

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**

**AWARD ON THE PRELIMINARY OBJECTIONS
OF THE RUSSIAN FEDERATION**

27 June 2022

ARBITRAL TRIBUNAL:

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

REGISTRY:

The Permanent Court of Arbitration

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GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

Convention or UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982
FSB	Federal Security Service of the Russian Federation
FSB Report	Press Service Statement on Acts of Provocations by Ukrainian Naval Ships, Federal Security Service of the Russian Federation, dated 26 November 2018
Hearing or Preliminary Objections Hearing	The hearing on the Russian Federation's Preliminary Objections held from 11 to 15 October 2021 at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands
Hrytsenko Statement	Witness Statement of Captain of the Second Rank Denys Volodymyrovych Hrytsenko, dated 6 May 2020
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
Melnychyk Statement	Witness Statement of Petty Officer Oleh Mykhailovych Melnychyk, dated 7 May 2020
Mokryak Statement	Witness Statement of Senior Lieutenant Roman Mykolayovych Mokryak, dated 14 May 2020
Nebylytsia Statement	Witness Statement of Captain Lieutenant Bohdan Pavlovych Nebylytsia, dated 13 May 2020
Notification and Statement of Claim	Notification under Article 287 and Annex VII, Article 1 of United Nations Convention on the Law of the Sea and Statement of the Claim and Grounds on which it is Based, dated 31 March 2019
Opening Criminal Case Order	Order on Opening a Criminal Case and Commencing Criminal Proceedings, dated 25 November 2018
PCA	Permanent Court of Arbitration
Provisional Measures Order or ITLOS Provisional Measures Order	ITLOS Order on Provisional Measures, dated 25 May 2019

Rules of Procedure	Rules of Procedure, adopted by the Arbitral Tribunal in Procedural Order No. 1, dated 22 November 2019
Russian Federation’s Comments on Ukraine’s Post-Hearing Observations	Comments of the Russian Federation on Ukraine’s Post-Hearing Observations, dated 12 November 2021
Russian Federation’s Post-Hearing Observations	Written Observations of the Russian Federation on the Arbitral Tribunal’s Questions of 13 October 2021, dated 5 November 2021
Russian Federation’s Preliminary Objections	Preliminary Objections of the Russian Federation, dated 24 August 2020
Russian Federation’s Timeline	Timeline of the Events of 24–25 November 2018, Russian Federation Hearing Bundle, Tab 6.4, submitted 14 October 2021
Sea of Azov Treaty	Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, 24 December 2003
Territorial Sea Convention	Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958
Ukraine Navy Report	Naval Forces of Ukraine, Report on the Events of 24–25 November 2018 in the Sea of Azov and Kerch Strait, dated 15 April 2019
Ukraine’s Comments on Post-Hearing Observations	Comments of Ukraine on the Russian Federation’s Post-Hearing Observations, dated 12 November 2021
Ukraine’s Memorial	Memorial of Ukraine, dated 22 May 2020
Ukraine’s Observations	Written Observations and Submissions of Ukraine on the Preliminary Objections of the Russian Federation, dated 27 January 2021
Ukraine’s Post-Hearing Observations	Written Observations of Ukraine on the Arbitral Tribunal’s Questions of 13 October 2021, dated 5 November 2021
Ukraine’s Timeline	Ukraine’s Timeline of Events 24-25 November 2018, Written Observations of Ukraine on the Arbitral Tribunal’s Questions of 13 October 2021, Annex B, dated 5 November 2021
VCLT	Vienna Convention on the Law of Treaties, 23 May 1969

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I. INTRODUCTION

1. Ukraine and the Russian Federation are States Parties to the United Nations Convention on the Law of the Sea (the “**Convention**” or “**UNCLOS**”), having ratified the Convention on 26 July 1999 and 12 March 1997, respectively.¹
2. On 24 November 2018, three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol* and the *Yani Kapu*) set sail on a mission with the objective of navigating from the Ukrainian port of Odesa, through the Kerch Strait, to Ukrainian ports in the Sea of Azov. They were confronted by Russian vessels, which claimed that the Russian Territorial Sea on the Black Sea side of the approach to the Kerch Strait was temporarily closed and that by navigating towards the Kerch Strait they would be unlawfully crossing the Russian State border. After the Ukrainian vessels abandoned their attempt to transit the Kerch Strait and began to sail away, they were ordered to stop by vessels of the Russian Federation.² When the Ukrainian vessels failed to do so, the Russian Federation intercepted and arrested the Ukrainian vessels and the servicemen on board.³ That same day, the Investigations Department of the FSB Directorate for the Republic of Crimea and the City of Sevastopol opened a criminal case and commenced criminal proceedings against the arrested servicemen, and detained the vessels as physical evidence in these criminal prosecutions, on the basis of their having unlawfully crossed the Russian State border.⁴
3. Ukraine takes the position that the Russian Federation has violated several provisions of the Convention. Ukraine principally argues that the Russian Federation has violated the Convention’s

¹ Unless otherwise indicated, all references to numbered articles herein refer to provisions of the Convention.

² Timeline of the Events of 24–25 November 2018, Russian Federation Hearing Bundle, Tab 6.4 (as submitted at the Hearing on Preliminary Objections on 14 October 2021) (“**Russian Federation’s Timeline**”), ¶ 12; Ukraine’s Timeline of Events 24–25 November 2018, Written Observations of Ukraine on the Arbitral Tribunal’s Questions of 13 October 2021, 5 November 2021, Annex B (“**Ukraine’s Timeline**”), ¶¶ 13–14; Press Service Statement on Acts of Provocations by Ukrainian Naval Ships, Federal Security Service of the Russian Federation, 26 November 2018 (**UA-4**) (“**FSB Report**”), Translation, p. 4; 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 (**UA-5**) (“**Ukraine Navy Report**”), ¶ 14; Witness Statement of Captain of the Second Rank Denys Volodymyrovych Hrytsenko, 6 May 2020 (“**Hrytsenko Statement**”), ¶¶ 18–19; Witness Statement of Captain Lieutenant Bohdan Pavlovych Nebylytsia, 13 May 2020 (“**Nebylytsia Statement**”), ¶¶ 13–14; Witness Statement of Senior Lieutenant Roman Mykolayovych Mokryak, dated 14 May 2020 (“**Mokryak Statement**”), ¶¶ 12–13; Preliminary Objections Hearing, 12 October 2021, 165:15–18 (Cheek); Preliminary Objections Hearing, 11 October 2021, 41:1–10 (Wordsworth), 66:1–2 (Pellet); Preliminary Objections Hearing, 15 October 2021, 433:1–4 (Cheek).

³ Russian Federation’s Timeline, ¶¶ 16–19; Ukraine’s Timeline, ¶¶ 18–21; FSB Report, Translation, p. 6; Ukraine Navy Report (**UA-5**), ¶ 15; Hrytsenko Statement, ¶ 20–23; Witness Statement of Petty Officer Oleh Mykhailovych Melnychuk (“**Melnychuk Statement**”), ¶¶ 15–16; Nebylytsia Statement, ¶ 16.

⁴ Order on Opening a Criminal Case and Commencing Criminal Proceedings, 25 November 2018 (**UA-13**) (“**Opening Criminal Case Order**”).

provisions on the immunity of warships and other governmental vessels operated for non-commercial purposes in the territorial sea and exclusive economic zone (specifically, Articles 30, 32, 58, 95 and 96).⁵

4. The Russian Federation has raised five Preliminary Objections concerning the Arbitral Tribunal's jurisdiction over Ukraine's claim, arguing, *inter alia*, that the dispute concerns military activities and is therefore excluded from the Arbitral Tribunal's jurisdiction pursuant to Article 298(1)(b).⁶
5. Ukraine contends that the Parties' opposing positions on the lawfulness of the Russian Federation's assertion of jurisdiction over Ukraine's naval vessels give rise to a "dispute concerning the interpretation and application of [the] Convention", which falls within the jurisdiction of this Arbitral Tribunal pursuant to Articles 286 and 288.⁷ Moreover, Ukraine disagrees that the dispute is excluded under Article 298(1)(b) as one concerning military activities, as opposed to law enforcement activities.

II. PROCEDURAL HISTORY

A. INSTITUTION OF THE PROCEEDINGS

6. The proceedings of this arbitration commenced when Ukraine on 1 April 2019 served on the Russian Federation a "Notification under Article 287 and Annex VII, Article 1, of the United Nations Convention on the Law of the Sea and Statement of the Claim and the Grounds on which it is Based" (the "**Notification and Statement of Claim**") dated 31 March 2019, as provided for in Annex VII to UNCLOS.
7. In its Notification and Statement of Claim, Ukraine requested the Arbitral Tribunal to adjudge and declare the following:
 - a. In seizing and detaining the Ukrainian naval vessels the "Berdyansk," the "Yani Kapu," and the "Nikopol," Russia breached its obligations to accord foreign naval vessels complete immunity under Articles 32, 58, 95 and 96 of the Convention.
 - b. In detaining the 24 crewmen of "Berdyansk," the "Yani Kapu," and the "Nikopol," and initiating criminal charges against the crewmen, Russia further breached its obligations under Articles 32, 58, 95 and 96 of the Convention.

⁵ Ukraine's Observations, ¶ 3. A full recitation of the claims and submissions of Ukraine is included at ¶¶ 19–20 below.

⁶ Russian Federation's Preliminary Objections, ¶ 18. A full recitation of the preliminary objections of the Russian Federation is included at ¶ 21 below.

⁷ Ukraine's Observations, ¶ 5.

- c. The aforementioned violations constitute internationally wrongful acts for which the Russian Federation is responsible.
- d. As a consequence, Russia is required to: (i) release the “Berdyansk,” the “Yani Kapu,” and the “Nikopol”; (ii) release the twenty-four servicemen captured with the “Berdyansk,” the “Yani Kapu,” and the “Nikopol”; (iii) provide Ukraine with appropriate assurances and guarantees of non-repetition; and (iv) provide Ukraine with full reparation.⁸

B. PROVISIONAL MEASURES PHASE

- 8. On 16 April 2019, Ukraine filed with the International Tribunal for the Law of the Sea (“ITLOS”) a request for provisional measures to be prescribed under Article 290(5).
- 9. By a *note verbale* dated 30 April 2019, the Russian Federation indicated:

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

[...]

[T]he Russian Federation has the honour to inform the International Tribunal for the Law of the Sea of its decision not to participate in the hearing on provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.

However, in order to assist the International Tribunal for the Law of the Sea and in conformity with Article 90 (3) of the Rules [of ITLOS], the Russian Federation intends to submit in due course more precise written observations regarding its position on the circumstances of the case.

- 10. The Russian Federation followed its *note verbale* with a Memorandum dated 7 May 2019, further setting out its positions that ITLOS lacked *prima facie* jurisdiction and that the requirements for provisional measures had not been met.⁹

⁸ Notification under Article 287 and Annex VII, Article 1 of the United Nations Convention on the Law of the Sea and Statement of the Claim and Grounds on which it is Based, 31 March 2019 (“**Notification and Statement of Claim**”), ¶ 31.

⁹ *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Memorandum of the Government of the Russian Federation, 7 May 2019 (UA-2) (“**Russian Federation’s Memorandum, ITLOS**”).

11. On 10 May 2019, ITLOS heard oral statements from representatives of Ukraine in a public sitting. The Russian Federation did not participate at the public sitting.
12. Pending the constitution of an arbitral tribunal under Part XV, Section 2, of the Convention, on 25 May 2019, ITLOS issued its decision on provisional measures (the “**Provisional Measures Order**”) prescribing the following provisional measures under Article 290(5):
 - a. The Russian Federation shall immediately release the Ukrainian naval vessels *Berdyansk*, *Nikopol* and *Yani Kapu*, and return them to the custody of Ukraine;
 - b. The Russian Federation shall immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine;
 - c. Ukraine and the Russian Federation shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.¹⁰
13. The Provisional Measures Order further provides:

The present Order in no way prejudices the question of the jurisdiction of the Annex VII arbitral tribunal to deal with the merits of the case, or any questions relating to the admissibility of Ukraine’s claims or relating to the merits themselves, and leaves unaffected the rights of Ukraine and the Russian Federation to submit arguments in respect of those questions.¹¹

C. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND INITIAL PROCEDURAL DECISIONS

14. In its Notification and Statement of Claim, Ukraine appointed Sir Christopher Greenwood QC as member of the Arbitral Tribunal pursuant to Article 3(b) of Annex VII to the Convention.
15. By a *note verbale* to Ukraine dated 30 April 2019, the Russian Federation appointed H.E. Judge Vladimir Vladimirovich Golitsyn as member of the Arbitral Tribunal pursuant to Article 3(c) of Annex VII to the Convention.
16. Since the Parties were unable to reach agreement within 60 days of receipt by the Russian Federation of the Notification and Statement of Claim on the appointment of the remaining members of the Arbitral Tribunal, on 12 June 2019, Ukraine requested that H.E. Judge Jin-Hyun Paik, President of ITLOS, make the appointments pursuant to Article 3(d) of Annex VII to the Convention. On 8 July 2019, Professor Donald M. McRae, H.E. Judge Gudmundur Eiriksson and H.E. Judge Rüdiger Wolfrum were appointed as members of the Arbitral Tribunal, and Professor

¹⁰ *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order, 25 May 2019 (UAL-2) (“**ITLOS Provisional Measures Order**”), ¶ 124(1).

¹¹ ITLOS Provisional Measures Order (UAL-2), ¶ 122.

Donald McRae was appointed as President of the Arbitral Tribunal. At the same time, the Parties agreed to request the Permanent Court of Arbitration (the “PCA”) to act as registry for the arbitration, which the PCA confirmed on 19 July 2019.

17. On 21 November 2019, the Arbitral Tribunal held a procedural meeting with the Parties at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands, to consider the procedure and timetable for the arbitration.
18. On 22 November 2019, the Arbitral Tribunal, with the agreement of the Parties, adopted Procedural Order No. 1, setting forth the Terms of Appointment of the Arbitral Tribunal and Rules of Procedure (the “**Rules of Procedure**”) for the present arbitration. Procedural Order No. 1 set out a timetable for written pleadings, and the Rules of Procedure included a procedure for addressing any preliminary objections.

D. SUBMISSION OF UKRAINE’S MEMORIAL

19. On 22 May 2020, pursuant to paragraph 3 of Procedural Order No. 1, Ukraine submitted its Memorial (“**Ukraine’s Memorial**”). In its Memorial, Ukraine requested the Arbitral Tribunal to adjudge and declare that:
 - a. The Russian Federation has violated the complete immunity of three Ukrainian naval vessels in breach of Articles 58, 95, and 96 of the Convention by boarding, arresting, and detaining the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, as well as the 24 Ukrainian servicemen on board, on the evening of 25 November 2018.
 - b. The Russian Federation has violated the complete immunity of three Ukrainian naval vessels in breach of Articles 58, 95, and 96 of the Convention by continuing to detain them until 18 November 2019, and repeatedly examining the vessels, removing items from the vessels, and otherwise damaging the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*.
 - c. The Russian Federation has violated the complete immunity of the three Ukrainian naval vessels in breach of Articles 58, 95, and 96 by continuing to detain until 7 September 2019 the 24 Ukrainian servicemen who were on board on the vessels, and commencing and maintaining criminal prosecutions of those servicemen based on their alleged actions on board the vessels.
 - d. The Russian Federation has violated the immunity of three Ukrainian naval vessels in breach of Articles 30 and 32 of the Convention by ordering the *Berdyansk*, the *Nikopol*, and the *Yani Kapu* to stop and attempting to prevent them from exiting the territorial sea.
 - e. The Russian Federation has violated Articles 290 and 296 of the Convention by failing to comply with the ITLOS provisional measures order.

- f. The Russian Federation has violated Article 279 by continuing to aggravate the dispute between the Parties.

20. On this basis, Ukraine requested the Arbitral Tribunal to order the Russian Federation to:

- a. Immediately terminate by a means of its own choosing the ongoing criminal prosecutions of the 24 Ukrainian servicemen based on their alleged actions on board the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*.
- b. Provide Ukraine with assurances that it will in the future respect the immunity enjoyed by Ukrainian naval vessels under the Convention.
- c. Pay Ukraine compensation for the material damages suffered by Ukraine as a consequence of Russia's internationally wrongful acts, specifically the physical damage to Ukraine's naval vessels, the cost of engaging Russian legal counsel, the cost of towing the vessels back to Ukraine, and the loss of items taken from the servicemen during their arrest and never subsequently returned, in the amount of Euros 2,654,400, and for loss of use of the vessels in an amount to be determined at a later stage in these proceedings, plus pre- and post-Award interest.
- d. Pay Ukraine compensation for the non-material damages suffered by Ukraine as a consequence of Russia's internationally wrongful acts, specifically nonmaterial damages arising from the pain, suffering, and hardships experienced by the servicemen as a result of their arrest, detention, and prosecution, in the amount of Euros 2,000,000 plus post-Award interest, and moral damages arising from the affront to Ukraine's sovereignty due to the infringement of its immunity, aggravated by Russia's failure to comply with the ITLOS provisional measures order, in the amount of Euros 2,000,000 plus post-Award interest.
- e. Pay Ukraine's legal costs in prosecuting this arbitration, including the advance deposits made by Ukraine for the costs of the Tribunal.

E. SUBMISSION OF THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION AND WRITTEN PLEADINGS RELATED THERETO

21. On 24 August 2020, pursuant to paragraph 5 of Procedural Order No. 1, the Russian Federation submitted the following Preliminary Objections (the "**Russian Federation's Preliminary Objections**"):

- a) that the dispute concerns military activities and is therefore excluded from the Tribunal's jurisdiction pursuant to Article 298(1)(b) of UNCLOS (the "**Article 298(1)(b) Objection**");
- b) that UNCLOS does not provide for an applicable immunity (the "**Article 288(1) Objection**");

- c) that the Tribunal has no jurisdiction over alleged breaches of the ITLOS Provisional Measures Order and Article 279 of UNCLOS (the “**Article 290 and 296 Objection**” and the “**Article 279 Objection**”);¹² and
 - d) that Ukraine has not complied with Article 283 of UNCLOS (the “**Article 283 Objection**”).
22. The Russian Federation requested that its Preliminary Objections be decided in a preliminary phase of the proceedings in accordance with Article 11, paragraph 3, of the Rules of Procedure.
 23. On 7 September 2020, pursuant to paragraph 5(a) of Procedural Order No. 1, Ukraine submitted its Observations on the Question of Bifurcation.
 24. On 21 September 2020, pursuant to paragraph 5(c) of Procedural Order No. 1, the Russian Federation submitted its Response to the Observations of Ukraine on the Question of Bifurcation.
 25. On 28 September 2020, pursuant to paragraph 5(d) of Procedural Order No. 1, Ukraine submitted its Reply to the Response of the Russian Federation on the Question of Bifurcation.
 26. On 27 October 2020, the Arbitral Tribunal issued Procedural Order No. 2. The Arbitral Tribunal decided:
 1. The Arbitral Tribunal considers that the Preliminary Objections of the Russian Federation appear at this stage to be of a character that justifies having them examined in a preliminary phase, and in accordance with Article 11, paragraph 3, of the Rules of Procedure, decides that the Preliminary Objections of the Russian Federation shall be addressed in a preliminary phase of these proceedings.
 2. The proceedings on the merits are hereby suspended.
 3. In accordance with paragraph 5(f) of Procedural Order No. 1, Ukraine shall file any observations on the Preliminary Objections of the Russian Federation within three months of the date of this Order. Following receipt of these observations, the Arbitral Tribunal will decide whether any further written submissions are needed and, after consultation with the Parties, the time limits for such submissions.
 4. If the Arbitral Tribunal, in delivering its award in the preliminary phase of the proceedings in accordance with Article 11, paragraph 7, of the Rules of Procedure, declares that a Preliminary Objection does not possess an exclusively preliminary character, then, in accordance with Article 11, paragraph 3, of the Rules of Procedure, that Objection shall be ruled upon in conjunction with the merits.

¹² The full text of the Russian Federation’s Article 279 Objection reads as follows: “Article 279 of UNCLOS provides no basis to claim jurisdiction as to the alleged aggravation of the dispute”.

27. On 27 January 2021, pursuant to paragraph 5(f) of Procedural Order No. 1 and paragraph 3 of Procedural Order No. 2, Ukraine submitted its Written Observations and Submissions on the Preliminary Objections of the Russian Federation (“**Ukraine’s Observations**”) seeking the dismissal of the Russian Federation’s Preliminary Objections in their entirety.

F. HEARING CONCERNING THE RUSSIAN FEDERATION’S PRELIMINARY OBJECTIONS

28. On 5 February 2021, the Arbitral Tribunal decided that the further proceedings in respect to the Russian Federation’s Preliminary Objections would be oral.

29. On 23 February 2021, after considering the Parties’ views, the Arbitral Tribunal decided that an oral hearing was necessary to address the Russian Federation’s Preliminary Objections.

30. On 16 March 2021, the Arbitral Tribunal set the dates of the oral hearing on the Russian Federation’s Preliminary Objections for the week of 11 October 2021 (up to and including Saturday, 16 October 2021, if necessary).

31. On 17 September 2021, the Arbitral Tribunal adopted Procedural Order No. 3, fixing the schedule for the Parties’ oral submissions in relation to the Russian Federation’s Preliminary Objections.

32. From 11 to 15 October 2021, a hearing on the Russian Federation’s Preliminary Objections (the “**Hearing**”) was held at the headquarters of the PCA at the Peace Palace in The Hague, the Netherlands. The Hearing consisted of two rounds of oral argument, held on 11 and 12 October 2021 and 14 and 15 October 2021, respectively. The following persons were present at the Hearing:

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Professor Donald McRae, President
Judge Gudmundur Eiriksson*
Judge Rüdiger Wolfrum
Judge Vladimir Vladimirovich Golitsyn*
Sir Christopher Greenwood*

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33. On 15 October 2021, upon the conclusion of the Hearing, the Arbitral Tribunal invited the Parties to submit any written observations that they had in response to the questions put to the Parties by the Arbitral Tribunal during the Hearing, following which each Party was invited to submit any comments they had on the written observations of the other Party.
34. On 5 November 2021, the Parties submitted their respective written observations in response to the questions of the Arbitral Tribunal.
35. On 12 November 2021, the Parties submitted their respective comments on the written observations of the other Party.

III. THE PARTIES' REQUESTS

A. THE RUSSIAN FEDERATION'S REQUESTS

36. In its Preliminary Objections and its final submissions at the Hearing, the Russian Federation requested the Tribunal to “adjudge and declare that it is without jurisdiction in respect of the dispute submitted to this Tribunal by Ukraine”.¹³

B. UKRAINE'S REQUESTS

37. In its Observations and its final submissions at the Hearing, Ukraine requested that the Arbitral Tribunal:

- a) Dismiss the Preliminary Objections submitted by the Russian Federation;
- b) Adjudge and declare that it has jurisdiction to hear and decide the claims and Submissions filed by Ukraine in this case; and
- c) Award Ukraine its costs for the preliminary phase of these proceedings, pursuant to Article 26 of the Rules of Procedure.¹⁴

IV. THE DISPUTE

38. In accordance with Article 288(1) of the Convention, the jurisdiction of the Arbitral Tribunal extends to “any dispute concerning the interpretation or application of [the] Convention”. Ukraine argues that the actions of the Russian Federation, in boarding and arresting the Ukrainian naval vessels *Berdyansk*, *Yani Kapu* and *Nikopol*, and in detaining and prosecuting the Ukrainian crew of those vessels, violated Articles 30, 32, 58, 95 and 96 of the Convention. The Russian Federation denies there has been any violation of the Convention, arguing *inter alia* that since the dispute is one concerning military activities then in accordance with Article 298(1)(b) the Arbitral Tribunal lacks jurisdiction.

¹³ Russian Federation's Preliminary Objections, ¶¶ 1, 116. Given that the events giving rise to this dispute occurred in the Black Sea, where Crimea is situated, the Russian Federation has also formally reserved its position with respect to the question of territorial sovereignty over Crimea, notwithstanding Ukraine's position that the question of sovereignty over Crimea is immaterial to the present dispute. *See* Russian Federation's Preliminary Objections, ¶ 23 *referring to* Memorial of Ukraine, 22 May 2020 (“**Ukraine's Memorial**”), ¶ 87, fn. 208; Preliminary Objections Hearing, 14 October 2021, 362:14–20 (Lobach); Final Hearing Submission of the Russian Federation, 14 October 2021, p.1.

¹⁴ Ukraine's Observations, ¶ 139; Preliminary Objections Hearing, 15 October 2021, 493:9–17 (Zolotaryova); Final Hearing Submission of Ukraine, 15 October 2021, p. 1.

39. In the view of the Arbitral Tribunal, the differences between the Parties concern the interpretation and application of the Convention, in particular Articles 30, 32, 58, 95 and 96 in respect of the substantive issues raised by Ukraine, and Article 298 and others in respect of the jurisdictional objections of the Russian Federation.
40. The foregoing differences constitute the dispute before the Arbitral Tribunal over which it must decide whether it has jurisdiction.

V. THE EVENTS OF 24–25 NOVEMBER 2018

41. With the exception of certain key details, the factual account of the events of 24 and 25 November 2018 culminating in the detention of the Ukrainian naval vessels and servicemen is common ground between the Parties. The narrative of these events presented below thus focuses primarily on the uncontested facts, highlighting only those factual differences that the Arbitral Tribunal considers pertinent to mention at this stage. These differences are otherwise further addressed as necessary in the context of the Parties' arguments in the sections that follow below.
42. The Arbitral Tribunal notes that the present dispute arises in the context of competing claims to sovereignty over the land and maritime areas in the vicinity of the Kerch Strait, matters that are outside the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal takes no position on these claims. References to "territorial sea" in the paragraphs that follow simply reflect the pleadings of the Parties and are without prejudice to their competing claims.
43. On the evening of 24 November 2018, two Ukrainian naval auxiliary vessels – the tugboat *Yani Kapu* and the refuelling vessel *Gorlovka*¹⁵ – rendezvoused while sailing in the Black Sea, southwest of the Kerch Strait outside the territorial sea.¹⁶
44. At approximately 20:30 (EET) / 21:30 (MSK) on 24 November 2018, as the *Gorlovka* and *Yani Kapu* approached the boundary of the territorial sea, they were informed via radio by FSB Coast

¹⁵ The *Gorlovka* is the vessel's Russian name, but it is sometimes referred to by its Ukrainian name, the *Horlivka*.

¹⁶ Russian Federation's Timeline, ¶ 1; FSB Report (UA-4), Translation, p. 1; Comments of the Russian Federation on Ukraine's Post-Hearing Observations, 12 November 2021 ("Russian Federation's Comments on Ukraine's Post-Hearing Observations"), ¶¶ 10–11; Written Observations of Ukraine on the Arbitral Tribunal's Questions of 13 October 2021, 5 November 2021 ("Ukraine's Post-Hearing Observations"), ¶ 10.

Guard Cruiser 302 about the procedure for crossing the State border of the Russian Federation and the rules of navigation through the Kerch-Yenikale Canal.¹⁷

45. According to the Russian Federation, both vessels responded that they did not plan to cross into the territorial sea or to pass through the Kerch Strait.¹⁸ Ukraine, on the other hand, insists that it was only the *Gorlovka* that responded that it did not intend to cross into the territorial sea or transit the Kerch Strait.¹⁹
46. At approximately 21:23–21:30 (EET) / 22:23–22:30 (MSK) on 24 November 2018, FSB Coast Guard Cruiser 302 informed the *Gorlovka* and *Yani Kapu* regarding the closure of the area and suspension of innocent passage on the Black Sea side of the approach to the Kerch Strait.²⁰
47. At approximately 01:00–02:45 (EET) / 02:00–03:45 (MSK) in the early morning of 25 November 2018, two Gyurza-M class small armoured Ukrainian naval vessels, the *Berdyansk* and *Nikopol*, rendezvoused outside the territorial sea with the *Gorlovka* and *Yani Kapu* to refuel.²¹
48. At approximately 04:00–04:35 (EET) / 05:00–05:35 (MSK) on 25 November 2018, the *Berdyansk* contacted FSB Coast Guard post Bereg-25 via radio and advised of the plan for the *Berdyansk*, *Nikopol* and *Yani Kapu* to enter the territorial sea at 06:00 (EET) / 07:00 (MSK) and then transit via the Kerch Strait at around 08:00 (EET) / 09:00 (MSK).²²
49. According to Ukraine, the *Berdyansk* also contacted Kerch and Kavkaz Traffic Control with the same message. Both FSB Coast Guard post Bereg-25 and Kerch Traffic Control confirmed receipt, while Kavkaz Traffic Control did not respond.²³

¹⁷ Russian Federation’s Timeline, ¶ 2; Ukraine’s Timeline, ¶ 1; FSB Report (UA-4), Translation, p. 1; Preliminary Objections Hearing, 11 October 2021, 37:7–38:17 (Wordsworth).

¹⁸ Russian Federation’s Timeline, ¶ 2; FSB Report (UA-4), Translation, p. 1; Preliminary Objections Hearing, 11 October 2021, 37:5–13 (Wordsworth), 64:8–19 (Pellet).

¹⁹ Ukraine’s Timeline, ¶ 1; Ukraine’s Full Timeline (as submitted by Ukraine at the Hearing on Preliminary Objections on 15 October 2021); Preliminary Objections Hearing, 15 October 2021, 424:17–21, 426:21–25, 427:1–2 (Cheek).

²⁰ Russian Federation’s Timeline, ¶ 3; Ukraine’s Timeline, ¶ 2; FSB Report (UA-4), Translation, p. 1; Ukraine Navy Report (UA-5), ¶ 8; Preliminary Objections Hearing, 11 October 2021, 64:6–17 (Pellet).

²¹ Russian Federation’s Timeline, ¶ 5; Ukraine’s Timeline, ¶ 3; Ukraine Navy Report (UA-5), ¶ 9; FSB Report (UA-4), Translation, p. 2; Nebylytsia Statement, ¶ 9.

²² Russian Federation’s Timeline, ¶ 6; Ukraine’s Timeline, ¶ 4; Preliminary Objections Hearing, 11 October 2021, 64:22–24 (Pellet).

²³ Ukraine’s Timeline, ¶ 4; Hrytsenko Statement, ¶ 10; Ukraine Navy Report (UA-5), ¶ 10; Preliminary Objections Hearing, 15 October 2021, 400:14–24, 403:12–14 (Cheek).

50. At approximately 04:45–04:50 (EET) / 05:45–05:50 (MSK) on 25 November 2018, FSB Coast Guard Cruiser 302 informed the *Berdyansk* by radio of the closure of the area and suspension of innocent passage on the Black Sea side of the approach to the Kerch Strait.²⁴
51. According to Ukraine, the *Berdyansk* replied asking FSB Coast Guard Cruiser 302 to identify the official notice to mariners, and FSB Coast Guard Cruiser 302 responded that there was no notice to mariners, but that they had made the decision to close the area.²⁵ The Russian Federation denies this account and asserts that the *Berdyansk* replied only by invoking a right to freedom of navigation pursuant to the 2003 Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (the “**Sea of Azov Treaty**”).²⁶
52. At approximately 05:30–05:45 (EET) / 06:30–06:45 (MSK) on 25 November 2018, FSB Coast Guard Cruiser 302 informed the *Berdyansk* by radio that 48 hours’ notice was required to cross the Kerch Strait, and that this requirement had not been complied with.²⁷
53. According to Ukraine, the *Berdyansk* replied that existing regulations only required four hours’ notice, which it had provided. It also stated that the *Yani Kapu* would take a pilot on board and tow the *Berdyansk* and *Nikopol*.²⁸ Ukraine further alleges that FSB Coast Guard post Bereg-25 then asked for information about the planned crossing, and that the *Berdyansk* provided the information requested.²⁹ The Russian Federation denies this.³⁰
54. At approximately 06:00–06:01 (EET) / 07:00–07:01 (MSK) on 25 November 2018, the *Berdyansk*, *Nikopol* and *Yani Kapu* crossed the boundary of the territorial sea sailing toward the Kerch Strait.³¹

²⁴ Russian Federation’s Timeline, ¶ 7; Ukraine’s Timeline, ¶ 5; FSB Report (UA-4), Translation, p. 2; Preliminary Objections Hearing, 11 October 2021, 20:17–20, 38:1–6 (Wordsworth), 64:24–25, 65:1–5 (Pellet).

²⁵ Ukraine’s Timeline, ¶ 5; Hrytsenko Statement, ¶ 11; Mokryak Statement, ¶ 8; Ukraine Navy Report (UA-5), ¶ 9.

²⁶ Russian Federation’s Timeline, ¶ 7; FSB Report (UA-4), Translation, p. 2.

²⁷ Russian Federation’s Timeline, ¶ 7; Ukraine’s Timeline, ¶ 6; FSB Report (UA-4), Translation, pp. 2–3; Preliminary Objections Hearing, 14 October 2021, 257:8–10 (Wordsworth).

²⁸ Ukraine’s Timeline, ¶ 6; Hrytsenko Statement, ¶ 12.

²⁹ Ukraine’s Timeline, ¶ 7; Hrytsenko Statement, ¶ 13; Preliminary Objections Hearing, 15 October 2021, 429:8–12 (Cheek).

³⁰ Russian Federation’s Timeline, ¶ 7; FSB Report (UA-4), Translation, p. 3.

³¹ Russian Federation’s Timeline, ¶ 8; Ukraine’s Timeline, ¶ 8; FSB Report (UA-4), Translation, p. 3; Ukraine Navy Report (UA-5), ¶ 11; Hrytsenko Statement, ¶ 14.

55. At approximately 06:01–06:20 (EET) / 07:01–07:20 (MSK) on 25 November 2018, the FSB Border Patrol Ships *Izumrud* and *Don*³² stated via radio that the *Berdyansk*, *Nikopol* and *Yani Kapu* had unlawfully crossed the Russian State border and ordered them to leave. The *Izumrud* and *Don* then commenced manoeuvres to prevent the *Berdyansk*, *Nikopol* and *Yani Kapu* from sailing toward the Kerch Strait.³³
56. According to Ukraine, the *Berdyansk* responded that the three naval vessels would leave if the Kerch Strait authorities confirmed that the Kerch Strait was closed.³⁴ The Russian Federation denies this and asserts that the vessels simply ignored these demands and proceeded towards the Kerch Strait.³⁵
57. At approximately 06:20–06:30 (EET) / 07:20–07:30 (MSK) on 25 November 2018, the *Izumrud* and *Don*, along with other Russian vessels including at least one naval vessel from the Russian Black Sea Fleet, continued manoeuvres to prevent the *Berdyansk*, *Nikopol* and *Yani Kapu* from sailing toward the Kerch Strait.³⁶ During these manoeuvres, the *Don* rammed the *Yani Kapu*.³⁷
58. At approximately 06:30–09:35 (EET) / 07:30–10:35 (MSK) on 25 November 2018, the *Berdyansk*, *Nikopol* and *Yani Kapu* proceeded around Russian vessels to anchorage area No. 471 and stopped there. During this time, the gun barrels on the *Berdyansk* were uncovered and were at one point raised to a 45–50 degree angle and then lowered again.³⁸ While the Russian Federation asserts that the gun barrels were not only raised, but also pointed at the Russian vessels during this time,³⁹ Ukraine maintains that there were visible coloured barrel caps on the gun

³² These FSB Border Patrol Ships form part of the Russian Federation’s coast guard rather than its navy.

³³ Russian Federation’s Timeline, ¶ 9; Ukraine’s Timeline, ¶ 8; FSB Report (UA-4), Translation, p. 3; Ukraine Navy Report (UA-5), ¶ 11; Hrytsenko Statement, ¶¶ 14–15.

³⁴ Ukraine’s Timeline, ¶ 8; Hrytsenko Statement, ¶ 14; Preliminary Objections Hearing, 15 October 2021, 430:1–5 (Cheek).

³⁵ Russian Federation’s Timeline, ¶ 9.

³⁶ According to Ukraine, this included the Russian Naval Vessel *Suzdalets*. Ukraine’s Timeline, ¶ 8; Ukraine Navy Report (UA-5), ¶ 11; Hrytsenko Statement, ¶ 15.

³⁷ Russian Federation’s Timeline, ¶ 9; Ukraine’s Timeline, ¶ 9; FSB Report (UA-4), Translation, p. 3; Ukraine Navy Report (UA-5), ¶ 11; Hrytsenko Statement, ¶ 15; Preliminary Objections Hearing, 11 October 2021, 39:2–4 (Wordsworth); Preliminary Objections Hearing, 15 October 2021, 430:6–10 (Cheek).

³⁸ Russian Federation’s Timeline, ¶ 9; Ukraine’s Timeline, ¶¶ 9–10; Hrytsenko Statement, ¶ 15; Mokryak Statement, ¶ 10.

³⁹ Russian Federation’s Timeline, ¶ 10; FSB Report (UA-4), Translation, p. 3; On the unlawful actions of the vessels of the Naval forces of Ukraine in the Russian territorial sea, Press Release, Federal Security Service of the Russian Federation (RU-21), Translation, p. 2; Preliminary Objections Hearing, 11 October 2021, 65:19–21 (Pellet).

barrels and metal covers on the guns’ optics on the *Berdyansk* and *Nikopol*, indicating that they were not operational at that time.⁴⁰

59. According to Ukraine, the *Berdyansk* had contacted Kerch Traffic Control and was directed to anchorage area No. 471, having been informed that the *Berdyansk*, *Nikopol* and *Yani Kapu* would be allowed to transit with a “caravan” heading north.⁴¹ The Russian Federation denies this.
60. From approximately 09:35 (EET) / 10:35 (MSK) to approximately 17:30 (EET) / 18:30 (MSK) on 25 November 2018, the *Berdyansk*, *Nikopol* and *Yani Kapu* remained in anchorage area No. 471, surrounded by Russian vessels and with one or more Russian military helicopters flying overhead.⁴²
61. During this time, Ukraine asserts that, while Russian coast guard vessels periodically ordered the *Berdyansk*, *Nikopol* and *Yani Kapu* to leave, Kerch Traffic Control eventually stated on open channels that a tanker had run aground and the Kerch Strait was closed as a consequence. The *Berdyansk* then radioed Kerch Traffic Control and nearby Russian coast guard vessels to state that the *Berdyansk*, *Nikopol* and *Yani Kapu* were abandoning transit and leaving the area.⁴³
62. At approximately 17:30–18:30 (EET) / 18:30–19:30 (MSK) on 25 November 2018, the *Berdyansk*, *Nikopol* and *Yani Kapu* began to leave anchorage area No. 471 in a south-southwesterly direction (approximately 200 degrees). The *Izumrud* and *Don* then followed and ordered the *Berdyansk*, *Nikopol* and *Yani Kapu* to stop.⁴⁴

⁴⁰ Ukraine’s Timeline, ¶ 10; Mokryak Statement, ¶¶ 9–10; Nebylytsia Statement, ¶ 11; Preliminary Objections Hearing, 15 October 2021, 406:7–25, 407:1–15 (Cheek).

⁴¹ Ukraine’s Timeline, ¶ 10; Mokryak Statement, ¶ 11; Hrytsenko Statement, ¶¶ 15–16; Nebylytsia Statement, ¶ 11; Preliminary Objections Hearing, 15 October 2021, 430:14–22 (Cheek).

⁴² Russian Federation’s Timeline, ¶ 11; Ukraine’s Timeline, ¶ 11; FSB Report (UA-4), Translation, pp. 3–4; Ukraine Navy Report (UA-5), ¶ 13; Hrytsenko Statement, ¶ 17; Nebylytsia Statement, ¶ 12.

⁴³ Ukraine’s Timeline, ¶ 12; Ukraine Navy Report (UA-5), ¶ 14; Hrytsenko Statement, ¶ 18; Nebylytsia Statement, ¶ 13; Mokryak Statement, ¶ 12; Preliminary Objections Hearing, 15 October 2021, 432:3–7 (Cheek).

⁴⁴ Russian Federation’s Timeline, ¶ 12; Ukraine’s Timeline, ¶¶ 13–14; FSB Report (UA-4), Translation, p. 4; Ukraine Navy Report (UA-5), ¶ 14; Hrytsenko Statement, ¶¶ 18–19; Nebylytsia Statement, ¶¶ 13–14; Mokryak Statement, ¶¶ 12–13; Preliminary Objections Hearing, 12 October 2021, p. 165:15–18 (Cheek); Preliminary Objections Hearing, 11 October 2021, 41:1–10 (Wordsworth), 66:1–2 (Pellet); Preliminary Objections Hearing, 15 October 2021, 433:1–7 (Cheek).

63. According to the Russian Federation, the three ships had deliberately manoeuvred around a blockade to begin sailing out of the territorial sea.⁴⁵ Ukraine denies that the vessels “broke through a blockade” in order to begin sailing away.⁴⁶
64. At approximately 18:30–19:30 (EET) / 19:30–20:30 (MSK) on 25 November 2018, the *Izumrud* and *Don* continued to follow the *Berdyansk*, *Nikopol* and *Yani Kapu*, repeating audio and visual stop signals.⁴⁷
65. The Russian Federation asserts that the group of Ukrainian naval vessels failed to respond to any communications.⁴⁸ Ukraine denies this and alleges that the *Berdyansk* responded via radio that they were on a peaceful mission and acting according to the Sea of Azov Treaty and international law.⁴⁹
66. At approximately 19:30–19:45 (EET) / 20:30–20:45 (MSK) on 25 November 2018, the *Izumrud* issued a warning and then fired warning shots.⁵⁰
67. The Russian Federation alleges that these warning shots were fired in the territorial sea at 44°53.47' N, 36°25.76' E,⁵¹ and that the *Berdyansk*, *Nikopol* and *Yani Kapu* turned off their running lights so that they were harder to hit.⁵²
68. At approximately 19:30–19:45 (EET) / 20:30–20:45 (MSK) on 25 November 2018, the *Izumrud* fired shots and hit the *Berdyansk*. The *Berdyansk* heaved to, began drifting, and radioed on open channels to report that there were injured people on board and to request assistance.⁵³

⁴⁵ FSB Report (UA-4), Translation, p. 4; Preliminary Objections Hearing, 11 October 2021, 41:1–10 (Wordsworth).

⁴⁶ Ukraine’s Post-Hearing Observations, ¶¶ 34–42; Preliminary Objections Hearing, 15 October 2021, 432:8–24 (Cheek).

⁴⁷ Russian Federation’s Timeline, ¶ 12; Ukraine’s Timeline, ¶¶ 14–15; FSB Report (UA-4), Translation, p. 4; Ukraine Navy Report (UA-5), ¶ 14; Hrytsenko Statement, ¶ 19; Nebylytsia Statement, ¶ 14; Mokryak Statement, ¶ 13; Preliminary Objections Hearing, 12 October 2021, 148:3–13 (Cheek), 176:9–14 (Cheek).

⁴⁸ Russian Federation’s Timeline, ¶ 12; FSB Report (UA-4), Translation, p. 4; Preliminary Objections Hearing, 11 October 2021, 41:1–10 (Wordsworth).

⁴⁹ Hrytsenko Statement, ¶ 19.

⁵⁰ Russian Federation’s Timeline, ¶¶ 13–14; Ukraine’s Timeline, ¶ 16; FSB Report (UA-4), Translation, pp. 4–5; Ukraine Navy Report (UA-5), ¶ 14; Hrytsenko Statement, ¶ 20; Nebylytsia Statement, ¶ 14; Preliminary Objections Hearing, 11 October 2021, 41:11–17 (Wordsworth).

⁵¹ Russian Federation’s Timeline, ¶ 14; FSB Report (UA-4), Translation, pp. 4–5.

⁵² Hrytsenko Statement, ¶ 20.

⁵³ Russian Federation’s Timeline, ¶ 15; Ukraine’s Timeline, ¶ 17; FSB Report (UA-4), Translation, pp. 5–6; Ukraine Navy Report (UA-5), ¶ 14; Hrytsenko Statement, ¶ 21; Nebylytsia Statement, ¶ 14; Preliminary Objections Hearing, 11 October 2021, 66:3–17 (Pellet).

69. According to Ukraine, the *Yani Kapu* turned around after the *Berdyansk* called for help. In addition, prior to being hit, the *Berdyansk* had radioed on open channels to state that it had exited the territorial sea.⁵⁴ Ukraine adds that an additional round was fired and hit the *Berdyansk* a second time.⁵⁵ The Russian Federation denies that any such radio communication was made, and asserts that the shots against the *Berdyansk* were fired in the territorial sea at 44°51.3' N, 36°23.4' E.⁵⁶
70. At approximately 20:06 (EET) / 21:06 (MSK) on 25 November 2018, the *Izumrud* boarded and arrested the *Berdyansk*.⁵⁷ Ukraine alleges that the arrest occurred outside the territorial sea.⁵⁸ The Russian Federation, however, asserts that the arrest took place in the territorial sea at 44°51.5' N, 36°23.6' E.⁵⁹
71. At approximately 20:15 (EET) / 21:15 (MSK) on 25 November 2018, the *Don* arrested the *Yani Kapu*.⁶⁰ Ukraine alleges that the arrest occurred outside the territorial sea.⁶¹ The Russian Federation, however, asserts that the arrest took place in the territorial sea at 44°53' N, 36°25' E.⁶²
72. At approximately 20:27–20:30 (EET) / 21:27–21:30 (MSK) on 25 November 2018, a Russian Ka-52 military helicopter warned the *Nikopol* to stop or it would fire. The *Nikopol* then stopped.⁶³
73. The Russian Federation alleges that the *Nikopol* stopped in the territorial sea, while the Black Sea Fleet Corvette *Suzdalets* monitored it.⁶⁴ Ukraine denies that this occurred in the territorial sea.

⁵⁴ Hrytsenko Statement, ¶ 20; Melnychyk Statement, ¶ 15.

⁵⁵ Hrytsenko Statement, ¶ 21.

⁵⁶ Russian Federation's Timeline, ¶ 15; FSB Report (UA-4), Translation, pp. 5–6.

⁵⁷ Russian Federation's Timeline, ¶ 16; Ukraine's Timeline, ¶ 18; FSB Report (UA-4), Translation, p. 6; Ukraine Navy Report (UA-5), ¶ 15; Hrytsenko Statement, ¶ 22–23.

⁵⁸ Ukraine's Timeline, ¶ 18.

⁵⁹ Russian Federation's Timeline, ¶ 16; Preliminary Objections Hearing, 14 October 2021, 323:8–20 (Pellet).

⁶⁰ Russian Federation's Timeline, ¶ 17; Ukraine's Timeline, ¶ 19; FSB Report (UA-4), Translation, p. 6; Ukraine Navy Report (UA-5), ¶ 15; Melnychyk Statement, ¶¶ 15–16; Preliminary Objections Hearing, 11 October 2021, 66:10–11 (Pellet); Ukraine's Memorial, ¶ 36.

⁶¹ Ukraine's Timeline, ¶ 19; Melnychyk Statement, ¶ 15; Preliminary Objections Hearing, 12 October 2021, 149:15–24 (Cheek).

⁶² Russian Federation's Timeline, ¶ 17; Maneuvering of Ukrainian naval vessels from 18:30 till 23:21, 25 November 2018 (RU-51) ("Maneuvering Illustration Map").

⁶³ Russian Federation's Timeline, ¶ 18; Ukraine's Timeline, ¶ 20; FSB Report (UA-4), Translation, p. 6; Ukraine Navy Report (UA-5), ¶ 15; Nebylytsia Statement, ¶¶ 15–16; Preliminary Objections Hearing, 11 October 2021, 42:2–15 (Wordsworth).

⁶⁴ Russian Federation's Timeline, ¶ 18; Maneuvering Illustration Map; FSB Report (UA-4), Translation, p. 6; Preliminary Objections Hearing, 14 October 2021, 326:1–6 (Pellet).

74. At approximately 22:20–22:21 (EET) / 23:20–23:21 (MSK) on 25 November 2018, the *Don* boarded and arrested the *Nikopol*.⁶⁵ It is common ground that this took place outside the territorial sea. The Russian Federation alleges that the *Nikopol* was arrested only a short distance outside the territorial sea (at 44°51' N, 36°28' E) after drifting from the position where it had been stopped.⁶⁶ Ukraine, however, alleges that the *Nikopol* was arrested at approximately 20 miles from the coast, well outside the territorial sea.⁶⁷

VI. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION PURSUANT TO ARTICLE 298(1)(b) OF THE CONVENTION BECAUSE THE DISPUTE CONCERNS "MILITARY ACTIVITIES"

75. Article 298(1)(b) of the Convention provides:

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 [of Part XV], declare in writing that it does not accept any one or more of the procedures provided for in section 2 [of Part XV] 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.

76. Pursuant to Article 298(1)(b), both Ukraine and the Russian Federation have excluded "disputes concerning military activities" from the jurisdiction of an arbitral tribunal.⁶⁸ The Parties, however, differ on whether this exclusion covers the present dispute. The Russian Federation submits that the dispute concerns "military activities", whether or not the activities in question might also be

⁶⁵ Russian Federation's Timeline, ¶ 19; Ukraine's Timeline, ¶ 21; FSB Report (UA-4), Translation, p. 6; Ukraine Navy Report (UA-5), ¶ 15; Nebylytsia Statement, ¶ 16; Preliminary Objections Hearing, 12 October 2021, 196:21–22 (Soons); Preliminary Objections Hearing, 11 October 2021, 66:11–17 (Pellet).

⁶⁶ Preliminary Objections Hearing, 14 October 2021, 326:1–327:2 (Pellet).

⁶⁷ Ukraine's Timeline, ¶ 21; Ukraine Navy Report (UA-5), ¶ 15; Preliminary Objections Hearing, 12 October 2021, 149:15–24 (Cheek).

⁶⁸ Ukraine's Memorial, fn. 130; Russian Federation's Preliminary Objections, ¶¶ 3, 25 referring to UNCLOS, Declarations of Ukraine, United Nations, Multilateral Treaties Deposited with the Secretary-General, Chapter XXI, No. 6, p. 32 (UA-15) ("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."); UNCLOS, Declarations of the Russian Federation, United Nations, Multilateral Treaties Deposited with the Secretary-General, Chapter XXI, No. 6, p. 28 (UA-16) ("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").

characterized as “law enforcement activities”. Ukraine submits that the dispute concerns law enforcement activities, and not military activities.

A. POSITION OF THE RUSSIAN FEDERATION

77. The Russian Federation submits that the present dispute falls outside the Arbitral Tribunal’s jurisdiction pursuant to the declaration made by the Russian Federation under Article 298(1)(b) of the Convention. This article allows a State Party to declare in writing that it does not accept binding dispute resolution procedures provided for in Section 2 of Part XV of the Convention for certain kinds of disputes. The relevant declarations made by the Russian Federation and Ukraine pursuant to Article 298(1)(b) exclude “disputes concerning military activities”.⁶⁹ The Russian Federation contends that the present dispute is a “dispute concerning military activities”, such that the Arbitral Tribunal lacks jurisdiction over Ukraine’s claims.⁷⁰
78. The Russian Federation argues that “the formulation ‘disputes concerning military activities’ is drafted in broad, unqualified terms” encompassing any activities relating to the armed forces. The Russian Federation adds that Article 298(1)(b) requires an “objective evaluation of the relevant activities, and their nature, taking into account the relevant circumstances”, as called for by ITLOS in its Provisional Measures Order.⁷¹ More particularly, the Russian Federation submits that the term “military” “means no more and no less than relating to the armed forces”.⁷² The Russian Federation contends that this interpretation is supported by the explicit inclusion in Article 298(1)(b) of military activities by government vessels and aircraft engaged in non-commercial service.⁷³ The Russian Federation also argues that the term “activities” is “inherently

⁶⁹ Russian Federation’s Preliminary Objections, ¶ 25.

⁷⁰ Russian Federation’s Preliminary Objections, ¶ 27; Preliminary Objections Hearing, 11 October 2021, 21:19–24 (Lobach).

⁷¹ Russian Federation’s Preliminary Objections, ¶ 34 referring to ITLOS Provisional Measures Order, ¶ 66; *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order, Separate Opinion of Judge Gao, 25 May 2019 (**RUL-32**) (“**Separate Opinion of Judge Gao**”), ¶¶ 22, 30.

⁷² Russian Federation’s Preliminary Objections, ¶ 29(a).

⁷³ Russian Federation’s Preliminary Objections, ¶ 29(b); The Russian Federation also finds confirmation for this interpretation in the activities mentioned in Article 19 of the Convention that Judge Jesus’s Separate Opinion at the provisional measures phase of this case included among the activities that he “believe[d] are military in nature”. See Russian Federation’s Preliminary Objections, ¶ 29(b), (d) referring to *Case Concerning The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order, Separate Opinion of Judge Jesus, 25 May 2019 (**RUL-33**) (“**Separate Opinion of Judge Jesus**”), ¶ 15; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, PCA Case No. 2017-06, Award, 21 February 2020 (**UAL-25**) (“**Coastal State Rights**”), ¶ 331; (“[T]here 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

broad” with “no further qualification”.⁷⁴ The Russian Federation adds that the term “concerning” is similarly broad and unqualified, drawing comparisons to the findings of other international tribunals regarding the breadth of the term.⁷⁵ The Russian Federation concludes that, in light of the “breadth of the terms used” in Article 298(1)(b), “no high threshold should be imposed” in order for activities to qualify as military activities for the purposes of the exclusion.⁷⁶

79. The Russian Federation disagrees with Ukraine’s position that the activities at issue are “law enforcement activities” and therefore do not qualify as “military activities” for the purposes of the Article 298(1)(b) exception.⁷⁷ In particular, the Russian Federation rejects Ukraine’s characterization of “military activities” and “law enforcement activities” as mutually exclusive categories.⁷⁸ The Russian Federation argues that, even if the categories may be seen as separate, this “does not exclude that the same activity may be classified as military when it is also conducted for enforcing the law”.⁷⁹
80. The Russian Federation elaborates that, even if “these activities have an element of law enforcement, or even concern mainly law enforcement [...] they would remain military activities” excluded from compulsory jurisdiction under Article 298(1)(b).⁸⁰ Based on its understanding of the “structure and purpose of Article 298(1)(b)” as well as its negotiating history, the Russian Federation submits that “the concepts of military activities and of law enforcement activities are not mutually exclusive”.⁸¹ In the Russian Federation’s view, the terms “military”, “activities”, and “concerning” in Article 298(1)(b) of the Convention are broad enough to encompass military

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”).

⁷⁴ Russian Federation’s Preliminary Objections, ¶ 29(c).

⁷⁵ Russian Federation’s Preliminary Objections, ¶ 30 referring to *M/V Louisa (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013 (RUL-23) (“*M/V Louisa*”), p. 31, ¶ 83; *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998 (RUL-9) (“*Fisheries Jurisdiction*”), p. 458, ¶ 62; *Coastal State Rights (UAL-25)*, ¶ 331; *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)*, PCA Case No. 2013-19, Award, 12 July 2016 (UAL-7) (“*South China Sea, Award*”), ¶ 1158.

⁷⁶ Russian Federation’s Preliminary Objections, ¶ 34.

⁷⁷ Russian Federation’s Preliminary Objections, ¶¶ 56 et seq. referring to Ukraine’s Memorial, ¶¶ 58–62.

⁷⁸ Russian Federation’s Preliminary Objections, ¶ 56; Preliminary Objections Hearing, 11 October 2021, 89:10–104:22 (Treves); Preliminary Objections Hearing, 14 October 2021, 307:1–314:22 (Treves).

⁷⁹ Preliminary Objections Hearing, 14 October 2021, 309:2–309:10 (Treves).

⁸⁰ Russian Federation’s Preliminary Objections, ¶¶ 5, 52, 56–74. According to the Russian Federation, “[t]he 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.”; see also Preliminary Objections Hearing, 11 October 2021, 89:10–104:22 (Treves).

⁸¹ Russian Federation’s Preliminary Objections, ¶¶ 57, 68; Preliminary Objections Hearing, 11 October 2021, 89:10–104:22 (Treves); Preliminary Objections Hearing, 14 October 2021, 307:1–314:22 (Treves).

activities that are not “exclusively military” and that also include “an element of law enforcement”.⁸² Moreover, the Russian Federation notes that the Convention contains provisions explicitly addressing law enforcement activities that: (i) may only be carried out by warships, military aircraft, or other ships or aircraft marked and identifiable as being on government service and authorized to that effect; but (ii) are not referred to in Article 298(1)(b), save for the “narrow” exceptions of enforcement activities concerning scientific research and fisheries in relation to exclusions from jurisdiction by operation of Articles 297(2) and (3).⁸³ The Russian Federation takes these two observations as indications of an overlap between the categories of law enforcement activities and military activities; indeed, according to the Russian Federation, “[s]tructurally, [Article 298(1)(b)] addresses two categories of disputes: those concerning military activities, and a subgroup of those concerning law enforcement activities.”⁸⁴

81. Using the *Fisheries Jurisdiction (Spain v. Canada)* case to illustrate, the Russian Federation adds that there is a functional difference between deciding, on the one hand, whether under Article 288(1) jurisdiction can be asserted over a dispute that includes a matter not concerning the interpretation or application of the Convention and, on the other hand, whether the dispute is excluded from jurisdiction under Article 298(1)(b).⁸⁵ The latter, it argues, excludes not only disputes whose immediate “subject-matter” is “military activities”, but also all other disputes “concerning military activities”.⁸⁶ The Russian Federation claims that “[a]ny narrower interpretation that confines the relevant question to solely that of the subject matter of the dispute not only cuts across the actual language used – ‘concerning military activities’ – but fails to take account of the context.”⁸⁷ It claims that Ukraine seeks to circumvent Article 298(1)(b) by ignoring context and targeting its pleading on specific activities outside the exclusion.⁸⁸ Even where the relevant question turns on identifying the single subject matter of the dispute, the Russian Federation argues that this identification requires a broader focus than on Ukraine’s claims

⁸² Russian Federation’s Preliminary Objections, ¶ 64; Preliminary Objections Hearing, 11 October 2021, 89:10–104:22 (Treves).

⁸³ Russian Federation’s Preliminary Objections, ¶¶ 65–67, 71 referring to UNCLOS, Articles 110(1), (4)–(5), 111(5), 224; see also Preliminary Objections Hearing, 11 October 2021, 90:8–92:3 (Treves).

⁸⁴ Russian Federation’s Preliminary Objections, ¶ 69; Preliminary Objections Hearing, 14 October 2021, 281:24–282:11 (Wordsworth).

⁸⁵ Preliminary Objections Hearing, 14 October 2021, 258:1–264:11 (Wordsworth) referring to *Fisheries Jurisdiction (RUL-9)*, ¶¶ 62–63.

⁸⁶ Preliminary Objections Hearing, 14 October 2021, 258:1–264:11 (Wordsworth).

⁸⁷ Preliminary Objections Hearing, 14 October 2021, 260:19–24 (Wordsworth).

⁸⁸ Preliminary Objections Hearing, 14 October 2021, 258:1–264:11 (Wordsworth).

alone.⁸⁹ Rather, the Russian Federation contends that the subject matter of a dispute is determined on an objective basis, looking at the Parties' characterizations and the relevant activities as a whole without isolating the boarding, arrest and detention from the immediately prior use of force or other military activities.⁹⁰

82. The Russian Federation considers that the finding by ITLOS that “the dispute does not concern military activities because it concerns law enforcement activities” can “readily be reversed” because the ITLOS Provisional Measures Order is “a *prima facie* decision” where ITLOS “did not need to ‘definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it’”.⁹¹ The Russian Federation refers to a number of separate opinions of ITLOS judges in the provisional measures phase of this case which took the position that “military activities” and “law enforcement activities” are not mutually exclusive categories.⁹² The Russian Federation further argues that the statements of other tribunals and scholarly commentators on which Ukraine relies do not support Ukraine’s view that “the classification as ‘law enforcement’ of Russia’s activities excludes the applicability of the military activities declaration”.⁹³
83. In addition to its submissions on the meaning of the structure and terms employed in Article 298(1)(b), the Russian Federation also argues that the context of Article 298(1)(b) as well as the object and purpose of the Convention support its broad interpretation of “disputes concerning military activities”.⁹⁴ The Russian Federation argues that Part XV of the Convention struck a balance between submission to compulsory dispute resolution and the widely-shared concern of States to exclude sensitive subjects such as “core aspects of State sovereignty” from such

⁸⁹ Preliminary Objections Hearing, 14 October 2021, 264:12–265:11 (Wordsworth).

⁹⁰ Preliminary Objections Hearing, 14 October 2021, 264:17–280:12 (Wordsworth).

⁹¹ Russian Federation’s Preliminary Objections, ¶¶ 26, 58 referring to ITLOS Provisional Measures Order (UAL-2), ¶¶ 36, 122; Preliminary Objections Hearing, 11 October 2021, 99:6–104:22 (Treves).

⁹² Russian Federation’s Preliminary Objections, ¶¶ 59–63 referring to Separate Opinion of Judge Gao (RUL-32), ¶ 49; Separate Opinion of Judge Jesus (RUL-33), ¶ 20; *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order, Separate Opinion of Judge Lucky, 25 May 2019 (RUL-36), ¶ 21; *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order, Declaration of Judge Kittichaisaree, 25 May 2019 (RUL-34), ¶ 4. The Russian Federation also refers to Judge Kolodkin’s position that “[t]he activities of the Applicant were purely military in nature and the activities of the Respondent were military to a large extent.” See Russian Federation’s Preliminary Objections, ¶ 63 quoting *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, ITLOS Case No. 26, Provisional Measures Order, Dissenting Opinion of Judge Kolodkin, 25 May 2019 (RUL-35) (“**Dissenting Opinion of Judge Kolodkin**”), ¶ 22; Preliminary Objections Hearing, 11 October 2021, 99:6–100:8 (Treves); Preliminary Objections Hearing, 14 October 2021, 312:21–313:10 (Treves).

⁹³ Preliminary Objections Hearing, 11 October 2021, 103:18–103:20 (Treves).

⁹⁴ Russian Federation’s Preliminary Objections, ¶¶ 31–33.

procedures.⁹⁵ The Russian Federation urges the Arbitral Tribunal not to interpret declarations excluding military activities from the Convention’s compulsory dispute settlement provisions “in a narrow or restrictive way such that the scope for its practical application is significantly diminished”.⁹⁶ In addition, in its view, a high threshold for military activities “may serve as an incentive for States to escalate rather than de-escalate a conflict”.⁹⁷

84. Turning to the dispute at issue, the Russian Federation contends that it concerns the activities which took place on 25 November 2018 in the Black Sea.⁹⁸ It notes that the detention of Ukrainian military vessels and servicemen “formed part of and resulted directly from that incident of 25 November 2018”.⁹⁹ The Russian Federation notes furthermore that Ukraine refers to violations of UNCLOS (specifically, the demand for the vessels to stop as well as the Russian Federation’s continuing exercise of jurisdiction over the vessels and servicemen beginning with their arrest and detention) arising from events on the evening of 25 November 2018.¹⁰⁰ In this context, the Russian Federation points to a number of “relevant circumstances” which in its view demonstrate that “the events that are at the heart of the current dispute constitute military activities”.¹⁰¹ As the Russian Federation characterizes them, these circumstances include, *inter alia*:

⁹⁵ Russian Federation’s Preliminary Objections, ¶¶ 31–32 referring to *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015 (**RUL-25**) (“**Chagos**”), ¶ 216; M.H. Nordquist (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Vol. V, Nijhoff, 1989 (**RUL-6**), ¶¶ 297.1, 298.2; Separate Opinion of Judge Gao (**RUL-32**), ¶ 9; 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*, Vol. 110, 2016 (**RUL-28**), p. 273.

⁹⁶ Russian Federation’s Preliminary Objections, ¶ 33 referring to N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, Cambridge University Press, 2005 (**RUL-14/UAL-56**) (“**Klein, Dispute Settlement**”), p. 291; S. Talmon, “The South China Sea Arbitration: Is There a Case to Answer?”, *Bonn Research Papers on Public International Law*, Paper No. 2/2014, 9 February 2014, (**RUL-24**), pp. 46–47; Preliminary Objections Hearing, 11 October 2021, 28:2–16 (Wordsworth).

⁹⁷ Russian Federation’s Preliminary Objections, ¶ 70 referring to Separate Opinion of Judge Gao (**RUL-32**), ¶¶ 9, 41, 45–46; see also Russian Federation’s Preliminary Objections, ¶ 33; Preliminary Objections Hearing, 11 October 2021, 59:5–24 (Wordsworth).

⁹⁸ Russian Federation’s Preliminary Objections, ¶ 35–36 referring to Ukraine’s Memorial, ¶ 21 (“The events giving rise to this dispute occurred in the Black Sea”); Ukraine’s Memorial, ¶ 77 (“The events giving rise to Russia’s violations of UNCLOS occurred in the evening of 25 November 2018.”); Ukraine’s Memorial, ¶ 53 citing 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**).

⁹⁹ Russian Federation’s Preliminary Objections, ¶ 37 referring to Opening Criminal Case Order (**UA-13**), p. 1; Ukraine’s Memorial, ¶¶ 20, 50–51, 61, 63; 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 (**UA-1**), ¶ 2.

¹⁰⁰ Russian Federation’s Preliminary Objections, ¶ 38 referring to Ukraine’s Memorial, ¶ 153.

¹⁰¹ Russian Federation’s Preliminary Objections, ¶¶ 35–54, 73. In particular, the Russian Federation contends that these circumstances also satisfy the criteria identified by the *South China Sea* arbitral tribunal of 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. See Russian Federation’s Preliminary Objections, ¶ 39 referring to *South China Sea*, Award (**UAL-7**), ¶ 1161. The Russian Federation further contends that there is a “parallel between the facts [...]

- a) that military personnel were present on both sides;¹⁰²
- b) that the three Ukrainian vessels that were detained were military vessels;¹⁰³
- c) that the three Ukrainian vessels were armed with guns and artillery, some of which were operational;¹⁰⁴
- d) that when the Ukrainian vessels did not comply with the Russian Federation’s order to stop, the “Ukrainian military and the Russian Federation’s military were arrayed in opposition to each other”,¹⁰⁵
- e) that there was threatened and actual use of force by the forces of the Russian Federation against the Ukrainian vessels and servicemen;¹⁰⁶
- f) that the Russian Federation’s conduct was in response to “an illegal crossing of its State border by another State’s warships” and that “the Russian military was protecting its State national security interests given the unwarranted (armed) presence of the military of another State”;¹⁰⁷

at issue [in the *South China Sea* case] and the facts now before [the Arbitral Tribunal]” and indeed that “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”. In this light, the Russian Federation recalls that the *South China Sea* tribunal deemed the facts presented in that case to “fall well within the exception”, rendering it unnecessary “to explore the outer bounds of what would or would not constitute military activities for the purposes of Article 298(1)(b)”. See Russian Federation’s Preliminary Objections, ¶¶ 53–54 *referring to South China Sea*, Award (UAL-7), ¶ 1161.

¹⁰² Russian Federation’s Preliminary Objections, ¶ 40; Preliminary Objections Hearing, 11 October 2021, 32:1–18 (Wordsworth).

¹⁰³ Russian Federation’s Preliminary Objections, ¶ 41; Preliminary Objections Hearing, 11 October 2021, 32:1–18 (Wordsworth).

¹⁰⁴ Russian Federation’s Preliminary Objections, ¶ 42; Preliminary Objections Hearing, 11 October 2021, 32:19–34:5 (Wordsworth).

¹⁰⁵ Russian Federation’s Preliminary Objections, ¶ 43; Preliminary Objections Hearing, 11 October 2021, 38:1–41:10 (Wordsworth).

¹⁰⁶ Russian Federation’s Preliminary Objections, ¶¶ 27, 44. The Russian Federation submits that “[t]he 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.” See Russian Federation’s Preliminary Objections, ¶ 50 *referring to* Separate Opinion of Judge Gao (RUL-32), ¶ 33; Preliminary Objections Hearing, 11 October 2021, 40:7–42:25 (Wordsworth).

¹⁰⁷ Russian Federation’s Preliminary Objections, ¶ 45; Preliminary Objections Hearing, 11 October 2021, 43:23–44:11 (Wordsworth).

- g) that the activities of 25 October 2018 were preceded by Ukraine’s military build-up in Berdyansk and the Sea of Azov, and amidst “the wider context of the dispute between Ukraine and Russia about the alleged annexation of Crimea”;¹⁰⁸ and
- h) that the Russian Federation,¹⁰⁹ Ukraine,¹¹⁰ third States¹¹¹ and international organizations¹¹² have characterized the activities of 25 November 2018 as

¹⁰⁸ Russian Federation’s Preliminary Objections, ¶¶ 27, 46 referring to “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> (RU-46); “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); “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); Russian Federation’s Memorandum, ITLOS (UA-2), ¶ 11; Preliminary Objections Hearing, 11 October 2021, 19:11–19 (Lobach), 30:14–31:9 (Wordsworth).

¹⁰⁹ Russian Federation’s Preliminary Objections, ¶ 48 referring to United Nations Security Council, 8409th meeting, 26 November 2018, S/PV.8409 (RU-15), p. 2; United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410 (RU-16), p. 14; Preliminary Objections Hearing, 11 October 2021, 43:23–44:18 (Wordsworth).

¹¹⁰ Russian Federation’s Preliminary Objections, ¶¶ 4, 49 referring to United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56 (RU-27), p. 11 (“blatant and barefaced act of military aggression against Ukraine by the Russian Federation”); 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) (“armed assault by Russian naval vessels and special forces”); 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) (“military incident”); “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> (RU-42); United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410, pp. 10, 12 (RU-16); 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); National Security and Defence 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); “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); “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);

Facebook page of Yuriy Lutsenko, Prosecutor General of Ukraine, 25 November 2018, available at <https://www.facebook.com/LlutsenkoYuri/posts/1073660022833172> (RU-14); “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); United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56 (RU-27), p. 11.

¹¹¹ Russian Federation’s Preliminary Objections, ¶ 51(c) referring to United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410 (RU-16), pp. 3–4, 9; United Nations General Assembly, 73rd session, 56th plenary meeting, 17 December 2018, A/73/PV.56 (RU-27), pp. 16–17.

¹¹² Russian Federation’s Preliminary Objections, ¶ 51(a)–(b) referring to OHCHR, “Report on the human rights situation in Ukraine 16 November 2018 to 15 February 2019”, 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

“military in nature”.¹¹³

85. The Russian Federation highlights several additional circumstances that in its view demonstrate that the events were military in nature.¹¹⁴ First, it notes the specific military activity of Ukraine, notably what the Russian Federation characterizes as a “covert military operation” of Ukraine’s warships in their intended redeployment to Berdyansk in the Sea of Azov, as confirmed by a checklist discovered on the *Nikopol*.¹¹⁵ Second, the Russian Federation asserts that the “Ukrainian warships raised their guns towards the Russian vessels, and vessels of the FSB Border Service, supported by Russian naval and military airpower, rammed one Ukrainian vessel and used armed force against another”.¹¹⁶ Third, the Russian Federation emphasizes that Ukraine has characterized the activities as military “time and again before multiple international bodies”.¹¹⁷
86. While the Russian Federation argues that weight should be accorded to what both States have said, it contends that particular weight should be accorded to Ukraine’s characterizations of the relevant acts.¹¹⁸ It notes that “it is well established under international law that a statement against interest has particular probative value as a form of admission”, and it does not accept that Ukraine’s past characterizations can be explained as being based on limited information.¹¹⁹ Citing

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); 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).

¹¹³ Russian Federation’s Preliminary Objections, ¶¶ 47–52. In relation to Ukraine’s statements in particular, the Russian Federation relies on the “well-established concept in interstate proceedings of statements against interest” to argue that particular weight should be given to statements that Ukraine made in the immediate aftermath of the events concerned and outside the context of the present claim. See Russian Federation’s Preliminary Objections, ¶ 49 referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, I.C.J. Reports 2007 (RUL-15) (“*Bosnian Genocide*”), p. 135, ¶ 227; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986 (RUL-5), p. 41, ¶ 64; Preliminary Objections Hearing, 11 October 2021, 43:1–50:15 (Wordsworth).

¹¹⁴ Preliminary Objections Hearing, 11 October 2021, 28:24–31:25 (Wordsworth).

¹¹⁵ Preliminary Objections Hearing, 11 October 2021, 28:24–29:5 (Wordsworth); Preliminary Objections Hearing, 14 October 2021, 283:25–287:15 (Sander) referring to 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) (describing the mission as “[t]o sail 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. To navigate through the KYC accompanied by a tugboat. The tugboat is the harbour tugboat ‘Yani Kapu’. In performing the task, the major focus should be on ensuring the secrecy of approach to the KYC and passage through it.”).

¹¹⁶ Preliminary Objections Hearing, 11 October 2021, 29:6–29:15 (Wordsworth).

¹¹⁷ Preliminary Objections Hearing, 11 October 2021, 29:23–25 (Wordsworth); Preliminary Objections Hearing, 14 October 2021, 302:7–305:19 (Sander).

¹¹⁸ Preliminary Objections Hearing, 11 October 2021, 56:13–58:16 (Wordsworth).

¹¹⁹ Preliminary Objections Hearing, 11 October 2021, 57:18–57:23 (Wordsworth); Preliminary Objections Hearing, 14 October 2021, 269:3–274:7 (Wordsworth); Preliminary Objections Hearing, 14 October 2021, 299:19–302:10 (Sander).

the *Bosnian Genocide* case before the International Court of Justice (the “ICJ”), the Russian Federation points to the source, the process of generation, the quality and the character of Ukraine’s pre-arbitration statements as demonstrating that “the greatest of weight” should be placed on them.¹²⁰ The Russian Federation also contends that its words and actions are consistent with its position that the activities are military in nature.¹²¹

87. The Russian Federation also points out that Ukraine characterizes the activities at issue as domestic law enforcement activities (for the purposes of the military activities exception) while emphasizing the military nature of its vessels (for the purpose of claiming immunities).¹²²

B. POSITION OF UKRAINE

88. Ukraine’s position is that the subject matter of this dispute concerns the lawfulness of the Russian Federation’s exercise of law enforcement jurisdiction rather than the lawfulness of any military activities. Ukraine therefore contends that the present dispute is not excluded from the jurisdiction of this Arbitral Tribunal by operation of the military activities exception in Article 298(1)(b) of the Convention.¹²³ In particular, Ukraine rejects the Russian Federation’s textual and purposive arguments regarding the breadth of Article 298(1)(b)’s exclusion for “military activities”.¹²⁴
89. Ukraine submits that “Article 298(1)(b) expressly distinguishes between military activities and law enforcement activities”,¹²⁵ and argues that the two categories are mutually exclusive based on a plain reading of Article 298,¹²⁶ interpretations by ITLOS in its Provisional Measures Order¹²⁷

¹²⁰ Preliminary Objections Hearing, 14 October 2021, 269:3–274:7 (Wordsworth) *referring to Bosnian Genocide (RUL-15)*, ¶ 227.

¹²¹ Preliminary Objections Hearing, 14 October 2021, 289:24–299:18 (Sander).

¹²² Russian Federation’s Preliminary Objections, ¶ 50, 72 *referring to* Ukraine’s Memorial, ¶¶ 1, 7, 61, 140; ITLOS Provisional Measures Order (UAL-2), ¶ 110; B.H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea”, *Virginia Journal of International Law*, Vol. 24, 1984 (RUL-4), p. 823 (*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”).

¹²³ Ukraine’s Observations, ¶¶ 14 *et seq.*; Preliminary Objections Hearing, 12 October 2021, 142:14–145:17 (Cheek).

¹²⁴ Ukraine’s Observations, ¶ 57.

¹²⁵ Ukraine’s Observations, ¶ 16, 68; Preliminary Objections Hearing, 12 October 2021, 177:12–182:3 (Cheek).

¹²⁶ Ukraine’s Observations, ¶¶ 49–51; Preliminary Objections Hearing, 15 October 2021, 434:1–435:20 (Cheek).

¹²⁷ Ukraine’s Observations, ¶ 52 *referring to* ITLOS Provisional Measures Order (UAL-2), ¶¶ 63–66, 74–77. Ukraine submits that the Russian Federation misconstrues several separate opinions by ITLOS judges in the provisional measures phase of this case while ignoring the fact that the Provisional Measures Order “recognized the Convention’s distinction between military and law enforcement activities”. *See* Ukraine’s Observations, ¶¶ 55–56 *referring to* Russian Federation’s Preliminary Objections, ¶¶ 57–60; Separate Opinion of Judge Gao (RUL-32), ¶¶ 50–52; Dissenting Opinion of Judge Kolodkin (RUL-35), ¶ 21; Preliminary Objections Hearing, 15 October 2021, 439:4–442:23 (Cheek).

and by the Annex VII Arbitral Tribunal in the *Coastal State Rights* arbitration,¹²⁸ commentators¹²⁹ and the negotiating history of Article 298(1)(b).¹³⁰ Ukraine explains that by referring separately to “disputes concerning military activities” and “disputes concerning [some, but not all] law enforcement activities”, Article 298(1)(b) “requires these concepts to be treated as distinct”.¹³¹ The use of the term “law enforcement activities” in Article 298(1)(b), according to Ukraine, specifically refers to juridical acts (as is particularly evident from the use of the terms *actes d’exécution forcée* and *actividades encaminadas a hacer cumplir las normas legales* in the French and Spanish texts, respectively) that are “fundamentally distinct” from military activities.¹³² Ukraine submits that, contrary to the Russian Federation’s interpretation, Article 298(1)(b) only allows States to exclude two limited subcategories of law enforcement activities (relating to marine scientific research and fisheries) from compulsory dispute resolution, mirroring the exclusion of jurisdiction of courts and tribunals over such disputes under Articles 297(2) and 297(3).¹³³ Lastly, Ukraine rejects the Russian Federation’s reliance on the separate opinions issued in the provisional measures proceedings before ITLOS.¹³⁴ Ukraine claims that both the ITLOS majority’s decision and the separate opinions thereto recognize that activities must be characterized as having either a military or a law enforcement nature for the purposes of Article 298(1)(b).¹³⁵

90. According to Ukraine, “[i]t is well-settled, in both judicial practice and scholarly commentary, that a dispute ‘concerns’ military activities only when the specific subject matter of the dispute, *i.e.*, the basis for the applicant’s legal claim, is a military activity; that the mere involvement of military (or coast guard) vessels does not trigger the exception; and that the acts of law

¹²⁸ Ukraine’s Observations, ¶ 52 referring to *Coastal State Rights* (UAL-25), ¶¶ 335–338.

¹²⁹ Ukraine’s Observations, ¶¶ 48, 53–54 referring to M.H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Part XV, Nijhoff, 2014 (UAL-8), ¶ 298.34; G. Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms*, 1985 (UAL-64), p. 148; B. Vukas, “Peaceful Uses of the Sea, Denuclearization and Disarmament”, in R.-J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Nijhoff, 1991 (UAL-65), pp. 1248–1249; Klein, *Dispute Settlement* (RUL-14/UAL-56), pp. 312–313; Preliminary Objections Hearing, 15 October 2021, 439:11–440:4 (Cheek).

¹³⁰ Preliminary Objections Hearing, 15 October 2021, 435:21–440:4 (Cheek).

¹³¹ Ukraine’s Observations, ¶ 49.

¹³² Ukraine’s Observations, ¶ 50.

¹³³ Ukraine’s Observations, ¶ 51 referring to Russian Federation’s Preliminary Objections, ¶¶ 67, 71; Third United Nations Conference on the Law of the Sea, Report of the President on the Work of the Informal Plenary Meeting of the Conference on the Settlement of Disputes, U.N. Doc. A/CONF.62/L.52 (29 March and 1 April 1980) (UAL-63), ¶ 7; *The Arctic Sunrise Arbitration (Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on Jurisdiction, 26 November 2014 (UAL-44) (“*Arctic Sunrise, Jurisdiction Award*”), ¶ 69.

¹³⁴ Preliminary Objections Hearing, 12 October 2021, 182:4–183:3 (Cheek).

¹³⁵ Preliminary Objections Hearing, 12 October 2021, 182:4–183:3 (Cheek).

enforcement, such as an attempted exercise of the right of hot pursuit, cannot be characterized as military activities.”¹³⁶ Ukraine argues that this requirement arises from the fact that Article 298(1)(b) limits the military activities exception to disputes “concerning” (a direct verb meaning to be “about”) military activities rather than disputes “arising from”, “arising out of”, or “arising from or in connection with” military activities, all of which are terms used elsewhere in the Convention and are “suggestive of looser relationships”.¹³⁷ Ukraine submits that both the *South China Sea* and *Coastal State Rights* Annex VII arbitral tribunals, as well as ITLOS in its Provisional Measures Order, have held that a dispute “concerns” military activities only if its “subject matter is military activities”, rejecting the proposition that the “mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception”.¹³⁸

91. Ukraine claims that the Russian Federation has not put forward a clear test for identifying what the dispute concerns, and it rejects the Russian Federation’s argument that there is a distinction between the question of deciding what a dispute concerns under Article 288(1) and deciding what a dispute concerns under Article 298(1)(b).¹³⁹ Relying on the jurisprudence of the ICJ and the *Coastal State Rights* arbitration, Ukraine reiterates that the question to be answered in order to identify what a dispute concerns is: “what is the essence of the applicant’s claims or, in other words, what is the subject matter of the dispute?”¹⁴⁰
92. In identifying the subject matter of the legal dispute, Ukraine argues that the Arbitral Tribunal must “isolate the real issue in the case and [...] identify the object of the claim” on an “objective basis”, while “giving particular attention to the formulation of the dispute chosen by the Applicant”.¹⁴¹ Ukraine contends that its submissions in this case advance claims concerning

¹³⁶ Ukraine’s Observations, ¶ 6; *see also* Ukraine’s Observations, ¶¶ 17, 19 *referring to Coastal State Rights (UAL-25)*, ¶ 330; Preliminary Objections Hearing, 12 October 2021, 155:10–156:18 (Cheek).

¹³⁷ Ukraine’s Observations, ¶ 58–62. Ukraine observes that this interpretation was adopted by the *Coastal State Rights* and *South China Sea* tribunals. *See* Ukraine’s Observations, ¶¶ 60–61 *referring to Coastal State Rights (UAL-25)*, ¶¶ 330–331; *South China Sea*, Award (*UAL-7*), ¶ 1158; Preliminary Objections Hearing, 12 October 2021, 155:10–156:18 (Cheek).

¹³⁸ Ukraine’s Observations, ¶ 17 *referring to South China Sea*, Award (*UAL-7*), ¶¶ 938, 1158; *Coastal State Rights (UAL-25)*, ¶¶ 330, 334; ITLOS Provisional Measures Order (*UAL-2*), ¶¶ 64–66; *see also* Preliminary Objections Hearing, 12 October 2021, 155:10–156:18 (Cheek).

¹³⁹ Preliminary Objections Hearing, 15 October 2021, 374:4–392:11 (Thouvenin).

¹⁴⁰ Preliminary Objections Hearing, 15 October 2021, 383:12–14 (Thouvenin).

¹⁴¹ Ukraine’s Observations, ¶ 20 *referring to The South China Sea Arbitration (Philippines v. China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015 (*UAL-5*) (“*South China Sea, Jurisdiction and Admissibility Award*”), ¶ 150; *The ‘Enrica Lexie’ Incident (Italian Republic v. Republic of India)*, PCA Case No. 2015-28, Award, 21 May 2020 (*UAL-41*) (“*Enrica Lexie Incident*”), ¶¶ 233–234; *Case Concerning the Territorial*

violations of UNCLOS (*inter alia*, immunity violations) pertaining to the Russian Federation’s boarding, arrest, detention and prosecution of its naval vessels.¹⁴² Ukraine concludes that this is the “subject matter” of the dispute, while “[b]y contrast, Ukraine has advanced no claims about, and seeks no relief from, any other ‘activities of the Ukrainian and Russian forces on 25 November 2018’.”¹⁴³

93. Ukraine also argues that the Russian Federation’s interpretation of Article 298(1)(b) is at odds with the Convention’s object and purpose.¹⁴⁴ Ukraine characterizes mandatory dispute resolution as the “pivot upon which the delicate equilibrium of the compromise [of the Convention] must be balanced”, referring to the “broad jurisdictional grant of Articles 286 and 288” and the “deliberate and precise” drafting of jurisdictional exceptions in Article 298.¹⁴⁵ Ukraine acknowledges that the “Convention’s purpose of fostering dispute resolution” is tempered by States’ reluctance to “expose military operations to compulsory adjudication” but argues that the Convention’s *travaux préparatoires* indicate that the military activities exception was carefully deliberated and worded to exclude conduct that is not in fact military in nature (including the exercise of law enforcement

and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (**RUL-51**), ¶ 38.

¹⁴² Specifically, Ukraine argues that the Russian Federation’s exercise of jurisdiction over Ukraine’s naval vessels was specifically for the enforcement of the Russian Federation’s domestic law, which Ukraine submits was also the Russian Federation’s stated reason for its actions on 25 November 2015. *See* Ukraine’s Observations, ¶¶ 21–25 referring to Ukraine’s Memorial, ¶¶ 34–38, 39–42, 75, 77–80, 82, 85–88, 90–91, 153(a)–(d); Ukraine’s Notification and Statement of the Claim, ¶¶ 1–2; Hrytsenko Statement, ¶¶ 19–22, 24–26, 29–30 & Annex B; Nebylytsia Statement, ¶¶ 14–22, 24–25 & Annex C; Ukraine Navy Report (**UA-5**), ¶ 14–15; Mokryak Statement, ¶¶ 13, 15, 17–19, 21–22 & Annex C; Melnychuk Statement, ¶¶ 14–17, 19–21, 23 & Annex C; Witness Statement of Nikolai Polozov, 19 May 2020, ¶¶ 2–5, 8, 10, Annexes A–E; Opening Criminal Case Order (**UA-13**), pp. 1–2; Witness Statement of Master Chief Petty Officer Yuriy Oleksandrovych Budzylo, 19 May 2020, ¶¶ 7–9, 13–14; Witness Statement of Senior Seaman Andriy Anatoliyovych Artemenko, 8 May 2020, ¶¶ 11–15, 17, 20, 24–25; Witness Statement of Senior Seaman Vyacheslav Anatoliyovych Zinchenko, 6 May 2020, ¶¶ 6–7, 9, 11, 13, 19, 22; ITLOS Provisional Measures Order (**UAL-2**), ¶ 41; Russian Federation’s Memorandum, ITLOS (**UA-2**), ¶ 21; Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 13741/2dsng, 5 November 2019 (**UA-9**), pp. 1–2; FSB Report (**UA-4**), Translation, pp. 2–4, 6; Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 14951/2dsng, 5 December 2018 (**UA-6**), p. 2; Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 3584, 16 September 2019 (**UA-11**); Ukrainians Who Returned Home on September 7 in the Framework of the Mutual Release of Detained Persons by Ukraine and Russia, The Presidential Office of Ukraine, 7 September 2019 (**UA-12**); Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 7811/2dsng, 25 June 2019 (**UA-10**); Note Verbale of the Ministry of Foreign Affairs in Ukraine, No. 72/22-188/3-1641, 26 June 2019 (**UA-3**); *Case Concerning the Detention of Three Ukrainian Naval Vessels*, Ukraine’s Supplemental Report on Compliance of 26 June 2019 (**UA-27**); Response of the Russian Federation to the Observations of Ukraine on the Question of Bifurcation, 21 September 2020, ¶ 19 citing Ukraine’s Observations on the Question of Bifurcation, ¶ 14; *see also* Preliminary Objections Hearing, 12 October 2021, 156:19–161:7 (Cheek).

¹⁴³ Ukraine’s Observations, ¶ 25 referring to *South China Sea, Jurisdiction and Admissibility Award (UAL-5)*, ¶ 150; *Coastal State Rights (UAL-25)*, ¶ 330; Russian Federation’s Preliminary Objections, ¶ 2.

¹⁴⁴ Ukraine’s Observations, ¶¶ 63–71.

¹⁴⁵ Ukraine’s Observations, ¶ 64 citing *South China Sea, Jurisdiction and Admissibility Award (UAL-5)*, ¶ 225.

jurisdiction, in its estimation).¹⁴⁶ Ukraine resists the assertion that its interpretation is unduly strict, and argues that the military activities exception extends to a wide range of military activities but stops short of law enforcement activities.¹⁴⁷ Ukraine argues that the Russian Federation’s interpretation, on the other hand, would “allow States Parties to avoid dispute resolution for *any* violation of the immunity provisions of the Convention that apply to warships”, which is unsupported by the Convention’s text (which uses categorical exclusions elsewhere, but not in disputes concerning Articles 30, 32, 95 and 96) or by the intent of its drafters, who would not have “exclude[d] a core tenet of the law of the sea—warship immunity—from a central feature of the Convention—mandatory dispute settlement”.¹⁴⁸

94. Ukraine also contends that “Russia *chose* to assert law enforcement jurisdiction”¹⁴⁹ and cites the *South China Sea* arbitral tribunal’s holding that a tribunal should not “deem [a respondent State’s] activities to be military in nature when [that State] itself has consistently and officially resisted such classifications and affirmed the opposite at the highest levels”.¹⁵⁰ Ukraine asserts that the “Russian Federation’s own words and actions must be relevant to understanding the nature of its activities”¹⁵¹ and submits that, beginning immediately after the events of 25 November 2018, and thereafter consistently, the Russian Federation has maintained that “the arrest, detention, and

¹⁴⁶ Ukraine’s Observations, ¶¶ 64–65 *referring to* Third United Nations Conference on the Law of the Sea, Revised Single Negotiating Text (Part IV), U.N. Doc. A/CONF.62/WP.9/Rev.2, 23 November 1976 (UAL-67), Article 18; Third United Nations Conference on the Law of the Sea, Informal Composite Negotiating Text, U.N. Doc. A/CONF.62/WP.10, 15 July 1977 (UAL-68), Article 297; Third United Nations Conference on the Law of the Sea, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, U.N. Doc. A/CONF.62/WP.10/Add.1, 22 July 1977 (UAL-69), p. 70; Third United Nations Conference on the Law of the Sea, Informal Composite Negotiating Text/Revision 2, U.N. Doc. A/CONF.62/WP.10/Rev.2, 11 April 1980 (UAL-70), Article 298. Ukraine submits that the Russian Federation’s reference to Judge Gao’s Separate Opinion at the preliminary measures phase of this case pertains to the “high threshold” for establishing a military activity in the sense of “*how many military vessels* a State deploys” rather than the “nature” of the activity, which is the proper touchstone for applying the military activities exception. *See* Ukraine’s Observations, ¶ 66 (emphasis in original) *referring to* Russian Federation’s Preliminary Objections, ¶ 70; Separate Opinion of Judge Gao (RUL-32), ¶¶ 11, 45; *South China Sea*, Award (UAL-7), ¶¶ 1026–1028, 1158; ITLOS Provisional Measures Order (UAL-2), ¶¶ 71, 76; *Coastal State Rights* (UAL-25), ¶¶ 336–338.

¹⁴⁷ Ukraine’s Observations, ¶ 67 (“In other contexts, [...] the military activities exception would apply, particularly where it is not a State’s coast guard that takes the lead, force is not employed using standard law enforcement protocols, or force is not used as part of an arrest that is expressly for the purpose of law enforcement.”).

¹⁴⁸ Ukraine’s Observations, ¶ 71 (emphasis in original); *see also* Ukraine’s Observations, ¶ 5 (“Much like warship immunity is a core tenet of the law of the sea, compulsory dispute resolution under Articles 286 and 288 is fundamental to UNCLOS.”).

¹⁴⁹ Ukraine’s Observations, ¶ 16 (emphasis in original).

¹⁵⁰ Ukraine’s Observations, ¶ 17 *citing* *South China Sea*, Award (UAL-7), ¶ 938; *see also* Ukraine’s Observations, ¶¶ 26–27 (“[T]he Tribunal can [...] determine that Russia is precluded from invoking the military activities exception based on its own consistent characterization of the activities at issue as law enforcement, not military.”) *referring to* *South China Sea*, Jurisdiction and Admissibility Award (UAL-5), ¶ 225; M.H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Part XV, Nijhoff, 2014 (UAL-8), ¶ XV.4.

¹⁵¹ Preliminary Objections Hearing, 12 October 2021, 164:6–8 (Cheek).

prosecution of Ukraine’s vessels and servicemen was for the purpose of law enforcement”.¹⁵² Specifically, Ukraine points to official statements, correspondence and legal submissions by the Russian Federation, which point to alleged non-compliance by the Ukrainian vessels and servicemen with the Russian Federation’s navigational regulations and statutes as well as the Criminal Code of the Russian Federation.¹⁵³

95. Ukraine rejects the Russian Federation’s efforts to reverse its “unwavering position” by arguing that both the Russian Federation and Ukraine have characterized the activities in question as “military in nature”.¹⁵⁴ Ukraine notes that the statements to which the Russian Federation refers pertain to the events on the evening of 25 November 2018 (specifically, the alleged provocation arising from the Ukrainian naval vessels’ assertion of a right to transit the Kerch Strait) or its immediate aftermath, when there was limited information as to “the full extent to which Russia was treating the incident as a law enforcement matter”.¹⁵⁵ Ukraine points out that the present dispute before the Arbitral Tribunal concerns the Russian Federation’s activities in “arresting, detaining, and prosecuting the Ukrainian naval vessels and servicemen, *after* those vessels ‘gave up their mission to pass through the strait’”, which the Russian Federation itself has consistently characterized as law enforcement activities.¹⁵⁶
96. In this regard, Ukraine rejects the argument that it is bound by its initial legal characterization of the incident on the basis of estoppel or “admissions against interest”.¹⁵⁷ Ukraine distinguishes the authorities relied upon by the Russian Federation, noting in particular that the doctrines apply

¹⁵² Ukraine’s Observations, ¶ 7; *see also* Ukraine’s Observations, ¶ 18 (“From the day of the arrests, Russia made clear that it viewed itself as engaging in law enforcement activity: it demanded that the Ukrainian vessels stop their exit from the territorial sea because they had violated Russian law; issued an official report stating that Russia acted pursuant to its right under UNCLOS to enforce coastal state laws and regulations; immediately charged the servicemen with violations of the Russian Criminal Code; and classified the Ukrainian vessels as ‘physical evidence in the criminal case initiated in connection with violations of Russian law’.”); Preliminary Objections Hearing, 12 October 2021, 161:7–167:17 (Cheek).

¹⁵³ Ukraine’s Observations, ¶ 28 *referring to* Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 14951/2dsng, 5 December 2018 (UA-6), p. 2; Statement of the Ministry of Foreign Affairs of the Russian Federation, No. 803-16-04-2019, 16 April 2019 (UA-48); ITLOS Provisional Measures Order (UAL-2), ¶ 76; FSB Report (UA-4), Translation, pp. 3–4; Russian Federation’s Preliminary Objections, ¶¶ 65, 86–88; *see also* Preliminary Objections Hearing, 12 October 2021, 161:1–167:17 (Cheek).

¹⁵⁴ Ukraine’s Observations, ¶¶ 29–31 *referring to* Russian Federation’s Preliminary Objections, ¶¶ 47, 49.

¹⁵⁵ Ukraine’s Observations, ¶ 31; *see also* Preliminary Objections Hearing, 12 October 2021, 167:17–170:1 (Cheek).

¹⁵⁶ Ukraine’s Observations, ¶¶ 29, 31 (emphasis in original); *see also* Ukraine’s Observations, ¶ 7 (“From the moment of the arrests and consistently thereafter, the Russian Federation has insisted that the arrest, detention, and prosecution of Ukraine’s vessels and servicemen was for the purpose of law enforcement. There should not be a serious question, then, that the subject matter of this dispute presented to the Tribunal by Ukraine is not one concerning military activities.”).

¹⁵⁷ Preliminary Objections Hearing, 15 October 2021, 413:14–423:25 (Cheek).

only to statements of fact, and not legal characterizations, and that there has been no reliance by the Russian Federation on Ukraine’s initial characterizations.¹⁵⁸

97. Ukraine also takes issue with the eight “relevant circumstances” cited by the Russian Federation in support of its conclusion that the present dispute concerns military activities:¹⁵⁹

- a) With respect to the Russian Federation’s observations that there were “military personnel on both sides” and that the Ukrainian vessels involved were “military vessels, namely naval warships and an auxiliary vessel”, Ukraine submits that Article 298(1)(b) is focused on the nature of the activities (“military activities”) rather than the actors involved.¹⁶⁰ Ukraine suggests that military activities did not take place on the evening of 25 November 2018 because “[t]he Ukrainian naval vessels never engaged with the Russian Federation’s coast guard (or military)” and, at the time of their pursuit and arrest, “the vessels were attempting to exit the territorial sea and return to their home port”.¹⁶¹
- b) Ukraine similarly dismisses the relevance of the Russian Federation’s allegation that Ukraine’s naval vessels “were armed with guns and artillery”, noting that “virtually all military vessels are armed” and yet the mere presence of military vessels does not trigger the exclusion.¹⁶² According to Ukraine, “[m]ore salient is the fact [...] that the Ukrainian vessels took measures to demonstrate their arms were not being used

¹⁵⁸ Preliminary Objections Hearing, 15 October 2021, 413:14–423:25 (Cheek).

¹⁵⁹ Ukraine’s Observations, ¶¶ 37 *et seq.* referring to Russian Federation’s Preliminary Objections, ¶ 39.

¹⁶⁰ Ukraine’s Observations, ¶¶ 38–39 referring to Russian Federation’s Preliminary Objections, ¶¶ 40–41; *Coastal State Rights (UAL-25)*, ¶¶ 333–335 (“The Arbitral Tribunal does not consider, however, that mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception. [...] 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.”); *South China Sea*, Award (UAL-7), ¶ 1158 (“the relevant question [is] whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute”); ITLOS Provisional Measures Order (UAL-2), ¶¶ 64, 66 (“the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question [...]. [T]he distinction between military and law enforcement activities must be based primarily on an objective evaluation of the nature of the activities in question [...]”); *Arctic Sunrise*, Jurisdiction Award (UAL-44), ¶ 9 (noting that in the *Arctic Sunrise* arbitration, the Russian Federation did not invoke the military activities exclusion notwithstanding the involvement of coast guard vessels and special forces of the Russian Federation); Klein, Dispute Settlement (RUL-14/UAL-56), pp. 312–313 (“It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities [...]. The mere fact that these rights are exercised by military and government vessels does not justify a characterization of ‘military activities’ for the purposes of Article 298.”); *see also* Preliminary Objections Hearing, 15 October 2021, 410:13–23 (Cheek).

¹⁶¹ Ukraine’s Observations, ¶ 39 referring to Ukraine’s Memorial, ¶¶ 33–38; Hrytsenko Statement, ¶¶ 19–23; Nebylytsia Statement, ¶¶ 7, 14–16; Melnychyk Statement, ¶¶ 14–16; Mokryak Statement, ¶¶ 9–16.

¹⁶² Ukraine’s Observations, ¶ 40 citing Russian Federation’s Preliminary Objections, ¶ 42.

or deployed.”¹⁶³ In this vein, Ukraine insists that the weapons of its warships were not aimed at the Russian Federation’s vessels.¹⁶⁴

- c) Ukraine disputes the Russian Federation’s contention 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”.¹⁶⁵ In Ukraine’s view of the facts, the Russian Federation’s coast guard issued the order to stop after the naval vessels had given up their objective of passing through the Kerch Strait and subsequently pursued them out of the territorial sea.¹⁶⁶ Ukraine concludes that “[w]hen one set of vessels is peacefully leaving an area and another set of vessels is giving chase to conduct an arrest, they are not ‘arrayed in opposition’.”¹⁶⁷
- d) Ukraine also denies that the Russian Federation’s undisputed use of force against the naval vessels and servicemen suffices to trigger the military activities exclusion, noting that use of force is commonplace in law enforcement activities.¹⁶⁸ Furthermore, Ukraine notes that the use of force in law enforcement “follows a standard set of principles, escalating from ‘an auditory or visual signal to stop,’ to warnings such as ‘shots across the bows of the ship,’ and only then a resort to force”, which were “exactly what the Russian coast guard employed” on the evening of 25 November 2018.¹⁶⁹
- e) Ukraine submits that the reason the Russian Federation offers for its arrests (“protecting its State national security interests given the unwarranted (armed) presence of the military of another State”) is inapposite because Ukraine’s claims concern events following the Ukrainian vessels’ abandonment of plans to transit the

¹⁶³ Ukraine’s Observations, ¶ 40 referring to Mokryak Statement, ¶ 9; Ukraine’s Memorial, ¶ 26.

¹⁶⁴ Preliminary Objections Hearing, 15 October 2021, 405:22–412:13 (Cheek).

¹⁶⁵ Ukraine’s Observations, ¶ 41 quoting Russian Federation’s Preliminary Objections, ¶ 43; see also Preliminary Objections Hearing, 15 October 2021, 405:22–410:12 (Cheek).

¹⁶⁶ Ukraine’s Observations, ¶ 41 referring to Hrytsenko Statement, ¶ 19; Mokryak Statement, ¶ 13; ITLOS Provisional Measures Order (UAL-2), ¶ 73.

¹⁶⁷ Ukraine’s Observations, ¶ 41.

¹⁶⁸ Ukraine’s Observations, ¶ 42 referring to Russian Federation’s Preliminary Objections, ¶ 44; *M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports 1999, 1 July 1999 (UAL-3) (“*M/V “Saiga” (No. 2)*”), ¶ 156; *Coastal State Rights (UAL-25)*, ¶ 336; *Arctic Sunrise*, Jurisdiction Award (UAL-44), ¶ 9.

¹⁶⁹ Ukraine’s Observations, ¶ 42 referring to *M/V “Saiga” (No. 2) (UAL-3)*, ¶ 156; Ukraine’s Memorial, ¶¶ 34–36; ITLOS Provisional Measures Order (UAL-2), ¶¶ 73–75.

Kerch Strait and decision to leave the territorial sea.¹⁷⁰ Ukraine also submits that the justification offered is at odds with express Russian Federation statements that “invoke the enforcement of domestic law”; Ukraine contends that “only in this litigation has Russia advanced this *post hoc* claim of national security interests”.¹⁷¹

- f) Ukraine also decouples the events of 25 November 2018 from the “wider context of the dispute between Ukraine and Russia about the alleged annexation of Crimea” by arguing that the present dispute “does not concern Russia’s [...] annexation and occupation of Crimea”, and by relying on the decisions of other arbitral tribunals (both with respect to the general relationship between an instant dispute and the broader context of relations between disputing States, as well as the alleged link to the occupation of Crimea).¹⁷²

98. Ukraine also disputes the Russian Federation’s claim that Ukraine’s warships intended to cross the Kerch Strait in secret, which Ukraine deems to be both implausible and irrelevant.¹⁷³ Ukraine contends that the word “covert” – which appears in the checklist found on board the *Nikopol* – is standard language used by the Ukrainian Navy for warships at sea and does not indicate an intention to transit the Kerch Strait in secret.¹⁷⁴ Moreover, Ukraine asserts that the plan to sail beyond areas of observation of the Russian Federation’s vessels was meant to avoid provocation rather than ensure secrecy.¹⁷⁵ Regardless, according to Ukraine, the factual record does not indicate a covert mission.¹⁷⁶ Ukraine asserts that, not only is it impossible to transit the Kerch Strait covertly, but that the commanders of Ukraine’s naval vessels have testified that they were

¹⁷⁰ Ukraine’s Observations, ¶ 43 referring to Russian Federation’s Preliminary Objections, ¶ 45. Ukraine also submits that the Russian Federation’s characterization is at odds with its account of the facts. Ukraine disputes the Russian Federation’s emphasis on a checklist recovered from the *Nikopol* that allegedly revealed plans to covertly transit the Kerch Strait, pointing out that the checklist merely employed “standard language” and that Ukraine’s vessels made their intention to peacefully transit the Strait known to Russian Federation representatives. Ukraine further points out that the Russian Federation’s characterization of a “non-permitting secret incursion” was rejected in the ITLOS Provisional Measures Order. See Ukraine’s Observations, ¶ 44 referring to Russian Federation’s Preliminary Objections, ¶ 45; Hrytsenko Statement, ¶ 8; Ukraine’s Memorial, ¶¶ 25–30; ITLOS Provisional Measures Order (UAL-2), ¶¶ 68, 70; see also Ukraine’s Observations, fn. 78.

¹⁷¹ Ukraine’s Observations, ¶ 43.

¹⁷² Ukraine’s Observations, ¶ 45 referring to Russian Federation’s Preliminary Objections, ¶ 46; *South China Sea, Jurisdiction and Admissibility Award (UAL-5)*, ¶ 152; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment, I.C.J. Reports 2015 (RUL-55), ¶ 32; *Coastal State Rights (UAL-25)*, ¶ 330.

¹⁷³ Preliminary Objections Hearing, 12 October 2021, 146:14–147:6 (Cheek); Preliminary Objections Hearing, 15 October 2021, 396:14–405:21, 424:13–433:7 (Cheek).

¹⁷⁴ Preliminary Objections Hearing, 15 October 2021, 397:1–399:6 (Cheek) relying on Hrytsenko Statement, ¶ 8.

¹⁷⁵ Preliminary Objections Hearing, 15 October 2021, 402:16–403:21 (Cheek).

¹⁷⁶ Preliminary Objections Hearing, 15 October 2021, 399:7–402:6 (Cheek).

in “proper touch” with the Kerch Port and planned to take a pilot on board the *Yani Kapu* to transit the Strait under the same procedures that they followed in September 2018 without incident.¹⁷⁷ Ukraine notes that this accords with the provisional measures decision of ITLOS concerning the incident, which found “that a non-permitted secret incursion by the Ukrainian naval vessels [...] would have been unlikely under the circumstances of the present case”.¹⁷⁸

99. Ukraine submits that an objective evaluation of the relevant facts, separate from the characterizations of the activities by the Russian Federation and Ukraine, would equally establish that the arrest and detention of the vessels and crew falls within the law enforcement category of the Convention.¹⁷⁹ Ukraine recalls that, by a 19–1 decision, ITLOS concluded that the dispute falls outside the exclusion because “the circumstances of the incident on 25 November 2018 suggest that the arrest and detention of the Ukrainian naval vessels by the Russian Federation took place in the context of a law enforcement operation”.¹⁸⁰ Ukraine submits that the more complete record before this Arbitral Tribunal compels the same conclusion.¹⁸¹
100. Ukraine submits that its Article 95 and 96 claims concern immunity from one State’s (the Russian Federation’s) exercise of jurisdiction through the enforcement of its domestic laws against another State (Ukraine) that is alleged to have violated those laws.¹⁸²
101. Article 95 provides that “[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.” Article 96 provides that “[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.”
102. The Russian Federation’s exercise of jurisdiction, according to Ukraine, is “as a general matter, law enforcement rather than military in nature”,¹⁸³ citing the *Arrest Warrant* judgment of the

¹⁷⁷ Preliminary Objections Hearing, 12 October 2021, 146:14–147:6 (Cheek); Preliminary Objections Hearing, 15 October 2021, 399:7–402:6 (Cheek).

¹⁷⁸ Preliminary Objections Hearing, 15 October 2021, 405:12–21 (Cheek) *referring to* ITLOS Provisional Measures Order (UAL-2), ¶ 70.

¹⁷⁹ Ukraine’s Observations, ¶ 32; Preliminary Objections Hearing, 12 October 2021, 170:14–177:12 (Cheek).

¹⁸⁰ Ukraine’s Observations, ¶ 15 *referring to* ITLOS Provisional Measures Order (UAL-2), ¶ 75.

¹⁸¹ Ukraine’s Observations, ¶ 15.

¹⁸² Ukraine’s Observations, ¶¶ 33–34.

¹⁸³ Ukraine’s Observations, ¶ 34.

ICJ,¹⁸⁴ commentary of the International Law Commission (“ILC”)¹⁸⁵ and international law scholarship.¹⁸⁶ Additionally, Ukraine submits that arrest and detention are considered law enforcement activities in ITLOS jurisprudence,¹⁸⁷ law of the sea scholarship¹⁸⁸ and the United Nations Code of Conduct for Law Enforcement Officials.¹⁸⁹

103. Ukraine argues that the Russian Federation’s appeal to potentially undesirable consequences of a narrow interpretation of the military activities exception is not grounded in the present dispute.¹⁹⁰ Ukraine contends that any “sweeping consequences” that its interpretation might have would relate to States seeking to assert law enforcement jurisdiction over another State’s military warships and crew, which Ukraine submits has no support in State practice.¹⁹¹ On the contrary, Ukraine submits that the Russian Federation’s interpretation “would allow States Parties to avoid dispute resolution for *any* violation of the immunity provisions of the Convention that apply to warships”, which is not contemplated in the text of the Convention (that otherwise includes categorical exclusions from compulsory dispute settlement, such as disputes concerning Article 83) and which was explicitly rejected when it was proposed during the negotiations leading up to the adoption of the Convention.¹⁹² Furthermore, Ukraine cites examples of State practice involving Russian and Soviet forces, wherein States refrained from exercising law enforcement jurisdiction against foreign warships in their territorial seas.¹⁹³ Ukraine concludes that it is the Russian Federation’s conduct deviating from this State practice that “requires this

¹⁸⁴ Ukraine’s Observations, ¶ 35 referring to *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002 (UAL-23), ¶ 71.

¹⁸⁵ Ukraine’s Observations, ¶ 35 referring to ILC, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries (1991) (UAL-52), Article 1, Commentary, ¶ 2.

¹⁸⁶ Ukraine’s Observations, ¶ 34–35 referring to B.H. Oxman, “Jurisdiction of States”, in Max Planck Encyclopedia of Public International Law, November 2007 (UAL-51), ¶ 3; P-T. Stoll, “State Immunity”, in Max Planck Encyclopedia of Public International Law, April 2011 (UAL-53), ¶ 1.

¹⁸⁷ Ukraine’s Observations, ¶ 36 referring to *M/V “Saiga” (No. 2)* (UAL-3), ¶ 156; Preliminary Objections Hearing, 12 October 2021, 171:13–21 (Cheek).

¹⁸⁸ Ukraine’s Observations, ¶ 36 referring to N. Klein, *Law Enforcement Activities, in Maritime Security and the Law of the Sea*, Oxford University Press, 2011 (UAL-96) (“**Klein, Law Enforcement**”), p. 63.

¹⁸⁹ Ukraine’s Observations, ¶ 36 referring to United Nations, Code of Conduct for Law Enforcement Officials, Adopted by General Assembly Resolution 34/169 of 17 December 1979 (UAL-55), Article 1, Commentary ¶ (a).

¹⁹⁰ Preliminary Objections Hearing, 12 October 2021, 183:4–184:5 (Cheek).

¹⁹¹ Ukraine’s Observations, ¶ 68.

¹⁹² Ukraine’s Observations, ¶ 71 (emphasis in original) referring to UNCLOS, Article 298(1)(a)(i); B. Vukas, “Peaceful Uses of the Sea, Denuclearization and Disarmament”, in R.-J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Nijhoff, 1991 (UAL-65), p. 1251.

¹⁹³ Ukraine’s Observations, ¶ 69 referring to M. Leitenberg, “The Case of the Stranded Sub”, *Bulletin of Atomic Scientists*, Vol. 83(3), 1982 (UAL-15), pp. 10–11; W.J. Aceves, “Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea”, *Naval War College Review*, Vol. 46, 1993 (UAL-71), pp. 67–75; Preliminary Objections Hearing, 12 October 2021, 183:4–187:4 (Cheek).

particular dispute to be classified as concerning law enforcement activities rather than military activities”.¹⁹⁴

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

104. Ukraine’s declaration in accordance with Article 298(1)(b) of the Convention excluded from dispute settlement “disputes concerning military activities”. Russia’s Article 298(1)(b) declaration referred to “disputes concerning military activities including military activities by government vessels and aircraft”. The effect of either declaration is that, to the extent that the dispute is one “concerning military activities”, the Arbitral Tribunal lacks jurisdiction.
105. The Russian Federation argues that the events that are the subject of this dispute concern “military activities”. Ukraine denies this, arguing that the events do not concern “military activities” but rather concern “law enforcement activities”. Thus, the dispute between the Parties under the first preliminary objection is over the meaning of the term “military activities”.
106. The Russian Federation argues that the exception in respect of military activities in Article 298(1)(b) was drafted in “broad” and “unqualified” terms.¹⁹⁵ According to the Russian Federation, the argument that some breadth should be given to the interpretation of the phrase “concerning military activities” is reinforced by the use of the words “concerning” and “activities”, both broad in scope. Ukraine rejects this approach to the interpretation of “military activities”, arguing that the exception only applies where the subject matter of the dispute is military activities. It further argues that the Convention creates a dichotomy between military activities and law enforcement activities with the result that, if the activities are law enforcement activities, they cannot be military activities.
107. The Arbitral Tribunal notes that there is no explicit definition in the Convention of what constitutes “military activities”. The use of the term in Article 298(1)(b) has been the subject of comment in some cases, without a consensus emerging on the scope of the “military activities” exception. In the *South China Sea* arbitration, the arbitral tribunal said that, in the interpretation of Article 298(1)(b), the question is “whether the dispute itself concerns military activities”.¹⁹⁶ In the *Coastal State Rights* arbitration, the arbitral tribunal saw the term “concerning” as limiting

¹⁹⁴ Ukraine’s Observations, ¶ 70.

¹⁹⁵ Russian Federation’s Preliminary Objections, ¶ 34.

¹⁹⁶ *South China Sea*, Award (UAL-7), ¶ 1158.

the exception to “those disputes whose subject-matter is military activities”.¹⁹⁷ What emerges from these cases is that there must be a close connection or relationship between the subject of the dispute and the military activities and that the activities must be military in nature in the sense that they are activities that would be undertaken by military vessels or by government vessels carrying out military functions.

108. In arguing that the “military activities” exception applies, the Russian Federation focuses on the events of 25 November 2018 “that underlie the dispute”.¹⁹⁸ Ukraine, on the other hand, sees the subject matter of the dispute as “the arrest, detention, and prosecution of Ukrainian naval vessels and their crew”.¹⁹⁹ For its part, the Arbitral Tribunal does not see these approaches as incompatible. The events of 25 November 2018 are relevant to the arrest of the Ukrainian vessels and that arrest is the precursor to the detention of the vessels and the prosecution of their crews.
109. In its decision on provisional measures, ITLOS said that the determination of whether activities are military “must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case”.²⁰⁰ In the view of the Arbitral Tribunal, that is the correct approach to take in determining whether the military activities exception to the Arbitral Tribunal’s jurisdiction can be invoked in this case. Accordingly, the Tribunal will look at the events that occurred leading to the arrest and detention of the Ukrainian naval vessels and the prosecution of their crews, taking account, where relevant, of the events subsequent to the arrest.
110. The Arbitral Tribunal is aware of the context in which this dispute arose. It occurred after the alleged annexation of Crimea by the Russian Federation and there was a continuing period of mistrust and hostility between the two States arising out of their conflicting positions on sovereignty over Crimea and the maritime areas appurtenant to it. These matters are outside the Arbitral Tribunal’s jurisdiction, and it takes no position on them. It simply refers to them as a matter of context.
111. The essential facts for the determination of whether the military activities exception applies start in the evening of 24 November 2018 when two Ukrainian naval vessels, the *Yani Kapu* and *Gorlovka*, were contacted by Russian coast guard vessels while they were in the Black Sea and

¹⁹⁷ *Coastal State Rights (UAL-25)*, ¶ 330.

¹⁹⁸ Russian Federation’s Preliminary Objections, ¶ 26.

¹⁹⁹ Ukraine’s Observations, ¶ 19.

²⁰⁰ ITLOS Provisional Measures Order (UAL-2), ¶ 66.

informed about the procedure for crossing the State border and navigating through the Kerch Strait. The *Gorlovka* informed the Russian coast guard that there was no intention to cross the territorial sea or transit the Kerch Strait, although it is disputed whether this referred to one or both vessels. There was a further communication later that evening from a Russian coast guard vessel to the two Ukrainian vessels regarding the closure of the Kerch Strait and the suspension of innocent passage in the Black Sea approach to the Kerch Strait.

112. On the morning of 25 November 2018, the Ukrainian naval vessel, *Berdyansk*, which by now together with the Ukrainian naval vessel *Nikopol* had joined the *Yani Kapu* and *Gorlovka*, contacted the Russian coast guard and indicated the intention of the *Berdyansk*, *Nikopol* and *Yani Kapu* to enter the territorial sea and then transit through the Kerch Strait. A short time later the *Berdyansk* was informed by a Russian coast guard vessel of the closure of the Kerch Strait and the suspension of innocent passage in the Black Sea approach to the Strait.
113. It is not contested that the *Berdyansk* challenged the claim that the Kerch Strait had been closed and asserted a right to navigation in the area. The Ukrainian vessels continued to navigate towards the Strait. The Russian Border Patrol Ships *Izumrud* and *Don* then ordered the Ukrainian vessels to leave and manoeuvred to prevent them from sailing towards the Kerch Strait which included the ramming of one of the Ukrainian vessels. The Ukrainian vessels did not comply with this order to leave but eventually proceeded around the Russian vessels to an anchorage area. By this time, the Russian vessels had been joined by other Russian vessels including at least one naval vessel from the Russian Black Sea fleet.
114. The Ukrainian vessels remained in that anchorage area for approximately eight hours surrounded by Russian vessels and with Russian military helicopters flying overhead. At some time during this period, the guns of the *Berdyansk* were raised to a 45–50 degree angle. At various times, it is alleged, the Russian coast guard vessels ordered the Ukrainian vessels to leave. However, the Ukrainian vessels did not do so, but eventually decided to abandon their attempt to transit through the Kerch Strait and instead return home. As they navigated away from the anchorage area, they were followed by the *Izumrud* and *Don* and ordered to stop, but the Ukrainian vessels did not comply. Eventually shots were fired by the Russian vessels and the *Berdyansk*, followed by the *Yani Kapu* and then the *Nikopol*, were all boarded and arrested.
115. The question for the Arbitral Tribunal is whether these events can be characterized as military activities. The Ukrainian vessels were engaged in a military mission – to redeploy from one port

in Ukraine to another Ukrainian port located in the Sea of Azov.²⁰¹ Their instructions were to “sail covertly, beyond the coastal and sea areas of observation of the Black Sea Fleet of the Russian Federation and Border Service of the Federal Security Service of the Russian Federation”.²⁰² And while such orders may not have meant that the operation was to be clandestine, which patently it could not have been,²⁰³ they are certainly orders that indicate that it was a military mission. The vessels were in constant contact with the Ukrainian Ministry of Defence and had Security Service personnel on board. These factors all suggest that Ukraine viewed the movement of its vessels to the port of Berdyansk in the Sea of Azov as having a military character.

116. Moreover, in the course of this mission the Ukrainian vessels were ordered by Russian coast guard and Russian naval vessels to stop, which they refused to do. In addition, at some point the *Berdyansk* raised its guns and then lowered them. The Parties dispute whether this was an aggressive act by the *Berdyansk*, as contended by the Russian Federation, or a disavowal of any hostile intent, as Ukraine maintains. Raising and lowering guns may well have been an attempt to limit any confrontation, but at the same time, in the view of the Arbitral Tribunal, it is indicative of the fact that the Ukrainian vessels perceived themselves as being in a confrontation with the naval vessels of the Russian Federation.
117. Furthermore, Ukraine’s actions immediately following the arrest of the vessels were to see the issue as having been one of military activity. When it brought the arrest to the attention of the United Nations Security Council on 26 November 2018, the day after the events, it characterized the matter as an act of aggression.²⁰⁴ The Arbitral Tribunal is not suggesting that an estoppel against Ukraine arises from the words it used before the Security Council, or that Ukraine’s words should be characterized as statements against interest. Ukraine’s statements before the Security Council are simply an indication of how at that time Ukraine understood and characterized the events.²⁰⁵ Equally, Ukraine’s request that the detained servicemen be treated as prisoners of war

²⁰¹ Dissenting Opinion of Judge Kolodkin (**RUL-35**), ¶ 14.

²⁰² 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**).

²⁰³ In this regard, the Arbitral Tribunal agrees with the statement in the ITLOS Order on Provisional Measures that a “non-permitted ‘secret’ incursion [...] would have been unlikely”. ITLOS Provisional Measures Order (**UAL-2**), ¶ 70.

²⁰⁴ United Nations Security Council, 8410th meeting, 26 November 2018, S/PV.8410 (**RU-16**), pp. 10, 12.

²⁰⁵ The Arbitral Tribunal has noted the statement of the *South China Sea* arbitral tribunal that, where a State “has consistently and officially resisted such classifications and affirmed the opposite at the highest levels”, a tribunal should not conclude that the activities in question are military activities. *South China Sea*, Award (**UAL-7**), ¶ 938. However, in this case both of the Parties have at times characterized the dispute as one concerning military activities and at other times as one concerning law enforcement activities. The point simply made here is that, on the day immediately after the event, Ukraine treated the matter before the UN Security Council as concerning military activities and Russia responded in the same way.

is a further indication that at the time Ukraine perceived the confrontation to have been a military one.

118. That the Russian Federation at the time saw this as a military confrontation can be inferred from these events as well. The naval vessels of a State, Ukraine, with which the Russian Federation had a troubled and hostile relationship, particularly regarding the land territory and waters in that area, had indicated that they had no intention to enter the territorial sea. Yet, a short time thereafter they were joined by other naval vessels of that State, which announced that they intended to enter the territorial sea and transit the Kerch Strait. Further, when told that the Kerch Strait was closed and ordered to leave, the Ukrainian naval vessels ignored the orders and continued to sail towards the Kerch Strait. Thus, the Russian vessels were confronting the naval vessels of another State that had refused to obey an order relating to transit within its territorial sea.
119. If these had been commercial vessels refusing to comply with the orders of the Russian coast guard, the matter might well have been seen as law enforcement. But they were vessels of a State that contested Russia's claims in the area. That the Russian Federation saw this as more than routine law enforcement and rather in the nature of a confrontation between two militaries is also evidenced by the fact that the Russian coast guard vessels were joined by a naval vessel from the Russian Black Sea Fleet and military helicopters. For a period of eight hours, the Ukrainian naval vessels were surrounded by Russian coast guard and naval vessels. Whether this was technically a blockade or not, the fact was that the naval vessels of one State were confronting the naval vessels of another State. And when the vessels decided to leave and were ordered by the Russian vessels to stop, those orders were ignored. Shots were fired and the Ukrainian vessels were arrested. These are the events that ultimately led to the arrest of the Ukrainian vessels and sailors and then the detention and prosecution that is at the heart of the dispute between the Parties.
120. Ukraine argues that these events were in fact law enforcement activities and recognized as such by the Russian Federation. Ukraine cites the fact that the Russian vessels asked the Ukrainian vessels to stop because they had violated Russian law.²⁰⁶ It also refers to subsequent statements after the arrest of the Ukrainian vessels by Russian officials publicly and in diplomatic notes.²⁰⁷ However, Ukraine's view that these factors turned what occurred into law enforcement activities is predicated on its view that there is a dichotomy between military activities and law enforcement activities – that it must be one or the other.

²⁰⁶ Ukraine's Observations, ¶ 18.

²⁰⁷ *Supra*, ¶ 94.

121. The Arbitral Tribunal does not accept the rigid “either-or” proposition espoused by Ukraine. In the view of the Arbitral Tribunal, activities that initially have a law enforcement character may become activities with a military character, and vice versa. In the present case, as the interactions between the Russian and Ukrainian vessels developed, their character changed.
122. The Arbitral Tribunal considers that the events which give rise to this dispute can be divided into three phases. The first phase involved a confrontation between the militaries of two States, where orders were given by one to the other that were ignored. There was alleged manoeuvring by the vessels of both States, either to block passage or to gain passage. There was a lengthy period of standoff between the two States with the vessels of one surrounded by the vessels of the other. In the view of the Tribunal, this confrontation between the vessels of the two States involved military activities within the meaning of Article 298(1)(b).
123. The second phase starts from the time that the Ukrainian vessels began to leave the anchorage area and were ordered to stop. It continues until the Ukrainian vessels were boarded and the vessels and their crews arrested. Two possibilities present themselves in this phase. One is that, at the point when the Ukrainian vessels began to leave the territorial sea in order to return to Odesa, the actions of the Russian vessels took on a law enforcement character. At that point, there would have been an end to military activities. The alternative possibility is that it was the boarding and arrest of the Ukrainian vessels that brought the confrontation between the vessels of the two States, and thus the military activities, to an end. The Arbitral Tribunal needs further elucidation of this matter by the Parties before reaching a conclusion and thus postpones that decision to the merits.
124. The third phase commences after the arrest of the Ukrainian vessels and involves the continued detention of the vessels and their crews and the prosecution of the Ukrainian servicemen. The Russian Federation had decided by this time to subject the Ukrainian servicemen to domestic law enforcement processes. This phase, in the view of the Arbitral Tribunal, did not involve military activities.
125. In summary, the Arbitral Tribunal concludes that the actions of the Parties in the first phase were military activities over which the Arbitral Tribunal has no jurisdiction. It also concludes that the actions of the Parties in the third phase were not military activities and the Arbitral Tribunal therefore has jurisdiction over the events in this phase. However, with respect to the second phase, the Arbitral Tribunal needs further elucidation by the Parties before reaching a definitive conclusion on when military activities came to an end. It thus postpones the decision with regard to the second phase to the merits.

VII. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION BECAUSE ARTICLE 32 OF THE CONVENTION DOES NOT PROVIDE FOR AN APPLICABLE IMMUNITY

126. Article 288(1) of the Convention provides:

A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

127. Article 32 provides:

With such exceptions as are contained in subsection A [of Part II, Section 2] and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.

128. The Parties disagree on whether Article 32 provides for an applicable immunity for warships or other government vessels operated for non-commercial purposes in the territorial sea such as to ground Ukraine's claims in the Convention.

129. The Parties further disagree on the relevance of paragraph 1 of Article 293 for jurisdictional purposes. Article 293, paragraph 1, provides that "[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention."

130. The Russian Federation contends that any "extra-conventional" immunity under customary international law, if it exists, merely forms part of the law to be applied by the Arbitral Tribunal, and the dispute concerning it is not a dispute regarding the Convention itself. By contrast, Ukraine submits that such customary immunity would, in combination with Article 293, give rise to an additional basis for the Arbitral Tribunal's jurisdiction.²⁰⁸

A. POSITION OF THE RUSSIAN FEDERATION

131. In its second preliminary objection, the Article 288(1) Objection, the Russian Federation contends that UNCLOS does not provide for an applicable immunity of warships or other government ships operated for non-commercial purposes in the territorial sea either in Article 32 or elsewhere in the Convention.²⁰⁹ Accordingly, the dispute between the Parties does not concern the

²⁰⁸ Russian Federation's Preliminary Objections, ¶ 83; Ukraine's Observations, ¶ 114.

²⁰⁹ Russian Federation's Preliminary Objections, ¶¶ 75 *et seq.*; Preliminary Objections Hearing, 11 October 2021, 62:25–87:22 (Pellet); Preliminary Objections Hearing, 14 October 2021, 330:7–336:8 (Pellet).

interpretation or application of the Convention under Article 288(1) and the Arbitral Tribunal lacks jurisdiction.²¹⁰ The Russian Federation clarifies that it takes no position on whether warships have “extra-conventional” immunity in the territorial sea, but “merely raises the [...] jurisdictional issue according to which such immunity is not provided for in the Convention”.²¹¹ As a result, the Russian Federation submits that “the alleged breach of the obligation to accord immunity to the Ukrainian vessels in the territorial sea falls outside UNCLOS and the jurisdiction of the Tribunal”.²¹²

132. Specifically, the Russian Federation submits that “[a]s a matter of its ordinary meaning, Article 32 establishes no right to immunity and only addresses exceptions to the potential immunity of warships”.²¹³ It cites at length from the Joint Opinion of Judges Wolfrum and Cot in the *ARA Libertad* case, which takes the position that “[A]rticle 32 constitutes a reference rather than a regulation in itself” and compares Article 32 to Article 95,²¹⁴ which in its view “makes very clear that only [A]rticle 95 [...] contains a regulation on immunity whereas [A]rticle 32 does not”.²¹⁵
133. In support of its interpretation, the Russian Federation points to the *travaux préparatoires* of the 1958 Convention on the Territorial Sea and the Contiguous Zone (the “**Territorial Sea Convention**”), which included provisions antecedent to UNCLOS’s provisions on the immunities

²¹⁰ Russian Federation’s Preliminary Objections, ¶¶ 7, 75–89; Preliminary Objections Hearing, 11 October 2021, 62:25–87:22 (Pellet).

²¹¹ Russian Federation’s Preliminary Objections, ¶¶ 75, 77. The Russian Federation also approvingly quotes the Separate Opinion of Judges Wolfrum and Cot in the *ARA Libertad* case, which shares the Russian Federation’s interpretation of Article 32 while clarifying that “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”. See Russian Federation’s Preliminary Objections, ¶ 79 referring to *ARA Libertad (Argentina v. Ghana)*, Provisional Measures Order, 15 December 2012, Separate Opinion of Judges Wolfrum and Cot, ITLOS Reports 2012 (**RUL-22**) (“*ARA Libertad, Provisional Measures Order, Separate Opinion of Judges Wolfrum and Cot*”), ¶ 43.

²¹² Russian Federation’s Preliminary Objections, ¶ 82; Preliminary Objections Hearing, 11 October 2021, 62:25–87:22 (Pellet).

²¹³ Russian Federation’s Preliminary Objections, ¶ 77; see also Russian Federation’s Preliminary Objections, ¶ 79 referring to *ARA Libertad*, Provisional Measures Order, Separate Opinion of Judges Wolfrum and Cot, ¶ 46 (**RUL-22**), (finding that Article 22(2) of the 1958 Convention on the Territorial Sea and Contiguous Zone “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”, which “provides for a clear indication that the issue of immunity had its basis outside treaty law in customary international law”).

²¹⁴ Article 95 of the Convention provides: “Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.”

²¹⁵ Russian Federation’s Preliminary Objections, ¶ 79 referring to *ARA Libertad*, Provisional Measures Order, Separate Opinion of Judges Wolfrum and Cot (**RUL-22**), ¶¶ 40–44; see also Russian Federation’s Preliminary Objections, ¶ 82 (“Contrary to Article 95 [...] the basis, meaning and scope of the immunity referred to in Article 32 is not found in UNCLOS.”).

of warships in the territorial sea.²¹⁶ The Russian Federation argues that the failure to adopt a provision that “would have expressly recognized the immunity of warships while exercising innocent passage in the territorial sea [...] supports the view that [the 1958 United Nations Conference on the Law of the Sea and the Third United Nations Conference on the Law of the Sea] deliberately refrained from setting up a treaty obligation on the immunities of warships while these exercise passage through the territorial sea”.²¹⁷

134. The Russian Federation argues that while the Convention addresses exceptions to innocent passage (in Subsection A of Section 3 of Part II) and to warship immunity upon non-compliance with coastal State laws and regulations in the territorial sea (Articles 30 and 31), the Convention “says nothing about the immunities of warships, leaving the matter to be dealt with elsewhere”.²¹⁸ The Russian Federation also emphasizes the difference between Article 32 and Article 95, noting that Article 95 provides positively that warships in the high seas have complete “immunity”, while Article 32 “merely implies” the existence of undefined “immunities” in the territorial sea and does not regulate them.²¹⁹
135. According to the Russian Federation, Article 32 is a “without prejudice” provision with respect to immunities under customary international law.²²⁰ The Russian Federation distinguishes between what it views as a matter of applicable law (“the Tribunal may have recourse to general international law not incompatible with the Convention in accordance with Article 293”) as

²¹⁶ Russian Federation’s Preliminary Objections, ¶ 80; Preliminary Objections Hearing, 14 October 2021, 334:16–336:8 (Pellet).

²¹⁷ The draft article adopted by the First Committee of the 1958 Conference read: “*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.” In the Plenary of the Conference, the draft article was amended to delete “authorization or” in paragraph 1. The draft article, as amended, was not adopted, having failed to obtain the required two-thirds majority. See Russian Federation’s Preliminary Objections, ¶ 80 referring to 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. 1 (RU-1); Preliminary Objections Hearing, 11 October 2021, 72:13–75:9 (Pellet).

²¹⁸ Russian Federation’s Preliminary Objections, ¶ 78 quoting 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).

²¹⁹ Preliminary Objections Hearing, 11 October 2021, 72:6–12 (“Article 32 recognises the existence of some kind of immunities of warships in the territorial sea, but it does not specify what these immunities comprise. Nor does that provision guarantee anything; it merely implies a recognition of the existence of undefined immunities.”), 72:18–20 (“Contrary to Article 95, Article 32 [...] refers to immunities, but, by no means, regulates them.”) (Pellet).

²²⁰ Russian Federation’s Preliminary Objections, ¶¶ 7, 89; see also Russian Federation’s Preliminary Objections, ¶ 82 (“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.”).

opposed to a matter of jurisdiction (“[the Arbitral Tribunal] is mandated only to decide on disputes concerning the interpretation and application of the Convention in accordance with Article 288”).²²¹ The Russian Federation further submits that Article 293 serves to confirm the applicability of other obligations under international law, but not 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”, however fundamental or longstanding the international law obligations invoked might be.²²²

136. The Russian Federation also submits that Article 32 is not a rule of incorporation, arguing that, in contrast to “the few provisions of the Convention which [...] directly incorporate other rules of international law [by] expressly refer[ring] to treaty law”, the customary immunity of warships has not been incorporated by reference.²²³ Likewise, the Russian Federation contends that the relevant customary rules cannot be considered as incorporated into the Convention through Article 30, which it claims is inseparable from Article 32.²²⁴

137. Contrary to Ukraine’s position, the Russian Federation argues that Article 32 is the relevant provision of the Convention because “the order to stop [the Ukrainian vessels], warning flares and shots into the air, the use of targeted weapons against [the *Berdyansk*] and the arrests of [the

²²¹ Russian Federation’s Preliminary Objections, ¶ 83 referring to *The M/V “Norstar” Case (Panama v. Italy)*, ITLOS Case No. 25, Judgment (UAL-31), p. 37, ¶ 136; *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015 (UAL-6) (“*Arctic Sunrise, Award*”), ¶ 188; *ARA Libertad*, Provisional Measures Order, Separate Opinion of Judges Wolfrum and Cot (RUL-22), ¶ 7; *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)*, PCA Case No. 2003-06, Partial Award, 30 January 2007 (RUL-16), ¶ 152; *MOX Plant (Ireland v. United Kingdom)*, Procedural Order No. 3, 24 June 2003 (RUL-13), ¶ 19; see also Preliminary Objections Hearing, 11 October 2021, 84:17–85:3 (Pellet).

²²² Russian Federation’s Preliminary Objections, ¶ 83 referring to *Chagos* (RUL-25), ¶¶ 184–186; *Arctic Sunrise*, Award (UAL-6), ¶ 190; see also Russian Federation’s Preliminary Objections, ¶ 84 referring to *ARA Libertad*, Provisional Measures Order, Separate Opinion of Judges Wolfrum and Cot (RUL-22), ¶ 7 (“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.”).

²²³ Russian Federation’s Preliminary Objections, ¶ 81 (giving the example of Article 74 of the Convention, which provides 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”). The Russian Federation also refers to the Joint Opinion of Judges Wolfrum and Cot in the *ARA Libertad* case, which rejects the notion that Article 32 incorporates customary international law and observes that the Convention contains “very few references to customary international law [...] due to the overall policy towards customary international law, whose universality was, at the time of the drafting of the Convention, put into question”. See Russian Federation’s Preliminary Objections, ¶ 81 referring to *ARA Libertad*, Provisional Measures Order, Separate Opinion of Judges Wolfrum and Cot (RUL-22), ¶ 50; see also Preliminary Objections Hearing, 11 October 2021, 76:8–82:14 (Pellet).

²²⁴ Preliminary Objections Hearing, 11 October 2021, 82:15–85:20 (Pellet).

Yani Kapu] and [the *Berdyansk*]” all occurred in the Russian Federation’s territorial sea.²²⁵ The Russian Federation rejects Ukraine’s argument that the Arbitral Tribunal must decide on the question of whether Ukraine’s claims fall within the Convention only on the basis of the bare allegations advanced by Ukraine.²²⁶ The Russian Federation additionally notes that “it does not accept the waters in question as belonging to Ukraine; but the [Arbitral] Tribunal has no jurisdiction to decide on a dispute over territorial sovereignty”.²²⁷

138. Alternatively, the Russian Federation asserts that the pursuit of the *Nikopol* started well within the territorial sea, such that “the correct focus is still on Article 32, by operation of Article 111 [on hot pursuit]”.²²⁸ Article 111 provides:

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.

2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

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.

²²⁵ Russian Federation’s Preliminary Objections, ¶ 85; Preliminary Objections Hearing, 11 October 2021, 63:6–67:24 (Pellet); Preliminary Objections Hearing, 14 October 2021, 315:11–324:21 (Pellet).

²²⁶ Preliminary Objections Hearing, 14 October 2021, 315:11–325:24 (Pellet).

²²⁷ Russian Federation’s Preliminary Objections, ¶ 85.

²²⁸ Russian Federation’s Preliminary Objections, ¶¶ 85–87; Preliminary Objections Hearing, 11 October 2021, 63:6–67:24 (“as for the *Nikopol*, it was stopped by a helicopter at 21.27 in Russia’s territorial sea and it drifted up to its capture at 23.21 in the Russian [exclusive economic zone] but in the immediate vicinity of the limit of the territorial sea”), 86:7–87:23 (“the hot pursuit undertaken by Russian warships while the Ukrainian vessels were within Russian territorial sea”) (Pellet); Preliminary Objections Hearing, 14 October 2021, 326:1–16 (“the *Nikopol* [...] was formally captured very close to the limit of [Russia’s] territorial sea but just inside its economic zone [...] after having been stopped within the territorial sea”) (Pellet).

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.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;

(b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

139. The Russian Federation submits that the conditions for hot pursuit under Article 111 were met in the present case: (i) the Russian Federation demanded that the vessels stop because they had violated the law of the Russian Federation while the vessels were in its territorial sea; (ii) hot pursuit was continuous and uninterrupted; (iii) a signal to stop had been given; and (iv) the Russian Federation's coast guard vessels were clearly marked and identifiable as being authorized to be on government service.²²⁹ According to the Russian Federation, “[s]ince Article 32 does not provide for the 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 to 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.”²³⁰ In any event, the Russian Federation contends that the *Nikopol* should be considered to have been captured in the territorial sea because it “stopped within the territorial sea officially surrendering to the jurisdiction of Russia” and then merely drifted 1.21 miles outside the territorial sea as a result of the current, not as a result of the “*de facto* or *de jure*” acts of either party.²³¹ The Russian Federation further argues that the fate of the three vessels should be considered together as they were all part of the same mission and subject to the same warnings, pursuit and injunctions of the Russian navy.²³²

²²⁹ Russian Federation's Preliminary Objections, ¶ 87 referring to Ukraine's Memorial, ¶¶ 33–34, 75, 78, 88.

²³⁰ Russian Federation's Preliminary Objections, ¶ 88.

²³¹ Preliminary Objections Hearing, 14 October 2021, 326:17–327:2 (Pellet).

²³² Preliminary Objections Hearing, 14 October 2021, 326:1–327:13 (Pellet).

140. With respect to the two alternative bases for the Arbitral Tribunal’s jurisdiction that Ukraine has argued for, the Russian Federation notes that the issue of the immunities of warships is not an incidental question; rather, “it is at the heart of the case” and thus there is no incidental jurisdiction over this question.²³³ The Russian Federation also rejects the argument that general international law is incorporated into the Convention through Article 2(3) as “doing so would deprive Article 32 of any material effect”.²³⁴ It thus claims that there is no jurisdiction on the basis of Article 2(3) either.²³⁵
141. The Russian Federation concludes that since “[t]here is no relevant and applicable rule [providing for the immunities of warships and other government ships operated for non-commercial purposes in the territorial sea] under the Convention, whether self-standing or through incorporation [...] [i]t follows that there can be no dispute concerning the interpretation or application of such a rule, as would be required for this [Arbitral] Tribunal to have jurisdiction under Article 288(1) of the Convention.”²³⁶

B. POSITION OF UKRAINE

142. Ukraine submits that the Russian Federation’s Article 288(1) Objection is “irrelevant” because, on Ukraine’s view of the facts, “all three vessels were arrested *beyond the territorial sea*”.²³⁷ Ukraine’s claims therefore focus on immunity violations under Articles 58, 95 and 96, “provisions which Russia agrees confer immunity”.²³⁸
143. Ukraine contends that at this preliminary objections stage, “the question of whether Ukraine’s claims fall within the Convention can only be assessed on the basis of the facts *advanced by Ukraine*”²³⁹ that, as attested to by commanders on board the three Ukrainian vessels, “[a]t the

²³³ Preliminary Objections Hearing, 11 October 2021, 81:10–82:14, 86:1–3 (Pellet); Preliminary Objections Hearing, 14 October 2021, 327:14–330:6 (Pellet).

²³⁴ Preliminary Objections Hearing, 11 October 2021, 76:8–82:14 (Pellet). Article 2(3) of UNCLOS provides that “[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.”

²³⁵ Preliminary Objections Hearing, 11 October 2021, 76:8–82:14 (Pellet). *See* Article 288(1) of UNCLOS *supra*, ¶ 126.

²³⁶ Russian Federation’s Preliminary Objections, ¶ 89; *see also* Russian Federation’s Preliminary Objections, ¶ 7 (“[Article 32] is not a provision that establishes a right to immunity under the Convention and nor is it a form of *renvoi*.”).

²³⁷ Ukraine’s Observations, ¶ 72 (emphasis in original); Preliminary Objections Hearing, 12 October 2021, 190:23–193:13 (Soons).

²³⁸ Ukraine’s Observations, ¶ 72; *see also* Ukraine’s Observations, ¶¶ 11, 73.

²³⁹ Ukraine’s Observations, ¶ 8 (emphasis in original); *see also* Ukraine’s Observations, ¶¶ 73–78 referring to UNCLOS, Articles 286 and 288; *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, Judgment, I.C.J. Reports 2019 (RUL-60), ¶ 57; *M/V “Louisa” (RUL-23)*, ¶ 99; *The M/V “Norstar” Case (Panama v. Italy)*, ITLOS Case No. 25, Preliminary Objections, Judgment, 4 November 2016

time of their boarding, arrest and detention, the Ukrainian naval vessels had exited the territorial sea” and were in the exclusive economic zone (where it is not disputed that Articles 95 and 96 apply to confer immunity).²⁴⁰ Ukraine stresses that “[t]here is no question that a dispute concerning violations of Articles 95 and 96—the claim actually advanced by Ukraine—is a dispute concerning interpretation or application of the Convention that is within the Tribunal’s jurisdiction.”²⁴¹

144. Ukraine further submits that, whether its account of the facts is accepted *pro tem* (placing the dispute within the scope of Articles 58, 95 and 96) or whether the Arbitral Tribunal takes up the Russian Federation’s request to adjudicate the Russian Federation’s contrasting account of the facts, the Russian Federation’s Article 288(1) Objection must be rejected.²⁴² Ukraine submits that the acts of which it complains “plainly fall within the provisions of UNCLOS”.²⁴³ Specifically, it contends that the Russian Federation’s boarding, arrest, detention and prosecution of Ukraine’s vessels and servicemen respectively breached Articles 58, 95 and 96; the Russian Federation’s order for the naval vessels to stop while in the territorial sea and attempts to prevent them from exiting the territorial sea breached Articles 30 and 32; the Russian Federation’s violation of the Provisional Measures Order violated Articles 290 and 296; and the Russian Federation’s aggravation of the dispute violated Article 279.²⁴⁴
145. Ukraine adds that the Russian Federation’s argument that Article 32 does not confer immunity is not in fact a *preliminary* objection because that argument only becomes relevant if the Arbitral Tribunal determines that the arrests of two of the vessels took place within the territorial sea, which is not a matter for the preliminary objections stage.²⁴⁵

(**RUL-30**) (“*M/V “Norstar” Preliminary Objections, Judgment*”), ¶ 110; *Case Concerning Oil Platforms (Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (**RUL-43**), ¶ 16; *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, Separate Opinion of Judge Higgins (**UAL-37**), ¶ 32; *see also* Preliminary Objections Hearing, 12 October 2021, 193:13–196:13 (Soons); Preliminary Objections Hearing, 15 October 2021, 448:1–451:1 (Soons).

²⁴⁰ Ukraine’s Observations, ¶ 78 *referring to* Ukraine’s Memorial, ¶ 78; Hrytsenko Statement, ¶¶ 9, 20–21; Melnychuk Statement, ¶¶ 9, 15–16; Nebylytsia Statement, ¶¶ 14–16; *see also* Ukraine’s Observations, ¶ 8.

²⁴¹ Ukraine’s Observations, ¶ 8.

²⁴² Ukraine’s Observations, ¶ 79 *referring to* Ukraine’s Memorial, ¶¶ 74–75, 77–78, 153(a); UNCLOS, Articles 95–96; Russian Federation’s Preliminary Objections, ¶ 85, p. 37; Preliminary Objections Hearing, 12 October 2021, 202:12–208:21 (Soons).

²⁴³ Ukraine’s Observations, ¶ 73.

²⁴⁴ Ukraine’s Observations, ¶ 73 *referring to* Ukraine’s Memorial, ¶¶ 77–92, 153(a)–(f).

²⁴⁵ Ukraine’s Observations, ¶ 74. Because it views the Russian Federation’s interpretation of Article 32 as contingent on the Arbitral Tribunal finding that two of the arrests took place within the territorial sea, Ukraine describes the Russian Federation’s position as “entirely hypothetical”, and suggests that “it is not for the [Arbitral Tribunal] to determine the applicable law with regard to a hypothetical situation”. *See* Ukraine’s Observations, ¶ 85 *referring to Question of the*

146. Ukraine also rejects the Russian Federation’s position that the right of hot pursuit under Article 111 overrides the immunity of warships under Articles 95 and 96²⁴⁶ and contends that, as a merits defence, it is “not properly presented at this stage of proceedings”.²⁴⁷ Ukraine submits that the relevant jurisdictional inquiry is whether the complained-of acts “fall within” the Convention’s provisions, whereas the Russian Federation’s defence “does not present the question of *whether* provisions of the Convention are applicable, but *which* provisions of the Convention are applicable”.²⁴⁸ Ukraine further argues that there is no textual support either for a “hot pursuit” exception to Article 95 or for the Russian Federation’s position that “the silence in Article 32 trumps and contradicts the rule enunciated in Article 95”.²⁴⁹ Indeed, Ukraine submits that the right of hot pursuit serves as a “continuation of a validly commenced act of jurisdiction”, but does not confer enforcement jurisdiction over immune vessels.²⁵⁰ Ukraine also argues that there is no legal

Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (**UAL-84**), ¶ 123; see also Ukraine’s Observations, ¶¶ 8, 100; Preliminary Objections Hearing, 12 October 2021, 202:12–203:3 (Soons).

²⁴⁶ Ukraine’s Observations, ¶¶ 75, 80 referring to Russian Federation’s Preliminary Objections, ¶¶ 85–86; Preliminary Objections Hearing, 12 October 2021, 198:3–202:11 (Soons). See Articles 95 and 96 of UNCLOS *supra*, ¶ 101.

²⁴⁷ Ukraine’s Observations, ¶ 11; see also Ukraine’s Observations, ¶ 75 (“that argument is a merits defense that should be raised at the merits stage, as it is a question of interpretation and application that falls within the scope of the Convention: Ukraine argues that Articles 95 and 96 apply, while the Russian Federation argues it need not comply with Articles 95 and 96 because of Article 111”); Ukraine’s Observations, ¶¶ 81–82; Preliminary Objections Hearing, 12 October 2021, 196:14–198:9 (Soons).

²⁴⁸ Ukraine’s Observations, ¶ 81 (emphasis in original) referring to *M/V “Louisa” (RUL-23)*, ¶ 99; *M/V “Norstar”* Preliminary Objections, Judgment (**RUL-30**), ¶ 110; Preliminary Objections Hearing, 12 October 2021, 196:14–198:9 (Soons).

²⁴⁹ Ukraine’s Observations, ¶ 82 referring to Russian Federation’s Preliminary Objections, ¶ 88; see also Ukraine’s Observations, fn. 177 (contending that the Russian Federation’s only support for this position is a Norwegian statement pertaining to commercial vessels); Preliminary Objections Hearing, 12 October 2021, 198:10–202:11 (Soons).

²⁵⁰ Ukraine’s Observations, ¶¶ 83–84 referring to D.J. Attard and P. Mallia, “The High Seas”, D.J. Attard et al. (eds), *The IMLI Manual on International Maritime Law*, Vol. I, 2014 (**UAL-74**), p. 263; Sir R. Jennings and Sir A. Watts, “Organs of the States for Their International Relations: Miscellaneous Agencies, State Ships Outside National Waters”, in Sir R. Jennings and Sir A. Watts (eds), *Oppenheim’s International Law*, Vol. 1, Oxford University Press, 9th ed., 2008 (**UAL-11**), § 563; *The Schooner Exchange v. Mcfaddon & Others*, 11 U.S. 116 (1812) (**UAL-75**) (“*Schooner Exchange*”), p. 147; *The “ARA Libertad” Case (Argentina v. Ghana)*, ITLOS Case No. 20, Order, 15 December 2012 (**UAL-1**) (“*ARA Libertad, ITLOS Order*”), ¶ 95; T.K. Thommen, *Legal Status of Government Merchant Ships in International Law*, Nijhoff, 1962 (**UAL-76**), p. 8; *Convention on the Territorial Sea and the Contiguous Zone 1958*, Reservations for the Union of the Soviet Socialist Republics, 516 U.N.T.S. 206, 30 October 1958 (**UAL-77**), p. 273; U.S. Navy, U.S. Marine Corps, & U.S. Coast Guard, “The Commander’s Handbook on the Law of Naval Operations”, July 2007 edn. (**UAL-13**), § 2.1.1; N.M. Poulantzas, *The Right of Hot Pursuit in International Law*, Nijhoff, 2nd ed., 2002 (**UAL-78**), p. 192, fn. 271; R.C. Reuland, “The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention”, *Virginia Journal of International Law*, Vol. 33, 1993 (**UAL-79**), p. 565; UNCLOS, Article 30; D. Nelson, “Maritime Jurisdiction”, in Max Planck Encyclopedia of Public International Law, January 2010 (**UAL-80**), ¶ 18; M.H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Part II, Nijhoff, 2014 (**UAL-8**), ¶ 30.6; J. Crawford, “Maritime Transit and the Regime of the High Seas”, in J. Crawford (ed), *Brownlie’s Principles of Public International Law*, Oxford University Press, 8th ed., 2012 (**UAL-81**), pp. 317–18; K. Aquilina, “Territorial Sea and the Contiguous Zone”, in D.J. Attard et al. (eds), *The IMLI Manual on International Maritime Law*, Volume I, 2014 (**UAL-82**), p. 55.

support for the position that “the *Nikopol* should be treated as if it was in the territorial sea because it is part of a group of ships and it should have the same fate as the others”.²⁵¹

147. Even if Article 32 were to be regarded as properly invoked at the preliminary objections stage, Ukraine disagrees with the Russian Federation’s interpretation that Article 32 is a “without prejudice” provision that does not provide for an applicable immunity of warships and other non-commercial government vessels in the territorial sea.²⁵² Ukraine submits that its interpretation of Article 32 comports with the Vienna Convention on the Law of Treaties’ (the “VCLT”) direction that treaty provisions must 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”,²⁵³ and is “widely accepted” among commentators on the law of the sea.²⁵⁴ According to Ukraine, interpreted in good faith and in the context of its placement (within Part II, Section 3, Subsection C, of the Convention, which sets out the “rules applicable to warships and other government ships used for non-commercial purposes”), Article 32 on the “[i]mmunities of warships and other government ships operated for non-commercial purposes” must prescribe an applicable immunity in the territorial sea.²⁵⁵
148. Ukraine finds further support for its interpretation in the textual links running from Article 32 to Articles 30 and 31, which codify the sole exceptions to Article 32’s “general rule of immunity” and “preserve” the “historic customary immunity of warships”; Ukraine reasons that “[g]iven that the Convention codifies exceptions to the rule of immunity in the territorial sea, and specifically

²⁵¹ Preliminary Objections Hearing, 15 October 2021, 456:18–22 (Soons).

²⁵² Ukraine’s Observations, ¶¶ 76, 85–86, 90; Preliminary Objections Hearing, 12 October 2021, 203:11–208:21 (Soons); Preliminary Objections Hearing, 15 October 2021, 457:20–462:13 (Soons).

²⁵³ Ukraine’s Observations, ¶ 87 *citing* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 23 May 1969 (UAL-88) (“VCLT”), Article 31(1); *see also* Preliminary Objections Hearing, 12 October 2021, 203:11–205:19 (Soons); Preliminary Objections Hearing, 15 October 2021, 462:14–464:13 (Soons).

²⁵⁴ Ukraine’s Observations, ¶ 93 *referring to* M.H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Part II, Nijhoff, 2014 (UAL-73), ¶ 32.1; D.J. Attard and P. Mallia, “The High Seas”, in D.J. Attard et al. (eds), *The IMLI Manual on International Maritime Law*, Vol. I, Oxford University Press, 2014 (UAL-74), fn. 107; N. Ronzitti, “Military Uses of the Sea”, in D.J. Attard et al. (eds), *The IMLI Manual on International Maritime Law*, Vol. III, Oxford University Press, 2016 (UAL-92), p. 561; B. Vukas, “Peaceful Uses of the Sea, Denuclearization and Disarmament”, in R.-J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, Nijhoff, 1991 (UAL-65), p. 1250; R.A. Barnes, “Flag States”, in D. Rothwell et al. (eds), *The Oxford Handbook on the Law of the Sea*, Oxford University Press, 2015 (UAL-93), p. 312; D. Nelson, “Maritime Jurisdiction”, in Max Planck Encyclopedia of Public International Law, January 2010 (UAL-80), ¶ 18; S. Ruiz-Cerutti, “The UNCLOS and the Settlement of Disputes: The ARA Libertad Case”, in L. del Castillo (ed), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos*, Nijhoff, 2015 (UAL-94), p. 716; F. Attard, “IMO’s Contribution to International Law Regulating Maritime Security”, *Journal of Maritime Law and Commerce*, Vol 45(4), 2014 (UAL-95), p. 528; Klein, *Law Enforcement* (UAL-96), p. 586; *ARA Libertad*, ITLOS Order (UAL-1), ¶¶ 63–65; Separate Opinion of Judge Gao (RUL-32), ¶¶ 2, 4.

²⁵⁵ Ukraine’s Observations, ¶ 87 *referring to* UNCLOS, Article 32, Part II.3.C; *see also* Preliminary Objections Hearing, 15 October 2021, 462:14–463:24 (Soons).

refers to those exceptions in the text of Article 32, it would be anomalous to interpret Article 32 as not also codifying the [customary] rule to which those exceptions apply.”²⁵⁶ Ukraine further submits that the variation in language between Article 32 and Article 95 has its roots in the Convention’s precursor, the Territorial Sea Convention, and relates to the different immunities codified in each provision (that is, “complete immunity” on the high seas, as opposed to immunity with limited exceptions in the territorial sea).²⁵⁷ It does not, Ukraine continues, sustain the Russian Federation’s conclusions that the Convention does not affirmatively provide for warship immunity in the territorial sea.²⁵⁸

149. Ukraine also submits that Article 32 is not worded like “without prejudice” provisions in other parts of the Convention or in other treaties, which refer to superseding rights or obligations under other sources of law; it contends that, instead, “Article 32 refers to the Convention’s own limited exceptions on [the immunity of warships and non-commercial governmental vessels in the territorial sea]”.²⁵⁹ Ukraine further argues that the reference in the Convention’s preamble to “matters not regulated by this Convention” relates to matters “wholly untouched by the Convention” (such as the law of armed conflict), whereas warship immunity is a subject regulated by the Convention.²⁶⁰
150. Ukraine submits that the object and purpose of the Convention as a whole (the “codification and progressive development of the law of the sea”), and of Part II in particular (“giv[ing] expression to [...] international customary law” governing the territorial sea and contiguous zone), further confirm that “Article 32 was intended to codify the rule of immunity in the territorial sea”.²⁶¹ Ukraine argues that there is “no explanation for why the drafters of the Convention, having

²⁵⁶ Ukraine’s Observations, ¶ 88; *see also* Ukraine’s Observations, ¶ 2 (“A fundamental rule of the law of the sea, codified in the [Convention], is that warships and other non-commercial government vessels have complete immunity from the jurisdiction of any State other than their own.”); Preliminary Objections Hearing, 12 October 2021, 203:11–208:21 (Soons).

²⁵⁷ Preliminary Objections Hearing, 15 October 2021, 457:20–462:13 (Soons) *referring to* B.H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea”, *Virginia Journal of International Law*, Vol. 24, 1984 (UAL-89), p. 817.

²⁵⁸ Ukraine’s Observations, ¶ 89 *referring to* UNCLOS, Articles 32, 58, 95.

²⁵⁹ Ukraine’s Observations, ¶ 90.

²⁶⁰ Ukraine’s Observations, ¶ 92; Preliminary Objections Hearing 15 October 2021, 464:1–464:13 (Soons).

²⁶¹ Ukraine’s Observations, ¶ 91 *referring to* UNCLOS, Preamble, Part II; *see also* Preliminary Objections Hearing, 12 October 2021, 206:8–208:21 (Soons).

otherwise codified the customary rules of warship immunity, would have intended to leave this one facet of warship immunity outside the scope of the Convention”.²⁶²

151. Finally, Ukraine argues that Article 32 is a “codification of the customary law rule of immunity [of warships and other government ships used for non-commercial purposes in the territorial sea]”,²⁶³ which provides two alternative bases for the Arbitral Tribunal’s jurisdiction in the present dispute.²⁶⁴ First, following the approach of the *Enrica Lexie* arbitral tribunal, the Arbitral Tribunal has jurisdiction to apply customary immunity principles as an incidental question arising in the context of the Arbitral Tribunal’s determinations on (i) whether the Russian Federation’s arrest of the *Nikopol* violated Articles 58 and 95 and (ii) whether the Russian Federation’s order to stop all three vessels violated Article 30.²⁶⁵ Second, the Arbitral Tribunal would have jurisdiction under Article 2(3) of UNCLOS, which states that “sovereignty over the territorial sea is exercised subject [...] to other rules of international law”, and which thus “incorporates into UNCLOS the obligation to respect customary international law rules of immunity in the territorial sea”.²⁶⁶

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

152. The essence of the second objection of the Russian Federation is that there is no provision in the Convention for the immunity of warships in the territorial sea and thus that the Arbitral Tribunal has no jurisdiction over Ukraine’s claim insofar as it relates to the immunity of its naval vessels

²⁶² Ukraine’s Observations, ¶ 91; Preliminary Objections Hearing, 12 October 2021, 206:8–208:21 (Soons).

²⁶³ Ukraine submits that although the Russian Federation has taken no position on the matter, it is indisputable that such a customary immunity exists in the territorial sea. See Ukraine’s Observations, fn. 172 referring to Sir R. Jennings and Sir A. Watts, “Organs of the States for Their International Relations: Miscellaneous Agencies, State Ships Outside National Waters”, in Sir R. Jennings and Sir A. Watts (eds), *Oppenheim’s International Law*, Vol. 1, Oxford University Press, 9th ed., 2008 (UAL-11), § 563; *Schooner Exchange* (UAL-75), p. 147; *ARA Libertad*, ITLOS Order (UAL-1), ¶ 95; T.K. Thommen, *Legal Status of Government Merchant Ships in International Law*, Nijhoff, 1962 (UAL-76), p. 8; *Convention on the Territorial Sea and the Contiguous Zone 1958*, Reservations for the Union of the Soviet Socialist Republics, 516 U.N.T.S. 206, 30 October 1958 (UAL-77), p. 273; U.S. Navy, U.S. Marine Corps, & U.S. Coast Guard, “The Commander’s Handbook on the Law of Naval Operations”, July 2007 edn. (UAL-13), § 2.1.1; see also Preliminary Objections Hearing, 12 October 2021, 203:11–208:21 (Soons).

²⁶⁴ Ukraine’s Observations, ¶¶ 86, 94; Preliminary Objections Hearing, 12 October 2021, 208:22–213:1 (Soons).

²⁶⁵ Ukraine’s Observations, ¶¶ 86, 96–97 referring to *Enrica Lexie Incident* (UAL-41), ¶¶ 806–809; see also Preliminary Objections Hearing, 12 October 2021, 208:22–211:17 (Soons); Preliminary Objections Hearing, 15 October 2021, 464:14–465:21 (Soons).

²⁶⁶ Ukraine’s Observations, ¶¶ 86, 98. Ukraine recalls that both the *South China Sea* and *Chagos* arbitral tribunals found violations of Article 2(3) based on legal obligations originating outside the Convention. Moreover, in the *South China Sea* case, China’s violation of “other rules of international law” was “not predicated on any assumption that one Party or the other is sovereign” over the territorial sea surrounding Scarborough Shoal. See Ukraine’s Observations, ¶¶ 98–99 referring to *South China Sea*, Award (UAL-7), ¶¶ 808, 814; *Chagos* (RUL-25), ¶¶ 514–544; see also Preliminary Objections Hearing, 12 October 2021, 211:20–213:1 (Soons); Preliminary Objections Hearing, 15 October 2021, 465:22–472:4 (Soons).

within the territorial sea. The Russian Federation does not dispute that there may be immunity for warships under customary international law, but argues that Article 32 does not incorporate customary international law into the Convention. It simply reserves the position in relation to the immunity of warships. Since the jurisdiction of the Arbitral Tribunal extends only to disputes concerning the interpretation and application of the Convention, then, in the view of the Russian Federation, as there is no provision in the Convention that can be interpreted or applied, there is no jurisdiction.

153. Ukraine, while disputing the view of the Russian Federation that the Convention does not provide for the immunity of warships in the territorial sea and its interpretation of Article 32, maintains that the Russian Federation's objection is only relevant insofar as vessels were arrested within the territorial sea. However, Ukraine argues that the arrest of all of the vessels took place beyond the territorial sea where the immunity of warships is specifically provided for under Articles 58, 95 and 96. In any event, Ukraine argues that, for the purpose of preliminary objections, the facts as pleaded by it must be the basis on which the Tribunal is to rely in reaching its decision. Otherwise, the Arbitral Tribunal would have to make its own factual enquiry, something that is inappropriate at the stage of preliminary objections.
154. The Arbitral Tribunal is faced with the situation where it is unable to determine at this stage if the question whether the Convention provides for an immunity for warships in the territorial sea is a live issue or an abstract question. If the arrest of a Ukrainian vessel took place in the territorial sea, then, without prejudice to the status of the territorial sea,²⁶⁷ the interpretation of Article 32 becomes essential in the present case. If, however, the arrest took place outside the territorial sea, there is no Article 32 claim by Ukraine to decide. Accordingly, this preliminary objection of the Russian Federation is not of an exclusively preliminary character and thus it is premature for the Arbitral Tribunal to decide it. The matter must be left for the merits, when the factual question of whether the arrests took place in the territorial sea can be determined.
155. The Arbitral Tribunal decides, therefore, to make no decision on this second procedural objection, and to join it to the merits.

²⁶⁷ See *supra*, ¶ 42.

VIII. THE RUSSIAN FEDERATION’S OBJECTION THAT THE ARBITRAL TRIBUNAL HAS NO JURISDICTION OVER THE ALLEGED BREACHES OF THE ITLOS PROVISIONAL MEASURES ORDER UNDER ARTICLES 290 AND 296 OF THE CONVENTION

156. Article 290(6) of the Convention provides:

The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.

157. Article 296 provides:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

158. Ukraine argues that the Russian Federation has “violated Articles 290 and 296 of the Convention by failing to comply with the ITLOS provisional measures order”.²⁶⁸ The Russian Federation claims that the arbitral tribunal lacks jurisdiction over any claim for breach of the ITLOS Provisional Measures Order.

A. POSITION OF THE RUSSIAN FEDERATION

159. The Russian Federation contends that, because the Arbitral Tribunal lacks jurisdiction over the “main dispute” between the Parties, the Arbitral Tribunal also lacks jurisdiction with respect to the Russian Federation’s alleged non-compliance with the Provisional Measures Order.²⁶⁹ In support of this position, the Russian Federation relies on the *LaGrand* judgment, where the ICJ held that, when it has jurisdiction to decide a case, the court also has jurisdiction to address submissions requesting a determination as to whether orders indicating measures seeking to preserve the rights of the parties have been complied with.²⁷⁰ The Russian Federation therefore argues that, although there is authority for the proposition that the Arbitral Tribunal’s jurisdiction to decide the main dispute also encompasses jurisdiction to adjudicate allegations of non-

²⁶⁸ Ukraine’s Memorial, ¶ 153(e). For the full text of the provisional measures order, see *supra*, ¶¶ 12–13.

²⁶⁹ Russian Federation’s Preliminary Objections, ¶¶ 94–96 citing *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001 (UAL-22) (“*LaGrand*”), p. 484, ¶ 45; Preliminary Objections Hearing, 11 October 2021, 104:8–109:4 (Treves); Preliminary Objections Hearing, 14 October 2021, 337:11–343:6 (Treves).

²⁷⁰ Russian Federation’s Preliminary Objections, ¶¶ 94–96 referring to *LaGrand (UAL-22)*, p. 484, ¶ 45 (“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.”); see also Preliminary Objections Hearing, 11 October 2021, 104:13–21 (Treves).

compliance with the Provisional Measures Order,²⁷¹ “there are several reasons to hold that the [Arbitral Tribunal] does not have jurisdiction over the main dispute”, emphasizing in particular Article 298(1)(b) and Article 32.²⁷² The Russian Federation contends that Article 290(6) does not alter this position, as it only confirms the binding character of provisional measures and does not address jurisdiction over non-compliance with provisional measures.²⁷³

160. In any event, while the Russian Federation maintains that the Arbitral Tribunal lacks jurisdiction over alleged breaches of the Provisional Measures Order, it submits that the Provisional Measures Order “has been complied with” since “the Ukrainian Military Servicemen were released on 7 September 2019 and the Ukrainian Military Vessels were released on 18 November 2019”.²⁷⁴

B. POSITION OF UKRAINE

161. Ukraine argues that “an order prescribing provisional measures must be complied with promptly because Article 290(6) expressly and unequivocally says so”.²⁷⁵ According to Ukraine, the disagreement between the Parties over whether the Russian Federation has violated its obligation under Article 290(6) to “comply promptly with any provisional measures prescribed under this article [in this case, by the Provisional Measures Order]” thus creates a dispute concerning the interpretation or application of the Convention, which is within the jurisdiction of the Arbitral Tribunal under Articles 286 and 288(1).²⁷⁶
162. Ukraine’s position is that the Russian Federation failed to comply with its obligations under Article 290 and 296.²⁷⁷ Ukraine points out that “Russia waited nearly four months after the [Provisional Measures Order] to release the servicemen, and nearly six months to release the vessels, returning them in an unacceptable state of disrepair, and also aggravated the dispute after

²⁷¹ Russian Federation’s Preliminary Objections, ¶¶ 94–95 referring to *LaGrand (UAL-22)*, p. 484, ¶ 45; *Dispute Concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, ITLOS Case No. 23, Judgment, 23 September 2017 (**RUL-31**) (“*Ghana/Côte d’Ivoire*”), p. 148, ¶ 546 (“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”); Preliminary Objections Hearing, 11 October 2021, 104:22–109:4 (Treves).

²⁷² Russian Federation’s Preliminary Objections, ¶ 96.

²⁷³ Preliminary Objections Hearing, 14 October 2021, 337:11–340:1 (Treves).

²⁷⁴ Russian Federation’s Preliminary Objections, ¶ 9.

²⁷⁵ Preliminary Objections Hearing, 12 October 2021, 220:11–14 (Thouvenin); see also Preliminary Objections Hearing, 12 October 2021, 220:15–223:23 (Thouvenin); Preliminary Objections Hearing, 15 October 2021, 471:21–479:13 (Zionts).

²⁷⁶ Ukraine’s Observations, ¶ 104; Preliminary Objections Hearing, 12 October 2021, 216:8–223:22 (Thouvenin); Preliminary Objections Hearing, 15 October 2021, 474:7–479:13 (Zionts).

²⁷⁷ Ukraine’s Observations, ¶ 101; Preliminary Objections Hearing, 12 October 2021, 214:23–216:17 (Thouvenin).

the [Provisional Measures Order] was issued”.²⁷⁸ Ukraine submits that – as required by ITLOS in the *M/V Louisa* case – it has “established a link between the facts advanced” and “the provisions of the Convention [as relevant here, Article 290(6)] referred to by it”, and “show[n] that such provisions can sustain the claim or claims submitted by [it]”.²⁷⁹

163. Additionally, Ukraine contends that the Russian Federation’s objection must be rejected “because it is predicated on the incorrect premise that the Tribunal lacks jurisdiction over Ukraine’s other claims [for violations of Articles 30, 32, 58, 95 and 96]”.²⁸⁰ Ukraine’s position is that UNCLOS grants the Arbitral Tribunal jurisdiction – independently of what the Russian Federation describes as jurisdiction over the “main dispute” – to address the Russian Federation’s alleged violations of the freestanding obligation under Article 290(6) to “comply promptly with any provisional measures prescribed under [Article 290]”, such as the provisional measures prescribed by ITLOS under Article 290(5).²⁸¹ Ukraine submits that this specific and independent obligation under Article 290(6) makes the present case distinguishable from the *LaGrand* case relied upon by the Russian Federation: the jurisdiction of the ICJ in the *LaGrand* case was based on the Vienna Convention on Consular Relations, which contains no provision requiring prompt compliance with a provisional measures order.²⁸² Ukraine finally points out that “[t]here is no provision of the Convention suggesting that a claim for a violation of Article 290(6) can only be decided if accompanied by a claim for violations of other provisions of the Convention.”²⁸³

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

164. The third preliminary objection of the Russian Federation, that the Arbitral Tribunal has no jurisdiction over the claim of Ukraine that the Russian Federation has failed to comply with the ITLOS Provisional Measures Order, rests on the contention, derived from the judgment of the ICJ

²⁷⁸ Ukraine’s Observations, ¶ 101.

²⁷⁹ Ukraine’s Observations, ¶ 104 quoting *M/V Louisa* (RUL-23), ¶ 99.

²⁸⁰ Ukraine’s Observations, ¶¶ 12, 105; see also Ukraine’s Observations, ¶ 102 referring to Russian Federation’s Preliminary Objections, ¶¶ 94, 96 (highlighting the Russian Federation’s alleged “conce[ssion] that if the Tribunal has jurisdiction over Ukraine’s other claims, it also has jurisdiction over Ukraine’s claim that the Russian Federation breached Articles 290 and 296 by violating the provisional measures prescribed by ITLOS”); Preliminary Objections Hearing, 12 October 2021, 223:23–230:1 (Thouvenin).

²⁸¹ Ukraine’s Observations, ¶¶ 103–106. Ukraine submits that ITLOS and Annex VII tribunals have consistently assumed jurisdiction over violations of provisional measures prescribed under Article 290. See Ukraine’s Observations, ¶ 103 referring to *Arctic Sunrise*, Award (UAL-6), ¶¶ 336, 360; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS Cases Nos. 3 and 4, Provisional Measures Order, 27 August 1999 (UAL-98), ¶ 87; *Ghana/Côte d’Ivoire* (RUL-31), ¶ 647; see also Preliminary Objections Hearing, 12 October 2021, 228:1–230:12 (Thouvenin); Preliminary Objections Hearing, 15 October 2021, 472:21–479:13 (Zionts).

²⁸² Ukraine’s Observations, ¶ 107; Preliminary Objections Hearing, 12 October 2021, 224:7–228:13 (Thouvenin).

²⁸³ Ukraine’s Observations, ¶ 105.

in *LaGrand*, that jurisdiction to determine whether provisional measures have been complied with depends on whether there is jurisdiction over the main dispute. The Russian Federation argues that, since there are several bases on which to deny jurisdiction over the main dispute, then there is no jurisdiction over Ukraine's claim regarding non-compliance with the ITLOS Provisional Measures Order.

165. Ukraine distinguishes *LaGrand* on the basis that there was no provision in the Vienna Convention on Consular Relations – the jurisdictional basis for the case – requiring compliance with orders for provisional measures. Under Article 290(6) of the Convention, on the other hand, “[t]he parties to the dispute shall comply promptly with any provisional measures prescribed under this article.” This is reinforced by Article 296 according to which decisions of courts and tribunals having jurisdiction under section 2 of Part XV (Compulsory Procedures) “shall be final and shall be complied with by all the parties to the dispute”.
166. The Arbitral Tribunal notes that the Russian Federation denies the relevance of Article 290(6), which according to the Russian Federation is concerned only with whether provisional measures are binding and not with the question of jurisdiction over non-compliance with an order of provisional measures. The difference between the Parties on the scope, application and relevance of Article 290(6) is a dispute concerning the interpretation and application of the Convention, which is a matter over which the Arbitral Tribunal has jurisdiction in accordance with Articles 287 and 288 of the Convention. It involves a matter that will have to be determined at the merits phase and there is no basis for a denial of jurisdiction as the Russian Federation claims.
167. Moreover, the Arbitral Tribunal notes that, even if it were to accept Russia's contention that the issue of jurisdiction should be resolved on the basis of its interpretation of *LaGrand*, the Arbitral Tribunal has already found in response to Russia's first preliminary objection that it would have jurisdiction over part of Ukraine's claims. Thus, the Russian objection that, since the Arbitral Tribunal has no jurisdiction over the “main dispute”, it has no jurisdiction over the question of compliance with provisional measures, would have to be rejected.
168. Accordingly, the Arbitral Tribunal rejects Russia's claim that it has no jurisdiction over Ukraine's claim that the Russian Federation had not complied with the ITLOS Preliminary Measures Order.

IX. THE RUSSIAN FEDERATION'S OBJECTION THAT ARTICLE 279 OF THE CONVENTION PROVIDES NO BASIS FOR THE ARBITRAL TRIBUNAL TO CLAIM JURISDICTION AS TO THE ALLEGED AGGRAVATION OF THE DISPUTE

169. Article 279 of the Convention provides:

States Parties shall 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 and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

170. Ukraine claims that the Russian Federation has “violated Article 279 by continuing to aggravate the dispute between the Parties”.²⁸⁴ The Russian Federation contends that the Arbitral Tribunal lacks jurisdiction over claims for breach of the obligation not to aggravate the dispute.

A. POSITION OF THE RUSSIAN FEDERATION

171. The Russian Federation’s position is that Ukraine’s claim concerning a violation of Article 279 “should be disregarded”, as the question of jurisdiction over compliance with an obligation of non-aggravation is absorbed by the question of jurisdiction over compliance with the other provisional measures.²⁸⁵ The Russian Federation argues that Article 279 does not provide a basis for jurisdiction as a result of the Russian Federation’s alleged continued aggravation of this dispute because Article 279 “contains no reference to aggravation of disputes”.²⁸⁶
172. The Russian Federation argues that Ukraine’s reliance on the *South China Sea* award is misplaced because the award relied on ICJ case law developed in relation to Article 41 of the ICJ Statute, whereas Article 279 of UNCLOS has no similarity to Article 41 of the ICJ Statute and is otherwise not an expression of the principle found therein.²⁸⁷ The Russian Federation also contends that “[t]he *South China Sea* arbitral tribunal is isolated in considering that the principle of non-aggravation is contained in [Article 279].”²⁸⁸

²⁸⁴ Ukraine’s Memorial, ¶¶ 92, 153(f). The Russian Federation notes that the operative paragraph of the ITLOS Provisional Measures Order prescribes that the Parties “shall refrain from taking any action which might aggravate or extend the dispute”, and therefore treats the Article 290 and 296 Objection and Article 279 Objection as collectively “amount[ing] to a claim that Russia has failed to comply with the Provisional Measures Order”. See Russian Federation’s Preliminary Objections, ¶ 92.

²⁸⁵ Preliminary Objections Hearing, 14 October 2021, 343:7–344:12 (Treves); Russian Federation’s Preliminary Objections, ¶¶ 97–100.

²⁸⁶ Russian Federation’s Preliminary Objections, ¶ 98; Preliminary Objections Hearing, 11 October 2021, 109:5–110:17 (Treves).

²⁸⁷ Russian Federation’s Preliminary Objections, ¶ 99.

²⁸⁸ Russian Federation’s Preliminary Objections, ¶ 99 referring to Ukraine’s Memorial, ¶ 73. The Russian Federation observes that the *South China Sea* arbitral tribunal relied on ICJ case law concerning the Court’s power to indicate provisional measures under Article 41 of the ICJ Statute, which shares “no similarity” with Article 279 of UNCLOS. See Russian Federation’s Preliminary Objections, ¶ 99 referring to *South China Sea*, Award (UAL-7), ¶ 1172; *LaGrand* (UAL-22), p. 503, ¶ 103 (“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”); Preliminary Objections Hearing, 11 October 2021, 109:5–110:18 (Treves).

173. The Russian Federation further supports this view by relying on the *Ghana/Côte d’Ivoire* case, where the Special Chamber of ITLOS made no reference to Article 279 when addressing the question concerning its jurisdiction over Côte d’Ivoire’s claim that Ghana failed to comply with the prescribed provisional measures.²⁸⁹
174. In any event, the Russian Federation contends that it has attenuated rather than aggravated the dispute.²⁹⁰ The Russian Federation submits that it had “accepted to meet with Ukraine and discuss issues concerning the settlement of the dispute even after Ukraine had already started the present proceedings” and “that Russia successfully negotiated the release of the [servicemen] and vessels”.²⁹¹

B. POSITION OF UKRAINE

175. Ukraine submits that the Russian Federation violated Article 279, as it aggravated the dispute between the Parties by extending the detention of Ukraine’s servicemen and continuing to maintain the criminal cases against them after their release.²⁹²
176. According to Ukraine, “Article 279 imposes a duty not to aggravate a dispute while it is subject to compulsory dispute settlement”.²⁹³ Ukraine submits that good faith performance of the obligation under Article 279 to settle disputes by peaceful means “requires that Parties engaged in a dispute settlement procedure under the Convention refrain from aggravating or extending the dispute”.²⁹⁴

²⁸⁹ Russian Federation’s Preliminary Objections, ¶ 99 referring to *Ghana/Côte d’Ivoire* (RUL-31), p. 148, ¶ 546.

²⁹⁰ Russian Federation’s Preliminary Objections, ¶ 101; Preliminary Objections Hearing, 14 October 2021, 343:7–344:12 (Treves).

²⁹¹ Russian Federation’s Preliminary Objections, ¶ 101.

²⁹² Ukraine’s Observations, ¶ 109; Preliminary Objections Hearing, 12 October 2021, 230:13–22 (Thouvenin); Preliminary Objections Hearing, 15 October 2021, 479:17–481:3 (Zionts).

²⁹³ Ukraine’s Observations, ¶ 110 referring to *South China Sea*, Award (UAL-7), ¶¶ 1169, 1172 (purportedly adopting the same interpretation of Article 279 after addressing the issue at the merits phase – rather than the preliminary phase – of the case); see also Preliminary Objections Hearing, 12 October 2021, 231:13–234:5 (Thouvenin).

²⁹⁴ Ukraine’s Observations, ¶¶ 111–114 referring to UNCLOS, Article 300 (requiring States Parties to “fulfil in good faith the obligations assumed under this Convention”); VCLT (UAL-88), Article 26 (providing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”); *South China Sea*, Award (UAL-7), ¶¶ 1171–1173 (adopting the same interpretation on the grounds that “[c]ompulsory settlement is [...] premised on the notion that the final result will be binding on the parties and implemented by them as a resolution of their dispute”, whereas the “very purpose of dispute settlement procedures would be frustrated by actions by any party that had the effect of aggravating or extending the dispute, thereby rendering it less amenable to settlement”).

177. Ukraine rejects the Russian Federation’s invocation of the *Ghana/Côte d’Ivoire* case on the grounds that it concerned a claim of non-compliance with provisional measures, not a claim of aggravation.²⁹⁵ According to Ukraine, the ITLOS Provisional Measures Order independently imposed an additional duty not to aggravate the dispute beyond the existing Article 279 obligation, such that “any aggravation of the dispute by Russia after 25 May 2019 also constitutes a violation of Article 290(6) of the Convention, in addition to Article 279”.²⁹⁶
178. Ukraine further points out that the *South China Sea* arbitral tribunal located the duty to refrain from aggravating or extending a dispute, not only in the text of UNCLOS, but in “general international law”,²⁹⁷ which provides additional support for the duty of non-aggravation since the Arbitral Tribunal has jurisdiction to address alleged violations of “other rules of international law not incompatible with the Convention” pursuant to Article 293.²⁹⁸
179. Ukraine characterizes the Russian Federation’s disagreement with its interpretation as a “merits defense rather than a jurisdictional objection”.²⁹⁹ According to Ukraine, the Parties’ differing interpretations on the content of the Article 279 obligation (specifically, whether it includes a non-aggravation requirement) creates a “dispute concerning the interpretation or application of [UNCLOS]”, which the Arbitral Tribunal would have the jurisdiction to resolve on the merits.³⁰⁰ Similarly, the Russian Federation’s argument that it did not in fact aggravate the dispute “is not proper in a jurisdictional objection [...and] is a question that goes to the merits of Ukraine’s Article 279 claim”.³⁰¹

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

180. The further aspect of the Russian Federation’s third preliminary objection is that the Arbitral Tribunal has no jurisdiction to rule that the Russian Federation has aggravated the dispute contrary to Article 279, which deals with the obligation to settle disputes peacefully and makes no reference to aggravation of disputes. The Russian Federation argues that Ukraine’s Article 279

²⁹⁵ Ukraine’s Observations, ¶ 115.

²⁹⁶ Ukraine’s Observations, ¶ 117.

²⁹⁷ See Ukraine’s Observations, ¶ 113 referring to *South China Sea*, Award (UAL-7), ¶¶ 1167–1172; *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, Order, P.C.I.J., 5 December 1939 (UAL-99), p. 199; Preliminary Objections Hearing, 12 October 2021, 231:13–234:5 (Thouvenin).

²⁹⁸ Ukraine’s Observations, ¶ 114 referring to *South China Sea*, Award (UAL-7), ¶ 1173.

²⁹⁹ Ukraine’s Observations, ¶ 12; see also Ukraine’s Observations, ¶ 118.

³⁰⁰ Ukraine’s Observations, ¶¶ 110, 118 referring to UNCLOS, Articles 286, 288(1); see also Preliminary Objections Hearing, 12 October 2021, 231:7–233:25 (Thouvenin).

³⁰¹ Ukraine’s Observations, ¶ 116.

claim “should be disregarded”. Since the ITLOS Provisional Measures Order itself includes a provision on non-aggravation then, in the view of the Russian Federation, the Article 279 claim is no different from the claim in respect of the alleged non-compliance with the other provisional measures.

181. Ukraine asserts that there is a duty of non-aggravation arising out of Article 279 and that the ITLOS Provisional Measures Order imposed an additional duty of non-aggravation. It views its disagreement with the Russian Federation over the interpretation of Article 279 as a merits question.

182. The Arbitral Tribunal notes that the Operative Provision in paragraph 124(1)(c) of the ITLOS Provisional Measures Order is as follows:

Ukraine and the Russian Federation shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.³⁰²

183. This, in the view of the Arbitral Tribunal, imposes a duty of non-aggravation on the Parties to this dispute. Moreover, the Arbitral Tribunal has already concluded that it has jurisdiction to consider allegations of non-compliance with the ITLOS Provisional Measures Order, which includes this obligation of non-aggravation.

184. Nevertheless, the Arbitral Tribunal notes that the ITLOS Provisional Measures Order, including the duty of non-aggravation, only took effect on 25 May 2019 and would not apply to the period between 1 April 2019 and 25 May 2019.³⁰³ Accordingly, any alleged breach of the duty of non-aggravation in this period would have to be based on other grounds, including presumably Article 279, whose meaning and scope is in dispute between the Parties. This gives rise to a dispute over the interpretation and application of the Convention over which the Arbitral Tribunal has jurisdiction pursuant to Article 288(1) of the Convention, and which falls to be resolved at the merits phase.

185. Accordingly, the Arbitral Tribunal makes no determination on the interpretation and application of Article 279 which is a matter not of an exclusively preliminary character and joins the issue to the merits.

³⁰² ITLOS Provisional Measures Order (UAL-2), ¶ 124(1)(c).

³⁰³ Ukraine contends that Article 279 imposes a duty of non-aggravation as from the moment that a dispute is submitted to compulsory dispute settlement. Accordingly, Ukraine alleges certain breaches of the duty of non-aggravation in the period between the institution of the present arbitration proceedings on 1 April 2019 and the adoption of the ITLOS Provisional Measures Order on 25 May 2019. *See* Ukraine’s Observations, ¶¶ 109–110, 117; Preliminary Objections Hearing, 15 October 2021, 479:17–480:7 (Zionts).

X. THE RUSSIAN FEDERATION'S OBJECTION THAT THE ARBITRAL TRIBUNAL LACKS JURISDICTION SINCE UKRAINE FAILED TO COMPLY WITH ARTICLE 283 OF THE CONVENTION

186. Article 283(1) of the Convention provides:

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.

187. As relevant to the Article 283 Objection, the following timeline of relevant events is not in dispute.³⁰⁴

- a) Following the events of 25 November 2018, the Parties exchanged a number of *notes verbale* between 26 November 2018 and 20 February 2019, none of which proposed an exchange of views regarding settlement of the dispute pursuant to Article 283 of the Convention;³⁰⁵
- b) On 15 March 2019, Ukraine sent a *note verbale* to the Russian Federation, which stated, *inter alia*, as follows:

In accordance with Article 283 of the Convention, the Ukrainian Side demands that Russia immediately start an exchange of views regarding the settlement of this dispute by negotiation or any other peaceful means. With this in mind, the Ministry of Foreign Affairs of Ukraine requests that the Russian Federation immediately provide its opinion on the proper means of settlement of this

³⁰⁴ See Russian Federation's Preliminary Objections, ¶ 104.

³⁰⁵ Russian Federation's Preliminary Objections, ¶¶ 104, 111 referring to 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. 6111/22-012-0198, 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); 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); 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).

dispute and conducting consultations on the matter with the Ukrainian Side within 10 days.³⁰⁶

- c) On 25 March 2019, the Russian Federation responded in a *note verbale* sent to Ukraine, acknowledging receipt of Ukraine's 15 March 2019 *note verbale* and advising that "[p]ossible comments on the issues raised in the Note are to be sent additionally";³⁰⁷
- d) On 1 April 2019, Ukraine made its notification instituting the present arbitration;³⁰⁸
- e) On 12 April 2019, the Russian Federation sent a *note verbale* to Ukraine confirming its "con[s]ent for holding consultations with the Ukrainian Side on the basis of Article 283 of the UN Convention of the Law of the Sea of 1982 (the responsibility to exchange views). The Russian Side is ready to review proposals of the Ukrainian Side regarding the time and place of their holding";³⁰⁹ and
- f) On 23 April 2019, the Parties met for consultations in The Hague.³¹⁰

A. POSITION OF THE RUSSIAN FEDERATION

188. The Russian Federation's position is that Ukraine has failed to meet the requirement in Article 283 that "parties to [a] dispute [concerning the interpretation or application of the Convention] shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".³¹¹ Specifically, the Russian Federation submits that it provided an "initial response" to Ukraine's 15 March 2019 *note verbale* within ten days (on 25 March 2019), but "Ukraine proceeded to issue its claim within the week".³¹² Furthermore, when the Parties met for

³⁰⁶ 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, Cover No. 6111/22-012-0438, 15 March 2019 (**RU-40**), Translation, p. 4; *see also* Russian Federation's Preliminary Objections, ¶ 8. The Russian Federation submits that Ukraine's 15 March 2019 *note verbale* was received on 18 March 2019. *See* Russian Federation's Preliminary Objections, ¶ 107.

³⁰⁷ 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**); *see also* Russian Federation's Preliminary Objections, ¶ 8. Ukraine argues that the English translation of the sentence of the *note verbale* quoted above should read as follows: "possible comments on the issues raised in the note are likely to be sent separately" Ukraine's Observations, ¶ 123.

³⁰⁸ Ukraine's Memorial, ¶ 8.

³⁰⁹ Ukraine's Observations, ¶ 123 *quoting* Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 4502/2dsng, 12 April 2019 (**UA-22**).

³¹⁰ Ukraine's Memorial, ¶¶ 55–56.

³¹¹ Russian Federation's Preliminary Objections, ¶¶ 102–115; Preliminary Objections Hearing, 11 October 2021, 110:24–125:9 (Usoskin); Preliminary Objections Hearing, 14 October 2021, 344:20–355:8 (Usoskin).

³¹² Russian Federation's Preliminary Objections, ¶ 8.

consultations on 23 April 2019, Ukraine failed to “engage meaningfully but elected to press on with a hearing on provisional measures before ITLOS”.³¹³

189. The Russian Federation submits – citing ITLOS case law – that “while [...] ‘a State Party is not obligated to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted,’ 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”.³¹⁴

190. The Russian Federation submits that, bearing in mind the timeline of the relevant events, the pre-condition established by Article 283 has not been satisfied for the following reasons:

a) Ukraine’s *note verbale* of 15 March 2019 was insufficient to comply with Article 283, as Ukraine in that note “[did] not express any view concerning the means for settlement of the dispute”, which the Russian Federation contends is required as part of the “exchange of views” contemplated by the Convention and supported in jurisprudence;³¹⁵

b) Ukraine’s suggestion that the Russian Federation’s lack of response before 1 April 2019 reflected any lack of “expeditiousness” in the exchange of views is incorrect.³¹⁶ While a State’s Article 283 obligations may be satisfied in exceptional circumstances “where the other State does not respond to requests for an exchange of views for a considerable period of time [...] [t]he present case is of a very different order”.³¹⁷ The Russian Federation promptly replied to Ukraine on 25 March 2019 (“just five business days after receiving [Ukraine’s] note verbale”), advising that it intended to

³¹³ Russian Federation’s Preliminary Objections, ¶ 8.

³¹⁴ Russian Federation’s Preliminary Objections, ¶ 103 referring to *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures Order, 3 December 2001, ITLOS Reports 2001 (**RUL-11**) (“**MOX Plant, Provisional Measures Order**”), ¶ 60; *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures Order, 8 October 2003, ITLOS Reports 2003 (**UAL-4**), ¶ 47; see also Russian Federation’s Preliminary Objections, ¶ 114(a) referring to *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011 (**RUL-20**), pp. 684–685, ¶¶ 131–132; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969 (**RUL-1**), p. 47, ¶ 85(a).

³¹⁵ Russian Federation’s Preliminary Objections, ¶ 106; Preliminary Objections Hearing, 11 October 2021, 114:14–119:17 (Usoskin); Preliminary Objections Hearing, 14 October 2021, 345:13–348:10 (Usoskin).

³¹⁶ Russian Federation’s Preliminary Objections, ¶ 107; Preliminary Objections Hearing, 11 October 2021, 119:18–123:6 (Usoskin); Preliminary Objections Hearing, 14 October 2021, 348:11–354:8 (Usoskin).

³¹⁷ Russian Federation’s Preliminary Objections, ¶ 108 referring to *M/V “Norstar”* Preliminary Objections, Judgment (**RUL-30**), ¶¶ 211, 217 (whereby Panama had invited Italy to proceed with an exchange of views on 3 August 2004 but Italy had not responded by the time Panama instituted proceedings in 2015).

provide a subsequent response.³¹⁸ Furthermore, Ukraine cannot rely on alleged urgency when Ukraine itself “made no proposals concerning possible means of resolving the dispute” and “commenc[ed] 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”.³¹⁹ The Russian Federation also calls upon the *travaux préparatoires* of UNCLOS to argue that Article 283 deliberately does not impose a deadline for a response to a proposal for exchange of views after “the strongest objections were voiced” against any idea of placing a deadline on the duration of diplomatic consultations when Article 283 was being negotiated.³²⁰ According to the Russian Federation, “[i]n the circumstances of this case, ten working days were clearly insufficient to form and express a view on the means of settling the dispute”, particularly because of the Russian Federation’s position that there is neither a jurisdictional basis for resort to the Convention’s compulsory dispute settlement mechanism nor a substantive basis in the Convention for Ukraine’s claimed immunities.³²¹ The Russian Federation also argues that Ukraine’s translation of its *note verbale* of 25 March 2019 is imprecise, and the note should instead be interpreted as stating that possible comments are to be sent (or are expected to be sent) additionally and implicitly asking for additional time to do so.³²²

- c) The 23 April 2019 consultations did not satisfy the conditions established by Article 283 and they are actually not relevant to determining Ukraine’s compliance with Article 283 since, as confirmed by the ICJ, “events subsequent to the institution of proceedings have only a limited role in assessing the existence of jurisdiction” and the consultations “took place after Ukraine instituted the present proceedings on 1 April 2019”.³²³

³¹⁸ Preliminary Objections Hearing, 11 October 2021, 113:15–20 (Usoskin)

³¹⁹ Russian Federation’s Preliminary Objections, ¶¶ 110–111.

³²⁰ Russian Federation’s Preliminary Objections, ¶ 103 referring to R. Ranjeva, “Settlement of Disputes”, in R.-J. Dupuy, D. Vignes (eds.), *Handbook on the New Law of the Sea*, Brill, 1991 (**RUL-7**), pp. 1344–1345.

³²¹ Russian Federation’s Preliminary Objections, ¶ 110; Preliminary Objections Hearing, 11 October 2021, 119:18–124:12 (Usoskin); Preliminary Objections Hearing, 14 October 2021, 348:11–354:8 (Usoskin).

³²² Preliminary Objections Hearing, 14 October 2021, 348:11–349:22 (Usoskin).

³²³ Russian Federation’s Preliminary Objections, ¶¶ 112–113 referring to *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 (**RUL-29**), ¶ 43; Preliminary Objections Hearing, 11 October 2021, 113:21–114:13 (Usoskin); Preliminary Objections Hearing, 14 October 2021, 354:9–355:1 (Usoskin).

- d) Contrary to its obligation to engage with the Russian Federation in good faith by considering the possibilities of reaching an agreement (including, where relevant, by contemplating modifying its own position), Ukraine arrived at the 23 April 2019 consultations with a “set position that the dispute should be submitted to a new Annex VII tribunal – the proceedings Ukraine had already instituted [...] reject[ing] Russia’s proposal to resolve the dispute by negotiations”. The Russian Federation’s proposed “joinder of the dispute to the ongoing *Coastal State Rights* arbitration” was rejected by Ukraine “because ‘the claims were distinct and unrelated’”.³²⁴

B. POSITION OF UKRAINE

191. Ukraine derives the following propositions on what it argues to be a “well-settled”³²⁵ interpretation of Article 283 arising from the decisions of ITLOS and Annex VII arbitral tribunals that have “regularly considered, and always rejected”³²⁶ objections under Article 283:

- a) Article 283 creates an obligation to “proceed expeditiously to an exchange of views” that “applies equally to both parties to the dispute”,³²⁷
- b) Article 283 pertains to an exchange of views on the process of dispute settlement, rather than the substance of the dispute between the parties,³²⁸
- c) a claimant State is “not obliged to continue with an exchange of views” when it concludes that a continued exchange “could not yield a positive result” (which the claimant State is “best positioned to assess”, subject to a “deferential standard”);³²⁹ and

³²⁴ Russian Federation’s Preliminary Objections, ¶ 114(b) referring to Witness Statement of Sergey Andreevich Leonidchenko, 20 August 2020, ¶¶ 4, 6–7.

³²⁵ Ukraine’s Observations, ¶¶ 10, 12, 120.

³²⁶ Ukraine’s Observations, ¶ 120 referring to *Chagos (RUL-25)*, ¶¶ 385–386; *In the Matter of the Duzgıt Integrity Arbitration (The Republic of Malta v. The Democratic Republic of São Tomé and Príncipe)*, PCA Case No. 2014-07, Award, 5 September 2016 (UAL-17), ¶ 201; *Guyana v. Suriname*, PCA Case No. 2004-04, Award, 17 September 2007 (UAL-39), ¶¶ 410, 457; *South China Sea, Jurisdiction and Admissibility Award (UAL-5)*, ¶ 352; *Barbados v. Republic of Trinidad and Tobago*, PCA Case No. 2004-02, Award, 11 April 2006 (UAL-40), ¶¶ 202–205, 214; see also *Arctic Sunrise*, Award (UAL-6), ¶ 156.

³²⁷ Ukraine’s Observations, ¶ 120 referring to UNCLOS, Article 283; ITLOS Provisional Measures Order (UAL-2), ¶ 88; Preliminary Objections Hearing, 12 October 2021, 234:18–237:10 (Zionts).

³²⁸ Ukraine’s Observations, ¶ 120 referring to *Chagos (RUL-25)*, ¶ 378; *Arctic Sunrise*, Award (UAL-6), ¶ 151; *South China Sea, Jurisdiction and Admissibility Award (UAL-5)*, ¶ 333.

³²⁹ Ukraine’s Observations, ¶ 120 referring to *Case Concerning Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore)*, ITLOS Case No. 12, Provisional Measures, Order, 8 October 2003 (UAL-4), ¶ 48; *MOX Plant*

- d) Article 283 is “concerned with notice” so that “a State would not be taken entirely by surprise by the initiation of compulsory proceedings”, and the provision should not be applied with “undue formalism”.³³⁰

192. Applying these interpretive guideposts to the present dispute, Ukraine submits that it has discharged its obligation under Article 283, while the Russian Federation failed to satisfy its own obligations under the provision.³³¹
193. Ukraine contends that it attempted to proceed expeditiously to an exchange of views but was thwarted by the Russian Federation’s failure to respond.³³² Ukraine relies on the *note verbale* that it sent to the Russian Federation on 15 March 2019 requesting consultations between the Parties on the means to resolve the dispute.³³³ Ukraine rejects the Russian Federation’s contention that the *note verbale* was insufficient because it “does not express any view concerning the means for settlement of the dispute”, arguing that it had complied with Article 283’s express directive to “*proceed expeditiously to an exchange of views*”.³³⁴
194. Ukraine also defends the deadline of ten working days provided to the Russian Federation in its 15 March 2019 *note verbale*, rejecting the Russian Federation’s argument that the deadline was “clearly insufficient to form and express a view on the means of settling the dispute”.³³⁵ Ukraine argues that the use of the term “expeditiously” (in English), “promptement” (in French) and “sin demora” (in Spanish) in the text of Article 283, as well as a 14-day time limit accompanying the use of “expeditiously” in another provision of the Convention, implies that Ukraine’s request for an exchange of views within a matter of ten days was appropriate.³³⁶ Ukraine points to ITLOS’s

Provisional Measures Order (**RUL-11**), ¶ 60; *South China Sea*, Jurisdiction and Admissibility Award (**UAL-5**), ¶ 343; *Arctic Sunrise*, Award (**UAL-6**), ¶ 154.

³³⁰ Ukraine’s Observations, ¶ 120 referring to *Chagos* (**RUL-25**), ¶ 382.

³³¹ Ukraine’s Observations, ¶¶ 10, 121–138; Preliminary Objections Hearing, 12 October 2021, 234:15–248:10 (Zionts); Preliminary Objections Hearing, 15 October 2021, 481:1–487:15 (Zionts).

³³² Ukraine’s Observations, ¶ 122; Preliminary Objections Hearing, 12 October 2021, 234:18–239:18 (Zionts); Preliminary Objections Hearing, 15 October 2021, 483:8–487:15 (Zionts).

³³³ Ukraine’s Observations, ¶ 122. Ukraine suggests that ITLOS had confirmed that Ukraine had satisfied its Article 283 obligation when it found that “Ukraine, in its *note verbale* of 15 March 2019, clearly expressed its willingness to exchange views with the Russian Federation regarding the means to settle their dispute”. See Ukraine’s Observations, ¶ 119 referring to ITLOS Provisional Measures Order (**UAL-2**), ¶¶ 86, 89.

³³⁴ Ukraine’s Observations, ¶ 125 (emphasis in original) referring to ITLOS Provisional Measures Order (**UAL-2**), ¶ 86 (allegedly finding that Ukraine “clearly expressed” its readiness to “proceed” to an exchange of views); see also Preliminary Objections Hearing, 12 October 2021, 239:19–240:10 (Zionts).

³³⁵ Ukraine’s Observations, ¶¶ 122, 126; Preliminary Objections Hearing, 12 October 2021, 242:5–243:19 (Zionts).

³³⁶ Ukraine’s Observations, ¶ 127 referring to UNCLOS, Articles 161(8)(e), 281.

conclusion that “[t]he time-limit of ten days indicated in Ukraine’s note verbale cannot be considered ‘arbitrary’ in light of the obligation to proceed expeditiously to an exchange of views.”³³⁷ Ukraine argues that because provisional measures can only be specified after Article 283 is satisfied, “it must be possible to discharge the Article 283 obligation [...] in a short period of time”.³³⁸

195. In the specific circumstances of the case, Ukraine further contends that its deadline “[reflected] the urgency of the situation and the ongoing harm to Ukraine’s vessels and servicemen” amidst the Russian Federation’s preparations “to subject the servicemen to additional criminal proceedings in mid-April”.³³⁹
196. Ukraine also refutes the Russian Federation’s allegations that Ukraine itself was responsible for delays by “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”.³⁴⁰ Ukraine submits that it “engaged in urgent and intensive diplomatic efforts” immediately after the incident and that it exercised its “sovereign prerogative to decide when those [diplomatic] avenues had failed and when it was appropriate to resort to dispute resolution under UNCLOS”. Both parties had an obligation to proceed expeditiously to an exchange of views and Russia did not meet that obligation.³⁴¹
197. Having argued that Article 283 has been interpreted to impose obligations upon both parties, Ukraine emphasizes “Russia’s failure to meet its own obligations under that provision”.³⁴² Specifically, Ukraine takes issue with the Russian Federation’s conduct after receiving Ukraine’s 15 March 2019 *note verbale*.³⁴³ The Russian Federation’s reply on 25 March 2019, at the end of the ten-day deadline specified by Ukraine, “merely ‘confirm[ed] the receipt’ of Ukraine’s communication and stated that ‘possible comments on the issues raised in the note are likely to

³³⁷ Ukraine’s Observations, ¶¶ 126, 132 referring to ITLOS Provisional Measures Order (UAL-2), ¶ 86; see also Preliminary Objections Hearing, 12 October 2021, 242:5–14 (Zionts).

³³⁸ Ukraine’s Observations, ¶ 129 referring to UNCLOS, Article 290(1).

³³⁹ Ukraine’s Observations, ¶¶ 122, 128; see also Ukraine’s Observations, ¶ 129 citing ITLOS Provisional Measures Order (UAL-2), ¶¶ 107, 110–113 (finding a “real and imminent risk of irreparable prejudice to the rights of Ukraine”, including “the continued deprivation of liberty and freedom of Ukraine’s servicemen”).

³⁴⁰ Ukraine’s Observations, ¶ 128 referring to Russian Federation’s Preliminary Objections, ¶ 111; Preliminary Objections Hearing, 12 October 2021, 243:20–246:13 (Zionts).

³⁴¹ Ukraine’s Observations, ¶ 128; Preliminary Objections Hearing, 12 October 2021, 243:20–246:13 (Zionts).

³⁴² Ukraine’s Observations, ¶ 12.

³⁴³ Preliminary Objections Hearing, 12 October 2021, 237:11–241:24 (Zionts).

be sent separately”, without reference to Article 283.³⁴⁴ Furthermore, the Russian Federation did not inform Ukraine that ten days was insufficient time to form a view, particularly when in prior diplomatic exchanges, “Russia had shown itself able to respond to communications from Ukraine in less than ten days”.³⁴⁵ Ukraine also rejects the Russian Federation’s argument that the Russian Federation’s reply on 25 March 2019 was an implicit request for additional time to provide comments.³⁴⁶ It was only on 12 April 2019 that the Russian Federation provided its “consent for holding consultations [...] on the basis of Article 283”.³⁴⁷ Ukraine emphasizes that 17 days had passed after its 15 March 2019 *note verbale* “with no demonstration of any intent on the part of Russia to proceed to an exchange of views” before Ukraine initiated arbitration.³⁴⁸ Ukraine also highlights that ITLOS had found that the Russian Federation’s response “was of such nature that Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted”.³⁴⁹

198. In light of the Russian Federation’s alleged failure “for a month” to engage in the mandated exchange of views, Ukraine contends that it “reasonably concluded that it was necessary to commence proceedings and seek provisional measures in light of the urgency of the situation”.³⁵⁰ Ukraine notes the Russian Federation’s concession 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”.³⁵¹ Ukraine argues that the Russian Federation’s “failure to engage constructively” with “Ukraine’s request simply to exchange views” rendered “further attempts to engage with Russia [...] futile”.³⁵² Drawing a comparison to the conclusions of the Annex VII

³⁴⁴ Ukraine’s Observations, ¶ 123 (emphasis in original) *referring to* Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 3528/2dsng, 25 March 2019 (UA-21).

³⁴⁵ Ukraine’s Observations, ¶¶ 130–131 *referring to* Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 985/2dsng, 31 January 2019 (UA-49) (responding to a *note verbale* sent by Ukraine in nine days).

³⁴⁶ Preliminary Objections Hearing, 15 October 2021, 483:8–485:6 (Zionts).

³⁴⁷ Ukraine’s Observations, ¶ 123 *referring to* Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 4502/2dsng, 12 April 2019 (UA-22).

³⁴⁸ Ukraine’s Observations, ¶ 124 (“Ukraine afforded Russia additional time to provide a meaningful response, delaying its initiation of arbitration for another week”, during which “Russia still did not provide its views or send any further correspondence”).

³⁴⁹ Ukraine’s Observations, ¶ 119 *quoting* ITLOS Provisional Measures Order (UAL-2), ¶ 86.

³⁵⁰ Ukraine’s Observations, ¶ 10; *see also* Ukraine’s Observations, ¶¶ 133–138; Preliminary Objections Hearing, 12 October 2021, 241:24–243:19 (Zionts).

³⁵¹ Ukraine’s Observations, ¶ 133 *quoting* Russian Federation’s Preliminary Objections, ¶ 103; *MOX Plant* Provisional Measures Order (RUL-11), ¶ 60 (emphasis added by Ukraine).

³⁵² Ukraine’s Observations, ¶ 133 *referring to* ITLOS Provisional Measures Order (UAL-2), ¶ 86 (finding that the Russian Federation’s conduct “was of such nature that Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted”).

arbitral tribunal in the *Arctic Sunrise* case, in which the Russian Federation’s position that the “Arctic 30” were “lawfully detained” partly contributed to the arbitral tribunal’s finding that the possibilities for a negotiated settlement had been exhausted,³⁵³ Ukraine argues that the Russian Federation’s insistence that Ukraine’s vessels and servicemen were lawfully detained “made it reasonable for Ukraine to reach the same conclusion”.³⁵⁴

199. Ukraine submits that its conclusion was further vindicated when the Parties eventually held consultations in The Hague on 23 April 2019, at which “Russia’s attitude at the meeting confirmed Ukraine’s view that there was no possibility of reaching agreement on a means for resolving the dispute”.³⁵⁵ According to Ukraine, at the 23 April 2019 meeting, the Russian Federation rejected Ukraine’s proposal for arbitration as a means of resolving the dispute and “then as a delay tactic proposed further consultations without being able to identify ‘any specific objectives’”; Ukraine rejects the Russian Federation’s narrative that Ukraine rejected the Russian Federation’s proposal for negotiations.³⁵⁶ Furthermore, Ukraine argues that Article 283 neither requires parties to “contemplate modifying” their positions nor can it “be understood as an obligation to negotiate the substance of the dispute”.³⁵⁷

C. ANALYSIS OF THE ARBITRAL TRIBUNAL

200. Article 283 imposes an obligation on the parties to a dispute to “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. It is an obligation that applies to both parties to the dispute.³⁵⁸ The Russian Federation argues that Ukraine failed to comply with this obligation. Ukraine invoked Article 283 on 15 March 2019. The Russian Federation responded on 25 March 2019. Without any further communication between the Parties, on 1 April 2019, Ukraine instituted the present arbitration proceedings and requested the prescription of provisional measures pending the constitution of an arbitral tribunal.

³⁵³ Preliminary Objections Hearing, 12 October 2021, 245:6–246:13 (Zionts).

³⁵⁴ Ukraine’s Observations, ¶ 134 referring to *Arctic Sunrise*, Award (UAL-6), ¶¶ 153–154; Note Verbale of the Ministry of Foreign Affairs of the Russian Federation, No. 14951/2dsng, 5 December 2018 (UA-6) (“On November 25, 2018, Ukrainian [servicemen] were detained for unlawfully crossing the State Border of the Russian Federation (Article 322(3) of the Criminal Code of the Russian Federation).”).

³⁵⁵ Ukraine’s Observations, ¶¶ 135–136; see also Ukraine’s Memorial, ¶ 56; Preliminary Objections Hearing, 12 October 2021, 246:14–247:21 (Zionts).

³⁵⁶ Ukraine’s Observations, ¶ 137.

³⁵⁷ Ukraine’s Observations, ¶ 137 referring to Russian Federation’s Preliminary Objections, ¶ 114; *Chagos* (RUL-25), ¶ 378; *Arctic Sunrise*, Award (UAL-6), ¶ 151; *South China Sea*, Jurisdiction and Admissibility Award (UAL-5), ¶ 333.

³⁵⁸ *M/V “Norstar”* Preliminary Objections, Judgment (RUL-30), ¶ 213.

201. In the present case, there had been a request by Ukraine to engage in an exchange of views and a response by the Russian Federation that views would be forwarded later. There was no further exchange between the Parties before 1 April 2019. After the initiation of arbitration proceedings there were discussions starting 23 April 2019. However, the Arbitral Tribunal does not view these later discussions as relevant to the question of compliance with Article 283.
202. The question for the Arbitral Tribunal is whether the two communications between Ukraine and the Russian Federation constitute an exchange of views within the meaning of Article 283 and constitute compliance with that provision in the circumstances of this case. In the view of the Arbitral Tribunal, the determination of whether there has been an exchange of views prior to the initiation of arbitration proceedings is a fact-driven determination taking account of the circumstances of the case. Thus, the Arbitral Tribunal has to consider whether what occurred between the Parties is, in the light of the circumstances of this case, sufficient to justify the initiation of arbitration proceedings by Ukraine.
203. As pointed out above, Ukraine's request for an exchange of views was met with a response by the Russian Federation that views would be sent later. There is disagreement between the Parties over whether this was an expression of an intention to submit views or merely a statement that views might be sent later. In any event, no further communication was received from the Russian Federation by 1 April 2019 when the arbitration was initiated. And, since Ukraine itself had not expressed any views on dispute settlement in its communication of 15 March 2019, there had in fact at the time of the initiation of arbitration proceedings been no exchange of views between the Parties.
204. On these facts alone, the Arbitral Tribunal does not consider that there is a basis for concluding that Article 283 has been complied with. Nor does the Arbitral Tribunal consider that there is enough to conclude that negotiations were futile when they had not really begun. The question, then, is whether there are other circumstances in the case that would justify the initiation of arbitration proceedings notwithstanding the lack of an exchange of views in accordance with Article 283.
205. At the time Ukraine's request for consultations was sent, the Ukrainian servicemen were being detained by the Russian authorities. Much of the efforts of Ukraine up to that time had been to get access to their servicemen and secure their release. However, the circumstances were about to change and there was a growing likelihood that the criminal case against the Ukrainian servicemen would proceed to trial. Faced with these new circumstances – a growing sense of urgency in respect of the fate of the Ukrainian servicemen and the absence of a substantive

response from the Russian Federation to its request for consultations under Article 283 – Ukraine decided to act and initiate arbitration proceedings and request provisional measures.

206. The Arbitral Tribunal considers that Ukraine was confronted with the prospect of immediate change in the circumstances of its servicemen. There was urgency in initiating proceedings given the imminent risk to Ukraine’s rights in respect of its vessels and servicemen.³⁵⁹ Accordingly, in the particular circumstances of this case, the Arbitral Tribunal does not see Article 283 as a barrier to its exercise of jurisdiction.

XI. CONCLUSION

207. The Arbitral Tribunal accordingly concludes that it has jurisdiction over the dispute identified in paragraphs 39 and 40, subject to the jurisdictional limitations set out above.

³⁵⁹ ITLOS Provisional Measures Order (UAL-2), ¶ 111.

XII. DISPOSITIF

208. For the reasons set out above, the Arbitral Tribunal

Article 298(1)(b) Objection

- a. *Finds* that the events of 25 November 2018 until a point in time after the Ukrainian naval vessels left anchorage area No. 471 constitute “military activities” excluded from the jurisdiction of the Arbitral Tribunal in accordance with Article 298(1)(b) of the Convention;
- b. *Finds* that the events following the arrest of the Ukrainian naval vessels do not constitute “military activities” excluded from the jurisdiction of the Arbitral Tribunal in accordance with Article 298(1)(b) of the Convention;
- c. *Decides* that the determination of the precise point at which the events ceased to be “military activities” within the meaning of Article 298(1)(b) of the Convention shall be ruled upon in conjunction with the merits;

Article 288(1) Objection

- d. *Declares* that the objection that UNCLOS does not provide for an applicable immunity does not possess an exclusively preliminary character;
- e. *Decides* that the objection that UNCLOS does not provide for an applicable immunity shall be ruled upon in conjunction with the merits;

Article 290 and 296 Objection

- f. *Rejects* the objection that the Arbitral Tribunal has no jurisdiction over alleged breaches of the ITLOS Provisional Measures Order;

Article 279 Objection

- g. *Declares* that the objection that Article 279 of the Convention provides no basis for the Arbitral Tribunal to claim jurisdiction as to the alleged aggravation of the dispute does not possess an exclusively preliminary character;
- h. *Decides* that the objection that Article 279 of the Convention provides no basis for the Arbitral Tribunal to claim jurisdiction as to the alleged aggravation of the dispute shall be ruled upon in conjunction with the merits;

Article 283 Objection

- i. *Rejects* the objection that Ukraine has not complied with Article 283 of the Convention;

Further Proceedings

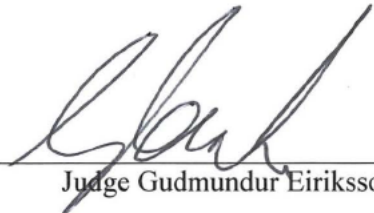
- j. *Decides* that it has jurisdiction over the dispute between the Parties, subject to the jurisdictional limitations set out above;
- k. *Decides* that the proceedings on the merits are hereby resumed, and that the Russian Federation shall submit a Counter-Memorial no later than six months from the date of this Award;

Costs

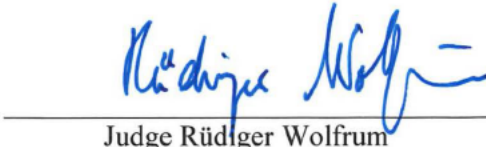
- l. *Decides* that the question of costs shall be ruled upon in conjunction with the merits.

Done at the Peace Palace, The Hague, the Netherlands, this 27th day of June 2022,

For the Arbitral Tribunal:




Judge Gudmundur Eiriksson




Judge Rüdiger Wolfrum



Judge Vladimir Golitsyn



Sir Christopher Greenwood



Professor Donald McRae
President

For the Registry:



Mr. Martin Doe
Registrar