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House of Lords, International Relations and Defence Committee inquiry, 'UNCLOS: fit for purpose in the 21st century?'

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About the author

1. Jessica NM Schechinger is a PhD Candidate in International Law and a Graduate Teaching Assistant in the School of Law at the University of Glasgow. She is also a co-convenor of the European Society of International Law (ESIL) Interest Group on the Law of the Sea. Jessica holds an LLB and an LLM (public international law), both from Utrecht University, the Netherlands. She also graduated from the Rhodes Academy of Oceans Law and Policy. Jessica previously worked as a junior researcher in the research project on Shared Responsibility in International Law (SHARES) at the University of Amsterdam; and as a research assistant at the department of International and European Law at Utrecht University and the Netherlands Institute for the Law of the Sea (NILOS).

Introduction

2. Since 2014, Jessica has been researching the issues addressed in this submission,¹ for the last four years as a PhD Candidate in the School of Law at the University of Glasgow.

The views and observations in this submission are derived from this research experience.

3. The following two questions of the call for evidence are addressed in this submission:² Question 6: 'What are the main challenges facing the effective implementation of UNCLOS in 2021? We would particularly welcome responses on: (...) Maritime security and human rights at sea (including migration, modern slavery and human trafficking)'; and question 9: 'What should be the priorities

¹ J. Schechinger, 'Geneva Declaration on Human Rights at Sea (Version 1, 5 April 2019) – a contribution to the discussion on human rights in the maritime context', *K.G. Jebsen Centre for the Law of the Sea (JCLOS)/Norwegian Centre for the Law of the Sea (NCLOS) Blog*, 6 May 2019; J.N.M. Schechinger, 'Responsibility for Human Rights Violations Arising from the Use of Privately Contracted Armed Security Personnel Against Piracy: Re-emphasizing the Primary Role and Obligations of Flag States', in C. Ryngaert et al. (eds.), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (Leiden: Brill, 2015), pp. 30-47 (also available at SSRN); and J.N.M. Schechinger, 'Flag States, Privately Contracted Armed Security Personnel and Human Rights Violations at Sea', Research Summary for www.piracy-studies.org (research portal for maritime security), 24 March 2015.

² All websites were last accessed on 9 November 2021.

for the UK Government regarding the future of UNCLOS and the international law of the sea? In what areas can or should the UK be a leader?’

4. The UK’s commitment to UNCLOS³ and ‘to upholding its rules and securing the implementation of its rights and obligations’⁴ is greatly appreciated and firmly supported by the author. In addition, this inquiry and the Lord Chair’s remarks, when she stated that ‘We will try to ensure that the UK Government are also more interested in the work on the law of the seas’,⁵ are appreciated and applauded.

5. In the first part of this submission, I will show that Privately Contracted Armed Security Personnel (PCASP), that provide armed security on board ships, present a challenge for maritime security and human rights at sea, and argue that this activity needs to be regulated on the international level (paras. 7-13).

6. Second, it is argued in this submission that international regulation of human rights at sea more generally, as well as the proper regulation of PCASP operating at sea, specifically, should be two priorities for the UK government (paras. 14-16).

PCASP as a challenge for maritime security and human rights at sea that needs to be regulated on the international level

7. In answering question 6, I would like to address one current challenge that relates to ‘the effective implementation of UNCLOS in 2021’, and maritime security and human rights at sea, that has not been discussed in the oral evidence hearings. Therefore, I wish to draw attention to PCASP in this submission, as an important non-state actor that operates at sea. Generally, using PCASP to protect vessels, cargo, and crews against piracy has become an accepted practice, and PCASP are extremely effective in deterring piratical acts. However, the use of PCASP can at the same time ‘be rather problematic in practice, particularly in terms of accountability for human rights violations’.⁶ This is because incidents have occurred where (alleged) pirates, and local fishermen that have been mistaken for pirates, have been harmed and/or killed due to the use of force by PCASP.⁷ The 2010 *Almezaan* incident involving PCASP⁸ is seen as

³ 1982 United Nations Convention on the Law of the Sea (1833 UNTS 3).

⁴ Foreign, Commonwealth & Development Office and Amy Townsend, ‘Upholding the UN Convention on the Law of the Sea’, National Statement at the UN General Assembly, 75th Session, on Oceans and the Law of the Sea, 8 December 2020 (transcript of the speech), at <https://www.gov.uk/government/speeches/upholding-the-un-convention-on-the-law-of-the-sea>.

⁵ House of Lords, International Relations and Defence Committee, Uncorrected oral evidence: UNCLOS: fit for purpose for the 21st century?, 20 October 2021 (transcript), at <https://committees.parliament.uk/event/6011/formal-meeting-oral-evidence-session/>, p. 16.

⁶ Schechinger, ‘Flag States, Privately Contracted Armed Security Personnel’, note 1, at introduction.

⁷ Schechinger, ‘Responsibility for Human Rights Violations’, note 1, pp. 35-37; M. Wiese Bockmann and A. Katz, ‘Shooting to Kill Pirates Risks Blackwater Moment’, *Bloomberg*, 9 May 2012 at <https://www.bloomberg.com/news/articles/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment>.

⁸ ‘“Pirate” dies as ship’s guards repel attack off Somalia’, *BBC*, 24 March 2010; A. Cowell, ‘In First, Private Guards Kill Somali Pirate’, *The New York Times*, 24 March 2010.

'the first time private security guards have killed a pirate in defence of a ship'.⁹ PCASP related incidents where accountability issues have arisen regarding the conduct of PCASP operating at sea further include the well-known 'Chennai six' case,¹⁰ and the horrendous 2012 'Murder at sea' incident, in which it is estimated that twelve persons were killed.¹¹

8. Several states that could have exercised jurisdiction with regard to these (and other) PCASP related incidents have, however, not investigated them. In fact, no one has been held accountable, on the international and national level, for any of these (known) incidents.

9. The international law of the sea at present does not specifically regulate the private maritime security industry and PCASP operating at sea. On the whole, there is a lack of effective and binding regulation and clarity in terms of several legal issues and uncertainties arising from the use of PCASP at sea. This includes first, the certification of PCASP; second, the use of force by PCASP; third, oversight of PCASP operating at sea (and companies that employ them), and; fourth, accountability for PCASP conduct.¹²

10. Professor Natalie Klein mentioned another issue, that is floating armouries and the lack of their regulation ('... there are indeed gaps in the legal regime. We do not have rules dealing directly with floating armouries...').¹³ Floating armouries are connected to PCASP operating at sea and have emerged due to the high demand for PCASP and weapons at sea. They are used to store weapons and serve as hotels for PCASP in between jobs. Floating armouries are a (potentially) serious maritime security risk for all states, including the UK.

11. Current international regulation and self-regulation are inadequate, and the need for accountability for PCASP conduct, and the need to regulate PCASP operating at sea on the international level, has been acknowledged.¹⁴ First,

⁹ "'Pirate" dies as ship's guards repel attack off Somalia', *ibid.*; also Cowell, 'In First, Private Guards Kill Somali Pirate', *ibid.*; Schechinger, 'Responsibility for Human Rights Violations', note 1, p. 35.

¹⁰ See e.g. 'Chennai Six: Britons released from Indian jail', *BBC*, 28 November 2017; AP, 'Indian police arrest crew of US-owned antipiracy escort ship and seize guns', *The Guardian*, 18 October 2013; Urbina, *The Outlaw Ocean: Crime and Survival in the Last Untamed Frontier* (The Bodley Head, 2019), pp. 331-333. This incident highlights the potential serious legal consequences for individual PCASP as well.

¹¹ I. Urbina, 'Murder at Sea: Captured on Video, but Killers go Free', *The New York Times*, 20 July 2015, at <https://www.nytimes.com/2015/07/20/world/middleeast/murder-at-sea-captured-on-video-but-killers-go-free.html>; I. Urbina, *Outlaw Ocean*, note 10, pp. 320-322; 341-342 (this incident is referred to in several other places in the book); *National Geographic* series 'Lawless Oceans', 2017, hosted by K. von Hoesslin, episode 2.

¹² Schechinger, 'Responsibility for Human Rights Violations', note 1, p. 33.

¹³ House of Lords, International Relations and Defence Committee, Uncorrected oral evidence: UNCLOS: fit for purpose for the 21st century?, 3 November 2021 (transcript), at <https://committees.parliament.uk/event/6169/formal-meeting-oral-evidence-session/>, Klein, p. 5.

¹⁴ See e.g. Schechinger, 'Responsibility for Human Rights Violations', note 1, p. 33; C. Oehmke, *Der Einsatz privater Sicherheitsdienste auf Handelsschiffen zur Abwehr gegen Piraterie* (Nomos, 2016); A. Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates' (2013) 62(3) *ICLQ* 667, at 699-701; N. Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options', in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (OUP, 2011), p. 37, at pp. 37, 51; A.

UNCLOS does not address PCASP at sea. Second, although the International Maritime Organization (IMO) approved recommendations and guidance on using PCASP on board vessels in the High Risk Area of the Western Indian Ocean and the Gulf of Aden, to date, the IMO has not sufficiently regulated PCASP either, especially considering the different contexts and geographical areas that PCASP operate in. In addition, some self-regulating efforts by the industry are insufficient to address the legal problems surrounding PCASP related incidents.

12. Professor Steven Haines mentioned the current lack of an effective remedy for (alleged) human rights violations that occur at sea.¹⁵ He mentioned the example of a young British woman who was sexually assaulted on a cruise ship that was sailing in the Mediterranean Sea a couple of years ago.¹⁶ This is, unfortunately, not uncommon, and the lack of an effective remedy is a problem in several other contexts as well. This submission focuses on one such context, that is the lack of an effective remedy in the scenario in which fishermen or (alleged) pirates have been injured and/or killed by PCASP. Although the (legal) reality at sea is complex, and '(exceptional) circumstances' may surround operating at sea, especially on the high seas,¹⁷ PCASP should be regulated regardless of where they operate, and potential victims should have access to an effective remedy if an (alleged) breach of human rights and harm has occurred at sea.

13. Professor Sir Malcolm Evans and Dr Sofia Galani mentioned that several human rights issues are not (properly) regulated, and that uncertainties exist surrounding how human rights obligations do and should apply at sea.¹⁸ Although it is recognised that human rights, generally, are applicable in the maritime context,¹⁹ there are some considerable legal uncertainties when it comes to how human rights apply in different contexts. Indeed, as I argued elsewhere,

Priddy and S. Casey-Maslen, 'Counter-piracy Operations by Private Maritime Security Contractors – Key Legal Issues and Challenges' (2012) 10(4) *JICJ* 839, at 840, 842; 'Regulating PMSCs at Sea: Operational and Legal Specificities', Presentation by Dr. Anna Petrig, 14 December 2016, United Nations Human Rights Council Intergovernmental Working Group on Private Military and Security Companies, 5th Session, Geneva, 12-16 December 2016, 6 pages; T.C. Skaanild, 'Piracy: Armed Robbery, Kidnapping, Torture and Murder at Sea', in M.Q. Mejia Jr. et al. (eds.) *Piracy at Sea* (Springer, 2013), pp. 27-28; I.M. Ralby, 'What Went Wrong When Regulating Private Maritime Security Companies', in J. Schildknecht et al. (eds.), *Operational Law in International Straits and Current Maritime Security Challenges* (Springer, 2018), p. 161, at pp. 161, 171; C.M.J. Ryngaert, 'De nieuwe Wet ter Bescherming Koopvaardij' (2018) *Ars Aequi* 787, 788-790, 792; V. Becker-Weinberg, 'Flag States' Liability for Wrongful Acts by Private Military and Security Companies on Board Ships', in C. Espósito et al. (eds.), *Ocean Law and Policy: Twenty Years of Development Under UNCLOS* (Brill, 2016), p. 220, pp. 233, 237, 248; Y.M. Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (2013) 24 *Duke JCIL* 107, especially at 110, 149-160; T. Singer, 'Private Military and Security Companies and Counter-Piracy: a Comparison of (National) Legislation on the Use of Armed Guards on Board of Merchant Ships' (2015) 28(1) *JILPAC* 13, at 23; and C. Liss, 'Commercial anti-piracy escorts in the Malacca Strait', in C.G. Berube and P. Cullen (eds.) *Maritime Private Security* (Routledge, 2012), p. 51, pp. 56-57.

¹⁵ Transcript, 20 October 2021, note 5, Haines, p. 11.

¹⁶ *Ibid.*

¹⁷ Schechinger, 'Geneva Declaration on Human Rights at Sea', note 1, at 'Some thoughts on the Declaration'.

¹⁸ E.g. transcript, 20 October 2021, note 5, Evans, pp. 5-6, 12 ('gap').

¹⁹ E.g. transcript, 3 November 2021, note 13, Klein, p. 7.

'significant gaps remain in our understanding of the role of international human rights law in the maritime context, and its relationship with the law of the sea. The roles and obligations of states under current international law regarding (alleged) human rights violations at sea are not as clear cut (...) This is especially the case if the state involved is not the flag state, and does not have a jurisdictional link to (and interest in) the victim of an (alleged) human rights violation. Jurisdiction at sea can also be complex due to the possibility of overlapping jurisdictions for the prescription and/or enforcement of rules'.²⁰

Regulating human rights at sea (including PCASP operating at sea) on the international level as a priority for the UK Government

14. With regard to question 9, it follows from the above that regulating human rights at sea, in general, and PCASP operating at sea, specifically, is important. The UK Government could, and arguably should, prioritise the future regulation of both these issues.

15. Professor Evans suggested that attempting to develop a new framework treaty on how human rights operate at sea is achievable.²¹ Dr Galani agreed, saying: 'human rights at sea (...) where we need new regulations and responses'.²² It would indeed be valuable if states in general, and the UK in particular, would pay more attention to human rights issues at sea, including those that arise in relation to PCASP. Furthermore, it would be helpful if the UK government would be taking these issues forward, by actively working towards developing a legally binding instrument that addresses human rights at sea, more generally, and a legally binding instrument that properly regulates PCASP operating at sea, more specifically. With regard to the latter, this future international instrument should explicitly address accountability for when PCASP operate at sea, mandatory incident reporting of PCASP related incidents, and compensation for damage that results from PCASP conduct.

16. Addressing the regulation of PCASP within the IMO would remove (some of) the legal uncertainties and could clarify the rights and obligations of states under international law, in case PCASP related incidents occur. Related to Question 5 of the call for evidence,²³ the IMO can indeed play an important role, and can be used as a forum to develop the law of the sea on this topic. Many of the legal problems surrounding PCASP operating at sea can realistically be addressed and regulated through the IMO.²⁴ Concerning the regulation of human rights at sea more broadly, starting a debate at the United Nations Human Right Council, as

²⁰ Schechinger, 'Geneva Declaration on Human Rights', note 1, at section 'Some thoughts on the Declaration'.

²¹ Transcript, 20 October 2021, note 5, Evans, p. 12.

²² Transcript, 3 November 2021, note 13, Galani, p. 4, also p. 11.

²³ Question 5 of the call for evidence addresses the role of the IMO in developing UNCLOS/the law of the sea.

²⁴ IMO, Our Work, Maritime Security and Piracy, section 'Armed security on board ships', at <https://www.imo.org/en/OurWork/Security/Pages/Default.aspx>; IMO, Our Work, Security, Private Armed Security, at <https://www.imo.org/en/OurWork/Security/Pages/Private-Armed-Security.aspx>.

suggested by Lord Alton of Liverpool,²⁵ would be a way in which the UK could take initiative and lead.

Conclusion

17. In light of the above, the overarching question of this inquiry, that is whether UNCLOS is fit for purpose in this context, can be answered as follows. In general, UNCLOS itself cannot properly deal with all the legal issues that are posed by PCASP. However, UNCLOS is still highly relevant and important, as it sets out the legal framework and serves as a starting point, by providing legal provisions and guidance for practically all legal issues that arise at sea.²⁶ UNCLOS is furthermore continuously used and referred to, and contains many provisions that have the status of norms of customary international law. In addition, it allows for including (future) legal developments into its framework Convention, and its provisions can be interpreted 'in the light of new realities'.²⁷ In that sense, UNCLOS is fit for purpose, and will remain to be so for many decades to come.

18. However, in some instances, additional, new regulation is needed, such is the case concerning human rights at sea, in general, and regulating PCASP, in particular. It has also been argued that a focus on these issues would be appropriate and welcome. Due to the abovementioned legal issues and problems with PCASP operating at sea, and it being a challenge for maritime security and human rights at sea, proper international regulation of PCASP operating at sea is needed.

19. The best way to address PCASP regulation would be through the IMO. In my view, this should be a priority for the UK government in terms of the law of the sea, maritime security and human rights at sea. The UK Government could bring about change, if it is willing to lead in addressing these issues, either in the IMO context (when regulating PCASP), or in the UN Human Rights Council forum, for instance, when it comes to regulating human rights at sea more broadly.

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²⁵ Transcript, 20 October 2021, note 5, p. 5; Transcript, 3 November 2021, note 13, p. 12.

²⁶ See e.g. transcript, 20 October 2021, note 5, Evans, p. 2.

²⁷ Transcript, 3 November 2021, note 13, Galani, p. 3, also p. 8.