

№ 1825/H

The Embassy of the Russian Federation to the Federal Republic of Germany presents its compliments to the Registrar of the International Tribunal for the Law of the Sea and further to its note verbale 1733 of 30 April 2019 has the honour to convey in accordance with Article 90 (3) of the Rules the Memorandum of the Russian Federation regarding its position on the circumstances of the case No. 26.

The Embassy of the Russian Federation to the Federal Republic of Germany avails itself of this opportunity to renew to the Registrar of the International Tribunal for the Law of the Sea the assurances of its highest consideration.



Berlin, May 7, 2019

**INTERNATIONAL TRIBUNAL  
FOR THE LAW OF THE SEA**

**Hamburg**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

“CASE CONCERNING THE DETENTION  
OF THREE UKRAINIAN NAVAL VESSELS  
(UKRAINE V. THE RUSSIAN FEDERATION),  
PROVISIONAL MEASURES”

**MEMORANDUM OF THE GOVERNMENT  
OF THE RUSSIAN FEDERATION**

7 MAY 2019

## **Introduction**

1. On 2 April 2019, the Ministry of Foreign Affairs of the Russian Federation (Russia) received a *Note Verbale* from the Ministry of Foreign Affairs of Ukraine enclosing a “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” dated 31 March 2019 (“the Claim”). Subsequently, Ukraine provided a “Request for the Prescription of Provisional Measures under Article 290, paragraph 5 of the United Nations Convention on the Law of the Sea” dated 16 April 2019 (“the PM Request”).
2. This Memorandum sets out Russia’s position that Ukraine has not, and could not, establish jurisdiction, including *prima facie* jurisdiction, of the Annex VII arbitral tribunal in respect of the Claim, and that the requirements for indicating any provisional measures could not be met.
3. This Memorandum does not address the substance of Ukraine’s allegations or the merits of the underlying claim. Nothing in this Memorandum should be interpreted as an acceptance of any assertions contained in the Claim or the PM Request<sup>1</sup> (or of the Annex VII arbitral tribunal’s jurisdiction over the Claim and, accordingly, of the International Tribunal for the Law of the Sea (“the Tribunal”) over the PM Request), and nor does it prejudice Russia’s participation in other phases of the proceedings.
4. The Memorandum is structured as follows:
  - A. Summary of the Claim and the PM Request
  - B. Relevant factual background
  - C. Manifest absence of jurisdiction: the military activities exception
  - D. Additional reasons why the PM Request should be denied

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<sup>1</sup> For the avoidance of doubt, Ukraine’s assertions made at footnote 56 of the PM Request are not accepted (denying a Russian state border in the Kerch Strait, Russia’s right to restrict passage through the Strait, and a Russian territorial sea in areas to the west of the Strait).

## A. Summary of the Claim and the PM Request

5. The Claim concerns an incident on 25 November 2018 in the Black Sea, whereby Russia intercepted and detained three Ukrainian military vessels (the “*Berdyansk*”, the “*Nikopol*” and the tugboat “*Yany Kapu*” (“the three Ukrainian Military Vessels”)), and the 24 military personnel on board (“the Military Servicemen”).<sup>2</sup>
6. Ukraine claims that pursuant to Articles 32, 58, 95 and 96 of the United Nations Convention on the Law of the Sea (“UNCLOS”) and customary international law applicable under Article 293, the Ukrainian Military Vessels and the Military Servicemen enjoy complete immunity from Russian jurisdiction.<sup>3</sup>
7. Ukraine requests an Annex VII arbitral tribunal to adjudge and declare that (i) in seizing and detaining the three Ukrainian Military Vessels, and detaining the Military Servicemen and initiating criminal charges against them, Russia has breached its obligations under Articles 32, 58, 95 and 96 of UNCLOS and such violations constitute internationally wrongful acts for which Russia is responsible, (ii) Russia is required to (a) release the three Ukrainian Military Vessels, (b) release the Military Servicemen, (c) provide Ukraine with appropriate assurances and guarantees of non-repetition, and with full reparation.<sup>4</sup>
8. The Claim includes a request for provisional measures pursuant to Article 290(5) of UNCLOS. This provision “has to be read in conjunction with” Article 290(1) of the Convention.<sup>5</sup> The two provisions set out the requirements for provisional measures in the following terms (emphasis added):

“1. If a dispute has been duly submitted to a court or tribunal which considers that *prima facie it has jurisdiction* under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers *appropriate under the circumstances to preserve the respective rights of the parties to the dispute* or to prevent serious harm to the marine environment, pending the final decision. [...]

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<sup>2</sup> The Claim, para. 1.

<sup>3</sup> The Claim, paras. 22-24.

<sup>4</sup> The Claim, para. 31.

<sup>5</sup> *The “Arctic Sunrise” Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 247, para. 80.*

5. 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.*”

9. Ukraine’s request for provisional measures contained in the Claim is that Russia (i) release the three Ukrainian Military Vessels and return them to the custody of Ukraine, (ii) suspend the criminal proceedings against the Military Servicemen and refrain from initiating new proceedings, and (iii) release the Military Servicemen and allow them to return to Ukraine.<sup>6</sup> By its PM Request, Ukraine seeks an order from this Tribunal prescribing those same provisional measures.<sup>7</sup>

## **B. Relevant factual background**

### **(i) Background to the incident of 25 November 2018**

10. Ukraine’s right of passage through the Kerch Strait is recognised by Russia in accordance with the 2003 Treaty on Cooperation in the Use of the Sea of Azov and the Kerch Strait.<sup>8</sup> The procedure for passing through the Kerch Strait is regulated by the Mandatory Regulations for the Seaport of Kerch approved by the Order of the Ministry of Transport of Russia No. 313 of 21 October 2015 (“the 2015 Regulations”). Similar regulations have been in place for the last 20 years, and were followed by Russian vessels when the Kerch-Yenikale Canal (in the Kerch Strait) was under the control of Ukraine.

11. The incident of 25 November 2018 was preceded by provocative actions and military build-up on the part of Ukraine. For example:

- <sup>a</sup> On 6-8 August 2016, Ukrainian sabotage and reconnaissance units made attempts to infiltrate the territory of Crimea. As a result, three Russian service members received gunshot wounds; one member of the Russian Border Guard Service of the Federal

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<sup>6</sup> The Claim, paras. 25-30 (measures specified at para. 26).

<sup>7</sup> See the PM Request at paras. 5, 22 and 46.

<sup>8</sup> Article 2 provides that “[m]erchant vessels and warships as well as other government vessels flying the flag of the Russian Federation and Ukraine used for non-commercial purposes shall enjoy freedom of navigation in the Sea of Azov and the Kerch Strait.”

Security Service (“the FSB Border Service”) and one member of the Russian Ministry of Defence died from their wounds.<sup>9</sup>

- b. On August 2018, the vessels and motorboats of Ukrainian State Coast Guard regularly threatened by radio to use lethal force against Russian vessels and motorboats if they approached closer than 3.5 km to the Ukrainian State Coast Guard vessels.<sup>10</sup>
- c. In September 2018, Ukraine established a new Azov Naval Base in Berdyansk.<sup>11</sup>
- d. On 24 October 2018, Ukrainian Navy armoured motorboats the “*Lubniy*” and the “*Kremenchug*”, accompanying a vessel sailing under the flag of Bulgaria through the Kerch Strait, repeatedly threatened to use lethal force against Russian vessels.<sup>12</sup> The artillery units were demonstratively prepared for action.<sup>13</sup>

## (ii) The incident of 25 November 2018

12. On 24 November 2018<sup>14</sup>:

- a. At 16:40<sup>15</sup>, the FSB Border Service in the Republic of Crimea detected and identified several vessels of the Ukrainian Navy in the exclusive economic zone (EEZ) of Russia at a distance of 28-30 nautical miles south-east of the Cape of Meganom, namely: the delivering ship “*Gorlovka*” (hull number U-753) and the tugboat “*Yany Kapu*” (hull number A-947), which headed northeast towards the Kerch Strait.
- b. At 21:30, these two Ukrainian naval vessels (the “*Gorlovka*” and the “*Yany Kapu*”) approached Russia’s State Border in the Black Sea near the entrance to the Kerch Strait. Representatives of the FSB Border Service informed them of the formal

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<sup>9</sup> FSB of Russia official website, “FSB of Russia prevented terrorist acts in the territory of the Republic of Crimea, arranged by the Chief Directorate of Intelligence of the Ministry of Defense of Ukraine”, 10 August 2016, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10437869%40fsbMessage.html>.

<sup>10</sup> See Briefing of the First Deputy Head of the Department of the Coast Guard of the FSB of Russia Border Service Aleksey Volskiy and the Chief of the Criminal Investigation Division of the FSB of Russia Mikhail Shishov, 8 December 2018, available at <https://www.youtube.com/watch?v=DZADwsc16gc>.

<sup>11</sup> “Two Ukrainian warships enter Sea of Azov to become part of newly created naval base”, *ukrinform.net*, 24 September 2018, available at <https://www.ukrinform.net/rubric-defense/2544002-two-ukrainian-warships-enter-sea-of-azov-to-become-part-of-newly-created-naval-base.html>. Generally, on the increased presence of Ukraine’s military in the Sea of Azov see “Ukraine to deploy more border guards, rescuers in Azov Sea — minister”, *tass.com*, 30 September 2018, available at <http://tass.com/world/1023671>; Facebook page of Yuriy Lavrenyuk, Deputy Minister of Infrastructure of Ukraine, post dated 10 September 2018.

<sup>12</sup> Briefing of A. Volskiy, 8 December 2018.

<sup>13</sup> *Ibid.*

<sup>14</sup> FSB of Russia official website, “On the provocative actions of the vessels of the Naval forces of Ukraine”, 26 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438315%40fsbMessage.html>.

<sup>15</sup> For the avoidance of doubt, it is noted that local times in Moscow (Russia) are provided.

procedure required to pass through the Kerch Strait. The commanders of the Ukrainian ships replied that they did not intend to sail through the Kerch Strait.

- c. At 22:23, the Ukrainian naval vessels were informed of the temporary suspension of the right of innocent passage for naval vessels in the Russian territorial sea near the entrance to the Kerch Strait.<sup>16</sup> The suspension reflected security concerns following a recent storm which resulted in a high number of vessels in the area (more than 150), including many with dangerous cargo.

**13.** On 25 November 2018, at 02:25 the Russian Coast Guard ship discovered Ukrainian naval vessels the “*Berdyansk*” and the “*Nikopol*” sailing in the Russian EEZ, heading east towards the Kerch Strait. At 05:35 (after their resupply of fuel by the “*Gorlovka*”) the commander of the “*Berdyansk*” notified the outpost located at Cape Takil of the planned passage of Ukrainian naval vessels “*Yany Kapu*”, “*Nikopol*” and “*Berdyansk*” (the three Ukrainian Military Vessels) through the Kerch Strait to the seaport of Berdyansk at around 07:00.<sup>17</sup>

**14.** The commander of the Russian Coast Guard vessel again informed the commander of the “*Berdyansk*” that the passage of Ukrainian Navy vessels through the Kerch Strait was not allowed because innocent passage through the territorial sea of Russia leading to the Kerch Strait was temporarily suspended for foreign military vessels and they had failed to follow the relevant procedure in the 2015 Regulations.<sup>18</sup>

**15.** The three Ukrainian Military Vessels ignored this information and continued approaching the State Border of the Russian Federation, which they crossed at 07:01. Russian Coast Guard vessels used radio communications to demand that the three Ukrainian Military Vessels immediately leave the territorial waters of Russia. These demands were ignored notwithstanding attempts by Russian Coast Guard vessels to stop the three Ukrainian Military Vessels.<sup>19</sup>

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<sup>16</sup> FSB of Russia official website, “On the provocative actions of the vessels of the Naval forces of Ukraine”, 26 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438315%40fsbMessage.html>.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

16. At 08:35, Ukrainian naval vessels (the “*Berdyansk*” and “*Nikopol*”) were put in combat position (artillery units were uncovered, and guns were elevated at 45 degrees and pointed at Russian Coast Guard vessels).<sup>20</sup> In view of the threat posed by these provocative actions to the security of navigation at the entrance to the Kerch-Yenikale Canal and through the Strait (166 merchant vessels were waiting for passage, many with dangerous cargo<sup>21</sup>) the Russian Coast Guard vessels blocked the Ukrainian vessels.
17. At 18:30, the three Ukrainian Military Vessels attempted to break through the blockade, failing to follow the relevant procedure in the 2015 Regulations for navigation in the harbour area and the unanchoring of vessels (specifically, failing to request permission from the port Kerch Vessel Traffic Service), and disregarding repeated demands to stop.<sup>22</sup>
18. At 20:42, the warning was issued by the Russian Coast Guard vessel “*Izumrud*” that they would open fire if the three Ukrainian Military Vessels did not stop. At 20:45, a warning shot was fired by the “*Izumrud*”, but three Ukrainian Military Vessels continued to move at full speed. At 20:50, the “*Izumrud*” warned armoured gunboat “*Berdyansk*” that in case of non-compliance with the demand to stop, it would be targeted by a weapon.<sup>23</sup>
19. The warnings were ignored; target weapons were subsequently used against the “*Berdyansk*”, and the “*Berdyansk*” and the “*Yany Kapu*” were detained by the Russian Coast Guard vessels “*Izumrud*” and “*Don*” respectively. The “*Nikopol*” was stopped by the Ka-52 combat helicopter of the Russian Ministry of Defence and subsequently detained by the Russian Coast Guard vessel “*Don*”. In addition to that, corvette ASW “*Suzdalets*” of the Black Sea Fleet of the Russian Federation was monitoring the Ukrainian Navy actions.<sup>24</sup>

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20 FSB of Russia official website, “On the provocative actions of the vessels of the Naval forces of Ukraine”, 26 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438315%40fsbMessage.html>.

21 Briefing of A. Volskiy, 8 December 2018.

22 FSB of Russia official website, “On the provocative actions of the vessels of the Naval forces of Ukraine”, 26 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438315%40fsbMessage.html>.

23 *Ibid.*

24 *Ibid.*

**(iii) Steps subsequently taken by Russia**

20. The FSB reported that on board the *Nikopol* there was a document entitled “A checklist of the ‘Nikopol’ boat’s readiness to enter the sea from 09:00 a.m. on 23.11.2018 to 18:00 on 25.11.2018.” That document set the task for the senior officer of the ships’ group to sail from Odessa to Berdyansk “covertly outside of the coastal and maritime regions of patrol of the Black Sea Fleet of Russia and of the Coast Guard of the FSB of Russia”, with “major focus [...] on ensuring the secrecy of approach to the Kerch-Yenikale canal and passage through it”.<sup>25</sup>
21. On 26 and 27 November 2018, 24 Ukrainians (the Military 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).<sup>26</sup>
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.<sup>27</sup> The investigation is still pending and on 17 April 2019, the Court extended the detention of the Military Servicemen until 24 July 2019.<sup>28</sup>
23. The High Commissioner for Human Rights in Russia, Tatiana Moskalkova, has visited certain of the Military Servicemen in detention, on 12 February and 3 April 2019, the latter visit being made jointly with the Council of Europe Commissioner for Human Rights, Dunja Mijatović. Arrangements were made so that Ms Mijatović could speak with the detainees in private. It was reported that the men were satisfied with their

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25 “A checklist of the ‘Nikopol’ boat’s readiness to enter the sea from 09:00 a.m. on 23.11.2018 to 18:00 on 25.11.2018.”, *ntv.ru*, 27 November 2018, available at <https://www.ntv.ru/novosti/2113580/>; FSB of Russia official website, “On the unlawful actions of the vessels of the Naval forces of Ukraine in the Russian territorial sea”, 27 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438317%40fsbMessage.html>.

26 FSB of Russia official website, “On the provocative actions of the vessels of the Naval forces of Ukraine”, *fsb.ru*, 26 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438315%40fsbMessage.html>.

27 See Annex C to the PM Request.

28 “The Court extended the retention in custody of all Ukrainian navy men detained in the Kerch Strait”, *ria.ru*, 17 April 2019, available at <https://ria.ru/20190417/1552787659.html>.

conditions of detention, have had the opportunity to meet with lawyers and Ukrainian consuls and were under constant medical supervision.<sup>29</sup>

### C. Manifest absence of jurisdiction: the military activities exception

24. A necessary precondition for this Tribunal to address the substance of the PM Request is a positive answer to the question whether the Annex VII arbitral tribunal to be constituted would *prima facie* have jurisdiction.
25. There is a simple answer to this question: the Annex VII arbitral tribunal would have no jurisdiction, including *prima facie* jurisdiction, and this is manifest.
26. Although Ukraine submits that “[n]one of the limitations on the Convention’s compulsory dispute settlement procedures set forth in Article 297 or 298 are relevant to this dispute”<sup>30</sup>, the present dispute concerns military activities and is therefore plainly excluded from the Annex VII arbitral tribunal’s jurisdiction.
27. Both Russia and Ukraine have made declarations pursuant to Article 298 of UNCLOS, limiting the potential scope of compulsory jurisdiction under Part XV including with respect to disputes concerning military activities.<sup>31</sup> The declarations read in relevant part as follows (emphasis added):

Russia: “The Russian Federation declares 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*”.

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29 “Russian and CoE Commissioners met with Ukrainian sailors in Lefortovo Prison”, *ombudsmanrf.org*, 3 April 2019, available at [http://eng.ombudsmanrf.org/events/news/news\\_of\\_the\\_commissioner/view/russian\\_and\\_coe\\_commissioners\\_met\\_with\\_ukrainian\\_sailors\\_in\\_lefortovo\\_prison](http://eng.ombudsmanrf.org/events/news/news_of_the_commissioner/view/russian_and_coe_commissioners_met_with_ukrainian_sailors_in_lefortovo_prison); “Tatiana Moskalkova met with Ukrainian sailors in Lefortovo Prison”, *ombudsmanrf.org*, 13 February 2019, available at [http://eng.ombudsmanrf.org/events/news/news\\_of\\_the\\_commissioner/view/tatiana\\_moskalkova\\_met\\_with\\_ukrainian\\_sailors\\_in\\_lefortovo\\_prison](http://eng.ombudsmanrf.org/events/news/news_of_the_commissioner/view/tatiana_moskalkova_met_with_ukrainian_sailors_in_lefortovo_prison). See also “Ukrainian sailors underwent comprehensive medical examination”, *ombudsmanrf.org*, 26 February 2019, available at [http://eng.ombudsmanrf.org/events/news/news\\_of\\_the\\_commissioner/view/ukrainian\\_sailors\\_underwent\\_comprehensive\\_medical\\_examination](http://eng.ombudsmanrf.org/events/news/news_of_the_commissioner/view/ukrainian_sailors_underwent_comprehensive_medical_examination).

30 The Claim, para. 21 and the PM Request, para. 18.

31 Article 298(1)(b) UNCLOS provides: “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”.

Ukraine: “Ukraine declares, 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.*”

28. That the present dispute concerns military activities is as clear as can be. The incident of 25 November 2018 concerned a non-permitted “secret”<sup>32</sup> 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. Ukraine’s dispute concerns these events.<sup>33</sup> 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.

29. Insofar as it is necessary to go any further into the details:

- a. The three Ukrainian Military Vessels were Ukrainian naval warships and auxiliary vessels, manned by Ukrainian naval personnel.<sup>34</sup> The FSB listed weapons found on the three Ukrainian Military Vessels as including various guns including machineguns, automatic grenade launchers, high-explosive fragmentation shells, hand grenades, and knife bayonets.<sup>35</sup>
- b. Military personnel from the Russian Coast Guard arrested the three Ukrainian Military Vessels;<sup>36</sup> the Coast Guard service is part of the FSB Border Service, which operates under the Russian Federal Security Service (FSB). The FSB is staffed by, *inter alia*, military personnel who perform military service in accordance with Russian legislation on military service.<sup>37</sup> The FSB Border Service is mandated to

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32 See referenced in para. 20 above.

33 As stated by Ukraine (para. 2 of the PM Request) “The dispute between the parties arises from the Russian Federation’s unlawful seizure and detention of the warships *Berdiansk* and *Nikopol*, the naval auxiliary vessel *Yani Kapu*, and the crew and other servicemen on those vessels”.

34 The Claim, para. 3; the PM Request, para. 2. At para. 9 of the PM request Ukraine refers to the “*Berdiansk*” and the “*Nikopol*” as “two operational warships employed in support of the national defense”. See further para. 31 of the PM Request, and paras. 3, 5 and 17 of Annex B to the PM Request.

35 FSB of Russia official website, “On the unlawful actions of the vessels of the Naval forces of Ukraine in the Russian territorial sea”, 27 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438317%40fsb%40Message.html>.

36 This is not disputed by Ukraine: see the PM Request, para. 2 referring to the Vessels seizure “by the Coast Guard of the Border Service of Russia’s Federal Security Service”.

37 Federal Law No. 40-FZ “On the Federal Security Service”, 3 April 1995, Article 16.1.

protect and defend Russia's State border,<sup>38</sup> and uses weapons and military equipment to that end.<sup>39</sup> The FSB Border Service exercises military functions in protecting the Russian State border, and is akin to the armed forces. As noted above, the Russian armed forces also participated in the operation; the “*Nikopol*” was stopped by the Ka-52 combat helicopter of the Russian Ministry of Defence, and corvette ASW “*Suzdalets*” of the Black Sea Fleet was monitoring the Ukrainian Navy actions.<sup>40</sup>

30. The Tribunal in *Philippines v. China*<sup>41</sup> 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”. This was the situation on 25 November 2018.<sup>42</sup>

31. Indeed, the description of the 25 November 2018 incident provided in Ukraine's Claim clearly points to the military nature of the relevant activities:

“When the vessels proceeded to enter the Strait on 25 November, they were obstructed by ships of the Russian Navy and Coast guard. The ‘Yani Kapu’ was rammed by a Russian Coast Guard Vessel and sustained damage”;

“the vessels were pursued by ships of the Russian Navy and Coast Guard, which fired shots in their direction. [...] the vessels were seized by the Russian Coast Guard ships”.<sup>43</sup>

“the Russian coast guard vessel ‘Izumrud’ fired warning shots at the ‘Nikopol’ and, soon after, the ‘Izumrud’ fired at and struck the ‘Berdyansk.’ The ‘Berdyansk’ sustained damage from the fire”.<sup>44</sup>

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38 Under Article 1 of the Federal Law “On the Federal Security Service”, the main function of the FSB is to ensure the security of the Russian Federation.

39 Resolution No. 80 of 24 February 2010 approves the rules regulating the use of weapons and military equipment while protecting the state border of the Russian Federation, the exclusive economic zone and the continental shelf of the Russian Federation.

40 FSB of Russia official website, “On the unlawful actions of the vessels of the Naval forces of Ukraine in the Russian territorial sea”, 27 November 2018, available at <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438317%40fsb%20Message.html>.

41 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award, 12 July 2016, para. 1161.

42 Argentina withdrew its optional exception in 2012, shortly before initiating arbitration over Ghana's seizure of the warship ARA Libertad. That withdrawal is consistent with a concern that even the goodwill visit at the heart of that incident could qualify as a military activity. See “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, *ITLOS Reports 2012*, pp. 339-340, para. 34.

43 The Claim, paras. 8-9.

44 Annex B to the PM Request, para. 14.

32. Further, in statements made outside the confines of the Claim, Ukraine has repeatedly characterised the incident as concerning military activities. Whilst 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. See for example:

a. Ukraine’s statement before the UN Security Council on 26 November 2018<sup>45</sup>:

“recordings clearly demonstrate that *the Russian military vessels were given orders to attack the Ukrainian vessels*”;

“pursuant to article 3 (d) of the annex to General Assembly resolution 3314 (XXIX), ‘an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State’ qualifies as an act of aggression.”;

“Russia’s recent belligerent acts”;

“we are ready to use all available means in exercising *our right to self-defence, as provided for in Article 51 of the Charter*”.

b. Ukraine’s subsequent formal communications with Russia:

“These vessels were seized and suffered significant damage *as a result of unprovoked, repeated use of artillery fire for effect, ramming, collisions, and other aggressive actions* by Russian naval vessels.”;

“*they (23 persons) were all taken as prisoners of war*”;

“*The Ukrainian Side views the actions of the Russian Federation as the unlawful use of force against Ukrainian naval vessels on the territory of Ukraine*”;

“Ukraine reserves the right to apply Article 51 of the UN Charter”;<sup>46</sup>

“the crew members [...] were taken as *prisoners of war* on November 25, 2018, following *an armed assault by Russian naval vessels and special forces* in the territorial waters and exclusive economic zone of Ukraine in the Black Sea.”;

“The Ukrainian Side once again demands that the Russian Side immediately release *the servicemen of the Naval Forces of the Armed Forces of Ukraine* from custody”;<sup>47</sup>

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<sup>45</sup> United Nations Security Council, 8410th meeting, UN Doc. S/PV.8410, 26 November 2018, pp. 10, 12, available at <https://undocs.org/en/S/PV.8410> (emphasis added).

<sup>46</sup> *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1329, 26 November 2018 (Annex A to the PM Request, pp. 71-72) (emphasis added).

<sup>47</sup> *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1339, 27 November 2018 (Annex A to the PM Request, pp. 74-75) (emphasis added).

“Embassy requests to officially inform of the whereabouts of servicemen of the Navy of Ukraine [...] wounded during the mentioned *military incident*.”<sup>48</sup>

- c. The Decision of the National Security and Defense Council of Ukraine dated 26 November 2018 recommending to the Ukrainian President to introduce martial law in Ukraine (which the President duly introduced):

“the *actions against the ships of the Naval Forces of the Armed Forces of Ukraine* exercised by the Russian Federation, which entailed grave consequences, *constitutes the crime of armed aggression*”.<sup>49</sup>

- d. Ukraine’s official statements before the OSCE:

“Based on the internationally recognized definition, *Ukraine determined Russia’s actions against Ukraine’s navy vessels, that took place on 25 November 2018, to be an act of armed aggression*. [Ukrainian boats were] followed and attacked by Russian ships, declaring ultimatums, *opening deadly fire and using units of special forces to capture Ukrainian vessels* out of the 12 mile zone. [...] we remind the aggressor-state of *Ukraine’s inherent right to self-defence*, as enshrined in the UN Charter.”<sup>50</sup>;

“on 25 November the *Russian Navy deliberately used military force against three Ukrainian vessels* in international waters in the Black sea. 24 Ukrainian sailors have been captured and are now *prisoners of war*. [...] I remind that *attack of armed forces of one state on armed forces of another state constitutes an act of aggression*, in accordance with 1974 UN GA resolution.”<sup>51</sup>

- e. Ukraine’s request for interim measures lodged with the European Court of Human Rights (“ECtHR”) dated 26 November 2018:

“the *Russian combat helicopter initiated an attack* on the Ukrainian ships. [...] *military administration of the Russian Federation transmitted illegal demand* to stop the Ukrainian vessels. [...] The Ukrainian ships were *surrounded by 10*

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<sup>48</sup> *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0135, 28 January 2019 (emphasis added).

<sup>49</sup> Decree of the President of Ukraine No. 390/2018 dated 26 November 2018 “On the decision of 26 November 2018 of the National Security and Defense Council of Ukraine on the Emergency Measures on Safeguarding State Sovereignty and Independence of Ukraine and Introduction of Martial Law” (emphasis added).

<sup>50</sup> Ministry of Foreign Affairs of Ukraine official website, “Statement by the delegation of Ukraine on the latest Russia’s act of unprovoked armed aggression against Ukraine”, 26 November 2018, available at <https://mfa.gov.ua/en/news-feeds/foreign-offices-news/68971-zajava-delegaciji-ukrajini-shhodo-aktu-nesprovokovanoji-zbrojnoji-agresiji-rosiji-proti-ukrajini> (emphasis added).

<sup>51</sup> Organization for Security and Co-operation in Europe official website, “Statement by H.E. Mr. Pavlo Klimkin, Minister for Foreign Affairs of Ukraine, at the 25th Meeting of the Ministerial Council of the OSCE (Milan, 6 December 2018)”, 6 December 2018, available at <https://www.osce.org/howeare/405560?download=true> (emphasis added).

*vessels of the Russian Coastal Guard and of the Black Sea Fleet of the Russian Navy (one of them issued warning concerning the use of force). The Russian ships jammed the Ukrainian ships' radio and electronic communication and fired at the Ukrainian ships and tried to ram them. [...] 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.*"<sup>52</sup>

- f. Ukraine's Military Prosecutors' Office: on 25 November 2018, the Military Prosecutor's Office of Southern Region registered in the Unified Register of Pre-Trial Investigations criminal proceedings in respect of an alleged act of aggressive war by the Russian Federation relying upon, *inter alia*, Article 437 of the Criminal Code of Ukraine regarding "planning, preparing, initiating or waging aggressive war".<sup>53</sup>
- g. Consistent with that characterisation by Ukraine, the so-called Prosecutor's Office of the Autonomous Republic of Crimea (Ukrainian authority based in Kiev) characterised the incident as a "violation of laws and customs of war". On 27 November 2018, that Office registered criminal proceedings under Article 438 of the Criminal Code of Ukraine into alleged violations of the laws and customs of war.<sup>54</sup>
- h. Recently, on 21 March and 3 April 2019 the President of Ukraine awarded all the Military Servicemen with military medals and orders, *inter alia*, for personal courage and selfless actions in the performance of military duty.<sup>55</sup>

33. Ukraine does state in its Claim that Russia has "treated the incident as a criminal law enforcement matter" and the Military Servicemen are to be subjected to prosecution in "civilian courts".<sup>56</sup> Similarly, the PM Request refers to the Military Servicemen being

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52 At paras. 11, 13-14 and 31 (emphasis added). See further Ukraine's application before the ECtHR No. 55855/18 dated 7 January 2019 referring to Russian combat helicopters and aircraft initiating laser targeting of the Vessels (para. 37), jamming by Russian military of naval communication (para. 39), a warning on use of force issued by the Russian navy (para. 42), and Russian use of a naval close-in weapon system (para. 45).

53 Facebook page of Yuriy Lutsenko, Prosecutor General of Ukraine, post dated 25 November 2018, available at <https://www.facebook.com/LlutsenkoYuri/posts/1073660022833172>.

54 Prosecutor's Office of the Autonomous Republic of Crimea official website, "The Prosecutor's office of the Autonomous Republic of Crimea launched pre-trial investigation into violations of the laws and customs of war with regard to PoW-Ukrainian navy men by the occupation authorities", 27 November 2018, available at <https://ark.gp.gov.ua/ua/news.html? m=publications& c=view& t=rec&id=241078>.

55 "Poroshenko decorated captured Ukrainian navy men with state orders", *krymr.com*, 7 April 2019, available at <https://ru.krymr.com/a/news-poroshenko-prisudil-ukrainskim-moryakam-gosudarstvenniye-nagradi/29866299.html> with further references to the Decrees of the President of Ukraine No. 83/2019 as of 21 March 2019 and No. 96/2019 as of 3 April 2019.

56 The Claim, para. 11.

“subject to Russian civilian criminal legal procedures”.<sup>57</sup> This may be part of an attempt to cast doubt on the plainly military nature of the activities. If so, Russia’s subsequent treatment is an irrelevance. The activities at issue in this case were military in nature. Further:

- a. Russia’s conduct subsequent to the incident of 25 November 2018 is entirely consistent with the military nature of the incident.
- b. 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 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.

34. For these reasons, the dispute is excluded from the Annex VII arbitral tribunal’s jurisdiction: there is likewise no *prima facie* jurisdiction as required by Article 290(5) of UNCLOS, and the provisional measures request must therefore be rejected.

#### **D. Additional reasons why the provisional measures request should be denied**

35. There are additional reasons why the provisional measures request should further be denied.<sup>58</sup>

##### **1) Article 283(1) UNCLOS: exchange of views**

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<sup>57</sup> The PM Request, para. 11.

<sup>58</sup> Annex VII arbitral tribunal does not have jurisdiction to determine whether Russia or Ukraine is the coastal State of Crimea; that is an issue of territorial sovereignty which is outside of its jurisdiction (See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, paras. 216-219.).

To the extent the Annex VII arbitral tribunal addresses the immunity of the three Ukrainian Military Vessels in the *territorial sea* of Crimea, it would need to consider the particular principles applicable to that maritime area, noting that those principles differ depending on whether the warship was operating in the territorial sea of the State whose conduct is under scrutiny or not. Specifically, Article 30 of UNCLOS provides that “[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, *the coastal State* may require it to leave the territorial sea immediately” (emphasis added). The PM Request expressly refers to Article 30 (The PM Request, para. 24.). But to determine whether or not Article 30 of UNCLOS was breached, the Annex VII arbitral tribunal would first need to consider which State (Russia or Ukraine) was the coastal State of Crimea, which it cannot do. It again lacks jurisdiction *prima facie* in this respect.

**36. Article 283(1) UNCLOS 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.”

**37.** 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”.<sup>59</sup> Within 10 days, i.e. on 25 March 2019, Russia provided a written holding response.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> In the premises, Article 283(1) of UNCLOS has not been satisfied, and *prima facie* jurisdiction is lacking for that reason.

**2) Lack of urgency**

**38.** Article 290(5) of UNCLOS states that the Tribunal may prescribe provisional measures if it considers that “the urgency of the situation so requires”. There is no such urgency in

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<sup>59</sup> *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (Annex A to the PM Request, pp. 78-80).

<sup>60</sup> *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 3528/2dsng, 25 March 2019.

<sup>61</sup> By *Note Verbale* No. 4502/2dsng dated 12 April 2019, Russia expressed its willingness to hold consultations pursuant to Article 283. By *Notes Verbales* dated 15 and 16 April 2019 respectively, Russia and Ukraine then arranged the date of those consultations.

<sup>62</sup> See Ministry of Foreign Affairs of the Russian Federation official website, “Commentary by the Information and Press Department of the Russian MFA in connection with the Russian-Ukrainian consultations on the incident of 25 November 2018 in the area of the Kerch Strait”, 24 April 2019, available at [http://www.mid.ru/ru/kommentarii/-/asset\\_publisher/2MrVt3CzL5sw/content/id/3624739](http://www.mid.ru/ru/kommentarii/-/asset_publisher/2MrVt3CzL5sw/content/id/3624739).

the present case, noting that such urgency is to be assessed with reference to the period during which the Annex VII arbitral tribunal is not yet constituted.<sup>63</sup>

39. Ukraine's Claim is dated 31 March 2019, and its PM Request is dated 16 April 2019; it has waited over four months since the incident of 25 November 2019 to seek interim relief before this Tribunal.
40. Furthermore, Ukraine has already been granted interim relief. By application dated 26 November 2018, Ukraine elected to seek interim relief against Russia before the ECtHR. That application concerned the same parties (Ukraine and Russia) and the same subject matter (incident of 25 November 2018 and subsequent detention of the Military Servicemen) as the Claim. The interim relief sought by Ukraine was the provision of medical assistance to the Military Servicemen, information as to their state of health, and their repatriation. The ECtHR granted interim relief to Ukraine by order dated 4 December 2018, namely an invitation to Russia to "ensure that appropriate medical treatment is administered to those captive Ukrainian naval personnel who require it, including in particular any who may have been wounded". Russia has complied with that order.<sup>64</sup> A further request for interim relief was made by Ukraine to the ECtHR on 15 February 2019, including for the Military Servicemen's transfer to Ukraine, but this was denied by the ECtHR on the basis that Ukraine's application for interim relief had already been considered and interim relief awarded.<sup>65</sup>

### 3) Pre-judgment of the merits of the case

41. A provisional measures request cannot prejudice the merits.<sup>66</sup> In its provisional measures request, Ukraine seeks the same relief that is sought on the merits. Specifically, in both

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<sup>63</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10, at p. 22, para. 68; *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013, p. 248, para. 85.

<sup>64</sup> See referenced in fn.29 noting that the High Commissioner for Human Rights in Russia has visited certain detained servicemen (on 12 February and 3 April 2019) and reported that they were satisfied with their conditions of detention, have had the opportunity to meet with lawyers and Ukrainian consuls and were under constant medical supervision.

<sup>65</sup> Letter from the ECtHR dated 19 February 2019.

<sup>66</sup> *"ARA Libertad" (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 350, para. 106; *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of

sets of proceedings, Ukraine seeks the release of the three Ukrainian Military Vessels and the Military Servicemen – see:

a. The relief requested by the PM Request<sup>67</sup>:

“[r]elease the Ukrainian naval vessels the ‘Berdyansk’, the ‘Yani Kapu’ and the ‘Nikopol’, [...] [r]elease the 24 detained Ukrainian servicemen”.

b. The relief requested on the merits<sup>68</sup>:

“(i) release the ‘Berdyansk’, the ‘Yani Kapu’ and the ‘Nikopol’; (ii) release the twenty-four servicemen”.

42. If the three Ukrainian Military Vessels and the Military Servicemen were released, Russia would be deprived of any possibility of exercising the rights it asserts over the three Ukrainian Military Vessels and the Military Servicemen because they would no longer be subject to its jurisdiction, and Ukraine would no longer need to pursue at the merits stage the relief sought in that regard (i.e. as to the release of the Vessels and Servicemen).<sup>69</sup>

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22 November 2013, *ITLOS Reports 2013*, p. 251, para. 100; “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, *ITLOS Reports 2015*, p. 204, para. 132.

<sup>67</sup> The Claim, para. 26; the PM Request, paras. 22 and 46.

<sup>68</sup> The Claim, para. 31(d).

<sup>69</sup> See the Declaration of Judge Paik in *Enrica Lexie* at paras. 6 and 9: “The second submission, if accepted, would then deprive India of any possibility, whether actual or legal, to exercise the rights it asserts over the *Enrica Lexie* incident during the pendency of the arbitral proceedings because the accused would no longer be subject to its jurisdiction. Furthermore, to me, requiring India virtually to ‘hand over’ the accused to Italy goes beyond the function of provisional measures as interim relief and comes close to prejudging the merits of the dispute. [...] I came to the conclusion that the provisional measure to lift immediately all restrictions imposed upon the liberty of the accused and to allow them to return to and remain in Italy during the pendency of the arbitral proceedings would not ‘equally’ preserve the rights of the respective Parties to the present dispute. Moreover, given that at the heart of the present dispute is the custody of the two accused Marines, such a measure would amount to prejudging the merits of the case to be decided by the Annex VII arbitral tribunal.” “*Enrica Lexie*” (*Italy v. India*), *Provisional Measures, Order of 24 August 2015, Declaration of Judge Paik, ITLOS Reports 2015*, pp. 213-214, paras. 6, 9