INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

MINUTES OF PUBLIC SITTINGS

MINUTES OF THE PUBLIC SITTING
HELD ON 10 MAY 2019

Case concerning the detention of three Ukrainian naval vessels
(Ukraine v. *Russian Federation), Provisional Measures*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

PROCÈS-VERBAL DE L'AUDIENCE PUBLIQUE
TENUE LE 10 MAI 2019

Affaire relative à l'immobilisation de trois navires militaires ukrainiens
(Ukraine c. Fédération de Russie), mesures conservatoires

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the revised verbatim records.

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Minutes of the Public Sitting held on 10 May 2019

Procès-verbal de l'audience publique tenue le 10 mai 2019

PUBLIC SITTING HELD ON 10 MAY 2019, 10 A.M.

Tribunal

Present: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, CHADHA, KITTICHAISAREE, KOLODKIN, LIJNZAAD; *Registrar* 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.

10 mai 2019, matin

AUDIENCE PUBLIQUE TENUE LE 10 MAI 2019, 10 H 00

Tribunal

Présents : M. PAIK, *Président* ; M. ATTARD, *Vice-Président* ; MM. JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, MME KELLY, MM. KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO SARUBBI, MME CHADHA, MM. KITTICHAISAREE, KOLODKIN, MME LIJNZAAD, *juges* ; M. GAUTIER, *Greffier*.

L'Ukraine est représenté par :

Mme Olena Zerkal,
Vice-ministre des affaires étrangères,

comme agent ;

et

Mme Marney L. Cheek,
Membre du barreau du District de Columbia ; Covington & Burling LLP,

M. Jonathan Gimblett,
Membre du barreau de Virginie et du District de Columbia ; Covington & Burling LLP,

M. Alfred H.A. Soons,
professeur à la faculté de droit de l'Université d'Utrecht ; membre associé de l'Institut de droit international,

M. Jean-Marc Thouvenin,
professeur à l'Université Paris-Nanterre ; Secrétaire général de l'Académie de droit international de La Haye ; membre du barreau de Paris ; Sygna Partners,

comme conseils et avocats ;

Mme Oksana Zolotaryova,
directrice, Département du droit international, Ministère des affaires étrangères,

M. Leonid Zaliubovskyi,
colonel de justice, forces navales ukrainiennes,

M. Nikhil V. Gore,
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Mme Alexandra Francis,
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comme conseils ;

M. Taras Kachka,
conseiller du Ministère des affaires étrangères,

comme conseiller ;

Vice-amiral Andrii Tarasov,
premier commandant en second et chef d'état-major, forces navales ukrainiennes,

Mme Kateryna Zelenko,
porte-parole, Ministère des affaires étrangères,

M. Nikolai Polozov,
avocat des militaires ukrainiens détenus,

M. Ilya Novikov,
avocat des militaires ukrainiens détenus,

comme observateurs ;

Mme Katerina Gipenko,
troisième secrétaire, Ministère des affaires étrangères,

Mme Valeriya Budyakova,
troisième secrétaire, Ministère des affaires étrangères,

Mme Rebecca Mooney,
Covington & Burling LLP,

comme assistantes.

La Fédération de Russie n'est pas représentée.

Opening of the Oral Proceedings

[ITLOS/PV.19/C26/1/Rev.1, p. 1–3; TIDM/PV.19/A26/1/Rev.1, p. 1–3]

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

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

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

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

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

LE GREFFIER : Merci, Monsieur le Président. Le 16 avril 2019, une copie de la demande en prescription de mesures conservatoires a été transmise au gouvernement de la Fédération de Russie.

Par ordonnance du 23 avril 2019, le Président du Tribunal a fixé les dates de la procédure orale aux 10 et 11 mai 2019.

Par note verbale du 30 avril 2019, l'ambassade de la Fédération de Russie à Berlin a informé le Tribunal que :

(Continued in English)

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

(Poursuit en français) Par la même note verbale, la Fédération de Russie a informé le Tribunal :

(Continued in English)

> of its decision not to participate in the hearing on provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.

(Poursuit en français) Le 2 mai 2019, le Greffe du Tribunal a reçu une communication dans laquelle *(Continued in English)* "Ukraine … requests, consistent with article 28 of the Tribunal's Statue, that the Tribunal continue the proceedings and render a decision on provisional measures."

(Poursuit en français) Le 2 mai 2019, le Président a fixé au 10 mai 2019 la date de la procédure orale.

Je vais à présent donner lecture des conclusions contenues dans la demande de l'Ukraine.

(Continued in English)

> Ukraine requests that the Tribunal indicate provisional measures requiring the Russian Federation to promptly:
>
> a. Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;
>
> b. Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
>
> c. Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.

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

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

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

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

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

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

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

STATEMENT OF MS ZERKAL – 10 May 2019, a.m.

First round: Ukraine

STATEMENT OF MS ZERKAL
AGENT OF UKRAINE
[ITLOS/PV.19/C26/1/Rev.1, p. 3–5]

Thank you, Mr President. With your permission, I will now introduce Ukraine's case.

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

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

Mr President, Members of the Tribunal, Ukraine's naval ships continue to be held by Russia, six months after they were seized, and the servicemen are under investigation and are detained in the Lefortovo prison in Moscow. They are:

Captain of the Third Rank Volodymyr Lisovyy; Captain of the Second Rank Denys Hrytsenko; Captain Lieutenant Serhiy Popov; Senior Lieutenants Andriy Drach, Bohdan Nebylytsia and Vasyl Soroka; Lieutenant Roman Mokryak; Master Chief Petty Officers Yuriy Budzyloy and Andriy Shevchenko; Petty Officers Oleh Melnychyk, Vladyslav Kostyshyn and Serhiy Chyliba; Senior Seamen Andriy Artemenko, Viktor Bezpalchenko, Yuriy Bezyazychnyy, Andriy Oprysko, Volodynyr Tereschenko, Mykhailo Vlasyuk, Volodymyr Varymez, Vyacheslav Zinchenko; and Seamen Andriy Eider, Bohdan Holovash, Yevheniy Semydotskyy and Serhiy Tsybizov.

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

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

Russia has ignored not only Ukraine's requests but also numerous calls by the international community, insisting that its actions are justified under its domestic laws and under the United Nations Convention on the Law of the Sea; and now Russia seeks to escape scrutiny of its unlawful actions by asking this Tribunal to treat them as military activities, exempt from compulsory dispute settlement under the Convention, even though Russia has previously insisted that the events of 25 November were not a military confrontation.

In fact, Russia's conduct constitutes a profound violation of the Convention and customary international law. Let me be clear, there is no question that Crimea is part of Ukraine and that the waters in which the seizure occurred constitute Ukraine's territorial sea or exclusive economic zone. However, Russia's actions would violate the Convention even if they had occurred in Russia's territorial sea or exclusive economic zone. The immunity of warships

is a core sovereign immunity in the international system. Warships and their personnel cannot be arrested by the law enforcement authorities of foreign States and subjected to the jurisdiction of foreign courts.

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

Each additional day of detention, each interrogation, each court appearance aggravates the dispute between the Parties.

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

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

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

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

The Russian Federation's decision not to participate in the hearing came as a surprise to Ukraine. After all, a Russian delegation participated in the pre-hearing phone call with the President of the Tribunal on 23 April 2019. Russia's decision not to appear here today is regrettable.

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

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

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

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

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

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[1] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, para. 94.

[2] *"Enrica Lexie" Incident (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015,* p. 182, para. 133 (citing *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999,* p. 10, para. 155).

[3] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013,* p. 230, para. 56.

Ms Cheek will respond to the Russian Federation's military activities argument.

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

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

THE PRESIDENT: Thank you, Ms Zerkal.

I now give the floor to Mr Jonathan Gimblett to make the next statement for Ukraine.

STATEMENT OF MR GIMBLETT
COUNSEL OF UKRAINE
[ITLOS/PV.19/C26/1/Rev.1, p. 5–10]

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

The essential facts of this case are not in dispute. On 25 November 2018, two small Ukrainian warships – the *Berdyansk* and *Nikopol* – and a naval auxiliary vessel, a tugboat named the *Yani Kapu*, were seized and detained by ships of the Russian Coast Guard. The seizure took place in the Black Sea, to the south and west of the entrance to the Kerch Strait.[1] The relevant maritime area is shown on the map at tab 1, page 1 in your binders and now on the screen.

A report published by Russia's Federal Security Service, the FSB, records that the Ukrainian vessels were in the Black Sea and traveling away from the Crimean coastline at the time of the seizure.[2] The Ukrainian Navy has also submitted a report with Ukraine's Request for provisional measures, which can be found at tab 3 in your binders. As that report explains, Ukraine does not have precise coordinates for the boarding of the vessels, either because the vessels did not have the opportunity to transmit their position or because the Russian Federation jammed the relevant transmissions.[3]

While both the FSB report and Russia's Memorandum of 7 May are silent on the subject, the Ukrainian Navy estimates, based on transmissions sent before the seizures, that the *Berdyansk* and the *Yani Kapu* were seized at a distance of approximately 12nm from the coast, and the *Nikopol* at a distance of approximately 20nm from the coast.[4] The separate declaration provided by Vice Admiral Andrii Tarasov, which you can find at tab 4 in your binders, explains the basis for the Ukrainian Navy's estimates in more detail.[5] The estimated locations of the seizures are shown on the map, at tab 1, page 2, now on your screen.

After the seizure, the vessels and the 24 servicemen on board them were transported to the port of Kerch, a Russian-occupied port on the eastern coast of Crimea, which is also shown on the map at tab 1, page 2. On the next slide, at tab 1, page 3 and now on screen, an AFP press photograph shows the three vessels in Russian custody at Kerch, with what appear to be Russian officials on board the *Nikopol*, which is the vessel marked P176.[6]

Russian government documents show that the servicemen were charged with the criminal offence of "a crossing of the state border of the Russian Federation without obtaining appropriate permission … [as part of an] organized group."[7] For example, at tab 1, page 4, and

[1] 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)), p. 5-6 [hereinafter "Annex A, Appendix C (FSB Report)"]; Annex B (Navy Report), paras 14-15.
[2] Annex A, Appendix C (FSB Report), p. 4.
[3] Annex B (Navy Report), paras 7, 15.
[4] Ibid., para. 15.
[5] Annex F (Tarasov Declaration), para. 10.
[6] Annex D, Appendix C, Image of Seized Ukrainian Military Vessels Seen in the Port of Kerch on November 26, 2018 (STF/AFP/Getty Images).
[7] 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)),

now on the screen, you can see the indictment in the case of Senior Seaman Andriy Anatoliyovych Artemenko, with underlined text reflecting that charge.[8] As indicated in the same indictment and shown on this slide, the Russian Federation contends that this alleged crossing violated article 322, paragraph 3, of Russia's domestic criminal code.[9]

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

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

In his declaration at tab 6, Mr Nikolai Polozov, the Russian attorney for the most senior officer among the servicemen, reports that the servicemen have repeatedly been interrogated; that they have been subjected to psychological evaluations; that they have been exposed to so-called "non-procedural" questioning by Russia's FSB outside the presence of counsel; and, as reflected in the press photograph at tab 1, page 6 and on the screen, that they have been displayed to the media in public court appearances as though they were common criminals.[12]

The purpose of those court proceedings has been to extend the detentions of the servicemen, and therefore the vessels, which are being held as evidence in the case against the servicemen. Two such extensions have been granted to date. Most recently, shortly after Ukraine filed its Request, a District Court in Moscow issued orders on 17 April 2019 extending the detentions until late July. On 8 May 2019, Ukraine submitted to the Tribunal the relevant District Court decision as to four of the servicemen, which was obtained from Mr Polozov. The decision appears at tab 8.[13]

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

These then are the facts upon which Ukraine bases its claim. As I mentioned at the outset, none of them are in dispute between the Parties. In its Memorandum of 7 May, however, Russia has raised a number of allegations about the events preceding the seizure and detention of the vessels. To be clear, the dispute Ukraine has submitted to arbitration, and that is now

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p. 2; Annex C, Appendix 2 (Six Decisions on Pre-Trial Detention for the 24 Detained Ukrainian Servicemen), p. 2.

[8] Annex C, Appendix 1 (Indictments against the 24 Detained Ukrainian Servicemen), p. 1.

[9] Ibid.

[10] Annex C (Polozov Declaration), para. 3.

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

[12] Annex C (Polozov Declaration), paras 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).

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

before this Tribunal, concerns only Russia's exercise of jurisdiction over the three Ukrainian vessels in spite of their complete immunity. That includes both the seizure and detention of those vessels, and the subsequent civilian legal process to which both the vessels and those on board have been subjected. Russia's version of what happened in the hours leading up to the seizure and detention is simply not relevant to the immunity of the Ukrainian vessels at the time they were seized. Nonetheless, in order to correct the record, I will briefly respond to certain of Russia's contentions.

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

Russia refers to a document found on board the *Nikopol* guiding them, in Russia's translation, to sail "covertly outside of the coastal and maritime regions of patrol of the Black Sea Fleet of Russia and the Coast Guard of the FSB of Russia."[16] Vice Admiral Tarasov confirms that the purpose of this guidance was to avoid unnecessarily provoking incidents with Russian government vessels during the two days it would take to reach the Kerch Strait from Odesa.[17]

Nor can the guidance be read as suggesting that the mission of the naval vessels was to transit the Kerch Strait secretly – an impossible task given the breadth of the Kerch Strait and the navigable channels through it. Indeed, as the Ukrainian Navy report at tab 3 confirms, as it approached the Kerch Strait, the *Berdyansk* radioed both a post of the Russian Border Guard Service and the port authorities at Kerch and Kavkaz ports to announce the intention of the three vessels to proceed through the Kerch Strait.[18]

Second, in its Memorandum, Russia invokes the allegedly crowded conditions in the Kerch Strait on 25 November as a justification for the actions taken by its Coast Guard.[19] Again, the Russian account is full of holes and cannot be relied upon.

The Kerch Strait regularly handles significant traffic in commercial vessels. The slide now on your screen (tab 1, page 8), for example, shows a snapshot of the traffic through the Kerch Strait and to and from the Ukrainian and Russian ports on the Sea of Azov on 7 May.[20]

According to Russia, its Coast Guard warned the Ukrainian naval vessels on the night of 24 November of a temporary suspension of the rights of innocent passage for naval vessels in the approach to the entrance to the Kerch Strait due to an expected storm. But, as the Ukrainian Navy report and the declaration of Vice Admiral Tarasov establish, the Ukrainian Navy was unable to find any evidence of such a restriction where it would normally be posted online.[21]

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

[15] 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), para. 1.

[16] Memorandum of the Russian Federation, para. 20.

[17] Annex F (Tarasov Declaration), para. 9.

[18] Annex B (Navy Report), para. 10.

[19] Memorandum of the Russian Federation, paras 12, 16.

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

[21] Annex B (Navy Report), para. 9; Annex F (Tarasov Declaration), para. 7.

Russia's version of events also fails to mention that, as widely reported in press coverage of the events of 25 November 2018, and reflected in the press photograph now on the screen (tab 1, page 9 of your binders), a tanker was positioned across the span of the Kerch Strait bridge on 25 November 2018 blocking all traffic through the Strait, not just that of naval vessels.[22]

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

Third, Russia accuses the Ukrainian naval vessels of what it calls "provocative actions".[23] These include the allegation that the *Nikopol* and *Berdyansk* were put in a condition of combat readiness with guns uncovered and elevated.[24] The suggestion that these two small and lightly armoured Ukrainian vessels were in a position to threaten the numerous Russian government vessels in the area in this way is, on its face, not credible. (Tab 1, page 10) As the Ukrainian Navy report and Vice Admiral Tarasov's declaration establish, the vessels were under orders to proceed peacefully and abstain from any aggressive acts.[25] There is no indication that they did otherwise.[26]

Vice Admiral Tarasov points out that sailing with uncovered guns is entirely consistent with Ukrainian standard operating procedure, just as it is with Russia's own standard operating procedure.[27] And, given the proximity of the Russian Coast Guard vessels, the raising of guns to an elevation of 45 degrees should – and would – have been interpreted by those vessels as signalling the absence of aggressive intent. Had the guns been fired at that elevation, the shells would have travelled far above and beyond the Russian vessels in the vicinity.[28]

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

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

THE PRESIDENT: Thank you, Mr Gimblett.

I now give the floor to Mr Alfred Soons.

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[22] Annex H, Appendix A, AP Photo, The Kerch Bridge Is Seen Blocked for Ships Entrance, Near Kerch, Crimea (25 November 2018).
[23] Memorandum of the Russian Federation, para. 16.
[24] Ibid.
[25] Annex B (Navy Report), para. 6; Annex F (Tarasov Declaration), para. 4.
[26] Annex F (Tarasov Declaration), para. 5.
[27] Ibid., para. 6.
[28] Ibid.

STATEMENT OF MR SOONS
COUNSEL OF UKRAINE
[ITLOS/PV.19/C26/1/Rev.1, p. 10–18]

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

First, the legal grounds. Ukraine's Request for provisional measures is intended to protect its rights under the Convention and customary international law to complete immunity of its warships, naval auxiliary vessels and all persons on board from the jurisdiction of any other State. Warship immunity is a fundamental and longstanding tenet of the law of the sea and, as I will explain further, the rights Ukraine seeks to protect meet and exceed the standard of plausibility applied at the provisional measures stage.[1]

As this Tribunal explained in its provisional measures order in the *"ARA Libertad"* Case, a warship, and any other vessel assigned to the public service of national defence, "is an expression of the sovereignty of the State whose flag it flies."[2] Several articles of the Convention entitle such ships to "complete immunity" from seizure, detention and legal process.

In particular, articles 95 and 96 of the Convention provide that warships and "ships owned or operated by a State and used only on government non-commercial service" – of which naval auxiliary vessels are the classic example – enjoy "complete immunity from the jurisdiction of any State other than the flag State". Article 58 extends the application of the immunity under articles 95 and 96 to the exclusive economic zone. Article 32 and customary international law guarantee the same immunity in the territorial sea. In short, wherever in the seas a naval vessel may be found, the Convention requires that it be accorded complete immunity from the jurisdiction of all States other than its flag State.

The immunity of warships, as a specific application of the principle of State immunity, has been established since at least the early 1800s. It is often pointed out that the doctrine was recognized more than two centuries ago in the 1812 decision of the United States Supreme Court in the *Schooner Exchange* v. *McFaddon* case,[3] and is also reflected in other venerable judgments, such as the 1880 decision of the Court of Appeals of England and Wales in the *Le Parlement Belge* case.[4] Both these authorities analogize the immunity of warships to the equally fundamental and longstanding rule of diplomatic immunity.

More recently, the 1958 Geneva Conventions on the Territorial Sea and Contiguous Zone and on the High Seas recognized and confirmed the customary immunity of warships and other non-commercial government vessels. Like the Law of the Sea Convention, the Convention on the Territorial Sea and Contiguous Zone provided in article 22 that nothing in it would "affect … the immunities which [government ships] enjoy."[5] Similarly, the Convention on the High Seas specified in articles 8 and 9 that warships and government non-

[1] *"Enrica Lexie" Incident (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015,* p. 182, para. 84.
[2] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, para. 94.
[3] *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 142-47 (1812).
[4] *The Parlement Belge*, (1879) 4 P.D. 129, 144-155.
[5] Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at article 22.

commercial vessels have "complete immunity from the jurisdiction of any State other than the flag State."[6]

This rule of "complete immunity" for warships and other governmental vessels is recognized not only in treaties relating to the Law of the Sea, but also in other relevant international instruments. For example, while allowing for legal process against government vessels on commercial service, article 16(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property categorically excludes jurisdiction over "warships or naval auxiliaries" and "other vessels … used … only on government non-commercial service".[7]

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

It is unsurprising, therefore, that Russia has been a strong advocate for such immunity, supporting the provisions on the immunity of governmental vessels in the 1958 Geneva Conventions and even suggesting that they be expanded to cover governmental ships on commercial service.[8]

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

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

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

A warship with all persons and goods on board, remains under the jurisdiction of her flag State even during her stay in foreign waters. Members of the crew who commit crimes when ashore and then return to the vessel may not be seized by the authorities of the littoral state, who can only request their surrender: If the request is granted the local courts have jurisdiction to try the offender, but not if it is refused, or if it is granted on conditions which exclude the exercise of jurisdiction. Individuals who are subjects of the littoral state and are only temporarily on board may, although they need not, be taken to the home country of the vessel, to be punished there, if they commit a crime on board. Even individuals who do not belong to the crew but who, after having committed a crime on the territory of the littoral state,

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[6] Convention on the High Seas, Geneva, 29 April 1958, at articles 8-9.

[7] United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, 2 December 2004, article 16.

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

[9] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999,* p. 10, para. 106; see also *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, para. 127; *The Arctic Sunrise Arbitration*, Annex VII Arbitral Award on the Merits of 14 August 2015, paras 170-172.

have taken refuge on board, cannot be forcibly taken off the vessel; if the commander refuses their surrender, it can be obtained only by diplomatic means from his home state.[10]

As for the second question – what obligations does the rule of complete immunity entail for States other than the flag State – again, the answer is well established. As implied by the term "complete immunity", other States are obliged not to take any action that physically or legally encumbers the vessel. Thus, they must not board such a vessel, arrest it, detain it, or otherwise prevent it, in the words of the "*ARA Libertad*" provisional measures order, from "discharging its mission and duties".[11] Further, as suggested by the passage from Oppenheim's just quoted, other States must not purport to subject the vessel or any person or thing on board to any form of civilian legal process.[12]

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

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

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

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

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[10] 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.

[11] "*ARA Libertad*" *(Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, paras 97-98.

[12] *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.

[13] Annex A, Appendix C (FSB Report), p. 4.

Indeed, even before the adoption of the Convention, it was well established – under article 23 of the Convention on the Territorial Sea and Contiguous Zone and customary international law – that the only remedy against a warship for claimed non-compliance with the rules on innocent passage was to request that the warship "leave the territorial sea".[14]

I would note that Russia itself has relied on this rule to its benefit. In the 1981 submarine incident in Swedish waters I referred to a few minutes ago, the Soviet Union reportedly submitted a diplomatic note (tab 10) to the Swedish government invoking: "The generally recognized principle of international law under which a warship enjoys complete immunity from the jurisdiction of any state other than the one under whose flag she is sailing."

The note continued: "Even if a foreign warship fails to observe a coastal State's rules on passage through its territorial waters, the only thing the coastal State may do is demand that she leave its waters."[15]

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

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

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

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

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

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

In its most recent provisional measures order, in the *"Enrica Lexie"* case, this Tribunal explained that this jurisdictional requirement is satisfied so long as "any of the provisions invoked by the Applicant appears *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded".[16]

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[14] Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at article 23.

[15] Milton Leitenberg, The Case of the Stranded Sub, Bulletin of Atomic Scientists, vol. 38, no. 3, p. 10-11 (March 1982).

[16] *"Enrica Lexie" Incident (Italy* v. *India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015,* p. 182, para. 52.

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

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

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

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

Article 283, paragraph 1 (tab 1), shown on the screen, provides that "the Parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means." This obligation to exchange views is simply that. As this Tribunal has observed in its provisional measures order in *"Arctic Sunrise"*, "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted",[17] a view consistent with its previous decisions.[18] And as the Annex VII tribunal determined, in concurring with this Tribunal's view that article 283 had been satisfied in the circumstances of the *"Arctic Sunrise"* Case:

> The Parties exchange views regarding the means by which a dispute that has arisen between them may be settled. Negotiation is evoked as one such means. Arbitration is another. Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute.[19]

Here, in our case, on 15 March 2019, Ukraine transmitted a diplomatic note to the Russian Federation indicating its preference that the dispute be resolved through Annex VII arbitration and requesting an exchange of views pursuant to article 283 (tab 12).[20] In light of the urgency of the situation, Ukraine insisted that this exchange of views take place within ten days. Contrary to Russia's argument,[21] this ten-day deadline was not "arbitrary". It reflected the fact that each passing day further compounded the harm to Ukraine's rights, and that

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[17] *"Arctic Sunrise" (Kingdom of the Netherlands* v. *Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013,* p. 230, para. 76.

[18] *MOX Plant (Ireland* v. *United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001,* p. 95, para. 60; *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, para. 71.

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

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

[21] Memorandum of the Russian Federation, para. 37.

Ukraine had already, over a period of months, repeatedly protested the detention of the vessels and servicemen and sought their release.

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

Despite the delay, Ukraine promptly responded to Russia's diplomatic note (tab 15) and arranged a meeting between the Parties on 23 April 2019 in The Hague.[24] By this time, on 1 April, Ukraine had filed its notification under Annex VII, including a request for provisional measures, but Ukraine remained interested in exchanging views regarding possible means of settlement of the dispute. At the same time, Ukraine could not accept further delay of implementation of the requested provisional measures. Accordingly, Ukraine filed its Request for provisional measures from this Tribunal on 16 April.

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

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

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

As should be apparent from this account of events, Ukraine's obligation to exchange views was satisfied on 25 March 2019. Article 283 requires the exchange of views to take place "expeditiously" and, in simply ignoring Ukraine's proposed schedule for an exchange of views, Russia failed to comply with that obligation. When it received Russia's note of 25 March 2019, Ukraine could not have foreseen that Russia would – weeks later – agree to Ukraine's request for a meeting, and Ukraine was entitled to presume that further attempts to seek negotiations

[22] Annex I, Appendix A (Note Verbale No. 3528/2 from the Russian Federation to Ukraine, dated 25 March 2019).
[23] Annex I, Appendix B (Note Verbale No. 4502/2 from the Russian Federation to Ukraine, dated 12 April 2019).
[24] 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 Russian Federation to Ukraine, dated 19 April 2019) (accepting proposed time and location for exchange of views).

would not be fruitful. Ukraine was not required to indefinitely postpone its case and allow further harm to its rights.

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

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

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

THE PRESIDENT: Thank you, Mr Soons.

We have now reached 11.10 a.m. At this stage the Tribunal will withdraw for a break of 30 minutes. We will continue the hearing at 11.40 a.m.

(Break)

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

STATEMENT OF MS CHEEK – 10 May 2019, a.m.

STATEMENT OF MS CHEEK
COUNSEL OF UKRAINE
[ITLOS/PV.19/C26/1/Rev.1, p. 18–25]

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

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

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

Second, even setting aside Russia's own characterization of its actions, the dispute Ukraine has brought, viewed on an objective basis, simply does not concern military activities. It is not enough that some of the ships involved happened to be military vessels. Rather, the acts of which Ukraine complains must be "military" acts. Here, they are not; rather, they involve the exercise of domestic jurisdiction in a law enforcement context.

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

The Convention itself establishes a categorical distinction between military and law enforcement activities. Article 298(1)(b) contains two separate clauses: one for disputes concerning military activities and another clause for certain disputes concerning law enforcement activities in regard to the exercise of certain sovereign rights or jurisdiction related to fishing and marine scientific research. This structure indicates that the concepts of "military activities" and "law enforcement activities" are distinct, mutually exclusive categories. The *Virginia Commentary* confirms that in crafting article 298(1)(b) the drafters of the Convention meant to "distinguish between military activities and law enforcement activities."[1] Scholars have likewise noted that the Convention's optional exception to jurisdiction for military activities was included on the understanding that law enforcement activity would not be considered a military activity.[2]

In order for the military activities exception to be properly invoked, Ukraine's claims must concern military activities. In this case, they do not. Ukraine's claims relate to the seizure

[1] Myron H. Nordquist et al., *United Nations Convention on the Law of the Sea: A Commentary* (2014) ("*Virginia Commentary*"), p. 135.
[2] *See* Gurdip Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), p. 148.

and detention of Ukrainian naval vessels and their crew, despite those vessels' immunity from Russian jurisdiction. Simply put, these claims do not concern activities that are military in nature.

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

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

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

Let me begin with the first legal basis for rejecting Russia's invocation of the military activities exception, and that is Russia's own characterization of its activities. In evaluating the applicability of the military activities exception to the Philippines' claims against China in the *South China Sea Arbitration*, the Annex VII tribunal relied on China's own characterization of the Chinese activities that the Philippines had complained of. In the relevant portion of that case, Chinese military vessels and crew were engaged in land reclamation, and the Chinese government repeatedly asserted that its land reclamation activities were intended to serve civilian, not military, purposes. The *South China Sea* Tribunal determined that it would not "deem [Chinese] activities to be military in nature when China itself has consistently and officially resisted such classifications and affirmed the opposite at the highest levels."[3] Parallel facts are presented here. Russia has repeatedly and consistently stated that its actions that provide the basis for Ukraine's claims were not military in nature.

In particular, Russia has maintained that its arrest and detention of the Ukrainian vessels and imprisonment and prosecution of the servicemen are solely matters of domestic law enforcement. For example, the Russian FSB's statement on the incident, released on 26 November 2018, one day after the seizure of Ukraine's naval vessels, described the incident in terms of alleged violations of Russian navigational regulations and statutes. That FSB statement, at tab 5, page 4, also on the screen, shows the FSB's assertion that the Ukrainian ships violated several Russian laws, including: Federal Law 155 "On the Internal Seas, Territorial Sea, and Contiguous Zone of the Russian Federation";[4] and Federal Law No. 4730-I "On the State Border of the Russian Federation."[5] Subsequently, in a diplomatic note dated 5 December 2018, at tab 11, and also on the screen, the Russian Ministry of Foreign Affairs explained that the Ukrainian servicemen were being detained for unlawfully crossing the State border of the Russian Federation, in violation of article 322, paragraph 3, of the Russian Criminal Code.[6]

Russia has continued to characterize its own actions as concerning civilian law enforcement even after Ukraine filed its provisional measures request with this Tribunal.[7] In a public statement made in response to Ukraine's Request for provisional measures dated

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[3] *South China Sea Arbitration (Philippines* v. *China)*, PCA Case No. 2013-19, Award of 12 July 2016, para. 938.
[4] Annex A, Appendix C (FSB Report), p. 2-4.
[5] Ibid., p. 4.
[6] Annex A, Appendix D (Note Verbale No. 14951/2 from the Russian Federation to Ukraine, dated 5 December 2018).
[7] Annex H, Appendix C (Statement by the Ministry of Foreign Affairs of Russia, dated 16 April 2019).

16 April, which appears at tab 16, the Russian Ministry of Foreign Affairs referred to an ongoing "criminal investigation being conducted in the Russian Federation".[8]

Further, as Professor Soons mentioned, Russia has invoked article 30 of UNCLOS to justify its detention of the *Berdyansk, Nikopol* and *Yani Kapu* on 25 November. I again refer you to the Russian FSB Report of 26 November 2018 on the incident. At tab 5, page 4, also on the screen, the Russian FSB invoked UNCLOS article 30.[9] Article 30 of UNCLOS is titled "Non-compliance by warships with the laws and regulations of the coastal State". This provision does not relate to military activities. It specifically addresses a warship's compliance, or lack thereof, with "the laws and regulations of the coastal State". The very provision upon which Russia itself relies relates to law enforcement activities, not military activities. And it is clear from the contemporaneous record that Russia regarded the seizure and detention of which Ukraine complains as an action taken to enforce its domestic laws and regulations.

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

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

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

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

Russia's Memorandum also spends significant time discussing events preceding the detention, even though those events are not the basis of Ukraine's claims, and Ukraine does not in this case allege any violation of the Convention based on those events. As explained by Ukraine and in the statement of Vice Admiral Tarasov, the mission of the *Berdyansk, Nikopol* and *Yani Kapu* was to navigate from the Ukrainian port of Odesa to the Ukrainian port of Berdyansk where they were to be stationed on a permanent basis, a trip that required passage through the Kerch Strait. These naval vessels were simply in transit, and they notified the Russian Coast Guard of their peaceful intentions.[10] Indeed, two months earlier, in September, Ukrainian naval vessels had successfully completed the same passage on their way to Berdyansk.

There are certainly disputed facts related to why and how Russia decided to close the Kerch Strait to Ukraine's naval vessels, and even whether or not the Kerch Strait was actually closed; but that is not relevant to the case before you. What is relevant, and what is not disputed, is this. At the time they were detained, Ukraine's warships had left the area to return to Odesa. Coast Guard vessels were giving chase to ships leaving the territorial sea. Why? In order to arrest them for violating Russian domestic laws. This is a typical law enforcement encounter, except, importantly, the subjects of that encounter were naval vessels that were immune from Russia's exercise of jurisdiction. What transpired at the time of the unlawful seizure was not,

[8] Ibid.
[9] Annex A, Appendix C (FSB Report), p. 3-4.
[10] Annex F (Tarasov Declaration), para. 5.

as Russia contends at paragraph 30 of its Memorandum, a situation involving military forces arrayed in opposition to one another.

A further observation regarding Russia's Memorandum is warranted before I speak to the second legal basis for rejecting Russia's invocation of the military activities exception. Russia notes at paragraph 33(b) of its Memorandum that it denies that the seizure and detention of which Ukraine complains arose in a situation of armed conflict. It states that the detention of Ukraine's warships and military personnel is a matter for its civilian courts. Russia also points to statements of Ukraine that have described Russia's conduct as an act of aggression and has referred to the Ukrainian servicemen in detention as prisoners of war, and Russia has emphatically rejected both characterizations.

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

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

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

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

Returning to the text of article 298(1)(b), the military activities exception applies to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service". According to the Oxford English Dictionary, the ordinary meaning of the verb "to concern" is "to be about".[11] Thus the exception applies to disputes that are about military activity. In other words, the exception is properly invoked only where the specific conduct that is alleged to constitute a violation of the Convention itself qualifies as a "military activity".

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

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

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

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

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

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

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

The Russian Federation also says a Russian military helicopter and a Russian naval vessel were in the vicinity during the Russian Coast Guard's boarding and arrest of the Ukrainian naval vessels. Specifically, the FSB report mentions that a naval helicopter stopped the *Nikopol* and that a corvette of the Black Sea Fleet "approached the site where the Ukrainian naval boat was stopped in order to monitor its actions."[12] This discrete naval support for the Coast Guard's enforcement action at sea is not unusual, and does not transform a law enforcement effort into a military one. The Russian navy did not seek to board the Ukrainian vessels or otherwise engage with them or interfere with the Coast Guard's activities. The Russian navy's limited role in support of the Russian Coast Guard as the incident was unfolding only bolsters the conclusion that the seizure and detention of Ukraine's warships was a law enforcement matter, not a military one.[13]

Interpreting article 298(1)(b) as applying solely to disputes where the activity alleged to violate the Convention is itself a military activity is also consistent with the object and purpose of the Convention. As set forth in its preamble, the Convention was designed to establish a legal order capable of "settl[ing] … *all issues* relating to the law of the sea".[14] An expansive reading of the military activities exception as excluding from jurisdiction any dispute that involves military vessels would create a wide gap in the judicial enforcement of the Convention. Given the regular role of navies in law enforcement, a carve-out for any dispute involving military vessels could cover the majority of law enforcement activity at sea that is otherwise subject to the Convention.

Accordingly, whether this dispute concerns military activities depends not on the particular ships that were present, but rather on the type of Russian activity alleged to violate the Convention. That is the test that was adopted by the *South China Sea Arbitration* tribunal, where the tribunal observed that "the relevant question" is "whether the dispute itself concerns

[12] Annex A, Appendix C (FSB Report), p. 4.
[13] Ibid., p. 6.
[14] UNCLOS, Preamble, 25 (emphasis added).

military activities, rather than whether a Party has employed its military in some manner in relation to the dispute."[15]

As previously mentioned, as Russia itself points out at paragraph 30 of its Memorandum, the *South China Sea* tribunal found the military activities exception to apply in a circumstance "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another."[16] Russia's assertion that this was the situation at the time of its seizure of Ukraine's vessels is demonstrably false.

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

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

As this Tribunal observed in *M/V "SAIGA" (No. 2)*, orders to stop, warning shots, and the use of force are all used in law enforcement at sea, generally in an escalating fashion.[17] According to Russia, the Russian Coast Guard sent signals to the Ukrainian navy vessels to stop at they sailed away from the Crimean coast and toward Odesa. Given their immunity, it is not surprising that the Ukrainian naval vessels ignored those signals. Russia states that warning shots were then fired by the Russian Coast Guard because the Ukrainian warships refused orders to stop but instead continued on their way.[18] Again, according to Russia's account, eventually there was a resort to force, whereby shots were fired at the *Berdyansk* to prevent the *Berdyansk* from leaving the area. Such escalation is not a quintessential military activity; it is a quintessential law enforcement one. The Russian Coast Guard was escalating their engagement in an effort to assert their law enforcement jurisdiction over the warships. This is consistent with the pattern of escalation that this Tribunal has recognized is traditionally followed in law enforcement operations at sea.

Further, as I also have mentioned, after the Ukrainian naval vessels were detained, Russian authorities charged the servicemen on board the vessels under article 322(3) of Russia's criminal code for allegedly unlawfully crossing the State border of the Russian Federation.[19] Since then, Russian authorities have undertaken a civilian criminal investigation led by the Investigations Department of the Russian Federal Security Service [20] and the servicemen have been subject to proceedings under Russia's civilian criminal procedures.[21]

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

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[15] *South China Sea Arbitration (Philippines* v. *China)*, PCA Case No. 2013-19, Award of 12 July 2016, para. 1158.
[16] Memorandum of the Russian Federation, para. 30.
[17] *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999,* p. 10, para. 156.
[18] Annex A, Appendix C (FSB Report), p. 3-4.
[19] 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).
[20] Annex C (Polozov Declaration), para. 5.
[21] Ibid., para. 10.

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

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

THE PRESIDENT: Thank you, Ms Cheek.

I now give the floor to Mr Jean-Marc Thouvenin.

IMMOBILISATION DE TROIS NAVIRES MILITAIRES UKRAINIENS

EXPOSÉ DE M. THOUVENIN
CONSEIL DE L'UKRAINE
[TIDM/PV.19/A26/1/Rev.1, p. 28–39]

Merci beaucoup, Monsieur le Président.

Monsieur le Président, Mesdames et Messieurs les Juges, c'est un grand honneur de paraître devant vous dans la présente affaire.

Comme cela a déjà été rappelé par le Professeur Soons, le paragraphe 5 de l'article 290 de la Convention dispose qu'en attendant la constitution d'un tribunal arbitral, le Tribunal peut prescrire des mesures conservatoires s'il considère, *prima facie*, que le tribunal devant être constitué aurait compétence et s'il estime que l'urgence de la situation l'exige[1]. Ce paragraphe 5 doit être lu à la lumière de l'article 290, paragraphe 1, aux termes duquel « le Tribunal peut prescrire toutes mesures conservatoires qu'il juge appropriées en la circonstance pour préserver les droits respectifs des parties en litige »[2].

La tâche qui m'est assignée consiste à montrer que, dans les circonstances tout à fait extraordinaires de l'espèce, les mesures conservatoires sollicitées par l'Ukraine sont à la fois nécessaires et parfaitement appropriées. Pour ce faire, je reviendrai sur trois aspects déterminants, à savoir :

- premièrement, le risque de préjudice irréparable subi par l'Ukraine, que la Russie ne conteste pas,
- deuxièmement, l'urgence, qui est évidente ici, en dépit des objections de la Russie,
- troisièmement, la nécessité des mesures sollicitées par l'Ukraine, qui sont les seules de nature à préserver ses droits.

Monsieur le Président, Mesdames et Messieurs les juges, la vérification par « le juge de l'urgence »[3] de l'existence d'un risque de « préjudice irréparable » causé aux droits en litige trouve ses racines dans la jurisprudence déjà ancienne des Cours de La Haye. La doctrine à cet égard s'affine constamment, et, d'ailleurs, la Cour internationale de Justice a très récemment précisé le standard en l'élargissant au « risque que la méconnaissance des droits allégués entraîne des conséquences irréparables »[4]. Ceci illustre le pragmatisme assumé du juge de l'urgence, qui apprécie la nécessité de mesures conservatoires *in concreto.* Du reste, aucune définition de ce qu'il faut entendre par « préjudice irréparable » aux droits allégués n'a jamais été formulée[5]. La raison en est que non seulement cette notion issue de la pure casuistique est revêche à toute systématisation, mais encore qu'il serait inopportun de l'enfermer dans des cadres abstraits puisqu'en pratique l'appréciation dépend de la nature des droits en cause et de la violation dont ils font l'objet[6].

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[1] *Incident de l'« Enrica Lexie » (Italie c. Inde), mesures conservatoires, ordonnance du 24 août 2015*, *TIDM Recueil 2015,* par. 33.

[2] Ibid., par. 74 et 75 ; voir aussi *« Arctic Sunrise » (Royaume des Pays-Bas c. Fédération de Russie), mesures conservatoires, ordonnance du 22 novembre 2013, TIDM Recueil 2012,* par. 80.

[3] Selon l'expression du Juge Ronny Abraham, dans son opinion individuelle dans l'affaire des Usines de pâte à papier, *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006,* par. 5.

[4] *Violations alléguées du traité d'amitié, de commerce, et de droits consulaires de 1955 (République Islamique d'Iran c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018*, par. 77 (« le pouvoir d'indiquer des mesures conservatoires lorsqu'il existe un risque qu'un préjudice irréparable soit causé aux droits en litige dans une procédure judiciaire … ou lorsque la méconnaissance alléguée de ces droits risque d'entraîner des conséquences irréparables »).

[5] J. Sztucki, *Interim Measures in The Hague Court : An Attempt at a Scrutiny*, Deventer, Kluwer, 1983, p. 106 ; R. Kolb, *The International Court of Justice*, Oxford, Hart, 2013, p. 629.

[6] Voir par exemple *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), mesures conservatoires, ordonnance du 19 avril 2017*, *C.I.J. Recueil 2017,* par. 96 ; voir

Pour ce qui est des droits en cause et de leur nature, le professeur Soons a déjà montré que ce qui est en litige en la présente espèce est l'immunité de l'Ukraine. Or le droit des Etats au respect de leur immunité figure parmi les plus importants que le droit international ait consacrés. Dans l'*Affaire des Immunités juridictionnelles de l'Etat*, la Cour internationale de Justice l'a solennellement rappelé :

La règle de l'immunité de l'Etat [...] procède du principe de l'égalité souveraine des Etats qui, ainsi que cela ressort clairement du paragraphe 1 de l'article 2 de la Charte des Nations Unies, *est l'un des principes fondamentaux de l'ordre juridique international*[7].

En mer, l'expression de ce droit à l'immunité s'attache essentiellement aux navires de guerre et gouvernementaux, et à leurs équipages, puisque, comme l'a indiqué le Tribunal de céans dans une formule limpide qui a déjà été rappelée ce matin, mais que je vais dire en français, car elle est limpide également en français : « le navire de guerre est l'expression de la souveraineté de l'Etat dont il bat le pavillon »[8].

Quant aux violations dont les droits en cause font l'objet, vous le savez, les trois navires ukrainiens, dont deux de guerre et un remorqueur en service pour la marine nationale, sont immobilisés de manière forcée par la Russie dans un port et font l'objet d'ingérences diverses, tandis que leurs équipages sont incarcérés à Moscou dans une prison de droit commun et poursuivis comme des criminels.

Monsieur le Président, on ne saurait trouver cas plus patent de situation caractérisée par un risque de préjudice irréparable à un droit en litige. Le Tribunal de céans a d'ailleurs été convaincu que tel était le cas dans l'*Affaire de l'« ARA Libertad »*. En effet, dans cette affaire, le Tribunal a constaté, d'évidence :

- premièrement, que la détention d'un navire de guerre « [l']empêche par la force [...] d'accomplir sa mission et de remplir ses fonctions »[9], et porte atteinte à l'immunité reconnue au navire ;

- deuxièmement, que les tentatives de l'Etat tiers pour monter à bord d'un navire de guerre et déplacer celui-ci par la force jusqu'à un autre poste d'amarrage sans l'autorisation de son commandant, et la possibilité de voir se reproduire de tels actes, caractérisent une situation de gravité[10] ; et

- enfin, qu'une telle situation est une source de conflit qui peut mettre en péril les relations amicales entre Etats[11].

Les similitudes entre l'affaire dont je viens de rappeler les enseignements et celle dont vous êtes aujourd'hui saisi sont évidemment frappantes. Mais, par comparaison, la situation présente est, de loin, plus grave. En effet :

- alors que l'« ARA Libertad » est un navire-école[12], les navires ukrainiens immobilisés par la Russie sont en service opérationnel. Leur immobilisation a pour effet de réduire les moyens affectés par l'Ukraine aux missions de sa défense nationale, ce qui en affaiblit la mise en œuvre et risque d'entraîner des préjudices irréparables ;

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aussi *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Émirats Arabes Unis), mesures conservatoires, ordonnance du 23 juillet 2018*, par. 67 ; *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979*, par. 38 à 40.

[7] *Immunités juridictionnelles de l'Etat (Allemagne c. Italie; Grèce (intervenant)), arrêt du 3 février 2012, C.I.J. Recueil 2012*, par. 57. Italiques ajoutées.

[8] *« ARA Libertad » (Argentine c. Ghana), mesures conservatoires, ordonnance du 15 décembre 2012, TIDM Recueil 2012*, par. 94.

[9] Ibid., par. 97 ; voir aussi le par. 98.

[10] Ibid., par. 99.

[11] Ibid., par. 97.

[12] Ibid., par. 40.

- alors que les officiers argentins commandant l'« ARA Libertad » avaient pu demeurer à leurs postes sur leur vaisseau immobilisé de force dans un port ghanéen[13], dans le cas présent les équipages ont été délogés de force de leurs unités et sont incarcérés depuis près de six longs mois dans une prison russe[14] ;

- alors que le Tribunal s'était ému de ce que les autorités ghanéennes avaient *tenté* de monter à bord de l'« ARA Libertad » pour le déplacer de force[15], les autorités russes sont *déjà* montées à bord et envisagent de continuer à le faire, sans aucune autorisation, pour procéder à toutes les inspections qu'elles souhaitent, notamment des équipements les plus sensibles, y compris les instruments, les armements embarqués destinés à assurer une communication sécurisée entre le navire et son commandement[16]. Les ingérences russes pour avoir accès à cet équipement sensible et crucial pour la défense de l'Ukraine sont évidemment de nature à lui causer un préjudice caractérisé. Le Tribunal constatera d'ailleurs que la Russie ne se cache nullement de ces ingérences puisqu'elle en fait état dans son mémorandum du 7 mai[17].

Permettez-moi de dresser un parallèle avec une autre affaire dont le Tribunal a également eu à connaître, celle du *Navire « SAIGA » (No. 2)*. Dans cette affaire, le Tribunal avait considéré que, alors même que le navire arraisonné par la Guinée et l'équipage retenu avaient été relâchés :

Les droits du demandeur ne sauraient être entièrement préservés si, dans l'attente de la décision définitive, le navire, son capitaine et les autres membres de l'équipage, ses propriétaires ou ses exploitants devaient faire l'objet d'une quelconque mesure judiciaire ou administrative en rapport avec les évènements qui ont conduit à l'arraisonnement et à l'immobilisation du navire, aux poursuites engagées par la suite contre le capitaine et à sa condamnation[18].

Sur cette base, le Tribunal avait unanimement décidé que :

La Guinée doit s'abstenir de prendre ou d'exécuter toute mesure judiciaire ou administrative à l'encontre du « Saiga », de son capitaine et des autres membres de l'équipage, de ses propriétaires ou exploitants, en rapport avec les évènements qui ont conduit à l'arraisonnement et à l'immobilisation du navire[19].

La situation est ici bien pire. Les droits revendiqués par l'Ukraine sont en grave péril du fait que, non seulement les équipages des navires, y compris leurs capitaines, font l'objet de mesures judiciaires en dépit de leur immunité, mais que, de surcroît, ni les navires, ni leurs équipages, n'ont été relâchés, étant au contraire soumis à des mesures coercitives, régulièrement interrogés et astreints à des obligations diverses[20]. Autant dire que les raisons qui ont conduit le Tribunal à ordonner des mesures conservatoires dans l'*Affaire du navire « SAIGA » (No. 2)* sont encore plus dirimantes ici.

La Russie ne conteste d'ailleurs pas la réalité du risque de préjudice irréparable aux droits en litige. Le mémorandum qu'elle a produit le 7 mai fait valoir l'absence d'urgence[21] – sur laquelle je reviendrai dans quelques secondes –, mais n'avance *aucun* argument sur le préjudice irréparable, alors même que l'Ukraine a développé ce point dans sa requête en

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[13] *« ARA Libertad » (Argentine c. Ghana)*, demande en prescription de mesures conservatoires présentée par l'Argentine, par. 16.

[14] Annexe C, déclaration de Me Polozov, par. 2 et 3.

[15] *« ARA Libertad » (Argentine c. Ghana), mesures conservatoires, ordonnance du 15 décembre 2012, TIDM Recueil 2012*, par. 99.

[16] Annexe C, déclaration de Me Polozov, par. 11.

[17] Mémorandum de la Fédération de Russie, 7 mai 2019, par. 20.

[18] *Navire « SAIGA » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée), mesures conservatoires, ordonnance du 11 mars 1998, TIDM Recueil 1998*, par. 41.

[19] Ibid., dispositif, par. 1.

[20] Annexe C, déclaration de Me Polozov, par. 5 à 7.

[21] Mémorandum de la Fédération de Russie, par. 38 à 40.

indication de mesures conservatoires[22] à laquelle le mémorandum répond. Le Tribunal pourra donc considérer qu'il n'y a pas désaccord, en tout cas pas désaccord connu, des Parties sur l'existence en l'espèce d'un risque de préjudice irréparable.

Ceci me conduit à l'urgence.

La Russie a argué dans son mémorandum du 7 mai que l'urgence ne serait pas établie parce que plusieurs mois se sont écoulés depuis que les navires ukrainiens sont immobilisés[23], et au motif que l'urgence s'apprécie en référence au délai nécessaire à la constitution du tribunal prévu à l'annexe VII[24]. La Russie a ajouté que la procédure engagée devant la Cour européenne des droits de l'homme aurait des conséquences sur la présente procédure, et, notamment, ôterait tout caractère d'urgence[25].

Pour ma part, je développerai quatre points pour à la fois justifier de l'urgence et répondre aux objections russes que je viens de résumer :

- premièrement, l'Ukraine a agi depuis le 25 novembre avec la diligence requise dans les circonstances de l'espèce ;

- deuxièmement, la jurisprudence du Tribunal invoquée par la Russie ne soutient aucunement sa thèse ;

- troisièmement, la situation *actuelle* se caractérise par l'urgence qu'il y a à ordonner des mesures conservatoires ;

- quatrièmement, la demande de mesures conservatoires portée devant la Cour européenne des droits de l'homme n'a aucun effet sur l'urgence que l'Ukraine fait valoir devant ce Tribunal.

En premier lieu, Monsieur le Président, le comportement de l'Ukraine avant la saisine du Tribunal ne contredit nullement son allégation relative à l'urgence, tout au contraire. Depuis le 25 novembre, l'Ukraine n'a cessé d'agir avec la diligence requise pour obtenir la libération de ses navires et de leurs équipages :

- elle l'a fait, cela a été rappelé ce matin, sur le terrain diplomatique[26] ; en vain ;

- elle a également compté sur l'insistance diplomatique des nombreux Etats qui, comme elle, ont réclamé de la Russie une attitude respectueuse de ses droits ; en vain ;

- elle a espéré que la Russie prendrait la mesure de la situation et que ses marins seraient relâchés ; en vain : le 17 avril dernier, il a une nouvelle fois été décidé de prolonger leur détention préventive pendant encore des mois[27] ;

- l'Ukraine a aussi eu recours à toutes les voies de droit disponibles, dont la saisine de la Cour européenne des droits de l'homme pour obtenir au minimum que le traitement auquel ses marins sont soumis soit autant que possible conforme aux standards posés par la Convention européenne des droits de l'homme.

Il est vrai que l'Ukraine a d'abord souhaité régler cette affaire par les voies diplomatiques et non judiciaires. Comment pourrait-on le lui opposer, alors que le règlement judiciaire des conflits internationaux « n'est qu'un succédané au règlement direct et amiable de ces conflits entre les Parties », selon la fameuse formule de la Cour permanente de justice internationale dans l'*Affaire des Zones franches de la Haute-Savoie et du Pays de Gex*[28] ? Le fait d'épuiser les voies diplomatiques pour tenter de régler une situation n'ôte rien à l'urgence de cette situation. La saisine du Juge est d'ailleurs un ultime recours, entrepris précisément lorsque l'urgence devient critique. C'est très exactement le cas en l'espèce, mais j'y reviendrai,

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[22] Demande en prescription de mesures conservatoires présentée par l'Ukraine, 16 avril 2019, par. 33 à 42.
[23] Mémorandum de la Fédération de Russie, par. 39.
[24] Ibid., par. 38.
[25] Ibid., par. 40.
[26] Annexe A, appendice E, notes verbales adressées par l'Ukraine à la Fédération de Russie.
[27] Mémorandum de la Fédération de Russie, par. 22.
[28] *Zones franches de la Haute Savoie et du Pays de Gex*, *CPJI, ordonnance du 19 août 1929*, p. 13.

où après près de 6 mois de violation continue des droits de l'Ukraine, la situation appelle des mesures conservatoires encore plus urgemment qu'au premier jour.

Monsieur le Président, la Russie cherche également à disqualifier l'urgence en renvoyant au paragraphe 68 de l'ordonnance rendue dans l'affaire du *Détroit de Johor*. Voici l'extrait pertinent sur vos écrans, remis dans son contexte. Je vais donc le lire :

Considérant que, au titre de l'article 290, paragraphe 5, de la Convention, le Tribunal est habilité à prescrire des mesures conservatoires avant la constitution du tribunal arbitral prévu à l'annexe VII [...],

Considérant que ladite période n'est pas forcément déterminante pour l'appréciation de l'urgence de la situation ou la période pendant laquelle les mesures prescrites sont applicables et que [nous arrivons au passage intéressant] l'urgence de la situation doit être appréciée compte tenu de la période pendant laquelle le tribunal arbitral prévu à l'annexe VII n'est pas encore à même de « modifier, rapporter ou confirmer ces mesures conservatoires »[29].

Ceci veut dire que dans le cadre l'article 290, paragraphe 5, de la Convention, l'urgence qui justifie que le Tribunal de céans prenne des mesures dans l'attente que le tribunal de l'annexe VII puisse le faire lui-même ne se vérifie pas en tenant compte de la date de « constitution » dudit tribunal, mais au regard de la date à laquelle ce tribunal pourra effectivement traiter lui-même le problème dont le Tribunal de céans est saisi. Ceci ne veut pas dire que l'urgence doive s'évaluer à l'aune du comportement du demandeur avant la saisine d'un tribunal de l'annexe VII, contrairement à ce qu'en induit la Russie.

Monsieur le Président, Mesdames et Messieurs les juges, les objections de la Russie que je viens d'évoquer sont d'autant plus mal fondées que la question qui se pose à vous n'est pas de savoir ce que l'Ukraine a fait avant de vous saisir, elle est de savoir si la situation actuelle appelle des mesures d'urgence, autrement dit, si « l'urgence de la situation l'exige »[30]. L'appréciation de l'urgence dépend donc des circonstances actuelles. Et, de ce point de vue, l'urgence ne fait aucun doute lorsque le préjudice irréparable ou les conséquences irréparables dont j'ai parlé tout à l'heure sont précisément actuels, c'est-à-dire s'ils sont déjà en cours et non pas seulement imminents. La jurisprudence de la Cour internationale de Justice le confirme puisqu'elle postule, je cite cette jurisprudence qui vous est projetée pour votre confort, que « [l]a condition d'urgence est remplie dès lors que les actes susceptibles de causer un préjudice irréparable peuvent "intervenir à tout moment" »[31].

A fortiori, la condition est nécessairement également remplie lorsque le préjudice irréparable est déjà en cours.

Ici, précisément, l'immunité de juridiction et d'exécution des navires ukrainiens et de leurs équipages n'est pas seulement *menacée*, elle est chaque jour plus gravement violée par la Russie.

Cette situation est évidemment comparable à celle qui prévalait dans l'*Affaire de l'« ARA Libertad »*, dans laquelle le Tribunal de céans a constaté l'urgence à raison de la violation continue de l'immunité du navire école argentin et des procédures judiciaires en cours à son encontre[32]. De même, dans l'affaire de l'*Incident de l'« Enrica Lexie »*, l'Italie avait fait valoir de manière convaincante un argument similaire, soulignant que – je l'ai reproduit là encore pour votre confort – « [l]e statu quo, en l'occurrence, est une situation où [...] les droits

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[29] *Travaux de poldérisation à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour), mesures conservatoires, ordonnance du 8 octobre 2003, C.I.J. Recueil 2003,* par. 67 et 68. Italiques ajoutées.

[30] *« Enrica Lexie », op. cit.*, par. 86. Italiques ajoutées.

[31] *Violations alléguées du traité d'amitié, de commerce, et de droits consulaires de 1955 (République Islamique d'Iran c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018*, par. 78, citant *Immunités et procédures pénales (Guinée équatoriale c. France),* mesures conservatoires, ordonnance du 7 décembre 2016, *C.I.J. Recueil 2016,* par. 90.

[32] *« ARA Libertad », op. cit.*, par. 97 à 100.

de l'Italie subissent un préjudice jour après jour, de manière continue et sans interruption»[33]. Nous sommes très exactement dans la même situation d'urgence aujourd'hui, car l'immunité de l'Etat ukrainien que lui reconnaît la Convention des Nations Unies sur le droit de la mer est chaque jour davantage et plus gravement violée.

Mais, Mesdames et Messieurs les juges, l'urgence, évidente en l'occurrence, s'impose avec encore plus de force lorsque l'on s'intéresse à la situation des équipages sur lesquels la Russie exerce illégalement sa juridiction. Votre Tribunal est sensible aux considérations d'humanité, et la détention manifestement illicite réservée à ces hommes, qui vous a été rapportée ce matin, aura sans doute suffi à former votre conviction[34].

C'est d'ailleurs cette même conviction qui avait conduit le Tribunal à juger dans l'*Affaire de l'« Arctic Sunrise »*[35] que l'urgence était établie notamment parce que « En ce qui concerne la détention prolongée de l'équipage, chaque jour passé en détention est irréversible »[36].

Laissez-moi insister sur ce mot, « irréversible ». Il sonne ici comme le terrible constat que chaque jour, chaque heure, chaque minute de liberté volée à ces marins est perdue à jamais, non seulement pour eux, mais aussi pour leurs familles, en particulier leurs conjointes, leurs enfants, et leurs parents. J'ajoute qu'un jour n'en vaut pas un autre. Être illégalement privé de liberté est difficile à vivre, injuste. Être durablement privé de liberté, qui plus est sans aucune perspective de libération à raison de l'obstination de celui qui vous tient dans ses geôles, est simplement insupportable, comme l'est toute détention arbitraire prolongée.

En l'espèce, les équipages sont en captivité depuis presque six longs mois. Toutes leurs demandes de libération ont été rejetées, y compris le 17 avril, date à laquelle leur détention a une nouvelle fois été prolongée de plusieurs mois ; aucune perspective de libération ne leur est suggérée par la conduite de leur geôlier, la Russie, qui les traite comme une bande de criminels, et ne tient pas le moindre compte des demandes de libération de l'Ukraine, répétées depuis le premier jour, ni des demandes multiples et pressantes qui viennent également du monde entier. Il y a plus que jamais, et chaque jour qui passe il y a davantage urgence à adopter des mesures conservatoires, et ce d'autant plus que la date de leur comparution lors du procès criminel qui leur est promis approche.

Monsieur le Président, Mesdames et Messieurs les juges, la Russie semble finalement suggérer dans son mémorandum du 7 mai que la procédure engagée devant la Cour européenne des droits de l'homme créerait une situation de litispendance, puisqu'elle souligne que cette procédure opposait les mêmes parties à propos du même litige que celui dont le Tribunal est saisi[37]. Il semble également que la Russie soutienne que dès lors que des mesures conservatoires ont été ordonnées par la Cour européenne des droits de l'homme, la situation dont le Tribunal est saisi perdrait son caractère d'urgence.

Ces objections n'ont aucun fondement :

- premièrement, le concept de litispendance est inconnu du droit international public, et aucune place ne lui est faite dans le Statut du Tribunal de céans ou dans la Convention ;

- deuxièmement, à supposer même que la litispendance puisse être invoquée – *quod non*, ses conditions ne seraient pas établies en l'espèce. La Cour permanente de justice internationale a décrit avec précision « les conditions essentielles qui constituent la litispendance » dans l'affaire relative à *Certains intérêts allemands en Haute Silésie*

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[33] *« Enrica Lexie », op. cit.*, par. 99.

[34] Ibid., par. 133, citant *Navire « SAIGA » (No. 2) (Saint-Vincent-et-les-Grenadines c. Guinée), arrêt du 1er juillet 1999, TIDM Recueil 1999,* par. 155.

[35] *« Arctic Sunrise », op. cit.*, par. 89.

[36] Ibid., par. 87.

[37] Mémorandum de la Fédération de Russie, par. 40.

polonaise[38]. Deux sur trois sont totalement absentes ici, à savoir i) « deux demandes identiques », ii) portées devant « des juridictions du même ordre »[39]. Les demandes ne sont pas identiques, et ont été portées devant des juridictions totalement indépendantes l'une de l'autre.

- troisièmement, les mesures prononcées par la Cour européenne des droits de l'homme concernent seulement les *conditions de détention* des marins ukrainiens, et n'influent donc nullement sur la *situation relative à la privation prolongée de la détention de ces marins*, qui est seule ici en cause lorsqu'il s'agit de caractériser l'urgence de la situation.

S'agissant enfin de la situation d'urgence se rapportant aux navires de guerre ukrainiens immobilisés par la Russie, et dont l'état comme la navigabilité se dégradent de jour en jour, afin de ne pas encombrer le prétoire, je suggère respectueusement au Tribunal de bien vouloir se reporter au paragraphe 42 de la demande en indication de mesures conservatoires du 16 avril 2019, qui n'a fait l'objet d'aucun commentaire de la Russie et n'appelle donc pas de développement supplémentaire de ma part.

J'en viens, Monsieur le Président, au dernier aspect qu'il me revient d'aborder, à savoir le caractère approprié des mesures conservatoires sollicitées. A vrai dire, l'Ukraine sollicite les seules mesures susceptibles de protéger les droits en litige, c'est-à-dire l'immunité absolue de ses navires et des équipages qui les servent. Elle demande en effet que soit enjoint sans délai à la Fédération de Russie de :

- libérer les navires militaires ukrainiens « Berdiansk », « Yani Kapu » et « Nikopol », et les remettre sous la garde de l'Ukraine ;

- suspendre les poursuites pénales engagées contre les vingt-quatre militaires ukrainiens détenus, et s'abstenir d'engager de nouvelles poursuites ; et

- libérer les vingt-quatre militaires ukrainiens détenus et les autoriser à rentrer en Ukraine.

Ce sont les conclusions qui sont portées devant vous par l'Ukraine.

Le Tribunal se souviendra que ce sont des mesures identiques qu'il avait ordonnées dans l'*Affaire de l'« ARA Libertad »,* qui est l'affaire la plus comparable à la situation présente. Dans l'*Affaire de l'« Arctic Sunrise »*, qui est également comparable puisqu'un navire et son équipage avaient été capturés et faisaient l'objet de poursuites, mais qui se distinguait de la présente affaire puisqu'elle ne mettait pas en cause l'immunité de navires de guerre contrairement au cas d'espèce, le Tribunal avait pris les mêmes mesures, mais en y adjoignant l'obligation pour le demandeur de déposer une caution. En la présente espèce, où ce qui est en cause est l'immunité de navires de guerre, l'idée d'une caution est, comme dans l'*Affaire de l'« ARA Libertad »*, sans objet et proprement impensable. Du reste, la Russie ne le suggère nullement.

Dans son mémorandum du 7 mai, la Russie oppose toutefois deux objections, la première postulant que les mesures conservatoires demandées préjugeraient du fond, la seconde se plaignant de ce qu'elles empêcheraient la Russie d'exercer sa juridiction pénale si les mesures provisoires étaient exécutées. Je vais réfuter ces deux objections tour à tour.

La Russie objecte d'abord qu'ordonner les mesures conservatoires sollicitées par l'Ukraine reviendrait à trancher l'affaire au fond. Pour en convaincre, elle compare la demande au fond et la demande de mesures conservatoires[40], et constate que l'une et l'autre contiennent des demandes de libération des navires et de leurs équipages.

Cette objection est erronée en fait comme en droit.

En premier lieu, les demandes au titre de l'urgence ne sont pas les mêmes que les demandes au fond. En effet :

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[38] *Certains intérêts allemands en Haute Silésie Polonaise*, *CPJI, arrêt du 25 août 1925*, p. 20.
[39] Ibid.
[40] Mémorandum de la Fédération de Russie, par. 41.

- au fond, ce que l'Ukraine demande au Tribunal est de constater que le comportement russe viole la Convention, et, par conséquent, qu'il décide que la Russie doit cesser de commettre cette violation, ce qui passe notamment par la libération des navires et de leurs équipages, et que des réparations appropriées lui soient allouées. Voilà les conclusions au fond, et il serait évidemment abscons que l'Ukraine ne conclue pas en ce sens sa demande au fond ;

- devant vous, l'Ukraine ne demande pas la mise en œuvre de la responsabilité de la Russie pour fait internationalement illicite, et ne demande pas que des conséquences soient tirées de cette responsabilité. Elle sollicite, afin que ses droits soient préservés, que des mesures conservatoires consistant à libérer ses navires et leurs équipages soient ordonnées. En aucun cas de telles mesures ne reviendraient à trancher le fond puisqu'elles ne seraient évidemment pas fondées sur l'engagement de la responsabilité de la Russie. Elles seraient justifiées, comme toute mesure d'urgence, par la nécessité, dans les circonstances de l'espèce, de protéger les droits en litige, en attendant la prise en charge du dossier par le tribunal de l'annexe VII.

En deuxième lieu, le Tribunal de céans n'a pas songé une seule seconde en 2012 que la libération à titre conservatoire de l'« ARA Libertad » et de son équipage reviendrait à trancher le fond, alors même que, au fond, l'Argentine demandait, tout comme l'Ukraine dans la présente espèce, que soit décidée la libération de son navire et de son équipage[41]. Le Tribunal a au contraire constaté que son ordonnance, dans l'*Affaire de l'« ARA Libertad »* : « ne préjuge[ait] en rien la question de la compétence du tribunal arbitral prévu à l'annexe VII pour connaître du fond de l'affaire, ni aucune question relative au fond lui-même »[42]. La même conclusion s'impose ici.

En troisième lieu, aucune juridiction internationale n'a admis le raisonnement de la Russie. Trois exemples tirés de la jurisprudence de la Cour internationale de Justice suffiront à l'illustrer.

- Dans *Géorgie c. Russie*, l'une des demandes au fond de la Géorgie était que la Cour ordonne à la Russie de s'abstenir de prendre des mesures discriminatoires et de protéger certaines populations des discriminations[43]. La Cour internationale de Justice a très exactement réclamé des parties, à titre conservatoire, de s'abstenir de tout acte de discrimination, et de prendre des mesures de protection contre la discrimination[44]. La ressemblance entre les demandes au fond et la demande de mesures conservatoires était patente. Cela n'a pas empêché la Cour de Justice de prendre les mesures conservatoires sollicitées.

- L'Inde a conclu sa requête au fond dans la récente *Affaire Jadhav* en demandant la suspension immédiate de la condamnation à mort de M. Jadhav[45]. La mesure conservatoire demandée par l'Inde, et indiquée par la Cour, a précisément été la suspension de l'exécution de M. Jadhav[46].

- Enfin, exemple plus ancien attestant de la permanence de cette approche, dans l'*Affaire du Personnel diplomatique et consulaire des Etats-Unis à Téhéran,* la Cour a ordonné

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[41] *« ARA Libertad » (Argentine c. Ghana)*, note en date du 29 octobre 2012 de l'Ambassadrice d'Argentine au Ghana au Ministre des affaires étrangères, engageant contre le Ghana la procédure prévue par l'annexe VII de la Convention, par. 7, point 1) (Traduction du Greffe, annexe A à la demande de prescription de mesures conservatoires de l'Argentine).

[42] *« ARA Libertad » (Argentine c. Ghana), mesures conservatoires, ordonnance du 15 décembre 2012, TIDM Recueil 2012*, par. 106 ; voir aussi *« Arctic Sunrise », op. cit.*, par. 100.

[43] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie),* requête introductive d'instance – Géorgie, par. 83 d) et g).

[44] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008,* par. 149.

[45] *Jadhav (Inde c. Pakistan), mesures conservatoires, ordonnance du 18 mai 2017, C.I.J. Recueil 2017,* par. 2, point 1).

[46] Ibid., par. 61.

à titre conservatoire la libération immédiate des personnels des Etats-Unis retenus captifs dans l'ambassade et la restauration de l'autorité américaine sur les locaux diplomatiques[47] alors même que la demande au fond contenait l'exacte même requête[48].

Par conséquent, contrairement à ce que la Russie avance, la ressemblance entre certaines demandes au fond et à titre conservatoire n'est pas une cause de rejet des mesures conservatoires à raison qu'elles préjugeraient du fond. Ce qui importe au Juge de l'urgence est de savoir si lesdites mesures sont nécessaires dans les circonstances de l'espèce pour la protection des droits en litige *pendente litis*.

Monsieur le Président, au titre de sa deuxième objection, la Russie se plaint de ce que, si les navires et leurs équipages sont relâchés à titre conservatoire des droits dont l'Ukraine se prévaut, la Russie ne pourrait plus engager de poursuites – en l'occurrence, des poursuites pénales – à leur endroit[49]. L'assertion est assénée de manière télégraphique dans le mémorandum du 7 mai, elle frappe par son caractère fruste, postulant que les relations internationales s'ordonnent autour de purs rapports de force.

Ce faisant, la Russie semble oublier – c'est une amnésie qui lui semble familière – que ses relations avec l'Ukraine sont encadrées par des règles de droit international dont, pour sa part, l'Ukraine n'a jamais eu l'intention de s'affranchir.

Autrement dit, dans les relations entre l'Ukraine et la Russie, lorsque l'un des deux Etats entend poursuivre des ressortissants de l'autre que ce dernier tient sous sa juridiction, la solution que le droit international lui propose n'est pas de les capturer illégalement, en violant l'immunité des navires de guerre tout comme le principe de l'exclusivité de la compétence de l'Etat du pavillon. La solution que promeut le droit international est de s'en remettre aux procédures patiemment négociées et consolidées dans les traités. En l'espèce, si, comme l'Ukraine le demande, ses navires et marins sont relâchés, mais si, par la suite, le droit à l'immunité ne lui est pas reconnu au fond, il sera loisible à la Russie, pour faire valoir ses prétentions à engager des poursuites pénales à l'encontre des marins ukrainiens, de mettre en œuvre toutes les procédures pertinentes qui lui sont offertes conformément au droit international.

Monsieur le Président, Mesdames et Messieurs les juges, j'en arrive à la conclusion de mon propos qui est que, dans les circonstances de l'espèce, les mesures conservatoires sollicitées par l'Ukraine sont parfaitement adaptées à la situation, qui se caractérise par un risque de préjudice irréparable aux droits dont l'Ukraine se prévaut, et par l'urgence qu'il y a à les préserver dans l'attente de la procédure au fond.

Vous remerciant bien vivement pour votre patiente attention, je me permets de suggérer, Monsieur le Président, que Son Excellence Olena Zerkal soit appelée à la barre afin de conclure les plaidoiries de l'Ukraine.

THE PRESIDENT: Thank you, Mr Thouvenin.

Now I give the floor again to the Agent of Ukraine, Ms Zerkal.

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[47] *Personnel diplomatique et consulaire des Etats Unis à Téhéran (Etats-Unis c. Iran), mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979,* par. 47.

[48] Ibid., par. 1, point b).

[49] Mémorandum de la Fédération de Russie, par. 42.

STATEMENT OF MS ZERKAL
AGENT OF ITALY
[ITLOS/PV.19/C26/1/Rev.1, p. 36]

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

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

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

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

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

THE PRESIDENT: Thank you, Ms Zerkal.

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

Closure of the Oral Proceedings
[ITLOS/PV.19/C26/1/Rev.1, p. 37; TIDM/PV.19/A26/1/Rev.1, p. 40]

THE PRESIDENT: This brings us to the end of the hearing. On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations at the hearing.

Now the Registrar will address questions in relation to documentation.

LE GREFFIER : Merci, Monsieur le Président.

Conformément à l'article 86, paragraphe 4, du règlement du Tribunal, les Parties peuvent, sous le contrôle du Tribunal, corriger le compte rendu de leurs plaidoiries ou déclarations, sans pouvoir toutefois en modifier le sens et la portée. Ces corrections concernent la version vérifiée du compte rendu dans la langue officielle utilisée par la Partie concernée. Les corrections devront être transmises au Greffe le plus tôt possible et au plus tard mardi 16 mai 2019 à 17 heures, heure de Hambourg.

THE PRESIDENT: Thank you, Mr Registrar.

The Tribunal will now withdraw to deliberate. The date for the delivery of the Order in this case is tentatively set to Saturday, 25 May 2019. The Parties will be informed reasonably in advance of any change to this date.

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

The hearing is now closed.

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

These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sitting held in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures.*

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal de l'audience publique de l'*Affaire relative à l'immobilisation de trois navires militaires ukrainiens (Ukraine c. Fédération de Russie), mesures conservatoires.*

Le 25 février 2020
25 February 2020

Le Président
Jin-Hyun Paik
President

La Greffière
Ximena Hinrichs Oyarce
Registrar