9 The law of the sea and the exercise of free speech and protest rights

Richard Caddell

Introduction

For all its myriad innovations in advancing and consolidating the maritime entitlements of States, the United Nations Convention on the Law of the Sea 1982 (LOSC)[1] remains a rare 'constitution' in which the central recognition of fundamental human rights is conspicuous by its absence. Formal references to individuals within the LOSC are few and far between,[2] while early judicial interpretations of its provisions viewed human beings in largely reductive terms as mere appendages of a vessel.[3] In recent years, however, a series of marine incidents has precipitated a greater degree of reflection upon the role and application of human rights norms at sea,[4] an issue that has long been among the more subtle and amorphous elements of the Convention. Specific procedural rights are readily identifiable within the LOSC,[5] as are requirements to protect human life in particular contexts,[6] while the need to account for 'considerations of humanity' has long held traction in international adjudication[7] and has subsequently been recognized as a core requirement in the further interpretation of the Convention.[8] Moreover, as one prominent former Judge of the International Tribunal for the Law of the Sea (ITLOS) has observed, while the LOSC 'is not a "human rights instrument" per se', such treaties have become increasingly relevant to the interpretation of law of the sea, just as the law of the sea may also exercise interpretive influence upon human rights instruments in particular contexts.[9] As observed throughout this volume, these interactions with other pertinent elements of international law pose intriguing questions for the future development of the law of the sea. To this end, this chapter considers the interaction between international maritime regulation and human rights law, with specific reference to the purported exercise of free speech and protest rights at sea.

Protest activities provide a vivid and compelling context through which to reflect upon the role of particular human rights entitlements within the wider fabric of the law of the sea. Maritime activism has a long history, but in recent years it has expanded substantially in scale, technical proficiency, bodily risk and scope for conflict between the various protagonists. Such actions have proved to be a particularly attractive tactic for a variety of activists, generating sustained

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global publicity as well as essential moral and material support for particular campaigns, often waged against the (unsustainable) use of marine resources and the taking of totemic species, such as marine mammals.[10] Whether terrestrially or nautically based, the exercise of the rights to freedom of expression and assembly have long been key features of a robust and tolerant democracy and have been repeatedly affirmed by a variety of national, regional and international courts and tribunals.[11] Increasingly, however, the conduct of protest at sea has diverged from merely vocalizing disapproval to more frequently engaging in direct action to impede the passage of particular vessels, disrupt economic activities and damage maritime property, provoking considerable anxiety among coastal and flag States. Maritime protests thus raise intriguing legal questions concerning the limits of free navigation and the ability of States to protect vessels and structures at sea. In the process, the boundary between the primary responsibility of the law of the sea in demarcating appropriate naval conduct on the one hand, and the role of human rights norms in articulating the precise boundaries of free speech on the other, has become increasingly relevant.

This chapter explores free speech and protest at sea, an issue that has traditionally been regulated as a distinct aspect of the law of international navigation but which has become increasingly recognized as engaging a broader suite of legal obligations and entitlements than the specific operational conduct of vessels and seafarers.[12] Accordingly, this chapter first outlines the applicable rules governing protest activity at sea as applied under the framework of the LOSC. Thereafter, this chapter considers the adjudication of maritime protest within international human rights forums. Finally, this chapter reflects more broadly on the implications of the increasing comingling of the law of the sea and human rights, and the guidance that may be drawn from the context of protest actions in framing this inter-relationship between these two broad fields.

Maritime protest and the law of the sea

Manifestations of maritime protest vary significantly, from the chaotic eccentricity of rival Brexiteer and Remainer flotillas campaigning on the River Thames in respect of the United Kingdom's withdrawal from the European Union[13] to the alarming risk to life and property engendered by deliberate attempts to provoke collisions between vessels by rather more militant campaigners.[14] Protest activities are truly global in scope and frequently occur within and beyond the boundaries of national jurisdiction. While at-sea protests are often peaceful in nature, involving memorable publicity stunts, awareness raising or collecting evidence of the alleged illegality of other ocean users,[15] a number of campaign groups have long been committed to direct action as a means of forcing the cessation of a particular course of conduct with little regard for navigational safety in the process.[16] As noted in the third section of this chapter, while a measure of disruption caused by legitimate protest activities is widely considered to be an acceptable manifestation of dissent within a democratic society,

the legal protection accorded to direct action remains rather more questionable. This dichotomy of tolerance is also reflected within the letter and practice of the LOSC, with considerable leeway granted to non-obstructive navigational activities, while providing flag and coastal States with clear authority to address more aggressive forms of protest that have the scope to endanger the safety of life and property at sea.

Protest entitlements and the LOSC

The degree of control that an aggrieved State may exercise over protestors depends upon the geographical and jurisdictional locus of these activities. Within internal waters, which lie on the landward side of the national baseline of a coastal State[17] and typically include ports, canals, lakes and navigable rivers, the right to protest turns on the discretion of the national authorities. Internal waters are subject to the exclusive sovereignty of the coastal State in question.[18] Constraints on protest activities may therefore be as restrictive as national law and the wider application of overarching constitutional or human rights provisions will permit. Protest actions in these waters will typically be against the entry or exit of a vessel bearing cargo that is considered objectionable, or support vessels for contentious ocean uses, such as the expansion of hydrocarbon industries. A coastal State can therefore bar foreign protestors from these waters, since access to ports is a privilege conferred at the discretion of the national authorities, rather than an absolute right,[19] and may take action against its own citizens for disruptive activities that occur within these waters.

This has led to some intriguing applications of domestic Admiralty law in particular jurisdictions, as protestors have found new and inventive means of disrupting port traffic. One such emerging issue has been the deployment of skilled climbers to scale the extensive bridge infrastructures often located near major ports, abseiling into the path of vessels to hinder their navigational progress. This has proven to be a particularly effective tactic in impeding tankers and support vessels, resulting in heavy costs for those charged with managing oil and gas projects.[20] This has been especially true in Canada, for instance, where protestors have successfully disrupted the navigation of tankers servicing a series of controversial hydrocarbon projects.[21] This has led in that jurisdiction to a more creative use of section 118 of the Canada Shipping Act 2001 against bridge-based protestors, which constrains activities that would serve to 'jeopardize the safety of a vessel', a provision that has been considered by the judiciary as one that should not be narrowly interpreted[22] and, it appears, not one that should necessarily be confined to the sea. Despite these developments, and while the LOSC does not support an overarching entitlement to pursue disruptive activism in internal waters, many States are broadly tolerant of protest activities and have made accommodations to ensure that such events occur with minimal risk to life and property. This has frequently involved, for instance, the establishment

of specific safety zones for campaigners,[23] particularly in relation to stretches of water that are known to be hazardous but for which protestors may lack local nautical knowledge.[24]

A clear basis to closely regulate protest activity also applies to the territorial sea, an area also under the sovereignty of the coastal State, albeit within which vessels of all nationalities enjoy the right of innocent passage.[25] Nevertheless, in exercising these entitlements, the passage of a vessel must be 'continuous and expeditious' unless halting to undertake acts 'incidental to navigation',[26] a qualification that is unlikely to legitimately include diversions to engage in protest actions. Even if a protest vessel is engaged in 'passage', such navigation may not be 'innocent' in the sense that it is 'not prejudicial to the peace, good order or security of the coastal State'.[27] Article 19(2) outlines a series of activities that are non-innocent in nature, including a threat of force,[28] which may be fairly construed from aggressive navigation, or 'any act of propaganda aimed at affecting the defence or security of the coastal State',[29] a criterion for which the LOSC does not necessarily envisage a narrow interpretation and is therefore considered to apply in principle to viewpoints espoused by a variety of actors that may be unconnected to any official State view.[30] Furthermore, the sweep-up clause provided under Article 19(2)(l), which allows the coastal State to consider 'any other activity not having a direct bearing on passage' to be non-innocent, establishes a clear jurisdictional basis to proceed against aggressive campaigning in these waters.

If a coastal State does tolerate protest activities within its territorial sea, it may adopt laws and regulations consistent with general international law and the LOSC to regulate innocent passage to maintain, *inter alia*, the 'safety of navigation and the regulation of maritime traffic'.[31] As with internal waters, this could include the designation of specific locations within which protest actions are permitted to occur, for which a failure to comply could be viewed as non-innocent passage. In extreme cases, where disorder associated with protest actions is sufficient to imperil the security of the coastal State, a temporary closure of territorial sea may be appropriate,[32] although as noted later such instances are exceptionally rare and may be unlikely to be endorsed as a proportionate response by an international court or tribunal.

Beyond the territorial sea, protest activities have posed intriguing questions of the regimes of the exclusive economic zone (EEZ) and high seas. Under Article 87(1) of the LOSC, freedom of navigation on the high seas has been established as a fundamental principle of the law of the sea. The exercise of these freedoms is tempered by the obligation to do so in a manner that pays 'due regard' to the rights of other States and to activities taking place within areas under the jurisdiction of the International Seabed Authority.[33] The notion of 'due regard' remains somewhat opaque, although it is self-evident that protest actions that obstruct the passage of another vessel, cause collisions or provoke other physical altercations between ships are unlikely to fall within this formulation. Moreover, under Article 88, the high seas 'shall be reserved for peaceful purposes', which is further indicative that non-peaceful

direct action operations do not fall within the acceptable exercise of freedom of navigation envisaged in these waters. In a similar vein, the privileges associated with freedom of navigation also apply within the EEZ, qualified also by the requirement of 'due regard' associated with the high seas, as well as 'any other internationally lawful uses of the sea related to these freedoms',[34] both of which are requirements with relevance to protest activities that move beyond mere annoyance of their target and become more disruptive and destructive in character. Similarly, foreign vessels operating within the EEZ must also comply with rules and regulations adopted by the coastal State in these waters,[35] which may include restrictions on protest activities in the vicinity of particular vessels or installations.

Further indication as to the acceptable standards of navigation in the conduct of protest activities beyond the territorial sea has been forthcoming from the International Maritime Organization (IMO).[36] This position has emerged in response to increasing concerns over the escalating violence associated with anti-whaling activism in the Southern Ocean.[37] In May 2010, the IMO adopted a Resolution calling upon protest vessels to refrain from actions that would violate international navigational standards and for governments to establish a clear jurisdictional basis to proceed against vessels that fail to heed this appeal. Resolution MSC.303(87) formally affirmed 'the rights and obligations relating to legitimate and peaceful forms of demonstration, protest or confrontation' while simultaneously upholding the importance of vessel safety and condemning 'any actions that intentionally imperil human life, the marine environment, or property during demonstrations, protests or confrontations on the high seas'.[38]

This has been echoed by regular quadripartite statements by the governments of Australia, New Zealand, the United States and the Netherlands in the context of disorderly anti-whaling protests, reinforcing their broad support for the principle of free speech at sea, while condemning actions that have led to dangerous incidents during protest activities and calling for respect for navigational safety.[39] For its part, albeit less influential in the context of shipping safety but carrying the authority of the pre-eminent regime responsible for the management of whales, the International Whaling Commission (IWC) has also adopted a series of Resolutions calling for respect for international navigational standards in the conduct of protest activities. Most recently, in 2011, the IWC and its parties declared that they 'do not condone and in fact condemn any actions that are a risk to human life and property in relation to the activities of vessels at sea' and, recognizing the primacy of the IMO regarding navigational safety, endorsed Resolution MSC.303(87) and called on governments to cooperate 'to prevent and suppress actions that risk human life and property at sea'.[40] The response of leading international institutions, endorsed by major maritime States, has therefore been to endorse free speech and protest activities in principle, unless and until such actions present a navigational hazard to other legitimate activities conducted in these waters.

Protestors and piracy

If there is little multilateral tolerance of protest activities that become hazardous to life and property at sea, the question arises as to how an aggrieved party may respond to direct action campaigns whose central purpose is disruptive or destructive to the legitimate interests of others. On the high seas, vessels are subject to the exclusive jurisdiction of the flag State.[41] The exclusive nature of flag State jurisdiction means that the victim State is heavily restricted in its ability to take enforcement action beyond reporting the incident to the flag State and expressing its displeasure through diplomatic channels. As far as activities on the high seas are concerned, the primary foundation upon which enforcement action may be justifiably taken against protestors is where the activities in question become so disruptive as to meet the standards for international piracy. In this respect, recent litigation suggests that this outcome is not necessarily as remote as may have been assumed at the time of the conclusion of the LOSC.

Findings of piracy against the activities of maritime activists have been made on two separate occasions to date. The law of piracy has been codified within the LOSC under Article 101 and addresses 'illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft' conducted against a ship or aircraft in areas beyond national jurisdiction or, by virtue of Article 58(2), within the EEZ. Traditionally, although it has been arguably more desirable for piracy norms to be applied against more stereotypical instances of criminality at sea,[42] in the small number of piracy cases involving protest activities, national courts have considered the notion of 'private ends' in a broad and far-reaching manner to encapsulate both the activities and the underlying motivation of environmental activists that attempt to board vessels or impede their lawful navigation. Activists have sought to rely on the inherent global altruism of their respective causes as rendering their actions outside the realms of 'private ends', or more nebulous legal justifications for vigilantism.[43] Nevertheless, there has been a tendency in such cases for this requirement to be interpreted in narrow terms, in line with Guilfoyle's assertion that '[t]he test of piracy lies not in the pirate's subjective sanction for his or her acts . . . all acts of violence that lack state sanction are acts undertaken "for private ends"'.[44]

Indeed, this approach was followed in 1986 in the first instance in which a maritime protest was considered to have descended into piracy, in the *Castle John* case.[45] Here, a number of Greenpeace activists, using vessels flagged to the Netherlands, were convicted of having attacked two vessels operated by a Belgian chemicals corporation that had been nationally licensed to discharge noxious waste into the North Sea. The activists impeded the progress of the vessels, temporarily boarded the ships, painted over some of their windows and attached themselves to the discharge pipes to ultimately prevent the dumping of the offending substances. Having been apprehended by the Belgian authorities and detained in Antwerp, the national courts initially declined jurisdiction to hear those aspects of the case pertaining to the high seas, viewing this as a

matter exclusively for the flag State. This decision was over-ruled by the Court of Appeal for Antwerp, which declared that the activities of the protestors could properly be considered an act of piracy and was thus subject to universal jurisdiction.[46] This ruling was subsequently upheld in a concise judgment of the national Cour de Cassation, which ruled that the vessel had been boarded by force, with the underlying motivation for doing so based on private ends, 'in particular the pursuit by the applicant of the objects set out in its articles of association'.[47]

The decision in the *Castle John* was light on substantive detail and has been considered by commentators to be a retrograde step in the post-LOSC application of piracy at sea.[48] Indeed, criticism has been raised over whether the prospect of 'violence' raised by the campaigners met the threshold of harm that was envisaged by the drafters of the Convention to apply to the actions of hardened and heavily armed maritime criminals,[49] as well as the broader implications for civil activism if acting in the pursuit of the stated aims of an organization fell sufficiently into the nexus of 'private ends' in order to be considered piratical.[50] Indeed, strong conceptual doubts remain as to the extent to which political actors such as environmental campaigners were ever intended to be caught by the definition of piracy.[51] While there are clear public policy grounds for seeking to curtail reckless and dangerous navigation at sea,[52] it remains a point of concern as to whether the law of piracy is the most appropriate mechanism through which to achieve this objective.

Nevertheless, the broad position adopted by the Belgian Cour de Cassation has been further endorsed in the United States[53] in domestic litigation brought by the Institute of Cetacean Research (ICR), a body that has undertaken the primary research activities for Japan's contentious scientific whaling program, against the Sea Shepherd Conservation Society, an equally controversial US-based organization with a long-standing reputation for environmental vigilantism.[54] The hunting of charismatic marine mammals has provoked extensive campaigning on the part of a variety of activists, a number of which have become directly interventionist in nature, where protestors have placed themselves between pods of whales and the harpoons of whaling vessels in order to thwart these endeavors. Japanese whaling has proved to be particularly contentious, having largely occurred within Antarctica, including a portion of the Southern Ocean claimed by Australia as part of its Antarctic claim.[55] The saga would eventually lead to extensive litigation before the International Court of Justice (ICJ),[56] which ruled that Japan's whaling program failed to meet the criteria established under the International Convention for the Regulation of Whaling.[57] Japan subsequently withdrew from the IWC in 2019 in order to pursue these activities within the confines of its own EEZ, for which it has enacted stern domestic legislation to discourage the attentions of environmental activists.[58] Prior to that point, in a campaign known colloquially as the 'whale wars' after the long-running reality television series that followed these developments, Sea Shepherd undertook extensive activities to locate and harass the Japanese whaling fleet operating in the remote waters of the Southern

Ocean. In the process, as noted earlier, serious concerns were raised in both the IMO and IWC as to the safety implications of the conduct of both sides, which had resulted in Sea Shepherd attempting to foul propellor lines with ropes and pelting the decks of whaling vessels with butyric acid, alongside a series of collisions between rival vessels.

Proceeding under the Alien Torts Act,[59] a collective of economic interests behind the Japanese scientific whaling program sought an injunction against Sea Shepherd on the basis, *inter alia*, of the alleged piracy of the activists.[60] The initial judgment by the US District Court found in favor of the defendants, albeit based upon on a flawed foundation. In the first instance, the District Court rejected a claim of piracy on the finding that Sea Shepherd was not acting for private ends, declaring that '[a]bsent an international consensus that preventing the slaughter of marine life is a "private end" the court cannot say that there is a specific, obligatory, and universal international norm against violence in the pursuit of the protection of marine life'.[61] This troubling conclusion appeared to overlook the extensive international law of navigation, as well as the global consensus expressed through the IMO concerning interventionist activities at sea. Moreover, the court rejected the contention that the defendant's objectives could be considered 'private' by virtue of the revenue generated through their television fees and additional donations received by viewers supportive of their efforts, which were considered to be 'merely a by-product' of the campaign.[62] This conclusion survived the rather odd assertion by the defendants that 'donors will cease their financial support if the court enjoins their tactics in the Southern Ocean',[63] a claim that the judge rejected but seemingly opted not to view as an admission that a degree of financial gain was inherent within their activities. Moreover, Sea Shepherd was considered not to have committed any act of violence proscribed by international law, with the launching of projectiles downplayed as 'acts akin to maritime mischief'.[64]

Rather unsurprisingly, these findings were challenged by the ICR and the initial judgment was overturned by the US Court of Appeals for the Ninth Circuit,[65] which considered that the actions of Sea Shepherd were sufficient to meet the threshold for a finding of piracy. This prompted the Court's memorable and oft-cited declaration that:

> You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.[66]

Overturning the previous judgment, the Court ruled that the concept of 'private ends' encompassed 'those pursued on personal, moral or philosophical grounds, such as Sea Shepherd's professed environmental goals. That the perpetrators believe themselves to be serving the public good does not render their ends public'.[67] Furthermore, the notion that Sea Shepherd had engaged in a form

of nautical misdemeanor as opposed to 'violence' was also rejected, with the defendants considered to have perpetrated 'clear instances of violent acts for private ends, the very embodiment of piracy'.[68] An injunction was granted in favor of the applicants, estopping the activists from navigating within 500 yards of the Japanese whaling fleet. This ultimately proved to have had little deterrent value in practice, with Sea Shepherd merely redirecting the Southern Ocean campaign through its Australian wing and continuing to pursue Japan's whaling vessels until the ICR ultimately discontinued its Antarctic research program of its own volition. Yet in neither instalment of the litigation were free speech arguments meaningfully considered. Indeed, as noted at first instance, Sea Shepherd declined to raise any First Amendment claims in support of its actions, while the appellate court determined the case exclusively upon the formulation of piracy.

Maritime protest and nautical blockade

Piracy and reckless navigation are not the only maritime issues to have been engaged on the high seas in recent years in the context of protest activities. In 2010, the *Mavi Marmara* incident raised further legal questions concerning the oversight of maritime activism. In this instance, an international incident was triggered between Turkey and Israel when a convey of aid vessels sought to circumvent the long-standing Israeli blockade of the Gaza Strip. Ignoring clear prior warnings not to approach the blockade, the vessels were aggressively intercepted on the high seas, which resulted in the deaths of ten of the activists and a number of serious injuries sustained on both sides.[69] Despite evident misgivings over the proportionality of the Israeli response,[70] the activists were essentially considered to have suffered the consequences of a security risk that they had freely chosen to take.

As with the domestic case law on international piracy, the subsequent Inquiry into the incident did not entertain protest activism as a legitimate exception to the law of blockade, declaring that '[t]here is no right within those rules to breach a lawful blockade as a right of protest. Breaching a blockade is therefore a serious step involving the risk of death or injury'.[71] The Panel observed that '[p]eople may, of course, freely express their views by *peaceful* protest',[72] but clearly indicated that more interventionist behavior was 'a dangerous and reckless act . . . exposing a large number of individuals to the risk that force will be used to stop the blockade and people will be hurt'.[73] Beyond this, the Inquiry offered no further analysis of the extent of protest rights at sea and their compatibility with the LOSC, aside from reinforcing the need for governments to exercise vigilance to ensure that their nationals were 'aware of the risks of engaging in such a hazardous activity, and to actively discourage them from attempting it'.[74]

Protest actions and economic entitlements

A final issue that has attained considerable prominence with regard to protest rights at sea pertains to the extent to which a coastal State may act to secure the protection of economic assets within the national EEZ. As noted

earlier, when navigating in the EEZ a protest vessel is obliged to exercise due regard for other ocean users, while also complying with rules and regulations adopted by the coastal State in respect of considerations that fall under its sovereign rights and jurisdiction. This has raised questions over the extent to which a coastal State may take enforcement measures to protect offshore installations and the vessels servicing these platforms from the attentions of nautical protestors. A degree of controversy has emerged as a result of the practice of designating safety zones around vessels engaged in direct or supporting activities concerning hydrocarbon exploration and exploitation, as established prominently in the United States, Australia and New Zealand. In New Zealand, for instance, following judicial confirmation by the New Zealand Supreme Court that the ambit of national criminal law extended to offences committed in the course of protest actions occurring on the high seas,[75] the Crown Minerals Act 1981 was amended in 2013 to address violations of safety zones and interference with vessels associated with offshore activities.[76] These amendments were inspired by similar provisions of Australian law, which provide for a specific offence of 'interfering with offshore petroleum installations or operations' and carries a maximum sanction of ten years' imprisonment.[77] The New Zealand position established a new offence of 'interfering with structure or operation in the offshore area',[78] which is seemingly one of strict liability,[79] although despite the best efforts of celebrity campaigners, appears yet to have been meaningfully invoked.[80] Unlike the Australian legislation, however, New Zealand has prescribed powers to establish 'specified non-interference zones' of 500 m within offshore waters that may be designated around installations and individual vessels associated with a permitted prospecting, mining or exploration activity.[81] This position goes further than the initial position of the LOSC itself, which exceeds the position prescribed by Article 60(4), which only envisages the designation of safety zones around 'artificial islands, installations and structures'.[82] It has nevertheless been strenuously argued that the position concerning the legitimate protection of economic interests in the EEZ allows for the development of such measures, provided that they are exercised in a proportionate manner and provide for minimal interference with the legitimate activities of other ocean users.[83]

Of greatest interpretive interest to these provisions is the *Arctic Sunrise* arbitration, which is to date the most significant instance of an international dispute triggered by the activities of maritime protestors within the EEZ. The *Arctic Sunrise* case concerns the boarding of the *Prirazlomnaya* oil platform, owned and operated by the Russian energy giant Gazprom, and representing a key component of its hydrocarbon activities within the Arctic. Oil and gas exploration within the Arctic region remains a highly contentious issue and has provoked instances of disruptive protest within Norway, the United States and Russia. In 2010, Greenpeace launched its 'Save the Arctic' campaign, which involved a mixture of awareness raising, political lobbying and occasional – but highly publicized – instances of civil disobedience, blockading of vessels and interference with oil platforms. In August 2012, a group of activists boarded

the *Prirazlomnaya* rig and one of its primary support vessels in protest of the expiry of the oil spill response plan pertaining to Russia's Arctic hydrocarbon program. Perhaps because of this – the lack of an appropriate pollution control program technically rendering Gazprom's activities temporarily illegal under Russian law at the material time – the activists received light misdemeanor penalties from the national authorities. In September 2013, emboldened by the success of the previous operation, a team of activists sought to board the platform again. This time the Russian response was far sterner, resulting in the arrest of all thirty persons involved in either a direct or an ancillary capacity and the arrest of the *Arctic Sunrise*, the veteran protest vessel operated by Greenpeace in many of its nautical protest campaigns. The activists were initially threatened with charges of piracy, although these were swiftly downgraded to the more nebulous offence of 'hooliganism' commonly applied against dissent in Russia, and duly incarcerated in Murmansk.

The arrest of the 'Arctic 30' and the vessel provoked widespread diplomatic disapproval, culminating in an action for the prompt release of the *Arctic Sunrise* being initiated before the ITLOS by the Netherlands as its flag State.[84] The prompt release proceedings were complicated by the refusal of the Russian Federation to participate, claiming erroneously that its Declaration upon ratifying the LOSC had excluded 'law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction'. This assertion that was rejected briefly but emphatically by the Tribunal[85] and equally emphatically but in a rather more detailed fashion by the subsequent Arbitral Panel.[86] With jurisdiction clearly recognized by the Panel, a decision on the Merits of the dispute was issued in August 2015, which has further clarified a number of key elements concerning the position of protestors at sea.[87]

In line with the prior pronouncements of the IMO regarding protest vessels, the Panel framed its view of the actions of the *Arctic Sunrise* in line with the exercise of freedom of navigation. In this respect, the Panel affirmed:

> Protest at sea is an internationally lawful use of the sea related to the freedom of navigation. The right to protest at sea is necessarily exercised in conjunction with the freedom of navigation. The right to protest derives from the freedom of expression and the freedom of assembly, both of which are recognised in several international human rights instruments.[88]

Nevertheless, the Panel further considered that the exercise of protest rights 'is not without its limitations, and when the protest occurs at sea its limitations are defined, *inter alia*, by the law of the sea'.[89] To this end, the requirement under Article 88 that the high seas is reserved for peaceful purposes alongside the obligation of due diligence owed to others while operating in the EEZ under Article 58(3) were factors legitimately qualifying the pursuit of protest activities conducted under the exercise of the right to freedom of navigation. Accordingly, the Award of the Arbitral Panel reinforces the position of the IMO that when a protest vessel oversteps the boundaries of safe and acceptable

navigational conduct, it has moved beyond the acceptable parameters of the exercise of entitlements under the LOSC.

Ultimately, the Panel was not required to substantively consider the role of human rights at sea, since by any objective standard the acceptable boundaries of navigational behavior had been clearly breached by the activists in this instance. As a result, the intriguing question of how the interpretation of the LOSC might be further influenced by pertinent human rights obligations was not substantively engaged beyond a recognition of the generalities of international protest law. This was not due to any lack of effort on the part of the activists subject to the dispute, with Greenpeace having attempted to submit extensive *amicus curiae* briefs before both the ITLOS and the subsequent Arbitral Panel, for which the exercise of free speech rights was an essential component of these purported interventions. In both instances these endeavors were firmly rebuffed, albeit with little reasoning offered in response.[90] While there appeared to be a discretion to consider the *amicus curiae* intervention under the Rules of Procedure of the Tribunal, the Panel remained impervious to external intervention,[91] and considerations of free speech ultimately proved to be largely peripheral to its findings.

The *Arctic Sunrise* dispute nevertheless represents arguably the most prominent instance in which human rights arguments have formed a significant element of the applicant's approach, with the direct invocation of the International Covenant on Civil and Political Rights 1966 (ICCPR)[92] considered to be 'revolutionary'.[93] Under Article 293(1) of the LOSC, any court or tribunal claiming jurisdiction under the dispute resolution functions of the Convention 'shall apply this Convention and other rules of international law not incompatible with this Convention'. This has provoked considerable reflection on the extent to which free speech norms could be applied to international adjudication of the LOSC. Thus far, this has been framed in a narrow manner, and it has been argued that such a move is appropriate only where it is necessary to the interpretation and application of the LOSC itself.[94] Indeed, a narrow approach to jurisdiction was adopted by the ITLOS in its consideration of provisional measures, which was noted critically by Judges Wolfrum and Kelly in their Separate Opinion, in which they observed that '[i]n the exclusive economic zone Greenpeace could invoke, amongst others, the freedom of expression as set out in the International Covenant on Civil and Political Rights'.[95]

Nevertheless, the role of Article 293(1) has been considered to be a gap-filling mechanism, rather than an avenue through which to explicitly engage in the systemic integration of treaties.[96] Ultimately, while human rights arguments were raised prominently by the Netherlands in the *Arctic Sunrise* dispute, the Arbitral Panel stated:

> Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention.[97]

It also clearly observed that its function was not to determine whether a breach of alternative treaties had occurred[98] or that it had jurisdiction to directly apply particular provisions from external regimes.[99] Existentially, the role of human rights norms in the interpretation of Convention will remain an issue of great importance to Article 293. However, to date, protest-related claims have involved such evident breaches of the boundaries of acceptable navigation that resort to 'other rules of international law' in interpreting the LOSC in this context has proved unnecessary and the judicial organs of the Tribunal have not needed to venture beyond the central tenets of the law of the sea in these deliberations.

Direct action, maritime protest and the boundaries of freedom of expression and assembly

Mirroring the position concerning the role of human rights norms in interpreting the freedom of navigation issues engaged in protest activities, the boundaries of freedom of expression and assembly have largely remained untroubled by incursions from the LOSC in their interpretation by human rights bodies. Nevertheless, as outlined earlier, a right to engage in protest at sea is rooted both in the principle of freedom of navigation and the rights to freedom of expression and assembly recognized in core major human rights instruments and the overwhelming majority of domestic legal systems. Entitlements to freedom of expression and assembly are prominently recognized within the Universal Declaration of Human Rights 1948,[100] the ICCPR,[101] the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR),[102] the American Convention on Human Rights 1969[103] and the African Charter on Human and Peoples' Rights 1982.[104] While the rights of freedom of expression and freedom of assembly are separate entitlements and give rise to markedly different jurisprudential considerations, they are commonly invoked together when the legality of State responses to protestors are challenged.[105] Despite their significance, neither the right to freedom of expression nor that of free assembly may be considered to be unqualified. Indeed, as with the tenets of navigational freedom, there is strong support for protest activities that are peaceful and non-obstructive in nature, whether they occur on land or at sea. While more disruptive forms of protest are not immediately incompatible with the exercise of these freedoms and a State is required to demonstrate tolerance towards demonstrations, the boundary of acceptable conduct nevertheless remains amorphous and has generated a rich and varied seam of caselaw from a variety of human rights adjudicators.

To date, much of the exploration of human rights considerations at sea has occurred under the auspices of the European Court of Human Rights. In this respect, the Court has pronounced clearly that the Convention applies in an extra-territorial manner to incorporate the actions of the contracting parties on the high seas.[106] The Court has also reviewed complaints concerning the processing of those arrested at sea,[107] as well as the application of procedural rights

pertinent to the process of posting a reasonable bond upon arrest for pollution offences[108] and, more esoterically, on the inviolably public nature of particular maritime spaces.[109]

The marine application of the entitlements to freedom of speech and protest under the ECHR has received limited attention by the Court – although there is extensive jurisprudence concerning their terrestrial application, which has provided significant guidance in assessing the legality of the actions of activists more broadly.[110] Freedom of speech is protected under Article 10 of the ECHR, which provides for derogations

> 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.

The exercise of freedom of assembly is subject to similar limitations imposed by the national authorities.[111] In this context, as with the exercise of freedom of navigation, attempts by a State to restrict the activities of protests that are peaceful and non-disruptive in nature will be unlikely to be considered compatible with the provisions of Articles 10 and 11.[112] Similarly, there is a general entitlement for protestors to seek to express dissent in the manner and location that is most impactful,[113] while the authorities cannot selectively or hypothetically cite safety risks as a means of curtailing individual protests.[114] Conversely, however, where there are pressing safety reasons for deterring protestors, the Court will generally consider this to fall within the margin of appreciation incumbent upon States to restrain the purported exercise of these rights.

Greater interpretive gymnastics are also required of protests that are less orderly and conflict with the legitimate exercise of rights by others. As the Court declared in the leading case of *Kudrevičius v. Lithuania*,[115] a certain level of disruption to ordinary life does not in and of itself justify State interference with these entitlements; the national authorities must accordingly demonstrate a certain degree of tolerance towards these activities. However, '[t]he appropriate "degree of tolerance" cannot be defined *in abstracto*: the Court must look at the particular circumstances of the case and particularly at the extent of the "disruption to ordinary life"'.[116] Little protection has been granted by the Court to protest activities that are disorderly and obstructive. The distinction is perhaps best illustrated by reference to the leading case on direct action protests before the Court, namely *Steel and Others v. UK*.[117] Here, five separate applicants appealed against various criminal convictions incurred during the course of direct action protest activities. The first applicant had disrupted a grouse-shooting event and had prevented a hunter from shooting a bird. The second applicant had broken into a building site and impeded digging equipment in protest at construction activities in an environmentally sensitive area.

The final three applicants had distributed anti-war literature to participants at an arms conference and had placarded the event. The Court found a violation of Article 10 in the latter application, given the lack of obstructive conduct, but endorsed the findings of the national courts in the other cases, ruling that 'physically impeding the lawful activities of others'[118] lay outside the protection accorded to freedom of expression under the Convention.

Thus far, the Court has considered the rights of protestors at sea on only two occasions. Neither has required great interpretive nuance since the actions of either the activists or the restricting authority patently exceeded the boundaries of Convention. With respect to disorderly protest, the Court has followed the broad approach established in *Steel* in what is to date the sole occasion upon which it has been called upon to review the protection accorded to direct action at sea. In *Geert Drieman and Others v. Norway*,[119] four Greenpeace activists had sought to impede whaling efforts within the Norwegian EEZ and were subsequently charged with a series of navigation and fisheries-related offences. During the 1994 whaling season the *Solo*, a Greenpeace-owned vessel flagged to the Netherlands, was involved in a series of minor altercations with the *Senet*, a Norwegian whaling vessel. A series of dinghies were launched from the *Solo*, one of which managed to navigate closely to the *Senet*, forcing the harpoon vessel to change course to avoid a collision and thereby preventing it from striking an individual minke whale. This action resulted in a confiscation order for one of the dinghies, while in a separate incident the *Solo* conducted a maneuver that forced the *Senet* to alter course during a hunt and obscured its visibility with water cannons. The Norwegian Supreme Court reduced the fines that had been levied against the applicants by the municipal authorities but upheld the confiscation order and rejected claims of a violation of Articles 10 and 11 of the ECHR.

An application to the European Court of Human Rights was rejected as manifestly ill-founded, with the measures adopted by Norway considered to have been supported by relevant and sufficient reasons and underpinned by a rationale for public maritime safety that was necessary in a democratic society.[120] Moreover, the Court reiterated that national policies to restrict obstructive protest 'must be allowed a wide margin of appreciation' and was accordingly

> not persuaded by the applicants' argument that the proscribed conduct should be assimilated to an incident of navigation and that the discretion enjoyed by the respondent State in restraining it was accordingly circumscribed by Article 97 of the Law of the Sea Convention.[121]

Indeed, the Court observed that the applicants were at all times 'able to express and demonstrate without restraint' their opposition to Norwegian whaling throughout the entirety of their campaign without having to resort to obstructive navigation, which thereby fatally undermined their claim to have sustained a violation of their rights under Article 10.[122]

At the other end of the scale, national authorities must be tolerant of a general right to protest at sea. In *Women on Waves and Others v. Portugal*,[123] a controversial Dutch NGO was banned from the entirety of the Portuguese territorial sea. The applicants had intended to operate an awareness campaign on family planning and sexual health issues aboard its vessel, mooring at a variety of Portuguese ports. However, fears had been raised over the group's history of prescribing medication to facilitate at-sea abortions at a time at which this remained heavily restricted under national law. Despite no meaningful evidence that the group was planning to engage in any activity contrary to innocent passage or national laws on termination, warships were deployed to ensure that the applicants were prevented from disembarking at any point within the territorial sea.

This was considered to be a violation of their Article 10 rights on the basis that the Portuguese authorities had other, less intrusive, means at their disposal to address the perceived problem posed by the activists including, if the allegations as to their intentions were correct, the possibility of seizing medication and equipment proscribed under national law.[124] Notably, the Court held that banning campaigners from the entirety of the territorial sea was manifestly excessive, given that this area is 'un espace public et ouvert de par sa nature même, contrairement aux locaux d'une administration ou d'un ministère' ('by its very nature, an open and public space, unlike the premises of an administration or a ministry').[125] Nevertheless, the Portuguese courts are not the only judicial authorities to have taken a narrow view of the acceptable use of ocean space, with the US courts having considered that 'the high seas are not a public forum' and campaigners have 'no audience at sea'.[126] This, however, appears to be a surprising pronouncement given the storied history of First Amendment jurisprudence and seem unlikely to be followed in subsequent cases in the light of the *Arctic Sunrise* case.

A prospective third instance for the European Court of Human Rights to consider aspects of protest rights at sea indeed stems from the *Arctic Sunrise* dispute itself, as a concurrent action brought under the Convention proceeds through the judicial process. At the time of writing, while arguments had been raised in the case of *Bryan and Others v. Russia*[127] in 2018, the Court had yet to rule on the complaint. The case was raised not on the more usual grounds of freedom of protest but on the basis of deprivation of liberty and the obstruction of the lawful activities of a journalist in observing a peaceful demonstration, with two members of the 'Arctic 30' having been freelance reporters. The case is likely to provide a new dimension to consideration of protest actions, notably the degree to which embedded journalists are able to exercise their 'public watchdog' functions protected under Article 10. Nevertheless, as Harrison observes, the separation of the law of the sea and human rights issues within the adjudication of the *Arctic Sunrise* dispute does raise a potential basis for double compensation if these issues are strictly bifurcated between different forums.[128]

Ultimately, the extensive case law of *inter alia* the European Court of Human Rights provides insights into the acceptable boundaries of the exercise of free

speech and protest rights, just as the LOSC and allied instruments articulate the parameters of safe navigation, with both regimes referencing the other in the application of these specific entitlements. As yet, however, the cross-fertilization of guiding principles remains nascent, as neither regime has required much recourse to the other in addressing the activities of protestors at sea. Nevertheless, intriguing developments are occurring within the realms of non-binding initiatives and instruments, with the ongoing elaboration of the Geneva Declaration on Human Rights at Sea, launched by the NGO Human Rights at Sea.[129] The Declaration remains a work in progress and seeks to map and articulate *inter alia* the primary examples of key human rights that are considered to be applicable at sea and the means by which they may be operationalized fully. The central tenets of the Declaration are a recognition that human rights apply at sea to the same degree that they do on land, that all persons at sea without any distinction are entitled to their human rights, that there are no maritime-specific rules that allow for derogation from human rights and that all human rights established under treaty and customary international law must be respected at sea.[130] While the exercise of protest rights cannot accurately be considered to fall within the pervasive 'maritime legal black holes'[131] experienced by particular constituents, this ongoing initiative is likely to represent a helpful further articulation of the acceptable boundaries of freedom of speech and assembly at sea.

Concluding remarks

The exercise of free speech and protest rights in the maritime arena provides a tantalizing glimpse at how the broad fields of the law of the sea and international human rights law are loosely, but tangibly, intertwined. Ultimately, however, such insights remain partial and fleeting in this particular setting. A series of high-profile protest actions has cast the previously self-contained law of maritime navigation in a broader contextual light, with the 'whale wars' and the saga of the 'Arctic 30' raising important questions of the extent of a discernible right to campaign at sea. In the process, both instances – alongside more localized protest campaigns within individual jurisdictions – have reinforced a general expectation that fundamental rights of all categories do not stop at the shoreline or gangplank. These international incidents have led to pronouncements by global regulatory bodies, as well as national courts and tribunals, that freedom of expression and protest have a latent presence within the more navigationally oriented provisions of the LOSC. Similarly, it is suggestive of a trend in international litigation towards a more prevalent use of human rights arguments within a maritime context, albeit one that is likely to continue to receive a cautious judicial reception within the dispute resolution mechanisms of the LOSC, both in the content of individual judgments and the broader willingness to entertain interventions predicated on more extraneous legal sources.

Nevertheless, the picture remains distinctly mixed. The right to protest is by no means unqualified, especially in the context of disruptive direct action protests. There has long been a clear legal intolerance for terrestrial protests

that endanger life and property, with such actions falling outside the otherwise extensive protections accorded to the freedom of speech and assembly. The very nature of protest activities at sea render safety considerations to be more readily engaged than on land, especially when conducted in the less predictable theatre of treacherous ocean conditions, or upon installations that already carry an alarming reputation for a high risk of injury when used in their intended industrial manner. Thus far, international and domestic courts have been largely unanimous in their findings that protest activities are to be staunchly discouraged in such locations and protestors are likely to find their claims defeated on grounds of public policy to preserve life and limb, rather than concerns over the justness of their individual cause.

Accordingly, while the position of protestors at sea has raised valuable interpretive questions concerning individual provisions of the LOSC, it has proved to be less forthcoming in mapping future interactions between the law of the sea and human rights law more broadly. Where such questions have been raised in a specifically maritime context, such as in the *Arctic Sunrise* dispute, the technical framework of the law of the sea has been sufficient to provide clear answers, with little need for interpretive recourse to other compatible rules of international law as is permitted under the 1982 Convention. Indeed, the law of protest at sea continues to be essentially framed both by international regulatory bodies and the international judiciary as a navigational question, rather than a specific human rights concern. Similarly, questions of the law of the sea have had little traction in those human rights forums that have considered nautical protest in a small handful of cases – in each instance, the conduct of either the protestors or the government authorities has been so evidently egregious that little existential exploration of the inter-relationship between the two fields of law has been deemed necessary, or helpful. Ultimately, other aspects of maritime conduct may provide more fertile ground by which to explore the extent to which the law of the sea has become steadily infused with the values of human rights law. In the meantime, protest will remain a regular occurrence in ocean space, and one that will continue to test the boundaries of the acceptable exercise of navigational entitlements.

Notes

1 Adopted 10 December 1982, entered into force 16 November 1994, 1883 UNTS 396.
2 I Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) 27 *International Journal of Marine and Coastal Law* 867, 868–871. Arguably the most explicit recognition of human rights standards within the LOSC falls under Article 99 in its injunction against slavery.
3 *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)* (Judgment) [1999] ITLOS Rep 44, [106]; see also *M/V 'Norstar' (Panama v. Italy)* (Judgment) [2016] ITLOS Rep 230.
4 See, especially, I Papanicolopulu, *International Law and the Protection of People at Sea* (Oxford University Press Oxford 2018). Conversely, human rights scholarship has also been criticized for largely neglecting maritime issues, see, for example, S Haines, 'Developing Human Rights at Sea' (2021) 35 *Ocean Yearbook* 18.

5 Notably Article 73 and 230.
6 Notably a duty to render assistance on the high seas (Article 98) and to protect human life in the Area (Article 146).
7 *Corfu Channel Case (United Kingdom v. Albania)* (Judgment) [1949] ITLOS Rep 4, [22]. On humanitarian considerations and the law of the sea more generally, see Chapter 8 of this volume by A Proelss.
8 See further, A Petrig and M Bo, 'The International Tribunal for the Law of the Sea and Human Rights' in M Scheinin (ed), *Human Rights Norms in 'Other' International Courts* (Cambridge University Press Cambridge 2019) 353, 402–405.
9 T Treves, 'Human Rights and the Law of the Sea' (2010) 28 *Berkeley Journal of International Law* 1, 3.
10 See further, R Caddell, 'Regulating the Whale Wars: Freedom of Protest, Navigational Safety and the Law of the Sea in the Polar Regions' (2014) 6 *Yearbook of Polar Law* 497.
11 On this issue generally, see D Mead, *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Oxford 2010) 57–117.
12 See further, AG Oude Elferink, 'The *Arctic Sunrise* Incident: A Multifaceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 *International Journal of Marine and Coastal Law* 244.
13 R Booth, 'Nigel Farage and Bob Geldof's Rival EU Referendum Flotillas Clash on the Thames' (2016) *The Guardian*, available at <www.theguardian.com/politics/2016/jun/15/nigel-farage-bob-geldof-rival-eu-referendum-thames-flotillas>.
14 J McCurry 'Sea Shepherd Boat Sinking after Being "Sliced in Half" by Japanese Whalers' (2010) *The Guardian*, available at <www.theguardian.com/environment/2010/jan/06/sea-shepherd-adygil-japan-whalers>.
15 This tactic has been termed 'bearing witness' by the global campaign group Greenpeace and forms an essential part of future legal actions and publicity campaigns: J Teulings, 'Peaceful Protests against Whaling on the High Seas – A Human-Rights Based Approach' in CR Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Leiden/Boston 2011) 221, 223–225.
16 See TN Phelps Bondaroff, 'A Typology of Direct Action at Sea' in J Castro Perreira and A Saramago, *Non-Human Nature in World Politics* (Springer Heidelberg 2020) 279 and G Plant, 'Civilian Protest Vessels and the Law of the Sea' (1983) 14 *Netherlands Yearbook of International Law* 133, 139–141.
17 Article 8(1) LOSC.
18 Article 2(1) LOSC.
19 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* (Judgment) [1986] ICJ Rep 14, [111].
20 See, for instance, the large fines levied through a contempt order on Greenpeace activists who attached themselves to St. Johns Bridge in Portland, Oregon, in 2015, reflecting the costs of impeding the progress of a support vessel for the oil and gas industry in Alaska: *Shell Inc v. Greenpeace Inc* (2016) (9th Circuit) Docket No. 15–35392.
21 See The Maritime Executive, Protests Disturb British Columbia Trade Flow (2020), available at <www.maritime-executive.com/article/protests-disrupt-british-columbia-trade-flow>.
22 *R v. Atlantic Towing Ltd*. (2011) NSPC 10 (CanLII), [29].
23 Notably the establishment of a 'Voluntary First Amendment Area' in April 2015 within the Puget Sound in response to a planned 'kayak flotilla' to be deployed to protest against Arctic hydrocarbon exploration activities: Safety Zones and Regulated Navigation Area; Shell Arctic Drilling/Exploration Vessels and Associated Voluntary First Amendment Area, Puget Sound, WA; reproduced at https://www.federalregister.gov/documents/2015/04/28/2015-09858/safety-zones-and-regulated-navigation-area-shell-arctic-drillingexploration-vessels-and-associated.
24 Caddell, n 10, 503.

25 Article 17 LOSC.
26 Article 18(2) LOSC.
27 Article 19(1) LOSC.
28 Article 19(2)(a) LOSC.
29 Article 19(2)(d) LOSC.
30 G Plant, 'International Law and Direct Action Protests at Sea: Twenty Years On' (2002) 33 *Netherlands Yearbook of International Law* 75, 91.
31 Article 21(1)(a) LOSC.
32 Article 25(3) LOSC.
33 Article 87(2) LOSC.
34 Article 58(1) LOSC. This position has been considered to generate a 'collision of rights, which may require accommodation': RE Fife, 'Obligations of "Due Regard" in the Exclusive Economic Zone: Their Context, Purpose and State Practice' (2019) 34 *International Journal of Marine and Coastal Law* 43, 45.
35 Article 58(3) LOSC.
36 The IMO expressly stated that the Resolution does not apply to 'territorial waters or ports, since there were other appropriate national instruments in place': NAV 55/21 [9.11].
37 See further, J Mossop, 'The Security Challenge Posed by Scientific Permit Whaling and its Opponents in the Southern Ocean' in AD Hemmings, DR Rothwell and KN Scott (eds), *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives* (Routledge Abingdon 2012) 306.
38 IMO, Maritime Safety Committee Resolution MSC.303(87), 17 May 2010, *Assuring Safety During Demonstrations, Protests or Confrontations on the High Seas*.
39 See R Caddell, 'Platforms, Protestors and Provisional Measures: The *Arctic Sunrise* Dispute and Environmental Activism at Sea' (2014) 45 *Netherlands Yearbook of International Law* 359, 361–362.
40 IWC, Resolution 2011–2, 14 July 2011, *Resolution on Safety at Sea* (reproduced at https://iwc.int/resolutions).
41 Article 94 LOSC.
42 See N Klein, *Maritime Security and the Law of the Sea* (Oxford University Press Oxford 2011) 141.
43 Sea Shepherd has cited the United Nations World Charter for Nature, adopted by the UN General Assembly in 1982, as providing blanket authority to use all available means to protect the environment, although such arguments have been given little legal credence: AM Caprari, 'Loveable Pirates? The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean' (2010) 42 *Connecticut Law Review* 1493, 1510; Klein, ibid.
44 D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press Cambridge 2009) 36–37.
45 *Castle John and Nederlandse Stitchting Sirius v. NV Mabeco and NV Parfin* 77 *International Legal Materials* 537.
46 Ibid., 540.
47 Ibid.
48 LVM Bento, 'The "Piratisation" of Environmental Activism' (2014) *Lloyds Commercial and Maritime Law Quarterly* 151, 153–156.
49 E David, 'Greenpeace: Des Pirates!' (1989) 22 *Revue Belge de Droit International* 295, 300.
50 SP Menefee, 'The Case of the *Castle John*, or Greenbeard the Pirate? Environmentalism, Piracy and the Development of International Law' (1993) 24 *California Western International Law Journal* 1, 15.
51 R Churchill, 'The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?' in P Koutrakos and A Skordas (eds) *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Oxford 2014) 9, 18.

52 See further, A Honniball, 'Private Political Activists and the International Law Definition of Piracy: Acting for "Private Ends"' (2015) 36 *Adelaide Law Review* 279.
53 On the development of the litigation in the United States, see further, D Doby, 'Whale Wars: How to End Violence on the High Seas' (2013) 44 *Journal of Maritime Law and Commerce* 145.
54 See further, G Nagtzaam and D Guilfoyle, 'Ramming Speed: The Sea Shepherd Conservation Society and the Law of Protest' (2018) 44 *Monash University Law Review* 360.
55 On these long-standing difficulties, see J Mossop, 'When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones' (2005) 36 *Victoria University of Wellington Law Review* 757.
56 *Whaling in the Antarctic (Australia v. Japan*; *New Zealand intervening)* (Judgment) [2014] ICJ Rep 226.
57 Adopted 2 December 1946, entered into force 10 November 1948, 161 UNTS 72; see further, R Caddell, 'Science Friction: Antarctic Research Whaling and the International Court of Justice' (2014) 26 *Journal of Environmental Law* 331.
58 This appears to fall short of expressly including environmental activism within the ambit of piracy law: see further, A Kanehara, 'Japanese Legal Regime Combating Piracy – The Act of Punishment of and Measures against Acts of Piracy' (2010) 53 *Japanese Yearbook of International Law* 469. Nevertheless, domestic politicians have not ruled this out as a potential course of action, although other commentators suggest that the legislation may not be fully compatible with the LOSC: M Hayashi, 'Japan's Anti-Piracy Law and UNCLOS' in HN Scheiber and J-H Paik (eds), *Regions, Institutions, and the Law of the Sea: Studies in Ocean Governance* (Brill Leiden/Boston 2013) 257, 265.
59 Reproduced at 28 U.S.C. § 1350.
60 *Institute of Cetacean Research et al. v. Sea Shepherd Conservation Society et al.* 860 F. Supp 2d 1216 (W.D. Wash 2012). The four bases for the injunction claimed by the applicant were freedom of navigation, freedom from piracy, freedom from terrorism and civil conspiracy.
61 Ibid., 22–23.
62 Ibid.
63 Ibid., 40.
64 Ibid., 25.
65 *Institute of Cetacean Research and Others v. Sea Shepherd Conservation Society and Watson* 720 F. 3d 572 (2012 US App).
66 Ibid., page 2 of the Order.
67 Ibid., page 5, endorsing Guilfoyle's view as to the status of acts undertaken outside the authority of a state as being inherently 'private' in nature.
68 Ibid., 6.
69 United Nations Secretary-General, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident ('Palmer Report')*, (United Nations New York 2011), [145].
70 See D Guilfoyle, 'The *Mavi Marmara* Incident and Blockade in Armed Conflict' (2010) 81 *British Yearbook of International Law* 171.
71 *Palmer Report*, n 69, 158.
72 Ibid., 92 (emphasis added).
73 Ibid.
74 Ibid., 159.
75 *New Zealand Police v. Elvis Heremia Teddy* [2015] NZSC 6, [13].
76 See further, J Mossop, 'Protests against Oil Exploration at Sea: Lessons from the *Arctic Sunrise* Arbitration' (2016) 31 *International Journal of Marine and Coastal Law* 60, 78–86.
77 Offshore Petroleum and Greenhouse Gas Storage Act 2006; section 603.
78 Crown Minerals Act 1981; section 101B as inserted by the Crown Minerals Amendment Act 2013.
79 Section 101B(3).

80 M Backhouse, 'Lucy Lawless Gets Fined for Protest' (2013) *The New Zealand Herald*, available at <www.nzherald.co.nz/nz/lucy-lawless-gets-fined-for-protest/4BZK35VAQ55SV2UK75DF4PSQLM/>.
81 Section 101B(6)–(8). These zones are applicable to the territorial sea, EEZ and continental shelf of New Zealand: section 101A.
82 Article 60(4) LOSC.
83 Mossop, n 76, 81–86.
84 *The 'Arctic Sunrise' Case (Kingdom of the Netherlands v. Russian Federation)* (Request for the Prescription of Provisional Measures under Article 290, para 5, of the United Nations Convention on the Law of the Sea) [2013] ITLOS.
85 Ibid., 45.
86 *The 'Arctic Sunrise' Case (Kingdom of the Netherlands v. Russian Federation)* (Award on Jurisdiction of 26 November) [2014], 48–78.
87 *The 'Arctic Sunrise' Case (Kingdom of the Netherlands v. Russian Federation)*, (Award on the Merits of 14 August 2015) [2015].
88 Ibid., 227.
89 Ibid., 228.
90 Procedural Order No. 3 (Greenpeace International's Request to File an Amicus Curiae Submission), stating that 'having deliberated, the Arbitral Tribunal finds no sufficient reason to grant Greenpeace International's application'.
91 See further, Y-C Chang, 'How Does the Amicus Curiae Submission Affect a Tribunal Decision?' (2017) 30 *Leiden Journal of International Law* 647, 655–657.
92 999 UNTS 171.
93 Petrig and Bo, n 8, 384.
94 D Guilfoyle and C Miles, 'Provisional Measures and the MV Arctic Sunrise' (2014) 108 *American Journal of International Law* 271, 285.
95 Joint Separate Opinion of Judge Wolfrum and Judge Kelly, [14].
96 Petrig and Bo, n 8, 398.
97 Award on the Merits, n 87, 192.
98 Ibid., 197.
99 Ibid., 198.
100 UNGA Res 217AIII; UN Doc A/810 at 71; Articles 19 (freedom of expression) and 20(1) (freedom of assembly).
101 Articles 19 (freedom of expression) and 21 (freedom of assembly).
102 213 UNTS 722; Articles 10 (freedom of expression) and 11 (freedom of assembly).
103 1144 UNTS 123; Articles 13 (freedom of expression) and 15 (freedom of assembly).
104 1520 UNTS 217; Articles 9 (freedom of expression) and 11 (freedom of assembly).
105 Teulings, n 15, 236.
106 ECHR, *Hirsi Jamaa et al. v. Italy*, No. 27765/09 [GC].
107 See, especially, ECHR, *Rigopoulous v. Spain*, No. 37388/97; ECHR, *Medvedyev v. France*, No. 3394/03 [GC]; ECHR, *Hasan v. France*, Nos. 46695/10 and 54588/1; ECHR, *Ali Samatar v. France*, Nos. 17110/10 and 17301/10.
108 ECHR, *Mangouras v. Spain*, No. 12050/04.
109 ECHR, *Depalle v. France*, No. 34044/02.
110 See further, Oude Elferink, n 12, 262–271.
111 Article 11(2) ECHR.
112 ECHR, *Ezelin v. France*, No. 11800/85, [53].
113 ECHR, *Süleyman Çelebi and Others v. Turkey*, No. 37273/10, [109].
114 See ECHR, *Lashmankin and others v. Russia*, No. 57818/09, [424] and ECHR, *United Civil Aviation Trade Union and Csorba v. Hungary*, No. 27585/13, [28].
115 ECHR, *Kudrevičius v. Lithuania*, No. 37553/05 [GC].
116 Ibid., 155
117 ECHR, *Steel and Others v. UK*, No. 24838/94.

118 Ibid., 160.
119 ECHR, *Geert Drieman and Others v. Norway*, No. 33678/96.
120 Ibid., 10.
121 Ibid.
122 Ibid.
123 ECHR, *Women on Waves and Others v. Portugal*, No. 31276/05.
124 Ibid., 41.
125 Ibid., 40.
126 *Shell Offshore Inc. v. Greenpeace Inc*. 709 F.3d 1281 (2013), at page 21 of the Order.
127 ECHR, *Bryan and Others v. Russia*, No. 22515/14.
128 J Harrison, 'The *Arctic Sunrise* Arbitration (Netherlands v. Russia)' (2016) 31 *International Journal of Marine and Coastal Law* 145, 158.
129 On the development of this initiative and a reproduction of its initial tenets, see Haines, n 4.
130 Ibid.
131 I Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 *European Journal of International Law* 347. On the need to ensure that such 'black holes' are filled, see the intriguing Individual Opinion of Hélène Tigroudja in the Human Rights Committee of the International Covenant on Civil and Political Rights, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning Communication No. 3042/2017* (Document CCPR/C/130/D/3042/2017, 27 January 2021).