UNCLOS in Action: Evidence on Maritime Security Challenges

Technical Report · November 2021

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Scott Edwards
University of Bristol
29 PUBLICATIONS   **53** CITATIONS

Christian Bueger
University of Copenhagen
99 PUBLICATIONS   **2,118** CITATIONS

Some of the authors of this publication are also working on these related projects:

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SafeSeas – Written evidence (UNC0014)

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About the authors

This evidence note is a collective submission made by the SafeSeas Network on Maritime Security. SafeSeas is a Non-Governmental Organisation registered in Denmark, that brings together academic researchers who investigate maritime security. More information can be found at www.safeseas.net. The evidence draws on the expertise of:

• Dr Scott Edwards, University of Bristol
• Professor Christian Bueger, University of Copenhagen
• Professor Tim Edmunds, University of Bristol
• Dr Basil Germond, Lancaster University
• Dr Tobias Liebetrau, Sciences Po Paris
• Dr Jan Stockbruegger, Brown University

1. Maritime Security

1.1   Many of the ocean governance challenges linked to the UN Convention on the Law of the Sea (UNCLOS) are expectedly legal in nature. Focusing solely on these legal considerations, however, belies many of the current gaps. In this evidence note, we foreground political and security factors when reviewing the status of UNCLOS and its capacity to deal with contemporary challenges at sea. It is based on substantial academic research in the field of maritime security.[1]

2. General Position

2.1   UNCLOS is the legal cornerstone of the international maritime system. It reflects a carefully balanced consensus that has been negotiated over decades and that reflects the interests of both the Global North and the Global South. UNCLOS continues to serve the interests of the UK and

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[1] Bueger, C. (2015), 'What is Maritime Security?', *Marine Policy* 53: 159-164; Bueger, C. and Edmunds, T. (2017), 'Beyond Seablindness: A New Agenda For Maritime Security Studies', *International Affairs*, 93(6): 1293–1311; Bueger, C. and Edmunds, T. (2020), 'Blue Crime: Conceptualising Transnational Organised Crime at Sea', *Marine Policy* 119, 140-167; Germond, B. (2015), 'The Geopolitical Dimension of Maritime Security', *Marine Policy* 54: 37-142.

other maritime powers for whom freedom of navigation and the right of innocent passage are of uttermost importance.

2.2   UNCLOS is the 'constitution of the oceans.'[2] Its foundational institutions and legal categories underpin ocean governance and are widely used and also recognised by non-signatory states. It has become the nucleus of a rich regime complex consisting of various conventions on flag and port state responsibility, environmental regulation, counterterrorism, and transnational organised crime. Several international institutions that are vital in global ocean governance work with the framework of UNLOS. These include the UN Security Council, the International Maritime Organisation (IMO), but also the UN Office on Drugs and Crime or the Food and Agricultural Organisation.

2.3   The provisions made in UNCLOS have to be interpreted in the light of historical context and emerging challenges. Many of today's challenges were not relevant (e.g. maritime piracy) or not foreseen (grey zone operations, terrorism, widespread illegal fishing, decline of ocean health, climate change, importance of subsea infrastructure) during the UNCLOS negotiations in the 1970 and 80s. Contemporary questions for UNCLOS therefore primarily concern its implementation in the face of new challenges.

2.4   The concept of 'maritime security' captures many of these current challenges in three dimensions[3]: 1) Inter-state challenges, including border and resource inter-state disputes, contested territorial claims, and grey zone operations, 2) terrorism and extremist violence at sea; 3) transnational organised crimes at sea – known as 'blue crime' – including marine piracy, the smuggling of narcotics and other illicit goods, irregular migration, or illegal fishing and deliberate pollution.

3. Challenges

3.1   State-sponsored challenges

3.1.1 The use of maritime grey zone tactics is a new and dangerous trend in international affairs. States have traditionally projected naval power to defend their maritime interests. Today, however, China, Russia, and Iran conduct covert operations and deploy civilian or irregular forces to claim territory in the South China Sea (China) or harass shipping traffic in the Persian Gulf (Iran). Grey zone operations are designed to avoid conflict escalation and the militarisation of maritime disputes. Yet they fuel maritime competition and undermine UNCLOS and freedom of navigation.[4]

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[2] Koh, T.T.B. '"A constitution of the oceans": Remarks by Tommy T.B. Koh, of Singapore, President of the Third United Nations Convention of the Law of the Sea." https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf
[3] Bueger, 'What is Maritime Security?'; Bueger and Edmunds (2017), 'Beyond Seablindness'; Bueger, and Edmunds (2020), 'Blue Crime'.
[4] Stockbruegger, J. and Bueger, C. (2021), 'Beyond competition: Why the U.S. must cooperate with China and Russia for maritime stability', https://cimsec.org/beyond-competition-why-the-united-states-must-cooperate-with-china-and-russia-for-maritime-stability/.

3.1.2 Dealing with grey zone operations is difficult. The UK and other states do not have a clear strategy to counter grey zone operations without risking naval conflict between nuclear-armed countries.[5] No mechanism currently exists to manage grey zone tactics, and the leading states have so far refused to discuss these issues. UNCLOS was designed to address territorial disputes and ensure freedom of navigation. It does not address competition between major naval powers, which fuels grey zone attacks and operations today. Grey zone operations thus remain a continuing threat to maritime stability and international security, as well as to the global maritime governance regime centred on UNCLOS.

3.2 Climate change

3.2.1 Climate change is a threat multiplier.[6] The effects of climate change on natural systems (sea-level rise, ocean salinity, sea temperature, eutrophication) impact negatively on human systems, either directly (for instance: reduction of fish stock) or indirectly (for instance: via poverty, health, inequalities). Evidence suggests that these pressures can undermine legitimate coastal livelihoods and may provide fertile ground for the growth of blue crimes.[7] Climate change pressures are also likely to influence grey zone operations, marine and resources disputes, and great power competition. Sea level rise will impact land-based infrastructures such as ports, while higher seas and fiercer storms will make new demands on shipping, including naval operations.[8]

3.2.2. Tackling the impacts of climate change on maritime security poses both legal and political challenges under UNCLOS due to overlapping jurisdictions, contested sovereignties, and competing economic interests.

3.3 Blue crime and law enforcement challenges

3.3.1 Blue crimes such as piracy, illegal fishing and smuggling by sea (including human trafficking) are increasingly recognised as a major international security issue that require political attention.[9] Such crimes often interconnect with each other in important ways.[10] Tackling them creates

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[5] Layton, P. (2021), 'Responding to China's Unending Grey-Zone Prodding'. *RUSI Commentary*, https://www.rusi.org/explore-our-research/publications/commentary/responding-chinas-unending-grey-zone-prodding.

[6] HMG (2021), *Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy*, CP 403 (London: The Stationary Office): para 1.8, p.7.

[7] Germond, B. and Mazaris, A. (2019), 'Climate Change and Maritime Security', *Marine Policy* 99: 262-266; U Rashid Sumaila, U.R. and Bawumia, M. (2014), 'Fisheries, Ecosystem Justice and Piracy: A Case Study of Somalia', *Fisheries Research* 157: 154–63.

[8] Naval Studies Board (2010), *Letter Report: Committee on National Security Implications of Climate Change for US Naval Forces*, (Washington DC: National Research Council of the National Academies). https://www.nap.edu/read/12897/chapter/2#6.

[9] UN Security Council (2019), *Open Debate on Transnational Organized Crime at Sea as a Threat to International Peace and Security*, 5 February.

[10] Jacobsen, K.L. (2018), 'Poly-Criminal Pirates and Ballooning Effects: Implications for International Counter-Piracy', *Global Politics*, 10(1): 52-59.

difficulties for UNCLOS as presently formulated, and for other relevant conventions such as the UN Convention against Transnational Organised Crime.

3.3.2 Blue crimes often take place in areas of diffuse state jurisdiction or may be carried out by vessels sailing under weakly regulated or indeterminate flag state authority.[11] Many countries do not have appropriate legislation to deal with criminality at sea, or the capacity to enforce legislation where it does exist.[12]

3.3.3 These challenges mean that effective enforcement responses to maritime organised crime can be highly contingent on flag state cooperation and littoral state capacity, or on close (sometimes ad hoc) multinational cooperation between stakeholders.[13] They also mean that, under some circumstances, maritime criminals can effectively operate with impunity.

3.4 *Undersea cables and subsea infrastructure*

3.4.1 Many of the core infrastructures of the digital age are situated on the seabed: International communication is dependent on the subsea data cable system. The system is vulnerable to both deliberate attacks and accidental damage. The UK is one of the main connecting states in the global cable network. It has substantial redundancy in its undersea cable infrastructure, making a full or major internet blackout extremely unlikely. However, the UK's overseas territories and many of its international partners are at a significant risk.

3.4.2 A core challenge to the protection of undersea cables is that UNCLOS regulations are underspecified in relation to cables under the high sea. In addition, undersea cables are owned and operated by global business conglomerates that often involve a complex thicket of multi-ownership. The international law for if and how these businesses can operate, lay, maintain, and repair cables is unclear. In contrast to ships that have a clearly assigned nationality, cables are not under full sovereignty or flag. In addition, the lack of information sharing on cable breaks poses a threat to the functioning and security of the global subsea cable system and global connectivity.[14]

4 Responses

4.1 *UK leadership in maritime security*

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[11] Miller, D.D. and Sumaila, U.R. (2014), 'Flag Use Behaviour and IUU Activity within the International Fishing Fleet: Definitions and Identifying Areas of Concern', *Marine Policy*, 44: 204-211.

[12] Vrancken, P. (2019), 'State Jurisdiction to Investigate and try Fisheries Crime at Sea', *Marine Policy*, 105: 129-139; Bardenwerper, T. (2021), 'Pushing or Overstepping: Legal Boundaries in the Fight Against Maritime Drug Smuggling', Centre for International Maritime Security, https://cimsec.org/pushing-or-overstepping-legal-boundaries-in-the-fight-against-maritime-drug-smuggling-pt-1/

[13] Bueger, C. and Edmunds, T. (2021), 'Pragmatic Ordering: Informality, Experimentation, and the Maritime Security Agenda, *Review of International Studies*, 47(2): 171-191.

[14] Bueger, C. and Liebetrau. T. (2021), 'Protecting Hidden Infrastructure: The Security Politics of the Global Submarine Data Cable Network', *Contemporary Security Policy*, 42(3): 391-413

4.1.1 Addressing these challenges will entail amendments or additions to existing international treaties, legal and maritime law enforcement capacity building with partner states, the strengthening or maritime security cooperation and information sharing arrangements between states and within regions, and the sharing and implementation of lessons learned and best practices (for example from piracy prosecutions[15]) between regions and across issue areas.

4.2 Freedom of the sea and 'collective seapower'

4.2.1 The challenges to ocean governance and maritime security presented in section 3 should be tackled collectively. Maritime nations share a common interest in striking the right balance between freedom of the sea and a safe and secure maritime domain.

4.2.2   Based on its naval heritage, traditions, expertise, and network of allies and partners, the UK is in a strong position to lead the collective effort towards sharing the burden and the benefits of securing the sea while maintaining freedom of navigation.

4.2.3   HM Government should continue to proactively uphold freedom of navigation and build a network of like-minded maritime nations under a 'collective seapower' strategy.[16] This includes confidence-building measures with allies and partners, port calls, joint naval exercises, and showing the flag in contested waters. The UK should also promote strategic dialogue on maritime security with China, India, Russia and other seapowers, and where possible to identify joint interests in maintaining security and good governance at sea.

4.3. Leadership in the United Nations Security Council

4.3.1 The UN Security Council (UNSC) has increasingly become an important forum for governing the sea.[17] It is the forum where interstate disputes and grey zone tactics are discussed and evaluated on a frequent basis. The UNSC has been central in sanctioning blue crime, in particular through resolutions against piracy, but also in providing legitimacy to informal regional groupings, such as the Contact Group on Piracy off the Coast of Somalia (CGPCS), or the G7++ Friends of the Gulf of Guinea (G7++). The UK is a permanent member of the Council with veto powers.

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[15] Guilfoyle, Douglas (2013), Prosecuting Pirates: The Contact Group on Piracy off the Coast of Somalia, Governance and International Law, Global Policy, 4(1): 73-79.

[16] Germond, B. (2021), 'AUKUS: The realisation of "Global Maritime Britain"', (Britain's World:Council on Geostrategy), https://www.geostrategy.org.uk/britains-world/aukus-the-realisation-of-global-maritime-britain/; Germond, B. (2021), 'Global Britain and Seapower', *Maritime 2021 – Magazine of the Maritime Foundation*, https://www.maritimefoundation.uk/publications/maritime-2021/global-britain-and-seapower/.

[17] Wilson, B. (2018). 'The Turtle Bay Pivot: How the United Nations Security Council Is Reshaping Naval Pursuit of Nuclear Proliferators, Rogue States, and Pirates', *Emory International Law Review*, 33 (1): 1–90.

4.3.2   The UK should use its UNSC powers to steer and influence the global debate on maritime security. In particular, the outcome of the August 2021 high-level UNSC debate on maritime security presents an opportunity for the UK's leadership[18]: UNSC members agreed to strengthen cooperation and information sharing and discussed a proposal to establish a new UN level maritime security structure.

4.3.3   The UK should lead this debate and provide concrete institutional proposals, such as installing an expert commission, or establishing a UNSC committee.[19] The UK can also use its Council powers to start discussing grey zone tactics and to help manage maritime competition. Such efforts would accelerate the significant investments the UK has made in the fight against blue crime, and advance its reputation gained through leadership in regional bodies such as the CGPCS, G7++ among others.

4.3.4   Given the emphasis that the UNSC has put on UNCLOS in the past, it is also the place where the UK could initiate or legitimise any efforts to develop better and additional rules for global ocean governance without risking eroding the existing regime.

4.4   NATO as a global maritime power

4.4.1   The North Atlantic Treaty Organisation (NATO) continues to be the most important security alliance for the UK. This is also the case for security at sea. NATO institutions can organise and lead multilateral efforts to secure the sea and maintain core maritime rules and norms. NATO integrates the maritime capabilities and expertise of member states, and it has global maritime experience and partnerships. NATO has worked with international organisations to build maritime security capacities in East Africa, for example, and it has also worked with China and Russia to protect shipping in the Gulf of Aden.

4.4.2   Taking leadership within NATO structures, the UK could strengthen international partnerships and relations with rivals like Russia and China. This could include strategic dialogue on maritime security in the Baltic Sea and the Black Sea, as well as discussions with China and other regional states on the Indo-Pacific. There is also an urgent need to revise NATO's 2011 Alliance Maritime Strategy[20] and to agree with alliance partners on NATO's core maritime tasks and missions. Most importantly, however, NATO needs to clarify its role in the North Atlantic and the Mediterranean - its core strategic areas – as well as if and how it plans to engage in the Indo-Pacific and other maritime theatres.

4.5   Maritime Domain Awareness, operational coordination and capacity building

[18] UN Security Council (2021), *Open Debate on Enhancing Maritime Security*, 9 August.
[19] Bueger, C. (2021), 'Does Maritime Security Require a New United Nations Structure?', *Global Observatory*, https://theglobalobservatory.org/2021/08/does-maritime-security-require-a-new-united-nations-structure/
[20] NATO (2011), *Alliance Maritime Strategy*, https://www.nato.int/cps/en/natohq/official_texts_75615.htm

4.51   Maritime Domain Awareness (MDA) and information sharing are vital to facilitate security cooperation at the operational level. MDA strengthens trust and confidence between maritime security stakeholders.[21] It also provides a common picture of maritime challenges. A growing number of national and regional Information Fusion Centres (IFC) provide MDA. The UK contributes to such efforts through its National Maritime Information Centre (NMIC), which is part of its Joint Maritime Security Centre (JMSC), and a world leading IFC.[22]

4.5.2   The UK should take leadership at the IMO to develop internationally agreed classification standards for maritime security data and to facilitate broader circulation of information and best practices with the assistance of UNODC, FAO and other international bodies.

4.5.3   The UK is a respected provider of maritime security capacity building to states in the Global South. These efforts help to build the legal and material capacities necessary for countries to police their own waters and to develop regional MDA and information sharing architectures.[23] The UK should continue to prioritise leadership in this area to address the legal and enforcement challenges to UNCLOS as discussed at 3.3 above.

4.6 Underseas Cables regime

4.6.1   Data cables and other subsea infrastructures (e.g. electricity cables) will gain in importance and hence the legal status of such infrastructures in the high sea, and what international body has the main authority to address any challenges requires urgent attention. The UK should seek a close dialogue with the International Cable Protection Committee in developing a global strategy for developing new law and improving global awareness and everyday information sharing on the issue.

Received 10 November 2021

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[21] Brewster, D. (2019), 'The IFC: Challenges in Building a Regional Maritime Domain Awareness System', in Bueger, C. and Chan, J. *Paving the way for regional Maritime Domain Awareness*, (Singapore: S. Rajaratnam School of International Studies).

[22] Bueger, C. Edmunds T. and Edwards, S. (2021), 'Innovation and New Strategic Choices: Refreshing the UK's National Strategy for Maritime Security', *RUSI Journal*, 166(4): 66-75.

[23] Bueger, C. Edmunds T. and McCabe, R. (2020), 'Into the Sea: Capacity Building Innovations and the Maritime Security Challenge', *Third World Quarterly*, 41(2): 228-246.