



# International Relations and Defence Committee

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

Wednesday 3 November 2021

10.05 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; Lord Mendelsohn; Baroness Rawlings; Lord Stirrup; Baroness Sugg; Lord Teverson.

Evidence Session No. 3

Heard in Public

Questions 24 - 29

### Witnesses

I: Dr Sofia Galani, Assistant Professor in Public International Law, Panteion University; Professor Natalie Klein, Professor, Faculty of Law & Justice, University of New South Wales, Sydney.

### USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on [www.parliamentlive.tv](http://www.parliamentlive.tv).

## Examination of witnesses

Dr Sofia Galani and Professor Natalie Klein.

Q24 **The Chair:** Good morning—at least it is the morning here in the UK—and a big welcome to those of our experts who are in fact in different time zones. I welcome to the meeting of the International Relations and Defence Select Committee Professor Natalie Klein from the School of Global and Public Law at the University of New South Wales in Sydney, Australia; and Dr Sofia Galani, assistant professor in public international law at Panteion University, Athens. Welcome to you both.

Thank you for joining us to contribute your expertise to our inquiry on the United Nations Convention on the Law of the Sea. We are questioning whether it is fit for purpose in the 21st century. At this stage, I always remind members and witnesses that our session is on the record, transcribed and broadcast. I also remind members of the committee to declare any relevant interests that they may have when they ask their questions.

As ever, I will begin by asking the first question, which is always rather general in nature. Then I will turn to my colleagues for more focused questions. After me, the next person with a question is going to be Lord Boateng. Starting off, how would you define maritime security? How does it relate to the existing law of the sea? May I please start with Professor Klein? I should explain that I will try to alternate between who starts first so it is not just one person who always comes second, so to speak. Professor Klein, I will hand over to you.

**Professor Natalie Klein:** Thank you for the opportunity to come and speak to you on these topics. What maritime security might mean is a broad question to start with. Traditionally we have associated it predominantly with the idea of a state's national security, but these days it is considered a much broader concept. When I talk about maritime security I tend to think about the protection of a state's land and maritime territory and the protection of its infrastructure, economy, environment and society from certain harmful acts occurring at sea.

We are looking at a wide range of interests that need to be protected and a varying number of acts that might be considered harmful. What those harmful acts might be might change over time. Some years ago, certainly, the UN Secretary-General pointed to armed robbery and piracy, as well as various trafficking offences, such as the illicit trafficking of arms or weapons of mass destruction, the trafficking of drugs or the trafficking of people, and terrorist acts. Harmful acts could even be construed as illegal fishing or deliberate harm to the marine environment. Where these particular acts or the threat of these acts is perceived as detrimental to the state, that is really where we start concentrating on maritime security. Maritime security is one frame that we can think about, but it is probably not the only one when we talk about some of these particular concerns.

In terms of how it relates to the existing law of the sea, as I am sure you are already aware from the witnesses you have heard from, UNCLOS does create the jurisdictional framework that determines what rights and duties states have in the different maritime zones. It is always very much interested in what is happening and where. UNCLOS provides the starting point for setting out the different rights and duties, particularly the policing powers of coastal states, as well as their authority, potentially, to interfere with vessels that are flagged with another state.

UNCLOS is definitely not the end point. A number of other multilateral treaties are relevant here, particularly those dealing with transnational crime. There are also instances where the Security Council will adopt resolutions that states can rely upon in acting, as we saw in relation to piracy off Somalia and in terms of enforcing arms embargos. Then we can possibly also turn to customary international law to try to fill in some gaps. It always come back to this idea of where something is happening and what is happening. That is where the law starts to premise what might be allowed in that situation.

**Dr Sofia Galani:** Thank you very much for the invitation to join you here today from Athens. I fully agree with what Professor Klein said. As far as I know in the literature and in the various strategies, we can find different definitions of maritime security. There has not been a fixed definition of maritime security. As Natalie said, our understanding of maritime security is influenced by time and space. Before 9/11 we used to talk about traditional threats such as coastal security and naval power. Nowadays we talk about a lot of other threats, such as armed robbery, piracy, drug trafficking, marine pollution and so on and so forth.

If we read the different maritime security strategies we will see that some threats are common in different regions, such as illegal fishing or marine pollution, but at the same time there are some threats that might be quite distinct in different regions, depending on their priorities and agendas. The African Union, for example, places more emphasis on oil theft and the lack of navigational aid, while the Association of Southeast Asian Nations continues to worry about armed robbery, inter-state disputes and terrorist incidents. The EU, on the other hand, places more emphasis on illegal migration and the protection of underwater cultural heritage. It is very difficult to agree on what maritime security means to different actors and different regions.

I draw attention to the fact that the Arctic and the Antarctic used to be considered safe. We did not have to worry much about maritime security in those regions. Now we do worry about maritime security in these regions. As the ice melts, it means we have a concentration of vessels and humans, so we have to worry about illegal fishing, human security and safety, and marine pollution even in those areas.

The last issue that really influences our understanding of maritime security has to do with the advancement of technology. It is often said that criminals are much faster than states in adopting and employing technology. Today, we worry about cybersecurity attacks against vessels

or port electronic systems, the use of drones for the planning or execution of terrorist attacks, the use of marine autonomous vessels for armed robbery, piracy, human trafficking and other illegal activities.

Overall, the concept of maritime security has grown a lot to encompass a lot of different threats that affect national, economic, human and environmental security. With reference to UNCLOS, I am not going to repeat what Natalie said, but I would like to highlight that unfortunately UNCLOS does not refer to maritime security. As a result, it does not have a definition of maritime security. It refers to security, and the references that we see have mostly to do with the traditional understanding of maritime security. In a sense, it talks about coastal security and national security. It has some references to safety. That also helps us understand what is meant by the safety of life and the safety of persons at sea. It does have some other references to piracy, the slave trade and drug trafficking. As Natalie said, these threats have been included in other treaties that can help us deal with maritime security.

I will stop here, because the other challenges would be better discussed with reference to question 2.

**The Chair:** Thank you both very much indeed for setting the scene for us so clearly. Before I turn to my colleague for the second question, I should explain that when a colleague is asking a question they may well wish to ask a supplementary at that stage as well. If there is time at the end I will turn to other colleagues to see whether they have supplementaries to cover the issues that we may not have fully elucidated today.

As I turn to Lord Boateng, I also want to explain that when we look down we are not avoiding looking at you, our witnesses. It is just the technology—it is excellent technology, I hasten to add—means that all the huge screens are on the floor. I was watching you closely, but it looks as though I was looking down. You have my apologies.

Q25 **Lord Boateng:** To what extent is the international law of the sea able to respond to new and emerging challenges and threats? Is there a need for new regulations? If there is, what should they be?

**Dr Sofia Galani:** I will try to answer this question bearing in mind two issues. The first has to do with the threats that can or cannot be addressed by UNCLOS. As we mentioned, there are a lot of new and emerging threats that cannot be addressed by UNCLOS. This does not mean that UNCLOS is totally helpless. UNCLOS is a living treaty; it allows us to interpret the provisions in the light of new realities. For example, the slave trade provision in Article 99 can be interpreted to reflect current needs and might help us deal with the problem of human trafficking or modern slavery. UNCLOS can be helpful when it comes to the protection of human rights at sea and maritime autonomous vehicles—we will see that later on—but we have to accept that, no matter how hard we try, UNCLOS cannot deal with all the existing threats to maritime security.

UNCLOS often refers to competent organisations, and these competent organisations can and have adopted new treaties. One of these competent organisations is the International Maritime Organization, which has adopted several conventions that can deal with a wide range of maritime security issues. SOLAS and COLREGs, for example, deal with the protection and safety of life at sea. MARPOL, the IMO polar code and a lot of other treaties deal with dumping incidents, hazardous substances and other issues of environmental pollution. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA convention), and its protocols deals with a wide range of illegal activities at sea. We also have other treaties. For example, Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances deals extensively with drug trafficking at sea. The 2004 Protocol against the Smuggling of Migrants by Land, Sea and Air deals with the problem of migration. The 1995 Fish Stocks Agreement deals with fisheries.

Do these treaties address all the new and emerging threats? I am afraid the answer is no. What can be done? UNCLOS will not be amended or renegotiated so we have to rely on existing treaties that have been amended, such as SOLAS and MARPOL. New treaties will be needed, and there are a lot of issues such as the use and regulation of maritime autonomous vehicles, human rights at sea or climate change where we need new regulations and responses.

The other issue we have to bear in mind is what Natalie said about what UNCLOS allows us to do and not to do. In a book that we coedited with Professor Sir Malcolm Evans, we posed the question, "Does UNCLOS help or hinder maritime security?" The answers that we got were very mixed. This has to do with the rights and duties that states have on the basis of the zonal approach introduced by UNCLOS. States can operate closer to their shores; they can adopt legislation to deal with maritime security in their territorial waters, for example. The further away we go, the less powers they have to deal with maritime security. On every occasion, states have to act while bearing in mind the right to freedom of navigation. There are certain principles, such as the freedom of navigation and exclusive flag state jurisdiction, that really limit what states can do when it comes to enhancing maritime security.

The main problem that we have is on the high seas. States on the high seas cannot exercise jurisdiction and only flag states are responsible for enforcing international standards on the vessels that fly their flags. Under UNCLOS, warships can stop and search vessels only in specific cases, such as if they have a reasonable ground for thinking that a vessel is involved in piracy, the slave trade, unauthorised broadcasting, or to verify the nationality of a vessel.

As we said, other treaties have tried to plug these gaps. They have tried to increase the board and search powers of states. Even under these other treaties, such as the SUA convention or the convention on illicit drug trafficking, a boarding state will still need to give notice to the flag

state or await permission from the flag state before it is able to act. This means that the high seas are an area where illegal activity thrives. It is very difficult for flags of convenience to enforce standards on board their vessels because they do not have either the ability or the willingness to do that. The other states cannot do much because of the exclusive flag state jurisdiction.

These are really the problems that we have under UNCLOS, and this is why it is important to start thinking about new regulations or even bilateral agreements that will allow states to co-operate with each other and foster a trust relationship in order to be able to allow each other to board vessels. I will stop here, because I have to give some time to Natalie as well.

**Professor Natalie Klein:** Thank you, Sofia. I very much agree with the points that Sofia has made on this topic. I have been thinking about this question. When we contemplate some of the new and emerging challenges, we do have a starting place that is provided under UNCLOS. The existing law gives us that frame, but from there we run into different problems.

Among those that Sofia has identified, I would add that there is also a problem about the ambiguity we find in the text of UNCLOS in different situations. In some instances, the provisions of UNCLOS were deliberately drafted to be ambiguous. For example, when a vessel is exercising its right of transit passage through an international strait, it is to proceed through that strait expeditiously and in its "normal mode". The question is what counts as a "normal mode"? At the time UNCLOS was negotiated these were code words to say that submarines could go through submerged, whereas they are not allowed to do that in territorial seas. Submarines have to go through on the surface of a territorial sea.

When we come forward and think about other technologies that are being used, there are maritime autonomous vehicles that could in their normal mode go through a strait, for example, and collect a whole raft of information about the waters, the seabed and the coastline. How is the strait state going to feel about what counts as a "normal mode" in that particular setting? It is good to have ambiguity when you need to reach some sort of middle ground when you are negotiating a treaty, but that ambiguity becomes more problematic when we are dealing with some of the new technologies and some of the new threats. We have to think about how we can maintain interpretations that align with key security interests.

I would also emphasise the issues we have around exclusive flag state authority. This has been a significant hurdle in a range of issues. I will not go over the points that Sofia has mentioned, but I very much agree with them. I agree with Sofia that there are indeed gaps in the legal regime. We do not have rules dealing directly with floating armouries. We do not have comprehensive rules protecting submarine cables, even though they are critically important for the global economy. We do not have precise rules on oil theft, which Sofia mentioned before.

We could potentially have new regulations to address each of these issues, but whether there is an appetite for new treaties is unclear. One thing I want to note is that there has been a tendency in addressing maritime security issues recently to adopt informal agreements. By informal agreements, I mean agreements that are legally non-binding. These sorts of agreements may be politically useful to provide an immediate response to a perceived problem but they carry their own risks because they are sometimes ambiguous in their terms. In other instances, because they are legally non-binding, they have to operate within the existing rules. You still get that emphasis, for example, on exclusive flag state authority. That was something that we saw with George W Bush pushing for the Proliferation Security Initiative some years ago.

A further risk that we can see is that sometimes these informal agreements end up undermining the existing law, where the existing law would still serve some security interests. We do not want to chip away at the rules that are working quite well in supporting maritime security through these informal agreements that are being adopted to respond to new threats. It is a matter not just of new regulations but of thinking carefully about the form of the new regulations as well.

**Lord Boateng:** Thank you very much to both of you for your very comprehensive answers. I wonder whether I could bring you down to some specific examples. If you take west Africa, the coastal states there seem to face threats that arise from the use of fishing, whether legal or illegal, as a cover for the smuggling of illicit or fake drugs, or for bringing in armaments. UNCLOS seems to be based on the assumption that all states will have an equal capacity to enforce and to have patrol vessels at their disposal. How, in practice, is UNCLOS able to assist the maritime security of the sort of states I have described, which face these various threats but do not have access to patrol boats and the like?

**Dr Sofia Galani:** One of the things that UNCLOS does is to encourage co-operation with reference to a number of threats. UNCLOS encourages states to find other ways and means to co-operate with each other. We have seen various regional agreements. Even in Africa, for example, we have the Djibouti code of conduct, which is a binding instrument. We have other codes of conduct that are soft law instruments. As Natalie said, they allow states to politically commit to tackling the problems at sea without being bound by those agreements.

The only thing that UNCLOS can do is facilitate and encourage co-operation, but then it is down to states to find ways to enforce those standards. It is true that UNCLOS seems to require the same from all states, but at the same time we should not overlook the fact that UNCLOS was drafted with almost universal participation. At the time it was drafted almost all states participated in the drafting process. The lack of coastguards or navies was not discussed a lot at the time because states had other priorities. As I said, the only thing UNCLOS can do is to encourage co-operation. It is then down to states to find ways to do that

and to improve capacity-building, which has proved enormously important when it comes to maritime security.

**The Chair:** Thank you. Professor Klein, is there anything you wish to add at this point?

**Professor Natalie Klein:** No, I agree with the points Sofia has made.

Q26 **Lord Teverson:** Last week, Professor Malcolm Evans, who I think you may know, said that UNCLOS had “an awful lot more to say about protecting fish than about protecting people.” Frankly, it does not do very well on fish either, but it certainly does not say much about people. What are the responsibilities of states regarding human rights at sea? What international conventions and treaties govern these? Have new challenges emerged that the original convention did not envisage? I should say that I am a patron of the charity Human Rights at Sea.

**Professor Natalie Klein:** I agree with the characterisation by Professor Sir Malcolm Evans in this regard. The responsibilities of states for human rights are drawn not from UNCLOS in the main but from international human rights treaties. There was a point in time where some countries did not consider that their human rights obligations extended out to sea once they were beyond their land territory, but that position has been firmly quashed at this stage. We know that states’ human rights obligations still apply to their territorial seas and to the vessels that are flagged to that particular state. We also know from human rights jurisprudence that human rights obligations extend to situations where states have effective control over a vessel and those onboard.

In addition to the international human rights treaties, individual rights are protected through some of the other treaties that Sofia has mentioned, such as the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, and, importantly for seafarers, the Maritime Labour Convention. We even saw that the International Health Regulations became relevant to protect passengers who were on cruise ships riddled with Covid last year. There are some laws, but I would say this is predominantly not UNCLOS.

This has been challenging because the situation, of course, has changed since UNCLOS was drafted. There were two particular challenges that I thought were worth highlighting. The first is mass migration by sea, which now occurs on a scale that we really did not anticipate at the time UNCLOS was drafted. We know now that migration by sea frequently involves unseaworthy vessels, frequently requires search and rescue missions, and, tragically, results in thousands upon thousands of lives being lost at sea. A central problem in state responses to migration by sea is that it is predominantly if not solely treated as a maritime security issue because it is dealing with the smuggling of people. Just because an issue relates to maritime security does not mean that human rights obligations no longer apply.

This position is really manifest in one of the main treaties dealing with migrant smuggling. The 2000 Migrant Smuggling Protocol grants states powers to police migrant smuggling at sea and gives states certain powers, but at the same time it does recognise the importance of human rights. Under Article 19 of the protocol, states' rights and duties remain subject to international human rights law and the Refugee Convention and its Protocol. States are not supposed to pick and choose which legal regime they follow in this situation; they must accept that human rights obligations apply.

A second main challenge that has emerged relates to forced labour on vessels. We have been hearing about some especially harrowing experiences in relation to the fishing industry. Now we know there is long-term detention of fishers onboard ships, which is being facilitated by bunkering, which is the refuelling of vessels at sea. Bunkering was really an industry in its nascence at the time UNCLOS was drafted. Now we have situations where vessels can stay on the high seas sometimes for years at a time with their crew onboard. They can transfer their catch, get refuelled and just stay there. UNCLOS does not even explicitly deal with bunkering. Even if it did, the real problem comes back to the flag state authority that we have already signalled as being particularly problematic. It is the flag state that has to ensure that human rights obligations are being met, and there has been a clear failure to take steps to protect human rights in these situations.

**Dr Sofia Galani:** In addition to what Natalie has said, I would like to highlight a few other examples of human rights violations at sea. We often tend to think of seafarers and migrants. This makes sense and I fully agree with it, but it is important to realise that now these things have changed. When we talk about human rights violations at sea, we should also think about the young cadets who might be bullied or sexually harassed; we should think about passengers on board cruise ships who might be raped; we should think about demonstrators or criminal suspects who are arrested at sea. They might be deprived of the right to liberty and the right to a fair trial.

We often do not talk about women at sea, because women account for only 2% of the world maritime force. Women who work at sea experience significant challenges. They might be protected by labour standards, but human rights law is also very important to protect their rights.

The other issue that I would like to mention here with reference to UNCLOS is that, yes, UNCLOS does not do a great deal of things when it comes to the protection of persons at sea, but as I said, UNCLOS is a living treaty. Some of its provisions can be interpreted in the light of the new challenges and problems that we face.

The International Tribunal for the Law of the Sea, for example, has argued that UNCLOS cannot be applied in a legal vacuum and due consideration has to be given to the protection of human rights. Through its jurisprudence, it has tried to protect the rights of persons arrested at sea, and has interpreted some of the provisions of UNCLOS that have to

do with the arrest, prompt release and procedural rights of crews arrested at sea in a way that protects their rights. Again, it is true that, no matter how hard we try, we will not be able to rely on UNCLOS to deal with human rights violations at sea. This is why it is important to look at human rights law and to find other ways to protect human rights at sea.

**Lord Teverson:** These vessels that are on the high seas for ages are a bit like the international space station, in that they are fed every now and again but they just stay there forever. In terms of port state control, can the vessels that fuel them somehow be used to enforce, at arm's length, what is happening on the high seas? Coming to Lord Boateng's point, it seems that states with flags of convenience are unable to fulfil the obligations that UNCLOS says they should do, whether that is in terms of human rights or other issues. Can that be reformed? Is there any way that we can insist that those who flag vessels are able to enforce the rules on those vessels at sea? Can we reform that somehow?

**Professor Natalie Klein:** Thinking about the options, in terms of port state control we have seen some changes within the law of the sea to grant greater powers to states to exercise enforcement jurisdiction over vessels that are coming in for acts that have occurred at sea. We have done that in relation to pollution. There is the Agreement on Port State Measures, which is trying that approach in relation to illegal fishing. We do not see that happening in relation to human rights at this stage.

The core tension you are dealing with, and why it is that we still have flags of convenience, is purely the economics of the situation. It is in the economic interests of the shipping companies and the fishing companies to go for the lowest common denominator in terms of the level of regulation to which they are going to be subjected while they can still make a good return on what they are doing. Until we get some fundamental economic reforms or we are willing to make some changes that might cost the industry some money, it seems very difficult to perceive how we might deal with flags of convenience.

At the moment, it seems that the approach is more to try to work collaboratively with some of the states where we know this is a particular problem to see whether they can adopt national measures that are going to change the situation. I am aware that some steps have been taken in Taiwan, for example. Taiwan obviously is not a party to these various treaties, but it has made some small changes to its laws, I understand. It might be that we need to work directly with some of the states that are known for these particular problems, but otherwise we are tackling a large-scale economic issue to be able to step away from the flags of convenience phenomenon.

**The Chair:** Dr Galani, is there anything you wish to add?

**Dr Sofia Galani:** I fully agree with Natalie. I do not have anything else to add, really.

Q27 **Lord Alton of Liverpool:** Having described this very disturbing situation,

could our witnesses identify what they see as the main obstacles and challenges to the effective implementation of human rights at sea? Could you also describe what enforcement mechanisms exist or are needed to pursue infringement of human rights law at sea?

**Dr Sofia Galani:** The main challenge in applying and enforcing human rights treaties at sea has to do with the concept of jurisdiction. States have to protect the rights of persons within their territory and extraterritorially when they exercise effective control. However, "jurisdiction" under UNCLOS is understood completely differently. It has to do with the rights and duties that states can exercise within the different maritime zones or on board a vessel. The fact that a person falls within the jurisdiction of a state for human rights purposes does not mean that that state can exercise jurisdiction under the law of the sea.

To give you an example, if a Liberia-flagged vessel navigates through the territorial waters of the UK and there are victims of human trafficking onboard, the victims fall within the UK's jurisdiction for human rights purposes but this does not mean that the UK has the right to interfere with the right of innocent passage in order to do something and protect the victims on board, unless the UK considers that human rights violations are a threat to the peace, security and good order of the coastal state. They can do that if they interpret the provision in this way, but it is a bit questionable whether they can do that without any problems in practice.

Similarly, coastal states cannot enforce human rights standards in their exclusive economic zone, because under the law of the sea they have jurisdiction only in relation to the exploration and exploitation of natural resources and the protection of the marine environment. Coastal states cannot enforce human rights on the high seas, and the right to visit under UNCLOS does not allow warships to stop and search other vessels because there is a reasonable ground that human rights violations are occurring on that vessel.

This is exactly why the comment of Professor Sir Malcolm Evans was spot on. Most fishing boats operate in the exclusive economic zones or on the high seas, especially those engaged in illegal fishing. UNCLOS does tell us what we need to consider in order to preserve fisheries, but it says nothing about the hundreds of fishers who are abused or even killed onboard fishing boats. Coastal states can exercise jurisdiction, but they have to do that with due respect to freedom of navigation and exclusive flag state jurisdiction. Those are two very important principles for the law of the sea, but they are two very unhelpful principles when it comes to the enforcement of human rights at sea.

We might also have exactly the opposite problem. A state might have a duty to protect persons at sea under the law of the sea but might not have jurisdiction under human rights law. We saw that in the recent complaint brought by Palestinian refugees before the Human Rights Committee. Italy was found in breach of the duty to protect the right to life of refugees because it failed to respond to a distress call and because

an Italian warship was near the shipwreck but did not do anything until it was too late. In this case, we all knew that Italy had a duty to act under the law of the sea and offer assistance to persons in distress.

The Human Rights Committee had to find a way to justify this finding on the basis of human rights law. In doing so, it offered a very generous interpretation of the effective control test. In a way, it made our understanding of the effective control test even more difficult and confusing. It tried to do that because it was trying to protect the right to life of the persons at sea, but this shows how difficult it is to find the right legal avenue to protect human rights at sea. It also shows how difficult it is to find the right forum to seek an effective remedy. The International Tribunal for the Law of the Sea cannot enforce human rights standards and the human rights bodies and courts cannot enforce the law of the sea standards.

One way of overcoming this problem might be by reading the different legal regimes in a complementary way. There might be ways to ensure we enforce law of the sea standards while also protecting human rights at sea, but we have to accept that this is not always possible. The way that jurisdiction operates in UNCLOS makes it not only difficult but sometimes impossible to protect human rights at sea. This is why it is time to think about another regulation or another treaty that would enable us to protect human rights at sea.

**Professor Natalie Klein:** I very much agree with that points that Sofia has made, especially around the jurisdictional framework that exists for enforcement. I would just underline that what is important here is thinking about not just UNCLOS but very much the domestic laws that states have that will enable their constabulary or their coastguard to be able to take action. In the maritime security field, we sometimes see that some parties to treaties do not necessarily take all the steps they need domestically to be able to follow through on some of their obligations. That is equally true for policing maritime security as it is for enforcing human rights obligations.

What I might do is pick up on one point that Sofia was talking about in terms of the possibility of resorting to dispute settlement under UNCLOS as a means of enforcing human rights. She has rightly identified that there have been situations where tribunals have read in the possibility of considerations of humanity or have indirectly considered individual rights when thinking about the detention of vessels. The jurisdiction of these courts and tribunals under UNCLOS is very constrained. Although we have seen situations where tribunals constituted under UNCLOS have been quite creative in reading their jurisdiction a bit more broadly, that just really underlines the difficulties we have in trying to bring these different regimes together.

It is a situation where there is, unfortunately, strong fragmentation between the law of the sea and human rights. We need to think a lot more about how we can bring those particular regimes together. At the moment, the more active space is in relation to the human rights

mechanisms, but we have countries such as Australia that do not have any regional human rights mechanisms and arguably can get away with a bit more because of that.

**Lord Alton of Liverpool:** At our previous session, Professor Sir Malcolm Evans and Professor Haines also identified this yawning gap that you have spoken about around this absence of human rights in UNCLOS. We asked them whether there would be any point in the United Kingdom raising this at the United Nations Human Rights Council and taking an initiative. Both of them were very optimistic about the traction that this might develop, and they said it would be well worth while for the United Kingdom to take such an initiative.

Do you agree with that? Who is working on such a project? How do we ensure that it encompasses everything from duties to fleeing refugees, which, as you have said, has been happening on a hitherto unimaginable scale, to the position of people being raped, which you mentioned a few moments ago, and the terrible labour conditions of deep-water fishing vessels that can be at sea for years on end? Is there a comprehensive series of amendments to UNCLOS that address those disturbing omissions? If not, who should be doing it?

**Dr Sofia Galani:** I would be strongly in favour of the UK taking such a step. It is true that the protection of human rights at sea is gaining more and more attention. We have seen more references in the reports of the Secretary-General with reference to UNCLOS. We have seen soft law initiatives by NGOs such as Human Rights at Sea, which is drafting a declaration on human rights at sea. We have seen a lot of writings on the protection of migrants and so on and so forth.

This could potentially be done through the Human Rights Council. A discussion could be initiated in the International Maritime Organization as well, although we have to bear in mind that the IMO does not have human rights jurisdiction. Such a discussion could be initiated in that form as well, exactly because the members of the IMO are members who have open registries. That could be a good forum to invite those states to participate in dialogue, and to make them aware of and more involved in the process of finding a solution to the problem of protecting human rights at sea.

**Professor Natalie Klein:** I would also support the United Kingdom trying to pursue this issue. I agree that there is very much growing momentum around this issue, just because there has been some very good investigative journalism that has exposed the scale of the problem. It is something that affects a wide number of countries. For example, in the Pacific region, some of the Pacific islands have been particularly concerned about the way their nationals are being treated when they are on fishing vessels flagged to other states. In some respects, they feel somewhat vulnerable or that they do not have the political power to be able to pursue these concerns with other states where they are dependent on that fishing industry for their livelihoods in different ways.

Going to a forum such as the United Nations has the advantage of probably being able to bring together a fairly wide number of states that would have an interest in this issue. I hope it would also avoid some of the fragmentation that we see where the IMO deals with some safety issues around rescuing people at sea, the International Labour Organization deals with seafarers more specifically, and then you have regional fisheries management organisations, which are just concerned about their industry as such. There is a need to go to a forum that would bring a lot of those stakeholders together.

**Q28 Lord Stirrup:** I would like to return to a subject that has already been touched upon, which is that of technology. We have been told that the regulation of new technologies—or perhaps more accurately the regulation of the activities that new technologies such as maritime autonomous vehicles makes possible—may be very difficult within the straitjacket of the existing law of the sea. I suspect from the things you have already said that you might agree with that. Professor Klein has given the example of maritime autonomous vehicles transiting straits, for example. I wonder whether you could you expand on the challenges that you see emerging from the use of new technologies in terms of international law, how international law is responding to that and indeed whether it offers opportunities as well as challenges.

**Professor Natalie Klein:** There are certainly quite a few different issues here. There are two different perspectives. On the one hand, there are the states using maritime autonomous vehicles to promote their maritime security, and then, as Sofia mentioned, there is also the possibility of criminal enterprises using maritime autonomous vehicles.

To start with states' use of these types of vehicles and how they present challenges to UNCLOS, first of all there is a question about whether maritime autonomous vehicles are ships or not. A US glider was seized by China at the end of 2016, and last year the Indonesian navy seized a glider that is known as a Chinese Sea Wing, which is an underwater uncrewed vehicle. They essentially look like torpedoes. They do not really look like ships at all. The legal question is whether that really matters. When you start having a situation where navies are seizing these vehicles that belong to other states, of course the question of immunity comes up. UNCLOS grants immunity to warships and to government ships that are operated for non-commercial purposes. Whether these are really ships is a legal matter.

If we are willing to say, "Sure, anything that is powered and moves through water counts as a ship", it should be protected with the immunities that UNCLOS has. Then we still have a question about whether some of these maritime autonomous vehicles count as warships. UNCLOS provides a definition of warships in Article 29. It is a definition that goes back well over a century. It was done to deal with the problem of privateering. That definition anticipates that a warship will be under the command of an officer and particularly that it will be "manned by a crew that is under regular armed forces discipline". If you have a remote-controlled maritime autonomous vehicle it may at a stretch fall within

that definition, but if something is fully autonomous that sort of system is less likely to fall within the definition of a warship.

That matters because, under the law of naval warfare, only warships have belligerent rights. Even when you are outside the context of an armed conflict, it matters for things like innocent passage through the territorial sea, where different responses are allowed depending on whether you are dealing with a warship or another sort of ship.

One of the advantages that we have with maritime autonomous vehicles is that they can be used extensively for intelligence, surveillance and reconnaissance. UNCLOS does not deal explicitly with intelligence gathering outside the territorial sea. Within the territorial sea, to do so is in violation of the right of innocent passage. That will be true for both maritime autonomous vehicles and crewed vessels. In the EEZ of another state, arguably maritime autonomous vehicles can be used for intelligence gathering so long as it is undertaken with due regard to the rights of the coastal state and there is no violation of the prohibition on threat or use of force. This is actually one of the areas where that ambiguity in the law might be quite useful in accommodating new and emerging technologies.

We also need to think about maritime autonomous vehicles being used for policing purposes, and UNCLOS sets out the requirement that they should be clearly marked and identifiable as being on government service. Aspects like that will need to be taken into account.

To flip quickly to the other side in terms of maritime autonomous vehicles being used for criminal purposes, Sofia already mentioned that drug traffickers are early adopters of new technologies. We have already seen remote-controlled ships being used for terrorist purposes. We are going to need to think about how the different transnational criminal treaties that we have mentioned can accommodate the types of offences that are going to occur here. As I mentioned, it is going to be about not just the treaties but states' domestic laws in making sure that they properly account for the use of these sorts of vehicles. I will leave it at that.

**Dr Sofia Galani:** I would like to add to what Natalie said. I agree with what she said. We also have to bear in mind the use of maritime autonomous vehicles for commercial purposes. We know that a lot of shipping companies keep investing in autonomous vessels for commercial purposes. The problem that we have here is that some treaties, for example the SOLAS convention and the MARPOL convention, have provisions that explicitly refer to the fact that on board the vessel there is a master and there is a qualified crew. There are also provisions that refer to cabins or other areas used by the crew. A lot of these provisions will be out of date when it comes to maritime autonomous vehicles, where we have no one on board and we have vessels that are being operated on the basis of remote control.

The IMO completed its scoping exercise on the use of maritime autonomous vehicles, with some delay because of Covid. If one reads the

report, you will see there that the IMO has highlighted that a lot of its own conventions are now out of date. They will have to be amended or it will have to come up with new regulations to plug the gaps that exist because the way that the older treaties are drafted means they now will not be able to be used to regulate the use of autonomous vehicles.

**Lord Stirrup:** That is very interesting. The sense I have from this morning is that there have been many developments—not just technological but, for example, as we heard earlier, in the area of human rights—that have seriously weakened the effectiveness of UNCLOS and the various laws and regulations that lie within that framework. Yet I have also had a pessimistic sense from both witnesses about the possibilities for improving the situation. Dr Galani said that UNCLOS would not be renegotiated and Professor Klein said that it is questionable whether there is any appetite for the negotiation of new treaties, that informal arrangements bring with them their own dangers and that it is difficult to reform the system of flagging because of economic pressures. I wonder what our witnesses think might be a realistic and practical way forward in closing the gap between the challenges that we face now and on into the 21st century and the regulatory system as it currently exists under UNCLOS.

**Professor Natalie Klein:** There is a multitude of possibilities here. What is going to be very important is ensuring that there is clarity and coherence in the positions that we take. As I mentioned, different perspectives can be taken within various organisations and, as Sofia mentioned, across particular regions of the world. To the extent that there can be more coherency in the approaches taken, that is important.

For the United Kingdom itself or for any country that considers itself a maritime power and has particular maritime interests, it is important for those states to bear in mind that words and actions count in the law of the sea. When actions are taken that are perceived as being contrary to human rights or to maritime security interests, protests are made. That is important as a legal matter to stop acquiescence to new interpretations, but it can also make a statement towards establishing what the new principles should be.

Some of the obfuscation that exists around the so-called grey zone of conflicts that we hear about these days could be avoided if states were prepared to articulate their positions on certain issues clearly. States can be quite reticent about that but there is a time and a place to be clearer. Sometimes actions are important too. The United States has been very clear that it wants to take freedom of navigation operations, for example, but the words that come with that do not necessarily always align with what it is doing. That consistency point is very important. Just being engaged and being clear about what the legal position is will make some contribution towards steering the law and how it is interpreted in the right direction.

**Dr Sofia Galani:** I just have a quick point. As I have mentioned, the IMO has on many occasions introduced amendments to existing treaties. The

SOLAS convention and the MARPOL convention, for example, have been amended many times to introduce new provisions that are needed. Through these amendments, you can introduce changes much faster, because it is much easier than trying to draft a new treaty from scratch or have all the states renegotiate something again. This could also be a way of introducing regulations in a much faster and easier way than trying to start something completely new from scratch.

**The Chair:** I will turn to Lord Anderson for our final question. Given the constraints of time I am afraid I am not going to invite you to ask a supplementary. I apologise to our witnesses as well. This will be the final question.

Q29 **Lord Anderson of Swansea:** May I run together a question and a brief supplementary? My question is this: as objective outside observers, do you believe that we in the UK are punching our weight in international maritime matters? If we were to do more, in which areas could we do so? For example, in his Sir Malcolm Evans pointed out that we have not had a judge, or even a candidate, on the international tribunal since the mid-1920s. Is it areas like that? Is it the enforcement of human rights or greater obligations for flagging countries?

**Dr Sofia Galani:** The UK is doing a lot when it comes to maritime security. This became clear to everyone when the UK published its 2014 maritime security strategy report, because it showed that it understands maritime security in a much broader way than just focusing on naval power. It had a lot of priorities. It was also a very good opportunity for the UK to reflect on its cross-sectoral approach when it comes to how it deals with maritime security. Later on, we had the establishment of the Joint Maritime Security Centre, which is a centre of excellence for maritime security.

The UK has been active. It is doing a lot. It is trying to be an international actor, and it is doing that. Going forward, the UK could do more. It should think of itself as a naval power and as an island state. In terms of being a naval power, the UK remains a naval power but it has a much smaller navy than other states, such as the US, China or Russia. If the UK wants to defend its own maritime security interests and remain a global actor in enforcing the rule of the law at sea, it will have to think about its partnerships.

Although we saw that the UK is moving in a new direction—we saw that in the trilateral agreement with Australia and the US—it is important for the UK to consider how it will maintain its relationship with the EU after Brexit. The UK-French disagreement when it comes to fishing shows there is some tension in the relationship between the UK and the EU. The EU is a global actor when it comes to maritime security. It has robust maritime security legislation and policies, and it plays a significant role globally. We should not overlook the fact that 21 of the 30 NATO member states are also EU member states. The UK will have to consider how it will move forward when it comes to these long-standing partnerships.

With reference to how the UK sees itself as an island state, it is important to take steps with reference to climate change and sea level rises. We have seen the effects of these already. The UK will be affected. Its Overseas Territories, coastal communities and infrastructure will be affected. The UK will have to take steps when it comes to protection against the impact of climate change.

With reference to human rights at sea, I watched the debate in the House of Lords a few weeks ago—it might have been a couple of months ago—when the Government were asked what they do when it comes to the protection of human rights at sea. The response from the Government was that they comply with the Maritime Labour Convention and the Work in Fishing Convention. It is extremely important to realise that, when we talk about human rights at sea, it is not only about labour standards. This is what we said earlier. It is also about a number of other people affected by human rights violations at sea who are not covered by labour standards. The UK should be encouraged to consider the steps that it will take. I know the new maritime security strategy is due to be published. I would hope to see more about the protection of human rights and how the UK intends to protect human rights going forward.

Finally, I have one other very quick point. The UK places a lot of emphasis on cybersecurity and smart ports. We saw that in the Integrated Review that was published a couple of years ago. We saw that the UK is very keen to invest in smart ports. It is a really great opportunity for the UK, because the combination of smart ports and maritime autonomous vehicles would really open up great opportunities for the UK. The UK has not really told us yet how it intends to protect submarine cables. As Natalie said, UNCLOS does not help us. We need to find other ways to protect submarine cables. The UK should be recommended to come up with a plan, a strategy or co-operation agreement that will enable it to protect submarine cables, because without them and without the digital data that they transfer, the whole project could easily collapse or at least not function properly.

**Professor Natalie Klein:** In view of the time, I will be very brief. Essentially, I will give you a very short wish list in terms of what I would wish the UK could do in dealing with a range of maritime issues. When it comes to addressing human rights at sea, I can see that the United Kingdom absolutely could take a leading position in this, as you suggest. I would strongly encourage that. I would also respectfully suggest that it ensures that any new policies or laws that it has adopted in relation to migration fully respect the human rights of those individuals.

The other key aspect that I would mention really comes back to the matter of exclusive flag state authority. We really need to use any occasions that present themselves to hold flag states to account for what is happening on the oceans in regional and multilateral fora in a way that will promote what should be the shared interest of maritime security. Those would be the two main aspects that I would encourage the United Kingdom to think about further, if possible.

**The Chair:** Thank you very much indeed. I am afraid we do have to close the session at this point. I know our forthcoming witnesses are in the wings, so to speak, on Zoom.

Thank you very much indeed for your contributions this morning. Your closing remarks, of course, direct us exactly to the importance of the work of Select Committees, which is about holding the Government to account in a positive and constructive way, and looking to the future of how we may help the Government to improve matters. Thank you for your advice and assistance this morning.