

## Separate Opinion of Judge Jesus

1. I voted for the provisional measures in this case. Nonetheless, since the characterization of military activities, as an exception to the jurisdiction of the arbitral tribunal under article 298, paragraph 1(b), was a central element in the decision of the Tribunal, I felt that I should clarify my position on this point since, in my view, the issue was not dealt with clearly in the text of the Order on provisional measures.
2. My first observation is that the issue of military activities has to be examined not only from the point of view of the actions taken by the Russian Federation surrounding the arrest and detention of the Ukrainian warships, but also from the point of view of the activities undertaken by the Ukrainian warships while exercising their right of passage through territorial waters.
3. The Tribunal seems to have centred its attention solely or mainly on the characterization of whether the actions taken by the Russian Federation were military activities for the purposes of excluding the jurisdiction of the arbitral tribunal in accordance with article 298, paragraph 1(b), of the Convention or, rather, law enforcement activities. The Tribunal concluded that the actions taken by the Russian Federation in the arrest and detention of the Ukrainian warships appear to be of a law enforcement nature. I concur with the conclusions of the Tribunal in this regard and I shall not address this issue here. I will only address the issue of whether the activities of the Ukrainian warships amounted to possible military activities.
4. Equal importance in this case can be attached to the *prima facie* determination of the military activities exception claimed by the Russian Federation and the characterization of the activities of the Ukrainian warships while exercising their right of passage through the territorial sea. I will therefore state my views on whether the Ukrainian warships may have engaged in any activities that can be considered as military in nature under the Convention.

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

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

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

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

It clarified that

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

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

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

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

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

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

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

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

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

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

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

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

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

18. It is true that the Russian Federation argued that

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

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

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

21. What we know is that both Parties presented information which led the Tribunal to the *prima facie* conclusion that the incident surrounding the Ukrainian warships’ passage and the use of force by the Russian Federation

appear to be activities in pursuance of law enforcement. What we do not know, due to lack of information from the Parties, is whether the Ukrainian warships were involved in military activities. Therefore, on both grounds it may be concluded that the Annex VII arbitral tribunal has *prima facie* jurisdiction.

(signed) José Luís Jesus