









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.