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Ministry of Defence – Written evidence (UNC0018)

Summary

1. This note sets out written evidence from the Ministry of Defence in submission to the Lords Select Committee on International Relations and Defence inquiry entitled 'UNCLOS: fit for purpose in the 21st century'. Personnel from the Naval Legal Service have also made contributions.
2. The note is in response to the Committee's request for submissions regarding autonomous maritime systems (both commercial and military), under Question 6. This submission will focus on the military aspect only, and in particular UNCLOS Article 29 – the definition of a warship.
3. Under Question 7, the Committee also asks whether in light of the challenges highlighted under Question 6, UNCLOS remains fit for purpose. It is the view of the Department that UNCLOS remains a clear and comprehensive framework within which to conduct operations at sea. It is also considered that even with the technological advances of maritime autonomous systems, UNCLOS remains fit for purpose.
4. The UK is committed to upholding the Rules Based International System (RBIS): UNCLOS is an integral part of that system. Further, under International Humanitarian Law (IHL), there is an obligation to ensure distinction between combatants and non-combatants. While IHL is beyond the scope of this Inquiry, UNCLOS Article 29 is a crucial link to IHL, because it provides the definition of a warship which requires a warship to be owned by the government of a state and thus by personnel who are entitled to act in a belligerent manner in an armed conflict.
5. This submission refers to un-crewed vessels to encompass all vessels which operate without crew on board. This may involve a remote-controlled vessel, completely controlled from another location with no crew on board through to vessels which exercise autonomous functions in relation to their navigation, including the making of decisions on route and avoidance of obstacles. It does not address the use of AI in weapons systems or belligerent acts which are outside of the scope of UNCLOS and this Inquiry.

Un-crewed vessels and the definition of a warship under UNCLOS Article 29: Question 6)

6. In a recent speech, Second Sea Lord highlighted the ambition of the Royal Navy (RN) to operate “lethal un-crewed vessels”.¹ There is an intention to deploy un-crewed mine-counter measures vessels to the Gulf region in the next 3 years, and recently a RN operated un-crewed vessel launched a missile as part of a NATO exercise. This ambition therefore is rapidly becoming closer to being a reality for the RN.
7. The definition of a warship is provided in UNCLOS Article 29:

“...a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline”.

The importance of “warship” status

8. There is a distinction between the character of a vessel, and its operation. A warship is designed, and crewed, so that it may act in a belligerent manner on behalf of the state. As a firm proponent of the RBIS, the UK must ensure that it’s warships act in a legitimate manner. From legitimacy flows two key aspects which are linked to the status of a warship.
 - a. **Belligerent rights.** Under the Law of Naval Warfare only warships may lawfully use offensive force during armed conflict. There is no defined list of these rights, but they broadly cover kinetic strike, visit board search and seizure, laying mines, amphibious operations against enemy held coast, blockade enforcement.
 - b. **Sovereign immunity (UNCLOS Articles 32, 95, 96).** Warships and government vessels on non-commercial service have sovereign immunity, which excludes the effects of certain international treaties around issues such as application of jurisdiction by other states and environmental protection.
8. In addition to the above, all vessels or ships have the right to certain passage rights, such as transit passage through international straits and innocent passage in territorial seas of another State.² Whilst not dependent on warship status, it is important to highlight as it is a right we would wish our un-crewed vessels to be able to assert.

¹ <https://www.royalnavy.mod.uk/news-and-latest-activity/news/2021/may/20/20210520-second-sea-lord-vice-admiral-nick-hine-speech-at-the-1st-sea-power-conference-2021>

² UNCLOS Articles 19, 38, 52, 53.

9. Un-crewed vessels currently being trialled within the RN are registered as government vessels on non-commercial service, affording them the ability to assert the rights of both sovereign immunity and passage. However, so far, these vessels are either not designed to be operated belligerently or are still considered to be “experimental” rather than at the stage of being commissioned into Service.
10. As systems mature, it will be necessary for the UK to settle the status it asserts for un-crewed vessels. There is not yet international consensus on the issue, though many states are developing un-crewed vessels for military purposes. The MOD considers that the key principle to uphold is that of *distinction* – in order that the operation of un-crewed vessels during Armed Conflict should not increase the risk to non-combatants. While UNCLOS does not deal directly with the issue of distinction, the purpose behind Article 29 is to attach state responsibility to the activities of a ‘vessel’ capable of acting in a belligerent manner, and allow non-belligerents to understand the extent of lawful conduct by vessels of different types. Further, this ensures that the effects of warfare are limited to only legitimate targets.
11. To balance this requirement for warships to act responsibly, through the principle of sovereign immunity, UNCLOS limits the controls that coastal states may assert against the peaceful use of the sea by the warships of another state – this measure is designed to reduce tension and the risk of misunderstanding between states – and to prevent the improper extension of the authority of states beyond their own borders.
12. UNCLOS therefore uses Article 29 to confirm state responsibility for the actions of warships and requires that the state have an accountable system of discipline to control the actions of those who operate them. Un-crewed vessels should be incorporated into this regime to regulate their proper use. This would be best achieved by an acceptance that Article 29 applies to state operated military un-crewed vessels (i.e. those which are intended to make a direct contribution to a military effect).
13. Some states might seek to avoid the control which flows from Article 29 by arguing that because the ‘crew’ are not embarked, the un-crewed vessel is in fact a military device rather than a vessel. Should this be the case, then Additional Protocol 1 to the Geneva Conventions would be engaged, and state responsibility would attach to the decision to deploy the device as a “means or method of warfare”. But those ‘devices’ would not be entitled to the privileges of a warship (or any flagged vessel) as regards third states – and so would be liable to seizure and enforcement actions if they entered the territorial sea of another state. Further, as ‘devices’ they would not be able to assert the passage rights afforded to all vessels.

14. The MOD position is that the matched authorities and safeguards which flow from Article 29 are suitable for military un-crewed vessels and should be applied to them.
15. Opponents to the MOD position may argue that at the time of the UNCLOS III negotiations, the Conference did not consider un-crewed vessels because of the technology available at the time.
16. The MOD's position is that this does not mean the Convention is not capable of application to new technology. Case law post the ratification of UNCLOS has established that the Treaty can be interpreted in the light of new technology rather than ignoring it.³
17. Noting that Article 29 also stipulates that a warship must also bear "*the external marks distinguishing such ships of its nationality*", the MOD considers that this also applies to un-crewed vessels. Thus, an un-crewed vessel which has been declared as a warship of the Royal Navy would both have a pennant number and fly the white ensign.
18. The MOD therefore considers UNCLOS is 'fit for purpose' in the 21st Century – provided the interpretation suggested above is adopted. By declaring an un-crewed vessel as a warship, the UK is making a formal assertion of responsibility, authority and immunity. The same responsible course should be taken by other operating states.

Received 11 November 2021

³ For example, with reference to the application of new technology to the principles of hot pursuit under UNCLOS Article 111, see *Arctic Sunrise Arbitration* para 259-260.