



INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

Press Release

**CASE CONCERNING THE DETENTION OF THREE
UKRAINIAN NAVAL VESSELS
(UKRAINE V. RUSSIAN FEDERATION), PROVISIONAL MEASURES**

**TRIBUNAL PRESCRIBES PROVISIONAL MEASURES ORDERING THE
RUSSIAN FEDERATION TO RELEASE THREE UKRAINIAN NAVAL VESSELS
AND THEIR 24 SERVICEMEN**

The International Tribunal for the Law of the Sea today delivered its Order in the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures*.

By its Notification and Statement of Claim dated 31 March 2019, Ukraine instituted arbitral proceedings under Annex VII to the United Nations Convention on the Law of the Sea (“the Convention”) against the Russian Federation in a dispute concerning “the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board”.

On 16 April 2019, Ukraine submitted to the Tribunal a Request for the prescription of provisional measures under article 290, paragraph 5, of the Convention in relation to the dispute. In accordance with that provision, pending the constitution of an Annex VII arbitral tribunal, the Tribunal may prescribe, modify or revoke provisional measures 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.

By note verbale dated 30 April 2019, the Russian Federation informed the Tribunal that it did not intend to participate in the proceedings before the Tribunal. By note verbale dated 7 May 2019, the Russian Federation transmitted a Memorandum regarding its position on the circumstances of the case.

The public hearing in the case was held on 10 May 2019. At the end of the hearing, Ukraine, in its final submissions, requested the Tribunal to prescribe provisional measures “requiring the Russian Federation to promptly:

- a. Release the Ukrainian naval vessels, the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;

- b. Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
- c. Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.”

I. *Prima facie* jurisdiction

In its Order of today’s date, the Tribunal states that it “may prescribe provisional measures under article 290, paragraph 5, of the Convention only if the provisions invoked by the Applicant *prima facie* appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded, but need not definitively satisfy itself that the Annex VII arbitral tribunal has jurisdiction over the dispute submitted to it” (paragraph 36 of the Order).

Existence of a dispute concerning the interpretation or application of the Convention

Ukraine claims that the Russian Federation breached its obligations under articles 32, 58, 95 and 96 of the Convention and argues that the Parties are engaged in a dispute over the interpretation and application of those articles. The Tribunal notes that the Russian Federation “did not directly respond to this argument” and states that the Russian Federation’s view on this question “may be inferred from its subsequent conduct”. According to the Tribunal, “the fact that the Russian authorities arrested and detained the Ukrainian naval vessels and commenced criminal proceedings against the Ukrainian servicemen indicates that the Russian Federation holds a different position from Ukraine on the question of whether the events which occurred on 25 November 2018 gave rise to the alleged breach of its obligations” under the aforementioned provisions of the Convention (paragraph 44 of the Order). The Tribunal “accordingly considers that a dispute concerning the interpretation or application of the Convention *prima facie* appears to have existed on the date the arbitral proceedings were instituted” (paragraph 45 of the Order).

Declarations made under article 298, paragraph 1(b), of the Convention

Both Ukraine and the Russian Federation made declarations under article 298, paragraph 1(b), of the Convention upon ratification of the Convention. The Tribunal therefore turns “to the question whether article 298, paragraph 1(b), is applicable, thus excluding the present case from the jurisdiction of the Annex VII arbitral tribunal” (paragraph 46 of the Order).

The Tribunal notes that “[t]he Parties disagree on the applicability of article 298, paragraph 1(b), of the Convention and their declarations under that provision.” The Russian Federation “maintains that the dispute submitted to the Annex VII arbitral tribunal concerns military activities and that the declarations of the Parties therefore exclude the dispute from the jurisdiction of the Annex VII arbitral tribunal.” Ukraine asserts that “the dispute does not concern military activities, but rather law enforcement activities, and that the declarations therefore do not exclude the present

dispute from the jurisdiction of the Annex VII arbitral tribunal” (paragraph 50 of the Order).

In the view of the Tribunal, “[t]he question to be decided is whether the dispute submitted to the Annex VII arbitral tribunal concerns military activities” (paragraph 63 of the Order). The Tribunal states that “the distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question”, nor can this distinction “be based solely on the characterization of the activities in question by the parties to a dispute” (paragraphs 64 and 65 of the Order). Such a distinction “must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case” (paragraph 66 of the Order). The Tribunal examines three circumstances in this regard.

First, “it appears from the information and evidence presented by the Parties to the Tribunal that the underlying dispute leading to the arrest concerned the passage of the Ukrainian naval vessels through the Kerch Strait.” The Tribunal observes that “it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity” and that “[u]nder the Convention, passage regimes, such as innocent or transit passage, apply to all ships” (paragraph 68 of the Order). Second, the facts indicate that “at the core of the dispute was the Parties’ differing interpretation of the regime of passage through the Kerch Strait” and that “such a dispute is not military in nature” (paragraph 72 of the Order). Third, “it is undisputed that force was used by the Russian Federation in the process of arrest”. The Tribunal states that “the context in which such force was used is of particular relevance” and that “what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation” (paragraphs 73 and 74 of the Order). The Tribunal adds that the above 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” (paragraph 75 of the Order). The “subsequent proceedings and charges against the servicemen further support the law enforcement nature of the activities of the Russian Federation” (paragraph 76 of the Order).

Based on “the information and evidence available to it, the Tribunal accordingly considers that *prima facie* article 298, paragraph 1(b), of the Convention does not apply in the present case” (paragraph 77 of the Order).

Article 283 of the Convention

As to the requirements under article 283 of the Convention relating to an exchange of views, the Tribunal refers to Ukraine’s note verbale of 15 March 2019, which “clearly expressed [Ukraine’s] willingness to exchange views with the Russian Federation regarding the means to settle their dispute within a specific time frame.” The Tribunal then refers to the Russian Federation’s response of 25 March 2019, and states that this response “was of such nature that Ukraine could reasonably conclude under the circumstances that the possibility of reaching agreement was exhausted” (paragraph 86 of the Order). Accordingly, “the Tribunal is of the view that these

considerations are sufficient at this stage to find that the requirements of article 283 were satisfied before Ukraine instituted arbitral proceedings” (paragraph 89 of the Order).

The Tribunal “concludes that *prima facie* the Annex VII arbitral tribunal would have jurisdiction over the dispute submitted to it” (paragraph 90 of the Order).

II. Urgency of the situation

Plausibility of the rights asserted by the Applicant

The Tribunal states that “[b]efore prescribing provisional measures, the Tribunal needs to satisfy itself that the rights which Ukraine seeks to protect are at least plausible” (paragraph 91 of the Order). The Tribunal notes that “the rights claimed by Ukraine are rights to the immunity of warships and naval auxiliary vessels and their servicemen on board under the Convention and general international law” (paragraph 96 of the Order). In the view of the Tribunal, “it appears that the *Berdyansk* and the *Nikopol* are warships within the meaning of article 29 of the Convention and that the *Yani Kapu* is a ship owned or operated by a State and used only on government non-commercial service, as referred to in article 96 of the Convention.” The Tribunal considers that “the rights claimed by Ukraine on the basis of articles 32, 58, 95 and 96 of the Convention are plausible under the circumstances” (paragraph 97 of the Order). The Tribunal also notes that “the 24 servicemen on board the vessels are Ukrainian military and security personnel. While the nature and scope of their immunity may require further scrutiny, the Tribunal considers that the rights to the immunity of the 24 servicemen claimed by Ukraine are plausible” (paragraph 98 of the Order).

Real and imminent risk of irreparable prejudice

Pursuant to article 290, paragraph 5, of the Convention, the Tribunal notes that it may not prescribe provisional measures “unless it considers that there is a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal” (paragraph 100 of the Order).

Recalling its statement in “*ARA Libertad*”, the Tribunal observes that “a warship, as defined by article 29 of the Convention, ‘is an expression of the sovereignty of the State whose flag it flies’”. It adds that “[t]his reality is reflected in the immunity it enjoys under the Convention and general international law”. The Tribunal notes that “any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security” (paragraph 110 of the Order). In the view of the Tribunal, “the actions taken by the Russian Federation could irreparably prejudice the rights claimed by Ukraine to the immunity of its naval vessels and their servicemen if the Annex VII arbitral tribunal adjudges those rights to belong to Ukraine” (paragraph 111 of the Order). The Tribunal also notes that “the continued deprivation of liberty and freedom of Ukraine’s servicemen raises humanitarian concerns” (paragraph 112 of the Order). The Tribunal finds that “there is a real and imminent risk of irreparable prejudice to the rights of

Ukraine pending the constitution and functioning of the Annex VII arbitral tribunal” and “accordingly considers that the urgency of the situation requires the prescription of provisional measures under article 290, paragraph 5, of the Convention” (paragraph 113 of the Order).

III. Provisional measures to be prescribed

The Tribunal may prescribe “any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute”, as provided for in article 290, paragraph 1, of the Convention. The Tribunal “considers it appropriate under the circumstances of the present case to prescribe provisional measures requiring the Russian Federation to release the three Ukrainian naval vessels and the 24 detained Ukrainian servicemen and to allow them to return to Ukraine in order to preserve the rights claimed by Ukraine” (paragraph 118 of the Order). The Tribunal “does not consider it necessary to require the Russian Federation to suspend criminal proceedings against the 24 detained Ukrainian servicemen and refrain from initiating new proceedings” (paragraph 119 of the Order). However, it considers it appropriate “to order both Parties to refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal” (paragraph 120 of the Order).

IV. Operative provisions

The operative provisions of the Order of 25 May 2019 read as follows:

For these reasons, the Tribunal

(1) *Prescribes*, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

(a) By 19 votes to 1,

The Russian Federation shall immediately release the Ukrainian naval vessels *Berdyansk*, *Nikopol* and *Yani Kapu*, and return them to the custody of Ukraine;

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDÓ, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, LIJNZAAD;

AGAINST: *Judge* KOLODKIN.

(b) By 19 votes to 1,

The Russian Federation shall immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine;

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, LIJNZAAD;

AGAINST: *Judge* KOLODKIN.

(c) By 19 votes to 1,

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

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, LIJNZAAD;

AGAINST: *Judge* KOLODKIN.

(2) By 19 votes to 1,

Decides that Ukraine and the Russian Federation shall each submit to the Tribunal the initial report referred to in paragraph 121 not later than 25 June 2019, and *authorizes* the President to request further reports and information as he may consider appropriate after that report.

FOR: *President* PAIK; *Vice-President* ATTARD; *Judges* JESUS, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, KELLY, KULYK, GÓMEZ-ROBLEDO, HEIDAR, CABELLO, CHADHA, KITTICHAISAREE, LIJNZAAD;

AGAINST: *Judge* KOLODKIN.

Judges Kittichaisaree and Lijnzaad append a declaration to the Order; Judges Jesus, Lucky and Gao append a separate opinion to the Order; Judge Kolodkin appends a dissenting opinion to the Order. The text of the Order, the declarations and opinions as well as a recorded webcast of the reading are available on the [website](#) of the Tribunal.

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