CURRENT DEVELOPMENTS

PROVISIONAL MEASURES AND THE MV *ARCTIC SUNRISE*

*By Douglas Guilfoyle and Cameron A. Miles**

On September 18, 2013, several Greenpeace activists, bearing ropes and posters, attempted to board a Gazprom oil platform, the Prirazlomnaya, in the Exclusive Economic Zone (EEZ) of the Russian Federation.[1] They did so in inflatable craft launched from a Greenpeace vessel, the Netherlands-flagged MV *Arctic Sunrise*. They were soon arrested by the Russian Coast Guard. The following day, armed agents of the Russian Federal Security Service boarded the *Arctic Sunrise* itself from a helicopter, arresting those on board.[2] The Netherlands was apparently informed of Russia's intention to board and arrest the vessel shortly after the original boarding of the platform.[3] Over the next four days, the vessel was towed to Murmansk. Russian authorities charged the thirty detained persons (the so-called Arctic 30) with "piracy of an organized group." Although President Vladimir Putin acknowledged that the protesters were "obviously . . . not pirates," he also noted that "formally, they tried to seize our platform."[4] On October 4, the Netherlands announced that, under Annex VII of the UN Convention on the Law of the Sea[5] (UNCLOS), it had commenced arbitration proceedings against Russia over the detention of the *Arctic Sunrise* and the legality of its seizure.[6] On October 21, the Netherlands filed with the International Tribunal for the Law of the Sea (ITLOS) a request for the prescription of provisional measures pending the constitution of the Annex VII arbitration tribunal. On October 23, Russian piracy charges against the Arctic 30 were recategorized as "hooliganism"; charges of resisting law enforcement officers were subsequently added.[7] On the same day,

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[1] John Dunford, *Arctic Sunrise Action Timeline* (Sept. 24, 2013), *at* http://www.greenpeace.org/new-zealand/en/blog/arctic-sunrise-action-timeline/blog/46743/; *see* Daniel Sandford, *On Russia's Controversial Arctic Oil Rig Prirazlomnaya*, BBC NEWS (Oct. 7, 2013), *at* http://www.bbc.co.uk/news/world-europe-24427153.

[2] Verbatim Record, "Arctic Sunrise" (Neth. v. Russ.), ITLOS Case No. 22 (Nov. 6, 2013), Doc. ITLOS/PV13/C22/1/Rev.1/6, at 13. All judgments, orders, and other documents of the International Tribunal for the Law of the Sea (ITLOS) cited in this article can be found on the Tribunal's website, http://www.itlos.org.

[3] Verbatim Record, *supra* note 2, at 3.

[4] Steven Lee Myers & Andrew Roth, *Putin Defends Seizure of Activists' Ship but Questions Piracy Charges*, N.Y. TIMES, Sept. 25, 2013, at A9.

[5] UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397 [hereinafter UNCLOS].

[6] Greenpeace Press Release, Greenpeace International Applauds Dutch Arbitration over Arctic 30 (Oct. 4, 2013), *at* http://www.greenpeace.org/usa/en/media-center/news-releases/Greenpeace-International-applauds-Dutch-arbitration-over-Arctic-30/.

[7] Shaun Walker & Sam Jones, *Arctic 30: Russia Changes Piracy Charges to Hooliganism*, GUARDIAN (Oct. 23, 2013), *at* http://www.theguardian.com/environment/2013/oct/23/arctic-30-russia-charges-greenpeace; *Greenpeace Arctic Activists Face Further Russian Charges*, GUARDIAN, Nov. 8, 2013, at 20.

Russia informed ITLOS that it did not accept UNCLOS dispute resolution procedures regarding matters of its "sovereign rights or jurisdiction" and that it did "not intend to participate in the proceedings" but remained ready "to continue to seek a mutually acceptable solution to this situation" with the Netherlands.[8] Russia's objections were founded on its statement on ratification of UNCLOS, whereby, pursuant to Article 298 of the Convention, it withheld consent to jurisdiction "with respect to disputes . . . concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction."[9] ITLOS proceeded—in Russia's absence—to hear the Dutch provisional measures application on November 6. The Netherlands sought orders that the *Arctic Sunrise* and the Arctic 30 be released and that both the vessel and detained persons be allowed to leave Russian jurisdiction. Greenpeace International participated in proceedings as amicus curiae. On November 22, ITLOS handed down an order (by 19 votes to 2) requiring Russia to release the vessel and the Arctic 30, and to allow them to leave the country on payment of a bond of €3.6 million, the amount of which was fixed by reference to "the respective rights claimed by the Parties and the particular circumstances of the . . . case."[10] December 2 was set as the date by which compliance with the order was to be reported. On December 18, the Russian Duma approved an amnesty bill that included the Arctic 30 within its ambit, allowing the charges to be dropped and the protesters to leave the country.[11] The *Arctic Sunrise* was not released.

"Arctic Sunrise" is potentially a landmark case for ITLOS. It is both the first case in which the Tribunal has faced nonappearance by a party to a dispute[12] and the first in which it has ordered as a provisional measure the release of a vessel other than a warship (protected by sovereign immunity) or a fishing vessel (expressly covered by UNCLOS prompt release procedures). The order itself lays down a marker as to how the Tribunal sees its own institutional authority and its role in upholding the integrity of UNCLOS. It may also indicate a willingness to take an expansive approach to provisional measures and even to take questions of human rights into account in ordering them. The latter, in particular, raises the possibility that ITLOS may see itself as having a wide jurisdiction over incidental questions of international law arising from disputes under the Convention.

This Note will discuss several aspects of the order. In part I, it will examine the procedures set out in UNCLOS that provide for the release of an arrested ship and its crew. In part II, it will address the substance of the Tribunal's order, and the extent to which Russian nonappearance and human rights concerns may have played a role in determining the outcome.

[8] "Arctic Sunrise" (Neth. v. Russ.), ITLOS Case No. 22, Provisional Measures, para. 9 (Nov. 22, 2013) (quoting November 22, 2013, *note verbale* from the Embassy of the Russian Federation in the Federal Republic of Germany to ITLOS)

[9] This language from Russia's declaration of March 12, 1997, made upon ratification of UNCLOS, *at* http://www.un.org/depts/los/convention_agreements/convention_declarations.htm, is first quoted in *"Arctic Sunrise," supra* note 8, at paragraph 9.

[10] "Arctic Sunrise," *supra* note 8, para. 96.

[11] *Russian Parliament Approves Amnesty for Prisoners*, BBC NEWS (Dec. 18, 2013), *at* http://www.bbc.co.uk/news/world-europe-25433426; *Russia Drops First Greenpeace Arctic 30 Case*, BBC NEWS (Dec. 24, 2013), *at* http://www.bbc.co.uk/news/world-europe-25504016.

[12] France threatened nonappearance in prompt release proceedings in "*Grand Prince*," as it declared the proceedings without object (as the vessel had already been forfeited under French law). It did, however, attend a hearing on the basis that it could contest both jurisdiction and admissibility. "Grand Prince" (Belize v. Fr.), ITLOS Case No. 8, Prompt Release (Apr. 20, 2001).

I. MECHANISMS FOR RELEASE OF THE *ARCTIC SUNRISE*: UNCLOS ARTICLES 292 AND 290(5)

The Netherlands' immediate priority at the time of commencing its case was to secure the release of the *Arctic Sunrise* and the Arctic 30 from Russian custody. Two mechanisms for such a release are potentially available under UNCLOS: prompt release and provisional measures. Elements of both were present in the Tribunal's order of November 22, 2013.

Prompt Release Proceedings Under UNCLOS Article 292

Prompt release proceedings[13] concern only the obligation to release vessels and crews promptly "upon the posting of a reasonable bond or other financial security."[14] The legality of the arrest itself is irrelevant. An order for prompt release[15]—of both vessel and crew—can be made by an Annex VII tribunal or by ITLOS.

Prompt release proceedings are brought under UNCLOS Article 292, which has generated extensive practice.[16] Such proceedings, however, would have been of no assistance to the Netherlands. There is no universal obligation in UNCLOS of prompt release (and if there were, it would seriously complicate various law enforcement operations at sea). Article 292 applies when the flag state alleges the detaining state "has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond." Such provisions are few, and they usually involve fisheries enforcement (Article 73) or pollution incidents (Articles 220 and 226). No such express obligation exists, for example, in relation to oil platforms and infringement of their safety zones. It is therefore understandable that the Netherlands sought the release of the *Arctic Sunrise* and its crew as a provisional measure under UNCLOS Article 290 to "preserve the respective rights of the parties" pending a final arbitration decision. The question of whether the limited provisions for prompt release found elsewhere in the Convention should have given ITLOS pause before it crafted a similar remedy under Article 290 is considered below.[17]

Provisional Measures Under UNCLOS Article 290(5)

Provisional measures represent a form of relief granted *pendente lite* to protect rights subject to litigation and to prevent further aggravation of the dispute. Their existence reflects the reality

[13] *See generally* Symposium, *The International Tribunal for the Law of the Sea: Establishment and "Prompt Release" Procedures*, 11 INT'L J. MAR. & COASTAL L. 137 (1996); Don Rothwell & Tim Stephens, *Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests*, 53 INT'L & COMP. L.Q. 171 (2004); Thomas Mensah, *The Tribunal and the Prompt Release of Vessels*, 22 INT'L J. MAR. & COASTAL L. 425 (2007); David H. Anderson, *Prompt Release of Vessels and Crews*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., online ed. 2008), *at* http://www.mpepil.com.

[14] UNCLOS, *supra* note 5, Art. 292.

[15] *See further* Erik Franckx, *"Reasonable Bond" in the Practice of the International Tribunal for the Law of the Sea*, 32 CAL. W. INT'L L. J. 303 (2002).

[16] *See*, *e.g.*, M/V "Saiga" (St. Vincent v. Guinea), ITLOS Case No. 1, Prompt Release (Dec. 4, 1997); "Grand Prince," *supra* note 12; "Volga" (Russ. v. Austl.), ITLOS Case No. 11, Prompt Release (Dec. 23, 2002); "Hoshinmaru" (Japan v. Russ.), ITLOS Case No. 14, Prompt Release (Aug. 6, 2007); "Tomimaru" (Japan v. Russ.), ITLOS Case No. 15, Prompt Release (Aug. 6, 2007).

[17] See section "The Significance of Russia's Nonappearance" in part II.

that international tribunals must be able to assert themselves on an interim basis to preserve the final integrity of any judgment and the status quo between the parties.[18]

Give that the Netherlands has chosen Annex VII arbitration, any arbitral tribunal constituted will assume responsibility over all aspects of the dispute—including provisional measures. UNCLOS Article 290(1) provides:

> If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction . . . , the court or tribunal may prescribe any provisional measures which it considers appropriate . . . to preserve the respective rights of the parties . . . or to prevent serious harm to the marine environment, pending the final decision.

Such tribunals, however, take time to constitute. Until an Annex VII tribunal has been constituted, and *if* the parties have agreed to no other court or tribunal within two weeks of the initial request to constitute a tribunal, ITLOS has the power to prescribe provisional measures under Article 290(5). That article provides:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, . . . [ITLOS] may prescribe, modify or revoke provisional measures . . . 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 . . . .

The critical features of this provision are (1) the prima facie jurisdiction requirement, (2) the criterion of urgency, and (3) the use of such orders as stop-gap measures until a competent arbitral tribunal is constituted. This capacity to award interim relief *pending constitution* of another tribunal is not ordinarily available within international adjudication[19] and raises questions of legitimacy in its exercise.[20] Nonetheless, ITLOS has already built an extensive Article 290(5) jurisprudence,[21] though that jurisprudence is not entirely consistent and does not include any case equivalent to "*Arctic Sunrise*."

[18] Maurice Mendelson, *Interim Measures of Protection in Cases of Contested Jurisdiction*, 1972–73 BRIT. Y.B. INT'L L. 259, 259; Bernard Oxman, *Jurisdiction and the Power to Indicate Provisional Measures*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 323, 324–26 (Lori Fisler Damrosch ed., 1987); CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 121 (2007). On provisional measures under UNCLOS (Article 290, in particular), see Rüdiger Wolfrum, *Provisional Measures of the International Tribunal for the Law of the Sea*, *in* THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 173 (P. Chandrasekhara Rao & Rahmatullah Khan eds., 2001); Thomas Mensah, *Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)*, 62 HEIDELBERG J. INT'L L. 43 (2002); SHABTAI ROSENNE, PROVISIONAL MEASURES IN INTERNATIONAL LAW: THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (2005); NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 59–85 (2005); Peter Tomka & Gleider I. Hernández, *Provisional Measures in the International Tribunal for the Law of the Sea*, *in* COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM (Holger P. Hestermeyer ed., 2012).

[19] Compare the Locarno Treaties of 1925 (for example, the Arbitration Convention Between Germany and France, Oct. 16, 1925, 54 LNTS 317), which in common Article 19 permitted the Permanent Court of International Justice to award provisional measures in place of an unconstituted conciliation commission. *See also* EDWARD DUMBAULD, INTERIM MEASURES OF PROTECTION IN INTERNATIONAL CONTROVERSIES 127 (1932).

[20] Mensah, *supra* note 18, at 46–47.

[21] *See also* Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), ITLOS Case Nos. 3 & 4, Provisional Measures (Aug. 27, 1999); MOX Plant (Ir. v. UK), ITLOS Case No. 10, Provisional Measures (Dec. 3, 2001); Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), ITLOS Case No. 12, Provisional Measures (Oct. 8, 2003); "ARA Libertad" (Arg. v. Ghana), ITLOS Case No. 20, Provisional Measures (Dec. 15, 2012). Provisional measures have been considered by ITLOS under UNCLOS Article 290(1) only in two cases: *M/V "Saiga" (No. 2)* (St. Vincent v. Guinea), ITLOS Case No. 2, Provisional Measures (Mar. 11, 1998), and *M/V "Louisa"* (St.

By way of further background, Article 290 descends from the same broad tradition of provisional measures as Article 41 of the International Court of Justice (ICJ) Statute.[22] The latter provision, however, contains only a "sparse[,] axiomatic statement" of the Court's power to award interim relief.[23] Unsurprisingly, in crafting Article 290 the drafters of UNCLOS sought not only to reflect aspects of the ICJ jurisprudence that had built up surrounding Article 41 but also to address certain controversies in its application.[24] Paragraphs (1) and (5) of UNCLOS Article 290 both require a finding of prima facie jurisdiction before granting provisional measures. Such a requirement is not expressly formulated in the ICJ Statute and was a controversial question in early ICJ disputes such as *Anglo-Iranian Oil*.[25] Second, UNCLOS Article 290(6) clearly provides that provisional measures are automatically binding on the parties, a point only recently resolved by the ICJ.[26] Third, UNCLOS Article 290(1) is phrased in similar terms to the ICJ Statute in describing the purpose of provisional measures as being "to preserve the respective rights of the parties to the dispute" pending judgment. (The further basis, being measures designed "to prevent serious harm to the marine environment," is a unique addition.)[27] Fourth, absent from UNCLOS is any reference to causing irreparable prejudice to a right subject to litigation[28]—a criterion that is well recognized in ICJ case law. Article 290(5) refers to urgency alone.

It remains uncertain whether irreparable prejudice is required for interim relief under UNCLOS.[29] The Tribunal made no mention of irreparability in the 1998 *M/V "Saiga" (No. 2)*

Vincent v. Spain), ITLOS Case No. 18, Provisional Measures (Dec. 23, 2010). The Annex VII tribunal in *MOX Plant* also exercised its power under UNCLOS Article 290(1). MOX Plant (Ir. v. UK), Order No. 3 (Perm. Ct. Arb. June 24, 2003).

[22] On similarities in practice between the ICJ and ITLOS (and other international tribunals) in awarding interim relief, see Cameron A. Miles, *The Influence of the International Court of Justice on the Law of Provisional Measures Before International Courts and Tribunals: A "Uniform" Approach?*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW (M. Andenas & E. Bjørge eds., forthcoming).

[23] ROSENNE, *supra* note 18, at 62.

[24] *See also* 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 53–59 (Shabtai Rosenne & Louis Sohn eds., 1989).

[25] Anglo-Iranian Oil (UK v. Iran), Provisional Measures, 1951 ICJ REP. 89, 92–93 (July 5); *id.* at 96 (Winiarski & Badawi Pasha, JJ., dissenting). *See generally* Mendelson, *supra* note 18; Oxman, *supra* note 18; ROSENNE, *supra* note 18, ch. 4; JEROME. B. ELKIND, INTERIM PROTECTION: A FUNCTIONAL APPROACH, ch. 7 (1981); JERZY SZTUCKI, INTERIM MEASURES IN THE HAGUE COURT: AN ATTEMPT AT A SCRUTINY, ch. 5.1 (1983).

[26] LaGrand (Ger. v. U.S.), 2001 ICJ REP. 466, paras. 101–03 (June 27); *see also* Joachim A. Frowein, *Provisional Measures by the International Court of Justice—The* LaGrand *Case*, 62 HEIDELBERG J. INT'L L. 54 (2002); Robert Jennings, *The* LaGrand *Case*, 1 LAW & PRAC. INT'L CTS. & TRIBUNALS 13 (2002). The binding nature of such measures is also reflected in the wording of paragraphs (1) and (3)–(6) of UNCLOS Article 290, which refer to the "prescription" of provisional measures, as opposed to their "indication."

[27] Wolfrum, *supra* note 18, at 175–78.

[28] There is, however, a reference to "serious harm" in the context of the marine environment in UNCLOS Article 290(1) and a further oblique reference to the "urgency of the situation" in paragraph (5) of the same article.

[29] Both ITLOS and Annex VII tribunals have avoided in-depth consideration of irreparable prejudice and focused on urgency. Where it does appear in ITLOS jurisprudence, irreparable prejudice is discussed only in passing. *See* M/V "Louisa," *supra* note 21, para. 72; Land Reclamation by Singapore in and Around the Straits of Johor, *supra* note 21, para. 72. See, however, the discussions in individual opinions. *E.g.*, M/V "Saiga" (No. 2), *supra* note 21, Sep. Op. Liang, J., para. 28; Southern Bluefin Tuna, *supra* note 21, Sep. Op. Liang, J., paras. 3–5; *id.*, Sep. Op. Treves, J., para. 5; Land Reclamation by Singapore in and Around the Straits of Johor, *supra* note 21, Sep. Op. Chandrasekhara Rao, J., para. 28; *id.*, Sep. Op. Cot, J., para. 4; "ARA Libertad," *supra* note 21, Decl. Paik, J., para. 1. Parties have continued to frame their applications in terms of irreparable prejudice. *See*, *e.g.*, Request for Provisional Measures Submitted by Malaysia, para. 15; Land Reclamation by Singapore in and Around the Straits of Johor, *supra* note 21; Request for Provisional Measures Submitted by Argentina, para. 29; "ARA Libertad," *supra* note 21. *See also* Miles, *supra* note 22, sec. III.C.2.

decision.[30] When called on to order Article 290(5) provisional measures in *MOX Plant* in 2001, ITLOS also made no reference to irreparable prejudice (except in rehearsing parties' submissions).[31] In 2003, however, the Annex VII tribunal in *MOX Plant* considered irreparability to be a key issue.[32] Similarly, in 2010, in *M/V "Louisa,"* the absence of irreparable harm was considered determinative in denying provisional measures.[33] But any trend toward consideration of irreparable harm is far from certain, the concept being notably absent from the orders given recently in *"ARA Libertad."*

II. THE ORDER OF NOVEMBER 22, 2013

The ITLOS order of November 22, 2013, on the Netherlands' provisional measures application prescribed the following interim measures (in each instance by 19 votes to 2):

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

The order itself is compressed in its legal reasoning. The separate and dissenting opinions, however, give some insight into the issues that concerned the judges. Several themes emerge. First, the Tribunal regarded Russia's nonappearance as serious. It is conceivable that the order was intended in part to signal that ITLOS would not take nonappearance lightly. Second, the Tribunal may have created a "back door" prompt release procedure that disrupts the Convention's finely balanced provisions. We consider that possible criticism overstated, at least at the formal level. We also consider the order for the release of the *Arctic Sunrise* open to challenge, however, on the basis that, irrespective of where one's sympathies lie on questions of peaceful protest, (a) it sets a damaging precedent in striking the wrong balance between the rights of navigating and coastal states, and (b) ordering the release of a vessel in such a case such may constitute not a provisional measure but an interim judgment. If an order crosses the line between temporary measures of protection and de facto final judgment, such an order may constitute abuse of judicial discretion. Third, various comments in the separate opinions, as well as recitations in the order itself, indicate that human rights considerations may also have played a role or could play a role in future cases. The extent to which the Tribunal may examine questions of international law beyond UNCLOS is both important and contentious.

[30] M/V "Saiga" (No. 2), *supra* note 21.

[31] MOX Plant, Provisional Measures, *supra* note 21, para. 67.

[32] MOX Plant, Order No. 3, *supra* note 21, para. 58 (citing as an example Certain Criminal Proceedings in France (Congo v. Fr.), Provisional Measures, 2003 ICJ REP. 102, paras. 34–35 (June 17)).

[33] M/V "Louisa," *supra* note 21, para. 72 ("[I]n the circumstances of this case, the Tribunal does not find that there is a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute . . . .").

Russia's Objection to Jurisdiction

Pursuant to UNCLOS Article 290(5), ITLOS first assessed the prima facie jurisdiction of any Annex VII tribunal. For this purpose, the Tribunal considered the scope and effects of Russia's declaration when ratifying UNCLOS that, under the UNCLOS Article 298 optional exclusions from the scope of the dispute settlement system, it did not accept binding dispute settlement processes arising from "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction"—a phrase that can reasonably be taken to refer to activities in its EEZ.[34] The Russian position was that as the arrest of the *Arctic Sunrise* and its crew occurred during just such an activity, any Annex VII tribunal would lack jurisdiction.[35]

The Tribunal found that Russia's declaration did not prima facie preclude the jurisdiction of an Annex VII tribunal in this instance. The Russian statement was effective only to the extent permitted under Article 298, which allows a state party to exclude such disputes "from the jurisdiction of a court or tribunal [otherwise having jurisdiction] under article 297, *paragraph 2 or 3*."[36] The declaration therefore did not apply to disputes under Article 297(1), which includes cases in which it is alleged a coastal state has interfered with "freedoms and rights of navigation" (or, indeed, with "other internationally lawful uses of the sea") within an EEZ. Obviously, as this language precisely captures the character of the present dispute as described in the Dutch application,[37] the declaration did not preclude jurisdiction.[38]

The Significance of Russia's Non-appearance

Russia's failure to appear before the Tribunal seems to have influenced the Tribunal's perception of the situation presented. Several paragraphs of the order detail the consequences of Russia's nonappearance, with the Tribunal expressly referring to the ICJ jurisprudence concerning nonappearance and provisional measures. For example, the Tribunal noted that "the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations."[39] The Tribunal further observed that "the non-appearing State is nevertheless a party to the proceedings

[34] *See supra* note 9.

[35] *See* "Arctic Sunrise," *supra* note 8, para. 9 (quoting November 22, 2013, *note verbale* from the Embassy of the Russian Federation in the Federal Republic of Germany to ITLOS); *see also Arctic Sunrise Case: Russia to Boycott International Maritime Tribunal over Greenpeace Arrests*, RUSSIA TODAY (Oct. 23, 2013), *at* http://rt.com/news/greenpeace-arctic-sunrise-court-617/. For the original Russian statement from the Ministry of Foreign Affairs of the Russian Federation, Oct. 23, 2013, see http://www.mid.ru/brp_4.nsf/newsline/299522E0AC241E4744257C0D0021F8D8.

[36] UNCLOS, *supra* note 5, Art. 289(1)(b) (emphasis added).

[37] *See* Request for Provisional Measures Submitted by the Netherlands, paras. 15, 20 (Oct. 21, 2013), "Arctic Sunrise," *supra* note 8, indicating the Dutch case hinged on UNCLOS Articles 56(2), 58, 87(1)(a), and 110 in alleging that Russia, "in boarding, investigating, inspecting and detaining the 'Arctic Sunrise' " without the Netherlands' consent, failed to respect its "freedom of navigation and its right to exercise jurisdiction over the 'Arctic Sunrise.' "

[38] "Arctic Sunrise," *supra* note 8, paras. 39–45. It is notable that the Russian Judge Golitsyn did not contest this holding on the effects of the Russian statement. *Id.*, Diss. Op. Golitsyn, J., paras. 2–14.

[39] "Arctic Sunrise," *supra* note 8, para. 48 (referring to Fisheries Jurisdiction (UK v. Ice.), Interim Protection, 1972 ICJ REP. 12, para. 11 (Aug. 17); Fisheries Jurisdiction (Ger. v. Ice.), Interim Protection, 1972 ICJ REP. 30, para. 11 (Aug. 17); Nuclear Tests (Austl. v. Fr.), Interim Protection, 1973 ICJ REP. 99, para. 11 (June 22); Nuclear Tests (N.Z. v. Fr.), Interim Protection, 1973 ICJ REP. 135, para. 12 (June 22); Aegean Sea Continental Shelf

. . . with the ensuing rights and obligations,"[40] and then quoted[41] the ICJ's *Nicaragua* judgment: "A State which decides not to appear must accept the consequences . . . , the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment . . . ."[42] Still further, the Tribunal noted that it "was ready to take into account any observations that might be presented to it by a party before the closure of the hearing,"[43] that "the Russian Federation was . . . given ample opportunity to present its observations, but declined to do so,"[44] and that "the Russian Federation could have facilitated the task of the Tribunal by furnishing it with fuller information on questions of fact and of law."[45]

Commentary within the individual opinions. Even stronger views were presented in various separate opinions. Judge *ad hoc* Anderson noted that Russia's refusal to participate had rendered it necessary to infer its stance through diplomatic communications, legislation, and judicial decisions, making the Tribunal's task more difficult. He concluded: "Non-appearance does not serve the efficient application of Part XV of the Convention or, more widely, the rule of law in international relations."[46] Judges Wolfrum and Kelly similarly noted that through nonappearance, a state not only weakens its own position in the legal dispute but hampers the other party and the international tribunal itself.[47] They further observed that by not appearing, Russia was acting in a manner contrary to the object and purpose of the dispute settlement system put in place by UNCLOS. Finally, the judges stressed:

> Judicial proceedings are based on a legal discourse among the parties and the co-operation of both parties with the international court or tribunal in question. Non-appearance cripples this process. As Sir Gerald Fitzmaurice has put it . . . non-appearance leaves the "outward shell" of the dispute settlement system intact, but washes away the "core". For that reason article 28 of [UNCLOS Annex VI (the ITLOS Statute)] should not be understood as attributing a right to parties not to appear, it rather reflects the reality that some States may, in spite of their commitment[s] . . . , take this course of action. The Order of the Tribunal does not express these concerns sufficiently and appears to be over diplomatic.[48]

The extent to which the order may be understood as a response to Russia's nonappearance. The Tribunal noted that "the Netherlands should not be put at a disadvantage" because of Russia's nonappearance[49] and therefore that "the Tribunal must . . . identify and assess the respective rights of the Parties involved on the best available evidence."[50]

(Greece v. Turk.), Interim Protection, 1976 ICJ REP. 3, para. 13 (Sept. 11); United States Diplomatic and Consular Personnel in Tehran (U.S. v. Iran), Provisional Measures, 1979 ICJ REP. 7, paras. 9, 13 (Dec. 15)).

[40] "Arctic Sunrise," *supra* note 8, para. 51 (referring to Nuclear Tests (Austl. v. Fr.), *supra* note 39, para. 24).

[41] *Id.*, para. 52.

[42] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, para. 28 (June 27).

[43] "Arctic Sunrise," *supra* note 8, para. 49.

[44] *Id.*, para. 50.

[45] *Id.*, para. 54.

[46] *Id.*, Decl. Anderson, J. *ad hoc*, para. 2.

[47] *Id.*, Sep. Op. Wolfrum & Kelly, JJ., para. 5.

[48] *Id.*, para. 6 (referring to Gerald Fitzmaurice, *The Problem of the 'Non-appearing' Defendant Government*, 1980 BRIT. Y.B. INT'L L. 89, 115).

[49] "Arctic Sunrise," *supra* note 8, para. 56.

[50] *Id.*, para. 57.

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This position may account for the Tribunal's reasoning on the question of urgency, which is little better than perfunctory. The Tribunal first extracts a section of the Dutch oral argument that the arrest of the *Arctic Sunrise* presents a risk of environmental harm, that the continuing detention of the Arctic 30 breaches certain of their human rights, that the continuing detention of the vessel and its crew has irreversible consequences, and that "prolong[ing] the detention pending the constitution of the arbitral tribunal and the resolution of the dispute would further prejudice the rights of the Kingdom of the Netherlands."[51] The Tribunal then cites, without comment or interpretation, an extract from the *Official Report on Seizure of Property* released publicly by Russia, which describes the allocation of responsibility for the *Arctic Sunrise* within the various Russian municipal authorities.[52] Without further analysis, the Tribunal finds that "under the circumstances of the present case, . . . the urgency of the situation requires the prescription . . . of provisional measures."[53]

Such an approach on the part of the Tribunal is troubling. It is one thing to, in the absence of contrary evidence, to take the *factual* assertions of the Netherlands at face value. After all, the Tribunal can hardly be expected to procure its own evidence. But it is quite another to so readily accept the *legal* assertions contained in the Dutch argument. Yet that is exactly what occurred. Having accepted the Dutch account as factually accurate, the majority simply moves to declare the situation urgent, without explicitly enunciating intermediate legal reasoning of its own. Some might argue that this response is appropriate in the face of Russian nonappearance and that the Tribunal is thereby firmly communicating that it is unwilling to have its compulsory jurisdiction challenged and proceedings thereby disrupted. But nonappearance cannot be the legal explanation. The Tribunal remains obligated to reach its own conclusions as to whether the legal requirements of UNCLOS Article 290(1) and (5) have been met. This point is reinforced by the nature of provisional measures themselves; given that such measures may be awarded prior to confirmation of a court's or tribunal's jurisdiction, they have correctly been characterized as an affront to the sovereignty of the party against whom they are awarded.[54] As a consequence, interim relief such as that contemplated by UNCLOS Article 290 is exceptional. That exceptional character cannot be altered by the fact of a nonappearance.

In cases of nonappearance, as in all disputed cases, tribunals should independently scrutinize applications against the relevant criteria and enunciate the legal reasoning leading to their conclusions. Such a process may result in the application being declined despite the nonappearance of the respondent. In *Aegean Sea Continental Shelf*, for example, the ICJ was faced by a Greek application for provisional measures and by a Turkish nonappearance. Greece requested interim relief that would prevent Turkish vessels from conducting seismic surveys in contested waters—which, Greece argued, would violate, *pendente lite*, Greece's claimed exclusive rights of exploration. Although the Court considered that "Turkey's activity in seismic exploration might then be considered . . . an infringement and invoked as a possible cause of prejudice to the exclusive rights of Greece,"[55] it concluded that any prejudice so caused was more than

[51] *Id.*, para. 87.
[52] *Id.*, para. 88.
[53] *Id.*, para. 89.
[54] Anglo-Iranian Oil, *supra* note 25, at 96 (Winiarski & Badawi Pasha, JJ., dissenting).
[55] Aegean Sea Continental Shelf, *supra* note 39, para. 31.

capable of reparation. The request for interim relief was therefore rejected.[56] Although Turkey actually submitted, despite its nonappearance, observations on the Greek application in *Aegean Sea Continental Shelf*,[57] the failure of Russia to do likewise in the present instance did not free the Tribunal from its obligation to subject the Dutch application to probing legal analysis.

The relevance of Article 28 of UNCLOS Annex VI (the ITLOS Statute). The next question concerns the implications of Article 28 of the ITLOS Statute in the context of Russia's nonappearance. Article 28 provides:

> When one of the parties does not appear before the Tribunal . . . , the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party . . . shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.

Should Article 28 apply to provisional measures proceedings under UNCLOS Article 290(5)? No mention of Article 28 is made in the order, but the issue is discussed in the separate opinions. First, Judges Wolfrum and Kelly attached weight to the location of Article 28 in the section of the ITLOS Statute that is intended to apply to all ITLOS proceedings—including those arising under UNCLOS Article 290(5).[58] Judge Paik, presenting a similar analysis, concluded that the interaction of the two provisions posed no great difficulty. The Tribunal needed only to establish, to its own satisfaction, that it possessed jurisdiction to consider an application for relief under Article 290(5) and that the application was grounded in fact and law (that is, that any Annex VII tribunal would possess prima facie jurisdiction and that the application itself met the required standards or urgency, irreparable prejudice, and so forth).[59]

It is fair to ask what might have happened if the Tribunal had undertaken an explicit, independent analysis of the Dutch position. Clearly, it had jurisdiction to consider the application within the meaning of Article 290(5). But beyond that jurisdictional matter, the situation is problematic. First, the order is not clear as to its legal or factual basis. The quoted paragraphs of the Dutch submissions refer to serious environmental harm arising from the continuing detention of the *Arctic Sunrise*, and they alluded to the individual freedoms and liberties of its crew. Although the Tribunal seemingly accepts these claims not only at face value but also as dispositive, it makes no specific reference to the Convention provisions that it seeks to protect through its award of interim relief, much less how the measures prescribed protect those rights.

Second, if we are to infer from the quoted submissions that the measures prescribed are intended to prevent serious harm to the marine environment in and around Murmansk, and to protect Dutch freedom of navigation in the Russian EEZ pending the outcome of the dispute, further questions as to urgency and irreparable harm arise. With respect to urgency, the purpose of these proceedings was *not* to prevent environmental harm prior to the date of any final judgment on the merits. Rather, the Tribunal was supposed to consider only whether such harm could realistically materialize before the Annex VII tribunal would have the opportunity

[56] *Id.*, para. 33.
[57] *Id.*, para. 29.
[58] "Arctic Sunrise," *supra* note 8, Sep. Op. Wolfrum & Kelly, JJ., para. 4.
[59] *Id.*, Sep. Op. Paik, J., paras. 1–7.

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to order its own measures.[60] It was unlikely, however, that the detention of the *Arctic Sunrise* would result in "serious harm" prior to the composition of the Annex VII tribunal.[61] As noted earlier, a publicly released Russian report indicated specifically how the responsibility for the vessel's maintenance was allocated between Russian municipal authorities. Such an allocation may well have been taken as equivalent to Spain's submission regarding the *M/V Louisa*, which ITLOS interpreted as removing the risk of serious harm to the marine environment.[62]

Although the environmental issue therefore lacks bite, it is arguable that at the time of the order, the Netherlands' freedom of navigation in Russia's EEZ was compromised, that it was further compromised each day that the vessel and its crew remained in detention, and that the detention of the crew likewise infringed their rights. As seen in *M/V "Saiga" (No. 2)*,[63] however, ITLOS provided monetary compensation in equivalent circumstances, and no compelling reason requires that the instant case be treated differently. Although many legal systems distinguish detention from other wrongs that can be sufficiently addressed by compensation (hence the existence of habeas corpus proceedings), it was not clear in this case that the detention was illegal, and the Netherlands did not even allege that the specific conditions of detention somehow rendered it wrongful. The individuals detained were at the time subject to criminal investigation. For ITLOS to order their release undermines Russia's criminal jurisdiction (as discussed below), an outcome that should not be lightly contemplated.

Has the Tribunal Created a "Back Door" Prompt Release Proceeding?

The appropriateness of the bond. Judge Jesus appropriately notes that *"Arctic Sunrise"* is the first case in which ITLOS, in Article 290(5) provisional measures proceedings, has been "requested to order the release of [a] vessel and persons onboard from detention for alleged violations of the maritime regulations of the coastal State" in its EEZ.[64] It therefore has a precedential role. In particular, Judge Jesus expressed concern that in ordering the release of the *Arctic Sunrise* and its crew *upon the posting of a bond*, the Tribunal has effectively created "a back-door prompt release procedure that the Convention designed to be applied only to cases involving illegal fisheries in the EEZ and the specific situations referred to in article 226, paragraph 1, in conjunction with article 220, paragraphs 3 and 8, of the Convention."[65]

As noted above, the references to prompt release in cases of fisheries and pollution offenses contained in Articles 76, 220, and 226 should perhaps have given ITLOS pause before ordering similar measures under Article 290(1) or (5). Given those few and specific references, it might be thought, to the contrary, that the parties to UNCLOS did not intend equivalent procedures to apply in other cases. The procedures for releasing a vessel under Article 290(5) would not be equivalent, however, to those under Article 292. Prompt release proceedings proper under Article 292 remain a unique (and extremely fast) procedure available even in the absence of any

[60] Any measures so ordered, however, may have an effect beyond this point. *See* Land Reclamation by Singapore in and Around the Straits of Johor, *supra* note 21, para. 69.

[61] "Arctic Sunrise," *supra* note 8, Diss. Op. Kulyk, J., paras. 3–7.

[62] M/V "Louisa," *supra* note 21, paras. 74–75; *see also* "Arctic Sunrise," *supra* note 8, Diss. Op. Kulyk, J., paras. 9–10.

[63] M/V "Saiga" (No. 2), *supra* note 21, Merits (July 1, 1999).

[64] "Arctic Sunrise," *supra* note 8, Sep. Op. Jesus, J., para. 7(a).

[65] *Id.*, para. 7(b).

case being commenced on the merits and entirely without any requirement that "urgency" or "irreparable prejudice" be made out. Seeking orders for release of a vessel under Article 290(5) will, by contrast, have a number of procedural hurdles: (1) steps must be taken to initiate UNCLOS Annex VII or VIII arbitration; (2) ITLOS must find that it has prima facie jurisdiction; and (3) the requirements of urgency and irreparable harm must be satisfied. Clearly, it is within the power of ITLOS to order the release of a vessel as a preliminary measure: the power to grant provisional measures under Article 290(1) is constrained only by the requirement that such measures be "appropriate."

The real point to be derived from the structure of UNCLOS is that ordering the release of a vessel absent a determination on the merits risks severe prejudice to certain interests of a coastal state. In the present case, the criminal investigation or prosecution of persons presumed to have violated the laws of a state is a sovereign function, and the early release of detainees pursuant to an interim measure may compromise the very purpose of such an investigation and subsequent criminal proceedings.[66]

Such concerns should strongly militate against the release of a vessel (and crew) from coastal state jurisdiction as a provisional measure. The fisheries and pollution offenses under UNCLOS for which prompt release upon payment of bond is ordinarily applicable are offenses that are punishable only by financial penalties.[67] Such offenses are peculiarly suitable to release on bond, in that if the offending vessel (and its crew) abscond, the financial security leaves the coastal state no worse off, and respect for its sovereign powers of law enforcement remains intact. One could thus fairly conclude that in cases concerning a criminal investigation that could lead to imprisonment, prompt release on bond is simply inadequate to preserve the rights of the coastal state ("release" including here the right to leave the jurisdiction). As Judge Jesus puts it, in cases where the sanction attached to the alleged offense "may not be convertible into a monetary penalty," release on bond "may not 'preserve the rights' of the detaining State."[68]

"ARA Libertad" *as an appropriate alternative.* Judge Jesus fairly observes that provisional measures proceedings inevitably trespass on the merits of the case.[69] If anything follows from this point, however, it would only be that provisional measures should be exercised with restraint. Nonetheless, Judge Jesus draws a surprising conclusion based on *"ARA Libertad."* His argument appears to be that in that case the orders were founded on a substantive interpretation of the Convention's applicable provisions regarding state immunity. Therefore, nothing would prevent in the present case a comparable substantive interpretation of provisions protecting freedom of navigation, which could then justify (or require) the release of a vessel as a provisional measure.

The logic of this proposition notwithstanding, it is difficult to treat *"ARA Libertad"*—a case involving the seizure of warship clearly subject to sovereign immunity—as anything other than confined to its own facts. The same might also be said of *Tehran Hostages*,[70] which involved a clear transgression of the Vienna Convention on Diplomatic Relations[71] and the inviolability

[66] *Id.*, para. 7(c)(i), (ii).

[67] *Id.*, paras. 9, 10.

[68] *Id.*, para. 11. Judge Jesus goes on to conclude, however, that the correct result would have been release *without bond*. Given his reasoning, this conclusion is hard to follow.

[69] *Id.*, para. 15(a).

[70] United States Diplomatic and Consular Staff in Tehran, Provisional Measures, *supra* note 39.

[71] Vienna Convention on Diplomatic Relations, June 24, 1964, 500 UNTS 95.

of diplomatic persons. When a strongly entrenched and protected international right such as sovereign or diplomatic immunity as sovereign or diplomatic immunity is being compromised, it is easy to see how an international tribunal could safely come to the conclusion that allowing such an interference to continue until judgment is rendered (or an arbitral tribunal constituted) would be intolerable. A case concerning warship immunity or inviolability of diplomats, touching so closely on core questions of sovereignty and international relations as they do, tells us little about a situation in which a private vessel is exercising the freedom of navigation. The latter is hardly a case of a sovereign organ suffering interference in the discharge of sovereign functions. Indeed, the emphasis on sovereign rights implicit in *"ARA Libertad"* would, in a case like *"Arctic Sunrise,"* lead one to expect the Tribunal to favor the position of a coastal state having an arguable claim to enforce its criminal law.

Balancing the interests involved and the nature of provisional measures. As a general rule, ITLOS should be reluctant to order release of a vessel as a provisional measure, especially in cases where UNCLOS Article 290(5) is involved. First, there is a legitimacy question: as the Tribunal will not be the body that ultimately hears the case on the merits, it should be slow to take action that might effectively determine the case. Second, it is not obvious that the harms involved are potentially irreversible (or at least noncompensable) or otherwise so unusual that they warrant urgent orders. In a case concerning detention of a vessel, one party likely will have to be disappointed. Either the flag state must suffer a potentially wrongful interference with its freedom of navigation, or the coastal state must suffer a potentially irreversible blow to its ability to enforce its laws in a particular case, given the likelihood that a released vessel and crew will not return to face charges.[72] As a general principle, the law should probably favor the coastal state. This tentative conclusion is strengthened by the limited role given to prompt release under UNCLOS. In *"Arctic Sunrise"* ITLOS does introduce a notable mechanism with the potential to enhance protection of coastal state interests in such situations. This provisional measures case is the first in which a body granted jurisdiction under UNCLOS Part XV has ordered the payment of a bond[73]—a measure that is also rare in international dispute resolution more generally.[74] When compared to the unilateral release ordered in *"ARA Libertad,"* this payment of a bond may be seen as reflecting the wider concern of international tribunals that the burden of a proposed provisional measure be distributed as evenly as possible as between the parties.[75]

Further, although multiple answers are possible, questions undoubtedly arise as to whether, on the facts of this case, the order to release the *Arctic Sunrise* exceeds the Tribunal's power to order provisional measures, irrespective of any balancing of the parties' rights and interests. In

[72] See, for example, "Grand Prince," *supra* note 12, Sep. Op. Anderson, J., and the French submissions in the verbatim record of "Monte Confurco" (Sey. v. Fr.), ITLOS Case No. 6: Doc. ITLOS/PV.00/5, at 5–6, 12 (Dec. 7, 2000), and Doc. ITLOS/PV.00/7, at 4 (Dec. 8, 2000) (arguing that prompt release procedures were being used to undermine national law enforcement measures regarding illegal fishing).

[73] Which was quickly paid. *See* Kingdom of the Netherlands, Report on Compliance with the Provisional Measures Prescribed by the Tribunal on 22 November 2013 in the Case Concerning the 'Arctic Sunrise' (Dec. 2, 2013), "Arctic Sunrise," *supra* note 8.

[74] The ICJ has never seen fit to order a bond by way of interim measures. Certain investor-state arbitration tribunals have been willing to consider such a measure in principle by way of security for costs but have never actually ordered one. *See*, *e.g.*,. Grynberg v. Grenada, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Costs, paras. 5.16, 5.21 (Oct. 14, 2012); *see also* C. Mouawad & E. Silbert, *A Guide to Interim Measures in Investor-State Arbitration*, 29 ARB. INT'L 381, 414–16 (2013).

[75] BROWN, *supra* note 18, at 146; *see also* D. W. Greig, *The Balancing of Interests and the Granting of Interim Relief by the International Court*, 1987 AUSTRALIAN Y.B. INT'L L. 108.

the *Factory at Chorzòw (Indemnities)* case, the Permanent Court of International Justice refused to award interim relief that "cannot be regarded as . . . measures of interim protection, but [is] designed to obtain an interim judgment in favour of a part of [a] claim."[76] This is a sound starting point: interim relief should not decide the very question at issue. In the *Tehran Hostages* case, however, the ICJ distinguished a U.S. request to release the hostages from the German request in *Factory at Chorzów (Indemnities)*, noting that "the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on part of a claim for a sum of money."[77] Notwithstanding that assertion, one could easily argue that the release of the U.S. diplomatic and consular personnel in *Tehran Hostages*, as well as the vessels in *"ARA Libertad"* and *"Arctic Sunrise,"* amounted to a final judgment—if not de jure, then certainly de facto.[78]

Human Rights Concerns Underpinning the Order

As alluded to above, a further (and possibly dispositive) concern of the Tribunal in *"Arctic Sunrise"* appears to have been the detention of the crew in Murmansk. The order quotes the Dutch submission that,

> [a]s a consequence of the actions taken by the Russian Federation [. . . absent an order for release], the crew would continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russian Federation. The 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.[79]

The mere fact that the individuals concerned have been caught up in an interstate dispute—as the second sentence of the Dutch submission suggests—does not itself modify the Tribunal's jurisdiction.[80] One may argue, however, as the Dutch did,[81] that UNCLOS Article 293(1), which provides that a "court or tribunal *having jurisdiction . . . shall apply* this Convention and other rules of international law not incompatible with this Convention" (emphasis added),

[76] Factory at Chorzów (Indemnities) (Ger. v. Pol.), 1927 PCIJ (ser. A) No. 12, at 10. The German request was based on the Permanent Court of Justice's earlier finding in *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 PCIJ (ser. A) No. 7, that Poland had expropriated industrial properties at Chorzów in violation of the Convention Concerning Upper Silesia, May 15, 1922, 9 LNTS 466. Subsequent phases of the proceeding concerned the question of quantum, but on any reading, Germany was entitled to a certain minimum amount. Germany requested the award of this amount as a provisional measure and was duly rebuffed. *See also* Cameron A. Miles, *The Origins of the Law of Provisional Measures Before International Courts and Tribunals*, 73 HEIDELBERG J. INT'L L. 615, 656–58 (2013).

[77] United States Diplomatic and Consular Personnel in Teheran, *supra* note 39, para. 28.

[78] International courts and tribunals have been lucky (thus far) to escape criticism in this respect. In *Tehran Hostages*, *supra* note 70, the order was ignored, and in any event, the United States eventually prevailed on the merits. In *"ARA Libertad"* the parties settled the dispute before the Annex VII tribunal could determine the merits. "ARA Libertad" (Arg. v. Ghana), Termination Order (Perm. Ct. Arb. Nov. 11, 2013).

[79] "Arctic Sunrise," *supra* note 8, para. 87.

[80] See, for example, the declaration of the Annex VII tribunal in MOX Plant, Order No. 3, *supra* note 21, para. 19. Compare, however, the judgment of ITLOS in *M/V "Saiga" (No. 2)*, Merits, *supra* note 21, paras. 155–56. *See also* Lorand Bartels, *Jurisdiction and Applicable Law Clauses: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?*, *in* MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 115 (Tomer Broude & Yuval Shany eds., 2011).

[81] Verbatim Record, *supra* note 2, at 18.

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may allow the Tribunal to apply other rules of international law. This provision could be construed to allow ITLOS an incidental jurisdiction to consider questions of general international law sufficiently closely related to a dispute arising under the Convention. The most obvious example of such recourse to other rules is to avoid a *non liquet*, and ITLOS and an arbitral tribunal have done so in at least two cases. In *M/V "Saiga" (No. 2)*, ITLOS found it had jurisdiction to adjudicate not only the legality of the arrest of the *Saiga* but also the lawfulness of the force used in that arrest, stating:

> In considering the force used by Guinea . . . , the Tribunal must take into account . . . 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.[82]

On the same basis the arbitral tribunal in *Guyana* v. *Suriname* held that Article 293 conferred upon it jurisdiction to adjudicate "alleged violations of the United Nations Charter and general international law," in addition to matters falling directly within the Convention.[83] The approach of the ICJ to such issues, however, has been more conservative. As the Court observed in *Bosnian Genocide*:

> The jurisdiction of the Court is founded on Article IX of the [Genocide] Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfillment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention . . . and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.[84]

Thus, while Article 293(1) might allow the Tribunal to have reference to general international human rights law, that result would have to be shown to be necessary to interpreting or applying UNCLOS itself. Ultimately, this task is an exercise of characterization. Absent such an act of characterization, one might expect a tribunal with jurisdiction arising only under a treaty to look to general international law only for rules of treaty interpretation or rules of state responsibility applicable to breaches of such obligations, as in *Bosnian Genocide*.[85] It is regrettable that the Tribunal did not indicate on what basis such rules might be relevant. The reasoning of separate opinions, insofar as they touched upon this issue, is equally opaque.

Further and additionally, the scale of the "breach" (if one took place, given that the Arctic 30 were prima facie subject to a legitimate criminal prosecution) was substantially reduced

[82] M/V "Saiga" (No. 2), Merits, *supra* note 21, para. 155; *id.*, paras. 156–59.

[83] Guyana v. Suriname, Award, para. 406 (Perm. Ct. Arb. Sept. 17, 2007). Suriname's extensive arguments that the Tribunal had no such jurisdiction were rejected. 1 Rejoinder of Suriname, paras. 4.5–.11 (Sept. 1, 2006), Guyana v. Suriname, *supra*; Transcript of Public Hearing, at 716–17 (Dec. 13, 2006), Guyana v. Suriname, *supra*.

[84] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 ICJ REP. 43, para. 149 (Feb. 26) (emphasis added).

[85] *Contra* Armed Activities in the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 ICJ REP. 168, 334, paras. 37–41 (Dec. 19) (sep. op. Simma, J.) (arguing certain core human rights, binding *erga omnes*, are always justiciable by an international court otherwise having jurisdiction).

since the Arctic 30 were bailed prior to the granting of provisional measures.[86] Arguably, this changed circumstance rendered the Dutch application largely moot.

III. CONCLUSIONS

From the outset, Russia's attitude toward the *Arctic Sunrise* proceedings has, from a rule-of-law standpoint, been troubling. Russia has denied the jurisdiction of both ITLOS and the Annex VII tribunal as forms of interference in its domestic affairs. In so doing, Russia has defied the UNCLOS Part XV compulsory dispute resolution system, despite its president having previously reminded another significant international actor that "[t]he law is still the law, and we must follow it whether we like it or not."[87]

The Russian position, we argue, is unfortunate for at least two reasons. First, and as noted repeatedly by members of ITLOS, nonappearance before an international court or tribunal is damaging to the rule of law. Second, Russian nonparticipation is to Russia's own detriment. In our view, had it participated in the provisional measures proceedings, it stood a good chance of prevailing on questions of urgency or irreparable prejudice to rights *pendente lite*. Russia's strategy of nonparticipation in this proceeding stands in contrast to its participation in prompt release proceedings both with Australia and Japan[88]—or, indeed, Russia's success before the ICJ in *Application of CERD*[89]—each resulting in better litigation outcomes for Russia.

Equally, however, one must ask if the Tribunal has been the best custodian of its own institutional legitimacy. As noted, the need to respond to the fact of nonappearance may arguably have dominated the Tribunal's approach. The resulting order adopts the Dutch submissions wholesale and is without a fully articulated engagement with the Tribunal's own earlier practice or its obligation to satisfy itself as to whether the application was well founded in law. In the process, the Tribunal has done itself no favors in the process of buttressing its institutional legitimacy against the attack implicit in the nonappearance of a major maritime power. Moreover, the decision introduces a precedent of questionable value into the limited corpus of UNCLOS Article 290 case law.

In addition, we have noted that the Tribunal's order *could* be read as a response to human rights concerns relating to the continuing detention of the Arctic 30. This possible subtext within the Tribunal's (admittedly parsimonious) reasoning is troubling. ITLOS is not a tribunal of general jurisdiction, and any departure from its core mandate *ratione materiae* should be carefully justified. It may also be asked whether the rights of individuals who were subject to a prima facie valid criminal prosecution (in that the prosecution cannot be deemed invalid until the merits are ruled upon) were actually being infringed. The rights specifically relied upon by the Netherlands were rights of liberty and security—not freedom from cruel, inhuman, or degrading treatment. Rights of personal liberty and security are subject to state powers of legitimate law enforcement.

[86] *Greenpeace Denies "Arctic 30" Group Were Ill-Prepared*, BBC NEWS (Nov. 23, 2013), *at* http://www.bbc.co.uk/news/uk-25065052; Andrew Darby, *Greenpeace Activist Colin Russell Granted Bail*, AGE (Nov. 28, 2013), *at* http://www.theage.com.au/national/greenpeace-activist-colin-russell-granted-bail-20131128-2yeh9.html.

[87] Vladimir Putin, *A Plea for Caution from Russia: What Putin Has to Say to Americans About Syria*, N.Y. TIMES, Sept. 11, 2013, at A31.

[88] See the proceedings referred to in note 16.

[89] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, 2011 ICJ REP. 70 (Apr. 1).

In sum, the order of November 22, 2013, in *"Arctic Sunrise"* can be seen as an attempt by ITLOS to address multiple and competing concerns. First, ITLOS is a judicial organ and bound to resolve international disputes through application of the judicial method. Second, ITLOS was confronted by a challenge to its legitimacy from a major power and had to take action to preserve its institutional relevance, while simultaneously sending a message to other powerful states that might want to opt out of international dispute settlement. Third, ITLOS was asked to act to preserve, inter alia, the human rights of thirty vulnerable individuals. It may be that all three forces cannot be accommodated equally, but as Judge Jesus points out, decisions such as *Tehran Hostages* or *"ARA Libertad"*—and now *"Arctic Sunrise"*—have precedential value.[90] The Tribunal has created an authority that may be used in other, less deserving cases. While the immediate implications of the decision are clear, its wider significance is as yet, worryingly, unknown.

[90] "Arctic Sunrise," *supra* note 8, Sep. Op. Jesus, J., para. 15.