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The Arctic Sunrise Arbitration and Acts of Protest at Sea

Dr Maria Chiara NOTO¹

Abstract

The present article analyses the *Arctic Sunrise* arbitration, which concerns the lawfulness of the boarding and seizure of the Dutch-flagged vessel, *Arctic Sunrise*, during a protest against the oil rig Prirazlomnaya in the exclusive economic zone of the Russian Federation. Even though the *Arctic Sunrise* vessel was three nautical miles from the rig, the Greenpeace activists on board were arrested, detained and charged with piracy, which was later replaced with a charge of aggravated hooliganism. Peaceful protest at sea is an internationally recognised lawful use of the sea, related to the freedom of navigation, and it is therefore subject to the limitations defined by, *inter alia*, the law of the sea. This necessitates a balancing of the right to protest at sea with other legitimate interests, including safety of navigation and the safety and security of artificial islands, installations and structures located on the continental shelf or in the exclusive economic zone of a State. According to the award, the coastal State should tolerate some level of nuisance caused by civilian protest as long as it does not amount to an interference with the exercise of its sovereign rights. In order to protect its sovereign rights, a coastal State may respond appropriately against acts of protest provided such measures are reasonable, necessary and proportionate. The *Arctic Sunrise* case raises a number of interesting legal questions concerning the phenomenon of acts of protest at sea, questions that have not been adequately explored to date. This paper aims to analyse the difference between acts of protest at sea, piracy and maritime terrorism, the limits on the right to protest at sea, and the connection between the law of the sea and the protection of human rights.

Keywords

right to peaceful protest, freedom of expression, piracy, maritime terrorism, fixed platform, law enforcement measures, international law of the sea, human rights, Greenpeace

1. Introduction

On the morning of 18 September 2013, two Greenpeace activists attempted to scale the Gazprom-operated Prirazlomnaya oil platform, located in the exclusive economic zone (EEZ) of the Russian Federation. This act was intended to be a non-violent direct action protesting the platform's

¹ Maria Chiara Noto holds her Ph.D. in International Law from the University of Milan and an LL.M. in Humanitarian Law from the University of Nice. At present, she is a legal adviser with the Italian Army and visiting research fellow at the Institute for International Legal Studies (ISGI) of the National Research Council (CNR) in Rome.



oil drilling activities.² The next day, in response to the protest, the Russian authorities boarded and seized the *Arctic Sunrise*, a Dutch-flagged Greenpeace vessel. The *Arctic Sunrise* was towed to the Russian port of Murmansk and was subsequently seized by the Leninsky District Court. Russian authorities arrested and detained the Greenpeace activists on board (the Arctic 30), charging them with piracy.³ One month later, the authorities dropped the piracy charge against the Arctic 30, replacing it with the charge of aggravated hooliganism.⁴

Piracy consists of acts of violence or depredation committed for private ends on the high seas, from persons on board a ship against another ship.⁵ The fact that the *Prirazlomnaya* is not a ship was the reason for the alternate charges of hooliganism against the Arctic 30. The initial charge of piracy, however, allowed the Russian authorities to board the *Arctic Sunrise* as provided by Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) and, according to the principle of universal jurisdiction, to arrest and charge the Arctic 30.

On 4 October 2013, the Kingdom of the Netherlands instituted arbitral proceedings against the Russian Federation under Annex VII to the UNCLOS. On 22 November 2013, pending the constitution of the Arbitral Tribunal (Tribunal), the International Tribunal for the Law of the Sea (ITLOS) ordered the Russian Federation to release the *Arctic Sunrise* and its crew upon payment of EUR 3.6 million bond.⁶

2 Greenpeace International has drafted a detailed account of the events leading up to the arrest of the *Arctic Sunrise* and its crew: Greenpeace, 'Updates from the Arctic Sunrise activists' (*Greenpeace*, 1 August 2014) <www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/> accessed 22 January 2016.

3 *ibid.*

4 See Shaun Walker, 'Arctic 30: Russia changes piracy charges to hooliganism' (*The Guardian*, 23 October 2013) <www.theguardian.com/environment/2013/oct/23/arctic-30-russia-charges-greenpeace> accessed 22 January 2016.

5 Art 15 of the Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 82 (High Sea Convention) and Art 101 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), to which Russia and the Netherlands are parties, both define piracy as '(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (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 sub-paragraph (a) or (b).'

6 This article does not investigate the ITLOS protective order of 22 November 2013 concerning provisional measures related to the *Arctic Sunrise* case. For comments on the ITLOS order, see Craig H Allen, 'ITLOS Orders Russia to Release Arctic Sunrise and its Greenpeace Protestors' (*Opinio Juris*, 25 November 2013) <<http://opiniojuris.org/2013/11/25/itlos-orders-russia-release-arctic-sunrise-greenpeace-protestors/>> accessed 16 January 2016; Giorgia Bevilacqua, 'Efficacità del diritto internazionale del mare e tutela delle libertà fondamentali nel caso Arctic Sunrise' (2014) 1 *Diritti Umani e Diritto Intl* 188; Alex G Oude Elferink, 'The *Arctic Sunrise* Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 *The Intl J Marine and Coastal Law* 344; Douglas Guilfoyle and Cameron A Miles, 'Provisional Measures and the MV *Arctic Sunrise*' (2014) 108 *AJIL* 271; Richard Caddell, 'Platforms, Protestors and Provisional Measures: The *Arctic Sunrise* Dispute and Environmental Activism at Sea' (2014) 45 *Netherlands YB Intl L* 359; Nuwan Peiris, '*Arctic Sunrise* from ITLOS: The Arctic Surprise and in Search of a Balanced Order' (2015) 29 *Ocean YB* 44; Eva Rieter, 'Introductory Note to the "Arctic Sunrise" Case (Netherlands/Russia) (ITLOS)' (2015) 53 *ILM* 603.



Russia did not participate in the proceedings at any stage, invoking the declaration that it made when becoming a party to the UNCLOS, according to which ‘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.’⁷ Prior to discussing the merits of the claims by the Netherlands, the Tribunal addressed issues of jurisdiction and admissibility, concluding that Russia’s declaration did not exclude, *prima facie*, the dispute from the jurisdiction of the Tribunal.⁸ According to Article 298(1)(b) UNCLOS, the optional exception in connection with disputes concerning law enforcement measures in regard to the exercise of sovereign rights or jurisdiction only applies with respect to disputes concerning marine scientific research and fisheries, neither of which was at issue in the *Arctic Sunrise* case.

Russia’s non-appearance did not constitute a bar to proceedings by virtue of Article 9 of Annex VII to the UNCLOS, according to which the Tribunal can make its award if the other party to the dispute requests the Tribunal to continue the proceedings.⁹ The Tribunal made its award on 14 August 2015, declaring that the boarding and seizure of the *Arctic Sunrise* by the Russian Federation and the arrest of the Arctic 30 was illegal; consequently, it ordered the Russian Federation to compensate the Netherlands for the damage caused to the *Arctic Sunrise* and its crew.¹⁰ The Tribunal did not discuss the direct action put in place by the two activists who had tried to climb the platform and their subsequent arrest by the Russian authorities, because the Netherlands statement of the claim focused on the legitimacy of the boarding.¹¹

This paper aims to analyse the legal aspects of the *Arctic Sunrise* case concerning the law of the sea and the international protection of human rights. In particular, it will explore the difference between

7 Note Verbale from Russia to ITLOS, 22 October 2013, Annex No 18 <www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Note_verbale_Russian_Federation_eng.pdf> accessed 25 January 2016.

8 *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Award on Jurisdiction) Case No 2014-02 (2014) <www.pcacases.com/web/sendAttach/1325> accessed 23 February 2016 [77]-[78]. For comments, see Anna Dolidze, ‘The Arctic Sunrise and NGOs in International Judicial Proceedings’ (2014) 18 *American Society of Intl L* <www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings> accessed 22 January 2016; Chao Zhang and Yen-Chiang Chang, ‘Letter to the Editors: The Russian Federation Refuses to Appear before the ITLOS and the Annex VII Arbitral Tribunal’ (2015) 14 *Chinese J of Intl L* 405.

9 According to Art 9 of Annex VII to the UNCLOS: ‘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.’ Concerning the non-appearance of the Russian Federation, see the ITLOS order of 22 November 2013 concerning provisional measures related to the *Arctic Sunrise* case and the joint separate opinion of Judge Wolfrum and Judge Kelly: *The “Arctic Sunrise” Case (The Kingdom of Netherlands v Russian Federation)* (Request for the prescription of provisional measures, Order of 22 November 2013) <www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf> accessed 22 February 2016.

10 *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Award on the Merits) Case No 2014-02 (2015) <www.pcacases.com/web/sendAttach/1438> accessed 22 January 2016. See for comments, Maria C Noto, ‘Atti di protesta violenta in mare: pirateria, terrorismo o fattispecie autonoma?’ (2015) 4 *Rivista di Diritto Intl* 1198.

11 *ibid*; *The Arctic Sunrise Arbitration (Netherlands v Russia)* (Notification and Statement of Claim dated 4 October 2013) <www.pcacases.com/web/sendAttach/1314> accessed 25 January 2016.



acts of protest at sea and piracy, on the one hand, and maritime terrorism on the other. Finally, this paper aims to examine the limits of the right to peaceful protest at sea and the human rights standards applicable to maritime law enforcement measures intended to prevent and punish violent acts of protest.

2. The association of protest at sea with illicit acts

The Russian Federation put forth a number of legal justifications for the measures taken against the *Arctic Sunrise*. The legal issue of the exercise of enforcement jurisdiction over the vessel and the activists was resolved by the fact that the Greenpeace activists were initially accused of piracy *ex* Article 101 UNCLOS. According to the general norm of international law codified in Article 105 UNCLOS, every State may seize a pirate ship and arrest the persons on board on the high seas and, in conjunction with Article 58(2) UNCLOS, in the exclusive economic zone. However, relying on a charge of piracy raised a number of different problems, which we discuss in the following. The Russian authorities accused the crew of the *Arctic Sunrise* of maritime terrorism, as provided by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation¹² and the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (together 1988 SUA Convention and its Protocol),¹³ to which the Netherlands and the Russian Federation are both parties. The 1988 SUA Convention and its Protocol were amended in 2005, but unlike the Netherlands, the Russian Federation did not ratify them.¹⁴ Thereafter, the Russian Federation, in a diplomatic note of 1 October 2013, accused the Greenpeace activists of infringing laws applicable to artificial islands, installations, structures and the surrounding safety zones in the EEZ, covered by Articles 56 and 60 UNCLOS.¹⁵

Acts of protest at sea are often associated – arguably incorrectly – with several offences against maritime security, such as piracy and terrorism. This is especially true when activists take violent actions against ships or installations that they consider unlawful or dangerous to the environment. For the purpose of this paper, it is useful to distinguish between peaceful protest, non-violent direct action and violent protest activities. This is a necessary distinction in terms of understanding when a State may tolerate protest activities instead of adopting maritime law enforcement measures to prevent or repress the violent acts or dangerous manoeuvres put in place by activists.

12 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221 (this Convention was amended in 2015). For comments, Maria C Noto, 'La repressione del terrorismo marittimo e del traffico illecito di armi di distruzione di massa dopo l'entrata in vigore della Convenzione SUA 2005' (2011) 2 *La Comunità Intl* 283.

13 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304. The mentioned Protocol was amended in 2015; Noto, 'La repressione del terrorismo marittimo e del traffico illecito di armi di distruzione di massa' (n 12) 283.

14 As of 17 December 2015.

15 On the legal regime of the safety zone around installations, see Sebastian tho Pesch, 'Coastal State Jurisdiction around Installations: Safety Zones in the Law of the Sea' (2015) 30 *Intl J of Marine and Coastal L* 512.



Acts of peaceful protest are lawful measures and include distributing leaflets or displaying banners. Peaceful protests do not cause physical damage, but they may disrupt traffic, passers-by and business or everyday activities. Greenpeace, which is one of the most visible environmental non-governmental organisations (NGO) in the world, uses peaceful protest to achieve its environmental goals. However, Greenpeace activists sometimes undertake non-violent direct action with the aim of interrupting activities they consider unlawful or dangerous to the environment, such as the dumping of waste, whaling or oil drilling. For instance, the main method used by Greenpeace activists to impede whaling is to place themselves between the harpoon and the whales.¹⁶

Particular instances of non-violent direct action may be questionable in terms of their lawfulness. Examples of this kind of action include blockades, workplace occupation or sit-ins aimed at stopping certain activities such as oil drilling in the Arctic waters. The consequences of such acts may be significant economic loss and/or minor property damage. For instance, the field in which the Prirazlomnaya rig was drilling contains 72 million tons of oil reserves, enabling potential annual production of 6.6 million tons.¹⁷ It is estimated that the interruption of extractive activities for any reason, including acts of protest, may result in the Gazprom oil company incurring losses of approximately USD 800 million per day.

Acts of violent protest at sea are unlawful acts, such as ramming and boarding other vessels, launching smoke bombs and flares, or dangerous manoeuvres – usually resulting in or creating a risk of property damage. The Sea Shepherd Conservation Society is one of the most aggressive environmental groups, usually attacking Japanese whaling ships in the Antarctic waters.¹⁸ Sea Shepherd claims to have sunk ten whaling ships between 1979 and 2002.¹⁹ This organisation attempts to justify its law enforcement role under the United Nations World Charter for Nature.²⁰ Paragraph 21 of the Charter states that ‘individuals [and] groups [shall] ... [s]afeguard and conserve nature in areas beyond national jurisdiction.’²¹ Sea Shepherd’s interpretation of the Charter is clearly erroneous because the Charter is a soft law instrument adopted by the UN General Assembly, and it does not provide for coercive measures nor does it authorise individuals or NGOs to use force. Even though certain provisions of the Charter refer to the responsibility of individuals, the protection of the high seas and its resources remain a State prerogative. Due to the use of violence at sea against other vessels, some States have described the activities of Sea Shepherd as eco-piracy or eco-terrorism, which is arguably incorrect.²²

16 The main techniques used by activists to hinder whaling are described in the reports available on the website of The Institute of Cetacean Research <www.icrwhale.org/News.html> accessed 25 January 2016.

17 Gazprom, ‘Prirazlomnoye oil field’ <www.gazprom.com/about/production/projects/deposits/pnm/> accessed 21 January 2016.

18 ‘Paul Watson: Sea Shepherd Eco-Warrior Fighting to Stop Whaling and Seal Hunts’ (*The Telegraph*, 17 April 2009) <www.telegraph.co.uk/earth/5166346/Paul-Watson-Sea-Shepherd-eco-warrior-fighting-to-stop-whaling-and-sealhunts.html> accessed 25 January 2016.

19 See Paul Watson, *Seal Wars: Twenty-five Years in the Front Lines with the Harp Seals* (Key Porter Books 2002) 36.

20 cf World Charter for Nature, annexed to UNGA Res 37/7 (28 October 1982) UN Doc A/RES/37/7.

21 *ibid.*

22 See, below Sec 2.2.



2.1 Acts of protest *versus* piracy

In the *Arctic Sunrise* case, Greenpeace's acts of protest were initially qualified as piracy by the Russian authorities, but in light of the lacking 'two-vessel' requirement, the authorities later replaced the charge with aggravated hooliganism.²³ As the Greenpeace activists took action against a platform rather than a ship, the Tribunal simply concluded that their actions could not constitute piracy within the scope of Article 101 UNCLOS, without further analysing the compatibility of acts of protest at sea with the constitutive elements of the piracy definition.²⁴ Considering that the Award of the Tribunal in the *Arctic Sunrise* case does not provide any useful guidance as to whether the definition of piracy may also encompass acts of violent protest at sea, it is necessary at this stage to compare the two phenomena.

Several elements are common to both acts of protest at sea and piracy, namely the location, the fact that two vessels are involved and, on occasion, the use of violence. Article 101 UNCLOS formulates the definition of piracy in broad terms and seems, *prima facie*, capable of applying to acts of violent protest at sea. During the negotiations of the High Seas Convention, the definition was formulated in broad terms in order to facilitate agreement on the constitutive elements of piracy;²⁵ however, this has resulted in interpretative uncertainty. Article 101 UNCLOS assumed the definition of piracy contained in Article 15 High Seas Convention without any modifications that would have clarified the meaning.

Several national courts have considered non-violent protest acts as acts of piracy. In *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*,²⁶ the Belgian Court of Cassation qualified as piracy the acts of protest undertaken by Greenpeace activists against two Belgian vessels, the *NV Mabeco* and the *NV Parfin*, which had discharged toxic substances on the high seas. Greenpeace activists boarded and seized the two vessels until law enforcement authorities arrived. The Belgian Court stated that in order to characterise illegal acts as piracy, it was sufficient that 'the acts in question were committed for personal ends.'²⁷ This interpretation by the Belgian Court appears to be incorrect because the term 'personal' is not a synonym for 'private'. Private ends are those not taken on behalf of a State. According to the United States Court of Appeals for the Ninth Circuit: 'The term [private ends] is normally used as an antonym to "public" (e.g., private attorney general) and often

23 *Netherlands v Russia* (Merits) (n 10) [123]-[124].

24 *ibid* [238]-[240]. For an in-depth analysis of the elements of distinction between acts of protest and piracy, see Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

25 ILC, 'Report of the International Law Commission on the work of its seventh session' (2 May to 8 July 1955) UN Doc A/2934 (1955) II YB of the ILC 25.

26 Part of the judgement relating to the case *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1988) 77 ILR 537. For comments, see Eric David, 'Greenpeace: Des Pirates!' (1989) 2 *Revue Belge de Droit Intel* 395; Samuel P Menefee, 'The Case of *Castle John*, or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western Intl L J* 7; Alexandre Kiss and Dinah Shelton, *Manual of European Environmental Law* (Hart Publishing 1993) 510.

27 *Castle John and Nederlandse Stichting Sirius* (n 26) 537.



refers to matters of a personal nature that are not necessarily connected to finance (e.g., private property, private entrance, private understanding and invasion of privacy).²⁸

The locution ‘private ends’ was included in the draft articles of the High Seas Convention by the International Law Commission in order to exclude cases of piracy by warships or other government ships operated for non-commercial purposes. On this point, during the work of the Commission, Sir Gerald Fitzmaurice observed that: ‘The Commission’s conception had been that piracy was essentially an act committed by a ship’s company or persons acting on their own authority, thereby excluding warships.’²⁹ The expression ‘private ends’ subsequently maintained in the UNCLOS serves to highlight the fact that an act of piracy can only be undertaken by private entities (individuals or NGOs), regardless of the underlying purpose (e.g. personal, economic or environmental). According to a Judge Kozinski of the United States Court of Appeals for the Ninth Circuit:

You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.³⁰

According to this perspective, any act of violence committed for private ends may be characterised as piracy if carried out on the high seas by persons on board a ship against another ship, regardless of the purpose pursued, which could be economic or social.

Even if the broad definition of piracy seems, *prima facie*, to include violent acts of protest, we can differentiate between the two phenomena. The purpose of activists is collective or social; activists mainly use non-violent methods of protest, but they occasionally resort to violence in order to resist during sit-ins, workplace occupations or to highlight certain activities in the media. The human and economic costs of piracy off the coast of Somalia and, more recently, off the coast of Guinea³¹ are not comparable.³² Crewmembers are rarely involved in incidents during the protests and no deaths

28 *Institute of Cetacean Research v Sea Shepherd Conservation* 725 F.3d 940 (CA, 9th Cir, 2013) 11 (Kozinski). For comments, see Ryan Keefe, ‘Ninth Circuit Issues Preliminary Injunction Recognizing Activist Conservation Society as Pirates’ (2013) 3 *Suffolk Transnational Law Review* 461; Tullio Scovazzi, ‘La caccia ai cacciatori di balene’ (2013) 28 *Rivista giuridica dell’ambiente* 457.

29 ILC, ‘Report of the International Law Commission on the work of its eighth session’ (23 April to 4 July 1956) UN Doc A/CN.4/104 (1956) I YB of the ILC 47 [53]-[55].

30 *Institute of Cetacean Research* (n 28) 2.

31 Many of the pirates acting in the Gulf of Guinea are guerrillas belonging to the Liberation Movement of the Niger Delta (MEND) and they are considered more violent than Somali pirates are, see ICC International Maritime Bureau (IBM), ‘Piracy and Armed Robbery Against Ships: 2014 Annual Report’ (January 2015) <www.hellenicshippingnews.com/wp-content/uploads/2015/01/2014-Annual-IMB-Piracy-Report-ABRIDGED.pdf> accessed 21 January 2016.

32 The IBM and the International Maritime Organization (IMO) constantly monitor piracy. The data reported in the text, updated as of 15 December 2015, can be found at the IMO and the IBM websites, respectively: <www.imo.it> and <www.icccs.org> accessed 20 January 2016.



have occurred to date. Pirates kidnap crewmembers and cargo on board private ships in order to extort ransom payments for their release.³³ The seizures may continue for long periods, sometimes even many years. Hostages may be subjected to inhuman treatment and their lives may be in danger because they are detained in constricted places or in unsanitary conditions.³⁴ The purpose pursued by pirates is mainly economic and the methods they employ include boarding vessels, committing armed robbery and stealing cargo.³⁵ Finally, pirates use violence systematically to break the will of the victims and the use of firearms is common. For the above reasons, it is not possible to qualify acts of protest at sea as ‘piracy’.

2.2 Acts of protest *versus* terrorism

Due to the forceful methods used by activists, several States, such as Canada³⁶ and the United States,³⁷ consider the acts of protest employed by certain NGOs as ‘eco-terrorism’.³⁸ In the *Arctic Sunrise* case, the Russian authorities claimed that the *Arctic Sunrise’s* rigid hull inflatable boats (RHIBs) had attacked the *Prirazlomnaya* and its crew was therefore suspected of terrorism. In particular, the Russian authorities described the Greenpeace protest action as ‘aggressive and provocative’ and bearing ‘to outward appearances’ the characteristics of ‘terrorist activities which could put lives in danger and have serious consequences for the platform,’ and which ‘exposed the Arctic region to the threat of an ecological disaster of unimaginable consequences.’³⁹

The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf appears to cover, *prima facie*, the actions of the *Arctic Sunrise* against

33 IBM, 2014 Annual Report (n 31).

34 Oceans Beyond Piracy, ‘The Human Cost of Maritime Piracy 2012’ (Working Paper, 2012) <www.oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf> accessed 20 January 2016.

35 IBM, 2014 Annual Report (n 31).

36 In a report on ‘Single Issue Terrorism’, the Canadian Security Intelligence Service declared that: ‘Watson and his supporters have been involved in a number of militant actions against whale hunting, driftnet fishing, seal hunting and other related issues [and mentions] activities against logging operations in Canada’, see G Davidson (Tim) Smith, ‘Single Issue Terrorism’ (Commentary no 74, Canadian Security Intelligence Service, 25 April 2008) <<http://ftp.fas.org/irp/threat/com74e.htm>> accessed 22 February 2016.

37 James F Jarboe, of the Counterterrorism Division of the FBI, has argued that Sea Shepherd is one of the main organisations involved in acts of eco-terrorism, see ‘The Threat of Eco-Terrorism’ (Congressional Testimony, 12 February 2002) <www2.fbi.gov/congress/congress02/jarboe021202.htm> accessed 22 January 2016.

38 See Raffi Khatchadourian, ‘Neptune’s Navy’ (*The New Yorker*, 5 November 2007) <www.newyorker.com/reporting/2007/11/05/071105fa_fact_khatchadourian> accessed 22 January 2016; Yoko Wakatsuki, ‘Japanese Accuse Anti-Whaling Activists of “Terrorism”’ (*CNN*, 12 February 2007) <<http://cnn.com/2007/WORLD/asiapcf/02/12/japan.whaling/index.html?iref=newsserarch>> accessed 20 January 2016; Joseph Elliot Roeschke, ‘Eco-Terrorism and Piracy on the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters’ (2009) 20 *Villanova Environmental LJ* 98; Amanda M Caprari, ‘Lovable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean’ (2010) 42 *Connecticut L Rev* 1511; Atsuko Kanehara, ‘So-Called “Eco-Piracy” and Interventions by NGOs to Protest Against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position’ in Clive R Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) 195.

39 *Netherlands v Russia* (Merits) (n 10) [98].



the *Prirazlomnaya*. Article 2 of the 1988 Protocol provides that if a person unlawfully and intentionally 'seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation', he or she commits an offence under the Protocol.⁴⁰ However, in the *Arctic Sunrise* case, the Tribunal rejected Russia's allegations of terrorism. In particular, the Tribunal stated that 'there were no reasonable grounds for the Russian authorities to suspect the Arctic Sunrise of terrorism and therefore any purported suspicion of potential terrorism could not provide a legal basis for the measures taken by the Russia against the vessel on 19 September 2013'.⁴¹ However, it is still worthwhile to note in short the similarities and distinctions between acts of protest and terrorism.⁴²

In the absence of a generally accepted definition of international terrorism contained in a binding legal instrument, our attention turns to the draft Comprehensive Convention on International Terrorism. According to the draft, international terrorism is any act that unlawfully and intentionally causes:

- (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; ... when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁴³

International terrorism is an offence with a specific scope, such that a connection exists between the conduct and intent. In other words, the offender must expect and intend the event to be a consequence of his or her action. Based on the definition mentioned above, the purpose of terrorist conduct is, by its nature or context, to intimidate the population or to compel a State or an international organisation to act in a certain way. The purpose of terrorism is political because the intention is to force a State or an international organisation to adopt a specific form of conduct. Although terrorists attack ships and the individuals on board, the target is actually the flag State or an international organisation.

In order to determine whether acts of violent protest could be equated with terrorism, it is necessary to determine whether the conduct of the activists is suitable to intimidate the population and if the aim of the activists is political. As specified above, some environmental NGOs use violence to disrupt activities, which, in some cases, may constitute illegal acts. The use of violence is not directed against individuals, but against vessels or installations involved in activities considered unlawful or

40 1988 Protocol (n 13).

41 *Netherlands v Russia* (Merits) (n 10) [322].

42 For an in-depth analysis of the elements of distinction between acts of protest and instead maritime terrorism, see Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

43 UNGA Res 59/894 (12 August 2005) UN Doc A/59/894. On the definition of international terrorism, see Chiara Di Stasio, *La lotta multilivello al terrorismo internazionale. Garanzia di sicurezza versus tutela dei diritti fondamentali* (Giuffrè Editore 2010) 15; Christian Walter, 'Terrorism' *Max Planck Encyclopedia of Public International Law* (2011) <www.mpepil.com> accessed 20 January 2016.



dangerous to the environment by the protesters. By contrast, terrorist organisations use violence systematically. Terrorist attacks often involve weapons or explosives and aim to provoke fear or terror in the population and institutions, and to cause a large number of civilian casualties. Finally, terrorists use information tools and media to promote rapid, mass dissemination of information about the attacks and their effects, with the aim of amplifying the threat as well as raising fear and a perception of a lack of safety within the population.⁴⁴ Regarding the aim, environmental organisations exercise continuous pressure upon States in an attempt to induce them to modify their conduct in environmental matters.⁴⁵ For instance, Greenpeace's *Save the Arctic* campaign⁴⁶ aims to sensitise involved States to the environmental risks resulting from drilling activities in the Arctic, while the *GrindStop 2014* campaign,⁴⁷ organised by Sea Shepherd, strives to save pilot whales in the Faroe Islands. The mentioned awareness campaigns seem to be politically motivated like terrorism acts, insofar as they are directed against States that undertake activities dangerous to the environment. The activities of environmental NGOs aim to protect the environment and to raise public awareness of issues affecting the ecosystem, in order to influence States' policies in environmental matters or encourage the effective implementation of treaties to which they are a party. For instance, on 7 January 2012, two Sea Shepherd activists illegally climbed aboard the Japanese whaling vessel *Shonan Maru 2* and delivered a letter to the commander containing the following message: 'We are taking this action to remind the Australian government of their obligation to enforce existing laws pertaining to the prohibition of whaling ships in our waters.'⁴⁸ The activists were unarmed and they immediately surrendered when the crew of the *Shonan Maru 2* attempted to arrest them.⁴⁹

Peaceful protests, direct actions and even violent acts of protest do not have the same intensity as acts intended to terrorize the population or to compel a State to behave in a particular way. For these reasons, acts of protests at sea should not be equated with terrorism.

3. Right to protest at sea and freedom of navigation

In an *amicus curiae* brief submitted to the ITLOS in the provisional measures procedure initiated by the Netherlands, Greenpeace justified its direct actions against the oil rig *Prirazlomnaya* by invoking

44 Joseph Kunkle, 'Social Media and the Homegrown Terrorist Threat' (*The Police Chief*, February 2016) <www.policchief-magazine.org/magazine/index.cfm?fuseaction=display&article_id=2692&issue_id=62012> accessed 24 February 2016.

45 cf Caprari (n 38); Alana Preston, 'Eco-Terrorism in the Southern Ocean: A Dangerous Byproduct of the Tangled Web of International Whaling Conventions and Treaties' (2012) 34 *Whittier L Rev* 117.

46 The program of the campaign is available at [Save the Arctic](http://www.savethearctic.org) <www.savethearctic.org> accessed 20 January 2016.

47 Information on the GrindStop 2014 campaign is available at [Sea Shepherd](http://www.seashepherd.org/grindstop/) <www.seashepherd.org/grindstop/> accessed 20 January 2016.

48 The facts are reported at Sea Shepherd, 'Three Australian Prisoners Now Detained on a Japanese Whaler in Australian Waters' (7 January 2012) <www.seashepherd.org/news-and-media/2012/01/07/three-australian-prisoners-now-detained-on-a-japanese-whaler-in-australian-waters-1309> accessed 25 January 2016.

49 *ibid.*



the right to peaceful protest.⁵⁰ The right to protest is part of the freedoms of expression, assembly and association, which are regulated by customary law and codified in several international human rights treaties.⁵¹ In accordance with the freedoms of assembly and expression, every individual has the right to express his opinion, his opposition and even to dispute decisions taken by any State. The European Court of Human Rights (ECtHR), in *Women on Waves v Portugal*, underlined the ‘crucial importance’ of the freedom of expression, which constitutes one of the preliminary conditions of a functioning democracy.⁵² Moreover, in *Youth Initiative for Human Rights v Serbia*, the ECtHR considered NGOs to be ‘critical watchdogs’ because they play the important task of disseminating information on matters of public interest in civil society.⁵³

The International Maritime Organization (IMO) has also addressed the right to protest at sea, and it is currently drafting a Code of Conduct for Assurance of the Safety of Crew and Maritime Navigation during Demonstrations/Campaigns against Ships on the High Seas.⁵⁴ This Code aims to provide guidelines for stakeholders to ensure and promote the safety of crewmembers, maintain maritime order and preserve the right to organise peaceful manifestations.⁵⁵ The text used as a basis for negotiations clarifies that acts of protest ‘should not involve violent activities, or threats of violent activities. Violent activities for the purpose of this Code include activities that are a risk (not only directly but also indirectly) to human life and property and safe navigation of vessels.’⁵⁶

The IMO is not the only international forum to discuss acts of violent protest at the sea and its consequences for maritime security. In 2011, the International Whaling Commission (IWC) adopted Resolution 2011-2, which recognises the right to peaceful protest at sea but condemns all illegal or dangerous acts at sea. Moreover, the Resolution invited Member States to call on the masters of vessels to take responsibility for ensuring that safety at sea is their highest priority and to observe strictly international collision avoidance regulations. Finally, the Commission has requested Member States that are often the target of protests to adopt appropriate measures in order to avoid incidents at sea during protests and demonstrations.

50 Greenpeace, ‘*Amicus Curiae* Submission by Stichting Greenpeace Council (Greenpeace International)’ (30 October 2013) <www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf> accessed 25 January 2016.

51 Philip Leach, *Taking a Case to the European Court of Human Rights* (3rd ed, OUP 2005) 326; Luzius Wildhaber, ‘Aspects of the Freedoms of Expression and Association Under the European Convention in Human Rights: Articles 10 and 11’ in Sergio A Fabris (ed), *Trends in the International Law of Human Rights Law: Studies in Honour of Professor Antônio Augusto Cançado Trindade* (OUP 2005) 191; Jasper Teulings, ‘Peaceful Protests Against Whaling on the High Seas – A Human Rights-Based Approach’ in Clive R Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Brill 2011) 221; Ian Currie, ‘Freedom of Expression and Association’ in Mark Tushnet, Thomas Feiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 231.

52 *Women on Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009) para 29.

53 *Youth Initiative for Human Rights v Serbia* App no 48135/06 (ECtHR, 25 June 2013) para 20.

54 IMO, Sub Committee on Safety of Navigation, NAV 54/10/1 of 25 April 2008.

55 *ibid* [1.2].

56 *ibid* [3.1.1].



According to the *Arctic Sunrise* arbitral award, peaceful protest at sea is ‘an internationally lawful use of the sea related to the freedom of navigation.’⁵⁷ As is well known, the freedom of navigation is a principle of customary international law, which foresees that, apart from the exceptions provided for in international law,⁵⁸ ships flying the flag of any sovereign State shall not suffer any interference from other States.⁵⁹ Every ship is subject to the jurisdiction of its flag State (i.e. ‘flag State jurisdiction’), which establishes criteria for inclusion of ships in its registry and determines the causes of vessels’ removal from it (Article 91 UNCLOS).

Based on recent practice, the jurisdiction of the flag State encompasses the ability to exercise diplomatic protection in favour of all individuals on board, regardless of their nationality.⁶⁰ In this regard, the Tribunal considered the *Arctic Sunrise* a unit such that its crew, all persons and goods on board, as well as its owner and every person involved or interested in its operations, constituted part of an entity linked to its flag State.⁶¹ This entitled the Netherlands to bring claims in respect to alleged violations of its rights under the UNCLOS. The flag State also has a duty (a due diligence obligation) to ensure that the ships flying its flag are not used to commit unlawful acts. Due to the dangerous and unlawful method of protest used, some States, such as the United Kingdom, have removed vessels used by Sea Shepherd from their ship register.⁶²

4. Limits to the right to protest at sea

The Tribunal in the *Arctic Sunrise* case recognised that acts of peaceful protest at sea may result in possible disruption of the freedom of navigation and expressed the view that this should be tolerated

⁵⁷ *Netherlands v Russia* (Merits) (n 10) [227].

⁵⁸ Art 110 UNCLOS provides for several exceptions, namely piracy, slave trade, unauthorised broadcasting, sailing without nationality, practicing deception with regard to nationality.

⁵⁹ Albert J Hoffmann, ‘Freedom of Navigation’ *Max Planck Encyclopedia of Public International Law* (2011) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1199?prd=EPIL>> accessed 25 January 2016.

⁶⁰ See *The M/V ‘Saiga’ (No 2) Case (Saint Vincent and the Grenadines v Guinea)* (Judgment, 1 July 1999) ITLOS Reports 1999 <www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf> accessed 20 January 2016. See for comments Maria I Papa, ‘Protezione diplomatica, diritti umani e obblighi erga omnes’ (2008) 3 *Rivista di Diritto Intl* 669.

⁶¹ *Netherlands v Russia* (Merits) (n 10) [172]. According to Art 18 of the Draft Articles on Diplomatic Protection adopted by the ILC in 2006: ‘The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crewmembers, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.’ See also *The M/V ‘Saiga’ (No 2)* (n 60) [106]; *The M/V ‘Virginia G’ Case (Panama/Guinea-Bissau)* (14 April 2014) ITLOS Reports 2014 [127].

⁶² The following States have removed vessels belonging to Sea Shepherd from their ship registers: Belize, Canada, the Cayman Islands, Great Britain and Togo; see also Sea Shepherd, ‘The Bob Barker Goes Dutch’ (25 May 2010) <www.seashepherd.org/news-and-media/2010/05/25/the-bob-barker-goes-dutch-194> accessed 20 January 2016.



by the coastal State so long as they do not interfere with the exercise of the sovereign powers of the State.⁶³ The European Court of Justice (ECJ), in *Eugen Schmidberger v Republic of Austria*, similarly stated that '[non-violent direct actions] usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.'⁶⁴ Moreover, the ECtHR, in *Sergey Kuznetsov v Russian Federation*, stated that:

any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.⁶⁵ However, it could be difficult to identify the limit beyond which acts of protest cause a level of disruption such that the State concerned may adopt appropriate measures. There is a presumption that manifestations or campaigns of protest are peaceful, unless there are reasonable grounds to believe that the activists intend to use or incite violence, which is never permissible. Acts of violent protest against a ship and its crew or performing dangerous manoeuvres at sea can cause accidents. In certain cases, they have serious consequences for the safety of maritime navigation, human life at sea or the marine environment.⁶⁶

According to the *Arctic Sunrise* award, the right to protest at sea is related to the freedom of navigation and is therefore subject to the limitations defined, *inter alia*, by the law of the sea.⁶⁷ Ships are subject to the jurisdiction of their flag State, the exercise of which differs according to the maritime zone in which the vessel is located. As is well known, the relevant maritime zones include internal waters and the territorial sea, the contiguous zone, the EEZ (if declared by a coastal State) and the high seas. As a ship sails away from a State's coastline, the extent of jurisdiction shifts in favour of the flag State, until it gains exclusive jurisdiction on the high seas. Conversely, as the ship approaches a State's coastline, the balance shifts partially in favour of the coastal State.

According to Article 87 UNCLOS, the high seas are open to all States. The freedom of navigation must be exercised by all States with due regard for the interests of other States in the exercise of the freedom of the high seas (Article 87(2) UNCLOS). Ships sailing the high seas are under the exclusive jurisdiction of their flag State (Article 92 UNCLOS). According to the principle of exclusive jurisdiction of the flag State on the high seas, only that State may intervene, i.e. stop and board vessels

63 *Netherlands v Russia* (Merits) (n 10) [328].

64 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* Case C-112/00 [2003] ECR I-5694 [91].

65 *Sergey Kuznetsov v Russian Federation* App no 10877/04 (ECtHR, 23 January 2009) para 44.

66 See Glen Plant, 'International Law and Direct Action Protests at Sea: Twenty Years On' (2002) 33 *Netherlands YB Intl L* 75; Atsuko Kanehara, 'Legal Responses of Japan to the Impediments and Harassments by Foreign Vessels against Japanese Vessels during Research Whaling in the Antarctic Sea' (2009) 56 *Japanese Digest of Intl L* 556; Kanehara (n 38); Preston (n 45); Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

67 *Netherlands v Russia* (Merits) (n 10) [228].



involved in protest activities. If a third State has an interest in intervening – for example, the State of nationality of the vessel that is the target of the protest – it must obtain the authorisation of the flag State prior to boarding the activists' ship. The principle of flag State jurisdiction impedes any interference with the navigation of foreign ships without the permission of their flag States. Article 88 UNCLOS reserves the high seas for peaceful purposes, and any intentional collisions or other unsafe conduct occurring during protests on the high seas violate this norm. The principle of good faith, the prohibition of abuse of rights and the peaceful use of the high seas are precise limits, according to which States exercise the freedom of navigation in accordance with the interests of all other States exercising the freedom of the high seas.

The framework relating to the high seas is also applicable to the EEZ, in which States must exercise their rights with due regard for the interests of the coastal State. Vessels sailing within the EEZ of a coastal State must comply with its laws and regulations in matters of management of natural resources, research and protection of marine environment, installation and the use of artificial structures (Article 58 UNCLOS). A platform located within the EEZ may be subjected to special security measures, such as allowing the coastal State to establish a safety zone not exceeding 500 metres around the platform, in which unauthorised access is prohibited (Article 60(5) UNCLOS). Breaching the safety zone without authorisation is therefore a violation of the Coastal State's sovereign rights and the flag State cannot invoke the freedom of navigation to justify this infraction. A breach of the safety zone around the installations located in the EEZ allows the coastal State to take all necessary measures in order to protect the platform, including boarding, searching and seizing the vessel (Article 55 in conjunction with Article 56 UNCLOS).⁶⁸ Moreover, according to the *Arctic Sunrise* award, a coastal State may pursue a vessel involved in illegal activities within the safety zone of the installation if the pursuit began in this area and if the pursuit has not been interrupted.⁶⁹ According to Article 111 UNCLOS, hot pursuit prevents foreign ships, which have violated the laws and regulations of a coastal State, from evading their responsibility by fleeing to the high seas. Such pursuit must commence when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea, the contiguous zone or safety zones around continental shelf installations of the pursuing State, and may only continue outside these zones if the pursuit is uninterrupted. Article 111 UNCLOS sets out four conditions for lawful exercise of the right to hot pursuit: (1) a violation of the laws of the coastal State, (2) commencement of pursuit (within the relevant zone), (3) location of the pursued ship and the giving of a signal to stop, (4) continuity of pursuit. These conditions are 'cumulative' and therefore each must be satisfied.⁷⁰ In the *Arctic Sunrise* case, the Dutch ship arrived in the vicinity of

68 According to Art 55 UNCLOS, in the exclusive economic zone, the coastal State has: '(a) sovereign rights ... for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures.' In exercising its rights and performing its duties under Art 58(3) UNCLOS, in the exclusive economic zone, '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 the Convention.'

69 *Netherlands v Russia* (Merits) (n 10) [272].

70 *The M/V 'Saiga' (No 2)* (n 60) [146].



the *Prirazlomnaya* on 17 September 2013, but it remained outside the safety zone established around the platform by the Russian Federation.⁷¹ Despite the constructive presence⁷² of five RHIBs launched from the *Arctic Sunrise* that approached the *Prirazlomnaya* rig, the Tribunal concluded that the pursuit was interrupted.⁷³ Moreover, having reviewed the evidence, the Tribunal stated that the Russian warship ‘remained in proximity to the *Arctic Sunrise* not as part of an ongoing pursuit, but rather to ensure that the Greenpeace ship did not undertake any further actions at the platform and in the expectation of further instructions from a higher authority.’⁷⁴

Acts of protest at sea may entail a risk not only to the security of navigation and installations, but also to the marine environment. Consider, for instance, the consequences for the marine environment following the collision of two vessels. Article 221 UNCLOS allows coastal States to take preventive measures against foreign ships and their crews in order to protect their coastlines from pollution or threat of pollution following an accident at sea or actions related thereto, when harmful consequences for the marine environment are reasonably expected. According to the *Arctic Sunrise* award, coastal State may adopt ‘enforcement measures [which] are to be “proportionate to the actual or threatened damage” to protect the coastal State’s interests from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty.’⁷⁵ However, in this case, the Tribunal stated that:

even if it were to accept that the actions of the *Arctic Sunrise* constituted an ‘occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo,’ the threatened damage to Russia’s interests could not reasonably have been expected to result in major harmful consequences.⁷⁶

The adverb ‘reasonably’ is found throughout the various provisions of the law of the sea providing for the adoption of maritime enforcement measures, but there are no legal parameters to identify the meaning and, as discussed below, could become a problem.

In the territorial and internal waters, foreign ships are under the exclusive coastal State jurisdiction as regards matters of taxation, immigration, health and security. For all other matters, the coastal State must ensure the innocent passage of foreign ships through its territorial sea (Article 24 UNCLOS). Coastal States may restrict or prevent access of foreign ships to its territorial sea when the

71 There was an issue concerning the legality of the breadth of the Russian safety zone. The Tribunal found no evidence that the Russian authorities, unlike what they declared, established a three-nautical mile safety zone. Therefore, the Tribunal concluded Russia’s EEZ not exceed 500 metres in radius, as confirmed by the Federal Law No. 187-F3 dated 20 November 1995 ‘On the continental shelf of the Russian Federation’: *Netherlands v Russia* (Merits) (n 10) [202]-[220].

72 The doctrine of constructive presence is incorporated into Art 111(4) UNCLOS.

73 *Netherlands v Russia* (Merits) (n 10) [275].

74 *ibid* [272].

75 *ibid* [308].

76 *ibid* [310].



passage could reasonably be considered prejudicial to the peace, good order or security of the State (Article 25 UNCLOS). The passage of certain NGO vessels may not be innocent, especially when they organise protests, which could cause a level of disruption to ordinary life, without asking for the coastal State's authorisation.

5. Limits to the maritime law enforcement measures from UNCLOS and (other) rules of international law

The preventive measures that a coastal State may adopt have specific limits and they must fulfil the tests of reasonableness, necessity and proportionality. The Tribunal in the *Arctic Sunrise* case gave careful and detailed consideration to the types of protest actions that could reasonably be considered to constitute an interference with the exercise of a coastal State's sovereign rights, particularly in the context of the case before it. In this regard, the Tribunal considered it reasonable for a coastal State to prevent: '(i) violations of its laws adopted in conformity with the Convention; (ii) dangerous situations that can result in injuries to persons and damage to equipment and installations; (iii) negative environmental consequences ... and (iv) delay or interruption in essential operations'.⁷⁷ In the case at hand, the Tribunal did not deny the violation of the security zone or undue interference on the sovereign rights of the Russian Federation. Instead, the Tribunal stated that due to the boarding and seizure of the *Arctic Sunrise*, it was no longer engaged in actions that could potentially interfere with Russia's exercise of its sovereign rights as a coastal State or with the operation of the *Prirazlomnaya*. Therefore, if the Russian Federation had wanted to arrest the *Arctic Sunrise* crewmembers for acts committed before the boarding and seizing, it should have obtained authorisation from the flag State.

Acts of protest may interfere with the exercise of the sovereign rights of a coastal State because they could be a threat of maritime safety and security and the safety of installations. The State concerned may adopt maritime enforcement measures in order to: (1) reduce and control vessel-source pollution in its EEZ (Article 220 UNCLOS), (2) prevent and repress the use of dangerous manoeuvres for the safety of navigation and the human life at sea (Rule 2 of the Convention on the International Regulations for Preventing Collisions at Sea),⁷⁸ (3) protect the security of installations in its EEZ or contiguous zone if a vessel enters the security zone without permission (Article 60(4) UNCLOS), (4) arrest a ship that was pursued after having committed unlawful acts against the security of coastal State, as well as its installations and resources (Article 111 UNCLOS), (5) arrest any person or ship engaged in unauthorised broadcasting and seize the broadcasting apparatus (Article 109 UNCLOS).⁷⁹ In compliance with the principle of exclusive jurisdiction of the flag State, the State of nationality of

⁷⁷ *ibid* [327].

⁷⁸ Convention on the International Regulations for Preventing Collisions at Sea (adopted 20 October 1972, entered into force 15 July 1977) 1050 UNTS 16.

⁷⁹ Broadcasting is sometimes employed for propaganda activities at sea. In cases other than those mentioned, and based on the aforementioned principle of flag State jurisdiction, only the flag State may exercise enforcement jurisdiction against ships employed for protest activities.



the targeted vessel of the protest, which could have an interest in intervening so as to defend it, shall make good faith efforts to obtain the consent of the flag State of the activists' ship prior to boarding it. Even if, in certain circumstances, the UNCLOS permits the use of maritime enforcement measures such as boarding, arrest or seizure of ships,⁸⁰ it does not specify when and how much force is acceptable for law enforcement authorities to use.

Concerning the maritime enforcement measures that a State may adopt in the cases mentioned above, Article 301 UNCLOS provides that: 'In exercising their rights and performing their duties under this Convention, State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner.' The use of force must be avoided to the extent possible. This is an important remark made in several dispute settlements such as the *I'm Alone*,⁸¹ the *Red Crusader*⁸² and the *MV Saiga (No. 2)*⁸³ cases. However, if the use of force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Force must be used only when strictly necessary and it must be proportional to lawful objectives. Moreover, the use of restraint in the use of force minimises damages and injuries. According to the Basic Principles on the Use of Force and Firearms, force may be used:

only in self-defence or defence of others against imminent threat of death or serious injury, or to prevent a particularly serious crime that involves a grave threat to life, or to arrest or prevent the escape of a person posing such a threat and who is resisting efforts to stop the threat, and in every case, only when less extreme measures are insufficient.⁸⁴

The intentional use of lethal force and firearms are only allowed when strictly unavoidable in order to protect human life. Finally, according to the *MV Saiga (No. 2)* case, 'considerations of humanity must apply in the law of the sea, as they do in other areas of international law.'⁸⁵ This important remark of the ITLOS, rather than amounting to a rule of law,⁸⁶ appears to be a moral principle, which should guide a State towards the adoption of appropriate maritime enforcement measures. The notion of 'humanity' includes all common human values, such as respect for human life and dignity, which a State cannot disregard when using force to arrest a ship.

Limits to the use of force in the exercise of police action authorised by international law – which

80 For comments, see Noto, 'Atti di protesta violenta in mare' (n 10) 1198.

81 *S.S. I'm Alone (Canada, United States)* (1935) 3 RIAA 1609.

82 *Investigation of certain incidents affecting the British trawler Red Crusader* (1962) 29 RIAA 521.

83 *The M/V 'Saiga' (No 2)* (n 60) [155].

84 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990) UN Doc A/CONF.144/28/Rev.1.

85 *The M/V 'Saiga' (No 2)* (n 60) [10].

86 There is a certain amount of disagreement concerning the source, scope and function of the notion of 'humanity'. See Elena Carpanelli, 'General Principles of International Law: Struggling with a Slippery Concept' in Laura Pineschi (ed), *General Principles of Law – The Role of the Judiciary* (Springer 2015) 125.



vary from, yet are compatible with, those contained in the UNCLOS – have been specified in dispute settlement and treaty practice. According to the *Arctic Sunrise* award, Article 293 UNCLOS ‘ensures that, in exercising its jurisdiction under the Convention, a Tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law.’⁸⁷ Article 293(1), however, does not constitute a source of jurisdiction and does not extend the jurisdiction of a Tribunal, but authorises the application of other rules of international law, which are integrated into the norms contained in the UNCLOS.⁸⁸ The Tribunals in *MOX Plant*⁸⁹ and *Chagos Islands*⁹⁰ likewise asserted that Article 293(1) does not constitute a grant of jurisdiction over claims falling outside the scope of the UNCLOS.⁹¹

The international legal order depends on the consent of States. Tribunals deriving their jurisdiction from the UNCLOS can exercise jurisdiction over disputes only where States have granted them jurisdiction. Article 288(1) limits the jurisdiction of UNCLOS Tribunals to disputes relating to the interpretation or application of the UNCLOS. The words ‘other rules of international law’ contained in Article 293 UNCLOS can only refer to secondary rules of international law that help one interpret and apply the UNCLOS provisions.

This interpretative approach is confirmed by Article 31(3)(c) of the Vienna Convention,⁹² which provides that in cases of broadly worded or general provisions, it may also be necessary to rely on primary rules of international law other than the UNCLOS in order to interpret and apply its provisions. The UNCLOS is therefore to be interpreted and implemented in accordance with other relevant rules of international law, such as those relating to the protection of human rights.⁹³ The Netherlands requested that the Tribunal interpret the relevant provisions of the UNCLOS in light of international human rights law, in conformity with Article 31(3)(c) of the Vienna Convention.

Concerning the application of human rights law, the Tribunal in the *Arctic Sunrise* case noted that

87 *Netherlands v Russia* (Merits) (n 10) [188]; see analogously *Ireland v United Kingdom* (*‘MOX Plant Case’*), Procedural Order No 3 (2003) 126 ILR 310 [19] *The “ARA” Libertad Case (Argentina v Ghana)* (Order of 15 December 2012) ITLOS Reports 2012 [7] (Wolfrum and Cot).

88 *Netherlands v Russia* (Merits) (n 10) [188].

89 *MOX Plant Case* (n 87) [19].

90 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Award No 2011-03) (PCA, 18 March 2015) [2007] PCA Award Series 1.

91 In addition, the Philippines did not seek to assert jurisdiction under Art 293(1) UNCLOS. See *The Republic of Philippines v The People’s Republic of China* (Award No 2013-19) (PCA, 8 July 2015) Jurisdiction Hearing Day 2 Final Transcript 97. Conversely, see *The M/V ‘Saiga’ (No 2)* (n 60) and *Guyana v Suriname* (Award, 17 September 2007) (2008) 47 ILM 164.

92 Art 31(3)(c) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 requires that, for the purposes of the interpretation of a treaty, there shall be taken into account, together with the context, ‘[a]ny relevant rules of international law applicable in the relations between the parties’.

93 Bernard H Oxman, ‘Human Rights and the United Nations Convention on the Law of the Sea’ (1997) 36 Columbia J of Transnational L 399; Budislav Vukas, ‘Droit de la mer et droits de l’homme’ in Giuseppe Cataldi (ed), *La Méditerranée et le Droit de la mer à l’aube du 21e siècle* (Bruylant 2002) 85; Sophie Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’ (2007) 19 Sri Lanka Journal of Intl L 85.



it is entitled to have regard, to the extent necessary, to all applicable rules of customary international law, including international human rights standards, in the interpretation and application of the provisions of the UNCLOS. The Tribunal considered that ‘if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate.’⁹⁴ The Tribunal recognised instead that it does not have jurisdiction to apply, or determine breaches of, the freedom of expression and the right to liberty (Articles 9 and 12 ICCPR),⁹⁵ as requested by the Netherlands. This treaty has its own jurisdiction and, as the Tribunal held, a UNCLOS Tribunal is not competent to act as a substitute for those regimes.⁹⁶

On 16 March 2014, the Arctic 30 brought the question to the ECtHR, asking for a finding that their arrest and detention by the Russian authorities constituted a violation of their right to liberty and security and the freedom of expression (Articles 5 and 10 of the European Convention on Human Rights).⁹⁷ To date, the ECtHR has not yet rendered a decision, but assuming all of the admissibility requirements are met, a finding of a violation by the Russian Federation is likely. While the measures adopted by the Russian Federation arguably pursued legitimate objectives – such as maintaining public order and the protection of the Prirazlomnaya rig – they were not proportionate to achieving their objectives and may therefore constitute a violation of the applicants’ freedom of expression and right to liberty.

6. Conclusions

The events at issue in the *Arctic Sunrise* case fall within the aforementioned category of non-violent direct action. This category constitutes a grey area of international law, the qualification of which as lawful or unlawful essentially depends on the nature of the acts put in place by the activists. This means that the legality of conduct by activists must be evaluated case by case. A protest must be presumed peaceful unless there are reasonable grounds to believe that the activists intend to use or incite violence, which is never permissible. Using violence against a ship and its crew or performing dangerous manoeuvres at sea may cause accidents with serious consequences for the safety of maritime navigation, human life at sea or the marine environment.

The violent conduct of the activists seems to be equated, *prima facie*, to piracy and terrorism due to the wider definitions contained in Article 101 UNCLOS and in the draft Comprehensive Convention

94 *Netherlands v Russia* (Merits) (n 10) [197].

95 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR). The Netherlands and Russia are both parties to the ICCPR.

96 *Netherlands v Russia* (Merits) (n 10) [197].

97 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222. See, eg, application forms of Ms. Sini Annuka Saarela, Mr. Kieron John Bryan, and Mr. Gizem Akhan and the form of other activists at <www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/Peace-Dove/Arctic-30/European-Court-of-Human-Rights/> accessed 20 January 2016.



on International Terrorism respectively. Acts of peaceful protest at sea instead represent a legitimate exercise of freedom of navigation, the possible disruption of which should be tolerated, unless these acts interfere with the exercise of the sovereign rights of a State. The Prirazlomnaya platform belongs to a private company, Gazprom, which the Russian Federation authorised to drill for oil in Arctic waters. Greenpeace activists have the right to protest as much as the Gazprom Company has the right to enjoy its property rights as the owners of the oil rig. Russia protected the property rights of Gazprom in its EEZ where, according to Article 56 UNCLOS, Russia not only has the sovereign rights of economic exploitation and exploration of that zone, but also jurisdiction – including enforcement jurisdiction – with regard to the installations in the EEZ. In this zone, according to Article 58(3) UNCLOS, States must have due regard to the rights and duties of the coastal State and must comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the UNCLOS. The coastal State should protect lawful activities on its territory, even if the threat comes from foreign individuals or NGOs.

The Tribunal in the *Arctic Sunrise* case gave us detailed indications to identify which acts of protest could reasonably be considered to constitute an interference with a coastal State's sovereign rights, particularly in the context of the case at hand. The Tribunal further provided several parameters in order to identify what preventive measures would be reasonable for a coastal State.⁹⁸ Of key importance are the first and fourth parameters: violations of the coastal State's laws adopted in conformity with the UNCLOS, and delay or interruption in essential operations. Given the constructive presence of the five RHIBs launched from the *Arctic Sunrise* that approached the Prirazlomnaya rig, the breach of the safety zone around the platform provided a basis that in principle allowed the Russia Federation to adopt preventive measures against the vessel. Referring to the fourth parameter, it is not clear what 'essential operations' means. Oil drilling or the production of energy from the water is probably not an essential operation, but in order to be protected by the coastal State, it should be sufficient that the activities that are unduly disturbed or interrupted are legal. 'Essential' is too high of a standard. If the coastal State has reasonable grounds to suspect that a ship is engaged in illicit acts against installations located in its EEZ, it may take preventive measures in order to protect them.

The preventive measures that a coastal State may adopt have specific limits and they must fulfil the tests of reasonableness, necessity and proportionality. Necessity and proportionality are parameters used for assessing the use of force in relation to a threat or unlawful acts. Preventive measures must therefore be necessary and proportionate to the objective pursued, namely preventing the commission of an unlawful act, or, if it has already occurred, impeding further negative consequences. The reasonableness test, unlike the others, is useful when measuring the legitimacy of the coastal State's suspicions. While the first two parameters appear to be objective, the latter is indicative of a State's perception, which could be overly broad.

The Tribunal in the *Arctic Sunrise* case tackled several legal issues. However, the crosscutting legal point – central to the resolution of the dispute – is the right of hot pursuit. According to the Tribu-

98 See above Sec 4.



nal, the pursuit was interrupted, thereby delegitimising the boarding of the *Arctic Sunrise*. However, the aim of Article 111 UNCLOS concerning the right to hot pursuit is clear: that is, balancing the rights of the coastal State against the rights of the international community. In order to ensure that the *Arctic Sunrise* did not undertake any further actions against the platform, the Russian authorities never lost sight of the vessel. This could suffice to ensure the continuity of the pursuit. An excessively narrow interpretation of Article 111 UNCLOS is likely to frustrate its meaning, ensuring the impunity of conduct, which although appreciable for the aims pursued, can at times jeopardise the safety of ships, navigation or installations, or directly or indirectly cause economic and material damage.