

**PRESERVING THE EFFECTIVENESS OF UNCLOS
DESPITE A PARTY'S NON-APPEARANCE?
SOME REMARKS ON THE *ARCTIC SUNRISE*
ARBITRATION (NETHERLANDS V. RUSSIA) IN THE
CONTEXT OF HUMAN RIGHTS PROTECTION**

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INTRODUCTION

On August 14th 2015 an Arbitral Tribunal established under Annex VII to the 1982 United Nations Convention on the Law of the Sea¹ (UNCLOS) delivered an Award on the Merits in the matter of the *Arctic Sunrise Arbitration* (The Kingdom of the Netherlands v. the Russian Federation)². The case concerned an alleged violation of UNCLOS through actions undertaken by the Russian Federation towards a Greenpeace-operated vessel – *Arctic Sunrise* – which had been boarded, seized and detained by the Russian authorities on September 19th 2013 due to its activities performed in the vicinity of an Arctic offshore oil platform (“Prirazlomnaya”) situated in the Pechora Sea within the Russian exclusive economic zone (EEZ). The Dutch claims against Russia related also to the subsequent measures taken by Russia towards the crew of the *Arctic Sunrise* and other persons present on board (“Arctic 30”), as well as the non-compliance by Russia with the provisional measures ordered by the International Tribunal for the Law of the Sea on November 22nd 2013³, and the non-payment by Russia of the deposits in the arbitration proceedings.

Arbitral tribunals under Annex VII of UNCLOS are composed of five members, two of whom are indicated by parties to the dispute. In the *Arctic Sunrise* case the Netherlands designated Prof. A. Soons, its national, as member of the Tribunal. Due to Russia’s failure to appoint a second member of the Tribunal within the deadline prescribed by Annex VII, the President of

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¹ 1833 UNTS 3. The Convention was adopted and opened for signature at Montego Bay, Jamaica, on December 10th 1982. It entered into force on November 16th 1994.

² PCA Case No 2014-02, Award on Merits, available at: <http://www.pcacases.com/web/sendAttach/1438>.

³ Cf. the Order of ITLOS of 22 November 2013, the ‘*Arctic Sunrise*’ Case (Kingdom of the Netherlands v Russian Federation), Request for the prescription of provisional measures, available at: www.itlos.org.

ITLOS appointed Dr. A. Székely (a Mexican national) as well as three arbitrators pursuant to Article 3(d) and (e) of Annex VII: Mr. H. Burmester (an Australian national), Prof. J. Symonides (a Polish national) and Judge Thomas A. Mensah (a Ghanaian national) who was designated as the President of the Arbitral Tribunal.

The *Arctic Sunrise* case constitutes an interesting basis of discussion for several reasons, one of them being that it was the first case in which the respondent state refused to appear before a court or tribunal constituted under UNCLOS. Russia chose to be absent both in the proceedings concerning provisional measures awarded by the International Tribunal for the Law of the Sea (ITLOS), as well as the proceedings under Annex VII to UNCLOS⁴. The uniqueness of the *Arctic Sunrise* arbitration may also stem from the fact that it appears to be the first case in the UNCLOS-based dispute settlement scheme which concerned a vessel other than a fishing vessel or a war ship⁵. But more importantly, the *Arctic Sunrise* case allowed the Arbitral Tribunal to examine the question of how and to what extent it may apply “other rules of international law” not incompatible with UNCLOS. Such application is permitted by Article 293(1) of this Convention, which provides that: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.”

In the circumstances of the case the Tribunal in fact refused the Netherlands’s claim to apply directly the provisions of the 1966 International Covenant on Civil and Political Rights⁶ (ICCPR) with respect to the Russian actions towards the “Arctic 30”. This brings up a vital question of whether the adjudication mechanisms under UNCLOS are an appropriate forums for ruling on human rights issues if the latter arise within the context of claims based on the law of the sea. In the present author’s view it would be undesirable if the arbitration tribunals or the ITLOS itself considered themselves as competent to rule on the international state responsibility for human rights violations, since this would overstep their jurisdiction and could be perceived as a sign of judicial activism undermining the nature of dispute settlement under UNCLOS. On the other hand, it would go too far if the adjudication mechanisms were unwilling to take notice of the human rights issues in cases under consideration, providing such context has legal relevance for evaluation of the case at hand.

Following a brief overview of the facts of the case, the analysis focuses on the ITLOS Order of November 22nd 2013 concerning provisional

⁴ An overview of UNCLOS dispute settlement mechanisms and some notable examples of the non-appearance of states in other jurisdictions are discussed in CRL Celebrano-Mallari, ‘Non-Appearance and Compliance in the Context of the UN Convention on the Law of the Sea Dispute Settlement Mechanism’ (2014) 88 Philippine Law Journal 300-341.

⁵ In an earlier commenced case under Annex VII to UNCLOS, *The Republic of Philippines v The People’s Republic of China*, concerning the dispute over the maritime jurisdiction of the Philippines in the West Philippine Sea, the respondent also refused to take part in the proceedings; however, the applicant state did not address the ITLOS with a request to prescribe provisional measures. The Tribunal established under Annex VII delivered an Award on Jurisdiction and Admissibility on October 29th 2015 and the proceedings are pending. The documents of this case are available at: <http://www.pcacases.com/web/view/7>.

⁶ 999 UNTS 171.

measures and the Arbitral Tribunal Order of August 15th 2015 on the merits of the case.

I. OVERVIEW OF THE FACTS

The facts of the case as established by the Arbitral Tribunal⁷ can be summarized as follows: a privately owned MV *Arctic Sunrise* which was chartered by Greenpeace International and flying the flag of the Netherlands, approached the Russian oil production platform (*Prirazlomnaya*) on September 17th 2013 with the intention of staging a protest action. There were thirty persons on board the vessel, including twenty-eight Greenpeace activists and two freelance journalists. On the morning of September 18th 2013 the *Arctic Sunrise* crew informed the *Prirazlomnaya* of its intention to stage a protest action at the platform and similar, detailed information was sent at the same time via fax by Greenpeace International to the authorities in charge of the platform. Soon afterwards the Greenpeace activists at *Arctic Sunrise* launched five inflatables from the vessel with two or three persons on board each of them. One of the inflatables was towing a “survival capsule” which the protesters intended to hoist up on the side of the platform.

The five inflatables entered the three-miles perimeter around the platform where special caution was advised while navigating, and finally they arrived at the base of *Prirazlomnaya*. The activists managed to attach lines to the platform in order to climb its outside structure, but were soon hampered by the Russian Coast Guard officers who removed the line and chased the inflatables of Greenpeace around the platform. Some members of the “Arctic 30” succeeded in climbing the platform individually but these activities resulted in an immediate reaction of the Coast Guard and officers at the *Prirazlomnaya*. Some shots were fired but reportedly nobody was hurt.

The protest was over by 6:00 a.m. the same day. Two of the protesters were taken on board the vessel of the Russian Coast Guard, whereas the others managed to return in their inflatables to the *MV Arctic Sunrise*. Before 7:00 a.m. the Russian Coast Guard ordered the *Arctic Sunrise* by radio to stop, heave to and allow an investigation team on board. The crew of the Greenpeace vessel refused and noted that it had been navigating in international waters. In the following hours the orders from the Russian Coast Guard were repeated several times. The “Arctic 30” were also informed that they were suspected of piracy and terrorism. Coast Guard attempted unsuccessfully to board *Arctic Sunrise*, but the latter undertook evasive manoeuvres and, later that day, moved 20 nautical miles north of *Prirazlomnaya*, only to approach the platform again in the evening.

On the same day the Dutch Ambassador in Moscow received a *Note Verbale* from the Russian Ministry of Foreign Affairs, which characterized the protest by Greenpeace as “aggressive and provocative”, informing the Dutch authorities of the decision to seize the *Arctic Sunrise*. In the evening of

⁷ Award on the Merits (n 2) paras. 70-139.

September 19th 2013 the *Arctic Sunrise* was approached by a helicopter with a unit of Russian special forces. The soldiers lowered themselves on a line and successfully seized the Greenpeace vessel. Following the seizure, on September 20th the Russian Coast Guard vessel proceeded to tow the *Arctic Sunrise* to the port of Murmansk where it arrived on September 24th.

A formal criminal investigation was opened by the Russian Investigation Committee against the “Arctic 30” who were initially accused of piracy committed by an organized group. The Netherlands lodged several *Notes Verbales* with the Russian authorities, requesting the release of the *Arctic Sunrise* and its crew. Russia provided the Dutch authorities with information about the boarding of the vessel and the criminal investigation opened but it maintained that the “visit” to the *Arctic Sunrise* had been carried out in accordance with the relevant provisions of UNCLOS. The criminal investigation against the “Arctic 30” continued and the charges against them were subsequently qualified as hooliganism (the charges of piracy were dropped).

The release on bail of all but one members of the “Arctic 30” was ordered by the District Court of St. Petersburg in decisions issued between November 18th and 22nd 2013. The Russian authorities released the one remaining member of the *Arctic Sunrise* crew shortly after November 28th 2013. The criminal investigation against the “Arctic 30” was discontinued due to an amnesty announced by the Russian Duma on December 18th 2013. The bail of the “Arctic 30” was lifted and all non-Russian national crewmembers left Russian territory by December 29th 2013. The case against the Greenpeace activists was formally terminated on September 24th 2014 by the Russian Investigation Committee.

The seizure of the *MV Arctic Sunrise* was finally lifted on June 6th 2014. The ship was handed to the representatives of the owners, the Stichting Phoenix, after a professional damage assessment and essential maintenance. On August 1st 2014 the vessel left Murmansk and eight days later it arrived safely in Amsterdam.

II. PROVISIONAL MEASURES AWARDED BY ITLOS

The *Arctic Sunrise* case was brought by the Netherlands against the Russian Federation under Annex VII of UNCLOS on October 4th 2013. Shortly thereafter, on October 21st 2013 the Netherlands filed with ITLOS the request for prescription of provisional measures under Article 290(5) of UNCLOS⁸, stressing *inter alia* “the urgency of the situation”. By a *Note Verbale* on October 22nd 2013, the Russian Federation informed the Tribunal

⁸ Article 290(5) of UNCLOS provides: *Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4.*

that “it did not intend to participate in the proceedings”, invoking its statement made upon ratification of UNCLOS to the effect that “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”. On November 22nd 2013 ITLOS delivered, by 19 votes to 2, its Order on provisional measures. The Tribunal prescribed, pending a decision by the Annex VII arbitral tribunal, that:

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

The Netherlands established a bank guarantee as ordered by the Tribunal and provided the Russian Federation with an appropriate confirmation in a diplomatic note of December 2nd 2013. However, Russia did not take steps to receive the guarantee, nor did it lift the arrest of the MV *Arctic Sunrise* until June 6th 2014. The “Arctic 30” were released on bail after November 18th 2013, i.e. almost at the same time as when ITLOS delivered its Order on provisional measures. Nevertheless, there is no indication that the decisions of the District Court in Petersburg to release the “Arctic 30” on bail were in any way influenced by the anticipated ITLOS Order on provisional measures in the *Arctic Sunrise* case.

The competence of ITLOS to deliver binding provisional measures is foreseen *expressis verbis* in Article 290(1) of UNCLOS⁹ and it is generally recognized in other international courts and tribunals, such as the International Court of Justice (ICJ)¹⁰, the European Court of Human Rights (ECtHR)¹¹ or the Inter-American Court of Human Rights¹². The language of

⁹ Article 290(1) of UNCLOS provides: *If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.*

¹⁰ Article 41(1) of the Statue of the ICJ provides: *The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.*

¹¹ Rule 39 of the Rules of Court provides: *The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings*

¹² Article 63(2) of the 1969 American Convention on Human Rights provides: *In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under*

Article 290(1) of UNCLOS leaves little room for doubts as to the legal force of the provisional measures ordered on its basis, while this matter was not equally obvious in the cases of the ICJ or ECHR, at least not until these courts expressed their views on this issue¹³. In any event, the ITLOS Order of November 22nd 2013 imposed specific obligations on both parties to the dispute, and the non-appearance of one of them was not considered by ITLOS as a reason to refuse the Dutch request. More specifically, the Tribunal ruled that “the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observation on the subject”¹⁴.

As regards the contents of the ITLOS Order of November 22nd, some commentators expressed rather serious criticism, arguing that the Order set “a damaging precedent in striking the wrong balance between the rights of navigating and coastal states”; it may have gone too far in the sense that it “crossed the line between temporary measures of protection and *de facto* final judgment”; and lastly, “human rights considerations may also have played a role” in the Tribunal’s line of reasoning¹⁵. The authors indicated that the Tribunal’s reasoning on the question of urgency had not been very in-depth or resounding; nor did they seem entirely persuaded that the ITLOS had undertaken an independent analysis of legal arguments rather than drawn some inferences from Russia’s non-appearance¹⁶.

D. Guilfoyle and C.A. Miles further claim that insofar as the ITLOS Order imposed on Russia an obligation to allow the “Arctic 30” to leave the *territory and maritime areas under the jurisdiction of the Russian Federation*, it may have overstepped its competence to apply “other rules of international law” not incompatible with UNCLOS¹⁷. While not referring to any specific legal basis, such as Article 9 of the ICCPR (the right to liberty and security of person) or the analogous Article 5(1) of the European Convention on Human Rights, the ITLOS seemed to agree with the Dutch argument that the detention of the “Arctic 30” constituted a (potential) violation of the right to liberty and security of person. The authors do not deny that ITLOS may be allowed to refer to general human rights law, provided however that this had proven necessary to interpret or apply the UNCLOS itself¹⁸.

consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

¹³ The matter of binding force of provisional measures of the ICJ was considered in the *LaGrand* case (*Germany v the United States*) (Judgment) [2001] ICJ Rep para. 98-109. The ECtHR expressed its views on the binding force of its “interim measures” in the *Mamatkulov and Askarov v Turkey* case, ECtHR judgment of February 4th 2005, para. 99-129.

¹⁴ Para 48 of the ITLOS Order of November 22nd 2013. and the „interim measures” of the ECtHR

¹⁵ D Guilfoyle, CA Miles, ‘Provisional Measures and the MV Arctic Case’ (2014) 108 *American Journal of International Law*, 271-287, at 276.

¹⁶ *ibid* 279-280.

¹⁷ *ibid* 284-285.

¹⁸ D Guilfoyle, CA Miles (n 15). The authors identified two instances where UNCLOS tribunals had recourse to rules other than the UNCLOS itself: the *M/V Saiga* case (No 2), ITLOS judgment of March 11th 1998 – which included considerations related to the legality of the use of force – and the *Guyana v Suriname* case (Award of September 17th 2007) in

The criticism towards the ITLOS Order of November 22nd 2013 is shared by the present author but only to some extent. First of all, it is not fair to say that by ordering the release of the *MV Arctic Sunrise* upon the posting of a bond or other financial security by the Netherlands, the ITLOS had pre-judged the case as to the merits. The Netherlands did refer to specific arguments which substantiated the claim of urgency in releasing the vessel, such as the need for its intensive maintenance and the prevention of its losing its operability. The assessment of the risks to the vessel's safety and seaworthiness caused by its arrest in the port of Murmansk was a matter of expert and/or judicial assessment. The vast majority of ITLOS considered the risk of "serious harm" persuasive enough to order the release of the vessel, even though it could be expected that the Russian authorities would not have left the vessel without any supervision or maintenance whatsoever. Be it as it may, the ITLOS Order in part concerning the obligation to release *Arctic Sunrise* upon financial guarantees could be perceived as preserving certain interests of the applicant party, without pre-judging the merits of the case. The Netherlands could not successfully rely on Article 292 of UNCLOS which established a procedure for the prompt release of vessels and crews since the circumstances of the case would not allow the claim that Russia disregarded any pre-existing and UNCLOS-based obligation of prompt release of vessels or their crews. In such circumstances the request for provisional measures under Article 293 of UNCLOS to the effect of ensuring the release of the *MV Arctic Sunrise* was a reasonable legal avenue to secure the interests of the parties¹⁹.

A more nuanced commentary is required when it comes to the part of the ITLOS Order of November 22nd 2013 which obliged Russia to release *all persons who have been detained* and allow them *to leave the territory and maritime areas under the jurisdiction of the Russian Federation*. While not explicitly referring to it, the Tribunal has apparently based its line of reasoning on the "ship-as-a-unit" concept developed by ITLOS in the *MV Saiga* judgment²⁰ which provides in relevant part:

106. The provisions referred to in the preceding paragraph indicate that the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person

which the Arbitral Tribunal considered itself competent to adjudicate on alleged violations of the UN Charter and general international law.

¹⁹ D Guilfoyle, CA Miles (n 15) 273.

²⁰ The *M/V "SAIGA" (No. 2) case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS judgment of July 1st 1999, para. 106. The right of the State of nationality of the ship to seek redress on behalf of crew members irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act, has been recognized in Article 18 of the 2006 Draft Articles on Diplomatic Protection elaborated by the International Law Commission (adopted at the 58th session of the ILC on May 30th 2009).

involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.

Interestingly, judge J.L. Jesus in his separate opinion to the ITLOS Order of November 22nd 2013 suggests a departure from the “ship-as-a-unit” concept as explained above and the exclusion of Russian nationals from the scope of the order of release. The judge argues:

19. While I am in full agreement that crew members of a nationality different from that of the ship’s flag State should also enjoy international judicial protection from that State, as promoted by the ship-as-a-unit concept, I do not think that the concept should interfere with the special legal relationship that exists between a State and its citizens in its own territory.

20. To order a State to release its own citizens who are being prosecuted in its domestic courts for alleged violations of that State’s own law may be overstretching the scope of applicability of the ship-as-a-unit concept, which is otherwise a valuable contribution to international law developed by the Tribunal in its early case law, a contribution that complements the institute of diplomatic protection. For these reasons alone, I would have preferred that the order of release apply to all personnel other than the Russian citizens.

The proposition of Judge Jesus includes an element of discrimination and unequal treatment which would be hardly acceptable under general international law of human rights *if* such perspective was used to assess this case. It is generally accepted that the nexus of citizenship plays hardly any role insofar as the protection of human rights is concerned. Distinguishing the protection of Russian nationals from other members of the Arctic 30 could have made more sense if the *Arctic Sunrise* case was considered as a classic example of exercising diplomatic protection. However, contrary to the views expressed by a commentator²¹, the *Arctic Sunrise* was also not a “pure” case involving diplomatic protection. This was shown by the subsequent award of the Arbitral Tribunal which considered that the Netherlands had standing under the law of the sea as a flag State to invoke Russia’s responsibility for injury caused by breaches of the Convention and held that:

*(...) all persons on board the Arctic Sunrise at the relevant times are part of the unit of the ship and therefore fall under the exclusive jurisdiction of the Netherlands as flag State. The nationality of the individuals is not relevant. **The Netherlands is not exercising diplomatic protection in the classic sense over all of the individuals on board**; it can only do that with respect to the Dutch nationals on board. Rather, the Netherlands is acting in its capacity as the flag State of the Arctic Sunrise, with exclusive jurisdiction over the vessel within the EEZ of Russia²². [emphasis added]*

Notwithstanding the above, the proposal to differentiate the status of persons on board *Arctic Sunrise* encourages the posing of a more provocative

²¹ MT Drenan, ‘Gone Overboard: Why the Arctic Sunrise Case Signals an Over-Expansion of the Ship-As-A-Unit Concept in the Diplomatic Protection Context’ (2014) 45 California Western International Law Journal 109-167, at 144 *et seq.*

²² Award on the Merits (n 2) para 175.

question: should the “ship-as-a-unit” concept be really applied in the circumstances of this case? If the answer is in the affirmative, then it becomes obvious that all persons on board should “share” the faith of the vessel in the sense that whatever is the outcome of the legal struggle for the release, it should concern both the vessel and all members of its crew (“Arctic 30”). However, if we allow the possibility that the “ship-as-a-unit” concept is subject to discussion – as Judge J.L. Jesus seemed to suggest – then it is reasonable to ask whether the legal status and rights of the “Arctic 30” should not be determined independently of the legal status of the vessel and the rights of its flag state.

In order to be precise: I do not insist that such a distinction *should* be made; I am rather suggesting such an approach to verify whether the ITLOS in its Order of November 22nd 2013 on provisional measures indeed accommodated human rights concerns in a way which overstepped the boundaries of its competence under Article 293(1) of UNCLOS.

The “Arctic 30” were beyond any doubt in the jurisdiction of Russian authorities from the moment of their detention until leaving the territory of the Russian Federation. Throughout this period they remained under the protection of international human rights law, including the two most relevant human rights conventions ratified by Russia: the ICCPR and the ECHR. The Netherlands explicitly referred to the right to liberty and security of person which is covered by both of these treaties and may be successfully claimed against Russia before the European Court of Human Rights or the Human Rights Committee²³. It was reported that on March 17th 2014 the “Arctic 30” did lodge a complaint to the European Court based on Article 5 (the right to liberty and security) and Article 10 (freedom of expression)²⁴. But for the purposes of the present analysis there is another legal issue worth considering: could the “Arctic 30” successfully address the ECHR with a request for interim measures under Rule 39 of the Rules of Court²⁵? In other words, would there be any chances that the ECtHR requested the Russian Federation to release all detained persons and allow them to leave the territory of Russia?

The answer is in the negative. The arrest of the “Arctic 30” could not *prima facie* be considered as blatantly violating Article 5(1) of the ECHR, at least not at the initial stage. The very claim of the violation of the right to liberty and security provides a rather weak basis for requesting that the

²³ The Russian Federation is a party to the 1966 Optional Protocol to the ICCPR which allows individuals to address the Human Rights Committee with a claim (a “communication”) that their rights enumerated in the Covenant have been violated.

²⁴ See <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/seeking-justice-for-the-arctic-30/blog/48541/> It should be recalled that both individuals (Article 34 of the ECHR) and states (Article 33) may bring cases to the ECtHR, however, inter-state cases are far less common. Nonetheless, under Article 36(1) of the ECHR state-parties have the right to submit written comments and to take part in hearings in all cases before a Chamber and Grand Chamber involving their nationals. This allows the Netherlands (and several other state-parties whose nationals were part of the “Arctic 30”) to intervene as a third party in the Strasbourg proceedings.

²⁵ See Article 41(1) of the Statue of the ICJ (n 10).

ECtHR orders an immediate release of those detained unless some exceptional circumstances occurred, like e.g. an imminent risk of subjecting the detainees to torture or inhuman or degrading treatment. Ordering an immediate release of the “Arctic 30” would therefore be highly unlikely had such a request been submitted to the ECtHR. It is similarly unthinkable that the ECtHR would rule that the State party to the ECHR has a legal obligation to allow a person to leave the territory of the state while criminal proceedings against this person are still pending. At the same time, a claim to that effect proved successful at ITLOS.

For the above reasons, it does not seem convincing that international human rights law was at the heart of the ITLOS Order on provisional measures insofar as they obliged Russia to release the “Arctic 30”. Had the ITLOS attempted to apply Article 5(1) of the ECHR, with due regard to the practice of the ECtHR concerning interim measures, it would have probably refused to order immediate release solely because of a risk of violation of the right to liberty and security. It follows that in the circumstances of the case it was the concept of **“the ship-as-a-unit”** rather than the direct (or implicit) reference to international human rights law which resulted in the ruling anticipated by the applicant state, and by the “Arctic 30” themselves. Paradoxical as it may sound, the law of the sea secured the human rights of the “Arctic 30” in a more efficient way than the international human rights law itself. It should be regarded as a blessing of the “ship-as-a-unit” concept since, as noted above, the same result (i.e. the order of release) would not have been obtained through invoking Article 5(1) of the ECHR and addressing the ECtHR with a request for interim measures.

III. THE COMPETENCE OF THE ARBITRAL TRIBUNAL TO APPLY “OTHER RULES OF INTERNATIONAL LAW”

It is worth considering how the Arbitral Tribunal tackled the question of applicable law and the Dutch submission that the scope of the Tribunal’s jurisdiction should also comprise human rights law. The Netherlands claimed in this respect that:

The Russian Federation, through its law-enforcement actions, exercised a level of control over the Arctic Sunrise and the persons on board that required it to respect and ensure the rights laid down in the ICCPR. Therefore, pursuant to Article 293 UNCLOS and Article 13 of the Tribunal’s Rules of Procedure, the Tribunal is required to apply international human rights law, in particular the ICCPR, to review the lawfulness of these law-enforcement actions under UNCLOS²⁶.

The Tribunal noted that the Netherlands “appeared to invite” it to directly determine that there had been a violation of specific provisions of the ICCPR, but the Dutch position on this issue slightly evolved throughout the proceedings. The applicant State clarified its claim at a later stage by submitting that the need to include the ICCPR in the scope of the Tribunal’s

²⁶ Award on the Merits (n 2) para 193.

jurisdiction is backed up by Article 56(2) of UNCLOS which obliges the coastal States exercising its rights in the EEZ to have 'due regard to the rights and duties of other States'. The Netherlands argued that the 'rights and duties' of other States extend to international human rights law²⁷. This stands to reason, since indeed the determination of a claim under Article 56(2) of UNCLOS would require first the identifying of what specific "rights and duties" of the Netherlands were disregarded (or not) by the coastal State. In other words, ruling on a claim under Article 56(2) would hardly be possible without a prior determination whether "rights and duties" were respected or not. Let us recall that although the international human rights law offers an extensive range of legal rights to individuals, it finds its origins in the multilateral, inter-state structure of obligations. State-parties to human rights treaties recognized their obligations for the benefit of subjects under their jurisdiction, but legally speaking these obligations are binding "originally" vis-à-vis other states or – in case of some human rights norms – vis-à-vis the international community as a whole (*erga omnes*).

A further adjustment of the Dutch position towards the application of the ICCPR in the present case could be discerned in the statement of the applicant state to the effect that:

*(...) it was not inviting the Tribunal to determine that there is a breach of Articles 9 and 12.2 of the ICCPR if the Tribunal considers that the content of these provisions, as interpreted and applied by international courts and tribunals, **are an integral part of the principle of reasonableness** as applicable to law enforcement actions under the Convention*²⁸. [emphasis added]

It is quite interesting that the applicant State referred to the principle of reasonableness as an alternative way of including human rights considerations into the legal evaluation of claims in the *Arctic Sunrise* case. It was already the third option suggested by the Netherlands – apart from the direct application of the ICCPR provisions and "taking them in regard" in interpreting and applying Article 56(2) and Article 58(2) of UNCLOS – aimed at accommodating the ICCPR provisions into the scope of the Tribunal's jurisdiction. Direct references to the principle of reasonableness are not unheard of in the history of international arbitration²⁹. The Dutch proposal can thus be regarded as an attempt to encourage the Tribunal to introduce the human rights concerns to its Award in a less "visible" and "softer" manner in comparison to a direct application of the ICCPR provisions.

Although the Dutch claim concerning the application of the ICCPR was well developed, the applicant party did not invite the Tribunal to

²⁷ *ibid*, para 194.

²⁸ *ibid*, para 195.

²⁹ C Mik, 'Zasada wykonywania zobowiązań w dobrej wierze w orzeczeniach arbitrażu międzynarodowego' [The Principle of Performance of Obligations in Good Faith in International Arbitration Awards] in C Mik, *Arbitraż w prawie międzynarodowym* [Arbitration in International Law] (2014) 122-123.

determine whether the Russian Federation also violated the ECHR³⁰. This could be easily explained by the contents of Article 55 of the ECHR which excludes “other means of dispute settlement” and expressly obliges the parties to refrain from availing themselves of “treaties, conventions or declarations in force between them” for the purpose of submitting a dispute arising out of the interpretation or application of the ECHR to a means of settlement other than the procedures provided in the ECHR itself. Any submission of a claim based on the ECHR by the Netherlands against Russia to the Arbitral Tribunal – in the absence of a ‘special agreement’ between the parties permitted by Article 55 of the ECHR – would constitute a violation of the latter provision.

In its Award the Tribunal recalled that Article 293(1) of UNCLOS does not extend its jurisdiction but rather it ensures that in exercising its jurisdiction it “can give full effect to the provision of the Convention”. The Tribunal also reminded that pursuant to Article 311(2) of UNCLOS, the Convention “shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”³¹ The Tribunal further noted that:

In order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility.

(...)

Article 293 is not, however, a means to obtain a determination that some treaty other than the

*Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention.*³²

The Tribunal conceded that it may have regard to general international law in relation to human rights in order to assess the reasonableness and proportionality of actions undertaken by Russian law enforcement towards the *Arctic Sunrise* and its crew. Thus the Tribunal opted for an approach which assumes an interpretation of UNCLOS by reference to the relevant context but excludes a direct determination of whether a specific provision of the ICCPR had been breached³³. In the final paragraph on the applicable law the Tribunal went on to note:

*In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, **the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention**, in order to assist in the interpretation and application of the Convention’s provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has*

³⁰ Award on the Merits (n 2) para 196.

³¹ *ibid*, paras 188-189.

³² *ibid*, paras 190 and 192.

³³ *ibid*, para 197.

*jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions*³⁴.
[emphasis added]

The above interpretation of Article 293 of UNCLOS appears balanced and legally sound. The Tribunal refused to apply directly the provisions of the ICCPR as it would effectively mean a judicial exercise outside its scope of jurisdiction. On the other hand, construing Article 293(1) of UNCLOS in such a way which allows the Arbitral Tribunal to apply only the secondary rules of international law (mentioned in para. 190 of the Award) would not be enough as it could impede the Tribunal's judicial competence to interpret and apply the UNCLOS. It follows that the Tribunal opted for the "contextual approach" and correctly established that it had full competence to refer to international human rights law, should such a reference be necessary to assess the case at hand. As a matter of course, the Tribunal's competence to apply "other rules of international law" extends to customary international law; however, in the context of the Tribunal's pronouncement quoted above, it should be argued that a customary character of a human rights norm should not be considered a prerequisite for its application in accordance with Article 293(1) of UNCLOS.

IV. MATERIAL ASPECTS

Having established its jurisdiction and the admissibility of the Netherlands's claims, the Tribunal examined the merits of the case and found *inter alia* that the boarding, seizure and detention of the *Arctic Sunrise* breached several obligations owed by Russia towards the Netherlands as a flag State. In assessing whether the actions undertaken by Russia were in accordance with Articles 58 (rights and duties of other States in the EEZ) and 87 of the UNCLOS (freedom of the high seas), the Tribunal observed that:

*Protest at sea is an internationally lawful use of the sea related to the freedom of navigation. The right to protest at sea is necessarily exercised in conjunction with the freedom of navigation. The right to protest derives from the freedom of expression and the freedom of assembly, both of which are recognised in several international human rights instruments to which the Netherlands and Russia are parties, including the ICCPR. The right to protest at sea has been recognised by resolutions of international organisations*³⁵.

At the same time the Tribunal acknowledged that the right to protest is not unlimited and its enjoyment in the EEZ needs to take into account other rules enshrined in the law of the sea, such as the obligation to take due regard of the rights and duties of the coastal State. On the other hand, it is of vital importance that the coastal State attempting to impose limitations on the right to protest in its EEZ is still obliged to acquire the consent of the flag State,

³⁴ *ibid*, para 198.

³⁵ *ibid*, para 227.

since the jurisdiction of the latter over a ship used for the exercise of the right to protest is exclusive.

The Tribunal examined the Netherlands's allegations by inquiring into the applicability of potential legal bases for measures undertaken by Russia in relation to the *Arctic Sunrise* and its crew. Those bases included: the right of visit on suspicion of piracy, potential violation of coastal State laws applicable to artificial islands, installations and structures in the EEZ, commission of terrorist offences, the right of the coastal State to enforce its laws regarding non-living resources in the EEZ, the enforcement jurisdiction related to the protection of the marine environment and several others. None of the legal grounds was considered a sufficient and valid basis for the Russian actions and as a consequence the Tribunal considered that Russia violated its obligations owed to the Netherlands under the UNCLOS by the boarding, seizure and detention of the *Arctic Sunrise*. This has also led the Tribunal to the conclusion that "all law enforcement measures taken by Russia vis-à-vis the *Arctic Sunrise* subsequent to its unlawful boarding, seizure, and detention of the vessel have no basis in international law"³⁶.

It should be noted that the Tribunal's analysis and conclusions concerned the measures undertaken towards the *MV Arctic Sunrise* and its crew exclusively from the perspective of Russia's obligations under UNCLOS. Having found that Russia violated the provisions of UNCLOS towards the Netherlands, the Tribunal concluded that it "did not need to consider the reasonableness, necessity, and proportionality of those measures"³⁷. It means that in fact the Tribunal refused to examine – through the perspective of the rule of reasonableness – the Netherlands's allegations concerning the Russia's actions towards the "Arctic 30", such as the legality of their deprivation of liberty and relevant procedural guarantees (e.g. the right to be brought promptly before a judge) from a human rights point of view³⁸. This judicial restraint may be understood given the Tribunal's refusal to directly apply human rights law under Article 293(1) of UNCLOS. Interestingly, the grounds of the Tribunal's Award refer primarily to the legal evaluation of measures undertaken towards the vessel; it is, however, in the *dispositif* of the Award where Tribunal explicitly finds that the Russia's obligations under UNCLOS are also breached by "arresting, detaining and initiating judicial proceedings against the Arctic 30"³⁹.

The Tribunal was also aware that the "Arctic 30" had already filed their complaint to the ECtHR so there was no risk of *non liquet* in relation to allegations of violating human rights law in the case at hand. In passing it could be mentioned that whereas the Award on Merits in the *Arctic Sunrise* will most probably be taken note of by the ECtHR examining the allegations under the ECHR, it is far from certain whether the Strasbourg Court would find all the law enforcement measures taken vis-à-vis the "Arctic 30" as

³⁶ *ibid*, para 333.

³⁷ *ibid*, para 333.

³⁸ The list of allegations included the deprivation of liberty outside formal arrest and detention, the failure to provide immediate information on the reasons of the arrest and the nature of charges, the failure to bring those arrested promptly before a judge, the bringing of charges disproportionate to their actions and the undue length of pre-trial detention – cf para 223 of the Award.

³⁹ Award on Merits (n 2) para 402 C.

unlawful. It could be expected that the Court will refer to some of its case-law concerning actions by state-parties undertaken at sea. Although in some of such cases the Court ruled that the detention was not in conformity with the ECHR⁴⁰, in a case concerning specifically the detention of Greenpeace activists following protests against whaling in the Norwegian EEZ, the Court was in favour of a wide margin of appreciation awarded to the respondent state and found the complaint inadmissible⁴¹.

Apart from legal evaluation of Russia's actions towards the *Arctic Sunrise* and its crew, the Tribunal also found a violation of UNCLOS by Russia's failure to comply with the ITLOS Order on provisional measures and by failing to pay its share of the deposits requested in procedural directions issued by the Tribunal to cover its fees and expenses in the arbitration⁴². Finally, the Tribunal decided that the Netherlands is entitled to compensation for material and non-material damage incurred by the violations established in the Award. These issues were addressed in the Award on Compensation delivered by the Tribunal on 10th July 2017⁴³.

CONCLUSION

Although a non-appearance of a state in dispute settlement proceedings can have a potentially obstructive effect on the outcomes of such litigation, the Arbitral Tribunal under Annex VII to UNCLOS in the *Arctic Sunrise* case made efforts to ensure that the non-appearance of Russia would not prevent the arbitration mechanism from effectively fulfilling its role. The Tribunal was nevertheless mindful of the delicate nature of the situation. It noted:

*Russia's non-participation in the proceedings has made the Tribunal's task more challenging than usual. In particular, it has deprived the Tribunal of the benefit of Russia's views on the factual issues before it and on the legal arguments advanced by the Netherlands. The Tribunal has taken measures to ensure that it has the information it considers necessary to reach the findings contained in this Award. (...)*⁴⁴

Article 9 of the Annex VII to the UNCLOS which allows the tribunal to continue proceedings in the absence of a party if the other party requests the tribunal to proceed this way, proved to be a genuinely important safeguard that a non-appearance of a state-party would not paralyse the adjudication mechanisms provided under the Convention. Obviously, a default of

⁴⁰ See for instance *Medvedyev and others v France*, application no. 3394/03, judgment of the ECtHR (Grand Chamber) of March 29th 2010.

⁴¹ See *Drieman and others v Norway*, application no 33678/96, decision of the ECtHR of May 4th 2000.

⁴² Award on Merits (n 2) paras. 334-362 and 363-371, respectively.

⁴³ Available at: <http://www.pcacases.com/web/sendAttach/2214>.

⁴⁴ Award on the Merits (n 2) para 19.

appearance of a party to a compulsory arbitration should not be considered as a 'regular' situation; it is rather a sign of a worrying distrust in peaceful ways of international dispute settlement. Such an attitude hardly serves also the interests of the absent state itself.

The *Arctic Sunrise* arbitration has been also an excellent opportunity to pronounce on the scope of the Tribunal's competence to apply "other rules of international law" as permitted by Article 293(1) of UNCLOS. The Tribunal adopted a balanced approach which on the one hand correctly rejected direct adjudication on the basis of treaties other than UNCLOS, but on the other – allowed for having regard to other rules of international law (such as human rights guarantees) whenever it is required for interpretation and application of UNCLOS. The effects of such an approach in the *Arctic Sunrise* case are quite remarkable: the Tribunal did establish that several human rights guarantees of the "Arctic 30" were violated but these violations ("arresting, detaining and initiating judicial proceedings against the Arctic 30") were found solely on the basis of the UN Convention on the Law of the Sea.

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