Declaration of Judge Kittichaisaree

1. Since the Order is relatively succinct in its reasoning, especially on certain important aspects of the case, I wish to explain why I have joined the majority of my colleagues in voting in favour of this Order.

Prima facie jurisdiction of an Annex VII arbitral tribunal

2. Russia's note verbale No. 1733/H of 30 April 2019 to the Tribunal states, *inter alia*, that Russia strongly disagrees with the qualification by Ukraine regarding the status of Kerch Strait and the territorial sea adjacent to Crimea, and Russia "declares that such issues of sovereignty over Crimea can not be the subject of any proceedings before the Tribunal." At the public sitting held on 10 May 2019, Ukraine asserted that, without prejudice to the legal status of Kerch Strait and Crimea, Russia's conduct constitutes a profound violation of the immunity of warships and their personnel under the 1982 United Nations Convention on the Law of the Sea ("the Convention") and customary international even if, *arguendo*, it had occurred in Russia's territorial sea or exclusive economic zone.[1] In rendering today's Order, the Tribunal correctly accepts Ukraine's argument on this point.

3. I also fully concur with the majority of the Tribunal that, *prima facie*, the military activity exception does not apply in the present case as contended by Russia.

4. The *travaux préparatoires* of article 298 of the Convention[2] are not very helpful in the matter of settling definitively whether the incident on 25 November 2018 was a military activity or a law-enforcement activity. I can imagine that some quintessential examples of military activities include military exercises at sea, military intelligence-gathering activities at sea, military confrontation at sea in the context of an inter-State political or military

1 ITLOS/PV.19/C26/1, p. 4, ll. 6–14 and p. 13, l. 22–32.

2 Cf. Myron Nordquist *et al.* (eds.), *United Nations Convention on the Law of the Sea. A Commentary* (Dordrecht/Boston/London: Martinus Nijhoff 1989), vol. v, pp. 135–137, paras. 298.33–298.38.

conflict,[3] as well as any consequential military action at sea taken by another State against such activities. Certain incidents may comprise a mixture of both military and law-enforcement aspects. Therefore, each case must be *objectively* determined primarily in the light of the nature and intent of the activities in question, taking into account the relevant circumstances and context in which the activities take place.

5. The use of force in the present case was also in the context of law-enforcement operations at sea alluded to in *M/V "SAIGA" (No. 2)*:

> The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (*S.S. "I'm Alone" case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III*, p. 1609; *The Red Crusader case (Commission of Enquiry, Denmark – United Kingdom, 1962), I.L.R, Vol. 35*, p. 485).[4]

3 According to one commentator,

> Only acts that are tantamount to a threat or use of force in the course of passage – by either the coastal State or the State passing through the strait or archipelagic waters – should be viewed as falling within the category of disputes that could be excluded from mandatory jurisdiction of an international court or tribunal. This conclusion would be in line with the exclusions appropriate for military actions on the high seas or in the EEZ (Nathalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press 2005), p. 314. See also ibid., pp. 304, 312).

4 *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at p. 62, para. 156.

Obligations to exchange views under article 283

6. Article 283, paragraph 1, of the Convention provides:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

7. This present case is the eighth case submitted to the Tribunal under article 290, paragraph 5, of the Convention. In its Request for the prescription of provisional measures filed with the Tribunal on 16 April 2019, Ukraine submits that it satisfies the requirement of article 283 of the Convention by taking "reasonable and expeditious steps to exchange views with the Russian Federation regarding the settlement of the dispute by negotiation or other peaceful means" but "no settlement of the dispute has been reached".[5] Russia strongly disagrees with Ukraine's contention. Russia's note verbale No. 1733/H of 30 April 2019 to the Tribunal states, *inter alia*, that Ukraine elected to submit its request for the prescription of provisional measures to the Tribunal before engaging in further bilateral consultations with Russia in addition to the one held in The Hague on 23 April 2019 despite Russia's expressed readiness to continue dialogue with Ukraine on the matter.

8. Pursuant to Russia's Memorandum of 7 May 2019:

> In its Note of 15 March 2019, Ukraine asserted that the Ukrainian Military Vessels and its crew enjoyed immunity, citing Articles 32, 58 and 95 of UNCLOS. In the final paragraph of that note Ukraine stated "[p]ursuant to Article 283 of the Convention, the Ukrainian Side demands that the Russian Federation expeditiously proceed to an exchange of views regarding the settlement of this dispute by negotiation or other peaceful means", arbitrarily imposing a deadline of "within ten days". Within 10 days, i.e. on 25 March 2019, Russia provided a written holding response. Ukraine failed to await a substantive response, and issued the Claim within the week, on 31 March 2019. Russia agreed to hold consultations with Ukraine under Article 283 UNCLOS. Consultations were held on 23 April 2019, but Ukraine did not engage meaningfully; Russia expressed its willingness to continue a dialogue on the settlement of the dispute by

5 Para. 17 of Ukraine's Request.

> peaceful means, but Ukraine declared its lack of interest in this path, and elected to press on with a hearing on provisional measures. In the premises, Article 283(1) of UNCLOS has not been satisfied, and *prima facie* jurisdiction is lacking for that reason.[6]

9. At the public sitting held on 10 May 2019, Ukraine orally rebutted Russia's contention quoted in paragraph 8 above as being "simply incorrect". According to Ukraine, on 15 March 2019, Ukraine transmitted a note verbale to the Russian Federation indicating its preference for the dispute to be resolved through Annex VII arbitration and requesting an exchange of views pursuant to article 283. In light of the urgency of the situation, Ukraine insisted that this exchange of views take place within ten days. Contrary to Russia's argument, this ten-day deadline was not "arbitrary" – it reflected the fact that each passing day further compounded the harm to Ukraine's rights, and that Ukraine had already, over a period of months, repeatedly protested the detention of the vessels and servicemen and sought their release. Ukraine then concluded that Ukraine's obligation to exchange views was satisfied on 25 March 2019. Since article 283 requires the exchange of views to take place "expeditiously" and, in simply ignoring Ukraine's proposed schedule for an exchange of views, Ukraine considered Russia to have failed to comply with that obligation. When it received Russia's note verbale of 25 March 2019, Ukraine could not have foreseen that Russia would – weeks later – agree to Ukraine's request for a meeting, and Ukraine was entitled to presume that further attempts to seek negotiations would not be fruitful. Ukraine considered that it was not required to indefinitely postpone its case and allow further harm to its rights.[7] On 16 April 2019, after the expiry of the time-limit of two weeks provided for in article 290, paragraph 5, of the Convention, and pending the constitution of the Annex VII arbitral tribunal, Ukraine submitted the Request to the Tribunal to prescribe provisional measures.

10. Pursuant to the well-established jurisprudence of the Tribunal, the obligation to "proceed expeditiously to an exchange of views" under article 283

6 Para. 37 of Russia's Memorandum of 7 May 2019, footnotes omitted.

7 ITLOS/PV.19/C26/1, pp. 15–17.

of the Convention applies equally to both parties to the dispute.[8] Typically, the applicant requesting the prescription of provisional measures from the Tribunal by virtue of article 290, paragraph 5, had on several occasions prior to the institution of proceedings under Annex VII to the Convention sent diplomatic notes to inform the respondent of the applicant's concerns about the respondent's conduct in violation of the Convention and to request that a meeting be held on an urgent basis to discuss these concerns with a view to resolving the dispute amicably.[9]

11. With due respect, the Tribunal's Order today does not seem to have examined the ordinary meaning of article 283, paragraph 1, that the obligation for the parties to the dispute to proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means is implicated "[w]hen a dispute arises between States Parties concerning the interpretation or application of this Convention". Paragraphs 86 to 90 of the Order focus on Ukraine's note verbale of 15 March 2019 and the futility of any further exchange of views between Ukraine and Russia for the Tribunal to reach the conclusion at this stage that the requirements of article 283 were satisfied *before* Ukraine instituted arbitral proceedings, and that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it.

12. Of all the documents submitted to the Tribunal, although Ukraine has persistently protested Russia's conduct against Ukraine's three naval vessels and the 24 servicemen on board, it was in Ukraine's note verbale No. 72/22-188/3-682 dated 15 March 2019 that Ukraine mentioned for the first time article 283 of the Convention and demanded that the Russian Federation "expeditiously proceed to an exchange of views regarding the settlement of this dispute by negotiation or other peaceful means", as well as requesting that the Russian Federation "immediately express its view regarding the proper means of resolving the dispute and the holding of consultations on the matter" with Ukraine. A pertinent legal question is: should not the obligation under article 283 for the parties to the dispute to proceed "expeditiously" to an exchange of views regarding its settlement by negotiation or other peaceful means have

8 E.g., *Land Reclamation in and around the Straits of Johor* (*Malaysia* v. *Singapore*), *Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 19, para. 38.

9 See, e.g., ibid., para. 39.

commenced once the dispute arose on 25 November 2018? That is to say, does the initiative taken by Ukraine on 15 March 2019 fail to satisfy the "expeditious" element required by article 283?

13. The *travaux préparatoires* of article 283 show that the obligation to proceed to this exchange of views "expeditiously" is not limited to an initial exchange of views at the commencement of a dispute; it is a continuing obligation applicable at every stage of the dispute during which the parties have complete freedom to utilize the dispute-settlement method of their choosing, including direct negotiation, good offices, mediation, fact-finding, conciliation, arbitration or judicial settlement. Therefore, if the parties should decide to skip the stage of direct negotiations and to proceed immediately to some other means, article 283 would not stand in the way of such an agreement.[10] The rationale behind article 283 seems to be to ensure that resort to the mechanisms of section 2 of Part XV or other compulsory procedures under the Convention is not premature or a matter of course, but occurs only once it becomes clear that the dispute cannot be solved by less adversarial means, whereas the requirement for the expeditious commencement of the exchange of views is intended to prevent it from being used as a delaying tactic.[11]

14. According to one view, expressed by Judge *ad hoc* Anderson in his Declaration in the *"Arctic Sunrise"* case:

> The emphasis is more upon the expression of views regarding *the most appropriate peaceful means of settlement, rather than the exhaustion of diplomatic negotiations over the substantive issues dividing the parties*. The main purpose underlying article 283 is to avoid the situation whereby a State is taken completely by surprise by the institution of proceedings against it. The Tribunal has rightly noted in paragraphs 73 and 74 of the Order [in the *"Arctic Sunrise"* case] that there were several diplomatic exchanges between the parties before legal proceedings were instituted.[12] [Emphasis added]

10 Nordquist *et al.* (eds.), above note 2, at p. 29, paras. 283.1 and 283.2.

11 Alexander Proelß (ed.), *United Nations Convention on the Law of the Sea. A Commentary* (Oxford: Hart 2017), p. 1831.

12 *"Arctic Sunrise"* (*Kingdom of the Netherlands* v. *Russian Federation*), *Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 230 at pp. 254–255, para. 3.

15. The Annex VII arbitral tribunal to be constituted will have to determine definitively whether Ukraine has satisfied all the conditions under article 283. At this stage of the case before this Tribunal, I would give the benefit of the doubt to Ukraine, although I do have some concern that the ten-day deadline imposed by Ukraine in its note verbale of 15 March 2019 for Russia to respond might not be reasonable for many States whose internal bureaucratic process requires inter-agency consultations in order for them to be able to respond officially to a demand by a foreign State.

16. The fact that Ukraine submitted a draft United Nations General Assembly resolution on 5 December 2018 – which, *inter alia*, called upon the Russian Federation to release the three naval vessels and their crews and equipment unconditionally and without delay; called for the utmost restraint to de-escalate the situation immediately; and called upon the Russian Federation "to refrain from impeding the lawful exercise of navigational rights and freedoms in the Black Sea, the Sea of Azov and the Kerch Strait in accordance with applicable international law, in particular provisions of the 1982 United Nations Convention on the Law of the Sea"[13] – might, at this stage, be considered, *prima facie*, as a means through which Ukraine proceeded "expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means" not long after the 25 November 2018 incident. Russia itself was involved in trying to block or at least amend the draft resolution, especially through its allies at the United Nations General Assembly.[14] There was, arguably, an expeditious, albeit indirect, exchange of views between the Parties using the United Nations General Assembly as a forum to settle this dispute by means of a draft United Nations General Assembly resolution, which was eventually adopted

13 Draft resolution entitled "Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov", United Nations General Assembly Document A/73/L. 47 (5 December 2018). The draft was co-sponsored by Australia, Austria, Bulgaria, Canada, Croatia, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovenia, Sweden, Turkey, Ukraine, United Kingdom, and United States of America.

14 United Nations General Assembly Document A/73/PV.56 (17 December 2018), pp. 11–23.

unchanged as resolution 73/194 of 17 December 2018 by a vote of 66 in favour, 19 against, and 72 abstentions.[15] This *prima facie* conclusion might also need to be seen in the context in which the bilateral relation between Ukraine and Russia has not been normal since 18 March 2014.

Plausibility of rights

17. Since 2015, the Tribunal has, following the International Court of Justice in 2009,[16] required that the rights for which the applicant seeks protection by means of the prescription of provisional measures appear to be plausible or are at least plausible.[17] I am pleased that in the present case before the Tribunal, the Tribunal has been scrupulous in ascertaining whether the alleged rights are plausible, and has not equated this threshold of plausibility with a lower threshold, such as that of possibility.[18]

18. With regard to the immunity of the 24 Ukrainian servicemen, Ukraine submits, in paragraph 25 of its Request:

> As this Tribunal has previously determined, "the Convention considers a ship as a unit," comprised of the ship itself, its crew, every other person on board the ship or otherwise "involved or interested in its operations," and the ship's cargo. Thus, the passengers and crew of a naval vessel are

15 United Nations General Assembly Document A/RES/73/194 (23 January 2019), operative paras. 5 and 6.

16 *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), *Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139, at p. 151, para. 57 and p. 152, para. 60. See also the discussion on the threshold of plausibility in relation to provisional measures in the Final Report on Provisional Measures (23 December 2016) by the Institut de droit international, *passim*, available at <http://www.idi-iil.org/app/uploads/2017/06/3eme_com.pdf>, accessed 24 May 2019.

17 *Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), *Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at pp. 158–159, paras. 58–62; *"Enrica Lexie"* (*Italy* v. *India*), *Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 197, paras. 84–85.

18 *Contra*: *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*, paras. 6–70, where the International Court of Justice notes that "the rights whose preservation is sought by Iran appear to be based on a *possible* interpretation of the 1955 Treaty and on the *prima facie* evidence of the relevant facts [and that] [i]n light of the foregoing, the Court concludes that, at the present stage of the proceedings, some of the rights asserted by Iran under the 1955 Treaty are *plausible*." (Emphasis added).

> entitled to immunity to the same extent as the vessel. The Ukrainian servicemen detained by the Russian Federation are also entitled to the customary immunity accorded public servants exercising official functions.[19]

19. I am not convinced that the legal position of a ship including its crew and passengers as a single unit for the purpose of the nationality of claims necessarily or automatically means that, if the ship in question is a warship entitled to immunity, its crew and passengers on board are also automatically entitled to the same immunity as the one accorded to the warship.

20. Paragraph 98 of today's Order reads:

> The Tribunal also notes that the 24 servicemen on board the vessels are Ukrainian military and security personnel. While the nature and scope of their immunity may require further scrutiny, the Tribunal considers that the rights to the immunity of the 24 servicemen claimed by Ukraine are plausible.

21. The Tribunal does not explain the basis of such plausibility of the immunity of the 24 servicemen. I myself concur that the 24 Ukrainian servicemen are, *prima facie*, entitled to immunity for the following reasons.

22. Firstly, by virtue of article 293, paragraph 1, of the Convention, this Tribunal shall apply this Convention "and other rules of international law not incompatible with this Convention". In this regard, rules of general international law on the immunity of State officials from foreign criminal jurisdiction are applicable insofar as they are not incompatible with the Convention.

23. The pertinent provisions of the International Law Commission's draft articles on immunity of State officials from foreign criminal jurisdiction, as provisionally adopted,[20] read as follows:

---

19 Footnotes omitted. See also ITLOS/PV.19/C26/1, p. 12, ll. 7–33.

20 UN Doc. A/CN.4/722 (12 June 2018), Annex.

Draft article 2. Definitions

For the purposes of the present draft articles:

[…]

(e) "State official" means any individual who represents the State or who exercises State functions.
(f) An "act performed in an official capacity" means any act performed by a State official in the exercise of State authority.

Part three Immunity *ratione materiae*

Draft article 5. Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Draft article 6. Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.
3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Draft article 7. Crimes in respect of which immunity *ratione materiae* does not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in relation to the following crimes:

    (a) Genocide;
    (b) Crimes against humanity;
    (c) War crimes;

(d) The crime of apartheid;
(e) Torture;
(f) Enforced disappearances.

2. For the purposes of this article, the meaning of crimes under international law referred to above shall be construed in accordance with the definition of such crimes as set forth in the treaties listed in the annex to these draft articles.

24. The International Law Commission's commentary on draft article 2(e) lists some examples of "officials" falling within the definition thereunder, including "military officials of various ranks, and various members of government security forces and institutions", irrespective of the hierarchical position occupied by these individuals within a State.[21] The commentary on draft article 2(f) makes it clear that, in order for a State official to be entitled to immunity *ratione materiae*, there must also be a direct connection between the act performed by the State official and the exercise of State functions and powers, since it is this connection that justifies the recognition of immunity in order to protect the principle of sovereign equality of States.[22]

25. As the 24 servicemen on board the three Ukrainian naval vessels have not been accused of committing any crime to which the immunity *ratione materiae* shall not apply, they are, at least *prima facie*, State officials entitled to immunity *ratione materiae*.

Law of naval warfare

26. In several diplomatic notes addressed to Russia, Ukraine has also asserted that that the Ukrainian servicemen were "taken as prisoners of war" and demanded that "the Russian Side immediately and fully ensure all the lawful rights of the captured military servicemen of the Armed Forces of Ukraine as

21 *Report of the International Law Commission, Sixty-sixth Session* (*5 May–6 June and 7 July–8 August 2014*), UN General Assembly Official Records, Sixty-ninth Session Supplement No. 10 (A/69/10), p. 233, para. (7) and p. 235, para. (14).

22 *Report of the International Law Commission, Sixty-eighth Session* (*2 May–10 June and 4 July–12 August 2016*), UN General Assembly Official Records, Seventy-first Session Supplement No. 10 (A/71/10), p. 354, para. (3).

required by the Geneva Convention of August 12, 1949, relative to the Treatment of Prisoners of War".[23] Russia simply rebuts this assertion by stating:

> Although it appears that Ukraine may wish to make something of the fact that Russia has denied that the Military Servicemen are prisoners of war (and hence is treating this as a matter for its civilian courts), that denial pertains to the categorisation of the situation as an armed conflict for the purposes of international humanitarian law and does not mean that the incident does not concern military activities for the purposes of Article 298 of UNCLOS, which is a wholly separate question. Russia's position is entirely consistent with the position taken by the Tribunal in the *Philippines v. China* Award cited above.[24]

27. Russia does not seem to accept that there is a situation of armed conflict between Russia and Ukraine. Therefore, there is no place in the present proceeding before this Tribunal for the applicability of the law of naval warfare as *lex specialis* that would replace the law of the sea under the 1982 United Nations Convention on the Law of the Sea and allow targeting military objectives such as enemy warships which are not immune from capture, attack or destruction to achieve a military advantage for Russia.[25]

28. Despite Ukraine's repeated reference to the 24 Ukrainian servicemen as "prisoners of war", Ukraine is not estopped from resorting to the application of the law of the sea, as opposed to the law of naval warfare, in the proceeding before this Tribunal. According to the Tribunal's established jurisprudence,

> [T]he Tribunal observes that, in international law, a situation of estoppel exists when a State, by its conduct, has created the appearance of a particular situation and another State, relying on such conduct in good faith, has acted or abstained from an action to its detriment. The effect of the notion of estoppel is that a State is precluded, by its conduct,

23 Ukraine's Statement of Claim, Appendix E.

24 Para. 33(b) of Russia's Memorandum of 7 May 2019. This is duly noted in para. 44 of the Tribunal's Order today.

25 Cf. James Kraska, "The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?", *EJIL Talk!* (3 December 2018), available at <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>, accessed 24 May 2019.

> from asserting that it did not agree to, or recognize, a certain situation. The Tribunal notes in this respect the observations in the *North Sea Continental Shelf* cases (*Judgment, I.C.J. Reports 1969*, p. 3, at p. 26, para. 30) and in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Judgment, I.C.J. Reports 1984*, p. 246, at p. 309, para. 145).[26]

29. At least one main element of estoppel has not been fulfilled in the case before us – Russia has not submitted any evidence to prove that it has been induced by Ukraine's representation to act to its detriment. On the contrary, the submissions to this Tribunal by both Russia and Ukraine focus on the interpretation or application of the provisions of the 1982 Convention they consider relevant to the dispute before this Tribunal.

Appropriateness for the Tribunal to prescribe provisional measures in this case

30. Ukraine has also resorted to the European Court of Human Rights to seek protection of the human rights of the 24 Ukrainian servicemen. On 4 December 2018, the European Court of Human Rights decided to indicate to the Russian Government by way of interim measure that, "in the interests of the parties and the proper conduct of the proceedings before it, they should ensure that appropriate medical treatment be administered to those captive Ukrainian naval personnel who required it, including in particular any who might have been wounded in the naval incident that took place on 25 November 2018".[27]

31. While paragraphs 108–109 of today's Order allude to that course of action by Ukraine and at the public sitting held on 10 May 2019 Ukraine tried to rebut Russia's argument on this point,[28] the Tribunal's Order does not refer to the relevance or non-relevance of the litigation pending before the European Court of Human Rights in relation to the Request by Ukraine for the prescription of provisional measures by this Tribunal.

---

26 *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), *Judgment, ITLOS Reports 2012*, p. 4, at p. 45, para. 124, also quoted in *"M/V Norstar"* (*Panama* v. *Italy*), *Preliminary Objections, Judgment of 4 November 2016*, at p. 70, para. 306.

27 European Court of Human Rights Press Release ECHR 421 (2018) of 4 December 2018.

28 ITLOS/PV.19/C26/1, p. 31, ll. 21–44.

32. In my view, the proceeding before the European Court of Human Rights is entirely different from this proceeding before this Tribunal. According to available information, Ukraine's inter-State case against Russia in the European Court of Human Rights alleges violation by the latter of articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security), 6 (right to a fair trial) and 38 (examination of the case) of the 1950 European Convention on Human Rights, to which both Ukraine and Russia are party.[29] None of these alleged violations are issues before the Tribunal, and the Tribunal can prescribe provisional measures within the limit of its own competence as provided for in article 290, paragraph 5, of the 1982 Convention.

Provisional measures prescribed by the Tribunal

33. Paragraph 119 of today's Order merely states that the Tribunal "does not consider it necessary to require the Russian Federation to suspend criminal proceedings against the 24 detained Ukrainian servicemen and refrain from initiating new proceedings" as requested by Ukraine. The Tribunal does not elaborate in more detail, as it should have done, why such a provisional measure is not necessary at this stage. In my humble opinion, an applicant for the prescription of provisional measures should be entitled to be fully apprised of the reason(s) why one or more provisional measures requested by it is or are not prescribed.

Compliance and enforcement of the Order

34. Article 290, paragraph 6, of the Convention stipulates unequivocally that the parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

29 Application no. 55855/18, and see "Russia seizure of Ukrainian sailors: what important step did the Ukraine …", *true-news.info* (8 January 2019), available at <http://all.true-news.info/russias-seizure-of-ukrainian-sailors-what-important-step-did-the-ukraine/>, accessed 24 May 2019.

35. Compliance with international legal obligations, including judgments and orders of international courts and tribunals, has been subject to extensive academic discussion.[30]

36. In the *"Arctic Sunrise"* case, Russia informed the Netherlands that it did not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands. Therefore, Russia did not participate in the proceedings before the Tribunal in respect of the Netherlands' request for the prescription of provisional measures under article 290, paragraph 5, of the Convention. Likewise, Russia did not take part in the proceedings before the Annex VII arbitral tribunal which subsequently, on 14 August 2015, issued a unanimous Award on the Merits, in which it found that Russia had breached its obligations under the Convention by boarding, investigating, inspecting, arresting, detaining, and seizing the Arctic Sunrise, Greenpeace's vessel flying the Dutch flag, without the prior consent of the Netherlands, and by arresting, detaining, and initiating judicial proceedings against the thirty persons on board that vessel. The Annex VII arbitral tribunal also found that Russia breached the Convention by failing to comply with the order prescribing provisional measures issued by the International Tribunal for the Law of the Sea in connection with this arbitration and by failing to pay the deposits requested by the Annex VII arbitral tribunal in the proceedings. In its Award on Compensation dated 10 July 2017, the Annex VII arbitral tribunal unanimously determined the quantum of compensation owed by Russia to the Netherlands. The Tribunal decided that Russia shall pay the Netherlands the following sums, with interest: (i) €1,695,126.18 as compensation for damage to the Arctic Sunrise; (ii) €600,000 as compensation for non-material damage to the vessel for

30 E.g., Oscar Schachter, *International Law in Theory and Practice* (Dordrecht/Boston/London: Martinus Nijhoff 1991), pp. 184–249, 389–417; Joseph Sinde Warioba, "Monitoring Compliance with and Enforcement of Binding Decisions of International Courts" (2001) 5 *Max Planck Yearbook of United Nations Law* 41; Karen J. Alter, "Do International Courts Enhance Compliance with International Law?" (2002) 25 *Review of Asian and Pacific Studies* 51; Andrew T. Guzman, "A Compliance-Based Theory of International Law" (2002) 90 *California Law Review* 1823; Carmela Lutmar, Cristiane L. Carneiro, and Sarah McLaughlin Mitchell, "Formal Commitments and States' Interests: Compliance in International Relations" (2016) 42 *International Interactions* 559.

their wrongful arrest, prosecution, and detention in Russia; (iii) €2,461,935.43 as compensation for material damage resulting from the measures taken by Russia against the vessel; (iv) €13,500 as compensation for the costs incurred by the Netherlands for the issuance of a bank guarantee to Russia pursuant to the Provisional Measures Order prescribed by the International Tribunal for the Law of the Sea; and (v) €625,000 as reimbursement of Russia's share of the deposits paid by the Netherlands in the proceedings.

37. Despite Russia's non-participation in the proceedings before this Tribunal and the Annex VII arbitral tribunal in the *"Arctic Sunrise"* case, a full and final settlement in that case was reportedly reached between the Netherlands and Russia on 17 May 2019, whereby Greenpeace would be paid €2.7 million by Russia.[31] This final settlement forms part of the agreement between the Netherlands and Russia on the prevention of and response to any future incident similar to the one in the *"Arctic Sunrise"* case.[32]

38. I am, therefore, optimistic that the provisional measures prescribed by the Tribunal today will be of practical significance in the eventual peaceful settlement of the present dispute between the Parties.

(*signed*) Kriangsak Kittichaisaree

---

31 "Russia to Award $3M to Greenpeace in Settlement", *Moscow Times* (17 May 2019), available at <https://www.themoscowtimes.com/2019/05/17/russia-to-award-3mln-to-greenpeace-in-settlement-a65632>, accessed 24 May 2019.

32 Joint statement by the Russian Federation and the Kingdom of the Netherlands on co-operation in the Arctic zone of the Russian Federation and dispute settlement, dated 17 May 2019, available at <http://www.mid.ru/ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/3651941?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB >, accessed 24 May 2019.