

# 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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**Verbatim Record**

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1 the servicemen, subjecting them to a maximum sentence of six years in a Russian  
2 labour camp.

3  
4 These then are the facts upon which Ukraine bases its claim. As I mentioned at the  
5 outset, none of them are in dispute between the Parties. In its Memorandum of  
6 7 May, however, Russia has raised a number of allegations about the events  
7 preceding the seizure and detention of the vessels. To be clear, the dispute Ukraine  
8 has submitted to arbitration, and that is now before this Tribunal, concerns only  
9 Russia's exercise of jurisdiction over the three Ukrainian vessels in spite of their  
10 complete immunity. That includes both the seizure and detention of those vessels,  
11 and the subsequent civilian legal process to which both the vessels and those on  
12 board have been subjected. Russia's version of what happened in the hours leading  
13 up to the seizure and detention is simply not relevant to the immunity of the  
14 Ukrainian vessels at the time they were seized. Nonetheless, in order to correct the  
15 record, I will briefly respond to certain of Russia's contentions.

16  
17 First, in its Memorandum of 7 May, Russia describes the mission of the three  
18 Ukrainian naval vessels as a "secret' incursion ... into Russian territorial waters".<sup>14</sup>  
19 That is simply not the case. The mission of the vessels was to navigate from the  
20 Ukrainian port of Odesa to the Ukrainian port of Berdyansk on the northern shore of  
21 the Sea of Azov, where they were thereafter to be permanently stationed.<sup>15</sup> Other  
22 Ukrainian naval vessels had successfully completed the same transit as recently as  
23 September 2018, just two months earlier. On the slide now on the screen (tab 1,  
24 page 7), you will see a general area map that reflects the location of both ports,  
25 Odesa and Berdyansk, and of the Kerch Strait.

26  
27 Russia refers to a document found on board the *Nikopol* guiding them, in Russia's  
28 translation, to sail "covertly outside of the coastal and maritime regions of patrol of  
29 the Black Sea Fleet of Russia and the Coast Guard of the FSB of Russia."<sup>16</sup> Vice  
30 Admiral Tarasov confirms that the purpose of this guidance was to avoid  
31 unnecessarily provoking incidents with Russian government vessels during the two  
32 days it would take to reach the Kerch Strait from Odesa.<sup>17</sup>

33  
34 Nor can the guidance be read as suggesting that the mission of the naval vessels  
35 was to transit the Kerch Strait secretly – an impossible task given the breadth of the  
36 Kerch Strait and the navigable channels through it. Indeed, as the Ukrainian Navy  
37 report at tab 3 confirms, as it approached the Kerch Strait, the *Berdyansk* radioed  
38 both a post of the Russian Border Guard Service and the port authorities at Kerch  
39 and Kavkaz ports to announce the intention of the three vessels to proceed through  
40 the Kerch Strait.<sup>18</sup>

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<sup>14</sup> Memorandum of the Government of the Russian Federation (7 May 2019), para. 28 [hereinafter "Memorandum of the Russian Federation"].

<sup>15</sup> 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.

<sup>16</sup> Memorandum of the Russian Federation, para. 20.

<sup>17</sup> Annex F (Tarasov Declaration), para. 9.

<sup>18</sup> Annex B (Navy Report), para. 10.

1 Second, in its Memorandum, Russia invokes the allegedly crowded conditions in the  
2 Kerch Strait on 25 November as a justification for the actions taken by its Coast  
3 Guard.<sup>19</sup> Again, the Russian account is full of holes and cannot be relied upon.

4  
5 The Kerch Strait regularly handles significant traffic in commercial vessels. The slide  
6 now on your screen (tab 1, page 8), for example, shows a snapshot of the traffic  
7 through the Kerch Strait and to and from the Ukrainian and Russian ports on the Sea  
8 of Azov on 7 May.<sup>20</sup>

9  
10 According to Russia, its Coast Guard warned the Ukrainian naval vessels on the  
11 night of 24 November of a temporary suspension of the rights of innocent passage  
12 for naval vessels in the approach to the entrance to the Kerch Strait due to an  
13 expected storm. But, as the Ukrainian Navy report and the declaration of Vice  
14 Admiral Tarasov establish, the Ukrainian Navy was unable to find any evidence of  
15 such a restriction where it would normally be posted online.<sup>21</sup>

16  
17 Russia's version of events also fails to mention that, as widely reported in press  
18 coverage of the events of 25 November 2018, and reflected in the press photograph  
19 now on the screen (tab 1, page 9 of your binders), a tanker was positioned across  
20 the span of the Kerch Strait bridge on 25 November 2018 blocking all traffic through  
21 the Strait, not just that of naval vessels.<sup>22</sup>

22  
23 Finally, if the Strait had been as crowded by vessels carrying dangerous cargo as  
24 Russia now claims it was at the time of these events, it would not have been  
25 possible for Russian Coast Guard vessels to engage in a high speed chase and to  
26 fire their guns in the direction of the Ukrainian vessels without risking civilian injury or  
27 death.

28  
29 Third, Russia accuses the Ukrainian naval vessels of what it calls "provocative  
30 actions".<sup>23</sup> These include the allegation that the *Nikopol* and *Berdyansk* were put in a  
31 condition of combat readiness with guns uncovered and elevated.<sup>24</sup> The suggestion  
32 that these two small and lightly armoured Ukrainian vessels were in a position to  
33 threaten the numerous Russian government vessels in the area in this way is, on its  
34 face, not credible. (Tab 1, page 10) As the Ukrainian Navy report and Vice Admiral  
35 Tarasov's declaration establish, the vessels were under orders to proceed peacefully  
36 and abstain from any aggressive acts.<sup>25</sup> There is no indication that they did  
37 otherwise.<sup>26</sup>

38  
39 Vice Admiral Tarasov points out that sailing with uncovered guns is entirely  
40 consistent with Ukrainian standard operating procedure, just as it is with Russia's

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<sup>19</sup> Memorandum of the Russian Federation, paras 12, 16.

<sup>20</sup> Annex H, Appendix B, MarineTraffic.com, Traffic in the Kerch Strait as of Tuesday, 7 May 2019, at 5:10 PM Kyiv Time.

<sup>21</sup> Annex B (Navy Report), para. 9; Annex F (Tarasov Declaration), para. 7.

<sup>22</sup> Annex H, Appendix A, AP Photo, The Kerch Bridge Is Seen Blocked for Ships Entrance, Near Kerch, Crimea (25 November 2018).

<sup>23</sup> Memorandum of the Russian Federation, para. 16.

<sup>24</sup> *Ibid.*

<sup>25</sup> Annex B (Navy Report), para. 6; Annex F (Tarasov Declaration), para. 4.

<sup>26</sup> Annex F (Tarasov Declaration), para. 5.

1 “ARA *Libertad*” provisional measures order, from “discharging its mission and  
 2 duties”.<sup>11</sup> Further, as suggested by the passage from Oppenheim’s just quoted, other  
 3 States must not purport to subject the vessel or any person or thing on board to any  
 4 form of civilian legal process.<sup>12</sup>

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

12  
 13 At 6:30 pm, the group of Ukrainian naval vessels, attempting to break  
 14 through the blockade, made sail and started moving at a course of 200  
 15 degrees [– that is a south southwest direction –] heading out of the  
 16 territorial sea of the Russian Federation. The artillery ships *Berdyansk* and  
 17 *Nikopol* were moving at a speed of 20 knots, and the seagoing tugboat  
 18 *Yana Kapu* at 8 knots. The border patrol ships *Don* and *Izumrud* started  
 19 following the group of Ukrainian naval ships and communicated to them an  
 20 order to stop (in accordance with article 30 of the UN Convention on the  
 21 Law of the Sea of 1982 and article 12(2) of Federal Law 155 dated July 31,  
 22 1998, “On the Internal Seas, Territorial Sea, and Contiguous Zone of the  
 23 Russian Federation”).<sup>13</sup>

24  
 25 For the avoidance of doubt, Ukraine of course does not accept that the area of sea  
 26 within 12 miles of the coast of Crimea is “the territorial sea of the Russian  
 27 Federation”. However, and contrary to Russia’s position at footnote 58 of its  
 28 Memorandum of 7 May, the identity of the coastal State is not a question that this  
 29 Tribunal, or even the Annex VII tribunal still to be constituted, would need to resolve.  
 30 Even if one were to posit that the vessels were in a Russian territorial sea, article 30  
 31 does not permit the coastguard of a littoral state to issue a foreign naval vessel with  
 32 “an order to stop”. To the contrary, the exclusive right accorded to the Russian Coast  
 33 Guard under article 30 would have been to require the vessels to leave the territorial  
 34 sea – something – and it is important to emphasize this – that the report  
 35 acknowledges the vessels were already in the process of doing.

36  
 37 In claiming to rely on the Law of the Sea Convention’s article 30, Russia overlooks  
 38 the fact that articles 30 and 31 (now shown on the screen) of the Convention serve  
 39 to confirm the complete immunity of warships and other governmental vessels from  
 40 foreign jurisdiction. They provide, as the exclusive remedies for a coastal State in  
 41 connection with a foreign naval vessel’s non-compliance with its laws and  
 42 regulations, that a coastal State is permitted under article 30 to “require [a warship]  
 43 to leave the territorial sea immediately”; and that, pursuant to article 31, the coastal  
 44 State may subsequently seek compensation from the flag State for any damage  
 45 caused by the warship.

<sup>11</sup> “ARA *Libertad*” (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 332, paras 97-98.

<sup>12</sup> See R. Jennings and A. Watts, *Organs of the States for their international relations: Miscellaneous agencies, State Ships Outside National Waters*, Oppenheim’s International Law Vol. 1 (Eds. Jennings and Watts) (19 June 2008), § 563.

<sup>13</sup> Annex A, Appendix C (FSB Report), p. 4.

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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”.<sup>14</sup>

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.”<sup>15</sup>

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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<sup>14</sup> Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, at article 23.

<sup>15</sup> Milton Leitenberg, The Case of the Stranded Sub, Bulletin of Atomic Scientists, vol. 38, no. 3, p. 10-11 (March 1982).

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

3  
4 Before elaborating on these two independent reasons why the military activities  
5 exception does not apply in this case, an appropriate starting point is to look at the  
6 language of article 298(1)(b).

7  
8 The Convention itself establishes a categorical distinction between military and law  
9 enforcement activities. Article 298(1)(b) contains two separate clauses: one for  
10 disputes concerning military activities and another clause for certain disputes  
11 concerning law enforcement activities in regard to the exercise of certain sovereign  
12 rights or jurisdiction related to fishing and marine scientific research. This structure  
13 indicates that the concepts of “military activities” and “law enforcement activities” are  
14 distinct, mutually exclusive categories. The *Virginia Commentary* confirms that in  
15 crafting article 298(1)(b) the drafters of the Convention meant to “distinguish  
16 between military activities and law enforcement activities.”<sup>1</sup> Scholars have likewise  
17 noted that the Convention’s optional exception to jurisdiction for military activities  
18 was included on the understanding that law enforcement activity would not be  
19 considered a military activity.<sup>2</sup>

20  
21 In order for the military activities exception to be properly invoked, Ukraine’s claims  
22 must concern military activities. In this case, they do not. Ukraine’s claims relate to  
23 the seizure and detention of Ukrainian naval vessels and their crew, despite those  
24 vessels’ immunity from Russian jurisdiction. Simply put, these claims do not concern  
25 activities that are military in nature.

26  
27 I will now elaborate on the two legal reasons for why Russia’s invocation of the  
28 military activities exception under article 298(1)(b) cannot be accepted and why it is  
29 therefore appropriate for this Tribunal to determine that an Annex VII tribunal would,  
30 *prima facie*, have jurisdiction over Ukraine’s claims.

31  
32 First, as noted, the military activities exception does not apply when the party whose  
33 actions are at issue has characterized its actions as non-military in nature.

34  
35 Second, the military activities exception is inapplicable in the instant case because,  
36 even setting aside Russia’s own characterization of its activity, Ukraine does not  
37 seek resolution of a dispute concerning military activities. Ukraine’s claims do not  
38 allege a violation of the Convention based on activities that are military in type, but,  
39 rather, Ukraine’s claims are based on Russia’s unlawful exercise of jurisdiction in a  
40 law enforcement context.

41  
42 Let me begin with the first legal basis for rejecting Russia’s invocation of the military  
43 activities exception, and that is Russia’s own characterization of its activities. In  
44 evaluating the applicability of the military activities exception to the Philippines’  
45 claims against China in the *South China Sea Arbitration*, the Annex VII tribunal relied  
46 on China’s own characterization of the Chinese activities that the Philippines had

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<sup>1</sup> Myron H. Nordquist et al., *United Nations Convention on the Law of the Sea: A Commentary* (2014) (“*Virginia Commentary*”), p. 135.

<sup>2</sup> See Gurdip Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (1985), p. 148.