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Evidence submitted to the Committee's Inquiry (Section 6 'Challenges')

The Invisibility of Non-State Actors in UNCLOS:

The Case of Private Rights in Contested Waters

An increasing number of coastal States grant private exploratory, fishing, and scientific research rights in marine and submarine areas which are also claimed by neighbouring States with opposite or adjacent coasts. If delimitation follows, those rights may be threatened with reallocation from the State which originally created them to the neighbouring State. The sudden displacement of private rights from one jurisdiction to another can affect the legal and economic interests of their holders.

A question that arises is: do the rules of maritime delimitation protect the rights of non-State actors effectively against the challenge of a potential reallocation? It would be expected that the answer to this question is affirmative. Private rights at sea bear an important socio-economic value to their holders and are of proprietary nature.[1] Proprietary rights are protected in all legal systems, including international law (human rights law, international investment law). For those reasons, private rights on land are protected against a potential reallocation in land delimitation. This is effected in two different ways: firstly, private rights situated in a disputed area tend to determine the land boundary's course -and in that case, they are secured from reallocation. Secondly, even when reallocation of private rights on land is inevitable (e.g for geographical reasons), States make sure to compensate the affected right holders or grant them new rights in the redistributed area.

Regrettably, the situation is completely different at sea. Private rights situated in contested waters are largely disregarded during the process of maritime delimitation. This is particularly evident in judicial delimitation effected by the 3-stage approach.[2] In those situations, judges tend to disregard private rights

[1] A concession or licence is essentially a usufruct or lease or a *profit-à-prendre.*

[2] According to this three-step approach, a provisional equidistance line is first drawn and then judges examine whether any circumstances justify its shifting. Finally, judges perform a

almost by reflex, and rely only on geographic factors. This opens the door to the reallocation of private rights from one jurisdiction to another and eventually their discharge post delimitation.[3] Eventually, this creates a tension in the dispute settlement mechanisms of law of the sea: the delimitation of a maritime disputed area will terminate the interstate dispute in a final and peaceful manner but at the same time, it can have a severe (if not catastrophic) impact on non-State actors holding interests in the region.

The above identified problem is mainly attributed to UNCLOS. The provisions of UNCLOS about boundary disputes and delimitation refer exclusively to the rights/duties and interests of States.[4] On the contrary, no reference is made to non-State actors holding legal or economic interests in contested waters. In the eyes of UNCLOS, these actors are literally invisible —for they possess no international rights or duties amid a boundary dispute and no procedural capacity to defend their interests against the acts of States before international courts or tribunals.[5]

In fact, the invisibility of non-State actors is not limited in the provisions which regulate boundary disputes and delimitation but extends in the entire body of UNCLOS. With the exceptions of piracy in the high seas[6] and the exploration of the deep seabed (the Area),[7] no other reference is made to physical or juridical private actors. And even on these few occasions, where the Convention does

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disproportionality test to make sure that no significant inequalities exist between the areas awarded to the concerned States. This method has been hailed in both theory and jurisprudence for securing objectivity and predictability in maritime delimitation. Therefore, it is applied firmly by courts unless there are compelling reasons that make it unfeasible in a particular case.

[3] For an analysis of this issue see Marianthi Pappa, Non-State Actors' Rights in Maritime Delimitation: Lessons from Land; Marianthi Pappa, 'The Impact of Judicial Delimitation on Private Rights Existing in Contested Waters: Implications for the Somali-Kenyan Maritime Dispute' (2017) Cambridge Journal of African Law 61(3) 393-418; Marianthi Pappa, Private Rights in Boundary Dispute Settlement: Land v Maritime Delimitation (2021) Evrigenis Yearbook of International and European Law Vol 2 58-77.

[4] E.g Articles 2-15 (referring to the Territorial Sea); 33 (referring to the contiguous zone); 55-75 (referring to the Exclusive Economic Zone); 76-85 (referring to the Continental Shelf); 279-299 (referring to the settlement of disputes).

[5] See relevant provisions, e.g Articles 15; 74; 83; 279-296 UNCLOS.

[6] Art 105, which provides that "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

[7] E,g Articles 137; 153; 168(3); 187(c); 190 which refer to the right of physical or juridical persons to request permission from an international body (the Authority) in order to conduct exploratory activities in the Area and their procedural capacity to appear before the International Tribunal of the Law of the Sea (ITLOS) in order to settle any disputes which may arise with the Authority in relation to these activities.

somehow refer to non-State actors, it is for areas which fall beyond the coastal States' jurisdiction. That is at least striking, considering that a significantly greater number of private activities take place within the States' maritime zones.[8]

The stance of UNCLOS towards non-State actors can only be partly justified. There is no doubt that UNCLOS has been successful in addressing various and demanding maritime issues, and in a manner which attracted such large number of signatories around the world. For its draftsmen, the Convention dealt "with all matters relating to the law of the sea"[9] which, according to President Koh made it the "constitution for the oceans."[10] However, this characterization can be now challenged. UNCLOS dealt with matters which were critical for the law of the sea *at the time of its making*, and concern mainly the acts and interests of States (coastal States, landlocked or geographically disadvantaged States, fishing States, archipelagic States) in the ocean.[11]

Although crucial, the above topics do not necessarily coincide with the issues which concern the international community 39 years after the treaty's making.[12]

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[8] For example, the exploration of the deep seabed is still very sparse. At the moment, only 15 contractors are operating in the Area, and many of these organizations are State-owned, like the China Minerals Corporation or the Federal Institute for Geosciences and Natural Resources of Germany. Source, <https://www.isa.org.jm/faq/who-are-countriescompanies-are-exploring-deep-seabed-minerals> accessed 5 November 2021. By contrast, a massively greater number of private (seismic, drilling, scientific) operations are conducted daily in the States' CS. In 2015, over 1.000 oil rigs were located in the world's maritime zones. Source <https://www.statista.com/statistics/279100/number-of-offshore-rigs-worldwide-by-region/> accessed 5 November 2021.

[9] UN General Assembly Resolution 3067 (XXVIII), 1973 para 3 deciding the convention of the Third United Nations Conference on the Law of the Sea; first para of UNCLOS Preamble.

[10] See remarks by Ambassador Tommy Koh, President of the Third United Nations Conference on the Law of the Sea at <http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf> accessed 5 November 2021.

[11] The agenda of the Conference of UNCLOS included 25 subjects: the international regime of the sea-bed and the ocean floor beyond national jurisdiction; the Territorial Sea; the contiguous zone; straits for international navigation; the Continental Shelf; the Exclusive Economic Zone beyond the territorial sea; coastal State preferential rights or other non-exclusive jurisdiction over resources beyond the Territorial Sea; high seas; land-locked countries; rights and interests of shelf-locked States and States with narrow shelves or short coastlines; rights and interests of States with broad shelves; preservation of the marine environment; scientific research; development and transfer of technology; regional arrangements; archipelagos; enclosed and semi-enclosed seas; artificial islands and installations; regime of islands; responsibility and liability for damage resulting from the use of the marine environment; settlement of disputes; peaceful uses of the ocean space: zones of peace and security; archaeological and historical treasures on the sea-bed and ocean floor beyond the limits of national jurisdiction; transmission from the high seas; enhancing the universal participation of States in multilateral conventions relating to the law of the sea.

[12] See, David Freestone (ed), *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas* (Brill 2013); Tullio Treves, 'UNCLOS at Thirty: Open Challenges' (2013) 27 Ocean Yearbook 49-66; David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006); Anastasia Strati et al (eds), *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (Martinus Nijhoff 2006).

A series of different aspects have arisen since then, which are not addressed in UNCLOS whatsoever. These include: the presence of private actors in the coastal States' maritime zones (e.g immigrants and refugees fleeing on boats, potential terrorists committing internationally prohibited acts at sea) and of course, the increasing conduct of private operations (exploratory, fishing, scientific research) in contested waters.

It could be assumed that UNCLOS does not specifically refer to private rights in its maritime delimitation framework in order to discourage States from granting such rights in contested waters. If that was indeed the case, then convention would have prohibited the creation of private rights in undelimited maritime spaces in the first place. Besides, such prohibition would be against the principles of law of the sea and the rights of coastal States. Insofar as States act within the legal limits of their entitled maritime zones (12 nautical miles for the Territorial Sea, 200 nautical miles for the Continental Shelf and the Exclusive Economic Zone), they are expected to create private rights.[13] The absence of international boundaries cannot prevent the States' economic development nor the exercise of their sovereign powers in the ocean. How can UNCLOS disregard this reality?

Besides, the impact of maritime delimitation extends beyond the sphere of the concerned States. Whether on land or at sea, the establishment of international boundaries affects the international community as a whole. It primarily secures the peaceful co-existence among States. But at the same time, it has a permanent effect on the lives and activities of any physical or legal persons situated in the transboundary area. Therefore, the rules which regulate maritime delimitation should consider not only the interests of the involved States but also the interests of private actors which may exist in the area under delimitation.

Finally, by excluding non-State actors from its auspices, the law of the sea fails to comply with the current stance of international law towards non-State actors. Until the dawn of the twentieth century, non-State actors had been absent from most (if not all) disciplines of international law.[14] However, their increasing

[13] For an analysis of the coastal States' rights in contested waters and the legal status of private rights unilaterally granted in those areas, see Marianthi Pappa, Non-State Actors' Rights in Maritime Delimitation: Lessons from Land (CUP 2021) 15-45; Marianthi Pappa, 'Private Oil Companies Operating in Contested Waters and International Law of the Sea: A Peculiar Relationship' (2018) OGEL 16(1).

[14] For a detailed discussion see: Manfred Lachs, *The Teacher in International Law* (2nd ed Martinus

presence in the international plane and their constant interaction with States has made clear that non-State actors are no longer mere objects of international law —and therefore, they should be elevated to subjects thereof.[15] In response to this need, the majority of international law disciplines, such as human rights law, humanitarian law, criminal law, investment law, and environmental law have conferred on non-State actors substantive rights, duties, and procedural capacities before international fora. By contrast, international law of the sea remains State-centric. That is particularly striking, considering that UNCLOS was established much later than most treaties which gave a place to non-State actors in the international arena.[16]

In sum, UNCLOS' scope is restricted, in that it deals mainly with State interests. Clearly, the convention was made *by* States *for* States. However, the increasing presence of private actors in the ocean, and particularly in contested waters, does not justify the disregarding of private interests by law of the sea. Although States were the main protagonists in the ocean when UNCLOS was drafted, the law's position towards non-State actors no longer reflects the present image of the world's seas.

Nijhoff 1987) 5-6; Lassa Oppenheim, 'The Science of International Law its Task and Method', and Anthony D'Amato, 'Is International Law Really ''Law''?' both in Gerry Simpson (ed), *The Nature of International Law* (Ashgate 2001) 97-136 and 137-158; Wolfgang Friedmann et al (eds), *Transnational Law in a Changing Society: Essays in Honor of Philip Jessup* (Columbia University Press 1972); Phillip Jessup, *A Modern Law of Nations* (The MacMillan Company 1945) esp 1-14; Wolfgang Friedmann, *The Changing Structure of International Law* (Stevens & Sons 1964); Andrzej Wasilkowski, 'International Law: How Far is it Changing?', in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff 1984) 308; Wilfred Jenks, 'The Scope of International Law' (1954) 31 British Yearbook of International Law 1-48; Malcolm Shaw, *International Law* (5th ed Cambridge University Press 2003) 42-47; Antonio Cassese, *International Law* (Oxford University Publishers 2001) 11-12; Wilfred Jenks, 'The Scope of International Law' (1954) 31 British Yearbook of International Law 1-48.

[15] The international community ''is no longer limited to States (if it ever was)'' but comprises a cluster of non-State entities, including organisations, such as the United Nations, and private persons, such as individuals and multinational corporations. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) 41. See also, Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (Longmans, Green and Co Lts 1927) 73-79; and by the same author, 'The Subjects of the Law of Nations' (1947) 63 International Law Quarterly Review 438-460; Clyde Eagleton, 'The Individual and International Law' (1946) 40 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 22; 22-29; Philip Jessup, 'The Subjects of a Modern Law of Nations' (1947) Michigan Law Review 45(4) 383-408; and by the same author, *Transnational Law* (Yale University Press 1956) 3; Georg Schwarzenberger and Edward Brown, in *A Manual of International Law* (6th ed) (Milton Eng: Professional Books 1976) 24; Christian Walter, 'Subjects of International Law' in Rudiger Wolfrum (eds), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2012) 640; Edith Brown Weiss, 'The New International Legal System' in Nandasiri Jasentuliyana (ed), *Perspectives on International Law* (Kluwer 1995) 65-66.

[16] Compare with human rights conventions, investment treaties etc, which were signed in early or mid-1900s.

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