

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2019

25 May 2019

<p><u>List of Cases:</u> No. 26</p>

**CASE CONCERNING THE DETENTION
OF THREE UKRAINIAN NAVAL VESSELS**

(UKRAINE *v.* RUSSIAN FEDERATION)

Request for the prescription of provisional measures

ORDER

Present: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Registrar* GAUTIER.

THE TRIBUNAL,

composed as above,

after deliberation,

Having regard to article 290 of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) and articles 21, 25 and 28 of the Statute of the Tribunal (hereinafter “the Statute”),

Having regard to articles 89 and 90 of the Rules of the Tribunal (hereinafter “the Rules”),

Having regard to the “Notification under Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea and Statement of the Claim and Grounds on which it is Based” (hereinafter “the Statement of Claim”) dated 31 March 2019, addressed by Ukraine to the Russian Federation, instituting arbitral proceedings under Annex VII to the Convention in respect of a “dispute concerning the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board”,

Having regard to the request for provisional measures contained in the Statement of Claim submitted by Ukraine to the Russian Federation pending the constitution of an arbitral tribunal under Annex VII to the Convention,

Makes the following Order:

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.

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.

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 24 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.
- 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 Bezpachenko;
 - o. Senior Seaman Yuriy Yuriyovych Bezyazychnyy;
 - p. Senior Seaman Andriy Andriyovych Oprysko;
 - q. Senior Seaman Volodynyr 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 Semydatsky; 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 24 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 24 Ukrainian servicemen] on board the vessels were formally apprehended under Article 91 of the 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 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 24 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 24 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 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 24 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, I.C.J. 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 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 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 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 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 "non-permitted '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.

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 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.

* * *

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 non-commercial 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 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 24 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 24 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 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 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 24 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 24 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 24 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 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 prejudices 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*, *I.C.J. Reports 1973*, p. 99, at pp. 103-104, 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 24 detained Ukrainian servicemen and allow them to return to 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.

(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.

Done in English and in French, both texts being equally authoritative, in the Free and Hanseatic City of Hamburg, this twenty-fifth day of May, two thousand and nineteen, in three copies, one of which will be placed in the archives of the Tribunal and the others transmitted to the Government of Ukraine and the Government of the Russian Federation, respectively.

(signed)

Jin-Hyun PAIK
President

(signed)

Philippe GAUTIER
Registrar

Judge Kittichaisaree appends a declaration to the Order of the Tribunal.

Judge Lijnzaad appends a declaration to the Order of the Tribunal.

Judge Jesus appends a separate opinion to the Order of the Tribunal.

Judge Lucky appends a separate opinion to the Order of the Tribunal.

Judge Gao appends a separate opinion to the Order of the Tribunal.

Judge Kolodkin appends a dissenting opinion to the Order of the Tribunal.