HOUSE OF LORDS

International Relations and Defence Committee

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

Wednesday 24 November 2021

11 am

Watch the meeting

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

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Witness

I: Professor Richard Barnes, Professor of International Law, University of Lincoln and Adjunct Professor of Law at the Norwegian Centre for the Law of the Sea, University of Tromsø

USE OF THE TRANSCRIPT

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

Examination of witness

Professor Richard Barnes.

Q84 **The Chair:** Good morning. I welcome to this meeting of the International Relations and Defence Committee in the House of Lords Richard Barnes, professor of international law at the University of Lincoln. Thank you for joining us to share your expertise as we now approach pretty much the end of our evidence taking for our inquiry on the United Nations Convention on the Law of the Sea, where we are posing the question: is it fit for purpose in the 21st century?

At this stage, I go through the formality, but an important one, of explaining to both witnesses and members that the session is on the record, it is broadcast, and it is transcribed. As ever, I remind my colleagues that when asking their question if they have a relevant interest to declare they should do so at that point. As ever, I will begin by asking the first question, which tends to be more general in nature, before turning to my colleagues who have more focused questions. I anticipate that my colleagues will wish to ask a supplementary question related to their initial question.

I turn to question No. 1. As we have been taking evidence, we have heard that UNCLOS is a framework convention, many of whose provisions can be implemented through specific regulations or through a competent international organisation, such as the International Maritime Organization. I should add that we are fortunate in having been invited to go to the IMO next week and learn more about its work. What is the usual process by which IMO instruments are established? Over to you, Professor Barnes.

Professor Richard Barnes: First, Lord Chair, thank you for inviting me to participate in these hearings. I know you have received a lot of evidence, so hopefully I can add something of a different perspective to the proceedings. I will begin by way of a couple of preliminary remarks.

You mentioned that the law of the sea convention is a framework convention, but it is also a package deal. It provides a basis for the law to develop, but it also means that the law as it develops has to be sensitive to the existing balance of rights and duties that are contained within the law of the sea convention. That has a bearing on the way in which law can develop through other for a, because those other fora ought to take into account, or should take into account, not just, for example, in the IMO's case, the way in which shipping operates, but wider rules on the protection of the marine environment, fisheries and so on. It is important that any development takes place in that context.

My second general remark is that, yes, the law can be developed through UNCLOS and through competent international organisations, but it is possible for UNCLOS to be amended, although it is incredibly difficult for that to happen; the threshold for renegotiating and bringing forward amendments is quite high. That tends to channel lawmaking activities through other fora. It is in that context that the IMO takes a leading role

in developing what are known as generally accepted international rules and standards in the field of shipping. As a rule of thumb, the rules tend to be more technical standards detailing how general obligations are advanced. When we look at the work of competent international organisations, they tend to be advancing the detail rather than restructuring any of the significant provisions of the law of the sea convention.

Against that general background, we can look at how the IMO develops the law. The IMO's legal mandate flows from its own constituent treaty. Its power to develop new conventions and laws is framed within the IMO treaty itself, although it can be supplemented by powers that are given by other agreements. This means that its powers to develop the law are not limited to UNCLOS's mandate and that it can do things beyond the scope of UNCLOS. The IMO's mandate itself has grown considerably since its inception. It was initially concerned with safety at sea but has taken on a much broader mandate to deal with environmental issues, including ship noise and ballast water emissions, and it is likely that that mandate will continue.

The other thing to note about how the law develops through the IMO is that its rules develop on the basis of non-discrimination. That means that its standards—its rules that it propagates—are intended to apply equally and uniformly. It is very much concerned with establishing global rules. That is important in the context of shipping, because it is an international activity. We need global rules so that ships are not working under different rules in different parts of the ocean or coming under different jurisdictional arrangements when they come into port and so on. That works quite well in the context of shipping, but it tends to raise some challenges when we look at other areas of law, such as the extent to which ships are bound by emissions commitments, but I will come back to that.

In terms of how the laws are developed, proposals for new laws or changes to existing conventions within the IMO come from member states or can be recommended by the UN or its agencies or by intergovernmental bodies. Basically, we have proposals for new regulations. Those are then advanced to the IMO, which has authority to decide how it takes forward those initiatives. The main forum would be the IMO's assembly, which is its highest decision-making body. The IMO's assembly is comprised of states. In effect, states propose things and states decide which matters are taken forward, although the IMO is important in shaping the process for that.

Decisions about how the IMO takes things forward would formally be done by absolute or qualified majority decision-making, but in practice the IMO tends to proceed by consensus. Rather than forcing things to potentially divisive votes, it tries to build consensus about what law should happen. That is intended to try to improve the prospects of implementation and is quite important in practice.

States are primarily the vehicles for advancing the law, but the IMO includes contributions from consultees, which include members of the shipping community and environmental organisations. They do not have the formal capacity to engage in decision-making, but they can provide valuable assistance in the development, drafting and framing of provisions through the provision of advice.

As to how the law develops, there are two principal mechanisms. One is the convening of a conference to negotiate a new convention. This is done when there are more serious issues that require large-scale changes. An example is the relatively recently negotiated ballast water convention. The second mechanism for developing law takes place through amendments or the development of new technical provisions under existing agreements. For example, the International Convention for the Safety of Life at Sea was proposed to be amended six times between 1960 and 1973. That process, at least historically, tended to be quite difficult because it was quite burdensome meeting the threshold for agreement for the introduction of those changes.

To get around that, the IMO introduced what is known as a tacit amendment procedure, which is a streamlined process for introducing changes to existing agreements. In very basic terms, it means that if the subject matter of an agreement has been adopted it will enter into force unless a significant number of states object to it. That has resulted in the IMO being able to adopt on a fairly expeditious basis changes to its existing instruments.

That is a broad overview of how the changes work. What it boils down to is that the work of the IMO is largely done by states, and generating consensus between states to make changes is critical.

The Chair: Thank you. That is a very helpful overview to launch the session.

Q85 **Lord Anderson of Swansea:** Professor, you characterised the UNCLOS as a framework or constitution, leaving other organisations, particularly the IMO, with major roles to fill in the gaps. The IMO, you mentioned, also works on the basis of consensus. Presumably, states seek to find ways and means of operating outside by banding together in certain areas and so on. Is there danger of a certain rigidity with the vested interests in the IMO preventing further progress?

Professor Richard Barnes: There is always a risk of any international organisation being confined by its own processes and following its own institutional culture. As a general remark, I think that holds true. Within the law of the sea more generally, it is a potential issue, because what we tend to see, despite the Law of the Sea Convention being a package deal and purporting to regulate the oceans as an integrated whole, is the fact that most activities tend to be organised and regulated on a sectoral basis. The IMO deals largely with shipping and pollution. Then we have a separate series of regional environmental agreements that deal with the spatial aspects of pollution. Fishing is dealt with outside that. Yes, there

is a degree to which the culture and practice of those bodies can become isolated. There is resistance to breaking down established responsibilities and allocations of competence.

For example, recently with the negotiation of an internationally legally binding instrument for areas beyond national jurisdiction, one of the key debates is about what is included within that agreement. For the most part it is, for example, excluding fisheries. The reason behind that is that it does not want to disturb or infringe on the mandates of existing bodies. That challenges their authority and potentially undermines the work that they are doing, which might be well regarded by some states. More generally, there need to be within the law of the sea greater efforts to harmonise or to try to co-ordinate activities between organisations.

Coming back to the IMO, it has, to some extent, been very open to that. For example, the IMO has entered into memoranda of understanding where it participates and co-ordinates some of its regulatory activities with other concerned international organisations. On shipping standards, it has done quite a lot of work with the International Labour Organization. It tends to co-ordinate some of its activities with regional environmental organisations, at least on an informal basis.

Equally, another area where it has been quite constructive is in supporting the development of a regime of port state control. The idea is that, because of problems of flag state compliance, some states have taken the view that it is possible to exercise control, to try to ensure that ships are adhering to international shipping standards at the point in time when they come into port, by exercising the jurisdiction they have over vessels there. That initiative took place initially outside the IMO, with the development of the Paris MoU, but the IMO subsequently endorsed that approach, encouraged other regional groups to try to formulate those types of arrangements, and provided some capacity-building support for that. There is potential for that, but on the other hand there are areas where there is a bit of resistance.

In the area of climate change, the IMO is principally responsible for dealing with ship source emissions, yet at the same time it is under a responsibility to think, for example, about how climate law more generally impacts its work. Under climate law, we have a slightly different approach, whereby states are entitled to benefit from what we might call common but differentiated responsibilities. The idea behind that is that developed states that have contributed more to the problems of emissions should take on a greater burden of addressing them, and that developing states that have done less should not have a burden.

In theory, that is quite good, but the problem is that it fundamentally challenges the role of the IMO, which is all about uniform standards, so the IMO has struggled to accommodate those concerns within its work. I will leave it there. This is a potential issue for collaboration, but some resistance to changes.

Lord Anderson of Swansea: Given all the constraints and the fact that

the IMO has been allocated a certain area of expertise, how successful has it been? What is the reputation of the IMO among the seafaring community?

Professor Richard Barnes: The IMO, certainly within the shipping community and more broadly, is very well regarded for its achievements. The IMO was established in 1958 and its first meeting was in 1959. In a period of about 60 years, it has effectively developed the entire regulatory framework by which commercial and other shipping activities are regulated. It is also widely participated in; 175 states are party to the IMO. The agreements that it has adopted are generally very well ratified and participated in by states. For most of the significant international maritime agreements, such as the International Convention for the Safety of Life at Sea and the International Convention for the Prevention of Pollution from Ships, the level of ratification is about 170 states and represents about 95% of world tonnage. In generating laws and getting states to sign up to them, its work has been tremendous.

The IMO's role is not just about propagating law; it is also about building the capacity of states to implement the law and trying to work with states to enhance compliance. It is in the areas where I think there is potentially greater room for the IMO to do more, although, again, it is doing some good work there. Implementation, for example, is largely based on capacity-building initiatives, and we are concerned with trying to address the gap between states formally adopting an agreement and being able effectively to make it operative within their domestic regimes. That is quite important, because it is in states that most of the work takes place.

The IMO has various capacity-building initiatives, but to be honest—I hate to say this—it is probably a bit underfunded. It invests about $15 million per year in technical co-operation, which is quite a lot, but that is largely funding workshops, training, advice and technical assistance. It probably does not go more than some of the way that is required to build up the infrastructure and technical capacity that states need. The IMO supports two training institutions, the World Maritime University in Malmö and the International Maritime Law Institute in Malta, which, again, is important in developing expertise, but they can only go so far. There is more to be done on supporting implementation, but that will require states to invest in those activities through the IMO.

Compliance is where perhaps the most interesting work is being done by the IMO. Compliance is primarily the responsibility of flag states and, as you have been hearing, flag state compliance has been an issue for decades, but the IMO is trying to work around that. It is not trying to address directly the failings of flag states as such; it is trying to build constructive dialogue with states to enhance their abilities to implement the obligations that they have entered into. It has done that in a couple of ways, probably the most important of which is the adoption of its mandatory audit scheme.

It introduces a standard system of auditing of member states' compliance with their international obligations. It does so for the main IMO

conventions and is quite an involved process. There is a preparatory phase where the scope of the audit is set out, member states are sent a questionnaire to complete about what they are actually doing to ensure compliance, and then an audit team visits the country and reviews the documentation that has been set and produces at least an interim report on how well the member state is doing. The member state is then invited to respond to that and to set out a plan of action to respond to any failings, and, again, that will then be followed up by a further audit report. That is really important, because throughout the process it is all about constructive dialogue, trying to devise solutions and work with states to improve things. It is not really a confrontational process as such. It acknowledges the fact that the IMO is not in a position to dictate to states; it needs to co-operate to do that.

Lord Anderson of Swansea: No sanctions.

Professor Richard Barnes: There are no sanctions behind that. The IMO does not have the ability to issue sanctions for non-compliance. That can be a potential issue. The fact is that many of the audit reports are not published, so there is no naming and shaming of states. The IMO gathers data, and this feeds into its own work, which can then be used to shape its agenda. It can also share summaries of the findings among other states and they can be used to share best practice. It is very much about a facilitative approach rather than dictating change.

The Chair: Thank you very much.

Q86 **Baroness Blackstone:** I would like to turn to dispute settlement. How successful has the settlement of disputes been under UNCLOS? In your answer, perhaps you could refer to the role of the International Tribunal for the Law of the Sea.

Professor Richard Barnes: Thank you for the question. I am a bit nervous about answering it, because it is always quite difficult to assess the effectiveness of dispute settlement. I will give you a couple of initial points, though.

First, although it is important to settle disputes, not all disputes have to be settled. Probably what is more important is managing disputes. We have some examples of long-standing disputes—for example, claims to various maritime entitlements—that have not been finally resolved but have been managed by interim arrangements whereby states agree not to engage in certain activities, or to co-operate in management in the interim. As long as the dispute itself is not blowing out of all proportion, we do not have to actively engage in direct dispute settlement.

The second point is that dispute settlement takes a number of different forms, ranging from diplomatic interventions to binding third-party dispute settlements. Under general international law, states are obliged to settle their disputes peacefully, but it is through the party's own choice of means. Although third-party dispute settlement is a matter of public record, we do not have much data on how disputes are settled through

diplomatic proceedings, such as through negotiation. The fact is that most disputes or issues are resolved through those processes, so in a sense, it is quite difficult to gauge how effective dispute settlement is.

Moving to actual third-party dispute settlement, the number of disputes that come forward for settlement is relatively small. The impact they have on the development of the law of the sea or setting an agenda is probably limited. There are a couple of reasons for that. States are reluctant to hand over control of their disputes to third parties, and there is a general preference for diplomatic settlement.

As regards measuring the effectiveness of UNCLOS in particular, it was designed to achieve three things. Its effectiveness can be measured against three or four objectives. First, it was to provide a structured system of dispute resolution. Secondly, it was intended to help less powerful states defend their legal interests against more powerful states. Finally, it was designed to protect the integrity of the package deal, and that included being a mechanism for developing the law of the sea.

On the first point, probably most people would see it as rather disappointing in its effectiveness, because litigation is rare. When we look at the cases that have come forward for dispute settlement, very few of them have dealt with what we might call substantial issues. Thirty cases each have come before the ICJ and ITLOS during that period. As far as the International Tribunal for the Law of the Sea is concerned, most of them have been what we call prompt release cases where states have sought an order from the tribunal to have vessels flying their flag released from the custody of the coastal state. Other cases have involved provisional measures that deal with interim orders to protect the respective positions of the parties, pending final resolution of disputes. The rest of the cases are largely concerned with maritime delimitation. The contribution to the jurisprudence of the law of the sea is a bit limited.

Turning to the second issue, which is protecting less powerful states, there is probably very little evidence at the moment that states are using litigation to protect their interests in that way. Most disputes are between neighbouring states or between flag states and coastal states on an ad hoc basis. There are some exceptions; for example, Timor-Leste was able to secure some protection of its offshore oil and gas rights against Australia in conciliation proceedings. As you have probably already heard, there is the possibility on the horizon of an advisory opinion being initiated by a group of small island states seeking an opinion from the Law of the Sea Cconvention on what can be done to protect against climate change and who is responsible for that, particularly through sea level rise. There is potential, but it has not really been tapped.

Finally, on developing the law, to come back to the disputes that the international tribunal has dealt with, UNCLOS runs to about 320 articles, but probably only about a dozen of those have been the subject of litigation. Where it has probably done most is through the issue of advisory opinions, and it has done two of those so far—one on seabed activities and the other on the rights and responsibilities of states in

respect of IUU fishing. The tribunal has done a good amount of work in advancing our understanding of those issues. In some ways, there is a bit of a mixed bag in answer to that question.

Baroness Blackstone: Does the UK have any particular role in the area of dispute resolution? Is it something where the UK might be able to add value, especially in the protection of less powerful states?

Professor Richard Barnes: In terms of contentious proceedings, the UK would be directly involved only if it was the object of litigation or if it wished to initiate litigation. The UK has tended not to initiate litigation in the past.

The UK has in the past had representation on the courts, with judges on both ITLOS and the International Court of Justice, although that is no longer the case. It does not contribute its input to those aspects of the judgment. The other area where I think there can be contributions and where the UK has engaged is in contributing towards advisory opinions, because those are generally open to all states and non-state actors to provide legal briefs. The UK is very much able to contribute towards that aspect of dispute resolution.

The Chair: Thank you very much.

Q87 **Lord Boateng:** How effective, Professor, is the current international law of the sea in addressing illegal, unreported and unregulated fishing, and are the existing mechanisms adequately equipped to enforce the existing rules?

Professor Richard Barnes: You will probably be glad to hear that the short answer is that it has not been effective. That is a rather pithy remark. If we look at the data on the state of world fisheries, we know that about 33% of stocks are currently overfished and only 7% of stocks are fished at the maximum sustainable yield. We also have data on the contribution of illegal, unreported and unregulated fishing. That is estimated to be somewhere in the value of between $10 billion and $23 billion per year, or about 20% of global commercial fish catch. The fact that we have overfishing and the fact that we still have high levels of IUU fishing suggests that the existing legal framework is not working effectively.

I could say something about why perhaps that is the case, but the key remark I would make is that, while this is in part a legal issue, tackling IUU fishing is not just a legal issue, and we have to approach it in a much more holistic manner. Yes, we can introduce regulatory reform. Yes, we can improve implementation and compliance, but we also have to look at how other initiatives are undertaken. That might involve capacity building. It might involve working with, for example, markets and purchasers of seafood products to introduce changes that can drive changes up the supply chain. If you are happy for me to do so, I could talk about some of the more specific issues.

Lord Boateng: Please do.

Professor Richard Barnes: Thank you. Coming back to IUU fishing, there are probably three main drivers of IUU fishing activity, and it is important to understand those when we look at whether the law is responding to them properly.

First, broadly speaking, are what we might call economic drivers of illegal fishing. Those are probably broken down into two or three key issues. The first is excess capacity. At the moment, we have more vessels able to catch fish than there are fish to be caught. As long as we have excess fishing capacity, there will always be pressure to engage in fishing activities. One way of addressing the problem of IUU fishing is to try to deflate the pressure to fish through reducing fishing capacity.

The second issue is probably more to do with the economic drivers of fishing. This is the fact that fishing happens outside normal regulatory frameworks because there is a market for seafood products. People need fish to eat, and there will always be incentives to try to catch fish to either sell or pass on. We need to think about how that aspect is addressed, which might involve changing some of the incentives around fishing activities to try to build up knowledge and understanding of what responsible fishing is about, but also to try to improve the conditions that are contributing towards illegal fishing activities, which are the underlying problems of poverty and the cheap supply of seafood from the sea.

Q88 **Lord Boateng:** Professor, on that, can I ask you to draw on your knowledge of the relationship between the law of the sea and the climate change regime? If I was fishing for yellowfin tuna off the barrier reef, I would be concerned about the impact of acidification on fish larva, and therefore on fish stocks, and therefore on my livelihood. Looking forward to COP 27 in Egypt, what more can be done to address acidification and support a more integrated approach between the climate change regime and the law of the sea?

Professor Richard Barnes: That is quite a difficult general issue, because the law of the sea has largely developed apart from the climate change regime. Under the Law of the Sea Convention, and through the related instruments, we have all the rules and regulations on the conduct of fishing activities, whereas the climate change regime is primarily concerned with the activities of states in reducing their emissions and so on. Clearly, there is some degree of overlap between them. The issue is probably twofold.

The first is which are the most appropriate fora for these developments to take place. Within the scope of the Paris Agreement, a number of general initiatives can be targeted at the common problem of emissions and their impact on the oceans. That is probably the best forum for dealing with the inputs and drivers of climate change more generally, whereas the Law of the Sea Convention is perhaps a more appropriate forum for dealing with mitigation and adaptation in a law of the sea context—for example, taking initiatives to reduce fishing efforts, taking initiatives to try to feed into the processes information about the impacts of climate change on marine issues, and working with measures that reduce

pressure on fish stocks, such as adapting the redistribution of fish stocks under climate change.

It is an uneasy relationship, and I am not sure I can give a clear answer about where those things are best resolved. Certainly, what would need to be done is to feed into the COP process very detailed and confident information about the impacts of climate change on oceans and to have that foregrounded and taken into account when states are setting their nationally determined contributions and their own plans of action to respond to climate change.

The Chair: Thank you very much.

Q89 **Lord Alton of Liverpool:** Professor Barnes, can I take you to the development of international law? In the written evidence that you submitted with Professor Kirk, you suggest that if the UK wishes to influence the development of international law, it will have to establish strategic partnerships. Can you unpack that for us and tell us what kind of partnerships the UK should be seeking to create? On which countries or regional groups should it focus? How feasible is it to expect co-operation with China or Russia on the future development of the international law of the sea?

Professor Richard Barnes: Thank you for that question. We should always be careful about what we say, as lawyers in particular. To try to unpack that observation about strategic partnerships, the starting point for any strategic partnership will depend on the UK's policy priorities. As I indicated in our written submissions, the UK has a series of strategies in different areas but lacks an overall co-ordinating oceans strategy. Those are currently under review, so some of the strategic priorities are likely to change. That said, as you have indicated, but also from existing policy priorities, there are a number of issues that I think the UK will be engaging on in its strategic partnership-building activities.

The first of those is ensuring sustainable use of marine resources. The second is promoting a rules-based order at sea. The third is protecting vital navigation routes. The fourth is protecting energy supplies through subsea cables and pipelines. The fifth is guarding against security threats, including cyberattacks. The last is protecting its own resources and the population of UK overseas territories. The way in which the UK engages with other states will be designed to enable it to best achieve those policy outcomes. That will be led principally by the FCDO and through diplomatic activities, including the UK's role on the Security Council, where it is able to engage in high-level policy initiatives.

In law-making, most activities will probably take place through existing global fora—for example, the IMO or the BBNJ negotiations—or regional fora, such as regional fisheries management organisations and OSPAR. The UK will participate in those in much the same way as it has in the past, although following Brexit the most significant change would be that the UK does so, in some fora at least, as an independent state rather than being part of the EU's bloc approach. That raises both opportunities

and challenges. The UK can pursue its own policy agenda, but at the same time it perhaps lacks the same weight that 28 member states and a powerful market have in their ability to influence other states. The challenge is both the UK selecting who it works with and making best use of its capacities at the moment.

In terms of strategic partnerships, the UK is part of a number of existing partnerships, and I suspect it will continue to build on those. It is an observer to the Arctic Council. It participates in regional co-operation initiatives under the RECAP initiative in south Asia. It participates in the Maritime Trade Information Sharing Centre in west Africa. It engages regularly in the strategic deployment of naval forces. It supports the work of the UN Office on Drugs and Crime in its piracy and maritime crime initiatives. I think that will continue.

Looking forward, there is probably potential for greater partnership in south Asia, particularly working with states in the region to try to stabilise and build capacity. The idea of capacity building is quite important, because although the UK may have limited ability to drive hard bargains as a single state, through good will and capacity building it can encourage states to share and participate in common agendas, through training, through joint operations at sea and so on. It would also probably look to expand its soft-law initiatives, such as developing research and development with partner states on common issues such as satellite technology, autonomous vehicles, and data-sharing systems. There are potentially a number of ways in which it can expand its co-operative initiatives.

Moving to the situation with Russia and China, the key point is that, even if co-operation with some states is difficult, there remain legal commitments under international law to co-operate in good faith, as well as specific obligations to co-operate under existing law of the sea instruments. We will have to try to co-operate. Often the impression is given that Russia and China are outliers on all aspects of the law of the sea. The annexation of the Crimea and restrictions on navigation in waters around it by Russia and the exorbitant claims to jurisdiction by China in the South China Sea are often used as examples in that way.

That is not always the case. There are opportunities to engage on a more constructive basis with those states through other fora, such as the IMO and regional fisheries management organisations. When the UK has to deal with China and Russia, it has to deal with them on a number of different levels. There will obviously be high-level diplomatic engagements, but what may be more important is how the UK conducts itself in what you might call track 2 or grass-roots-type diplomatic efforts. I will not speak about the high-level diplomatic initiatives that the UK is undertaking. I am sure it has very experienced staff in the FCO who engage in those kinds of activities.

There are potentially ways in which the UK could undertake indirect and backroom channel-type initiatives. This is probably overstating the contribution of academic debate, but it is an area that is increasingly

important. China has traditionally always been a bit inward-looking, but it is increasingly setting a very external-facing policy agenda in initiatives that are not just those of the central Chinese Government but are being undertaken at a number of different levels.

If we look at the South China Sea dispute, for example, although China refused to engage in the litigation, challenging the jurisdiction of the tribunal, alongside that it provoked academic debate about the legitimacy of China's claims. The Chinese Society of International Law basically produced a shadow set of arguments about China's claims in the disputed sea area. That was used to legitimate and advance China's arguments. In those kinds of fora, there is potential scope to engage with the arguments and to try to draw China and Russia into debates about whether their claims are legal and whether they are entitled to do such things. That is one example of where there are alternative approaches to engaging with those states. They are initiatives that perhaps we do not look at often or frequently enough.

Q90 **Lord Alton of Liverpool:** Professor Barnes, that is a really interesting and very helpful reply. Can I invite you to drill down a little deeper beyond the academic, theoretical and hypothetical into a specific example in real time? Last weekend, there was a report that three Chinese coastguard vessels fired water cannons on two Philippine navy ships to block them from taking food supplies to military personnel stationed on a disputed atoll in the South China Sea. The Philippines has accused China of illegality, while China has laid claim to the so-called nine-dash line. How concerned should we be about disputes like that? Can you take us further into how dangerous something of that order is for us, and what the United Kingdom should be doing as it reacts? How can that best be settled through the mechanisms that you have just described to us?

Professor Richard Barnes: I am not familiar with that particular dispute, although I think there are infrequent controversies between Chinese, Philippine and Indonesian vessels in the contended waters. At a high level, the UK has to be somewhat careful about what it does. I know historically we have asserted particular positions against China, and that has received a degree of hostility. For example, supporting the peaceful protests in Hong Kong and the grant of extensions of visas to Hong Kong citizens was seen to be an intervention in China's domestic affairs and drew a frosty response. There will always be a bit of give and take in what we do and some careful judgment to be exercised about which disputes we intervene in.

With the South China Sea, it is important to do a couple of things. The first is to make sure that the UK obviously maintains and publicises its position as regards the legality of those activities, because the UK does not want to be seen to be failing to act and then somehow to have acquiesced in what China is doing. If the UK thinks that there are illegal activities, it has to put on the record that it disagrees with what China is doing. That is important in preventing the soft development of international law and the legitimisation of those claims.

Secondly, it probably has to engage in collective policy responses. For example, the US has been very active in asserting its freedom of navigation programme. Other states have joined that. Those displays of actual power are quite important in defending your positions on navigation. That may not be intervening in specific disputes between two states, but it is certainly maintaining the view about the legitimacy of claims to vast waters being entirely within the jurisdiction of China. To reinforce the point, the UK has to build capacity within other states to be able to respond and defend their positions. That might be through the provision of aid advice and back-channel support.

Lord Alton of Liverpool: Thank you.

Q91 **Baroness Sugg:** Turning to piracy, what are the main legal and practical challenges to combat piracy, and how have those challenges relating to piracy changed since UNCLOS was negotiated?

Professor Richard Barnes: As a general point, UNCLOS was negotiated against a very historic view of piracy. It was a historic crime. It was not happening frequently. It was very much concerned with a limited notion of crime at sea: that is, piracy on the high seas where one vessel approaches and takes a violent act against another vessel for private means. It had a very restricted and limited view of piracy. I do not think that at the time it was very controversial.

In recent decades, we have seen the situation change. With the collapse of authority off the coast of Somalia, we have seen an expansion in both piracy and armed robbery at sea within coastal waters. We have seen a continued increase or sustained level of piracy in south Asia in the Malacca Strait and in the Gulf of Guinea. The question is whether UNCLOS is well equipped to deal with those types of activities. One of the real challenges is that there has been a lot of research on piracy, and it points to the fact that it is a very complex phenomenon. It is geographically contingent. It is often caused by issues within a state's territory—economic issues or a lack of good order. When we are dealing with piracy, we are not just dealing with enforcement activities at sea. The solution to piracy is probably dealing with the root causes of piracy on land.

Nowadays, most pirates operate from landward bases. They have high-speed vessels and spend a relatively short period of time at sea. They make quick raids and then return to shore, where they are often hidden or supported by local militia or clans. The law of the sea element is in some ways a small part of the problem. The Law of the Sea Convention provides a reasonably clear framework, but perhaps dealing with other activities, such as armed robbery at sea, is supported through other initiatives such as the SUA convention, as well as the regional initiatives that have been developed to co-ordinate responses.

The problem with the law is not so much that there are rules but that there are practical challenges with implementing the rules. These are just simple things such as dealing with the gathering of evidence, dealing with

the movement of arrested pirate suspects from one jurisdiction to the other, gathering information, sharing information, and dealing with the prosecution of offenders and knowing how best to do that. A lot of the work that needs to be done is probably happening at a level below the Law of the Sea Convention.

The other thing to think about in how we respond to it is the cost of these activities. The response that was initiated to piracy off Somalia has been largely successful, but it took a considered effort in international co-operation and huge investment in the deployment of vessels, followed up by regional capacity-building initiatives. That worked in Somalia, but obviously it would need to be replicated in other areas. There are other initiatives under way, but they will require continued investment and support. It is not necessarily a legal issue. I will leave it there, but if you have specific points you would like me to follow up on, I am happy to address them.

Q92 **Baroness Sugg:** Thank you. Our previous witnesses described combating piracy as a success story for UNCLOS. Do you agree?

Professor Richard Barnes: As far as it goes. It has enabled responses, but the fact that we still have relatively high levels of piracy within certain waters suggests that more needs to be done. Going back to my point, it is not so much that we do not have a strong jurisdictional framework for dealing with piracy; it is more about improving initiatives in domestic law or in regional fora for taking those forward. Many states do not have the capacity. They do not always have the legal regimes to deal with the prosecution of piracy.

One area that might come up for review in the Law of the Sea Convention is the core aspect of the jurisdiction. There is exclusive jurisdiction on the high seas. Only flag states can take action against vessels; there is an exception for piracy, but it is framed as a power or a right and not as a responsibility, and the problem is that unless states have a responsibility they will not act. With piracy, it is expensive. You can get yourself into all sorts of complications about human rights issues if you are apprehending suspects, so states are not always willing to exercise universal jurisdiction. There may be some reconsideration of that, although, as I indicated, reforming the Law of the Sea Convention may be unlikely.

Probably what you are looking at is an expansion of ad hoc agreements that operate at a regional level or allow states to have stronger commitments to tackle these activities at sea. Where there is sufficient will by states to do that, it can happen. A decade or so ago, the US initiated what is called the proliferation security initiative, which allowed for ad hoc inspection and boarding of vessels flying other states' flags, as a co-operative initiative. If it works there, why can that set of initiatives not work in other fora?

The Chair: Thank you.

Q93 **Lord Teverson:** Professor, you talked about illegal fisheries. Regional

fisheries management organisations were supposed to solve that, but they clearly have not. Is there a role? Could they be made to better enforce what they are supposed to do, or are they really at their limitations with the law of the sea as it is at the moment?

Professor Richard Barnes: Thank you for that question. It allows me to expand on two points.

One of the problems with some regional fisheries management organisations is that they simply lack the competence to regulate fisheries. We have NEAFC and NAFO, which have the ability to adopt fairly strong measures, and they work quite well on a regional basis, but there are areas of the oceans where we do not have regional fisheries organisations with the power to adopt rules. That contributes to the unregulated aspects of fishing activity. There is work to be done enhancing capacity and ensuring that regional fisheries management organisations are put in place for all areas where key fishing activities take place. That would include the central Atlantic Ocean and the southern Indian Ocean where there are no strong arrangements for fisheries.

The second aspect is to do with whether the RFMOs are working effectively, and here there is very much a mixed picture. There are a couple of challenges. One is that although RFMOs have the power to adopt regulations and they can encourage non-contracting states to participate in those, strictly speaking, as a matter of international law, treaty obligations do not bind third states without their consent. You will always have a potential free-rider problem. That is what needs to be addressed. That has to be done through diplomacy or through incentives to try to encourage states to adhere to the rules.

A third aspect is to do with a more general accountability of states dealing with IUU fishing. I talked about the IMO's member state audit scheme. We do not have equivalent mechanisms in place for fisheries management, so it is largely left to individual states or organisations to decide how best they are functioning. There are review mechanisms for RFMOs, but certainly for states there is no strong accountability mechanism for their failure to do anything to respond to IUU fishing. States may sign up to the Law of the Sea Convention, the fish stocks agreement or the port state measures agreement, which require them to inspect vessels coming into port for IUU fishing activities, but if they fail to implement them, the shortcomings are not exposed and there are no mechanisms to address that in the same way there are under the mandatory audit system. There is certainly work to be done in those areas.

The Chair: Thank you.

Q94 **Lord Campbell of Pittenweem:** I have been thinking carefully about what I might take away from your evidence as a whole, Professor. I am sure you will not let me put words into your mouth. I derive from what you said that if you were asked, "Is it fit for purpose?", you would say,

"Partially", and that there are things that have been done well and effectively but that other opportunities could now be taken. That being so, the question "Is it fit for purpose?" ought to be answered in a qualified affirmative. Would you agree?

Professor Richard Barnes: Yes. The Law of the Sea Convention has done incredibly well. The law of the sea generally is developing quite well, but there will always be problem areas, and we have to keep working to improve those.

One point I have not made, and I think this is a rather pointed remark, is that the law of the sea works well when states are seen to engage constructively and purposely with its mechanisms. If the UK wants to push forward a rules-based order, it has to be seen to be adhering to a rules-based order. When the UK is seen to sit against other states' positions under international law—for example, by maintaining its claims to the Chagos Islands or by undermining the rule of law in suggesting that it will engage in specific but limited breaches of international law in the context of Brexit—that undermines its ability to advance its interests. At the very least, it opens up the UK to criticism of hypocrisy, and it is absolutely critical that that does not happen going forward.

Lord Campbell of Pittenweem: That is a very interesting point. We must always remember that it is a framework and not a statute.

Q95 **Lord Anderson of Swansea:** Thank you very much. Professor, we are responsible in international law not only for our own territorial waters but for those of the overseas territories, some of which are disputed, such as the British Indian Ocean territory or the Chagos Islands. What sort of problems for international law does that pose for UNCLOS and its ancillary organisations?

Professor Richard Barnes: It comes back to my answer to the last question. It will certainly be problematic for the UK if it maintains claims over the Chagos Islands that are seen to be illegitimate. There is perhaps another aspect of this. It is the challenge of dealing with disputes that are not just law of the sea disputes. When we look at the Chagos Islands, there are elements that are disputes about territorial sovereignty: who is the legitimate Government or state responsible for the Chagos Islands? Then there are separate issues to do with the rights that states can exercise in the waters around the Chagos Islands and delimitation with nearby states.

The thing about the Law of the Sea Convention is that it is concerned with the law of the sea. When we are looking at disputes, it cannot, and should not, overreach itself and deal with issues that do not fall properly within the law of the sea. With many of the problems, such as climate change and disputed sea areas, it is difficult to a draw a clean boundary. Unless we maintain a clear focus on what is properly within the law of the sea, it risks destabilising or delegitimising the way in which the law of the sea operates.

The Chair: Thank you very much indeed. Referring to a comment by

Lord Alton, thank you very much indeed for your contribution to written evidence as well. We are most grateful for your time today.