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PCA Case No. 2019-28

IN THE MATTER OF AN ARBITRATION
before
AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII
TO THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

between

UKRAINE

and

THE RUSSIAN FEDERATION

in respect of a

DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND SERVICEMEN

Volume I - PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

ARBITRAL TRIBUNAL:

Professor Donald McRae (President)
Judge Gudmundur Eiriksson
Judge Rüdiger Wolfrum
Judge Vladimir Golitsyn
Sir Christopher Greenwood

REGISTRY:
The Permanent Court of Arbitration

24 August 2020

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CHAPTER 1
INTRODUCTION

I. The dispute and the jurisdictional issues that inevitably arise

1. In accordance with the Rules of Procedure (Article 11) and Procedural Order No. 1 dated 22 November 2019 (paragraph 5), the Russian Federation ("Russia") submits these Preliminary Objections in which it requests the Tribunal to find that it is without jurisdiction in respect of the dispute submitted to the Tribunal by Ukraine.

2. The dispute concerns the activities of the Ukrainian and Russian forces on 25 November 2018 in the Black Sea. There was a prolonged stand-off between – on the Ukrainian side – three Ukrainian military vessels (the warships "*Berdyansk*" and the "*Nikopol*", and the naval auxiliary vessel "*Yany Kapu*") ("the Ukrainian Military Vessels") with 24 military personnel on board ("the Ukrainian Military Servicemen"), and – on the Russian side – a combination of military and paramilitary forces, including combat aircraft of the Russian Ministry of Defence and naval vessels of the Black Sea Fleet.[1] Following the failure of the Ukrainian Military Vessels to adhere to an order to stop, Russian forces opened fire on one of the Ukrainian Military Vessels,[2] ultimately intercepting and detaining the Ukrainian Military Vessels and Servicemen. Consistent with the serious nature of this military engagement, this issue was immediately raised before the UN Security Council (on the morning of 26 November 2018), with Russia and Ukraine taking directly opposing positions as to responsibility for acts of provocation and aggression.[3]

3. As inevitably follows from these basic facts, which are common ground between the Parties, the dispute concerns military activities and is therefore excluded from the Tribunal's jurisdiction: both Russia and Ukraine have made declarations pursuant to Article 298(1)(b) of the United Nations Convention on the Law of the Sea ("UNCLOS") expressly excluding "disputes concerning military activities".[4]

4. In a manner that is obviously inconsistent with its contemporaneous characterisation of events, Ukraine seeks to characterise the dispute as concerning "law enforcement activities", and contends that it cannot therefore be classified as concerning "military activities". Yet,

[1] See Chapter 2 below.
[2] Memorial of Ukraine dated 22 May 2020 ("UM"), para. 34.
[3] See Chapter 2 below.
[4] See below, para. 25. See **UA-15** and **UA-16** cited at UM, fn. 130.

outside the confines of this case, Ukraine has consistently characterised the events of 25 November 2018 in terms such as a "blatant and barefaced act of military aggression against Ukraine by the Russian Federation",[5] referring to this "armed assault by Russian naval vessels and special forces"[6] as a "military incident".[7] The President of Ukraine has awarded all the Ukrainian Military Servicemen with military medals and orders for their performance of military duty.[8]

5. The key events cannot somehow now be re-cast by Ukraine to meet the demands of its current Claim. The dispute concerns military activities, and Ukraine's after the fact re-characterisation of the events as supposedly concerning "law enforcement activities" cannot change that. Moreover, even if the events at issue could be analysed as including an element of law enforcement activity, which Russia does not accept as it considers that the dispute concerns a paradigm instance of military activities, then the dispute would still fall within Article 298(1)(b). Ukraine is wrong in its central contention that the concepts of military activities and of law enforcement activities are mutually exclusive.

6. There are two additional reasons why this Tribunal lacks jurisdiction.

7. First, there is no legal basis for the Claim under the Convention. Ukraine asserts that Russia has violated the immunities granted to warships and non-commercial vessels under UNCLOS.[9] However, the events giving rise to the dispute occurred in the territorial sea, and Article 32 of UNCLOS does not establish an applicable immunity in the territorial sea. Rather, Article 32 is a "without prejudice" provision with respect to immunities under customary international law: it is not a provision that establishes a right to immunity under the Convention, and nor is it a form of *renvoi*. Accordingly, there can be no dispute concerning the interpretation or application of an applicable rule of immunity, as would be required for this Tribunal to have jurisdiction under Article 288(1) of the Convention.

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[5] United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56, p. 11 (**RU-27**).
[6] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1339, 27 November 2018 (**UA-19**).
[7] *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0135, 28 January 2019 (**RU-35**).
[8] "Poroshenko decorated captured Ukrainian navy men with state orders", *krymr.com*, 7 April 2019, available at https://ru.krymr.com/a/news-poroshenko-prisudil-ukrainskim-moryakam-gosudarstvenniye-nagradi/29866299.html with further references to the Decrees of the President of Ukraine No. 83/2019 of 21 March 2019 and No. 96/2019 of 3 April 2019 (**RU-42**).
[9] UM, paras. 47 and 50.

8. Secondly, Ukraine has failed to satisfy the requirement in Article 283 of UNCLOS for an expeditious exchange of views on the settlement of the dispute. By its Note of 15 March 2019, Ukraine demanded that the Russian Federation expeditiously proceed to an exchange of views regarding the settlement of this dispute.[10] Within 10 days, i.e. on 25 March 2019, Russia provided an initial response,[11] yet Ukraine proceeded to issue its claim within the week. Further, when consultations were held on 23 April 2019, Ukraine did not engage meaningfully but elected to press on with a hearing on provisional measures before ITLOS.[12]

9. Finally, whilst the Provisional Measures Order subsequently issued by ITLOS[13] has been complied with (the Ukrainian Military Servicemen were released on 7 September 2019 and the Ukrainian Military Vessels were released on 18 November 2019), Russia notes that the Tribunal lacks jurisdiction over alleged breaches of the Provisional Measures Order – since it lacks jurisdiction to determine the Claim.

II. Summary of procedural history

10. By its "Notification and Statement of the Claim and the Grounds on which it is Based" dated 31 March 2019, Ukraine submitted this dispute to the arbitral procedure provided for in Annex VII to UNCLOS.

11. On 16 April 2019, Ukraine filed a request for the prescription of provisional measures. On 30 April 2019, Russia sent a *Note Verbale* stating it would not participate because the Tribunal lacks jurisdiction. Its position was set out in more detail in a Memorandum[14] (dated 7 May 2019) as to why Ukraine has not, and could not, establish jurisdiction, including *prima facie* jurisdiction, of the Annex VII arbitral tribunal in respect of the Claim, and that the requirements for indicating any provisional measures could not be met.[15]

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[10] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438) (**RU-40**).
[11] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 3528/2dsng, 25 March 2019 (**RU-41**).
[12] See Ministry of Foreign Affairs of the Russian Federation official website, "Commentary by the Information and Press Department of the Russian MFA in connection with the Russian-Ukrainian consultations on the incident of 25 November 2018 in the area of the Kerch Strait", 24 April 2019, available at http://www.mid.ru/ru/kommentarii/-/asset_publisher/2MrVt3CzL5sw/content/id/3624739 (**RU-44**).
[13] *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures, Order of 25 May 2019* ("ITLOS PM Order") (**UAL-2**).
[14] *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures*, Memorandum of the Government of the Russian Federation, 7 May 2019 ("Memorandum of the Russian Federation") (**UA-2**).
[15] *Ibid.*

12. Following a hearing on provisional measures, on 25 May 2019 ITLOS issued its decision on provisional measures. As the Provisional Measures Order expressly observed:

> "The present Order in no way prejudges the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case…and leaves unaffected the rights of Ukraine and the Russian Federation to submit arguments in respect of those questions".[16]

13. As noted above, following that Provisional Measures Order both the Serviceman and Vessels have been released.

14. On 21 November 2019, a procedural hearing with the Parties was held at which the procedure and timetable to be adopted at the hearing was discussed. Pursuant to Procedural Order No. 1 dated 22 November 2019, Ukraine submitted its Memorial on 22 May 2020[17] ("UM"). Pursuant to paragraph 5 of that Order, the Russian Federation submits these Preliminary Objections in which it requests the Tribunal to dismiss Ukraine's claims for lack of jurisdiction.[18]

15. The Rules of Procedure dated 22 November 2019 provide at Article 11(3):

> "The Arbitral Tribunal shall rule on any Preliminary Objection in a preliminary phase of the proceedings, unless the Arbitral Tribunal determines, after ascertaining the views of the Parties, that such Preliminary Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits".

16. The default position of a preliminary phase reflects the basic principles of consent and good administration of justice.[19] All of the Preliminary Objections raised by Russia are exclusively preliminary; to the extent the Tribunal must engage in facts they are undisputed, and none of the Preliminary Objections requires it to address any legal question that could only be determined by hearing the merits of the case.

III. Outline of Preliminary Objections

17. Russia's Preliminary Objections are organised as follows.

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[16] ITLOS PM Order, para. 122 (**UAL-2**).

[17] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russian Federation), PCA Case No. 2019-28*, Procedural Order No. 1, 22 November 2019, para. 3: "No later than six months from the date of this Procedural Order, Ukraine shall submit its Memorial".

[18] *Ibid.*, para 5. See also Rules of Procedure, Article 11(1). This document does not address the substance of Ukraine's allegations or the merits of the underlying claim. Nothing in this document should be interpreted as an acceptance of any assertions contained in the Memorial.

[19] See, e.g., *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56 (**RUL-2**); International Court of Justice, Rules of Court (1978), adopted on 14 April 1978 and entered into force on 1 July 1978 (with amendments), and further amended on 21 October 2019 (**RUL-3**).

18. **Chapter 2** establishes that the dispute concerns military activities and is therefore excluded from the Tribunal's jurisdiction pursuant to Article 298(1)(b) of UNCLOS.

19. **Chapter 3** explains that UNCLOS does not provide for an applicable immunity.

20. **Chapter 4** addresses why the Tribunal has no jurisdiction over alleged breaches of the ITLOS Provisional Measures Order.

21. **Chapter 5** sets out the reasons why Ukraine has not complied with Article 283 of UNCLOS.

22. The Preliminary Objections conclude with Russia's formal Submission.

23. As a final introductory point, Russia recalls that the events giving rise to this dispute occurred in the Black Sea, where Crimea is situated. Russia takes note that Ukraine advances its case on the basis that there is no need for the Tribunal to take any position on the issue of territorial sovereignty over Crimea.[20] Ukraine states that Russia's alleged violation of the Convention is "independent of the question of sovereignty" and that "[i]f Russia is the coastal State, Russia's actions against Ukraine's naval vessels still violated the [relevant] provisions of UNCLOS".[21] Russia formally reserves its position with respect to any attempt by Ukraine to introduce any question of disputed sovereignty into this dispute.

[20] UM, para. 87.
[21] *Ibid.*, fn. 208.

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CHAPTER 2

THE DISPUTE CONCERNS MILITARY ACTIVITIES

I. The present dispute is one concerning military activities

A. Introduction

24. Article 298(1)(b) of UNCLOS provides (emphasis added):

> "When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: … (b) *disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service*, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3".

25. Russia has made a declaration pursuant to Article 298(1)(b), as indeed has Ukraine. The declarations read in relevant part as follows (emphasis added):[22]

> "The Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to […] *disputes concerning military activities, including military activities by government vessels and aircraft*";
>
> "Ukraine declares, in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for the consideration of […] *disputes concerning military activities*".

26. The key question for the Tribunal, therefore, is whether the present dispute is one "concerning military activities". To answer this question, the Tribunal must examine the events of 25 November 2018 that underlie the dispute (the critical facts of which are common ground), when Russia intercepted and detained three Ukrainian Military Vessels (the "*Berdyansk*", the "*Nikopol*" and the tugboat "*Yany Kapu*") and the 24 Ukrainian Military Servicemen on board. The evaluation is one that the Tribunal must make *de novo* and of course, unlike ITLOS at the provisional measures phase of this case, the Tribunal is concerned with its actual as opposed to *prima facie* jurisdiction.[23]

[22] See **UA-15** and **UA-16** cited at UM, fn. 130.
[23] See ITLOS PM Order, para. 122 (**UAL-2**).

27. As explained in this Chapter, in light of the critical facts, which as noted above are common ground, this is indeed a "dispute concerning military activities". The relevant events concerned the interception and detention of Ukrainian Military Vessels that were armed, in circumstances where there were military personnel on both sides, where there was threatened and actual use of force, where the events took place within the wider context in which Ukraine maintains that Russia has annexed Crimea through unlawful use of force,[24] and where both States have characterised the activities at issue as military. The dispute concerns these events and the ramifications thereof.

B. The correct approach to identification of "disputes concerning military activities"

28. Neither in Article 298(1)(b) nor elsewhere in the Convention is any definition given to the formula "military activities" or any express indication given as to which disputes fall within the category of "disputes concerning military activities", although it is expressly clarified that "military activities by government vessels and aircraft engaged in non-commercial service" are included.

29. Applying the usual rules of treaty interpretation, it is important first to note that as a matter of their ordinary meaning[25] the terms "military" and "activities" are notably broad.

a. The term "military" means no more and no less than relating to the armed forces.[26] There is no caveat or limitation to the activities of the military that may be encompassed by the exclusion.

[24] For a recent example, see "Statement by Mr. Andrii Taran, Minister of Defence of Ukraine, at the Closing Session of the OSCE Forum for Security Co-operation under the Chairpersonship of Ukraine (952nd Meeting of the Forum for Security Co-operation, 22 July 2020)", Organization for Security and Co-operation in Europe official website, 27 July 2020, available at https://www.osce.org/files/f/documents/a/1/459292.pdf), 27 July 2020: "I would like to make one point with this regard very clearly and strongly – Russian aggression against Ukraine remains as the top issue for our national and regional security. Our country has been at war since 2014…." (**RU-46**).

[25] Vienna Convention on the Law of Treaties, Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[26] The Cambridge Dictionary defines the adjective "military" as "relating to or belonging to the armed forces" (**RU-48**). See also the definition in Merriam-Webster as "of or relating to armed forces" (**RU-50**); Oxford Dictionary of English (3rd ed.) defining "military" as "relating to or characteristic of soldiers or armed forces" (**RU-49**). The Constitution of Ukraine (**RU-5**) and the Law of Ukraine No. 2232-XII "On Military Duty and Military Service" (**RU-3**) refers to "the Armed Forces of Ukraine and other military formations". The Constitutional Court of Ukraine has stated that "the legislator classifies the State Border Guard Service of Ukraine as a military formation" (Decision No. 39-u/2008 of 10 September 2008) (**RU-7**).

b. To the contrary, Article 298(1)(b) expressly confirms its broad scope by clarifying that it includes (and so is implicitly not thereby limited to) military activities by government vessels and aircraft engaged in non-commercial service.[27]

c. The term "activities" is inherently broad, and there is no further qualification as to the nature or extent of the activities.

d. The breadth of the formula "military activities" may also be seen as confirmed by reference to Article 19(2) of the Convention. Judge Jesus in his Separate Opinion on provisional measures noted that "[t]hough the Convention does not include a definition of what military activities are, it does outline specific activities that I believe are military in nature. This is the case, for example, at least with the first six activities described in subparagraphs (a) to (f) of article 19 of the Convention".[28] Those activities include "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations", "any exercise or practice with weapons of any kind", and "the launching, landing or taking on board of any aircraft" or of "any military device".

30. Pursuant to its ordinary meaning, the term "concerning" ("*relatifs à*" (French text); "*relativas a*" (Spanish text); "*касающихся* / kasayushchikhsya" (Russian text)[29]) is likewise notably broad, and is not qualified so as to require, for example, that the dispute concerns primarily or only military activities (although in the current case any such qualification would be met).

a. ITLOS has similarly observed that the term "concerning" is a broad one; in the *M/V Louisa* case, noting the declaration of Saint Vincent and the Grenadines referring to

[27] As the tribunal in the *Coastal State Rights* matter recently noted, "there is no consistent State practice as to the scope of activities that are to be regarded as being exercised by 'military' vessels, aircraft, and personnel. Forces that some governments treat as civilian or law enforcement forces may be designated as military by others, even though they may undertake comparable tasks. In addition, many States rely on their military forces for non-military functions, such as disaster relief, evacuations, or the reestablishment of public order" (*Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award, 21 February 2020, para. 335) (**UAL-25**).

[28] ITLOS PM Order, Separate Opinion of Judge Jesus, para. 15 (**RUL-33**).

[29] The verb "касаться" (kasat'sya) is translated as "concern", "regard" or "relate to" (see V.K. Muller, *Complete English-Russian Russian-English Dictionary* (**RU-10**)). The Chinese text (关于军事活动; 关于 ; guānyú) is translated as "about" or "concerning". The Arabic text (المتعلقة بالأنشطة العسكرية ; المتعلقة ; al mutaalliqa) is translated as "related to", "concerning" or "having a connection with".

disputes "concerning" the arrest or detention of vessels, observed that the use of the term "concerning" "indicates that the declaration does not extend only to articles which expressly contain the word 'arrest' or 'detention' but to any provision of the Convention having a bearing on the arrest or detention of vessels".[30]

b. Further, the term "concerning" formed part of wording identified by the ICJ in the *Fisheries Jurisdiction* case as of particular breadth. When considering a reservation excluding "disputes arising out of or concerning" conservation and management measures, the Court noted: "The language used in the English version – 'disputes arising out of or concerning' – brings out more clearly the broad and comprehensive character of the formula employed. The words of the reservation exclude not only disputes whose immediate 'subject-matter' is the measures in question and their enforcement, but also those 'concerning' such measures and, more generally, those having their 'origin' in those measures ('arising out of') – that is to say, those disputes which, in the absence of such measures, would not have come into being."[31]

c. According to the *Coastal State Rights* case, the appropriate question can usefully be formulated as "whether 'certain specific acts subject of Ukraine's complaints' constitute military activities".[32]

d. The tribunal in *Philippines v. China* contrasted a dispute "concerning" military activities with a scenario where a party has merely "employed its military in some manner in relation to the dispute".[33] An example it gave is where a party "initiated compulsory dispute settlement under the Convention in respect of a dispute that does not concern military activities and the other Party were later to begin employing its military in relation to the dispute in the course of proceedings". A further example given by the Annex VII tribunal in the *Coastal States Rights* case is the "*mere* involvement or

[30] *M/V Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 31, para. 83 (**RUL-23**).
[31] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 458, para. 62 (**RUL-9**).
[32] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait,* Award, 21 February 2020, para. 331 (**UAL-25**).
[33] *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China),* Award, 12 July 2016, para. 1158 ("Philippines v. China") (**UAL-7**). The context was its consideration of an argument that an obligation not to aggravate the dispute (with respect to events subsequent to the commencement of proceedings) is not separately subject to the limitations on dispute resolution set out in, *inter alia*, Art. 298(1)(b).

presence of military vessels".[34] Both examples are far removed from the facts of the present dispute, as addressed in Section C below.

31. As to the relevant context, and object and purpose, it is important to recall that Part XV of the Convention establishes and reflects a delicate balance between (i) ensuring that States acceded to the Convention with its extensive compulsory dispute settlement procedures, and (ii) giving weight to the concern of many States not to subject certain sensitive issues to such procedures, notably those pertaining to core aspects of State sovereignty, including military activities. As noted by the tribunal in the *Chagos Marine Protected Area Arbitration*:

> "The negotiation of the Convention involved extensive debate regarding the extent to which disputes concerning its provisions would be subject to compulsory settlement. The distrust with which some participants at the Conference viewed compulsory settlement is evidenced by the inclusion in the final texts of substantial carve outs in Article 297, for disputes relating to the exercise of sovereign rights and jurisdiction in the exclusive economic zone. It is also apparent in the option, in Article 298[(1)](a)(i), for States to exclude the delimitation of maritime boundaries from dispute settlement, subject only to the requirement of compulsory conciliation."[35]

32. The point applies with even greater force with respect to Article 298(1)(b), given the absence there of any compulsory conciliation mechanism. To similar effect, the importance to many States of exclusions from dispute settlement – from the very outset of negotiations – is recalled in the *Virginia Commentary*:

> "The acceptance of many participants in the Third U.N. Conference on the Law of the Sea of the provisions for the settlement of disputes relating to the interpretation of the Law of the Sea Convention was, from the very beginning, conditioned upon the exclusion of certain issues from the obligation to submit them to a procedure entailing a binding decision. There was no doubt that the basic obligations of Part XV, section 1, relating to the settlement of disputes by means agreed upon by the parties to the dispute (articles 279 to 284) should apply to all disputes arising under the Convention. Beyond that, however, there was some opposition to an unlimited obligation to submit a dispute to a procedure entailing a binding decision."[36]

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[34] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award, 21 February 2020, para. 334 (**UAL-25**) (emphasis added).

[35] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, para. 216 (**RUL-25**).

[36] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, pp. 87-88, para. 297.1 (**RUL-6**). See also ITLOS PM Order, Separate Opinion of Judge Gao, para. 9, referring to the "carefully designed and articulated compromise between the compulsory dispute settlement procedures on the one hand and State sovereignty and jurisdiction on the other hand" (**RUL-32**); also L.F. Damrosch, "Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS", *AJIL Unbound*, 2016, Vol. 110, p. 273: "That optional exclusion, embodied in Article 298(1)(b) of the Convention, was a central component of the strenuously-negotiated compromise between states that favoured compulsory jurisdiction in principle and those that would

> "The idea of a specific exemption clause for certain categories of disputes was considered early in the [Third United Nations Conference on the Law of the Sea] by the informal working group on the settlement of disputes in 1974. While some of its members believed that the integrity of the compromise packages to be embodied in the Convention had to be preserved at all costs against unravelling by reservations that would actually result in a disintegration of the package, *the majority agreed that various States consider certain matters to be so sensitive that they should not be subject to the far-reaching dispute settlement procedures being envisaged for inclusion in the Convention*."[37]

33. The balance achieved in Part XV must be respected, including by ensuring that where States have made a declaration under Article 298 excluding disputes concerning military activities (there are currently 28 such States[38]), that declaration is not interpreted in a narrow or restrictive way such that the scope for its practical application is significantly diminished.[39] Such would create confusion and concern amongst State Parties that have made declarations,[40] and lead to the risk of undesirable consequences with respect to the future conduct of States,

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have preferred a strictly optional system for third-party legal dispute settlement. Its availability has been critical in enabling certain states to ratify the Convention and would be an indispensable condition of eventual U.S. ratification…. an exclusion for military activities as a key element in achieving agreement on the compromise package" (**RUL-28**).

[37] M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989, p. 109, para. 298.2 (**RUL-6**) (emphasis added).

[38] These comprise: (1) Algeria (on 22.05.2018); (2) Argentina (upon ratification on 01.12.1995); (3) Belarus (upon ratification on 30.08.2006); (4) Cabo Verde (upon ratification on 10.08.1987);(5) Canada (upon ratification on 07.11.2003); (6) Chile (upon ratification on 25.08.1997); (7) China (on 25.08.2006); (8) Cuba (upon ratification on 15.08.1984); (9) Denmark (upon ratification on 16.11.2004); (10) Ecuador (upon accession on 24.09.2012); (11) Egypt (upon ratification on 26.08.1983 and on 16.02.2017); (12) France (upon ratification on 11.04.1996); (13) Greece (upon ratification on 21.07.1995 and on 16.01.2015); (14) Guinea-Bissau (upon ratification on 25.08.1986); (15) Mexico (on 06.01.2003); (16) Nicaragua (upon ratification on 03.05.2000); (17) Norway (upon ratification on 24.06.1996); (18) Portugal (upon ratification on 03.11.1997); (19) Republic of Korea (on 18.04.2016); (20) Russian Federation (upon signature on 10.12.1992 and ratification on 12.03.1997); (21) Saudi Arabia (on 02.01.2018); (22) Slovenia (on 11.10.2011); (23) Thailand (upon ratification on 15.05.2011); (24) Tunisia (upon ratification on 24.04.1985 and on 22.05.2001); (25) Ukraine (upon ratification on 26.07.1999); (26) United Kingdom (on 12.01.1998 and 07.04.2003); (27) Uruguay (upon ratification on 10.12.1992) (See ITLOS PM Order, Separate Opinion of Judge Gao, para. 11) (**RUL-32**). (28) Togo made the relevant declaration on 12 April 2019 (**RU-43**).

[39] See N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005, p. 291 recognising the "versatility allowed" with respect to the exclusion of 'military activities' from compulsory dispute settlement pursuant to Article 298(1)(b) (**RUL-14**). See also S. Talmon, "The South China Sea Arbitrations: is there a Case to Answer?", Paper No. 2/2014, 9 February 2014, pp. 46-47 (cited by Judge Gao (in his Separate Opinion) at para. 19): "there is a widespread agreement that, considering the highly political nature of military activities, the term must be interpreted widely" (**RUL-24**).

[40] The concerns of the US regarding a tribunal's jurisdiction under UNCLOS to challenge the State's designation of the relevant activity as 'military' for the purposes of a declaration pursuant to Article 298(1)(b) are documented in the US Senate Hearings on UNCLOS: see Hearings before the Committee on Foreign Relations, United States Senate, 112th Congress, Second Session, The Law of the Sea Convention (Treaty Doc. 103-309), Senate Hearing 112-654, 23 May, 14 and 28 June 2012, at pp. 14-15, 43-45 of the downloaded copy, available at https://www.govinfo.gov/content/pkg/CHRG-112shrg77375/html/CHRG-112shrg77375.htm (**RU-9**). See also L.F. Damrosch, "Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS", *AJIL Unbound*, 2016, Vol. 110, p. 277: "Opponents of U.S. ratification have seized on the possibility—however remote—that UNCLOS organs might disregard this limitation on U.S. consent to the Convention as part of their argumentation against subordinating U.S. 'sovereign' prerogatives to compulsory dispute settlement." (**RUL-28**).

including even by serving as "an incentive for States to escalate rather than de-escalate a conflict by deploying a great number[s] of naval vessels and increasing the level of forces in order to qualify for the military activities exception to compulsory dispute settlement jurisdiction".[41]

34. As follows from the above, the formulation "disputes concerning military activities" is drafted in broad, unqualified terms, and it falls to be applied as such. As to its application, Article 298(1)(b) requires primarily an objective evaluation of the relevant activities, and their nature, taking into account the relevant circumstances, as was rightly noted by ITLOS in its Order of 25 May 2019.[42] In conducting that evaluation, no high threshold should be imposed, but rather an approach should be adopted that is consistent with the breadth of the terms used.

C. The dispute in the present case concerns "military activities"

35. The dispute at issue in the present case concerns the activities on 25 November 2018 in the Black Sea, specifically when Russia intercepted and detained three Ukrainian Military Vessels (the "*Berdyansk*", the "*Nikopol*" and the tugboat "*Yany Kapu*") and the 24 Ukrainian Military Servicemen on board. As stated by Ukraine in its Memorial, "[t]he events giving rise to this dispute occurred in the Black Sea", and further:[43]

> "The events giving rise to Russia's violations of UNCLOS occurred in the evening of 25 November 2018".[44]

36. That the dispute concerns the incident on 25 November 2018 is also reflected in the fact that the first *Note Verbale* relied upon by Ukraine with respect to the incident is dated 26 November 2018.[45]

37. The detention of the three Ukrainian Military Vessels and the Ukrainian Military Servicemen formed part of and resulted directly from that incident of 25 November 2018, and

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[41] See ITLOS PM Order, Separate Opinion of Judge Gao, paras. 11 and 45 (**RUL-32**).
[42] See ITLOS PM Order, para. 66 ("an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case") (**UAL-2**). See also the Separate Opinion of Judge Gao at paras. 22 and 30 ("evaluation of military activities should be based on a combination of factors, such as the intent and purpose of the activities, taking into account the relevant circumstances of the case, such as the manner in which the Parties deployed their forces and the way in which the Parties engaged one another at sea.....an objective evaluation of the activities in question should also take into account the international actions, official positions and legal documents of the Parties") (**RUL-32**). Russia disagrees with the application of the relevant test to the facts of this case by the majority of ITLOS at the provisional measures stage.
[43] UM, para. 21.
[44] *Ibid*., para. 77.
[45] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1329, 26 November 2018 (**UA-18)**, cited at UM, para. 53.

is part of the dispute before the Tribunal.[46] Indeed, this is clear from Ukraine's own framing of the dispute in its Memorial:

> "Part B sets out the subject matter of the dispute itself: the arrests and detentions on the evening of 25 November 2018 and the continuation of those detentions that extended for months thereafter";[47]
>
> "Specifically, this dispute concerns the interpretation and application of the provisions of the Convention guaranteeing warships and other non-commercial government vessels immunity from the jurisdiction of any State other than the flag state….Ukraine contends that Russia violated these provisions when it arrested and detained the Berdyansk, the Nikopol, and the Yani Kapu, and the servicemen on board those vessels, and continued to exercise jurisdiction through prolonged detention and criminal prosecution both before and after ITLOS issued its order prescribing provisional measures";[48]
>
> "The dispute that Ukraine has brought before the Tribunal concerns the arrest of the Berdyansk, the Nikopol, and the Yani Kapu on the evening of 25 November 2018, and the subsequent detention of those vessels and their crew as part of domestic criminal prosecutions."[49]

38. At paragraph 75 of its Memorial, Ukraine refers to the violations of UNCLOS comprising the events of the evening of 25 November 2018, specifically the demand for the vessels to stop, followed by the subsequent arrest and detention that evening of the military vessels and servicemen, and "after that initial arrest" the allegation that "Russia *continued* to illegally exercise jurisdiction over the vessels and their crew…." (emphasis added).[50]

39. As noted above, in conducting an objective evaluation of the activities of 25 November 2018, and their nature, the relevant circumstances must be taken into account. Those circumstances (all based on undisputed facts) are addressed below and demonstrate that the

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[46] The criminal charges brought against the Servicemen were expressly based on the manoeuvres of 25 November 2018 as contravening Russian law (see Order on opening a criminal case and commencing criminal proceedings, 25 November 2018, at **UA-13**, p. 1).

[47] UM, para. 20.

[48] *Ibid.*, paras. 50-51.

[49] *Ibid.*, para. 61. See also para. 63 referring to Russia's "actions on the evening of 25 November 2018 and continuing thereafter". See also para. 2 of the *Case Concerning the Detention of Three Ukrainian Naval Vessels*, Request of Ukraine for the Prescription of Provisional Measures Under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea, 16 April 2019 ("PM Request"): "The dispute between the parties arises from the Russian Federation's unlawful seizure and detention of the warships Berdyansk and Nikopol, the naval auxiliary vessel Yani Kapu, and the crew and other servicemen on those vessels" (**UA-1**).

[50] See also the submissions at UM, para. 153 referring to the order to stop and prevent the vessels' exit on 25 November 2018 (subparagraph d), the boarding, arresting and detention of the vessels and servicemen on the evening of 25 November 2018 (subparagraph a) and the act of "*continuing* to detain" the vessels and servicemen (subparagraphs b and c, emphasis added). See also ITLOS PM Order, Separate Opinion of Judge Gao, para. 29 noting that the "subsequent domestic legal proceedings against the servicemen in Russia may be a relevant factor of the case, but it should not have a decisive bearing on the characterization of the activities in question" (**RUL-32**).

activities fall squarely in the category of "a quintessentially military situation" identified by the tribunal in *Philippines v. China*, namely one:

> "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another".[51]

40. **First**, it is undisputed that there were military personnel on both sides:

a. The three Ukrainian Military Vessels were under the command of commissioned officers of the Ukrainian Navy and were manned by Ukrainian naval personnel subject to armed forces discipline, and it was those naval personnel who were arrested and detained.[52]

b. It was the Russian Coast Guard (on board government vessels) that issued the order to the vessels to stop,[53] boarded the Ukrainian Military Vessels,[54] then arrested the Ukrainian Military Servicemen on board and detained the three Ukrainian Military Vessels.[55] The Coast Guard service is part of the FSB Border Service ("FSB Border Service"), which operates under the Russian Federal Security Service ("FSB"). The FSB is staffed by, *inter alia,* military personnel who perform military service in accordance with Russian legislation on military service.[56] The FSB Border Service is mandated to protect and defend Russia's State border,[57] and uses weapons and military equipment to that end.[58] The FSB Border Service exercises military functions in protecting the Russian State border, and is akin to the armed forces.[59]

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[51] *Philippines v. China*, para. 1161 (**UAL-7**).
[52] UM, paras. 2, 16, 17, 22, 23, 30, 74. See also Report on the events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, 15 April 2019, p. 2 (**UA-5**).
[53] UM, para. 34.
[54] *Ibid.*, paras. 2, 35-37, 77.
[55] *Ibid.*, paras. 16, 35-37, 77. See also the PM Request, para. 2 referring to the Vessels seizure "by the Coast Guard of the Border Service of Russia's Federal Security Service" (**UA-1**).
[56] Federal Law No. 40-FZ "On the Federal Security Service", 3 April 1995, Article 16.1 (**RU-4**).
[57] Under Article 1 of the Federal Law "On the Federal Security Service", the main function of the FSB is to ensure the security of the Russian Federation (**RU-4**).
[58] Decree of the Government of the Russian Federation No. 80 "On Approving the Rules of Use of Weapons and Military Equipment When Protecting the State Border of the Russian Federation, the Exclusive Economic Zone, and the Continental Shelf of the Russian Federation", 24 February 2010, approves the rules regulating the use of weapons and military equipment while protecting the state border of the Russian Federation, the exclusive economic zone and the continental shelf of the Russian Federation (**RU-8**).
[59] Ukraine characterises (without authority) the FSB as simply "the Russian law enforcement organization of which the Coast Guard is a part" (UM, para. 38). As set out in the sources cited above (all set out in the Russian Memorandum at **UA-2** but not addressed by Ukraine), the FSB Border Service exercises military functions in protecting the Russian State border and is akin to the armed forces. See also "Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations for the Period Until 2030" (adopted by Decree of the President of the Russian Federation No. 327 of 20 July 2017) (**RU-11**).

c. [redacted]

41. **Second**, it is undisputed that the three Ukrainian vessels that were ordered to stop and then detained were military vessels, namely naval warships and an auxiliary vessel.[62] The Ukrainian Ministry of Defence describes the purpose of the naval fleet of which the warships are part as the "deterrence or repression of armed aggression against Ukraine from the sea and in coastal areas",[63] and notes that the three Ukrainian Military Vessels are "operational vessels with important public duties in the interest of Ukraine's national defence".[64]

42. **Third**, it is undisputed that the Ukrainian Military Vessels were armed with guns and artillery.[65] The FSB listed the weapons found on board as including machine guns, automatic grenade launchers, high-explosive fragmentation shells, hand grenades, and knife bayonets.[66] Ukraine accepts that certain of the guns were operational.[67] The Ukrainian Military Vessels

[60] [redacted]

[61] [redacted]

[62] UM, paras. 16, 17, 22, 23, 74.

[63] Report on the events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, 15 April 2019, p. 1 (**UA-5**).

[64] *Ibid.*, p. 8.

[65] See UM, para. 26 referring to guns on board all three Military Vessels.

[66] See the list on the FSB of Russia official website, "On the unlawful actions of the vessels of the Naval forces of Ukraine in the Russian territorial sea", 27 November 2018, available at http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438317%40fsbMessage.html (**RU-21**).

[67] UM, para. 26: "several of the guns on the Berdyansk and the Nikopol were either not operational or only partly operational".

also had "encryption technology used in connection with classified radio communications and system of state recognition".[68]

43. **Fourth**, it is undisputed that when the Ukrainian Military Vessels ignored the Russian order to stop the Ukrainian military and the Russian military were arrayed in opposition to each other.[69] There was a prolonged stand-off between the Ukrainian military force and the Russian combination of military and paramilitary forces.[70]

44. **Fifth**, it is undisputed that Russian forces used force against the Ukrainian Military Vessels and the Ukrainian Military Servicemen. Specifically, the Russian forces rammed the "*Yani Kapu*",[71] and subsequently opened fire (with first warning, then target, shots) on the "*Berdyansk*".[72] That use of force resulted in the wounding of three Ukrainian military personnel on board and caused damage to the Military Vessel.[73] The use of force was deployed pursuant to the Decree of the Government of the Russian Federation No. 80 of 24 February 2010 "On Approving the Rules of Use of Weapons and Military Equipment When Protecting the State Border of the Russian Federation, the Exclusive Economic Zone, and the Continental Shelf of the Russian Federation"[74] (the Decree applies to both military personnel of the Russian Armed Forces and the FSB when defending and protecting Russia's State border).

45. **Sixth**, Russia's conduct (the order to stop, the use of force and the subsequent detention) responded to an illegal crossing of its State border[75] by another State's warships (which is "an expression of the sovereignty of the State whose flag it flies"[76]), i.e. the Russian

[68] Report on the events of 24-25 November 2018 in the Sea of Azov and Kerch Strait, Ministry of Defense, Naval Forces of Ukraine, 15 April 2019, p. 8 (**UA-5**).
[69] ITLOS PM Order, Separate Opinion of Judge Gao, para. 24 "When the order to stop was ignored by the Ukrainian naval vessels, they were stopped and blocked in the vicinity of an anchorage, with restrictions on their movement, by Russian Coast Guard vessels for allegedly making an illegal crossing of the State border of the Russian Federation. It is from this moment on that the incident escalated from a normal passage into a fully-fledged stand-off at sea, involving the three Ukrainian naval vessels on one side and a combination of ten Russian naval warships and Russian Coast Guard vessels, plus one combat helicopter, on the other." (**RUL-32**).
[70] UM, para. 34; ITLOS PM Order, Separate Opinion of Judge Gao, para. 39 (**RUL-32**); Federal Security Service of the Russian Federation, Press Service Statement on Acts of Provocations by Ukrainian Naval Ships, 26 November 2018, pp. 3-4 (**UA-4**).
[71] UM, para. 34.
[72] *Ibid.*, paras. 34, 35, 61, 93.
[73] *Ibid.*, para. 34.
[74] Federal Security Service of the Russian Federation, Press Service Statement on Acts of Provocations by Ukrainian Naval Ships, 26 November 2018, pp. 4-5 (**UA-4**). The use of force here is clearly distinguishable from the facts and context considered by the tribunal in the Coastal State Rights case: *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Award, 21 February 2020, para. 336 (**UAL-25**).
[75] Russia charged the Military Servicemen with illegally crossing Russia's state border in violation of Article 322(3) of the Criminal Code of the Russian Federation (see Order on opening a criminal case and commencing criminal proceedings, 25 November 2018 (**UA-13**); UM, para. 19).
[76] UM, para. 1 citing the *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, para. 94 (**UAL-1**). See also UM, para. 7.

military was protecting its State national security interests given the unwarranted (armed) presence of the military of another State.[77] On board the "*Nikopol*" there was moreover a document entitled "Checklist of the artillery gunboat Nikopol's readiness to go to sea from 09:00 a.m. on 23.11.2018 to 06:00 p.m. on 25.11.2018", which set the task for the senior officer of the ships' group to sail from Odessa to Berdyansk "covertly, beyond the coastal and sea areas of observation of the Black Sea Fleet of the Russian Federation and the Border Service of the Federal Security Service of the Russian Federation", with "major focus [...] on ensuring the secrecy of approach to the KYC [Kerch-Yenikale canal] and passage through it".[78] The document also recorded a task as follows: "At 8:30 a.m. on 23.11.18, to start preparing the gunboat for battle and sailing".

46. **Seventh**, as referred to above, the activities of 25 November 2018 all occurred in the wider context of the dispute between Ukraine and Russia about the alleged annexation of Crimea. Indeed, the events of 25 November 2018 were preceded by provocative actions and military build-up on the part of Ukraine, including in establishing a new Azov Naval Base in Berdyansk and generally increasing Ukraine's military presence on the Sea of Azov.[79]

47. **Finally**, the activities at issue have repeatedly been characterised as military in nature, including in multiple statements by both Russia and Ukraine.

48. Thus, on 26 November 2018 (the day after the relevant events), Russia stated before the Security Council that "the Kyiv regime made a direct threat to international peace and security by ordering the Ukrainian Naval Forces to carry out an aggressive act of provocation with regard to the Russian Federation's State Border", referring expressly to "the Ukrainian regime's military provocations".[80] In a subsequent meeting of the Security Council that same day, Russia referred to Ukraine's "act of clear provocation" as reflecting "Kyiv's policy of

[77] See Decree of the Government of the Russian Federation No. 80 of 24 February 2010 (cited above) (**RU-8**). See also the statements of Russia before the Security Council at the extraordinary meetings of 26 November 2018: "We will put a firm stop to any infringement on the sovereignty and security of the Russian Federation" (United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410, p. 14) (**RU-16**); "…the Kyiv regime made a direct threat to international peace and security by ordering the Ukrainian Naval Forces to carry out an aggressive act of provocation with regard to the Russian Federation's State Border…" (United Nations Security Council, 8409th meeting, 26 November 2018, S/PV.8409, p. 2) (**RU-15**).

[78] "Checklist of the artillery gunboat Nikopol's readiness to go to sea from 09:00 a.m. on 23.11.2018 to 06:00 p.m. on 25.11.2018" (**RU-47**). See also Items Inspection Protocol, 26 November 2018 (**RU-20**).

[79] "Two Ukrainian warships enter Sea of Azov to become part of newly created naval base", *ukrinform.net*, 24 September 2018, available at https://www.ukrinform.net/rubric-defense/2544002-two-ukrainian-warships-enter-sea-of-azov-to-become-part-of-newly-created-naval-base.html (**RU-12**). On the increased presence of Ukraine's military in the Sea of Azov see "Ukraine to deploy more border guards, rescuers in Azov Sea — minister", *tass.com*, 30 September 2018, available at http://tass.com/world/1023671 (**RU-13**). Other examples of military build-up and provocative actions are cited in the Memorandum of the Russian Federation, para. 11 (**UA-2**).

[80] United Nations Security Council, 8409th meeting, 26 November 2018, S/PV.8409, p. 2 (**RU-15**).

provoking a conflict with Russia".[81] Indeed, the very fact that the events of 25 November 2018 were immediately brought before the Security Council is an apt demonstration that they concerned an important military engagement, not mere law enforcement as Ukraine now wishes to contend.

49. As to Ukraine, both before the Security Council on 26 November 2018 and in various other fora, it has made multiple statements clearly and consistently characterising the incident as concerning military activities. Particular weight should be given to those statements as they were made in the immediate aftermath of the relevant events and outside the confines of the current claim.[82] Notably:

a. Ukraine's statement before the UN Security Council on 26 November 2018:

> "recordings clearly demonstrate that *the Russian military vessels were given orders to attack the Ukrainian vessels*";
>
> "pursuant to article 3 (d) of the annex to General Assembly resolution 3314 (XXIX), 'an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State' qualifies as an act of aggression";
>
> "Russia's recent belligerent acts";
>
> "we are ready to use all available means in exercising *our right to self-defence, as provided for in Article 51 of the Charter*";
>
> "These events are yet another testament to the relevance of the General Assembly draft resolution prepared by Ukraine and like-minded States regarding the *issue of the militarization of Crimea, the Black Sea and the Sea of Azov*."[83]

b. Ukraine's subsequent formal communications with Russia:

> "These vessels were seized and suffered significant damage *as a result of unprovoked, repeated use of artillery fire for effect, ramming, collisions, and other aggressive actions* by Russian naval vessels.";
>
> "*they (23 persons) were all taken as prisoners of war*";
>
> "*The Ukrainian Side views the actions of the Russian Federation as the unlawful use of force against Ukrainian naval vessels on the territory of Ukraine*";
>
> "Ukraine *reserves the right to apply Article 51 of the UN Charter*";[84]

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[81] United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410, p. 14 (**RU-16**).

[82] Reflecting the well-established concept in interstate proceedings of statements against interest (see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 135, para. 227 (**RUL-15**); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64 (**RUL-5**)).

[83] United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410, pp. 10, 12 (**RU-16**) (emphasis added).

[84] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1329, 26 November 2018 (**UA-18**) (emphasis added).

"the crew members […] were taken as *prisoners of war* on November 25, 2018, following *an armed assault by Russian naval vessels and special forces* in the territorial waters and exclusive economic zone of Ukraine in the Black Sea";

"The Ukrainian Side once again demands that the Russian Side immediately release *the servicemen of the Naval Forces of the Armed Forces of Ukraine* from custody";[85]

"Embassy requests to officially inform of the whereabouts of servicemen of the Navy of Ukraine […] wounded during the mentioned *military incident*."[86]

c. The Decision of the National Security and Defence Council of Ukraine dated 26 November 2018 recommending to the Ukrainian President to introduce martial law in Ukraine (which the President duly introduced):

"the *actions against the ships of the Naval Forces of the Armed Forces of Ukraine* exercised by the Russian Federation, which entailed grave consequences, *constitutes the crime of armed aggression*".[87]

d. Ukraine's official statements before the OSCE:

"Based on the internationally recognized definition, *Ukraine determined Russia's actions against Ukraine's navy vessels, that took place on 25 November 2018, to be an act of armed aggression.* [Ukrainian boats were] followed and attacked by Russian ships, declaring ultimatums, *opening deadly fire and using units of special forces to capture Ukrainian vessels* out of the 12 mile zone. […] we remind the aggressor-state of *Ukraine's inherent right to self- defence*, as enshrined in the UN Charter."[88]

"… on 25 November the *Russian Navy deliberately used military force against three Ukrainian vessels* in international waters in the Black sea. 24 Ukrainian sailors have been captured and are now *prisoners of war.* […] I remind that *attack of armed forces of one state on armed forces of another state constitutes an act of aggression,* in accordance with 1974 UN GA resolution."[89]

e. [redacted]

[redacted]

[85] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1339, 27 November 2018 (**UA-19**) (emphasis added).
[86] *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0135, 28 January 2019 (**RU-35**) (emphasis added).
[87] National Security and Defense Council of Ukraine, Resolution "On the Emergency Measures Taken to Protect the State Sovereignty and Independence of Ukraine and on the Introduction of Martial Law in Ukraine" (enacted by Decree No. 390/2018 of the President of Ukraine, 26 November 2018) **(RU-17) (**emphasis added).
[88] "Statement by the delegation of Ukraine on the latest Russia's act of unprovoked armed aggression against Ukraine" (as delivered by Ambassador Ihor Prokopchuk, Permanent Representative of Ukraine to the International Organizations in Vienna, to the 1204th special meeting of the Permanent Council, 26 November 2018), available at https://www.osce.org/files/f/documents/2/6/404666.pdf **(RU-22) (**emphasis added).
[89] "Statement by H.E. Mr. Pavlo Klimkin, Minister for Foreign Affairs of Ukraine, at the 25th Meeting of the Ministerial Council of the OSCE (Milan, 6 December 2018)", Organization for Security and Co-operation in Europe official website, 6 December 2018, available at https://www.osce.org/whoweare/405560?download=true (**RU-26**) (emphasis added).

[redacted]

f. Ukraine's Military Prosecutors' Office: on 25 November 2018, the Military Prosecutor's Office of Southern Region registered in the Unified Register of Pre-Trial Investigations criminal proceedings in respect of an alleged act of aggressive war by the Russian Federation relying upon, *inter alia*, Article 437 of the Criminal Code of Ukraine regarding "planning, preparing, initiating or waging aggressive war".[91]

g. Consistent with that characterisation by Ukraine, the so-called Prosecutor's Office of the Autonomous Republic of Crimea (Ukrainian authority based in Kiev) characterised the incident as a "violation of laws and customs of war". On 27 November 2018, that Office registered criminal proceedings under Article 438 of the Criminal Code of Ukraine into alleged violations of the laws and customs of war.[92]

h. Ukraine's statement before the UN General Assembly on 17 December 2018:

> "That attack [on 25 November 2018] represents yet another blatant and barefaced act of military aggression against Ukraine by the Russian Federation".[93]

[90] [redacted]

[91] Facebook page of Yuriy Lutsenko, Prosecutor General of Ukraine, post dated 25 November 2018, available at https://www.facebook.com/LlutsenkoYuri/posts/1073660022833172 (**RU-14**).

[92] Prosecutor's Office of the Autonomous Republic of Crimea official website, "The Prosecutor's office of the Autonomous Republic of Crimea launched pre-trial investigation into violations of the laws and customs of war with regard to PoW – Ukrainian navy men by the occupation authorities", 27 November 2018, available at https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=241078 (**RU-23**).

[93] United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56, p. 11 (**RU-27**).

i. More recently, on 21 March and 3 April 2019, the President of Ukraine awarded all the Ukrainian Military Servicemen with military medals and orders, *inter alia*, for personal courage and selfless actions in the performance of military duty.[94]

50. As to Ukraine's characterisation in its Memorial of the activities of 25 November 2018, this is confused as Ukraine wishes both to identify the activities as comprising domestic law enforcement only and to emphasise the military nature of its vessels (so as to claim immunity). Thus it seeks to downplay Russia's activities as "normal practice" with respect to stopping a ship at sea,[95] but at the same time characterises the events as an "unusually direct affront to [its] sovereignty",[96] and contends that "a warship is an expression of the sovereignty of the State whose flag it flies".[97] The correct position is that where, as in the present case, one State's military has used force against another State's warship, this comes within the intended scope of the military activities declaration.[98]

51. As to the characterisation accorded to the key events by international organisations and States, Russia notes that:

a. The OHCHR described the events of 25 November 2018 as a "hostile encounter between the armed forces or assimilated armed units of two sovereign states".[99]

b. The High Representative of the EU made a declaration on 28 November 2018 referring to the "use of force by Russia … against the backdrop of increasing militarisation in the area",[100] and the Council of Europe Parliamentary Assembly issued

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[94] "Poroshenko decorated captured Ukrainian navy men with state orders", *krymr.com*, 7 April 2019, available at https://ru.krymr.com/a/news-poroshenko-prisudil-ukrainskim-moryakam-gosudarstvenniye-nagradi/29866299.html with further references to the Decrees of the President of Ukraine No. 83/2019 as of 21 March 2019 and No. 96/2019 as of 3 April 2019 (**RU-42**).
[95] UM, para. 61.
[96] *Ibid.*, para. 140.
[97] *Ibid.*, para. 1 citing the *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, para. 94 (**UAL-1**). See also UM, para. 7; ITLOS PM Order, para. 110 (**UAL-2**) cited at UM, para. 65 which stated: "any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security".
[98] ITLOS PM Order, Separate Opinion of Judge Gao, para. 33 (**RUL-32**).
[99] OHCHR, "Report on the human rights situation in Ukraine 16 November 2018 to 15 February 2019", para. 100, available at https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf (**RU-28**).
[100] "Declaration by the High Representative on behalf of the EU on the escalating tensions in the Azov Sea", Council of the European Union official website, 28 November 2018, available at https://www.consilium.europa.eu/en/press/press-releases/2018/11/28/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-escalating-tensions-in-the-azov-sea/pdf (**RU-24**).

a resolution on 24 January 2019 which "condemns the use of military force by the Russian Federation against Ukrainian warships and their crews".[101]

c. Before the UN Security Council and General Assembly, States have repeatedly characterised the events with reference to military use of force. The UK condemned Russia's "use of military force",[102] the Netherlands urged Russia to "refrain from any further military confrontation with Ukrainian vessels in the region",[103] France and Germany (in a joint statement) referred to Russia's "violent manoeuvres" and "use of force",[104] Poland referred to the "illegal use of military force" by Russia[105] and Lithuania stated that Russia "directly attacked the Ukrainian navy with military force".[106]

d. Whilst it is not in any way accepted that Russia engaged in an unlawful use of force, including any act of aggression, it is clear that the incident was widely and correctly regarded as concerning military activities.

52. Curiously, and notwithstanding all the above, Ukraine relies on a purported subsequent characterisation by Russia of the activities as solely "law enforcement"; indeed, this is the first argument it elects to rely upon in denying the application of the military activities exclusion.[107] Yet the Parties' characterisation of the activities (and likewise the characterisation of third parties) plainly further demonstrates that they constitute military activities. The mere fact that Russia recorded that the Ukrainian Military Vessels were detained pursuant to Russian domestic law prohibiting unlawful crossing of its state border is in no way inconsistent with the fact that the relevant activities were military,[108] and at no point did Russia deny the activities were military.[109]

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[101] Parliamentary Assembly of the Council of Europe, "The escalation of tensions around the Sea of Azov and the Kerch Strait and threats to European security", Resolution 2259 (2019), 24 January 2019, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25419&lang=en (**RU-33**).
[102] United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410, p. 3 (**RU-16**).
[103] *Ibid.*, p. 9.
[104] *Ibid.*, p. 4.
[105] United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56, p. 16 (**RU-27**).
[106] *Ibid.*, p. 17.
[107] UM, para. 59.
[108] *Cf.* UM, para. 59.
[109] Russia has denied that the Military Servicemen are prisoners of war (and hence is treating this as a matter for its civilian courts). That denial pertains to the categorisation of the situation as an armed conflict for the purposes of international humanitarian law and does not mean that the incident does not concern military activities for the purposes of Article 298 of UNCLOS, which is a wholly separate question. The position of Russia is therefore clearly distinguishable from the instance identified in the *Philippines v. China* (para. 938) (**UAL-7**), concerning the activities of China on Mischief Reef, as to which "China itself has consistently resisted such classifications and affirmed the opposite at the highest level" (cited at UM, para. 59).

53. By reference to all the above, Russia considers that the activities at issue in this case were plainly military in nature, such that its declaration under Article 298(1)(b) is engaged. It is useful to recall the determination of the Annex VII tribunal in the *South China Sea* case with respect to the Second Thomas Shoal:

> "On the basis of the record set out above, the Tribunal finds that the essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies. In connection with this stand-off, Chinese Government vessels have attempted to prevent the resupply and rotation of the Philippine troops on at least two occasions. Although, as far as the Tribunal is aware, these vessels were not military vessels, China's military vessels have been reported to have been in the vicinity. In the Tribunal's view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another. As these facts fall well within the exception, the Tribunal does not consider it necessary to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b)."[110]

54. There is some parallel between the facts then at issue and the facts now before this Tribunal. The principal difference is that, here, there are *more* factors demonstrating that the events that are at the heart of the current dispute constitute military activities, including the actual use of force.

55. Russia turns now to consider Ukraine's current position that the activities are solely "law enforcement" in nature.

II. Ukraine's incorrect reliance on "law enforcement activities"

56. In Ukraine's view the present dispute does not concern military activities because it concerns "law enforcement activities".[111] According to Ukraine there is a "categorical distinction between 'military' and 'law enforcement' activities"[112] and "the concepts of 'military activities' and 'law enforcement activities' are distinct, mutually exclusive categories".[113] It would follow from this (if correct) that, if the dispute can be classified as

[110] *Philippines v. China*, para. 1161 (**UAL-7**).
[111] UM, paras. 58-62.
[112] *Ibid.*, para. 60. See also *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures*, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, 10 May 2019 (Cheek), p. 19 (**RU-45**).
[113] *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures*, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, 10 May 2019 (Cheek), p. 19 (**RU-45**), summarised in ITLOS PM Order, para. 55 (**UAL-2**).

concerning law enforcement activities, it cannot be classified as concerning military activities. Consequently, the declarations excluding military activities would not apply.

57. In the present Section, Russia shows that this argument is not correct as the concepts of military activities and of law enforcement activities are not mutually exclusive.

58. The ITLOS Order of 25 May 2019 stating that the dispute does not concern military activities because it concerns law enforcement activities is, as already noted, a *prima facie* decision.[114] This means that, in order to grant provisional measures, ITLOS did not need to "definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it".[115] The Order of 25 May 2019 can thus readily be reversed in the next phases of the case.

59. Several separate opinions in the provisional measures phase of the present case before ITLOS confirm that the present Tribunal has ample margin for reaching a conclusion different from that of ITLOS.

60. These opinions endorse the view that the two categories of "military" and "law enforcement" activities as referred to in Article 298(1)(b) are not mutually exclusive.

61. Judge Gao affirms that the two categories "are in reality not always so clearly differentiated and mutually exclusive".[116]

62. Judge Jesus states that "[i]t may well be that the Ukrainian warships engaged in acts that could be qualified as military activities".[117] Similarly, Judge Lucky states that "it could be both military and law enforcement"[118] and Judge Kittichaisaree observes that "[c]ertain incidents may comprise a mixture of both military and law-enforcement aspects".[119]

63. In Judge Kolodkin's view: "The activities of the Applicant were purely military in nature and the activities of the Respondent were military to a large extent."[120]

64. In previous paragraphs it has been demonstrated that, according to the rules on treaty interpretation, as a matter of their ordinary meaning, the terms "military", "activities" and "concerning" in UNCLOS Article 298(1)(b) are notably broad.[121] These terms are broad

[114] See above, para. 26.
[115] ITLOS PM Order, para. 36 (**UAL-2**).
[116] *Ibid.*, Separate Opinion of Judge Gao, para. 49 (**RUL-32**).
[117] *Ibid.*, Separate Opinion of Judge Jesus, para. 20 (**RUL-33**).
[118] *Ibid.*, Separate Opinion of Judge Lucky, para. 21 (**RUL-36**).
[119] *Ibid.*, Declaration of Judge Kittichaisaree, para. 4 (**RUL-34**).
[120] *Ibid.*, Dissenting Opinion of Judge Kolodkin, para. 22 (**RUL-35**).
[121] See above, paras. 29-30.

enough to encompass activities covered by the notion of military activities which are engaged where there is also an element of law enforcement. Moreover, they contain no indication that to qualify as "military activities" activities must be exclusively military.

65. Further, as previously mentioned, UNCLOS does not contain a definition of military activities[122] nor does it contain provisions directly mentioning these activities different from Article 298. References to activities that may be considered as military, such as some of those making passage not innocent mentioned by Judge Jesus in his separate opinion in the provisional measures phase of the present proceedings before ITLOS,[123] are scarce and do not shed much light on the notion of military activities. By contrast, UNCLOS contains provisions explicitly mentioning enforcement activities such as Article 224, concerning pollution violations, or describing activities that consist in enforcing certain rules, such as Article 110 on the exercise of the right of visit and Article 111 on the exercise of the right of hot pursuit. These law enforcement activities may be carried out only by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.[124] This does not make these enforcement activities automatically military, but is a strong indication that this may be the case.

66. Disputes concerning these law enforcement activities are in principle submitted to compulsory jurisdiction under Section 2 of Part XV, and so are the two narrow categories – concerning fisheries and marine scientific research – mentioned in Article 298(1)(b). The latter may, however, be excluded from compulsory jurisdiction by the declaration referred to in Article 298(1)(b).

67. Article 298(1)(b) does not refer to law enforcement activities different from those concerning marine scientific research and fisheries. It consequently does not exclude that these other activities may be covered by the notion of military activities.

68. This emerges from the structure and purpose of Article 298(1)(b).

69. Structurally, this provision addresses two categories of disputes: those concerning military activities, and a subgroup of those concerning law enforcement activities.

70. The purpose of the exclusion of the first category is to permit the carving out of a group of disputes that must be broad because the notion of military activity is broad and linked to

[122] See above, para. 28.
[123] ITLOS PM Order, Separate Opinion of Judge Jesus, paras. 14-15 (**RUL-33**).
[124] UNCLOS, Articles 110(1), (4), (5), 111(5), 224.

"sensitive issues of sovereignty"[125] and security. As stated in Judge Gao's Separate Opinion to the ITLOS Order of 25 May 2019, an interpretation supporting a "high threshold" for military activities may have "legal as well as political implications".[126] Such high threshold "may serve as an incentive for States to escalate rather than de-escalate a conflict".[127] Moreover, "States that have made declarations under article 298, paragraph 1(b), would fall into frustration and disappointment upon learning from the jurisprudence that their declarations made in accordance with the Convention on the military activities exception can hardly serve their original intent and purpose, since a strict interpretation of this provision has been adopted in case law for its application".[128] The same concerns must be in the minds of States considering acceding to UNCLOS with the military activities declaration, as emerges from the intention manifested by the United States to make a declaration concerning military activities specifying that "its consent to accession to the Convention is conditioned upon the understanding that, under article 298(1)(b), each State Party has the exclusive right to determine whether its activities are or were 'military activities' and that such determinations are not subject to review".[129]

71. The purpose of the exclusion of the two subcategories concerning marine scientific research and fisheries is narrow and aims at specifying that the two categories of disputes explicitly excluded from jurisdiction by Article 297(2) and (3) may be left so excluded by a declaration also as regards the aspect of enforcement.

72. Article 298(1)(b) thus does not refer to the two categories of disputes it mentions as being one in opposition to the other. There is nothing in Article 298(1)(b) of UNCLOS to the effect that law enforcement activities cannot be military activities. The two categories are not exclusive of each other. Oxman supports this interpretation when, in referring to "law enforcement activities that are neither military activities, nor an exercise of coastal State enforcement rights over marine scientific research or fisheries in the exclusive economic zone", he implies that there can be law enforcement activities that are military activities.[130]

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[125] ITLOS PM Order, Separate Opinion of Judge Gao, para. 9 (**RUL-32**).
[126] *Ibid*., para. 41.
[127] *Ibid*., para. 45.
[128] *Ibid*., para. 46.
[129] Section 2(2) of the draft resolution of advice and consent to ratification submitted in 2007 to the US Senate as part of the Senate Foreign Relations Committee Executive Report (Report together with Minority views [to accompany Treaty Doc. 103-39], United States Senate, 110th Congress, 1st Session, The Law of the Sea Convention, Treaty Doc. 110-9, the US Government official website, 19 December 2007, available at https://www.govinfo.gov/content/pkg/CRPT-110erpt9/html/CRPT-110erpt9.htm) (**RU-6**).
[130] B.H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea", *Virginia Journal of International Law*, 1984, Vol. 24, p. 823 (**RUL-4**).

73. But in the present case the activities of the Parties on 25 November 2018 present all the features of military activities. These features are listed in detail above[131] and there is no need to repeat them. A dispute concerning these activities is, consequently, excluded by the declarations made by the Russian Federation and by Ukraine under Article 298(1)(b).

74. Even if it were considered that these activities have an element of law enforcement, or even concern mainly law enforcement (neither of which is accepted), they would remain military activities. Consequently, they would be excluded from compulsory jurisdiction by the Article 298(1)(b) declarations concerning military activities.

[131] See above, paras. 35-54.

CHAPTER 3

UNCLOS DOES NOT PROVIDE FOR AN APPLICABLE IMMUNITY

75. Contrary to what Ukraine claims,[132] and as will be shown in the present Chapter, Article 32 of UNCLOS does not provide for an applicable immunity of warships and other government ships operated for non-commercial purposes in the territorial sea. Hence, the dispute does not concern the application of the Convention and the Tribunal lacks jurisdiction under Article 288(1). That having been said, Russia wishes to make clear that it does not imply that warships have no immunity in the territorial sea:[133] it does not intend here to take any position on the substance, it merely raises the rather obvious jurisdictional issue according to which such immunity is not provided for in the Convention.

76. Article 32 reads as follows:

> "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."

77. As a matter of its ordinary meaning, Article 32 establishes no right to immunity and only addresses exceptions to the potential immunity of warships, not the immunity itself – which is "extra-conventional".

78. The first conventional exceptions are embodied in Subsection A of Section 3 of Part II of UNCLOS which contains the rules regarding innocent passage in the territorial sea applicable to all ships; "[t]he point being made is that immunity from enforcement jurisdiction of the coastal State does not excuse a warship from the duty to respect the provisions of the Convention regarding the regulation of innocent passage."[134] As for Articles 30 and 31, they respectively cover non-compliance by warships with the laws and regulations of a coastal State concerning passage through the territorial sea, and flag State responsibility for any loss or damage to a coastal State resulting from such non-compliance. "Put simply, therefore, the Convention states that it says nothing about the immunities of warships, leaving the matter to be dealt with elsewhere."[135]

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[132] Statement of Claim, paras. 22-23; UM, paras. 67, 86-88.
[133] See below, Judges Wolfrum and Cot's similar caveat, para. 78.
[134] B.H. Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea", *Virginia Journal of International Law*, 1984, Vol. 24, p. 818 (**RUL-4**).
[135] M. Happold, "Immunity of Warships: Argentina Initiates Proceedings Against Ghana under UNCLOS", *EJIL talk*, 20 November 2012, available at https://www.ejiltalk.org/immunity-of-warships-argentina-initiates-proceedings-against-ghana-under-unclos/ (**RUL-21**).

79. As developed in the persuasive and detailed reasoning of their Joint Opinion in the *ARA Libertad* case, which it is worth quoting at some length, Judges Wolfrum and Cot clearly explain that Article 32 does not establish the immunity of warships and is not a rule of incorporation:

> "40. As far as the interpretation of article 32 of the Convention is concerned article 31 of the Vienna Convention on the Law of Treaties is to be applied; thus text, context, object and purpose as well as the legislative history of this provision are of relevance.
>
> 41. The wording of this provision makes it plain that this provision does not establish the immunity of warships. Instead the immunity of warships is taken for granted. Therefore article 32 constitutes a reference rather than a regulation in itself. In that respect article 32 of the Convention corresponds to the last preambular paragraph of the Convention, which states: 'Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.
>
> 42. Further, the wording of article 32 of the Convention also clearly spells out that it addresses limitations and exceptions to immunity. This textual interpretation is reinforced by the wording of article 95 of the Convention, which reads: 'Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.'
>
> 43. Comparing the wording of these two provisions on the immunity of warships makes it very clear that only article 95 of the Convention contains a regulation on immunity whereas article 32 does not; any other interpretation disregards the difference in wording while making it obsolete. That having been said, this must not be misunderstood to mean that warships have no immunity in internal waters; they have but the basis thereof is in customary international law and not in the Convention.
>
> 44. It having been established on the basis of a textual analysis that article 32 of the Convention constitutes a reference to immunity and not a regulation as far as the establishment of immunity is concerned, it is easier to understand the reference to 'nothing in this Convention'. This reference does not apply to an establishment of immunity but rather to exceptions. It means that, apart from the exceptions specifically referred to articles 30 and 31 and in subsection A of Section 3 (Innocent Passage in the Territorial Sea), the Convention does not contain any further exceptions for the immunity of warships. […]
>
> 46. Our reading of article 32 of the Convention is endorsed by the legislative history of this provision. This provision developed out of article 23 of the International Law Commission's draft articles prepared in 1956. The main issue at that time was not warships but government ships operated for non-commercial purposes. The ILC draft was taken over and expanded by article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone. What is of interest in this context is that its paragraph 2 emphasized that the rules regarding the enjoyment of the rights of innocent passage of government ships operated for non-commercial purposes were without prejudice to whatever immunities such ships might enjoy under the provisions of the 1958 Convention or other rules of international law. This, at least, provides for a clear indication that the issue of immunity had its basis outside treaty law in customary

international law. This reference to customary international law was repeated for warships in article 31 ISNT/Part II. This reference was dropped in article 31 RSNT/ Part II. The ultimate reason for that was the general reference to customary international law in the last preambular paragraph."[136]

80. A reference to the *travaux préparatoires* of Article 23 of the 1958 Convention on the Territorial Sea and the Contiguous Zone (TSCZ), which later became Article 30 of UNCLOS, may be added to that reasoning. Initially, the said article was accompanied by another draft provision, which had been considered by the UNCLOS I First Committee and would have expressly recognized the immunity of warships while exercising innocent passage in the territorial sea, i.e.:

"*Article 24 Passage*

1. The coastal State may make the passage of warships through the territorial sea subject to previous authorization or notification. Normally it shall grant innocent passage subject to the observance of the provisions of articles 17 and 18.

2. During passage warships have complete immunity from the jurisdiction of any State other than its flag State."[137]

The failure to adopt the above provision supports the view that UNCLOS I and III deliberately refrained from setting up a treaty obligation on the immunities of warships while these exercise passage through the territorial sea of the coastal State.

81. Moreover, the immunity of warships as customary international law has not been incorporated by reference through Article 32 into the Convention. As further explained by Judges Wolfrum and Cot:

"49. The mechanism to incorporate rules from one set of rules into another one is well established in many national legal systems. However, it always has to be established whether the norm in question incorporates another one by reference or whether that norm only refers to another norm without incorporating it, thus leaving the issue to be regulated by the other set of norms, in our case by customary international law.

50. Article 32 of the Convention does not indicate that through it the customary international law is being incorporated into the Convention. It simply takes the immunity of warships as a fact. It becomes evident upon scrutiny of the Convention that there are very few references to customary international law – except the already mentioned last preambular paragraph. This is due to the overall policy towards customary international

[136] *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012,* Separate Opinion of Judges Cot and Wolfrum, *ITLOS Reports 2012* (**RUL-22**).
[137] United Nations Conference on the Law of the Sea, Report of the First Committee, *Official Records of the United Nations Conference on the Law of The Sea, Volume II (Plenary Meetings)*, 24 February to 27 April 1958, A/CONF.13/L.28/Rev. l (**RU-1**).

law, whose universality was, at the time of the drafting of the Convention, put into question."[138]

In fact, the few provisions of the Convention which, in contrast, directly incorporate other rules of international law, expressly refer to treaty law, such as Article 74 providing that "[t]he delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 in the Statute of the International Court of Justice, in order to reach an equitable solution".

82. In sum, Article 32 is a kind of "without prejudice" clause. It does not create a self-standing rule on immunity under the Convention, nor does it incorporate customary international law into the Convention; it merely treats the immunity as a fact and only addresses limitations and exceptions to immunity. Contrary to Article 95 (applicable to the high seas and, by virtue of Article 58(2), to the EEZ), the basis, meaning and scope of the immunity referred to in Article 32 is not found in UNCLOS. In other words, the alleged breach of the obligation to accord immunity to the Ukrainian vessels in the territorial sea[139] falls outside UNCLOS and the jurisdiction of the Tribunal.

83. Indeed, two issues have to be clearly separated: the Tribunal may have recourse to general international law not incompatible with the Convention in accordance with Article 293,[140] but it is mandated only to decide on disputes concerning the interpretation and application of the Convention in accordance with Article 288. This was recently reaffirmed by ITLOS in *The M/V "Norstar" Case* according to which "a distinction must be made between the question of its jurisdiction, on the one hand, and the applicable law, on the other".[141] Article 293 cannot be invoked to empower a Part XV tribunal to decide disputes which have arisen in fields of international law that lie outside the provisions of the Convention. Rather its purpose is "to dispel any doubt that, in interpreting and applying the provisions of the Convention", the Tribunal "may have recourse to such secondary rules as the law of treaties, State

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[138] *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012,* Separate Opinion of Judges Cot and Wolfrum, *ITLOS Reports 2012* (**RUL-22**).
[139] UM, paras. 75, 86-88.
[140] "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".
[141] *The M/V "Norstar" Case (Panama v. Italy), ITLOS Case No. 25, Judgment*, p. 37, para. 136 (**UAL-31**). See also *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits, 14 August 2015, para. 188 (**UAL-6**); *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012*, Separate Opinion of Judges Cot and Wolfrum, *ITLOS Reports 2012*, para. 7 (**RUL-22**); *Eurotunnel (1. The Channel Tunnel Group Limited 2. France-Manche S.A. v. 1. The Secretary of State for Transport of the United Kingdom 2. Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer de la France)*, Partial Award, 30 January 2007, para. 152 (**RUL-16**); *MOX Plant (Ireland v. United Kingdom)*, Procedural Order No. 3, 24 June 2003, para. 19 (**RUL-13**).

responsibility, diplomatic protection et cetera".[142] The jurisdiction of the Tribunal in this case is based solely on UNCLOS; it has no power to rule on alleged breaches of other obligations under international law; that is so even if the alleged breaches are of obligations "of fundamental and longstanding tenet of the law of the sea".[143]

84. As summarised by Judges Wolfrum and Cot,

> "A dispute concerning the interpretation and application of a rule of customary law […] does not trigger the competence of the Tribunal unless such rule of customary international law has been incorporated in the Convention. In our view the question of the immunity of warships in foreign internal waters, including ports, is a rule of customary international law which is not being incorporated in the Convention."[144]

As shown above and as also results from the persuasive reasoning of the two concurring Judges in their separate opinion, this is equally applicable in the present case with respect to immunity in the territorial sea. Any other interpretation would extend the Convention to virtually all general public international law.

85. Since Article 32 does not provide for an applicable immunity of warships and other government ships operated for non-commercial purposes in the territorial sea, within which the events started, as depicted in detail on Map 1 at page 37 below, the Tribunal has no jurisdiction to rule on the dispute. In fact, the present dispute involves the order to stop to all three of the Ukrainian Military Vessels, warning flares and shots into the air,[145] the use of targeted weapons against the armored gunboat "*Berdyansk*"[146] and the arrests of the tugboat "*Yani Kapu*"[147] and the "*Berdyansk*",[148] all of which occurred in the territorial sea of Russia – contrary to what Ukraine alleges in its Memorial (without however giving the specific location of the incident).[149] Ukraine's diplomatic correspondence itself asserts that Russia's "armed assault on

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[142] See the United Kingdom's position as summarised in *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, paras. 184-186 (**RUL-25**). See also *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits, 14 August 2015, para. 190: "In order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties [as reflected in the Vienna Convention on the Law of Treaties, 1969, for example] or the rules of State responsibility [as reflected in the Articles on State Responsibility, for example]" (**UAL-6**).

[143] UM, para. 65. See in that sense, with respect to the comparable articles 36 and 38 of the ICJ Statute, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 104, para. 147 (**RUL-15**).

[144] *"ARA Libertad" Case (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012*, Separate Opinion of Judges Cot and Wolfrum, *ITLOS Reports 2012*, para. 7 (**RUL-22**).

[145] Latitude 44° 53.47' N, longitude 36° 25'76 E.

[146] Latitude 44° 51.3' N, longitude 36° 23.4' E.

[147] Latitude 44° 53' N, longitude 36° 25' E.

[148] Latitude 44° 51.5' N, longitude 36° 23.6' E.

[149] UM, paras. 16 ff.

and seizure of the Ukrainian naval cutters Berdyansk and Nikopol and tugboat Yani Kapu, as well as the wounding and capture of their crewmembers […] took place in the territorial waters and the exclusive economic zone of Ukraine in the Black Sea".[150] Russia wishes to make clear that it does not accept the waters in question as belonging to Ukraine; but the Tribunal has no jurisdiction to decide on a dispute over territorial sovereignty.[151] However, if the Tribunal accepts, as it should, that the title on the waters in question belongs to Russia, as the territorial sovereign over Crimea, it is obvious that, while, admittedly, the "*Nikopol*" was arrested just as it exited the Russian territorial sea,[152] the pursuit started well within said waters; thus, the correct focus is still on Article 32, by the operation of Article 111.

86. According to this provision:

> "1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.
>
> […]
>
> 4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.
>
> 5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. […]"

87. The conditions of Article 111 are met in the present case. As Ukraine itself underlines,

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[150] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No 610/22-110-1329, 26 November 2018 (**UA-18**).

[151] And it must be noted that inasmuch Ukraine links its claim to immunity to its alleged title on these waters, this is another ground for the lack of jurisdiction of the Tribunal. See above, Chapter 1, para. 23.

[152] Latitude 44° 51' N, longitude 36° 28' E.

- Russia demanded that the vessels stop because they had violated Russian law.[153]
- It is not in dispute that when hot pursuit commenced, i.e. when Russia demanded that the Ukrainian vessels stop and took steps to stop them, those vessels were in the territorial sea.[154]
- Hot pursuit was continuous and uninterrupted.[155]
- A signal to stop had been given.[156]
- Russian coast guard vessels fall under Article 111, paragraph 5, as ships clearly marked and identifiable as being on government service and authorised to that effect.[157]

88. Indeed, "it is the rule to which the ship is subject at the spot where the pursuit is commenced which is determinative."[158] Since Article 32 does not provide for immunity of warships in the territorial sea, while Article 95 is categorical as regards the existence of such immunity on the high seas, implying a restriction of the right of hot pursuit as enunciated in Article 111, in the present case, the silence in Article 32 trumps and contradicts the rule enunciated in Article 95. Consequently, there is no reason to deal differently with the "*Yani Kapu*" and the "*Berdyansk*" on the one hand and the "*Nikopol*" on the other.

89. In conclusion, the alleged breach of the obligation to accord immunity to the Ukrainian vessels falls outside UNCLOS and the jurisdiction of the Tribunal since the events giving rise to the dispute commenced in the territorial sea, where Article 32 acts merely as a "without prejudice" clause regarding the immunities of warships and other government ships operated for non-commercial purposes that may or may not arise pursuant to sources of law exterior to the Convention. There is no relevant and applicable rule under the Convention, whether self-standing or through incorporation. It follows that there can be no dispute concerning the

[153] See notably UM, para. 33.
[154] *Ibid.*, paras. 75, 78, 88. See also Map 1: "Maneuvering of Ukrainian Naval Vessels from 18:30 till 23:21, 25 November 2018" (**RU-51**).
[155] See notably UM, para. 34.
[156] *Ibid*.
[157] See Federal Law No. 40-FZ "On the Federal Security Service" establishing the legal framework for the FSB's activities (**RU-4**) and Figure 1 below.
[158] See e.g.: United Nations Conference on the Law of the Sea (I), Comments by Governments on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session, *Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents)*, 24 February to 27 April 1958, A/CONF.13/5 and Add. 1 to 4, p. 95 (**RU-2**).

interpretation or application of such a rule, as would be required for this Tribunal to have jurisdiction under Article 288(1) of the Convention.

Map 1: "Maneuvering of Ukrainian Naval Vessels from 18:30 till 23:21, 25 November 2018" (RU-51)

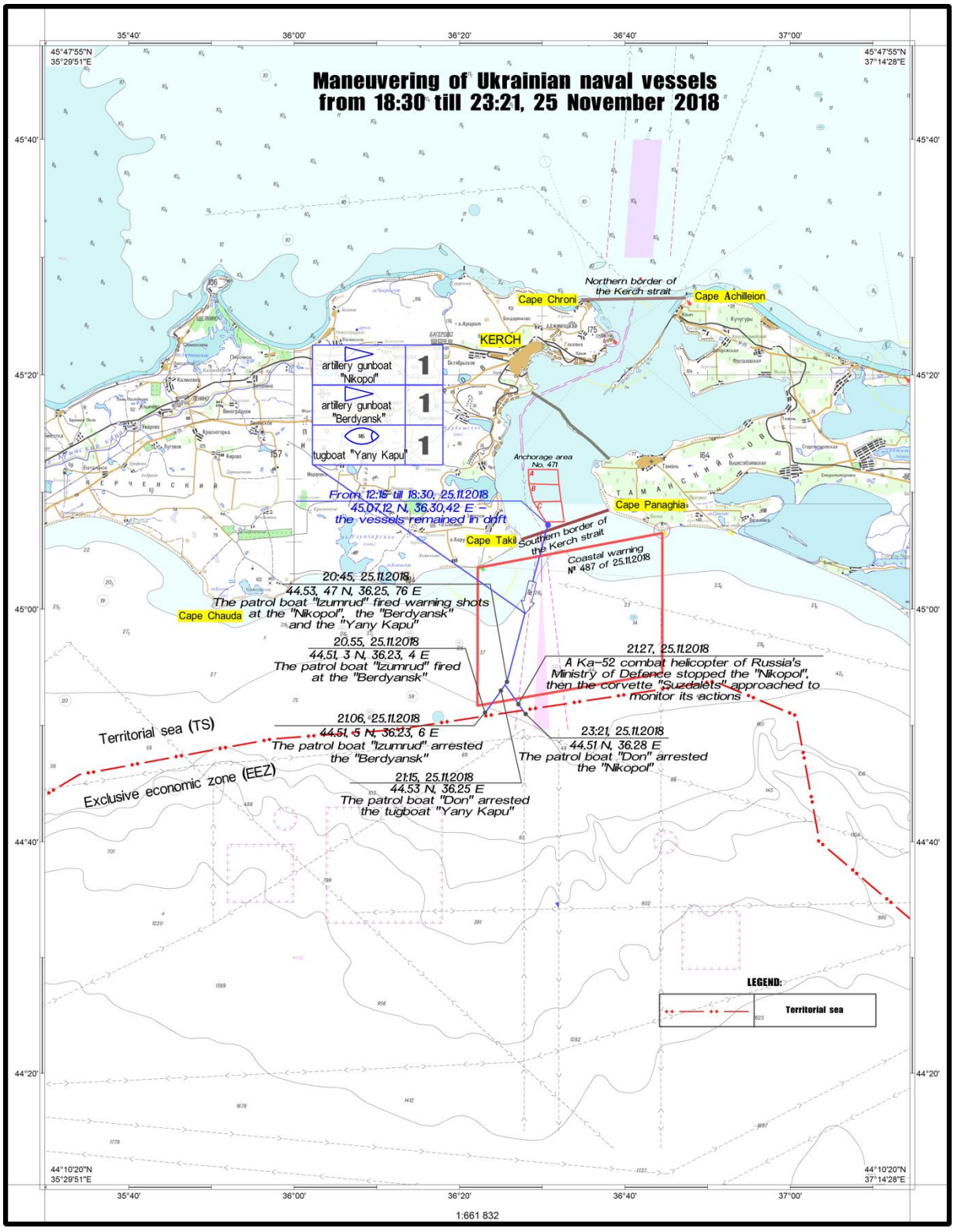

Figure 1: Photo of “Izumrud” Border Guard Vessel

CHAPTER 4
THE TRIBUNAL HAS NO JURISDICTION OVER THE ALLEGED BREACHES OF ARTICLES 290, 296 AND 279

I. The Tribunal has no jurisdiction over alleged breaches of the ITLOS Provisional Measures Order

90. One of Ukraine's submissions is that the Tribunal adjudge and declare that "[t]he Russian Federation has violated Articles 290 and 296 of the Convention by failing to comply with the ITLOS provisional measures order".[159] Ukraine also submits that the Tribunal adjudge and declare that "[t]he Russian Federation has violated Article 279 by continuing to aggravate the dispute between the Parties".[160] The latter submission is presented as an additional violation independent of the alleged violation of the ITLOS Provisional Measures Order.[161]

91. The Tribunal does not have jurisdiction over the above alleged breaches and it is striking that Ukraine's Memorial contains a pure assertion as to the existence of the Tribunal's jurisdiction in this regard without submitting arguments in support.[162]

92. In light of the fact that the operative paragraph of the ITLOS Provisional Measures Order contains a point, to which Ukraine refers in a footnote, prescribing that the Parties "shall refrain from taking any action which might aggravate or extend the dispute"[163] and of the irrelevance – to be demonstrated below – of the reference to Article 279, both of the above-mentioned submissions amount to a claim that Russia has failed to comply with the Provisional Measures Order handed down by ITLOS in the present case.

93. It must be recalled that ITLOS stated in its Provisional Measures Order that it "leaves unaffected" the rights of the Parties to submit arguments relating to jurisdiction, admissibility and the merits.[164]

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[159] UM, para. 153(e).
[160] *Ibid*., para. 153(f).
[161] *Ibid*., para. 92: "Finally, the Russian Federation has violated the ITLOS provisional measures order and, independently, UNCLOS Article 279 by aggravating the dispute between the Parties…".
[162] *Ibid*., para. 47. This is the opening paragraph of Chapter Four, concerning jurisdiction, of Ukraine's Memorial. The sections that follow develop other assertions set out in this and in the following introductory paragraph, but not the one concerning jurisdiction over the alleged non-compliance with the ITLOS PM Order.
[163] ITLOS PM Order, para. 124(1)(c) (**UAL-2**); UM, fn. 219.
[164] ITLOS PM Order, para. 122 (**UAL-2**). See also in the ITLOS jurisprudence: *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 205, para. 137 (**RUL-26**); *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 165, para. 104 (**RUL-27**). In ICJ jurisprudence: *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation),*

94. Such arguments include those relating to the jurisdiction over violations of an order on provisional measures, which, as already stated, are not present in Ukraine's Memorial. This absence is peculiar in light of the *LaGrand* judgment where the International Court of Justice held that:

> "Where the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with."[165]

95. ITLOS, in its Special Chamber's judgment on the merits in the *Ghana/Côte d'Ivoire* case is similarly oriented stating that:

> "jurisdiction to adjudicate over the alleged violation of the provisional measures prescribed by its Order of 25 April 2015…belongs to the inherent competence of the Tribunal."[166]

But this reasoning is not found in Ukraine's Memorial.

96. Ukraine was perhaps too sure of itself. As explained in the present Preliminary Objections, there are several reasons to hold that the Tribunal does not have jurisdiction over the main dispute that divides the Parties. Suffice it to recall that the immunities invoked by Ukraine are not covered by UNCLOS and that the military activities exception applicable under the declaration made by both Parties excludes the Tribunal's jurisdiction.[167] In light of these reasons and pursuant to the *LaGrand* jurisprudence, since the Tribunal lacks jurisdiction on the main dispute, it also lacks jurisdiction on the claims based on the alleged non-compliance with the Provisional Measures Order.

Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, pp. 397-398, para. 148 (**RUL-18**). See also, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 155, para. 74 (**RUL-19**); *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007*, p. 17, para. 54 (**RUL-17**); *Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, p. 91, para. 58 (**RUL-12**); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 202, para. 77 (**RUL-10**).

[165] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 484, para. 45 (**UAL-22**).

[166] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 148, para. 546 (**RUL-31**).

[167] See above, Chapters 2 and 3.

II. Article 279 of UNCLOS provides no basis to claim jurisdiction as to the alleged aggravation of the dispute

97. It must further be specified that, as regards the alleged violation of UNCLOS Article 279, the Tribunal lacks jurisdiction for another reason.

98. According to Ukraine, Russia breached Article 279 due to its continued aggravation of the dispute.[168] This provision, however, contains no reference to aggravation of disputes.

99. To support its interpretation, Ukraine relies on the *South China Sea* award that in turn relied on the ICJ case law developed in relation to Article 41 of the ICJ Statute on provisional measures.[169] According to the ICJ, Article 41 of the ICJ Statute applies the principle according to which "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".[170] Whatever the merits of this interpretation of Article 41 of the ICJ Statute, Article 279 of UNCLOS, which has no similarity to Article 41 of the ICJ Statute, is not an expression of such a principle. As Ukraine points out in its Memorial, Article 279 merely "requires States Parties to 'settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations'".[171] The *South China Sea* arbitral tribunal is isolated in considering that the principle of non-aggravation is contained in said Article. It is moreover significant that the Special Chamber of ITLOS in its Judgment in the *Ghana/Côte d'Ivoire* case, when dealing with the question of its jurisdiction to adjudicate Côte d'Ivoire's claim that Ghana had not complied with the provisional measures prescribed, made no reference to Article 279 of UNCLOS.[172]

100. Ukraine's claim of a violation of Article 279 should therefore be disregarded.

101. Ukraine's claim that Russia aggravated the dispute is moreover unfounded. As explained in the following Chapter, Russia accepted to meet with Ukraine and discuss issues concerning the settlement of the dispute even after Ukraine had already started the present

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[168] UM, para. 92.
[169] *Ibid*., para. 73 relying on *Philippines v. China*, Award, 12 July 2016, para. 1172 (**UAL-7**).
[170] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 503, para. 103 (**UAL-22**) citing *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Interim Measures of Protection, Order of 5 December 1939, PCIJ Series A/B, No. 79*, p. 199.
[171] UM, para. 73.
[172] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 148, para. 546 (**RUL-31**).

proceedings.[173] In addition, the very fact that Russia successfully negotiated the release of the Ukrainian Military Servicemen and vessels has substantially contributed not to the aggravation but to the attenuation of the dispute.

[173] See below, Chapter 5.

CHAPTER 5
THE TRIBUNAL LACKS JURISDICTION SINCE UKRAINE FAILED TO COMPLY WITH ARTICLE 283 OF UNCLOS

102. The broad and compulsory jurisdiction of dispute settlement bodies under UNCLOS is subject to a number of important conditions and limitations aimed at ensuring States' acceptance of the mechanism in its entirety.[174] Article 283 is one such important condition, one that is recognized as such by Ukraine,[175] and must be given full effect. Specifically, Article 283 of UNCLOS – which will be well-known to this Tribunal, provides that

> "1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

103. Article 283 of UNCLOS requires a State to communicate its views regarding the means of settling a dispute and engage in a good faith discussion with the other State concerning this issue. While, as pointed out by ITLOS, "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",[176] a genuine and good faith engagement with the other State is required, otherwise Article 283 of UNCLOS would be reduced to a mere notice requirement. Article 283 of UNCLOS does not impose a deadline for a response to a proposal for the exchange of views. Indeed, during the drafting of UNCLOS "*the strongest objections were voiced against any idea of placing a deadline on the duration of diplomatic negotiations*" in the context of what was to become Article 283 of UNCLOS.[177]

104. In considering why the pre-condition established by Article 283 of UNCLOS has not been satisfied, it is important to bear in mind the timeline of the relevant events:

25 November 2018 – Ukrainian Military Vessels are detained.

[174] See Chapter 2.
[175] UM, para. 48.
[176] *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, para. 60 (**RUL-11**); see also *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, para. 47 (**UAL-4**).
[177] R. Ranjeva, "Chapter 25: Settlement of Disputes", in R.-J. Dupuy, D. Vignes (eds.), *Handbook on the New Law of the Sea*, Brill, 1991, pp. 1344-1345 (**RUL-7**).

26 November 2018 – 14 March 2019 (3.5 months) – Ukraine and Russia exchange a number of *Notes Verbales* concerning the matter;[178] Ukraine does not propose an exchange of views regarding the settlement of a dispute under UNCLOS.

15 March 2019 (Friday) – Ukraine sends a *Note Verbale* inviting Russia to provide a view concerning the settlement of the dispute under UNCLOS without communicating Ukraine's view on the matter.[179]

25 March 2019 (Monday) – Russia responds advising that comments will be provided.[180]

1 April 2019 (next Monday) – Ukraine issues an application instituting the present arbitration.

23 April 2019 – a meeting between Ukraine and Russia takes place.

105. Ukraine appears to claim that the pre-condition established by Article 283 of UNCLOS has been satisfied with particular reference to Ukraine having sent the *Note Verbale* on 15 March 2019 and the meeting held between the Parties on 23 April 2019.[181] This is incorrect.

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[178] E.g., *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-2160, 26 November 2018 (**RU-18**); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1329, 26 November 2018 (**UA-18**); *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 610/22-110-1339, 27 November 2018 (**UA-19**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-2199, 29 November 2018 (**RU-25**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-2345, 20 December 2018 (**RU-29**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0100, 22 January 2019 (**RU-31**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0108, 23 January 2019 (**RU-32**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0126, 26 January 2019 (**RU-34**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0135, 28 January 2019 (**RU-35**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0291, 20 February 2019 (**RU-39**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0198, 5 February 2019 (**RU-36**); *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0210, 7 February 2019 (**RU-37**) and *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0262, 15 February 2019 (**RU-38**) listed in *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438), p. 1 (**RU-40**).

[179] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438), p. 1 (**RU-40**).

[180] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 3528/2dsng, 25 March 2019 (**RU-41**).

[181] UM, paras. 53-56.

106. **First**, the Note Ukraine sent on 15 March 2019[182] is insufficient to comply with Article 283 of UNCLOS. Fundamentally, in the Note, Ukraine itself does not express any view concerning the means for settlement of the dispute. In addition, the Convention requires an "exchange of views" meaning that both Parties would need to participate in a discussion regarding modes of settlement before the condition could be satisfied.

107. **Second**, Ukraine is incorrect in suggesting that Russia's lack of response before 1 April 2019 reflected any lack of "expeditiousness" in the exchange of views.[183] Ukraine had sent the request for the exchange of views on Friday, 15 March 2019 and it was received by the Russian Federation on Monday, 18 March 2019, and Ukraine instituted proceedings on Monday, 1 April 2019,[184] a mere ten working days later.

108. The condition imposed by Article 283 of UNCLOS may, in an exceptional case, be satisfied where the other State does not respond to requests for exchange of views for a considerable period of time. For example, in *M/V "Norstar"*, ITLOS found that it was satisfied when Panama had sent a letter inviting Italy to proceed with the exchange of views on 3 August 2004,[185] and Italy did not respond to this invitation by the time Panama instituted the proceedings in 2015.[186] The present case is of a very different order.

109. Here, Russia promptly replied to Ukraine on 25 March 2019 (within just five business days of receiving Ukraine's Note) advising that it intended to provide a subsequent response.[187] Yet, before Russia had an opportunity to provide that response, Ukraine instituted proceedings on 1 April 2019,[188] two working weeks later.

110. In the circumstances of this case, ten working days were clearly insufficient to form and express a view on the means of settling the dispute. To begin with, Ukraine itself made no proposals concerning possible means of resolving the dispute[189] for the Russian Federation to consider. Moreover, as explained above, the Russian Federation considers that the dispute does not fall within the jurisdiction of compulsory dispute settlement mechanisms under

[182] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438) (**RU-40**).
[183] UM, para. 54.
[184] *Ibid.*, para. 8.
[185] *The M/V "Norstar" Case (Panama v. Italy)*, Preliminary Objections, Judgment, 4 November 2016, para. 211 (**RUL-30**).
[186] *Ibid.*, para. 217.
[187] *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 3528/2dsng, 25 March 2019 (**RU-41**).
[188] UM, para. 8.
[189] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438) (**RU-40**).

UNCLOS[190] and UNCLOS does not provide for immunity as claimed by Ukraine.[191] In these circumstances, the Russian Federation needed time to examine and discuss internally possible options for a mechanism for the settlement of the dispute to propose in response to Ukraine's inquiry.

111. Furthermore, Ukraine cannot rely on the alleged urgency of the exchange of views. Ukraine itself is responsible for commencing the discussion on the means of settlement of the dispute only on 15 March 2019, while the incident occurred on 25 November 2018, 3.5 months earlier. During this period the Parties engaged in extensive diplomatic correspondence concerning the incident, yet Ukraine never proposed to the Russian Federation to discuss modes of settlement of a dispute under UNCLOS, including in the 13 *Notes Verbales* listed in Ukraine's *Note Verbale* of 15 March 2019.[192] Ukraine cannot be allowed to elect not to commence the discussion and then claim that the Russian Federation must respond urgently.[193]

112. *Third*, the consultations held between Russia and Ukraine on 23 April 2019 do not satisfy the condition established by Article 283 of UNCLOS, contrary to the suggestion of Ukraine.[194]

113. Fundamentally, the consultations on 23 April 2019 are not relevant to determining whether Article 283 of UNCLOS was complied with since they took place after Ukraine instituted the present proceedings on 1 April 2019. Under Article 286 of UNCLOS a dispute may be submitted to a tribunal "where no settlement has been reached by recourse to section 1" – exchange of views under Article 283 of UNCLOS (located in section 1 of Part XV of UNCLOS) must precede recourse to arbitration. Moreover, as confirmed by the International Court of Justice, events subsequent to the institution of proceedings have only a limited role in assessing the existence of jurisdiction.[195] Specifically, such events cannot be used to demonstrate the existence of a "dispute" between the parties because "a respondent would be deprived of the opportunity to react before the institution of proceedings to the claim made against its conduct".[196] With respect to the exchange of views concerning the modes of dispute

[190] See Chapter 2.
[191] See Chapter 3.
[192] *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438) (**RU-40**).
[193] *Ibid*., p. 1.
[194] UM, para. 56.
[195] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, para. 43 (**RUL-29**).
[196] *Ibid.*

settlement, the applicant State cannot rely on the purported exchanges subsequent to the institution of proceedings because the respondent State has already been deprived of an opportunity to discuss the modes of settlement of the dispute and is, in fact, presented with a *fait accompli*.

114. In any event, the consultations of 23 April 2019 do not satisfy the condition imposed by Article 283 of UNCLOS.

a. Article 283 of UNCLOS requires States not merely to notify each other of their positions but to engage in a genuine discussion on a mode of peaceful settlement of the dispute between them. The process should be conducted in good faith[197] and be meaningful, with the parties prepared to listen and consider the position of the other party and contemplate modifying their own.[198] It follows that a State is obliged to explore in good faith the possibilities of reaching such an agreement.

b. Contrary to this obligation, Ukraine came to the consultations with a set position that the dispute should be submitted to a new Annex VII tribunal – the proceedings Ukraine had already instituted. It ignored Russia's attempts to define the scope of the dispute[199] and rejected Russia's proposal to resolve the dispute by negotiations.[200] When Russia proposed to discuss joinder of the dispute to the ongoing *Coastal State Rights* arbitration,[201] Ukraine dismissed this proposal because the claims "were distinct and unrelated"[202] even though in December 2018 Ukraine wrote to the *Coastal State Rights* tribunal claiming that the incident aggravated the dispute before that tribunal.[203] Finally, after proposing that the dispute be submitted to an Annex VII tribunal and failing to secure Russia's consent at the meeting, Ukraine rejected the proposal to continue the discussion further,[204] depriving the Parties of an opportunity to consider and discuss internally the proposal made.

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[197] *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 684-685, paras. 131-132 (**RUL-20**).
[198] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47, para. 85(a) (**RUL-1**).
[199] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28, Witness Statement of Sergey Andreevich Leonidchenko, 20 August 2020 ("Witness Statement"), para. 4 (**WS-1**).
[200] *Ibid*., para. 6.
[201] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06.
[202] UM, para. 56.
[203] United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56, p. 18 (**RU-27**).
[204] Witness Statement, para. 7.

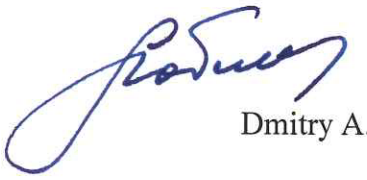
115. In conclusion, there was no exchange of views as required under Article 283 of UNCLOS and this Tribunal lacks jurisdiction over the dispute.

CHAPTER 6

SUBMISSION

116. For the reasons set out in these Preliminary Objections the Russian Federation requests the Tribunal to adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine.

Moscow, 24 August 2020



Dmitry A. Lobach

Agent of the Russian Federation

Appendix I

EXHIBITS

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RU-9 Hearings before the Committee on Foreign Relations, United States Senate, 112th Congress, Second Session, The Law of the Sea Convention (Treaty Doc. 103-309), Senate Hearing 112-654, the US Government official website (https://www.govinfo.gov/content/pkg/CHRG-112shrg77375/html/CHRG-112shrg77375.htm), 23 May, 14 and 28 June 2012 (excerpts)

RU-10 V.K. Muller, *Complete English-Russian Russian-English Dictionary*, Eksmo, 2013, entry "касаться" [kasat'sya]

RU-11 "Fundamentals of the State Policy of the Russian Federation in the Field of Naval Operations for the Period Until 2030" (adopted by Decree of the President of the Russian Federation No. 327 of 20 July 2017) (excerpts)

RU-12 "Two Ukrainian warships enter Sea of Azov to become part of newly created naval base", *ukrinform.net* (https://www.ukrinform.net/rubric-defense/2544002-two-ukrainian-warships-enter-sea-of-azov-to-become-part-of-newly-created-naval-base.html), 24 September 2018

RU-13 "Ukraine to deploy more border guards, rescuers in Azov Sea – minister", *tass.com* (https://tass.com/world/1023671), 30 September 2018

RU-14 Facebook page of Yuriy Lutsenko, Prosecutor General of Ukraine, post dated 25 November 2018 (https://www.facebook.com/LlutsenkoYuri/posts/1073660022833172)

RU-15 United Nations Security Council, 8409th meeting, 26 November 2018, S/PV.8409 (excerpt)

RU-16 United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410

RU-17 National Security and Defense Council of Ukraine, Resolution "On the Emergency Measures Taken to Protect the State Sovereignty and Independence of Ukraine and on the Introduction of Martial Law in Ukraine" (enacted by Decree No. 390/2018 of the President of Ukraine, 26 November 2018) (excerpts)

RU-18 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-2160, 26 November 2018

RU-19 [redacted]

RU-20 Items Inspection Protocol, 26 November 2018

RU-21 "On the unlawful actions of the vessels of the Naval forces of Ukraine in the Russian territorial sea", FSB of Russia official website (http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438317%40fsbMessage.html), 27 November 2018

RU-22 "Statement by the delegation of Ukraine on the latest Russia's act of unprovoked armed aggression against Ukraine" (as delivered by Ambassador Ihor Prokopchuk, Permanent Representative of Ukraine to the International Organizations in Vienna, to the 1204th special meeting of the Permanent Council, 26 November 2018), Organization for Security and Co-operation in Europe official website (https://www.osce.org/files/f/documents/2/6/404666.pdf), 27 November 2018

RU-23 "The Prosecutor's office of the Autonomous Republic of Crimea launched pre-trial investigation into violations of the laws and customs of war with regard to PoW – Ukrainian navy men by the occupation authorities", Prosecutor's Office of the Autonomous Republic of Crimea official website (https://ark.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=241078), 27 November 2018

RU-24 "Declaration by the High Representative on behalf of the EU on the escalating tensions in the Azov Sea", Council of the European Union official website (https://www.consilium.europa.eu/en/press/press-releases/2018/11/28/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-escalating-tensions-in-the-azov-sea/pdf), 28 November 2018

RU-25 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-2199, 29 November 2018

RU-26 "Statement by H.E. Mr. Pavlo Klimkin, Minister for Foreign Affairs of Ukraine, at the 25th Meeting of the Ministerial Council of the OSCE (Milan, 6 December 2018)", Organization for Security and Co-operation in Europe official website (https://www.osce.org/whoweare/405560?download=true), 6 December 2018

RU-27 United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56 (excerpts)

RU-28 OHCHR, "Report on the human rights situation in Ukraine 16 November 2018 to 15 February 2019" (https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019.pdf) (excerpt)

RU-29 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-2345, 20 December 2018

RU-30 [redacted]

RU-31 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0100, 22 January 2019

RU-32 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0108, 23 January 2019

RU-33 Parliamentary Assembly of the Council of Europe, "The escalation of tensions around the Sea of Azov and the Kerch Strait and threats to European security", Resolution 2259 (2019), 24 January 2019 (http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25419&lang=en)

RU-34 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0126, 26 January 2019

RU-35 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0135, 28 January 2019

RU-36 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0198, 5 February 2019

RU-37 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0210, 7 February 2019

RU-38 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0262, 15 February 2019

RU-39 *Note Verbale* of the Embassy of Ukraine in the Russian Federation to the Ministry of Foreign Affairs of the Russian Federation No. 6111/22-012-0291, 20 February 2019

RU-40 *Note Verbale* of the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation No. 72/22-188/3-682, 15 March 2019 (with cover No. 6111/22-012-0438)

RU-41 *Note Verbale* of the Ministry of Foreign Affairs of the Russian Federation to the Embassy of Ukraine in the Russian Federation No. 3528/2dsng, 25 March 2019

RU-42 "Poroshenko decorated captured Ukrainian navy men with state orders", *krymr.com*, (https://ru.krymr.com/a/news-poroshenko-prisudil-ukrainskim-moryakam-gosudarstvenniye-nagradi/29866299.html), 7 April 2019 (excerpt)

RU-43 Declaration of Togo under Article 298, 12 April 2019, *Law of the Sea Bulletin*, 2019, No. 100, p. 15

RU-44 "Commentary by the Information and Press Department of the Russian MFA in connection with the Russian-Ukrainian consultations on the incident of 25 November 2018 in the area of the Kerch Strait", Ministry of Foreign Affairs of the Russian Federation official website (http://www.mid.ru/ru/kommentarii/-/asset_publisher/2MrVt3CzL5sw/content/id/3624739), 24 April 2019

RU-45 *Case Concerning The Detention of Three Ukrainian Naval Vessels, (Ukraine v. Russian Federation), Provisional Measures*, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, 10 May 2019 (excerpts)

RU-46 "Statement by Mr. Andrii Taran, Minister of Defence of Ukraine, at the Closing Session of the OSCE Forum for Security Co-operation under the Chairpersonship of Ukraine (952nd Meeting of the Forum for Security Co-operation, 22 July 2020)", Organization for Security and Co-operation in Europe official website (https://www.osce.org/files/f/documents/a/1/459292.pdf), 27 July 2020

RU-47 Checklist of the artillery gunboat Nikopol's readiness to go to sea from 09:00 a.m. on 23.11.2018 to 06:00 p.m. on 25.11.2018

RU-48 The Cambridge Dictionary, entry "military"

RU-49 Oxford Dictionary of English (3 ed.), entry "military"

RU-50 Merriam-Webster Dictionary, entry "military"

RU-51 Map 1: "Maneuvering of Ukrainian Naval Vessels from 18:30 till 23:21, 25 November 2018"

WITNESS STATEMENT

WS-1 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28, Witness Statement of Sergey Andreevich Leonidchenko, 20 August 2020

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Appendix II

ANNEXES: LEGAL AUTHORITIES

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