

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



2019

Friday, 10 May 2019, at 10 a.m.,  
at the International Tribunal for the Law of the Sea, Hamburg,

President Jin-Hyun Paik presiding

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

(Ukraine v. Russian Federation)

---

**Verbatim Record**

---

<i>Present:</i>	President	Jin-Hyun Paik
	Vice-President	David Attard
	Judges	José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Elsa Kelly
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
	Registrar	Philippe Gautier

---

*Ukraine is represented by:*

H.E. Olena Zerkal, Deputy Foreign Minister,

*as Agent;*

*and*

Ms Marney L. Cheek, Member of the Bar of the District of Columbia; Covington & Burling LLP,

Mr Jonathan Gimblett, Member of the Bar of Virginia and the District of Columbia; Covington & Burling LLP,

Professor Alfred H.A. Soons, Utrecht University School of Law; Associate Member of the Institute of International Law,

Professor Jean-Marc Thouvenin, University Paris Nanterre; Secretary General of the Hague Academy of International Law; Member of the Paris Bar; Sygna Partners,

*as Counsel and Advocates;*

Ms Oksana Zolotaryova, Director, International Law Department, Ministry of Foreign Affairs,

Colonel Leonid Zaliubovskiy, Colonel of Justice, Naval Forces of Ukraine,

Mr Nikhil V. Gore, Covington & Burling LLP,

Ms Alexandra Francis, Covington & Burling LLP,

*as Counsel;*

Mr Taras Kachka, Advisor to the Foreign Minister,

*as Advisor;*

Vice Admiral Andrii Tarasov, First Deputy Commander and Chief of Staff, Naval Forces of Ukraine,

Ms Kateryna Zelenko, Spokesperson, Ministry of Foreign Affairs,

Mr Nikolai Polozov, attorney of detained Ukrainian servicemen,

Mr Ilya Novikov, attorney of detained Ukrainian servicemen,

*as Observers;*

Ms Katerina Gipenko, Third Secretary, Ministry of Foreign Affairs,

Ms Valeriya Budyakova, Third Secretary, Ministry of Foreign Affairs,

Ms Rebecca Mooney, Covington & Burling LLP,

*as Assistants.*

*The Russian Federation is not represented.*

1 **THE PRESIDENT:** The International Tribunal for the Law of the Sea is now in  
2 session. Good morning and welcome to the Tribunal.

3  
4 Pursuant to article 26 of its Statute, the Tribunal today holds the hearing in the Case  
5 concerning the detention of three Ukrainian naval vessels between Ukraine and the  
6 Russian Federation.

7  
8 At the outset, I would like to note that Judge Ndiaye, for medical reasons duly  
9 explained to me, is prevented from participating in this case.

10  
11 On 16 April 2019, Ukraine submitted to the Tribunal a Request for the prescription of  
12 provisional measures pending the constitution of an arbitral tribunal in a dispute with  
13 the Russian Federation concerning the detention of three Ukrainian naval vessels.  
14 The Request was made pursuant to article 290, paragraph 5, of the United Nations  
15 Convention on the Law of the Sea. The case was named “Case concerning the  
16 detention of three Ukrainian naval vessels” and entered in the List of Cases of the  
17 Tribunal as Case No. 26.

18  
19 I now call on the Registrar to summarize the procedure and to read out the  
20 submissions of Ukraine.

21  
22 **THE REGISTRAR** (*Interpretation from French*): Thank you, Mr President. On  
23 16 April 2019 a copy of the Request for the prescription of provisional measures was  
24 sent to the Government of the Russian Federation.

25  
26 By order of 23 April 2019, the President of the Tribunal fixed 10 and 11 May 2019 as  
27 the dates for the hearing.

28  
29 By note verbale of 30 April 2019, the Embassy of the Russian Federation in Berlin  
30 informed the Tribunal that

31  
32 (*Continued in English*)

33  
34 The Russian Federation is of the view that the arbitral tribunal to be  
35 constituted under Annex VII of UNCLOS will not have jurisdiction, including  
36 *prima facie*, to rule on Ukraine’s claim, in light of the reservations made by  
37 both the Russian Federation and Ukraine under article 298 of UNCLOS  
38 stating, inter alia, that they do not accept the compulsory procedures  
39 provided for in section 2 of Part XV thereof entailing binding decisions for  
40 the consideration of disputes concerning military activities. Furthermore,  
41 the Russian Federation expressly stated that the aforementioned  
42 procedures are not accepted with respect to disputes concerning military  
43 activities by government vessels and aircraft. For this obvious reason, the  
44 Russian Federation is of the view that there is no basis for the International  
45 Tribunal for the Law of the Sea to rule on the issue of the provisional  
46 measures requested by Ukraine.

47  
48 (*Interpretation from French*) By the same note, the Russian Federation informed the  
49 Tribunal

50  
51 (*Continued in English*)

1  
2 of its decision not to participate in the hearing on provisional measures in  
3 the case initiated by Ukraine, without prejudice to the question of its  
4 participation in the subsequent arbitration if, despite the obvious lack of  
5 jurisdiction of the Annex VII tribunal whose constitution Ukraine is  
6 requesting, the matter proceeds further.

7  
8 (*Interpretation from French*) On 2 May 2019, the Registry of the Tribunal received a  
9 communication in which

10  
11 (*Continued in English*) “Ukraine ... requests, consistent with article 28 of the  
12 Tribunal’s Statute, that the Tribunal continue the proceedings and render a decision  
13 on provisional measures.”

14  
15 (*Interpretation from French*) By order of 2 May 2019, the President fixed 10 May  
16 2019 as the date for the hearing. I will now read out the submissions of Ukraine.

17  
18 (*Continued in English*)

19  
20 Ukraine requests that the Tribunal indicate provisional measures requiring  
21 the Russian Federation to promptly:

22  
23 a. Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the  
24 *Yani Kapu*, and return them to the custody of Ukraine;

25  
26 b. Suspend criminal proceedings against the twenty-four detained  
27 Ukrainian servicemen and refrain from initiating new proceedings; and

28  
29 c. Release the twenty-four detained Ukrainian servicemen and allow them  
30 to return to Ukraine.

31  
32 **THE PRESIDENT:** Thank you, Mr Registrar. At today’s hearing, Ukraine will present  
33 its oral arguments. The sitting will last until approximately 1 p.m., with a break of 30  
34 minutes in the middle.

35  
36 I note the presence at the hearing of the Agent, Counsel and Advocates of the  
37 Applicant. I call on the Agent of Ukraine, Ms Olena Zerkal, to introduce her  
38 delegation.

39  
40 **MS ZERKAL:** Mr President, Members of the Tribunal, it is an honour for me to  
41 appear before this Tribunal representing Ukraine.

42  
43 Let me begin by introducing the delegation of Ukraine. My name is Olena Zerkal, the  
44 Deputy Minister of Foreign Affairs and Ukraine’s Agent.

45  
46 Present with me in the courtroom is Vice Admiral Andrii Tarasov, First Deputy  
47 Commander and Chief of Staff of the Naval Forces of Ukraine. Ukraine’s Counsel  
48 and Advocates are Mr Jonathan Gimblett, Professor Fred Soons, Ms Marney Cheek,  
49 and Professor Jean-Marc Thouvenin.

1 Ms Oksana Zolotaryova, Colonel Leonid Zaliubovskiy, Mr Nikhil V. Gore and  
2 Ms Alexandra Francis are our Counsel. Finally, Taras Kachka is our Adviser.

3  
4 **THE PRESIDENT:** Thank you, Ms Zerkal. May I then request you to begin your  
5 statement?

6  
7 **MS ZERKAL:** Thank you, Mr President. With your permission, I will now introduce  
8 Ukraine's case.

9  
10 The dispute between the Parties concerns the Russian Federation's unlawful and  
11 continuing seizure and detention of the Ukrainian warships the *Berdyansk* and  
12 *Nikopol*, and the Ukrainian naval vessel the *Yani Kapu*, on 25 November 2018 in the  
13 Black Sea. It is not just the ships that have been detained, but also the 24 Ukrainian  
14 servicemen on board. As a result of the seizure and detention, Russia has violated  
15 the basic principle of the immunity of warships under the United Nations Convention  
16 on the Law of the Sea.

17  
18 Ukraine has instituted an arbitration under Annex VII of the Convention to seek relief  
19 for this violation. We appear before this Tribunal today to ask you to exercise your  
20 power under article 290, paragraph 5, of the Convention to prescribe provisional  
21 measures where the urgency of the situation so requires.

22  
23 Mr President, Members of the Tribunal, Ukraine's naval ships continue to be held by  
24 Russia, six months after they were seized, and the servicemen are under  
25 investigation and are detained in the Lefortovo prison in Moscow. They are:  
26 Captain of the Third Rank Volodymyr Lisovyy; Captain of the Second Rank Denys  
27 Hrytsenko; Captain Lieutenant Serhiy Popov; Senior Lieutenants Andriy Drach,  
28 Bohdan Nebylytsia and Vasyl Soroka; Lieutenant Roman Mokryak; Master Chief  
29 Petty Officers Yuriy Budzyloy and Andriy Shevchenko; Petty Officers Oleh  
30 Melnychyk, Vladyslav Kostyshyn and Serhiy Chyliba; Senior Seamen Andriy  
31 Artemenko, Viktor Bezpachenko, Yuriy Bezyazychnyy, Andriy Oprysko, Volodynyr  
32 Tereschenko, Mykhailo Vlasyuk, Volodymyr Varymez, Vyacheslav Zinchenko; and  
33 Seamen Andriy Eider, Bohdan Holovash, Yevheniy Semydotskyy and Serhiy  
34 Tsybizov.

35  
36 These servicemen are charged with a criminal offence – violating the border of the  
37 Russian Federation; and they are now under pre-trial investigation. Their detention  
38 has been renewed twice by Russia's courts. The second time was only three weeks  
39 ago, two days after Ukraine submitted its Request for provisional measures before  
40 this Tribunal. This is just an additional illustration of Russia's continuing disrespect  
41 for international law.

42  
43 From the moment of the detentions, Ukraine has worked urgently to resolve this  
44 matter. In keeping with article 33 of the United Nations Charter, we gave Russia  
45 every opportunity to settle the issue by diplomatic means. We have worked through  
46 a variety of international fora to persuade Russia to respect its international  
47 obligations. However, having made no progress after several months of such efforts,  
48 and instead seeing the detention of our servicemen being extended, we finally had  
49 no choice but to turn to judicial means of dispute resolution.

1 Russia has ignored not only Ukraine's requests but also numerous calls by the  
2 international community, insisting that its actions are justified under its domestic laws  
3 and under the United Nations Convention on the Law of the Sea; and now Russia  
4 seeks to escape scrutiny of its unlawful actions by asking this Tribunal to treat them  
5 as military activities, exempt from compulsory dispute settlement under the  
6 Convention, even though Russia has previously insisted that the events of  
7 25 November were not a military confrontation.

8  
9 In fact, Russia's conduct constitutes a profound violation of the Convention and  
10 customary international law. Let me be clear, there is no question that Crimea is part  
11 of Ukraine and that the waters in which the seizure occurred constitute Ukraine's  
12 territorial sea or exclusive economic zone. However, Russia's actions would violate  
13 the Convention even if they had occurred in Russia's territorial sea or exclusive  
14 economic zone. The immunity of warships is a core sovereign immunity in the  
15 international system. Warships and their personnel cannot be arrested by the law  
16 enforcement authorities of foreign States and subjected to the jurisdiction of foreign  
17 courts.

18  
19 Ukraine has come before this Tribunal seeking urgent relief from ongoing harm  
20 under articles 32, 58, 95 and 96 of the Convention and under customary principles of  
21 international law.

22  
23 Each additional day of detention, each interrogation, each court appearance  
24 aggravates the dispute between the Parties.

25  
26 This Tribunal has previously said that a warship is the very "expression of the  
27 sovereignty of the State whose flag it flies"<sup>1</sup> and it has recognized that each day a  
28 warship is detained results in material and irreparable harm to the legal and practical  
29 interests of the flag State.

30  
31 As for the servicemen, this Tribunal has more than once observed that  
32 "considerations of humanity must apply in the law of the sea as they do in other  
33 areas of international law."<sup>2</sup> Here, such principles require an immediate end to the  
34 separation of Ukraine's 24 servicemen from their families and their homes.

35  
36 The harm imposed on Ukraine, its naval vessels and its servicemen is grave and  
37 grows with every day that passes. The situation is, therefore, exceptionally urgent.  
38 That is why Ukraine today asks the Tribunal to grant provisional measures requiring  
39 that Russia promptly release Ukraine's naval vessels and its servicemen, and return  
40 them to Ukraine.

41  
42 Mr President, before asking that you give the floor to our counsel team, may  
43 I express Ukraine's regret that the Russian Federation has once again decided not to  
44 fully participate in provisional measures proceedings before this Tribunal.

45  

---

<sup>1</sup> "ARA Libertad" (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 332, para. 94.

<sup>2</sup> "Enrica Lexie" Incident (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 182, para. 133 (citing *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment*, ITLOS Reports 1999, p. 10, para. 155).

1 The Russian Federation's decision not to participate in the hearing came as a  
2 surprise to Ukraine. After all, a Russian delegation participated in the pre-hearing  
3 phone call with the President of the Tribunal on 23 April 2019. Russia's decision not  
4 to appear here today is regrettable.

5  
6 However, this Tribunal has previously had occasion to conduct hearings and award  
7 provisional measures against the Russian Federation despite Russia's decision not  
8 to appear. That decision cannot prejudice Ukraine's ability to obtain international  
9 justice for its vessels and servicemen. As the Tribunal stated in *Arctic Sunrise*, it  
10 must ensure that the other Party is not "put at a disadvantage because of the non-  
11 appearance of the Russian Federation in the proceedings."<sup>3</sup>

12  
13 Mr President, Members of the Tribunal, let me return to the critical facts at hand. The  
14 warships the *Berdyansk* and *Nikopol*, the naval vessel *Yani Kapu* and the  
15 24 servicemen on board remain, unlawfully, in Russian custody and subject to  
16 Russia's jurisdiction.

17  
18 This situation cannot continue without further irreparable harm to Ukraine's rights.  
19 With your permission, our counsel team will address why the situation satisfies the  
20 requirements for the grant of provisional measures under the Convention.

21  
22 Mr Gimblett will provide a brief factual background, including addressing events after  
23 Ukraine filed its Request for provisional measures on 16 April.

24  
25 Professor Soons will describe the legal grounds for Ukraine's request and will also  
26 address the *prima facie* jurisdiction of an Annex VII tribunal over the underlying  
27 dispute.

28  
29 Ms Cheek will respond to the Russian Federation's military activities argument.

30  
31 Finally, Professor Thouvenin will address the appropriateness of provisional  
32 measures in this case and the specific elements of harm and urgency.

33  
34 Mr President, I respectfully ask you to call Mr Gimblett to the podium.

35  
36 **THE PRESIDENT:** Thank you, Ms Zerkal. I now give the floor to Mr Jonathan  
37 Gimblett to make the next statement for Ukraine.

38  
39 **MR GIMBLETT:** Mr President, Members of the Tribunal, it is an honour to appear  
40 before you on behalf of Ukraine. I will describe the facts giving rise to Ukraine's  
41 claim, before other members of our team explain how those facts support the  
42 prescription of provisional measures by the Tribunal. I will also provide some  
43 additional factual background in response to the Memorandum of the Government of  
44 the Russian Federation dated 7 May 2019. I will refer during the course of my  
45 presentation to a slide deck that can be found at the first tab in your binders and  
46 which will be projected simultaneously on the screen.

47  

---

<sup>3</sup> "Arctic Sunrise" (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, para. 56.



1 The essential facts of this case are not in dispute. On 25 November 2018, two small  
2 Ukrainian warships – the *Berdyansk* and *Nikopol* – and a naval auxiliary vessel, a  
3 tugboat named the *Yani Kapu*, were seized and detained by ships of the Russian  
4 Coast Guard. The seizure took place in the Black Sea, to the south and west of the  
5 entrance to the Kerch Strait.<sup>1</sup> The relevant maritime area is shown on the map at  
6 tab 1, page 1 in your binders and now on the screen.

7  
8 A report published by Russia’s Federal Security Service, the FSB, records that the  
9 Ukrainian vessels were in the Black Sea and traveling away from the Crimean  
10 coastline at the time of the seizure.<sup>2</sup> The Ukrainian Navy has also submitted a report  
11 with Ukraine’s Request for provisional measures, which can be found at tab 3 in your  
12 binders. As that report explains, Ukraine does not have precise coordinates for the  
13 boarding of the vessels, either because the vessels did not have the opportunity to  
14 transmit their position or because the Russian Federation jammed the relevant  
15 transmissions.<sup>3</sup>

16  
17 While both the FSB report and Russia’s Memorandum of 7 May are silent on the  
18 subject, the Ukrainian Navy estimates, based on transmissions sent before the  
19 seizures, that the *Berdyansk* and the *Yani Kapu* were seized at a distance of  
20 approximately 12nm from the coast, and the *Nikopol* at a distance of approximately  
21 20nm from the coast.<sup>4</sup> The separate declaration provided by Vice Admiral Andrii  
22 Tarasov, which you can find at tab 4 in your binders, explains the basis for the  
23 Ukrainian Navy’s estimates in more detail.<sup>5</sup> The estimated locations of the seizures  
24 are shown on the map, at tab 1, page 2, now on your screen.

25  
26 After the seizure, the vessels and the 24 servicemen on board them were  
27 transported to the port of Kerch, a Russian-occupied port on the eastern coast of  
28 Crimea, which is also shown on the map at tab 1, page 2. On the next slide, at tab 1,  
29 page 3 and now on screen, an AFP press photograph shows the three vessels in  
30 Russian custody at Kerch, with what appear to be Russian officials on board the  
31 *Nikopol*, which is the vessel marked P176.<sup>6</sup>

32  
33 Russian government documents show that the servicemen were charged with the  
34 criminal offence of “a crossing of the state border of the Russian Federation without  
35 obtaining appropriate permission ... [as part of an] organized group.”<sup>7</sup> For example,  
36 at tab 1, page 4, and now on the screen, you can see the indictment in the case of  
37 Senior Seaman Andriy Anatoliyovych Artemenko, with underlined text reflecting that

---

<sup>1</sup> Annex A, Appendix C (Federal Security Service of the Russian Federation, Press Service Statement on Acts of Provocations by Ukrainian Naval Ships (26 November 2016)), p. 5-6 [hereinafter “Annex A, Appendix C (FSB Report)”]; Annex B (Navy Report), paras 14-15.

<sup>2</sup> Annex A, Appendix C (FSB Report), p. 4.

<sup>3</sup> Annex B (Navy Report), paras 7, 15.

<sup>4</sup> *Ibid.*, para. 15.

<sup>5</sup> Annex F (Tarasov Declaration), para. 10.

<sup>6</sup> Annex D, Appendix C, Image of Seized Ukrainian Military Vessels Seen in the Port of Kerch on November 26, 2018 (STF/AFP/Getty Images).

<sup>7</sup> Annex C, Appendix 1 (Indictments Against the 24 Detained Ukrainian Servicemen), p. 1; see also Annex A, Appendix D (Order on Opening a Criminal Case and Commencing Criminal Proceedings (25 November 2018)), p. 2; Annex C, Appendix 2 (Six Decisions on Pre-Trial Detention for the 24 Detained Ukrainian Servicemen), p. 2.

1 charge.<sup>8</sup> As indicated in the same indictment and shown on this slide, the Russian  
2 Federation contends that this alleged crossing violated article 322, paragraph 3, of  
3 Russia's domestic criminal code.<sup>9</sup>

4  
5 Other documents reflecting these charges include the Order on Opening a Criminal  
6 Case and Commencing Criminal Proceedings at tab 7, submitted as Annex A,  
7 Appendix D to Ukraine's Request, and the court documents submitted as Annex C,  
8 Appendices 1 and 2 to Ukraine's Request.

9  
10 Based on these charges, the Russian Federation is holding the 24 servicemen at the  
11 Lefortovo Prison in Moscow, a detention centre of the Ministry of Justice of the  
12 Russian Federation.<sup>10</sup> While in detention, the servicemen have had access to  
13 consular officials and Russian lawyers, although their meetings with consular officials  
14 have been monitored by the Russian authorities. However, they have been allowed  
15 no other visits, even from family members; and, as described in the news article  
16 appearing at tab 9 in your binders, it was only after this case was filed that Russia  
17 even allowed the sailors to call home for the first time.<sup>11</sup>

18  
19 In his declaration at tab 6, Mr Nikolai Polozov, the Russian attorney for the most  
20 senior officer among the servicemen, reports that the servicemen have repeatedly  
21 been interrogated; that they have been subjected to psychological evaluations; that  
22 they have been exposed to so-called "non-procedural" questioning by Russia's FSB  
23 outside the presence of counsel; and, as reflected in the press photograph at tab 1,  
24 page 6 and on the screen, that they have been displayed to the media in public court  
25 appearances as though they were common criminals.<sup>12</sup>

26  
27 The purpose of those court proceedings has been to extend the detentions of the  
28 servicemen, and therefore the vessels, which are being held as evidence in the case  
29 against the servicemen. Two such extensions have been granted to date. Most  
30 recently, shortly after Ukraine filed its Request, a District Court in Moscow issued  
31 orders on 17 April 2019 extending the detentions until late July. On 8 May 2019,  
32 Ukraine submitted to the Tribunal the relevant District Court decision as to four of the  
33 servicemen, which was obtained from Mr Polozov. The decision appears at tab 8.<sup>13</sup>

34  
35 This recent hearing demonstrated the gravity and urgency of the situation  
36 precipitated by Russia's detention of the vessels and servicemen. The court  
37 documents submitted by Ukraine on 8 May confirm that Russia will further violate the  
38 immunity of the vessels by subjecting them to ongoing investigations and forensic  
39 examinations. Those documents also make clear that Russia will continue to push  
40 forward with civilian interrogations and investigations, and with its plan to prosecute

---

<sup>8</sup> Annex C, Appendix 1 (Indictments against the 24 Detained Ukrainian Servicemen), p. 1.

<sup>9</sup> Ibid.

<sup>10</sup> Annex C (Polozov Declaration), para. 3.

<sup>11</sup> Annex H, Appendix D, ASPI News, Ukrainian Navy Seaman Calling Home from Captivity for the First Time (23 April 2019).

<sup>12</sup> Annex C (Polozov Declaration), paras 5-6; Annex D, Appendix A, Canadian Broadcasting Corporation, "This Is Soul-Destroying": Families of Captured Ukrainian Sailors Fear the World Has Forgotten Them (20 February 2019).

<sup>13</sup> Annex G, Appendix A, Lefortovo District Court Ruling on the Extension of the Term of Arrest (17 April 2019), p. 8.

1 the servicemen, subjecting them to a maximum sentence of six years in a Russian  
2 labour camp.

3  
4 These then are the facts upon which Ukraine bases its claim. As I mentioned at the  
5 outset, none of them are in dispute between the Parties. In its Memorandum of  
6 7 May, however, Russia has raised a number of allegations about the events  
7 preceding the seizure and detention of the vessels. To be clear, the dispute Ukraine  
8 has submitted to arbitration, and that is now before this Tribunal, concerns only  
9 Russia's exercise of jurisdiction over the three Ukrainian vessels in spite of their  
10 complete immunity. That includes both the seizure and detention of those vessels,  
11 and the subsequent civilian legal process to which both the vessels and those on  
12 board have been subjected. Russia's version of what happened in the hours leading  
13 up to the seizure and detention is simply not relevant to the immunity of the  
14 Ukrainian vessels at the time they were seized. Nonetheless, in order to correct the  
15 record, I will briefly respond to certain of Russia's contentions.

16  
17 First, in its Memorandum of 7 May, Russia describes the mission of the three  
18 Ukrainian naval vessels as a "secret' incursion ... into Russian territorial waters".<sup>14</sup>  
19 That is simply not the case. The mission of the vessels was to navigate from the  
20 Ukrainian port of Odesa to the Ukrainian port of Berdyansk on the northern shore of  
21 the Sea of Azov, where they were thereafter to be permanently stationed.<sup>15</sup> Other  
22 Ukrainian naval vessels had successfully completed the same transit as recently as  
23 September 2018, just two months earlier. On the slide now on the screen (tab 1,  
24 page 7), you will see a general area map that reflects the location of both ports,  
25 Odesa and Berdyansk, and of the Kerch Strait.

26  
27 Russia refers to a document found on board the *Nikopol* guiding them, in Russia's  
28 translation, to sail "covertly outside of the coastal and maritime regions of patrol of  
29 the Black Sea Fleet of Russia and the Coast Guard of the FSB of Russia."<sup>16</sup> Vice  
30 Admiral Tarasov confirms that the purpose of this guidance was to avoid  
31 unnecessarily provoking incidents with Russian government vessels during the two  
32 days it would take to reach the Kerch Strait from Odesa.<sup>17</sup>

33  
34 Nor can the guidance be read as suggesting that the mission of the naval vessels  
35 was to transit the Kerch Strait secretly – an impossible task given the breadth of the  
36 Kerch Strait and the navigable channels through it. Indeed, as the Ukrainian Navy  
37 report at tab 3 confirms, as it approached the Kerch Strait, the *Berdyansk* radioed  
38 both a post of the Russian Border Guard Service and the port authorities at Kerch  
39 and Kavkaz ports to announce the intention of the three vessels to proceed through  
40 the Kerch Strait.<sup>18</sup>

14 Memorandum of the Government of the Russian Federation (7 May 2019), para. 28 [hereinafter "Memorandum of the Russian Federation"].

15 Annex F, Appendix A, *Nikopol* Small Armored Gunboat, Checklist for Readiness to Sail (09:00 Hours on 23 November 2018 to 18:00 Hours on 25 November 2018), para. 1.

16 Memorandum of the Russian Federation, para. 20.

17 Annex F (Tarasov Declaration), para. 9.

18 Annex B (Navy Report), para. 10.

1 Second, in its Memorandum, Russia invokes the allegedly crowded conditions in the  
2 Kerch Strait on 25 November as a justification for the actions taken by its Coast  
3 Guard.<sup>19</sup> Again, the Russian account is full of holes and cannot be relied upon.  
4

5 The Kerch Strait regularly handles significant traffic in commercial vessels. The slide  
6 now on your screen (tab 1, page 8), for example, shows a snapshot of the traffic  
7 through the Kerch Strait and to and from the Ukrainian and Russian ports on the Sea  
8 of Azov on 7 May.<sup>20</sup>  
9

10 According to Russia, its Coast Guard warned the Ukrainian naval vessels on the  
11 night of 24 November of a temporary suspension of the rights of innocent passage  
12 for naval vessels in the approach to the entrance to the Kerch Strait due to an  
13 expected storm. But, as the Ukrainian Navy report and the declaration of Vice  
14 Admiral Tarasov establish, the Ukrainian Navy was unable to find any evidence of  
15 such a restriction where it would normally be posted online.<sup>21</sup>  
16

17 Russia's version of events also fails to mention that, as widely reported in press  
18 coverage of the events of 25 November 2018, and reflected in the press photograph  
19 now on the screen (tab 1, page 9 of your binders), a tanker was positioned across  
20 the span of the Kerch Strait bridge on 25 November 2018 blocking all traffic through  
21 the Strait, not just that of naval vessels.<sup>22</sup>  
22

23 Finally, if the Strait had been as crowded by vessels carrying dangerous cargo as  
24 Russia now claims it was at the time of these events, it would not have been  
25 possible for Russian Coast Guard vessels to engage in a high speed chase and to  
26 fire their guns in the direction of the Ukrainian vessels without risking civilian injury or  
27 death.  
28

29 Third, Russia accuses the Ukrainian naval vessels of what it calls "provocative  
30 actions".<sup>23</sup> These include the allegation that the *Nikopol* and *Berdyansk* were put in a  
31 condition of combat readiness with guns uncovered and elevated.<sup>24</sup> The suggestion  
32 that these two small and lightly armoured Ukrainian vessels were in a position to  
33 threaten the numerous Russian government vessels in the area in this way is, on its  
34 face, not credible. (Tab 1, page 10) As the Ukrainian Navy report and Vice Admiral  
35 Tarasov's declaration establish, the vessels were under orders to proceed peacefully  
36 and abstain from any aggressive acts.<sup>25</sup> There is no indication that they did  
37 otherwise.<sup>26</sup>  
38

39 Vice Admiral Tarasov points out that sailing with uncovered guns is entirely  
40 consistent with Ukrainian standard operating procedure, just as it is with Russia's

---

<sup>19</sup> Memorandum of the Russian Federation, paras 12, 16.

<sup>20</sup> Annex H, Appendix B, MarineTraffic.com, Traffic in the Kerch Strait as of Tuesday, 7 May 2019, at 5:10 PM Kyiv Time.

<sup>21</sup> Annex B (Navy Report), para. 9; Annex F (Tarasov Declaration), para. 7.

<sup>22</sup> Annex H, Appendix A, AP Photo, The Kerch Bridge Is Seen Blocked for Ships Entrance, Near Kerch, Crimea (25 November 2018).

<sup>23</sup> Memorandum of the Russian Federation, para. 16.

<sup>24</sup> *Ibid.*

<sup>25</sup> Annex B (Navy Report), para. 6; Annex F (Tarasov Declaration), para. 4.

<sup>26</sup> Annex F (Tarasov Declaration), para. 5.

1 own standard operating procedure.<sup>27</sup> And, given the proximity of the Russian Coast  
2 Guard vessels, the raising of guns to an elevation of 45 degrees should – and  
3 would – have been interpreted by those vessels as signalling the absence of  
4 aggressive intent. Had the guns been fired at that elevation, the shells would have  
5 travelled far above and beyond the Russian vessels in the vicinity.<sup>28</sup>  
6

7 As I said previously, though, none of these incorrect factual allegations by Russia  
8 are pertinent to your consideration of Ukraine’s claim, which concerns only Russia’s  
9 exercise of jurisdiction over the Ukrainian vessels and servicemen, beginning with  
10 their seizure and detention on 25 November 2018. Even if these Russian allegations  
11 were true, which they are not, the undisputed facts of this case would still give rise to  
12 a clear and continuing breach of the Convention and an urgent situation meriting  
13 provisional measures to preserve Ukraine’s rights.  
14

15 With the Tribunal’s permission, I will now cede the podium to Professor Soons to  
16 address the legal grounds for Ukraine’s claim and the Tribunal’s *prima facie*  
17 jurisdiction.  
18

19 **THE PRESIDENT:** Thank you, Mr Gimblett. I now give the floor to Mr Alfred Soons.  
20

21 **MR SOONS:** Mr President, Members of the Tribunal, it is an honour for me to appear  
22 before you on behalf of Ukraine in this important case. My task today will be to set  
23 out the legal grounds for Ukraine’s Request for provisional measures, and then to  
24 show that the legal grounds Ukraine invokes *prima facie* afford a basis for the  
25 jurisdiction of an Annex VII tribunal. Thereafter I will show that Ukraine has complied  
26 with the requirements of sections 1 and 2 of Part XV of the Convention in connection  
27 with the underlying dispute.  
28

29 First, the legal grounds. Ukraine’s Request for provisional measures is intended to  
30 protect its rights under the Convention and customary international law to complete  
31 immunity of its warships, naval auxiliary vessels and all persons on board from the  
32 jurisdiction of any other State. Warship immunity is a fundamental and longstanding  
33 tenet of the law of the sea and, as I will explain further, the rights Ukraine seeks to  
34 protect meet and exceed the standard of plausibility applied at the provisional  
35 measures stage.<sup>1</sup>  
36

37 As this Tribunal explained in its provisional measures order in the “*ARA Libertad*”  
38 Case, a warship, and any other vessel assigned to the public service of national  
39 defence, “is an expression of the sovereignty of the State whose flag it flies.”<sup>2</sup>  
40 Several articles of the Convention entitle such ships to “complete immunity” from  
41 seizure, detention and legal process.  
42

43 In particular, articles 95 and 96 of the Convention provide that warships and “ships  
44 owned or operated by a State and used only on government non-commercial

---

<sup>27</sup> Ibid., para. 6.

<sup>28</sup> Ibid.

<sup>1</sup> “*Enrica Lexie*” Incident (*Italy v. India*), *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, para. 84.

<sup>2</sup> “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, para. 94.

1 service” – of which naval auxiliary vessels are the classic example – enjoy “complete  
2 immunity from the jurisdiction of any State other than the flag State”. Article 58  
3 extends the application of the immunity under articles 95 and 96 to the exclusive  
4 economic zone. Article 32 and customary international law guarantee the same  
5 immunity in the territorial sea. In short, wherever in the seas a naval vessel may be  
6 found, the Convention requires that it be accorded complete immunity from the  
7 jurisdiction of all States other than its flag State.

8  
9 The immunity of warships, as a specific application of the principle of State immunity,  
10 has been established since at least the early 1800s. It is often pointed out that the  
11 doctrine was recognized more than two centuries ago in the 1812 decision of the  
12 United States Supreme Court in the *Schooner Exchange v. McFaddon* case,<sup>3</sup> and is  
13 also reflected in other venerable judgments, such as the 1880 decision of the Court  
14 of Appeals of England and Wales in the *Le Parlement Belge* case.<sup>4</sup> Both these  
15 authorities analogize the immunity of warships to the equally fundamental and  
16 longstanding rule of diplomatic immunity.

17  
18 More recently, the 1958 Geneva Conventions on the Territorial Sea and Contiguous  
19 Zone and on the High Seas recognized and confirmed the customary immunity of  
20 warships and other non-commercial government vessels. Like the Law of the Sea  
21 Convention, the Convention on the Territorial Sea and Contiguous Zone provided in  
22 article 22 that nothing in it would “affect ... the immunities which [government ships]  
23 enjoy.”<sup>5</sup> Similarly, the Convention on the High Seas specified in articles 8 and 9 that  
24 warships and government non-commercial vessels have “complete immunity from  
25 the jurisdiction of any State other than the flag State.”<sup>6</sup>

26  
27 This rule of “complete immunity” for warships and other governmental vessels is  
28 recognized not only in treaties relating to the Law of the Sea, but also in other  
29 relevant international instruments. For example, while allowing for legal process  
30 against government vessels on commercial service, article 16(2) of the United  
31 Nations Convention on Jurisdictional Immunities of States and Their Property  
32 categorically excludes jurisdiction over “warships or naval auxiliaries” and “other  
33 vessels ... used ... only on government non-commercial service”.<sup>7</sup>

34  
35 Not surprisingly, given that the Russian Empire, the Soviet Union and the Russian  
36 Federation have all maintained substantial naval forces in the Pacific, the Baltic Sea,  
37 the Black Sea and further afield, Russia has long benefited from the rule of complete  
38 immunity. The Soviet Union, for example, asserted immunity to protect warships,  
39 including submarines, operating both in international waters and in the territorial sea  
40 and internal waters of other States – such as in the well-known case of the Soviet  
41 submarine that ran aground in Swedish internal waters in 1981, which I will return to  
42 in a few minutes. Even today, the Russian Federation continues to operate its  
43 warships far from home – something that is only possible because of the immunity of  
44 warships and the naval auxiliary vessels that support them.

---

<sup>3</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 142-47 (1812).

<sup>4</sup> *The Parlement Belge*, (1879) 4 P.D. 129, 144-155.

<sup>5</sup> Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at article 22.

<sup>6</sup> Convention on the High Seas, Geneva, 29 April 1958, at articles 8-9.

<sup>7</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, article 16.

1  
2 It is unsurprising, therefore, that Russia has been a strong advocate for such  
3 immunity, supporting the provisions on the immunity of governmental vessels in the  
4 1958 Geneva Conventions and even suggesting that they be expanded to cover  
5 governmental ships on commercial service.<sup>8</sup>  
6

7 What precisely, then, does the rule of complete immunity protect? And what  
8 obligations does it entail for third States?  
9

10 As for the first question, the rule of complete immunity protects the ships themselves,  
11 as well as their crews, their passengers and all others aboard them, and even goods  
12 and equipment on board. This follows directly from the jurisprudence of this Tribunal.  
13 In its Judgment in the *M/V “SAIGA” (No. 2) Case*, for example, this Tribunal  
14 recognized that “the Convention considers a ship as a unit”, comprised of not only  
15 the ship itself but also its crew, every other person on board the ship or otherwise  
16 “involved or interested in its operations”, and the ship’s cargo.<sup>9</sup> Oppenheim’s  
17 International Law states the case in even stronger terms, referring specifically to the  
18 fact that the immunity of a naval vessel takes precedence over the criminal  
19 jurisdiction of the coastal State with respect to the vessel and all persons it carries:  
20

21 I will quote the relevant passage from Oppenheim, as it is shown on the screen, but  
22 it is a long passage. I will read it because it is useful to have it in mind.  
23

24 A warship with all persons and goods on board, remains under the  
25 jurisdiction of her flag State even during her stay in foreign waters.  
26 Members of the crew who commit crimes when ashore and then return to  
27 the vessel may not be seized by the authorities of the littoral state, who can  
28 only request their surrender: If the request is granted the local courts have  
29 jurisdiction to try the offender, but not if it is refused, or if it is granted on  
30 conditions which exclude the exercise of jurisdiction. Individuals who are  
31 subjects of the littoral state and are only temporarily on board may,  
32 although they need not, be taken to the home country of the vessel, to be  
33 punished there, if they commit a crime on board. Even individuals who do  
34 not belong to the crew but who, after having committed a crime on the  
35 territory of the littoral state, have taken refuge on board, cannot be forcibly  
36 taken off the vessel; if the commander refuses their surrender, it can be  
37 obtained only by diplomatic means from his home state.<sup>10</sup>  
38

39 As for the second question – what obligations does the rule of complete immunity  
40 entail for States other than the flag State – again, the answer is well established. As  
41 implied by the term “complete immunity”, other States are obliged not to take any  
42 action that physically or legally encumbers the vessel. Thus, they must not board  
43 such a vessel, arrest it, detain it, or otherwise prevent it, in the words of the

---

<sup>8</sup> See William N. Harben, *Soviet Attitudes and Practices Concerning Maritime Waters*, 15 JAG J. 149, 150 (1961).

<sup>9</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 106; see also *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 127; *The Arctic Sunrise Arbitration*, Annex VII Arbitral Award on the Merits of 14 August 2015, paras 170-172.

<sup>10</sup> See R. Jennings and A. Watts, *Organs of the States for their international relations: Miscellaneous agencies, State Ships Outside National Waters*, Oppenheim’s International Law Vol. 1 (Eds. Jennings and Watts) (19 June 2008), § 563.

1 “ARA *Libertad*” provisional measures order, from “discharging its mission and  
2 duties”.<sup>11</sup> Further, as suggested by the passage from Oppenheim’s just quoted, other  
3 States must not purport to subject the vessel or any person or thing on board to any  
4 form of civilian legal process.<sup>12</sup>

5  
6 Notwithstanding the “complete immunity” from the exercise of jurisdiction the Law of  
7 the Sea Convention accords to warships and other governmental vessels, Russia’s  
8 Coast Guard has wrongly suggested that its attempt to prevent the return of the  
9 vessels to Odesa, and its ultimate seizure of the vessels, was consistent with the  
10 Convention. Specifically, in a report published on its website and reproduced at  
11 tab 5, page 4, the FSB Coast Guard stated:

12  
13 At 6:30 pm, the group of Ukrainian naval vessels, attempting to break  
14 through the blockade, made sail and started moving at a course of 200  
15 degrees [– that is a south southwest direction –] heading out of the  
16 territorial sea of the Russian Federation. The artillery ships *Berdyansk* and  
17 *Nikopol* were moving at a speed of 20 knots, and the seagoing tugboat  
18 *Yana Kapu* at 8 knots. The border patrol ships *Don* and *Izumrud* started  
19 following the group of Ukrainian naval ships and communicated to them an  
20 order to stop (in accordance with article 30 of the UN Convention on the  
21 Law of the Sea of 1982 and article 12(2) of Federal Law 155 dated July 31,  
22 1998, “On the Internal Seas, Territorial Sea, and Contiguous Zone of the  
23 Russian Federation”).<sup>13</sup>

24  
25 For the avoidance of doubt, Ukraine of course does not accept that the area of sea  
26 within 12 miles of the coast of Crimea is “the territorial sea of the Russian  
27 Federation”. However, and contrary to Russia’s position at footnote 58 of its  
28 Memorandum of 7 May, the identity of the coastal State is not a question that this  
29 Tribunal, or even the Annex VII tribunal still to be constituted, would need to resolve.  
30 Even if one were to posit that the vessels were in a Russian territorial sea, article 30  
31 does not permit the coastguard of a littoral state to issue a foreign naval vessel with  
32 “an order to stop”. To the contrary, the exclusive right accorded to the Russian Coast  
33 Guard under article 30 would have been to require the vessels to leave the territorial  
34 sea – something – and it is important to emphasize this – that the report  
35 acknowledges the vessels were already in the process of doing.

36  
37 In claiming to rely on the Law of the Sea Convention’s article 30, Russia overlooks  
38 the fact that articles 30 and 31 (now shown on the screen) of the Convention serve  
39 to confirm the complete immunity of warships and other governmental vessels from  
40 foreign jurisdiction. They provide, as the exclusive remedies for a coastal State in  
41 connection with a foreign naval vessel’s non-compliance with its laws and  
42 regulations, that a coastal State is permitted under article 30 to “require [a warship]  
43 to leave the territorial sea immediately”; and that, pursuant to article 31, the coastal  
44 State may subsequently seek compensation from the flag State for any damage  
45 caused by the warship.

---

<sup>11</sup> “ARA *Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 332, paras 97-98.

<sup>12</sup> See R. Jennings and A. Watts, *Organs of the States for their international relations: Miscellaneous agencies, State Ships Outside National Waters*, Oppenheim’s International Law Vol. 1 (Eds. Jennings and Watts) (19 June 2008), § 563.

<sup>13</sup> Annex A, Appendix C (FSB Report), p. 4.



1  
2 Indeed, even before the adoption of the Convention, it was well established – under  
3 article 23 of the Convention on the Territorial Sea and Contiguous Zone and  
4 customary international law – that the only remedy against a warship for claimed  
5 non-compliance with the rules on innocent passage was to request that the warship  
6 “leave the territorial sea”.<sup>14</sup>  
7

8 I would note that Russia itself has relied on this rule to its benefit. In the 1981  
9 submarine incident in Swedish waters I referred to a few minutes ago, the Soviet  
10 Union reportedly submitted a diplomatic note (tab 10) to the Swedish government  
11 invoking: “The generally recognized principle of international law under which a warship  
12 enjoys complete immunity from the jurisdiction of any state other than the one under whose  
13 flag she is sailing.”  
14

15 The note continued: “Even if a foreign warship fails to observe a coastal State’s rules on  
16 passage through its territorial waters, the only thing the coastal State may do is demand that  
17 she leave its waters.”<sup>15</sup>  
18

19 Mr President, Members of the Tribunal, it is therefore apparent that, while Russia  
20 claims to have complied with the Convention, it has in fact violated the immunity of  
21 Ukraine’s naval vessels and the servicemen on board by seizing them, exercising its  
22 jurisdiction over them, and continuing to do so up to the present day.  
23

24 As Mr Gimblett just described, since the seizure, Russia has compounded its  
25 violations of the Convention and aggravated the dispute between the Parties by,  
26 among other things, conducting on-board investigations of the *Berdyansk*, *Nikopol*,  
27 and *Yani Kapu*, in plain violation of those vessels’ immunity under the Convention;  
28 and violating the corresponding immunity of the servicemen on board those vessels  
29 by arresting them, initiating and pursuing civilian legal proceedings against them,  
30 detaining them in Russian prisons, and repeatedly subjecting them to interrogations,  
31 psychological examinations and legal process.  
32

33 Each additional day of detention, each interrogation, each involuntary psychological  
34 examination, and each court appearance compounds Russia’s violation of the  
35 immunity guaranteed to Ukraine’s naval vessels under articles 32, 58, 95 and 96 of  
36 the Convention.  
37

38 Mr President, Members of the Tribunal, having set out the legal grounds for  
39 Ukraine’s request, I will now turn to showing that, *prima facie*, an Annex VII tribunal  
40 would have jurisdiction over the underlying dispute between the parties. Ukraine has  
41 invoked provisions of the Convention that appear, *prima facie*, to afford a basis for  
42 the jurisdiction of the Annex VII tribunal, and Ukraine has complied with the  
43 remaining requirements of sections 1 and 2 of Part XV of the Convention, including  
44 the obligation to exchange views under article 283. As a consequence, this Tribunal  
45 is competent to prescribe provisional measures under article 290, paragraph 5.  
46

---

<sup>14</sup> Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at article 23.

<sup>15</sup> Milton Leitenberg, The Case of the Stranded Sub, Bulletin of Atomic Scientists, vol. 38, no. 3, p. 10-11 (March 1982).

1 Ukraine has invoked provisions of the Convention that, *prima facie*, afford a basis for  
2 the jurisdiction of an Annex VII tribunal.

3  
4 Let me begin by recalling that article 290, paragraph 5, of the Convention provides  
5 that this Tribunal is competent to prescribe provisional measures in connection with  
6 a dispute “if it considers that *prima facie* the tribunal which is to be constituted would  
7 have jurisdiction” over the dispute [and that tribunal, in our case, means the  
8 Annex VII tribunal to be constituted].

9  
10 In its most recent provisional measures order, in the “*Enrica Lexie*” case, this  
11 Tribunal explained that this jurisdictional requirement is satisfied so long as “any of  
12 the provisions invoked by the Applicant appears *prima facie* to afford a basis on  
13 which the jurisdiction of the Annex VII arbitral tribunal might be founded”.<sup>16</sup>

14  
15 Here, Ukraine has invoked article 32, and, through article 58, paragraph 2, articles  
16 95 and 96 of the Convention and, as just described, the Parties are plainly engaged  
17 in a dispute over the interpretation and application of those articles. In Ukraine’s  
18 view, Russia’s seizure and continued detention of the naval vessels, as well as its  
19 criminal prosecution of the vessels’ servicemen, violate the principle of warship  
20 immunity under these articles. Russia, however, has maintained that its actions are  
21 lawful under, among other provisions, article 30 of the Convention. It is this  
22 difference of views that the Annex VII tribunal would have to resolve, and that it will  
23 have the competence to resolve under articles 286 and 288 of the Convention.

24  
25 Mr President, Members of the Tribunal, in addition to being a dispute concerning the  
26 interpretation or application of the Convention under articles 286 and 288, the  
27 dispute submitted by Ukraine meets the remaining conditions for the jurisdiction of  
28 an Annex VII tribunal.

29  
30 Ukraine’s written request, and the notification appended to Ukraine’s request, set out  
31 the bases for this conclusion: Ukraine and Russia are both Parties to the  
32 Convention; both Ukraine and Russia have selected Annex VII arbitration as the  
33 means of settling disputes such as this one pursuant to section 2 of Part XV of the  
34 Convention; and, prior to submitting the notification, Ukraine satisfied the  
35 requirement in article 283 that the Parties to the dispute “proceed expeditiously to an  
36 exchange of views regarding its settlement by negotiation or other peaceful means.”

37  
38 Russia, of course, in its 7 May Memorandum, denies that article 283 has been  
39 satisfied; but its argument is simply incorrect.

40  
41 Article 283, paragraph 1 (tab 1), shown on the screen, provides that “the Parties to  
42 the dispute shall proceed expeditiously to an exchange of views regarding its  
43 settlement by negotiation or other peaceful means.” This obligation to exchange  
44 views is simply that. As this Tribunal has observed in its provisional measures order  
45 in “*Arctic Sunrise*”, “a State Party is not obliged to continue with an exchange of  
46 views when it concludes that the possibilities of reaching agreement have been

---

<sup>16</sup> “*Enrica Lexie*” Incident (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 182, para. 52.

1 exhausted”,<sup>17</sup> a view consistent with its previous decisions.<sup>18</sup> And as the Annex VII  
2 tribunal determined, in concurring with this Tribunal’s view that article 283 had been  
3 satisfied in the circumstances of the “*Arctic Sunrise*” Case:

4  
5 The Parties exchange views regarding the means by which a dispute that  
6 has arisen between them may be settled. Negotiation is evoked as one  
7 such means. Arbitration is another. Article 283(1) does not require the  
8 Parties to engage in negotiations regarding the subject matter of the  
9 dispute.<sup>19</sup>

10  
11 Here, in our case, on 15 March 2019, Ukraine transmitted a diplomatic note to the  
12 Russian Federation indicating its preference that the dispute be resolved through  
13 Annex VII arbitration and requesting an exchange of views pursuant to article 283  
14 (tab 12).<sup>20</sup> In light of the urgency of the situation, Ukraine insisted that this exchange  
15 of views take place within ten days. Contrary to Russia’s argument,<sup>21</sup> this ten-day  
16 deadline was not “arbitrary”. It reflected the fact that each passing day further  
17 compounded the harm to Ukraine’s rights, and that Ukraine had already, over a  
18 period of months, repeatedly protested the detention of the vessels and servicemen  
19 and sought their release.

20  
21 Russia acknowledged receipt of Ukraine’s diplomatic note 10 days later, on  
22 25 March 2019. However, Russia did not even attempt to exchange views with  
23 Ukraine within this time frame, nor did it provide any explanation of why it could not  
24 do so. Instead, as shown at tab 13 in your folder and on the screen, Russia simply  
25 stated that “possible comments” on Ukraine’s note of 15 March were “expected to be  
26 sent separately” – leaving it entirely ambiguous whether, and when, Russia would  
27 ultimately agree to participate in an exchange of views.<sup>22</sup> It was only on 12 April, four  
28 weeks after Ukraine’s request for an exchange of views, that Russia finally accepted  
29 Ukraine’s request (tab 14).<sup>23</sup>

30  
31 Despite the delay, Ukraine promptly responded to Russia’s diplomatic note (tab 15)  
32 and arranged a meeting between the Parties on 23 April 2019 in The Hague.<sup>24</sup> By

---

<sup>17</sup> “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, *ITLOS Reports 2013*, p. 230, para. 76.

<sup>18</sup> *MOX Plant (Ireland v. United Kingdom)*, *Provisional Measures, Order of 3 December 2001*, *ITLOS Reports 2001*, p. 95, para. 60; “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, *ITLOS Reports 2012*, p. 332, para. 71.

<sup>19</sup> *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, *Award on the Merits of 14 August 2015*, para. 151; see also *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, *Award on Jurisdiction and Admissibility of 29 October 2015*, para. 333.

<sup>20</sup> Annex A, Appendix E (Note Verbale No. 72/22-188/3-682 from Ukraine to the Russian Federation, dated 15 March 2019).

<sup>21</sup> Memorandum of the Russian Federation, para. 37.

<sup>22</sup> Annex I, Appendix A (Note Verbale No. 3528/2 from the Russian Federation to Ukraine, dated 25 March 2019).

<sup>23</sup> Annex I, Appendix B (Note Verbale No. 4502/2 from the Russian Federation to Ukraine, dated 12 April 2019).

<sup>24</sup> Annex I, Appendix C (Note Verbale No. 72/22-188/3-973 from Ukraine to the Russian Federation, dated 15 April 2019) (proposing time and location for exchange of views); Annex I, Appendix D (Note Verbale No. 4643/2 from the Russian Federation to Ukraine, dated 16 April 2019) (proposing alternative location for exchange of views); Annex I, Appendix E (Note Verbale No. 72/22-194/60-996 from Ukraine to the Russian Federation, dated 17 April 2019) (reiterating proposed location and proposing agenda for exchange of views); Annex I, Appendix F (Note Verbale No. 4841/2 from the

1 this time, on 1 April, Ukraine had filed its notification under Annex VII, including a  
2 request for provisional measures, but Ukraine remained interested in exchanging  
3 views regarding possible means of settlement of the dispute. At the same time,  
4 Ukraine could not accept further delay of implementation of the requested provisional  
5 measures. Accordingly, Ukraine filed its Request for provisional measures from this  
6 Tribunal on 16 April.

7  
8 At the meeting between the Parties on 23 April, the Russian Federation failed to  
9 make any concrete proposals to resolve the dispute or to secure the prompt release  
10 of the servicemen or vessels. Instead, the Russian Federation proposed additional  
11 consultations between the Parties under article 283, and also asked Ukraine whether  
12 it had considered joining the present case to the ongoing Annex VII proceeding  
13 between the Parties.

14  
15 In response to Russia's suggestion of additional consultations, Ukraine asked the  
16 Russian delegation whether Russia had any specific objectives or requests for  
17 Ukraine to consider as part of such consultations. The Russian Federation was  
18 unable to provide any. Accordingly, Ukraine indicated that further consultations were  
19 not likely to be fruitful and were not appropriate given, among other things, the  
20 urgency of the situation precipitated by Russia's actions.

21  
22 In connection with Russia's question regarding joinder of these proceedings, Ukraine  
23 explained that the ongoing Annex VII case involves an entirely different subject  
24 matter from the present dispute concerning warship immunity and attempting to  
25 combine those two completely separate disputes at this stage would not be efficient.  
26 Notably, the delegation of the Russian Federation did not indicate that Russia itself  
27 viewed joinder of the two disputes to be appropriate – or, indeed, even legally  
28 possible. Ukraine confirmed its view that a separate Annex VII arbitral proceeding is  
29 the proper way to settle this distinct dispute.

30  
31 As should be apparent from this account of events, Ukraine's obligation to exchange  
32 views was satisfied on 25 March 2019. Article 283 requires the exchange of views to  
33 take place "expeditiously" and, in simply ignoring Ukraine's proposed schedule for an  
34 exchange of views, Russia failed to comply with that obligation. When it received  
35 Russia's note of 25 March 2019, Ukraine could not have foreseen that Russia  
36 would – weeks later – agree to Ukraine's request for a meeting, and Ukraine was  
37 entitled to presume that further attempts to seek negotiations would not be fruitful.  
38 Ukraine was not required to indefinitely postpone its case and allow further harm to  
39 its rights.

40  
41 To the extent the Tribunal considers that the Parties were still under an obligation to  
42 exchange views after 25 March, however, Ukraine's 23 April exchange of views with  
43 the Russian Federation satisfies the requirements of article 283. Again, under the  
44 plain text of the article, the only obligation imposed by article 283 is for each Party to  
45 put forward its views on the appropriate process for resolution of the dispute. That  
46 obligation was satisfied, at least on Ukraine's part, at the 23 April meeting (and, for  
47 that matter, also through the diplomatic notes that preceded the meeting).

---

Russian Federation to Ukraine, dated 19 April 2019) (accepting proposed time and location for exchange of views).

1  
2 In sum, Ukraine has satisfied the requirements of article 283 in this case.

3  
4 Mr President, Members of the Tribunal, having described the provisions of the  
5 Convention that apply to this case, and that Russia continues to violate even today,  
6 and having shown that the dispute submitted by Ukraine satisfies, *prima facie*, the  
7 requirements of sections 1 and 2 of Part XV of the Convention, I now conclude my  
8 portion of Ukraine's oral submissions. With your permission, Mr President, possibly  
9 after the break, Ms Marney Cheek will address the remainder of Ukraine's case on  
10 jurisdiction – specifically, its response to Russia's arguments under the military  
11 activities clause in article 298(1)(b). I thank you for your attention to my presentation.

12  
13 **THE PRESIDENT:** Thank you, Mr Soons. We have now reached 11.10 a.m. At this  
14 stage the Tribunal will withdraw for a break of 30 minutes. We will continue the  
15 hearing at 11.40 a.m.

16  
17 (Break)

18  
19 **THE PRESIDENT:** I now give the floor to Ms Marney Cheek to make the next  
20 statement for Ukraine.

21  
22 **MS CHEEK:** Mr President, Members of the Tribunal, it is an honour to appear before  
23 you today on behalf of Ukraine. I will address Russia's claim that this dispute falls  
24 within the scope of the optional exclusion for "disputes concerning military activities"  
25 under article 298(1)(b) of the Convention. Russia contends that this Tribunal cannot  
26 find that there is jurisdiction even on a *prima facie* basis because Ukraine's claims  
27 fall within this military activities exception. That is not the case.

28  
29 Russia's invocation of the military activities exception is misplaced. That exception  
30 does not apply to Ukraine's claim that Russia has unlawfully exercised its jurisdiction  
31 over the *Berdyansk, Nikopol* and *Yani Kapu* in contravention of the bedrock principle  
32 of the sovereign immunity of warships and other naval vessels enshrined in the  
33 Convention. At this stage of the proceedings, Russia's attempt to invoke the military  
34 activities exception does not alter the proper conclusion that the Annex VII tribunal  
35 would, *prima facie*, have jurisdiction over this dispute.

36  
37 The military activities exception is not applicable to Ukraine's claims for two reasons.  
38 First, Russia itself has repeatedly insisted that its actions are law enforcement, not  
39 military, activities. Article 298 draws a clear distinction between law enforcement  
40 activities on the one hand and military activities on the other. Russia characterizes its  
41 own conduct as falling in the law enforcement category. Prior Annex VII tribunals  
42 applying the Convention have correctly concluded that the military activities  
43 exception cannot apply when the party whose actions are at issue has characterized  
44 its own actions as non-military in nature. That is sufficient to dispose of Russia's  
45 attempt to invoke the military activities exception in this case.

46  
47 Second, even setting aside Russia's own characterization of its actions, the dispute  
48 Ukraine has brought, viewed on an objective basis, simply does not concern military  
49 activities. It is not enough that some of the ships involved happened to be military  
50 vessels. Rather, the acts of which Ukraine complains must be "military" acts. Here,

1 they are not; rather, they involve the exercise of domestic jurisdiction in a law  
2 enforcement context.

3  
4 Before elaborating on these two independent reasons why the military activities  
5 exception does not apply in this case, an appropriate starting point is to look at the  
6 language of article 298(1)(b).

7  
8 The Convention itself establishes a categorical distinction between military and law  
9 enforcement activities. Article 298(1)(b) contains two separate clauses: one for  
10 disputes concerning military activities and another clause for certain disputes  
11 concerning law enforcement activities in regard to the exercise of certain sovereign  
12 rights or jurisdiction related to fishing and marine scientific research. This structure  
13 indicates that the concepts of “military activities” and “law enforcement activities” are  
14 distinct, mutually exclusive categories. The *Virginia Commentary* confirms that in  
15 crafting article 298(1)(b) the drafters of the Convention meant to “distinguish  
16 between military activities and law enforcement activities.”<sup>1</sup> Scholars have likewise  
17 noted that the Convention’s optional exception to jurisdiction for military activities  
18 was included on the understanding that law enforcement activity would not be  
19 considered a military activity.<sup>2</sup>

20  
21 In order for the military activities exception to be properly invoked, Ukraine’s claims  
22 must concern military activities. In this case, they do not. Ukraine’s claims relate to  
23 the seizure and detention of Ukrainian naval vessels and their crew, despite those  
24 vessels’ immunity from Russian jurisdiction. Simply put, these claims do not concern  
25 activities that are military in nature.

26  
27 I will now elaborate on the two legal reasons for why Russia’s invocation of the  
28 military activities exception under article 298(1)(b) cannot be accepted and why it is  
29 therefore appropriate for this Tribunal to determine that an Annex VII tribunal would,  
30 *prima facie*, have jurisdiction over Ukraine’s claims.

31  
32 First, as noted, the military activities exception does not apply when the party whose  
33 actions are at issue has characterized its actions as non-military in nature.

34  
35 Second, the military activities exception is inapplicable in the instant case because,  
36 even setting aside Russia’s own characterization of its activity, Ukraine does not  
37 seek resolution of a dispute concerning military activities. Ukraine’s claims do not  
38 allege a violation of the Convention based on activities that are military in type, but,  
39 rather, Ukraine’s claims are based on Russia’s unlawful exercise of jurisdiction in a  
40 law enforcement context.

41  
42 Let me begin with the first legal basis for rejecting Russia’s invocation of the military  
43 activities exception, and that is Russia’s own characterization of its activities. In  
44 evaluating the applicability of the military activities exception to the Philippines’  
45 claims against China in the *South China Sea Arbitration*, the Annex VII tribunal relied  
46 on China’s own characterization of the Chinese activities that the Philippines had

---

<sup>1</sup> Myron H. Nordquist et al., *United Nations Convention on the Law of the Sea: A Commentary* (2014) (“*Virginia Commentary*”), p. 135.

<sup>2</sup> See Gurdip Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), p. 148.

1 complained of. In the relevant portion of that case, Chinese military vessels and crew  
2 were engaged in land reclamation, and the Chinese government repeatedly asserted  
3 that its land reclamation activities were intended to serve civilian, not military,  
4 purposes. The *South China Sea* Tribunal determined that it would not “deem  
5 [Chinese] activities to be military in nature when China itself has consistently and  
6 officially resisted such classifications and affirmed the opposite at the highest  
7 levels.”<sup>3</sup> Parallel facts are presented here. Russia has repeatedly and consistently  
8 stated that its actions that provide the basis for Ukraine’s claims were not military in  
9 nature.

10  
11 In particular, Russia has maintained that its arrest and detention of the Ukrainian  
12 vessels and imprisonment and prosecution of the servicemen are solely matters of  
13 domestic law enforcement. For example, the Russian FSB’s statement on the  
14 incident, released on 26 November 2018, one day after the seizure of Ukraine’s  
15 naval vessels, described the incident in terms of alleged violations of Russian  
16 navigational regulations and statutes. That FSB statement, at tab 5, page 4, also on  
17 the screen, shows the FSB’s assertion that the Ukrainian ships violated several  
18 Russian laws, including: Federal Law 155 “On the Internal Seas, Territorial Sea, and  
19 Contiguous Zone of the Russian Federation”;<sup>4</sup> and Federal Law No. 4730-I “On the  
20 State Border of the Russian Federation.”<sup>5</sup> Subsequently, in a diplomatic note dated 5  
21 December 2018, at tab 11, and also on the screen, the Russian Ministry of Foreign  
22 Affairs explained that the Ukrainian servicemen were being detained for unlawfully  
23 crossing the State border of the Russian Federation, in violation of article 322,  
24 paragraph 3, of the Russian Criminal Code.<sup>6</sup>

25  
26 Russia has continued to characterize its own actions as concerning civilian law  
27 enforcement even after Ukraine filed its provisional measures request with this  
28 Tribunal.<sup>7</sup> In a public statement made in response to Ukraine’s Request for  
29 provisional measures dated 16 April, which appears at tab 16, the Russian Ministry  
30 of Foreign Affairs referred to an ongoing “criminal investigation being conducted in  
31 the Russian Federation”.<sup>8</sup>

32  
33 Further, as Professor Soons mentioned, Russia has invoked article 30 of UNCLOS  
34 to justify its detention of the *Berdiansk*, *Nikopol* and *Yani Kapu* on 25 November.  
35 I again refer you to the Russian FSB Report of 26 November 2018 on the incident. At  
36 tab 5, page 4, also on the screen, the Russian FSB invoked UNCLOS article 30.<sup>9</sup>  
37 Article 30 of UNCLOS is titled “Non-compliance by warships with the laws and  
38 regulations of the coastal State”. This provision does not relate to military activities. It  
39 specifically addresses a warship’s compliance, or lack thereof, with “the laws and  
40 regulations of the coastal State”. The very provision upon which Russia itself relies  
41 relates to law enforcement activities, not military activities. And it is clear from the

---

<sup>3</sup> *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award of 12 July 2016, para. 938.

<sup>4</sup> Annex A, Appendix C (FSB Report), p. 2-4.

<sup>5</sup> *Ibid.*, p. 4.

<sup>6</sup> Annex A, Appendix D (Note Verbale No. 14951/2 from the Russian Federation to Ukraine, dated 5 December 2018).

<sup>7</sup> Annex H, Appendix C (Statement by the Ministry of Foreign Affairs of Russia, dated 16 April 2019).

<sup>8</sup> *Ibid.*

<sup>9</sup> Annex A, Appendix C (FSB Report), p. 3-4.

1 contemporaneous record that Russia regarded the seizure and detention of which  
2 Ukraine complains as an action taken to enforce its domestic laws and regulations.

3  
4 Further, in this proceeding, the Russian Federation stated at paragraph 21 of its  
5 Memorandum of 7 May that it submitted to this Tribunal:

6  
7 On 26 and 27 November 2018, 24 Ukrainians (the Military Servicemen) on  
8 board the vessels were formally apprehended under article 91 of the Code  
9 of Criminal Procedure of the Russian Federation as persons suspected of  
10 having committed a crime of aggravated illegal crossing of the State border  
11 of the Russian Federation (section 3 of article 322 of the Criminal Code of  
12 the Russian Federation).

13  
14 Now Russia refers here to 26 and 27 November. Those are the dates that the  
15 servicemen were formally arrested and charged under the Russian Criminal Code for  
16 their alleged crime of illegally crossing the border. To be clear, the ships and crew at  
17 issue were detained at sea on 25 November for that alleged crime.

18  
19 In any case, Russia says that its detention of Ukraine's naval vessels was to enforce  
20 the laws of the Russian Federation; and it is this detention that Ukraine claims  
21 violates the Convention. Ukraine's claims are therefore outside the scope of the  
22 military activities exception on which Russia attempts to rely.

23  
24 Russia's Memorandum also spends significant time discussing events preceding the  
25 detention, even though those events are not the basis of Ukraine's claims, and  
26 Ukraine does not in this case allege any violation of the Convention based on those  
27 events. As explained by Ukraine and in the statement of Vice Admiral Tarasov, the  
28 mission of the *Berdyansk*, *Nikopol* and *Yani Kapu* was to navigate from the Ukrainian  
29 port of Odesa to the Ukrainian port of Berdyansk where they were to be stationed on  
30 a permanent basis, a trip that required passage through the Kerch Strait. These  
31 naval vessels were simply in transit, and they notified the Russian Coast Guard of  
32 their peaceful intentions.<sup>10</sup> Indeed, two months earlier, in September, Ukrainian naval  
33 vessels had successfully completed the same passage on their way to Berdyansk.

34  
35 There are certainly disputed facts related to why and how Russia decided to close  
36 the Kerch Strait to Ukraine's naval vessels, and even whether or not the Kerch Strait  
37 was actually closed; but that is not relevant to the case before you. What is relevant,  
38 and what is not disputed, is this. At the time they were detained, Ukraine's warships  
39 had left the area to return to Odesa. Coast Guard vessels were giving chase to ships  
40 leaving the territorial sea. Why? In order to arrest them for violating Russian  
41 domestic laws. This is a typical law enforcement encounter, except, importantly, the  
42 subjects of that encounter were naval vessels that were immune from Russia's  
43 exercise of jurisdiction. What transpired at the time of the unlawful seizure was not,  
44 as Russia contends at paragraph 30 of its Memorandum, a situation involving  
45 military forces arrayed in opposition to one another.

46  
47 A further observation regarding Russia's Memorandum is warranted before I speak  
48 to the second legal basis for rejecting Russia's invocation of the military activities  
49 exception. Russia notes at paragraph 33(b) of its Memorandum that it denies that the

---

<sup>10</sup> Annex F (Tarasov Declaration), para. 5.



1 seizure and detention of which Ukraine complains arose in a situation of armed  
2 conflict. It states that the detention of Ukraine’s warships and military personnel is a  
3 matter for its civilian courts. Russia also points to statements of Ukraine that have  
4 described Russia’s conduct as an act of aggression and has referred to the  
5 Ukrainian servicemen in detention as prisoners of war, and Russia has emphatically  
6 rejected both characterizations.

7  
8 The focus of the Tribunal should be on Russia’s characterization of its own conduct  
9 when determining if this dispute concerns military activities. Russia is the Party  
10 which seeks to invoke this exception to the Annex VII tribunal’s jurisdiction, and  
11 Russia is the Party whose actions are the subject of this dispute.

12  
13 Certainly, there has been heated political rhetoric on both sides, but Russia’s  
14 consistent position that the seizure of Ukraine’s warships was an exercise of  
15 domestic law enforcement jurisdiction should be conclusive in this particular case.  
16 After all, the legal grounds for Ukraine’s claim is its vessels’ complete immunity from  
17 the exercise of Russia’s jurisdiction, and Russia, by its own account, exercised law  
18 enforcement jurisdiction over those military vessels and their crew.

19  
20 The *South China Sea* Annex VII tribunal properly recognized that a State may not  
21 invoke the military activities exception for activities that a State itself has insisted are  
22 not military in nature. Consistent with that approach, Ukraine asks this Tribunal to  
23 hold Russia to its repeated and consistent statements that the seizure and detention  
24 of Ukraine’s warships was a law enforcement exercise. The military activities  
25 exception under article 298(1)(b) is, accordingly, not applicable to this dispute.

26  
27 While it is sufficient for this Tribunal to rely on Russia’s own statements to conclude  
28 that the military activities exception does not apply to this dispute, there is a second  
29 reason why Russia cannot invoke the military activities exception. Simply put,  
30 Ukraine’s claims do not concern military activities, and so the exception is not  
31 applicable in the present circumstances.

32  
33 Returning to the text of article 298(1)(b), the military activities exception applies to  
34 “disputes concerning military activities, including military activities by government  
35 vessels and aircraft engaged in non-commercial service”. According to the Oxford  
36 English Dictionary, the ordinary meaning of the verb “to concern” is “to be about”.<sup>11</sup>  
37 Thus the exception applies to disputes that are about military activity. In other words,  
38 the exception is properly invoked only where the specific conduct that is alleged to  
39 constitute a violation of the Convention itself qualifies as a “military activity”.

40  
41 The narrow meaning of “concerning” in article 298 is confirmed by the context. The  
42 Convention uses broader terms in other exceptions from mandatory dispute  
43 resolution, such as “arising from”, “arising out of” and “arising from or in connection  
44 with”. A dispute may “arise from” or be “in connection with” certain events that are  
45 causally related to the violation, even though those events do not constitute the  
46 violation itself. Yet the drafters chose not to use those broader terms in article  
47 298(1)(b).

---

<sup>11</sup> See, e.g., Oxford English Dictionary, *concern* (v) (“... [T]o be about”); *ibid.*, *concerning* (prep) (“In reference or relation to; regarding, about”).

1  
2 Taking account of this context, the use of the term “concerning military activities”  
3 must be viewed as a deliberate choice, reflecting an intent to draw narrowly the  
4 scope of the exception under article 298(1)(b).  
5

6 What, then, is a dispute “concerning” military activities? It is a dispute that is about  
7 military activities. In other words, it is a dispute where the activity claimed to violate  
8 the Convention is itself a military activity. To determine, then, whether Russia can  
9 invoke the military activities exception to prevent this Tribunal from finding that the  
10 Annex VII tribunal would have *prima facie* jurisdiction over Ukraine’s claims, the  
11 Tribunal should examine whether Ukraine’s claims are about military activity – and  
12 they are not.  
13

14 In the first instance, a dispute does not “concern military activities” simply because it  
15 involves warships or because warships were present. Rather, the subject of the  
16 dispute – i.e. the acts of which Ukraine complains – must be military acts. Article  
17 298(1)(b)’s express reference to military activities by non-military governmental  
18 vessels confirms that it is not the type of vessel, but rather the type of activity the  
19 vessel is engaged in, that matters.  
20

21 If article 298(1)(b) was meant to exclude all activities of warships from dispute  
22 settlement, then its language would be different. Rather than focusing on disputes  
23 “concerning military activities”, the article could have explicitly permitted Parties to  
24 exclude from jurisdiction all disputes concerning “activities by warships”, or all  
25 disputes concerning “activities by ships subject to articles 29 to 32 and 95 of the  
26 Convention”. Yet warships are not the focus of this voluntary exception to jurisdiction  
27 for military activities.  
28

29 Further, given that many countries use their navies and coast guards for law  
30 enforcement at sea, the military activities exception could not possibly apply to all  
31 disputes involving military vessels. The simple fact, then, that the Russian  
32 coastguard seized the *Berdyansk*, *Nikopol* and *Yani Kapu* does not support the  
33 invocation of the military activities exception.  
34

35 The Russian Federation also says a Russian military helicopter and a Russian naval  
36 vessel were in the vicinity during the Russian Coast Guard’s boarding and arrest of  
37 the Ukrainian naval vessels. Specifically, the FSB report mentions that a naval  
38 helicopter stopped the *Nikopol* and that a corvette of the Black Sea Fleet  
39 “approached the site where the Ukrainian naval boat was stopped in order to monitor  
40 its actions.”<sup>12</sup> This discrete naval support for the Coast Guard’s enforcement action  
41 at sea is not unusual, and does not transform a law enforcement effort into a military  
42 one. The Russian navy did not seek to board the Ukrainian vessels or otherwise  
43 engage with them or interfere with the Coast Guard’s activities. The Russian navy’s  
44 limited role in support of the Russian Coast Guard as the incident was unfolding only  
45 bolsters the conclusion that the seizure and detention of Ukraine’s warships was a  
46 law enforcement matter, not a military one.<sup>13</sup>  
47

---

<sup>12</sup> Annex A, Appendix C (FSB Report), p. 4.

<sup>13</sup> *Ibid.*, p. 6.

1 Interpreting article 298(1)(b) as applying solely to disputes where the activity alleged  
2 to violate the Convention is itself a military activity is also consistent with the object  
3 and purpose of the Convention. As set forth in its preamble, the Convention was  
4 designed to establish a legal order capable of “settling] ... *all issues* relating to the  
5 law of the sea”.<sup>14</sup> An expansive reading of the military activities exception as  
6 excluding from jurisdiction any dispute that involves military vessels would create a  
7 wide gap in the judicial enforcement of the Convention. Given the regular role of  
8 navies in law enforcement, a carve-out for any dispute involving military vessels  
9 could cover the majority of law enforcement activity at sea that is otherwise subject  
10 to the Convention.

11  
12 Accordingly, whether this dispute concerns military activities depends not on the  
13 particular ships that were present, but rather on the type of Russian activity alleged  
14 to violate the Convention. That is the test that was adopted by the *South China Sea*  
15 *Arbitration* tribunal, where the tribunal observed that “the relevant question” is  
16 “whether the dispute itself concerns military activities, rather than whether a Party  
17 has employed its military in some manner in relation to the dispute.”<sup>15</sup>

18  
19 As previously mentioned, as Russia itself points out at paragraph 30 of its  
20 Memorandum, the *South China Sea* tribunal found the military activities exception to  
21 apply in a circumstance “involving the military forces of one side and a combination  
22 of military and paramilitary forces on the other, arrayed in opposition to one  
23 another.”<sup>16</sup> Russia’s assertion that this was the situation at the time of its seizure of  
24 Ukraine’s vessels is demonstrably false.

25  
26 What was happening when these Ukrainian warships were seized? The *Berdyansk*,  
27 *Nikopol* and *Yani Kapu* were not engaged with the Russian military; they were not  
28 arrayed in opposition to one another. Instead, the Ukrainian vessels could not have  
29 been considered a threat. To the contrary, as I have mentioned, it is undisputed that  
30 the Ukrainian warships were trying to leave the area, and they were being chased by  
31 the Russian Coast Guard. The sole justification offered for this chase was to effect  
32 an arrest for the violation of Russia’s domestic laws.

33  
34 While the Russian Coast Guard reportedly escalated its use of force as it attempted  
35 to exercise jurisdiction over Ukraine’s naval vessels, the use of force alone does not  
36 convert a law enforcement activity into a military one.

37  
38 As this Tribunal observed in *M/V “SAIGA” (No. 2)*, orders to stop, warning shots, and  
39 the use of force are all used in law enforcement at sea, generally in an escalating  
40 fashion.<sup>17</sup> According to Russia, the Russian Coast Guard sent signals to the  
41 Ukrainian navy vessels to stop as they sailed away from the Crimean coast and  
42 toward Odesa. Given their immunity, it is not surprising that the Ukrainian naval  
43 vessels ignored those signals. Russia states that warning shots were then fired by  
44 the Russian Coast Guard because the Ukrainian warships refused orders to stop but

---

<sup>14</sup> UNCLOS, Preamble, 25 (emphasis added).

<sup>15</sup> *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award of 12 July 2016, para. 1158.

<sup>16</sup> Memorandum of the Russian Federation, para. 30.

<sup>17</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, p. 10, para. 156.

1 instead continued on their way.<sup>18</sup> Again, according to Russia’s account, eventually  
2 there was a resort to force, whereby shots were fired at the *Berdyansk* to prevent the  
3 *Berdyansk* from leaving the area. Such escalation is not a quintessential military  
4 activity; it is a quintessential law enforcement one. The Russian Coast Guard was  
5 escalating their engagement in an effort to assert their law enforcement jurisdiction  
6 over the warships. This is consistent with the pattern of escalation that this Tribunal  
7 has recognized is traditionally followed in law enforcement operations at sea.

8  
9 Further, as I also have mentioned, after the Ukrainian naval vessels were detained,  
10 Russian authorities charged the servicemen on board the vessels under  
11 article 322(3) of Russia’s criminal code for allegedly unlawfully crossing the State  
12 border of the Russian Federation.<sup>19</sup> Since then, Russian authorities have undertaken  
13 a civilian criminal investigation led by the Investigations Department of the Russian  
14 Federal Security Service<sup>20</sup> and the servicemen have been subject to proceedings  
15 under Russia’s civilian criminal procedures.<sup>21</sup>

16  
17 In short, it is law enforcement activities, not military activities, that this dispute  
18 concerns. Ukraine’s claims are about Russia’s decision to seize and detain three  
19 Ukrainian naval vessels as those vessels were traveling in the Black Sea back to  
20 Odesa. The question of whether it was lawful for Russia to exercise jurisdiction over  
21 the *Berdyansk*, *Nikopol* and *Yani Kapu* is the question Ukraine puts to the Annex VII  
22 tribunal in this case, and that question does not “concern” military activities.

23  
24 In conclusion, the military activities exception of article 298 does not apply in this  
25 case. Russia’s own conduct shows that it believes it was engaged in law  
26 enforcement, not military activity. Even setting aside Russia’s own characterization  
27 of its actions, the conduct that this dispute concerns – that is, Russia’s exercise of  
28 jurisdiction over Ukraine’s naval vessels – is not military in nature. The Annex VII  
29 tribunal which is to be constituted in this case would therefore have jurisdiction,  
30 *prima facie*, to hear Ukraine’s claims.

31  
32 Mr President, Members of the Tribunal, this concludes Ukraine’s case on *prima facie*  
33 jurisdiction. I ask that you now invite Mr Thouvenin to the podium to address the  
34 need for, and appropriateness of, the provisional measures requested by Ukraine.

35  
36 **THE PRESIDENT:** Thank you, Ms Cheek. I now give the floor to Mr Jean-Marc  
37 Thouvenin.

38  
39 **MR THOUVENIN** (*Interpretation from French*): Thank you very much, Mr President.

40  
41 Mr President, Members of the Tribunal, it is a great honour to appear before you in  
42 this case.

43  

---

<sup>18</sup> Annex A, Appendix C (FSB Report), p. 3-4.

<sup>19</sup> Annex A, Appendix D (Note Verbale No. 14951/2 from the Russian Federation to Ukraine, dated 5 December 2018); see also Annex C, Appendix 1 (Indictments against the 24 Detained Ukrainian Servicemen).

<sup>20</sup> Annex C (Polozov Declaration), para. 5.

<sup>21</sup> *Ibid.*, para. 10.

1 As Professor Soons has already pointed out, paragraph 5 of article 290 of the  
2 Convention provides that pending the constitution of an arbitral tribunal, the Tribunal  
3 may prescribe provisional measures if it considers that *prima facie* the tribunal which  
4 is to be constituted would have jurisdiction and that the urgency of the situation so  
5 requires.<sup>1</sup> This paragraph 5 should be read in the light of paragraph 1 of article 290,  
6 under which “the Tribunal may prescribe any provisional measures which it  
7 considers appropriate under the circumstances to preserve the respective rights of  
8 the parties to the dispute”.<sup>2</sup>

9  
10 My task today is to demonstrate that in the highly extraordinary circumstances of this  
11 case the provisional measures requested by Ukraine are both necessary and  
12 perfectly appropriate. To this end, I will discuss three key aspects, namely:

- 13  
14 - first, the risk of irreparable prejudice to Ukraine, which Russia does not contest;  
15  
16 - second, urgency, which is clear here, despite Russia’s objections;  
17  
18 - and, third, the need for the measures requested by Ukraine, which are the only  
19 means to preserve its rights.

20  
21 Mr President, Members of the Tribunal, the determination by “the court asked to  
22 grant interim relief”<sup>3</sup> of the existence of a risk of “irreparable harm” to the rights in  
23 dispute is rooted in the longstanding case law of The Hague Courts. The legal  
24 doctrine in this respect is being constantly refined and indeed the International Court  
25 of Justice very recently clarified the standard by extending it to the risk that “alleged  
26 disregard of such rights may entail irreparable consequences”.<sup>4</sup> This illustrates the  
27 pragmatism required of the court asked to grant interim relief, which assesses the  
28 need for provisional measures *in concreto*. Moreover, no definition of what is to be  
29 understood by “irreparable harm” to alleged rights has ever been formulated.<sup>5</sup> This is  
30 not only because this concept is purely casuistic, stubbornly resisting any  
31 systematization, but also because it would be unwise to look at it solely in abstract  
32 terms as, in practice, the assessment depends on the nature of the rights at issue  
33 and the violation to which they are subject.<sup>6</sup>

---

<sup>1</sup> “*Enrica Lexie*” Incident (*Italy v. India*), *Provisional Measures, Order of 24 August 2015*, ITLOS Reports 2015, p. 182, para. 33.

<sup>2</sup> Ibid., paras 74-75; see also “*Arctic Sunrise*” (*Kingdom of the Netherlands v. Russian Federation*), *Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, p. 230, para. 80.

<sup>3</sup> The expression used by Judge Ronny Abraham in his Separate Opinion in the Case concerning Pulp Mills on the River Uruguay; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures, Order of 13 July 2006*, I.C.J. Reports 2006, p. 113, para. 5.

<sup>4</sup> *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, *Provisional Measures, Order of 3 October 2018*, para. 77 (“the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings ... or when the alleged disregard of such rights may entail irreparable consequences”).

<sup>5</sup> J. Sztucki, *Interim Measures in The Hague Court: An Attempt at a Scrutiny*, Deventer, Kluwer, 1983, p. 106; R. Kolb, *The International Court of Justice*, Oxford, Hart, 2013, p. 629.

<sup>6</sup> See for example *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Provisional Measures, Order of 19 April 2017*, I.C.J. Reports 2017, p. 104, para. 96; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, *Provisional Measures, Order of 23 July*

1  
2 As far as these rights at issue and their nature are concerned, Professor Soons has  
3 already shown that what is in dispute in this case is Ukraine's immunity. The right of  
4 States to respect for their immunity is one of the most important rights enshrined in  
5 international law. In the *Jurisdictional Immunities of the State* case, the International  
6 Court of Justice stated:

7  
8 the rule of State immunity ... derives from the principle of sovereign equality  
9 of States, which, as Article 2, paragraph 1, of the Charter of the United  
10 Nations makes clear, *is one of the fundamental principles of the*  
11 *international legal order.*<sup>7</sup>  
12

13 In terms of the law of the sea, this right to immunity is expressed primarily in relation  
14 to warships and government vessels and their crews because, as this Tribunal has  
15 stated in clear words which have already been recalled this morning, but which I will  
16 say in French, as they are also clear in French: "a warship is an expression of the  
17 sovereignty of the State whose flag it flies".<sup>8</sup>  
18

19 With regard to the violations to which the rights at issue are subject, as you know, the  
20 three Ukrainian vessels -- two warships and a tugboat operating for the national  
21 navy -- have been forcibly detained by Russia in a port and have been subject to  
22 various forms of interference, whilst their crews have been imprisoned in Moscow  
23 and prosecuted like common criminals.  
24

25 Mr President, one could not find a more blatant case of a situation characterized by a  
26 risk of irreparable harm to a right in dispute. This Tribunal has furthermore already  
27 been convinced that this was the case in the "*ARA Libertad*" Case. In that case the  
28 Tribunal clearly found:

- 29  
30 - firstly, that the detention of a warship "prevents [it] by force from discharging its  
31 mission and duties"<sup>9</sup> and impinges upon the immunity enjoyed by the vessel;  
32  
33 - secondly, that the third State's attempts to board a warship and to move it by force  
34 to another berth without authorization by its Commander and the possibility that such  
35 actions may be repeated demonstrate the gravity of the situation;<sup>10</sup> and  
36  
37 - finally, that such a situation is a source of conflict that may endanger friendly  
38 relations among States.<sup>11</sup>  
39

40 The similarities between the case from which I have just recalled certain key findings  
41 and the one which has been brought before you today are clearly striking but, by  
42 comparison, the situation at issue is far more serious.

---

2018, para. 67; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 7, paras 38-40.

<sup>7</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, para. 57; italics added.

<sup>8</sup> "*ARA Libertad*" (*Argentina v. Ghana*), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332, para. 94.

<sup>9</sup> *Ibid.*, para. 97; see also para. 98.

<sup>10</sup> *Ibid.*, para. 99.

<sup>11</sup> *Ibid.*, para. 97.

1  
2 Whereas the “*ARA Libertad*” is a training vessel,<sup>12</sup> the Ukrainian vessels detained by  
3 Russia are in operational service. Their detention reduces the resources which  
4 Ukraine apportions to national defence missions, which weakens its implementation  
5 and could lead to irreparable harm.  
6

7 Whereas the Argentinian officers in command of the “*ARA Libertad*” were able to  
8 remain at their posts on the vessel which had been forcibly detained in a Ghanaian  
9 port,<sup>13</sup> in this case the crews were forcibly removed from their units and have been  
10 incarcerated for almost six long months in a Russian prison.<sup>14</sup>  
11

12 Whereas the Tribunal was concerned that the Ghanaian authorities had *attempted* to  
13 board the “*ARA Libertad*” and to move it by force,<sup>15</sup> the Russian authorities have  
14 *already* boarded and intend to continue to do so without authorization in order to  
15 carry out any inspections they wish, in particular of highly sensitive equipment,  
16 including instruments, arms on board, and equipment intended to provide secure  
17 communications between the vessel and its command.<sup>16</sup> The Russian interferences  
18 to gain access to this sensitive equipment, which is crucial to Ukraine’s defence, are  
19 evidently such as to cause Ukraine serious harm. The Tribunal will note, furthermore,  
20 that Russia does not in any way conceal such interferences as it mentions them in its  
21 Memorandum of 7 May.<sup>17</sup>  
22

23 Allow me to draw a parallel with another case which the Tribunal also heard, the  
24 *M/V “SAIGA” (No. 2) Case*. In that case the Tribunal held that, even though the  
25 vessel boarded by Guinea and the crew that had been detained had been released:  
26

27 the rights of the Applicant would not be fully preserved if, pending the final  
28 decision, the vessel, its Master and the other members of the crew, its  
29 owners or operators were to be subjected to any judicial or administrative  
30 measures in connection with the incidents leading to the arrest and  
31 detention of the vessel and to the subsequent prosecution and conviction  
32 of the Master.<sup>18</sup>  
33

34 On this basis the Tribunal ruled unanimously that:  
35

36 Guinea shall refrain from taking or enforcing any judicial or administrative  
37 measure against the *M/V Saiga*, its Master and the other members of the  
38 crew, its owners or operators, in connection with the incidents leading to  
39 the arrest and detention of the vessel.<sup>19</sup>  
40

---

<sup>12</sup> *Ibid.*, para. 40.

<sup>13</sup> “*ARA Libertad*” (*Argentina v. Ghana*), Request for the prescription of provisional measures submitted by Argentina, para. 16.

<sup>14</sup> Annex C (Polozov Declaration), paras 2-3.

<sup>15</sup> “*ARA Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, para. 99.

<sup>16</sup> Annex C (Polozov Declaration), para. 11.

<sup>17</sup> Memorandum of the Russian Federation (7 May 2019), para. 20.

<sup>18</sup> *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Provisional Measures, Order of 11 March 1998, ITLOS Reports 1998*, p. 24, para. 41.

<sup>19</sup> *Ibid.*, Operative provisions, para. 1.

1 The situation here is even worse. The rights claimed by Ukraine are at serious risk  
2 because not only are the crews of the vessels, including their captains, the subject of  
3 judicial measures despite their immunity but, furthermore, neither the vessels nor  
4 their crews have been released. Quite to the contrary, they have been subject to  
5 coercive measures, regularly interrogated and required to fulfil various obligations.<sup>20</sup>  
6 In other words, the reasons that led the Tribunal to order provisional measures in the  
7 *M/V “SAIGA” (No. 2) Case* are even more compelling here.

8  
9 Russia does not contest the reality of the risk of irreparable harm to the rights in  
10 dispute. The Memorandum which it produced on 7 May asserts the absence of  
11 urgency,<sup>21</sup> and I shall come back to that in a moment, but does not put forward *any*  
12 arguments on irreparable harm, even though Ukraine expounded on this point in its  
13 Request for the prescription of provisional measures,<sup>22</sup> to which the Memorandum is  
14 a response. The Tribunal will therefore be able to hold that there is no disagreement,  
15 or at least no known disagreement, between the Parties on the existence of a risk of  
16 irreparable harm in this case.

17  
18 This brings me to urgency.

19  
20 In its Memorandum of 7 May, Russia argued that urgency is not established because  
21 several months have passed since the Ukrainian vessels were detained,<sup>23</sup> and on the  
22 ground that urgency is to be assessed with reference to the period during which the  
23 Annex VII arbitral tribunal is not yet constituted.<sup>24</sup> Russia added that the proceedings  
24 brought before the European Court of Human Rights would have consequences on  
25 these proceedings and in particular would eliminate any notion of urgency.<sup>25</sup>

26  
27 I will make four points to justify urgency and also to respond to the Russian  
28 objections which I have just summarized.

29  
30 Firstly, since 25 November, Ukraine has acted with due diligence in the  
31 circumstances of the present case;

32  
33 Secondly, the case law of the Tribunal relied on by Russia in no way supports its  
34 case;

35  
36 Thirdly, the *present* situation is characterized by urgency requiring provisional  
37 measures to be ordered;

38  
39 And, fourthly, the request for provisional measures made before the European Court  
40 of Human Rights does not affect the urgency which Ukraine asserts before this  
41 Tribunal.

42  
43 First, Mr President, Ukraine’s conduct before the matter was brought before the  
44 Tribunal in no way contradicts its assertion relating to urgency. Quite the contrary.

---

<sup>20</sup> Annex C (Polozov Declaration), paras 5-7.

<sup>21</sup> Memorandum of the Russian Federation, paras 38-40.

<sup>22</sup> Request of Ukraine for the Prescription of Provisional Measures (16 April 2019), paras 33-42.

<sup>23</sup> Memorandum of the Russian Federation, para. 39.

<sup>24</sup> *Ibid.*, para. 38.

<sup>25</sup> *Ibid.*, para. 40.



1 Since 25 November, Ukraine has constantly acted with due diligence to secure the  
2 release of its vessels and their crews.

3  
4 It did so, as was recalled this morning, through diplomatic channels;<sup>26</sup> to no avail.

5  
6 It also relied on diplomatic pressure from a number of States which, like it, called  
7 upon Russia to adopt an attitude that respected its rights; to no avail.

8  
9 It hoped that Russia would take stock of the situation and that its servicemen would  
10 be released; to no avail. On 17 April it was once again decided to extend their  
11 pre-trial detention for several more months.<sup>27</sup>

12  
13 Ukraine has also had recourse to all available legal remedies, including taking the  
14 matter to the European Court of Human Rights, in order to ensure that, at the  
15 minimum, the treatment given to its servicemen should be consistent as far as  
16 possible with the standards laid down by the European Convention on Human  
17 Rights.

18  
19 It is true that Ukraine initially sought to settle this matter through diplomatic and  
20 non-judicial channels. How could there be any objection when the judicial settlement  
21 of international disputes is “simply an alternative to the direct and friendly settlement  
22 of such disputes between the parties”, in the well-known words of the Permanent  
23 Court of International Justice in the *Free Zones of Upper Savoy and the District of*  
24 *Gex* case?<sup>28</sup> Exhausting diplomatic means in order to attempt to resolve a situation  
25 does not take anything away from the urgency of that situation. Bringing the matter to  
26 court is a last resort undertaken precisely when urgency becomes critical. That is the  
27 case here – but I will return to this – where after almost six months of continuous  
28 violations of Ukraine’s rights, the situation calls for provisional measures even more  
29 urgently than on the first day.

30  
31 Mr President, Russia also seeks to deny urgency by referring to paragraph 68 of the  
32 Order delivered in the *Straits of Johor* case. Here is the relevant extract on your  
33 screens, placed in its context. I will read it:

34  
35         Considering that, under article 290, paragraph 5, of the Convention, the  
36         Tribunal is competent to prescribe provisional measures prior to the  
37         constitution of the Annex VII arbitral tribunal ...

38  
39         Considering that the said period is not necessarily determinative for the  
40         assessment of the urgency of the situation or the period during which the  
41         prescribed measures are applicable and that ...

42  
43 We come to the interesting passage  
44

---

<sup>26</sup> Annex A, Appendix E (Notes Verbales from Ukraine to the Russian Federation).

<sup>27</sup> Memorandum of the Russian Federation, para. 22.

<sup>28</sup> *Free Zones of Upper Savoy and the District of Gex*, PCIJ, Order of 19 August 1929, p. 13.

1            *the urgency of the situation must be assessed taking into account the*  
2            *period during which the Annex VII arbitral tribunal is not yet in a position to*  
3            *“modify, revoke or affirm those provisional measures”.*<sup>29</sup>  
4

5 This means that, under article 290, paragraph 5, of the Convention, the urgency  
6 justifying measures taken by this Tribunal until the Annex VII tribunal can do so itself  
7 cannot be determined on the basis of the date of “constitution” of that tribunal, but  
8 having regard to the date on which the tribunal will actually be able itself to deal with  
9 the matter that has been brought before this Tribunal. This does not mean that  
10 urgency must be assessed on the basis of the conduct of the applicant before the  
11 matter is referred to an Annex VII tribunal, contrary to what Russia intimates.  
12

13 Mr President, Members of the Tribunal, Russia’s objections that I have just outlined  
14 are all the more unfounded in that the question raised before you is not what Ukraine  
15 did before bringing the matter to you, but whether the present situation calls for  
16 urgent measures; in other words, if “*the urgency of the situation so requires*”.<sup>30</sup> The  
17 assessment of urgency therefore depends on the present circumstances. In that  
18 respect, urgency is beyond doubt when the irreparable harm or the irreparable  
19 consequences that I have just referred to are precisely present; that is to say, if they  
20 are already under way and not just imminent. The case law of the International Court  
21 of Justice confirms this as it posits – I will cite this case law which is being displayed  
22 for your convenience – “the condition of urgency is met when the acts susceptible of  
23 causing irreparable prejudice can ‘occur at any moment’”.<sup>31</sup> *A fortiori*, the condition  
24 must also be met when the irreparable harm is already under way.  
25

26 In this case, the immunity from jurisdiction and enforcement of the Ukrainian vessels  
27 and their crews is not just *threatened*, it is more seriously violated by Russia with  
28 every passing day.  
29

30 This situation is comparable to that which existed in the “*ARA Libertad*” Case in  
31 which this Tribunal established urgency on account of the continuous violation of the  
32 immunity of the Argentinian training vessel and the judicial proceedings in progress  
33 against it.<sup>32</sup> Similarly, in the “*Enrica Lexie*” Incident Case, Italy had compellingly  
34 advanced a similar argument asserting – and I will reproduce it again for your  
35 convenience – “the status quo ... is one where ... Italy’s rights are suffering  
36 irreparable damage on a daily basis”.<sup>33</sup> We are precisely in the same situation of  
37 urgency today because the immunity of the Ukrainian State conferred upon it by the  
38 United Nations Convention on the Law of the Sea is more seriously violated with  
39 every passing day.  
40

41 But, Members of the Tribunal, the manifest urgency in this case becomes even more  
42 apparent when we consider the situation of the crews over which Russia is illegally

---

<sup>29</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, paras 67-68; italics added.

<sup>30</sup> *Enrica Lexie*, *op. cit.*, para. 86; italics added.

<sup>31</sup> *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018*, para. 78, citing *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016*, p. 1148, para. 90.

<sup>32</sup> *ARA Libertad*, *op. cit.*, paras 97-100.

<sup>33</sup> *Enrica Lexie*, *op. cit.*, para. 99.

1 exercising its jurisdiction. This Tribunal appreciates considerations of humanity and  
2 the manifestly illegal detention of these men that has been described to you this  
3 morning will undoubtedly have been sufficient for you to form a conviction.<sup>34</sup>  
4

5 It is in fact the same conviction that led the Tribunal to rule in the “*Arctic Sunrise*”  
6 *Case*<sup>35</sup> that urgency was established in particular “as for the continuing detention of  
7 the crew, every day spent in detention is irreversible”.<sup>36</sup>  
8

9 Allow me to stress this word “irreversible”. It rings here as a terrible acknowledgment  
10 that every day, every hour, every minute of freedom stolen from these servicemen is  
11 lost forever, not just for them, but for their families, in particular for their spouses,  
12 their children and their parents. I would add that no two days are equal. To be  
13 illegally deprived of liberty is hardship enough, and unjust. To be deprived of liberty  
14 persistently, what is more, without any prospect of release owing to the obstinacy of  
15 your jailor, is simply unbearable, as is any prolonged arbitrary detention.  
16

17 In the present case the crews have been in custody for almost six long months. All  
18 their requests for release have been denied, including on 17 April, a date on which  
19 their detention was once again extended by several months. No prospect of release  
20 has been suggested to them by the conduct of their jailor, Russia, which treats them  
21 like a gang of criminals, and does not take the slightest notice of the requests for  
22 release that have been made by Ukraine, repeatedly from the very first day, or the  
23 many pressing requests that come from all over the world. More than ever, and  
24 increasingly with every passing day, there is an urgent need for provisional  
25 measures, all the more so because the date of their appearance at the criminal trial  
26 that awaits them is approaching.  
27

28 Mr President, Members of the Tribunal, Russia seems to suggest in its Memorandum  
29 of 7 May that the proceedings brought before the European Court of Human Rights  
30 create a situation of *lis pendens* as it states that the proceedings are between the  
31 same parties and concern the same subject matter as those before this Tribunal.<sup>37</sup> It  
32 would also seem that Russia contends that, once provisional measures have been  
33 ordered by the European Court of Human Rights, the situation before this Tribunal  
34 loses its urgency.  
35

36 These objections are unfounded.  
37

38 Firstly, the concept of *lis pendens* is unknown in public international law and has no  
39 place in the Statute of this Tribunal or in the Convention.  
40

41 Second, even if *lis pendens* could be invoked, *quod non*, its conditions would not be  
42 met in the present case. The Permanent Court of International Justice precisely  
43 described “the essential elements which constitute litispendance” in the *Case*  
44 *concerning certain German interests in Polish Upper Silesia*.<sup>38</sup> Two out of three are

---

<sup>34</sup> Ibid., para. 133 (citing *M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, *Judgment, ITLOS Reports 1999*, p. 10, para. 155).

<sup>35</sup> *Arctic Sunrise*, *op. cit.*, para. 89.

<sup>36</sup> Ibid., para. 87.

<sup>37</sup> Memorandum of the Russian Federation, para. 40.

<sup>38</sup> *Certain German Interests in Polish Upper Silesia*, PCIJ, Judgment of 25 August 1925, p. 20.

1 completely absent here, namely (i) “two identical actions”, (ii) brought before “courts  
2 of the same character”.<sup>39</sup> The actions are not identical and have been brought before  
3 courts that are totally independent of one another.  
4

5 Third, the measures ordered by the European Court of Human Rights concern only  
6 the *conditions of detention* of the Ukrainian servicemen and have no bearing  
7 whatsoever on the *situation in relation to the extended hardship of the sailors’*  
8 *detention*, which is solely at issue here in characterizing the urgency claimed.  
9

10 Lastly, as regards the situation of urgency relating to the Ukrainian warships  
11 detained by Russia, whose condition and seaworthiness is deteriorating with every  
12 day that passes, so as not to encumber you unnecessarily I would respectfully  
13 suggest that the Tribunal refers to paragraph 42 of the Request for the prescription  
14 of provisional measures of 16 April 2019, on which Russia has not commented at all  
15 and which therefore requires no further argument from me.  
16

17 Mr President, I now come to the final aspect to be addressed by me, namely the  
18 appropriateness of the provisional measures requested. The truth is that Ukraine is  
19 seeking the only measures that could protect the rights in dispute; that is, the  
20 absolute immunity of its vessels and of the crews serving them. It requests that the  
21 Russian Federation be immediately required to  
22

23 release the Ukrainian naval vessels, the *Berdyansk*, the *Nikopol* and the  
24 *Yani Kapu*, and return them to the custody of Ukraine;  
25

26 suspend criminal proceedings against the twenty-four detained Ukrainian  
27 servicemen and refrain from initiating new proceedings; and  
28

29 release the twenty-four detained Ukrainian servicemen and allow them to  
30 return to Ukraine.  
31

32 These are the submissions that are being made to you by Ukraine.  
33

34 The Tribunal will recall that these measures are identical to those ordered in the  
35 “*ARA Libertad*” Case, which is the case that is most readily comparable to the  
36 present situation. In the “*Arctic Sunrise*” Case, which is also comparable, since a  
37 vessel and its crew had been captured and were being prosecuted, but in which,  
38 unlike this case, the immunity of warships was not at issue, the Tribunal took the  
39 same measures, but required the applicant to post a bond. In this case, where the  
40 immunity of warships is at issue, the idea of a bond is, as in the “*ARA Libertad*” Case,  
41 irrelevant and rightly inconceivable. In addition, it has not been suggested by Russia.  
42

43 In its Memorandum of 7 May, Russia nonetheless raises two objections, the first  
44 postulating that the provisional measures requested would prejudice the merits; the  
45 second complaining that they would prevent Russia from exercising its criminal  
46 jurisdiction if the provisional measures were executed. I am going to refute these two  
47 objections in turn.  
48

---

<sup>39</sup> Ibid.

1 First of all, Russia objects that ordering the provisional measures requested by  
2 Ukraine would be tantamount to ruling on the merits. To convince its audience of this  
3 it compares the request on the merits with the Request for provisional measures,<sup>40</sup>  
4 and states that both contain requests for the release of the vessels and their crews.  
5

6 This objection is erroneous both in fact and in law.  
7

8 In the first instance, urgent requests are not the same as requests on the merits.  
9

10 On the merits, Ukraine is requesting the Tribunal to find that Russia's conduct  
11 violates the Convention and, as a consequence, to rule that Russia must put an end  
12 to this violation, which requires inter alia the release of the vessels and their crews,  
13 and that appropriate reparations be awarded to it. These are the submissions on the  
14 merits, and it would clearly be abstruse for Ukraine not to make such submissions in  
15 its request on the merits.  
16

17 Before this Tribunal, Ukraine is not asking that Russia's responsibility for an  
18 internationally wrongful act be established. It is not asking that consequences be  
19 drawn from that responsibility. In order to preserve its rights it is seeking an order for  
20 provisional measures consisting in the release of its vessels and their crews. Such  
21 measures would not under any circumstances be equivalent to a decision on the  
22 merits because they would patently not be based on establishing the responsibility of  
23 Russia. They would be justified, like any urgent measure, by the need, in the  
24 circumstances of the present case, to protect the rights in dispute until the case is  
25 referred to the Annex VII tribunal.  
26

27 In the second instance, this Tribunal did not think for one second in 2012 that the  
28 release, by way of provisional measures, of the "ARA Libertad" and its crew would  
29 amount to a ruling on the merits, even though, on the merits, Argentina requested,  
30 like Ukraine in the present case, a ruling that its vessel and its crew be released.<sup>41</sup>  
31 The Tribunal, on the contrary, found that its Order in the "ARA Libertad" Case "in no  
32 way prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal  
33 with the merits of the case, or any questions relating to the merits themselves".<sup>42</sup> The  
34 same conclusion must be drawn here.  
35

36 In the third instance, there is no international court or tribunal that has accepted  
37 Russia's reasoning. Three examples taken from the jurisprudence of the International  
38 Court of Justice will suffice to illustrate this.  
39

40 In *Georgia v. Russia* one of the claims on the merits made by Georgia was that the  
41 Court should order Russia to refrain from taking discriminatory measures and to  
42 protect certain populations against discrimination.<sup>43</sup> The International Court of Justice

---

<sup>40</sup> Memorandum of the Russian Federation, para. 41.

<sup>41</sup> "ARA Libertad" (*Argentina v. Ghana*), Note dated 29 October 2012 from the Argentine Ambassador in Ghana to the Foreign Minister instituting proceedings against Ghana under Annex VII of the UNCLOS, para. 7(1) (Annex A to the Request for the prescription of provisional measures submitted by Argentina).

<sup>42</sup> "ARA Libertad" (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 332, para. 106; see also *Arctic Sunrise*, *op. cit.*, para. 100.

<sup>43</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Application Instituting Proceedings, Georgia, para. 83(d) and (g).

1 very precisely called upon the Parties, as a provisional measure, to refrain from any  
2 act of discrimination and to take protection measures against discrimination.<sup>44</sup> There  
3 was a clear similarity between the claims on the merits and the request for  
4 provisional measures. That did not prevent the Court from taking the requested  
5 provisional measures.

6  
7 India concluded its request on the merits in the recent *Jadhav* case by asking for the  
8 immediate suspension of the sentence of death awarded to Mr Jadhav.<sup>45</sup> The  
9 provisional measure requested by India and prescribed by the Court was precisely to  
10 suspend Mr Jadhav's execution.<sup>46</sup>

11  
12 Lastly, there is an even older example that confirms the longstanding nature of this  
13 approach. In the *United States Diplomatic and Consular Staff in Tehran* case, the  
14 Court ordered, as a provisional measure, the immediate release of United States staff  
15 held captive in the embassy and the restoration of United States authority over the  
16 diplomatic premises,<sup>47</sup> while the application on the merits contained the very same  
17 request.<sup>48</sup>

18  
19 As a consequence, contrary to Russia's claim, the similarity between certain requests  
20 on the merits and requests for provisional measures is not a reason to reject the  
21 provisional measures on the ground that they would prejudice the merits. What is  
22 important to the court asked to grant interim relief is whether those measures are  
23 necessary in the circumstances of the case in order to protect the rights in dispute  
24 *pendente litis*.

25  
26 Mr President, in its second objection, Russia complains that if the vessels and their  
27 crews are released pursuant to a provisional measure safeguarding the rights relied  
28 on by Ukraine, Russia would no longer be able to institute proceedings, in this  
29 instance criminal proceedings, against them.<sup>49</sup> This assertion is mentioned very  
30 briefly in the Memorandum of 7 May and it is strikingly crude, postulating that  
31 international relations are built solely on power relations.

32  
33 In doing this, Russia seems to forget – and this amnesia seems to be very familiar in  
34 its case – that its relations with Ukraine are governed by the rules of international law  
35 which Ukraine, for its part, never intended to infringe.

36  
37 In other words, in the relations between Ukraine and Russia, when one of the two  
38 States intends to prosecute nationals of the other, who are under the jurisdiction of  
39 that other State, the solution offered by international law is not to capture them  
40 unlawfully, in violation of the immunity of warships and in breach of the principle of

---

<sup>44</sup> *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353, para. 149.*

<sup>45</sup> *Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017, p. 231, para. 2(1).*

<sup>46</sup> *Ibid.*, para. 61.

<sup>47</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 7, para. 47.*

<sup>48</sup> *Ibid.*, para. 1(b).

<sup>49</sup> Memorandum of the Russian Federation, para. 42.

1 the exclusive jurisdiction of the flag State. The solution provided by international law  
2 is to rely on the procedures that have been patiently negotiated and consolidated in  
3 treaties. In this case, if, as Ukraine requests, its vessels and seamen are released,  
4 but if subsequently its right to immunity is not recognized on the merits, Russia will be  
5 free to apply all the relevant procedures available to it under international law in order  
6 to assert its claims to bring criminal prosecutions against the Ukrainian seamen.

7  
8 Mr President, Members of the Tribunal, I now come to the conclusion of my  
9 statement, which is that, in the circumstances of this case, the provisional measures  
10 requested by Ukraine are perfectly appropriate to the situation, which is characterized  
11 by a risk of irreparable prejudice to the rights relied on by Ukraine and by urgency in  
12 preserving those rights pending the proceedings on the merits.

13  
14 I would like to thank you cordially for your attention and, Mr President, if I may,  
15 I would suggest that Her Excellency Olena Zerkal be called to conclude Ukraine's  
16 pleadings.

17  
18 **THE PRESIDENT:** Thank you, Mr Thouvenin. Now I give the floor again to the Agent  
19 of Ukraine, Ms Zerkal.

20  
21 **MS ZERKAL:** Mr President, Members of the Tribunal, before I conclude Ukraine's  
22 presentations by making our final submissions, I would like to take this opportunity to  
23 express, on behalf of Ukraine, my gratitude to the Registrar and his staff for arranging  
24 these proceedings.

25  
26 We also extend our thanks to the President and each Member of the Tribunal for your  
27 attention today and for the consideration given to our request.

28  
29 Mr President, Members of the Tribunal, according to article 75, paragraph 2, of the  
30 Rules of the Tribunal, with your permission I will now present the final submissions of  
31 Ukraine.

32  
33 Ukraine respectfully requests that the International Tribunal for the Law of the Sea  
34 order the Russian Federation, by means of provisional measures, to immediately  
35 release the Ukrainian naval vessels, the *Berdyansk*, the *Nikopol* and the *Yani Kapu*,  
36 and return them to the custody of Ukraine; to suspend criminal proceedings against  
37 the twenty-four detained Ukrainian servicemen and refrain from initiating new  
38 proceedings; and to immediately release the twenty-four detained Ukrainian  
39 servicemen and allow them to return to Ukraine.

40  
41 This concludes Ukraine's oral submissions. Once again, thank you, Mr President,  
42 and thank you, Members of the Tribunal.

43  
44 **THE PRESIDENT:** Thank you, Ms Zerkal.

45  
46 The written text of the final submissions signed by the Agent shall be communicated  
47 to the Tribunal and a copy of it shall be transmitted to the other Party.

1 This brings us to the end of the hearing. On behalf of the Tribunal, I would like to take  
2 this opportunity to express our appreciation for the high quality of the presentations at  
3 the hearing.

4  
5  
6

Now the Registrar will address questions in relation to documentation.

7 **THE REGISTRAR** (*Interpretation from French*): Thank you, Mr President. Pursuant  
8 to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the  
9 supervision of the Tribunal, correct the transcripts of speeches and statements made  
10 on their behalf, but in no case may such corrections affect the meaning and scope  
11 thereof. These corrections relate to the checked versions of the transcripts in the  
12 official language used by the Party in question.

13  
14  
15  
16

These corrections should be submitted to the Registry as soon as possible and by  
Thursday 16 May 2019 at 5 p.m. Hamburg time, at the latest.

17 **THE PRESIDENT**: Thank you, Mr Registrar. The Tribunal will now withdraw to  
18 deliberate. The date for the delivery of the Order in this case is tentatively set to  
19 Saturday, 25 May 2019. The Parties will be informed reasonably in advance of any  
20 change to this date.

21  
22  
23  
24

In accordance with the usual practice, I request the Agent to kindly remain at the  
disposal of the Tribunal in order to provide any further assistance and information  
that it may need in its deliberations prior to the delivery of the Order.

25  
26  
27  
28

The hearing is now closed.

*(The sitting closed at 1 p.m.)*