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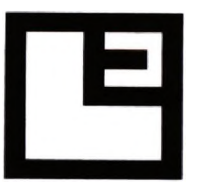

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Arctic Sunrise: Coastal State´s Jurisdiction V. Hot Pursuit Practicalities

Paula de Castro Silveira

"If the end does not justify the means – What can?"

Edward Paul Abbey

Resumo: Os protestos contra instalações petrolíferas localizadas na Zona Económica Exclusiva (doravante ZEE) e na plataforma continental dos Estados têm-se multiplicado nos últimos anos, como forma de chamar a atenção para os potenciais danos que podem resultar para o ambiente natural na sequência dessas actividades. A Greenpeace levou a cabo um dos mais divulgados nos últimos tempos, a 18 de Setembro de 2013, contra a instalação petrolífera da Gazprom, localizada na ZEE da Rússia. Aqui, vamos analisar o problema unicamente do ponto de vista do direito internacional, a fim de compreender como o Estado Costeiro deve agir face a uma ameaça deste tipo à instalação petrolífera e à zona de segurança estabelecida ao seu redor.

Palavras-chave: Direito de Perseguição; Arctic Sunrise; ZEE, Jurisdição; Instalações Petrolíferas

Abstract: Protests against oil installations located in the Exclusive Economic Zone (hereinafter EEZ) and Continental Shelf of States have been multiplied in the recent years, as a way to draw attention to the potential damage that they can cause to the natural environment. Greenpeace, carried one of the most publicized in recent times, on 18 September 2013, against the oil installation of Gazprom, located in Russia´s EEZ. Here, we will analyze the problem only from the point of view of the international law, in order to understand how coastal State´s should act against a possible threat of this kind to an oil installation and the established safety zone thereof.

Keywords: Hot Pursuit; Arctic Sunrise; EEZ; Jurisdiction; Offshore Oil Installations

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1. INTRODUCTION[1]

"Save the Arctic" is the slogan of the campaign that Greenpeace International (hereinafter Greenpeace) and national/regional Greenpeace Organizations have been engaged in since 2010.[2] In the course of this campaign, on 18 September 2013, on board the ship *"The Arctic Sunrise"*, Greenpeace activists engaged a protest against the Russian oil installation, Prirazlomnaya, located on Russia's continental shelf in the Pechora Sea, within the EEZ, in order to draw attention to the potential environmental damage resulting from the exploration and exploitation of the Arctic.[3]

The following day the Russian authorities boarded the intruder's ship, arrested the crew and detained the ship, alleging that those actions *"exposed the Arctic region to the threat of an ecological disaster with unimaginable consequences".*[4]

This detention prompted the immediate reaction of its flag state, the Netherlands. According to them, the vessel when boarded was exercising the freedom of navigation guaranteed by the UNCLOS[5], to which both states are parties.[6] This problem is, in fact, the main issue of the case.

Therefore, having in consideration that the coastal State's perspective received a rather limited focus until now, the present article examines the jurisdictional aspects of the case.[7] In particular, the purpose will be to understand and clarify,

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1 - This paper is a short version of the dissertation submitted as a partial fulfillment of the requirements for the award of the Degree of Master of Laws (L.L.M) in International Maritime Law at IMO International Maritime Law Institute supported by a scholarship from the Lloyd's Register Foundation.

2 - The "Arctic Sunrise" Case (Kingdom of Netherlands v. Russian Federation), Case No. 22, Request for prescription of provisional measures under Article 290, paragraph 5, of UNCLOS, of 21 October 2013 (hereinafter REQUEST), ITLOS, last viewed April 7, 2014, available at The "Arctic Sunrise" Case (Kingdom of Netherlands v. Russian Federation), Case No. 22, ORDER of 22 November 2013, ITLOS, last viewed April 7, 2014, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/, Annex 2, para. 5.

3 - About ZEE see J. M. de Souza, Mar Territorial, Zona Econômica Exclusiva ou Plataforma Continental, in *Revista Brasileira de Geofisiva,* Vol. 17, n.° 1, São Paulo Mar, 1999, available in http://dx.doi.org/10.1590/S0102-261X1999000100007, last viewed 26 January, 2015.

4 - REQUEST, p. 3 of Annex 2 of Annex 1.

5 - United Nations Convention on the Law of The Sea of 10 December 1982.

6 - ASSAF HAREL, Preventing Terrorist Attacks on Offshore Installations: Do States Have Sufficient Legal Tools?, *Harvard National Security Journal*, Vol. 4, 2012, pp. 131-184, p.135, available in http://harvardnsj.org/wp-content/uploads/2013/01/Vol.4-Harel-FINAL.pdf, last viewed May 5, 2014.

7 - ANNA DOLIDZE, The Arctic Sunrise and NGOs, in International Judicial Proceedings, *Insights*,

according to international law, the limits of the coastal State's Jurisdiction on board the oil installation in the EEZ and inside the safety zones thereof.
For that, it will be first provided an overview of the events leading up to the arrest of the Arctic Sunrise, followed by a brief description of the ITLOS decision. After that, the discussion will start with the analysis of the safety zone concept and jurisdictional issues related, with special emphasis to the 3 nautical mile safety zone imposed by Russia. Follow the understanding of the rationale for the protection of the offshore oil installation, and its safety zone, under two different perspectives: UNCLOS and SUA Protocol. Finally, to complete the article it will be analyzed the most important tool for Coastal State's reaction facing an attack to an offshore installation - the right of hot pursuit – and its application to the present case.

2. THE ARCTIC SUNRISE CASE: BRIEF OUTLINE OF THE CIRCUMSTANCES

On 18 September 2013, during a protest, Greenpeace activists tried to access the Russian offshore oil installation Prirazlomnaya. According to the information, five rigid inflatable boats (RIBs) from the Arctic Sunrise (Greenpeace mothership) approached the oil installation, while the Arctic Sunrise remained in a three-mile distance from the installation and briefly came within 3 nautical miles of it. The RIBs transported activists to the installation, who proceeded to climb the side wall of the installation as a form of protest with a safety pod that would allow climbers to hide and protect themselves.[8]
The Russian coast guard vessel Ladoga responded by taking measures to prevent the occupation of the installation, including firing warning shots from firearms. *Two of the speedboats occupants (a Swiss national and a Finnish national) were removed from the installation and taken aboard the coastguard vessel".*[9] The

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Vol. 18, Issue: 1, January 3, 2014, available in http://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings, last viewed April 1.

8 - The "Arctic Sunrise" Case (Kingdom of Netherlands v. Russian Federation), Case No. 22, Request for prescription of provisional measures under Article 290, paragraph 5, of UNCLOS, of 21 October 2013 (hereinafter REQUEST), ITLOS, last viewed April 7, 2014, available at The "Arctic Sunrise" Case (Kingdom of Netherlands v. Russian Federation), Case No. 22, ORDER of 22 November 2013, ITLOS, last viewed April 7, 2014, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/

9 - REQUEST, p. 2 of Annex 2 of Annex 1.

remaining activists and RIBs returned to the Arctic Sunrise.[10]

Following this incident, in a *note verbale*, dated 18 September 2013, the Russian Federation informed the Netherlands that it had decided "*to seize The Arctic Sunrise*".[11] "*The captain did not respond to the order to bring the ship to a halt. As a consequence, at 07:15 (Moscow time) warning shots were fired from the coast guard vessel's artillery. The ship did not respond to the warning shots, however, and proceed to leave the security zone, after which it remained in the area that bordered on the security zone*".[12]

On 19 September, "*after having spent a day and a half on board the Coast Guard vessel, activists Sini Saarela and Marco Weber* [the Swiss national and the Finnish national] *are returned to the MYAS* [The Arctic Sunrise]".[13] Subsequently, after boarding the Arctic Sunrise, the authorities of the Russian Federation took over control and took it to Murmansk Oblast.

In this regard, the Netherlands argued that the Russian Federation's actions "*breached its obligations owed to the Kingdom of the Netherlands in regard to the freedom of navigation and its right to exercise jurisdiction over the Arctic Sunrise*".[14] After the failure of diplomatic contacts between Russia and the Netherlands, on 4 October 2013, the Netherlands commenced an arbitration procedure against Russia under the provisions of UNCLOS. The Netherlands requested a determination that the arrest and detention of the Arctic Sunrise without prior consent were illegal under international law. In reply, Russia informed that it did not accept the arbitration procedure, invoking a declaration, it had made in becoming a party to the UNCLOS.[15] Subsequently, on 21 October 2013 the Netherlands submitted a request for provisional measures to ITLOS.[16]

On 22 November 2013, ITLOS announced its ruling in the Arctic Sunrise Case (Kingdom of the Netherlands v. Russia Federation) ordering the release of the crew and the ship upon the posting of a bond by the Netherlands.[17] Concomitantly,

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10 - REQUEST, p. 6 of Annex 2.

11 - REQUEST, p. 3 of Annex 2 of Annex 1.

12 - REQUEST, p. 2 of Annex 2.

13 - REQUEST, p. 8 of Annex 2.

14 - REQUEST, p. 4.

15 - ALEX G. OUDE ELFERINK, The Arctic Sunrise Incident: A Multi-faceted Law of the Sea Case with a Human Rights Dimension, in The International Journal of Marine and Coastal Law, Vol. 29, No. 2, June 2014, pp. 244-289, p. 246.

16 - REQUEST, p. 4.

17 - The "Arctic Sunrise" Case (Kingdom of Netherlands v. Russian Federation), Case No. 22,

the Russian Parliament granted amnesty from criminal charges to all persons on board the ship and the crew, following which the ship was released. However, this decision did not solve all the problems of the case, because the ITLOS abstained from considering the implications of Article 111 of UNCLOS in its Order.
Moreover, the Netherlands in its oral pleadings had put this matter before the Tribunal, as it had raised the question whether Russia could successfully rely on Article 111 of UNCLOS in an arbitration. Therefore, by not ruling on this critical issue in determining the existence of *prima facie* jurisdiction, the ITLOS opened the door for the criticism that its Order was not well founded in the facts and the law.[18]

3. THE SAFETY ZONE

The notion of safety zones around offshore installations was born in the ILC´s deliberations on the legal regime pertaining to the Continental Shelf in the early 1950s. In its report to the UN General Assembly in 1956, the ILC recommended that coastal States be allowed to construct and maintain installations on their continental shelf and to establish safety zones at a *"reasonable distance"* around these installations. In the ILC´s view, the establishment of safety zones were necessary due to the *"extreme vulnerability"* of these installations and the need to protect them from shipping.[19]
Consequently, the Continental Shelf Convention codifies, for the first time, the right to establish safety zones around those installations. However, the 500-meter limit on the breadth of the safety zones, which is included in that Convention, had been based on analogous regulations concerning the protection of oil production facilities on land from the danger of fire. Apparently, the distinct attributes of the offshore oil and gas industry were not taken into account when this limit was adopted.[20] Therefore, whether, or not, the breadth of the safety zone is sufficient for the security of oil installations against the threat of destruction remains questionable.
As offshore exploration and exploitation increased exponentially in the 1960s and 1970s, several "*concerned states*" attempted to extend the breadth of the safety

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ORDER of 22 November 2013, ITLOS, last viewed April 7, 2014, available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/

18 - ALEX G. OUDE ELFERINK, *op. cit.* p. 284.

19 - ASSAF HAREL, *op. cit.*, p.144.

20 - Ibid. at 145.

zone to 2,000 or even 4,000 meters. Nevertheless, States, fearing that giving coastal States discretion in determining the breadth of safety zones would lead to excessive limitations on navigation and disturb the "*delicate balance*" between exploitation of natural resources and the freedom of navigation, resisted that position.[21]

Under UNCLOS, Coastal States are entitled to declare safety zones around artificial islands and installations in the 200 nautical mile EEZ and on the Continental Shelf. [22] Article 60 (4) of UNCLOS provides authority for coastal States to "*establish reasonable safety zones around such artificial islands, installations and structures*". In addition, this article establishes the 500 meters as the normal breadth of the safety zones. However, the Article also states that this breadth can be wider when *"authorized by generally accepted international standards or as recommended by the competent international organizational standards or as recommended by the competent international organization"*.[23]

Recognized as "*the competent international organization*", the International Maritime Organization (IMO)Assembly has made a number of resolutions pertaining to the safety of installations in order to take into account the climatic conditions of polar waters and to meet appropriate standards of maritime safety and pollution prevention. These have covered issues such as guidelines for safety zones and safety of navigation around offshore installations and guidelines for ships operating in polar waters.[24] In this regard, the limits of the protection of the safety zones have raised some issues.[25]

In 2007, Brazil[26] presented a proposal to IMO asking for the approval for an expansion of the maximum size of permissible safety zones around offshore energy installations.[27] A number of delegates expressed concern that there were no established IMO procedures or guidelines in place to determine the granting of

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21 - D.O. O'CONNELL, *The International Law of The Sea*, Volume I, Claredon Press, Oxford, 1989, p.503.

22 - JAMES KRASKA and RAUL PEDROZO, *International Maritime Security Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2013, p. 76.

23 - Article 60 (5) of UNCLOS.

24 - IMO Resolution A.1024 (26), Dec. 2, 2009, available in http://www.imo.org/blast/blastDataHelper.asp?data_id=29985&filename=A1024(26).pdf, last viewed 26 January, 2015.

25 - STUART KAYE, *op. cit.*, p. 395.

26 - JAMES KRASKA and RAUL PEDROZO, *op. cit.*, p. 78.

27 - IMO Doc. NAV 53/3, Feb. 26, 2007, available in http://www.sjofartsverket.se/pages/10882/53-3.pdf, last viewed 26 January, 2015.

such approval with regard to safety zones in excess of 500 meters.[28]

To support this view, the U.S. delegation stated that: "...*the* [Navigation] *Sub-Committee should develop uniform procedures, and guidelines by which safety zone proposals should be considered. Otherwise, the Sub-Committee would be considering proposals for the safety zones greater than 500 meters on an ad hoc basis without guidelines, standards or objective measures by which to make a judgment. The development of uniform procedures would...ensure that safety of navigation was taken consistently into account".*[29]

Ultimately, the Sub-Committee supported the draft SN circular titled *Guidelines for Safety Zones and Safety of Navigation Around Offshore Installations and Structures.*[30] The Sub-Committee also agreed with the U.S. position *"that there was no demonstrated need, at present, to establish safety zones more than 500 meters around artificial* [...] *installations and structures in the exclusive economic zone or to develop guidelines to do so, and that the continuation of the work beyond 2010 for a Correspondence Group on Safety Zones was, at present, no longer necessary".*[31]

On December 2010, at the 88th session of the Maritime Safety Committee, the member States approved *Guidelines for Safety Zones and Safety of Navigation Around Offshore Installations and Structures.*[32]

Although IMO can legally authorize the establishment of safety zones wider than 500 meters, this authority remains unused despite requests for the IMO to authorize such wider safety zones. However, while IMO struggles to maintain the size of safety zones established in UNCLOS, State practice has been challenging the law with the adoption of a precautionary approach around offshore structures with a limitation zone wider than those stipulated in international law.[33]

In the present case, while article 16 (6) of the Federal Law on the Continental Shelf of the Russian Federation, adopted by the State Duma on 25 October 1995 states

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28 - IMO Doc. NAV 53/22, Aug. 14, 2007, para. 3.14, available in http://www.uscg.mil/imo/nav/docs/nav53-report.pdf, last viewed 26 January, 2015.

29 - IMO Doc. NAV 53/22, Aug. 14, 2007, para. 3.16, available in http://www.uscg.mil/imo/nav/docs/nav53-report.pdf, last viewed 26 January, 2015.

30 - IMO Doc. NAV 56/20, Aug. 31, 2010, para. 4.13, available in http://www.uscg.mil/imo/nav/docs/nav56-report.pdf, last viewed 26 January, 2015.

31 - IMO Doc. NAV 56/20, Aug. 31, 2010, para. 4.15, available in http://www.uscg.mil/imo/nav/docs/nav56-report.pdf, last viewed 26 January, 2015.

32 - IMO Doc. MSC 88/26, Dec. 15, 2010, para. 11.8, available in http://www.krs.co.kr/eng/dn/inf/Final%20report_MSC%2088.pdf and SN.1/CIRC.295, Dec. 7, 2010, available in http://www.imo.org/blast/blastDataHelper.asp?data_id=30258&filename=295.pdf, last viewed 26 January, 2015.

33 - JAMES KRASKA and RAUL PEDROZO, *op. cit.*, p. 82.

that *"safety zones extending for not more than 500 meters from each point on the outer edge of artificial islands, installations and structures shall be established around such islands, installations and structures"*, in practice, the situation assumes a different proportion. In reality, "[t]*he Russian authorities declared a safety zone with a radius of 3 nautical miles around the Prirazlomnaya* by *Notice to Mariners No. 51 of 2011, which states that* "[v]*essels should not enter the safety zone of the marine ice-stable installation without permission of the operator of the installation"*.[34] This brings into discussion its legality under international law. As demonstrated by Kaye, *"a vessel approaching an installation, at a speed of 25 knots, would pass from the outer edge of the safety zone to the installation in just under 39 seconds"*.[35] With this in mind, the 500-meter safety zone may not be sufficient to protect high-value offshore installations and structures from attacks, and, more importantly, to protect the marine ecosystem from the consequences of an attack in a hazardous and sensitive area.[36]

Considering the special circumstances of ice-covered areas, as is the case of the Arctic, further strengthens the need to increase protection from shipping activities due to increased hazards to navigation that prevail in such areas and the particular vulnerability of the marine environment that is inherent in the delicate ecological balance of such areas.[37] Therefore, as stated in Article 234 of UNCLOS, some special measures are necessary where *"particularly severe climate conditions and the presence of ice covering such areas for most of the year*
create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to irreversible disturbance of the ecological balance".[38]

In view of the above, the 500-meter safety zone might be insufficient to protect the installations and the environment, in particular, in the fragile ice-covered waters. If widening the breadth of the safety zone established at UNCLOS is difficult, then a protective area[39] in ice-covered waters additional to the safety

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34 - REQUEST, p. 2 of Annex 2.

35 - STUART KAYE, *op. cit.*, p. 405.

36 - Ibid.

37 - THOMAS DUX, *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ): The Regime for the Protection of Specific Areas of the EEZ for Environmental Law*, Lot Verlag, The Netherlands, 2011, p. 213.

38 - See Maritime Affairs, Legal aspects of Arctic shipping, Summary Report, Publications Office of the European Union, European Union, 2010.

39 - MARKUS J. KACHEL, *Particularly Sensitive Areas, The IMO's Role in Protecting Vulnerable Marine Areas*, Hamburg Studies on Maritime Affairs 13, Springer, Berlim, 2008, pp. 37 ss.

zone should be considered. In such areas, ships without sovereign immunity could be advised to avoid such zones, upon entry, render themselves obliged to report detailed information concerning their intentions, cargo, and the destination, failing which would subject them to be boarded.[40] This suggested solution produces a more acceptable balance of interests and responds to the special circumstances criteria in order to take into account the climatic conditions of polar waters while enhancing maritime safety and pollution prevention around installations.[41]
However, although the Russia imposition can raise some important legal discussion under international law, for the present situation, we will have the opportunity to realize that the breadth of the safety zone did not affect, in any way, the result of the case. After all, although do not exist evidences of the Arctic Sunrise itself at any time entered the 500 meter safety zone, the five boats launched from it in fact did so. Therefore, it is important to understand the jurisdictional issues related to the offshore oil installation and, in particular, to the safety zone thereof.

4. COASTAL STATE'S JURISDICTION OVER THE INSTALLATION AND SAFETY ZONE

Once a State authorizes the construction and operation of an offshore installation, the question of jurisdiction on board arises, as this is different in the various delimitations of the maritime zones. The question of jurisdiction over oil installations is different within territorial waters, on the continental shelf, within the EEZ, and on the high seas.[42] Nonetheless, the EEZ will be the focus, as well as the jurisdiction in the installation and in relation to the safety zones established around it.
Article 60 (2) of UNCLOS stipulates that "*the coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations*".
In relation to the EEZ, Article 56 (1) (b) (i) of UNCLOS gives coastal States jurisdiction with regard to the "*establishment and use of artificial islands, installations and structures*" within its EEZ. On the other hand, in relation to the

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40 - STUART KAYE, *op. cit.*, p. 422 and ASSAF HAREL, *op. cit.*, p.150.

41 - Canada already tried a similar approach, with the defense of a "*cautionary zone*" in STUART KAYE, *op. cit.*, p. 422 and ASSAF HAREL, *op. cit.*, p.150.

42 - ALFRED H. A. SOONS, *Artificial islands and Installations in International Law*, Occasional Paper series Law of The Sea Institute, 22, University of Rhode Island, July 1974, pp. 21 ss.

continental shelf, by reference of Article 80, Article 60 applies *mutatis mutandis* to the installations and structures erected in the continental shelf in cases where an EEZ was not established, or in regard of the extended continental shelf.[43]
Therefore, the ILC´s Commentary to the articles concerning the zhe Sea, Article 71 (now Article 60) states that *"[t]hey are subject to any regulations and orders issued by the coastal State authorities, such as those concerning maintenance of order on the installations, safety measures, registration, etc*".[44]
In relation to the safety zones, the position is not so clear and many questions have been raised. The kind of protective measures in the safety zone, whether the power to take necessary measures within the safety zones is the same as the jurisdiction enjoyed by the installations, or should a distinction be drawn between them,[45] are some of the questions that have not been answered by UNCLOS.
Article 5 (2) of Continental Shelf Convention states that *"the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources, and to establish safety zones around such installations and devices and to take in those zones measures necessary for their protection"*.
The Continental Shelf Convention, in Article 3, states that the status of the superjacent waters of the shelf qualifies as high seas. Papadakis confirms this by stating that this is an existence of a *prima facie* evidence in favor of a restrictive interpretation of the coastal State´s powers to interfere with foreign shipping.[46]
However, after UNCLOS this argument lost its effectiveness with the acceptance of a new maritime zone that overlaps with the superjacent waters of the continental shelf and that is no longer characterized as part of the high seas, but as a *sui generis* maritime zone.
Article 60 (4) of UNCLOS provides that *"the coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial island installations and structures"*. Thus, the measures taken must be "*appropriate*", and only for the specific purpose of ensuring *"the safety both of navigation and of the artificial islands, installations and structures"*.

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43 - ERIK JAAP MOLENAAR, *Coastal State Jurisdiction Vessel-Source Pollution*, International Environmental Law & Policy Series, Book 51, Kluwer Law International; 1st Edition, 1998, p. 426.

44 - NIKOS PAPADAKIS, *The International Legal Regime of Artificial Islands*, Sijthoff Publications on Ocean Development, Vol. 2, 1977, p. 179.

45 - Ibid.

46 - Ibid.

Article 60, as a whole, does not seem to place any substantive restrictions on coastal State measures prescribed in safety zones. A closure to international navigation would therefore not be excluded. Moreover, apart from the requirements reflected by the terms "appropriate" which equally apply to prescriptive jurisdiction, no other restrictions concern the modalities of enforcement. While maximum restrictions are thus largely absent, Article 208 imposes on coastal States some minimum requirements for the exercise of jurisdiction to prevent, reduce and control pollution. [47]

Furthermore, IMO has adopted Resolution A.671(16) on "*Safety Zones and Safety of Navigation Around Offshore Installations and Structures*" which, *inter alia*, provides coastal States with guidance in their exercise of jurisdiction under Article 60 and states that *"every coastal State which authorizes and regulates the operation and use of offshore installations and structures under its jurisdiction should...issue early Notices to Mariners by appropriate means to advise vessels of the location or intended location of offshore installations or structures, the breadth of any safety zones and the rules which apply therein, and any fairways available".*

In short, there is good reason to assume that the extension of the regime of exclusive jurisdiction of the coastal States over the installations and structures, stipulated under Article 60 (2) of UNCLOS, can be extended to the safety zones around them. Therefore, it is important to understand the rationale for the protection of the offshore oil installation and, also, the safety zone around it, under UNCLOS and under the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platform. Both regimes establish the protection rights of coastal states facing an unlawful attack to an installation, or to the safety zone around it.

5. PROTECTION OF THE INSTALLATION

5.1. Rationale for the Protection under UNCLOS: Economic Rights

The world was reminded of the great risks posed by oil spills when the *Deepwater Horizon*,[48] a drilling installation leased by BP, explored and sank 35 nautical miles

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47 - ERIK JAAP MOLENAAR, *op. cit.*, p. 428.

48 - REBECCA K. RICHARDS, Deepwater Mobile Oil Rig in the Exclusive Economic Zoe and the Uncertainty of Coastal State Jurisdiction, *in Journal of International Business and Law*, Vol. 10, Issue 2, Article 10, available at http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.

off the Louisiana coast in April 2010. The ruptured wellhead spewed at least 800 million liters before it could be capped three months later.[49] Immensurable, intergenerational damage was caused to the environment of the Gulf of Mexico, and to the fishing and tourism industries of at least four U.S. States. This event highlighted the potential impacts on human and environment interests when things go wrong on the continental shelf and EEZ.[50]

The risks posed by oil spills are even greater in the Arctic. Oil dispersants, used in oil spill situations, degrades very slowly at colder temperatures. More than two decades after the *Exxon Valdez* spilled more than 80 million liters of crude oil into Prince William Sound on Alaskas´s southern coast, continues to persist in the ecosystem. Distance, sea-ice, seasonal darkness, rough weather, and a lack of coastal infrastructure and population centers render the prospects for a successful cleanup even more difficult in the Arctic. The highly specialized species that make up the Arctic marine ecosystems are particularly sensitive to disruption and already badly stressed by warming water temperatures and disappearing sea-ice. Last, but not least, many indigenous inhabitants of the Arctic are still dependent on fish and marine mammals for food.[51]

Consequently, the coastal State needs a specific basis in the rules of international law in order to exercise jurisdictional powers over the continental shelf and over the activities taking place in the EEZ.[52] Particularly relevant to our subject is the definition of the rights of coastal States within the space outside their territorial waters, through the setting up of the so-called exclusive economic zone.[53]

Article 56 (1) of UNCLOS contains a convenient summary of the coastal State´s rights and jurisdiction within the EEZ. Therefore, it is possible to affirm that management and control of virtually all economically oriented activities in the

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cgi?article=1176&context=jibl, last viewed on 11 May 2014, pp. 387-412, p. 390.

49 - MICHAEL BYERS, *International Law and the Arctic*, Part of Cambridge Studies in International and Comparative Law, 103, United Kingdom, 2013, p. 200.

50 - JOANNA MOSSOP, The Legal Framework for the Regulation of Safety and Environment Issues on the Outer Continental shelf, *in The Regulation of Continental Shelf Development, Rethinking International Standards*, editor Myron H. Nordquist, Serie: Center for Oceans Law and Policy, Vol. 17, Martinus Nijhoff Publishers, The Netherlands, 2013, pp. 179-194, p. 179.

51 - MICHAEL BYERS, *op. cit.*, p. 200.

52 - KNUT KAASEN, Safety Regulation on the Norwegian Continental Shelf, *in Risk Governance of Offshore Oil and Gas Operations*, edited by Preben Hempel Lindoe, Michael Baram, Ortwin Renn, Cambridge University Press, United States of America, 2014, pp. 103-131, p. 109.

53 - GEORGE ELIAN, *The Principle of Sovereignty over Natural Resources*, Martinus Nijhoff Publishers, The Netherlands, 1979, p. 126.

zone are assigned to the coastal State.[54]

UNCLOS adopted the formulation agreed to in the 1958 Continental Shelf Convention of affording the coastal State *"sovereign rights"* for the purpose of exploring and exploiting both the non-living resources of the seabed and subsoil as well as sedentary species.[55] However, it also extended the sovereign rights, besides the seabed and subsoil, to the resources in the superjacent waters and other activities for the "*economic exploitation and exploration*", and also the conservation and management of natural resources.[56]

The specific terminology of *"sovereign rights"* rather than *"sovereignty"* or *"jurisdiction and control"* were adopted to make it clear that the coastal State did not own the seabed. It is not assimilated to land territory, as is the case with inland waters, but is merely an area in which jurisdictional rights connected with the exploration and exploitation of its natural resources are exercised.[57] According to the International Law Commission, such rights include *"all rights necessary for and connected with the exploitation of the continental shelf...* [including] *jurisdiction in connection with the prevention and punishment of violations of the law.*[58] In other words, the shelf is not regarded as part of the territory of the coastal State and these rights are restricted to exploration of the shelf and exploitation of its natural resources. Nonetheless, such rights were exclusive and other States might not exploit the continental shelf without the consent of the coastal State.[59]

However, those rights established in Article 56 of UNCLOS are not absolute. In the exercise of its EEZ rights, the coastal State shall have *"due regard to the rights and duties of other States and shall act in a manner compatible with the provision of this Convention"* and may not establish installations and safety zones around it "*where interference may be caused to the use of recognized sea lanes essential to international navigation*".[60]

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54 - DAVID JOSEPH ATTARD, *The Exclusive Economic Zone in International Law*, Claredon Press, Oxford, 1987, p. 46.

55 - R.R. CHURCHILL and A.V LOWE, *The Law of The Sea*, Third Edition, Manchester University Press, UK, 1999, p.151.

56 - Ibid. at 47.

57 - Ibid.

58 - ILC Yearbook, 1956, Vol. II, p. 297.

59 - S. JOYAKUMAR, The Continental Shelf Regime Under The UN Convention On The Law Of The Sea: Reflections After Thirty Years, *in The Regulation of Continental Shelf Development, Rethinking International Standards*, editor Myron H. Nordquist, Serie: Center for Oceans Law and Policy, Vol. 17, Martinus Nijhoff Publishers, The Netherlands, 2013, pp. 3-14, p. 6.

60 - Article 56 (2) and Article 60 (7).

As already analyzed, under Article 56 (1) (b) of UNCLOS jurisdiction is given to the coastal State with regard to the establishment and use of installations and protection and preservation of the marine environment, as these matters are considered essential to the exploration and exploitation and managing of the natural resources. Consequently, the regime under UNCLOS is designed to ensure the coastal State´s jurisdiction over such economic activities in the EEZ and continental shelf. Therefore, besides the limitations imposed by the regime, there is a presumption in favor of the protection of the economic rights of the coastal State.[61]

However, the types of offshore threats are not specifically addressed at UNCLOS. It merely provides the regime for piracy. Nonetheless, it is questionable whether an act of piracy can be committed against an offshore oil and gas installation in the legal sense. In short, the law of piracy can apply to offshore installations in very limited circumstances: only in circumstances where the offshore installations were regarded as ship for legal purposes at the time of the attack.[62] Considering the above, a threat to an installation could jeopardize the full exercise of the economic rights related to the exploration and exploitation of the natural resources. Hence, the coastal State can make use of the hot pursuit, already part of customary law, but codified in article 111 of UNCLOS.[63]

5.2. Rationale for the Protection under Sua Fixed Platform: Security Rights

Although there have been few successful terrorist attacks on offshore installations, thus far, attacks and attempted attacks have become more frequent in the past several years.[64] Technological developments that facilitate the exploration of ocean resources in extended areas from the coast have warranted claims that State´s economic and environmental interests require protection and have thereby extended understandings of security, as meaning the protection against unlawful,

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61 - DAVID JOSEPH ATTARD, *op. cit.*, p. 48.

62 - MIKHAIL KASHUBSK, Protecting Offshore Oil and Gas Installations: Security Threats and Countervailing Measures, *in Journal of Energy Security*, on 11 December 2013, available in http://www.ensec.org/index.php?option=com_content&view=article&id=476:protecting-offshore-oil-and-gas-installations-security-threats-and-countervailing-measures&catid=140:energysecurity content&Itemid=429, last viewed on 9 May 2014.

63 - NICHOLAS M. POULANTZAS, *The Right of Hot Pursuit in International Law*, Series A: Modern International Law, Number 22, Publications of the Institute of Public International Law of Utrecht University, Second edition, Martinus Nijhoff Publishers, The Netherlands, 2002, pp. 167 ss.

64 - ASSAF HAREL, *op. cit.*, p.171.

and deliberate, acts.[65] Considering that UNCLOS does not propose a typical reaction to terrorism, and in particular to "ecological terrorism", it is necessary to analyze the international response to fix that lacuna.

Greater enforcement powers for the protection of installations have been accorded under the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platform located on the Continental Shelf 1988 (hereinafter 1988 SUA Fixed Platform Protocol) which, along with the Convention for the Suppression of Unlawful Acts Against the Safety of the Maritime Navigation 1988 (hereinafter 1988 SUA), deals with unlawful acts against offshore oil installations.[66]

The 1988 SUA Fixed Platform Protocol established that the provisions of 1988 SUA are extended and apply *mutatis mutandis* to "fixed platform", as meaning "*an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes*".[67]

However, Article 1 limits the scope of application of this Protocol to facilities on the continental shelf, excluding the application of the 1988 SUA Fixed Platform Protocol to installations in the territorial sea of a coastal State.[68] Furthermore, the State may exercise jurisdiction also when the offender is a national of that State.[69] The offences are specifically defined in the Protocol.[70] The Protocol establishes that each State Party shall take measures as may be necessary to establish jurisdiction over the offences listed. Therefore, the State has jurisdiction in relation to those offences when they are committed: i) against or on board a fixed installation while it is located on the continental shelf of that State; ii) by a national of that State; iii) by a stateless person whose habitual residence is in that State; iv) if during its commission a national of that State is seized, threatened, injured or killed; or v) it is committed in an attempt to compel that State to do or abstain from doing any act.[71]

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65 - NATALIE KLEIN, *Maritime Security and The Law of the Sea*, Oxford Monographs in International Law, Oxford University Press, New York, 2011, pp. 7-8.

66 - Ibid. at 103.

67 - Article 1, 1988 SUA Fixed Platform Protocol, available in http://cil.nus.edu.sg/rp/il/pdf/1988%20Fixed%20Platform%20Protocol-pdf.pdf, last viewed 26 January, 2015.

68 - Article 1, 1988 SUA Fixed Platform Protocol, available in http://cil.nus.edu.sg/rp/il/pdf/1988%20Fixed%20Platform%20Protocol-pdf.pdf, last viewed 26 January, 2015.

69 - Article 3 (1) and (2), 1988 SUA Fixed Platform Protocol, available in http://cil.nus.edu.sg/rp/il/pdf/1988%20Fixed%20Platform%20Protocol-pdf.pdf, last viewed 26 January, 2015.

70 - Article 2, 1988 SUA Fixed Platform Protocol, available in http://cil.nus.edu.sg/rp/il/pdf/1988%20Fixed%20Platform%20Protocol-pdf.pdf, last viewed 26 January, 2015.

71 - Article 3 (1) of 1988 SUA Fixed Platform Protocol, available in http://cil.nus.edu.sg/rp/il/pdf/1988%20Fixed%20Platform%20Protocol-pdf.pdf, last viewed 26 January, 2015.

However, the Protocol in no part refers to what the "measures" are in order to establish jurisdiction, as mentioned earlier. Revisions were undertaken in 2005 to amend 1988 SUA and 1988 SUA Fixed Platform Protocol, expanding the range of offences and to balance the coastal State and flag State relationship in relation to those offences, as well as establishing formal procedural measures to be followed if such offences are committed. Nonetheless, one of the most prominent features of 2005 SUA – Article 8bis – the procedure for obtaining flag State consent to boarding a ship suspected of involvement in one of said offences was not incorporated into the 2005 Fixed Platforms Protocol.[72]

Therefore, some authors consider this as *"unfortunate"*, stating that the inclusion of that provision in the 2005 SUA Fixed Platform Protocol would have promoted, to a certain extent, efforts to protect offshore installations.

In practice, if those provisions were to apply *mutatis mutandis* to the 2005 Fixed Platform Protocol it would encounter some difficulties of coexistence with the provision of *"exclusive jurisdiction"* of coastal States in the installations, and the protection of the safety zones, established under UNCLOS. The coastal State is already authorized to justify the boarding and the arrest of the perpetrators threatening a fixed installation, as well as inside the safety zone around it.

In relation to the Arctic Sunrise case, some important features relating to the SUA Fixed Installation are important to highlight. Firstly, the Netherlands and the Russian Federation are both Parties to the 1988 SUA Fixed Platform Protocol, but only The Netherland is a Party of the 2005 SUA Fixed Installation Protocol.[73] Applying the Convention in this case, the 1998 version will prevail. Secondly, the facts described above could fall under the offences listed in Article 2 (d) *"places or causes to be placed on a fixed installation, by any means whatsoever, a device* [the safety pod] ... *which is ... likely to endanger its safety"*. This provision is broad enough to encompass the vicissitudes of the case and guarantees the jurisdiction of the coastal State. The Protocol, however, is not adequate by itself because the coastal State must appropriately incorporate those offences in its domestic law to better apply them in a specific situation.

Bearing in mind that the Fixed Platform Protocol does not solve all the issues related to installations and *"gaps remain within this regime"*, the existing rules of international law will continue to apply to situations not covered by its terms.[74] Therefore, to enforce the jurisdictional powers of coastal States in relation to the

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72 - ASSAF HAREL, *op. cit.*, p.171.

73 - Status of those Conventions at http://www.imo.org/About/Conventions/StatusOf Conventions/ Pages/Default.aspx, last viewed 7 May 2014.

74 - NATALIE KLEIN, *op. cit.*, p. 103.

offshore oil installation and safety zone thereof, it will have to be necessary to make use of the right of hot pursuit codified by UNCLOS.

6. AN ASSESSMENT OF RUSSIA ACTION IN THE LIGHT OF THE RIGHT OF HOT PURSUIT

An important instrument of coastal State's action in the face of an incursion into the installation, or into the safety zone around it, is the regime of hot pursuit,[75] already part of customary law, but codified in article 111 of UNCLOS.

In relation to an installation located in the EEZ,[76] Article 111 (2) gives the right of hot pursuit *mutatis mutandis* to violations of the laws of the territorial state in the EEZ, or the continental shelf, including safety zones around continental shelf installations.[77]
The right of hot pursuit represents a traditional limitation of the freedom of the high seas and should only be used in exceptional and urgent circumstances which necessitate very quick action on the part of the coastal State.[78]
Therefore, hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the EEZ or above the continental shelf.[79]
Furthermore, hot pursuit cannot be initiated simply after a warning from the offshore oil installation, it must commence with a visual or auditory signal to stop from a pursuing vessel or an aircraft.[80] It cannot come from the installation, as only ships and aircraft have such authorization under Article 111 (5), and even from that category, they must be clearly identified as being on government service.

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75 - JOÃO TIAGO V. A. DA SILVEIRA, A Hot Pursuit Nos Mares, *in Revista Jurídica da A.A.F.D.L.,* n.º 24, pp. 85-136, April 2001, available in http://joaotiagosilveira.org/mediaRep/jts/files/Hot_Pursuit_nos_Mares_-_Revista_Jur__dica_n.___24_-_Abril_2001.pdf, last viewed 26 January, 2015.

76 - NICHOLAS M. POULANTZAS, *op. cit.*, pp. 167 ss.

77 - JAMES CRAWFORD, *Brownlies's Principles of Public International Law*, 8th Edition, Oxford University Press, United Kingdom, 2012, p. 310.

78 - NICHOLAS M. POULANTZAS, *op. cit.*, p. 209.

79 - Article 111 (4).

80 - Article 111 (4).

The practicalities of the requirement of a visual or an auditory signal mean that the pursuer must be physically close to the installation, because the sign has to be given at a distance which enables it to be seen or heard by the foreign ship.[81] Also, the visual or auditory signal must be made while the offending vessel is physically in the safety zone. Given the zone's small size, and the expectation that a fleeing vessel will be in the safety zone, at best the opportunity to commence hot pursuit is limited.[82]

In accordance with the regime, it is possible to identify two characteristics that qualify the pursuit as "hot": first, the lawful performance of the right of hot pursuit requires the immediate commencement of the pursuit; second, its uninterrupted continuation upon the high seas.[83]

ITLOS notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative, each of them has to be satisfied for the pursuit to be legitimate under the Convention.[84] Therefore, having in consideration that was already established that Russia has exclusive jurisdictional powers over the installation and, consequently, inside the safety zone thereof, it is important assessing the legality of Russia actions in relation to the boarding and arrest of the Arctic Sunrise, and crew, in the light of hot pursuit requirements.

As noted above, the ITLOS abstained from considering the implications of Article 111 in its Order.

Nonetheless, Judge Golitsyn of ITLOS, in his dissenting opinion to the Order, argued that the factual accounts provided by Greenpeace and Russia provided sufficient grounds to conclude that the Russian Coast Guard vessel Ladoga was carrying out a hot pursuit. Consequently, Russia "*acted in full conformity with the Convention*".[85] Therefore, he pointed out that the logical conclusion to draw from Russia acting in accordance with Article 111 of UNCLOS would be that there was no basis to assert that it had infringed the freedom of navigation enjoyed by the Netherlands, as that freedom in this case did not exist. [86]

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81 - STUART KAYE, *op. cit.*, p. 407.

82 - Ibid.

83 - Article 111 (1).

84 - M/V Saiga (Saint Vincent and The Grenadines v Guinea), Case No. 2, Judgment, ITLOS, available in http://www.itlos.org/index.php?id=59, last viewed on 8 May 2014, paragraph 146.

85 - Dissenting Opinion of Judge Golitsyn, para. 36, available in http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_diss.op.Golitsyn_orig_Eng.pdf, last viewed May 5, 2014.

86 - Dissenting Opinion of Judge Golitsyn, para. 37, available in http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_diss.op.Golitsyn_orig_Eng.pdf,

However, in our opinion, after an assessment of the law and available facts of the case, this is not true. As noted above, the Arctic Sunrise *"briefly enters"* the safety zone.[87] Therefore, it could be argued that the ship is not subject to the regime of hot pursuit. However, Article 111 (4) adopts the doctrine of "the mother vessel", a ramification of the doctrine of "constructive presence", which allows the right of hot pursuit to a mother ship for the activities of its boats or other crafts as they work as a team. Hence, the Arctic Sunrise and the boats, that were launched from it, acted as a team and therefore the ship Arctic Sunrise is equally responsible for the violations committed.[88]

Hence, if an analysis of the case is carried out on the literal meaning of the words of the Convention, it will appear that the right of hot pursuit can be initiated against a ship that makes an unauthorized entry into a safety zone around an installation, even though that ship may only be briefly in such a zone, as is the case of the Arctic Sunrise. It may also continue to be pursued for hours on the basis of hot pursuit. It could be argued that the Russian authorities had authority to take enforcement measures against the Arctic Sunrise, as the mother ship, and, consequently, that the boarding, arrest of the crew and detention of the ship were valid under international law. However, in the light of the factual account of events and the above mentioned practicalities of the right of hot pursuit, some important legal questions arose. The violation of the safety zone and the attempt to seize the installation occurred around 04:20 (Moscow time) on 18 September[89] and, in consequence, the climbers were removed from the installation and taken aboard the coastguard ship. From this point in time, the pursuit could not be interrupted. Although the Russian authorities decided to seize the Arctic Sunrise, as expressed in the *note verbale* of the same date, the Arctic Sunrise remained within the mediations of the 3 nautical miles of the installation and no persecution was initiated. On 19 September, around 21:50, the ship was arrested, as well as the crew. Nothing in the description of the events shows a pursuit of the Arctic Sunrise after the arrest of the two perpetrators, as should have happened, missing the element of "hotness" of the pursuit and therefore falling out the scope of the provision of hot pursuit.

Consequently, in relation to the two climbers caught when attempting to seize the installation that were under the exclusive jurisdictional powers of the coastal State,

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last viewed May 5, 2014.

87 - REQUEST, p. 4 of Annex 2.

88 - Dissenting Opinion of Judge Golitsyn, para. 35, p. 10, available in http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22.11.2013_diss.op.Golitsyn_orig_Eng.pdf, last viewed May 5, 2014.

89 - REQUEST, p. 4 of Annex 2.

the actions shall be legally qualified under the domestic law of the coastal State and treated in conformity with the criminal law of the coastal State. However, following the events described above, the Russian authorities returned the climbers, the Swiss national and the Finnish national, to the ship Arctic Sunrise when the ship was already under their control.[90] Therefore, because the boarding of the Arctic Sunrise by Russian authorities was illegal the perpetrators were, in fact, returned to the exclusive jurisdiction of the flag State.[91] Consequently, the coastal State no longer had authority to arrest them without the consent of the flag State.

In the absence of hot pursuit, as described in UNCLOS, what should a coastal State do when faced with an attack to the installation or safety zone? Article 58 (2) of UNCLOS reads thus: "*Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part*". Therefore, by applying these articles, the principle of exclusive jurisdiction of the flag State is recognized and in which case the coastal State is not justified to board the ship unless in the cases specifically described in Article 110 (1) of UNCLOS, which is not the case.[92] Hence, because the hot pursuit was interrupted and was not validly applicable in this case, the Russian Federation should have requested permission of the flag State to board, arrest and detain the ship. Having failed to comply with this requirement, Russia clearly breached international law.

CONCLUSION

In light of the above, having considered that international law provides to coastal States "*sovereign rights*" for the purpose of exploiting, conserving and manage the natural resources, it is logical to conclude that Greenpeace's acts against the installation located in the Russia's EEZ constitutes a threat to EEZ rights. Firstly, it may jeopardize the full enjoyment of the economic rights prescribed by UNCLOS. Secondly, it may constitute a security threat, endangering the life of the crew, the integrity of the installation, and consequently, the marine environment and safety of navigation.

The coastal State has "*exclusive jurisdiction*" for the protection of the exploration

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90 - REQUEST, p. 8 of Annex 2.

91 - Article 94 (1).

92 - Article 94 (2) (b).

and exploitation of natural resources in the EEZ and the continental shelf. This jurisdiction includes the prevention and punishment of violations committed in the installation and inside the safety zone established around it. As a result, any act committed against an installations or a safety zone within the EEZ of a State will be subject to the domestic law of the coastal State and will fall under the competence of the coastal State´s Courts.

To enforce these jurisdictional powers under customary international law, and codified by UNCLOS, the coastal State can exercise the right of hot pursuit. However, in the present case, between the infringement of the safety zone and the attempting to seize the installation, and the boarding of the ship Arctic Sunrise by Russian authorities, almost 48 hours lapsed and nothing in the description of the events indicates a pursuit. Therefore, after the infringement of the safety zone, or the arrest of the two climbers, Russian authorities should have immediately initiated the procedures for the pursuit. By not doing so, they missed the element of "hotness" of the pursuit and, therefore, their acts fall out the scope of the provision and, do not constitute hot pursuit under international law.

In conclusion, even though Russia has the right to protect the installation and the marine environment surrounding it, in the present case, the end does not justify the means. Although they had under international law the possibility to lawfully respond to the attack, they did not follow the practicalities required by law for the pursuit, and consequently, it cannot be qualified as "Hot" under the international regime. Therefore, boarding the ship without the consent of the Netherlands, as the flag State, constituted a breach of international law, incurring potential international responsibility on the part of the Russian Federation. The situation would have been different if they had followed the appropriate procedures described in international law to protect the offshore installation and, consequently, their EEZ rights.

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