BEFORE THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA **CASE NO. 22**

IN THE MATTER OF A REQUEST FOR THE PRESCRIPTION OF PROVISIONAL MEASURES PURSUANT TO ARTICLE 290(5) OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982

THE "ARCTIC SUNRISE"

KINGDOM OF THE NETHERLANDS

Applicant

and

RUSSIAN FEDERATION

Respondent

***AMICUS CURIAE* SUBMISSION BY**
STICHTING GREENPEACE COUNCIL
(GREENPEACE INTERNATIONAL)

30 October 2013

GREENPEACE

A. INTRODUCTION

1. The present *amicus curiae* brief is made by Stichting Greenpeace Council, otherwise known as Greenpeace International ("GPI"), in respect of the Request for the Prescription of Provisional Measures filed by the Kingdom of the Netherlands ("the Netherlands") on 21 October 2013 pursuant to Article 290(5) of the United Nations Convention on the Law of the Sea 1982 ("the Convention", or "UNCLOS") in relation to the arbitral proceedings instituted by the Netherlands against the Russian Federation on 4 October 2013 pursuant to Section 2 of Part XVII of UNCLOS and Article 1 of Annex VII to the Convention ("the Annex VII arbitral proceedings").

2. The Annex VII arbitral proceedings instituted by the Netherlands against the Russian Federation relate to the boarding by the Russian Federation of the MY "Arctic Sunrise" on 19 September 2013 in Russia's Exclusive Economic Zone, and the subsequent seizure of the vessel and the arrest and continuing detention of all persons on board.

1. Identification and Interest of GPI

3. Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, in order to protect and conserve the environment and to promote peace. Greenpeace consists of 27 independent national or regional organisations with a presence in over 40 countries worldwide, as well as GPI, which serves as a coordinating body. GPI is established under the laws of the Netherlands.

4. On 18 September 2013, the M/Y "Arctic Sunrise", a ship operated by GPI, was present in the exclusive economic zone of the Russian Federation in order to protest peacefully (in exercise of rights of freedom of expression and assembly) against the offshore ice-resistant fixed platform "Prirazlomnaya". In the early morning of 18 September 2013, a number of rigid hull inflatable boats left the M/Y "Arctic Sunrise" and their occupants sought to take part in a peaceful protest, which involved two of their number scaling the walls of the base of the platform up to a point some distance below the main deck.[1] They were stopped in that attempt by members of the Russian coastguard.[2] During these events, the M/Y "Arctic Sunrise" at all times remained at some distance from the platform.

5. The next day, in the early evening of 19 September 2013, the M/Y "Arctic Sunrise" was boarded by armed agents of the Russian Federation, who took control of the ship. At the time it was boarded, at approximately 18:35, the M/Y "Arctic Sunrise" was located at

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[1] Request, Annex 2 (Statement of Facts), at paras. 11 and 13.
[2] Request, Annex 2 (Statement of Facts), at paras. 16-19.
[3] Request, Annex 2 (Statement of Facts), at paras. 16 and 19.

approximately 69°19.86 N, 57°16.56 E,[3] outside the territorial sea of the Russian Federation and within its exclusive economic zone.

6. Following the boarding of the M/Y "Arctic Sunrise", all those on board were rounded up and then detained by agents of the Russian Federation in the ship's mess. In addition, two individuals who had been retrieved from the water around the platform by agents of the Coast Guard of the Russian Federation were returned on board the M/Y "Arctic Sunrise" at approximately 19.43 on 19 September 2013.[4]

7. The M/Y "Arctic Sunrise" was subsequently transported to waters near Murmansk, where all on board were taken ashore. They were formally arrested in the late evening of 24 September 2013 and the early hours of 25 September 2013.[5]

8. On or between 26 and 29 September 2013 all those on board were subject to detention orders for a period of two months, as authorised by the Leninsky District Court.[6]

9. On 2 and 3 October 2013, all on board on the M/Y "Arctic Sunrise" were charged with piracy under Article 227(3) of the Criminal Code of the Russian Federation.[7]

10. Subsequent to the filing of the Request by the Netherlands, news outlets reported statements by officials of the Russian Federation that the charges of piracy would be dropped, and that lesser charges of hooliganism, carrying a maximum penalty of seven year's imprisonment, would be pursued.[8] As at the time of writing, the process of charging those on board the M/Y "Arctic Sunrise" with hooliganism is underway, but there has been no formal notification made to those detained or their defence lawyers that the initial charges of piracy have or will be withdrawn.

11. Details of the individuals on board the MY "Arctic Sunrise" who were detained by agents of the Russian Federation on 19 September 2013 and whose detention is continuing are set out in the following table:[9]

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[3] Request, Annex 2 (Statement of Facts), at para 34; and Annex 8
[4] Request, Annex 2 (Statement of Facts), at para. 38.
[5] Ibid., at paras. 50-51
[6] Ibid., paras. 53-54 and 58.
[7] Ibid, para. 60.
[8] See See e.g. "Greenpeace activists have piracy charges dropped by Russia, The Guardian, 23 October 2013; <http://www.theguardian.com/environment/2013/oct/23/greenpeace-activists-piracy-russia-charges-dropped >; "Russia drops piracy charges against Greenpeace group" BBC News, 23 October 2013; <http://www.bbc.co.uk/news/world-europe-24645300>; "Russia reduces charges against Greenpeace activists over Arctic protest", Reuters, 23 October 2013;< http://www.reuters.com/article/2013/10/23/us-russia-greenpeace-idUSBRE99M0TH20131023>.
[9] See also Statement of Claim, Annex 1.

Name	Age	State of Nationality
Peter Henry WILLCOX	60	United States of America
Paul Douglas RUZYCKI	48	Canada
Miguel Hernan PEREZ ORSI	40	Argentina
Anne Mie Roer JENSEN	26	Denmark
Mannes UBELS	42	Netherlands
Iain Christopher ROGERS	37	United Kingdom
David John HAUSSMANN	49	New Zealand
Jonathan David BEAUCHAMP	51	New Zealand
Colin Keith RUSSELL	59	Australia
Ruslan YAKUSHEV	33	Ukraine
Alexandre PAUL	36	Canada
Francesco PISANU	38	France
Cristian D'ALESSANDRO	32	Italy
Ana Paula AMINHANA MACIEL	31	Brazil
Ekaterina ZASPA	37	Russia
Gizem AKHAN	24	Turkey
Camila SPEZIALE	21	Argentina/Italy
Sini SAARELA	31	Finland
Tomasz DZIEMIANCZUK	36	Poland
Marco Paolo WEBER	28	Switzerland
Philip Edward BALL	42	United Kingdom

Anthony PERRETT	32	United Kingdom
Faiza OULAHSEN	26	Netherlands/Morocco
Dmitri LITVINOV	51	Sweden/United States of America
Alexandra Hazel HARRIS	27	United Kingdom
Frank HEWETSON	45	United Kingdom
Denis SINYAKOV	36	Russia
Kieron BRYAN	29	United Kingdom
Roman DOLGOV	44	Russia
Andrey ALLAKHVERDOV	50	Russia

2. Scope of submissions

12. The present submission aims to assist the Tribunal in relation to the requests of the Netherlands for the prescription of provisional measures which relate to the fundamental human rights of those on board the "Arctic Sunrise", and in particular its requests that the Tribunal should prescribe provisional measures that the Russian Federation should:

> "*immediately release the crew members of the 'Arctic Sunrise', and allow them to leave the territory and maritime areas under the jurisdiction of the Russian Federation*";[10] and
>
> "*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', and refrain from taking or enforcing any judicial or administrative measures against the 'Arctic Sunrise', its crew members, its owners and its operators*".[11]

13. In its Statement of Claim, dated 4 October 2013, by which it commenced Annex VII arbitral proceedings against the Russian Federation, the Netherlands:

    a. noted that on 19 September 2013, the authorities of the Russian Federation boarded, took control over and detained the "Arctic Sunrise" without the prior

[10] Request, para. 47 (ii).
[11] Request, para. 47(iii).

consent of the Netherlands;[12] that following the boarding of the vessel, the authorities of the Russian Federation "*arrested and detained the crew, and initiated judicial proceedings against them*", and that the detention of the individuals and the judicial proceedings "are continuing";[13]

b. asserted that the said actions of the Russian authorities constituted violations of UNCLOS, the 1966 International Covenant on Civil and Political Rights ("the ICCPR" or "the Covenant"),[14] and customary international law,[15]

c. in particular noted that those violations, inter alia, prevented the crew members from exercising and enjoying their human rights and fundamental freedoms, and that the Netherlands "*suffered and continues to suffer injuries both in its own right and in the form of injuries to […] the crew members*",[16]

d. asserted that pursuant to Article 293 UNCLOS, the arbitral tribunal was to apply UNCLOS and such other rules of international law as are not incompatible with it, and that such rules include the Covenant ;[17]

e. claimed that, pursuant to UNCLOS, the Russian Federation was under an obligation to obtain the prior consent of the Netherlands before boarding the vessel "*in order to arrest and detain the crew members and to initiate judicial proceedings against them*", and that by boarding the vessel without its prior consent "*to detain and arrest the crew members, irrespective of their nationality*", the Russian Federation had deprived them of "*their right to liberty and security as well as their right to leave the territory and maritime zones of the Russian Federation*", as provided by Articles 9 and 12(2) of the Covenant, and under customary international law.[18]

f. requested the immediate implementation by the Russian Federation of provisional measures, including that it "*immediately release the crew members, and to allow them to leave the territory and maritime zones of the Russian Federation*";[19]

g. noted that "*[t]he crew members would not have been arrested, detained and subjected to judicial proceedings but for the Russian Federation's violation of the international law of the sea […]*", and that "*[p]ending arbitration proceedings during which the legality of the actions of the Russian Federation remains to be determined,*

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[12] Statement of Claim, para. 1.
[13] Statement of Claim, para. 2.
[14] International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966, 999 UNTS 171.
[15] Statemetn of Claim, para. 4.
[16] Statement of Claim, para. 5; see also ibid, para. 6.
[17] Statement of Claim, paras. 28-29
[18] Statement of Claim, para. 30(3).
[19] Statement of Claim, para. 32(2).

it would cause irreparable prejudice to these persons to have to continue to undergo pre-trial detention and face criminal prosecution with potentially severe sentences being imposed, if found guilty".[20]

14. In its Request for the Prescription of Provisional Measures dated 21 October 2013, the Netherlands

    a. asserts that "*the Russian Federation's actions constitute internationally wrongful acts having a continuing character. This causes injury to the rights of the Kingdom of the Netherlands in its own right, its right to protect a vessel flying its flag, its right to diplomatic protection of its nationals, and its right to seek redress on behalf of crew members of a vessel flying its flag*";[21]

    b. notes that the rights in question concern, inter alia, "*the right to liberty and security of the crew members, and their right to leave the territory and maritime areas under the jurisdiction of a coastal state*" under the Covenant and customary international law;[22]

    c. argues that "*the Russian Federation, in boarding, investigating, inspecting, arresting and detaining the 'Arctic Sunrise' in its exclusive economic zone as well as in subsequently seizing the vessel in Murmansk Oblast, without the prior consent of [the Netherlands], breached its obligations owed to [the Netherlands] in regard to the freedom of navigation and its right to exercise jurisdiction over the 'Arctic Sunrise'*", and that the actions of the Russian Federation were prohibited under UNCLOS;[23]

    d. asserts that, "*[s]ince by boarding, investigating, inspecting, arresting and detaining the vessel the Russian Federation breached its obligations to the [Netherlands] in regard to the freedom of navigation and the flag state's right to exercise jurisdiction, the crew's arrest and detention cannot but constitute a further breach of the Russian Federation's obligations owed to the [Netherlands]. Accordingly, the ongoing detention of the vessel and its crew, irrespective of its conformity with the domestic law of the Russian Federation, is an internationally wrongful act that continues in time*";[24]

    e. argues that "*[a]s long as the vessel and its crew remain detained, the Russian Federation's internationally wrongful acts continue in time. Thus, to prolong the*

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[20] Statement of Claim, para. 34.
[21] Request for Prescription of Provisional Measures, para. 19
[22] Ibid.
[23] Request for Prescription of Provisional Measures, para. 20.
[24] Request for Prescription of Provisional Measures, para. 25.

detention pending the constitution of the arbitral tribunal and the resolution of the dispute would prejudice the rights of the [Netherlands];"[25]

f. as regards the consequences if its request for the prescription of provisional measures were not granted, argues that the present case is one "*between two states in relation to the rights and obligations of a coastal state in its exclusive economic zone affecting the rights and obligations of a flag state regarding vessels flying its flag and navigating in this zone*"; that as a result of the actions of the Russian Federation, "*the crew would continue to be deprived of their right to liberty and security as well as their right to the leave the territory and maritime areas under the jurisdiction of the Russian Federation*" pending adjudication upon that dispute; and that "*[t]he settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned*".[26]

15. The present submission is limited to addressing the issues which arise for decision by the Tribunal in relation to the Netherlands' request for the prescription of provisional measures, and in particular focusses on the appropriateness of the prescription of provisional measures aimed at ensuring respect for the fundamental rights of all the individuals who were on board the M/Y "Arctic Sunrise" at the time of its detention and who have been subsequently arrested and detained. As a consequence, this submission takes no position as to:

    a. whether the Annex VII arbitral tribunal which will be constituted to hear the dispute submitted by the Netherlands will have jurisdiction to hear the dispute;

    b. whether the actions of the Russian Federation are compatible with its obligations as a coastal state in respect of a foreign-flagged ship within its exclusive economic zone, and with the rights of the flag State of such a ship under UNCLOS and customary international law.

16. Rather, for the purposes of the present proceedings relating to the Netherlands request for the prescription of provisional measures, it proceeds on the assumptions that:

    a. the actions of the Russian Federation give rise to a *prima facie* dispute as to whether the Russian Federation has breached its obligations under UNCLOS and customary international law owed to the Netherlands as the flag State of the M/Y "Arctic Sunrise", including in particular the rights of the Netherlands of freedom of navigation and the right to exercise jurisdiction over a ship flying its flag; and

[25] Request for Prescription of Provisional Measures, para. 29.
[26] Request for Prescription of Provisional Measures, para. 38.

b. the Annex VII arbitral tribunal has, at least, *prima facie* jurisdiction over the dispute.

17. The fact that the present submission expresses no view on the merits of the dispute, and the existence *prima facie* of a dispute and the *prima facie* jurisdiction of the Annex VII arbitral tribunal should not be taken as implying that the position of GPI in differs from that taken by the Netherlands on those issues, nor that GPI accepts that the actions of the Russian Federation were compatible with its obligations under UNCLOS and customary international law.

3. Structure of the submission

18. Following the present introductory section, the present submission consists of a further six sections:

a. Section B sets out the standards applicable to the obligations to respect the right of security and liberty and the right of freedom of movement under Articles 9 and 12 ICCPR invoked by the Netherlands, and provides evidence that those obligations are paralleled by equivalent obligations as a matter of customary international law;

b. Section C explains the basis on which, in accordance with Article 293 UNCLOS, international human rights law falls to be applied by the Annex VII arbitral tribunal in deciding the merits of the dispute and by the Tribunal in ruling upon the Netherlands' request for the prescription of provisional measures

c. Section D provides an overview of the jurisprudence relevant to the extra-territorial applicability of the ICCPR, and sets out the basis on which the relevant obligations under the ICCPR are applicable to all of the actions of the Russian Federation, including those occurring within its exclusive economic zone;

d. Section E addresses the right of the Netherlands to invoke the violation of the fundamental human rights obligations under the ICCPR of those on board the M/Y "Arctic Sunrise";

e. Section F sets out how the actions of the authorities of the Russian Federation in arresting and detaining those on board the M/Y "Arctic Sunrise" violate its obligations to respect their fundamental human rights;

f. finally, Section G addresses the urgency of the provisional measures requested by the Netherlands, including in particular the irreparable prejudice to the rights of those on board the M/Y "Arctic Sunrise" invoked by the Netherlands which would be suffered if those provisional measures are not ordered by the Tribunal.

B. THE FUNDAMENTAL HUMAN RIGHTS OF THOSE ON BOARD THE MY "ARCTIC SUNRISE" INVOKED BY THE NETHERLANDS

19. As noted above, in its Statement of Claim and Request for Prescription of Provisional Measures, the Netherlands invokes violations of the rights of those on board the the MY "Arctic Sunrise" to liberty and security under and the right to freedom of movement under Articles 9 and 12(2), respectively, of the ICCPR, to which both the Netherlands and the Russian Federation are States parties, as well as the corresponding obligations under customary international law.

1. Content of the obligation under Article 9(1) ICCPR (right to liberty and security of person)

20. Article 9(1) of the Covenant provides

> *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

21. In *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice observed that:

> *"The provisions of Article 9, paragraphs 1 and 2, of the Covenant, […] apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person* (*Human Rights Committee,* CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person))*. The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure […]*[27]

22. The jurisprudence of the Human Rights Committee in application of Article 9 is constant that the concept of 'arbitrariness' in this context goes beyond the lack of formal compliance with the provisions of domestic law. According to the Committee:

> "*The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include*

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[27] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Merits, Judgment, ICJ Reports 2010, p. 639, at p. 668 (para. 77).

elements of inappropriateness, injustice, lack of predictability and due process of law. As the Committee has observed on a previous occasion, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Remand in custody must further be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime"[28]

23. Further, as regards the point made in the last sentence in the passage just quoted, the Human Rights Committee, has made clear that

"in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification".[29]

24. As a consequence, it is not sufficient for a deprivation of liberty to be formally based on the provisions of domestic law. The law itself must also not be arbitrary, and, crucially, the way in which the law is enforced and applied must likewise not be arbitrary. Accordingly, arrest and detention, even when formally based on the substantive and procedural provision of domestic law, will result in a breach of the prohibition of arbitrary deprivation of liberty contained in Article 9 if effected in a manner which is inappropriate, unjust or unpredictable.

25. The International Court in *Diallo*, held that the detention of Mr Diallo had been "arbitrary" within the meaning of Article 9(1) ICCPR,[30] on the basis that

a. *"he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary*";[31]

b. the expulsion decree on the basis of which he was arrested *"was not reasoned in a sufficiently precise way"*;[32] and

c. although various allegations of "corruption" and other offences had been made, no concrete evidence had been put forward to support those claims; in that regard, the

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[28] Human Rights Committee, *Mukong v. Cameroon* (Comm. No. 458/1991), Views of 21 July 1994; UN doc. A/49/40 vol. II, p. 171; UN doc. CCPR/C/51/D/458/1991, at para. 9.8; see previously, *van Alphen v. The Netherlands* (Comm. No. 305/1988), Views of 23 July 1990; UN doc. A/45/40 vol. II, p. 108 at para. 5.8; and see also *Fongum Gorji-Dinka v Cameroon*, Communication No. 1134/2002, Human Rights Committee, Views of 17 March 2005, UN doc. CCPR/C/83/D/1134/2002 (2005), para. 5.1 and *Mikhail Marinich v Belarus* (Comm. No. 1502/2006), Views of 16 July 2010; UN doc. CCPR/C/99/D/1502/2006 (2010), at para. 10(4).

[29] *Baban et al. v Australia* (Comm. No. 1014/2001), Views of 6 August 2003; UN doc. CCPR/C/78/D/1014/2001, para. 7.2; see previously *A. v. Australia* (Comm. No. 560/1993), Views of 3 April 1997, UN doc. CCPR/C/59/D/560/1993, paras. 9.2 and 9.4; and *C. v. Australia* (Comm. No. 900/1999), Views of 28 October 2002; UN doc. CCPR/C/76/D/900/1999, para. 8.2; and see *Mikhail Marinich v Belarus* (Comm. No. 1502/2006), Views of 16 July 2010; UN doc. CCPR/C/99/D/1502/2006 (2010), at para. 10(4);

[30] Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, ICJ Reports 2010, p. 639, at p. 669 (para. 80).

[31] Ibid., para. 82.

[32] Ibid., para. 82, and see ibid., p. 666 (para. 72).

Court noted that the allegations had not resulted in any procedings against Mr Diallo, and a fortiori, had not resulted in any conviction. On that basis, the Court express the view that it was

> "*difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant*".[33]

26. In addition, the Human Rights Committee has made clear its view that:

> *"arbitrary detention can also occur when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Covenant, in particular under articles 19 and 21"*.[34]

27. In addition to setting out a prohibition of "arbitrary" deprivation of liberty, Article 9 makes clear the corollary requirement that any deprivation of liberty must be based on grounds and follow procedures which are "established by law".

28. The requirement of legality of detention was affirmed in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly in 1988. Principle 2 provides:

> "*Arrest, detention or imprisonment shall only be carried out <u>strictly in accordance with the provisions of the law</u> and by competent officials or persons authorized for that purpose.*" (emphasis added)[35]

29. Additional guidance in relation to the scope and correct approach to the interpretation of Article 9 ICCPR can be derived from the jurisprudence of the European Court of Human

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[33] Ibid., para. 82

[34] Human Rights Committee, Concluding Observations on Canada, CCPR/C/CAN/CO/5, para. 20; the Working Group on Arbitrary Detention has expressed the view that detention will be arbitrary where "[t]he deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights": UN Working Group on Arbitrary Detention, "Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law", in Report of the Working Group on Arbitrary Detention, UN doc. A/HRC/22/44 (2012), para. 38(b),

[35] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to GA Resolution 43/173, 9 December 1988; UN doc. A/RES/43/173.

Rights in relation to Article 5 of the European Convention on Human Rights,[36] which in many key respects is similar to Article 9, in particular insofar as it requires that any arrest and detention should be "in accordance with a procedure prescribed by law". Both the Netherlands and the Russian Federation are party to the European Convention.

30. Article 5(1) of the European Convention provides:

> *"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law; […]".*

31. As with the approach taken by the Human Rights Committee under Article 9 ICCPR, the European Court of Human Rights, in interpreting Article 5 of the European Convention has repeatedly emphasised that "'Lawfulness' […] implies absence of any arbitrariness"[37] and that a deprivation of liberty will be 'arbitrary' if the authorities have made use of the domestic law in a way which amounts to an 'abuse of power'.

32. For example, in *Bozano v. France*, the Court rejected the applicant's argument that his arrest "was automatically deprived of any legal basis when the deportation order was retroactively quashed".[38] The Court observed that

> *"It may happen that a Contracting State's agents conduct themselves unlawfully in good faith. In such cases, a subsequent finding by the courts that there has been a failure to comply with domestic law may not necessarily retrospectively affect the validity, under domestic law, of any implementing measures taken in the meantime. On the other hand, it is conceivable that matters would be different if the authorities at the outset knowingly contravened the legislation in force and, in particular, if their original decision was an abuse powers."*[39]

33. Further, the European Court of Human Rights has taken the view that compliance with any applicable international rules may be relevant to the question of whether a deprivation is lawful for the purposes of Article 5. In *Medvedyev v. France*, the Court observed that:

> *"where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes*

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[36] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950); ETS No. 5 (as subsequently amended).
[37] See, e.g., *Bozano v. France* (App. No. 9990/82), Series A, No. 111 (1986), para. 59.
[38] Ibid., para. 60.
[39] Ibid., para. 55.

the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness".[40]

34. Similarly, in its decision in *Öcalan v. Turkey*, the Grand Chamber had previously suggested that, to the extent that the arrest of an individual by the agents of a State Party in the territory of a State which was not a party to the European Convention had been conducted without the latter State's consent, and therefore in violation of its territorial sovereignty and international law, it would not be "lawful" within the meaning of Article 5.[41]

2. Content of the obligation under Article 12(2) (right to freedom of movement and to leave any country).

35. Article 12(2) of the Covenant provides:

"Everyone shall be free to leave any country, including his own".

36. Article 12(3), which is also of relevance, provides that the right under Article 12(2)

"shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

37. In General Comment No. 27, concerning the right to freedom of movement contained in Article 12, the Human Rights Committee noted that:

"Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (ordre public), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant."[42]

38. In addition, the Human Rights Committee emphasized that any restriction on the right to freedom of movement under Article 12(3) must be as limited as possible and proportionate to the aim which is sought to be achieved:

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[40] *Medvedyev v. France* (App. No. 3394/03), judgment of 29 March 2010 [GC], para. 79.

[41] *Öcalan v. Turkey* (App. 46221/99), ECHR 2005-IV [GC], para. 90; and see *ibid*., paras. 98-99.

[42] Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)*, UN doc. CCPR/C/21/Rev.1/Add.9 (1999), at para. 11.

it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

[…] The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality."[43]

39. Again, additional guidance as to the scope of the obligation under Article 12(2) ICCPR can be derived from the approach of the European Court of Human Rights in applying Article 2(2) of Protocol No. 4 to the European Convention, which is in identical terms. Both the Netherlands and the Russian Federation are party to Protocol No. 4.

40. In this regard, the European Court in *Bartik v. Russian Federation* observed that the right of freedom of movement guaranteed in Article 2(1) and (2) of Protocol No. 4 to the European Convention:

> *"is intended to secure to any person a right to liberty of movement within a territory and to leave that territory, which implies a right to leave for such country of the person's choice to which he may be admitted […]. It follows that liberty of movement prohibits any measure liable to infringe that right or to restrict the exercise thereof which does not satisfy the requirement of a measure which can be considered as "necessary in a democratic society" in the pursuit of the legitimate aims referred to in the third paragraph of this Article"*[44]

41. The European Court has likewise held that pursuant to Article 2(3) of Protocol No. 4,

> *"a restriction must be 'in accordance with the law', pursue one or more of the legitimate aims contemplated in paragraph 3 of the same Article and be 'necessary in a democratic society'"*[45]

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[43] Ibid., para. 14-16.
[44] *Bartik v. Russian Federation* (App. No. 55565/00), judgment of 21 December 2006, para. 36.
[45] *Ibid.*, para. 38.

42. Further, the European Court has held that the requirement that any restriction be "necessary in a democratic society" imports a test of proportionality:

> *"the test as to whether the impugned measure was "necessary in a democratic society" involves showing that the action taken was in pursuit of that legitimate aim, and that the interference with the rights protected was no greater than was necessary to achieve it. In other words, this requirement, commonly referred to as the test of proportionality, demands that restrictive measures should be appropriate to achieve their protective function".*[46]

3. Customary nature of the obligations in question

43. There is no doubt that the prohibition of arbitrary detention reflected in Article 9 ICCPR constitutes customary international law, another source of international law applicable under Article 293 UNCLOS.

44. The right to be free of arbitrary detention is recognised in the Universal Declaration of Human Rights as well as in all of the universal and regional human rights instruments.[47]

45. Further, in *United States Diplomatic and Consular Staff in Tehran*, the International Court of Justice observed that

> "*wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*"[48]

46. The Human Rights Committee has likewise recognised that the prohibition of arbitrary detention constitutes customary international law. In its General Comment No. 24 on reservations, the Committee expressed the view that:

> *"Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the*

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[46] *Ibid.*, para. 46.

[47] In addition to Article 9(1), ICCPR, see Article 9, Universal Declaration of Human Rights, General Assembly Resolution 217A (III), 10 December 1948; Article 6, African Charter of Human and Peoples' Rights (Banjul, 27 June 1981), 1520 UNTS 217; Article 7, American Convention on Human Rights (San Jose, 21 November 1969), OAS Treaty Series No. 36; Article 14, Arab Charter on Human Rights (Tunis, 22 May 2004), reprinted in International Human Rights Reports vol. 12 (2005), p. 893; and Article 5(1), European Convention on Human Rights.

[48] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, ICJ Reports 1980, p. 3, at p. 42 (para. 91).

benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori *when they have the character of peremptory norms) may not be the subject of reservations*".[49]

Amongst the obligations identified by the Committee which it regarded as being part of customary law, and therefore in respect of which reservations are impermissible, it included the prohibition of arbitrary arrest and detention.[50]

47. More recently, the Working Group on Arbitrary Detention has also expressed the view that "the prohibition of all forms of arbitrary deprivation of liberty constitutes part of customary international law".[51] In support of that conclusion, the Working Group, inter alia:

   a. noted that "*167 States have ratified the International Covenant on Civil and Political Rights, and the prohibition of arbitrary deprivation of liberty is widely enshrined in national constitutions and legislation and follows closely the international norms and standards on the subject*";[52]

   b. pointed out that "*detailed prohibitions of arbitrary arrest and detention are also contained in the domestic legislation of States not party to the International Covenant on Civil and Political Rights*".[53]

   c. drew attention to the fact that "*many United Nations resolutions confirm the* opinio iuris *supporting the customary nature of these rules: first, resolutions speaking of the arbitrary detention prohibition with regard to a specific State that at the time was not bound by any treaty prohibition of arbitrary detention; second, resolutions of a very general nature on the rules relating to arbitrary detention for all States, without distinction according to treaty obligations*", and on that basis expressed the view that there existed a "*consensus that the prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law*";[54]

48. Although practice and commentary in relation to the customary nature of the right to freedom of movement contained in Article 12(2) ICCPR is more sparse, it may be noted that

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[49] General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, UN doc. CCPR/C/21/Rev.1/Add.6, para. 8.
[50] Ibid.
[51] UN Working Group on Arbitrary Detention, 'Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law', in Report of the Working Group on Arbitrary Detention, UN doc. A/HRC/22/44 (2012), paras. 37 et seq, at para. 79; see also, ibid., paras. 51 and 75. The Working Group further expressed the view that that the prohibition "constitutes a peremptory or jus cogens norm" (ibid., para. 79, and see paras.47, 50-51, and 75).
[52] Ibid., at para. 43.
[53] Ibid., at para. 46.
[54] Ibid.

it is likewise reflected in all of the major international human rights instruments.[55] As such, it too now reflects a rule of general international law, applicable under Article 293 of the Convention.

[55] In addition to Article 12 ICCPR, see Article 13, Universal Declaration of Human Rights; Article 2 of Protocol No. 4 to the European Convention on Human Rights (Strasbourg, 16 September 1963), ETS No. 46; Article 22, American Convention on Human Rights; Article 12, African Charter on Human and Peoples' Rights; Articles 26 and 27, Arab Charter on Human Rights.

C. Relevant Obligations Under International Human Rights Law Fall to be Applied Under Article 293 UNCLOS

49. Article 293(1) UNCLOS provides that a court or tribunal having jurisdiction to adjudicate upon a dispute under section 2 of Part XV "shall apply this Convention and other rules of international law not incompatible with this Convention".

50. Article 293 has been interpreted widely, both by this Tribunal and tribunals constituted under Annex VII, as conferring jurisdiction to apply rules of international law extraneous to the Convention.

51. In *The M/V Saiga (No. 2)*, this Tribunal held that Article 293 conferred upon it jurisdiction to apply not only UNCLOS, but also the international norms regulating the use of force:

> *"In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law."*[56]

52. Similarly, the Annex VII arbitral tribunal in the *Guyana v. Suriname* arbitration held that the effect of Article 293 UNCLOS was that it was competent to rule upon claims of State responsibility resulting from the threat or use of force by Suriname; it accordingly rejected Suriname's objection that it had "no jurisdiction to rule upon alleged violations of the United Nations Charter and general international law".[57]

53. In the course of the proceedings in *The "Tomimaru*", the Russian Federation itself recognised the importance and significance of "human and civil rights and freedoms proclaimed by universally recognised principles and norms of international law and international treaties to which the Russian Federation is party".[58]

54. Finally, the Tribunal in its judgment on the merits in *The M/V Louisa* emphasised that

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[56] The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 7, at para. 155.
[57] *Guyana v. Suriname*, Award of 17 September 2007, para. 406.
[58] "Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007, p. 74, at para. 64.

"States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances".[59]

55. The ICCPR, Articles 9 and 12(2) of which are invoked by the Netherlands in its Statement of Claim, is in force between the Netherlands and the Russian Federation. There can be no suggestion that the ICCPR as a whole, or Articles 9 and 12(2) specifically, are in any way "incompatible" with UNCLOS within the meaning of Article 293.

56. Nor could it be suggested that the corresponding rules of customary international law relating to the right of liberty and security of the person, and the right to freedom of movement, are incompatible with the Convention.

57. As a consequence, those rules fall to be applied by both the Tribunal in considering the Request of the Netherlands for the prescription of provisional measures and the Annex VII arbitral tribunal to be constituted to adjudicate upon the merits of the present dispute.

[59] The M/V Louisa (Saint Vincent and the Grenadines v. Spain), Judgment of 28 May 2013, para. 155.

D. APPLICABILITY OF THE ICCPR TO THE ACTIONS OF THE AUTHORITIES OF THE RUSSIAN FEDERATION

58. Pursuant to Article 2(1) of the ICCPR,

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

59. As an initial point, it should be emphasised that it results clearly from Article 2(1) of the ICCPR that the substantive rights contained in the Covenant are to be respected and ensured by States parties to all individuals within their territory and subject to their jurisdiction, irrespective of, inter alia, their nationality.

60. Second, the fact that the relevant events occurred in part within the EEZ of the Russian Federation, and thus outside its territory (including its territorial sea), does not mean that the obligations incumbent upon the Russian Federation under the ICCPR were not applicable.

61. In this regard, it is well established that it is sufficient for the ICCPR to apply that individuals are in some way brought within the jurisdiction of a State party by reason of acts of its agents, even if those acts occur outside its territory.

62. In its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[60] the International Court of Justice considered the interpretation of Article 2 of the ICCPR, and in particular whether it was "applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances."[61]

63. The Court observed that Article 2(1) ICCPR

> *"can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction."* [62]

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[60] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136.
[61] Ibid., at p. 178 (para. 107).
[62] Ibid., at p. 179 (para. 108).

64. The Court concluded that the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."[63] In reaching that conclusion, the Court first had regard to the interpretation of Article 2 ICCPR in the light of the object and purpose of the Covenant, observing that

> "*while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.*"[64]

65. Having noted that the "constant practice" of the Human Rights Committee was to find the Covenant "applicable where the State exercises its jurisdiction on foreign territory",[65] the Court further observed that the *travaux préparatoires* confirmed that interpretation of Article 2, insofar as they showed that

> "*in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence*".[66]

66. Similarly, the Human Rights Committee in its General Comment No. 31, entitled "Nature of the General Legal Obligation Imposed on States Parties to the Covenant", has adopted the same approach, emphasising that the terms "within their territory" and "subject to their jurisdiction" in Article 2(1) of the Covenant are to be read disjunctively, and that it is sufficient for application of the Covenant that an individual be brought within the jurisdiction of a State party by reason of being subject to the effective control authorities, even if the relevant events occur outside its territory:

> *"States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. […] the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find*

[63] Ibid., at p. 180 (para. 111).
[64] Ibid., at p. 179 (para. 109).
[65] Ibid.
[66] Ibid.

themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation".[67]

67. It should also be noted that a similar position obtains under the European Convention on Human Rights, Article 1 of which contains no reference to territory, and provides that States Parties

"*shall secure to everyone within their jurisdiction the rights and freedoms contained in Section I of this Convention*".

68. In this regard, the European Court of Human Rights has held that

"*Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.*"[68]

69. Of particular relevance to these proceedings, in *Medvedyev v. France*, the Grand Chamber of the European Court held that the European Convention was applicable in circumstances in which French agents had boarded a Cambodian-flagged ship on the high seas, detained the crew, and transported the ship back to a French port with the crew abroad, where they were then arrested. It held that given that France had exercised

"full and exclusive control over the Winner and its crew, at least de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention."*[69]

70. Similarly in *Hirsi Jamaa v. Italy*, a case concerning migrants who were intercepted and brought on board Italian military vessels outside Italian territorial waters, and subsequently returned to Libya (their point of departure), the Grand Chamber of the European Court held that

[67] General Comment No. 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 25 May 2004; UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 10.
[68] *Al-Skeini v. United Kingdom* (App. No. 55721/07), judgment of 7 July 2011 [GC], para. 137; *Hirsi Jamaa v. Italy* (App. No. 27765/09), judgment of 23 February 2012 [GC], para. 74.
[69] *Medvedyev v. France* (App. No. 3394/03), judgment of 29 March 2010 [GC], para. 67.

> *"in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive de jure and de facto control of the Italian authorities".*[70]

As a result, the Grand Chamber concluded that the events at issue relating to the treatment of the applicants had fallen within Italy's jurisdiction within the meaning of Article 1 of the Convention.[71]

71. In the present case, following the boarding and seizure of the MY "Arctic Sunrise" by agents of the Russian Federation, those on board were detained by force and thereby came under the authority and control of the authorities of the Russian Federation. They thereby were brought within the "jurisdiction" of the Russian Federation within the meaning of Article 2 of the ICCPR, such that the ICCPR was applicable from the start of their detention.

72. In any case, insofar as they were then transported to the port of Murmansk aboard the MY "Arctic Sunrise", and were subsequently taken ashore, arrested and continued to be detained, they also were brought within the territory of the Russian Federation within the meaning of Article 2 ICCPR.

73. As a consequence, there can be no doubt that the ICCPR, including Articles 9 and 12(2), are applicable to the actions of the authorities of the Russian Federation at issue in the present case. The same applies insofar as the same obligations form part of customary international law.

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[70] *Hirsi Jamaa v. Italy* (App. No. 27765/09), judgment of 23 February 2012 [GC], para. 81.
[71] Ibid., para. 82.

E. The Netherlands Is Entitled to Invoke Breaches of Obligations Under International Human Rights Law in Respect of Those on Board the MY "Arctic Sunrise"

74. The Netherlands has the right to invoke breaches of the obligations under the ICCPR and customary international law in respect of those on board the MY "Arctic Sunrise", as a result of the fact that it is the flag State of the vessel. In the alternative, and in any case, it is entitled to invoke breaches of those obligations as a matter of general international law.

1. The Netherlands is entitled as the flag state to invoke breaches of the human rights of all those on board the MY "Arctic Sunrise"

75. First, in light of the fact that the MY "Arctic Sunrise" flies the Dutch flag, the Netherlands is competent, and is entitled to invoke the breaches of the fundamental human rights of all those on board, both under the ICCPR and under customary international law.

76. That right is not limited to those on board having Dutch nationality, and on behalf of whom the Netherlands would in any case be entitled to exercise diplomatic protection, but extends to all those on board, whatever their nationality. In the *M/V Saiga (No. 2)*, this Tribunal rejected the objection to admissibility on the basis of nationality raised by Guinea in relation to the claims made by the Saint Vincent and the Grenadines in respect of the detention of members of the ship's crew, including nationals of third States. That conclusion was reached on the basis that

> "*the Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, every thing on it, and <u>every person involved or interested in its operations</u> are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.*"[72] (emphasis added)

77. The fact that a flag State is able to claim reparation on behalf of all members of a ship's crew, regardless of their nationality, was subsequently recognised by the International Law Commission (ILC) in its Articles on Diplomatic Protection, as adopted by the ILC on second reading in 2006,[73] and commended by the General Assembly to the attention of governments in 2007.[74] Article 18 of the Articles on Diplomatic Protection provides

[72] M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 7, at para. 106.
[73] Report on the Work of the ILC, 58th Session, UN Doc. A/61/10 (2006), ch. IV (para. 50 et seq)
[74] General Assembly Resolution 62/67; UN doc. A/RES/62/67 (2007); the text of the Articles on Diplomatic Protection were annexed to the resolution.

> "*The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.*"

78. As explained in the ILC's Commentaries, the recognised right of the State of nationality of a ship (i.e. the flag State) to seek redress in respect of the members of the ship's crew "*cannot be characterized as diplomatic protection in the absence of the bond of nationality between the flag State of a ship and the members of a ship's crew*."[75]

79. The ILC also made clear that the right of the flag State to seek redress extends not only to direct injury to crew members during or in the course of an arrest of the vessel, but also to

> "*injuries sustained in connection with an injury to the vessel resulting from an internationally wrongful act, that is as a consequence of the injury to the vessel. Thus such a right would arise where members of the ship's crew are illegally arrested and detained after the illegal arrest of the ship itself*."[76]

2. In any case, the Netherlands is entitled to invoke breaches of the human rights of all those on board the MY "Arctic Sunrise" as a matter of general international law

80. Second, and in any case, the Netherlands is entitled to invoke breaches of relevant provisions of the ICCPR, as well as of the corresponding rules of customary international law insofar as those norms are owed either *erga omnes partes* (i.e. to all States parties to the ICCPR) or *erga omnes* (i.e. to the international community as a whole).

81. As regards the relevant provisions of the ICCPR, although the principal beneficiaries of the substantive obligations contained in the Covenant are individuals, the obligations in question are owed to all other State parties, which accordingly "have a legal interest" in the protection of the rights involved.

82. The Human Rights Comments in its General Comment No. 31, observed that

> "*While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are* erga omnes *obligations and that, as indicated in the fourth preambular paragraph of*

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[75] Commentary to Article 18, paragraph (1); see also ibid., paragraph (8)
[76] Commentary to Article 18, paragraph (9).

the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty."[77]

83. The Committee also emphasised that the existence of the inter-State complaint mechanism under Article 41 of the Covenant did not affect that conclusion:

> "*the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.*"[78]

84. In its recent judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice observed in relation to the right of Belgium to bring claims against Senegal for breach of its obligations under the Convention Against Torture, that obligations arising under a treaty of this type "may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case",[79] and that, as a result,

> "*[t]he common interest in compliance […] implies the entitlement of each State party […] to make a claim concerning the cessation of an alleged breach by another State party*".[80]

85. Similarly, in so far as parallel obligations to those under the ICCPR are binding upon the Russian Federation as a matter of customary international law, in particular the customary prohibition of arbitrary detention, those rules constitute obligations *erga omnes*, in the sense that they are owed to the international community as a whole.

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[77] General Comment No. 31, "Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 25 May 2004; UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 2.
[78] Ibid.
[79] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, para. 68.
[80] Ibid., para. 69.

86. In *Barcelona Traction*, the International Court of Justice, in contrasting obligations of this type with the obligations which are typically the subject of the exercise of diplomatic protection observed that:

> "*an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising* vis-à-vis *another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations* erga omnes*".*[81]

Notably, among the examples the Court subsequently gave of obligations *erga omnes* was the "*basic rights of the human person*".[82]

87. As with the case in respect of obligations *erga omnes partes* arising under treaties, each State, (including the Netherlands) has the right to invoke the infringement of a customary obligation owed *erga omnes*.

88. The right of other States to invoke the breach of obligations owed *erga omnes* and those owed *erga omnes partes* was recognised by the ILC in its work on the international law of State Responsibility. Article 48(1)(a) and (b) of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts provides that:

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

89. Article 48(2) of the Articles goes on to specify the manner in which responsibility can be invoked by a State other than an injured State falling within the scope of Article 48(1), noting in particular the right to claim from the responsible State cessation and the provision of assurances and guarantees of non-repetition (Article 48(2)(a)), as well as compliance with the obligation to make reparation in the interest of the injured State or other beneficiaries of the obligation in question (Article 48(2)(b)).

90. As noted above, the right of a State party to a treaty containing obligations *erga omnes partes* to claim cessation in respect of a breach of those obligations was expressly singled

[81] Barcelona Traction, Light and Power, Limited, Second Phase, ICJ Reports 1970, p. 3, at p. 32 (para. 33).
[82] Ibid., p. 32 (para. 34).

out and recognised by the International Court in *Questions Relating to the Obligation to Prosecute or Extradite*.[83]

91. The *Institut de droit international* has likewise recognised the right of other States to invoke breaches of obligations *erga omnes* and *erga omnes partes* and to seek cessation. In its Resolution on "Obligations *erga omnes* in international law", adopted at its Krakow session in 2005,[84] the *Institut* recognised that in the case of a breach of an obligation *erga omnes*[85]

> "*[…] all the states to which the obligation is owed are entitled, even if they are not specially affected by the breach, to claim from the responsible State in particular:*
>
> *(a) cessation of the internationally wrongful act ;*
>
> *(b) performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach. Restitution should be effected unless materially impossible.*"[86]

92. The obligation of cessation is a recognised consequence of the breach of an obligation which has a continuing character; in this regard, Article 30 of the ILC's Articles on State Responsibility makes clear that one of the consequences for the State responsible for an internationally wrongful act is that it is under an obligation to "*cease that act, if it is continuing*".

93. In its Commentary to Article 30, the ILC explained that

> "*Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act.*"[87]

94. The ILC further observed that

> "*The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the*

[83] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, para. 69.
[84] *Institut de droit international*, Resolution on "Obligations erga omnes in international law", Krakow Session (2005).
[85] As defined in ibid., Article 1, the term "obligations erga omnes" used in the Resolution encompasses both obligations *erga omnes* under general international law, in the sense used by the International Court of Justice in *Barcelona Traction*, as well as obligations *erga omnes partes* arising under multilateral treaties.
[86] Ibid., Article 2.
[87] Commentary to Article 30, paragraph (4), reproduced in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge, CUP, 2002), p. 196.

injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law."[88]

95. As a consequence, the obligation of cessation incumbent upon the responsible State is of particular relevance in respect of obligations having as their object the protection of community interests (whether obligations owed *erga omnes* or *erga omnes partes*), and in particular where there may be no injured State. That importance is reflected in the fact that all other States to which such obligations are owed may claim cessation.

96. It follows that the Netherlands has the right to invoke the breach of the human rights obligations owed to it, whether under the ICCPR or customary international human rights law, even if the primary beneficiaries of those obligations are individuals, and that it has a right to claim cessation of any breach which is of a continuing character.

[88] Commentary to Article 30, paragraph (5); Crawford, *The ILC's Articles on State Responsibility*, at p. 197.

F. *PRIMA FACIE* VIOLATION OF THE RIGHTS OF THOSE ON BOARD THE M/Y "ARCTIC SUNRISE" INVOKED BY THE NETHERLANDS

97. As noted above, in *Medvedyev v. France*, the European Court of Human Rights made clear that the question of whether detention complies with the requirement of "lawfulness" under Article 5 of the European Convention of Human Rights, including the question whether "a procedure prescribed by law" has been followed depends on compliance with (i) relevant national law, and (ii) "*other applicable legal standards, including those which have their source in international law*".[89]

98. It is submitted that the same approach is applicable under Article 9 ICCPR, insofar as that provision likewise requires that any deprivation "in accordance with such procedure as are established by law".

99. As noted above, the present submissions express no view as to the merits of the dispute, and in particular whether the actions of the Russian Federation in boarding the M/V "Arctic Sunrise" and subsequently arresting and detaining those on board are consistent with its obligations under the 1982 Convention.

100. Irrespective of the legality under the Convention of those actions, the arrest and detention which has led to the deprivation of liberty in any case plainly does not comply with the requirement under Article 9. In particular, it does not accord with the fundamental precept that any deprivation of liberty must be "on such grounds and in accordance with such procedure as are established by law".

101. As noted by the Netherlands in its Request, the basis on which the Russian Federation has purported to justify the boarding and detention of the M/Y "Arctic Sunrise", and the arrest and detention of every individual on board, irrespective of their role and involvement, has no settled basis and has varied over time. In just a short period of time a range of different purported justifications has been put forward.[90] Any doubt as to the arbitrariness of these measures has been extinguished by the fact that all those on board were initially charged with the serious offence of piracy, which is an offence defined under Article 227(3) of the Criminal Code of the Russian Federation as involving an "assault on a sea-going ship or river boat with the aim of capturing other people's property, committed with the use of violence or the threat of its use". It is plain from the facts that there was no use of violence or threat of such. Nevertheless, the detention was authorised by the judge on that basis.

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[89] *Medvedyev v. France* (App. No. 3394/03), judgment of 29 March 2010 [GC], para. 79.
[90] Request, para. 23

102. Piracy is defined by Article 101 UNCLOS as involving one or more of the following acts:

> *"(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*
>
> > *(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
> >
> > *(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;*
>
> *(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
>
> *(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

103. The events at issue in the present case self-evidently do not give rise to even a colourable claim that they constitute the offence of piracy, whether as defined under the relevant Russian legislation, or under international law.

104. In particular, whether or not the platform is properly characterised as a sea-going ship under Russian law,[91] for the purposes of the Russian legislation the acts of peaceful protest carried out by some of those on board the M/Y "Arctic Sunrise" cannot be characterised as an "assault", were not carried out with the "aim of capturing other people's property", and were not "committed with the use or threat of use of violence". Similarly, for the purposes of the definition of piracy under international law, the relevant conduct cannot be characterised as "illegal acts of violence or detention, or any act of depredation", nor were they carried out for the "private ends" of those involved.

105. As much is evident from the fact that President Putin admitted that those on board the M/Y "Arctic Sunrise" are "obviously not pirates",[92] and the subsequent indication by the competent Russian authorities that the charges of piracy would be dropped.

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[91] In this regard, GPI understands that the platform is not registered in the State register of ships, but in the separate State register maintained for platforms; further, the Russian courts have previously held, in the context of an unrelated tax dispute, that "Prirazlomnaya" is an ice-resistant fixed platform and not a sea-going ship: see "Court Papers Show Greenpeace-Targeted Oil Rig 'Not Ship', RIA Novosti, 22 October 2013, <http://en.ria.ru/russia/20131022/184299679/Court-Papers-Show-Greenpeace-Targeted-Oil-Rig-Not-Ship.html?id=184302219>

[92] Request, Annex 2, at para. 52.

106. In these circumstances, the arrest and detention of those on board the M/Y “Arctic Sunrise” in relation to charges of piracy, and the authorisation of their continued detention by the Russian courts, appear to be a wilful misapplication of the law, and an apparent abuse of power. This has persisted for an extended period of time. As such, the arrest and detention of the individuals on board, and the consequent continuing deprivation of liberty is arbitrary and breaches the prohibition of arbitrary detention under Article 9 ICCPR and customary international law.

107. As a consequence, the restriction on the right of those on board the M/Y “Arctic Sunrise to leave the territory of the Russian and its maritime zones under Article 12 ICCPR and customary international law, in the period from their detention until the present time, cannot reasonably be regarded as being proportionate to any permissible legitimate aim. The fact that such detention has occurred for all individuals on board, irrespective of their role, confirms the arbitrariness of the actions of the Russian Federation.

108. Finally, as noted above, the prohibition of arbitrary detention under Article 9 ICCPR, which reflects customary international law, requires that remand in custody “*must not only be lawful but reasonable in all the circumstances”*. In that regard, whether or not continued pre-trial detention is reasonable depends upon whether it is shown to be “*necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime”.*[93]

109. In the present case, there are no obvious grounds on which remand in custody for a period in excess of 2 months can be justified. The fact that every individual on board has been detained for the same charge indicates that it cannot be characterised as reasonable. This is all the more so given the addition of less serious charges following the indication that the charges of piracy would be dropped.

110. Further, there is no obvious justification for continued detention under present conditions or at all. There is no risk of flight, given that those on board the M/Y “Arctic Sunrise” have had their passports confiscated, such that they are unable to leave the Russian Federation; there is no risk of interference or tampering with evidence, since the relevant authorities searched the M/Y “Arctic Sunrise” and are to presumed to have removed all evidence relevant for the prosecution, and the vessel is in any case kept under armed guard; and there is no obvious risk of the commission of further serious crimes.

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[93] Human Rights Committee, *Mukong v. Cameroon* (Comm. No. 458/1991), Views of 21 July 1994; UN doc. A/49/40 vol. II, p. 171; UN doc. CCPR/C/51/D/458/1991, at para. 9.8; see previously, *van Alphen v. The Netherlands* (Comm. No. 305/1988), Views of 23 July 1990; UN doc. A/45/40 vol. II, p. 108 at para. 5.8; and see also *Fongum Gorji-Dinka v Cameroon*, Communication No. 1134/2002, Human Rights Committee, Views of 17 March 2005, UN doc. CCPR/C/83/D/1134/2002 (2005), para. 5.1 and *Mikhail Marinich v Belarus* (Comm. No. 1502/2006), Views of 16 July 2010; UN doc. CCPR/C/99/D/1502/2006 (2010), at para. 10(4).

111. As such, the continued detention of those on board by the M/Y "Arctic Sunrise" likewise constitutes a manifest violation of the prohibition of arbitrary detention under Article 9 ICCPR and customary international law also in this respect.

G. URGENCY REQUIRING THE PRESCRIPTION OF PROVISIONAL MEASURES

112. Article 290 UNCLOS provides:

> *"1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.*
>
> *[…]*
> *5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures, acting in conformity with paragraphs 1 to 4."*

113. Accordingly, where the Tribunal is seized in respect of a request for the prescription of provisional measures under Article 290(5) in respect of a dispute which is being submitted to an Annex VII arbitral tribunal, provided that the Tribunal concludes that *prima facie* the Annex VII arbitral tribunal would have jurisdiction, it may prescribe provisional measures in order to preserve "the respective rights of the parties to the dispute or to prevent serious harm to the marine environment", to the extent it is satisfied that the urgency of the situation so requires. It is then for the Annex VII tribunal, once constituted, to modify, revoke or affirm those provisional measures.

114. As recently observed by the Tribunal in the "*ARA Libertad*", it may

> *"prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."*[94]

115. In the *MOX Plant* case, the Tribunal observed:

> *"Provisional measures may be prescribed pending the constitution of the Annex VII arbitral tribunal if the Tribunal considers that the urgency of the situation so requires*

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[94] "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, to be published, at para. 74.

in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal".[95]

116. Further, the Tribunal has also made clear where it results from the circumstances that the situation is one of urgency, provisional measures may be prescribed

"that will ensure full compliance with the applicable rules of international law, thus preserving the respective rights of the Parties".[96]

1. Preservation of the respective rights of the parties to the dispute

117. The rights invoked by the Netherlands include, inter alia, its right to invoke the breaches of the obligations owed to it by the Russian Federation under Articles 9 and 12(2) ICCPR. in respect of the rights of "*liberty and security"* and the *"right to leave the territory and maritime zones of the Russian Federation"* of all those on board the M/Y "Arctic Sunrise".

118. As set out above, those obligations form part of the applicable law pursuant to Article 293 UNCLOS, and are obligations the breach of which the Netherlands is entitled to invoke in respect of those on board the M/Y "Arctic Sunrise". This is both pursuant to the jurisprudence of this Tribunal in respect of members of a ship's crew, and more generally as a matter of general international law insofar as they constitute obligations *erga omnes partes* under the ICCPR or obligations *erga omnes* under customary international law.

119. To the extent that the actions of the Russian Federation in respect of the arrest and detention of those on board the M/Y "Arctic Sunrise", and the subsequent bringing of administrative and criminal charges against them was not in accordance with international law, including in particular insofar as those actions constituted a breach of UNCLOS and customary international law, those actions result in a breach of the obligations of the Russian Federation in respect of the fundamental human rights of those on board the M/Y "Arctic Sunrise".

120. By their nature, such breaches are of a continuing nature, and the breaches will continue until such time as the individuals on board the M/Y "Arctic Sunrise" are released, and the administrative and criminal proceedings against them are discontinued.

121. Prescription of the provisional measures requested by the Netherlands in respect of those on board the M/Y "Arctic Sunrise" is thus necessary in order to preserve the rights of the

[95] MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95, at para. 64.
[96] "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, to be published, para. 100.

Netherlands which form the subject of the dispute submitted to the Annex VII arbitral tribunal.

2. Urgency

122. As to the requirement that the situation be one of urgency, in light of the continuing nature of the breaches of the fundamental rights of those on board the M/Y “Arctic Sunrise” invoked by the Netherlands, there is undoubtedly a risk of irreparable prejudice to the rights of the Netherlands and of those on board the M/Y “Arctic Sunrise” insofar as the breaches will continue and be prolonged for such time as their detention continues and the administrative and judicial proceedings continue.

123. For the same reason, the present situation is undoubtedly also one characterised by significant urgency. To the extent that the actions of the Russian Federation are found by the Annex VII arbitral tribunal to have violated its obligations under UNCLOS and customary international law, every day during which the individuals who were arrested on board the M/Y “Arctic Sunrise” continue to be detained by the Russian Federation results in a prolongation of the breach of the obligations of the Russian Federation in respect of the fundamental rights of those on board Sunrise” under the ICCPR and customary international law, as invoked by the Netherlands.

124. By their very nature, such breaches gives rise to irreparable harm insofar no amount of compensation can adequately make good the mental anguish that is likely to be felt by the individuals, or the deprivation of their liberty that has been occasioned.

30 October 2013

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