

BOFAXE

A CHANGE OF COURSE FOR THE MILITARY ACTIVITIES CLAUSE?

On ITLOS' order in the *Case concerning the detention of three Ukrainian vessels*

— On 25 May 2019, the International Tribunal for the Law of the Sea (ITLOS) prescribed provisional measures in a case revolving around the Russian Federation's capture of three Ukrainian naval vessels and their crew members. The Ukrainian ships, consisting of two warships and one auxiliary vessel, had tried to transit through the Kerch Strait near Crimea on 25 November 2018, when their passage was physically blocked by the Russian Coast Guard. When the vessels later turned away, Russian ships pursued them and fired at one of the vessels, causing damage to it and to three servicemen. The Ukrainian ships were seized, their crew members detained and charged with illegally crossing the Russian border. On 29 April 2019, Ukraine brought the 'Kerch Strait incident' before ITLOS, requesting provisional measures for the immediate release of the ships and the crew members under Article 290(5) of the United Nations Convention on the Law of the Sea (UNCLOS).

ITLOS has now ruled in favor of Ukraine, with an overwhelming majority of 19 to 1. While at first glance, the outcome might not be a major surprise, the Tribunal's argumentation doubtlessly deserves further scrutiny. The key question of the case was whether ITLOS had jurisdiction to prescribe provisional measures. Both parties had made declarations pursuant to Article 298(1)(b) UNCLOS, which exempts disputes concerning 'military activities' from the Tribunal's jurisdiction.

Russia, while not directly participating in the proceedings, argued in a memorandum that the seizure of the vessels and the detention of the crew members qualified as 'military activity', thereby invoking the exemption clause. In contrast, Ukraine classified the incident as a measure of law enforcement, even though Ukraine had previously referred to it as being military in nature on numerous occasions. Therefore, it fell to the Tribunal to determine the legal scope of 'military activities'. It suggested that the distinction between military and law enforcement activities is neither based on the type of vessels employed in the activity in question, nor on the characterization of the activities by the parties. Rather, the Tribunal primarily demanded an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case. Based on that test, the Tribunal concluded that Russia's conduct merely amounted to a measure of law enforcement. It held that the incident dealt with questions of navigation, which apply to all ships, not just military ones. The Tribunal further remarked that Russia itself had charged the crew with unlawfully crossing the State border, an issue of law enforcement. Notwithstanding the unsettled question about the incident's exact location, the Tribunal then applied the principle of sovereign immunity to the Ukrainian warships. It held that *prima facie*, a Russian violation of Articles 32, 58, 95 and 96 UNCLOS could not be ruled out, thereby ordering Russia to return the vessels and the crew.

Interestingly, the incident was not the first one to revolve around the 'military activities' exemption. In *Phillippines v. China*, the tribunal formed under the auspices of the Permanent Court of Arbitration (PCA) referred to a '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'. These criteria seemed to be met in the Kerch Strait incident, with Russian Coast Guard vessels actively engaging Ukrainian Navy ships. By narrowing the definition given by the PCA, the Tribunal's approach raises an intriguing question: What has to be done for an incident to be military, if even a State vessel's use of force against another State's warship does not suffice?

As a result, the Tribunal sharply increases the requirements for invoking the exemption clause of Article 298(1)(b) UNCLOS and further blurs the lines between law enforcement and military action, something the 27 states which have declared a 'military activities' exemption may now have to keep in mind. Unfortunately, ITLOS hardly touches upon further issues the case brings up. For example, could Ukraine have been estopped from bringing forward its argumentation, having repeatedly declared the Russian behavior 'aggression', invoked its right of self-defense and even temporarily proclaimed martial law? Further, what is the relationship of the 'military activities' clause and the law of armed conflict? Had the Tribunal applied the latter, the law of naval warfare would have replaced the concept of warship immunity as *lex specialis* – with an entirely different outcome. As it stands, the Tribunal's decision carries the weight of greater geopolitical conflict. While the ultimate result may be laudable, further deliberations on the more complex interrelation between international law subfields would have been desirable. Nevertheless, it is important to note that the case was decided on a *prima facie* basis. It remains to be seen whether an Annex VII tribunal will follow ITLOS' line of logic on the merits.

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