

## **The One Ocean Hub – Written evidence (UNC0030)**

### **The One Ocean Hub Written Evidence to the UK Parliament International Relations and Defence Committee**

#### **UNCLOS: Fit for Purpose in the 21<sup>st</sup> Century?**

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#### **Background information on the One Ocean Hub**

- 1.** The One Ocean Hub is an international programme of research for sustainable development, working to promote fair and inclusive decision-making for a healthy ocean whereby people and planet flourish. The Hub brings together coastal people, researchers, decision-makers, civil society, and international organisations to value, and learn from, different knowledge systems and voices. It specifically addresses the challenges and opportunities facing South Africa, Namibia, Ghana, Fiji, and the Solomon Islands, endeavouring to share relevant research findings at the regional and international levels. The Hub is funded by UK Research and Innovation (UKRI) through the Global Challenges Research Fund (GCRF), a key component in delivering the UK AID strategy to tackle the UN Sustainable Development Goals (SDGs). Led by the University of Strathclyde, UK, the Hub gathers 126 researchers, 21 research partners, and 19 project partner organisations, including UN bodies and programmes. The Hub is currently collaborating with the UN Food and Agriculture Organization and the UN Environment Programme to clarify and mainstream within pertinent policy dialogues the nexus between the ocean, climate change, biodiversity, and human rights. It has also been collaborating with the UN Division for Ocean Affairs and the Law of the Sea since 2020, providing virtual training sessions for government officials and other ocean practitioners around the world on the law of the sea, international environmental law and human rights.

#### **Scope of this written submission**

- 2.** This submission addresses a selection of the topics raised by the House of Lords International Relations and Development Committee in their call for evidence. In particular, the submission offers observations on the complementarities that exist between UNCLOS and other international agreements and treaties (question 4); the role played by international organisations in the progressive

development of the international law of the sea (question 5); the challenges facing the effective implementation of UNCLOS in 2021 (question 6); the need for and feasibility of renegotiating UNCLOS (question 7); and, finally, the opportunities available to the UK to lead the future development of the international law of the sea (question 9). The main recommendation put forward in this submission is that the UK **promote policy coherence by advocating a mutually supportive interpretation and application of international environmental law and international human rights law across levels and arenas of decision-making regarding oceanic affairs**. It is submitted that the more systematic consideration of the inter-dependencies between human rights and marine biodiversity can offer the following benefits:

- help harness the capacity of nature- and human-rights based solutions to strengthen policy coherence, this being a prerequisite for effective ocean conservation and sustainable ocean-based development;
- provide a platform for engaging the private sector, on the basis of business responsibility to respect human rights; and
- broaden alliances among environmental and human rights constituencies advocating for the conservation and sustainable use of marine biodiversity.

### **UNCLOS as a dynamic multilateral environmental agreement**

- 3.** The continued centrality of UNCLOS to global ocean governance cannot be overstated. Often referred to as 'a constitution for the oceans', the Convention establishes an integral maritime legal order which facilitates international communication and promotes the peaceful use of ocean space, the equitable, efficient, and sustainable utilization of marine economic resources, and the study, protection, and preservation of the marine environment.
- 4.** In the latter respect, the Convention sets out a general duty for States to protect and preserve the marine environment,<sup>1</sup> and calls upon them to exercise their sovereign right to exploit their natural resources according to that duty.<sup>2</sup> These broadly formulated obligations are largely regarded as anticipating 'a number of developments relating to the international law of the environment [...] particularly in connection with the ecosystem management approach'.<sup>3</sup> This obligation includes a due diligence obligation to, for example, prevent direct harvesting of internationally recognised endangered species, and the 'prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat'.<sup>4</sup> In addition, flag States must exercise due diligence in respect of fishing by vessels flying its flag in the exclusive economic zone of another State. This is exercised through the adoption of appropriate rules and measures, as well as a 'certain level of vigilance in their

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<sup>1</sup> UNCLOS, art 192.

<sup>2</sup> UNCLOS, art 193.

<sup>3</sup> Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (CUP 1999), 49.

<sup>4</sup> *South China Sea Arbitration (Philippines v Peoples Republic of China) (Merits) (2016)* paras. 956–7

enforcement and the exercise of administrative control'.<sup>5</sup> States are also expected to cooperate on a global and regional basis in fulfilling this obligation.<sup>6</sup>

5. It is hardly surprising then that the international community has time and again recognised the enduring relevance of UNCLOS as a multilateral environmental agreement: from the outcome document of the 1992 Rio Earth Summit to Agenda 2030, all the major international sustainable development instruments of the past thirty years acknowledge that the Convention 'provides the international basis upon which to pursue the protection and sustainable development of the marine and coastal environment and its resources'.<sup>7</sup>
6. While climate change and biodiversity were not at the forefront of the international agenda during the negotiation of UNCLOS, it should, however, be underscored that **the continuing vitality of UNCLOS as a multilateral environmental agreement is largely attributable to the range of mechanisms available to enable the evolutionary interpretation and application of the pertinent provisions.** The latter can be attributed to UNCLOS reference to the generally accepted rules and standards,<sup>8</sup> adopted under the auspices of functionally specialised international organisations, such as the International Maritime Organisation (IMO). This reference in UNCLOS also allows to incorporate into the law of the sea the standards adopted by the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD – discussed below), which provide guidance for states in complying with their obligations under UNCLOS and its implementing agreements.<sup>9</sup>
7. In addition, UNCLOS has been complemented by subsequently adopted 'implementation agreements', such as the 1994 Agreement Relating to Part XI and the 1995 UN Fish Stocks Agreement, which have contributed to clarify international obligations on the protection of the marine environment and its living resources. The same can be expected from the proposed legally binding instrument to regulate marine biological diversity of areas beyond national jurisdiction (BBNJ). These are crucial negotiations as there is broad understanding that the obligations and approaches to the conservation and sustainable use of BBNJ under UNCLOS require clarification.<sup>10</sup> Even if UNCLOS contains obligations to use best available science and generally agreed standards when designing conservation and management measures for the long-term sustainability of marine living resources and protecting the marine environment,<sup>11</sup> and even if it is widely acknowledged that UNCLOS should be interpreted and

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<sup>5</sup> UNCLOS, art 197.

<sup>6</sup> Daniela Diz, 'Marine biodiversity: unravelling the intricacies of global frameworks and applicable concepts' in Elisa Morgera and Jona Razzaque (eds.) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE, 2017).

<sup>7</sup> Agenda 21: Programme of Action for Sustainable Development, UN Doc A/CONF.151/26, para 17.1.

<sup>8</sup> UNCLOS, arts 192, 194, and 207.

<sup>9</sup> Daniela Diz, 'Marine biodiversity: unravelling the intricacies of global frameworks and applicable concepts' in E Morgera and Jona Razzaque (eds.) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE, 2017).

<sup>10</sup> UNGA Res 72/249 of 2017; latest version of the negotiating draft.

<sup>11</sup> D Diz, "Marine biodiversity: unravelling the intricacies of global frameworks and applicable concepts" in E Morgera and Jona Razzaque (eds) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE, 2017).

applied in accordance with the ecosystem approach,<sup>12</sup> as its preamble emphasizes “that the problems of ocean space are closely interrelated and need to be considered as a whole”, there is extensive legal literature that has underscored how other, more specific provisions in UNCLOS, notably in the area of fisheries, take a more sectoral and less precautionary approach to marine biodiversity.<sup>13</sup>

8. Furthermore, regional agreements aimed at facilitating multilateral cooperation on environmental and fisheries-related matters, the UN General Assembly’s annual resolutions on oceans and the law of the sea and sustainable fisheries, and the jurisprudence of international courts and tribunals contribute to support an evolving interpretation of UNCLOS.<sup>14</sup>
9. With regard to the fisheries provisions of UNCLOS, these are rather opaque, but international effort has been made to clarify these through the 1995 Fish Stocks Agreement, as well as a suite of legally binding and non-legally binding instruments developed under the auspices of the Food and Agriculture Organisation of the United Nations (FAO). For example, several instruments have been developed to tackle illegal, unreported, and unregulated (IUU) fishing. This includes the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which is legally binding on the States which accede to it, including the UK, and the non-legally binding International Plan of Action to prevent, Deter and Eliminate IUU Fishing. Further, the international community has pledged to combat IUU fishing through Sustainable Development Goal 14.4. Despite these evolutionary developments in the law of the sea, there are issues with fisheries and the seafood sector. For example, there is still a disconnect with implementing and enforcing human rights at sea, and current FAO IUU fishing instruments do not directly address human rights and labour abuses, which are known to occur on vessels conducting IUU fishing.<sup>15</sup> To address this disconnect, FAO are in the process of developing new international guidelines to set an internationally accepted standard for labour and human rights for workers on fishing vessels and in the seafood industry. These should complement the FAO Voluntary Guidelines on Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication, and the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security which also promote a human rights-based approach, and inform the fisheries and environmental provisions of UNCLOS. FAO has also reported a high level of implementation of their fisheries instruments, which should prove

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<sup>12</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015, ITLOS Reports 2015*, para. 131; quoting *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 14, at p. 97, para. 197; See also *South China Sea Arbitration*, para. 944.

<sup>13</sup> UNCLOS, art 237

<sup>14</sup> See, for example Erik Molenaar and Richard Caddell (eds.) *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart, 2019).

<sup>15</sup> See for example, reports by the NGO Human Rights at Sea, available online at: <https://www.humanrightsatsea.org/publications/>

promising in the context of improving human rights and labour conditions on fishing vessels and in the seafood sector.<sup>16</sup>

- 10.** Equally significant are normative and institutional developments transpiring within other international regimes, the substantive scope of which is more or less directly encompassing of marine environmental issues. UNCLOS specifically preserves the freedom of States to adopt further agreements relating to the protection and preservation of the marine environment, provided these are 'concluded in furtherance of the general principles and objectives set forth in this Convention'.<sup>17</sup> This clause paves the way for forging and fostering synergies between UNCLOS and many of the multilateral environmental agreements that succeeded it, including the 1992 UN Framework Convention on Climate Change and the Paris Agreement, the 1992 UN Convention on Biological Diversity (CBD), and international human rights instruments. In addition, UNCLOS itself supports a systemic interpretation of its provisions in light of other treaties concerning the protection of the marine environment,<sup>18</sup> so decisions adopted by the CBD Conference of the Parties (COP) – discussed below – provide guidance for states in complying with their obligations under UNCLOS and its implementing agreements.<sup>19</sup>
- 11.** Being the cornerstone of the international biodiversity regime, the **CBD** has a key role to play in the protection and preservation of the marine environment. The Convention states in this connection that its implementation with respect to the marine environment shall be '[consistent] with the rights and obligations of States under the law of the sea'.<sup>20</sup> This provision has been interpreted as encompassing not only UNCLOS, but also other agreements formulating the corpus of international law of the sea, including the UN Fish Stocks Agreement and relevant instruments elaborated within the framework of the UN Food and Agriculture Organization.<sup>21</sup> Also worth noting is that the jurisdictional scope of the CBD incorporates biodiversity components located in areas within the limits of national jurisdiction, as well as processes and activities carried out under the jurisdiction or control of Parties.<sup>22</sup> Accordingly, States Parties to the CBD must take measures to ensure that the actions of their nationals and of the ships flying the flag are in compliance with the general principles of the Convention, even when they occur on the high seas.<sup>23</sup>

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<sup>16</sup> FAO, COFI/2020/7 <http://www.fao.org/3/ne710en/ne710en.pdf>. E Morgera and J Nakamura, "Shedding a Light on the Human Rights of Small-scale Fisherfolk: Complementarities and Contrasts between the UN Declaration on Peasants' Rights and the Small-Scale Fisheries Guidelines" in Brunori et al, *Commentary on the Declaration on the Rights of Peasants* (Routledge, 2021) – available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3850133](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850133)

<sup>17</sup> UNCLOS, art 237(1).

<sup>18</sup> UNGA Res 72/249 of 2017; latest version of the negotiating draft.

<sup>19</sup> Daniela Diz, 'Marine biodiversity: unravelling the intricacies of global frameworks and applicable concepts' in E Morgera and Jona Razzaque (eds.) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (EE, 2017).

<sup>20</sup> CBD, art 22(2).

<sup>21</sup> Hanling Wang, 'Ecosystem Management and Its Application to Large Marine Ecosystems: Science, Law, and Politics' (2004) 35 *Ocean Development & International Law* 41.

<sup>22</sup> CBD, art 4.

<sup>23</sup> Louise Angélique de La Fayette, 'A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction' (2009) 24 *The*

**12. UNCLOS and the CBD thus provide clear entry points for their harmonious and mutually reinforcing interpretation and application. From this it follows that UNCLOS provisions of relevance to the protection of the marine environment and the sustainable use of marine economic resources can and should be read in the light of international biodiversity law and international human rights law.** This integrative perspective finds a solid legal basis not only in the above-cited provisions of the two conventions, but also in the principle of systemic interpretation of international law embedded in the Vienna Convention on Law of Treaties.<sup>24</sup> There have been insufficient efforts, however, to explore the prospects that this perspective offers, whether that be with a view to enhancing the capacity of UNCLOS to respond to contemporary socio-ecological challenges or with a view to rendering the normative landscape of international law more cohesive. Accordingly, the remainder of this submission will make the case for increased cross-fertilisation between the international law of the sea, international biodiversity law, international climate law, and international human rights law, and identify opportunities for the UK Government to exercise leadership to this end.

### **The nexus between the ocean, climate change, biodiversity, and human rights**

**13.** In 2019, the Intergovernmental Panel on Biodiversity and Ecosystem Services (IPBES) released its long-anticipated assessment of the status and trends of the natural world, the direct and indirect causes of these trends, their implications for human well-being, and, importantly, the actions that can still be taken to stem the tide of deterioration. The report concluded that 'nature across most of the globe has now been significantly altered by multiple human drivers, with the great majority of indicators of ecosystems and biodiversity showing rapid decline'.<sup>25</sup> With specific regard to the ocean, the report noted that, already in 2014, only 3% of the marine environment was deemed free from human pressure while some 66% was found to be experiencing increasing, and increasingly severe, cumulative impacts (compared to 40% in 2008). Predictably, the resulting decline in the richness and abundance of marine life was found to undermine the ocean's manifold contributions to human societies, including vis-à-vis food security and climate change mitigation and adaptation. It was also said to hold far-reaching implications for the achievement of the SDGs, undermining progress towards 80% (35 out of 44) of targets assessed within Goal 1 on poverty, Goal 2 on hunger, Goal 3 on health, Goal 6 on water, Goal 11 on cities, Goal 13 on climate, Goal 14 on oceans, and Goal 15 on land).

**14.** The Panel responded to these findings with a number of recommendations, several of which can be readily linked to environmental human rights concerns and related international standards. For instance, the Panel underscored the

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*International Journal of Marine and Coastal Law* 221.

<sup>24</sup> Vienna Convention on the Law of Treaties, art 31(3)(c).

<sup>25</sup> Sandra Díaz and others, *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES 2019), 11.

need to address socioeconomic inequalities that undermine human societies' capacity for sustainability, including inequalities related to income, race, and gender; ensure inclusive decision-making and the fair and equitable sharing of benefits arising from the sustainable use and conservation of biodiversity; and promote the respectful inclusion of indigenous and local knowledge within environmental governance.

15. Enter the CBD Conference of the Parties (COP), which is the principal body charged with overseeing the implementation of the Convention. The COP is recognised as 'a prolific norm-creating body across all areas covered by the CBD and on issues that are directly or indirectly related to biodiversity'.<sup>26</sup> To date, the COP has adopted a number of decisions, action plans, and targets in order to provide concrete advice to States Parties to the CBD as to how they should go about discharging their obligations.
16. This normative activity has increasingly centred around the ocean. Having launched **an ongoing work programme on marine and coastal biodiversity** as early as 1995,<sup>27</sup> the CBD COP has since gone on to address a broad range of related issues and activities, placing particular attention on those not regulated fully or adequately by other international instruments, such as ocean fertilisation, ocean acidification, underwater noise, marine debris, invasive species,<sup>28</sup> coral reefs conservation,<sup>29</sup> and guidance for the incorporation of biodiversity considerations in environmental impact assessment and strategic environmental assessments.<sup>30</sup>
17. Both in decisions of direct relevance to marine and coastal biodiversity and in decisions dealing with cross-cutting matters (e.g., environmental impact assessment), the CBD COP has adopted an approach which is conducive to the synergistic interpretation and application of international environmental law and international human rights law. **Whilst CBD decisions tend not to be explicitly couched in human rights language, they nevertheless incorporate equity considerations, hence providing useful entry points for mainstreaming human rights considerations into marine and coastal biodiversity management.** For instance, CBD Parties have agreed that equitable governance models for protected and conserved areas are those that include appropriate procedures and mechanisms for the full and effective participation of indigenous peoples and local communities and for the recognition of customary tenure and governance systems; ensure gender-equitable representation in the establishment, governance, planning, monitoring, and reporting of protected and conserved areas situated within traditional territories (lands and waters); provide for the equitable sharing of benefits based on

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<sup>26</sup> Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2010) 21 Yearbook of International Environmental Law 3, 6-7.

<sup>27</sup> See, indicatively, CBD COP Decisions II/10, IV/5, and X/29.

<sup>28</sup> James Harrison, *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment* (OUP 2017), 48.

<sup>29</sup> CBD Dec XII/23.

<sup>30</sup> CBD Dec XI/18.

criteria agreed among rights- and stake-holders; promote transparency and accountability; and make arrangements for fair dispute or conflict resolution.<sup>31</sup>

- 18.** The focus placed on the rights of indigenous peoples and local communities resonates with IPBES' finding that biodiversity is declining less rapidly in indigenous peoples' lands, which cover at least a quarter of the global land area, including approximately 35% of the area that is formally protected, as well as approximately 35% of all remaining terrestrial areas with very low human intervention. For their part, CBD Parties have increasingly acknowledged the role of Indigenous and Community Conserved Areas,<sup>32</sup> calling for recognising, respecting, and supporting community-based approaches to conservation and the integration of communities in governance and management arrangements.<sup>33</sup>
- 19.** The significance of these developments becomes evident when one takes into account the fact that CBD COP decisions are adopted by consensus. This mode of decision-making entails an international law-making effect, serving to '[secure] widespread support for a text that legitimizes and promotes consistent State practice'.<sup>34</sup> The Inter-American Court of Human Rights has accordingly considered CBD COP decisions as tools not only for the evolutionary interpretation of the CBD itself, but also for the mutually supportive interpretation of international environmental and human rights standards. Thus, the Court identified the following safeguards for establishing conservation measures on indigenous peoples' traditional lands: effective participation, continued access and use of traditional territories by indigenous peoples that are compatible with protection and sustainable use, and fair and equitable benefit-sharing from conservation measures.<sup>35</sup> More generally, the reliance of international human rights bodies on the CBD and its COP decisions confirms the binding nature of the underlying obligations, clarifying the limits for States' discretion in implementing international biodiversity obligations.<sup>36</sup>
- 20.** Moreover, the CBD has produced a series of guidance documents negotiated and agreed upon by 196 Parties which have already addressed an array of issues at the intersection of biodiversity, climate change, and human rights, which relate directly or implicitly to ocean management. CBD Parties have already systematically identified potential and actual threats that climate change

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<sup>31</sup> CBD Dec XIV/8, annex II.

<sup>32</sup> Holly C Jonas, 'Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs): Evolution in International Biodiversity Law' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017).

<sup>33</sup> CBD Decisions X/31/B (2010) para 31, XII/19 (2014) para 4(f), and X/33 (2010) para 8(i); 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (19 January 2017) UN Doc A/HRC/34/49 (Knox Report), para 71.

<sup>34</sup> Elisa Morgera, 'The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law' (2018) BENELEX Working Paper No 17, 14, available online at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3273997](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3273997)

<sup>35</sup> *Case of the Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs) [2015] IACtHR Series C No. 309, paras 181 and 197.

<sup>36</sup> Elisa Morgera, 'Under the radar: the role of fair and equitable benefit-sharing in protecting and realising human rights connected to natural resources' *The International Journal of Human Rights* 23 (2019), available online at: <https://www.tandfonline.com/doi/abs/10.1080/13642987.2019.1592161>



response measures pose to the conservation and sustainable use of marine biodiversity. They have also identified to assess and prevent negative impacts on biodiversity through mutually supportive interpretation and application of international climate and biodiversity law. Specifically, the CBD's guidance on the ecosystem approach has contributed to clarifying a human rights-based approach to climate change adaptation and mitigation, mainly with regard to indigenous peoples and local communities (including small-scale fishers).<sup>37</sup> CBD decisions can be considered to be the expression of subsequent agreement or subsequent practice related to obligations – in other words, their legal value as interpretative tools is derived from the obligatory nature of CBD provisions that they clarify. Even in the few exceptional cases in which Parties have excluded their value as treaty interpretation tools, CBD guidelines could be considered as 'best practices' that serve to 'facilitate the implementation' of existing international obligations and should be 'adopt[ed] as expeditiously as possible.'<sup>38</sup> In addition, to the extent that the interpretative value of CBD COP decisions is also recognised from an international human rights perspective, their legal value can also be derived from the legally binding human rights obligations to the interpretation of which they are considered relevant.<sup>39</sup>

**21.** The impacts of climate change on the ocean are well documented and have recently been synergised in the Intergovernmental Panel on Climate Change's Special Report on Oceans and the Cryosphere published in 2019.<sup>40</sup> As indicated in paragraphs 6 and 7, UNCLOS must be interpreted and applied in an evolutionary manner in line with developments of international law and policy.<sup>41</sup>

**22.** On the **ocean-climate nexus**, CBD Parties have committed to:<sup>42</sup>

- integrating ecosystem-based approaches when updating their nationally determined contributions, where appropriate and pursuing domestic climate action under the Paris Agreement, taking into account the importance of ensuring the integrity and functionality of all ecosystems, including the ocean;

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<sup>37</sup> Elisa Morgera, 'No need to reinvent the wheel for a human rights-based approach to tackling climate change' *Edinburgh Research Explorer* (2013) available online at:

[https://www.pure.ed.ac.uk/ws/portalfiles/portal/16211494/No\\_need\\_to\\_reinvent\\_the\\_wheel\\_for\\_a\\_human\\_rights\\_based\\_approach\\_to\\_tackling\\_climate\\_change.pdf](https://www.pure.ed.ac.uk/ws/portalfiles/portal/16211494/No_need_to_reinvent_the_wheel_for_a_human_rights_based_approach_to_tackling_climate_change.pdf); Elisa Morgera, 'Fair and equitable benefit-sharing in a new international instrument on marine biodiversity: A principled approach towards partnership building?' *Maritime Safety and Security Law Journal* 8 (2019) available online at: <https://www.marsafelawjournal.org/contributions/fair-and-equitable-benefit-sharing-in-a-new-international-instrument-on-marine-biodiversity-a-principled-approach-towards-partnership-building/>

<sup>38</sup> This applies by analogy the reasoning in John Knox (2018), 'Human rights obligations relating to the enjoyment of a safe, clean, health and sustainable environment' UN Doc. A/73/188.

<sup>39</sup> Elisa Morgera "Biodiversity as a Human Right and its Implications for the EU's External Action", Report to the European Parliament, (2020) available online at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO\\_STU\(2020\)603491\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603491/EXPO_STU(2020)603491_EN.pdf)

<sup>40</sup> Intergovernmental Panel on Climate Change, *Special Report on the Ocean and Cryosphere in a Changing Climate* (2019) available online at: <https://www.ipcc.ch/srocc/>

<sup>41</sup> VCLT, art 31(3)(c); see also the *South China Sea Arbitration* (Merits).

<sup>42</sup> CBD Dec. XIV/5.

- recognising that ecosystems can be managed to limit climate change impacts on biodiversity and support people's resilience, taking into account multiple social, economic and cultural co-benefits for local communities; and
- recognising the role of Indigenous and Community Conserved Areas and biodiversity-based livelihoods in the face of climate change.<sup>43</sup>

**23.** With specific regard to **climate change adaptation**, CBD Parties have adopted voluntary guidelines for the design and effective implementation of ecosystem-based approaches to adaptation and disaster risk reduction.<sup>44</sup> These should be aimed at contributing to the well-being of societies, including indigenous peoples and local communities, together with maintaining as well as increasing the resilience of ecosystems and people. The guidelines should be read in conjunction with the CBD short-term action plan on ecosystem restoration.<sup>45</sup> Together, these guidelines call for:

- ensuring transparency throughout planning and implementation;
- promoting fair and equitable benefit-sharing and not exacerbating existing inequities,<sup>46</sup> thus aiming to prevent and avoid the disproportionate impacts of climate change as well as disaster risk on vulnerable groups, indigenous peoples as well as local communities, women and girls;<sup>47</sup>
- integrating traditional knowledge in identifying and monitoring climatic, weather and biodiversity changes along with impending natural hazards and maintaining/re-introducing customary sustainable use (traditional agricultural practices);
- applying the CBD Akwé Kon Guidelines on environmental and socio-cultural impact assessments at the earliest stage of project design;<sup>48</sup>
- seeking prior informed consent through the full and effective participation of indigenous peoples and local communities, as well as the engagement of women and other relevant stakeholders at all stages of ecosystem restoration, particularly in the identification of priority areas for restoration;
- reviewing, improving or establishing a legal and policy framework for land tenure, recognising the rights of indigenous peoples and local communities;
- selecting restoration approaches that allow people to maintain and/or establish sustainable livelihoods; and
- maximising synergies to achieve multiple benefits, for instance in gender equality and human health.<sup>49</sup>

**24.** On **coral reefs and closely associated ecosystems (such as mangroves and seagrasses)**, CBD Parties have adopted voluntary guidelines that can

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<sup>43</sup> CBD Report of the Workshop on the Ecosystem Approach (1998) UN Doc. CBD/COP/4/Inf.9.

<sup>44</sup> CBD Dec XIV/5.

<sup>45</sup> CBD Dec XIII/5.

<sup>46</sup> CBD Dec XIII/5, Annex para 8.

<sup>47</sup> CBD Dec XIV/5.

<sup>48</sup> CBD Dec XIV/5.

<sup>49</sup> CBD Dec XIII/5, Annex para 8-10, 13(3), 14(2), 15(1).

support socio-ecological resilience to the impacts of climate change, as well as respect for substantive and cultural rights, by calling for:

- maintaining sustainable livelihoods and food security in reef-dependent coastal communities, including indigenous and local communities, along with providing for viable alternative livelihoods;
- promoting community-based measures, including community rights-based management, to manage fisheries sustainably; and encouraging as well as supporting community-based marine managed areas;
- managing impacts from large-scale tourism development and consequent habitat loss as well as alteration in coral reefs and closely associated ecosystems, together with support for sustainable tourism, by providing socioeconomic incentives and empowering coastal communities for eco-tourism operations;<sup>50</sup>
- identifying and applying measures to improve the adaptive capacity of coral reef-based socio-ecological systems within the local context, which will ensure sustainable livelihoods of reef-dependent coastal communities and provide for viable alternative livelihoods, on the basis of socio-ecological vulnerability monitoring and assessment protocols in coral reef regions;
- prioritising poverty-reduction programmes for reef and essential habitats (e.g., mud banks and flats) dependent coastal communities and implementing socioeconomic incentives to encourage coastal communities to play a central role in conservation and sustainable use of coral reefs along with closely associated ecosystems (for instance, through community-based conservation trust funds supported by fees from ecotourism and fines for unsustainable use); and empowering coastal communities in reef-management, by providing necessary resources and capacity-building, as well as devolving responsibilities;<sup>51</sup>
- the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction are shared commons important for collective ecosystem services as marine species travel from areas within national jurisdiction to areas beyond national jurisdiction and vice versa during their life-cycle. In addition, activities in areas beyond national jurisdiction (e.g. mining) can have profound impacts on marine ecosystem and coastal communities within their national jurisdiction.<sup>52</sup>

### **Opportunities for the UK Government to foster synergies between the international law of the sea, international biodiversity law, and international human rights law**

**25.** In its 25-year Environment Plan, the UK committed to protecting and improving international biodiversity, using its influence to build support for an ambitious post-2020 international biodiversity strategy, rooted in a natural capital approach that emphasises the importance of nature’s contribution to

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<sup>50</sup> CBD Dec XII/23, para 8.1.b, 8.3.c-g, 8.8c.

<sup>51</sup> CBD Dec XIV/5, para 9 and 10(f).

<sup>52</sup> CBD, art 4.

people, their health and prosperity, and the links with the SDGs, and the Paris Agreement.<sup>53</sup> Among other action points is playing an active role in securing a new international agreement for the conservation and sustainable use of marine areas beyond national jurisdiction.

**26.** Against this background, this submission identifies two key opportunities for the UK to act towards fostering synergies between the international law of the sea, international biodiversity law, and international human rights law. The first opportunity is **the 15<sup>th</sup> meeting of the CBD COP**, the second and final meeting is scheduled to take place between 25 April – 8 May 2022. This meeting will see CBD Parties finalise a post-2020 global biodiversity framework, outlining what countries need to do going forward, individually and collectively, to align humanity’s trajectory with the Convention’s overall vision of ‘living in harmony with nature’ by 2050. COP 15 is thus a crucial opportunity to reflect the understanding that the full enjoyment of everyone’s human rights to life, health, food, and water depend on healthy marine and coastal ecosystems.<sup>54</sup> The UK could also exercise global leadership by supporting children and youth’s participation, as well as the consideration of **children’s human rights**, in negotiations on marine biodiversity.<sup>55</sup>

**27.** The second opportunity is **the fourth session of the Intergovernmental Conference on a new international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction**, which is expected to take place in 2022. It is recommended that the UK Government rely on the normative guidance adopted by CBD Parties as a means of better joining up the different elements of the package of issues under negotiation, namely, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments, strategic environmental assessments and capacity-building and the transfer of marine technology. In particular, the CBD voluntary guidelines for the consideration of biodiversity in environmental impact assessments and strategic environmental assessments in marine and coastal areas are important in promoting and facilitating EIA and SEA processes which are inclusive of both biodiversity and human rights.<sup>56</sup> The Guidelines promote an ecosystem approach, and as such are not restricted to national jurisdiction. In particular, there is a need to include provisions in the new legally binding

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<sup>53</sup> DEFRA, ‘A Green Future: Our 25 Year Plan to Improve the Environment’ (HM Government 2018), 119.

<sup>54</sup> Knox Report, para 5; ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (15 July 2020) UN Doc A/75/161 (Boyd Report).

<sup>55</sup> Michael Sweeney and Elisa Morgera, ‘Don’t forget a healthy ocean as part of children’s right to a healthy environment’ *One Ocean Hub Policy Brief* available online at: <https://oneoceanhub.org/publications/policy-brief-dont-forget-a-healthy-ocean-as-part-of-childrens-right-to-a-healthy-environment/>

<sup>56</sup> CBD, Decision XI/18; see discussion in Harrison, J., Lobach, T., Morgera, E., Diz, D., Kuemlangan, B., Manoa, P. and Hamley, G. 2019. *Step-wise guide for the implementation of international legal and policy instruments related to deep-sea fisheries and biodiversity conservation in the areas beyond national jurisdiction*. Rome, FAO, at 30-31.

instrument on SEAs, in line with CBD Parties' obligation to carry these out,<sup>57</sup> which needs to take into account potential impact on human rights and multiple impacts of climate change. However, this remains controversial in the current draft text of the instrument.<sup>58</sup> In addition, the UK should support an appropriate multilateral institutional structure under the new instrument, in order to identify collectively the greatest need for progress in ocean science, conservation and management to support basic economic, social and cultural rights, taking into account ecological connectivity between areas within and beyond national jurisdiction, as well as our evolving understanding of the ecosystem services provided by BBNJ.<sup>59</sup>

**28.** An additional opportunity is presented by the concomitant **UN Decade for Ocean Science for Sustainable Development** and the **UN Decade for Action on Ecosystem Restoration** (2021-2030). The UK has an opportunity to exercise global leadership by underscoring the need to systematically address coastal and marine ecosystem restoration with a view to contributing also to climate mitigation and adaptation action (notably nature-based solutions), and human rights-based protection, thereby supporting multiple Sustainable Development Goals. To that end, the UK could also channel climate, ocean and biodiversity finance towards supporting transdisciplinary research on the nexus of climate change, ocean, biodiversity restoration and human rights as a precondition for transformative science/policy engagements, to develop inclusive and resilient climate responses to the benefit of the most vulnerable.<sup>60</sup>

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<sup>57</sup> CBD, art. 14(b).

<sup>58</sup> Draft art 1(13), 21bis(c), and partial brackets in art. 28 in A/CONF.232/2020/3, Annex.

<sup>59</sup> Elisa Morgera, 'The relevance of the human right to science for the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction: A new legally binding instrument to support co-production of ocean knowledge across scales' in Vito De Lucia, Lan Nguyen and Alex G. Oude Elferink (eds.) *International Law and Marine Areas beyond National Jurisdiction: Current Status and Future Trends* (Brill, 2021 Forthcoming) available online at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3870399](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3870399)

<sup>60</sup> Mitchell Lennan 'Integrated and inclusive ocean governance is essential to tackling climate change' *One Ocean Hub Policy Brief*, available online at: <https://oneoceanhub.org/publications/integrated-and-inclusive-ocean-governance-is-essential-to-tackling-climate-change/>