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Order of Provisional Measures in Ukraine versus Russia and Mixed Disputes concerning Military Activities

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ABSTRACT

This article discusses mixed disputes concerning military activities in light of the Order of Provisional Measures in *Ukraine v Russia*. It is argued that the International Tribunal for the Law of the Sea (ITLOS) decision that Russia's use of force against the Ukrainian warships was not military in nature would diminish the military activities exception under Article 298(1)(b) of the United Nations Convention on the Law of the Sea (UNCLOS). The distinct status of warships means that use of force against them can hardly be taken as merely pertaining to law enforcement activities. Thus, the dispute should be more properly characterized as a mixed dispute, containing both a military element and a law enforcement element. In light of the jurisprudence of UNCLOS tribunals concerning mixed disputes, if the Annex VII Tribunal to be constituted intends to assume jurisdiction over the dispute, it would need to either isolate the law enforcement element from the military element, or define and apply the preponderance test applicable to mixed disputes concerning military activities.

On 25 May 2019, the International Tribunal for the Law of the Sea (ITLOS) delivered its decision regarding Ukraine's request for the prescription of provisional measures in the *Ukraine v Russia* case and ordered Russia to release three Ukrainian naval vessels and 24 servicemen on board that had been detained by the Russian authority following an incident on 25 November 2018 near the Kerch Strait.[1] As the first decision of ITLOS concerning the interpretation of the 'military activities' exception under Article 298(1)(b) of the United Nations Convention on the Law of the Sea (UNCLOS),[2] the Tribunal held that the use of force by Russia

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1 *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation)*, ITLOS Case No 26, Order of 25 May 2019.

2 United Nations Convention on the Law of the Sea, 1833 UNTS 396, art 298(1)(b).

against the Ukrainian naval vessels was 'in the context of a law enforcement operation rather than a military operation' and thus fell outside the remit of Article 298(1)(b).[3] This article examines the Tribunal's decision and discusses whether the dispute between the parties should not be more properly characterized as a mixed dispute containing both a military element and a law enforcement element. Sections 1 and 2 briefly outline the factual background of the case and the reasoning of the Tribunal. Section 3 assesses the Tribunal's characterization of Russia's use of force against the Ukrainian warships and makes a case for the existence of a mixed dispute. Section 4 goes on to explore, in light of jurisprudence concerning mixed disputes and academic discourse, how jurisdiction over this mixed dispute may be founded.

1. FACTUAL BACKGROUND OF THE CASE

The incident underlying the dispute between the two States concerns two Ukrainian artillery boats (the *Berdyansk* and the *Nikopol*) and one Ukrainian naval tugboat (the *Yani Kapu*), which had departed from the Ukrainian port of Odesa and intended to transit through the Kerch Strait to reach the Ukrainian port of Berdyansk in the Sea of Azov.[4] As the vessels arrived at the entrance of the Kerch Strait, they were physically blocked by Russian Coast Guard vessels.[5] The Russian authority justified the denial of passage by the Ukrainian vessels on the grounds that the vessels had failed to comply with the 'relevant procedure in the 2015 Regulations' and that the innocent passage of Kerch Strait by foreign vessels was temporarily suspended due to 'security concerns following a recent storm'.[6] As a result, the Ukrainian vessels were ordered to stay in the vicinity, subject to restrictions on their movement.[7] After 8 hours of waiting, the vessels sought to break the blockade by turning around and navigating away from the Kerch Strait.[8] This led to the pursuit of the Ukrainian vessels by the Russian Coast Guard vessels and, after initial warnings were ignored by the Ukrainian vessels, the Russian vessels, with the help of a Ka-52 combat helicopter, opened fire against the Ukrainian warships.[9] Three Ukrainian crew members were wounded, and two vessels (the *Berdyansk* and the *Yani Kapu*) sustained damage.[10] All three vessels were detained by the Russian authority and the 24 servicemen on board were arrested and later prosecuted in Russian judicial proceedings for the crime of 'unlawfully crossing the Russian State border'.[11]

2. APPLICABLE LAW AND THE TRIBUNAL'S DECISION

Following the detention of the three naval vessels and the prosecution of the military personnel, Ukraine initiated arbitral proceedings against Russia in accordance with

3 *Detention of Ukrainian Vessels* (n 1), para 74.
4 ibid, para 31.
5 ibid.
6 ibid, para 71.
7 ibid.
8 ibid, para 73.
9 ibid.
10 ibid, para 31.
11 ibid, para 76.

Article 287 and Annex VII, Article 1 of UNCLOS.[12] On 16 April 2019, Ukraine further requested the ITLOS to order provisional measures pursuant to Article 290(5) of UNCLOS, which grants the Tribunal competence if it considers that *prima facie* the arbitral tribunal to be constituted would have jurisdiction over the dispute.[13] Article 298(1)(b) of UNCLOS allows a State party to make a declaration to exclude 'disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service' from the jurisdiction of an Annex VII arbitral tribunal.[14] Both Russia and Ukraine have made such declaration. Therefore, the core issue in the present case is whether the dispute concerns 'military activities'.

The Tribunal answered this question in the negative. It is held that the distinction between military and law enforcement activities must be based 'primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case'.[15] The involvement of naval vessels and the characterization of the activities by the parties are relevant factors to be considered but they are not dispositive of the nature of the dispute.[16] Following this principle, the Tribunal pointed to three relevant facts to support its conclusion that the 'military activities' exception does not apply in the present case.

Firstly, the Tribunal indicated that the specific cause of the incident was Russia's denial of passage of the Ukrainian vessels through the Kerch Strait and the attempt by those vessels to proceed nonetheless.[17] The facts that Russia invoked its 2015 Regulations (which set out procedural requirements for foreign vessels seeking to navigate through the Kerch Strait) to justify the blockade and that the commander of the *Berdyansk* gave prior notification to the Russian authority invoking its right to freedom of navigation under the 2003 Treaty between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait led the Tribunal to conclude that the core of the dispute was the parties' differing interpretation of the passage regimes, which apply to all ships and thus are not military in nature.[18]

Secondly, the Tribunal noted that force was used by the Russian authority when the Ukrainian naval vessels, having waited in the vicinity of the Kerch Strait for 8 hours, sought to break the blockade in violation of the Russian Coast Guard's order.[19] This suggests, according to the Tribunal, that the use of force was in the context of a law enforcement operation rather than a military operation.[20]

Thirdly, the Tribunal stated that the subsequent criminal prosecutions against the 24 Ukrainian servicemen, together with Russia's invocation of Article 30 of UNCLOS (Non-compliance by warships with the laws and regulations of the coastal

12 UNCLOS (n 2), art 287, Annex VII, art 1.
13 ibid, art 290(5).
14 ibid, art 298(1)(b).
15 *Detention of Ukrainian Vessels* (n 1), para 66.
16 ibid, paras 64–5.
17 ibid, para 71.
18 ibid, paras 68, 72.
19 ibid, para 73.
20 ibid, para 74.

State) to justify its detention of the vessels, further corroborate the finding that the activities of Russia are of a law enforcement nature.[21]

3. ASSESSMENT OF THE ORDER: MILITARY ASPECT OF THE INCIDENT AND THE EXISTENCE OF A MIXED DISPUTE

From a methodological perspective, the Tribunal's decision that the nature of a dispute is to be determined by an objective evaluation of relevant facts seems justified, although the degree of objectivity may be questioned in some cases given the lack of viable standards in jurisprudence.[22] Ukraine argued that the military activities exception was inapplicable because Russia had itself characterized them as non-military in nature.[23] In particular, it was pointed out that, in *South China Sea Arbitration*, the Tribunal ruled that it 'will not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest level'.[24] But it should be noted that, unlike Russia in the present dispute, China in that case did not dispute the characterization of its activities in the Position Paper.[25] Given the breadth of the Position Paper and the fact that China did launch an objection to jurisdiction based on maritime delimitation,[26] the omission of the military activities exception may well be taken as a tacit recognition of the jurisdiction of the Tribunal, hence the deference of the Tribunal to the attitude of China. However, when the respondent State contests the characterization or subject of a dispute, courts and tribunals have been fairly consistent in ruling that the determination is to be made by the court/tribunal in light of relevant factors.[27] Indeed, in *Chagos Marine Protected Area Arbitration* (hereinafter *Chagos*), the Tribunal, in determining whether a dispute concerning the definition of a 'coastal State' is one relating to the interpretation or application of UNCLOS or one pertaining to land sovereignty issue, examined the attitude of the **claimant** State (Mauritius) prior to the proceeding and concluded that the real dispute at issue relates to land sovereignty over the Chagos Archipelago, over which the Tribunal had no jurisdiction.[28] If this *Chagos* approach is followed, the dispute between Ukraine and Russia may well fall outside the jurisdiction of the Tribunal, as Ukraine has, prior to the initiation of the proceeding,

21 ibid, para 76.

22 See below Section 4.

23 *Detention of Ukrainian Vessels* (n 1), para 56.

24 *Arbitration between the Republic of the Philippines and the People's Republic of China*, UNCLOS Annex VII Arbitral Tribunal, Case No 2013-19, Award of 12 July 2016, para 1028.

25 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014 <https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm> accessed 30 September 2019.

26 China excluded all categories of disputes under art 298(1) from compulsory procedures by a declaration on 25 August 2006. See, ibid, para 58.

27 *Fisheries Jurisdiction (Spain v Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998*, 432, para 30; *Nuclear Tests (New Zealand v France), Judgment, ICJ Reports 1974*, 466, para 30.

28 The Tribunal pointed out, inter alia, that 'prior to the initiation of these proceedings, there is scant evidence that Mauritius was specifically concerned with the United Kingdom's implementation of the Convention'. *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, UNCLOS Annex VII Arbitral Tribunal, Award of 18 March 2015, para 21. For detailed discussion of the case, see Section 4 below.

consistently claimed that Russia's act is military in nature.[29] In any event, the approach taken by the *South China Sea Arbitration* hardly finds any support in jurisprudence of either the UNCLOS tribunals or the ICJ. The better view, therefore, seems to be that characterization of a dispute by the parties is but one factor to be considered by the tribunal in making the determination.

The main problem with the decision, however, lies in the Tribunal's characterization of Russia's use of force against the Ukrainian warships. By examining what it perceived as relevant circumstances and establishing a context of law enforcement operation, the Tribunal concluded that the use of force was part of Russia's law enforcement activities and thus not military in nature.[30] However, several aspects of the conclusion deserve further attention.

In the first place, it is questionable whether use of force against foreign warships can ever be considered as merely pertaining to law enforcement activities. The Tribunal's decision is premised on the fact that naval vessels are nowadays routinely involved in law enforcement activities which necessarily entail use of force to a certain extent.[31] In a similar vein, Ukraine cited the case of *M/V 'Saiga' (No. 2)* to support its claim that Russia's use of force was a quintessential law enforcement activity 'in an escalating fashion'.[32] However, it is to be noted that *M/V 'Saiga' (No. 2)* concerns a private oil tanker, not a warship.[33] Whereas it is generally recognized that force may be used, even by naval vessels, against foreign private vessels in a law enforcement context, it is doubtful whether the same can be said with regard to foreign warships, in particular against the backdrop of rising tensions between the two States. Warships differ from private vessels in that they represent the sovereignty of the flag State.[34] This representative character makes it difficult to maintain that use of force against warships is merely a law enforcement activity. As pointed out by Judge Gao in his separate opinion, firing target shots against a naval vessel 'falls well within the military activities' because it is 'tantamount to use of force against the sovereignty of the State whose flag that vessel flies'.[35] Furthermore, law enforcement activities presuppose a hierarchical relationship between the enforcing authority and

29 For example, speaking before the Security Council, Ukraine stated that the Russian military vessels 'were given orders to attack the Ukrainian vessels' and that 'Russia committed an act of open military aggression against Ukraine by targeting, firing on and capturing three military vessels'. UN Doc S/PV.8410 <https://undocs.org/en/S/PV.8410>, 11-2, accessed 18 October 2019. Other official statements by Ukraine can be found in Russia's memorandum. Memorandum of the Government of the Russian Federation <www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf>, para 32, accessed 14 July 2019.

30 *Detention of Ukrainian Vessels* (n 1), para 74.

31 It was pointed out in particular that 'the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred'. ibid, para 64.

32 Verbatim record of Case Concerning the Detention of Three Ukrainian Naval Vessels, ITLOS/PV.19/C26/1, 24.

33 *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea), Judgment, ITLOS Reports 1999*, 10, para 31.

34 ITLOS pointed out in *ARA Libertad* that 'a warship is an expression of the sovereignty of the State whose flag it flies'. *'ARA Libertad' (Argentina v Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, 332, para 94.

35 *Detention of Ukrainian Vessels* (n 1), Separate Opinion of Judge Gao, para 33.

the object of the enforcement action,[36] yet this relationship does not exist in cases concerning warships, which enjoy absolute immunity under UNCLOS and thus stand on an equal footing with the law enforcing authority.[37] Since a warship in general falls outside the police power of a foreign coastal State, use of force by that State against the warship should be considered, at least *prima facie*, as **not** pertaining to law enforcement activities.[38]

The distinct status of warships is also reflected in the fact that their operation almost invariably involves sovereign or military purposes to some extent. In times of rising tensions between two States, in particular, the mere presence of a warship in disputed areas serves the unique function of signalling and consolidating the military or political position of the flag State.[39] Thus, in the *South China Sea Arbitration*, the presence of the Philippines tank landing ship BRP Sierra Madre at the Second Thomas Shoal led the arbitral tribunal to conclude that the situation involved a military stand-off between China and the Philippines.[40] In light of the consistent characterization by Ukraine of the situation between the two States as 'armed conflict' or 'military aggression' prior to the incident,[41] it seems obvious that the Ukrainian warships' attempted passage of Kerch Strait carries a strong military and political implication. It is true that Russia's claim that its activities were in resistance of Ukraine's 'secret incursion' was rejected by the Tribunal,[42] but the military purpose achieved by the naval presence in the disputed area is not affected by whether the presence is secret or not. Indeed, the functions of naval presence would be better served if the presence is non-secret in nature. In his dissenting opinion to the decision, Judge Kolodkin further noted that the 'Checklist for Readiness to Sail', which was on board the warship *Nikopol*, stated that one of the missions of the warships was to stand by at the port of Berdyansk to 'take on missions to stabilize the situation in the Azov

36 TD Gill, 'The Forcible Protection, Affirmation and Exercise of Rights by States under the Contemporary International Law' (1992) 23 NYIL 105, 121.

37 UNCLOS (n 2), arts 32, 58, 95, 96. Under art 110, warships and governmental vessels, due to their absolute immunity, are specifically exempt from a foreign warship's exercise of right of visit, which is apparently a law enforcement activity. UNCLOS (n 2), art 110.

38 For a detailed analysis on this point, see, PJ Kwast, 'Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in Light of the Guyana/Suriname Award' (2008) 13 Journal of Conflict and Security Law 49, 83–5.

39 For instance, naval presence is one of the core missions of the US Navy. The main objectives of this mission are: firstly, 'to deter actions inimical to the interests of the United States or its allies'; secondly, 'to encourage actions that are in the interests of the United States or its allies'. S Turner, 'Missions of the U.S. Navy' (1998) 51 Naval War College Review 87, 99. See also, N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP 2005) 280.

40 *South China Sea Arbitration* (n 25), para 1161.

41 See, for example, Statement of the Ministry of Foreign Affairs of Ukraine on 4th anniversary of the beginning of the Russian Federation military aggression against Ukraine <mfa.gov.ua/en/press-center/news/63119-statement-of-the-ministry-of-foreign-affairs-of-ukraine-on-4th-anniversary-of-the-beginning-of-the-russian-federation-military-aggression-against-ukraine> accessed 10 July 2019. Commenting on the incident on 25 November 2018, the Ministry of Foreign Affairs of Ukraine also claimed that the Russia has 'de facto expanded its military aggression against Ukraine to the sea' <mfa.gov.ua/en/press-center/comments/9487-zajava-mzs-ukrajini-u-zvjazku-z-chergovim-aktom-agresiji-rosiji-proti-ukrajini> accessed 10 July 2019.

42 *Detention of Ukrainian Vessels* (n 1), para 70.

theatre of operation'.[43] For Judge Kolodkin, navigational activities of warships are 'inherently, or at least on their face, military'.[44] This seems to be a convincing argument, and one which is more in line with the attitudes of States towards peaceful use of Exclusive Economic Zone (EEZ).[45] In this respect, it is questionable whether the Tribunal's argument—that the dispute merely concerns passage regimes which apply to all ships under the UNCLOS[46]—is sufficient to deny the military nature of the incident.

The distinct status of warships naturally suggests that any use of force against them, even by paramilitary forces or government vessels, would amount to a military activity. However, Russian military forces were also actively involved in the detention of the Ukrainian vessels. The Ukrainian warship *Nikopol* was stopped by a Russian military helicopter before it was detained by a Russian Coast Guard vessel; and a corvette from the Russian Black Sea Fleet was in the vicinity monitoring the actions of the Ukrainian warships.[47] Compared to *South China Sea Arbitration*, in which the arbitral tribunal held that the mere presence of Chinese military vessels in the vicinity when Chinese government vessels were preventing the supply and rotation of the Philippine troops stationed at the Second Thomas Shoal represented a 'quintessential military situation' featuring a standoff between the two States,[48] it seems obvious that Russia's military involvement in the incident on 25 November 2018 is far more direct and intensive.

In fact, even if the Ukrainian warships were to be taken as having the same standing as private vessels, the direct involvement of Russian military in the use of force may still have been characterized as military in nature. In *Guyana v Suriname*, the arbitral tribunal ruled, with regard to the threat of force by Suriname against a private drill ship authorized by Guyana to operate in the disputed maritime area, that threat of force in violation of the UN Charter 'seemed more akin to a threat of military action rather than a mere law enforcement activity'.[49] Suriname stated that the action of its navy boats was in pursuance of its domestic mining decree and that the Attorney General was consulted before the action,[50] but this did not prevent the tribunal from upholding the military nature of the activity, in spite of the fact that force was actually **not** used and that the drill ship is only a private vessel as opposed to a warship.[51] In essence, this is a matter of whether use of force in alleged law enforcement context is 'unavoidable, reasonable and necessary'.[52] However, considering that the use of force by Russia in the present dispute clearly constitutes a violation of *jus*

43 *Detention of Ukrainian Vessels* (n 1), Dissenting Opinion of Judge Kolodkin, para 14.
44 ibid, para 9.
45 See nn 56–62 and accompanying text.
46 *Detention of Ukrainian Vessels* (n 1), para 68.
47 Memorandum of Russian (n 30), para 19.
48 *South China Sea Arbitration* (n 25), para 1161.
49 *Guyana v Suriname*, UNCLOS Annex VII Arbitral Tribunal, Award of 17 September 2007, para 445.
50 ibid, para 441.
51 ibid, para 445. For a detailed analysis as to whether the action taken by Suriname in this case should be characterized as military action or law enforcement action, see Kwast (n 38) 77–83.
52 *Guyana v Suriname* (n 49), para 445.

ad bellum and potentially triggers Ukraine's lawful right of self-defence,[53] it is difficult to maintain that the incident merely pertains to law enforcement activities.[54]

The second problem with the Tribunal's decision lies in its apparent incompatibility with States' attitudes towards the military nature of an activity. In the context of peaceful use of EEZ and the high seas, in particular, there appears to be general agreement that military activities should be interpreted broadly, pertaining not only to use of force but also to other non-violent military activities. For example, States which have made declaration under UNCLOS regarding the use of EEZ generally speak of 'military exercises' or 'military manoeuvres' which include, but not limited to, 'use of weapons or explosives', regardless of the target (warships or otherwise) of such usage.[55] Other States refuse to recognize these declarations, but they do not dispute the remit of these military activities.[56] In its response to the US–Korea joint military drills in the Yellow Sea, the Ministry of Foreign Affairs of China also referred to the drills as 'military operations' which were not allowed to be carried out in China's EEZ without consent, although the drills did not concern a confrontation between China and US/Korea.[57] Similarly, the US upholds a broad scope of 'military activities' which include:

> Anchoring, launching and landing of aircraft and other military devices, launching and recovering waterborne craft, operating military devices, intelligence collection, surveillance and reconnaissance activities, exercises, operations, and conducting military surveys.[58]

Admittedly, these claims do not specifically address activities in the territorial sea, where the incident on 25 November 2018 took place. But the military nature of an act is arguably not affected by where it has taken place. It would be difficult to explain why an act should be characterized as a military act when it is performed on the high seas but as a non-military act while performed in the territorial sea. As Klein points out, in arguing that military activities exception extends to all questions

53 In *Oil Platforms*, the ICJ implies that a single attack on military vessels may constitute an armed attack and thus triggers the 'inherent right of self-defence'. *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, 161, para 72. More explicitly, Heinegg points out that an act of violence against a warship is not only an illegal use of force but also an armed attack triggering the flag State's right of self-defence. WHV Heinegg, 'Warships' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e443?rskey=FMviPh&result=1&prd=MPIL> accessed 21 December 2019, para 17. In *Military and Paramilitary Activities in and against Nicaragua*, the ICJ distinguished an armed attack from other less grave forms of use of force. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, para 191.

54 Commenting on art 301 (peaceful uses of the seas) of the UNCLOS, Klein indicates that activities 'that are either directed against the sovereignty . . . of another State or constitute a blockade or an attack on the sea forces or the marine fleets of another State' are prohibited military acts. Klein (n 39), 283–4.

55 See declarations of Bangladesh, Brazil, Cape Verde, India, Malaysia, Pakistan, Thailand and Uruguay <treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> accessed 10 July 2019.

56 See declarations of Germany, Italy, Netherlands and the UK, ibid.

57 See official statement at <www.gov.cn/gzdt/2010-11/26/content_1754601.htm> accessed 10 July 2019.

58 Senate Executive Report 110-9, 17 December 2007 <www.govinfo.gov/content/pkg/CRPT-110erpt9/html/CRPT-110erpt9.htm> accessed 10 July 2019.

pertaining to the passage of military and government vessels, 'many of the reasons that led to the inclusion of the optional exception in relation to military activities on the high seas and EEZ are equally applicable to the passage of military and government vessels through the territorial sea'.[59] Furthermore, to the extent that 'military activities' are construed as those activities which are not innocent under Article 19(2) of UNCLOS,[60] it is also obvious that Russia's act in the present dispute can easily fall into the remit of the article.[61]

In literature, the liberal interpretation of 'military activities' has also commanded wide support. Talmon, for instance, points out that:

> The Convention does not provide a definition of 'military activities' but there is widespread agreement that, considering the highly political nature of military activities, the term must be interpreted widely. Military activities are not limited to actions taken by warships and military aircraft or governmental vessels and aircraft engaged in non-commercial service.[62]

In a similar vein, Boczek identifies eight 'major categories of military activities in the oceans' which include navigation (with or without use of explosives), overflight, collecting strategic and military information, emplacement of buoys and other navigation devices, emplacement of conventional weapons, building installations for launching missiles, emplacement of anti-submarine warfare devices and logical support.[63] In essence, these broadly worded categories enclose anything which might further the military or strategic interests of a State into the remit of 'military activities'.

The third issue relating to the Tribunal's decision is the relationship between 'military activities' and 'law enforcement activities'. By establishing a law enforcement context and denying the military nature of Russia's use of force, the Tribunal seems to have endorsed Ukraine's proposition that 'military activities' and 'law enforcement activities' are mutually exclusive concepts.[64] It is true that law enforcement activities were originally conceived as the opposite of military activities.[65] But it seems that

59 Klein (n 39), 299.

60 This is the position taken by Judge Jesus in his separate opinion, see, *Detention of Ukrainian Vessels* (n 1), Separate Opinion of Judge Jesus, para 15. See also, M Hayashi, 'Military Activities in the Exclusive Economic Zones of Foreign Coastal States' (2012) 27 International Journal of Marine and Coastal Law 795, 801; BA Boczek, 'Peaceful Purposes Provisions of the United Nations Convention on the Law of the Sea' (1989) 20 ODIL 359, 372.

61 art 19(2) includes, inter alia, 'any exercise or practice with weapons of any kind'. UNCLOS (n 2), art 19(2)(b).

62 S Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' in S Talmon and BB Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing 2014) 15, 57–58.

63 BA Boczek, 'Peacetime Military Activities in the Exclusive Economic Zeon of Third Countries' (1988) 19 ODIL 445, 447–48. For similar liberal interpretation of the term, see, N Klein, 'Legal Implications of Australia's Maritime Identification System' (2006) 55 ICLQ 337, 350; MW Janis, 'Dispute Settlement in the Law of the Sea Convention: The military Activities Exception' (1977) 4 ODIL 51, 56, 63; E Rauch, 'Military Uses of the Oceans' (1984) 28 German Yearbook of International Law 229, 252; Hayashi (n 61) 796, 801.

64 Verbatim Record (n 32) 19.

65 See, for example, Part IV of the informal single negotiating text of 1976, art 18(2)(b) of which provides that disputes concerning military activities are excluded from the dispute settlement procedures, 'it being understood that law enforcement activities pursuant to the present Convention shall not be considered

drafters of the convention were primarily, if not completely, concerned with activities **by** military or governmental vessels, with virtually no attention being paid to activities performed **against** these vessels.[66] While it seems rather straightforward to maintain a distinction between a warship's law enforcement activities (against private subjects) and its military activities, it is questionable whether the same could be said with regard to activities taken against foreign warships, which are covered by absolute immunity. The conundrum in this latter respect lies in the fact that violation of immunity is an issue which potentially straddles the bifurcation between military activities and law enforcement activities. On the one hand, immunity from jurisdiction—be it adjudicative jurisdiction or enforcement jurisdiction—has a natural undertone of pertaining to law enforcement activities, as the rule is in essence an exception to the authority of a State to enforce its laws. On the other hand, however, certain enforcement measures in violation of a foreign warship's immunity must be taken as military in nature if they reach a degree of intensity. Given that a warship enjoys immunity in literally all maritime areas under UNCLOS, any other conclusion would lead to the result that no action against a foreign warship would ever be considered as military in nature, for even an armed attack could be formulated as a violation of immunity issue and thus labelled as law enforcement nature. In other words, when it comes to warships, military activities and law enforcement activities are not readily distinguishable. A violation of immunity may well be brought forth, **in the context of law enforcement activities**, by a military activity.

This seems to be an accurate description of the incident on November 25: on the one hand, the use of force by Russia against the Ukrainian warships has an indubitable 'military' element; on the other hand, Russia's invocation of its 2015 Regulations during the incident, together with its domestic prosecutions of the Ukrainian servicemen after the arrest, suggests that the activities merely concern law enforcement measures. From this analysis, the dispute between the States seems to be more of a mixed character, viz. it contains both a law enforcement element and a military element. The Tribunal, however, has largely ignored the military aspect of the dispute and focused almost exclusively on the existence of a law enforcement context. This may be sufficient for establishing *prima facie* jurisdiction of the Annex VII Tribunal to be constituted.[67] However, the more difficult question, and one which the arbitral tribunal to be constituted would have to resolve in order to

military activities'. UN Doc A/CONF.62/WP.9/Rev.1, pp 190–91. See also, G Singh, *United Nations Convention on the Law of the Sea: Dispute Settlement Mechanisms* (Academic Publications 1985) 148.

66 See, in particular, Nordquist, Rosenne and Sohn, who point out that the military activities exception 'owes its origin to the preoccupation of the naval advisors to the delegations that activities by naval vessels should not be subject to judicial proceedings in which some military secrets might have to be disclosed'. MH Nordquist and others, *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V* (Martinus Nijhoff 1989) 135. For detailed reviews of the drafting history of the exception, see, ibid 135–39.

67 This is the position of Judge Gao, who indicated in his separate opinion that 'it is perhaps this law enforcement element of a mixed dispute that appears to equally afford a basis on which the *prima facie* jurisdiction of the Annex VII arbitral tribunal could be found'. Separate Opinion of Judge Gao (n 35) para 51. In his Declaration in *M/V Louisa*, Judge Paik likewise pointed out that a 'plausible connection' may be enough for the order of provisional measures. *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v Kingdom of Spain)*, ITLOS Case No 18, Judgment of 28 May 2013, Declaration of Judge Paik, para 18.

proceed to the merits of the dispute, is how to properly define the nature of the mixed dispute.

4. THE DETERMINATION OF MIXED DISPUTE

A mixed dispute generally denotes a situation which contains both an UNCLOS issue and a non-UNCLOS issue. A classic example of mixed disputes is maritime boundary delimitation disputes which simultaneously touch upon land sovereignty issues. Disputes concerning land sovereignty fall outside the remit of UNCLOS. But the principle 'land dominates the sea' naturally suggests that, in practice, maritime boundary delimitation is often interwoven with disputes over land territory.[68] As a result, a court or tribunal may have to consider land sovereignty issues as part of its overall jurisdiction over a maritime boundary delimitation dispute,[69] hence the term 'mixed dispute'.

Yet the practice of adjudicating mixed disputes is not limited to maritime boundary delimitation but extends to any dispute concerning the interpretation or application of UNCLOS which necessarily involves making 'incidental determination' over matters that fall outside the remit of UNCLOS.[70] Given the all-embracing nature of UNCLOS, disputes between State parties rarely concern UNCLOS provisions alone.[71] In this sense, jurisdiction over incidental matters is crucial to ensuring that courts and tribunals would effectively exercise their jurisdiction under UNCLOS.[72] But the exercise of incidental jurisdiction also opens the door for potential expansion

68 See, for instance, (former) Judge Shi, who indicates that 'many maritime delimitation cases require the Court to decide, as a preliminary step, questions of sovereignty over disputed islands or certain coastal regions of land territory'. J Shi, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9 Chinese Journal of International Law 271, 275. See also, AE Boyle, 'UNCLOS Dispute Settlement and the Uses and Abuses of Part XV' (2014) 47 Revue Belge de Droit International 182, 195; I Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals' (2012) 27 International Journal of Marine and Coastal Law 59, 60.

69 This has been termed 'incidental jurisdiction' (over non-UNCLOS issues). L Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals' in AD Vecchio and R Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Springer 2019) 383.

70 For example, the Tribunals in *M/V 'Saiga' (No 2)* and in *Guyana v Suriname* both included a finding on the illegal use or threat of force in the operative part of the decision. *Saiga* (n 33) para 183(9); *Guyana v Suriname* (n 49), para 488(2). But this has been criticized as an unjustifiable expansion of jurisdiction. See, Marotti (n 69) 388–89. With respect to mixed disputes concerning the so-called 'parallelism of treaties', see J Harrison, 'Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation' (2017) 48 ODIL 269.

71 Aside from the present dispute, Russia and Ukraine are also involved in another arbitral proceeding concerning Ukraine's rights in the disputed maritime area. Ukraine's assertion of its rights as a coastal State may well raise the issue relating to Russia's annexation of Crimea. Written submissions of the parties can be found at <https://pca-cpa.org/en/cases/149/> accessed 10 October 2019. For a discussion of the case, see, RG Volterra and others, 'The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait' (2018) 33 International Journal of Marine and Coastal Law 614.

72 See, in particular, Judge Wolfrum, who holds that jurisdiction over 'associated question of delimitation over land or islands' is 'in line with the principle of effectiveness and enables the adjudicative body in question to truly fulfil its function'. R Wolfrum, 'Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs' 23 October 2006 <https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf> accessed 25 September 2019.

of a court or tribunal's jurisdiction. Coupled with the absence of a viable standard in jurisprudence for the determination of incidental matters, jurisdiction over mixed disputes proves to be one of the most controversial topics in the field of dispute resolution under UNCLOS.[73] This section examines how mixed disputes have been approached by courts and tribunals in the past and sets out the potential ways that the Annex VII Tribunal to be constituted may deal with the situation between Russia and Ukraine.

A. Severability Test

When faced with a mixed dispute, a logical first step for any court or tribunal would be to consider whether the aspect of the dispute over which it has no jurisdiction can be separated from the aspect over which it has. This consideration is important to ensure that the court or tribunal would exercise jurisdiction over a non-UNCLOS matter only if the matter is inseparable from the main UNCLOS dispute. In *Chagos*, the parties disputed as to whether the Marine Protected Area (MPA) established by the UK surrounding the Archipelago should be properly characterized as a measure 'for the protection and preservation over the marine environment', which falls into the Tribunal's jurisdiction by virtue of Article 297(1)(c) of UNCLOS, or as an exercise of the UK's 'sovereign rights with respect to the living resources of the exclusive economic zone', which precludes the Tribunal's jurisdiction in accordance with Article 297(3)(a) of the Convention.[74] The Tribunal drew a clear distinction between the two issues by ruling that the purpose of the MPA extends well beyond the management of fisheries and that the fisheries aspect of the dispute is without prejudice to the court's jurisdiction over the environmental aspect.[75] In a similar vein, the arbitral tribunal in the *South China Sea Arbitration* separated Philippines' submissions concerning the status of certain maritime features and the source of maritime entitlements from the major disputes between the two States relating to land sovereignty and maritime boundary delimitation.[76] For the Tribunal, the Philippines' submissions are just 'several distinct matters' independent of the general territorial dispute, and 'a dispute over an issue that may be considered in the course of a maritime boundary delimitation [does not constitute] a dispute over maritime boundary delimitation itself'.[77]

73 In *Chagos*, for example, the majority and the minority disagreed as to the degree of connection required for the exercise of incidental jurisdiction over land sovereignty issues. Whereas the majority held that jurisdiction can only be exercised over 'ancillary' or 'minor' matters, the minority argued that existence of a 'genuine link' or 'nexus' would be sufficient. See, *Chagos* (n 28) para 221; Dissenting and Concurring Opinion, para 28, 44, 45. Talmon dismisses all these terms as 'poorly defined' and 'vague'. S Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of Unclos Part XV Courts and Tribunals' (2016) 65 ICLQ 927, 935.

74 *Chagos* (n 28) para 284.

75 ibid para 304.

76 *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, 29 October 2015, para 153, 157.

77 ibid para 152, 155. This approach also finds support in ICJ jurisprudence. In *Tehran Hostages*, for instance, the ICJ refuted Iran's argument that the dispute before the Court only represents a 'marginal and secondary aspect' of the overall dispute between the two States which falls outside jurisdiction of the Court. It was pointed out, inter alia, that the Court should not 'decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important'. *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, ICJ Reports 1980, 3, para 36.

The main question that this severability test seeks to answer is whether distinct aspects of a situation should be considered as integral parts of one major dispute or as several independent sub-disputes. Yet applying this severability test is not an easy task. In *Chagos*, the Tribunal's ruling that a dispute concerning the definition of a 'coastal State' cannot be separated from the primary dispute between the parties concerning the sovereignty over the Archipelago was subject to a joint dissenting opinion by Judge Kateka and Judge Wolfrum, who took the view that the former dispute 'only covers an aspect' of the territorial dispute and is thus capable of being independently resolved.[78] Likewise, the Tribunal of *South China Sea Arbitration* has been criticized for failing to recognize that 'issues of interpretation and application of the Convention in this case are integrally linked to the issues of sovereignty and maritime delimitation, even if they are two separate parts of the same exercise'.[79] The lack of consistent standards for the application of this severability test means that much is dependent on the discretion of the tribunal. It appears that the way an ostensible mixed dispute is presented may have significant impact on the application of this severability test.[80]

But this severability test does provide a useful tool for the Tribunal to be constituted to deal with the situation between Russia and Ukraine, not least because it helps the Tribunal avoid dealing with the more complicated issue of which aspect, military or law enforcement, properly defines the situation as a whole.[81] It has been analysed above that the military element of the incident on 25 November 2018 is Russia's use of force against the Ukrainian warships.[82] The main focus of Ukraine's claim, on the other hand, is Russia's violation of its sovereign immunity. A plausible argument along this line of severability would be that Russia's act of holding the Ukrainian warships and military personnel in captivity is per se a violation of Ukraine's immunity, regardless of how this condition of captivity is brought forth. The capture of the warships and the military personnel might be a military activity, but the prolonged detention of the warships (which Russia sought to justify on the basis of Article 30 of UNCLOS[83]) and the subsequent domestic prosecution of the individuals are **separate and independent** violations of Ukraine's sovereign immunity. This latter aspect of the dispute does not seem to have any difference of

78 *Chagos* (n 29), Dissenting and Concurring Opinion, para 10.

79 SR Pemmaraju, 'The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility' (2016) 15 Chinese Journal of International Law 265, 306. For similar criticism, see, N Klein, 'The Vicissitudes of Dispute Settlement under the Law of the Sea Convention' (2017) International Journal of Marine and Coastal Law 332; X Zhang, 'Problematic Expansion on Jurisdiction: Some Observation on the South China Sea Arbitration' (2016) 9 Journal of East Asia and International Law 449.

80 In *Chagos*, the dissenting judges criticized the majority for failing to pay sufficient attention to the formulation of the dispute by Mauritius. Dissenting and Concurring Opinion, paras 5–10. As pointed out by Boyle, 'everything turns in practice not on what each case involves but on how the issues are formulated'. AE Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) ICLQ 37, 44–45.

81 See Section 4.B below.

82 See Section 3 above.

83 *Detention of Ukrainian Vessels* (n 1) para 76. art 30 is entitled 'Non-compliance by warships with the laws and regulations of the coastal State'.

substance from the situation in *ARA Libertad*.[84] In that case, the Argentinian frigate ARA Libertad voluntarily entered the Ghanaian port following an invitation from the Ghanaian government but was subsequently detained by the Ghanaian authority pursuant to a court order. During the detention, the Ghanaian authority also threatened to prosecute the Commander of the warship for impeding the Ghanaian officials from boarding and moving the warship.[85] In its order of provisional measures on 15 December 2012, ITLOS confirmed the immunity of warships and ordered Ghana to immediately release ARA Libertad and its crew.[86] The dispute was later resolved after the court order to detain ARA Libertad was quashed by the Ghanaian Supreme Court and Ghana recognized its international responsibility for violating the immunity of ARA Libertad.[87] It appears that the situation in *ARA Libertad* represents a quintessential example of violation of warship immunity in a purely law enforcement context. Likewise, it may be argued that the detention of the Ukrainian warships and the prosecution of the servicemen are law enforcement activities in violation of Ukraine's sovereign immunity, and this characterization is not altered by the fact that the state of detention was brought forth by a military activity. In short, the capture of the warships is separate from their subsequent detention.

B. Preponderance Test

If, on the other hand, the Tribunal to be constituted would regard the situation as an integrated whole, viz. that the use of force cannot be separated from the subsequent detention of the warships and the prosecution of the military personnel, it would then have to consider which element—military or law enforcement—properly characterizes the whole dispute. This line of thought was followed by Judge Gao, who indicated in his Separate Opinion that, since the current dispute is 'at least' a mixed nature of both military and law enforcement activities, the Annex VII arbitral tribunal to be constituted needs to apply a preponderance test to determine which aspect of the dispute is predominant.[88] But the question remains how this preponderance test is to be applied.

In *Chagos*, the Tribunal had to determine the nature of a dispute concerning the definition of a 'coastal state'. Whereas Mauritius insisted that the dispute concerns merely the interpretation and application of UNCLOS and thus falls into the jurisdiction of the Tribunal, the UK objected that Mauritius' claim is 'an artificial re-characterisation of the long-standing sovereignty dispute as a "who is the coastal State" dispute'.[89] The Tribunal, having pointed out the principle that the nature of a dispute is to be determined 'on an objective basis', went on to conclude that the present dispute 'primarily' concerns sovereignty, with the UK's actions as a coastal State

84 *ARA Libertad* (n 35).
85 ibid para 84.
86 ibid para 108(1).
87 MC Mirassou, 'ARA Libertad, The' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2145?rskey=B8ChKc&result=1&prd=MPIL> accessed 21 December 2019, paras 16–18.
88 Separate Opinion of Judge Gao (n 35) para 52.
89 *Chagos* (n 28) para 207.

merely representing a manifestation of that dispute.[90] In reaching the conclusion, the Tribunal laid particular emphasis on the attitude of the applicant State (Mauritius) both before and during the proceeding. At a later stage, the Tribunal also confirmed, if indirectly, that an 'ancillary' or 'minor' non-UNCLOS issue does not alter the nature of the main dispute as one concerning the interpretation or application of UNCLOS.[91] On neither occasion, however, a solid standard for the application of this primary/ancillary test was spelled out by the Tribunal. This has led authors to conclude that the application of the preponderance test is 'an inherently subjective exercise'.[92]

Coupled with this lack of viable standard for the application of preponderance test is the difficulty with the test itself. A mixed dispute denotes any dispute that simultaneously touches upon UNCLOS and non-UNCLOS issues. But the sensitivity of each non-UNCLOS issue is not necessarily the same. As the majority in *Chagos* noted, whereas the parties' intention regarding the compulsory dispute settlement mechanism was that sensitive issues such as sovereign rights and maritime territory should be excluded from jurisdiction, 'such sensitivities arise to an even greater degree in relation to land territory'.[93] This in turn raises the question whether the degree of preponderance may differ depending on the sensitivity of the underlying non-UNCLOS issue. Should a mixed dispute which touches on a coastal State's rights regarding the management of fisheries in its EEZ (and thus falls outside the remit of compulsory procedures by virtue of Article 297(3)(a)) be subject to the same preponderance test as a mixed dispute concerning sovereignty over land territory? Under Article 298(1)(a)(i), disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, are automatically excluded from compulsory conciliation as long as they involve (regardless of the extent of involvement) 'concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory'. Citing this article, Talmon points out that:

> Considering the overwhelming significance that States ascribe to questions of territorial sovereignty, it seems doubtful that disputes concerning sovereignty over continental or insular land territory can ever be "ancillary" or "incidental" to a dispute concerning the interpretation or application of the UNCLOS.[94]

If one accepts the proposition that the more sensitive an underlying non-UNCLOS issue, the less likely a mixed dispute containing this issue would be subject to compulsory jurisdiction, it becomes clear that the preponderance test must not only be **applied** on a case-by-case basis, but also be **defined** on the same basis. This naturally

90 ibid paras 211–12.
91 ibid paras 220–21.
92 Talmon (n 73) 934.
93 *Chagos* (n 28) para 219.
94 Talmon (n 73) 936. See also, Pemmaraju, who argues that 'it is beyond any doubt that from a reading of article 298(1)(a)(i), disputes which are mixed up with sovereignty issues are excluded from compulsory dispute settlement procedure including the compulsory conciliation procedure if a State party decided to exclude them by declaration'. Pemmaraju (n 79) 277, 305.

suggests more discretion on the part of the court or tribunal, for, in the absence of a clear definition, its task is not limited to evaluating whether the evidence before it has reached a particular preponderance threshold, but extends to defining that preponderance threshold itself.

Therefore, in the dispute between Russia and Ukraine, if the arbitral tribunal to be constituted is to rule that the military element of the dispute cannot be separated from the law enforcement element, it would then have to define the preponderance test applicable to mixed disputes concerning military activities, before assessing whether the incident on 25 November 2018, viewed as a whole, should be characterized as military activities or law enforcement activities. In light of the complete absence of jurisprudence concerning mixed disputes relating to military activities, it seems obvious that the Tribunal is bound to set a new precedent. However, considering the highly political nature of military activities and the sensitivities of States,[95] any imprudent exercise of jurisdiction is likely to backfire and reduces the authority of the compulsory procedures under UNCLOS.

5. CONCLUSION

It remains to be seen whether the dispute would proceed to the arbitral proceeding stage and, if so, how the Annex VII Tribunal would deal with the issue of jurisdiction. In a recent update of the case, the 24 Ukrainian servicemen were released following an exchange of prisoners between the two States.[96] Still, the Ukrainian warships remain in custody; and in July, Ukraine seized a Russian tanker allegedly involved in the blocking of the Ukrainian warships in the incident on November 25.[97] As it is, the Tribunal's decision has clearly diminished the military activities exception under Article 298(1)(b). The distinct status of warships, together with States' attitude towards military activities, suggests that Russia's use of force can hardly be taken as merely pertaining to law enforcement measures. Therefore, the present dispute should be more properly characterized as a mixed dispute containing both a military element and a law enforcement element. A diminished military activities exception is likely to encourage States to escalate a conflict in order to be exempt from the compulsory procedures.[98] In addition, the reasoning of the Tribunal is also likely to be applied in other contexts to expand the jurisdiction of a tribunal over mixed disputes concerning military activities.[99] On the other hand, if the Annex VII Tribunal to be

95 Klein (n 39) 291.

96 'Ukraine and Russia exchange prisoners in landmark deal', *BBC News*, 7 September 2019 <https://www.bbc.com/news/world-europe-49610107> accessed 15 October 2019.

97 S Walker, 'Ukraine seizes Russian tanker in Danube port city of Izmail' (*The Guardian*, 25 July 2019) <https://www.theguardian.com/world/2019/jul/25/ukraine-seizes-russian-tanker-on-danube-port-city-of-izmail-nika-spirit> accessed 15 October 2019.

98 Separate Opinion of Judge Gao (n 35) para 45.

99 Kraska points out in this respect that the Tribunal's decision would lead to disputes concerning freedom of navigation operation performed by warships being taken as pertaining to navigational issues (which apply to all ships) and thus non-military in nature. Similarly, intelligence, surveillance and reconnaissance missions performed by warships would be taken as relating to marine scientific research and fall into the remit of compulsory procedures. J Kraska, 'Did ITLOS Just Kill the Military Activities Exemption in Article 298?', EJIL: Talk!, 27 May 2019 <www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/> accessed 21 December 2019.

constituted is to regard the present dispute as a mixed one, it would need to either isolate the law enforcement element from the military element, or determine how the preponderance test should be defined and applied in mixed disputes concerning military activities. Whatever the outcome, however, it is always advisable to bear in mind that the ultimate success of an international dispute settlement mechanism hinges upon a proper balance between the competence of a judicial body to determine its jurisdiction and the recognition of States' actual intention to be bound by the decisions of that body.

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