Offshore installations as the arena for environmental protests

Law of the sea issues

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1 Introduction

This article examines the legal issues pertaining to the exercise of jurisdiction by a coastal State over environmental activists who stage protests against the offshore activities of that State. Such protests are usually performed with the assistance of a ship which brings the activists to the protest's location, in the proximity of the installation or vessel chosen as a target for their action.

Activists often take extreme measures to physically impede offshore operations and to draw the world community's attention to the environmentally harmful activities of the coastal State. They climb onto oil platforms, dive in front of vessels servicing the platforms and otherwise hinder the drilling operations by creating a "human blockade". These so-called "direct actions" performed by Greenpeace have become relatively frequent: the two most recent examples being the actions staged by Greenpeace's ship the *Arctic Sunrise* in the Russian Arctic (September 2013) and off the Canary Islands, Spain (October, 2014).

Coastal States cannot prevent activists from arriving within the proximity of offshore installations to stage direct actions, because ships are able to rely on the freedom of navigation on the high seas to reach the location of the protest. Freedom of navigation through coastal waters can, therefore, be used to perform deliberate acts targeting offshore installations.

The problem is, in itself, not new and can be seen in light of the traditional tension between the coastal State's jurisdiction over its coastal waters, on the one hand, and the freedom of the high seas, on the other hand, enjoyed by all States under the law of the sea and codified in the UN Convention on the Law of the Sea (UNCLOS). It should be noted that, although it is a non-governmental organisation staging such protests, and an oil company that will be prevented from operating the installation as a result of the protest, it is the States that generally have rights and obligations under UNCLOS. A significant difference between direct actions performed onshore and actions against offshore installations is

that the State has full territorial jurisdiction over the former, but a considerably more limited jurisdiction at sea, where the flag State enjoys the freedom of navigation.

The question is whether, and by what measures, coastal States are able to protect their offshore installations against unsafe or otherwise undesirable activities undertaken by foreign vessels, including environmental protests. In principle, UNCLOS provides coastal States with certain rights to this end, including the right to take enforcement measures vis-à-vis foreign vessels in the exclusive economic zone (EEZ) and on the continental shelf. Measures undertaken by some coastal States may, however, go beyond what is permitted under UNCLOS or international law generally, especially if they involve some form of coercion vis-a-vis a foreign ship and its crew.

The incidents examined in this article illustrate the numerous legal issues arising from measures taken by the coastal State's action to prevent or stop direct actions at sea. UNCLOS is the central treaty providing a legal framework for these issues, since it sets out the rights and duties of States in the EEZ and continental shelf, including rights with respect to offshore activities.

This treaty is also very important because it establishes dispute settlement procedures, including compulsory procedures resulting in binding decisions for the States involved. To this author's best knowledge, there have so far been several national litigations over direct actions where law of the sea issues were also touched upon, but only one international dispute where the plaintiff State resorted to such compulsory procedures under UNCLOS (the *Arctic Sunrise*, Netherlands v. Russia). Just weeks after the *Arctic Sunrise* returned from arrest in Russia, and before the case was settled on the merits, it was detained again for a direct action against offshore drilling off the Canary Islands, this time by the Spanish authorities. More direct actions are likely to take place in the future. It is therefore necessary to discuss and clarify the underlying law of the sea issues raised by such direct actions.

Chapter 2 addresses the substantive legal issues, including coastal States' jurisdiction to take enforcement measures against foreign ships

and their crews which participate in direct actions against offshore installations in the EEZ (focusing on the *Arctic Sunrise* incident), and assesses the limits of this jurisdiction in light of the flag State's rights and obligations under the law of the sea.

Chapter 3 discusses legal issues arising under Part XV UNCLOS, which regulates dispute settlement between States on the issues of interpretation and application of UNCLOS and the prescription of provisional (interim) measures. Given the lengthy nature of international disputes, such measures may at times be essential to ensure that the interests of the States involved in the litigation are not irreversibly damaged during the wait for the ruling on the merits.

Chapter 4 contains a summary and conclusions.

2 Can you stop a sunrise? Detention of foreign vessels in the proximity of offshore installations

2.1 Introduction

Most offshore oil extraction activities take place beyond territorial waters, i.e. in the EEZ and on the continental shelf. By contrast to internal waters and territorial sea (the latter subject to the right of innocent passage by foreign ships), coastal States do not have full sovereignty over the EEZ and waters superjacent to the continental shelf. These waters are open to free navigation by all ships and the coastal State's rights are generally confined to exploration and use of natural resources, as provided by UNCLOS.

According to UNCLOS, coastal States may regulate other States' access to natural resources in its EEZ and continental shelf and adopt rules giving effect to international environmental standards, including provi-

sions on penalties for the infringements of these rules.[1]

A range of other violations committed by foreign ships outside territorial waters may also be regulated by States, according to UNCLOS or other rules of international law. It should be noted in this respect that, although UNCLOS contains a comprehensive legal regime for oceans, it does not fully codify international law rules of jurisdiction. Thus, UNCLOS is generally silent on the question of criminal jurisdiction of States over foreign subjects who are involved in the violation of a coastal State's rules applicable to offshore activities.

Exercise by the coastal State of its rights vis-à-vis foreign ships may easily result in conflicts between the coastal State and the flag State if they do not manage to accommodate each other's interests in a mutually satisfactory manner.[2] Such conflicts are likely to arise in cases where the rules of international law do not clearly spell out the scope of the coastal State's jurisdiction to prescribe and enforce rules vis-a-vis foreign subjects, i.e. if such jurisdiction is not expressly covered by UNCLOS or other treaties. Disagreements between States may also arise where the treaty does contain relevant rules but these rules are formulated in general terms, as is the case with Article 60 UNCLOS and other UNCLOS provisions examined in more detail later.

Under international customary law, a State may in general be entitled to apply its national laws extraterritorially to conduct by foreign subjects, in cases where such conduct has some connection with that State. This could be an offence which caused damage to the State's interests or produced some negative consequences on the State's territory.[3] Presumably, this could also include conduct which interfered with the lawful rights of the coastal State to the resources of the EEZ and continental

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1 Articles 60, Article 73 and 217.

2 For a discussion of the legal issues arising from the need to balance the rights of different users see, e.g., Alexander Proels, «The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited", *Ocean Yearbook* 26: 87-112.

3 See generally Michael Akehurst "Jurisdiction in international law". *British Yearbook of International Law* 46 (1972-1973): 145-257, and Cedric Ryngaert. *Jurisdiction in International Law*. Oxford: Oxford University Press, 2008.

shelf or which significantly affected the interests of the coastal State in the EEZ in some other way.

From this perspective, it may be lawful for the coastal State to adopt rules prohibiting environmental activists from performing protest actions against offshore installations to the extent they endanger the interests or rights of the coastal State in the EEZ and continental shelf, but it would be unlawful to prohibit or criminalize all protest actions at sea, irrespective of their impact on the coastal State.

However, disputes between States arise, as a rule, not from the coastal State's legislative action as such, but from the actual enforcement steps undertaken by the coastal State vis-à-vis foreign subjects in order to give effect to such legislation.

In the case of protests near the offshore installations, as further examined here, an infringement of international law may easily occur in cases where the coastal State takes enforcement steps against foreign-flagged ships, since it is the flag State that holds exclusive jurisdiction over its vessels on the high seas. Although the EEZ is not the high seas but a maritime zone subject to a special legal regime laid down in Part V UNCLOS, the freedoms of the high seas still apply there, subject to limitations laid down in UNCLOS. This means, as a general rule, that only the flag State may take enforcement measures against ships which are flying its flag beyond the territorial sea of the coastal State, including the EEZ.[4] Nonetheless, as we shall see below, UNCLOS contains a number of provisions which extend the rights of the coastal State in the EEZ, so that this general principle of the flag State jurisdiction does have certain exceptions.

It should also be noted that for the purposes of the discussion in this article, it is not necessary to make a distinction between the regime of the EEZ, on the one hand, and that of the continental shelf, on the other hand. Rules of jurisdiction will, in general, be governed by the same regime, in cases involving actions against installations on the extended continental shelf (i.e. the shelf stretching beyond the 200-nautical mile

[4] In the territorial sea, the coastal State has a somewhat broader (but also not unlimited) enforcement jurisdiction over foreign ships: cf. Arts 25, 27 and 28.

limit as envisaged in Article 76 UNCLOS).[5]

An on-going case which illustrates the issues above (but which is far from providing clear-cut answers on them) is the *Arctic Sunrise* case. The dispute on its merits raises interesting legal issues on the interpretation of Part V of UNCLOS and coastal States' jurisdiction; in particular, it addresses the coastal State's right to take enforcement measures against foreign-flagged vessels in its EEZ. Section 2.2 below describes the relevant facts and the legal background to the *Arctic Sunrise* case. The case also addresses the question of the applicability of compulsory dispute settlement procedures entailing binding decisions under UNCLOS, as well as the application of provisional measures which are examined in Chapter 3 below.

2.2 The *Arctic Sunrise* dispute: why focus on this case?

2.2.1 An overview of the events

On 18th September 2013, a Greenpeace International vessel, the *Arctic Sunrise,* approached a fixed platform Prirazlomnaya to demonstrate against oil drilling activities in the Arctic. The Prirazlomnaya is situated 60 km offshore in the Russian EEZ in the Arctic Ocean (Pechora Sea). This is an ice-resistant platform and the first one to start offshore production in Russia.[6] The Prirazlomnaya was a natural target for Greenpeace: there were serious doubts as to its compliance with environmental standards and activists claimed

[5] By contrast, it is necessary to make a distinction between the legal regimes governing the EEZ and the continental shelf with respect to jurisdiction over *living* resources of the sea: the coastal State holds rights over living resources in the EEZ (including jurisdiction over infringements of such rights committed by foreign ships) but not in the waters superjacent to the continental shelf extending beyond the EEZ. In the latter case the coastal State only has rights to non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species (Art. 77 UNCLOS).

[6] The Russian Federation has claimed a 200-mile EEZ: Federal Law # 191-Ф3 of 18 November 1998 "On the Exclusive Economic Zone of the Russian Federation". For more information on the Prirazlomnaya see, e.g., Gazprom website http://www.gazprom.com/about/production/projects/deposits/pnm/

that operations at this platform had been launched without the necessary official authorization being in effect.[7]

Five inflatable crafts were launched from the *Arctic Sunrise* which carried activists to the platform. The *Arctic Sunrise* did not cross the border of the three nautical-mile zone established around the platform.[8] Two of the activists climbed up the platform by using ropes. Others remained in the inflatable boats in the proximity of the platform. The two activists who had climbed on the platform, were subsequently taken on board by the Russian coast guard vessel, whereas the others managed to return to the ship under the circumstances described as dramatic by Greenpeace.

In the meantime, the *Arctic Sunrise* received an order to stop and allow boarding by the coast guard and eventually, after some attempts to evade, was forced to stop and was boarded by the Russian authorities (outside the three-mile zone). The boarding of the *Arctic Sunrise* is reported to have taken place on 19th September 2013.

The ship was escorted or towed to the Murmansk harbor in Kola Bay on 20th September where she was detained and searched by the Russian authorities. A district court in Murmansk decided to arrest all crew members (mostly foreigners of different nationalities), the "Arctic 30".[9]

The order for the seizure of the ship was adopted by the district court in Murmansk on the 7th October 2013, whereupon the owner and possessor were prohibited from using or disposing of the ship.

As the *Arctic Sunrise* sails under the flag of the Kingdom of Netherlands, the Netherlands was invited by the Russian authorities to send a representative to attend the search of the ship scheduled for 28th September 2013. By then, the crew members were already being kept in

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7 See the Statement of facts by Greenpeace (dated 19th October 2013), para 9. There are some discrepancies in the presentation and interpretation of the events between different sources which the author does her best to summarise and reconcile. The reader is referred to the extensive case materials, which also include documents of the Russian authorities. Available at www.itlos.org and www.pca-cpa.org (under "Cases").

8 See Section 2.3.2 below for more discussion of this zone.

9 28 protesters and two freelance journalists.

detention in Murmansk pending the judicial proceedings.

Administrative proceedings were instituted by the Russian authorities for violations of national laws applicable in the EEZ. In the ruling of 8th October 2013, an administrative penalty was imposed on the shipmaster for the infringement and for the failure to comply with the coast guard's order to stop and allow an inspection of the ship.

In addition, criminal proceedings were instituted against the shipmaster and the crew on various charges, first for piracy and subsequently for hooliganism.

Immediately after the detention, the Netherlands contacted Russian authorities and requested release of the ship and its crew. Having received no satisfactory response, the Netherlands initiated the proceedings described in the following section.

2.2.2 International proceedings

Russia and the Netherlands ratified UNCLOS and are, accordingly, bound by the UNCLOS provisions on dispute settlement procedures laid down in Part XV thereof.

Both States also adopted declarations concerning the forum for dispute settlement under UNCLOS. The Netherlands accepted the jurisdiction of the International Court of Justice over disputes with those State which were parties to UNCLOS, which adopted the same jurisdiction. When signing UNCLOS in 1982, the (then) Soviet Union declared that the Annex VII tribunal would be the basic means for the settlement of disputes concerning the interpretation or application of the Convention. In addition, the Soviet Union recognized the competence of the International Tribunal for the Law of the Sea (ITLOS), as provided for in Article 292, in matters relating to the prompt release of detained vessels and crews. [10]

The declaration adopted by Russia in 1997 upon the ratification of UNCLOS did not modify the 1982 declaration with respect to jurisdiction. The 1982 declaration is, in any case, irrelevant for disputes between the

[10] Ratification status and full texts of the declarations made by the States parties to UNCLOS are available at www.un.org/depts/los/convention_agreements/convention_overview_convention.htm under "Current status of the Convention".

Netherlands and Russia, as they did not adopt the same procedure. UNCLOS provides that in such cases disputes are to be settled by the tribunal established under Annex VII.

At the international level, two sets of proceedings were instituted in parallel.

First, on 4th October 2013 the Netherlands initiated arbitral proceedings under the procedures envisaged in Part XV UNCLOS. The tribunal's proceedings are ongoing at the time of writing.[11]

Second, on 21st October 2013, the Netherlands instituted proceedings at the ITLOS, seeking an order on provisional measures to have the ship and its crew released from the detention in Russia, since the arbitration tribunal that would be competent to prescribe such measures was not yet established.[12]

The 1997 declaration made by Russia also contained a reservation against application of the compulsory dispute settlement procedures of Section 2, Part XV. As examined in more detail in Chapter 3, Russia invoked this reservation and refused to participate in both proceedings.

The activists remained in detention until the majority were bailed during the proceedings at the ITLOS (and shortly after the Order on the application of preliminary measures was adopted by the ITLOS on 22 November 2013). The activists were allowed to leave the territory of the Russian Federation after being amnestied in December 2013. Criminal proceedings in Russia were closed in October 2014, due to the amnesty. The ship remained in Murmansk harbour and was only released in June 2014, leaving the harbor in August 2014.[13]

The release of the ship and its crew has not fully resolved the dispute,

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[11] Case No. 2014-02 *Arctic Sunrise Arbitration (Netherlands v. Russia)*. The arbitral tribunal held its first meeting on 17th March 2014. The current status of these proceedings is available at the website of the Permanent Court of Arbitration http://www.pca-cpa.org.

[12] Case No. 22, *The Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation), ITLOS, Provisional measures, available at www.itlos.org under "Cases".

[13] As reported by SweetCrude Rep. 10/1/14, Interfax Russ.&CIS Mil. Newswire 10/1/14 and Targeted News Serv. (U.S.) 10/1/14 (Westlaw database). The amnesty that included the Arctic 30 was declared by the State Duma in December 2013.

as the Netherlands still seeks a declaratory judgment on the wrongfulness of Russia's conduct, a formal apology, and compensation for financial losses incurred as a result of Russia's sanctions against the *Arctic Sunrise* and the persons on board.

2.2.3 Claims

2.2.3.1 Claims on the merits of the case

In the tribunal set up under Annex VII, the Netherlands requested the following ruling (in this author's summary):[14]

1) to adjudge and declare that, by boarding, investigating, inspecting, arresting and detaining the *Arctic Sunrise* and by initiating judicial proceedings against its crew, the Russian Federation breached its obligations under Articles 58(1), 87(1)(a) UNCLOS and under customary international law, as well as obligations to the Kingdom of Netherlands with regard to the right to liberty and security of the crew under Articles 9 and 12(2) of the 1966 International Covenant on Civil and Political Rights and customary international law;

2) To adjudge and declare that the aforementioned violations constitute internationally wrongful acts entailing the international responsibility of the Russian Federation; and

3) to adjudge and declare that these wrongful acts shall be ceased and the plaintiff State must receive assurances and guarantees of non-repetition as well as receiving full reparation for the injury caused by all these acts.

2.2.3.2 Claims concerning provisional measures (release)

On 21 October 2013, the Netherlands submitted a request for provisional measures to the ITLOS, pending the constitution of an arbitral

[14] The full text of the claim is available at the website of the Permanent Court of Arbitration http://www.pca-cpa.org.

tribunal. The Netherlands argued that the "principal reason for requesting provisional measures is that the Russian Federation's actions constitute internationally wrongful acts having a continuing character. . . and the circumstances of the present case require adoption of provisional measures."

The Netherlands requested a declaration by the ITLOS that:

1) the ITLOS has jurisdiction over the request for provisional measures;

2) the arbitral tribunal to which the dispute is being submitted has *prima facie* jurisdiction; and

3) the claim is supported by fact and law.

4) The Netherlands asked for the following decision by the ITLOS:

5) Enable the *Arctic Sunrise* to be resupplied and leave the Russian Federation;

6) Release the crew members;

7) Suspend all judicial and administrative proceedings and refrain from initiating any further proceedings in connection with the incidents leading to the boarding and detention of the *Arctic Sunrise*; refrain from taking and enforcing any judicial or administrative measures against the vessel, its crew members, its owners and its operators; and

8) Ensure that no other action will be taken which might aggravate or extend the dispute.

2.2.4 The importance of the *Arctic Sunrise* for the law of the sea

The discussion in the following chapters attempts to clarify the law of the sea issues arising in "direct action" cases and highlighted by the dispute in the *Arctic Sunrise* case. Why does this article focus on the *Arctic Sunrise* and what makes it different from other similar

incidents?

It should be pointed out that incidents involving direct actions against offshore installations performed by Greenpeace activists have taken place before, and some of those cases were adjudicated by the national courts of USA, Canada and Norway. Thus, in 1993 the Supreme Court of Norway upheld the lower courts' ruling, whereby the shipmaster and the leader of the direct action were sentenced for infringing the rules on safety zones around oil rigs (*Ross Rig*-case). A similar case was addressed by the Supreme Court of Norway in 2002, when the Court upheld criminal penalties for the direct action against the oil rig Deep Sea Bergen. Shell's activities on the US and Canadian shelves in the Arctic were also targeted by Greenpeace, resulting in judicial proceedings.

The Russian Arctic has been a target for direct actions before the *Arctic Sunrise*, without triggering judicial proceedings at the national or international level (as far as is known to this author). More recently, in October 2014, the same ship, the *Arctic Sunrise*, was detained by the Spanish authorities in a Lanzarote port for a direct action against offshore drilling off the Canary Islands.

All these cases are similar, in that they challenge the powers of the coastal State in the EEZ and question the scope of a coastal State's jurisdiction to take enforcement measures in order to prevent or stop direct actions. However, by contrast to other cases, the *Arctic Sunrise* is being resolved under the UNCLOS dispute settlement mechanism and has, therefore, presented international tribunals with an opportunity to shed light on the interpretation of the relevant UNCLOS provisions.

2.3 Rights and duties of States in the EEZ and waters superjacent to the continental shelf

2.3.1 Overview

For the purposes of this article's discussion, it is necessary to highlight some of the key aspects of States' rights and duties under the law of the sea and to examine relevant legal issues arising from the exercise of such

rights in the EEZ. UNCLOS lays down a number of provisions regulating coastal and other States' rights and duties in the EEZ (Part V) and on the continental shelf (Part VI). Provisions on the high seas laid down in Part VII apply in the EEZ and on the continental shelf, with the limitations following from Parts V and VI of UNCLOS.

UNCLOS' provisions on the scope of the coastal State's jurisdiction in the EEZ, on the one hand, and the flag State's freedom of navigation, on the other hand, are central to this article. It should, however, be kept in mind that the main challenge does not lie in the identification of the respective rights of each State. It is also necessary to strike a balance between these (conflicting) rights, in order to determine whether or not a party to the dispute acted in a way compatible with the law of the sea. This is a complicated exercise, as the discussion below shows.

2.3.2 Coastal State's rights and obligations, including jurisdiction over foreign vessels

In so far as a coastal State's rights and duties are concerned, UNCLOS provides it with sovereign rights for the purposes of exploring and exploiting natural resources of seabed and superjacent waters of the EEZ and the natural resources of the seabed and subsoil of the continental shelf.[15] The coastal State also holds exclusive rights with regard to the establishment and use of artificial islands, installations and structures. Article 60 (examined in more detail below) regulates coastal State jurisdiction in the EEZ, but applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.[16]

Article 60 does not differentiate between fixed and movable (floating) platforms. Provided the mobile rig is fastened to the seabed, nothing precludes it from being considered an "installation" or a "structure" for the purposes of Article 60. The application of this provision to mobile rigs under towage is less clear.[17]

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[15] Article 56(1) and Article 77 respectively.

[16] Art 80 UNCLOS.

[17] See Barbara Kwiatkowska. *The 200 Mile Exclusive Economic Zone in the New Law of*

In the Deep Sea Bergen-case, the Supreme Court of Norway decided that, in that case, Norway possessed sufficient jurisdiction over the rig as the flag State to justify the measures undertaken vis-à-vis the activists. 18 For this reason, the Court did not find it necessary to examine whether the coastal State had any residual jurisdiction over mobile rigs under towage. (If this were the case, the safety zone regime of Article 60(4) would continue to apply. Safety zones are discussed further below.) Still, the Court appears to have accepted that with respect to mobile rigs under towage the coastal State's jurisdiction is determined not on the basis of Article 60, but under Part VII, i.e. as the flag State's jurisdiction on the high seas.

Article 60 only touches very briefly on the scope and contents of coastal State's jurisdiction. Article 60(1) provides that coastal States have the exclusive jurisdiction in their EEZ to construct and regulate the construction, operation and use of various artificial installations. Article 60(2) further provides that coastal States have "*exclusive jurisdiction over* such artificial islands, installations and structures, *including* jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations."(author's emphasis)

The above provisions refer to the "exclusive jurisdiction" of the coastal State, but do not specify the scope and limits of such jurisdiction, other than referring to some examples ("including…"). The wording of Article 60(2) suggests that the list is not exhaustive.[19]

It is logical to assume that the concept of exclusive jurisdiction in Article 60 corresponds with the concept of jurisdiction in international law generally; at least to the extent that other UNCLOS rules do not modify it.

The exclusivity of jurisdiction means that the coastal State may exercise both prescriptive and enforcement jurisdiction over its offshore

the Sea. Martinus Nijhoff Publishers (1989), pp 108-109.

[18] On the *Deep Sea Bergen*, see Section 2.6 below.

[19] Cf. Article 21(2)(h) on the territorial sea and Article 33 on the contiguous zone which contain exhaustive lists of matters subject to the coastal State's jurisdiction.

installations without having to share with any other States.[20] Jurisdiction of the coastal State over its offshore installations in the EEZ and on the continental shelf stretches, therefore, much farther than its jurisdiction over foreign navigation through its territorial sea, EEZ and waters superjacent to its continental shelf.[21] Still, Article 60 does not afford coastal States unlimited jurisdiction over foreign vessels in the vicinity of installations.

By contrast to some other provisions in UNCLOS regulating coastal State jurisdiction over foreign-flagged ships, Article 60(2) is formulated in rather general terms.[22] Therefore, the spatial (geographic) and the substantive limits of the coastal State jurisdiction over foreign ships and persons in the context of Article 60 are somewhat unclear.

Article 60 contains provisions addressing some of the specific aspects of coastal States' jurisdiction over its platforms. In addition to Article 60(2), providing for some examples of matters under the exclusive jurisdiction of the coastal State, Article 60(4) allows States to establish, "where necessary, reasonable safety zones" around installations in which the coastal State "may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures".

It is perfectly compatible with Article 60 UNCLOS and international law for coastal States to prescribe rules prohibiting conduct by foreign subjects committed *on* such artificial islands, installations and structures. It should, in principle, also permit the regulation and prohibition of conduct aimed against these installations, i.e. applying national rules not only *on* the installations but also in the waters surrounding them.[23]

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[20] The wording of Article 60 UNCLOS is more generous in this respect than corresponding provisions in its predecessor, the 1958 Convention on Continental Shelf, which expressly grants "exclusive" rights to natural resources but does not use the same wording with regard to the construction and use of the installations.

[21] In the latter cases, foreign-flagged ships are governed either by the exclusive flag State jurisdiction or by the concurrent jurisdiction of the coastal State and the flag State: Cf. Arts 27, 28, 97, 110, 220 and 228.

[22] Cf. Arts 21, 73, 211(5) and (6) and 220.

[23] Nandan, Satya N. and Shabtai (1993), p. 585. Nandan and Shabtai links this criminal jurisdiction to the SUA Convention with Protocols: see fn. 12 on p. 585. See also Alex Oude Elferink, "The *Arctic Sunrise* Incident: A Multi-faceted Law of the Sea Case

In principle, if construed in light of the international law rules of jurisdiction, Article 60(2) authorises the coastal State to apply its national laws to foreign vessels and persons located in (sailing through) its EEZ, in cases where their conduct may interfere with the coastal State's rights offshore, and cause damage to the coastal State's interests. Such damage is especially likely to occur in the vicinity of the offshore installations. By providing for establishing safety zones around installations, UNCLOS acknowledges that such damage can, in principle, warrant the exercise of jurisdiction by the coastal State vis-à-vis foreign ships.

Although Article 60(4) should not be construed as narrowing down the substantive scope of the exclusive jurisdiction over offshore installations granted to the coastal State in Article 60(2), UNCLOS does not make it clear what measures can be undertaken by the coastal State in the safety zone. Thus, it leaves open the question of whether UNCLOS permits the prohibition of navigation through these zones altogether or instead restricts stopping and anchoring in the safety zones.[24] IMO instruments indicate that the coastal State may impose restrictions on the navigation and other activities in the safety zone and prohibit *inter alia* foreign ships from entering these zones without authorisation.[25] However, the jurisdiction of the coastal State under Article 60(4) is limited to the regulating of *unsafe* conduct, rather than regulating all activities in the safety zone.

Even if the right to prescribe the rules of conduct for foreign ships in the proximity of platforms can be derived from Article 60(2) provisions, the enforcement of such rules by the coastal State vis-à-vis foreign ships

with a Human Rights Dimension", *The International Journal of Marine and Coastal Law* 29 (2014) 244-289, p. 257.

24 See Kwiatkowska (1989), p. 121. See also Nandan and Rosenne (1993), p. 586.

25 IMO Resolution A.671(16) of 19 October 1989 "Safety zones and safety of navigation around offshore installations and structures". The prohibition on ships staying in and sailing through safety zones, with some exceptions not relevant here, is laid down in the Decree of the President of the Russian Federation (2013), cited in the dissenting opinion of Judge Golitsyn in the *Arctic Sunrise*, para. 26, available at www.itlos.org under "Cases". Kwiatkowska (1989) points out at p. 122 that the imprecise wording of UNCLOS resulted in the State, in practice, imposing all kinds of restrictions on navigation in the vicinity of offshore installations.

is more controversial. For example, in the case of protests at sea, the enforcement rights of the coastal State in the vicinity of platforms are under an increasing challenge both from the law of the sea and from a human rights perspectives.

In this author's view, it would not be correct to interpret Article 60(4) as precluding rights of the coastal State to prescribe rules applicable to foreign vessels navigating in the vicinity of the offshore installations on other aspects than safety, simply because Article 60(2) addresses the coastal State's jurisdiction as a whole, in all its dimensions, whereas Article 60(4) addresses *enforcement* in the safety zones. For example, the coastal State may lay down penalties for violations committed against installations from crafts operating from water or prescribe other norms of conduct for foreign ships. However, the supervision of compliance with these rules by the foreign ship may remain the flag State's responsibility. (Whether the coastal State has jurisdiction to *enforce* its laws, vis-à-vis foreign ships and persons within and outside safety zones, is discussed later in this Chapter.)

An express limitation on the prescriptive jurisdiction of the coastal State is laid down in Article 60(5) and relates to the function of the safety zones, as they must be "reasonably related to the nature and function" of the offshore installations. In addition, the breadth of such zones, cannot, as a general rule, be broader than 500 metres. As pointed out earlier, safety zones are relevant for the purposes of enforcement against unsafe conduct, so this provision does not generally affect the prescriptive jurisdiction afforded to the coastal State by Article 60(2) UNCLOS on other matters than the function and breadth of the safety zones.

An example of national rules which are probably incompatible with the requirements of Article 60(5) is found in the Russian provisions applicable to the Arctic waters where the *Arctic Sunrise* episode took place. There, two zones were established around the Prirazlomnaya platform: a safety zone of 500 metres, where all navigation was prohibited, and a three-nautical-mile zone declared to be a dangerous area for navigation (with prior permission required for entry).[26]

[26] The 500-metre zone is envisaged in Article 16 of the Federal Law of 30 November

No exception in the *Arctic Sunrise* case, allowing a broader safety zone, can be derived from the IMO rules or from generally accepted international standards, suggesting that these national rules are contrary to Article 60(4).[27]

Can Russia justify the three-mile zone by referring to Article 234 UNCLOS? Article 234 regulates the protection of ice-covered areas from pollution and can be considered as representing a *lex specialis* rule with respect to the general provisions on the protection of the marine environment on the EEZ and continental shelf.

In ice-covered areas, Article 234 entitles coastal States to regulate and enforce rules applicable to foreign-flagged ships to an extent beyond what is generally permitted under UNCLOS. As a result, in these areas, the coastal State may circumscribe the freedom of navigation around its offshore installations more than is generally permitted under Part V and VII UNCLOS. This provision could, in principle, explain the establishment of the special zones in the Arctic waters, in cases where the coastal State imposes certain restrictions to prevent unsafe accidents with ships in order to protect the marine environment.

Nonetheless, in this author's view, Article 234 may not provide sufficient justification for the establishment of the three-mile zone around the Prirazlomnaya. The three-mile zone in this case is established around the platform and appears to be functionally related to the 500 metre safety zone, and not to the Pechora Sea (or any specific parts of this Sea) generally. In addition, it was established as a zone "dangerous for navigation" and is not (or at least not expressly) aimed at protecting the marine environment of the Pechora Sea. The latter may, however, be justified in light of the Article 234 reference to "exceptional hazards to navigation" due to the ice conditions and the environmental risks this

1995 N 187-ФЗ «On the Continental Shelf of the Russian Federation". The three-mile zone was noted in the Notices to Mariners 6623/11, referred to in the translated ruling of the Russian court and reproduced in the case materials (fn. 7 above).

[27] Article 60(5) allows exceptions "as authorised by generally accepted international standards or as recommended by the [IMO]" but to this author's best knowledge no such rules have been adopted so far adopted by IMO, making this exception unavailable for the Prirazlomnaya.

brings about for shipping.[28] However, the three-mile zone in this case appears to have as its actual purpose extending the 500 metre zone further than permitted under Article 60(4) and (5), so enabling the coastal State to impose limitations on the navigation in it, and not (merely) to reduce the risk of environmental damage in those waters. This zone resembles rather the practice of "designated areas" in the EEZ which is generally considered to be incompatible with UNCLOS.[29]

In light of these considerations, Article 234 UNCLOS is unlikely to trump the provisions of Article 60(5) on the maximum permitted breadth of the safety zone around offshore installations. From the law of the sea perspective, this means that the three-mile zone is not relevant for determining the rights and obligations of the foreign-flagged ships navigating in those waters.

2.3.3 Flag State's rights and obligations

Article 56(2) provides that the coastal State shall have due regard to the rights and duties of other States in the EEZ and shall act in a manner compatible with the provisions of UNCLOS. In this respect, the freedom of navigation is one of the central rights enjoyed by the flag State.

Furthermore, Article 58 regulates the rights and duties of other, non-coastal, States in the EEZ and provides that in this maritime zone all States "enjoy, subject to relevant provisions of UNCLOS, the freedoms referred to in article 87 of navigation […], and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operations of ships […] and compatible with the other provisions of this Convention."

Article 90 UNCLOS defines the right of navigation as the right of every State, whether coastal or land-locked, to sail ships flying its flag on the high seas. If the right to free navigation is defined narrowly as the right to sail and to freely *pass* through the EEZ, it would be questionable whether arriving at a coastal State's EEZ with the purpose of performing

[28] See also Elferink (2014), p. 256.
[29] See Kwiatkowska (1989) at p. 124 et seq.z

an environmental action, and not merely for transiting, would be covered by the right to free navigation on the high seas.

Such an interpretation would not, however, be supported by the general context of UNCLOS. Foreign ships are not, in any case, prohibited from stopping and anchoring in the EEZ, whatever purpose this may have, including environmental protests, provided these vessels do not infringe upon the coastal State's rights in the EEZ. No special permission from the coastal State is required for such stays. By contrast, UNCLOS requires that passage by foreign vessels through the *territorial sea* of a coastal State should be continuous and expeditious, and any stopping and anchoring in the territorial sea is only permitted in so far as it is "incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance (…)".

The right to free navigation on the high seas is not absolute; it has to be exercised with due regard to the rights of other States, including the coastal State. UNCLOS does not, however, establish any clear hierarchy of rights of the coastal State and other States in the EEZ.[30] Seen from this perspective, it can be argued that the lawful rights of the coastal State do not trump the lawful rights of the flag State in the EEZ. Therefore, even the lawful exercise by the coastal State of its rights in the EEZ does not automatically give a higher priority to these rights than to the right to free navigation, even if the latter right is exercised in such a way as to interfere with the coastal State's offshore operations, assuming that it is still exercised in a way that takes "due regard" to the coastal State.

As mentioned earlier, Article 56 grants the coastal State the sovereign rights to the exploitation of the resources of the EEZ, as well as jurisdiction with respect to the establishment and operation of the installations in the EEZ. Direct actions do not, arguably, have as their purpose the exploitation or the claiming of rights to the resources of this zone; they are rather aimed at changing the manner in which

[30] Except Article 60(7) which does give a higher priority to "recognised sea lanes essential to international navigation" than to the coastal State's rights to establish installations and safety zones around them. See also Kwiatkowska (1989), p. 116.

coastal State exercises its rights.[31]

In this author's view, the requirement to take "due regard" of the rights of other States should be understood as requiring foreign ships sailing in the EEZ to operate in such a way as not to unjustifiably encroach upon the coastal State's rights in the EEZ. It is difficult to see how a mere arrival and peaceful demonstration in the EEZ would encroach upon the coastal State's rights under Part V or VI. Thus, the flag State's right to free navigation ensures a legal basis for the environmental activists to approach the location of the protest in the EEZ and to conduct such a protest without being interdicted by the coastal State.

At the same time, the coastal State's rights in the EEZ may not be rendered entirely irrelevant by an excessive reliance by the flag State on its right to free navigation. Actions which not only impede the exercise of the right to extract natural resources in the EEZ (creating such hindrances is actually one of the principal objectives of direct actions), but which have an effect of stopping offshore operations altogether (or obstructing all navigation) are unlikely to take "due regard" of the rights of the coastal State within the meaning of Part V. This also applies to direct actions which pose an actual or potential risk for the safety of the installation and its operations.

A separate question is whether the coastal State's rights under Part V UNCLOS, where exercised in a way harmful for the environment, should benefit to the full extent from the protection under Part V UNCLOS, i.e. whether the coastal State may invoke the obligation of the flag State to take "due regard" by restricting the right to stage environmental protests which go farther than would be allowed under UNCLOS.

Protection of the marine environment, not only for the sake of the particular States, but for the international community as a whole, is not overlooked by UNCLOS. In particular, Article 56(2) requires that coastal States act "in a manner compatible with the provisions of" UNCLOS,

[31] By contrast to illegal fishing by foreign ships in the EEZ, which have as a purpose the (unlawful) exploitation of the coastal State's resources. Greenpeace may, however, appear to go so far in its protests that it actually attempts to take over this authority from the coastal State.

whereas Article 56(1) grants coastal States jurisdiction with regard to the protection of the marine environment. Article 208 of Part XII imposes an obligation on the coastal States to adopt laws and take other measures to control pollution from their seabed activities.

If the coastal State authorises offshore operations and sets standards for such operations which do not meet the national or, as the case may be, international safety criteria, the exercise of the coastal State's rights may be fully or partly incompatible with the requirements of Part V. It should be pointed out that Article 58(3) requires other States to comply with the laws of the coastal State and other rules of international law in so far as they are *not incompatible* with this Part V. This consequently suggests that the coastal State may not rely on its own laws and regulations, where incompatible with the provisions of Article 56 cited above, in order to argue that the flag State has violated its obligations vis-à-vis the coastal State under Part V.

From this prospective, coastal States may not rely on the provisions of Part V to argue that all aspects of the exploration of natural resources offshore are their exclusive business, which may under no circumstances be the object of any protests. If there are serious concerns about environmental compliance or the consequences of offshore projects, it must be permissible to take steps, also at sea, to protest against such projects in a way that would influence the stakeholders in the offshore projects.

However, direct actions, which have as their direct purpose putting a complete stop to all offshore projects, will not benefit from the arguments above. Pollution is regulated but not prohibited altogether, as it is an inevitable by-product of any human activities, including offshore operations. In so far as the standard-setting for the offshore operations is concerned, all States, including the flag States of Greenpeace ships, are required to cooperate in order to achieve a satisfactory environmental regime at the international level.[32]

[32] Non-governmental organisations do not have such rights under UNCLOS but may contribute in other ways to the standard-setting and environmental monitoring. This is outside the scope of this article.

2.3.4 What about rights not expressly protected by UNCLOS?

The *Arctic Sunrise* and similar incidents show that the flag State may also invoke the rights which are not expressly guaranteed by UNCLOS. The status of such rights within the scope of UNCLOS is, however, unclear.

It would be reasonable for UNCLOS to protect rights which can be derived from the customary law of the sea (to the extent they are not already codified in UNCLOS or do not conflict with it) and the rights laid down in treaties connected to UNCLOS.

It is, however, much less certain that rights, which are not, strictly speaking, of the law-of-the-sea nature, are protected by UNCLOS. For example, in the *Arctic Sunrise* case, the right to freedom of expression and other human rights were invoked by the flag State.

As a starting point, the law of the sea has a neutral relation to human rights. Nothing in the wording of UNCLOS suggests that UNCLOS provisions override such significant human rights as the right to liberty, fair trial and prohibition of inhumane treatment.[33] The coastal State must also respect these rights when it exercises its jurisdiction over foreign subjects in its EEZ and continental shelf. This means, in particular, that enforcement by the coastal State must not be such as to unjustifiably encroach upon these rights: for example, the coastal authorities may not intentionally cause excessive and unnecessary damage to the activists and the ship.

In the example of the *Arctic Sunrise*, it is clear that the activists could not be arrested or prosecuted by the Russian authorities without a proper legal basis in its national law and that Russia could not completely prohibit Greenpeace from performing any kind of protests anywhere in the EEZ. Similarly, a coastal State is not allowed to impose excessively harsh penalties on the activists for infringements of the relevant rules of that coastal State.

[33] UNCLOS even contains some provisions indirectly protecting the crew against excessive and inhumane punishment by the coastal State: see Articles 73 and 230.

It is, in any case, not excluded that the conduct of the coastal State in a particular case may lead to the infringement of *both* UNCLOS and the human rights instruments binding on that State. In practice, parallel application of both regimes may not necessarily bring about any real changes in the legal position of the States.

The problem will, however, arise if human rights are invoked in the course of dispute which is being settled under UNCLOS, and not at a human rights' court. Although human rights may, in principle, be viewed as compatible with UNCLOS, earlier court practice shows that not all human rights instruments will be automatically applicable in a dispute under UNCLOS.[34]

Invocation of human rights in a law of the sea dispute may result in the extension of the obligations on the part of the opponent State beyond what is clearly envisaged by UNCLOS. This would be the case if a flag State could invoke human rights or other rights not expressly envisaged in UNCLOS, in order to have enforcement jurisdiction of the coastal State in the EEZ limited further than is stipulated in the relevant UNCLOS provisions. It is far from certain that States must tolerate unauthorized entries into the safety zone or to put up with the activists attaching themselves to oil platforms in order to hinder their operations solely because, by preventing or interrupting such actions in its capacity as the coastal State under Part V of UNCLOS, the State would violate their freedom of expression or any other rights such as right to liberty, peaceful assembly etc.

Prior to the *Arctic Sunrise*, Greenpeace invoked (without any particular success) human rights violations in other similar cases at the national level such as the *Ross Rig* and the *Deep Sea Bergen* (Norway).[35] In the

[34] The European Court of Human Rights has interpreted UNCLOS in a number of cases; the question here is, however, whether a tribunal acting under UNCLOS will be competent to apply human rights instruments: see Section 3.2 below. Generally on the interrelationship between UNCLOS and human rights see, e.g., Tullio Treves, "Human rights and the law of the sea", *Berkeley Journal of International Law*, Vol 28:1 (2010), pp 1-14.

[35] See also *Shell Offshore Inc v Greenpeace Inc* (709 F.3d 1281) where the US district court examines the freedom of speech claimed by Greenpeace and does not give it as much weight as Shell's arguments based on safety of sea operations.

Deep Sea Bergen, the Supreme Court of Norway ruled that confiscation of Greenpeace boats and the life capsule used in a direct action against a mobile oil rig was necessary to protect lawful activities offshore and to prevent the disorder.[36] This ruling referred to the decision of the European Court of Human Rights in *Drieman and Others v Norway*, in which the applicants complained that, by detaining and prosecuting them for protests against whaling in the Norwegian EEZ, Norway infringed their right to freedom of expression and peaceful assembly.[37]

Although the Court proceeded on the assumption that the interference against the Greenpeace activists did amount to the restriction of these freedoms, it considered that Norway was entitled to invoke the derogation from the freedom of speech envisaged in the European Convention for Human Rights. The Court concluded that the "measures taken against the applicants' conduct in obstructing [lawful – A.P.] whaling could reasonably be viewed as having been taken for the prevention of disorder or crime or for the protection of the rights and freedoms of others."[38]

Moreover, the Court pointed out that the conduct in question in this case did not enjoy the same privileged protection as a political speech or debate on questions of public interests or the peaceful demonstration of opinions.[39] In addition, protest campaigns against whaling have not been generally prohibited in Norway, so that activists could perform their protests in a way which would not impede the exercise of the rights of entities involved in whaling.

It is, of course, not certain that the European Court of Human Rights would apply the derogation to all cases involving environmental protests at sea that go beyond what appears to be allowed by UNCLOS. For example, protests involving entering the safety zone of the rig, but without the boarding or other similar actions directly aimed at impeding offshore operations, may be viewed as acceptable.[40]

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36 Rt-2002-1271 at p. 1279 (available in Norwegian at LOVDATA).

37 *Drieman and Others v Norway* (Application No.33678/96). Application against Norway was declared inadmissible.

38 *Drieman and Others v Norway*, p. 9.

39 *Drieman and Others v Norway*, p. 10.

40 Greenpeace representatives reported that on 17th March 2014 the complaint against

A far more interesting question for this article is how the tribunal acting under Part XV UNCLOS would approach this question.[41]

In principle, certain extensions of States' obligations vis-à-vis each other may be justified by changing circumstances and new challenges which were not fully foreseen at the conclusion of the treaty. Like other international treaties, UNCLOS permits a dynamic interpretation of its provisions. Nevertheless, it may still be problematic to circumscribe the coastal State's jurisdiction so substantially as to overlook or set aside the clear wording of the relevant UNCLOS provisions, in order to ensure an unlimited access to conduct direct actions against offshore activities of the coastal State.

In addition, Article 59 addresses cases where UNCLOS does not attribute rights or jurisdiction to the coastal State or other States in the EEZ and relates generally to conflicts over residual rights in such cases. In light of the functional nature of the EEZ, where conflicts arise on non-economic issues, the formula would tend to favour the interests of other States or of the international community as a whole. However, since the most controversial direct actions do compromise the economic rights of coastal States, Article 59 is not very helpful for the question of how the balance should be struck.[42]

Obviously, UNCLOS does not completely rule out the right to freedom of expression at sea. However, freedom of expression is to be applied in conjunction with the other provisions of UNCLOS, so as not to contravene directly the rights of the coastal State under Part V or VI. It is possible that the exercise of freedom of expression and other rights in the context of a direct action at sea may be more limited than would generally be the case on shore. Application of such limitations in the case of offshore operations, especially in the harsh environment of the Arctic, may, *inter alia,* be justified by the higher safety risks warranting more

the Russian Federation was submitted by the "Arctic 30" to the European Court of Human Rights. The proceedings in this Court are not examined here but may shed more light on the relationship between the law of the sea and freedom of expression. See also Elferink (2014) p. 259 et seq. and p. 271 et seq.

41 See Section 3.2 below.

42 See also Nandan and Rosenne (1993), p. 569.

protection against direct actions than would be the case on shore.[43]

2.4 Enforcement within the safety zones

Discussion in the following sections focuses on the way in which the coastal State may exercise its rights in the EEZ, i.e. how (and whether) actual enforcement may take place vis-à-vis foreign vessels and their crews. As pointed out earlier, the enforcement jurisdiction of the coastal State under the law of the sea does not necessarily coincide with its jurisdiction to prescribe, the former being considerably limited beyond its internal waters and ports. Although it may be logical to assume that the right to prescribe laws applicable extraterritorially should automatically imply the existence of a corresponding right to coerce compliance with such laws, this is not the case in UNCLOS and international law generally.[44]

Since Article 60 provides coastal States with exclusive jurisdiction *over* installations in the EEZ without limiting such jurisdiction in any significant way, enforcement measures undertaken by the coastal State authorities *on* the installation are in line with UNCLOS. In this author's view, it is also perfectly in line with international law to submit that the coastal State has exclusive jurisdiction over persons physically located there or in the immediate proximity thereof under similar circumstances, for example, if they are attached to the installation in "life capsules" or similar equipment. Coastal State authorities are entitled to stop, search and detain such persons, and to institute proceedings against them, where necessary.[45]

The "exclusive" nature of such jurisdiction suggests that, if the offenders are foreigners, the State of their nationality (or the flag State of their ship), would not be entitled to claim that its jurisdiction prevails

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43 See also Elferink (2014) p. 271 et seq.

44 Cf. Arts 27 and 28 UNCLOS on coastal State criminal and civil jurisdiction in the territorial sea and Article 220 on jurisdiction with regard to ship-source pollution.

45 Nandan and Rosenne (1993), p. 585. See also Elferink (2014), p. 257 who refers to the commentary of the International Law Commission on this point in its *Yearbook* (1956).

and that the detaining coastal State was required to obtain its consent before taking the enforcement measures.[46]

It would be logical to assume that the exclusive jurisdiction granted in Article 60(2) also includes the right to transfer such foreign nationals to the coastal State's territory, where the question of further proceedings will be resolved. The coastal State's jurisdiction under international law to institute proceedings and impose penalties for violations against offshore installations is dealt with in more detail in Section 2.6 below.

What about boarding, searching and detention of foreign individuals or crafts located not on the platform but in the waters surrounding the platform?

Article 60(2) can arguably be interpreted as also extending the coastal State's jurisdiction to areas in the immediate proximity of the platform, since this may be necessary to make the exercise of jurisdiction over the platform possible in practice. At the same time, by its wording, Article 60 does not provide the coastal State with a power to enforce any kind of rules relating to the operations of the platforms to an unlimited distance in the EEZ. Firstly, such jurisdiction is limited by Article 60(2) which only gives jurisdiction *over* installations.

Secondly, Article 60(4) provides that the coastal State may, *in* the safety zones, "*take appropriate measures to ensure the safety* both of navigation and of the artificial islands, installations and structures." (author's italics) This provision narrows down the scope of enforcement jurisdiction both with respect to the objective and type of the measures to be undertaken vis-à-vis foreign ships ("appropriate" measures to ensure safety), as well as with respect to the spatial limits for such jurisdiction (in the safety zone, but not beyond).

Article 60(4) does not say expressly what "enforcement" other specific

[46] No problem with competing jurisdiction should arise in a case where the persons involved are the coastal State's own nationals. However, in the *Arctic Sunrise* case, the ITLOS has either missed this point or understood it differently, as the Order requires *all* persons who have been detained to be released from arrest and the territory of the Russian Federation, including the two Russian nationals. See also the dissenting opinion of Judge Golitsyn, criticising the ITLOS on this point, at www.itlos.org under "Cases".

measures which the coastal State may undertake. On a very narrow reading, one can even argue that this provision grants no enforcement rights to the coastal State at all, as the measures are limited to the right to *regulate* navigation and other activities to ensure the safety (i.e. prescriptive jurisdiction), leaving the question of actual compliance to the flag State. Such a reading can find support in the fact that Part V does contain a more detailed provision in Article 73 which sets out enforcement rights by the coastal State, but only in respect of the protection of the living resources of the EEZ, whereas no corresponding provision is included on the infringement of rules applicable to offshore installations.

In addition, a duty is imposed on the flag State to ensure that its ships act in compliance with Article 60, suggesting that the problem of enforcement should be the flag State's concern. Thus, Article 60(6) provides that "[a]ll ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones."

This author argues, however, that Article 60(4) does give the coastal State enforcement rights within the safety zone, as the total absence of any enforcement rights would deprive this provision of any practical effect in cases where the flag State is not able to ensure actual compliance by its ships anywhere they sail (a common problem under the law of the sea).

Such a reading would also result in a limitation of the coastal State's rights in comparison to the rights it holds under customary international law partly codified in UNCLOS, for example, the right to self-defence and the right of hot pursuit.[47] It would not be logical for the States to agree to include a special provision in UNCLOS with a view to circumscribing their rights in the near proximity of the platforms; quite the opposite, the objective of Article 60 is to secure more rights to the coastal State than would normally be the case beyond the territorial sea. Lastly, such a reading is not supported by the actual practice of the coastal States, which do enforce their rules in the safety zone without any sig-

[47] Hot pursuit may be undertaken from the safety zone: see Section 2.5 below.

nificant objections from other States against such measures.[48]

However, any enforcement measures to be undertaken by the coastal State in the safety zone are expressly limited to measures appropriate to ensuring the safety of navigation or installations, i.e. measures aimed at preventing or interrupting unsafe conduct. Safety may include a very broad range of objectives, including the protection of the marine environment and the security of the offshore installations against terrorist or similar attacks, and States should enjoy a certain margin of interpretation in this respect. Still, measures pursuing totally different objectives are not allowed under Article 60, for example, detention of an offender for an earlier crime unrelated to the safety zone regime, or, as a more relevant example, a protest action which involves entering the zone but does not endanger the safety of the offshore operations and of the related activities.[49]

Furthermore, the type of enforcement measure may not be chosen absolutely freely by the coastal State but must be "appropriate" to protect the safety of the installation. Thus, Article 60(4) requires the State to assess the type of measures to be taken on a case-by-case basis, depending on what is necessary (appropriate) in the given situation.

Although in practice the use of force against Greenpeace ships and activists is rather common, such use of force is only acceptable for the purposes of Article 60 (and international law generally), provided it does not go beyond what is "appropriate" in the circumstances.[50]

This means that the type of measure taken must correspond to the risk which the conduct by a ship (or other craft or object) and by persons navigating this ship represents for the safety of the offshore installation.

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48 So far as is known to this author. The *Arctic Sunrise* appears to be an exception in this respect. Scholars also support the view that Article 60(4) does, in general, provide the coastal State with the right to take appropriate enforcement measures in the safety zone. See, e.g., Elferink (2014), p. 257.

49 Or if the coastal state has some other legal basis for enforcement laid down elsewhere in UNCLOS, e.g., Article 110 which is not relevant here.

50 By "use of force" or "coercion" in the context of this article, the author means all measures physically interfering with the navigation of the ship, including forced stopping, boarding, and detention. Cf. the *Arctic Sunrise* detentions in Russia and, more recently, Spain.

Thus, boarding, search or detention of the foreign ship may be appropriate in some cases, whereas in other cases it may be sufficient to communicate the order to leave the safety zone. [51]

If a measure involves the use of force, as it did in the *Arctic Sunrise*, such use must be justified by the risks posed by the direct action and proportionate to such risks.[52] However, the enforcement actions must not, in any event, be of repressive character and must not aim to punish or physically damage the offenders, or to unreasonably hinder navigation in the safety zone.

For the coastal authorities, a correct assessment of the situation may, however, be complicated for many reasons. The intent of those on board a ship approaching the platform may not be all that obvious until it is far too late. The long distance from the shore and harsh weather conditions may complicate the continuous monitoring by the coastal authorities. In practice, the very potential for the situation to become acute is hard to predict.

In the *Arctic Sunrise* case, the ship arrived in the proximity of the safety zone some time before the action actually took place, suggesting that the authorities of the coastal State had some time at their disposal to assess the intentions of the activists. It is also claimed by Greenpeace that the intentions of the ship were clearly communicated to the Russian authorities.[53] If no attempt to climb on the platform had taken place, it would have been possible to argue that the enforcement measures could have been limited to the least intrusive, such as communicating with the ship, warning it not to attempt to undertake any unsafe activities and ordering it to leave the zone, and there would have been no need to detain the activists.[54]

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[51] Cf. Article 220 which sets out very clear limits for what a coastal State may do vis-à-vis foreign vessels engaged in unlawful discharges within each of its maritime zones. Detention under Article 220 would only be possible in cases of major damage. See also Elferink (2014), p. 258.

[52] Stuart Kaye, "International Measures To Protect Oil Platforms, Pipelines, and Submarine Cables from Attack", 31 *Tul. Mar. L.J.* 377 (2006-2007), p. 414.

[53] See Statement of facts by Greenpeace, cited in fn. 7 above.

[54] In the case of the *Arctic Sunrise*, it is, however, unclear whether the picking up the activists from the Prirazlomnaya was initially an act of detention or rescue.

However, the very boarding of the platform by activists who do not aim to do any damage to the platform or those on it may still represent a potential safety risk for the platform, those working on it and for the activists themselves. Therefore, coercive measures aimed at the prevention of such a boarding may also be considered reasonable by the authorities. (In addition, any unauthorised boarding of an offshore installation, even if safe, would, in this author's view, trigger the application of Article 60(2) and thereby justify the detention of individuals by the coastal State.) Although the coastal State enjoys a certain margin of interpretation in this respect, use of coercion must only be applied as a measure of last resort, irrespective of whether it takes place on the platform or in the waters surrounding it.

2.5 Enforcement outside safety zones

The discussion above, mainly based on the analysis of the wording of Article 60(4), suggests that the coastal State is permitted to take certain steps against foreign ships "in" the safety zones, but not outside such zones. In the example of the *Arctic Sunrise*, this would mean that the Russian coastguard could be entitled to board and detain the ship or its crafts within the 500 metre distance off the rig, assuming that these represented a safety risk *and* other, less intrusive, measures were considered insufficient. Russian authorities were also entitled to arrest the activists who actually boarded the rig, by virtue of Article 60(2). But outside the 500–meter radius, they were in principle precluded from any enforcement steps against the *Arctic Sunrise*.[55]

Article 73 confirms that the coastal State may have enforcement jurisdiction over foreign ships in the EEZ with respect to a specific category of rules, namely, those related to the living resources of the EEZ. By

[55] This was supported in the *Arctic Sunrise* case at the ITLOS: see separate opinion by Judges Wolfrum and Kelly, para. 13, at www.itlos.org under "Cases", who agreed that the Russian Federation enjoys enforcement functions in respect of the protection of the platform within the safety zone but not outside the zone, where Greenpeace may invoke freedom of expression. See also Elferink (2014), p. 258.

contrast to Article 60(4), Article 73(1) specifies that the "coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the *living* resources *in the exclusive economic zone*, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention."(author's italics).

Thus, Article 73 applies to the EEZ as a whole and provides that the coastal State may take a broad range of enforcement measures vis-à-vis a certain category of infringements in the EEZ. Article 73 supports the view that Part V does not provide a legal basis for the enforcement vis-à-vis foreign vessels in the EEZ, other than in cases expressly envisaged therein, i.e. violations of rules on the living resources of the EEZ. If the intent of the States parties to UNCLOS were to grant the coastal States specific far-reaching enforcement powers vis-à-vis foreign vessels in the EEZ beyond the safety zone in respect to violations of the rules applicable to installations, this would indeed be expressly provided for in the text of UNCLOS. In the absence of an express provision to that end, the freedoms of the high seas should prevail to ensure a proper balance between the coastal State's rights over resources in the EEZ and the rights of other States.

In the broader context of UNCLOS, not only stopping and detention of foreign vessels, but *any* interference by the coastal State with foreign ships, other than that envisaged in the relevant UNCLOS provisions, may arguably be unlawful outside the safety zone. Thus, under Article 220 of Part XII, the coastal State may not even request information from the foreign vessel sailing in the EEZ unless there are clear grounds to believe that a discharge violation has been committed by this vessel. However, it is in any case unlikely that mere requests for information from foreign ships in the EEZ would result in litigation between States, as would be the case with more intrusive measures.

Thus, no other provisions of Part V or VI appear to give the coastal State the right to take enforcement steps outside the safety zone against the vessel involved in a direct action.[56]

[56] It should be pointed out that coastal States may generally detain foreign ships

In exceptional cases, UNCLOS does permit the taking of enforcement steps against foreign ships on the high seas, including the EEZ. Thus, Article 105 permits the seizing of a pirate ship or aircraft. Article 110 lays down rules on the right of visit on the high seas. However, a right of visit in Article 110 does not cover situations with Greenpeace's direct actions. As to the piracy, Article 105 could have resolved the problem of enforcement jurisdiction in the *Arctic Sunrise*-case, since it permits non-flag States to seize pirate ships and arrest persons on board on the high seas. Such a legal basis has in fact been applied to direct actions by national authorities and courts, including the *Arctic Sunrise.* In the latter case, these charges were dropped by the Russian authorities.[57]

The discussion below shows that the coastal State may still have certain enforcement rights outside the safety zone for infringements committed within the safety zone, in cases where such an action is justified by the right to hot pursuit (Article 111). Although the Russian Federation did not make any public statements confirming that the action against the *Arctic Sunrise* was exercised on the basis of Article 111, this may be a plausible explanation for the measures undertaken against the *Arctic Sunrise* beyond the safety zone.[58]

Article 111 allows the coastal State to stop and detain a foreign ship on the basis of a right of hot pursuit, provided a number of conditions for the exercise of this right are met. One of the conditions is that the authorities must have "good reason to believe that the ship has violated the laws and regulations of that State".[59] Taken literally (and in line with practice on hot pursuit generally), it means that hot pursuit may not be undertaken as a preventive measure: the coastal authorities must only

in the ports for violations committed off shore (see also Section 2.6 below). For example, the *Arctic Sunrise* was detained in the Spanish port of Arrecife (Lanzarote) for a protest action conducted at the offshore site. According to Agence France Presse English Wire of 26 November 2014, the bail was requested for the release of the ship and the captain.

[57] On *Sea Shepherd* Case in the USA, see, e.g., Whitney Magnuson, "Marine Conservation Campaigners as Pirates: The Consequences of Sea Shepherd" 44 *Envtl. L.* 923 (2014) pp. 923-958.

[58] See also Dissenting opinion by Judge Golitsyn at www.itlos.org under "Cases".

[59] Article 111(1).

act *after* the infringement has taken place. However, the standard of evidence that the infringement has taken place is relatively low, as it is sufficient to have a "good reason to believe" that a violation has taken place.[60] By contrast to other violations in the EEZ, such as unauthorised fishing, direct actions are intentionally performed in a very obvious way. Therefore, it should not be difficult to realise that the rules applicable to offshore installations are being infringed upon.

Article 111(2) confirms that hot pursuit provisions may, in principle, be relied upon in cases such as the *Arctic Sunrise* and other similar incidents taking place outside the territorial sea. It provides:

"The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones."

Article 111 does not differentiate between violations, leaving it to the coastal State to determine what infringements of the national rules applicable to the EEZ, continental shelf or the safety zone need to be enforced in this way. In practice, fishing violations have been the most typical case, whereas ship-source pollution violations have so far generated no practice known to this author. Apparently, Article 111 catches also direct actions, to the extent they involve conduct violating the coastal State's rules adopted under Article 60.

It should be noted that Article 111(4) specifically envisages that hot pursuit may also be undertaken with respect to a "mother ship", where a violation involves several boats or crafts working together, if at least one of these vessels is within the EEZ or continental shelf (or territorial sea, as the case may be). The pursuing ship must only satisfy itself "by such practicable means as may be available" that the pursued ship or

[60] Cf. Article 220 requiring "clear grounds" to believe a discharge violation has taken place before any enforcement steps can be taken by the coastal State in the territorial sea or beyond. Still, a mere suspicion is not sufficient: *M/V Saiga* (No 2) (Saint Vincent and the Grenadines v Guinea), ITLOS, 1 July 1999, available at www.itlos.org.

craft is located within the "right" zone, i.e. EEZ or continental shelf, before the pursuit begins.

Thus, the fact that the *Arctic Sunrise* was detained outside the safety zone does not, in itself, preclude Russia from relying on Article 111 as a basis for enforcement. The problem may instead lie in the (somewhat unclear) fact that the pursuit of the crafts launched from the ship may have begun after these crafts were already outside the safety zone of the Prirazlomnaya.

In principle, Article 111(4) does not require expressly that a craft, from which a direct action is performed against an installation, is itself physically situated *within the safety zone* when the pursuit begins. According to the wording of this provision, it is enough that either the mother ship or the craft is situated in the EEZ or on the continental shelf, and that a violation of the relevant rules has been committed.

Such an understanding could, however, be implied by the requirement in Article 111 that a violation must have been committed before the pursuit can start. If the particular conduct only amounts to a violation if it is committed *within* the safety zone, and the enforcement of such rules would also only be permitted within the safety zone, as is generally the case with the direct actions against the installations, it would be logical to assume that the pursuit must start while the craft is still within the safety zone. Otherwise, the coastal State's enforcement jurisdiction would extend far beyond what is allowed under Article 60. It is unclear whether coastal States would agree with such a narrowing down of their rights under Article 111, but it can be justified by the contextual interpretation of this provision.[61]

The ruling on the merits by the arbitral tribunal in the case of the *Arctic Sunrise* may explain whether the UNCLOS permits the stopping and detention of a ship outside the safety zone in direct action cases involving violations of the rules applicable within the safety zone, as well

[61] See Section 2.4 above. The commentary to Article 111 does not contain any indications that such a restriction was (or was not) implied in Article 111: see Satya N. Nandan and Shabtai Rosenne (eds). *United Nations Convention on the Law of the Sea. A Commentary.* Volume III. Martinus Nijhoff Publishers, Dodrecht (1995), p. 249 et seq. See, however, Elferink (2014) at pp 258-259 who advocates this understanding.

as in cases where the pursuit was started outside the safety zone.

It should, however, be noted that in cases involving direct actions against oil rigs, it is logical to assume that, in practice, the conduct aimed at violating the rules of the safety zone will require the craft's actual presence in the immediate proximity to the platform. Therefore, even if Article 111 does not require that the pursuit of crafts involved in a direct action starts from within the safety zone, the very fact that the pursuit only starts when the pursued craft is already too far from the platform to be within the safety zone may indicate that the other conditions of Article 111, as examined below, are not met.

Firstly, the pursuit may only begin after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship. It is not specified that this signal must necessarily be given from a vessel which is authorised to exercise the hot pursuit, although some authors interpret this provision as implying such a requirement.[62] In this author's view, it would be reasonable to allow signals also to be given from the installation, if this is more practical.

It is also submitted by some authors that the signal must be given while the pursued ship or its craft is still within the safety zone, a condition which may not have been observed in the *Arctic Sunrise*, given the considerable time which elapsed before the order to stop was given.[63] However, such a requirement is not explicitly envisaged in Article 111.

Secondly, the hot pursuit must not be interrupted. Under the general rule of Article 111(1), the pursuit commenced from the internal waters or territorial sea may be continued on the high seas, if not interrupted. The fact that considerable time may have passed before the pursuit was undertaken, as was the case in the *Arctic Sunrise*, is not, in itself, sufficient to make Article 111 inapplicable. It is necessary to determine whether the underlying events show that the pursuit was in fact interrupted.

By virtue of Article 111(2) cited above, this provision applies *mutatis*

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[62] See Kaye (2006-2007) who points out at pp. 406-407 that Article 111(4) is to be read in conjunction with Article 111(6) which applies to ships and aircrafts but not installations.

[63] Elferink (2014), p. 275.

mutandis to a pursuit which starts in the EEZ or continental shelf, or from the safety zone, as the case may be. No equivalent requirement appears to have been provided with respect to the pursuit from the safety zone into the EEZ. Thus, as long as the pursuit starts from the EEZ and ends in the EEZ (and not when the pursued vessel is on the high seas), it does not appear to matter for the purposes of Article 111 whether there were any stops on the way.[64]

In the *Arctic Sunrise* case, however, it was submitted by Greenpeace that communication had taken place between the coastguard vessel and *Arctic Sunrise* concerning a voluntary inspection on board the latter (when outside the safety zone but within the EEZ) before more assertive steps were taken by the coastguard to board the ship. This indicates that there were indeed interruptions in the pursuit and in such a case it would be difficult to characterize it as uninterrupted or "hot". Although, as pointed out above, the wording of Article 111 is not conclusive on this, in this author's view, the exceptional character of the coastal State's right to enforcement under Article 111 justifies an approach that favours the flag State.[65]

Lastly, the right of hot pursuit may only be exercised by warships or military aircrafts, or by other ships or aircrafts clearly identifiable as being on governmental service and authorised to that effect.

Article 111 does not specify exactly what measures the coastal State may undertake once it captures the ship. However, Article 111(7) provides that the "release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely …" This provision indicates that the coastal State may detain the ship and its crew, while the flag State has a corresponding right to require the ship to be released. The conditions for requesting the release are found elsewhere in UNCLOS.[66]

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[64] Nandan and Rosenne (1995) also link the requirement with the right to continue pursuit outside the territorial sea or, as the case may be, the EEZ: see p. 257.

[65] See also Elferink (2014) at p. 275 who considers that the communication between the coastguard and *Arctic Sunrise* indicates that the pursuit was interrupted.

[66] See Section 3.4 below.

An older incident illustrating the exercise of hot pursuit in practice is the case of *Ross Rig*. On 26 October 1993, a Greenpeace ship, the M/S *Solo,* approached the safety zone around the oil rig Ross Rig on the Norwegian continental shelf in the Barents Sea. While staying just outside the safety zone, the ship launched 4 inflatable boats with 16 persons on board, which entered the safety zone and approached the rig. Four persons climbed the anchor chain and stayed on the platform for about 2.5 hours.

The police took a decision to detain the ship, the *Solo*, together with the four boats used in the protest action, as well as the shipmaster and the crew. The ship and the crew were subsequently taken to Tromsø, where the ship was searched by the police and passports of the shipmaster and the leader of the action were confiscated. Criminal charges were subsequently brought against them for infringements of Norwegian rules applicable to offshore installations.

The court proceedings concerned the applicability of the enforcement measures under criminal law, namely, the lawfulness of the arrest of the ship and the boats and the confiscation of passports.[67] The appellants argued *inter alia* that the Norwegian authorities could not invoke the right of hot pursuit because the ship was arrested in the international waters outside the safety zone, with boats already taken on board. Therefore, under international law, there was no hot pursuit in the circumstances of this case.[68]

The Appeals Committee of the Norwegian Supreme Court upheld the ruling of the lower courts. The Appeals Committee agreed that the application of the coercive measures of criminal procedural character was not precluded by the fact that the *Solo* was arrested in international waters. Even if the mother ship as such was outside the safety zone when

[67] There was no dispute as to the applicability of the Norwegian criminal law as such in the circumstances of the case. The shipmaster and the leader were prosecuted and a corporate penalty was also imposed on Greenpeace in the criminal proceedings: cf. the *Arctic Sunrise* where the Netherlands do not accept that Russia has criminal jurisdiction.

[68] At the time of the incident and the proceedings, Norway was not party to UNCLOS or its predecessor with the corresponding provision on the hot pursuit, Article 23 on the 1958 Geneva Convention on the High Seas. The provisions on the hot pursuit were, however, considered to be customary international law.

the action was performed, the four boats had to be viewed as a part of the mother ship's equipment. Since the infringement was committed inside the safety zone by the crew of the boats, Norwegian authorities were entitled to pursue the ship in order to apply coercive measures.

As to the factual evidence supporting the applicability of hot pursuit in the *Ross Rig* case, the account of the circumstances surrounding the pursuit and arrest in the rulings is very brief. The ruling records that the inspectors arrived on board the oil rig when the boats were still within the safety zone and some of the inspectors were on board a (governmental) vessel K/V *Andenæs*. The signal appeared to have been given at the ship's arrest, and not prior to that, and there was also no pursuit as such, and not ''hot'' pursuit, in any case. So a number of conditions of hot pursuit were not (proved to be) met.

The Appeals Committee of the Supreme Court considered that the fact that the *Solo* did not actually try to escape, so that the pursuit was not particularly "hot", was not in itself decisive. In this respect, the Court accepted that the police had considered safety aspects when they carried out the pursuit. Other conditions for hot pursuit (remarkably, whether proper notice had been given of the commencement of such pursuit) were not expressly considered in the rulings of the Appeals Committee of the Supreme Court and the lower courts.

Apart from the right of hot pursuit, other justifications for enforcement action to protect oil installations may be available, such as the right to self-defence, and the necessity, but they fall outside the scope of this article.[69]

Lastly, a rhetorical question is whether it is reasonable at all to make the coastal State's jurisdiction to enforce dependent on the location of the potential offender within or outside the safety zone. Such a zonal approach has considerable disadvantages in practice because of the higher risks for all those involved, since action can then only be taken by the coastal authorities in the closest proximity

[69] See, e.g., Kaye (2006-2007) for a discussion of self-defence and necessity as legal bases under international law for the enforcement measures against foreign ships threatening the safety of the offshore installations.

to the platform and after the violation has been committed.

It must, however, be kept in mind that the coastal State's enforcement rights in the EEZ, including the right of hot pursuit, are generally viewed as an exception to the high seas regime and are reserved for special situations warranting exceptional measures. It should generally be the responsibility of the flag State to supervise and ensure compliance by its ships with the rules of the coastal State.

UNCLOS' requirement to take due regard of the coastal State's rights indicates that the flag State should be encouraged (although not positively obliged) to grant consent in cases where timely enforcement by the flag State itself is not possible and the enforcement is likely to exceed Article 60 or Article 111. In cases such as the *Arctic Sunrise*, the coastal State authorities may have had sufficient time to contact the flag State after the direct action was commenced and before they finally took an action vis-à-vis the Greenpeace ship.

2.6 Can the coastal State institute criminal proceedings for direct actions offshore?

The question addressed in this section is whether the coastal State which lawfully detained foreign activists and their ship for a direct action has jurisdiction to institute proceedings and impose penalties for such conduct.[70] The general rule in the law of the sea is that the flag State exercises penal jurisdiction over its ships and their crews.

UNCLOS contains very few provisions expressly regulating non-flag State jurisdiction to institute proceedings to impose penalties. None of these provisions apply directly to infringements of the kind described in this article.[71] Therefore, the question of whether the coastal State may conduct proceedings to impose penalties needs to be examined in light

[70] We assume for the purposes of this discussion that unlawful detention would preclude the jurisdiction to prosecute, cf. Article 16 "Apprehension in Violation of International Law" of the Draft Convention on Jurisdiction with Respect to Crime (American Society of International Law, 1935). This approach is not always followed by the national courts: see, e.g., *US v. Williams* 617 F.2d 1063, 1090 (5th Cir.1980).

[71] E.g., Article 73, 97, 228, 230.

of general rules of international law.

The only provision which sheds some light on the coastal State's jurisdiction to impose penalties is Article 60(2) cited earlier, which grants exclusive jurisdiction to coastal States over offshore installations, without providing for any substantive limitations on such jurisdiction.

In the *Arctic Sunrise*, one of the judges noted in his separate opinion that "criminal investigation and possible prosecution of persons presumed to have violated the laws of a State, in accordance with its procedural and substantive laws, is a normal function of any State and an emanation of its sovereignty, due regard…to the guarantees of the detainee."[72] This position reflects the general view on jurisdiction under international law. However, there may still be a difference between jurisdiction with respect to offences committed on the installations, on the one hand, and in the waters of the EEZ, on the other hand.

It is, in this author's view, fully compatible with the international law in general to attribute penal jurisdiction to coastal States for unlawful conduct undertaken *on* offshore installations. UNCLOS leaves it generally to those States to determine, in their national legislation, the kind of liability – administrative or criminal, or civil - to be applied to violations of the coastal States' rules in the EEZ. The law of the sea does not generally put any limits on the type of sanctions to be applied; the only such limitation relates to the prohibition on applying non-monetary punishment for pollution and fishing violations (without, however, precluding States from applying monetary sanctions following criminal prosecution).[73]

As to the conduct undertaken in the proximity of such installations but not, strictly speaking, *on* them, the analysis would require an assessment of whether there a link exists between the offence and the installations, for example, whether the conduct at sea caused some damage or other negative effects on the installation. One might, however, question whether the objective territorial principle works in the same fashion with

[72] Judge Jesus, para 7(c)(i) of his separate opinion, at www.itlos.org under "Cases". His view on this point is, however, difficult to reconcile with his further argument that all detainees must be released, including those detained for actual boarding of the platform.

[73] Article 230 UNCLOS.

respect to offshore installations which are, after all, not a part of the "territory" of the coastal State. At the same time, precluding the coastal State's jurisdiction to punish any offence committed off the installation would deprive Article 60(2) and 60(4) of any practical meaning. It would be logical to argue that such jurisdiction exists at least with respect to offences threatening the safety of installations.

Article 60(2) may, through the "effects" approach to jurisdiction, give the coastal State jurisdiction over offences committed off the platform, provided they caused negative effects on the coastal State. However, in such cases the effects alleged by the coastal State have to be sufficiently material as to outweigh the concurring jurisdiction of other States. Notably, the flag State (but also the nationality State of the offender) may claim jurisdiction over offences committed in the proximity of installations in the EEZ.

In the *Deep Sea Bergen*, the Supreme Court of Norway examined the application of Article 97 and the general principle of flag State jurisdiction in the criminal proceedings undertaken in respect to a direct action in the Norwegian EEZ.[74] This provision addresses collisions and "any other incident of navigation" concerning a ship on the high seas and assigns penal jurisdiction over the master and the crew to the flag State of the ship (or to the nationality State of these persons).

The direct action in question targeted a mobile rig under towage to a new drilling location by a Norwegian-flagged vessel. The activists approached this towage vessel from the crafts launched from the mother ship, "Greenpeace", and dived in front of it forcing it to slow down and change the direction. Later, more activists arrived and boarded the rig from the crafts launched from "Greenpeace".

The activists and the crafts were subsequently detained by the coastal authorities. Criminal penalties were imposed on some of the activists, while the boats were confiscated. The appeal to the Supreme Court concerned, in particular, the question of whether under the circumstances of the case Norway had criminal jurisdiction under UNCLOS.[75] The

[74] Rt-2002-1271 (text in Norwegian available on LOVDATA).

[75] Norway was already a party to UNCLOS at the time the incident at the Deep Sea

appellants argued that the direct action against the rig under towage was to be viewed as an "incident of navigation" for the purposes of Article 97 which would mean that only the flag State or the nationality State could conduct criminal proceedings.

The Supreme Court examined whether Article 97 constituted the appropriate legal basis for determining the allocation of criminal jurisdiction between Norway and the flag State of "Greenpeace" (the Netherlands). The Court interpreted Article 97 as only regulating "incidents" of navigation of the same type as collisions (i.e. unfortunate and non-intentional accidents) and noted that UNCLOS does not contain any other provisions that would deny (or confirm) Norway's jurisdiction over the present case. The Court did not doubt that (under the law of the sea generally) Norway had criminal jurisdiction as a flag State and could apply necessary measures to protect the towage and the rig and to prevent similar actions from taking place in the future. As this was sufficient to deny the appeal, the Court did not examine whether Norway's jurisdiction could be based on the residual competence over the rig under Part V, including Article 60.[76]

The fact that the flag State's jurisdiction prevails over the coastal State's jurisdiction in a given case does not mean that the infringement of the coastal State's laws will not be investigated by the flag State, possibly resulting in some penalties. Under the SUA Treaty and protocols, States have undertaken to adopt national statutes prohibiting and penalising acts against the safety of navigation, including terrorism and piracy, and make these statutes applicable outside territorial waters.[77] This obligation

Bergen rig took place.

[76] A similar argument is now put forward by Greenpeace in the case of the enforcement by the Spanish authorities near the Canary Islands (October 2014), namely that the safety zone regime does not apply to drilling vessels, so that it was therefore entitled to stage a protest at the exploration site and to hinder the drilling vessel (performing generally the same functions as a rig) from arriving at the site.

[77] The Convention on the Suppression of Unlawful Acts against Safety of Navigation, 1988 (SUA Convention) Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, and 2005 protocols amending the Convention and the Protocol of 1988. The SUA instruments do not provide a self-standing basis for the enforcement jurisdiction of the coastal State,

is held by States who are parties to SUA, irrespective of the capacity in which they act, be it as a coastal State, flag State, the State of nationality etc. That some of the Greenpeace actions may be considered as terrorist attacks or other offences caught under these instruments is not totally excluded, although it is doubtful that all States would agree to such an approach.[78]

However, the reaction of the flag State may not satisfy the coastal State in whose waters the infringement has taken place. UNCLOS contains no general obligation to criminalise a particular conduct and does not contain any instructions to the flag State as to what penalties are to be imposed. Therefore, in cases where the flag State's jurisdiction prevails over the coastal State's jurisdiction it will be up to the flag State to decide whether, and how, to punish the violations committed in the coastal State's EEZ. Should the flag State decide that the direct action in question did not ultimately amount to an unlawful conduct, no action will accordingly be taken by the flag State. The flag State may also have a different view on the type and level of penalties to be applied to the persons involved in an unlawful direct action than the flag State.

Lastly, the flag State may disregard its obligations vis-à-vis the coastal State and not take any measures to punish the perpetrators or to prevent similar acts from taking place in the future. It should be pointed out in this respect that Parts V – VII of UNCLOS do not contain provisions corresponding to those of Article 228 of Part XII (discharge violations), to provide coastal States with a right to refuse to transfer proceedings to the flag State which "has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels." The coastal State (and the flag State, as the case may be) will, however, be entitled to resort to the dispute settlement procedures under UNCLOS if they consider that the opponent party has violated its obligations under UNCLOS.

which remains under the UNCLOS domain.

78 See Elferink (2014), pp 253-254 (on the *Arctic Sunrise*) and David Mead. *The New Law of Peaceful Protest*. Hart Publishing, 2010, p. 239 et seq (more generally on direct actions as terrorism).

3 Settlement of disputes between States in "direct action" cases

3.1 Introduction

In this chapter the discussion focuses on the question of whether disputes arising from "direct actions" against offshore installations can be settled under the dispute settlement mechanism established in UNCLOS. Settlement of disputes concerning the interpretation and application of UNCLOS between States Parties is regulated in Part XV UNCLOS. Part XV contains *inter alia* Section 2, laying down provisions on compulsory procedures, entailing binding decisions for the Parties.

In practice, international litigation between States in disputes arising from the exercise of jurisdiction by coastal States vis-à-vis foreign ships in the EEZ have not been common (apart from cases involving hot pursuit of fishing vessels).[79] This may be explained by the fact that States prefer other, more discreet and diplomatic ways of achieving a settlement and would only use international litigation as a last resort.

The *Arctic Sunrise* is the only case known to this author where the flag State invoked Section 2 provisions and initiated international litigation against the coastal State for excessive enforcement against a direct action offshore. That is why this chapter refers mainly to this case as an example of the issues pertaining to the application of UNCLOS Part XV provisions to disputes involving enforcement in such cases.

Many of the issues raised in the *Arctic Sunrise* are common for all cases settled under Part XV of UNCLOS, for example, the extent of the duty to attempt to find a pre-trial settlement under Section 1, the scope of opt-outs from dispute settlement rules available to State parties or the scope and conditions of provisional measures. These issues can to some extent be clarified by looking at the earlier practice of the ITLOS, the

[79] See List of Cases on the ITLOS website www.itlos.org.

International Court of Justice and other international tribunals.

However, cases involving allegations of the excessive use of enforcement jurisdiction by the coastal State – or, from the coastal State's perspective, violations of rules applicable to offshore installations and the safety zones by the flag State – also raise a number of *sui generis* issues. For example, the scope of the coastal State's jurisdiction over offshore installations under Article 60, and the applicability of Section 2 to disputes arising from the excessive exercise of such jurisdiction, is not yet fully clarified. It is also uncertain whether human rights, in addition to the traditional right of free navigation, can also be protected under Part XV, and Section 2 thereof.

The international tribunal dealing with the *Arctic Sunrise* may greatly contribute to clarifying the international law on these matters. However, the *Arctic Sunrise* case illustrates that UNCLOS dispute settlement procedures may be important to the States for pragmatic, rather than academic, reasons. For example, under Section 2 of Part XV, the parties have the possibility of requesting the competent tribunal to adopt provisional (interim) measures. Such measures can be very important to protect the rights of the parties in the period before the final ruling is given.

In the *Arctic Sunrise* case, it appears to have been of primary importance for the flag State to achieve the release of the ship and especially of its crew from arrest in the Russian Federation. In similar cases, where enforcement did not include the arrest and pre-trial jailing of the Greenpeace activists (even if it did include detention of the ship and criminal liability for the crew), no action has been undertaken by the flag State under Section 2 provisions.

The important point is that Section 2 procedures are not available unconditionally to any State parties to UNCLOS who are wishing to obtain a binding ruling in any of the kind of disputes arising under UNCLOS. To the contrary, a number of conditions and limitations apply. These will be examined in more detail below.

3.2 Some preliminary remarks on the dispute settlement under UNCLOS

Part XV UNCLOS consists of three sections: Section 1 sets out general provisions, including the obligation to settle disputes by peaceful means, Section 2 contains the list of the international courts which may be selected by the State parties to resolve the disputes under this Section and the rules on compulsory procedures entailing binding decisions; and Section 3 provides for certain limitations and exceptions to the Section 2 procedures.[80]

Article 286 UNCLOS provides that: "[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." It is generally sufficient that there has arisen a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (or States, in our case).[81]

The wording of Article 286 suggests that there are three general conditions which must be met for in order for the binding settlement under Section 2 to apply: the dispute must concern the interpretation and application of UNCLOS; the tribunal must have jurisdiction under this section; and the parties must have failed to achieve a solution under the non-binding procedures of Section 1. In addition, the limitations and exceptions set out in Section 3 of Part XV UNCLOS may not apply to the dispute (these are addressed in Section 3.3 below).

The first and second conditions address two distinct, but interrelated, questions of applicable law and jurisdiction.

As a starting point, Article 287(1) UNCLOS provides States with a choice between different international courts which may have jurisdiction

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[80] It is worth emphasising that dispute settlement under Section 2 is not only compulsory but also entails a decision binding on the parties.

[81] See, e.g., *Mavrommatis Palestine Concessions* (Greece v. UK), PCIJ, Series A, No. 2, p 11 (1924). See also Nordquist M.H., Nandan S.N. and Rosenne Sh.(eds), *United Nations Convention on the Law of the Sea 1982. A Commentary*. Volume 5. Martinus Nijhoff Publishers, Dodrecht (1989), pp 18-19.

under Section 2, including the ITLOS, the International Court of Justice or arbitration tribunals (under Annex VII or VIII). If the opponent States do not adopt the same dispute settlement procedure, as happened in the *Arctic Sunrise*, the disputes will be submitted to the Annex VII tribunal.[82] In addition, the ITLOS has been given a special right to prescribe provisional measures in cases where the court or tribunal has not yet been agreed upon or put in place by the parties.[83]

Furthermore, it is necessary to examine whether the dispute in question concerns *UNCLOS* at all, since a dispute unrelated to UNCLOS will logically fall outside the dispute settlement procedures of Part XV. The difficulties will arise in disputes raising complex questions which are not clearly limited to the traditional law of the sea issues.

The *Arctic Sunrise* illustrates this problem, as the flag State has invoked not only UNCLOS violations by the coastal State jurisdiction, but also violations of human rights instruments such as 1966 International Covenant on Civil and Political Rights (ICCPR) and customary human rights.

According to Article 288(1), a tribunal shall have jurisdiction over any dispute concerning the interpretation or application of UNCLOS, which is submitted to it in accordance with Part XV. In principle, the disputes do not have to be limited strictly to the provisions of UNCLOS, since the disputes concerning international agreements "related to the purposes of [UNCLOS]" are also subject to Part XV procedures.[84] It should, in principle, be sufficient that such an agreement between the States relates to some aspect of the law of the sea and provides for submission to any tribunal under article 287 UNCLOS.[85] The court or tribunal will decide whether it has jurisdiction over a given dispute.[86]

In light of the above, it can be concluded that the arbitration tribunal dealing with the merits of the *Arctic Sunrise* case will not have jurisdiction

[82] Article 287(4) and (5).

[83] Article 290(5) is examined in Section 3.4 below.

[84] Article 288 (1) and (2).

[85] Nordquist et al (1989), pp 47-48. An agreement of this kind is, for example, the SUA convention with protocols (cited in fn. 77 above).

[86] Article 288(5).

over aspects of the dispute concerning the interpretation or application of the human rights instruments. To the extent that claims arise directly under other instruments than UNCLOS, the tribunal would not have jurisdiction under Article 288.

Thus, disputes based solely on human rights infringements, including those committed at sea, may not be resolved under the provisions of Part XV. This does not mean that the injured State (or individuals concerned) is deprived of any other international dispute settlement mechanisms which may be available. The point is only that UNCLOS will not be the relevant mechanism for such cases.

However, in the *Arctic Sunrise* case, the dispute on the merits mainly concerns the interpretation and application of UNCLOS. It remains to be seen whether the tribunal will address the merits of the Netherlands' claim concerning infringements of the human rights instruments.

A question arises as to what extent the arbitration tribunal may take account of the human rights in the disputes of the kind which arose in the *Arctic Sunrise*. Article 293(1) of Section 2, dealing with the applicable law, envisages that the tribunal "shall apply [UNCLOS] and other rules of international law *not incompatible* with [it]".

It does not follow clearly from UNCLOS that disputes involving application of the customary law of the sea, or general international law rules related to UNCLOS, but not codified in its provisions, can also be submitted to a settlement under Part XV. In this author's view, this interpretation should not raise any difficulties, as long as the customary rule relied upon by a party to the dispute does not conflict with UNCLOS provisions. It may, however, be of little practical concern for the purposes of Section 2, as only a limited category of disputes can be settled through the procedures laid down therein.[87]

It is more doubtful whether, under Article 293, it would be acceptable to allow an (albeit implied) incorporation into UNCLOS of any other international instrument, not directly mentioned in this provision. Although it may be in line with the dynamic nature of the law of the sea to take account of contemporary challenges to its regime, a line still needs

[87] See Section 3.3 below.

to be drawn between the rules which are related to UNCLOS, on the one hand, and the rules that are irrelevant for the purposes of UNCLOS, on the other hand. The latter may not be considered "applicable law" for the purposes of Article 293 UNCLOS. However, these rules may still be referred to as rules incidental to the interpretation of UNCLOS.[88]

A dispute can only be submitted to the procedures of Section 2 if no settlement has been reached by recourse to conciliation or other procedures laid down in Section 1 of Part XV, i.e. the procedures as agreed upon by the parties (Article 282), an obligation to exchange views (Article 283) and conciliation (Article 284).

Article 281 (reflecting a general rule of international law) provides that the procedures in Part XV only apply where no settlement has been reached by peaceful means chosen by the parties under Article 280 of Section 1. Thus, under Section 1 of Part XV, parties to a dispute are *required* to seek a settlement by peaceful means and to exchange views regarding the settlement before they can proceed to international litigation.[89]

The requirement to resort to Section 1 procedures gives the parties an opportunity to settle their dispute by less drastic means than binding procedures of Section 2. By omitting this step, the parties would not only forego the requirement to seek peaceful settlement of disputes, but would also disregard the principle of the autonomy of the parties which underlies Section 1.[90]

How rigorously does the competent tribunal have to examine whether options of Section 1 have been exhausted by the parties?

In the *Arctic Sunrise*, the ITLOS, acting under Article 290(5), was

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[88] See Order No. 3, para 19, in the *Mox Plant* case where the tribunal draws a clear distinction between the jurisdiction and applicable law under Part XV UNCLOS, agreeing with the defendant's argument on this point, although the tribunal does not elaborate on this (cf. Chapter 4 of the UK Counter-Memorial, p. 97 et seq), available at www.pca-cpa.org. See also Elferink (2014), p. 279 (fn. 169) and Irini Papanicolopulu, «International Judges and the Protection of Human Rights at Sea» at p. 538 in N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, T.M.C. ASSER PRESS, The Hague (2013).

[89] Article 283(1), cf. Article 281. See also Nordquist et al (1989), p. 38.

[90] See also Nordquist et al (1989), p. 38.

only obliged to conduct a *prima facie* examination of this question. The ITLOS was generally satisfied with the exchanges of notes and communications between the parties which had taken place before the submission of the dispute to the tribunal under Section 2.[91]

The dispute was submitted by the plaintiff, the Netherlands, within two weeks after the incident had taken place. Before this submission, the Netherlands sent a formal notice to Russia containing a number of questions to ascertain the factual circumstances of the detention, and attached the request to release the ship and the crew immediately, followed by another notice asking to appoint a reasonable bond for the release and then another notice formally protesting against the detention. The two of the three notices by the Netherlands remained unanswered.

On 1st October 2013, Russia did respond with a statement describing the events and the procedural steps taken with respect to the *Arctic Sunrise* and its crew as well as briefly mentioning the provisions of UNCLOS containing the legal basis for such steps. This statement did not contain any express proposals for solution but was considered by the Netherlands to be sufficient to proceed with the establishment of the arbitration tribunal because the statement showed the "diverging views on the rights and obligations of the Russian Federation as a coastal State in its [EEZ]".[92]

Generally, if the procedure chosen by the parties is no longer likely to lead to a settlement, a party to the dispute may go ahead with the procedures under Section 2.[93] However, it does not appear from these (publicly available) communications between the parties that any further steps were undertaken by either party to settle the dispute under Section 1.

In the *Arctic Sunrise* case, the Netherlands and Russia had not yet chosen any such procedures when the Netherlands submitted the case to Section 2 litigation. According to the publicly available communication between the parties, Russia appeared to suggest resolving the case by

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91 Order, paras 73-76.

92 Note of 3rd October 2013. See communication between the two States contained in the case materials at www.itlos.org or www.pca-cpa.org.

93 Nordquist et al (1989), p. 23 (referring to the *North Continental Shelf* cases).

negotiation, whereas the Netherlands asked for release of the ship and its crew immediately, in exchange for a bond to be determined by Russia. It may, therefore, be questioned whether any real negotiations had taken place at all before the Netherlands submitted the dispute under Section 2 procedures; not least since the release as an interim measure appears to have been unilaterally determined by the flag State.[94]

In Judge Anderson's ad hoc view, expressed in his declaration, the condition was *prima facie* satisfied, as the exchange of notes had taken place between the parties. This was, in his view, sufficient, because "[t]he main purpose underlying article 283 [i.e. obligation to exchange views – A.P.] is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it".[95]

It remains to be seen whether or not the arbitration tribunal set up under Annex VII will concur with the ITLOS's view that this condition was met in the present dispute.[96]

It should also be noted that the objection by a State to the jurisdiction of an international tribunal to hear the case or to other procedural or substantive aspects of the case does not justify a refusal to participate in the proceedings. UNCLOS also provides for safeguards that can be used by the defendant State to ensure that no abuse of the legal process takes place.[97] In the *Arctic Sunrise* case Russia has been extensively criticised for its refusal to participate in the proceedings at the ITLOS and the arbitration tribunal.[98] Non-appearance in itself does not, in any case, preclude the tribunal from giving the ruling on the merits and will only

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[94] See the dissenting opinion of the Judge Golitsyn where he criticises the Order on several points, including the one discussed herein.

[95] Para 3 of the declaration by ad hoc judge Anderson. See also para 60 of ITLOS Order of 3 December 2001 in Case No. 10 *The Mox Plant Case (Ireland v. United Kingdom)*, Provisional measures, available at www.itlos.org under "Cases".

[96] At the time of writing, the arbitration tribunal has only given an award on jurisdiction, deciding that the dispute between the Netherlands and Russia falls under Section 2 procedures. See Award on Jurisdiction of 26 November 2014 in the *Arctic Sunrise Arbitration*, available at www.pca-cpa.org under "Cases".

[97] Article 294.

[98] See, e.g., separate opinions of Judges Wolfrum and Kelly and Judge Paik, at www.itlos.org under "Cases".

deprive the defendant State of an opportunity to present its views on the dispute, including the points discussed in this section.

3.3 Can "direct action" cases be settled under compulsory dispute settlement procedures?

3.3.1 Overview

Apart from the requirements discussed above, Section 3 of Part XV UNCLOS narrows down the scope of application of Section 2 by limiting the legal issues which fall under the compulsory dispute settlement (Article 297) and envisaging opt-out rules allowing States to adopt reservations (of a limited scope) to the application of Section 2 (Article 298). Thus, not every claim based on the infringement of UNCLOS will benefit from the Section 2 procedures, although dispute settlement rules of Section 1 will still apply.

By contrast to Article 297, which applies automatically, States need to adopt a declaration to give effect to opt-out provisions of Article 298.

The discussion below examines whether the disputes arising from the direct actions against offshore installations fall under Article 297 provisions and, if so, whether States parties to UNCLOS may adopt reservations under Article 298 to preclude settlement of the dispute under Section 2.

3.3.2 What disputes fall under the compulsory dispute settlement mechanism of UNCLOS?

Relevant parts of Article 297 specify that:

1) Disputes concerning the interpretation or application of this Convention *with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention* shall be subject to the procedures provided for in Section 2 in the following cases:
(a) when it is alleged that a coastal State has acted *in contravention of the provisions of this Convention with regard to the freedoms and rights of navigation*, overflight or the laying of submarine cables

> and pipelines, or with regard to other internationally lawful uses of the sea specified in article 58 [rights and duties of other States in EEZ – A.P.]; or
> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted *in contravention of this Convention or of laws or regulations adopted by the coastal State* in conformity with this Convention and other rules of international law not incompatible with this Convention; or […] (author's italics).

Article 297(2) and 297(3) contain further limitations which apply, respectively, to disputes concerning the interpretation and application of UNCLOS with respect to marine scientific research and fisheries. Although these parts of Article 297 are not directly relevant for this article and are not reproduced here, they should be kept in mind for the purposes of further discussion of the opt-out provisions laid down in Article 298.

Article 297(1)(a) distinguishes between disputes arising from allegations that the coastal State has acted in contravention of the provisions of UNCLOS with regard to the freedoms and rights of navigation etc., or with regard to other internationally lawful uses of the sea specified in Article 58. By virtue of the alternative wording "or", it is sufficient to establish that one of the rights of other States was infringed.

In the *Arctic Sunrise*, the Netherlands relies *inter alia* on Articles 56(2), 58, 87(1)(a), and 110(1) UNCLOS, whereas the Russian position (in the absence of any formal statements on this point in the course of the on-going international litigation) appears to be based on the provisions of Articles 56, 60 and 111 UNCLOS. The two States hold opposing positions on the interpretation and application of the rules governing jurisdiction of the coastal State and the rights of the flag State in the EEZ. The essential difference also lies in the weight attributed by the two parties to the freedom of navigation, on the one hand, and the sovereign rights and jurisdiction of the coastal State over its offshore installations, on the other hand.

Article 297(1)(a) does not expressly mention disputes arising from the exercise by the coastal State of jurisdiction under Article 60. However,

provisions of Article 297 reflect the understanding that a close link exists between the coastal State's sovereign rights and jurisdiction over its EEZ and the flag State's right to freedom of navigation. The interpretation and application of Article 60 is inextricably linked to the provisions on freedom of navigation and other lawful uses of the sea and it would not be logical in the context of UNCLOS as a whole to exclude disputes involving claims based on Article 60 from the scope of Article 297. A disproportionate exercise of any of these rights falls, therefore, under Section 2 procedures.[99]

Article 297(1)(b) grants the coastal State the right to take proceedings against the flag State for violations in its EEZ. A general wording of this paragraph also suggests that rules applicable to the offshore installations in the EEZ and continental shelf are included in this provision. Narrowing down the scope of Article 297(1)(a), in such a way as to preclude bringing corresponding claims on the part of the flag State against the coastal State, would result in a major imbalance in the rights of States under Section 2, a result hardly intended by this provision.

In this author's view, the intention of Article 297 is rather to exclude those disputes regarding the exercise of sovereign rights and jurisdiction by States which do not relate to the exercise of freedom of navigation or to the other rights not expressly included in Article 297's list.

It should also be pointed out that Article 297 does not require the plaintiff State to prove *convincingly* that the defendant State has violated relevant UNCLOS provisions; it is sufficient that "it is alleged" that a State has acted in contravention of these provisions.

Can claims be brought concerning allegations that, by unlawfully restricting the freedom of navigation, the coastal State has also committed human rights violations, as submitted by the Netherlands in the *Arctic Sunrise*? Actions undertaken by the coastal State against environmental protests at sea may very well amount to human rights infringements,

[99] See discussion in Section 2.3 above. See also Tullio Treves, «The jurisdiction of the international tribunal for the law of the sea», in Chandrasekhara Rao and Rahmatullah Khan (eds). *The International Tribunal for the Law of the Sea: Law and Practice.* Kluwer Law International, the Hague (2001), at p.120.

which the State must be responsible for under the relevant international law rules.

The wording of Article 297 UNCLOS does not provide for any extension of the list of the disputes envisaged therein. That is because Article 297 represents a compromise between the States parties to UNCLOS: coastal States accept the compulsory provisions of Section 2 in exchange for excluding certain disputes arising out of the exercise of sovereignty by coastal States from this Section. Article 297 provides safeguards against the abuse of power by coastal States but also against the abuse of legal process by other States.[100] This means that Article 297 should not be construed too broadly, so that claims based on provisions clearly outside this provision do not unjustifiably benefit from Section 2 procedures.

A conclusion that can be drawn from reading Article 297 in the context of Part XV and UNCLOS more generally is that disputes concerning issues which do not have anything to do with the exercise by the coastal State of its sovereign rights or jurisdiction under UNCLOS are not, in any case, caught by Article 297. Thus, in this author's view, the dispute settlement procedures under Section 2 (or indeed Section 1, apart from the peaceful settlement following from customary international law) will not apply to disputes based exclusively or predominantly on allegations of the human rights violations by the coastal State. This conclusion is also in line with the limits placed on the court jurisdiction and applicable law in the dispute settlement procedures of Section 2.

3.3.3 Reservations against the compulsory dispute settlement: the example of the *Arctic Sunrise*

By virtue of the opt-out provisions in Article 298, States may declare that they do not accept Section 2 procedures for disputes generally covered by Article 297, albeit only with respect to certain categories of disputes listed in this provision. For the purposes of this article, the relevant exception is laid down in Article 298(1)(b), which permits States to opt

[100] See Nordquist et al (1989), p. 85 et seq: the history of negotiations of this provision illustrate that such disputes as those concerning the territorial integrity of States were not to be included in the procedures of Section 2.

out from Section 2 with respect to "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3 [i.e. marine scientific research and fisheries – A.P.]".

One of the central points of controversy in the Arctic Sunrise (and the only point on which the defendant actually made a statement to the tribunal) was caused by the reservation by the Russian Federation against Section 2 procedures. The declaration of 12 March 1997 adopted at the ratification of UNCLOS by Russia contains an opt-out clause which inter alia applies to disputes concerning "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".

The Russian Federation argues that the 1997 declaration excludes the present dispute from the dispute settlement procedures of Section 2. The position of the Russian Federation on this question has until now remained unchanged.[101] At the time of writing, the Tribunal set up under Annex VII has ruled that Section 2 applies to the dispute in the Arctic Sunrise and that the 1997 declaration does not exclude this dispute from its jurisdiction, thus confirming the prima facie assessment by the ITLOS.[102]

The wording of the 1997 declaration cited above differs from the wording of the corresponding provisions in Article 298, as the declaration omits the reference to Article 297(2) and (3) included at the end of the relevant sentence in Article 298. Thus the wording of the 1997 declaration appears to extend the scope of reservation beyond what is expressly provided for in Article 298, because it excludes compulsory dispute settlement in all cases "concerning law enforcement activities in regard to exercise of sovereign rights or jurisdiction" under UNCLOS, and not only disputes relating to fisheries or marine scientific research.

It is necessary to examine thoroughly the wording of the relevant UNCLOS provisions as well as the 1997 declaration, in order to establish

[101] According to the *note verbale* of 27 February 2014, in which the Russian Federation confirmed its earlier refusal to accept the arbitration procedure: http://www.pca-cpa.org under "Cases".

[102] Award on Jurisdiction of 26 November 2014 in the *Arctic Sunrise Arbitration* (fn. 11 above).

the scope of the opt–out permitted under Article 298, whether there exists a conflict between Article 298 and the 1997 declaration, whether such conflict can be reconciled, and what the legal implications are if it cannot be reconciled.

The only possible way to reconcile the wording of Article 298(1)(b) with the 1997 declaration is by linking the reference to Article 297(2) and (3) solely to the word "jurisdiction", but not to the "sovereign rights". Under this approach, disputes concerning the exercise of jurisdiction would be limited solely to the fisheries and marine research, whereas all law enforcement activities in the exercise of sovereign rights would be included into the opt-out right. Given that the concepts of sovereign rights and jurisdiction in international law are not identical (albeit related) and could, in principle, be subject to different sets of rules, such a reading may deserve a closer look.

In this author's view, such a reading of Article 298 is not correct. First, disputes concerning law enforcement activities in regard to the exercise of sovereign rights would, on under this approach, enjoy a much broader opt-out rule than the corresponding disputes in regard to the exercise of jurisdiction. Such an interpretation would also result in practically all law enforcement activities related to the exercise of sovereign rights being excluded from Section 2 procedures, a result clearly not intended by UNCLOS Part XV.[103]

Second, such a reading of Article 298 provision is rebutted by the formulation of the respective provision in the Russian version of UNCLOS, relevant in the context of the Arctic Sunrise case.[104] A grammatical inspection of the sentence structure of the Russian Article 298(1)(b) clearly shows that the limitations of Articles 297(2) and (3) apply to disputes with regard to both sovereign rights and jurisdiction (the use of "or" in both English and Russian versions means that it is sufficient

[103] See paras 73-76 of the Award on Jurisdiction in the *Arctic Sunrise Arbitration*, above. See also Natalie Klein. *Dispute Settlement in the UN Convention on the Law of the Sea*. Cambridge University Press, 2005, p. 308.

[104] Russian is one of the authentic languages of UNCLOS (Art. 320). All authentic language versions of UNCLOS are available at http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm .

that either sovereign rights or jurisdiction are exercised). The use of commas in the Russian text of Article 298(1)(b) UNCLOS to single out the part of the sentence "concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction" between the words "disputes" and "which" (in plural) shows that all such disputes are to be related to Article 297(2) or 297(3).

Having concluded that Article 298(1)(b) must be read as linking Article 297(2) and (3) to disputes arising from the enforcement of either sovereign rights or jurisdiction, we are then faced with further issues.

First, is the 1997 declaration to be construed, as the Russian Federation submits, as really seeking to exclude a broader range of disputes from Section 2 of Part XV UNCLOS than are permitted under Article 298? Or is the omission of the reference to Article 297 merely incidental and to be ignored?

Second, if the 1997 declaration does intend to broaden the scope of opt-out rule of Article 298, how can such a conflict to be resolved?

A purely literal reading of the 1997 declaration may support the position taken by the Russian Federation on the meaning which it intended to give to this text at the time the declaration was adopted, but this is still not conclusive, because other interpretation factors point in different directions.

By comparison, the 1982 declaration of the Soviet Union did not contain any reference to the "exercise of sovereign rights or jurisdiction" and did not go beyond the wording of the corresponding provision in Article 298(1)(b) UNCLOS. On the one hand, comparison with the 1982 declaration shows that the intent behind the 1997 declaration may have been to broaden the opt-out provision, by covering more types of disputes than before. On the other hand, the 1997 declaration contains an express reference to Article 298 ("in accordance with Article 298"), which supports the interpretation leading to the result compatible with the formulations in Article 298. Seen from this perspective, an omission of a part of Article 298(1)(b) from the 1997 declaration could be merely accidental and unimportant.

The interpretation maintained by the Russian Federation after the

dispute has arisen is in any case not relevant.[105] In addition, given that the declaration is a part of an international treaty, it is not sufficient to rely on the subjective intent of the legislator (which is in any case uncertain), as the interpretation here aims to find out the intention "in the sense of the true meaning of the treaty rather than the intention of the parties distinct from it".[106]

In the Arctic Sunrise, the ITLOS does not shed any light on this question as the Order merely says that the declaration made by the Russian Federation with respect to law enforcement activities under art 298(1)(b) prima facie applies only to disputes excluded from the jurisdiction of a court or tribunal under Article 297(2), (3) UNCLOS. No further reasons are given for this conclusion. [107] As to the previous practice of the parties on the application of UNCLOS (in this case, by Russia), it is non-existent in cases similar to the Arctic Sunrise. However, the arbitration tribunal deals with this question in more detail. [108]

A purely grammatical interpretation of the Russian reservation would lead to results incompatible with the general principles of treaty interpretation in international law, as codified in the 1980 Vienna Convention on the Law of Treaties. Article 31(1) of the Convention provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The treaty would therefore, for the purposes of this provision, also encompass declarations and reservations made by the parties at the time of adoption of the treaty.[109]

A contextual interpretation of UNCLOS provisions would not correspond to the verbatim interpretation/reading of the 1997 declaration,

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[105] Oliver Dörr and Kirsten Schmalenbach (eds). *Vienna Convention on the Law of Treaties: a Commentary.* Heidelberg, Springer, 2012, p. 523.

[106] Dörr and Schmalenbach (2012), pp 522-523.

[107] para 45 of the Order.

[108] Award on Jurisdiction in the *Arctic Sunrise Arbitration* (fn. 102 above), para 69 et seq.

[109] Article 31(2)(b) of the Vienna Convention on the Law of Treaties referring to any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

especially taking into account Articles 309 and 310 UNCLOS, as examined in more detail further below. Such an understanding would also be incompatible with the object and purpose of the dispute settlement provisions in Section 2, which aims to achieve an effective law of the sea dispute resolution between States in exchange for certain limitations on the application of these provisions.

Thus, since no sources point in the opposite direction, the conclusion must be that the interpretation of the 1997 declaration which is compatible with Article 298 is the correct one, and that the declaration does not seek to deviate from Article 298.[110] The arbitration tribunal also did not find it decisive that the wording of the declaration did not "precisely track the language of Article 298(1)(b)" and concluded that the declaration could not create an exclusion than was wider than what is permitted under this provision.[111]

If the opposite were true, and there were a conflict between the 1997 declaration and the rules governing dispute settlement in Section 2 of Part XV UNCLOS, the question would arise as to how to deal with this conflict.

As a starting point, Article 309 UNCLOS does not allow for any reservations or exceptions, unless permitted by other articles of UNCLOS, e.g. Article 298. Opt-out provisions of Article 298 are formulated in considerable detail, suggesting that the interpretation of this provision should not permit deviations beyond its wording.[112]

In addition, Article 310 clarifies that a State may make "declarations or statements, however phrased or named, with a view, inter alia, to the harmonisation of its laws and regulations with the provisions of this Convention". Article 310 does not, however, permit declarations or statements which "purport to exclude or to modify the legal effect of the

[110] For the purposes of the Russian internal law, such conclusion is also likely to be well-founded: see the Federal Law 15.07.1995 N 101-ФЗ "On the International Treaties of the Russian Federation", Arts 25 and 31.

[111] Award on Jurisdiction in the *Arctic Sunrise Arbitration* (fn. 96 above), para. 72.

[112] The tribunal also points out that the 1997 declaration must be interpreted with due regard to the relevant provisions of UNCLOS, Arts 309 and 310: see Award on Jurisdiction in the *Arctic Sunrise Arbitration* (fn. 96 above), para 70.

provisions of this Convention in their application to that State." [113] Although UNCLOS is silent on the legal effect of incompatible reservations, it is reasonable to assume that such reservations are to be considered null.[114]

The absence of any objections to the 1997 declaration at the time of its adoption also cannot be invoked in the case of UNCLOS, since it specifically spells out the restrictions on the reservations which can be made.[115] In this author's view, it would be incompatible with the general principles of the law of treaties, such as pacta sun servanda and good faith, to avoid obligations under UNCLOS in such a way in the present case.

In principle, Articles 309 and 310 do not seek to preclude any other interpretation of Article 298 than a purely textual one. The problem in the case of the Arctic Sunrise is that the defendant's interpretation goes way beyond what the wording of Article 298 permits and excludes virtually all disputes concerning the exercise of the coastal State's enforcement jurisdiction in its EEZ from judicial settlement under Section 2. Such a result is likely to lead to a direct contradiction between the declaration and Articles 309 and 310, because the former would indeed exclude or modify the legal effect of the provisions of this Convention in their application to a State.[116] It would also contradict Russia's own declaration of 1997, where it condemned any unilateral statements by State parties which attempted to exclude or modify the legal effect of UNCLOS provisions.

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[113] See also arguments in paras 43-44 of the Order in the *Arctic Sunrise*-case. See also Article 19 of the Vienna Convention on the Law of Treaties which precludes adopting of reservations which are not provided for in the treaty or which are incompatible with the object and purpose of the treaty.

[114] Dörr and Schmalenbach (2012).

[115] See Article 20(4) of the Vienna Convention which opens for such an argument in principle. No objections known to the author were made to the Russian declaration in question. However, this point was not raised by either party in the *Arctic Sunrise*.

[116] Wolfrum and Kelly, para 10 of their separate opinion (supported in other separate opinions). Dissenting opinions also did not object expressly to the ITLOS majority interpretation of Article 298.

At the same time, even if Section 2 does not apply to a dispute, the parties are still obliged to follow the provisions on peaceful settlement and non-binding decisions in Section 1. However, in the case of the Russian declaration invoked in the *Arctic Sunrise*, the resulting exception from Section 2 settlements would be so broad that it would preclude international litigation with binding outcomes for Russia in the vast category of cases, so that even availability of Section 1 procedures would probably not prevent the effect of excluding or modifying Part XV provisions.

In any case, in the *Arctic Sunrise*, the flag State would not have been satisfied with Section 1 procedures, since they do not envisage the possibility of seeking the provisional measures examined below. [117]

3.4 Release of ships and activists arrested for direct actions offshore

3.4.1 Overview

In any litigation, it may be necessary to ensure that the conduct of the opponent State or other circumstances do not result in an undue deterioration of parties' rights before the final ruling. Thus, in the *Arctic Sunrise*, the flag State considered it necessary to obtain release of the ship and its crew before the dispute was settled, in order to prevent deterioration of the ship's condition and to help free the activists from their arrest in Russia.

As mentioned earlier, the availability of provisional measures that are binding on the parties is one of the advantages of dispute settlement under Section 2. The procedures for the prompt release of vessels and crews are laid down in Article 292 UNCLOS, which deals specifically

[117] In many cases, Section 1 procedures may still be a more effective way of resolving a dispute. This author doubts whether resorting to Section 2 procedures in the *Arctic Sunrise* case has indeed speeded up resolution of the dispute or release of the ship and its crew for the plaintiff State. The ship has been released nearly a year after she was detained and the crew left the territory of the Russian Federation after more than two months under arrest.

with cases of detention of foreign vessels and crews by coastal States. In addition, Article 290 sets out rules on the provisional measures available to the parties to a dispute under Section 2.

The *Arctic Sunrise* case does not, however, involve a request for prompt release submitted under Article 292 UNCLOS, but instead a request for provisional measures under Article 290 (albeit in the shape of the prompt release of the vessel and the crew). Although it would probably have been easier for the Netherlands to rely on Article 292, in this case it was precluded from invoking this provision because Article 292 only applies to detentions for violations of rules on fisheries and ship-source pollution, clearly not the case with Arctic Sunrise.[118]

Earlier practice at the ITLOS on Article 290 did not address situations such as the *Arctic Sunrise*, so this case presented the ITLOS with an opportunity to shed more light on the scope and contents of the provisional measures which may be available in "direct action" cases. In particular, it showed that the release of the ship and its crew may, in principle, be prescribed under Article 290, in cases where Article 292 did not apply.

Article 290 does not specify the type of provisional measures which may be prescribed. At the same time, Article 290 empowers the competent tribunal to 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."

Under Article 290(5), the ITLOS holds a corresponding right with respect to the prescription, modification or revocation of such measures in cases where the competent tribunal has not yet been established. This competence of the ITLOS is subject to Article 290(1) constraints on the

[118] More precisely, Article 292 catches cases in which it is alleged that the detaining State has not complied with the UNCLOS provisions for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security. Such provisions are envisaged in Article 73 (detention for violations of rules applicable to living resources of EEZ) and Article 226 (discharge violations), excluding therefore detention for violations of other rules such as those relating to off-shore installations.

type and objective of the measures to be prescribed and, in addition, to the conditions laid down in Article 290(5). The ITLOS must examine whether the forthcoming tribunal will *prima facie* have jurisdiction over the dispute and whether the urgency of the situation requires the prescription of provisional measures (i.e. before the competent tribunal is set up).

It should be pointed out that, by contrast to the question of jurisdiction, the ITLOS is not asked to apply a *prima facie* standard when deciding on the type of provisional measures to be prescribed and on the urgency of the situation. The ITLOS must take a stand-alone decision on these matters, examining any requests with the same level of detail as would be applied by the tribunal competent under Article 290(1).[119]

On 22 November 2013, the ITLOS ordered the Russian Federation to immediately release the *Arctic Sunrise* and all persons on board from detention and ensure that both the vessel and the personnel were allowed to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The release was to be made conditional upon the posting of a bond or other financial security in the amount of 3,600,000 euros by the Netherlands, in the form of a bank guarantee.

The Order does not fully illuminate the Tribunal's view of the legal questions raised by this case. The discussion below examines in more detail the legal issues arising under Article 290 in the "direct action" cases.

3.4.2 Is release an appropriate provisional measure in "direct action" disputes?

The question in the *Arctic Sunrise* was whether the release of the ship and its crew were entirely covered by Article 290, i.e. that the particular case fell outside Article 292.

Article 290 does not list any specific measures that may be prescribed. As a starting point, Article 290 expressly provides for a possibility of applying "any" provisional measures, on condition that these are appropriate to preserve the rights of the parties.

[119] However, the competent tribunal, once constituted, will be free to modify, revoke or affirm the provisional measures prescribed under Article 290(5).

The existence of a separate provision on prompt release in Article 292 UNCLOS may indicate that tribunals are precluded from granting release in cases other than those falling under this provision. Article 292 aims to give a practical effect to the substantive provisions of UNCLOS protecting foreign vessels and crews against prolonged detentions in the coastal State.[120] Since no substantive right to claim a prompt release is envisaged under Article 60 (by contrast to Article 73 or 226), it may be argued that extending such a right to Article 290 would result in excessive encroachment upon coastal States' jurisdiction in the EEZ.

In this author's view, such *a priori* narrowing down of the measures available under Article 290 is unreasonable in light of its wording, which allows for *any* measures to the extent they are appropriate. The wording of Article 290(1) makes it clear that the appropriateness of measures is to be assessed from the point of view of the parties' rights that need to be preserved.

A sufficient safeguard against an excessive imbalance in favour of the flag State is provided by the requirement that provisional measures are "appropriate" in the circumstances of the case. Thus, the tribunal dealing with this question is under an obligation to examine whether or not the release would be appropriate for preserving the rights of the coastal (detaining) State, or if some other measure should be chosen instead.

In the *Arctic Sunrise*, the outcome of the proceedings at the ITLOS confirms a view, expressed in the academic literature, that the release of the vessel and its crew is not, in principle, precluded in cases where the release is requested as a provisional measure under Article 290 UNCLOS.[121] Moreover, the order for the release of the Greenpeace ship and its crew was conditional on the posting of a bond by the flag State. The decision was, therefore, in principle, the same as it would have been in the prompt release proceedings under Article 292. However, the ITLOS reasoning is so brief that it is impossible to say with any certainty what

[120] Nordquist et al (1989), p. 67. It should, however, be pointed out that the preparatory materials to Article 290 and 292 do not contain any indication that the States' intention was to preclude release under Article 290.

[121] See, e.g., Anne-Katrin Escher, "ITLOS: Release of Vessels and Crews", 3 *Law& Prac. Int'l Cts&Tribunals* 342 (2004) and Elferink (2014), p. 286.

kind of arguments lie behind the Tribunal's choice of the particular provisional measures, other than that the flag State specifically requested the release.

The criterion for "appropriateness" is that the tribunal dealing with the request examines the facts and the substance of the case, thereby going much further than a mere *prima facie* examination, while at the same time not going so far as to consider the case on its merits. Since the provisional measures must, by their nature and purpose, relate to the circumstances peculiar to the case in hand, the tribunal must inevitably consider the substantive issues of the dispute, in order to take measures truly preserving the rights of the parties.[122]

Before deciding what measures would be appropriate to preserve the rights of the parties, it is necessary to determine what rights, and whose rights, are protected by the provisional measures of Article 290.

By its express wording, Article 290 protects the respective rights of the parties to the dispute. The "parties" in our case would be the States (parties to UNCLOS). Apparently, the tribunal must consider the rights of both parties, including in cases of default of appearance by either of them. However, by contrast to the proceedings on the merits, the duty to establish that a claim is well founded in law and fact is not expressly provided for in connection with the request for provisional measures.[123]

The rights of States who are not parties to UNCLOS, as well as rights of individuals or organisations such as Greenpeace International in the case of the *Arctic Sunrise*, will not be taken into consideration on a stand-alone basis, since the dispute settlement under Part XV of UNCLOS is only open to such parties where specifically provided for in UNCLOS.[124]

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[122] See the Separate opinion of Judge Jesus, para 15. See also *US Diplomatic Staff in Tehran v Iran*, ICJ (1979), *ARA Libertad (Argentina v Ghana)*, ITLOS, Order of 15 December 2012.

[123] See Article 28 of the Statute of the ITLOS and Article 9 of Annex VII.

[124] See Article 291 UNCLOS. The right to intervene is envisaged only for States parties to UNCLOS (Article 31 of Annex VI UNCLOS containing the Statute of the ITLOS). Not even *amicus curiae* submissions by the Greenpeace were permitted by the ITLOS and the Annex VII Tribunal in the *Arctic Sunrise*. See Procedural Order nr. 3 of 8 October 2014 denying Greenpeace's petition to file an *amicus curiae* submission

Although in "direct action" cases it is the flag State and the coastal State which would be the central actors in the dispute, Article 290 does not, in principle, limit the definition of the "parties" to the coastal State and the flag State.[125] Since other States may, in principle, also be affected by the excessive enforcement measures of the coastal State (for example, the nationality State of the crew), there is a possibility that these States will also bring up proceedings under Section 2 and, accordingly, file a request for provisional measures under Article 290.

The wording of Article 290 suggests that it excludes the possibility for the States parties to the dispute to request measures aimed at preserving rights of *third party* States, i.e. States who are *not* parties to the dispute in question. Thus, even if a nationality State (for example) considers that its rights have been compromised by the coastal State action, the flag State may not act on its behalf.

On this basis, it can also be concluded that the rights of individuals, such as crew members, or organisations such as Greenpeace, are not directly protected by the provisional measures prescribed under Article 290. However, some of these rights may still be taken into account by the tribunal in the proceedings on the merits, as the discussion above shows.

Since Article 290 does not contain a list with specific rights, it has to be interpreted to determine what rights are protected under this provision. Reading Article 290 in conjunction with other UNCLOS provisions, it becomes clear that these rights include, at a minimum, the rights expressly granted by the relevant provisions of UNCLOS (or related agreements).

Thus, in the context of the *Arctic Sunrise*, the right of flag States to the freedoms of the high seas is absolutely relevant for the purposes of Article 290. The term "crew" is logically connected to the ship's ability to navigate and consequently to avail itself of the freedom of navigation. It is more doubtful whether activists or other persons on-board who do not perform any navigation-related functions on the ship should be

"addressing the legal issues relating to international human rights law which may arise in the proceeding". Available at www.pca-cpa.org (under "Cases").

125 No such limitation is envisaged in Article 297 as well.

considered as "crew" for the purposes of this discussion. It can, however, be argued that the right to free navigation should apply to both the ship and its crew, including the captain (a ship as a unit).[126]

As to the rights of the coastal State, these should include the rights granted under Parts V or VI of UNCLOS, such as the right to the resources of the EEZ and continental shelf and the right to exercise jurisdiction in a way compatible with the relevant provisions of UNCLOS. It is reasonable to assume that the rights to detain foreign vessels and to institute penal proceedings are protected under Article 290, to the extent they are compatible with UNCLOS.

The question remains as to whether rights not expressly mentioned in Article 58 and other relevant UNCLOS provisions are included in Article 290; notably, human rights such as freedom of expression or the right to liberty relied upon by the Netherlands in its request for provisional measures in the *Arctic Sunrise*.

A narrow interpretation suggests that only those rights expressly covered by UNCLOS are protected by the provisional measures in Article 290. If read strictly in conjunction with Articles 288 and 293 examined earlier in this Chapter, it may be doubtful whether human rights would be protected under Article 290.

A liberal interpretation of Article 290 may, however, be supported by the need to take account of the developments in the law of the sea and the international law generally. The dynamic nature of the law of the sea needs to be reflected in the interpretation and application of the dispute settlement provisions of Part XV, including Article 290, so that creating an exhaustive list of all the rights to be covered by (or excluded from) Article 290 is unreasonable. In addition, the prescription of the provisional measures under Article 290 does not encroach upon the tribunal's jurisdiction to resolve the case on the merits, but is instead aimed at protecting of the rights of the parties before the ruling on the merits has been issued. Thus, the tribunal does not risk directly exceeding the limits

[126] See para 18 et seq of the separate opinion by Judge Jesus (ITLOS). See also Escher (2004), p. 280, who argues that the term "crew" applies to all members of the crew, irrespective of their position on board.

imposed by UNCLOS with respect to the jurisdiction and the applicable law.

Having determined generally the spectrum of rights relevant in the particular case, the tribunal acting under Article 290 must instead try to achieve a proper *balance* between the respective, and probably conflicting, rights of the parties. The complexity of such an exercise is well illustrated by the case of the *Arctic Sunrise*.

Since parties to a dispute will normally have opposite interests, it is unlikely that a tribunal will be able to tender to both parties' interests to a full extent. Thus, in order to preserve the Netherlands' right to free navigation (including the proper condition of the ship and the crew) and to take account of the relevant human rights, the release of the ship and its crew would appear the most suitable measure. Russia's rights, to the contrary, would be linked to the need to investigate the incident, to punish the offenders and to prevent similar violations from taking place in the future, thus justifying the continued detention of the ship and especially of its crew. The fact that the tribunal places greater weight on the rights of one State does not directly threaten the rights of the opponent State; it is only when placing too much weight on the former that an unfair imbalance may result.

In the *Arctic Sunrise*, the ITLOS did not explain what weight, if any, it assigned to the human rights invoked by the Netherlands.[127]

The ITLOS may also have taken into account the right of the coastal State to investigate the case and to conduct judicial proceedings, including criminal proceedings. This is indicated by the fact that the Netherlands' claim to order Russia to stop all national judicial proceedings (in addition to the release) was not expressly granted by the ITLOS.

Since the Tribunal did not specify its reasons for ignoring this part of the Netherlands' claim, it is unclear what weight it actually attributed to Russia's right to pursue national proceedings against the *Arctic Sunrise* and its crew. Thus, the order to release both the ship and its crew immediately, albeit in exchange for financial security, would weaken the coastal State's opportunity to perform the investigation and finalise

[127] See, however, separate joint opinion of Judges Wolfrum and Kelly, para 13.

proceedings in practice. This is because the release of the detainees may compromise the very purpose of the investigation and criminal proceedings, unless it is certain that the accused would return to the prosecuting State.

Cases such as the *Arctic Sunrise* may involve imprisonment terms which, under the applicable domestic law, may not be convertible into a monetary penalty. Therefore, an early release upon posting of a bond would hinder the carrying out of criminal investigation and prosecution by authorities of the detaining State, unlike Article 292 – cases where only monetary penalties may be imposed by the coastal State anyway (Articles 73 and 230 UNCLOS). [128]

It could be argued that the conditions of release in cases where non-monetary penalties could be applied by the coastal State must ensure that the offenders will return (or will be delivered to) the prosecuting State, insomuch as the international tribunal settling the dispute on the merits decides in favour of the detaining State. The release would then safeguard the rights of both parties; both the coastal State and the flag State, the latter by ensuring that the ship owner, operator, other interested persons and crew do not suffer damages and hardships from prolonged periods of detention pending trial.[129]

In this respect, human rights could provide a useful framework for the balancing exercise without excessively encroaching upon the "traditional" law-of-the-sea rights. Even if the coastal State has the right to conduct the proceedings and impose criminal penalties, the tribunal may still adjust the provisional measure to take into account the human rights of the crew. Although human rights *per se* do not render irrelevant the coastal state's jurisdiction under the law of the sea to conduct judicial proceedings, such rights may justify certain adjustments to the manner in which this jurisdiction is exercised.

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[128] See separate opinion of Judge Jesus. See also dissenting opinion by Judge Kulyk who criticised the prescription of a bond in the form of a bank guarantee to the Annex VII tribunal was criticised as confusing these two separate objectives – to obtain release, on the one hand, and to guarantee the implementation of the future decision of the Annex VII tribunal in the part of possible payment to the Russian Federation.

[129] See dissenting opinion by Judge Kulyk, para 13.

For example, the activists do not necessarily have to be kept in pre-trial detention, but less restrictive measures may be imposed which would secure their appearance before the investigators and the court. Of course, it is not in general excluded that a bond would be sufficient to achieve this end. In the *Arctic Sunrise*, it would, however, be difficult for the flag State to guarantee the return of activists who were nationals of different States, unless they were detained in the Netherlands or their respective States of nationality until the ruling on the merits is issued by the tribunal.[130]

In the case of the *Arctic Sunrise*, this author strongly doubts whether the Russian Federation's right to perform judicial proceedings and to impose penalties should in any case have been assigned more weight than it actually was by the ITLOS. The administrative proceedings were quickly finalised, so the release would not have interfered with them. As to the criminal proceedings, it soon became obvious that the prosecuting State did not actually have a proper legal basis in its national criminal law for prosecution of the violation. In these circumstances, their continued detention in the territory of the Russian Federation would have resulted in an unnecessary hardship for the activists.

Thus, it is highly unlikely that the release compromised the interests of the detaining State in the *Arctic Sunrise*, especially considering that the financial security was in place. It may have been more reasonable to order the flag State to take steps in order to prevent future actions from taking place or to investigate the incident and to take appropriate measures under its national law. [131]

In addition, the tribunal acting under Article 290 should take into

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[130] In addition, some other legal mechanisms would be necessary to ensure their transfer back to Russia. This is outside the scope of this discussion.

[131] It was reported by BFM.RU at www.bfm.ru/news/274877 (5th October 2014) that a court in the Netherlands imposed a prohibition on Greenpeace to hinder delivery of Russian oil at the port of Amsterdam. In the USA, *Shell Offshore Inc v Greenpeace Inc* (709 F.3d 1281), the court granted a preliminary injunction prohibiting Greenpeace from disturbing lawful off-shore activities of the company by direct actions. See Elferink (2014) at p. 264 who reports a ruling by the court in the Netherlands temporarily prohibiting Greenpeace from entering the safety zone of the rigs off Greenland (*Capricorn and Others v. Greenpeace International and Others,* 2011).

account that both parties may have a right to compensation from each other for damage arising from the infringement of their rights. As to securing of the coastal State's losses suffered as a result of the direct action, a bond or a financial security in exchange for release of the ship and its crew appears to be a reasonable measure.

As to the possible economic losses of the flag State arising from excessive enforcement by the coastal State (including the damage to the ship due to the extreme detention measures or to poor maintenance, as in the *Arctic Sunrise*), the Order by the ITLOS does not shed light on measures that could secure any such claims by the Netherlands prior to the ruling on the merits, as no particular requests were made by the Netherlands in this respect. An alternative or supplement to the release to mitigate such losses could, for example, be the order to grant the operator of the ship access to the vessel in order to perform necessary preservation and maintenance procedures to ensure operability of the vessel.[132]

3.4.3 The urgency of the situation necessitating the provisional measures

In several cases on provisional measures, the ITLOS examined whether such measures were justified in light of the irreversible and imminent damage to the rights of the parties. A similar requirement has emerged in international jurisprudence generally and focuses on the question of whether the situation is urgent and the rights of the parties to the dispute are under real, if not imminent, risk of suffering prejudice or damage.[133] Although Article 290(5) requires that a situation requires the prescription of provisional measures, no condition of irreversible damage is expressly mentioned therein. Furthermore, the urgency of the situation encouraging

[132] See Opinion by Kulyk, para 11. See also dissenting opinion of Judge Golitsyn where he argues that Russian authorities guaranteed that the *Arctic Sunrise* would not perish and that it would be sufficiently maintained (para 41 of the opinion). See also *M/V Louisa* case (Saint Vincent and the Grenadines v. Kingdom of Spain), available at www.itlos.org, where the ITLOS accepted assurances of the detaining State in this regard.

[133] See dissenting opinion of Judge Kulyk, where he refers to such cases as *Mox Plant* (fn. 88) and *M/V Louisa* (fn. 132).

a party to seek provisional measures is only mentioned in cases where such measures are prescribed by the "temporary" tribunal acting under Article 290(5). By contrast, Article 290(1) does not refer to the urgency as a pre-condition for the prescription of provisional measures.[134]

In the *Arctic Sunrise* case, the Netherlands was particularly concerned with the poor conditions for the ship and its crew, which were likely to bring about irreversible consequences and significant damage. These concerns were apparently taken into consideration by the ITLOS. Although the ITLOS only dedicates a brief examination to the question of "urgency", it does formally take this condition into account.[135]

It is not entirely clear whether a tribunal acting under Article 290 *must* consider such risks, and the ITLOS jurisprudence is, in any case, not completely uniform.[136] In this author's view, the risk of irreversible and imminent damage should be taken into account under the assessment of the "appropriateness" of the measures to be prescribed and of the urgency of the given situation. If no risk of irreparable and imminent damage is actually present in a dispute, it appears unnecessary (and probably harmful for the opponent party's interests) to prescribe provisional measures. On the other hand, if such a risk *is* present, the decision of the tribunal to prescribe such provisional measures as it considers appropriate would both safeguard the rights of the requesting party and contribute to the mitigation of possible liability of the opponent party.

Article 290(5) does not lay down any time framework for the "urgency" of a measure requested, although the two-week period after which the parties may turn to the ITLOS may appear to provide some guidance in this respect. In the *Arctic Sunrise*, however, the ITLOS pointed out that the period *prior* to the establishment of the Annex VII tribunal is "not necessarily determinative for the assessment of the urgency of the situation or the period during which the measures prescribed are applicable"

[134] As to the ITLOS, Article 89(4) of the Rules of ITLOS refers to the "urgency of the situation", whereas Article 89(1) dealing with provisional measures does not. In the jurisprudence of the International Court of Justice, the urgency must normally be shown for the ICJ to apply interim measures under Article 41 of the Statute.

[135] See, e.g., paras 78, 85, 87 and 89 of the Order. See also Escher (2004) at p. 360-361.

[136] In *Ara Libertad* (fn. 122 above): no express reference to the irreparable damage.

but that it should rather be assessed in light of the period during which the Annex VII tribunal is not yet in position to modify, revoke or affirm those provisional measures.[137] It is, therefore, the timing prospects for the parties to the dispute to have their rights taken care of by the competent tribunal that are important, and not the time which has passed since the dispute has arisen.

4 Conclusions

UNCLOS does not provide for straightforward solutions of all the law of the sea issues arising from environmental protests at sea. Other sources, including court practice, clarify some of the general questions but do not fully explain the special legal issues raised by direct actions against offshore installations. This author concludes with the following observations.

Firstly, the powers of the coastal State to prohibit and prosecute direct actions aimed against its offshore installations are not unlimited or absolute, and environmental activists may generally rely on the freedoms of the high seas to stage protests against offshore activities of the coastal State. Article 60 provides coastal States with jurisdiction over their installations and the right to take reasonable measures to protect the safety of the installations in the safety zone around their coasts.

In practice, coastal States generally consider that Article 60 UNCLOS authorises them to stop, board and detain activists in the safety zone around their installation. The wording of this provision is not, however, conclusive on this point and only authorises States to take reasonable measures against unsafe conduct. The lawfulness of the specific enforcement measures applied by the coastal authorities to stop or prevent the direct action will depend on several circumstances, including the level of risk the particular conduct represents.

In cases where the ship and, as the case may be, its crafts, used to

[137] See para 85 of the Order.

perform the protest action are located outside the safety zones, the right of coastal State to stop, board and detain the ship will be conditional upon the presence of some exceptional legal bases in UNCLOS: notably, the right of hot pursuit. In "direct action" cases, conditions for the exercise of this right laid down in Article 111 may, however, be difficult to comply with in practice.

Secondly, UNCLOS does not expressly regulate the right of coastal States to institute penal proceedings against foreign ships or individuals in this category of cases. Given that flag States have the principal (and on the high seas exclusive) jurisdiction over their ships, it may be more reasonable for coastal States to rely on the flag State taking necessary measures to punish the offenders and ensure future compliance by their ships.

However, in light of the general international law rules of jurisdiction, it is possible to justify the coastal State exercising penal jurisdiction over activists whose conduct has significantly affected the lawful interests of the coastal State. Still, the right of the coastal State to conduct criminal proceedings and impose penalties requires a more nuanced analysis under international law. In this author's view, the fact that the detention at sea was not in compliance with UNCLOS would probably terminate the right of the coastal State to punish the offenders, even if they were actually in this State's custody.

Thirdly, disputes arising from direct actions offshore fall under the UNCLOS dispute settlement mechanisms of Part XV, including Section 2 thereof. This Section envisages compulsory dispute settlement procedures entailing binding decisions and also provides for provisional (interim) measures, such as the release of the ship and its crew.

Several national cases examined in this article addressed the legality of the coastal States' measures against Greenpeace activists from the law of the sea perspective. All these cases (settled in the courts of coastal States) concerned rather assertive actions by the activists, carrying potentially serious risks for all the parties involved. In those circumstances, national courts appeared to give more support to the rights of the coastal State to protect its legitimate interests in the EEZ, than to the freedom

of navigations and other rights invoked by Greenpeace.

The fact that there are few, if any, international litigations between coastal and flag States on disputes arising from the enforcement in the EEZ, may prove the existence of a general consensus on the coastal States' rights to protect their offshore activities against unsafe protest actions. However, the dispute in the *Arctic Sunrise* shows that the perception by coastal and flag States of the above questions may be very different, and even opposite. Nevertheless, States would normally prefer to achieve solutions on controversial issues through diplomatic means, and not through the formal dispute settlement procedures of UNCLOS.

The *Arctic Sunrise* is the only international litigation (known to this author) which has arisen due to a direct action offshore. This case is in many respects similar to the national cases but also differs in one (but significant) respect: the Greenpeace activists of *Arctic Sunrise* were arrested and would probably have had to remain in the pre-trial arrest until the criminal proceedings were finalised and the judgment rendered. Obviously, the flag State's concerns (probably justified) for the activists risking prolonged detention terms in the Russian prison was the actual pragmatic reason for the flag State to resort to the international dispute settlement in this case.

What lessons for the application of UNCLOS to direct actions performed by Greenpeace offshore can be learned from the *Arctic Sunrise*?

Resolution of disputes resulting from direct actions offshore may only be achieved by the States balancing their rights and obligations in the EEZ and on the continental shelf. From this perspective, the *Arctic Sunrise* dispute may have signaled that, contrary to the spirit and the express wording of UNCLOS, States have actually become less interested in compromises and consider it more effective to unilaterally claim their rights under the law of the sea. The refusal of the defendant, the Russian Federation, to participate in the proceedings at both tribunals is not legally (or otherwise) plausible and does not, in any case, put a stop to the proceedings. The position of the plaintiff on the substantive issues of the law of the sea appears to overlook the possibility that some of the defendant's arguments (albeit not formally presented to the tribunal)

may be well-founded in UNCLOS.

The ITLOS Order in the *Arctic Sunrise* case on the release of the ship and its crew contributes very little to the clarification of Article 290 and other relevant provisions of UNCLOS concerning dispute settlement procedures. This is partly due to the limited scope of the ITLOS competence, which largely only required *prima facie* assessment of the jurisdiction of a tribunal under Part XV over this dispute, and partly due to the laconic reasoning in the Order, even with respect to Article 290. The default of appearance by the defendant probably deprived the Tribunal of a full and comprehensive overview of the legal arguments in the case. This weakness is unfortunately little helped by the more detailed legal analysis of the relevant issues in the separate opinions of the individual judges participating in this case at the ITLOS.

The case on its merits is not yet finalised at the time of writing. It remains to be seen how the tribunal established under Annex VI UNCLOS will decide the case on its merits. It is uncertain whether the termination of the criminal proceedings in Russia due to the amnesty will have any practical impact on the final outcome of the case.

There is a considerable potential for the further clarification of the important substantive rules of UNCLOS, especially the scope and interrelationship between the rights and duties of States in the EEZ, the freedom of navigation and human rights. It is, however, far from certain that the tribunal will undertake to examine claims based on the violations of human rights on their merits, because these may fall outside its competence.

The States which may be most considerably affected by the outcome of the proceedings on the substantive issues of the *Arctic Sunrise* case, are the coastal States active in the exploitation and extraction of the natural resources of the EEZ and continental shelf. These States are unlikely to accept that they may not stop and detain Greenpeace activists in cases such as the *Arctic Sunrise*. Coastal States are unlikely to comply with the interpretation given to the relevant UNCLOS provisions by the tribunal if it is perceived as favouring the flag State and assigning too much weight to the freedom of navigation and, as the case may be, to

human rights. In this event, the ruling on the merits of the *Arctic Sunrise* case risks becoming no more than a random example of how UNCLOS can be applied to direct actions offshore.

At the same time, giving a green light to the excessive use of coercion and prosecution of environmental activists for direct actions offshore, in cases where the legality of the coastal State's measures is doubtful, may easily be perceived as an unfair favouring of the coastal States active in the offshore business to the detriment of the environment and the international community as a whole. That would also be a step in the wrong direction.

It is, therefore, important for the development of the law of the sea in this field that the ruling on the merits of the *Arctic Sunrise* is sufficiently nuanced in its examination of the legality of the detention of *Arctic Sunrise* and also with respect to the right of the coastal State to conduct criminal investigation and to impose penalties for this type of conduct. It will also be important for the tribunal to illuminate the weight, if any, which it gives to human rights in its assessment of the freedom of navigation in the EEZ.