

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

**SECOND SUPPLEMENTAL WRITTEN PLEADINGS OF
THE KINGDOM OF THE NETHERLANDS**
(Replies to questions posed by the Arbitral Tribunal to the Netherlands pursuant to Section
2.1.4.1 of Procedural Order No. 2)

ARBITRAL TRIBUNAL:

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

REGISTRY:

Permanent Court of Arbitration

12 January 2015

QUESTIONS

1. The Tribunal understands that the “Arctic 30” have made applications before the European Court of Human Rights (“ECtHR”), “asking it to find that their apprehension and detention by Russian authorities constituted a breach of their rights under Articles 5 and 10 of the European Convention on Human Rights” (Greenpeace Statement of Facts, Exhibit N-3, para. 127). The Tribunal also notes that the Netherlands does not request the Tribunal to interpret or apply the European Convention for Human Rights (Memorial, para. 170). The Netherlands is invited to provide the Tribunal with information concerning:

- (i) the current status of the claims brought by the “Arctic 30” before the ECtHR;
- (ii) the scope of those claims; and,
- (iii) the extent to which those claims would overlap with the claims brought by the Netherlands in this arbitration.

I. The Current Status of the Claims Brought by the “Arctic 30” Before the ECtHR

1. The applications brought by the “Arctic 30” before the European Court of Human Rights (ECtHR) against the Russian Federation are currently pending. The applications have not yet been communicated to the Government of the Russian Federation and made public by the ECtHR, but 27 applications can be found on the website of Greenpeace International.¹

II. The Scope of the Claims

2. The 30 applications consist of three different types (Annex N-44, para. 17):
- 2 applications of the ‘climbers’;
 - 2 applications of the ‘freelance journalists’;
 - 26 applications from the other members of the “Arctic 30”.

¹ <http://www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/Peace-Dove/Arctic-30/European-Court-of-Human-Rights/>.

An example of each of the three types of applications has been enclosed (Annex N-44, appendices 41-43).

3. In the applications of the ‘climbers’, the individuals concerned complain of:
 - Unlawful apprehension on 18 September 2013 in breach of Article 5.1 of the 1950 European Convention on Human Rights (ECHR) (right to liberty and security);
 - Unlawful deprivation of liberty as a result of not being brought before a judge within the time limits prescribed by Russian law in breach of Article 5.1 ECHR;
 - Unlawful deprivation of liberty in the absence of any reasonable suspicion of piracy in breach of Article 5.1(c) ECHR;
 - Interference with the right to peaceful protest in breach of Article 10 ECHR (freedom of expression).

4. In the applications of the ‘freelance journalists’, the individuals concerned complain of:
 - Unlawful apprehension on board the *Arctic Sunrise* on 19 September 2013 in breach of Article 5.1 ECHR;
 - Unlawful deprivation of liberty as a result of not being brought before a judge within the time limits prescribed by Russian law in breach of Article 5.1 ECHR;
 - Unlawful deprivation of liberty in the absence of any reasonable suspicion of piracy in breach of Article 5.1(c) ECHR;
 - Interference with journalistic activities in breach of Article 10 ECHR.

5. In the applications of the other members of the “Arctic 30”, the individuals concerned complain of:
 - Unlawful apprehension on board the *Arctic Sunrise* on 19 September 2013 in breach of Article 5.1 ECHR;
 - Unlawful deprivation of liberty as a result of not being brought before a judge within the time limits prescribed by Russian law in breach of Article 5.1 ECHR;
 - Unlawful deprivation of liberty in the absence of any reasonable suspicion of piracy in breach of Article 5.1(c) ECHR;
 - Interference with the right to peaceful protest in breach of Article 10 ECHR.

III. The Extent to which the Claims Would Overlap with the Claims Brought by the Netherlands in this Arbitration

6. As for the extent to which the claims covered by the ECHR overlap with aspects of the claims of the Netherlands in the present arbitration, the Netherlands would make the following remarks. First, the claims of the “Arctic 30” and those of the Netherlands are based on different legal instruments. The claims of the “Arctic 30” concern alleged breaches of rights under the ECHR, whereas the human rights aspects of the claims of the Netherlands in the present arbitration concern alleged breaches of rights under the UNCLOS, the 1966 International Covenant on Civil and Political Rights (ICCPR) and customary international law. Another legally relevant distinction is that the “Arctic 30” claim breaches of their respective individual rights, whereas the Netherlands claims that the Russian Federation breached its obligations owed to the Kingdom of the Netherlands not only in the exercise of its right to diplomatic protection of its nationals and 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, but also in its own right 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.

7. Second, in respect of the material aspects of the human rights concerned, the claims of the “Arctic 30” relate to the claims of the Netherlands in the present arbitration as follows.

- With respect to the right to liberty and security, it is noted that the “Arctic 30” complain of breaches of Article 5 ECHR. The content of this provision corresponds with the content of Article 9 ICCPR. Although the formulation, the interpretation and the application of the two provisions may not be identical, there would seem to be some material overlap with regard to these parts of the claims.
- With respect to the right to leave a country, it is noted that the “Arctic 30” have not invoked before the ECtHR the provision that corresponds with Article 12.2 ICCPR, i.e. Article 2.2 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than those

Already Included in the Convention and in the First Protocol Thereto. Therefore, there would seem to be no overlap in this regard.

- With respect to the freedom to protest at sea, it is noted that the scope of the relevant norms of the UNCLOS, i.e. Articles 56.2 and 58.1 and Part VII, invoked by the Netherlands in the Memorial (see *e.g.* paras. 225-243), differs from the norm invoked in the applications of the “Arctic 30”, i.e. Article 10 ECHR. In spite of this difference in scope, there would seem to be some material overlap with regard to the parts of the claims related to the freedom of protest at sea. In this respect, it is noted that the Netherlands has not invoked the provisions of the ICCPR that correspond with Article 10 ECHR.

8. Finally, there could potentially only be overlap in the respective claims for reparation for injury with respect to the following claims included in paragraph 55 of the Supplementary Written Pleadings on Reparation for Injury:

- The return of the personal belongings of the persons on board the *Arctic Sunrise* which have not yet been returned;
- The formal dismissal of the charge of piracy brought against the persons who were on board the *Arctic Sunrise*;
- The non-material damage suffered by the persons who were on board the *Arctic Sunrise* during the wrongful detention in the Russian Federation;
- The costs incurred for the provision of bail for the persons who were on board the *Arctic Sunrise*;
- The costs incurred during the detention in the Russian Federation of the persons who were on board the *Arctic Sunrise*;
- The costs incurred between release from prison and the departure from the Russian Federation of the persons who were on board the *Arctic Sunrise*.

9. However, there are significant differences in respect of the formulation of the claims, the award of reparation for injury, and the execution of the award of this Tribunal and a judgment of the ECtHR. First, at this juncture, the “Arctic 30” have not yet been able to formulate their

claims, because no separate question to that effect is included in the standard application form. Some information can be found on the website of Greenpeace International which provides as follows:

“The 30 individuals are requesting ‘just compensation’ from the Russian Federation, and importantly, a statement from the independent Court saying that their apprehension in international waters by Russian agents and subsequent detention were unlawful”.²

10. Second, pursuant to Article 46.1 ECHR, it is for the respondent State to execute the judgment, in accordance with its internal law, and to provide reparation, where possible on the basis of *restitutio in integrum*. Where the law of the State allows only partial reparation to be made, the ECtHR may, pursuant to Article 41 ECHR, afford just satisfaction to the injured party. The Netherlands is not well versed into Russian law and cannot authoritatively conclude whether the law of the Russian Federation allows only partial reparation to be made. Therefore, the Netherlands cannot exclude the possibility that full reparation in the appropriate form may not be available under Russian law. In contrast, the award of this Tribunal will not be affected by the law of the Russian Federation.

11. Third, the award of this Tribunal provides a title enabling the execution of the award in States. A judgment of the ECtHR will not provide such a title. The execution of a judgment of this Court is supervised by the Committee of Ministers of the Council of Europe in accordance with the procedure set out in Article 46 ECHR.

IV. Parallel Proceedings

12. Neither international law in general nor the UNCLOS in particular contain prohibitions on parallel proceedings resulting from partially overlapping claims. As was made clear by the International Law Commission (ILC) in the particular context of the exercise of diplomatic protection in light of resort to other human rights instruments, a State is not deprived of standing to invoke State responsibility through the exercise of diplomatic protection by the existence of

² Ibid.

parallel proceedings before a human rights court such as the ECtHR.³ The flag State should likewise not be deprived of standing to protect the persons on board a ship flying its flag. In addition, the existence of parallel proceedings should only invite one tribunal to relinquish jurisdiction in favor of another when the proceedings are truly identical. This requires that the proceedings are identical on three points with respect to: (a) the person(s) making the claim (*ratione personae*); (b) the merits of the claim (*ratione materiae*); and (c) the kind and amount of reparation claimed.

13. This is not the case in the present dispute. The parties are not identical. The present procedure also differs from procedures before the ECtHR *ratione materiae*. As the tribunal in *Southern Bluefin Tuna* found, a bar to jurisdiction through the existence of parallel proceedings only occurs when there is “a single dispute arising under both Conventions”.⁴ This is not the case for the present dispute. While there is overlap between the proceedings before this Tribunal and the ECtHR, it is not a ‘single dispute’ that ‘arises’ simultaneously under two Conventions. Finally, the proceedings differ with respect to the reparation claimed. Any reparation claimed before the ECtHR will necessarily be limited to reparation related to the material and immaterial damages suffered by the “Arctic 30”. Before this Tribunal, the Netherlands also claims reparation for damages suffered by the Netherlands and by the ship flying its flag.

2. The Netherlands is invited to clarify the grounds upon which it considers that the determination of alleged breaches of international human rights law, as set out in paragraph 397(1)(c) of the Memorial, involves the interpretation or application of the UNCLOS.

1. The alleged breaches set out in paragraph 397(1)(c) of the Memorial concern Articles 9 (right to liberty and security) and 12.2 (right to leave a country) of the ICCPR.

³ ILC, ‘Draft Articles on Diplomatic Protection, with Commentaries’, II(2) *Y.I.L.C.* (2006), Article 16 and accompanying Commentary, pp. 51-52 (currently only available in French).

⁴ *Southern Bluefin Tuna Case, Award on Jurisdiction and Admissibility*, para. 54, p. 42. The two Conventions referred to are the UNCLOS and the 1993 Convention for the Preservation of the Southern Bluefin Tuna.

2. In specific circumstances and under specific conditions, the UNCLOS permits States to arrest, detain, and initiate judicial proceedings against foreign ships and persons on board such ships. In such cases, the UNCLOS provides the legal basis for depriving persons of their liberty and security, and bringing them within the jurisdiction of another State without the right to leave. For example, a coastal State may arrest and detain persons on board foreign fishing vessels in its exclusive economic zone, and initiate judicial proceedings against them, in accordance with Article 73 UNCLOS. Another example is the adoption of “appropriate measures” by a coastal State to ensure the safety of navigation in safety zones and of artificial islands, installations and structures pursuant to Article 60.4 UNCLOS, which may involve the arrest and detention of persons as well as the initiation of judicial proceedings against them. Likewise, state practice indicates that the boarding of a ship when there is reasonable ground for suspecting that the ship is engaged in piracy, on the basis of Article 110.1(a) UNCLOS, may be accompanied by the arrest and detention of as well as the initiation of judicial proceedings against persons on board such ship.

3. In general, in exercising such rights, a State must comply with international human rights standards as a corollary and integral part of the right to arrest, detain and initiate judicial proceedings against a person on the basis of the relevant provisions of the UNCLOS. These provisions must therefore be applied and interpreted in accordance with international human rights law. Accordingly, the determination of the breaches of Articles 9 and 12.2 ICCPR by the Russian Federation involves the interpretation and application of any provision of the UNCLOS that may be invoked to justify the arrest and detention of as well as the initiation of judicial proceedings against the persons on board the *Arctic Sunrise*.

4. In particular, in exercising such rights in its exclusive economic zone, a coastal State must have “due regard to the rights and duties of other States” in accordance with Article 56.2 UNCLOS. This obligation is not limited to the rights and duties of other States under the UNCLOS, but extends to other rules of international law, including international human rights law. This is corroborated by Article 58.2 UNCLOS pursuant to which “other pertinent rules of international law” apply in respect of the rights and duties of other States in the exclusive economic zone. Accordingly, the determination of the breaches of Articles 9 and 12.2 ICCPR by

the Russian Federation involves the interpretation and application of Articles 56.2 and 58.2 UNCLOS.

3. The Netherlands is invited to comment on the relevance, if any, of the decision in the ICJ Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation) for the interpretation and application of Arts. 283.1 and 286 of the UNCLOS.

1. The decision of the International Court of Justice (ICJ) in the *Case Concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)* (*Case concerning the Application of the CERD*)⁵ examines the question of procedural requirements contained in a compromissory clause of a treaty conferring jurisdiction on the ICJ. The following paragraphs will: (a) set out the difference between the relevant obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the UNCLOS; and (b) address whether the reasoning of the ICJ in the *Case concerning the Application of the CERD* could be relevant for the interpretation and application of Articles 283.1 and 286 UNCLOS.

2. Article 22 CERD and the relevant articles of the UNCLOS read as follows.

- Article 22 CERD: “Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement”.
- Article 283.1 UNCLOS: “When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”.

⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70.*

- Article 286 UNCLOS: “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”.

3. First, the Netherlands has reservations in attributing relevance to the decision of the ICJ in the *Case concerning the Application of the CERD* for the interpretation and application of Articles 283.1 and 286 UNCLOS, because the wording of the relevant provisions of the CERD and the UNCLOS differs. Article 22 CERD refers to resort to negotiation or the procedures expressly provided for in the CERD as a precondition for the resort to the ICJ. Even if Articles 283.1 and 286 UNCLOS would be interpreted to refer to resort to an exchange of views regarding the settlement of a dispute by negotiation or other peaceful means as a precondition for the resort to the compulsory procedures entailing binding decisions under Section 2 of Part XV of the UNCLOS, it appears from the wording that the cited provisions of the CERD and the UNCLOS differ in terms of their objective as well as their nature.

4. The objective of negotiations, as a precondition for the resort to a mechanism for the compulsory settlement of disputes, is the resolution of the dispute by mutual agreement,⁶ whereas the objective of the exchange of views under Part XV of the UNCLOS would appear to be the consideration of appropriate means for the resolution of the dispute.

5. The nature of negotiations, as a precondition for the resort to a mechanism for the compulsory settlement of disputes, requires “a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party” that “must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question”.⁷ This obligation to negotiate has been characterized by the Permanent Court of International Justice as an obligation “not only to enter into negotiations, but also to pursue them as far as possible”.⁸ In contrast, the nature of an exchange of views, as a precondition for the

⁶ *Case concerning the Application of the CERD*, para. 158.

⁷ *Case concerning the Application of the CERD*, paras. 157 and 161.

⁸ *Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42, p. 116.*

resort to a mechanism for the compulsory settlement of disputes, would appear to involve an expression of views regarding the most appropriate means of settlement of the dispute.⁹

6. In this context, the Netherlands considers that an obligation to resort to negotiations, an exchange of views or any other applicable procedures, as a precondition for the resort to a mechanism for the compulsory settlement of disputes, should be applied in harmony with other components of a mechanism for the settlement of disputes. In particular, such precondition should not preclude the right of parties to a dispute to request the prescription of provisional measures if the urgency of the situation so requires. It may also be relevant to assess whether parties continued with negotiations, an exchange of views or any other applicable procedures to settle the dispute after resort to a mechanism for the compulsory settlement of disputes.

7. Alternatively, if the Tribunal would consider the decision of the ICJ in the *Case concerning the Application of the CERD* of relevance for the interpretation and application of Articles 283.1 and 286 UNCLOS, the reasoning of the ICJ would have to be applied *mutatis mutandis*. Accordingly, the Tribunal would have to: (a) assess what constitutes an exchange of views; (b) consider its adequate form and substance; and (c) determine to what extent it should be pursued before it can be said that such precondition has been met.¹⁰ The Netherlands observes that international courts and tribunals to which disputes have been submitted under Part XV of the UNCLOS have already expressed themselves, as indicated in the Memorial,¹¹ on some aspects of these issues when interpreting and applying Articles 283.1 and 286 UNCLOS.

8. Finally, the decision of the ICJ in *United States Diplomatic and Consular Staff in Tehran*¹² may be found to be of relevance too. In that case, the ICJ found that the provisions related to resort to other means of compulsory dispute settlement are not to be understood as laying down a “precondition” of the applicability of the provision establishing the compulsory

⁹ See also the declaration of Judge Anderson in *The Arctic Sunrise Case, Provisional Measures, Declaration of Judge Anderson*; and D. Anderson, ‘Article 283 of the United Nations Convention on the Law of the Sea’, in T.M. Ndiaye and R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007), pp. 847–866.

¹⁰ Cf. *Case concerning the Application of the CERD*, para. 156.

¹¹ Memorial, para. 81.

¹² *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 3.

jurisdiction of the Court.¹³ Those provisions provide only that, as a substitute for recourse to Court, the parties “*may agree*” upon resort to such other means of dispute settlement.¹⁴

According to the Court, such provisions have no application, unless recourse to such other means has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal. In the present case, the Netherlands expressed its views regarding the most appropriate means of settlement of the dispute in exchanges with the Russian Federation, notably its notes of 26 September and 3 October 2013. However, the Russian Federation did not respond to express its views.

4. The Netherlands is invited to clarify the specific conduct of the Russian Federation towards the “Arctic 30” that it considers constituted a breach of their human rights under Arts. 9 and 12 of the International Covenant on Civil and Political Rights and/or customary international law.

1. In the present case, the Russian authorities were only able to arrest and detain the persons on board the *Arctic Sunrise* by boarding the ship without the prior consent of the Netherlands. Even if the unlawful capture of a person by the authorities of one State in an area or place under the jurisdiction of another State may result in lawful detention under the domestic law of some nations under the doctrine of *male captus, bene detentus*, it does not preclude its wrongfulness under international law. The capture of the persons on board the *Arctic Sunrise* constituted a breach of their human rights under Articles 9 and 12.2 ICCPR and customary international law.

2. The following conduct of the Russian authorities with respect to the persons on board the *Arctic Sunrise*, which could not have taken place if it were not for their unlawful capture, also constituted a breach of their human rights under Articles 9 and 12.2 ICCPR and customary international law:

- The unlawful detention of 30 persons on board the *Arctic Sunrise* and, subsequently, in the Russian Federation;

¹³ Ibid., p. 26, para. 48.

¹⁴ Ibid.

- The failure to provide immediate information to these persons on the reasons of their arrest and the nature of the charges;
- The failure to bring them promptly before a judge;
- The bringing of serious criminal charges (piracy and hooliganism) against them disproportionate to their actions in the exercise of their right to peaceful protest at sea;
- The length of their pre-trial detention.

5. With respect to the claims of the Netherlands arising out of the treatment by the Russian Federation of the “Arctic 30,” the Netherlands is invited to comment on any legal consequences of the distinct factual circumstances concerning Mr. Marco Paolo Weber and Ms. Sini Annuka Saarela.

1. The Netherlands considers that the distinct factual circumstances concerning Ms. Sini Annuka Saarela and Mr. Marco Paolo Weber do not have any legal consequences. Their distinct factual circumstances might have had legal consequences if Russian authorities had arrested Ms. Saarela and Mr. Weber on the *Prirazlomnaya* or in a safety zone of 500 meters. In this respect, the Netherlands would like to refer to the factual account provided by Greenpeace International. On 18 September 2013, after the protest action was ended, Ms. Saarela and Mr. Weber were taken to the Russian Coast Guard vessel the *Ladoga*.¹⁵ The Netherlands would in particular point to the following paragraphs, in relation to events on 19 September 2013:

“37. At 11:22, contact has resumed and the MYAS and the Coast Guard discuss the possibility of releasing Saarela and Weber. Agreement is reached on a transfer of clothing, food and medication for the two, which is delivered to the *Ladoga* a short while later by a Greenpeace RHIB, which then immediately returns to the MYAS.

38. At 11:37, the Coast Guard tells the MYAS to move out to 20 nautical miles, and suggests that that is a condition for a potential discussion of a transfer of the two activists. The MYAS moves out as requested, the *Ladoga* follows at a close distance.

¹⁵ Statement of Facts, para. 31.

39. At 14:47, a Russian news outlet reports that a spokesman for the Coast Guard has stated that Saarela and Weber are “guests” on board the Coast Guard vessel Ladoga. The Finnish consulate also confirms to Greenpeace that it has been informed by Russian authorities that two climbers were ‘rescued’ from the water after falling off Prirazlomnaya and are being treated as guests.

40. At 15:55, the Ladoga thanks the MYAS for moving out and explains that it is still waiting for instructions from higher up regarding a possible transfer of Saarela and Weber. At 17:25 it repeats this message (videos 20 and 21)”.

2. Based on these facts, the detention of Ms. Saarela and Mr. Weber by Russian authorities only started upon their return to the *Arctic Sunrise*. On the basis of the actions and statements of Russian authorities, the Netherlands cannot but conclude that Ms. Saarela and Mr. Weber were neither arrested on the platform nor in a safety zone of 500 meters.

3. Alternatively, if it were contended that the two crew members were arrested in a safety zone of 500 meters and the Tribunal would accept this as a fact, the Netherlands considers that their subsequent detention and criminal prosecution are not ‘appropriate measures’ under Article 60.4 UNCLOS to ensure the safety of navigation and the *Prirazlomnaya*. In particular, the Netherlands is of the view that the following conduct of the Russian authorities should be taken into account to assess whether the requirements of Article 60.4 UNCLOS have been met:

- The failure to provide immediate information to Ms. Saarela and Mr. Weber on the reasons of their arrest and the nature of the charges;
- The failure to bring them promptly before a judge;
- The bringing of serious criminal charges (piracy and hooliganism) against them disproportionate to their actions in the exercise of their right to peaceful protest at sea;
- The length of their pre-trial detention.

6. The Netherlands is invited to elaborate on its position that Greenpeace's planned and actual actions vis-à-vis the Prirazlomnaya would not have any adverse impact (Memorial, paras. 271, 299, 313-314, 325), in particular with respect to:

(i) the safety of persons and property;

(ii) the operations of the Prirazlomnaya; and,

(iii) the environment (see e.g., Russia's Note Verbale of 18 September 2013, Annex N-5, referring to an "ecological disaster of unimaginable consequences").

1. The Netherlands will address: (a) the purpose of the actions; (b) the planned actions; and (c) the actual actions. According to Greenpeace International, the objective of the 'Save-the-Arctic' campaign is to "secure international agreement to create a global sanctuary in the uninhabited area around the North Pole and a ban on offshore oil drilling and unsustainable industrial fishing in Arctic waters".¹⁶ The purpose of the actions directed against the offshore ice-resistant fixed platform *Prirazlomnaya* was "to convince Gazprom to drop its plans to conduct oil drilling actions in the Arctic".¹⁷ Greenpeace International is of the view that this purpose can best be achieved by the termination of the operations of the *Prirazlomnaya* as well as other activities in the Arctic region related to the exploitation of oil and gas reserves.¹⁸ In contrast, as evidenced by the statutory objectives of Greenpeace International and its activities, the purpose of the actions was not in any way to have an adverse impact on: (a) the safety of persons and property; or (b) the (marine) environment.

2. According to Greenpeace International, and as conveyed to the management of *Prirazlomnaya* and Gazprom Neft Shelf at the start of the protest action on 18 September 2013, the following protest action was planned:

"The action we are taking consists of scaling the platform and the establishment of a camp in a survival capsule. Everything will be done safely and non-violently. A number of activists are determined to stay on in the capsule until such time as Gazprom promises to abandon its plans to drill for oil at Prirazlomnaya, or publishes its oil spill response

¹⁶ Statement of Facts, para. 5.

¹⁷ Statement of Facts (Annex N-3, appendix 2).

¹⁸ Ibid.

plan in full and explains in a credible way how such drilling can be done without creating an unacceptable threat to the environment”¹⁹.

It would thus appear that the action was planned in such a way that it could not have an adverse impact on: (a) the safety of persons and property; or (b) the (marine) environment. Furthermore, the scaling of the *Prirazlomnaya* and the establishment of a camp in a survival capsule would not necessarily result in an interference with the operations of a platform. However, it could not, *a priori*, have been excluded that the planned actions might result in a temporary interference with the operations of the *Prirazlomnaya* as a result of the application of safety protocols. To the best of our knowledge, there are no publicly available industry-wide safety protocols that could have guided the planning of the actions in this respect. In any event, the planned actions did not, as indicated in the Memorial (para. 325), in any way envisage the use of force, the threat to use force or any other form of intimidation to seize or exercise control over the platform.

3. The actual actions consisted of a failed attempt to deploy the survival capsule and an aborted attempt of two persons to scale the *Prirazlomnaya*.²⁰ The Netherlands is not aware of any information indicating that the actual actions had an adverse impact on: (a) the safety of persons or property; (b) the operations of the *Prirazlomnaya*; or (c) the (marine) environment, let alone an ecological disaster of unimaginable consequences. As for the safety of persons and property, the Netherlands considers that: (a) the presence of divers could have been a consideration of safety, but there is no evidence that divers were active during the actual actions; and (b) the survival capsule²¹ could perhaps have been perceived as a potential threat to the safety of the platform, but it never got anywhere near the platform.

¹⁹ Ibid.

²⁰ Statement of Facts, paras. 27-31.

²¹ See, on the function of the survival capsule, Statement of Facts (Annex N-3, appendix 2).

7. The Netherlands is invited to comment on the relevance, if any, of the doctrine of constructive presence with respect to the Arctic Sunrise and its rigid hull inflatable boats (“RHIBs”), and the events of 18 September 2013.

1. The right of hot pursuit is one of the exceptions to the rule of exclusive flag state jurisdiction laid down in Article 92.1 UNCLOS. The doctrine of constructive presence forms an integral part of the right of hot pursuit.²² It finds its origin in customary international law and has been codified in Article 111 UNCLOS. Subsequent developments provide no indication that the doctrine can be applied beyond what Article 111 UNCLOS permits.

2. According to Article 111.2 in conjunction with Article 111.4 UNCLOS, hot pursuit is not deemed to have begun, unless the pursuing ship has satisfied itself by such practicable means as may be available that (a) ‘the ship pursued’, or (b) ‘one of its boats or other craft working as a team and using the ship pursued as a mother ship’ is within the limits of a safety zone around a ‘continental shelf installation’ in the exclusive economic zone established in accordance with the UNCLOS.

3. Although the *Arctic Sunrise* was never actually present within a safety zone of 500 meters around the *Prirazlomnaya*, its presence therein could have been construed for the purpose of exercising hot pursuit by virtue of the doctrine of constructive presence. Since the five RHIBs of the *Arctic Sunrise* that entered a safety zone of 500 meters around the *Prirazlomnaya* on 18 September 2013 had been launched from, and belonged to, the *Arctic Sunrise*, the *Arctic Sunrise* could be regarded as the mother ship. Such constructive presence could have enabled the Russian Federation to exercise the right of hot pursuit and pursue the RHIBs of the *Arctic Sunrise* and/or the *Arctic Sunrise* irrespective of whether the *Arctic Sunrise* itself was present in a safety zone of 500 meters around the *Prirazlomnaya*, provided that such pursuit was exercised in accordance with the UNCLOS. It has been demonstrated in the Memorial that this is not the case (paras. 272-286).

²² N.M. Poulantzas, *The Right of Hot Pursuit in International Law* (2002), p. 246.

8. The Netherlands is invited to comment on the apparent discrepancy in the accounts of the facts concerning the location of the Arctic Sunrise's RHIBs when the Ladoga first requested the Arctic Sunrise to stop, having regard to, inter alia:

(i) Greenpeace Statement of Facts, para. 32: "At about 6:20, the Ladoga orders the MYAS not to pick up its RHIBs and to stop or heave to . . ."

(ii) Memorial, para. 277: "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 Sunrise, which were previously located within the safety zone of 500 metres around the Prirazlomnaya, had already returned to the Arctic Sunrise . . ."

(iii) Greenpeace Statement of Facts, Exhibit N-3, Annex 8, Witness Statement of Nikolai Marchenkov: "At 06:23, our ship's commanding officer instructed me to prepare our AK-230 gun mounts No 1 and No 2 for the firing of a warning shot. At this point, the master of the 'Arctic Sunrise' was ordered once again to either stop or heave about or we would fire a warning shot, to which the master responded once again that he hadn't broken any Russian Federation laws, that he was refusing to admit our inspection group onboard, that our demands were unlawful, and that their vessel was located in international waters. It was during this period of time that both we and the 'Arctic Sunrise' had hoisted our respective inflatables back onboard."

(iv) Greenpeace Statement of Facts, Exhibit N-3, Annex 8, Witness Statement of Ivan Solomakhin: ". . . the 'Arctic Sunrise' inflatables began returning to their vessel, and A. S. Sokolov and I began heading back to coastal patrol ship 'Ladoga,' hoisting our cutters onto the ship once we arrived. At that point, it was roughly 07:00. . . . When we arrived at our ship, the ship's commander sounded the alarm and issued the command 'Seize the vessel.' By radio communications, the 'Arctic Sunrise' was ordered to stop and heave about."

1. The discrepancy in the accounts of the facts concerning the location of the RHIBs of the *Arctic Sunrise* seems to relate to the timing of events, in particular the time of the first stop order, and not to their sequence or the actual location of the RHIBs of the *Arctic Sunrise* at the time of the stop order. This discrepancy may be due to the fact that much of the relevant evidence is

based on information from various sources, namely statements of Russian witnesses which cannot be attributed to the Netherlands, and information provided by Greenpeace International.

- According to the two drivers of the RHIBs of the *Ladoga*, Mr. Solomakhin and Mr. Sokolov, as stated in their witness accounts (Annex N-3, appendix 8), after delivering the two detained activists to the *Ladoga* (at 06:02 hrs UTC on 18 September 2013 according to Mr. Marchenkov), they returned to the platform in order to prevent new attacks and the storming of the *Prirazlomnaya*. According to Mr. Sokolov, no RHIBs of the *Arctic Sunrise* were present, whereas Mr. Solomakhin stated that a skirmish took place. Gunnery officer on board of the *Ladoga*, Mr. Marchenkov, stated that the RHIBs of the *Arctic Sunrise* left the platform at 06:13 hrs UTC on 18 September 2013.
- According to the two drivers, following the departure of the RHIBs of the *Arctic Sunrise*, they returned to their vessel, the *Ladoga*, after which the first stop order was issued.
- According to Mr. Solomakhin, a stop order was issued approximately at 07:00 hrs UTC, whereas the Resolution of 8 October 2013, imposing a fine on the master of the *Arctic Sunrise* for an administrative offence (Annex N-3, appendix 14), refers to the first stop order at 06:15 hrs UTC.
- According to the Greenpeace International Statement of Facts of 15 August 2014 (Annex N-3) (Statement of Facts), based on information received from the *Arctic Sunrise* on 18 September 2013, a stop order was issued at 06:20 hrs UTC, together with the order not to take the RHIBs back on board.
- According to the logbook of the *Arctic Sunrise* (Annex N-3, appendix 38), a stop order was issued at 06:35 hrs UTC.
- According to the logbook of the *Arctic Sunrise* (Annex N-3, appendix 38), the RHIBs of the *Arctic Sunrise* were hoisted back on board at 06:35 hrs UTC. At that time the *Arctic Sunrise* was located at more than three nautical miles from the *Prirazlomnaya*.

2. Despite the discrepancy relating to the timing of events, which may partially be explained by the fact that different sources may refer to different stop orders, it appears well-established that:

- The RHIBs of the *Ladoga* did not return to their vessel to be hoisted on board before the RHIBs of the *Arctic Sunrise* departed for the return to their vessel;
- Neither the *Ladoga* nor its RHIBs pursued the RHIBs of the *Arctic Sunrise* outside a safety zone of 500 meters around the *Prirazlomnaya*;
- The first stop order was issued no earlier than 06:15 hrs UTC and only after the return of the RHIBs of the Russian Coast Guard to the *Ladoga* and their hoisting on board.

3. On the basis of these facts, when the *Ladoga* first requested the *Arctic Sunrise* to stop, the RHIBs of the *Arctic Sunrise* must be deemed to have been well outside a safety zone of 500 meters around the *Prirazlomnaya*.

9. The Netherlands is invited to indicate whether there are, in its view, circumstances where prior consent of a flag State is not required for a coastal State to take enforcement measures against a foreign ship located outside the coastal State's territorial sea.

1. There are several circumstances in which a coastal State may take enforcement measures, in accordance with the UNCLOS and other applicable rules of international law, against a foreign ship located outside the coastal State's territorial sea without the prior consent of the flag State. Such circumstances could relate to an adverse impact on the interests indicated in question 6, namely: (a) the safety of persons and property; (b) the operations of the *Prirazlomnaya*; or (c) the (marine) environment.

2. The adoption of enforcement measures in any such circumstances, however, requires the application of a two-pronged test. First, it must be established by plausible evidence that the conduct in question had such an adverse impact. Second, the adoption of the enforcement measures must be in accordance with one of the exceptions to the rule that the prior consent of

the flag State must be obtained for the adoption of such measures, as elaborated in the Memorial (Section 2.4.1).

10. The Netherlands is invited to elaborate on why, in its view, the circumstances precluding wrongfulness recognized in the law of State responsibility do not apply in this case.

I. Introduction

1. In its Memorial, the Kingdom of the Netherlands has presented its preliminary view on the (non-)application of circumstances precluding wrongfulness to justify the conduct of the Russian Federation.²³ Further to the invitation of the Tribunal, in the particular context of the non-participation of the Russian Federation, the Netherlands presents its additional views on the applicability of circumstances precluding wrongfulness. The Netherlands wishes to note that this constitutes an exception to the rule that the burden of proof should be borne by the State invoking circumstances precluding wrongfulness. It also wishes to stress the inability of the Netherlands to appreciate fully the considerations of the Russian Federation leading to its conduct that is the subject matter of the present dispute.²⁴

2. The customary international law of State responsibility, as reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), recognizes six circumstances precluding wrongfulness: consent, self-defence, countermeasures in respect of an internationally wrongful act, *force majeure*, distress, and necessity.²⁵ Circumstances precluding wrongfulness, if invoked, provide a justification for conduct that would otherwise constitute an internationally wrongful act. In what follows, the absence of any circumstances precluding the wrongfulness of the conduct of the Russian Federation in relation to the boarding of the *Arctic*

²³ Memorial, paras. 200-205.

²⁴ See on this point also ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Part I, Chapter V, para. 8, p. 72.

²⁵ 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), Articles 20 to 25, pp. 72-84.

Sunrise and subsequent acts related thereto will be demonstrated for each of the five internationally wrongful acts indicated in the Memorial of the Kingdom of the Netherlands.

3. For any circumstance precluding wrongfulness to be invoked successfully, the cumulative conditions must be fulfilled. Failure to comply with any one of the requirements will therefore invalidate resort to circumstances precluding wrongfulness in order to justify the commission of an internationally wrongful act. In addition, the application of circumstances precluding wrongfulness constitutes an exception to the international responsibility of a State for conduct that would otherwise be wrongful. Therefore, the requirements for successful resort to any circumstance precluding wrongfulness must be strictly complied with.

II. Consent

II.1 Introduction

4. The wrongfulness of conduct may be precluded when validly consented to. Such consent must be validly provided by the State to which the obligation breached is owed. Consent may not be presumed and must be given prior to the commission of the act or during its commission. Consent is only valid when the expression of consent is attributable to the State. Non-state actors whose conduct cannot be attributed to a State cannot provide valid consent on behalf of that State. In the present circumstances, only a State organ of the Netherlands could have provided valid consent to the wrongful conduct of the Russian Federation.

5. The Netherlands has not provided express prior consent to any of the five internationally wrongful acts indicated in its Memorial and, as will be discussed below, neither can consent be implied from the conduct of the Netherlands. In addition, with respect to the boarding of the *Arctic Sunrise* and subsequent acts by the authorities of the Russian Federation, the Netherlands lodged immediate and repeated protests.

II.2 National legislation of the Russian Federation Relating to the *Prirazlomnaya*

6. The Russian Federation published the creation of a safety zone of three nautical miles around the *Prirazlomnaya* in its Notice to Mariners 51/2001 (Annex N-16). The Netherlands did not actively support the establishment of the zone in any manner which could constitute implied consent.

7. In particular, consent cannot be implied from the absence of a formal objection (acquiescence) to the enactment of the relevant Russian legislation when it was adopted.²⁶ Acquiescence cannot preclude the wrongfulness of an act, even if it may preclude standing of the acquiescing State to invoke the responsibility for this wrongfulness.²⁷ In the present circumstances, an express objection to the national Russian legislation contrary to the UNCLOS was not required. Not only is the invocation of provisions of national law to avoid compliance with international law prohibited under international law,²⁸ but States are also not required to investigate, on their own accord, the compatibility of enactments of national legislation by other States with international law. A failure to do so does not lead to acquiescence in the lawfulness of such legislation under international law.²⁹

II.3 Conduct of the Russian Federation with respect to the Exercise of the Freedom of Protest at Sea

8. The conduct of the Netherlands does not imply consent to the law-enforcement actions by the authorities of the Russian Federation carried out against the persons on board the *Arctic Sunrise*, in particular the bringing of serious criminal charges (piracy and hooliganism) and the length of their pre-trial detention.

²⁶ Memorial, para. 204.

²⁷ ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', II(2) *Y.I.L.C.* (2001), Commentary to Article 20, p. 73, para. 3, and Article 45, p. 122, para. 2.

²⁸ 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.

²⁹ 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.

9. This is evidenced by the immediate and repeated protest by the Netherlands against the wrongful conduct of the Russian Federation subsequent to the exercise of the freedom of protest at sea by the *Arctic Sunrise* and the people on board. By diplomatic notes, the Netherlands repeatedly objected to the wrongful conduct of the Russian Federation vis-à-vis the *Arctic Sunrise* and persons on board.³⁰

II.4 Boarding of the *Arctic Sunrise* by the Russian Federation and Subsequent Acts Related Thereto

10. On 18 September 2013, the Russian Federation informed the Netherlands of its intention to board the *Arctic Sunrise*. The Netherlands has not provided express consent in response. In addition, the absence of a formal objection cannot be interpreted as implied consent to or acquiescence with the boarding of the *Arctic Sunrise* by the authorities of the Russian Federation. To the contrary, the Netherlands subsequently lodged immediate and repeated protest against the boarding of the *Arctic Sunrise* and the subsequent acts related thereto.³¹

II.5 Conduct of the Russian Federation with respect to the Implementation of the ITLOS Order

11. The Netherlands attached considerable importance to the implementation of the ITLOS Order, as is demonstrated by the fulfillment of its obligations under the ITLOS Order, the provision of a bank guarantee, within two weeks.³² Therefore, its consent to the non-implementation of the ITLOS Order by the Russian Federation cannot be implied from its conduct.

³⁰ Diplomatic notes, exchanged between the Netherlands and the Russian Federation, of 23 September 2013, Annex N-6; 29 September 2013, Annex N-9; 3 October 2013, Annex N-11; 18 October 2013, Annex N-15; and 26 August 2014, Annex N-26.

³¹ *Ibid.*

³² 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*.

II.6 Non-participation of the Russian Federation in the Arbitral Procedure

12. The Russian Federation has to date decided not to participate in any of the procedures. In its Memorial, the Netherlands has indicated on what grounds it considers that this non-participation constitutes an internationally wrongful act (Section V.2.6). The Netherlands does not consent to the non-participation of the Russian Federation and has confirmed upon request to the ITLOS, and at a later stage to this Tribunal, that it wished to continue the procedures notwithstanding the non-participation of the Russian Federation.³³ In addition, the Netherlands requested the Tribunal to bifurcate the proceedings, with the express purpose of allowing the Russian Federation to reconsider its position on non-participation at a later stage.³⁴

III. *Self-Defence*

13. The Russian Federation cannot invoke the right to self-defence to preclude the wrongfulness of its conduct in relation to the *Arctic Sunrise* and persons on board. Self-defence, as a circumstance precluding wrongfulness, is only applicable to measures of self-defence taken in conformity with international law, in particular the Charter of the United Nations. Thus, recourse to the use of force in self-defence requires an (imminent) armed attack against the Russian Federation, emanating from another State. None of the events leading to the wrongful conduct of the Russian Federation in relation to the *Arctic Sunrise* and persons on board can be considered as constituting an (imminent) armed attack. The Netherlands would also observe that the Russian Federation never claimed to have suffered an armed attack, thus resulting in a right to use force in self-defence. In particular, it never informed the Security Council of the United Nations of measures taken in the exercise of its right to self-defence. Therefore, the wrongfulness of the conduct of the Russian Federation cannot be precluded on this basis.

³³ Letter to the ITLOS of 24 October 2013, [Annex N-20](#); and Letter to the President of the ITLOS of 13 December 2013, [Annex N-29](#).

³⁴ Procedural Order No. 4, pp. 2-3.

IV. Countermeasures in respect of an internationally wrongful act

14. The wrongfulness of the conduct of the authorities of the Russian Federation in relation to the *Arctic Sunrise* and the persons on board cannot be precluded by defining this conduct as a countermeasure pursuant to Article 22 ARSIWA against a prior wrongful act of the Netherlands. The conditions for the lawful resort to countermeasures are stipulated in Articles 49 to 54 ARSIWA.

15. The taking of countermeasures is subject to extensive conditions. The Netherlands will address only the failure by the Russian Federation to comply with the most important conditions due to their cumulative nature. As a principal requirement, countermeasures may only be taken against a State which is responsible for a prior internationally wrongful act, to induce compliance by that State with its obligations under international law (Article 49.1 ARSIWA). This means that, first, the taking of countermeasures by the Russian Federation is conditioned upon the existence of a prior internationally wrongful act attributable to the Netherlands and that, second, the measures taken may only affect the Netherlands and not third States.

16. There is no evidence to suggest that the Russian Federation was invoking the international responsibility of the Kingdom of the Netherlands for a prior wrongful act attributable to it and that it committed any of the five wrongful acts indicated in the Memorial in response to this prior wrongful act. This is supported by the absence of any call by the Russian Federation on the Netherlands to comply with its international obligations prior to the taking of countermeasures pursuant to Article 52.1(a) ARSIWA.

17. Furthermore, the taking of countermeasures must be preceded by a notification of the responsible State of any decision to take countermeasures pursuant to Article 52.1(b) ARSIWA. No such notification has been received by the Netherlands.³⁵ While Article 52.2 ARSIWA would

³⁵ In its diplomatic notes, the Russian Federation never invoked the international responsibility of the Netherlands, nor informed the Netherlands of its decision to resort to the taking of countermeasures. See diplomatic notes of 18 September 2013, Annex N- 5; 1 October 2013, Annex N-10; 22 October 2013, Annex N-17; 16 May 2014, Annex N-31; 12 June 2014, Annex N-31; and 27 February 2014, Annex N-34.

allow a State to take “urgent countermeasures as are necessary to preserve its rights”,³⁶ the Russian Federation could not have justified its failure to notify the Netherlands on this basis. The conduct of the Russian Federation cannot be interpreted as a preservation of its rights vis-à-vis the Netherlands. Therefore, any perceived notion of urgency surrounding the events related to the peaceful protest of the *Arctic Sunrise* and the persons on board cannot provide a justification for the non-compliance by the Russian Federation with its obligation to notify the Netherlands.

18. While this in and of itself disallows the preclusion of the wrongfulness of the acts of the Russian Federation indicated in the Memorial by characterizing them as countermeasures, a further analysis with respect to the additional requirements for the taking of countermeasures and the five wrongful acts indicated in the Memorial is presented below.

19. The establishment of a zone of three nautical miles around the *Prirazlomnaya* constitutes a measure affecting not only the Netherlands, but all flag States of ships sailing in the area. The measure is therefore insufficiently discriminate to qualify as a countermeasure, contrary to Article 49.1 ARSIWA.

20. Furthermore, Article 50.2 ARSIWA stipulates that States, when taking countermeasures, must comply with their obligations with respect to dispute settlement. This means that the non-compliance with obligations arising under dispute settlement mechanisms cannot be justified as a countermeasure. Therefore, the wrongfulness of the conduct of the Russian Federation with respect to the implementation of the ITLOS Order and with respect to its non-participation in the present arbitral procedure cannot be precluded on the basis of Article 22 ARSIWA.

21. Finally, the qualification of the wrongful conduct of the Russian Federation as a countermeasure would have required it to suspend this conduct as soon as the dispute between it and the Netherlands was pending before the Arbitral Tribunal (Article 52.3(b) ARSIWA). The Netherlands resorted to arbitration on 4 October 2013 and resorted to the ITLOS for the

³⁶ ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, II(2) *Y.I.L.C.* (2001), Commentary to Article 52.2.

prescription of provisional measures on 21 October 2013. Beyond that date, any countermeasure by the Russian Federation should have been suspended without undue delay.

V. *Force Majeure*

22. The wrongfulness of an act may be precluded when it is due to *force majeure*. Under international law, a situation of *force majeure* exists in a situation “of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”.³⁷ Resort to *force majeure* is thus conditioned upon three requirements: (a) the presence of an irresistible force or unforeseen event; (b) the absence of control over this event by the State invoking *force majeure*; and (c) the material impossibility due to the first two requirements to perform the relevant obligation.

23. The Netherlands considers that none of the events leading to the present dispute could have created a situation of *force majeure*. As acknowledged by the Russian Federation, it was aware of Greenpeace’s intention to conduct a peaceful protest directed against the *Prirazlomnaya* (Annex N-5). While the Russian Federation did expect the protest to cause disturbance, it apparently did not consider it to constitute an irresistible force nor an unforeseen event. The announcement was followed by the deployment of the coastguard vessel *Ladoga* to the area to supervise the protest, not by immediate measures with a view to preventing the protest at all cost.

24. The only subsequent event that could possibly bear resemblance to a situation of *force majeure* was the presence of the survival capsule towed by three RHIBs towards the *Prirazlomnaya*. It is conceivable that the authorities of the Russian Federation may have perceived the launch of the survival capsule as a threat, despite the announcement of Greenpeace of the peaceful and unarmed nature of its protest, and of its intention to launch the survival capsule during the protest.³⁸ However, for three reasons the presence of the survival capsule did not constitute *force majeure*.

³⁷ ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, II(2) *Y.I.L.C.* (2001), Article 23, p. 76.

³⁸ Annex N-3, appendix 5.

25. First, the survival capsule never entered a safety zone of 500 meters around the *Prirazlomnaya*, but remained close to the *Arctic Sunrise*. While it was being towed towards the *Prirazlomnaya*, the line broke between it and the three RHIBs towing it. It was subsequently picked up by the *Arctic Sunrise*. Therefore, it did not constitute an irresistible force threatening the *Prirazlomnaya*.

26. Secondly, due to the delay between the launching of the survival capsule from the *Arctic Sunrise* and the law-enforcement actions of the authorities of the Russian Federation, resort to *force majeure* cannot preclude the wrongfulness of this conduct of the Russian Federation. If the survival capsule had constituted an irresistible force or unforeseen event, immediate action to eliminate the threat emanating from the survival capsule would have been expected. The fact that the boarding of the *Arctic Sunrise* and all subsequent law-enforcement actions happened more than 24 hours after the first appearance of the survival capsule disqualifies the resort to *force majeure* to preclude their wrongfulness.

27. Thirdly, the response by the Russian Federation in the form of the five internationally wrongful acts indicated in the Memorial does not comply with the requirement of material impossibility. The Russian Federation had other means at its disposal to avoid any perceived irresistible force emanating from the survival capsule, especially since it was informed by Greenpeace of its intention to launch the survival capsule. Should the capsule have entered a safety zone of 500 meters around the *Prirazlomnaya*, its removal from the area would have sufficed, making it materially possible not to commit the five internationally wrongful acts indicated in the Memorial.

VI. Distress

28. An appeal to distress to preclude the wrongfulness of conduct is available when “the author of the act in question had no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care”.³⁹ Distress, therefore, is

³⁹ ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, II(2) *Y.I.L.C.* (2001), Article 24, p. 78.

only available in situations endangering the lives of individuals and where the conduct that would otherwise be wrongful is adopted because the author had no reasonable alternatives to save his own life or that of individuals entrusted to his care.

29. The Netherlands considers that none of the events leading to the present dispute constituted a situation of distress. At no point in time were lives of individuals entrusted to the care of the authorities of the Russian Federation endangered through conduct that could not be attributed to the Russian Federation.

30. The Russian Federation has asserted that diving operations were carried out around the *Prirazlomnaya*. The presence of divers at the scene of the protest could have created a situation of distress, as the lives of the divers would possibly have been endangered by the RHIBs. Yet, there is no evidence to suggest that divers were actually present at the scene at the time of the peaceful protest by Greenpeace International. As is reported in the Statement of Facts, no dive down flags or support vessel were present in the vicinity of the *Prirazlomnaya*.⁴⁰ In addition, the conduct of the Russian Federation, in particular the deployment of RHIBs by the *Ladoga* of the Russian Coast Guard and the multiple shots fired by the Russian Coast Guard into the water surrounding the *Prirazlomnaya*, demonstrates that the Russian Federation itself did not anticipate the presence of divers in deciding its response to the peaceful protest by the *Arctic Sunrise* and the persons on board.

31. Even if a situation of distress had existed due to the presence of divers in combination with the protest staged by Greenpeace, this situation would have been aggravated by the conduct of the authorities of the Russian Federation due to the deployment of its own RHIBs and the shots fired. Pursuant to Article 24.2(a) ARSIWA, a situation of distress cannot be invoked “when the situation is due, either alone or in combination with other factors, to the conduct of the State invoking it”.

32. Finally, by the time the authorities of the Russian Federation boarded the *Arctic Sunrise*, a day after the protests or any time thereafter in relation to any other internationally wrongful act

⁴⁰ Statement of Facts, para. 65.

indicated in the Memorial, any situation of distress could no longer have existed. As there was no situation of distress, reasonable alternatives would have been available to the five internationally wrongful acts of the Russian Federation indicated in the Memorial.

VII. Necessity

33. The last circumstance precluding wrongfulness to be considered is the existence of a state of necessity. As the negative wording of the provision in the ARSIWA suggests, recourse to the plea of necessity for the preclusion of wrongfulness is exceptional. The conditions are stipulated in Article 25 ARSIWA. These are: (a) the existence of a “grave and imminent peril”; (b) a threat to an “essential interest of the State” by this grave and imminent peril; (c) the commission of an act which, although contrary to an international obligation, is the “only means” to safeguard an essential interest of the State against this grave and imminent peril; and (d) no “serious impairment of the interests” of the State towards which the obligation exists, or of the international community as a whole through the commission of this act.⁴¹

34. As to the first and second requirement, the Netherlands considers that none of the events leading to the present dispute constituted a “grave and imminent peril” against an “essential interest” of the Russian Federation due to which the wrongfulness of any of the five internationally wrongful acts of the Russian Federation indicated in the Memorial could have been precluded. As the ILC noted, what is an essential interest “cannot be prejudged”⁴² and is not limited to the very existence of a State.⁴³ However, it is only in combination with the threat of a grave and imminent peril that an essential interest will be established.⁴⁴ In addition, it must be an essential interest of the State, its people or the international community. Therefore, while the avoidance of an ecological disaster could, if threatened by a grave and imminent peril, constitute an essential interest of the Russian Federation, the mere continuance of operations on the *Prirazlomnaya* in the face of a peaceful protest could not.

⁴¹ ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, II(2) *Y.I.L.C.* (2001), Article 25, p. 80.

⁴² ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries’, II(2) *Y.I.L.C.* (2001), Commentary to Article 25, para. 15, p. 83.

⁴³ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, *Merits, Judgment*, *I.C.J. Reports 1997*, p. 7, para. 53.

⁴⁴ *Ibid.*

35. As the Netherlands indicated in its Memorial (para. 325), the people of the *Arctic Sunrise* who participated in the protest were unarmed and at no point constituted a threat to the security of the *Prirazlomnaya* or the (marine) environment.

36. As to the survival capsule, due to the fact that the line broke between it and the RHIBs towing it in the direction of the *Prirazlomnaya*, it never entered a safety zone of 500 meters around the *Prirazlomnaya* and remained close to the *Arctic Sunrise*. It could therefore not have been considered by the authorities present as a grave and imminent peril. As the International Court of Justice found in *Gabčíkovo-Nagymaros Project*, a possible peril, as opposed to a duly established peril, is not sufficient to meet the threshold of necessity.⁴⁵ The same applies to ‘imminence’, which necessarily implies proximity “and goes far beyond the concept of ‘possibility’”.⁴⁶

37. The absence of a grave and imminent peril emanating from the presence of the survival capsule and the protesters climbing on the *Prirazlomnaya* is further supported by the delays in the responses by the authorities of the Russian Federation and the non-immediacy of its law-enforcement actions. The lack of urgency in the responses by the Russian Federation indicates that the situation was not one that was considered “instant, overwhelming, leaving no choice of means, and no moment of deliberation”, as the standard of necessity requires.⁴⁷

38. Regarding the third requirement, even if the presence of the survival capsule and the protesters climbing on the *Prirazlomnaya* were to be considered a grave and imminent threat against an essential interest of the Russian Federation, the wrongfulness of the conduct of the Russian Federation in response to these events could still not be precluded on the basis of necessity as this conduct was not the “only means” available to the Russian Federation to avoid the perceived grave and imminent peril. The removal of the two individuals who reached the *Prirazlomnaya* from the platform and lawful measures to prevent the arrival of the survival

⁴⁵ *Gabčíkovo-Nagymaros Project*, para. 54.

⁴⁶ *Ibid.*

⁴⁷ This criterion was introduced in the *Caroline* incident of 1837. See *29 British and Foreign State Papers* (1837), p. 1129 and has subsequently been followed in the assessment of the justification of recourse to a plea of necessity.

capsule within a safety zone of 500 meters around the *Prirazlomnaya* would have averted any threat to the security of the *Prirazlomnaya* and the environment. The boarding of the *Arctic Sunrise*, one day after the protest had ended, and all subsequent law-enforcement actions were therefore not the only way to address any perceived state of necessity.

39. Finally, with respect to the fourth requirement, the Netherlands notes that measures taken in response to a situation of necessity must not “seriously impair an essential interest” of the other State or of the international community as a whole. A balance has to be struck, therefore, between addressing a state of necessity and the interests of others. As described in the Memorial, the serious criminal charges brought against the persons who were on board the *Arctic Sunrise* and the length of their pre-trial detention creates a chilling effect on the freedom of protest at sea, as included in the freedom of navigation, not only to the Netherlands, but to the international community.⁴⁸ As has been demonstrated above, these measures were not taken immediately after the occurrence of the perceived state of necessity. This delay would have allowed the Russian Federation to consider other, less intrusive, measures. Therefore, and in view of the fundamental importance of the freedom of navigation in the law of the sea, the impairment caused by the chilling effect on the freedom of protest at sea due to the serious criminal charges (piracy and hooliganism) and the length of the pre-trial detention of the persons who had been on board the *Arctic Sunrise* outweighs the interest of the Russian Federation. The wrongfulness of these law-enforcement actions cannot therefore be precluded on the basis of necessity.

VIII. Conclusion

40. In conclusion and having considered all circumstances precluding wrongfulness available under the law of State responsibility, the Kingdom of the Netherlands considers that none of the circumstances precluding wrongfulness apply to any of the five wrongful acts of the Russian Federation indicated in the Memorial.

⁴⁸ Memorial, paras. 8, 127 and 181.

11. The Netherlands is invited to indicate its views on the responsibilities, if any, of the Netherlands, as the flag State, in respect of the actions of the Arctic Sunrise in this case.

1. Pursuant to international law, a flag State bears responsibilities for ships flying its flag. The general responsibilities of flag States are reflected in Article 94 UNCLOS. Accordingly, flag States must: (a) effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying its flag (paragraphs 1-2); and (b) take such measures for ships flying its flag as are necessary to ensure safety at sea (paragraphs 3-5). It does not appear from the facts that any concerns over the actions of the *Arctic Sunrise* against the *Prirazlomnaya* on 18 September 2013 relate to administrative, technical and social matters or specific responsibilities of flag States other than those related to safety at sea.

2. The Kingdom of the Netherlands attaches great importance to the safety of life at sea and other safety matters referred to in Article 94.3 to 94.5 UNCLOS as well as compliance with the generally accepted international regulations, procedures and practices related to safety at sea by ships flying its flag. The Kingdom of the Netherlands is a party to the relevant treaties, referred to in the Memorial (para. 241), and has always emphasized that the right of peaceful protest at sea must be exercised in accordance with such generally accepted international regulations, procedures and practices, as reflected in the various international instruments, referred to in the Memorial (paras. 225 and 226).

3. Article 94 UNCLOS obliges flag States to secure that ships flying its flag observe “generally accepted international regulations, procedures and practices” with respect to safety at sea (Article 94.5). In order to achieve this, flag States will have to incorporate such generally accepted international regulations, procedures and practices in its domestic law.

4. To ensure safety at sea by ships flying its flag, the Netherlands has adopted the Ships Act (*Schepenwet*), the Seafarers Act (*Wet zeevarenden*), and the Shipping Traffic Act (*Scheepvaartverkeerswet*).⁴⁹ The specific aim of the Shipping Traffic Act is to prevent collisions of ships at sea. These legislative measures implement Article 94.3 and 94.4 UNCLOS as well as

⁴⁹ This legislation can be found (in Dutch) at: wetten.overheid.nl/BWBR0001876/; wetten.overheid.nl/BWBR0009124/; wetten.overheid.nl/BWBR0004364/.

the generally accepted international regulations, procedures and practices under Article 94.5 UNCLOS. Pursuant to these measures, a ship registered in the Netherlands must have valid certificates to attest to its safety and be surveyed on a regular basis.

5. All ships registered in the Netherlands are subject to the continuous supervision of the Netherlands' Government. The officials of the Netherlands Shipping Inspectorate of the Ministry of Infrastructure and the Environment are responsible for the supervision of the compliance with the provisions of the above-mentioned legislative measures. Compliance with these measures, which is a prerequisite for issuing the compulsory certificates, is regularly checked by means of periodical surveys as well as risk-based inspections by the Inspectorate and the classification societies, recognized and authorized by the Netherlands. Instances of non-compliance are reported to the Ministry of Infrastructure and the Environment. The Ministry reports pertinent cases to the public prosecutor which is responsible for the implementation of any enforcement measures.

6. The *Arctic Sunrise* is registered as a non-commercial vessel and has to comply with the provisions of the above-mentioned legislative measures that are applicable to ships not engaged in trade. The application of specific measures in the field of the prevention of pollution from ships, manning, safety of life at sea and security is based on the scope of the relevant international instruments. For ships not engaged in trade, this means that they have to comply, for example, with the provisions of the 1972 International Regulations for Preventing Collisions at Sea and the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL), but not with the provisions of other relevant international instruments, including several instruments relating to manning, safety and security.

7. Although not required by law, on a voluntary basis, the *Arctic Sunrise* complies with many international instruments relating to manning, safety and security. The *Arctic Sunrise* is classed by *DNV GL*, which issued several certificates indicating compliance with, for example, the 1966 International Convention on Load Lines, the 1974 International Convention for the Safety of Life at Sea, MARPOL, and the International Management Code for the Safe Operation of Ships and for Pollution Prevention. This classification society, which has been recognized and

authorized by the Netherlands, has performed surveys of the *Arctic Sunrise* on a regular basis. The supervision by the Netherlands' Shipping Inspectorate is limited to compliance with those instruments applicable to ships not engaged in trade.

8. In addition to the implementation and enforcement of the above-mentioned legislative measures, it is the practice of the Netherlands, as indicated in the Memorial (para. 242), to actively convey to the relevant non-governmental organizations its view that the right to protest at sea should be exercised in accordance with these measures. When the authorities are aware of an upcoming protest, they normally contact the relevant non-governmental organization to urge it to comply with domestic and international regulations, procedures and practices regarding safety at sea. Following indications that safety at sea may have been jeopardized during a protest action at sea, the authorities contact the relevant non-governmental organization to evaluate the protest and, where appropriate, request the Netherlands' Shipping Inspectorate to deliver an opinion regarding the events based on the available information.

9. Article 94.6 UNCLOS provides for a procedure enabling other States to address the flag State if a vessel flying its flag has not complied with generally accepted international regulations, procedures and practices. Accordingly, when a State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised, it may report the facts to the flag State. Upon receipt of such a report, the flag State is required to investigate the matter and, if appropriate, to take any action necessary to remedy the situation.

10. The Russian Federation has not invoked this provision following the protest directed against the *Prirazlomnaya* on 18 September 2013. Even if the Russian Federation's diplomatic note of 18 September 2013 were to qualify as such a report, by boarding and detaining the *Arctic Sunrise* the day after, the Russian Federation did not allow the Netherlands any time to investigate the incidents leading to the boarding and detention of the *Arctic Sunrise*.

11. In fact, the Netherlands' Shipping Inspectorate of the Ministry of Infrastructure and the Environment did investigate the incidents preceding the boarding of the *Arctic Sunrise*. It concluded in an opinion, dated 18 October 2013 (Annex N-45), that: (a) the *Arctic Sunrise* did

not cause any danger to ships, sea farers, navigation, the marine environment, and the *Prirazlomnaya*; and (b) there is no evidence of bad seamanship. If the Inspectorate would have concluded otherwise, the police and the public prosecutor could have taken further steps.

12. The Netherlands is invited to provide to the Tribunal any materials documenting Russian criminal or administrative proceedings related to the subject-matter of this dispute that have not yet been filed in this arbitration but that the Netherlands has in its possession or could obtain.

1. The Netherlands has requested Greenpeace International to furnish any further materials available to it documenting the facts and domestic legal proceedings relevant to the subject-matter of this dispute that were not provided previously. In response, Greenpeace International has provided an Addendum and Corrigendum to the Statement of Facts (Annex N-44).
2. The Netherlands does not have any further materials documenting Russian criminal or administrative proceedings related to the subject-matter of this dispute in its possession nor could it obtain such materials.

The Hague, 12 January 2015



René Lefeber
Co-Agent for the Kingdom of the Netherlands

LIST OF ANNEXES SUBMITTED BY THE KINGDOM OF THE NETHERLANDS

Annex N-44

Addendum and Corrigendum to the Greenpeace International Statement of Facts of 15 August 2014 (9 January 2015)

Annex N-45

Memorandum on the *Arctic Sunrise* Incident of 18 September 2013 of the Netherlands' Shipping Inspectorate of the Ministry of Infrastructure and the Environment (18 October 2013)