

Dr Montserrat Gorina-Ysern – Written evidence (UNC0020)

Response to the International Relations and Defence Committee, House of Lords
UNCLOS: fit for purpose in the 21st century?

Preliminaries. This submission by Dr. Gorina-Ysern is under 3,000 words long. Responses are provided in unbold ink. It is an original response to the Committee's call for evidence, and it has not been published anywhere.

Biography of the submitter. Mrs. Montserrat Gorina-Ysern is a naturalized citizen of the United States of America since 2002; formerly she was a citizen of the Kingdom of Spain who resided in Catalonia between 1956-83; she was also a resident of Cambridge, United Kingdom 1983-85, where she married a USA citizen at the Cambridge Shire Hall; next, she was a resident of Melbourne first, and Sydney, later, in Australia, 1985-98. She has been a resident of Maryland, USA from 1998-to date.

Bachelor of Law and Graduate in Law (Universitat Autònoma de Barcelona 1974-79 and Universitat de Barcelona 1980-84), studying with Professor Santiago Hernández Yzal. Member of the Barcelona Bar (1981-83 in practice; to 2005 consulting status).

Doctor of Philosophy Degree (Faculty of Law, University of New South Wales, 1989-96 and recipient of Commonwealth and Australian Postgraduate Research Awards 1989-92). Academic research and teaching positions at Faculty of Law, University of Melbourne (1985-86 Research Visiting Fellow associated with Professor Gillian D. Triggs); Faculty of Law, University of New South Wales (Visiting Fellow, Associated with Professor Martin Krygier; PhD candidate supervised by the late Professor Ivan Shearer, shortly by Professor Christine Chinkin, and to completion by Professor Martin Tsamenyi - Lecturer 1986-96); Faculty of Law, University of Western Sydney-Nepean (Lecturer and Tenure-track Lecturer 1996-97, and thesis adviser to 2002, associated with Professors Carolyn and Razeen Sappiddeen); and School of International Service, American University (Adjunct Professor and Professorial Lecturer 2000-04 associated with Professors Renée Marlin Bennet and Paul Williams).

2005 to 2015, Consultant to IOC/UNESCO (Marine Scientific Research under UNCLOS), pro-bono adviser on Marine Scientific Research and Law of the Sea to the Advisory Body of Experts on the Law of the Sea ABE/LOS, and to various government Delegations to UN conferences; private international legal policy analyst on cyber security and implementation of the International Maritime Organization's International Ship and Port Security Code on maritime security worldwide.

The undersigned is the author of two maritime law and law of the sea monographs, as well as research studies and refereed papers that may be useful to the Committee. See: An International Regime for Marine Scientific Research

[<https://brill.com/view/title/14020> reviewed by Dr. Nele Matz in the Max Planck Yearbook of United Nations Law 2005, https://www.mpil.de/files/pdf2/mpunyb_bookreviews_9_697_704.pdf]; Defense Aspects of Marine Scientific Research [with Professor Martin Tsamenyi, <https://www.tandfonline.com/doi/abs/10.1080/07266472.1997.10878495>] cited in 2017 by Efthymios Papastavridis in a US Naval War College Naval War College publication <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1712&context=ils>; Gorina-Ysern, <https://www.asil.org/insights/volume/7/issue/22/legal-issues-raised-profitable-biotechnology-development-through-marine>; Gorina-Ysern and Ms. Aurora Mateos, <https://www.asil.org/insights/volume/14/issue/8/climate-change-and-guidelines-argo-profiling-float-deployment-high-seas>.

Presently, Founder and President, Healthy Children-Healthy Oceans Foundation since 2006, a non-stock and not-for profit corporation registered in the US, with a US Patent and Trademark Office registered mark in the main Registry, engaged in charitable, educational, and capacity building awareness projects in the US and elsewhere.

The undersigned is also an accredited (Australia 1987) and certified (Maryland 2007) Spanish language court interpreter and translator; and a certified digital filmmaker by Boston University (2014), providing professional services as Montserrat Gorina-Ysern, LLC (woman-owned registered in Maryland USA).

Reason for submitting evidence. To the extent of her familiarity with the field of inquiry, the undersigned is guided by a professional desire to assist the Committee in reaching effective and sensible responses in its assessment. She conveys best wishes to the distinguished members of the House of Lords International Relations and Defense Committee of the United Kingdom Parliament.

General

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

UNCLOS is built on the provisions of the 1958 Geneva Conventions on the law of the sea. These provide a customary international law solid foundation to UNCLOS. Additionally, the global rate of ratification and accession since UNCLOS was adopted in 1982 would indicate its provisions satisfy the needs of States Parties. The USA, not being a party and having congressional obstacles to accession, nonetheless, was a main player during the preparatory conferences, and abides by UNCLOS provisions - with some exceptions for deep seabed mining. Aside from the saber rattling in the South China Seas, the insecurity posed by piracy in some regions, and some notorious or lingering disputes (Falklands/Malvinas; Aegean Sea) there has been no major international conflict that ITLOS or the ICJ were unable to resolve by application of UNCLOS provisions.

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

In terms of outreach, the UK exerts a unique influence on 2.5 billion people around the globe.

Historical maritime powers and States with rich technological and scientific infrastructures in Europe, Russia, China, South East Asia, Indian Sub-continent, Australia/New Zealand, South America, Mexico, Canada and the USA exert considerable influence on the development of the law of the sea at the UN.

However, it is fair to say that since the entry into force of UNCLOS in 1994, States have organized around issues within the UN system and in regional organizations. There are very powerful groups, including G-77 whose reputation and force in numbers have changed the discourse in very significant ways.

Economic lobbying is an important force to reckon with, as different industries compete on the UN floor financing/favoring specific policies, and through global, international, regional, national and public opinion campaigns to influence the online-connected public.

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

Naval enforcement and civilian enforcement need to be distinguished.

Example of Naval Enforcement:

The Commander's Handbook on the Law of Naval Operations - used by the U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard:

- 2017th Edition: <https://www.hsdl.org/?view&did=806860>
- As to relevance: [https://www.marines.mil/Portals/1/Publications/MCTP%2011-10B%20\(%20Formerly%20MCWP%205-12.1\).pdf?ver=2017-07-11-151548-683](https://www.marines.mil/Portals/1/Publications/MCTP%2011-10B%20(%20Formerly%20MCWP%205-12.1).pdf?ver=2017-07-11-151548-683)
 - With Commentary over certain treaties: <https://www.history.navy.mil/content/history/nhhc/research/library/online-reading-room/title-list-alphabetically/c/commanders-handbook-on-the-law-of-naval-operations.html>

Examples of Civilian Enforcement:

Compliance is achieved through actions by **Flag State, Port State, and Coastal State** authorities and law enforcement services.

See generally: - **Oceans and the Law of the Sea**, Report by the United Nations Secretary-General. It covers the period from 1 September 2020 to 31 August 2021: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/237/46/PDF/N2123746.pdf?OpenElement> [hereinafter 2021 UNSG Report]

2021 UNSG Report para 68. Committee on Fisheries of Food and Agricultural Organization (**FAO**) 2030 Agenda, small-scale and artisanal fisheries, ecosystems approach to fisheries, combatting illegal unreported and unregulated fishing and global and regional fisheries processes. The third meeting of States parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

2021 UNSG Report para 70. International Labor Organization (**ILO**) published guidelines for flag State and port State inspections under the Maritime Labour Convention, 2006.

In the UK, for example, Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**): <https://cites.org/eng/parties/country-profiles/gb/national-authorities>,

Regarding Dispute Resolution:

See Statute of the International Court of Justice

International Court of Justice (ICJ) cases and advisory opinions
International Tribunal for the Law of the Sea (ITLOS)

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

First, the implementation of UNCLOS is carried out within the principles and rules governed by the methodology of public international law.

The **Vienna Convention on the Law of Treaties (1969)** is the most important tool for the integration of UNCLOS within the field [See Vienna Convention on the Law of Treaties https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf].

Serving as specific sources of customary international law of the sea that complement UNCLOS are:

- 1958 Geneva Convention on the High Seas
- 1958 Geneva Convention on the Continental Shelf
- 1994 UNCLOS Implementation Agreement

Additionally, UNCLOS provisions relating to flora and fauna are complemented by

the provisions of the 1973 Convention on the International Protection of Endangered Species of Flora and Fauna (**CITES**).

Secondly, UNCLOS provisions are implemented through:

- Municipal laws of State parties
- Private sector agreements
- Bilateral and Regional Agreements

Thirdly, UNCLOS governs a series of activities based on the extraction of flora, fauna, and natural resources, including the genetic properties of certain marine resources. These activities are governed by the following - as well as other - complementary legal instruments:

- Paris Convention on the Protection of Industrial Property
- Patent Convention Treaty
- Strasbourg Agreement on International Patent Classification
- Budapest Treaty on the Deposit of Microorganisms for Patent Procedure
- International Convention on the Protection of New Plant Varieties
- European Patent Convention
- Berne Convention for the Protection of Literary and Artistic Works
- Universal Copyright Convention
- Brussels Convention on the Distribution of Program-Carrying Signals Transmitted by Satellite
- Agreement on Trade Related Aspects of Intellectual Property

[See Montserrat Gorina-Ysern, Marine Scientific Research. Overview of major issues, programs, and their objectives. Chapter 8, pp. 127-142 in Routledge Handbook of Ocean Resources and Management, Edited by Hance D. Smith, Juan Luís Suárez de Vivero, and Tundi S. Agardi, 2015

How many of the complementary sources and regimes interact with UNCLOS is the focus of the **Annual Reports of the United Nations Secretary General** where extensive multi-disciplinary references between UNCLOS implementation and other areas of public international law will be found:

- Secretary-General's **bulletin** setting out the Organization of the Office of Legal Affairs: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/015/44/PDF/N2101544.pdf?OpenElement>

- **Oceans and the Law of the Sea**, Report by the United Nations Secretary-General.

It covers the period from 1 September 2020 to 31 August 2021:

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/237/46/PDF/N2123746.pdf?OpenElement>

[hereinafter 2021 UNSG Report]

Dr. Patricio A. Bernal formally Executive Secretary IOC/UNESCO, provides the following list on table 3.1. on p. 44 of his report [See Routledge Handbook of Ocean Resources and Management, Edited by Hance D. Smith, Juan Luís Suárez de Vivero, and Tundi S. Agardi, 2015]:

- International Labor Organization (ILO)
- Food and Agricultural Organization (FAO)
- UN Economic Scientific and Cultural Organization (UNESCO)
- International Civil Aviation Organization (ICAO)
- Intergovernmental Oceanographic Commission (IOC)
- World Health Organization (WHO)
- World Bank (WB)
- United Postal Service (UPU)
- International Monetary Fund (IMF)
- International Telecommunications Union (ITU)
- World Meteorological Organization (WMO)
- International Maritime Organization (IMO)
- World Intellectual Property Organization (WIPO)
- UNIDO
- UN-WTO
- UN-DESA
- UN-DOALOS
- UN Development Program (UNDP)
- UN Environmental Program (UNEP)
- International Atomic Energy Agency (IAEA)
- UNISDR
- UN University (UNU)
- UNOPS
- UN Framework Convention on Climate Change (UNFCCC)
- Convention on Biological Diversity (CBD)

The above is not a comprehensive response to the inquiry, though it is intended as an aid for the Committee.

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

See expansive role of IMO. 2021 UNSG Report para 70: Ministerial Conference on Fishing Vessel Safety and Illegal, Unreported and Unregulated Fishing, held in 2019, IMO, Torremolinos Declaration on the Cape Town Agreement of 2012 on the Implementation of the Provisions of the Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977.

Challenges

6. 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)**

Trading routes: IMO WB IMF IMB BIMCO

Maritime Boundaries: ICJ, ITLOS

Status of Island States: depends on habitability at high tide/sea level rise.

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

Since the terrorist attacks of 9/11 in the USA, the IMO response with the ISPS CODE has improved considerably the safety of installations globally.

- Autonomous maritime vehicles (both commercial and military), cybersecurity, and other new technologies

See Gorina-Ysern and Mateos,

<https://www.asil.org/insights/volume/14/issue/8/climate-change-and-guidelines-argo-profiling-float-deployment-high-seas>

- 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

See Gorina-Ysern, <https://www.asil.org/insights/volume/7/issue/22/legal-issues-raised-profitable-biotechnology-development-through-marine>

CITES: <https://cites.org/eng/parties/country-profiles/national-authorities>

2021 UNSG Report para 71. Agreement to prevent Unregulated High Seas Fisheries in the Central Arctic Ocean entered into force on 25 June 2021

2021 UNSG Report para 72. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal regarding plastic waste.

2021 UNSG Report para. 99. WTO talks on the elimination of harmful fisheries subsidies [Geneva from 30 November to 3 December 2021] a number of crucial international meetings are expected to be held in 2022 on fisheries issues, including Review Conference on the Fish Stocks Agreement and the review by the General Assembly on bottom fishing.

Note: for the Fish Stocks Agreement see:

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-7&chapter=21&clang=en.

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

With due respect, this question is akin to asking whether the UN Human Rights legal body of universal declarations, fundamental rights covenants, treaties, and agreements should be renegotiated, in light of the poor implementation in some regions of the world.

As H.E. Mary Robinson observed some time ago, when asked about the need for new human rights treaties, all the instruments we need are already in place. What is needed is the political will to implement them effectively.

The history of UNCLOS reaches back to the late 1960s, and it took some 30 years until its entry into force. The Committee might wish to estimate how long it would take to renegotiate UNCLOS provisions through the UN system, what would be the effect in the interim for the clarity of legal rules to be applied, which authority would be able to advise in that regard, whether this would lead to non-compliance in key areas, and the cost of participation and new accession for States facing financial hardships.

An effective approach to existing challenges may include assistance to State agencies lacking staff and technical capacity, extracting more political will from the recalcitrant, and putting pressure on all States and relevant agencies to implement UNCLOS and to integrate its provisions with existing legal regimes through Art. 311, Part XVII.

UK's Maritime Strategy

8. 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?

- Insufficient familiarity to answer this question.

9. 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?

The UK, as the leader of the Commonwealth, includes directly and/or indirectly a global population of 2.3 billion people. The impact of UK UNCLOS implementation and enforcement measures is felt globally.

See Mrs. Luciana Fernandez Coelho forthcoming PhD at World Maritime University, on Marine Scientific Research implementation in Small Island Developing States in the Caribbean region.

10. 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?

As above.

11. In light of the challenges posed by climate change to the provisions of UNCLOS, what considerations should be given to the law of the sea during and after COP26, and what should be the position of the UK Government?

As above. This inquiry may turn out to require a systematic and well orchestrated political response to impending maritime crises triggering a domino effect over all the islands and territories associated with the Commonwealth, irrespective of what ensues elsewhere.

UNCLOS will be one of the mechanisms to review, but scarcely the only one.

The US Navy has offered humanitarian maritime responses around the globe over time: <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/s/sampling-of-us-naval-humanitarian-operations.html>

The humanitarian preparedness of the USNS Mercy and the USNS Comfort would serve as models to the Committee on how to prepare in the short term for what is likely in store for civilian governments around the world, as this century progresses.

See:

USNS Mercy <https://www.msc.usff.navy.mil/Ships/Mercy/>

USNS Comfort <https://www.southcom.mil/Media/Special-Coverage/Hospital-Ship-Medical-Assistance-Mission-USNS-Comfort-in-Latin-America/>

It will be the law of the land, not the law of the sea, that is going to pose hurdles to effective solutions in the short term.

Respectfully yours,

Montserrat Gorina-Ysern

Chevy Chase, Maryland, USA, November 11, 2021.

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