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UNCLOS: FIT FOR PURPOSE IN THE 21ST CENTURY?

Introduction

1. We are a former professor of international law at Cardiff and Dundee Universities and current Reader at Dundee University. Professor Churchill has been researching and writing about the law of the sea for more than 40 years and is the author, with Professor Vaughan Lowe QC, of a standard textbook, *The Law of the Sea* (Manchester University Press, 4th edition due April 2022). Dr Jacques Hartmann has likewise been researching and writing about the law of the sea and we have both acted as a consultant to a number of foreign governments and NGOs. We are making this submission because we believe our expertise may be of assistance to the Committee. The views expressed below are our own and do not reflect those of any organisation with which we are or have been associated. For reasons of space, we only answer the Committee's questions numbered 1 and 3-7. As this submission is in excess of 3,000 words, we include a summary at the end, as requested by the Committee.

General

2. Initially it should be noted that UNCLOS is largely a 'framework' convention, which means that it establishes a set of broad commitments for its parties and a general system of governance. It contains relatively few detailed or precise obligations, and leaves more detailed rules on issues such as shipping, fisheries and protection of the marine environment to subsequent agreements, of which there are many (see para 16 below). Many of the shortcomings in the regulation of the law of the sea are therefore not directly attributable to UNCLOS.

Q1. What have been the main successes and accomplishments of UNCLOS?

3. Traditionally, activities at sea have been regulated on a zonal basis. The first attempt to codify the law of the sea, the four Geneva Conventions of 1958, was unsuccessful in dealing with maritime zones. That led to States claiming territorial seas of anywhere

between three and 200 nautical miles (nm) in breadth and zones beyond the territorial sea for various purposes and of varying breadths. It further led to fears that technologically advanced States would arrogate large areas of the seabed to themselves. Not surprisingly, there were numerous disputes, such as the UK's 'cod wars' with Iceland (1958-1976). UNCLOS put an end to such claims and the chaotic situation that resulted. It established:

- a maximum limit for the *territorial sea* of 12 nm;
- a 24-nm *contiguous zone* within which coastal States may enforce their customs, fiscal, immigration and sanitary laws;
- a 200-nm *exclusive economic zone* (EEZ) within which coastal States have various resource-related rights and other States enjoy the freedoms of navigation, overflight and the laying of cables and pipelines; and
- established a definite, if complex, formula for determining the *outer limit to the continental shelf*, with a body of independent experts, the Commission on the Limits of the Continental Shelf, to ensure that States comply with that formula.

4. Although there has been a minor amount of non-compliance with some of the established rules, the UNCLOS has essentially stood firm for the past 40 years and shows every sign of continuing to do so. UNCLOS has thus provided a stable framework for regulating activities at sea, something that had never previously existed. This is probably the greatest achievement of UNCLOS.

5. A second achievement has been to provide a regime for regulating the mining of minerals from the seabed beyond the continental shelf, in the so-called International Seabed Area (the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction). Prior to the adoption of UNCLOS, there was a fear that deep sea mining would become a free-for-all. Even subsequently, there was a period of time, in the late 1980s and early 1990s, when it looked as though many industrialised countries would not ratify UNCLOS and instead set up their own mining regime. That danger was averted with the conclusion of an agreement in 1994 which, while euphemistically described as merely 'implementing' Part XI of UNCLOS, in fact radically amends it. The agreement encouraged industrialised countries to ratify UNCLOS. Since then, the International Seabed Authority, which is charged with regulating deep sea mining in the Area, has adopted three sets of regulations governing exploration for manganese nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. The Authority is currently drafting regulations for commercial mining, with a deadline of June 2023. A major issue is how far those regulations will be able to mitigate the inevitable harm to the marine environment caused by deep sea mining.

6. A third achievement of UNCLOS is that it has attracted near-universal participation. Of the UN's 193 members, 164 are parties to UNCLOS, along with four non-members (Cook Islands, European Union, Niue and Palestine). That contrasts with the 1958 Geneva Conventions, which were ratified by less than half of then existing States. Even for non-parties, which include Iran, Israel, Libya, Turkey and the USA, many of the provisions of UNCLOS are binding because they represent customary international law.

7. Fourth, as a framework convention UNCLOS has acted as a catalyst for the adoption of large number of other treaties relating to the sea (see further para. 16 below). Many of those treaties are predicated on the jurisdictional and zonal scheme laid down by UNCLOS.

8. Fifth, UNCLOS contains a system of dispute settlement under which any State party to a dispute concerning the interpretation and application of UNCLOS may (subject to some exceptions) refer that dispute to adjudication without the consent of the other party, such consent is normally being required for other courts or tribunals to have jurisdiction. UNCLOS's dispute settlement system is therefore relatively rare among multilateral treaties. Around a dozen subsequent treaties make use of the UNCLOS system.

9. Last, as a framework convention UNCLOS is sufficiently flexible that it has been able to develop in various ways, even though its formal amendment procedures are too cumbersome to be useful. First, two so-called implementation agreements have been concluded. The first, on deep sea mining, has already been mentioned (para. 5). The second agreement was concluded in 1995 and develops in considerable detail the laconic provisions of UNCLOS on the conservation and management of straddling fish stocks (i.e. stocks that are found both in the EEZ and high seas or that migrate between them) and highly migratory fish species, such as tuna. Currently, an ongoing UN conference, scheduled to conclude in 2022, is elaborating what may turn out to be a third implementation agreement, on the conservation of marine biodiversity and the equitable sharing of marine genetic resources in areas beyond national jurisdiction. A second means of developing UNCLOS has been through the so-called 'rules of reference'. Those are rules that require UNCLOS parties to adopt measures to give effect to provisions in other treaties, even if they are not parties to them. For example, Article 210(6) of UNCLOS requires States parties to adopt national laws to control the dumping of waste at sea that are 'no less effective than the global rules and standards'. As global rules have been tightened over the past 30 years, so has the obligation under UNCLOS. Third, the UN General Assembly has adopted a large number

of resolutions relating to UNCLOS, some of which may be regarded as 'subsequent practice in the application of a treaty', which means they shall be taken into account when interpreting UNCLOS. An example concerns provisions of UNCLOS that require coastal States, in respect of their EEZs, to take measures when setting allowable catches that 'are designed . . . to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield [MSY], as qualified by relevant environmental and economic factors'. In the past it has been argued that the 'economic factors' qualification would allow a coastal State to set an allowable catch at practically any level in order to benefit its fishing industry, even if that resulted in fishing above the level of MSY. It is doubtful that such a reading can still be maintained in view of a host of General Assembly resolutions, adopted since 2000, calling for fish stocks to be restored or maintained at levels of MSY 'as determined by their biological characteristics', without mention of possible qualification by environmental or economic factors. Last, UNCLOS has been developed through interpretation by international courts and tribunals. Examples of such development include the provisions relating to maritime boundary delimitation and environmental impact assessment.

10. In spite of its achievements, UNCLOS does have shortcomings. It reflects the time at which it was negotiated. Thus, it does not directly address climate change, has very little to say about the conservation of marine biodiversity and raises some compatibility issues with future issues, such as autonomous shipping. Some of its provisions are compromises that have resulted in provisions that are almost empty, such as those on the delimitation of boundaries between overlapping EEZs and continental shelves, or are too broad brush to be helpful, such as those concerning the conservation and management of shared fish stocks. Many of these shortcomings can be, and have been, addressed by the various means for the development of UNCLOS outlined in the previous paragraph or by other treaties (see para. 16 below), which shows the functioning of UNCLOS as a framework convention.

Q3. How is UNCLOS enforced and how successful is its enforcement? How successful is dispute resolution under UNCLOS?

11. As a framework convention UNCLOS contains relatively few substantive obligations. Most law applying at sea is national law and does not implement UNCLOS, although it may implement some of the treaties referred to in para. 16: most breaches of such law are by non-State actors as most activities at sea are carried out by private persons. Thus, the question of enforcement of UNCLOS in respect of States parties arises less often than might be supposed.

12. Where one State (State A) considers that another State (State B) has violated its (State A's) rights, and State B's correlative duties, there are a number of means open to State A to try to secure State B's compliance with its obligations. A first means is retortion (i.e. a legal but unfriendly act) against State B. Most instances of retortion in relation to UNCLOS have taken the form of protest and assertion of rights. Either before or after an act of retorsion, State A could seek to resolve the matter through negotiation. In practice, this often works. If it did not, but the alleged violation of UNCLOS by State B was relatively minor and appeared to be a one-off incident, there would be little point in State A taking the matter further. Where, however, a violation was more serious and/or ongoing, and could not be settled by negotiation, State A could take counter-measures against State B (i.e. an act that would otherwise be illegal) in order to induce compliance, provided that the counter-measure was proportionate. For example, if State B had refused passage through its territorial sea to ships carrying nuclear waste of State A's nationality, State A could retaliate by denying State B's ships access to its ports. In practice, counter-measures rarely seem to be used to induce compliance with UNCLOS, perhaps because of the fear of adverse effects. If State A resorted to counter-measures but failed to induce State B to comply, State A could use the compulsory dispute settlement machinery of UNCLOS (mentioned in para. 8 above) to refer State B's non-compliance to a court or tribunal, provided that the matter did not fall within one of the exceptions to compulsory settlement. In practice, relatively little use has been made of this possibility, perhaps because of the cost, effort and time required to prepare and conduct international litigation.

13. Most of the duties imposed on States by UNCLOS give rise to a co-relative right for other States, and thus may be enforced in the ways explained in the previous paragraph. However, there are some duties, relating mainly to fisheries conservation, safety standards for ships and environmental protection, that do not give rise to a co-relative right. In such cases, a State will not usually have sufficient interest to try to enforce alleged non-compliance with such duties by another State. A rare example is the *South China Sea* case (*Philippines v. China*), where the Philippines successfully argued that China was in breach of its duty to protect rare and fragile ecosystems and the habitat of threatened and endangered species. There is also an exception in relation to the International Seabed Area, where the International Seabed Authority is charged with ensuring that those engaged in seabed mining comply with their environmental obligations.

14. Turning to the second half of Q3, inter-State litigation is relatively infrequent (except in the World Trade Organisation – WTO), and use of the dispute settlement procedures of

UNCLOS is no exception. In the quarter of a century or so that those procedures have been available – and leaving aside the specialised procedure whereby a flag State of an arrested fishing vessel may apply to the International Tribunal for the Law of the Sea (ITLOS) for its release on payment of a bond (which has been used nine times) – only 24 cases have to date been referred to adjudication, nine to the ITLOS and 15 to arbitration. Of these, seven did not result in a judgment on the merits, either because the tribunal concerned lacked jurisdiction or the case was settled out of court. In addition, four cases are still ongoing. Of the 13 cases where there has been a judgment on the merits, six concerned the wrongful arrest and/or detention of a ship and five maritime boundary delimitation. The other two cases were the *Chagos Marine Protected Area case* (*Mauritius v. UK*) and *South China Sea case,* mentioned above. Compliance with a judgment seems only to have been a problem in two cases. In the *Arctic Sunrise* case, Russia rejected an award finding Russia's arrest and detention of a Dutch-flagged Greenpeace ship unlawful. However, two years later (in 2019) it settled the case with the Netherlands and paid an undisclosed amount in compensation. The other case is the *South China Sea* case where China refused to participate in the arbitration, rejected the award, and published a lengthy rebuttal of the tribunal's findings. Non-compliance is, nonetheless, rare.

15. Apart from adjudication, the ITLOS has given two advisory opinions. There has also been one instance of 'compulsory' conciliation, which successfully resolved a lengthy, festering dispute between Australia and Timor Leste over their maritime boundary. It should also be noted that since UNCLOS entered into force in 1994, the International Court of Justice has delimited maritime boundaries in eight cases (and there are a further three boundary cases pending), but its jurisdiction in those cases did not derive from UNCLOS. It is noteworthy that all these cases disputed were settled peacefully.

Q4. What are the other important international agreements and treaties that complement UNCLOS?

Q5. What is the role of the IMO and other international organisations in developing UNCLOS and the law of the sea?

16. As noted initially, UNCLOS is a framework convention, with numerous subsequent agreements on more detailed issues. The following provides an overview below of the main treaties in terms of subject matter.

Shipping. The IMO has developed a comprehensive set of treaties relating to the safety and seaworthiness of ships and for preventing pollution from shipping. These treaties are binding on more than 95% of the world merchant fleet by weight; may be

easily amended to take account of developments in technology and in response to shipping accidents; and are effectively enforced by port States through a system of port State control, co-ordinated on a regional basis through regional agreements, and by the IMO's mandatory flag State audit scheme. The treaties have led to a reduction in sub-standard ships, and consequently in shipping accidents, environmental disasters and casualties. The working conditions of seafarers are regulated by treaties adopted by the International Labour Organisation (ILO), notably the Maritime Labour Convention (2006). Since it came into force in 2013, it has led to improvement in working conditions, not least because it has a number of mechanisms for its enforcement.

Fisheries. At the global level, the Food and Agriculture Organisation (FAO) has adopted two treaties, the Compliance Agreement (1993), which is designed to improve compliance with fisheries management measures adopted for the high seas, and the Port State Measures Agreement (2009), which is designed to deny vessels that have fished illegally access to markets for their catches. The FAO has also adopted various 'soft law' measures, notably the Code of Conduct for Responsible Fisheries (1995) and four international plans of action, on illegal, unreported and unregulated (IUU) fishing, fishing vessel capacity, the incidental catching of seabirds, and sharks. Although these instruments are not legally binding, there is an expectation that States will comply with them and they are required to report on their implementation of them to the FAO at regular intervals. In addition, the WTO is currently trying to produce a treaty to phase out fisheries subsidies, which have undoubtedly contributed to the overfishing of many stocks. At the regional level, there is a network of treaties establishing some 20 regional fisheries management organisations/arrangements for the management of high seas fish stocks. These bodies have to date had a somewhat chequered history. They have not always been able to set catches at the levels advised by scientists; where catch limits have been agreed, they have not always been complied with; and in some cases conservation efforts have been undermined by the action of non-members of the body concerned. Consequently, there has been overfishing of high seas fish stocks, as indeed there has been within EEZs.

Pollution. There are global treaties to control pollution from shipping and the dumping of wastes at sea, which have resulted in reductions in pollution from ships (particularly of oil) and the dumping of the most noxious wastes. But there are no global rules addressing pollution from land-based sources (around 80% of all marine pollution, such as plastic pollution) and offshore petroleum activities. Instead, they are regulated by a dozen or so regional treaties, many concluded under the UN Environment

Programme's Regional Seas Programme, but these treaties do not cover all the regions of the world.

Conservation of marine biodiversity. There are many treaties aimed at conserving various aspects of marine biodiversity. At the global level they include the Convention on Migratory Species, the Convention on International Trade in Endangered Species, the Whaling Convention, UNESCO's World Heritage Convention and the Ramsar Convention on Wetlands, and there may in time be an agreement on the conservation of biodiversity in areas beyond national jurisdiction, as explained above. At the regional level, there are a number of supplementary agreements under the Migratory Species Convention, covering, *inter alia*, seals, sharks, small cetaceans and turtles, and several of the regional pollution treaties mentioned above also deal with the conservation of biodiversity. The latter have led to the establishment of many marine protected areas in various parts of the world.

Criminal activity on the high seas. In recent decades the high seas, have become the scene of considerable criminal activity. UNCLOS deals in detail only with piracy. However, a growing network of treaties is gradually being developed to combat other types of crime. To date, there are treaties dealing with maritime terrorism and drug and people trafficking. One notable characteristic of such treaties is that they supplement the traditional system of exclusive flag State jurisdiction on the high seas (which is codified in UNCLOS) by authorising other States to take various forms of enforcement action against ships suspected of engaging in the activities proscribed by those treaties, although the consent of the flag State is necessary before a ship is boarded.

Challenges

Q6. What are the main challenges facing the effective implementation of UNCLOS?

17. There are many challenges to good order at sea, the sustainable use of marine resources and the protection of the marine environment. The most important is the warming and acidification of seawater and sea level rise caused by global climate change. Other challenges include the pollution of the sea by plastics and micro-plastics; the adverse impact of the fishing industry on the marine environment (the sustained overfishing of around 30% of target stocks; killing or injuring non-target species, such as dolphins, seabirds and turtles; and damaging seabed habitats) and

certain forms of criminality, such as trafficking. Most of these challenges do not derive from poor implementation of UNCLOS. Some may be due to poor implementation of certain of the other treaties referred to in the previous paragraph. Others, such as the effects of climate change, plastic pollution and trafficking are essentially manifestations of problems arising on land and therefore cannot only be tackled in a framework convention on the law of the sea.

18. We will discuss two of the challenges specifically mentioned by the Committee: climate change and human rights. The effects of climate change on the oceans are due to greenhouse gas emissions. The IMO is taking measures to reduce emissions from ships, which are responsible for about 3% of the global total. Almost all the remainder comes from sources on land. International action to reduce such emissions is coordinated through another framework convention, *viz*. the UN Framework Convention on Climate Change. As for the impact of climate change on the oceans, the rise in sea water temperatures is causing changes to the distribution of fish stocks. That may require changes to regimes that manage stocks co-operatively, such as regional fisheries management organisations/arrangements and bilateral/regional arrangements for shared stocks. An example is north-east Atlantic mackerel. Until a few years ago the stock was managed co-operatively by the EU, the Faroe Islands and Norway. Climate-induced changes have affected the distribution of the mackerel so that it is now also found in the EEZ of Iceland and on the high seas. Thus, the former trilateral arrangement has become outdated, but an effective arrangement to replace it has not yet been agreed. Such developments do not require any changes to UNCLOS because its provisions on shared and straddling fish stocks are so broad-brush as not to be affected. That is not necessarily the case with sea level rise, which in many parts of the world will impact on the baselines from which maritime zones are delineated by causing the low-water line to recede, low-tide elevations to become wholly submerged and islands to become low-tide elevations or disappear, including some low laying island States. Such developments could require some adjustment to the UNCLOS rules, but opinion is divided on this matter. If change is required, that need not necessarily come through amendment of UNCLOS or the conclusion of a further implementing agreement. It could result from the practice of States (see para. 9 above), as is already happening to some extent in the Pacific Ocean, or the work of the International Law Commission, which has recently put 'Sea-level rise in relation to international law' on its agenda.

19. Turning to human rights. There have been several notable rulings applying global and regional human treaties to incidents at sea. In addition, since 2013 the human rights of

seafarers have been protected under the ILO's Maritime Labour Convention (see para. 18 above), which has its own enforcement mechanisms. In the light of these developments, there is no need to add provisions on human rights to directly to UNCLOS.

20. Some of what may be genuinely regarded as problems with the implementation of UNCLOS come down to the (often deliberate) ambiguity or vagueness of some of its provisions. For example, the disputes that have arisen from time to time between China and the USA over the actions of US warships and military aircraft in China's EEZ are due to a lack of clarity in UNCLOS. Warships and military aircraft have a right of navigation and overflight through and over the EEZ, as well as to engage in 'other internationally lawful uses of the sea related to' navigation and overflight. There are legitimate differences of opinion between some developed and some developing States on the interpretation of this provision, which was left deliberately ambiguous during the negotiations of UNCLOS. If an attempt was made to clarify the law by amending UNCLOS, it is doubtful that agreement on a revised text could be reached today. As long as incidents are relatively infrequent and do not escalate into something more serious (as has been the case up to now), it is probably best to live with an unclear text.

21. Other problems with the implementation of UNCLOS may be due to a lack of resources or bureaucratic inertia. Some States have failed to manage their maritime zones effectively due to a lack of resources rather than the absence of the will to do so. For example, many West African States have not succeeded in preventing extensive illegal fishing in their EEZs by foreign vessels because they lack adequate means of enforcement. The answer to that problem lies not so much with trying to enforce UNCLOS as for rich countries to help those States establishing the necessary enforcement capacity. Bureaucratic inertia may also explain why a considerable number of States have failed to provide the UN with the information on the delineation and delimitation of their maritime zones that is required by UNCLOS.

Q7. In the light of these challenges, is UNCLOS still fit for purpose? Can it or should it be renegotiated to better reflect these challenges?

22. In our view the primary purpose of UNCLOS is to provide a framework to allow activities at seas to be regulated in an orderly and sustainable way, not to provide every last detail as to how that should be done. That is a task for other instruments, as mentioned above. In our view, UNCLOS does provide an appropriate framework and is therefore broadly fit for purpose. To the extent that it is not, its defects can be

addressed through the mechanisms for its development that were outlined in para. 8 above and the amendment or conclusion of other treaties, rather than through its renegotiation. Indeed, we believe that it would be a serious mistake to try to renegotiate UNCLOS. The negotiations that led to UNCLOS were lengthy (1967-1982), tortuous and challenging. There is no evidence that a renegotiation of UNCLOS would be any easier today. Indeed, it is likely to be more difficult. China has become more powerful and assertive, and the USA and Russia no longer share an identity of interest on many issues that the USA and then Soviet Union had during the negotiation of UNCLOS. Even if a majority of States parties agreed to a renegotiation (which is doubtful), there is no certainty that agreement would be reached on a renegotiated text; and, even if was, that it would attract enough ratifications for its timely entry into force. In the meantime, the certainty and legitimacy of the existing text would be severely undermined.

Summary

The main achievements of UNCLOS have been to: (1) establish a stable framework for regulating activities at sea through rules delineating and defining various maritime zones, something that had never previously existed in the law of the sea; (2) provide a regime for regulating the mining of minerals from the seabed beyond national jurisdiction; (3) attract near-universal participation; (4) act as a catalyst for the adoption of large number of other treaties relating to the sea, particularly as regards shipping, fisheries, protection of the marine environment and criminal activity on the high seas; (5) contain a system for the compulsory settlement of disputes relating to UNCLOS, which is being regularly used; and (6) be sufficiently flexible to allow UNCLOS to develop without resort to its cumbersome formal amendment procedures.

Challenges to the law of the sea, such as climate change and human rights, are being addressed in other fora. There is no need to duplicate this work, and no reason to suppose that if provisions on these matters were added to UNCLOS, they would lead to any more effective action. More generally, it would be a mistake to try to renegotiate UNCLOS to clarify current provisions that are ambiguous or unclear or to add provisions to meet new challenges. There is no guarantee that agreement on a revised text of UNCLOS could be reached, or in the unlikely event that it was, that it would attract the level of support that the present text enjoys. In the meantime, the certainty and legitimacy of that text would risk being undermined.

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