

Professor Richard Barnes, The Law School, The University of Lincoln, and Professor of Law, The University of Tromsø; and Professor Elizabeth Kirk, Lincoln Centre for Ecological Justice and The Law School, The University of Lincoln – Written evidence (UNC0015)

House of Lord's International Relations and Defence Committee, Enquiry: UNCLOS: fit for purpose in the 21st century?

Written Evidence submitted by Professor Richard Barnes, The Law School, The University of Lincoln, and Professor of Law, The University of Tromsø; and Professor Elizabeth Kirk, Lincoln Centre for Ecological Justice and The Law School, The University of Lincoln.

This evidence is submitted in a personal capacity.

Personal Statements

Richard Barnes is a Professor of International Law at the University of Lincoln. LLB (Hons) (Dundee), LLM (Cantab), PhD (Hull). He has published 5 books and over 50 papers on the law of the sea.

Elizabeth Kirk is a Professor of Global Governance and Ecological Justice at the University of Lincoln. LLB (Hons) (Glasgow) Dip LM (Glasgow) LLM (University of British Columbia), formerly Solicitor, Scotland. She has published 2 books and over 50 papers on (international) environmental law and the law of the sea.

Summary of Key Points:

- A. If the UK wishes to influence the development of international law, it must establish strategic partnerships. In the law of the sea, this means close cooperation with neighbouring states (**paras 2-6**)
- B. Enforcement of maritime rights and duties is difficult because such obligations are open to interpretation, and because enforcement at sea is difficult in practice. Effective technologies and co-operation in their use are both required (**paras 7-9**).
- C. UNCLOS sits within a complex web of agreements. As such implementation requires improved coordination across these instruments (**paras 11-14**).
- D. Specialist agencies are key to the development of more detailed rules on maritime activities (**paras 15-18**).
- E. The four main challenges resulting from climate change to be addressed are:
1) ensuring safe shipping through Arctic waters (**para 19**); 2) responding to

the jurisdictional and humanitarian consequences of sea-level rise and loss of coastal territories (**para 20**); 3) adapting to the redistribution of fish stocks and biodiversity (**para 21**); and 4) protecting vulnerable marine habitats, species and ecosystems from ocean warming and acidification (**para 22**).

- F. The law of the sea does little to ensure the protection of human rights and welfare at sea. More needs to be done to ensure that violations of human rights standards and welfare are identified. Individuals responsible for breaches of international protections should not be able to hide behind flag State jurisdiction (**paras 23-25**).
- G. The effective regulation of marine economic resources depends upon international cooperation and precautionary action (**paras 26-0**).
- H. UNCLOS is largely fit for purpose. The development of new rules and responding to new challenges is best pursued through related instruments. In doing so greater attention needs to be put on ensuring coordinated action since ocean activities cannot be regulated in isolation. Coordination and cooperation will reduce the risks of disputes between different sectors (**paras 30-32, 41 and 42**).
- I. We suggest eight areas of priority for UK policy and leadership: 1) sharing best practices in marine spatial planning and marine renewable energy; 2) enhance the robustness of environmental impact assessments; 3) leading on effective measures to reduce marine plastic pollution; 4) leadership and support for the conclusion of a complete Mining Code of deep-seabed minerals and the adoption of an agreement on the conservation and sustainable use of resources in areas beyond national jurisdiction; 5) leading of international efforts to reduce human rights infringements at sea and to improve welfare conditions in the maritime sector; 6) investing in and supporting the use of new marine technologies; and 7) build strategic partnerships to pre-empt threats to maritime security from increased competition for scarce resources (**paras 34-41**).

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

1. UNCLOS established a widely accepted jurisdictional framework for the regulation of most ocean activities. This influences every aspect of oceans use and has enabled the development of a rich body of law addressing shipping, fisheries, and marine environmental protection to develop both globally and at the regional level.

Which countries are the key international actors influencing the international law of the sea? What are their approaches towards UNCLOS?

2. Although all States may contribute to the development of international law, influence is usually secured through strategic partnerships or sheer political influence.
3. The EU is an important actor. As a party to UNCLOS it represents and coordinates most of the maritime interests of its Member States. The EU views itself as a leader in developing maritime policies, either through generation of initiatives (e.g., Marine Strategy Framework Directive) or capacity building measures with developing States. Particularly in fisheries, it uses its valuable market position to shape fisheries governance in third states by making them comply with harvesting standards if they wish to export seafood to the EU markets.
4. China is a major maritime and economic power. It is implementing ambitious maritime policies designed to secure resources, as well as strategic links with markets for its manufactured goods (e.g., Maritime Silk Road). Its actions are a major regional concern because its claims to excessive maritime jurisdiction in South and East Asia threaten the interest of neighbouring States.
5. The US is not a party to UNCLOS, but it robustly upholds many of UNCLOS' rules. This influences the development of customary law rules that exist beyond the treaty obligations in UNCLOS that only apply to its parties. The US robustly defends navigational rights and freedoms through its Freedom of navigation programme. It also robustly protests exorbitant claims to maritime jurisdiction by coastal States.
6. Other States may be able to better influence the development of the law of the sea through strategic alliances and coordinated policy initiatives. On the issue of plastics, for example, small island developing States, African and Asian States are showing greater leadership than the larger, wealthier States. On the issue of fisheries, the Parties to the Nauru Agreement have established sub-regional arrangements to increase their influence in the Western and Central Pacific Fisheries Commission.

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

7. Enforcement varies depending upon the activity being addressed, its location and who is carrying out the activity. Most maritime activities are conducted by individuals or companies (e.g., fishermen, offshore energy concerns or shipping companies), so when we speak of enforcement, we are usually referring to States ensuring that such individuals operate in accordance with the rules that the State has set for the conduct of ocean activities in their waters or on board their vessels. Coastal States may enforce a range of rights and duties within their coastal waters (also known as maritime zones).

Second, flag States (i.e., states to which a ship or other maritime vehicle is registered) may enforce a range of laws, from pollution control, to addressing piracy. Port States also play a role in these issues by ensuring that vessels coming into port comply with generally accepted rules and standards, as well as local conditions for entry into port.

- 8.** A key challenge with enforcement is that States enjoy considerable discretion as to how to interpret and implement their obligations under UNCLOS. This makes proving breaches of obligations and taking enforcement action problematic. Thus, when we look at questions of fisheries management, it is not simply a question of whether obligations relating to the prevention of illegal, unregulated or unreported (IUU) fishing are enforced, but also a question of State discretion in setting (un)sustainable catch limits (Total Allowable Catch, or TAC). Similarly, it is not that the obligations in relation to land-based sources of pollution are not often subject to enforcement action, but that it is left to the discretion of States to interpret and decide how to implement those obligations.
- 9.** Enforcement activities at sea is problematic due to the remoteness of activities and the limited capacity for physical inspection and intervention. There is a need to develop complementary enforcement technologies, such as remote monitoring devices and information systems that can be used identify breaches of obligations and support enforcement action.
- 10.** One of the strengths of UNCLOS is its flexible nature, which allows States to select their preferred mode of dispute settlement. Litigation between States is relatively infrequent. Some cases concerning the arrest of foreign ships are settled quickly within 2 months, but other cases can take up to 12 years to resolve. Most judgments are complied with by the parties.¹ Maritime boundary settlements are generally respected. However, there are examples of States refusing to participate in proceedings that threaten key policy interests (e.g., China in the South China Sea case, Russia in the Arctic Sunrise case). The effectiveness of dispute resolution (post-1982) should not, however, be measured solely in terms of actual judgements which are relatively infrequent (27 cases at ITLOS, approx. 27 cases at the ICJ, 15 at the PCA) because the threat of compulsory settlement may encourage states to settle dispute through diplomatic channels. Also, the settlement of disputes may clarify the law and pre-empt future disputes.

What are the other important international agreements and treaties which complement UNCLOS?

¹ Exceptions include Nigeria in Cameroon v Nigeria (2002).

- 11.** There are too many agreements to list that complement UNCLOS. For example, in fisheries alone, there are three major multilateral agreements (UN Fish Stocks Agreement, the Port State Measures Agreement and the FAO Compliance Agreement), as well as 16 regional fisheries management organisations, and many more bilateral and local fisheries agreements. In addition, there are several important non-binding instruments, such as the FAO Code of Conduct for Responsible Fisheries, which influence how fishing is conducted. It is also important not to forget that general international agreements that can have a major impact on fishing. In the UK, the UK/EU Trade and Cooperation Agreement fundamentally shapes how the UK can regulate fishing. more generally, the WTO Agreements control the use of trade measures, such as subsidies. Fishing subsidies are estimated to be as high as \$35billion, of which \$20 billion contributes directly to overfishing. Although subsidies have been on the agenda of the WTO since 200 States have not been able to agree restrictions on harmful subsidies.
- 12.** Similarly in marine environmental protection there are 5 major conventions which are directly relevant (the Whaling Convention, the London Dumping Convention, MARPOL, the International Convention on Oil Pollution Preparedness, Response and Cooperation and the Fund Convention alongside both a range of broader conventions such as the Biodiversity Convention, the Climate Change Convention, the Persistent Organic Pollutants Convention, the Mercury Convention, and the Long-range Transboundary Air Pollution Convention which are relevant and 13 regional seas treaties and a range of soft law agreements which are highly influential in protecting our seas, such as the Global Programme of Action on Marine Pollution from Land-based activities.
- 13.** There are 56 agreements or measures falling within the remit of the IMO that govern shipping and related activities.
- 14.** This brief overview indicates the vast range of instruments used to govern oceans, and the complex interrelationship between issues. A key challenge moving forward is coordinating action under these agreements, enhancing participation in agreements (since many instruments, and building capacity to ensure effective implementation of measures at a national level.

What is the role of the International Maritime Organisation (IMO) and other international organisations in developing UNCLOS and the law of the sea?

- 15.** UNCLOS was designed to be a framework agreement with details to be provided through more focussed agreements. These are developed through the IMO and other bodies. Regional bodies such as OSPAR provide the

specialist regional rules needed to address marine pollution and environmental protection. Such specialist rules could not, realistically be developed at global level given the need to take account of geographic, oceanographic, and socio-economic circumstances in each region and the impact these have on environmental protection. For example, the proportions of and types of diffuse pollution coming from urban areas, forestry and agriculture will vary by region, so too the types of point source pollution from industry. Region specific provisions can therefore provide more pointed and potentially stricter standards than would be possible through a global agreement.

16. Similarly, the IMO and other specialist bodies have the technical expertise to provide the detailed rules required to address e.g., traffic routing, and marine pollution from shipping which could not be developed through a framework treaty such as UNCLOS which addresses such a broad range of issues.
17. The IMO is specifically identified as the competent organisation to develop shipping rules under UNCLOS. Part of its effectiveness results from the use of the tacit amendment procedure that expedites technical changes to IMO treaties, allowing them to be readily updated.
18. The UN General Assembly plays an important role in shaping the direction of policy. It may also mandate intergovernmental conferences to negotiate new law of the sea agreements, such as the Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement), which is currently in progress.

Challenges: What are the main challenges facing the effective implementation of UNCLOS in 2021? We would particularly welcome responses on:

Climate change and the impact it has had/will have on the structures and provisions of UNCLOS (including trading routes, maritime boundaries, and the status of island ocean states)

19. Climate change appears likely to lead to the opening of Arctic shipping routes. These routes could offer benefits in reduced shipping times and costs, but such routes will carry particular risks of harm to the environment and to human life. While the Arctic Ocean is and will increasingly be largely ice free for significant periods of time each year, some ice will remain. Some of that ice will drift and there is the potential for icebergs to appear in

shipping routes. Their appearance will be harder to predict than the formation of pack ice previously was and as such they will present a danger to shipping which may lead to oil, or chemical spills and place the lives of those on board at considerable risk. The Arctic Ocean remains a harsh environment and shipping routes will largely be at a considerable distance from settlements with significant search and rescue capacity. Any incidents in the Arctic Ocean therefore place the lives of those involved at greater risk than if they happened in a region such as the North Sea. The opening of Arctic shipping routes may also increase ocean-based tourism in the area, heightening this risk to life. Climate change induced sea-level rise threatens all States.

20. All states will face pressures from coastal erosion and inundation of low-lying land territory. For some states this will lead to the loss of territory. For others it may render territory uninhabitable. This will impact soonest and hardest on low lying small islands developing States. This poses challenges for the designation and maintenance of maritime jurisdiction because maritime entitlements flow from land territory. The loss of territory could result in some states maritime zones being diminished. This is currently under review by the International Law Commission with a view to setting out recommendations to States. Whilst it is possible to adapt the rules on maritime delimitation, the loss of habitable territory will eventually lead to relocation of peoples to habitable areas, and this will likely result in migration of peoples to other States (so-called climate refugees). This is not a matter that can be addressed under the law of the sea. It will require cooperation across a range of different institutions.

21. Climate change will impact on the distribution to fish stocks and on biodiversity more generally. Both will change as warming temperatures drive species poleward and as ocean acidification interferes with the abilities of some species to thrive by interfering, for example, with the ability to form shells. Species moving poleward will act in the same way that invasive species do, at times out-competing 'native' species and changing ecosystems functions and dynamics. It also poses several challenges for fisheries. First, it increases the conditions of uncertainty in the management of fish and diminishes the scientific basis of decisions on catch allowance. Second, the nature of fixed maritime jurisdiction, and allocation of fishing based upon zonal attachment may generate winners and losers as stocks move from traditional fishing grounds. RFMOs have struggled to develop equitable and flexible allocation rules to deal with the distribution of fish. Climate induced changes will make this even more difficult to develop and implement in the future.

22. Climate change may increase the vulnerability of marine ecosystems to environmental harm from pollution or changes to habitats. A clear example is provided by the reduction of Arctic ice. Such ice provides a habitat for

species, as it reduces the impact of any pollution on the remaining habitat is magnified compared to its impact had ice remained at higher levels. The increased vulnerability may be seen in other ecosystems if habitats, such as coral reefs, are affected by ocean acidification or warming temperatures, any additional pollution, or dredging or other changes to the habitat will be magnified in impact compared to their potential impact in earlier years.

Maritime security and human rights at sea (including migration, modern slavery and human trafficking)

- 23.** The most significant human rights concerns arise in two areas: the provision of assistance to persons in distress at sea (especially for irregular maritime migrants) and the protection of persons working at sea who are vulnerable to mistreatment.

- 24.** The law of the sea and UNCLOS developed before and outside the influence of international human rights law. As such, it has little to say about the protection of human rights at sea. Whilst human rights apply universally and States are responsible for ensuring human rights within their jurisdiction or control, this presents challenges in practice because there are mismatches between the jurisdictional regimes for the law of the sea and the protection of human rights. This is highly problematic for maritime migration. States are under no obligation to allow vessels carrying irregular migrants into their ports – resulting in many people being left in maritime orbit until states can agree who should deal with the issue. Second, states may deliberately avoid providing immediate and vital assistance to persons in distress because this may incur more costly duties to receive persons in distress. There are at present no effective global burden sharing mechanisms to deal with these issues.

- 25.** A key obstacle to the improvement of human rights and working /living conditions at sea is the exclusivity of flag State jurisdiction. This means that flag states are solely responsible for setting, monitoring and ensuring human rights and working conditions. This leads to three problems, which effectively shield wrongdoers from accountability. First ship owners may register their vessels in States with lower regulatory standards. Second, flag States may be unable or unlikely to enforce high regulatory standards on their vessels. Third, non-flag States have few opportunities to identify and address human rights violations on foreign vessels. Moreover, there is no positive duty on States to seek out and address violations of human rights standards on vessels belong to other States. Although exceptions to exclusive flag State jurisdiction on the high seas exists in respect of some wrongful behaviour, such as slavery, there is no exception in respect of other human rights concerns (including modern slavery or people trafficking). These three factors

impede the improvement of human rights and working conditions in the maritime sector.

Regulation of access to economic resources, including on the deep seabed and in the water column, fishing, and the protection of resources such as undersea cables

- 26.** A key challenge to effective regulation is that climate change and its impacts on marine ecosystems will undermine our understanding of those ecosystems. For example, increase shipping or oil and gas activities in the Arctic will lead to an increase in operational pollution. Whilst such pollution may not be problematic in the open ocean where it may be relatively easily dispersed, its impact in the Arctic could be greater for two reasons. First the cold environment which has little light during the winter seasons, is not conducive to breaking down pollutants. Secondly, any pollutants could become trapped in what ice remains, or reforms each winter. If it does, that pollution may travel thousands of miles (further than it would in the open ocean) in the ice pack to be deposited as a single pollution incident when the ice melts. As such the pollution may have an impact both on species that rely on the ice for habitat, and in the area in which it is deposited.
- 27.** This lack of understanding will impact on our ability to undertake Environmental Impact Assessments (EIA) prior to developments in, or that may impact on the marine environment. EIAs rely on baseline measurements, but in a rapidly changing environment, such measurements become less reliable. In addition, when constructed any project approved following an EIA must be monitored for their impact. Again, the precise impact may prove hard to quantify and to separate from other changes to, for example, biodiversity brought about by climate change, even where those changes occur the development area. Inevitably such changes will also impact on our abilities to implement effective marine spatial planning.
- 28.** Deep sea ecosystems are amongst the most vulnerable places on Earth. As pressure to commercially exploit valuable marine genetic resources and minerals located on the deep seabed grows, States must ensure that exploitation is only permitted when it can be demonstrated not to threaten the viability of these ecosystems. An [international agreement](#) is presently being negotiated to ensure the conservation and sustainable use of the resources of the deep seabed. Also, the International Seabed Authority is currently under pressure to adopt a Mining Code to enable deep seabed mining. Until such rules are in place, activities on the deep seabed must be limited to exploratory activities only.
- 29.** Cooperation in general is critical to the effective regulation of ocean spaces and activities. This is illustrated clearly in the context of fisheries

management, particularly post-Brexit. Effective measures to ensure fair and sustainable exploitation of shared stocks cannot be undertaken without cooperation, especially with neighbouring States. Failure to agree cooperative measures and to reach compromise on competing interests will only result in costly disputes and risks to already vulnerable fish stocks. The UK needs to show leadership in existing international fora, and to build strategic partnerships with other States to maximise opportunities for collective gains.

In light of these challenges, is UNCLOS still fit for purpose? Can or should UNCLOS be renegotiated to better address these challenges?

30. UNCLOS is still capable of providing the basic framework through which more detailed rules can be negotiated in specialist instruments. Developing new rules through subsidiary and related agreement is advisable because it would be politically and legally difficult to amend UNCLOS. There is little political will to renegotiate UNCLOS. UNCLOS was a carefully negotiated package deal and States are reluctant to upset the careful balance of rights and duties it embodies. Amendments to UNCLOS must also overcome serious procedural obstacles. The UK could submit an amendment proposal, but this would require the support of at least half the States parties (i.e., 84 States) to convene an amendment conference, any proposals and counter proposals negotiated, and finally a high degree of consensus on the terms of any proposal would be needed before it was adopted. A simplified procedure for amendments is available for matters relating to the deep seabed, but this would fail if any single state objected to it within 12 months of the proposal being made. No amendments have yet been proposed. Changes or developments of the rules in UNCLOS have been pursued through separate treaty negotiations or through developments in other fora, such as the IMO.

31. Legal developments would be easier to pursue at a regional level or through existing sectoral organisations, such as the IMO or FAO. Alternatively, there is scope to develop change more gradually through the development and promotion of soft law measures such as guides or codes of conduct. These can be used to influence and coordinate the actions of states without having to go through the demands of formal treaty negotiations and are frequently used in respect of marine environmental protection. Development of such agreements is an area where soft power and leadership can be used to good effect.

UK's Maritime Strategy

What is your assessment of the UK's policy and practice within the current legal framework of the international law of the sea? Are the Government currently working to address any of the challenges outlined above?

32. In 2018, the Foreign Secretary promised the development of an integrated [Oceans Strategy](#). Instead, the UK has a series of different strategies, such as the [Marine Strategy \(2012-15\)](#), [Fisheries Policy](#), [Blue Belt Programme](#), [Maritime 2050](#) strategy, and a [Strategy for Maritime Security](#) (currently under review). Whilst some of these strategies are commendable, some such as the Blue Belt appear to me more tokenism than serious attempts to address the issues outlined above. In addition, very few activities at sea can be governed in isolation, so it is important to have joined up policy. Whilst individual policies contain good ideas and practices, it is impossible set cross cutting priorities, to ensure consistent and coordinated action, and to assess the effectiveness of policy when this is conducted in a patchwork fashion.

What should be the priorities for the UK Government regarding the future of UNCLOS and the international law of the sea? In what areas can or should the UK be a leader?

33. In the UK, there is world-leading strength and depth in marine science, law, and policy. This should be leveraged through positive capacity building initiatives with other States as a form of soft power. Direct and indirect influence should be focused in eight key areas where the UK has significant strengths and interests.

34. First, given that the UK's practice in marine spatial planning is advanced compared to most other countries, the UK could provide leadership in the development of treaties/soft law instruments addressing the conduct of marine spatial planning, the development of marine renewable energy and, as a necessary part of that, EIA. A key aspect of such cooperative initiatives will be to develop mechanisms to enhance energy security through transmission cables and inter-connectors to allow of the distribution of renewable energy according to natural fluctuations in supply and variable market demands.

35. Second, the UK should focus on would be the development of further guidance on how to conduct EIA, particularly in environments impacted by climate change and how to conduct marine spatial planning.

36. Third, the UK should focus on how to better address pollution from land-based activities in more detail. Agreements are needed on, inter alia, plastics, thermal pollution, and diffuse pollution, especially from urban conglomerations.

37. Fourth, as a member of the Council of International Seabed Authority, the UK should continue work with other States to support the development of

effective mineral exploitation rules and policies. The ISA is under a duty to finalise exploitation rules within the next 18th months, without which exploration activities may commence even though such rules are not completed. This should complement UK support for the conclusion of a legal agreement on the conservation and sustainable use of resources in areas beyond national jurisdiction.

- 38.** Fifth, within the UK there is significant policy experience in developing measures to prevent modern slavery. The UK should build on this and advance initiatives at the international level to improve the protection of vulnerable workers in maritime sectors.
- 39.** Sixth, through initiatives like the Satellite Catapult, the UK should lead on the development of maritime technologies such as remote monitoring mechanisms that would enhance at sea enforcement capacity.
- 40.** Seventh, maritime security challenges are likely to grow over the next few decades as competition for finite resources increase and the scale and scope of ocean activities expand. Some states are beginning to exert greater power over sea areas (e.g., South China Sea). Undersea cables are vulnerable to interference. The UK is highly dependent upon global supply chains, many of which depend upon maritime trading routes. Ensuring food and energy security as well as the safe and steady flow of goods is essential to UK national security.
- 41.** Finally, a key challenge facing the global governance of ocean spaces is the development of effective mechanisms to enable coordinated and coherent regulation across different sectors. The UK should support initiatives, such as the institutionalisation of cooperation through the BBNJ Agreement, as well as developing best practices and mechanisms for cooperation through regional ocean governance mechanisms. In pursuing these priorities, Government should ensure that it engages widely and effectively with stakeholders.

What will be the most important international partnerships and alliances for the UK in addressing these challenges and upholding its interests with regards to the law of the sea?

- 42.** Although UNCLOS establishes a global framework for the regulation of the oceans, many of its general commitments are put into effect at a regional level, especially in the context of fishing, environmental protection, and marine spatial planning. This and the simply geographic proximity of the UK to Europe means that the UK's most important partner will be the EU. Regional cooperation is required by UNCLOS (also the UN Fish Stocks Agreement, the North East Atlantic Fisheries Commission, and EU/UK Trade and Cooperation Agreement) for fisheries management of shared stocks. Similarly, cooperation will be required with the EU and its member States

under OSPAR on marine environmental issues. Shared security concerns will require cooperation on issues of search and rescue, migration and border controls, protection of submarine pipelines and cables in the North Sea and Atlantic, and coordination of mineral extraction activities.

Received 11 November 2021