

RESEARCH ARTICLE

# The United Nations Convention on the Law of the Sea, global justice and the environment

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## Abstract

The recent fortieth anniversary of the United Nations Convention on the Law of the Sea (UNCLOS) has sparked a good deal of reflection and retrospection. Looking back, it is clear that the Convention's architects carefully navigated, and selectively absorbed, a number of competing visions of oceanic governance, from freedom to enclosure to visions of Global North–South equality. This made the Convention's construction period a very drawn-out and painful one – longer than for any other international treaty in history – and while some hopes were realized, others were dashed. Forty years on, it is important not to let its current canonical status blind us to the fact that the Convention came close to being a failure, and that things could have gone differently at a number of critical junctures. Nor should it stop us asking whether UNCLOS is really fit for purpose today. In this article, I situate the Convention within wider developments in the global economy and the global environment, and consider the role it has played in promoting goals of global justice and environmental protection.

**Keywords:** environment; global justice; Global North–South equality; oceanic governance; United Nations Convention on the Law of the Sea (UNCLOS)

## I. Introduction

The recent fortieth anniversary of the United Nations Convention on the Law of the Sea (UNCLOS) has sparked a good deal of reflection and retrospection. To browse now through the pages of the Convention is to remember, among other things, what a monumental edifice it is. As David Freestone (2012: 677) points out, 'The sheer size of the Convention and the breadth of its ambit are unprecedented and remain unequalled' within international law. In all of its complexity, UNCLOS has gone on to become a central and settled feature of international law, and one of its most widely subscribed instruments (with the United States, which did much to shape the Convention but has never ratified it, being the most notable holdout).

Yet the monumental stature of UNCLOS should not blind us to the controversies that rendered its construction so very fraught. Those have never quite gone away, and have in some respects intensified in recent years. Looking back, it is clear that the Convention's architects carefully navigated, and selectively absorbed, a number of competing visions of

oceanic governance, from freedom to enclosure to visions of Global North–South equality. This made the Convention’s construction period a very drawn-out and painful one – longer than for any other international treaty in history – and while some hopes were realized, others were dashed. Forty years on, it is important not to let its current canonical status blind us to the fact that the Convention came close to being a failure, and that things could have gone differently at a number of critical junctures. Nor should it stop us asking whether UNCLOS is really fit for purpose today. In this article, I situate the Convention within wider developments in the global economy and the global environment, and consider the role it has played in promoting goals of global justice and environmental protection.

## II. UNCLOS and global justice

Our first topic might seem an odd one because, in retrospect, it is far from clear that political leaders in Europe and North America saw the promotion of global justice as a major objective for a new Convention at all. For the most part, they appear to have sought a Convention that would minimize disputes over the exploitation of natural resources. Cod Wars were bubbling up off the coast of Iceland. The emergence of new, but capital-intensive, opportunities such as offshore fossil fuel extraction placed a premium on security of title at sea, without which private investment would be very risky. By ushering in exclusive economic zones (EEZs) and the continental shelf regime, the Convention set clear ground-rules for the extractive economy at sea.

But rival visions were also at play, within which concerns of global justice were central. The years leading up to the decisive treaty-making conference witnessed a major revolution in world politics. Scores of societies emerged from colonialism, with their own views about what a postcolonial international order and a fair global economy should look like (Getachew 2019). Crucially, they came to believe that the Convention could play a central role in bringing about a just world order. This created a strong North/South dynamic, which turned out to be by far the greatest source of tension in the treaty-making process (disagreements between East and West, by contrast, were minimal: the United States and the Soviet Union had remarkably similar views about the form a new Convention should take).

Although many newly independent countries keenly supported the introduction of EEZs (which would, they believed, protect their coastal fisheries from the predations of distant water fleets), they also saw the regime for the mining of mineral resources on the deep seabed as an important instrument of global redistribution. Negotiators from the South were adamant that private exploitation of the seabed beyond national jurisdiction should be forbidden: an international public corporation called the Enterprise should monopolize extraction instead. This Enterprise would initially be funded by the Global North, but its eventual profits would then be used by the International Seabed Authority (ISA) to fund catch-up development for the South. If successful, this might even eliminate dependence on foreign aid and foreign investment (which typically came with political strings attached), providing space and resources for autonomous economic development. The Convention could help to transform the economic, and therefore political, relationship between North and South, remaking the world order at sea (Armstrong 2022).

The North’s hostility to this radically new model of pro-poor extractivism almost spelled the demise of the Convention. Although it was adopted in 1982, over the next decade, Iceland – the government of which was keen to assert sovereignty over cod – was

alone among wealthy countries in ratifying it. To the new Reagan administration in the United States, the idea that the Enterprise would have a monopoly on extraction represented the thin end of the wedge of international socialism. It took an oddly titled Implementing Agreement to placate the North – oddly titled because this Agreement actually undercut the most basic principles of the seabed mining regime, rendering the Enterprise practically inoperable, and transforming the ISA from a potential agent of global justice into little more than a registry for corporate mining claims.

By and large, then, the leading powers managed to head off the egalitarian challenge from the South. The Treaty in general, and the ISA in particular, have not turned out to be redistributive institutions. There have been some winners in the Global South, especially in fishing, but by and large the dream that UNCLOS would help usher in a more egalitarian world order was dashed. As a result of geographical differences, uneven access to capital and patchy state capacity, the ocean economy has ended up being even more unequal than its land-based equivalents (Armstrong 2020). Although the Convention declared an ambition to integrate landlocked or ‘geographically disadvantaged’ countries into the ocean economy, this has never occurred in a sustained way. Despite extensive nutritional reliance on fish in many poor countries of the world, traded fish still flows, for the most part, from South to North, and many Southern countries have signed resource concessions with multinational corporations on highly unfavourable terms. The slow emergence of the Convention, and its real life as an effective treaty, saw some visions realized and others closed down. As such, it displayed in miniature what Ranganathan (2021: 161) has called the ‘flickerings and foreclosures of the various possibilities of the decolonization moment’. The dream that oceanic governance could be a vehicle for a more equal world remains unrealized.

### III. UNCLOS and environmental protection

The emergence of the climate and biodiversity crises is placing many parts of the global institutional architecture under severe strain, and UNCLOS is not distinctive in that regard. But in retrospect, it has probably fared worse than most. Some of its omissions are perhaps forgivable: the Convention was drafted before widespread recognition of the massive problem of climate change and it is not surprising that it contains no reference to either greenhouse gas emissions or the ocean’s role as perhaps the world’s most important carbon sink. Neither should it necessarily be blamed for failing to anticipate growing problems such as plastic pollution. But the crucial question is not whether the Convention’s architects should have anticipated such problems, but rather whether it possesses the tools to respond effectively to them now.

Here there are serious reasons for doubt. If it is true that the overwhelming focus of the Convention was on orderly access to marine resources, the lack of provisions that would protect biodiversity or individual marine animals as ends in themselves should not come as a surprise. But rereading the Convention can still be a jarring experience. Among other things, the Convention never recognizes that the organisms that inhabit the ocean might have rights worthy of protection, and that this could justify constraints on their exploitation. Instead, those creatures exist in the Convention only in their role as resources to be argued over. In that respect, the language of Article 62 is probably the most glaring. It suggests that each coastal state should endeavor to harvest the ‘entire allowable catch’ of living resources within its EEZ, and that if it does not possess the capacity to do so, it should give access to other states instead so they can complete the job. Although allowable

catch is defined here in terms of sustainable yield, the overall imperative – that the living resources of the ocean should be fully ‘utilized’ – is clear.

In recent years, truly global problems such as ocean acidification, sea level rise and plastic pollution have placed pressure on the sectoral, compartmentalized approach taken by the Convention. The failed egalitarian experiment of the deep-sea mining regime notwithstanding, the Convention is trapped in a dialectic between state enclosure and freedom of the seas, neither of which has facilitated effective responses to such problems. Within their coastal zones, some states have certainly allowed local ecosystems to recover, even if many others have lacked either the political will or the capacity to do so. But no state can effectively protect its coastal waters from threats such as acidification or plastic pollution, and ocean warming now seems likely to bring about enormous changes in living ecosystems, irrespective of political boundaries.

It is on the high seas, however, that we see the biggest challenges. Under a system of exclusive flag state jurisdiction – where each state is alone responsible for the activities of vessels sailing under its flag – the struggle to establish large marine protected areas on the high seas has for the most part ended in failure. The flag state system has also meant that the contribution the regional fisheries management organizations (RFMOs) could make to sustainable governance has been continually undercut. We have to hope that the new Biodiversity Beyond National Jurisdiction (BBNJ) treaty will make more headway. Among other things, the new treaty is notable for taking ideas that have been prominent since the Rio Summit of 1992 – including the precautionary principle and the ecosystem approach – and giving them a proper role within the UNCLOS system. But the agreed text does not provide much confidence that significant ‘governance gaps’ will really be closed. Individual countries appear to have considerable autonomy over whether Environmental Impact Assessments (EIAs) are carried out in relation to their activities on the high seas, and the roles of other countries and the scientific and technical body of the new Convention appear to be limited to sending them comments. The mechanism for establishing marine protected areas (MPAs) on the high seas is a vital innovation, especially given global commitment to the ‘30 by 30’ target for biodiversity conservation (which is central to the recent Kunming–Montreal Global Biodiversity Framework). But countries have multiple grounds on which they can object to MPAs – in which case they would apparently not be bound by their rules – and this part of the agreed text does not mention fish at all. Establishing a substantial network of MPAs will be one challenge; however, ensuring that it actually makes a significant positive impact on high seas ecosystems will be quite another.

#### IV. Conclusion

Four decades on, it is clear that for those who care about environmental protection or global justice, the record of UNCLOS has been seriously disappointing. The Convention has undoubtedly helped to reduce conflict over marine resources, smoothing the rapid progress of the ‘blue economy’. But is it now ripe for revolution? Faced with such questions, scholars of ocean law tend to point out that there is ‘no desire in the international community’ to replace UNCLOS, ‘or even radically to amend it’ (Churchill 2015: 45). That invites the response that the 1994 Implementing Agreement, rather than merely implementing the mining provisions of UNCLOS, actually overturned many of its key principles (Ranganathan 2021: 180). If the Implementing Agreement is to be celebrated as an ‘excellent example of adapting international law to new circumstances’

(Sohn 1994: 705), why not contemplate others too? Today, there is a danger that sheer relief a new treaty on Biodiversity Beyond National Jurisdiction has been agreed will close off discussions about the future of ocean governance for the foreseeable future. In time, we might decide that the new treaty applied a sticking-plaster to an edifice that was crumbling, and distracted us from asking deeper questions about the governance of the ocean.

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