HOUSE OF LORDS

# International Relations and Defence Committee

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

Wednesday 17 November 2021

10 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; Baroness Sugg; Lord Teverson.

Evidence Session No. 7 Heard in Public Questions 60 - 65

### Witnesses

I: Professor Clive Schofield, Head of Research, WMU-Sasakawa Global Ocean Institute, World Maritime University; Dr Surabhi Ranganathan, Associate Professor and Co-Acting Director of the Lauterpacht Centre for International Law, University of Cambridge.

USE OF THE TRANSCRIPT

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

# Examination of witnesses

Professor Clive Schofield and Dr Surabhi Ranganathan.

Q60 **The Chair:** Good morning. I welcome to this meeting of the International Relations and Defence Select Committee Professor Clive Schofield, head of research, Global Ocean Institute, World Maritime University; and Dr Surabhi Ranganathan, associate professor at King's College, University of Cambridge and co-acting director of the Lauterpacht Centre for International Law. Welcome to both of you. 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 posing the question: is it fit for purpose in the 21st century?

At this stage, I always remind witnesses and my colleagues that the session is on the record. It is transcribed and broadcast. I also remind members to declare any relevant interests before they ask their questions. I shall begin, as usual, by asking the first question, which is always rather general in scope and then I will turn to my colleagues for more focused questions. I anticipate that my colleagues will wish to ask a supplementary to their initial question on each occasion. At the formal run of those questions, if there is sufficient time, I will invite my colleagues to ask further supplementary questions.

I will start with the more general question. The United Nations Secretary-General's report of the 76th session of the UN General Assembly noted that, "The devastating impacts of climate change on the oceans have never been more apparent". What areas of the law of the sea are most affected by the impacts of climate change? Can UNCLOS and the current law effectively address these changes?

***Professor Clive Schofield:*** Good morning. It is a great honour to be able to speak to the committee, so thank you for the invitation and that kind introduction. I suspect the committee is well aware of some of the diverse and numerous impacts of climate change on the oceans. That is not a surprise, given the way the oceans serve as the globe's primary sink for our excess heat and carbon dioxide, leading to impacts such as ocean warming, changing chemistry of the oceans, acidification, deoxygenation, impacts on the circulation system and in terms of the increasing frequency and intensity of extreme weather events.

That, in turn, leads to impacts on, for example, the abundance and distribution of marine species. By way of example, the International Court of Justice was called upon to deliver a maritime delimitation settlement in a dispute between the Kingdom of Denmark on behalf of Greenland and Norway on behalf of its small island, Jan Mayen in 1993. In that dispute, the stock of capelin fish was a factor in the deliberations of the court. Subsequently, we now know that the nursery and feeding area of the capelin has shifted in location. There have been changes and delays in the migration of the stock and the spawning periods. One of the key factors in the deliberations of the International Court of Justice in that case has now been fundamentally changed as a consequence of climate change impacts on the oceans.

There are major impacts on coasts, nearshore areas and coastal ecosystems such as mangroves and corals, which provide extremely valuable ecosystem services such as protection for the coastline. Of course, there are also direct impacts on the people who live there, leading to displacement and issues of migration as a consequence of climate change, which I believe the committee has already touched on to some extent.

Many of these impacts or issues related to climate change are not directly related to the United Nations Convention on the Law of the Sea as it stands at the moment. It is fair to characterise the convention as being largely climate silent or climate blind, as a consequence of when it was negotiated in the early 1970s through to 1982. In many ways, the convention is not adequate to the climate change impacts that we see.

Having said that, the convention is an extremely valuable document. It is remarkable to think that, in that time, we had the ability to come together and that over 100 countries in the room—after nine years of negotiations, it must be admitted—actually came up with a framework document for, essentially, all activities in the oceans. There are issues that arise in relation to how the convention interacts with the climate change treaty regime, which I am sure my colleague will touch on.

One area that I think we will discuss further later on and that is squarely within the ambit of the convention is maritime jurisdiction and the issues related to sea level rise impacts on baselines along the coasts, on the delineation of outer limits to maritime zones and on the delimitation of maritime boundaries. What I would say on that introductory comment is: if the climate regime succeeds—and last week may give us some pause for consideration of quite how much progress we have made in Glasgow—then the oceans are one of the key beneficiaries. At that point, I will pause and hand the baton back to you.

***Dr Surabhi Ranganathan:*** Thank you for the invitation to present evidence before you. It is an honour to be here. To answer your question, and very much in line with what Professor Schofield said, multiple areas of the law of the sea are affected by impacts of climate change because multiple areas of the sea are impacted by climate change. The effects in the marine environment, which Professor Schofield described, bring in to test Part XII of the UN convention, in terms of its adequacy. The fact that climate change is linked to biodiversity loss again brings up questions of the adequacy and implementation of UNCLOS's provisions, as well as of other relevant treaties, such as the Convention on Biological Diversity, and whether ongoing efforts to negotiate a new treaty for biodiversity beyond national jurisdiction are ambitious enough.

Climate change places increasing stress on oceanic fisheries, which brings into play not only UNCLOS provisions but provisions of the fish stocks agreement and the regional treaties that exist for the conservation and use of fishery resources, including questions of distribution. They also invite questions about the conditions under which fishing activities take place, including lax frameworks—planning frameworks, for example—that

magnify human vulnerability at sea, harmful subsidies that lead to overfishing and, of course, differences in state capacity to enforce coastal and economic zone regulations.

Climate change mitigation and adaptation place new demands on the ocean, including demands on oceanic minerals to support green energy transitions and on marine genetic resources for what they might contribute to adaptation and ocean resilience. There is the question of removal and storage of carbon, which can, on the one hand, foster beneficial activities such as the restoration of marine and coastal ecosystems, but can also open the way to ambitious but dangerous and unproven enterprises, such as geoengineering.

There is, of course, a question of rising sea levels, which raises issues about the adequacy of the law of the sea provisions on baselines and maritime entitlements. There are indirect effects of climate change, including loss of livelihoods that push people into activities such as piracy, which bring up questions of maritime security, or into jobs that are made dangerous by the absence of oceanic regulations. There is the question of climate refugees and what protection the law of the sea offers in the context of increasingly dangerous and desperate voyages across the ocean.

Plastic is a major pollutant of the ocean and is collecting in large garbage patches across different oceans. Also, climate change increases the use of plastics, for example for bottled water when freshwater sources decline.

There are then, of course, the ironies, as melting ice in the Arctic, for example, opens up new opportunities for the extraction of resources across oil and gas, but also fisheries and navigational resources.

As Professor Schofield noted, UNCLOS does not directly speak to climate change. It offers responses to some of these issues. Some of these responses provide important starting points but others, quite frankly, are part of the problem. I would go further and say that the treaty also encodes some quite outdated understandings of the ocean, of human relationships to the ocean and of economic models that should underpin the use of oceanic resources. These are all reasons to take a dynamic approach to its interpretation and implementation.

Q61 **Lord Anderson of Swansea:** Thank you very much for illustrating the diversity of problems caused by climate change. In that same report, the UN Secretary-General called for greater co-operation and co-ordination at an international level on climate change. What are the main relevant international initiatives that seek to mitigate the consequences of climate change, recalling that, in a report published at the end of October, the UN stated that it is the poorest in Africa who suffer most the consequences of climate change?

***Dr Surabhi Ranganathan:*** Depending on which initiatives are promoted and how, mitigation activities can be either beneficial or perilous for the ocean. An example of beneficial mitigation includes promoting nature-

based solutions, which includes the restoration of coastal and marine ecosystems—mangroves, salt marshes, sea grasses and so on—that can act as carbon sinks. Here, relevant work is being done in various quarters, including by members of UN-Oceans, which is the UN's interagency co-ordination mechanism. To mention just one of these members, the Global Environment Facility has a key role to play in facilitating funding for financing for coastal and marine protection and restoration projects.

It is important to keep in mind the design principles that inform these projects. IUCN, for example, has provided an overview of the kinds of factors that must be taken into account. Such projects must be inclusive of local communities. They must be credible, based on the best available scientific evidence and measurable.

An example of potentially harmful mitigation is geoengineering proposals. These can come across as innovative and exciting, but for the most part they are untested and unproven. They would entail large-scale manipulations of oceanic chemistry or biology, and it is not possible at the moment to say what the knock-on consequences might be. The dangers of this are recognised. Forms of geoengineering have been barred under various different instruments. The London protocol of the International Maritime Organization seeks to bring geoengineering, especially carbon sequestration, under its regulation.

There are also mitigation measures that are directed to the reduction of carbon emissions by moving away from fossil fuels to green energy. This can be a mixed bag for the ocean. On the one hand, there are obvious benefits for the ocean from the reduction of carbon pollution and of the kinds of environmental externalities that follow from oil and gas extraction. On the other hand, mitigation is being problematically cited to advance the cause of deep seabed mining, which has extremely high environmental risks and could produce devastating feedback loops. In fact, it cuts right against the precautionary principle. I hope we might come back to this later, because the UNCLOS regime, as amended by the 1994 implementation agreement, is flawed in several ways when it comes to deep sea mining.

To come back to other kinds of beneficial mitigation efforts, other beneficial efforts are those that aim to knit back the divided ocean that was produced by UNCLOS. It is in some ways a magnificent treaty, but the fact is that it carved up the ocean into multiple zones and separated even seawater regimes from seabed regimes in ways that do not really reflect the reality of the ocean's fragile and interconnected ecosystems. The regimes foster extraction and hamper protection of the oceans.

In that context, it is notable that there is now a rising push for integrated, ecosystem-based management of the ocean. Particularly important in this context is a call to establish marine protected areas over 30% of the ocean by 2030 to protect them from mining, fishing and perhaps even shipping activities. The UK, in fact, supports this call. This call translates into a need for concrete British support for efforts towards

ecosystem-based management and precautionary decision-making at various multilateral forums, which include the forums relating to the Convention on Biological Diversity, regional mechanisms, the International Maritime Organization and, of course, the ongoing negotiations on biodiversity beyond national jurisdiction.

Finally, it is also important to renew commitments via the BBNJ[1] negotiations, as they are called, and elsewhere relating to the cause of ocean justice. That includes promoting the equitable distribution of the benefits of the high seas and deep seabed resources, and an undertaking for a frank appraisal of who will bear the costs of mitigation. The burden should not fall on exactly the same communities that have also carried the burden of the costs of anthropogenic climate change and, historically, of the factors that contribute to it.

***Professor Clive Schofield:*** Thank you ever so much, Dr Ranganathan. That covers an awful lot of ground in a very short intervention. Fundamentally, if we are talking about mitigation, that is the reduction of $CO_2$ emissions and greenhouse gases, the United Nations Convention on the Law of the Sea plays an important framework role but is itself exactly that: a framework. It does not address specific sectors or impacts.

However, it enables other organisations under its umbrella to do so. For example, of the order of 80% to 90% of global trade is carried by ships. Some 95% of transport at the moment tends to be dependent on burning petroleum. The shipping sector is aware of the challenges of decarbonisation and that is, essentially, governed by the competent organisation, the United Nations International Maritime Organization (IMO). Here, I have to say that my own university, the World Maritime University, is a child of the IMO. I should declare that.

The IMO has its own policies and targets in planning for decarbonisation: a target of a 40% reduction in $CO_2$ emissions from shipping by 2030 from 2008 levels. This is an example of the way that subsidiary organisations enabled by the convention can tackle some of these climate change impacts.

To add to Dr Ranganathan's comments, I totally agree with the couple of comments on mangroves. Their role in what has been termed blue carbon, of being wonderfully capable of storing carbon in their systems, is remarkable. The other really extraordinary thing, from my point of view, when we look at issues around coastal stability, baselines, limits and boundaries is that mangroves provide that ecosystem service in terms of coastal protection, but in addition they are especially noteworthy in the sense that they are an ecosystem that can autonomously respond to changing sea level. Through deposition in their root systems, mangroves can actually raise the level of the land in response to a rise in sea level, so they have a remarkable capacity to provide ongoing protection and response, through a natural system, to a changing sea level as a consequence of, essentially, our anthropogenic climate change.

[1] Marine Biodiversity Beyond Areas of National Jurisdiction

In terms of governance, there have been long-term calls for what used to be called integrated coastal management. I totally agree that we are increasingly seeing the desire for more integrated oceans governance. The way in which we have broad, large-scale marine protected areas is to be encouraged, so long as they are representative and well governed. That is a question mark that has been raised about some of the very large-scale marine protected areas. Some critique of them is that they are no more than paper parks if they are not well-governed.

The other issue around this drive towards ocean governance is the advent of marine spatial planning, which I was going to say is a novel way to deal with competing interests in the ocean space or to try to reconcile competing interests, but it is not necessarily quite so new. The implementation of that marine spatial planning tends to be dominated by examples in the northern hemisphere—among the developed world rather than being integrated in the global south. That is an area where the UK can play a very important role, through aid and capacity-building, to support the implementation of that kind of integrated approach to ocean governance.

**Lord Anderson of Swansea:** You both touched on the shortcomings in the existing system. What would be your priorities in seeking to tackle those shortcomings: increasing regulation, promotion of mangrove swamps or what?

***Dr Surabhi Ranganathan:*** Yes, some of those. The ideas for what might be beneficial mitigation measures are there. The question is, as Professor Schofield pointed out, about the design of these measures and how they are implemented. In the context of the restoration of coastal ecosystems, which includes restoring mangroves, salt marshes and seagrasses, the design principles—the inclusion of local communities, and making sure that they are based on scientific evidence, that they are credible but also measurable in their impacts, and that they are enforced—will all be important.

The same goes for marine protected areas. What is important in the new calls for expanding the spread of marine protected areas across the ocean is to think of this not as something that can be done in a patchy or fragmented kind of way, but to think of 30% as something that allows for integrated ecosystem-based protection of the ocean. Scientific evidence should be used to identify and locate marine protected area in ways that not only connect them to each other but expand the positive feedback loops between these different areas.

Again, the principles of design are very important. Professor Schofield was absolutely right that they should end up being more than just paper parks. This means constantly integrating scientific evidence, monitoring, ensuring that they are doing the work they are supposed to do and taking a dynamic approach. For example, certain marine protected areas might be fixed by place, but others might have to follow species and so might have to migrate seasonally. These are all factors that would be important to their success.

There are lots of things that can be done. The question is the will to do it and, of course, things such as the availability of financing and support at international fora that actually seek to promote these activities.

***Professor Clive Schofield:*** Very briefly, if I may, my Lord, I think you would dismay some of my mangrove scientific colleagues by use of the term "swamps". Instead, if you will permit me, we try to term them "forests" these days as that term has a less negative connotation, if you will.

Those restoration efforts are vital. What we are really talking about, I suppose, from the developing world point of view is the degree to which we can build capacity and support those restoration efforts. There has been the advent of these large-scale marine parks. As one example, 80% of Palau's exclusive economic zone is marine reserve. The capacity of small island developing state in terms of surveillance and enforcement over those broad maritime spaces is a real question: how can these states actually enforce these vast maritime spaces? These are fundamentally what have been characterised as small island states, but they are large ocean states.

Collectively, the small island states of the south-west Pacific have a maritime jurisdiction that is larger in area than the surface of the moon. The scale of it is difficult to comprehend. For Kiribati, relaying the road that runs down the spine of Tarawa, which is the main island and where the capital is, took 10% of the land area of the island. That should give you some impression of the precarious nature of these states in territorial terms, but also the vast expanse of maritime jurisdiction that they are responsible for. It is a responsibility but it is also, of course, an opportunity. The income from fisheries—really we are talking about tuna here—is fundamental to their national well-being and represents their key developmental opportunity, but how does one deal with the surveillance and enforcement challenge there? We have a role to play in providing capacity support.

Q62 **Baroness Fall:** I wonder whether we could go back to the issue of rising sea level and how it impacts on baselines and boundaries, and whether you think there should be a new approach—or at least an approach that is agile enough to deal with what could become a baseline for disputes about resources and national boundaries.

***Professor Clive Schofield:*** I have been looking forward to this question. Thank you very much indeed. Fundamentally, we have a traditional perspective from the law of the sea convention, which is a child of its time, where sea level rise and climate change was not really on the radar of the drafters of the convention. Although there can be critiques of the way the ocean is divided up into maritime zones, the spatial framework of maritime claims that the convention gives us is an enormous step forward from where we were. Prior to the 1982 convention, we did not even have agreement on how broad the territorial sea should be.

This series of maritime zones, measured from the coasts—12 nautical miles territorial sea, contiguous zone, 200 nautical mile limited exclusive economic zone—provides a spatial framework for the extent of maritime claims. This has, to a large extent, brought to an end an era of increasing creeping jurisdiction on the part of coastal states. Earlier I said that these maritime zones are measured from the coastline. Really, the legal representation of the coastline, that is the land/sea interface, is the normal baseline. That is a default baseline that coastal states have. All other baselines depend on the normal baseline, because they have to tie back to the coast.

The normal baseline is coincident with the low water line along the coast, so the traditional view has been that, if the coast moves, the normal baseline is also ambulatory. It shifts and changes over time. As a consequence of that, if the base points that define the outer limit of a maritime claim move and potentially retreat inland as a consequence of sea level rise, then the maritime limit will also shift landward and contract.

What we are talking about in terms of a more agile approach in a way is already happening. You may remember that, last week, the Foreign Minister of Tuvalu gave an address while in his shorts, up to his knees in ocean, standing on an area that had been land. The Pacific island region in particular is undertaking state practice that essentially goes about the process of declaring baselines, limits and boundaries, and depositing that information with the United Nations Secretary-General through the Division for Ocean Affairs and the Law of the Sea.

In August of this year, the Pacific island leaders made a declaration, which is a culmination of many years of similar declarations. The real change here is that the Pacific island states are essentially indicating their interpretation of the law of the sea. They are being consistent in their declaration with the convention, but they are going to declare the location of their baselines, limits and boundaries and not update them in the future as a consequence of the coastlines changing as a consequence of sea level rise. These states seek an interpretation of the convention that enables them to retain their entitlements. This is ongoing now: these states are going ahead essentially prior to the international community sanctioning this.

The real question is how the international community reacts to this interpretation and how opposable these maritime claims then are to, for example, distant water fishing nations operating within those maritime entitlements. They are the work of the International Law Association's committee on sea level rise.[2] The International Law Commission study group on sea level rise is significant for how that will be accepted by the international community. I had better stop there.

[2] Professor Schofield is a member of the International Law Association Committee on International Law and Sea Level Rise

***Dr Surabhi Ranganathan:*** As Professor Schofield noted, work is being done at the International Law Commission and by the International Law Association to look into the principles of the law of the sea that actually support this idea of fixing maritime entitlements as they are now. They look at it through the prism of important things such as certainty and stability.

To this, I would simply add that it is also important to consider these issues from an ocean justice prism. As Professor Schofield noted, it is the small island states of the Pacific and elsewhere that stand to lose the most from sea level rise. They can also rightly argue that they have contributed the least to the problem. For them, fixing maritime entitlements is part of the solution but can be only part of the solution. There are also other issues that are relevant to ocean justice in the face of sea level rise. These include things such as compensation for loss and damage, access to finance and technology for mitigation and adaptation, and regimes that prioritise distributive justice vis-à-vis high seas and deep seabed resources.

Q63 **Lord Teverson:** As we know, in the Arctic, climate change is happening something like three times faster than elsewhere on the globe. There, we have some of the biggest changes on the planet. What are the legal and practical implications of those changes of climate in the Arctic region? I suppose what we are trying to understand is, once the ice retreat continues, why is the northern passage not just treated like any other EEZ for the Arctic nations? What particular issues arise?

***Dr Surabhi Ranganathan:*** The danger is that the Arctic might end up being treated just like the rest of the ocean in the application to it of all the extractive principles supported by the law of the sea. I talked about the ironies of climate change in terms of the opportunities it is creating with respect to claims to the continental shelf in the Arctic. These claims have been made by Russia, Denmark and Canada, and, potentially, by the US, Norway and Iceland. These claims are supported by the UN Convention on the Law of the Sea: Article 76 enables claims to the continental shelf much beyond 200 miles when this is supported by geological evidence.

In addition to the possibility of expanded continental shelf claims, there is the possibility of expanded shipping with shrinking ice cover, which brings forward some questions. For example, are the routes that will open up in the Arctic within national jurisdiction as, for example, Canada claims, or are these to be regarded as international straits? Also, just as with continental shelf claims, the bigger question is what the implications for the marine environment of the Arctic will be. It is a very fragile marine environment. What will be the implications for marine life, and what will be the feedback loops of both these activities in terms of worsening ice melt in the Arctic?

This calls up the need for area-based management tools to regulate and limit these activities. The provisions for these kinds of tools exist under multiple treaties. For example, the International Maritime Organization

can designate parts of the Arctic as particularly sensitive sea areas or as special areas. The convention that is currently under negotiation on biodiversity beyond national jurisdiction might help with picking up large parts of the Arctic as marine protected areas. These are important.

A good example of what a precautionary approach to the Arctic might look like is already in place to some extent vis-à-vis Arctic fishing. Melting ice and warming waters have opened the prospects for commercial fishing, but at the moment those prospects are constrained as there is a regional treaty. Nine states, plus the European Union, have agreed to an agreement that prohibits unregulated fishing in the high seas of the Arctic. This is a good example of precaution in action.

I should note, however, that this agreement also provides for exploring the possibilities of sustainable fishing and creates a framework for exploratory fishing. At the same time as it closes down the prospects of unregulated fishing, it opens up the possibility of commercial fishing and, again, the need to proceed cautiously with treating the Arctic as yet another reservoir of resources. This is very important.

There are other issues as well. Melting ice will catalyse the release of methane from the Arctic depths. This is again a feedback loop adding to the amount of carbon already in the atmosphere. This is potentially quite dangerous.

I will close with this. The last thing is that all these changes to the Arctic and the possibility of these new economic activities there really bring forth the enhanced need for research into Arctic ecologies and the threats that indigenous communities of the Arctic face. There is clutch of regulation on all this and a bunch of bodies with some competence on these issues. Again, the need for an integrated approach that brings all this under one framework is quite important.

***Professor Clive Schofield:*** Thank you very much indeed for this question. There has been an enormous increase in interest in Arctic ocean issues, particularly spurred by the significant reductions in Arctic summer sea ice coverage. The Intergovernmental Panel on Climate Change, in its ocean and cryosphere special report, stated that these changes are "unprecedented for at least 1,000 years". They are extremely eye-catching, if you will, for commentators, who seem to view the Arctic as special, different, not necessarily part of the global ocean regime and as a potential arena for geopolitical competition, for conflicting claims and potential conflict.

This does not chime or fit with the perspective of the Arctic five. The Arctic five coastal states themselves, through the Ilulissat Declaration in 2008, were quite clear that "We remain committed to this legal framework"—the United Nations Convention on the Law of the Sea—"and to the orderly settlement of any possible overlapping claims."

On those overlapping claims, in the central part of the Arctic Ocean, beyond 200 nautical mile limited exclusive economic zones, there are

multiple and overlapping assertions of rights to so-called outer or extended continental shelf. That is certainly the case. However, the Arctic has been a scene not necessarily of conflict but of remarkable scientific co-operation and of soft law bodies, such as the Arctic Council, that deliver meaningful practical efforts to deal with Arctic issues, including against oil spills and the moratorium on fisheries in the central Arctic Ocean, which is legally binding and precautionary in character.

In terms of the disputes or overlaps for continental shelf rights, it appears to me that all the states concerned are playing by the rules, with the exception of the United States, which is not a party to the convention.[3] Indeed, assertions to rights over continental shelf in the central Arctic Ocean have been made through submissions to the relevant scientific and technical body, the United Nations Commission on the Limits of the Continental Shelf (CLCS), so everyone appears to be playing by the rules. The caveat here is, "at the moment". We have not had the determinations of the outer limits of the continental shelf claims of the Russian Federation, Denmark on behalf of Greenland and Canada, particularly, where the main overlaps occur.

A question to my mind is: what if one of those parties does not quite get what it wishes? That is not up to the commission. It does not have the mandate to determine or settle disputes. It is then up to the coastal states to negotiate and delimit outer continental shelf maritime boundaries. It is really a tale of co-operation, and a remarkable one at that so far, in the face of major challenges in terms of a rapidly changing environment in the Arctic region.

Q64 **Baroness Blackstone:** I want to turn to international disputes and the use of international law to solve them. Can you tell us what impact climate change might have on international disputes and their settlement within the framework of international law and the international law of the sea? For instance, could claims relating to climate change be referred to either international courts or international tribunals?

***Professor Clive Schofield:*** Whether international law can provide options for dispute resolution for issues that arise related to climate change is a really very relevant question. I would say a qualified yes. I believe Dr Ranganathan is probably far better positioned to answer this question, but the legal luminaries such as Professor Alan Boyle and Philippe Sands have commentated on the opportunities here. I do feel that we need to have some perspective on the caution of judges. I think the judges are sensitive to the issue of whether their rulings will actually be respected and have traction.

For issues where climate change impacts relate directly to the law of the sea convention as we have it, the International Tribunal for the Law of the Sea would be the obvious forum to hear such a dispute. For instance,

[3] Four of the five Arctic coastal States are parties to UNCLOS. Although the United States is not a party to the convention, conducts its oceans policy in line with UNCLOS and accepts that much of it is reflective of customary international law.

in relation to sea level rise impacts on coastlines and maritime jurisdiction, there is an avenue that, if not a contentious case, then at least an advisory opinion related to those impacts would probably be beneficial and is a realistic option. I suspect Dr Ranganathan will be able to comment more cogently on the issue of whether bodies such as the International Court of Justice, which offers much more status, if you will, and legitimacy to the decision that it could hand down, would be attracted or feel itself able to take on such a case.

***Dr Surabhi Ranganathan:*** This is an important question. In recent years, we have seen a rise in climate litigation in different forums. Most recently, you will have seen that Vanuatu has announced its intention to seek an advisory opinion from the ICJ on states' legal obligations to prevent and redress the effects of climate change. At the moment, this is at the diplomatic stage. Vanuatu has to build support in the UN General Assembly to get it to refer the question to the international court.

We have also seen a rise in climate litigation in domestic courts. The notable judgment from earlier this year was from the Hague district court, which ordered Shell to cut its carbon emissions, but we have also seen judgments from other courts. Just a few weeks ago, the Committee on the Rights of the Child delivered its opinion on complaints that 16 child complainants had made. They cited carbon emissions as violating their rights under the Convention on the Rights of the Child. This is an example of how various procedures, including various different treaty procedures, are being used as vehicles for climate litigation.

The UN Convention on the Law of the Sea could also be a vehicle in the same way. In fact, Part XV of the convention provides a sophisticated regime for dispute settlement, with four different routes available to states. Further, Part XII on the responsibility of states for the protection of the marine environment offers one basis for claiming that there is a dispute under the convention vis-à-vis climate change, so there are both procedural routes and a substantive link. It could be argued that carbon emissions violate obligations to protect and preserve the marine environment, and that necessary measures should be taken to prevent, reduce and control pollution of the environment. Part XII also says that, to determine what sorts of pollution control measures are necessary, it is necessary to take into account internationally agreed rules, standards and practices. This brings in things such as the Paris Agreement.

UNCLOS has a dispute settlement process that is sophisticated and allows for links to be made with climate treaties, but it is important to keep in mind some of the difficulties. It has not been used for this purpose so far. It has not been invoked for climate litigation. It has not been the site of climate litigation. It is also possible that, if a dispute were brought, the tribunals, or the arbitration tribunals, might find that the dispute is more properly a climate dispute, not an ocean dispute, and therefore should go under alternative procedures provided for under climate treaties. There is this question of whether the International Tribunal for the Law of the Sea

or one of the other procedures will find themselves as having jurisdiction to deal with the dispute.

The greatest problem, however, is that the language in which UNCLOS specifies duties to the marine environment is even now both weak and qualified. The same Part XII that set out states' rights to protect the marine environment also reiterates their right to exploit their natural resources. The duties it imposes are largely obligations of conduct. They are duties of due diligence, not obligations to produce particular results. Thresholds under linking treaties such as the Paris Agreement are soft and discretionary. In other words, a tribunal, even if it decides to take up the case, might find that the obligations are satisfied as long as it can find that states have shown that they have done enough in terms of taking steps towards reducing carbon emissions and so forth.

Even if there is litigation, what such litigation would achieve is unclear without strengthening the substantive duties. Here, it is important to know that there is potential in Part XII of UNCLOS that has simply not been exploited fully. For example, it imposes obligations on states to co-operate to raise the bar, to elaborate international rules, standards and recommended practices for the protection and preservation of the marine environment. These are by way of Articles 197, 200 and 201.

This is again somewhere where the UK, for example, could take a role in actually realising some of these obligations of co-operation and promoting the elaboration of higher standards of marine environmental protection at relevant international fora. That might then mean that, if there is litigation, it would lead to more meaningful outcomes.

**The Chair:** I will turn in just one moment to Baroness Rawlings for the final question of the formal run. If there is time, I will go back to Baroness Fall, Lord Teverson and Baroness Blackstone for supplementaries.

Q65 **Baroness Rawlings:** I wondered whether you could tell us how the international law of the sea should adapt to climate change induced changes, such as rising ocean temperature or sea level. What are the initiatives that the UK Government could or should take? For example, unlike Antarctica, which is being dramatically impacted by climate change, the Arctic lacks a comprehensive Arctic-specific treaty. I wondered what your view on that was.

***Dr Surabhi Ranganathan:*** This is a really important question. There is a lot that the UK Government could do to secure particular protections for the Arctic, but also elsewhere in the ocean. To run through a few things that the UK might do, there is, of course, the question of sea level rise. Here, the UK could support the fixed baselines and maritime entitlements approach but also promote ocean justice in the form of linking loss and degradation of territory to compensation for loss and damage, and to finance for adaptation and resilience. I should note that the UK is a member of the Ocean Risk and Resilience Action Alliance, which does this.

The UK could also promote the protection of Pacific blue economies by, for example, supporting the elimination of distant water fishing subsidiaries of industries in the global north. It could also support market measures that protect the blue economies of Pacific states. It could promote ambitious schemes for sharing the benefits of oceanic resources of the high seas and the deep seabed at relevant international forums.

The UK could support an ambitious BBNJ agreement. The negotiations that are ongoing have been criticised for the things they exclude, including things such as plastics and fisheries, but there are so many prospects for strengthening what is within these negotiations. That includes, for example, the use of area-based management tools, which could be relevant for the Arctic as well. There is a question of whether there is the need for a whole new treaty on the Arctic or whether the protections for the Arctic could be strengthened within the existing framework of the law of the sea.

The BBNJ negotiations also talk about environmental impact assessments, and capacity building and technology transfer obligations of states, which would be important in advancing ocean resilience. They talk about creating an equitable framework for sharing the benefits of the marine genetic resources of the ocean. Again, that is something where the UK could promote more ambitious proposals, rather than the less ambitious proposals we have seen emerge over time.

Another thing the UK could push at the BBNJ negotiations is perhaps to establish a conference of parties, much like the conference of parties that exists under the UN Framework Convention on Climate Change, to ensure that the framework of the BBNJ agreement continues to evolve in response to challenges as they emerge.

I should note that the UK is also a co-leader of the International Partnership on Marine Protected Areas, Biodiversity and Climate Change, which essentially aims to work with other countries to ensure that they have as much information as they need to understand the importance of marine protected areas. This is something that might help. It can knit into it. It is what role it can play at the BBNJ negotiations in supporting a firm commitment to the expansion of marine protected areas.

The UK could support the inclusion of an obligation to take a biodiversity-inclusive and integrated approach to the protection of all ocean areas. If such an obligation is placed in the BBNJ agreement it might have important consequences for how the governance of other parts of the ocean, including the deep seabed, are approached. That is something the UK can push.

The UK can do a lot to strengthen marine protected areas within its own jurisdiction. We talked a bit about paper parks earlier. The fact is that the UK has designated large areas within its national jurisdiction as marine protected areas. Once you start looking at what they actually do, you find that unchecked bottom trawling, for example, happens in these areas. That is something that needs to be addressed. There is also a need to

restrict industrial fishing in these areas in general and empower small-scale and subsidence fishing.

Marine plastics is an important issue. The UK now supports the call for a new treaty. With all new treaty negotiations, it is important that they do not become endless exercises that carry on forever and do not really reach an outcome.

Then there is this important question of what pressures mitigation and adaptation would place on the resources of the ocean, particularly seabed mineral resources. Here, I reiterate only that seabed mining is a risky and dangerous activity. There is a presentation of the need for seabed minerals, but this has not been critically assessed against the possibilities of recycling, substitution or finding ways to reduce demand for seabed minerals. There is a major push at the moment for a moratorium on seabed mining, at least while the issue can be studied and more scientific evidence about possible impacts emerges. Again, this is something the UK could support.

Lastly, we know that, with fishing, there is a decline in fish stocks but also there will be an increased demand for fisheries. Here, the UK's role might include championing the elimination of harmful subsidies and scrutinising the measures that regional fisheries management organisations take towards regulating fishing. The UK could scrutinise in particular quota-setting practices that act as a disincentive for new entrants to join but also set the quotas that are allocated to existing members at already quite unsustainable levels, leading to the decline of fish stocks despite supposed management by regional organisations. The UK could champion an end to things such as flags of convenience, which are supported by open registries that have almost no links to the ships that fly their flags and are linked to so many problems, including human vulnerability and IUU fishing et cetera.

It boils down to a few activities. The UK can play a huge role in mobilising financing. This is something it can do but it can also show leadership in. It can build ambition at international forums. The BBNJ negotiations are a good example. It can lead the way back to more positive understandings of the ocean commons as entailing not just rights but duties towards distributive justice. It can link sea change to wider understandings of oceanic justice. It can publicise and end harmful practices that include open flagging practices, bottom trawling practices and distant water subsidies, and prevent new harmful practices such as geoengineering and seabed mining from the beginning. It can take actions to protect areas that are within its jurisdiction, including support for local communities and small-scale and subsistence fishers over big, industrial fishers.

**The Chair:** Mr Schofield, I am not sure there will be many gaps left in that comprehensive list, but if there is any gap you would like to fill this is your chance.

***Professor Clive Schofield:*** I am mindful of time, so I will restrict my comments to the issues of sea level rise and the question about the

treaty for the Arctic. I will take the latter part first. I mentioned before, when we were discussing the Arctic, the Ilulissat Declaration of 2008. The Arctic five—Canada, Denmark on behalf of Greenland, Norway, Russian Federation and the United States—issued that declaration and recognised the importance of UNCLOS as governing the Arctic Ocean. They also indicated, "We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean."

There is, I think, a lack of enthusiasm, if not hostility from the Arctic five, from the Arctic coastal states, towards an equivalent, if you will, of the Antarctic Treaty regime for the Arctic. These coastal states believe that the United Nations Convention on the Law of the Sea is adequate for their needs. That, in combination with the soft law instruments developed through the Arctic Council, is the way forward from the perspective of those critical coastal states that you would need on board for any treaty regime governing the Arctic. There is little taste or excitement for that.

On the way in which the United Kingdom can assist in the way the international law of the sea develops or adapts, I very strongly support the idea that the United Kingdom could bolster the efforts of small island states to retain their existing entitlements. I say that against the context of the recently released, in August of this year, physical science basis for the 6th IPCC assessment report (AR6). That indicates that average rates of sea level rise have almost trebled from the 1901 to 1971 period to the most recent assessment, 2006 to 2018. Human influence is very likely to be the main driver for that and it is virtually certain that sea level rise will continue to the end of the 21st century and that sea level is committed to rise for centuries to millennia and will remain elevated for thousands of years. There is a justice element here, as Dr Ranganathan has indicated, around the states that have done least to contribute to global warming, to climate change, being the most vulnerable to suffering its sea level rise related consequences.

On the Arctic front, some of the most vulnerable coasts and coastal communities are there. We are seeing coasts that are ice rich and unlithified, meaning they are not rocky, facing warming temperatures and therefore losing their structural integrity, being much more prone to slumping, to erosion and losing the fast ice around the coast, which has acted as a buffer to wave action. We are seeing increased storminess, more wave action, intensity and frequency of extreme weather events and very substantial erosion in the Arctic region, with impacts on Arctic coastal communities.

There are ways that we can, as the United Kingdom, support vulnerable coastal communities and build capacity to deal with these issues, but also support their initiatives at the international level. I will leave it there, with profound thanks for the opportunity to talk to you.

**The Chair:** It is my opportunity now for a profound thanks for the depth and extent of your answers. I know that my colleagues, Baroness Fall, Lord Teverson, Baroness Blackstone and Baroness Rawlings were not able to ask supplementaries. With your permission, Dr Ranganathan and

Professor Schofield, I would like to invite them to submit any supplementaries they have in writing. I am seeing nodding from our guests. Thank you. We would be grateful if you might respond.

With this particular inquiry, we feel as though we have opened a very glorious Pandora's box, where there are goodies and not-so goodies among that. It is a case of ensuring we can hold the Government to account for what we can do. Thank you for helping us to explore more of that today. Thank you and, at this stage, I close this virtual meeting. We will soon have one in person. Thank you to our witnesses today. I formally close this virtual meeting.