International tribunals — Provisional measures — Jurisdiction — United Nations Convention on the Law of the Sea, 1982 ("UNCLOS") — International Tribunal for the Law of the Sea ("ITLOS") — Arbitral tribunal constituted under Annex VII of UNCLOS ("Annex VII tribunal") — Provisional measures requested pending constitution of Annex VII tribunal — Article 290(5) of UNCLOS — *Prima facie* jurisdiction — Whether dispute concerning interpretation or application of UNCLOS — Immunity of warships and auxiliary vessels — Immunity of crew-members — Military activities exception — Article 298(1)(b) of UNCLOS — Whether incident of 25 November 2018 involving military activities excluded from jurisdiction of Annex VII tribunal — Distinction between military and law-enforcement activities — Whether Parties using force in the context of incident of 25 November 2018 — Plausibility of rights invoked by Ukraine — Real and imminent risk of irreparable prejudice — Urgency — ITLOS having power to prescribe provisional measures different, in whole or in part, from those requested — Provisional measures for non-aggravation and non-extension of dispute — Binding character of provisional measures — Report on compliance with provisional measures prescribed

Sea — Straits — Kerch Strait — Passage through Kerch Strait obstructed — Confrontation between warships of Ukraine and Russian Federation

Case Concerning the Detention of Three Ukrainian Naval Vessels

(Ukraine *v.* Russian Federation)[1]

International Tribunal for the Law of the Sea

Order on Provisional Measures. 25 *May* 2019

(Paik, *President*; Attard, *Vice-President*; Jesus, Cot, Lucky, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Kelly, Kulyk, Gómez-Robledo, Heidar, Cabello, Chadha, Kittichaisaree, Kolodkin, Lijnzaad, *Judges*)

[1] Counsel for the Parties are listed in para. 19 of the Tribunal's Order.

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SUMMARY:[2] *The facts*:—On 25 November 2018, the authorities of the Russian Federation arrested and detained three vessels belonging to the Ukrainian Navy, the *Berdyansk*, the *Nikopol* and the *Yani Kapu* ("the three vessels"), as well as their twenty-four servicemen. The arrest took place in the vicinity of the Kerch Strait, which divided the Crimean Peninsula from the Taman Peninsula. The *Berdyansk* and the *Nikopol* were artillery boats, and the *Yani Kapu* was a naval tugboat. Ukraine and the Russian Federation did not dispute either the status of the three vessels as warships, or the status of the twenty-four servicemen as Ukrainian naval personnel.

According to Ukraine, the three vessels departed from the port of Odesa towards the Ukrainian port of Berdyansk, on the Sea of Azov. Upon reaching the vicinity of the Kerch Strait, the Russian Federation's coastguard halted the three vessels, which changed their course away from the Strait, while being pursued by the coastguard. During the pursuit, shots were fired at the *Berdyansk*, causing damage to the ship and injuring three servicemen. Following the pursuit, the coastguard arrested and detained the three vessels and their servicemen, leading them to the port of Kerch to which they arrived on 26 November 2018.

On 31 March 2019, Ukraine instituted arbitral proceedings against the Russian Federation under Annex VII of the United Nations Convention on the Law of the Sea, 1982 ("UNCLOS") in a dispute concerning the immunity of the three vessels and the twenty-four servicemen.[3] On 16 April 2019, pending the constitution of the Annex VII tribunal, Ukraine filed with the Tribunal a request for the prescription of provisional measures against the Russian Federation in accordance with Article 290(5) of UNCLOS.[4]

By note verbale sent to the Tribunal and dated 30 April 2019, the Russian Federation stated that the Annex VII tribunal would have no jurisdiction to hear the merits of the case brought by Ukraine, owing to the reservations made by the Russian Federation pursuant to Article 298 of UNCLOS. On that basis, the Russian Federation chose not to participate in the provisional measures proceedings before the Tribunal. On 7 May 2019, the Tribunal received the "Memorandum of the Russian Federation regarding its position on the circumstances of the case No 26" ("the Memorandum"), which set out in more detail the Russian Federation's position on the Annex VII tribunal's lack of jurisdiction.

Ukraine argued that the dispute submitted to the Annex VII tribunal concerned the alleged breach by the Russian Federation of Articles 32, 58 and 95 of UNCLOS. The dispute was thus one on the interpretation or application of UNCLOS over which the Annex VII tribunal would have jurisdiction. Ukraine stated that the Russian Federation itself had sought to

[2] Prepared by Dr M. Lando.

[3] For the Award of the Arbitration Tribunal on the preliminary objections of the Russian Federation, see *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* 204 ILR 599.

[4] For the text of Article 290(5) of UNCLOS, see para. 33 of the Order.

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justify its actions based on Article 30 of UNCLOS, as reported in a press release of the Border Service of the Federal Security Service.

The Russian Federation argued that the dispute concerned the Parties' military activities, which was excluded from the jurisdiction of the Annex VII tribunal by means of the Parties' declarations made under Article 298(1)(b) of the Convention.[5] The Russian Federation emphasized that, in the incident of 25 November 2018, both Parties had deployed military personnel and equipment. Ukraine replied that, as the dispute concerned law-enforcement activities, it fell within the Annex VII tribunal's jurisdiction, because it was not a dispute to which the Parties' declarations under Article 298(1)(b) applied. Ukraine stated that military activities and law-enforcement activities are mutually exclusive characterizations. According to Ukraine, the mere presence of military personnel and equipment could not determine the characterization of the dispute as one concerning military activities. Ukraine added that the pursuit of the three vessels by the Russian coastguard was a typical law-enforcement activity.

Ukraine contended that it had taken steps to resolve the dispute by negotiation or other peaceful means, as required by Article 283 of UNCLOS.[6] Ukraine stated that the diplomatic correspondence from the Russian Federation was ambiguous as to whether the latter would exchange views in accordance with UNCLOS. In any case, according to Ukraine the exchange of views of 23 April 2019 satisfied the requirement of Article 283 of UNCLOS. The Russian Federation contended that, on 16 April 2019, it had consented to hold consultations with Ukraine, but that Ukraine had not participated meaningfully in the exchange of views. The Russian Federation thus maintained that the requirement to exchange views under Article 283 was not met.

Concerning plausibility, Ukraine argued that, as the *Berdyansk* and the *Nikopol* were warships and the *Yani Kapu* was an auxiliary vessel, they were entitled to immunity under Articles 32 and 96 of UNCLOS and general international law. Ukraine added that, in detaining the three vessels and the twenty-four servicemen, the Russian Federation had breached UNCLOS and general international law.

Ukraine submitted that the continued detention of the three vessels and of the twenty-four servicemen intruded on its dignity and sovereignty as a State. As such, it presented a real and imminent risk of irreparable prejudice to the rights of Ukraine under UNCLOS. Ukraine also maintained that the inability to service the three vessels was a source of irreparable prejudice to its rights under UNCLOS, and that the detention of the twenty-four servicemen was an infringement of their individual rights. Ukraine also stated that this harm could not be made good by a subsequent award of damages, and that the humanitarian aspect of the case heightened the urgency of the situation.

[5] For the text of Article 298(1)(b) of UNCLOS, see para. 47 of the Order.
[6] For the relevant part of the text of Article 283 of UNCLOS, see para. 79 of the Order.

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According to the Russian Federation, there could be no urgency in the situation because Ukraine had waited more than four months before seeking interim relief from the Tribunal. The Russian Federation recalled that the European Court of Human Rights ("ECtHR") had already granted Ukraine interim measures in respect of the twenty-four servicemen, with which the Russian Federation claimed that it had complied.

Held:—

A. Operative Part

(1) (by nineteen votes to one, Judge Kolodkin dissenting) The Russian Federation had to release the three vessels and return them to the custody of Ukraine immediately.

(2) (by nineteen votes to one, Judge Kolodkin dissenting) The Russian Federation had to release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine immediately.

(3) (by nineteen votes to one, Judge Kolodkin dissenting) Both Parties had to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

(4) (by nineteen votes to one, Judge Kolodkin dissenting) The Parties had each to submit to the Tribunal the initial report regarding compliance with the Tribunal's order no later than 25 June 2019, and the President was empowered to request further reports and information as may be appropriate.

B. Reasoning

(1) The absence of a Party was not a bar to proceedings being held before the Tribunal, provided that both Parties were given an opportunity to be heard. The Tribunal had given the Russian Federation ample opportunity to present its observations by transmitting all case-related communications to it. The Russian Federation, in fact, had sent the Tribunal the Memorandum in which it explained its position in relation to the Annex VII tribunal's lack of jurisdiction. Ukraine could not be put at a disadvantage because of the Russian Federation's decision not to appear (paras. 27-9).

(2) (a) The Tribunal had to determine whether a dispute *prima facie* existed concerning the interpretation or application of UNCLOS. The fact that the Russian authorities had arrested and detained the three vessels and commenced prosecuting the twenty-four servicemen indicated that the Russian Federation and Ukraine had different positions on whether the incident of 25 November 2018 had involved breach of the Russian Federation's obligations under UNCLOS. On this basis, a dispute concerning the interpretation or application of UNCLOS *prima facie* existed at the time of the institution of proceedings before the Annex VII tribunal (paras. 42-5).

(b) The distinction between military activities and law-enforcement activities could not be determined only by reference to the kind of vessels involved or the characterization of the dispute by the Parties but had to be based on an

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objective evaluation of the facts. The Russian Federation had used force in the context of a law-enforcement operation rather than a military operation. It followed that Article 298(1)(b) of UNCLOS *prima facie* did not apply to the present dispute (paras. 64-77).

(c) The *notes verbales* of 15 March 2019 (sent by Ukraine)[7] and of 25 March 2019 (sent by the Russian Federation) demonstrated that the obligation to exchange views under Article 283 of UNCLOS had been exhausted. The Annex VII tribunal had *prima facie* jurisdiction to entertain the merits of the case filed by Ukraine (paras. 86-9).

(3) Concerning plausibility, Ukraine claimed rights to immunity of warships and naval auxiliary vessels and their servicemen under UNCLOS and customary international law. The *Berdyansk* and the *Nikopol* were warships, and the *Yani Kapu* was a ship operated for government non-commercial purposes. The twenty-four servicemen were Ukrainian military and security personnel. The rights claimed by Ukraine were plausible (paras. 96-9).

(4) Any action affecting the immunity of warships could cause serious harm to a State's dignity and sovereignty, and could undermine that State's national security. The Russian Federation's actions could cause irreparable prejudice to the right Ukraine claimed regarding the immunity of the three vessels and the twenty-four servicemen, should the Annex VII tribunal adjudge those rights to belong to Ukraine. The deprivation of freedom of the twenty-four servicemen also raised humanitarian considerations (paras. 110-12).

(5) The requirements for prescribing provisional measures were met in the circumstances (para. 114).

Declaration of Judge Kittichaisaree: (1) The *travaux préparatoires* of UNCLOS were not helpful in deciding whether the incident of 25 November 2018 took place in the context of military activities. In each case, the Tribunal had to determine objectively whether an activity was military in character on the basis of the nature and intent of the activity, taking into account all the circumstances. A question was whether the Ukrainian note verbale of 15 March 2019, in which Ukraine requested to proceed "expeditiously" to exchange views under Article 283 of UNCLOS, satisfied the requirements of Article 283. The drafting history of UNCLOS showed that the obligation to exchange views applied to all stages of the proceedings. At the provisional measures stage, Ukraine had to be given the benefit of the doubt in respect to whether the Article 283 requirement had been satisfied (paras. 4-15).

(2) The fact that a vessel was a warship entitled to immunity did not automatically entail that crew and passengers of that vessel were also entitled to immunity. The Tribunal did not explain how the twenty-four servicemen were entitled to immunity. However, the Tribunal had reason to reach that

[7] For the relevant part of the text of Ukraine's note verbale dated 15 March 2019 addressed to the Russian Federation, see para. 38.

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conclusion on the basis of Article 293 of UNCLOS and the principles stated in the International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction (paras. 19-25).

(3) The proceedings before the ECtHR were entirely different from the proceedings before the Tribunal, as they pertained to alleged violations of different rules of international law (para. 32).

Declaration of Judge Lijnzaad: The positions of the Parties showed there was a dispute concerning interpretation or application of UNCLOS. However, the issue was whether the dispute between Parties was truly a dispute concerning interpretation or application of UNCLOS, or whether the dispute concerned other rules of international law in relation to which the Annex VII tribunal would have no jurisdiction, such as the UN Charter and the Third Geneva Convention on Prisoners of War, 1949. The final decision on the applicable law and on jurisdiction was to be made by the Annex VII tribunal (paras. 2-8).

Separate Opinion of Judge Jesus: (1) Concerning Article 298(1)(b) of UNCLOS, the activities concerned had to be evaluated not only from the point of view of the Russian Federation's response to Ukraine's operations, but also from the point of view of the activities of the three vessels. Nothing in the documents before the Tribunal indicated that the three vessels had been arrested for having undertaken certain military activities in Russian territorial waters (paras. 2-11).

(2) A determination that military activities were undertaken within the meaning of Article 298(1)(b) of UNCLOS could not be made in the abstract. Article 19 of UNCLOS provided the legal context for understanding whether the activities concerned were military in character or not, insofar as the first six subparagraphs of Article 19(2) listed examples of such activities. The Russian Federation did not mention that the three vessels had been arrested for having undertaken any of these activities. The Tribunal did not have before it sufficient information to conclude that the activities of the three vessels were military in character, which the Annex VII tribunal would have to determine (paras. 12-20).

Separate Opinion of Judge Lucky: The principal factors of the proceedings concerned the effect of the Russian Federation's non-appearance and whether the dispute concerns military or law enforcement activities. By considering all relevant documents, the Tribunal was fair to the Russian Federation, although its non-appearance made the Tribunal's task more difficult. The Tribunal had denied the Ukrainian request for the suspension of proceedings against the twenty-four servicemen, which would have amounted to interfering with the judicial process in a domestic court. Domestic law and international law were not superior to each other, as each was superior in its own sphere. Given the evidence before the Tribunal, the activities concerned could have been either military or law-enforcement activities, although the events of 25 November 2018 revealed a law-enforcement purpose (paras. 4-21).

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Separate Opinion of Judge Gao: (1) Warships and auxiliary vessels enjoyed complete immunity under UNCLOS and customary international law, and, therefore, the three vessels and their servicemen had to be released without delay. The traditional doctrine of warship immunity could be the object of the military activities exception under Article 298(1)(b) of UNCLOS. Article 298(1)(b) was a carefully designed compromise between compulsory jurisdiction under Part XV of UNCLOS and the State's prerogative to exercise its own exclusive jurisdiction over certain sensitive issues (paras. 2-9).

(2)(a) The crux of the case was whether the dispute between the Parties concerned military activities. Although UNCLOS did not define "military activities", commentators endorsed a generous interpretation of the military activities exception. Determining whether certain activities were military in character had to be based on various factors, including the intent and purpose of the activities, and in the light of all relevant circumstances, such as how the Parties deployed their vessels and how the Parties engaged one another. Moreover, this determination also had to take into account the official position, international actions and legal documents of the Parties (paras. 17-30).

(b) Firing shots against a military vessel was tantamount to using force against a State, which, in the circumstances, had converted what started as a law-enforcement operation into a military action. In its request for interim relief before the ECtHR, Ukraine seemed to have accepted explicitly that the activities concerned were military in character. However, the Tribunal had mischaracterized the activities carried out by the Parties as law enforcement in a manner inconsistent with the decision of another arbitral tribunal (paras. 33-44).

Dissenting Opinion of Judge Kolodkin: (1) The Annex VII tribunal lacked *prima facie* jurisdiction on the basis of the military activities exception under Article 298(1)(b) of UNCLOS, and, therefore, the Tribunal could not have prescribed provisional measures. Activities carried out by warships at sea were, at least on their face, inherently military in character, including activities such as the exercise of freedom of navigation on the high seas, and passage through certain maritime zones (paras. 1-9).

(2) The incident of 25 November 2019 involved military activities by the Parties. Ukraine itself had characterized the situation as a military conflict, making references to "aggression" by the Russian Federation. The "Checklist for readiness to sail" also included references that showed the military character of the activities of the three vessels. It followed that the mission of the three vessels was *prima facie* military in character. Moreover, Ukraine did not seem to dispute the regime of passage through the Kerch Strait, as the Tribunal stated in its Order, but rather focused on the issue of immunity of the three vessels under certain provisions of UNCLOS (paras. 10-17).

(3) *Prima facie*, the activities of the Parties started as a law-enforcement operation, and escalated into military activities as soon as the navy and air force of the Russian Federation became involved. The Parties also used force

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against one another. The Tribunal had to conclude that the dispute was *prima facie* one which concerned military activities within the meaning of Article 298(1)(b) of UNCLOS, and, as a consequence, one over which the Annex VII tribunal had no *prima facie* jurisdiction (paras. 21-3).

The Order of the Tribunal and the Declarations, Separate Opinions and Dissenting Opinions are set out as follows:

The following is the text of the Order on the Provisional Measures:[8]

1. On 16 April 2019, Ukraine filed with the Tribunal a Request for the prescription of provisional measures (hereinafter "the Request") under article 290, paragraph 5, of the Convention in the dispute between Ukraine and the Russian Federation concerning the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board. The case was entered in the List of Cases as Case No 26 and named *Case concerning the detention of three Ukrainian naval vessels*.

2. In a letter dated 16 April 2019 addressed to the Registrar, the Minister of Foreign Affairs of Ukraine notified the Tribunal of the appointment of Ms Olena Zerkal, Deputy Minister of Foreign Affairs, as Agent for the Government of Ukraine.

3. On the same date, the Deputy Registrar transmitted copies of the Request electronically to the Minister of Foreign Affairs of the Russian Federation together with a letter to the Ambassador of the Russian Federation to the Federal Republic of Germany. By letter dated 16 April 2019, the Deputy Registrar also transmitted a certified copy of the Request to the Minister of Foreign Affairs of the Russian Federation.

4. In accordance with article 24, paragraph 3, of the Statute, the Registrar notified the States Parties to the Convention of the Request by a note verbale dated 17 April 2019.

[8] The text of the judgment is also available at DOI 10.1163/9789004430471_005.

5. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the Request by a letter dated 17 April 2019.

6. On 23 April 2019, pursuant to articles 45 and 73 of the Rules, the President of the Tribunal held consultations by telephone with the Agent of Ukraine and Mr Evgeny Zagaynov, Director, Legal Department of the Ministry of Foreign Affairs of the Russian Federation, to ascertain the views of Ukraine and the Russian Federation with regard to questions of procedure.

7. By Order dated 23 April 2019, the President, pursuant to article 27 of the Statute and articles 45 and 90, paragraph 2, of the Rules, fixed 10 and 11 May 2019 as the dates for the hearing. The Order was communicated to the Parties on the same date.

8. In a note verbale dated 30 April 2019 and received in the Registry on the same date, the Embassy of the Russian Federation to the Federal Republic of Germany stated:

> The Russian Federation is of the view that the arbitral tribunal to be constituted under Annex VII of UNCLOS will not have jurisdiction, including *prima facie*, to rule on Ukraine's claim, in light of the reservations made by both the Russian Federation and Ukraine under article 298 of UNCLOS stating, inter alia, that they do not accept the compulsory procedures provided for in section 2 of Part XV thereof entailing binding decisions for the consideration of disputes concerning military activities. Furthermore, the Russian Federation expressly stated that the aforementioned procedures are not accepted with respect to disputes concerning military activities by government vessels and aircraft. For this obvious reason the Russian Federation is of the view that there is no basis for the International Tribunal for the Law of the Sea to rule on the issue of the provisional measures requested by Ukraine.
>
> . . .
>
> [T]he Russian Federation has the honour to inform the International Tribunal for the Law of the Sea of its decision not to participate in the hearing on provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.
>
> However, in order to assist the International Tribunal for the Law of the Sea and in conformity with article 90(3) of the Rules, the Russian Federation intends to submit in due course more precise written observations regarding its position on the circumstances of the case.

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9. By letter dated 30 April 2019, while transmitting a copy of that note verbale to the Agent of Ukraine, the Registrar drew her attention to article 28 of the Statute and informed her that any comments that Ukraine might wish to make on the matter should be received by 2 May 2019.

10. In a letter dated 2 May 2019, the Agent of Ukraine stated that Ukraine "requests, consistent with article 28 of the Tribunal's Statute, that the Tribunal continue the proceedings and render a decision on provisional measures".

11. In light of these developments, by Order dated 2 May 2019, the President fixed 10 May 2019 as the revised date for the hearing. The Order was communicated to the Parties on the same date.

12. By a note verbale dated 7 May 2019 and received in the Registry on the same date, the Embassy of the Russian Federation to the Federal Republic of Germany transmitted a "Memorandum of the Russian Federation regarding its position on the circumstances of the case No 26" (hereinafter "the Memorandum"). In the note verbale, the Embassy of the Russian Federation stated that it conveyed the Memorandum "in accordance with article 90(3) of the Rules". In an electronic communication accompanying the note verbale, the Embassy of the Russian Federation indicated that "[t]ranslations of legal acts and reference materials referred to in the Memorandum will be provided further". The Registrar transmitted an electronic copy and a certified copy of the Memorandum to the Agent of Ukraine on the same date.

13. On 8 May 2019, the Embassy of the Russian Federation to the Federal Republic of Germany submitted the above documents, copies of which were transmitted by the Registrar to the Agent of Ukraine on 9 May 2019.

14. On 8 May 2019, Ukraine submitted additional documents. The Registrar transmitted a copy of these documents to the Embassy of the Russian Federation to the Federal Republic of Germany on 9 May 2019.

15. Pursuant to paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal, Ukraine submitted the required information to the Tribunal on 9 May 2019.

16. In accordance with article 68 of the Rules, the Tribunal held initial deliberations on 9 May 2019 concerning the written pleadings and the conduct of the case.

17. On the same day, in accordance with article 45 of the Rules, the President held consultations with the Agent of Ukraine with regard to questions of procedure.

18. Pursuant to article 67, paragraph 2, of the Rules, copies of the Memorandum and documents annexed thereto were made accessible to the public on the date of the opening of the oral proceedings.

19. Oral statements were presented at a public sitting held on 10 May 2019 by the following:

On behalf of Ukraine: Ms Olena Zerkal, Deputy Foreign Minister of Ukraine,
as Agent,
Mr Jonathan Gimblett, Member of the Bar of Virginia and the District of Columbia, Covington & Burling LLP,
Mr Alfred H. A. Soons, Emeritus Professor of Public International Law, Utrecht University, Associate Member of the Institute of International Law,
Ms Marney L. Cheek, Member of the Bar of the District of Columbia, Covington & Burling LLP,
Mr Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, Member of the Paris Bar, Sygna Partners,
as Counsel and Advocates.

20. In the course of the oral proceedings, a number of exhibits, including photographs and extracts from documents, were displayed by Ukraine on video monitors.

21. The Russian Federation was not represented at the public sitting.

* *

22. In paragraph 31 of the Statement of Claim, Ukraine requests the arbitral tribunal to be constituted under Annex VII to the Convention (hereinafter "the Annex VII arbitral tribunal") to adjudge and declare that:

a. In seizing and detaining the Ukrainian naval vessels the "*Berdyansk*", the "*Yani Kapu*", and the "*Nikopol*", Russia breached its obligations to accord foreign naval vessels complete immunity under articles 32, 58, 95 and 96 of the Convention.
b. In detaining the twenty-four crewmen of "*Berdyansk*", the "*Yani Kapu*", and the "*Nikopol*", and initiating criminal charges against the crewmen, Russia further breached its obligations under articles 32, 58, 95 and 96 of the Convention.

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c. The aforementioned violations constitute internationally wrongful acts for which the Russian Federation is responsible.
d. As a consequence, Russia is required to: (i) release the "*Berdyansk*", the "*Yani Kapu*", and the "*Nikopol*"; (ii) release the twenty-four servicemen captured with the "*Berdyansk*", the "*Yani Kapu*", and the "*Nikopol*"; (iii) provide Ukraine with appropriate assurances and guarantees of non-repetition; and (iv) provide Ukraine with full reparation.

23. In paragraph 46 of the Request, Ukraine requests the Tribunal to indicate provisional measures requiring the Russian Federation to promptly:

a. Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;
b. Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
c. Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.

24. At the public sitting held on 10 May 2019, the Agent of Ukraine made the following final submissions, a signed copy of which was communicated to the Tribunal:

1. Ukraine requests that the Tribunal indicate provisional measures requiring the Russian Federation to promptly:
   a. Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;
   b. Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
   c. Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.
2. The servicemen to be covered by measures (b) and (c), above, are:
   a. Captain (Third Rank) Volodymyr Volodymyrovych Lisovyy;
   b. Captain (Second Rank) Denys Volodymyrovych Hrytsenko;
   c. Captain Lieutenant Serhiy Mykolayovych Popov;
   d. Senior Lieutenant Andriy Leonidovych Drach;
   e. Senior Lieutenant Bohdan Pavlovych Nebylytsia;
   f. Senior Lieutenant Vasyl Viktorovych Soroka;
   g. Lieutenant Roman Mykolayovych Mokryak;
   h. Master Chief Petty Officer Yuriy Oleksandrovych Budzyloy;
   i. Master Chief Petty Officer Andriy Anatoliyovych Shevchenko;
   j. Petty Officer Oleh Mykhailovych Melnychyk;
   k. Petty Officer (1st Stage) Vladyslav Anatoliyovych Kostyshyn;
   l. Petty Officer (2nd Stage) Serhiy Romanovych Chyliba;
   m. Senior Seaman Andriy Anatoliyovych Artemenko;
   n. Senior Seaman Viktor Anatoliyovych Bezpalchenko;
   o. Senior Seaman Yuriy Yuriyouvych Bezyazychnyy;
   p. Senior Seaman Andriy Andriyovych Oprysko;

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q. Senior Seaman Volodymyr Anatoliyovych Tereschenko;
r. Senior Seaman Mykhailo Borysovych Vlasyuk;
s. Senior Seaman Volodymyr Kostyantynovych Varymez;
t. Senior Seaman Vyacheslav Anatoliyovych Zinchenko;
u. Seaman Andriy Dmytrovych Eider;
v. Seaman Bohdan Olehovych Holovash;
w. Seaman Yevheniy Vitaliyovych Semydotskyy; and
x. Seaman Serhiy Andriyovych Tsybizov.

* * *

25. As noted in paragraph 8, the Embassy of the Russian Federation to the Federal Republic of Germany, by note verbale dated 30 April 2019, informed the Tribunal of the Russian Federation's "decision not to participate in the hearing on provisional measures in the case initiated by Ukraine".

26. The Tribunal notes that article 28 of the Statute reads:

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

27. The Tribunal recalls that

> the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject. (*"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 242, para. 48)

28. The Tribunal observes that all communications relevant to the case were transmitted by the Tribunal to the Russian Federation to ensure full implementation of the principle of equality of the parties in a situation where the absence of a party may hinder the regular conduct of the proceedings and affect the good administration of justice. The Tribunal further observes that the Russian Federation, before the closure of the oral proceedings, submitted the Memorandum to the Tribunal, which it took into account pursuant to article 90, paragraph 3, of the Rules. The Tribunal is therefore of the view that the Russian Federation was given ample opportunity to present its observations.

29. The Tribunal notes that Ukraine should not be put at a disadvantage because of the non-appearance of the Russian Federation in the

proceedings and that the Tribunal "must therefore identify and assess the respective rights of the Parties involved on the best available evidence" (*"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 243, paras. 56 and 57).

* *

30. The factual background against which the Request has been submitted to the Tribunal can be summarized as follows. On 25 November 2018, three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol* and the *Yani Kapu*) and their twenty-four servicemen were arrested and detained by authorities of the Russian Federation. The incident took place in the Black Sea near the Kerch Strait. The *Berdyansk* and the *Nikopol* are artillery boats of the Ukrainian Navy and the *Yani Kapu* is a Ukrainian naval tugboat. Their status as Ukrainian naval warships and an auxiliary vessel is not disputed. The status of the crew as Ukrainian naval personnel is also not disputed between the Parties.

31. According to Ukraine, the three naval vessels had departed from the "port of Odesa", in the Black Sea, and their mission was to transit, through the Kerch Strait, to the port of Berdyansk in the Sea of Azov. Ukraine further states that,

> [a]s they approached the entrance to the Kerch Strait on the night of 24/25 November, the vessels received radio communications from the Russian Coast Guard—a division of the Border Service of the Federal Security Service ("FSB")—asserting that the Strait was closed.

When the Ukrainian vessels proceeded to the strait on 25 November 2018, they were blocked by Coast Guard vessels of the Russian Federation. The Ukrainian vessels later turned around and navigated away from the Kerch Strait but were pursued by the Coast Guard vessels. During the pursuit, one Coast Guard vessel fired at the *Berdyansk*, wounding three members of its crew and causing damage to the vessel. In the following course of events, all three Ukrainian vessels and the servicemen on board were seized and detained by Coast Guard vessels of the Russian Federation. According to the Press Service of the FSB (hereinafter "the FSB Press Service") of 26 November 2018, the three vessels were "delivered to the port of Kerch" on 26 November 2018.

32. According to the Memorandum submitted by the Russian Federation:

> 21. On 26 and 27 November 2018, [the twenty-four Ukrainian servicemen] on board the vessels were formally apprehended under article 91 of the

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Code of Criminal Procedure of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the State border of the Russian Federation (section 3 of article 322 of the Criminal Code of the Russian Federation).

22. By separate decisions of 27 and 28 November 2018 delivered by the Kerch City Court and the Kievskiy District Court of Simferopol, the Military Servicemen were placed in detention. The investigation is still pending and on 17 April 2019, the Court [Lefortovo District Court of Moscow] extended the detention of the Military Servicemen until 24 July 2019.

I. *PRIMA FACIE* JURISDICTION

33. Article 290, paragraph 5, of the Convention provides:

> Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires . . ..

34. Ukraine and the Russian Federation are States Parties to the Convention, having ratified the Convention on 26 July 1999 and on 12 March 1997, respectively. Pursuant to article 287, paragraph 1, of the Convention, both States have chosen an arbitral tribunal constituted in accordance with Annex VII to the Convention as the "principal" or "basic" means for the settlement of disputes concerning the interpretation or application of the Convention.

35. The Tribunal notes that Ukraine, by the Statement of Claim dated 31 March 2019 which included a request for provisional measures, accordingly instituted proceedings under Annex VII to the Convention against the Russian Federation in a dispute concerning "the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board". The Tribunal further notes that, on 16 April 2019, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Ukraine submitted the Request to the Tribunal.

36. The Tribunal may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded, but

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need not definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it (see "*ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 343, para. 60).

Existence of a dispute concerning the interpretation or application of the Convention

37. Ukraine invokes articles 286 and 288 of the Convention as the basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded. The first question the Tribunal has to address is whether the dispute submitted to the Annex VII arbitral tribunal is "a dispute concerning the interpretation or application of this Convention" referred to in those articles.

38. In its note verbale dated 15 March 2019 addressed to the Russian Federation, Ukraine states that

> [t]he Russian Federation's seizure and continued detention of the three Ukrainian naval vessels and their twenty-four crewmembers, and the commencement of criminal proceedings against said crewmembers, constitute a flagrant breach by the Russian Federation of its obligations under the Convention, as well as provisions and principles of international law, particularly articles 32, 58, and 95 of the Convention.

39. In its Statement of Claim, Ukraine requests the Annex VII arbitral tribunal to adjudge and declare, *inter alia*:

a. In seizing and detaining the Ukrainian naval vessels the "*Berdyansk*", the "*Yani Kapu*", and the "*Nikopol*", Russia breached its obligations to accord foreign naval vessels complete immunity under articles 32, 58, 95 and 96 of the Convention;
b. In detaining the twenty-four crewmen of "*Berdyansk*", the "*Yani Kapu*", and the "*Nikopol*", and initiating criminal charges against the crewmen, Russia further breached its obligations under articles 32, 58, 95 and 96 of the Convention.

40. Ukraine argues that the Parties are plainly engaged in a dispute over the interpretation and application of the above articles. Ukraine maintains that "Russia's seizure and continued detention of the naval vessels, as well as its criminal prosecution of the vessels' servicemen, violate the principle of warship immunity under these articles." Ukraine further asserts that "Russia, however, has maintained that its actions are lawful under, among other provisions, article 30 of the Convention." According to Ukraine, "[i]t is this difference of views that the Annex VII tribunal would have to resolve, and that it will

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have the competence to resolve under articles 286 and 288 of the Convention".

41. The Russian Federation did not directly respond to Ukraine's argument on this question. The Tribunal, however, notes that the FSB Press Service stated that

> [t]he border patrol ships *Don* and *Izumrud* started following the group of Ukrainian naval ships and communicated to them an order to stop (*in accordance with article 30 of the UN Convention on the Law of the Sea of 1982 and article 12(2) of Federal Law 155 dated July 31, 1998 . . .*).

The Tribunal further notes that, in the subsequent criminal proceedings in the Russian Federation, all twenty-four servicemen were indicted for a crime of aggravated illegal crossing of the State border of the Russian Federation under Part 3 of article 322 of the Criminal Code of the Russian Federation.

* *

42. Article 288, paragraph 1, of the Convention provides that "[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part". The Tribunal accordingly has to determine whether, on the date of the institution of arbitral proceedings, a dispute concerning the interpretation or application of the Convention existed between the Parties.

43. Although the Russian Federation has not clearly professed any view on the conformity of its actions with the provisions of the Convention invoked by Ukraine, its view on this question may be inferred from its subsequent conduct. In this regard, the Tribunal recalls the statement of the International Court of Justice (hereinafter the "ICJ") in *Land and Maritime Boundary between Cameroon and Nigeria* that

> a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.

(*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, ICJ Reports 1998*, p. 275, at p. 315, para. 89; see also *M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 69, para. 100)

44. In the view of the Tribunal, the fact that the Russian authorities arrested and detained the Ukrainian naval vessels and

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commenced criminal proceedings against the Ukrainian servicemen indicates that the Russian Federation holds a different position from Ukraine on the question of whether the events which occurred on 25 November 2018 gave rise to the alleged breach of its obligations under articles 32, 58, 95 and 96 of the Convention. The Tribunal also notes that the Russian Federation denies the "categorisation of the situation as an armed conflict for the purposes of international humanitarian law".

45. The Tribunal accordingly considers that a dispute concerning the interpretation or application of the Convention *prima facie* appears to have existed on the date the arbitral proceedings were instituted.

Applicability of article 298, paragraph 1(b), of the Convention

46. The Tribunal now turns to the question whether article 298, paragraph 1(b), of the Convention is applicable, thus excluding the present case from the jurisdiction of the Annex VII arbitral tribunal.

47. Article 298, paragraph 1(b), of the Convention reads:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> . . .
>
> (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

48. Upon ratification of the Convention on 26 July 1999, Ukraine declared,

> in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of . . . *disputes concerning military activities*. (Emphasis added by the Tribunal)

49. Upon ratification of the Convention on 12 March 1997, the Russian Federation declared that,

> in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part

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XV of the Convention, entailing binding decisions with respect to . . . *disputes concerning military activities, including military activities by government vessels and aircraft*, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction . . . (Emphasis added by the Tribunal)

50. The Parties disagree on the applicability of article 298, paragraph 1(b), of the Convention and their declarations under that provision. The Russian Federation maintains that the dispute submitted to the Annex VII arbitral tribunal concerns military activities and that the declarations of the Parties therefore exclude the dispute from the jurisdiction of the Annex VII arbitral tribunal. Ukraine asserts that the dispute does not concern military activities, but rather law enforcement activities, and that the declarations therefore do not exclude the present dispute from the jurisdiction of the Annex VII arbitral tribunal.

51. The Russian Federation contends that, according to a "checklist for readiness to sail" found on board the *Nikopol*, the mission of the three Ukrainian military vessels was a "non-permitted 'secret' incursion" by them into Russian territorial waters. It states that this mission was resisted by military personnel of the Russian Coast Guard, followed by the arrest of the three Ukrainian military vessels and the military servicemen. According to the Russian Federation, their detention resulted directly from the incident of 25 November 2018 and thus cannot be considered separately from the respective chain of events, involving military personnel and equipment from both the Russian and the Ukrainian sides. The Russian Federation maintains that "[i]t is manifestly a dispute concerning military activities".

52. The Russian Federation states that "[t]he Tribunal in *Philippines* v. *China* described 'a quintessentially military situation' as one 'involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another'". In the view of the Russian Federation, this was the situation on 25 November 2018.

53. The Russian Federation contends that Ukraine has, in statements made outside the confines of the claim, including before the United Nations Security Council and in subsequent formal communications with the Russian Federation, repeatedly characterized the incident as concerning military activities. The Russian Federation adds that, "[w]hilst it is not in any way accepted that Russia engaged in an unlawful use of force, including any act of aggression, it is clear that it is common ground that the incident concerned military activities".

54. In response to Ukraine's statement that the Russian Federation has treated the incident as a criminal law enforcement matter, the

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Russian Federation maintains that its "conduct subsequent to the incident of 25 November 2018 is entirely consistent with the military nature of the incident".

55. Ukraine states that article 298 of the Convention draws a clear distinction between military activities and law enforcement activities, and that they are distinct, mutually exclusive categories.

56. Ukraine argues that the military activities exception is not applicable in this case for two reasons. First, referring to the *South China Sea Arbitration*, Ukraine contends that the exception does not apply when the party whose actions are at issue has characterized them as non-military in nature. According to Ukraine,

> Russia has repeatedly and consistently stated that its actions that provide the basis for Ukraine's claims were not military in nature. In particular, Russia has maintained that its arrest and detention of the Ukrainian vessels and imprisonment and prosecution of the servicemen are solely matters of domestic law enforcement.

57. Second, Ukraine argues that

> the military activities exception is inapplicable in the instant case because, even setting aside Russia's own characterization of its activity, Ukraine does not seek resolution of a dispute concerning military activities. Ukraine's claims do not allege a violation of the Convention based on activities that are military in type, but, rather, Ukraine's claims are based on Russia's unlawful exercise of jurisdiction in a law enforcement context.

58. In this regard, Ukraine contends that a dispute does not "concern military activities" simply because it involves warships or because warships are present. According to Ukraine, it is not the type of vessel, but rather the type of activity the vessel is engaged in, that matters. Ukraine adds that, given that many countries use their navies and coast guards for law enforcement at sea, the military activities exception could not possibly apply to all disputes involving military vessels.

59. Ukraine maintains that its warships "were not engaged with the Russian military" and that "they were not arrayed in opposition to one another". According to Ukraine, it is undisputed that its warships were trying to leave the area and that the Russian Coast Guard was chasing them in order to arrest them for violating Russian domestic laws. Ukraine argues that this was a typical law enforcement encounter.

60. Ukraine emphasizes that neither the involvement of the Russian Navy in the incident nor the use of force alone converts a law enforcement activity into a military one.

61. Ukraine contends that "[t]he mission of the vessels was to navigate from the Ukrainian port of Odesa to the Ukrainian port of

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Berdyansk on the northern shore of the Sea of Azov, where they were thereafter to be permanently stationed".

62. Responding to the Russian Federation's argument that the warships planned a "secret incursion", Ukraine maintains that "the purpose of this guidance was to avoid unnecessarily provoking incidents with Russian government vessels during the two days it would take to reach the Kerch Strait from Odesa". Ukraine adds that "[n]or can the guidance be read as suggesting that the mission of the naval vessels was to transit the Kerch Strait secretly—an impossible task given the breadth of the Kerch Strait and the navigable channels through it". Ukraine also points out that the commander of the *Berdyansk* communicated to the Russian authorities the intention of the three vessels to proceed through the Kerch Strait.

* *

63. The question the Tribunal has to decide is whether the dispute submitted to the Annex VII arbitral tribunal concerns military activities. While the Russian Federation argues that it concerns military activities, Ukraine contends that its claims are based on "Russia's unlawful exercise of jurisdiction in a law enforcement context".

64. In the view of the Tribunal, the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question. This may be a relevant factor but the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred. The Tribunal notes that it is not uncommon today for States to employ the two types of vessels collaboratively for diverse maritime tasks.

65. Nor can the distinction between military and law enforcement activities be based solely on the characterization of the activities in question by the parties to a dispute. This may be a relevant factor, especially in case of the party invoking the military activities exception. However, such characterization may be subjective and at variance with the actual conduct.

66. In the view of the Tribunal, the distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.

67. The Tribunal notes that the dispute submitted to the Annex VII arbitral tribunal concerns the alleged violation of Ukraine's rights under articles 32, 58, 95 and 96 of the Convention, arising from the arrest and detention of its naval vessels and their servicemen and the subsequent

exercise of criminal jurisdiction over them by the Russian Federation. For the purposes of determining whether the dispute concerns military activities under article 298, paragraph 1(b), of the Convention, however, it is necessary for the Tribunal to examine a series of events preceding the arrest and detention. In the view of the Tribunal, those events may shed light on whether the arrest and detention took place in the context of a military operation or a law enforcement operation.

68. The Tribunal considers that the following three circumstances are particularly relevant in this regard. First, it appears from the information and evidence presented by the Parties to the Tribunal that the underlying dispute leading to the arrest concerned the passage of the Ukrainian naval vessels through the Kerch Strait. In the view of the Tribunal, it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity. Under the Convention, passage regimes, such as innocent or transit passage, apply to all ships.

69. The Tribunal notes that the particular passage at issue was attempted under circumstances of continuing tension between the Parties. In addition, according to the Memorandum submitted by the Russian Federation, the incident of 25 November 2018 was preceded by "provocative actions and military build-up on the part of Ukraine". On the other hand, Ukraine states that its naval vessels had previously passed through the Kerch Strait. According to Ukraine, "[o]ther Ukrainian naval vessels had successfully completed the same transit as recently as September 2018, just two months earlier".

70. The Tribunal is of the view, on the basis of evidence before it, that a "nonpermitted 'secret' incursion" by the Ukrainian naval vessels, as alleged by the Russian Federation, would have been unlikely under the circumstances of the present case, including those stated in paragraph 62.

71. Second, it appears that the specific cause of the incident that occurred on 25 November 2018 was the Russian Federation's denial of the passage of the Ukrainian naval vessels through the Kerch Strait and the attempt by those vessels to proceed nonetheless. According to the Memorandum, the passage was denied on two grounds: the failure of the Ukrainian naval vessels to comply with the "relevant procedure in the 2015 Regulations" and the temporary suspension of the right of innocent passage for naval vessels because of "security concerns following a recent storm". It is undisputed that the commander of the *Berdyansk* gave notification of the naval vessels' intention to proceed by invoking a right to the freedom of navigation pursuant to the 2003 Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait. It is also undisputed that, as the Ukrainian naval vessels proceeded, they

were physically blocked by the Russian Coast Guard. The vessels were ordered to wait in the vicinity of an anchorage, subject to restrictions on their movement. They were held there for about eight hours.

72. The aforementioned facts indicate that at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait. In the view of the Tribunal, such a dispute is not military in nature.

73. Third, it is undisputed that force was used by the Russian Federation in the process of arrest. In this regard, the Tribunal considers that the context in which such force was used is of particular relevance. The facts provided by the Parties do not differ on this point. After being held for about eight hours, the Ukrainian naval vessels apparently gave up their mission to pass through the strait and turned around and sailed away from it. The Russian Coast Guard then ordered them to stop and, when the vessels ignored the order and continued their navigation, started chasing them. It was at this moment and in this context that the Russian Coast Guard used force, first firing warning shots and then targeted shots. One vessel was damaged, servicemen were injured and the vessels were stopped and arrested.

74. In the Tribunal's view, considering the above sequence of events, what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation.

75. The aforementioned circumstances of the incident on 25 November 2018 suggest that the arrest and detention of the Ukrainian naval vessels by the Russian Federation took place in the context of a law enforcement operation.

76. The subsequent proceedings and charges against the servicemen further support the law enforcement nature of the activities of the Russian Federation. The servicemen have been charged with unlawfully crossing the Russian State border and the Russian Federation has invoked article 30 of the Convention, entitled "Non-compliance by warships with the laws and regulations of the coastal State", to justify its detention of the vessels.

77. Based on the information and evidence available to it, the Tribunal accordingly considers that *prima facie* article 298, paragraph 1(b), of the Convention does not apply in the present case.

Article 283 of the Convention

78. The Tribunal will now proceed to determine whether the requirements under article 283 of the Convention relating to an exchange of views are met.

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79. Article 283, paragraph 1, of the Convention reads:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

80. Ukraine contends that it has "taken reasonable and expeditious steps to exchange views with the Russian Federation regarding the settlement of the dispute by negotiation or other peaceful means". According to Ukraine, all attempts to secure the release of the detained vessels and servicemen through diplomatic and judicial means have been unsuccessful.

81. In this context, Ukraine draws the attention of the Tribunal to the note verbale it sent to the Russian Federation on 15 March 2019, in which it demanded, pursuant to article 283 of the Convention, that "the Russian Federation expeditiously proceed to an exchange of views regarding the settlement of this dispute by negotiation or other peaceful means". In that note verbale, Ukraine further requested that "the Russian Federation immediately express its view regarding the proper means of resolving the dispute and the holding of consultations on the matter with the Ukraine side within ten days".

82. Ukraine states that on 25 March 2019 it received the note verbale of the Russian Federation acknowledging receipt of Ukraine's note and adding that "[p]ossible comments to the issues raised in [Ukraine's] note are expected to be sent separately". Ukraine contends that this left it "entirely ambiguous whether, and when, Russia would ultimately agree to participate in an exchange of views". Ukraine argues that when it received that note, it "could not have foreseen that Russia would—weeks later—agree to Ukraine's request for a meeting, and Ukraine was entitled to presume that further attempts to seek negotiations would not be fruitful". It also argues that the ten-day deadline was not "arbitrary" in light of the urgency of the situation. Ukraine adds that it was not required to postpone its case indefinitely and allow further harm to its rights. In Ukraine's view, its obligation to exchange views was therefore satisfied on 25 March 2019, prior to the institution of arbitral proceedings.

83. Ukraine also states that, "[t]o the extent the Tribunal considers that the Parties were still under an obligation to exchange views after 25 March, . . . Ukraine's 23 April exchange of views with the Russian Federation satisfies the requirements of article 283".

84. The Russian Federation contends that "Article 283(1) of UNCLOS has not been satisfied". It maintains that Ukraine arbitrarily imposed a deadline of "within ten days". Furthermore, the Russian

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Federation points out that, within ten days, *i.e.* on 25 March 2019, it provided a written holding response.

85. The Russian Federation notes that, on 16 April 2019, it confirmed its consent to hold consultations with Ukraine under article 283 of the Convention. In the view of the Russian Federation, Ukraine did not engage meaningfully in the consultations held on 23 April 2019. The Russian Federation adds that it expressed "its willingness to continue a dialogue on the settlement of the dispute by peaceful means, but Ukraine declared its lack of interest in this path, and elected to press on with a hearing on provisional measures".

* *

86. The Tribunal notes that Ukraine, in its note verbale of 15 March 2019, clearly expressed its willingness to exchange views with the Russian Federation regarding the means to settle their dispute over the immunity of the detained naval vessels and servicemen within a specific time frame. The time-limit of ten days indicated in Ukraine's note verbale cannot be considered "arbitrary" in light of the obligation to proceed expeditiously to an exchange of views. In the view of the Tribunal, the Russian Federation's response of 25 March 2019, which stated that "possible" comments to the issues raised by Ukraine "are expected to be sent" separately, was of such nature that Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted.

87. In this regard, the Tribunal recalls that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted" (see *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at p. 107, para. 60; *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 345, para. 71; *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 248, para. 76).

88. The Tribunal further recalls that "the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute" (*M/V "Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at p. 91, para. 213).

89. Accordingly, the Tribunal is of the view that these considerations are sufficient at this stage to find that the requirements of article 283 were satisfied before Ukraine instituted arbitral proceedings.

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90. In light of the foregoing, the Tribunal concludes that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it.

II. URGENCY OF THE SITUATION

Plausibility of rights asserted by the Applicant

91. The power of the Tribunal to prescribe provisional measures under article 290, paragraph 5, of the Convention has as its object the preservation of the rights asserted by a party requesting such measures pending the constitution and functioning of the Annex VII arbitral tribunal. Before prescribing provisional measures, the Tribunal therefore needs to satisfy itself that the rights which Ukraine seeks to protect are at least plausible (see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at p. 158, para. 58).

92. Ukraine states that the *Berdyansk* and the *Nikopol* are warships of the Ukrainian Navy, flying the naval ensign, under the command of officers duly commissioned by the Government of Ukraine and manned by crew under the regular discipline of the Ukrainian Navy. According to Ukraine, they are warships within the meaning of article 29 of the Convention. Ukraine further states that the *Yani Kapu* is a naval auxiliary vessel equally entitled to immunity under articles 32 and 96 of the Convention and general international law.

93. According to Ukraine,

> articles 95 and 96 of the Convention provide that warships and "ships owned or operated by a State and used only on government noncommercial service"—of which naval auxiliary vessels are the classic example—enjoy "complete immunity from the jurisdiction of any State other than the flag State". Article 58 extends the application of the immunity under articles 95 and 96 to the exclusive economic zone. Article 32 and customary international law guarantee the same immunity in the territorial sea.

Ukraine further maintains that the immunity provided for in the Convention protects not only warships and naval auxiliary vessels but also their crews.

94. Ukraine contends that "[t]he immunity accorded Ukraine's vessels and servicemen exempts them from any form of arrest and

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detention, and makes it unlawful for any third State to board the vessels or otherwise prevent them 'from discharging [their] mission and duties'". It further contends that, "[i]n detaining Ukraine's naval vessels and servicemen, and continuing to hold them, the Russian Federation has violated the immunity accorded by the Convention and customary international law".

* *

95. At this stage of the proceedings, the Tribunal is not called upon to determine definitively whether the rights claimed by Ukraine exist, but need only decide whether such rights are plausible (see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, para. 84).

96. The Tribunal notes that the rights claimed by Ukraine are rights to the immunity of warships and naval auxiliary vessels and their servicemen on board under the Convention and general international law.

97. In the view of the Tribunal, it appears that the *Berdyansk* and the *Nikopol* are warships within the meaning of article 29 of the Convention and that the *Yani Kapu* is a ship owned or operated by a State and used only on government non-commercial service, as referred to in article 96 of the Convention. The Tribunal considers that the rights claimed by Ukraine on the basis of articles 32, 58, 95 and 96 of the Convention are plausible under the circumstances.

98. The Tribunal also notes that the twenty-four servicemen on board the vessels are Ukrainian military and security personnel. While the nature and scope of their immunity may require further scrutiny, the Tribunal considers that the rights to the immunity of the twenty-four servicemen claimed by Ukraine are plausible.

99. The Tribunal is accordingly of the view that the rights Ukraine seeks to protect in the dispute are plausible.

Real and imminent risk of irreparable prejudice

100. Pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if the urgency of the situation so requires. Accordingly, the Tribunal may not prescribe such measures unless it considers that there is a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal (see *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports* 2015, p. 182, at

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p. 197, para. 87). The Tribunal therefore has to determine whether there is a risk of irreparable prejudice to the rights of the Parties to the dispute and whether such risk is real and imminent.

101. Ukraine argues that the requested provisional measures are necessary to protect its rights against the serious and irreparable harm that will be caused by the continued detention of its naval vessels and servicemen.

102. According to Ukraine, the detention of a warship and its crew intrudes on the flag State's dignity and sovereignty, and risks interfering with the performance of important public duties. As such, it presents "a grave threat of irreparable harm to the rights of the flag State". Ukraine claims that the Russian interferences seeking to gain access to "highly sensitive equipment including instruments, arms on board, and equipment intended to provide secure communications between the vessel and its command", which is "crucial to Ukraine's defence", are such as to cause Ukraine serious harm. Ukraine also contends that its inability to service the vessels as required presents a further risk of irreparable harm, in particular "the extended or even permanent loss of the use of these vessels for public purposes". Ukraine asserts that the detention of the servicemen constitutes a further ongoing infringement of Ukraine's sovereign immunity and entails irreparable prejudice to individual rights of the servicemen.

103. In Ukraine's view, harm of this nature cannot be remedied by a subsequent award of damages.

104. Ukraine claims that a risk of irreparable prejudice not only exists but such risk is real and imminent. For Ukraine, harm imposed on its vessels and servicemen increases as every day passes, making the situation "exceptionally urgent".

105. Ukraine maintains that "[t]he urgent need for provisional measures is further heightened by the practical and humanitarian considerations presented by this case". According to Ukraine, such measures cannot wait the months it may take to constitute, convene and brief an Annex VII arbitral tribunal, when its servicemen have already spent the past five months in Russian prisons and will likely be tried and sentenced to lengthy terms of imprisonment of up to six years.

106. Ukraine asserts that urgency is "beyond doubt" when the irreparable harm or irreparable consequences are "precisely present; that is to say, if they are already under way and not just imminent".

107. The Russian Federation argues that there is no urgency as required under article 290, paragraph 5, of the Convention. It maintains that the criterion of urgency is to be assessed with reference to the period during which the Annex VII arbitral tribunal

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is not constituted. It states that Ukraine's claim is not urgent, as Ukraine "waited over four months" after the incident occurred to seek "interim relief" from the Tribunal.

108. Furthermore, the Russian Federation refers to the fact that Ukraine had already been granted "interim relief" through its recourse to the European Court of Human Rights. It notes that Ukraine, in its first application to the European Court, sought the provision of medical assistance to its servicemen. According to the Russian Federation, it complied with the "interim relief" ordered by the European Court. It also notes that a subsequent request made by Ukraine to the European Court, seeking the transfer of its servicemen to Ukraine, was denied.

109. Ukraine states that the measures ordered by the European Court of Human Rights concerned the conditions of detention of its servicemen. It argues that those measures "have no bearing whatsoever" on the extended hardship of the detained servicemen which, it submits, was the basis of the urgency it claims in this case.

* *

110. The Tribunal recalls its statement in *"ARA Libertad"* (*(Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at p. 348, para. 94) that a warship, as defined by article 29 of the Convention, "is an expression of the sovereignty of the State whose flag it flies". This reality is reflected in the immunity it enjoys under the Convention and general international law. The Tribunal notes that any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security.

111. In the view of the Tribunal, the actions taken by the Russian Federation could irreparably prejudice the rights claimed by Ukraine to the immunity of its naval vessels and their servicemen if the Annex VII arbitral tribunal adjudges those rights to belong to Ukraine. In addition, the Tribunal finds that the risk of irreparable prejudice is real and ongoing under the circumstances of the present case.

112. Moreover, the continued deprivation of liberty and freedom of Ukraine's servicemen raises humanitarian concerns.

113. In the light of the seriousness of the above circumstances, the Tribunal finds that there is a real and imminent risk of irreparable prejudice to the rights of Ukraine pending the constitution and functioning of the Annex VII arbitral tribunal. The Tribunal accordingly considers that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention.

III. PROVISIONAL MEASURES TO BE PRESCRIBED

114. In light of the above conclusion that the requirements for the prescription of provisional measures under article 290, paragraph 5, of the Convention are met, the Tribunal may prescribe "any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute", as provided for in article 290, paragraph 1, of the Convention.

115. The Tribunal notes in this regard that, in accordance with article 89, paragraph 5, of the Rules, it may prescribe measures different in whole or in part from those requested.

116. Ukraine requests the Tribunal to prescribe provisional measures requiring the Russian Federation to promptly: release the three Ukrainian naval vessels and return them to the custody of Ukraine; suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and release the servicemen and allow them to return to Ukraine.

117. The Russian Federation argues that if the three Ukrainian vessels and the servicemen were released, it would be deprived of any possibility of exercising the rights it asserts over them because they would no longer be subject to its jurisdiction. It also maintains that Ukraine, in its request for provisional measures, seeks the same relief that is sought on the merits, thus prejudging the merits.

118. Having examined the measures requested by Ukraine, the Tribunal considers it appropriate under the circumstances of the present case to prescribe provisional measures requiring the Russian Federation to release the three Ukrainian naval vessels and the twenty-four detained Ukrainian servicemen and to allow them to return to Ukraine in order to preserve the rights claimed by Ukraine.

119. The Tribunal does not consider it necessary to require the Russian Federation to suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings.

120. However, the Tribunal considers it appropriate to order both Parties to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

121. Pursuant to article 95, paragraph 1, of the Rules, each party is required to submit to the Tribunal a report and information on compliance with any provisional measures prescribed. In the view of the Tribunal, it is consistent with the purpose of proceedings under article 290, paragraph 5, of the Convention that parties also submit reports to the Annex VII arbitral tribunal, unless the arbitral tribunal

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decides otherwise. Accordingly, it may be necessary for the Tribunal to request further information from the Parties on the implementation of the provisional measures prescribed and it is appropriate in this regard that the President be authorized to request such information in accordance with article 95, paragraph 2, of the Rules.

122. The present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the admissibility of Ukraine's claims or relating to the merits themselves, and leaves unaffected the rights of Ukraine and the Russian Federation to submit arguments in respect of those questions.

123. The Tribunal reaffirms that the non-appearing party is nevertheless a party to the proceedings (see *Nuclear Tests (Australia* v. *France), Interim Protection, Order of 22 June 1973, ICJ Reports 1973*, p. 99, at pp. 103-4, para. 24; *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at p. 242, para. 51), with the ensuing rights and obligations, including an obligation to comply promptly with any provisional measures prescribed under article 290 of the Convention.

IV. OPERATIVE PROVISIONS

124. For these reasons,
THE TRIBUNAL,

(1) *Prescribes*, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

(a) By 19 votes to 1,

The Russian Federation shall immediately release the Ukrainian naval vessels *Berdyansk*, *Nikopol* and *Yani Kapu*, and return them to the custody of Ukraine;

FOR: *President* Paik; *Vice-President* Attard; *Judges* Jesus, Cot, Lucky, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Kelly, Kulyk, Gómez-Robledo, Heidar, Cabello, Chadha, Kittichaisaree, Lijnzaad;
AGAINST: *Judge* Kolodkin.

(b) By 19 votes to 1,

The Russian Federation shall immediately release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine;

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FOR: *President* Paik; *Vice-President* Attard; *Judges* Jesus, Cot, Lucky, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Kelly, Kulyk, Gómez-Robledo, Heidar, Cabello, Chadha, Kittichaisaree, Lijnzaad;
AGAINST: *Judge* Kolodkin.

(c) By 19 votes to 1,

Ukraine and the Russian Federation shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.

FOR: *President* Paik; *Vice-President* Attard; *Judges* Jesus, Cot, Lucky, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Kelly, Kulyk, Gómez-Robledo, Heidar, Cabello, Chadha, Kittichaisaree, Lijnzaad;
AGAINST: *Judge* Kolodkin.

(2) By 19 votes to 1,

Decides that Ukraine and the Russian Federation shall each submit to the Tribunal the initial report referred to in paragraph 121 not later than 25 June 2019, and *authorizes* the President to request further reports and information as he may consider appropriate after that report.

FOR: *President* Paik; *Vice-President* Attard; *Judges* Jesus, Cot, Lucky, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Kelly, Kulyk, Gómez-Robledo, Heidar, Cabello, Chadha, Kittichaisaree, Lijnzaad;
AGAINST: *Judge* Kolodkin.

DECLARATION OF JUDGE KITTICHAISAREE

1. Since the Order is relatively succinct in its reasoning, especially on certain important aspects of the case, I wish to explain why I have joined the majority of my colleagues in voting in favour of this Order.

Prima facie *jurisdiction of an Annex VII arbitral tribunal*

2. Russia's note verbale No 1733/H of 30 April 2019 to the Tribunal states, *inter alia*, that Russia strongly disagrees with the qualification by Ukraine regarding the status of Kerch Strait and the territorial sea adjacent to Crimea, and Russia "declares that such issues of sovereignty over Crimea cannot be the subject of any proceedings before the Tribunal". At the public sitting held on 10 May 2019, Ukraine asserted that, without prejudice to the legal status of Kerch Strait and Crimea, Russia's conduct constitutes a profound violation of the immunity of warships and their personnel under the 1982 United Nations Convention on the Law of the Sea ("the Convention") and

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customary international even if, *arguendo*, it had occurred in Russia's territorial sea or exclusive economic zone.[1] In rendering today's Order, the Tribunal correctly accepts Ukraine's argument on this point.

3. I also fully concur with the majority of the Tribunal that, *prima facie*, the military activity exception does not apply in the present case as contended by Russia.

4. The *travaux préparatoires* of article 298 of the Convention[2] are not very helpful in the matter of settling definitively whether the incident on 25 November 2018 was a military activity or a law-enforcement activity. I can imagine that some quintessential examples of military activities include military exercises at sea, military intelligence-gathering activities at sea, military confrontation at sea in the context of an inter-State political or military conflict,[3] as well as any consequential military action at sea taken by another State against such activities. Certain incidents may comprise a mixture of both military and law-enforcement aspects. Therefore, each case must be *objectively* determined primarily in the light of the nature and intent of the activities in question, taking into account the relevant circumstances and context in which the activities take place.

5. The use of force in the present case was also in the context of law-enforcement operations at sea alluded to in *M/V "Saiga" (No 2)*:

> The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone" case (Canada/United States, 1935), UNRIAA, Vol. III*, p. 1609; *The Red Crusader case (Commission of Enquiry, Denmark—United Kingdom, 1962)*, 35 ILR 485).[4]

[1] ITLOS/PV.19/C26/1, p. 4, ll.6-14 and p. 13, ll.22-32.

[2] Cf. Myron Nordquist *et al.* (eds.), *United Nations Convention on the Law of the Sea. A Commentary* (Dordrecht/Boston/London: Martinus Nijhoff 1989), vol. V, pp. 135-7, paras. 298.33-298.38.

[3] According to one commentator,

> Only acts that are tantamount to a threat or use of force in the course of passage—by either the coastal State or the State passing through the strait or archipelagic waters—should be viewed as falling within the category of disputes that could be excluded from mandatory jurisdiction of an international court or tribunal. This conclusion would be in line with the exclusions appropriate for military actions on the high seas or in the EEZ (Nathalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press 2005), p. 314. See also *ibid.*, pp. 304, 312).

[4] *M/V "Saiga" (No 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 62, para. 156.

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Obligations to exchange views under article 283

6. Article 283, paragraph 1, of the Convention provides:

When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

7. This present case is the eighth case submitted to the Tribunal under article 290, paragraph 5, of the Convention. In its Request for the prescription of provisional measures filed with the Tribunal on 16 April 2019, Ukraine submits that it satisfies the requirement of article 283 of the Convention by taking "reasonable and expeditious steps to exchange views with the Russian Federation regarding the settlement of the dispute by negotiation or other peaceful means" but "no settlement of the dispute has been reached".[5] Russia strongly disagrees with Ukraine's contention. Russia's note verbale No 1733/H of 30 April 2019 to the Tribunal states, *inter alia*, that Ukraine elected to submit its request for the prescription of provisional measures to the Tribunal before engaging in further bilateral consultations with Russia in addition to the one held in The Hague on 23 April 2019 despite Russia's expressed readiness to continue dialogue with Ukraine on the matter.

8. Pursuant to Russia's Memorandum of 7 May 2019:

In its Note of 15 March 2019, Ukraine asserted that the Ukrainian Military Vessels and its crew enjoyed immunity, citing articles 32, 58 and 95 of UNCLOS. In the final paragraph of that note Ukraine stated "[p]ursuant to article 283 of the Convention, the Ukrainian Side demands that the Russian Federation expeditiously proceed to an exchange of views regarding the settlement of this dispute by negotiation or other peaceful means", arbitrarily imposing a deadline of "within ten days". Within 10 days, *i.e.* on 25 March 2019, Russia provided a written holding response. Ukraine failed to await a substantive response, and issued the Claim within the week, on 31 March 2019. Russia agreed to hold consultations with Ukraine under article 283 UNCLOS. Consultations were held on 23 April 2019, but Ukraine did not engage meaningfully; Russia expressed its willingness to continue a dialogue on the settlement of the dispute by peaceful means, but Ukraine declared its lack of interest in this path, and elected to press on with a hearing on provisional measures. In the premises, article 283(1) of UNCLOS has not been satisfied, and *prima facie* jurisdiction is lacking for that reason.[6]

[5] Para. 17 of Ukraine's Request.
[6] Para. 37 of Russia's Memorandum of 7 May 2019, footnotes omitted.

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9. At the public sitting held on 10 May 2019, Ukraine orally rebutted Russia's contention quoted in paragraph 8 above as being "simply incorrect". According to Ukraine, on 15 March 2019, Ukraine transmitted a note verbale to the Russian Federation indicating its preference for the dispute to be resolved through Annex VII arbitration and requesting an exchange of views pursuant to article 283. In light of the urgency of the situation, Ukraine insisted that this exchange of views take place within ten days. Contrary to Russia's argument, this ten-day deadline was not "arbitrary"—it reflected the fact that each passing day further compounded the harm to Ukraine's rights, and that Ukraine had already, over a period of months, repeatedly protested the detention of the vessels and servicemen and sought their release. Ukraine then concluded that Ukraine's obligation to exchange views was satisfied on 25 March 2019. Since article 283 requires the exchange of views to take place "expeditiously" and, in simply ignoring Ukraine's proposed schedule for an exchange of views, Ukraine considered Russia to have failed to comply with that obligation. When it received Russia's note verbale of 25 March 2019, Ukraine could not have foreseen that Russia would—weeks later—agree to Ukraine's request for a meeting, and Ukraine was entitled to presume that further attempts to seek negotiations would not be fruitful. Ukraine considered that it was not required to indefinitely postpone its case and allow further harm to its rights.[7] On 16 April 2019, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Ukraine submitted the Request to the Tribunal to prescribe provisional measures.

10. Pursuant to the well-established jurisprudence of the Tribunal, the obligation to "proceed expeditiously to an exchange of views" under article 283 of the Convention applies equally to both parties to the dispute.[8] Typically, the applicant requesting the prescription of provisional measures from the Tribunal by virtue of article 290, paragraph 5, had on several occasions prior to the institution of proceedings under Annex VII to the Convention sent diplomatic notes to inform the respondent of the applicant's concerns about the respondent's conduct in violation of the Convention and to request that a meeting be held on an urgent basis to discuss these concerns with a view to resolving the dispute amicably.[9]

[7] ITLOS/PV.19/C26/1, pp. 15-17.

[8] *E.g.*, *Land Reclamation in and around the Straits of Johor (Malaysia* v. *Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 19, para. 38.

[9] See, *e.g.*, *ibid.*, para. 39.

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11. With due respect, the Tribunal's Order today does not seem to have examined the ordinary meaning of article 283, paragraph 1, that the obligation for the parties to the dispute to proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means is implicated "[w]hen a dispute arises between States Parties concerning the interpretation or application of this Convention". Paragraphs 86 to 90 of the Order focus on Ukraine's note verbale of 15 March 2019 and the futility of any further exchange of views between Ukraine and Russia for the Tribunal to reach the conclusion at this stage that the requirements of article 283 were satisfied *before* Ukraine instituted arbitral proceedings, and that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it.

12. Of all the documents submitted to the Tribunal, although Ukraine has persistently protested Russia's conduct against Ukraine's three naval vessels and the twenty-four servicemen on board, it was in Ukraine's note verbale No 72/22-188/3-682 dated 15 March 2019 that Ukraine mentioned for the first time article 283 of the Convention and demanded that the Russian Federation "expeditiously proceed to an exchange of views regarding the settlement of this dispute by negotiation or other peaceful means", as well as requesting that the Russian Federation "immediately express its view regarding the proper means of resolving the dispute and the holding of consultations on the matter" with Ukraine. A pertinent legal question is: should not the obligation under article 283 for the parties to the dispute to proceed "expeditiously" to an exchange of views regarding its settlement by negotiation or other peaceful means have commenced once the dispute arose on 25 November 2018? That is to say, does the initiative taken by Ukraine on 15 March 2019 fail to satisfy the "expeditious" element required by article 283?

13. The *travaux préparatoires* of article 283 show that the obligation to proceed to this exchange of views "expeditiously" is not limited to an initial exchange of views at the commencement of a dispute; it is a continuing obligation applicable at every stage of the dispute during which the parties have complete freedom to utilize the dispute-settlement method of their choosing, including direct negotiation, good offices, mediation, fact-finding, conciliation, arbitration or judicial settlement. Therefore, if the parties should decide to skip the stage of direct negotiations and to proceed immediately to some other means, article 283 would not stand in the way of such an agreement.[10]

[10] Nordquist *et al.* (eds.), above note 2, at p. 29, paras. 283.1 and 283.2.

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The rationale behind article 283 seems to be to ensure that resort to the mechanisms of section 2 of Part XV or other compulsory procedures under the Convention is not premature or a matter of course, but occurs only once it becomes clear that the dispute cannot be solved by less adversarial means, whereas the requirement for the expeditious commencement of the exchange of views is intended to prevent it from being used as a delaying tactic.[11]

14. According to one view, expressed by Judge ad hoc Anderson in his Declaration in the *"Arctic Sunrise"* case:

> The emphasis is more upon the expression of views regarding *the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties*. The main purpose underlying article 283 is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it. The Tribunal has rightly noted in paragraphs 73 and 74 of the Order [in the *"Arctic Sunrise"* case] that there were several diplomatic exchanges between the parties before legal proceedings were instituted.[12] [Emphasis added]

15. The Annex VII arbitral tribunal to be constituted will have to determine definitively whether Ukraine has satisfied all the conditions under article 283. At this stage of the case before this Tribunal, I would give the benefit of the doubt to Ukraine, although I do have some concern that the ten-day deadline imposed by Ukraine in its note verbale of 15 March 2019 for Russia to respond might not be reasonable for many States whose internal bureaucratic process requires interagency consultations in order for them to be able to respond officially to a demand by a foreign State.

16. The fact that Ukraine submitted a draft United Nations General Assembly resolution on 5 December 2018—which, *inter alia*, called upon the Russian Federation to release the three naval vessels and their crews and equipment unconditionally and without delay; called for the utmost restraint to deescalate the situation immediately; and called upon the Russian Federation "to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait in accordance with applicable international law, in particular provisions

[11] Alexander Proelß (ed.), *United Nations Convention on the Law of the Sea. A Commentary* (Oxford: Hart 2017), p. 1831.

[12] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230 at pp. 254-5, para. 3.

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of the 1982 United Nations Convention on the Law of the Sea"[13]—might, at this stage, be considered, *prima facie*, as a means through which Ukraine proceeded "expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means" not long after the 25 November 2018 incident. Russia itself was involved in trying to block or at least amend the draft resolution, especially through its allies at the United Nations General Assembly.[14] There was, arguably, an expeditious, albeit indirect, exchange of views between the Parties using the United Nations General Assembly as a forum to settle this dispute by means of a draft United Nations General Assembly resolution, which was eventually adopted unchanged as resolution 73/194 of 17 December 2018 by a vote of 66 in favour, 19 against, and 72 abstentions.[15] This *prima facie* conclusion might also need to be seen in the context in which the bilateral relation between Ukraine and Russia has not been normal since 18 March 2014.

Plausibility of rights

17. Since 2015, the Tribunal has, following the International Court of Justice in 2009,[16] required that the rights for which the applicant seeks protection by means of the prescription of provisional measures appear to be plausible or are at least plausible.[17] I am pleased that in the present case before the Tribunal, the Tribunal has been scrupulous in ascertaining whether the alleged rights are plausible, and has not

[13] Draft resolution entitled "Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov", United Nations General Assembly Document A/73/L.47 (5 December 2018). The draft was co-sponsored by Australia, Austria, Bulgaria, Canada, Croatia, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovenia, Sweden, Turkey, Ukraine, United Kingdom, and United States of America.

[14] United Nations General Assembly Document A/73/PV.56 (17 December 2018), pp. 11-23.

[15] United Nations General Assembly Document A/RES/73/194 (23 January 2019), operative paras. 5 and 6.

[16] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, ICJ Reports 2009*, p. 139, at p. 151, para. 57 and p. 152, para. 60. See also the discussion on the threshold of plausibility in relation to provisional measures in the Final Report on Provisional Measures (23 December 2016) by the Institut de droit international, *passim*, available at <http://www.idi-iil.org/app/uploads/2017/06/3eme_com.pdf>, accessed 24 May 2019.

[17] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at pp. 158-9, paras. 58-62; *"Enrica Lexie" (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, paras. 84-5.

equated this threshold of plausibility with a lower threshold, such as that of possibility.[18]

18. With regard to the immunity of the twenty-four Ukrainian servicemen, Ukraine submits, in paragraph 25 of its Request:

> As this Tribunal has previously determined, "the Convention considers a ship as a unit", comprised of the ship itself, its crew, every other person on board the ship or otherwise "involved or interested in its operations", and the ship's cargo. Thus, the passengers and crew of a naval vessel are entitled to immunity to the same extent as the vessel. The Ukrainian servicemen detained by the Russian Federation are also entitled to the customary immunity accorded public servants exercising official functions.[19]

19. I am not convinced that the legal position of a ship including its crew and passengers as a single unit for the purpose of the nationality of claims necessarily or automatically means that, if the ship in question is a warship entitled to immunity, its crew and passengers on board are also automatically entitled to the same immunity as the one accorded to the warship.

20. Paragraph 98 of today's Order reads:

> The Tribunal also notes that the twenty-four servicemen on board the vessels are Ukrainian military and security personnel. While the nature and scope of their immunity may require further scrutiny, the Tribunal considers that the rights to the immunity of the twenty-four servicemen claimed by Ukraine are plausible.

21. The Tribunal does not explain the basis of such plausibility of the immunity of the twenty-four servicemen. I myself concur that the twenty-four Ukrainian servicemen are, *prima facie*, entitled to immunity for the following reasons.

22. Firstly, by virtue of article 293, paragraph 1, of the Convention, this Tribunal shall apply this Convention "and other rules of international law not incompatible with this Convention". In this regard, rules of general international law on the immunity of State officials from foreign criminal jurisdiction are applicable insofar as they are not incompatible with the Convention.

[18] *Contra*: *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018*, paras. 6-70, where the International Court of Justice notes that "the rights whose preservation is sought by Iran appear to be based on a *possible* interpretation of the 1955 Treaty and on the *prima facie* evidence of the relevant facts [and that] [i]n light of the foregoing, the Court concludes that, at the present stage of the proceedings, some of the rights asserted by Iran under the 1955 Treaty are *plausible*." (Emphasis added).

[19] Footnotes omitted. See also ITLOS/PV.19/C26/1, p. 12, ll. 7-33.

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23. The pertinent provisions of the International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction, as provisionally adopted,[20] read as follows:

Draft article 2. Definitions

For the purposes of the present draft articles:

[. . .]

(e) "State official" means any individual who represents the State or who exercises State functions.
(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Part three. Immunity ratione materiae

Draft article 5. Persons enjoying immunity ratione materiae

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Draft article 6. Scope of immunity ratione materiae

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Draft article 7. Crimes in respect of which immunity ratione materiae *does not apply*

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in relation to the following crimes:
   (a) Genocide;
   (b) Crimes against humanity;
   (c) War crimes;
   (d) The crime of apartheid;
   (e) Torture;
   (f) Enforced disappearances.

[20] UN Doc. A/CN.4/722 (12 June 2018), Annex.

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2. For the purposes of this article, the meaning of crimes under international law referred to above shall be construed in accordance with the definition of such crimes as set forth in the treaties listed in the annex to these draft articles.

24. The International Law Commission's commentary on draft article 2(e) lists some examples of "officials" falling within the definition thereunder, including "military officials of various ranks, and various members of government security forces and institutions", irrespective of the hierarchical position occupied by these individuals within a State.[21] The commentary on draft article 2(f) makes it clear that, in order for a State official to be entitled to immunity *ratione materiae*, there must also be a direct connection between the act performed by the State official and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of sovereign equality of States.[22]

25. As the twenty-four servicemen on board the three Ukrainian naval vessels have not been accused of committing any crime to which the immunity *ratione materiae* shall not apply, they are, at least *prima facie*, State officials entitled to immunity *ratione materiae*.

Law of naval warfare

26. In several diplomatic notes addressed to Russia, Ukraine has also asserted that that the Ukrainian servicemen were "taken as prisoners of war" and demanded that "the Russian Side immediately and fully ensure all the lawful rights of the captured military servicemen of the Armed Forces of Ukraine as required by the Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War".[23] Russia simply rebuts this assertion by stating:

Although it appears that Ukraine may wish to make something of the fact that Russia has denied that the Military Servicemen are prisoners of war (and hence is treating this as a matter for its civilian courts), that denial pertains to the categorisation of the situation as an armed conflict for the purposes of international humanitarian law and does not mean that the incident does

[21] *Report of the International Law Commission, Sixty-sixth Session (5 May-6 June and 7 July-8 August 2014)*, UN General Assembly Official Records, Sixty-ninth Session Supplement No 10 (A/69/10), p. 233, para. (7) and p. 235, para. (14).

[22] *Report of the International Law Commission, Sixty-eighth Session (2 May-10 June and 4 July-12 August 2016)*, UN General Assembly Official Records, Seventy-first Session Supplement No 10 (A/71/10), p. 354, para. (3).

[23] Ukraine's Statement of Claim, Appendix E.

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not concern military activities for the purposes of article 298 of UNCLOS, which is a wholly separate question. Russia's position is entirely consistent with the position taken by the Tribunal in the *Philippines* v. *China* Award cited above.[24]

27. Russia does not seem to accept that there is a situation of armed conflict between Russia and Ukraine. Therefore, there is no place in the present proceeding before this Tribunal for the applicability of the law of naval warfare as *lex specialis* that would replace the law of the sea under the 1982 United Nations Convention on the Law of the Sea and allow targeting military objectives such as enemy warships which are not immune from capture, attack or destruction to achieve a military advantage for Russia.[25]

28. Despite Ukraine's repeated reference to the twenty-four Ukrainian servicemen as "prisoners of war", Ukraine is not estopped from resorting to the application of the law of the sea, as opposed to the law of naval warfare, in the proceeding before this Tribunal. According to the Tribunal's established jurisprudence,

> [T]he Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation. The Tribunal notes in this respect the observations in the *North Sea Continental Shelf* cases (*Judgment, ICJ Reports 1969*, p. 3, at p. 26, para. 30) and in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Judgment, ICJ Reports 1984*, p. 246, at p. 309, para. 145).[26]

29. At least one main element of estoppel has not been fulfilled in the case before us—Russia has not submitted any evidence to prove that it has been induced by Ukraine's representation to act to its detriment. On the contrary, the submissions to this Tribunal by both Russia and Ukraine focus on the interpretation or application of the provisions of the 1982 Convention they consider relevant to the dispute before this Tribunal.

[24] Para. 33(b) of Russia's Memorandum of 7 May 2019. This is duly noted in para. 44 of the Tribunal's Order today.

[25] Cf. James Kraska, "The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?", *EJIL: Talk!* (3 December 2018), available at <https://www.ejiltalk.org/the-kerch-straitincident-law-of-the-sea-or-law-of-naval-warfare/>, accessed 24 May 2019.

[26] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 4, at p. 45, para. 124, also quoted in *"M/V Norstar" (Panama* v. *Italy), Preliminary Objections, Judgment of 4 November 2016*, at p. 70, para. 306.

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Appropriateness for the Tribunal to prescribe provisional measures in this case

30. Ukraine has also resorted to the European Court of Human Rights to seek protection of the human rights of the twenty-four Ukrainian servicemen. On 4 December 2018, the European Court of Human Rights decided to indicate to the Russian Government by way of interim measure that, "in the interests of the parties and the proper conduct of the proceedings before it, they should ensure that appropriate medical treatment be administered to those captive Ukrainian naval personnel who required it, including in particular any who might have been wounded in the naval incident that took place on 25 November 2018".[27]

31. While paragraphs 108-9 of today's Order allude to that course of action by Ukraine and at the public sitting held on 10 May 2019 Ukraine tried to rebut Russia's argument on this point,[28] the Tribunal's Order does not refer to the relevance or non-relevance of the litigation pending before the European Court of Human Rights in relation to the Request by Ukraine for the prescription of provisional measures by this Tribunal.

32. In my view, the proceeding before the European Court of Human Rights is entirely different from this proceeding before this Tribunal. According to available information, Ukraine's inter-State case against Russia in the European Court of Human Rights alleges violation by the latter of articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial) and 38 (examination of the case) of the 1950 European Convention on Human Rights, to which both Ukraine and Russia are party.[29] None of these alleged violations are issues before the Tribunal, and the Tribunal can prescribe provisional measures within the limit of its own competence as provided for in article 290, paragraph 5, of the 1982 Convention.

Provisional measures prescribed by the Tribunal

33. Paragraph 119 of today's Order merely states that the Tribunal "does not consider it necessary to require the Russian Federation to suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings" as

[27] European Court of Human Rights Press Release ECHR 421 (2018) of 4 December 2018.
[28] ITLOS/PV.19/C26/1, p. 31, ll. 21-44.
[29] Application no 55855/18, and see "Russia seizure of Ukrainian sailors: what important step did the Ukraine . . .", *true-news.info* (8 January 2019), available at <http://all.true-news. info/russias-seizure-of-ukrainian-sailors-what-important-step-did-the-ukraine/>, accessed 24 May 2019.

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requested by Ukraine. The Tribunal does not elaborate in more detail, as it should have done, why such a provisional measure is not necessary at this stage. In my humble opinion, an applicant for the prescription of provisional measures should be entitled to be fully apprised of the reason(s) why one or more provisional measures requested by it is or are not prescribed.

Compliance and enforcement of the Order

34. Article 290, paragraph 6, of the Convention stipulates unequivocally that the parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

35. Compliance with international legal obligations, including judgments and orders of international courts and tribunals, has been subject to extensive academic discussion.[30]

36. In the *"Arctic Sunrise"* case, Russia informed the Netherlands that it did not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands. Therefore, Russia did not participate in the proceedings before the Tribunal in respect of the Netherlands' request for the prescription of provisional measures under article 290, paragraph 5, of the Convention. Likewise, Russia did not take part in the proceedings before the Annex VII arbitral tribunal which subsequently, on 14 August 2015, issued a unanimous Award on the Merits, in which it found that Russia had breached its obligations under the Convention by boarding, investigating, inspecting, arresting, detaining, and seizing the *Arctic Sunrise*, Greenpeace's vessel flying the Dutch flag, without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the thirty persons on board that vessel. The Annex VII arbitral tribunal also found that Russia breached the Convention by failing to comply with the order prescribing provisional measures issued by the International Tribunal for the Law of the Sea in connection with this arbitration and by failing to pay the deposits requested by the Annex VII arbitral tribunal in the proceedings. In its Award on Compensation dated 10 July 2017, the Annex VII arbitral tribunal unanimously determined

[30] *E.g.*, Oscar Schachter, *International Law in Theory and Practice* (Dordrecht/Boston/London: Martinus Nijhoff 1991), pp. 184-249, 389-417; Joseph Sinde Warioba, "Monitoring Compliance with and Enforcement of Binding Decisions of International Courts" (2001) 5 *Max Planck Yearbook of United Nations Law* 41; Karen J. Alter, "Do International Courts Enhance Compliance with International Law?" (2002) 25 *Review of Asian and Pacific Studies* 51; Andrew T. Guzman, "A Compliance-Based Theory of International Law" (2002) 90 *California Law Review* 1823; Carmela Lutmar, Cristiane L. Carneiro, and Sarah McLaughlin Mitchell, "Formal Commitments and States' Interests: Compliance in International Relations" (2016) 42 *International Interactions* 559.

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the quantum of compensation owed by Russia to the Netherlands. The Tribunal decided that Russia shall pay the Netherlands the following sums, with interest: (i) €1,695,126.18 as compensation for damage to the *Arctic Sunrise*; (ii) €600,000 as compensation for non-material damage to the vessel for their wrongful arrest, prosecution, and detention in Russia; (iii) €2,461,935.43 as compensation for material damage resulting from the measures taken by Russia against the vessel; (iv) €13,500 as compensation for the costs incurred by the Netherlands for the issuance of a bank guarantee to Russia pursuant to the Provisional Measures Order prescribed by the International Tribunal for the Law of the Sea; and (v) €625,000 as reimbursement of Russia's share of the deposits paid by the Netherlands in the proceedings.

37. Despite Russia's non-participation in the proceedings before this Tribunal and the Annex VII arbitral tribunal in the *"Arctic Sunrise"* case, a full and final settlement in that case was reportedly reached between the Netherlands and Russia on 17 May 2019, whereby Greenpeace would be paid €2.7 million by Russia.[31] This final settlement forms part of the agreement between the Netherlands and Russia on the prevention of and response to any future incident similar to the one in the *"Arctic Sunrise"* case.[32]

38. I am, therefore, optimistic that the provisional measures prescribed by the Tribunal today will be of practical significance in the eventual peaceful settlement of the present dispute between the Parties.

DECLARATION OF JUDGE LIJNZAAD

1. I have voted for the Order on Provisional Measures, but with a certain reluctance as to the Tribunal's considerations about the law that may be applicable to this case.

2. Under article 290, paragraph 5, the Tribunal is to evaluate whether it considers that *prima facie* "... the tribunal which is to be constituted would have jurisdiction ...". This criterion is understood to refer to the existence of a dispute concerning the interpretation and application of the Convention. As the information presented to the

[31] "Russia to Award $3M to Greenpeace in Settlement", *Moscow Times* (17 May 2019), available at <https://www.themoscowtimes.com/2019/05/17/russia-to-award-3mln-to-greenpeacein-settlement-a65632>, accessed 24 May 2019.

[32] Joint statement by the Russian Federation and the Kingdom of the Netherlands on cooperation in the Arctic zone of the Russian Federation and dispute settlement, dated 17 May 2019, available at <http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3651941?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB>, accessed 24 May 2019.

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Tribunal has shown, the positions of Ukraine and the Russian Federation quite clearly demonstrate that a difference of opinion exists as to the interpretation and applicability of provisions of the Convention with respect to passage through the Kerch Strait by the three Ukrainian naval vessels on 25 November 2018.

3. Initially, it is the plaintiff who shapes a court case, not only by formulating its application but also by presenting the grounds on which its claim is based. In its Notification and Statement of Claim, Ukraine refers to the violation by Russia of its rights under articles 32, 58, 95 and 96 of the Convention through the seizure and detention of the three Ukrainian naval vessels, the *Berdyansk*, the *Nikopol* and the *Yani Kapu*, and the detention of the crew of these vessels. This is reiterated in its Request for the Prescription of Provisional Measures, and was further elaborated upon during the hearing on 10 May 2019.

4. The Memorandum of the Government of the Russian Federation provides the reasons why it considers the Tribunal ought not to consider that *prima facie* jurisdiction of an arbitral tribunal would exist. This is based on the military activities exception under article 298, paragraph 1(b). Consequently, in its view, the Tribunal should decline the Request for Provisional Measures. On more substantive legal aspects, the Press Release of 26 November 2018 of the Federal Security Service of the Russian Federation about the incident in the Kerch Strait refers *inter alia* to articles 19, 25, paragraph 3, and 30 of the Convention as relevant to the Russian actions on 25 November 2018.

5. What concerns me is whether the current matter is truly a dispute concerning the interpretation and application of the Convention, or whether other rules of international law, for which the Tribunal may not have jurisdiction, are at issue. Ukrainian diplomatic notes addressed to the Russian Federation give an indication of other legal rules potentially applicable to the situation. While referring to various articles of the Convention, a note verbale of Ukraine dated 26 November 2019 also refers to "a flagrant violation of article 33 of the UN Charter" and "reserves the right to apply article 51 of the UN Charter concerning the right to self-defense". It further refers to the applicability of the Third Geneva Convention of 12 August 1949 "relative to the Treatment of Prisoners of War" in respect of the detained crew members. In a note verbale on 27 November 2018, the detained crew members are referred to as having been "taken as prisoners of war". More notes verbales were sent by Ukraine, but not all have been shared with the Tribunal.[1]

[1] See: note verbale of 15 March 2019, 1st paragraph.

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6. In its discussion of military activities as an exception to the Tribunal's jurisdiction, the Russian Memorandum refers in paragraph 33(b) to its unwillingness to treat the detained crew members as prisoners of war as pertaining to "the categorisation of the situation as an armed conflict for the purposes of international humanitarian law". That paragraph seeks to distinguish Russia's reliance on the military activity exception under article 298, paragraph 1(b), from its non-acceptance of the applicability of international humanitarian law in this case.

7. This information suggests that the law potentially applicable to this case, in a *prima facie* evaluation of the jurisdiction of an Annex VII arbitral tribunal, has been dealt with too succinctly by the Tribunal in paragraph 44 of the Order. The final sentence of that paragraph cannot be understood without also making reference to the views on relevant legal provisions as expressed by Ukraine in its earlier communications to the Russian Federation.

8. The views expressed by the Parties in this dispute potentially demonstrate a difference of opinion as to the interpretation and application of the laws of armed conflict, for which this Tribunal has no jurisdiction. I am confident that the questions of the applicable law and of whether the issues raised are solely to be understood as being related to the interpretation and application of the United Nations Convention on the Law of the Sea (matters that go well beyond the *prima facie* analysis of a Request for Provisional Measures) may be addressed by an Annex VII arbitral tribunal at a later stage.

SEPARATE OPINION OF JUDGE JESUS

1. I voted for the provisional measures in this case. Nonetheless, since the characterization of military activities, as an exception to the jurisdiction of the arbitral tribunal under article 298, paragraph 1(b), was a central element in the decision of the Tribunal, I felt that I should clarify my position on this point since, in my view, the issue was not dealt with clearly in the text of the Order on provisional measures.

2. My first observation is that the issue of military activities has to be examined not only from the point of view of the actions taken by the Russian Federation surrounding the arrest and detention of the Ukrainian warships, but also from the point of view of the activities undertaken by the Ukrainian warships while exercising their right of passage through territorial waters.

3. The Tribunal seems to have centred its attention solely or mainly on the characterization of whether the actions taken by the Russian

Federation were military activities for the purposes of excluding the jurisdiction of the arbitral tribunal in accordance with article 298, paragraph 1(b), of the Convention or, rather, law enforcement activities. The Tribunal concluded that the actions taken by the Russian Federation in the arrest and detention of the Ukrainian warships appear to be of a law enforcement nature. I concur with the conclusions of the Tribunal in this regard and I shall not address this issue here. I will only address the issue of whether the activities of the Ukrainian warships amounted to possible military activities.

4. Equal importance in this case can be attached to the *prima facie* determination of the military activities exception claimed by the Russian Federation and the characterization of the activities of the Ukrainian warships while exercising their right of passage through the territorial sea. I will therefore state my views on whether the Ukrainian warships may have engaged in any activities that can be considered as military in nature under the Convention.

5. At issue here was the argument raised by the Russian Federation questioning the jurisdiction of the arbitral tribunal, based on the declaration it made under article 287 of the Convention upon deposit of its ratification instrument, in which it expressly stated that it did not "accept the procedures, provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning . . . military activities by government vessels and aircraft". The characterization of the activities surrounding the arrest and detention of the Ukrainian naval vessels became the central issue in this case concerning the determination of whether the arbitral tribunal has *prima facie* jurisdiction to adjudicate on the case.

6. Although the Russian Federation decided not to appear before the Tribunal in the present case, it nonetheless conveyed its position on the Request for provisional measures submitted by Ukraine through a Memorandum sent to the Tribunal dated 7 May 2019.

7. Relying on its declaration made under article 287 of the Convention, the Russian Federation stated in that Memorandum that the arbitral tribunal instituted by Ukraine ". . . would have no jurisdiction, including *prima facie* jurisdiction . . ." stating that "the present dispute concerns military activities". It argued further that

> the incident of 25 November 2018 concerned a non-permitted "secret" incursion by the three Ukrainian Military Vessels into Russian territorial waters, which was resisted by military personnel of the Russian Coast Guard, followed by the arrest of the three Ukrainian Military Vessels and the Military Servicemen.

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It clarified that

> Ukraine's dispute concerns these events. The detention of the three Ukrainian Military Vessels and the Military Servicemen resulted directly from the incident of 25 November 2018 and thus cannot be considered separately from the respective chain of events, involving military personnel and equipment both from the Russian and Ukrainian sides. It is manifestly a dispute concerning military activities.

8. Therefore, the main task for the Tribunal in this case was to ascertain *prima facie* whether or not the military activities exception claimed by the Russian Federation applies to the facts and circumstances of the present case.

9. What do these facts and circumstances articulated by the two Parties tell us? They indicate that both Ukraine and Russia admitted that the warships were detained because basically they did not abide by the order not to cross the Kerch Strait.

10. I did not find anything in the information submitted by the Parties, including the information provided to the Tribunal by the Russian Federation, to clearly indicate that the ships were arrested for undertaking this or that concrete military activity in Russian territorial waters.

11. Indeed, the Russian Federation's submissions mention at some point that the ships violated article 19 (innocent passage) of the Convention but, short of that, there is no indication that such a violation was based on this or that particular military activity.

12. In my view, the characterization of military activities as an exception to the compulsory jurisdiction provided for in Section 2 of Part XV of the Convention cannot be made in abstract. Rather, it has to be made in the context of a particular activity being undertaken in a particular maritime space.

13. In the instant case, as the warships where navigating through the territorial sea, article 19 of the Convention appears to provide a particular legal context for examining whether the activities surrounding or resulting from the incident involving the Ukrainian naval vessels, while crossing the territorial sea of the Russian Federation[1] in their attempt to reach the Kerch Channel, are of a military nature. Therefore, the examination of the provisions of paragraph 2 of article 19 referred to above may be seen as providing legal guidance for determining the nature of the activities of the Ukrainian warships

[1] The expression "territorial sea of the Russian Federation" is used in the text of this opinion for ease of reference. It has no bearing on possible disputes relating to the sovereignty over those waters.

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during their passage through the territorial waters of the Russian Federation.

14. Article 19 of the Convention, which the Russian Federation claims to have been violated, sets out, in paragraph 2, the conditions under which the innocent passage of foreign vessels should be processed. An infringement of at least one of those conditions may justify the right of the coastal State to oppose the passage as this would be considered non-innocent passage.

15. Though the Convention does not include a definition of what military activities are, it does outline specific activities that I believe are military in nature. This is the case, for example, at least with the first six activities described in subparagraphs (a) to (f) of article 19 of the Convention. These activities are:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device.

16. Had the Ukrainian warships been detained for undertaking any of the activities referred to above, then this would have indicated to this Tribunal that the incident concerned "military activities". Therefore, because of the article 287 Russian declarations excluding disputes concerning military activities from compulsory jurisdiction under Part XV, the possible conclusion would have been that, on this ground, the arbitral tribunal would lack jurisdiction to adjudicate upon the case.

17. It is clear from the proceedings and from the Memorandum of the Russian Federation that, fundamentally, the detention of the ships took place as a result of enforcement actions on the part of the Coast Guard of the Russian Federation. Upon arresting the warships, the Russian Federation did not mention that they did so because the warships were engaged in one or more of those activities referred to in article 19, paragraph 2(a) to (f), of the Convention.

18. It is true that the Russian Federation argued that

the incident of 25 November 2018 concerned a non-permitted "secret" incursion by the three Ukrainian Military Vessels into Russian territorial

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waters, which was resisted by military personnel of the Russian Coast Guard, followed by the arrest of the three Ukrainian Military Vessels and the Military Servicemen.

19. On the assumption that this is what happened, a "secret" incursion by ships, including warships, into the territorial sea is not one of the activities outlined in article 19, paragraph 2, which would have given legal grounds for opposing the right of passage of the warships. It is hard to believe that the framers of the Convention would have failed to include in article 19 of the Convention a provision along these lines if they had believed it to be an exception to the right of innocent passage. Indeed, under the Convention, States are not required to inform or request prior authorization from the coastal State when their ships, including warships, plan to make use of their right of innocent passage through the territorial sea of the coastal State.

20. It may well be that the Ukrainian warships engaged in acts that could be qualified as military activities. In the context of these proceedings on provisional measures, however, neither were we given enough information to reach that *prima facie* conclusion, especially by the Russian Federation, which chose not to appear before this Tribunal, nor is it the role of the Tribunal in these proceedings to determine whether the activities of the Ukrainian warships, while passing through the territorial sea, were indeed military activities. That is a role reserved for the Annex VII arbitral tribunal, as the tribunal on the merits. The role of this Tribunal in these proceedings was to determine whether there is a plausibility or a possibility that the activities surrounding the warships' passage through the territorial sea of the Russian Federation may not have been military in nature.

21. What we know is that both Parties presented information which led the Tribunal to the *prima facie* conclusion that the incident surrounding the Ukrainian warships' passage and the use of force by the Russian Federation appear to be activities in pursuance of law enforcement. What we do not know, due to lack of information from the Parties, is whether the Ukrainian warships were involved in military activities. Therefore, on both grounds it may be concluded that the Annex VII arbitral tribunal has *prima facie* jurisdiction.

SEPARATE OPINION OF JUDGE LUCKY

1. I voted in favour of the Order prescribing that the naval vessels are to be released and returned to Ukraine and that the twenty-four detained Ukrainian servicemen are to be released and returned to Ukraine.

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2. The provisional measures requested by Ukraine are:

1. Ukraine requests that the Tribunal indicate provisional measures requiring the Russian Federation to promptly:
   (a) Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;
   (b) Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
   (c) Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.

The names of the servicemen are set out in paragraph 2 of the final submissions.

3. The complex issue in resolving the Request arises from the fact that although the Russian Federation participated in the consultations with the President of the Tribunal and the Agent of Ukraine on 23 April 2019 with regard to questions of procedure, the Russian Federation informed the Tribunal, by note verbale dated 30 April 2019, of its decision not to participate in the provisional measures case initiated by Ukraine. The said note states:

> The Russian Federation is of the view that the arbitral tribunal to be constituted under Annex VII of UNCLOS will not have jurisdiction, including *prima facie*, to rule on Ukraine's claim, in light of the reservations made by both the Russian Federation and Ukraine under article 298 of UNCLOS stating, *inter alia*, that they do not accept the compulsory procedures provided for in section 2 of Part XV thereof entailing binding decisions for the consideration of disputes concerning military activities. Furthermore, the Russian Federation expressly stated that the aforementioned procedures are not accepted with respect to disputes concerning military activities by government vessels and aircraft. For this obvious reason the Russian Federation is of the view that there is no basis for the International Tribunal for the Law of the Sea to rule on the issue of the provisional measures requested by Ukraine.
>
> . . .
>
> [T]he Russian Federation has the honour to inform the International Tribunal for the Law of the Sea of its decision not to participate in the hearing on the provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.
>
> However, in order to assist the International Tribunal for the Law of the Sea and in conformity with article 90(3) of the Rules, the Russian Federation intends to submit in due course more precise written observations regarding its position on the circumstances of the case.

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4. In the light of the content in the said note verbale, the Russian Federation contends that the Request is not urgent. In view of the reservations made by both the Russian Federation and Ukraine, stating *inter alia* that they do not accept the "compulsory procedures provided for in section 2 of Part XV [of the Convention] entailing binding decisions for the consideration of disputes concerning military activities" the Tribunal does not have jurisdiction to determine the request for provisional measures. Consequently, the salient factors concern the effect of non-participation in the hearing and the question whether the dispute concerns "military activities" or law enforcement activities.

5. It appears to me that the Order has dealt adequately with the foregoing and I agree with the reasons set out in the Order. However, in this Opinion I will also elaborate and express my views on the non-participation of the Russian Federation and provide reasons why I do not agree with the request of Ukraine to "[s]uspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings".

6. I will set out my views in the following manner: firstly, on nonparticipation by the Russian Federation and, secondly, on the suspension of criminal proceedings against the twenty-four Ukrainian servicemen.

7. The procedural history and the factual background of the case are set out in paragraphs 30-2 of the Order. I shall not repeat these as such but I may refer to them in the context of my views on the matters mentioned.

Non-participation of the Russian Federation

Default proceedings

8. Article 28 of the Statute of the International Tribunal for the Law of the Sea ("the Tribunal") provides:

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

9. By note verbale dated 30 April 2019, the Russian Federation informed the Tribunal of its decision "not to participate in the hearing on the provisional measures in the case initiated by Ukraine" (see paragraph 3 of this Opinion).

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10. Although the Russian Federation did not appear at the hearing on the dates fixed and submitted no evidence in support of its statements, all the relevant documents were considered in context. In my view the Tribunal exercised fairness in these circumstances.

11. It is regrettable that the Tribunal did not have the benefit of hearing submissions from the Russian Federation in support of its position, which can be deduced from the contents of the Memorandum submitted on 7 May 2019. The case for Ukraine was clear and the documents provided sufficient. However, in my opinion, the absence of oral submissions and testimony of witnesses to support the contentions, where necessary, made the task of the Tribunal difficult. Added to the foregoing is the non-appearance of the Russian Federation.

12. It appears to me that because the Russian Federation failed to appear at the hearing and to provide admissible evidence, the Tribunal was deprived of a valuable contribution which may have made its task easier. Nevertheless, the Tribunal was able to arrive at its conclusions.

13. The fact that a party does not appear does not automatically lead to reasonable treatment for the requesting party. Indeed the proceedings must be carried out as normal (T. M. Ndiaye, "Non-Appearance before the International Tribunal for the Law of the Sea", *Indian Journal of International Law*, Vol. 53, p. 546).

14. The reasons set out in the Order explain that the claim is well founded both in fact and law.

Request for suspension of criminal proceedings

15. With respect to the request to *suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings*, I agree with the decision of the Tribunal. However, I want to add my reasons for agreeing.

16. Paragraph 119 of the Order states: "The Tribunal does not consider it necessary to require the Russian Federation to suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and to refrain from initiating new proceedings."

17. The servicemen have been charged and indicted for committing a crime punishable under Part 3 of article 322 of the Criminal Code of the Russian Federation; *i.e.* committing an illegal crossing of the State border of the Russian Federation.

18. The proceedings concerning the offences for which the servicemen are indicted are currently before the Russian criminal court. The servicemen have appeared before the court and the matter was

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adjourned. The proceedings are still pending. I do not think an international court or tribunal can accede to a request to suspend proceedings. This would be tantamount to interfering in the judicial process of a State and its domestic court. The judiciary of a State is an independent institution in accordance with the separation of powers. Only a superior court or director of public prosecutions can order the suspension of proceedings in most States. International tribunals and courts are not superior to domestic courts and international law is not superior to municipal or domestic law. I accept the view that the legal system governed by international law is not superior to the legal system governed by municipal law because each system or order is superior in its own sphere (G. Fitzmaurice, "The General Principles of International Law", *92 H R 1957 II* pp. 5, 70-80; Borchand, "The Relations between International Law and Municipal Law", *27 Virginia Law Review 1940*, p. 137).

19. I agree with the request to release the vessels. They are warships and a warship cannot be arrested and detained (see *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332). A warship has immunity under article 32 of the Convention. I would like to add that the vessels, though mentioned in the indictments, are not designated or detained as exhibits or *corpus delicti* in the domestic judicial proceedings.

20. The Russian Federation maintains in its Memorandum that the incident of 25 November concerned "military activities" and, as such, based on the declarations of both Parties, it does not accept the procedures provided for in section 2 of Part XV of the Convention entailing binding decisions with respect to disputes concerning military activities by government vessels and aircraft. Ukraine contends that the dispute does not concern military activities but rather law enforcement activities and that the declarations do not exclude the present dispute from the jurisdiction of the Annex VII arbitral tribunal.

21. The Tribunal found that, based on the facts before it, "such a dispute is not military in nature". Whether this is conclusive is an issue for the Annex VII arbitral tribunal. I find it difficult to concur with a definitive finding in these proceedings because the Russian Federation did not provide any substantial evidence, documentary or otherwise, to support its contention. It could have been law enforcement or military in nature. At this stage I think it could be both military and law enforcement, but in the light of the evidence before the Tribunal, it seems to me that the events of 25 November reveal a law enforcement exercise.

SEPARATE OPINION OF JUDGE GAO

1. I have voted in favour of the Order simply for the reason and purpose of upholding and honouring the well-established and long-standing basic principle of the immunity of warships under the 1982 United Nations Convention on the Law of the Sea ("UNCLOS" or "the Convention") and customary international law. However, I have major reservations on the approach to and treatment of the issue of the military activities exception in the Order.

2. Before proceeding to the points, I wish to make my position on the immunity of warships absolutely clear. That is to say, warships and naval auxiliary vessels enjoy complete immunity under UNCLOS and customary international law. Therefore, the three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol* and the *Yani Kapu*) and the twenty-four servicemen on board those vessels should never have been arrested and detained in any event. As a corollary, both the vessels and the servicemen should be unconditionally released without delay.

3. The familiar doctrine of sovereign immunity is articulated by a leading scholar in the following statement:

> The general doctrine is, therefore, that a warship remains under the exclusive jurisdiction of her flag-State during her entry and stay in foreign ports and waters. No legal proceedings can be taken against either for recovery of possession or for damages for collision or for a salvage reward, or for any other cause, and no official of the territorial State is permitted to board the vessel against the wishes of her commander.[1]

4. This traditional doctrine of the immunity of warships has remained intact with passage of time, and been reaffirmed in articles 32, 95 and 96 of UNCLOS: warships and ships owned or operated by a State and used only on government non-commercial service "have complete immunity from the jurisdiction of any State other than the flag State".

5. That being said, UNCLOS has also injected a new element into the traditional doctrine: the military activities exception to compulsory dispute settlement procedures embodied in article 298, paragraph 1(b). While the traditional concept of complete immunity for warships may favour naval and maritime powers, coastal States can now also benefit to some extent from the new regime of the military activities exception for the purpose of safeguarding their sovereignty and jurisdiction.

[1] C. J. Colombos, *The International Law of the Sea* (4th Edition, 1959), Longmans Green & Co., London, at p. 227.

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6. Hence, the traditional doctrine of the immunity of warships may now be subject to the limitation of the military activities exception, in cases where such a declaration made by a party under article 298, paragraph 1(b), to exclude military activities from the compulsory dispute settlement procedure is upheld by a court or tribunal in legal proceedings.

7. As indicated, my major reservation concerns the way in which the military activities exception is interpreted and applied in the Order.

8. Article 298, paragraph 1(b), of the Convention on optional exceptions to compulsory jurisdiction provides:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
> . . .
> (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

9. Article 298 of the Convention is a carefully designed and articulated compromise between the compulsory dispute settlement procedures on the one hand and State sovereignty and jurisdiction on the other hand. It serves as a balance by permitting States to except certain disputes concerning sensitive issues of sovereignty, such as maritime boundary delimitation, historical bay and titles, military activities, and certain law enforcement activities, from the application of Section 2 of Part XV in order to foster a universal acceptance of the Convention.

10. Article 298, paragraph 1(b), of the Convention provides that a State Party to the Convention may declare that it does not accept any one or more of the procedures provided for in section 2 with respect to

> disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

11. There have thus far been 27 States that have made declarations pursuant to article 298, paragraph 1(b), on the military activities exception, including: (1) Algeria (on 22.05.2018); (2) Argentina (upon ratification on 01.12.1995); (3) Belarus (upon ratification on

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30.08.2006); (4) Cabo Verde (upon ratification on 10.08.1987); (5) Canada (upon ratification on 07.11.2003); (6) Chile (upon ratification on 25.08.1997); (7) China (on 25.08.2006); (8) Cuba (upon ratification on 15.08.1984); (9) Denmark (upon ratification on 16.11.2004); (10) Ecuador (upon accession on 24.09.2012); (11) Egypt (upon ratification on 26.08.1983 and on 16.02.2017); (12) France (upon ratification on 11.04.1996); (13) Greece (upon ratification on 21.07.1995 and on 16.01.2015); (14) Guinea–Bissau (upon ratification on 25.08.1986); (15) Mexico (on 06.01.2003); (16) Nicaragua (upon ratification on 03.05.2000); (17) Norway (upon ratification on 24.06.1996); (18) Portugal (upon ratification on 03.11.1997); (19) Republic of Korea (on 18.04.2016); (20) Russian Federation (upon signature on 10.12.1992 and ratification on 12.03.1997); (21) Saudi Arabia (on 02.01.2018); (22) Slovenia (on 11.10.2011); (23) Thailand (upon ratification on 15.05.2011); (24) Tunisia (upon ratification on 24.04.1985 and on 22.05.2001); (25) Ukraine (upon ratification on 26.07.1999); (26) United Kingdom (on 12.01.1998 and 07.04.2003); (27) Uruguay (upon ratification on 10.12.1992).[2]

12. Ukraine declared upon ratification on 26 July 1999

in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities.[3]

13. The Russian Federation declared upon ratification on 12 March 1997 that

in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.[4]

[2] Declarations made under articles 287 and 298 of the Convention, ITLOS/47/11/Rev.1, 26 February 2019.
[3] UN Treaty collection database.
[4] *Ibid.*

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14. Both Parties have made declarations to exclude disputes concerning military activities from compulsory dispute settlement procedures under section 2 of Part XV of the Convention. But, in comparison, the Russian Federation further excludes in its declaration "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".

15. Despite their identical declarations on the military activities exception, Ukraine and the Russian Federation, however, hold confronting views on the characterization of the incident and the applicability of article 298, paragraph 1(b).

16. While the Russian Federation maintains that "[i]t is manifestly a dispute concerning military activities" and that the declarations of the Parties therefore exclude the dispute from the jurisdiction of the Annex VII arbitral tribunal, Ukraine asserts that the dispute does not concern military activities, but rather law enforcement activities, and the declarations do not therefore exclude the dispute from the compulsory dispute settlement procedures.

17. Accordingly, the question to be dealt with in this case is whether the dispute between the two Parties concerns military or law enforcement activities. That is the crux of the present case.

18. The term "military activities" is used but not defined in the Convention. Nor has it been dwelled upon by international courts and tribunals in case law since the entry into force of the Convention.

19. Nonetheless, the literature generally seems to support a relatively generous interpretation of this concept. For example, S. Talmon shares the view that:

> there is a widespread agreement that, considering the highly political nature of military activities, the term must be interpreted widely. Military activities are not limited to actions by warships and military aircraft or government vessels and aircraft engaged in non-commercial service.[5]

20. A recent arbitral award briefly touches upon the issue of the military activities exception. The reasoning adopted by the tribunal suggests that the presence of one or more naval vessels may itself be found to characterize the situation as a "dispute concerning military activities, which would result in exclusion from the dispute settlement procedures . . .".[6] But such a line of reasoning and conclusion do not

[5] S. Talmon, "The South China Sea Arbitrations: is there a Case to Answer?" in S. Talmon and B. B. Jia, *The South China Sea Arbitration: A Chinese Perspective*, Hart Publishing, 2014, at pp. 57-8.

[6] Arbitration between the Republic of the Philippines and the People's Republic of China, UNCLOS Annex VII Arbitral Tribunal, Award, 12 July 2016, para. 1161, available at www.pcacpa.org.

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sound very convincing; as one author opines: "[h]owever, this component of the decision is also problematic for a number of reasons. Of these, the most significant is that it appears to considerably lower the threshold . . ." for the military activities exception.[7] Another commentator also points out that "[t]he conflicting interpretation and application of article 298(1)(b) by the tribunal are obvious".[8]

21. The interpretation and application of article 298 are at the centre of three recent cases submitted to Annex VII arbitral tribunals,[9] and the present case relating to provisional measures submitted to this Tribunal. All these four cases involve a choice between and a decision on a restrictive or expansive interpretation of article 298. The jurisdiction of the tribunals in these cases also depends, in whole or in part, on the interpretation and application of article 298, paragraph 1(b).

22. Evaluation of military activities should be based on a combination of factors, such as the intent and purpose of the activities, taking into account the relevant circumstances of the case, such as the manner in which the Parties deployed their forces and the way in which the Parties engaged one another at sea.

23. The facts of the incident and the sequence of the events in the present case can be divided into two distinctive phases: transit passage and stand-off at sea. During an intended passage through the Kerch Strait on 25 November 2018, the three Ukrainian naval vessels were ordered by the Russian Coast Guard to stop and suspend their passage because of the failure of the Ukrainian naval vessels to comply with the relevant regulatory procedures and the temporary closure of the Strait for safety reasons following a recent storm.

24. When the order to stop was ignored by the Ukrainian naval vessels, they were stopped and blocked in the vicinity of an anchorage, with restrictions on their movement, by Russian Coast Guard vessels for allegedly making an illegal crossing of the State border of the Russian Federation.

25. It is from this moment on that the incident escalated from a normal passage into a fully fledged stand-off at sea, involving the three

[7] D. Letts, R. Mclaughlin and H. Nasu, "Maritime Law Enforcement and the Aggravation of the South China Sea Dispute: Implications for Australia", *Australian Year Book of International Law*, vol. 34, 2017, pp. 53-63, at p. 62.

[8] K. Zhou and Q. Ye (2017), "Interpretation and application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal", *Ocean Development & International Law*, 48:331-44, at p. 340.

[9] *The South China Sea Arbitration (The Philippines* v. *China)*, the *Arctic Sunrise Arbitration (Kingdom of the Netherlands* v. *Russian Federation)* and the *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*.

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Ukrainian naval vessels on one side and a combination of ten Russian naval warships and Russian Coast Guard vessels, plus one combat helicopter, on the other.

26. After being blocked for eight hours, the Ukrainian vessels started to break up the block and navigated back from the Kerch Strait. The stand-off is further characterized by a series of violent acts at sea, including firing of warning and target shots on the *Berdyansk*. Three members of the crew on board the *Berdyansk* were wounded by the target shots.

27. Moreover, the Ka-52 combat helicopter of the Russian Ministry of Defence took an active part in the pursuit to stop and detain the Ukrainian naval vessel *Nikopol*. The corvette *ASW "Suzdalets"* of the Black Sea Fleet of the Russian Federation was deployed to be in the vicinity for the purpose of "monitoring the Ukrainian naval vessels' action".[10]

28. As a result of these serious encounters at sea, the three Ukrainian naval vessels and the twenty-four servicemen were arrested and detained by the Russian Coast Guard Vessels and the combat helicopter. The twenty-four servicemen have been subsequently charged in domestic judicial proceedings in Russia.

29. This subsequent domestic legal proceedings against the servicemen in Russia may be a relevant factor of the case, but it should not have a decisive bearing on the characterization of the activities in question.

30. An objective evaluation of the activities in question should also take into account the international actions, official positions, and legal documents of the Parties.

31. Before the Request for provisional measures submitted to this Tribunal, the matter had already been brought by Ukraine to the United Nations Security Council and the European Court of Human Rights (ECHR) on 26 November 2018.

32. It is a matter of common legal knowledge that only events of use or threat of force in potential violation of article 2(4) of the Charter of the United Nations can be referred to the UN Security Council for a resolution; other disputes concerning the interpretation and application of the Convention are normally amenable to resolution through diplomatic or judicial means.

33. Since this Tribunal has ruled in the *"ARA Libertad"* case "that a warship is an expression of the sovereignty of the State whose flag it flies",[11] it should be recognized that the firing of target shots against a

[10] Statement of Claim (Request of Ukraine); Memorandum of Russia, 7 May 2019.

[11] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, para. 94.

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naval vessel is therefore tantamount to use of force against the sovereignty of the State whose flag that vessel flies. This important fact falls well within the military activities.

34. This fact is perhaps the most decisive factor, out of all the information and evidence available to the Tribunal, for the purpose of evaluating the nature of the activities in question. This mere factor has effectively converted what was initially a law enforcement operation into a military situation.

35. The military nature of the activities is also officially recognized in the request for interim measures lodged by Ukraine with the ECHR:

> the Russian combat helicopter initiated an attack on the Ukrainian ships . . . The Ukrainian ships were surrounded by ten vessels of the Russian Coast Guard and of the Black Sea Fleet of the Russian Navy . . . the members of the Ukrainian Navy, taken by the Russian forces following an armed combat when following the orders of his superiors in the Ukrainian Navy Command should be treated by the Russian authorities as the prisoners of war and accorded the treatment, provided for in the Third Geneva Convention.[12]

36. In this urgent request for interim measures, Ukrainian explicitly requested that "the sailors be treated as *prisoners of war* in accordance with the Third Geneva Convention of 1949 and that they be repatriated without delay" (emphasis added).[13]

37. These international actions and legal proceedings between the two Parties provide manifest evidence in support of the military nature of the activities under discussion.

38. Nonetheless, it is regrettable that the Order has failed to pay attention to, and take into account, these important facts and the evidence available to the Tribunal.

39. During the confrontation, all of these activities, such as prolonged standoff between the Ukrainian military force and the Russian combination of military and paramilitary forces, the "hot pursuit" and ramming, the firing of warning and target shorts, the vessel damage and personal casualties suffered from the shooting, should be deemed to constitute military activities for the purposes of article 298, paragraph 1(b).

40. On the contrary, a different characterization and interpretation of these activities was offered in the Order. It is considered in the Order that the use of force is "in the context of law enforcement operation

[12] Quoted in para. 32(e) of the Memorandum of the Government of Russian Federation, 7 May 2019, originally paras. 11, 13-14 and 31 of the Request for Interim Measures of Ukraine, 26 November 2018.

[13] Press Release, ECHR 412 (2018), 30 November 2018.

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rather than a military operation"[14] and "the Tribunal accordingly considers that *prima facie* article 298, paragraph 1(b), of the Convention does not apply in the present case".[15]

41. This part of the Order is perhaps problematic for a number of reasons. Of these, the most significant is that it appears to have considerably raised the threshold for the military activities exception. Such a high threshold for the application of article 298, paragraph 1(b), may potentially have legal as well as political implications.

42. The ruling in the present case and that in another recent arbitral award on the military activities exception offer conflicting interpretations and applications of article 298, paragraph 1(b).

43. While the arbitral award found that the event "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another" constitutes "*a quintessentially military situation*" (emphasis added),[16] the present case decides that, although the Russian naval vessels appeared in the vicinity for monitoring the Ukrainian naval vessels' action and the combat helicopter participated in the operation, "what occurred appears to be the use of force in the context of a *law enforcement operation* . . ." (emphasis added).[17]

44. These contradictory interpretations of article 298, paragraph 1(b), and the double standards employed in its application will certainly give rise to legal confusion between the Parties and among States.

45. A high threshold for the military activities exception may serve as an incentive for States to escalate rather than de-escalate a conflict by deploying a great number of naval vessels and increasing the level of forces in order to qualify for the military activities exception to compulsory dispute settlement jurisdiction.

46. Those States that have made declarations under article 298, paragraph 1(b), would fall into frustration and disappointment upon learning from the jurisprudence that their declarations made in accordance with the Convention on the military activities exception can hardly serve their original intent and purpose, since a strict interpretation of this provision has been adopted in case law for its application. It may also cast doubt in the minds of these States about the impartiality and effectiveness of the compulsory dispute settlement system.

[14] Para. 73 of the Order, *Case concerning the detention of three Ukrainian vessels*, ITLOS, 25 May 2019.
[15] *Ibid.*, para. 77.
[16] *Supra* note 6.
[17] *Supra* note 14.

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47. The recent judicial developments in this respect may therefore cause general concern that the UNCLOS dispute settlement organs might intrude upon military activities excluded from their jurisdiction.

48. The differing interpretation and application of article 298, paragraph 1(b), in recent cases could create fragmentation in not only the jurisdiction of dispute settlement organizations but also international jurisprudence. States Parties might be prompted by recent judicial practice to ponder what, if any, are the objective legal criteria for the military activities exception.

49. In conclusion, although "military activities" and "law enforcement activities" in article 298, paragraph 1(b), ought to be read as distinct categories, they are in reality not always so clearly differentiated and mutually exclusive. For instance, an initial law enforcement activity may eventually escalate into a military situation for one reason or another. The Kerch Strait incident perhaps represents such an example.

50. In my view, the dispute in question has, at least, a mixed nature of both military and law enforcement activities or, in other words, it is a mixed dispute involving both military and law enforcement elements.

51. It is perhaps this law enforcement element of a mixed dispute that appears to equally afford a basis on which the *prima facie* jurisdiction of the Annex VII arbitral tribunal could be found. Unfortunately, such a plausible road is not taken in the Order.

52. This Opinion does not consider it necessary to apply a preponderance test at this stage of the provisional measures to determine which element, military or law enforcement, is predominant, since that is a task for the Annex VII arbitral tribunal to be constituted to decide in the subsequent arbitral proceedings.

53. Last but not the least, it needs to be pointed out that it may have touched upon, or even prejudged, the merits of the case for the Order to rule conclusively at this stage on the nature of the incident as law enforcement activities.

54. Recent judicial practice, albeit still very limited, on the treatment of the military activities exception embodied in the Convention does not seem to shed much light on the interpretation and application of article 298, paragraph 1(b).

55. A legally sound and viable approach to the issue in question should endeavour, bearing in mind the negotiating history of the Convention, to avoid introducing and applying either a very low or a very high threshold for the military activities exception.

DISSENTING OPINION OF JUDGE KOLODKIN

1. For the reasons explained below I was not able to join the Tribunal in concluding that *prima facie* article 298, paragraph 1(b), of the United Nations Convention on the Law of the Sea (hereinafter "the Convention" or "UNCLOS") does not apply in the present case[1] and that *prima facie* the Annex VII arbitral tribunal (hereinafter "the Arbitral Tribunal") instituted by Ukraine (hereinafter "the Applicant") would have jurisdiction over the dispute submitted to it.[2] In my opinion, the Arbitral Tribunal *prima facie* lacks jurisdiction to consider the dispute because the "military activities exception" provided for in article 298, paragraph 1(b), of the Convention is *prima facie* applicable in the present case. Consequently, the Tribunal was not in a position to prescribe provisional measures.

2. The Russian Federation (hereinafter "the Respondent"), when expressing its consent to be bound by the Convention, declared that "in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to ... disputes concerning military activities, including military activities by government vessels and aircraft". Essentially the same declaration was made by the Applicant.[3]

3. The Applicant, noting the declarations made by both Parties under article 298, stated that none of the limitations on the Convention's compulsory dispute settlement procedures set forth in that article is relevant to this dispute.[4] The Applicant developed this view in the oral pleadings. In particular, the Applicant noted that the dispute it brought to the Tribunal, viewed on an objective basis, does not concern military activities and that the acts of which it complains must be military acts, but here they are not, and rather involve the exercise of domestic jurisdiction in a law enforcement context.[5] The Applicant stated that its claims relate to the seizure and detention of its naval vessels and their crew, despite those vessels' immunity from the Applicant's jurisdiction, and that these claims do not concern activities that are military in nature.[6]

[1] Order, para. 77.
[2] *Ibid.*, para. 90.
[3] *Ibid.*, paras. 48, 49.
[4] Request of Ukraine for the prescription of provisional measures under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 16 April 2019, para. 18.
[5] ITLOS/PV.19/C26/1, pp. 18-19.
[6] *Ibid.*

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4. The Respondent does not appear to me to have been arguing, at least directly, that the present dispute is not about the detention of the vessels and servicemen or their immunity from its jurisdiction. Rather, referring to its declaration, the Respondent claimed that "the present dispute concerns military activities and is therefore plainly excluded from the Annex VII arbitral tribunal's jurisdiction".[7]

5. Thus, as the Tribunal observed, the Parties disagree on the applicability of article 298, paragraph 1(b), of the Convention and their declarations under that provision.[8]

6. The Tribunal noted that it is not uncommon for States today to employ naval and law enforcement vessels collaboratively for diverse maritime tasks; that the distinction between military and law enforcement activities cannot be based solely on the characterization of the activities in question by the parties to a dispute; and that this distinction must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.[9] It also stated that for the purposes of determining whether the dispute submitted to the Arbitral Tribunal concerns military activities under article 298, paragraph 1(b), of the Convention, it is necessary to examine a series of events preceding the arrest and detention.[10] I agree with that.

7. However, I cannot go along with the Tribunal's interpretation and legal assessment of the circumstances of the case, or with its legal reasoning, on the basis of which the Tribunal decided not to apply to the present dispute the "military activities exception" under article 298, paragraph 1(b).

8. In particular, I do not agree with the view of the Tribunal that "it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity".[11] Though the Tribunal did not state directly that the Applicant's naval vessels were not exercising military activity while attempting to pass through the Kerch Strait, this seems to be implied in paragraphs 68-70 of the Order. I cannot accept that. Nor do I agree with the Tribunal's view that "at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait";[12] or that "what occurred appears to be the use of force in

[7] Memorandum of the Government of the Russian Federation, 7 May 2019, paras. 26-7.
[8] Order, para. 50.
[9] *Ibid.*, paras. 64-6.
[10] *Ibid.*, para. 67.
[11] *Ibid.*, para. 68.
[12] *Ibid.*, para. 72.

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the context of a law enforcement operation rather than a military operation".[13]

* * *

9. I consider that the navigational activities at sea of a State's warships are inherently, or at least on their face, military. Where, for example, a State's warships exercise freedom of navigation on the high seas or in the exclusive economic zone, this is normally to be considered as military activity. The same holds for the passage of warships through certain maritime areas. Only specific circumstances in a particular situation may warrant a different conclusion. This also applies, in my opinion, for the purposes of the "military activities exception" under article 298, paragraph 1(b), of UNCLOS.

* * *

10. The incident of 25 November 2018 did involve military activities carried out by both Parties.

11. It is publicly known that long before the incident, the Applicant started to officially characterize the situation between itself and the Respondent as armed conflict (and continues to describe it as such after the incident). The Applicant was (and still is) officially accusing the Respondent of "aggression" against it. Thus, the Applicant was knowingly sending its warships to pass through waters controlled by the "enemy" coast guard and military forces.

12. The "Checklist for Readiness to Sail" that was on board the *Nikopol* gunboat, one of the ships that were supposed to pass through the Kerch Strait,[14] is also telling. In his Declaration submitted by the Applicant, Admiral Tarasov, while denying that the "Checklist" was an official order, at the same time described it as a "document".[15]

13. The "Checklist", obviously completed by the Applicant's navy while preparing the departure of its warships towards the port of Berdyansk through the Kerch Strait, states *inter alia* the purposes of their mission and the means by which they are to be accomplished. The Applicant has disputed neither the fact that the "Checklist" was a document produced by its navy nor the content thereof, and itself referred to it in the oral pleadings.[16]

[13] *Ibid.*, para. 74.

[14] Request, Annex F, Appendix A, Nikopol Small Armored Gunboat, Checklist for Readiness to Sail (09:00 Hours on 23 November 2018 to 18:00 Hours on 25 November 2018).

[15] Request, Annex F, para. 9.

[16] ITLOS/PV.19/C26/1, p. 8.

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14. The "Checklist" expressly states that in particular:

- it was a mission of a "tactical gunboat group No 5" (*i.e.* a military unit, consisting in this case of the small armed gunboats *Berdyansk* and *Nikopol*);
- while on the mission, the group must "concentrate on covertly approaching and passing through the Kerch Strait" (this is stated twice in the "Checklist");
- from the morning hours of 23 November, preparations must begin for "action and passage" (not just for passage);
- upon arrival at the port of Berdyansk, the warships were to "stand by to take on missions to stabilize the situation in the Azov theatre of operation";
- and, finally, that the main or one of the main tasks prior to the mission was "[a]ccomplishing main combat training tasks for mission given".[17]

15. "Tactical gunboat group No 5" announced its intention to pass the Kerch Strait, together with the auxiliary navy tugboat *Yani Kapu*, to the navigation administration of the Respondent only at 05:35 on 25 November, *i.e.* eight hours after it had been contacted by the Respondent's border guard and asked about its intentions.[18] After that, the gunboats and the tugboat continued for hours to manoeuvre in the vicinity of the Kerch Strait, ignoring the attempts of the Respondent's coast guard to stop them, until they were blocked. However, after that, the naval group of the Applicant attempted to break through the blockade, disregarding the applicable regulations referred to by the Respondent and ignoring the demands from the Respondent's coast guard to stop.[19] It was not until the Respondent's ships opened fire that the Applicant's naval vessels were actually stopped by the Respondent's coast guard (the *Berdyansk* and the *Yani Kapu*) and military (the *Nikopol*).

16. In my view, it is clear from the above that *prima facie* the mission and the activity of the Applicant's navy in the present case were military. It does not look to me like an intended but not accomplished ordinary passage. Even if it were regarded as such, the mere fact that it was intended to be exercised by the warships, especially when considered together with its purposes, the specifics of the preparations and the manner in which it was intended and attempted to be accomplished, testifies to the military character of the activity.

[17] *Ibid.*, paras. 3-5.
[18] Memorandum, paras. 12-13.
[19] *Ibid.*, paras. 14-17.

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17. There seems to me to be very little in the pleadings of the Parties to support the view that "at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait", despite the fact that passage was denied by the Respondent with reference to its national regulations. In my opinion, in the present case the Applicant, at least at this stage, is not disputing the regime of passage through the Strait, which is based, first of all, on the Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait of 2003 (and the Parties seem not to disagree on this point). What is argued by the Applicant is only the limited issue of the immunity of its naval vessels under articles 32, 58, 95 and 96 of the Convention. Neither Party has claimed that the issue of the lawfulness of the denial by the Respondent of the passage of the Applicant's naval vessels through the Strait was at the heart or the background of the dispute.

18. The Applicant's official position with respect to the Respondent's action in the incident remained for months as follows: from the outset, it characterized this action as an act of aggression, use of force by the Respondent.[20] In doing so, the Applicant did not distinguish between the actions of the Respondent's coast guard, on the one hand, and military, on the other, both of which were involved in the incident. This is consistent with the official position of the Applicant formulated long before the incident in the Kerch Strait. The Applicant believes that it is waging an armed conflict with the Respondent, so what happened on 25 November was a new instance of this conflict. Accordingly, for several months, the Applicant claimed the application of humanitarian and human rights law to the detained servicemen, whom it considered to be prisoners of war, and not immunity under UNCLOS.[21] In the documents submitted to the Tribunal there is no evidence that the Applicant claimed immunity before 15 March. Even after that date, in the proceedings in the Respondent's courts, the defence for the Applicant's personnel continues to insist that they were captured by the Applicant "during an armed conflict", in a "specifically border incident that happened on 25 November", that they are prisoners of war, and it is not claiming immunity.[22]

19. However, in the proceedings before the Tribunal, the Applicant claims that the Respondent's action was a law enforcement one,

[20] *Ibid.*, para. 32.
[21] *Ibid.*
[22] Request, Annex G, Appendix A, p. 5.

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observing that the Respondent itself has "treated the incident as a criminal law enforcement matter" and that the servicemen are subjected to prosecution in "civilian courts".[23]

20. The Respondent did not state that its action in the incident was an act of use of force in an armed conflict. Nor, in my view, did it, while referring to the provisions of UNCLOS and its national criminal law, describe its action in the incident as law enforcement. Rather, the Respondent emphasizes the involvement of its military in the incident, which was followed by the arrest of the Applicant's three naval vessels and the servicemen, and states that detention of these vessels and personnel resulted directly from the incident. It claims that the activities involved in the incident were plainly military in nature, that, this being the case, its subsequent treatment is an irrelevance, and that the activities at issue in this case were military in nature.[24]

21. For me, the real picture of the Respondent's action in the incident is *prima facie* as follows. It started as a law enforcement activity when the Applicant's naval vessels were first detected, contacted and warned by the Respondent's coast guard. Then it escalated into military activities when the Respondent's navy and air force became involved. They were not just in the vicinity, but rather actively engaged in the operation. They were engaged, first, to obstruct and, then, to curb current activities and prevent further activities by the Applicant's naval group when the Respondent's Ministry of Defence combat helicopter stopped the gunboat *Nikopol* and a corvette from the Respondent's Black Sea Fleet monitored the Applicant's navy actions.[25] As the Applicant itself observed, when its vessels proceeded to enter the Strait on 25 November, they were obstructed by ships from the Respondent's navy and coast guard.[26] It was only after the Applicant's naval group and its military activity had been stopped, with the direct involvement and assistance of the Respondent's military, that the latter resumed its distinctly law enforcement action (in particular, the arrest and detention of the *Nikopol* took place only after it had been stopped by the armed forces). In my view, the Respondent's activity in the incident was *prima facie* military to a large extent, at least.

22. The activities of each Party during the incident contributed to its nature. They were obviously interrelated and, in assessing the overall picture of the incident, should be considered as a whole. The activities

[23] See, for example, Request, Annex A, para. 11.
[24] Memorandum, paras. 28, 33.
[25] Memorandum, para. 19.
[26] Request, Annex A, para. 8.

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of the Applicant were purely military in nature and the activities of the Respondent were military to a large extent. Taken as a whole, the real picture of the incident reveals a confrontation, involving the use of force, between the armed forces of one State and law enforcement and armed forces of the other. The events that immediately preceded the arrest and detention, especially when objectively assessed *prima facie*, look to me much more like a naval clash, or, as the defence for the servicemen described it, a border incident, than a law enforcement operation. These events did not amount to armed conflict but went beyond law enforcement.

23. In my view, the arrest and detention of the Applicant's vessels are *prima facie* so closely related to the immediately preceding military activities that they cannot be reasonably considered separately. Accordingly, the present dispute concerning the detention of the vessels, at the same time, *prima facie* concerns military activities and as such is *prima facie* excluded from the jurisdiction of the Arbitral Tribunal under article 298, paragraph 1(b), of the Convention.

[Report: *ITLOS Reports 2018-2019*, p. 283]

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