SEPARATE OPINION OF JUDGE GAO

1. I have voted in favour of the Order simply for the reason and purpose of upholding and honouring the well-established and longstanding basic principle of the immunity of warships under the 1982 United Nations Convention on the Law of the Sea ("UNCLOS" or "the Convention") and customary international law. However, I have major reservations on the approach to and treatment of the issue of the military activities exception in the Order.

2. Before proceeding to the points, I wish to make my position on the immunity of warships absolutely clear. That is to say, warships and naval auxiliary vessels enjoy complete immunity under UNCLOS and customary international law. Therefore, the three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol* and the *Yani Kapu*) and the 24 servicemen on board those vessels should never have been arrested and detained in any event. As a corollary, both the vessels and the servicemen should be unconditionally released without delay.

3. The familiar doctrine of sovereign immunity is articulated by a leading scholar in the following statement:

> The general doctrine is, therefore, that a warship remains under the exclusive jurisdiction of her flag-State during her entry and stay in foreign ports and waters. No legal proceedings can be taken against either for recovery of possession or for damages for collision or for a salvage reward, or for any other cause, and no official of the territorial State is permitted to board the vessel against the wishes of her commander.[1]

4. 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: warships and ships owned or operated by a State and used only on government non-commercial service "have complete immunity from the jurisdiction of any State other than the flag State."

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[1] C.J. Colombos, *The International Law of the Sea* (4th Edition, 1959), Longmans Green & Co., London, at p. 227.

5. That being said, UNCLOS has also injected a new element into the traditional doctrine: the military activities exception to compulsory dispute settlement procedures embodied in article 298, paragraph 1(b). While the traditional concept of complete immunity for warships may favour naval and maritime powers, coastal States can now also benefit to some extent from the new regime of the military activities exception for the purpose of safeguarding their sovereignty and jurisdiction.

6. Hence, the traditional doctrine of the immunity of warships may now be subject to the limitation of the military activities exception, in cases where such a declaration made by a party under article 298, paragraph 1(b), to exclude military activities from the compulsory dispute settlement procedure is upheld by a court or tribunal in legal proceedings.

7. As indicated, my major reservation concerns the way in which the military activities exception is interpreted and applied in the Order.

8. Article 298, paragraph 1(b), of the Convention on optional exceptions to compulsory jurisdiction provides:

> 1. 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:
> …
> (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

9. Article 298 of the Convention is a carefully designed and articulated compromise between the compulsory dispute settlement procedures on the one hand and State sovereignty and jurisdiction on the other hand. It serves as a balance by permitting States to except certain disputes concerning sensitive issues of sovereignty, such as maritime boundary delimitation, historical bay and titles, military activities, and certain law enforcement activities, from the application of Section 2 of Part XV in order to foster a universal acceptance of the Convention.

10. Article 298, paragraph 1(b), of the Convention provides that a State Party to the Convention may declare that it does not accept any one or more of the procedures provided for in section 2 with respect to

> disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3.

11. There have thus far been 27 States that have made declarations pursuant to article 298, paragraph 1(b), on the military activities exception, including: (1) Algeria (on 22.05.2018); (2) Argentina (upon ratification on 01.12.1995); (3) Belarus (upon ratification on 30.08.2006); (4) Cabo Verde (upon ratification on 10.08.1987); (5) Canada (upon ratification on 07.11.2003); (6) Chile (upon ratification on 25.08.1997); (7) China (on 25.08.2006); (8) Cuba (upon ratification on 15.08.1984); (9) Denmark (upon ratification on 16.11.2004); (10) Ecuador (upon accession on 24.09.2012); (11) Egypt (upon ratification on 26.08.1983 and on 16.02.2017); (12) France (upon ratification on 11.04.1996); (13) Greece (upon ratification on 21.07.1995 and on 16.01.2015); (14) Guinea-Bissau (upon ratification on 25.08.1986); (15) Mexico (on 06.01.2003); (16) Nicaragua (upon ratification on 03.05.2000); (17) Norway (upon ratification on 24.06.1996); (18) Portugal (upon ratification on 03.11.1997); (19) Republic of Korea (on 18.04.2016); (20) Russian Federation (upon signature on 10.12.1992 and ratification on 12.03.1997); (21) Saudi Arabia (on 02.01.2018); (22) Slovenia (on 11.10.2011); (23) Thailand (upon ratification on 15.05.2011); (24) Tunisia (upon ratification on 24.04.1985 and on 22.05.2001); (25) Ukraine (upon ratification on 26.07.1999); (26) United Kingdom (on 12.01.1998 and 07.04.2003); (27) Uruguay (upon ratification on 10.12.1992).[2]

12. Ukraine declared upon ratification on 26 July 1999

> in accordance with article 298 of the Convention, that it does not accept, unless otherwise provided by specific international treaties of Ukraine with relevant States, the compulsory procedures entailing binding decisions for

[2] Declarations made under articles 287 and 298 of the Convention, ITLOS/47/11/Rev. 1, 26 February 2019.

> the consideration of disputes relating to sea boundary delimitations, disputes involving historic bays or titles, and disputes concerning military activities.[3]

13. The Russian Federation declared upon ratification on 12 March 1997 that

> in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 of the Convention, relating to sea boundary delimitations, or those involving historic bays or titles; disputes concerning military activities, including military activities by government vessels and aircraft, and disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction; and disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations.[4]

14. Both Parties have made declarations to exclude disputes concerning military activities from compulsory dispute settlement procedures under section 2 of Part XV of the Convention. But, in comparison, the Russian Federation further excludes in its declaration "disputes concerning law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction".

15. Despite their identical declarations on the military activities exception, Ukraine and the Russian Federation, however, hold confronting views on the characterization of the incident and the applicability of article 298, paragraph 1(b).

16. While the Russian Federation maintains that "[i]t is manifestly a dispute concerning 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 the declarations do not therefore exclude the dispute from the compulsory dispute settlement procedures.

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[3] UN Treaty collection database.
[4] Ibid.

17. Accordingly, the question to be dealt with in this case is whether the dispute between the two Parties concerns military or law enforcement activities. That is the crux of the present case.

18. The term "military activities" is used but not defined in the Convention. Nor has it been dwelled upon by international courts and tribunals in case law since the entry into force of the Convention.

19. Nonetheless, the literature generally seems to support a relatively generous interpretation of this concept. For example, S. Talmon shares the view that:

> there is a widespread agreement that, considering the highly political nature of military activities, the term must be interpreted widely. Military activities are not limited to actions by warships and military aircraft or government vessels and aircraft engaged in non-commercial service.[5]

20. A recent arbitral award briefly touches upon the issue of the military activities exception. The reasoning adopted by the tribunal suggests that the presence of one or more naval vessels may itself be found to characterize the situation as a "dispute concerning military activities, which would result in exclusion from the dispute settlement procedures …".[6] But such a line of reasoning and conclusion do not sound very convincing; as one author opines: "[h]owever, this component of the decision is also problematic for a number of reasons. Of these, the most significant is that it appears to considerably lower the threshold …" for the military activities exception.[7] Another commentator also points out that "[t]he conflicting interpretation and application of Article 298(1)(b) by the tribunal are obvious".[8]

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[5] S. Talmon, "The South China Sea Arbitrations: is there a Case to Answer?" in S. Talmon and B.B. Jia, *The South China Sea Arbitration: A Chinese Perspective*, Hart Publishing, 2014, at p. 57-58.
[6] Arbitration between the Republic of the Philippines and the People's Republic of China, UNCLOS Annex VII Arbitral Tribunal, Award, 12 July 2016, para. 1161, available at www.pca-cpa.org.
[7] D. Letts, R. Mclaughlin and H. Nasu, "Maritime Law Enforcement and the Aggravation of the South China Sea Dispute: Implications for Australia", *Australian Year Book of International Law*, vol. 34, 2017, pp. 53-63, at p. 62.
[8] K. Zhou & Q. Ye (2017), "Interpretation and application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal", *Ocean Development & International Law,* 48:331-344, at p. 340.

21. The interpretation and application of article 298 are at the centre of three recent cases submitted to Annex VII arbitral tribunals,[9] and the present case relating to provisional measures submitted to this Tribunal. All these four cases involve a choice between and a decision on a restrictive or expansive interpretation of article 298. The jurisdiction of the tribunals in these cases also depends, in whole or in part, on the interpretation and application of article 298, paragraph 1(b).

22. Evaluation of military activities should be based on a combination of factors, such as the intent and purpose of the activities, taking into account the relevant circumstances of the case, such as the manner in which the Parties deployed their forces and the way in which the Parties engaged one another at sea.

23. The facts of the incident and the sequence of the events in the present case can be divided into two distinctive phases: transit passage and stand-off at sea. During an intended passage through the Kerch Strait on 25 November 2018, the three Ukrainian naval vessels were ordered by the Russian Coast Guard to stop and suspend their passage because of the failure of the Ukrainian naval vessels to comply with the relevant regulatory procedures and the temporary closure of the Strait for safety reasons following a recent storm.

24. When the order to stop was ignored by the Ukrainian naval vessels, they were stopped and blocked in the vicinity of an anchorage, with restrictions on their movement, by Russian Coast Guard vessels for allegedly making an illegal crossing of the State border of the Russian Federation.

25. It is from this moment on that the incident escalated from a normal passage into a fully-fledged stand-off at sea, involving the three Ukrainian naval vessels on one side and a combination of ten Russian naval warships and Russian Coast Guard vessels, plus one combat helicopter, on the other.

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[9] *The South China Sea Arbitration (The Philippines* v. *China)*, the *Arctic Sunrise Arbitration (Kingdom of the Netherlands* v. *Russian Federation)* and the *Chagos Marine Protected Area Arbitration (Mauritius* v. *United Kingdom)*.

26. After being blocked for eight hours, the Ukrainian vessels started to break up the block and navigated back from the Kerch Strait. The stand-off is further characterized by a series of violent acts at sea, including firing of warning and target shots on the *Berdyansk*. Three members of the crew on board the *Berdyansk* were wounded by the target shots.

27. Moreover, the Ka-52 combat helicopter of the Russian Ministry of Defence took an active part in the pursuit to stop and detain the Ukrainian naval vessel *Nikopol*. The corvette *ASW "Suzdalets"* of the Black Sea Fleet of the Russian Federation was deployed to be in the vicinity for the purpose of "monitoring the Ukrainian naval vessels' action".[10]

28. As a result of these serious encounters at sea, the three Ukrainian naval vessels and the 24 servicemen were arrested and detained by the Russian Coast Guard Vessels and the combat helicopter. The 24 servicemen have been subsequently charged in domestic judicial proceedings in Russia.

29. This subsequent domestic legal proceedings against the servicemen in Russia may be a relevant factor of the case, but it should not have a decisive bearing on the characterization of the activities in question.

30. An objective evaluation of the activities in question should also take into account the international actions, official positions, and legal documents of the Parties.

31. Before the Request for provisional measures submitted to this Tribunal, the matter had already been brought by Ukraine to the United Nations Security Council and the European Court of Human Rights (ECHR) on 26 November 2018.

32. It is a matter of common legal knowledge that only events of use or threat of force in potential violation of article 2(4) of the Charter of the United Nations can be referred to the UN Security Council for a resolution; other disputes concerning the

[10] Statement of Claim (Request of Ukraine); Memorandum of Russia, 7 May 2019.

interpretation and application of the Convention are normally amenable to resolution through diplomatic or judicial means.

33. Since this Tribunal has ruled in the *"ARA Libertad"* case "that a warship is an expression of the sovereignty of the State whose flag it flies",[11] it should be recognized that the firing of target shots against a naval vessel is therefore tantamount to use of force against the sovereignty of the State whose flag that vessel flies. This important fact falls well within the military activities.

34. This fact is perhaps the most decisive factor, out of all the information and evidence available to the Tribunal, for the purpose of evaluating the nature of the activities in question. This mere factor has effectively converted what was initially a law enforcement operation into a military situation.

35. The military nature of the activities is also officially recognized in the request for interim measures lodged by Ukraine with the ECHR:

> the Russian combat helicopter initiated an attack on the Ukrainian ships …The Ukrainian ships were surrounded by 10 vessels of the Russian Coast Guard and of the Black Sea Fleet of the Russian Navy … the members of the Ukrainian Navy, taken by the Russian forces following an armed combat when following the orders of his superiors in the Ukrainian Navy Command should be treated by the Russian authorities as the prisoners of war and accorded the treatment, provided for in the Third Geneva Convention.[12]

36. In this urgent request for interim measures, Ukrainian explicitly requested that "the sailors be treated as *prisoners of war* in accordance with the Third Geneva Convention of 1949 and that they be repatriated without delay" (emphasis added).[13]

37. These international actions and legal proceedings between the two Parties provide manifest evidence in support of the military nature of the activities under discussion.

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[11] *"ARA Libertad" (Argentina* v. *Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012,* p. 332, para. 94.

[12] Quoted in para. 32 (e) of the Memorandum of the Government of Russian Federation, 7 May 2019, originally paras 11, 13-14 and 31 of the Request for Interim Measures of Ukraine, 26 November 2018.

[13] Press Release, ECHR 412 (2018), 30 November 2018.

38. Nonetheless, it is regrettable that the Order has failed to pay attention to, and take into account, these important facts and the evidence available to the Tribunal.

39. During the confrontation, all of these activities, such as prolonged stand-off between the Ukrainian military force and the Russian combination of military and paramilitary forces, the "hot pursuit" and ramming, the firing of warning and target shorts, the vessel damage and personal casualties suffered from the shooting, should be deemed to constitute military activities for the purposes of article 298, paragraph 1(b).

40. On the contrary, a different characterization and interpretation of these activities was offered in the Order. It is considered in the Order that the use of force is "in the context of law enforcement operation rather than a military operation"[14] and "the Tribunal accordingly considers that *prima facie* article 298, paragraph 1(b), of the Convention does not apply in the present case."[15]

41. This part of the Order is perhaps problematic for a number of reasons. Of these, the most significant is that it appears to have considerably raised the threshold for the military activities exception. Such a high threshold for the application of article 298, paragraph 1(b), may potentially have legal as well as political implications.

42. The ruling in the present case and that in another recent arbitral award on the military activities exception offer conflicting interpretations and applications of article 298, paragraph 1(b).

43. While the arbitral award found that the event "involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another" constitutes "*a quintessentially military situation*"

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[14] Para. 73 of the Order, *Case concerning the detention of three Ukrainian vessels*, ITLOS, 25 May 2019.
[15] Ibid., para. 77.

(emphasis added),[16] the present case decides that, although the Russian naval vessels appeared in the vicinity for monitoring the Ukrainian naval vessels' action and the combat helicopter participated in the operation, "what occurred appears to be the use of force in the context of a *law enforcement operation* …" (emphasis added).[17]

44. These contradictory interpretations of article 298, paragraph 1(b), and the double standards employed in its application will certainly give rise to legal confusion between the Parties and among States.

45. A high threshold for the military activities exception may serve as an incentive for States to escalate rather than de-escalate a conflict by deploying a great numbers of naval vessels and increasing the level of forces in order to qualify for the military activities exception to compulsory dispute settlement jurisdiction.

46. Those States that have made declarations under article 298, paragraph 1(b), would fall into frustration and disappointment upon learning from the jurisprudence that their declarations made in accordance with the Convention on the military activities exception can hardly serve their original intent and purpose, since a strict interpretation of this provision has been adopted in case law for its application. It may also cast doubt in the minds of these States about the impartiality and effectiveness of the compulsory dispute settlement system.

47. The recent judicial developments in this respect may therefore cause general concern that the UNCLOS dispute settlement organs might intrude upon military activities excluded from their jurisdiction.

48. The differing interpretation and application of article 298, paragraph 1(b), in recent cases could create fragmentation in not only the jurisdiction of dispute settlement organizations but also international jurisprudence. States Parties might be

[16] Supra note 6.
[17] Supra note 14.

prompted by recent judicial practice to ponder what, if any, are the objective legal criteria for the military activities exception.

49. In conclusion, although “military activities” and “law enforcement activities” in article 298, paragraph 1(b), ought to be read as distinct categories, they are in reality not always so clearly differentiated and mutually exclusive. For instance, an initial law enforcement activity may eventually escalate into a military situation for one reason or another. The Kerch Strait incident perhaps represents such an example.

50. In my view, the dispute in question has, at least, a mixed nature of both military and law enforcement activities or, in other words, it is a mixed dispute involving both military and law enforcement elements.

51. It is perhaps this law enforcement element of a mixed dispute that appears to equally afford a basis on which the *prima facie* jurisdiction of the Annex VII arbitral tribunal could be found. Unfortunately, such a plausible road is not taken in the Order.

52. This Opinion does not consider it necessary to apply a preponderance test at this stage of the provisional measures to determine which element, military or law enforcement, is predominant, since that is a task for the Annex VII arbitral tribunal to be constituted to decide in the subsequent arbitral proceedings.

53. Last but not the least, it needs to be pointed out that it may have touched upon, or even prejudged, the merits of the case for the Order to rule conclusively at this stage on the nature of the incident as law enforcement activities.

54. Recent judicial practice, albeit still very limited, on the treatment of the military activities exception embodied in the Convention does not seem to shed much light on the interpretation and application of article 298, paragraph 1(b).

55. A legally sound and viable approach to the issue in question should endeavour, bearing in mind the negotiating history of the Convention, to avoid

introducing and applying either a very low or a very high threshold for the military activities exception.

(signed) Zhiguo Gao