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Drawing the line between law enforcement and military activities at sea: the 2018 Russia-Ukraine incident near the Kerch Strait

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Master's thesis in Law of the Sea, JUR-3910, September 2021

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Chapter I. Introduction

In November 2018, Russian coast guard vessels fired upon and apprehended three Ukrainian naval vessels near the coast of Crimea.[1] In relation to the incident, Ukraine brought the case before the International Tribunal for the Law of the Sea (ITLOS),[2] accusing Russia of unlawful seizure and detention of the Ukrainian vessels and servicemen on board[3] and requesting the Tribunal prescribe provisional measures for the release of the vessels and the crew and their return to Ukraine.[4]

Upon ratification of the United Nations Law of the Sea Convention (LOSC),[5] Russia has made a declaration in accordance with art. 298(1)(b) of the Convention.[6] According to this article, State-parties to the Convention are allowed to exclude from the compulsory dispute settlement mechanism all disputes concerning military activities and those disputes regarding law enforcement activities that involve marine scientific research or the sovereign rights of coastal States over fisheries in their exclusive economic zone. Considering that all military activities and only some law enforcement activities can be excluded from the compulsory dispute settlement, the clear-cut distinction between the two becomes all the more important.

The ITLOS confirmed *prima facie* that the actions of the Russian Federation can qualify as a law enforcement activity.[7] The ITLOS, therefore, issued an order on the prescription of provisional measures demanding the immediate release of the Ukrainian vessels and the crew.

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[1] The factual background of the incident is discussed in chapter II.

[2] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures, Order [2019] ITLOS Case No. 26, ICGJ 542.

[3] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures [2019] ITLOS Case No. 26. Request of Ukraine for the Prescription of Provisional Measures under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea, para.2.

[4] *Ibid*, para.46.

[5] United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3.

[6] Federal law of the Russian Federation No. 30-ФЗ "*On the ratification of the United Nations Convention on the Law of the Sea and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea"* (26 February 1997) (Official text is available in Russian: http://pravo.gov.ru/proxy/ips/?docbody=&firstDoc=1&lastDoc=1&nd=102045863).

[7] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, paras.74-76.

The case is also pending the decision of the LOSC Annex VII arbitral tribunal, administered by the Permanent Court of Arbitration (PCA),[8] which will be tasked with re-assessing its jurisdiction and potentially deciding on the merits of the case, which may involve such issues as the legality of Russia's actions, the passage regime in and near the Kerch Strait, as well as the immunity and innocent passage of warships.

1.1 Objective

The thesis engages in the critical analysis of the conclusion of the ITLOS on *prima facie* jurisdiction and its evaluation of the Russia-Ukraine incident. The thesis further discusses the future PCA's decision on jurisdiction, which may differ from the assessment of the ITLOS. The objective of the thesis is to analyse and address some of the uncertainties with regard to defining a situation as a military or law enforcement activity. For that purpose, the author seeks to systematize and examine the criteria necessary for distinguishing between the two types of activities and review different arguments for the evaluation of the incident.

Within the thesis, the distinction between law enforcement and military activities is drawn for the purpose of dispute resolution. Therefore, the research also seeks to contribute to the discussion on possible weaknesses or uncertainties surrounding the current dispute resolution mechanism of Part XV of the LOSC, especially with regard to the optional exception from the compulsory dispute settlement concerning military and law enforcement activities. From this perspective, more clarity in the definitions and limits of the exceptions from the compulsory dispute settlement could positively impact the consistency and predictability of the dispute settlement mechanism. This could, in turn, make States more willing to bring disputes before an international court or tribunal, which helps further interpret and develop the international law.

The thesis will further attempt to reach its own conclusion on whether the 2018 Russian-Ukrainian incident near the Kerch Strait qualifies as law enforcement or military activity and open the discussion on the difference between law enforcement and military activities as applicable to other incidents worldwide, including, among others, the frequent low-level

[8] *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)* Award pending [2019] PCA Case No. 2019-28.

confrontations between the Greek and Turkish coast guard vessels in the Aegean Sea[9] and the incidents of harassment of the US naval vessels in the Chinese maritime zones.[10] Apart from the undeniable relevance of this topic for the current, still unresolved, Ukrainian-Russian dispute regarding the arrest of Ukrainian naval vessels, the issues discussed in the thesis are also of importance for the ongoing PCA case on the rights of both States in the Black Sea, Azov Sea and Kerch Strait,[11] as well as in a broader context of security operations elsewhere in the world.

Although the main focus of the thesis lies in the domain of the law of the sea, the research will also inadvertently engage in discussions on the applicability of humanitarian law to the present case study. Quasi-military activity at sea can be considered a tool used by States to avoid responsibilities that arise from the involvement in a full-fledged armed conflict. States may also use this tool to avoid the LOSC compulsory dispute settlement based on the military activities exception. The clarity in the distinction between military and law enforcement activities and the scopes of application of the law of the sea and humanitarian law may help prevent States from exploiting this grey area of law and contribute to the goal of peaceful and equitable use of the sea.

1.2 Research questions

The main research question for the thesis is formulated as follows: How does international law distinguish between military and law enforcement activities at sea for the purpose of dispute resolution within the case study of the 2018 incident between Russia and Ukraine near the Kerch Strait?

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[9] M Pappa, "The Aegean Sea dispute on the edge of escalating. Mapping the legal options between Greece and Turkey" (2020) *Völkerrechtsblog.*

[10] P Nguyen "Deciphering the Shift in America's South China Sea Policy" (2016) *Contemporary Southeast Asia*, 38(3), pp.389–421, p.392-393.

[11] *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation)* Award concerning the preliminary objection of the Russian Federation [2020] PCA Case No. 2017-06.

The main question will require the addressing of the following sub-questions in the context of the present case study:

- What criteria have been outlined so far for distinguishing between law enforcement and military activities?
- What kind of disputes "concern" military activities?
- What role does the type of vessels involved in an incident play in the identification of the incident as law enforcement or military activity?
- How do conduct, cause, purpose and context of an incident help separate law enforcement activities from military activities?

1.3 Methodology and sources

The research questions require the application of the legal doctrinal methodology. This approach will help analyse and interpret the appropriate legal sources, as defined in art. 38 of the Statute of the International Court of Justice[12] (ICJ), which include international treaties, customary international law, general principles, jurisprudence, and legal publications of scholars. The thesis also follows the outlined case study of the 2018 incident near the Kerch Strait and applies the legal sources as far as relevant for this incident.

The thesis adopts the rules outlined in the Vienna Convention on the Law of Treaties (VCLT) for the interpretation of treaties.[13] However, the present study also requires reliance on the subsidiary means for the determination of rules of law, such as judicial decisions and teachings of highly qualified scholars. Although the judicial decisions of international courts and tribunals have "no binding force except between the parties and in respect of that particular case,"[14] the courts, nevertheless, strive for consistency, coherence, and predictability of the case law. This is especially important when it comes to vague and ambiguous provisions. In this way, jurisprudence can help bring clarity to disputed legal norms and identify their proper interpretation. Often using case law as a starting point, the thesis compares and contrasts arguments unveiled by various previous judicial decisions, assessing their consistency and

[12] Statute of the International Court of Justice (24 October 1945) 33 UNTS 933.

[13] Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

[14] ICJ Statute, n.12, art.59.

discussing them in a critical manner. Likewise, the thesis utilizes the writings of scholars, which help uncover arguments behind the meaning of legal provisions, support academic debates and discuss the law and facts without the jurisdictional restrains. The use of non-legal sources, such as news articles, is primarily limited to chapter II for establishing the factual background of the incident.

More specifically, the present thesis will use as its sources multilateral treaties in the area of the law of the sea, mainly the LOSC and Russian-Ukrainian bilateral agreements. Limited use of treaties on humanitarian law is expected, as well as the non-binding San Remo Manual on International Law Applicable to Armed Conflicts at Sea.[15]

The thesis also analyses and critically assesses the 2019 Order of the ITLOS on the prescription of provisional measures, the 2020 PCA Award on preliminary objections of the case concerning *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, as well as other documents related to these two cases in parts relevant for the identification and distinction between law enforcement and military activities. Other case law that includes discussions on military and law enforcement activities or assessment of other exceptions from the compulsory dispute settlement mechanism is also actively engaged with for the purpose of interpreting the legal provisions. Articles and other works of scholars that discuss the present topic are analysed to further interpret the legal provisions and identify diverging opinions.

The existing literature provides ample information on various general issues surrounding the theme of maritime security. Such renowned authors, as Natalie Klein or James Kraska, wrote extensively on the issues of both law enforcement and military activities and their books and publications provide an excellent foundation for the topic of this thesis. At the same time, there has not been found many examples of authors engaging in the discussion on how to distinguish between the use of force in the context of law enforcement and military activities. Nevertheless, their findings will be helpful for identifying the key elements of both types of activities and will help draw a distinction between them.

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[15] San Remo Manual on International Law Applicable to Armed Conflicts at Sea (12 June 1994) ICRC IHL database. Mode of access: https://ihl-databases.icrc.org/ihl/INTRO/560 [last accessed 4 June 2021].

Books and articles related to the status of waters between Russian and Ukrainian coasts and Russian-Ukrainian disagreements in the law of the sea issues are present in the literature, especially in works of Ukrainian and Russian authors. Of note here is the book on international law in relationships between Ukraine and Russia of professor Zadorozhnii,[16] as well as various articles of Russian scholars, such as Judge Kolodkin, as well as Sulakshyn, Gutsulyak and Surzhyn.

More specifically, the Ukraine-Russia incident near the Kerch Strait has also received international attention in recent publications of James Kraska,[17] Yurika Iishi,[18] Xinxiang Shi and Yen-Chiang Chang,[19] Valentin J. Schatz and Dmytro Koval.[20] The mentioned articles commented on certain aspects of the case or evaluated the definition of military activities. However, they did not enter into extensive discussions on the objective criteria necessary to distinguish between law enforcement and military activity. Yushifumi Tanaka has both commented on the 2018 incident and raised the question of the criteria for evaluating the nature of activities as part of military or law enforcement.[21] Even though the main purpose of his article was a comparative analysis between two cases involving the release of a detained vessel through provisional measures, his findings bear strong relevance for the present research. Apart from this, the incident has been commented upon by Russian and Ukrainian representatives in the ITLOS provisional measures case and the ongoing case at the PCA. Although the final award in the case will not be available by the time the thesis is finished, the submissions of States, the Order of ITLOS (together with declarations, separate and dissenting opinions of

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[16] ОВ Задорожній, *Міжнародне право в міждержавних відносинах України і Російської Федерації 1991-2014* (Київ: К.І.С. 2014).

[17] J Kraska, "Did ITLOS Just Kill the Military Activities Exception in Article 298?" (2019) *European Journal of International Law* 30(3).

[18] Y Ishii, "The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation), Provisional Measures Order (2019) *European Journal of International Law*, 30(3).

[19] X Shi and YC Chang, "Order of Provisional Measures in Ukraine versus Russia and Mixed Disputes concerning Military Activities" (2020) *Journal of International Dispute Settlement*, 11, 278–294.

[20] VJ Schatz and D Koval, "Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective" (2019) *Ocean Development & International Law*, 50:2-3, 275-297.

[21] Y Tanaka "Release of a Detained Warship and Its Crew through Provisional Measures: A Comparative Analysis of the *ARA Libertad* and *Ukraine v. Russia* Cases" (2020) *International Law Studies* 96, p.223.

judges) and the PCA Award on preliminary objections in another ongoing case between Ukraine and Russia address the issue at hand and are actively utilized during the writing.

1.4 Structure

The structure of the thesis includes an introduction, the main part consisting of three chapters and a conclusion. In the second chapter, which follows the introduction, the author discusses the factual background of the 2018 incident near the Kerch Strait. This chapter includes a general comment on the disagreements regarding the status of waters between the Russian and Ukrainian coasts, which aims to put in perspective the events that unfolded in 2018 and the description of the naval confrontation between Russia and Ukraine on 25 November 2018. As it is not the focus of the thesis, the discussions regarding the legitimacy of the Russian or Ukrainian security operations in these waters are largely avoided, similar to the questions of the determination of the status of the Crimean Peninsula and the legality or illegality of the actions of the Russian Federation.

The third chapter revolves around the dispute resolution mechanism in Part XV of the LOSC. Upon the general overview of the dispute settlement system of the LOSC, the author analyses the ways international courts and tribunals have applied the exceptions from compulsory dispute settlement in order to identify trends and inconsistencies. The last section of this chapter focuses specifically on the analysis of the application of the military exception and mentions the list of criteria that were previously put forward for identifying an incident as a military or law enforcement activity.

The fourth chapter examines the relevance and weight of each of the criteria for drawing an objective distinction between law enforcement and military activities, including the evaluation of what it means when a dispute “concerns” military activities, type of vessels that took part in the incident, as well as the conduct, cause, purpose, and context surrounding the incident. This chapter both discusses these criteria theoretically and applies them to the present case study to determine whether the 2018 incident qualifies as a law enforcement or military activity.

The last chapter includes the conclusion and summarizes the findings of the previous chapters.

Chapter II. The factual background of the 2018 incident between Russia and Ukraine near the Kerch Strait

2.1 Comment on the status of the waters between the Russian and Ukrainian coasts

Tensions with regard to the water areas between the Ukrainian and Russian coasts have been following the two States since the dissolution of the USSR in 1991. Russia and Ukraine had disagreements over the status of the Azov Sea and Kerch Strait and the delimitation of the maritime boundary in this region. These tensions were exacerbated following the ousting from Ukraine of pro-Russian president Yanukovich, the subsequent occupation by Russia of the Crimean Peninsula and the establishment by Russian proxies of two unrecognized republics in eastern Ukraine (Figure 1 – General map).

In the Black Sea, there was little disagreement between Russia and Ukraine over the status of waters prior to the occupation of Crimea in 2014. The occupation of the peninsula by Russia created a sovereignty dispute over this land territory. The legality or illegality of Russia's actions is not pertinent to the fact that such a dispute indeed exists.[22] In accordance with the "land dominates the sea" concept,[23] Ukraine and Russia now both claim the coastal State rights over the maritime zones surrounding the Crimean Peninsula. The occupation of Crimea was not recognised by the majority of States[24] and *de jure*, the status of Crimea and the surrounding maritime zones remains the same. However, the tension between the two States persists due to the *de facto* control of Russia over the territory, as well as the lack of opportunities for compulsory dispute settlement for Ukraine and veto rights of Russia in the United Nations Security Council. The ongoing daily armed confrontations between the Ukrainian army and the Russian-led armed formations in the eastern part of the Ukrainian mainland further aggravate the relationships between the two States.

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[22] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, para.178.

[23] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* Judgement [1969] ICJ Rep 1969 p.3 para.96.

[24] *See, e.g.*, UNGA Res (27 March 2014) A/RES/68/262; UNGA Res (7 December 2020) A/RES/75/29, etc.

Unlike the Black Sea, the status of the Azov Sea and Kerch Strait was the subject of controversy between the littoral States even prior to the occupation of Crimea. Following lengthy negotiations, the Russian Federation and Ukraine reached an agreement in 2003, defining these waters as internal waters of both States based on the claimed historic title.[25] The agreement further states that the Sea of Azov is delimited by the State border in accordance with the agreement between the States.[26] However, the single bilateral treaty on the State border between Ukraine and Russia defines only the land border from the junction point of the borders of Ukraine, Russia and Belarus to the coast of the Taganrog Bay.[27] The treaty further clarifies that the maritime boundary between the two States shall be delimited by a special agreement.[28] No such agreement has been concluded thus far, *de facto* making the Azov Sea and Kerch Strait the area of Russian-Ukrainian condominium where both States enjoy equal rights in accordance with the regime of internal waters. That means, in particular, that all commercial vessels and military ships of both States enjoy full freedom of navigation in these waters.[29]

Whereas Ukraine and Russia were close to establishing a maritime boundary in the Azov Sea, which would most likely be an adjustment of a median line (Figure 2 – Azov Sea as internal waters with a hypothetical median line), the disagreements over the status of the Kerch Strait prevented the States from delimiting both these areas.[30] Ukraine based its claims on the principle of *uti possidetis juris*, trying to define the boundary in accordance with the former administrative border and the distribution of administrative powers between Ukrainian and

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[25] Agreement between the Russian Federation and Ukraine on cooperation in the use of the Sea of Azov and the Strait of Kerch (24 December 2003) (Official text is available in Russian on the website of the Presidential Administration of Russia: http://kremlin.ru/supplement/1795 and in Ukrainian on the website of the Ukrainian Parliament: http://zakon2.rada.gov.ua/laws/show/643_205) art. 1.

[26] *Ibid*.

[27] Treaty between the Russian Federation and Ukraine on the Russian-Ukrainian State Border (28 January 2003) (Official text is available in Russian on the website of the Presidential Administration of Russia: http://kremlin.ru/supplement/1653 and in Ukrainian on the website of the Ukrainian Parliament: http://zakon5.rada.gov.ua/laws/show/643_157) art. 1.

[28] *Ibid* art. 5.

[29] Agreement on the Sea of Azov and the Strait of Kerch, n.25, art. 2(1).

[30] Сулакшин С.С., *Национальная безопасность: научное и государственное управленческое содержание*: материалы Всерос. науч. конф., 4 дек. 2009 г., Москва (Москва: Научный Эксперт 2010) стр.689.

Russian Soviet Socialist Republics.[31] Russia categorically opposed these claims as the Ukrainian SSR had control over about 60% of the Azov Sea and the deeper and more widely used Kerch-Yenikalskyi channel of the Kerch Strait, while the Russian SSR, accordingly, controlled 40% of the Azov Sea and two shallow fairways in the Kerch Strait.[32] The factual condominium in this area may be rather advantageous for Russia, as the international regulation of internal waters is scarce, allowing Russia to adopt stricter laws for foreign vessels. Although according to the 2003 agreement, Ukraine enjoys the same rights as Russia in the Azov Sea and Kerch Strait, Ukraine may fear inequity in the sharing of resources between the two States, as Russia is a much larger State with greater economic potential. Apart from that, the Russian *de facto* control over both coasts of the Kerch Strait and the majority of Azov Sea coasts leaves little say to Ukraine in the use of these waters.

Ukraine has also made attempts to establish normal maritime zones in the Sea of Azov during the negotiations between the two States (Figure 3 – Hypothetical delimitation of the Azov Sea with normal maritime zones). Considering that the Parties were struggling to agree on a maritime boundary, in 2002, the Ukrainian Parliament registered a bill proposing the establishment of a 12-nautical-miles territorial sea in the Azov Sea and attempted to use it as leverage in the negotiations.[33] In the recent PCA case, Ukraine reiterated that the Azov Sea and Kerch Strait "no longer qualify as internal waters" and consist of the territorial seas and EEZs of Russia and Ukraine.[34] By making these claims, Ukraine attempts to allow wider international (as opposed to unilateral) regulation for these water areas than the regime of internal water foresees. In particular, the recognition of the Kerch Strait as the strait used for international navigation in the meaning of art. 34 of the LOSC would guarantee the regime of transit passage through the strait for all vessels that shall not be impeded (art. 38(1)) or suspended (art. 44). Despite these claims, Ukraine has not terminated the 2003 bilateral treaty that recognizes these waters as internal waters. This may be related to the fears of losing the benefits that this

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[31] ОВ Задорожній 2014 n.16, стр.292-293.

[32] *Ibid*; Суржин А.С., 'Международно-правовой режим Азовского моря и Керченского пролива', *Ежегодник морского права 2008* под ред. А.Л. Колодкина (Москва: Линкор 2009) стр.393-410, стр.405; Колодкин А. Л., Гуцуляк В. Н., Боброва Ю. В. *Мировой океан. Международно-правовой режим. Основные проблемы* (Москва: Статут 2007) стр.131.

[33] ОВ Задорожній 2014 n.16, стр.297.

[34] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, paras.212-215.

agreement provides. For instance, the definition of straits used for international navigation is vague, and there is no guarantee that the Kerch Strait will indeed be recognized as one, yet the 2003 agreement already guarantees the freedom of navigation in the area for Ukrainian commercial and military vessels. At the moment, it is unlikely that Ukraine and Russia reach a new arrangement in the Azov Sea and Kerch Strait that is at least as beneficial for Ukraine as the current agreement due to the underlying territorial dispute over the Crimean Peninsula.

The abovementioned disagreements with regard to the status of the waters between the Russian and Ukrainian coasts and the sovereignty over the Crimean Peninsula and, at times, opportunistic interpretation of the 2003 bilateral agreement and the LOSC create a situation where an escalation of the conflict becomes almost inevitable.

2.2 Account of the events surrounding the 2018 incident near the Kerch Strait

On 23-25 November 2018, three Ukrainian naval vessels, including two artillery boats of the Ukrainian navy *Berdyansk* and *Nikopol*, and the naval tugboat *Yany Kapu*, together with the crew of 24 servicemen on board, were navigating from the Ukrainian port of Odesa to the Ukrainian port of Mariupol (Figure 4 – Planned journey).[35] A similar transit of Ukrainian naval vessels was conducted two months prior, in September 2018, without any incident.[36]

On 24 November 2018, as the Ukrainian naval vessels were passing through the EEZ around the Crimean Peninsula, two Russian coast guard vessels started escorting the Ukrainian boats.[37] Prior to entering the territorial sea, the Ukrainian naval vessels received a notification from the

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[35] Прикордонні кораблі РФ здійснили відверто агресивні дії проти кораблів ВМС ЗС України (25 листопада 2018) *Новини Військово-Морських Сил Збройних Сил України*. Mode of access: https://navy.mil.gov.ua/prykordonni-korabli-rf-zdijsnyly-vidverto-agresyvni-diyi-proty-korabliv-vms-zs-ukrayiny/ [last accessed 4 July 2021].

[36] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures [2019] Public Sitting Held on 10 May 2019 (Minutes), 10 A.M. ITLOS/PV.19/C26/l/Rev.1 p.14.

[37] Reconstruction of the events in the Kerch strait (5 December 2018), *Prosecutor General's Office of Ukraine*. Mode of access: https://www.youtube.com/watch?v=JnU_F2LwHrI&t=46s [last accessed 5 June 2021].

coast guard of the Russian Federation stating that the right of innocent passage through the territorial sea near the entrance to the strait was temporarily suspended for foreign military vessels.[38] At different points in time, Russia cited various reasons for this suspension, including the failure of the Ukrainian vessels to notify the port administration about the passage 48 and 24 hours in advance,[39] harsh weather conditions and high traffic in the area.[40] Nevertheless, the Ukrainian Navy claims to have failed to find evidence of the suspension of innocent passage where such a restriction would normally be published online.[41]

On 25 November 2018, the captain of *Berdyansk* notified the Russian coast guard of the intention to enter the territorial sea and pass through the Kerch Strait. The Russian coast guard confirmed to have received the information but provided no further reply.[42] Upon entering the territorial sea, the two Russian vessels escorting the Ukrainian vessels began manoeuvring and requested that the Ukrainian vessels leave the territorial sea.[43] The Ukrainian vessels proceeded further, citing the 2003 bilateral agreement that guarantees freedom of navigation for all Ukrainian and Russian vessels in the Kerch Strait and Azov Sea.[44] Other vessels of the Russian coast guard, including *Don* and *Izumrud*, attempted to intercept the Ukrainian vessels. As the Ukrainian vessels continued to sail towards the Kerch Strait, the Russian coast guard vessel *Don* intentionally rammed the Ukrainian tugboat *Yany Kapu* on two separate occasions, causing damage.[45] As the Russian coast guard attempted to ram the artillery boat *Berdyansk*, the latter

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[38] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures [2019] ITLOS Case No. 26. Memorandum of the Government of the Russian Federation, para.14.

[39] О провокационных действиях кораблей ВМС Украины (26 ноября 2018) *Федеральная Служба Безопасности Российской Федерации*. Mode of access: http://www.fsb.ru/fsb/press/message/single.htm!id%3D10438315@fsbMessage.html [last accessed 11 June 2021].

[40] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.12(c).

[41] *Ukraine* v *Russian Federation*, ITLOS Minutes, n.36, p.14.

[42] Новини Військово-Морських Сил ЗСУ n.35.

[43] Prosecutor General's Office of Ukraine n.37.

[44] Agreement on the Sea of Azov and the Strait of Kerch, n.25, art. 2(1).

[45] M Cruickshank, "Investigating the Kerch Strait Incident" (30 November 2018) *Bellingcat*. Mode of access: https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/ [last accessed 11 June 2021].

moved out of the way, which led to the collision between the Russian vessels *Don* and *Izumrud*.[46]

Despite this confrontation, the Ukrainian vessels reached the entrance to the Kerch Strait, where they were prevented from passing through. A large container tanker was positioned to block the way in and out of the strait.[47] After eight hours of waiting, the Ukrainian vessels decided to turn around and started navigating away from the Kerch Strait towards the exit from the territorial sea. The Russian coast guard ordered them to stop. A total of eleven Russian vessels, ten coast guard vessels and one warship, as well as four supporting aircrafts engaged in the pursuit of the Ukrainian vessels.[48] Following the pursuit, around 12 nautical miles from the coast of Crimea, the Russian vessels surrounded the Ukrainian navy vessels and fired first warning, then targeted shots at *Berdyansk*, wounding three Ukrainian sailors and causing damage to the vessel.[49] The events described above are briefly visualized by Figure 5 – Chronology of the events.

As a result of these events, the Ukrainian vessels were seized, and the crew on board was detained by the Russian Federation. Upon their capture, the Ukrainian servicemen were held in detention facilities and charged with illegally crossing the Russian border "as part of an organised group."[50]

Following the incident, Ukraine made use of the compulsory dispute settlement mechanism and brought the case before the ITLOS under art. 290 of the LOSC. On 25 May 2019, ITLOS issued an order on the prescription of provisional measures, demanding that Russia immediately release the Ukrainian naval vessels and the detained servicemen. The servicemen returned to Ukraine on 7 September 2019 following an agreement on prisoners' exchange between Ukraine and Russia.[51] Despite the significance of politics and diplomacy in making this exchange

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[46] Prosecutor General's Office of Ukraine n.37.

[47] *Ukraine v Russian Federation*, ITLOS Minutes, n.36, p.15.

[48] Prosecutor General's Office of Ukraine n.37.

[49] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.31.

[50] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures [2019] ITLOS Case No. 26. Request of Ukraine, n.3, para.11.

[51] В Бега, "Росія і Україна завершили обмін полонених: як це було (ОНЛАЙН)" (7 вересня 2019) *Громадське Радіо*. Mode of access: https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/ [last accessed 4 July 2021].

happen, the order of the ITLOS has undoubtedly strengthened Ukraine's demands for freedom of the captured sailors. On 20 November 2019, one day before the start of the PCA hearings in the ongoing case *Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Russia returned the three arrested naval vessels back to Ukraine.[52]

Although the ITLOS has decided to prescribe the provisional measures, this decision was by no means obvious. The main obstacle the Tribunal had to deal with was the possible lack of jurisdiction over this case.[53] The next chapter explains the compulsory dispute settlement mechanism of the LOSC in greater detail, but the crux of the issue lies in determining whether the Ukraine-Russia incident qualifies as a law enforcement or military activity. In the case of the latter, the Tribunal would lack jurisdiction to issue such an order. On top of that, while the ITLOS decided that the incident can constitute a law enforcement activity and found a basis for the jurisdiction of the Tribunal to decide upon its merits, it did so only *prima facie*, in accordance with Article 290(1) of the LOSC. The final decision on the jurisdiction and the potential decision on the merits of the case still rests with the PCA.

Chapter III. Optional exceptions from the compulsory dispute settlement in the LOSC

3.1 Overview of the compulsory dispute settlement system

While many international multilateral treaties have provisions related to the settlement of disputes, few have been as successful in building a comprehensive dispute settlement system as the LOSC. The system developed within the LOSC has been truly innovative, progressive, and far-reaching[54] in the way it combined traditional consent-based and compulsory

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[52] В Шрамович, "Без рацій, але зі зброєю. Як українські кораблі повертаються додому і навіщо це Росії" (20 листопада 2019) *BBC News*. Mode of access: https://www.bbc.com/ukrainian/news-50487374 [last accessed 9 June 2021].

[53] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.50.

[54] R Rayfuse, "The Future of Compulsory Dispute Settlement under the Law of the Sea Convention" (2005) *Victoria University of Wellington Law Review*, 36(4), 683-712, p.683.

proceedings.[55] Despite all the successes of the LOSC dispute resolution mechanism, the recent years saw an increase in attention to and tension around the few limitations and exceptions from the compulsory proceedings. The vagueness in the framing of some of these limitations and exceptions raises fears of expansive interpretation, which, in turn, may undermine the reliability of the compulsory dispute settlement system.

All disputes regarding the interpretation and application of the LOSC are to be settled by peaceful means (art. 279) of the choice of the Parties to the dispute (art. 280). Peaceful means of dispute settlement are listed in art. 33 of the UN Charter[56] and include *inter alia* "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements."

A dispute was previously described in the case law as "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other."[57] In order to objectively establish the presence of a dispute, it must be shown that one party positively objects to the claim of another party.[58] The presence of a dispute is the central element for triggering dispute settlement mechanisms.

As confirmed by art. 280 of the LOSC, States are generally free to choose the peaceful means to settle a dispute among them. As long as all the parties to a dispute so agree, they are free to negotiate a settlement on their own, invite a third party to mediate or advise them throughout the process or resort to a judicial settlement involving a binding decision. A problem occurs when the parties fail to agree on the dispute settlement method or a specific procedure within a certain dispute settlement method, or the chosen method does not lead to the resolution of a dispute. To address this issue and help ensure settlement of disputes, some international treaties, including the LOSC, foresee compulsory procedures for dispute settlement entailing binding decisions, which solve both the problem of the choice of means and the inability of States to arrive at the resolution. The right to initiate a compulsory dispute settlement procedure in

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[55] N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005) p.29.

[56] Charter of the United Nations (24 October 1945) 1 UNTS XVI.

[57] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment [1998] ICJ Rep 1998, p. 275 para.89.

[58] *Ibid* para.87.

accordance with the LOSC is subject to certain obligations, in particular, the obligation to exchange views (art. 283) and obligations arising from other international agreements that foresee another compulsory proceeding for dispute settlement entailing a binding decision (art. 282).

The procedures in the compulsory dispute settlement can be initiated by only one party to the dispute, while the other party is considered to have accepted the procedure by ratifying or acceding to the LOSC. The default procedure for the compulsory dispute settlement in accordance with the LOSC is the *ad hoc* arbitration, almost always administered by the PCA,[59] (art. 287(3 and 5)), unless both parties agree to submit their dispute to the ITLOS, the International Court of Justice (ICJ), or, for some categories of disputes, a special arbitral tribunal as per Annex VIII of the LOSC (art. 287(1,4)). The other exception from the default procedure is the obligation of States to accept the jurisdiction of the Seabed Disputes Chamber of the ITLOS for disputes regarding the activities in the Area (art. 287(2)).

Courts and tribunals listed in art.287(1) have jurisdiction over all disputes concerning the interpretation and application of the LOSC (art. 288(1)), as well as the interpretation and application of international agreements related to the purposes of the LOSC if a dispute is submitted to a court or tribunal in accordance with the agreement (art. 288(2)). The purposes of the Convention can be found in the Preamble and interpreted from its provisions and include, among other things, the establishment of a legal regime for the seas which will "promote the peaceful uses of the seas and oceans."[60] Some problems may arise in situations where a dispute in accordance with art. 287(1-2) also includes other incidental issues not governed by the Convention, be it a land sovereignty issue or issues related to the application of rules of the international humanitarian law. In this case, the determination of whether a court or tribunal can render a decision on merits without deciding on the incidental issues not covered by the

[59] PCA, *Contribution of the Permanent Court of Arbitration to the report of the United Nations Secretary-General on oceans and the law of the sea, as at 18 June 2021* (2021) Executive summary. Mode of access: https://docs.pca-cpa.org/2020/06/2020/06/97401439-en-contribution-of-the-pca-to-the-report-of-the-un-sg.pdf (last accessed 14 August 2021) p.1.

[60] LOSC, n.5, Preamble para.4.

LOSC is an important part of establishing jurisdiction.[61] The authority to determine whether a court or tribunal has jurisdiction over a dispute rests with the said court or tribunal (art. 288(4)).

The LOSC also refers to two types of preliminary proceedings that can be initiated within the compulsory dispute settlement mechanism, namely the prompt release of vessels and crews (art. 292) and prescription of provisional measures (art. 290). The prompt release proceedings can be resorted to only in cases of the violation by a coastal State of art. 73 of the LOSC, related to the enforcement of coastal State's sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, as well as arts. 220 and 226, related to the enforcement by a port State of laws and regulations regarding the protection of the marine environment. The cases of prompt release can be submitted to any court or tribunal as agreed by the parties to a dispute or, upon failure to reach such an agreement, to a court or tribunal accepted by the detaining State or to the ITLOS (art. 292(1)).

Issues not related to the prompt release, as well as issues regarding the release of vessels and crews not covered by art. 73, 220, and 226, as is the case in the *Ukraine v Russia* dispute regarding the 2018 Kerch Strait incident, can be submitted to a court or tribunal agreed upon the parties or to the ITLOS to initiate proceedings for the prescription of provisional measures (art. 290(1,5)). A court or tribunal can prescribe provisional measures it deems appropriate "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment" (art. 290(1)). In order to prescribe provisional measures, a court or tribunal must establish that the court or tribunal to which a dispute was submitted has *prima facie* jurisdiction to decide on the merits of the case (art. 290(1,5)).

The compulsory dispute settlement procedures are subject to limitations listed in art. 297 of the LOSC, as well as optional exceptions from the compulsory dispute settlement listed in art. 298. During the negotiations on the LOSC, some issues were deemed too sensitive to be subject to the compulsory proceedings entailing binding decisions.[62] The limitations from the compulsory proceedings apply to certain disputes related to the interpretation or application of the

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[61] A Proelss, "The limits of jurisdiction *ratione materiae* of UNCLOS tribunals" (2018) *Hitotsubashi Journal of Law and Politics* 46 (2018), pp.47-60, pp.55-56.

[62] K Zou and Q Ye, "Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal" (2017) *Ocean Development & International Law* 48:3-4, 331-344 p.332.

provisions of the LOSC with regard to coastal States' sovereign rights and jurisdiction (art. 297(1)), marine scientific research (art. 297(2)) and fisheries (art. 297(3)). Disputes excluded from the compulsory dispute settlement due to the limitations in art. 297 can be resolved by any peaceful means agreed upon by both States or submitted to a conciliation procedure entailing non-binding decisions under Annex V section 2 of the LOSC at the request of any party to the dispute.

States also have the right to exclude any or all categories of disputes listed in art. 298 of the LOSC from the compulsory dispute settlement procedures by issuing an according declaration. The article also allows States to exclude these categories of disputes specifically with regard to any or all compulsory dispute settlement procedures, such as ITLOS, ICJ or an arbitral tribunal. The PCA previously confirmed that one of the differences between the limitations in art. 297 and optional exceptions in art. 298 is that the latter must not be specifically invoked during the proceedings, as States confirm their intentions in written form in advance.[63] Out of 168 parties to the LOSC, 40 States chose to exclude one or more categories of disputes from the compulsory dispute settlement procedures in accordance with art. 298.[64]

Art. 298 became a compromise necessary to accommodate the interests of States within a nearly-globally accepted legal regime.[65] The categories of disputes that can be excluded from the compulsory dispute settlement procedures in accordance with art. 298 are the following: those concerning the interpretation or application of arts. 15, 74 and 83 relating to the sea boundaries delimitation (art. 298(1)(a)(i)); those involving historic bays and titles (art. 298(1)(a)(i)); those concerning military activities (art. 298(1)(b)); those concerning law enforcement activities with regard to the limitations on the applicability of mandatory dispute settlement procedures under arts. 297(2) and (3) (art. 298(1)(b)), as well as those disputes in respect of which the United Nations Security Council exercises its functions (art. 298(1)(c)).

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[63] *South China Sea Arbitration (Philippines v China),* Award [2016] PCA Case No 2013-19, ICGJ 495, para. 1156.

[64] United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Chapter XXI 6. United Nations Convention on the Law of the Sea (Declarations and Reservations). Mode of access: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [last accessed 6 July 2021].

[65] K Zou and Q Ye (2017), n.62, pp.331-332.

The various conditions for compulsory dispute settlement procedures discussed in this section create jurisdictional challenges for judicial dispute resolution. The following section focuses on the exceptions from the compulsory dispute settlement and reviews common trends and inconsistencies in the interpretation of art. 298 and some aspects of art. 297 by courts and tribunals. Although the decisions of international courts and tribunals in art. 287 are not precedential, meaning that they have no binding force except between the parties in respect of their specific case,[66] the authority exerted by these institutions is transferrable to their decisions. The interpretation performed by esteemed international courts and tribunals can help reconcile opposing views towards a legal issue and promote the progressive development of international law.

3.2 Interpretation by international courts and tribunals of the exceptions from the compulsory dispute resolution

The interpretation and application of art. 298 of the LOSC has been central to several recent international disputes. States that issued a declaration in accordance with art. 298 can argue for the lack of jurisdiction of courts and tribunals in dealing with issues these States chose to exclude from the compulsory dispute settlement. However, the definition and the scope of the categories of disputes of art. 298 is open to interpretation. Additionally, disputes between States are often complex and concern several legal questions that may be both related and unrelated to the issues listed in art. 298. The analysis of the way courts and tribunals applied this article in the past can therefore assist us in the interpretation of the military exception in the context of the dispute between Russia and Ukraine regarding the events that unfolded near the Kerch Strait in 2018. This section focuses on general aspects of art. 298, followed by an overview of such exceptions from the compulsory dispute settlement as those relating to sea boundary delimitations, historic bays and titles, and law enforcement activities.

Art. 298 was briefly brought up in the *Chagos Marine Protected Area* arbitration,[67] where the PCA had to address the issue of whether this provision can be interpreted *a contrario*, in

[66] ICJ Statute n.12, art.59; Statute of the International Tribunal for the Law of the Sea (10 December 1982) 1833 UNTS 561, art.33(2).

[67] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* Award [2015] PCA Case No. 2011-03.

particular with regard to land sovereignty disputes. Mauritius argued that since land sovereignty disputes are not excluded from the compulsory dispute settlement in art. 298, then they must be automatically included under the LOSC dispute resolution system, as long as the dispute as a whole is about the interpretation and application of the Convention.[68] The Tribunal reached the opposite conclusion. Reading into the provisions of art. 297 and 298(1)(a) of the LOSC, the Tribunal found it apparent that States are especially sensitive to their sovereign rights and maritime territory.[69] Both provisions were designed to strike a compromise between issues related to State sovereignty and compulsory dispute settlement. It is, therefore, more likely that if the drafters of the LOSC intended to view disputes regarding land sovereignty as "concerning the interpretation and application of the Convention," they would indeed have included an option to opt out of such disputes, similar to other disputes mentioned in art. 298.[70] Additionally, art. 298 is far from being the only way to exclude disputes from the compulsory dispute settlement.

In the *South China Sea* case,[71] the Tribunal had to deal with a number of objections to the jurisdiction arising from arts. 297 and 298 of the LOSC, since China excluded from the compulsory dispute settlement all the categories of disputes mentioned in art. 298.[72] Before issuing the final Award, the Tribunal reviewed issues related to the jurisdiction and admissibility in preliminary proceedings.[73] In order to be settled in these preliminary proceedings, issues of the jurisdiction and admissibility have to possess an "exclusively preliminary character."[74] To follow this procedure, the Tribunal first examines if it has all the necessary facts to deal with an objection and determines whether it would be forced to make a judgement on some of the elements of the dispute's merits.[75] Notably, this procedure differs from the ITLOS proceedings in the *Ukraine v Russia* case[76] regarding the establishment of the

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[68] *Chagos Marine Protected Area Arbitration,* PCA Award n.67, para.193.

[69] *Ibid*, para.216.

[70] *Ibid*, para.217.

[71] *South China Sea,* PCA Final Award n.63.

[72] UNTC, LOSC Declarations and Reservations n.64.

[73] *South China Sea Arbitration (Philippines v China),* Award on jurisdiction and admissibility [2015] PCA Case No 2013-19.

[74] *Ibid*, para.380.

[75] *Ibid*, para.382.

[76] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2.

jurisdiction *prima facie* in order to issue an order for the prescription of provisional measures as per art. 290. In order to prescribe provisional measures, a court or tribunal "must satisfy itself that the provisions invoked by the Applicant appear *prima facie* to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded,"[77] rather than either render a final decision on the jurisdiction or leave out the questions that need to be reviewed in conjunction with the merits. During the preliminary proceedings in the *South China Sea* case, the Tribunal reserved the right to review most of the questions regarding its jurisdiction based on arts. 297 and 298 in conjunction with the decision on the merits.[78]

In the decision on the merits,[79] the *South China Sea* Tribunal dealt both with issues regarding the sea boundary delimitation and the historic bays and titles. With regard to the first category of disputes that can be excluded from compulsory proceedings per art. 298, the language "sea boundary delimitations" used in art. 298(1)(a)(i) is not found anywhere else in the Convention, so it seems reasonable that its interpretation in good faith would not end up being too restrictive.[80] In the conciliation between Timor-Leste and Australia, the PCA suggested that "disputes concerning the interpretation or application of arts. 15, 74 and 83 relating to the sea boundaries delimitation" as per art. 298(1)(a)(i) involve the actual delimitation and also the question of the transitional period and practical provisional arrangements pending delimitation.[81]

In the *South China Sea* case, the Tribunal drew a distinction between disputes concerning the delimitation of maritime boundaries and disputes concerning entitlement to maritime zones.[82] While a maritime boundary can be delimited only between States with adjacent or opposite coasts which have overlapping entitlements, disputes concerning the existence of entitlement may exist even without any overlapping claims.[83] The Tribunal further noted that only the

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[77] *"ARA Libertad" (Argentina v. Ghana),* Provisional Measures, Order [2012] ITLOS Reps 2012, p. 332, para.60.

[78] *South China Sea*, PCA Award on jurisdiction and admissibility, n.73, paras.397-412.

[79] *South China Sea,* PCA Final Award n.63.

[80] K Zou and Q Ye (2017), n.62, p.335.

[81] *Timor Sea Conciliation (Timor-Leste v. Australia)* Decision on Competence [2016] PCA Case No. 2016-10, para.97.

[82] *South China Sea*, PCA Award on jurisdiction and admissibility, n.73, para.156.

[83] *Ibid*, para.156.

disputes concerning the delimitation of maritime boundaries, and not those on the existence of entitlement, can be excluded from the compulsory dispute settlement via art. 298(1)(a).[84]

The Tribunal went on to point out that disputes regarding the status of land features as "rocks" or "islands" per art. 121 of the LOSC or "low tide elevations" as per art. 13 cannot be excluded from the compulsory dispute settlement procedures based on art. 298(1)(a)(i) relating to the delimitation of the maritime boundaries,[85] even though the status of a land feature can affect the delimitation. However, with regard to the Philippines submissions regarding the activities of China in what the Philippines perceived to be its EEZ, the PCA indicated that its jurisdiction depends on whether it can confirm that no overlapping claims can exist in this area.[86] The presence of overlapping claims depended on whether the Tribunal recognises any of the land features in the Spratly Islands as "islands" that generate entitlements to an EEZ and continental shelf.[87] If there could be overlapping claims in the area, the Tribunal would be precluded from recognising that the maritime territory belongs to one State or the other, as it is barred from delimiting the area due to China's declaration in accordance with art. 298(1)(a)(i), and therefore, would not be able to confirm that China's activities indeed took place in the EEZ of the Philippines. The Tribunal went on to decide on the merits of the Philippines submissions, as it found no islands in the area that can generate overlapping entitlements and, accordingly, concluded that no delimitation is required or even possible in the area.[88]

With regard to the disputes "involving historic bays and titles" included in art. 298(1)(a)(i), the Tribunal confirmed that it is not necessary for such dispute to involve the question of delimitation to be excluded from the compulsory dispute settlement mechanism.[89] Based on the language of the provision, this category of disputes is distinct from the sea boundary delimitation disputes. However, the PCA also made sure to draw a distinction between "historic rights" and "historic titles," where the latter only refer to "historic sovereignty over land or maritime areas" and no other rights falling short of sovereignty.[90] Similarly, the term "historic

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[84] *South China Sea*, PCA Award on jurisdiction and admissibility, n.73, para.157.

[85] *Ibid*, paras.400-401, 403-404.

[86] *South China Sea*, PCA Final Award n.63, para.629.

[87] *South China Sea*, PCA Award on jurisdiction and admissibility, n.73, paras.394.

[88] *South China Sea*, PCA Final Award n.63, para.633.

[89] *Ibid*, para.215.

[90] *Ibid*, paras.225–226.

bay" was interpreted to mean bays for which a State claims a historic title (sovereignty).[91] Having analysed China's claims in the South China Sea, the Tribunal concluded that these constitute historic rights claims, which do not correspond to claims over a historic title, excluded from the jurisdiction of the Tribunal.[92] Therefore, the Tribunal rejected the notion that it lacks jurisdiction based on art. 298(1)(a)(i) regarding disputes involving historic bays and titles.

An argument could be made against the jurisdiction of the Tribunal and its interpretation of disputes involving historic bays and titles. It goes as follows: the reason art. 298(1)(a)(i) refers only to "historic bays" and "historic titles" is that these are the terms used in the Convention (e.g., art. 10(6) or 15 of the LOSC), while disputes involving historic rights are already excluded from the compulsory dispute settlement since they fall outside the disputes concerning the interpretation and application of the LOSC per art. 288(1).[93] If the Tribunal establishes jurisdiction over the dispute, it must do so with reference to a specific provision in the LOSC. Nevertheless, even if historic rights are not included in the LOSC, the disputes relating to issues not covered by the Convention are not equivalent to disputes optionally excluded from the compulsory dispute settlement with a declaration per art. 298. In the case of the former, a court or tribunal may make findings and ancillary determinations of law as necessary for the resolution of a dispute, as long as the main object of the claim lies within the interpretation or application of the Convention.[94] A court or tribunal may also address all issues that do not require it to render a decision on an issue outside of the scope of the LOSC, even when these issues are closely related.[95] Even so, the Tribunal's clarification regarding the relationship between historic bays, titles and rights on the one hand and disputes concerning the interpretation and application of the LOSC on the other hand could be helpful for a better understanding of the jurisdictional challenges this category of disputes faces.

Regarding art. 298(1)(b), the law enforcement activity at sea can be generally defined as "the exercise of policing powers by states against vessels within their jurisdictional reach in order

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[91] *South China Sea*, PCA Final Award n.63, para.225.

[92] *Ibid*, para.228.

[93] K Zou and Q Ye (2017), n.62, pp.337-338.

[94] *Chagos Marine Protected Area Arbitration,* PCA Award n.67, para. 220.

[95] Proelss (2018), n.61, pp.55-56.

to maintain public order."[96] Such activity is often premised on a hierarchical relationship and assumes inequality between the enforcing authority and the object of the law enforcement action.[97] The PCA confirmed during the *South China Sea* preliminary proceedings that the law enforcement activities exception from the compulsory dispute settlement in art. 298(1)(b) is not applicable in the territorial sea, as it only relates to the activities in the EEZ listed in art. 297(2) and (3).[98] This limitation, however, does not apply to the military exception. Art. 298(1)(b) received a similar treatment in the *Arctic Sunrise* case, where the Tribunal reaffirmed that the law enforcement activities exception concerns activities only "in regard to the exercise of sovereign rights and jurisdiction excluded from the jurisdiction of a court or tribunal under art. 297, paragraph 2 or 3" and cannot exclude any other disputes.[99] Art. 297(2) and (3) refer, respectively, to provisions of the LOSC with regard to marine scientific research and fisheries in the EEZ. The Tribunal further confirmed that based on arts. 309 and 310 of the Convention, a State may only exclude from the compulsory dispute settlement disputes listed in art. 298 and cannot create an exclusion of a wider scope than permitted by the article.[100] The restrictive interpretation of law enforcement activities in art. 298(1)(b) was also supported by ITLOS Judge Treves, as otherwise, one could conflate law enforcement activities with the sovereign rights and jurisdiction they aim to protect.[101]

Overall, it seems that the tribunals often lean towards narrower interpretations when it comes to the exceptions from the compulsory dispute settlement in art. 298, while generally staying in line with the wording of the respective provisions. The interpretation of the historic bays and titles exception by the *South China Sea* Tribunal is, perhaps, the most creative, as the LOSC gives little indication to the definition of historic bays and titles and their relationship with other

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[96] Kwast PJ, "Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award" (2008) *Journal of Conflict & Security Law,* Vol. 13(1), pp. 49-91, p.54.

[97] *Ibid*.

[98] *South China Sea*, PCA Award on jurisdiction and admissibility, n.73, para.410.

[99] *The Arctic Sunrise Arbitration (Netherlands v. Russia)* Award on Jurisdiction [2014] PCA Case No. 2014-02 para.69.

[100] *Ibid,* paras.70-72.

[101] T Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea" in P Chandrasekhara Rao, Rahmatullah Khan (eds) *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, 2001) p.121.

historic rights. The following section focuses on the features and nuances of the military exception from the compulsory dispute settlement and evaluates whether this tendency is also observable with regard to this type of disputes.

3.3 The military exception

By virtue of art. 298(1)(b), States can choose not to accept compulsory dispute settlement procedures with regard to "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service." Out of 40 parties to the LOSC that made a declaration in accordance with art. 298, 25 States, including both Russia and Ukraine, opted out of the compulsory dispute settlement procedures for disputes concerning military activities.[102] The declaration of the Russian Federation exactly recreates the wording of art. 298 with respect to military activities.[103]

The wording of art. 298(1)(b) is quite vague. In particular, it gives an indication that only disputes that "concern" military activities may be excluded, so the practice of courts and tribunals in interpreting the word "concerning" will be of relevance. The article further mentions the types of vessels that may be involved in military activities and clarifies that these are not restricted to military ships but can also involve "government vessels and aircraft engaged in non-commercial service." This part also calls on a short consideration regarding the types of vessels involved in the incident between Russia and Ukraine near the Kerch Strait and the relevance of this factor for qualifying activities as those relating to military or law enforcement.

The *Ukraine v Russia* case is the first time the ITLOS was called on to interpret the military activities exception in art. 298(1)(b).[104] Prior to that, the provision was interpreted only by the PCA.[105] The ITLOS pointed out that the disputes relating to the military exception have to be decided upon on the case-by-case basis, claiming that the distinction between military and law enforcement activities has to be based on "objective evaluation of the nature of the activities in

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[102] UNTC, LOSC Declarations and Reservations n.64.

[103] Federal law of the Russian Federation No. 30-ФЗ n.6.

[104] Y Ishii (2019), n.18, p.1.

[105] *Ibid*.

question, taking into account the relevant circumstances in each case."[106] The individual cases where a party invokes the military exception being difficult enough, the "case-by-case" approach makes it especially challenging to develop an objective and independent test for distinguishing between military and law enforcement activities for all future cases.

Concerning the specific factors that have to be taken into account for characterising activities as law enforcement or military, the ITLOS decided to leave out the positions of States regarding their own activities in the case between Russia and Ukraine.[107] This was not the case in the *South China Sea* arbitration, where the PCA decided not to deem China's construction activities as military due to China's consistent and official claims that the purpose for these activities was civilian in nature, namely the improvement of working and living condition of the population.[108] There is not necessarily a controversy between these two decisions, as the statements of Ukraine and Russia regarding the incident near the Kerch Strait were at times lacking consistency. Both States brought up each other's statements made earlier outside of the proceedings as arguments for the justification of their own position.[109] However, it is also questionable whether the position of States regarding their own activities should ever be a decisive factor in these kinds of disputes unless the concept of *estoppel* can be invoked. Issues related to the security of a State often involve sensitive information, and public statements of States may therefore lack accuracy when it comes to their activities of military nature. Arguably, inaccurate official information regarding security issues should not preclude States from enjoying their right to exclude certain types of disputes from the compulsory dispute settlement, as it only highlights how sensitive these issues may be to a State.

In *Russia v Ukraine*, the Tribunal highlighted three relevant circumstances that it needed to analyse in order to determine whether the arrest and detention of the Ukrainian vessels and crew took place within a military or law enforcement operation.[110] These are: the specific actions of

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[106] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.66.

[107] *Ibid*, para.65.

[108] *South China Sea*, PCA Final Award n.63, paras.936-938.

[109] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, paras 31-32; *Ukraine* v *Russian Federation*, ITLOS Minutes, n.36, p.23; X Shi and YC Chang (2020), n.19, p.281.

[110] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.68.

the vessels in question (conduct),[111] the cause of the incident,[112] and the context in which the force was used.[113]The Tribunal found the above-mentioned circumstances relevant for the present case, which leaves the question of whether other possible factors can be of relevance in other cases to determine the status of activities as military or law enforcement in nature. For example, in his separate opinion, Judge Gao points out the importance of the intent and purpose of the activities for the evaluation of the incident,[114] which is a factor related to but not equivalent to any of the factors chosen by the Tribunal. The conduct is different from the intent, as for evaluating the conduct, we need to answer the question of *what* was done, and for intent – *why* it was done. The cause also differs from the intent, as it is directed towards the past, while the intent focuses on the future. The Judge also added that domestic judicial proceedings in Russia might be a relevant factor for the qualification of the dispute, although it should not be a decisive one,[115] similar to "the international actions, official positions, and legal documents of the Parties."[116]

Since the hearings for the prescription of provisional measures require jurisdiction only *prima facie*, the ITLOS did not need to go much further than finding that the dispute appears to have a basis on which jurisdiction for the arbitral tribunal can be found.[117] This may mean that it would be enough for the Tribunal to establish that the dispute has features of the law enforcement activity, without addressing whether there are also features of military activity and which features are more prominent in the case. In this regard, Judge Gao pointed out that military and law enforcement activities are not mutually exclusive, and some activities may be of mixed nature.[118] It may be the case that in order to assess the jurisdiction in full, the Arbitral Tribunal will have to determine whether law enforcement or military element is predominant in the case regarding the Kerch Strait incident.

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[111] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, paras.68–70.

[112] *Ibid*, paras.71–72.

[113] *Ibid*, paras.73–74.

[114] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures, Order [2019] ITLOS Case No. 26. Separate opinion of Judge Gao para.22.

[115] *Ibid*, para.29.

[116] *Ibid*, para.30.

[117] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.36.

[118] *Ukraine v Russian Federation*, ITLOS Separate opinion of Judge Gao, n.114, paras.49-50.

Another debatable aspect of the military activities exception concerns the relationship between the military activities in the meaning of art. 298(1)(b) and the activities regulated by the international humanitarian law (IHL). The theories around the relationship between the LOSC and the law of naval warfare, which is part of the IHL, vary.[119] However, the most widely accepted view envisages that the LOSC applies during the time of peace and is not aimed at replacing the customary rules on naval warfare, at least in the relationship between the warring parties.[120] If the LOSC and IHL are independent and not interconnected regimes and military activities in the meaning of art. 298(1)(b) are only applicable in the time of conflict and are fully governed by the IHL, the inclusion of the military activities exception from the mandatory dispute settlement would almost seem redundant since the disputes arising from the IHL are already excluded based on art. 288. The article limits the jurisdiction of courts and tribunals within the compulsory dispute settlement system to the interpretation and application of the LOSC and, in some cases, other agreements related to the purposes of the LOSC (art. 288(1,2)), so disputes, where the independent regime of the IHL applies, would naturally be excluded from the LOSC dispute settlement mechanism.

The activities governed by the IHL seem to indeed qualify as military activities in the meaning of art. 298(1)(b). The whole purpose of the IHL, otherwise called the law of armed conflict or *jus in bello*, is to provide the rule of conduct in relation to armed confrontations between two or more States or States and non-State actors as *lex specialis* to the rules of the LOSC. In other words, this is the area of international law that governs military activities in the context of armed conflicts. That would, in turn, mean that activities governed by the IHL are excluded from the LOSC compulsory dispute settlement mechanism based both on arts. 288(1) and 298(1)(b). However, the extent of the overlap between the IHL and the LOSC military exception is not clear. Art. 288 almost suggests that the military activities exception in art. 298(1)(b) is broader than military activities in the context of the IHL, as the drafters of the LOSC were prompted to create a special optional exception from the compulsory dispute settlement. Based on these considerations, it is likely the case that the art. 298(1)(b) military exception covers a broader range of activities than those governed by the IHL. In addition to

[119] N Klein (2005), n.55, p.283.

[120] *Ibid*, p.283; Schatz VJ and Koval D (2019), n.20, p.276.

the activities governed by the IHL, it would also cover peacetime military activities, such as military exercises, construction works for military purposes or military surveillance.[121]

Based on the discussion in this section, chapter IV analyses the following criteria for distinguishing between military and law enforcement activities: to what extent the dispute "concerns" military activities, the types of vessels involved, the conduct, the cause, the purpose, and the context of the incident. The issue of the applicability of the IHL is analysed in conjunction with the context of the incident. The analysis is performed in light of the factual background of the Ukraine-Russia incident and the general trends in jurisprudence on optional exceptions identified in this chapter.

Chapter IV. Criteria for distinguishing between law enforcement and military activities

4.1 Disputes "concerning" military activities

The first general issue for drawing the line between military and law enforcement activities for the purpose of dispute resolution is the interpretations of the wording of art. 298(1)(b) to determine what kinds of disputes "concern" military activities.

The PCA previously assessed the term "concerning" as it is used in art.298(1)(b) by contrasting it with such terms as "arising from" or "involving," which appear to be "open to a more expansive interpretation."[122] The term "concerning," on the other hand, limits the military activities exception to "those disputes whose subject matter is military activities."[123] The Tribunal went on to point out that a causal or historical link between military activities and the

[121] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures, Order [2019] ITLOS Case No. 26. Declaration of Judge Kittichaisaree, para.4; X Shi and YC Chang (2020), n.19, p.285.

[122] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, para.330.

[123] *Ibid*.

dispute in question is insufficient to trigger the military activities exception, as specific acts that are subject of complaint within the dispute must constitute military activities.[124]

Analysing the word "concerning" in a different context, the ITLOS seems to have adopted a broader interpretation. While referring to disputes "concerning the arrest or detention," the ITLOS explained that the use of the term "concerning" does not extend exclusively to articles containing the words "arrest" or "detention," but also to other provisions of the LOSC "having a bearing on the arrest or detention of vessels."[125] In this case, the ITLOS analysed the declaration of Saint Vincent and the Grenadines in accordance with art. 287 of the LOSC, in which it chose ITLOS as a procedure for the compulsory dispute settlement only for disputes concerning the arrest or detention. Nevertheless, the ITLOS found that this declaration did not preclude it from deciding on other issues, as long as they are connected to the detention and arrest.[126] This interpretation may signify that the word "concerning" is generally interpreted more narrowly in the context of exceptions from the compulsory dispute settlement.

The issue was also brought up in the *South China Sea* case, where the Tribunal pointed out the difference between "disputes concerning military activities" and "military activities" as such.[127] The Tribunal further clarified that the dispute itself must concern military activities rather than the State's military forces being employed in relation to the dispute.[128] Therefore, the Tribunal evaluated whether the military activities were an aggravation dependent on the underlying dispute between the Philippines and China or constituted a distinct dispute to which the optional exception would be applicable.[129]

Going back to the *Ukraine v Russia* dispute, an argument can be made (and has, in part, been made during the ITLOS proceedings)[130] that the dispute itself concerned the navigation rights of the Ukrainian navy, and the confrontation ensued in relation to the different interpretation of

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[124] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, paras.330-331.

[125] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)* Judgement [2013] ITLOS Rep 2013 p.4, para.83.

[126] *Ibid,* para.84.

[127] *South China Sea*, PCA Final Award n.63, para.1158.

[128] *Ibid*, para.1158.

[129] *Ibid*, para.1159.

[130] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.72.

the passage regime by the parties to the dispute. Accordingly, the military activities would not be at the core of the dispute, as the quasi-military confrontation occurred as a consequence of the main dispute. Such interpretation, however, would seem unnecessarily narrow. While differences with regard to the passage regime of the Kerch Strait were the catalyst of the dispute, the dispute involves multiple separate issues and still revolves around Russia's use of force against the Ukrainian navy vessels and the subsequent arrest of the vessels and the crew. If the actions of the Russian coast guard are indeed military in nature, the dispute "concerns" them in the same manner as it concerns the navigational rights of Ukraine in the Kerch Strait. Similarly, in the *South China Sea* case, the Tribunal found that the interaction between the Chinese and Philippine military was a distinct matter that would be excluded from the compulsory dispute settlement procedure if characterised as a military activity.[131]

The broader interpretation of the disputes concerning military activities also seems to be supported by the language used in other non-English authentic texts of the LOSC. Pursuant to art. 320 of the LOSC, "the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic." This is confirmed by art. 33 of the VCLT that also provides that where there is a difference in the meaning of authentic texts in different languages, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." As per art. 31(1) of the VCLT treaties shall be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty." Therefore, the analysis of the original text is the primary element in the treaty interpretation, while the case law, in principle, belongs to subsidiary means for the determination of law.[132]

Following this thread, the wording of art. 298(1)(b) in most of the other authentic texts seems to be less strong than in the English one (for example, "касающихся" in Russian, "relatifs" in French, "relativas" in Spanish, or "المتعلقة" in Arabic). These terms correspond more closely to the English phrases "relating to" or "having to do with" that seem to establish a weaker link between a dispute in question and military activities than the word "concerning" and allow for a more expansive interpretation. Such phrasing may suggest that issues closely related and

[131] *South China Sea*, PCA Final Award n.63, para.1160.

[132] ICJ Statute n.12, art.38(1)(d).

interdependent with military activities can also be excluded from the compulsory dispute settlement based on art. 298(1)(b).

It is most likely that if the use of force against the Ukrainian naval vessels constitutes a military activity, at least some issues within the dispute would concern military activities and, therefore, be excluded from the compulsory dispute settlement mechanism. It seems, however, based on the previous interpretations done by tribunals, as well as on the wording of most of the authentic texts of the LOSC, that disputes on issues bearing an inseparable connection to the military activities and having a direct, impactful relationship with military activities may also be subject to the exclusion from the compulsory dispute settlement mechanism.

At the same time, disputes between States are rarely one-dimensional. A single dispute may involve both questions related and unrelated to military activities. For example, in the *Ukraine v Russia* case, the issues regarding the passage rights can be decided upon in isolation from the armed confrontation that can potentially qualify as a military activity. If an issue within a dispute does not require a judgement on issues concerning military activities, it should not be swept out of the compulsory dispute settlement based on the military activities exception. Indeed, it could be problematic for the international dispute resolution system if States could get away with violating their obligations in the law of the sea simply by resorting to military force.

4.2 Types of vessels

Among all the criteria for distinguishing between law enforcement and military activities, art. 298(1)(b) gives the most indication with regard to the type of vessels involved in the incident. It mentions that military activities that can be excluded from the compulsory dispute settlement include those conducted by "government vessels and aircraft engaged in non-commercial service."

The article does not use the term "warship," but it is implied that warships normally engage in military activities. In this thesis, the terms "naval vessels", "military ships", and "warships" are used synonymously and refer to vessels under the control of the armed forces of a State. The LOSC defines a warship in art. 29 as:

> a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

This definition is almost identical to the one used in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea,[133] a non-binding document that reflects the binding customary international law on naval warfare. However, the San Remo Manual also includes the term "auxiliary vessel," which often receives a similar treatment to warships and means "a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service."[134] This seems to indicate that the main distinguishing factor for the types of vessels that normally engage in military activities is the fact that they remain under the command of the armed forces.

It is at the discretion of flag States to designate their ships as warships. States are also free to decide which governmental bodies or agencies belong to the armed forces and which belong to the law enforcement. The PCA pointed out that there is no consistent practice with regard to what tasks are to be performed by military vessels and "[f]orces that some governments treat as civilian or law enforcement forces may be designated as military by others, even though they may undertake comparable tasks."[135] For example, while most States designate the coast guard as a law enforcement agency, China has recently passed a law, which transfers the coast guard under the command of the armed forces.[136] Moreover, military vessels also may engage in non-military activities, such as "disaster relief, evacuations, or the reestablishment of public order."[137]

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[133] San Remo Manual n.15, para.13(g).

[134] *Ibid*, para.13(h).

[135] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, para.335.

[136] S Permal, "Beijing Bolsters the Role of The China Coast Guard" (2021) *Asia Maritime Transparency Initiative*, mode of access: https://amti.csis.org/beijing-bolsters-the-role-of-the-china-coast-guard/ [last accessed 4 August 2021].

[137] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, para.335.

Even though the LOSC uses different terms for "warships" and "government vessels operated for non-commercial purposes" or "ships clearly marked and identifiable as being on government service and authorized to that effect," the Convention does not often make a distinction between them. The term "warship" is used without the mention of other types of government vessels only in art. 29, which defines the term, art. 30, which asserts the right of coastal States to require warships to leave the territorial sea under certain conditions, as well as art. 110 regarding the right to visit. In other instances (e.g., arts. 31, 32, 95 together with 96, 102, 107, 111(5), 224, 236, and 298(1)(b)), the Convention applies its rules equally to warships and other government ships either engaged in non-commercial service or clearly marked and authorized by the government.

While only vessels belonging to the Ukrainian navy were involved in the incident on Ukraine's side, Russia's side consisted almost exclusively of vessels belonging to the Russian coast guard. In Russia, the coast guard is included in the Federal Security Service of the Russian Federation, a federal law enforcement agency.[138] Apart from the coast guard vessels, a Ka-52 combat helicopter took part in the pursuit of the Ukrainian naval vessels, while the corvette ASW *Suzdalets*, belonging to the Russian Black Sea Fleet, stayed in the vicinity to monitor the situation.[139] All of the vessels involved in the incident belonged to the respective government and were not engaged in commercial service.

In the *South China Sea* case, the Tribunal addressed the issue of the Chinese government vessels trying to prevent the resupply and rotation of the Philippine navy. Similar to the situation with the Russian corvette ASW *Suzdalets*, the Chinese military vessels were in the vicinity at the time for monitoring and did not get physically involved in the activities of the Chinese government vessels.[140] Nevertheless, the Tribunal described this involvement of military forces on one side and military and paramilitary forces on the other as a "quintessentially military situation," based on the types of vessels involved and their conduct.[141]

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[138] Federal law of the Russian Federation № 40-ФЗ "*On the Federal Security Service"* (3 April 1995) (Official text is available in Russian: https://docs.cntd.ru/document/9011123) art.2.

[139] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.19.

[140] *South China Sea*, PCA Final Award n.63, para.1161.

[141] *Ibid*, para.1161.

In the *Ukraine v Russia* case, Ukraine argued that "it is not the type of vessel, but rather the type of activity the vessel is engaged in, that matters."[142] The ITLOS generally supported this view and highlighted the blurring of the traditional distinction between naval and law enforcement vessels, as it is not uncommon for States to employ both types of vessels to work collaboratively on the same task.[143] The Tribunal clarified that the type of vessels involved might be a relevant factor for distinguishing between military and law enforcement activities, but the final decision cannot be based solely upon it.[144] This view is also supported by the International Committee of the Red Cross (ICRC) commentary on the Second Geneva Convention 1949,[145] which states that "armed conflict… may come into existence even if the armed confrontation does not involve military personnel but rather non-military State agencies such as paramilitary forces, border guards or coast guards."[146]

The blurring of the line between the roles of law enforcement and military vessels and little significance given by the tribunals to the types of vessels involved also have the opposite effect: as the PCA pointed out, the fact that military vessels were involved in an incident is not sufficient for triggering the military activities exception.[147] At the same time, when it comes to forcible actions, it can be argued that any attempt to exercise law enforcement jurisdiction against a foreign warship automatically turns this attempt into the threat or use of force.[148] This is because, as the Tribunal held in the *ARA Libertad* case, "a warship is an expression of the sovereignty of the State whose flag it flies,"[149] so a forcible action against it amounts to a forcible action against the State's sovereignty. Moreover, law enforcement activities suggest a hierarchy between the authority enforcing laws and the object of the enforcing action, which is

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[142] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.58.

[143] *Ibid,* para.64.

[144] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.64.

[145] Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (12 August 1949) 75 UNTS 85.

[146] ICRC, *Commentary on Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949* (2017). Mode of access: https://ihl-databases.icrc.org/ihl/full/GCII-commentary [last accessed 13 August 2021] art. 2 para. 248.

[147] *Coastal State Rights (Ukraine v Russia)*, PCA Award on the preliminary objection, n.11, paras.334.

[148] BH Oxman, "The Regime of Warships Under the United Nations Convention on the Law of the Sea" (1984) 24 *Virginia Journal of International Law* 809, p.815.

[149] *"ARA Libertad",* ITLOS Provisional Measures n.77, para.94.

absent in the relationship of equality between warships that enjoy immunity under the LOSC.[150] This would, in turn, suggest that the law enforcement action against warships, whether it is exercised in response to a violation of international or national laws, should normally be considered at least unlawful but also likely amount to military action.[151]

The types of vessels involved in the Kerch Strait incident, including both warships and law enforcement vessels, do not prevent the qualification of the incident as a military activity within the meaning of art. 298(1)(b). At face value, the fact of involvement of military and other government vessels is not decisive for the qualification, as these types of vessels can also engage in law enforcement activities. However, taking into consideration that the Russian coast guard vessels engaged in the use of force against the Ukrainian naval vessels, while likely having no law enforcement powers to do so, this criterion reveals the higher probability of the military nature of the Kerch Strait incident.

4.3 Conduct

The conduct of vessels was selected by the ITLOS as the first out of three relevant circumstances for determining the nature of the incident in the *Ukraine v Russia* case.[152] This is hardly surprising since the art. 298(1)(b) exception is focused precisely on disputes concerning military *activities* and not, for example, the military forces as such. It is, therefore, highly pertinent to the case to analyze the specific actions of the vessels in question and, in particular, "the manner in which the Parties deployed their forces and the way in which Parties engaged one another at sea."[153]

The *South China Sea* Tribunal confirmed that the relevant question for the application of art. 298(1)(b) is whether the dispute concerns activities that are military in nature rather than whether military forces were involved in connection with the dispute.[154] Similarly, in order to

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[150] X Shi and YC Chang (2020), n.19, pp.282-283.

[151] Kwast PJ (2008), n.96, p.54.

[152] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.69.

[153] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Gao, n.114, para.22.

[154] *South China Sea*, PCA Final Award n.63, para.1161.

characterise Suriname's actions as a threat of military action or law enforcement, the PCA analysed the conduct of the Surinamese navy based on the testimony of witnesses.[155]

In addressing the conduct of the parties in the *Ukraine v Russia* case, the ITLOS stressed that the Ukrainian navy was engaged in the planned passage through the Kerch Strait, which led to the arrest.[156] In view of the Tribunal, the passage of warships *per se* generally does not amount to military activity.[157] This is because the passage regimes apply under the LOSC to all ships – whether warships or commercial vessels.[158] In connection to this, Judge Jesus more openly stated in his separate opinion that warships are not required to inform coastal States or request authorisation in order to engage in innocent passage through the territorial sea.[159]

This point was questioned by Kraska, who noted that by the same logic, military intelligence gathering, surveillance, and reconnaissance operations could also not be considered a military activity since both naval and civilian vessels can do surveys.[160] Similarly, Ishii argued that the passage of warships in the territorial sea is one of the most controversial issues in the LOSC, making it difficult to confidently say that this issue is not military in nature.[161] At the same time, von Heinegg expressed an opinion that "the continuing presence in the territorial sea of a foreign warship which has not complied with a demand to leave may be considered a use of force not only under the *jus ad bellum*, but also under international humanitarian law."[162] At the same time, it may be too audacious to claim that any incident of non-innocent passage by a warship potentially starts an armed conflict, and more nuance should be expected in evaluating this possibility. Alternatively, it could also be the case that an international armed conflict comes into existence only after a coastal State uses force to compel a warship to leave its

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[155] *Guyana v Suriname,* Award [2007] PCA Case No. 2004-04, ICGJ 370 para.445.

[156] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.68.

[157] *Ibid*.

[158] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.68.

[159] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures, Order [2019] ITLOS Case No. 26. Separate opinion of Judge Jesus para.19.

[160] J J Kraska (2019), n.17, pp.5-6.

[161] Y Ishii (2019), n.18, p.2.

[162] WH von Heinegg, "The difficulties of conflict classification at sea: Distinguishing incidents at sea from hostilities" (2016) *International Review of the Red Cross,* 98 (2), 449–464, p.458.

territorial sea.[163] Moreover, in the present situation, based on the status of waters surrounding Crimea and the Russian-Ukrainian bilateral agreements, Ukraine can question the legitimacy of the Russian request that the Ukrainian warships leave the area,[164] making it harder to consider the actions of the Ukrainian vessels as hostile. The Tribunal further pointed out that other Ukrainian naval vessels had previously undertaken a similar journey without incident.[165]

Notably, in reviewing this factor, the ITLOS focused primarily on the conduct of the Ukrainian vessels, which is much easier to see from a non-military perspective, only mentioning the fact of their arrest by the Russian coast guard in passing. This differs from the approach of the *South China Sea* Tribunal, which focused mainly on the interaction between the two parties rather than their independent actions and intentions. In the *South China Sea* case, the PCA highlighted that the Philippines' armed forces engaged in a stand-off with ships from China's navy, coast guard and other government agencies.[166] The Tribunal referred to the situation where the military and paramilitary forces are "arrayed in opposition to one another" as a "quintessentially military situation" that falls within the exception from the compulsory dispute settlement in art. 298(1)(b).[167]

Analysing the incident near the Kerch Strait from the same perspective, it seems possible to outline a somewhat similar stand-off between the military vessels on one side and the combination of military and other government vessels on the other. Arguing against this view, Ukraine pointed out that the forces of the two States were not "arrayed in opposition to one another" in this case, as the Ukrainian warships were trying to leave.[168] However, this argument does not seem very convincing, as there was similarly no report of the Philippines vessels being confrontational during the incidents with the Chinese government vessels, with the Philippines reportedly aborting planned operations[169] and changing the course of the navy vessels to avoid the Chinese vessels.[170] Moreover, it seems that both sides do not have to attack simultaneously

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[163] WH von Heinegg (2016), n.162, pp.458-459.

[164] *Ukraine v Russian Federation*, ITLOS Minutes, n.36, p.18.

[165] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.69.

[166] *South China Sea*, PCA Final Award n.63, para.1161.

[167] *Ibid,* para.1161.

[168] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.59.

[169] *South China Sea*, PCA Final Award n.63, para.1123.

[170] *Ibid*, para.1127.

for the forces of two States to be in opposition to one another. If forces of one of the sides attack while the other side attempts to defend itself or flee, the situation would still be likely described as a military stand-off. Similarly, if through this argument, Ukraine implies that the Ukrainian vessels were not seeking confrontation and attempted to disengage, it is not uncommon for an armed confrontation to be initiated by only one side.

With regard to the specific actions taken by the Russian coast guard, Judge Gao argues that the use of force against the Ukrainian navy vessels, such as "the 'hot pursuit' and ramming, the firing of warning and target shorts, the vessel damage and personal casualties suffered from the shooting," should be qualified as military activity.[171] It is also true that force can be used both in the military and law enforcement context. However, in contrasting the law enforcement and the threat of military action in the *Guyana v Suriname* case, the Tribunal held that force in law enforcement can be used if it is "unavoidable, reasonable and necessary."[172]

It seems more likely that the use of force was not unavoidable in the *Ukraine v Russia* case, at least at the point where the Russian coast guard mounted shots on the Ukrainian vessels, as the Ukrainian vessels were trying to disengage and leave the territorial sea. The necessity of the use of force is also questionable, as it did not seem necessary to use force to prevent the Ukrainian vessels from passing through the Kerch Strait, as the strait was physically blocked. Similarly, although ramming of the Ukrainian vessels could potentially prevent them from going deeper into the territorial sea, the firing of shots at the stage when the Ukrainian vessels were leaving was not necessary for this purpose. The firing might have been unnecessary for arresting the Ukrainian vessels too, but the information is insufficient to claim that positively.

With regard to the reasonableness of the use of force, it is suggested that this factor can be judged against the current legal rules of conduct. While the threshold would be different in the context of the IHL, the law enforcement activities at sea are governed by the LOSC. The Convention provides the rule of conduct in relation to warships in the territorial sea in art. 30. It states that the coastal State may require a warship to leave the territorial sea if the warship violates the laws and regulations of the coastal State and disregards any request for compliance. This is also the provision that Russia invoked to justify the arrest of the vessels during the

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[171] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Gao, n.114, para.39.

[172] *Guyana v Suriname*, PCA Award, n.155, para.445.

internal proceedings and charges against the Ukrainian servicemen.[173] This article, however, does not foresee a scenario where a coastal State uses force or arrests the warship, suggesting that government vessels have no law enforcement power against a foreign warship. In the context of the law enforcement actions against commercial vessels, the ITLOS stated before that the normal practice is to use force only as a last resort.[174] While Ukrainian vessels could be accused of violating internal regulations of Russia (whether these are consistent with international law or not), they did eventually comply with the request to leave the territorial sea before they were fired upon. Art. 30 of the LOSC suggests that the use of force against the Ukrainian vessels was not reasonable for the purpose of a law enforcement operation and might have to be judged in the context of a military activity instead. All that said, the validity of this test to distinguish between law enforcement and military activities may be questioned, as the fact that a State acted in violation of the rules of conduct regarding law enforcement activities does not necessarily mean that those rules are inapplicable. However, it can also be argued that failure to observe principles of the law enforcement action against foreign vessels in a space governed by international law may seriously heighten tensions between States and inadvertently lead to an armed conflict.[175]

Apart from that, there is an argument to be made that some activities are military by nature and cannot be viewed from the law enforcement perspective altogether, as, for example, the use of force against foreign warships.[176] Moreover, although there can be no exhaustive list of military activities, Judge Jesus points out that some of the activities in art. 19 of the LOSC are strictly military, such as, in particular, any threat or use of force against the State sovereignty.[177] As pointed out before, a warship is equated to the expression of State sovereignty. Hence, the firing

[173] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.76.

[174] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment [1999] ITLOS Rep 1999 p. 10, para.156.

[175] Kwast PJ (2008), n.96, p.57.

[176] X Shi and YC Chang (2020), n.19, p.282.

[177] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Jesus n.159, para.15.

of target shots against a naval vessel can amount to the use of force against the State sovereignty.[178]

Overall, the conduct of the Russian coast guard and the stand-off between the Russian and Ukrainian forces seems to be more in line with military activities than law enforcement.

4.4 Cause and purpose

Having evaluated the actions of the vessels, the ITLOS moved on to assessing what caused the Russia-Ukraine incident. The ITLOS identified the cause of the incident as "the Russian Federation's denial of the passage of the Ukrainian naval vessels through the Kerch Strait and the attempt by those vessels to proceed nonetheless."[179] The Tribunal discerned from the Russian Memorandum that the passage was denied due to the alleged violation of Russian internal regulations and the temporary suspension of the right of innocent passage due to "security concerns following a recent storm".[180] The Tribunal further stated that in its view, differing interpretations regarding the passage regime through the Kerch Strait are not military in nature.[181]

In its Memorandum, the Russian Federation stated that the incident was provoked by a "non-permitted secret incursion" of the Ukrainian naval vessels, which the Russian coast guard resisted.[182] The ITLOS noted that this assertion seems unlikely,[183] given the breadth of the navigable channels in the Kerch Strait and the fact that the Ukrainian vessels had communicated their intentions to the Russian authorities in advance.[184] In his separate opinion, Judge Jesus supported the view that the Russian claim is unlikely but also mentioned that a "secret

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[178] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Gao, n.114, para.33.

[179] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.71.

[180] *Ibid*.

[181] *Ibid*, para. 72.

[182] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.28.

[183] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.70.

[184] *Ibid*, para.62.

incursion" is not one of the activities that violate innocent passage mentioned in art. 19 of the LOSC.[185]

Russia further claimed that the actions of the Russian coast guard were caused by the fact that the Ukrainian vessels were put in a combat position in that the "artillery units were uncovered, and guns were elevated at 45 degrees and pointed at Russian Coast Guard vessels."[186] The ITLOS did not address this claim. However, Ukraine argued that there is no indication that the Ukrainian vessels had any but peaceful intentions. During the oral statements, a counsel of Ukraine clarified that sailing with uncovered guns is consistent with both Ukrainian and Russian standard operating procedures.[187] Furthermore, Ukraine pointed out that given the proximity of the Russian coast guard, the 45 degrees elevation of guns would normally be interpreted as "signalling the absence of aggressive intent," as fired at this elevation in this situation, "the shells would have travelled far above and beyond the Russian vessels."[188]

Other statements of Russia regarding the suspension of the right of innocent passage in the area,[189] the failure of the Ukrainian naval vessels to follow the Russian internal regulations,[190] and the demands of the Russian coast guard that the Ukrainian vessels leave the territorial sea immediately[191] seem to be in line with the conclusion of the ITLOS that the incident occurred due to the different interpretation of the passage regimes based on the 2003 bilateral treaty but also, possibly, differences regarding the land sovereignty over the Crimean Peninsula.

Apart from the cause, it may also be worth a while to look into the purpose or intent of the incident, which Judge Gao identified as a relevant factor in the evaluation of military activities.[192] On the one hand, the purpose of the incident can be extrapolated from its cause: while the cause is differing interpretations of the passage regimes by Ukraine and Russia, the

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[185] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Jesus n.159, para.19.

[186] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.16.

[187] *Ukraine v Russian Federation*, ITLOS Minutes, n.36, p.15.

[188] *Ukraine v Russian Federation*, ITLOS Minutes, n.36, p.15.

[189] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.12(c).

[190] *Ibid*, para.14.

[191] *Ibid*, para.15.

[192] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Gao, n.114, para.22.

purpose of the incident was to make use of the States' own rights and act in accordance with their own view regarding the legal regime of passage. On the other hand, the passage of the Ukrainian vessels may also adopt military features when looked at through the context of the underlying land dispute, as an attempted passage by a warship through a disputed territory may carry strong military and political implications.[193] Although the ITLOS rejected the claim that the Ukrainian vessels attempted a "secret incursion," the presence of naval forces in a disputed area can achieve a military objective regardless of whether it is secret or not.[194] Judge Kolodkin further noted that the "Checklist for Readiness to Sail" found on board of the seized *Nikopol* gunboat stated the Ukrainian warships were to "concentrate on covertly approaching and passing through the Kerch Strait" and "stand by to take on missions to stabilize the situation in the Azov theatre of operation" upon arrival to the Ukrainian port.[195]

Apart from that, given that the Russian coast guard did not allow the Ukrainian vessels to leave the territorial sea, the purpose of the use of force could be the arrest (or capture) of the vessels and the crew. Depending on the context, this purpose may adopt military elements, as the capture of enemy vessels is a recognised military objective permitted in the context of an armed conflict.[196] Furthermore, given that the Ukrainian vessels were conducting the planned rotation to the Azov Sea – the area where Russia significantly increased its control since 2014 – and the Russian coast guard prevented them from doing so, the incident begins to resemble more closely the confrontation in the *South China Sea* case, which was recognised as a military activity for the purposes of art. 298(1)(b) of the LOSC. Although in the *South China Sea* case, the Tribunal focused primarily on the type of vessels and their conduct, the incident was caused by the territorial claims over the Second Thomas Shoal, and its intent was to prevent the resupply and rotation of the Philippines' armed forces.[197]

Additionally, Ukraine argued in the *Ukraine v Russia* case that the Russian suspension of the right of innocent passage was not communicated in the usual way.[198] Also, since Russia

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[193] X Shi and YC Chang (2020), n.19, p.283.

[194] *Ibid*.

[195] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures, Order [2019] ITLOS Case No. 26. Dissenting opinion of Judge Kolodkin, para.14.

[196] San Remo Manual n.15, para.135.

[197] *South China Sea*, PCA Final Award n.63, para.1161.

[198] *Ukraine v Russian Federation*, ITLOS Minutes, n.36, p.15.

suspended the innocent passage due to a recent storm and a high number of vessels in the area, including those with dangerous cargo,[199] it may be questioned why the right of passage was suspended exclusively for military ships. This argument is reinforced by the fact that art. 25(3) of the LOSC allows coastal States to temporarily suspend passage in the areas of their territorial sea for protection of its security, "without discrimination in form or in fact among foreign ships." The article further requires that such suspension shall be duly published in order to take effect. This may potentially indicate that the Russian intent was not so much to enforce its laws and assert its view regarding the regime of passage in the Kerch Strait, but to specifically target the Ukrainian navy vessels by preventing them from concluding their rotation and/or capturing them.

Overall, it seems that the general cause of the incident is largely in line with law enforcement activities. At the same time, there are indications that the purpose of the incident could have both military and law enforcement elements depending on the underlying context.

4.5 Context

The ITLOS chose the context in which the incident took place as the last relevant circumstance for identifying the nature of the events that unfolded near the Kerch Strait.

The Tribunal pointed out that the force against the Ukrainian naval vessels was used in the context of an arrest in an attempt to stop the fleeing vessels.[200] The Tribunal stressed that the Russian coast guard used force exactly in the moment and context of the Ukrainian vessels ignoring the order to stop and continuing their navigation.[201] The ITLOS concluded that this sequence of events seems to be in the context of a law enforcement operation rather than a military one.[202]

At the same time, it may seem that the Tribunal chose a very narrow context to set the stage for the events that unfolded – it could almost be mixed up with other relevant circumstances, such

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[199] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.12(c).

[200] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.73.

[201] *Ibid.*

[202] *Ibid*, para.74.

as the conduct or intent. It may be more valuable for identifying the nature of the activities if the context was wide enough to be able to help explain the conduct, cause and purpose of an activity, rather than reiterating them.

In its Memorandum, the Russian Federation put the events near the Kerch Strait in the context of "provocative actions and military build-up on the part of Ukraine," including alleged attempts to infiltrate the territory of Crimea and repeated threats to use force against Russian vessels.[203] Russia has also actively cited Ukraine's remarks made outside of the ITLOS proceedings to support the claim that the Tribunal lacks jurisdiction based on the military activities exception. For example, Russia cited Ukraine's statements made before the UN Security Council on 26 November 2018, where Ukraine referred to Russia's actions as an "act of aggression" and "belligerent acts."[204] In a note verbale to Russia, Ukraine referred to "a flagrant violation of article 33 of the UN Charter" regarding pacific settlement of disputes and stated that it "reserves the right to apply article 51 of the UN Charter concerning the right to self-defence."[205] In Ukraine's request for interim measures to the European Court of Human Rights, Ukraine claimed that the Ukrainian sailors should be treated as prisoners of war, highlighting the applicability of the Third Geneva Convention.[206]

At the same time, Judge Kittichaisaree pointed out that Ukraine is not estopped from resorting to the law of the sea in these proceedings based on these previous statements.[207] To fulfil one of the main elements of *estoppel*, Russia must prove that it was induced to act to its detriment due to Ukraine's position.[208] However, both Ukraine and Russia based their positions on the interpretation and application of the LOSC in the submissions made to the ITLOS.[209]

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[203] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.11.

[204] *Ibid*, para.32(a).

[205] *Case Concerning the Detention of three Ukrainian Naval Vessels (Ukraine v Russian Federation)* Provisional measures, Order [2019] ITLOS Case No. 26. Declaration of Judge Lijnzaad para.5.

[206] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135; *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.32(e).

[207] *Ukraine v Russian Federation*, ITLOS Provisional measures, declaration of Judge Kittichaisaree n.121, para.28.

[208] *Ibid*, para.29.

[209] *Ibid*.

In analysing Russia's claims during the ITLOS proceedings, Judge Kittichaisaree further noted that Russia mainly refers to Ukraine's arguments when talking about the presence of an armed conflict between the two States and does not seem to actually accept these arguments.[210] On the contrary, Russia repeatedly denied that its actions were military in nature and charged the captive Ukrainian sailors with violations of criminal law.[211] According to the Judge, since Russia does not openly admit the existence of an armed conflict, only mentioning it in the context of Ukraine's previous remarks, the law of naval warfare should not be applicable during the proceedings.[212]

This discussion goes back to the argument about whether the position of States should be taken into account when evaluating the nature of certain activities as military or law enforcement. It seems that the ITLOS opted in favour of the objective evaluation, especially because the positions of Ukraine and Russia in this matter often lack consistency, and it does not seem possible to resort to *estoppel*. Furthermore, it is expected of States to argue in support of their own interests during the judicial proceedings. Finally, the sensitivity of the subject may make it more likely that the statements of States will lack accuracy.

The objective approach in the evaluation of military activities (or, in this case, the presence of an armed conflict) also seems to be favoured by the IHL. It may prove to be beneficial to apply similar approaches in both the IHL and the law of the sea regimes, as it could help prevent overlap of the regimes and potential legal gaps. Art. 2, common for all four Geneva Conventions, sets conditions for the application of the IHL. The provision focuses on the *de facto* existence of hostilities, whether recognised by States or not, especially when classic means and methods of warfare come into play, "such as the deployment of troops on the enemy's territory, the use of artillery or the resort to jetfighters or combat helicopters."[213] The evaluation of the situation developed in the Geneva Conventions is always objective and does not rely on the characterisation of the situation by governments unless the war has actually been

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[210] *Ukraine v Russian Federation*, ITLOS Provisional measures, declaration of Judge Kittichaisaree n.121, paras.26-27.

[211] J Kraska (2019), n.17, p.4.

[212] *Ukraine v Russian Federation*, ITLOS Provisional measures, declaration of Judge Kittichaisaree n.121, para.27.

[213] ICRC, *Commentary on Geneva Convention (II),* n.146, art. 2, para.247.

declared.[214] Moreover, for the application of art. 2(1) any use of force suffices, with no special requirement regarding a level of intensity or duration,[215] as "[e]ven minor skirmishes between the armed forces, be they land, air or naval forces, would spark an international armed conflict and lead to the applicability of humanitarian law."[216] The intentional ramming of foreign warships could also arguably be interpreted as "an act of violence by the use of a traditional means of warfare" on par with the firing of shots.[217]

The occupation of Crimea and the ongoing clashes between Ukrainian government forces and pro-Russian armed formations in eastern Ukraine leave little doubt about the presence of an armed conflict on the territory of Ukraine and the applicability of the IHL, whether it applies to the incident near the Kerch Strait or not. Art. 2 of the Geneva Conventions states that the Conventions apply to all cases of total or partial occupation of a State's territory, "even if the said occupation meets with no armed resistance." The Office of the Prosecutor for the International Criminal Court (ICC) assessed that the situation on the Crimean Peninsula amounts to an international armed conflict between Ukraine and Russia, which started at the latest on 26 February 2014 and continues to apply "to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation."[218]

The ICC's Office of the Prosecutor also analysed the hostilities in eastern Ukraine, concluding the existence of a non-international armed conflict there since 30 April 2014.[219] Furthermore, due to a direct military engagement of the Russian armed forces, the Office suggested the existence of an international armed conflict between Ukraine and Russia in eastern Ukraine since 14 July 2014 at the latest that goes on in parallel to the non-international one.[220] The

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[214] WH von Heinegg (2016), n.162, p.451.

[215] ICRC, *Commentary on Geneva Convention (II),* n.146, art. 2, para.258.

[216] *Ibid*, para.259.

[217] WH von Heinegg (2016), n.162, p.454.

[218] ICC, the Office of the Prosecutor, *Report on Preliminary Examination Activities 2017 - Ukraine* (2017). Mode of access: https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Ukraine_ENG.pdf (last accessed 14 August 2021) para. 88.

[219] *Ibid*, para.94.

[220] *Ibid*.

Office also did not reject the possibility of the armed conflict in eastern Ukraine being entirely international.[221]

Whether the context is viewed as a separate element from the possible application of the humanitarian law or together with it, it may be short-sighted to ignore the ongoing armed conflict between the two States while analysing a separate incident of the use of force involving these States' government vessels. Although not everything can be interpreted as part of an ongoing conflict, it could also be harmful to re-evaluate the meeting of a threshold for every incident between the same adversaries when the armed conflict between them, according to its legal definition, has already been generally recognised and continues to exist. At the same time, while the objective evaluation of the context of the Kerch Strait incident seems to indicate the military nature of the incident in question, it is hard to expect from the provisional measures Tribunal to recognise the lack of jurisdiction based on the applicability of the IHL when neither of the parties directly mentions its applicability during the proceedings.

4.6 The nature of the Kerch Strait incident

Upon analysing the conduct, cause and context of the incident near the Kerch Strait, the Tribunal found it possible to conclude that the arrest and detention of the Ukrainian vessels took place as part of a law enforcement operation.[222]

At the same time, it is important to keep in mind that the evaluation of the Tribunal was made only *prima facie*. The ITLOS had to decide whether there is a possibility or plausibility that the activities could not be military in nature.[223] The conclusions of the Tribunal seem to indicate that the incident demonstrated law enforcement elements; however, the present analysis suggests that they are intertwined with the military ones. Given that it is possible for both military and law enforcement activities to exist simultaneously, it is likely that the PCA would

[221] ICC, the Office of the Prosecutor (2017), n. 218, para.95.

[222] *Ukraine v Russian Federation*, ITLOS Provisional measures n.2, para.75.

[223] *Ukraine v Russian Federation*, ITLOS Provisional measures, separate opinion of Judge Jesus n.159, para.20.

need to apply a preponderance test during the proceedings on the merits of the case to decide whether the law enforcement or military element is predominant.[224]

The considerations laid out in the thesis suggest the overall dominance of the military elements in the present case study. The types of vessels involved in the incident are generally appropriate during both law enforcement and military operations; however, the use of force against a military vessel that represents the sovereignty of the flag State tips the scale towards the military activities. The analysis of the conduct of the vessels in line with the PCA's assessment of the stand-off in the *South China Sea* case heavily suggests that the incident falls under the military exception in art. 298(1)(b).

The cause of the incident in the *Ukraine v Russia* case seems to be more akin to the law enforcement nature. Still, with regard to the purpose, it seems possible to extrapolate the presence of intentions of military nature, especially when reviewed together with the context. It is difficult to evaluate how broad of a context should be taken into account for assessing the nature of the activities, and it can be argued that the context used in the thesis is too broad. However, in the author's view, a wider application of the context that includes the discussion on the ongoing armed conflict between the two States helps separate this factor from the conduct and cause of the incident and provide a background that may be necessary for better understanding of the cause and purpose of the incident.

Given the low threshold of art. 2 of the Geneva Conventions and the ongoing state of an armed conflict between Russia and Ukraine, it is also possible to suggest that the IHL can be applicable to the present incident. As Judge Lijnzaad pointed out, the questions of whether the case solely relates to the interpretation and application of the LOSC or also involves the interpretation and application of the laws of armed conflict lie well beyond the *prima facie* analysis of the request for provisional measures and may be addressed at a later stage by the PCA.[225] However, in the view of the author, the evaluation of the incident strictly from the perspective of the interpretation and application of the LOSC still suggests that the military element overpowers the law enforcement one.

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[224] Y Tanaka (2020), n.21, p.237.

[225] *Ukraine v Russian Federation*, ITLOS Provisional measures, declaration of Judge Lijnzaad n.205, para.8.

All these considerations, combined with a generally broader interpretation of the word "concerning" suggested in the thesis, lead to a conclusion that the 2018 incident near the Kerch Strait can be predominantly characterised as a military activity that can be excluded from the compulsory dispute settlement by virtue of art. 298(1)(b).

At the same time, only those issues within the dispute that are military in nature or inseparably connected to the military issues can preclude the jurisdiction of the Tribunal. Russia argued during the proceedings that the military exception covers not only the use of force and arrest of the Ukrainian vessels but all issues within the present dispute because the "[d]etention… resulted directly from the incident of 25 November 2018 and thus cannot be considered separately from the respective chain of events, involving military personnel and equipment both from the Russian and Ukrainian sides."[226] Similar to the argument the PCA made regarding the difference between the sea boundary delimitation disputes and the disputes regarding the presence of entitlement or status of land features, it is not enough that an issue has some connection to the issues excluded from the compulsory dispute settlement, to be automatically excluded together with it. Such issues as the status of waters (without the determination of the status of Crimea), the passage regime and innocent passage of warships within the *Ukraine v Russia* case do not require that the Tribunal decides on the legality of Russia's use of force in, possibly, a military context, and therefore, should not strip the Tribunal from its jurisdiction. Similarly, the prolonged detention of the warships and the domestic prosecution of the Ukrainian sailors could also possibly be reviewed separately from the use of force against them and their capture.[227]

Finally, if the PCA finds that the incident near the Kerch Strait indeed qualifies as a military activity, a question could be raised of whether the optional exceptions from the compulsory dispute settlement sufficiently protect States from compulsory dispute settlement during the proceedings on provisional measures, considering a much lower threshold for jurisdiction. However, considering that per art. 290(1 and 5) of the LOSC, provisional measures only refer to urgent measures appropriate "to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment," the proceedings on provisional measures

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[226] *Ukraine* v *Russian Federation*, ITLOS Memorandum of Russia n.38, para.28.

[227] X Shi and YC Chang (2020), n.19, p.290.

can also be viewed as a certain safety valve that must still uphold the optional exceptions while avoiding decisions on the merits, but can also protect the essential interests of the claimant.

Chapter V. Conclusion

The 2018 incident between Russia and Ukraine near the Kerch Strait unfolded against the backdrop of the growing tensions between the two States relating to the land sovereignty dispute over the Crimean Peninsula and the maritime zones surrounding it, the unresolved disagreements regarding the status of waters in the Azov Sea and Kerch Strait, differences regarding the interpretation and application of the 2003 bilateral treaty, and the ongoing clashes between Ukrainian government forces and the pro-Russian armed formations in eastern Ukraine. The incident found its way to the ITLOS, which confirmed *prima facie* jurisdiction over the case and issued an order on the prescription of provisional measures. The case currently awaits the PCA's final decision on jurisdiction and merits of the dispute.

The carefully developed LOSC compulsory dispute settlement system creates great opportunities for States to resolve contentious issues in the law of the sea domain. At the same time, it was built to strike a compromise between the essential interests States wish to protect from the international adjudication and the interest of the international community in the effective dispute resolution and progressive development of the international law. This compromise becomes especially apparent and must be upheld in disputes involving the optional exceptions from the compulsory dispute settlement, as a too broad interpretation of the exceptions may hinder the effectiveness and reliability of the LOSC dispute resolution system, while a very narrow interpretation may provoke fears that the tribunals do not give due regard to the sensitive issues protected by the Convention and undermine the trust in the international judicial institutions.

Due to the *Ukraine v Russia* case regarding the arrest of the Ukrainian naval vessels and crew near the Kerch Strait, the military exception managed to receive more attention in the jurisprudence than it has had so far, with the *South China Sea* case and the award on the preliminary objections in the *Ukraine v Russia* case regarding the coastal State rights only briefly evaluating the art. 298(1)(b) exception. The final PCA award in the case regarding the Kerch Strait incident has the potential of further clarifying the applicability of the military exception and settling some of the issues raised in the ITLOS order on provisional measures.

The heightened attention to the present topic may benefit the development of international law in the area of security operations at sea and lead to a better understanding of the law applicable to various quasi-military situations worldwide.

The analysis in the thesis suggests that international courts and tribunals generally opt for a more narrow interpretation of the provisions that may strip them of jurisdiction, sometimes, possibly, to the detriment of the effectiveness of the optional exceptions from the compulsory dispute settlement. This tendency is followed by the ITLOS order on provisional measures in the *Ukraine v Russia* case, which seems to adopt a very different approach in evaluating the applicability of the military exception than the one used in the *South China Sea* case. This could be attributed to the fact that the ITLOS was only required to establish jurisdiction *prima facie*, which assumes a much lower threshold for jurisdiction. This, in turn, could raise questions about the effectiveness of the optional exceptions of art. 298 in protecting the sensitive interests of States during the proceedings regarding provisional measures and whether the lower threshold for jurisdiction is sufficiently justified by the need to urgently protect the rights of the claimant.

The thesis also highlights possible inconsistencies in the interpretation of the word "concerning" when it comes to the exceptions from the compulsory dispute settlement and other unrelated issues. The analysis of non-English authentic texts may suggest that the drafters intended for "disputes concerning military activities" to have a broader interpretation that includes military activities as such, together with inseparable issues and issues bearing a strong, impactful relationship with the military activities.

The case law further suggests that the following criteria are most relevant for distinguishing between law enforcement and military activities for the purposes of art. 298(1)(b): the type of vessels, the conduct, the cause, the purpose, and the context. Even so, the military and law enforcement activities are not mutually exclusive, so there might be a need to evaluate a predominant element in each of these criteria in order to conclude whether the military activities exception applies to a dispute.

Additionally, the author supports the conclusion of the ITLOS that the nature of the activities should be assessed based on an *objective* evaluation of the abovementioned criteria. Although the positions of States regarding their own actions may be taken into account for this purpose, they should not be a decisive factor unless *estoppel* can be invoked. The objective evaluation

is preferable considering the sensitivity of the security issues to States and the fact that States normally choose arguments that support their own position in a given case. The objective approach is also favoured by the IHL conventions, and it might prove advantageous to keep approaches regarding the evaluation of comparable issues similar across different legal instruments to avoid further fragmentation of the international law.

Regarding the type of vessel, this criterion loses some relevancy when it comes to distinguishing between warships and other government vessels due to the blurring of the line between the two. However, it becomes more relevant when comparing warships to commercial vessels. In the *Ukraine v Russia* case, the types of vessels involved in the incident are appropriate for both law enforcement and military operations. However, analysing the types of vessels in conjunction with their conduct, which involves the use of force against a warship, and the argument that governments have no law enforcement powers over foreign warships reveals higher relevancy to the types of vessels involved in the incident between Russian and Ukraine and signifies the military nature of activities that took place during the incident.

With regard to the conduct of vessels, the author supports the *South China Sea* case approach of analysing the interaction between the two sides for evaluating the nature of the activities, rather than focusing on individual actions of the parties to a dispute. This approach leads to the conclusion that the conduct in the *Ukraine v Russia* case, which included a stand-off between the Russian and Ukrainian forces and the clear use of force against foreign naval vessels, amounts to military activity. Even if we assumed that the Russian coast guard was involved in a law enforcement operation, we would also have to accept that the Russian forces acted in violation of principles of unavoidableness, necessity, and reasonableness of law enforcement action, which potentially may be interpreted as crossing the line into the realm of military activities.

The author agrees with the findings of the ITLOS regarding the cause of the incident, which was interpreted as differing interpretations of the passage regime in the Kerch Strait. The author further agrees with the Tribunal that this cause seems to have more of a law enforcement nature, although convincing arguments have been made regarding the possibility of evaluating the passage of warships as a military activity.

It is further suggested that the purpose or intent of the incident should not be overlooked when assessing the nature of the Kerch Strait incident, even though this factor can be hard to evaluate

objectively. In the *Ukraine v Russia* case, the purpose seems to involve both law enforcement and military features, however taking into account the incident's context, the military element in the intentions of both parties appears to become more prominent.

The author further suggests that the context of the incident in the *Ukraine v Russia* dispute should be broad enough to help objectively evaluate the purpose of the incident and set the stage for a better understanding of the nature of the activities. Given the recognised ongoing armed conflict between the two States, the context seems to suggest a military nature of activities that unfolded near the Kerch Strait in 2018. The context of the incident also raises the question of the applicability of the IHL to the present case, which could restrict the PCA's jurisdiction also based on art. 288 of the LOSC. Although, it remains to be seen whether the PCA will take into consideration the possible application of the IHL, despite the fact that neither of the parties has brought it up so far.

Finally, should the PCA disagree with the findings of the ITLOS and recognise the applicability of the military exception to the present case, it is of utmost importance that the lack of jurisdiction is limited to issues that indeed concern military activities. A number of issues within the present dispute, such as, among others, the passage regime in and around the Kerch Strait and the innocent passage of warships, should not be automatically excluded from the compulsory dispute settlement based on the co-existence of a dispute concerning military activities, as both the international dispute resolution system and the peace and security at sea could be compromised if States had an opportunity to avoid their international responsibility by resorting to force.

Figures

Figure 1 – General map

Figure 2 – Azov Sea as internal waters with a hypothetical median line

Figure 3 – Hypothetical delimitation of the Azov Sea with normal maritime zones

Figure 4 – Planned journey[228]

[228] Image source: http://euromaidanpress.com/2018/11/30/russian-attack-on-ukrainian-ships-who-has-a-right-to-do-what-in-the-azov-sea/ [image edited] [last accessed 5 June 2021].

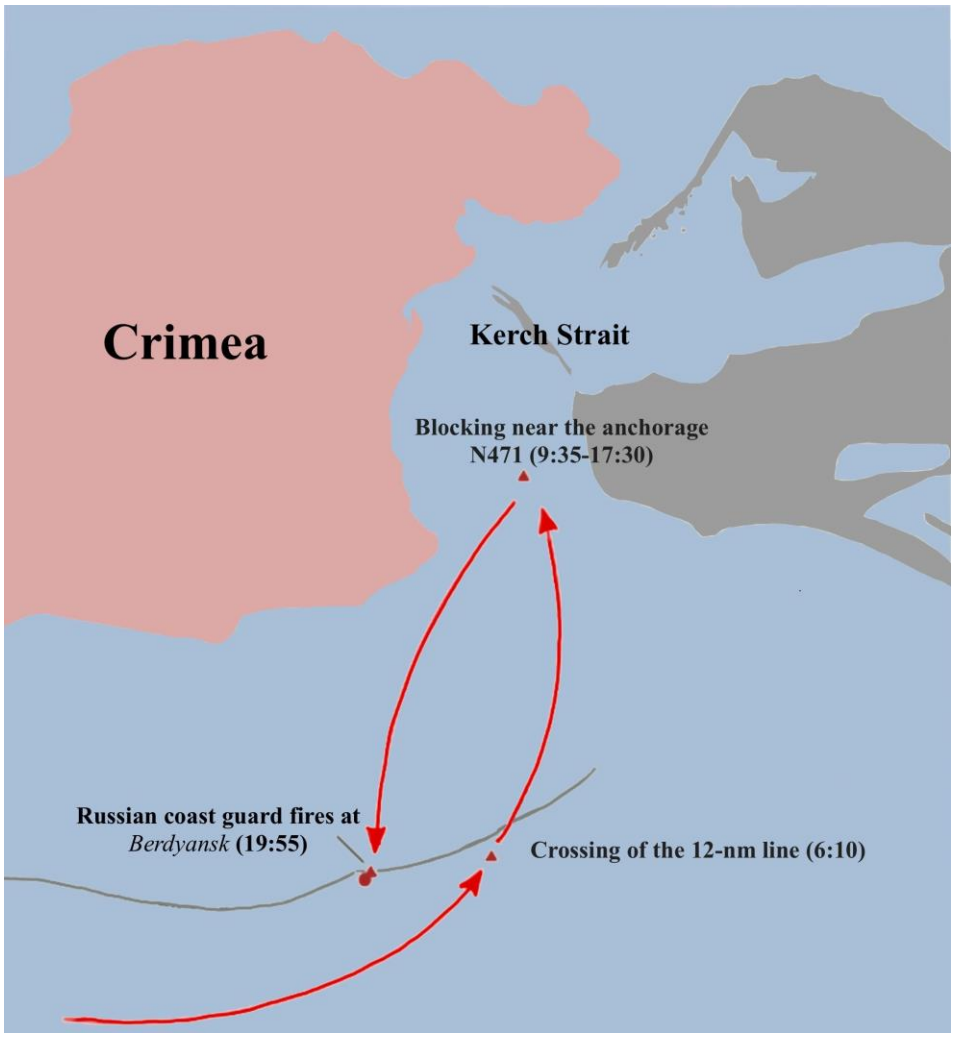

Figure 5 – Chronology of the events[229]

[229] Image source: https://uk.wikipedia.org/wiki/%D0%86%D0%BD%D1%86%D0%B8%D0%B4%D0%B5%D0%BD%D1%82_%D1%83_%D0%9A%D0%B5%D1%80%D1%87%D0%B5%D0%BD%D1%81%D1%8C%D0%BA%D1%96%D0%B9_%D0%BF%D1%80%D0%BE%D1%82%D0%BE%D1%86%D1%96#/media/%D0%A4%D0%B0%D0%B9%D0%BB:Kerch_incident_map.svg [image translated and edited] [last accessed 5 June 2021].

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