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Written evidence (UNC0033)**

To the International Relations and Defence Committee
UK Parliament

**Submission in response to the call for evidence
UNCLOS: fit for purpose in the 21st century?**

Submitted by

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1. This submission has been prepared by Irini Papanicolopulu, Andrea Longo and Daniele Mandrioli, acting in our personal capacity. We are all three international law scholars specialising in the law of the sea. Irini Papanicolopulu is Associate Professor of International Law at the University of Milano-Bicocca. She has more than 20 years experience in the law of the sea; she has taught this course at the Universities of Oxford, Glasgow, Milano-Bicocca, Lisbon Catolica and St Gallen; has published two monographs and over 50 articles and book chapters on topics related to the law of the sea; and has advised States and international organisations on law of the sea issues. Andrea Longo is a PhD candidate at the University of Milano-Bicocca and a Nippon Fellow at the International Tribunal for the Law of the Sea. He is pursuing a thesis on protection of human rights in the fishing sector. Daniele Mandrioli is a Postdoctoral Researcher at the University of Milano. He has just completed a doctoral thesis on autonomous vessels. With this submission, in our capacity as experts in international law and the law of the sea, we would like to provide evidence with respect to the following questions raised in the call for evidence.

What have been the main successes and accomplishments of UNCLOS over the past 40 years?

2. The United Nations Convention on the Law of the Sea (UNCLOS) was adopted with the aim “to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea” (UNCLOS Preamble). Today, it provides a stable legal framework for all States, since most of its provisions reflect customary international law.

3. In order to do so, it includes different categories of rules: rules on substantial matters, rules on institutionalised cooperation, rules on settlement of international disputes through peaceful means and, last but not least, rules on the allocation of power over maritime space between States. These rules address numerous issues of great relevance for the seas and oceans. For example, substantial rules regulate different human activities, including shipping, fishing, extraction of minerals, marine scientific research.

4. These rules have played a pivotal role in promoting the rule of law at sea, setting the fundamental principles for human activities. For example, Art. 192 UNCLOS, for the first time ever, clearly said that "States have the obligation to protect and preserve the marine environment". Similarly, Art. 117 provides that "All States have the duty to take ... such measures ... as may be necessary for the conservation of the living resources of the high seas".

5. When it comes to the protection of the people who are at sea – for work, travel or other reasons – Art. 94 UNCLOS plays a fundamental role. It obliges the flag State to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". This means that the flag State is now under a legal obligation to ensure protection of, among others, labour and human rights on board its vessels.

6. These principles have constituted the basis for the development of law of the sea in the field of environmental protection and fisheries, respectively. At the same time, these principle can always be recalled to fill gaps when legal rules do not exist and to guide States action when developing new rules.

7. UNCLOS rules on allocation of power between States divide the sea into maritime zones: internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, high seas, international seabed area. Within each zone, the State or States having jurisdiction, and hence the right to regulate and enforce, are identified, sometimes based on the activity considered (so-called functional jurisdiction). These rules have added clarity, since now it is easier to identify the State or States which have a specific right or duty.

What are the main challenges facing the effective implementation of UNCLOS in 2021?

8. Notwithstanding the positive impact of the UNCLOS, it has not solved all problems. Significantly, both categories of rules described above have proven insufficient to address some current concerns of the international community.

Human rights at sea

9. Protection of human rights at sea is among the most pressing. A number of instances have demonstrated this point, including the following.

10. Piracy off the coasts of Somalia: the capture and trial of (alleged) pirates has highlighted the inadequacy of international and national laws to ensure protection of the right to life, the right to personal freedom and the right to a fair trial, among others.

11. Irregular migration by sea: active disregard for the duty to save life at sea, lack of coordination between interested States, criminalisation of masters and owners of vessels providing rescue have demonstrated that the right to life may still be

flagrantly violated today at sea, as well as the prohibition of torture, including prohibition of refolement.

12. COVID-19 crewing crisis: the situation resulting from denial of port access and the consequent stranding of seafarers during the Covid-19 pandemic has brought to the forefront issues of flags of convenience, as well as the lack of capacity of the international legal system to ensure fundamental human and labour rights for those working at sea.

13. Illegal, Unreported and Unregulated fishing (IUU fishing) deserves particular attention. IUU fishing includes any activities in breach of international, regional and national rules and regulations on the conservation and management of marine living resources as well as any fishing activities carried out in areas to which there are no applicable rules.

14. The notion emerged in the 90s in the aftermath of the Rio De Janeiro Conference as a policy tool to counter major threats to the marine environment and ecosystems such as destructive fishing practices and overfishing. However, these constitute the tip of the iceberg of what is a whole submerged system of human rights abuses and criminal activities referred to by the INTERPOL as "transnational fisheries crimes". IUU fishing negatively impacts on both fishers and coastal communities.

15. Fishermen, very often migrant workers, work under very hard conditions. Fishing and shipping remain the two most dangerous occupations worldwide and fatal incidents are commonplace even in the UK. For example, during 1996 to 2005 the fatal accident rate in the UK fishing industry was 115 times higher than that in the general workforce of Great Britain, 24 times higher than in the construction industry and 81 times higher than in manufacturing.

16. When they do not die, fishers are often subject to the most terrible working conditions, in some cases amounting to forced labour, slavery and torture.

17. For coastal communities and indigenous populations, the impact of IUU fishing is fundamental for their security and livelihood.

18. Port State control is increasingly used to address IUU fishing and, more broadly, the enforcement of human rights and working conditions at sea. However, wrongdoing vessels may easily evade port State controls. They can choose "ports of convenience", i.e. ports that are unwilling or unable to implement strict control standards.- They can opt for staying at sea, using bunkering and transshipment in order to get fuel and transport their catch on land.

19. In this respect, the adoption of the Port State Measures Agreement in 2009 is surely to be praised for it marked the international community's recognition of port States' potential to deter and eliminate IUU fishing. However, the Agreement does not give port States the right and obligation to adopt enforcement measures such as investigations, judicial proceedings and sanctions, which rest with flag States' powers. Furthermore, few States have ratified it. Complementary action is thus needed, especially with a view to hamper the economic profitability of IUU fishing and broader human rights violations linked to it.

20. More generally, the protection of human rights at sea faces a number of legal and practical challenges:

- First, while flag States have a general duty under Art. 94 to protect human and labour rights on board their vessels, there is no international treaty and little national legislation clarifying how this should be done.

- Second, the existence of flags of convenience and the absence of uniform international standards allows shipowners and operators to opt for the least protective national legislation.
- Third, under current rules, only the flag States may control vessels at sea. This is often impossible, given that a ship may navigate anywhere in the world, far away from the territory and the patrol vessels of its flag State.
- Fourth, even when other States have enforcement jurisdiction, they often lack the means and the training to effectively conduct it.

21. The basic reasons for this situation are two. The main reason is that the entire UNCLOS is drafted as if people did not exist at sea, but only vessels, resources and marine species. As a consequence, the UNCLOS does little to protect the human and labour rights of the people who travel, work and live at sea. The second reason is that States are currently unwilling to negotiate new treaties or to implement them.

22. The Maritime Labour Convention (MLC), adopted in 2006, constitutes the only successful example so far. It is ratified by more than 90 States which represent more than 90% WGT. But it excludes fishers and people working on platforms, installations and other structures at sea.

23. The Work in Fishing Convention, adopted in 2007, has so far been ratified by only 19 States. In any case, it does not apply to small fishing vessels, as are many vessels that provide the fish which enters into the British market.

24. It is therefore necessary to draft, adopt and implement international treaties which will regulate working and living conditions for all categories of workers at sea. They should provide a minimum standard to be applied worldwide, independently from the flag of the vessel or the coastal zone where it is operating.

25. Furthermore, it is necessary to adopt regulations concerning law enforcement activities at sea. They should be intensified, to prevent gross violations from taking place with impunity. Law enforcement personnel should be trained to make sure that enforcement operations comply with the relevant human rights law requirements for any enforcement action.

26. The plight of individuals at sea is not only urgent and serious as detailed above, but also concerns the lack of expeditious procedural remedies to invoke the protection of their rights. On the one hand, UNCLOS dispute settlement mechanisms are devised only for inter-States disputes, *de facto* leaving individuals aside. On the other, due to the nature of their very activity, victims of human rights abuses at sea may hardly be able to bring a case against their oppressors (individuals or State) before domestic or international courts, and when they managed to do so, this usually takes years and years.

Autonomous maritime vehicles and other new technologies

27. A further area where the UNCLOS regime proves unfit concerns autonomous ships. Nowadays, the production of autonomous and remotely controlled ships is no longer a futuristic scenario. This tremendous innovation is capable of re-defining the concept of "navigation" and its related international regulation. Accordingly, it is debatable whether the existing international regime of State governance over navigation applies to the use of autonomous ships.

28. Due to their unmanned nature, these "new" ships are fully or partially controlled by individuals acting from a remote location. In addition to the flag State, therefore, even the State in whose territory the remote operators are located plays a role in the allocation of national jurisdiction over ships. In other words, dislocation of remote

operators in States with poor legislation, joined with a flag of convenience, could make "regulation of convenience squared"

29. Surveillance technologies also pose new challenges. Ongoing engineering projects demonstrate how automation technology could help in the performance of "dull, dirty and dangerous" activities. For example, some States have already integrated unmanned and autonomous technology in their Search and Rescue (SAR) national systems. Again, the use of drones is particularly useful for conducting hydrographic operations.

30. The performance of surveillance activities through automation and digitalization poses new issues. In particular, the gathering of an immense quantity of data in the marine domain is new reality, which is not specifically regulated at an the international level. To date, new questions regarding espionage at sea, data protection and maritime digital surveillance are emerging, thus requiring the law of the sea to rapidly and efficiently address them.

In light of these challenges, is UNCLOS still fit for purpose? Can or should UNCLOS be renegotiated to better address these challenges?

31. When it was adopted, in 1982, UNCLOS was an excellent step forward. Today, however, it is not sufficient to address the challenges posed, among others, by the need to protect human rights at sea and by the use of new technologies, including autonomous vessels and remote surveillance technologies. It is necessary to continue developing national and international law.

32. Until the moment when it will fully protect people at sea, protecting and fulfilling their rights, the UNCLOS cannot be deemed complete. A radical change is needed, in perspective, policy and law. In particular it is necessary to always consider the human component in any action taken with regard to maritime spaces, maritime activities and the maritime environment

33. In an ideal world, the best solution would be to renegotiate the UNCLOS, so as to include the necessary new principles and rules. For example, a general provision similar to that in Art. 192 should say that "States have the duty to protect the human rights of any person who is at sea".

34. Further substantial and procedural rules should clarify which State has the duty to protect the rights of a person in any given case; which State must intervene if the primary State having responsibility does not fulfil its obligations; and how individuals could bring cases against public and private actors to ensure protection for their rights.

35. Renegotiation of the UNCLOS does not however appear to be a feasible option at the moment. The international community is already busy negotiating a new treaty concerning protection of biological diversity in areas beyond national jurisdiction, and any new proposal for a global multilateral negotiation would be likely to be turned down.

36. Furthermore, any renegotiation of the UNCLOS would present issues. It might be used, instead of furthering much needed principles, to lessen what had already been acquired. In addition, it could be used by new powers to upset the delicate balance of powers of coastal and other States reached in 1982, creating insecurity concerning the exercise of powers.

37. At the moment, it would therefore be best to opt for a combination of other measures:

- Strengthen the national normative framework, extending to all people working at sea human rights and labour rights protection, including social rights
- Enable national judges to pierce the corporate veil of flags of convenience and address cases relating to them.
- Train enforcement officers in human rights protection, so that they may respect human rights themselves and may promptly identify and further investigate potential situations of threat to human rights.
- Work with the competent international organisations, e.g. IMO and ILO; in order to develop regulations, guidelines and checklists for public and private actors.
- Promote and contribute to the adoption of soft law instruments at the international level, including a Resolution by the United Nations General Assembly on human rights at sea.

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?

38. The United Kingdom can and should do more to promote the protection and enforcement of human rights and working standards at sea, paying due consideration to its three-fold status as coastal, flag and port State as well as to its role as key global actor in the field of both fisheries and human rights.

39. Furthermore, the UK must promote change and must lead developments, in order to reaffirm its leadership in maritime matters and push towards a level playing field for all vessels, independently from their flags.

40. The UK has a long-standing tradition as both a maritime power and a champion of human rights, dating back to the Magna Charta. It is time to bring the two together and ensure that human rights are protected at sea.

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