HOUSE OF LORDS

International Relations and Defence Committee

Corrected oral evidence: UNCLOS: fit for purpose for the 21st century?

Wednesday 20 October 2021

11.05 am

Watch the meeting

Members present: Baroness Anelay of St Johns (The Chair); Lord Alton of Liverpool; Lord Anderson of Swansea; Baroness Blackstone; Lord Boateng; Lord Campbell of Pittenweem; Baroness Fall; Baroness Rawlings; Lord Stirrup; Lord Teverson.

Evidence Session No. 2 Heard in Public Questions 10 - 23

Witness

I: Professor Sir Malcolm Evans, Professor of Public International Law, University of Bristol.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witness

Professor Sir Malcolm Evans.

Q10 **The Chair:** I now welcome to this meeting of the International Relations and Defence Committee Professor Sir Malcolm Evans, who is Professor of Public International Law at University of Bristol Law School. Thank you for joining us today to share your expertise as we launch our new inquiry on the United Nations Convention on the Law of the Sea.

At this stage I always remind both our members and our witness that this meeting is on the record and transcribed. It is also broadcast, as is obvious from the person to my left, who is valiantly carrying on the broadcasting work for us. I also remind members that if they have any relevant interests that should be declared, they must do so before they ask their question.

As ever, I will begin by opening with a general background question and I will then turn to my colleagues, who will ask more focused questions. In your view, what have been the main successes and accomplishments of UNCLOS over the last nearly 40 years?

Professor Sir Malcolm Evans: Possibly its greatest achievement is that it is there. When one looks back at the history of the negotiation of the Convention on the Law of the Sea, it was by no means a given that there would be a satisfactory outcome to what was a very long and protracted negotiation that attempted to do what, frankly, had never been done successfully before and has never been attempted since: to get all states of the world together around a table to produce a holistic, integrated convention that addressed virtually all the relevant issues concerning the law of the sea at that time in a package-deal convention.

As I am sure you know, even when adopted, the chances of it being formally ratified by enough states to come into force was for a long time unclear. When it did, the adherence to it by most of the major developed world countries was far from clear, because none of them had done so initially. The fact that today, 40 years on, we can look at the law of the sea convention as ratified by approaching 170 states of the little shy of 200 in the world, and many of its provisions accepted as reflecting principles of customary international law binding on all states irrespective of that, is a huge achievement. So the very fact that there is a United Nations law of the sea convention of this nature, with such breadth and reach, which has gained acceptance over the time, is in many ways its own achievement.

Of course, there is much more beyond that. It is a question of what it achieved within that, particularly in terms of getting ordered approaches to the ability to explore and exploit resources in a way that previously had not been acceptable; through the exclusive economic zone and an improved approach to the continental shelf, but perhaps most importantly—I am sure we will come back to this over the course of the morning—putting in place the idea of the common heritage of mankind as

the governing approach to the resources of the deep seabed beyond national jurisdiction.

It also encouraged more collaborative approaches to ocean governance, which has been hugely beneficial, and was the first general recognition of the importance of the marine environment, fisheries conservation and marine research as part of a holistic framework.

All these and much more besides were individual achievements. It is also important that it settled many long-standing controversies concerning navigational rights and so on, which remain hugely important today. Perhaps above all, it has given us the starting point for virtually any consideration of issues relating to the law of the sea today. That remains a remarkable achievement.

Q11 **Baroness Blackstone:** I want to ask you quite a big question, too. How is UNCLOS enforced, and how successful is it in this enforcement?

Professor Sir Malcolm Evans: A little bit like most international law, "enforcement" is not always quite the right word to use, as I am sure you appreciate. Much of the convention, however, unlike much else of the law of the sea, has a much clearer enforcement framework than one finds elsewhere.

This is largely because the convention in large part is a template for the allocation of jurisdictional competencies. Basically, it parcels out the seas to different states for different purposes the territorial seas, the high seas, the continental shelf and so on, and allocates within each of those who can do what. As a result, there is a huge amount of potential for enforcement of its substantive provisions through the systems and structures which it itself puts in place, allowing coastal states, port states and others to enforce certain of its provisions.

In some ways, it is also flexible, because it allocates competencies and it gives guidance as to what states can and cannot do with its zones, but it also gives them quite a lot of flexibility about what they can do as well.

So the first answer to the question is that the main way in which it seeks to achieve enforcement of its provisions is through the systems of jurisdiction which it itself puts in place, such as coastal state, flag state and port state. Also, and perhaps more obviously, it helpfully allows for discrete enforcement action at sea by states in certain circumstances. This is one of the most controversial areas in the convention that goes to the heart of some questions that need to be considered, such as whether the powers which it currently allows states to exercise and over what in forcing compliance, not only with its own terms but with those of other provisions of international law, are sufficient to enable states to feel safe at sea.

It is true that the fundamental approach of the convention, which again I am sure we will come back to, is very much rooted still in the idea of flag state jurisdiction over vessels at sea that can be intruded upon by other

states only in very limited circumstances. There are genuine questions to be asked about whether the calibration around that is correct.

On the one hand, there is a lot of enforcement potential through the state and its own apparatus within its own zones of jurisdiction. Once you move out on to the high seas, there is relatively little capacity to engage in enforcement action by the state itself against those currently on the seas.

At the same time in relation to enforcement, it is also important to stress that one of the great innovations of the law of the sea convention was its own dispute settlement provisions. These have been hugely important in the ability to enforce the law of the sea convention in another way and in another place. It is notoriously difficult, as we all know, to bring international claims against another state before official third-party fora, arbitration and certainly judicial settlement. The law of the sea convention provides this very carefully crafted framework for that, utilising and establishing the International Tribunal for the Law of the Sea and using special procedures of arbitrations.

These are all becoming more and more used. As we know, some of the most high-profile arbitrations of late concern the building and extension of runways and facilities on islets by China in the South China Sea, and cases involving the United Kingdom concerning the Chagos Islands et cetera. This then opens up new avenues of potential consideration of the law of the sea and is gaining increasing traction. That will be a growth area.

We see, in short, a convention that is now unusual in the range of enforcement potential and possibilities that it has. Frankly, it is quite unlikely to be replicated.

Q12 **Baroness Blackstone:** In domestic law, we might talk about persistent offenders. In this area of international law, are there persistent offenders who regularly do not comply, and what can be done to reduce the number of such offenders, whether they are states or non-state organisations?

Professor Sir Malcolm Evans: As far as states are concerned, as always within international law, some states just do not seem to think the rules apply to them in the same way that they apply to everybody else. That is just the way of it.

In the law of the sea, you may have long-standing interests or policy issues in certain areas and you perhaps do not quite like the way things have been calibrated because they do not, strictly speaking, play to your interests, although, interestingly, even when people intend to flout the rules they at least try to do so in a way that suggests that they are attempting to operate within them. In other words, there is a high degree of fidelity to the ideas of what the rules say, even if what states do does not always match up to that.

A very obvious but technical example—it is a good one nevertheless, because it is so boring that no one ever bothers to notice it too much—is the drawing of that arcane thing called baselines, and straight baselines in particular. These are hugely important because, as I am sure you know, these are the lines from which maritime zones are claimed. Yet if states routinely flout the details, which are prescribed in considerable detail, surrounding how these are to be drawn, they can take for themselves considerable areas of ocean space and exercise jurisdictional control over them. It does look rather nerdy to spend your time querying the way in which basepoints have been made and lines drawn, and states take advantage of that with a vengeance.

States spend a lot of time scrutinising the details of other states' practice in relation to the law of the sea in these more technical corners, because a lot can be done there to improve compliance with the detail.

Q13 **Lord Alton of Liverpool:** Can I invite you, Sir Malcolm, to dive deeper into one or two of the specifics? How much does UNCLOS hinder or help maritime security, and human security and human rights?

Professor Sir Malcolm Evans: Oh dear. This could take us until 12 o'clock. "Maritime security" is now a very fashionable phrase. Quite what it means is rather open-ended. It means very different things to very different people. For some, maritime security very much means national security—how you protect your national interests, your security assets, at sea. For others, maritime security means the safety and the integrity of the seas themselves—environmental protection and fisheries conservation, things of this nature. We could spend a lot of time trying to unpack it, but that probably is not where we need to go, although I am happy to spend more time doing that.

It is increasingly clear—again, doubtless we will come back to this—that when we look back at the law of the sea convention from where we stand today, its chief preoccupations were largely to do with issues of navigation and access to and exploitation of resources at sea. So most of its provisions were focused on those. Does it have a lot to say, therefore, about security issues at sea directly in a way that is not, if you like, parasitic on ideas of freedom of navigation, particularly navigation for military vessels in traditional means? No, not really.

Does it say much at all about human security at sea and what we mean by that these days? It has extraordinarily little to say. It has classic provisions on the obligation on states to respond to those in distress at sea, which is obviously of vital importance and reflects long traditions of the uses of the seas. The seas have always inspired both awe and fear in people. They are sites of huge danger and people have always understood the need to respond to people who are in distress at sea. This is reflected in the convention, but it does not touch on at all the details of how that plays out in practice, what it means and the consequences of that.

The convention has an awful lot more to say about protecting fish than about protecting people. That is one of its huge flaws. It is worse than that. Not only does it not say much that is helpful about it, but the way it approaches its zones of jurisdiction and the way it allocates flag state jurisdiction and says that the high seas are beyond jurisdiction makes it extremely difficult to apply other areas of law such as human rights law at sea.

So not only does it not say much about it, but the way it is structured and the way it approaches jurisdiction at sea makes it extremely difficult to effectively extend human rights obligations and other obligations concerning the human person at sea to those people. At the end of the day, if a vessel is registered in a state that is not interested in achieving compliance with human rights commitments, people on board those vessels will be extremely vulnerable, and they are.

Q14 **Lord Alton of Liverpool:** Malcolm, thank you for that. All of us have been horrified when looking at the situation of refugees, such as Rohingya refugees, or people in the English Channel or in the Mediterranean, whose lives are compromised and sometimes lost at sea as a result of there being so little protection or jurisdiction.

I was very struck in our earlier session today when Professor Haines told us that human rights are not a priority in UNCLOS and do not feature at all. There is total ignorance of human rights in UNCLOS. He gave us an example of a Panamanian ship and an underage British woman who was sexually assaulted at sea and the failure then to bring any kind of justice for her. Extraterritoriality, of course, does function in the United Kingdom in such cases, but not in this case.

Is there more we could be doing about this? We are members of the United Nations Human Rights Council. Should we be triggering a debate there about human rights and its failure to feature in UNCLOS, and would it get anywhere?

Professor Sir Malcolm Evans: The short answer is yes. Would it get anywhere? Yes, because this is now recognised as a huge gap. Careful thinking is needed about how it can be filled in a way that does not do too much damage to other areas where you still need to have the integrity of those systems and structures.

To give a practical example, a set of views given by the United Nations Human Rights Committee earlier this year concerned an Italian military vessel that had, for all practical purposes, stood off for too long while a vessel with Libyan migrants on it in the Mediterranean was in distress and ultimately sank leading to a huge loss of life. It may have been as many as 400 people or possibly not as many as that.

The vessel did in the end go to the rescue. It acted fully within the theory of the law at the time. It was in the Maltese search and rescue zone. The vessel was in the high seas. The Italian vessel did not on the face of it have any obligation, it is said, to do anything at that point, because it had not been officially notified that it was in distress, except that

arguably it had because the authorities in Rome had been told and they told the Maltese, who then took some time to tell them. In the end, the Human Rights Committee said, "You knew this vessel was there in the real world. You knew it was in distress and you didn't do anything until it was too late, because you were waiting for someone to tell you to do it because you did not have to".

That in some senses is a very powerful argument, but it then sort of suggests that, if you follow that route, anytime any vessel of any state is in proximity to or knows that there may be a vessel in those circumstances, it may have the obligation to sail considerable distances to go to that situation to rescue the people on board.

These are all quite difficult from a practical point of view, so we need something that does not look at piecemeal solutions to these things but looks at them more holistically and gets a better sense of how human rights obligations ought to extend to the sea. We tend to think of it in terms of migrants drowning at sea and all the horrors that flow from that, but also in completely different contexts. Another well-known situation concerns those working in deep-water fishing vessels, which may be at sea for many years. The labour conditions on these things are truly terrible, yet who is regulating them? For practical purposes, either they are unregulated or the regulation that exists is not capable of effective enforcement. That produces terrible abuses, and so on.

There is a crying need to be able to do this but in a way that is systematic but does not, in my view, overextend or contort existing categories in a way that is a little bit disingenuous at times and can cause other, unexpected, problems. We have all seen how that has happened in that past.

Lord Alton of Liverpool: That is really. Thank you.

Q15 **Lord Stirrup:** Professor, you mentioned some of the key issues of concern that have evolved since UNCLOS was first agreed. Another area that has developed quite dramatically in the intervening years is technology. What view do you take of the impact of technological developments on maritime law; for example, autonomous maritime vehicles, both civilian and military, and capabilities for exploiting the seabed?

Professor Sir Malcolm Evans: This area is hugely important. It is interesting and problematic for a number of reasons.

First, I said that one of the great glories of the law of the sea convention is that it finally got the package deal that put everything on the table in the 1970s. It has, of course, ended up inevitably being somewhat static as a result. We may come on to this later.

The point I am trying to get to is simply this: the law of the sea has always changed quite dramatically in the light of changing ideas of technology. There is absolutely nothing new about our approach to legal regulation changing as technology changes. After all, jurisdiction over the

continental shelf was driven entirely by the technical capacity to exploit oil and gas at distances from the coast that had not been possible in the 1940s and the 1950s. Goodness, the first definition of the outer limit of the continental shelf was indeed where the waters were 600 feet deep or as far seawards as admits of exploitation.

Clearly, there were problems with that, which is why it was changed and we have something else, but it is a clear example how the idea of technological capacity, innovation and change has always been a driver for how we go about regulating the oceans from the law of the sea perspective. Some people would argue that there is, but in my view there is absolutely nothing wrong with trying to do it and every reason why we should. In the normal course of events, we would do it in a piecemeal fashion, but this is where the effect of the law of the sea convention is a little bit difficult, because you have to do it within its straitjacket—and elements of it are a straitjacket.

We need some careful thinking about where the real areas of technological change have occurred that are difficult to fit within the existing law of the sea framework, rather than think that just because there is technological change and development we have to throw everything out and start again.

There is no doubt that some elements of the law of the sea convention are a bit embarrassing from a technological point of view. They still rather assume that if you hail a vessel at sea, you will be waving a flag or using a megaphone—literally; there were cases some years ago considering whether, when it says an audible or visual signal, that could include a radio signal or had to be semaphore or a voice.

Clearly, we can find ways around that, and we have. But we need to have a much clearer idea of the real problems that technology poses for the architecture of the law of the sea, rather than spend perhaps too much time on small technical matters that a bit of common sense and imagination can move around.

Beyond that, though, how they change our interests in the use of the sea—certainly, underwater vehicles are a good example of this—is the real issue here, rather than the technologies themselves. You can adapt most technologies to most sets of rules if you want, but do they tell us that we want to be doing something fundamentally different from what we did before?

The answer is probably yes in some ways. If we look at interests in energy, for example, and resource utilisation, inevitably the law of the sea was largely geared towards oil and gas and then some other types of resources in the deep seabed. It says something about wind and wave power and energy resources from the motions of the oceans and so on, but not a great deal. It certainly means that the security aspects of offshore energy production, which are now much more important to us, are not well regulated through the law of the sea convention. Safety zones are 500 metres. What does that mean in the current world?

Given that we now know that we have different interests in the law of the sea, partly because of technology enabling things but partly because our interests in the technological possibilities have changed, some of our knock-on interests in other areas such as zonal jurisdiction and the capacity to involve safety at sea have changed with it. The archetypal one, of course, is undersea cables, where historically were mainly used for telecommunications and are now important not just for voice communication but for electronic communication. There are also new trends in keeping computer servers in undersea high-pressure containers. It is a lot cooler down there and a lot cheaper to keep them there, and more environmentally safe. But if you have most of your high-security services located in a pod on the floor of the sea, what security issues does that raise?

These are the sorts of technology issues that we need to be thinking of rather than the more granular issues about how we can do things a little bit differently. The changing technological possibilities and interests that we have today have fundamentally shifted our strategic interests in the use of seabed areas.

If I may throw one in here that is not highlighted enough, it is rethinking the strategic minerals, strategic metals, rare earths and so on that we can extract from the seas and the water columns. In the last couple of years, we have all become painfully aware of the heightened dependency that we have on a relatively small number of countries and insecure supplies of things that are strategically vital to our modern understanding of the world. This is driving another global commons issue that you are not looking at, which is the increased interest in outer space and the burst of interest in space exploration, mineral resourcing from space et cetera. There is equal interest in returning to look at the deep seabed to see whether things that are not effectively regulated through current regimes are of much more interest to us now. Technology in a different way from the way we normally talk about it is changing what our strategic interests and priorities should be in the law of the sea.

I am sorry. That is a bit of a ragbag of things there that might not be what you were thinking of.

Q16 **Lord Stirrup:** It is very interesting. Briefly, is there also scope for technology to assist with the monitoring of compliance with the law of the sea?

Professor Sir Malcolm Evans: Absolutely. Thank you for that. I wanted to raise that point. The capacity for greater regulatory activity and greater inspection at sea through heightened use of technology is fantastical if one were to use it effectively. Goodness, we still talk in terms of inspection at sea and, literally, a military vessel coming along, sending off almost the equivalent of a skiff—I know it will not have oarsmen on it these days—boarding the vessel with your papers and going to look.

You do not need to do it that way these days, obviously. There is a whole host of ways in which you might legitimately exercise surveillance over a vessel, even if you want to do it in proximity using drones and things of that nature. You might have a right to fly over a vessel to inspect. These are doable within existing frameworks, but they require imagination to think it through. Certainly, much better and heightened regulatory inspection and enforcement potential is high on the list of things that improve technological capacity permits.

All of that means that some review of how best to go about improving certainly the inspection and enforcement at sea is so important. Better inspection is the key here.

Q17 **Baroness Fall:** Thank you very much, Professor. My question is about the delimitation of maritime boundaries, the challenges, how disputes are settled and how the rising sea levels are providing more challenges.

Professor Sir Malcolm Evans: My PhD thesis 40 years ago—well, I am not quite that old; a little under 40 years ago—was on maritime boundary delimitation, so it is fair to say I have spent much of the last 40 years looking at maritime boundary delimitation.

A key problem here is that the law is as much a mess now as it was then. Seriously, a lot of the problems about maritime delimitation are with the nebulous and ever-changing and ever-fluctuating state of the law. Almost every time there is a major arbitrational case from the International Court of Justice on this, everything seems to change yet again, like it did last week when another case came out on the boundaries between Somalia and Kenya. You look at it and think, "Where did all this come from?" You can see where it comes from at one level, but every case is a lottery and every case basically throws up another set of head-scratching possibilities and conundrums. None of this is conducive to settling disputes and effective resolution of boundaries.

Ultimately, you are trying to get an equitable solution, this law says, between states. Whatever states agree between themselves is equitable. If they cannot, it falls to others to apply the law of equity within the laws that exist to produce that outcome. The net result is that it is very difficult to predict the outcome of cases, and that states are not necessarily encouraged to compromise and come to agreements. They might hold off and roll the dice elsewhere and, frankly, if they do not like the outcome, quite often they just walk away from it, so it is not hugely satisfactory.

Against that background are distinct issues that we have to face. You have named one of them: the idea of permanency in the face of change. The law of the sea is very keen on the idea of stability of boundaries and permanency. It stresses time and time again that what is done is done and a boundary is a boundary, without paying a huge amount of attention to what happens when the facts that underpin it have changed fundamentally.

Say it ever so softly: we have a delimitation in the Black Sea at the moment between the Crimea and Romania. It was delimited, entirely rightly, when the sovereignty over Crimea resided with the Ukraine. I do not want to go into the details of the legal situation relating to Crimea at the moment, but the idea, from a purely practical perspective, that the Ukraine is able to exercise effective jurisdiction and control in the territorial seas off the Crimea at the moment is somewhere between a fiction and a fantasy. Of course, the Royal Navy sailed through those areas not so long ago to test these matters out.

How do you respond to these things that happen that should not happen but have? Pretending that they have not may be the right thing to do at one level but is hopeless in practice.

The South China Sea is another great example of this. In the arbitration I mentioned a little while ago, the tribunal—entirely correctly, in my view—came to the view that these little islets were not capable of being extended and built on, and de facto appropriated in the way China had. I know that is not technically the way it was phrased, but let us not go there. That is what it really means.

The net result is that these things that look like islands with airstrips on them theoretically do not exist. They are low-tide elevations. The tips of some of these airstrips could easily be high seas. In principle, you are meant to be able to sail over them. I do not know the last time you tried to sail a boat over somebody else's runway, but it tends not to end well. How long can you pretend that things that are not true are true because that is how in theory they should be? The same then goes into the effect of climate change in relation to islands that, frankly, are no longer there.

There is a lot of focus, inevitably and rightly, on the island nations that are in danger, but it is not just those. I mentioned baselines earlier. It is what it is. Arguably, you could get a basepoint miles from the coast, roughly the size of that chair, which at the moment is above water by that much and generates up to 12 miles of territorial sea. With a barely perceptible tidal increase in water, it is underwater at high tide and is no longer an island but is a low-tide elevation and is not entitled to generate anything. Huge differences depend on inches of water.

It is not just island nations disappearing. The less dramatic example I just gave has always happened. But it has never happened on a scale that causes so great a problem before. We need to seriously address this, and not only in the case of the island nations. Some have theorised that if you have an island nation that disappears, its maritime jurisdictions can carry on and it exists on the map; the state could relocate somewhere else and, theoretically, it would still be there even though it is not. Well—

Q18 **Lord Teverson:** Sir Malcolm, thanks very much indeed. In our earlier session, we were effectively told that there is no way in the current world that a renewed and renegotiated UNCLOS will happen. I am interested to know whether you have the same view about that. If that was the case, what areas can we change and should we start to change, and how then

would we do that? As an example, there are lots of issues on the high seas over resources, fishing and all sorts of other areas. In one area, piracy, anybody can do anything in terms of enforcement, but of course pirate vessels do not have national flags. Would that incidence of in effect modern slavery on long-haul fishing vessels be an example where perhaps you could extend that, or is all that impossible when a vessel has a nation's flag on the bow?

Professor Sir Malcolm Evans: If you have been told that it is virtually inconceivable that we would have another convention like the law of the sea convention, I would have to agree with that, if only because, even 40 years on, there has never been another treaty process like it since. It is almost as if it completely drained the will from the international community to negotiate on such a grand scale and they have never found the mojo since.

Seriously, in other areas you might have expected draft texts produced by the International Law Commission to lead to multilateral negotiating processes to provide treaties, and they have not. Some have even argued that the age of the great law-making international treaty is over. Possibly that is correct. Who knows?

On the idea that we will solve these problems by putting everything back on the table and having a big conference about it, frankly you would be lucky to get in a national interest a convention as good as the one we have. You would have to make trade-offs and concessions in all possible directions, even maybe to hold on to some things that you think are important at the moment. So not only might it be inconceivable from a practical perspective, but it would be a high-risk strategy.

A much more appropriate way would be to respect the fact, as you have indicated, that there are a lot of ways in which you can change the law of the sea convention. De facto, it already has been on numerous occasions. When it had just come into force, we had the so-called implementing agreement on the deep seabed of 1994. "Implementing" is a lovely word. It was not an implementing agreement. It basically threw out the existing Part XV of the convention on the deep seabed and more or less rewrote it. It was nothing about implementing it. It was about renegotiating part of it that was not hugely satisfactory anymore because of changed political circumstances and other things.

In other parts of it, we know there are gaps, and states have been willing to produce, as you know, other conventions to fill in those gaps. We have a process at the moment about biodiversity beyond national jurisdiction, but even that then shows part of the difficulties of doing it through this larger negotiating route. There is still not even complete consensus about the frame of reference of biodiversity beyond national jurisdiction. Is it just fishing stocks? Is it not fishing stocks? What is it? After some years, there is still indeterminacy about what is even being negotiated. All these things do not suggest that that will always be the way forward. Supplementing treaties are possible and need to happen, absolutely, but they are not easy or quick wins.

Some parts of the convention allow for GAIRS—generally agreed international rules and standards—where there is a dynamic policy of development. In other words, you agree to apply the generally agreed standard. If you can go to another forum like the IMO or elsewhere and get agreement on a chain standard, it becomes part of the law. You can use those techniques. A lot can be done. Just encouraging better jurisprudential thinking about some of these matters—as old-fashioned, stuck in the mud and rather reactionary as some of it has been over the years—to take things on would be helpful.

In saying all that, some areas have the possibility of some serious development here. We have mentioned some of them already. Human rights at sea is a gap that you could go straight into and say, "Look, we need to have a new framework convention on how human rights obligations are dealt with at sea". It is complex and very pressing, but doable.

A lot can be done by rethinking how things are approached. You mentioned piracy. Part of the problem with piracy is that for years it was largely seen as a problem for the law of the sea about jurisdiction at sea. Then, of course, we have come to realise through Somalia and elsewhere that it is not all about the sea. Piracy is a land-based problem that has been displaced to the sea. Dealing with it on land as well as on sea is primarily a way forward.

You also mentioned the jurisdictional points. This area is ripe for getting back to and one could take a lead. Why can things be so chaotic jurisdictionally at sea? It is not only the idea of flag state jurisdiction but the abuse of flag state jurisdiction. It is so easy to be able to register a vessel in a country that will not take its obligations as a flag state seriously. If you put those two things together, of course you will have trouble. It is easy to register flags of convenience or countries that, even if they wished to enforce their regulation, have no meaningful capacity to do so and diminished capacity for everyone else. Going back to the business about trying to insist that the genuine link between a vessel flying a flag has to be a lot stronger than currently would be a very good place to start.

These are the sorts of things that can be done to improve the quality of control even within the current framework. A lot of ratcheting up can be done within the existing framework rather than starting again. For example, it is not difficult to see a world in which you may be willing to grant your flag to vessels with a lax approach to this, but if such a vessel enters your waters you expect to be able to exercise a heightened degree of control over that vessel, greater inspectoral powers, enhanced port state control and so on as a quid pro quo for the fact that you do not have confidence in the regulatory systems. All that is certainly within the frame of reference.

Q19 **Lord Teverson:** Briefly, in terms of renegotiation, it stands out strongly that the United States is not a signatory to the current convention. Does that matter in practice? Neither is Turkey, because of the Greek island

issues. Quite a conflict is coming in the eastern Mediterranean at the moment. If you are not a signatory, can you ignore the convention completely or are you still seen as subject to some customary law?

Professor Sir Malcolm Evans: You are still subject to the provisions of the convention that are generally accepted as reflecting customary international law, because that binds all states. Increasingly, the US has taken the view that more of the convention is reflective of customary international law. After all, it was arguing for much of it in the first place, so it accepts much of it as being legally binding anyway, just through a different means.

Similarly with Turkey. Turkey in fact refused to ratify the convention largely because it had fixed views on how to go about delimiting maritime boundaries and it did not like the wording in the convention on the issue. Nothing has changed on that, except that if that dispute ever got anywhere near a court, the approach would be different anyway.

The short answer is that the fact that some of these states are not formally parties and bound by the convention does not have a great deal of effect regarding the substantive obligations in many of the key areas that bind them. It does matter that they are not party to the dispute settlement mechanisms, which apply only to those that are party to the convention. In a way, it makes it a little easier for non-state parties to have their cake and eat it.

Q20 **Lord Campbell of Pittenweem:** Professor, what are your priorities for the United Kingdom Government? You have given us an eloquent answer almost in anticipation as to what you regard as the priorities.

Something has occurred to me out of left field. Three members of NATO operate submarines carrying nuclear weapons. Has anyone ever thought to ask whether these particular operations fall foul of the law of the sea? To put it another way, have you ever been asked your opinion on that topic?

Professor Sir Malcolm Evans: No, but it would almost be a non-discussion in a sense because, if you look back to the negotiations on the law of the sea convention originally—we were talking about technologies—it is quite farcical. One provision says that if submarines pass through your territorial sea, because they are terrible things and you do not know where they are they have to do so on the surface and flying a flag.

When you are trying to increase the breadth of the territorial sea from three to 12 miles, things like the Straits of Gibraltar and the English Channel all become territorial seas, so could you really have your strategic nuclear deterrent surfacing and flying a flag to say, "Hi, we're over here at the moment"? No, which is why they negotiated regimes of transit passage that do not say so but in reality allow strategic nuclear submarines to pass through strategic straits without having to reveal where they are by surfacing and flying a flag, as if most states did not

know where they were anyway these days because of technological changes.

The point is that given that that is embedded into the warp and weft of the convention, the idea that carrying nuclear weapons at sea could itself be seen as somehow in violation of the convention would require quite a radical rethinking of the presuppositions on which this is all based. After all, so much of the 1982 convention was designed to facilitate the continued use of strategic seaborne nuclear deterrence. Many other states played that bargaining chip to get concessions elsewhere within the framework, because they knew it was so important to the three that you mention.

In terms of the UK's priorities, at a slightly more technical level, what I said at the end is where I start, which is the business about trying to make flag state regulation and the awarding of a flag to countries more onerous and to return to the debate about a genuine link. If you are to be entrusted with the privilege of having vessels flying your flags at sea and all with it, the privilege should not be given too lightly, given the benefits that flow from that.

Viewing it in that light, as a privilege that you have to earn rather than as a Grotian freedom that everybody can have, might be one way of changing the discussion about that. It is entirely consonant with the way we view the seabed as a global commons. Maybe the high seas should be a global commons free for the use of all but not free for abuse by all.

Q21 **Lord Campbell of Pittenweem:** Given the national interests you referred to, is it feasible that you could persuade an international body to take away a privilege of that kind, which is in many cases absolutely fundamental to their local economies?

Professor Sir Malcolm Evans: The international community these days is full of groups of like-minded states. You would never get a consensus, but you would quite easily find a group of like-minded states that would see it as being in their common interests to pursue such an approach for a whole bevy of reasons. Getting a group of like-minded states together that wanted to revisit the question concerning the allocation of jurisdiction to vessels at sea through higher standards for flag-flying would be a good conversation at least to start and entirely doable within the existing frameworks.

We need to wonder whether the law of the sea is overly focused on zones of jurisdiction. It is so zonally based. That will not go away, but when new issues come along, finding governance approaches that move beyond rigidly giving jurisdiction to this state because it happens to be in its zone might be worth thinking about.

The law of the sea has always been quite fluid, which might seem a bit strange, but the way it uses jurisdictional competencies is a lot more creative than it has been on land, which has always been a bit binary. It is either mine or it is yours. The law of the sea has always understood the

idea of sharing and shared responsibilities, because you cannot control it in the same way. You can build on that.

Finally, again, break down this idea that what happens at sea is at sea and what happens on land is on land. That is another starting point. This quite rigid distinction between the law of the sea and territorial jurisdiction is understandable historically, but given the way in which our interests are much more integrated these days, we can think about it in other ways.

Q22 **Baroness Rawlings:** Following on from sharing and integrating, what level of influence do the UK Government have in international bodies responsible for overseeing the current international regime of the international law of the sea, for example? What can we do?

Professor Sir Malcolm Evans: I am sure they would say that it was considerable. I am not sure I can say whether they would be right or wrong.

I can say that we have not had a judge on the International Tribunal for the Law of the Sea since the mid-2000s. We have not put up a candidate for that since our one and only judge reached the end of his time. That is unfortunate. It does not send a good signal, and it also means that perhaps we are deprived of knowledge and of a source of understanding of the way trends develop in this area.

Similarly, I have not mentioned this but another important body established within the architecture of the convention is the Commission on the Limits of the Continental Shelf. We have never had a member of that, to the best of my knowledge. Admittedly—I am being recorded—it is little short of a disgrace, given the length of time it takes to deal with matters. It is still considering submissions that were made to it back in 2009. It is at least 15 years behind in its workload. There are lots of good reasons for that, but it is still a problem. We have not had a member on that.

We are on the financial and technical committee of the International Seabed Authority. I know we are up for election to the Assembly of the International Maritime Organization. At a more technical level, we are well represented. We get our voice over and we are heard.

We do not seem to be so visible anymore in the slightly higher, more visible positions on some of these bodies. People look for that. We could therefore do more on the visibility of our international positioning and engagement on the law of the sea.

I find it quite interesting that there is now a lot more interest in the law of the sea than there has been for many years. It might be interesting to ponder why, but I will not do that here. In other quarters, as an academic for example, 10 or 15 years ago there was little interest in this subject area, or so it seemed. People were writing about other things. It was almost a barren field. That has changed and there is a lot more interest in that.

There is a huge amount of technical experience in the United Kingdom of law of the sea matters among hydrographers, cartographers, lawyers and others. The expertise in this country is drawn on by the world. If we cannot harness that to get a better understanding of these problems and try to draw that into a policy matrix, we are missing a big trick.

Q23 **Lord Anderson of Swansea:** In your judgment, Professor, is there a consensus internationally for limited changes within the convention? You have mentioned piracy, which has ad hoc co-operation at the moment that might be incorporated. You have talked about the poor conditions of many seafarers and flagging. Where is the possibility of progress and updating?

Professor Sir Malcolm Evans: In general terms, there is still considerable interest in wanting improvements concerning with regard to fishing resources, access and control of illegal, unreported and unregulated—IUU—fishing. This is still a big problem, although one cannot avoid the clear observation that some people who complain the most could try a bit harder and the problem might not be so acute.

There is a huge interest in things that in particular tie into the agendas of the sustainable development goals. Achieving the sustainable development goals is a high priority for most states through the United Nations at the moment, and some of those directly relate to sustainable fisheries and fishing-related matters. It has become totemic, so it is not difficult to gain a consensus on that. Clearly, anything to address the effects of climate change on the marine environment is not a difficult conversation to start having at the moment. Those are good generic entry points into some of the more fine-grained issues that need to be addressed.

The consensus points lie around better regulation of sustainable fishing tying into sustainable development and the effects of climate change on the law of the sea.

The Chair: It is my pleasant duty to thank Professor Sir Malcolm Evans for the session this morning. Thank you very much indeed.

Of course, this morning's opening sessions for our new inquiry have two functions. The first is to make sure that we are better informed. We are fortunate that we were given some advanced briefings, including on some of the matters upon which you have written in any event, so we have read your own pieces. Also, so vitally in this opening session, we were clearly given an idea of the interesting challenges that lie ahead for us so that we can better use our time when we have other witnesses to share their expertise with us. Thank you for being able to assist us on both of those important pieces of work this morning.

We certainly wish you well for the future. I am delighted to hear there is more interest in the work on the law of the seas. We will try to ensure that the UK Government are also more interested in the work on the law of the seas. Thank you.