PCA Case No. 2019-28

IN THE MATTER OF A DISPUTE CONCERNING THE DETENTION OF UKRAINIAN NAVAL VESSELS AND SERVICEMEN

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

REPLY OF UKRAINE TO THE RESPONSE OF THE RUSSIAN FEDERATION ON THE QUESTION OF BIFURCATION

ARBITRAL TRIBUNAL:

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

REGISTRY:

The Permanent Court of Arbitration

28 September 2020

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I. Introduction

1. The Response of the Russian Federation to the Observations of Ukraine on the Question of Bifurcation ("Russia's Response") attempts to recast the dispute before the Tribunal in an effort to bolster Russia's argument that its preliminary objections are of an exclusively preliminary character. But the reference point for the Tribunal's assessment regarding bifurcation must be the case Ukraine has advanced, and Ukraine's claims are discrete and straightforward. On the evening of 25 November 2018, three Ukrainian naval vessels had abandoned plans to transit the Kerch Strait and communicated that they were returning to their home port of Odesa. Russian Coast Guard vessels pursued them and ordered them to stop for violating Russian law. Shortly after the Ukrainian vessels exited the territorial sea, the Russian Coast Guard vessels arrested the Ukrainian vessels. The ships and their crew were then detained, for nearly a year, and nine-and-a-half months, respectively; the servicemen were prosecuted under Russia's civilian criminal laws; and the ships were held, searched, and stripped as physical evidence in those criminal proceedings. Ukraine alleges that Russia violated the immunity provisions of UNCLOS through this arrest, detention, and prosecution; that Russia violated the provisions of UNCLOS requiring compliance with provisional measures orders; and that Russia violated the provisions of UNCLOS obliging it not to aggravate disputes.

2. These merits claims and Russia's Objections should be considered and decided together. Russia's military activities objection, in addition to failing to engage with the actual dispute raised by Ukraine, is not exclusively preliminary in character. Ukraine's merits claim is that the arrest, detention, and prosecution of the vessels and servicemen violates UNCLOS. The jurisdictional question of whether *those same events* are military activities is not just overlapping, but depends on *the same* facts and evidence. That alone makes the military activities objection not exclusively preliminary, similar to the military activities objection in the *South China Sea* case. Moreover, here the facts are not only overlapping but disputed. Though Russia in its Response claims that there are no factual disputes, it has chosen its words carefully, and conspicuously avoids engaging with the

specific factual points raised in Ukraine's Observations. Deciding these issues at a preliminary phase would require consideration of evidence common to the merits and would substantially risk prejudice to Ukraine.

3. Russia also asks the Tribunal to decide at a preliminary phase whether Article 32 of the Convention provides immunity to warships within the territorial sea. But ITLOS has decided that this exact question concerns interpretation of the Convention — a merits issue, not a jurisdictional one. Notably, Russia's Response does not address this ITLOS decision. And even if this Tribunal were to depart from ITLOS and treat the Article 32 question as a jurisdictional objection, it is not exclusively preliminary in character. Ukraine has provided sworn witness testimony that all three vessels had exited the territorial sea at the time of their arrest, and thus the question of their immunity is governed by Articles 95 and 96, not Article 32. Russia is not permitted to challenge Ukraine's factual position on this point at a preliminary stage of proceedings, and Russia has also not placed any evidence in the record that would give the Tribunal the ability to resolve this dispute. Russia's Response even attempts to advance a brand new, procedurally improper objection to Ukraine's Article 30 claim that appears nowhere in Russia's Preliminary Objections and therefore cannot be considered by the Tribunal.

4. As explained further below, all of Russia's objections either lack an exclusively preliminary character or are actually merits defenses regarding the scope of Russia's UNCLOS obligations that should not be considered in a preliminary phase. Further, when one focuses on the limited case Ukraine has put to the Tribunal, bifurcation would result in this straightforward dispute essentially being adjudicated twice: first, through a fact-intensive preliminary round devoted to Russia's Objections, and a second time when examining the merits of Ukraine's claims. Twenty-four servicemen were unlawfully detained for nine-and-a-half months and continue to suffer from the ill effects of their mistreatment. A bifurcated proceeding would cause these sailors to wait years for closure and justice, even as the criminal cases launched against them by Russia continue. For all of these reasons,

Ukraine respectfully submits that the Tribunal should join Russia's Objections to the merits and direct Russia to file a Counter-Memorial.

II. All of Russia's Objections Are Either Not Proper Jurisdictional Objections, Or Are Not Exclusively Preliminary in Character

5. Russia begins its Response by asserting repeatedly that Article 11(3) adopts a "default" rule in favor of bifurcation.[1] But nowhere do the Rules of Procedure say that there is a "default" rule in these proceedings; they instead call for the Tribunal to "ascertain[] the views of the Parties" and "determine[]" whether the objections should be joined to the merits. The standard adopted under Article 11(3) is whether the objections do "not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits." If they are objections to jurisdiction that possess an exclusively preliminary character, there will be bifurcation. If they do not, there will be no bifurcation. The Rules do not place a thumb on the scale in either direction. There would have been no reason for the present exercise of exchanging pleadings on the question of bifurcation if, as Russia suggests, bifurcation were effectively a foregone conclusion. This procedure is quite distinct from the Rules of the International Court of Justice, whose practice Russia cites in support of its "default" view,[2] which *do* provide for automatic bifurcation, permitting a challenge to the exclusively preliminary nature of the objection only during the bifurcated jurisdictional phase of the case.[3] That procedure was deliberately not chosen for the current arbitration.

6. Russia's assertion that joining its preliminary objections to the merits would somehow implicate Russia's consent to the jurisdiction of Annex VII tribunals under UNCLOS also cannot be credited. Russia consented to such jurisdiction when it ratified

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[1] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Response of the Russian Federation to the Observations of Ukraine on the Question of Bifurcation of 21 September 2020 ("Russia's Response"), ¶¶ 4(b), 6–11.

[2] Russia's Response, ¶ 8.

[3] International Court of Justice, Rules of the Court, Art. 79*bis*(3) (providing that "[u]pon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit for the presentation by the other party of a written statement of its observations and submissions") **(UAL-47)**.

UNCLOS, without any guarantee of what Rules of Procedure any particular tribunal would adopt. As noted in the Observations of Ukraine on the Question of Bifurcation ("Ukraine's Observations"), it is hardly uncommon for tribunals to conclude that a jurisdictional objection should be deferred to the merits stage of a case.[4] A decision that a jurisdictional objection is best considered in conjunction with the merits does not impair the principle of consent in any way.

7. Thus, Russia's rhetoric aside, whether or not Russia's preliminary objections should be joined to the merits is determined on a case-by-case basis, giving due consideration to the claims and objections before the Tribunal. In the first instance, bifurcation is never warranted for objections that are not jurisdictional, but, rather, present a disagreement over the interpretation or application of the Convention. Nor is bifurcation warranted for jurisdictional objections that are not exclusively preliminary in character. In applying this latter standard, as the *South China Sea* tribunal stated, an objection is not exclusively preliminary if it "would entail prejudging the dispute or some elements of the dispute on the merits," or if the tribunal lacks "all the necessary facts to dispose of the preliminary objection."[5] And as elaborated by the *Coastal State Rights* tribunal, an objection is not exclusively preliminary when there is a "risk of the arbitral tribunal considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions."[6]

8. Judged against these standards, all of Russia's preliminary objections should be joined to the merits in this case.

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[4] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Observations of Ukraine on the Question of Bifurcation of 7 September 2020 ("Ukraine's Observations"), ¶ 29.

[5] *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015 ("*South China Sea*, Award on Jurisdiction"), ¶ 382 **(UAL-5)**.

[6] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Award on Preliminary Objections of the Russian Federation of 21 February 2020 ("*Coastal State Rights*, Award on Preliminary Objections"), ¶ 289 **(UAL-25)**.

A. Russia's Objection Concerning the Military Activities Exception Should Be Joined to the Merits

9. As established in Ukraine's Observations, Russia's military activities objection to the Tribunal's jurisdiction pursuant to Article 298(1)(b) should be joined to the merits.

10. As an initial matter, Russia seeks to artificially redefine the dispute between the parties. Russia directs its military activities objection at a purported dispute which "concerns the activities of the Ukrainian and Russian forces on 25 November 2018 in the Black Sea."[7] In its Response, Russia continues to define the relevant dispute expansively, concerning a generic "engagement" spanning "a period of some 12 hours."[8] But Ukraine's Memorial raises a different dispute over whether Russia violated the immunity provisions of UNCLOS by arresting three Ukrainian naval vessels and their crew, detaining them, and prosecuting the servicemen (and maintaining those prosecutions to this day). This dispute — a disagreement over whether Russia's assertion of criminal jurisdiction over Ukraine's warships and sailors violated specific provisions of UNCLOS — does not concern military activities, as confirmed by the nearly unanimous ITLOS decision reaching this conclusion *prima facie*.[9] Russia's preliminary objection does not engage with the actual dispute Ukraine brought to the Tribunal, and for this reason alone it is not a proper jurisdictional objection warranting consideration at a preliminary phase.

11. But even if Russia's military activities objection were treated as a proper preliminary objection, it is not *exclusively* preliminary in character. The jurisdictional and merits issues now before the Tribunal will require the Tribunal to engage with the same set of facts, decide disputed factual questions, and resolve disagreements between the parties

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[7] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Preliminary Objections of the Russian Federation of 24 August 2020 ("Russia's Preliminary Objections"), ¶ 2.

[8] Russia's Response, ¶ 16. Russia thus claims that a wide range of facts are relevant to that dispute, going so far as to raise the "radio" communications aboard the Ukrainian vessels. *Id.*, ¶ 14(c).

[9] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019 ("ITLOS Provisional Measures Order"), ¶¶ 72–77 **(UAL-2)**.

about the nature of Ukraine's claims. As Russia acknowledges in its Response, the ultimate "merits" question the Tribunal will be called upon to decide is whether the "arrest/detention/prosecution violated the relevant UNCLOS provision(s)."[10] Russia raises a question about whether *those same events* all are military activities. Thus, in a bifurcated proceeding the full case would effectively have to be heard twice, creating, as articulated by the *Coastal State Rights* tribunal, an undeniable "risk of the arbitral tribunal considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions."[11]

12. Unable to deny this factual overlap, Russia argues that the merits could not be prejudiced because "the fact of the arrest/detention/prosecution of the Ukrainian Military Servicemen and Vessels, including Russia's 'application of its civilian criminal regime' in that regard, is not disputed."[12] Russia thus admits that it arrested the vessels and applied its civilian criminal regime to them, but it has not disclosed what legal justifications for those acts it intends to raise as defenses on the merits. An objection is not exclusively preliminary when there is a "*risk* of . . . considering, and forming a potentially incomplete view of, evidence that is common to jurisdictional and merits questions."[13] In raising an objection that puts in issue the same events as the ones that give rise to the claim itself, Russia inevitably creates a substantial *risk* of considering common evidence and thereby prejudging the merits.[14]

13. What Russia has said about its anticipated defenses thus far only confirms this risk of prejudice. Russia has suggested that it had a "right of hot pursuit" of Ukraine's

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[10] Russia's Response, ¶ 23.

[11] *Coastal State Rights*, Award on Preliminary Objections, ¶ 289 **(UAL-25)**.

[12] Russia's Response, ¶ 23(b).

[13] *Coastal State Rights*, Award on Preliminary Objections, ¶ 289 (emphasis added) **(UAL-25)**.

[14] As noted above, Russia has defined the dispute as encompassing a broader set of facts than Ukraine has alleged in its Memorial. *See supra* ¶ 10. Where the parties do not even agree on what the relevant events are, the risk of prejudice to the merits of the case by splitting the proceeding is compounded.

naval vessels, and that this would apparently allow Russia to exercise jurisdiction over those vessels despite their immunity from jurisdiction under the Convention.[15] Yet any such defense would surely put in issue the facts relating to the arrest of the vessels, facts which will also be relevant to Russia's military activities objection.

14. In the *South China Sea* case, the tribunal recognized that "the specifics of China's activities" and "whether such activities are military in nature" unavoidably related to the merits.[16] Russia disagrees with the approach taken by the *South China Sea* tribunal, and accuses Ukraine of "cherry-picking" that example.[17] To the contrary, Ukraine is simply responding to the way Russia framed its own objection. Russia's Objections rely heavily on the *South China Sea* tribunal's eventual determination that military forces were "arrayed in opposition," and an argument that there was a "parallel between the facts" in *South China Sea* and this case.[18] Ukraine strongly disagrees that the facts are parallel, but if Russia wishes this Tribunal to reach the same conclusion as the *South China Sea* tribunal, that decision should be made with a full understanding of the merits just as in *South China Sea*.

15. Russia now prefers to analogize this case to a different Award on Jurisdiction, that in *Coastal State Rights* — where the tribunal *rejected* Russia's invocation of the military activities exception.[19] Unlike in this case, in *Coastal State Rights* the tribunal only had to address a small subset of claims that Russia alleged involved military incidents; Russia describes questions of sovereignty as the "key" objection in that case,[20] whereas here the military activities exception is Russia's "key" objection. The *Coastal State Rights* tribunal's decision to bifurcate is therefore of no value to this Tribunal, as that bifurcation decision was based on a very different set of claims, preliminary objections, and facts.

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[15] Russia's Response, ¶ 33.

[16] *South China Sea*, Award on Jurisdiction, ¶¶ 409, 411 (**UAL-5**).

[17] Russia's Response, ¶ 4(b).

[18] Russia's Preliminary Objections, ¶¶ 39, 53–54.

[19] *Coastal State Rights*, Award on Preliminary Objections, ¶¶ 327–341 (**UAL-25**).

[20] Russia's Response, ¶ 56(c).

16. In the case here, the undeniable overlap between the facts of the arrest, detention, and prosecution, and the jurisdictional objection raised by Russia that characterizes those facts, is sufficient reason for the Tribunal to conclude that the objection lacks an exclusively preliminary character. That conclusion is only confirmed by the disputed factual issues implicated by Russia's objection. While Russia now seeks to sanitize the factual assertions it originally made in its Objections, it has carefully avoided direct responses to the factual disputes noted by Ukraine.

17. *First*, in its Objections, Russia made the following assertion: "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 one another."[21] This was a temporally specific assertion — that the vessels were supposedly arrayed against one another *when the stop order was given*. Ukraine explained that such an allegation is disputed, noting its evidence that when the stop order was given, the Ukrainian vessels were in fact traveling away from the Russian vessels and on their way to exit the territorial sea.[22] Rather than respond to this point, Russia seeks to change the subject, now alleging a generic "engagement" of vessels "over a period of some 12 hours" that is supposedly undisputed.[23] But on the question of whether the vessels were arrayed in opposition to one another *when the stop order was given*, Russia cannot deny that its Objections allege one thing, and Ukraine's evidence says the opposite.

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[21] Russia's Preliminary Objections, ¶ 43.

[22] Ukraine's Observations, ¶ 13; *see* Witness Statement of Captain of the Second Rank Denys Volodymyrovych Hrytsenko (6 May 2020) ("Hrytsenko Statement"), ¶¶ 19–20; Witness Statement of Senior Lieutenant Roman Mykolayovych Mokryak (14 May 2020), ¶ 13; Witness Statement of Petty Officer Oleh Mykhailovych Melnychyk (7 May 2020) ("Melnychyk Statement"), ¶¶ 14–15; Witness Statement of Captain Lieutenant Bohdan Pavlovych Nebylytsia (13 May 2020) ("Nebylytsia Statement"), ¶ 14 ("As we returned to Odesa, we were being followed by Russian FSB coast guard and military vessels. After some time, the Russian FSB coast guard ordered us to stop and said we had violated Russian law.").

[23] Russia's Response, ¶ 16.

18. *Second*, Russia in its Objections alleged a "prolonged stand-off."[24] Ukraine has explained that any alleged standoff has nothing to do with the dispute before the Tribunal. The existence of any alleged standoff also is disputed, as the evidence shows that Ukrainian vessels were in constant communication with Kerch Traffic Control authorities, including following their instructions about where to wait until they were able to pass through the Strait. Such a fact pattern is not reasonably described as a stand-off.[25] Russia describes the disagreement as "semantics," but it is not so.[26] Russia pointedly does not comment on Ukraine's view of the facts concerning the Ukrainian vessels following the instructions of Kerch Traffic Control authorities.

19. *Third*, in its Objections Russia discussed a checklist it took from the *Nikopol* and stated, without providing any additional context, that the checklist used the word "covertly."[27] Ukraine explained in its Observations that the checklist used standard language for naval orders, and that the vessels' intentions of transiting the Kerch Strait were openly communicated to the Russians.[28] Now Russia says that "whether the Ukrainian Military Vessels' movements on 25 November 2018 were or were not in fact 'covert' is beside the point," and suggests that it accepts Ukraine's explanation that its vessels were open about their intentions.[29] While Russia now attempts to walk away from the checklist for bifurcation purposes, its Objections still rely on this point; the significance of the language of the checklist is disputed and goes directly to both Russia's objection and its foreshadowed defense on the merits.

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[24] Russia's Preliminary Objections, ¶¶ 2, 43.

[25] Ukraine's Observations, ¶ 13.

[26] Russia's Response, ¶ 16.

[27] Russia's Preliminary Objections, ¶¶ 39, 45 (citing the checklist and referencing the alleged "covert[]" nature of the mission in support of Russia's argument that the incident "fall[s] squarely in the category of 'a quintessentially military situation'").

[28] Ukraine's Observations, ¶ 13; Hrytsenko Statement, ¶ 8.

[29] Russia's Response, ¶ 18 & n. 34.

20. *Finally*, Russia claims to be perplexed by Ukraine's assertion in its Observations that "[i]t is unclear whether Russia disputes that enforcement of domestic law was the stated reason for the arrest [of the vessels and servicemen] on the evening of 25 November 2018."[30] Yet here too, Russia is careful not to address the specific factual point made in Ukraine's Observations. Ukraine noted its evidence that the Russian vessels, *while pursuing the Ukrainian vessels*, cited violations of Russian law as the basis for ordering them to stop.[31] Russia does not say whether it disputes that factual claim. Instead, Russia acknowledges that it has "referred . . . to the fact that the Ukrainian Military Servicemen were charged on 25 November 2018 with illegally crossing Russia's state border."[32] But this reference to what happened later, shortly after the arrest of the vessels, is conspicuously *not* an admission of Ukraine's allegation, that the contemporaneously stated reason *during* the arrest itself was the enforcement of Russia's domestic laws.

21. Ukraine further notes the misleading nature of Russia's response to another important point made in Ukraine's Observations: that the parties have disputes over the proper "characterization of the facts" and the "characterization of the events" at issue.[33] As Ukraine explained, the Tribunal will have to reach a decision regarding these facts not by taking pieces of evidence in isolation as Russia proposes, but by weighing all of the evidence together. Russia cannot explain why this fact-intensive task is an exclusively preliminary exercise. Instead, it again changes the topic, and notes that "the question of the correct characterisation of *the dispute* is one that is typically taken prior to the merits."[34] This point, which Russia draws from the entirely different context of deciding whether a dispute falls under a particular treaty, has nothing to say about the questions of characterization of the facts and evidence presented by Russia's military activities objection.

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[30] Russia's Response, ¶ 19 (referencing Ukraine's Observations, ¶ 14).

[31] Nebylytsia Statement, ¶ 14.

[32] Russia's Response, ¶ 19.

[33] Ukraine's Observations, ¶¶ 3, 7.

[34] Russia's Response, ¶ 24.

22. In sum, the facts relevant to Ukraine's claims are both disputed and interwoven with Russia's military activities objection. The facts and evidence underlying both the merits claim and the jurisdictional question are *the same*, and to rule on the military activities objection the Tribunal must engage with the full scope and content of Ukraine's claims and evidence on the merits.

23. The Tribunal should therefore decide, similar to the conclusion of the *South China Sea* tribunal, that the military activities question is "a matter best assessed in conjunction with the merits," and that Russia's military activities objection lacks an exclusively preliminary character.[35] Russia's military activities objection should accordingly be joined to the merits.

B. Russia's Objection Concerning Immunity Under Article 32 Should Be Joined to the Merits

24. Russia's Article 32 objection could only become relevant if a factual determination has been made that two of the three naval vessels had not yet exited the territorial sea at the time of their actual arrest — an issue addressed below. Yet setting that factual dispute aside for the moment, as Ukraine explained in its Observations, the question of whether Article 32 provides immunity to warships while in the territorial sea is a question "concerning the interpretation [] of the Convention" which falls squarely within the jurisdiction of the Tribunal.[36] In the *ARA Libertad* case — which Russia fails to address in its Response — ITLOS took note of the parties' differing views on whether Article 32 provides immunity in internal waters and concluded that, "in the light of the positions of the Parties, a difference of opinions exists between them as to the applicability of article 32 and thus [. . .] a dispute appears to exist between the Parties concerning the interpretation or application of the Convention."[37]

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[35] *South China Sea*, Award on Jurisdiction, ¶¶ 409, 411 (**UAL-5**).

[36] Ukraine's Observations, ¶ 16; *see* UNCLOS Arts. 286, 288 (conferring jurisdiction with respect to "any dispute concerning the interpretation or application of this Convention").

[37] *The "ARA Libertad" Case (Argentina v. Ghana),* ITLOS Case No. 20, Provisional Measures, Order of 15 December 2012, ¶ 65 (**UAL-1**).

25. Disregarding the ITLOS decision that speaks directly to the nature of its Article 32 argument, Russia points to International Court of Justice decisions addressing different provisions of different treaties. But the fact that assessing jurisdiction *ratione materiae* "*may* require the interpretation of the provisions that define the scope of the treaty" does not resolve the question of whether Russia's preliminary objections in this case are indeed of an exclusively preliminary character.[38] The ICJ's practice reflects that sometimes interpretive questions concerning the scope of a treaty are resolved as a preliminary matter, and sometimes the question of a treaty's scope will go to the merits of the applicant's claim.

26. For example, in the *Bosnia Genocide Case*, the Court declined to accept as a jurisdictional objection Yugoslavia's argument that the Convention on the Prevention and Punishment of the Crime of Genocide did not apply to acts of genocide committed by the State itself.[39] Rather, the Court concluded it had jurisdiction because "the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in *disagreement with respect to the meaning and legal scope of several of those provisions*."[40]

27. In *Ukraine v. Russian Federation*, the Court identified issues that had been raised by Russia as preliminary objections but presented "complex issues of law and especially of fact that divide the Parties and are properly a matter for the merits."[41] Similarly, in *Certain Iranian Assets*, the Court decided that it did not have before it all the facts necessary to determine whether Bank Markazi could properly be characterized as a

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[38] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, ICJ Judgment of 8 November 2019 ("*Ukraine v. Russian Federation*, Judgment on Preliminary Objections"), ¶ 57 (emphasis added) **(RUL-60)**.

[39] *Application of the Convention on the Prevention and Punishment of the Crime of* Genocide *(Bosnia and Herzegovina v. Yugoslavia),* Preliminary Objections, ICJ Judgment of 11 July 1996, ¶¶ 32–33 **(UAL-48)**.

[40] *Id.*, ¶ 33 (emphasis added) **(UAL-48)**.

[41] *Ukraine v. Russian Federation*, Judgment on Preliminary Objections, ¶ 63 **(RUL-60)**.

"company" under the Treaty of Amity and therefore fall within the scope of Iran's claims under that treaty.[42] Since the elements were "largely of a factual nature" and "closely linked to the merits of the case," the Court considered that it would be able to rule on that objection "only after the Parties have presented their arguments in the following stage of the proceedings."[43] Against this mixed set of outcomes, by far the most relevant authority is the one directly concerning Article 32 of UNCLOS and yet ignored by Russia, the *ARA Libertad* decision.

28. In any event, preliminary objections focused on whether a claim falls within the scope of a treaty are not exclusively preliminary when they turn on factual questions. As explained by Judge Higgins in her separate opinion in the *Oil Platforms* case, "[t]he only way" to assess whether claims are capable of falling within a treaty "is to accept *pro tem* the facts as alleged by [the Applicant] to be true and in that light to interpret" the treaty.[44] Here, the facts as alleged by Ukraine are that all three vessels were arrested outside of the territorial sea.[45] Accepting that allegation as true, deciding whether Ukraine's claim is capable of falling within provisions of UNCLOS is a straightforward question. Ukraine's claim of immunity falls under Articles 95 and 96, which Russia does not dispute provide for an applicable immunity beyond the territorial sea.

29. Even if Ukraine's factual claims were not treated as true for purposes of assessing jurisdiction *ratione materiae* as they should be, Russia's objection would still lack an exclusively preliminary character because the Tribunal does not have, in the words of the

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[42] *Certain Iranian Assets, (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, ICJ Judgment of 13 February 2019, ¶ 97 (**RUL-59**).

[43] *Id.* (**RUL-59**).

[44] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, ICJ Judgment of 12 December 1996, Separate Opinion of Judge Higgins, p. 856, ¶ 32 (**UAL-37**).

[45] *See* Memorial of Ukraine, ¶¶ 34–37; Nebylytsia Statement, ¶¶ 14–16; Hrytsenko Statement, ¶¶ 20–23; Melnychyk Statement, ¶¶ 15–16.

South China Sea tribunal, "all the necessary facts to dispose of the preliminary objection."[46] Russia accuses Ukraine of not meeting its "duty" to "give the crucial and accurate details" of the location of the arrest.[47] This is false. Ukraine has put forward testimony from commanders on all three vessels, testifying to their first-hand observations that they had left the territorial sea by the time of the arrest.[48] Russia does not acknowledge this testimony at all, much less offer some reason why it should not be credited. Against this sworn witness testimony, Russia put forward a bare assertion of coordinates in its pleadings, and a map of unexplained provenance.[49] In its Response, Russia for the first time adds an assertion that this map was "received from the FSB Border Guard service."[50] Setting aside the procedural impropriety of Russia attempting to supplement its Preliminary Objections in a procedural submission, it remains the case that Russia has presented no actual evidence supporting its claim of where the *Berdyansk* and the *Yani Kapu* were arrested. The Tribunal lacks any evidentiary basis to disregard the testimony of Ukraine's witnesses and simply accept Russia's conclusory assertions. Accordingly, the Tribunal has an incomplete record before it; it does not have "all the necessary facts to dispose of the preliminary objection," so it is not exclusively preliminary.[51]

30. On top of all of these reasons why Russia's Article 32 objection is not a jurisdictional objection and not exclusively preliminary, the objection is only a partial one. For two different reasons, Russia's objection is not capable of affecting the entirety of Ukraine's case.

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[46] *South China Sea*, Award on Jurisdiction, ¶ 382 **(UAL-5)**.

[47] Russia's Response, ¶ 31.

[48] *See* Memorial of Ukraine, ¶¶ 34–37; Nebylytsia Statement, ¶¶ 14–16; Hrytsenko Statement, ¶¶ 20–23; Melnychyk Statement, ¶¶ 15–16.

[49] Russia's Preliminary Objections, ¶ 85 & nn. 147–148, 152; *id.*, p. 37.

[50] Russia's Response, ¶ 31.

[51] *South China Sea*, Award on Jurisdiction, ¶ 382 **(UAL-5)**.

31. *First*, Russia's Response makes no mention at all of the location of the *Nikopol*, which Russia has previously conceded was arrested beyond the territorial sea.[52] However the Tribunal might resolve the factual dispute concerning the location of the arrest of the *Berdyansk* and the *Yani Kapu*, and the interpretive question of whether Article 32 provides for an applicable immunity, Ukraine's claim for a violation of Article 95 will go forward in any case in respect of the *Nikopol*. Though Russia briefly insists it had a "right of hot pursuit" under Article 111,[53] and that this somehow justified its assertion of law enforcement jurisdiction over the Ukrainian vessels, a claim of right to make the arrest *under UNCLOS* is a merits defense, not an argument that Ukraine's claim does not fall within the scope of Article 95 of UNCLOS.

32. *Second*, even if the Tribunal were to eventually decide that some of the vessels were arrested in the territorial sea and that Article 32 does not provide an applicable immunity, the Tribunal would still have jurisdiction over Ukraine's claim that Russia violated Article 30 of the Convention. In its Memorial, Ukraine presented a straightforward dispute concerning interpretation or application of the Convention: Russia invoked Article 30 of the Convention as justification for ordering the Ukrainian vessels to stop,[54] whereas in Ukraine's view Article 30 does not permit such an order.[55]

33. Russia raised no preliminary objection to the jurisdiction of the Tribunal to assess Ukraine's claim regarding Article 30. Yet in its Response on bifurcation, Russia argues for the first time that Russia had other remedies available to it under international law beyond those provided for in Article 30, and that the "question of the legality of other remedies are beyond the scope of UNCLOS."[56] This argument is improper: the Tribunal ordered Russia to present its preliminary objections within three months of the filing of

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[52] Russia's Preliminary Objections, ¶ 85 & n. 152.

[53] *Id.*, ¶¶ 85–88.

[54] Memorial of Ukraine, ¶ 85; FSB Report, p. 4 (**UA-4**).

[55] Memorial of Ukraine, ¶ 86.

[56] Russia's Response, ¶ 32.

Ukraine's Memorial,[57] Russia submitted Preliminary Objections that included no objection to Ukraine's Article 30 claim, and Russia may not now raise a new, belated jurisdictional objection in a submission that is supposed to concern the procedural question of bifurcation. In any event, Russia's new argument makes no sense. Russia *itself* invoked Article 30 as justification for its actions, not some other rule of international law.[58] Ukraine's claim plainly concerns the interpretation or application of that provision of the Convention.

34. For all of these reasons, Russia's Article 32 objection should be joined to the merits. The objection is not jurisdictional at all, because it raises a dispute between the parties concerning the interpretation of the Convention. And even if it is jurisdictional, it is not exclusively preliminary, because it depends on resolution of a factual dispute, and indeed one on which the Tribunal lacks an adequate record.

C. Russia's Objection Concerning the Obligation to Comply with Provisional Measures Should Be Joined to the Merits

35. The Tribunal's jurisdiction over Ukraine's claims for violations of the provisional measures order is independent of Ukraine's other claims. Under Article 290, the parties to a dispute "shall comply promptly with any provisional measures prescribed."[59] Under Article 296, any decision rendered by a court or tribunal having jurisdiction under Part XV of UNCLOS is "final and shall be complied with by all the parties to the dispute."[60] Ukraine alleges that Russia has violated its obligations under Articles 290 and 296, and Russia denies that it has violated those provisions. This is a dispute concerning interpretation or application of the Convention, and Russia identifies no exception to the Tribunal's jurisdiction that could apply to that dispute. In particular, it has not argued, and cannot argue, that its failure to comply with the Provisional Measures Order should be

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[57] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, PCA Case No. 2019-28, Procedural Order No. 1 dated 22 November 2019, ¶ 5.

[58] FSB Report, p. 4 **(UA-4)**.

[59] UNCLOS Art. 290(6).

[60] UNCLOS Art. 296(1).

excluded from the jurisdiction of the Tribunal because it would have some relation to "military activities."

36. Russia faults Ukraine for not responding to its invocation of the ITLOS Special Chamber decision in *Ghana/Côte d'Ivoire*, but that decision adds nothing to Russia's argument. The Special Chamber simply noted that there was no question of its inherent jurisdiction to adjudicate a violation of provisional measures, which Ukraine of course does not dispute.[61] The Chamber had no reason to address, and did not say anything about, a claim that a tribunal *lacks* an independent basis for jurisdiction pursuant to Articles 286 and 288 of the Convention to resolve a dispute concerning the interpretation or application of Articles 290 and 296.

37. In any event, even on Russia's terms (which Ukraine does not accept), this objection is conditional on the success of its other objections. Thus, Russia does not dispute that if its other objections are deemed not of an exclusively preliminary character, then its objection to jurisdiction over the Article 290/296 claim also lacks an exclusively preliminary character.

38. Accordingly, Russia's objection to Ukraine's claim for violations of Article 290 and 296 is not exclusively preliminary, and it should be joined to the merits.

D. Russia's Objection Concerning Aggravation of the Dispute Should Be Joined to the Merits

39. Russia's objection that the Tribunal lacks jurisdiction over Ukraine's claim alleging a violation of Article 279 of UNCLOS similarly cannot be considered a jurisdictional objection. There is no question that Article 279 imposes on Russia an obligation to settle disputes peacefully. The parties disagree only about the *content* of this obligation, *i.e.*, whether this obligation, understood in the context of the general obligation to fulfill the obligations of UNCLOS in good faith,[62] includes a requirement that Russia not aggravate a

[61] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Coˆte d'Ivoire)*, ITLOS Case No. 23, Judgment of 23 September 2017, ¶ 546 **(RUL-31)**.

[62] UNCLOS Art. 300.

dispute while it is before a tribunal. This is another question of interpretation of the Convention that is subject to the Tribunal's jurisdiction.[63] Whether Russia's actions have violated this obligation presents a question of application of the Convention. It is therefore unsurprising that the *South China Sea* tribunal addressed this issue in its judgment on the merits, when it concluded that Article 279 requires that a party to a dispute under the Convention refrain from taking steps that risk "aggravating or extending the dispute."[64] The fact that the contours of the Article 279 obligation presents a "question of law," as stated by Russia,[65] did not lead the *South China Sea* tribunal to address it at a preliminary stage, and it should not be addressed at such a stage here, either.

40. Accordingly, Russia's objection to Ukraine's Article 279 claim simply raises a merits dispute, not a jurisdictional objection, and it should be joined to the merits.

E. Russia's Objection Concerning the Article 283 Requirement of an Expeditious Exchange of Views on Settlement of the Dispute Should Be Joined to the Merits

41. As Ukraine noted in its Observations, no tribunal has found an Article 283 objection to be an independent basis for bifurcation.[66] Russia asks the Tribunal to disregard the decisions in *Chagos Marine Protected Area* and *Suriname/Guyana* because of differences in wording of the relevant procedural rules. But it is apparent that these tribunals followed a similar analysis as the one called for in Article 11(3) of the Rules of Procedure. The *Suriname/Guyana* tribunal rejected bifurcation on the ground that "the facts and arguments in support of [the objections were] in significant measure the same as the facts and arguments on which the merits of the case depend," reflecting that it was assessing whether the objections were exclusively preliminary in character.[67] And in

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[63] Ukraine's Observations, ¶ 23.

[64] *South China Sea Arbitration*, *(The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016, ¶¶ 1169–1172 **(UAL-7)**; Memorial of Ukraine, ¶ 73.

[65] Russia's Response, ¶ 47.

[66] Ukraine's Observations, ¶ 27.

[67] *Guyana v. Suriname*, PCA Case No. 2004-04, Order No. 2 dated 18 July 2005, ¶ 2 **(UAL-35)**.

Chagos, while the tribunal did not provide an explanation for its decision on bifurcation, the United Kingdom based its request for bifurcation on the "exclusively preliminary character" standard.[68]

42. Applying that same standard here, the issues relevant to Russia's Article 283 objection are interwoven with the merits because the Tribunal will need to consider facts relating to the urgency of the situation. Russia does not dispute that Ukraine referred to the urgency of the situation in its request for a prompt exchange of views, or that this urgency was an appropriate consideration for Ukraine in deciding whether to continue consultations with Russia. Russia protests that Ukraine's claims on the merits do not "depend[] on whether the situation was urgent."[69] But that misses the point: the *reasons* for that urgency are very much related to Ukraine's substantive claims of immunity violations on the merits. In particular, many of the facts that are relevant to Ukraine's request for reparation are directly relevant to the urgent situation that existed at the time Ukraine requested a prompt exchange of views. Russia offers the partial response that it does not dispute "the existence of the ongoing criminal proceedings against the servicemen at that time,"[70] but it says nothing about Ukraine's allegations of mandatory court appearances, repeated interrogations, forced psychological evaluations, and other poor treatment that will be relevant to the merits and quantum of reparation on one hand, and to the urgency of the situation as relevant to the Article 283 objection on the other.

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[68] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Preliminary Objections of the United Kingdom dated 31 October 2012, ¶¶ 6.2, 6.4–6.5, 6.10(a), 6.16–6.17 (arguing that "the United Kingdom invites Mauritius to recognise that the Preliminary Objections are serious and substantial, and are manifestly well-suited to being addressed as a preliminary matter, as would anyway be consistent with practice before the International Tribunal for the Law of the Sea and the International Court of Justice" and that "the Preliminary Objections are exclusively preliminary in character" and "none of the objections come close to being 'inextricably interwoven' or 'closely interconnected' with the merits") **(UAL-43)**.

[69] Russia's Response, ¶ 52.

[70] *Id.*

43. Finally, Russia has no response to Ukraine's point that, while Article 283 objections are frequently made, such an objection has never been accepted.[71] Tribunals are consistently deferential to the claimant State in applying this provision. Even Russia admits that this deference is required, and that "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."[72] There is no dispute here that Ukraine did so conclude. Russia's insubstantial Article 283 objection should therefore not be treated, for the first time ever, as an independent basis to bifurcate proceedings.

44. Accordingly, Russia's Article 283 objection is not exclusively preliminary, and it should be joined to the merits.

III. Rejecting Bifurcation Would Serve the Interests of Efficiency and Justice in This Case

45. Russia rejects any consideration of the interests of efficiency and justice as part of the Tribunal's bifurcation decision, pointing to Article 11(3)'s adoption of the "exclusively preliminary" standard. But that standard, which is drawn from the ICJ Rules, is not categorically divorced from principles of efficiency; the ICJ has itself said that this standard helps ensure against "the unnecessary prolongation of proceedings at the jurisdictional stage."[73]

46. As explained above, Russia's Objections are either not jurisdictional in nature or do not have an exclusively preliminary character. One of the main reasons why bifurcation would be inefficient is *because* Russia's Objections are so intertwined with the merits. If bifurcation were accepted, the Tribunal may ultimately still conclude that some or all of Russia's objections should be deferred to the merits stage, making bifurcation an

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[71] Ukraine's Observations, ¶ 25.

[72] Russia's Preliminary Objections, ¶ 103 (emphasis added).

[73] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Judgment of 27 June 1986, ¶ 41 (discussing the 1972 revision to Article 79 of the ICJ Rules of Procedure) **(RUL-5)**; *see also Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, ICJ Judgment of 27 February 1998, ¶ 49 **(RUL-46)**.

unnecessary delay accomplishing little. Alternatively, if the Tribunal does decide the objections at a preliminary stage, it would have to carefully consider numerous facts put in issue by both Ukraine and Russia, and then at the merits stage the Tribunal would have to evaluate essentially the same set of facts, again causing delay and duplicative work for both the Tribunal and the parties, compounded by the potential for prejudicial factual findings on a limited record in the first phase.

47. Russia also shows little regard for the servicemen it subjected to prolonged detention under trying conditions. It insists that "the key point is that these were all released over a year ago," but does not address or deny the point made by Ukraine in its Observations: that Russia continues to subject those servicemen to criminal prosecution.[74] Moreover, the fact that the servicemen were released "over a year ago" only highlights that these individuals, still suffering from their ordeal, should not be made to wait several more years for justice and compensation.

48. This is not a complex or multi-faceted case. And it is relevant to the bifurcation decision that this case is limited in scope. Ukraine asserts a discrete set of claims related to arrests on a single evening in November 2018. Russia's preliminary objections are closely intertwined with all of the facts underlying Ukraine's substantive claims. In this circumstance, there will be no narrowing of the dispute through a preliminary phase; there will just be duplicative briefing and duplicative hearings on the same sets of issues.

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49. The Russian Federation, in an effort to delay resolution of this dispute and compensation for the injuries it has inflicted to Ukraine's sovereignty, its ships, and its sailors, has advanced preliminary objections that are not proper jurisdictional objections and that are not exclusively preliminary in character. The Tribunal should not accept Russia's proposal for duplicative rounds of proceedings, one assessing all of the key facts from a jurisdictional perspective and another assessing those same facts from a merits perspective.

[74] Russia's Response, ¶ 56(b).

The Tribunal should instead order Russia's objections joined to the merits so that the parties can complete the written pleadings, the Tribunal can hold a hearing and hear from the parties and witnesses, this dispute can be resolved, and the harms caused by Russia's violations of the Convention can finally be remedied.

Kyiv, Ukraine, 28 September 2020

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