WRITTEN TESTIMONY OF
DEPUTY SECRETARY OF DEFENSE GORDON ENGLAND
BEFORE THE
SENATE FOREIGN RELATIONS COMMITTEE
ON SEPTEMBER 27, 2007

ACCESSION TO THE 1982 LAW OF THE SEA CONVENTION AND RATIFICATION OF THE 1994 AGREEMENT AMENDING PART XI OF THE LAW OF THE SEA CONVENTION

[Senate Treaty Document 103-39; Senate Executive Report 108-10]

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on the 1982 United Nations Convention on the Law of the Sea ("the Convention") and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 ("the 1994 Agreement").

As Deputy Secretary of Defense, and a prior Deputy Secretary of Homeland Security and prior Secretary of the Navy, I am well acquainted with the Law of the Sea Convention. The legal framework that the Convention establishes is essential to the mission of the Department of Defense, and the Department of Homeland Security concurs that it is also essential for their mission. For that reason, Secretary Gates, the Joint Chiefs of Staff, the Military Department Secretaries, all of the Combatant Commanders, and the Commandant of the Coast Guard join me in asking the Senate to give its swift approval for U.S. Accession to the Law of the Sea Convention and ratification of the 1994 Agreement.

In our judgment, the bar should be set very high for the United States to decide to join a major multilateral treaty, such as this Convention. Therefore, before the President issued his statement of support for the Convention on May 15, the Administration

thoroughly reviewed the benefits and challenges. As I will explain further below, the benefits to joining this Convention are significant, and they substantially and unquestionably outweigh any perceived risks.

As the President noted in his May 15 statement, joining the Convention will secure U.S. sovereign rights over extensive marine areas, promote U.S. interests in the environmental health of the oceans, and give the United States a seat at the table when rights vital to our national interests are debated and interpreted.

The President also noted that joining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide. It is this point that is the focus of my testimony today. The navigation and overflight rights and high seas freedoms codified in the Convention are essential for the global mobility of our Armed Forces and the sustainment of our combat forces overseas. We are a nation at war, and we require a great sacrifice of the men and women in uniform who go into harm's way on our behalf. Joining this Convention will make our nation stronger and will directly support our men and women in uniform.

As the world's foremost maritime power, our security interests are intrinsically linked to freedom of navigation. America has more to gain from legal certainty and public order in the world's oceans than any other country. By joining the Convention, we provide the firmest possible legal foundation for the rights and freedoms needed to project power, reassure friends and deter adversaries, respond to crises, sustain combat forces in the field, and secure sea and air lines of communication that underpin international trade and our own economic prosperity. Specifically, the legal foundation of this Convention:

- Defines the Right of Innocent Passage, whereby ships may continuously and expeditiously transit the territorial seas of foreign States without having to provide advance notification or seek permission from such States.
- Establishes the Right of Transit Passage through, under, and over international straits and the approaches to those straits. This right, which may not be suspended, hampered or infringed upon by coastal States, is absolutely critical to our national security. This is the right that underpins free transit through the critical chokepoints of the world, such as the Strait of Hormuz, the Straits of Singapore and Malacca, and the Strait of Gibraltar.
- Establishes the Right of Archipelagic Sealane Passage, which, like Transit Passage, helps ensure free transit through, under, and over the sealanes of archipelagic nations, such as Indonesia.
- Secures the right to exercise High Seas Freedoms in exclusive economic zones, the 200 nautical mile-wide bands of ocean off coastal shores. The Department's ability to position, patrol, and operate forces freely in, below, and above those littoral waters is critical to our national security.
- Secures the right of U.S. warships, including Coast Guard cutters, to board stateless vessels on the high seas, which is a critically important element of maritime security operations, counter-narcotic operations, and anti-proliferation efforts, including the Proliferation Security Initiative.

If the United States is not a Party to the Convention, then our current legal position is reduced to President Reagan's oceans policy statement of March 1983 and several 1958 Conventions on the seas that remain in force but are, in our judgment, no

longer adequate. President Reagan accepted that the navigation and overflight provisions of the Convention -- as well as those relating to other traditional uses of the oceans – reflected customary international law and state practice. Further, President Reagan directed the United States Government to adhere to those provisions of the Convention while he, and successive Presidents, worked to fix the Deep Seabed Mining provisions of the Convention.

In perspective, the U.S. reliance on customary international law was intended to serve as an interim measure while the Deep Seabed Mining provisions of the Convention were modified to address U.S. concerns. In his recent letter to the Committee, former Secretary of State George Shultz confirms that President Reagan and his Administration supported ratification of the Convention if the Deep Seabed mining provisions were fixed. Secretary Shultz also stated that the treaty has been changed in such a way with respect to the Deep Seabed that it is now acceptable in his judgment. Mr. Ken Adelman, another former Reagan Administration official who dealt directly with the Convention, has also confirmed this point

Although reliance on customary international law has been relatively effective for us as an interim measure, neither customary international law nor the 1958 Conventions are adequate in the long-term. U.S. assertions of rights under customary international law carry less weight to States than do binding treaty obligations. By its very nature, customary international law is less certain than convention law, as it is subject to the influence of changing State practice. In addition, the 1958 Conventions are inadequate for many reasons, including their failure to establish a fixed limit to the breadth of territorial seas, silence regarding transit passage and archipelagic sea lanes passage, and

absence of well-defined limits on the jurisdictional reach of coastal states in waters we now recognize as exclusive economic zones. If the United States remains outside the Convention, it will not be best positioned to interpret, apply, and protect the rights and freedoms contained in the Convention.

Becoming a Party to the Law of the Sea Convention directly supports our National Strategy for Maritime Security. As the President noted in the opening pages of the Strategy: "We must maintain a military without peer – yet our strength is not founded on force of arms alone. It also rests on economic prosperity and a vibrant democracy. And it rests on strong alliances, friendships, and international institutions, which enable us to promote freedom, prosperity, and peace in common purpose with others." That simple truth has been the foundation for some of our most significant national security initiatives, such as the Proliferation Security Initiative. As the leader of a community of nations that are Parties to the Convention, more than 150 in total, the United States will be better positioned to work with foreign air forces, navies, and coast guards to address jointly the full spectrum of 21st Century security challenges.

Before closing, I would like to address some of the opposing views. Critics of the Convention argue that an international tribunal will have jurisdiction over our Navy and that our intelligence and counter-proliferation activities will be adversely affected. In the judgment of the Department, these concerns have been more than adequately addressed within the terms of the Convention.

- Our intelligence activities will not be hampered by the Convention. This matter was fully addressed in a series of open and closed hearings in 2004. Just recently,

the Defense Department, State Department, and Office of the Director of National Intelligence confirmed the accuracy of the testimony provided in those hearings.

- The Senate can ensure that international tribunals do not gain jurisdiction over our military activities when we join this Convention. In 2003, the Administration worked closely with the Committee to develop a proposed Resolution of Advice and Consent --- which we continue to support --- that contains a declaration regarding choice of procedure for dispute resolution. The United States rejected the International Court of Justice and the International Tribunal for the Law of the Sea and instead chose arbitration. That choice-of-procedure election is expressly provided for in the Convention itself. In addition, and again in accordance with the express terms of the Convention, the draft Resolution of Advice and Consent completely removes our military activities from the dispute resolution process. Furthermore, each State Party, including the United States, has the exclusive right to determine which of its activities constitutes a military activity, and that determination is not subject to review.
- Regarding our counter-proliferation efforts, which include interdiction activities at sea and in international airspace, I strongly endorse the position of the Vice Chief of Naval Operations, Admiral Walsh, who served as the Commander of all U.S. and Coalition maritime forces in the Persian Gulf, North Arabian Sea, Horn of Africa, and Red Sea from 2005 to 2007. There is no better authority on maritime interception operations than Admiral Walsh, and he correctly points out that not only does the Convention enhance our interdiction authorities, but not

joining the Convention is detrimental to our efforts to expand the number of countries that support the Proliferation Security Initiative.

- And, as all recognize, this Convention does not affect the United States' inherent right and obligation of self defense. Further, as Mr. Negroponte has explained in detail, joining the Convention gives us the opportunity to extend our sovereign rights dramatically and advance our energy security interests by maximizing legal certainty and international recognition for our extended continental shelf off Alaska and elsewhere.

As I noted in opening this statement, President Bush, Secretary Gates, the Joint Chiefs of Staff, the Military Department Secretaries, the Combatant Commanders, the Commandant of the Coast Guard and I urge the Committee to give its approval for U.S. accession to the Law of the Sea Convention and ratification of the 1994 Agreement. The United States needs to join the Law of the Sea Convention, and join it now, to take full advantage of the many benefits it offers, to mitigate the increasing costs of being on the outside, and to support the global mobility of our armed forces and the sustainment of our combat forces overseas.

Thank you for the opportunity to make the Department of Defense's views known on this important matter.