

# Did ITLOS Just Kill the Military Activities Exemption in Article 298?

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In a May 25, 2019 interlocutory decision, the International Tribunal for the Law of the Sea (ITLOS) prescribed provisional measures in the case brought by Ukraine against Russia, ordering Russia to release three Ukrainian naval vessels and 24 Ukrainian service members seized on November 25, 2018 in an incident in the Kerch Strait. During the incident last fall, Russian Coast Guard forces, operating in concert with a Russian naval corvette and a military aircraft, fired on two Ukrainian warships and a naval auxiliary as they attempted to transit the strait against the orders of Russian authorities. The ships and their crews were captured and remain in detention in Russia, charged with violating Russian criminal law.



On April 29, Ukraine filed a case with ITLOS requesting provisional measures to order their immediate release. Such measures are authorized under article 290 of the United Nations Convention on the Law of the Sea (UNCLOS) in urgent situations to prevent a real and imminent risk of irreparable prejudice to the rights of a party, in this case Ukraine. Article 290(5) permits such measures before the merits of the case so long as the Tribunal has *prima facie* jurisdiction in the case. The key question was whether the Russia’s operation constituted a “military activity,” and was therefore exempt from jurisdiction in accordance with a previous Russian declaration under article 298 of UNCLOS. The Tribunal determined that Russia’s operations were not a military activity, but the decision is likely to generate unintended consequences.

The ITLOS order has effectively diminished the military activities exemption which will give pause to the 27 nations that have made such declarations, including China, France, Norway, Denmark, and the United Kingdom – and in the future, most likely the United States, which intends to make such a declaration once it accedes to the Convention. (The states are identified in paragraph 11 of Judge Gao’s separate opinion). In a decision that suggests outcome-based legal reasoning to constrain Russia, ITLOS questions the viability of the military activities exemption based on any rationale.

As part of its analysis for jurisdiction, the Tribunal avoided a determination on whether there was an armed conflict between the two states, as would appear from the application of the Geneva Conventions in article 2 common, and as I suggested in an earlier piece. Instead, the ITLOS order accepts without analysis that Ukraine and Russia are interacting during a time of peace, a dubious assumption. In doing so, the Tribunal vindicates two important rights that will be welcomed by maritime powers: sovereign immunity of warships and other government vessels and the peacetime right of freedom of navigation by Ukrainian military vessels. But in reaching this conclusion, the Tribunal diminished the

military activities exemption. In a departure from the broader understanding of military activities evident in the 2016 Philippines v. China arbitration, the Tribunal found that the confrontation over innocent passage was a navigational issue, rather than one concerning a military activity, because innocent passage is a right enjoyed by all ships. The Tribunal also determined that Russia's temporary suspension of innocent passage declared conveniently to halt the transit of Ukrainian warships was a law enforcement activity rather than a military activity. These factors led the Tribunal to conclude that Russia's actions were "in the context of a law enforcement operation rather than a military operation."

### **The Order for Provisional Measures**

The case was brought by Ukraine on April 19, 2019, and is pending on the merits. The tribunal voted 19 to 1 to award provisional measures. As Russia previously had by declaration exercised its right to exempt military activities from compulsory dispute resolution procedures in accordance with article 298 of UNCLOS, the sole issue before the tribunal was whether Russia's action constituted "military activities." (para. 63, Order).

The Tribunal concluded that a determination of "military activities" cannot be made only based on whether naval vessels or law enforcement vessels were involved, as the roles and missions of these two types of vessels "has become considerably blurred." (para. 64, Order). Nor was the Tribunal willing to draw the distinction between law enforcement and military activities based solely on how parties subjectively characterized the dispute (para. 65). Instead, the Tribunal suggested that it made the distinction based on an "objective evaluation of the nature of the activities." (para. 66, Order).

In this regard, the Tribunal determined three circumstances to be particularly relevant. The first two concern the applicable navigational regime and Russian coastal state law that applies in the Kerch Strait, and the third focuses on Russian resort to force to protect its rights. First, the Tribunal found that the right of Ukrainian ships to transit the Kerch Strait is a navigational issue under the regime of innocent passage, and not *per se* a military activity, as innocent passage is a right enjoyed by all ships. (para. 68, Order). Second, the Tribunal determined that Russia acted to enforce its 2015 navigational regulations and temporary suspension of the right of innocent passage, both law enforcement activities. (para. 71, Order). Third, the Tribunal concluded Russia's use of force against Ukrainian ships was regarded as "in the context of a law enforcement operation rather than a military operation." (paras. 73-74, Order). The subsequent arrest and detention of the Ukrainian ships and criminal proceedings against the Ukrainian sailors strengthened the holding that Russia had conducted a law enforcement action rather than a military activity. (paras. 75-76., Order). The Ukrainian ships were captured after disobeying an order to leave the area, and disregarding Russia's order to temporarily close the territorial sea. The Ukrainian sailors were arrested under art. 91 Code of Criminal Procedure of the Russian Federation for the crime of aggravated illegal crossing of the State border of the Russian Federation under section 3 of article 322 of the Criminal Code of the Russian Federation. The service members were placed in detention by order of the Kerch City Court and the Kievskiy District Court of Simferopol on

November 27-28, 2018. ITLOS accepted Ukraine's argument that Russia acted to enforce its laws, rather than pursuant to "military activities," and therefore the Tribunal may assert jurisdiction in the case.

### **Ukraine Characterizes the Incident as Russian Aggression**

Although Russia declined to participate in the proceedings in violation of its obligation under Part XV of UNCLOS, it did set forth its argument against jurisdiction in the case. In a May 7, 2019 memorandum to ITLOS, the Russian Federation recounted numerous examples in which Ukraine had characterized the Kerch Strait incident as a military activity. Speaking before the UN Security Council on November 26, for example, Ukraine claimed the Russian military vessels were given orders to "attack" the Ukrainian vessels. Ukraine called the Russian conduct an "act of aggression" and cited to UN General Assembly Resolution 3314, as the incident involved "an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State." Ukraine also stated it stood "ready to use all available means in exercising our right to self-defense, as provided for in Article 51 of the Charter." In later communications with Russia, Ukraine charged Russia with "unprovoked, repeated use of artillery fire for effect, ramming, collisions, and other aggressive actions by Russian naval vessels, and that its sailors were seized as "prisoners of war." The latter statement was reiterated publicly by outgoing Ukrainian President Petro Poroshenko, who insisted that the captured sailors were "prisoners of war." The "prisoner of war" claim was repeated when Ukraine charged its "crew members [...] were taken as prisoners of war on November 25, 2018, following an armed assault by Russian naval vessels and special forces in the territorial waters and exclusive economic zone of Ukraine in the Black Sea." (para. 32 of the Order).

Ukraine also stated to Russia that it viewed the incident an "unlawful use of force against Ukrainian naval vessels on the territory of Ukraine." (Note 47). In response, Ukraine claimed the "right to apply Article 51 of the UN Charter," to use force against Russia in self-defense. (Note 46). The Ukrainian National Security and Defense Council released a Decision the day after the incident, which recommended the President introduce martial law, which he did. The Decision determined that "the actions against the ships of the Naval Forces of the Armed Forces of Ukraine exercised by the Russian Federation, which entailed grave consequences, constitutes the crime of armed aggression." (Note 49).

Similarly, the Ukraine statement before the Organization for Security and Cooperation in Europe, characterized Russian action as "combat" and "an act of armed aggression." Ukraine called for Russian authorities to treat the captured sailors as "provided for in the Third Geneva Convention." (para. 32(e) of the Russia May 7 Memorandum). Ukraine's before the European Court of Human Rights (ECtHR No. 55855/18 dated 7 January 2019) refers to Russian combat helicopters and aircraft initiating laser targeting of its naval vessels (para. 37), jamming by Russian military of Ukrainian naval communication (para. 39), and Russian use of a naval close-in weapon system (para. 45).

For its part, Russia, unhelpful to its own case, repeatedly denied that its actions were military in nature and stated that the arrest and detention of the Ukrainian ships and imprisonment and prosecution of service members is solely a matter of domestic law

enforcement. Denying that the Ukrainian captives are prisoners of war, Russia has charged them with violations of criminal law. This course of action suggests that the situation is not an armed conflict for the purposes of international humanitarian law. Although Russia is correct that such categorization does not predetermine whether the Russian operation was a military activity for purposes of art. 298, it resolves one dispositive issue in favor of Ukraine.

### **Russia Bolsters its Claim of a Military Activities Exemption**

In para. 30 of its May 7, 2019 memorandum to ITLOS, Russia cited to paragraph 1161 of the Annex VII arbitration between the Philippines and China, which described “a quintessentially military situation” as 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.” Russia claims this statement is an accurate description of the Kerch Strait incident.

Russia reiterated its article 298 declaration to exempt military activities, stating, “The Russian Federation declares that, in accordance with article 298 of [UNCLOS], 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 military activities, including military activities by government vessels and aircraft.” (para. 27). Military personnel perform military service and serve in accordance with Russian legislation on the military service staff of the Russian Federal Security Service (FSB). FSB forces use military weapons and personnel to perform a national defense function akin to the armed forces. The *Nikopol* was stopped by the Ka-52 combat helicopter of the Russian Ministry of Defense and an ASW corvette, *Suzdalets*, of the Black Sea Fleet. Russia claims that its Coast Guard forces took military action, obstructing the passage of the Ukrainian ships, ramming the *Yani Kapu*, firing shots in their direction and seizing the Ukrainian ships. The Russian ship *Izumrud* fired at and struck the Berdyansk, which sustained damage from fire.

### **Implications of a Diminished Military Activities Exemption**

Russia’s criminal proceedings against the Ukrainian sailors offered further proof to ITLOS that its actions were law enforcement rather than military in nature. Yet, even the Tribunal recognized that the line between law enforcement and military activities has blurred, and the holding is ripe with unintended consequences as it suggests that such a narrow view of military activities could draw in future states, and thereby weaken trust in ITLOS. Paragraph 33 of the separate opinion of Judge Gao from China is more convincing. He states that after the Tribunal ruled in the *ARA Libertad* case “that a warship is an expression of the sovereignty of the State whose flag it flies”, the fact that Russia fired on Ukrainian warships is therefore tantamount to a use of force against the sovereignty of the Ukraine, and falls “well within” the scope of military activities.

What are the implications for the provisional measures order? First, it ramps up pressure on Russia to release the detain sailors and vessels. In the Arctic Sunrise Case, for example, the decision against Russia appears to have led to release of the ship, albeit as

an act independent of specific compliance with the decision. The case is part of the greater Ukraine-Russia relationship and will play out in that context. There are broader implications for the decision, however, as the military activities exemption has been significantly weakened. The states that have declared such an exemption under article 298, or plan to do so, as is the case of the United States, now must assess the damage.

Suppose a coastal state brings a case against the United States over a U.S. warship which was conducting a freedom of navigation (FON) operation in waters under its sovereignty or jurisdiction. Such FON operations are conducted by U.S. warships – ostensibly a military activity. Some coastal states, for example, have declared that such naval operations are not permitted in its territorial sea or EEZ without prior notification or consent. Based on the Ukraine order, ITLOS would determine that FON operations essentially are about rights to navigation in innocent passage or high seas freedoms in the exclusive economic zone (EEZ), and assert jurisdiction over them, rather than decline jurisdiction because they constitute a military activity, since because navigational rights are enjoyed by all ships. Thus, one of the most significant peacetime signaling mechanisms by U.S. and allied and partner nation naval forces would fall under the purview of ITLOS if the United States became a party.

Likewise, each year the United States and other naval forces conduct numerous intelligence, surveillance, and reconnaissance (ISR) missions throughout the world's oceans, collecting information on competitors and potential adversaries. Some other states have rejected the right to conduct ISR, claiming that such operations are not a lawful exercise of high seas freedoms in EEZ because they are tantamount to marine scientific research (MSR). Indeed, the U.S. Navy operates oceanographic survey and ocean surveillance special mission ships that employ some of the same equipment used by oceanographers to study the oceans. Under the logic of the recent order, a future ITLOS could determine that these ISR activities constitute MSR rather than distinct from military activities that may be exempted from its jurisdiction under article 298, since surveys may be done by both naval vessels and civilian ships.

The ITLOS order is an effort to make Russia accountable for its aggression against Ukraine, which is a laudable goal. But in doing so, the Tribunal has eviscerated the military activities exemption, generating unintended consequences for states that have (or will have) exercised their rights under article 298 to exempt military activities. To the extent the order serves as a useful precedent for future cases, these states are now left to consider the impact of the decision on proceedings under Part XV. Unfortunately, by overreaching on its jurisdiction to restrain Russia, ITLOS may actually make states that have declared a military exemption under article 298 less inclined to fulfill their obligations to participate in Part XV dispute resolution procedures.