

## Separate Opinion of Judge Lucky

1. I voted in favour of the Order prescribing that the naval vessels are to be released and returned to Ukraine and that the 24 detained Ukrainian servicemen are to be released and returned to Ukraine.
2. The provisional measures requested by Ukraine are:
  1. Ukraine requests that the Tribunal indicate provisional measures requiring the Russian Federation to promptly:
    - (a) Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;
    - (b) Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
    - (c) Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.

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

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

The Russian Federation is of the view that the arbitral tribunal to be constituted under Annex VII of UNCLOS will not have jurisdiction, including *prima facie*, to rule on Ukraine's claim, in light of the reservations made by both the Russian Federation and Ukraine under Article 298 of UNCLOS stating, inter alia, that they do not accept the compulsory procedures provided for in section 2 of Part xv thereof entailing binding decisions for the consideration of disputes concerning military activities. Furthermore, the Russian Federation expressly stated that the aforementioned procedures are not accepted with respect to disputes concerning

military activities by government vessels and aircraft. For this obvious reason the Russian Federation is of the view that there is no basis for the International Tribunal for the Law of the Sea to rule on the issue of the provisional measures requested by Ukraine.

...

[T]he Russian Federation has the honour to inform the International Tribunal for the Law of the Sea of its decision not to participate in the hearing on the provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.

However, in order to assist the International Tribunal for the Law of the Sea and in conformity with Article 90 (3) of the Rules, the Russian Federation intends to submit in due course more precise written observations regarding its position on the circumstances of the case.

4. In the light of the content in the said note verbale, the Russian Federation contends that the Request is not urgent. In view of the reservations made by both the Russian Federation and Ukraine, stating inter alia that they do not accept the “compulsory procedures provided for in section 2 of Part xv [of the Convention] entailing binding decisions for the consideration of disputes concerning military activities” the Tribunal does not have jurisdiction to determine the request for provisional measures. Consequently, the salient factors concern the effect of non-participation in the hearing and the question whether the dispute concerns “military activities” or law enforcement activities
5. It appears to me that the Order has dealt adequately with the foregoing and I agree with the reasons set out in the Order. However, in this Opinion I will also elaborate and express my views on the non-participation of the Russian Federation and provide reasons why I do not agree with the request of Ukraine to “[s]uspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings”.

6. I will set out my views in the following manner: firstly, on non-participation by the Russian Federation and, secondly, on the suspension of criminal proceedings against the 24 Ukrainian servicemen.

7. The procedural history and the factual background of the case are set out in paragraphs 30–32 of the Order. I shall not repeat these as such but I may refer to them in the context of my views on the matters mentioned.

### **Non-participation of the Russian Federation**

#### Default proceedings

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

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

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

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

11. It is regrettable that the Tribunal did not have the benefit of hearing submissions from the Russian Federation in support of its position, which can be deduced from the contents of the Memorandum submitted on 7 May 2019. The case for Ukraine was clear and the documents provided sufficient. However,

in my opinion, the absence of oral submissions and testimony of witnesses to support the contentions, where necessary, made the task of the Tribunal difficult. Added to the foregoing is the non-appearance of the Russian Federation.

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

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

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

### **Request for suspension of criminal proceedings**

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

16. Paragraph 119 of the Order states: “The Tribunal does not consider it necessary to require the Russian Federation to suspend criminal proceedings against the 24 detained Ukrainian servicemen and to refrain from initiating new proceedings.”

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

18. The proceedings concerning the offences for which the servicemen are indicted are currently before the Russian criminal court. The servicemen have appeared before the court and the matter was adjourned. The proceedings are still pending. I do not think an international court or tribunal can accede to a

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

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

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

21. The Tribunal found that, based on the facts before it, "such a dispute is not military in nature." Whether this is conclusive is an issue for the Annex VII arbitral tribunal. I find it difficult to concur with a definitive finding in these

proceedings because the Russian Federation did not provide any substantial evidence, documentary or otherwise, to support its contention. It could have been law enforcement or military in nature. At this stage I think it could be both military and law enforcement, but in the light of the evidence before the Tribunal, it seems to me that the events of 25 November reveal a law enforcement exercise.

*(signed)*      Anthony Lucky