PCA Case No. 2019-28

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

before

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

between

UKRAINE

and

THE RUSSIAN FEDERATION

WRITTEN OBSERVATIONS AND SUBMISSIONS OF UKRAINE ON THE PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION

ARBITRAL TRIBUNAL:

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

REGISTRY:

The Permanent Court of Arbitration

27 January 2021

INDEX

TABLE OF CONTENTS

Chapter One: Introduction

1. Pursuant to Procedural Order No. 2 of 27 October 2020, Ukraine respectfully submits its Written Observations and Submissions ("Written Observations") on the Preliminary Objections of the Russian Federation ("Preliminary Objections"), which Ukraine asks the Tribunal to dismiss in their entirety.

2. A fundamental rule of the law of the sea, codified in the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention"), is that warships and other non-commercial government vessels have complete immunity from the jurisdiction of any State other than their own. In defiance of this rule, the Russian Federation exercised enforcement jurisdiction against three of Ukraine's naval vessels — the *Berdyansk*, the *Nikopol*, and the *Yani Kapu* — and their crew. On the evening of 25 November 2018, after openly abandoning their plans to peacefully transit the Kerch Strait, the three vessels navigated out of the territorial sea and toward their home port of Odesa. Russian coast guard vessels pursued the Ukrainian vessels and demanded that they stop, on the basis that they had violated Russian law. After all three of Ukraine's vessels disregarded this demand and exited the territorial sea, the Russian coast guard arrested them. Russia then charged the 24 servicemen on board with violations of Russian law, detained the servicemen for nine-and-a-half months in connection with criminal prosecutions in civilian courts, and detained the vessels for nearly a year as "physical evidence" in those criminal prosecutions.

3. On the basis of these facts, Ukraine claims that Russia has committed serious violations of the immunity provisions of the Convention. By ordering the Ukrainian vessels to stop while they were exiting the territorial sea, Russia violated Article 30, which permits only a demand to exit the territorial sea. By arresting, detaining, and prosecuting the vessels and their crew after they had exited the territorial sea, Russia violated their complete immunity from jurisdiction under Articles 95 and 96, which are applicable in the exclusive economic zone pursuant to Article 58. By failing to immediately release the vessels and servicemen for several months after being ordered to do so in a provisional measures order of the International Tribunal for the Law of the Sea ("ITLOS"), Russia violated Articles

290(6) and 296(1) of the Convention. And by aggravating the dispute, Russia violated both the provisional measures order and Article 279 of the Convention.

4. Russia does not deny that it exercised enforcement jurisdiction over Ukraine's naval vessels and their crew by arresting, detaining, and prosecuting them. Nor does Russia deny that the reason its coast guard pursued and arrested those vessels was to enforce Russian law. Russia does, however, contest that it is responsible for breaching the Convention. According to Russia, it was authorized by Article 30 of the Convention to demand that Ukraine's vessels stop[1]; it was authorized by Article 111 of the Convention to engage in a hot pursuit of Ukraine's naval vessels, which Russia asserts creates an unwritten exception to the complete immunity from jurisdiction under Articles 95 and 96[2]; its arrest of the vessels does not implicate any provision of the Convention[3]; and it did not violate the ITLOS provisional measures order or aggravate the dispute.[4] In short, Ukraine claims that Russia's exercise of jurisdiction over its vessels and servicemen violated the Convention, and Russia responds that its exercise of jurisdiction did not violate — and in fact was authorized by or simply not covered by — the Convention.

5. This is, therefore, an international dispute in which the two parties "hold clearly opposite views concerning the performance or non-performance of certain international obligations."[5] Just as clearly, this is a "dispute concerning the interpretation or application of th[e] Convention," so it is within the jurisdiction of this Tribunal pursuant to Articles 286 and 288. Much like warship immunity is a core tenet of the law of the sea,

---

[1] *See* Federal Security Service of the Russian Federation, Press Service Statement on Acts of Provocations by Ukrainian Naval Ships (26 November 2018) ("FSB Report"), p. 4 **(UA-4)**.

[2] *See Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, PCA Case No. 2019-28, Preliminary Objections of the Russian Federation, dated 24 August 2020 ("Preliminary Objections"), ¶¶ 85–88.

[3] *See id.* ¶¶ 75–78, 89, 98–99.

[4] *See id.* ¶¶ 9, 13, 101.

[5] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, PCA Case No. 2017-06, Award on Preliminary Objections of 21 February 2020, ¶ 163 ("*Coastal State Rights*, Award on Preliminary Objections of 21 February 2020") (quoting *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, ICJ Judgment of 5 October 2016, ¶ 34) **(UAL-25)**.

compulsory dispute resolution under Articles 286 and 288 is fundamental to UNCLOS. As noted by the Annex VII tribunal in the *South China Sea* case, this "system for the settlement of disputes" is an "integral part and an essential element of the Convention."[6]

6. In its preliminary objections, however, Russia seeks to exempt itself from its prior consent to this system of dispute settlement, and to evade accountability for its flagrant violations of the immunity provisions of the Convention. Russia's principal objection invokes the optional exclusion under Article 298(1)(b) for "disputes concerning military activities." To advance such an objection, Russia defies settled interpretations of Article 298(1)(b) and mischaracterizes the dispute presented to this Tribunal by Ukraine. It 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 acts of law enforcement, such as an attempted exercise of the right of hot pursuit, cannot be characterized as military activities.

7. Here, Ukraine has presented to the Tribunal a dispute that concerns Russia's assertion of jurisdiction over Ukraine's vessels, which Ukraine contends was unlawful and Russia maintains was lawful. 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. ITLOS thus did not have any difficulty rejecting Russia's invocation of the military activities exception, and neither should this Tribunal.

---

[6] *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 225 ("*South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015") (quoting Myron H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary*, Part XV, ¶ XV.4 ("*Virginia Commentary*")) **(UAL-5)**.

8. Russia's remaining objections are just as readily disposed of. According to Russia, the Convention does not govern the question of immunity in the territorial sea, so Ukraine's claims do not fall within the scope of the Convention. Russia's interpretation of the Convention is wrong, but more importantly, it is only theoretical. At the 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*. And here, Ukraine alleges and has presented evidence that all three of its vessels were arrested in the exclusive economic zone, where Articles 95 and 96 indisputably apply and confer immunity. There 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.

9. Similarly, Ukraine raises claims for violations of Articles 290 and 296 (for Russia's violation of the provisional measures order) and of Article 279 (for Russia's aggravation of the dispute), and those claims also fall within the scope of the Convention.

10. Finally, prior to initiating this arbitration, Ukraine discharged its obligation under Article 283 to proceed expeditiously to an exchange of views on the means of resolving the dispute. Despite Ukraine's clear request to hold such an exchange of views without delay, Russia did not agree to conduct an exchange of views for a month, by which point Ukraine had reasonably concluded that it was necessary to commence proceedings and seek provisional measures in light of the urgency of the situation. ITLOS agreed, both that Ukraine had met its obligation under Article 283, and that the urgent circumstances warranted provisional measures.

11. In these Written Observations, Ukraine responds to Russia's objections and explains the basis for the Tribunal's jurisdiction over the dispute that Ukraine has presented to it. **Chapter Two** responds to Russia's principal objection, explaining that the dispute before the Tribunal, which concerns Russia's assertion of jurisdiction over three Ukrainian naval vessels and their crew notwithstanding their immunity from jurisdiction, is not a dispute concerning military activities that falls within the optional exclusion from mandatory

dispute settlement that Russia has invoked under Article 298(1)(b). **Chapter Three** explains that Ukraine's claims of immunity violations, which are based on arrests that occurred beyond the territorial sea, fall within the scope of the Convention, in particular Articles 95, 96, and 58. It further explains that Russia's invocation of the right of hot pursuit under Article 111 as a purported exception to warship immunity, and its interpretation of Article 32 as not providing for the immunity of warships in the territorial sea, are not properly presented at this stage of proceedings.

12. **Chapter Four** explains that Russia's objection to Ukraine's claims of violations of the ITLOS provisional measures order must be rejected, because it is predicated on the incorrect premise that the Tribunal lacks jurisdiction over Ukraine's other claims. In addition, the Tribunal independently has jurisdiction over a dispute concerning Articles 290 and 296, which require compliance with provisional measures orders. **Chapter Five** explains that Russia's interpretation of Article 279 is a merits defense rather than a jurisdictional objection, and that Article 279 imposes an obligation not to aggravate a dispute. **Chapter Six** addresses Ukraine's clear efforts to proceed expeditiously to an exchange of views under Article 283 before initiation of arbitration, and Russia's failure to meet its own obligations under that provision. Finally, **Chapter Seven** presents Ukraine's formal Submissions.

13. It has now been more than two years since the Russian Federation violated bedrock norms of international law by arresting the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, detaining those vessels and their crew, and prosecuting 24 Ukrainian servicemen as criminals in Russia's domestic civilian courts. To this day, Russia has maintained its prosecutions of the Ukrainian servicemen, and it has still not provided reparation for the grave harms done to the servicemen and vessels during their prolonged detention, nor to Ukraine for the damage inflicted by such a brazen violation of its sovereignty. Ukraine asks the Tribunal to dismiss Russia's preliminary objections, move swiftly to proceedings on the merits, and ensure accountability and justice following this serious breach of UNCLOS.

Chapter Two: The Dispute Before the Tribunal Is Not a Dispute Concerning Military Activities Under Article 298(1)(b)

14. As the *Berdyansk*, the *Nikopol*, and the *Yani Kapu* were navigating toward Odesa, Russian coast guard vessels ordered them to stop because they had allegedly violated Russian law. The coast guard then arrested the vessels and their crew and detained them in connection with criminal prosecutions in Russia's civilian courts. Ukraine's legal claim in this arbitration is that this conduct violated the Convention's guarantees of immunity from jurisdiction. The dispute before the Tribunal is thus a focused one: it concerns the lawfulness of Russia's exercise of jurisdiction over three Ukrainian naval vessels and their crew.[7]

15. Russia seeks to avoid accountability for this clear breach of the law of the sea by arguing that the dispute "concerns military activities," and therefore falls within the optional exclusion from mandatory dispute settlement under Article 298(1)(b) that Russia has invoked. ITLOS, however, in a 19-1 decision, concluded that the dispute does not fall within that 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."[8] As this Chapter demonstrates, the more complete record now before this Tribunal requires the same conclusion.

16. Russia's objection mischaracterizes both Ukraine's claims and the ITLOS decision. The issue before the Tribunal is that Article 298(1)(b) expressly distinguishes between military activities and law enforcement activities, and Russia *chose* to assert law enforcement jurisdiction in connection with the incident of 25 November, repeatedly affirming that the object of the arrests, detentions, and prosecutions was to enforce Russian

[7] Ukraine also raises a dispute concerning Russia's obligation under the Convention to comply with provisional measures orders. As explained in Chapter Four, the Tribunal independently has jurisdiction over that dispute irrespective of Russia's military activities objection.

[8] *Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. The Russian Federation)*, ITLOS Case No. 26, Provisional Measures, Order of 25 May 2019 ("*Three Ukrainian Naval Vessels*, Provisional Measures Order"), ¶ 75 **(UAL-2)**.

criminal law. It is that exercise of jurisdiction that is the subject of Ukraine's legal complaint.

17. The proper interpretation of Article 298(1)(b) is well established. The *South China Sea* tribunal explained that "Article 298(1)(b) applies to '*disputes concerning* military activities' and not to 'military activities' as such."[9] As a matter of ordinary meaning, a dispute "concerns" military activities if the dispute itself is "about" military activities.[10] Thus, as explained by the *Coastal State Rights* tribunal, "the term 'concerning' circumscribes the military activities exception by limiting it to those disputes whose subject matter is military activities."[11] In identifying the subject matter of a dispute, ITLOS has recognized that Article 298(1)(b) of the Convention draws a "distinction between military and law enforcement activities."[12] ITLOS, the *South China Sea* tribunal, and the *Coastal State Rights* tribunal have all rejected the notion that the "mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception."[13] And as the *South China Sea* tribunal affirmed, 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."[14]

18. These principles dispose of Russia's objection. 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

---

[9] *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award of 12 July 2016 (*South China Sea Arbitration*, Award of 12 July 2016"), ¶ 1158 (emphasis in original) **(UAL-7)**.

[10] *See, e.g.*, Oxford English Dictionary (online ed.), *concern* (v), p. 9 (" . . . [T]o be about") **(UAL-49)**; *id.*, *concerning* (prep), p. 23 ("In reference or relation to; regarding, about.").

[11] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 330 **(UAL-25)**.

[12] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 64–66 **(UAL-2)**.

[13] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 334 **(UAL-25)**; *see also Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 66 **(UAL-2)**; *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1158 **(UAL-7)**.

[14] *South China Sea Arbitration*, Award of 12 July 2016, ¶ 938 **(UAL-7)**.

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."[15] Put simply, Russia enforced Russian laws against immune vessels and their crew, which Ukraine claims violated UNCLOS. The lawfulness of that exercise of law enforcement jurisdiction is the subject matter of the dispute — it is what the dispute concerns.

I. The Dispute Before the Tribunal Concerns Russia's Exercise of Jurisdiction By Arresting, Detaining, and Criminally Prosecuting Ukrainian Naval Vessels and Their Crew

19. To assess whether the dispute brought by Ukraine "concerns military activities," the Tribunal must determine the "subject matter" of the dispute.[16] The problem for Russia is that Ukraine's claims concern the arrest, detention, and prosecution of Ukrainian naval vessels and their crew, which Russia has consistently justified as law enforcement activity. Now, faced with the legal consequences of its decision to exercise criminal jurisdiction over vessels possessing immunity, Russia seeks to change the subject. According to Russia, the dispute before the Tribunal is not one that concerns specifically the arrest, detention, and prosecution that Ukraine claims were illegal, but one that more generally "concerns the activities of the Ukrainian and Russian forces on 25 November 2018 in the Black Sea."[17] Russia, the respondent, cannot decide for itself what dispute is before the Tribunal. Ukraine will therefore begin by clarifying, first, how the subject matter of the dispute should be properly identified, and second, what is the subject matter of the dispute before this Tribunal.

20. In determining the subject matter of a legal dispute, a tribunal is to "isolate the real issue in the case and . . . identify the object of the claim."[18] As noted by the *Enrica*

---

[15] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 13741/2dsng (5 November 2019), p. 1 **(UA-9)**

[16] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 330 **(UAL-25)**.

[17] Preliminary Objections, ¶ 2.

[18] *South China Sea Arbitration,* Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 150 (quoting *Nuclear Tests Case (New Zealand v. France)*, ICJ Judgment of 20 December 1974, ¶ 30) **(UAL-5)**.

Lexie tribunal, the tribunal decides on "an objective basis the dispute dividing the parties, by examining the position of both parties," while "giving particular attention to the formulation of the dispute chosen by the Applicant."[19] Thus, "in identifying the real issue in dispute, the applicant's notification and statement of claim instituting the proceedings have particular significance."[20]

21. The object of Ukraine's claim is to obtain redress for Russia's unlawful exercise of enforcement jurisdiction over Ukraine's vessels and servicemen. Ukraine complained in its Notification and Statement of Claim that "the Russian Federation assumed control of, and detained, three Ukrainian naval vessels — the '*Berdyansk*,' the '*Nikopol*,' and the '*Yani Kapu*'"; that "[t]he Russian Federation's ongoing detention of these vessels and of Ukraine's servicemen violates, *inter alia*, the sovereign immunity accorded to warships and naval auxiliary vessels under the United Nations Convention on the Law of the Sea"; and that the Russian Federation has "subjected the detained Ukrainian servicemen to arrest and prosecution in civilian courts."[21] Likewise, in its Memorial, Ukraine submits that "Russia has violated th[e] absolute immunity [of the Ukrainian vessels] in multiple respects," specifically by "unlawfully arrest[ing] and detain[ing] the vessels and their crews," "after that initial arrest, . . . continu[ing] to illegally exercise jurisdiction over the vessels and their crew in violation of UNCLOS Articles 58, 95, and 96," and "in contravention of UNCLOS Articles 30 and 32, . . . improperly demand[ing] that the Ukrainian vessels stop and not proceed out of the territorial sea on their way to their home port."[22]

---

[19] *The 'Enrica Lexie' Incident (Italian Republic v. Republic of India)*, PCA Case No. 2015-28, Award of 21 May 2020 ("*The 'Enrica Lexie' Incident*, Award of 21 May 2020"), ¶¶ 233–234 (quoting *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction of the Court, ICJ Judgment of 4 December 1998, ¶ 30) **(UAL-41)**; *see also Case Concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia),* Preliminary Objections, ICJ Judgment of 13 December 2007, ¶ 38 **(RUL-51)**.

[20] *The 'Enrica Lexie' Incident*, Award of 21 May 2020, ¶ 233 **(UAL-41)**.

[21] Ukraine's 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, 1 April 2019 ("Notification and Statement of Claim"), ¶¶ 1–2.

[22] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. The Russian Federation)*, Memorial of Ukraine, dated 22 May 2020 ("Memorial of Ukraine"), ¶ 75.

22. In its submissions, Ukraine "requests the Tribunal to adjudge and declare" that Russia committed the following immunity violations:

- "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."[23]

- "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*."[24]

- "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 the vessels, and commencing and maintaining criminal prosecutions of those servicemen based on their alleged actions on board the vessels."[25]

- "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."[26]

23. Ukraine thus claims and requests relief for immunity violations. The facts that Ukraine identifies as the basis for its claims are as follows:

- After the Ukrainian naval vessels announced that they had abandoned their transit of the Kerch Strait and were returning to their home port of Odesa, Russian coast guard vessels ordered them to stop and not to exit the territorial sea.[27]

- The Russian coast guard expressly informed the Ukrainian vessels that they were being ordered to stop because they "had violated Russian law."[28]

---

[23] *Id.* ¶ 153(a).

[24] *Id.* ¶ 153(b).

[25] *Id.* ¶ 153(c).

[26] *Id.* ¶ 153(d).

[27] Memorial of Ukraine, ¶¶ 85–88 (citing, *e.g.*, FSB Report, p. 4 **(UA-4)**).

[28] *Id.* ¶¶ 77–78; *see also id.* Chapter 3, Part II, Section A; Memorial of Ukraine, Witness Statement of Captain of the Second Rank Denys Volodymyrovych Hrytsenko (6 May 2020) ("Hrytsenko Statement"), ¶ 19; Memorial of Ukraine, Witness Statement of Captain Lieutenant Bohdan Pavlovych Nebylytsia (13 May 2020) ("Nebylytsia Statement"), ¶ 14; *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 41 (quoting the FSB Report) **(UA-4)**) **(UAL-2)**.

- The "Russian coast guard employed a series of escalating law enforcement tactics" to compel the three naval vessels to stop, using force only after delivering auditory warnings, visual warning flares, and firing warning shots in the air.[29]

- Russian coast guard officers boarded the Ukrainian naval vessels, over the objections of the ships' commanders, and effected arrests.[30]

- Russia described the arrests as "formally apprehend[ing] . . . persons suspected of having committed a crime" under Russian domestic law.[31]

- Russia then prosecuted the 24 Ukrainian servicemen for alleged violations of Article 322 of the Russian Criminal Code, and interrogated them in connection with that prosecution.[32]

- The Russian Federation continued to detain the Ukrainian servicemen on the basis of the criminal charges pending against them, frequently renewing their detention through Russian criminal procedures for pre-trial detention.[33]

---

[29] Memorial of Ukraine, ¶ 77; *see also id.* ¶¶ 34–35; Hrytsenko Statement, ¶¶ 19–21; Ministry of Defense, Naval Forces of Ukraine, Report on the Events of 24-25 November 2018 in the Sea of Azov and Kerch Strait (15 April 2019) ("Navy Report"), ¶ 14 **(UA-5)**; Memorial of Ukraine, Witness Statement of Senior Lieutenant Roman Mykolayovych Mokryak (14 May 2020) ("Mokryak Statement"), ¶ 13; Nebylytsia Statement, ¶ 14; Memorial of Ukraine, Witness Statement of Petty Officer Oleh Mykhailovych Melnychyk (7 May 2020) ("Melnychyk Statement"), ¶¶ 14–15.

[30] Memorial of Ukraine, ¶ 77; *see also id.* ¶¶ 35–37; Hrytsenko Statement, ¶ 22; Melnychyk Statement, ¶¶ 15–16; Mokryak Statement, ¶ 15; Nebylytsia Statement, ¶¶ 15–16; Navy Report, ¶ 15 **(UA-5)**. Russia does not dispute that it was the Russian coast guard vessels (*i.e.*, the FSB border patrol vessels) — and not any Ministry of Defense or Black Sea Fleet vessels — that boarded the Ukrainian warships, performed the actual arrests, and detained the vessels and servicemen. *See, e.g.*, FSB Report, p. 6 ("the border patrol ship *Izumrud* detained the artillery ship *Berdyansk* and removed seven crewmembers from it"; "the border patrol ship *Don* stopped and detained the seagoing tugboat *Yana Kapu*"; "the border patrol ship *Don* detained the artillery ship *Nikopol*") **(UA-4)**.

[31] *Three Ukrainian Naval Vessels*, Provisional Measures, Memorandum of the Russian Federation, dated 7 May 2019, ¶ 21 **(UA-2)**; *see also* Memorial of Ukraine, ¶¶ 37–38, 77; Hrytsenko Statement, ¶ 22; Melnychyk Statement, ¶¶ 15–16; Mokryak Statement, ¶ 15; Nebylytsia Statement, ¶¶ 15–16; Navy Report, ¶ 15 **(UA-5)**; FSB Report, pp. 2–4, 6 **(UA-4)**; *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 14951/2dsng (5 December 2018), p. 2 **(UA-6)**.

[32] Memorial of Ukraine, ¶ 82; *see also id.* ¶ 41 (citing Memorial of Ukraine, Witness Statement of Nikolai Polozov (19 May 2020) ("Polozov Statement"), Annex A, p. 1); Order on Opening a Criminal Case and Commencing Criminal Proceedings (25 November 2018), pp. 1–2 **(UA-13)**; Polozov Statement, Annex B, p. 8; Polozov Statement, ¶ 5; Hrytsenko Statement, ¶¶ 24–25, 29 (recalling being subjected to 12 interrogations); Mokryak Statement, ¶¶ 17–18, 21 (recalling being subjected to 14 interrogations); Nebylytsia Statement, ¶¶ 17–18, 20, 22, 24 (recalling being subjected to 15–16 interrogations); Melnychyk Statement, ¶¶ 17, 20, 23 (recalling being subjected to seven to eight interrogations); Memorial of Ukraine, Witness Statement of Master Chief Petty Officer Yuriy Oleksandrovych Budzylo (19 May 2020) ("Budzylo Statement"), ¶¶ 7, 13 (recalling being subjected to seven to eight interrogations); Memorial of Ukraine, Witness Statement of Senior Seaman Andriy Anatoliyovych Artemenko (8 May 2020) ("Artemenko Statement"), ¶¶ 11–12, 14, 17, 24 (recalling being subjected to at least 14–15 interrogations); Memorial of Ukraine, Witness Statement of Senior Seaman Vyacheslav Anatoliyovych Zinchenko (6 May 2020) ("Zinchenko Statement"), ¶¶ 7, 19 (recalling being subjected to at least 17–22 interrogations).

[33] Memorial of Ukraine, ¶¶ 79–80; *see also id.* ¶¶ 40–42; Hrytsenko Statement, ¶¶ 24–26, 29–30 & Annex B; Mokryak Statement, ¶¶ 17–19, 21–22 & Annex C; Nebylytsia, ¶¶ 18–22, 24–25 & Annex C; Melnychyk Statement, ¶¶ 17, 19–21, 23 & Annex C; Budzylo Statement, ¶¶ 7–9, 13–14; Zinchenko Statement, ¶¶ 6–7, 9, 11, 13, 19, 22; Artemenko Statement, ¶¶ 11–15, 17, 20, 24–25; Polozov Statement, ¶¶ 2–4, 8, 10 & Annexes A–E; *Note Verbale of the Ministry of Foreign Affairs of the Russian*

- Russia detained the three vessels themselves on the basis that they constitute "physical evidence in the criminal case initiated in connection with violations of Russian law committed on 25 November 2018."[34] As part of the criminal investigation and prosecution, Russian investigators repeatedly inspected the three Ukrainian warships and stripped the vessels of most of their fixtures.[35]

- After the ITLOS order prescribing provisional measures, Russia unilaterally attempted to condition the release of the three vessels and 24 servicemen on Ukraine "provid[ing], in accordance with the criminal procedure legislation of the Russian Federation, written guarantees of participation of each of the 24 Ukrainian sailors, after their release from custody, in the preliminary and judicial investigation, as well as written guarantees of the preservation of physical evidence - naval vessels the *Berdyansk*, the *Nikopol* and the *Yani Kapu* - after their transfer to the Ukrainian side for safekeeping pending a court decision."[36]

24. In short, Ukraine has put forward evidence establishing that Russia exercised jurisdiction over the *Berdyansk*, the *Nikopol*, the *Yani Kapu*, and their crew for the express purpose of enforcing its domestic laws. In fact, Russia does not dispute that "enforcement of domestic law was the stated reason for the arrest on the evening of 25 November 2018."[37]

25. Nor has Russia challenged that the legal dispute between the parties concerns the lawfulness under UNCLOS of an exercise of jurisdiction: Ukraine claims that the order to stop violated Articles 30 and 32, and the arrest, detention, and prosecution violated Articles 58, 95, and 96.[38] That is the "real issue in the case," "the object of [Ukraine's] claim," and

---

Federation, No. 14951/2dsng (5 December 2018), p. 2 **(UA-6)**; *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation,* No. 13741/2dsng (5 November 2019), p. 2 **(UA-9)**; *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)**; Order on Opening a Criminal Case and Commencing Criminal Proceedings (25 November 2018), pp. 1–2 **(UA-13)**.

[34] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 13741/2dsng (5 November 2019), p. 1 **(UA-9)**; Memorial of Ukraine, ¶¶ 39, 82, 90.

[35] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 13741/2dsng (5 November 2019), p. 2 **(UA-9)**; Memorial of Ukraine, ¶¶ 39, 82.

[36] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 7811/2dsng (25 June 2019) **(UA-10)**; *see also* Memorial of Ukraine, ¶¶ 90–91; *Note Verbale of the Ministry of Foreign Affairs in Ukraine,* No. 72/22-188/3-1641 (26 June 2019) (rejecting Russia's unilateral effort to impose conditions on the vessels' release) **(UA-3)**; *Case Concerning the Detention of Three Ukrainian Naval Vessels,* Ukraine's Supplemental Report on Compliance of 26 June 2019 (notifying ITLOS of Russia's unilateral effort to impose conditions on the vessels' release) **(UA-27)**.

[37] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. The Russian Federation)*, Response of the Russian Federation to the Observations of Ukraine on the Question of Bifurcation, dated 21 September 2020, ¶ 19 (quoting Ukraine's Observations on the Question of Bifurcation, ¶ 14, and confirming, that it does not dispute the statement made therein).

[38] *See, e.g.*, Memorial of Ukraine, ¶¶ 75, 153(a)–(d).

the "subject matter" of the dispute.[39] By 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."[40]

II. Russia's Own Characterization of the Arrest, Detention, and Prosecution Preclude It from Invoking the Military Activities Exception

26. At the Provisional Measures phase of this case, ITLOS conducted an "objective evaluation of the nature of the activities in question" and concluded that the dispute did not concern military activities.[41] While it is open to this Tribunal to conduct the same evaluation (which would lead to the same result), the Tribunal can also 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.

27. A similar approach was taken by the *South China Sea* tribunal, which concluded that it would "not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest levels."[42] There, the Philippines challenged land reclamation and construction activities on and around certain islands.[43] The Chinese military participated in the construction of these new facilities, as one express purpose of the construction was "satisfying the need of necessary military defense."[44] But, according to China, the "main purposes" of the construction were

---

[39] *South China Sea Arbitration,* Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 150 (quoting *Nuclear Tests Case (New Zealand v. France)*, ICJ Judgment of 20 December 1974, ¶ 30) **(UAL-5)**; *see also Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 330 **(UAL-25)**.

[40] Preliminary Objections, ¶ 2.

[41] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 66 **(UAL-2)**.

[42] *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1028 **(UAL-7)**.

[43] *See, e.g.*, *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶¶ 101, 371, 377, 396, 409 **(UAL-5)**; *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 22(d), 562, 565, 568, 818–819, 852–862 **(UAL-7)**.

[44] *South China Sea Arbitration*, Hearing on Jurisdiction and Admissibility Transcript, dated 13 July 2015, p. 53, lines 21–22 (statement of Professor Bernard H. Oxman) (quoting Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs (16 June 2015), Philippine's Annex 579) **(UAL-50)**; *see also South China Sea Arbitration*, Award of 12 July 2016, ¶ 1027 (citing Ministry of Foreign Affairs of the People's Republic of China, Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs (16 June 2015), Philippine's Annex 579) **(UAL-7)**.

civilian, including: "improving the living and working conditions of personnel stationed" on the islands; "better safeguarding territorial sovereignty and maritime rights and interests"; and performing environmental and scientific research functions.[45] On this basis, the Tribunal "accept[ed] China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the extensive construction activities."[46]

28. Much like China's insistence that its military's construction activities had a primarily civilian purpose, Russia has repeatedly stressed that the motivation underlying the Russian coast guard's actions on the evening of 25 November 2018 was the enforcement of Russia's criminal laws. For example, one day after the arrests, the Russian FSB issued an official statement describing the incident in terms of alleged violations of Russian navigational regulations and statutes, including violations of "an authorization-based procedure for the passage and anchorage of ships . . . in effect in the Kerch Strait" and the federal Russian laws "On the State Border of the Russian Federation" and "On the Internal Seas, Territorial Sea, and Contiguous Zone of the Russian Federation."[47] In diplomatic correspondence, the Russian Ministry of Foreign Affairs stated that the Ukrainian servicemen were being detained for violating Article 322(3) of the Russian Criminal Code.[48] In response to Ukraine's request for provisional measures, the Russian Ministry of Foreign Affairs referred to an ongoing "criminal investigation being conducted in the Russian Federation."[49] As ITLOS pointed out, "the Russian Federation has invoked article 30 of the Convention, entitled 'Noncompliance by warships with the laws and regulations of the coastal State,' to justify its detention of the vessels."[50] And Russia's own Preliminary

---

[45] *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 936, 1022 (citations omitted) **(UAL-7)**.

[46] *Id.* ¶ 936.

[47] FSB Report, pp. 3, 4 **(UA-4)**.

[48] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 14951/2dsng (5 December 2018), p. 2 **(UA-6)**.

[49] Statement of the Ministry of Foreign Affairs of Russia, No. 803-16-04-2019 (16 April 2019) **(UA-48)**.

[50] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 76 **(UAL-2)**; *see also* FSB Report, pp. 3–4 **(UA-4)**.

Objections claim that its coast guard's chase of the Ukrainian vessels constituted "hot pursuit," which Russia specifically describes as a "law enforcement activit[y]."[51] Russia's repeated claim that it was engaged in a "law enforcement activity" — *i.e.*, that its "motivation" was to enforce its laws[52] — is sufficient to reject its invocation of the military activities exception.

29. Seeking to avoid the consequences of its unwavering position, Russia now argues that "the activities at issue have repeatedly been characterised as military in nature . . . in multiple statements by both Russia and Ukraine."[53] It is simply not true that Russia has repeatedly characterized its own activities arresting the vessels as military in nature. The only Russian statements to which it refers are two political statements before the Security Council accusing Ukraine's Navy of "an aggressive act of provocation" by attempting to transit the Kerch Strait.[54] That allegation was false, but more importantly, the dispute before the Tribunal does not concern whether Ukraine's naval vessels had a right to transit the Kerch Strait — Ukraine makes no legal claim about that issue and does not ask the Tribunal to adjudicate the rights of its naval vessels to transit the Strait. It therefore does not matter that Russia criticized that transit as a provocation. The dispute before the Tribunal concerns *Russia*'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."[55] Russia presents no evidence that it has ever characterized those activities as being anything other than law enforcement.

30. Russia's attempt to change the subject by referring to statements by Ukraine is no more successful. ITLOS found the parties' characterization relevant "especially in case of the party invoking the military activities exception."[56] Here, Russia is the party invoking

---

[51] Preliminary Objections, ¶¶ 65, 86–88.

[52] *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1028 **(UAL-7)**.

[53] Preliminary Objections, ¶¶ 47, 49.

[54] *Id.* ¶ 48.

[55] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 73 **(UAL-2)**.

[56] *Id.* ¶¶ 65, 76; *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 1026–1028 **(UAL-7)**.

the military activities exception, and it is Russia's own activities that the dispute concerns. Russia identifies no legal support for the undue importance it attaches to various Ukrainian statements.

31. In any event, even if the Tribunal considers these statements, they add nothing to Russia's case, and certainly do not overcome the clear law enforcement nature of Russia's acts, as characterized by Russia itself. Most of the statements identified by Russia were made in the immediate aftermath of the events in question, at a time when Ukraine was required to react with limited information — precisely *because* Russia was detaining the primary witnesses to the dispute. It only later became clear the full extent to which Russia was treating the incident as a law enforcement matter. Neither can Russia invoke Ukraine's initial request for the detained servicemen to be treated as prisoners of war.[57] Russia admits in its Preliminary Objections that it denied this request and "hence is treating this as a matter for its civilian courts."[58] In light of Russia's decision to assert law enforcement jurisdiction and "treat this as a matter for its civilian courts," it was appropriate for Ukraine to hold Russia responsible for the unlawfulness of its actions within the law enforcement framework on which Russia has itself insisted.

III. A Dispute Concerning a State's Unlawful Exercise of Jurisdiction Through Arrests, Detentions, and Criminal Prosecutions Is a Dispute Concerning Law Enforcement Activities, Not Military Activities

32. Although Russia's characterization of its own activities is sufficient to reject the military activities objection, the Tribunal can reach the same result by conducting an objective evaluation of the additional relevant facts. ITLOS conducted such an evaluation, and concluded that a dispute challenging the lawfulness of Russia's assertion of jurisdiction over Ukraine's naval vessels concerns law enforcement activities, not military activities. If this Tribunal conducts the same analysis, it should reach the same result.

[57] Preliminary Objections, ¶ 49(b), (d)–(e).

[58] *Id.* ¶ 52 n.109.

A. The Russian Activities that Ukraine Claims Violated the Immunity Provisions of UNCLOS Are Quintessential Law Enforcement Activities

33. Ukraine's claims concern an exercise of jurisdiction — actions by Russia to enforce its laws — against the government vessels of another State. The principal treaty provisions on which Ukraine's claims are based — Articles 95 and 96 — are specifically addressed to "immunity from *the jurisdiction*" of other states.

34. The concept of "exercising jurisdiction" is, as a general matter, law enforcement rather than military in nature. As explained by Professor Oxman:

> The term jurisdiction is most often used to describe the lawful power of a State to define and enforce the rights and duties, and control the conduct, of natural and juridical persons. A State exercises its jurisdiction by establishing rules, sometimes called the exercise of legislative jurisdiction or prescriptive competence; by establishing procedures for identifying breaches of the rules and the precise consequences thereof, sometimes called judicial jurisdiction or adjudicative competence; and by forcibly imposing consequences such as loss of liberty or property for breaches or, pending adjudication, alleged breaches of the rules, sometimes called enforcement jurisdiction or competence.[59]

In other words, "exercising jurisdiction" includes applying and enforcing a State's domestic laws against an alleged violator of those laws, which constitute exactly the Russian acts that are the subject of Ukraine's claim.

35. Similarly, "immunity from jurisdiction" generally refers to a limitation on one State's application and enforcement of its own laws against another State or its officials. For example, in the *Arrest Warrant* case, the International Court of Justice ("ICJ") concluded that a warrant for the arrest of a State's Foreign Minister violated his "immunity from criminal jurisdiction."[60] According to the International Law Commission ("ILC") commentary to the Draft Articles on Jurisdictional Immunities of States and Their Property,

---

[59] Bernard H. Oxman, *Jurisdiction of States, in* Max Planck Encyclopedia of Public International Law (November 2007), ¶ 3 **(UAL-51)**.

[60] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Judgment of 14 February 2002, ¶ 71 **(UAL-23)**.

"[t]he concept [of 'jurisdictional immunities'] covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders . . . [and] immunity of a State in respect of property from measures of constraint."[61] Within scholarly commentary, it is well understood that "State immunity protects a State and its property from the jurisdiction of the courts of another State. It covers administrative, civil, and criminal proceedings (jurisdictional immunity), as well as enforcement measures (enforcement immunity)."[62]

36. Unsurprisingly, then, arrest and detention are considered quintessential law enforcement activities. That is why ITLOS considers the arrest of a ship to be a typical "law enforcement operation[] at sea."[63] It is why scholarship considers the "stopping and boarding [of] vessels, . . . arrest or seizure of persons and vessels, [and] detention [of those vessels]" to fall within the classical definition of "law enforcement" activities at sea.[64] And it is why the United Nations Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in 1979, considers that "the term 'law enforcement officials', includes all officers of the law, whether appointed or elected, who exercise police powers, *especially the powers of arrest or detention*."[65]

37. Everything about Russia's arrest, detention, and prosecutions indicate law enforcement — after all, Russia expressly said it was *enforcing its laws*. Without ever grappling with this fundamental point, Russia enumerates eight "relevant circumstances" to

---

[61] ILC, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries (1991), Art. 1, Commentary, ¶ 2 **(UAL-52)**.

[62] Peter-Tobias Stoll, *State Immunity*, *in* Max Planck Encyclopedia of Public International Law (April 2011), ¶ 1 **(UAL-53)**.

[63] *See, e.g.*, *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Case No. 2, Judgment of 1 July 1999 ("*M/V 'Saiga' (No. 2)*"), ¶ 156 **(UAL-3)**.

[64] Natalie Klein, *Law Enforcement Activities, in* Maritime Security and the Law of the Sea (Oxford University Press, 2011), p. 63 ("Enforcement is the process of invoking and applying authoritative prescriptions. The range of operations includes surveillance, stopping and boarding vessels, search or inspection, reporting, arrest or seizure of persons and vessels, detention, and formal application of law by judicial or other process, including imposition of sanctions." (quoting William T. Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press, Oxford 1994), p. 303)) **(UAL-54)**.

[65] United Nations, Code of Conduct for Law Enforcement Officials, Adopted by General Assembly Resolution 34/169 of 17 December 1979, Art. 1, Commentary ¶ (a) (emphasis added) **(UAL-55)**.

argue that the dispute instead concerns military activities.[66] None of these supposedly "relevant circumstances" is actually relevant to the dispute before the Tribunal, and on top of that many include factual misrepresentations or errors.

38. **First**, Russia says "it is undisputed that there were military personnel on both sides."[67] However, the plain text of Article 298(1)(b) focuses on conduct rather than personnel — "military activities," not "military actors." The *Coastal State Rights* tribunal rejected the notion that the "mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception," and the *South China Sea* tribunal likewise concluded that "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."[68] Here, while the Russian navy was in the vicinity and appears to have been providing general support to Russia's coast guard, it is undisputed that it was Russian coast guard vessels that actually boarded and arrested the Ukrainian vessels.[69] Russia therefore relies on its internal characterization of its coast guard as "akin to armed forces."[70] The *Coastal State Rights* tribunal rejected a focus on the identity of the actor precisely to avoid the vagaries of domestic legal status: "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."[71] What matters is the nature of the *activities*. Russia itself recognizes that when its coast guard conducts an arrest, it is engaged in law

---

[66] Preliminary Objections, ¶ 39.

[67] *Id.* ¶ 40.

[68] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶¶ 333–334 **(UAL-25)**; *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1158 **(UAL-7)**; *see also Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 64, 66 ("[T]he 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 . . . .") **(UAL-2)**; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005), 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 . . . vessels does not justify a characterization of 'military activities' for the purposes of Article 298.") **(UAL-56)**.

[69] *See supra* ¶ 23 & n.30.

[70] Preliminary Objections, ¶ 40(b).

[71] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 335 **(UAL-25)**.

enforcement. In *Arctic Sunrise*, Russian coast guard vessels and "special forces" conducted an arrest, and Russia invoked only the Convention's partial law enforcement exclusion — not its military activities exclusion.[72]

39. **Second**, Russia notes that "it is undisputed that the three Ukrainian vessels that were ordered to stop and then detained were military vessels, namely naval warships and an auxiliary vessel."[73] Again, for purposes of invoking the military activities exception, it is the nature of the activities that matters, not the identity of the actors involved. The Ukrainian naval vessels never engaged with the Russian coast guard (or military).[74] And at the time Russia pursued, arrested, and detained them, the vessels were attempting to exit the territorial sea and return to their home port.[75]

40. **Third,** Russia alleges that "it is undisputed that the Ukrainian Military Vessels were armed with guns and artillery."[76] This is just another way for Russia to argue that the presence of military vessels triggers the exclusion, since virtually all military vessels are armed. More salient is the fact, not mentioned by Russia, that the Ukrainian vessels took overt measures to demonstrate their arms were not being used or deployed.[77]

41. **Fourth,** Russia alleges that "it is undisputed that when the Ukrainian Military Vessels ignored the Russian order to stop the Ukrainian military and the Russian military were arrayed in opposition to each other."[78] This is not only disputed, but false.

---

[72] In the *Arctic Sunrise* arbitration, Russia did not participate but informed the Tribunal of its position that the law enforcement exception applied, without mentioning military activities. *See In the Matter of the Arctic Sunrise Arbitration (The Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on Jurisdiction of 26 November 2014 ("*Arctic Sunrise*, Award on Jurisdiction of 26 November 2014"), ¶ 9 (quoting a Russian *note verbale* dated 22 October 2013 addressed to ITLOS) **(UAL-44)**; *In the Matter of the Arctic Sunrise Arbitration (The Netherlands v. Russian Federation)*, PCA Case No. 2014-02, Award on the Merits of 14 August 2015 ("*Arctic Sunrise*, Award on the Merits of 14 August 2015"), ¶¶ 100–102 **(UAL-6)**.

[73] Preliminary Objections, ¶ 41.

[74] *See, e.g.*, Memorial of Ukraine, ¶¶ 33–38; Hrytsenko Statement, ¶¶ 19–23; Nebylytsia Statement, ¶¶ 7, 14–16; Melnychyk Statement, ¶¶ 14–16; Mokryak Statement, ¶¶ 9–16.

[75] *See id.*

[76] Preliminary Objections, ¶ 42.

[77] *See, e.g.*, Mokryak Statement, ¶ 9; Memorial of Ukraine, ¶ 26 (and statements cited in support thereof).

[78] Preliminary Objections, ¶ 43. Russia also alleges that "[t]here was a prolonged stand-off between the Ukrainian military force and the Russian combination of military and paramilitary forces." *Id.*

Ukraine's evidence establishes that the Russian coast guard ordered the Ukrainian vessels to stop while pursuing them out of the territorial sea.[79] Russia itself calls this a law enforcement "pursuit." Notably, Russia does not cite any evidence for its factual claim, but instead a separate opinion from a single ITLOS judge.[80] The ITLOS provisional measures order itself, however, correctly understood the chronology: "[T]he Ukrainian naval vessels apparently gave up their mission to pass through the strait and turned around and sailed away from it. The Russian coast guard *then* ordered them to stop and, when the vessels ignored the order *and continued their navigation*, started chasing them."[81] When 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."

42. **Fifth,** Russia states that "it is undisputed that Russian forces used force against the Ukrainian Military Vessels and the Ukrainian Military Servicemen."[82] But as ITLOS first recognized in *M/V Saiga*, force is common in "law enforcement operations at sea."[83] The *Coastal State Rights* tribunal likewise noted that "[l]aw enforcement forces . . . are generally authorised to use physical force without their activities being considered military for that reason."[84] Unlike military engagements, law enforcement use of force follows a standard set of principles, escalating from "an auditory or visual signal to

---

Russia appears to be referring to the period of several hours during which Ukrainian vessels were waiting in an anchorage area as directed by the Kerch Traffic Control authorities, events which are not the subject of Ukraine's claims. *See* Hrytsenko Statement, ¶ 16. Moreover, Russia's characterization of a "standoff" is inaccurate. During this episode, the Ukrainian vessels communicated with and followed the instructions of Kerch Traffic Control as they waited to transit the Strait; received clearance from Kerch Traffic Control to wait at the anchorage point; were "periodically" requested by Russian coast guard vessels to "leave the Kerch Strait and go beyond the 12-mile zone"; and, upon confirmation that the Kerch Strait was closed to navigation, departed the area as they had been requested to do. *See id.* ¶¶ 16–18.

[79] *See, e.g.*, Hrytsenko Statement, ¶ 19; Mokryak Statement, ¶ 13.

[80] Preliminary Objections, ¶ 43 & n.69 (citing and quoting *Three Ukrainian Naval Vessels*, Provisional Measures Order, Separate Opinion of Judge Gao, ¶ 24 **(RUL-32)**).

[81] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 73 (emphasis added) **(UAL-2)**.

[82] Preliminary Objections, ¶ 44.

[83] *M/V "Saiga" (No. 2)*, ¶ 156 **(UAL-3)**.

[84] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 336 **(UAL-25)**; *see also id.* ("[T]he alleged use of physical force is insufficient to conclude that an activity is military in nature.").

stop," to warnings such as "shots across the bows of the ship," and only then a resort to force.[85] Such classic law enforcement tactics are exactly what the Russian coast guard employed here.[86] That is why ITLOS determined that "what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation."[87] Even Russia recognizes that its coast guard's use of force does not alone trigger the military activities exception; its coast guard used force in arresting the *Arctic Sunrise*, which, as mentioned above, Russia viewed as law enforcement.[88]

43. **Sixth,** Russia alleges that its "conduct . . . responded to an illegal crossing of its State border by another State's warships . . . , i.e. the Russian military was protecting its State national security interests given the unwarranted (armed) presence of the military of another State."[89] This assertion is unsupported by evidence, irreconcilable with the actual chronology, and contradicted by Russia's many express statements about the reason for the arrest. Ukraine's claims concern Russia's exercise of jurisdiction *after* the Ukrainian vessels abandoned their plans to transit the Kerch Strait and announced that they were returning to Odesa. Whatever national security interest Russia might have claimed from an ongoing attempt to transit the Kerch Strait, or even a naval vessel's presence in what Russia considers its territorial sea, cannot have been the motivation to chase vessels *leaving* the territorial sea, and then arrest them *beyond* the territorial sea. Such actions make sense only as a response to past lawbreaking. Unsurprisingly, all of Russia's statements justifying the arrests invoke the enforcement of domestic law[90]; only in this litigation has Russia advanced this *post hoc* claim of national security interests.

---

[85] *M/V "Saiga" (No. 2)*, ¶ 156 **(UAL-3)**.

[86] *See* Memorial of Ukraine, ¶¶ 34–36 (citing Hrytsenko Statement, ¶¶ 19–21; Mokryak Statement, ¶¶ 13–14; Nebylytsia Statement, ¶ 14; Melnychyk Statement, ¶¶ 14–15; Navy Report, ¶ 14); *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 73–75 **(UAL-2)**.

[87] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 74 **(UAL-2)**.

[88] *Arctic Sunrise*, Award on Jurisdiction of 26 November 2014, ¶ 9 **(UAL-44)**.

[89] Preliminary Objections, ¶ 45 (citations omitted).

[90] *See supra* ¶¶ 28–29.

44. Nor can this theory be squared with the facts. Russia highlights a checklist it took from the *Nikopol*, insinuating that it reveals an agenda to transit the Strait covertly.[91] Russia ignores, however, the first-hand testimony from the Commander of the mission that this checklist included "standard language" that "simply means that the mission should not generally be discussed," and "does not mean that [the Ukrainian vessels] were directed to secretly approach or transit the Strait."[92] In fact, Ukraine's vessels repeatedly communicated with representatives of the Russian Federation, explained their intention to transit the Kerch Strait, and waited to join a group of non-military vessels to transit the strait at the appropriate time.[93] Just two months earlier, on 23 September 2018, two other Ukrainian naval vessels had peacefully transited the Strait without incident.[94] ITLOS correctly determined that peaceful transit from one port to another is not a "military activity," and found Russia's characterization of a "non-permitted secret incursion" unsupported by the facts.[95]

45. **Seventh**, Russia argues that "the activities of 25 November 2018 all occurred in the wider context of the dispute between Ukraine and Russia about the alleged annexation of Crimea."[96] Russia does not explain how this context could have any connection to the dispute before the Tribunal, which does not concern Russia's unlawful annexation and occupation of Crimea. The *South China Sea* tribunal recognized that "it is entirely ordinary and expected that two States with a relationship" that is "extensive and multifaceted" "would have disputes in respect of several distinct matters," including "regarding multiple aspects of

---

[91] Preliminary Objections, ¶ 45.

[92] Hrytsenko Statement, ¶ 8.

[93] Memorial of Ukraine, ¶¶ 25–30 (and statements cited in support thereof).

[94] *Id.*

[95] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 68, 70 ("[I]t is difficult to state in general that the passage of naval ships *per se* amounts to a military activity. Under the Convention, passage regimes, such as innocent or transit passage, apply to all ships."; "The Tribunal is of the view, on the basis of evidence before it, that a 'nonpermitted "secret" incursion' by the Ukrainian naval vessels, as alleged by the Russian Federation, would have been unlikely under the circumstances of the present case . . . .") **(UAL-2)**.

[96] Preliminary Objections, ¶ 46.

the prevailing factual circumstances or the legal consequences that follow from them."[97] Tribunals should not "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[98] Moreover, the *Coastal State Rights* tribunal rejected a similar attempt by Russia to invoke the military activities exception based on an alleged causal link to the occupation.[99]

46. **Eighth**, and finally, Russia claims that "the activities at issue have repeatedly been characterised as military in nature, including in multiple statements by both Russia and Ukraine."[100] These allegations are addressed above.[101]

47. In short, Russia's allegedly "relevant circumstances" are actually irrelevant, wrong, or both. The key fact that *is* relevant is that Russia conducted arrests, detentions, and prosecutions of Ukraine's ships and servicemen for the express purpose of enforcing Russian law. That exercise of jurisdiction is a law enforcement activity.

B. For Purposes of Article 298(1)(b), Law Enforcement Activities Are Not Military Activities

48. The structure of Article 298(1)(b) makes plain what ITLOS called "the distinction between military and law enforcement activities." Russia's argument, that "the concepts of military activities and of law enforcement activities are not mutually exclusive"[102] is contradicted by a plain reading of the text, interpretations by other tribunals, and the leading commentaries.

---

[97] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 152 **(UAL-5)**.

[98] *Id.* ¶ 152 (quoting *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Jurisdiction and Admissibility, ICJ Judgment of 24 May 1980, ¶ 36). The ICJ has repeatedly explained that "a distinction must be drawn between a broader disagreement between two States and the related but distinct dispute presented by an Application." *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Preliminary Objections, ICJ Judgment of 24 September 2015, ¶ 32 **(RUL-55)**.

[99] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 330 (holding in relation to the military occupation of Crimea that "a mere 'causal' or historical link between certain alleged military activities and the activities in dispute cannot be sufficient to bar an arbitral tribunal's jurisdiction under Article 298, paragraph 1, subparagraph (b), of the Convention") **(UAL-25)**.

[100] Preliminary Objections, ¶ 47.

[101] *See supra* ¶¶ 29–31.

[102] Preliminary Objections, ¶ 57.

49. Article 298(1)(b) expressly covers two distinct categories. One clause covers "disputes concerning military activities," and another covers "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."[103] Article 297(2) addresses marine scientific research, and Article 297(3) addresses living resources in the exclusive economic zone. Thus, Article 298(1)(b) covers disputes concerning *all* military activities, but only disputes concerning *certain* law enforcement activities (*i.e.*, those related to marine scientific research and living resources). The decision to exempt disputes concerning *some* law enforcement activities from mandatory jurisdiction necessarily implies a decision *not* to exempt disputes concerning all other law enforcement activities; otherwise, that limitation would be deprived of effect.[104] And by treating "military activities" and "law enforcement activities" separately, the provision's structure requires these concepts to be treated as distinct.

50. This distinction is further supported by the concept of "law enforcement activities" itself as used in Article 298(1)(b), which turns on the nature and purpose of the act — to enforce the law. In the French text of Article 298(1)(b), for example, the reference is to "actes d'exécution forcée," a legal term of art that connotes legal acts, asserting domestic jurisdiction.[105] Similarly, the Spanish text — "actividades encaminadas a hacer cumplir las normas legales" ("activities aimed at enforcing legal regulations") — speaks directly to the

---

[103] UNCLOS Art. 298(1)(b).

[104] *See Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Judgment of 17 March 2016, ¶ 37 (describing application by the ICJ and PCIJ of *a contrario* reasoning "by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded") **(UAL-57)**; *see also* Alexandre Senegacnik, *Expressio Unius (Est) Exclusio Alterius*, *in* Max Planck Encyclopedia of Public International Law (February 2018) **(UAL-58)**; *SS 'Wimbledon' (United Kingdom and Others v. Germany)*, PCIJ Judgment of 17 August 1923, pp. 23–24 **(UAL-59)**; *United States Diplomatic and Consular Staff in Tehran (United States v. Iran),* ICJ Judgment of 24 May 1980, pp. 21–22, ¶ 40 **(UAL-60)**; *Railway Traffic Between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys) (Lithuania v. Poland)*, PCIJ Advisory Opinion of 15 October 1931, p. 121 **(UAL-61)**.

[105] *See, e.g.*, F.H.S. Bridge, *The Council of Europe French–English Legal Dictionary* (1994), pp. 8, 122 (defining the legal term "acte d'exécution" as "execution (enforcement) measure; measure of execution" and "exécution forcée" as "execution by force or threat of force; enforcement; execution") **(UAL-62)**.

legal purpose of the action.[106] A juridical act is fundamentally distinct from a military activity.

51. Russia strains to reconcile its contrary interpretation with the text. Russia argues that "Article 298(1)(b) does not refer to law enforcement activities different from those concerning marine scientific research and fisheries [and] consequently does not exclude that these other activities may be covered by the notion of military activities."[107] Russia's conclusion does not follow from its premise. As Russia admits in its Preliminary Objections, "[t]he purpose of the exclusion of the two [law enforcement] subcategories concerning marine scientific research and fisheries is narrow and aims at specifying that the two categories of disputes explicitly excluded from jurisdiction by Article 297(2) and (3) may be left so excluded by a declaration also as regards the aspect of enforcement."[108] As stated by the President of the Third Conference, Ambassador H.S. Amerasinghe, the wording of Article 298(1)(b) was chosen to "align the law enforcement activities *that may be excluded* by declaration with the exercise of the sovereign rights and jurisdiction which were excluded from the compulsory jurisdiction of a court or tribunal."[109] In other words, identifying certain law enforcement activities that "may be excluded" means that other law enforcement activities may *not* be excluded. The *Arctic Sunrise* tribunal made the same point, confirming that the exception "*can only* exclude disputes 'concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction' which are also 'excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.'"[110]

---

[106] Similarly, the Arabic text — "أنشطة تنفيذ القوانين" — translates literally as "activities of implementation of the laws."

[107] Preliminary Objections, ¶ 67.

[108] *Id.* ¶ 71.

[109] 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), ¶ 7 (emphasis added) **(UAL-63)**.

[110] *Arctic Sunrise*, Award on Jurisdiction of 26 November 2014, ¶ 69 (emphasis added) **(UAL-44)**.

52. Moreover, the distinction between law enforcement activities and military activities has been recognized by other tribunals. The *Coastal State Rights* tribunal distinguished "law enforcement activity" from "military activity."[111] ITLOS in its Provisional Measures Order in this case referred repeatedly to "the distinction between military and law enforcement activities."[112]

53. Further confirming this distinction, the *Virginia Commentary* reports that in crafting Article 298(1)(b), the drafters of the Convention intentionally sought to "distinguish between military activities and law enforcement activities."[113] Likewise, having reviewed the *travaux préparatoires*, Judge Budislav Vukas concludes in the *Handbook on the New Law of the Sea* that it is "clear that 'law enforcement activities' are not considered military activities, even when undertaken by warships or military aircraft."[114] Only a subset of disputes concerning law enforcement activities may be excluded, while "[d]isputes concerning activities of enforcing all other rules of municipal and international law cannot be subject to optional exceptions under Article 298."[115] Thus, Judge Vukas notes that "there is no possibility of optional exceptions" for law enforcement activities such as those that concern "the right of hot pursuit"[116] — a right that Russia specifically claims it was exercising in this case.[117]

54. Professor Natalie Klein, whose commentary Russia cites as support for the general "versatility" of the military activities exception,[118] similarly provides a succinct

---

[111] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶¶ 335–338 **(UAL-25)**.

[112] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 63–66 **(UAL-2)**; *see also id.* ¶¶ 74–77.

[113] Myron H. Nordquist, et al. (eds.), *United Nations Convention on the Law of the Sea: A Commentary* (2014) ("*Virginia Commentary*"), Part XV, ¶ 298.34 **(UAL-8)**; *see also* Gurdip Singh, *United Nations Convention on the Law of the Sea Dispute Settlement Mechanisms* (1985), p. 148 ("it [was] understood that law enforcement activities pursuant to the Convention shall not be considered military activities") **(UAL-64)**.

[114] Budislav Vukas, *Peaceful Uses of the Sea, Denuclearization and Disarmament*, *in* René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, The Hague 1991), p. 1248 **(UAL-65)**.

[115] *Id.* pp. 1248–1249.

[116] *Id.* (citations omitted).

explanation for why law enforcement activities, even those carried out by military vessels, cannot be subject to the military activities exception:

> It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities rather than military activities as both acts involve the enforcement of specific laws. 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. Clearly, from the terms of Article 298(1)(b), only law enforcement activities pertaining to fishing or marine scientific research in the EEZ may be excluded as "law enforcement." Furthermore, the drafting history of this provision would indicate that all law enforcement activities besides those specified are subject to compulsory procedures entailing binding decisions. The military activities exception is not intended, and not needed, to insulate from mandatory jurisdiction disputes that are more properly construed as law enforcement activities.[119]

55. Without textual support for its interpretation, or support from the decisions of tribunals or the works of commentators, Russia relies almost exclusively on what it calls "[s]everal separate opinions in the provisional measures phase of the present case before ITLOS," which Russia contends "endorse the view that the two categories of 'military' and 'law enforcement' activities as referred to in Article 298(1)(b) are not mutually exclusive."[120] As an initial matter, Russia's suggestion that "several" opinions endorse its position is plainly an overstatement. The Order itself, which recognized the Convention's distinction between military and law enforcement activities, was adopted by a vote of 19-1, and the separate opinions on which Russia relies were in the extreme minority.

56. More importantly, Russia misinterprets those minority views, which did not disagree that law enforcement and military activities are separate categories, or that "disputes concerning law enforcement activities" are not covered by the military activities

---

[117] Preliminary Objections, ¶¶ 65, 86–88.

[118] *Id.* n.39 (citing Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), p. 291 **(RUL-14)**).

[119] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005), pp. 312–313 **(UAL-56)**.

[120] Preliminary Objections, ¶¶ 57–60.

exception. Judge Gao suggested that there can be "mixed dispute[s] involving both military and law enforcement elements," but he specifically recognized that the "law enforcement element of a mixed dispute" could provide a basis for jurisdiction in this case.[121] And Judge Kolodkin recognized that by the time of the actual arrest of the vessels — *i.e.*, the beginning of Russia's exercise of jurisdiction that is the subject matter of this dispute — the Russian coast guard had "resumed its distinctly law enforcement action."[122] Thus, even these minority opinions accepted that a dispute that might have military elements, but is focused on law enforcement activities, would not fall within the military activities exclusion. That question is only of academic interest, however, because as explained above,[123] the dispute presented by Ukraine concerns *only* the lawfulness of Russia's exercise of jurisdiction over Ukraine's vessels and their crew, which is a quintessential law enforcement activity.

IV. Russia's Arguments About the Breadth of the Military Activities Exception Are Inapposite

57. Despite the straightforward nature of the legal principles explained above, Russia devotes significant attention to the interpretation of Article 298(1)(b) as a general matter, makes sweeping pronouncements about "the purpose of the exclusion" being to "permit the carving out of a group of disputes that must be broad," and warns that narrowing the exception would disrupt a "delicate balance" and cause "concern amongst State Parties."[124] But the question before the Tribunal is not whether the exception is "broad" or "narrow" in the abstract; it is whether Russia can invoke the exception for the particular

---

[121] *Three Ukrainian Naval Vessels*, Provisional Measures Order, Separate Opinion of Judge Gao, ¶¶ 50–52 **(RUL-32)**.

[122] *Id.*, Dissenting Opinion of Judge Kolodkin, ¶ 21 **(RUL-35)**. Russia also quotes Judges Jesus, Kittichaisaree, and Lucky, all of whom offer similar opinions that law enforcement activities and military activities are separate categories. Judge Lucky, for example, stated that "[i]t could have been law enforcement or military in nature," and merely noted that a "definitive finding" was difficult because Russia "did not provide any substantial evidence." *Id.*, Separate Opinion of Judge Lucky, ¶ 21 **(RUL-36)**. Judge Jesus only posed the question "whether the activities of the Ukrainian warships amounted to possible military activities." *Id.*, Separate Opinion of Judge Jesus, ¶ 3 **(RUL-33)**. And Judge Kittichaisaree merely noted that "[c]ertain incidents may comprise a mixture of both military and law-enforcement aspects," while still recognizing that the overall law enforcement context would support jurisdiction. *Id.*, Separate Opinion of Judge Kittichaisaree, ¶¶ 3–5 **(RUL-34)**.

[123] *See supra* Chapter 2, Part I.

[124] Preliminary Objections, ¶¶ 31, 33, 70.

dispute before this Tribunal. Generic arguments that the terms "military" and "activities" are "notably broad" do nothing to help Russia establish the application of the exception under the specific circumstances of this case.[125] Nonetheless, Ukraine will address the general interpretive argument made by Russia and explain why its dire warnings are misguided.

A. The Dispute Itself Must Concern a Military Activity in Order to Fall Within the Article 298(1)(b) Exception

58. The text of Article 298(1)(b) states that the military activities exception applies to "disputes *concerning* military activities, including military activities by government vessels and aircraft engaged in non-commercial service."[126] The ordinary meaning of the verb "to concern" — to be "about" — is direct and focuses on the activities that the dispute is specifically about.[127] Use of the term "concerning" signals that Article 298(1)(b) applies only where the crux of the dispute before the tribunal — the conduct allegedly giving rise to the legal violation claimed by the applicant — is "military activity."

59. This ordinary meaning is supported by context — in particular, the fact that the Convention uses terms suggestive of looser relationships, such as "arising from," "arising out of," and "arising from or in connection with," in other provisions of the Convention.[128] For example, the phrase "arising from," which appears in UNCLOS Articles 208, 214, 232, and 297, means "to stem from" or "to result from."[129] The phrase "arising out of," which appears in UNCLOS Articles 223, 263, and 297, is, according to dictionaries, used "with loose construction" "to introduce a circumstance, action, proposal, etc. arising out of an

---

[125] *Id.* ¶ 64.

[126] UNCLOS Art. 298(1)(b) (emphasis added).

[127] *See, e.g.*, Oxford English Dictionary (online ed.), *concern* (v) (" . . . [t]o be about") **(UAL-49)**; *id.*, *concerning* (prep), p. 23 ("In reference or relation to; regarding, about.").

[128] "Arising from" appears in, *e.g.*, UNCLOS Articles 208, 214, 232, and 297. "Arising out of" appears in, *e.g.*, UNCLOS Articles 223, 263, and 297. "Arising from in or in connection with" appears in Articles 208 and 214.

[129] Black's Law Dictionary, *arise* (10th ed., 2014) ("To originate; to stem (from) . . . . To result (from) . . . .") **(UAL-66)**.

event, statement, etc."[130] And the term "connection" used in the phrase "arising from or in connection with," which appears in UNCLOS Articles 208 and 214, is defined as "the condition of being connected or joined together."[131]

60. The *Coastal State Rights* tribunal adopted this reasoning. It noted that "[c]ompared to such other terms, which are open to a more expansive interpretation, the term 'concerning' circumscribes the military activities exception by limiting it to those disputes whose subject matter is military activities,"[132] and that "the relevant question is whether 'certain specific acts subject of Ukraine's complaints' constitute military activities."[133]

61. This interpretation is supported by other Annex VII tribunals as well. As set out by the *South China Sea* tribunal, the test for whether a dispute concerns an alleged military activity is the following: "Article 298(1)(b) applies to '*disputes concerning* military activities' and not to 'military activities' as such. Accordingly, the Tribunal considers the relevant question to be whether the dispute itself concerns military activities, rather than whether a party has employed its military in some manner in relation to the dispute."[134]

62. Russia seeks to expand the scope of the Article 298(1)(b) exception as if that provision had used different words, for example, suggesting that the exception encompasses "events giving rise to" the actual dispute.[135] But as other tribunals have emphasized, the drafters of UNCLOS opted not to use the phrase "arising out of" in Article 298(1)(b), despite using it elsewhere. Russia cannot escape the requirement that a dispute must itself "concern" military activities for the exception to apply.[136]

---

[130] Oxford English Dictionary (online ed.), *arise* (v), p. 7 ("*arising out of*: used, with loose construction, to introduce a circumstance, action, proposal, etc., arising out of an event, statement, etc." (emphasis in original)) **(UAL-49)**.

[131] *See id.*, *connection* (n), p. 25 (" . . . the condition of being connected or joined together") **(UAL-49)**.

[132] *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 330 **(UAL-25)**.

[133] *Id.* ¶ 331.

[134] *South China Sea Arbitration*, Award of 12 July 2016, ¶ 1158 (emphasis in original) **(UAL-7)**.

[135] Preliminary Objections, ¶ 35.

[136] Russia relies on *Fisheries Jurisdiction* in support of its interpretation and application of the exception, noting that "the term 'concerning' formed part of wording identified by the ICJ in the

B. Russia's Interpretation Would Thwart the Object and Purpose of the Convention

63. Russia asserts that any interpretation other than its own would disrupt the "delicate balance" reached by the States parties to the Convention between compulsory dispute settlement and exceptions for "sensitive issues," and that such disruption would lead to "undesirable consequences."[137] No such sensitive issues are raised here. Instead, it is Russia's interpretation that would be inconsistent with the object and purpose of the Convention and result in "undesirable consequences."

64. Mandatory dispute resolution was considered "integral" to the Convention, and the "pivot upon which the delicate equilibrium of the compromise [of the Convention] must be balanced."[138] The broad jurisdictional grant of Articles 286 and 288 safeguards that equilibrium and ensures that each State's rights under the Convention are respected. The context of Article 298 (and UNCLOS dispute settlement, as a whole) further establishes that jurisdictional exceptions were drawn in a deliberate and precise manner. One need only look at the careful wording, deliberation, and attention paid to the drafting of the military activities exception.[139] Yet Russia attempts to construe the military activities exception to

---

Fisheries Jurisdiction case as of particular breadth." Preliminary Objections, ¶ 30(b). Russia ignores, however, that the other part of the wording was "disputes arising out of," and that the ICJ found the language "disputes arising out of" formed a "more general[]" clause extending to disputes "having their 'origin' in those measures ('arising out of') — that is to say, those disputes which, in the absence of such measures, would not have come into being." *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, ICJ Judgment of 4 December 1998, ¶ 62 **(RUL-9)**.

[137] Preliminary Objections, ¶¶ 31, 33.

[138] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 225 (quoting Third United Nations Conference on the Law of the Sea, *Memorandum by the President of the Conference on Document A/CONF.62/WP.9*, U.N. Doc. A/CONF.62/WP.9/ADD.1, p. 122, ¶ 6 (31 March 1976); Third United Nations Conference on the Law of the Sea, *185th Meeting*, U.N. Doc. A/CONF.62/PV.185, p. 14, ¶ 53 (26 January 1983)) **(UAL-5)**.

[139] *See, e.g.*, 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), Art. 18 **(UAL-67)**; 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), Art. 297 **(UAL-68)**; 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), p. 70 **(UAL-69)**; 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), Art. 298 **(UAL-70)**.

cover conduct that is not in fact military in nature. To do so would disrupt the Convention's "delicate equilibrium."

65. Of course, the Convention's purpose of fostering dispute resolution was balanced by the sensitivities of States reluctant to expose military operations to compulsory adjudication. But Russia cannot explain why resort to dispute resolution would disrupt this balance when a State *elects to exercise its own law enforcement jurisdiction* over another State's sovereign vessels and initiate court proceedings and criminal prosecutions — in clear contravention of the Convention and longstanding customary international law.

66. Russia's reliance on Judge Gao's Separate Opinion actually illustrates why the consequences Russia warns of are not really at stake. Russia quotes at length from Judge Gao to suggest that a "high threshold" for establishing a military activity may serve as "an incentive for States to escalate rather than de-escalate a conflict by deploying a great number of naval vessels and increasing the level of forces in order to qualify for the military activities exception to compulsory dispute settlement jurisdiction."[140] This concern may well be a sound reason why application of the military activities exception should not depend on *how many military vessels* a State deploys for some activity. What matters is the "nature" of the activity, whatever the quantity of military (or in this case, coast guard) vessels involved.[141]

67. Despite Russia's statements to the contrary, Ukraine's interpretation — the one already adopted by ITLOS and other Annex VII tribunals — is not unduly "strict,"[142] or a reason for "concern."[143] Under the settled interpretation of Article 298(1)(b), many actions taken by military vessels are indeed military activities to which the exception will apply. In other contexts, it is certainly possible that where "one State's military has used force against

---

[140] Preliminary Objections, ¶¶ 33, 70 (quoting *Three Ukrainian Naval Vessels*, Provisional Measures Order, Separate Opinion of Judge Gao, ¶¶ 11, 45 (**RUL-32**)).

[141] *See, e.g.*, *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 1026–1028, 1158 (**UAL-7**); *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 71, 76 (**UAL-2**); *Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶¶ 336–338 (**UAL-25**).

[142] Preliminary Objections, ¶ 70 (citing *Three Ukrainian Naval Vessels*, Provisional Measures Order, Separate Opinion of Judge Gao,¶ 46 (**RUL-32**)).

[143] Preliminary Objections, ¶ 33.

another State's warship," 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.[144]

68. At the same time, Article 298(1)(b) expressly distinguishes military activities from law enforcement activities, based on a judgment that law enforcement activities should not be categorically covered by the optional jurisdictional exclusion. Giving effect to that drafting choice has no sweeping consequences. Any State that does not choose to assert law enforcement jurisdiction over another State's warships would be unaffected by the principles at issue here. Nor is Ukraine aware of any common practice by one State's coast guard to arrest and jail the military vessels and crew of other States for violations of domestic law.

69. For example, after a Soviet submarine ran aground in Swedish internal waters in 1981, Sweden requested Soviet permission to board the vessel and inspect it, which the Soviet Union refused on the basis of the immunity of its warship; Sweden made no attempt to exercise jurisdiction over the vessel or its crew, and the Soviet submarine departed Swedish waters as soon as it was able to do so.[145] Similarly, in the well-known 1988 Black Sea Bumping Incident, the United States and the Soviet Union disagreed on the scope of innocent passage for warships. United States warships conducted a freedom of navigation operation in the Soviet Union's territorial sea, and Soviet vessels responded by "bumping" and "shouldering" the U.S. vessels to induce them to leave — not by asserting law enforcement jurisdiction over the U.S. naval vessels and their crew and arresting them.[146]

---

[144] *Id.* ¶ 50. Ukraine again notes that, in this case, it was Russian coast guard vessels, not military vessels, that arrested Ukraine's ships.

[145] *See* Memorial of Ukraine, ¶ 69; Milton Leitenberg, *The Case of the Stranded Sub*, 83 Bull. of Atomic Scientists 3 (March 1982), pp. 10–11 **(UAL-15)**.

[146] *See* William J. Aceves, *Diplomacy at Sea: U.S. Freedom of Navigation Operations in the Black Sea*, 46 Naval War College Rev. 59 (1993), pp. 67–75 **(UAL-71)**. The disagreement over innocent passage was then resolved through diplomatic channels, resulting in a joint statement of interpretation of international law. *Id.* pp. 71–75; Union of Soviet Socialist Republics–United States: Joint Statement with Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, 28 International Legal Materials 1444 (1989) **(UAL-72)**.

70. It is Russia's anomalous decision to enforce its domestic laws against another sovereign's vessels that requires this particular dispute to be classified as concerning law enforcement activities rather than military activities.

71. Endorsing Russia's approach, by contrast, would allow States Parties to avoid dispute resolution for *any* violation of the immunity provisions of the Convention that apply to warships. Such an outcome is not supported by the Convention's text. Elsewhere, the Convention permits a categorical exclusion from jurisdiction for all disputes concerning certain provisions, such as Article 83.[147] But the Convention says nothing similar with respect to disputes concerning Articles 30, 32, 95, and 96. Indeed, during the treaty negotiations, there was a proposal to include an exception for "disputes concerning vessels and aircraft entitled to sovereign immunity under international law," but such an exception was not adopted.[148] The Tribunal should not lightly impute to the drafters an intent to exclude a core tenet of the law of the sea — warship immunity — from a central feature of the Convention — mandatory dispute settlement.

[147] UNCLOS Art. 298(1)(a)(i) ("When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes concerning the interpretation or application of articles 15, 74 and 83 . . . .").

[148] *See* Budislav Vukas, *Peaceful Uses of the Sea, Denuclearization and Disarmament*, *in* René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, The Hague 1991), p. 1251 **(UAL-65)**.

Chapter Three: Ukraine's Immunity Claims Fall Within the Scope of UNCLOS

72. Russia's second objection argues that "Article 32 of UNCLOS does not provide for an applicable immunity of warships and other government ships operated for non-commercial purposes in the territorial sea."[149] This contention is irrelevant. The facts advanced by Ukraine show that all three vessels were arrested *beyond the territorial sea*. Accordingly, Ukraine claims immunity violations under Articles 58, 95, and 96 of the Convention, provisions which Russia agrees confer immunity.

73. Pursuant to Articles 286 and 288 of the Convention, the Tribunal has jurisdiction over "any dispute concerning the interpretation or application of this Convention."[150] As the ICJ has explained, "in order to determine the [tribunal's] jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains 'fall within the provisions' of the treaty containing the clause."[151] ITLOS follows the ICJ's test.[152] Here, Ukraine complains of acts which plainly fall within provisions of UNCLOS:

- Ukraine claims that by boarding, arresting, and detaining Ukraine's naval vessels, continuing to detain the vessels and the servicemen on board, and pursuing criminal prosecutions against the servicemen, the Russian Federation acted "in breach of Articles 58, 95, and 96 of the Convention."[153] Russia does not dispute that Articles 95 and 96 confer immunity, and that Article 58 extends those provisions to the exclusive economic zone.

---

[149] Preliminary Objections, ¶ 75.

[150] UNCLOS Arts. 286, 288.

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

[152] *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment of 28 May 2013 ("*M/V 'Louisa'*"), ¶ 99 **(RUL-23)**; *The M/V "Norstar" Case (Panama v. Italy)*, ITLOS Case No. 25, Preliminary Objections, Judgment of 4 November 2016 ("*M/V 'Norstar'*"), ¶ 110 **(RUL-30)**.

[153] Memorial of Ukraine, ¶¶ 153(a)–(c); *see also id.* ¶¶ 77–84.

- Ukraine claims that by ordering the Ukrainian naval vessels to stop while they were in the territorial sea, and attempting to prevent them from exiting the territorial sea, the Russian Federation acted "in breach of Articles 30 and 32 of the Convention."[154] While Russia maintains that Article 32 confers no immunity, it does not challenge the Tribunal's jurisdiction over Ukraine's claim that Russia's order to stop violated Article 30.

- Ukraine also claims that by violating the ITLOS provisional measures order the Russian Federation violated Articles 290 and 296 of the Convention,[155] and by aggravating the dispute the Russian Federation violated Article 279 of the Convention.[156] These claims are addressed in Chapters Four and Five, respectively.

74. Thus Russia's objection that Article 32 does not confer immunity is not really a *preliminary* objection at all. Russia's interpretation of Article 32 could only become relevant if the Tribunal, after reviewing all of the facts, rejects Ukraine's evidence and determines that the arrests of two of the vessels took place within the territorial sea. At the preliminary objections stage, that is not an appropriate inquiry. For purposes of assessing its jurisdiction *ratione materiae*, the Tribunal must accept the facts as advanced by Ukraine.

75. Russia's second objection must therefore be rejected. Ukraine claims immunity violations under Articles 58, 95, and 96, claims which plainly fall within UNCLOS. Russia argues that Article 111, concerning the right of hot pursuit, overrides the immunity of warships and non-commercial government vessels in the exclusive economic zone and allows their arrest notwithstanding Articles 95 and 96. The notion that Article 111 trumps Articles 95 and 96 lacks any support. Consistent with the longstanding immunity of warships and other non-commercial government vessels, there is no right of hot pursuit against such ships, and no exception to their "complete immunity" under Articles 95 and 96 on the basis of such a claim. But more importantly for present purposes, 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 Russia argues it need not comply with Articles 95 and 96 because of Article 111.

---

[154] *Id.* ¶ 153(d); *see also id.* ¶¶ 85–88.

[155] Memorial of Ukraine, ¶ 153(e); *see also id.* ¶¶ 89–91.

[156] *Id.* ¶ 153(f); *see also id.* ¶ 92.

76. While the correct interpretation of Article 32 is not properly before the Tribunal at this stage, Russia's interpretation is also flawed. When Article 32 is interpreted in good faith, in context, and in accordance with the Convention's object and purpose, it provides for the immunity of warships and other non-commercial government vessels in the territorial sea. Moreover, the Tribunal would also have alternative grounds to exercise jurisdiction over immunity violations taking place within the territorial sea.

I. Russia's Interpretation of Article 32 Is Irrelevant

77. The question for purposes of jurisdiction is whether the applicant's claims fall within the provisions of the treaty.[157] ITLOS applied this test in *M/V Louisa* to determine whether it had jurisdiction over claims brought by Saint Vincent and the Grenadines, and explained: "To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the *facts advanced by Saint Vincent and the Grenadines* and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines."[158] This focus on the "facts advanced by" the applicant is in accord with ICJ practice, as summarized by Judge Higgins in *Oil Platforms*, "to accept *pro tem* the facts alleged by [the applicant] to be true," and "to see if on the basis of [the applicant's] claims of fact there could occur a violation of" the treaty.[159]

78. Thus, for purposes of establishing the Tribunal's jurisdiction, the Tribunal is required to accept as true the facts advanced by Ukraine, and decide whether in light of those facts there could be a violation of the Convention. Ukraine's Memorial makes its factual

---

[157] *See Case Concerning Oil Platforms (Iran v. United States of America)*, Preliminary Objections, ICJ Judgment of 12 December 1996, ¶ 16 **(RUL-43)**; *see also Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, ICJ Judgment of 8 November 2019, ¶ 57 **(RUL-60)**.

[158] *M/V "Louisa,"* ¶ 99 (emphasis added) **(RUL-23)**; *see also M/V "Norstar,"* ¶ 110 ("[T]he Tribunal must establish a link between the facts advanced by Panama and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama.") **(RUL-30)**.

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

claim clear: "At the time of their boarding, arrest, and detention, the Ukrainian naval vessels had exited the territorial sea."[160] Ukraine has supported this claim with evidence, presenting testimony of commanders on board each of the three vessels who testify to their first-hand observation that they had crossed out of the territorial sea at the time of their arrest.[161]

79. Since Ukraine alleges immunity violations in connection with arrests that occurred beyond the territorial sea, its claims clearly fall within the scope of Articles 58, 95, and 96 of the Convention, and thus within the jurisdiction of the Tribunal.[162] In fact, Russia admits that the factual premise of its objection, that the *Berdyansk* and the *Yani Kapu* (although not the *Nikopol*) were arrested in the territorial sea, is "contrary to what Ukraine alleges in its Memorial."[163] This admission alone — that Russia is asking the Tribunal to decide whether Ukraine's claims fall within the Convention on the basis of facts that contradict those advanced by Ukraine — requires Russia's objection to be rejected.[164]

II. Russia's Invocation of the "Right of Hot Pursuit" Is a Baseless Merits Defense

80. Russia also argues that even for arrests that occurred beyond the territorial sea, "the correct focus is still on Article 32" because "the pursuit started" in the territorial sea, and Russia was exercising the "right of hot pursuit" under Article 111 when it made the arrest.[165] Russia advances this argument with respect to the *Nikopol*, which it concedes was

---

[160] Memorial of Ukraine, ¶ 78.

[161] Hrytsenko Statement, ¶¶ 9, 20–21 (testifying that the *Berdyansk* was stopped and arrested by the Russian coast guard after he had announced over open channels of communication that the vessel had crossed out of the territorial sea); Melnychyk Statement, ¶¶ 9, 15–16 (testifying that the *Yani Kapu* was arrested after the vessel had crossed out of the territorial sea); Nebylytsia Statement, ¶¶ 14–16 (testifying that the *Nikopol* was well beyond the territorial sea when it was arrested).

[162] *See* Memorial of Ukraine, ¶¶ 74–75, 77–78, 153(a); UNCLOS Art. 95 ("Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."); *id.* Art. 96 ("Ships 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.").

[163] Preliminary Objections, ¶ 85.

[164] Though Russia cannot properly challenge Ukraine's factual allegations at this stage, it has also not substantiated its claim that the *Berdyansk* and the *Yani Kapu* were arrested within the territorial sea. Instead, Russia merely asserts coordinates in footnotes in its legal pleading, and plots those asserted coordinates onto a demonstrative map. *Id.* ¶ 85; *id.* p. 37.

[165] *Id.* ¶¶ 85–86.

arrested outside the territorial sea, but the argument would appear to apply to all three of Ukraine's vessels, since all three were arrested outside the territorial sea.

81. At the jurisdictional stage, the question before the Tribunal is whether the acts of which Ukraine complains "fall within" the provisions of the treaty.[166] Russia's defense that it cannot be found liable under Article 95, because it was engaged in the right of hot pursuit under Article 111, does not present the question of *whether* provisions of the Convention are applicable, but *which* provisions of the Convention are applicable: Ukraine claims that the facts fall within the scope of Article 95 and 96,[167] while Russia claims that the facts fall within the scope of Article 111.[168] Whichever party is right, both parties agree that the Convention applies. Thus, Russia's Article 111 defense does not call into doubt that this is a dispute concerning interpretation or application of the Convention, and so does not implicate the Tribunal's jurisdiction over Ukraine's claims.

82. While the interpretation of Articles 95, 96, and 111 does not present a jurisdictional question and therefore can only be examined at the merits stage of these proceedings, as a matter of law the plain text of these provisions makes clear that there is simply no "hot pursuit" exception to Article 95. Article 95 provides that "[w]arships on the high seas have complete immunity from the jurisdiction of any State other than the flag State."[169] Russia identifies no text in the Convention to support its argument that in the

---

[166] *M/V "Louisa,"* ¶ 99 (citation and quotation omitted) **(RUL-23)**; *see also M/V "Norstar,"* ¶ 110 **(RUL-30)**.

[167] Russia does not address Article 96 because of its incorrect assumption that the *Yani Kapu*, a naval auxiliary vessel, was arrested in the territorial sea. Nonetheless, to the extent Russia would make a similar argument for an exception to Article 96, it fails for the same reasons.

[168] Preliminary Objections, ¶ 85.

[169] UNCLOS Art. 95. Article 96 provides the same with respect to non-commercial government vessels. *Id.* Art. 96. And both are fully applicable in the exclusive economic zone through Article 58. *Id.* Art. 58; *see also Virginia Commentary*, Part VII, ¶ 95.6(c) ("Warships therefore also have complete immunity in the exclusive economic zone from the jurisdiction of any State other than the flag State.") **(UAL-73)**; Budislav Vukas, *Peaceful Uses of the Sea, Denuclearization and Disarmament*, *in* René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, The Hague 1991), p. 1250 ("Pursuant to Article 58, paragraph 2, this [complete immunity of warships] also applies in the exclusive economic zone.") **(UAL-65)**.

event of hot pursuit of a warship, "the silence in Article 32 trumps and contradicts the rule enunciated in Article 95."[170]

83. Moreover, the notion of a right of hot pursuit against an immune vessel is a contradiction in terms. In *The IMLI Manual on International Maritime Law*, Judge David Attard and Professor Patricia Mallia explain that the right of hot pursuit allows "a wider scope for the enforcement of a coastal State's laws," on the basis that it is "a continuation of a validly commenced act of jurisdiction."[171] But a coastal State has no enforcement jurisdiction against a warship, so there can be no validly commenced act of jurisdiction in the first instance.[172] As the leading commentary on the right of hot pursuit concludes: "Regarding warships and government vessels operated for non-commercial purposes, one may conclude, by taking into account general provisions of international law on the immunity of certain categories of vessels, that hot pursuit is not allowed against these ships."[173]

---

[170] Preliminary Objections, ¶ 88.

[171] David Joseph Attard and Patricia Mallia, *The High Seas*, *in* The IMLI Manual on International Maritime Law: Volume I (2014), p. 263 **(UAL-74)**.

[172] Russia states that it takes no position on the immunity of warships in the territorial sea as a matter of customary law, *see* Preliminary Objections, ¶ 75, but it does not and could not dispute that warships are entitled to immunity in the territorial sea as a matter of customary international law. *See* Sir Robert Jennings and Sir Arthur Watts, *Organs of the States for Their International Relations: Miscellaneous Agencies, State Ships Outside National Waters*, Oppenheim's International Law Vol. 1 (9th ed., 2008), § 563 ("[A] warship has a special status and privileges. Being a state organ, a warship benefits from that state's sovereign immunity from the jurisdiction of other states.") **(UAL-11)**; *The Schooner Exchange v. Mcfaddon & Others*, 11 U.S. 116 (1812), p. 147 ("a public armed ship in the service of a foreign sovereign, . . . [is] exempt from the jurisdiction of the country") **(UAL-75)**; *see also The "ARA Libertad" Case (Argentina v. Ghana)*, ITLOS Case No. 20, Order of 15 December 2012 ("*'ARA Libertad,'* Order of 15 December 2012"), ¶ 95 ("in accordance with general international law, a warship enjoys immunity") **(UAL-1)**. The same is true with respect to other non-commercial government vessels. *See* Thamarappallil Kochu Thommen, *Legal Status of Government Merchant Ships in International Law* (Martinus Nijhoff, The Hague 1962), p. 8 ("[S]hips owned or operated by a state and used exclusively for governmental and noncommercial purposes shall enjoy immunity from the jurisdiction of states other than the flag state.") **(UAL-76)**; 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), p. 273 ("The Government of the Union of Soviet Socialist Republics considers that government ships in foreign territorial waters have immunity.") **(UAL-77)**; U.S. Navy, U.S. Marine Corps, & U.S. Coast Guard, The Commander's Handbook on the Law of Naval Operations (July 2007 ed.), § 2.1.1 ("As a matter of customary international law, all vessels owned or operated by a state, and used, for the time being, only on government noncommercial service are entitled to sovereign immunity.") **(UAL-13)**.

[173] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law* (2d ed., 2002), p. 192 n.271 **(UAL-78)**; *see also* Robert C. Reuland, *The Customary Right of Hot Pursuit Onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention*, 33 Va. J. Int'l L. 557 (1993), p. 565 ("International law limits the categories of ships against which a state may lawfully exercise its right of

84. Had the Convention intended to permit the pursuit and arrest of warships, notwithstanding their well-established immunity, it surely would have said so clearly. Instead it does the opposite. Article 30 of the Convention expressly addresses what the coastal State may do in respect of warships: "If any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately."[174] As explained by Judge Dolliver Nelson (as well as others), the remedy described in Article 30 is "the sole recourse for non-compliance, given the immunity status enjoyed by warships in the law of the sea."[175] Once a warship is in the exclusive economic zone, Article 95 unequivocally confers on it "complete immunity," in a provision that Russia correctly describes as "categorical."[176] Russia's theory that the "silence" of Article 32 trumps the categorical rule of Article 95, by virtue of exercising a non-existent right of hot pursuit against warships, defies reason.[177]

---

hot pursuit. Warships, as defined above, are generally immune from the jurisdiction of any state other than their flag state and are not amenable to hot pursuit onto the high seas.") **(UAL-79)**.

[174] UNCLOS Art. 30.

[175] Dolliver Nelson, *Maritime Jurisdiction*, *in* Max Planck Encyclopedia of Public International Law (January 2010), ¶ 18 **(UAL-80)**; *see also Virginia Commentary*, Part II, ¶ 30.6 ("Under article 30, the sole recourse available to a coastal State in the event of noncompliance by a foreign warship with that State's laws and regulations regarding innocent passage is to require the warship to leave the territorial sea immediately.") **(UAL-8)**; James Crawford, *Maritime Transit and the Regime of the High Seas*, *in* Brownlie's Principles of Public International Law (8th ed., 2012), p. 317–18 ("UNCLOS Article 30 contains a special regime applicable to warships and other government ships operated for non-commercial purposes. It excludes enforcement against warships, which in the case of non-compliance with the regulations of the coastal state can *only* be required to leave the territorial sea." (emphasis added)) **(UAL-81)**; Kevin Aquilina, *Territorial Sea and the Contiguous Zone*, *in* The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea (2014), p. 55 ("In the case of a warship, the coastal State may require it to leave its territorial sea immediately.") **(UAL-82)**.

[176] Preliminary Objections, ¶ 88; *see supra* n.169.

[177] Russia's only support for its position is an inapposite statement by the Norwegian government in 1958 about the treatment of *commercial* vessels in the Draft Articles on the Law of the Sea. Preliminary Objections, ¶ 88 (citing First United Nations Conference on the Law of the Sea, *Comments by Governments on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session*, *in* Official Records of the United Nations Conference on the Law of the Sea, Volume I (Preparatory Documents), U.N. Doc. A/CONF.13/5 and Add. 1 to 4 (24 February to 27 April 1958) (excerpt) **(RU-2)**). Norway was concerned that the Draft Articles extended immunity on the high seas to the commercial vessels of a government, while in the territorial sea immunity was limited to non-commercial government vessels. Norway opined that "[i]f differential immunity rules are maintained, it should be made clear that it is the rule to which the ship is subject at the spot where the pursuit is commenced which is determinative." First United Nations Conference on the Law of the Sea, *Comments by Governments on the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session*, U.N. Doc.

III. The Tribunal Would Have Jurisdiction Over Any Immunity Violations in the Territorial Sea

85. The legal basis of Russia's objection is a claim that Article 32 is merely a "without prejudice" provision, and does not provide for an applicable immunity to vessels in the territorial sea.[178] As explained above, the legal question of the correct interpretation of Article 32 is not properly before this Tribunal, because Ukraine has alleged and presented evidence that all three vessels were arrested beyond the territorial sea. This question could only become relevant if, at the merits stage, the Tribunal did not accept the facts as advanced by Ukraine and determined that the location of two of the arrests took place within the territorial sea. At this stage of the proceedings, Russia's interpretation of Article 32 as not conferring immunity is thus entirely hypothetical. As stated by the ICJ in *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia*, "it is not for the Court to determine the applicable law with regard to a hypothetical situation."[179]

86. As a legal matter, Russia's interpretation is also incorrect. Article 32 guarantees the immunity of warships and other government ships used for non-commercial purposes in the territorial sea as a codification of the customary law rule of immunity. The Tribunal also would have alternative bases for exercising jurisdiction over an arrest of an immune vessel within the territorial sea. The Tribunal possesses incidental jurisdiction to apply customary immunity principles, consistent with the approach of the tribunal in *Enrica*

A/CONF.13/5 and Add. 1 to 4 (24 February to 27 April 1958), pp. 94–95 **(UAL-83)**. These differential immunity rules were not maintained, so there was no reason for this Norwegian proposal to be adopted. *See* UNCLOS Art. 96. This single negotiating statement does not remotely suggest that a warship or non-commercial government vessel, which is immune in both the territorial sea and beyond, may be pursued and arrested.

[178] Preliminary Objections, ¶ 89.

[179] *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, ICJ Judgment of 17 March 2016, ¶ 123 **(UAL-84)**; *see also Nuclear Tests Case (Australia v. France)*, ICJ Judgment of 20 December 1974, ¶ 57 (the ICJ "can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties") **(UAL-85)**; *M/V "Louisa,"* Separate Opinion of Judge Ndiaye, 28 May 2013, ¶ 40 ("The contentious-jurisdiction function of courts and tribunals leads them to entertain disputes which must be settled on the basis of the law. This means that the dispute must exist and be justiciable.") **(UAL-86)**; *M/V "Norstar,"* Separate Opinion of Judge Ndiaye, 4 November 2016, p. 32 ("the dispute must exist and be justiciable") **(UAL-87)**.

Lexie. The Tribunal may also, following the approach of the *South China Sea* and *Chagos Marine Protected Area* tribunals, exercise jurisdiction over immunity violations in the territorial sea pursuant to Article 2(3) of the Convention, which incorporates into UNCLOS the obligation to respect customary international law rules of immunity in the territorial sea.

A. Article 32 Guarantees the Immunity of Warships and Other Non-Commercial Government Vessels in the Territorial Sea

87. Article 32 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."[180] The title of Article 32 reads: "Immunities of warships and other government ships operated for non-commercial purposes."[181] Under this heading, the provision then specifies that "[w]ith such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."[182] This provision falls within Part II, Section 3, Subsection C of the Convention, which elaborates the "rules applicable to warships and other government ships used for non-commercial purposes."[183] Read in good faith and in the context of its placement in the Convention, Article 32 prescribes a rule that warships and non-commercial government ships are immune within the territorial sea. Otherwise, the provision would lack effectiveness: Article 32 would not establish "Immunities of warships and other government ships operated for non-commercial purposes," as its title specifies, and it would not constitute a "rule applicable to warships and other government ships used for non-commercial purposes," as its placement in the Convention indicates it does.

---

[180] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (23 May 1969) ("VCLT"), Art. 31(1) (**UAL-88**).

[181] Similarly, Article 95 is titled "Immunity of warships on the high seas."

[182] UNCLOS Art. 32.

[183] UNCLOS Part II.3.C. Section 3 of the Convention concerns "Innocent Passage in the Territorial Sea," and first delimits "rules applicable to all ships" in Subsection A, followed by rules applicable to merchant ships and government ships operated for commercial purposes in Subsection B.

88. Article 32 also must be read in tandem with the other provisions of Subsection C. Articles 29, 30, 31, and 32 expressly set out the "rules" governing warships and other non-commercial government vessels in the territorial sea. Articles 30 and 31 regulate what the coastal State may do in respect of a warship in its territorial sea that does not comply with its laws and regulations.[184] Thus, as explained above, Article 30 provides, as the sole recourse of the coastal State, that it may require a warship or non-commercial government vessel to exit the territorial sea.[185] Article 32 is textually linked to Articles 30 and 31 (and to Subsection A) by identifying them as the sole exceptions to the general rule of immunity reflected in Article 32 itself, which, per Judge James Crawford, "preserves" the historic customary immunity of warships.[186] Given that the Convention codifies exceptions to the rule of immunity in the territorial sea, and specifically refers to those exceptions in the text of Article 32, it would be anomalous to interpret Article 32 as not also codifying the rule to which those exceptions apply.

89. Russia emphasizes that Article 32 uses different language than Article 95, in particular its use of the formulation "nothing in this Convention affects."[187] That drafting choice does not compel Russia's interpretation of Article 32. Rather, the phrase is the result

---

[184] Under Article 30, "[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." And pursuant to Article 31, "[t]he flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship . . . with the laws and regulations of the coastal State concerning passage through the territorial sea . . . ."

[185] *See supra* ¶ 84 & n.175.

[186] *See* James Crawford, *Maritime Transit and the Regime of the High Seas*, *in* Brownlie's Principles of Public International Law (8th ed., 2012), p. 319 ("As to foreign warships . . . UNCLOS Article 32 preserves their customary immunity. Such vessels must still comply with the rules applicable to all ships in exercising innocent passage.") **(UAL-81)**; Budislav Vukas, *Peaceful Uses of the Sea, Denuclearization and Disarmament*, *in* René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, The Hague 1991), pp. 1250–1251 (Articles 30 and 31 are "exceptions" to warships' immunity under Article 32) **(UAL-65)**. Subsection A ("Rules Applicable to All Ships") includes Article 17, which establishes the right of innocent passage for all ships in the territorial sea. Article 19 elaborates the meaning of innocent passage for all ships and requires that innocent passage "take place in conformity with this Convention and with other rules of international law." Article 24 ("Duties of the coastal State") further clarifies that "[t]he coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention."

[187] Preliminary Objections, ¶¶ 79, 82.

of Article 32 following the language of its precursor in the Territorial Sea Convention. Professor Bernard Oxman explains that this language in the Territorial Sea Convention was chosen for unrelated reasons and does not reflect differential treatment of warship immunity in the territorial sea.[188] Nor is a direct comparison of Articles 32 and 95 appropriate; Article 32 could not have followed the precise wording of Article 95 because the immunities they codify are different. Article 95 guarantees "complete immunity" on the high seas (and, by operation of Article 58, in the exclusive economic zone), but Article 32 recognizes exceptions (albeit limited ones) to the immunity the Convention guarantees within the territorial sea.

90. Russia is also incorrect in describing Article 32 as "a kind of 'without prejudice' clause."[189] Article 32 does not parallel other "without prejudice" provisions in the Convention itself, which state that intention directly — for example, Article 303 provides, "[t]his article is *without prejudice* to *other international agreements and rules of international law* regarding the protection of objects of an archaeological and historical nature."[190] Nor is it written like "without prejudice" provisions in other treaties.[191] Article 32 does not state that the immunity of warships in the territorial sea arises "under international law" and not the Convention. Nor is it styled as a "without prejudice" provision that restricts or delimits the scope of the treaty obligations with reference to separate, superseding rights or obligations enjoyed under other sources of law and separate from the legal framework established by the Convention. Instead, Article 32 refers to the Convention's own limited exceptions on such immunity.

---

[188] The 1958 Convention adopted this formulation because "there was some difference of opinion regarding the scope and the effect of the immunities of government noncommercial ships other than warships when in the territorial sea." Bernard H. Oxman, *The Regime of Warships Under the United Nations Convention on the Law of the Sea*, 24 Va. J. Int'l L. 809 (1984), p. 817 **(UAL-89)**. Professor Oxman emphasizes that when UNCLOS was adopted, there was no "dispute regarding the scope or effect of the immunity of warships." *Id.* p. 818.

[189] Preliminary Objections, ¶¶ 82, 88.

[190] UNCLOS Art. 303(4) (emphasis added).

[191] For example, Article 3 of the United Nations Convention on the Jurisdictional Immunities of States and Their Property is titled "Privileges and immunities not affected by the present Convention," and provides: "The present Convention is *without prejudice* to the privileges and immunities enjoyed by a State *under international law* . . . ." United Nations Convention on the Jurisdictional Immunities of States and Their Property, Art. 3 (2 December 2004) (emphasis added) **(UAL-90)**.

91. The object and purpose of the Convention is also important in interpreting Article 32; notably, Russia makes no argument as to how its interpretation would be consistent with the object and purpose of the Convention. The preamble of UNCLOS reflects its object and purpose as the "codification and progressive development of the law of the sea."[192] As the *Virginia Commentary* notes, Part II of the Convention in particular "give[s] expression to a vast if not unwieldy mass of international customary law" governing the territorial sea and contiguous zone.[193] Given that (i) the purpose of the Convention was to codify customary international law, particularly in the territorial sea; (ii) Article 95 indisputably does codify immunity on the high seas; and (iii) Articles 30 and 31 directly regulate the exceptions to immunity in the territorial sea, it stands to reason that Article 32 was intended to codify the rule of immunity in the territorial sea. Interpreting Article 32 as a mere "without prejudice" clause would be directly contrary to the Convention's purpose of codifying the law of the sea. Russia puts forth no explanation for why the drafters of the Convention, having 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.

92. Instead, Russia points to the eighth preambular paragraph of UNCLOS, which affirms that "matters not regulated by this Convention continue to be governed by the rules and principles of general international law."[194] This paragraph addresses matters such as the law of armed conflict, which were intended to be left wholly untouched by the Convention.[195]

---

[192] *See* UNCLOS preamble ("*Believing* that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world . . . .").

[193] *Virginia Commentary*, Part II, ¶ II.15 **(UAL-73)**; *see also* Kevin Aquilina, *Territorial Sea and the Contiguous Zone*, *in* The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea (2014), p. 27 ("To a certain extent, the UNCLOS is codifying customary international law, particularly those provisions of the Territorial Sea Convention which are identical to those contained in the UNCLOS.") **(UAL-82)**.

[194] Preliminary Objections, ¶ 79 (quoting "*ARA Libertad,"* Order of 15 December 2012, Separate Opinion of Judges Cot and Wolfrum, ¶ 41 **(RUL-22)**).

[195] *See, e.g.*, Statement of Bernard H. Oxman, Hearing on the United Nations Convention on the Law of the Sea before the Senate Committee on Environment and Public Works, 108th Cong. (23 March 2004), pp. 161–162 ("Suffice it to say that the matters not regulated by the Convention include the right of self-defense, the international law of armed conflict, and the complex (and for understandable

But warship immunity is plainly a subject that *is* "regulated by the Convention." Russia does not dispute that Article 95 regulates warship immunity. Nor can Russia dispute that the Convention regulates warship immunity in the territorial sea, as Articles 30 and 31 codify exceptions to that immunity. Thus, Article 32 cannot reasonably be described as addressing a matter "not regulated by the Convention." It must be interpreted, consistent with the object and purpose of the treaty, as incorporating and codifying the well-established customary immunity of warships.

93. This interpretation of Article 32 as governing the immunity of warships in the territorial sea under UNCLOS is widely accepted. According to the *Virginia Commentary*, "Article 32 emphasizes that warships and other government ships operated for noncommercial purposes have immunity, except as provided in articles 17 to 26, 30 and 31."[196] Judge Attard has written that warships are "given immunity within the territorial sea (and possibly internal waters) of a State" by Article 32.[197] And according to *The IMLI Manual on International Maritime Law*, under Article 32 warships "are immune from the enforcement jurisdiction of the coastal State" as a reflection and codification of customary law.[198] Judge Vukas also has written: "[T]he 1982 Convention expressly recognizes immunities to warships exercising the right of innocent passage through the territorial sea (Art. 32)."[199] Many other commentaries agree.[200] Consistent with this conventional view,

---

reasons, rarely discussed) questions regarding the practice of states with regard to covert intelligence activities in each others' territory.") **(UAL-91)**.

[196] *Virginia Commentary*, Part II, ¶ 32.1 **(UAL-73)**.

[197] *See* David Joseph Attard and Patricia Mallia, *The High Seas*, *in* The IMLI Manual on International Maritime Law: Volume I (2014), n.107 **(UAL-74)**.

[198] Natalino Ronzitti, *Military Uses of the Sea*, *in* The IMLI Manual on International Maritime Law: Volume III: Marine Environmental Law and International Maritime Security Law (2016), p. 561 **(UAL-92)**.

[199] Budislav Vukas, *Peaceful Uses of the Sea, Denuclearization and Disarmament*, *in* René-Jean Dupuy and Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (Martinus Nijhoff, The Hague 1991), p. 1250 **(UAL-65)**.

[200] *See* Richard A. Barnes, *Flag States*, *in* The Oxford Handbook on the Law of the Sea (2015), p. 312 ("Coastal State jurisdiction over warships and State operated non-commercial vessels is limited because such vessels enjoy sovereign immunity." (citing UNCLOS Art. 32)) **(UAL-93)**; Dolliver Nelson, *Maritime Jurisdiction*, *in* Max Planck Encyclopedia of Public International Law (2010), ¶ 18 ("[Article 30] is the sole recourse for non-compliance, given the immunity status enjoyed by warships in the law of the sea." (citing UNCLOS Arts. 29–32)) **(UAL-80)**; Susana Ruiz-Cerutti, *The UNCLOS and the Settlement of Disputes: The* ARA Libertad *Case*, *in* Law of the Sea, From Grotius to the

ITLOS in *ARA Libertad* appeared to assume that Article 32 guarantees immunity, suggesting that the only difficult question before it was whether that immunity would extend to internal waters to apply to a ship at port.[201] Russia's position that Article 32 does not govern immunity in the territorial sea is not persuasive.

B. The Tribunal Also Would Have Alternative Grounds for Jurisdiction to Apply Customary Rules of Immunity

94. In the hypothetical event the Tribunal were presented with an immunity violation in the territorial sea, it would also have two further, alternative bases upon which to make a determination. Warships and other non-commercial government vessels are entitled to immunity in the territorial sea also as a matter of customary international law,[202] and the Tribunal has competence to apply those customary rules, either as a matter of incidental jurisdiction or pursuant to Article 2 of the Convention.

95. **First**, consistent with the approach of the tribunal in *Enrica Lexie*, the Tribunal would have jurisdiction to decide the question of immunity that "necessarily arises as an incidental question in the application of the Convention."[203] In *Enrica Lexie*, the tribunal was asked to determine whether India's exercise of criminal jurisdiction over Italian marines was lawful under the Convention. The exercise of jurisdiction concerned conduct at sea, but the marines were arrested while in port. Therefore, the tribunal noted, "the Convention may not provide a basis for entertaining an independent immunity claim under

---

International Tribunal for the Law of the Sea: *Liber Amicorum* Judge Hugo Caminos (2015) ("[I]t is clear that a warship enjoys immunity. Furthermore, Article 32 of the UNCLOS confirms a well-established rule of general international law.") **(UAL-94)**; Felicity Attard, *IMO's Contribution to International Law Regulating Maritime Security*, 45 J. Mar. L. & Com. 479 (2014), p. 528 ("UNCLOS as well as customary international law accords [foreign warships] a special status which provides immunity from the jurisdiction of other States." (citing UNCLOS Art. 32)) **(UAL-95)**; Natalie Klein, *Maritime Security*, *in* the Oxford Handbook of the Law of the Sea (2015), p. 586 ("The coastal State is only limited in taking action against warships . . . as these vessels are subject to sovereign immunity." (citing UNCLOS Art. 32)) **(UAL-96)**.

[201] *See "ARA Libertad,"* Order of 15 December 2012, ¶¶ 63–65 **(UAL-1)**; *see also Three Ukrainian Naval Vessels*, Provisional Measures Order, Separate Opinion of Judge Gao, ¶¶ 2, 4 ("[W]arships and naval auxiliary vessels enjoy complete immunity under UNCLOS and customary international law. . . . This traditional doctrine of the immunity of warships has remained intact with passage of time, and been reaffirmed in articles 32, 95 and 96 of UNCLOS . . . .") **(RUL-32)**.

[202] *See supra* n.172.

[203] *The Enrica Lexie Incident*, Award of 21 May 2020, ¶ 809 **(UAL-41)**.

general international law."[204] Nevertheless, the tribunal determined that "[t]he issue of entitlement to exercise jurisdiction encompasses, but is not conclusively answered by, the question as to whether the Marines enjoy immunity from jurisdiction."[205] This is because "[i]mmunity from jurisdiction, by definition, operates as an exception to an otherwise-existing right to exercise jurisdiction."[206] Thus, in resolving a dispute over whether India's exercise of jurisdiction was lawful under the Convention, the tribunal's competence extended to "determination of the issue of immunity . . . that necessarily arises as an incidental question in the application of the Convention."[207]

96. Here, even in the hypothetical scenario in which Russia conducted arrests within the territorial sea, *and* the Tribunal accepted Russia's interpretation of Article 32 as conferring no immunity, the dispute would still fall within the provisions of the Convention. The Tribunal would still be called upon to assess Russia's entitlement to exercise law enforcement jurisdiction over Ukraine's naval vessels: (i) Russia's arrest of the *Nikopol* beyond the territorial sea and whether it violated Articles 58 and 95; and (ii) Russia's order to stop to all three vessels within the territorial sea, and whether that order violated Article 30.

97. Notably, Russia has raised no preliminary objection with respect to Ukraine's Article 30 claim. Russia specifically invoked Article 30 to justify its actions on 25 November 2018, while Ukraine maintains that under Article 30, Russia's sole recourse was to require Ukraine's vessels to leave the territorial sea.[208] That claim is thus before the Tribunal, and it is necessarily intertwined with the question of immunity. Judge Nelson made this link explicit, explaining that Article 30's remedy "is the sole recourse for non-compliance, *given*

---

[204] *Id.*

[205] *Id.* ¶ 806.

[206] *Id.* ¶ 808.

[207] *Id.* ¶ 809.

[208] *See* FSB Report, p. 4 **(UA-4)**; Memorial of Ukraine, ¶¶ 85–88.

the immunity status enjoyed by warships in the law of the sea."[209] In deciding whether Article 30 limited Russia to requiring the vessels to leave the territorial sea, or whether Russia could commence an exercise of enforcement jurisdiction without violating Article 30, the question of immunity necessarily arises as an incidental question. Thus, irrespective of Article 32, the Tribunal has before it a dispute within the scope of UNCLOS, and in resolving that dispute the Tribunal would have competence to decide whether Russia violated the customary immunity of Ukraine's vessels.[210]

98. **Second**, the Tribunal has competence to apply customary rules of immunity incorporated into the Convention under Article 2 with respect to any immunity violations in the territorial sea. Pursuant to Article 2(3), sovereignty in the territorial sea must be "exercised subject to this Convention and to other rules of international law."[211] Both the *South China Sea* and *Chagos Marine Protected Area* tribunals confirmed that, in the territorial sea, "Article 2(3) contains an obligation on States to exercise their sovereignty subject to 'other rules of international law,'" and both found violations of Article 2 on the basis that the respondent State violated a legal obligation originating outside of the Convention.[212] "Other rules of international law" include rules of customary international law.[213] Thus, a violation in the territorial sea of customary rules of immunity is itself a violation of Article 2(3), over which the Tribunal would have jurisdiction.

---

[209] Dolliver Nelson, *Maritime Jurisdiction*, *in* Max Planck Encyclopedia of Public International Law (2010), ¶ 18 (emphasis added) **(UAL-80)**.

[210] Further, Article 293(1) provides that once the Tribunal's jurisdiction is established, it "shall apply this Convention and other rules of international law not incompatible with this Convention." UNCLOS Art. 293(1); *see also* Rules of Procedure, Art. 21. In *M/V "Saiga,"* ITLOS concluded that although the Convention "does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible." *M/V "Saiga" (No. 2)*, ¶ 155 **(UAL-3)**. Because ITLOS otherwise had jurisdiction over issues related to the arrest of the *Saiga*, ITLOS concluded that it also had authority to find that Guinea had violated the rights of Saint Vincent and the Grenadines under international law through its use of excessive force in boarding the *Saiga*. *See id.* ¶¶ 155–159.

[211] *South China Sea Arbitration*, Award of 12 July 2016, ¶ 808 (quoting UNCLOS Art. 2(3)) **(UAL-7)**; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award of 18 March 2015 ("*Chagos*, Award of 18 March 2015"), ¶¶ 514, 516 **(RUL-25)**.

[212] *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 808, 814 **(UAL-7)**; *Chagos*, Award of 18 March 2015, ¶¶ 514–544 **(RUL-25)**.

[213] *Chagos*, Award of 18 March 2015, ¶ 516 ("the obligation in Article 2(3) is limited to exercising sovereignty subject to the general rules of international law") **(RUL-25)**; *see also Chagos*, Award of 18

99. To be clear, as Ukraine noted in its Memorial, Russia's claim to the waters around the Crimean Peninsula as its territorial sea has no foundation in international law and is rejected by an overwhelming international consensus.[214] But application of Article 2 does not require a tribunal to address any question of sovereignty.[215] In the *South China Sea* case, the tribunal addressed an Article 2 claim by the Philippines relating to China's actions in the territorial sea surrounding Scarborough Shoal, sovereignty over which was disputed between China and the Philippines. The tribunal determined that China violated traditional fishing rights in the area, which in turn violated "other rules of international law" applicable in the territorial sea under Article 2.[216] That conclusion, the tribunal emphasized, was "not predicated on any assumption that one Party or the other is sovereign"; the tribunal was able to determine that China's actions in the territorial sea around Scarborough Shoal violated the Convention "independent of the question of sovereignty."[217] Similarly in this case, even if Russia's assertion of jurisdiction over Ukraine's vessels had occurred within the territorial sea off the coast of Crimea, such an assertion of jurisdiction would violate Article 2 of the Convention, independent of the question of sovereignty.

100. The Tribunal should not, however, address either of these alternative grounds of jurisdiction, or for that matter the interpretation of Article 32. These issues would arise only in a hypothetical scenario — that Ukraine's vessels were arrested in the territorial sea — that is not consistent with the facts advanced by Ukraine. If at the merits stage Russia were to present evidence to substantiate its claim of where the arrests occurred, the Tribunal could properly assess that disputed factual issue and determine the location of the arrests. Then, if the Tribunal determined that the arrests occurred in the territorial sea, it would be

---

March 2015, Dissenting and Concurring Opinion of Judges James Kateka and Rüdiger Wolfrum, ¶¶ 92–94 (agreeing with the majority that Article 2(3) imposes this obligation, and maintaining that it extends to bilateral or even unilateral commitments undertaken by a State, as well as obligations arising under customary international law or binding decisions of an international organization) **(UAL-97)**.

[214] Memorial of Ukraine, ¶¶ 86–88 & n.208.

[215] *Cf. Coastal State Rights*, Award on Preliminary Objections of 21 February 2020, ¶ 197 **(UAL-25)**.

[216] *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 812–814 **(UAL-7)**.

[217] *Id.* ¶ 793.

able to consider whether such arrests violated Article 32 of the Convention. Alternatively, it would be able to consider whether those arrests violated rules of customary international law, either as a matter of incidental jurisdiction, or through Article 2. At the moment, however, all of these legal issues are presented only in the abstract and without any connection to the dispute that Ukraine has submitted to the Tribunal. Ukraine's claims of immunity violations fall within Articles 95 and 96 of the Convention, which indisputably confer immunity, so the dispute before the Tribunal concerns the interpretation or application of UNCLOS and falls squarely within the Tribunal's jurisdiction. Russia's objection that Ukraine's claims do not fall within UNCLOS, on the theory that Article 32 does not provide an applicable immunity, is beside the point and must be rejected.

Chapter Four: The Tribunal Has Jurisdiction Over Ukraine's Claim that Russia Violated UNCLOS By Breaching the ITLOS Provisional Measures Order

101. On 25 May 2019, ITLOS issued an order prescribing provisional measures pursuant to Article 290(5) of the Convention, requiring that the Russian Federation "immediately release the Ukrainian naval vessels *Berdyansk, Nikopol* and *Yani Kapu*, and return them to the custody of Ukraine" and "immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine."[218] The order further required both parties to refrain from taking any action that might aggravate or extend the dispute.[219] Pursuant to Article 290(6) of the Convention, Russia was required to "comply promptly with any provisional measures prescribed under this article."[220] Ukraine claims that the Russian Federation did not comply promptly with the provisional measures prescribed.[221] Specifically, Russia waited nearly four months after the ITLOS 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 the ITLOS provisional measures order was issued.[222]

102. Russia argues that "since the Tribunal lacks jurisdiction on the main dispute, it also lacks jurisdiction on the claims based on the alleged non-compliance with the Provisional Measures Order."[223] The premise of Russia's objection — that "the Tribunal lacks jurisdiction on the main dispute" — is incorrect, as demonstrated above. Russia concedes that if the Tribunal has jurisdiction over Ukraine's other claims, it also has jurisdiction over Ukraine's claim that Russia breached Articles 290 and 296 by violating the provisional measures prescribed by ITLOS.[224]

---

[218] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 124(1)(a)–(b) **(UAL-2)**.

[219] *Id.* ¶ 124(c).

[220] UNCLOS Art. 290(6).

[221] Memorial of Ukraine, ¶ 76.

[222] *Id.*, Chapter 6, Part II, Sections D–E; *id.* ¶¶ 79, 93, 102, 104–106.

[223] Preliminary Objections, ¶ 96.

[224] *Id.* ¶ 94.

103. But the Tribunal does have an independent basis for asserting jurisdiction over Ukraine's claim that Russia violated its obligation under UNCLOS to comply with the provisional measures prescribed by ITLOS, separate from the Tribunal's jurisdiction over what Russia calls "the main dispute."[225] Article 290(6) provides that "parties to the dispute shall comply promptly with any provisional measures prescribed under this article."[226] ITLOS prescribed provisional measures under Article 290(5), so the text of Article 290(6) leaves no doubt that Russia had a treaty obligation under UNCLOS to "comply promptly" with those measures. Prior ITLOS and Annex VII tribunal decisions are in accord that UNCLOS creates an independent obligation to comply with provisional measures prescribed under Article 290.[227] For example, the tribunal in *Arctic Sunrise* concluded that Russia's non-compliance with the provisional measures prescribed by ITLOS "breached its obligations to the Netherlands under Articles 290(6) and 296(1) of the Convention."[228]

104. Russia does not question that the Convention requires compliance with provisional measures prescribed under Article 290, or that the provisional measures at issue here were prescribed under that provision. It does allege that the provisional measures order in this case "has been complied with," suggesting that Russia believes it has not violated Article 290(6) of the Convention (although Russia notably avoids saying that it "complied promptly").[229] Thus, Ukraine claims that Russia violated Article 290(6), and Russia opposes that claim. This dispute is plainly one that concerns the interpretation or application of the Convention, and so is within the jurisdiction of the Tribunal under Articles

---

[225] *Id.* ¶ 96.

[226] UNCLOS Art. 290(6).

[227] *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 336 **(UAL-6)**; *see also Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS Cases Nos. 3 and 4, Provisional Measures, Order of 27 August 1999, ¶ 87 (considering "the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt") **(UAL-98)**; *Dispute Concerning Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Judgment of 23 September 2017 ("*Ghana/Côte d'Ivoire*, Judgment of 23 September 2017"), ¶ 647 (noting "that, pursuant to article 290 of the Convention, its Order for the prescription of provisional measures is obligatory in nature, creating legal obligations with which parties have to comply") **(RUL-31)**.

[228] *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 360 **(UAL-6)**.

[229] Preliminary Objections, ¶ 9.

286 and 288(1). As stated by ITLOS in *M/V Louisa* in explaining how a tribunal "determine[s] whether it has jurisdiction," Ukraine has "established a link between the facts advanced by [it]" — that Russia did not comply promptly with the provisional measures order — and "the provisions of the Convention referred to by it" — Article 290(6) — and has "show[n] that such provisions can sustain the claim or claims submitted by" Ukraine.[230]

105. Russia's position, that the Tribunal's jurisdiction to decide a claim of a violation of Article 290(6) is conditional on its jurisdiction over other claims, has no basis in the Convention. There 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. Nor has Russia identified any prior tribunal decision suggesting such a limitation on the jurisdiction conferred by Articles 286 and 288 to decide a claim for a violation of Article 290(6).

106. Russia also has not argued, and cannot argue, that there is any other applicable limitation on the Tribunal's jurisdiction to decide Ukraine's claim of a violation of the obligation under UNCLOS to comply promptly with a provisional measures order. For the reasons explained above, Russia's argument that "the Tribunal does not have jurisdiction over the main dispute" because "the immunities invoked by Ukraine are not covered by UNCLOS and that the military activities exception applicable under the declaration made by both parties excludes the Tribunal's jurisdiction" is incorrect.[231] In any case, these objections have no connection to Ukraine's claim of a violation of Articles 290(6) and 296(1).

107. The only support Russia attempts to offer for its position is "the *LaGrand* jurisprudence" of the ICJ.[232] *LaGrand* provides no assistance to Russia. The basis of the Court's jurisdiction in *LaGrand* was the Optional Protocol to the Vienna Convention on Consular Relations ("VCCR"), which establishes jurisdiction for disputes concerning the

---

[230] *M/V "Louisa,"* ¶ 99 **(RUL-23)**.

[231] Preliminary Objections, ¶ 96.

[232] *Id.*; *LaGrand Case (Germany v. United States of America)*, ICJ Judgment of 27 June 2001 **(UAL-22)**.

interpretation and application of the VCCR.[233] But while the primary claims in *LaGrand* were for violations of the VCCR, the claim for a violation of the provisional measures order was not based on any provision of the VCCR. The VCCR does not contain a provision similar to UNCLOS Article 290(6) requiring prompt compliance with a provisional measures order, so the claim for a provisional measures violation did not concern interpretation or application of the VCCR in that case. Instead, the provisional measures order was binding by virtue of Article 41 of the Statute of the Court,[234] but the Court was not given compulsory jurisdiction over disputes concerning interpretation or application of the Statute. That is why the ICJ relied on its jurisdiction over the case as a whole to recognize its jurisdiction over the claim of a provisional measures violation.[235] Here, by contrast, a provision of UNCLOS does create a specific obligation to comply promptly with prescribed provisional measures, and the Tribunal has jurisdiction over a claim that a party has violated this provision of the Convention.[236]

108. Thus, the Tribunal has jurisdiction to adjudicate Ukraine's claim that Russia violated Articles 290(6) and 296(1), just as it would for a claim that any other provision of the Convention has been violated unless subject to an express exception. The Tribunal's jurisdiction over this claim is independent of its jurisdiction over Ukraine's other claims. There is no need for the Tribunal to reach this issue, however, because Russia objects to jurisdiction over Ukraine's claim of a violation of the obligation to comply with provisional measures only to the extent that the Tribunal concludes it lacks jurisdiction over Ukraine's

---

[233] *LaGrand Case (Germany v. United States of America)*, ICJ Judgment of 27 June 2001, ¶¶ 42, 45, 47–48 **(UAL-22)**.

[234] *Id.* ¶ 110 ("[The provisional measures order] had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States.").

[235] *Id.* ¶ 45.

[236] Russia also relies on a statement by the ITLOS Special Chamber in *Ghana/Côte d'Ivoire* that it had "inherent competence" over an alleged violation of provisional measures. Preliminary Objections, ¶ 95; *see Ghana/Côte d'Ivoire*, Judgment of 23 September 2017, ¶ 546 **(RUL-31)**. The scope of ITLOS's inherent competence says nothing about this Annex VII Tribunal's jurisdiction under Articles 286 and 288 over a claim for a violation of Article 290(6), a question that was not at issue in that case.

other claims. The Tribunal does have jurisdiction over Ukraine's other claims, which is a sufficient reason to reject this objection.

Chapter Five: The Tribunal Has Jurisdiction Over Ukraine's Claim that Russia Violated Article 279 By Aggravating the Dispute

109. In addition to violating the ITLOS provisional measures order and the provisions of the Convention requiring compliance with that Order, the Russian Federation has also violated UNCLOS Article 279, by aggravating the dispute between the Parties.[237] Specifically, Russia extended the detention of Ukraine's servicemen,[238] and it has continued to maintain the criminal cases against the servicemen in its domestic courts — even after their physical release to Ukraine.[239]

110. Article 279 imposes a duty not to aggravate a dispute while it is subject to compulsory dispute settlement, an interpretation that was also adopted by the *South China Sea* tribunal.[240] Russia disagrees with Ukraine's interpretation of Article 279.[241] Thus, the parties have a "dispute concerning the interpretation or application of this Convention," which the Tribunal must decide on the merits.[242] This was the approach of the *South China Sea* tribunal, which resolved this question of the interpretation of Article 279 in its Award on the merits — not at the preliminary phase of that case.[243]

111. Article 279 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,

---

[237] The ITLOS provisional measures order also required Russia not to take any action which might aggravate or extend the dispute. *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 124(1)(c) **(UAL-2)**.

[238] Polozov Statement, ¶¶ 6–7; *see also id.* Annexes D–E; Memorial of Ukraine, ¶¶ 42, 82.

[239] Memorial of Ukraine, ¶ 41.

[240] *South China Sea Arbitration*, Award of 12 July 2016, ¶¶ 1169, 1172 (relying on Article 279, as well as Articles 296 and 300 of UNCLOS) **(UAL-7)**.

[241] Preliminary Objections, ¶¶ 99–100.

[242] UNCLOS Arts. 286, 288(1).

[243] *See South China Sea Arbitration,* Award of 12 July 2016, ¶¶ 1169–1172 **(UAL-7)**; *cf. "ARA Libertad,"* Order of 15 December 2012, ¶ 65 (stating that "in the light of the positions of the Parties, a difference of opinions exists between them as to the applicability of article 32 and thus the Tribunal is of the view that a dispute appears to exist between the Parties concerning the interpretation or application of the Convention") **(UAL-1)**.

shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter."[244] This obligation must be performed in good faith as prescribed by Article 300 of UNCLOS, and more generally under the principle of *pacta sunt servanda* enshrined in the Vienna Convention on the Law of Treaties. Article 300 of UNCLOS expressly requires parties to "fulfil in good faith the obligations assumed under this Convention."[245] Article 26 of the VCLT similarly provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[246] Good faith performance of Article 279 requires that Parties engaged in a dispute settlement procedure under the Convention refrain from aggravating or extending the dispute.

112. Thus, the *South China Sea* tribunal concluded that, "[i]n carrying out the dispute settlement procedures of the Convention," "actions by either Party to aggravate or extend the dispute would be incompatible with the recognition and performance in good faith of these obligations."[247] The tribunal explained:

> Where a treaty provides for the compulsory settlement of disputes, the good faith performance of the treaty requires the cooperation of the parties with the applicable procedure. Compulsory settlement is also premised on the notion that the final result will be binding on the parties and implemented by them as a resolution of their dispute. 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.[248]

113. While the *South China Sea* tribunal located this duty within the text of the Convention itself, it recognized similar principles as a matter of general international law. The tribunal reviewed "extensive jurisprudence on provisional measures" that recognizes "a duty on Parties engaged in a dispute settlement procedure to refrain from aggravating or

---

[244] UNCLOS Art. 279.

[245] UNCLOS Art. 300.

[246] VCLT Art. 26 **(UAL-88)**.

[247] *South China Sea Arbitration,* Award of 12 July 2016, ¶ 1172 **(UAL-7)**.

[248] *Id.* ¶ 1171.

extending the dispute."[249] In 1939, the Permanent Court of International Justice in *Electricity Company of Sofia and Bulgaria* explained that "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."[250]

114. Russia does not explain how aggravating a dispute before a tribunal could be consistent with good faith performance of the Article 279 obligation to settle disputes peacefully. Russia criticizes the *South China Sea* tribunal for "rel[ying] on the ICJ case law developed in relation to Article 41 of the ICJ Statute on provisional measures."[251] Russia ignores, however, that while this jurisprudence provided relevant background, the tribunal expressly concluded that it had "no need to reach beyond the text of the Convention to identify the source of the law applicable to the conduct of parties in the course of dispute settlement proceedings under Part XV."[252] The *South China Sea* tribunal also concluded, in the alternative, that it could apply these principles as "other rules of international law not incompatible with the Convention" pursuant to Article 293, which would provide this Tribunal another basis to address Russia's aggravation of the dispute.[253]

115. Russia's reliance on the Special Chamber's judgment in the *Ghana/Côte d'Ivoire* case also makes little sense.[254] Russia points out that the Special Chamber "made no reference to Article 279" in considering "Côte d'Ivoire's claim that Ghana had not complied with the provisional measures prescribed."[255] In *Ghana/Côte d'Ivoire*, there was no claim of

---

[249] *Id.* ¶¶ 1167–1172.

[250] *The Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, PCIJ Order of 5 December 1939, p. 199 **(UAL-99)**.

[251] Preliminary Objections, ¶ 99.

[252] *South China Sea Arbitration,* Award of 12 July 2016, ¶ 1173 **(UAL-7)**.

[253] *Id.* (explaining the duty to "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" constitutes a principle of international law that is applicable to States "to which the Tribunal may have recourse" under Article 293 (internal quotations and citations omitted)); *see also* UNCLOS Art. 293.

[254] Preliminary Objections, ¶ 99.

[255] *Id.*

aggravation, so there would have been no reason to address the interpretation of Article 279. Ukraine invokes Article 279 as the basis for a requirement to refrain from aggravating a dispute subject to dispute resolution, not a requirement to comply with provisional measures (which is a separate obligation under the Convention, as discussed in Chapter Four).

116. Russia briefly asserts that Ukraine's factual claim of aggravation is unfounded.[256] This argument is not proper in a jurisdictional objection. Ukraine presented evidence of aggravation in its Memorial,[257] and whether Russia did in fact aggravate the dispute is a question that goes to the merits of Ukraine's Article 279 claim.

117. Finally, Ukraine notes the limited practical importance of Russia's objection concerning Article 279. Beginning on 25 May 2019, Russia was under a duty not to aggravate the dispute as prescribed by the ITLOS provisional measures order, in addition to its separate obligation under Article 279.[258] Thus, 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.

118. In sum, Russia's challenge to the Tribunal's jurisdiction to adjudicate Ukraine's claim that Russia breached Article 279 of the Convention fails. Article 279 imposes on Russia an obligation to settle disputes peacefully. The parties disagree only about the *content* of this obligation, *i.e.*, whether this obligation, understood in the context of the obligation to fulfill the provisions of UNCLOS in good faith,[259] includes a requirement that Russia not aggravate a dispute while it is before a tribunal. Russia's objection to Ukraine's Article 279 claim therefore raises a merits dispute, not a jurisdictional objection. When the Tribunal reaches the issue on the merits, there is ample support for concluding that aggravation of a dispute subject to the Convention's dispute settlement procedures is a violation of Article 279.

---

[256] *Id.* ¶ 101.

[257] Memorial of Ukraine, ¶ 92.

[258] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 124(1)(c) **(UAL-2)**.

[259] UNCLOS Art. 300.

Chapter Six: Ukraine Satisfied the Article 283 Requirement to Proceed Expeditiously to an Exchange of Views Regarding the Settlement of the Dispute

119. Russia's final objection is that Ukraine did not comply with Article 283 of UNCLOS. ITLOS rejected the same argument. It concluded 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," and Russia's untimely response "was of such nature that Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted."[260] Accordingly, ITLOS determined that "the requirements of article 283 were satisfied before Ukraine instituted arbitral proceedings."[261] This Tribunal should reach the same conclusion.

120. Article 283, paragraph 1, of the Convention reads: "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."[262] Tribunals have regularly considered, and always rejected, objections under Article 283.[263] The interpretation of Article 283 is thus well-settled, and several points have been consistently emphasized:

- **First**, on its face Article 283 requires the exchange of views to be "expeditious[]."[264] ITLOS has stressed that "the obligation to proceed expeditiously to an exchange of views applies equally to both parties to the dispute."[265]

---

[260] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 86 **(UAL-2)**.

[261] *Id.* ¶ 89.

[262] UNCLOS Art. 283(1).

[263] *See Chagos*, Award of 18 March 2015, ¶¶ 385–386 **(RUL-25)**; *In the Matter of the Duzgit Integrity Arbitration (The Republic of Malta v. The Democratic Republic of São Tomé and Príncipe)*, PCA Case No. 2014-07, Award of 5 September 2016, ¶ 201 **(UAL-17)**; *Guyana v. Suriname,* PCA Case No. 2004-04, Award of the Arbitral Tribunal of 17 September 2007, ¶¶ 410, 457 **(UAL-39)**; *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 352 **(UAL-5)**; *Barbados v. Republic of Trinidad and Tobago*, PCA Case No. 2004-02, Award of the Arbitral Tribunal of 11 April 2006, ¶¶ 202–205, 214 **(UAL-40)**; *see also Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 156 **(UAL-6)**.

[264] UNCLOS Art. 283.

[265] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 88 (citing *M/V "Norstar" (Panama v. Italy),* ITLOS Case No. 25, Judgment of 10 April 2019, ¶ 213) **(UAL-2)**.

- **Second**, Article 283 concerns an exchange of views on the process of dispute settlement; it does not impose an obligation to negotiate on the substance of the dispute between the parties.[266]

- **Third**, ITLOS and Annex VII tribunals have consistently recognized that the claimant State is "not obliged to continue with an exchange of views when it concludes that this exchange could not yield a positive result."[267] This deferential standard reflects that the claimant State itself is best positioned to assess whether further attempts to exchange views would be fruitful.

- **Fourth**, as explained by the *Chagos* tribunal, Article 283 must not be applied with "undue formalism."[268] Article 283 is concerned with notice, and "was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings."[269]

121. In light of these principles, the only reasonable conclusion is that Ukraine satisfied the requirements of Article 283 to "proceed expeditiously to an exchange of views" with Russia before instituting arbitral proceedings.

I. Ukraine Attempted to Proceed Expeditiously to an Exchange of Views, but Russia Failed to Respond

122. On 15 March 2019, Ukraine sent Russia a *note verbale* that specifically invoked Article 283 and requested that the parties "expeditiously proceed to an exchange of views."[270] As ITLOS noted, Ukraine's diplomatic note "clearly expressed its willingness to

[266] *See, e.g.*, *Chagos*, Award of 18 March 2015, ¶ 378 ("As a matter of textual construction, the Tribunal considers that Article 283 cannot be understood as an obligation to negotiate the substance of the dispute.") **(RUL-25)**; *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 151 ("Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute.") **(UAL-6)**; *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 333 (citing *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 151) **(UAL-5)**.

[267] *Case Concerning Land Reclamation in and Around the Straits of Johor (Malaysia v. Singapore)*, ITLOS Case No. 12, Provisional Measures, Order of 8 October 2003, ¶ 48 **(UAL-4)**; *see also The Mox Plant Case*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 60 ("[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") **(RUL-11)**; *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 343 ("Thereafter, it is well established that the Philippines was not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted." (internal quotes and citation omitted)) **(UAL-5)**; *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 154 ("[I]t was reasonable for the Netherlands to conclude, as they did, that the possibilities to settle the dispute by negotiation or otherwise ha[d] been exhausted." (internal quotes and citation omitted)) **(UAL-6)**.

[268] *Chagos*, Award of 18 March 2015, ¶ 382 **(RUL-25)**.

[269] *Id.*

[270] *Note Verbale of the Ministry of Foreign Affairs in Ukraine*, No. 72/22-188/3-682 (15 March 2019) **(UA-17)**.

exchange views."[271] Reflecting the urgency of the situation and the ongoing harm to Ukraine's vessels and servicemen, Ukraine requested in its *note verbale* that Russia hold consultations on the means to resolve the dispute within ten days.[272]

123. On the tenth day, Russia replied to Ukraine. In its *note verbale* of 25 March 2019, Russia merely "confirm[ed] the receipt" of Ukraine's communication and stated that "*possible* comments on the issues raised in the note are likely to be sent separately."[273] Russia gave no indication in its *note verbale* of whether or when such "possible comments" would be provided, or whether it would participate in the requested exchange of views.[274] Nor did Russia's note even mention Article 283 of UNCLOS; it was not until 12 April 2019 that Russia belatedly indicated its "consent for holding consultations with the Ukrainian Side on the basis of Article 283."[275]

124. Nonetheless, even though it was apparent to Ukraine from Russia's note of 25 March that Russia did not intend to proceed expeditiously to an exchange of views, Ukraine afforded Russia additional time to provide a meaningful response, delaying its initiation of arbitration for another week. Russia still did not provide its views or send any further correspondence in that week. In total, by the time Ukraine initiated arbitration on 1 April 2019, not ten, but seventeen days had passed since Ukraine's request to proceed to an expeditious exchange of views, with no demonstration of any intent on the part of Russia to proceed to an exchange of views.

125. Russia objects that Ukraine's *note verbale* was "insufficient to comply with Article 283 of UNCLOS" because "Ukraine itself does not express any view concerning the

---

[271] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 86 **(UAL-2)**.

[272] *Note Verbale of the Ministry of Foreign Affairs in Ukraine*, No. 72/22-188/3-682 (15 March 2019) **(UA-17)**.

[273] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 3528/2dsng (25 March 2019) (emphasis added) **(UA-21)**.

[274] *Id.*

[275] *Id.*; *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 4502/2dsng (12 April 2019) **(UA-22)**

means for settlement of the dispute."[276] But the text of Article 283 requires that the Parties "*proceed* expeditiously to an exchange of views." As ITLOS recognized, Ukraine "clearly expressed" its readiness to "proceed" to such an exchange. [277]

126. Russia also argues that the "ten working days" between Ukraine's 15 March 2019 note and the 1 April 2019 notice of arbitration "were clearly insufficient to form and express a view on the means of settling the dispute," such that its delay did not indicate "any lack of 'expeditiousness' in the exchange of views."[278] ITLOS, however, recognized 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."[279] This Tribunal should reach the same conclusion, for several reasons.

127. **First**, the Convention's use of the word "expeditiously" indicates that Ukraine's request for an exchange of views within a short period of time was appropriate. The French text of Article 283 uses the word "promptement," which is the same word used when the Convention requires an action to be "without delay."[280] The Spanish text of Article 283 uses the words "sin demora," which translates literally to "without delay." This indicates that the words "expeditiously" and "without delay" have the same meaning in the Convention. Another provision of the Convention, Article 161(8)(e), provides that a conciliation committee of the Council of the International Seabed Authority "shall work expeditiously and report to the Council within 14 days following its establishment," further indicating that "expeditiously" in the Convention refers to a matter of days.[281]

---

[276] Preliminary Objections, ¶ 106.

[277] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 86 **(UAL-2)**.

[278] Preliminary Objections, ¶¶ 107, 110.

[279] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 86 **(UAL-2)**.

[280] *See* UNCLOS Art. 283 ("Lorsqu'un différend surgit entre des Etats Parties à propos de l'interprétation ou de l'application de la Convention, les parties en litige procèdent promptement à un échange de vues concernant le règlement du différend par la négociation ou par d'autres moyens pacifiques."); UNCLOS Art. 292(3) ("[t]he court or tribunal shall deal without delay with the application for release and shall deal only with the question of release"; "La cour ou le tribunal examine promptement cette demande et n'a à connaître que de la question de la mainlevée ou de la mise en liberté . . .").

[281] UNCLOS Art. 161(8)(e).

128. **Second**, in the specific circumstances of this case, Ukraine's request for the exchange of views to occur within ten days was particularly appropriate for an expeditious exchange of views. When Ukraine sent its *note verbale* to the Russian Federation on 15 March, Russia was preparing to subject the servicemen to additional criminal proceedings in mid-April, and in fact pursued those criminal proceedings and extended the detentions of the servicemen shortly after Ukraine commenced arbitration.[282] Russia argues that "Ukraine cannot rely on the alleged urgency of the exchange of views" because "Ukraine itself is responsible for commencing the discussion on the means of settlement of the dispute only on 15 March 2019, while the incident occurred on 25 November 2018, 3.5 months earlier."[283] But immediately after 25 November 2018, Ukraine had engaged in urgent and intensive diplomatic efforts to secure the release of its servicemen and vessels. It was Ukraine's sovereign prerogative to decide when those avenues had failed and when it was appropriate to resort to dispute resolution under UNCLOS; at that time, both parties had an obligation to proceed expeditiously to an exchange of views, and Russia did not meet that obligation.

129. Moreover, Russia made a similar argument before ITLOS, contending that Ukraine's alleged delay meant the situation was not sufficiently urgent for provisional measures to be prescribed.[284] ITLOS disagreed, 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."[285] Provisional measures in urgent situations can only be requested after dispute resolution proceedings are instituted,[286] and such

---

[282] *See, e.g.*, Hrytsenko Statement, Annex B; Mokryak Statement, Annex C; Nebylytsia Statement, Annex C; Melnychyk Statement, Annex C; *see also* Polozov Statement, ¶ 6, Annex C.

[283] Preliminary Objections, ¶ 111.

[284] *Three Ukrainian Naval Vessels*, Provisional Measures, Memorandum of the Russian Federation, dated 7 May 2019, ¶¶ 38–40 **(UA-2)**.

[285] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶¶ 107, 110–113 **(UAL-2)**.

[286] UNCLOS Art. 290(1) ("If a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."); UNCLOS Art. 290(5) ("Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in

proceedings cannot be instituted before Article 283 is satisfied, so it must be possible to discharge the Article 283 obligation to proceed expeditiously to an exchange of views in a short period of time.

130. **Third**, in its 15 March *note verbale*, Ukraine clearly articulated its request to hold consultations within ten days,[287] and Russia did not respond to the *note verbale* by informing Ukraine that ten days was insufficient time to form a view.[288] Had Russia considered this amount of time inadequate to form a view, as it now alleges, it should have said so at the time so that Ukraine could have considered whether more time should be allowed.

131. **Fourth**, Ukraine reasonably determined that Russia should have been able to respond within the requested time period. In prior diplomatic exchanges concerning Ukraine's demands for an immediate release of its vessels and servicemen, Russia had already expressed its position on the substance of the dispute, asserting its view that it was lawfully exercising criminal jurisdiction over the vessels and servicemen.[289] And during these exchanges, Russia had shown itself able to respond to communications from Ukraine in less than ten days.[290]

132. In short, in light of Article 283's express requirement that the parties proceed "expeditiously" to an exchange of views, Ukraine's request to exchange views within ten days "cannot be considered 'arbitrary,'" as ITLOS correctly concluded.[291] Adding to this the

---

the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.").

[287] *Note Verbale of the Ministry of Foreign Affairs in Ukraine*, No. 72/22-188/3-682 (15 March 2019) **(UA-17)**.

[288] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 3528/2dsng (25 March 2019) **(UA-21)**.

[289] *See, e.g.*, *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 14951/2dsng (5 December 2018) ("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).") **(UA-6)**.

[290] *See, e.g.*, *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 985/2dsng (31 January 2019) (responding to a *note verbale* sent by Ukraine in nine days) **(UA-49)**.

[291] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 86 **(UAL-2)**.

urgency of the situation, as also acknowledged by ITLOS, ten days was more than sufficient. Yet Russia did not object to that time period, did not ask for more time, said nothing for ten days, and when it responded did not agree to proceed to an exchange of views. Thus, while Ukraine discharged its obligation under Article 283, Russia's inadequate response failed to satisfy its own obligation to proceed expeditiously to an exchange of views regarding the settlement of the dispute.

II. Ukraine Appropriately Determined that the Possibility of Reaching Agreement Between the Parties Was Exhausted

133. Russia acknowledges 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."[292] This principle disposes of Russia's objection. In light of Russia's failure to engage constructively with Ukraine over the dispute, Ukraine did conclude that the possibility of reaching an agreement had been exhausted. ITLOS considered Russia's failure to accept Ukraine's request to exchange views on resolution of the dispute, and determined that Russia's response "was of such nature that Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted."[293] Russia's failure to accept Ukraine's request simply to exchange views made it obvious that further attempts to engage with Russia would be futile.

134. Moreover, Ukraine reasonably took into account Russia's insistence that it was lawfully detaining Ukraine's naval vessels and servicemen. In *Arctic Sunrise*, the Annex VII tribunal found the Netherlands' efforts to exchange views with Russia sufficient where the exchange was "brief, one-sided (in the sense that Russia did not make any counter-proposal or accept the proposal to arbitrate) and took place one day before the commencement of arbitration."[294] One reason for this conclusion was that Russia had already "maintained the view that the Arctic 30 were lawfully detained," which made it

---

[292] Preliminary Objections, ¶ 103 (quoting *MOX Plant (Ireland v. United Kingdom)*, ITLOS Case No. 10, Provisional Measures, Order of 3 December 2001, ¶ 60 **(RUL-11)**) (emphasis added).

[293] *Three Ukrainian Naval Vessels*, Provisional Measures Order, ¶ 86 **(UAL-2)**.

[294] *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶¶ 153–154 **(UAL-6)**.

"reasonable for the Netherlands to conclude, as they did, that 'the possibilities to settle the dispute by negotiation or otherwise ha[d] been exhausted.'"[295] Here too, Russia had maintained that Ukraine's vessels and servicemen were lawfully detained, which made it reasonable for Ukraine to reach the same conclusion.[296] In fact, Ukraine waited significantly longer to initiate arbitration (seventeen days from its request to exchange views) than did the Netherlands in *Arctic Sunrise*.

135. Finally, the consultations that the parties did eventually hold on 23 April 2019 confirmed Ukraine's conclusion that no agreement with Russia was possible. As noted above, it was only on 12 April 2019 — nearly two weeks after Ukraine initiated arbitration, and eighteen days after the period for consultations proposed in Ukraine's 15 March 2019 *note verbale* had expired — that Russia belatedly accepted Ukraine's request to "hold consultations with the Ukrainian Side on the basis of Article 283."[297] Russia provided no explanation for its delay. Ukraine nonetheless responded promptly, on 15 April 2019, and proposed consultations between the parties to be held in The Hague on 23 April 2019.[298] Ukraine expressly made this proposal "without prejudice to Ukraine's recourse to the compulsory dispute resolution procedures based on the UN Convention of the Law of the Sea."[299] To be clear, Ukraine does not, as Russia suggests, seek to rely on "exchanges subsequent to the institution of proceedings" to satisfy the Article 283 requirement;[300] as explained above, Ukraine had already fully discharged its obligation to proceed to an exchange of views. Yet Ukraine remained willing to discuss the matter even after initiating

---

[295] *Id.* ¶ 154.

[296] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 14951/2dsng (5 December 2018) ("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).") **(UA-6)**.

[297] *Note Verbale of the Ministry of Foreign Affairs of the Russian Federation*, No. 4502/2dsng (12 April 2019) **(UA-22)**.

[298] *Note Verbale of the Ministry of Foreign Affairs in Ukraine*, No. 72/22-188/3-973 (15 April 2019) **(UA-23)**.

[299] *Id.*

[300] Preliminary Objections, ¶ 114.

arbitration, and 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.

136. Even at this point, Ukraine's resort to arbitration was not a "*fait accompli*" as alleged by Russia[301]: Ukraine's 15 March *note verbale* expressly invited Russia to discuss means of dispute settlement, and if the 23 April meeting had been productive, nothing would have prevented Ukraine from suspending its arbitration. Unfortunately, the meeting was not productive, as explained in Ukraine's Memorial.[302]

137. After arguing that "the consultations of 23 April are not relevant," Russia criticizes Ukraine's position during the meeting.[303] But as explained in Ukraine's Memorial, Ukraine made a proposal for how the dispute should be resolved (arbitration), Russia rejected that proposal but "did not offer any concrete alternative," and then as a delay tactic proposed further consultations without being able to identify "any specific objectives."[304] Russia now asserts that it did make a proposal (negotiation) and that Ukraine rejected it.[305] But even if Russia's narrative were accurate, the parties' failure to reach agreement is simply irrelevant to the Article 283 requirement of an exchange of views. Article 283 does not, as Russia alleges, require parties to "contemplate modifying" their position.[306] Russia bases this argument on ICJ cases that involved an obligation to negotiate regarding the substantive claims in dispute,[307] without mentioning the extensive jurisprudence holding that "Article 283 cannot be understood as an obligation to negotiate the substance of the dispute."[308]

---

[301] *Id.* ¶ 113.

[302] Memorial of Ukraine, ¶ 56.

[303] Preliminary Objections, ¶ 114.

[304] Memorial of Ukraine, ¶¶ 56–57.

[305] Preliminary Objections, ¶ 114(b).

[306] *Id.* ¶ 114(a).

[307] *Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece)*, ICJ Judgment of 5 December 2011, ¶ 127 (concerning whether the Applicant had "breached its obligation to negotiate in good faith") **(RUL-20)**; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Judgment of 20 February 1969, ¶¶ 84–85(a) (concerning "an obligation to enter into negotiations with a view to arriving at an agreement . . .") **(RUL-1)**.

[308] *Chagos*, Award of 18 March 2015, ¶ 378 **(RUL-25)**; *see also Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 151 ("Article 283(1) does not require the Parties to engage in negotiations regarding

138. The record reflects that Ukraine invited Russia to proceed to an exchange of views, Russia provided no meaningful response, and Russia's conduct both before and after the initiation of arbitration confirms the reasonableness of Ukraine's judgment that there was no possibility of the parties reaching agreement. Ukraine satisfied its obligation under Article 283, while Russia did not satisfy its own obligation under that provision. Accordingly, Russia's objection should be rejected.

the subject matter of the dispute.") **(UAL-6)**; *South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, ¶ 333 (citing *Arctic Sunrise*, Award on the Merits of 14 August 2015, ¶ 151) **(UAL-5)**.

Chapter Seven: Conclusions and Submissions

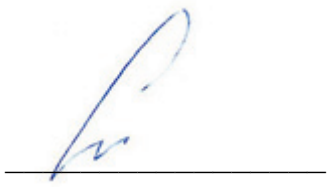
139. For the reasons set forth in these Written Observations, Ukraine respectfully requests that the Tribunal:

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.

Kyiv, Ukraine, 27 January 2021



H.E. Yevhenii Yenin

Agent for Ukraine

Deputy Minister of
Foreign Affairs of Ukraine