

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



2019

Friday, 10 May 2019, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,
President Jin-Hyun Paik presiding

CASE CONCERNING THE DETENTION OF THREE UKRAINIAN NAVAL VESSELS

(Ukraine v. Russian Federation)

Verbatim Record

<i>Present:</i>	President	Jin-Hyun Paik
	Vice-President	David Attard
	Judges	José Luís Jesus
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Elsa Kelly
		Markiyan Kulyk
		Alonso Gómez-Robledo
		Tomas Heidar
		Óscar Cabello Sarubbi
		Neeru Chadha
		Kriangsak Kittichaisaree
		Roman Kolodkin
		Liesbeth Lijnzaad
	Registrar	Philippe Gautier

Ukraine is represented by:

H.E. Olena Zerkal, Deputy Minister of Foreign Affairs, Ministry of Foreign Affairs,

as Agent;

and

Ms Marney L. Cheek, Member of the Bar of the District of Columbia; Covington & Burling LLP,

Mr Jonathan Gimblett, Member of the Bar of Virginia and the District of Columbia; Covington & Burling LLP,

Professor Alfred H.A. Soons, Utrecht University School of Law; Associate Member of the Institute of International Law,

Professor Jean-Marc Thouvenin, University Paris Nanterre; Secretary General of the Hague Academy of International Law; member of the Paris Bar; Sygna Partners,

as Counsel and Advocates;

Ms Oksana Zolotaryova, Acting Director, International Law Department, Ministry of Foreign Affairs,

Mr Leonid Zaliubovskyi, Colonel of Justice, Naval Forces of Ukraine,

Mr Nikhil V. Gore, Covington & Burling LLP,

Ms Alexandra Francis, Covington & Burling LLP,

as Counsel;

Mr Taras Kachka, Advisor to the Foreign Minister,

as Advisor;

Vice Admiral Andrii Tarasov, First Deputy Commander and Chief of Staff, Naval Forces of Ukraine,

Ms Kateryna Zelenko, Spokesperson, Ministry of Foreign Affairs,

Mr Nikolai Polozov, attorney of detained Ukrainian servicemen,

Mr Ilya Novikov, attorney of detained Ukrainian servicemen,

as Observers;

Ms Katerina Gipenko, Third Secretary, Ministry of Foreign Affairs,

Ms Valeriya Budyakova, Third Secretary, Ministry of Foreign Affairs,

as Assistants.

The Russian Federation is not represented.

1 **THE PRESIDENT:** The International Tribunal for the Law of the Sea is now in
2 session. Good morning and welcome to the Tribunal.

3
4 Pursuant to article 26 of its Statute, the Tribunal today holds the hearing in the Case
5 concerning the detention of three Ukrainian naval vessels between Ukraine and the
6 Russian Federation.

7
8 At the outset, I would like to note that Judge Ndiaye, for medical reasons duly
9 explained to me, is prevented from participating in this case.

10
11 On 16 April 2019, Ukraine submitted to the Tribunal a Request for the prescription of
12 provisional measures pending the constitution of an arbitral tribunal in a dispute with
13 the Russian Federation concerning the detention of three Ukrainian naval vessels.
14 The Request was made pursuant to article 290, paragraph 5, of the United Nations
15 Convention on the Law of the Sea. The case was named “Case concerning the
16 detention of three Ukrainian naval vessels” and entered in the List of Cases of the
17 Tribunal as Case No. 26.

18
19 I now call on the Registrar to summarize the procedure and to read out the
20 submissions of Ukraine.

21
22 **THE REGISTRAR** (*Interpretation from French*): Thank you, Mr President. On
23 16 April 2019 a copy of the Request for the prescription of provisional measures was
24 sent to the Government of the Russian Federation.

25
26 By order of 23 April 2019, the President of the Tribunal fixed 10 and 11 May 2019 as
27 the dates for the hearing.

28
29 By note verbale of 30 April 2019, the Embassy of the Russian Federation in Berlin
30 informed the Tribunal that

31
32 (*Continued in English*)

33
34 The Russian Federation is of the view that the arbitral tribunal to be constituted
35 under Annex VII of UNCLOS will not have jurisdiction, including *prima facie*,
36 to rule on Ukraine’s claim, in light of the reservations made by both the Russian
37 Federation and Ukraine under article 298 of UNCLOS stating, inter alia, that
38 they do not accept the compulsory procedures provided for in section 2 of Part
39 XV thereof entailing binding decisions for the consideration of disputes
40 concerning military activities. Furthermore, the Russian Federation expressly
41 stated that the aforementioned procedures are not accepted with respect to
42 disputes concerning military activities by government vessels and aircraft. For
43 this obvious reason, the Russian Federation is of the view that there is no
44 basis for the International Tribunal for the Law of the Sea to rule on the issue
45 of the provisional measures requested by Ukraine.

46
47 (*Interpretation from French*) By the same note, the Russian Federation informed the
48 Tribunal

49
50 (*Continued in English*) “of its decision not to participate in the hearing on provisional
51 measures in the case initiated by Ukraine, without prejudice to the question of its

1 participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of
2 the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds
3 further.”

4
5 *(Interpretation from French)* On 2 May 2019, the Registry of the Tribunal received a
6 communication in which

7
8 *(Continued in English)* “Ukraine ... requests, consistent with article 28 of the
9 Tribunal’s Statue, that the Tribunal continue the proceedings and render a decision
10 on provisional measures.”

11
12 *(Interpretation from French)* By order of 2 May 2019, the President fixed 10 May
13 2019 as the date for the hearing. I will now read out the submissions of Ukraine.

14
15 *(Continued in English)*

16
17 Ukraine requests that the Tribunal indicate provisional measures requiring the
18 Russian Federation to promptly:

19
20 a. Release the Ukrainian naval vessels the *Berdiansk*, the *Nikopol*, and the
21 *Yani Kapu*, and return them to the custody of Ukraine;

22
23 b. Suspend criminal proceedings against the twenty-four detained Ukrainian
24 servicemen and refrain from initiating new proceedings; and

25
26 c. Release the twenty-four detained Ukrainian servicemen and allow them to
27 return to Ukraine.

28
29 **THE PRESIDENT:** Thank you, Mr Registrar. At today’s hearing, Ukraine will present
30 its oral arguments. The sitting will last until approximately 1 p.m., with a break of 30
31 minutes in the middle.

32
33 I note the presence at the hearing of the Agent, Counsel and Advocates of the
34 Applicant. I call on the Agent of Ukraine, Ms Olena Zerkal, to introduce her
35 delegation.

36
37 **MS ZERKAL:** Mr President, Members of the Tribunal, it is an honour for me to
38 appear before this Tribunal representing Ukraine.

39
40 Let me begin by introducing the delegation of Ukraine. My name is Olena Zerkal, the
41 Deputy Minister of Foreign Affairs and Ukraine’s Agent.

42
43 Present with me in the courtroom is Vice Admiral Andrii Tarasov, First Deputy
44 Commander and Chief of Staff of the Naval Forces of Ukraine. Ukraine’s Counsel
45 and Advocates are Mr Jonathan Gimblett, Professor Fred Soons, Ms Marney Cheek,
46 and Professor Jean-Marc Thouvenin.

47
48 Ms Oksana Zolotaryova, Colonel Leonid Zaliubovskyi, Mr Nikhil V. Gore and
49 Ms Alexandra Francis are our Counsel. Finally, Taras Kachka is our Adviser.

1 **THE PRESIDENT:** Thank you, Ms Zerkal. May I then request you to begin your
2 statement?
3

4 **MS ZERKAL:** Thank you, Mr President. With your permission, I will now introduce
5 Ukraine's case.
6

7 The dispute between the Parties concerns the Russian Federation's unlawful and
8 continuing seizure and detention of the Ukrainian warships the *Berdyansk* and
9 *Nikopol*, and the Ukrainian naval vessel the *Yani Kapu*, on 25 November 2018 in the
10 Black Sea. It is not just the ships that have been detained, but also the 24 Ukrainian
11 servicemen on board. As a result of the seizure and detention, Russia has violated
12 the basic principle of the immunity of warships under the United Nations Convention
13 on the Law of the Sea.
14

15 Ukraine has instituted an arbitration under Annex VII of the Convention to seek relief
16 for this violation. We appear before this Tribunal today to ask you to exercise your
17 power under article 290, paragraph 5, of the Convention to prescribe provisional
18 measures where the urgency of the situation so requires.
19

20 Mr President, Members of the Tribunal, Ukraine's naval ships continue to be held by
21 Russia, six months after they were seized, and the servicemen are under
22 investigation and are detained in the Lefortovo prison in Moscow. They are:
23 Captain of the Third Rank Volodymyr Lisovyy; Captain of the Second Rank Denys
24 Hrytsenko; Captain Lieutenant Serhiy Popov; Senior Lieutenants Andriy Drach,
25 Bohdan Nebylytsia and Vasyl Soroka; Lieutenant Roman Mokryak; Master Chief
26 Petty Officers Yuriy Budzyloy and Andriy Shevchenko; Petty Officers Oleh
27 Melnychyk, Vladyslav Kostyshyn and Serhiy Chyliba; Senior Seamen Andriy
28 Artemenko, Viktor Bezpалchenko, Yuriy Bezyazychnyy, Andriy Oprysko, Volodynyr
29 Tereschenko, Mykhailo Vlasyuk, Volodymyr Varymez, Vyacheslav Zinchenko; and
30 Seamen Andriy Eider, Bohdan Holovash, Yevheniy Semydotskyy and Serhiy
31 Tsybizov.
32

33 These servicemen are charged with a criminal offence – violating the border of the
34 Russian Federation; and they are now under pre-trial investigation. Their detention
35 has been renewed twice by Russia's courts. The second time was only three weeks
36 ago, two days after Ukraine submitted its Request for provisional measures before
37 this Tribunal. This is just an additional illustration of Russia's continuing disrespect
38 for international law.
39

40 From the moment of the detentions, Ukraine has worked urgently to resolve this
41 matter. In keeping with article 33 of the United Nations Charter, we gave Russia
42 every opportunity to settle the issue by diplomatic means. We have worked through
43 a variety of international fora to persuade Russia to respect its international
44 obligations. However, having made no progress after several months of such efforts,
45 and instead seeing the detention of our servicemen being extended, we finally had
46 no choice but to turn to judicial means of dispute resolution.
47

48 Russia has ignored not only Ukraine's requests but also numerous calls by the
49 international community, insisting that its actions are justified under its domestic laws
50 and under the United Nations Convention on the Law of the Sea; and now Russia

1 seeks to escape scrutiny of its unlawful actions by asking this Tribunal to treat them
2 as military activities, exempt from compulsory dispute settlement under the
3 Convention, even though Russia has previously insisted that the events of
4 25 November were not a military confrontation.

5
6 In fact, Russia's conduct constitutes a profound violation of the Convention and
7 customary international law. Let me be clear, there is no question that Crimea is part
8 of Ukraine and that the waters in which the seizure occurred constitute Ukraine's
9 territorial sea or exclusive economic zone. However, Russia's actions would violate
10 the Convention even if they had occurred in Russia's territorial sea or exclusive
11 economic zone. The immunity of warships is a core sovereign immunity in the
12 international system. Warships and their personnel cannot be arrested by the law
13 enforcement authorities of foreign States and subjected to the jurisdiction of foreign
14 courts.

15
16 Ukraine has come before this Tribunal seeking urgent relief from ongoing harm
17 under articles 32, 58, 95 and 96 of the Convention and under customary principles of
18 international law.

19
20 Each additional day of detentions, each interrogation, each court appearance
21 aggravates the dispute between the Parties.

22
23 This Tribunal has previously said that a warship is the very "expression of the
24 sovereignty of the State whose flag it flies"¹ and it has recognized that each day a
25 warship is detained results in material and irreparable harm to the legal and practical
26 interests of the flag State.

27
28 As for the servicemen, this Tribunal has more than once observed that
29 "considerations of humanity must apply in the law of the sea as they do in other
30 areas of international law."² Here, such principles require an immediate end to the
31 separation of Ukraine's 24 servicemen from their families and their homes.

32
33 The harm imposed on Ukraine, its naval vessels and its servicemen is grave and
34 grows with every day that passes. The situation is, therefore, exceptionally urgent.
35 That is why Ukraine today asks the Tribunal to grant provisional measures requiring
36 that Russia promptly release Ukraine's naval vessels and its servicemen, and return
37 them to Ukraine.

38
39 Mr President, before asking that you give the floor to our counsel team, may
40 I express Ukraine's regret that the Russian Federation has once again decided not to
41 fully participate in provisional measures proceedings before this Tribunal.

42
43 The Russian Federation's decision not to participate in the hearing came as a
44 surprise to Ukraine. After all, a Russian delegation participated in the pre-hearing

¹ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 94.

² *Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶ 133 (citing *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999, ¶ 155).

1 phone call with the President of the Tribunal on 23 April 2019. Russia’s decision not
2 to appear here today is regrettable.

3
4 However, this Tribunal has previously had occasion to conduct hearings and award
5 provisional measures against the Russian Federation despite Russia’s decision not
6 to appear. That decision cannot prejudice Ukraine’s ability to obtain international
7 justice for its vessels and servicemen. As the Tribunal stated in *Arctic Sunrise*, it
8 must ensure that the other Party is not “put at a disadvantage because of the non-
9 appearance of the Russian Federation in the proceedings.”³

10
11 Mr President, Members of the Tribunal, let me return to the critical facts at hand. The
12 warships the *Berdyansk* and *Nikopol*, the naval vessel *Yani Kapu* and the
13 24 servicemen on board remain, unlawfully, in Russian custody and subject to
14 Russia’s jurisdiction.

15
16 This situation cannot continue without further irreparable harm to Ukraine’s rights.
17 With your permission, our counsel team will address why the situation satisfies the
18 requirements for the grant of provisional measures under the Convention.

19
20 Mr Gimblett will provide a brief factual background, including addressing events after
21 Ukraine filed its Request for provisional measures on 16 April.

22
23 Professor Soons will describe the legal grounds for Ukraine’s request and will also
24 address the *prima facie* jurisdiction of an Annex VII tribunal over the underlying
25 dispute.

26
27 Ms Cheek will respond to the Russian Federation’s military activities argument.

28
29 Finally, Professor Thouvenin will address the appropriateness of provisional
30 measures in this case and the specific elements of harm and urgency.

31
32 Mr President, I respectfully ask you to call Mr Gimblett to the podium.

33
34 **THE PRESIDENT:** Thank you, Ms Zerkal. I now give the floor to Mr Jonathan
35 Gimblett to make the next statement for Ukraine.

36
37 **MR GIMBLETT:** Mr President, Members of the Tribunal, it is an honour to appear
38 before you on behalf of Ukraine. I will describe the facts giving rise to Ukraine’s
39 claim, before other members of our team explain how those facts support the
40 prescription of provisional measures by the Tribunal. I will also provide some
41 additional factual background in response to the Memorandum of the Government of
42 the Russian Federation dated 7 May 2019. I will refer during the course of my
43 presentation to a slide deck that can be found at the first tab in your binders and
44 which will be projected simultaneously on the screen.

45
46 The essential facts of this case are not in dispute. On 25 November 2018, two small
47 Ukrainian warships – the *Berdyansk* and *Nikopol* – and a naval auxiliary vessel, a

³ *Arctic Sunrise (Netherlands v. Russia)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013, ¶ 56.

1 tugboat named the *Yani Kapu*, were seized and detained by ships of the Russian
2 Coast Guard. The seizure took place in the Black Sea, to the south and west of the
3 entrance to the Kerch Strait.⁴ The relevant maritime area is shown on the map at
4 tab 1, page 1 in your binders and now on the screen.

5
6 A report published by Russia's Federal Security Service, the FSB, records that the
7 Ukrainian vessels were in the Black Sea and traveling away from the Crimean
8 coastline at the time of the seizure.⁵ The Ukrainian Navy has also submitted a report
9 with Ukraine's Request for provisional measures, which can be found at tab 3 in your
10 binders. As that report explains, Ukraine does not have precise coordinates for the
11 boarding of the vessels, either because the vessels did not have the opportunity to
12 transmit their position or because the Russian Federation jammed the relevant
13 transmissions.⁶

14
15 While both the FSB report and Russia's Memorandum of 7 May are silent on the
16 subject, the Ukrainian Navy estimates, based on transmissions sent before the
17 seizures, that the *Berdiansk* and the *Yani Kapu* were seized at a distance of
18 approximately 12nm from the coast, and the *Nikopol* at a distance of approximately
19 20nm from the coast.⁷ The separate declaration provided by Vice Admiral Andrii
20 Tarasov, which you can find at tab 4 in your binders, explains the basis for the
21 Ukrainian Navy's estimates in more detail.⁸ The estimated locations of the seizures
22 are shown on the map, at tab 1, page 2, now on your screen.

23
24 After the seizure, the vessels and the 24 servicemen on board them were
25 transported to the port of Kerch, a Russian-occupied port on the eastern coast of
26 Crimea, which is also shown on the map at tab 1, page 2. On the next slide, at tab 1,
27 page 3 and now on screen, an AFP press photograph shows the three vessels in
28 Russian custody at Kerch, with what appear to be Russian officials on board the
29 *Nikopol*, which is the vessel marked P176.⁹

30
31 Russian government documents show that the servicemen were charged with the
32 criminal offence of "a crossing of the state border of the Russian Federation without
33 obtaining appropriate permission ... [as part of an] organized group."¹⁰ For example,
34 at tab 1, page 4, and now on the screen, you can see the indictment in the case of
35 Senior Seaman Andriy Anatoliyovych Artemenko, with underlined text reflecting that
36 charge.¹¹ As indicated in the same indictment and shown on this slide, the Russian

⁴ Annex A, Appendix C (Federal Security Service of the Russian Federation, Press Service Statement on Acts of Provocations by Ukrainian Naval Ships (26 November 2016)), pp. 5-6 [hereinafter "Annex A, Appendix C (FSB Report)"]; Annex B (Navy Report), ¶¶ 14-15.

⁵ Annex A, Appendix C (FSB Report), p. 4.

⁶ Annex B (Navy Report), ¶¶ 7, 15.

⁷ *Id.*, ¶ 15.

⁸ Annex F (Tarasov Declaration), ¶ 10.

⁹ Annex D, Appendix C, Image of Seized Ukrainian Military Vessels Seen in the Port of Kerch on November 26, 2018 (STF/AFP/Getty Images).

¹⁰ Annex C, Appendix 1 (Indictments Against the 24 Detained Ukrainian Servicemen), p. 1; *see also* Annex A, Appendix D (Order on Opening a Criminal Case and Commencing Criminal Proceedings (25 November 2018)), p. 2; Annex C, Appendix 2 (Six Decisions on Pre-Trial Detention for the 24 Detained Ukrainian Servicemen), p. 2.

¹¹ Annex C, Appendix 1 (Indictments Against the 24 Detained Ukrainian Servicemen), p. 1.

1 Federation contends that this alleged crossing violated article 322, paragraph 3, of
2 Russia's domestic criminal code.¹²

3
4 Other documents reflecting these charges include the Order on Opening a Criminal
5 Case and Commencing Criminal Proceedings at tab 7, submitted as Annex A,
6 Appendix D to Ukraine's Request, and the court documents submitted as Annex C,
7 Appendices 1 and 2 to Ukraine's Request.

8
9 Based on these charges, the Russian Federation is holding the 24 servicemen at the
10 Lefortovo Prison in Moscow, a detention centre of the Ministry of Justice of the
11 Russian Federation.¹³ While in detention, the servicemen have had access to
12 consular officials and Russian lawyers, although their meetings with consular officials
13 have been monitored by the Russian authorities. However, they have been allowed
14 no other visits, even from family members; and, as described in the news article
15 appearing at tab 9 in your binders, it was only after this case was filed that Russia
16 even allowed the sailors to call home for the first time.¹⁴

17
18 In his declaration at tab 6, Mr Nikolai Polozov, the Russian attorney for the most
19 senior officer among the servicemen, reports that the servicemen have repeatedly
20 been interrogated; that they have been subjected to psychological evaluations; that
21 they have been exposed to so-called "non-procedural" questioning by Russia's FSB
22 outside the presence of counsel; and, as reflected in the press photograph at tab 1,
23 page 6 and on the screen, that they have been displayed to the media in public court
24 appearances as though they were common criminals.¹⁵

25
26 The purpose of those court proceedings has been to extend the detentions of the
27 servicemen, and therefore the vessels, which are being held as evidence in the case
28 against the servicemen. Two such extensions have been granted to date. Most
29 recently, shortly after Ukraine filed its Request, a District Court in Moscow issued
30 orders on 17 April 2019 extending the detentions until late July. On 8 May 2019,
31 Ukraine submitted to the Tribunal the relevant District Court decision as to four of the
32 servicemen, which was obtained from Mr Polozov. The decision appears at tab 8.¹⁶

33
34 This recent hearing demonstrated the gravity and urgency of the situation
35 precipitated by Russia's detention of the vessels and servicemen. The court
36 documents submitted by Ukraine on 8 May confirm that Russia will further violate the
37 immunity of the vessels by subjecting them to ongoing investigations and forensic
38 examinations. Those documents also make clear that Russia will continue to push
39 forward with civilian interrogations and investigations, and with its plan to prosecute
40 the servicemen, subjecting them to a maximum sentence of six years in a Russian
41 labour camp.

42

¹² *Id.*

¹³ Annex C (Polozov Declaration), ¶ 3.

¹⁴ Annex H, Appendix D, ASPI News, Ukrainian Navy Seaman Calling Home from Captivity for the First Time (23 April 2019).

¹⁵ Annex C (Polozov Declaration), ¶¶ 5-6; Annex D, Appendix A, Canadian Broadcasting Corporation, 'This Is Soul-Destroying': Families of Captured Ukrainian Sailors Fear the World Has Forgotten Them (20 February 2019).

¹⁶ Annex G, Appendix A, Lefortovo District Court Ruling on the Extension of the Term of Arrest (17 April 2019), p. 8.

1 These then are the facts upon which Ukraine bases its claim. As I mentioned at the
2 outset, none of them are in dispute between the Parties. In its Memorandum of
3 7 May, however, Russia has raised a number of allegations about the events
4 preceding the seizure and detention of the vessels. To be clear, the dispute Ukraine
5 has submitted to arbitration, and that is now before this Tribunal, concerns only
6 Russia's exercise of jurisdiction over the three Ukrainian vessels in spite of their
7 complete immunity. That includes both the seizure and detention of those vessels,
8 and the subsequent civilian legal process to which both the vessels and those on
9 board have been subjected. Russia's version of what happened in the hours leading
10 up to the seizure and detention is simply not relevant to the immunity of the
11 Ukrainian vessels at the time they were seized. Nonetheless, in order to correct the
12 record, I will briefly respond to certain of Russia's contentions.

13
14 First, in its Memorandum of 7 May, Russia describes the mission of the three
15 Ukrainian naval vessels as a "secret" incursion ... into Russian territorial waters".¹⁷
16 That is simply not the case. The mission of the vessels was to navigate from the
17 Ukrainian port of Odessa to the Ukrainian port of Berdyansk on the northern shore of
18 the Sea of Azov, where they were thereafter to be permanently stationed.¹⁸ Other
19 Ukrainian naval vessels had successfully completed the same transit as recently as
20 September 2018, just two months earlier. On the slide now on the screen (tab 1,
21 page 7), you will see a general area map that reflects the location of both ports,
22 Odessa and Berdyansk, and of the Kerch Strait.

23
24 Russia refers to a document found on board the *Nikopol* guiding them, in Russia's
25 translation, to sail "covertly outside of the coastal and maritime regions of patrol of
26 the Black Sea Fleet of Russia and the Coast Guard of the FSB of Russia."¹⁹ Vice
27 Admiral Tarasov confirms that the purpose of this guidance was to avoid
28 unnecessarily provoking incidents with Russian government vessels during the two
29 days it would take to reach the Kerch Strait from Odessa.²⁰

30
31 Nor can the guidance be read as suggesting that the mission of the naval vessels
32 was to transit the Kerch Strait secretly – an impossible task given the breadth of the
33 Kerch Strait and the navigable channels through it. Indeed, as the Ukrainian Navy
34 report at tab 3 confirms, as it approached the Kerch Strait, the *Berdyansk* radioed
35 both a post of the Russian Border Guard Service and the port authorities at Kerch
36 and Kavkaz ports to announce the intention of the three vessels to proceed through
37 the Kerch Strait.²¹

38
39 Second, in its Memorandum, Russia invokes the allegedly crowded conditions in the
40 Kerch Strait on 25 November as a justification for the actions taken by its Coast
41 Guard.²² Again, the Russian account is full of holes and cannot be relied upon.

42

¹⁷ Memorandum of the Government of the Russian Federation (7 May 2019), ¶ 28 [hereinafter "Memorandum of the Russian Federation"].

¹⁸ 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), ¶ 1.

¹⁹ Memorandum of the Russian Federation, ¶ 20.

²⁰ Annex F (Tarasov Declaration), ¶ 9.

²¹ Annex B (Navy Report), ¶ 10.

²² Memorandum of the Russian Federation, ¶¶ 12, 16.

1 The Kerch Strait regularly handles significant traffic in commercial vessels. The slide
2 now on your screen (tab 1, page 8), for example, shows a snapshot of the traffic
3 through the Kerch Strait and to and from the Ukrainian and Russian ports on the Sea
4 of Azov on 7 May.²³

5
6 According to Russia, its Coast Guard warned the Ukrainian naval vessels on the
7 night of 24 November of a temporary suspension of the rights of innocent passage
8 for naval vessels in the approach to the entrance to the Kerch Strait due to an
9 expected storm. But, as the Ukrainian Navy report and the declaration of Vice
10 Admiral Tarasov establish, the Ukrainian Navy was unable to find any evidence of
11 such a restriction where it would normally be posted online.²⁴

12
13 Russia's version of events also fails to mention that, as widely reported in press
14 coverage of the events of 25 November 2018, and reflected in the press photograph
15 now on the screen (tab 1, page 9 of your binders), a tanker was positioned across
16 the span of the Kerch Strait bridge on 25 November 2018 blocking all traffic through
17 the Strait, not just that of naval vessels.²⁵

18
19 Finally, if the Strait had been as crowded by vessels carrying dangerous cargo as
20 Russia now claims it was at the time of these events, it would not have been
21 possible for Russian Coast Guard vessels to engage in a high speed chase and to
22 fire their guns in the direction of the Ukrainian vessels without risking civilian injury or
23 death.

24
25 Third, Russia accuses the Ukrainian naval vessels of what it calls "provocative
26 actions".²⁶ These include the allegation that the *Nikopol* and *Berdyansk* were put in a
27 condition of combat readiness with guns uncovered and elevated.²⁷ The suggestion
28 that these two small and lightly armoured Ukrainian vessels were in a position to
29 threaten the numerous Russian government vessels in the area in this way is, on its
30 face, not credible. (Tab 1, page 10) As the Ukrainian Navy report and Vice Admiral
31 Tarasov's declaration establish, the vessels were under orders to proceed peacefully
32 and abstain from any aggressive acts.²⁸ There is no indication that they did
33 otherwise.²⁹

34
35 Vice Admiral Tarasov points out that sailing with uncovered guns is entirely
36 consistent with Ukrainian standard operating procedure, just as it is with Russia's
37 own standard operating procedure.³⁰ And, given the proximity of the Russian Coast
38 Guard vessels, the raising of guns to an elevation of 45 degrees should – and would
39 – have been interpreted by those vessels as signalling the absence of aggressive

²³ Annex H, Appendix B, MarineTraffic.com, Traffic in the Kerch Strait as of Tuesday, 7 May 2019, at 5:10 PM Kyiv Time.

²⁴ Annex B (Navy Report), ¶ 9; Annex F (Tarasov Declaration), ¶ 7.

²⁵ Annex H, Appendix A, AP Photo, The Kerch Bridge Is Seen Blocked for Ships Entrance, Near Kerch, Crimea (25 November 2018).

²⁶ Memorandum of the Russian Federation, ¶ 16.

²⁷ *Id.*

²⁸ Annex B (Navy Report), ¶ 6; Annex F (Tarasov Declaration), ¶ 4.

²⁹ Annex F (Tarasov Declaration), ¶ 5.

³⁰ *Id.*, ¶ 6.

1 intent. Had the guns been fired at that elevation, the shells would have travelled far
2 above and beyond the Russian vessels in the vicinity.³¹

3
4 As I said previously, though, none of these incorrect factual allegations by Russia
5 are pertinent to your consideration of Ukraine's claim, which concerns only Russia's
6 exercise of jurisdiction over the Ukrainian vessels and servicemen, beginning with
7 their seizure and detention on 25 November 2018. Even if these Russian allegations
8 were true, which they are not, the undisputed facts of this case would still give rise to
9 a clear and continuing breach of the Convention and an urgent situation meriting
10 provisional measures to preserve Ukraine's rights.

11
12 With the Tribunal's permission, I will now cede the podium to Professor Soons to
13 address the legal grounds for Ukraine's claim and the Tribunal's *prima facie*
14 jurisdiction.

15
16 **THE PRESIDENT:** Thank you, Mr Gimblett. I now give the floor to Mr Alfred Soons.

17
18 **MR SOONS:** Mr President, Members of the Tribunal, it is an honour for me to appear
19 before you on behalf of Ukraine in this important case. My task today will be to set
20 out the legal grounds for Ukraine's Request for provisional measures, and then to
21 show that the legal grounds Ukraine invokes *prima facie* afford a basis for the
22 jurisdiction of an Annex VII tribunal. Thereafter I will show that Ukraine has complied
23 with the requirements of sections 1 and 2 of Part XV of the Convention in connection
24 with the underlying dispute.

25
26 First, the legal grounds. Ukraine's Request for provisional measures is intended to
27 protect its rights under the Convention and customary international law to complete
28 immunity of its warships, naval auxiliary vessels and all persons on board from the
29 jurisdiction of any other State. Warship immunity is a fundamental and longstanding
30 tenet of the law of the sea and, as I will explain further, the rights Ukraine seeks to
31 protect meet and exceed the standard of plausibility applied at the provisional
32 measures stage.³²

33
34 As this Tribunal explained in its provisional measures order in the "*ARA Libertad*"
35 Case, a warship, and any other vessel assigned to the public service of national
36 defence, "is an expression of the sovereignty of the State whose flag it flies."³³
37 Several articles of the Convention entitle such ships to "complete immunity" from
38 seizure, detention and legal process.

39
40 In particular, articles 95 and 96 of the Convention provide that warships and "ships
41 owned or operated by a State and used only on government non-commercial
42 service" – of which naval auxiliary vessels are the classic example – enjoy "complete
43 immunity from the jurisdiction of any State other than the flag State". Article 58
44 extends the application of the immunity under articles 95 and 96 to the exclusive
45 economic zone. Article 32 and customary international law guarantee the same

³¹ *Id.*

³² *Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶ 84.

³³ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 94.

1 immunity in the territorial sea. In short, wherever in the seas a naval vessel may be
2 found, the Convention requires that it be accorded complete immunity from the
3 jurisdiction of all States other than its flag State.

4
5 The immunity of warships, as a specific application of the principle of State immunity,
6 has been established since at least the early 1800s. It is often pointed out that the
7 doctrine was recognized more than two centuries ago in the 1812 decision of the
8 United States Supreme Court in the *Schooner Exchange v. McFaddon* case,³⁴ and is
9 also reflected in other venerable judgments, such as the 1880 decision of the Court
10 of Appeals of England and Wales in *The Parlement Belge* case.³⁵ Both these
11 authorities analogize the immunity of warships to the equally fundamental and
12 longstanding rule of diplomatic immunity.

13
14 More recently, the 1958 Geneva Conventions on the Territorial Sea and Contiguous
15 Zone and on the High Seas recognized and confirmed the customary immunity of
16 warships and other non-commercial government vessels. Like the Law of the Sea
17 Convention, the Convention on the Territorial Sea and Contiguous Zone provided in
18 article 22 that nothing in it would “affect ... the immunities which [government ships]
19 enjoy.”³⁶ Similarly, the Convention on the High Seas specified in articles 8 and 9 that
20 warships and government non-commercial vessels have “complete immunity from
21 the jurisdiction of any State other than the flag State.”³⁷

22
23 This rule of “complete immunity” for warships and other governmental vessels is
24 recognized not only in treaties relating to the Law of the Sea, but also in other
25 relevant international instruments. For example, while allowing for legal process
26 against government vessels on commercial service, article 16(2) of the United
27 Nations Convention on Jurisdictional Immunities of States and Their Property
28 categorically excludes jurisdiction over “warships or naval auxiliaries” and “other
29 vessels ... used ... only on government non-commercial service”.³⁸

30
31 Not surprisingly, given that the Russian Empire, the Soviet Union and the Russian
32 Federation have all maintained substantial naval forces in the Pacific, the Baltic Sea,
33 the Black Sea and further afield, Russia has long benefited from the rule of complete
34 immunity. The Soviet Union, for example, asserted immunity to protect warships,
35 including submarines, operating both in international waters and in the territorial sea
36 and internal waters of other States – such as in the well-known case of the Soviet
37 submarine that ran aground in Swedish internal waters in 1981, which I will return to
38 in a few minutes. Even today, the Russian Federation continues to operate its
39 warships far from home – something that is only possible because of the immunity of
40 warships and the naval auxiliary vessels that support them.

41
42 It is unsurprising, therefore, that Russia has been a strong advocate for such
43 immunity, supporting the provisions on the immunity of governmental vessels in the

³⁴ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 142-47 (1812).

³⁵ *The Parlement Belge*, (1879) 4 P.D. 129, 144-155.

³⁶ Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at Art. 22.

³⁷ Convention on the High Seas, Geneva, 29 April 1958, at Arts. 8-9.

³⁸ United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, Art. 16.

1 1958 Geneva Conventions and even suggesting that they be expanded to cover
2 governmental ships on commercial service.³⁹

3
4 What precisely, then, does the rule of complete immunity protect? And what
5 obligations does it entail for third States?
6

7 As for the first question, the rule of complete immunity protects the ships themselves,
8 as well as their crews, their passengers and all others aboard them, and even goods
9 and equipment on board. This follows directly from the jurisprudence of this Tribunal.
10 In its judgment in the *M/V "Saiga" No. 2* case, for example, this Tribunal recognized
11 that "the Convention considers a ship as a unit", comprised of not only the ship itself
12 but also its crew, every other person on board the ship or otherwise "involved or
13 interested in its operations", and the ship's cargo.⁴⁰ Oppenheim's International Law
14 states the case in even stronger terms, referring specifically to the fact that the
15 immunity of a naval vessel takes precedence over the criminal jurisdiction of the
16 coastal State with respect to the vessel and all persons it carries:
17

18 I will quote the relevant passage from Oppenheim, as it is shown on the screen, but
19 it is a long passage. I will read it because it is useful to have it in mind.
20

21 A warship with all persons and goods on board, remains under the jurisdiction
22 of her flag State even during her stay in foreign waters. Members of the crew
23 who commit crimes when ashore and then return to the vessel may not be
24 seized by the authorities of the littoral state, who can only request their
25 surrender: If the request is granted the local courts have jurisdiction to try the
26 offender, but not if it is refused, or if it is granted on conditions which exclude
27 the exercise of jurisdiction. Individuals who are subjects of the littoral state and
28 are only temporarily on board may, although they need not, be taken to the
29 home country of the vessel, to be punished there, if they commit a crime on
30 board. Even individuals who do not belong to the crew but who, after having
31 committed a crime on the territory of the littoral state, have taken refuge on
32 board, cannot be forcibly taken off the vessel; if the commander refuses their
33 surrender, it can be obtained only by diplomatic means from his home state.⁴¹
34

35 As for the second question – what obligations does the rule of complete immunity
36 entail for States other than the flag State – again, the answer is well established. As
37 implied by the term "complete immunity", other States are obliged not to take any
38 action that physically or legally encumbers the vessel. Thus, they must not board
39 such a vessel, arrest it, detain it, or otherwise prevent it, in the words of the
40 "*ARA Libertad*" provisional measures order, from "discharging its mission and
41 duties".⁴² Further, as suggested by the passage from Oppenheim's just quoted, other

³⁹ See William N. Harben, *Soviet Attitudes and Practices Concerning Maritime Waters*, 15 JAG J. 149, 150 (1961).

⁴⁰ *M/V Saiga (No. 2) (St Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999, ¶ 106; see also *M/V "Virginia G" (Panama v. Guinea-Bissau)*, ITLOS Case No. 19, Judgment of 14 April 2014, ¶ 127; *The Arctic Sunrise*, Annex VII Arbitral Award on the Merits of 14 August 2015, ¶¶ 170-172.

⁴¹ See R. Jennings and A. Watts, *Organs of the States for Their International Relations: Miscellaneous Agencies, State Ships Outside National Waters*, Oppenheim's International Law Vol. 1 (Eds. Jennings and Watts) (19 June 2008), § 563.

⁴² *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶¶ 97-98.

1 States must not purport to subject the vessel or any person or thing on board to any
2 form of civilian legal process.⁴³

3
4 Notwithstanding the “complete immunity” from the exercise of jurisdiction the Law of
5 the Sea Convention accords to warships and other governmental vessels, Russia’s
6 Coast Guard has wrongly suggested that its attempt to prevent the return of the
7 vessels to Odesa, and its ultimate seizure of the vessels, was consistent with the
8 Convention. Specifically, in a report published on its website and reproduced at
9 tab 5, page 4, the FSB Coast Guard stated:

10
11 At 6:30 pm, the group of Ukrainian naval vessels, attempting to break through
12 the blockade, made sail and started moving at a course of 200 degrees – that
13 is a south southwest direction – heading out of the territorial sea of the Russian
14 Federation. The artillery ships *Berdyansk* and *Nikopol* were moving at a speed
15 of 20 knots, and the seagoing tugboat *Yana Kapu* at 8 knots. The border patrol
16 ships *Don* and *Izumrud* started following the group of Ukrainian naval ships
17 and communicated to them an order to stop (in accordance with article 30 of
18 the UN Convention on the Law of the Sea of 1982 and article 12(2) of Federal
19 Law 155 dated July 31, 1998, “On the Internal Seas, Territorial Sea, and
20 Contiguous Zone of the Russian Federation”).⁴⁴

21
22 For the avoidance of doubt, Ukraine of course does not accept that the area of sea
23 within 12 miles of the coast of Crimea is “the territorial sea of the Russian
24 Federation”. However, and contrary to Russia’s position at footnote 58 of its
25 Memorandum of 7 May, the identity of the coastal State is not a question that this
26 Tribunal, or even the Annex VII tribunal still to be constituted, would need to resolve.
27 Even if one were to posit that the vessels were in a Russian territorial sea, article 30
28 does not permit the coastguard of a littoral state to issue a foreign naval vessel with
29 “an order to stop”. To the contrary, the exclusive right accorded to the Russian Coast
30 Guard under article 30 would have been to require the vessels to leave the territorial
31 sea – something – and it is important to emphasize this – that the report
32 acknowledges the vessels were already in the process of doing.

33
34 In claiming to rely on the Law of the Sea Convention’s article 30, Russia overlooks
35 the fact that articles 30 and 31 (now shown on the screen) of the Convention serve
36 to confirm the complete immunity of warships and other governmental vessels from
37 foreign jurisdiction. They provide, as the exclusive remedies for a coastal State in
38 connection with a foreign naval vessel’s non-compliance with its laws and
39 regulations, that a coastal State is permitted under article 30 to “require [a warship]
40 to leave the territorial sea immediately”; and that, pursuant to article 31, the coastal
41 State may subsequently seek compensation from the flag State for any damage
42 caused by the warship.

43
44 Indeed, even before the adoption of the Convention, it was well established – under
45 article 23 of the Convention on the Territorial Sea and Contiguous Zone and
46 customary international law – that the only remedy against a warship for claimed

⁴³ See R. Jennings and A. Watts, *Organs of the States for Their International Relations: Miscellaneous Agencies, State Ships Outside National Waters*, Oppenheim's International Law Vol. 1 (Eds. Jennings and Watts) (19 June 2008), § 563.

⁴⁴ Annex A, Appendix C (FSB Report), p. 4.

1 non-compliance with the rules on innocent passage was to request that the warship
2 “leave the territorial sea”.⁴⁵

3
4 I would note that Russia itself has relied on this rule to its benefit. In the 1981
5 submarine incident in Swedish waters I referred to a few minutes ago, the Soviet
6 Union reportedly submitted a diplomatic note (tab 10) to the Swedish government
7 invoking:

8
9 The generally recognized principle of international law under which a warship
10 enjoys complete immunity from the jurisdiction of any state other than the one
11 under whose flag she is sailing.

12
13 The note continued:

14
15 Even if a foreign warship fails to observe a coastal State’s rules on passage
16 through its territorial waters, the only thing the coastal State may do is demand
17 that she leave its waters.⁴⁶

18
19 Mr President, Members of the Tribunal, it is therefore apparent that, while Russia
20 claims to have complied with the Convention, it has in fact violated the immunity of
21 Ukraine’s naval vessels and the servicemen on board by seizing them, exercising its
22 jurisdiction over them, and continuing to do so up to the present day.

23
24 As Mr Gimblett just described, since the seizure, Russia has compounded its
25 violations of the Convention and aggravated the dispute between the Parties by,
26 among other things, conducting on-board investigations of the *Berdyansk*, *Nikopol*,
27 and *Yani Kapu*, in plain violation of those vessels’ immunity under the Convention;
28 and violating the corresponding immunity of the servicemen on board those vessels
29 by arresting them, initiating and pursuing civilian legal proceedings against them,
30 detaining them in Russian prisons, and repeatedly subjecting them to interrogations,
31 psychological examinations and legal process.

32
33 Each additional day of detention, each interrogation, each involuntary psychological
34 examination, and each court appearance compounds Russia’s violation of the
35 immunity guaranteed to Ukraine’s naval vessels under articles 32, 58, 95 and 96 of
36 the Convention.

37
38 Mr President, Members of the Tribunal, having set out the legal grounds for
39 Ukraine’s request, I will now turn to showing that, *prima facie*, an Annex VII tribunal
40 would have jurisdiction over the underlying dispute between the parties. Ukraine has
41 invoked provisions of the Convention that appear, *prima facie*, to afford a basis for
42 the jurisdiction of the Annex VII tribunal, and Ukraine has complied with the
43 remaining requirements of sections 1 and 2 of Part XV of the Convention, including
44 the obligation to exchange views under article 283. As a consequence, this Tribunal
45 is competent to prescribe provisional measures under article 290, paragraph 5.

46

⁴⁵ Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at Art. 23.

⁴⁶ Milton Leitenberg, The Case of the Stranded Sub, 83 Bulletin of Atomic Scientists 3, 10-11 (March 1982).

1 Ukraine has invoked provisions of the Convention that, *prima facie*, afford a basis for
2 the jurisdiction of an Annex VII tribunal.

3
4 Let me begin by recalling that article 290, paragraph 5, of the Convention provides
5 that this Tribunal is competent to prescribe provisional measures in connection with
6 a dispute “if it considers that *prima facie* the tribunal which is to be constituted would
7 have jurisdiction” over the dispute [and that tribunal, in our case, means the
8 Annex VII tribunal to be constituted].

9
10 In its most recent provisional measures order, in the “*Enrica Lexie*” case, this
11 Tribunal explained that this jurisdictional requirement is satisfied so long as “any of
12 the provisions invoked by the Applicant appears *prima facie* to afford a basis on
13 which the jurisdiction of the Annex VII arbitral tribunal might be founded”.⁴⁷

14
15 Here, Ukraine has invoked article 32, and, through article 58, paragraph 2, articles
16 95 and 96 of the Convention and, as just described, the Parties are plainly engaged
17 in a dispute over the interpretation and application of those articles. In Ukraine’s
18 view, Russia’s seizure and continued detention of the naval vessels, as well as its
19 criminal prosecution of the vessels’ servicemen, violate the principle of warship
20 immunity under these articles. Russia, however, has maintained that its actions are
21 lawful under, among other provisions, article 30 of the Convention. It is this
22 difference of views that the Annex VII tribunal would have to resolve, and that it will
23 have the competence to resolve under articles 286 and 288 of the Convention.

24
25 Mr President, Members of the Tribunal, in addition to being a dispute concerning the
26 interpretation or application of the Convention under articles 286 and 288, the
27 dispute submitted by Ukraine meets the remaining conditions for the jurisdiction of
28 an Annex VII tribunal.

29
30 Ukraine’s written request, and the notification appended to Ukraine’s request, set out
31 the bases for this conclusion: Ukraine and Russia are both Parties to the
32 Convention; both Ukraine and Russia have selected Annex VII arbitration as the
33 means of settling disputes such as this one pursuant to section 2 of Part XV of the
34 Convention; and, prior to submitting the notification, Ukraine satisfied the
35 requirement in article 283 that the Parties to the dispute “proceed expeditiously to an
36 exchange of views regarding its settlement by negotiation or other peaceful means.”

37
38 Russia, of course, in its 7 May Memorandum, denies that article 283 has been
39 satisfied; but its argument is simply incorrect.

40
41 Article 283, paragraph 1 (tab 1), shown on the screen, provides that “the Parties to
42 the dispute shall proceed expeditiously to an exchange of views regarding its
43 settlement by negotiation or other peaceful means.” This obligation to exchange
44 views is simply that. As this Tribunal has observed in its provisional measures order
45 in “*Arctic Sunrise*”, “a State Party is not obliged to continue with an exchange of
46 views when it concludes that the possibilities of reaching agreement have been

⁴⁷ *Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶ 52.

1 exhausted”,⁴⁸ a view consistent with its previous decisions.⁴⁹ And as the Annex VII
2 tribunal determined, in concurring with this Tribunal’s view that article 283 had been
3 satisfied in the circumstances of the “*Arctic Sunrise*” Case:

4
5 The Parties exchange views regarding the means by which a dispute that has
6 arisen between them may be settled. Negotiation is evoked as one such
7 means. Arbitration is another. Article 283(1) does not require the Parties to
8 engage in negotiations regarding the subject matter of the dispute.⁵⁰
9

10 Here, in our case, on 15 March 2019, Ukraine transmitted a diplomatic note to the
11 Russian Federation indicating its preference that the dispute be resolved through
12 Annex VII arbitration and requesting an exchange of views pursuant to article 283
13 (tab 12).⁵¹ In light of the urgency of the situation, Ukraine insisted that this exchange
14 of views take place within ten days. Contrary to Russia’s argument,⁵² this ten-day
15 deadline was not “arbitrary”. It reflected the fact that each passing day further
16 compounded the harm to Ukraine’s rights, and that Ukraine had already, over a
17 period of months, repeatedly protested the detention of the vessels and servicemen
18 and sought their release.
19

20 Russia acknowledged receipt of Ukraine’s diplomatic note 10 days later, on
21 25 March 2019. However, Russia did not even attempt to exchange views with
22 Ukraine within this time frame, nor did it provide any explanation of why it could not
23 do so. Instead, as shown at tab 13 in your folder and on the screen, Russia simply
24 stated that “possible comments” on Ukraine’s note of 15 March were “expected to be
25 sent separately” – leaving it entirely ambiguous whether, and when, Russia would
26 ultimately agree to participate in an exchange of views.⁵³ It was only on 12 April, four
27 weeks after Ukraine’s request for an exchange of views, that Russia finally accepted
28 Ukraine’s request (tab 14).⁵⁴
29

30 Despite the delay, Ukraine promptly responded to Russia’s diplomatic note (tab 15)
31 and arranged a meeting between the Parties on 23 April 2019 in The Hague.⁵⁵ By

⁴⁸ *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013, ¶ 76.

⁴⁹ *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 60; *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 71.

⁵⁰ *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, Award on the Merits of 14 August 2015, ¶ 151; see also *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 333.

⁵¹ Annex A, Appendix E (Note Verbale No. 72/22-188/3-682 from Ukraine to the Russian Federation, dated 15 March 2019).

⁵² Memorandum of the Russian Federation, ¶ 37.

⁵³ Annex I, Appendix A (Note Verbale No. 3528/2 from the Russian Federation to Ukraine, dated 25 March 2019).

⁵⁴ Annex I, Appendix B (Note Verbale No. 4502/2 from the Russian Federation to Ukraine, dated 12 April 2019).

⁵⁵ Annex I, Appendix C (Note Verbale No. 72/22-188/3-973 from Ukraine to the Russian Federation, dated 15 April 2019) (proposing time and location for exchange of views); Annex I, Appendix D (Note Verbale No. 4643/2 from the Russian Federation to Ukraine, dated 16 April 2019) (proposing alternative location for exchange of views); Annex I, Appendix E (Note Verbale No. 72/22-194/60-996 from Ukraine to the Russian Federation, dated 17 April 2019) (reiterating proposed location and proposing agenda for exchange of views); Annex I, Appendix F (Note Verbale No. 4841/2 from the

1 this time, on 1 April, Ukraine had filed its notification under Annex VII, including a
2 request for provisional measures, but Ukraine remained interested in exchanging
3 views regarding possible means of settlement of the dispute. At the same time,
4 Ukraine could not accept further delay of implementation of the requested provisional
5 measures. Accordingly, Ukraine filed its Request for provisional measures from this
6 Tribunal on 16 April.

7
8 At the meeting between the Parties on 23 April, the Russian Federation failed to
9 make any concrete proposals to resolve the dispute or to secure the prompt release
10 of the servicemen or vessels. Instead, the Russian Federation proposed additional
11 consultations between the Parties under article 283, and also asked Ukraine whether
12 it had considered joining the present case to the ongoing Annex VII proceeding
13 between the Parties.

14
15 In response to Russia's suggestion of additional consultations, Ukraine asked the
16 Russian delegation whether Russia had any specific objectives or requests for
17 Ukraine to consider as part of such consultations. The Russian Federation was
18 unable to provide any. Accordingly, Ukraine indicated that further consultations were
19 not likely to be fruitful and were not appropriate given, among other things, the
20 urgency of the situation precipitated by Russia's actions.

21
22 In connection with Russia's question regarding joinder of these proceedings, Ukraine
23 explained that the ongoing Annex VII case involves an entirely different subject
24 matter from the present dispute concerning warship immunity and attempting to
25 combine those two separate disputes at this stage would not be efficient. Notably,
26 the delegation of the Russian Federation did not indicate that Russia itself viewed
27 joinder of the two disputes to be appropriate – or, indeed, even legally possible.
28 Ukraine confirmed its view that a separate Annex VII arbitral proceeding is the
29 proper way to settle this distinct dispute.

30
31 As should be apparent from this account of events, Ukraine's obligation to exchange
32 views was satisfied on 25 March 2019. Article 283 requires the exchange of views to
33 take place "expeditiously" and, in simply ignoring Ukraine's proposed schedule for an
34 exchange of views, Russia failed to comply with that obligation. When it received
35 Russia's note of 25 March 2019, Ukraine could not have foreseen that Russia
36 would – weeks later – agree to Ukraine's request for a meeting, and Ukraine was
37 entitled to presume that further attempts to seek negotiations would not be fruitful.
38 Ukraine was not required to indefinitely postpone its case and allow further harm to
39 its rights.

40
41 To the extent the Tribunal considers that the Parties were still under an obligation to
42 exchange views after 25 March, however, Ukraine's 23 April exchange of views with
43 the Russian Federation satisfies the requirements of article 283. Again, under the
44 plain text of the article, the only obligation imposed by article 283 is for each Party to
45 put forward its views on the appropriate process for resolution of the dispute. That
46 obligation was satisfied, at least on Ukraine's part, at the 23 April meeting (and, for
47 that matter, also through the diplomatic notes that preceded the meeting).

Russian Federation to Ukraine, dated 19 April 2019) (accepting proposed time and location for exchange of views).

1
2 In sum, Ukraine has satisfied the requirements of article 283 in this case.

3
4 Mr President, Members of the Tribunal, having described the provisions of the
5 Convention that apply to this case, and that Russia continues to violate even today,
6 and having shown that the dispute submitted by Ukraine satisfies, *prima facie*, the
7 requirements of sections 1 and 2 of Part XV of the Convention, I now conclude my
8 portion of Ukraine's oral submissions. With your permission, Mr President, possibly
9 after the break, Ms Marney Cheek will address the remainder of Ukraine's case on
10 jurisdiction – specifically, its response to Russia's arguments under the military
11 activities clause in article 298(1)(b). I thank you for your attention to my presentation.

12
13 **THE PRESIDENT:** Thank you, Mr Soons. We have now reached 11.10 a.m. At this
14 stage the Tribunal will withdraw for a break of 20 minutes. We will continue the
15 hearing at 11.40 a.m.

16
17 (Break)

18
19 **THE PRESIDENT:** I now give the floor to Ms Marney Cheek to make the next
20 statement for Ukraine.

21
22 **MS CHEEK:** Mr President, Members of the Tribunal, it is an honour to appear before
23 you today on behalf of Ukraine. I will address Russia's claim that this dispute falls
24 within the scope of the optional exclusion for "disputes concerning military activities"
25 under article 298(1)(b) of the Convention. Russia contends that this Tribunal cannot
26 find that there is jurisdiction even on a *prima facie* basis because Ukraine's claims
27 fall within this military activities exception. That is not the case.

28
29 Russia's invocation of the military activities exception is misplaced. That exception
30 does not apply to Ukraine's claim that Russia has unlawfully exercised its jurisdiction
31 over the *Berdyansk, Nikopol* and *Yani Kapu* in contravention of the bedrock principle
32 of the sovereign immunity of warships and other naval vessels enshrined in the
33 Convention. At this stage of the proceedings, Russia's attempt to invoke the military
34 activities exception does not alter the proper conclusion that the Annex VII tribunal
35 would, *prima facie*, have jurisdiction over this dispute.

36
37 The military activities exception is not applicable to Ukraine's claims for two reasons.
38 First, Russia itself has repeatedly insisted that its actions are law enforcement, not
39 military, activities. Article 298 draws a clear distinction between law enforcement
40 activities on the one hand and military activities on the other. Russia characterizes its
41 own conduct as falling in the law enforcement category. Prior Annex VII tribunals
42 applying the Convention have correctly concluded that the military activities
43 exception cannot apply when the party whose actions are at issue has characterized
44 its own actions as non-military in nature. That is sufficient to dispose of Russia's
45 attempt to invoke the military activities exception in this case.

46
47 Second, even setting aside Russia's own characterization of its actions, the dispute
48 Ukraine has brought to the Tribunal, viewed on an objective basis, simply does not
49 concern military activities. It is not enough that some of the ships involved happened
50 to be military vessels. Rather, the acts of which Ukraine complains must be "military"

1 acts. Here, they are not; rather, they involve the exercise of domestic jurisdiction in a
2 law enforcement context.

3
4 Before elaborating on these two independent reasons why the military activities
5 exception does not apply in this case, an appropriate starting point is to look at the
6 language of article 298(1)(b).

7
8 The Convention itself establishes a categorical distinction between military and law
9 enforcement activities. Article 298(1)(b) contains two separate clauses: one for
10 disputes concerning military activities and one other clause for certain disputes
11 concerning law enforcement activities in regard to the exercise of certain sovereign
12 rights or jurisdiction related to fishing and marine scientific research. This structure
13 indicates that the concepts of “military activities” and “law enforcement activities” are
14 distinct, mutually exclusive categories. The *Virginia Commentary* confirms that in
15 crafting article 298(1)(b) the drafters of the Convention meant to “distinguish
16 between military activities and law enforcement activities.”⁵⁶ Scholars have likewise
17 noted that the Convention’s optional exception to jurisdiction for military activities
18 was included on the understanding that law enforcement activity would not be
19 considered a military activity.⁵⁷

20
21 In order for the military activities exception to be properly invoked, Ukraine’s claims
22 must concern military activities. In this case, they do not. Ukraine’s claims relate to
23 the seizure and detention of Ukrainian naval vessels and their crew, despite those
24 vessels’ immunity from Russian jurisdiction. Simply put, these claims do not concern
25 activities that are military in nature.

26
27 I will now elaborate on the two legal reasons for why Russia’s invocation of the
28 military activities exception under article 298(1)(b) cannot be accepted and why it is
29 therefore appropriate for this Tribunal to determine that an Annex VII tribunal would,
30 *prima facie*, have jurisdiction over Ukraine’s claims.

31
32 First, as noted, the military activities exception does not apply when the party whose
33 actions are at issue has characterized its actions as non-military in nature.

34
35 Second, the military activities exception is inapplicable in the instant case because,
36 even setting aside Russia’s own characterization of its activity, Ukraine does not
37 seek resolution of a dispute concerning military activities. Ukraine’s claims do not
38 allege a violation of the Convention based on activities that are military in title, but,
39 rather, Ukraine’s claims are based on Russia’s unlawful exercise of jurisdiction in a
40 law enforcement context.

41
42 Let me begin with the first legal basis for rejecting Russia’s invocation of the military
43 activities exception, and that is Russia’s own characterization of its activities. In
44 evaluating the applicability of the military activities exception to the Philippines’
45 claims against China in the *South China Sea Arbitration*, the Annex VII tribunal relied
46 on China’s own characterization of the Chinese activities that the Philippines had

⁵⁶ Myron H. Nordquist, et al., *United Nations Convention on the Law of the Sea: A Commentary* (2014) (“*Virginia Commentary*”), p. 135.

⁵⁷ See Gurdip Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), p. 148.

1 complained of. In the relevant portion of that case, Chinese military vessels and crew
2 were engaged in land reclamation, and the Chinese government repeatedly asserted
3 that its land reclamation activities were intended to serve civilian, not military,
4 purposes. The *South China Sea* Tribunal determined that it would not “deem
5 [Chinese] activities to be military in nature when China itself has consistently and
6 officially resisted such classifications and affirmed the opposite at the highest
7 levels.”⁵⁸ Parallel facts are presented here. Russia has repeatedly and consistently
8 stated that its actions that provide the basis for Ukraine’s claims were not military in
9 nature.

10
11 In particular, Russia has maintained that its arrest and detention of the Ukrainian
12 vessels and imprisonment and prosecution of the servicemen are solely matters of
13 domestic law enforcement. For example, the Russian FSB’s statement on the
14 incident, released on 26 November 2018, one day after the seizure of Ukraine’s
15 naval vessels, described the incident in terms of alleged violations of Russian
16 navigational regulations and statutes. That FSB statement, at tab 5, page 4, also on
17 the screen, shows the FSB’s assertion that the Ukrainian ships violated several
18 Russian laws, including: Federal Law 155 “On the Internal Seas, Territorial Sea, and
19 Contiguous Zone of the Russian Federation”,⁵⁹ and Federal Law No. 4730-I “On the
20 State Border of the Russian Federation.”⁶⁰ Subsequently, in a diplomatic note dated
21 5 December 2018, at tab 11, and also on the screen, the Russian Ministry of Foreign
22 Affairs explained that the Ukrainian servicemen were being detained for unlawfully
23 crossing the State border of the Russian Federation, in violation of article 322,
24 paragraph 3, of the Russian Criminal Code.⁶¹

25
26 Russia has continued to characterize its own actions as concerning civilian law
27 enforcement even after Ukraine filed its provisional measures request with this
28 Tribunal.⁶² In a public statement made in response to Ukraine’s Request for
29 provisional measures dated 16 April, which appears at tab 16, the Russian Ministry
30 of Foreign Affairs referred to an ongoing “criminal investigation being conducted in
31 the Russian Federation”.⁶³

32
33 Further, as Professor Soons mentioned, Russia has invoked article 30 of UNCLOS
34 to justify its detention of the *Berdyansk*, *Nikopol* and *Yani Kapu* on 25 November.
35 I again refer you to the Russian FSB Report of 26 November 2018 on the incident. At
36 tab 5, page 4, also on the screen, the Russian FSB invoked UNCLOS article 30.⁶⁴
37 Article 30 of UNCLOS is titled “Non-compliance by warships with the laws and
38 regulations of the coastal State”. This provision does not relate to military activities. It
39 specifically addresses a warship’s compliance, or lack thereof, with “the laws and
40 regulations of the coastal State”. The very provision upon which Russia itself relies
41 relates to law enforcement activities, not military activities. And it is clear from the

⁵⁸ *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award of 12 July 2016, ¶ 938.

⁵⁹ Annex A, Appendix C (FSB Report), pp. 2-4.

⁶⁰ *Id.*, p. 4.

⁶¹ Annex A, Appendix D (Note Verbale No. 14951/2 from the Russian Federation to Ukraine, dated 5 December 2018).

⁶² Annex H, Appendix C (Statement by the Ministry of Foreign Affairs of Russia, dated 16 April 2019).

⁶³ *Id.*

⁶⁴ Annex A, Appendix C (FSB Report), pp. 3-4.

1 contemporaneous record that Russia regarded the seizure and detention of which
2 Ukraine complained as an action taken to enforce its domestic laws and regulations.

3
4 Further, in this proceeding, the Russian Federation stated at paragraph 21 of its
5 Memorandum of 7 May that it submitted to this Tribunal:

6
7 On 26 and 27 November 2018, 24 Ukrainians (the Military Servicemen) on
8 board the vessels were formally apprehended under article 91 of the Code of
9 Criminal Procedure of the Russian Federation as persons suspected of having
10 committed a crime of aggravated illegal crossing of the State border of the
11 Russian Federation (section 3 of article 322 of the Criminal Code of the
12 Russian Federation).

13
14 Now Russia refers here to 26 and 27 November. Those are the dates that the
15 servicemen were formally arrested and charged under the Russian Criminal Code for
16 their alleged crime of illegally crossing the border. To be clear, the ships and crew at
17 issue were detained at sea on 25 November for that alleged crime.

18
19 In any case, Russia says that its detention of Ukraine's naval vessels was to enforce
20 the laws of the Russian Federation; and it is this detention that Ukraine claims
21 violates the Convention. Ukraine's claims are therefore outside the scope of the
22 military activities exception on which Russia attempts to rely.

23
24 Russia's Memorandum also spends significant time discussing events preceding the
25 detention, even though those events are not the basis of Ukraine's claims, and
26 Ukraine does not in this case allege any violation of the Convention based on those
27 events. As explained by Ukraine and in the statement of Vice Admiral Tarasov, the
28 mission of the *Berdyansk*, *Nikopol* and *Yani Kapu* was to navigate from the Ukrainian
29 port of Odessa to the Ukrainian port of Berdyansk where they were to be stationed
30 on a permanent basis, a trip that required passage through the Kerch Strait. These
31 naval vessels were simply in transit, and they notified the Russian Coast Guard of
32 their peaceful intentions.⁶⁵ Indeed, two months earlier, in September, Ukrainian naval
33 vessels had successfully completed the same passage on their way to Berdyansk.

34
35 There are certainly disputed facts related to why and how Russia decided to close
36 the Kerch Strait to Ukraine's naval vessels, and even whether or not the Kerch Strait
37 was actually closed; but that is not relevant to the case before you. What is relevant,
38 and what is not disputed, is this. At the time they were detained, Ukraine's warships
39 had left the area to return to Odessa. Coast Guard vessels were giving chase to
40 ships leaving the territorial sea. Why? In order to arrest them for violating Russian
41 domestic laws. This is a typical law enforcement encounter, except, importantly, the
42 subjects of that encounter were naval vessels that were immune from Russia's
43 exercise of jurisdiction. What transpired at the time of the unlawful seizure was not,
44 as Russia contends at paragraph 30 of its Memorandum, a situation involving
45 military forces arrayed in opposition to one another.

46
47 A further observation regarding Russia's Memorandum is warranted before I speak
48 to the second legal basis for rejecting Russia's invocation of the military activities
49 exception. Russia notes at paragraph 33(b) of its Memorandum that it denies that the

⁶⁵ Annex F (Tarasov Declaration), ¶ 5.

1 seizure and detention of which Ukraine complains arose in a situation of armed
2 conflict. It states that the detention of Ukraine's warships and military personnel is a
3 matter for its civilian courts. Russia also points to statements of Ukraine that have
4 described Russia's conduct as an act of aggression and has referred to the
5 Ukrainian servicemen in detention as prisoners of war, and Russia has emphatically
6 rejected both characterizations.

7
8 The focus of the Tribunal should be on Russia's characterization of its own conduct
9 when determining if this dispute concerns military activities. Russia is the Party
10 which seeks to invoke this exception to the Annex VII tribunal's jurisdiction, and
11 Russia is the Party whose actions are the subject of this dispute.

12
13 Certainly, there has been heated political rhetoric on both sides, but Russia's
14 consistent position that the seizure of Ukraine's warships was an exercise of
15 domestic law enforcement jurisdiction should be conclusive in this particular case.
16 After all, the legal grounds for Ukraine's claim is its vessels' complete immunity from
17 the exercise of Russia's jurisdiction, and Russia, by its own account, exercised law
18 enforcement jurisdiction over those military vessels and their crew.

19
20 The *South China Sea* Annex VII tribunal properly recognized that a State may not
21 invoke the military activities exception for activities that a State itself has insisted are
22 not military in nature. Consistent with that approach, Ukraine asks this Tribunal to
23 hold Russia to its repeated and consistent statements that the seizure and detention
24 of Ukraine's warships was a law enforcement exercise. The military activities
25 exception under article 298(1)(b) is, accordingly, not applicable to this dispute.

26
27 While it is sufficient for this Tribunal to rely on Russia's own statements to conclude
28 that the military activities exception does not apply to this dispute, there is a second
29 reason why Russia cannot invoke the military activities exception. Simply put,
30 Ukraine's claims do not concern military activities, and so the exception is not
31 applicable in the present circumstances.

32
33 Returning to the text of article 298(1)(b), the military activities exception applies to
34 "disputes concerning military activities, including military activities by government
35 vessels and aircraft engaged in non-commercial service". According to the Oxford
36 English Dictionary, the ordinary meaning of the verb "to concern" is "to be about".⁶⁶
37 Thus the exception applies to disputes that are about military activity. In other words,
38 the exception is properly invoked only where the specific conduct that is alleged to
39 constitute a violation of the Convention itself qualifies as a "military activity".

40
41 The narrow meaning of "concerning" in article 298 is confirmed by the context. The
42 Convention uses broader terms in other exceptions from mandatory dispute
43 resolution, such as "arising from", "arising out of" and "arising from or in connection
44 with". A dispute may "arise from" or be "in connection with" certain events that are
45 causally related to the violation, even though those events do not constitute the
46 violation itself. Yet the drafters chose not to use those broader terms in article
47 298(1)(b).

⁶⁶ See, e.g., Oxford English Dictionary, *concern* (v) (" . . . [T]o be about"); *id.*, *concerning* (prep) ("In reference or relation to; regarding, about").

1
2 Taking account of this context, the use of the term “concerning military activities”
3 must be viewed as a deliberate choice, reflecting an intent to draw narrowly the
4 scope of the exception under article 298(1)(b).
5

6 What, then, is a dispute “concerning” military activities? It is a dispute that is about
7 military activities. In other words, it is a dispute where the activity claimed to violate
8 the Convention is itself a military activity. To determine, then, whether Russia can
9 invoke the military activities exception to prevent this Tribunal from finding that the
10 Annex VII tribunal would have *prima facie* jurisdiction over Ukraine’s claims, the
11 Tribunal should examine whether Ukraine’s claims are about military activity – and
12 they are not.
13

14 In the first instance, a dispute does not “concern military activities” simply because it
15 involves warships or because warships were present. Rather, the subject of the
16 dispute – i.e. the acts of which Ukraine complains – must be military acts. Article
17 298(1)(b)’s express reference to military activities by non-military governmental
18 vessels confirms that it is not the type of vessel, but rather the type of activity the
19 vessel is engaged in, that matters.
20

21 If article 298(1)(b) was meant to exclude all activities of warships from dispute
22 settlement, then its language would be different. Rather than focusing on disputes
23 “concerning military activities”, the article could have explicitly permitted Parties to
24 exclude from jurisdiction all disputes concerning “activities by warships”, or all
25 disputes concerning “activities by ships subject to articles 29 to 32 and 95 of the
26 Convention”. Yet warships are not the focus of this voluntary exception to jurisdiction
27 for military activities.
28

29 Further, given that many countries use their navies and coast guards for law
30 enforcement at sea, the military activities exception could not possibly apply to all
31 disputes involving military vessels. The simple fact, then, that the Russian
32 coastguard seized the *Berdyansk*, *Nikopol* and *Yani Kapu* does not support the
33 invocation of the military activities exception.
34

35 The Russian Federation also says a Russian military helicopter and a Russian naval
36 vessel were in the vicinity during the Russian Coast Guard’s boarding and arrest of
37 the Ukrainian naval vessels. Specifically, the FSB report mentions that a naval
38 helicopter stopped the *Nikopol* and that a corvette of the Black Sea Fleet
39 “approached the site where the Ukrainian naval boat was stopped in order to monitor
40 its actions.”⁶⁷ This discrete naval support for the Coast Guard’s enforcement action
41 at sea is not unusual, and does not transform a law enforcement effort into a military
42 one. The Russian navy did not seek to board the Ukrainian vessels or otherwise
43 engage with them or interfere with the Coast Guard’s activities. The Russian navy’s
44 limited role in support of the Russian Coast Guard as the incident was unfolding only
45 bolsters the conclusion that the seizure and detention of Ukraine’s warships was a
46 law enforcement matter, not a military one.⁶⁸
47

⁶⁷ Annex A, Appendix C (FSB Report), p. 4.

⁶⁸ *Id.*, p. 6.

1 Interpreting article 298(1)(b) as applying solely to disputes where the activity alleged
2 to violate the Convention is itself a military activity is also consistent with the object
3 and purpose of the Convention. As set forth in its preamble, the Convention was
4 designed to establish a legal order capable of “settling] ... *all issues* relating to the
5 law of the sea”.⁶⁹ An expansive reading of the military activities exception as
6 excluding from jurisdiction any dispute that involves military vessels would create a
7 wide gap in the judicial enforcement of the Convention. Given the regular role of
8 navies in law enforcement, a carve-out for any dispute involving military vessels
9 could cover the majority of law enforcement activity at sea that is otherwise subject
10 to the Convention.

11
12 Accordingly, whether this dispute concerns military activities depends not on the
13 particular ships that were present, but rather on the type of Russian activity alleged
14 to violate the Convention. That is the test that was adopted in the *South China Sea*
15 *Arbitration* tribunal, where the tribunal observed that “the relevant question” is
16 “whether the dispute itself concerns military activities, rather than whether a Party
17 has employed its military in some manner in relation to the dispute.”⁷⁰

18
19 As previously mentioned, as Russia itself points out at paragraph 30 of its
20 Memorandum, the *South China Sea* tribunal found the military activities exception to
21 apply in a circumstance “involving the military forces of one side and a combination
22 of military and paramilitary forces on the other, arrayed in opposition to one
23 another.”⁷¹ Russia’s assertion that this was the situation at the time of its seizure of
24 Ukraine’s vessels is demonstrably false.

25
26 What was happening when these Ukrainian warships were seized? The *Berdyansk*,
27 *Nikopol* and *Yani Kapu* were not engaged with the Russian military; they were not
28 arrayed in opposition to one another. Instead, the Ukrainian vessels could not have
29 been considered a threat. To the contrary, as I have mentioned, it is undisputed that
30 the Ukrainian warships were trying to leave the area, and they were being chased by
31 the Russian Coast Guard. The sole justification offered for this chase was to effect
32 an arrest for the violation of Russia’s domestic laws.

33
34 While the Russian Coast Guard reportedly escalated its use of force as it attempted
35 to exercise jurisdiction over Ukraine’s naval vessels, the use of force alone does not
36 convert a law enforcement activity into a military one.

37
38 As this Tribunal observed in *M/V “Saiga” (No. 2)*, orders to stop, warning shots, and
39 the use of force are all used in law enforcement at sea, generally in an escalating
40 fashion.⁷² According to Russia, the Russian Coast Guard sent signals to the
41 Ukrainian navy vessels to stop as they sailed away from the Crimean coast and
42 toward Odessa. Given their immunity, it is not surprising that the Ukrainian naval
43 vessels ignored those signals. Russia states that warning shots were then fired by
44 the Russian Coast Guard because the Ukrainian warships refused orders to stop but

⁶⁹ UNCLOS, Preamble, 25 (emphasis added).

⁷⁰ *South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award of 12 July 2016, ¶ 1158.

⁷¹ Memorandum of the Russian Federation, ¶ 30.

⁷² *M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, ¶ 156.

1 instead continued on their way.⁷³ Again, according to Russia’s account, eventually
2 there was a resort to force, whereby shots were fired at the *Berdyansk* to prevent the
3 *Berdyansk* from leaving the area. Such escalation is not a quintessential military
4 activity; it is a quintessential law enforcement one. The Russian Coast Guard was
5 escalating their engagement in an effort to assert their law enforcement jurisdiction
6 over the warships. This is consistent with the pattern of escalation that this Tribunal
7 has recognized is traditionally followed in law enforcement operations at sea.

8
9 Further, as I also have mentioned, after the Ukrainian naval vessels were detained,
10 Russian authorities charged the servicemen on board the vessels under
11 article 322(3) of Russia’s criminal code for allegedly unlawfully crossing the State
12 border of the Russian Federation.⁷⁴ Since then, Russian authorities have undertaken
13 a civilian criminal investigation led by the Investigations Department of the Russian
14 Federal Security Service⁷⁵ and the servicemen have been subject to proceedings
15 under Russia’s civilian criminal procedure code.⁷⁶

16
17 In short, it is law enforcement activities, not military activities, that this dispute
18 concerns. Ukraine’s claims are about Russia’s decision to seize and detain three
19 Ukrainian naval vessels as those vessels were traveling in the Black Sea back to
20 Odessa. The question of whether it was lawful for Russia to exercise jurisdiction over
21 the *Berdyansk*, *Nikopol* and *Yani Kapu* is the question Ukraine puts to the Annex VII
22 tribunal in this case, and that question does not “concern” military activities.

23
24 In conclusion, the military activities exception of article 298 does not apply in this
25 case. Russia’s own conduct shows that it believes it was engaged in law
26 enforcement, not military activity. Even setting aside Russia’s own characterization
27 of its actions, the conduct that this dispute concerns – that is, Russia’s exercise of
28 jurisdiction over Ukraine’s naval vessels – is not military in nature. The Annex VII
29 tribunal which is to be constituted in this case would therefore have jurisdiction,
30 *prima facie*, to hear Ukraine’s claims.

31
32 Mr President, Members of the Tribunal, this concludes Ukraine’s case on *prima facie*
33 jurisdiction. I ask that you now invite Mr Thouvenin to the podium to address the
34 need for, and appropriateness of, the provisional measures requested by Ukraine.

35
36 **THE PRESIDENT:** Thank you, Ms Cheek. I now give the floor to Mr Jean-Marc
37 Thouvenin.

38
39 **MR THOUVENIN** (*Interpretation from French*): Thank you very much, Mr President.

40
41 Mr President, Members of the Tribunal, it is a great honour to appear before you in
42 this case.

43

⁷³ Annex A, Appendix C (FSB Report), pp. 3-4.

⁷⁴ Annex A, Appendix D (Note Verbale No. 14951/2 from the Russian Federation to Ukraine, dated 5 December 2018); see also Annex C, Appendix 1 (Indictments Against the 24 Detained Ukrainian Servicemen).

⁷⁵ Annex C (Polozov Declaration), ¶ 5.

⁷⁶ *Id.*, ¶ 10.

1 As Professor Soons has already pointed out, paragraph 5 of article 290 of the
2 Convention provides that pending the constitution of an arbitral tribunal, the Tribunal
3 may prescribe provisional measures if it considers that *prima facie* the tribunal which
4 is to be constituted would have jurisdiction and that the urgency of the situation so
5 requires. This paragraph 5 should be read in the light of paragraph 1 of article 290,
6 under which “the Tribunal may prescribe any provisional measures which it
7 considers appropriate under the circumstances to preserve the respective rights of
8 the parties to the dispute”.

9
10 My task today is to demonstrate that in the highly extraordinary circumstances of this
11 case the provisional measures requested by Ukraine are both necessary and
12 perfectly appropriate. To this end, I will discuss three key aspects, namely:

- 13
14 - first, the risk of irreparable harm to Ukraine, which Russia does not contest;
15
16 - second, urgency, which is clear here, despite Russia’s objections;
17
18 - and, third, the need for the measures requested by Ukraine, which are the only
19 means to preserve its rights.

20
21 Mr President, Members of the Tribunal, the determination by “the court asked to
22 grant interim relief” of the existence of a risk of “irreparable harm” to the rights in
23 dispute is rooted in the longstanding case law of the courts in The Hague. The legal
24 doctrine in this respect is being constantly refined and indeed the International Court
25 of Justice very recently clarified the standard by extending it to the risk that “alleged
26 disregard of such rights may entail irreparable consequences”. This illustrates the
27 pragmatism required of the court asked to grant interim relief, which assesses the
28 need for provisional measures *in concreto*. Moreover, no definition of what is to be
29 understood by “irreparable harm” to alleged rights has ever been formulated. This is
30 not only because this concept is purely casuistic, stubbornly resisting any
31 systematization, but also because it would be unwise to look at it solely in abstract
32 terms as, in practice, the assessment depends on the nature of the rights at issue
33 and the violation to which they are subject.

34
35 As far as these rights at issue and their nature are concerned, Professor Soons has
36 already shown that what is in dispute in this case is Ukraine’s immunity. The right of
37 States to respect for their immunity is one of the most important rights enshrined in
38 international law. In the *Jurisdictional Immunities of the State* case, the International
39 Court of Justice stated:

40
41 the rule of State immunity ... derives from the principle of sovereign equality
42 of States, which, as Article 2, paragraph 1, of the Charter of the United Nations
43 makes clear, is one of the fundamental principles of the international legal
44 order.

45
46 In terms of the law of the sea, this right to immunity is expressed primarily in relation
47 to warships and government vessels and their crews because, as this Tribunal has
48 stated in clear words which have already been recalled this morning, but which I will
49 say in French, as they are also clear in French: “a warship is an expression of the
50 sovereignty of the State whose flag it flies”.

1
2 With regard to the violations to which the rights at issue are subject, as you know, the
3 three Ukrainian vessels -- two warships and a tugboat operating for the national
4 navy -- have been forcibly detained by Russia in a port and have been subject to
5 various forms of interference, whilst their crews have been imprisoned in Moscow
6 and prosecuted like common criminals.
7

8 Mr President, one could not find a more blatant case of a situation characterized by a
9 risk of irreparable harm to a right in dispute. This Tribunal has furthermore already
10 been convinced that this was the case in the "*ARA Libertad*" Case. In that case the
11 Tribunal clearly found:

12
13 - firstly, that the detention of a warship "prevents [it] by force from discharging its
14 mission and duties" and impinges upon the immunity enjoyed by the vessel;

15
16 - secondly, that the third State's attempts to board a warship and to move it by force
17 to another berth without authorization by its Commander and the possibility that such
18 actions may be repeated demonstrate the gravity of the situation; and

19
20 - finally, that such a situation is a source of conflict that may endanger friendly
21 relations among States.
22

23 The similarities between the case from which I have just extrapolated certain
24 principles and the one which has been brought before you today are clearly striking
25 but, by comparison, the situation at issue is far more serious.
26

27 Whereas the "*ARA Libertad*" is a training vessel, the Ukrainian vessels detained by
28 Russia are in operational service. Their detention reduces the resources which
29 Ukraine apportions to national defence missions, which weakens its implementation
30 and could lead to irreparable harm.
31

32 Whereas the Argentinian officers in command of the "*ARA Libertad*" were able to
33 remain at their posts on the vessel which had been forcibly detained in a Ghanaian
34 port, in this case the crews were forcibly removed from their units and have been
35 incarcerated for almost six long months in a Russian prison.
36

37 Whereas the Tribunal was concerned that the Ghanaian authorities had *attempted* to
38 board the "*ARA Libertad*" and to move it by force, the Russian authorities have
39 *already* boarded and intend to continue to do so without authorization in order to
40 carry out any inspections they wish, in particular of highly sensitive equipment,
41 including instruments, arms on board, and equipment intended to provide secure
42 communications between the vessel and its command. The Russian interferences to
43 gain access to this sensitive equipment, which is crucial to Ukraine's defence, are
44 evidently such as to cause Ukraine serious harm. The Tribunal will note, furthermore,
45 that Russia does not in any way conceal such interferences as it mentions them in its
46 Memorandum of 7 May.
47

48 Allow me to draw a parallel with another case which the Tribunal also heard, the *M/V*
49 "*Saiga*" (*No. 2*) Case. In that case the Tribunal held that, even though the vessel
50 boarded by Guinea and the crew that had been detained had been released:

1
2 the rights of the Applicant would not be fully preserved if, pending the final
3 decision, the vessel, its Master and the other members of the crew, its owners
4 or operators were to be subjected to any judicial or administrative measures
5 in connection with the incidents leading to the arrest and detention of the
6 vessel and to the subsequent prosecution and conviction of the Master.
7

8 On this basis the Tribunal ruled unanimously that:

9
10 Guinea shall refrain from taking or enforcing any judicial or administrative
11 measure against the M/V Saiga, its Master and the other members of the crew,
12 its owners or operators, in connection with the incidents leading to the arrest
13 and detention of the vessel.
14

15 The situation here is even worse. The rights claimed by Ukraine are at serious risk
16 because not only are the crews of the vessels, including their captains, the subject of
17 judicial measures despite their immunity but, furthermore, neither the vessels nor
18 their crews have been released. Quite to the contrary, they have been subject to
19 coercive measures, regularly interrogated and required to fulfil various obligations. In
20 other words, the reasons that led the Tribunal to order provisional measures in the
21 *M/V "Saiga" (No. 2) Case* are even more compelling here.
22

23 Russia does not contest the reality of the risk of irreparable harm to the rights in
24 dispute. The Memorandum which it produced on 7 May asserts the absence of
25 urgency, and I shall come back to that in a moment, but does not put forward *any*
26 arguments on irreparable harm, even though Ukraine expounded on this point in its
27 Request for the prescription of provisional measures, to which the Memorandum is a
28 response. The Tribunal will therefore be able to hold that there is no disagreement, or
29 at least no known disagreement, between the Parties on the existence of a risk of
30 irreparable harm in this case.
31

32 This brings me to urgency.

33
34 In its Memorandum of 7 May, Russia argued that urgency is not established because
35 several months have passed since the Ukrainian vessels were detained, and on the
36 ground that urgency is to be assessed with reference to the period during which the
37 Annex VII arbitral tribunal is not yet constituted. Russia added that the proceedings
38 brought before the European Court of Human Rights would have consequences on
39 these proceedings and in particular would eliminate any notion of urgency.
40

41 I will make four points to justify urgency and also to respond to the Russian
42 objections which I have just summarized.

43
44 Firstly, since 25 November, Ukraine has acted with due diligence in the
45 circumstances of the present case;

46
47 Secondly, the case law of the Tribunal relied on by Russia in no way supports its
48 case;

49
50 Thirdly, the *present* situation is characterized by urgency requiring provisional
51 measures to be ordered;

1
2 And, fourthly, the request for provisional measures made before the European Court
3 of Human Rights does not affect the urgency which Ukraine asserts before this
4 Tribunal.

5
6 First, Mr President, Ukraine's conduct before the matter was brought before the
7 Tribunal in no way contradicts its assertion relating to urgency. Quite the contrary.
8 Since 25 November, Ukraine has constantly acted with due diligence to secure the
9 release of its vessels and their crews.

10
11 It did so, as was recalled this morning, through diplomatic channels; to no avail.

12
13 It also relied on diplomatic pressure from a number of States which, like it, called
14 upon Russia to adopt an attitude that respected its rights; to no avail.

15
16 It hoped that Russia would take stock of the situation and that its servicemen would
17 be released; to no avail. On 17 April it was once again decided to extend their
18 pre-trial detention for several more months.

19
20 Ukraine has also had recourse to all available legal remedies, including taking the
21 matter to the European Court of Human Rights, in order to ensure that, at the
22 minimum, the treatment given to its servicemen should be consistent as far as
23 possible with the standards laid down by the European Convention on Human
24 Rights.

25
26 It is true that Ukraine initially sought to settle this matter through diplomatic and
27 non-judicial channels. How could there be any objection when the judicial settlement
28 of international disputes is "simply an alternative to the direct and friendly settlement
29 of such disputes between the parties", in the well-known words of the Permanent
30 Court of International Justice in the *Free Zones of Upper Savoy and the District of*
31 *Gex* case. Exhausting diplomatic means in order to attempt to resolve a situation
32 does not take anything away from the urgency of that situation. Bringing the matter to
33 court is a last resort undertaken precisely when urgency becomes critical. That is the
34 case here – but I will return to this – where after almost six months of continuous
35 violations of Ukraine's rights, the situation calls for provisional measures even more
36 urgently than on the first day.

37
38 Mr President, Russia also seeks to deny urgency by referring to paragraph 68 of the
39 Order delivered in the *Straits of Johor* case. Here is the relevant extract on your
40 screens, placed in its context. I will read it:

41
42 Considering that, under article 290, paragraph 5, of the Convention, the
43 Tribunal is competent to prescribe provisional measures prior to the
44 constitution of the Annex VII arbitral tribunal ...

45
46 Considering that the said period is not necessarily determinative for the
47 assessment of the urgency of the situation or the period during which the
48 prescribed measures are applicable and that ...

49
50 We come to the interesting passage
51

1 the urgency of the situation must be assessed taking into account the period
2 during which the Annex VII arbitral tribunal is not yet in a position to “modify,
3 revoke or affirm those provisional measures”.

4
5 This means that, under article 290, paragraph 5, of the Convention, the urgency
6 justifying measures taken by this Tribunal until the Annex VII tribunal can do so itself
7 cannot be determined on the basis of the date of “constitution” of that tribunal, but
8 having regard to the date on which the tribunal will actually be able itself to deal with
9 the matter that has been brought before this Tribunal. This does not mean that
10 urgency must be assessed on the basis of the conduct of the applicant before the
11 matter is referred to an Annex VII tribunal, contrary to what Russia intimates.

12
13 Mr President, Members of the Tribunal, Russia’s objections that I have just outlined
14 are all the more unfounded in that the question raised before you is not what Ukraine
15 did before bringing the matter to you, but whether the present situation calls for
16 urgent measures; in other words, if “the urgency of the situation so requires”. The
17 assessment of urgency therefore depends on the present circumstances. In that
18 respect, urgency is beyond doubt when the irreparable harm or the irreparable
19 consequences that I have just referred to are precisely present; that is to say, if they
20 are already under way and not just imminent. The case law of the International Court
21 of Justice confirms this as it posits – I will cite this case law which is being displayed
22 for your convenience – “the condition of urgency is met when the acts susceptible of
23 causing irreparable prejudice can ‘occur at any moment’”, and, *a fortiori*, the condition
24 must also be met when the irreparable harm is already under way.

25
26 In this case, the immunity from jurisdiction and enforcement of the Ukrainian vessels
27 and their crews is not just *threatened*, it is more seriously violated by Russia with
28 every passing day.

29
30 This situation is comparable to that which existed in the “*ARA Libertad*” Case in
31 which this Tribunal established urgency on account of the continuous violation of the
32 immunity of the Argentinian training vessel and the judicial proceedings in progress
33 against it. Similarly, in the “*Enrica Lexie*” Incident Case, Italy had compellingly
34 advanced a similar argument asserting – and I will reproduce it again for your
35 convenience – “the status quo ... is one where ... Italy’s rights are suffering
36 irreparable damage on a daily basis”. We are precisely in the same situation of
37 urgency today because the immunity of the Ukrainian State conferred upon it by the
38 United Nations Convention on the Law of the Sea is more seriously violated with
39 every passing day.

40
41 But, Members of the Tribunal, the manifest urgency in this case becomes even more
42 apparent when we consider the situation of the crews over which Russia is illegally
43 exercising its jurisdiction. This Tribunal appreciates considerations of humanity and
44 the manifestly illegal detention of these men that has been described to you this
45 morning will undoubtedly have been sufficient for you to form a conviction.

46
47 It is in fact the same conviction that led the Tribunal to rule in the “*Arctic Sunrise*”
48 Case that urgency was established in particular “as for the continuing detention of the
49 crew, every day spent in detention is irreversible”.

50

1 Allow me to stress this word “irreversible”. It rings here as a terrible acknowledgment
2 that every day, every hour, every minute of freedom stolen from these servicemen is
3 lost forever, not just for them, but for their families, in particular for their spouses,
4 their children and their parents. I would add that no two days are equal. To be
5 illegally deprived of liberty is hardship enough, and unjust. To be deprived of liberty
6 persistently, what is more, without any prospect of release owing to the obstinacy of
7 your jailor, is simply unbearable, as is any extended arbitrary detention.

8
9 In the present case the crews have been in custody for almost six long months. All
10 their requests for release have been denied, including on 17 April, a date on which
11 their detention was once again extended by several months. No prospect of release
12 has been suggested to them by the conduct of their jailor, Russia, which treats them
13 like a gang of criminals, and does not take the slightest notice of the requests for
14 release that have been made by Ukraine, repeatedly from the very first day, or the
15 many pressing requests that come from all over the world. More than ever, and
16 increasingly with every passing day, there is an urgent need for provisional
17 measures, all the more so because the date of their appearance at the criminal trial
18 that awaits them is approaching.

19
20 Mr President, Members of the Tribunal, Russia seems to suggest in its Memorandum
21 of 7 May that the proceedings brought before the European Court of Human Rights
22 create a situation of *lis pendens* as it states that the proceedings are between the
23 same parties and concern the same subject matter as those before this Tribunal. It
24 would also seem that Russia contends that, once provisional measures have been
25 ordered by the European Court of Human Rights, the situation before this Tribunal
26 loses its urgency.

27
28 These objections are unfounded.

29
30 Firstly, the concept of *lis pendens* is unknown in public international law and has no
31 place in the Statute of this Tribunal or in the Convention.

32
33 Second, even if *lis pendens* could be invoked, *quod non*, its conditions would not be
34 met in the present case. The Permanent Court of International Justice precisely
35 described “the essential elements which constitute litispendance” in the *Case*
36 *concerning certain German interests in Polish Upper Silesia*. Two out of three are
37 completely absent here, namely (i) “two identical actions”, (ii) brought before “courts
38 of the same character”. The actions are not identical and have been brought before
39 courts that are totally independent of one another.

40
41 Third, the measures ordered by the European Court of Human Rights concern only
42 the *conditions of detention* of the Ukrainian servicemen and have no bearing
43 whatsoever on the *situation in relation to the extended hardship of the sailors’*
44 *detention*, which is solely at issue here in characterizing the urgency claimed.

45
46 Lastly, as regards the situation of urgency relating to the Ukrainian warships
47 detained by Russia, whose condition and seaworthiness is deteriorating with every
48 day that passes, so as not to encumber you unnecessarily I would respectfully
49 suggest that the Tribunal refers to paragraph 42 of the Request for the prescription

1 of provisional measures of 16 April 2019, on which Russia has not commented at all
2 and which therefore requires no further argument from me.

3
4 Mr President, I now come to the final aspect to be addressed by me, namely the
5 appropriateness of the provisional measures requested. The truth is that Ukraine is
6 seeking the only measures that could protect the rights in dispute; that is, the
7 absolute immunity of its vessels and of the crews serving them. It requests that the
8 Russian Federation be immediately required to

9
10 release the Ukrainian naval vessels, the *Berdyansk*, the *Nikopol* and the *Yani*
11 *Kapu*, and return them to the custody of Ukraine;

12
13 suspend criminal proceedings against the twenty-four detained Ukrainian
14 servicemen and refrain from initiating new proceedings; and

15
16 release the twenty-four detained Ukrainian servicemen and allow them to
17 return to Ukraine.

18
19 These are the submissions that are being made to you by Ukraine.

20
21 The Tribunal will recall that these measures are identical to those ordered in the
22 “*ARA Libertad*” Case, which is the case that is most readily comparable to the
23 situation before us. In the “*Arctic Sunrise*” Case, which is also comparable, as a
24 vessel and its crew had been captured and were being prosecuted, but in which,
25 unlike this case, the immunity of warships was not at issue, the Tribunal took the
26 same measures, but required the applicant to post a bond. In this case, where the
27 immunity of warships is at issue, the idea of a bond is, as in the “*ARA Libertad*” Case,
28 irrelevant and rightly inconceivable. What is more, it has not been suggested by
29 Russia.

30
31 In its Memorandum of 7 May, Russia nonetheless raises two objections, the first
32 postulating that the provisional measures requested would prejudice the merits; the
33 second complaining that they would prevent Russia from exercising its criminal
34 jurisdiction if the provisional measures were executed. I am going to refute these two
35 objections in turn.

36
37 First of all, Russia objects that ordering the provisional measures requested by
38 Ukraine would be tantamount to ruling on the merits; and to convince us of this it
39 compares the request on the merits with the Request for provisional measures, and
40 states that both contain requests for the release of the vessels and their crews.

41
42 This objection is erroneous both in fact and in law.

43
44 In the first instance, urgent requests are not the same as requests on the merits.

45
46 On the merits, Ukraine is requesting the Tribunal to find that Russia’s conduct
47 violates the Convention and, as a consequence, to rule that Russia must put an end
48 to this violation, which requires inter alia the release of the vessels and their crews,
49 and that appropriate reparations be awarded to it. These are the submissions on the
50 merits, and it would clearly be abstruse for Ukraine not to make such submissions in
51 its request on the merits.

1
2 Before this Tribunal, Ukraine is not asking that Russia's responsibility for an
3 internationally wrongful act be established. It is not asking that consequences be
4 drawn from that responsibility. In order to preserve its rights it is seeking an order for
5 provisional measures consisting in the release of its vessels and their crews. Such
6 measures would not under any circumstances be equivalent to a decision on the
7 merits because they would patently not be based on establishing the responsibility of
8 Russia. They would be justified, like any urgent measure, by the need, in the
9 circumstances of the present case, to protect the rights in dispute until the case is
10 referred to the Annex VII tribunal.

11
12 In the second instance, this Tribunal did not think for one second in 2012 that the
13 release, by way of provisional measures, of the "*ARA Libertad*" and its crew would
14 amount to a ruling on the merits, even though, on the merits, Argentina requested,
15 like Ukraine in the present case, a ruling that its vessel and its crew be released. The
16 Tribunal, on the contrary, found that its Order in the "*ARA Libertad*" Case "in no way
17 prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal with
18 the merits of the case, or any questions relating to the merits themselves". The same
19 conclusion must be drawn here.

20
21 In the third instance, there is no international court or tribunal that has accepted
22 Russia's reasoning. Three examples taken from the jurisprudence of the International
23 Court of Justice will suffice to illustrate this.

24
25 In *Georgia v. Russia* one of the claims on the merits made by Georgia was that the
26 Court should order Russia to refrain from taking discriminatory measures and to
27 protect certain populations against discrimination. The International Court of Justice
28 very precisely called upon the Parties, as a provisional measure, to refrain from any
29 act of discrimination and to take protection measures against discrimination. There
30 was a clear similarity between the claims on the merits and the request for
31 provisional measures. That did not prevent the Court from taking the requested
32 provisional measures.

33
34 India concluded its request on the merits in the recent *Jadhav* case by asking for the
35 immediate suspension of the sentence of death awarded to Mr Jadhav. The
36 provisional measure requested by India and prescribed by the Court was precisely to
37 suspend Mr Jadhav's execution.

38
39 Lastly, there is an even older example that confirms the longstanding nature of this
40 approach. In the *United States Diplomatic and Consular Staff in Tehran* case, the
41 Court ordered, as a provisional measure, the immediate release of United States staff
42 held captive in the embassy and the restoration of United States authority over the
43 diplomatic premises, while the application on the merits contained the very same
44 request.

45
46 As a consequence, contrary to Russia's claim, the similarity between certain requests
47 on the merits and requests for provisional measures is not a reason to reject the
48 provisional measures on the ground that they would prejudice the merits. What is
49 important to the court asked to grant interim relief is whether those measures are

1 necessary in the circumstances of the case in order to protect the rights in dispute
2 *pendente litis*.

3
4 Mr President, in its second objection, Russia complains that if the vessels and their
5 crews are released by way a provisional measure in respect of the rights relied on by
6 Ukraine, Russia would no longer be able to institute proceedings, in this instance
7 criminal proceedings, against them. This assertion is mentioned very briefly in the
8 Memorandum of 7 May and it is strikingly crude, postulating that international
9 relations are built solely on power relations.

10
11 In doing this, Russia seems to forget – and this amnesia seems to be very familiar in
12 its case – that its relations with Ukraine are governed by the rules of international law
13 which Ukraine, for its part, never intended by infringe.

14
15 In other words, in the relations between Ukraine and Russia, when one of the two
16 States intends to prosecute nationals of the other, who are under the jurisdiction of
17 that other State, the solution offered by international law is not to capture them
18 unlawfully, in violation of the immunity of warships and in breach of the principle of
19 the exclusive jurisdiction of the flag State. The solution advocated by international law
20 is to rely on the procedures that have been patiently negotiated and consolidated in
21 treaties. In this case, if, as Ukraine requests, its vessels and seamen are released,
22 but if subsequently its right to immunity is not recognized on the merits, Russia will be
23 free to apply all the relevant procedures available to it under international law in order
24 to assert its claims to bring criminal prosecutions against the Ukrainian seamen.

25
26 Mr President, Members of the Tribunal, I now come to the conclusion of my
27 statement, which is that, in the circumstances of this case, the provisional measures
28 requested by Ukraine are perfectly appropriate to the situation, which is characterized
29 by a risk of irreparable harm to the rights relied on by Ukraine and by urgency in
30 preserving those rights pending the proceedings on the merits.

31
32 I would like to thank you cordially for your attention and, Mr President, if I may,
33 I would suggest that Her Excellency Olena Zerkal be called to conclude Ukraine's
34 pleadings.

35
36 **THE PRESIDENT:** Thank you, Mr Thouvenin. Now I give the floor again to the Agent
37 of Ukraine, Ms Zerkal.

38
39 **MS ZERKAL:** Mr President, Members of the Tribunal, before I conclude Ukraine's
40 presentations by making our final submissions, I would like to take this opportunity to
41 express, on behalf of Ukraine, my gratitude to the Registrar and his staff for arranging
42 these proceedings.

43
44 We also extend our thanks to the President and each Member of the Tribunal for your
45 attention today and for the consideration given to our request.

46
47 Mr President, Members of the Tribunal, according to article 75, paragraph 2, of the
48 Rules of the Tribunal, with your permission I will now present the final submissions of
49 Ukraine.

1 Ukraine respectfully requests that the International Tribunal for the Law of the Sea
2 order the Russian Federation, by means of provisional measures, to immediately
3 release the Ukrainian naval vessels, the *Berdyansk*, the *Nikopol* and the *Yani Kapu*,
4 and return them to the custody of Ukraine; to suspend criminal proceedings against
5 the twenty-four detained Ukrainian servicemen and refrain from initiating new
6 proceedings; and to immediately release the twenty-four detained Ukrainian
7 servicemen and allow them to return to Ukraine.

8
9 This concludes Ukraine's oral submissions. Once again, thank you, Mr President,
10 and thank you, Members of the Tribunal.

11
12 **THE PRESIDENT:** Thank you, Ms Zerkal.

13
14 The written text of the final submissions signed by the Agent shall be communicated
15 to the Tribunal and a copy of it shall be transmitted to the other Party.

16
17 This brings us to the end of the hearing. On behalf of the Tribunal, I would like to take
18 this opportunity to express our appreciation for the high quality of the presentations at
19 the hearing.

20
21 Now the Registrar will address questions in relation to documentation.

22
23 **THE REGISTRAR** (*Interpretation from French*): Thank you, Mr President. Pursuant
24 to article 86, paragraph 4, of the Rules of the Tribunal, the Parties may, under the
25 supervision of the Tribunal, correct the transcripts of speeches and statements made
26 on their behalf, but in no case may such corrections affect the meaning and scope
27 thereof. These corrections relate to the checked versions of the transcripts in the
28 official language used by the Party in question.

29
30 These corrections should be submitted to the Registry as soon as possible and by
31 Thursday 16 May 2019 at 5 p.m. Hamburg time, at the latest.

32
33 **THE PRESIDENT:** Thank you, Mr Registrar. The Tribunal will now withdraw to
34 deliberate. The date for the delivery of the Order in this case is tentatively set to
35 Saturday, 25 May 2019. The Parties will be informed reasonably in advance of any
36 change to this date.

37
38 In accordance with the usual practice, I request the Agent to kindly remain at the
39 disposal of the Tribunal in order to provide any further assistance and information
40 that it may need in its deliberations prior to the delivery of the Order.

41
42 The hearing is now closed.

43
44 *(The sitting closed at 1 p.m.)*