PCA Case N° 2014-02

IN THE MATTER OF THE ARCTIC SUNRISE ARBITRATION

- before -

AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

- between -

THE KINGDOM OF THE NETHERLANDS

- and -

THE RUSSIAN FEDERATION

MEMORIAL OF THE KINGDOM OF THE NETHERLANDS

ARBITRAL TRIBUNAL:

Judge Thomas Mensah (President)
Mr. Henry Burmester
Professor Alfred Soons
Professor Janusz Symonides
Dr. Alberto Székely

REGISTRY:

Permanent Court of Arbitration

31 August 2014

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I. INTRODUCTION

1. Pursuant to Section 2 of Part XV of UNCLOS and Annex VII to the 1982 United Nations Convention on the Law of the Sea (UNCLOS or Convention), the Kingdom of the Netherlands hereby requests that the Tribunal[1] resolves the dispute between the Kingdom of the Netherlands and the Russian Federation concerning the *Arctic Sunrise*, a vessel that flies the flag of the Kingdom of the Netherlands.

2. The dispute relates to authorities of the Russian Federation boarding and detaining the *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and detaining the persons on board the ship without the prior consent of the Kingdom of the Netherlands.

3. The Kingdom of the Netherlands submitted the dispute to the arbitral procedure provided for in Annex VII to the Convention by notification to the Russian Federation conveyed in a diplomatic note dated 4 October 2013. The 'Statement of the claim and the grounds upon which it is based' (Statement of Claim) was annexed to this notification. A certified copy of the diplomatic note with the Statement of Claim is annexed to this request (Annex N-1).

4. In the Statement of Claim (see paragraph 32), the Kingdom of the Netherlands requested the Russian Federation to adopt and implement provisional measures to the effect that, in sum, it immediately release the *Arctic Sunrise* and the persons who had been on board. The Russian Federation did not respond to the request, and it did not adopt and implement the requested provisional measures. Instead, its authorities continued, *inter alia*, to detain the persons who had been on board and formally seized the *Arctic Sunrise*, thereby aggravating and extending the dispute.

5. Further to a request of the Kingdom of the Netherlands dated 21 October 2013 (Request for Provisional Measures), the International Tribunal for the Law of the Sea (ITLOS) prescribed

[1] The 'Tribunal' is the Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea in the Matter of the *Arctic Sunrise* Arbitration between the Kingdom of the Netherlands and the Russian Federation, PCA Case N° 2014-02; for the terms of appointment of the Tribunal, see Procedural Order No. 1 of 17 March 2014.

provisional measures in its Order of 22 November 2013 in *The "Arctic Sunrise" Case (Kingdom of the Netherlands* v. *Russian Federation)* (ITLOS Order). Although the Russian Federation released the *Arctic Sunrise* and the persons who had been detained, and allowed them to leave the territory and maritime areas under the jurisdiction of the Russian Federation, it did not comply with the Order, neither in time nor in full.

6. Notwithstanding the release of the *Arctic Sunrise* and the persons who had been on board as well as their return to their respective home countries, the dispute has not yet been resolved.

7. First, not all claims, as reflected in the Statement of Claim, have been satisfied by the Russian Federation.

8. Second, as noted in the Request for Provisional Measures (Annex N-2) and in paragraph 4 above, the Russian Federation further aggravated and extended the dispute since 4 October 2013, in particular by bringing serious criminal charges (piracy and hooliganism) against the persons on board the *Arctic Sunrise* and by the length of their pre-trial detention. These acts of the Russian Federation have a chilling effect on the exercise of the freedom of protest at sea. For this reason, the Kingdom of the Netherlands submits an additional claim related to the conduct of the Russian Federation with respect to the exercise of the freedom to protest at sea.

9. Third, the Kingdom of the Netherlands submits additional claims related to (a) the failure of the Russian Federation to timely and fully implement the ITLOS Order as well as (b) the non-participation of the Russian Federation in the present arbitral procedure. These additional claims also arise from conduct of the Russian Federation subsequent to the submission of the dispute to the arbitral procedure provided for in Annex VII to the Convention on 4 October 2013.

10. Therefore, the Netherlands requests the Tribunal to render the award requested in the Statement of Claim, as modified by this Memorial.

II. STATEMENT OF FACTS

11. In addition to the statement of facts below, the Kingdom of the Netherlands hereby submits to the Tribunal:

(a) Greenpeace International Statement of Fact and Appendices (Greenpeace Factual Account), provided to it by Greenpeace International, the operator of the *Arctic Sunrise* (Annex N-3);

(b) Eight written witness statements subscribing the Greenpeace Factual Account in whole or in part (Annex NWS-1, Annex NWS-2, Annex NWS-3, Annex NWS-4, Annex NWS-5, Annex NWS-6, Annex NWS-7, and Annex NWS-8).

12. The events that gave rise to the dispute between the Kingdom of the Netherlands and the Russian Federation are set out in paragraphs 16-27 of the Statement of Claim. These paragraphs are quoted below and have been renumbered for reasons of clarity.

"The 'Arctic Sunrise' and its crew

[12.1] The 'Arctic Sunrise' is owned by *Stichting Phoenix*, whose address is as follows:

Stichting Phoenix
Dorpsstraat 3
1151 AC Broek in Waterland
The Netherlands

[12.2] The vessel is operated by Greenpeace International, whose address is as follows:

C/o Stichting Greenpeace Council
Otto Heldringstraat 5
1066 AZ Amsterdam
The Netherlands

[12.3] The 'Arctic Sunrise' is flying the flag of the Netherlands. The details of the vessel are as follows:

- IMO number: 7382902
- Gross tonnage: 949

- Category of Ice Strengthening: 1A1 Icebreaker (for max draught 4.7 m) E0 Recyclable (Det Norske Veritas classification certificate)
- Port of registry: Amsterdam, Netherlands
- Type of ship: Motor Yacht
- Call sign: PE 6851

[12.4] According to the Crew List (Annex 1) [Attached as Annex N-4], the number of persons on board the 'Arctic Sunrise' was 30. In addition to two Dutch nationals, the members of the crew are nationals from Argentina, Australia, Brazil, Canada, Denmark, Finland, France, Italy, Morocco, New Zealand, Poland, Russian Federation, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

The events giving rise to the dispute

[12.5] On 18 September 2013, Greenpeace International used the 'Arctic Sunrise' to stage a protest directed against the offshore ice-resistant fixed platform (OIRFP) 'Prirazlomnaya' in the Barents Sea. In connection with this protest, in a *note verbale*, dated 18 September 2013 (Annex 2) [Attached as Annex N-5], the Russian Federation informed the Kingdom of the Netherlands that it had been decided "to seize the *Arctic Sunrise*."

[12.6] On 19 September 2013, in the Russian Federation's exclusive economic zone, authorities of the Russian Federation boarded, took over control and detained the 'Arctic Sunrise', and proceeded to bring it to Murmansk Oblast.

[12.7] By *note verbale*, informally communicated on 20 September 2013 receipt of which was acknowledged by the Russian Federation on the same day and formally communicated on 23 September 2013 (Annex 3) [Attached as Annex N-6], the Kingdom of the Netherlands, as the Flag State of the 'Arctic Sunrise', requested the Russian Federation to provide information, including answers to specific questions, concerning the actions by the Russian Federation's authorities against the vessel and its crew. In the *note verbale*, the Kingdom of the Netherlands also underlined the importance of the immediate release of the vessel and its crew. The Kingdom of the Netherlands requested the Russian Federation to reply by 23 September 2013.

[12.8] On 24 September 2013, 08:42 hrs Coordinated Universal Time (UTC), as far as known, the 'Arctic Sunrise' was moored alongside the Russian Federation's coast guard vessel *Ladoga*, which is clearly marked and identifiable as being on government service, in position 69 04.3N 033 06.9E. As far as known, all crew members of the 'Arctic Sunrise' had been removed from the vessel to shore by 15:42 hrs UTC that day. The crew members have since been kept in detention in Murmansk Oblast pending judicial proceedings.

[12.9] The Kingdom of the Netherlands' requests in its *note verbale* of 23 September 2013 remained unanswered and in a further *note verbale* to the Russian Federation, dated 26 September 2013 (Annex 4) [Attached as Annex N-7], the Kingdom of the Netherlands reiterated its request for information and urged a reply. In the *note verbale*, the Kingdom of the Netherlands also reiterated its request that the Russian Federation immediately release the vessel and its crew. In this connection, the Kingdom of the Netherlands inquired as to

> "whether such release would be facilitated by the posting of a bond or other financial security and, if so, what the Russian Federation would consider to be a reasonable amount for such bond or other financial security."

[12.10] On 27 September, the Russian Federation informed the Consulate-General of the Kingdom of the Netherlands in St. Petersburg that, from 28 September 2013 to 2 October 2013, officials of the Committee of Investigation of the Russian Federation (Investigation Department for the Northwestern Federal District) would conduct investigations on board of the 'Arctic Sunrise' as part of the criminal investigations in case Nr. 83543 (Annex 5) [Attached as Annex N-8]. It was suggested that a representative of the Consulate-General be present during these investigations. On 28 September 2013, authorities of the Russian Federation commenced an investigation of the vessel. The Kingdom of the Netherlands had denied its consent thereto and after the investigation, the Kingdom of the Netherlands recorded its formal protest in a *note verbale*, dated 29 September 2013 (Annex 6) [Attached as Annex N-9]. To date, a report of the investigation has not been received by the Kingdom of the Netherlands.

[12.11] On 1 October 2013, the Russian Federation sent a *note verbale* responding to the requests for information of the Kingdom of the Netherlands' *note verbale* of 23 September 2013 (Annex 7) [Attached as Annex N-10]. According to the note, the boarding, investigation and detention of the 'Arctic Sunrise' and its crew were justified on the basis of general provisions in UNCLOS related to the exclusive economic zone and the continental shelf. In its *note verbale* of 3 October 2013, the Kingdom of the Netherlands expressed its view that these provisions did not justify the actions taken against the 'Arctic Sunrise' and its crew (Annex 8) [Attached as Annex N-11].

[12.12] In its *note verbale* of 3 October 2013, the Kingdom of the Netherlands stated that it therefore appeared that the Russian Federation and the Kingdom of the Netherlands have diverging views on the rights and obligations of the Russian Federation as a Coastal State in its exclusive economic zone. It was indicated that, in view of the urgency of the matter, resulting from the detention of the vessel and its crew, the Kingdom of the Netherlands was considering to initiate arbitration as soon as feasible."

13. On 21 October 2013, the Kingdom of the Netherlands submitted its Request for Provisional Measures to the ITLOS, of which it informed the Russian Federation by diplomatic note on the same day (Annex N-12). The events that further aggravated and extended the dispute between 4 and 21 October 2013 are set out in paragraphs 9-12 of said Request. These paragraphs are quoted below and have been renumbered for reasons of clarity.

"[13.1] Since 4 October 2013, when the Kingdom of the Netherlands notified the Russian Federation that it submitted the dispute to the arbitral procedure provided for in Annex VII to UNCLOS, the dispute has further aggravated and extended. First, the detention of the crew has been continuing.

[13.2] Second, on 7 October 2013, the Leninsky District Court in Murmansk granted an application by the Interior Affairs Sector of the Investigation Department for the Northwestern Federal District of the Committee of Investigation of the Russian Federation of the same date and ordered (Annex 3) [Attached as Annex N-13]

> "the seizure of the Dutch-flagged ship *Arctic Sunrise*, IMO number 7382902, belonging to 'Stichting Phoenix', Amsterdam, being used by 'Stichting Greenpeace Council', Amsterdam, under a ferryboat charter agreement concluded on 28 December 2012 and whose actual location is in the waters of Kola Bay, under which order the owner and possessor is prohibited from using or disposing of the ship."

According to said order:

> "The grounds for the application state that the seizure of the aforementioned property is necessary for the enforcement of the part of the judgment concerning the civil claim, other economic sanctions or a possible forfeiture order in respect of the property in accordance with article 104.1 CC RF".

[13.3] On 15 October 2013, the seizure order was implemented against the vessel and an official report was drawn up (Annex 4) [Attached as Annex N-14]. On 18 October 2013, the Kingdom of the Netherlands lodged a formal protest against the seizure of the 'Arctic Sunrise' and once more urged the Russian Federation to immediately release the vessel and its crew (Annex 5) [Attached as Annex N-15].

[13.4] Third, by judgment of 8 October 2013 (Annex 6) [Attached as Annex N-16], the Federal Security Service of the Russian Federation, Coast Guard Division for Murmansk Oblast, found the captain of the 'Arctic Sunrise' guilty of an administrative offence, and imposed a fine of 20,000 roubles, for failing to comply with a coast guard order to stop the 'Arctic Sunrise' and allow an inspection."

14. The events that occurred following the submission of the Request for Provisional Measures are set out below.

15. On 22 October 2013, the Russian Federation informed the Netherlands by diplomatic note that it had made a statement upon the ratification of the Convention on 26 February 1997

according to which, *inter alia*, 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 law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction" (Annex N-17). On this basis, the Russian Federation informed the Netherlands that it does not accept the arbitral procedure under Annex VII of the Convention and that it did not intend to participate in the hearing of the ITLOS related to the Request for Provisional Measures. On the same day, the Russian Federation conveyed this position to the ITLOS by diplomatic note (Annex N-18).

16. On 23 October 2013, further to the diplomatic note of 22 October 2013 of the Russian Federation to the ITLOS referred to in the preceding paragraph, the President of the ITLOS drew the attention of the Kingdom of the Netherlands to Article 28 of the Statute of the ITLOS. He invited the Netherlands to provide any comments it may wished to make in this respect (Annex N-19). On 24 October 2013, the Netherlands requested the ITLOS to continue the proceedings and make its decision on the Request for Provisional Measures in accordance with Article 28 of its Statute (Annex N-20).

17. On 31 October 2013, the ITLOS transmitted to the Kingdom of the Netherlands a copy of a letter by Greenpeace International petitioning the ITLOS for permission to file submissions as *amicus curiae* as well as a request from the President of the ITLOS to the Netherlands to make comments in this respect (Annex N-21). On 1 November 2013, the Netherlands informed the ITLOS that Greenpeace International had informally informed the Netherlands of its intention to petition the Tribunal for such permission, and that the Netherlands had informally informed Greenpeace International that it did not have any objection to such petition (Annex N-22). On 6 November 2013, the ITLOS transmitted to the Netherlands a message from the Russian Federation in which the latter objected to the submission by Greenpeace International of the *amicus curiae* submission (Annex N-23). On 8 November 2013, the ITLOS transmitted to the Netherlands its letter to Greenpeace International containing its decision not to accept the *amicus curiae* submission (Annex N-24).

18. On 6 November 2013, the hearing of the ITLOS took place without the participation of the Russian Federation. On 7 November 2013, the Kingdom of the Netherlands submitted to the

ITLOS its answers to questions raised by the ITLOS on 5 November 2013 prior to the hearing and during the oral hearing of 6 November 2013 (Annex N-25).

19. On 15 November 2013, in view of the fact that the Russian Federation had not appointed an arbitrator within the timeframe specified in Article 3(c) of Annex VII to the Convention, the Kingdom of the Netherlands requested the President of the ITLOS, Mr Shunji Yanai, to make this appointment in accordance with Article 3(e) of Annex VII to the Convention in order to secure the timely constitution of the arbitral tribunal (Annex N-26).

20. On 22 November 2013, the ITLOS issued its Order on the Request for Provisional Measures in which it prescribed, *inter alia*, the following provisional measures:

> "(a) The Russian Federation shall immediately release the vessel Arctic Sunrise and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;
>
> (b) Upon the posting of the bond or other financial security referred to above, the Russian Federation shall ensure that the vessel Arctic Sunrise and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation".[2]

21. On 2 December 2013, the Kingdom of the Netherlands informed the Russian Federation by diplomatic note that, pursuant to the ITLOS Order, the Netherlands had concluded an agreement with the Royal Bank of Scotland ZAO, Moscow, to issue a bank guarantee in which the RBS guaranteed to pay the Russian Federation a sum up to EUR 3.6 million as may be determined by a decision of the Tribunal or by agreement between the parties (Annex N-27). On the same day, the Netherlands reported to the ITLOS on its compliance with the provisional measures prescribed in the ITLOS Order (Annex N-28).

[2] ITLOS Order, *dispositif*, para. 105(1).

22. On 13 December 2013, in view of the fact that the Netherlands and the Russian Federation had not within the timeframe specified in Article 3(d) of Annex VII reached agreement on the appointment of the other three members of the Tribunal, the Kingdom of the Netherlands requested the President of the ITLOS to make the remaining appointments in accordance with Article 3(e) of Annex VII to the Convention (Annex N-29).

23. On 10 January 2014, the President of the ITLOS informed the Netherlands of his decision to: (a) appoint Mr Thomas Mensah, Mr Janusz Symonides, and Mr Henry Burmester as arbitrators in the present proceedings; and (b) appoint Mr Thomas Mensah as President of the Tribunal (Annex N-30).

24. On 3 March 2014, the Permanent Court of Arbitration (PCA) transmitted a diplomatic note to the Kingdom of the Netherlands, received from the Russian Federation and dated 27 February 2014, in which the Russian Federation confirmed its refusal to take part in this arbitral procedure and in which it stated that it abstains from providing comments on the substance of the case as well as procedural matters.

25. On the same day, the Tribunal invited the Netherlands and the Russian Federation to establish an initial deposit of EUR 300,000 (EUR 150,000 from each party) with the PCA. The receipt of the initial deposit of EUR 150,000 by the Netherlands was acknowledged on 11 March 2014.

26. On 17 March 2014, the Tribunal held its first meeting in Bonn, Germany. No representatives of the Russian Federation were present at this meeting. At this meeting, the Tribunal adopted the Rules of Procedure, Procedural Order No. 1 (Terms of Appointment) and Procedural Order No. 2 (Rules of Procedure; Initial Procedural Timetable).

27. On 31 March 2014, further to the above-mentioned diplomatic note of the Russian Federation to the PCA dated 27 February 2014, in light of the non-participation of the Russian Federation and as conveyed orally during the first meeting, the Kingdom of the Netherlands requested the Tribunal to continue the present arbitral procedure and make its award in

accordance with Article 9 of Annex VII to the Convention.

28. On 13 May 2014, in view of the fact that no initial deposit had been received from the Russian Federation pursuant to Article 33.3 of the Rules of Procedure and Paragraph 7.2 of Procedural Order No. 1 (Terms of Appointment), the Tribunal requested that the Netherlands pay the remaining portion of the initial deposit of EUR 150,000. The receipt of this portion of the deposit by the Netherlands was acknowledged on 27 May 2014.

29. On 16 May 2014, the Russian Federation informed the Kingdom of the Netherlands by diplomatic note that, although the prosecution of all persons who had been on board the *Arctic Sunrise* had been halted, the investigation into the criminal case was continuing in order to establish all the circumstances under which the alleged criminal offences were committed. Since most of the investigative and other procedural steps in the criminal case had been completed, the Russian Federation was considering the possibility of taking a decision on transferring custody of the *Arctic Sunrise* to the representatives of the owner. However, the Russian Federation requested from the Kingdom of the Netherlands "written guarantees [...] on the basis of which representatives of investigative authorities and other competent authorities [of the Russian Federation] are given unhindered access at all times to the vessel Arctic Sunrise outside the territory of the Russian Federation, without having to resort to international legal assistance procedures, should the need arise to take any further investigative steps or procedural steps" (Annex N-31).

30. On 12 June 2014, the Russian Federation conveyed to the Kingdom of the Netherlands the text of the verbal communication between Minister of Foreign Affairs of the Russian Federation, Mr Sergey Lavrov, and Minister of Foreign Affairs of the Kingdom of the Netherlands, Mr Frans Timmermans, in which Minister Lavrov stated that, following the release under amnesty of all the detained members of the *Arctic Sunrise* crew, on 6 June 2014, a decision was taken to lift the arrest of the vessel, and that the vessel had already been handed over to the representatives of the owner, the Stichting Phoenix (Annex N-32).

31. On 22 August 2014, pursuant to Article 19 of the Rules of Procedure, the Kingdom of the Netherlands submitted a request for leave to submit supplementary written pleadings in the *Arctic Sunrise Arbitration* on reparation for injury caused to the Netherlands by the internationally wrongful acts of the Russian Federation.

32. On 26 August 2014, the Kingdom of the Netherlands responded to the diplomatic notes of the Russian Federation of 16 May 2014 and 12 June 2014 (Annex N-33). The Netherlands welcomed the transfer of custody of the vessel the *Arctic Sunrise* to the representatives of the owner and the departure of the vessel from the maritime areas under jurisdiction of the Russian Federation. However, it pointed out that, notwithstanding the release of the vessel and its crew, the dispute had not yet fully been resolved and referred in this respect to the terms in its Statement of Claim.

33. On 30 August 2014, the Tribunal informed the Kingdom of the Netherlands that the Netherlands' request for leave to submit supplementary written pleadings in the 'Arctic Sunrise Arbitration' on reparation for injury caused to the Netherlands by the internationally wrongful acts of the Russian Federation was granted.

III. NON-PARTICIPATION

1. INTRODUCTION

34. By diplomatic note dated 22 October 2013 (Annex N-17), the Russian Federation, in relation to the proceedings before the ITLOS concerning the Kingdom of the Netherlands' request for provisional measures in the *Arctic Sunrise* case, informed the ITLOS and the Netherlands as follows:

> "Upon the ratification of the Convention on the 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, 'it does not accept procedures provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes [...] concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction'.
>
> Acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by note verbale [...] that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel "Arctic Sunrise" and that [it] does not intend to participate in the proceedings of the International Tribunal for the Law of the Sea in respect of the request of the Kingdom of the Netherlands for the prescription of provisional measures under Article 290, Paragraph 5, of the Convention".

35. By diplomatic note dated 27 February 2014 (Annex N-34), the Russian Federation informed the Tribunal as follows:

> "The Russian side confirms its refusal to take part in this arbitration and abstains from providing comments both on the substance of the case and procedural matters".

36. The Kingdom of the Netherlands regrets the refusal of the Russian Federation to participate in the present arbitral proceedings, including the proceedings before the ITLOS. Its

non-participation has a negative impact on the sound administration of justice. Furthermore, the non-participation adversely affects the integrity of the compulsory dispute settlement system under the UNCLOS. In this respect, it is noted that the International Law Commission (ILC) considers that "non-appearance" amounts to the failure of a State to implement applicable dispute settlement procedures in "good faith".[3]

2. INTEGRITY OF THE COMPULSORY DISPUTE SETTLEMENT SYSTEM UNDER THE UNCLOS

37. The Kingdom of the Netherlands has a long-standing tradition of encouraging States to settle their conflicts and disputes peacefully. The hosting by the Netherlands of, *inter alia,* the Hague Peace Conferences of 1899 and 1907, the International Court of Justice (ICJ) and the Permanent Court of Arbitration (PCA) attest to this. The ICJ and PCA play an important role in the peaceful settlement of disputes, including in the field of the law of the sea. With respect to the interpretation and application of the UNCLOS, the Netherlands recognizes the important role of the ITLOS.

38. During the negotiations on what eventually became the 1982 United Nations Convention on the Law of the Sea, it became clear that, in order to balance the interests of all States against the increased jurisdictional competences conferred on coastal States, it was necessary to include a comprehensive system of compulsory dispute settlement.[4] At the fourth session (1976) of the Third Law of the Sea Conference, the President of the Conference, Mr Hamilton Shirley Amerasinghe, pointed out that

> "the provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention".[5]

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[3] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 52, p. 135.
[4] M. Nordquist, S. Nandan & S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: a Commentary* (vol. V, 1989), pp. 3-15.
[5] UNCLOS III, 'Memorandum by the President of the Conference on document A/CONF.62/WP.9', Doc. A/CONF.62/WP.9/ADD.1, 31 march 1976; M. Nordquist, *United Nations Convention on the Law of the Sea: a*

He continued:

> "Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise, the compromise [reached in the UNCLOS] will disintegrate rapidly and permanently. I should hope that it is the will of all concerned that the prospective convention should be fruitful and permanent. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the convention will be interpreted both consistently and equitably".[6]

39. Mr Tommy Koh, his successor as President of the Third Law of the Sea Conference, stated at the final session in 1982:

> "The world community's interest in the peaceful settlement of disputes and the prevention of use of force in the settlement of disputes between States have been advanced by the mandatory system of dispute settlement in the Convention".[7]

40. The Netherlands takes pride in recalling that the former Netherlands' Legal Adviser Professor Willem Riphagen was among those who laid the foundation for the current Article 287 of the UNCLOS. This provision, known as the 'Montreux Compromise', provides a crucial and unique system for the settlement of disputes under the Convention. The essence of the 'Montreux Compromise' is that each party to the Convention may select the method of dispute settlement it prefers and that, if a party does not make a choice, the Convention refers to arbitration as the default procedure. Professor Riphagen considered it important that "the Convention would also

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Commentary (vol. V, 1989), pp. 3-15; See further *Southern Bluefin Tuna Case (Australia and New Zealand* v. *Japan), Award on Jurisdiction and Admissibility*, Separate Opinion of Justice Sir Kenneth Keith, paras. 23-29.

[6] Ibid.

[7] Statement by the President, in 17 *Third United Nations Conference on the Law of the Sea: Official Records*, UN Sales No. E.84.V.3 (1984), p. 13, para. 48.

make provision for the situation in which a defendant failed to act".[8] This notion is captured in Article 287 of the Convention.

41. The availability of a default mechanism through the Convention is one of its gems: a dispute settlement procedure is always available. By becoming a party to the Convention, States explicitly accept this regime for the compulsory peaceful settlement of disputes. This also implies accepting and implementing decisions of the institutions responsible for the settlement of disputes under the Convention, including the ITLOS, the ICJ and any arbitral tribunal established under the Convention.

42. The Netherlands considers the establishment of this system of compulsory dispute settlement one of the cornerstones of the Convention. As recognized in the *Barbados v. Trinidad and Tobago* arbitration under Annex VII, "state practice in relation to Annex VII acknowledges that the risk of arbitration proceedings being instituted unilaterally against a State is an inherent part of the UNCLOS dispute settlement regime".[9] The Netherlands considers it imperative that States parties to the UNCLOS respect the system and implement any decisions taken on the basis of this system.[10] In a world where the use of the oceans is changing and where conflicting ambitions may lead to different views on the use of the oceans, it is critical that the system of the Convention be upheld and that disputes are settled peacefully.

43. In proceedings between States before international courts and tribunals, it is rare for a State not to participate. Throughout the last century, international courts and tribunals have been confronted with a situation of default only in a limited number of cases. The proceedings before the ITLOS in relation to the Netherlands' Request for Provisional Measures in the present dispute were the first instance in which the ITLOS was confronted with a situation of default.

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[8] S. Rosenne, 'UNCLOS III – The Montreux (Riphagen) Compromise', in A. Bos & H. Siblesz (eds), *Realism in Law-making: Essays on international law in honour of Willem Riphagen* (1986), pp. 169-178.
[9] *Barbados/Trinidad and Tobago, Award*, para. 204.
[10] Speech held by the Netherlands at the General Assembly of the United Nations on the occasion of the adoption of the Resolution of Oceans and the Law of the Sea, 9 December 2013, available at Ministry of Foreign Affairs of the Kingdom of the Netherlands; Statement on behalf of the European Union and its Member States by Dr Anastasia Strati, Chair of the EU Working Party on the Law of the Sea, Ministry of Foreign Affairs of Greece, at the 24th Meeting of States Parties to the United Nations Convention on the Law of the Sea: Agenda item 9 - Report of the International Tribunal for the Law of the Sea, 9 June 2014, New York, available at: http://www.eu-un.europa.eu/articles/en/article_15126_en.htm

Before the Permanent Court of International Justice (PCIJ), there have been three instances; before the ICJ there have been nine , the last of which was *Military and Paramilitary Activities in and against Nicaragua* in 1986.[11] Thereafter, instances of non-appearance have been virtually non-existent which seemed to indicate the decline of non-appearance as a phenomenon. Today, more than 25 years later, there is cause for concern that this trend has come under pressure.

3. LEGAL IMPLICATIONS OF NON-PARTICIPATION

44. On 4 October 2013, the Kingdom of the Netherlands instituted the present arbitral proceedings against the Russian Federation. As set out above, the Russian Federation refuses to participate in these proceedings.

45. According to the Netherlands' records, it is the first time that the Russian Federation refuses to participate in proceedings between States before an international court or tribunal. In 2002, the Russian Federation itself made use of the compulsory procedures under the Convention. It initiated proceedings before the ITLOS against Australia in *The "Volga" Case*.[12] Furthermore, the Russian Federation participated in two other proceedings before the ITLOS brought against it in 2007 by Japan: *The "Hoshinmaru" Case* [13] and *The "Tomimaru Case"*.[14]

46. The refusal by the Russian Federation to accept the arbitration procedure under Annex VII to the Convention instituted by the Kingdom of the Netherlands in relation to the present dispute constitutes a plea concerning the jurisdiction of the Tribunal under Article 20.3 of the Tribunal's Rules of Procedure. The regular practice of States, when they consider that an international court or tribunal does not have jurisdiction, is to appear before the court or tribunal and challenge its jurisdiction.

47. The Russian Federation itself followed this practice in the case brought against it by Georgia before the ICJ in 2008. It participated in those proceedings, including the proceedings

[11] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment*, p. 14.
[12] *The "Volga" Case, Prompt Release, Judgment.*
[13] *The "Hoshinmaru" Case, Prompt Release, Judgment.*
[14] *The "Tomomaru" Case, Prompt Release, Judgment.*

related to Georgia's request to indicate provisional measures. The Russian Federation challenged the jurisdiction of the Court. Although the Court indicated provisional measures after the Court had satisfied itself that it had *prima facie* jurisdiction,[15] the Russian Federation's challenge to the jurisdiction of the Court prevailed and the Court declined to exercise jurisdiction on the merits.[16]

48. With respect to the present case, it would have been in line with its own practice if the Russian Federation it had appeared and challenged the jurisdiction of the ITLOS and the Tribunal. Instead, it decided not to participate. Consequently, the Tribunal will have to address the consequences of this non-participation.

49. In the present arbitration under Annex VII to the Convention, the non-participation of the Russian Federation is governed by Article 9 of this Annex. This article reads as follows:

> "If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral 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".

50. Accordingly, the refusal of the Russian Federation to participate in the proceedings does not bar the Tribunal from exercising its jurisdiction to entertain the Netherlands' claims in the present case. Furthermore, the refusal of the Russian Federation to participate in the proceedings has legal implications for the making of a decision by the Tribunal. Pursuant to Article 9 of Annex VII to the Convention, the Tribunal must satisfy itself that: (1) it has jurisdiction; (2) the claim is well founded in fact; and (3) the claim is well founded in law.

51. To date, Article 9 of Annex VII to the Convention has not yet been interpreted and applied in case law. Therefore, the Netherlands has sought inspiration from the practice of other

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[15] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, Judgment*, p. 70.
[16] Ibid.

international courts and tribunals, including the ICJ in applying the corresponding test under Article 53.2 of its Statute. Other international courts and tribunals have in the past sought inspiration from the jurisprudence of the ICJ on matters pertaining to procedure. Professor Shabtai Rosenne saw no obstacles to such an approach. In his study on provisional measures juxtaposing the ICJ and the ITLOS, he wrote:

> "Since Annex VI, Article 28 of the Law of the Sea Convention follows Article 53 of the Statute of the ICJ, it may be assumed that ITLOS will follow the same practice".[17]

52. Since Article 9 of Annex VII to the Convention reflects Article 28 of Annex VI to the Convention *mutatis mutandis*, the Tribunal may also wish to be guided by the case law of the ICJ. The following chronological review of the ICJ's case law describes the approach of the Court in cases where a party did not appear.

53. First, in the case concerning *Corfu Channel*, the ICJ found that, while Article 53 of its Statute obliges the Court

> "to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded".[18]

54. Second, in the cases concerning *Fisheries Jurisdiction*, the Court addressed the failure of a State to appear which was understood to entertain objections to the Court's jurisdiction. In its judgments on jurisdiction, the Court concluded that it,

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[17] S. Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (2004), p. 165.
[18] *Corfu Channel, Merits, Judgment*, p. 248.

"in accordance with its Statute and its settled jurisprudence, must examine *proprio motu* the question of its own jurisdiction".[19]

For the purpose of deciding whether the claim was well founded in law, the Court observed in its judgments on the merits that it

"is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court".[20]

55. Third, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court found that

"by not appearing in the present proceedings, the Government of Iran, by its own choice, deprives itself of the opportunity of developing its own arguments before the Court".[21]

In its Judgment, the ICJ found that,

"in accordance with its settled jurisprudence, the Court, in applying Article 53 of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case".[22]

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[19] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgment*, para. 13; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment*, para. 12.
[20] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits*, para. 17; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits*, para. 18.
[21] *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order*, para. 24.
[22] *United States Diplomatic and Consular Staff in Tehran, Judgment*, para. 33.

56. Fourth, in *Military and Paramilitary Activities in and against Nicaragua*, the Court stated that

> "[a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute".[23]

In the same case, with respect to whether the claim is well founded in law, the Court observed that

> "[t]he use of the term 'satisfy itself' [...] implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law [...], so that the absence of one party has less impact".[24]

With respect to whether the claim is well founded in fact, the Court observed that

> "in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties [...]. Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts".[25]

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[23] *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua* v. *United States of America), Merits, Judgment,* para. 28.
[24] Ibid., para. 29.
[25] Ibid., para. 30.

In addition, the Court stated that

> "the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage".[26]

57. In 1991, the *Institut de Droit International* reflected the essential elements of the ICJ's case law in a resolution on 'Non-Appearance Before the International Court of Justice'.[27] Article 4 of the Resolution provides that, notwithstanding the non-appearance of a State before the Court in proceedings to which it is a party, that State is, by virtue of the Statute, bound by any decision of the Court in that case, whether on jurisdiction, admissibility, or the merits.

4. CONCLUSION

58. Article 9 of Annex VII to the Convention is applicable in the present proceedings. In this respect, taking into account the case law of the ITLOS and the ICJ, the Kingdom of the Netherlands wishes to make the following observations:

- The non-appearance of the Russian Federation cannot by itself constitute an obstacle to the Tribunal entertaining the Netherlands's claims in the present arbitration;
- The Tribunal must, on its own accord, examine the question of jurisdiction and make a decision thereon;
- The Tribunal needs to ensure that the factual and legal requirements of the Netherlands' claim are met;

[26] Ibid., para. 31.
[27] Institute of International Law, 'Non-Appearance Before the International court of Justice', Session of Basel - 1991, 31 August 1991.

- The Russian Federation, which has chosen not to appear, remains a party to the case and is bound by the decision of the Tribunal in accordance with Article 11 of Annex VII to the Convention.

59. The Kingdom of the Netherlands remains hopeful that the Russian Federation will reconsider its position and participate in these arbitral proceedings. For this reason, the Netherlands considers it vitally important that the Tribunal bifurcates the proceedings, considers the Russian Federation's diplomatic notes of 22 October 2013 (Annex N-17) and 27 February 2014 (Annex N-34) as a plea concerning its jurisdiction, and rules on the plea as a preliminary question in accordance with Article 20.3 of the Tribunal's Rules of Procedure.

IV. JURISDICTION AND ADMISSIBILITY

1. JURISDICTION OF THE TRIBUNAL

1.1 Introduction

60. Both the Kingdom of the Netherlands and the Russian Federation are Parties to the UNCLOS. The Convention entered into force for the Kingdom of the Netherlands on 28 July 1997, having ratified it on 28 June 1996. The Convention entered into force for the Russian Federation on 11 April 1997, having ratified it on 12 March 1997.

61. Article 286 UNCLOS provides that:

> "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section".

62. Upon signature of the Convention, the Russian Federation declared, *inter alia*, that

> "under article 287 of the United Nations Convention on the Law of the Sea, it chooses an arbitral tribunal constituted in accordance with Annex VII as the basic means for the settlement of disputes concerning the interpretation or application of the Convention. It opts for a special arbitral tribunal constituted in accordance with Annex VIII for the consideration of matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping".

63. Upon ratification of the Convention, the Kingdom of the Netherlands declared that,

> "having regard to article 287 of the Convention, it accepts the jurisdiction of the International Court of Justice in the settlement of disputes concerning the interpretation and application of the Convention with States Parties to the Convention which have likewise accepted the said jurisdiction".

64. Article 287.5 UNCLOS provides:

> "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree".

65. Since the Kingdom of the Netherlands and the Russian Federation have not accepted the same procedure for the settlement of the dispute, Annex VII to the Convention applies and the Tribunal established thereunder has jurisdiction over this dispute.

1.2 Declaration of the Russian Federation upon Ratification of the UNCLOS

66. The Netherlands submits that the jurisdiction of the Tribunal is not affected by the declaration of the Russian Federation upon ratification of the Convention. The Russian Federation declared that

> "in accordance with article 298 of the [Convention], 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 law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".

67. The Russian Federation invoked this declaration in its diplomatic note to the ITLOS of 22 October 2013 (Annex N-18). The Russian Federation stated that it does not accept the arbitration procedure and that it did not intend to participate in the proceedings before the ITLOS. In a

diplomatic note to the ITLOS dated 27 February 2014, it confirmed this position (Annex N-34).

68. The Netherlands submits that it is not for the Russian Federation, but for the Tribunal to determine whether it has jurisdiction (doctrine of *compétence de la compétence*), as laid down in Article 288.4 UNCLOS.

69. Before considering the legal effects of the Russian declaration, the Netherlands would point out that, as a general rule, the Convention does not allow reservations and exceptions (Article 309).

70. With respect to the declaration of the Russian Federation, there are two provisions of the Convention that are particularly relevant. First, Article 297.1(a) of the Convention provides, *inter alia*, that a dispute shall be subject to binding dispute settlement when it is alleged that a coastal State has acted

> "in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58".

71. Second, Article 298 allows States to opt out of binding dispute settlement. However, only a limited number of categories of disputes can be excluded. The first category of disputes, in paragraph 1(a), concerns sea boundary delimitations, or those involving historic bays or titles. The *Arctic Sunrise* dispute does not fall in this category. The second category of disputes, in paragraph 1(b), concerns military activities. The *Arctic Sunrise* dispute does not fall in this category either. The third category of disputes, in paragraph 1(c), concerns 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. There has not been Security Council involvement and the *Arctic Sunrise* dispute does not fall in this category. The remaining category of disputes, also in paragraph 1(b), concerns law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraphs

2 and 3. This last category merits further consideration.

72. The Netherlands notes that the Russian declaration makes an exception for "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction". However, Article 298.1(b) limits the scope of this exception: it only applies to disputes that are excluded from dispute settlement under Article 297, paragraph 2 or 3. Hence, not all law-enforcement activities can be excluded from compulsory dispute settlement under the UNCLOS.[28]

73. There are two possible ways to interpret the declaration of the Russian Federation. The first is that the declaration is in conformity with the Convention. This would mean that the exception is limited to disputes in Article 297, paragraphs 2 and 3, of the Convention. These are disputes concerning marine scientific research and fisheries, respectively. The facts of the present dispute do neither concern marine scientific research nor fisheries. Therefore, the Russian declaration cannot affect the jurisdiction of the Tribunal on the basis of one of the exceptions in Article 297, paragraph 2 or 3, of the Convention. In its Order on provisional measures in *The "Arctic Sunrise" Case*, the ITLOS confirmed this view by concluding that

> "the declaration made by the Russian Federation with respect to law enforcement activities under article 298, paragraph 1(b), of the Convention *prima facie* applies only to disputes excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3, of the Convention".[29]

74. The second possible interpretation is that the declaration is in fact a reservation, and not a declaration or statement under Article 310 UNCLOS. Depending on the intention of its author, the declaration may be understood as a statement purporting "to exclude or modify the legal effect of certain provisions of the treaty".[30] This would mean that the intention has been to put any "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights

[28] See in this respect also: B. H. Oxman, "Le régime des navires de guerre dans le cadre de la Convention des Nations Unies sur le droit de la mer", 28 *Annuaire français de droit international* (1982), p. 821; R-J. Dupuy & D. Vignes, *A Handbook on the New Law of the Sea* (1991), pp. 1248-1249.
[29] *The Arctic Sunrise Case, Provisional Measures, Order*, para. 45.
[30] Article 310 UNCLOS in fine. Cf. Article 2.1.d, 1969 Vienna Convention on the Law of Treaties.

or jurisdiction" beyond the reach of binding dispute settlement under the Convention.[31] Such a broad exception to the Convention's dispute settlement system is not permitted: Article 309 prohibits reservations unless permitted by other articles of the Convention. Such a reservation is not expressly permitted by any other article of the Convention.

75. Furthermore, such a reservation has been preemptively addressed by the Netherlands in its objection upon ratification. The prohibition of Articles 309 and 310 was recognized and emphasized by the Netherlands in its declaration upon ratification. The Netherlands objected to any declaration or statement excluding or modifying the legal effect of the Convention:

> "*B. Objections:*
> The Kingdom of the Netherlands objects to any declaration or statement excluding or modifying the legal effect of the provisions of the United Nations Convention on the Law of the Sea.
> This is particularly the case with regard to the following matters:
> *(...)*
> *II. Exclusive economic zone*
> *1. Passage through the Exclusive Economic Zone*
> Nothing in the Convention restricts the freedom of navigation of nuclear-powered ships or ships carrying nuclear or hazardous waste in the Exclusive Economic Zone, provided such navigation is in accordance with the applicable rules of international law. In particular, the Convention does not authorize the coastal state to make the navigation of such ships in the EEZ dependent on prior consent or notification.
> *2. Military exercises in the Exclusive Economic Zone*
> The Convention does not authorize the coastal state to prohibit military exercises in its EEZ. The rights of the coastal state in its EEZ are listed in article 56 of the Convention, and no such authority is given to the coastal state. In the EEZ all states enjoy the freedoms of navigation and overflight, subject to the relevant provisions of the Convention.
> *3. Installations in the Exclusive Economic Zone*

[31] See ILC, Guideline 1.3, Guide to Practice on Reservations to Treaties (UN doc A/66/10/Add.1), p. 74.

> The coastal state enjoys the right to authorize, operate and use installations and structures in the EEZ for economic purposes. Jurisdiction over the establishment and use of installations and structures is limited to the rules contained in article 56 paragraph 1, and is subject to the obligations contained in article 56 paragraph 2, article 58 and article 60 of the Convention.
>
> *4. Residual rights*
>
> The coastal state does not enjoy residual rights in the EEZ. The rights of the coastal state in its EEZ are listed in article 56 of the Convention, and can not be extended unilaterally".

76. The Russian Federation made a similar declaration that is of particular relevance in the present case:

> "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".

77. In sum, the refusal by the Russian Federation to accept the jurisdiction of the Tribunal in the present case is not only inconsistent with Articles 309 and 310 of the Convention, but it is also inconsistent with its own declaration upon ratification. Consequently, the declaration by the Russian Federation does not affect the jurisdiction of the Tribunal: either it does not apply or it is not allowed.

1.3 Conclusion

78. The Russian Federation has indicated that the Tribunal has no jurisdiction over the present dispute. It has invoked its declaration upon ratification of the Convention to justify its refusal to participate in the present proceedings. The Netherlands submits that it is not for the Russian Federation but for the Tribunal to determine whether it has jurisdiction (doctrine of *compétence de la compétence*), as laid down in Article 288.4 UNCLOS. To determine whether it has jurisdiction, the Tribunal will have to review the validity of the Russian declaration upon ratification of the Convention.

79. The Netherlands submits that:

- The declaration of the Russian Federation either does not apply or it is not allowed;
- The Tribunal has jurisdiction over the present dispute.

2. ADMISSIBILITY OF CLAIMS

2.1 Obligation to Exchange Views

80. Article 283.1 UNCLOS provides that

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

81. This provision is an integral element of the dispute-settlement procedures contained in Part XV of the Convention. In its jurisprudence, the ITLOS has interpreted the extent of the obligation of States Parties under Article 283. It held that "a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted".[32] Similarly, it held that "a State Party is not obliged to

[32] *Southern Bluefin Tuna Case, Provisional Measures, Order*, paras. 60–61.

continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted".[33] The ITLOS confirmed this view in the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*, where, in the circumstances of the case, "Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result".[34] In *The "ARA Libertad" Case*,[35] and in *The Arctic Sunrise Case*,[36] the ITLOS referred to the standard set out in *The MOX Plant Case*, under which "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted".[37]

82. While the Netherlands is bound to comply with the Article 283 of the UNCLOS, there is no additional rule, under general international law, that imposes conditions that had to be fulfilled prior to the submission of the present dispute to arbitration. As stated by the ITLOS in *The M/V "Louisa" Case*, with reference to the ICJ:

> "*Considering* that, as the International Court of Justice has stated, "[n]either in the Charter [of the United Nations] nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 303, paragraph 56)".[38]

83. As observed by Judge Anderson, the emphasis of the obligation to exchange views "is more upon the expression of views regarding the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties".[39]

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[33] *The MOX Plant Case, Provisional Measures, Order*, para. 60.
[34] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor, Provisional Measures, Order*, para. 48.
[35] *The "ARA Libertad" Case, Provisional Measures, Order*, para. 71.
[36] ITLOS Order, para. 76.
[37] *The MOX Plant Case, Provisional Measures, Order*, para. 60.
[38] *The M/V "Louisa" Case, Provisional Measures, Order*, para. 64.
[39] ITLOS Order, Declaration Judge Anderson, para. 3.

84. The present dispute arose on 18 September 2013, when the Russian Federation informed the Netherlands by diplomatic note that the decision had been made "to seize the *Arctic Sunrise*" (Annex N-5). Subsequently, the Netherlands proceeded expeditiously to an exchange of views with the aim of reaching a settlement. The diplomatic exchanges show that the parties exchanged views in respect of the facts of the present case, the legal qualification of these facts and the respective rights of the parties under the Convention.

85. Following the Russian note of 18 September 2013, the Netherlands sent diplomatic notes on 23 September 2013 (informally communicated to the Russian Federation on 20 September 2013) (Annex N-6), 24 September 2013 (Annex N-35), 26 September 2013 (Annex N-7), 27 September 2013 (Annex N-36) and 29 September 2013(Annex N-9). On 1 October 2013 (Annex N-10), the Russian Federation replied to the Netherlands' note of 23 September 2013, to which the Netherlands replied on 3 October 2013 (Annex N-11).

86. In addition to the exchange of diplomatic notes, the Ministers of Foreign Affairs of the Kingdom of the Netherlands and the Russian Federation discussed the dispute twice in this period, namely on 25 September 2013 and 1 October 2013.[40]

87. In sum, on several occasions prior to the institution of proceedings under Annex VII to the Convention, the Kingdom of the Netherlands has, through diplomatic channels, exchanged views with the Russian Federation in relation to the law-enforcement actions of the Russian Federation taken against the *Arctic Sunrise* with the aim of settling the dispute. In view of the content of the diplomatic note of the Russian Federation of 1 October 2013, the Netherlands concluded that the possibilities to settle the dispute by negotiation or otherwise had been exhausted, entitling the Netherlands to submit the dispute to the arbitral procedure provided for in Annex VII to the Convention.[41] On 3 October 2013, the Netherlands informed the Russian Federation that there seemed to be merit in submitting the dispute to arbitration under the UNCLOS and, on the following day, the Netherlands submitted the dispute to the arbitral procedure provided for in Annex VII to the Convention.

[40] Request for Provisional Measures, para. 16.
[41] Ibid., para. 17.

88. The ITLOS confirmed that the Netherlands has satisfied the requirements of Article 283 UNCLOS. In the ITLOS Order, it held that:

> "73. *Considering* that the Netherlands and the Russian Federation have exchanged views regarding the settlement of their dispute as reflected in the exchange of diplomatic notes and other official correspondence between them since 18 September 2013, including the note verbale dated 3 October 2013 from the Ministry of Foreign Affairs of the Netherlands to the Embassy of the Russian Federation in the Netherlands;
> 74. *Considering* that, according to the Netherlands, the dispute was discussed on a number of occasions between the respective Ministers of Foreign Affairs; [...]
> 77. *Considering* that, in the circumstances of the present case, the Tribunal is of the view that the requirements of article 283 are satisfied".

2.2 Invocation of the Responsibility of the Russian Federation

2.2.1 Introduction

89. The Kingdom of the Netherlands has standing to invoke the international responsibility of the Russian Federation on four grounds. First, under the law of the sea, the Netherlands is entitled as a flag State to invoke responsibility for injury caused by breaches of the UNCLOS. Secondly, the Netherlands is entitled to invoke responsibility for injury caused to all persons on board the ship flying its flag, the *Arctic Sunrise*. Thirdly, the Netherlands is entitled to exercise diplomatic protection on behalf of the individual members of the crew having Dutch nationality. Fourthly, and finally, the Netherlands has standing to invoke the international responsibility of the Russian Federation for breaches of its obligations *erga omnes (partes)*.

90. The UNCLOS generally considers a ship and all persons and objects on it as a 'unit'. As the ITLOS stated in *The M/V "SAIGA" (No. 2) Case*,

> "the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage

caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State".[42]

91. The *Arctic Sunrise* and all persons on board thus constitute a 'unit'. On board the *Arctic Sunrise*, as a ship exercising the freedom of protest at sea campaigning for Greenpeace, all persons are either "involved" or "interested" in the operations of the ship.

92. In the *dispositif* of the ITLOS Order, the ITLOS ordered the Russian Federation to "immediately release the vessel *Arctic Sunrise* and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands" and to "ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation".[43] In this Order, the ITLOS treated the ship as a 'unit'.

93. The case concerning the *Arctic Sunrise* is the first case before an international court or tribunal under the UNCLOS not involving fisheries or a war ship. While on those kinds of ships all persons on board usually are part of the crew, the concept of the ship as a unit equally applies to ships with persons on board not included in the crew of the ship. On ships, such as the *Arctic Sunrise*, a campaign ship involved in peaceful protest at sea, all persons on board are nevertheless either "involved" or "interested" in its operations, as the ITLOS phrased it as cited above.

94. For these reasons, the *Arctic Sunrise* must be considered a unit. The Netherlands accordingly has standing to present its claims concerning the ship and all persons on board.

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[42] *The M/V "SAIGA" (No. 2) Case, Judgment*, para.106. See also *The M/V "Virginia G" Case, Judgment*, para. 127.
[43] ITLOS Order, *dispositif*, para. 105(1)(a) and (b) respectively.

2.2.2 Invocation of the Responsibility of the Russian Federation by the Netherlands as an Injured State

2.2.2.1 Injury to the Netherlands Resulting from the Breach of the Freedom of Navigation and the Right to Exercise Exclusive Jurisdiction

95. The Netherlands has standing to invoke the responsibility for internationally wrongful acts of the Russian Federation because it is directly injured through the injury inflicted on the *Arctic Sunrise*, a ship flying its flag, and all persons on board. Article 42.1 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides standing to the State to which the obligation breached is owed individually.[44] This includes obligations arising under a multilateral treaty, such as the UNCLOS, when the performance of the relevant obligation is owed to the injured State individually. The obligations under the UNCLOS at issue in the present dispute were owed to the Netherlands as a flag State.

96. First, Article 58 UNCLOS clearly states that "all States [...] enjoy [...] the freedoms referred to in Article 87 of navigation and [...] other internationally lawful uses of the sea related to these freedoms".[45] This provision, therefore, directly confers rights upon the flag State and failure to comply with the ensuing obligation to respect these rights causes direct injury to the flag State. Breaches of the relevant provisions of the UNCLOS by the Russian Federation injure the Netherlands as a State Party.

97. Secondly, the UNCLOS, under Article 92, confers on the Netherlands the exclusive jurisdiction over ships flying its flag. The exercise of jurisdiction with respect to the *Arctic Sunrise* by the Russian Federation, through its law-enforcement actions, interferes with this sovereign right of the Netherlands and thereby provides standing to bring a claim.

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[44] Annex to United Nations General Assembly Resolution A/RES/56/83; ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 42, pp. 26-143.

[45] See also P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (2007), p. 88.

98. Thirdly, the Russian Federation is obliged to implement the ITLOS under Articles 290.6 and 296.1 UNCLOS. This obligation is directly owed to the Netherlands as applicant in the relevant proceedings before the ITLOS and beneficiary of the Order.

99. Standing of the flag State to invoke the responsibility of the wrongdoing State was confirmed by the ITLOS in its decision on the merits concerning *The M/V "SAIGA" (No. 2) Case*. In this case, it found that "the rights which Saint Vincent and the Grenadines claims have been violated by Guinea are all rights that belong to Saint Vincent and the Grenadines under the Convention (articles 33, 56, 58, 111 and 292) or under international law".[46]

100. The invocation of responsibility for breaches of such rights is not subject to the exhaustion of local remedies. Under the law of State responsibility as codified in the ARSIWA and recognized under general international law the local remedies rule does not apply to direct claims.[47] In *The M/V "Virginia G" Case*, the ITLOS found that "[i]t is also established in international law that the exhaustion of local remedies rule does not apply where the claimant State is directly injured by the wrongful act of another State".[48] It concluded with respect to Panama's claim that

> "the principal rights that Panama alleges have been violated by Guinea-Bissau include the right of Panama to enjoy freedom of navigation and other internationally lawful uses of the seas in the exclusive economic zone of the coastal State and its right that the laws and regulations of the coastal State are enforced in conformity with article 73 of the Convention. Those rights are rights that belong to Panama under the Convention, and the alleged violations of them thus amount to direct injury to Panama. Given the nature of the principal rights that Panama alleges have been violated by the wrongful acts of Guinea-Bissau, the Tribunal finds that the claim of Panama as a whole is brought on the basis of

[46] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 98.
[47] J. Dugard, 'Diplomatic Protection' in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010), p. 1062.
[48] *The M/V "Virginia G" Case, Judgment*, para. 153.

an injury to itself. [...] Accordingly, the Tribunal concludes that the claims in respect of such damage are not subject to the rule of exhaustion of local remedies".[49]

101. To the extent that the international responsibility of the Russian Federation is invoked for violations of human rights of the persons on board the *Arctic Sunrise*, the Netherlands has standing to include these claims in its direct claim as a result of the violations of its right under the UNCLOS, including the freedom of navigation, the freedom of protest at sea, and its exclusive jurisdiction over the *Arctic Sunrise*. As will be demonstrated in paragraph 168 below, the violation of human rights of the persons on board the Arctic Sunrise is reasonably related to the violation of direct rights to the Netherlands. Such interdependence, as the ICJ confirmed in *Avena and other Mexican Nationals*, allows the Netherlands to request a ruling "on the violations of rights which it claims to have suffered both directly and through the violation of individual rights".[50] The Court went on to conclude that "[t]he duty to exhaust local remedies does not apply to such a request".[51]

102. In conclusion, the Netherlands has standing under international law to invoke the responsibility of the Russian Federation for violation of the Netherlands' freedom of navigation and of its exclusive jurisdiction over the *Arctic Sunrise* and all persons on board.

2.2.2.2 Injury to the Netherlands Resulting from the Treatment of the Persons on Board the *Arctic Sunrise*

103. The Netherlands is entitled to invoke the responsibility of the Russian Federation for breaches of the UNCLOS affecting all persons on board the *Arctic Sunrise*. Standing of the Netherlands to invoke the international responsibility of the Russian Federation in this regard must be distinguished from the exercise of diplomatic protection for injury affecting Dutch nationals, as international law entitles the flag State of a ship to present a claim regarding

[49] Ibid., paras. 157-158.
[50] *Avena and other Mexican Nationals, Judgment*, p. 12, para. 40.
[51] Ibid.

breaches of international law affecting the crew of its ship regardless of the nationality of the persons on board the ship.[52] As the ITLOS explained in *The M/V "Virginia G" Case* ,

> "in accordance with international law, the exercise of diplomatic protection by a State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of a ship".[53]

104. This follows Article 18 of the Articles on Diplomatic Protection.[54] In its Commentary to that provision, the ILC wrote that "it is necessary to recognize the right of the State of nationality of the ship to seek redress in respect of the members of the ship's crew".[55] The provision is supported in state practice and international legal doctrine.[56] International law treats a ship and all persons on board as a unit which falls under the exclusive sovereignty of the flag State (see para. 90 above).

105. This position was reaffirmed in *The M/V "Virginia G" Case*.[57] The fact that the ship and crew must be considered a unit is further supported by the ITLOS Order, as has been explained above. Standing to present the claim regarding all persons on board the ship is thus inherent in standing to invoke the responsibility of the Russian Federation for its wrongful conduct vis-à-vis the *Arctic Sunrise*.

106. Therefore, the Netherlands invokes the responsibility of the Russian Federation also for the breach of the right to peaceful protest at sea and the individual human rights violated through the boarding of the *Arctic Sunrise* and the subsequent arrest and detention of all persons on board. Under this heading, these rights are to be considered as part of the direct claim, not subject to the exhaustion of local remedies (see para. 100 above).

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[52] Standing of The Netherlands to present a claim in the exercise of diplomatic protection for the Dutch members of the crew will be demonstrated below, section *iii*.
[53] *The M/V "Virginia G" Case, Judgment*, para. 128.
[54] Annex to United Nations General Assembly Resolution A/RES/62/67.
[55] ILC, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006), UN Doc. A/61/10, Draft Articles on Diplomatic Protection, Commentary to Article 18, para. 1.
[56] Ibid., para. 2.
[57] *The M/V "Virginia G" Case, Judgment*, para. 127.

107. In conclusion, the Netherlands as a flag State has standing to invoke the responsibility of the Russian Federation for its wrongful conduct vis-à-vis the *Arctic Sunrise* and all persons on board, by denying it the freedom of navigation and by wrongfully boarding the ship and subsequently arresting and detaining the ship and all persons on board.

2.2.2.3 Injury to the Netherlands Resulting from the Injury to its Nationals

108. The Netherlands is entitled to exercise diplomatic protection on behalf of its nationals, subject to the exhaustion of local remedies rule and nationality of claims rule. The Netherlands hereby confirms that two individuals on board the *Arctic Sunrise*, Mr Mannes Ubels and Ms Faiza Oulahsen, are Dutch nationals.

109. The injuries suffered by these Dutch nationals are described below in Sections V.2.3 and V.2.4.2. Should this Tribunal consider that the Netherlands cannot invoke the responsibility of the Russian Federation for violations of international law vis-à-vis all persons on board the *Arctic Sunrise*, then the Netherlands wishes to invoke the responsibility of the latter for breaches of international law vis-à-vis its nationals. As the ICJ found in *LaGrand*, the fact that the exercise of diplomatic protection is one of customary international law "does not prevent a State party to a treaty [...] from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty".[58] The exercise of diplomatic protection was clearly foreseen under the UNCLOS, witness Article 295 which requires the exhaustion of local remedies.

110. Mr Ubels and Ms Oulahsen do not simultaneously hold the Russian nationality that could have been considered their predominant nationality. Therefore, the nationality of claims rule has been satisfied.

111. With respect to the local remedies rule, there is no denying of the fact that with respect to the injuries inflicted on Mr Ubels and Ms Oulahsen local remedies have not been exhausted. It is

[58] *LaGrand, Judgment*, p. 466, para. 42.

submitted, however, that in the present case such exhaustion was not required because they did not voluntarily subject themselves to the jurisdiction of the Russian Federation.

112. Applying *The M/V "SAIGA" (No. 2) Case* to the present dispute, it is clear that "a prerequisite for the application of the [local remedies] rule is that there must be a jurisdictional connection between the person suffering damage and the State responsible for the wrongful act which caused the damage".[59] Similarly, Article 15(c) of the Articles on Diplomatic Protection provides that:

> "Local remedies do not need to be exhausted where: [...]
> (c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury".[60]

113. The Commentaries to that provision explain that "it is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he would be expected to exhaust local remedies".[61] Since the Netherlands as the flag State at no point consented to the exercise of jurisdiction by the Russian Federation over the *Arctic Sunrise*, Mr Ubels and Ms Oulahsen did not voluntarily or lawfully submit to the jurisdiction of the Russian Federation. Indeed, such a jurisdictional link is absent when the exercise of jurisdiction by the respondent authorities was unlawful, as the ITLOS found in *The M/V "SAIGA" (No. 2) Case*:

> "If, on the other hand, Guinea's application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed. [...] For reasons set out [below], the Tribunal concludes that there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case".[62]

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[59] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 99.
[60] Draft Articles on Diplomatic Protection, Article 15 with commentaries, pp. 80-83.
[61] Ibid., p. 81.
[62] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 100.

114. At no point in time Mr Ubels and Ms Oulahsen voluntarily placed themselves within Russian jurisdiction.

115. In conclusion, should this Tribunal consider that the Netherlands cannot invoke the responsibility of the Russian Federation for violations of international law vis-à-vis all persons on board the *Arctic Sunrise*, the Netherlands is entitled to exercise diplomatic protection on behalf of the two Dutch nationals on board the ship.

2.2.3 Invocation of the Responsibility of the Russian Federation by the Netherlands other than as an Injured State

2.2.3.1 Introduction

116. In addition, but not subsidiarily, to standing based on direct and indirect injury, the Netherlands also has standing *erga omnes (partes)* to invoke the international responsibility of the Russian Federation. Rights and obligations of states that are beyond national jurisdiction typically apply *erga omnes (partes)*. In particular, when an area is beyond national sovereignty or when the norms protected represent values beyond a single state's interest, all states have a legal interest in compliance and standing *erga omnes (partes)* is required to ensure effective enforcement.

117. The breach of an obligation that applies *erga omnes (partes)* thus gives standing to invoke the international responsibility for this breach to all members of the relevant '*omnes*'. As the ICJ stated in *Barcelona Traction, Light and Power Company, Limited*,

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[63]

[63] *Barcelona Traction, Light and Power Company, Limited, Judgment*, p. 3, para 33.

118. This rule is reflected in the ARSIWA, Article 48.1(a) with respect to obligations arising under a treaty (obligations *erga omnes partes*) and Article 48.1(b) with respect to obligations under customary international law (obligations *erga omnes*), which provide:

> "Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
> (i) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
> (ii) The obligation breached is owed to the international community as a whole".

119. Standing *erga omnes (partes)* is applicable where the obligation is 'established for the protection of a collective interest' and may concern 'the environment or security of a region' or a 'system for the protection of human rights'.[64] For an obligation to apply *erga omnes (partes)*, it must be established 'in some wider common interest', 'transcend the sphere of bilateral relations of the States parties', and 'foster a common interest, over and above any interests of the States concerned individually'.[65] As the ICJ confirmed in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, "[t]hat common interest implies that the obligations in question are owed by any State party to all the other States parties to [a] Convention".[66]

120. In the present dispute, various norms that apply *erga omnes* are to be identified. First, the freedoms on the high seas, and in particular the freedom of navigation, as codified in the UNCLOS, apply *erga omnes (partes)*. This applies equally to the customary right to freedom of navigation, which applies *erga omnes*. Secondly, various human rights, violated as a consequence of the Russian violations of the law of the sea, as codified in the International Covenant on Civil and Political Rights (ICCPR) apply *erga omnes partes* as between the parties to that Covenant. To the extent that the relevant rights also apply *erga omnes* under customary international law, the Netherlands has standing *erga omnes* to invoke responsibility for their breach. These two issues will now be discussed in turn.

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[64] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 48, p. 126.
[65] Ibid, 126-127.
[66] *Questions relating to the Obligation to Prosecute or Extradite, Judgment*, p. 422, para. 68.

2.2.3.2 *Erga Omnes (Partes)* Character of the Freedom of Navigation

121. It has long been recognized that the freedoms of the high seas, of which the freedom of navigation has been qualified as "the freedom par excellence",[67] protect a public interest.[68] The obligations of States to respect these freedoms apply *erga omnes*. Beyond the territorial sea, the sovereignty of States is limited to the extent provided for in the Convention and customary international law while at the same time the safety and accessibility of the waters beyond the territorial sea, as well as their living and non-living resources, must be protected. All States, therefore, have a common interest in the enforcement of the lawful uses of the high seas.[69] In the exclusive economic zone, the freedoms of the high seas are applicable subject to the limitations of these rights provided in Article 56 UNCLOS. It is in the interest of all States that the freedom of navigation, including the freedom of protest at sea, is being protected.

122. This common interest underlies the development of the regime applicable to the high seas.[70] It was emphasized in the Preamble to the UNCLOS, which frequently refers to the interest of all peoples of the world in the maintenance of 'peace, justice and progress', to be promoted through the regulation and enforcement of the rules set forth in the UNCLOS.[71]

123. For all States to be able to enjoy the freedoms of the high seas, and in particular the freedom of navigation, a concerted and disciplined use of the high seas is required.[72] Applying the criteria stipulated by the ILC and cited above, the freedom of navigation is a fundamental right that is established for a wider common interest which transcends the sphere of bilateral relations. It is in the interest of all States collectively that the seas beyond a coastal State's territorial waters remain open for navigation and that such navigation be enjoyed peacefully and without unlawful impediment.

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[67] E. Papastavridis, 'The Right of Visit on the High Sease in a Theoretical Perspective: *Mare Liberum* versus *Mare Clausum* revisited', 24 Leiden Journal of International Law (2011), p. 53.
[68] R. Lapidoth, 'Freedom of Navigation-Its Legal History and Its Normative Basis', 6 Journal of Marine Law and Commerce (1975), pp. 259-272. See also A. Pardo, Statement to the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 23 March 1971.
[69] ILC, 'Regime of the High Seas – Mémorandum présenté par le Secrétariat', II *Y.I.L.C.* (1950), para. 26.
[70] Ibid.
[71] Preamble to the UNCLOS, in particular the first, fifth and seventh consideration.
[72] ILC, 'Regime of the High Seas – Mémorandum présenté par le Secrétariat', II *Y.I.L.C.* (1950), para. 32.

124. The *erga omnes (partes)* nature of obligations concerning the seas and waterways was recognized by the PCIJ in 1923 in *S.S. "Wimbledon"*. In this case, the Court accepted four States as applicant to the claim. The United Kingdom, as the flag state of the ship, and France, where the charter company bearing most of the financial losses was incorporated, were arguably injured, but the other two claimants, Italy and Japan, had no interest in the claim apart from a general interest in navigation through the Kiel Canal. As the Court stated,

> "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags. They are therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of [the Treaty of Versailles]".[73]

125. It continued to qualify the regime established for the Kiel Canal as an "international waterway intended [...] for the benefit of all nations of the world" and "to facilitate access to the Baltic by establishing an international régime, and consequently to keep the canal open at all times to foreign vessels of every kind".[74] The regime thus created conferred on all States Parties the right to invoke the responsibility of a State not acting in conformity with the rules upholding the regime.

126. Similarly, the obligation to respect the freedom of navigation, including the right to peaceful protest at sea, applies *erga omnes*. A threat to the freedom of navigation concerns all seafaring nations as it impedes their enjoyment of the high seas. The conduct of the Russian Federation, both with respect to its declaration of a safety zone not in conformity with the UNCLOS and with respect to its boarding of the *Arctic Sunrise* and subsequent arrest and detention of the ship and all persons on board, constitutes a breach of the obligation to respect the freedom of navigation. This obligation is owed by the Russian Federation to all States, including the Netherlands.

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[73] *S.S. "Wimbledon", Judgment*, p. 20.
[74] Ibid, pp. 22 and 23 respectively.

127. Especially since the rules violated in the present case are not of a purely bilateral nature, their breach has effects beyond the bilateral relationship between the Netherlands and the Russian Federation. The impediments to the freedom of navigation, including the right to peaceful protest at sea, were not directed against the Netherlands in particular. This follows from the fact that the safety zone of three nautical miles did not only apply to ships flying the Dutch flag but to all ships and from the fact that the Russian Federation failed to inform the Netherlands promptly and properly of its law-enforcement actions against the *Arctic Sunrise* and the persons who had been on board the ship. This demonstrates that the underlying concern was not specifically to act against the Netherlands, but against any ship in the relevant marine area. Such conduct inevitably has a chilling effect on other states.

128. In conclusion, due to the nature of the freedom of navigation, including the right to peaceful protest at sea, on the high seas and in the exclusive economic zone, the Netherlands has standing *erga omnes (partes)* to invoke the international responsibility of the Russian Federation.

2.2.3.3 *Erga Omnes (Partes)* Character of the International Human Rights of the Persons on Board the *Arctic Sunrise*

129. Some of the injury inflicted on the members of the crew of the *Arctic Sunrise* arises from breaches of norms of international law that apply *erga omnes (partes)*. In particular, basic human rights such as the right to freedom of expression and the right not to be arbitrarily detained belong to that category.[75] This was confirmed in *Barcelona Traction, Light and Power Company, Limited*, in which the ICJ held that obligations *erga omnes* include "basic rights of the human person".[76]

130. More recently, the *erga omnes (partes)* nature of basic human rights and the subsequent standing for all states (parties) under international law was confirmed by the ICJ in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. As the Court stated,

[75] See T. Meron, 'On a Hierarchy of International Human Rights', 80 AJIL (1986), pp. 11-12; A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 56-58; S. Kadelbach, 'The Identification of Fundamental Norms', in C. Tomuschat & J.-M. Thouvenin, *The Fundamental Rules of the International Legal Order*, (2006), p. 30.
[76] *Barcelona Traction, Light and Power Company, Limited, Judgment*, p. 3, para. 34.

"[t]hese obligations may be defined as 'obligations erga omnes partes' in the sense that each State party has an interest in compliance with them in any given case".[77] As Judge Simma has observed, referring in particular to the prohibition on arbitrary detention, "[t]he obligations deriving from human rights treaties [...] are instances par excellence of obligations that are owed to a group of states including [the Applicant], and are established for the protection of a collective interest of the States parties to the Covenant".[78] The Netherlands, a party to the ICCPR, is therefore entitled to invoke the responsibility of the Russian Federation, also a party to the ICCPR, for breaches of the Covenant.

131. In the present case, the violations of the relevant rules of the law of the sea are reasonably related to violations of human rights under customary international law and the ICCPR, which are both binding on the Netherlands and the Russian Federation. The breach of the individual human rights as claimed in the present case was caused by the breach of the right to freedom of navigation and the right to exercise exclusive jurisdiction over the *Arctic Sunrise*. Since the claim concerning the breaches of the latter rights is admissible, the Netherlands also has standing to claim the former.

132. As stated above, the Netherlands invokes the responsibility of the Russian Federation for injury affecting the persons on board the *Arctic Sunrise*. The ITLOS Order applied to all 30 individuals on board the *Arctic Sunrise*, including four Russian nationals. In their individual opinions attached to the Order, Judges Jesus and Golitsyn expressed their disagreement with the order of release to apply also to the Russian nationals.[79] While the Netherlands has standing to invoke the responsibility of the Russian Federation for breaches of international law affecting all persons on board the *Arctic Sunrise* irrespective of their nationality, as was confirmed in the ITLOS Order, it emphasizes that for it to have standing to invoke the responsibility of the Russian Federation for the breach of obligations *erga omnes* the nationality of the injured individuals is irrelevant.[80] As Judge Simma observed,

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[77] *Questions relating to the Obligation to Prosecute or Extradite, Judgment*, p. 422, para. 68.
[78] *Armed Activities on the Territory of the Congo, Judgment*, p. 168, Separate Opinion Judge Simma, para. 35.
[79] ITLOS Order, Separate Opinion Judge Jesus, para. 20, and Dissenting Opinion Judge Golitsyn, para. 46.
[80] See also *Questions relating to the Obligation to Prosecute or Extradite, Judgment*, p. 422, para. 68.

"As to the question of standing against a claimant State for violations of human rights committed against persons who might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer".[81]

133. As opposed to invocation of responsibility based on direct or indirect injury, the admissibility of invocation of responsibility *erga omnes (partes)* is only subject to two criteria: whether the norm breached applies *erga omnes* and whether the State invoking responsibility *erga omnes (partes)* is part of the *omnes*. Criteria such as the establishment of injury, the exhaustion of local remedies and the nationality of claims are not applicable.

134. Both the Netherlands and the Russian Federation are parties to the ICCPR and bound by customary international law. Therefore, the rights and obligations *erga omnes (partes)* follow: the Netherlands is part of the relevant *omnes*, and the Russian Federation is obliged to comply with the relevant norms of international law.

135. Therefore, the Netherlands has standing to invoke the responsibility under international law of the Russian Federation for breaches of its obligations owed to the Netherlands *erga omnes partes* and *erga omnes*.

2.3 Conclusion

136. Under the established case law of the ITLOS, a State Party to the UNCLOS is not obliged under Article 283 UNCLOS to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted. The Netherlands has, on several occasions prior to instituting the present arbitral procedure, exchanged views with the Russian Federation with a view to settling the dispute. In view of the content of the diplomatic note of the Russian Federation of 1 October 2013, the Netherlands concluded that the possibilities to settle the dispute by negotiation or otherwise had been exhausted, entitling it to submit the dispute to the arbitral procedure under Annex VII to the Convention.

[81] *Armed Activities on the Territory of the Congo, Judgment*, p. 168, Separate Opinion Judge Simma, para. 35.

137. Based on the considerations presented above, the Netherlands has standing to invoke the international responsibility of the Russian Federation for its wrongful conduct injuring the Netherlands as a flag State, the *Arctic Sunrise* as a ship flying the flag of the Netherlands and all persons on board the *Arctic Sunrise*. The Netherlands has standing on the following grounds:

- The Netherlands is directly injured by the violations of its right to freedom of navigation, including the right to peaceful protest, and its exclusive jurisdiction over the *Arctic Sunrise*;
- The Netherlands is directly injured by the wrongful conduct of the Russian Federation leading to the unlawful boarding of the *Arctic Sunrise* and the subsequent arrest and detention of the ship and the persons on board;
- Alternatively, the Netherlands is indirectly injured by the injuries affecting its nationals, having complied with the nationality of claims rule and the local remedies rule;
- Additionally, the Netherlands has a legal interest in enforcing compliance with obligations *erga omnes (partes)*:
    - The freedom of navigation, including the right to peaceful protest; and
    - The basic human rights, including the freedom of protest at sea, the freedom of arbitrary arrest and detention, and the freedom to leave a country.

V. STATEMENT OF LEGAL GROUNDS

1. SUBJECT MATTER OF THE DISPUTE AND THE APPLICABLE LAW

1.1 Introduction

138. This Section will set out the Netherlands' position regarding the existence and subject matter of the dispute with which it wishes to seize the Tribunal and the sources of law to be applied by the Tribunal. There being a "cardinal distinction"[82] between jurisdiction and applicable law, these matters will be dealt with separately. It is submitted that a dispute exists between the Netherlands and the Russian Federation concerning the interpretation and application of the UNCLOS, and that the Tribunal has jurisdiction over all aspects of this dispute.

139. It is further submitted that in the present case, pursuant to Article 293 UNCLOS, alongside the Convention, other rules of international law not incompatible with the Convention form part of the applicable law, including international human rights law.

1.2 Existence of a Dispute concerning the Interpretation or Application of the UNCLOS and the Subject Matter of this Dispute

140. Article 288.1 UNCLOS determines the scope of the jurisdiction of the Tribunal:

> "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".

141. The jurisdiction of the Tribunal is subject to two conditions. The first is that a dispute exists between the parties. In *Mavrommatis Palestine Concessions*, the PCIJ defined a dispute as

[82] *The MOX Plant Case, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, Order of 24 June 2003*, para. 19.

"[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[83]

142. The second condition is that the subject matter of the dispute concerns the interpretation or application of the UNCLOS. It must be demonstrated that "the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point".[84]

1.2.1 Existence of a Dispute

143. It is submitted that a dispute between the Netherlands and the Russian Federation has arisen with respect to the interpretation and application of the Convention. The existence of this dispute, which is "a matter for objective determination",[85] is borne out by the diplomatic correspondence between the parties set out in the paragraph below.

144. Following the protest actions by *Arctic Sunrise* and the persons on board directed at the *Prirazlomnaya* on 18 September 2013, a dispute arose and its subject-matter rapidly crystallized. In diplomatic notes dated 18 September 2013 (Annex N-5), 23 September 2013 (Annex N-6), 24 September 2013 (Annex N-35), 26 September 2013 (Annex N-7), 27 September 2013 (Annex N-36), 29 September 2013 (Annex N-9), and 1 October 2013 (Annex N-10), the parties exchanged views in respect of the facts of the present case as well as the legal qualification of these facts, notably the protest actions by the *Arctic Sunrise* and the persons on board, and the corresponding law-enforcement actions of the Russian Federation.

145. The views of the Russian Federation were contested by the Netherlands. In its diplomatic note of 3 October 2013, the Netherlands stated that the provisions of the Convention invoked by the Russian Federation in its diplomatic note of 1 October 2013, did not "justify the actions taken against the *Arctic Sunrise* and its crew" and that the Russian Federation and the Netherlands appeared to hold "diverging views on the rights and obligations of the Russian Federation as a

[83] *Mavrommatis Palestine Concessions, Judgment*, p. 11.
[84] *Southern Bluefin Tuna Case, Award on Jurisdiction and Admissibility*, pp. 38-39, para. 48.
[85] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, p. 74.

coastal State in its exclusive economic zone" (Annex N-11). This diplomatic note confirms that a dispute existed concerning the interpretation and application of the Convention.

146. The diplomatic exchanges between the parties show that the claims of the Russian Federation in defense of its actions regarding the *Arctic Sunrise* and the persons on board, were and remain, "positively opposed"[86] by the Netherlands and that both parties "hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations"[87] under the Convention.

147. Furthermore, the express references to the UNCLOS and law of the sea principles by both the Netherlands and the Russian Federation in their exchanges confirm that the interpretation and application of the Convention lies at the heart of the present dispute. As the ICJ remarked in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*:

> "While it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter. An express specification would remove any doubt about one State's understanding of the subject-matter in issue and put the other on notice".[88]

148. Following the submission of the dispute to arbitration by the Netherlands on 4 October 2013, the Russian Federation has, in diplomatic notes dated 22 October 2013 (Annex N-7) and

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[86] *South West Africa, Preliminary Objections, Judgment*, p. 319, p. 328.
[87] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, p. 65, p. 74.
[88] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Preliminary Objections, Judgment*, p. 70, p. 85, para. 30.

27 February 2014 (Annex N-34), sustained the position that its actions in respect of the *Arctic Sunrise* and its crew were in accordance with the UNCLOS.

1.2.2 Subject Matter of the Dispute and the Jurisdiction of the Tribunal

149. Having established the existence of a dispute concerning the interpretation or application of the Convention, attention must be given to the subject matter of the dispute, and the jurisdiction of the Tribunal – as determined by the compromissory clause in Article 288 UNCLOS – over all aspects of the dispute. The next paragraphs will first set out the Netherlands' understanding of the legal framework regarding the jurisdiction *ratione materiae* of the Tribunal. Thereafter, the Netherlands will present to the Tribunal the subject of the dispute and the provisions invoked to sustain its claims.

150. With respect to the conferral of jurisdiction on the ICJ by way of a compromissory clause, it has been observed that

> "the parameters of the dispute and of the jurisdiction of the Court are determined by the treaty in which the clause is embodied or to which it is linked. The dispute must be one that comes within the terms of the compromissory clause as part of the treaty".[89]

151. Questions in relation to compromissory clauses have been addressed by the Permanent Court of International Justice (PCIJ) and the ICJ in several cases. In *Mavrommatis Palestine Concessions*,[90] the PCIJ had to consider whether a dispute fell under Article 26 of the Mandate for Palestine which provided for the submission to the Court of any dispute "relating to the interpretation or the application of the provisions of the Mandate".[91] In *Military and Paramilitary Activities in and Against Nicaragua*, the ICJ considered that, in order to establish the Court's jurisdiction over the dispute under the 1956 Treaty of Friendship, Commerce and Navigation between the United States of America and Nicaragua,

[89] Rosenne, *The Law and Practice of the International Court, 1920 – 2005* (vol. II, Jurisdiction, 2006), p. 646.
[90] *Mavrommatis Palestine Concessions*, *Judgment*.
[91] Ibid., p. 16.

"Nicaragua must establish a reasonable connection between the Treaty and the claims submitted to the Court".[92]

152. In *Oil Platforms*, the ICJ was not able to determine

"if and to what extent the destruction of the Iranian oil platforms had an effect upon the export trade in Iranian oil; it notes nonetheless that their destruction was capable of having such an effect and, consequently, of having an adverse effect upon the freedom of commerce as guaranteed by Article X, paragraph 1, of the Treaty of 1955. It follows that its lawfulness can be evaluated in relation to that paragraph".[93]

153. Questions relating to the application of the jurisdictional rules set out above have also been addressed in arbitrations under Annex VII to the Convention. In the first Annex VII arbitration, *Southern Bluefin Tuna Cases*, the arbitral tribunal considered that, when

"invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue".[94]

154. The arbitral tribunal thus used a similar test as the one developed by the ICJ in order to determine whether claims made arise under the UNCLOS. Applied to the case at hand, any claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the provisions of the UNCLOS.

155. The ITLOS also has dealt extensively with questions relating to the subject and existence of a dispute, and to its jurisdiction. In *The M/V "Louisa" Case*, it noted that the case before it had two aspects:

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[92] *Military and Paramilitary Activities in and Against Nicaragua, Preliminary Objections, Jurisdiction and Admissibility, Judgment*, p. 392.
[93] *Oil Platforms, Preliminary Objections, Judgment*, para. 51.
[94] *Southern Bluefin Tuna Case, Award on Jurisdiction and Admissibility*, para. 48, pp. 86-87.

"one involving the detention of the vessel and the persons connected therewith and the other concerning the treatment of these persons".

It recalled that:

> "To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provision of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines".[95]

156. As noted by the Tribunal in the Preamble of its Rules of Procedure, the present dispute concerns the "boarding and detention of the vessel *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and the detention of the persons on board the vessel by the Russian authorities". It will be demonstrated that certain violations of provisions of the UNCLOS have resulted in breaches of international human rights law. The claims in respect of these breaches reasonably relate to, or are capable of being evaluated in relation to, the legal standards of the UNCLOS. It will further be demonstrated that the provisions of the UNCLOS invoked by the Netherlands can sustain all aspects of its claims.

157. The boarding, investigating, inspecting, arresting and detaining the *Arctic Sunrise* by the Russian Federation in its exclusive economic zone, as well as subsequently seizing the vessel in Murmansk Oblast, without the prior consent of the Kingdom of the Netherlands, relate to the interpretation or application of several provisions of the Convention, laid down in particular in Parts V, VI, VII, and XVI, notably:

- Article 56.1 in conjunction with Articles 60 and 80: whether the law-enforcement actions of the Russian Federation against the *Arctic Sunrise* and the persons on board were exercised in accordance with the Convention;

[95] *The M/V "Louisa" Case, Judgment*, para. 9.

- Article 56.2: whether the Russian Federation, as a coastal State, paid due regard to the rights of the Netherlands;
- Article 60.5 in conjunction with Article 58.3: whether the safety zone of three nautical miles established by the Russian Federation around the *Prirazlomnaya* is in compliance with the Convention;
- Article 58.1 in conjunction with Article 87.1(a): whether the law-enforcement actions of the Russian Federation against the persons on board the *Arctic Sunrise* violated the obligations it owed to the Netherlands in respect of the freedom of navigation and the freedom of protest at sea as an internationally lawful use of the sea related to the freedom of navigation or, in the alternative, in respect of the freedom of protest at sea as an integral component of the freedom of navigation of the *Arctic Sunrise*;
- Article 92.1 in conjunction with Article 58.2: whether the law-enforcement actions of the Russian Federation violated the obligation it owed to the Netherlands in respect of the exclusive right to exercise jurisdiction over the *Arctic Sunrise* and the persons on board;
- Article 110 in conjunction with Article 58.2: whether the Russian Federation acted in compliance with the provisions related to the right of visit in respect of the *Arctic Sunrise* and the persons on board.

1.3 Sources of Law to be Applied by the Tribunal

158. Article 293.1 UNCLOS stipulates:

"A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".

159. Article 13.1 of the Tribunal's Rules of Procedure stipulates:

"Pursuant to Article 293 of the Convention, the Arbitral Tribunal shall apply the Convention and other rules of international law not incompatible with the Convention".

160. As noted by the ILC, "a limited jurisdiction does not, however, imply a limitation of the scope of the law applicable in the interpretation and application of those treaties".[96]

161. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ has underlined the importance of rules other than those contained in the treaty forming the subject matter of the dispute:

> "The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts".[97]

162. In international case law related to the Convention, Article 293.1 UNCLOS has been used to apply rules other than those found in the Convention in the exercise of the adjudicatory function.

163. In *The M/V "SAIGA" (No. 2) Case*, the ITLOS applied rules on the use of force in its assessment of the lawfulness of the arrest of a ship by the Respondent:

> "In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although 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

[96] See ILC, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', A/CN.4/L.682, 13 April 2006, para. 45.
[97] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Merits, Judgment*, para. 149.

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".[98]

164. The passage in *The M/V "SAIGA" (No. 2) Case* was recently cited by the ITLOS in *The M/V "Virginia G" Case* in connection with its examination of the use of force by Guinea-Bissau.[99] Furthermore, in *Guyana v. Suriname*, the arbitral tribunal constituted under Annex VII of the UNCLOS rejected the contention that it had "no jurisdiction to adjudicate alleged violations of the United Nations Charter and general international law".[100]

165. Speaking at the United Nations, President Jesus of the ITLOS expressed the following views as regards Article 293 UNCLOS:

> "This reference to "other rules of international law" should be understood to include rules of customary international law, general principles that are common to the major legal systems of the world transposed into the international legal system, and rules of a conventional nature";[101]

And:

> "[T]he Tribunal's application of the "other rules of international law" referred to in article 293 of the Convention shows that the law of the sea is part and parcel of the international law system".[102]

166. On a number of occasions, international courts and tribunals have shown concern for human rights law in cases related to the law of the sea. In *Corfu Channel*, the ICJ referred to the "elementary considerations of humanity" as one of the bases for the obligations incumbent upon

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[98] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 155.
[99] *The M/V "Virginia G" Case, Judgment*, para. 359.
[100] *Guyana* v. *Suriname, Award*, para. 406.
[101] Statement by Judge José Luis Jesus, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 25 October 2010, pp. 7-8, http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/legal_advisors_251010_eng.pdf.
[102] Ibid., p. 9.

the Respondent.[103] The ITLOS, having sought inspiration in the abovementioned passage, held in *The M/V "SAIGA" (No. 2) Case* that "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law".[104] In *The M/V "Louisa" Case*, the ITLOS, although lacking jurisdiction, could not but "take note of the issues of human rights".[105] The Tribunal reaffirmed earlier jurisprudence on due process of law with specific reference to human rights law. It stated that

> "States are required to fulfill their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances (see *"Juno Trader" (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at pp. 38-39, para. 77; *"Tomimaru" (Japan* v. *Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007*, p. 74, at p. 96, para. 76)".[106]

167. Former Judge Treves of the ITLOS observed that:

> "The Law of the Sea and the law of human rights are not separate planets rotating in different orbits. Instead, they meet in many situations. Rules of the Law of the Sea are sometimes inspired by human rights considerations and may or must be interpreted in light of such considerations".[107]

168. In the present case, the breaches of the UNCLOS are reasonably related to breaches of international human rights law. The law-enforcement actions of the Russian Federation affected the human rights enjoyed by the persons on board the *Arctic Sunrise*. These human rights impacts resulted from law-enforcement actions carried out at sea. The review of the lawfulness of these law-enforcement actions under the UNCLOS should not be disassociated from their review under international human rights law.

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[103] *Corfu Channel, Merits, Judgment*, p. 22.
[104] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, para. 155.
[105] *The M/V "Louisa" Case (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Judgment of 28 May 2013, para. 154.
[106] Ibid., para. 155.
[107] T. Treves, "Human Rights and the Law of the Sea", 28 *Berkeley J.I.L.* (2010) 1, p. 12.

169. The international human rights law relevant to the present case can be found in instruments ratified by both parties, namely the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1950 European Convention on Human Rights (ECHR), as well as in customary international law.

170. It is noted that the Netherlands does not request the Tribunal to interpret or apply the ECHR. Pursuant to Article 55 ECHR, States Parties are precluded from submitting a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than those provided for in the ECHR. However, this does not preclude States Parties to refer to the ECHR and the case law of the European Court of Human Rights (ECtHR) for the purpose of legal analysis.

171. Article 2.1 ICCPR provides that:

> "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".

172. This provision has been interpreted by the Human Rights Committee in a general comment. As stated by the ICJ, interpretations of the Covenant by the Human Rights Committee should be ascribed "great weight" as they are crafted by an "independent body that was established specifically to supervise the application of that treaty".[108] In its General Comment No. 31, the Human Rights Committee held that:

> "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party,

[108] *Ahmadou Sadio Diallo, Merits, Judgment*, p. 664, para. 66.

even if not situated within the territory of the State Party".[109]

173. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ has affirmed that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[110]

174. The ECtHR has stipulated that every State Party to the ECHR is under an obligation to secure to an individual the rights and freedoms of the Convention, when it "through its agents exercises control and authority over [that] individual, and thus jurisdiction".[111] Several cases involving law-enforcement actions by other States than the flag State have appeared before the ECtHR in which the applicability of the ECHR was not disputed by the respondent State.[112] In *Medvedyev*, the Court found that Article 1 ECHR applied to France on account of the "full and exclusive control" it exercised over the vessel and its crew "at least *de facto*".[113]

175. The Russian Federation, through its law-enforcement actions, exercised a level of control over the *Arctic Sunrise* and the persons on board that required it to respect and ensure the rights laid down in the ICCPR. Therefore, pursuant to Article 293 UNCLOS and Article 13 of the Tribunal's Rules of Procedure, the Tribunal is required to apply international human rights law, in particular the ICCPR, to review the lawfulness of these law-enforcement actions under the UNCLOS.

176. In the alternative, should the Tribunal decide that international human rights law, or parts thereof, do not form part of the applicable law in the present case, the Netherlands requests the Tribunal to interpret the relevant provisions of the UNCLOS in light of international human rights law, in conformity with Article 31.3(c) of the 1969 Vienna Convention on the Law of Treaties. The latter provides that for the purpose of the interpretation of a treaty, there shall be taken into account, together with the context, "[a]ny relevant rules of international law applicable

[109] HRC, General Comment No. 31, para. 10.
[110] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, p. 180, para. 111.
[111] *Al-Skeini and Others, Grand Chamber, Judgment*, para. 137.
[112] *Medvedyev and Others, Grand Chamber, Judgments*; *Xhavara and Others, Decision*; ECtHR, *Rigopoulos, Decision*.
[113] *Medvedyev and Others, Grand Chamber, Judgment*, para. 67.

in the relations between the parties".

177. In sum, the Netherlands requests the Tribunal to:

- Apply the Convention and any other rules of international law not incompatible with the Convention that the Tribunal deems of relevance for resolving the present dispute, in particular the ICCPR, the 1969 Vienna Convention on the Law of Treaties, and customary international law, notably the law of the sea, international human rights law, the law of treaties and the law of State responsibility;
- Interpret all applicable treaty law in accordance with the rules on treaty interpretation as reflected in the 1969 Vienna Convention on the Law of Treaties;
- Interpret the UNCLOS in light of other rules of international law not incompatible with the Convention that the Tribunal deems of relevance for resolving the present dispute.

2. FIVE INTERNATIONALLY WRONGFUL ACTS OF THE RUSSIAN FEDERATION

2.1 Introduction

178. The law of State responsibility, as reflected in the ARSIWA, provides that the international responsibility of a State is incurred when a wrongful act is attributable to that State and contrary to an international obligation binding upon that State. The general rule is found in Article 1 which provides:

> "Every internationally wrongful act of a State entails the international responsibility of that State".

179. Article 2 subsequently specifies the conditions for the establishment of an internationally wrongful act of a State:

"There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State".

180. As the commentaries by the ILC confirm, these provisions are part of customary international law and have been applied generally by courts and tribunals for the determination of international responsibility.[114] The establishment of the responsibility of a State for an internationally wrongful act gives rise to a new legal relation between the State invoking the responsibility, in this case the Netherlands, and the wrongful State, in this case the Russian Federation.[115] This new legal relation entails, amongst others, the obligation of cessation of wrongful conduct, the duty to make reparation and, if circumstances so require, the offer of assurances and guarantees of non-repetition.[116]

181. In this Section, it will be demonstrated that the Russian Federation is responsible for the following five internationally wrongful acts related to the boarding and detention of the *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and the detention of the persons on board the ship without the prior consent of the Kingdom of the Netherlands. The internationally wrongful acts of the Russian Federation involve:

- Extending the breadth of safety zones around installations in its exclusive economic zone beyond the extent allowed under the UNCLOS;
- Bringing serious criminal charges against the persons on board the *Arctic Sunrise* (piracy and hooliganism) and keeping them in pre-trial detention for an extended period with a chilling effect on the freedom of protest at sea;
- Boarding and detention of the *Arctic Sunrise* in the exclusive economic zone of the Russian Federation and the detention of the persons on board the ship without the prior consent of the Kingdom of the Netherlands;

[114] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 2, p. 32-36.
[115] Ibid., p. 33.
[116] Ibid., pp. 33, 88 and 91.

- Not timely and fully implementing the ITLOS Order;
- Not making the required payments to contribute to the Tribunal's expenses.

2.2 National Legislation of the Russian Federation Relating to the *Prirazlomnaya*

2.2.1 Breach of International Obligations Related to Installations in the Exclusive Economic Zone

182. On a single occasion, the *Arctic Sunrise* entered a zone of a breadth of three nautical miles around the *Prirazlomnaya*.[117] This zone, called an "area dangerous to navigation", was published by the Russian Federation in its Notices to Mariners No. 51/2011, which added the following caution note:

> "Vessels should not enter a safety zone of the marine ice-stable platform without permission of an operator of the platform".[118]

183. The *Ladoga* explained this particular provision contained in this Notice by means of a radio communication, entered in its log, to the *Arctic Sunrise* when that vessel changed its course on 17 September 2013 away from the Kara Strait to head for the *Prirazlomnaya*. The content of this exchange was incorporated in the administrative court's judgment imposing an administrative fine on the master of the vessel. According to this judgment the communication stated

> "that it was not permitted to enter the area, where there was a danger to shipping within a radius of 3 miles and where there was a ban on shipping movements within a zone of 500 metres from the *MLSP Pri[r]azlomnaya*".[119]

184. Following an earlier protest action by the *Arctic Sunrise* in 2012, including the entry into this zone by boats departing from the ship, the Ministry of Transport of the Russian Federation

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[117] Greenpeace Factual Account, para. 22.
[118] Notices to Mariners No. 51/2011 (English version), Annex N-37.
[119] Federal Security Service of the Russian Federation, Coast Guard Division for Murmansk Oblast, Judgment in the Case Concerning Administrative Offence No. 2109/623-13, 8 October 2013, Annex N-16.

sent a letter to the Netherlands protesting the violation of the three nautical miles zone.[120] The letter stated that this zone of three nautical miles was established in accordance with Article 60.4 UNCLOS and Resolution A.671(16) of the International Maritime Organization.[121]

185. Given that permission to enter the three nautical miles zone was not obtained before the protest action by the *Arctic Sunrise* on 18 September 2013, the legal implications of the brief entry of the ship into this zone merits further examination.

186. The Kingdom of the Netherlands wishes to recall the scope of its duty to "comply with the laws and regulations" of the Russian Federation in its exclusive economic zone under Article 58.3 UNCLOS. The extent of this obligation is limited by the proviso that a State must only comply with the coastal State's laws and regulations:

> "in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part [concerning the exclusive economic zone]".

187. Article 58.3 UNCLOS reflects a more general rule, stressed by the Kingdom of the Netherlands in its declaration issued upon ratification of the Convention on 28 June 1996:

> "VIII. National legislation
> As a general rule of international law, as stated in articles 27 and 46 of the Vienna Convention on the Law of Treaties, States may not rely on national legislation as a justification for a failure to implement the Convention".

188. International courts and tribunals have accepted their jurisdiction to examine a State's municipal law with a view to assessing that State's compliance with international law. The PCIJ in *Certain German Interests in Polish Upper Silesia* observed:

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[120] Letter of the Ministry of Transport of the Russian Federation, 3 December 2012, Annex N-38.
[121] Reference is made to IMO, 'Safety Zones and Safety of Navigation Around Offshore Installations and Structures', Res. A.671(16), 19 October 1989.

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention".[122]

This precedent has been cited by the ITLOS in support of its decision to examine the conformity of municipal law with provisions of the UNCLOS.[123]

189. Any action taken by the Russian Federation to uphold a zone of three nautical miles in which the freedom of navigation is prohibited encroaches on the rights and freedoms that the Kingdom of the Netherlands enjoys under Part V of the UNCLOS with respect to the *Arctic Sunrise* in the exclusive economic zone of the Russian Federation.

190. The zone of three nautical miles cannot be qualified as a valid safety zone. Article 60.5 UNCLOS stipulates that:

> "The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones".

[122] *Certain German Interests in Polish Upper Silesia, Merits, Judgment*, p. 19.
[123] *The M/V "SAIGA" (No. 2) Case, Judgment*, paras. 120-121; *The M/V "Virginia G", Judgment*, para. 226.

191. The maximum permissible breadth of the safety zone around the *Prirazlomnaya* under contemporary international law is 500 meters. There are no generally accepted international standards that the Russian Federation could rely on to expand its radius.

192. The competent international organization mentioned in the abovementioned provision is the International Maritime Organization (IMO). The United Nations Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs, acting as the secretariat responsible for the UNCLOS under the United Nations General Assembly resolution A/RES/49/28,[124] prepared an indicative table of "competent or relevant international organizations" under the UNCLOS, in which solely the IMO is mentioned as the competent international organizations in reference to article 60.5.[125] In one of its studies, the Secretariat of the IMO describes Article 60 as a provision which "clearly establish[es] an obligation on UNCLOS States Parties to apply IMO rules and standards"[126] and further notes that "any safety zone established in accordance with article 60(5) of UNCLOS which exceeds 500 meters must be submitted to IMO for adoption".[127]

193. To date, the IMO has refrained from enlarging safety zones. In 2007, Brazil requested the Sub-Committee on Safety of Navigation to:

> "extend the breadth of the Safety Zone to: 1 (one) nautical mile around fixed oil rigs and offshore terminals e [*sic.*] 2 (two) nautical miles around FPSOs [Floating Production, Storage and Off-Loading Units] and PD [*sic.* Dynamic Positioning] oil rigs, in order to reduce the risk of a maritime casualty and resulting marine pollution in the area, due to damage of oil rigs".[128]

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[124] UN DOALOS '"Competent or relevant international organizations" under the United Nations Convention on the Law of the Sea', 31 *Law of the Sea Bulletin* (1996), p. 79.
[125] Ibid., p. 82.
[126] IMO, 'Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization', IMO Doc. LEG/MISC.6, 10 September 2008, pp. 9-10.
[127] Ibid., p. 32.
[128] IMO, 'Proposal for the establishment of an Area to be Avoided and modifications to the breadth of the Safety Zones around Oil Rigs located off the Brazilian Coast – Campos Basin', IMO Doc. NAV 53/3, 26 February 2007, para. 30.2.

194. After noting that "the majority of the [Working G]roup was concerned and did not agree to the extension of the safety zones, taking into consideration that there were not any established procedures and guidelines in order to determine the proposed extension",[129] the Sub-Committee observed that:

> "the delegation of Brazil – in view of the decision of the Working Group not to agree to the safety zones as proposed by Brazil – concurred with maintaining the breadth of the safety zones as provided by UNCLOS".[130]

195. In the wake of the Brazilian proposal, a correspondence group was established under the coordination of the United Kingdom to, *inter alia*, "develop relevant guidelines for recommending Safety Zones larger than 500 metres around artificial islands, installations and structures in the Exclusive Economic Zone (EEZ)".[131] However, the activities of the group were discontinued. The Sub-Committee noted:

> "that there was no demonstrated need, at present, to establish safety zones larger than 500 metres around artificial islands, installations and structures in the exclusive economic zone or to develop guidelines to do so and that the continuation of the work beyond 2010 for a Correspondence Group on Safety Zones was, at present, no longer necessary".[132]

196. In 2010, the IMO adopted Guidelines for Safety Zones and Safety of Navigation Around Offshore Installations and Structures. It contains recommendations for both the Governments of the offshore installations and structures as well as flag States. The conformity of safety zones with international law clearly comes to the fore in these Guidelines. Thus, the flag States are requested to

[129] IMO, 'Report to the Maritime Safety Committee', IMO Doc. NAV 53/22, 14 August 2007, para. 3.50.
[130] Ibid., para. 3.51.
[131] IMO, 'Report to the Maritime Safety Committee', IMO Doc. NAV 55/21, 1 September 2009, para. 5.6.1.
[132] IMO, 'Report to the Maritime Safety Committee', IMO Doc. NAV 56/20, 31 August 2010, para. 4.15.

> "take all necessary steps to ensure that, unless specifically authorized, ships flying their flag observe any coastal State's conditions for entry into and/or navigation within duly established safety zones".[133]

In the paragraph addressed to the Governments of the offshore installations and structures, reference is made to "safety zones established in accordance with international law".[134]

197. Consequently, the adoption of a three nautical miles zone, in which navigation without prior authorization of the Russian Federation is prohibited, is not compatible with the UNCLOS. Should the Russian Federation assert that the law-enforcement actions against the *Arctic Sunrise* and the persons on board were taken in pursuance of the prohibition on navigation lacking permission, the Russian Federation violated the freedom of navigation and exclusive flag State jurisdiction of the Netherlands in respect of the *Arctic Sunrise*. It can finally be noted that the Russian Federation has recently changed the caution note related to the "area dangerous to navigation" of three nautical miles around the *Prirazlomnaya*. Accordingly, "[v]essels are not recommended to enter a safety zone of the offshore ice-resistant platform (OIRP) [...] without the platform operator permission".[135]

2.2.2 Attribution of Conduct to the Russian Federation

198. The conduct of organs of a State is always attributable to that State. This rule is codified in Article 4 ARSIWA, which provides that

> "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State".

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[133] IMO, 'Guidelines for Safety Zones and Safety of Navigation Around Offshore Installations and Structures', IMO Doc. SN.1/Circ.295, Annex, 7 December 2010, para. 4.2.1.
[134] Ibid., para. 4.1.3.
[135] Notices to Mariners No. 21/2014 (English version), Annex N-39.

199. For the purpose of international responsibility, 'organs of a State' explicitly include legislative organs, which has been firmly established in international decisions. For instance, in *Certain German interests in Polish Upper Silesia*, the PCIJ determined that "municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[136] For this reason, the application vis-à-vis the Netherlands, including ships flying its flag, of Russian national legislation related to installations in its exclusive economic zone is attributable to the Russian Federation.

2.2.3 Absence of Circumstances Precluding Wrongfulness

200. The Russian Federation has not invoked any circumstances to preclude the wrongfulness of its conduct at issue before the Tribunal. The Netherlands, as the applicant in the present arbitral procedure, does not bear the burden of proof with respect to the existence of circumstances that could preclude the wrongfulness of the conduct of the Russian Federation.[137] Nevertheless, due to the non-appearance of the Russian Federation, the Netherlands has included its position on the application of any circumstances precluding wrongfulness for consideration by the Tribunal.

201. The international responsibility of a State may be precluded when it is able to invoke the circumstances precluding wrongfulness. The ARSIWA identify seven different circumstances precluding wrongfulness: consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24), necessity (Article 25) and compliance with peremptory norms (Article 26).

202. Due to the exceptional nature of circumstances precluding wrongfulness, they can only be resorted to when certain conditions are fulfilled.

203. Since the application of the zone of three nautical miles around the *Prirazlomnaya* vis-à-vis the *Arctic Sunrise* was not a response to wrongful conduct of the Netherlands, nor a response

[136] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7*, p. 19.
[137] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Chapter V, p. 72.

to an emergency situation, it cannot be qualified as an exercise of self-defence, a countermeasure, compliance with a peremptory norm, or a situation of *force majeure*, distress or necessity.

204. The Netherlands has also not consented to the application of the legislation. It has not issued explicit consent to the zone of three nautical miles. In addition, its consent cannot be implied from the absence of a formal objection to the enactment of the relevant Russian legislation when it was adopted. Consent in the form of acquiescence is only established when a State "fail[s] to assert claims in circumstances that would have required action".[138] In the present case, the Netherlands was not required to object to the national Russian legislation. As is well established under international law, States cannot invoke provisions of national law to avoid compliance with international law.[139] In addition, States are not required to investigate, on their own accord, the compatibility of enactments of national legislation by other States with international law and a failure to do so does not lead to acquiescence in the lawfulness of such legislation under international law.[140]

205. In sum, none of the circumstances precluding wrongfulness recognized in the law of State responsibility identified in this Section have been invoked by the Russian Federation to justify its conduct. Nor could any such circumstance preclude the wrongfulness of the application by the Russian Federation of national legislation vis-à-vis the Netherlands, including ships flying its flag, extending the breadth of safety zones around installations in its exclusive economic zone beyond the extent allowed under the UNCLOS.

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[138] C. Tams, 'Waiver, Acquiescence and Extinctive Prescription' in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility*, (2010), 1035-1050, 1044 (emphasis in original).
[139] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Article 3 and Commentary to Article 3, pp. 36-37; see also Article 27, 1969 Vienna Convention on the Law of Treaties.
[140] See M. Kohen and S. Heathcote, 'Article 45, Convention of 1969' in O. Corten and P. Klein *The Vienna Convention on the Law of Treaties, a Commentary*, (2011), pp. 1081-1086, and M. Bothe, 'Article 46, Convention of 1969' in ibid., pp. 1090-1099.

2.3 Conduct of the Russian Federation with respect to the Exercise of the Freedom of Protest at Sea

2.3.1 Breach of International Obligations with respect to the Freedom of Protest at Sea

2.3.1.1 Introduction

206. The protest action by the persons on board the *Arctic Sunrise* directed at the *Prirazlomnaya* was ended by the authorities of the Russian Federation on 18 September 2013. As stated by the Kingdom of the Netherlands on several occasions,[141] and as will be demonstrated below, the actions conducted by the *Arctic Sunrise* and the persons on board constituted an exercise of the right to peaceful protest. The Netherlands attaches great importance to the right to peaceful protest, including at sea. This may be illustrated, for example, by the annual 'Joint Statement on Whaling and Safety at Sea' in which the Governments of Australia, New Zealand, the United States and the Netherlands emphasize that they

> "respect the rights of individuals and groups to protest peacefully, including on the high seas".[142]

207. Everyone has the right to freedom of expression and freedom of assembly, which includes the right to protest peacefully. This right also applies at sea and persons on board ships have this right. The freedom of protest at sea constitutes one of the freedoms of the high seas as well as an internationally lawful use of the sea related to the freedom of navigation.[143] Hence, questions in relation to the exercise by the persons on board the *Arctic Sunrise* of the freedom of protest at sea involve the interpretation and application of the UNCLOS.

208. The following sections will set out the scope and content of the right to peaceful protest in international law and the interaction of this right with the law of the sea. In applying the law to

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[141] For example, see Diplomatic Note Netherlands – Russian Federation of 24 September 2013, Annex N-35; Netherlands' Answers to Questions Judges ITLOS, Annex N-25.

[142] 2013 *Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States: Call for Responsible Behavior in the Southern Ocean Whale Sanctuary*, available at: http://www.rijksoverheid.nl/documenten-en-publicaties/vergaderstukken/2013/12/20/joint-statement-on-whaling-and-safety-at-sea-2013.html.

[143] Article 87 UNCLOS in conjunction 58 UNCLOS.

the facts of the present case, it will be demonstrated that the law-enforcement actions of the Russian Federation against the persons on board the *Arctic Sunrise* violated its obligations owed to the Netherlands in respect of the freedom of protest at sea as an internationally lawful use of the sea related to the freedom of navigation.

209. In the alternative, it will be demonstrated that the law-enforcement actions of the Russian Federation against the persons on board the *Arctic Sunrise* violated its obligations owed to the Netherlands in respect of the right to peaceful protest as an integral component of the freedom of navigation of the *Arctic Sunrise* and the persons on board.

2.3.1.2 The Right to Peaceful Protest in International Law

210. The right to peaceful protest is inherent to the freedom of expression and the freedom of assembly.[144] These freedoms are recognized in several international human rights instruments.[145] The relevant provisions in these instruments consist of two elements: a first part which sets forth the right to freedom of expression and freedom of assembly; and a second part which establishes that the exercise of these freedoms may be subject to certain limitations.

211. It is well established that the freedom of expression and the freedom of assembly cover peaceful protest actions (right to peaceful protest). The Human Rights Committee held in relation to Article 19.2 ICCPR (Freedom of expression) that this Article

> "must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant,

[144] N. Rodley, 'Civil and Political Rights', in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook* (2009), p. 110; R. Goodrick, 'The Right of Peaceful Protest in International Law and Australian Obligations under the International Covenant on Civil and Political Rights', *The Right of Peaceful Protest Seminar*, Human Rights Commission, Occasional Paper 14, Canberra, 3-4 July 1986, AGPS, Canberra 1986, p. 230.
[145] Articles 19 and 20 Universal Declaration of Human Rights; Articles 19(2) and 21 of the 1966 International Covenant on Civil and Political Rights; Articles 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms; Articles IV, XXI, and XXIV of the 1948 American Declaration of the Rights and Duties of Man; Articles 13 and 15 of the 1969 American Convention on Human Rights; Articles 9(2) and 11 of the 1981 African Charter on Human and Peoples' Rights; and Articles 11(1) and 12(1) of the 2000 Charter of Fundamental Rights of the European Union.

of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression".[146]

212. In *Oberschlick*, the ECtHR held that Article 10 ECHR (Freedom of expression)

"protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed".[147]

213. In *Steel and Others*, the ECtHR explicitly held that the freedom of expression covers protest actions, even those 'physically impeding the activities' which are the subject of the protest.[148]

214. In respect of the freedom of assembly, the ECtHR has held that this freedom "covers both private meetings and meetings in public thoroughfares as well as static meetings and public processions; in addition, it can be exercised by individuals and those organising the assembly".[149] In the context of certain public protest actions, freedom of expression is to be regarded as a *lex generalis* in relation to freedom of assembly, a *lex specialis*.[150]

215. The importance of the freedom of expression and the freedom of assembly is well established in international case law. Competent international bodies have emphasized in various cases the fundamental importance of these freedoms. The Human Rights Committee has stated that

"freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the

[146] Human Rights Committee, *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), para. 11.3.
[147] *Oberschlick v. Austria, Judgment*.
[148] See e.g. *Steel and* Others, *Judgment*, para 92.
[149] *Djavit An, Judgment*, para. 56.
[150] *Ezelin v. France, Judgment*, para. 35.

foundation stone for every free and democratic society".[151]

216. The Inter-American Court of Human Rights has held that

> "freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion".[152]

217. The African Commission on Human and Peoples' Rights has stated with respect to Article 9 of the African Charter on Human and Peoples' Rights (Freedom of expression) that

> "this Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country".[153]

218. The ECtHR held in *Handyside* that

> "freedom of expression constitutes one of the essential foundations of [a 'democratic society'], one of the basic conditions for its progress and for the development of every man".[154]

219. With respect to the freedom of assembly, the ECtHR, in *Kudrevičius*, reiterated its standing case law as follows:

> "The Court observes at the outset that 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".[155]

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[151] HRC, General Comment No. 34, para. 1.
[152] *Compulsary Membership in an Assaciatian Prescribed by Law for the Practice of Joarnalism, Advisory Opinion*, para. 70.
[153] *Media Rights Agenda and Others, Decision*, para. 54.
[154] *Handyside, Judgment*, para. 49; *Women on Waves and Others, Judgment*, para. 29.
[155] *Kudrevičius and Others v. Lithuania, Judgment*, para. 80.

220. Notwithstanding the fundamental importance of the freedom of expression and the freedom of assembly, these freedoms are not absolute. They may be restricted when this is necessary to protect other interests. Paragraph 3 of article 19 ICCPR provides that:

> "The exercise of the rights provided for in paragraph 2 of this article [Freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals".

221. As established in the relevant instruments and affirmed and crystallized in international case law, any restrictions on the freedoms of expression and assembly must meet three conditions:

(a) The restriction must be prescribed by law;
(b) The restriction must serve a legitimate aim, such as the protection of the public order or the rights of others; and
(c) The restriction must be necessary and proportionate for the achievement of that aim.

222. With respect to these conditions, the HRC noted in the context of Article 19 ICCPR that

> "it is for the State party to demonstrate the legal basis for any restrictions imposed on freedom of expression. If, with regard to a particular State party, the Committee has to consider whether a particular restriction is imposed by law, the State party should provide details of the law and of actions that fall within the scope of the law".[156]

It further held that

> "restrictions must not be overbroad. The Committee observed in general comment No. 27 that 'restrictive measures must conform to the principle of proportionality; they must be

[156] HRC, General Comment No. 34, para. 27.

appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected";[157]

And that

> "when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".[158]

223. States are afforded a margin of appreciation in this respect.[159] However, this margin is not unrestricted and subject to judicial review. The HRC "reserves to itself an assessment of whether, in a given situation, there may have been circumstances which made a restriction of freedom of expression necessary".[160] The ECtHR held likewise that it is "empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10 [ECHR]".[161] As explained by the ECtHR:

> "The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court".[162]

224. Given the fundamental nature of the freedoms of expression and assembly, the right to peaceful protest should not be interpreted restrictively.[163] However, as noted by the ECtHR, "whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope

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[157] Ibid., para. 34.
[158] Ibid., para. 35.
[159] *Handyside, Judgment*, para. 48.
[160] HRC, General Comment No. 34, para. 36.
[161] *Handyside, Judgment*, para. 48.
[162] Ibid., para. 49.
[163] *Kudrevičius and Others, Judgment*, para. 80.

of which depends on his situation and the technical means he uses".[164] Furthermore, the right to peaceful protest is subject to restrictions. Restrictions include measures taken before, during, or after a protest action.[165] Any such restrictions must strike a balance between the different interests involved.[166] In the context of a peaceful protest, regard must be had to "the dangers inherent in the [protestor's] particular form of protest activity and the risk of disorder arising from the persistent obstruction by the protestors [...] of a lawful pastime".[167] Notwithstanding a margin of appreciation, a State must refrain from applying unreasonable restrictions upon this right.[168]

2.3.1.3 The Right to Peaceful Protest and the Law of the Sea

225. It is broadly recognized today that the right to peaceful protest also applies at sea.[169] The Maritime Safety Committee of the IMO addressed this in a resolution of 2010 by:

> "Affirming the rights and obligations relating to legitimate and peaceful forms of demonstration, protest, or confrontation and noting that there are international instruments that may be relevant to these rights and obligations".[170]

226. In Resolution 2011-2 on "Safety at Sea", the International Whaling Commission (IWC) stated that

> "the Commission and Contracting Governments support the right to legitimate and peaceful forms of protest and demonstration".[171]

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[164] *Handyside, Judgment*, para. 49.
[165] *Ezelin v. France, Judgment*, para. 39.
[166] *Kudrevičius and Others, Judgment*, para. 81.
[167] *Steel and Others, Judgment*, para. 103 - 106.
[168] *Ezelin v. France, Judgment*, para. 57
[169] See e.g. the Annual *Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States: Call for Responsible Behavior in the Southern Ocean Whale Sanctuary* of 2013, 2012, 2011 and 2010.
[170] IMO, 'Assuring Safety during Demonstrations, Protests or Confrontations on the High Seas', Res. MSC.303(87), 17 May 2010.
[171] International Whaling Commission, 'Safety at Sea', Res. 2011-2.

227. When exercised at sea, this right interacts with the rules of the law of the sea. The right to peaceful protest at sea is consistent with the law of the sea. It will be demonstrated that the right to peaceful protest constitutes a freedom of the high seas (freedom of protest at sea). It will further be demonstrated that the right to peaceful protest is an internationally lawful use of the sea related to the freedom of navigation and overflight.

228. As codified in Article 87 UNCLOS, the "high seas are open to all States, whether coastal or land-locked". The article further lists a number of freedoms of the high seas. The provision does not exclude other freedoms than those specified. As noted in a commentary on the Convention (Virginia Commentary):

> "The words '*inter alia*' in paragraph 1 indicate that the list of specific freedoms in paragraphs 1(a) to 1(f) is not exhaustive, and that the freedom of the high seas may entail more than the enumerated activities".[172]

In this respect:

> "The reference in paragraph 2 to 'these freedoms' includes the six freedoms specifically listed in paragraph 1, as well as other freedoms coming within the '*inter alia*' category. In the 1958 Convention on the High Seas, article 2 referred to '[t]hese freedoms, and others which are recognized by the general principles of international law.' The language of article 87, paragraph 2, therefore must be considered as referring to freedom of the high seas in a general sense, encompassing all recognized freedoms at any given time".[173]

229. The main condition for activities on the high seas is laid down in article 88 UNCLOS: "The high seas shall be reserved for peaceful purposes". It has been observed that "any use compatible with the status of the high seas – that is, a use which involves no claim to appropriation of parts of the high seas – should be admitted as a freedom unless it is excluded by

[172] M. Nordquist, S. Nandan & S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary* (vol. III, 1985-2011), para. 87.9 (i), p. 84.
[173] Ibid., para. 87.9 (j), p. 85.

some specific rule of law".[174] It has also been observed that "States are free to use the sea as they deem fit".[175]

230. There are several possible examples of activities that are not listed in Article 87 UNCLOS, but that may be compatible with the requirements set out above. Reference has been made, for instance, to "activities in outer space conducted from the high seas, such as the launching of satellites".[176] Also "uses of the high seas for military purposes – such as training and other military exercises – though restricted in other maritime zones, [come] within the scope of the freedom of the high seas".[177] Other activities may, today or in the future, be carried out on the high seas as well, including the creation of human dwellings at sea, the so-called 'seasteading',[178] or the expression at sea of certain forms of art, such as the 'Friendly Floatees'.[179]

231. Article 87.1 UNCLOS stipulates that the freedom of the high seas is to be exercised subject to the provisions laid down by the Convention and by other rules of international law. Paragraph 2 of this Article further requires all States to exercise the freedom of the high seas with "due regard for the interests of other States in their exercise of the freedom of the high seas". The Virginia Commentary further explains that

> "the requirement of 'due regard' is a qualification of the rights of States in exercising the freedoms of the high seas. The standard of 'due regard' requires all States, in exercising their high seas freedoms, to be aware of and consider the interests of other States in using the high seas, and to refrain from activities that interfere with the exercise by other States of the freedom of the high seas".[180]

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[174] R. Churchill & V. Lowe, The Law of the Sea (3rd ed, 1999), pp. 205-206.
[175] T. Treves, 'Navigation', in R.-J. Dupuy & D. Vignes (eds), *A Handbook on the New Law of the Sea* (Vol. 2. 1991), p. 836.
[176] M. Nordquist, S. Nandan & S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary* (vol. III, 1985-2011), p. 84.
[177] Ibid., p. 85.
[178] See: http://en.wikipedia.org/wiki/Seasteading.
[179] See: http://en.wikipedia.org/wiki/Friendly_Floatees.
[180] M. Nordquist, S. Nandan & S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary* (vol. III, 1985-2011), para. 87.9 (l), p. 86.

232. It has been remarked that "the requirement of 'due regard' seems to require that where there is a potential conflict between two uses of the high seas, there should be a case-by-case weighing of the actual interests involved in the circumstances in question, in order to determine which use is the more reasonable in that particular case".[181]

233. Irrespective of the location, the right to peaceful protest should always be exercised with due regard for the rights of others. Indeed, at sea as well as on land, the lawfulness of any protest action is to be assessed by balancing the different interests involved. On the high seas, an activity must also be compatible with the 'peaceful purposes' criterion.

234. The right to peaceful protest at sea also exists in the exclusive economic zone of coastal States. However, one of the major challenges for the Third United Nations Conference on the Law of the Sea was to balance the conflicting interests between the rights, obligations, freedoms and jurisdiction of coastal States and other States in the exclusive economic zone. This resulted in a formula reflected in Articles 55, 56, 58, 86, 87 and 89 UNCLOS.[182] Pursuant to Article 58.1 UNCLOS, all States enjoy in the exclusive economic zone,

> "subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of the Convention".

235. While the high seas' freedom of navigation and other internationally lawful uses of the sea related to these freedoms apply in the exclusive economic zone, all States shall have "due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules

[181] Churchill & Lowe, *The Law of the Sea*, p. 206.
[182] D.J. Attard, *The Exclusive Economic Zone in International Law* (1987), p. 62.

of international law in so far as they are not incompatible with this Part".[183] The Virginia Commentary notes that

> "in theory, the freedoms exercised in the exclusive economic zone by other States are the same as those incorporated from article 87, provided they are compatible with the other provisions of the Convention. The difference is that these freedoms are subject to measures relating to the sovereign rights of the coastal State in the zone, and they are not subject to such measures or those rights beyond the zone".[184]

236. In turn, the coastal State has a corresponding obligation to have "due regard to the rights and duties of other States and [to] act in a manner compatible with the provisions of this Convention" (Article 56.2 UNCLOS). As noted by the ITLOS in *The M/V "Virginia G" Case*, the coastal State must, in pursuance of article 56, paragraph 2 of the Convention, "proceed with all possible consideration".[185]

237. Article 58 UNCLOS does not list the "other internationally lawful uses of the sea" related to the freedoms of navigation and overflight. It only provides a few examples and allows for other uses, including the right to protest at sea.

238. The right to peaceful protest cannot be effectively exercised at sea without using the freedom of navigation or the freedom of overflight. Such exercise necessarily concerns the operation of ships or aircraft. Hence, an exercise of the right to peaceful protest at sea – in addition to being a freedom of the high seas – constitutes an internationally lawful use of the sea related to the freedom of navigation or the freedom of overflight.

239. In sum, the right to peaceful protest exists on the high seas as well as in exclusive economic zones. In these maritime areas, this right must be exercised (a) with due regard for the interests of other States on the high seas and the rights and duties of coastal States in exclusive

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[183] Article 58, paragraph 3, of the UNCLOS.
[184] M. Nordquist, S. Nandan & S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (vol. II 2011), para. 58.10 (c), p. 564.
[185] *The M/V "Virginia G" Case, Judgment*, para. 349.

economic zones, and (b) under the conditions laid down by the Convention and other rules of international law, notably rules relating to safety at sea.

240. With respect to the due regard for the interests of other States and the rights and duties of coastal States respectively, a balance needs to be struck between different activities at sea that coincide in time and place. Although coastal States enjoy a margin of appreciation, the exercise by the coastal State of law-enforcement powers must take into account the rights of other States, notably the right to peaceful protest. In this respect, the ITLOS observed in *The M/V "Virginia G" Case* that

> "the principle of reasonableness applies generally to enforcement measures under article 73 of the Convention. It takes the position that in applying enforcement measures due regard has to be paid to the particular circumstances of the case and the gravity of the violation".[186]

Although this conclusion relates to enforcement measures under Article 73 UNCLOS, there is no reason why the underlying reasoning would not apply to enforcement measures under the UNCLOS in general.

241. With respect to safety at sea, the applicable rules must be complied with. These rules are laid down in various instruments, in particular the 1972 International Regulations for Preventing Collisions at Sea; the 1974 International Convention for the Safety of Life at Sea (SOLAS); the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), and its 1988 Protocol for the Suppression of Unlawful Acts against Fixed Platforms Located on the Continental Shelf (SUA Fixed Platforms Protocol); and the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. The various instruments in which the right of peaceful protest at sea is recognized also indicate that any such protest must be exercised in accordance with the relevant rules on safety

[186] Ibid., para. 270.

and security of human life and property.[187]

242. It is the practice of the Netherlands to actively convey to the relevant non-governmental organizations its view that the right to protest at sea should be exercised in accordance with applicable law. In particular, masters of vessels are called upon to ensure that safety of human life at sea is not endangered and that international collision avoidance regulations are observed. The Netherlands condemns dangerous and unlawful behavior at sea and has conveyed to the relevant actors its readiness to, if need be, prosecute unlawful activities in accordance with applicable law.[188]

243. In sum, the Netherlands concludes the following:

- The right to peaceful protest is well established in international law;
- The right to peaceful protest is one of the freedoms of the high seas;
- The right to peaceful protest, as a rule of international law not incompatible with the UNCLOS, applies to the high seas and in exclusive economic zones pursuant to Articles 87 and 58 UNCLOS respectively;
- An exercise of the right to peaceful protest constitutes an internationally lawful use related to the freedom of navigation and the freedom of overflight as referred to in Article 58 UNCLOS;
- The right to peaceful protest at sea must be exercised with due regard for the interests of other States on the high seas and the rights and duties of coastal States in exclusive economic zones, and under the conditions laid down by the Convention and other rules of international law, notably rules relating to safety at sea.

[187] 2013 Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States; IMO, 'Assuring Safety During Demonstrations, Protests, or Confrontations on the High Seas, Res. MSC.303(87), 17 May 2010; International Whaling Commission, 'Safety at Sea', Res. 2011-2.
[188] 2013 Joint Statement on Whaling and Safety at Sea from the Governments of Australia, the Netherlands, New Zealand, and the United States.

2.3.1.4 The Exercise of the Right to Peaceful Protest around the *Prirazlomnaya* and the Law-enforcement Actions of the Russian Federation

244. As demonstrated above, the right to peaceful protest is applicable to the exercise by the Russian Federation of law-enforcement powers in its exclusive economic zone, and therefore to the present dispute. The actions by the persons on board the *Arctic Sunrise* constitute an exercise of the right to peaceful protest at sea, as derived from Articles 58.1 and 87 UNCLOS in conjunction with the freedom of expression and freedom of assembly. Hence, they fall within the scope of protection of the relevant provisions of both the law of the sea and international human rights law.

245. On a regular basis, the Netherlands has conveyed to the operator of the *Arctic Sunrise*, Greenpeace International, its view that the right to protest at sea should be exercised in accordance with applicable law.

246. The law-enforcement actions taken by the Russian Federation in respect of the persons on board the *Arctic Sunrise* constitute an interference with the right to peaceful protest. The following paragraphs will elaborate whether the interference was prescribed by law, whether it served a legitimate aim, and whether it was necessary and proportionate for the achievement of that aim.

247. Information provided by the Russian Federation indicates that the interference may have been based on the applicable Russian national legislation implementing Articles 56, 60 and 80 of the UNCLOS. For the purposes of the following paragraphs, it is assumed that the interference may have pursued a 'legitimate aim', notably the protection of safety and public order, as well as the protection of the interests of the operator of the installation.

248. Even assuming that considerations of safety and public order or the rights of others justified putting an end to the protest immediately, the subsequent measures taken by the Russian authorities – in particular the serious criminal charges brought against the persons on board the *Arctic Sunrise* (piracy and hooliganism) and the length of their pre-trial detention – did by no

standards meet the requirements of necessity and proportionality. As soon as the persons who had climbed the outside structure of the *Prirazlomnaya* had been removed and all rigid hull inflatable boats (RHIBs) from the *Arctic Sunrise* had moved away from the direct vicinity of the platform, any immediate negative impact on safety, public order or interest of the operator of the platform had been averted.

249. In conclusion, the exercise by the persons on board the *Arctic Sunrise* of the right to peaceful protest constitutes an internationally lawful use related to the freedom of navigation as referred to in Article 58 UNCLOS. Interpreting and applying the relevant provisions of the UNCLOS, the ICCPR and customary international law, it is submitted that the Russian Federation has not struck the right balance between the different interests involved. Consequently, the law-enforcement actions of the Russian Federation violated its obligations owed to the Netherlands in respect of the freedom of protest at sea as an internationally lawful use of the sea related to the freedom of navigation as well as its obligations under Articles 19 and 21 ICCPR.

250. In the alternative, it is submitted that the law-enforcement actions of the Russian Federation against the persons on board the *Arctic Sunrise* violated its obligations owed to the Netherlands in respect in respect of the freedom of navigation of the *Arctic Sunrise* and the persons on board, of which the freedom of protest is an integral component.

2.3.2 Attribution of Conduct to the Russian Federation

251. As will be explained below, the unlawful boarding of the *Arctic Sunrise* and the subsequent arrest and detention of the ship and the persons on board is attributable to the Russian Federation. The criminal charges brought against the persons on board the ship and the pre-trial detention are equally attributable to the Russian Federation. The conduct of State organs, such as law-enforcement officers and courts, is attributable to the State under Article 4 ARSIWA.

2.3.3 *Absence of Circumstances Precluding Wrongfulness*

252. None of the circumstances precluding wrongfulness recognized in the law of State responsibility and identified in Section V.2.2.3 above have been invoked by the Russian Federation to justify its conduct, nor could any such circumstance preclude the wrongfulness of the conduct of the Russian Federation with respect to the exercise of the freedom of protest at sea.

2.4 Boarding of the *Arctic Sunrise* by the Russian Federation and Subsequent Acts Related Thereto

2.4.1 Breach of International Obligations Resulting from the Boarding of the Arctic Sunrise *and Subsequent Acts Related Thereto*

2.4.1.1 Introduction

253. As a ship flying the Netherlands' flag, the *Arctic Sunrise* was subject to the exclusive jurisdiction of the Kingdom of the Netherlands.

254. Exclusive flag State jurisdiction is one of the cornerstones of the law of the sea. The reach of this principle was articulated by the PCIJ in *S.S. "Lotus"*:

> "It is certainly true that–apart from certain special cases which are defined by international law–vessels on the high seas are subject to no authority except that of the State whose flag they fly".[189]

255. Today this rule of customary international law finds its codified form in Article 92.1 UNCLOS which provides that

> "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas".

[189] *The Case of the S.S. "Lotus", Judgment*, p. 25.

256. Flag State jurisdiction covers both legislative and enforcement jurisdiction over the ship and everything on it. In this respect, the ITLOS noted that

> "[t]he ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant".[190]

257. Through Article 58.2 UNCLOS, this rule applies to the exclusive economic zone of the Russian Federation.

258. At the time of boarding by the Russian Federation, the *Arctic Sunrise* was located in the Russian exclusive economic zone. The presence of the vessel in the exclusive economic zone of a coastal State was permitted in pursuance of the freedom of navigation and other internationally lawful uses of the sea which the flag State, the Netherlands, enjoys under Articles 87 and 58.1 UNCLOS. In *The M/V "Louisa" Case*, the ITLOS reaffirmed the application of the freedom of navigation in the exclusive economic zone:

> "The Tribunal notes that article 87 of the Convention deals with the freedom of the high seas, in particular the freedom of navigation, which applies to the high seas and, under article 58 of the Convention, to the exclusive economic zone".[191]

259. During the Third United Nations Conference on the Law of the Sea, the representative of the USSR expressed the view that, as regards the future Convention, the freedom of navigation had to be upheld in the exclusive economic zone:

> "[T]he granting of sovereign rights in the economic zone to the coastal State was not equivalent to the granting of territorial sovereignty and must in no way interfere with the other lawful activities of States on the high seas, especially with international maritime communications. The convention must state clearly that the rights of the coastal State in

[190] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 106.
[191] *The M/V "Louisa" Case, Judgment*, para. 109.

the economic zone must be exercised without prejudice to the rights of any other State recognized in international law, including the freedoms of navigation, overflight and the laying of cables and pipelines, and the freedom of scientific research not connected with the exploration and exploitation of the living and mineral resources of the economic zone".[192]

260. While the high seas' freedom of navigation and other internationally lawful uses of the sea related to this freedom apply in the exclusive economic zone, all States shall have "due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part" (Article 58.3 UNCLOS). As noted above in Section V.2.3.1.3 above, the coastal State has a corresponding obligation to have due regard to the rights and duties of other States and to act in a manner compatible with the provisions of this Convention (Article 56.2 UNCLOS).

261. The combined effect of exclusive flag State jurisdiction and freedom of navigation is such that a State which contemplates taking enforcement measures against a ship must, save a rule establishing an exception, obtain the prior consent of the flag State. It is undisputed that such consent was not given by the Kingdom of the Netherlands (Annex N-6; Annex N-9).

262. The Netherlands wishes to emphasize that the freedom of navigation together with exclusive flag State jurisdiction encompass a general prohibitive rule under the law of the sea for other States to exercise prescriptive or enforcement jurisdiction over a ship. Any exceptions to said rule, and thus any rules the Russian Federation could rely on in this regard, must be narrowly construed.[193] In *Owners, Officers and Men of the Wanderer*, the arbitral tribunal declared that:

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[192] UNCLOS III, 'Summary records of meetings of the Second Committee 28th meeting', UN Doc. A/CONF.62/C.2/SR.28, 6 August 1974, p. 221, para. 54.

[193] See *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion*, p. 25: "The provision [...] is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation".

"The fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful vocation on the high seas, except in time of war or by special agreement.

The *Wanderer* was on the high seas. There is no question here of war. It lies, therefore, on the United States to show that its naval authorities acted under special agreement. Any such agreement being an exception to the general principle, must be construed *stricto jure*".[194]

263. The exceptional nature of enforcement jurisdiction exercised by States other than the flag State can further be derived from the negative formulation in Article 110.1 UNCLOS:

"*Except* where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship [...] is *not justified* in boarding it *unless*".[195]

264. Through its diplomatic correspondence with the Netherlands and statements of several of its organs, the Russian Federation has formulated a number of grounds for its actions related to the *Arctic Sunrise* and the persons on board. Some of these are vague, whereas others appear either to have been retracted or modified over time. Notwithstanding this wavering legal stance and in light of the Russian Federation's declared intention not to participate in the present arbitral proceedings,[196] the grounds invoked by the Russian Federation as well as others provided for in international law will be examined.

265. It will be demonstrated below that no grounds can be substantiated to justify the law-enforcement actions against the *Arctic Sunrise* and the persons on board. Therefore, through its law-enforcement actions, the Russian Federation breached its obligations owed to the Kingdom of the Netherlands in regard to the freedom of navigation and its exclusive right to exercise

[194] *Owners, Officers and Men of the Wanderer, Decision*, p. 71.
[195] Emphasis added.
[196] Diplomatic Note No. 487 of the Russian Federation to the Arbitral Tribunal dated 27 February 2014, Annex N-34.

jurisdiction over the *Arctic Sunrise*. Through its law-enforcement actions, the Russian Federation, as a coastal State, also violated its obligation to have due regard for the rights of the Netherlands, as a flag State, under Article 56.2 UNCLOS.

2.4.1.2 Jurisdiction over Artificial Islands, Installations and Structures

266. In its diplomatic note to the Netherlands of 1 October 2013 (Annex N-10), the Russian Federation provided a justification for its visit of the *Arctic Sunrise*, by basing its actions on Articles 56, 60 and 80 of the UNCLOS. It is important at this point to consider the extent of the jurisdiction the Russian Federation may exercise in conformity with these provisions vis-à-vis the *Arctic Sunrise* and the persons on board. Article 56 of the Convention establishes the rights, jurisdiction and duties of the coastal State in the exclusive economic zone, Article 60 sets out the legal framework applicable to artificial islands, installations and structures in the exclusive economic zone, and Article 80 declares this provision to be applicable *mutatis mutandis* to the same artificial islands, installations and structures on the continental shelf.

267. As demonstrated in Section V.2.3.1.3 above, Article 56 UNCLOS, to which the Russian Federation itself refers in the abovementioned diplomatic note of 1 October 2013, balances the rights and obligations of coastal States and those of other States in exclusive economic zones.

268. In its exclusive economic zone, the coastal State has the exclusive right to construct, authorize and regulate the construction, operation and use of an installation, such as the *Prirazlomnaya*, under Article 60.1 UNCLOS. Although this right is "exclusive", it is not "absolute". Indeed, "[t]he rights of the coastal State are restricted or are subject to certain conditions in a number of instances".[197] Pursuant to Article 60.2 UNCLOS, a coastal State has exclusive jurisdiction over such installations in its exclusive economic zone, including jurisdiction with regard to safety.

269. A coastal State may establish safety zones around such installations in accordance with Article 60.4 UNCLOS.The jurisdiction of the coastal State in such safety zones is not exclusive.

[197] H. Esmaeili, *The Legal Regime of Offshore Oil Rigs in International Law* (2001), p. 77.

This jurisdiction is also limited as the coastal State may only "take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures" in these zones. A requirement for the exercise of the coastal State's jurisdiction in its safety zone under Article 60.4 UNCLOS is that the measures taken must be "appropriate".

270. While the coastal State has a certain degree of appreciation in determining what law-enforcement actions meet the requirements under Article 60 UNCLOS, its margin of appreciation is (a) qualified by the principle of reasonableness as set out by the ITLOS in *The M/V "Virginia G" Case*,[198] and (b) subject to judicial review.[199]

271. In the course of the protest action, the persons on board the *Arctic Sunrise* never posed a threat to the safety of the *Prirazlomnaya* or the navigation in the safety zone around it. Safety considerations, therefore, could not provide any reasonable grounds for boarding the *Arctic Sunrise*. Should the Tribunal conclude that there was a threat to the safety of the *Prirazlomnaya* or the navigation in the safety zone around it, the serious criminal charges (piracy and hooliganism) brought against the persons who had been on board the *Arctic Sunrise* and the length of their pre-trial detention were neither necessary nor proportional. As has been demonstrated in Section V.2.3.1.2 above, this must be assessed in light of the exercise of the freedom of protest at sea by the persons on board the *Arctic Sunrise*.

2.4.1.3 Right of Hot Pursuit

272. On 8 October 2013, the Federal Security Service of the Russian Federation Coast Guard Division for Murmansk Oblast rendered a judgment against the master of the *Arctic Sunrise* in respect of an administrative offence under the law of the Russian Federation.[200] The judgment refers to Article 36 of the Federal Act on the Exclusive Economic Zone of the Russian Federation. This provision sets out the mandates of law-enforcement authorities and the circumstances under which the right of hot pursuit may be exercised (Annex N-16).

[198] See *The M/V "Virginia G" Case, Judgment*, para. 270; See also para. 240 above.
[199] See also para. 223 above.
[200] Federal Security Service of the Russian Federation, Coast Guard Division for Murmansk Oblast, Judgment in the Case Concerning Administrative Offence No. 2109/623-13, 8 October 2013, Annex N-16.

273. In accordance with Article 111 of the Convention, a State may engage in hot pursuit of a foreign ship when it has good reason to believe that the ship, or one of its boats or other craft working as a team and using the ship pursued as a mother ship, have violated the laws and regulations of that State, including those with respect to safety zones around artificial islands, installations and structures.

274. The availability of the right of hot pursuit is subject to conditions that are cumulative in nature. The ITLOS leaves no room for doubt:

> "The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention".[201]

275. This interpretation is also supported by the Russian Federation. In its Application in *The "Volga" Case*, it cited the paragraph above in support of its challenge of Australia's apprehension of a Russian-flagged vessel.[202]

276. The Netherlands submits that Article 111 of the Convention cannot afford a legal basis for the law-enforcement actions carried out by the Russian Federation against the *Arctic Sunrise*, because several conditions essential to lawful hot pursuit were not met.

277. The account of the events related to the pursuit of the *Arctic Sunrise* by the Russian Federation below is based on (a) the Greenpeace Factual Account, including the witness statements of three crew members of the *Ladoga* and decisions of Russian courts, and (b) written witness statements subscribing the Greenpeace Factual Account. The pursuit commenced on 18 September 2013 at 06:20 hrs UTC, when the *Ladoga* contacted the *Arctic Sunrise* via radio with an order to stop or heave to. By the time this signal to stop was given, the RHIBs of the *Arctic*

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[201] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 146. See also Ibid., *Separate Opinion of Judge Anderson*, p. 6 (agreeing that the conditions for hot pursuit are cumulative).
[202] *The "Volga" Case, Prompt Release, Application submitted by the Russian Federation of 29 November 2002*, p. 30.

Sunrise, which were previously located within a safety zone of 500 meters around the *Prirazlomnaya*, had already returned to the *Arctic Sunrise*, which was situated outside of the "area dangerous to navigation" of three nautical miles. This is confirmed by witness statements of three crew members of the *Ladoga* describing the events which had transpired on 18 September 2013 related to the *Prirazlomnaya* (Annex N-3, appendix 8).

278. The order to stop for the purpose of initiating hot pursuit must take the form of a "visual or auditory signal" as mentioned in Article 111.4 UNCLOS. The radio message conveyed by the *Ladoga* to the *Arctic Sunrise* does not qualify as such. The term "visual or auditory signal" finds its origin in Article 23.3 of the 1958 Convention on the High Seas which, in turn, can be traced back to the work of the ILC. In the Commentary to its draft articles concerning the law of the sea, the ILC noted:

> "To prevent abuse, the Commission declined to admit orders given by wireless, as these could be given at any distance; the words 'visual or auditory signal' exclude signals given at a great distance and transmitted by wireless".[203]

279. Moreover, the timeframe within which the Russian Federation could issue a valid signal to stop had already passed. Article 111, paragraph 1 read together with paragraph 2, of the Convention requires the State wishing to avail itself of the right of hot pursuit to commence such pursuit, and thus give the signal to stop, when the foreign ship or one of its boats are within the safety zone. As stated above, none of the RHIBs of the *Arctic Sunrise* which had previously entered the 500-meter safety zone around the *Prirazlomnaya* were still in the said zone at the time the order to stop was given.

280. In accordance with Article 111, paragraph 1 read together with paragraph 2, of the UNCLOS, a State may only continue pursuit outside the safety zone if the pursuit has not been interrupted. The pursuit of the *Arctic Sunrise* by the Russian Federation did not come to a close before at least 18:26 hrs UTC on 19 September 2013. At that the time, the process of boarding by

[203] ILC, 'Articles concerning the law of the sea with commentaries', II *Y.I.L.C.* (1956), Commentary to Article 47, p. 285.

an unidentified helicopter unfolded. Hence, between the issuance of the radio signal for the *Arctic Sunrise* to stop by the *Ladoga* (18 September 2013 at 06:20) and the boarding of the *Arctic Sunrise* by a helicopter (19 September 2013 at 18:26) approximately 36 hours had passed.

281. The duration of the "pursuit" was considerable when understood in its geographical context. During the "pursuit", the *Arctic Sunrise* remained most of the time near the *Prirazlomnaya*. On one occasion, the ship granted a request of the Coast Guard of the Russian Federation formulated at 11:23 hrs UTC Time on 18 September 2013 to move out to 20 nautical miles. This request formed part of the on-going discussions concerning the potential transfer of two persons who had climbed the outside structure of the *Prirazlomnaya* and were in the custody of the Russian Federation. A few hours later, on account of the failure to make progress on this issue, the *Arctic Sunrise* resumed circling the *Prirazlomnaya* at a distance of more than three nautical miles. This proximity provided the Russian Federation Coast Guard with ample opportunity to pursue the ship without undue delay as required by Article 111.5 UNCLOS. The fact that a large amount of time had passed despite the limited geographical scope of the "pursuit" demonstrates a hesitant attitude of the Russian authorities which cannot be reconciled with the requirements of an "uninterrupted" and "hot" pursuit.

282. The hesitant attitude of the Russian authorities further casts doubt on the uninterrupted nature of the pursuit. On 18 September 2013 at 11:22 hrs UTC, the *Ladoga* and the *Arctic Sunrise* started a discussion concerning the potential release of the two persons who had climbed the outside structure of the *Prirazlomnaya*. At 15:55 hrs UTC on that same day, the *Ladoga* informed the *Arctic Sunrise* that it was awaiting instructions from its superiors regarding the transfer of the abovementioned persons. This message was repeated shortly after at 17:25 hrs UTC on 18 September 2013. Later attempts to establish communications with the *Ladoga* failed. Before the boarding of the *Arctic Sunrise*, the *Ladoga* kept a position between the *Artic Sunrise* and the *Prirazlomnaya* for approximately a full day. The reasons for the Russian Federation's inaction remain unclear, but the hesitant attitude of the Russian authorities demonstrates that the pursuit had been interrupted and was no longer "hot".

283. Paragraph 5 of Article 111 of the Convention stipulates:

> "The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect".

284. In addition, the Russian Federation was under an obligation to comply with a broader rule of general international law which was recently explained by the ITLOS as follows in *The M/V "Virginia G" Case*:

> "The Tribunal considers it important to reiterate that general international law establishes clear requirements that must be complied with by all States during enforcement operations [...]. These requirements provide, in particular, that enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State and that their vessels must be clearly marked as being on government service".[204]

285. The boarding of the *Arctic Sunrise* was carried out on 19 September 2013 from 18:26 hrs UTC onwards by a helicopter bearing "no obvious markings apart from a small red star on the bottom".[205] Armed persons descended from the helicopter onto the ship. They wore "balaclavas and unmarked uniforms".[206] Furthermore, they "refuse[d] to answer questions about the agency or unit they belong to".[207] It later emerged that the individuals who boarded the *Arctic Sunrise* were from the Federal Security Service and had used a Mi-8 helicopter.[208]

286. The anonymity of the boarding party and the aircraft used to pursue the *Arctic Sunrise* amounts to a violation of identification requirements under Article 111.5 of the UNCLOS and customary international law. Furthermore, the Netherlands wishes to emphasize that the identification obligation as specified in *The M/V "Virginia G" Case* is a condition for all

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[204] *The M/V "Virginia G" Case, Judgment*, para. 342.
[205] Greenpeace Factual Account, para. 47.
[206] Ibid.
[207] Ibid.
[208] Ibid., para. 56.

enforcement operations at sea.[209] Thus, the Russian Federation should have complied with this requirement.

2.4.1.4 Right of Visit

287. The right of visit, as codified in Article 110 UNCLOS, is made applicable in the exclusive economic zone by virtue of Article 58.2 UNCLOS in so far as it is not incompatible with Part V of the Convention. Pursuant to Article 110.1 UNCLOS, the right of visit may only be exercised when "there is reasonable ground for suspecting that" a foreign ship has engaged in one of the activities listed in subparagraphs (a) to (e).

288. The Russian Federation cannot claim unfamiliarity with Greenpeace, a non-governmental organization which has spearheaded campaigns in the Arctic on several occasions. The same is true for the *Arctic Sunrise*, a vessel that had conducted peaceful protests in the Russian Federation's exclusive economic zone prior to September 2013.[210] The *Ladoga* had already been in contact with the *Arctic Sunrise* before the protest action directed at the *Prirazlomnaya* was staged.[211]

289. Turning to the events leading up to the current dispute, it should be recalled that personnel on board the *Arctic Sunrise* contacted the Russian Federation Coast Guard via radio so as to make their peaceful intentions known.[212] The Russian Federation was therefore fully aware of the peaceful aims of the *Arctic Sunrise*'s actions in its exclusive economic zone and could not claim to have a "reasonable ground" to suspect any wrongdoing that would warrant boarding the ship in accordance with international law as discussed below.

290. Indeed, Article 110.1 UNCLOS authorizes a warship to board a foreign ship only if there is reasonable ground for suspecting that:

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[209] *The M/V "Virginia G" Case, Judgment*, para. 342.
[210] Greenpeace Factual Account, paras. 10-13.
[211] For an account of this contact, see Section V.2.4.1.7 below.
[212] Greenpeace Factual Account, paras. 13-14.

"(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship".

291. The Netherlands will consider the various grounds in the order in which they are listed in Article 110.1 UNCLOS, starting with piracy.

292. Allegations of piracy were first made on 20 September 2013 by the Committee of Investigation of the Russian Federation (Investigation Department for the Northwestern Federal District) (Investigative Committee) of the Russian Federation in a statement claiming it had materials to demonstrate that piracy had been committed in the sense of Article 227 of the Criminal Code of the Russian Federation. An order was signed on 24 September 2013 by a Captain of Justice of the Investigative Committee stating that there were sufficient grounds to suspect the commission of the offense of piracy in the sense of Article 227.3 of the above-mentioned Code (piracy committed by an organised group), as a result of which criminal proceedings were instituted. On 25 September 2013, the detained persons who had been on board the *Arctic Sunrise* were presented with a written protocol of their arrest on suspicion of piracy. On 1 October 2013, the Russian Federation responded to the requests for information of the Kingdom of the Netherlands. It gave notification that it had instituted a criminal investigation into the persons who had been on board the vessel for the crime of piracy under Russian law (Annex N-10). The official charge of piracy was brought by the Investigative Committee against the detained persons who had been on board the *Arctic Sunrise* individually on 2 and 3 October 2013.

293. An order of the Leninsky District Court of Murmansk, dated 7 October 2013, imposed the seizure of the vessel, thereby referring to Article 19 of the 1958 Convention on the High Seas with respect to piracy. According to the Court, it was on the basis of that Convention that the

Russian Federation Coast Guard had seized the *Arctic Sunrise* as "there was a reasonable suspicion that this ship was engaged in piracy" (Annex N-13).

294. It should be added that, during this timeframe, the soundness of the piracy allegations were called into question by the President of the Russian Federation, Mr Vladimir Putin, who remarked on 25 September 2013 that the Greenpeace activists were "obviously not pirates".[213]

295. Several actions and statements of Russian Federation officials following the order of the Leninsky District Court of 7 October 2013 suggest that the piracy charges had been dropped. On 11 October 2013, human rights adviser to President Putin, Mr Mikhail Fedotov, urged prosecutors to discontinue the investigation into piracy. In a letter to the lead investigator in the case against the persons who had been on board the *Arctic Sunrise*, dated 21 October 2013, Lieutenant-General of Justice, Mr A.Y. Mayakov, proposed changing the charge against the persons who had been on board the *Arctic Sunrise* from piracy to hooliganism. In its petition of 15 November 2013 seeking a three-month extension of the detention of the persons who had been on board the *Arctic Sunrise*, the Investigative Committee no longer referred to piracy, only to hooliganism.

296. To justify the boarding of the *Arctic Sunrise* on the suspicion that the vessel was engaged in piracy, the actions concerned need to meet the definition of piracy under Article 101 UNCLOS. Neither Article 19 of the 1958 Convention on the High Seas, which does not apply in this case in accordance with Article 311.1 UNCLOS, nor the definition of piracy under the law of the Russian Federation are relevant in this regard.

297. Article 101 UNCLOS, which is generally considered a reflection of customary international law,[214] reads:

[213] Ibid., para. 69.
[214] J. Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012), pp. 302-303.

"Piracy consists of any of the following acts:

(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;

(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 subparagraph (a) or (b)".

298. The actions of the persons on board the *Arctic Sunrise* related to the *Prirazlomnaya* fall outside the scope of Article 101 in several respects.

299. It follows from Article 101 (a) of the Convention that violence is an essential element of any act of piracy.[215] Such acts of violence cannot be ascribed to the persons on board the *Arctic Sunrise* whose aim was to stage a peaceful protest. At no point during the events of 18 and 19 September 2013 were they armed, nor did any of them resort to acts of violence against agents or property of the Russian Federation.

300. An additional element of piracy under Article 101(a) UNCLOS is that the acts in question must be committed for "private ends". The *Arctic Sunrise* is a ship chartered by Greenpeace International, a non-governmental organization dedicated to the protection and conservation of the environment and the promotion of peace. The peaceful protest of the persons on board the *Arctic Sunrise* which commenced on 18 September 2013 in the exclusive economic zone of the Russian Federation was part of the campaign 'Save the Arctic'.[216]

[215] D.P. O'Connell & I.A. Shearer, *The International Law of the Sea* (vol. 2, 1984), pp. 969-970.
[216] On the objectives of this campaign, see Greenpeace Factual Account, para. 5.

301. It is clear from these stated goals that the persons on board the *Arctic Sunrise* were acting out of their environmental beliefs and that the peaceful protest against the oil-drilling activities of the *Prirazlomnaya* were politically-motivated. Such motivations lie outside the ambit of the "private ends" requirement. In this regard, Judge Jesus of the ITLOS observed:

> "The 'private ends' criterion seems to exclude acts of violence and depredation exerted by environmentally-friendly groups or persons, in connection with their quest for marine environment protection. This seems to be clearly a case in which the 'private ends' criterion seems to be excluded".[217]

302. Article 101(a)(i) and (ii) UNCLOS establish that an act constitutes piracy only if directed against a ship, an aircraft, or against persons or property on board such ship or aircraft. The facts show that this "two-vessel" requirement was not met. Whereas the *Arctic Sunrise* qualifies as a ship, the *Prirazlomnaya* does not. At the time of the events giving rise to the current dispute, the *Prirazlomnaya* was an offshore ice-resistant fixed platform located on the continental shelf of the Russian Federation. For a number of reasons the *Prirazlomnaya* cannot be equated with a ship:

(a) The *Prirazlomnaya* is not listed in the register of ships of the Russian Federation;[218]
(b) The *Prirazlomnaya* does not have the unique seven-digit IMO number, which is required for large ships in accordance with SOLAS Regulation XI/3;
(c) At the time of the events giving rise to the dispute, the *Prirazlomnaya*, as opposed to a ship, was fixed to the seabed and could not navigate independently.

303. Furthermore, it should be noted that in the abovementioned letter of 21 October 2013 sent by Lieutenant-General of Justice, Mr A.Y. Mayakov, to the chief investigator in the case against the persons who had been on board the *Arctic Sunrise*, the Lieutenant-General stated that "at the present time, it has been established that the offshore ice-resistant fixed platform «Prirazlomnaya» is not a ship".[219]

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[217] J.L. Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects', 18 *International Journal of Marine and Coastal Law* (2003), p. 379.
[218] http://www.rs-class.org/ru/regbook/file_shipr/list_24.php.
[219] Greenpeace Factual Account, para. 92.

304. In conclusion, the claim that the person on board the *Arctic Sunrise* had committed or could reasonably have been suspected of having committed piracy are without merit.

305. The second ground which could warrant the right of visit pertains to the slave trade. There were however no reasonable grounds to suspect that the *Arctic Sunrise* was engaged in the slave trade, and this was never alleged by the Russian Federation. Furthermore, the enforcement rights beyond that of visit are limited to the flag State under Article 99 UNCLOS.

306. A third ground for the right of visit concerns unauthorized broadcasting. No reasonable grounds were present for suspecting that the *Arctic Sunrise* was engaged in unauthorized broadcasting and this has not been alleged by the Russian Federation.

307. Fourthly, the right of visit may be exercised in respect of a ship without nationality. There were no reasonable grounds for suspecting that the *Arctic Sunrise* was without nationality and this has not been alleged by the Russian Federation. The *Arctic Sunrise* flies the flag of the Kingdom of the Netherlands and the Russian Federation was conscious of the fact that the *Arctic Sunrise* is of Dutch nationality. Its diplomatic note of 18 September 2013 may serve as evidence to this fact (Annex N-5).

308. The final ground which could substantiate the right of visit under Article 110 of the Convention relates to a ship which, though flying a foreign flag or refusing to show its flag, is in reality of the same nationality as the warship. There were no reasonable grounds for suspecting that the *Arctic Sunrise* was, though flying the flag of the Kingdom of the Netherlands, of Russian nationality and this has not been alleged by the Russian Federation. The Russian Federation has acted on the understanding that the vessel is of Dutch nationality. Its diplomatic note of 18 September 2013 attests to that point as well.[220]

[220] Ibid.

2.4.1.5 Resource-related Enforcement Jurisdiction

309. By virtue of Article 73.1 UNCLOS, the Russian Federation may "in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention".

310. The *Arctic Sunrise* sailed in the Russian Federation's exclusive exclusion zone for the purpose of conducting peaceful protest at sea. The ship did not at any point engage in resource-related activities in violation of Russian laws or regulations, nor has the latter been alleged by the Russian Federation.

311. Moreover, the enforcement jurisdiction which the Russian Federation may exercise in accordance with Article 73.1 UNCLOS relates to "living resources". However, the activities for which the *Prirazlomnaya* is used, are directed at the exploitation of hydrocarbon reserves and thus to non-living resources. Article 73.1 UNCLOS therefore does not apply to the facts in question.

2.4.1.6 Marine Environment-related Enforcement Jurisdiction

312. The Russian Federation observed that the actions of the *Arctic Sunrise* could be interpreted only as "a provocation, which exposed the Arctic region to the threat of an ecological disaster with unimaginable consequences".[221] On 1 November 2013, Interfax News Agency reported that the Prime Minister of the Russian Federation, Mr Dmitry Medvedev, said at a news conference that his country "cannot support activities which may cause damage to the environment and which may be dangerous for people on the whole".[222]

[221] Diplomatic Note of the Russian Federation, 18 September 2013, Annex N-5.
[222] *Verbatim record of the public sitting at the International Tribunal for the Law of the Sea in the 'Arctic Sunrise' Case on 6 November 2013*, ITLOS/PV.13/C22/1/Rev.1, pp. 19-20.

313. Article 220, paragraphs 3 to 8, read in conjunction with Article 226.1 of the Convention permit a coastal State to take specified enforcement measures with respect to foreign vessels under narrowly defined circumstances. These circumstances all relate to the violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels. The facts do not support the view that the *Arctic Sunrise* polluted the marine environment and this has also not been alleged by the Russian Federation. This exception does not apply either.

314. Article 221 of the UNCLOS contains a safeguard clause with respect to measures to avoid pollution arising from maritime casualties. This provision permits the coastal State to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests from pollution or threat of pollution. Such measures must be taken following a maritime casualty, or acts relating thereto, which may reasonably be expected to result in major harmful consequences. The Russian Federation has alluded to the threat of an ecological disaster with unimaginable consequences in the Arctic region to justify its action with respect to the *Arctic Sunrise*, but these allegations cannot be substantiated. The facts do not support such a claim. Therefore, this exception cannot apply either.

2.4.1.7 Ice-covered Area-related Enforcement Jurisdiction

315. Article 234 of the UNCLOS grants the coastal State additional enforcement jurisdiction in ice-covered waters with respect to the prevention, reduction and control of marine pollution besides those just described in the previous paragraph. This enlarged coastal State enforcement competence is not applicable to the protest actions of the *Arctic Sunrise* and the persons on board directed at the *Prirazlomnaya*.

316. The severe climatic conditions and ice coverage, creating obstructions or exceptional hazards to navigation, were not present in the area around the *Prirazlomnaya* at the time of the arrest of the *Arctic Sunrise*, which is a class 1A1 icebreaker as certified by *Det Norske Veritas*. Moreover, it can be doubted whether the Barents Sea can be classified as a sea area covered by ice for most of the year. Irrespective of these uncertainties, the fact remains that the Russian

Federation today does not apply its stringent navigational regulations concerning the Northern Sea Route for ice-covered areas to the Barents Sea as the western limit has at present been defined as the "Novaya Zemlya Archipelago [...], with the eastern coastline of the Novaya Zemlya Archipelago and the western borders of Matochkin Strait, Kara Strait and Yugorski Shar".[223] The Barents Sea, consequently, does not fall under the competence of the Administration of the Northern Sea Route.[224]

317. This analysis of the relevant legislative framework of the Russian Federation is corroborated by the practice of the Administration of the Northern Sea Route. The *Arctic Sunrise* specifically attempted at four occasions during the Summer of 2013 to obtain permission to sail the Northern Sea Route, but was denied access each time.[225] The Ministry of Transport, when learning about the intention of the ship to enter the Kara Sea after notification of the third refusal, passed this information to the Ministry of Foreign Affairs of the Russian Federation.[226] When the *Arctic Sunrise* did enter the Kara Sea at the end of August 2013, the Coast Guard of the Russian Federation boarded the vessel and threatened to use force if the ship would not leave the waters of the Northern Sea Route, what it finally did after four days.[227] This triggered the fourth, and last demand by Greenpeace International on 5 September 2013 to use the Northern Sea Route. The reason for the fourth refusal by the Administration of the Northern Sea Route during that

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[223] Article 3, of the Federal Law "On the Introduction of Changes to Certain Legislative Acts of the Russian Federation Related to the Governmental Regulation of Merchant Shipping in the Water Areas of the Northern Sea Route", http://www.nsra.ru, amending Article 5(1, 1) of the Merchant Marine Code of the Russian Federation.

[224] This contrasts sharply with the time its predecessor was first established in 1933, when the geographical area of competence of this body was determined to start at the White Sea, *i.e.*, a southern inlet of the Barents Sea, until the Bering Strait. On the Organisation by the Council of the People's Commissars of the USSR of the Head Administration of the Northern Sea Route, Article 1, Decree of the Council of the People's Commissars of the USSR of 17 December 1932, N° 1873, as reprinted in M.Y. Zinger, Osnovnye zakony po krayinemy Severy (Basic Laws for the Extreme North) (Leningrad, Izdetel'stvo glavnogo upravlenii Severnogo morskogo puti) 144 (1935).

[225] See the letter addressed on 19 August 2013 by D. Simons, Legal Counsel Campaigns & Actions of Greenpeace International to A. Olshevskiy, Head of the Northern Sea Route Administration, http://www.greenpeace.org/international/Global/international/briefings/climate/2013/2013-08-19-Letter-to-Northern-Sea-Route-Administration.pdf. All these refusals, each time indicating the underlying reasons of the decision, are also documented on the website of the Administration of the Northern Sea Route, http://www.nsra.ru.

[226] 'The Ship of Greenpeace Did Not Receive Permission to Sail the Northern Sea Route – Ministry of Transport' (in Russian), *PortNews*, 27 August 2013, http://portnews.ru/news/166291 and posted on the website of the Administration of the Northern Sea Route, http://www.arctic-lio.com/node/200.

[227] 'The Greenpeace Icebreaker leaves the Kara Sea (in Russian)', PortNews, 27 August 2013, http://portnews.ru/news/166258. On that occasion the vessel was subjected to an inspection. Russian Borderguards Hold Up Greenpeace Icebreaker in the Arctic (in Russian), *PortNews*, 26 August 2013, http://portnews.ru/news/166220/. See also Statement of facts, para. 13.

year with respect to the *Arctic Sunrise*, is of particular importance in the present context, for it reads:

> "Violation of the Rules of navigation in the water area of the Northern Sea Route, adopted and enforced by the Russian Federation in accordance with the article 234 of the United Nations Convention on the Law of the Sea, 1982, - navigation in the water area of the Northern Sea Route from 24.08.2013 to 27.08.2013 without permission of the Northern Sea Route Administration, as well as taken actions in this creating potentially threat of marine pollution in the water area of the Northern Sea Route, ice-covered for most part of the year".[228]

318. On 16 September 2013, when the *Arctic Sunrise* was again heading east for the Kara Strait before it changed course the next day to the *Prirazlomnaya* in a southwesterly direction, the *Ladoga* explicitly warned the ship that it had no permission to enter the Northern Sea Route, an element emphasized by the administrative court's judgement inflicting an administrative fine to the master of the ship.[229]

319. It is clear that no such special requirements were at any time demanded from the ship when sailing the Barents Sea, clearly indicating that the Russian Federation does not apply legislation based on Article 234 of the UNCLOS to the area around the *Prirazlomnaya*.

2.4.1.8 Terrorism-related Charges

320. In its diplomatic note of 18 September 2013 (Annex N-5), the day before the boarding of the *Arctic Sunrise*, the Russian Federation informed the Kingdom of the Netherlands that the decision had been made to seize the vessel. It was stated that the actions by the persons on board the Arctic Sunrise "bore the characteristics of terrorist activities".

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[228] Ministry of Transport of the Russian Federation, Federal Agency of Maritime and River Transport, Federal State Institution, The Northern Sea Route Administration, Notification No. 77, 20 September 2013 (English translation provided by the Administration), http://www.nsra.ru/files/zayavka/20130920143952ref%20A%20S.pdf.

[229] Federal Security Service of the Russian Federation, Coast Guard Division for Murmansk Oblast, Judgment in the Case Concerning Administrative Offence No. 2109/623-13, 8 October 2013, Annex N-16.

321. These allegations of terrorism were not further substantiated by the Russian Federation, nor did the latter specify any legal instruments in connection with these claims. Nonetheless, should the Tribunal consider that the SUA Fixed Platforms Protocol,[230] which obliges States Parties to enact legislation for the purpose of criminalizing certain offenses against the safety of fixed platforms, applies to the actions of the persons on board the *Arctic Sunrise*, the Netherlands wishes to contest the applicability of that Protocol.

322. First and foremost, it should be highlighted that the Fixed Platforms Protocol was adopted together with the SUA Convention and should be interpreted consistent with the latter Treaty. The preamble of the Protocol, which recognizes that "the reasons for which the [SUA] Convention was elaborated also apply to fixed platforms located on the continental shelf" and takes account of the provisions of that Convention, attests to this point. It is apparent from the preamble of the SUA Convention, with its several references to acts of terrorism and UN General Assembly resolutions on this issue, that the instrument was intended to tackle acts of terrorism. Recently, the ITLOS observed that the SUA Convention "was concluded in light of 'the worldwide escalation of acts of terrorism in all its forms' and as part of the measures taken by the international community to combat terrorism in all its manifestations".[231]

323. The actions of the persons on board the *Arctic Sunrise* as part of their peaceful protest at sea did not remotely resemble acts of terrorism and therefore cannot be deemed acts within the scope of the Fixed Platform Protocol.

324. Article 2 of the Fixed Platforms Protocol provides:

> "1. Any person commits an offence if that person unlawfully and intentionally:
>
> (a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or
>
> (b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or

[230] The Kingdom of the Netherlands accepted the Protocol on 5 March 1992 (entry into force: 3 June 1992). The Russian Federation ratified the Protocol on 4 May 2001 (entry into force: 2 August 2001).
[231] *The M/V "Virginia G" Case, Judgment*, para. 376.

(c) destroys a fixed platform or causes damage to it which is likely to endanger its safety; or

(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or

(e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d).

2. Any person also commits an offence if that person:

(a) attempts to commit any of the offences set forth in paragraph 1; or

(b) abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform".

325. The persons on board the *Arctic Sunrise* who entered the safety zone of 500 meters established around the *Prirazlomnaya* did not commit any acts constituting offenses in the sense of the abovementioned provision. As regards Article 2.1(a), the unarmed crew members who reached the exterior of the *Prirazlomnaya* did not use force, threaten to use force or engage in any other form of intimidation to seize or exercise control over the platform. *A fortiori*, none of the offences listed in paragraph 2, which enumerates auxiliary acts in connection with offenses set forth in paragraph 1, apply.

326. In the alternative, should the Tribunal consider that the Fixed Platforms Protocol applies in the present dispute, the Netherlands submits that no provision can be found in the Protocol granting the Russian Federation jurisdiction to board a foreign ship. As stipulated in the Preamble, "matters not regulated by this Protocol continue to be governed by the rules and principles of general international law", therefore the main legal framework remains the law of the sea. This conclusion is further strengthened by Article 4, which stipulates that "[n]othing in

this Protocol shall affect in any way the rules of international law pertaining to fixed platforms located on the continental shelf".

2.4.1.9 Absence of Other Justifications

327. Other justifications advanced by the Russian Federation do not provide for exceptions to the general prohibitive rule protecting ships from interference by States other than the flag State.

328. The Russian Federation made allegations of dangerous manoeuvring on the part of the *Arctic Sunrise*. The international standards and rules referred to by the Russian Federation in its diplomatic note of 1 October 2013 (Annex N-10), that is the 1965 International Code of Signals and the 1972 International Regulations for Preventing Collisions at Sea, do not permit States to board a foreign vessel, let alone to take other enforcement measures. This is corroborated by Article 97.3 UNCLOS. In matters of collision or any other incident of navigation, no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag States.

329. Finally, on 23 October 2013, the actions of the persons who had been on board the *Arctic Sunrise* were qualified as hooliganism under Article 213.2 of the Criminal Code of the Russian Federation by a Captain of Justice of the Russian Federation.[232] Charges of hooliganism were maintained on 15 November 2013 by the Investigative Committee of the Russian Federation with a view to obtaining a three-month extension of the detention of the persons who had been on board the *Arctic Sunrise*. On 24 and 25 December 2013, the Investigative Committee dropped these charges, following an amnesty decree of 18 December 2013 passed by the State Duma of the Russian Federation calling, *inter alia*, for an end to pending investigations against individuals suspected of having committed acts of hooliganism.

330. Hooliganism may be a criminal offence under the law of the Russian Federation, but there is no corollary for such an offence under international law. Consequently, hooliganism cannot be invoked by the Russian Federation as a valid ground for taking law-enforcement

[232] Greenpeace Factual Account, para. 94.

actions against a foreign-flagged vessel. Furthermore, as demonstrated above in Section V.2.3 above, the actions of the persons on board the *Arctic Sunrise* fall within the ambit of the right to peaceful protest at sea, which is protected under international law.

2.4.2 Breach of International Obligations under International Human Rights Law Resulting from the Boarding of the Arctic Sunrise *and Subsequent Acts Related Thereto*

2.4.2.1 Freedom from Arbitrary Arrest and Detention

331. Pursuant to Article 9.1 ICCPR, no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. Notwithstanding the answer to the question of whether the arrest and subsequent detention of the persons on board the *Arctic Sunrise* were in accordance with Russian domestic law, the drafting history of the above provision confirms that

> "'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of the crime".[233]

332. According to Article 9.2 ICCPR, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. If preventive detention is used for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available.[234]

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[233] HRC, 23 July 1990, *Van Alphen v. the Netherlands, Decision*, para. 5.8.
[234] HRC, General Comment 8, para. 4.

333. Furthermore, pursuant to Article 9.3 ICCPR, anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody.

334. Applying these provisions to the present case, the Netherlands concludes that the arrest and detention of the persons on board the *Arctic Sunrise* were arbitrary and therefore in violation of Article 9 ICCPR.

335. Although the persons on board the *Arctic Sunrise* were exercising their right to peaceful protest at sea, the ending of the protest action by the Russian authorities may not in itself have been inappropriate, unforeseeable or otherwise unreasonable under the circumstances. The persons on board the *Arctic Sunrise* could have been aware that their attempt to climb the platform might lead to coercive measures by the authorities. However, the arrest and detention of the persons on board the *Arctic Sunrise* would not have been possible but for the wrongful boarding of the *Arctic Sunrise* and, hence, was not prescribed by law. Furthermore, even if they could have expected to be arrested as a result of the exercise of their right to peaceful protest, the serious criminal charges brought against them (piracy and hooliganism) and the length of their pre-trial detention were under no circumstances appropriate, foreseeable, or reasonable. The requirements of Article 9.1 ICCPR were therefore not fulfilled.

336. The requirement under Article 9.2 ICCPR of immediate information on the reasons of the arrest and the nature of the charges brought was also not fulfilled, since this only happened in Murmansk on 24 September 2013, five days after the boarding of the *Arctic Sunrise*.

337. Finally, as far as Article 9.3 ICCPR is concerned, the Netherlands concludes that the persons who had been on board the *Arctic Sunrise* were not brought promptly before a judge. The case law of the Human Rights Committee indicates that the limit of 'promptness' for the purposes of Article 9.3 lies somewhere around three days.[235] The arrested persons were held on

[235] HRC, *Borisenko v. Hungary, Decision*; HRC, *Freemantle v. Jamaica, Decision*; and HRC, *Nazarov v. Uzbekistan, Decision*.

board the Arctic Sunrise from 19 to 24 September and were brought before the Investigative Committee for the first time on 24 September 2013 and before a judge on 26 September 2013. The period between arrest and judicial control thus amounted to five days, and therefore did not meet the requirement of promptness enshrined in Article 9.3 ICCPR.

2.4.2.2 Freedom to Leave a Country

338. Pursuant to Article 12.2 ICCPR, everyone shall be free to leave any country. According to Article 12.3 ICCPR, this right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the ICCPR.

339. As a consequence of the violation of Article 9 ICCPR, the Netherlands is of the view that the freedom of the persons on board the *Arctic Sunrise* to leave the Russian Federation was violated between the moment they were brought to Russian territory and the moment they left the country. It is recalled that they were arrested on 19 September 2013, brought to Murmansk on 24 September 2013, and were only allowed to leave the Russian Federation on 29 December 2013. None of the exceptions to the right enshrined in Article 12.2 ICCPR were applicable.

340. But even if one were of the view that the criminal proceedings against the persons who had been on board the *Arctic Sunrise* constituted an interest of public order, justifying a prohibition to leave the Russian Federation, it is submitted that such prohibition did not meet the respective tests of necessity and proportionality.

2.4.3 Attribution of Conduct to the Russian Federation

341. The *Arctic Sunrise* was boarded on 19 September 2013 by persons wearing balaclavas and unmarked uniforms descending from a helicopter. They were not immediately identifiable as law-enforcement officers of the Russian Federation. The helicopter itself was also not clearly marked as belonging to enforcement authorities of the Russian Federation.

342. The relevant rules of international law on attribution of conduct, as codified in the ARSIWA, provide that the conduct of State organs (Article 4), of entities exercising elements of governmental authority and thereto empowered by law (Article 5), of entities under effective control of the State (Article 8) and of entities whose conduct is acknowledged and accepted as the State's own conduct (Article 11), are attributable to the State.

343. The persons who boarded the *Arctic Sunrise* with a view to prepare the arrest and detention of the ship and the persons on board may not have been immediately identifiable as law-enforcement officers of the Russian Federation. Even so, communication between them and the Coast Guard and the fact that they boarded the *Arctic Sunrise* after the authorities of the Russian Federation had taken the decision to seize the *Arctic Sunrise* as well as the fact that the arrest and detention of the ship and the persons on board was followed up by the Coast Guard of the Russian Federation allows the Netherlands to consider, in good faith, that they were representing organs of the Russian Federation.

344. This is further supported by testimony given by Mr Anatolievich in the Witness Interrogation Report issued by the authorities of the Russian Federation (Annex N-3, appendix 8). He was acting in official capacity as commander of the artillery. The testimony confirms the presence of "special unit" forces descending from the helicopter. It does not indicate any hesitation about the authority of these special units to board the *Arctic Sunrise*, and to prepare the arrest and detention of the ship and the persons on board. Other witness statements of Mr Sergeevich and Mr Aleskandrovich attest to the involvement of the Federal Security Service which adds to the conclusion that the persons descending from the helicopter were in fact representing State organs (Annex N-3, appendix 8).

345. Should the Tribunal consider that the persons boarding the *Arctic Sunrise* cannot be qualified as representing State organs, their conduct is still attributable to the Russian Federation. First, by instructing the Coast Guard to arrest and detain the ship and the persons on board, the Russian Federation must have acknowledged and adopted as its own the conduct of the

unidentified persons. It accepted and acted upon their conduct without further inquiries as to their status.

346. Second, if the persons boarding the *Arctic Sunrise* were indeed not a representing a State organ but a private entity, they must have acted under the direction and control of the Russian Federation. The Russian Federation established an "area dangerous to navigation" around the *Prirazlomnaya*. A helicopter with the capacity to arrest and detain a ship and the persons on board could not have been present in or near this area without instructions and control of the authorities of the Russian Federation. The fact that the *Ladoga* returned to the *Prirazlomnaya* upon arrival of the helicopter indicates concerted action between the law-enforcement action by the persons descending from the helicopter and the Russian Coast Guard.

347. All subsequent law-enforcement actions taken against the *Arctic Sunrise* and the persons on board are attributable to the Russian Federation. All entities involved were State organs, including the Federal Security Service, the Coast Guard, the judicial and prison authorities, and the Duma.

2.4.4 Absence of Circumstances Precluding Wrongfulness

348. None of the circumstances precluding wrongfulness recognized in the law of State responsibility and identified in Section V.2.2.3 above have been invoked by the Russian Federation to justify its conduct, nor could any such circumstance preclude the wrongfulness of the conduct of the Russia Federation with respect to the boarding of the *Arctic Sunrise* by the Russian Federation and subsequent acts related thereto.

349. It may be added that the Netherlands protested immediately and repeatedly against the acts of the Russian authorities against the *Arctic Sunrise* and the persons on board. Therefore, the Netherlands has not consented to the wrongful conduct of the Russian Federation (Annex N-6; Annex N-9).

2.5 Conduct of the Russian Federation with respect to the Implementation of the ITLOS Order

2.5.1 Breach of International Obligations with respect to the Implementation of the ITLOS Order

350. Pending the constitution of the present arbitral tribunal, the ITLOS prescribed provisional measures in its Order on provisional measures in *The "Arctic Sunrise" Case*. In the *dispositif* of the Order, the ITLOS:

> "*Prescribes*, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:
>
> (a) The Russian Federation shall immediately release the vessel Arctic Sunrise and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands which shall be in the amount of 3,600,000 euros, to be posted with the Russian Federation in the form of a bank guarantee;
>
> (b) Upon the posting of the bond or other financial security referred to above,
>
> the Russian Federation shall ensure that the vessel Arctic Sunrise and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation".[236]

351. These provisional measures are binding upon the Netherlands and the Russian Federation as a result of Article 290 UNCLOS in conjunction with Article 296.1 of the Convention and Article 25.1 of the Statute of the ITLOS.

352. Use of the term "prescribe" in Article 290 of the UNCLOS and Article 25.1 of the Statute of the ITLOS, as opposed to the term "indicate" found in Article 41 of the Statute of the ICJ, leaves no doubt as to the binding nature of provisional measures prescribed by a court or tribunal having jurisdiction under Part XV or Part XI, Section 5, of the UNCLOS.[237] Moreover, in its

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[236] ITLOS Order, para. 105(1).

[237] T.A. Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), pp. 44-45; R. Wolfrum, 'Provisional Measures of the International Tribunal for the Law of the Sea', in P. Chandrasekhara Rao & R. Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice* (2001), pp. 185-186.

Order on provisional measures in *The "Arctic Sunrise" Case*, the ITLOS referred to "the binding force of the measures prescribed".[238] Even if an Annex VII arbitral tribunal were to find it lacked jurisdiction, provisional measures adopted by the ITLOS prior to its constitution have effect until their revocation.

353. The ITLOS Order has created international obligations of which the Netherlands and the Russian Federation are the addressees. In this regard, the ICJ noted in its most recent indication of provisional measures:

> "The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed".[239]

354. A State that fails to comply with provisional measures prescribed by the ITLOS commits an internationally wrongful act. In its Commentary to Article 12 ARSIWA, on the existence of a breach of an international obligation, the ILC notes that "the articles are of general application" and that "[t]hey apply to all international obligations of States, whatever their origin may be".[240] Several examples are given including "a judgment given between two States by ICJ or another tribunal".[241] There is no reason that would bar the application of the rule reflected in Article 12 ARSIWA to binding provisional measures prescribed by the ITLOS.

355. The Russian Federation failed to take the acts necessary in a timely fashion to comply with the provisional measures prescribed by the ITLOS and, at the time of writing of this Memorial, it still has not fully complied with the ITLOS Order.

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[238] ITLOS Order, para. 101.
[239] *Questions relating to the Seizure and Detention of Certain Documents and Data, Provisional Measures, Order of 3 March 2014*, para. 53.
[240] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 12, p. 55.
[241] Ibid., p. 55.

356. On 2 December 2013, in compliance with the ITLOS Order, the Netherlands concluded an agreement with the Royal Bank of Scotland ZAO, Moscow (RBS), to issue a bank guarantee in which the RBS undertook and guaranteed to pay the Russian Federation a sum up to 3,600,000 euros promptly after receipt by the RBS of a written demand by the competent authority of the Russian Federation designated for these purposes. By diplomatic note of the same day, the Netherlands informed the Russian Federation of the issuance of the bank guarantee.[242]

357. Upon the issuance of the bank guarantee by the Netherlands, the Russian Federation was under an obligation to "immediately release the vessel Arctic Sunrise and all persons who have been detained" and to "ensure that the vessel Arctic Sunrise and all persons who have been detained are allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation".[243]

358. On 28 November 2013, the last person on board the *Arctic Sunrise* who had been detained by the Russian Federation was granted bail. The following day he was released, joining the other crew members in a hotel in St Petersburg.[244]

359. The release of the persons who had been on board the *Arctic Sunrise* stood in stark contrast with the situation concerning the *Arctic Sunrise*. The arrest of the ship was ordered by the Leninsky District Court of Murmansk on 7 October 2013, only to be lifted on 6 June 2014 by the Investigative Committee (Annex N-3, appendix 34). The extensive period of time between the prompt issuance of a bank guarantee by the Netherlands on 2 December 2013 and the lifting of the arrest of the *Arctic Sunrise* on 6 June 2014 constitutes a patent violation of the Russian Federation's duty to "immediately" release the vessel.

360. In addition to the obligation of immediate release detailed above, the Russian Federation had a duty to ensure that the *Arctic Sunrise* and the persons who had been on board were allowed to leave the territory and maritime areas under its jurisdiction. It should be emphasized that the

[242] ITLOS Order, *Report on Compliance with the Provisional Measures Prescribed by the Tribunal on 22 November 2013 in the Case concerning the 'Arctic Sunrise' of 2 December 2013*.
[243] ITLOS Order, para. 105(1).
[244] Greenpeace Factual Account, para. 112.

Russian Federation was required to "comply promptly" with this measure ordered by the ITLOS.[245]

361. Legal representatives of the non-Russian nationals who had been on board the *Arctic Sunrise* requested the Investigative Committee on 4 December 2013 to arrange for the necessary documentation so that these individuals could leave the Russian Federation in conformity with the ITLOS Order. The Investigative Committee informed these legal representatives on 9 December 2013 that it could not assist in distributing such papers as it fell beyond the scope of its powers. On 18 December 2013, the State Duma of the Russian Federation passed an amnesty decree, which, among others, called for the cessation of pending investigations against persons suspected of offences under Article 213 of the Criminal Code – the provision on hooliganism under which the persons on board the *Arctic Sunrise* were charged.[246] On 24 and 25 December 2013, the Investigative Committee dropped the criminal prosecution for hooliganism against all persons who had been on board the *Arctic Sunrise* and lifted the conditions of their bail. On 26 and 27 December 2013, the way was cleared for the 26 non-Russian nationals to depart, when the Federal Migration Service decided not to institute administrative proceedings against the non-Russian nationals for unauthorized entry onto Russian territory. By 29 December 2013, the non-Russian nationals had left the country. Thus, a period of over three weeks had elapsed between the issuance of the bank guarantee by the Netherlands on 2 December 2013 and the departure of the last non-Russian national from the Russian Federation. The Netherlands submits that this lapse of time does not meet the requirement of immediacy of the ITLOS Order of 22 November.

362. The Russian Federation also failed to comply promptly with the same obligation it had in respect of the *Arctic Sunrise*. The facts above describing the situation before the lifting of the arrest of the *Arctic Sunrise* show clearly that organs of the Russian Federation acted to prevent the departure of the ship. After the lifting of the arrest of the *Arctic Sunrise*, Greenpeace International and an independent P&I surveyor verified the seaworthiness of the ship.

[245] ITLOS Order, para. 101.
[246] Article 6.5 of the Resolution of the State Duma of 18 December 2013, N 3500-6 DG, "On Amnesty in connection with the 20th Anniversary of the Adoption of the Constitution of the Russian Federation", http://www.rg.ru/2013/12/18/amnistia-dok.html.

Subsequently, the *Arctic Sunrise* underwent essential maintenance so as to enable its departure. Although these works were completed on 22 July 2014, unexplained delays meant that the port State inspection was conducted and permission for the ship to leave Murmansk was only obtained on 31 July 2014. The *Arctic Sunrise* left the exclusive economic zone of the Russian Federation on 1 August 2014. In effect, between 2 December 2013 and 1 August 2014, approximately nine months had passed before the Russian Federation complied with its duty to ensure that the *Arctic Sunrise* was allowed to leave the areas under its jurisdiction.

363. Items have been taken from the *Arctic Sunrise* as well as personal effects from the persons on board while the ship was in custody of the authorities of the Russian Federation. At the time of writing, an important number of these items and personal effects have not been returned. The Netherlands submits that the provisional measures prescribed by the ITLOS Order include an obligation incumbent upon the Russian Federation to ensure the prompt return of all such items and personal effects. The Russian Federation continues to disregard this obligation.

364. In its Order on provisional measures in *The "Arctic Sunrise" Case*, the ITLOS further:

> "*Decides* that the Netherlands and the Russian Federation shall each submit the initial report referred to in paragraph 102 not later than 2 December 2013 to the Tribunal, and *authorizes* the President to request further reports and information as he may consider appropriate after that report".[247]

365. On 2 December 2013, the Netherlands submitted a report on compliance with the provisional measures prescribed by the ITLOS.[248] The President of the Tribunal did not request any further reports. The Russian Federation failed to submit a report by 2 December 2013, nor did it submit a report after that date.

366. Finally, it is noted that the ILC considers that "non-compliance with a provisional measures order" amounts to the failure of a State to implement applicable dispute settlement

[247] ITLOS Order, para. 105 (2).
[248] ITLOS Order, *Report on Compliance with the Provisional Measures Prescribed by the Tribunal on 22 November 2013 in the Case concerning the 'Arctic Sunrise' of 2 December 2013.*

procedures in "good faith".[249] The Russian Federation, by not meeting all terms of the ITLOS Order and still not having fully complied with the Order, has acted contrary to its good faith obligation under Article 300 UNCLOS with respect to the implementation of the UNCLOS dispute settlement procedure.

367. The Netherlands concludes the following with respect to the ITLOS Order:

- The Russian Federation did not comply with its duty to immediately release the *Arctic Sunrise*;
- The Russian Federation did not comply with its duty to promptly ensure that the *Arctic Sunrise* and all crew members of the *Arctic Sunrise* who it had detained were allowed to leave the territory and maritime areas under its jurisdiction;
- The Russian Federation did not comply with its duty to promptly return all items it took from the *Arctic Sunrise* and all personal effects it took from the crew members of the ship as a result of its law-enforcement actions;
- The Russian Federation did not comply with its duty to submit a report on compliance with the provisional measures prescribed by the ITLOS;
- The Russian Federation, through its non-compliance with the ITLOS Order, has violated its good faith obligation to implement the UNCLOS dispute settlement procedure.

2.5.2 Attribution of Conduct to the Russian Federation

368. The ITLOS Order imposed an obligation on the Russian Federation to instruct the relevant State organs to implement the necessary measures to give effect to the Order.250 Since acts and omissions of State organs are directly attributable to the State, the failure to comply with the Order is therefore attributable to the Russian Federation.

[249] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 52, pp. 135, 137.
[250] See *LaGrand, Judgment*, paras. 111-115.

2.5.3 Absence of Circumstances Precluding Wrongfulness

369. None of the circumstances precluding wrongfulness recognized in the law of State responsibility and identified in Section V.2.2.3 above have been invoked by the Russian Federation to justify its conduct, nor could any such circumstance preclude the wrongfulness of the conduct of the Russia Federation with respect to the implementation of the ITLOS Order.

2.6 Non-participation of the Russian Federation in the Arbitral Procedure

2.6.1 Breach of International Obligations Resulting from the Non-participation of the Russian Federation in the Present Arbitral Procedure

370. In Section III.1 above, the Kingdom of the Netherlands observed that the refusal of the Russian Federation to participate in the present arbitral proceedings has a negative impact on the sound administration of justice and adversely affects the integrity of the compulsory dispute settlement system under the UNCLOS. In this respect, the Netherlands noted the finding of the ILC that "non-appearance" amounts to the failure of a State to implement applicable dispute settlement procedures in "good faith".[251] It also noted the finding of the ICJ that "the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage".[252]

371. The non-participation of the Russian Federation is not limited to its refusal to appear before the ITLOS and the Tribunal. It also amounts to non-fulfilment of its obligations related to the compulsory dispute settlement mechanisms under the UNCLOS. In particular, it has failed to comply with its obligation to bear its part of the expenses of the Tribunal.

372. Pursuant to Article 7 of Annex VII to the Convention and Article 31 of the Tribunal's Rules of Procedure, the expenses, including the remuneration of its members, of the Tribunal shall be borne by the parties to the dispute in equal shares. Article 33 of the Tribunal's Rules of Procedure and Paragraph 7 of Tribunal's Procedural Order No. 1 require the parties to the

[251] ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 52, p. 135.
[252] *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment*, para. 31.

dispute to deposit amounts as an advance for the Tribunal's expenses, including fees to the arbitrators and the Registry.

373. As acknowledged by the Registrar of the Tribunal on 11 March 2014, the Netherlands paid its portion of EUR 150,000 of the initial deposit of EUR 300,000. Since the initial deposit had not been fully established in accordance with Article 33 of the Tribunal's Rules of Procedure and Paragraph 7 due to the failure of the Russian Federation to pay its portion of EUR 150,000, the Netherlands was requested on 13 May 2014 to pay the remaining portion. The Registrar acknowledged the payment of this portion by the Netherlands on 27 May 2014. Pursuant to Article 33.3 of the Tribunal's Rules of Procedure and Paragraph 7.3 of the Tribunal's Procedural Order No. 1, the Registrar may, after consultation with the President of the Tribunal, request the parties to make supplementary deposits. In the event the Russian Federation fails to pay its portions, it may be expected that the Netherlands will be requested to pay those portions.

374. The Russian Federation, by not making the required payments under Article 33.3 of the Tribunal's Rules of Procedure and Paragraph 7 of the Tribunal's Procedural Order No. 1, has acted contrary to its good faith obligation under Article 300 UNCLOS with respect to the implementation of the UNCLOS dispute settlement procedure.

375. The Netherlands concludes the following with respect to the non-participation of the Russian Federation in the present arbitral procedure:

- The Russian Federation, by not making deposits to secure the Tribunal's fees and expenses, did not comply with its obligation to bear half of the expenses of the Tribunal in accordance with Annex VII to the Convention and the Tribunal's Rules of Procedure;
- The Russian Federation, by not making deposits to secure the Tribunal's fees and expenses, has violated its good faith obligation to implement the UNCLOS dispute settlement procedure.

2.6.2 Attribution of Conduct to the Russian Federation

376. Annex VII to the Convention (Article 9), the Tribunal's Rules of Procedure (Article 33.3) and Procedural Order No. 1 of the Tribunal (Paragraph 7) impose obligations on the Russian Federation to contribute to the fees and expenses of the Tribunal.[253] Since acts and omissions of State organs are directly attributable to the State, the failure to comply with these obligations is therefore attributable to the Russian Federation.

2.6.3 Absence of Circumstances Precluding Wrongfulness

377. None of the circumstances precluding wrongfulness recognized in the law of State responsibility and identified in Section V.2.2.3 above have been invoked by the Russian Federation to justify its conduct, nor could any such circumstance preclude the wrongfulness of the conduct of the Russia Federation resulting from the non-participation of the Russian Federation in the present arbitral procedure.

2.7 Content of the International Responsibility of the Russian Federation

2.7.1 Introduction

378. At the time of writing, it is not possible for the Netherlands to identify, specify and quantify all counts of reparation. This is due to the fact that the *Arctic Sunrise* only arrived in Amsterdam on 9 August 2014 and the need to procure a comprehensive and independent assessment of the damage to the ship. The Netherlands requested leave from the Tribunal to submit supplemental written pleadings on reparation for injury before 1 October 2014, and such leave was granted on 30 August 2014.[254] This Section may accordingly be modified in those supplemental written pleadings.

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[253] See *LaGrand, Judgment, ICJ Reports 2001*, 466, paras. 111-115.

[254] Letter of the Agent for the Kingdom of the Netherlands to the Registrar of the Tribunal of 22 August 2014; and Letter of the Registrar of the Tribunal to the Agent and Co-agent for the Kingdom of the Netherlands and the Minister of Foreign Affairs of the Russian Federation of 30 August 2014.

379. As has been demonstrated above in this Section, the Russian Federation bears responsibility under international law for breaches of its obligations owed to the Netherlands as the flag State of the *Arctic Sunrise*. As the PCIJ found in *Factory at Chorzow*,

> "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[255]

380. The PCIJ also found that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed".[256] As will be explained more in detail below, the Kingdom of the Netherlands therefore presents a claim for full reparation.

381. The general rules on the content of international responsibility following a breach of international law, including the various forms, have been codified in the ARSIWA in Articles 30(a) (cessation), 30(b) (assurances and guarantees of non-repetition), 31 (reparation), 35 (restitution), 36 (compensation), 37 (satisfaction) and 38 (interest).

382. In view of the breaches of international law that are attributable to the Russian Federation, the Netherlands considers appropriate, in addition to the obligation of the Russian Federation to cessation of the internationally wrongful acts that are continuing in time and assurances and guarantees of non-repetition, the following forms of reparation, which will be indicated in detail below for each heading of the statement of legal grounds: restitution, compensation and satisfaction.

383. In view of the internationally wrongful acts of the Russian Federation, the Kingdom of the Netherlands considers that cessation of the internationally wrongful acts that are continuing in time as well as assurances and guarantees of non-repetition are appropriate.

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[255] *Factory at Chorzow, Jurisdiction, Judgment*, p. 21.
[256] Ibid, p. 47.

384. The internationally wrongful acts continuing in time are: (a) the application by the Russian Federation of national legislation vis-à-vis the Netherlands, including ships flying its flag, extending the breadth of safety zones around installations in its exclusive economic zone beyond the extent allowed under the UNCLOS; (b) the failure to return objects belonging to the *Arctic Sunrise* and persons who had been on board; and (c) the non-participation of the Russian Federation in the present arbitral procedure.

385. The circumstances of the present dispute require the award of assurances and guarantees of non-repetition. The Russian law-enforcement actions have had a chilling effect on the freedom of protest at sea. This chilling effect arose from the seriousness of the criminal charges (piracy and hooliganism) brought against the persons on board the *Arctic Sunrise* and the length of their pre-trial detention.

386. The claims regarding reparation are divided in four headings: (a) reparation addressing injury to the Netherlands and its claims as a non-injured State with a legal interest; (b) reparation addressing the damage inflicted on the *Arctic Sunrise*; (c) reparation addressing the damage suffered by the persons on board the *Arctic Sunrise*; and (d) interest to be paid on the claims for compensation.

387. The Netherlands wishes to emphasize that the order of the first three headings does not reflect a hierarchy and that the reparation for each heading is considered equally important. As the flag State, the Netherlands has standing to request compensation on behalf of the *Arctic Sunrise*, and subsidiarily its owner and operator, as well as all persons on board. In this respect, the ITLOS found in *The M/V "SAIGA" (No. 2) Case* that

> "Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the Saiga, including all persons involved or interested in its operation. Damage or other loss suffered by the Saiga and all persons involved or interested in its operation comprises injury to persons, unlawful

arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit".[257]

388. In *The M/V "Virginia G" Case*, the ITLOS similarly found that the losses of entities involved in the operation of the ship, for instance the charter company, having suffered damage as a consequence of the breach of the law of the sea, could be claimed by Panama.[258]

389. Pursuant to Article 7 of Annex VII to the Convention, the expenses of the Tribunal shall be borne by the parties to the dispute in equal shares, unless the Tribunal decides otherwise because of the particular circumstances of the case. The Kingdom of the Netherlands submits that no such particular circumstances warrant deviating from this provision in the present case. Hence, the Kingdom of the Netherlands requests the Tribunal to decide that the Netherlands and the Russian Federation shall bear the expenses of the Tribunal in equal shares.

390. Should the Tribunal find that the Russian Federation has not committed any internationally wrongful act through its law-enforcement actions, the Russian Federation is required to pay compensation for any damage or loss caused by these actions under the Convention (Articles 106, 110(3) and 111(8)). Even if the Russian Federation could justify its law-enforcement actions against the *Arctic Sunrise* and persons who had been on board, subsequent events have demonstrated that the suspicions were unfounded, that there were no adequate grounds or that there were no circumstances justifying the conduct of the Russian Federation. This follows from the absence of any criminal conviction on the basis of the law-enforcement actions.

2.7.2 Injury to the Netherlands

391. The internationally wrongful acts by the Russian Federation caused injury to the Netherlands. The Netherlands therefore requests the following counts of reparation:

[257] *The M/V "SAIGA" (No. 2) Case, Judgment*, para. 172.
[258] *The M/V "Virginia G" Case, Judgment*, para. 434.

- A declaratory judgment on the wrongfulness of the conduct of the Russian Federation in respect of all five claims;
- Assurances and guarantees of non-repetition by the Russian Federation;
- A formal apology from the Russian Federation for its wrongful conduct in respect of all five claims;
- Compensation for the deposits to secure the Tribunal's fees and expenses paid by the Netherlands due to failures of the Russian Federation to pay its portions of those deposits in accordance with Article 33 of the Tribunal's Rules of Procedure and Paragraph 7 of Tribunal's Procedural Order No. 1 except for any unused balance returned to the Netherlands at the end of the arbitration;
- Modification or application, as appropriate, of the national legislation related to zones around installations in its exclusive economic zone to the extent allowed under the Convention;
- Compensation of the costs of the issuance of a bank guarantee as a financial security for the release of the *Arctic Sunrise* pursuant to the ITLOS Order.

2.7.3 Injury to the Arctic Sunrise

392. The arrest and detention of the *Arctic Sunrise* caused considerable damage to the ship, its owner and its charterer. First, the ship suffered material damage due to lack of maintenance as well as the removal of objects and havoc caused to the ship by persons unknown whilst it was in the custody of the authorities of the Russian Federation in the port of Murmansk Oblast. Second, the owner and charterer were deprived of the ship resulting in loss of profits. This loss of profits resulted from the unavailability of the ship during its detention and the fee paid by the charterer, Greenpeace International, to the owner, Stichting Phoenix, as well as salary costs of persons on board the *Arctic Sunrise*. Third, material damage was suffered in connection with the return of the ship to Amsterdam following its release. All of these costs are included in the claim for reparation and in particular the claim for compensation. As provided for in Article 36.2 ARSIWA, compensation "shall cover any financially assessable damage including loss of profits".

393. The costs claimed under this heading are described in: (a) the Condition Survey Report by Murmansk P&I Agency of 2 July 2014 verifying the seaworthiness of the *Arctic Sunrise* prior to departure (Annex N-3, appendix 35); (b) the Report of Survey by Halyard Survey BV of 21 August 2014 providing a damage survey estimating the cost for repair and recovery of missing equipment and goods after the return of the *Arctic Sunrise* to Amsterdam (Annex N-40); and (c) the Audited Claims Statement by WEA Accountants of 29 August 2014 concerning damages related to the support and release of the persons who had been on board the *Arctic Sunrise* as well as the recovery of the ship (Annex N-41). The latter two reports were only recently received by the Netherlands, and the Netherlands has not yet been able to review their contents.

394. On the basis of these reports, the following counts for reparation are identified:

- Restitution of objects belonging to the *Arctic Sunrise* that have not yet been returned, including RHIBs, computers, navigational tools and documents;
- Alternatively and subsidiarily, should restitution not be achieved within two months after the award of this Tribunal, the objects not recovered must be compensated;
- Compensation for damage caused to the *Arctic Sunrise* during the detention of the ship to the extent not covered by (a) and (b) above, including costs of cleaning and repairing the *Arctic Sunrise*;
- Compensation for costs of legal services rendered in the Russian Federation related to the arrest of the *Arctic Sunrise*;
- Compensation for costs regarding the *Arctic Sunrise* for:
  - The harbour dues and agent costs in the port of Murmansk Oblast;
  - The resupplying of the *Arctic Sunrise* prior to departure, including crew costs and costs for standby crew during the detention of the ship;
  - The return voyage of the *Arctic Sunrise* to Amsterdam;
  - Compensation for loss of use of the *Arctic Sunrise* while it was wrongfully detained in Murmansk and associated costs for compensating for the absence of the *Arctic Sunrise*;
- Compensation for costs of the procurement of:
  - The Condition Survey Report by Murmansk P&I Agency of 2 July 2014;

- The Report of Survey by Halyard Survey BV of 21 August 2014;
- The relevant part of the Audited Claims Statement by WEA Accountants of 29 August 2014.

2.7.4 Injury to the Persons on Board the Arctic Sunrise

395. Due to the wrongful boarding of the *Arctic Sunrise* and the subsequent law-enforcement measures, material and non-material injury has been suffered by all persons on board the ship. The award of non-material injury in situations of wrongful detention is well-established under international law. Judicial precedent includes *The M/V "SAIGA" (No. 2) Case*[259] and *Ahmadou Sadio Diallo*.[260] Therefore, the following counts for reparation are identified:

- Restitution of personal belongings of all persons on board that have not yet been returned, including computers, personal documents and other personal belongings;
- Alternatively and subsidiarily, should restitution not be achieved within two months after the award of this Tribunal, the objects not recovered must be compensated;
- Compensation for the costs for having to provide bail as security for the release of all persons on board pursuant to the decisions of Russian courts;[261]
- Compensation for costs incurred during the wrongful detention of the persons on board the *Arctic Sunrise*:
  - Supplies of goods and services, including support to the persons detained;
  - Medical costs;
  - Costs of legal representation;
  - Salary costs as lost funds;
- Compensation for costs incurred on behalf of all persons on board the *Arctic Sunrise* between release from prison and departure from the Russian Federation:
  - Hotel costs for the nights after release from prison but before leaving the Russian Federation;
  - Daily subsistence allowance;

[259] *The M/V "SAIGA" (No. 2), Judgment*, para. 175.
[260] *Ahmadou Sadio Diallo, Compensation, Judgment*, p. 324, paras. 21-24.
[261] For example, see Annex N-3, appendix 22.

- Travel costs for the return journey to the countries of origin of the non-Russian nationals on board the *Arctic Sunrise*;
- Compensation for immaterial damage incurred due to the wrongful detention;
- Compensation for costs of the procurement of the relevant part of the Audited Claims Statement by WEA Accountants of 29 August 2014.

2.7.5 Interest

396. In order to achieve full reparation, the award of interest is required. The Netherlands requests the Tribunal to award interest for the following sums:

- Interest on the principle sum consisting of all payable sums awarded from the date when the principle sum should have been paid until the date the obligation to pay is fulfilled;
- Interest on the sums paid in advance by the Netherlands, the operator of the *Arctic Sunrise*, the charter of the *Arctic Sunrise* or entities associated with the operator of the *Arctic Sunrise* covering costs directly incurred by the wrongful conduct of the Russian Federation from the date the payment was done until the date the obligation to pay the compensation is fulfilled.

VI. AWARD REQUESTED

397. The Kingdom of the Netherlands therefore requests the arbitral tribunal to adjudge and declare that:

(1) The Russian Federation:

(a) In boarding, investigating, inspecting, arresting, detaining and seizing the *Arctic Sunrise* without the prior consent of the Kingdom of the Netherlands, as described in this Memorial, breached its obligations to the Kingdom of the Netherlands, in its own right, in the exercise of its right to protect a ship flying its flag, and as a non-injured State with a legal interest, in regard to the freedom of navigation as provided by Articles 58.1 and 87.1(a) UNCLOS, and under customary international law;

(b) In boarding, investigating, inspecting, arresting, detaining and seizing the *Arctic Sunrise* without the prior consent of the Kingdom of the Netherlands, as described in this Memorial, breached its obligations to the Kingdom of the Netherlands, in regard to the exercise of jurisdiction by a flag State as provided by Articles 56.2 and 58 UNCLOS, and Part VII of the UNCLOS, and under customary international law;

(c) In boarding the *Arctic Sunrise* without the prior consent of the Kingdom of the Netherlands to arrest and detain the crew members and initiating judicial proceedings against them, as described in this Memorial, breached its obligations to the Kingdom of the Netherlands, in its own right, in the exercise of its right to diplomatic protection of its nationals, in the exercise of its right to seek redress on behalf of the persons on board a ship flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, and as a non-injured State with a legal interest, in regard to the right to liberty and security of the persons on board a ship and their right to leave the territory and maritime areas under the jurisdiction of a coastal State as provided by Articles 9 and 12.2 ICCPR, and customary international law;

(d) In applying national legislation related to artificial islands, installations and structures in the exclusive economic zone vis-à-vis the Netherlands, including ships flying its flag, extending the breadth of safety zones around artificial islands, installations and structures in its exclusive economic zone beyond the extent allowed under the UNCLOS, breached its obligations to the Kingdom of the Netherlands:

(i) in its own right, in the exercise of its right to protect a ship flying its flag, in regard to freedom of navigation, the exercise of jurisdiction by a flag State and the freedom of protest at sea as provided by Articles 56.2, 58.1, and 60.4 UNCLOS, and Part VII of the UNCLOS, and under customary international law; and

(ii) as a non-injured State with a legal interest in regard to freedom of navigation;

(e) In bringing serious criminal charges against the persons on board the *Arctic Sunrise* (piracy and hooliganism) and keeping them in pre-trial detention for an extended period, breached its obligations to the Kingdom of the Netherlands in its own right, in the exercise of its right to protect a ship flying its flag, in the exercise of its right to diplomatic protection of its nationals, in the exercise of its right to seek redress on behalf of the persons on board a ship flying the flag of the Kingdom of the Netherlands, irrespective of their nationality, and as a non-injured State with a legal interest, in regard to the freedom of protest at sea as provided by Articles 56.2 and 58.1 UNCLOS, and Part VII of the UNCLOS, and under customary international law;

(f) In not timely and fully implementing the ITLOS Order, breached its obligations to the Kingdom of the Netherlands in its own right, in regard to the compliance with provisional measures as provided for by Articles 290.6 and 296.1 UNCLOS, and Part XV and Article 300 of the Convention;

(g) In not making the required payments to contribute to the Tribunal's expenses, breached its obligations to the Kingdom of the Netherlands in its own right, in regard to the equal sharing of the Tribunal's expenses as provided for by Article 7

of Annex VII to the Convention, Articles 31 and 33 of the Tribunal's Rules of Procedure, Paragraph 7 of the Tribunal's Procedural Order No. 1, and Part XV and Article 300 of the Convention;

(2) The aforementioned violations constitute internationally wrongful acts entailing the international responsibility of the Russian Federation;

(3) Said internationally wrongful acts involve legal consequences requiring the Russian Federation to:

(a) Cease, forthwith, the internationally wrongful acts continuing in time, as specified in Section V.2.7 above;

(b) Provide the Kingdom of the Netherlands with appropriate assurances and guarantees of non-repetition of all the internationally wrongful acts referred to in subparagraph (2) above, as specified in Section V.2.7 above;

(c) Provide the Kingdom of the Netherlands full reparation for the injury caused by all the internationally wrongful acts referred to in subparagraph (2) above, as specified in Section V.2.7 above and as may be modified in supplementary written pleadings.

VII. RESERVATION OF RIGHTS

38. While acknowledging, with appreciation, the leave granted by the Tribunal to submit supplementary written proceedings on reparation for injury, the Kingdom of the Netherlands reserves the right to modify and extend the terms of the award requested and the grounds on which it is based if any events subsequent to the submission of this Memorial related to the present dispute would warrant such modification.

The Hague, 1 September 2014

René Lefeber
Co-Agent for the Kingdom of the Netherlands

A. LIST OF ANNEXES SUBMITTED BY THE KINGDOM OF THE NETHERLANDS

Annex N-1
NV NL – RF (4 October 2013) (Notification of Arbitration)
'Statement of claim and the grounds on which it is based' including annexes (4 October 2013)

Annex N-2
'Request for Provisional Measures' including annexes (21 October 2013)

Annex N-3
(Revised + updated) Statement of Facts by Greenpeace International (15 August 2014)

Annex N-4
Crew List Greenpeace International (03 October 2013)

Annex N-5
Diplomatic Note RF - NL (18 September 2013) (Decision to Seize the *Arctic Sunrise*)

Annex N-6
Diplomatic Note NL - RF (23 September 2013) (Request for Information and Request for Release of Vessel and Crew)

Annex N-7
Diplomatic Note NL – RF (26 September 2013) (Reiteration of Request for Information and for Release of Vessel and Crew)

Annex N-8
Diplomatic Note Public Prosecutor Murmansk - Consul General NL (27 September 2013) (Request for Attendance)

Annex N-9
Diplomatic Note NL – RF (29 September 2013) (Protest against Investigation of the *Arctic Sunrise*)

Annex N-10
Diplomatic Note RF - NL (1 October 2013) (RF Replies to Questions NL)

Annex N-11
Diplomatic Note NL – RF (3 October 2013) (Reiterated Protest)

Annex N-12
Diplomatic Note NL – RF (21 October 2013) (Notification of Request for Provisional Measures ITLOS)

Annex N-13
Leninsky District Court Order on Seizure of Property (07 October 2013)

Annex N-14
Official Report of Seizure of Property (15 October 2013)

Annex N-15
Diplomatic Note NL - RF (18 October 2013) (Formal Protest against Seizure of the *Arctic Sunrise*)

Annex N-16
Judgment in the Case Concerning Administrative Offence - Captain Pete Willcox (8 October 2013)

Annex N-17
Diplomatic Note RF –NL (22 October 2013) (Non-Participation RF in Arbitral Procedure)

Annex N-18
Diplomatic Note RF - ITLOS (22 October 2013) (Non-Participation RF in Arbitral Procedure)

Annex N-19
Letter ITLOS - NL (23 October 2013) (Note of 22 October 2013 Non-participation RF; Request for Comments; Article 28 Statute ITLOS)

Annex N-20
Letter NL - ITLOS (24 October 2014) (Request to Continue Proceedings)

Annex N-21
Letter ITLOS – NL (31 October 2013) (Transmission letter Greenpeace on *amicus curiae*)

Annex N-22
Letter NL - ITLOS (01 November 2013) (Submission as *amicus curiae* by Greenpeace International)

Annex N-23
Letter ITLOS – NL (06 November 2013) (Transmission Protest RF on *amicus curiae* Greenpeace International)

Annex N-24
Letter ITLOS – Greenpeace (08 November 2013) (Refusal by ITLOS of *amicus curiae* Submission Greenpeace International)

Annex N-25
Netherlands' Replies to Questions posed by the International Tribunal for the Law of the Sea in *The "Arctic Sunrise" Case* (7 November 2013)

Annex N-26
Letter NL - ITLOS (15 November 2013) (Request to President ITLOS to Appoint Second Arbitrator)

Annex N-27
Diplomatic Note NL – RF (02 December 2013) (Informing RF of Issuance of Bank Guarantee)

Annex N-28
Netherlands' Report on Compliance with the ITLOS Order (22 November 2013)

Annex N-29
Letter NL - President ITLOS (13 December 2013) (Request for Appointment of Three Arbitrators)

Annex N-30
Letter President ITLOS - NL Arbitration (10 January 2014) (Appointment of Three Arbitrators)

Annex N-31
Diplomatic Note RF - NL (16 May 2014) (RF Proposal Transfer of Custody of Vessel)

Annex N-32
Diplomatic Note RF- NL (12 June 2014) (Decision to Lift Arrest of *Arctic Sunrise*)

Annex N-33
Diplomatic Note NL - RF (26 August 2014) (Reply to RF Diplomatic Notes of 16 May and 12 June)

Annex N-34
Diplomatic Note RF – ITLOS (27 February 2014) (Confirmation of Non-participation)

Annex N-35
Diplomatic Note NL – RF (24 September 2013) (Contacts with Greenpeace)

Annex N-36
Diplomatic Note NL – RF (27 September 2013) (Reply to RF Note of 27 September 2013)

Annex N-37
Notice to Mariners No 51-2011

Annex N-38
Letter RF – NL (3 December 2012) (RF Ministry of Transport – Greenpeace)

Annex N-39
Notice to Mariners No 21-2014

Annex N-40
Halyard Survey Report *Arctic Sunrise* (21 August 2014)

Annex N-41
WEA Auditor's Report (29 August 2014)
Audited Claim Statement

B. LIST OF WITNESS STATEMENTS SUBMITTED BY THE KINGDOM OF THE NETHERLANDS

Witness Statement NWS-01 Peter Henry Willcox

Witness Statement NWS-02 Dimitri Litvinov

Witness Statement NWS-03 Francis Patrick Michael Hewetson

Witness Statement NWS-04 Philip Edward Ball

Witness Statement NWS-05 Sini Annukka Saarela

Witness Statement NWS-06 Andrey Suchkov

Witness Statement NWS-07 Sergey Vasilyev

Witness Statement NWS-08 Daniel Simons

C. LIST OF REFERENCES

C.1 Treaties and Documents

C.1.1 Treaties

1950 Convention for the Protection of Human Rights and Fundamental Freedoms

1958 Convention on the Continental Shelf

1958 Convention on the High Seas

1966 International Covenant on Civil and Political Rights

1969 American Convention on Human Rights

1969 Vienna Convention on the Law of Treaties

1972 International Regulations for Preventing Collisions at Sea

1974 International Convention for the Safety of Life at Sea United Nations

1981 African Charter on Human and Peoples' Rights

1982 United Nations Convention on the Law of the Sea

1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

2000 Charter of Fundamental Rights of the European Union

C.1.2 United Nations

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C.1.3 Third United Nations Conference on the Law of the Sea

Statement by the President, in 17 *Third United Nations Conference on the Law of the Sea: Official Records* at 13, 48 UN Sales No. E.84.V.3 (1984)

UNCLOS III, 'Summary records of meetings of the Second Committee 28th meeting', UN Doc. A/CONF.62/C.2/SR.28, 6 August 1974

UNCLOS III, 'Memorandum by the President of the Conference on document A/CONF.62/WP.9', UN Doc. A/CONF.62/WP.9/Add.1, 31 March 1976

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