

VII

Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution

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Introduction

Since 1990 the UN Security Council has adopted a number of resolutions calling on UN members to take various kinds of action that have the potential, depending on how those resolutions are interpreted, to interfere with States' navigational rights under the 1982 United Nations Convention on the Law of the Sea (1982 LOS Convention).¹ These resolutions, virtually all of which were explicitly adopted under Chapter VII of the UN Charter, fall into a number of different categories.

A first category is resolutions providing for the enforcement of sanctions imposed under Article 41 of the Charter. They include Resolution 221 (1966)² (paragraph 5 of which calls on the British government "to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia"); Resolution 665 (1990)³ (paragraph 1 of which calls on those UN Member States deploying maritime forces in the Persian Gulf to "use

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such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation” of the economic sanctions imposed on Iraq); Resolutions 787 (1992)⁴ (paragraph 12 of which contains similar provisions in respect to the former Yugoslavia) and 820 (1993)⁵ (paragraphs 28 and 29 of which “prohibit all commercial maritime traffic from entering the territorial sea” of the Federal Republic of Yugoslavia and authorize States to “use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to enforce” this prohibition); Resolutions 875 (1993)⁶ and 917 (1994)⁷ (of which paragraphs 1 and 10, respectively, contain provisions in respect to Haiti similar to those in Resolutions 665 and 787); and Resolution 1132 (1997)⁸ (paragraph 8 of which contains similar provisions as regards Sierra Leone).⁹

A second category of Security Council resolutions that have the potential to interfere with States’ navigational rights relates to the prevention of trafficking in weapons of mass destruction (WMD). Such resolutions include Resolution 1540 (2004)¹⁰ (paragraphs 3(c) and 10 of which call on all States to develop effective border controls to prevent illicit trafficking in WMD and to take cooperative action to prevent such trafficking “consistent with international law”) and Resolution 1718 (2006)¹¹ (in paragraph 8(f) of which the Security Council “decides” that in order to prevent trafficking in WMD with North Korea, all UN Member States should take, “consistent with international law, cooperative action including through inspection of cargo to and from” North Korea).

A third, and related, category concerns resolutions to prevent the transfer of certain materials to particular States. Examples include Resolution 1695 (2006)¹² (paragraph 3 of which “requires all Member States . . . consistent with international law to . . . prevent missile and missile-related items, materials, goods and technology from being transferred” to North Korea) and Resolution 1696 (2006)¹³ (paragraph 5 of which contains similar provisions in respect to Iran). Unlike the resolutions in the first category, the resolutions in the second and third categories do not explicitly refer to action being taken against shipping at sea. Nevertheless their wording seems broad enough to encompass such action, although in the case of Resolution 1540 its drafting history suggests otherwise.¹⁴

A fourth category of Security Council resolutions that have the potential to interfere with 1982 LOS Convention navigational rights relates to the prevention of terrorism. The main example of such resolutions is Resolution 1373 (2001),¹⁵ paragraph 2(b) of which “decides” that all States shall “take the necessary steps to prevent the commission of terrorist acts.” There seems to be no reason why such steps could not include action against ships while at sea.

Last and certainly very far from least is the well-known set of Security Council resolutions authorizing States to “use all necessary means” (in other words, force) to achieve a particular goal, including Resolutions 678 (1990)¹⁶ (relating to Iraq), 794 (1992)¹⁷ (Somalia), 940 (1994)¹⁸ (Haiti) and 1264 (1999)¹⁹ (East Timor). There seems no reason why “necessary means” could not cover the use of force directed at ships at sea in addition to the use of force on land and in the air, which are both clearly covered.

This article will attempt to answer three questions arising from the above resolutions and from possible future Security Council resolutions that could interfere with navigational rights enshrined in the 1982 LOS Convention:

1. Is there in fact, or is it likely that there could be, a conflict between such UN Security Council resolutions, however interpreted, and provisions of the 1982 LOS Convention concerned with navigational rights?
2. If so, are such conflicts resolved by either the UN Charter or the Convention?
3. Would a dispute settlement body acting under Part XV of the Convention have the competence to consider and rule on the above two questions, as well as the competence to interpret relevant UN Security Council resolutions? Given the breadth and generality of some of the provisions of the resolutions quoted above, it may be essential for a 1982 LOS Convention dispute settlement body to interpret these provisions if it is going to be able to answer questions 1 and 2.²⁰

Before answering these three questions, it is necessary to establish the legal nature of UN Security Council resolutions, in particular whether they are legally binding. Article 25 of the UN Charter provides that UN members “agree to accept and carry out the decisions of the Security Council.” It is clear, therefore, that “decisions” of the Security Council are binding on UN members. *A contrario*, any act adopted by the Security Council that is not a “decision” is not legally binding. This raises the question as to what acts adopted by the Security Council constitute “decisions” within the meaning of Article 25. The answer to this question depends primarily on the Charter provision under which an act is adopted and on its wording.²¹ Measures adopted under Chapter VI, other than decisions to carry out an investigation under Article 34, are not “decisions” within the meaning of Article 25.²² On the other hand, measures adopted by the Security Council under Chapter VII are “decisions” if it is clear from their wording that they are intended to be legally binding.²³ If the language used by the Council is to “decide” that something is to be done, that is clearly intended to be legally binding and is thus a “decision”

within the meaning of Article 25. The same is true if the Council “requires” or “demands” that States do something. On the other hand, if the Council “encourages” or “invites” States to do something, that appears intended not to be legally binding but more in the nature of a recommendation and thus not a “decision” within the meaning of Article 25. Some terminology is ambiguous. If the Security Council “calls upon” or “requests” States to do something, it is not always clear simply from its wording whether this is a “decision” or not. At least one writer has suggested that “calls upon” is not a decision but is of the nature of a recommendation.²⁴ However, this expression was used in the operative parts of Resolutions 665, 787 and 875, where the Security Council called upon States to enforce the sanctions that it had imposed on Iraq, the Federal Republic of Yugoslavia and Haiti, respectively, and was clearly regarded both by States and by writers as being intended to be legally binding.

Question 1. Is It Likely or Possible That There Is or Could Be a Conflict between a UN Security Council Resolution and the 1982 LOS Convention?

It is clear at the outset that there cannot be a conflict in the true sense—a conflict of norms—where there is incompatibility between a legally binding act (such as a treaty provision) and a non-legally binding act. Thus, there is no conflict where there is incompatibility between any act of the UN Security Council that is not a “decision” within the meaning of Article 25 of the UN Charter and the 1982 LOS Convention. Only where the Security Council resolution is a “decision” can there be, at least potentially, a conflict with the Convention. However, some such potential conflicts are avoided because of provisions either in the resolution or in the Convention.

In the case of a Security Council resolution, it may authorize or call on UN members to take action “consistent with international law” (for example, Resolution 1540 (2004),²⁵ paragraphs 3 and 10 (on the prevention of trafficking in WMD), and Resolution 1695 (2006),²⁶ paragraph 3 (concerning the transfer of missiles and related items to North Korea)). Clearly “international law” in this context includes the 1982 LOS Convention. This means that action taken by UN members under these resolutions must be consistent with the Convention and so no question of conflict will arise.

Turning now to the 1982 LOS Convention, several of its provisions stipulate that navigational rights are subject to other provisions of international law. Thus, Article 92 provides that while ships on the high seas are in principle under the exclusive jurisdiction of the flag State, this is subject to exceptions “expressly provided for in international treaties.” Likewise, Article 110, in setting out the limited

circumstances in which a warship may stop and board a foreign ship on the high seas, prefaces this with the words “except where acts of interference derive from powers conferred by treaty.” “International treaties” in Article 92 and “treaties” in Article 110 appear to include the UN Charter, as well as legally binding acts adopted thereunder, such as a Security Council resolution under Chapter VII.²⁷ Thus interference by a warship of one State with a ship of another State on the high seas (or in the exclusive economic zone (EEZ)²⁸) pursuant to a Security Council decision under Chapter VII of the UN Charter will not be in conflict with the Convention.²⁹

In other situations of interference with navigational rights set forth in the 1982 LOS Convention, the position may not be so clear. Suppose, for example, that a warship of State A, purportedly acting pursuant to a Security Council resolution adopted under Chapter VII of the Charter, intercepts a ship registered in State B that is exercising its right of innocent passage through State C’s territorial sea. On the face of it, the warship’s action would violate both the right of innocent passage of State B’s ship and State C’s sovereignty over its territorial sea. Under Article 2(3) of the Convention, a State exercises sovereignty over its territorial sea “subject to this convention and to other rules of international law.” Under Article 19(1) a ship’s right of innocent passage is to “take place in conformity with this convention and other rules of international law.” In each case, the “rules of international law” presumably include the Charter and legally binding acts adopted thereunder.³⁰ In the scenario just outlined, the warship of State A, and the Security Council resolution under which it is acting, would not appear to breach the Convention as far as the interference with State C’s sovereignty over its territorial sea is concerned, since such sovereignty is “subject to” other rules of international law.³¹ The interference with State B’s ship may be different, however. Article 19(1) does not say that the right of innocent passage is “subject to” the rules of international law, but that innocent passage is to take place “in conformity with” other rules of international law. Both its wording and its context suggest that this provision is directed to the way in which a ship exercises its right of innocent passage, and could not therefore cover the acts of the warship of State A. Unless one can argue that passage in conformity with the rules of international law includes the notion that a ship in innocent passage is required to allow itself to be interfered with by a warship of a State other than the coastal State when that warship is acting under a binding Security Council resolution—and this may be a sustainable argument—there would be a conflict between the Convention and the resolution in the scenario above. There would seem to be even more likelihood of a conflict in the case of interference by a foreign warship with a ship exercising a right of transit passage through an international strait because the provisions of the Convention dealing with transit passage

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do not contain any reference to such passage having to be in conformity with international law.

In practice so far there has actually been relatively little potential for conflict between Security Council resolutions and the 1982 LOS Convention, either because particular resolutions are not legally binding or because the wording of the resolution or the provision of the Convention at issue avoids conflict by making one subject to the other. Depending on how one interprets the reference to the “rules of international law” in Article 19(1) of the 1982 LOS Convention, any actual conflicts between navigational rights in the Convention and Security Council resolutions that may exist have largely been in the context of Security Council Resolution 820, which prohibited all commercial shipping from entering the territorial sea of the Federal Republic of Yugoslavia.

Question 2. Are Conflicts between a Security Council Resolution and the 1982 LOS Convention Resolved by Either the UN Charter or the Convention?

Where a conflict between a Security Council resolution and the 1982 LOS Convention does arise, how is it to be resolved? Does either the UN Charter or the Convention provide for its resolution? In the case of the Charter, Article 103 provides that “in the event of a conflict between the obligations of the members of the UN under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Thus, the Charter prevails over any treaty that is in conflict with it, whether that treaty was concluded before or after the Charter came into force.³² The phrase “obligations under the present Charter” in Article 103 includes binding decisions adopted by UN bodies under the Charter, such as decisions adopted by the Security Council under Chapter VII.³³ Thus, the latter will prevail over any conflicting treaty provisions.³⁴ The consequence of Article 103, therefore, is that Security Council resolutions that are legally binding will prevail over any conflicting provisions of the 1982 LOS Convention.

Although that appears to resolve the matter, for the sake of completeness one should also consider what (if anything) the 1982 LOS Convention has to say about the issue. Article 311 of the Convention addresses possible conflicts between the Convention and a range of other treaties. The latter do not explicitly include the Charter. Two provisions of Article 311 are potentially relevant to the relationship of the Charter (and Security Council resolutions) to the Convention. First, paragraph 2 provides that the Convention “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the

performance of their obligations under this Convention.” Obviously, the Charter as such is compatible with the 1982 LOS Convention, but it is also clear that Security Council resolutions adopted under it have the potential to, and on occasions actually do, affect the enjoyment of States’ rights under the Convention. This might suggest that in such a situation the Convention would prevail over the resolution in question. However, this is negated by Article 103 of the Charter, which clearly must have priority in this situation since there was no intention on the part of the drafters of the 1982 LOS Convention to try to override or negate Article 103 of the Charter.³⁵ In any case, any apparent conflict between Article 311(2) of the Convention and Article 103 of the Charter will in practice on many occasions be avoided as a result of paragraph 5 of Article 311, which provides that Article 311 (including paragraph 2) “does not affect international agreements expressly permitted or preserved by other articles of this Convention.” It was suggested earlier that the various references to “treaties” and “international law” found in such provisions of the Convention as Articles 2(3), 19(1), 92 and 110 include the Charter and Security Council resolutions adopted thereunder. It can therefore be argued that the Charter and Security Council resolutions are permitted or preserved by the articles in question and therefore that they are not affected by the 1982 LOS Convention.

Question 3. Would a Dispute Settlement Body Acting under Part XV of the 1982 LOS Convention Have the Competence to Consider and Rule on Questions 1 and 2 Above?

Rather than try to answer this question in the abstract, an easier way is to consider what might happen in a hypothetical dispute. Suppose a warship of State A, purportedly acting pursuant to a Security Council resolution, stops a merchant vessel registered in State B that is exercising a right of innocent passage through the territorial sea of State C, boards it and searches it for WMD. State B then brings a case against State A before a 1982 LOS Convention dispute settlement body arguing that State A has breached its vessel’s right of innocent passage under the Convention. State A’s defense is that its actions are justified because the reference to “rules of international law” in Article 19(1) of the Convention requires State B’s vessel to be subject to searches under the Security Council resolution (compare the discussion on this point above); but if this is not the case, the actions of its warship pursuant to the resolution trump the right of innocent passage of State B’s ship by virtue of Article 103 of the Charter. Suppose that the 1982 LOS Convention dispute settlement body rejects State A’s first argument. Can it consider its alternative defense or is this beyond its jurisdiction? At first sight, the latter might indeed appear to be

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the case since Article 288(1) of the Convention limits the jurisdiction of a dispute settlement body to “any dispute concerning the interpretation and application of this Convention.” A dispute settlement body under the Convention does not, therefore, have jurisdiction to hear disputes involving other treaties, such as the UN Charter and acts done pursuant to it. However, there are a number of arguments to suggest that this is an oversimplified approach to Article 288(1) and that the 1982 LOS Convention dispute settlement body could indeed consider State A’s alternative defense.

Even though the question before the dispute settlement body is whether the acts of State A that have interfered with State B’s rights under the 1982 LOS Convention are overridden by the Security Council resolution, the dispute arguably remains one related to the “application” of the Convention, namely, the alleged breach of its provisions on innocent passage. Article 293 of the Convention, dealing with applicable law, provides that a dispute settlement body having jurisdiction under Article 288(1) “shall apply this Convention and other rules of international law not incompatible with the Convention.” This provision would allow the dispute settlement body to consider the Security Council resolution since the phrase “other rules of international law not incompatible with the Convention” must include the UN Charter and legally binding acts adopted thereunder. Support for this position can be found in the judgment of the International Tribunal for the Law of the Sea in the *M/V Saiga (No. 2)* case, where, on the basis of Article 293, the Tribunal invoked the customary international law rules governing the degree of permissible force that may be used to arrest ships, to find that Guinea’s breach of the 1982 LOS Convention in illegally arresting the *Saiga* was compounded by its excessive use of force.³⁶ The Tribunal also suggested that had the necessary conditions for its application been fulfilled (which they were not), Guinea might have been able to rely on the general international law of necessity to justify its breach of the Convention.³⁷

A second argument to support the competence of a dispute settlement body, acting pursuant to the 1982 LOS Convention, to consider State A’s alternative defense relates to Article 298(1) of the Convention. The latter provides that a State party may at any time make a declaration excepting from compulsory dispute settlement any dispute to which it is a party concerning military activities, law enforcement activities relating to its rights in the EEZ or disputes in respect to which the UN Security Council “is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.” Since this is an optional exception to the jurisdiction of a 1982 LOS Convention dispute settlement body, it presupposes that some disputes involving

action taken by the Security Council may come before a Convention dispute settlement body.³⁸

A third argument is a policy one. If in the hypothetical dispute outlined above, the dispute settlement body could not consider State A's argument based on the superiority of the Security Council resolution over provisions of the 1982 LOS Convention, this would lead to the fragmentation of the dispute, with this point having to be dealt with (if at all) under some other dispute settlement mechanism. It is desirable on grounds of judicial economy not to fragment disputes if this can reasonably be avoided. Furthermore, if the argument about the superiority of a Security Council resolution over a Convention provision were not dealt with by another body, considerable injustice might be caused, because State A might be found to have violated the Convention without its perfectly plausible defense based on the superiority of the resolution being considered at all. Some support for the policy argument put forward here can be found in remarks made by the President of the International Tribunal for the Law of the Sea, Judge Wolfrum, in addresses to the UN General Assembly and before an Informal Meeting of Legal Advisers in 2006.³⁹ Judge Wolfrum argued, based on the deliberations of the Tribunal judges at their 2006 sessions on administrative and legal matters not connected with cases, that in a maritime boundary delimitation case the Tribunal had competence not only in respect to such delimitation but also in respect to associated disputed issues of delimitation over land and sovereignty over territory because of their close connection with the maritime delimitation. Although Judge Wolfrum did not use the expression "fragmentation of the dispute" explicitly, this position taken by the Tribunal judges seems to be based on a similar idea since President Wolfrum justified it in part on the basis of the "principle of effectiveness" which "enables the adjudicative body in question to truly fulfill its function."⁴⁰

A final argument to support the competence of a 1982 LOS Convention dispute settlement body to consider State A's defense based on the superiority of the Security Council resolution is the practice of some other international courts, in particular the European Court of Human Rights. That court's jurisdiction is limited by Article 32 of the European Convention on Human Rights to "all matters concerning the interpretation and application of the Convention." Nevertheless, in a recent case the court held that it was competent to consider whether certain actions taken under the aegis of the NATO-led Kosovo Force and the UN Mission in Kosovo amounted to breaches of the Convention.⁴¹ Although the Convention contains no provisions on applicable law, the court held that it could not interpret and apply the Convention "in a vacuum" but "must also take into account relevant rules of international law when examining questions concerning its jurisdiction."

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Such rules include the UN Charter and Security Council resolutions adopted under Chapter VII.⁴²

If the meaning of the Security Council resolution at issue in the above hypothetical dispute is clear, the matter is relatively straightforward. But if it is not (for example, if there is doubt as to whether the resolution is a decision within the meaning of Article 25 of the Charter or whether its terms authorize the search of foreign vessels in innocent passage), would the 1982 LOS Convention dispute settlement body have the competence to interpret the resolution? This is an important question because Security Council resolutions are often quite vague as to what action may be taken and where. Article 288(1) might suggest that a Convention dispute settlement body does not have the competence to interpret Security Council resolutions. However, there are arguments to the contrary. First, it would be illogical if a 1982 LOS Convention dispute settlement body could apply a Security Council resolution whose meaning was clear but was precluded from doing so if the meaning of the resolution was not wholly certain. In any case, the distinction between applying an apparently clear legal provision and interpreting a legal provision is not always clear-cut. Secondly, there is support for the proposition that the Convention dispute settlement body would have the competence to interpret the resolution at issue from analogous practice by the International Tribunal for the Law of the Sea. In the *Saiga No. 2* case the Tribunal had to discover and articulate the customary international law relating to the use of force in arresting ships, a not markedly different exercise from interpreting a written legal text.⁴³ Furthermore, other international courts whose jurisdictions do not cover the interpretation and application of the UN Charter and acts adopted thereunder have considered themselves competent to interpret Security Council resolutions that are relevant to determining the outcome of the case before them, e.g., the European Court of Human Rights in *Behrami v. France* and *Saramati v. France et al.*⁴⁴ Thirdly, to say that a 1982 LOS Convention dispute settlement body may not interpret a Security Council resolution would again lead to fragmentation of the dispute.

If there are concerns that the interpretation of Security Council resolutions should be left to the International Court of Justice, as the principal judicial organ of the United Nations, these concerns may be allayed by pointing out that the consequences of any interpretation of a Security Council resolution by a 1982 LOS Convention dispute settlement body are limited. Any interpretation would be binding only on the parties to the case, not on other UN members or on the UN Security Council itself.⁴⁵

However, it would be going too far to say that a 1982 LOS Convention dispute settlement body could rule on the legality of a Security Council resolution—this would clearly exceed its jurisdiction under Article 288(1). That this is so is

supported by the practice of other courts. Thus, the European Union's Court of First Instance has taken the position, based on Articles 25, 48 and 103 of the UN Charter, as well as European Union law, that it cannot review the lawfulness of Security Council resolutions, although, curiously perhaps, it has made a limited exception in the case of possible incompatibility of Security Council resolutions with *ius cogens*.⁴⁶ The European Court of Human Rights has implied that it lacks the jurisdiction to question the validity of Security Council resolutions as to do so would interfere with the effective functioning of the Council under Chapter VII of the UN Charter.⁴⁷ Thus, it would seem that if the dispute settlement body found that the interference by State A's warship with State B's vessel fell within the terms of a legally binding Security Council resolution adopted under Chapter VII, it would have to accept that the acts of the warship overrode State B's rights under the 1982 LOS Convention. To do otherwise would not only risk interfering with the activities of the Security Council under Chapter VII but also challenge Article 103 of the UN Charter. It needs to be asked, however, whether this would be the position if the Convention dispute settlement body were the International Court of Justice. Whether the Court may review the legality of Security Council resolutions is a hotly debated topic,⁴⁸ but one on which it is not necessary to take a view here. Even if the Court does have such competence in general terms, it would not appear to have it where its jurisdiction in a particular case was derived from the 1982 LOS Convention, as like every other Convention dispute settlement body, its jurisdiction is confined by Article 288(1) of the Convention to disputes "concerning the interpretation and application" of the Convention.

Finally, it may be noted that a 1982 LOS Convention dispute settlement body would not be able to hear the dispute if either State A or State B had made a declaration under Article 298 excepting from compulsory dispute settlement "disputes concerning military activities" and/or disputes in respect to which the Security Council was exercising its functions under the UN Charter, and such a declaration covered the dispute between States A and B. However, statistically the chances of this are slight, as only 19 of the 155 parties to the Convention have made such declarations. Furthermore, the exception in Article 298(1)(c) may be less far-reaching than it at first sight appears. Excepted under it are "*disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations*" (emphasis added). In the scenario being discussed here, the exception will not apply unless there is actually a dispute between States A and B with which the Security Council is dealing. If State A is merely purportedly acting under a Security Council resolution (as is posited in the scenario here), the exception will not apply (though of course the military activities exception may).

Conclusions

The aim of this article was to consider three questions. As far as the first question is concerned, whether there are in fact or are likely to be conflicts between UN Security Council resolutions and the 1982 LOS Convention (in particular, the latter's provisions dealing with navigational rights), the answer is that in most cases a conflict is or would be avoided either because of the language of the Security Council resolution (if it states that action to be taken under it should be consistent with international law) or because the situation is one where the Convention provides for the possibility of interference with shipping pursuant to Security Council resolutions. The latter is particularly the case in respect to interferences with foreign merchant shipping by warships on the high seas or in the EEZ. The most likely situation where a conflict would arise would be where there was interference with a ship while in the territorial sea by a State, other than the flag or coastal State, purportedly acting under a Security Council resolution. Where such a conflict did arise (turning to the second question), it follows from Article 103 of the UN Charter that the conflict would be resolved by the UN Security Council resolution taking priority over the Convention. The third question was whether a 1982 LOS Convention dispute settlement body would have the competence to decide a dispute involving an alleged conflict between the Convention and a UN Security Council resolution. It was argued that notwithstanding Article 288(1) of the Convention, which limits the jurisdiction of a Convention dispute settlement body to disputes "concerning the interpretation and application" of the Convention, such a body would have the competence to rule on an alleged conflict between the Convention and a UN Security Council resolution. This follows from the provisions of the Convention on applicable law, from the fact that exceptions to the jurisdiction of Convention dispute settlement bodies for disputes involving military matters or the Security Council are optional, and in order to avoid fragmentation of the dispute. For similar reasons, a 1982 LOS Convention dispute settlement body would also be competent to interpret a Security Council resolution but it could not question its validity. Support for the position put forward here is provided by the practice of other international courts.

Notes

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf [hereinafter 1982 LOS Convention]. These rights set forth in the Convention are those of innocent passage (arts. 17–32), transit passage through international straits (arts. 37–44), and freedom of navigation through the exclusive economic zone (EEZ) and the high seas (arts. 58 and 87–110).

It is generally accepted that these rights also form part of customary international law and thus are enjoyed by non-parties to the Convention, such as the United States.

2. S.C. Res. 221, UN Doc. S/RES/221 (Apr. 9, 1966). The text of all Security Council resolutions referred to in this article can be found on the Council's website at <http://www.un.org/Docs/sc/>; then follow "Resolution" and year of resolution hyperlinks.

3. S.C. Res. 665, UN Doc. S/RES/665 (Aug. 18, 1990).

4. S.C. Res. 787, UN Doc. S/RES/787 (Nov. 16, 1992).

5. S.C. Res. 820, UN Doc. S/RES/820 (Apr. 12, 1993).

6. S.C. Res. 875, UN Doc. S/RES/875 (Oct. 16, 1993).

7. S.C. Res. 917, UN Doc. S/RES/917 (May 6, 1994).

8. S.C. Res. 1132, UN Doc. S/RES/1132 (Oct. 8, 1997).

9. For detailed discussion of these resolutions, see Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LOUISIANA LAW REVIEW 1191 (1992–93); Rob McLaughlin, *United Nations Mandated Naval Interdiction Operations in the Territorial Sea?*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 249 (2002); Alfred H. A. Soons, *Enforcing the Economic Embargo at Sea*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 307–24 (Vera Gowlland-Debbas ed., 2001).

10. S.C. Res. 1540, UN Doc. S/RES/1540 (Apr. 28, 2004).

11. S.C. Res. 1718, UN Doc. S/RES/1718 (Oct. 14, 2006).

12. S.C. Res. 1695, UN Doc. S/RES/1695 (July 15, 2006).

13. S.C. Res. 1696, UN Doc. S/RES/1696 (July 31, 2006).

14. During the drafting of Security Council Resolution 1540, China insisted that all references to "interdiction" should be removed from the text of the resolution. See Douglas Guilfoyle, *Interdicting Vessels to Enforce the Common Interest: Maritime Countermeasures and the Use of Force*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 69, 76–77 (2007).

15. S.C. Res. 1373, UN Doc. S/RES/1373 (Sept. 28, 2001).

16. S.C. Res. 678, UN Doc. S/RES/678 (Nov. 29, 1990).

17. S.C. Res. 794, UN Doc. S/RES/794 (Dec. 2, 1992).

18. S.C. Res. 940, UN Doc. S/RES/940 (July 31, 1994).

19. S.C. Res. 1264, UN Doc. S/RES/1264 (Sept. 15, 1999).

20. One might also ask whether other dispute settlement bodies (such as the International Court of Justice when not acting as a 1982 LOS Convention dispute settlement body) would have such competence, but such an inquiry falls outside the scope of this article. Note also that this article is concerned only with the possible *competence* of an LOS Convention dispute settlement body to interpret UN Security Council resolutions, not with *how* it would interpret such resolutions if it had the competence to do so.

21. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 457 (Bruno Simma ed., 2d ed. 2002).

22. *Id.*

23. *Id.*

24. Michael Byers, *Policing the High Sea: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526, 532 (2004).

25. *Supra* note 10.

26. *Supra* note 12.

27. This is assumed or implied by several writers, e.g., Byers, *supra* note 24, at 531 and Angelos Syrigos, *Developments on Interdiction of Vessels on the High Seas*, in UNRESOLVED ISSUES AND NEW CHALLENGES TO THE LAW OF THE SEA 149, 178 (Anastasia Strati, Maria Gavouneli & Nikolaos Skourtos eds., 2006). The authoritative six-volume UNITED NATIONS CONVENTION

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ON THE LAW OF THE SEA 1982: A COMMENTARY (Myron H. Nordquist, Shabtai Rosenne & Louis Sohn eds., 1985) [hereinafter Nordquist et al.] does not consider this issue.

28. Articles 92 and 110 of the 1982 LOS Convention apply in the EEZ by virtue of Article 58(2).

29. Although if a Security Council resolution calls for action taken by a warship to be “consistent with international law,” a warship will not be able to interfere with a foreign civilian ship unless the action taken is consistent with the explicit provisions of the 1982 LOS Convention permitting interference by warships with foreign merchant ships on the high seas (as opposed to action taken under other treaties referred to in Articles 92 and 110). If this were not so, there would be scope for a completely circular argument.

30. This is argued by McLaughlin, *supra* note 9, at 270.

31. This view is, however, implicitly rejected by Soons, who argues that measures under a Security Council resolution may only be taken in the territorial sea with the consent of the coastal State. See Soons, *supra* note 9, at 323. The opposite position is taken by McLaughlin, *supra* note 9, at 272–77.

32. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 21, at 1297–98.

33. *Id.* at 1295–96.

34. *Id.* at 1295–96 and 1300. See also Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.) (Provisional Measures), 1992 ICJ REP. 3, para. 39 (Apr. 14), available at <http://www.icj-cij.org/docket/files/89/7213.pdf>.

35. Compare Article 30 of the Vienna Convention on the Law of Treaties and the International Law Commission’s commentary on its draft treaty article that eventually became Article 30 in II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 214–16 (1966).

36. M/V Saiga (No. 2) (St. Vincent v. Guinea), 120 I.L.R. 143, paras. 155–59 (Int’ Trib. L. of the Sea 1999), 38 INTERNATIONAL LEGAL MATERIALS 1323 (1999), available at http://www.itlos.org/start2_en.html (then Proceedings and Judgments, then List of Cases).

37. *Id.*, paras. 132–35.

38. But compare Nordquist et al., *supra* note 27, Vol. V, at 138, which argues that the purpose of the exception in Article 298(1)(c) is to prevent a conflict between any dispute settlement proceedings under the 1982 LOS Convention and any action the Security Council is taking to maintain international peace and security. However, with great respect to the learned editors, this argument does not appear to be correct. The point they make would only hold true if Article 298(1)(c) were a general exception, not an optional exception.

39. Rüdiger Wolfrum, President, International Tribunal for the Law of the Sea, Statement to the General Assembly of the United Nations paras. 5–8 (Dec. 8, 2006), http://www.itlos.org/start2_en.html (then follow “News” hyperlink; then follow “Statements of the President” hyperlink). See also Rüdiger Wolfrum, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs 3–7 (Oct. 23, 2006), available at *id.*

40. Statement by President Wolfrum to the General Assembly, *supra* note 39, para. 7.

41. Decision on admissibility of the Grand Chamber of the European Court of Human Rights in *Behrami v. France and Saramati v. France et al.* para. 122 (May 31, 2007), available at [http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62605&sessionId=10475686&skin=](http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62605&sessionId=10475686&skin=hudoc-en&attachment=true)

42. *Id.*

43. *Supra* note 36, para. 156.

44. *Supra* note 41, paras. 123–43. However, the Court did say that it was “not its role to seek to define *authoritatively* the meaning of provisions of the UN Charter and other international instruments” (para. 122, emphasis added).

45. See 1982 LOS Convention, *supra* note 1, art. 296(2). Concerns should also be allayed by the approach of the European Court of Human Rights outlined in the previous note, where the Court stressed that it was not giving an authoritative interpretation.

46. See Case no. T-306/1, Yusuf v. Council and Commission, [2005] II-E.C.R. 3533, paras. 272–77. The Court has maintained this position in later cases: see, e.g., Case T-315/01, Kadi v. Council, [2005] II-E.C.R. 33649, paras. 217–31 and Case T-253/02, Ayadi v. Council, [2006] II-E.C.R. 2139, para. 116. *Kadi* has been appealed from the Court of First Instance to the Court of Justice (as Case C-402/05). As of September 20, 2007 the Court had not given its judgment. In none of the cases did the Court of First Instance find any breach of the rules of *ius cogens*.

47. *Behrami v. France and Saramati v. France et al.*, *supra* note 41, para. 149.

48. See, e.g., Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 309 (1997); Vera Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 643 (1994); Geoffrey R. Watson, *Constitutionalism, Judicial Review and the World Court*, 34 HARVARD INTERNATIONAL LAW JOURNAL 1 (1993).