



Ministry of Foreign Affairs

Mr Philippe Gautier
International Tribunal for the Law of the Sea
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Germany

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Our reference
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Date 7 November 2013
Re Questions in case 22 (Arctic Sunrise)

Dear Mr Gautier,

Further to the requests of the Tribunal of 5 and 6 November 2013 respectively, it is my pleasure to attach the replies to the questions raised. The three questions raised prior to the session, on 5 November 2013, and their answers are included in the same document as the questions raised by the individual judges in during the session of the Tribunal on the morning of 6 November 2013.

With respect to the Tribunal's request to provide copies of various Russian legislative instruments, contained in a letter of 5 November 2013, I would note that the Russian Federation is best placed to provide this information. The government of the Kingdom of the Netherlands has but a limited understanding of foreign legislation, and is unable to verify the accuracy of information concerning Russian legislation. However, in the coming days we will attempt to obtain copies of the instruments referred to in order to assist the Tribunal.

Yours sincerely,

Liesbeth Lijnzaad
Agent for the Kingdom of the Netherlands

Attachments:

- Replies to questions from the Tribunal
- Information provided by Greenpeace on the situation of the detainees with cover note.

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ARCTIC SUNRISE, CASE NO. 22
Replies to questions from the Tribunal

I. Questions raised on 5 November 2013, prior to the hearing

1. According to the note verbale of the Ministry of Foreign Affairs of the Russian Federation dated 18 September 2013 (Annex 2 of the Statement of Claim), “[o]n several previous occasions the ship’s crew have carried out activities that constituted a threat to the maritime safety of ships performing exploratory activities on the continental shelf in the Russian sector of the Arctic region”. Has there been any contact between the Russian Federation and the Netherlands as the flag State of the Arctic Sunrise in this respect and, if so, what was the action taken?

Reply

Since 2010 Greenpeace has been engaged in the campaign “Save the Arctic”. In the course of this campaign it has staged a number of protests at sea. It demonstrated, *inter alia*, against:

the offshore platform ‘Prirazlomnaya’ in Barents Sea in August 2012;
activities of Rosneft and Exxon Mobile in the Barents and Kara Seas in August 2013;
and
the offshore platform ‘Prirazlomnaya’ in the Barents Sea in August 2013.

Following these protests, the Russian Federation and the Kingdom of the Netherlands have had contacts. Further to these contacts, the Netherlands maritime authorities have requested Greenpeace to provide further information on these incidents.

On the basis of the available information, the Netherlands Shipping Inspectorate assessed the incidents. The Inspectorate reviewed the incident of 18 September 2013 from the perspective of compliance with the 1972 Convention on the International Regulations for Preventing Collisions at Sea, in particular with regard to the principle on the ordinary practice of seamen. The Inspectorate concluded, *inter alia*, that the RHIB’s (Rigid Hull Inflatable Boats) of the ‘Arctic Sunrise’ entered the safety zone established around the platform (Request for Provisional Measures, Annex 7). Furthermore, it concluded that the conduct of the crew members of the ‘Arctic Sunrise’ and its RHIBs did not jeopardize the safety of vessels, crew members, the environment and the offshore platform ‘Prirazlomnaya’. Due to the short timeframe between the diplomatic note, dated 18 September 2013, and the seizure of the ‘Arctic Sunrise’ on 19 September 2013, it was impossible for the Kingdom of the Netherlands government to take appropriate action.

Greenpeace is conscious of the view of the Netherlands’ Governments that the right of freedom of expression at sea should only be exercised as long as safety at sea is ensured and international legislation is adhered to. This view of the Netherlands’ Government is well known to non-governmental organizations and it has repeatedly called on the masters of vessels to ensure that safety of human life at sea is not endangered and international collision avoidance regulations are observed.

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Furthermore, the Netherland’s Government reaffirms its respect for the right to peaceful protest, condemns dangerous and unlawful behavior at sea, and indicates its preparedness to deal with unlawful activity in accordance with relevant international and domestic laws.

2. As the Applicant requests immediate release of all crew members of the Arctic Sunrise because they have been detained in the EEZ, where the Russian Federation does not have jurisdiction to detain them, what would be the legal ground for such request with regard to the members of the crew who have been detained in the safety zone?

Reply

For the answer to this question, we would like first of all to refer to the factual account provided by Greenpeace International, submitted as Annex 2 to the Request for Provisional Measures.

According to paragraph 19, "Men in one of the Coast Guard RHIBs attempt to pull one of the two climbers, Finnish activist Sini Saarela, off the rig by tugging at her safety rope (video from 5'30"). This action puts her in apparent danger, even though she can clearly be heard shouting in English that she is coming down. At some point both Saarela and the other climber, Swiss national Marco Paolo Weber, descend into the water. Saarela is nearly caught between the Coast Guard RHIB and the rig structure (video from 4'00"). Both are picked up by Coast Guard RHIBs." These were the only two members of the crew who were 'picked up' in the safety zone by the Russian Coast Guard.

According to paragraph 29 of the factual account, on Wednesday 18 September 2103, at 14:47, "a Russian news outlet reports that a spokesman for the Coast Guard has stated that Saarela and Weber are 'guests' on board the Coast Guard vessel Ladoga. The Finnish consulate also confirms to Greenpeace that it has been informed by Russian authorities that two climbers were 'rescued' from the water after falling off *Prirazlomnaya* and are being treated as guests."

According to paragraph 33 of the factual account, on Thursday 19 September 2013, at 18:26, "the MYAS reports that a helicopter is hovering over its rear deck and armed FSB agents are descending. Crew is held at gunpoint (see photos in the video from 10'37")." On the boarding, see <http://youtu.be/DW31bYjZ4bc>.

According to paragraph 38 of the factual account, on Thursday 19 September 2013, at a time between 19:43 and 23:45, "After having spent a day and a half on board the Coast Guard vessel, activists Sini Saarela and Marco Weber are returned to the MYAS." If that is so, the detention of Sini Saarela and Marco Weber by Russian authorities only started upon their return to the 'Arctic Sunrise'. On this basis, the Kingdom of the Netherlands cannot but conclude that Sini Saarela and Marco Weber were not 'detained' in the safety zone.

Alternatively, insofar as the Russian Federation would argue that two crew members were detained in the safety zone upon rescue from the water and the Tribunal would accept this as a fact, the Kingdom of the Netherlands argues that such detention and

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subsequent criminal prosecution is not an 'appropriate measure' to ensure the safety both of navigation and the artificial islands, installations and structures. The crew never posed a threat to safety of navigation or the 'Prirazlomnaya' and, in any event, they did not do so from the time they were in the water. Even if the Tribunal would conclude that they did pose a threat to the safety of navigation or the 'Prirazlomnaya', the Kingdom of the Netherlands argues that the detention and subsequent criminal prosecution are neither necessary nor proportional. This must be assessed in the light of the fact that the crew was exercising their freedom of expression, freedom of demonstration and freedom of peaceful protest.

3. Could the Tribunal receive additional information on the current situation of the crew members of the *Arctic Sunrise*, including information on pending proceedings before Russian courts?

Reply

The Kingdom of the Netherlands first notes that the Russian Federation is best placed to provide this information. The Kingdom is able to offer the following information.

On 6 November 2013, a diplomatic note was sent to the Ministry of Foreign Affairs of the Russian Federation by the Embassy of the United Kingdom on behalf, and with the agreement of, the concerned Embassies of Argentina, Australia, Brazil, Canada, Denmark, Finland, France, Italy, Netherlands, New Zealand, Poland, Sweden, Switzerland, Turkey, Ukraine, United States and the United Kingdom. This note repeats the request of these Embassies of 15 October 2013 that the Ministry of Foreign Affairs facilitate a meeting with the relevant authorities for consular staff from the concerned Embassies to discuss and better understand the consular and other processes that are involved in the Russian authorities handling of the case. The note contains an indicative list of questions related to the crew members of the 'Arctic Sunrise', including information on pending proceedings before Russian courts.

In addition, the Kingdom of the Netherlands has requested the assistance of Greenpeace International to provide the Tribunal with information to respond to this question. Greenpeace International has arranged for legal assistance to the detained crew members and is well placed to provide such information. The Kingdom of the Netherlands received the information from Greenpeace International contained in the annex to this letter.

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II. Questions raised at the hearing on 6 November 2013

Judge Wolfrum

Could the Applicant clarify whether in its view the operator of the *Arctic Sunrise* decided on the activities of the persons on board of the vessel who on inflated boats entered the safety zone around the continental shelf installation established by the Russian Federation and some of whom subsequently climbed on this installation? Or was the decision taken by the captain on his own responsibility?

Reply

As the flag state of the ‘Arctic Sunrise’, the Kingdom of the Netherlands has no knowledge of the internal organisation of the operator of the vessel (Greenpeace International). The Kingdom of the Netherlands has requested the operator to provide the information sought by Judge Wolfrum.

The operator provided the following information:

“The plan for the protest was conceived by the operator Greenpeace International prior to departure. The operator did decide to allow the volunteers on the inflatable boats to enter the 500 m safety zone around the platform, and the two climbers among them to attach themselves to the exterior of the platform in order to display a small banner. All as part of a peaceful protest. This authorization is of course notwithstanding the final authority of the Captain to proceed, or not, based on his own appraisal of the safety situation at that time.”

Judge Golitsyn

Is the urgency of the release of the *Arctic Sunrise* at the stage of the provisional measures justified given the fact that, in accordance with the “Official Report on seizure of property” dated 15 October 2013 (Appendix 7 to Annex 2 of the Request), the competent Russian authorities “will be responsible for compliance with security measures” and “have been notified [...] of their liability for any loss, disposal of, concealment or illegal transfer of property that has been seized or confiscated”?

Reply

The Order of 15 October 2013 imposes responsibility on the Russian Coast Guard for compliance with “security measures”. Furthermore, it notifies two individuals, as representatives of the entities identified in the order, of their liability for “any loss, disposal of, concealment or illegal transfer of property that has been seized or confiscated” under Russian law. The Kingdom of the Netherlands submits the following points.

First, it is not clear to the Kingdom of the Netherlands whether this Order is final. Second, the Kingdom of the Netherlands has demonstrated in the Request for Provisional Measures and its Oral Statement on 6 November 2013 that the ‘Arctic

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Sunrise’ is at risk of perishing due to lack of servicing. It is not clear whether the ‘security measures’ referred to in the court order covers servicing.

Third, it is not clear who is entitled to invoke the liability referred to in the court order. In particular, it is not clear whether the Kingdom of the Netherlands is entitled to do so.

Fourth, the Kingdom of the Netherlands cannot be expected to avail itself of Russian procedures to enforce this liability under Russian law. The responsibility of the Russian Federation towards the Kingdom arises under international law.

Fifth, the Kingdom is not in a position to determine the exact meaning of the phrase “liability for any loss, disposal of, concealment or illegal transfer of property that has been seized or confiscated”, as it is to be interpreted under Russian law. It is not clear whether this liability covers all forms of financially assessable damage recognized under international law, as covered by Article 36 of the Articles on the Responsibility of States for Internationally Wrongful Acts.

The perishing of the vessel would rule out any possibility for restitution, thus obliging the Russian Federation to pay compensation for the perished vessel. In accordance with the law of state responsibility, restitution takes precedence over compensation (Article 35(a) of the Articles of Responsibility of States for Internationally Wrongful Acts). It is this right to restitution which the Kingdom of the Netherlands invokes. This underscores the urgency of the request for provisional measures in relation to the vessel.

Judge *ad hoc* Anderson

My question arises from counsel’s statement when allusion was made to the order made by a court in Russia in application of article 19 of the Convention on the High Seas of 1958. Have you been informed of any legal basis for the seizure of the ship, or does the ship remain under detention today on the basis of this order under the Convention on the High Seas?

Reply

The Kingdom of the Netherlands understands that Judge Anderson refers to the Order on the Seizure of Property by the Leninsky district court in Murmansk on 7 October 2013 (Request for Provisional Measures, Annex 3), signed by judge D.V. Krivonosov. This order applies article 19 of the 1958 Geneva Convention on the High Seas. It was followed by the seizure of the ‘Arctic Sunrise’ on 15 October 2013 in Kola Bay, Murmansk Oblast, of which an official report was made (Request for Provisional Measures, Annex 4).

The Kingdom of the Netherlands has not been informed of any other legal basis.

Furthermore, the Kingdom would recall that, under Article 311, paragraph 1, of the Convention, the Convention shall prevail, as between states parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958. Therefore, article 19 of the 1958 Geneva Convention on the High Seas does not apply between the Russian Federation and the Kingdom of the Netherlands.

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M. le juge Akl

Pourriez-vous, si possible, nous indiquer quelles sont les pénalités imposables pour les violations des lois et règlements de la Fédération de Russie relatifs à la zone de sécurité autour des îles artificielles et des installations dans la zone économique exclusive ?

Reply

The Kingdom of the Netherlands first notes that the Russian Federation is best placed to provide this information. The following information on ‘Legislation Regarding Safety Zones’ has been obtained from external sources. The Kingdom was unable to verify the accuracy of the following information.

Legislation Regarding Safety Zones

Article 16 of the Russian Federal Law on the Continental Shelf provides, *inter alia*:

“Safety zones extending for not more than 500 metres from each point on the outer edge of artificial islands, installations and structures shall be established around such islands, installations and structures.

The specifically authorized federal defence agency, with the agreement of the specifically authorized federal frontier service agency, shall determine the measures which must be taken in these zones to ensure the safety of navigation and of the artificial islands, installations and structures. Information about the safety measures shall be published in the ‘Notices to Navigators’.”

On 14 January 2013, Presidential Decree No. 23 was adopted ‘On Federal Executive Agencies Responsible for Determining Measures for the Protection of Navigation in Safety Zones around Artificial Islands, Installations and Structures Located on the Continental Shelf of the Russian Federation, as well as measures for the Safety of such Artificial Islands, Installations and Structures’.

This Decree provides that:

The Ministry of Transport is the federal executive agency responsible for determining measures for ensuring safety of navigation in safety zones around artificial islands, installations and structures;

The Ministry of Transport, Federal Security Service, and Ministry of Defense are the federal executive agencies responsible for the safety of artificial islands, installations and structures.

On 10 September 2013, the Russian Ministry of Transport, acting pursuant to Presidential Decree No. 23 of 14 January 2013, adopted Order No. 285, ‘On the Determination of Measures to Ensure the Safety of Navigation in Safety Zones Established around Artificial Islands, Installations and Structures Located on the Continental Shelf of the Russian Federation’. This Order entered into force on 22 October 2013 after the boarding of the ‘Arctic Sunrise’ on 19 September 2013. The Order does not foresee any sanctions for violation of a safety zone, but provides

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certain measures to ensure safety, such as requiring a vessel which intends to enter a safety zone to contact the person responsible for operation of the facility in question over VHF Channel 16 when at a distance of three nautical miles from the edge of the zone.

The Russian Code of Administrative Offences on violations of navigational rules imposes a fine for violation of a safety zone. Article 11.7.1 provides that a violation of the rules of sailing and moorage by a person operating a vessel (except small boats) shall be punishable by an administrative fine of 500 to 1,000 roubles (approximately €11 to 22), or deprivation of the right to operate a ship for a period of up to one year.

M. le juge Cot

La demande en prescription de mesures conservatoires fait état aux paragraphes 30 et 31 d’une demande de mainlevée de l’immobilisation de l’*Arctic Sunrise* moyennant une caution ou autre garantie financière. Le demandeur peut-il donner une estimation de la valeur du navire en question ?

Reply

According to information provided by Greenpeace International, the operator of the ‘Arctic Sunrise’, the vessel is considered to be worth € 1,800,000 insured value. It is understood that the ship is covered by a mortgage.

M le juge Bouguetaia

Je voudrais demander à l’Agente du Royaume des Pays-Bas s’il lui était possible de nous dire dans quelles conditions exactes les trente marins qui étaient sur l’*Arctic Sunrise* ont été arrêtés. Il est évident que les faits se sont produits en zone économique exclusive. Mais je voudrais savoir avec précision dans quelle partie exactement les marins ont été arrêtés. S’agit-il d’une arrestation qui s’est faite en zone économique exclusive, mais en dehors de la zone dite « zone de sécurité », ou dans la zone de sécurité, ou éventuellement sur la plateforme ou, comme on croit le savoir, sur les petites embarcations qui ont transporté les marins du navire *Arctic Sunrise* jusqu’à la plateforme ?

Reply

In addition to the relevant factual information provided in the reply to question 2 of the questions raised on 5 November 2013, prior to the hearing, the Kingdom of the Netherlands submits the following reply to the present question. On Thursday 10 September 2013, at 18:35 hours Moscow Standard Time, the ‘Arctic Sunrise’ was boarded when the vessel was at a position of 69 degrees 19’ 86” N and 57 degrees 16’ 56” E, approximately five nautical miles from the oil rig ‘Prirazlomnaya’, well outside the safety zone.

On Tuesday 24 September 2013, the Investigative Committee published a statement on its website that it had opened a criminal case under Article 227, paragraph 3, of the

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Criminal Code of the Russian Federation. At about 13:00 hours Standard Moscow Times, the ‘Arctic Sunrise’ anchored outside Murmansk (coordinates 69 degrees 4’ 14” N, 33 degrees 6’ 56” E).

On Wednesday 25 September 2013, at 01:38 hours Moscow Standard Time, Greenpeace International learned that the Investigative Committee had ended its proceedings and that all 30 persons on board had been presented with a written protocol of their arrest, marking the institution of criminal proceedings against them.

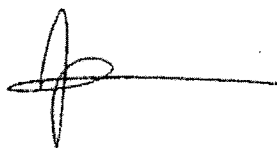
Amsterdam, 7 November 2013

Ministry of Foreign Affairs
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Dear Dr. Lijnzaad,

Please find enclosed the information requested as per our discussion yesterday.

Yours truly,



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General Counsel / Advocaat

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INFORMATION PROVIDED BY GREENPEACE INTERNATIONAL TO THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS

Information on detention and legal proceedings

All on board were formally arrested in Murmansk on 24 and 25 September 2013 on suspicion of piracy under article 227 (3) of the Criminal Code of the Russian Federation (cfr. Greenpeace International Statement of Facts paras. 45 and 51). On 2 and 3 October 2013, all were formally charged with piracy (cfr. Statement of Facts para. 60).

On 23 October 2013 the Russian Investigative Committee announced on its website (<http://www.sledcom.ru/actual/361187/>) that the piracy charges would be 'requalified' to hooliganism under article 213 (2) of the Criminal Code of the Russian Federation. Between 24 October and 31 October 2013 all thirty persons were brought before the Investigative Committee and charged with hooliganism. As of 6 November 2013 all persons remain charged with both piracy and hooliganism. Contrary to some media reports, the piracy charges have not been withdrawn. On 7 November the Investigative Committee announced some detainees would be charged with disobeying police orders (see http://voiceofrussia.com/news/2013_11_07/Some-Arctic-Sunrise-activists-to-be-charged-with-disobeying-police-Investigative-Committee-0916/)

All persons are currently being held in Detention Centre no. 1 (SIZO-1) in Murmansk, Russia. The conditions of detention the 30 face are harsh. Individual circumstances vary, but there are concerns with respect to food and drinking water, dark cells, restrictions on communications with the outside, and the allowed exercise time and facilities.

The detainees are confined to a prison cell 23 hours of the day. They are allowed up to one hour of exercise in a small, covered courtyard once a day (a dark 5x5m concrete space). The women are alone in their cells. The men are often sharing with one or more other inmates, not part of the Greenpeace group. The large majority of the detainees does not speak Russian and thus faces communication problems. It has been very difficult for them to obtain permission to make telephone calls to their family. For those people with special dietary requirements, the prison authorities have not made proper arrangements. Women are allowed one shower per week, men one per fortnight. The windows to the cells are poorly isolated and some are broken. Detainees have complained they need to sleep with their gloves and hats on.

Some detainees report having been questioned without their lawyers being present by unidentified men under threat confinement into a 'punishment cell' if they fail to reveal 'interesting information'. A number of detainees have been refused access to a doctor when feeling ill.

Consular visits – one of the few opportunities for detainees to send messages home to relatives and friends – have been limited to two per person per month. At the same time the authorities have allowed very few visits by relatives.

There are indications that the 30 detainees may be transferred to St. Petersburg, which is over 1000km away, in the near future. This typically involves an unpleasant journey of at least 27 hours in an unheated prison train or in police vans. If they are not transferred, the detainees face six weeks without any daylight as a result of the polar night in Murmansk.

The detainees have been remanded in custody pending investigation into the aforementioned charges until 24 November 2013. Investigators may seek a further detention period of up to four months before the competent District Court by 17 November at the latest. Pretrial detention may last up to 18 months in total.