

CASE NOTE: DETENTION OF THREE UKRAINIAN NAVAL VESSELS (UKRAINE V RUSSIAN FEDERATION) (PROVISIONAL MEASURES) (INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, CASE NO 26, 25 MAY 2019)

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Introduction

The International Tribunal for the Law of the Sea (ITLOS or the Tribunal) was established pursuant to the *United Nations Convention for the Law of the Sea* (UNCLOS) after the Convention came into force in 1994.¹ Annex VI established the actual Tribunal² and, as The Free and Hanseatic City of Hamburg agreed to pay for the cost of the land and premises, so the negotiating parties agreed that ITLOS have its seat and headquarters there.³ The composition of the Tribunal was to be of 21 judges with recognized competence in law of the sea with the ability for the parties to appoint an ad hoc judge each if one of their nationality was not already on the Tribunal.⁴

One of the better things from UNCLOS was the establishment of ITLOS and one of the better things from ITLOS is that it is a convenient international Tribunal to which a flag State may apply for the prompt release of its vessel that has been arrested by a foreign State.⁵

Over the 22 years of its decision making the Tribunal has decided 26 cases and it has one pending, and of those 27 cases 18 are related to shipping of which most are for prompt release of the vessel. This Case Note is concerned with the most recent prompt release decision from ITLOS (as at June 2019), namely *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Provisional Measures)*.⁶

Facts

In 2014 the Ukraine was invaded by Russia, initially under the guise of militia, and there has been armed conflict ever since, mainly on the land but also in the air and at sea. The Russian Federation was determined to have control of the Crimean Peninsula as it has the port of Sevastopol, which is Russia's only warm water port on the European side of the country.⁷ Wikipedia put the situation succinctly as:

The location and navigability of the city's harbours have made Sevastopol a strategically important port and naval base throughout history. The city has been a home to the Russian Black Sea Fleet, which is why it was considered as a separate city in Crimea of significant military importance and was once operated by the Soviet Union as a closed city.⁸

The Crimean Peninsula intrudes into the Black Sea and the Kersch Strait, where these events occurred, joins the main body of the Black Sea with the Sea of Azov. On 25 November 2018 three Ukrainian naval vessels, two patrol boats and an auxiliary support vessel, set out to transit from the Black Sea through the Kersch Strait to a Ukrainian port in the Sea of Azov. There should have been no issue about that as, despite the military tensions, Ukrainian naval vessels did this from time to time with the last passage being two months before.

On this occasion, however, the Russian Coast Guard challenged them and said the Kersch Strait was closed. The Ukrainian vessels anchored and waited for eight hours and then set sail back for home. The Russians ordered them

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¹ [1994] ATS 31.

² UNCLOS annex VI, art 1(1).

³ 'The Tribunal: History', *ITLOS* (Web Page, 2019) <<https://www.itlos.org/the-tribunal/history/>>.

⁴ UNCLOS annex VI, arts 2, 17.

⁵ UNCLOS Article 290 provides the Tribunal may order Provisional Measures and Article 292 provides that one of those orders can be the prompt release of the vessels provided the alleged offending party provide a reasonable bond or other financial security.

⁶ (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) ('*Three Ukrainian Naval Vessels*').

⁷ 'Russian Military Intervention in Ukraine (2014–Present)', *Wikipedia* (Web Page, 2019)

<[https://en.wikipedia.org/wiki/Russian_military_intervention_in_Ukraine_\(2014%E2%80%93present\)](https://en.wikipedia.org/wiki/Russian_military_intervention_in_Ukraine_(2014%E2%80%93present))>.

⁸ 'Sevastopol', *Wikipedia* (Web Page, 2019) <<https://en.wikipedia.org/wiki/Sevastopol>>.

to stop which they ignored, so the Russians fired warning shots, then fired into one of the vessels wounding three crew and damaging the vessel. They then escorted the vessels and crews into the Russian port, imprisoned the 24 officers and crew and charged them in Russian courts with illegally crossing the State border into Russia.⁹



Map of part of the Black Sea, the Crimean Peninsula and Kersch Strait.¹⁰

The Ukrainian authorities initially sought relief in the European Court of Human Rights (ECHR) but finally in March 2019 they invoked UNCLOS and commenced arbitration proceedings against Russia under UNCLOS Article 287 and Annex VII. On 16 April 2019 Ukraine then sought provisional orders for relief in the nature of a prompt release order, pending the substance of the matter being heard by the Arbitral Panel. Provisional Orders are available under Article 290 and, in particular, the Provisional Order of Prompt Release relief is available under Article 292.

None of these proceedings should be unfamiliar to the Common Lawyer as, in any superior court involved in litigation and in most arbitrations, a party can apply for interim interlocutory relief once the main proceedings are commenced. It is frequently done in ship arrest cases. In ITLOS these procedures are all set out in detail in UNCLOS treaty itself, the ITLOS Statutes and the Rules.

Proceedings in the Tribunal

The Tribunal was concerned, of course, to meet the requirements of UNCLOS Articles 290 and 292 before it could make provisional orders including release of the vessels and crews. To do this it had to decide a number of preliminary points, which will be mentioned shortly.

⁹ *Three Ukrainian Naval Vessels* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) [30]–[32], [71]–[76].

¹⁰ Maps online at <https://activismwithali.files.wordpress.com/2014/03/ukraine.jpg>.

These proceedings in the Tribunal had some unusual features because they were naval and not civilian vessels. The main principles about the immunity of naval vessels had been decided by ITLOS in the *ARA Libertad* case in 2012 when private principals arrested the Argentinian naval training ship *Libertad* while it was on a goodwill visit to Ghana for a commercial debt owed by the Argentinian government.¹¹ The Tribunal ordered its release.

In this Ukrainian case Russia refused to participate in the hearing but did make written submissions.¹² Failing to appear at the hearing to put the arguments is, in the author's view, a big mistake as opportunities are thereby missed that otherwise could have been taken in the course of the hearing. China had refused to appear in the *Philippines v China* arbitration over the South China Sea¹³ and got a worse result than otherwise may have been the case. Russia had refused to appear in its earlier ITLOS case of *Arctic Sunrise* when it had boarded and arrested the Greenpeace vessel in the Russian EEZ that was protesting against Russian conduct.¹⁴ The Tribunal ordered the release of the vessel and crews upon the posting of a suitable bank guarantee.¹⁵

Rulings of the Tribunal

Declarations Relating to Military Activities

A major objection by Russia to jurisdiction was that both Russia and the Ukraine had, on acceding to UNCLOS, filed Declarations stating that their agreement to the UNCLOS dispute settlement proceedings did not apply to 'military activities'.¹⁶ This is, of course, fairly normal as military activities are not usually subject to civil arbitral tribunals under UNCLOS. To meet this point the Ukraine submitted that the arrest of its vessels was a criminal law enforcement activity and not a military activity and the mere fact that it involved naval vessels was not the deciding point. Russia submitted to the contrary relying on the *Philippines v China* decision about the South China Sea, mentioned above, that a military situation was one 'involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.'¹⁷

The Tribunal held that the events related to law enforcement and not military activity so the declarations removing jurisdiction for military activities did not apply.¹⁸

Article 283(1): Exchange of Views

Article 283(1) requires that the parties in dispute exchange views before proceeding further. The Tribunal explored the exchange of Notes Verbale and other communications and noted that a party is not obliged to continue when it concludes that the possibilities of reaching agreement are exhausted.¹⁹ It also held that the obligation lay on both parties noting that Russia had been somewhat dilatory.²⁰ It decided therefore that Article 283 had been satisfied.

Article 290(5) Requires That the Claim Must be Plausible. Were They Warships?

The international law has long held that warships have sovereign immunity and this is codified in UNCLOS Article 95 for warships and Article 96 for government ships on non-commercial services, which covered the auxiliary. A warship is defined in Article 29 as a ship in the armed forces under the command of a duly commissioned officer and manned by a regular armed forces crew.

¹¹ *ARA Libertad (Argentine v Ghana) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 20, 15 December 2012).

¹² *Three Ukrainian Naval Vessels* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) [21].

¹³ *South China Sea Arbitration (Republic of the Philippines v People's Republic of China)* (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016).

¹⁴ *Arctic Sunrise (Kingdom of the Netherlands v Russian Federation) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 22, 22 November 2013) ('*Arctic Sunrise*').

¹⁵ *Arctic Sunrise* (International Tribunal for the Law of the Sea, Case No 22, 22 November 2013) [103].

¹⁶ *Three Ukrainian Naval Vessels* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019) [48] et seq.

¹⁷ *Ibid* [52].

¹⁸ *Ibid* [74]–[77].

¹⁹ *Ibid* [87], citing a number of earlier ITLOS cases.

²⁰ *Ibid* [88], citing *M/V Norstar (Panama v Italy) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 25, 4 November 2016) [213].

The Ukraine adduced evidence that the two war ships were manned by regular naval officers and crew and the auxiliary was a government owned ship on duty for non-commercial purposes. Russia argued to the contrary. The Tribunal held that all three ships were entitled to immunity and so the case brought by Ukraine was plausible.²¹

Was There Urgency and Real and Imminent Risk of Irreparable Prejudice?

Under Article 290(5) the Tribunal had to be satisfied that the urgency of the situation required provisional measures, and the Tribunal had held that ‘urgency’ is shown by a real and imminent risk of irreparable prejudice.²² Readers will be aware that this requirement is differently framed but this is much the same test as a court applies before ordering any interim interlocutory injunctive relief.

Ukraine submitted that the detention of its warships and 24 crew intruded on ‘the flag State’s dignity and sovereignty’ and risked interfering with the ‘performance of important public duties,’ that Russia was seeking access to sensitive equipment and communications on board its ships and on the humanitarian considerations for the crew.²³ Russia argued that there was no urgency at all as Ukraine had taken four months to come before the Tribunal and anyway had obtained some humanitarian relief from the ECHR (about medical care for the wounded and sick sailors).

The Tribunal noted that any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and held that all of the requirements had been met and suitable provisional orders should be made.²⁴

Tribunal Orders Release of Vessels and Crews

In light of its earlier findings the Tribunal had little hesitation in holding that the prerequisites for making provisional orders by way of prompt release had been satisfied and ordered release of the three vessels and all of the 24 crew. It did this over the Russian objection that release of the crew would affect the court proceedings against them but it did not order that Russia should stop the criminal proceedings against the crew for illegally crossing the Russian border. No order was made for the usual posting of a suitable bond. Also it did order both parties to submit a report about whether Russia complied with the orders and what was to happen in relation to the Arbitral case that was to follow. In each order made by the Tribunal the vote was 19 in favour and one against which, true to form of international tribunal judges voting in one’s country’s interest, was the Russian Judge (Kolodkin).²⁵

Conclusions

Of course it was outrageous conduct by the Russian Coast Guard to stop the Ukrainian warships passing through an international strait where they had every right, holding them up, firing into one of them and forcibly detaining the ships and crews. Ukraine had the right and the law but it needed a suitable international court from which to seek its relief. It first tried the ECHR but that was not entirely satisfactory and then it tried ITLOS where it did get justice.

Naturally the dispute has yet to proceed to the Arbitral Tribunal under UNCLOS Annex VII but that remains to be seen. Rogue and lawless States like Russia and China usually show a reluctance to appear in forums according to law so we will see in due course what they do. In the mean time it is still uncertain if Russia will obey the order to release the warships and crews. At time of writing (June 2019) it had not done so.

²¹ Ibid [97]–[99].

²² Ibid [100], citing ‘*Enric Lexie*’ Incident (*Italy v India*) (*Provisional Measures*) (International Tribunal for the Law of the Sea, Case No 24, 24 August 2015) [87].

²³ Ibid [102]–[105].

²⁴ Ibid [110]–[113].

²⁵ Ibid [121]–[124].