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Paper:

Caddell, R. (2015). Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea. *Netherlands Yearbook of International Law*, 45, 359-384.

http://dx.doi.org/10.1007/978-94-6265-060-2_14

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Chapter 14

Platforms, Protestors and Provisional Measures: The *Arctic Sunrise* Dispute and Environmental Activism at Sea

Richard Caddell

Abstract On 18 September 2013, a team of Greenpeace activists attempted to board the *Prirazlomnaya* oil platform, situated within the Russian exclusive economic zone, intending to disrupt drilling activities and raise awareness of Arctic environmental issues. This action resulted in the subsequent arrest of 30 individuals associated with the protest, as well as that of the *Arctic Sunrise*, a Greenpeace support vessel sailing under the Dutch flag. The plight of the so-called ‘Arctic 30’ dominated global headlines until their release under a general amnesty by Russia in December 2013. Meanwhile, the arrest of the vessel prompted the commencement of arbitral proceedings by the Netherlands against Russia, a process that had yet to be concluded at the time of writing. In November 2013, however, the International Tribunal for the Law of the Sea upheld a Dutch petition for provisional measures, including the release of the vessel and its crew subject to the payment of a bond. In so doing, the Tribunal faced the issue of non-participation by a respondent state for the first time, while also developing arguably a ‘back-door’ position on prompt release. In the meantime, aspects of the legality of environmental activism at sea remain somewhat uncertain which, given that a considerable number of protest vessels are registered to the Netherlands, may engage the litigative attention of the Dutch authorities in future incidents.

Keywords Provisional measures • UN convention on the law of the sea 1982 • Non-appearance of respondent state • Prompt release • Freedom of speech • Oil platforms

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14.1 Introduction

In recent years, the legal position of protest actions at sea has become a matter of increasing significance. Marine protests have proved to be a particularly attractive tactic for many campaign groups, since the dramatic media coverage that invariably accompanies such activities commands considerable public attention, often helping to generate additional support for the cause in question. Protest activism at sea is by no means a recent phenomenon¹; the localised blockading of ports has long been an effective weapon for disgruntled coastal interests, although nautical campaigning has steadily expanded to become more pelagic in scope since the late 1960s. Many modern exponents now spend extended periods at sea in pursuit of their targets, traversing a variety of zones of maritime jurisdiction in the process and engaging in activities that operate at the limits of—and sometimes beyond—the current legal parameters of entitlements to free speech and assembly.

Maritime protest also varies significantly in format and conduct. This may entail essentially passive activism, in which campaigners merely observe and document the activities in question and express their dissent in a non-obstructive manner,² a practice dubbed ‘bearing witness’ by Greenpeace.³ Alternatively, many campaign groups have considered that such tactics are unlikely to provoke

¹ On earlier questions raised by the legality of such approaches see Plant 1983, at 146–162 (examining activities dating back to 1971). See also Plant 2002.

² The ‘mere shadowing’ of a vessel appears to be a universally accepted application of the principle of freedom of navigation: Plant 1983, at 153.

³ See further Teulings 2011, at 223–225. As General Counsel for Greenpeace, Teulings is keen to draw a clear distinction between this approach and the tactics of more militant activists. In the interests of proper balance, however, it should be observed that in the context of Arctic oil platforms Greenpeace has engaged in more disruptive manifestations of direct action protest that clearly extend beyond mere observation and placarding.

the desired changes in policy and behaviour. Accordingly, more interventionist forms of direct action have been deployed to physically impede the activity in question, which has increasingly led to violent clashes at sea. This approach has been perhaps most vividly illustrated by the regular campaigns waged by the Sea Shepherd Conservation Society against the Japanese Antarctic whaling fleet, a decade-long saga that has degenerated from a series of entertaining Corinthian escapades into a significant nautical hazard, culminating in dangerous collisions between vessels in remote Polar waters, the sinking of a yacht and, ultimately, the spectre of piracy proceedings in at least one jurisdiction.⁴ As is the case with land-based protests,⁵ the legal response to activism at sea involves a fine balancing act between the competing imperatives of protected and socially-valuable rights to protest and the need to ensure wider issues of public safety. Marine campaigning also carries an inherent risk of civil and criminal penalties, as well as the possibility of serious physical injury⁶—a prospect for which states seemingly carry at least a moral obligation to ensure that their nationals exhibit an appreciation.⁷

The legal position concerning activism at sea has a particular resonance for the Netherlands, since a number of campaign groups have found an accommodating home for many of their key protest vessels within the Dutch shipping registry. This has created occasional diplomatic and legal difficulties for the national authorities. As the flag state of vessels operated by Sea Shepherd, the Dutch authorities, together with Australia, New Zealand and the US, have been moved to issue regular quadripartite statements upholding broad support for freedom of speech at sea, yet condemning certain actions of its nationally-registered vessels and urging respect for

⁴ *Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Watson*, 9th Cir., 725 F.3d 940, 2013, overturning an earlier decision of the US District Court in *Institute of Cetacean Research et al. v. Sea Shepherd Conservation Society et al.*, W. D. Wash, 860 F. Supp 2d 1216, 2012 that had been distinctly more favourable to the activists. On the legal issues raised by these campaigns, see Mossop 2012; Doby 2013. Notwithstanding the US position, a successful piracy action is considered unlikely to be forthcoming against Sea Shepherd under the current Japanese provisions, even though new legislation was adopted in 2009 which, in principle, considered such harassment to potentially lie within the scope of the law. Kanehara 2011, at 206.

⁵ On the challenges inherent in balancing competing considerations raised by protest activism see Mead 2010, at 57–117.

⁶ A vivid example being the distinctly ill-advised attempt by the pro-Palestinian activist crew of the *Mavi Marmara* in 2010 to navigate through an Israeli blockade, duly sustaining six fatalities and a host of serious injuries.

⁷ Sir Geoffrey Palmer, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 flotilla incident, September 2011, para 159, http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf. Accessed 9 January 2015.

navigational safety.⁸ Such concerns have also led to calls for the Netherlands to review the grant of flag privileges and to reinforce procedures to facilitate the expulsion of delinquent vessels, although wholesale amendments to national laws on vessel registration have thus far been resisted.⁹ The Netherlands also remains the flag state of a considerable number of vessels operated by Greenpeace, notably the *Arctic Sunrise*. The arrest of this veteran protest ship in September 2013, following the attempted boarding of the controversial *Prirazlomnaya* oil platform by activists in the Russian exclusive economic zone (EEZ), subsequently prompted arbitration proceedings between the Netherlands and the Russian Federation. These proceedings remain in progress and are likely to formally conclude in 2015. In November 2013, however, the International Tribunal for the Law of the Sea (ITLOS) considered a request by the Netherlands for the grant of provisional measures to release the vessel and its crew. This action, the twenty-second case submitted to the Tribunal thus far, resulted in an order delivered in favour of the petition by the Netherlands. Moreover, the position taken by ITLOS may have intriguing implications for future detention actions heard by this forum, in addressing the issue of non-engagement by the respondent state and, arguably, pioneering a basis for the prompt release of vessels that may exceed the intentions prescribed by the 1982 UN Convention on the Law of the Sea.¹⁰ This chapter, accordingly, examines the issues raised in the dispute and the reasoning of the Tribunal in granting the release of the *Arctic Sunrise*, before addressing a wider series of emerging questions pertaining to the legality of oil platform protests.

14.2 The *Arctic Sunrise* Dispute

The *Arctic Sunrise* incident is illustrative of long-standing environmental concerns over the prospective expansion of industrial activities within the Arctic region. In recent years, the Arctic has been transformed from a comparative legal and political backwater into an arena of global strategic interest. The projected reduction of

⁸ See, most recently, Joint statement on whaling and safety at sea, 20 December 2013, <http://www.rijksoverheid.nl/ministeries/bz/documenten-en-publicaties/vergaderstukken/2013/12/20/joint-statement-on-whaling-and-safety-at-sea-2013.html>. Accessed 9 January 2015. No such statement was issued in 2014, largely due to the limited whaling activities undertaken by Japan that year following the ruling by the International Court of Justice in March 2014 that these activities had failed to qualify as 'scientific research': *Case Concerning Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, ICJ, Judgment of 31 March 2014. Prior to the ICJ judgment, however, there were a series of conflicts at sea between protest vessels and Japanese whaling ships. On 19 December 2014, Sea Shepherd was ruled to have been in contempt of an injunction issued in 2013 by the US courts, restraining the organisation from navigating within 500 metres of the Japanese fleet. *Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Paul Watson*, On a Motion for Contempt, 9th Cir., No. 12-35266, 2014.

⁹ This has led to some friction with Japan, which in September 2014 criticised the response of the Netherlands as the flag state of at least one Sea Shepherd vessel to be insufficient. Chair's Report of the 65th Meeting of the International Whaling Commission, 2014, para 272.

¹⁰ 1982 United Nations Convention on the Law of the Sea, 1883 UNTS 396 (hereinafter LOSC).

Polar ice coverage has raised the tantalising economic prospect of a dramatic increase in industrial and shipping possibilities in these waters, prompting considerable interest in securing access to the natural resources of the region on the part of both Arctic and non-Arctic States.¹¹ Nevertheless, strong concerns have been voiced as to the potential environmental ramifications of the wholesale economic development of the Arctic, with calls to preserve the region as an unsullied wilderness area of global significance.¹² Particular reservations have been expressed over the poorly regulated pursuit of hydrocarbons in these waters, with the damage wrought by the *Exxon Valdez* tanker disaster in Alaska in 1989 serving as a stark reminder of the dangers posed by oil to the highly sensitive marine environment of the Arctic. Indeed, the apocalyptic ecological prospect of a *Deepwater Horizon*-style calamity in this region has prompted the European Parliament to adopt a Resolution calling for ‘a ban on oil drilling in the icy Arctic waters of the EU and the EEA’.¹³

In 2010 Greenpeace launched its ‘Save the Arctic’ campaign, a suite of activities that has included information gathering, environmental education and outreach, advocacy at pertinent regional and international fora and a series of direct action campaigns against offshore oil and gas installations in a variety of jurisdictions. Particular ire has been reserved for the *Prirazlomnaya* oil platform, operated by the Russian energy giant Gazprom and situated in the Pechora Sea in northern Arctic waters. Strong concerns have been expressed, both by NGOs and the European Parliament, over the relatively lax approach to the regulation of Arctic

¹¹ A number of claims to extended continental shelves in the Arctic have been submitted to the Commission on the Limits of the Continental Shelf, most recently as announced by the Danish Ministry of Foreign Affairs on 15 December 2014 in respect of Greenland. Denmark and Greenland will today file a submission regarding the continental shelf north of Greenland, 15 December 2015, <http://um.dk/en/news/newsdisplaypage/?newsID=71574E42-6115-4D16-9C8A-4C056F8603F3>. Accessed 9 January 2015. Meanwhile, numerous non-Arctic States have developed national strategies to frame their strategic objectives and interactions with the region, including many jurisdictions far removed from Arctic waters. In November 2014 the IMO adopted a mandatory International Code for Ships Operating in Polar Waters, which is expected to enter into effect in 2017. Although applicable to both Polar regions, this instrument was primarily developed with increased Arctic navigation in mind.

¹² Bastmeijer 2009.

¹³ European Parliament Resolution on the EU Strategy for the Arctic, 2013/2595(RSP), 12 March 2014, para 33. Oil and gas legislation adopted by the EU prior to the *Arctic Sunrise* dispute also considered the potential problems raised by Arctic expansion—notwithstanding the relatively limited ability of its institutions to secure additional regulatory standards in this region—noting, *inter alia*, that ‘[t]he serious environmental concerns relating to the Arctic waters require special attention to ensure the environmental protection of the Arctic in relation to any offshore oil and gas operation, including exploration, taking into account the risk of major accidents and the need for effective response.’ Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, 52nd Recital.

hydrocarbon operations assumed by the Russian authorities.¹⁴ In August 2012 the *Arctic Sunrise* was used as a base to launch a first high-profile protest against the *Prirazlomnaya* rig on account of its oil spill response plan having expired, thereby rendering Gazprom's continued operations technically illegal under Russian law. Six activists briefly scaled the platform, while another group chained themselves to the anchor of its primary support vessel, the *Anna Akhmatova*, disrupting drilling activities for five days.

On 18 September 2013, Greenpeace activists attempted to board the platform again. Four inflatable boats were launched from the *Arctic Sunrise* which, at the material time, was apparently situated at a nearby point within the Russian EEZ, yet outside the three-mile exclusion zone established by the national authorities around the *Prirazlomnaya*.¹⁵ The activists were swiftly apprehended at the base of the platform. Later that day, the Russian authorities directed a diplomatic note to their Dutch counterparts announcing their intention to arrest the *Arctic Sunrise*. The vessel was duly boarded in the Russian EEZ on 19 September, an operation that involved firing eleven warning shots, and subsequently sailed under arrest to Murmansk.

The criminal charges against the arrested activists and the legal basis for their detention would oscillate considerably over the course of the following weeks. Between 26 September and 3 October 2013 the various members of the 'Arctic 30'—as they were swiftly dubbed by the global media—were each individually charged with piracy, despite a categorical public assertion by President Vladimir Putin that the activists were 'obviously' not pirates.¹⁶ On 4 October, in response to the piracy charges, the Netherlands formally commenced arbitral proceedings pursuant to Annex VII of the LOSC. In the meantime, a combination of official communications between Russia and the Netherlands, as well as municipal legal proceedings against the *Arctic Sunrise* itself, demonstrated a litany of inconsistencies concerning the basis for the arrest and ongoing detention of the vessel. Concurrent with the initial attempt to board the *Prirazlomnaya*, the Russian authorities informed the Netherlands by a diplomatic note on 18 September that the *Arctic Sunrise* was to be seized due to alleged terrorism offences. On 1 October a further diplomatic note

¹⁴ Indeed, in arguably the most prominent example of diplomatic concern over the regulatory regime adopted by Russia for offshore installations in these waters, the European Parliament expressed 'its strong concern regarding the rush for oil exploration and drilling in the Arctic without adequate standards being enforced, such as on the Gazprom *Prirazlomnaya* platform in the Russian EEZ.' European Parliament Resolution on the EU Strategy for the Arctic, 2013/2595(RSP), 12 March 2014, at para 32.

¹⁵ This version of events is based on evidence provided by Greenpeace and incorporated in the Dutch submission to ITLOS. There has been no credible suggestion that the *Arctic Sunrise* at any time transgressed into the exclusion zone surrounding the rig—a distinction of significance, as discussed below—since Russia declined to submit any contrary evidence to ITLOS, and thus far the subsequent arbitral panel, to dispute this assertion.

¹⁶ Putin: Greenpeace Activists Not Pirates but They Violated International Law, *RT*, 27 September 2013, <http://rt.com/news/putin-greenpeace-pirates-arctic-323/>. Accessed 9 January 2015.

asserted that the vessel had been visited by Russian law enforcement officials pursuant to powers under Articles 56, 60 and 80 LOSC and Article 36(1)(1) of the domestic Federal Law 'On the Exclusive Economic Zone of the Russian Federation'. By 7 October, however, a national court order for the seizure of the *Arctic Sunrise* revealed that this position had subsequently shifted back to a foundation of piracy, while on 18 October an administrative judgment found the master of the vessel guilty of 'erratic navigation'.¹⁷ On 23 October the initial piracy charges brought against the arrested activists were downgraded to those of 'hooliganism' and resisting arrest, following widespread political and legal condemnation of the original indictment.¹⁸

14.2.1 Jurisdiction of the Tribunal

In accordance with Article 287 LOSC, arbitral proceedings under Annex VII of the LOSC were instituted by the Netherlands against Russia, alleging that the boarding, arrest and detention of the *Arctic Sunrise* in the Russian EEZ without the prior consent of the flag state contravened Articles 58(1) and 87(1)(a) LOSC, in addition to the rights to liberty and security and to leave a state's territory on the part of the vessel's crew founded under Articles 9 and 12(2) of the International Covenant on Civil and Political Rights 1966.¹⁹ The Netherlands accordingly sought a declaration from the tribunal that these actions were internationally wrongful acts and that Russia should thereby cease and desist such violations, provide appropriate assurances and guarantees of non-repetition and facilitate full reparation for the injury caused thereby.

Under Article 290(1) LOSC, provisional measures may be prescribed by a court or tribunal if it considers that it *prima facie* has jurisdiction over the dispute and if such measures are 'appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to

¹⁷ Full details of these bases are cited in Annexes 1, 3 and 6 of the Dutch request for Provisional Measures. *The 'Arctic Sunrise' Case (Kingdom of the Netherlands v. Russian Federation)*, ITLOS, Request for the Prescription of Provisional Measures under Article 290, para 5, of the United Nations Convention on the Law of the Sea, 21 October 2013, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf. Accessed 9 January 2015.

¹⁸ The potential applicability of the offence of piracy to protests conducted against oil platforms is considered below in Sect. 14.3.1.

¹⁹ International Covenant on Civil and Political Rights, 999 UNTS 171 (hereinafter ICCPR). It has been observed that the dual nature of these claims, based as they are on both navigational matters and human rights considerations, might present jurisdictional complications for the arbitral tribunal in due course. Oude Elferink 2014, at 279. As noted below, however, the refusal by the tribunal of an *amicus curiae* petition by Greenpeace specifically engaging the human rights elements of the protest may suggest that the panel is minded to pay closer attention to the specific law of the sea aspects of the dispute.

the marine environment, pending the final decision'. In view of the urgency of many marine-related disputes and the time-frame necessary to convene an Annex VII tribunal, Article 290(5) LOSC permits ITLOS to facilitate consideration of provisional measures in its stead if, absent agreement to the contrary between the parties, a period of two weeks has elapsed from the time of the initial request for interim relief and '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.' Receiving no satisfactory response from the Russian authorities, the Netherlands accordingly filed a request for provisional measures before ITLOS on 21 October 2013. The following day, Russia stated that it neither accepted the Annex VII process in this context nor did it intend to participate at the ITLOS proceedings.²⁰ With the exception of a polite statement declining its involvement within the Annex VII arbitration,²¹ the Russian Federation has remained steadfastly aloof to the ongoing judicial machinations of the dispute.

Russia's objection to the arbitration process has been founded on the basis of a Declaration made upon ratifying the LOSC on 12 March 1997, in which

[t]he Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.

The Russian Federation, bearing in mind articles 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or made for any other reason in connection with the Convention, that are not in keeping with the provisions of article 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and for this reason they shall not be taken into account by the Russian Federation in its relations with that party to the Convention.²²

²⁰ *Note verbale* of the Embassy of the Russian Federation in Berlin, 22 October 2013, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf. Accessed 9 January 2015.

²¹ *Note verbale* from the Russian Federation to the Permanent Court of Arbitration, 27 February 2014 http://www.pca-cpa.org/showfile.asp?fil_id=2532. Accessed 9 January 2015.

²² Declaration of the Russian Federation upon the ratification of the Law of the Sea Convention, 12 March 1997, http://www.un.org/depts/los/convention_agreements/convention_declarations.htm. Accessed 9 January 2015 (emphasis added).

Nevertheless, while apparently prescribing a basis to avoid the compulsory settlement mechanisms of the LOSC, the Declaration may be considered to have been founded upon a circular and ultimately flawed position. While Article 298 LOSC does allow for the elaboration of optional exceptions on the basis of law enforcement activities, the provision clearly provides that such exemptions apply only to the specific disputes addressed under Article 297(2) and (3) LOSC.²³ These issues are confined to marine scientific research and fisheries matters respectively. In contrast, the present dispute engaged—in the clear view of the Applicant, at least²⁴—an alleged breach by the coastal state of the freedom of navigation enjoyed by foreign vessels within the national EEZ, as prescribed under Article 58 LOSC. The position concerning this potential cause for international litigation is instead addressed under Article 297(1) LOSC. It therefore lies outside the scope of national discretion to exclude particular matters from the compulsory jurisdiction of the court, as contemplated under Article 298 LOSC. The distinction is significant given the explicit reference to Articles 309 and 310 LOSC within the Russian Declaration, since these provisions preclude further reservations or statements on the part of the ratifying state that are not expressly permitted by the LOSC, or that purport to exclude or modify the effect of its terms. Read cumulatively, the practical effect of the Declaration rather undermines the Russian assertion that disputes engaging law enforcement activities concerning the exercise of national rights or jurisdiction are excluded from the jurisdiction of an international tribunal. Indeed, the Declaration essentially serves to emphasise that the ability of a contracting party to exclude from the jurisdiction of a tribunal incidents arising from law enforcement operations should be strictly limited to the specific contexts of marine scientific research and fisheries infractions, while simultaneously reinforcing the principle that attempts to undermine this clear position through contrary national declarations should be strongly deterred in order to facilitate the consistent interpretation and operation of the Convention.

As Churchill observes, ‘the reasoning in the provisional measures orders of the ITLOS is not always entirely adequate or convincing’.²⁵ This is especially true of the Tribunal in this context, which confined its rejection of the Russian position to a mere sentence,²⁶ an exercise in brevity that may be considered counter-productive. This was rectified to a considerable degree on 26 November 2014, when the Annex VII Tribunal delivered a unanimous award on jurisdiction that comprehensively

²³ Article 298(1)(b) LOSC.

²⁴ Request for the Prescription of Provisional Measures under Article 290, para 5, of the United Nations Convention on the Law of the Sea, 21 October 2013, paras 19–22 and 25, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf. Accessed 9 January 2015.

²⁵ Churchill 2015, at 22.

²⁶ *The ‘Arctic Sunrise’ Case (Kingdom of the Netherlands v. Russian Federation)*, ITLOS, Request for the Prescription of Provisional Measures, Order, 22 November 2013, para 45 (hereinafter *The ‘Arctic Sunrise’ Case*).

addressed the Russian Declaration and declared categorically that the effect of this statement did not preclude law enforcement activities pursuant to Article 297(1) LOSC from the jurisdiction of the dispute resolution mechanisms of the 1982 Convention.²⁷ Meanwhile, and within the context of the ITLOS decision, the sparse exploration of this issue generated a degree of consternation among individual members of the Tribunal, with Judges Wolfrum and Kelly of the view that '[a] convincing reasoning is missing but is called for'.²⁸ Moreover, Judge Jesus considered the concise treatment of this issue to be especially troublesome, since this was ultimately the only legal point that Russia had sought to make in response to the Dutch petition.²⁹ These concerns notwithstanding, there was seemingly strong endorsement for the Tribunal's decision on the practical effect of the Russian Declaration,³⁰ which accordingly raised practical and legal questions concerning the intended non-engagement of the respondent in the subsequent proceedings.

14.2.2 *Non-participation of the Respondent State*

The effect of the Russian position, even if the national Declaration *strictu sensu* provided no legitimate basis to avoid the jurisdiction of the Tribunal in the present case, meant that ITLOS was confronted by an instance of non-appearance for the first time in its tenure. Non-appearance before international courts and tribunals is an infrequent, although regrettable, eventuality and one that has been within the contemplation of the constituent statutes of various judicial bodies. Annex VI of the LOSC, through which the Statute of the International Tribunal for the Law of the Sea is articulated, is no different in this regard and, by virtue of Article 28 of Annex VI, prescribes a basis for proceeding in a case of default:

When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the 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.

²⁷ *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Arbitral Tribunal, Award on Jurisdiction, 26 November 2014, paras 70–78, http://www.pca-cpa.org/showpage.asp?pag_id=1556. Accessed 9 January 2015.

²⁸ *The 'Arctic Sunrise' Case*, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, para 9.

²⁹ *The 'Arctic Sunrise' Case*, Separate Opinion of Judge Jesus, para 5.

³⁰ Judge Golitsyn considered the application for provisional measures to be 'inadmissible' but did not address the nuances of the Russian Declaration, basing this view instead on the convoluted timeline of the incident and concluding that the prior obligation to exchange views pursuant to Article 283 of the LOSC had not been met. *The 'Arctic Sunrise' Case*, Dissenting Opinion of Judge Golitsyn, paras 1–14. In this respect, he disagreed with the general finding of the Tribunal that the Netherlands had been able to consider attempts to reach an alternative resolution with the Russian authorities to have been exhausted. *The 'Arctic Sunrise' Case*, paras 72–78. Judge Kulyk, the only other dissenting voice, objected to the Order ultimately granted by the Tribunal but not, seemingly, its jurisdictional entitlement to make it. *The 'Arctic Sunrise' Case*, Dissenting Opinion of Judge Kulyk.

Notwithstanding this clear position—and, moreover, the explicit references within the Dutch submission to this provision—consideration of Article 28 of Annex VI within the Order of the Tribunal is distinctly conspicuous by its absence. Instead, the Tribunal based the decision to continue its deliberations upon a review of the relevant provisions of the Statute of the International Court of Justice (ICJ Statute) and the jurisprudence of that Court. In this respect, Article 53 ICJ Statute provides that the appearing party may request a ruling in favour of its claim, subject to the proviso that the ICJ has jurisdiction over the dispute and that the action is well founded in fact and law. Article 28 of Annex VI was modelled upon this provision, albeit with the distinction that a state may only request a continuation of the proceedings before ITLOS, rather than an explicit ruling in its favour. In reality, there is little practical distinction since Article 53(2) ICJ Statute clarifies that a claim must still be adjudged to be well founded: it does not prescribe a walkover mechanism for undefended, yet spurious, actions. The regime of non-appearance before the ICJ is buttressed by an obligation that the defaulting party be given an opportunity to present its observations.³¹ Finding that Russia had been accorded ample occasion to do so, the Tribunal considered that the Netherlands should not be disadvantaged by its subsequent non-appearance³² and the status of the respondent as a party to the proceedings accordingly remained unchanged.³³

While the practical distinction between the respective Statutes may be considered essentially minimal, the failure to undertake a reasoned evaluation of the scope of Article 28 of Annex VI nonetheless sat uneasily with individual members of the Tribunal. Judges Wolfrum and Kelly attributed this oversight to a purported inconsistency with Article 290 LOSC: Article 28 of Annex VI refers to the ‘jurisdiction’ of the Tribunal, yet the process for the grant of provisional measures envisaged under the 1982 Convention requires only that a judicial body be convinced that it has *prima facie* jurisdiction.³⁴ This begged the question as to whether an application for provisional measures was caught by the scope of Article 28 of Annex VI. This was considered to be unproblematic in the view of the judges, a position also taken by Judge Paik,³⁵ since the ITLOS Statute drew no distinction between the jurisdiction of the Tribunal in assessing provisional

³¹ See especially *Fisheries Jurisdiction (United Kingdom v. Iceland)*, ICJ, Interim Protection, Order of 17 August 1972, para 11; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Interim Protection, Order of 17 August 1972, para 11; *Nuclear Tests (Australia v. France)*, ICJ, Interim Protection, Order of 22 June 1973, para 11; *Nuclear Tests (New Zealand v. France)*, ICJ, Interim Protection, Order of 22 June 1973, para 12; *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, ICJ, Interim Protection, Order of 11 September 1976, para 13; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ, Provisional Measures, Order of 15 December 1979, para 9.

³² *The ‘Arctic Sunrise’ Case*, para 56.

³³ *Ibid.*, para 51.

³⁴ *Ibid.*, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, para 4.

³⁵ *Ibid.*, Separate Opinion of Judge Paik, para 4.

measures as opposed to any other context. In their view, there was no ostensible reason as to why the default clause could not be applied to the present dispute and the Tribunal had duly missed an opportunity to expand both its own jurisprudence and that of international decision-making bodies generally.³⁶

Strong criticism was nonetheless reserved for the Russian refusal to participate in the process, an approach that the Tribunal considered ‘may hinder the regular conduct of the proceedings and affect the good administration of justice’.³⁷ Individual judges further noted their concerns that non-participation hampered the evidential base upon which to undertake their consideration of the issues,³⁸ and served to undermine both the position of the Respondent and the wider system of compulsory settlement established under the LOSC.³⁹ Unilateralism of this nature was clearly viewed in a dim light by ITLOS—especially since the Respondent had officially expressed clear faith in its legal position, which could have been swiftly tested before the Tribunal—and it has been suggested that a discernible punitive intent duly permeates the resulting Order.⁴⁰ Indeed, as noted below, a strikingly different stance was taken by the Tribunal in an action addressing a number of similar issues convened shortly before that in relation to the *Arctic Sunrise*, in which the respondent opted to rebut a distinctly flimsy claim brought against it, where non-appearance might otherwise have been a tempting option.⁴¹

14.2.3 Prompt Release and Provisional Measures

Given that Russia’s refusal to participate provided no practical impediment to the continued judicial appraisal of the dispute, ITLOS ultimately ruled in favour of the Dutch application on 22 November 2013, ordering the immediate release of the *Arctic Sunrise* and its crew and the facilitation of their ability to leave Russian jurisdiction, contingent upon the payment of a bond of €3.6 million. As with other elements of the Order, however, the reasoning behind this decision is decidedly frugal and would have benefitted considerably from additional reflection—and, to a significant extent, a robust contribution in rebuttal on the part of the respondent.

³⁶ *Ibid.*, at para 7.

³⁷ *The ‘Arctic Sunrise’ Case*, para 53.

³⁸ *Ibid.*, Declaration of Judge Ad Hoc Anderson, para 2.

³⁹ *Ibid.*, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, para 5.

⁴⁰ Guilfoyle and Miles 2014, at 277–281.

⁴¹ *The M/V Louisa Case (St. Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS, Judgment of 28 May 2013. This is not to suggest that the action was vexatious—indeed, the dispute raises clear concerns over the procedural rights of arrested seafarers—merely that there was little basis for the dispute to be heard by that particular forum. Indeed, as Judge Cot wryly suggested in his dissenting opinion to the finding of jurisdiction by ITLOS, ‘in applying to our Tribunal, the Applicant has come to the wrong address’.

As noted above, ITLOS is empowered under Article 290(5) LOSC to order provisional measures if it considers that the Annex VII body would have jurisdiction over the dispute and ‘the urgency of the situation so requires’. The Tribunal ruled in the affirmative on both points; the first of which has been subsequently confirmed by the Annex VII tribunal itself.⁴² The notion of ‘urgency’ being a relative concept, ITLOS observed that this provision must be read in conjunction with Article 290(1) LOSC, which emphasises the respective rights of the parties to the dispute and the need to prevent serious harm to the marine environment.⁴³ The latter issue appeared to be of most direct interest to the Tribunal, with the Netherlands having raised concerns that the vessel itself, a veteran icebreaker, required extensive maintenance to prevent its general condition from deteriorating which could, given that it lay impounded in Murmansk, potentially threaten Arctic waters with pollution. No further analysis of this position was forthcoming within the Order, however, and ITLOS appears to have accepted the Dutch submission *verbatim*, prompting the rather minimalist conclusion that ‘the urgency of the case requires the prescription by the Tribunal of provisional measures’.⁴⁴

In this respect, perhaps more than any other, the respondent was essentially the author of its own misfortune. By failing to provide any countervailing evidence that the *Arctic Sunrise* did not ultimately pose an environmental hazard, or that the national authorities were sufficiently equipped to address potential concerns, a considerable hurdle to the granting of provisional measures was duly removed by Russia itself. In marked contrast to this position, in rejecting a request for provisional measures in the *M/V Louisa* dispute, ITLOS was prepared to ‘place on record the assurance given by Spain’ that there was no threat of imminent harm and that the national authorities were able to respond appropriately should the vessel’s condition deteriorate.⁴⁵ Interestingly, in that instance, the expert witness for the Applicant in raising such concerns had been accorded no opportunity to view the vessel in question, a position that further undermined the case for provisional measures. Conversely, in the *Arctic Sunrise* case, little first-hand evidence was adduced as to the supposedly troubling state of the vessel, yet this position was accepted uncritically by the Tribunal.

There may indeed be pressing reasons as to why an arresting state ought to be ordered as a provisional measure to surrender an impounded vessel due to environmental concerns—for instance, if it evidently lacks the resources or expertise to maintain it in safe condition or, hypothetically, if the authorities unreasonably insist upon securing a vessel with limited capacity to endure Arctic conditions in a noted

⁴² *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Arbitral Tribunal, Award on Jurisdiction, paras 70–78, http://www.pca-cpa.org/showpage.asp?pag_id=1556. Accessed 9 January 2015.

⁴³ *The ‘Arctic Sunrise’ Case*, para 80.

⁴⁴ *Ibid.*, para 89.

⁴⁵ *The M/V Louisa Case (St. Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS, Provisional Measures, Order of 23 December 2010, para 78.

cold-water port such as Murmansk. There was, however, no reasoned basis as to why the Russian authorities could be considered to have lacked the ability to effectively manage the *Arctic Sunrise* under these circumstances; the Tribunal merely observed that the vessel was within the possession of the national coastguard and a chain of command had been established thereto.⁴⁶ In refusing to participate in the proceedings, however, Russia forfeited the opportunity to subject such arguments to further scrutiny and it appears that the Tribunal had little inclination to do so on its behalf.⁴⁷

Historical instances of non-participation before the ICJ appear to have accorded the defaulting state no operational advantage in the proceedings.⁴⁸ In this context, however, the Order appears to have reinforced a clear message that non-appearance can have a critical bearing on the narrative of provisional measures before ITLOS. This general message was endorsed by the Tribunal, although the two dissenting Judges each raised concerns on this point, with Judge Kulyk warning that a failure to consider the Russian documentation as sufficient confirmation of an assumption of environmental obligations might potentially undermine the principle of good faith on the part of ITLOS.⁴⁹ This is perhaps somewhat overplayed—the notion of ‘security’ was not expounded further in the Russian documentation pertaining to the arrest, and could have been so addressed had Russia engaged with the process. The prevailing jurisprudence of the Tribunal is nonetheless suggestive that, absent clear and contrary evidence, an unequivocal assertion of environmental stewardship over an impounded vessel by the arresting state is generally sufficient, since in the incontrovertible logic of Judge Paik in the *M/V Louisa* dispute, ‘if and when pollution occurs, it is the Respondent that will suffer the most’.⁵⁰ While there was no intimation that the Russian authorities exhibited a negligent intent towards the vessel at the material time, it appears from the Order

⁴⁶ *Ibid.*, para 88.

⁴⁷ This point was raised as a question to the Dutch legal team by Judge Golitsyn, for which it was considered, *inter alia*, that the Russian statements concerning the stewardship of the *Arctic Sunrise* during its period of detention were ambiguous, since they related only to responsibility for the ‘security’ of the vessel. Moreover, there was no indication that such measures were either final or pertained to the servicing of the vessel: *The ‘Arctic Sunrise’ Case (Kingdom of the Netherlands v. Russian Federation)*, ITLOS, Replies to Questions from the Tribunal, 7 November 2013, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Response_questions_en.pdf. Accessed 9 January 2015. Again, it would appear that these issues could have been addressed in a relatively straightforward manner by Russia—in the same way that such assurances were taken seriously from Spain in the context of the *M/V Louisa* dispute—hence non-appearance was clearly to the detriment of the respondent’s case in this instance.

⁴⁸ It might be argued that, had the respondent entered an appearance in the *Aegean Sea Continental Shelf Case*, the ICJ could have further probed a Turkish declaration to the Court that the purported seismic surveying of the Aegean seabed was unlikely to cause irreparable and non-compensable harm. Nevertheless, the tenor of the judgment suggests that the Court was minded to have endorsed this proposition and that non-appearance did not deprive the judiciary of vital scope for further examination that might have influenced a marginal decision.

⁴⁹ *The ‘Arctic Sunrise’ Case*, Dissenting Opinion of Judge Kulyk, para 10.

⁵⁰ *Ibid.*, Separate Opinion of Judge Paik, para 16.

that silence is nonetheless insufficient: effective environmental stewardship must be formally asserted in the context of provisional measures, and will seemingly not be otherwise presumed by the Tribunal.

Likewise, the question of the respective rights of the parties also had considerable resonance for the Tribunal, although its reasoning on this point was again skeletal, while the Respondent's failure to engage with the proceedings further undermined its position. In ordering the release of the vessel and crew,⁵¹ the *Arctic Sunrise* case marked a new departure in the prompt release practice of the Tribunal. The LOSC prescribes a mechanism for the prompt release of a vessel in two clear instances, namely fisheries infractions under Article 73 LOSC and the violation of particular rules and procedures pertaining to the prevention, reduction and control of vessel-source pollution pursuant to Articles 220 and 226 LOSC. The circumstances of the *Arctic Sunrise* dispute accordingly lay outside these two fundamental premises, although there is no explicit position within the Convention that a similar process cannot in principle be applied in other contexts for the purposes of provisional measures. Nevertheless, the common denominator between the offences subject to the prompt release procedure under the LOSC is that they are to be addressed solely by financial penalties, as opposed to imprisonment or other sanctions.⁵² Under these circumstances, if prompt release is ordered and the crew and/or vessel subsequently flee the jurisdiction, the coastal state is left in materially the same position had the legal process run its full and legitimate course. In contrast, for alternative offences that may include the possibility of incarceration, the provision of financial security may arguably fail to fully secure the rights of the arresting state in such an instance.

For this reason, Judge Jesus considered that the Order of the Tribunal potentially represents 'a back-door prompt release remedy' for which the precedential value of the decision ought to have merited clearer explanation.⁵³ Meanwhile, Judge Golitsyn considered that the decision fundamentally failed to protect the rights of the coastal state,⁵⁴ a position that would appear to have some foundation. Indeed, while Article 290 allows the Tribunal to award appropriate provisional measures, it would have arguably been on safer ground in expanding the principles of prompt release to instances of nautical offences that solely carry financial penalties.⁵⁵ The effect of the Order was therefore to truncate the criminal investigation into the

⁵¹ *The 'Arctic Sunrise' Case*, para 92.

⁵² Articles 73(3) and 230(1) and (2) LOSC.

⁵³ *The 'Arctic Sunrise' Case*, Separate Opinion of Judge Jesus, para 7. These concerns notwithstanding, Judge Jesus concurred with the general decision to release the vessel and the non-Russian members of the crew.

⁵⁴ *Ibid.*, Dissenting Opinion of Judge Golitsyn, paras 43–47.

⁵⁵ For example, in November 2014 the Spanish authorities arrested the *Arctic Sunrise* following a number of clashes between activists and the offshore oil industry. The vessel was impounded and charged with breaches of nautical rules, a series of offences punishable solely by fines. Greenpeace Ship Arctic Sunrise Detained in Spain, *The Guardian*, 19 November 2014, <http://www.theguardian.com/environment/2014/nov/19/greenpeace-ship-arctic-sunrise-detained-in-spain>. Accessed 9 January 2015.

boarding of the *Prirazlomnaya*, which as noted below presented a genuine case to answer, thereby impinging upon the rights of the arrested state. Again, however, the future interpretation of this point may be based on the degree to which the *Arctic Sunrise* is viewed as a special case on default. To this end, it may be questioned whether a future panel would be as generously minded where the arresting state enters a robust defence of its entitlement to exercise the due process of its marine criminal jurisdiction.

On 18 December 2013, a general amnesty bill adopted by the Russian Duma to celebrate the twentieth anniversary of the Russian Constitution was amended to include the arrested *Prirazlomnaya* activists. The *Arctic Sunrise* itself was finally and somewhat unexpectedly released from detention by the Russian authorities on 6 June 2014.⁵⁶ In March 2014, petitions by the *Prirazlomnaya* activists were submitted to the European Court of Human Rights, alleging violations of Articles 5 and 10 of the European Convention on Human Rights.⁵⁷ This development, as well as the ongoing examination of the dispute by the Annex VII Tribunal, raises the question as to the general position of protest activism at sea, to which this article now turns.

14.3 Platforms and Protest Activism

14.3.1 Offshore Installations and the Law of the Sea

Specific powers over offshore installations are conferred on the coastal state through Article 60 of the LOSC.⁵⁸ Under Article 60(2) LOSC, the coastal state has exclusive jurisdiction over installations and therefore controls access to these structures, as well as imposing criminal sanctions for breaching these rules. Reasonable safety zones may also be established around installations to ensure the safety of navigation and of the structures themselves.⁵⁹ Under Article 60(5) LOSC, the coastal state may determine the dimensions of the safety zone up to a maximum of 500 m as measured from each point of their outer edge, except as authorised by 'generally accepted international standards or as recommended by the competent international organization', which is generally considered to be the International Maritime

⁵⁶ Greenpeace Arctic Sunrise: Russia 'Frees Protest Ship', *BBC News*, 6 June 2014, <http://www.bbc.com/news/world-europe-27736927>. Accessed 9 January 2015.

⁵⁷ The redacted petitions are reproduced on-line. Greenpeace, Applications to the European Court of Human Rights, <http://www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/Peace-Dove/Arctic-30/European-Court-of-Human-Rights/>. Accessed 9 January 2015.

⁵⁸ This is based on the recognition that the coastal state exercises sovereign rights over the natural resources of the seabed and jurisdiction over the establishment and use of installations for the purpose of exploiting these resources pursuant to Article 58.

⁵⁹ Article 60(4) LOSC.

Organization (IMO). Notwithstanding a degree of agitation by coastal states, the IMO has resisted a general expansion of the 500 m limit for safety zones.⁶⁰ Nevertheless, state practice remains somewhat variable and a degree of creeping jurisdiction has been experienced in this regard, exemplified in the context of the *Prirazlomnaya*, whose safety zone exceeds the current standards by some 2500 m.

Where such a zone is lawfully designated, '[a]ll ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity'.⁶¹ In practice, breaching a safety zone will constitute a domestic criminal violation within most jurisdictions with an offshore industrial presence.⁶² The LOSC accordingly establishes no general foundation for vessels to enter these areas, nor for unauthorised access to the rigs themselves. Nevertheless, if the 'vicinity' of an offshore platform is understood as encapsulating the remaining areas of the EEZ that are not pockmarked by installations and their accompanying safety zones, it would be a logical assumption that activists may assert a right to demonstrate in these waters, to the extent that such a right is forthcoming under general privileges accorded to foreign shipping within the EEZ as outlined below. This point was not explicitly addressed by ITLOS in the *Arctic Sunrise* dispute, although it was clearly within the contemplation of individual judges that the activists 'could invoke, among others, the freedom of expression as set out in the International Covenant on Civil and Political Rights whereas in the safety zone, depending on the factual situation, the exercise of such rights may have to yield to the safety interests of the operator of the platform'.⁶³ The general position that safety zones are in principle not to be freely entered remains intact, however, and was considered a fundamental basis by Judge Golitsyn as to why provisional measures may not have served the interests of the coastal state in the *Arctic Sunrise* case.⁶⁴

Ultimately, however, offshore installations are likely to remain an attractive target for determined campaigners, which will generally provoke a defensive response from the coastal state in question. Under Article 58(2) LOSC, the exclusivity of flag state jurisdiction is broadly extended to issues arising within the EEZ; the breach of this was indeed an issue of particular consternation to the Dutch authorities in the *Arctic Sunrise* action. Indeed, the IMO has considered that reporting an infraction to the flag state is, in the first instance, the most appropriate course of action where a

⁶⁰ IMO NAV 56/20, 31 August 2010, at 14–17.

⁶¹ Article 60(6) LOSC.

⁶² This has also led to some divergent practices between jurisdictions, notably New Zealand which, in 2013 introduced a controversial amendment to the Crown Minerals Act 1981 to allow for the designation of 'specified non-interference zones' of 500 m within around individual vessels associated with permitted prospecting, mining or exploration. This exceeds the mandate of the LOSC, which prescribes no such position for support vessels.

⁶³ *The 'Arctic Sunrise' Case*, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, para 13.

⁶⁴ *Ibid.*, Dissenting Opinion of Judge Golitsyn, para 34.

safety zone has been violated.⁶⁵ Nevertheless, this appears to be subject to two broad exceptions operating in favour of the coastal state, although neither is without practical and legal difficulties. In the first instance, Article 111(2) LOSC establishes a right to hot pursuit in respect *inter alia* of violations of safety zones. This would seemingly extend to incursions by small boats launched from other ships which, under the doctrine of constructive presence, would justify the eventual arrest of the parent vessel if the conditions inherent in the exercise of hot pursuit have been lawfully followed.⁶⁶ The precise conditions regulating pursuit from inside a specific safety zone are not explicitly stated under the LOSC. However, Article 111(2) LOSC has been applied *mutatis mutandis* from the core principles established in Article 111(1) LOSC concerning pursuit from internal or archipelagic waters, the territorial sea or contiguous zone, specifying that pursuit must commence from within the zone in question. The implication is that hot pursuit in response to a violation of Article 60 must accordingly commence from within this zone to fulfil such criteria. As the *Arctic Sunrise* dispute amply illustrates, this may be a significant evidential burden for the arresting state to discharge. The non-participation of Russia deprived the Tribunal of vital evidence to assess the legitimacy of such an approach. In contrast, the testimony submitted by the Netherlands suggests strongly that, while the general position on hot pursuit from such zones may hold true, the precise conditions for its application were not made out in the present case.⁶⁷

The second alternative is to invoke the law of piracy, as was controversially raised at the outset of the dispute, which would also override flag state jurisdiction. This option, especially when applied to environmental campaigners, generates particular legal and diplomatic obstacles for the arresting state, as was amply illustrated in the aftermath of the arrest of the ‘Article 30’ on this basis. Piracy is defined under Article 101 of the LOSC as:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

⁶⁵ IMO Resolution A.671(16), Safety Zones and Safety of Navigation around Offshore Installations and Structures 19 October 1989. The Resolution expressly cites Article 60 LOSC as underpinning these considerations. Nevertheless, this Resolution was largely based on concerns over potential incursions into safety zones by fishing vessels, rather than the premeditated boarding of an installation as in the *Arctic Sunrise* case.

⁶⁶ This broad approach was asserted Judge Golitsyn, who observed that ‘[t]he Convention is quite clear in Article 111 LOSC on the right of hot pursuit that a mother ship is responsible for the activities of its boats or other craft as they work as a team.’ *The ‘Arctic Sunrise’ Case*, Dissenting Opinion of Judge Golitsyn, para 35.

⁶⁷ See further Oude Elferink 2014, at 283.

- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in paras (a) or (b).

In this respect—and assuming that the unauthorised boarding of an oil platform qualifies as ‘violence’, ‘detention or ‘depredation’, a connection that is by no means axiomatic—two particular impediments would appear to militate against a finding of piracy. First, the requirement of ‘private ends’ would need to be established, an issue that has proved to be notoriously controversial when applied against those with political or altruistic motivations. Commentators have expressed concerns that environmental activists ought not in principle to be considered piratical in motivation,⁶⁸ although a more inclusionary approach to the concept of private ends⁶⁹ has been favoured by national courts on the rare occasions in which protest cases have proceeded on a foundation of piracy. Indeed, the lack of state sanction for the actions of protestors was considered a determinative factor in the deliberations of both the Belgian Cour de Cassation⁷⁰ and the US Court of Appeals for the Ninth Circuit.⁷¹ If current jurisprudence suggests that this might be less problematic for the arresting authorities than has traditionally been considered the case, it is still by no means certain that every jurisdiction would adopt this approach. Second, and perhaps rather more significantly, piracy must be directed against a ‘ship or aircraft’. It is highly doubtful whether an installation that has been affixed to the seabed to the extent that the designation of a safety zone is necessary would ordinarily qualify as a ‘ship’. No international court has as yet ruled upon the legal nature of an oil platform.⁷² However, most domestic jurisdictions exclude

⁶⁸ See, for instance, Klein 2011, at 141.

⁶⁹ Such as that advanced by Guilfoyle, who argues that ‘the words “for private ends” must be understood broadly. All acts of violence that lack state sanction are acts undertaken “for private ends”.’ Guilfoyle 2009, at 36–37.

⁷⁰ *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, Belgium, Cour de Cassation, 19 December 1986, reproduced in 77 *International Legal Materials* 537. The Cour de Cassation considered that, in boarding a vessel allegedly laden with toxic waste on the high seas, Greenpeace had acted violently and ‘in particular the pursuit by the applicant of the objects set out in its articles of association.’ *Ibid.*, at 540.

⁷¹ *Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Watson*, 9th Cir., 725 F.3d 940, 2013. In this instance, private ends included ‘those pursued on personal, moral or philosophical grounds, such as Sea Shepherd’s professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public’. *Ibid.*, at 944. This decision overturned a previous judgment that considered that piracy was not made out in this instance, albeit one based on flawed reasoning.

⁷² This issue was fleetingly raised in an application for provisional measures before the ICJ, but the matter was ultimately settled by agreement. *Case Concerning Passage through the Great Belt (Finland v. Denmark)*, ICJ, Provisional Measures, Order of 29 July 1991.

permanent seabed fixtures from the concept of a ‘ship’,⁷³ while the IMO expressly considers that drilling apparatus and other platforms are vessels only while in transit.⁷⁴ This provides some scope for piracy offences to be applied against oil platforms in certain circumstances—but not, it would clearly appear, in the particular context of the *Prirazlomnaya*.

A more specific basis for a coastal state to address incursions onto oil platforms would seem to be forthcoming from the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988.⁷⁵ While the scope of this Convention is explicitly restricted to vessels ‘of any type whatsoever not permanently attached to the sea-bed’,⁷⁶ a widely-ratified Protocol to the Convention does, however, apply to fixed platforms⁷⁷ and creates a series of offence against such structures. Of most immediate relevance to at-sea protests is Article 2(1)(a) of the Protocol, which creates the offence of unlawfully and intentionally seizing or exercising control over a fixed platform ‘by force or threat thereof or any other form of intimidation’. The nuances of this provision have not been tested by national or international courts and it nonetheless remains questionable whether the actions of Greenpeace would have met the requisite standards of force or intimidation had the *Prirazlomnaya* protest proceeded as planned.

14.3.2 Freedom of Speech at Sea

A final element of the case—and one that raises wider questions concerning the contemporary use of ocean space—involved the role of human rights considerations in framing the rationale for the protest itself and ensuring that the dispute between states did ‘not infringe upon [*sic*] the enjoyment of individual rights and freedoms of the crew of the vessels concerned.’⁷⁸ At both the provisional measures stage and within the main proceedings of the Annex VII Tribunal, Greenpeace

⁷³ A small number of jurisdictions consider immovable property such as oil rigs to qualify as a ‘ship’, hence piracy may be a theoretical option for certain national courts. See, for example, Spain in Ley 21/1977 de 1 abril, Sobre aplicación de sanciones en los casos de contaminación marina provocada por vertidos desde buques y aeronaves, Article 1(3), reproduced at BOE-A-1977-8604.

⁷⁴ IMO Resolution A.671(16), Safety Zones and Safety of Navigation around Offshore Installations and Structures 19 October 1989.

⁷⁵ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 UNTS 201 (hereinafter SUA Convention).

⁷⁶ Article 1(1)(a) SUA Convention.

⁷⁷ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 2005, 1678 UNTS 304. Under Article 1(3) of this Protocol, it applies to ‘an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes.’

⁷⁸ *The ‘Arctic Sunrise’ Case*, para 87 (citing the Dutch position on the matter).

sought to join the litigation as an *amicus curiae*, purporting to draw the attention of both panels to the human rights considerations incumbent in the case. Ostensibly, the human rights dimension is barely addressed within the Order for provisional measures, although it has been suggested in some quarters that these considerations exercised a latent influence over the decision-making process.⁷⁹ As noted above, Judges Wolfrum and Kelly alluded to the possibility of the protestors invoking the ICCPR in support of certain elements of their activities, albeit with minimal discussion of the potential application of such norms in the present case. The clear rejection of both *amicus curiae* briefs suggests that such issues may remain secondary in importance to the more central—and, perhaps, less emotive—concerns raised by the Netherlands as to the freedom of navigation. A degree of attention may nonetheless be forthcoming from the European Court of Human Rights on this point in due course, however, which has expanded its activist tendencies towards the marine sphere in recent judgments.

The LOSC provides no specific guidance on the role of freedom of speech and assembly at sea, beyond a general rule of interpretation and through the residual rights established in the context of freedom of navigation. In the case of the former, Article 293(1) LOSC permits a court or tribunal faced with an interpretive question to apply both the LOSC as well as ‘other rules of international law not incompatible with this Convention’. The Tribunal declined to articulate a clear statement as to the compatibility of pertinent human rights norms to the present dispute, although previous cases suggest that both ITLOS⁸⁰ and arbitral bodies⁸¹ are prepared to do so where appropriate. In the meantime, it may be suggested that recourse to the European Court of Human Rights provides a more desirable means of raising these specific points, both in avoiding jurisdictional complications for a resulting tribunal and in addressing a more appropriate audience in the process.

Beyond the application of Article 293 LOSC, it may be suggested that there is considerable toleration for protest activities at sea under the 1982 Convention, albeit one that is contingent upon a balancing act with the rights of navigation of others and the overarching imperative of public safety at sea. In the context of the

⁷⁹ Guilfoyle and Miles 2014, at 284–287.

⁸⁰ Most notably, in the *M/V Saiga (No. 2) Case (St. Vincent and the Grenadines v. Guinea)*, ITLOS, Judgment on the Merits, 1 July 1999, ITLOS considered the extraneous context of the international rules governing the use of force, stating that ‘[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’ *Ibid.*, para 155.

⁸¹ In *Guyana and Suriname* the arbitral panel endorsed the approach of ITLOS in the *M/V Saiga (No. 2) Case* as a ‘reasonable interpretation of Article 293’ and accordingly rejected the submissions of Suriname that it had no jurisdiction to address alleged violations of the UN Charter and general international law. *Guyana and Suriname*, PCA Award, 17 September 2007, para 406, http://www.pca-cpa.org/showpage.asp?pag_id=1147. Accessed 9 January 2015.

Prirazlomnaya protest, within the EEZ (as is the case on the high seas⁸²), the LOSC prescribes that a vessel may exercise freedom of navigation subject to an obligation to exercise ‘due regard’ to the rights and duties of the coastal state and compliance with rules and regulations that are not incompatible with the exercise of EEZ powers.⁸³ Therefore, there exists a right to conduct protest activities under the general principle of free navigation, provided that these conditions are met. This position has been reinforced by the IMO which, in May 2010, adopted a Resolution formally affirming ‘the rights and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation’ while simultaneously upholding the importance of vessel safety and condemning ‘any actions that intentionally imperil human life, the marine environment, or property during demonstrations, protests or confrontations on the high seas’.⁸⁴ Resolution MSC.303(87) also calls upon protest vessels to refrain from actions that would violate international navigational standards and for governments to establish a clear jurisdictional basis to proceed against vessels that fail to heed this approach. Although the Resolution is ultimately vague as to the specific rights and obligations incumbent in maritime protest, it may be considered that it provides an additional political imperative for flag states to take disciplinary action against delinquent protest vessels upon the high seas. Through this measure, the IMO mandates compliance with global navigational rules as a minimum standard for protests at sea. It further appears that this position is reinforced within the margin of appreciation accorded to states under human rights norms to establish the boundaries of acceptable activism.

The current corpus of case-law addressing specifically nautical protest before the European Court of Human Rights is distinctly limited, but suggests that the Greenpeace petitions, if accepted by the Court, may encounter some turbulence in their appraisal of freedom of expression at sea. The Court has reaffirmed that marine space is little different from the terrestrial context in how the authorities should consider the legitimacy of such activities. It is clear from its jurisprudence that purported restrictions on access to marine areas by campaigners must be proportionate to the wider aim pursued by the state in question. In perhaps the leading case to date, *Women On Waves and Others v. Portugal*,⁸⁵ a Dutch NGO that had intended to conduct a family planning campaign in Portuguese ports was banned from the entirety of the national territorial sea, primarily due to concerns that the vessels would be used to facilitate abortions, a practice that was still illegal in Portugal at the time. Although no evidence of law-breaking was adduced, warships

⁸² Article 87(1) LOSC.

⁸³ Article 58(3) LOSC. This position is different within the territorial sea, whereby a foreign vessel must exhibit innocent passage, for which protest activities may be considerably more restricted in scope. Similarly internal waters are subject to the exclusive sovereignty of the coastal state.

⁸⁴ Resolution MSC.303(87): Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas.

⁸⁵ *Women On Waves and Others v. Portugal*, ECtHR, No. 31276/05, 9 February 2009.

were deployed to prevent the applicants from disembarking at any point within the territorial sea. The Court considered this response to be a violation of their Article 10 ECHR rights, since the Portuguese authorities had other, less intrusive, means at their disposal to address the perceived problem posed by the activists including, if the allegations as to their intentions were correct, the possibility of seizing medication and equipment proscribed under national law.⁸⁶

Moreover, the Court held that there was no legal basis under the Convention to ban foreign campaigners from a zone of maritime jurisdiction, since the territorial sea was considered fundamentally to be:

un espace public et ouvert de par sa nature meme, contrairement aux locaux d'une administration ou d'un ministere.⁸⁷

While this decision would, at face value, suggest a broad toleration for nautical protest, it may be considered that the situation is rather more nuanced. Indeed, perhaps more problematic from the standpoint of Greenpeace's Article 10 arguments is a precedent that lies rather closer to home. In *Drieman and Others v. Norway*,⁸⁸ four Greenpeace activists were convicted of a series of public order offences, and a dinghy was impounded by the Norwegian courts, following a series of altercations between protestors and a whaling vessel in the Norwegian EEZ. The Norwegian Supreme Court reduced the fines that had been levied against the applicants by the municipal authorities, but upheld the confiscation order and rejected claims of a violation of Articles 10 and 11 ECHR. The European Court of Human Rights declined the application as manifestly ill-founded, with the measures adopted by Norway considered to have been supported by relevant and sufficient reasons and underpinned by a rationale for public maritime safety that was necessary in a democratic society.⁸⁹ Moreover, the Court reiterated that national policies to restrict obstructive protest 'must be allowed a wide margin of appreciation' and it was accordingly 'not persuaded by the applicants' argument that the proscribed conduct should be assimilated to an incident of navigation'.⁹⁰

The combined effect of *Women On Waves* and *Drieman* suggests that, absent a reasonable basis to presume intended misconduct, a state cannot preclude access to its maritime jurisdiction to activists per se, although localised restrictions on movement may be imposed where necessary to safeguard public safety and the

⁸⁶ *Ibid.*, para 41.

⁸⁷ *Ibid.*, para 40. This stands in striking contrast to a recent decision of the US courts which, in restraining purported protest activities in Alaskan offshore waters, stated that 'the high seas are not a public forum ... Greenpeace USA has no audience at sea'. *Shell Offshore Inc. v. Greenpeace Inc.*, 9th Cir., 709 F.3d 1281, 2013, at 1291 (*per* Tashima J.). This is a surprising conclusion, given the comparative strength of the First Amendment and its associated jurisprudence. It is also patently incorrect given the principle of freedom of navigation enshrined under the LOSC. While the Court may have been justified in preventing disruptive access to oil rigs, rights to navigate in these waters and conduct protest activities in conjunction with the LOSC would surely remain intact.

⁸⁸ *Drieman and Others v. Norway*, ECtHR, No. 33678/96, 4 May 2000.

⁸⁹ *Ibid.*, para 10.

⁹⁰ *Ibid.*

legitimate rights of others. Nevertheless, this does not equate to an automatic right to maritime access in all cases. Freedom of speech may be upheld even where campaigners are refused entry to marine areas, although *Drieman* mandates that an effective alternative basis to espouse their views must be maintained. In the context of the *Prirazlomnaya* dispute, the Russian authorities considered the boarding of the platform unjustified since Greenpeace had been granted an opportunity to contribute to appropriate Arctic governance fora concerning the broad regulation of oil and gas installations in the High North. The extent to which these opportunities have provided a realistic platform to inform debate on the pursuit of Arctic hydrocarbons will be seemingly constitute a significant question in any future deliberations by the Court in assessing a potential breach of the Convention.

14.4 Concluding Remarks

The order for provisional measures by ITLOS in the *Arctic Sunrise* case marks the end of the beginning for a dispute that raises pressing questions concerning elements of free navigation, as well as the burgeoning international jurisprudence on the legal parameters of protest actions at sea. As with other such orders, which are debated and delivered in comparative haste and are not designed to address the specific merits of the dispute,⁹¹ the reasoning of the Tribunal in the present case is decidedly brief and not entirely consistent with elements of previous decisions. The order in many respects represents a missed opportunity on the part of ITLOS to expand its procedural jurisprudence, not least concerning the specific rules on default as elaborated under Part VI of the LOSC, while conversely the projected extension of aspects of the prompt release mechanism could be construed as excessive.

Individual elements of the order present some cause for unease, notably the uncritical acceptance of the Dutch submission as to the alleged environmental imperatives for provisional measures, while the decision itself strikes a generous balance in favour of the flag state in the context of an ongoing and legitimate (if somewhat politicised) criminal investigation by the coastal state. It remains to be seen whether elements of this approach will be followed by ITLOS in subsequent cases, or whether the *Arctic Sunrise* will be viewed in its unique context of default by the respondent state. The underlying message of the order is nevertheless that non-appearance before the Tribunal can significantly undermine the position of the defaulting state; it remains an exercise in conjecture as to whether provisional measures would have been as freely ordered in this case had the respondent mounted a meaningful defence of its legal interests. Meanwhile, the position of

⁹¹ Nevertheless, this issue did have some bearing on the order, with Judge Jesus considering that 'there are some matters of substance that a court or tribunal dealing with a request for provisional measures cannot abstain from addressing'. *The 'Arctic Sunrise' Case*, Separate Opinion of Judge Jesus, para 15.

Russia in the dispute remains a cause for wider concern: the national authorities have responded to the incident by ignoring international judicial institutions and adjusting domestic law to allow for a more robust security presence aboard offshore platforms such as the *Prirazlomnaya*.⁹²

The *Arctic Sunrise* case also provides scope for further judicial appraisal of the human rights issues involved in protest actions at sea, an issue that has been developed piecemeal by national and regional courts to date. These elements were addressed peripherally within this order on an official basis, although as the Separate Opinion of Judges Wolfrum and Kelly demonstrates, they nonetheless played a role in the contemplation of individual judges. The arbitral panel may opt to follow the lead of ITLOS in this regard and focus specifically on the navigation-related elements of the dispute, for which there are important questions to answer. Issues of free speech at sea might be more appropriately addressed by the European Court of Human Rights in this instance, although there is a case for suggesting that such entitlements may be viewed more conservatively than a number of campaign groups have argued thus far; international maritime law considers that protest actions within clearly designated safety zones ought to be tempered by the demands of public security at sea. In the meantime the *Arctic Sunrise*, still bearing the Dutch flag, was arrested in November 2014 by the Spanish authorities, following a series of clashes during a protest against oil exploration. Questions over the exercise of free speech rights at sea—and the involvement of the Netherlands in their resolution—accordingly look set to continue for some considerable time.

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⁹² In April 2014, as a direct result of the *Prirazlomnaya* incident, new legislation was adopted to facilitate the use of private military contractors to guard Arctic installations. Федеральный закон Российской Федерации от 20 апреля 2014 О внесении изменений в отдельные законодательные акты Российской Федерации по вопросу создания ведомственной охраны для обеспечения безопасности объектов топливно-энергетического комплекса г. N 75-ФЗ [Federal Law of April 20, 2014 on Amendments to Certain Legislative Acts of the Russian Federation on the Establishment of Departmental Security to Ensure the Safety of the Fuel and Energy Complexes, N 75-FZ]. Under Article 4 of this Law, companies have the right to establish ‘departmental security’ to protect, *inter alia*, offshore oil rigs.

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