

UNCLOS: Fit for Purpose?

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Placing UNCLOS in Historical Context

- The Grotian Era – Mare Liberum
- 1600 to 1950
- The basic premise was that the control or regulation of the seas and oceans should be of a bare minimum to allow for their free use. This included minimum territorial possession – eventually restricted in general to 3 nautical miles from land,
- From a Legal stance, there were three main legal pillars:
 - The Laws of War and Neutrality at Sea
 - The Law of Sea Piracy
 - Exclusive Flag State Jurisdiction on the High Seas

Defining the Grotian Era

- A period of Maritime Imperialism
- European Dominance of the Oceans: By early 20th century, 80% of globe under European or North American imperial control/influence
- European rivalries led to wars that extended to the oceans, from the Anglo-Dutch wars of the 17th century to the World Wars of the 20th
- Symbiotic relationship between navies and merchant fleets
- Mercantilism replaced by Free Trade in the 19th century
- Ocean resources not under threat globally (local issues notwithstanding)

The Ocean Environment Today

- Eight Dimensions of the Ocean Environment
- Profound Change in all eight dimensions:
 - Political
 - Economic
 - Social
 - Technological
 - Physical
 - Security
 - Normative
 - Institutional

The UNCLOS Process

- Early stages in the 1930s, interrupted by the Second World War
- 1958 UNCLOS I – Dominated by the traditional maritime powers
- An attempt to set the framework for the future in their favour
- Four Conventions
 - Territorial Sea and Contiguous Zone
 - High Seas
 - Continental Shelf
 - Fisheries

The UNCLOS Process 2

- UNCLOS II – Unsuccessful attempt to agree the limit of the Territorial Sea – essentially unfinished business from 1958
- 1960s Emergence of Common Heritage of Mankind coupled with significant increase in the number of states following the end of empires
- Developing world – so called Third World – looking to change the international system in their favour, including the establishment of ‘New International Orders’, including the NIEO
- Emergence of rival Group of 77 and Major Maritime Powers’ agendas

The UNCLOS Process 3

- UNCLOS III – 1973 to 1982 + Agreement on Seabed Mining
- Resultant 1982 Convention was and remains a combination of new thinking and attempts to retain traditional positions, including ‘Free Seas’ thinking and navigation rights etc, including naval mobility
- The Conference was meeting as the Ocean Environment was going through profound change. That process was not complete. It was held a quarter of a century after the ‘end of the Grotian Era’ and before many developments had fully emerged. Indeed, many are still not yet fully appreciated
- 1982 UNCLOS is now 40 years old and reflects a set of compromises reached against a dynamic and shifting background. It does not reflect realities today or those likely in the future.

Is 1982 UNCLOS Fit for Purpose?

- Quick answer is NO....it would be surprising if it was, given the rate of environmental change over recent decades.
- It is not about to be changed – there is no international appetite for UNCLOS IV – and opening the Convention up for significant change would probably destroy it (on balance it is probably better to have it with all its faults than to abandon it altogether!).
- No shortage of law – including multiple conventions produced under IMO auspices, many of which work after a fashion....but which tend to favour the international shipping industry.
- Greatest of all problems is to do with enforcement.

From *Mare Liberum* to *Mare Legitimum*?

- My thesis is that *Mare Liberum* worked reasonably well and to the satisfaction of the major powers until the mid-20th century.
- Dramatic changes since the mid-20th century have rendered *Mare Liberum* obsolete
- The residue of *Mare Liberum* within 1982 UNCLOS prevents the development of safe, secure and lawful seas – well regulated, responsibly used and sustainable seas – what I refer to as *Mare Legitimum*.
- Issues of great concern include the continuing existence of Exclusive Flag State Jurisdiction on the High Seas and a profound lack of enforcement capability and arrangements – both on the High Seas and within coastal zones. – The need for effective enforcement is frequently overlooked (BBNJ is a prime example of this....as are MPAs)

Focus on Human Rights at Sea

- The UNCLOS process up to and including UNCLOS III ignored the issue of human rights at sea.
- Not surprising as International Human Rights Law was not a major influence globally in the 1970s – it is a 21st century phenomenon (I realise this is a controversial statement....but it is true, nevertheless!)
- There are around 30 million men women and children physically at sea as I speak, the vast majority of whom have no effective remedy if their human rights are breached
- Mention of slavery in fishing and crime on board cruise ships.

1982 UNCLOS is not fit for purpose!

- Negotiated in the midst of change and could not take account of developments since then.
- Was lacking serious consideration of how law should be enforced at sea.
- Did not consider Human Rights at all (OK....it did mention slavery, and arguably safety of life at sea etc has a Human Rights dimension).
- There is a virtual legal vacuum on the High Seas.
- The Exclusive Flag State Jurisdiction idea is now completely broken, with open registries wholly incapable of exercising jurisdiction over their vessels – and ships not having a ‘genuine link’ to them.

What to do?

- A very difficult question to answer – If I had the answer to it I would be fully employed solving the world’s problems with no time to speak to you today – although there would also be no need for me to bang on the way I just have!
- We need to stop denying there is a problem – we need to stop claiming, as many do, that 1982 UNCLOS is a working ‘constitution for the oceans’. It is a seriously flawed constitution at best.
- The regulation of the oceans and the enforcement of laws at sea is a significant global issue to join the issues of climate change and environmental degradation, not least because it overlaps with those issues to a substantial degree

Thank you!

- Do please feel free to get in touch if you have any questions in the future. My email is s.haines@gre.ac.uk
- A much expanded explanation of what I have said this afternoon will be published in the *Ocean Yearbook* next year – I am drafting it at the moment.
- For Human Rights related information, see the website of the NGO Human Rights at Sea: www.humanrightsatsea.org and also see the paper ‘Developing Human Rights at Sea’ I published in the *Ocean Yearbook* in 2021 (it is available open access online through both the Brill and Human Rights at Sea websites).