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UNCLOS: fit for purpose in the 21st century?

My name is Edwin Egede, and I am a Professor of International Law and International Relations at Cardiff University's School of Law and Politics in Wales, United Kingdom. One of my areas of expertise is maritime law, with a particular interest in deep seabed mining and the blue economy. I am submitting this evidence because I feel I can assist the committee in its consideration of the UNCLOS. Email: EgedeE@cardiff.ac.uk

A. What have been the main successes and accomplishments of UNCLOS over the past 40 years?

One of the primary reasons for these successes and accomplishments is the thorough negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III) from 1973 to 1982, which involved a diverse spectrum of States and non-State parties from many regions of the world. Unlike the previous UNCLOS I and II Conferences, the UNCLOS III Conference was not a 'closed shop,' but rather open-handed negotiations bringing together numerous developed and developing States, as well as a large number of non-State actors with various expertise relating to the law of the sea, thus providing a platform for a diverse range of 'voices' to be heard on the issue of the law of the sea.

The UNCLOS, which was adopted in 1982 and entered into force in November 1994, has a long list of milestones and successes, including the following:

1. The sheer number of parties to the UNCLOS is a huge achievement and success for the organisation. As of this writing, the Convention has 168 Parties, including 167 countries from across the world and the European Union.¹
2. The UN Convention on the Law of the Sea (UNCLOS), the product of a package deal that involved trade-offs and compromise,² is reasonably extensive and incorporates several topics of maritime law into a single document that contains 320 articles, seventeen parts, and nine annexes. It's no surprise that the Convention is frequently referred to as the "ocean constitution."³ This is in contrast to the pre-UNCLOS situation, when the law of the sea was split among the four Geneva Law of the Sea

¹https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea The UK became a Party on 25 July 1997

² See Caminos, H, & Molitor, M.R., "Progressive Development of International Law and the Package Deal", (1985)79 American Journal of International law, pp.871-890

³ See 'A Constitution for the Oceans', Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf

Conventions of 1958.⁴ Another related success is that the UNCLOS recognises that sea-related matters are intrinsically connected and should be addressed as a whole under a single overarching Convention.⁵ Nonetheless, it acknowledged that UNCLOS Parties may enter into other Law of the Sea Treaties, both regional and global, as long as they are not incompatible with the UNCLOS.⁶

3. Another achievement of the UNCLOS, in my opinion, is the intriguing frameworks it gives for furthering or updating specific aspects of the law of the sea. Apart from the formal amendment processes under Articles 312, 313 and 314 of UNCLOS, States Parties have devised a number of innovative and flexible mechanisms to keep key parts of the Convention up to date. Implementing Agreements have been used to accomplish this goal.⁷ Prior to the UNCLOS's entry into force on 10 December 1982, there was a 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, which modified the provisions of Part XI of the Convention on deep seabed mining without resorting to formal amendment procedures. There's also the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as of 11 December 2001), which aims to improve the UNCLOS in terms of straddling stock and highly migratory stock conservation and management by addressing specific issues like overfishing and emphasising the precautionary approach (a phrase not found in the UNCLOS) to the protection, management, and exploitation of these fish stocks in order to conserve living marine resources and maintain the marine environment.⁸ Even more recently, an Implementation Agreement under the United Nations Convention on the Law of Sea on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction is being negotiated.⁹
4. Furthermore, the UNCLOS has been updated to overcome issues that may arise from a rigid interpretation of the Convention through the sometimes creative interpretation and application of the Convention's provisions by States Parties to the Law of the Sea Convention (SPLOS). For example, the SPLOS in response to concerns expressed by certain States, particularly developing countries, who became Parties to the Convention prior to its entry into force and were unable to comply with the provisions of Article 76(8) and Annex II, Article 4 of the UNCLOS, which required

⁴ 1958 Conventions on the Territorial Sea and Contiguous Zone, the High Seas, the Continental Shelf and Fishing and Conservation of the Living Resources of the High Seas.

⁵ See Preamble 3 of UNCLOS

⁶ Article 311 of UNCLOS

⁷ David Freestone and Alex Oude Elferink, "Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures Ever be Used?" in Alex Oude Elferink, *Stability and Change in the Law of the Sea: The Role of the LOS Convention*, (Martinus Nijhoff, 2005), p169 at 184-203

⁸ Article 6 of 1995 Agreement.

⁹ See UN General Assembly resolution A/RES/72/249 of 24 December 2017 and Efthymios Papastavridis, "The Negotiations for a New Implementing Agreement under the UN Convention on the Law of the Sea Concerning Marine Biodiversity," (2020)69 *International and Comparative Law Quarterly*, pp.585-610

States Parties with Continental Shelves beyond 200 nautical miles to submit their claim to the Commission on the Limits of the Continental Shelf (CLCS), a body established under the UNCLOS, within 10 years of ratifying the Convention. In a 2001 decision, the SPLOS determined that the start date for calculating the 10-year period for States which became party to the UN Convention on the Law of the Sea prior to 13 May 1999 (when the CLCS approved its Scientific and Technical Guidelines) was the 13 May 1999.¹⁰

B. How is UNCLOS enforced and how successful is its enforcement? How successful is dispute resolution under UNCLOS?

1. Part XV of the UNCLOS encourages states to resolve maritime disputes peacefully in accordance with the UN Charter, whether through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, recourse to regional organisations or arrangements, or other peaceful means of their choice.¹¹ States Parties may choose to resolve their disputes through the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), an arbitral tribunal, or a special arbitral tribunal established by Annex VII or Annex VIII, respectively, when signing, ratifying, or acceding to the Convention, or at any time thereafter.¹² Apart from these defined dispute resolution processes, State Parties are free to pick additional dispute resolution mechanisms, such as regional agreements, and may even opt out of using the courts. The variety of dispute resolution processes provides the essential flexibility, encouraging states parties to seek peaceful resolution of conflicts rather than resorting to the use of force as an option.¹³

2. One of the specified dispute-resolution mechanisms, the ICJ, has an enforcement mechanism that allows the winning State Party to go to the Security Council, if necessary, to have the Court's decision enforced if the other Party does not comply with the decision. The veto power of permanent members, on the other hand, renders the UNSC's enforcement mechanism challenging. In general, compliance with International Courts or Tribunals decisions is not predicated on enforcement. In particular, general compliance by UNCLOS States Parties with the decisions of the various International Courts and Tribunals could be said to be because the jurisdiction of such Court or Tribunal is based on such States' consent, as well as the option of choosing from a wide range of peaceful dispute resolution options.

C. What are the main challenges facing the effective implementation of UNCLOS in 2021?

¹⁰ Para.81 of the Report of the Eleventh Meeting of the SPLOS, SPLOS/73 of 14 June 2001. See Edwin Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, (Springer, 2011), pp.50-52.

¹¹ See Article 279 of UNCLOS and Article 33(1) of the UN Charter

¹² Article 287 of UNCLOS

¹³ See Edwin Egede, "Institutional Gaps in the 2050 Africa's Integrated Maritime Strategy," (2016) 1 *Journal of Ocean Law & Governance in Africa*, 1 at 10-15

I am interested in the regulation of economic resource access, and looking into it from two perspectives: the deep seabed and the Blue Economy.

1. Deep seabed

The seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (the Area), an ocean space covering about 54 per cent of the total area of the world oceans, and its resources are the Common Heritage of Mankind (CHM) (this is sometimes referred to as Common Heritage of Humankind).¹⁴ The International Seabed Authority (ISA), an Intergovernmental Organization established by the UNCLOS, as modified by the 1994 Agreement, has the responsibility for organizing and controlling all mineral resources related activities in the Area. The ISA is also responsible for the protection of the marine environment in the Area.¹⁵ There are strategic mineral resources in the Area, such as polymetallic nodules, polymetallic sulphides, and ferromanganese cobalt-rich crusts, which contain copper, cobalt, nickel, zinc, silver, and gold, as well as lithium and rare-earth elements, that would be invaluable in meeting demand for batteries for electric cars, solar panels, wind turbines, and other clean energy technologies required for the transition to a low-carbon sustainable future. Only exploration activities have been undertaken in the Area thus far, with exploitation yet to begin. The ISA has signed 31 exploration contracts with various states, state entities, and sponsored companies, two of which are with UK Seabed Resources Ltd, sponsored by the UK.

Although there are concerns about the potential for deep seabed mining to have an adverse environmental impact,¹⁶ the ISA has made significant progress in developing regulations based on UNCLOS, as modified by the 1994 Agreement, that are aimed at ensuring that deep seabed mining is developed in an environmentally sustainable manner. It has produced regulations for prospecting and exploration for polymetallic nodules, polymetallic sulphides, and cobalt-rich ferromanganese crusts in the Area, with the precautionary approach incorporated into these exploration regulations.¹⁷ The draft regulations for exploitation of mineral resources in the Area is currently being developed with the participation of a wide range of stakeholders, including States, civil society, corporations etc.¹⁸ The Covid 19 pandemic has caused a delay in the development of draft regulations for exploitation. Recently, Nauru, a member of the ISA and a sponsoring State, after over 7 years of discussions on draft exploitation regulations, by a letter dated 25 June 2021 triggered off a “two-year rule”, under the 1994 Agreement,¹⁹ which obliges the ISA to finalise the exploitation regulation within two years from the 30 June 2021.²⁰

¹⁴ See Article 1(1)(2) and (3), 133(1) and Article 136 of UNCLOS

¹⁵ See Article 145 of UNCLOS

¹⁶ Some conservation groups such as IUCN have called for a moratorium on deep seabed mining. See “Protection of deep-ocean ecosystems and biodiversity through a moratorium on seabed mining”, published on 22 September 2021, <https://www.iucncongress2020.org/motion/069>

¹⁷ See ISBA/19/C/17 of 22 July 2013; ISBA/16/A/12/Rev.1 of 15 November 2010 and ISBA/18/A/11 of 22 October 2012

¹⁸ The current version of the draft Exploitation Regulations is ISBA/25/C/WP.1 of 22 March 2019, https://isa.org.jm/files/files/documents/isba_25_c_wp1-e_0.pdf

¹⁹ Section 1 paragraph 15(a)-(c) of the Annex to the 1994 Agreement

²⁰ “Nauru requests the President of ISA Council to complete the adoption of rules, regulations and procedures necessary to facilitate the approval of plans of work for exploitation in the Area”, <https://www.isa.org.jm/index.php/news/nauru-requests-president-isa-council-complete-adoption-rules-regulations-and-procedures>

Surprisingly, only the ISA's African regional group has formally expressed concern about the two-year deadline, especially given how the pandemic has hampered the negotiating process and the significant pressing issues that have yet to be resolved.²¹ The ISA's Western European and Others (WEOG) regional grouping, to which the UK belongs, has expressed no official reservations about Nauru's application of the "two-year" provision. Despite the pandemic's challenges, it is critical for the UK, along with other WEOG members, to be more clear about their positions on Nauru's trigger of the two-year limit, and to be actively involved in the negotiations of the proposed exploitations regulations.

2. Blue Economy

The UNCLOS recognises the potential economic uses of the oceans and seas, both inside and outside of national jurisdiction, in sectors such as seabed mining, cable laying, fishing, and shipping. The concept of 'blue economy' (sometimes used interchangeably with other terminologies such as 'ocean economy,' 'blue growth economy,' and 'marine economy') has become a popular buzzword in international relations in recent years, building on these potential economic uses of the sea and oceans (also river, lakes, and other internal waters, as well).

Although the term "blue economy" has been used in a variety of contexts, the OECD defines it as '...the sum of the economic activities of ocean-based industries, and the assets, goods and services of marine ecosystems.'²² According to a UN/World Bank report, the blue economy strives 'to promote economic growth, social inclusion, and the preservation or improvement of livelihoods while at the same time ensuring environmental sustainability of the oceans and coastal areas.'²³ Traditional ocean sectors such as fishing, tourism, and maritime transportation may be included in the blue economy, as well as new and emerging activities such as offshore renewable energy, aquaculture, seabed extractive activities, and marine biotechnology and bioprospecting. It could also comprise a wide range of services provided by ocean ecosystems, such as carbon sequestration, coastline and biodiversity preservation, and waste disposal, all of which can have a significant impact on economic and other human activity.²⁴ This research did acknowledge, however, that each country's definition of a blue economy may alter depending on its unique national circumstances and priorities.²⁵

²¹ African Group. 2021. Submission of members of the Council of the International Seabed Authority from the African Group in relation to the request made by Nauru pursuant to section 1, paragraph 15, of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, ISBA/26/C/40 of 13 July 2021, https://isa.org.jm/files/files/documents/ISBA_26_C_40-2110120E.pdf

²² OECD, "Ocean Economy in 2030" (2016) at p.22, https://read.oecd-ilibrary.org/economics/the-ocean-economy-in-2030_9789264251724-en?_ga=2.49387877.25951295.1635955606-876179441.1635955606#page1

²³ World Bank and United Nations Department of Economic and Social Affairs. 2017. The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries. World Bank, Washington DC at p.vi, <https://sustainabledevelopment.un.org/content/documents/2446blueeconomy.pdf>

²⁴ Ibid

²⁵ Ibid

With a long history of exploring, innovating, and studying the oceans and seas,²⁶ the UK has a unique chance to lead the blue economy and build international partnerships, particularly with developing countries, which might open up new markets for UK marine businesses. For example, Africa has only recently begun to take the blue economy seriously, with the adoption of its 2050 Africa's Integrated Maritime Strategy in 2014 and the African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) in 2016, and would represent a significant market for UK marine industries.

D. Conclusions

1. The UNCLOS is still functional because it has flexible mechanisms in place, such as the use of Implementation Agreements to update or expound on pertinent maritime law concerns. Because of its enormous success, as evidenced by the extensive negotiation process and the large number of parties, I do not believe the UNCLOS should be renegotiated. UNCLOS is a framework Convention that provides broad commitments for its parties while leaving the specifics to be worked out through Implementation Agreements or future more detailed Agreements. The UNESCO 2001 Convention on Underwater Cultural Heritage, which expanded on Articles 149 and 303 of the UNCLOS, is a good example of the latter.
2. The UNCLOS's plethora of dispute resolution processes encourages parties to settle their differences in a peaceful manner.
3. The UK must keep a close eye on and actively engage in the negotiations of the draft deep seabed mining regulations under the auspices of the ISA, especially as it has a UK company with two exploration contracts with the ISA.
4. To be a major player in the blue economy, the UK must draw on its long history of discovery, invention, and marine sciences, as well as form international partnerships, particularly with developing countries, to expand market opportunities for UK maritime companies.

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²⁶ See generally Government Office for Science, "Foresight Future of the Sea: A Report from the Government Chief Scientific Adviser", (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706956/foresight-future-of-the-sea-report.pdf