INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

2019

Friday, 10 May 2019, at 10 a.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

President Jin-Hyun Paik presiding

CASE CONCERNING THE DETENTION
OF THREE UKRAINIAN NAVAL VESSELS

(Ukraine v. Russian Federation)
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the servicemen, subjecting them to a maximum sentence of six years in a Russian labour camp.

These then are the facts upon which Ukraine bases its claim. As I mentioned at the outset, none of them are in dispute between the Parties. In its Memorandum of 7 May, however, Russia has raised a number of allegations about the events preceding the seizure and detention of the vessels. To be clear, the dispute Ukraine has submitted to arbitration, and that is now before this Tribunal, concerns only Russia’s exercise of jurisdiction over the three Ukrainian vessels in spite of their complete immunity. That includes both the seizure and detention of those vessels, and the subsequent civilian legal process to which both the vessels and those on board have been subjected. Russia’s version of what happened in the hours leading up to the seizure and detention is simply not relevant to the immunity of the Ukrainian vessels at the time they were seized. Nonetheless, in order to correct the record, I will briefly respond to certain of Russia’s contentions.

First, in its Memorandum of 7 May, Russia describes the mission of the three Ukrainian naval vessels as a “‘secret’ incursion … into Russian territorial waters”. That is simply not the case. The mission of the vessels was to navigate from the Ukrainian port of Odesa to the Ukrainian port of Berdyansk on the northern shore of the Sea of Azov, where they were thereafter to be permanently stationed. Other Ukrainian naval vessels had successfully completed the same transit as recently as September 2018, just two months earlier. On the slide now on the screen (tab 1, page 7), you will see a general area map that reflects the location of both ports, Odesa and Berdyansk, and of the Kerch Strait.

Russia refers to a document found on board the Nikopol guiding them, in Russia’s translation, to sail “covertly outside of the coastal and maritime regions of patrol of the Black Sea Fleet of Russia and the Coast Guard of the FSB of Russia.” Vice Admiral Tarasov confirms that the purpose of this guidance was to avoid unnecessarily provoking incidents with Russian government vessels during the two days it would take to reach the Kerch Strait from Odesa.

Nor can the guidance be read as suggesting that the mission of the naval vessels was to transit the Kerch Strait secretly – an impossible task given the breadth of the Kerch Strait and the navigable channels through it. Indeed, as the Ukrainian Navy report at tab 3 confirms, as it approached the Kerch Strait, the Berdyansk radioed both a post of the Russian Border Guard Service and the port authorities at Kerch and Kavkaz ports to announce the intention of the three vessels to proceed through the Kerch Strait.

15 Annex F, Appendix A, Nikopol Small Armored Gunboat, Checklist for Readiness to Sail (09:00 Hours on 23 November 2018 to 18:00 Hours on 25 November 2018), para. 1.
16 Memorandum of the Russian Federation, para. 20.
17 Annex F (Tarasov Declaration), para. 9.
Second, in its Memorandum, Russia invokes the allegedly crowded conditions in the Kerch Strait on 25 November as a justification for the actions taken by its Coast Guard.\(^{19}\) Again, the Russian account is full of holes and cannot be relied upon.

The Kerch Strait regularly handles significant traffic in commercial vessels. The slide now on your screen (tab 1, page 8), for example, shows a snapshot of the traffic through the Kerch Strait and to and from the Ukrainian and Russian ports on the Sea of Azov on 7 May.\(^{20}\)

According to Russia, its Coast Guard warned the Ukrainian naval vessels on the night of 24 November of a temporary suspension of the rights of innocent passage for naval vessels in the approach to the entrance to the Kerch Strait due to an expected storm. But, as the Ukrainian Navy report and the declaration of Vice Admiral Tarasov establish, the Ukrainian Navy was unable to find any evidence of such a restriction where it would normally be posted online.\(^{21}\)

Russia’s version of events also fails to mention that, as widely reported in press coverage of the events of 25 November 2018, and reflected in the press photograph now on the screen (tab 1, page 9 of your binders), a tanker was positioned across the span of the Kerch Strait bridge on 25 November 2018 blocking all traffic through the Strait, not just that of naval vessels.\(^{22}\)

Finally, if the Strait had been as crowded by vessels carrying dangerous cargo as Russia now claims it was at the time of these events, it would not have been possible for Russian Coast Guard vessels to engage in a high speed chase and to fire their guns in the direction of the Ukrainian vessels without risking civilian injury or death.

Third, Russia accuses the Ukrainian naval vessels of what it calls “provocative actions”.\(^{23}\) These include the allegation that the Nikopol and Berdyansk were put in a condition of combat readiness with guns uncovered and elevated.\(^{24}\) The suggestion that these two small and lightly armoured Ukrainian vessels were in a position to threaten the numerous Russian government vessels in the area in this way is, on its face, not credible. (Tab 1, page 10) As the Ukrainian Navy report and Vice Admiral Tarasov’s declaration establish, the vessels were under orders to proceed peacefully and abstain from any aggressive acts.\(^{25}\) There is no indication that they did otherwise.\(^{26}\)

Vice Admiral Tarasov points out that sailing with uncovered guns is entirely consistent with Ukrainian standard operating procedure, just as it is with Russia’s

\(^{19}\) Memorandum of the Russian Federation, paras 12, 16.

\(^{20}\) Annex H, Appendix B, MarineTraffic.com, Traffic in the Kerch Strait as of Tuesday, 7 May 2019, at 5:10 PM Kyiv Time.

\(^{21}\) Annex B (Navy Report), para. 9; Annex F (Tarasov Declaration), para. 7.


\(^{23}\) Memorandum of the Russian Federation, para. 16.

\(^{24}\) Ibid.

\(^{25}\) Annex B (Navy Report), para. 6; Annex F (Tarasov Declaration), para. 4.

\(^{26}\) Annex F (Tarasov Declaration), para. 5.
“ARA Libertad” provisional measures order, from “discharging its mission and duties”.11 Further, as suggested by the passage from Oppenheim’s just quoted, other States must not purport to subject the vessel or any person or thing on board to any form of civilian legal process.12

Notwithstanding the “complete immunity” from the exercise of jurisdiction the Law of the Sea Convention accords to warships and other governmental vessels, Russia’s Coast Guard has wrongly suggested that its attempt to prevent the return of the vessels to Odesa, and its ultimate seizure of the vessels, was consistent with the Convention. Specifically, in a report published on its website and reproduced at tab 5, page 4, the FSB Coast Guard stated:

At 6:30 pm, the group of Ukrainian naval vessels, attempting to break through the blockade, made sail and started moving at a course of 200 degrees [– that is a south southwest direction –] heading out of the territorial sea of the Russian Federation. The artillery ships Berdyansk and Nikopol were moving at a speed of 20 knots, and the seagoing tugboat Yana Kapu at 8 knots. The border patrol ships Don and Izumrud started following the group of Ukrainian naval ships and communicated to them an order to stop (in accordance with article 30 of the UN Convention on the Law of the Sea of 1982 and article 12(2) of Federal Law 155 dated July 31, 1998, “On the Internal Seas, Territorial Sea, and Contiguous Zone of the Russian Federation”).13

For the avoidance of doubt, Ukraine of course does not accept that the area of sea within 12 miles of the coast of Crimea is “the territorial sea of the Russian Federation”. However, and contrary to Russia’s position at footnote 58 of its Memorandum of 7 May, the identity of the coastal State is not a question that this Tribunal, or even the Annex VII tribunal still to be constituted, would need to resolve. Even if one were to posit that the vessels were in a Russian territorial sea, article 30 does not permit the coastguard of a littoral state to issue a foreign naval vessel with “an order to stop”. To the contrary, the exclusive right accorded to the Russian Coast Guard under article 30 would have been to require the vessels to leave the territorial sea – something – and it is important to emphasize this – that the report acknowledges the vessels were already in the process of doing.

In claiming to rely on the Law of the Sea Convention’s article 30, Russia overlooks the fact that articles 30 and 31 (now shown on the screen) of the Convention serve to confirm the complete immunity of warships and other governmental vessels from foreign jurisdiction. They provide, as the exclusive remedies for a coastal State in connection with a foreign naval vessel’s non-compliance with its laws and regulations, that a coastal State is permitted under article 30 to “require [a warship] to leave the territorial sea immediately”; and that, pursuant to article 31, the coastal State may subsequently seek compensation from the flag State for any damage caused by the warship.

Indeed, even before the adoption of the Convention, it was well established – under article 23 of the Convention on the Territorial Sea and Contiguous Zone and customary international law – that the only remedy against a warship for claimed non-compliance with the rules on innocent passage was to request that the warship “leave the territorial sea”.14

I would note that Russia itself has relied on this rule to its benefit. In the 1981 submarine incident in Swedish waters I referred to a few minutes ago, the Soviet Union reportedly submitted a diplomatic note (tab 10) to the Swedish government invoking: “The generally recognized principle of international law under which a warship enjoys complete immunity from the jurisdiction of any state other than the one under whose flag she is sailing.”

The note continued: “Even if a foreign warship fails to observe a coastal State’s rules on passage through its territorial waters, the only thing the coastal State may do is demand that she leave its waters.”15

Mr President, Members of the Tribunal, it is therefore apparent that, while Russia claims to have complied with the Convention, it has in fact violated the immunity of Ukraine’s naval vessels and the servicemen on board by seizing them, exercising its jurisdiction over them, and continuing to do so up to the present day.

As Mr Gimblett just described, since the seizure, Russia has compounded its violations of the Convention and aggravated the dispute between the Parties by, among other things, conducting on-board investigations of the Berdyansk, Nikopol, and Yani Kapu, in plain violation of those vessels’ immunity under the Convention; and violating the corresponding immunity of the servicemen on board those vessels by arresting them, initiating and pursuing civilian legal proceedings against them, detaining them in Russian prisons, and repeatedly subjecting them to interrogations, psychological examinations and legal process.

Each additional day of detention, each interrogation, each involuntary psychological examination, and each court appearance compounds Russia’s violation of the immunity guaranteed to Ukraine’s naval vessels under articles 32, 58, 95 and 96 of the Convention.

Mr President, Members of the Tribunal, having set out the legal grounds for Ukraine’s request, I will now turn to showing that, prima facie, an Annex VII tribunal would have jurisdiction over the underlying dispute between the parties. Ukraine has invoked provisions of the Convention that appear, prima facie, to afford a basis for the jurisdiction of the Annex VII tribunal, and Ukraine has complied with the remaining requirements of sections 1 and 2 of Part XV of the Convention, including the obligation to exchange views under article 283. As a consequence, this Tribunal is competent to prescribe provisional measures under article 290, paragraph 5.

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they are not; rather, they involve the exercise of domestic jurisdiction in a law enforcement context.

Before elaborating on these two independent reasons why the military activities exception does not apply in this case, an appropriate starting point is to look at the language of article 298(1)(b).

The Convention itself establishes a categorical distinction between military and law enforcement activities. Article 298(1)(b) contains two separate clauses: one for disputes concerning military activities and another clause for certain disputes concerning law enforcement activities in regard to the exercise of certain sovereign rights or jurisdiction related to fishing and marine scientific research. This structure indicates that the concepts of “military activities” and “law enforcement activities” are distinct, mutually exclusive categories. The Virginia Commentary confirms that in crafting article 298(1)(b) the drafters of the Convention meant to “distinguish between military activities and law enforcement activities.”¹ Scholars have likewise noted that the Convention’s optional exception to jurisdiction for military activities was included on the understanding that law enforcement activity would not be considered a military activity.²

In order for the military activities exception to be properly invoked, Ukraine’s claims must concern military activities. In this case, they do not. Ukraine’s claims relate to the seizure and detention of Ukrainian naval vessels and their crew, despite those vessels’ immunity from Russian jurisdiction. Simply put, these claims do not concern activities that are military in nature.

I will now elaborate on the two legal reasons for why Russia’s invocation of the military activities exception under article 298(1)(b) cannot be accepted and why it is therefore appropriate for this Tribunal to determine that an Annex VII tribunal would, prima facie, have jurisdiction over Ukraine’s claims.

First, as noted, the military activities exception does not apply when the party whose actions are at issue has characterized its actions as non-military in nature.

Second, the military activities exception is inapplicable in the instant case because, even setting aside Russia’s own characterization of its activity, Ukraine does not seek resolution of a dispute concerning military activities. Ukraine’s claims do not allege a violation of the Convention based on activities that are military in type, but, rather, Ukraine’s claims are based on Russia’s unlawful exercise of jurisdiction in a law enforcement context.

Let me begin with the first legal basis for rejecting Russia’s invocation of the military activities exception, and that is Russia’s own characterization of its activities. In evaluating the applicability of the military activities exception to the Philippines’ claims against China in the South China Sea Arbitration, the Annex VII tribunal relied on China’s own characterization of the Chinese activities that the Philippines had