

# **Sir Michael Wood, K.C.M.G – Written evidence (UNC0009)**

## **House of Lords: Select Committee on International Relations and Defence**

### **UNCLOS: fit for purpose in the 21st century?**

Submission by Sir Michael Wood, K.C.M.G.

*I am a barrister at Twenty Essex Chambers, London, practising in the field of public international law, and am a member of the United Nations International Law Commission. I was Legal Adviser to the Foreign and Commonwealth Office between 1999 and 2006, having joined as an Assistant Legal Adviser in 1970.*

*I was a member of the United Kingdom delegation to the Third United Nations Conference on the Law of the Sea (between 1975 and 1981). Thereafter I dealt with many aspects of the law of the sea as an FCO Legal Adviser. Since 2006, I have acted for various governments, including before international courts and tribunals in cases involving the law of the sea.*

*I make this submission in my personal capacity, to assist the Committee in the present inquiry.*

#### **A. General observations**

1. The United Nations Convention on the Law of the Sea, 1982 ('**UNCLOS**') cannot be seen in isolation. The international law of the sea is a complex area of law that comprises, in addition to UNCLOS, rules of the customary international law of the sea (many of which in substance mirror the rules set forth in UNCLOS). The law of the sea also includes an extensive range of important multilateral, regional and bilateral treaties, as well as case-law, on matters such as shipping (including the welfare of seafarers), fisheries, marine mammals, the protection of the environment, and maritime delimitation. Other aspects of general international law, such as those concerning jurisdiction, international criminal law, human rights, and the use of force, apply in respect of activities at sea, much as they do to activities elsewhere.
2. For many years, the General Assembly of the United Nations has engaged in an open-ended informal consultative process on oceans and the law of the sea in order to facilitate an annual review by the General Assembly of developments in the field. The UN's Department of Ocean Affairs and the

Law of the Sea (DOALOS) prepares an informative annual report (the Secretary-General's report). The annual General Assembly resolution on oceans and the law of the sea reflects the latest developments.

3. A considerable number of international organizations are engaged in applying, implementing and supplementing UNCLOS, including by developing further instruments and internationally agreed rules, standards and recommended practices and procedures. In addition to the United Nations itself, the organizations concerned include the International Maritime Organization, the United Nations Educational, Scientific and Cultural Organization, the International Labour Organization, the United Nations Food and Agricultural Organization and the International Hydrographic Organization. They also include a wide range of regional and sectoral organizations, such as regional fisheries management organizations, as well as non-governmental organizations working in the field.
4. UNCLOS is one of the most important and successful conventions of modern international law. In many respects, it acts as a framework, setting the basic parameters without necessarily prejudging solutions reached in respect of particular matters. It currently has 168 States Parties. Those States that are not Parties for the most part accept the rules set forth therein as binding under customary international law. That is the case, for example, with the United States of America, whose absence from UNCLOS is to be regretted since it weakens their position when it comes to dealing with matters of crucial importance such as the People's Republic of China ('**PRC**')s claims in respect of the South China Sea, as well as other potential restrictions on freedom of navigation and overflight. The US Navy has, nevertheless, long maintained a 'Freedom of Navigation' program (FON) based on the rules set forth in UNCLOS.<sup>1</sup>
5. The negotiators of UNCLOS succeeded in achieving agreement among virtually all States on the basic rules of the international law of the sea through a so-called 'package deal'. They did this at a time when it looked as though the claims of some coastal States would lead to the enclosure of more and more maritime spaces, to the great disadvantage of the many States for whom navigation and overflight represented vital interests. UNCLOS achieved a balanced outcome concerning the exclusive economic zone, and laid the groundwork for implementing the common heritage of mankind (the International Seabed Area). Above all, UNCLOS consolidated rights essential for international communications, and for international peace and security more generally, including the freedoms of navigation and overflight, transit passage through international straits, and innocent passage through the territorial sea.

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<sup>1</sup> See A. Roach, *Excessive Maritime Claims* (4<sup>th</sup> ed., Brill, 2021).

6. Other major achievements of UNCLOS include setting a sound framework within which activities for the protection of the marine environment and for marine scientific research may proceed, as well as the establishment of a comprehensive system for the peaceful settlement of law of the sea disputes, which has helped avoid conflict and promoted stability in this area of the law and beyond.

## **B. Specific issues**

7. The law of the sea covers a wide range of matters. If the present inquiry is to succeed, it will be necessary to select a limited number of specific issues, which could then be covered in some depth. Having made some general observations at paragraphs 1 to 6 above, I now touch briefly on four issues that have been raised by others: (i) the exclusive jurisdiction of the flag State; (ii) the application of human rights obligations to persons at sea; (iii) sea-level rise; and (iv) dispute settlement.

### **(i) The exclusive jurisdiction the flag State**

8. Save in exceptional cases, ships on the high seas are subject to the exclusive jurisdiction of the flag State, as spelt out in UNCLOS article 92. This is a key principle of the international law of the sea, and there is no prospect of changing it. Among other obvious merits, it ensures that there is always one State responsible for the ship. Moreover, flag States bear important duties, which are set out in UNCLOS, though efforts to make such duties more effective have not always been successful, for various reasons.
9. The term 'exclusive jurisdiction' is sometimes misunderstood. The principle essentially means that States may not extend their jurisdiction to foreign ships on the high seas without the consent of the flag State, since to do so would impede freedom of navigation. This applies principally to enforcement jurisdiction, which may interfere directly with navigation. But there have been cases in which prescriptive jurisdiction has also, rightly or wrongly, been raised in this context. Similar rules apply to the overflight of aircraft.
10. There is no reason to suggest that UNCLOS, or the principle of exclusive flag State jurisdiction, is 'not fit for purpose'. States have been able to find, without prejudice to the basic principle of exclusive jurisdiction, "ways in which to ensure the upholding of other important principles, such as compliance with international conventions on the safety of life at sea and marine pollution, as well as the fight against IUU [*illegal, unreported and unregulated*] fishing."<sup>2</sup>

11. Concern has sometimes been expressed about the exclusive application of flag State jurisdiction to persons onboard ships, for example those working on fishing boats or passengers on cruise liners. Yet there is nothing in UNCLOS to prevent States from agreeing to regulate conditions onboard by international agreement, as has already been done in many respects;<sup>3</sup> or to prevent States from extending their jurisdiction to crimes committed onboard foreign ships, for example where those concerned disembark in their territory (as happens with those disembarking from aircraft). The important thing is that efforts to overcome particular difficulties need to work with the grain of the existing law, including exclusive flag State jurisdiction.

(ii) **The application of human rights obligations to persons at sea**

12. To blame UNCLOS for the ineffectiveness, under certain circumstances, of 'human rights' and human rights institutions in relation to persons at sea indicates a lack of appreciation of the modern international law of the sea.<sup>4</sup> All may not be well for seafarers and those on luxury cruises, matters to which bodies such as *Human Rights at Sea* usefully draw attention. But it is misleading to seek to place the blame for this on UNCLOS, which is more likely to be part of the solution, not the problem. To focus on its supposed defects in this field, without acknowledging the essential contribution that it makes in so many important ways, including those vital to international relations and defence, is to paint a distorted picture.

13. Looking beyond labour conditions and criminal law, the application of international human rights law to those at sea is a developing area, concerning which there have already been pronouncements from international courts and tribunals,<sup>5</sup> as well as from human rights bodies such as the European Court of Human Rights and the UN Human Rights Committee (under the International Covenant on Civil and Political Rights). UNCLOS itself includes a novel procedure for the prompt release of vessels and crews in certain cases, which has proved effective in practice.<sup>6</sup>

14. The question of the international law of the sea and migration is likely to be a central one in the 21<sup>st</sup> century, and is receiving ever greater attention. Given that a lot of migration routes include passage by sea,

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<sup>2</sup> C.A. Whomersley, "The Principle of Exclusive Flag State Jurisdiction: Is it Fit for Purpose in the Twenty-First Century?", 5 *Asia-Pacific Journal of Ocean Law and Policy* (2020) 330 at 347.

<sup>3</sup> Not least as regards conditions of labour at sea: see the International Labour Organization's Maritime Labour Convention of 2005.

<sup>4</sup> See B.H. Oxman, "Human Rights and the United Nations Convention on the Law of the Sea", 36 (1998) *Columbia Journal of Transnational Law* 399-430.

<sup>5</sup> Going as far back as the ICJ's first case, the *Corfu Channel* case ("elementary considerations of humanity"). See also the first case heard on the merits by ITLOS, the *M/V Saiga (No.2)* case.

<sup>6</sup> See UNCLOS, art. 292, and the case-law of the International Tribunal for the Law of the Sea.

UNCLOS and related agreements are likely to continue to be the focus of significant attention in the years to come in this context also.

### **(iii) Sea-level rise**

15. Changes arising from sea-level rise have received much attention in recent years because of the dramatic effects on low-lying areas, including (but not limited to) those of small island developing States. The application of the international law of the sea has been the subject of particular concern, including in the United Nations International Law Commission ('**ILC**'), which began consideration of the matter at its 2021 session.<sup>7</sup> Much detailed work has already been done by experts in the field, including within the International Law Association's Baselines and Sea-level Rise Committees.
16. A central issue is what happens when the actual physical line between land territory and the sea changes, for whatever reason. UNCLOS refers to this line as the 'normal baseline', and article 5 provides that "[e]xcept where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."
17. This gives rise to a number of legal issues that will in due course be studied within the ILC. A natural reading of UNCLOS article 5 suggests that baselines are ambulatory. But what happens if the line marked on charts differs from the actual low-water line (which is of course constantly changing)? How far is there, or should there be, an obligation to keep charts up to date? Charts are vital for the safety of navigation, and there should be no question of deliberately not updating them so as to maintain existing baselines.
18. While the better view seems to be that UNCLOS and customary international law provide for 'ambulatory' baselines, this could change if States agree. It is important to distinguish in this regard between (i) proposals concerning the application of existing law to new circumstances and (ii) proposals for new law. The latter approach would require a new or amending treaty, or the development of new rules of customary international law (requiring a general practice among States that is accepted by them as law). The Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise, issued by Leaders

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<sup>7</sup> See Chapter IX of the ILC's annual report for 2021 (A/76/10), available at <https://legal.un.org/ilc/reports/2021/english/chp9.pdf>. Chapter IX largely overtakes the co-chairs' 2020 'issues paper', which did not claim to express the view of the ILC itself (despite sometimes being represented as such). Chapter IX should be read with the questions in Chapter III of the annual report. The ILC is not expected to return to the law of the sea aspects of sea-level rise before 2023.

of the Pacific Island Forum ('PIF') on 6 August 2021<sup>8</sup> needs to be seen in this light. It is difficult to see how a regional customary rule could assist PIF members, given that to be effective maritime zones need to be applicable *erga omnes* (that is, towards all States).

19. There are many other treaties, multilateral and bilateral, involving different zones and activities that could be affected by sea-level rise. And there are the rules of customary international law, which are not necessarily the same as those in the treaties. Especially as regards procedural requirements, such as the notification of straight baselines, it is not always clear how far the provisions of UNCLOS reflect customary international law.

#### **(iv) Dispute settlement**

20. As a general matter, there is a high degree of compliance with the rules set forth in UNCLOS. This reflects the balance struck within the 'package deal' negotiated at the Third United Nations Conference on the Law of the Sea (1973-1982), which was and is seen to be in the overall interests of all States. Departures from the rules are closely monitored, and (with certain exceptions) UNCLOS inter-State dispute settlement may be instituted as a last resort.

21. UNCLOS Part XV makes extensive provision for the compulsory settlement of disputes concerning the interpretation or application of its provisions. Settlement may be by the International Court of Justice (based in The Hague), the International Tribunal for the Law of the Sea established by UNCLOS (based in Hamburg), or an *ad hoc* arbitral tribunal established for the case. Decisions are binding on the parties to the case, and have for the most part been complied with. Part XV also provides in certain circumstances for compulsory conciliation, a procedure first used, and used successfully, by Timor-Leste and Australia between 2016 and 2018.<sup>9</sup>

22. There has been extensive practice of dispute settlement under Part XV of UNCLOS since its entry into force in 1994. This follows a long tradition of law of the sea dispute settlement going back at least a century, in which the United Kingdom has played a major role. Together these cases have made important contributions to the peaceful settlement of disputes between States, to the development of general international law, and to the consolidation of the law of the sea under UNCLOS. Indeed, they have sometimes contributed to the resolution of disputes between States even extending beyond law of the sea matters.

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<sup>8</sup> Available at <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>.

<sup>9</sup> <https://pca-cpa.org/en/cases/132/>

23. The Part XV dispute settlement provisions are binding on all States Parties, subject to limited reservations and exceptions. The *South China Sea* arbitration brought by The Philippines against the PRC took place under these provisions (though the PRC contested jurisdiction). In addition, the Part XV procedures are applicable under certain agreements related to UNCLOS, including the 1995 Straddling Fish Stocks Agreement. They do not apply to the few States that are not parties to UNCLOS, such as the USA, except to the extent that such States are parties to such related agreements.
24. The dispute settlement provisions of UNCLOS (which also include advisory proceedings) were a remarkable achievement at the time of their negotiation at the height of the Cold War. It may be doubted whether such provisions could be obtained if UNCLOS were to be renegotiated today.

### **Concluding remarks**

25. UNCLOS undoubtedly remains 'fit for purpose'. Suggestions that UNCLOS be 'renegotiated', in whole or in part, are most unlikely to be taken forward by States generally; moreover, any attempts at 'renegotiation' would be unlikely to lead to improvements. The expression 'free seas' has no particular meaning in law, and is best avoided.
26. That is not to say that improvements cannot be made as regards specific matters, as has happened continuously over the years since the adoption of UNCLOS in 1982; but these need to be handled with care so as not to disrupt the overall legal order. Change in specific areas could come about (as it has in the past) both through the adoption and updating of sectoral conventions and, within limits, through agreed interpretations of UNCLOS and other existing treaties, as well as the development of customary international law. It is having regard to this potential flexibility that UNCLOS has sometimes been referred to as a 'living treaty'.<sup>10</sup> At the same time, it is no simple matter to achieve agreement among almost 200 States, each with their specific interests in the field. UNCLOS itself was the result of almost 20 years of negotiation.
27. The United Kingdom is a major maritime power and an island State with very extensive commercial and security interests in the international law of the sea. It has long played an important and active role in law of the sea matters, and will doubtless continue to do so. It will be most effective if it acts together with others and within international bodies, including international courts and tribunals dealing with the law of the sea.

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<sup>10</sup> J. Barrett, R. Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty* (BIICL, 2016).

**Received 7 November 2021**