

Dissenting Opinion of Judge Kolodkin

1. For the reasons explained below I was not able to join the Tribunal in concluding that *prima facie* article 298, paragraph 1(b), of the United Nations Convention on the Law of the Sea (hereinafter “the Convention” or “UNCLOS”) does not apply in the present case¹ and that *prima facie* the Annex VII arbitral tribunal (hereinafter “the Arbitral Tribunal”) instituted by Ukraine (hereinafter “the Applicant”) would have jurisdiction over the dispute submitted to it.² In my opinion, the Arbitral Tribunal *prima facie* lacks jurisdiction to consider the dispute because the “military activities exception” provided for in article 298, paragraph 1(b), of the Convention is *prima facie* applicable in the present case. Consequently, the Tribunal was not in a position to prescribe provisional measures.

2. The Russian Federation (hereinafter “the Respondent”), when expressing its consent to be bound by the Convention, declared that “in accordance with article 298 of the United Nations Convention on the Law of the Sea, 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, including military activities by government vessels and aircraft”. Essentially the same declaration was made by the Applicant.³

3. The Applicant, noting the declarations made by both Parties under article 298, stated that none of the limitations on the Convention’s compulsory dispute settlement procedures set forth in that article is relevant to this dispute.⁴ The Applicant developed this view in the oral pleadings. In particular, the Applicant noted that the dispute it brought to the Tribunal, viewed on an objective basis, does not concern military activities and that the acts of which it complains must be military acts, but here they are not, and rather involve the exercise of domestic jurisdiction in a law enforcement context.⁵ The Applicant stated that its claims relate to the seizure and detention of its naval vessels and their crew, despite those vessels’ immunity from the Applicant’s

1 Order, para. 77.

2 *Ibid.*, para. 90.

3 *Ibid.*, paras 48, 49.

4 Request of Ukraine for the prescription of provisional measures under article 290, paragraph 5, of the United Nations Convention on the Law of the Sea, 16 April 2019, para. 18.

5 ITLOS/PV.19/C26/1, pp. 18–19.

jurisdiction, and that these claims do not concern activities that are military in nature.⁶

4. The Respondent does not appear to me to have been arguing, at least directly, that the present dispute is not about the detention of the vessels and servicemen or their immunity from its jurisdiction. Rather, referring to its declaration, the Respondent claimed that “the present dispute concerns military activities and is therefore plainly excluded from the Annex VII arbitral tribunal’s jurisdiction.”⁷

5. Thus, as the Tribunal observed, the Parties disagree on the applicability of article 298, paragraph 1(b), of the Convention and their declarations under that provision.⁸

6. The Tribunal noted that it is not uncommon for States today to employ naval and law enforcement vessels collaboratively for diverse maritime tasks; that the distinction between military and law enforcement activities cannot be based solely on the characterization of the activities in question by the parties to a dispute; and that this distinction must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.⁹ It also stated that for the purposes of determining whether the dispute submitted to the Arbitral Tribunal concerns military activities under article 298, paragraph 1(b), of the Convention, it is necessary to examine a series of events preceding the arrest and detention.¹⁰ I agree with that.

7. However, I cannot go along with the Tribunal’s interpretation and legal assessment of the circumstances of the case, or with its legal reasoning, on the basis of which the Tribunal decided not to apply to the present dispute the “military activities exception” under article 298, paragraph 1(b).

6 Ibid.

7 Memorandum of the Government of the Russian Federation, 7 May 2019, paras 26–27.

8 Order, para. 50.

9 Ibid., paras 64–66.

10 Ibid., para. 67.

8. In particular, I do not agree with the view of the Tribunal that “it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity”.¹¹ Though the Tribunal did not state directly that the Applicant’s naval vessels were not exercising military activity while attempting to pass through the Kerch Strait, this seems to be implied in paragraphs 68–70 of the Order. I cannot accept that. Nor do I agree with the Tribunal’s view that “at the core of the dispute was the Parties’ differing interpretation of the regime of passage through the Kerch Strait”;¹² or that “what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation”.¹³

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9. I consider that the navigational activities at sea of a State’s warships are inherently, or at least on their face, military. Where, for example, a State’s warships exercise freedom of navigation on the high seas or in the exclusive economic zone, this is normally to be considered as military activity. The same holds for the passage of warships through certain maritime areas. Only specific circumstances in a particular situation may warrant a different conclusion. This also applies, in my opinion, for the purposes of the “military activities exception” under article 298, paragraph 1(b), of UNCLOS.

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10. The incident of 25 November 2018 did involve military activities carried out by both Parties.

11. It is a publicly known that long before the incident, the Applicant started to officially characterize the situation between itself and the Respondent as armed conflict (and continues to describe it as such after the incident). The Applicant was (and still is) officially accusing the Respondent of “aggression” against it. Thus, the Applicant was knowingly sending its warships to pass through waters controlled by the “enemy” coast guard and military forces.

11 Ibid., para. 68.

12 Ibid., para. 72.

13 Ibid., para. 74.

12. The “Checklist for Readiness to Sail” that was on board the *Nikopol* gunboat, one of the ships that were supposed to pass through the Kerch Strait,¹⁴ is also telling. In his Declaration submitted by the Applicant, Admiral Tarasov, while denying that the “Checklist” was an official order, at the same time described it as a “document”.¹⁵

13. The “Checklist”, obviously completed by the Applicant’s navy while preparing the departure of its warships towards the port of Berdyansk through the Kerch Strait, states *inter alia* the purposes of their mission and the means by which they are to be accomplished. The Applicant has disputed neither the fact that the “Checklist” was a document produced by its navy nor the content thereof, and itself referred to it in the oral pleadings.¹⁶

14. The “Checklist” expressly states that in particular:

- it was a mission of a “tactical gunboat group No. 5” (i.e. a military unit, consisting in this case of the small armed gunboats *Berdyansk* and *Nikopol*);
- while on the mission, the group must “concentrate on covertly approaching and passing through the Kerch Strait” (this is stated twice in the “Checklist”);
- from the morning hours of 23 November, preparations must begin for “action and passage” (not just for passage);
- upon arrival at the port of Berdyansk, the warships were to “stand by to take on missions to stabilize the situation in the Azov theatre of operation”;
- and, finally, that the main or one of the main tasks prior to the mission was “[a]ccomplishing main combat training tasks for mission given”.¹⁷

15. “Tactical gunboat group No. 5” announced its intention to pass the Kerch Strait, together with the auxiliary navy tugboat *Yani Kapu*, to the navigation administration of the Respondent only at 05:35 on 25 November, i.e. eight hours

14 Request, 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).

15 Request, Annex F, para. 9.

16 ITLOS/PV.19/C26/1, p. 8.

17 *Ibid.*, paras 3–5.

after it had been contacted by the Respondent's border guard and asked about its intentions.¹⁸ After that, the gunboats and the tugboat continued for hours to manoeuvre in the vicinity of the Kerch Strait, ignoring the attempts of the Respondent's coast guard to stop them, until they were blocked. However, after that, the naval group of the Applicant attempted to break through the blockade, disregarding the applicable regulations referred to by the Respondent and ignoring the demands from the Respondent's coast guard to stop.¹⁹ It was not until the Respondent's ships opened fire that the Applicant's naval vessels were actually stopped by the Respondent's coast guard (the *Berdyansk* and the *Yani Kapu*) and military (the *Nikopol*).

16. In my view, it is clear from the above that *prima facie* the mission and the activity of the Applicant's navy in the present case were military. It does not look to me like an intended but not accomplished ordinary passage. Even if it were regarded as such, the mere fact that it was intended to be exercised by the warships, especially when considered together with its purposes, the specifics of the preparations and the manner in which it was intended and attempted to be accomplished, testifies to the military character of the activity.

17. There seems to me to be very little in the pleadings of the Parties to support the view that "at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait", despite the fact that passage was denied by the Respondent with reference to its national regulations. In my opinion, in the present case the Applicant, at least at this stage, is not disputing the regime of passage through the Strait, which is based, first of all, on the Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait of 2003 (and the Parties seem not to disagree on this point). What is argued by the Applicant is only the limited issue of the immunity of its naval vessels under articles 32, 58, 95 and 96 of the Convention. Neither Party has claimed that the issue of the lawfulness of the denial by the Respondent of the passage of the Applicant's naval vessels through the Strait was at the heart or the background of the dispute.

18 Memorandum, paras 12–13.

19 Ibid., paras 14–17.

18. The Applicant's official position with respect to the Respondent's action in the incident remained for months as follows: from the outset, it characterized this action as an act of aggression, use of force by the Respondent.²⁰ In doing so, the Applicant did not distinguish between the actions of the Respondent's coast guard, on the one hand, and military, on the other, both of which were involved in the incident. This is consistent with the official position of the Applicant formulated long before the incident in the Kerch Strait. The Applicant believes that it is waging an armed conflict with the Respondent, so what happened on 25 November was a new instance of this conflict. Accordingly, for several months, the Applicant claimed the application of humanitarian and human rights law to the detained servicemen, whom it considered to be prisoners of war, and not immunity under UNCLOS.²¹ In the documents submitted to the Tribunal there is no evidence that the Applicant claimed immunity before 15 March. Even after that date, in the proceedings in the Respondent's courts, the defence for the Applicant's personnel continues to insist that they were captured by the Applicant "during an armed conflict", in a "specifically border incident that happened on 25 November", that they are prisoners of war, and it is not claiming immunity.²²

19. However, in the proceedings before the Tribunal, the Applicant claims that the Respondent's action was a law enforcement one, observing that the Respondent itself has "treated the incident as a criminal law enforcement matter" and that the servicemen are subjected to prosecution in "civilian courts".²³

20. The Respondent did not state that its action in the incident was an act of use of force in an armed conflict. Nor, in my view, did it, while referring to the provisions of UNCLOS and its national criminal law, describe its action in the incident as law enforcement. Rather, the Respondent emphasizes the involvement of its military in the incident, which was followed by the arrest of the Applicant's three naval vessels and the servicemen, and states that detention of these vessels and personnel resulted directly from the incident. It claims that the activities involved in the incident were plainly military in nature, that,

20 Ibid., para. 32.

21 Ibid.

22 Request, Annex G, Appendix A, p. 5.

23 See, for example, Request, Annex A, para. 11.

this being the case, its subsequent treatment is an irrelevance, and that the activities at issue in this case were military in nature.²⁴

21. For me, the real picture of the Respondent's action in the incident is *prima facie* as follows. It started as a law enforcement activity when the Applicant's naval vessels were first detected, contacted and warned by the Respondent's coast guard. Then it escalated into military activities when the Respondent's navy and air force became involved. They were not just in the vicinity, but rather actively engaged in the operation. They were engaged, first, to obstruct and, then, to curb current activities and prevent further activities by the Applicant's naval group when the Respondent's Ministry of Defence combat helicopter stopped the gunboat *Nikopol* and a corvette from the Respondent's Black Sea Fleet monitored the Applicant's navy actions.²⁵ As the Applicant itself observed, when its vessels proceeded to enter the Strait on 25 November, they were obstructed by ships from the Respondent's navy and coast guard.²⁶ It was only after the Applicant's naval group and its military activity had been stopped, with the direct involvement and assistance of the Respondent's military, that the latter resumed its distinctly law enforcement action (in particular, the arrest and detention of the *Nikopol* took place only after it had been stopped by the armed forces). In my view, the Respondent's activity in the incident was *prima facie* military to a large extent, at least.

22. The activities of each Party during the incident contributed to its nature. They were obviously interrelated and, in assessing the overall picture of the incident, should be considered as a whole. The activities of the Applicant were purely military in nature and the activities of the Respondent were military to a large extent. Taken as a whole, the real picture of the incident reveals a confrontation, involving the use of force, between the armed forces of one State and law enforcement and armed forces of the other. The events that immediately preceded the arrest and detention, especially when objectively assessed *prima facie*, look to me much more like a naval clash, or, as the defence for the servicemen described it, a border incident, than a law enforcement operation. These events did not amount to armed conflict but went beyond law enforcement.

24 Memorandum, paras 28, 33.

25 Memorandum, para. 19.

26 Request, Annex A, para. 8.

23. In my view, the arrest and detention of the Applicant's vessels are *prima facie* so closely related to the immediately preceding military activities that they cannot be reasonably considered separately. Accordingly, the present dispute concerning the detention of the vessels, at the same time, *prima facie* concerns military activities and as such is *prima facie* excluded from the jurisdiction of the Arbitral Tribunal under article 298, paragraph 1(b), of the Convention.

(signed) Roman A. Kolodkin