

UN SECURITY COUNCIL RESOLUTION OF INTERNATIONAL WATER DISPUTES

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ABSTRACT

This Article is the first to identify and analyze the various ways that the UN Security Council has attempted to resolve international water disputes through its ability to create binding obligations on states. These obligations tend to diverge from what international water law provides, thereby creating tension between the UN regime and the treaty regime. The Security Council might want to be more careful before interfering with the freedom to navigate international watercourses in the future, inasmuch as that freedom represents the cornerstone of international water law. With international water disputes on the rise, the Security Council should find ways to bolster this important area of public international law, not undermine it.

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I. INTRODUCTION

American author and humorist Mark Twain purportedly quipped, “Whiskey is for drinking; water is for fighting over.”¹ Commentators wildly disagree over whether international water disputes lead to actual armed conflict on the international level. Aaron Wolf occupies one extreme, with his assertion that the last international armed conflict over water occurred over 4,500 years ago, with the intervening millennia being more accurately characterized as international water cooperation.² The Pacific Institute occupies the other end of the spectrum, pointing to at least 166 instances of international armed conflict over water, with the most recent observed in 2018 when Turkey allegedly attacked water infrastructure in northern parts of Syria.³ The divergence in the perceived magnitude of the problem stems from the former looking for traditional wars over water, while the latter looks for any type of international violence over water, no matter how significant. Both seem to search for threats to international security deriving from water disputes, but they differ on how to define international security. This presumably is because “international security” defies scientific

1. Barbara Schmidt, *Whiskey*, TWAINQUOTES, www.twainquotes.com/WaterWhiskey.html (last visited Mar. 16, 2019).

2. See Aaron T. Wolf et al., *International Waters: Identifying Basins at Risk*, 5 WATER POL’Y 29, 30 (2003); Aaron T. Wolf, *A Long Term View of Water and International Security*, 142 J. CONTEMP. WATER RES. & EDU. 67, 68 (2009); Jesse H. Hamner & Aaron T. Wolf, *Patterns in International Water Resource Treaties: The Transboundary Freshwater Dispute Database*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 157, 157 (1998) (citing Aaron T. Wolf, “Water Wars” and Water Reality: Conflict and Cooperation Along International Waterways 9-10, Presentation at the North Atlantic Treaty Organisation (NATO) Advanced Research Workshop on Environmental Change, Adaptation and Human Security, Budapest, Hungary (Oct. 9, 1997) (unpublished manuscript) (on file with the author)).

3. See *Water Conflict Chronology List*, PAC. INST., www2.worldwater.org/conflict/list/ (last visited Mar. 16, 2019) (where the entry refers to violence between two or more states or state-like entities, including empires and city-states but excluding rebels and terrorism from non-state actors). This website is exceptional in its apparent comprehensiveness, and Peter Gleick and his colleagues at the Pacific Institute should be commended for their work. See also MARQ DE VILLIERS, *WATER WARS* (1999) (providing a more journalistic and activist viewpoint on water-related international armed conflict).

definition due to its inherent subjectivity, like fear or angst, as well as its multidimensionality.⁴ Surprisingly, no commentators before now have focused on U.N. Security Council Chapter VII resolutions relating to international water disputes. The Security Council represents the main international entity tasked with determining and responding to threats to international security,⁵ among other things, and so arguably provides a more reliable – although still unscientific – way to identify international water disputes that impact international security. As it has done with other types of disputes and in other situations, the Security Council has suspended treaty obligations and imposed alternative treaty-like obligations in international water law disputes in at least eight instances. This article describes those instances and explores their legal significance in relation to international water law. This analysis reveals that the Security Council has at times undermined international water law by giving priority to drinking water over other uses (whereas international water law does not prioritize any particular uses of water⁶) and by interfering with the freedom to navigate international watercourses, which is the oldest protection of international watercourses under international water law.⁷ While the former type of interference easily can be justified due to humanitarian considerations, the latter type significantly weakens the cornerstone of international water law. As the number of international water disputes arguably is on the rise,⁸ the Security Council should find ways of supporting international water law, as opposed to undermining it, in order to bring greater stability to regions of the world that face water-related tensions.

4. See, e.g., Rüdiger Wolfrum, *Article 1*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 107, 109-10 (Bruno Simma et al. eds., 3d ed., 2012) (noting the connection between international security and peace within the UN Charter, as well as the different kinds of peace); see also Nicholas Thomas & William T. Tow, *The Utility of Human Security: Sovereignty and Humanitarian Intervention*, 33 *SEC. DIALOGUE* 177 (2002) (exploring the connections between human-centered security and state-centered security).

5. See, e.g., U.N. Charter chs. V & VII; see also Troy Lavers, [Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom?, 71 *ALB. L. REV.* 299, 304-12 (2008) (discussing the Security Council's role in determining and responding to threats to international peace and security).

6. See sec. IV(B)(1), *infra*.

7. As Security Council involvement with international water disputes increases over time, presumably it will address other aspects of the international water law regime unless greater care is taken in the future.

8. See *Water Fights*, *ECONOMIST*, Mar. 2, 2019, at 8; *How Climate Change Can Fuel Wars*, *ECONOMIST*, May 25, 2019, at 58-60 (although speculating that many of those conflicts will involve civil wars).

This Article is divided into five parts, with this introduction and an equally brief conclusion comprising Parts I and V, respectively. Part II provides a review of the literature on international water law and disputes to assess the degree to which researchers already have identified the involvement of the Security Council, with the conclusion being that such coverage has been woefully inadequate. Part III provides a concise explanation of how certain Security Council decisions have the power to suspend treaty obligations and to impose alternative treaty-like obligations on member states in their place based on UN Charter articles 25 and 103, among others. Part IV provides the bulk of this article with its review and analysis of all Security Council resolutions to date that create binding obligations in the context of international water disputes.⁹ This Article is the first to catalogue and analyze the ways that the Security Council has imposed obligations on disputants when resolving international water disputes. While the limited number of examples frustrates efforts to determine correlation in a statistically significant manner, this article nevertheless suggests that the Security Council has been far more active in resolving international water disputes through the imposition of obligations than other researchers have been willing to acknowledge in the past.

Before proceeding with the analysis, two definitions and two disclaimers are crucial. First, commentators usually are not clear on what constitutes an international water dispute, even when their writings focus on such disputes.¹⁰ This Article defines “international water dispute” as any disagreement between two or more states over the law, facts or interests pertaining to any aspect of the international water-law regime, to the point of direct contention between these states that rises to the level of a potential threat to international peace and security.¹¹

9. This Article has included in its search and analysis all of the Security Council resolutions until Dec. 3, 2018.

10. See, e.g., Stephen C. McCaffrey, *Water Disputes Defined: Characteristics and Trends for Resolving Them*, in RESOLUTION OF INTERNATIONAL WATER DISPUTES 49, 49-53 (International Bureau of the Permanent Court of Arbitration ed. 2003) (preferring to focus on the legal definition of “dispute” instead of defining the contours of the international water-law regime itself); Salman M. A. Salman, *International Water Disputes: A New Breed of Claims, Claimants, and Settlement Institutions*, 31 WATER INT’L 2 (2006).

11. See *Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30); Robert Jennings, *Reflections on the Term “Dispute”*, in ESSAYS IN HONOUR OF WANG TIEYA 401, 402 (R. St. J. Macdonald ed., 1993) (arguing that this is obiter dicta because the PCIJ had jurisdiction over all disputes between the Mandatory and members of the League of Nations under article 26 of the Mandate for Palestine, not just legal disputes); NII LANTE WALLACE-BRUCE, *THE SETTLEMENT OF INTERNATIONAL DISPUTES: THE CONTRIBUTION OF AUSTRALIA AND NEW ZEALAND* 5 (1998).

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To be clear, a dispute's physical proximity to water – for example, along a state's river-based boundary – does not make it an international water dispute for the purposes of this Article.¹²

Second, when it comes to what constitutes international water law, one usually thinks of the following treaties and softer instruments (in chronological order):

- the International Law Association's Helsinki Rules on the Uses of the Waters of International Rivers of 1966 (1966 Helsinki Rules);
- the United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992;
- the United Nations Convention on the Law of Non-Navigational Uses of International Watercourses of 1997;
- the International Law Association's update of the 1966 Helsinki Rules, contained in the Berlin Rules on Water Resources of 2004; and
- the International Law Commission's Draft Articles on the Law of Transboundary Aquifers of 2008.

These legal instruments help codify the customary international law relating to international watercourses, which is the dominant source of law in this area.¹³ All of these rules and principles combine to regulate the navigational and non-navigational uses of the world's roughly 300 rivers, 100 lakes and countless aquifers that two or more states share.¹⁴ The authors of this Article have analyzed the content of international water law elsewhere,¹⁵ and the curious reader is encouraged to go there to learn more. Sections IV(A)(1) and (B)(1) below elaborate on the relevant parts of this regime when exploring how the Security Council's decisions impacted this regime.

Third, this Article focuses on the legal approach to international dispute settlement, inasmuch as it focuses on the rules and procedures for

12. *But see* Lucius Caflisch, *Judicial Means for Settling Water Disputes*, in RESOLUTION OF INTERNATIONAL WATER DISPUTES 235, 235 (International Bureau of the Permanent Court of Arbitration ed. 2003) (including border disputes along states' river boundaries as international water disputes, as well as institutional issues relating to rivers).

13. *See* Salman, *supra* note 10, at 2 (listing these facts about international watercourses).

14. *See id.*; KEN CONCA, GOVERNING WATER 93 (2006) (putting the number of international rivers and lakes at 263).

15. *See* James D. Fry & Agnes Chong, *International Water Law and China's Management of Its International Rivers*, 39 B.C. INT'L & COMP. L. REV. 227, 230-37 (2016).

resolving the disputes,¹⁶ not necessarily to bring about actual peace. From this admittedly normative perspective, the dispute ends when there is a negotiated settlement, when a court or tribunal renders a binding judgment or when the Security Council uses its binding decision-making powers under the UN Charter to determine the just result of a dispute.¹⁷ The assertion that this Article takes the “legal approach” to international dispute settlement is merely to juxtapose it with the international-relations approach to dispute resolution. Otherwise known as conflict prevention or conflict resolution, the international-relations approach focuses on the effectiveness of dispute resolution mechanisms and asks such questions as why disputants obey or disobey a particular Security Council resolution or judicial outcome,¹⁸ which is not the focus of this Article. Instead, the focus of this empirical study is to better understand the extent to which the Security Council actually has used its decision-making powers to resolve international water disputes, with the hope of promoting greater awareness of such involvement and broader studies on this topic in the future.

Finally, and related to the previous point, this Article recognizes that international disputes tend to be complicated and that a dispute might not revolve entirely around water-related matters. In studying international water disputes, this Article must adopt the notion of fragmentation or fractionation of international disputes, which allows for complex disputes such as water-related disputes to be broken into their constituent parts and handled separately as smaller disputes, which can help make progress resolving an otherwise overwhelming overarching dispute.¹⁹

The cases highlighted in this article suggest two tentative conclusions. First, in future international water disputes, the Security Council might use its extensive powers under UN Charter Chapter VII to modify the treaty-based right of freedom of navigation where a threat to international peace and security exists, as it has done in the past. Second, the Security Council might vary from international water law and give priority to certain water uses for humanitarian purposes where

16. See MARY ELLEN O'CONNELL, *INTERNATIONAL DISPUTE RESOLUTION* 5 (2006).

17. See Richard B. Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DIS. RESOL. 1, pt. VII (1986).

18. See O'CONNELL, *supra* note 16, at 5.

19. See ROGER FISHER, *INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE* 91-109 (1964); Sydney D. Bailey, *Peaceful Settlement of International Disputes*, in *DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS* 73, 97-98, 101 (K. Venkata Raman ed., 1977); see also Urs Luterbacher & Ellen Wiegandt, *Cooperation or Confrontation: Sustainable Water Use in an International Context*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* 15, 33 (Edith Brown Weiss et al. eds., 2005) (demonstrating the complexity of water-related disputes).

international water law provides for no such priorities of uses, as it also has done in the past. The small sample size here and the complexity of these types of situations frustrates any efforts to determine the likelihood of such a Security Council response in a statistically significant manner. Therefore, this Article is left to merely suggest how the Security Council might respond in future cases involving an international water dispute that impacts international peace and security based on its prior responses. As the following section shows, this is far more than what other researchers have done in the past.

II. PRIOR VIEWS ON INTERNATIONAL WATER DISPUTES

This Article is novel for multiple reasons, the greatest of which is the fact that it fills a significant gap in the literature. Surprisingly, with just seven relatively minor exceptions and three more significant exceptions, a comprehensive review of the literature on international water disputes specifically or international water law generally revealed that none of it mentions the *actual* role of the Security Council in resolving international water disputes. Instead, that body of literature prefers to focus on resolution by the International Court of Justice and arbitral tribunals, efforts at resolution by river basin commissions and other joint institutions, and mediation, among other dispute settlement mechanisms. In particular, a number of publications focused on the UN General Assembly, the UN International Law Commission and other UN-related entities in the context of developing international water law and handling international water disputes, but they consistently overlook the Security Council, even with a *potential* role in resolving international water disputes.²⁰ This section first mentions the minor exceptions and then moves on to the more significant exceptions.

20. See, e.g., Alistair Rieu-Clarke, *Determining Sovereign Rights and Duties over International Watercourses: The Contribution of the International Law Commission and the UN General Assembly*, in HISTORY OF WATER 149 (Terje Tvedt et al. eds. 2015); Surya P. Subedi, *Regulation of Shared Water Resources in International Law: The Challenge of Balancing Competing Demands*, in INTERNATIONAL WATERCOURSES LAW FOR THE 21ST CENTURY 7, 8-12 (Surya P. Subedi ed. 2005); Raya Marina Stephan & Gabriel de los Cobos, *State Sovereignty and Transboundary Aquifers*, in HISTORY OF WATER, supra note 20, at 297; Sylvie Paquerot, *Integration of the Right to Water in International Law: Circumventing and Bypassing State Sovereignty*, in HISTORY OF WATER, supra note 20, at 273; CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 33-35, 61-63 (2013); Catarina de Albuquerque, *Water and Sanitation are Human Rights: Why Does it Matter?*, in INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES, supra note 20, at 48, 54-56; Malin Falkenmar, *Fresh Waters as a Factor in Strategic Policy and Action*, in GLOBAL RESOURCES AND INTERNATIONAL CONFLICT 85, 104-08 (Arthur H. Westing ed. 1986); Stephen C. McCaffrey,

The first minor exception is a 1990 article that mentions “various appendages of the [sic] security council and the general assembly” as being oft cited by commentators as an avenue for resolving disputes, but it dismisses their helpfulness with the disputes relating to the Euphrates Basin as “too unwieldy for this region-specific dispute.”²¹ The second exception discusses Security Council resolution of disputes in the abstract without expressly connecting it to actual or even potential resolution of international water disputes.²² The third exception involves a 2015 article that makes an entirely normative argument that the Security Council *should* get involved with international water disputes, without ever recognizing that the Security Council *has* done exactly that on numerous occasions.²³ The fourth exception is a 1981 book that merely identifies that the Security Council *can* get involved with international water disputes through its powers from the U.N. Charter.²⁴

The next two exceptions are from the older literature reviewed, and they remarkably are the most advanced concerning the Security Council’s *potential* role with *actual* international water disputes. The first is a 1969 article that discusses Israel’s 1953 artillery attack of Syrian equipment that was intended to be used to divert the Jordan River, with the author wondering whether the Israeli attack had been brought before the Security Council, and then asserting that the Security

The Codification of Universal Norms: A Means to Promote Cooperation and Equity?, in INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES, *supra* note 20, at 125, 126-31; CONCA, *supra* note 14, at 133 (stating that there are more than 20 UN-affiliated entities with a mandate relating to freshwater, but not expressly including the Security Council); DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION 195-95 (2d ed. 2007) (listing numerous international organizations that adopt resolutions relating to international water law and water disputes, but not expressly including the Security Council); Peter H. Gleick, *Water and Conflict: Fresh Water Resources and International Security*, 18 INT’L SEC. 79, 84, 174 (1993); FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, SOURCES OF INTERNATIONAL WATER LAW 119-76 (1998) (reproducing the decisions of UN-affiliated entities that address international water law and disputes, but not providing any Security Council decisions); J.G. LAMMERS, POLLUTION OF INTERNATIONAL WATERCOURSES 333-38 (1984) (discussing United Nations efforts in this area without mentioning the Security Council).

21. Robert A. Hager, *The Euphrates Basin: In Search of a Legal Regime*, 3 GEO. INT’L ENVTL. L. REV. 207, 225 (1990).

22. See Richard K. Paisley & Alex Grzybowski, *Some Reflections on the Resolution of State-to-State Disputes in International Waters Governance Agreements*, 2011 INT’L J. RURAL L. & POL’Y 1, 5, 8 (2011), www.internationalwatersgovernance.com/ (last visited Mar. 16, 2019).

23. See Aaron Worthen, *Resolving International Water Disputes: Lessons from American and Canadian Federalism*, 11 B.Y.U. INT’L L. & MGMT. REV. 132, 132-34, 154-58 (2015).

24. See B. R. Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins* 368-72 (1981).

Council is “the proper organ of the UN to deal with” India’s building of a barrage on the Ganges River at Farakka, just eleven miles upstream from East Pakistan.²⁵ The second is a 1960 article that refers to this same incident between Syria and Israel, with the author adding that the Syrian delegate to the United Nations addressing the Security Council in 1953 emphasized the international water law principles that commonly bind both states when it comes to use of the Jordan River.²⁶ A 2012 article wonders what would have happened had Syria and Jordan presented their 1950s complaints about Israel’s activities relating to the Jordan River to the Security Council.²⁷

The first somewhat significant exception was in 1993, when Eugene Rostow discussed a U.S. initiative in 1966 entitled “Water for Peace” when the United States apparently tried to negotiate a Security Council resolution to address Israeli-Syrian tensions relating to paramilitary actions and water rights in the region, only to have the Soviet Union withhold its support for such a resolution at the last minute.²⁸ The second somewhat significant exception was in 1997, where Greg Shapland discussed Security Council Resolution 465 of 1980, which related to Israel’s West Bank and Gaza Strip settlements and Israel’s alleged depletion of water supplies there.²⁹ The third was in 2013, where Munther Haddadin recognized how Security Council Resolution 100 of 1953 “suspended the diversion” by Israel of water from the water-rich north of Israel to the water-poor south because it was “contrary to the provisions of the armistice.”³⁰ While these are the only mentions of the

25. Helmut R. Külz, *Further Water Disputes Between India and Pakistan*, 18 INT’L & COMP. L. Q. 720, 735-36 (1969).

26. See William W. Van Alstyne, *International Law and Interstate River Disputes*, 48 CAL. L. REV. 596, 610, 620 (1960).

27. See Yaser Khalailah, *Prospects for Cooperation and Dispute Over Water in the Middle East*, 5 BERK. J. MIDDLE E. & ISLAMIC L. 75, 116-17 (2012).

28. See Eugene V. Rostow, *The Drafting of Security Council Resolution 242: The Role of the Non-Regional Actors*, 25 N.Y.U. J. INT’L L. & POL. 489, 493 (1993).

29. See GREG SHAPLAND, *RIVERS OF DISCORD: INTERNATIONAL WATER DISPUTES IN THE MIDDLE EAST* 25 (1997) (discussing S.C. Res 465, UN Doc. S/RES/465 (Mar. 1, 1980)).

30. See Munther J. Haddadin, *The Jordan River Basin: A Conflict Like No Other*, in *WATER AND POST-CONFLICT PEACEBUILDING* 243, 246 (Erika Weinthal et al. eds., 2013). Somewhat strangely, Haddadin discussed the United Nations Truce Supervision Organization (UNTSO) on several occasions in the context of the Jordan River Basin, which was the first peace support operation established by the Security Council, without expressly mentioning the Security Council in that context. See *id.* at 244, 250-55 (using passive voice for the establishment of UNTSO); see also S.C. Res. 50, UN Doc. S/RES/50 (May 29, 1948) (no mention of water or rivers); UN DEP’T OF PUB. INFO., *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACEKEEPING* 8 (2d ed. 1990) (discussing the establishment of the first peace support operation).

Security Council being involved in trying to resolve an *actual* international water dispute, these resolutions are not included in part IV's analysis because Resolution 465's only mention of water comes in the form of a *request* to a Security Council commission to "investigate the reported serious depletion of natural resources, particularly the water resources, with a view to ensuring the protection of those important natural resources of the territories under occupation . . .,"³¹ and Resolution 100 merely "[d]eem[ed] it desirable . . . that the works started in the demilitarized zone . . . should be suspended during the urgent examination of the question by the Security Council[.]"³² None of this language imposes any water-related obligations on states, and neither does the language of any other resolutions relating to these water-related disputes.

The fourth exception was in 2016, when Mara Tignino identified the Security Council's involvement with navigational aspects along the Danube River during the Yugoslav Wars of the 1990s through its Resolutions 787 and 820.³³ However, the body of Tignino's text only mentioned non-binding provisions of these Security Council resolutions that lead with the signal "confirms," not with the binding signal "decides" or its equivalent. Admittedly, Tignino mentions the content of Security Council Resolution 992 in the body of her text, which she quotes in a footnote:

Decides that the use of the locks of the Iron Gates I system on the left hand bank of the Danube by vessels (a) registered in the Federal Republic of Yugoslavia (Serbia and Montenegro) or (b) in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be permitted in accordance with this resolution.³⁴

This language of Resolution 992 resembles that of Resolution 787, although without the reference to Iron Gates I system, as explained below. Resolution 992 appears to be somewhat unique among Security Council resolutions in that the Security Council actually *delayed* the resolution's entry into force until "the day following the receipt by the Council from the Committee established pursuant to resolution 724

31. S.C. Res. 465, ¶ 8 (Mar. 1, 1980).

32. S.C. Res. 100, ¶ 1 (Oct. 27, 1953).

33. See MARA TIGNINO, WATER DURING AND AFTER ARMED CONFLICTS 70-71 (2016).

34. S.C. Res. 992, ¶ 1 (May 11, 1995); TIGNINO, *supra* note 33, at 71.

(1991) of a report by the Danube Commission that they are satisfied that preparations for the repairs to the locks of the Iron Gates I system on the right hand bank of the Danube have been completed[.]”³⁵ No public record appears to exist of the Committee ever submitting such a report from the Danube Commission to the Security Council,³⁶ nor does such a report exist among the Danube Commission’s catalogue of documents.³⁷ Therefore, it is unlikely that Resolution 992 ever entered into force on account of this condition, which removes Resolution 992 as a valid example of where the Security Council attempted to resolve an international water dispute through its binding powers.

Any other references in the literature to the Security Council resolutions analyzed in part IV below have been made in passing, if at all, or in a context outside of international water disputes. The most obvious place for such a reference to the Security Council would have been in a handful of pieces that discuss the importance of promoting and sustaining international peace and security in the context of international water disputes, but which do not mention the Security Council in that context, even though it has the main role in maintaining international peace and security.³⁸ Alternatively, one might have expected such a

35. S.C. Res. 992, ¶ 1 (May 11, 1995). *See also* S.C. Res. 1022, ¶ 2 (Nov. 22, 1995) (“*Decides also that the suspension referred to in paragraph 1 above shall not apply to the measures imposed on the Bosnian Serb party until the day after the commander of the international force to be deployed in accordance with the Peace Agreement, on the basis of a report transmitted through the appropriate political authorities, informs the Council via the Secretary-General that all Bosnian Serb forces have withdrawn behind the zones of separation established in the Peace Agreement[.]*”).

36. *See* UN SECURITY COUNCIL PRACTICES AND CHARTER RESEARCH BRANCH, REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL 1993-1995 136 (1996), www.un.org/en/sc/repertoire/ (last visited Mar. 16, 2019).

37. *See* DANUBE COMMISSION, CATALOGUE OF PUBLICATIONS OF THE DANUBE COMMISSION (2017), www.danubecommission.org/uploads/doc/Katalog_2017/catalogue_en_2017.pdf (last visited Mar. 16, 2019).

38. *See, e.g.*, Patricia Wouters, “Dynamic Cooperation” – *The Evolution of Transboundary Water Cooperation*, in WATER AND THE LAW: TOWARDS SUSTAINABILITY 13, 14 (Michael Kidd et al. eds. 2014); Patricia Wouters & Ruby Moynihan, *Water Security – Legal Frameworks and the UN Watercourses Convention*, in THE UN WATERCOURSES CONVENTION IN FORCE 336 (Flavia Rocha Loures & Alistair Rieu-Clarke eds. 2013); Patricia Wouters et al., *Water Security, Hydrosolidarity and International Law: A River Runs Through It*, 19 Y.B. INT’L ENVTL. L. 97, 102 (2009); ANTOINETTE HILDERING, INTERNATIONAL LAW, SUSTAINABLE DEVELOPMENT AND WATER MANAGEMENT 61 (2004); BJORN-OLIVER MAGSIG, INTERNATIONAL WATER LAW AND THE QUEST FOR COMMON SECURITY 35-67 (2015) (discussing the water security discourse but not mentioning the Security Council); Alistair Rieu-Clarke & Flavia Rocha Loures, *An Institutional Structure to Support the Implementation Process*, in THE UN WATERCOURSES CONVENTION IN FORCE, *supra* note 38, at 263; Haddadin, *supra* note 30, at 243; Eyal Benvenisti, *The Role of Third Parties in Promoting Collective Action Among Riparians*, in

reference to the Security Council in publications that focus on water and international water law during and after times of crisis and hostilities, inasmuch as the Security Council has a main role in addressing threats to the peace, breaches of the peace and acts of aggression.³⁹ Regardless, all members of this epistemic community, with the extremely rare exceptions highlighted above, overlook the actual role of the Security Council with actual international water disputes. Aaron Wolf – a significant figure in this community – goes so far as to say that “[o]ne of the greatest gaps in international water dispute resolution is the lack of . . . a recognized authority” in resolving such disputes, although he surprisingly overlooks the Security Council, instead focusing on the U.N. International Law Commission, the U.N. General Assembly and the International Court of Justice (ICJ) as potential authorities before dismissing them all.⁴⁰ Patricia Wouters – another leader of this community – even asserts on at least two occasions that the Security Council has dismissed a possible role with promoting water security because it refused to see such environmental security matters as part of its mandate to maintain international peace and security.⁴¹ The examples provided in part IV below suggest otherwise. In short, this Article fills a significant gap in the literature.

III. BINDING SECURITY COUNCIL DECISIONS

The Security Council generally is not considered as a source of international water law. However, its coercive powers from the U.N. Charter make it a type of source of international water law. In particular,

RESOLUTION OF INTERNATIONAL WATER DISPUTES 201 (International Bureau of the Permanent Court of Arbitration ed. 2003) (discussing collective action with water disputes but not mentioning the Security Council); Natalia Ochoa-Ruiz, *Non-Navigational Uses of International Watercourses: Theory and Practice*, in WATER RESOURCES AND INTERNATIONAL WATER LAW 343, 348 (Hague Academy of International Law ed. 2005) (mentioning the importance of maintaining international peace and security when international water disputes arise).

39. See, e.g., TIGNINO, *supra* note 33 (except for pages 70-71); Mara Tignino, *Water in Times of Armed Conflict*, in RESOLUTION OF INTERNATIONAL WATER DISPUTES, *supra* note 38, at 319 (although mentioning in passing Security Council Resolution 687 and Iraqi liability for “environmental damage and depletion of natural resources . . .” on page 347, but water goes unmentioned there); Nikolai Jorgensen, *The Protection of Freshwater in Armed Conflict*, 3 J. INT’L L. & INT’L REL. 57 (2007).

40. Aaron T. Wolf, *Indigenous Approaches to Water Conflict Negotiations and Implications for International Waters*, 5 INT’L NEG. 357, 367 (2000). See also SARAH HENDRY, FRAMEWORKS FOR WATER LAW REFORM 2-3, 77 (2015) (recognizing the central role of the United Nations with international water policy, but not mentioning the Security Council).

41. See Patricia Wouters, *Addressing Water Security Challenges: The International Law ‘Duty to Cooperate’ as a Limit on Absolute State Sovereignty*, in HISTORY OF WATER, *supra* note 20, at 334, 334-35; Wouters, *supra* note 38, at 25.

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Security Council resolutions have the weight of law through the interaction of several provisions of the U.N. Charter. Article 25 is particularly important: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."⁴² Article 103 gives these decisions higher normative value than conflicting treaty obligations: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."⁴³ In light of these provisions, it is clear that the framers of the UN Charter intended for the Security Council to be able to bind member states, even by suspending existing treaty obligations and imposing treaty-like obligations in their place.⁴⁴

Chapter VII provides the types of enforcement measures that the Security Council can adopt to ensure compliance with its decisions:

Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.⁴⁵

42. U.N. Charter, art. 25. *See generally* Jost Delbrück, *Article 25*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 452 (Bruno Simma ed., 2002).

43. U.N. Charter, art. 103. *See generally* Rudolf Bernhardt, *Article 103*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 42, at 1292.

44. *See* DAVID SCHWEIGMAN, *THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE* 31-32 (2001).

45. U.N. Charter, arts. 41-42 (emphasis added). *See generally* Jochen Abr. Frowein & Nico Krisch, *Article 41*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 42, at 735;

There is the possibility that the Security Council will adopt a decision under Chapter VII without imposing any of these types of enforcement measures, which would not diminish the binding effect of that decision, as article 25 focuses only on the binding effect of the Security Council's *decisions*, not just on its Chapter VII decisions. Nevertheless, it is generally believed that the reference in a Security Council resolution to Chapter VII or to enforcement measures under Chapter VII only strengthens the resolution's binding status, with such language as "decides" or "demands" as the signal in the operative paragraphs of the resolution being particularly powerful indicators of Security Council binding decisions.

"Demands" and "decides" are not the only signals in Security Council resolutions that can create binding obligations on states. Although somewhat controversial, "calls upon" also can have a binding effect on states. As the corresponding author has argued elsewhere,⁴⁶ the ICJ in its 1971 *Namibia* advisory opinion determined that "calls upon" language in Security Council Resolutions 264, 269 and 276 was binding on all UN member states – namely, that all states had to work towards South Africa withdrawing its administration from Namibia.⁴⁷ Similarly, various Security Council member states – especially the United States, the United Kingdom, France, and Japan – interpreted "calls upon" language in Resolutions 1696 and 1737 as requiring action from Iran and other member states.⁴⁸

This interpretation of "calls upon" recently has been validated through Security Council Resolution 2249 of 2015, which was adopted in response to the terrorist attacks in Paris on November 13, 2015, where the Security Council:

Call[ed] upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of [Islamic State of Iraq and the Levant (ISIL)] also known as Da'esh, in Syria and Iraq, to

Jochen Abr. Frowein & Nico Krisch, *Article 42*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 42, at 748.

46. See JAMES D. FRY, LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES 83 (2013).

47. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ REP. 16, 51, 58 (June 21).

48. See UN SCOR, 61st Sess., 5500th mtg., at 3, UN Doc. S/PV.5500 (Jul. 31, 2006); UN SCOR, 61st Sess., 5612th mtg., at 2-6, UN Doc. S/PV.5612 (Dec. 23, 2006).

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redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as [Al Nusrah Front], and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the Statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria.⁴⁹

In subsequent statements following the adoption of this resolution, Security Council members asserted that this language created the legal authorization to use force against the Islamic State of Iraq and the Levant (ISIL).⁵⁰ For example, France interpreted this language as allowing its military actions against ISIL to be “characterized as individual self-defense, in accordance with Article 51 of the Charter of the United Nations,” with France “[i]n the coming days . . . increase[ing] its strike capability threefold with the arrival of the aircraft carrier *Charles de Gaulle*.”⁵¹ Spain interpreted the above block quote from Resolution 2249 as providing “legal coverage” for military actions against ISIL.⁵² The United States asserted that it was “taking necessary and proportionate military action to deny ISIL safe haven” in response to that paragraph from Resolution 2249.⁵³ The Russian Federation saw this language as “a step in creating a broad anti-terrorism front by marshalling comprehensive cooperation among all States to end all manifestations of terrorism and eradicate its root causes.”⁵⁴ Perhaps the Bolivarian Republic of Venezuela went the furthest in inferring that that paragraph provided a mandate “to take joint, coordinated and consensual actions” in response to acts of terrorism.⁵⁵ The President of the Security Council summarized that this resolution “is a powerful international recognition of the threat ISIL poses,”⁵⁶ presumably referring to the block quote provided above. All of these statements support

49. S.C. Res. 2249, UN Doc. S/RES/2249 (Nov. 20, 2015), ¶ 5.

50. See U.N. Security Council, 70th Sess., 7565th Mtg., S/PV.7565 (Nov. 20, 2015).

51. *Id.* at 2.

52. See *id.* at 3.

53. *Id.* at 4.

54. *Id.* at 5.

55. *Id.* at 8.

56. *Id.* at 9.

the notion that “calls upon” provisions in the Chapter VII resolutions have binding effect.

Under U.N. Charter article 103 and the ICJ’s confirmation of its validity in the *Lockerbie* case, these Security Council decisions essentially trump treaty rights and obligations through its Chapter VII powers,⁵⁷ which involves the suspension of these treaty rights and obligations, instead of their modification or removal. In the *Lockerbie* case, Libya asked the ICJ to declare Libya in full compliance with its obligations under article 5 of the 1971 Montreal Convention, which require that Libya either try or extradite two Libyan nationals who allegedly were responsible for the bombing of Pan Am Flight 103 over Lockerbie, Scotland. Libya sought provisional measures including an injunction against the United Kingdom and the United States in forcing Libya to surrender the suspects.⁵⁸ Meanwhile, the Security Council had adopted several resolutions under its Chapter VII powers essentially suspending the “try or extradite” option of the Montreal Convention by requiring Libya to surrender the two suspects.⁵⁹ The ICJ relied heavily on these resolutions and on U.N. Charter article 103 in dismissing Libya’s request for provisional measures.⁶⁰ However, at the preliminary-objections stage of the proceedings, when the United Kingdom and the United States argued that these Chapter VII resolutions had removed the ICJ’s jurisdiction, the ICJ refused to dismiss the application for lack of jurisdiction, determining that if it “had jurisdiction on [the date that Libya filed its application], it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established.”⁶¹ Likewise, the ICJ refused to dismiss the application on inadmissibility grounds when the United Kingdom and the United States claimed the resolutions closed off the relief Libya sought from the Montreal Convention, because

57. See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US), Order on Provisional Measures, 1992 ICJ REP. 114, 126-127 (Order of April 14) [hereinafter *Lockerbie Order*].

58. See *id.* at 117-18.

59. S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992); S.C. Res. 748, U.N. Doc. S/RES/748 (March 31, 1992); S.C. Res. 833, U.N. Doc. S/RES/833 (Nov. 11, 1993).

60. See *Lockerbie Order*, *supra* note 57, at 126-127.

61. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Preliminary Objections, 1998 ICJ REP. 9, 23-24 (Feb. 27) (citing Nottebohm, Preliminary Objection, Judgment, 1953 ICJ REP. 111, 122 (Nov. 18); Right of Passage over Indian Territory (Portugal v. India), Preliminary Objections, Judgment, 1957 ICJ REP. 125, 142 (Nov. 26)); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US), Preliminary Objections, 1998 ICJ REP. 115, 128-129 (Feb. 27) (same).

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“[t]he date . . . on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application.”⁶²

With this background in mind, the following section discusses the ways that the Security Council has attempted to resolve international water disputes through its binding decisions, which has resulted in changing international water law in ways unintended by the drafters of that body of law.

IV. RELEVANT SECURITY COUNCIL DECISIONS

It would be an exaggeration to say that the Security Council is heavily involved in resolving international water disputes, a fact that influenced the decision to adopt a qualitative methodology for this study. At the same time, it would be equally incorrect to assert or infer that the Security Council has not been involved at all in international water disputes, a belief that appears to be held by many researchers, as explained in Part II above. This part catalogues the ways the Security Council has been involved with resolving international water disputes, especially by imposing obligations through its Chapter VII powers. These instances can be divided into navigational disputes and non-navigational disputes, and this part is divided along those same lines.

Before providing that analysis, however, it must be noted that this part excludes the following four types of instances. First, this part excludes instances where water-related matters only act as background information leading up to a Security Council decision. For instance, it excludes Resolution 2313 of 2016, where the Security Council “urg[ed] the United Nations country team in coordination with other actors to continue to support the Government of Haiti in addressing the structural weaknesses, in particular in the water and sanitation systems” in the preamble before extending the mandate of the United Nations Stabilization Mission in Haiti (UNSTAMIH) and expanding its numbers under the Security Council’s Chapter VII powers.⁶³ This is excluded because the extension and expansion did not directly relate to water. Second, this part excludes situations where the Security Council acts to “ensure the safety, welfare and security of inhabitants”

62. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Preliminary Objections, 1998 ICJ REP. 9, 25-26 (Feb. 27); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. US), Preliminary Objections, 1998 ICJ REP. 115, 130-31 (Feb. 27).

63. S.C. Res. 2313, U.N. Doc. S/RES 2313 (Oct. 13, 2016), pmb1. ¶¶ 22, 37; *id.* at ¶¶ 1-2.

in a conflict area,⁶⁴ inasmuch as this part focuses on express references to international water disputes and issues directly relating to international water law. Third, this part excludes situations where the Security Council has interfered with a state's purchase of goods associated with water in the context of a sanctions regime, such as the Security Council's decision to deny North Korea certain luxury goods including "aquatic recreational vehicles" that could be used on North Korea's international watercourses,⁶⁵ because this decision does not *per se* interfere with North Korea's freedom to navigate its international watercourses. The Security Council's decision to deny Iraq "[a]ir independent propulsion (AIP) engines and fuel cells specially designed for underwater vehicles, and specially designed components therefore"⁶⁶ is excluded from this part of the Article for the same reason—it does not *per se* interfere with Iraq's freedom to navigate its international watercourses. Finally, this part excludes instances where the Security Council has adopted resolutions relating to maritime zones under the law of the sea, which do not fall under the international water law regime, even though the word "water" might be involved. For example, in Resolution 242 of 1967, the Security Council affirmed "the necessity [f]or guaranteeing freedom of navigation through international waterways in the area" in relation to tensions between Egypt and Israel in the 1960s concerning navigation in the context of the law of the sea.⁶⁷ As the geekier among us often tease, not a drop of water exists in the ocean. With those disclaimers in mind, the remainder of this part sets out the navigational and non-navigational disputes where the Security Council has invoked its Chapter VII powers.

A. Navigational Disputes

This section focuses on disputes arising over navigational matters. As alluded to in this Article's introduction, the freedom to navigate international watercourses is one of the oldest uses of international watercourses protected under international water law. As the instances in the

64. S.C. Res. 237, U.N. Doc. S/RES/237 (June 14, 1967), ¶ 1.

65. S.C. Res. 2270, U.N. Doc. S/RES/2270 (Mar. 2, 2016), annex IV, ¶ b.

66. S.C. Res. 1382, U.N. Doc. S/RES 1382 (Nov. 29, 2000), pmb1. ¶ 5 & Annex 1.

67. S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967), ¶ 2(a); *see also* Jonathan E. Fink, *The Gulf of Aqaba and the Strait of Tiran: The Practice of "Freedom of Navigation" after the Egyptian-Israeli Peace Treaty*, 42 NAVAL L. REV. 121 (1995) (discussing the connection between this language of the Security Council resolution and the Strait of Tiran, the Gulf of Aqaba and the Suez Canal in the context of the law of the sea); Mohamed ElBaradei, *The Egyptian-Israeli Peace Treaty and Access to the Gulf of Aqaba: A New Legal Regime*, 76 AM. J. INT'L L. 532, 545-49 (1982) (same).

second sub-section below show, the Security Council occasionally undermines this most fundamental of protections by closing off navigation of rivers. The main examples can be found in 1993 with the Danube River during the Yugoslavia War and in 2000 with the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) and the Congo River. These examples go against both international water law and the Security Council's own affirmations of the need to ensure the freedom of navigation of international waterways.⁶⁸ Before analyzing these cases, however, the first sub-section below elaborates on the content and importance of the protection of freedom of navigation under international water law.

1. The Freedom of Navigation

The modern principle of the freedom of navigation of rivers was declared in the First Peace of Paris of 1814, signed by the coalition of Austria, Great Britain, Prussia and Russia after Napoleon's defeat in Russia.⁶⁹ It was in article 5 of the First Peace of Paris that the principle of non-exclusive use of a common waterway, the Rhine, was articulated:

The navigation of the Rhine, from the point where it becomes navigable to the sea, and vice versa, *shall be free, so that it can be interdicted to no one*, and at the future Congress attention shall be paid to the establishment of the principles according to which the dues to be levied by the States bordering on the Rhine may be regulated in the mode the most impartial and the most favourable to the commerce of the nations.⁷⁰

The main idea behind the free-to-all-forbidden-to-none principle was to dismantle monopolistic controls over navigation.⁷¹ Earlier attempts had included the Decree by the Provisional Executive Council of the French Republic of November 16, 1792, which prohibited monopolies of navigation of the Meuse and Scheldt, and the Convention de l'Octroi of August 15, 1804, which outlawed domination of the lower

68. See S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967), ¶ 2(a).

69. See Christophe Dupont, *History and Coalitions: The Vienna Congress (1814-1815)*, 8 INT'L NEG. 169, 170-71 (2003).

70. Definitive Treaty of Peace and Amity (First Peace of Paris) art. V, May 30, 1814, 63 Consol. T.S. 171.

71. See *id.*; see also Eugene Borel, *Freedom of Navigation on the Rhine*, 2 BRIT. Y.B. INT'L L. 75, 76 (1921-1922).

parts of the Rhine.⁷² These attempts conflicted with centuries of sovereigns' practice of limited navigation of rivers to their subjects.⁷³ As a result of the limitation on sovereign rights over these rivers, the second part of article 5—requiring the future Congress to enable states to establish a fair system for the collection of tolls for shipping on the Rhine River so that it may favor commerce of all states—reflected the need to reduce the costs for the rights to discharge and the transshipment of cargoes.⁷⁴ Article 5 is significant because collectively its two components broke down the barriers to the freedom of navigation on the Rhine. Additionally, article 5 invited the future Congress to extend the principle of freedom of navigation not just to the Rhine, but to all rivers.⁷⁵

Following the First Peace of Paris of 1814, various interests met at the Vienna Congress of 1815 to try to undermine the protections provided in the First Peace of Paris. In particular, Cologne, Mainz and Strasbourg and their boatmen associations had been pushing to protect their exclusive rights to the Rhine for the new limitations from the Peace of Paris, whereas Frankfurt's push for the freedom of navigation ultimately won out on account of the benefits to trade from the freedom of navigation.⁷⁶ The 1815 Final Act of the Vienna Congress was part of the significant "peace programme" that demanded the retreat of France from its conquered territories, that liberated lands be "secure and happy" and be free of French aggression, and that universal public law guarantee this.⁷⁷ For the purposes of this Article, the most significant development of the Final Act was its establishment of the new standard of navigation that allowed "freedom of navigation" for all states and not just for a monopolistic few.⁷⁸

72. See Bela Vitanyi, *The Regime of Navigation on International Waterways; Part I: The Beneficiaries of the Right of Navigation*, 5 NETH. Y.B. INT'L L. 111, 113 (1974); Borel, *supra* note 71, at 76.

73. See ARCHIBALD ALISON, 1 HISTORY OF EUROPE FROM THE COMMENCEMENT OF THE FRENCH REVOLUTION IN 1789 TO THE RESTORATION OF THE BOURBONS IN 1815 195 (1843); BELA VITANYI, THE INTERNATIONAL REGIME OF RIVER NAVIGATION 21-23 (1979).

74. See Vitanyi, *supra* note 72, at 114.

75. See *id.*; Tuomas Kuokkanen, *Water Security and International Law*, 20 POTCHESTROOM ELECTRONIC L.J. 1, 10 (2017).

76. See JOSEPH PERKINS CHAMBERLAIN, THE REGIME OF THE INTERNATIONAL RIVERS: DANUBE AND RHINE 173-74 (1923).

77. Robert Rie, *The Origins of Public Law and the Congress of Vienna*, 36 TRANSACTIONS OF THE GROTIUS SOCIETY 209, 212-13 (1950).

78. *Id.*, at 227; see also Ralph W. Johnston, *Freedom of Navigation for International Rivers: What Does It Mean?*, 62 MICH. L. REV. 465, 466 (1964); Sander Meijerink, *Scheldt River*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007); CHRISTINE LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 57 (2013) (providing an interesting analysis of the PCIJ case on *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (1927) and

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In addition to the special interests of the cities involved and their boatmen associations, the freedom of navigation was limited by absolute sovereignty of states over part or the entire course of the waterway because riparian states could refuse foreign vessels the use of the river for navigation purposes or to maintain banks or channels in accordance with their sovereign powers.⁷⁹ The Congress attempted to overcome this limitation by establishing a committee for the free navigation of rivers that would focus on the “general interests of commerce.”⁸⁰ Article 109 of the Final Act of the Vienna Congress of 1815 states:

The navigation of the rivers, along their whole course, referred to in the preceding Article, from the point where each of them becomes navigable, to its mouth, shall be entirely free, and shall not, in respect to commerce, be prohibited to any one; it being understood that the regulations established with regard to the police of this navigation, shall be respected; as they will be framed alike for all, and as favourable as possible to the commerce of all nations.⁸¹

The main issue with this was that the freedom of navigation was applicable to only riparian states. Article 108 of the Final Act provides: “Powers whose states are separated or crossed by the same navigable river, engage to regulate, by common consent, all that regards its navigation.”⁸² This limitation eventually was changed by the Treaty of Paris of 1856, which ended the 1853-1856 Crimean War.⁸³ The Treaty of Paris of 1856 declared that navigation was free to all flag states and all were to be treated equally.⁸⁴ Freedom of navigation was extended to all states—both riparian and non-riparian states—by way of the Peace Treaty of Versailles of 1919 and the Barcelona Statute on the Regime of

Article 109 of the Final Act of the Vienna Congress of 1815 in which it was recognized that the problem of preventing the freedom of navigation for states hindered the building of peaceful relations).

79. See Vitanyi, *supra* note 72, at 7-8.

80. *Id.* at 8.

81. Final Act of the Congress of Vienna art. 109, June 9, 1815, 1 MAJOR PEACE TREATIES 519 [hereinafter *Final Act of 1815*].

82. *Id.* art. 108.

83. See generally Romuald R. Haule, *The Paris Declaration of (1856)*, 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 61 (Rudiger Wolfrum ed. 2008).

84. See European Commission of the Danube between Galatz and Braila, PCIJ Series B, No. 14 (1927), ¶ 182; DANTE A. CAPONERA, *THE LAW OF INTERNATIONAL WATER RESOURCES* 4 (1980).

the Navigable Waterways of International Concern of 1921.⁸⁵ The freedom of navigation was not merely the utilization of international waterways but also the freedom of commerce and economic activity.⁸⁶ The emphasis on freedom of commerce and economic activity reflected the changed perception that economic liberalization of navigation aided “Europe’s economic awakening during the 19th Century,” enabling states to be more tolerant of foreign vessels on their national waters.⁸⁷

The Barcelona Conference took place on April 20, 1921, and it was initiated by the League of Nations and attended by forty-one states.⁸⁸ The Barcelona Conference confirmed the freedom-of-navigation principle and adopted a set of articles by way of the Barcelona Statute relating to the Regime of Navigable Waterways.⁸⁹ The Statute on the Regime of Navigable Waterways of International Concern of 1921 (“Barcelona Statute”) was signed at the Barcelona Conference and was annexed to the International Convention Concerning the Regime of Navigable Waterways of International Concern of 1921.⁹⁰ The parties to the Convention and the Statute accepted the obligations contained in the Barcelona Statute in accordance with its provisions.⁹¹

The Barcelona Statute is significant because it codified the body of rules that had been started by the Congress of Vienna of 1815 and the Congress of Paris of 1856.⁹² The International Law Commission noted in connection with its research and drafting of the 1997 Watercourses Convention: “[The Barcelona Statute] codif[ied] the body of rules relating to the freedom of navigation and equality of treatment of

85. See Territorial Jurisdiction of International Commission of River Oder (U.K. v. Poland), PCIJ Series A, No. 23 (1929), ¶¶ 81-88; see also Caflisch, *supra* note 12, at 7; Laurence Boisson de Chazournes, *Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives*, in THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2 (2009).

86. European Commission of the Danube between Galatz and Braila, 1927, PCIJ Series B, No. 14 (1927), ¶ 99.

87. Caflisch, *supra* note 12, at 7.

88. See, e.g., International Convention Concerning the Regime of Navigable Waterways of International Concern preamb., Apr. 20, 1921, 7 L.N.T.S. 51 [hereinafter *Barcelona Statute*].

89. See *id.*

90. See *id.* art. 1.

91. See *id.*

92. See Report by the Secretary-General on the Legal Problems Relating to the Utilization and Use of International Rivers, U.N. Doc. A/5409 (Apr. 15, 1963), reprinted in [1974] 2 Y.B. Int’l L. Comm’n 33, 60, U.N. Doc. A/CN.4.Ser.A/1974 [hereinafter U.N. Doc. A/5409]; Nico Schrijver, *Development without Destruction: The UN and Global Resource Management* 26 (2010); Boisson de Chazournes, *supra* note 85, at 2.

international rivers.⁹³ The Barcelona Statute promotes the freedom of navigation of international waterways and defines “navigable waterways” as broadly permitting regulation of any waterway that may be “naturally navigable to and from the sea” and that may connect states as coming under this regime.⁹⁴ The freedom of navigation is so important that the International Law Commission acknowledged that the statute prioritizes the freedom of navigation over other possible uses of international waterways.⁹⁵ The importance of navigation had been expressed as navigation taking priority over other uses. However, other international bodies such as the International Law Association understand that, in fact, no priority exists between freedom of navigation over other uses as expressed in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers.⁹⁶ The International Law Association expressly affirmed its position in respect to the non-priority of navigation over other uses in its commentary on Article VI on no inherent preference of uses of international waterways.⁹⁷

Slavko Bogdanovic disputes the priority of navigation over other uses as a concept, arguing it cannot be reconciled with the principle of equitable utilization and instead positing that navigation is merely one factor to be taken into consideration when determining a state’s right of equitable utilization of international waterways.⁹⁸ Commentators concur concerning the non-priority of navigation over other uses.⁹⁹ The priority of navigation over other uses on the one hand and the

93. U.N. Doc. A/5409, *supra* note 92, at 60; *see also* Territorial Jurisdiction of International Commission of River Oder (U.K. v. Poland), PCIJ Series A, No. 23 (Sept. 10, 1929), ¶¶ 81-88 (determining that the definition gave “jurisdiction of the Commission [that] extends up to the points at which the Warthe (Warta) and the Netze (Noteć) cease to be either naturally navigable or navigable by means of lateral channels or canals which duplicate or improve naturally navigable sections or connect two naturally navigable sections of the same river”).

94. Barcelona Statute, *supra* note 88, art. 1

95. U.N. Doc. A/5409, *supra* note 92, at 60.

96. *See* Int’l Law Ass’n, Commentary to the Helsinki Rules of 1966 adopted at the Fifty-Second International Law Association Conference of 1966, Report of the Fifty-Second International Law Association Conference 485 (1966) [hereinafter *Helsinki Rules Report*].

97. *See id.*

98. *See* SLAVKO BOGDANOVIC, INTERNATIONAL LAW OF WATER RESOURCES: CONTRIBUTION OF THE INTERNATIONAL LAW ASSOCIATION (1954-2000) 16 (2001).

99. The Convention Relating to the Development of Hydraulic Power Affecting More than One State of 1923 is understood to represent the decline of the priority of navigation over other uses. *See* Salman M. A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 WATER RES. DEV. 625, 626-27 (2007); Cafilisch, *supra* note 12, at 6; SALMAN M. A. SALMAN & KISHOR UPRETY, CONFLICT AND COOPERATION ON SOUTH ASIA’S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE 11 (2002); Boisson de Chazournes, *supra* note 85, at 3.

emphasis of importance of navigation for all states on the other hand are different. The emphasis on the importance of navigation for all states is present in articles 3, 4, and 5 of the Barcelona Statute. Article 3 of the Statute allows freedom of exercise of navigation by all Contracting Parties.¹⁰⁰ The Barcelona Statute emphasized the economic liberalization of navigation so that all riparian states enjoyed the freedom of navigation when read together with article 1 of the Barcelona Statute, which defines a natural waterway as a waterway that is used or capable of being used for “ordinary commercial navigation.”¹⁰¹ The Statute focuses the obligations on the riparian state whose part of the navigable waterway is under its sovereignty to maintain the upkeep of the conditions of navigability.¹⁰² Article 4 emphasizes equal treatment of riparian states and non-riparian states in the exercise of navigation, and no one party is accorded priority in the exercise of navigation on international waterways.¹⁰³ Article 5 permits states to fly their own flag for vessels transporting passengers and goods to ports under its sovereignty, and states may choose not to fly their flag for their vessels, although doing so will not lead to the enjoyment of the equal treatment under the regime of freedom of navigation.¹⁰⁴ This incentivizes states to fly their flag in order to enjoy such equal treatment.¹⁰⁵ Furthermore, by flying their own flag, states enjoy the right of exclusive jurisdiction over their ships. The Permanent Court of International Justice in *Lotus* affirmed the principle of exclusive jurisdiction of a sovereign over its ships on the high seas whereby “what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the state whose flag the ship flies.”¹⁰⁶ However, in that case the right of exclusive jurisdiction over a sovereign’s ships was limited by incidences where a culpable act was committed on the high seas.¹⁰⁷ Since the *Lotus* case, the Convention on the High Seas of 1958 and the

100. See Barcelona Statute, *supra* note 88, art. 3.

101. *Id.* arts. 1, 3, 4.

102. See *id.* art. 10 (placing the burden on riparian states to remove obstacles of navigation and the regime may be understood to favor freedom of the exercise of navigation).

103. See *id.* art. 4.

104. See *id.* art. 5.

105. It is further assumed in Article 5(2) of the Statute that states will fly their flag for their vessels on navigable waterways unless the voyages are between ports not within the regime, that is, between ports under the same sovereignty. See Barcelona Statute, *supra* note 88, art. 5(2).

106. See *S. S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, ¶ 65.

107. See *id.* ¶¶ 307-14 (determining that there is no rule of international law that neither prevents Turkey from exercising its right of territoriality in the prosecution of criminal acts in its territory nor prohibits the Turkish prosecution of French Lieutenant on board a French ship that collided with a Turkish ship that killed eight persons for the charge of manslaughter).

United Nations Convention on the Law of the Sea of 1982 (UNCLOS) overturned the court's decision in this regard and restored exclusive jurisdiction of a sovereign over its own ships—the flag state instituting proceedings against the wrongdoer for the wrongdoing on its ship in incidences of collision on the high seas.¹⁰⁸

Jurisdiction of flag-state vessels matters to ensure equal treatment within the regime.¹⁰⁹ The regime deals with practical matters such as emergencies and safe passage of navigation and dispute resolution, and so flying the flag is important for these reasons. Sovereignty of international waterways is important to maintain the upkeep of conditions of navigation. For example, vessels along the Danube and off the coast of Yugoslavia would ordinarily enjoy the freedom of navigation under the regime of the Barcelona Statute, assuming it comes under the regime and there is no agreement to the contrary. The regime would assume that the flag the vessel flies would belong to the flag state for the purposes of navigation of international waterways. However, the Barcelona Statute does not provide for obligations of flag-state vessels beyond paying a toll to cover the expenses to maintain the use of the waterway,¹¹⁰ and so conceivably the international water law regime does not interfere with a state's desire to fly the flag of a different state if it so chooses. This would be entirely consistent with the way that Hugo Grotius envisioned states having free passage over international rivers without any form of prejudice.¹¹¹

The issue with respect to international water disputes is that the freedom of navigation and the Barcelona Statute continue to operate in times of conflict. Article 15 of the Barcelona Statute explicitly provides the following:

The Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however,

108. See Geneva Convention on the High Seas of 1958 art. 11, Apr. 29, 1958 13 U.S.T. 2312, 45 U.N.T.S. 82; United Nations Convention on the Law of the Sea art. 97, Dec. 10, 1982, 1833 U.N.T.S. 561.

109. See Camille Goodman, *The Regime for Flag State Responsibility in International Fisheries Law – Effective Fact, Creative Fiction, or Further Work Required?*, 23 AUSTL. & N.Z. MAR. L.J. 157, 158 (2009).

110. See INT'L LAW ASS'N, HELSINKI RULES ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS AND COMMENTS, IN REPORT OF THE FIFTY-SECOND CONFERENCE 484 (1966) [hereinafter *Helsinki Rules*] (art. 18 supporting the obligation on riparian states to maintain the facilities of the river and to remove obstacles to the freedom of navigation).

111. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Book II) 438-42 (1625, Richard Tuck & Jean Barbeyrac eds. 2005).

continue in force in time of war as far as such rights and duties permit.¹¹²

The International Law Association examined this provision between 1974 and 1975, and it decided that water-related treaties such as the Barcelona Statute ought to be suspended during times of armed conflict, assuming that the purpose of the armed conflict warrants such suspension.¹¹³ Authority for such a decision comes from the emergency clause in article 15 of the 1950 European Convention on Human Rights and article 20 of the 1966 Helsinki Rules, both of which provide for carve-out protections for humanitarian purposes.¹¹⁴ The International Law Association's commentary on article 20 of the Helsinki Rules acknowledges that the continuation of the freedom of navigation in article 15 of the Barcelona Statute means that where the law of neutrality and belligerency imposes obligations on riparian states in conflict, those obligations override article 15 of the Barcelona Statute.¹¹⁵ Furthermore, article 20 of the Helsinki Rules imposes further detailed provisions for the rights of navigation for humanitarian purposes.¹¹⁶ Such a position is reflected in article 20 of the Helsinki Rules:

In time of war, other armed conflict, or public emergency constituting a threat to the life of a State, a riparian State may take measures derogating from its obligations under this Chapter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. The riparian State shall in any case facilitate navigation for humanitarian purposes.¹¹⁷

The International Law Association emphasized that the freedom of navigation does not take precedence over obligations under the law of armed conflict when a riparian or non-riparian state that is engaged in armed conflict seeks to navigate the international waterway.¹¹⁸ As such, commercial vessels are suspended unless they support the military and

112. Barcelona Statute, *supra* note 88, art. 15. See J. H. W. Verzijl, 3 Int'l L. Hist. Persp. 189 (1970).

113. See Int'l Law Ass'n, Report of the Fifty-sixth Conference 102, 144 (1974-1975).

114. See *id.*

115. See Helsinki Rules Report, *supra* note 96, at 499-500.

116. See *id.*

117. *Helsinki Rules*, *supra* note 110, art. 20.

118. See Helsinki Rules Report, *supra* note 96, at 500.

humanitarian efforts of a riparian state.¹¹⁹ In practice, the neutral facilitation of navigation for humanitarian purposes may be challenging. For example, in cases where private persons of a neutral state illegally assist belligerents, neutral vessels are not sufficiently protected against belligerent acts under the laws of naval warfare and rules governing maritime neutrality.¹²⁰ Under such circumstances, the Security Council may act under Chapter VII to determine the existence of an act of aggression or breach of peace and in connection with its determination decide on measures according to articles 40 and 41 to ensure safe passage of goods and persons.¹²¹ This was the case during the Yugoslav Wars of the 1990s, where the Security Council intervened in the regime that presumes the freedom of navigation under article 41.¹²² This example is discussed further in Section IV(A) (2) (b) below.

This subsection has discussed how the freedom-of-navigation principle was broadened over the past two centuries in accordance with economic interests. The freedom-of-navigation principle was first applicable only to riparian states.¹²³ The Barcelona Statute of 1921 changed the scope of applicability to both riparian and non-riparian states, and it stipulated that this freedom of navigation continues even in times of armed conflict provided in article 15 of the Barcelona Statute of 1921.¹²⁴ However, studies by the International Law Association on the law of international watercourses have since argued that emerging customary international law reflects a derogation of this right of freedom-of-navigation during times of armed conflict and the facilitation of navigation for humanitarian purposes.¹²⁵ In practice the limitation of the freedom-of-navigation principle is supported by Security Council determinations of acts of aggression or breaches of the peace and decisions for the safe passage of goods and persons during armed conflicts under article 39 of the U.N. Charter, as shown in the following subsection.

119. *See id.*

120. *See* Wolff Heintschel von Heinegg, *The Protection of Navigation in Case of Armed Conflict*, 18 INT'L J. MARINE & COASTAL L. 401, 420-21 (2003).

121. *See* U.N. Charter arts. 39-41. *See also* U.N. Repertory of Practice of the Security Council Supplement 393-401 (1975-1980).

122. *See* U.N. Repertory of Practice of United Nations Organs Supplement Numbers 7-9 (1985-1999), Volume III, Article 41, ¶ 91.

123. *See Final Act of 1815*, *supra* note 81, arts. 108-09. *See also* Johnston, *supra* note 78, at 470.

124. *See Barcelona Statute*, *supra* note 88, art. 15; *Helsinki Rules Report*, *supra* note 96, at 500; *see also* BOLESŁAW ADAM BOCZEK, INTERNATIONAL LAW: A DICTIONARY 226 (2005).

125. *See Helsinki Rules Report*, *supra* note 96, at 496-97; INT'L LAW ASS'N, 4 REPORT OF THE BERLIN CONFERENCE 42 (2004).

2. Security Council Decisions Relating to the Freedom of Navigation

This sub-section highlights two of the instances where the Security Council has imposed obligations relating to the freedom of navigation. The first example brings protections from international water law into the U.N. legal framework through reiteration of those protections as demands under Chapter VII, while the second somewhat undercuts the protections provided by international water law.

a. Congo River

Sometimes the Security Council reiterates the obligations already found within international water law when addressing an international water dispute. The main legal impact of such reiteration is to bring those obligations within the U.N. legal framework. That way, these obligations can be enforced as treaty obligations *and* as Security Council obligations. Violation of Security Council obligations brings about, among other things, U.N. Charter article 25 sanctions, which are in addition to claims of state responsibility in connection with the breach of the treaty.¹²⁶ Moreover, it is not possible to withdraw from Security Council obligations, whereas article 56 of the Vienna Convention on the Law of Treaties allows for withdrawal from a treaty even in the absence of a withdrawal provision in the underlying treaty.¹²⁷ Therefore, Security Council reiteration of existing treaty obligations can have significant legal effects.

The main example can be found with the Congo River in the Democratic Republic of Congo (DRC) in 2002. The second civil war in the DRC broke out in 1998 when rebels supported by Burundi, Rwanda and Uganda attempted to remove the DRC's authoritarian ruler Laurent Kabila, who was supported by Angola, Namibia and Zimbabwe.¹²⁸ A ceasefire was signed in 1999, although peace has been elusive ever since.¹²⁹ Indeed, reports estimate that 5.4 million people died in the DRC between 1998 and 2007.¹³⁰

126. For more information on the legal significance of Security Council reiteration of treaty obligations, see FRY, *supra* note 62, at 131-33.

127. See *id.*

128. See Denis M. Tull, Peacekeeping in the Democratic Republic of Congo: Waging Peace and Fighting War, 16 INT'L PEACEKEEPING 215, 216-17 (2009); Jared Genser, *The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18 CHI J. INT'L J. 420, 451-56 (2018) (explaining the political situation in the DRC).

129. See Tull, *supra* note 128, at 216.

130. See BENJAMIN COGHLAN ET AL., MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS, INT'L RESCUE COMM. (May 1, 2007), <https://www.rescue.org/report/mortality->

The Security Council established the United Nations Mission in the DRC (MONUC) in 1999 through Resolution 1279.¹³¹ At first, MONUC's mandate was relatively weak, inasmuch as it focused mainly on liaising and providing information.¹³² However, the Security Council strengthened MONUC's mandate and increased its size over time as hostilities there escalated.¹³³ In particular, Resolution 1291 of 2000 allowed MONUC to "take the necessary action to protect UN and other personnel, facilities, ensure security and freedom of movement of its personnel and protect civilians under imminent threat of physical violence."¹³⁴ This language "take the necessary action" has come to mean that the Security Council is authorizing enforcement actions under its Chapter VII powers.¹³⁵

Turning to the water-related aspects of this dispute, a major part of the strategic fighting involved control of port cities along the Congo River, including the city of Kisangani, inasmuch as the Congo River served as the main route for trade and transportation.¹³⁶ In particular, the closure of the river impacted the distribution of food and medicine throughout the DRC, along with disrupting many other aspects of life there.¹³⁷ To get a broader perspective on the legal significance of this closure, the freedom of navigation of the Congo River has been legally protected since the 1885 General Act of the Congress of Berlin,¹³⁸

democratic-republic-congo-ongoing-crisis; see also *U.N. Pleads for Aid to Saves Lives in Congo*, N.Y. TIMES, Feb. 13, 2006, at A3 (putting the deaths at 4 million).

131. See S.C. Res. 1279, ¶ 4, U.N. Doc. S/RES/1279 (Nov. 30, 1999). For a history of MONUC, see Anthony W. Gambino, *Democratic Republic of the Congo, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS* 360-63 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

132. See S.C. Res. 1279, ¶ 4, U.N. Doc. S/RES/1279 (Nov. 30, 1999).

133. See Tull, *supra* note 128, at 217-18. For a glimpse at the particularly horrific war in and around the DRC from this time, see HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* (2002), available at www.hrw.org/sites/default/files/reports/congo0602.pdf (last visited Mar. 16, 2019).

134. S.C. Res. 1291, ¶ 8, U.N. Doc. S/RES/1291 (Feb. 24, 2000).

135. For more information on the different types of language that constitute a reference to the Security Council's enforcement powers under Chapter VII, see James D. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity*, 38 GEO. WASH. INT'L L. REV. 327, 336-39 (2006) (analyzing the frequency of "all necessary means," "the necessary measures," "the necessary action," "as may be necessary," "all measures necessary," and "by the use of force if necessary" in Security Council resolutions).

136. See Edith M. Lederer, *Security Council Extends U.N. Peacekeeping Mission in Congo for One Year*, AP WORLDSTREAM, June 14, 2002; see also Maarten J. de Wit et al., *Preface, in GEOLOGY AND RESOURCE POTENTIAL OF THE CONGO BASIN* i, x (Maarten J. de Wit et al. eds., 2015) (noting that the Congo River is Africa's second longest river).

137. See *Highlights in History on this Date*, AP WORLDSTREAM, May 22, 2002.

138. See Text of the General Act of the Congress of Berlin Concerning the Congo, Trade, Slave Trade, Navigation of Rivers arts. 13-25, Feb. 26, 1885, in S. Exec. Doc. No. 196, 49th Cong., 1st

which is almost as long as the protections for the Danube River. A U.N. secretary general report on MONUC in September 2002 highlighted how MONUC needed new powers in light of the changed circumstances on the ground, including riverine units “to support the reopening of the Congo River for commercial traffic and the movement of United Nations transports, as well as to facilitate MONUC monitoring in the area south-east of Kisangani.”¹³⁹ In December 2002, the Security Council determined that the “situation in the Democratic Republic of the Congo continue[d] to pose a threat to international peace and security in the region” and adopted Resolution 1445 of 2002, which took note of this report and these recommendations, determined that there was a threat to international peace and security there, and “[d]emand[ed] that all parties work to the immediate full restoration of freedom of movement on the Congo river.”¹⁴⁰ The engineering firm responsible for updating river maps for the Congo River and other rivers in the DRC emphasizes that the Congo River has few barriers to free navigation,¹⁴¹ suggesting that the Security Council resolutions have had their intended impact.

b. Danube River

Similar to the “demands” signal, the “decides” signal in Chapter VII resolutions of the Security Council provides binding effect on states. When it comes to international water disputes, this becomes relevant in the context of the civil war in Yugoslavia, which started in 1991 as ethnic conflict between the various groups there that eventually led to the disintegration of Yugoslavia, years of ethnic conflict, and one of the Security Council’s most extensive sanctions regimes to date.¹⁴²

Sess. 297. For more information on the protections for navigation from the General Act, see Ludwik A. Teclaf, *Fiat or Custom: The Checkered Development of International Water Law*, 31 NAT. RESOURCES J. 45, 56-58 (1991).

139. Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, UN Doc. S/2002/1005 (Sept. 10, 2002), ¶ 48, 53.

140. S.C. Res. 1445, UN Doc. S/RES/1445 (Dec. 4, 2002), pmb. ¶¶ 8, 13.

141. See ARTELIA GROUP, *Definition of Navigation Maps of the Rivers Congo and Kasai*, <https://www.arteliagroup.com/en/expertise/markets/water/waterways-canals-and-locks/definition-navigation-maps-rivers-congo-and-kasai> (last visited Mar. 16, 2019).

142. See generally MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (3d ed. 1996); Aleksa Djilas, *Fear Thy Neighbor: The Breakup of Yugoslavia*, in NATIONALISM AND NATIONALITIES IN THE NEW EUROPE 85 (Charles A. Kupchan ed., 1995); Erik Drewniak, *The Bosphorus Case: The Balancing of Property Rights in the European Community and the Public Interest in Ending the War in Bosnia*, 20 FORDHAM INT’L L.J. 1007, 1047-61 (1997).

The Danube River historically has been a major source of disputes in the region, although these disputes have intensified since the end of the Cold War.¹⁴³ As with the Congo River, much of the strategic fighting (at least early on) occurred in towns and villages along the Danube River, such as Vukovar, mainly so that the winner could control and monopolize trade and transportation along the Danube River.¹⁴⁴ During roughly the first six-months of the civil war in Yugoslavia in the 1990s, there was tremendous loss of life and destruction of property.¹⁴⁵ As a result, the Security Council adopted Resolution 713 in 1991, in which the Security Council “[d]ecide[d], under Chapter VII, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia.”¹⁴⁶ Resolution 724 of 1991 aimed to improve the implementation of that embargo by creating a Security Council committee to oversee that implementation, including seeking information from states about the actions they have taken to implement the embargo and recommending responses to violations, *inter alia*.¹⁴⁷ However, Yugoslavian assistance was needed for the Yugoslav-Romanian projects along the Danube River relating to electricity generation and navigation, and so the Security Council had to adjust the sanctions regime.¹⁴⁸ Resolution 757 of 1992 clarified that this embargo *did not* interfere with the “trans-shipment through the Federal Republic of Yugoslavia (Serbia and Montenegro) of

143. See Joanne Linnerooth-Bayer & Susan Murcott, *The Danube River Basin: International Cooperation or Sustainable Development*, 36 NAT. RESOURCES J. 521, 524-34 (1996); Paul Nunn, *Trans-Boundary Water Management in Europe: Conflict and Cooperation on the Danube*, in THE EUROPEAN WATER ENVIRONMENT IN A PERIOD OF TRANSFORMATION 171 (John Hassan et al. eds. 1996).

144. See *Fighting Rages as Serbs, Croats Agree to Truce*, ORLANDO SENTINEL, Nov. 24, 1991, § A; T. Modibo Ocran, *How Blessed Were the UN Peacekeepers in Former Yugoslavia? The Involvement of UNPROFOR and Other UN Bodies in Humanitarian Activities and Human Rights Issues in Croatia, 1992-1996*, 18 WIS. INT'L L.J. 193, 203-205 (2000); see also Mari Nakamichi, *The International Court of Justice Decision Regarding the Gabčíkovo-Nagymaros Project*, 9 FORDHAM ENVTL. L.J. 377, 339-40 (1998) (“Throughout European history, the Danube River has played a vital role in the commercial and economic development of its riparian states. . . .”). *But see* Linnerooth-Bayer & Murcott, *supra* note 143, at 524, 529-30 (1996) (recognizing the Danube River area as being a center of intense fighting during the civil war in Yugoslavia; asserting that the Danube River “has not been a major international waterway . . .,” although trade nevertheless was hindered during the hostilities there).

145. See Report of the Secretary-General Pursuant to Paragraph 3 of Security Council Resolution 713, UN Doc. S/23169 (Oct. 25, 1991) (detailing the death and destruction observed in Yugoslavia during that initial period).

146. S.C. Res. 713, U.N. Doc. S/RES/713 (Sept. 25, 1991), ¶ 6.

147. See S.C. Res. 724, U.N. Doc. S/RES/724 (Dec. 15, 1991), ¶ 5.

148. See TIGNINO, *supra* note 33, at 70.

commodities and products originating outside the Federal Republic of Yugoslavia (Serbia and Montenegro) and temporarily present in the territory of the Federal Republic of Yugoslavia (Serbia and Montenegro) only for the purpose of such transshipment.”¹⁴⁹ Recognizing “reports of continuing violations of the embargo” established by these resolutions,¹⁵⁰ the Security Council severely limited the exceptions to the embargo in Resolution 787 by deciding to prohibit under its Chapter VII powers the transshipment of a list of items to ensure no diversion of these items to the Federal Republic of Yugoslavia (Serbia and Montenegro): “crude oil, petroleum products, coal, energy-related equipment, iron, steel, other metals, chemicals, rubber, tyres, vehicles, aircraft and motors of all types unless such transshipment is specifically authorized on a case-by-case basis by the Committee established by resolution 724 (1991) under its no-objection procedure.”¹⁵¹

Finally, Resolution 787 went on to address the issue of flag-state jurisdiction:

Further decides, acting under Chapter VII of the Charter of the United Nations, that any vessel in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be considered, for the purpose of implementation of the relevant resolutions of the Security Council, a vessel of the Federal Republic of Yugoslavia (Serbia and Montenegro) regardless of the flag under which the vessel sails.¹⁵²

Commentators have noted the fear among Western powers, especially the United States, that Serbia and Montenegro would use other states’ flags with their vessels in an effort to circumvent Security Council

149. S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992), ¶ 6. See Sokol Braha, *The Changing Nature of U.S. Sanctions Against Yugoslavia*, 8 MSU-DCL J. INT’L L. 273, 280-83 (1999) (somewhat surprisingly singling out Resolution 757 as solidifying the coercive powers of states to effectively influence the behavior of Bosnian Serbs).

150. S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992), pmb. ¶¶ 11-12.

151. *Id.* ¶ 9; see also Drewniak, *supra* note 142, at 1050-51, 1054 (mentioning the transshipment prohibition in Resolution 787); Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT’L L. 771, 804 (1993) (same); Braha, *supra* note 149, at 281 (same).

152. S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992), ¶ 10. See Braha, *supra* note 149, at 281 (mentioning this language from Resolution 787); Scharf & Dorosin, *supra* note 151, at 801-02 (1993) (same); Drewniak, *supra* note 142, at 1054-55.

sanctions.¹⁵³ This provision of Resolution 787 undoubtedly was designed to stop that from happening. However, as explained in Section IV(A)(1) above, the Barcelona Statute does not require states to fly their flag over a vessel that they own, with the inference being that they can fly whatever flag they want over their vessels due to sovereignty considerations. In other words, the Security Council ought not to have interfered in shipping along the Danube River during the Yugoslav War of the 1990s, according to international water law. The Security Council's emphasis on its Chapter VII binding powers in Resolution 787 especially stands out here, almost as if it were acutely aware of over-riding accepted standards of international water law.

As with the Congo River discussed in the previous section, all of the measures within these Security Council resolutions still did not have their intended effect as the destruction continued and even intensified, with the Serbian side being singled out for their actions.¹⁵⁴ As a result, this embargo was expanded in 1993 through Resolution 820, in which the Security Council emphasized the embargo in relation to river-based trade when it “[d]ecide[d] to prohibit the transport of all commodities and products across the land borders or to or from the ports of the Federal Republic of Yugoslavia (Serbia and Montenegro),” with the provision of a few exceptions relating to “medical supplies and food-stuffs,” “other essential humanitarian supplies,” and “transshipments” only with approval of the Security Council committee established under Resolution 724.¹⁵⁵

The Security Council reduced the sanctions with its Resolution 942 in relation to everyone but Bosnian Serbs.¹⁵⁶ Moreover, Resolution 942 strengthened the blockage of Bosnian Serbian ports by “[d]ecid[ing] to prohibit all commercial riverine traffic from entering ports of those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces except when authorized on a case-by-case basis by the Committee established by resolution 724 (1991), or by the

153. See Hungdah Chiu & Sun Yun Chang, *Contemporary Practice and Judicial Decisions of the Republic of China Relating to International Law, 1992-1993*, 12 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 213, 220 (1994); Braha, *supra* note 149, at 281.

154. S.C. Res. 820, U.N. Doc. S/RES/820 (Apr. 17, 1993), ¶¶ 3 & 5.

155. *Id.* ¶¶ 15, 16, 22. See Drewniak, *supra* note 142, at 1050, 1054-56, 1069-71, 1079-80 (discussing the strengthening of the prohibition of transshipment in Resolution 820, especially in the context of the Bosphorus case of the European Court of Justice that resulted from it); Scharf & Dorosin, *supra* note 151, 807, 809 (discussing Resolution 820, although focusing on the provisions not relating to transshipment and the role of the Sanctions Committee in implementing this resolution); Braha, *supra* note 149, at 281-82.

156. S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1993), ¶¶ 1-3, pt. B intro., ¶ 8.

Government of the Republic of Bosnia and Herzegovina for its territory, or in case of force majeure.”¹⁵⁷ The following paragraph of Resolution 942 required states to make “all shipments of commodities and products” into Bosnia Serb areas to be “properly manifested and either be physically inspected by the Sanctions Assistance Missions or the competent national authorities at loading to verify and seal their contents or be laden in a manner which permits adequate physical verification of the contents.”¹⁵⁸ All sanctions eventually were terminated with Resolution 1074 in 1996.¹⁵⁹

This “decides” language in the above resolutions, combined with the fact that the Security Council expressly adopted this part of the resolution under Chapter VII,¹⁶⁰ created binding obligations that actually undermined the general freedom of navigation protected under international water law, as outlined in Section IV(A)(1) above. Moreover, this resolution directly undermines the Belgrade Convention Regarding Navigation on the Danube of 1948, which guarantees that “[n]avigation on the Danube shall be free and open for the nationals, vessels of commerce and goods of all States, on a footing of equality in regard to port and navigation charges and conditions for merchant shipping.”¹⁶¹ The freedom of navigation on the Danube River enjoys some of the lengthiest protection offered in international law, dating back to the 1857 Act for the Navigation of the Danube between Austria, Bavaria, Turkey, and Wurtemberg.¹⁶² While the Security Council was morally and legally justified in imposing these obligations that vary from international water law concerning navigation, it nevertheless must be recognized that the Security Council interfered with the regular operation of international water law in these instances, and in the case of Yugoslavia undoing nearly 140 years of virtually constant legal protection of the freedom of navigation on the Danube River.

157. *Id.* ¶ 15. See also Braha, *supra* note 149, at 282 (discussing these resolutions).

158. S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1993), ¶ 16.

159. See S.C. Res. 1074, U.N. Doc. S/RES/1074 (Oct. 1, 1996), ¶ 2.

160. S.C. Res. 820, U.N. Doc. S/RES/820 (Apr. 17, 1993), pmbl. ¶ B (“Determined to strengthen the implementation of the measures imposed by its earlier relevant resolutions, Acting under Chapter VII of the Charter of the United Nations”).

161. Convention Regarding the Regime of Navigation on the Danube art. 1, Aug. 18, 1948, 33 U.N.T.S. 181.

162. See Act for the Navigation of the Danube between Austria, Bavaria, Turkey, and Wurtemberg, Nov. 7, 1857, 117 Parry’s T.S. 471. For a history of the protection of the freedom of navigation on the Danube River, see Aaron Schwabach, *Diverting the Danube: The Gabčíkovo-Nagyymaros Dispute and International Freshwater Law*, 14 BERKELEY J. INT’L L. 290, 313-22 (1996); Teclaf, *supra* note 138, at 51-56.

Mixed in with these obligations from “decides” and “demands” in the Yugoslavia context were obligations from “calls upon” provisions. In addition to the provisions prohibiting all transport of commodities and products into and out of Yugoslavia, as well as all commercial maritime traffic,¹⁶³ the Security Council created in Resolution 820 duties on riparian states by “call[ing] upon [them] to ensure that adequate monitoring is provided to all cabotage traffic involving points that are situated between Vidin/Calafat and Mohacs.”¹⁶⁴ These are cities situated along the Danube River in Bulgaria, Romania and Hungary, respectively, with the points of the Danube River in between being in the former Yugoslavia. “Cabotage” means transportation of goods or people between places within one country.¹⁶⁵ Resolution 820 went on to highlight the binding effect of these provisions by “[r]emind[ing] States of the importance of strict enforcement of measures imposed under Chapter VII, and calls upon them to bring proceedings against persons and entities violating the measures imposed by . . . the present resolution and to impose appropriate penalties.”¹⁶⁶ In other words, the binding effect of these provisions was emphasized by this provision expressly reminding states of “the importance of strict enforcement measures under Chapter VII,” under which this resolution was adopted, and it also reminded them by requiring states to prosecute and penalize offenders. Such monitoring of cabotage traffic along the Danube interfered with Yugoslavia’s freedom of navigation along the Danube, as well as the freedom of Bulgaria, Romania, and Hungary not to have to monitor the activities of neighbors along the Danube River, which is a corollary to the freedom of navigation.¹⁶⁷

In concluding this section, it is important to note that the Security Council also conceivably was regulating freedom-of-navigation activities

163. See S.C. Res. 820, U.N. Doc. S/RES/820 (Apr. 17, 1993), ¶¶ 22 & 28 (“Decides to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) except when authorized on a case-by-case basis by the Committee established by resolution 724 (1991) or in case of force majeure”).

164. *Id.* ¶ 16.

165. See *Cabotage*, BLACK’S LAW DICTIONARY 243 (10th ed. 2014).

166. S.C. Res. 820, U.N. Doc. S/RES/820 (Apr. 17, 1993), ¶ 19.

167. Convention Regarding the Regime of Navigation on the Danube art. 3, Aug. 18, 1948, 33 U.N.T.S. 181 (establishing that state parties to the Belgrade Convention only have an obligation “to undertake to maintain their sections of the Danube in a navigable condition . . . and to carry out the works necessary for the maintenance and improvement of navigation conditions . . .”). However, none of this requires monitoring of neighbors, only monitoring of the riparian state’s section of the Danube.

along international rivers when it halted maritime shipping through various sanctions regimes, including:

- the Artibonite River between Haiti and the Dominican Republic when creating an embargo on Haiti under Chapter VII to “halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations;”¹⁶⁸
- the Kolenté and Moa Rivers between Sierra Leone and Guinea and the Mano River between Sierra Leone and Liberia when imposing an embargo on Sierra Leone under Chapter VII “by halting inward maritime shipping in order to inspect and verify their cargoes and destinations;”¹⁶⁹ and
- the Tumen and Yalu Rivers between North Korea and the People’s Republic of China when the Security Council imposed a Chapter VII embargo on North Korea.¹⁷⁰

All of these embargoes conceivably interfered with the freedom of riparian states to navigate international watercourses including rivers. However, they are not the focus of this section inasmuch as they do not expressly involve navigational uses protected under international water law.

This section has highlighted the two main instances where the Security Council has interfered with international water law when trying to resolve navigational disputes that threatened international peace and security. The next section shifts the focus to such interference with non-navigational disputes.

B. *Non-Navigational Disputes*

Not all international water disputes center around navigational issues. This section focuses on the six instances where the Security Council has attempted to resolve non-navigational international water disputes using its Chapter VII powers. Not surprisingly, all of them have arisen only after the commencement of broader hostilities between two states. These disputes take the form of one side of a dispute denying the other side its regular supply of water or denying individuals on the

168. S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 17, 1993), pmb. ¶¶ 7-8, ¶ 1; S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994), preamb. ¶ 14 & ¶ 9.

169. S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997), pmb. ¶ 10, ¶ 8.

170. S.C. Res. 2270, U.N. Doc. S/RES/2270 (Mar. 2, 2016), pmb. ¶ 11-12, ¶ 18. This is to say nothing about blanket embargoes on states, which presumably include transshipment and other types of international shipping within the target states.

other side the water they are entitled to under humanitarian considerations. The Helsinki Rules on the Uses of the Waters of International Rivers of 1966 (1966 Helsinki Rules) in article IV expressly state, “A use or category of uses is not entitled to any inherent preference over any other use or category of uses.”¹⁷¹ However, there occasionally are humanitarian situations where the availability of drinking water must take top priority, and the Security Council has emphasized this point in disputes in at least six different locations.¹⁷²

In addition to the provisions emphasized in the following subsection, this emphasis on humanitarian considerations is supported by article 26(3) of the 1929 Geneva Convention that requires the provision of water to prisoners.¹⁷³ Likewise, article 20 of the Third Geneva Convention of 1949 requires that prisoners of war have “sufficient food and potable water, and with the necessary clothing and medical attention,”¹⁷⁴ with article 89 of the Fourth Convention requiring similar provisions for civilians.¹⁷⁵ For example, article 89(3) of the Fourth Geneva Convention states, “Sufficient drinking water shall be supplied to internees.”¹⁷⁶ Article 127(2) requires the detaining power to provide internees with sufficient water “to maintain them in good health” during their transfers.¹⁷⁷ As the International Committee of the Red Cross’ (ICRC) Commentary on the Fourth Geneva Convention indicates, this obligation to provide water is “a most important one, particularly in desert areas,”¹⁷⁸ which is particularly relevant to the Yemeni context below, even though that situation arguably does not involve internees. No other provisions of the Fourth Geneva Convention expressly refer to drinking water. The ICRC, nevertheless, includes drinking water as part of its “assistance approach” to international humanitarian law (IHL) under the umbrella of “assisting victims of armed conflict and other situations of violence:”

171. *Helsinki Rules*, *supra* note 42, art. 4.

172. *See id.*

173. *See* Convention Relative to the Treatment of Prisoners of War art. 26(3), July 27, 1929, 118 L.N.T.S. 343.

174. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 20, Aug. 12, 1949, 75 U.N.T.S. 135.

175. *Id.* art. 89.

176. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 89(3), Aug. 12, 1949, 75 U.N.T.S. 287.

177. *Id.* art. 127(2).

178. COMMENTARY OF THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 394 (Jean S. Pictet ed., 1958).

- The aim of assistance is to preserve life and/or restore the dignity of individuals of communities adversely affected by armed conflict or other situations of violence.
- Assistance activities principally address the consequences of violations of international humanitarian law and other relevant bodies of law. They may also tackle the causes and circumstances of these violations by reducing exposure to risk.
- Assistance covers the unmet essential needs of individuals and/or communities as determined by the social and cultural environment. These needs vary, but responses mainly address issues relating to health, water, sanitation, shelter and economic security by providing goods and services, supporting existing facilities and services and encouraging the authorities and others to assume their responsibilities.¹⁷⁹

Outside of this “assistance approach,” the ICRC frames the protection of water solely as being a civilian object that is needed for survival.¹⁸⁰ However, unlike many other IHL protections, the ICRC does not cite an exact article of IHL as support. This presumably is because no IHL provision expressly relates to water supplies of civilians outside of the internee context. The ICRC says that “[a]ttacks against civilian objects and, in particular, against objects that are indispensable for the survival of the civilian population are war crimes.”¹⁸¹ However, article 8(2) (b) (xxv) of the Rome Statute of the International Criminal Court lists the following as a war crime in connection with objects indispensable to survival: “Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions.”¹⁸² Somewhat surprisingly, the commentaries on this provision of the Rome Statute do not list water among the types of

179. *The ICRC: Its Mission and Work*, INTERNATIONAL COMMITTEE OF THE RED CROSS 15 (2009).

180. Jean-Marie Henckaerts, *What IHL Says About Water*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Mar. 22, 2007), www.icrc.org/eng/resources/documents/interview/water-ihl-interview-220307.htm.

181. *Id.*

182. Rome Statute of the International Criminal Court art. 8(2) (b) (xxv), July 17, 1998, 2187 U.N.T.S. 90.

indispensable objects for survival.¹⁸³ Therefore, there is little in terms of tangible sources that supports the ICRC's interpretation.

While treaties in the realm of human rights do not expressly provide for a right to water, there is such an emerging right under the International Covenant on Economic, Social and Cultural Rights as articulated in General Comment Number 15 and in General Assembly Resolution 64/292 of 2010 where the General Assembly recognized the human right to water and sanitation.¹⁸⁴ While all references in Security Council resolutions to humanitarian assistance and rights under international humanitarian law presumably will include the right to water, this section focuses only on those resolutions that expressly mention water and only on resolutions that the Security Council adopted under Chapter VII that responded to attacks on water and water-related items in close temporal proximity to each other. Before proceeding with that analysis, however, the following sub-section sets out and analyzes the relevant aspects of international water law in order to understand how the Security Council's measures vary from these norms.

1. Priorities with Non-Navigational Uses in Light of Humanitarian Needs

The section above on the freedom of navigation discussed how the freedom-of-navigation principle continues in times of armed conflict in accordance with article 15 of the Barcelona Statute. The International Law Association has argued that the freedom of navigation does not take priority in times of armed conflict and that there ought to be a derogation of this right as well as a facilitation of navigation for humanitarian purposes.¹⁸⁵ This is supported by the practice of the Security

183. *Article 8*, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 104 (Mark Klamburg ed., 2017) (citing, *inter alia*, Michael Cottier, *Article 8*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 458 (Otto Triffterer ed., 2d ed., 2008)); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 362-65 (2005) (including in "starvation" such "non-food objects" as "medicines, blankets or clothing").

184. See generally G.A. Res. 64/292, U.N. GAOR, U.N. Doc. A/RES/64/292 (Aug. 3, 2010); Committee on Economic, Social & Cultural Rights, General Comment No. 15, UN Doc. E/C.12/2002/11 (Jan. 20, 2003). For more information on the emerging right to water, see Jootaek Lee & Maraya Best, *Attempting to Define the Human Right to Water with an Annotated Bibliography & Recommendations for Practitioners*, 30 GEO. ENVTL. L. REV. 75 (2017); Takele Soboka Bulto, *The Emergence of the Human Right to Water in International Human Rights Law: Invention or Discovery?* 12 MELB. J. INT'L L. 290 (2011); Stephen C. McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1 (1992).

185. *Helsinki Rules Report*, *supra* note 96, at 500 ("Certainly, the freedom of navigation reflected in Articles XIII, XIV and XVII of this Chapter does not prevail when the riparian State and the State, whether or not a co-riparian, whose vessels seeks to navigate the international river or lake

Council, which uses its authority under article 39 of the U.N. Charter to determine acts of aggression and breaches of the peace and thereby ensure the safe passage of goods and persons under articles 40 and 41 of the U.N. Charter. The implementation of these rules relating to the safe passage of goods and persons are *lex ferenda*.¹⁸⁶ However, there is an emerging interpretation of the Convention on the Law of Non-Navigational Uses of International Watercourses (“1997 Watercourses Convention”) that prioritizes uses for humanitarian purposes.

The 1997 Watercourses Convention is the main convention that governs the non-navigational uses of international watercourses. The 1997 Watercourses Convention does not generally prioritize non-navigational uses. Article 10(1) of the 1997 Watercourses Convention states, “In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.”¹⁸⁷ However, there is an exception to the rule. Article 10(2) of the 1997 Watercourses Convention provides, “In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.”¹⁸⁸ The text provides that where there is a conflict between non-navigational uses (say state X’s building of dams clashes with state Y’s fishing rights), the humanitarian purposes receive the priority. The phrase “special regard . . . to vital human needs” is the most relevant part of the 1997 Watercourses Convention Article 10(2) to the analysis here.

Commentators interpret this language in different ways. Gudmundur Eiriksson interprets it as limiting the navigation right in light of changing human needs.¹⁸⁹ Further interpretations relate to special humanitarian

are engaged in war or armed conflict with one another. Although naval vessels are subject to denial of passage, any restriction upon the passage of purely commercial vessels should be limited to situations where the passage would be detrimental to the military effort of the riparian State. On the other hand, where humanitarian interests are involved, effort should be made to permit navigation by non-military vessels where the situation permits.”).

186. See Repertory of Practice of United Nations Organs for each of Article 39, 40, 41 and 42 in the corresponding Repertory of Practice, Article 39, Supplement Nos. 7-9 (1985-1999), Volume III; Repertory of Practice, Article 40, Supplement Nos. 7-9 (1985-1999), Volume III; Repertory of Practice, Article 41, Supplement Nos. 7-9 (1985-1999), Volume III; Repertory of Practice, Article 42, Supplement Nos. 7-9 (1985-1999), Volume III; see also Repertory of Practice, Articles 39-42, Supplement No. 10 (2000-2009).

187. Convention on the Law of the Non-Navigational Uses of International Watercourses art. 10(1), May 21, 1997, 36 I.L.M. 700 (1997) [hereinafter Watercourses Convention].

188. *Id.* art. 10(2).

189. See Gudmundur Eiriksson, *The Work of the International Law Commission at Its 43rd Session Part Three*, 61 NORDIC J. INT’L L. 319, 324 (1992).

needs in times of armed conflict. Elizabeth Burleson relies on this language in the context of a water dispute in Israel involving the Palestinian Occupied Territories, with a human right to water being inferred from this provision, notwithstanding any derogations from human rights treaties *stricto sensu* due to armed conflict.¹⁹⁰ Mara Tignino interprets this language to mean that water resources must be protected under international humanitarian law because water is necessary for civilians to survive.¹⁹¹

The interpretations of Burleson and Tignino are further supported by article 29 of the 1997 Watercourses Convention, which provides for protection of international watercourses for the safeguarding of humanitarian purposes:

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.¹⁹²

Article 29 explicitly refers to the law of armed conflict as applying to international watercourses as well as to installations or facilitations of international watercourses that must be protected thereunder.¹⁹³

In contrast to the Barcelona Statute, which does not prioritize uses of a waterway for humanitarian purposes in times of armed conflict, the 1997 Watercourses Convention does have an explicit provision in article 10(2) that prioritizes uses of an international waterway for the interests of “vital human needs.” Interpretations of article 10(2) by Burleson and Tignino argue that human rights and humanitarian protection are implicit in the term “vital human needs.” Assuming such interpretations are accurate, such an explicit provision that prioritizes uses of international waterways for humanitarian purposes as well as article 20 of the Helsinki Rules of 1966 curtail the freedom of navigation of international waterways during times of armed conflict as provided in article 15 of the Barcelona Statute. These rules restricting the freedom of navigation complement each other as well as the Security Council

190. See Elizabeth Burleson, Middle Eastern and North African Hydropolitics: From Eddies of Indecision to Emerging International Law, 18 GEO. INT'L ENVTL. L. REV. 385, 396 (2006).

191. See Mara Tignino, *Water, International Peace and Security*, 92 INT'L REV. RED CROSS 647, 672 (2010).

192. Watercourses Convention, *supra* note 187, art. 29.

193. See Int'l L. Comm'n, The Law of Non-Navigational Uses of International Watercourses, Report of the International Law Commission on the Forty-Third Session 76-77 (1991).

interventions in international water disputes discussed below. With these views of priorities concerning non-navigational uses under international water law in mind, this section now turns to actual instances where the Security Council has imposed obligations in relation to the priorities of non-navigational uses of water.

2. Security Council Decisions Relating to Non-Navigational Matters

The examples of where the Security Council has imposed obligations with regard to priorities with non-navigational uses of water range from the early instances with Iraq in the 1990s to more recent instances in Syria. All of these examples involve the supply of water in times of crisis for humanitarian reasons. These situations go beyond what one might consider as water security from a development perspective, which promotes human economic activity and economic efficiency of a community.¹⁹⁴ As alluded to in the introduction for this section, these situations involve the necessity of water for the basic survival of a community during times of armed conflict.¹⁹⁵

a. Iraq

On August 2, 1990, Iraq invaded Kuwait, and this set off a series of actions taken by the Security Council designed to oust Iraq from Kuwait, *inter alia*. This sub-section does not analyze these resolutions because they have been analyzed elsewhere.¹⁹⁶ Water-related equipment featured prominently in the attacks by both sides, with Iraqi forces destroying Kuwait's desalination plants before retreating and coalition forces destroying much of Iraq's water and sanitation systems,

194. See Christina Leb & Patricia Wouters, *The Water Security Paradox and International Law*, in WATER SECURITY: PRINCIPLES, PERSPECTIVES AND PRACTICES 26 (Declan Conway & Mark Zeitoun eds. 2013).

195. See generally Nikolai Jorgensen, *The Protection of Freshwater in Armed Conflict*, 3 J. INT'L L. & INT'L REL. 57 (2007) (discussing the protections of water under international humanitarian law); Gamal Abouali, *Natural Resources under Occupation: The Status of Palestinian Water under International Law*, 10 PACE INT'L L. REV. 411 (1998) (same).

196. For analysis of the Security Council resolutions arising out of the Iraqi invasion of Kuwait, including Resolutions 660, 678, 686 and 687, see James D. Fry, *Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq*, 15 TUL. J. INT'L & COMP. L. 611-15, 626-29 (2007); Adam Tait, *The Legal War: A Justification for Military Action in Iraq*, 9 GONZ. J. INT'L L. 96, pt. III (2005); Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE COMP. INT'L L. REV. 233, 241-42 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 578-82 (2003).

thus creating a strain on water supplies.¹⁹⁷ Saddam Hussein apparently also poisoned and depleted water supplies of his Shiite opponents in southern Iraq.¹⁹⁸

Acting expressly under Chapter VII, the Security Council adopted Resolution 674 and “[d]emand[ed] that Iraq ensure the immediate access to food, water and basic services necessary to the protection and well-being of Kuwaiti nationals and of third-State nationals in Kuwait and Iraq, including the personnel of diplomatic and consular missions in Kuwait.”¹⁹⁹ Notwithstanding these resolutions, observers found water-borne diseases and child mortality rates up in 1994, at least in part due to the shortage of safe water.²⁰⁰ The Security Council in 2000 decided in Resolution 1302 to keep the sanctions in place but tried to lessen their impact with regard to water supplies by deciding to remove items relating to water and sanitation supplies from the list of items that the Resolution 661 Sanctions Committee had to approve before entering Iraq.²⁰¹ Such a sanctions regime has no shortage of criticism.²⁰² One commentator colorfully branded this attempt at balance as “humanitarian showmanship indulging in meaningless words.”²⁰³ Admittedly, the water-related elements of these resolutions were relatively minor compared to all the other resolutions, which focused mainly on the oil-for-food program, compensation owed by Iraq, border demarcation issues, the UN observers between Iraq and Kuwait, and Iraq’s WMD disarmament.²⁰⁴ Regardless, Iraqi civilians continued

197. See Peter H. Gleick, *Water Conflict: Fresh Water Resources and International Security*, 18 INT’L SEC. 79, 87-88 (1993); Pamela LeRoy, *Troubled Waters: Population and Water Scarcity*, 6 COLO. J. INT’L ENVTL. L. & POL’Y 299, 317 (1995); James A. Frederick, *Thou Shall Not Covet Thy Neighbor’s Water: A Look at the Journey Both Texas and the Middle East Must Embark Upon to Solve the Kinks in their Water Regulation*, 29 HOUS. J. INT’L L. 423, 439-40 (2007).

198. See Gleick, *supra* note 197, at 87-88.

199. S.C. Res. 674, U.N. Doc. S/RES/674, pmbl. ¶ 8, ¶ 5 (Oct. 29, 1990).

200. See Lea Carol Owen, *Between Iraq and a Hard Place: The U.N. Compensation Commission and its Treatment of War Crimes*, 31 VAND. J. TRANSNAT’L L. 499, 541-42 (1998); Carlyle Murphy, *Iraqis Say Sanctions Hurt the Wrong People*, WASH. POST, July 5, 1991, at A1 (talking about water purification problems in Iraq).

201. See S.C. Res. 1302, U.N. Doc. S/RES/1302, pmbl. ¶ 6, ¶ 8 (June 8, 2000).

202. See Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 EUR. J. INT’L L. 43, 48-50 (2002) (discussing these resolutions and listing problems with the authorization process and the exemption process, as well as the focus on “transactional aspects of welfare delivery,” among other perceived problems).

203. Roger Normand & Christoph Wilcke, *Human Rights, Sanctions, and Terrorist Threats: United Nations Sanctions Against Iraq*, 11 TRANSNAT’L L. & CONTEMPT. PROBS. 299, 331 (2001).

204. See Ben Saul, *The Legality of the Use of Force Against Iraq in 2003: Did the Coalition Defend or Defy the United Nations?*, 8 UCLA J. INT’L L. & FOR. AFF. 267, 277-78 (2003).

to suffer from poor water access and quality for years following the introduction of these sanctions.²⁰⁵

Following the 2003 invasion of Iraq, the Security Council expressly acted under Chapter VII when it adopted Resolution 1472, which “[c]all[ed] on the international community also to provide immediate humanitarian assistance to the people of Iraq, both inside and outside Iraq in consultation with relevant States, and in particular to respond immediately to any future humanitarian appeal of the United Nations.”²⁰⁶ This resolution also “[a]uthorize[d] the Secretary-General and representatives designated by him to undertake as an urgent first step, and with the necessary coordination” the designation of “alternative locations . . . for the delivery, inspection and authenticated confirmation of humanitarian supplies and equipment” and to otherwise adjust contracts to expedite and facilitate delivery of these humanitarian supplies and equipment.²⁰⁷ Commentators have seen this resolution as a “summon[ing] of the international community to assist in resolving the humanitarian crisis” in Iraq,²⁰⁸ although it is unclear that it was successful. Regardless, presumably this immediate assistance with humanitarian supplies and equipment referred to in this resolution included access to water for drinking and sanitation purposes, along with the related equipment, as Iraqi civilians continued to suffer from a shortage of water.²⁰⁹

Nevertheless, these paragraphs and the others in the resolution either do not mention water *per se* or involve binding obligations imposed on member states by the Security Council, and so this sub-section gives them no more attention than this. The only provision of Resolution 1472 that expressly mentions water is towards the end where it “request [ed] the Secretary General to update the Committee [established

205. See Christopher Joyner, *United Nations After Iraq: Looking Back to See Ahead*, 4 CHI. J. INT'L L. 329, 338-40 (2003); Sarah R. Denne, *Re-Thinking Humanitarian Aid in the Post-Gulf War Era: The International Committee of the Red Cross Takes the Lead*, 39 CASE W. RES. J. INT'L L. 867, 871-72 (2008) (putting the number of Iraqis without water at 2.5 million and those with a quarter of the clean water they had before the war at 14.5 million); Eyal Benvenisti, *Water Conflicts during the Occupation of Iraq*, 97 AM. J. INT'L L. 860 (2003); Stan Crock, *Commentary: How the U.S. Can Keep Iraq from Unraveling*, BUS. WK., June 2, 2003, at 28 (discussing the problems in Iraq, including the lack of reliably clean drinking water); Hilary Charlesworth, *Law after War*, 8 MELB. J. INT'L L. 233, 243 (2007) (stating that seventy percent of Iraqi people do not have access to safe water in 2007).

206. S.C. Res. 1472, U.N. Doc. S/RES/1472, ¶ 2 (Mar. 28, 2003).

207. *Id.* ¶ 4.

208. Robert Bejesky, *A Theorization on Equity: Tracing Causal Responsibility for Missing Iraqi Antiquities and Piercing Official Immunity*, 27 PACE INT'L L. REV. 399, 425-26 (2015).

209. See DILIP HIRO, *SECRETS AND LIES: OPERATION IRAQI FREEDOM AND AFTER 192-93* (2004) (discussing the shortage of water in Iraq during this time).

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pursuant to Resolution 661] on the measures as they are being taken and to consult with the Committee on prioritization of contracts for shipments of goods, other than foodstuffs, medicines, health and water sanitation related supplies.”²¹⁰ Again, this provision exists as a non-binding request, and so it is excluded from further analysis for falling outside of this Article’s narrow scope. Nevertheless, the clear obligations that the Security Council imposed on Iraq in Resolution 674 to “ensure the immediate access to food, water and basic services necessary to the protection and well-being of Kuwaiti nationals and of third-State nationals in Kuwait and Iraq,” as well as the adjustments to the sanctions regime from Resolution 1301, stand out for both their binding effect and their express relevance to water. Nevertheless, water scarcity continues to be a problem in Iraq, mainly due to droughts, salinization problems and the Islamic State of Iraq and the Levant using water as a weapon, among other problems.²¹¹

b. Bosnia and Herzegovina

The Security Council similarly was involved in Bosnia and Herzegovina in August 1993. The basic facts of the civil war that was occurring in Yugoslavia at this time already have been sketched out in Section IV(A)(2)(b) above.²¹² The Security Council established the United Nations Protection Force (UNPROFOR) in February 1992 and gave it a mandate in Resolution 743 to “create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis.”²¹³ By April 1992, the situation in Bosnia and Herzegovina in particular had deteriorated to the point that the Secretary General was reporting to the Security Council “that persons

210. S.C. Res. 1472, U.N. Doc. S/RES/1472, ¶ 10 (Mar. 28, 2003).

211. See TOBIAS VON LOSSOW, MORE THAN INFRASTRUCTURES: WATER CHALLENGES IN IRAQ, CLINGENDAEL (July 2018), https://www.clingendael.org/sites/default/files/2018-07/PB_PSI_water_challenges_Iraq.pdf.

212. See generally Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT’L. L. 569, 577-79 (1992) (outlining the international community’s response, including that of the Security Council).

213. S.C. Res. 743, U.N. Doc. S/RES/743, ¶ 5 (Feb. 21, 1992). Subsequent resolutions expanded this force and adjusted its mandated. See Charlotte Ku, *When Can Nations Go to War? Politics and Change in the UN Security System*, 24 MICH. J. INT’L L. 1077, 1118-19 (2003) (describing these resolutions and changes); Anna Roberts, “*Soldiering on in Hope*”: *United Nations Peacekeeping in Civil Wars*, 35 N.Y.U. J. INT’L L. & POL. 839, 841-43 (2003) (same). For a history of Security Council involvement in Bosnia-Herzegovina, see Geoffrey Nice & Nena Tromp, *Bosnia-Herzegovina*, in *THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS* 288 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

of various nationalities have been expelled from their homes.”²¹⁴ In April 1992, the siege of Sarajevo began, which lasted for over three years and included Serbian forces cutting off electricity and water to the city from the mountains, notwithstanding the promises of Serbian leaders not to use the city’s utilities as a weapon.²¹⁵ As a result of the escalating atrocities from the ethnic cleansing,²¹⁶ the Security Council, “[n]oting the urgent need for humanitarian assistance” in Bosnia and Herzegovina, “[c]all[ed] on all parties and others concerned to ensure that conditions are established for the effective and unhindered delivery of humanitarian assistance” in Resolution 752.²¹⁷

In response to the further deterioration of the situation, the U.N. Secretary General recommended to the Security Council on June 6, 1992, that UNPROFOR’s mandate be extended to include the “unloading of humanitarian cargo and ensur[ing] the safe movement of humanitarian aid and related personnel...,” among many other humanitarian functions,²¹⁸ which the Security Council decided to adopt in its Resolution 758.²¹⁹ These resolutions and related ones did not expressly mention the supplying of water, although it can be implied from the references to humanitarian assistance and the Security Council’s efforts to decrease human suffering there. Bosnian groups ultimately did not allow for such humanitarian assistance to be provided, so the Security Council levied further sanctions.²²⁰ Nevertheless, these resolutions are seen as helping set a precedent for

214. Report of the Secretary-General Pursuant to Security Council Resolution 743, UN Doc. S/2377, ¶ 16 (Apr. 2, 1992).

215. See generally Sanja Kutnjak Ivkovic & John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)justice*, 40 L. & SOC’Y REV. 369, 375-79 (2006); K.J. Riordan, Shelling, *Sniping and Starvation: The Law of Armed Conflict and the Lessons of the Siege of Sarajevo*, 41 VICT. U. WELLINGTON L. REV. 149 (2010).

216. See Nicole M. Procida, *Ethnic Cleansing in Bosnia-Herzegovina, A Case Study: Employing United Nations Mechanisms to Enforce the Convention on the Prevention and Punishment of the Crime of Genocide*, 18 SUFFOLK TRANSNAT’L L. REV. 655, 674-75 (1995).

217. S.C. Res. 752, U.N. Doc. S/RES/752 (May 15, 1992), ¶ 8. See also S.C. Res. 770, U.N. Doc. S/RES/770, ¶ 2 (Aug. 13, 1992) (similarly calling on states to adopt “all measures necessary to facilitate . . . humanitarian assistance”).

218. Report of the Secretary-General Pursuant to Security Council Resolution 757, UN Doc. S/24075, ¶ 4 (June 6, 1992).

219. See S.C. Res. 758, U.N. Doc. S/RES/758 (June 8, 1992), ¶ 2; see also Gideon A. Moor, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and UNMET Responsibilities*, 18 FORDHAM INT’L L.J. 870, 896-98 (1995); Paul Freedman, *International Intervention to Combat the Explosion of Refugees and Internally Displaced Persons*, 9 GEO. IMMIGR. L.J. 565 (1995).

220. See Procida, *supra* note 216, at 675; Moor, *supra* note 219, at 897.

how the Security Council authorizes intervention based on the need to provide humanitarian assistance.²²¹

In 1993, Bosnian Serbs took control of many of Sarajevo's wells and otherwise sabotaged Sarajevo's water supplies.²²² As a result, the Security Council, acting under Chapter VII, started to focus on water when it "[s]trongly condemn[ed] the disruption of public utilities (including water)" there and "call[ed] upon all parties concerned to cooperate in restoring them" before "[d]emand[ing] that all concerned facilitate the unhindered flow of humanitarian assistance, including the provision of . . . water . . . in particular to the 'safe areas' in Bosnia and Herzegovina."²²³ This greater emphasis was to help ensure that the needed humanitarian assistance got to where it needed to go.²²⁴ The need for water became so great in 1994 that the Security Council even tied the "security of UNPROFOR and its freedom of movement for all of its missions" to the establishment of water supplies there,²²⁵ and later requested UNPROFOR to inform the Security Council of any improvements with these water supplies,²²⁶ under the Security Council's Chapter VII powers.²²⁷ UNPROFOR was active in distributing water to refugees.²²⁸ However, hostilities escalated shortly after this point in time, and both sides decreased their cooperation with UNPROFOR, with UNPROFOR's mandate eventually expiring in

221. See, e.g., David M. Kresock, "Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention, 27 CORNELL INT'L L.J. 203, 226-27 (1994); Davis Brown, *The Role Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 235, 274-75 (1997).

222. See Murray Kempton, *The UN Shuffles Toward Destiny*, NEWSDAY, 13 (May 7, 1993).

223. S.C. Res. 859, U.N. Doc. S/RES/859 (Aug. 24, 1993), pmbl. ¶¶ 8 & 15, ¶ 3. This was a significant change, because UNPROFOR's mandate originally was established under UN Charter Chapter VI. See Jonathan E. Davis, *From Ideology to Pragmatism: China's Position on Humanitarian Intervention in the Post-Cold War Era*, 44 VAND. J. TRANSNAT'L L. 217, 238-39 (2011) (discussing the significance of this change).

224. See Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 260-61 (1999).

225. S.C. Res. 871, U.N. Doc. S/RES/871 (Oct. 4, 1993), ¶ 8.

226. See S.C. Res. 947, U.N. Doc. S/RES/947 (Sep. 30, 1994), ¶ 5.

227. See S.C. Res. 871, *supra* note 225, pmbl. ¶ 6; S.C. Res. 947, *supra* note 226, pmbl. ¶ 9; see also Christine Gray, *Host-State Consent and the United Nations Peacekeeping in Yugoslavia*, 7 DUKE J. COMP. & INT'L L. 241, 262 (1996) (discussing the significance of these resolutions being adopted under Chapter VII).

228. See T. Modibo Ocran, *How Blessed Were the UN Peacekeepers in Former Yugoslavia? The Involvement of UNPROFOR and Other UN Bodies in Humanitarian Activities and Human Rights Issues in Croatia, 1992-1996*, 18 WIS. INT'L L.J. 193, 219 (2000).

March 1995.²²⁹ It is unclear whether these provisions were complied with, but it seems safe to assume that they were not.

c. Croatia

The situation in Croatia was considerably better than that in Bosnia and Herzegovina. For example, UNPROFOR's main tasks there were to disarm and demilitarize designated areas, as the humanitarian situation was not as dramatic as that in Bosnia and Herzegovina, although Serbian forces still targeted water supplies, with considerable success.²³⁰ Nevertheless, Security Council Resolution 779 of 1992 "call[ed] on all the parties and others concerned to . . . cooperat[e]" to "ensure the restoration of . . . water supplies before the coming winter."²³¹ This presumably was an alternative in case the refugees and displaced persons did not return to their homes, which was in the preceding paragraph and was the main emphasis of Resolution 779.²³² The Security Council did not adopt this resolution under Chapter VII or use the somewhat stronger signal "decides" or "demands," which would have made it easier to talk of this resolution having a binding effect on states. Instead, in Resolution 779 the Security Council "[r]ecall[ed] the provisions of Chapter VIII of the Charter of the United Nations," as well as "[r]eaffirm[ed] its resolution 743 (1992) of 21 February 1992,"²³³ which itself "[r]ecall[ed] the provisions of article 25 and Chapter VIII of the Charter."²³⁴ This reference to article 25 can be seen as asserting the binding nature of Resolution 743,²³⁵ and that binding nature was incorporated into Resolution 779 by the reference it made to Resolution 743. As the ICJ explained in its 1970 *Namibia* advisory opinion, even if the resolution at issue does not contain an express reference to Chapter VII or an express reference to article 41 or 42, such a reference nevertheless can be read into the resolution at issue through incorporation

229. See Gray, *supra* note 227, at 266-67 (1996) (citing Report of the Secretary-General Pursuant to Security Council Resolution 947 (1994), U.N. SCOR, 50th Sess., U.N. Doc. S/1995/222 (1995), ¶¶ 3-5).

230. See U.N. Secretary-General, *Further Report of the Secretary-General Pursuant to Security Council Resolution 721*, ¶ 38, U.N. Doc. S/23592 (Feb. 15, 1992).

231. S.C. Res. 779, U.N. Doc. S/RES/779, ¶¶ 3, 6 (Oct. 6, 1992).

232. *Id.* ¶ 5; see John Quigley, *Repairing the Consequences of Ethnic Cleansing*, 29 PEPP. L. REV. 33, 39 (2001); John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 779 (1996).

233. S.C. Res. 779, *supra* note 231, pmb. ¶¶ 1 & 7.

234. S.C. Res. 743, *supra* note 213, pmb. ¶ 7.

235. See Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 188-89 (2006).

if a related resolution makes such a reference.²³⁶ By extension, this reasoning applies to the legal effect of article 25 being applied to resolutions that lack a reference to article 25 but instead incorporate article 25 by reference to a resolution referring to article 25.

The Security Council's involvement in Croatia intensified in 1993, with it eventually adopting Resolution 847 under Chapter VII with regard to "ensur[ing] the security of UNPROFOR and its freedom of movement for all its missions" in Croatia.²³⁷ To these ends, the Security Council "[c]all[ed] on the parties and others concerned to . . . restor[e] the supply of . . . water to all regions of the Republic of Croatia including the United Nations Protected Areas."²³⁸ Therefore, one no longer needs to rely on the incorporation by reference to article 25 provided in Resolution 743, as explained above, thereby solidifying the binding nature of the Security Council's involvement with these matters.

d. Libya

Between 1994 and 2011, the Security Council appears to have been silent on international water disputes of a non-navigational nature. This certainly was not for a lack of water-related situations worthy of the Security Council's attention. For example, the Pacific Institute's chronology of water conflict indicates that there were at least seventeen international water disputes that occurred during this period, such as the destruction of water pumping plants and pipelines along the border of Eritrea and Ethiopia during their 1998-2000 armed conflict, as well as the hostilities between Iran and Afghanistan in 2001 when Afghani authorities cut off the Helmand River that flowed into Iran, with Iranian forces entering Afghanistan to restore the flow into Iran.²³⁹

The Security Council broke its silence in relation to access to water for humanitarian purposes in the context of Libya in 2011. Libya has been suffering from a civil war since 2011, when revolutionary forces

236. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, 53 (June 21).

237. S.C. Res. 847, U.N. Doc. S/RES/847, pmbl. ¶ 7 (June 30, 1993). See also Gray, *supra* note 227, at 262 (discussing the shift to Chapter VII with these resolutions); Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT'L L. & TRADE 1 (1995) (same).

238. S.C. Res. 847, *supra* note 237, pmbl. ¶ 6.

239. See generally *Water Conflict Chronology*, PAC. INST., <http://www.worldwater.org/conflict/map/> (last visited Mar. 16, 2019).

rose to oust Colonel Muammar Gaddafi from power, and the struggle to fill the power vacuum has continued ever since.²⁴⁰ The North Atlantic Treaty Organization (NATO) played a key role in the ousting of Gaddafi, and it has received much criticism for its actions there.²⁴¹ The Security Council began Resolution 1970 of February 26, 2011 by “[e]xpressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians” before invoking its Chapter VII powers to “[d]emand[] an immediate end to the violence” and to “[d]ecide[] to refer the situation in the Libyan Arab Jamahiriya . . . to the Prosecutor of the International Criminal Court,” as well as impose an arms embargo, asset freeze, travel ban, and new sanctions committee, among other measures.²⁴² Resolution 1970 also recognized the need to maintain humanitarian assistance, as it “[c]all[ed] upon all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya. . . .”²⁴³ The Security Council adopted Resolution 1973 on March 17, 2011, when it became clear that Libya was not complying with Resolution 1970.²⁴⁴ This resolution obliged Libya to “take all measures to protect civilians and meet their basic needs,” all of which presumably included water-related needs in a humanitarian context.²⁴⁵

While these early resolutions did not expressly focus on water, Libya quickly started to suffer from various water-related problems, one of which was brought on by NATO attacking a pipe factory in Brega and a water facility in Sirte, which it apparently believed was a base for military operations and missile launches.²⁴⁶ Apparently pro-rebel groups tried to blame Gaddafi loyalists for these water-related attacks, but UNICEF

240. See generally MEGAN BRADLEY ET. AL., LIBYA’S DISPLACEMENT CRISIS: UPROOTED BY REVOLUTION AND CIVIL WAR (2016); Genser, *supra* note 128, at 440-45 (explaining the political situation in Libya).

241. See generally HORACE CAMPBELL, GLOBAL NATO AND THE CATASTROPHIC FAILURE IN LIBYA (2013).

242. S.C. Res. 1970, U.N. Doc. S/RES/1970, pmb. ¶ 1, ¶¶ 1, 4, 9, 15, 17, 24 (Feb. 26, 2011).

243. *Id.* ¶ 26.

244. See S.C. Res. 1973, U.N. Doc. S/RES/1973, pmb. ¶¶ 2-8 (Mar. 17, 2011).

245. *Id.* ¶ 3.

246. See Nafeez Ahmed, *Good News: UK Counter-Extremism Plans Could be Used to Silence Katie Hopkins*, MIDDLE EAST EYE (May 13, 2015), <https://www.middleeasteye.net/opinion/good-news-uk-counter-extremism-plans-could-be-used-silence-katie-hopkins>; Timothy Bancroft-Hinchey, *NATO’s Ultimate War Crime: Destroying Libya’s Water Supply*, GLOBAL RESEARCH (Aug. 1, 2011), <https://www.globalresearch.ca/nato-s-ultimate-war-crime-destroying-libya-s-water-supply/25861/>.

confirmed that this was not the case.²⁴⁷ Gaddafi loyalists later gained access to the water control system for Tripoli and cut off the water.²⁴⁸ In an effort to lessen the impact from the water shortages, the Security Council in its Resolution 2009 of 2011 excluded from its Chapter VII freezing of Libyan assets the funds to be used for “humanitarian needs” and “water for strictly civilian uses,” among other things.²⁴⁹ It is interesting that this resolution distinguishes these two uses, which potentially undermines the assumption made above that humanitarian assistance implicitly includes water needs of civilians.

Nevertheless, this resolution made it clear that water for civilian uses deserved to be excluded from the sanctions regime against Libya at that time for humanitarian reasons. Even after the Declaration of Liberation by the National Transition Council on October 23, 2011, when the Security Council withdrew the authorization of states to “take all necessary measures” to protect civilians of Libya, it nonetheless continued to require Libya to “protect civilians and meet their basic needs,”²⁵⁰ which Resolution 2009 made clear included “water for strictly civilian uses.” Therefore, when read together, this series of resolutions made clear that the Security Council included water among the basic needs that Libya was obliged to provide to its civilians. Commentators have focused on the arms embargo, travel ban, and asset freeze of these resolutions,²⁵¹ but curiously not on the requirement from the Security Council for Libya to meet the water needs to its civilians. This requirement essentially places human consumption of water as a priority over other uses during these times of crisis.

247. See Ahmed, *supra* note 246.

248. See *Libya's Beleaguereed Government Faces Water Threat*, UNITED PRESS INT'L (Sept. 12, 2013), <https://www.upi.com/Energy-News/2013/09/12/Libyas-beleaguereed-government-faces-water-threat/76361379024782/>.

249. S.C. Res. 2009, ¶ 16(a)(i)-(ii) (Sept. 16, 2011). For a history of Security Council involvement in Libya, see Philippe Kirsch & Mohamed S. Helal, *Libya*, in THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 396 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

250. S.C. Res. 2016, ¶ 5 (Oct. 27, 2011), ¶ 5 (citing S.C. Res. 1973, *supra* note 260 ¶¶ 4-5).

251. See, e.g., Paul R. Williams & Colleen (Betsy) Popken, *Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity*, 44 CASE W. RES. J. INT'L L. 225, 246 (2011); Genser, *supra* note 128, at 440-45; Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 372-83 (2012); Benjamin G. Davis, *Obama and Libya*, 7 FLA. A & M U. L. REV. 1, 4-8 (2011).

e. Yemen

Yet again in 2011, the Security Council focused on access to water for humanitarian purposes in the context of Yemen. During this period, Yemen suffered from severe water shortages due to decreased supply in mountain springs, presumably from inefficient water usage with farming practices,²⁵² which led to an emergency situation there.²⁵³ Regardless of the exact cause of the water depletion, and in connection with general unrest in Yemen from the Arab Spring and persistent tensions within Yemen,²⁵⁴ the Security Council adopted Resolution 2014 in 2011, in which the Security Council cited its “primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,” “[e]xpress[ed] serious concern about, the . . . increasingly difficult access to safe water,” and “[d]emand[ed] the Yemeni authorities immediately ensure their actions comply with obligations under applicable international humanitarian and human rights law.”²⁵⁵ Resolution 2402 of February 26, 2018 reiterated this obligation for states to comply with international humanitarian law, as well as that the Security Council was “[g]ravely distressed by the continued determination of the devastating humanitarian situation in Yemen, express[ed] serious concern at all instances of hindrances to the effective delivery of humanitarian assistance, including limitations on the delivery of vital goods to the

252. See William A. Rugh, *Yemen and the United States, Conflicting Priorities*, FLETCHER F. WORLD AFF., 109, 113 (2010); Ramee Khooshie Lal Panjabi, *Not a Drop to Spare: The Global Water Crisis of the Twenty-First Century*, 42 GA. J. INT'L & COMP. L. 277, 306 (2014). These water problems had been foreseen a few years before the start of the crisis. See, e.g., Amr Hamzawy & Marina Ottaway, *When Islamists Go Into Politics*, FLETCHER F. WORLD AFF., 37, 43 (2009); Panjabi, *supra*, at 306; *Success of Economic Reform May Have Laid Groundwork for a Recovery in 1997*, 20 MIDDLE E. EXEC. REP. 1, 8 (1997); Laura Kasinof, *At Heart of Yemen's Conflicts: Water Crisis*, CHRISTIAN SCI. MONITOR (Nov. 5, 2009), <https://www.csmonitor.com/World/Middle-East/2009/1105/p06s13-wome.html/>.

253. See Usha Natarajan, *TWAIL and the Environment: The State of Nature, The Nature of the State, and the Arab Spring*, 14 OR. REV. INT'L L. 177, 196 (2012).

254. See generally Genser, *supra* note 128, at 478-83 (explaining the political situation in Yemen leading up to Resolution 2014); John Odle, *Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists?* 27 EMORY INT'L L. REV. 603, 619-22 (2013) (same).

255. S.C. Res. 2014, pmb. ¶¶ 11, 18, ¶ 5 (Oct. 21, 2011); see also Eliav Lieblich, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations Under International Law*, 32 B.U. INT'L L. J. 355, 383-84 (2014) (discussing the significance of this resolution's language). Such a prioritization of drinking water by the Security Council resembles Yemen's own water prioritization for “drinking and domestic uses of water.” Carl Bruch, *Legal Frameworks Governing Water in the Middle East and North Africa*, SM083 ALI-ABA 219, 225 (2007) (quoting Yemen Water Law No. 33/2002, art. 20).

civilian population of Yemen.”²⁵⁶ These resolutions involving Yemen have been included in this study not only for their references to international humanitarian law and humanitarian purposes, which include the need for water, but more importantly for this express reference to water in Resolution 2014.

The temporal proximity of the water-related attacks in Yemen in 2015 and the Security Council’s Chapter VII resolutions also support inclusion of these resolutions in this study. The most notable water-related attacks in Yemen include alleged Saudi-led attacks on a Yemeni bottled water plant and a pipe factory in 2015 and 2016, and Yemeni reports of thousands being killed every year from water-related fighting there.²⁵⁷ Water shortages in Yemen continue to pose a genuine threat to the population, including the outbreak of cholera.²⁵⁸ The Security Council has failed to expressly mention these attacks or water-related dangers in its resolutions. Nevertheless, the Security Council has continued to “[n]ot[e] . . . the acute need of humanitarian assistance” and to “[e]ncourag[e] the international community to continue providing

256. S.C. Res. 2402, pmb. ¶¶ 5, 11 (Feb. 26, 2018); *see also* S.C. Pres. Statement 2015/8, ¶ 20 (Mar. 22, 2015) (reiterating the obligation to comply with international humanitarian law); S.C. Pres. Statement 2016/5, ¶ 11 (Apr. 25, 2016); S.C. Pres. Statement 2017/7, ¶ 7 (June 15, 2017).

257. *See Spokesman of Joint Accident Assessment Team in Yemen Reviews Results of Team Assessment 3 Riyadh*, SAUDI PRESS AGENCY (Sept. 26, 2018), <https://www.spa.gov.sa/viewfullstory.php?lang=en&newsid=1818987#1818987> (explaining that the 2016 Radfan bottled water plant had been used as an arms depot and as a meeting place for combatants); *Fresh Saudi-led Coalition Airstrikes Pound Yemen’s Hodeida Province*, THE NEW ARAB (July 30, 2018), <https://www.alaraby.co.uk/english/news/2018/7/30/fresh-saudi-led-coalition-airstrikes-pound-yemens-hodeida-province-un> (reporting on the destruction of water and sewage pipes in Hodeida from bombing and shelling); Yuram Abdullah Weiler, *Yemen: All but Forgotten in the West*, TEHRAN TIMES (June 17, 2017), <https://www.tehrantimes.com/news/414326/Yemen-All-but-forgotten-in-the-West> (listing water-related attacks in Yemen); James Dunn, *Locals Pick Through the Rubble of a Yemen Factory Destroyed in a Saudi Bombing Campaign Which Uses British Weapons, as MPs Argue Whether to Halt Arms Deals with the Kingdom*, DAILY MAIL ONLINE (Sept. 15, 2016), <https://www.dailymail.co.uk/news/article-3791740/Locals-pick-rubble-Yemen-factory-destroyed-Saudi-bombing-campaign-uses-British-weapons-MPs-argue-halt-arms-deals-kingdom.html>; Kareem Fahim, *Airstrikes in Yemen Take Toll on Civilians*, N.Y. TIMES, Sept. 12, 2015.

258. *See Yemen: 12 Days Into the Blockade - We Are Running Out of Fuel, Food and Medicines*, STATEMENT, INT’L RESCUE COMMITTEE (Nov. 17, 2017), <https://www.rescue.org/press-release/yemen-12-days-blockade-we-are-running-out-fuel-food-and-medicines>; Annie Slemrod, *Peeking through the Cracks into Yemen’s War*, THE NEW HUMANITARIAN (Nov. 16, 2017), <https://www.thenewhumanitarian.org/special-report/2017/11/15/peeking-through-cracks-yemen-s-war> (reporting that 27.4 million Yemenis lacked access to safe drinking water and 920,000 were suspected of having been infected by cholera through the water supply); Megan O’Toole, *What is Fueling Yemen’s Cholera Epidemic?*, AL JAZEERA (Sept. 5, 2017), <https://www.aljazeera.com/indepth/features/2017/09/fuelling-yemen-cholera-epidemic-170905090641210.html> (describing it as the “world’s worst cholera outbreak”); Alice Klein, *Cholera Crisis in Yemen*, 234 NEW SCIENTIST 4 (2017).

humanitarian assistance to Yemen,” while “[c]all[ing] on all parties to comply with their obligations under international law including applicable international humanitarian law and human rights law.”²⁵⁹

More recent Security Council resolutions have increasingly referred to the need for humanitarian assistance in Yemen. For example, Resolution 2201 of 2015 recognized the need to “avoid further deterioration of the humanitarian and security situation in Yemen.”²⁶⁰ Moreover, the Security Council made the following observations in the preambular paragraphs of its Resolution 2216 of 2015:

- Expressing grave alarm at the significant and rapid deterioration of the humanitarian situation in Yemen, and emphasizing that the humanitarian situation will continue to deteriorate in the absence of a political solution,
- Recalling that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including willfully impeding relief supply and access, may constitute a violation of international humanitarian law, [and]
- Emphasizing the need for the return to the implementation of the Gulf Cooperation Council Initiative and its Implementation Mechanism and the outcomes of the comprehensive National Dialogue conference . . . to avoid further deterioration of the humanitarian and security situation in Yemen[.]²⁶¹

With these observations in mind, the Security Council made the following decisions in the operative paragraphs of Resolution 2216:

259. S.C. Res. 2140, pmb. ¶ 11, ¶¶ 9, 28 (Feb. 26, 2014); *see also* S.C. Res. 2201, pmb. ¶ 9 (Feb. 15, 2015) (“*Noting* the formidable economic, security and social challenges confronting Yemen, which have left many Yemenis in acute need of humanitarian assistance[.]”); pmb. ¶ 10 (“*Emphasizing* the need for the return to the implementation of the Gulf Cooperation Council Initiative and its Implementation Mechanism and the outcomes of the comprehensive National Dialogue conference . . . to avoid further deterioration of the humanitarian and security situation in Yemen[.]”), pmb. ¶ 13 (“*Condemning* the growing number of attacks carried out or sponsored by Al-Qaida in the Arabian Peninsula, and expresses its determination to address this threat in accordance with the Charter of the United Nations and international law including applicable human rights, refugee and humanitarian law. . .”).

260. S.C. Res. 2201, pmb. ¶ 10 (Feb. 15, 2015).

261. S.C. Res. 2216, ¶¶ 9-11 (Apr. 14, 2015).

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- *Calls on* all parties to comply with their obligations under international law, including applicable international humanitarian law and human rights law;
- *Reaffirms*, consistent with international humanitarian law, the need for all parties to ensure the safety of civilians, including those receiving assistance, as well as the need to ensure the security of humanitarian personnel and United Nations and its associated personnel, and *urges* all parties to facilitate the delivery of humanitarian assistance, as well as rapid, safe and unhindered access for humanitarian actors to reach people in need of humanitarian assistance, including medical assistance;
- *Requests* the Secretary-General to intensify his efforts in order to facilitate the delivery of humanitarian assistance and evacuation, including the establishment of humanitarian pauses, as appropriate, in coordination with the Government of Yemen, and calls on Yemeni parties to cooperate with the Secretary General to deliver humanitarian aid to those in need; [and]
- *Reaffirms* paragraph 18 of resolution 2140 (2014), and *underscores* that acts that threaten the peace, security, or stability of Yemen may also include the violations of the arms embargo imposed by paragraph 14 or obstructing the delivery of humanitarian assistance to Yemen or access to, or distribution of, humanitarian assistance in Yemen.²⁶²

These provisions highlight the Security Council's focus on the need for humanitarian assistance and the delivery of humanitarian aid in Yemen, including the "safety of civilians" and "objects indispensable to [civilian] survival," which undoubtedly includes water, especially in such an arid climate as that of Yemen. Commentators often list water as one of the basic needs that Yemen should do better in providing its citizens.²⁶³ Again, the combination of the express references to water and the timing of those water-related attacks to these resolutions has necessitated the inclusion of these resolutions in this study.

Concerning which provisions in Security Council resolutions might be imposing (even if tacitly) water-related obligations in the context of

262. *Id.*, ¶¶ 8-9, 12, 19.

263. See, e.g., Matthew Fuss, *Increasing Health Care in Yemen Through Community-Based Health Insurance*, 23 IND. J. GLOBAL LEGAL STUD. 795, 796, 813 (2016); Ayat Mujais, *The Dos and Don'ts of Federal Constitutions: A Case Study on Yemen*, 33 AM. U. INT'L L. REV. 287, 301 (2017).

Yemen, the “demands” signal of Resolution 2014 and the “calls on” signal of Resolution 2216 stand out, especially since those signals typically convey obligations when they appear within Chapter VII resolutions, as explained in Part III above. Moreover, both provisions relate to compliance with international humanitarian law and human rights law. Both branches of international law provide some rights to water, as alluded to in the introduction to Section IV(B) above, with Resolution 2014’s express reference to water making the connection more obvious. Notwithstanding these connections to water, commentators have failed to recognize the involvement of the Security Council in addressing these water-related matters when discussing these resolutions.²⁶⁴

f. Syria

The most recent example of the Security Council imposing water-related obligations in the context of humanitarian assistance is the case of Syria. Water scarcity can be seen as one of the root causes of the Syrian civil war, which started in 2011. At that time, severe drought forced over 1.5 million people to move from rural to urban parts of Syria, creating what some saw as destabilizing pressure on society, which eventually led to some seeking the removal of the existing government.²⁶⁵ In 2012, fighting damaged a main water pipeline in Aleppo, cutting off the water supply for many of its 3 million inhabitants.²⁶⁶ Later in 2012, rebels captured a strategically important hydroelectric dam.²⁶⁷ In 2014, rebels cut off a key spring for the Damascus region, thus driving government forces away.²⁶⁸ In 2015, Al-Qaeda fighters bombed the key water pipeline for Aleppo, with one result being many

264. See, e.g., Genser, *supra* note 128, at 478-83; Gregory H. Fox et al., *The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law*, 67 AM. U. L. REV. 649, 673-74 (2018); Monica Hakimi, *The Jus Ad Bellum’s Regulatory Form*, 112 AM. J. INT’L L. 151, 172-74 (2018); Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 INT’L L. STUD. 483, 485 (2016); Babak Ghafarzade, *Yemen: Post-Conflict Federalism to Avoid Disintegration*, 48 N.Y.U. J. INT’L L. & POL. 933, 944-45 (2016) (failing to mention the Security Council’s emphasis on water even where the article addresses water issues on numerous occasions).

265. See Peter H. Gleick, *Water, Drought, Climate Change, and Conflict in Syria*, 6 WEATHER, CLIMATE, & SOC’Y 331 (2014).

266. See *Aleppo Water Supply Cut as Syria Fighting Rages*, BBC (Sept. 8, 2012), <https://www.bbc.co.uk/news/world-middle-east-19533112>.

267. See Bassem Mroue, *Activists: Syrian Rebels Seize Major Dam in North*, THE DAILY STAR (Nov. 26, 2012), <https://www.dailystar.com.lb/News/Middle-East/2012/Nov-26/196180-activists-syrian-rebels-seize-major-dam-in-north.ashx/>.

268. See Alisa Reznick, *Weaponizing Syria’s Water*, BOSTON REV. (Jan. 4, 2016), <https://www.bostonreview.net/world/syria-water-alisa-reznick>.

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people got sick from contaminated water.²⁶⁹ Meanwhile, in December 2015, rebels reduced Damascus' water supply by ninety percent for three days by cutting off a nearby spring, which led to shortages.²⁷⁰ In addition, Russian forces bombed one of Syria's most important water treatment facilities near Aleppo in late 2015, thinking it was producing oil, thereby cutting off the water for over 3 million people, about half of whom still suffer from water shortages.²⁷¹ The UN Secretary General described the situation in 2017:

Parties to the conflict, in particular the Government, ISIL, the Nusrah Front and armed opposition groups, continued to use siege and starvation as a tactic of war. In January 2016, an estimated 393,700 people were living under siege ... The use of water as a weapon of war escalated significantly, with some 7.7 million civilians affected by deliberate water cuts. The United Nations verified attacks on humanitarian facilities and attacks and threats against humanitarian personnel.²⁷²

Thus, it would appear that virtually all sides in the Syria conflict have been using the water supply as a weapon, and all sides might be condemned for such usage.

During all of this, the Security Council adopted a series of resolutions – including Resolutions 2165, 2191 and 2258 – after “[d]etermining that the deteriorating humanitarian situation in Syria continues to constitute a threat to peace and security in the region.”²⁷³ Resolutions 2165 and 2191 also “[u]nderscor[ed] that Member States are obligated under [a]rticle 25 of the Charter of the United Nations to accept and carry out the Council's decisions,” which is enough to emphasize the binding nature of the Security Council's decisions in these resolutions.²⁷⁴ Part of this “deteriorating humanitarian situation” related to “deliberate interruptions of water supply,” among other alleged

269. *See id.*

270. *See id.*

271. *See Statement by Hanaa Singer, UNICEF Representative in Syria on Airstrikes Against the Al-Khafsia Water Treatment Facility in Aleppo*, UNICEF (Dec. 1, 2015), https://www.unicef.org/media/media_86402.html/.

272. U.N. Secretary-General, Children and Armed Conflict ¶ 162, U.N. Doc. A/70/836-S/2016/360 (Apr. 20, 2016).

273. S.C. Res. 2165, pmb. ¶ 18 (July 14, 2014); S.C. Res. 2191, pmb. ¶ 19 (Dec. 17, 2014); S.C. Res. 2258, pmb. ¶ 26 (Dec. 22, 2015).

274. S.C. Res. 2165, pmb. ¶ 19 (July 14, 2014); S.C. Res. 2191, pmb. ¶ 20 (Dec. 17, 2014); S.C. Res. 2258, pmb. ¶ 27 (Dec. 22, 2015).

violations of international humanitarian law, which the Security Council was “[g]ravelly concerned” over and “grave[ly] alarm[ed]” over.²⁷⁵ In addition to these express references to water within Security Council resolutions, these resolutions also “[d]emand[ed] that all parties, in particular the Syrian authorities, immediately comply with their obligations under international law, including international humanitarian law . . .,”²⁷⁶ which include access to water, as explained in the introduction to Section IV(B) above. The President of the Security Council made this connection between international humanitarian law and water clear in a statement on October 2, 2013; when he, on behalf of the Council, “call[ed] on all parties to fully respect their obligations under international humanitarian law and to take all appropriate steps to protect civilians, including by desisting from attacks directed against civilian objects, such as medical centres, schools and *water stations*. . . .”²⁷⁷ Admittedly, the connection could have been made clearer through an express reference to international humanitarian law and water within the operative paragraphs of the Security Council resolutions addressed above. Nevertheless, this statement by the President of the Security Council on behalf of the Security Council made it sufficiently clear that the Security Council had in mind water-related protections when it obliged states to comply with international humanitarian law in Resolutions 2191 and 2258 of 2014 and 2015, respectively, and perhaps even in more recent resolutions such as Resolution 2426 of July 29, 2018, which “call[ed] on all parties to the Syrian domestic conflict to . . . respect international humanitarian law.”²⁷⁸ While that resolution classified the Syrian conflict as a domestic one, obviously for political reasons due to Russia’s membership on the Security Council, that does not change the fact that the Security Council imposed obligations on states through this resolution.

V. CONCLUSION

This Article has been the first to review and analyze the Security Council’s efforts to resolve international water disputes through its Chapter VII coercive powers. International water law regulates both navigational and non-navigational uses of fresh water. For the purposes of this Article, the main regulation in the former involves protection of

275. S.C. Res. 2165, pmbl. ¶¶ 13-14 (July 14, 2014); S.C. Res. 2191, pmbl. ¶ 5 (Dec. 17, 2014); S.C. Res. 2258, pmbl. ¶ 5 (Dec. 22, 2015).

276. S.C. Res. 2191, ¶ 1 (Dec. 7, 2014); S.C. Res. 2258, ¶ 1 (Dec. 22, 2015).

277. S.C. Pres. Statement 2013/15, ¶ 9 (Oct. 2, 2013) (emphasis added).

278. S.C. Res. 2426, pmbl. ¶ 8 (June 29, 2018).

the freedom of navigation, with the main regulation in the latter involving access to drinking water. The Security Council has been active in both of these areas. To be clear, many other legal norms exist under both categories, and many other situations that resemble international water disputes exist in the world. This study has focused just on those international water disputes where the Security Council has used its Chapter VII decision-making powers to resolve the matter. These international water disputes obviously are part of a much larger political dispute. By looking at just the water-related elements of these disputes, this Article has been able to better see how these types of international water disputes fit into the overarching dispute and how the international community, through the Security Council, has attempted to address the matter. The Security Council imposed obligations through its Chapter VII powers in eight instances, all of which undermined the international water law regime to some degree, either by giving priority to drinking water (whereas the international water law regime does not prioritize any particular uses of water in those circumstances discussed) or by interfering with the freedom to navigate international watercourses, which is the oldest type of use of international watercourses protected under international law. Of course, it is within the power of the Security Council to suspend treaty rights and to impose other obligations in their place, and arguably the dangerous and humanitarian situations highlighted in this Article provide an adequate basis for the Security Council to make such exceptions. Nevertheless, the impact of such measures on the international water law regime and on state sovereignty should not be ignored, as previous commentators have tended to do.

Admittedly, the Security Council occasionally has failed to get involved with international water disputes. For example, water-related disputes in Israel and its surrounding areas are as long as Israel's modern history, with Israel forcibly acquiring access to key springs and groundwater from the Palestinians early on in its history.²⁷⁹ Moreover, sabotage of the other's dams and competing river diversion projects led to the 1967 Six Day War, and water-related matters have continued to be a source of tension there ever since.²⁸⁰ However, the Security

279. See Martin A. Rowland, *The Evolution of Two Water Resource Management Systems: Case Studies of Tampa Bay and the Middle East*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 411, 446-47 (2000).

280. See, e.g., *id.*; MOSTAFA DOLATYAR & TIM S. GRAY, WATER POLITICS IN THE MIDDLE EAST: A CONTEXT FOR CONFLICT OR CO-OPERATION? 103-08 (2000); Rose M. Mukhar, *The Jordan River Basin and the Mountain Aquifer: The Transboundary Freshwater Disputes Between Israel, Jordan, Syria, Lebanon and the Palestinians*, 12 ANN. SURV. INT'L & COMP. L. 59 (2006); Urs Luterbacher & Ellen

Council has not imposed any water-related obligations on Israel, due to the protective veto of the United States. While it may be easy for some to get frustrated with the exercise of such veto powers, it must not be forgotten that the United Nations probably would not exist now if the permanent members of the Security Council had not been given such an extraordinary power.²⁸¹ Whether the permanent members have effectively tempered the hostile tendencies of their client states when it comes to international water disputes is left for future research.

With the affirmative examples in mind of actual Security Council involvement in resolving international water disputes, the stage is set for future studies to look at how judicial methods of resolution might be better at respecting the underlying norms of the international water law regime, such as through the International Water Tribunal.²⁸² In addition, the stage is set for future studies to look at how the Security Council could use its preventive and mitigative powers, as well as its enforcement powers, to help resolve other actual or emerging international water disputes. Examples include potential disputes over navigation and non-navigation uses of the Amazon, Brahmaputra, Essequibo, Ganges, Indus, Mekong, Nile, Rhine, Rhone and Salween rivers, among many others, all of which have been the focus of international tensions in recent years. While some international water disputes exist between permanent members of the Security Council, such as disputes over the Ussuri River between the People's Republic of China and the Russian Federation, these are not the kinds of disputes that the Security Council is well situated to handle on account of those states' veto powers. Be that as it may, the time is ripe for the UN Secretary General to consider conducting a policy study—presumably through his UN Charter Article 99's right of initiative—on the possibility of increasing the role of the Security Council with preventing international water disputes,²⁸³

Wiegandt, *Cooperation or Confrontation: Sustainable Water Use in an International Context*, in FRESH WATER AND INTERNATIONAL ECONOMIC LAW 11, 20 (Edith Brown Weiss et al. eds., 2005).

281. See Francis O. Wilcox, *The Yalta Voting Formula*, 39 AM. POL. SCI. REV. 943 (1945).

282. For more information on the International Water Tribunal, see Ellen Hey & André Nollkaemper, *The Second International Water Tribunal*, 22 ENVTL. POL'Y & L. 82 (1992); Stephen Salaff, *Water Tribunal Urges China to Postpone Massive Yangtze Dam*, ENV'T. WK., Mar. 12, 1992, at 9; HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF DETERMINATION* 27-30 (1990). For more information on the comparison of judicial resolution versus diplomatic resolution through the Security Council, see generally JAMES D. FRY, *LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES* (2013).

283. See UN Charter, art. 99; Provisional Rules of Procedure of the Security Council, Rule 16, U.N. Doc. S/96/Rev.7 (Dec. 21, 1982). For more information, see Simon Chesterman, *Article 99*, in *THE CHARTER OF THE UNITED NATIONS* 2009 (Bruno Simma et al. eds., 3d ed., 2012).

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especially those not involving permanent members of the Security Council. Civil society seems to be looking to the Security Council to get involved with preventing international water disputes,²⁸⁴ which acts as an invitation for the Security Council to increase its involvement with this type of collective action. In particular, the possibility of increasing fact-finding by the Security Council with international water disputes must be explored further. With an increase in this type of collective action, as well as the creation and involvement of joint institutions that are closer to the international water disputes at hand, the international community will be in a better position to resolve and even prevent these disputes before they get out of hand.

284. See, e.g., *How Climate Change Can Fuel Wars*, *ECONOMIST*, May 25, 2019, at 58, 60 (mentioning how the World Resources Institute presented results from its innovative research into identifying future water disputes to the Security Council in October 2018).