

## DECLARATION OF JUDGE LIJNZAAD

1. I have voted for the Order on Provisional Measures, but with a certain reluctance as to the Tribunal's considerations about the law that may be applicable to this case.
2. Under article 290, paragraph 5, the Tribunal is to evaluate whether it considers that *prima facie* "... the tribunal which is to be constituted would have jurisdiction ...". This criterion is understood to refer to the existence of a dispute concerning the interpretation and application of the Convention. As the information presented to the Tribunal has shown, the positions of Ukraine and the Russian Federation quite clearly demonstrate that a difference of opinion exists as to the interpretation and applicability of provisions of the Convention with respect to passage through the Kerch Strait by the three Ukrainian naval vessels on 25 November 2018.
3. Initially, it is the plaintiff who shapes a court case, not only by formulating its application but also by presenting the grounds on which its claim is based. In its Notification and Statement of Claim, Ukraine refers to the violation by Russia of its rights under articles 32, 58, 95 and 96 of the Convention through the seizure and detention of the three Ukrainian naval vessels, the *Berdyansk*, the *Nikopol* and the *Yani Kapu*, and the detention of the crew of these vessels. This is reiterated in its Request for the Prescription of Provisional Measures, and was further elaborated upon during the hearing on 10 May 2019.
4. The Memorandum of the Government of the Russian Federation provides the reasons why it considers the Tribunal ought not to consider that *prima facie* jurisdiction of an arbitral tribunal would exist. This is based on the military activities exception under article 298, paragraph 1(b). Consequently, in its view, the Tribunal should decline the Request for Provisional Measures. On more substantive legal aspects, the Press Release of 26 November 2018 of the Federal Security Service of the Russian Federation about the incident in the Kerch Strait refers inter alia to articles 19, 25, paragraph 3, and 30 of the Convention as relevant to the Russian actions on 25 November 2018.

5. What concerns me is whether the current matter is truly a dispute concerning the interpretation and application of the Convention, or whether other rules of international law, for which the Tribunal may not have jurisdiction, are at issue. Ukrainian diplomatic notes addressed to the Russian Federation give an indication of other legal rules potentially applicable to the situation. While referring to various articles of the Convention, a note verbale of Ukraine dated 26 November 2019 also refers to “a flagrant violation of article 33 of the UN Charter” and “reserves the right to apply article 51 of the UN Charter concerning the right to self-defense”. It further refers to the applicability of the Third Geneva Convention of 12 August 1949 “relative to the Treatment of Prisoners of War” in respect of the detained crew members. In a note verbale on 27 November 2018, the detained crew members are referred to as having been “taken as prisoners of war”. More notes verbales were sent by Ukraine, but not all have been shared with the Tribunal.<sup>1</sup>

6. In its discussion of military activities as an exception to the Tribunal’s jurisdiction, the Russian Memorandum refers in paragraph 33(b) to its unwillingness to treat the detained crew members as prisoners of war as pertaining to “the categorisation of the situation as an armed conflict for the purposes of international humanitarian law”. That paragraph seeks to distinguish Russia’s reliance on the military activity exception under article 298, paragraph 1(b), from its non-acceptance of the applicability of international humanitarian law in this case.

7. This information suggests that the law potentially applicable to this case, in a *prima facie* evaluation of the jurisdiction of an Annex VII arbitral tribunal, has been dealt with too succinctly by the Tribunal in paragraph 44 of the Order. The final sentence of that paragraph cannot be understood without also making reference to the views on relevant legal provisions as expressed by Ukraine in its earlier communications to the Russian Federation.

8. The views expressed by the Parties in this dispute potentially demonstrate a difference of opinion as to the interpretation and application of the laws of armed

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<sup>1</sup>See: note verbale of 15 March 2019, 1<sup>st</sup> paragraph.

conflict, for which this Tribunal has no jurisdiction. I am confident that the questions of the applicable law and of whether the issues raised are solely to be understood as being related to the interpretation and application of the United Nations Convention on the Law of the Sea (matters that go well beyond the *prima facie* analysis of a Request for Provisional Measures) may be addressed by an Annex VII arbitral tribunal at a later stage.

(signed) Liesbeth Lijnzaad