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**GONE OVERBOARD: WHY THE *ARCTIC SUNRISE* CASE
SIGNALS AN OVER-EXPANSION OF THE SHIP-AS-A-UNIT
CONCEPT IN THE DIPLOMATIC PROTECTION CONTEXT**

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TABLE OF CONTENTS

| | |
|---|-----|
| I. INTRODUCTION | 111 |
| II. BACKGROUND | 116 |
| <i>A. The United Nations Convention on the Law of the Sea</i> | 116 |
| 1. <i>The International Tribunal for the Law of the Sea</i> | 117 |
| 2. <i>Relevant Forms of Compulsory Jurisdiction</i> | 120 |
| <i>a. Provisional Measures: Article 290</i> | 121 |
| <i>b. Prompt Release: Article 292</i> | 123 |
| <i>B. Diplomatic Protection: An Introduction</i> | 126 |
| 1. <i>Nationality of Claims</i> | 128 |
| 2. <i>Exhaustion of Local Remedies</i> | 128 |
| <i>C. Establishing Flag State Jurisdiction</i> | 130 |
| III. ARTICLE 18: A REPRESENTATION OF CUSTOMARY INTERNATIONAL LAW | 134 |

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| | |
|--|-----|
| A. <i>The International Law Commission</i> | 134 |
| B. <i>Draft Article 18: Codifying the Ship-As-A-Unit Concept</i> .. | 135 |
| IV. THE ARCTIC SUNRISE CASE: THE CONFLICT WITH INTERNATIONAL LAW..... | 139 |
| A. <i>The Arctic Sunrise Case</i> | 139 |
| 1. <i>Factual Background</i> | 141 |
| 2. <i>Contentions of the Parties</i> | 142 |
| 3. <i>Prescription of Provisional Measures</i> | 144 |
| 4. <i>Dissent and Separate Opinion: Highlighting the Conflict</i> | 146 |
| B. <i>Arctic Sunrise and the Conflict with Russia's Rights under International Law</i> | 148 |
| 1. <i>Russia's Enforcement Jurisdiction Regarding Installations in the EEZ</i> | 149 |
| a. <i>Enforcement Jurisdiction in International Criminal Law</i> | 149 |
| b. <i>The Exclusive Economic Zone Relating to UNCLOS Article 60</i> | 150 |
| c. <i>Russia's Exclusive Criminal Enforcement Jurisdiction under UNCLOS Article 60</i> | 151 |
| 2. <i>The Conflict between the Arctic Sunrise Case and Nationality Jurisdiction</i> | 154 |
| a. <i>Establishing Nationality</i> | 155 |
| b. <i>The Active Nationality Principle: Theory and Application</i> | 156 |
| 1. <i>Theory</i> | 156 |
| 2. <i>Application</i> | 158 |
| V. RUSSIA'S OBLIGATIONS TO ITS NATIONALS UNDER INTERNATIONAL LAW..... | 159 |
| A. <i>Jus Cogens Norms</i> | 160 |
| B. <i>The European Convention on Human Rights</i> | 162 |
| VI. CONCLUSION..... | 166 |

I. INTRODUCTION

“What men, what monsters, what inhuman race,
 What laws, what barb’rous customs of the place
 Shut up a desert shore to drowning men,
 And drive us to the cruel seas again?”¹ – Virgil

Much has changed since Virgil’s prose evaluated the intersection of two ancient codes of law: the law of hospitality and the law of the sea.² The juncture, however, of the laws that regulate the interaction of humans and those of the sea is not a recent development. The law of the sea has evolved in accordance with the demands humans have placed on it, and never before have humans demanded more from the oceans, and subsequently, from the code that regulates them.

The last fifty years represent the most impactful era in law of the sea development, due much in part to human innovation. Negotiations for what would become the 1982 United Nations Convention on the Law of the Sea³ (“UNCLOS” or the “Convention”) began almost as soon as the ink had dried from the 1958 Geneva Convention on the Law of the Sea (“GCHS”).⁴ Armed with the technology and legal authorization to explore and exploit⁵ the ocean’s resources more than ever before, States demanded a complex system of laws that zonally protected their economic rights, while also preserving Grotius’ call for

1. VIRGIL, JOHN CAREY & KNIGHTLY CHETWOOD, THE WORKS OF VIRGIL, VOL. II 31 (John Carey ed., Mr. Dryden trans., James Swan Press 1803).

2. GROTIUS, THE FREEDOM OF THE SEAS 8 (Magoffin ed., 1916) [hereinafter GROTIUS] (discussing Virgil’s treatment of law of hospitality). Hugo Grotius was a 17th century Dutch statesman and scholar who contributed extensively to the development of international law including some of the most fundamental underpinnings of the law of the sea. See *Hugo Grotius*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/246809/Hugo-Grotius>.

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

4. 1958 Geneva Convention on the High Seas Apr. 29 1958, 450 U.N.T.S. 11. In 1960, The Secretary-General convened a Second UN Conference on the Law of the Sea (UNCLOS II) to consider the topics of the breadth of the territorial sea and fishery limits; discussions, however, were ultimately deferred. *Second United Nations Conference on the Law of the Sea*, PENCE LAW LIBRARY (Feb. 10, 2013), <http://wcl.american.libguides.com/content.php?pid=455926&sid=4072006>.

5. See UNCLOS, art. 56, *supra* note 3.

the freedom of navigation.⁶ The Exclusive Economic Zone (“EEZ”)⁷ was a response to the States’ demand for bifurcated rights by allowing coastal States⁸ to possess certain exclusive economic privileges within a 200 nautical mile⁹ zone adjacent to their territorial sea.¹⁰ The Convention, however, granted States not only the exclusive right to economic resources but, almost more importantly, the enforcement power to protect that right.¹¹

The 1956 advent of containerization,¹² which was contemporaneous with the partitioning of the seas, was “one of the most important innovations affecting the conduct of international trade in the second half of the twentieth century.”¹³ With containerization came an increase in the amount of crewmembers and flag State¹⁴ vessels¹⁵ now operating in a considerably more regulated area.¹⁶ With

6. See generally GROTIUS, *supra* note 2.

7. See UNCLOS, *supra* note 3, art. 55.

8. A coastal State is a State (a nation) that is adjacent to an ocean. See 16 U.S.C. § 1453(4) (2014) (Under U.S. law, the definition is broken down further into the states of the Union that are adjacent to a body of water: “The term ‘coastal state’ means a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, [or] Long Island Sound . . .”).

9. See UNCLOS, *supra* note 3, art. 57.

10. *Id.* (“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”).

11. See UNCLOS, *supra* note 3, art. 60, with respect to artificial islands, installations and structures in the coastal State’s EEZ.

12. MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER 1* (2006). By 1974 most of North America, Europe, and East Asia had adopted containerization. Giesla Rua, *Fixed Costs, Network Effects, and the Diffusion of Containerization*, *BD. OF GOVERNORS OF THE FED. RESERVE* 11 (2012) [hereinafter Rua]. Nine years later, in 1983, “80% of countries had built at least one container port,” and “by 2008, only Gabon, Solomon Islands and Somalia had yet to adopt containerization.” *Id.* at 10-11.

13. Rua, *supra* note 12.

14. See *infra* Part II.C.

15. Today, the world fleet is comprised of 103,392 vessels, registered in over 150 nations, and operated by 1.5 million seafarers of nearly every nationality. IMO: MARITIME KNOWLEDGE CENTRE, *International Shipping Facts and Figures – Information on Trade, Safety, Security, Environment* 7, 9, available at <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20->

increased economic rights, and the power to enforce them, came the propensity for more coastal and flag State interaction and the subsequent intersection between the law of the sea and other more general areas of public international law. One such intersection between States and public international law is the application of diplomatic protection theory in the international maritime context.

In 2006 the International Law Commission¹⁷ (“ILC”) adopted its Draft Articles on Diplomatic Protection¹⁸ (“Draft Articles”). The Draft Articles codify widely accepted customary norms¹⁹ on the diplomatic protection of nationals.²⁰ Draft Article 18 codifies the customary norm of the ship-as-a-unit concept as applied to diplomatic protection.²¹ Specifically, it secures a flag State’s right to espouse

%20Facts%20and%20Figures.pdf. More than half of those vessels constitute the world cargo fleet, transporting more than 90 percent of global trade, representing 8.4 billion tons of cargo. *Id.*

16. “Originally defined as the area beyond the territorial seas of coastal nations, today the high seas are defined by the LOS Convention as the area seaward of the EEZs of those nations. Sixty percent of the world’s oceans remain in this zone, where the traditional freedom of the seas still prevails.” U.S. COMM’N ON OCEAN POL’Y, *Primer On Ocean Jurisdictions: Drawing Lines In The Water* 73 (2004), available at http://govinfo.library.unt.edu/oceancommission/documents/full_color_rpt/03a_primer.pdf.

17. See *infra* Part III.A.

18. Rep. of the Int’l Law Comm’n, Draft Articles on Diplomatic Protection with Commentaries, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) [hereinafter Diplomatic Protection].

19. “Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” Ian Patrick Barry, *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299, 330 (2004) (quoting RESTATEMENT OF FOREIGN RELATIONS § 102(2) (1986)). Noted Scholars Mark Janis and John Noyes define customary international law as a theory based on “state practice and *opinio juris*, the belief that states act in a certain way because they are legally bound to do so.” MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 96 (2d ed. 2001).

20. Diplomatic Protection, *supra* note 18, art. 18; Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT’L L. 37, 38 (2007) [hereinafter Vermeer-Künzli].

21. The “ship-as-a-unit” concept is the understanding that everything on a vessel is considered holistically. See Diplomatic Protection, *supra* note 18, art. 18. Article 18 codifies the application of this concept regarding diplomatic protection.

claims on behalf of the crew of a vessel flying the State's flag, regardless of whether a crewmember shares the nationality of that flag State.²² The Draft Articles are silent, however, on whether a flag State can espouse a claim on behalf of a non-national crewmember when that non-national is detained by his or her State of nationality.²³

On November 22, 2013, The International Tribunal for the Law of the Sea ("ITLOS" or the "Tribunal") incorrectly answered that question in the *Arctic Sunrise* case.²⁴ There, Russian authorities arrested a thirty-member crew of the Greenpeace vessel, *Arctic Sunrise*, for interfering with drilling operations in the Russian EEZ.²⁵ Russian authorities subsequently detained the vessel and crew and issued indictments for piracy and the Russian crime of hooliganism.²⁶

The facts, stipulated to by Greenpeace, are as inconceivable as ITLOS' decision. In the early morning of September 18, 2013, a number of rigid-hull inflatable boats dispensed from the *Arctic Sunrise*.²⁷ The occupants sought to protest against the presence of the offshore, ice-resistant, fixed, oil platform, *Prirazlomnaya*.²⁸ The protest entailed "two of their [crewmembers] scaling the wall of the base of the platform up to a point some distance below the main deck."²⁹ The Russian coastguard intervened.³⁰ The coastguard

See id. This concept denotes the well-established ability for a flag State to espouse claims on behalf of the crew of the vessel, regardless of their nationality. *Id.* This concept is referred to throughout this article as Article 18, the ship-as-a-unit concept, or vessel unity.

22. *Id.*

23. *Id.*

24. *See* The "Arctic Sunrise" Case, (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013 [hereinafter *Arctic Sunrise*], available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf.

25. *Id.*

26. *29 Arctic Sunrise Crewmembers Granted Bail*, RT.COM (Nov. 22, 2013, 3:16 PM), <http://rt.com/news/arctic-sunrise-crew-free-143/> [hereinafter RT.COM].

27. Brief for Greenpeace Int'l et al. as Amici Curiae Supporting Applicants, para. 4, The "Arctic Sunrise" Case, (Neth. v. Russ.), Case No. 22, available at <http://www.greenpeace.org/international/Global/international/briefings/climate/2013/ITLOS-amicus-curiae-brief-30102013.pdf>.

28. *Id.*

29. *Id.*

30. *Id.*

boarded the *Arctic Sunrise* the following day at 18:35 and confined the crew to the ship's mess.³¹ Subsequently, the Russian coastguard transported the vessel to Murmansk where the crew was taken ashore.³² Formal arrests were carried out in the late evening of September 24, 2013.³³

The Tribunal permitted the flag State of the *Arctic Sunrise*, the Netherlands, to espouse claims on behalf of the multi-national crew against Russia, despite three of the crewmembers' status as Russian nationals.³⁴ ITLOS then issued an order commanding Russia to release the crew, including Russia's own nationals.³⁵

Article 18 neither confirms nor denies the Netherlands' right of diplomatic protection in this scenario.³⁶ But conceptually, allowing flag States to bring claims against a non-national's³⁷ State of nationality is incompatible with some of the most well-established doctrines of international law, as well as the dualist nature³⁸ of the international legal system as a whole. In accordance with international law, Russia possesses the affirmative right to hold its citizens accountable under national law for acts committed extraterritorially because: (1) UNCLOS Article 60 grants Russia exclusive enforcement jurisdiction in its EEZ,³⁹ and (2) Russia may invoke a sovereign jurisdictional right over its citizens through the *active nationality* principle.⁴⁰

The impact of ITLOS' decision not only confuses the customary application of the ship-as-a-unit concept with regard to diplomatic protection, but it also undermines the integrity of the Tribunal. Since international tribunals lack enforcement capabilities, if the law is

31. *Id.* paras. 5-6.

32. *Id.* para. 7.

33. *Id.*

34. *See id.* paras. 11-13, 105.

35. *Arctic Sunrise*, *supra* note 24, para. 105.

36. *See* Diplomatic Protection, *supra* note 18, art. 18.

37. The term "non-national" as used in this article, refers to a crewmember who does not share the nationality of the vessel.

38. JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 48-50 (8th ed. 2012) [hereinafter *BROWNLIE*].

39. *See infra* Part IV.B.1.

40. *See infra* Part IV.B.2.

misapplied, a State will simply refuse, as Russia did,⁴¹ to comply with the order. A trend of obstinate State practice to ITLOS' decisions would be debilitating to the future success of such a young international tribunal. The Tribunal's order forces the ILC to crystallize the distinction between the customary norms it endorsed under Draft Article 18 and the unprecedented and unsubstantiated approach employed by the *Arctic Sunrise* court.

This article will address the conflict between allowing flag States to espouse claims on behalf of non-national crewmembers detained by the State in which they hold national citizenship and the very foundation of the international legal system. Part II provides background on UNCLOS, ITLOS, and its forms of compulsory jurisdiction, traditional diplomatic protection theory, and flag State standing. Part III addresses Article 18 in its present form as a representation of customary international law. Part IV evaluates the *Arctic Sunrise* case and how the Tribunal's order is incompatible with Russia's right to hold its nationals accountable for extraterritorial conduct under UNCLOS Article 60, as well the active nationality principle. Part V proffers two conceivable, but improbable, scenarios where an international tribunal could compel a sovereign State to release that State's own nationals. Part VI concludes and suggests the ILC should crystallize Article 18's application by making it clear that the ship-as-a-unit concept does not extend to diplomatic claims made on behalf of nationals detained by their State of nationality.

II. BACKGROUND

A. *The United Nations Convention on the Law of the Sea*

In 1994 UNCLOS entered into force representing a comprehensive and universally agreed upon regime for the seas and regulating the ocean including its space, use, and resources.⁴² Beyond

41. *Arctic Sunrise*, *supra* note 24, para. 9.

42. Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, 26 PENN ST. INT'L L. REV. 289, 290 (2007) [hereinafter *The Contribution of the International Tribunal for the Law of the Sea*].

regulating the sea itself, this “Constitution for the Oceans”⁴³ also created ITLOS.⁴⁴

1. The International Tribunal for the Law of the Sea

ITLOS is “an independent judicial body established by [UNLOS] to adjudicate disputes arising out of the interpretation and application of the Convention.”⁴⁵ UNCLOS created ITLOS as part “of its compulsory third-party dispute settlement system,”⁴⁶ and for the rendering of advisory opinions.⁴⁷ Headquartered in Hamburg, Germany, the Tribunal had its first working session in October 1996⁴⁸ and is now fully operational.⁴⁹ The Tribunal represents the largest international judicial body, composed of twenty-one judges,⁵⁰ and

43. *Id.* (citing T.T.B. Koh, *A Constitution for the Oceans, Remarks Made by the President of the Third United Nations Conference on the Law of the Sea*, in OFFICIAL TEXT OF THE UNITED NATIONS ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, E.83.V.5, p. xxxiii).

44. *See* INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, www.itlos.org (last visited Feb. 23, 2014) [hereinafter ITLOS Website].

45. *Id.*

46. John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 110 (1998) [hereinafter *The International Tribunal for the Law of the Sea*].

47. *The Contribution of the International Tribunal for the Law of the Sea*, *supra* note 42, at 292. ITLOS issued its first advisory opinion following “a request for an advisory opinion concerning administration of the International Seabed Area.” Samuel J. Zeidman, *Sittin’ on the Dhaka the Bay: The Dispute Between Bangladesh and Myanmar and Its Implications for the International Tribunal for the Law of the Sea*, 50 COLUM. J. TRANSNAT’L L. 442, 451 (2012) [hereinafter Zeidman] (citing Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area, Draft Advisory Opinion, ITLOS Seabed Disputes Chamber (Feb. 1, 2011)).

48. John Shamsey, *Itlos vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-Eu Swordfish Dispute*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 513, 515 (2002) [hereinafter Shamsey].

49. *Id.*; *see* ITLOS Website, *supra* note 44. ITLOS became active on October 1, 1996. *The Contribution of the International Tribunal for the Law of the Sea*, *supra* note 42, at 292.

50. *The Contribution of the International Tribunal for the Law of the Sea*, *supra* note 42, at 294.

“despite the seemingly slow start . . . its usage rate thus far compares relatively well with those of other nascent international tribunals.”⁵¹

ITLOS’ jurisdiction is unique in comparison to other international tribunals;⁵² an *ex post* special agreement, or *compromis*, is not required to establish jurisdiction.⁵³ In addition to the compulsory jurisdiction UNCLOS provides, ITLOS derives its jurisdiction from other international agreements.⁵⁴ Specifically, UNCLOS Article 288 provides that if ITLOS is a conceivable forum for two states under the Convention, the Tribunal may hear “any dispute concerning the interpretation or application of an international agreement related to the purpose of . . . [the] Convention.”⁵⁵ Pertinent to the discussion, ITLOS also distinguishes itself from other international tribunals, most notably the International Court of Justice (“ICJ”), in permitting non-state entities to bring cases before it.⁵⁶

In general, the Tribunal possesses jurisdiction⁵⁷ over any disputes implicating the law of the sea, including maritime boundary disputes,

51. Zeidman, *supra* note 47, at 475 (citing *The Contribution of the International Tribunal for the Law of the Sea*, *supra* note 42, at 293-94).

52. Shamsey, *supra* note 48, at 515; *see, e.g.*, Charles F. Whitman, *Palestine’s Statehood and Ability to Litigate in the International Court of Justice*, 44 CAL. W. INT’L L.J. 73 (2013) (discussing the International Court of Justice’s jurisdiction).

53. *See The International Tribunal for the Law of the Sea*, *supra* note 46, at 32.

54. Shamsey, *supra* note 48, at 516.

55. *Id.* (citing Hugh Caminos, *The Jurisdiction of the International Tribunal for the Law of the Sea: An Overview*, in OCEANS POLICY-NEW INSTITUTIONS, CHALLENGES AND OPPORTUNITIES XI-XIII 98-99 (Myron H. Nordquist & John Moore eds., 1999)).

56. Shamsey, *supra* note 48, at 516; *see infra* Part II.A.2.b. for a discussion of private parties bringing prompt release cases on behalf of the flag State under UNCLOS Article 292.

57. While ITLOS’ jurisdiction is notably broad regarding disputes arising out of the interpretation of the Convention, and law of the sea issues in general, it is not competent to adjudicate *any* claim that comes before it. *See* UNCLOS, *supra* note 3, art. 288. This is to say that, regarding the subject matter of claims, the International Court of Justice would be one of the few international tribunals capable of adjudicating a case involving a multitude of intersecting issues. *See infra* Part V.B., regarding ITLOS’ inability to adjudicate claims under the European Convention on Human Rights.

fisheries, sea pollution, or marine scientific research.⁵⁸ Articles 297 and 298, however, impose some restrictions on the jurisdictional reach of the Tribunal relating to certain discretionary powers of coastal States and the rights of States Parties to exclude categories of disputes from compulsory jurisdiction,⁵⁹ including sea boundaries or military activities.⁶⁰ These exceptions to the compulsory procedures are made through written declarations.⁶¹ As of 2012 only thirty-three declarations had been made exempting States from the compulsory jurisdiction of the Tribunal.⁶² The practical effect of a declaration, however, can be profound. This manifested itself in the *Arctic Sunrise* case, where Russia disputed ITLOS' jurisdiction based on its declaration upon ratifying the Convention, and subsequently refused to partake in the proceedings that followed.⁶³

58. *The Contribution of the International Tribunal for the Law of the Sea*, *supra* note 42, at 293-94.

59. See *infra* Part II.A.2. for a discussion of ITLOS' forms of compulsory jurisdiction provided by UNCLOS Articles 290 and 292.

60. *The Contribution of the International Tribunal for the Law of the Sea*, *supra* note 42, at 292. Maritime delimitation cases had previously been heard by the ICJ (the other forum allowed by UNCLOS) or gone to private arbitration. Zeidman, *supra* note 47, at 451.

61. HELMET TUERK, REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA 130 (2012) [hereinafter REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA]. Despite the fact that the United States is not a States Party to the Convention, it has been recommended that the United States make the following declaration:

The government of the United States of America declares, in accordance with article 287(1), that it chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention: (A) a special arbitral tribunal constituted in accordance with Annex VIII for the settlement of disputes concerning the interpretation or application of the articles of the Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping; and (B) an arbitral tribunal constituted in accordance with Annex VII for the settlement of disputes not covered by the declaration in (A) above.

J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 760 (3rd ed. 2012) [hereinafter EXCESSIVE MARITIME CLAIMS].

62. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 130.

63. "Upon ratification of the Convention on 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, 'it does not accept procedures provided for in section 2 of Part XV of the Convention, entailing binding

2. *Relevant Forms of Compulsory Jurisdiction*

UNCLOS contains a comprehensive system for dispute settlement at the international level representing perhaps the most sophisticated of its kind.⁶⁴ It represents a collage of compromises. Compulsory dispute settlement surfaced as a necessary stipulation of several States, hopeful that obligatory jurisdiction would promote observance of Convention norms.⁶⁵ UNCLOS delegates two forms of compulsory jurisdiction to ITLOS in the form of provisional measures under Article 290 and for prompt release applications under Article 292.⁶⁶ It is these two forms of compulsory jurisdiction in which flag States have and will continue to espouse claims on behalf of non-national crewmembers.⁶⁷

ITLOS has been entrusted with instances of compulsory jurisdiction because the function of the jurisdiction cannot be effected by arbitral tribunals.⁶⁸ The drafters of UNCLOS ultimately decided that provisional measures and prompt release decisions required a permanently established Tribunal that would allow for the development of a body of law.⁶⁹ UNCLOS provides ITLOS with

decisions with respect to disputes . . . concerning law-enforcement activities in regard to the exercise of the sovereign rights of jurisdiction.” Arctic Sunrise, *supra* note 24, para. 9.

64. John E. Noyes, *Compulsory Third-Party Jurisdiction and the 1982 United Nations Convention on the Law of the Sea*, 4 CONN. J. INT’L L. 675 (1989) [hereinafter *Compulsory Third-Party Jurisdiction And the 1982 United Nations Convention on the Law of the Sea*]. In addition to the complex dispute resolution system, most commentators agree that UNCLOS has the ability to evolve with international maritime law. See Erik Franckx, *Should the Law Governing Maritime Areas in the Arctic Adapt to Changing Climactic Circumstances?*, 41 CAL. W. INT’L L.J. 397, 422 (2011) (“[T]he overall adaptive capacity of this document has not been considered inferior to other dynamics of living instruments.”).

65. *Compulsory Third-Party Jurisdiction And the 1982 United Nations Convention on the Law of the Sea*, *supra* note 64, at 675.

66. UNCLOS, *supra* note 3, arts. 290, 292.

67. See generally REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 144 (Nine of the twenty-two cases before ITLOS have been prompt release cases under Article 292.).

68. *Id.* at 130 (citing T. Treves, *The Jurisdiction of the International Tribunal on the Law of the Sea*, 37 INDIAN J. INT’L L. 400 (1997)).

69. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 130 (citing Judge R. Wolfrum, President of ITLOS, Statement to the Sixth

residual compulsory jurisdiction in carrying out the adjudication of provisional measures and prompt release requests because of the temporal sensitivity associated with these pleadings.⁷⁰ The negotiators of the Convention feared giving comprehensive deference to arbitral tribunals could lead to undue delays.⁷¹

A States Party is supposed to have accepted compulsory procedure as a result of its ratification of UNCLOS.⁷² And, unlike the International Court of Justice Statute,⁷³ no separate declaration is required to accept the compulsory procedure of UNCLOS and the Tribunal.⁷⁴ Understanding the jurisdictional vehicles flag States employ in requesting the release of non-national crewmembers highlights the flaw committed by the *Arctic Sunrise* court in ordering the release of Russian detainees held in and by Russia.

a. Provisional Measures: Article 290

Article 290(1) provides ITLOS compulsory jurisdiction “where a dispute on the merits has been submitted to it”⁷⁵ providing the Tribunal prima facie jurisdiction.⁷⁶ Once jurisdiction is established under Article 290(1), the Tribunal “may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties . . . or to prevent serious

Committee of the UN General Assembly, 20 October 2006, at 6, *available at* www.itlos.org).

70. *See Compulsory Third-Party Jurisdiction And the 1982 United Nations Convention on the Law of the Sea*, *supra* note 64, at 677-78.

71. *Id.* at 675.

72. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 130.

73. Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 15 U.N.T.S. 331 [hereinafter ICJ Statute].

74. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 135. (The ICJ usually requires a *compromis*, where the States submit themselves to the jurisdiction of the court; UNCLOS, however, provides the jurisdictional trigger for ITLOS.)

75. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 135; *see* UNCLOS, *supra* note 3, art. 290, para. 1.

76. UNCLOS, *supra* note 3, art. 290, para. 1.

harm to the marine environment”⁷⁷ In the *Arctic Sunrise* case, the Tribunal’s order for Russia to release the crew, albeit incorrect with respect to the Russian nationals, represents an attempt to preserve the Netherlands’ rights under UNCLOS.⁷⁸ The Netherlands brought the *Arctic Sunrise* case as a request for provisional measures because the detention did not arise out of a fishing or pollution violation reserved for prompt release applications under UNCLOS Article 292.⁷⁹ Therefore, under ITLOS’ jurisdiction, the Netherlands’ best pleading option was a request for provisional measures under UNCLOS Article 290. The Netherlands also likely petitioned ITLOS under Article 290 because of the discretionary and equitable nature of provisional measures as well as the urgency that is borne in mind in evaluating the propriety of their prescription.⁸⁰ Provisional measures may be made pending the final decision on the merits⁸¹ and are ripe for modification or revocation “as soon as the circumstances justifying them have changed.”⁸² Revision of provisional measures may occur only at the request of one of the parties and following an opportunity to be heard.⁸³ It is the Tribunal’s responsibility to inform the parties of subsequent modifications.⁸⁴

77. *Id.* “The Term ‘marine environment,’ as used in the Convention, includes ‘marine life,’ so that a competent court or tribunal may prescribe provisional conservation for living marine resources under the respective rights of the parties.” EXCESSIVE MARITIME CLAIMS, *supra* note 61, at 760.

78. *See Arctic Sunrise*, *supra* note 24, para. 105.

79. *See infra* Part II.A.2.b. for the requirements necessitated for a prompt release application under UNCLOS Article 292.

80. *See generally The International Tribunal for the Law of the Sea*, *supra* note 46, at 137 (citing M/V “Saiga” (No. 2) (St. Vincent v. Guinea), Provisional Measures, Case No. 2, Order of Mar. 11, 1998, para. 5 n.5 (separate opinion of Judge Laing), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/provisional_measures/order_110398_so_laing_eng.pdf).

81. *See UNCLOS*, *supra* note 3, art. 290, para. 1.

82. *Id.* art. 290, para. 2.

83. *Id.* art. 290, para. 3.

84. *Id.* art. 290, para. 4. Additionally, Article 290(5) provides ITLOS compulsory jurisdiction when such a dispute has been submitted to an arbitral tribunal that is pending constitution, and provides that if the tribunal chosen by the parties fails to provide provisional measures within two weeks of submission, “[ITLOS] . . . may prescribe, modify or revoke provisional measures . . . if . . . the urgency of the situation so requires.” *Id.* art. 290, para. 5. Provisional measures made out of necessity by ITLOS may be subsequently modified by the tribunal to

b. Prompt Release: Article 292

Prompt release applications represent the primary medium through which flag States request the release of nationals and non-nationals alike, as this is the specific purpose for its inclusion under the Convention.⁸⁵ An application for prompt release was not the source of jurisdiction employed in the *Arctic Sunrise* case.⁸⁶ But, if ITLOS had ordered Russia to release Russian nationals under a prompt release application, instead of Article 290, Russia would have been equally justified in refusing to honor the Tribunal's request.⁸⁷

UNCLOS Article 292 is the second form of residual compulsory jurisdiction contained in the Convention.⁸⁸ It provides for expedited dispute settlement to address allegations that a States Party has not complied with the UNCLOS provisions regarding the prompt release of a vessel and crew of another States Party.⁸⁹ Issues pertaining to the release of vessels and crew had traditionally been reserved for the national admiralty jurisdiction of the various States.⁹⁰ Conceptually, the inclusion of compulsory jurisdiction in the Convention implicates

which the dispute was originally submitted in accordance with the procedure set forth in Article 290. *See id.* art. 290. Parties to the Convention are obligated to comply promptly with provisional measures made under Article 290. *Id.* art. 290, para. 6.

85. *See id.* art. 290.

86. *See Arctic Sunrise, supra* note 24, para. 1 (“[O]n 21 October 2013, the Netherlands filed with the Tribunal a Request for the prescription of provisional measures . . . under article 290.”).

87. *See infra* Part IV. (Russia was justified in denying the release of Russian Nationals, not because of a procedural issue under Articles 290 or 292, but because the order to do so violated Russia's rights under well-founded doctrines of international law such as criminal enforcement and nationality jurisdiction.)

88. UNCLOS, *supra* note 3, art. 292.

89. EXCESSIVE MARITIME CLAIMS, *supra* note 61, at 760; UNCLOS, *supra* note 3, art. 292, para. 1. Article 292 has been described as a “human rights mechanism,” protecting the master and crew through an application for prompt release. MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 33 (Martinus Nijhoff 2007) [hereinafter GAVOUNELI]; *see also* Bernard H. Oxman, *Observations on Vessel Release Under the United Nations Convention on the Law of the Sea*, 11 INT'L J. MAR. & COASTAL L. 2, 201-15 (1996).

90. *The International Tribunal for the Law of the Sea, supra* note 46, at 141.

relationships at all levels of the international legal community, including ITLOS, individuals, States, and national courts.⁹¹

Procedurally, prompt release applications are fairly simple. Under Article 292(1), if after ten days a States Party has not complied with the provisions of the Convention for prompt release, “the question of release from detention may be submitted to any court or tribunal agreed upon by the parties”⁹² under UNCLOS Article 287⁹³ or to ITLOS, excepting ancillary agreements of the parties.⁹⁴ The application for release may only be made by or on behalf of the flag State.⁹⁵ The court or tribunal to which the prompt release application is brought may “deal only with the question of release, without prejudice to the merits of any case before the appropriate domestic forum against the vessel, its owner or its crew.”⁹⁶ Assuming a State establishes standing through its flag,⁹⁷ “[u]pon the posting of the bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.”⁹⁸

The original drafters proposed the language that ultimately became Article 292 in response to coastal States’ and others States’ strong objections to granting private persons access to international forums.⁹⁹ Article 292 has shown to be incredibly effective and has been employed in almost fifty percent of the cases ITLOS has heard since its 1999 inception.¹⁰⁰ However, as much as flag States employ

91. *Id.*

92. UNCLOS, *supra* note 3, art. 292, para. 1.

93. See *infra* Part II.A.2.a. for a discussion of State declarations.

94. UNCLOS, *supra* note 3, art. 292, para. 1.

95. *Id.* art. 292, para. 2.

96. *Id.* art. 292, para. 3.

97. See *infra* Part II.C. for a discussion of flag State standing.

98. UNCLOS, *supra* note 3, art. 292, para. 14.

99. 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 70 (Myron Nordquist et al., 1995) [hereinafter UNCLOS COMMENTARY].

100. EXCESSIVE MARITIME CLAIMS, *supra* note 61, at 164 n.11; see GAVOUNELI, *supra* note 89, at 33 n.4 (“The success of the new procedure is evident in the fact that more than half of the cases adjudicated so far by the [ITLOS] refer to prompt release proceedings . . .”). Cases adjudicated by ITLOS involving prompt

Article 292 to compel the release of vessels, flag states may only use prompt release applications for detentions relating to fishing or pollution violations.¹⁰¹ Crewmembers are naturally included in prompt release proceedings, as they are part of the vessel unit.¹⁰² Normal practice involves the submission of the prompt release applications directly from the flag State to the detaining State, as in the *Volga* case where a member of Russia's Foreign Ministry made the submission directly from the Russian Federation.¹⁰³

Private parties, however, may also further their interests before ITLOS.¹⁰⁴ As stated in Article 292(2), the question of release may be submitted "on behalf" of the flag state.¹⁰⁵ Indeed, six of the nine prompt release cases submitted to ITLOS have been brought on behalf of the flag State.¹⁰⁶ The rules of the Tribunal allow a flag State to give private parties authorization (even prior to the existence of a dispute) to bring prompt release applications on behalf of the flag

release applications include: The "Tomimaru" Case (Japan v. Russ.), Prompt Release, Case No. 15, Order of July 9, 2007, *available at* www.itlos.org; The "Hoshinmaru" Case (Japan v. Russ.), Prompt Release, Case No. 14, Order of July 9, 2007, *available at* www.itlos.org; The "Juno Trader" Case (St. Vincent v. Guinea), Case No. 13, Order of Dec. 1, 2004, *available at* www.itlos.org; The "Volga" Case (Russ. v. Austl.), Prompt Release, Case No. 11, Order of Dec. 2, 2002 [hereinafter *Volga*], *available at* www.itlos.org; The "Chaisiri Reefer 2" Case (Pan. v. Yemen), Prompt Release, Case No. 9, Order of July 13, 2001, *available at* www.itlos.org; The "Grand Prince" Case (Belize v. Fr.), Prompt Release, Case No. 8, Order of Mar. 21, 2001 [hereinafter *Grand Prince*], *available at* www.itlos.org; The "Camouco" Case (Pan. v. Fr.), Prompt Release, Case No. 5, Order of Jan. 17, 2000, *available at* www.itlos.org; M/V Saiga Case (St. Vincent v. Guinea), Prompt Release, Case No. 1, Order of Nov. 21, 1997, *available at* www.itlos.org.

101. EXCESSIVE MARITIME CLAIMS, *supra* note 61, at 433.

102. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 142 (citing Judge J.L. Jesus, President of ITLOS, Statement to the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 27 October 2009, at 6, *available at* www.itlos.org).

103. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 142 n.815 (citing P. Gautier, *Les affaires de 'prompte mainlevé' devant le Tribunal international du droit de la mer*, 3/d GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 85 (2003) (Fr.)).

104. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 141.

105. *Id.*

106. *Id.*

State.¹⁰⁷ In practice, vessel owners negotiate the right to bring claims on behalf of the flag State in the event a dispute arises with a coastal State.¹⁰⁸ This concept extends the already strained legal fiction of diplomatic protection in the ship-as-a-unit context, as the private parties are not required to be nationals of the flag State. Conceptually, if the *Arctic Sunrise* court's extension of the ship-as-a-unit concept is accepted, absurd results could ensue—individuals that do not share the nationality of the vessel could compel a sovereign State to release its own nationals.¹⁰⁹

B. Diplomatic Protection: An Introduction

The ship-as-a-unit concept codified in Article 18 involves several rather liberal exceptions to the traditional understanding of diplomatic protection.¹¹⁰ For that reason, it should be narrowly construed. A discussion of diplomatic protection as it evolved under public international law is necessary to evaluate the impropriety of ITLOS' extension of the ship-as-a-unit notion in the *Arctic Sunrise* context.

Conceptually, diplomatic protection is a mechanism engineered to secure reparation to a State based on the legal fiction that the injury to

107. *Id.* Article 292(2) is distinct from the rule shaped by the *Arctic Sunrise* court as it allows non-national vessel owners the ability to file prompt release applications despite the fact that they do not possess the same national citizenship as the flag their vessel flies. Compare UNCLOS, *supra* note 3, art. 292, para. 2, with *Arctic Sunrise*, *supra* note 24, para. 105. The rule distilled from the *Arctic Sunrise* case allows the flag State to espouse claims on behalf of non-national crewmembers, including those who share the nationality of the offending state. *Arctic Sunrise*, *supra* note 24, para. 105.

108. REFLECTIONS ON THE CONTEMPORARY LAW OF THE SEA, *supra* note 61, at 141.

109. Under ITLOS' rationale, if Russia had arrested the *Arctic Sunrise* for a pollution or fishing violation, and the Netherlands had delegated prompt release rights to a Greenpeace official, that individual, regardless of his or her nationality, could have compelled the Russian Federation to release its own nationals. The absurdity of this scenario is not comprehensible, but is possible, however, considering together the stipulations under Article 292, and the Tribunal's extension of Article 18 in the *Arctic Sunrise* case.

110. See Diplomatic Protection, *supra* note 18, art. 18. See *infra* Part II.B.1. (The exemption of the nationality requirement is the most obvious and important exception recognized by Article 18 and is a representation of customary international law.).

one of its nationals is an injury to the State itself.¹¹¹ The ILC recognizes, however, that the legal fiction supporting the concept of diplomatic protection is an “exaggeration,” for it is obvious that the State itself is not injured contemporaneously with one of its nationals.¹¹² This Section outlines the traditional understanding of diplomatic protection, highlighting the hyperbolic fiction that Article 18 exhausts.

The Draft Articles define diplomatic protection as:

[T]he invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.¹¹³

In the *Mavrommatis Palestine Concessions* case the Permanent Court of International Justice (“PCIJ”) submitted that “by taking up the case of one of its subjects and by restoring to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law.”¹¹⁴ The legal foundation for the PCIJ’s reasoning is grounded in the work of a Swiss jurist, Emmerich de Vattel, who noted in 1758 that “whoever ill-treats a citizen indirectly injures the State, which must protect the citizen.”¹¹⁵ Traditionally, the responsibility of a State may not be invoked if:

111. Rep. of the Int’l Law Comm’n, 58th Sess., art. 1, May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006) [hereinafter Diplomatic Protection Commentary]; Vermeer-Künzli, *supra* note 20, at 38 (“[T]he injury to an individual is treated as if it constituted an injury to the individual’s national state, thereby entitling the national state to espouse the claim.”).

112. Diplomatic Protection Commentary, *supra* note 111, art. 1.

113. Diplomatic Protection, *supra* note 18, art. 1.

114. Diplomatic Protection Commentary, *supra* note 111, art. 1 (quoting *Mavrommatis Palestine Concession (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30)); *see also* Vermeer-Künzli, *supra* note 20, at 38.

115. Diplomatic Protection Commentary, *supra* note 111, art. 1 (quoting 3 E. DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO AFFAIRS OF NATIONS AND SOVEREIGNS* 136 (C.G. Fenwick trans., Carnegie Institution, Washington 1916) (1758)).

“[(1)] the claim is not brought in accordance with any applicable rule relating to the nationality of claims; [and] [(2)] the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.”¹¹⁶

1. Nationality of Claims

Subject to limited exceptions, one of which includes Article 18, a claimant that cannot establish the nationality of a claim will be barred because no legal interest exists on its part.¹¹⁷ Draft Article 5 defines the notion as it pertains to individuals: “A state is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of the injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.”¹¹⁸ The Commentary to Draft Article 5 establishes nationality of the claim as the centerpiece to diplomatic protection.¹¹⁹

Article 18 circumvents the traditional requirement of the establishment of nationality, as it allows for the espousal of claims for non-national crewmembers.¹²⁰ Instead, Article 18 establishes diplomatic protection for non-national crewmembers using the legal fiction that flag State nationality establishes the vessel as the national itself.¹²¹ Therefore, when the vessel of a State is harmed, the State incurs the same injury, and an international claim may proceed.¹²²

2. Exhaustion of Local Remedies

Under traditional diplomatic protection theory, a State may not present an international claim on behalf of an injured person before

116. Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 44, *adopted by Rep. of the Int’l Law Comm’n*, 53rd Sess., 56 U.N. GAOR, Supp. No. 10 at 383, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter *State Responsibility*].

117. BROWNLEE, *supra* note 38, at 702.

118. Diplomatic Protection, *supra* note 18, art. 5, para. 1.

119. Diplomatic Protection Commentary, *supra* note 111, art. 5.

120. Diplomatic Protection, *supra* note 18, art. 19.

121. *See id.*

122. *Id.*

local remedies have been exhausted.¹²³ Both the ILC and the ICJ recognize this facet of diplomatic protection as a customary norm and prerequisite to the espousal of claims in international tribunals.¹²⁴ The Draft Articles on Diplomatic Protection define local remedies as remedies available to the injured person “before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.”¹²⁵ The ICJ noted the importance of this concept in the *Interhandel* case, stating that the “State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system.”¹²⁶ If, however, no effective remedy is available locally because domestic courts lack jurisdiction under their own law, it may be assumed local remedies have been exhausted, and international claims may proceed.¹²⁷

Prompt release applications brought under UNCLOS Article 292, many of which implicitly invoke Article 18,¹²⁸ do not require the exhaustion of local remedies because it would be contrary to the purpose and design of the application.¹²⁹ The analysis may be different, however, when a claim is espoused on behalf of a non-national crewmember against the crewmember’s home State. For instance, in the *Arctic Sunrise* case, the Russian crewmembers who were detained by their home State, the Russian Federation, should have been forced to exhaust their remedies in domestic Russian courts

123. *Id.* art. 14, para. 1.

124. *Interhandel Case (Switz. v. U.S.) Preliminary Objections*, 1959 I.C.J. 6, 27 (Mar. 21) [hereinafter *Interhandel*]; *Diplomatic Protection Commentary*, *supra* note 111, art. 14.

125. *Diplomatic Protection*, *supra* note 18, art. 14, para. 2.

126. *Diplomatic Protection Commentary*, *supra* note 111, art. 14 (citing *Interhandel*, *supra* note 124, at 27).

127. BROWNLIE, *supra* note 38, at 713-14.

128. Prompt release cases by their very nature involve the espousing of claims by flag States on behalf of crewmembers who do not share the nationality of the flag of the vessel.

129. The purpose of the prompt release remedy is to ensure the swift release of a crew secured by a bond. *See UNCLOS*, *supra* note 3, art. 292. This is evidenced by the ten-day requirement included in Article 292. *See id.* Therefore, requiring the crew to exhaust local remedies in domestic courts would undermine the purpose of the provision. *See supra* Part II.A.2.b., for a more detailed discussion of the policy and purpose underlying prompt release applications.

before the Netherlands was permitted to espouse claims on their behalf at the international level.

C. Establishing Flag State Jurisdiction

A State alleging to be the flag State of a vessel must establish standing as the flag State to effectively espouse a claim on behalf of a non-national crewmember. Therefore, a brief discussion of the requirements involved in establishing flag State standing is appropriate.

The flag a vessel flies classifies the ship's nationality, its place of registration, and identifies to the international community what legal jurisdiction the flag State possesses over the vessel.¹³⁰ Flag states retain exclusive jurisdiction, "subject to some notable limitations,^[131] over their ships on the high seas."¹³² Customary international law,¹³³

130. CDR David Garfield Wilson, JAGC, USN, *Interdiction on the High Seas: The Role and Authority of A Master in the Boarding and Searching of His Ship by Foreign Warships*, 55 NAVAL L. REV. 157, 168 (2008) [hereinafter Wilson].

131. UNCLOS Article 92 provides that vessels are subject to the exclusive jurisdiction of the flag State. UNCLOS, *supra* note 3, art. 92. Boarding of a vessel on the high seas must be "authorized by UNCLOS or general international law, issue-specific bilateral or multilateral treaties or *ad hoc* by the flag State." Douglas Guilfoyle, *Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters*, in SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA 84 (Clive R. Symomons ed., Martinus Nijhoff 2011) [hereinafter Guilfoyle]. UNCLOS Article 110 grants the right to visit on the high seas where a warship has reasonable grounds for suspecting a vessel is engaged in piracy, engaged in the slave trade, engaged in unauthorized broadcasting, is without nationality, is the same nationality as the warship though the vessel is flying a foreign flag, or refuses to show its flag. UNCLOS, *supra* note 3, art. 110. UNCLOS "allocates a universal competence for States to visit and inspect vessels" suspected of engaging in the enumerated offenses described in Article 110. Guilfoyle, *supra* note 131, at 83. An absolute right to boarding of vessels for the smuggling of narcotics, irregular migrants, or weapons of mass destruction is not provided for in UNCLOS, but may be authorized through bilateral or multilateral treaties. *Id.*

132. Allyson Bennett, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 YALE J. INT'L L. 433, 436 (2012) [hereinafter Bennett].

133. *Id.* (referencing flag State jurisdiction as a customary norm); Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 145-46 (1996) [hereinafter Anderson, III] (discussing flag State jurisdiction as a notion of customary international law).

as well as UNCLOS Article 92(1),¹³⁴ mandate vessels fly under the flag of only one State.¹³⁵

The general provisions required to establish the nationality of a vessel are defined in UNCLOS Article 91(1):

Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.¹³⁶

Judge Laing noted in the *Grand Prince* case that

in the ideal situation, up to three elements may be involved in a determination of or as ingredients of the nationality of a vessel – (1) the actual grant of nationality by the flag State, (2) the registration of the vessel and (3) the flying of the flag State’s flag as of right.¹³⁷

The flag State has exclusive jurisdiction to determine the criteria and procedures for granting and withdrawing nationality to ships.¹³⁸ Judge Wolfrum submitted, however, that “the registration cannot be reduced to a mere fiction and serve just one purpose, namely to open

134. “[T]he drafting history of Article 92(1) can be traced to the almost identical Article 30 of the 1956 draft Articles” prepared by the ILC, the commentary to which states that “[t]he absence of any authority over ships sailing the high seas would lead to chaos” and that “a ship must fly the flag of a single State and that it is the subject to the jurisdiction of that state.” Neil Brown, *Jurisdictional Problems Relating to Non-Flag State Boarding of Suspect Ships in International Waters: A Practitioner’s Observations*, in *SELECTED CONTEMPORARY ISSUES IN THE LAW OF THE SEA 70* (Clive R. Symomons ed., Martinus Nijhoff 2011) (citing 3 UNCLOS COMMENTARY, *supra* note 99).

135. YOSHIFUMU TANAKA, *THE INTERNATIONAL LAW OF THE SEA 155* (Cambridge Univ. Press 2012) [hereinafter TANAKA].

136. UNCLOS, *supra* note 3, art. 91, para. 1.

137. *Grand Prince*, *supra* note 100, para. 2 (Separate Opinion of Judge Laing).

138. *M/V “Saiga” (No. 2) (St. Vincent v. Guinea)*, Provisional Measures, Case No. 2, Order of Mar. 11, 1998, para. 65 [hereinafter *M/V Saiga (No. 2)*], available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf; see TANAKA, *supra* note 135, at 141.

the possibility to initiate proceedings under article 292 of the Convention on the Law of the Sea.”¹³⁹

The only caveat to the unimpeded freedom afforded to the flag State to establish its flagging procedure is the nebulous requirement of a genuine link between the vessel and the flag State.¹⁴⁰ The *Nottenbohm* case, decided by the ICJ in 1955, provides the genesis for the genuine link requirement.¹⁴¹ Also, the notion was included in Article 5 of the 1958 Geneva Convention on the Law of Sea, just three years later.¹⁴² The application of this principle to vessel nationality is “tenuous at best”¹⁴³ and registration, as defined by the flag State, is the only method to establish “reciprocal rights and duties.”¹⁴⁴ Because registration may be considered evidence of a genuine link,¹⁴⁵ it is the registration itself that creates the link between the vessel and flag State.¹⁴⁶

Consistent with this understanding, ITLOS noted in the *M/V Saiga* (No. 2) case that:

[T]he purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.¹⁴⁷

Thus, “[n]othing in the Convention [or a customary norm] permits a state that questions the existence of a genuine link to disregard the jurisdiction of the flag state over the ship.”¹⁴⁸

139. Grand Prince, *supra* note 100, para. 3 (declaration of Judge Wolfrum).

140. Anderson, III, *supra* note 133, at 145-46.

141. The Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6) [hereinafter Nottebohm], available at <http://www.icj-cij.org/docket/index.php?sum=215&p1=3&p2=3&case=18&p3=5>.

142. See Anderson, III, *supra* note 133, at 148.

143. *Id.* at 149.

144. *Id.*

145. GAVOUNELI, *supra* note 89, at 17.

146. *Id.*; see, e.g., Grand Prince, *supra* note 100, paras. 82-83.

147. *M/V Saiga* (No. 2), *supra* note 138, para. 83.

148. LOUIS B. SOHN, KRISTEN GUSTAFSON JURAS, JOHN E. NOYES & ERICK FRANCKX, *LAW OF THE SEA IN A NUTSHELL* 51 (2d ed. 2010).

The registration and subsequent flagging of a vessel “creates a permanent legal relationship between the ship and the State.”¹⁴⁹ It also provides the State the right to assert jurisdiction and diplomatic protection over the vessel.¹⁵⁰ But, such privileges come with obligations.¹⁵¹ Specifically, UNCLOS Article 94 makes it the flag State’s responsibility to “effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.”¹⁵² This responsibility includes diligence in overseeing activities central to vessel operation such as the construction, equipment, and seaworthiness of ships.¹⁵³ Despite the obligations defined in the Convention, a case has never been brought before ITLOS on this matter.¹⁵⁴

“Flags of convenience” emerged during the post-World War II economic boom when ship owners began to register their vessels where they could operate at the lowest cost, thus abandoning the previous custom of registering in their country of nationality.¹⁵⁵ Ship registries are categorized into “closed” or “national” registers, “second” registers, and “open” registers.¹⁵⁶ “Closed” registers generally exclude registration to vessels that are not owned by individuals or entities located in the flag State.¹⁵⁷ “Second” registers are similar to “closed” registers in that a majority of the owners and crew are nationals of the flag State but represent a middle ground because they embody some features of an “open” register.¹⁵⁸ “Open”

149. GAVOUNELI, *supra* note 89, at 17.

150. *See id.*

151. *Id.* These obligations include, “the obligation to *effectively* exercise jurisdiction or control in administrative, technical and social matters, from the construction, equipment and seaworthiness of ships to the meaning, labour conditions and the training of crews on board.” *Id.*

152. UNCLOS, *supra* note 3, art. 94, para. 1.

153. *See id.* para. 3.

154. GAVOUNELI, *supra* note 89, at 17 (citing Davis R. Robinson, *Recourse Against Flag States for Breaches of Their International Obligations Under the 1982 Law of the Sea Convention*, in CURRENT MARINE ENVIRONMENTAL ISSUES AND THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 371-83 (Myron N. Nordquist & John N. Moore eds., 2001)).

155. *See* Wilson, *supra* note 130, at 157.

156. *Id.*

157. *See id.*

158. *See id.*

registers are synonymous with “flags of convenience.”¹⁵⁹ They encourage vessel owners to matriculate to States that offer “lower or no taxes, low labor standards, and loose environmental and safety regulations.”¹⁶⁰ Accordingly, “flags of convenience” allow States with no connection to the vessel to espouse claims on the crew’s behalf in international forums. It is this evolution of ship registration that is likely responsible for the wide-spread acceptance of the ship-as-a-unit concept.¹⁶¹

III. ARTICLE 18: A REPRESENTATION OF CUSTOMARY INTERNATIONAL LAW

A. *The International Law Commission*

The ILC, which is the drafting body of the Draft Articles on Diplomatic Protection, grew out of nineteenth and early twentieth-century efforts to codify international law, and was established by the U.N. General Assembly in 1947.¹⁶² In carrying out its mandate to progressively develop and codify international law, the Commission may consider draft conventions prepared by organs of the United Nations other than the General Assembly, as well as “specialized agencies, or official bodies established by intergovernmental agreement.”¹⁶³ The members of the ILC are elected by the General Assembly because of their prowess and expertise in specific areas of

159. See *id.* “Many in the maritime shipping industry use the term ‘flags of convenience’ or ‘open registry’ in reference to ships registered (i.e. flagged) in a state in which both the ships and their owners have little or no contact, but for the registration itself.” *Id.*

160. *Id.*

161. Given the diversity of crewmembers and nations at sea, it makes sense that States want their nationals to be protected by the flag State. At the same time, the ship-as-a-unit concept in the diplomatic protection context is swallowed up by the fact that many of the “flags of convenience” are third-world States that offer no ability to assert claims on behalf of their own nationals, let alone non-national crewmembers. See *supra* note 15, for statistics on the volume and diversity of seafarers.

162. LOUIS B. SOHN, JOHN E. NOYES, ERIK FRANCKX & KRISTEN JURAS, *CASES AND MATERIALS ON THE LAW OF THE SEA* (2d ed. 2014) [hereinafter *CASES AND MATERIALS ON THE LAW OF THE SEA*].

163. Statute of the International Law Commission, G.A. Res 174 (II), art. 17, para. 1 (Nov. 21, 1947) [hereinafter *ILC Statute*].

international law.¹⁶⁴ This prowess and expertise ensures the ILC carries out the goal of Article 13(1).¹⁶⁵

Article 15 of the ILC Statute defines two roles, including: (1) the progressive development of international law, meaning “the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States,”¹⁶⁶ and (2) the codification of “the more precise formulation and systemization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”¹⁶⁷ Article 18 represents the ILC at work in the latter capacity, as extensive State practice supports the ship-as-a-unit concept as a representation of customary international law.¹⁶⁸

B. Draft Article 18: Codifying the Ship-As-A-Unit Concept

In May 2006 the ILC adopted its Draft Articles on Diplomatic Protection, codifying widely accepted customary norms on the diplomatic protection of nationals.¹⁶⁹ Article 18 of the Draft Articles operates contrary to the traditional constructs of international diplomacy law.¹⁷⁰ It extends the right of diplomatic protection to the flag State of a vessel over the entire crew regardless of whether the crewmember shares the nationality of the flag State.¹⁷¹ Article 18, however, is silent on whether a flag State’s right to espouse claims on behalf of non-nationals extends to scenarios where a non-national crewmember is detained by his or her State of nationality.¹⁷² Perhaps originally just an unlikely hypothetical, the scenario became a reality in the *Arctic Sunrise* case when ITLOS ordered Russia to release Russian crewmembers arrested on a Dutch flag vessel.¹⁷³

164. CASES AND MATERIALS ON THE LAW OF THE SEA, *supra* note 162.

165. U.N. Charter art. 13, para. 1.

166. ILC Statute, *supra* note 163, art. 15, para. 1.

167. *Id.* para. 2.

168. *See infra* Part III.B.

169. Vermeer-Künzli, *supra* note 20, at 37-38.

170. *See* Diplomatic Protection, *supra* note 18, art. 18.

171. *See id.*

172. *See id.*

173. *Arctic Sunrise*, *supra* note 24, para. 105.

The Commentary to Article 18 contends that the concept of vessel unity in the context of diplomatic protection is a representation of customary international law.¹⁷⁴ Indeed, the practice of States, domestic and international courts, and the most highly qualified publicists¹⁷⁵ accept a flag State's right to espouse claims on behalf of the crew of a vessel flying its flag. This concept has been historically recognized and is still presently respected.¹⁷⁶ Article 18 states:

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.¹⁷⁷

As codified by Article 18, decisions of international and domestic tribunals are consistent in their recognition and treatment of the ship-as-a-unit concept in the diplomatic protection context. Before the *Arctic Sunrise* case the Tribunal properly implemented the ship-as-a-unit concept in prompt release and provisional measures cases; the concept was thought of as a meaningful contribution to international law.¹⁷⁸ In the *M/V Saiga (No. 2)* case the Tribunal noted, "the ship, every thing on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant."¹⁷⁹ The Tribunal

174. See generally Diplomatic Protection Commentary, *supra* note 111, art. 18 (The support offered by the accompanying Commentary indicates that the ILC as well as the international community regards the ship-as-unit concept to be a customary norm.).

175. The International Court of Justice recognizes the works of the most highly qualified scholars under the ICJ Statute. See ICJ Statute, *supra* note 73, art 38, para. 1.

176. Diplomatic Protection Commentary, *supra* note 111, art. 18 ("There is support in the practice of States, in judicial decisions and in the writing of publicists, for the position that the state of nationality (the flag State) may seek redress for members of the crew of the ship who do not have its nationality.").

177. Diplomatic Protection, *supra* note 18, art. 18.

178. See *Arctic Sunrise*, *supra* note 24, separate opinion of Judge Jesus, paras. 18-19.

179. *M/V Saiga (No.2)*, *supra* note 138, para. 106.

conclusively stated that claims may be brought on behalf of non-nationals, “irrespective of their nationality.”¹⁸⁰

ITLOS reaffirmed flag State standing in the *The Grand Prince* case: “it is the flag State of the vessel that is given *locus standi* to make up the question of release in an appropriate court or tribunal. Any other entity may make an application only on behalf of the flag State of the vessel.”¹⁸¹ Additionally, the *Arctic Sunrise* court implicitly accepted the concept of vessel unity pertaining to crewmembers when it allowed a State to bring a claim on behalf of a non-national against their home State.¹⁸² Even ITLOS’ Judge Jesus, who did not agree with the Dutch espousal of claims over the Russian nationals, generally acknowledged the ship-as-a-unit concept in his separate opinion:

I understand that the ship-as-a-unit concept developed by the Tribunal in the *M/V “SAIGA” (No. 2) Case* brings under the international judicial protection of that State all the crew members of the vessel flying its flag, even if the crew members hold a different nationality from that of the flag State. . . . I am in full agreement that crew members of a ship that hold a nationality different from that of the flag State should also have the international judicial protection from that State, as promoted by the ship-as-a-unit concept [T]he ship-as-a-unit concept . . . is . . . a valuable contribution to international law developed by the Tribunal in its early case law, [and] a contribution that complements the institute of diplomatic protection.¹⁸³

While the Tribunal’s recognition of diplomatic protection of crewmembers through the legal fiction of vessel nationality is notable, the court was not making a novel finding but merely confirming a well-established doctrine. ICJ Judges Hackworth and Badwi Pasha both dissented and noted this concept in the *Reparation for Injuries advisory opinion*.¹⁸⁴ Judge Hackworth stated that “seamen and aliens serving in the armed forces . . . are assimilated to the status of

180. *Id.* para. 104.

181. *Grand Prince*, *supra* note 100, para. 66.

182. *Arctic Sunrise*, *supra* note 24, para. 105.

183. *Id.*, separate opinion of Judge Jesus, paras. 18-20.

184. 1949 I.C.J. 12, 202-03 (Apr. 11).

nationals.”¹⁸⁵ Judge Badwi Pasha submitted that “protection extends to everyone in the ship . . . independent of nationality” and that “nationality is satisfied as regards the flag or forces, its absence, in the case of one or more units or person of a national entity, may be held to be covered by a principle of the individuality of the flag or the armed forces.”¹⁸⁶ As early as the nineteenth century the Supreme Court of the United States recognized the relationship between the crew and the flag State of the vessel it flies.¹⁸⁷ It found that “[w]here a nation allows a vessel to sail under her flag, and the crew have the protection of that flag, common sense and justice require that they should be punishable by the law of the flag.”¹⁸⁸ Additionally, in the *I’m Alone* case, where a U.S. Coast Guard ship sank a Canadian vessel suspected of smuggling liquor, Canada successfully espoused compensation claims on behalf of three non-national crewmembers.¹⁸⁹ The Supreme Court of the United States contended that when a claim is made on behalf of a vessel, the crew as a whole shares the nationality of the vessel.¹⁹⁰

In addition to the acceptance of this concept in domestic and international tribunals, some of the most highly qualified publicists in international law and the law of the sea have recognized this concept as part of international diplomacy law. Churchill and Lowe, two of the most prolific publishers on international law of the sea, find that “[a] State could . . . exercise the right of diplomatic protection, which extends to the State’s nationals . . . and ships . . . flying its flag.”¹⁹¹ And, the absence of a link of nationality of some kind is ultimately immaterial.¹⁹² Jennings and Watts submit that a State may assert claims on behalf of crewmembers serving on a vessel flying its flag.¹⁹³

185. *Id.* at 202-03 (dissenting opinion of Judge Hackworth).

186. *Id.* at 206-07 (dissenting opinion of Judge Badwi Pacha).

187. *See* *Ross v. McIntyre*, 140 U.S. 453 (1891).

188. *Id.* at 478.

189. *Claim of the British Ship “I’m Alone” v. United States: Reports of the Commissioners*, 29 AM. J. INT’L L. 326 (1935).

190. *Id.*

191. R.R. CHURCHILL AND A.V. LOWE, *THE LAW OF THE SEA* 331 (2nd rev. ed. 1992).

192. *Id.*

193. *See* ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 937 (9th ed. 1992).

Crawford suggests that the ship-as-a-unit concept is an exception to the general requirements of diplomatic protection: “A right to the protection of non-nationals may arise from treaty or an ad hoc arrangement establishing an agency. The other generally accepted exceptions are alien seamen on ships flying the flag of the protecting state and members of the armed forces of a state.”¹⁹⁴ As much as the international legal community accepts the ship-as-a-unit concept as part of the “institute of diplomatic protection,”¹⁹⁵ there is no customary foundation for the right to be extended to situations where a crewmember is detained by his or her State of nationality.¹⁹⁶

IV. THE *ARCTIC SUNRISE* CASE: THE CONFLICT WITH INTERNATIONAL LAW

A. *The Arctic Sunrise Case*

On November 22, 2013, ITLOS released its decision in the *Arctic Sunrise* case regarding the Kingdom of the Netherlands’ request for provisional measures.¹⁹⁷ The Tribunal ordered Russia to release the crew of the *Arctic Sunrise* including those of Russian nationality.¹⁹⁸ This decision substantially undermines the ILC’s understanding of diplomatic protection as stated in Article 18. Presumably, the ILC did not find it necessary to articulate that Article 18 does not apply in situations where a national is charged under domestic law and detained in his or her State of nationality. The application of diplomatic protection in such a context is at odds with the very

194. JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 460 (6th ed. 2003)

195. *Arctic Sunrise*, *supra* note 24, separate opinion of Judge Jesus, paras. 18-19.

196. Article 18, as codified by the ILC, includes the ship-as-a-unit concept as part of diplomatic protection theory because it is supported by a customary foundation. *See* Diplomatic Protection, *supra* note 18, art. 18. Conversely, the absence of language explicitly entitling flag States to espouse claims on behalf of non-nationals detained by their State of nationality should indicate that the ILC did not consider that scenario to be supported by State practice. *See id.*

197. *Arctic Sunrise*, *supra* note 24, para. 105.

198. *Id.*

foundation and dualist nature¹⁹⁹ of public international law.²⁰⁰ ITLOS' implicit extension of Article 18 in this context creates dangerous precedent by contradicting the most traditional notions of international law.

Additionally, the application of Article 18 in this circumstance places the reputation of ITLOS in jeopardy. If other States follow Russia's lead and refuse to comply with an order mandating the release of its own nationals,²⁰¹ ITLOS' perceived authority will be weakened. Alternatively, States that anticipate the application of diplomatic protection in this manner will likely decline to submit themselves to the Tribunal regardless of its compulsory jurisdiction.

An international tribunal serves little purpose if its decisions are not followed. Like most tribunals, ITLOS does not possess an enforcement arm²⁰²—its orders are followed by nations simply out of respect for the Tribunal and the rule of international law.²⁰³ A trend of recalcitrant State practice in defying ITLOS decisions would be debilitating to the present effectiveness and future success of such a young international tribunal.

The following section addresses the specifics of the Tribunal's order, how it conflicts with well-established pillars of international law, and why it demands the ILC's immediate attention.

199. See BROWNLIE, *supra* note 38, at 48 (“Dualism emphasizes the distinct and independent character of the international and national legal systems.”).

200. See *infra* Part II.B. (discussing the interplay between the foundational components of public international law and diplomatic protection theory).

201. See Arctic Sunrise, *supra* note 24, para. 9.

202. See, e.g., John M. Scheib, *Enforcing Judgments of the European Court of Human Rights: The Conduit Theory*, 10 N.Y. INT'L L. REV. 101, 110 (1997) [hereinafter Scheib] (“In the international context . . . there is no worldwide sheriff to enforce the judgment. Rather, it has traditionally been assumed that the judgment or award of satisfaction may be enforced and executed only by the state against whom the Court renders a judgment.”); see also Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 682 (2013) (discussing the deference given to international tribunals by domestic courts: “Given the difficulties in taming and naming this beast, it is not surprising that federal courts have haphazardly addressed the question of how much deference should be conferred on international tribunal decisions[.]”).

203. See *supra* note 202.

1. *Factual Background*

The substantive legal issues arise out of a colorful factual record. On September 19, 2013, competent authorities of the Russian Federation, the Coast Guard of the Federal Security Service of Russia for Murmansk Oblast (“the Russian coastguard”),²⁰⁴ arrested the Dutch flagged Greenpeace²⁰⁵ vessel, *Arctic Sunrise*.²⁰⁶ The arrest was based on allegations of protesting “against the operation of the offshore fixed oil platform *Prirallomnaya*” in the Pechora Sea of the Russian EEZ.²⁰⁷ The protest involved staging an attempt to seize the oil platform.²⁰⁸ Russian authorities towed the *Arctic Sunrise* to the Russian port of Murmansk where the Leninsky District Court subsequently seized the vessel.²⁰⁹ The Greenpeace activists on board of the *Arctic Sunrise* were initially charged with piracy,²¹⁰ and “ordered to be held in pre-trial detention for two months.”²¹¹ The charges were then converted to hooliganism,²¹² and the crewmembers “were transferred to the Kresty detention center in St. Petersburg on November 12.”²¹³ Release of the crew on bail began two months after the arrest, and on December 18 “the Russian State Duma²¹⁴ declared

204. *Arctic Sunrise*, *supra* note 24, para. 88.

205. “Greenpeace is an independent global campaigning organization that acts to change attitudes and behavior, to protect and conserve the environment and to promote peace . . .” *About Greenpeace*, GREENPEACE.COM, <http://www.greenpeace.org/international/en/about/> (last visited Apr. 3, 2014).

206. *Arctic Sunrise*, *supra* note 24, para. 88.

207. Anna Dolidze, *The Arctic Sunrise and NGOs in International Judicial Proceedings*, 18 A.S.I.L. INSIGHTS 1 (2013) [hereinafter Dolidze], available at <http://www.asil.org>.

208. RT.COM, *supra* note 26.

209. Dolidze, *supra* note 207, at 1.

210. It is unclear whether this charge was in conformity with the strict definition of piracy under UNCLOS Article 101.

211. RT.COM, *supra* note 26.

212. *See infra* Part IV.B.1.b. (discussing hooliganism and its applicability to the *Arctic Sunrise* case).

213. RT.COM, *supra* note 26.

214. “After the collapse of the Soviet Union in 1991, the Russian Federation in 1993 replaced its old Soviet-era constitution with a new document that revived the name ‘State Duma’ for the lower house of the newly created Federal Assembly, or

amnesty due to the 20th anniversary of the Russian Constitution and the Arctic Sunrise crew . . . [was] eligible to it.”²¹⁵ By December 29, 2013, all non-Russian crewmembers had left Russia.²¹⁶

The crew became known as the “Arctic 30” and was a truly multi-national assemblage²¹⁷ of thirty individuals consisting of seventeen different nationalities.²¹⁸ Most importantly, crewmembers Roman Dolgov, Denis Sinyakov, and Andrey Allakhverdov were Russian nationals.²¹⁹

2. Contentions of the Parties

On October 1, 2013, the Embassy of the Russian Federation addressed the Ministry of Foreign Affairs of the Netherlands and made the following contentions regarding its authority under international law to arrest and detain the crew of the *Arctic Sunrise*:

On 19 September . . . within the [EEZ] of the Russian Federation, on the basis of Articles 56, 60, and 80 of [UNCLOS], and in accordance with Article 36(1(1)) of the Federal Law ‘on the [EEZ] of the Russian Federation’ a visit . . . to the vessel ‘Arctic Sunrise’ was carried out. . . . In view of the authority that a coastal State possesses in accordance with the aforementioned rules of international law, in the situation in question requesting consent of

Russian national parliament.” *Duma*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/EBchecked/topic/173419/Duma>.

215. Voice of Russia, *Russia Drops Charges Against All 30 Drilling Protesters—Greenpeace*, VOICEOFRUSSIA.COM (Dec. 26, 2013 12:20 PM), http://voiceofrussia.com/news/2013_12_26/Russia-drops-charges-against-all-30-drilling-protesters-Greenpeace-8528/.

216. *Updates from the Arctic Sunrise*, GREENPEACE.COM <http://www.greenpeace.org/international/en/news/features/From-peaceful-action-to-dramatic-seizure-a-timeline-of-events-since-the-Arctic-Sunrise-took-action-September-18-CET/> (last visited Apr. 1, 2014).

217. The nationalities of the crewmembers are as follows: United Kingdom, 6; Russia, 3; Argentina, 2; Canada, 2; Netherlands, 2; New Zealand, 2; Australia, 1; Brazil, 1; Denmark, 1; Finland, 1; France, 1; Italy, 1; Sweden, 1; Switzerland, 1; Turkey, 1; Ukraine, 1; and the United States of America, 1. See *Meet the Arctic 30*, GREENPEACE.COM, <http://www.greenpeace.org/usa/arctic30/> (last visited Mar. 28, 2014).

218. *Id.*

219. *Id.*

the flag State to the visit by the inspection team on board the vessel was not required[.]²²⁰

The procedural posture of the *Arctic Sunrise* case is as complicated as the claims for which the case was brought. Because the Netherlands and Russia “have not accepted the same procedure for the settlement of disputes” under UNCLOS Article 287, they are deemed to have accepted the arbitration procedure under the Convention.²²¹ Consistent with this understanding, the Netherlands requested for ITLOS to act as an arbitral tribunal, and to find that:²²²

[Russia] breached its obligations to the Kingdom of the Netherlands . . . in the exercise of its right to diplomatic protection of its nationals, and its right to seek redress on behalf of crew members of a vessel flying the flag of the Kingdom *irrespective of their nationality*, in regard to the right to liberty and security of a vessel’s crew members and their right to leave the territory and maritime zones of a coastal state²²³

220. *Arctic Sunrise*, *supra* note 24, para. 64.; *see also* UNCLOS, *supra* note 3, art. 110 (discussing the “right to visit”); *see supra* Part II.C.; *see infra* Part IV.B.1.c. (discussing Russia’s implementation of domestic enforcement regulations under international law). UNCLOS Article 56 defines the rights of the Coastal State in the EEZ. *See infra* Part IV.B.1.b. UNCLOS Article 60 defines Coastal States’ rights regarding artificial islands and installations in the EEZ. *See infra* Part IV.B.1.c. UNCLOS Article 80 extends the rights under Article 60 to the continental shelf: “Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.” UNCLOS, *supra* note 3, art. 80.

221. *Arctic Sunrise*, *supra* note 24, para. 2.

222. In addition to seeking the right to espouse claims on behalf of the crew, the Netherlands also asked ITLOS to find that the Russian Federation:

(1) in boarding, investigating, inspecting, arresting and detaining the ‘Arctic Sunrise’ . . . breached its obligations to the Kingdom of the Netherlands . . . in regard to the freedom of navigation . . . [under] Articles 58, paragraph 1, and 87, paragraph 1(a) of UNCLOS, and under customary international law; (2) in boarding, investigating, inspecting, arresting and detaining the ‘Arctic Sunrise’ breached its obligations to the Kingdom of the Netherlands, in regard to the exercise of jurisdiction by a flag state as provided by Article 58 and Part VII of UNCLOS, and under customary international law[.]

Id. para. 33.

223. *Id.* (emphasis added).

3. Prescription of Provisional Measures

On October 21, 2013, the Netherlands filed a request for the prescription of provisional measures “under article 290 paragraph 5, of the Convention in a dispute concerning the boarding and detention of the vessel *Arctic Sunrise* in the [EEZ] of the Russian Federation and the detention of the persons on board the vessel by the Russian Federation.”²²⁴ Subsequently, the Netherlands asked ITLOS to prescribe provisional measures, and order Russia to:

[(1)] Enable the ‘Arctic Sunrise’ to be resupplied, to leave its place of detention and the maritime areas under the jurisdiction of the Russian Federation and to exercise the freedom of navigation; [(2)] 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 Federation²²⁵

On October 22, 2013, the Russian Federation brought to the attention of the tribunal that:

Upon ratification of the Convention on 26th February 1997 the Russian Federation made a statement, according to which, *inter alia*, ‘it does not accept procedures provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes . . . concerning law-enforcement activities in regard to the exercise of the sovereign rights of jurisdiction.’²²⁶

224. *Id.* para. 1.

225. *Id.* para. 34. The additional provisional measures requested by the Netherlands included the following:

“[(3)] 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; and [(4)] Ensure that no other action is taken which might aggravate or extend the dispute”

Id. para. 64.

226. *Id.* para. 9.

On this basis, Russia notified the Netherlands that it did not intend to participate in the proceedings before ITLOS.²²⁷

On November 6, 2013, despite Russia's absence from the proceedings, the Tribunal heard oral statements from the Netherlands.²²⁸ After considering the case holistically, ITLOS found that as a matter of international law "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."²²⁹ Given the contentions of the parties, the Tribunal found that the substantive dispute involved "a difference of opinions . . . as to the applicability of the provisions of the Convention as to the rights and obligations of a flag State and a coastal State."²³⁰ By a vote of nineteen to two,²³¹ the Tribunal then prescribed the following provisional measures:

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 . . . in the amount of 3,600,000 euros . . . Upon the posting of a bond or other financial security . . . the Russian Federation shall ensure that the vessel *Arctic Sunrise* and all persons who have been detained are allowed to leave the

227. *Id.*

228. *Id.* para. 27. Ms. Liesbeth Lijnzaad, Legal Adviser of Foreign Affairs, appeared as Agent on behalf of the Netherlands. *Id.*

229. *Id.* para. 48.

230. *Id.* para. 68. Although not relevant to the discussion, the analysis the Tribunal undertook in establishing jurisdiction is quite elegant. ITLOS decreed that the articles of the Convention invoked by the Netherlands formed "a basis on which the jurisdiction of the arbitral tribunal might be founded . . . [and] that the Annex VII arbitral tribunal would *prima facie* have jurisdiction over the dispute." *Id.* paras. 70-71. Reading Article 290(1) and 290(5) together, ITLOS concluded the subject matter on which the Netherlands sought relief (the Convention provisions), necessitated the prescription of provisional measures. *Id.* para. 105. The Tribunal possessed the power to determine the necessity of prescribing provisional measures under UNCLOS Article 290(5) because Article 290(1) provides in pertinent part that if "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, [ITLOS] . . . may prescribe provisional measures . . . if it considers . . . the situation so requires." *Id.* paras. 78-79.

231. *Id.* para. 105.

territory and maritime areas under the jurisdiction of the Russian Federation.²³²

In ordering the release of “all persons who have been detained,” ITLOS made international judicial history. Subject to the limited scenarios where a State has or is violating *jus cogens*²³³ norms or a multi-lateral agreement,²³⁴ it does not appear that an international tribunal has ever ordered the release of a State’s national being held intrastate and prosecuted under that State’s domestic laws.²³⁵

4. *Dissent and Separate Opinion: Highlighting the Conflict*

The majority’s extension of Article 18 is articulated implicitly, as the order to release “all persons who have been detained”²³⁶ includes Russian nationals. Therefore, the majority does not substantively defend its application of Article 18 nor even acknowledge the unorthodox nature of its order. The separate opinion of Judge Jesus, and the critical dissent of Judge Golitsyn, highlight the magnitude of ITLOS’ decision.²³⁷ Interestingly, beyond noting the lack of legal foundation for the majority’s decision, Judges Jesus and Golitsyn failed to discuss the specific faults in the majority order and submitted their opinions in a relatively undeveloped state.²³⁸ Perhaps further discussion was not given because the Tribunal’s implicit decree appeared so explicitly erroneous.

232. *Id.* (emphasis added).

233. See *infra* Part V.A., regarding an international tribunal’s ability to compel the release of nationals based on the violation of *jus cogens* norms.

234. See *infra* Part V.B. (discussing the availability for redress under the European Convention on Human Rights).

235. Excluding the *Arctic Sunrise* case, no ITLOS decision to date has ordered a State to release one of its own citizens who is being prosecuted under the national laws of that State. See *List of Cases*, ITLOS.ORG, <https://www.itlos.org/index.php?id=94> (last visited Dec. 26, 2014).

236. *Arctic Sunrise*, *supra* note 24, para. 105.

237. See *generally* *Arctic Sunrise*, *supra* note 24, separate opinion of Judge Jesus; see also *id.*, dissenting opinion of Judge Golitsyn. Judge Kulyk also dissented, however, his rationale did not turn on the Tribunal’s implicit order to release the Russian detainees. See *id.* para. 15.

238. See *generally* *Arctic Sunrise*, *supra* note 24, separate opinion of Judge Jesus; *id.*, dissenting opinion of Judge Golitsyn.

Despite joining the majority, Judge Jesus wrote separately to note the impropriety of extending Article 18 to the Russian crewmembers.²³⁹ He began by stating the implicit effect of the majority's order in that "[t]he decision of the Tribunal ordering the Russian Federation to release all the detained persons includes members of the personnel of Russian citizenship."²⁴⁰ He then concurs with the customary understanding of diplomatic protection, as codified by the ILC in Article 18 and complied with by the Tribunal in earlier decisions.²⁴¹

After explaining the universal understanding and application of diplomatic protection when considered in the ship-as-unit context, Judge Jesus contrasts the unnerving approach the majority took, stating that he does "not think . . . that the concept should interfere with the special legal relationship that exists between a State and its citizens in its own territory."²⁴² Importantly, Judge Jesus then decisively frames the quandary declared by the Tribunal stating:

To order a State to release its own citizens who are being prosecuted in its domestic courts for alleged violations of that State's own law may be pushing too far the scope of the applicability of the ship-as-a-unit concept . . . I would have preferred that the order of release applies to all personnel and not to the Russian citizens.²⁴³

Judge Golitsyn, a Russian himself,²⁴⁴ was stronger in his contentions. In his dissent he noted the core error in the majority's decision: an international tribunal has no authority under international law to compel the release of a State's nationals prosecuted under domestic law.²⁴⁵ Finding the majority's order at odds with the

239. *See id.*, separate opinion of Judge Jesus, para. 18.

240. *Id.*

241. *See id.* at paras. 18-20. *See supra* note 183, for Judge Jesus' full comments on the matter.

242. Arctic Sunrise, *supra* note 24, separate opinion of Judge Jesus, para. 19.

243. *Id.* para. 20.

244. *See generally* President Vladimir Vladimirovich Golitsyn, ITLOS.ORG, <https://www.itlos.org/index.php?id=94> (last visited Mar. 15, 2014) (providing background information on President Vladimir Vladimirovich Golitsyn).

245. *See* Arctic Sunrise, *supra* note 24, dissenting opinion of Judge Golitsyn, paras. 46-47.

international legal regime that empowers it, Judge Golitsyn submitted that “[w]hat is utterly incomprehensible . . . is how the Tribunal can prescribe a provisional measure calling for all detained persons to be allowed to leave the territory under the jurisdiction of the Russian Federation, including, and this is the most astounding, the Russian nationals among them.”²⁴⁶ Judge Golitsyn concluded that “[t]he Tribunal cannot claim under the circumstances that it preserves the rights of the Russian Federation by prescribing the release of the ship and its crew upon the posting of a bond or other financial security.”²⁴⁷

What the majority ordered implicitly, Judges Jesus and Golitsyn criticized explicitly. While they declined to include their full rationale, their comments demonstrate that the Tribunal’s decision cannot coexist with the most fundamental underpinnings of public international law.

B. Arctic Sunrise and the Conflict with Russia’s Rights under International Law

Where the indictment of foreign citizens under Russian law may very well trigger questions of international law, the indictment of Russian citizens under its national law is within the sole adjudicative discretion of Russia. This is because international law is a system of laws between States, where national law is a system of laws within a State, “regulating the relations of its citizens with each other and with that [S]tate.”²⁴⁸ “Neither legal order has the power to create or alter rules of the other.”²⁴⁹ In accordance with international law, Russia possesses the affirmative right to hold its citizens accountable under national law for acts committed extraterritorially because: (1) UNCLOS Article 60 provides Russia exclusive enforcement jurisdiction in its EEZ, and (2) Russia may invoke a sovereign jurisdictional right over its citizens through the active nationality principle.

246. *Id.*

247. *Id.*

248. BROWNLIE, *supra* note 38, at 49.

249. *Id.*

1. *Russia's Enforcement Jurisdiction Regarding Installations in the EEZ*

a. *Enforcement Jurisdiction in International Criminal Law*

Generally, enforcement jurisdiction in a State's own territory is uncontroversial where "the unilateral and extra-territorial use of enforcement jurisdiction is impermissible."²⁵⁰ "[Jurisdiction] cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international law or a convention."²⁵¹ A State's consent to extraterritorial enforcement action may be given on an ad hoc basis, or standing orders for enforcement action may take the form of bi-lateral or multi-lateral agreements.²⁵²

As a States Party to UNCLOS,²⁵³ Russia possesses exclusive criminal enforcement jurisdiction under Article 60 of the Convention with regard to artificial islands, installations, and structures in its EEZ.²⁵⁴ Under UNCLOS, ITLOS was "established to adjudicate disputes arising out of the interpretation and application of the Convention,"²⁵⁵ not the application of a State's domestic criminal law with regard to its own citizens. Assuming Russian criminal law extends to the *Prirallomnaya* fixed oil platform, ITLOS possesses neither the legal competence nor jurisdiction to question the culpability of a Russian citizen, charged with a Russian crime, in a Russian court, and detained in a Russian prison.

250. *Id.* at 478.

251. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. 25 (ser. A) No. 9/10, at p. 18-19 (Sept. 7), available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.

252. See BROWNIE, *supra* note 38, at 480.

253. The Russian Federation ratified UNCLOS on March 12, 1997. *Chronological Lists of Ratification*, UN.ORG, http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Apr. 7, 2014).

254. See UNCLOS, *supra* note 3, art. 60; 2 UNCLOS COMMENTARY, *supra* note 99, at 585.

255. ITLOS Website, *supra* note 44.

b. The Exclusive Economic Zone Relating to UNCLOS Article 60

The EEZ is an area beyond and adjacent to the territorial sea,²⁵⁶ in which the rights of the coastal State, Russia, are superior to all others as it relates to economic exploitation and exploration.²⁵⁷ UNCLOS Article 57 limits the EEZ to 200 nautical miles,²⁵⁸ measured from the baselines from which the breadth of the territorial sea is measured.²⁵⁹ Specifically, Russia has jurisdiction over the establishment and use of artificial islands, installations, and structures, created under Article 60 of the Convention.²⁶⁰ The coastal State must give due regard to the rights and obligations of other States when it exercises its EEZ rights.²⁶¹

The status of the EEZ, and the sovereignty the coastal State possesses in it, has been a subject of discussion since the zone's inception.²⁶² The EEZ is, by its very nature, a discretionary zone that must be proclaimed to the world.²⁶³ The general consensus is that the EEZ is a *sui generis* area representing neither a part of the high seas nor part of the territorial sea.²⁶⁴ Defining the status of the zone naturally defines the classification of rights of coastal and flag States within it. Despite the continuing adjudication of rights and enumeration of powers to States in the EEZ, the Convention is clear on the jurisdictional rights of coastal States relating to artificial islands, installations, and structures in the EEZ.²⁶⁵

256. UNCLOS, *supra* note 3, art. 55.

257. *Id.* art. 56, para. 1, sec. a.

258. The extent of sovereignty afforded the coastal State in the EEZ has been a constant source of a debate. *See generally* Jonathon I. Carney, *The Exclusive Economic Zone and Public International Law*, in *LAW OF THE SEA* 159, 159-60 (Donald R. Rothwell ed. 2013).

259. UNCLOS, *supra* note 3, art. 57.

260. *Id.* art. 56, para. 1, sec. b(i). *See generally id.* art. 60.

261. UNCLOS, *supra* note 3, art. 56, para. 2. The origin of the zone may be linked to the practice of Latin American States after World War II, "when Chile, Peru, and Ecuador claimed . . . [200 nautical miles] for the exercise of full sovereignty." 2 UNCLOS COMMENTARY, *supra* note 99, at 585.

262. *See generally* GAVOUNELI, *supra* note 89, at 62-64.

263. *Id.* at 65.

264. *Id.* at 66.

265. *See* UNCLOS, *supra* note 3, art. 60.

c. Russia's Exclusive Criminal Enforcement Jurisdiction under UNCLOS Article 60

UNCLOS Article 60²⁶⁶ provides the coastal State, in this case Russia, the exclusive right to construct, authorize, and regulate the construction and operation of artificial islands, installations, and structures in the EEZ.²⁶⁷ The coastal State also possesses exclusive jurisdiction as it relates to these islands, installations, and structures in matters of customs, fiscal, health, safety, and immigration laws and regulations.²⁶⁸ “This exclusive jurisdiction also includes criminal jurisdiction with regard to offenses committed on or against such artificial islands, installations and structures.”²⁶⁹ Notice must be given in conjunction with construction under Article 60 as well as permanent means for warning of the presence of an object manufactured by the coastal State.²⁷⁰

266. Interestingly, the USSR submitted Draft Articles at the 1971 session of the Sea-Bed Committee, which addressed the construction of “stationary and mobile installations.” 2 UNCLOS COMMENTARY, *supra* note 99, at 574. The proposal “addressed the establishment of safety zones around such structures, to avoid interference with and ensure the safety of international navigation.” *Id.*

267. UNCLOS, *supra* note 3, art. 60, para. 1. “At UNCLOS I (1958), the issue of artificial islands, installations and structures was addressed in the context of the continental shelf.” 2 UNCLOS COMMENTARY, *supra* note 99, at 573.

268. UNCLOS, *supra* note 3, art. 60, para. 2; *see* 2 UNCLOS COMMENTARY, *supra* note 99, at 585 (UNCLOS Article 60(2) pertaining to customs, fiscal, health, safety, and immigration laws and regulations “follows [UNCLOS] [A]rticle 21, paragraph 2(h), which allows the coastal State to adopt laws and regulations in respect of such matters in the territorial sea, and article 33 regarding the contiguous zone.”).

269. 2 UNCLOS COMMENTARY, *supra* note 99, at 585; *see generally* Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *adopted* March 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668. The Convention was entered into force March 1, 1992. *Convention for the Suppression of Unlawful Acts Against Maritime Navigation*, IMO, <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx> (last visited Nov. 28, 2014) (addressing criminal enforcement jurisdiction in the EEZ).

270. UNCLOS, *supra* note 3, art. 60, para. 3; *see* George K. Walker & John E. Noyes, *Definitions for the 1982 Law of the Sea Convention-Part II*, 33 CAL. W. INT'L L.J. 191, 226 (2003) (“UNCLOS also provides for signals ‘warning’ of various dangers. Article 60(3) *inter alia* requires coastal states declaring an EEZ to give ‘[d]ue notice . . . of the construction of such artificial islands, installations or

Therefore, UNCLOS provides Russia the right to enforce its rights under international law through the enactment of domestic law. Consistent with this right, the Russian State Duma has extended the Criminal Code of the Russian Federation to the Russian EEZ.²⁷¹ Article 11(2) of the Criminal Code of the Russian Federation states that “[t]he validity of this Code shall also be extended to offences committed on the continental shelf and in the exclusive economic zone of the Russian Federation.”²⁷² Article 213 of the Criminal Code of the Russian Federation provides for “hooliganism,” the crime under which Russian investigators indicted the “Arctic 30.”²⁷³ “[H]ooliganism,” as defined in the Criminal Code of the Russian Federation, appears to be a logical charge as it involves “a gross violation of the public order which expresses patent contempt for society, attended by violence against private persons or by the threat of its use, and likewise by the destruction or damage of other people’s property.”²⁷⁴ Additionally, the State Duma has also codified the “Russian Federation Law on the Exclusive Economic Zone of the Russian Federation” in furthering its Article 60 rights.²⁷⁵

Installations and structures under UNCLOS Article 60 include human-made objects such as oil drilling rigs, navigational towers, and off-shore docking and oil pumping facilities.²⁷⁶ This brings the *Prirallomnaya* fixed oil platform, located wholly within Russia’s EEZ,²⁷⁷ squarely within the Article’s definitional scope.²⁷⁸ Although

structures, and permanent means for giving warning of their presence must be maintained.”).

271. UGOLOVNYI KODEKS ROSSIKOI FEDERATSII [UK RF] [Criminal Code] art. 11, para. 2 (Russ.).

272. *Id.*

273. *Id.* art. 213.

274. *Id.*

275. See RUSSIAN FEDERATION: LEGISLATION, *Federal Act on the exclusive economic zone of the Russian Federation*, 2 December 1998, available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf (discussing the implementation of internationally founded enforcement rights under domestic law and in accordance with the Russian Constitution).

276. 2 UNCLOS COMMENTARY, *supra* note 99, at 578.

277. See *supra* Part IV.A.2.

278. EXCESSIVE MARITIME CLAIMS, *supra* note 61, at 71 (“Artificial Islands, installations and structures . . . do not possess the status of islands, and may not be

installations and structures do not possess the status of islands,²⁷⁹ the coastal State may, as necessary, establish reasonable safety zones around these structures to ensure the safety both of navigation and of the structures.²⁸⁰ It is within the discretion of the coastal State to decide the breadth of the safety zones around structures in its EEZ, but such breadth “shall not exceed a distance of 500 met[ers] around them, measured from each point on their outer edge.”²⁸¹ The Convention mandates that all ships must²⁸² “respect these safety zones and shall comply with the generally accepted international standards regarding navigation in the vicinity of artificial islands.”²⁸³

It is uncontested that, consistent with its international treaty rights under UNCLOS, Russia had the exclusive right to enact and enforce Russian domestic criminal law with regard to the *Prirallomnaya* fixed oil platform. Consequently, Russian criminal law applied to all crewmembers of the *Arctic Sunrise* and, most undoubtedly, to those possessing Russian nationality. While the balance of rights in the EEZ will continue to be debated, the enforcement jurisdiction of a coastal State in situations relating to the interference of a structure or installation created in accordance with UNCLOS Article 60 is not a contested issue.²⁸⁴ ITLOS’ application

used to establish baselines, enclose internal waters, or establish or measure the breadth of the territorial sea, EEZ or continental shelf.”).

279. UNCLOS, *supra* note 3, art. 60, para. 8.

280. *Id.* art. 60, para. 4. See EXCESSIVE MARITIME CLAIMS, *supra* note 61, at 71 (noting that safety zones may be established not only for the safety of the structures but also for “the safety of navigation in their vicinity”).

281. UNCLOS, *supra* note 3, art. 60, para. 5.

282. At the second session of the Conference (1974), the United States of America proposed Articles on installations in the EEZ, “stat[ing] in imperative terms that ships ‘must’ respect established safety zones.” 2 UNCLOS COMMENTARY, *supra* note 99, at 577-78. That language was picked up in subsequent proposals. *Id.*

283. UNCLOS, *supra* note 3, art. 60, para. 6.

284. Tanaka submits that “it is clear that the coastal State has exclusive . . . enforcement jurisdiction, over installations and structures . . . under Article 60.” TANAKA, *supra* note 135, at 129. It is also seems clear that enforcement does not extend under Article 60, pertaining to artificial structures in the EEZ, for non-economic purposes. *Id.* The most favored view seems to be that a right not explicitly afforded the coastal State in UNCLOS, falls into the scope of Article 59. *Id.* UNCLOS Article 59 is a fallback provision for the resolution of conflicts between the coastal State and other States in the EEZ, where the Convention does not provide an exclusive right. See UNCLOS, *supra* note 3, art. 59.

of the ship-as-a-unit concept codified in Article 18 is incompatible with Russia's rights under Article 60 and is not a representation of customary international law. The Tribunal's order forces the ILC to crystallize the distinction between the customary norms it endorsed under Draft Article 18 and the unprecedented and unsubstantiated approach employed by the *Arctic Sunrise* court.

2. *The Conflict between the Arctic Sunrise Case and Nationality Jurisdiction*

As incompatible as ITLOS' application of Article 18 is with Russia's right to hold its nationals accountable under Article 60, the Tribunal's order is even more irreconcilable with the nationality principle. ITLOS' order meddles in Russia's application of its criminal code with regard to its nationals. It is undeniable that ITLOS lacks subject matter jurisdiction over a sovereign State's application of its criminal law when the offenders are nationals of the detaining State. ITLOS' conduct is inapposite to the bedrock principle of nationality jurisdiction and necessitates an affirmative exception to the application of Article 18 in the *Arctic Sunrise* context.

The nationality principle invokes personal jurisdiction based on the connection between the State and its nationals and represents one of "[t]he two undisputed bases on which State jurisdiction is founded."²⁸⁵ The concept of nationality is perhaps the oldest legal link recognized by international law.²⁸⁶ All States in one form or another apply nationality jurisdiction because it is a representation of sovereignty over nationals and the ability to retain sovereign order throughout the world.²⁸⁷ Criminal jurisdiction based on this principal, where the perpetrator is a national of the perpetrating State, is referred

285. Ahlström and others v. Commission (In re Wood Pulp Cartel), joint cases 89/85, 104/85, 114/85, 116-17/85 and 125-9/85, 96 I.L.R. 148 et seq. (1994); see MALCOLM N. SHAW, INTERNATIONAL LAW 653 (6th ed., Cambridge Univ. Press 2008) [hereinafter SHAW].

286. GAVOUNELI, *supra* note 89, at 13; see SHAW, *supra* note 285, at 659 ("Since every state possesses sovereignty and jurisdictional powers and since every state must consist of a collection of individual human beings, it is essential that a link between the two be legally established.").

287. Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 18 (2007) [hereinafter Blakesley & Stigall].

to as the active nationality principle.²⁸⁸ In the *Arctic Sunrise* context, the perpetrators are Russian nationals.

a. Establishing Nationality

Before a State can employ the active nationality principle it must establish that the offender holds the nationality of that State.²⁸⁹ But, the nationality of the Russian crewmembers was not at issue in the *Arctic Sunrise* case.²⁹⁰ The ICJ defined nationality in the *Nottebohm* case as “a legal bond having in its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”²⁹¹ Nationality jurisdiction is analogous to that of territorial sovereignty as it involves the assignment of persons to States.²⁹² Most importantly, it is generally accepted as a pillar of international law that States possess freedom of action in matters of nationality.²⁹³

“It is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.”²⁹⁴ Nationality has traditionally been conferred based on two principles: descent from a national, *ius sanguinis*; and

288. ANTONIO CASSESE, INTERNATIONAL LAW 451 (2d ed. 2005).

289. *See id.*

290. *See supra* Part IV.A.2.

291. *Nottebohm*, *supra* note 141, at 23.

292. BROWNLIE, *supra* note 38, at 510.

293. *Id.* at 509.

294. *Nottebohm*, *supra* note 141, at 4; *see also* Eur. Consult. Ass., *European Convention on Nationality*, art. 3, E.T.S. No. 166 (1997) (“Each State shall determine under its own law who are its nationals. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and principles of law generally recognised with regard to nationality.”); BROWNLIE, *supra* note 38, at 511. This notion, generally accepted by international law, is often disputed when the terms upon which nationality is granted conflicts with and affects another State. *See* Nationality Decrees Issued in Tunis and Morocco (Fr. v. Gr. Brit.), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7) (“[W]hether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question . . . depend[ing] upon the development of international relations . . . [I]n the present state of international law, questions of nationality are, in the opinion of this court, in principle within this reserved domain.”).

birth in a State territory, *ius soli*.²⁹⁵ Once a State bestows nationality upon a person, “the individual upon whom . . . [nationality] is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.”²⁹⁶

b. The Active Nationality Principle: Theory and Application

1. Theory

Both civil and common law countries employ the active nationality principle in attaching jurisdiction to a crime committed by a national abroad.²⁹⁷ The jurisdictional right of a State to prosecute its nationals solely on the basis of nationality is grounded in the allegiance owed to one’s nation under domestic law.²⁹⁸ Traditionally, States have invoked the active nationality principle to protect State interests abroad (treason is the most prevalent example).²⁹⁹ More recently, however, States have employed nationality jurisdiction in situations that do not directly endanger State interests.³⁰⁰

Civil law nations, such as the Russian Federation, apply the active nationality principle rather liberally,³⁰¹ where common law nations confine the application of the principle to serious offenses or when

295. BROWNIE, *supra* note 38, at 511. Interestingly, persons born on a vessel or aircraft are generally awarded citizenship of the State of registration. *Id.*

296. Nottebohm, *supra* note 141, at 4.

297. ILIAS BANTEKAS, SUSAN NASH & MARK MACKEREL, INTERNATIONAL CRIMINAL LAW 23 (Cavendish Publishing 2001) [hereinafter INTERNATIONAL CRIMINAL LAW].

298. *Id.*; see *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 435, 519 (Supp. July 1935); Blakesley & Stigall, *supra* note 287, at 19 (“[N]ationals have the benefit and protection of their state, owe allegiance for this protection, and thus should be answerable to national jurisdiction for any offense they commit.”).

299. INTERNATIONAL CRIMINAL LAW, *supra* note 297, at 23.

300. *Id.*

301. *Id.*; see *Public Prosecutor v. Antoni*, 32 I.L.R. 140 (1960), in 32 INTERNATIONAL LAW REPORTS 140-47 (E. Lauterpacht ed., 1966) (The Swedish Supreme Court found that Swedish nationals were bound by the Swedish traffic code while abroad.).

imposing a double criminality requirement.³⁰² The justification for expansive application may be found in civil law nations' general refusal to extradite their nationals.³⁰³ This is to say that civil law nations are forced to invoke the active nationality principle in prosecuting their nationals for crimes committed abroad because they will not allow extradition.³⁰⁴ Inversely, "the state does not need to extradite its citizens because it can prosecute them itself."³⁰⁵ There is also the general fear that if prosecution is not invoked through the nationality principle for an extraterritorial offense, the perpetrator may very well go unpunished.³⁰⁶

This theory of intrastate prosecution is a motivating factor in Russia's broad treatment of the active nationality principle as it disallows the extradition of its nationals under the Criminal Code of the Russian Federation³⁰⁷ as well as Chapter 2 of the Russian Constitution.³⁰⁸ Although extradition is part of Russia's theoretical

302. Zsuzsanna Deen-Racsomány, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. INT'L L. 606, 609 (2001) [hereinafter Deen-Racsomány]. On a more theoretical basis, Europeans assert that an offense committed abroad by a national actually harms the reputation and respect of the State globally and therefore warrants prosecution by the national's home state. Blakesley & Stigall, *supra* note 287, at 19. In general, even civil law nations consider nationality jurisdiction secondary to a State that claims jurisdiction based on the territoriality principle. *Id.*

303. INTERNATIONAL CRIMINAL LAW, *supra* note 297, at 23; see Deen-Racsomány, *supra* note 302, at 609 ("While the principle is most frequently justified on grounds of the allegiance owed by a person to his state of nationality and state sovereignty, a more pragmatic reason is that many countries—mainly those with a civil-law tradition—generally do not extradite their own nationals."). Civil law nations draw their heritage in disallowing the extradition of their own citizens from antiquity, namely the city-states of Greece and Rome. Blakesley & Stigall, *supra* note 287, at 19.

304. Michael Plachta, *(Non-)Extradition of Nationals: A Neverending Story?*, 13 EMORY INT'L L. REV. 77, 119 (1999) [hereinafter Plachta] (noting the correlative nature of non-extradition States and the active nationality principle).

305. *Id.*

306. Blakesley & Stigall, *supra* note 287, at 19.

307. UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] art. 13 (Russ.) ("Citizens of the Russian Federation who have committed crimes in foreign states shall not be subject to extradition to these states.").

308. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 61 (Russ.) ("A citizen of the Russian Federation may not be deported from Russia or extradited to another State.").

basis for invoking the active nationality principle, Russia is not precluded from applying its criminal code in non-extradition contexts such as the *Arctic Sunrise* case.

2. Application

Naturally, the award of a State's nationality to an individual confers both rights as well as obligations.³⁰⁹ Nationals are entitled to a number of rights, depending on the nation, such as the right to vote and a valid passport enabling the individual the ability to travel abroad.³¹⁰ Chapter 2 of the Russian Constitution provides for the "Rights and Freedoms of Man and Citizen" and confers several fundamental rights upon Russian nationals.³¹¹ Article 26(1) of this Chapter notes that "[e]veryone shall have the right to determine and indicate his nationality. No one may be forced to determine and indicate his or her nationality."³¹² Under Article 27(1), persons who "legally stay[] in the territory of the Russian Federation shall have the right to free travel, choice of place of stay or residence."³¹³ Additionally, a Russian national may legally hold dual nationality; however, "the possession of a foreign citizenship . . . shall not derogate his rights and freedoms and shall not free him from the obligations stipulated by . . . Russian citizenship."³¹⁴

Concomitantly, nationals of a State also avail themselves to the criminal jurisdiction of that State.³¹⁵ Many countries "claim jurisdiction over crimes committed by their nationals" regardless of whether the offense was committed extraterritorially.³¹⁶ Russia

309. GAVOUNELI, *supra* note 89, at 14. In *Nottebohm*, the ICJ crystallized this concept, noting that "[n]ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants or imposes on its nationals." *Nottebohm*, *supra* note 141, at 4.

310. SHAW, *supra* note 285, at 659.

311. See KONSTITUTSIIA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] arts. 17-64 (Russ.).

312. *Id.* art. 26, para. 1.

313. *Id.* art. 27, para. 1.

314. *Id.* art. 62, para. 1.

315. See SHAW, *supra* note 285, at 663.

316. *Id.*

subscribes to this application of the active nationality principle—the principle is codified in the Criminal Code of the Russian Federation under Articles 11 and 12.³¹⁷ Article 11(2) states “[t]he validity of this [Criminal] Code shall . . . be extended to offences committed on the continental shelf and in the exclusive economic zone of the Russian Federation.”³¹⁸ Article 12 broadly extends the applicability of Russian criminal law to its nationals, stating “[c]itizens of the Russian Federation . . . who have committed crimes outside the boundaries of the Russian Federation shall be brought to criminal responsibility under this Code.”³¹⁹

ITLOS’ order for Russia to release its nationals breaches Russia’s conclusive right to invoke the active nationality principle and demands the ILC except the Tribunal’s application of Article 18 from the customary norms it affirmatively endorsed in the Draft Articles. Russia’s right to nationality jurisdiction is unaffected by ITLOS, as Russia has extended its Criminal Code to the EEZ and competently charged its nationals with hooliganism, a crime provided in that Code. ITLOS possesses no jurisdiction under UNCLOS to evaluate the propriety of a sovereign nation, like Russia, indicting its own citizens under Russian criminal law.

V. RUSSIA’S OBLIGATIONS TO ITS NATIONALS UNDER INTERNATIONAL LAW

Despite the overwhelming reasons grounded in well-established international law and public policy for disallowing the extension of the ship-as-a-unit concept to nationals detained by their State of nationality, two unlikely but hypothetically plausible scenarios exist in which an international tribunal could compel release. These scenarios include: (1) if the State, in detaining its nationals, is violating a *jus cogens* norm; or (2) if the detaining State is a member of the European Convention on Human Rights and is violating an enumerated right under the Convention, for which release would be appropriate. The two scenarios are inapplicable in the *Arctic Sunrise* context and

317. UGOLOVNIY KODEKS ROSSIYSKOI FEDERATSII [UK RF] [Criminal Code] arts. 11-12 (Russ.).

318. *Id.* art. 11, para. 2.

319. *Id.* art. 12.

ITLOS would not be competent to adjudicate the claims given its jurisdictional limitations.

A. *Jus Cogens Norms*

One conceivable and unlikely instance in which an international tribunal could compel a sovereign State to release its own citizens who are charged and detained under national law would be if, in doing so, the State's actions or its national law³²⁰ violated a *jus cogens* norm. As noted by one scholar, "[a] *jus cogens* norm is a peremptory rule of international law that prevails over any conflicting rule or agreement."³²¹ As such, all States are obligated *erga omnes* to abstain from the commission of a *jus cogens* norm "towards the international community as a whole"³²² including all States as well as to its own nationals.³²³ Article 53 of the Vienna Convention on the Law of

320. In addition to the requirement that a national law may not conflict with a peremptory norm as discussed *supra*, a State's internal law may not negate its treaty obligations. See Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331, 339 [hereinafter VCLT] ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

321. Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement*, 22 WIS. INT'L L.J. 245, 245 (2004); VCLT, *supra* note 320, art. 53.

322. *Barcelona Traction, Light and Power Co. (Second Phase) (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) [hereinafter *Barcelona Traction*].

323. See *State Responsibility*, *supra* note 116, art. 48. Under this article:

1. Any State other than an injured State is entitled to invoke the responsibility of another State . . . 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. 2. Any State entitled to invoke responsibility . . . may claim the responsible State: (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition . . . ; and (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or the beneficiaries of the obligation breached.

Id. Similarly, as noted in the *Barcelona Traction* case:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn

Treaties addresses the impact of *jus cogens* norms on treaty applicability:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law . . . a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which derogation is not permitted and which can be modified only by a subsequent norm of general international law having the same character.³²⁴

According to the ILC, the most notable examples of *jus cogens* norms include “the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid, and torture.”³²⁵ “[B]asic rules of international humanitarian law applicable in armed conflict and, right to self-determination” are also considered norms of a *jus cogens* nature.³²⁶ The ICJ noted in the *Barcelona Traction* case that such acts include “acts of aggression . . . genocide [and] the basic rights of the human person, including protection from slavery and racial discrimination.”³²⁷

Although the international community has had difficulty defining with great specificity those offenses that garner *jus cogens* status, it is abundantly clear that the detention of Russian nationals in a Russian prison for interfering with drilling operations in the Russian EEZ is not tantamount to the violation of a *jus cogens* norm. Insinuating the subject matter of the *Arctic Sunrise* case triggers a *jus cogens* analysis,

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*.

Barcelona Traction, *supra* note 322, at 33.

324. VCLT, *supra* note 320, art. 53.

325. Rep. of the Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, sec. 33, July 18, U.N. Doc A/CN.4/L.702 (2006); *see also* BROWNIE, *supra* note 38, at 596.

326. Rep. of the Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, sec. 33, July 18, U.N. Doc A/CN.4/L.702 (2006).

327. *Barcelona Traction*, *supra* note 322, at 32.

reserved for crimes such as genocide, would be both ridiculous and irresponsible. Neither ITLOS, nor any other international tribunal, could order the release of Russia's nationals under the theory Russia had violated its obligations to its citizens, *erga omnes*.

Even if Russia's actions or the application of its national law implicated a *jus cogens* norm, the jurisdiction of ITLOS over the parties is still in question.³²⁸ The ICJ has been clear, however, that regardless of a State's culpability in violating a *jus cogens* norm, jurisdictional requirements must still be met.³²⁹ This is to say that an international tribunal may not ignore the jurisdictional requirements needed over the parties solely because the subject matter of the case involves the alleged violation of a *jus cogens* norm.

B. *The European Convention on Human Rights*

Another conceivable scenario where an international tribunal could compel the release of Russian detainees is if the European Court of Human Rights ("the Court") conclusively found Russia violated its obligations under the European Convention on Human Rights ("ECHR"). On March 17, 2014, the "Arctic 30" (which included the three Russian nationals) "applied to the European Court of Human Rights requesting damages from the Russian Federation, as well as a declaration that their apprehension and detention was unlawful."³³⁰ The complaint alleged Russia violated its obligations under Articles 5 and 10 of the ECHR concerning the improper deprivation of liberty and freedom of expression, respectively.³³¹

For purposes of the relevant discussion regarding diplomatic protection, the ECHR claims will be addressed as if they had been alleged during the Russian nationals' two-month detention. Assuming

328. Russia did not voluntarily consent to the jurisdiction of the Tribunal, and it contested ITLOS' compulsory jurisdiction over the case under UNCLOS Article 290. Arctic Sunrise, *supra* note 24, para. 9.

329. BROWNLIE, *supra* note 38, at 596-97.

330. 'Arctic 30' Jailed in Russia to Take Case to European Court, GREENPEACE.COM (Mar. 17, 2014) <http://www.greenpeace.org/international/en/press/releases/Arctic-30-jailed-in-Russia-to-take-case-to-European-Court-of-Human-Rights/>.

331. *Id.*

also that Russia did violate the ECHR³³² with respect to its nationals, the Dutch invocation of diplomatic protection on their behalf was still inappropriate.

The atrocities committed in World War II provided the requisite impetus for the fifteen member states of the Council of Europe to draft the ECHR.³³³ The original parties signed the document in Rome on November 4, 1950.³³⁴ Netherlands ratified the ECHR in 1954³³⁵ and Russia became a member in 1998 following the conclusion of the Cold War and the Soviet era marking the beginning of a new Russia.³³⁶ The ECHR is based loosely on the rights acknowledged in the Universal Declaration of Human Rights³³⁷ and is bifurcated into two interrelated sections: (1) the substantive human rights recognized by contracting parties, and (2) the creation of “a procedural apparatus of the Commission and the Court for ensuring that those rights are respected in the member states.”³³⁸

Irrespective of the substantive merits of the Russian nationals’ claims under Articles 5³³⁹ and 10³⁴⁰ of the ECHR, the enumerated

332. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Eur. TS No. 5, 213 UNTS 221 [hereinafter ECHR].

333. Scheib, *supra* note 202, at 103.

334. *Id.*

335. *The Netherlands*, ECHR.COE, http://www.echr.coe.int/Documents/CP_Netherlands_ENG.pdf (last visited Apr. 2, 2014).

336. *The Russian Federation*, ECHR.COE.INT, http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf (last visited Apr. 2, 2014).

337. Scheib, *supra* note 202, at 104.

338. *Id.*

339. ECHR, *supra* note 332, art. 5. Article 5, titled “Right to liberty and security,” states:

1. 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: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational

procedures defined in the ECHR for bringing a claim before the Court make a flag State's espousal of claims not only premature, but completely preempted. Under Article 32 of the ECHR, the jurisdiction of the Court is naturally limited to "matters concerning the interpretation and application of the Convention and the Protocols."³⁴¹

If the Netherlands had sought to espouse a claim on behalf of the Russian nationals during their ongoing detention under the ECHR, it would have been completely preempted by Article 35. Article 35 involves "[a]dmissibility criteria," the first provision of which mandates the exhaustion of all local remedies:³⁴² "[t]he Court may deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and

supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Id.

340. ECHR, *supra* note 332, art. 10. Article 10, regarding the right to the "Freedom of Expression," states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.

341. *Id.* art. 32.

342. See *infra* Part II.B.2., for discussion of diplomatic protection theory and exhaustion of local remedies. The theory underlying the exhaustion of local remedies prior to seeking redress at the international level is the same with regard to diplomatic protection; States should be given an opportunity to redress a wrong in their domestic courts before a case is allowed to be brought in an international forum, either by the individual themselves, or by a State on the individual's behalf.

within a period of six months from the date on which the final decision was taken.”³⁴³ If the claim had been brought any time before December 29, 2013, the date amnesty was granted,³⁴⁴ the Court would have been forced to deny an application based on Article 35, for domestic remedies were still available at that time and were ultimately granted. Therefore, the Court would not have had jurisdiction over the matter³⁴⁵ and ITLOS was not competent to adjudicate a third party claim under the ECHR, as the Tribunal’s jurisdiction pertains only to the interpretation of UNCLOS.³⁴⁶

Furthermore, it also would have been appropriate for the Court to deny the espousal of a claim based on Article 34, regarding individual applications: “The Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties . . . The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”³⁴⁷ Under traditional diplomatic protection theory, as well as the ship-as-a-unit concept embodied in Article 18, a State (like the Netherlands) is permitted to espouse claims on behalf of a national—or a non-national under Article 18—in part because most international forums limit standing to States.³⁴⁸ Where traditional diplomatic protection is grounded in the legal fiction that the State itself is harmed through its nationals’ injuries, a flag State under Article 18 is not harmed by the injury of a non-national crewmember.³⁴⁹ Consequently, because the flag State is not fictionally harmed, and because Article 34 permits an individual to

343. ECHR, *supra* note 332, art. 35.

344. *See supra* note 215.

345. Clearly the “Arctic 30” are complying with the jurisdictional requirements in applying to the Court following the exhaustion of local remedies and “within a period of six months from the date on which the final decision was taken.” ECHR, *supra* note 332, art. 35. The hypothetical presented is merely to show that the invocation of Article 18 would have been unsuccessful even if the Netherlands had espoused claims on behalf of the Russian Nationals before the European Court of Human Rights.

346. *See infra* Part II.A.1. (discussing ITLOS jurisdiction).

347. ECHR, *supra* note 332, art. 34.

348. *See e.g.*, Whitman, *supra* note 52, at 97-98 (discussing the requirement of Statehood to litigate before the ICJ).

349. *See supra* Part II.B. (discussing the preliminary diplomatic protection criteria).

bring a claim on his or her own behalf, the Court should not entertain a claim diplomatically espoused on the individual's behalf before the individual attempts to do so.³⁵⁰

VI. CONCLUSION

"Deserve's got nothin' to do with it."³⁵¹ Will Munny's timeless words resonate when considering Russian nationals' claims to Dutch diplomatic protection in the *Arctic Sunrise* case. The ship-as-a-unit concept as applied in the diplomatic protection context allows flag States to espouse claims on behalf of the crewmembers of a vessel flying its flag, regardless of their nationality. It is a strained fiction yet customarily accepted function of international law embodied in Article 18 of the ILC's Draft Article's on Diplomatic Protection. Why should it be extended further especially in a context that violates the rights of a sovereign nation?

350. If the State allegedly committing the wrong denied the detained individual the ability to bring a claim under Article 34, then another contracting State would be permitted to espouse a claim on the individual's behalf under Article 33 ("[i]nterstate cases"). ECHR, *supra* note 332, art. 34. This is because the detaining State would have violated its obligation under Article 34 to not "hinder in any way the effective exercise of th[e] right" of an individual to bring a claim on his or her own behalf. *Id.* Article 33 states: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." *Id.* art. 33. If, following this unlikely scenario, a favorable judgment were rendered on behalf of the detained nationals, Russia could respond in one of four ways:

First, a state may take substantive action to comply with the language and spirit of the Convention and the judgment . . . Second, it may take action to comply with the language of the Convention only . . . Third, the state may simply ignore the judgment or award of just satisfaction and take no action to comply with the Court's decision . . . Finally, a state may act drastically by withdrawing from the optional provisions of the Convention, the entire Convention or the Council.

Scheib, *supra* note 202, at 108-09.

351. UNFORGIVEN (Warner Bros. 1992). In *Unforgiven* Clint Eastwood plays the character of Will "Bill" Munny, an ex-outlaw who agrees to come out of retirement for one last assassin job. *See id.* Munny uttered the iconic quote, "Deserve's got nothin' to do with it" prior to shooting the crooked local sheriff, Little Bill, played by Gene Hackman. *See id.* Munny embodies a character who struggles with his own humanity, to the extent that he ultimately dismisses morality all together, and sees little difference between life and death. *See id.*

On November 22, 2013, ITLOS prescribed provisional measures in the *Arctic Sunrise* case when it recognized claims espoused by the Netherlands on behalf of three Russian nationals. The order, which Russia refused to recognize, commanded the Russian Federation to release the detained Russians, despite their status as Russian nationals who were detained in a Russian Prison and charged under Russian national law. The order upsets some of the most foundational components of international law, namely, a sovereign State's right to hold its citizens accountable for crimes committed extraterritorially. The Tribunal's order violates Russia's jurisdictional rights under international law in two regards: (1) As a States Party to UNCLOS, Russia possesses exclusive criminal enforcement jurisdiction for crimes committed on installations or structures in its EEZ, and (2) the active nationality principle entitles Russia to prosecute its nationals under national law, regardless of where the crime was committed.

Furthermore, as discussed, the two conceivable scenarios where the Netherlands may have competently espoused claims on behalf of the Russian nationals are ultimately inapplicable. First, the detention carried out by the Russian Federation can in no way be likened with the traditional understanding of *jus cogens* norms owed *erga omnes*. Second, the Netherlands could not rightfully advocate on behalf of the Russian nationals before the ECHR. Jurisdiction in that context would be preempted by the Russian nationals' failure to exhaust local remedies under Article 35 of the Convention and subsequent ability to bring claims as individuals under Article 34. Furthermore, ITLOS lacks the jurisdictional competency to adjudicate such claims given its exclusive mandate to interpret UNCLOS.

ITLOS' directive creates a rift in the customary understanding of the ship-as-a-unit concept as applied in diplomatic protection scenarios: no international tribunal has ever permitted a flag State to espouse a claim on behalf of a non-national crewmember when that non-national is detained by his or her State of nationality. If the Draft Articles on Diplomatic Protection are intended to be the blueprint for an internationally accepted convention, the ILC must crystallize the correct application of Article 18 by creating an exception for cases analogous to the *Arctic Sunrise*.

