.I. 9, 64-67 (1978); Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995). An International Law Commission study acknowledged primacy of UN Charter art. 103-based law and *jus cogens* but did not catalogue what are *jus cogens* norms. Rep. of the Int'l Law Comm'n, U.N. GAOR, 60th Sess., May 2-June 3, July 11-Aug. 5, 2005, U.N. Doc. A/60/10, U.N. GAOR, 60th Sess., Supp. No. 10, at 221-25 (2005); see also Michael J. Matheson, *The Fifty-Seventh Session of the International Law Commission*, 100 AM. J. INT'L L. 416, 422 (2006).

customary rule, might it supersede rules in treaties?<sup>57</sup> If it is a *jus cogens*-girded norm, it will supersede treaty rules. If based on Article 51, under Article 103, action in self-defense supersedes treaty rules.<sup>58</sup> Self-defense is also a space law issue, if for no other reason than Article 103 of the Charter, which says it trumps all treaties, which includes those international agreements related to space law with “peaceful purposes” provisions.<sup>59</sup>

U.N. Security Council “decisions,”<sup>60</sup> as distinguished from other nonbinding Council resolutions, e.g., those recommending action, and nearly all U.N. General Assembly resolutions that are nonbinding,<sup>61</sup> can

---

57. Cf. I.C.J. STAT. art. 38(1) (stating, “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”); RESTATEMENT, *supra* note 21, §§ 102-03 (explaining, “(1) A rule of international law is one that has been accepted as such by the international community of states: (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted. (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”).

58. U.N. Charter arts. 51, 103 (Author’s note: this article is not a place to explore Charter era self-defense issues. Among these are anticipatory self-defense versus “reactive” self-defense; necessity and proportionality standards in self-defense; differences, if any, between the customary law of self-defense and self-defense under *id.* art. 51; alliance or coalition operations issues; self-defense standards for units and individuals during armed conflict, as distinguished from self-defense as a *jus ad bellum* principle; self-defense against individuals or groups involved in international criminal acts, e.g., piracy, slave trade, terrorism. See George K. Walker, *Self-Defense, the Law of Armed Conflict and Port Security*, 5 S.C.J. INT’L L. & BUS. 347, 348-66 (2009)).

59. See also *supra* notes 29-30 and accompanying text.

60. U.N. Charter arts. 25, 48, 94(1), 103; see also GOODRICH ET AL., *supra* note 44, at 207-11, 334-37, 555-56, 614-17; SIMMA ET AL. ED., *supra* note 44, at 786-854, 1376-84, 1957-71, 2110-37.

61. U.N. Charter arts. 10-11, 13-14, 33, 36-37, 39-41; see also SYDNEY D. BAILEY & SAM DAWES, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 18-21, 236-37 (3d ed. 1998); CRAWFORD, *supra* note 34, at 42; JORGE CASTANEDA, *LEGAL EFFECTS OF UNITED*

also trump treaty terms under the authority of Article 103.<sup>62</sup> (Resolutions nonbinding under Charter terms can bind countries through acceptance of them as customary law, however.<sup>63</sup>) Thus action through U.N. principal organs can also bind parties in space law controversies.<sup>64</sup> There is no “way out” of these realities, unless the central U.N. system is abolished.

A message through the galaxies for space law might be binding authority given through treaties, even as UNCLOS allows parties to resort to the International Court of Justice for dispute resolution.<sup>65</sup> If a litigant refuses to comply with a judgment, the aggrieved party can resort

---

NATIONS RESOLUTIONS 78-79 (Alba Amoia trans., 1969); GOODRICH ET AL., *supra* note 44, 111-29, 133-44, 257-65, 277-87, 290-314; JENNINGS & WATTS, *supra* note 34, § 16; RESTATEMENT, *supra* note 21, § 103(2)(d) & r.2; SIMMA ET AL. ED., *supra* note 44, at 461-506, 525-66, 1069-85, 1119-60, 1272-1329; ANDREAS ZIMMERMANN ET AL. EDS., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 119-33 (2d ed. 2012); Robin R. Churchill, *Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea*, 84 INT’L L. STUDY SER. U.S. NAVAL WAR COLL. 143, 146-48 (2008) (analysis in context of UNCLOS, *supra* note 1, noting division of authorities).

62. W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT’L L. 83, 87 (1993) (principles flowing from Council decisions pursuant to U.N. Charter arts. 25, 48, 103 are treaty law binding U.N. Members and override other treaty obligations).

63. See W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57, 72-73 (2007-08) (citing Uniting For Peace Resolution, G.A. Res. 377, ¶ 1, U.N. Doc. A/1775 (Nov. 3, 1950) – employed during the Korean War to continue U.N. operations); Legal Consequences of Construction of a Wall in Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136, 148-51 (July 9); Certain Expenses of the United Nations, Advisory Opinion, 1952 I.C.J. 151, 163-71 (July 20). By parity of reasoning, an otherwise nonbinding Council resolution, e.g., a call for action, could evolve into a customary norm through State practice and acceptance of its standards as law.

64. This includes International Court of Justice [hereinafter ICJ] judgments. While I.C.J. Statute art. 59 declares the Court’s judgments lack precedential weight, U.N. Charter art. 94 authorizes the Security Council to issue a “decision,” upon a winning State’s petition, against a noncomplying State, in a case before the Court. See also GOODRICH ET AL., *supra* note 44, at 555-56; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 44, at 1959-66; ZIMMERMANN ET AL. EDS., *supra* note 61, at 1416-46. This possibility of a Council decision does not raise the judgment to precedent status, but it is a powerful message to litigants before the Court. See also *Medellin v. Texas*, 552 U.S. 491, 511-12 (2008) for the Supreme Court view on ICJ decisions’ status in U.S. law.

65. UNCLOS, *supra* note 1, arts. 286-99 (establishing procedures for binding decisions to resolve disputes, including resort to the International Court of Justice); see also CHURCHILL & LOWE, *supra* note 15, ch. 19; 5 COMMENTARY, *supra* note 43, ¶¶ 286.1-299.5; ROTHWELL & STEPHENS, *supra* note 8, at 445-59.

to the Security Council for a binding “decision.”<sup>66</sup> A second message for the future is that a new governance mechanism for space, on the order of a U.N. specialized agency with broad rule or lawmaking authority, might include rule or lawmaking authority by a representative body through its constitutive treaty<sup>67</sup> or a separate agreement.<sup>68</sup> Should space law follow one of these routes? Or should space law chart a different course entirely?

#### IV. OTHER FACTORS

The reality, sometimes painful, is that we live in an interconnected world. We are in a world of new States, with maybe more on the way.<sup>69</sup> Wars are as ever with us, but today they are more often non-international in nature.<sup>70</sup> Non-state actors, e.g., terrorists, pirates and criminal gangs, are more virulent. Non-governmental organizations have proliferated, sometimes with conflicting messages on international law, a few of which are just plain wrong. We are in a time of instant communication by more people than ever before, courtesy of the Internet. We are also in an era of “lawfare,”<sup>71</sup> where views on law (some of it inaccurate and

---

66. U.N. Charter arts. 94(1), 103; *see also supra* note 60 and accompanying text. (A two-tier process would be necessary if the International Tribunal for the Law of the Sea issues a decision that the losing State rejects. Then a winning State could institute new litigation in the ICJ to compel compliance if the Court has jurisdiction. After success in the ICJ, the judgment winner could invoke Articles 94(1) and 103 for a Council decision.)

67. E.g., new mandatory health standards through the World Health Organization. WORLD HEALTH ORGANIZATION, CONST. arts. 10, 19, 21-22, 24-37, 59-60, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185.

68. E.g., safety standards amendments through the alternative tacit acceptance procedure for the International Convention for the Safety of Life at Sea, art. 8, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2, within the IMO, the U.N. specialized agency for many maritime matters. *See generally* Convention on the Intergovernmental Maritime Consultative Organization, Mar. 6, 1948, *supra* note 35, *amended by* Amendments to the Convention on the Intergovernmental Maritime Consultative Organization of March 6, 1948, Nov. 14, 1975, *supra* note 37; UNCLOS, *supra* note 1, has a similar model for Area governance. *Id.* arts. 156-91, i.e., within the constitutive document that also recites standards for States’ parties; *see also* CHURCHILL & LOWE, *supra* note 15, at 239-53; 6 COMMENTARY, *supra* note 31, ¶¶ 156.1-191.7(b).

69. For example, South Sudan’s 2011 recognition as an independent State. The prospect of this may be greater today than when I wrote *Integration*, *supra* note 53, as the Cold War ended.

70. *See generally* ANN HIRONAKA, NEVERENDING WARS: THE INTERNATIONAL COMMUNITY, WEAK STATES, AND THE PERPETUATION OF CIVIL WAR (2005).

71. Charles Dunlap, *Legal Issues in Coalition Warfare: A US Perspective*, 82 INT’L LAW STUDIES 222, 227 (2006).



often spread through open, accessible media like the Internet) can shape national and international decision-making.<sup>72</sup>

## V. CONCLUSIONS

These thoughts may range far afield, or perhaps far at sea or far into deep space as more appropriate phrases for discussion and analysis, but I submit them for further consideration. However, as James Russell Lowell, a poet, lawyer, diplomat and ardent abolitionist, wrote in *The Present Crisis* over a century ago, “new occasions teach new duties; new truth makes ancient good uncouth.”<sup>73</sup> It may be that models from the developing law of the sea will be useful in shaping the developing law of outer space; the reverse may be true, too.<sup>74</sup> On the other hand, as Lowell advocated in *The Present Crisis* over a century and a half ago, perhaps it is the occasion for development of new duties and rules. Might some of the old rules and concepts, and maybe some of the new ones, supply principles and ultimately the law for cyberspace?

---

72. The first of Woodrow Wilson’s *Fourteen Points*, *supra* note 13, declared: “[o]pen covenants of peace, openly arrived at. . . .” The result was Covenant of the League of Nations art.18, requiring treaty registration with the League, not always obeyed and which was not binding on countries that were not League members, e.g. the United States. The Paris Peace Conference that included the League in its peace treaties was itself a confidential meeting in part. *See generally* MARGARET MACMILLAN, *PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD* (2002). There was further retrenchment on publicly available treaties after World War II; U.N. Charter art. 102 only requires their publication if they are cited within the United Nations. *See also* GOODRICH ET AL., *supra* note 44, at 610-14; *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 44, at 2089-2109. National security considerations may keep a treaty in classified files, perhaps never to be in print or other public access source. *RESTATEMENT*, *supra* note 21, § 312 reporter’s n.5.

73. JAMES RUSSELL LOWELL, *The Present Crisis*, in 1 JAMES RUSSELL LOWELL, *POETICAL WORKS* 185, 190 (1890).

74. E.g., the “peaceful purposes” principle, first found in the Antarctic Treaty, *supra* note 3, establishing sea and land standards for that continent, next appeared in treaties for outer space and later still in UNCLOS, *supra* note 1. *See supra* notes 24, 30 and accompanying text.