The *Arctic Sunrise* Incident: A Multifaceted law of the sea case with a human rights dimension

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Introduction

The Arctic in recent years has been the scene of increased efforts to exploit offshore oil and gas resources. All Arctic Ocean coastal states – Canada, Denmark/Greenland, Norway, the Russian Federation and the United States have been granting oil companies licenses to operate in their Arctic waters. The risk oil spill incidents pose to the fragile Arctic ecosystem has led to strong opposition to these activities from environmentalists. Both the World Wildlife Fund (WWF) and Greenpeace International have called for a moratorium on offshore activities in the Arctic.[1] Greenpeace International in this connection has been targeting the activities of oil companies in Arctic waters. On 18 September 2013, during one of these actions involving the vessel *Arctic Sunrise* Greenpeace activists tried to access the rig *Prirazlomnaya*, which was operating within the Russian Federation's exclusive economic zone in the Pechora Sea between the Russian mainland and Novaya Zemlya. The following day the Russian authorities boarded and arrested the *Arctic Sunrise* and detained its crew. The vessel and crew were subsequently transferred to the Russian port of Murmansk and the crew was charged with various offenses. The detention of the *Arctic Sunrise* and its crew prompted the immediate reaction of its flag state, the Netherlands. The Netherlands informed the Russian Federation that it considered that through the detention of the *Arctic Sunrise* the Russian Federation had breached its obligations towards the Netherlands as the flag state of the *Arctic Sunrise*.[2] According to the Netherlands the vessel when boarded was exercising the freedom of navigation guaranteed by the United Nations Convention on the Law of the Sea (LOSC),[3] to which the Netherlands and the Russian Federation are both parties.[4] The Dutch position is based on the premise that only the Netherlands as the flag state was entitled to take enforcement action against the *Arctic Sunrise* and that the Russian authorities could only have boarded the vessel with its consent.[5]

After diplomatic contacts between the Netherlands and the Russian Federation failed to resolve the issue, the Netherlands, on 4 October 2013, commenced an arbitration against the Russian Federation under the LOSC.[6] The Netherlands requested a determination that the arrest and detention of the *Arctic Sunrise* without its prior consent were illegal under international law. In reply, the Russian Federation informed the Netherlands that it did not accept the arbitration procedure, invoking a declaration it had made in becoming a party to the

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[1] See *e.g. Cairn discovery poses grave threat to climate and the Arctic* (www.greenpeace.org/international/en/press/releases/Cairn-discovery-poses-grave-threat-to-climate-and-the-Arctic/); *WWF calls for moratorium on oil exploration in the Arctic* (wwf.panda.org/?122040/WWF-calls-for-moratorium-on-oil-exploration-in-the-Arctic).

[2] See Submission of dispute to arbitration 'Arctic Sunrise'; The Kingdom of the Netherlands v. The Russian Federation, dated 4 October 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf at p. 15), paras 1 and 4.

[3] Adopted on 10 December 1982; 1833 UNTS 3.

[4] *Ibid*., para. 5.

[5] See note MinBuza.2013.274797 of the Dutch Ministry of Foreign Affairs to the Embassy of the Russian Federation in The Hague of 29 September 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf, at p. 39).

[6] See Submission, note 2.

LOSC.[7] On 21 October 2013 the Netherland requested provisional measures from the International Tribunal for the Law of the Sea (ITLOS) in Hamburg.[8] The relief requested included the immediate release of the *Arctic Sunrise* and its crew by the Russian authorities.[9] Consistent with its position on the arbitration, the Russian Federation informed the ITLOS that it did not intend to participate in the proceedings for the prescription of provisional measures.[10] The proceedings went ahead without the participation of the Russian Federation and the ITLOS rendered its decision on 22 November 2013.[11] The Tribunal's order to a large extent granted the measures requested by the Netherlands.

The present article looks at the issues of international law raised by the arrest of the *Arctic Sunrise* and the arbitration initiated by the Netherlands.[12] It will first of all provide an overview of the events leading up to the arrest of the *Arctic Sunrise* and its crew, after which the Dutch and Russian positions on the applicable legal framework will be discussed. This is followed by two sections looking respectively at the law of the sea and human rights dimension of the incident. The latter framework is essential for assessing the kind of measures a coastal state may take in its exclusive economic zone against protest actions. Providing sufficient room for the freedom of expression may limit the scope of action that might otherwise exist. These two legal frameworks are combined in a subsequent section. A final part of the article looks at the arbitration initiated by the Netherlands and the order of the ITLOS on provisional measures. This is followed by concluding remarks of a general nature.

The events leading up to the arrest of the *Arctic Sunrise* and its crew

In 2010 Greenpeace started the campaign "Save the Arctic". In the course of this campaign Greenpeace has carried out a number of actions directed at oil and gas activities in the maritime zones of the Russian Federation.[13] This resulted in several incidents involving the

[7] Note no. 11945 of the Ministry of Foreign Affairs of the Russian Federation to the Dutch Embassy in Moscow of 22 October 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf); Declaration of the Russian Federation upon ratification of the LOSC on 12 March 1997 (English text available at www.un.org/Depts/los/convention_agreements/convention_declarations.htm. On this point see further below text at note 156~~157~~ and following.

[8] Request for the prescription of provisional measures under article 290, paragraph 5, of the United Nations Convention on the law of the sea, dated 21 October 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf).

[9] *Ibid*., para. 47.

[10] Note 3838/N of the Embassy of the Russian Federation in Berlin to the ITLOS of 22 October 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf).

[11] ITLOS, Order of 22 November 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf).

[12] The article does not deal with questions concerning the legislation of the Russian Federation that are relevant to arrest and detention of the *Arctic Sunrise* and its crew.

[13] See Letter of the Agent for the Kingdom of the Netherlands to the Registrar of the International Law of the Sea of 7 November 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Response_questions_en.pdf), attachment *Arctic Sunrise, Case No. 22, Replies to questions from the Tribunal; Reply to question 1*. This reply refers to actions against the *Prirazlomnaya* in August 2012 and 2013 in the Barents Sea and against activities of Rosneft and ExxonMobil in the Barents and Kara Seas in August 2013.

Arctic Sunrise and the Russian authorities. According to a spokesperson of the Russian Ministry of Foreign Affairs, the Netherlands as the flag state of the *Arctic Sunrise* was asked on more than one occasion to stop the activities of the vessel, but this did not have any results.[14] When asked about these incidents by the ITLOS, the Netherlands indicated that they had been assessed by the Netherlands Shipping Inspectorate. As far as can be ascertained, the Netherlands did not take any action in relation to the *Arctic Sunrise* following these incidents.[15] While the *Arctic Sunrise* was in the Kara Sea in August 2013, the ship was reportedly inspected by the Russian authorities and it was informed that force would be used against it if it would not leave the area.[16] The Dutch Ministry of Foreign Affairs brought this latter incident to the attention of the Russian Embassy in The Hague and in that connection protested the threat of use of force and pointed out that the Russian Federation should have obtained permission for the inspection from the Netherlands as the flag state of the *Arctic Sunrise*.[17]

After a further action of the *Arctic Sunrise* directed at the rig *Prirazlomnaya* operated by Gazprom on 18 September 2013, the vessel was arrested the next day by the Russian Coast Guard. The *Prirazlomnaya* at this time was stationed in the Pechora Sea in the southeastern part of the Barents Sea in the exclusive economic zone of the Russian Federation. The rig was intended to start producing oil before the end of 2013. This would make the rig the first offshore producing unit in the Arctic.[18] That target date was actually met.[19]

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[14] See BBC Russkaya Sluzhba *Rossiya raskritikovala Gollandiyu iz-za sudna "Grinpis"* (www.bbc.co.uk/russian/international/2013/10/131005_russia_netherlands_greenpeace_reaction.shtml); see also note No. 10344/1 edn of the Ministry of Foreign Affairs of the Russian Federation to the Dutch Embassy in Moscow of 18 September 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf, at p. 32), and Letter, note 13, at Reply to question 1. In commenting on the Order of ITLOS of 22 November 2013, the Russian Ministry of Foreign Affairs expressed the hope that the Tribunal would look objectively at the case, taking into account all of its aspects, including the non-fulfilment of the Netherlands of its obligation as the flag state of the *Arctic Sunrise* (*Kommentarii Departamenta informatsii i pechati MID Rossii v svyazi s resheniem Mezhdunarodnogo tribunala po morskomu pravu o vremennykh merakh po delu "Arktik Sanraiz"* (www.mid.ru/BDOMP/Brp_4.nsf/arh/4B386118B88DE72A44257C2B00537563?OpenDocument).

[15] See BBC Russkaya Sluzhba, note 14; see also Letter, note 13, at Reply to question 1.

[16] See *Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden* Parliamentary papers 2013-2014, Appendix to the proceedings no. 136 (https://zoek.officielebekendmakingen.nl/ah-tk-20132014-136.pdf), answer to question 1. This concerns questions submitted by Members of Parliament on 28 August 2013 and an answer submitted by the Dutch Minister of Foreign Affairs on 2 October 2013.

[17] Vragen, note 16 at answer to question 4. The Minister of Foreign Affairs in his answers also discussed the refusal of the Russian authorities to give the *Arctic Sunrise* access to the Northern Sea Route, the navigational route along the northern coast of the Russian Federation and administered by it. The Minister acknowledged that article 234 of the LOSC entitled the Russian Federation to take certain measures but that it did not imply an unfettered right to limit the freedom of navigation. The Russian authorities had refused access to the Northern Sea Route because Greenpeace had provided incomplete information on the technical specifications of the *Arctic Sunrise*. The Minister indicated that the vessel had the second to highest ice classification, which was more than sufficient to undertake the planned voyage and that there were no grounds to doubt the technical status of the vessel (*ibid*., answers to questions 3and 4).

[18] Greenpeace International *Statement of facts concerning the Boarding and Detention of the MY* Arctic Sunrise *and the judicial proceedings against all persons on board* (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf, at p. 47), para. 7.

A detailed account of the events leading up to the arrest of the *Arctic Sunrise* and its crew has been prepared by Greenpeace International.[20] A Russian view on the unfolding of events can be gleaned, in a rather cursory form, from a judgment of 8 October 2013 in an administrative procedure against the master of the *Arctic Sunrise*.[21] The account of events prepared by Greenpeace International, also broaches the purpose of its action against the *Prirazlomnaya*. Before the action started, the rig was informed of the purpose and peaceful nature of the action.[22] The account also indicates that the two protesters who climbed the outside structure of the rig intended to unfurl a banner some distance beneath the main deck and that it was intended to put a safety pod on the structure that would allow climbers to hide from the elements and fire hoses.[23] The suggestion that this pod was intended to allow a longer stay is confirmed by a statement of Faiza Oulahsen, one of the activists, after her return to the Netherlands from her detention in the Russian Federation:

> Our plan was to stop the platform for a certain time. If you place climbers on it – *unauthorized personnel* – you are able to shut down such a platform for a week or three in a safe and effective manner. Then you put Gazprom under pressure. They lose income. And you scare of other investors.[24]

On 16 September 2013, the Russian Federation's Coast Guard vessel *Ladoga* warned the crew of the *Arctic Sunrise* over the radio that an infringement of the provisions of the LOSC for the protection of the safety of shipping in the vicinity of the *Prirazlomnaya* would not be tolerated. On the following day, when the *Arctic Sunrise* changed course towards the *Prirazlomnaya*, the *Ladoga* again communicated over the radio that regulations had to be complied with and that it was not permitted to enter the area with a radius of 3 nautical miles around the rig where there was a danger to shipping and the 500-meter safety zone around the

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[19] "Gazprom nachal dobychu nefti na platforme "Prirazlomnaya" s 10-letnim opozdaniem" of 20 December 2013 (www.newsru.com/russia/20dec2013/gazprom.html.

[20] This account is annexed to the Netherlands' application instituting the arbitration under the LOSC (Greenpeace International, note 18).

[21] Federal Security Service of the Russian Federation; Coast Guard Division for Murmansk Oblast; judgment in the case concerning an administrative offence no. 2109/623-13 of 8 October 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf, at pp. 103 and 111).

[22] Greenpeace International, note 18, para. 12. The account does not indicate in what terms the purpose of the actions was communicated to the *Prirazlomnaya*.

[23] *Ibid*., paras 13-14.

[24] Y. Aboutaleb and J. van der Kris "In de cel voel je je echt geen held; Interview Faiza Oulahsen" *NRC Weekend*, 4 and 5 January 2014, pp. 6-7 at p. 6 (translation from Dutch by the author). According to Daniel Simons, Legal Counsel Campaigns and Actions of Greenpeace International, the statement of Ms. Oulahsen was correctly conveyed by the newspaper, but he added that in general this kind of protest would be ended rapidly, either by the authorities or through summary proceedings in a civil case (e-mail of D. Simons to the author of 17 January 2014). Information Greenpeace provided to the Netherlands and that was used by the Netherlands in answering a question from the ITLOS suggests a much more limited purpose of the action. According to this Dutch reply, Greenpeace had decided to allow volunteers to enter the safety zone and two climbers to attach a small banner to the exterior of the platform (*Arctic Sunrise Case, Case no. 22; Replies to questions from the Tribunal* (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Response_questions_en.pdf), Reply to a question of judge Wolfrum, p. 5).

rig.[25] The next day, the *Arctic Sunrise* launched 5 boats near the perimeter of the 3-nautical-mile zone that moved in the direction of the *Prirazlomnaya*. Three of the boats were carrying a large object with them. According to Greenpeace this safety pod was intended to hang from the side of the rig and offer shelter to Greenpeace activists. There is no indication the *Arctic Sunrise* itself at any time entered the safety zone around the rig, but it did enter the 3-nautical-mile zone at one point. A number of persons attempted to board the *Prirazlomnaya* from the boats launched by the *Arctic Sunrise* and two of them were arrested by the Russian Coast Guard. During the attempt to scale the rig, fire hoses were used by persons on the rig and warning shots were fired into the water near the boats.[26]

The accounts of the arrest of the *Arctic Sunrise* differ. The Russian judgment of 8 October 2013 indicates that the master of the vessel was instructed to stop and allow an inspection by the Coast Guard following the actions of the boats of the *Arctic Sunrise* directed at the *Prirazlomnaya*. This order was given over an hour after the last reported incident at the rig took place. The judgment further notes that this order and subsequent orders were not obeyed by the master of the *Arctic Sunrise* and that "[e]ventually the *Arctic Sunrise* was forced to stop for inspection on 19 September 2013".[27] After the *Arctic Sunrise* was first ordered to stop for boarding the *Ladoga* fired 11 warning shots and subsequently communicated that it would open fire on the ship if it did not allow boarding, adding that any casualties would be the responsibility of Greenpeace.[28] The accounts of the incident indicate that no firing at the *Arctic Sunrise* actually took place.

The account by Greenpeace suggests an even longer gap between the last reported incident and the order to the master of the *Arctic Sunrise* to stop for boarding. It reports subsequent negotiations between the *Ladoga* and the *Arctic Sunrise* in which release of the arrested activists was offered in return for allowing voluntary inspection of the *Arctic Sunrise* by the Coast Guard.[29] Later the *Ladoga* ordered the *Arctic Sunrise* to move away from the *Prirazlomnaya*, suggesting that this was a condition for discussing the transfer of the arrested

[25] Article 16 of the Federal Law on the Continental Shelf of the Russian Federation, adopted on 25 October 1995 provides for the establishment of safety zones around installations not extending beyond 500 meters (English text available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1995_Law.pdf). The language employed suggests that such a safety zone is automatically established. Article 16 does require that the competent authorities determine the measures that shall apply in the safety zone and that these shall be published in the Notices to Mariners. A review of the Notices to Mariners on a website of the Hydrographic Office of the Russian Navy (http://structure.mil.ru/structure/forces/hydrographic/esim.htm?f=51&blk=10375815) on the specific measures applicable to the safety zone of the *Prirazlomnaya* did not yield any results. The Federal Law does not provide for the possibility of a 3-nautical-mile zone. On a prior occasion a 3-nautical-mile safety zone around the *Prirazlomnaya* had been notified through the Notices to Mariners (*Izveshcheniya Moreplavatelyam*, No. 6618-6774 of 10 December 2011 (http://structure.mil.ru/files/morf/military/files/NM1151.PDF), p. 7.

[26] Greenpeace International, note 18, paras 11-17; on the latter point see also note No. 10344/1 edn, note 14 at p. 2.

[27] Judgment of 8 October 2013, note 21 at p. 5.

[28] Greenpeace International, note 18, at paras 22 and 25; the former points are also mentioned in note No. 10344/1, note 14 at p. 2.

[29] Greenpeace International, note 18 at para 26.

activists.[30] After the *Arctic Sunrise* moved away from the rig nothing happened and the vessel subsequently moved back within a distance of five nautical miles of the rig. At no time did the *Arctic Sunrise* move back into the 3-nautical-mile zone around the rig. The boarding of the *Arctic Sunrise* took place the next day from a helicopter by armed government officials.[31]

The Dutch and Russian positions on the applicable legal framework

The Russian Federation has invoked a number of grounds to justify its actions against the *Arctic Sunrise*. The Russian Coast Guard initially justified its order to the master of the *Arctic Sunrise* to stop and allow an inspection by referring to the fact that the actions of the vessel and its boats constituted terrorism.[32] A Russian diplomatic note of 18 September 2013[33] relied on the same grounds, while a court order of 7 October 2013 of a Russian district court concerning the seizure of the *Arctic Sunrise* referred to the provisions on piracy contained in the 1958 Convention on the High Seas[34] to which the Russian Federation and the Netherlands are parties.[35] The order concluded that the Russian Coast Guard took control of the *Arctic Sunrise* in accordance with the Convention on the High Seas "since there was a reasonable suspicion that the ship was engaged in piracy."[36] The order also pointed out that the documents that had been submitted indicated that the crew of the *Arctic Sunrise* had attacked the *Prirazlomnaya*, using threats of violence and using objects as weapons, with the aim of taking possession of property belonging to another person.[37] Finally, the judgment of 8 October by a Coast Guard official and a Russian diplomatic note of 1 October 2013 invoked articles 56 and 60 of the LOSC as a basis for the Russian action.[38]

The Dutch view on the relevant legal framework is based in article 58 of the LOSC, which refers to the freedom of navigation of all states in the exclusive economic zone of the coastal state. Ships exercising the freedom of navigation are in principle only subject to the jurisdiction of the flag state – the Netherlands in the case of the *Arctic Sunrise*. According to the Netherlands none of the exceptions to the exclusiveness of flag state jurisdiction was

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[30] *Ibid*., para. 27.
[31] *Ibid*., paras 27 and 33.
[32] *Ibid*., para. 20.
[33] Note No. 10344/1, note 14 at p. 2. The note refers to "actions [that] bore the characteristics of terrorist activities".
[34] Adopted on 29 April 1958; 450 UNTS 11.
[35] Leninskii District Court, Order for the seizure of property of 7 October 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf at pp. 85 and 87), p. 2. The Netherlands has taken the position that the Convention on the High Seas does not apply between itself and the Russian Federation in the light of article 311(1) of the LOSC, which indicates that the LOSC prevails over the Convention on the High Seas (see Letter, note 13, at Reply to judge *ad hoc* Anderson, p. 5). However, in view of the fact that the provisions on piracy of both conventions are virtually identical, it is questionable whether the term prevail in article 311(1) has the effect of making those provisions in the Convention on the High Sea inapplicable between its parties.
[36] Order, note 35 at p. 2.
[37] *Ibid*., p.1.
[38] Judgment of 8 October 2013, note 21 at p. 2; Note 162-N of the Embassy of the Russian Federation in The Hague to the Dutch Ministry of Foreign Affairs of 1 October 2013 ((www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf at p. 40), p. 2.

present at the time the boarding and arrest were carried out, which happened beyond the safety zone of the *Prirazlomnaya*, making them contrary to international law.[39] In addition, the Netherlands has argued that the actions of Greenpeace in the safety zone of the *Prirazlomnaya* in any case did not warrant the detention of the vessel and its crew.[40]

The law of the sea dimension of the incident

The law of the sea provides one of the two frameworks that are relevant in assessing the incident involving the *Arctic Sunrise* and the *Prirazlomnaya*. The Russian claim that the actions of the *Arctic Sunrise* constituted terrorism has to be reviewed in the context of the 1988 Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf (SUA Protocol)[41] to which the Netherlands and the Russian Federation are parties. The Protocol might seem to cover the actions of the *Arctic Sunrise* against the *Prirazlomnaya*. Article 2(1) of the Protocol provides that if a person unlawfully and intentionally "seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation" (s)he commits an offense under the Protocol. This also extends to persons who attempt to commit such an offense.[42] It could well be argued that unlawfully and intentionally entering the safety zone of a platform, which in accordance with industry standards means that operations on a rig may have to be suspended, amounts to taking control of a rig in accordance with article 2 of the SUA Protocol.[43] This argument would apply *a fortiori* to Greenpeace's intended purpose of placing unauthorized personnel on the rig to shut it down for a couple of weeks.[44] However, it has been observed that proposals for a preambular paragraph in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)[45] to expressly exclude "Greenpeace-style environmental organisations' seaborne protest operations were not pressed on the understanding that such acts were to be considered not to be included in its scope".[46] However, the nature of a specific action could arguably still lead to it being covered by the SUA Convention or its Protocol.

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[39] See The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation) Public sitting of 6 November 2010; Verbatim Record ITLOS/PV.13/C22/1 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/ITLOS_PV13_C22_1_Eng.pdf), p. 21, lines 23-44 and p. 22, lines 20-48.

[40] See Letter, note 13, at Reply to question 2; see also below, text at note 6768.

[41] Adopted on 10 March 1988 (1678 UNTS 304).

[42] SUA Protocol, article 2(2).

[43] According to the Dutch Branch organization of oil and gas producers (NOGEPA) upon an intentional and unauthorized entry of a vessel or its boasts into the safety zone of an installation, the operator of the installation will, if deemed necessary, shut it down to ensure the safety of the installation and the personnel stationed on it. The further response to such an entry will be assessed on a case by case basis (Communication of R. Hillen, Legal Counsel of NOGEPA, to the author of 29 January 2014).

[44] See text at note 24.

[45] Adopted on 10 March 1988; 1678 UNTS 221.

[46] G. Plant "The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation" 1990 (39) *International and Comparative Law Quarterly* pp. 27-56 at p. 34. There is no reason to assume that the same considerations do not also apply to the SUA Protocol.

The SUA Protocol does not provide an independent basis for exercising enforcement jurisdiction over foreign-flagged vessels. The LOSC is the primary frame of reference for making that assessment in case an act falls under the SUA Protocol.[47]

Defining the actions of the crew of the *Arctic Sunrise* as piracy resolves the issue of the exercise of enforcement jurisdiction.[48] Article 105 of the LOSC and article 19 of the Convention on the High Seas provide that every state may seize a pirate ship and arrest the persons on board on the high seas, which for the purposes of these articles includes the exclusive economic zone. [49] However, relying on piracy also raises a number of problems. Article 101 of the LOSC and article 15 of the Convention on the High Seas indicate that piracy only is concerned with acts carried out by the crew of a ship or aircraft against another ship or aircraft, and thus would seem to exclude similar actions directed against a fixed platform.[50] Secondly, the acts have to be committed for private ends. Views differ as to whether politically motivated protests like the actions of the crew of the *Arctic Sunrise* fall under the private ends requirement.[51]

Articles 56 and 60 of the LOSC offer a basis for the Russian Federation to regulate activities on a rig involved in oil activities in its exclusive economic zone. Article 60(2) provides that the coastal state has exclusive jurisdiction over such installations. The wording of article 60(2) indicates that this jurisdiction is comprehensive. Article 60 also entitles the coastal state to establish a safety zone around installations. Such safety zones shall not exceed a distance of

[47] See further below.

[48] The charge of piracy was subsequently changed into "hooliganism" (see LIVE - Latest Updates from the Arctic Sunrise activists (www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/). This offence would not have provided a basis for detaining the *Arctic Sunrise* and arresting its crew beyond the safety zone of the installation absent hot pursuit from the safety zone.

[49] On the relation between the two conventions see note 35.

[50] See also L. Lucchini and M. Vœlckel *Droit de la mer, Tome 2, Vol. 2* (Pedone, 1996), p. 166; D. Guilfoyle *Greenpeace 'Pirates' and the MV Arctic Sunrise* (http://www.ejiltalk.org/greenpeace-pirates-and-the-mv-arctic-sunrise/). The LOSC Convention does not provide a definition of the term ship and certain conventions, such as e.g. the MARPOL Convention, include fixed platforms in the definition of the term (International Convention for the Prevention of Pollution from Ships of 2 November 1973, as modified by the Protocol of 1 June 1978 and the Protocol of 26 September 1997; as regularly amended, article 2(4)). The LOSC itself does seem to make a distinction between installations and ships (see *e.g.* LOSC, article 208 and 211). The SUA Convention and SUA Protocol distinguish between fixed platforms and ships (SUA Convention, article 1(1); SUA Protocol, article 1). The latter is defined as "any vessel of any type whatsoever not permanently attached to the sea-bed" (SUA Convention, article 1(1)).

[51] For the view that the term private ends does not cover the actions of Greenpeace see *e.g.* J.L. Jesus "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects" 2003 (18) IJMCL, pp. 363-399 at p. 379; see also M. Byers *et al. Statement of Concern* (www.greenpeace.org/international/Global/international/briefings/other/Statement-of-concern.pdf) who maintain that the action of the *Arctic Sunrise* was not covered by the definition of article 105 of the LOSC, without singling out specific elements of the definition. For the view that such actions would be included in the term private ends see *e.g.* M. Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Security" 1988 (82) *American Journal of International Law*, pp. 269-310 at p. 290; D. Guilfoyle *Can Russia prosecute Greenpeace protestors over the Arctic Sunrise?* (http://theconversation.com/can-russia-prosecute-greenpeace-protestors-over-the-arctic-sunrise-18683).

500 meters around them.[52] Article 60 indicates that a safety zone may extend beyond 500 meters if it is authorized by generally accepted international standards or recommended by the competent international organization, *i.e.* the International Maritime Organization (IMO). No such standards or recommendations have been developed to date.[53] The fact that the Russian Federation distinguished the 3-nautical-mile zone around the *Prirazlomnaya* from the 500-meter safety zone around the rig indicates that the Russian Federation has not relied on article 60 in establishing the 3-nautical-mile zone. The only other basis for establishing this zone could be article 234 of the LOSC, which allows a coastal state to adopt non-discriminatory rules and regulations in ice-covered areas within the limits of its exclusive economic zone. However, the fact that the Russian Federation justified the 3-nautical-mile zone by reference to the danger to shipping might suggest that it is not intended to implement article 234, which is concerned with laws and regulations for the prevention, reduction and control of marine pollution from vessels. Finally, the Russian Federation at no point seems to have relied on article 234. It seems thus safe to conclude that the 3-nautical-mile zone does not have any relevance in determining the applicable international legal framework.

The LOSC provides that all ships are required to respect the safety zone around an installation.[54] A ship entering the safety zone is in violation of this provision of the LOSC and cannot invoke the freedom of navigation as a justification for this infraction. Article 58(3) of the LOSC explicitly provides that states in exercising the freedom of navigation "shall comply the laws and regulations adopted by the coastal state in accordance with the provisions of [the LOSC]". In the present case, the coastal state had established a safety zone in accordance with article 60 of the LOSC entailing the obligation of foreign-flagged ships to respect that zone. The fact that the requirement to respect the safety zone implies an obligation to refrain from entering the zone is confirmed by a number of considerations. First, article 60(6) makes reference to respecting the zone as such and not to respecting measures inside the zone. Secondly, article 60(6) requires ships to comply with generally accepted standards regarding navigation in the vicinity of safety zones, thus making a distinction between the safety zone itself and the area beyond the zone. Finally, an IMO resolution on this issue explicitly recommends government to "take all necessary steps to ensure that, unless specifically authorized, ships flying their flags do not enter or pass through duly established safety zones".[55] The IMO resolution also addresses the measures vessels navigating in the vicinity of offshore installations should take. Vessels should among others "navigate with caution, giving due consideration to safe speed and safe passing distances" and "where appropriate, take early and substantial avoiding action when approaching such an installation […] to facilitate

[52] LOSC, article 60(5). For a discussion of the origin of the figure of 500 meters, which suggests that the establishment of a zone with this breadth may not always be justified see S. Oda "Proposals for revising the Convention on the Continental Shelf" 7 1 (1968) *Columbia Journal of Transnational Law* pp. 1-31 at pp. 21-23.
[53] This issue has been considered by IMO's sub-committee on the safety of navigation. In 2010 the sub-committee concluded that there at present was no demonstrated need for safety zones of more than 500 meters (Report to the Maritime Safety Committee (NAV 56/20 of 31 August 2010), paras 4.15-4.16).
[54] LOSC, article 60(6).
[55] IMO Assembly Resolution A.671(16) Safety zones and safety of navigation around offshore installations and structures of 19 October 1989 (doc. A 16/Res.671 of 30 November 1989, para. 1(d). The preambular considerations to the resolution indicate that the Assembly considered article 60 and 80 of the LOSC.

the installation's […] awareness of the vessel's closest point of approach".[56] Although these measures in themselves are not obligatory, in view of IMO's role under the LOSC and the fact that they are contained in an IMO Assembly resolution, they constitute "generally accepted international standards regarding navigation in the vicinity of [installations with which all ships] shall comply". [57]

Article 60 of the LOSC does not explicitly address enforcement jurisdiction in relation to infractions of the rules and regulations of the coastal state in relation to installations and their safety zones. In the light of the full jurisdiction of the coastal state over such installations, full enforcement jurisdiction also exists over these installations.[58] Article 60(4) indicates that the enforcement jurisdiction of the coastal state in the safety zone is limited. The coastal state in a safety zone may "take appropriate measures to ensure the safety both of navigation and of the [installation]". Article 60 does not further specify what the term "appropriate" means. In view of the coastal state's jurisdiction over installations and the safety zones around them, the coastal state in first instance has the competence to determine what constitute appropriate measures and in this respect will have a margin of discretion.[59] As article 60 entails a prohibition for vessels to enter a safety zone without authorization, it has to be presumed that the appropriate measures a coastal state may take in accordance with article 60(4) include measures aimed at ending the unauthorized presence of a vessel in the safety zone. The circumstance of the specific case will play a role in determining the exact nature of these measures. A single instance of unauthorized entry might be answered by requesting the vessel to leave the safety zone and upon non-compliance measures could be taken to remove the vessel from the safety zone. Intentional unauthorized entry into the safety zone could also give rise to measures to prevent further infringements of a safety zone. For instance, the Norwegian authorities in 1993 temporarily seized the documents of the Greenpeace vessel *Solo* following a protest against the *Ross Rig*.[60]

Article 60(4) does not refer to the possibility for the coastal state to take enforcement action beyond the safety zone of an installation. A restrictive interpretation of the enforcement jurisdiction of the coastal state in relation to infringements of a safety zone is confirmed by article 111 of the LOSC. Article 111 accords the coastal state the right of hot pursuit. This right entails that where the competent authorities of the coastal state have good reason to

[56] *Ibid*., Annex; Recommendations on safety zones and safety of navigation around offshore installations and structures, paras 2.1 and 2.2.
[57] LOSC, article 60(6).
[58] The ILC in the commentary on its draft articles on installations on the continental shelf observed that "installations are under the jurisdiction of the coastal State for the purpose of maintaining order and of the civil and criminal competence of the courts" (*Yearbook of the International Law Commission* 1956 Vol. II, pp. 299-300).
[59] It this connection it can moreover be observed that the precursor of article 60(4) of the LOSC, article 5(2) of the Convention on the Continental Shelf (adopted on 29 April 1958; 499 UNTS 311) provided that the coastal state in a safety zone was entitled to take "measures necessary for" the protection of installations. This indicates that in drafting article 60 of the LOSC it was intended to provide coastal states with a larger measure of discretion than they enjoyed under the Convention on the Continental Shelf.
[60] This measure was litigated up to the Norwegian Supreme Court, which upheld the measure of the Norwegian authorities (see Høyesteretts kjæremålsutvalg - HR-1993-2476-S - Rt-1993-1567; available at lovdata.no/).

believe that a ship has violated its laws and regulations they may pursue a ship and stop it and take enforcement actions.[61] Article 111 in this connection explicitly refers to hot pursuit from safety zones around continental shelf installations.[62] This reference includes a rig like the *Prirazlomnaya* since it is both located in the exclusive economic zone and over the continental shelf of the Russian Federation and is used in connection with the exploitation of the resources of the continental shelf. The explicit reference to the safety zone of installations in article 111 confirms that the coastal state only has enforcement jurisdiction in relation to a foreign-flagged ship that has violated the coastal state's legislation in relation to the installation or its safety zone if that enforcement action is taken inside the safety zone or after a hot pursuit starting from that safety zone. A restrictive interpretation of the coastal state's enforcement jurisdiction in relation to infractions of a safety zone around installations also logically follows from the approach to enforcement jurisdiction in coastal state maritime zones. Generally, the coastal state may take enforcement actions if a ship is still in the maritime zone in which the infraction took place. This might suggest that the coastal state could take enforcement action against the infraction of a safety zone anywhere in its continental shelf or exclusive economic zone. However, a safety zone is a special zone in these latter zones, in which the coastal state has rights that it does not otherwise have in the exclusive economic zone or continental shelf.[63] This indicates that enforcement jurisdiction in relation to these rights only exist inside the safety zone, just like enforcement jurisdiction in relation to maritime zones in general cannot be exercised beyond the outer limit of those zones.[64] This same argument is applicable to the exercise of enforcement jurisdiction in relation to infractions of the legislation of the coastal state applicable to the installation itself.

The human rights dimension[65]

Greenpeace has justified its actions directed at the *Prirazlomnaya* by invoking human rights law. For instance, in an *amicus curiae* submission to the ITLOS in the provisional measures procedure initiated by the Netherlands, Greenpeace observed that:

> On 18 September 2013, the M/Y "Arctic Sunrise", a ship operated by [Greenpeace] was present in the exclusive economic zone of the Russian Federation in order to protest peacefully (in exercise of rights of freedom of expression and assembly) against the offshore ice-resistant fixed platform "Prirazlomnaya". In the early morning of 18 September 2013, a number of rigid hull inflatable boats left the M/Y "Arctic

[61] LOSC, article 111(1).

[62] *Ibid*., article 111(2). Article 111 does not explicitly refer to the right of hot pursuit starting from continental shelf installations. However, since an installation is located inside the safety zone, it has to be presumed that the right of hot pursuit applies *mutatis mutandis* when the pursuit starts from the installation.

[63] See also *Yearbook of the International Law Commission* 1950 Vol. I, p. 234, paras 59-60.

[64] The exception of course being the territorial sea in which case the coastal State may also take enforcement action in the contiguous zone (LOSC, article 33). However, this point rather confirms the position in relation to the safety zone. In that case no provision is made for exercising enforcement jurisdiction beyond the safety zone safe for the situation of hot pursuit from that zone.

[65] For another review of human rights law and protests at sea see J. Teulings "Peaceful Protests against Whaling on the High Seas – A Human Rights-Based Approach" in C.R. Symmons (ed.) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, 2012), pp. 221-249. This analysis puts much emphasis on the statements in the case law subscribing to the importance of the freedom of expression but is largely silent on the case law's discussion of the conditions that may apply to the exercise of this freedom.

> Sunrise" and their occupants sought to take part in a peaceful protest, which involved two of their number scaling the walls of the base of the platform up to a point some distance below the main deck.[66]

The Netherlands has subscribed to this point of view. In reply to a question from the ITLOS in the proceedings on provisional measures the Netherlands submitted that the evaluation of the legality of the Russian measures against the Greenpeace activists "must be assessed in the light of the fact that the crew was exercising their [sic] freedom of expression, freedom of demonstration and freedom of peaceful protest".[67] The Netherlands at the same time indicated that in its view the "freedom of expression at sea should only be exercised as long as the safety at sea is ensured and international legislation is adhered to".[68] The position of Greenpeace and the Netherlands implies that the exercise of the freedom of expression prevails over the prohibition contained in article 60(6) of the LOSC for ships to enter the safety zone of an installation without authorization.[69] The position of the Netherlands also implies that the exercise of the freedom of expression curtails the possibilities of the coastal state to take enforcement action against a vessel that does not respect a safety zone. Assessing the actions of Greenpeace in the light of this appeal to the freedom of expression and assembly is also relevant in determining whether or not they are covered by article 2 of the SUA Protocol and the LOSC provisions on piracy.

The freedom of expression and the freedom of assembly are guaranteed by major human rights instruments such as European Convention on Human Rights and Fundamental Freedoms[70] (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).[71]

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[66] Amicus Curiae Submission by Stichting Greenpeace Council (Greenpeace International) dated 30 October 2013 (www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf), para. 1.4. The Tribunal did not include the submission in the case file (Order of 22 November 2013, para. 18.). See also the statement of Daniel Simons, Legal Counsel Campaigns and Actions of Greenpeace International, during the oral proceedings at the ITLOS concerning the Dutch request for provisional measures (Verbatim Record, note 39, p. 17, lines 9-17).

[67] Letter, note 13, at Reply to question 2.

[68] Letter, note 13, at Reply to question 1.

[69] The Dutch Minister of Foreign Affairs previously seems to have taken a different position. In reply to questions from Members of Parliament he indicated that the reported institution of a 4-nautical-mile safety zone around the survey vessel *Geolog Dmitry Nalivkin* by the Russian Federation was excessive in character because it in practice deprived Greenpeace of the right to demonstrate peacefully and because the LOSC provided for a standard safety zone of 500 meters (Vragen, note 16 at answer to question 4).

[70] Adopted on 4 November 1950 (www.echr.coe.int/Documents/Convention_ENG.pdf), articles 10 and 11.

[71] Adopted on 16 December 1966 (999 UNTS 172), articles 19 and 21. The Netherlands and the Russian Federation are both parties to both conventions. In view of the extensive jurisprudence of the ECtHR on freedom of expression and assembly and the fact that both the Netherlands and the Russian Federation are parties to the ECHR, the present analysis focuses on the case law of the ECtHR. A detailed analysis of the practice under the ICCPR and other regional human rights treaties is beyond the scope of the present analysis. Legal literature indicates that these different human rights bodies take into account each other's jurisprudence in interpreting the scope of rights and freedoms (see *e.g.* E.A. Bertoni "The Inter-American Court of Human Rights and the European Court of Human Rights: A dialogue on freedom of expression standards" 2009 *European Human Rights Law Review* pp. 332-352 at pp. 348-352; L. Burgorgue-Larsen and A.Úbeda de Torres *The Inter-American Court of Human Rights; Case Law and Commentary* (Oxford University Press, 2011), pp. 541-542; A. Raisz *Transfer of Values as to the Regional Human Rights Tribunals* (http://www.esil-sedi.eu/fichiers/en/Agora_Raisz_465.pdf), pp. 1-2. Raisz in this connection refers to "a new *ius gentium*" (*ibid.*,

These freedoms are not only guaranteed in the territory of the parties to these Conventions but also "whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction".[72] There can be no doubt that this implies that a coastal State is required to guarantee these freedoms on installations, over which it has exclusive jurisdiction.[73] Article 60(4) of the LOSC on safety zones around installations does not explicitly refer to the exercise of jurisdiction and control. However, the establishment of a safety zone around an installation and the taking of specific measures in it in accordance with article 60(4) implies that the coastal State is exercising control and authority over the safety zone and as a consequence is also required to guarantee human rights in the safety zone.

The European Court of Human Rights (ECtHR) in its jurisprudence has repeatedly emphasized the fundamental importance of the freedom of expression and the freedom of assembly. For instance, in *Kudrevičius* the ECtHR observed:

> the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively.[74]

Notwithstanding this fundamental importance and the requirement to not interpret these freedoms restrictively, they are subject restrictions.[75] In the present incident involving the *Arctic Sunrise* and the *Prirazlomnaya*, two issues are particularly relevant. First, do the freedoms of expression and assembly as among other guaranteed by the ECHR trump the prohibition to enter safety zones contained in article 60 of the LOSC? Secondly, if there is a right of entry into a safety zone to express one's opinion what kind of restrictions may be imposed on those exercising these freedoms in a safety zone or on an installation? Restrictions in this case could both be imposed to ensure the safety of navigation and the installation as provided for in article 60 of the LOSC as articles 10 and 11 of the ECHR refer to public safety, and the protection of the rights of others.

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p. 1). The ECtHR, being the longest functioning court, has been particularly influential in this respect (see *e.g.* Bertoni, note 71~~72~~ at p 348-352; Burgorgue-Larsen and Úbeda de Torres, note 71~~72~~ at pp. 541-542). This interaction does not exclude that different human rights bodies would reach distinct conclusions on specific points, in particular because certain norms are not formulated in identical manner in the relevant human rights treaties. For instance, Bertoni submits that article 13 of the American Convention on Human Rights:

> has been designed to be more "generous" than [article 10 of the ECHR]. Thus the interpretation of [article 10 by the ECtHR] may provide a minimum standard for the interpretation of [article 13], but never a ceiling. The judgments of the Inter-American Court reviewed in this paper also support this contention (Bertoni, note 71~~72~~ at p. 352; see also Burgorgue-Larsen and Úbeda de Torres, note 71~~72~~ at pp.543-544 and 548).

[72] See *e.g.* ECtHR (Grand Chamber) case of Al-Skeini and Others v. The United Kingdom, judgment of 7 July 2011 (hudoc.echr.coe.int/webservices/content/pdf/001-105606?TID=sfnmsxdoiz), para. 137.
[73] LOSC, article 60(4).
[74] ECtHR (Second Section), case of Kudrevičius and Others v. Lithuania, judgment of 26 November 2013 (hudoc.echr.coe.int/webservices/content/pdf/001-138556?TID=ldqtpozmxd), para. 80.
[75] See ECHR, article 10(2) and 11(2).

The prohibition of entry into a specific maritime zone has been considered by the ECtHR in *Women on Waves*. [76] In this case Portugal had refused the vessel *Borndiep*, which was being used by the organization Women on Waves for imparting information on among others birth control, access to the Portuguese territorial sea. [77] Women on Waves had intended to use the *Borndiep* for various activities in the Portuguese port of Figueira da Foz. In assessing the general prohibition of entry into the territorial sea, the ECtHR distinguished the case at hand from *Appleby*[78] that had been invoked by the Portuguese government. In *Appleby* the ECtHR had concluded that the freedom of expression did not entail "automatic rights of entry to private property or even necessarily all publicly owned property".[79] In *Women on Waves*, the ECtHR concluded that the territorial sea of Portugal by its very nature was a public and open space.[80] The ECtHR noted that Portugal had a certain margin of appreciation in assessing whether the entry of the vessel into the territorial sea could have led to infractions of its abortion legislation. However, the Court noted that the facts of the case did not provide sufficiently serious grounds to assume that the appellants had the intention to purposely violate that legislation.[81] Finally, the Court observed that the concern of public safety did not entitle a state to take any measure it considered appropriate. According to the Court, Portugal certainly disposed of other means than a complete prohibition of the *Borndiep* to enter the territorial sea.[82] Such a "radical measure" certainly not only had a dissuasive effect on the appellants, but also on others who wanted to impart controversial ideas.[83]

Two recent national cases involving Greenpeace International and Greenpeace USA specifically discuss the exclusion of activists from a zone around vessels or installations. In a case between Shell and Greenpeace USA, the US Court of Appeals (Ninth Circuit) affirmed a preliminary injunction of a district court prohibiting Greenpeace USA from coming within a specified distance of vessels employed by Shell in exploratory activities in the Arctic.[84] In reaching its decision the Court of Appeals concluded that "the district court did not err in finding that the balance of equities favors Shell".[85] Shell had an interest in carrying out its legally authorized activities without dangerous interference by Greenpeace USA.[86] Greenpeace USA had argued that the imposition of a safety zone prevented it from exercising its countervailing First Amendment right to protest Shell's activities in close proximity of

[76] ECtHR (Second Section), affaire Women on Waves et autres c. Portugal, judgment of 3 February 2009 (hudoc.echr.coe.int/webservices/content/pdf/001-91046?TID=uehirtqzoz).
[77] See *ibid*., para. 8.
[78] ECtHR (Fourth Section), case of Appleby and Others v. The United Kingdom, judgment of 6 May 2003 (hudoc.echr.coe.int/webservices/content/pdf/001-61080?TID=empryzpcxf).
[79] Women on Waves, note 7677, para. 47.
[80] *Ibid*., para. 40.
[81] *Ibid*., paras 40-41.
[82] *Ibid*., para. 43. The ECtHR did not specify what these other means could have consisted of.
[83] *Ibid*.
[84] United States Court of Appeals for the Ninth Circuit, Shell Offshore and Shell Gulf of Mexico v. Greenpeace, Opinion, Filed 12 March 2013 (www.gpo.gov/fdsys/pkg/USCOURTS-ca9-12-35332/pdf/USCOURTS-ca9-12-35332-0.pdf).
[85] *Ibid*., p. 20.
[86] *Ibid*.

Shell vessels and submitted that this constituted an undue speech restriction.[87] The Court of Appeals rejected this argument, observing that the prohibition of a safety zone around abortion clinics did not provide a relevant precedent. While such safety zones would restrict the freedom of speech on public sidewalks – "quintessential public fora" – the high seas were not a public forum and the safety zones around Shell vessels did not prevent Greenpeace USA from communicating with its target audience, because it had no audience at sea.[88] The Court of Appeals also pointed out that upholding the decision of the district court was justified because the injunction was narrowly tailored and the conduct it sought to enjoin posed serious risk to human life and property.[89] The Court of Appeals also rejected the argument of Greenpeace USA that the district court had not taken into account the public interest in having it monitor Shell's activities in the Arctic. The Court of Appeals observed that this role of Greenpeace USA had been taken into account and that for that reason the injunction had been crafted narrowly. The district court had moreover envisaged the possibility of modifying the injunction to permit Greenpeace to monitor Shell's activities more closely.[90]

The summary proceedings case *Capricorn and others v. Greenpeace International and others* before the District Court of Amsterdam concerned actions of Greenpeace against the oil rigs *Leiv Eriksson* and *Ocean Rig Corcovado* that Capricorn operated in the exclusive economic zone of Greenland.[91] The District Court in its decision ruled that Greenpeace for a period of 6 months had to refrain from entering the 500-meter safety zone of the two rigs as long as they operated in the exclusive economic zone of Greenland.[92] The 500-meter safety zone around the rigs was in accordance with the applicable Greenlandic legislation.[93] In reaching its decision, the District Court balanced the interests of Greenpeace in drawing the attention of the public to the risk of the drilling activities against the interest of Capricorn in pursuing its legal activities without interference from Greenpeace.[94] The Court in this connection referred to the fact that Greenpeace through the actions it had carried out thus far had already generated much attention to the risks that were involved, that Capricorn had an interest in a safe working environment to conduct its high risk activities, that there likely were high costs involved as a result of a delay of its activities, and that only a limited period of time was available due to climatological circumstances.[95] The District Court did not specify why its measure applied to the whole safety zone of the installations.[96]

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[87] *Ibid*., p. 21.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*., p. 22.
[91] Rechtbank van Amsterdam, Capricorn en anderen tegen Greenpeace International en anderen, vonnis in kort geding of 9 June 2011 (uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2011:BQ7690).
[92] *Ibid*., para. 5.1. For each day or a part of it Greenpeace would enter the safety zone it would have to pay Capricorn € 50,000 until a maximum of € 1,000,000 would have been reached (*ibid*. para. 5.2).
[93] *Ibid*., para. 4.4.
[94] *Ibid*., para. 4.9.
[95] *Ibid*.
[96] The District Court did specify that Capricorn had an interest in a safe environment in carrying out its activities (see *ibid*.).

The Greenlandic authorities arrested Greenpeace activists that scaled the *Leiv Eriksson* while it was involved in exploratory drilling in the exclusive economic zone of Greenland in 2011. The activists were prosecuted for breaching Greenlandic legislation prohibiting the entry into the safety zone of the rig and trespassing in relation to the rig itself. They were found guilty on both counts and sentenced to a fine and deportation from Greenland. The Greenlandic court in reaching its decision did take into account the arguments on freedom of expression that had been made by the defendants.[97]

In assessing the actions of Greenpeace against oil rigs, a distinction has to be made between the safety zone around an installation and the installation itself. The former is part of a public area, albeit with a regime that is different from the surrounding waters, but the latter is private property. As the ECtHR observed in *Appleby*, the freedom of expression does not entail "automatic rights of entry to private property or even necessarily all publicly owned property".[98] The only exception in this respect would be a situation in which "the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed".[99] In that instance the state might have a positive obligation "to protect the enjoyment of the Convention rights by regulating property rights". [100] In *Appleby*, the applicants had argued that the easiest and most effective way of reaching people would be to get access to a privately owned shopping mall. The Court held that by being denied access to the shopping mall the applicants had not effectively been prevented from communicating their views, as they had had a number of alternatives at their disposal.[101]

As articles 10 and 11 of the ECHR indicate, the freedoms of expression, assembly and association may be subject to restrictions to protect the rights of others. In the case at hand, this in the first place concerns the right of the operator of the continental shelf installation. The case law on this point indicates that a measure of inconvenience to others should be tolerated. An instructive example is provided by *Schmidberger*, a case before the European Court of Justice (ECJ).[102] In this case it was alleged that a blockade of the Brenner motorway between Austria and Italy by demonstrators that had been allowed by the Austrian authorities constituted a restriction on the free movement of goods. The ECJ found that allowing the demonstration was not incompatible with the provisions of the Treaty on the European Community concerning the free movement of goods.[103] The ECJ identified a number of reasons for this finding. First, while the free movement of goods constituted a fundamental aspect of the Treaty on the European Community, it could be subject to restrictions.[104] On the other hand, the rights protected by articles 10 and 11of the ECHR could also be subject to

[97] Information provided to the author by Mr. M. Nielsen of the Greenlandic police on 1 April 2014.
[98] Appleby, note 78~~79~~ at para. 47.
[99] *Ibid*.
[100] *Ibid*.
[101] *Ibid*., para. 48.
[102] ECJ, Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, judgment of 12 June 2003 (curia.europa.eu).
[103] *Ibid*., dispositif.
[104] *Ibid*., para. 78.

certain restrictions.[105] In language that is very similar to that of the ECtHR in *Appleby*, the ECJ observed that it was required:

> that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed […].
>
> In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.[106]

In assessing the specific circumstances of the blockade of the Brenner motorway, the ECJ distinguished this case from actions it had considered in *Commission v. France*.[107] In the latter case, French farmers had repeatedly carried out actions against farm products from other Member States of the European Communities. In contrast to the latter case, the blockade of the Brenner had been authorized by the authorities.[108] The ECJ also observed that the blockade of the Brenner motorway had been limited in size: "traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours".[109] In addition, the organizers of the blockade and the authorities had taken various steps to ensure that the demonstration passed off smoothly.[110] The single blockade also did not result in:

> a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v France*.[111]

The ECJ considered that the imposition of stricter limitations on the blockade, as had been suggested by Schmidberger, was not an option as these "could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope".[112] Inconvenience had to be tolerated "provided that the objective pursued is essentially the public and lawful demonstration of an opinion".[113]

In *Kudrevičius*, the ECtHR had to consider measures the Lithuanian authorities had taken against certain participants in an unauthorized road block after a demonstration that had been allowed.[114] The ECtHR confirmed that the authorities could place restrictions on the freedom of assembly in public places to protect the rights of others.[115] The ECtHR then applied the

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[105] *Ibid*.
[106] *Ibid*., paras 80-81.
[107] *Ibid*., para. 84.
[108] *Ibid*.
[109] *Ibid*., para. 85.
[110] *Ibid*., para. 87.
[111] *Ibid*.. para. 88.
[112] *Ibid*., para. 90.
[113] *Ibid*., para. 91.
[114] Kudrevičius, note 7475 .
[115] *Ibid*., para. 80.

proportionality principle for determining whether a balance had been struck between the requirements of freedom of assembly and those allowing a limitation of that freedom.[116] In assessing the circumstances of the case before it, the Court acknowledged that the demonstration that had been allowed "dispersed and resulted in major disruptions of traffic on three main roads".[117] The Court added that nevertheless any demonstration in a public place would inevitably lead a "certain of disruption to ordinary life."[118] To avoid that the freedom of assembly would be deprived of all its substance the authorities would have to show a degree of tolerance towards peaceful meetings.[119] The Court criticized the Lithuanian authorities for assessing the conduct of the applicants in terms of rioting. That context did not allow for the proper consideration of the restrictions that had been imposed on the freedom of assembly.[120] In making this finding, the Court took into account that the demonstrators had not blocked traffic completely and had been involved in good faith negotiations with the government. [121] The dissent of three of the seven judges on this point indicates that the application of the proportionality principle may lead to sharply diverging results. The minority indicated that the demonstrators had been able to exercise their freedom of assembly within the restrictions set by the authorities to safeguard the rights of others.[122] The unauthorized road blocks without prior warning caught the authorities and the general public by surprise and made it impossible to adopt mitigating measures.[123] What had been caused was not "mere inconvenience to the public", but "general chaos".[124]

In *Steel* the ECtHR considered protests that physically impeded activities of which the applicants disapproved. The Court considered that such protests constituted the expression of an opinion within the meaning of article 10 of the ECHR.[125] In that light, the Court had to assess whether the actions undertaken by the authorities against the applicants "pursued the legitimate aims of preventing disorder and protecting the rights of others".[126] The Court subsequently considered whether the "binding over" of two of the applicants – i.e. requiring them to abstain from certain actions – pursued a legitimate aim under article 10(2) of the ECHR. The Court considered that the measures taken against one of the applicants, Ms. Steel "amounted to serious interferences with the exercise of her right to freedom of expression".[127] However, the Court concluded that the measures that had been taken against her – effectively requiring her to agree to certain conduct for a year – were not excessive in the

[116] *Ibid*., para. 81.
[117] *Ibid*., para. 82.
[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid*.
[122] *Ibid*., Partly Dissenting Opinion of Judges Raimondi, Jočienė and Pinto de Albuquerque, para. 15.
[123] *Ibid*., para. 16.
[124] *Ibid*., para. 17.
[125] ECtHR (Chamber), case of Steel and others v. The United Kingdom, judgment of 23 September 1998 (hudoc.echr.coe.int/webservices/content/pdf/001-58240?TID=tdcchtaubk), para. 90.
[126] *Ibid*., para. 96.
[127] *Ibid*., para. 103.

circumstances.[128] In this connection the Court referred to the dangers inherent in the form of protest that had been chosen and the interest of the public interest in deterring such conduct.[129]

The ECtHR has critically reviewed sanctions that have been imposed on persons in instances in which they had exercised the freedom of expression. A fundamental concern of the Court is the "chilling effect" that the fear of the imposition of sanctions may have on others.[130] As the Court observed in *Kudeshkina*:

> This effect, which works to the detriment of society as a whole, is likewise a factor which concerns the proportionality of, and thus the justification for, the sanctions imposed on the applicant, who, as the Court has held above, was undeniably entitled to bring to the public's attention the matter at issue.[131]

The case law of the Court suggests that criminal sanctions should only be imposed in exceptional circumstances, For instance in *Nikula*, the Court concluded that:

> it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of *even a relatively light criminal penalty* or an obligation to pay compensation for harm suffered or costs incurred.[132]

In *Cumpănă and Mazăre* the Court indicated a standard for evaluating when the imposition of a prison sentence might be compatible with article 10 of the ECHR:

> Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.[133]

An assessment of the incident in the light of the applicable law

The arrest and detention of the *Arctic Sunrise* by the Russian authorities raises two related issues. First, it has to be assessed whether the actions of the *Arctic Sunrise* constituted a breach of rules of international law that justified the response by the Russian Federation. Secondly, in view of the above conclusions on the extent of enforcement jurisdiction of the coastal state and the fact that the boarding and arrest of the *Arctic Sunrise* took place outside

[128] *Ibid.*, para. 106.
[129] *Ibid.*, para. 106. In respect of a second applicant the ECtHR reached a similar conclusion (*ibid*., para. 108).
[130] See *e.g.* ECtHR (First section), case of Kudeshkina v. Russia, judgment of 26 February 2009 (hudoc.echr.coe.int/webservices/content/pdf/001-91501?TID=dtcxptnkud) para. 99, which also refers to earlier statements on this effect.
[131] *Ibid*.
[132] ECtHR (Former Fourth Section) case of Nikula v. Finland, judgment of 21 March 2002 (hudoc.echr.coe.int/webservices/content/pdf/001-60333?TID=tcifpkotfh), para. 54 (emphasis provided).
[133] ECtHR (Grand Chamber), case of Cumpănă and Mazăre v. Romania, judgment of 17 December 2004 (hudoc.echr.coe.int/webservices/content/pdf/001-67816?TID=yfdfgcrpmw), para. 115.

the safety zone around the *Prirazlomnaya*, assessing the legality of these actions essentially entails an assessment of the question of whether they were carried out after a hot pursuit from the safety zone.[134]

The Russian Federation as the coastal state has exclusive jurisdiction over an installation like the *Prirazlomnaya* that is being used to exploit the mineral resources of its continental shelf. On the installation, the Russian Federation is entitled to enforce all applicable legislation. In the safety zone of the installation the Russian Federation would be entitled to take appropriate measures to ensure the safety of navigation and that of the installation. The Netherlands has submitted that the detention of two crew members of the *Arctic Sunrise* in the safety zone of the *Prirazlomnaya* did not constitute "appropriate measures" to ensure the safety of navigation and the installation as the crew never posed a threat to the safety of navigation or the installation.[135] This position of the Netherlands is based on a narrow construction of the term safety that is not justified by the implications an unauthorized entry into a safety zone or on an installation has for its operation.[136] As was set out above, such an unauthorized may lead to an interruption of the activities of the rig and seriously impede its operation. . As one of the activists involved in the action against the *Prirazlomnaya* indicated, the purpose of entering the safety zone and scaling the rig was to delay its operations for a couple of weeks.[137] Viewed in this context, article 60(4) of the LOSC would allow the Russian Federation to take appropriate measures to end the unauthorized presence of a vessel in the safety zone and in case of repeated infractions of the safety zone it could take additional measures to prevent further their further occurrence.

Viewed in isolation, the LOSC regime would have allowed the Russian Federation to take enforcement actions against the activists that scaled the *Prirazlomnaya* and the *Arctic Sunrise*.[138] However, human rights law is also relevant to assess the incident. The review of human rights law indicates that in this connection a distinction has to be made between public areas and private property, that is, a distinction has to be made between the safety zone and the installation. As *Appleby* indicates the state only has to take action for regulating access to private property if the absence of access would have the effect of preventing any exercise of the freedom of expression or would destroy the essence of that freedom.[139] In the present case, the absence of access to the installation does not have these consequences. Greenpeace would have ample opportunity to express itself in the vicinity of the installation and such action would allow it to communicate with its target audience in a similar manner as through an action on the installation itself.

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[134] In view of the nature of the incident it is not material to determine whether the hot pursuit may have actually been commenced from the installation itself. As was observed above, enforcement jurisdiction is more limited in a safety zone around an installation than on the installation itself.
[135] Letter, note 13, at Reply to question 2.
[136] The US and Dutch court cases discussed above also indicate a broader view of safety of an installation.
[137] See the text at footnote 24.
[138] Although the *Arctic Sunrise* did not enter the safety zone itself, its boats did, leading to the constructive presence of the vessel in that zone (see LOSC, article 111(4)).
[139] Obviously, such an obligation neither exists for the operator. In those circumstances it would be possible to take appropriate measures against an unauthorized entry.

A safety zone around and installation is not private property but it is part of a public area, in which the freedom of expression and assembly in principle applies. However, there may be limitations on these freedoms, as long as they meet the criteria listed in articles 10(2) and 11(2) of the ECHR. Public safety and the rights of others figure among these criteria. Safety concerns are the main reason for allowing the establishment of safety zones around offshore installations. The safety zone moreover has important implications for the rights of the operator and the owner of an installation. The infringement of a safety zone will cause a shutdown of an installation leading to delays and economic loss. This raises the question whether these other interests justify a complete ban on the exercise of the freedom of expression and assembly inside the safety zone of an installation. The case law that was discussed in the preceding section indicates that it is necessary to balance the rights and interests involved to reach a conclusion. In carrying out this balancing exercise a number of considerations could be taken into account. Safety zones are a carefully crafted exception to the regime of the continental shelf and the exclusive economic zone with a very limited scope of application.[140] In this light an analogy with the finding of the ECtHR in *Women on Waves* that a prohibition to enter the territorial sea of Portugal was an undue limitation on the freedom of expression because the territorial sea is by its very nature a public and open space is unconvincing. The argument that Portugal in this case had other means at its disposal for the protection of the public order and public health than a prohibition to enter the territorial waters of Portugal is also in unpersuasive in the present case. A safety zone rather can be seen as such other means that are applied instead of a broader restriction. The latter approach in this case would also be problematic from a law of the sea perspective.

Secondly, the unauthorized entry in a safety zone directly affects the rights of the operator of an installation as it results in the interruption of operations. As the costs involved in operating continental shelf installations are high, even a limited interruption of activities could lead to substantial loss entailing much more than inconvenience, the standard applied in the case law in balancing the exercise of the freedoms of expression and assembly with the rights of others. On the other hand, a blanket prohibition to enter the safety zone of installations would prevent activists from carrying out their actions in the manner that they consider to be most effective. Drawing attention to the risks involved in exploring for and exploiting Artic oil and gas in the vicinity of an installation is markedly different from protesting beyond the perimeter of a safety zone. The ECtHR has repeatedly confirmed that article 10 of the ECtHR not only protects "the substance of the ideas and information expressed, but also the form in which they are conveyed".[141] The nature of the activities taking place on a rig would also be a factor to be taken into account. Drawing the attention to the risks involved in deep-water drilling or

[140] See, however, note 5253.

[141] ECtHR (Plenary), *Case of Oberschlick v. Austria*, judgment of 23 May 1991 (hudoc.echr.coe.int/webservices/content/pdf/001-58044?TID=iidxhvmetb), para. 57. This finding was confirmed in ECtHR (Second Section), *Case of Thoma v. Luxembourg*, judgment of 29 March 2001 (hudoc.echr.coe.int/webservices/content/pdf/001-59363?TID=hnieorodnx), para. 45; and Women in Waves, note 7677 at para. 30; see also *ibid*., para. 39.

in an Arctic environment would in principle deserve more protection than protests against a low-risk activity that is not a matter of great public concern.

The above considerations suggest that limited actions inside a safety zone of the *Prirazlomnaya* should have been tolerated to achieve a proper balance between the interests involved. The stated purpose of the action of Greenpeace in September 2013 – a shutdown of the *Prirazlomnaya* for a couple of weeks – in any case would seem to tilt the balance too much in the direction of the exercise of the freedom of expression. Such an action would not result in inconvenience but substantial detriment.[142] The two national cases on safety zones discussed above might suggest that in certain instances a complete prohibition to enter a safety zone would achieve a proper balance of the rights concerned. However, the US District Court in this connection takes a very restrictive view of what constitutes a public forum to reach target audiences. In combination with present day means communication, such as web-based services, imaginative actions on the oceans may be very effective in reaching one's target audience. The decision of the District Court at the same time indicates that the freedom of expression and pointing out the risks of certain activities may require preventing that safety measures, or the rights of others, make a close watch on controversial and risky activities impossible. The District Court of Amsterdam reached its conclusion that a balancing of the interests involved required a ruling in favor of Capricorn while among others noting that Greenpeace had by its actions already been able to draw ample attention to the dangers related to the activities of Capricorn and that Capricorn due to the climatological conditions only had a limited period in which to carry out its activities. This reasoning leaves the door open to reach a different conclusion in other circumstances. Both cases do point to the substantial weight that is attributed safety considerations. A similar approach is apparent from *Steel*.[143]

A final point to be noted about the interaction between the law of the sea and human rights law is that it is on the coastal state to carry out the balancing of the various interest involved in assessing to what extent exercising the freedom of expression is allowed inside a safety zone, not the flag state of the vessel. This includes the taking of appropriate enforcement measures. As article 60(4) of the LOSC indicates it is on the coastal state to make the assessment what constitute appropriate measures to ensure the safety of navigation and the installation.[144]

In this particular case, the Russian Federation took the decision to prohibit the *Arctic Sunrise* from entering the safety zone of the *Prirazlomnaya*. In view of the purpose of the action Greenpeace – a shutdown of the rig for a couple of weeks –,[145] such a refusal might be judged

[142] Since the action was intended to take place on the platform itself, it for that reason was contrary to the case law's findings on access to private property in exercising the freedom of expression.
[143] See text at note 129~~130~~.
[144] At the same time, this does not exclude the possibility of the flag State to invoke compulsory dispute settlement (see the text at footnotes 157~~158~~ and 158~~159~~).
[145] It is not known whether the Russian authorities were aware of this purpose, but in view of earlier actions of Greenpeace targeting oil companies in the Arctic, it would be reasonable to assume that the action in this case would also have substantial impact on the operation of the rig.

to be reasonable. In this connection it could also be taken into consideration that Greenpeace had already carried out a number of actions against oil activities in the Russian Federation's maritime zones in 2012 and 2013.

The available information suggests that the enforcement actions taken by the Russian Federation at sea in general were proportionate and graduated. After a repeated warning not to enter the safety zone, Greenpeace activists were prevented from scaling the platform.[146] Subsequently, the *Arctic Sunrise* was ordered to stop for boarding and warning shots were fired when this order was not obeyed. Only after the warning shots were fired the threat was made to fire on the vessel, but this threat in any case was not effectuated. The boarding of the vessel from a helicopter by armed officials could be justified by the reference to the repeated refusal of the vessel to allow boarding from the Coast Guard vessel *Ladoga*.

It is on the other hand clear that the charges that were brought against the crew of the *Arctic Sunrise*, involving long prison terms, were contrary to the case law of the ECtHR in respect of acceptable sanctions in the context of freedom of expression. The sanctions that were envisaged in the charges no doubt would have had the "chilling effect" the Court finds unacceptable. For this same reason, framing the peaceful actions of the *Arctic Sunrise* and its crew in the term of piracy under the LOSC or offences under the SUA Protocol would not be compatible with article 10 and 11 of the ECHR.[147] On the other hand, as *Steel* indicates, the ECtHR has accepted that the authorities can take quite far reaching measures to restrict the freedom of expression where it affects safety or the rights of others – *i.e.* requiring people to abstain from certain behavior for a period of time and upon non-compliance impose further sanctions. The Norwegian Supreme Court case involving the Greenpeace vessel *Solo* and the measures of the Greenlandic authorities against Greenpeace activists indicate possible approaches the Russian authorities could have taken in respect of the *Arctic Sunrise* and its crew.[148]

Turning to the issue of hot pursuit, a number of conditions of article 111 of the LOSC undoubtedly were met by the Russian Federation.[149] For instance, the fact that the *Arctic Sunrise* itself did not enter the safety zone is immaterial, in view of the fact that its boats did

[146] As video footage indicates (https://www.youtube.com/watch?v=Kx2tSVAsQc8), shots were fired from the *Prirazlomnaya* in the water very near one of the boats of the *Arctic Sunrise*, which arguably created an undue risk in the circumstances of the case. However, this whole episode was very chaotic and just before the shots were fired, the boat of the *Arctic Sunrise* was approaching and then pushing against a smaller boat of the Russian security forces (sequence between 1.24 and 1.34 of the video).

[147] See also the text at note 120~~121~~. As discussed above, the drafters of the SUA Convention and SUA Protocol reportedly intended that they would not apply in the case of peaceful protest at sea (see above text at note 46).

[148] For further reference to this case see note 60~~61~~ above. I would like to thank Tore Henriksen for making this specific point.

[149] For a discussion of the regime of hot pursuit see *e.g.* N.M. Poulantzas *The Right of Hot Pursuit in International Law 2nd* (Martinus Nijhoff Publishers, 2002); E.J. Molenaar "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*" 2004 (19) IJMCL pp. 19-42 at pp. 26-30.

enter the safety zone.[150] Article 111 provides that in such a case the right of hot pursuit also applies to the vessel concerned.[151] However, two points in the available accounts of the incident raise questions about whether the Russian Federation complied with the requirements of article 111 of the LOSC, making the subsequent arrest of the *Artic Sunrise* illegal. First, the accounts of the incident that are available do not make it possible to establish with certainty whether the requirement that a pursuit was commenced after a visual or auditory signal was given while the boats of the *Arctic Sunrise* were still in the safety zone of the *Prirazlomnaya*.[152] As was observed above, a considerable time elapsed between the events near and on the rig and the order by the Coast Guard vessel *Ladoga* to the master of the *Arctic Sunrise* to stop for inspection. Secondly, article 111(1) requires that the pursuit is not interrupted. The somewhat opaque description contained in the judgment of the Russian Coast Guard authorities of 8 October 2013 does not suggest that there was an interruption of the pursuit. However, the more detailed account provided by Greenpeace International rather would seem to indicate that the hot pursuit actually was interrupted. That account refers to contacts between the *Ladoga* and the *Arctic Sunrise* concerning the voluntary inspection of the *Arctic Sunrise* and a request to the vessel to move away from the *Prirazlomnaya*. These events seem difficult to square with a continued hot pursuit.[153]

The arbitration process

The Netherlands instituted proceedings in relation to the arrest of the *Arctic Sunrise* under Part XV of the LOSC on 4 October 2013.[154] In view of the fact that the Netherlands and the Russian Federation have not chosen the same third party dispute settlement body, the case will be considered and decided by an arbitral tribunal constituted in accordance with Annex VII to the LOSC.[155] As was noted above, the Russian Federation did not accept the arbitration initiated by the Netherlands in this specific case. To justify this course of action the Russian Federation referred to the fact that upon ratification of the LOSC in 1997 it had made a declaration indicating that it did not accept compulsory dispute settlement mechanisms in relation to among others "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".[156]

At face value, this declaration would seem to allow the Russian Federation to reject arbitration in this particular case. However, if read in conjunction with the relevant provisions of the LOSC, the Russian position collapses. The declaration constitutes a reservation or

[150] LOSC, article 111(4).
[151] *Ibid*.
[152] This requirement is contained in *ibid*., article 111(4).
[153] The Netherlands in its pleadings before the ITLOS broached this topic and submitted that the pursuit in fact had been interrupted. The only argument the Netherlands provided in this connection is that "[a]pproximately 36 hours elapsed between the decision to seize the vessel and its boarding by agents of the Russian Federal Security Service." (Verbatim Record, note 39, p. 20, lines 26-28). The mere passage of time is however not a criterion allowing the conclusion that a pursuit has been interrupted. Interestingly, the argument of the Netherlands seems to admit that the hot pursuit had been instituted in accordance with article 111 of the LOSC.
[154] Submission, note 2.
[155] See LOSC, article 287(5).
[156] Note, note 7; Declaration, note 7 at para. 1.

exception to the LOSC. Article 309 of the LOSC provides that reservations or exceptions may only be made if they are expressly permitted by the Convention. Article 298 of the LOSC allows a state to exclude only certain disputes concerning law enforcement activities, namely those activities that are mentioned paragraphs 2 and 3 of article 297 of the LOSC. These paragraphs are concerned with respectively marine scientific research and fisheries and thus have no relevance for this specific case. On the other hand, paragraph 1 of article 297 is relevant to this specific case and no reservation or exception to this paragraph is allowed by the Convention. Although article 297(1) in principle excludes disputes concerning the exercise of jurisdiction by a coastal state of its sovereign rights and jurisdiction provided for in the LOSC, the paragraph then continues by providing that these disputes are nonetheless subject to compulsory procedures in a number of specific cases. One of those concerns the situation in which it is alleged that the coastal state has acted in contravention of the provisions of the Convention in regard to the freedom of navigation.[157] The *Arctic Sunrise* incident falls under this exception to the exception to compulsory dispute settlement contained in article 297. Article 297(1) has a broad scope and it also covers the question whether the measures the coastal state has taken in a safety zone are in accordance with article 60(4) of the LOSC.[158] It also covers the question whether the Russian Federation in effecting the boarding and arrest of the *Arctic Sunrise* acted in accordance with the requirements for hot pursuit contained in article 111 of the LOSC.

The Russian Federation could have raised the significance of its declaration and the exception to compulsory dispute settlement contained in article 297(1) either by starting preliminary proceedings under article 294 of the LOSC or by making preliminary objections in the context of the arbitration.[159] Recourse to article 294 in all likelihood would not have been successful. Article 294 allows a state to ask for a determination that a claim in a dispute that is covered by article 297 of the LOSC is an abuse of legal process or is *prima facie* well-founded. In the former case a court or tribunal shall take no further action in the case. In the light of the circumstances of the case, it would seem to be unlikely that a tribunal would conclude that the application of the Netherlands constituted an abuse of process. This is confirmed by the fact that the ITLOS in its Order on provisional measures concluded that the arbitral tribunal *prima facie* had jurisdiction.[160] The Russian Federation could also have raised preliminary objections during the arbitration procedure, arguing that it had not acted in contravention of the LOSC and that consequently, article 297(1) of the LOSC did not offer a basis for jurisdiction. However, such preliminary objections would go to the heart of the dispute on the merits. As a consequence, raising the preliminary objections would in any case not have avoided a discussion of and judgment on the law enforcement activities of the Russian authorities.[161] The Russian Federation would also have had the option to raise a preliminary

[157] LOSC, article 297(1)(a).
[158] See *ibid*., article 58(3).
[159] For the latter point see *ibid*., article 288(4).
[160] See further *infra*.
[161] It cannot be excluded that if preliminary objections would have been raised, the arbitral tribunal would have joined them to the merits because otherwise a ruling on the preliminary objections would have prejudged the

objection in relation to article 283 of the LOSC.[162] This matter would not have required also looking at the merits for it to be decided, but would not have prevented the indication of provisional measures.

The refusal of the Russian Federation to participate in the arbitral proceedings does not put a stop to them. A first step in this procedure is the constitution of the tribunal. The Netherlands in its application instituting the proceedings nominated its arbitrator. Annex VII also provides for a procedure to nominate the remaining four arbitrators if the respondent state refuses to participate in the procedure.[163] In accordance with this procedure, on 15 November 2013 the Netherlands requested the appointment of the Russian Federation's arbitrator and on 13 December the nomination of the three remaining arbitrators. The appointment procedure was finalized on 10 January 2014.[164] Now that the tribunal has been constituted it can start considering the case. Annex VII to the LOSC requires that in a case of non-appearance a tribunal "must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law".[165] As the ITLOS hinted at in its Order on provisional measures of 22 November 2013, the non-appearance of a party may make it more difficult for a tribunal to establish the law and the facts.[166] The ITLOS at the same time noted "the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings".[167]

Unless the Netherlands and the Russian Federation reach a settlement out of court, the arbitration will continue until the tribunal renders its decision. In view of the non-appearance of the Russian Federation, the procedure may be limited to one round of written pleadings and one round of oral pleadings by the Netherlands and a decision may still be rendered in late 2014 or early 2015.

The decision on the Netherlands requests from the tribunal implies that the focus of the arbitration will be on whether or not the boarding and detention of the *Arctic Sunrise* by the Russian authorities were carried out in accordance with the LOSC.[168] The legality of the

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merits. This joining would have implied a full discussion of the merits even in case the preliminary objections would eventually have been upheld.

[162] For a discussion of this point see text at note 193~~194~~ and following.

[163] LOSC, Annex VII, article 3

[164] See *Arbitrators Appointed in the Arbitral Proceedings instituted by the Kingdom of the Netherlands against the Russian Federation in respect of the Dispute regarding the* Arctic Sunrise (ITLOS/Press 207 of 13 January 2014 (www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_207_E.pdf).

[165] LOSC, Annex VII, article 9.

[166] Order, note 11 at para. 54.

[167] *Ibid*., para. 56.

[168] The mixed nature of the dispute concerning the *Arctic Sunrise* incident raises the question whether an arbitral constituted under Annex VII of the LOSC would have jurisdiction to deal with all its aspects. Article 288 of the LOSC provides that an Annex VII Tribunal has jurisdiction over "any dispute concerning the interpretation or application of [the LOSC] which is submitted to it in accordance with [Part XV]". However, article 293 allows an Annex VII Tribunal to apply "other rules not incompatible with [the LOSC]". An Annex VII Tribunal in the *MOX Plant* case considered that there was a "cardinal distinction" between its jurisdiction and the law to be applied by it (Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea (Ireland *v.* United Kingdom), Order No. 3 of 24 June

actions of the *Arctic Sunrise* will only have to be assessed to the extent this is required to determine whether or not the Russian authorities acted in accordance with article 111 in commencing the hot pursuit of the *Arctic Sunrise*.[169]

The order of the ITLOS on provisional measures

In filing its application instituting proceedings on 4 October 2013, the Netherlands also asked the Russian Federation to take provisional measures to ensure the release of the *Arctic Sunrise* and its crew and indicated that it would turn to the ITLOS if the Russian Federation would not do so within 14 days.[170] This approach is explained by article 290(1) of the LOSC, which provides that if a dispute has been duly submitted to a court or tribunal and that court or tribunal has *prima facie* jurisdiction it:

> may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.

Since the Russian Federation did not comply with the Dutch request to release the *Arctic Sunrise*, on 21 October 2013 the Netherlands turned to the ITLOS in accordance with article 290(5) of the LOSC.[171] The ITLOS may prescribe provisional measures in accordance with article 290 "if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires."[172] . The Netherlands requested the Tribunal to prescribe that the Russian Federation: immediately release of the *Arctic Sunrise* and its crew; immediately suspend all national proceedings and refrain from commencing new proceedings; refrain from taking or enforcing judicial or administrative measures against the *Arctic Sunrise*, its crew, its owners and operators; and ensure that no other action which might aggravate or extend the dispute would be taken.[173]

2003, para. 19). The tribunal also observed that "to the extent that any aspects of Ireland's claims arise directly under legal instruments other than the Convention, such claims may be inadmissible" (*ibid*.). In the arbitration instituted by the Netherlands, the main issue in dispute arises directly under the LOSC, *i.e.* whether the arrest of the *Arctic Sunrise* was in accordance with the relevant provisions of the LOSC. The tribunal also may need to look at certain human rights issues in determining this issue, but that would not constitute claims of the Netherlands "directly under legal instruments other than the Convention". It would seem that the tribunal in any case would not need to consider the merits of the human rights issues involved, but only would need to establish whether or not the Russian Federation would be prevented from exercising enforcement jurisdiction as a consequence of the existence of such rights. The relevant provisions of the ECHR indicate that it would first of all be on the Russian Federation to determine what kind of enforcement actions it could take in this respect. One specific claim of the Netherlands in instituting the proceedings under the LOSC would seem to be inadmissible if the finding of the *MOX Plant* tribunal on article 293 of the LOSC were to be applied. This concerns the claim that the Russian Federation breached its obligations under articles 9 and 12 of the ICCPR (see Submission, note 2, para. 37(1)(c)).

[169] For instance, article 111(1) provides that the hot pursuit may be undertaken "when the competent authorities have good reason to believe that the [foreign] ship has violated the laws and regulations of that State".

[170] Submission, note 2 at paras 32-33.

[171] Request, note 8.

[172] LOSC, article 290(5).

[173] *Ibid*., para. 47.

In light of the Russian Federation's rejection of arbitration in this specific case, it did not come as a surprise that it informed the ITLOS that it did not intend to participate in the proceedings for the prescription of provisional measures.[174] The hearings on the provisional measures took place on 6 November 2013 and consisted of one round of pleadings by the Netherlands. The ITLOS issued its Order on provisional measures on 22 November 2013, prescribing that the Russian Federation immediately release the *Arctic Sunrise* and the detained crew upon the posting of a bond or other financial security of € 3,600,000 by the Netherlands and that the Russian Federation ensure that the *Arctic Sunrise* and the persons that had been detained would be allowed to leave the territory and maritime areas under its jurisdiction.[175] The operative paragraph of the Order was adopted by a majority of 19 to 2, with judges Golitsyn and Kulyk voting against.[176]

Before being able considering the issue of provisional measures, the ITLOS had to establish that the arbitral tribunal *prima facie* had jurisdiction to consider the merits of the case. A first point in this respect concerned the reliance of the Russian Federation on its declaration excluding law enforcement measures from compulsory dispute settlement procedures. The Tribunal not only took note of the statements of the Netherlands, but also referred to the text of Russian Federation's declaration upon ratification of the LOSC.[177] In that declaration, the Russian Federation had also observed that it believed that declarations that were not in accordance with articles 309 and 310 of the LOSC – these articles imply that reservations and exceptions are only allowed to the extent that they are permitted by the LOSC and that declarations cannot modify or exclude the legal effect of the LOSC – cannot exclude or modify the legal effect of the provisions of the LOSC.[178] The Tribunal then concluded, taking into account this observation, that the Russian Federation's declaration *prima facie* only excluded disputes under article 297(2) and (3).[179] In this way the ITLOS provided an interpretation of the Russian Federation's declaration that was in accordance with articles 309 and 310 of the LOSC and the Russian Federation's declaration on those articles. This implied that a dispute covered by the exception to article 297(1), which refers to the freedom of navigation and on which the Netherlands relied, was not excluded by the Russian declaration.

[174] Note, note 10. On the day the ITLOS issued its Order on provisional measures, the Russian Ministry of Foreign Affairs issued a commentary expressing the hope that the Tribunal had considered the case objectively and in deciding on it had taken into account all of its aspects, including the non-fulfilment by the Netherlands of its obligation as a flag state and the violation by the *Arctic Sunrise* of the requirements attaching to the exercise of the freedom of navigation in the exclusive economic zone of another state. It was also observed that the circumstances of the case warranted a hot pursuit of the *Arctic Sunrise* (Kommentarii, note 14). These issues raised by the commentary all go to the merits of the case and it thus would be difficult for the Tribunal to live up to the hopes of the Ministry. In that sense the commentary could be seen as a disguised announcement that the Russian Federation would not be complying with the Order and a justification for that approach.
[175] Order, note 11 at para. 105.
[176] See *ibid*.
[177] *Ibid*., paras 40-45.
[178] Declaration, note 7 at para. 2.
[179] Order, note 11 at para. 45.

The Order also discussed the consequences of the non-participation of the Russian Federation in the proceedings.[180] The Order observes that this non-participation does not constitute a bar to prescribing provisional measures and notes that the Russian Federation was given ample opportunity to present its views, but did not do so.[181] The ITLOS also confirmed that a non-appearing state remains a party to the proceedings and is bound by the ensuing decision.[182] After spelling out these consequences for the Russian Federation, the Tribunal considered the impact of the non-appearance on the Tribunal's consideration of the facts and the law. The Tribunal observed that the fact that the Russian Federation had been given ample opportunity to present its views, but had declined to do so made it more difficult "to evaluate the nature and scope of the respective rights of the Parties to be preserved by provisional measures."[183] To avoid that the Netherlands would be put at a disadvantage by this state of affairs, the Tribunal decided to "identify and assess the respective rights of the Parties involved on the best available evidence."[184] A number of the separate opinions to the Order also were critical of the Russian Federation for its non-appearance.[185]

In order to make the determination that the arbitral tribunal *prima facie* had jurisdiction, the Order first considers whether there existed a dispute between the Netherlands and the Russian Federation concerning the interpretation or application of the LOSC.[186] As article 279 of the Convention indicates, only disputes of this nature can be settled under the dispute settlement provisions of the LOSC. After considering the positions of the parties, the ITLOS concluded that they had different views on a number of provisions of the LOSC concerned with coastal flag state jurisdiction and that this implied a dispute concerning the interpretation or application of the LOSC.[187] The Tribunal also concluded that the provisions invoked by the Netherlands provided a basis for jurisdiction and since it was not required to definitively establish the rights of the Netherlands at this stage of the proceedings, the ITLOS concluded that the arbitral tribunal *prima facie* had jurisdiction.[188] This conclusion was challenged by Judge Golitsyn in his dissenting opinion.[189] Golitsyn in this connection considered the implications of the right of hot pursuit that exists under article 111 of the LOSC and argued that the factual accounts provided by Greenpeace and the Russian authorities provided sufficient grounds to conclude that the Russian Coast Guard vessel *Ladoga* was carrying out a hot pursuit. Consequently, the Russian Federation "acted in full conformity with the

[180] *Ibid*., paras 46-57.
[181] *Ibid*., paras 48 and 50.
[182] *Ibid*., para, 52.
[183] *Ibid*., para. 55.
[184] *Ibid*., para. 57.
[185] See Declaration of judge *ad hoc* Anderson (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_decl.Anderson_orig_Eng.pdf); joint separate opinion of judges Wolfrum and Kelly (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_sep.op.Wolfrum-Kelly_orig_Eng.pdf).
[186] Order, note 11 at paras 58-71.
[187] *Ibid*., para. 68.
[188] *Ibid*., para. 71.
[189] Dissenting opinion of judge Golitsyn (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_diss.op.Golitsyn_orig_Eng.pdf).

Convention".[190] As Golitsyn also indicated, the only logical conclusion to draw from the Russian Federation acting in accordance with article 111 would be that there was no basis to assert that it had infringed the freedom of navigation enjoyed by the Netherlands, as that freedom in this case did not exist.[191] As a consequence, the ITLOS "wrongly conclude[d] that the arbitral tribunal, to be constituted, would have *prima facie* jurisdiction".[192]

As was argued above, the question whether or not the Russian Federation acted in accordance with article 111 of the LOSC is probably the most fundamental issue in dealing with the arbitration between the Netherlands and the Russian Federation. As Judge Golitsyn's argument illustrates, it is also a key element in determining whether the arbitral tribunal will have jurisdiction.

An assessment of the law and available facts indicates that Judge Golitsyn's conclusion on the implications of article 111 for prescribing provisional measures is questionable. As was set out above, contrary to what he asserts, the available information rather seems to indicate that the Russian authorities interrupted the hot pursuit, if it was indeed initiated from the safety zone of the *Prirazlomnaya*. In view of this uncertainty, concluding that the Russian Federation had acted in accordance with article 111 would have required going into the merits of the case, something that is beyond the remit of the ITLOS in indicating provisional measures. The only possible conclusion was that there exists a dispute concerning this matter between the parties, just as is the case for the other provisions of the LOSC mentioned by the ITLOS and to uphold the *prima facie* jurisdiction of the arbitral tribunal. It is somewhat of a missed opportunity that the ITLOS refrained from considering the implications of article 111 in its Order. As was pointed out above, the Netherlands in its oral pleadings had put this matter before the Tribunal, as it had raised the question as to whether the Russian Federation could successfully rely on article 111 of the LOSC in an arbitration. By not ruling on this critical issue in determining the existence of *prima facie* jurisdiction, the ITLOS opened the door for the criticism that its Order was not well-founded in the facts and the law.

Before moving to the indication of provisional measures, the Tribunal also considered the implications of article 283(1) of the LOSC, which provides that:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

The Tribunal noted that there had been diplomatic correspondence between the parties and that the Dutch and Russian Ministers of Foreign Affairs had discussed the matter a number of times.[193] The Tribunal attached significant weight to the fact that the Netherlands in its request for provisional measures had indicated that in its view "[t]he possibilities to settle the

[190] *Ibid*., para. 36.
[191] *Ibid*., para. 37.
[192] *Ibid*., para. 1.
[193] Order, note 11 at para 73-74.

dispute by negotiation or otherwise have been exhausted".[194] Referring to its case law, the Tribunal observed that a party in those circumstances was not required to continue an exchange of views and consequently held that article 283 had been complied with.[195] This conclusion was criticized by Judge Golitsyn in his dissenting opinion, who concluded that since the conditions of article 283 had not been fulfilled, the ITLOS should have concluded that the submission of the dispute to arbitration was inadmissible and should have declined to prescribe provisional measures.[196] Golitsyn pointed out that only in a diplomatic note of 1 October 2013 the Russian Federation had indicated the provisions of the LOSC on which it relied to justify the legality of its actions. The Netherlands in a note of 3 October 2013 rejected this justification. According to Golitsyn this crystalized the dispute. As the Netherlands already started the arbitral procedure on the following day, it had not complied with its obligation under article 283(1) of the LOSC.[197]

It can be doubted whether Judge Golitsyn's conclusion on the relevance of article 283 at this state of the proceedings is justified. In diplomatic correspondence prior to 1 October 2013, the Netherlands had already indicated legal grounds on which it considered the boarding and arrest of the *Arctic Sunrise* illegal, and although there was no explicit reference to the LOSC in this connection, the legal arguments advanced by the Netherlands (and the Russian Federation) cannot but have their basis in the LOSC. In addition, the fact that two notes of the Netherlands remained unanswered[198] should also be taken into account in considering the fulfilment of the obligation contained in article 283. Judge Golitsyn's conclusion also seems at odds with the reliance by the ITLOS on its jurisprudence on the significance of the view of the individual party whether the possibilities of article 283 have been exhausted.[199] Most importantly, as this discussion also indicates, it should be clear that it was reasonable for the ITLOS to consider that the requirement of article 283 *prima facie* had been met. As was pointed out by Judge Anderson in a declaration appended to the order, it will be on the arbitral tribunal to fully consider the implications of article 283.[200]

The ITLOS indicated two closely related provisional measures. Upon the posting of a bond or other financial security of € 3,600,000 by the Netherlands, the Russian Federation was required to immediately release the *Arctic Sunrise* and all detained persons; and upon the posting of the security the Russian Federation was to ensure that the vessel and detainees were allowed to leave its territory and maritime zones.[201]

The ITLOS in indicating provisional measures concluded that the urgency of the circumstances of the case required the prescription of provisional measures.[202] In making this

[194] *Ibid*., paras 75-76.
[195] *Ibid*., para. 76.
[196] Opinion Golitsyn, note 189~~190~~ at paras 5 and 14.
[197] *Ibid*., paras 11-14.
[198] See note, note 5.
[199] This jurisprudence was quoted in the Tribunal's Order (Order, note 11 at para 76).
[200] Declaration Anderson, note 185~~186~~ at para. 3.
[201] Order, note 11 at para. 105.
[202] *Ibid*., para. 89.

assessment, the Tribunal took into account the period in which the Annex VII Tribunal would not yet be in a position to consider this issue while referring to its case law, and referred to the Dutch arguments to substantiate that there was urgency in the present case.[203] The Tribunal paid scant attention to the question how the indicated measures would preserve the respective rights of the parties. Judge Golitsyn argued that the provisional measures as a matter of fact did not preserve the rights of the Russian Federation.[204] At first sight, this criticism might seem to be justified. The arbitral tribunal could conclude that the arrest of the *Arctic Sunrise* and its crew were in accordance with the LOSC. In that case the Netherlands could be ordered to return the *Arctic Sunrise* and the former detainees to the Russian Federation and the Russian Federation would be entitled to take measures against the vessel and the crew. If the Netherlands would not be willing or able to comply with that judgment, *e.g.* because the detainees would no longer be under its jurisdiction, it would forfeit the bond or other financial security. To the extent that other than pecuniary sanctions might be imposed by a national procedure in the Russian Federation, this forfeiture would not fully maintain the Russian Federation's rights. However, in assessing this point it should also be taken into account that if the position of the Netherlands were to be accepted by the tribunal, the detention of the *Arctic Sunrise* and its crew would have been illegal from the start. In that light the provisional measures of the ITLOS can certainly be said to have struck a reasonable balance.

Judges Golitsyn and Jesus in their opinions appended to the Order submitted that the release of a vessel could only be ordered in accordance with article 292 of the LOSC.[205] Under the LOSC the procedure for the prompt release of vessels is only envisaged in cases involving the enforcement by the coastal state of its fisheries legislation in the exclusive economic zone or the enforcement of that state's legislation relating to vessel source pollution and dumping in its maritime zones,[206] However, it would seem that the fact that prompt release is envisaged as a procedure that can be invoked by the flag state in certain specified cases does not preclude the ITLOS or another court or tribunal from ordering the prompt release of a vessel as a provisional measure in other instances if it considers this "appropriate under the circumstances to preserve the respective rights of the parties to the dispute".[207]

On 2 December 2013, the Netherlands informed the ITLOS and the Russian Federation that it had complied with the condition for the release of the *Arctic Sunrise* and its crew.[208] The Russian Federation has not complied with the measures it was requested to take after this step

[203] *Ibid*., paras 85 and 87,
[204] Opinion Golitsyn, note 189~~190~~ at paras 45-47.
[205] Opinion Golitsyn, note 189~~190~~ at paras 48-49; separate opinion of Judge Jesus (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_sep.op.Jesus_orig_Eng.pdf), para. 7.
[206] See LOSC, articles 73, 226 and 292.
[207] *Ibid*., article 292.
[208] See *Report on compliance with the provisional measures prescribed by the Tribunal on 22 November 2013 in the case concerning the 'Arctic Sunrise'* dated 2 December 2013 (www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/C22_initial_report_orig.pdf).

by the Netherlands.[209] The crew of the *Arctic Sunrise* was released as part of an amnesty in connection with the 20th anniversary of the Russian constitution in December 2013. The bill introduced in the State Duma was amended at the last moment to include the charges that had been brought against the crew members.[210] The *Arctic Sunrise* itself presently is still held in the port of Murmansk. In March of 2014, all crew members of the *Arctic Sunrise* lodged an application with the ECtHR alleging among others that their rights under articles 5 and 10 of the ECHR had been breached.[211]

Conclusions

An assessment of the *Arctic Sunrise* incident from the perspective of international law requires looking into both the law of the sea and human rights law. Although the focus of the arbitration process has been to a very large measure on the law of the sea, human rights law is of critical importance in considering the legality of the actions of the crew of the *Artic Sunrise* and the Russian authorities. Interestingly, as was set out above the present analysis suggests that human rights law would probably have left the Russian authorities ample opportunity to take measures to prevent the actions of *the Arctic Sunrise* directed at the *Prirazlomnaya*. However, in light of the Russian Federation's approach to the freedom of expression and assembly it should probably not come as a surprise that the Russian Federation at no time attempted to frame the issue in the light of articles 10 and 11 of the ECHR.[212]

An outcome of the arbitration that has been started by the Netherlands could be that the arrest of the *Arctic Sunrise* was a breach of the LOSC. This conclusion, which subscribes the Dutch view that the boarding and detention of the *Arctic Sunrise* were not in accordance with the relevant international legal framework, might seem to be unsatisfactory from the perspective of the substantive law. The crew of the *Arctic Sunrise* has clearly acted contrary to provisions of the LOSC and it is likely that their specific action need not be tolerated from a human rights law perspective. The Russian Federation would be justified in taking measures against the crew and the vessel while they were under its jurisdiction. If there would have been no doubt that the Russian authorities had complied with article 111 of the LOSC, the reliance on

[209] The Dutch Report to the ITLOS (note 208~~209~~) suggests that in complying with its obligation the Netherlands could not count on the collaboration of the Russian Federation as was envisaged by the Order of the ITLOS (see Order, note 11 at para. 105(1)(a)). The fact that the website of the Tribunal only contains the Dutch initial report on compliance with the provisional measures suggests that the Russian Federation also did not comply with the obligation to submit an initial report on compliance as it was required to do in accordance with paragraph 105(2) of the Order on provisional measures.

[210] See *Russian parliament votes for amnesty for Arctic 30* (www.greenpeace.org/international/en/press/releases/Russian-parliament-votes-for-amnesty-for-Arctic-30/); A. Luhn, "Arctic 30 and Pussy Riot members to be freed after Russia passes amnesty law", *The Independent* of 18 December 2013 (www.independent.co.uk/news/world/europe/arctic-30-and-pussy-riot-members-to-be-freed-after-russia-passes-amnesty-law-9013096.html).

[211] See J. Meikle "Arctic 30 protesters seek damages from Russia" *The Guardian* of 17 March 2014 (http://www.theguardian.com/environment/2014/mar/17/arctic-30-activists-damages-russia-court-greenpeace).

[212] See *e.g.* Amnesty International *Annual Report 2013; The state of the world's human rights* (Amnesty International, 2013 (files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf) pp. 218-219; Human Rights Watch *Laws of Attrition; Crackdown on Russia's Civil Society after Putin's Return to the Presidency* (24 April 2013) (www.hrw.org/sites/default/files/reports/russia0413_ForUpload_0.pdf).

the Netherlands on the freedom of navigation would have been unconvincing and the Netherlands in that case might not have started an arbitration. Put differently, it could be argued that points of procedure prevented the Russian Federation from protecting its substantive rights in its exclusive economic zone. On closer consideration, this argument is unpersuasive. The procedural requirements in article 111 are carefully drafted to ensure that the balance of rights between the coastal state and the international community is maintained. Moreover, the facts of the case indicate that the Russian Federation had every opportunity to act in accordance with article 111 and protect its rights. This point is confirmed by the dissenting opinion of Judge Golitsyn to the Order of the ITLOS on provisional measures. The opinion points to the significance of article 111 and does not suggest that this right in any way should be expanded.[213]

The refusal of the Russian Federation to accept arbitration and to participate in the proceedings on provisional measures before the ITLOS might, together with the refusal of China to participate in a LOSC Annex VII arbitration initiated by the Philippines earlier in 2013, suggest that the compulsory dispute settlement procedures of the Convention are under strain. However, cases of non-appearance have happened in the past in international litigation without substantially affecting the system as such. Moreover, in view of the fact that both arbitrations will go ahead in any case and the impact they may eventually have is difficult to predict at present, one should be careful in drawing conclusions in this respect.

The Russian Federation has not taken any actions to comply with the Order of the ITLOS. The detention of the crew of the *Arctic Sunrise* attracted wide coverage and criticism from especially western public opinion and governments. Releasing the crew of the *Arctic Sunrise* under an amnesty law did allow the Russian Federation to extricate itself from this thorny issue without giving the impression of budging on its decision to reject arbitration and the proceedings before the ITLOS.

The real reasons for the Russian Federation's refusal to accept the arbitration are not known. The only reason that has been officially provided – the declaration of the Russian Federation upon ratifying the Convention – is unconvincing. The Convention indicates that non-appearance is not the appropriate step in case a state considers that another state has no legal basis to start a compulsory dispute settlement procedure. In the present case, the Russian Federation could have invoked its declaration to contest the jurisdiction of the arbitral tribunal in preliminary proceedings or could have relied on the procedure of article 294 of the LOSC. In both cases success would probably have been unlikely. Possibly, the Russian Federation might have had more success in arguing that the Netherlands had not complied with its obligation to exchange views as is required by article 283 of the LOSC. One reason why the Russian Federation may have decided to refrain from participating in the arbitration is that its enforcement authorities seem to have mishandled the incident on more than one count. First, the Russian Coast Guard could have acted in a manner that would have left no doubt that the

[213] Opinion Golitsyn, note 189~~190~~ at paras 36-37.

arrest had been carried out in accordance with article 111 of the LOSC on hot pursuit. Secondly, the varying charges against the *Arctic Sunrise* and its crew suggest that the Russian authorities were ill-prepared to deal with this matter. The charge of piracy, that is difficult to square with the definition of piracy under international law, as a matter of fact completely backfired. It allowed Greenpeace to present itself as the innocent victim of a state that was flouting the law, while it should be clear that in reality the Russian Federation had good grounds to take measures against the *Arctic Sunrise*.

The conclusion of the ITLOS that the arbitral tribunal would have *prima facie* jurisdiction is reasonable in the circumstances of the case and its provisional measures strike a balance in preserving the rights of the parties. The reasoning of the ITLOS might have been reinforced in a number of specific instances. As the dissenting opinion of Judge Golitsyn indicates, the Order left room to question a number of critical points. In particular in the light of the non-appearance of the Russian Federation it would have been preferable from the perspective of upholding the integrity of Part XV of the LOSC if the Order would have left as little room as possible to provide the Russian Federation with arguments that its course of action was justified.