

**REQUEST OF UKRAINE FOR THE PRESCRIPTION
OF PROVISIONAL MEASURES UNDER ARTICLE 290,
PARAGRAPH 5, OF THE UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA**

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

DISPUTE CONCERNING THE IMMUNITY OF
THREE UKRAINIAN NAVAL VESSELS
AND THE TWENTY-FOUR SERVICEMEN ON BOARD

UKRAINE v. THE RUSSIAN FEDERATION

REQUEST OF UKRAINE FOR THE PRESCRIPTION OF
PROVISIONAL MEASURES UNDER ARTICLE 290, PARAGRAPH 5,
OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

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IMMUNITY OF THREE UKRAINIAN NAVAL VESSELS
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AND THE TWENTY-FOUR SERVICEMEN ON BOARD**REQUEST OF UKRAINE FOR THE PRESCRIPTION OF
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OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA****CHAPTER 1
INTRODUCTION**

1. Pursuant to Article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (the “Convention” or “UNCLOS”), Ukraine requests that the International Tribunal for the Law of the Sea (the “Tribunal”) prescribe provisional measures in the dispute between Ukraine and the Russian Federation concerning the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board.
2. The dispute between the parties arises from the Russian Federation’s unlawful seizure and detention of the warships *Berdiansk* and *Nikopol*, the naval auxiliary vessel *Yani Kapu*, and the crew and other servicemen on those vessels. At the time of their seizure by the Coast Guard of the Border Service of Russia’s Federal Security Service (the “FSB Coast Guard”), the three Ukrainian naval vessels were in the Black Sea traveling away from the coast of the Crimean Peninsula and toward their home port of Odesa.
3. Despite Ukraine’s protests, the Russian Federation continues to detain Ukraine’s naval vessels and has instituted criminal proceedings against its servicemen for allegedly violating a Russian border control statute. The twenty-four servicemen remain in Russian prisons, have been subjected to interrogations and psychological examinations by civilian authorities of the Russian government, and have been made repeatedly to appear before Russian courts. Each day of detention, each interrogation, each involuntary psychological examination, and each court appearance compounds Russia’s violation of the sovereign immunity accorded to warships, naval auxiliary vessels, and their passengers and crew under Articles 32, 58, 95, and 96 of the Convention and customary international law.
4. By written Notification served on the Russian Federation on 1 April 2019, Ukraine submitted the dispute between the parties to the arbitral procedure provided for in Annex VII of UNCLOS. A certified copy of the Notification and Statement of the Case and Grounds on which it is Based (the “Notification”) is provided as **Annex A** to this Request.
5. In its Notification, Ukraine requested that Russia adopt and implement provisional measures to avoid further prejudice to Ukraine’s legal rights, including by immediately releasing Ukraine’s naval vessels and the servicemen on board. More than two weeks have passed since this request, and Russia has not implemented the requested provisional measures. In the interim, the parties have not agreed to the jurisdiction of any other court or tribunal in connection with Ukraine’s request, and they have not yet constituted an Annex VII tribunal to hear the dispute between them. Accordingly, Ukraine now seeks an order from this Tribunal prescribing the provisional measures outlined in its Notification.

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STATEMENT OF FACTS

6. The facts relevant to this dispute are set out in paragraphs 3-15 of the Notification.
7. **Annex B** to this Request contains a report (the “Navy Report”), executed by the Commander of the Naval Forces of Ukraine, Vice Admiral Ihor Oleksandrovykh Voronchenko, which provides further information on the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and the events preceding their detention.¹
8. The Navy Report and the documents annexed to it confirm that: the three Ukrainian naval vessels were engaged in a peaceful transit between two Ukrainian ports; at the time they were stopped and boarded, the three vessels had abandoned their transit and were seeking to navigate away from the Crimean shoreline and to return to their home port of Odesa; and the boarding of the vessels took place in the Black Sea, approximately 12 nautical miles from the coast in the case of the *Berdyansk* and the *Yani Kapu* and approximately 20 nautical miles from the coast in the case of the *Nikopol*.² As the Navy Report explains, the Russian Federation interfered with radio transmissions from the vessels around the time of the boarding, which may have prevented them from transmitting their precise locations.³
9. The seizure and detention of the *Berdyansk* and the *Nikopol* have deprived Ukraine of the use of two operational warships employed in support of the national defense — ships that carry sensitive equipment that cannot be inspected by foreign authorities without prejudicing Ukraine’s interests.⁴ Further, the detention of all three vessels interferes with required maintenance and threatens their seaworthiness.⁵
10. Also appended to this request, as **Annex C**, is a declaration of Mr. Nikolai Polozov, an Advocate of the Russian bar who serves as legal counsel to Captain (Second Rank) Denys Volodymyrovych Hrytsenko and who is in regular contact with the attorneys representing each of the remaining detained Ukrainian servicemen.⁶
11. Mr. Polozov’s declaration confirms that the servicemen have, since their capture on 25 November 2018, been held in Russian prisons and been subject to Russian civilian criminal legal procedures, having been charged with illegally crossing the state border

¹ Ukraine’s Notification indicated that Senior Lieutenant Andriy Leonidovych Drach and Senior Lieutenant Vasyl Viktorovych Soroka were stationed on the *Yani Kapu*. As reflected in the Navy Report, Annex B, at page 9, Senior Lieutenants Drach and Soroka were on the *Berdyansk* and the *Nikopol*, respectively. Ukraine’s Notification further stated that the vessels were initially bound for Mariupol; their original destination was in fact the neighboring port of Berdyansk. *Id.*, ¶ 6.

² Annex B, Navy Report, ¶¶ 6, 14-15.

³ *Id.*, ¶¶ 7, 15.

⁴ *Id.*, ¶ 18.

⁵ *Id.*, ¶ 16.

⁶ Annex C, Polozov Declaration, ¶¶ 1-2.

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of the Russian Federation in violation of Article 322(3) of the Russian Criminal Code.⁷

12. The Russian Federation has rebuffed all attempts to secure the pre-trial release of the twenty-four servicemen. Their detentions have already been extended by Russian authorities and, this week, the servicemen will again be made to appear in Russian court for hearings on the further extension of their pre-trial detentions.⁸ While in custody, the servicemen have been made to endure not only periodic interrogations by the FSB, but also “psychological examinations” at the Serbsky Institute, a government-run psychological institution.⁹ In accordance with their training and their immunity from Russian jurisdiction, the servicemen have refused to cooperate with Russian civilian investigators.¹⁰ Nevertheless, each interrogation, each psychological examination, each forced court appearance, each day facing Russian criminal charges, and each day of continued detention results in a further affront to the immunity accorded to them under international law, and imposes a significant emotional burden on the servicemen and their families. The wives and parents of servicemen have spoken publicly about the emotional hardship they have endured from the continued detentions of their husbands and sons.¹¹
13. Mr. Polozov’s declaration explains that, in addition to detaining Ukraine’s servicemen, the Russian Federation is undertaking pre-trial procedures to prepare for criminal trials against them. These pre-trial procedures will continue over the course of this spring and summer.¹² The trials themselves are expected to take place in the late summer or autumn and may result in sentences of up to six years’ imprisonment for each of the servicemen, which would likely be served at a corrective labor camp.¹³ In addition to pre-trial procedures related to the servicemen, the trials will be preceded by, among other things, additional “investigations” by Russian authorities on board the captured vessels — testing everything from their armaments to their navigation and radio equipment — which will further violate the immunity of the vessels.¹⁴
14. The essential facts establishing the Russian Federation’s violation of Ukraine’s immunities are not in dispute. The FSB has published a formal statement, reproduced at Appendix C to the Notification, concerning the events of 25 November 2018.

⁷ *Id.*, ¶¶ 3-4.

⁸ *Id.*, ¶ 9.

⁹ *Id.*, ¶ 5.

¹⁰ *Id.*, ¶ 7.

¹¹ *See, e.g.*, 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), <https://www.cbc.ca/news/world/captured-ukrainian-sailors-1.5017239>; Annex D, Appendix B, Voice of America, Families of Detained Ukrainian Sailors Search for Answers (7 December 2018), <https://www.youtube.com/watch?v=yLBi1QcgrtU>.

¹² Annex C, Polozov Declaration, ¶ 10.

¹³ *Id.*, ¶ 10.

¹⁴ *Id.*, ¶ 11.

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While the statement does not accurately reflect all aspects of the events of that day, it does evidence Russia's acknowledgement that the detained vessels are "Ukrainian naval ships,"¹⁵ that the FSB Coast Guard seized those vessels,¹⁶ that at the time of the seizure the vessels were attempting to navigate away from the Crimean Peninsula,¹⁷ and that the Convention is applicable to this incident.¹⁸ The continued detention of the servicemen and the nature of the civilian criminal charges against them is also a matter of public record, and is reflected in Russian court documents appended to Mr. Polozov's declaration.¹⁹

CHAPTER 3
JURISDICTION

15. Article 290, paragraph 5, of UNCLOS provides that this Tribunal is competent to prescribe provisional measures in connection with this dispute "if it considers that *prima facie* the tribunal which is to be constituted [under Annex VII] would have jurisdiction" over the dispute. As the Tribunal explained in its most recent provisional measures order, the requirements of Article 290(5) are 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."²⁰
16. Here, paragraphs 16-21 of the Notification establish that an Annex VII arbitral tribunal would have jurisdiction over the dispute under Articles 286 and 288 of the Convention. In particular, Ukraine and the Russian Federation are both parties to the Convention, and a dispute has arisen between them concerning, *inter alia*, the interpretation or application of Articles 32, 58, 95, and 96.
17. Ukraine's Notification of an Annex VII dispute also satisfies the requirements of Articles 287 and 283 of the Convention. Pursuant to Article 287, both Ukraine and the Russian Federation have selected Annex VII arbitration as the means of settling disputes such as this one.²¹ And, consistent with Article 283 of the Convention, Ukraine has taken reasonable and expeditious steps to exchange views with the

¹⁵ See 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), at p. 1.

¹⁶ See *id.*, p. 6.

¹⁷ See *id.*, p. 4.

¹⁸ See *id.*, pp. 3-4 (citing UNCLOS Articles 19, 25, and 30 as purported justification for the actions taken by the FSB Coast Guard); see also Annex D, Appendix C, Image of Seized Ukrainian Military Vessels Seen in the Port of Kerch on November 26, 2018 (STR/AFP/Getty Images).

¹⁹ Annex C, Polozov Declaration, Appendices A-B.

²⁰ *Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶ 52.

²¹ Declarations of States Parties Relating to Settlement of Disputes, ITLOS Yearbook 2002, Vol. 6, Annex II, pp. 118-120.

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Russian Federation regarding the settlement of the dispute by negotiation or other peaceful means.²² However, no settlement of the dispute has been reached.

18. Ukraine and the Russian Federation have both made reservations in accordance with Articles 297 and 298 of the Convention. None of the limitations on the Convention's compulsory dispute settlement procedures set forth in Article 297 or 298 are relevant to this dispute.

CHAPTER 4
STATEMENT OF LEGAL GROUNDS

19. Ukraine seeks provisional measures to protect against the serious and irreparable harm to its rights that will be caused by the continued detention of its naval vessels and the continued detention and prosecution of its servicemen.
20. As this Tribunal has recognized, a warship, and any other vessel assigned to the public service of national defense, "is an expression of the sovereignty of the State whose flag it flies."²³ Such ships are entitled to complete immunity from seizure, detention and legal process. The seizure and detention of a warship or other naval vessel, and persons on board comprising part of the unit of the ship,²⁴ gravely threatens the rights and dignity of the flag State and presents a situation of urgency. That is especially so here, where the circumstances of Russia's detention of the *Berdyansk*, the *Nikopol*, the *Yani Kapu*, and the servicemen on board those vessels present both practical and humanitarian considerations that compel the prescription of provisional measures in this case.
21. Part I of this Chapter summarizes the measures Ukraine asks this Tribunal to prescribe and Part II sets out the rights under the Convention that such measures would protect. Part III establishes that the detention of Ukraine's warships, its naval auxiliary vessel, and the servicemen on board has resulted in continuing, irreparable harm to Ukraine that should urgently be addressed through the prescription of provisional measures.

I. The Measures Requested

22. Ukraine asks this Tribunal to prescribe the provisional measures outlined in Ukraine's Notification. Specifically, Ukraine seeks an order requiring Russia to promptly:
- a. Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to Ukraine;

²² See Annex A, Notification, ¶¶ 13-15, 19.

²³ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 94; see *Allianz Via Insurance v. United States of America*, Cour d'appel [CA] [regional court of appeal] Aix-en-Provence (France), 2nd Chamber, Judgment of 3 September 1999, available at Oxford International Law Reports, vol. 127, p. 148 (applying the same principle to all vessels assigned to "the public service of national defense").

²⁴ See *infra*, ¶ 25 & n.29 (collecting cases that confirm a ship is to be treated as a single unit).

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- 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.

II. Legal Grounds for Ukraine's Request

23. Ukraine's request for provisional measures is intended to protect its rights under UNCLOS Articles 32, 58, 95, and 96, as well as principles of customary international law concerning the sovereign immunity of warships and naval auxiliary vessels. The rights Ukraine seeks to protect are among "the most important pillars of the *ordre public* of the oceans,"²⁵ and are not only plausible but compelling.²⁶
24. Under Articles 95 and 96 of the Convention, warships and naval auxiliary vessels on the high seas and in the exclusive economic zone enjoy "complete immunity from the jurisdiction of any State other than the flag State."²⁷ Article 32 of the Convention and customary international law guarantee the same complete immunity for warships and naval auxiliary vessels in the territorial sea and internal waters.²⁸ Confirming the immunity of warships in the territorial sea, Articles 30 and 31 provide — as the exclusive remedies for the coastal State in connection with a naval vessel's non-compliance with its laws and regulations — that the coastal State is permitted to "require [a warship] to leave the territorial sea immediately" when it has failed to comply with permissible laws and regulations concerning passage, and that the coastal State may subsequently seek compensation from the flag State for any damage caused by the warship.²⁹
25. As this Tribunal has previously determined, "the Convention considers a ship as a unit," comprised of the ship itself, its crew, every other person on board the ship or otherwise "involved or interested in its operations," and the ship's cargo.³⁰ Thus, the

²⁵ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, Declaration of Judge Paik, ¶ 2.

²⁶ *See Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶ 84 ("[B]efore prescribing provisional measures, the Tribunal does not need to concern itself with the competing claims of the Parties, . . . it needs only to satisfy itself that the rights which [the Parties] claim and seek to protect are at least plausible.").

²⁷ UNCLOS Articles 95-96; *see id.* Article 58 (applying Articles 95 and 96 in the exclusive economic zone).

²⁸ *See id.* Article 32 ("With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."); *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 95 ("[I]n accordance with general international law, a warship enjoys immunity, including in internal waters . . .").

²⁹ UNCLOS Articles 30-31.

³⁰ *See M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999, ¶ 106; *M/V Virginia G (Panama v. Guinea-Bissau)*, ITLOS Case No. 19, Judgment of 14 April 2014, ¶¶ 126-127 ("The Tribunal finds that the *M/V Virginia G* is to be considered as a unit and therefore the *M/V Virginia G*, its crew and cargo on board as well as its owner and every person involved or interested in its operations are to be treated

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passengers and crew of a naval vessel are entitled to immunity to the same extent as the vessel.³¹ The Ukrainian servicemen detained by the Russian Federation are also entitled to the customary immunity accorded public servants exercising official functions.³²

26. The immunity accorded Ukraine's vessels and servicemen exempts them from any form of arrest or detention, and makes it unlawful for any third State to board the vessels or otherwise prevent them "from discharging [their] mission and duties."³³ The vessels and servicemen are also immune from all forms of civilian legal process, and such immunity must be recognized and applied at the very outset of any legal proceeding against them.³⁴ In the specific context of criminal proceedings against foreign governmental officials, the mere *issuance* of an unexecuted arrest warrant has been held by both international and domestic tribunals to violate customary immunities under international law.³⁵ The actions of the Russian Federation go much further.

as an entity linked to the flag State."); see also *Arctic Sunrise*, Annex VII Award on the Merits of 14 August 2015, ¶¶ 170-172 ("Not all of the persons on board the *Arctic Sunrise* were, strictly speaking, crewmembers. . . . Notwithstanding this, . . . they were all closely involved or interested in the ship's campaigning operations for Greenpeace through protest at sea. As such, they are properly considered part of the unit of the ship, and thus fall under the jurisdiction of the Netherlands as the flag State.").

³¹ 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 ("A warship with all persons and goods on board[] remains under the jurisdiction of her flag-state even during her stay in foreign waters.").

³² See *Jones v. United Kingdom*, ECtHR Nos. 34356/06 and 40528/06, Judgment, 14 January 2014, ¶ 204 ("The weight of authority at international and national level therefore appears to support the proposition that State immunity in principle offers individual employees or officers of a foreign State protection in respect of acts undertaken on behalf of the State under the same cloak as protects the State itself.").

³³ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶¶ 97-98; see also 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 ("No official of the littoral state is allowed to board the vessel without special permission of the commander. Crimes committed on board by persons in the service of the vessel are under the exclusive jurisdiction of the commander and the other home authorities.").

³⁴ See *Immunity From Legal Process*, ICJ Advisory Opinion of 29 April 1999, ¶¶ 62-63 (holding that national courts are obliged to "expeditiously" decide "questions of immunity . . . in *limine litis*").

³⁵ See, e.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Judgment of 14 February 2002, ¶¶ 70-71, 76 (issuance of an arrest warrant violated the immunity of the Congolese Minister Foreign Affairs, and warrant had to be revoked even after the Minister left office and even though it had not been executed while the Minister was in office); *Application for Arrest Warrant Against General Shaul Mofaz*, District Court — Bow Street (London, England), Judgment of 12 February 2004, ¶ 10, reproduced in 53 I.C.L.Q. 772 (UK 2004) ("It has been argued by the Applicant that if the [Israeli Defense Minister] enjoys any kind of immunity, and that is not accepted by the Applicant, then the proper time to raise it would be at the first hearing after the warrant has been issued. I am afraid that I disagree with that proposition and take the view that [S]tate immunity is one of the issues that I must consider.").

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27. Rather than merely issue threats, Russia has actually seized Ukraine's vessels and arrested its servicemen. And it has subjected Ukraine's servicemen to months of legal process, notwithstanding their immunity from Russian jurisdiction. Russia's continued detention of Ukraine's vessels and its continued detention, interrogation, and prosecution of Ukraine's servicemen results in ongoing and compounding harm to Ukraine's legally protected interests.

III. Possible Consequences of the Continued Detention of Ukraine's Naval Vessels and Servicemen, and the Urgency of the Situation Presented by their Detention

28. Under Article 290, paragraphs 1 and 5, this Tribunal may prescribe provisional measures where appropriate: (i) to preserve the rights of the parties and (ii) in light of the urgency of the situation.
29. As this Tribunal has previously recognized, the detention of a warship or other naval vessel presents a grave threat of irreparable harm to the rights of the flag State and should be addressed on an urgent basis. In addition, the particular circumstances of this case — which, as noted, involve the extended custodial detention of Ukraine's servicemen, ongoing criminal cases against them, and the continued detention of damaged vessels that require repairs and regular maintenance — further establish the need for provisional measures under Article 290.

A. Prejudice to the Flag State and Urgency Associated with the Detention of Naval Vessels and the Servicemen on Board

30. In its provisional measures order in *The ARA Libertad*, the Tribunal recognized that the detention of a warship and its crew intrudes on the flag State's dignity and sovereignty, and risks interfering with the performance of important public duties.³⁶
31. The situation here is more acute than that presented in *The ARA Libertad*. There, Ghana had detained a training and goodwill vessel of the Argentinian Navy,³⁷ which remained under the command of Argentinian officers who were able to secure and maintain the ship even while it was detained.³⁸ Here, the vessels seized by the Russian Federation are operational ships of the Ukrainian Navy which play important roles in the public defense.³⁹ The two artillery boats, in particular, make an important contribution to Ukraine's national defense and carry sensitive radio encryption

³⁶ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 98.

³⁷ See *id.*, ¶ 40; *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Request of Argentina for Provisional Measures, Annex B (providing information regarding the vessel from the Argentinian Navy).

³⁸ See *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 91; *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Request of Argentina for Provisional Measures, Annex 1, § 3 (affidavit of the Commander of the *Libertad* detailing serious challenges associated with the detention, but affirming that "the crew is fulfilling its vessel maintenance and security duties").

³⁹ Annex B, Navy Report, ¶ 17.

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equipment that cannot be inspected by foreign authorities without causing harm to Ukraine's interests.⁴⁰

32. Moreover, the detained naval vessels are no longer under the control of Ukrainian sailors and are, according to the account of Mr. Polozov, subject to boarding and “investigat[ive]” steps by Russian officials.⁴¹ Far from being able to secure their vessels and perform their regular maintenance duties, the servicemen on board the *Berdiansk*, the *Nikopol*, and the *Yani Kapu* have spent the past five months in Russian prisons, where they have faced criminal charges, been subjected to interrogations, to periodic appearances in criminal court, and even to psychological examinations.⁴² These intrusions on their immunity — and their personal freedom — will be compounded each additional day they remain in detention.
33. As the Tribunal recognized in *The ARA Libertad*, harms of this nature, involving intrusions on the immunity of warships and their crew, cannot be remedied by a subsequent award of damages.⁴³ Writing separately in support of the Tribunal's provisional measures order in *The ARA Libertad*, Judge Paik observed:

[T]he rights allegedly violated are of such nature that compensation or any material reparation may fall short of repairing harm caused to them. According to Argentina, prejudice or harm to its rights includes not only a serious risk to the very existence of its rights but consequential damages such as the prevention of the warship from fulfilling its missions and duties, a serious risk to the safety of the warship and its crew and injuries to the dignity of the State and the feelings of its people. What is important in this case is that the continuation of [the] situation is likely to increase a serious risk of irreparable prejudice or harm to those rights.⁴⁴

34. The Tribunal's order in *The ARA Libertad* also established the urgency inherent in any situation involving the detention of a warship. As the Tribunal stated: “any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States.”⁴⁵ The Tribunal further determined that the unauthorized boarding of a warship, and the risk of additional unauthorized boardings, presents a “grav[e]” situation that “underline[s] the

⁴⁰ *Id.*, ¶¶ 17-18.

⁴¹ Annex C, Polozov Declaration, ¶ 11.

⁴² See *supra*, ¶¶ 11-13; Annex C, Polozov Declaration, ¶¶ 3-5, 8-9.

⁴³ See *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 100 (determining that provisional measures were necessary to “preserv[e] the respective rights of the Parties”).

⁴⁴ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, Declaration of Judge Paik, ¶ 2.

⁴⁵ *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 97.

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urgent need for measures pending the constitution of [an] Annex VII arbitral tribunal.”⁴⁶ The same reasoning applies equally to naval auxiliary vessels, such as the *Yani Kapu*, which enable warships to perform their duties, and which are also immune from any form of visit by foreign authorities.

35. This Tribunal found that the situation presented by the detention of the *ARA Libertad* was grave and urgent. *A fortiori*, the situation presented by Russia’s detention of the *Berdiansk*, the *Nikopol*, and the *Yani Kapu*, and Russia’s imprisonment and ongoing prosecution of the servicemen on board those vessels, is only more so. The requirements of prejudice and urgency under Article 290(5) of the Convention are, therefore, satisfied in this case.

B. Aggravating Circumstances Further Demonstrating Prejudice to the Flag State and Urgency of the Situation

36. In addition to recognizing the particular gravity and urgency associated with detentions of naval vessels, this Tribunal, and arbitral tribunals constituted under Annex VII, have repeatedly recognized that the continued detention of *any* vessel and its crew — including merchant vessels and vessels in non-governmental service — prejudices the rights of the flag State and justifies the prescription of provisional measures. Thus, the Tribunal has issued orders: (i) precluding judicial or administrative measures against the master, crew, owners and operators of an oil tanker, the *M/V Saiga*, even after that vessel’s release from detention by the coastal State;⁴⁷ (ii) requiring the release on bond of the *Arctic Sunrise* and all detained passengers and crew members;⁴⁸ and (iii) requiring the suspension of all court proceedings against Italian marines accused of killing two Indian fishermen while on board the *Enrica Lexie*, an oil tanker.⁴⁹ In the *Enrica Lexie* case, an Annex VII arbitral tribunal subsequently ordered the parties to cooperate to enable the one Italian marine who remained in India (on bail rather than in custody) to be allowed to return to Italy for the pendency of the Annex VII arbitration.⁵⁰
37. The detention of a warship or naval auxiliary vessel presents a categorically different, more serious, and more urgent situation than those presented in the *M/V Saiga*, *Arctic Sunrise*, and *Enrica Lexie* cases. But the Tribunal’s orders in those cases relied on practical and humanitarian considerations that further support the prescription of provisional measures here.

⁴⁶ *Id.*, ¶ 99.

⁴⁷ *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Provisional Measures, Order of 11 March 1998, ¶ 52.

⁴⁸ See *Arctic Sunrise (Netherlands v. Russia)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013, ¶ 95.

⁴⁹ See *Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶¶ 43, 141.

⁵⁰ See *Enrica Lexie (Italy v. India)*, Annex VII Provisional Measures Order, ¶ 132.

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38. First, as the Tribunal recognized in *M/V Saiga No. 2 (Provisional Measures)*, the pursuit of legal proceedings against the master and crew of any vessel results in irreparable harm to the interests of the flag State, and also presents a situation of urgency. In particular, the Tribunal explained that, “the rights of the Applicant would not be fully preserved if, pending the final decision, the vessel, its Master and the other members of the crew, its owners or operators were to be subjected to *any judicial or administrative measures* in connection with the incidents leading to the arrest and detention of the vessel and to the subsequent prosecution and conviction of the Master.”⁵¹
39. Notably, the Tribunal in *M/V Saiga* came to this conclusion even though the master and crew of the vessel had — notwithstanding the master’s conviction on charges of illegal importation of fuel — been released from the custody of the coastal State pursuant to a prior prompt release order under Article 292 of the Convention.⁵² Here, Ukraine’s vessels and servicemen remain in Russian custody, creating an ongoing risk that the servicemen will be tried and sentenced to lengthy terms of imprisonment of up to six years.
40. Second, the Tribunal has repeatedly affirmed that “considerations of humanity must apply in the law of the sea as they do in other areas of international law,”⁵³ and it has specifically recognized such considerations as relevant in connection with detentions by coastal States of the crew and others on board foreign vessels. In the *Enrica Lexie* case, the Tribunal considered the situation of two Italian marines who, while on board a merchant vessel in India’s exclusive economic zone, had mistaken an Indian fishing vessel for a pirate ship and opened fire on it, killing two fishermen. The marines had been arrested by Indian authorities and, as noted, were subsequently released on bail, with one of the marines being permitted to return temporarily to Italy.⁵⁴ Notwithstanding their release on bail, the Tribunal indicated that the “lengthy restrictions on [the] liberty” of the marines harmed them and their families, and implicated considerations of humanity.⁵⁵
41. Here, the crime Russia contends the detained servicemen have committed — violation of a Russian statute regulating border crossings — is plainly victimless, not remotely comparable to the alleged taking of human life in *Enrica Lexie* and, in any event, beyond the authority of Russia to prosecute given the complete immunity enjoyed by the vessels and servicemen.⁵⁶ Thus, the countervailing considerations of humanity

⁵¹ *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Provisional Measures, Order of 11 March 1998, ¶ 41 (emphasis added).

⁵² *Id.*, ¶¶ 36, 38.

⁵³ *Enrica Lexie (Italy v. India)*, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015, ¶ 133 (citing *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999, ¶ 155).

⁵⁴ *See id.*, ¶ 108(b) (noting Italy’s request that one detained marine be permitted to “remain in Italy” and the other be permitted “to travel to and remain in Italy”).

⁵⁵ *See id.*, ¶ 135.

⁵⁶ For the avoidance of doubt, Ukraine categorically rejects any suggestion that there exists a Russian state border in the Kerch Strait, that Russia has any right to restrict passage through the Strait, and that Russia has a

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considered in *Enrica Lexie* — *i.e.*, “the grief and suffering of the families of the two Indian fishermen” killed by the Italian marines⁵⁷ — find no parallel in this case. Moreover, and unlike the Italian marines in *Enrica Lexie*, Ukraine’s servicemen have repeatedly been denied pre-trial release and have instead been held on remand, resulting in a severe and prolonged deprivation of their liberty and causing significant distress to their loved ones.⁵⁸ Considerations of humanity overwhelmingly favor the release of Ukraine’s twenty-four detained servicemen.

42. Finally, Russia’s violation of the immunity of Ukraine’s vessels may compromise their continued seaworthiness. In ordering the release from detention of the *Arctic Sunrise*, the Tribunal considered the contentions of the Netherlands that, “[a]s the vessel is an aging icebreaker, it requires intensive maintenance in order to maintain its operability.”⁵⁹ Like the *Arctic Sunrise*, the *Yani Kapu* is an older — 45-year old — specialized vessel that, as explained in the Navy Report, requires regular maintenance.⁶⁰ The need for such maintenance is particularly urgent given that the vessel sustained damage during the events of 25 November 2018. The *Berdiansk* (which also sustained damage) and the *Nikopol* similarly require regular maintenance, including to ensure the functioning of sensitive equipment on board. As the Ukrainian Navy has explained,⁶¹ when in port, the *Berdiansk* and *Nikopol* are subject to a strict maintenance regime which involves, among other things, operating the engines and other equipment of the vessels on a daily basis. Ukraine’s inability to service the vessels as required presents a further risk of irreparable harm — in particular, the extended or even permanent loss of the use of these vessels for public purposes.

* * *

43. In sum, the provisional measures requested by Ukraine — the release of its detained naval vessels and the twenty-four servicemen on board, and the suspension and non-resumption of associated municipal legal proceedings — are necessary to preserve the immunity of Ukraine’s warships and its naval auxiliary vessel. The urgent need for provisional measures is further heightened by the practical and humanitarian considerations presented by this case. As the Tribunal has recognized through its prior orders, such measures cannot await the months it may take to constitute, convene, and brief an Annex VII tribunal, let alone the years it may take to complete Annex VII proceedings. It is thus necessary and appropriate for this Tribunal to prescribe the provisional measures Ukraine requests.

territorial sea in areas to the west of the Strait. Because warships and naval auxiliary vessels enjoy immunity from foreign jurisdiction in all parts of the sea, the legal status of the waters of the Kerch Strait and to the south and west of the Kerch Strait in the Black Sea are immaterial for purposes of this case.

⁵⁷ *Id.*, ¶ 134.

⁵⁸ *See supra*, ¶¶ 11-13.

⁵⁹ *Arctic Sunrise (Netherlands v. Russia)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013, ¶ 87.

⁶⁰ Annex B, Navy Report, ¶ 16.

⁶¹ *Id.*, ¶ 16.

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APPOINTMENT OF AGENT AND ADDRESS FOR SERVICE

44. In accordance with Article 56, paragraph 2 of the Rules of the Tribunal, Ukraine designates Her Excellency Ms. Olena Zerkal, Deputy Minister of Foreign Affairs, as its Agent for the purpose of all proceedings in connection with this Request. Ms. Zerkal's contact details are as follows:

Ministry of Foreign Affairs
1 Mykhailivska Square
Kyiv 01018
Ukraine
+380 (044) 238 1748
szm4@mfa.gov.ua

45. In accordance with Article 56, paragraph 1 of the Rules of the Tribunal, Ukraine designates the following service address at the seat of the Tribunal.

Ms. Olena Zerkal, Deputy Minister of Foreign Affairs
c/o The Consul-General of Ukraine in Hamburg
Mundsburger Damm 1
Hamburg 22087
Federal Republic of Germany

CHAPTER 6
SUBMISSIONS

46. For the foregoing reasons, 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.
47. The servicemen to be covered by measures (b) and (c), above, are:
- a. Captain (Third Rank) Volodymyr Volodymyrovych Lisovyv (34 years of age);
 - b. Captain (Second Rank) Denys Volodymyrovych Hrytsenko (34 years of age);
 - c. Captain Lieutenant Serhiy Mykolayovych Popov (28 years of age);
 - d. Senior Lieutenant Andriy Leonidovych Drach (24 years of age);
 - e. Senior Lieutenant Bohdan Pavlovych Nebylytsia (25 years of age);

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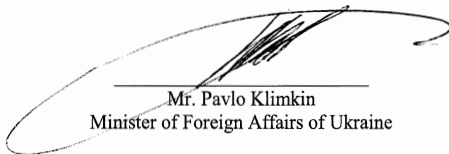
- f. Senior Lieutenant Vasyl Viktorovych Soroka (28 years of age);
- g. Lieutenant Roman Mykolayovych Mokryak (32 years of age);
- h. Master Chief Petty Officer Yuriy Oleksandrovych Budzyloy (45 years of age);
- i. Master Chief Petty Officer Andriy Anatoliyovych Shevchenko (27 years of age);
- j. Petty Officer Oleh Mykhailovych Melnychuk (23 years of age);
- k. Petty Officer (1st Stage) Vladyslav Anatoliyovych Kostyshyn (24 years of age);
- l. Petty Officer (2nd Stage) Serhiy Romanovych Chyliba (30 years of age);
- m. Senior Seaman Andriy Anatoliyovych Artemenko (25 years of age);
- n. Senior Seaman Viktor Anatoliyovych Bezpachenko (31 years of age);
- o. Senior Seaman Yuriy Yuriyovych Bezyazychnyy (28 years of age);
- p. Senior Seaman Andriy Andriyovych Oprysko (47 years of age);
- q. Senior Seaman Volodynyr Anatoliyovych Tereschenko (24 years of age);
- r. Senior Seaman Mykhailo Borysovych Vlasyuk (34 years of age);
- s. Senior Seaman Volodymyr Kostyantynovych Varymez (26 years of age);
- t. Senior Seaman Vyacheslav Anatoliyovych Zinchenko (20 years of age);
- u. Seaman Andriy Dmytrovych Eider (19 years of age);
- v. Seaman Bohdan Olehovych Holovash (23 years of age);
- w. Seaman Yevheniy Vitaliyovych Semydotsky (20 years of age); and
- x. Seaman Serhiy Andriyovych Tsybizov (21 years of age).

REQUEST OF UKRAINE

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Kyiv, 16 April 2019



Mr. Pavlo Klimkin
Minister of Foreign Affairs of Ukraine



Ms. Olena Zerkal
Deputy Foreign Minister of Ukraine
Agent of Ukraine

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**ANNEXES IN SUPPORT OF UKRAINE'S REQUEST FOR THE
PRESCRIPTION OF PROVISIONAL MEASURES**

- ANNEX A** **Certified Copy of Ukraine's Notification under Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea and the Statement of the Claim and Grounds on which it is Based, Instituting Proceedings Against the Russian Federation, Dated 31 March 2019**
- Appendix A** Ukrainian Naval Documents Concerning the Vessels
- Appendix B** Ukrainian Naval Documents Concerning the Commanders of Each Vessel
- Appendix C** Report of the Federal Security Service of the Russian Federation on the Events of 24-25 November 2018, Dated 26 November 2018
- Appendix D** *Note Verbale* from the Russian Federation to Ukraine, Dated 5 December 2018, and Russian Order on Opening a Criminal Case and Commencing Criminal Proceedings, Dated 25 November 2018
- Appendix E** *Notes Verbales* from Ukraine to the Russian Federation, Dated 26 November 2018, 27 November 2018, 28 November 2018, and 15 March 2019
- ANNEX B** **Report on the Events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, Dated 15 April 2019**
- ANNEX C** **Declaration of Nikolai Polozov, Counsel for Captain (Second Rank) Denys Volodymyrovych Hrytsenko, Dated 15 April 2019**
- Appendix 1** Indictments Against the 24 Detained Ukrainian Servicemen
- Appendix 2** Six Decisions on Pre-Trial Detention for the 24 Detained Ukrainian Servicemen
- ANNEX D** **Public Sources**
- Appendix A** Article from the Canadian Broadcasting Corporation, Dated 20 February 2019
- Appendix B** Video from Voice of America, Dated 7 December 2018
- Appendix C** Image of Seized Ukrainian Military Vessels Seen in the Port of Kerch on November 26, 2018 (STR/AFP/Getty Images)

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Note on Translations of Annexes: Proper nouns have been transliterated according to the convention for the Russian or Ukrainian language, as appropriate. As a result, some vessel and individual names appear differently in translations of Ukrainian and Russian documents. Among others, the "Yani Kapu" is transliterated as "Yana Kapu" from Russian and the surname "Hrytsenko" is transliterated as "Gritsenko" from Russian.

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**LEGAL AUTHORITIES IN SUPPORT OF UKRAINE'S REQUEST FOR THE
PRESCRIPTION OF PROVISIONAL MEASURES**

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|-----------------------------|--|
| ANNEXED | <ol style="list-style-type: none"> 1. <i>Allianz Via Insurance v. United States of America</i> (1999), Cour d'Appel, Aix-en-Provence, 2nd Chamber, Judgment of 3 September 1999 2. R. Jennings and A. Watts, <i>Organs of the State for the Their International Relations: Miscellaneous Agencies, State Ships Outside National Waters</i>, Oppenheim's International Law Vol. 1 (Eds. Jennings and Watts) (19 June 2008) 3. Application for Arrest Warrant Against General Shaul Mofaz, District Court — Bow Street (London, England), Judgment of 12 February 2004 |
| PUBLICALLY AVAILABLE | <ol style="list-style-type: none"> 4. <i>Enrica Lexie (Italy v. India)</i>, ITLOS Case No. 24, Provisional Measures, Order of 24 August 2015 5. Declarations of States Parties Relating to Settlement of Disputes, ITLOS Yearbook 2002 Vol. 6 6. <i>ARA Libertad (Argentina v. Ghana)</i>, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012 7. <i>ARA Libertad (Argentina v. Ghana)</i>, ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, Declaration of Judge Paik 8. <i>M/V Saiga (No. 2) (St Vincent v. Guinea)</i>, ITLOS Case No. 2, Judgment of 1 July 1999 9. <i>M/V Virginia G (Panama v. Guinea-Bissau)</i>, ITLOS Case No. 19, Judgment of 14 April 2014 10. <i>The Arctic Sunrise</i>, Annex VII Award on the Merits of 14 August 2015 11. <i>Case of Jones and Others v. The United Kingdom</i>, ECtHR Nos. 34356/06 and 40528/06, Judgement of 14 January 2014 12. <i>Immunity From Legal Process</i>, ICJ Advisory Opinion of 29 April 1999 13. <i>Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium)</i>, ICJ Judgment of 14 February 2002 |

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14. *ARA Libertad (Argentina v. Ghana)*, ITLOS Case No. 20, Request of Argentina for Provisional Measures
15. *M/V Saiga (No. 2) (St Vincent v. Guinea)*, ITLOS Case No. 2, Provisional Measures, Order of 11 March 1998
16. *Arctic Sunrise (Netherlands v. Russia)*, ITLOS Case No. 22, Provisional Measures, Order of 22 November 2013
17. *Enrica Lexie*, Annex VII Provisional Measures Order of 29 April 2016