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EVIDENCE SUBMISSION ON UNCLOS

INTRODUCTION

This evidence is submitted by the Maritime Security team¹ within the Centre for Trust, Peace and Social Relations (CTPSR) at Coventry University. Since 2012 we have conducted research on all aspects of security in the maritime domain examining issues as diverse as Illegal, Unregulated, and Unreported (IUU) fishing and associated crimes, piracy, port security and irregular migration by sea. We specialise in exploring the relationship between (in)security and sustainable development and focus on enhancing maritime security governance and capacity-building efforts, all of which rely on effective legal frameworks. Our research also informs our education portfolio which includes our MA in Maritime Security, alongside Continuous Professional Development (CPD) programmes both at home and abroad. Our response to selected questions asked in the call for evidence and the analysis of UNCLOS encapsulated in this submission stems from insights gained in our research and teaching work.

GENERAL

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

UNCLOS in legal terms is a convention, which is binding only for states that will ratify it through their national parliaments. Partial ratification of articles and clauses by signatories is also an option, subject to national interests. Although this is understandable in International Relations terms, it causes controversies in the implementation and enforcement, as countries can 'pick and choose' which articles suit them geopolitically to adopt and abide by and which to object to and/or decline. There is also a challenge whereby states may be signatories to the convention but do not subsequently adhere to requirements. Consequently, there are distinctions between ratification, adherence, and enforcement.

To give some examples, Turkey is one of the countries that have not ratified the convention. This has posed significant challenges with multidimensional consequences in the handling of the illegal migration crisis in the Mediterranean, as well as long standing disputes with Greece and Cyprus over maritime zone delimitations. The United States is another country that has not ratified UNCLOS but is leading the dispute against China's claims in the South China Sea. As such, condemning China (and/ or Russia) for violations to a convention the US

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haven't ratified themselves, demonstrates a level of controversy as well as the need to drive for consensus amongst states and update UNCLOS to reflect a modern context.

International law sits alongside domestic law, and it is important to acknowledge that these are not always in alignment. For example, in relation to port security, requirements associated with the International Ship and Port Facility Security Code (ISPS) are implemented and enforced differently dependent on the location of the port. In addition, the Code sits alongside policy related to other issues such as border control.

Questions to consider: Is it better to maintain UNCLOS as an ideal model or is there place for a looser, less all-encompassing regime that could be more inclusive but is less potent and risks becoming meaningless? Is an aspirational UNCLOS more sensible even if we accept enforcement is problematic?

Another issue that highlights the urgent need to update the outdated convention, is the fact that more contemporary maritime security challenges (e.g. cyber threats and human trafficking) are not referred to in UNCLOS and those that exist need to be refined (e.g. piracy). This makes enforcement even more problematic, as significant gaps exist in the range of contemporary threats that occur within the maritime domain for UNCLOS to address.

Finally, many ships transiting the oceans and especially piracy high risk areas, now carry onboard privately contracted armed personnel to enhance their security. Similarly, private companies are patrolling developing countries' maritime zones to combat fisheries crime, detaining ships on IUU fishing blacklists, etc. This makes the enforcement of UNCLOS even more problematic, as these are private, non-state actors and there is no provision within UNCLOS as to the responsibilities, jurisdiction, authority, or regulation of the private maritime security sector. This also raises a series of further questions on the controlling mechanisms flag states put in place to ensure that this outsourcing of responsibility to private contracting parties is conducted within the spirit of the UNCLOS. Do open registries for example – which form the vast majority of current merchant fleets – adhere to the principles, state accountability and enforcement of UNCLOS. Are there adequate controlling mechanisms in place to ensure that? Who should be held accountable in case of wrongdoings/ UNCLOS violations? And what if the flag state under discussion hasn't ratified UNCLOS? What should the relationship between flag registries and their respective flag states be?

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

- Convention for the Suppression of Unlawful Acts (SUA) filling the terrorism gap that exists in the UNCLOS.
- International Convention for the Safety of Life at Sea (SOLAS) with the International Ship and Port Facility Security (ISPS) Code being introduced via chapter XI-2 and coming into force on 1st July 2004.
- UN Convention against Transnational Organized Crime (2000).
- Suppression of Unlawful Seizure of Aircraft (1971).
- International Convention Against the Taking of Hostages (1979).

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)

Climate change will result, among others, in sea-level rises which will change the geography and coastlines of coastal states and their respective maritime zone delimitations. Islands for example, which currently extend coastal states' territorial waters and Exclusive Economic Zones (EEZ) could even fully submerge in the long term, so coastal states' sovereign territory and EEZ would shrink/ be redefined because of climate change.

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

Modern Slavery

'UNCLOS article 99: Prohibition on the transport of slaves' – needs to be updated and apply to modern slavery and human trafficking by sea. The article refers to 'slave trade' but consideration should be given especially to:

- a. In what ways modern slavery is understood differently from the 'old' one and how this provision could apply to challenges such as for example human trafficking by sea and forced labour, with particular focus on the fishing industry.
- b. Transshipment vessels are frequently utilised by the (illegal) fishing industry to transport trafficked victims to/from fishing vessels [see for example Chapsos, I. and Hamilton, S. (2019) 'Illegal fishing and fisheries crime as a transnational organized crime in Indonesia'. *Trends in Organized Crime*, 22 (3): 255-273]. This specific UNCLOS article 99 could be updated to provide an additional tool to the international community when flag states can't adequately prevent and punish the transport of 'modern' slaves, and allow authorities to board ships suspected of conducting slave trade/ human trafficking and conduct any necessary checks.

Piracy

Despite presenting a codified legal definition of maritime piracy and urging all nations to cooperate in the repression of piracy, UNCLOS, has weakened counter-piracy activities rather than enhanced them. There is a lack of clarity around issues of jurisdiction; 'hot pursuit'; the 'private ends' motivational clause; the 'two vessel' requirement; and a failure to impose a legal obligation on states to suppress piracy in their territorial waters. Some of these limitations were partially rectified in proceeding conventions such as the SUA Convention 1988 and the UN Convention against Transnational Organized Crime of 2000. Key challenges include:

- Article 101 (a) stipulates that two vessels must be involved for an incident to be piracy *jure gentium*. This does not consider, for example, acts of

violence detention or depredation committed for private ends by the crew or the passengers of a single vessel or robbery from the shore against a ship that is berthed.

- The private ends clause (article 101, a) cannot be utilised to prosecute politically motivated acts of piracy or incidents of maritime terrorism. Indeed, the designation of what constituted 'private ends' is not defined in UNCLOS and is therefore open to interpretation and contestation. For example: is it a lack of public sanction? or theft for desire or gain?
- By limiting acts of piracy to those committed outside the jurisdiction of a state's maritime boundary, UNCLOS inadvertently creates two separate definitions of what was essentially an identical crime perpetrated in a different maritime space. This is problematic as most of these types of attacks, as well as other forms of maritime criminal activity, tend to occur in anchorages, ports and littoral sea spaces.
- The limitations of UNCLOS as a counter-piracy instrument were further evident in its failure to impose a legal obligation on states to suppress piracy in their territorial waters or to cooperate in the suppression of piracy in these waters. Moreover, the absence of any international enforcement mechanism in UNCLOS was a significant shortcoming.
- The provisions on the right of 'hot pursuit' (article 111) add strict limitations on pursuing a vessel suspected of engaging in piratical acts - 'The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State' (article 111, 3), which eases the evasion of prosecution by suspected pirates.
- **Autonomous maritime vehicles** (both commercial and military), cybersecurity, and other new technologies

As highlighted in the previous section, UNCLOS 'article 101: Definition of piracy' requires a physical boarding of the vessel to take place in the high seas for the crime to classify as piracy. The introduction of autonomous vessels, which could be potentially hacked remotely and result in the whole vessel been stolen without being physically boarded would not legally classify as an act of piracy. As such, UNCLOS should follow the advancement of technology, consider the vulnerabilities that cyber threats could pose to autonomous maritime vehicles' navigational systems and proactively address this legal lacuna.

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?

Unless UK's maritime policies and practices get integrated in UNCLOS, they don't have global application. All UK's acquired knowledge and developed best practices to address contemporary challenges that are currently not addressed in UNCLOS should inform an updated legal convention that will better equip states in this framework.

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?

- It is important to ensure public pronouncements by UK government (whether from political leaders or not), do not undermine, however indirectly or inadvertently, UK obligations under UNCLOS. This is particularly important where issues are politically sensitive, such as, for example, around irregular migration by sea. Public discourse shapes the policy environment and can help/hinder efforts by maritime actors to carry out their duties.
- UK's latest security review rightly highlights the importance of maritime security. However, the UK's National Strategy for Maritime Security (NSMS) was published in 2014, and requires continual refresh and updates, to keep up with the dynamic environment, the actors involved, and the challenges it encapsulates. As part of this process more information is also required on how actors with national responsibilities in the maritime security domain work together within government and beyond government, whilst also ensuring a strong focus on institutional memory building. The existing NSMS provides a useful mapping of stakeholders and committees responsible to uphold the UK's maritime security, but a more detailed structure and mechanisms around the continuity of inter-agency and cross-government departments' cooperation would be essential, particularly given the way in which civil service/naval roles tend to rotate personnel regularly.

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