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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

Detention of a foreign warship by a coastal State creates particular strategic and security interest sensitivities for both the flag State of the warship and the coastal State. Thus, the determination of whether to release a detained foreign warship and its crew is a crucial issue in law and practice. Two cases before the International Tribunal for the Law of the Sea (ITLOS), the 2012 *ARA Libertad* case[1] and the 2019 *Ukraine v. Russia* case,[2] provide important insights into this issue.

The *ARA Libertad* case concerned the release of the frigate *Libertad*, a warship of the Argentine Navy, after it was detained by Ghanaian authorities.[3] Following discussions between Ghana and Argentina, Ghana authorized the visit of the vessel to the port of Tema on June 4, 2020 and formally advised Argentina of its decision by an exchange of notes through diplomatic channels.[4] A formal welcome ceremony was held on board when the *Libertad* arrived in Tema on October 1. The following day, an official of the Judicial Service of the Superior Court of Judicature of Ghana (Commercial Division) arrived at the vessel and delivered an order issued by that court requiring the *Libertad* to be held at the port of Tema.[5] According to Ghana, this "unfortunate incident" resulted from a series of cases brought by NML in the courts of the United States and the United Kingdom against Argentina.[6]

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1. ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332. For a commentary on this case, see Yoshifumi Tanaka, *Current Legal Developments International Tribunal for the Law of the Sea: The* Ara Libertad *Case (*Argentina v. Ghana*, 15 December 2012), Request for the Prescription of Provisional Measures*, 28 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 375 (2013).

2. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, ITLOS Rep. [hereinafter Ukraine v. Russia Order]. Please note that the analysis in this article relies on the electronic version of the Tribunal's Order of May 25, 2019, available at the ITLOS website. *See* INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, CASE NO. 26, https://www.itlos.org/en/cases/list-of-cases/case-no-26/.

3. ARA Libertad (Arg. v. Ghana), Case No. 20, Request for Provisional Measures Submitted by Argentina, 2–3, ¶ 3 (Nov. 14, 2012) [hereinafter Request for Provisional Measures Submitted by Argentina].

4. *Id.* ¶ 4.

5. *Id.* ¶¶ 5–6.

6. ARA Libertad (Arg. v. Ghana), Case No. 20, Written Statement of the Republic of Ghana, 1–2, ¶ 3 (Nov. 28, 2012). According to Ghana, NML is a company incorporated under the laws of the Cayman Islands and a subsidiary of a U.S. company engaged in the management of investments. *Id.*

On October 29, 2012, Argentina instituted proceedings against Ghana before an arbitral tribunal[7] established under Annex VII to the United Nations Convention on the Law of the Sea (UNCLOS or the Convention).[8] On November 14, 2012, Argentina also filed with ITLOS a request for the prescription of provisional measures[9] pursuant to UNCLOS Article 290(5).[10] Argentina requested the Tribunal to order Ghana to "unconditionally enable the Argentine warship Frigate ARA Libertad to leave the Tema port and the jurisdictional waters of Ghana and to be resupplied to that end."[11] ITLOS, in its December 15 Order, unanimously prescribed the following provisional measure:

> Ghana shall forthwith and unconditionally release the frigate *ARA Libertad*, shall ensure that the frigate *ARA Libertad*, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate *ARA Libertad* is resupplied to that end.[12]

Seven years later, a similar dispute arose between Ukraine and the Russian Federation. A key issue in the *Ukraine v. Russia* case concerned the release of three Ukrainian naval vessels (the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*) and their twenty-four crewmen detained by the Russian Federation. The *Berdyansk* and the *Nikopol* are artillery boats, and the *Yani Kapu* is a

7. ARA Libertad Arbitration (Arg. v. Ghana), Case No. 2013-11, Permanent Court of Arbitration, https://pca-cpa.org/en/cases/65/. The arbitral proceedings were terminated pursuant to Article 22(1) of the Rules of Procedure after an agreement was reached between Argentina and Ghana. *See* ARA Libertad Arbitration (Arg. v. Ghana), Case No. 2013-11, PCA Case Repository, Termination Order (Perm. Ct. Arb. 2013).

8. United Nations Convention on the Law of the Sea, Annex VII, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

9. ARA Libertad, *supra* note 1, at 338, ¶ 26. According to Argentina, following the institution of arbitral proceedings, the situation became even more aggravated. It cited the Port Authority's attempt on November 7 to forcibly move the *Libertad* and the cutting off of electricity and water to the ship. Request for Provisional Measures Submitted by Argentina, *supra* note 3, at 10, ¶ 17, and 6–7, ¶ 30.

10. UNCLOS, *supra* note 8, art. 290(5).

11. Request for Provisional Measures Submitted by Argentina, *supra* note 3, at 24, ¶ 72bis; ARA Libertad, *supra* note 1, at 338, ¶ 28.

12. ARA Libertad, *supra* note 1, at 350, ¶ 108.

tugboat. In contrast to the *Libertad*, a tall ship used for the training of naval cadets, the Ukrainian vessels were in operational service.[13]

On November 25, the three Ukrainian vessels and their crews were arrested and detained by Russian Federation authorities in the Black Sea near the Kerch Strait.[14] Russian authorities claimed that innocent passage through the Russian territorial sea leading to the Kerch Strait was temporarily suspended for foreign military vessels and that the Ukrainian naval vessels attempted to break through what Russia described as a blockade without following the procedures provided in a 2015 regulation.[15]

In response, on March 31, 2019, Ukraine instituted the arbitral proceedings in respect of a "dispute concerning the immunity of three Ukrainian naval vessels and the twenty-four servicemen on board."[16] On April 16, 2019, Ukraine further asked ITLOS to prescribe provisional measures requiring the Russian Federation to promptly:

> a. Release the Ukrainian naval vessels the *Berdyansk*, the *Nikopol*, and the *Yani Kapu*, and return them to the custody of Ukraine;
>
> b. Suspend criminal proceedings against the twenty-four detained Ukrainian servicemen and refrain from initiating new proceedings; and
>
> c. Release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.[17]

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13. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, at 28 (May 10, 2019).

14. According to Ukraine, the *Berdyansk* and the *Yani Kapu* were seized at a distance of approximately twelve nautical miles from the coast and the *Nikopol* at a distance of approximately twenty nautical miles from the coast. *Id.* at 6.

15. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Memorandum of the Government of the Russian Federation, 6–7, ¶¶ 14, 17 (May 7, 2019) [hereinafter Russian Memorandum]. The 2015 regulations refer to the Mandatory Regulations for the Seaport of Kerch approved by Order of the Ministry of Transport of Russia No. 313 of 21 October 2015. *Id.* at 4, ¶ 10.

16. Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukr. v. Russ.), Case No. 2019-28, PCA Case Repository, Procedural Order No. 1, pmbl., ¶ 6 (Perm. Ct. Arb. 2019).

17. 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, Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26 Written Pleadings, ¶ 22 (Apr. 16, 2019); Ukraine v. Russia Order, *supra* note 2, ¶ 24.

While the Russian Federation chose not to appear before ITLOS,[18] the Tribunal, in its May 25 Order, prescribed the following provisional measures:

> The Russian Federation shall immediately release the Ukrainian naval vessels *Berdyansk*, *Nikopol* and *Yani Kapu*, and return them to the custody of Ukraine;
>
> The Russian Federation shall immediately release the 24 detained Ukrainian servicemen and allow them to return to Ukraine;
>
> Ukraine and the Russian Federation shall refrain from taking any action which might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal. [19]

Thus, in both the *ARA Libertad* and *Ukraine v. Russia* cases, ITLOS prescribed provisional measures ordering the release of detained warships and the crewmembers. In this connection, three issues must be examined.

The first is the interpretation of military activities set out in UNCLOS Article 298(1)(b). This provision allows parties to the Convention to exempt "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3."[20] This raises the question of whether the detention of a foreign warship and its crew would fall within the scope of "military activities." This question was the most contentious issue in the *Ukraine v. Russia* case.

The second issue relates to the immunity of the ships involved in the two cases. In that regard, the Convention provides immunities to two types of ships. The first are warships, which are defined in UNCLOS Article 29.[21] Article 95 sets forth the second type, which are "[s]hips owned or operated by a State and used only on government non-commercial service."[22] On the

18. Ukraine v. Russia Order, *supra* note 2, ¶ 8. However, the Russian Federation submitted a memorandum in support of its position that ITLOS lacked jurisdiction to hear the matter. *See* Russian Memorandum, *supra* note 15, at 2, ¶ 2.

19. Ukraine v. Russia Order, *supra* note 2, ¶ 124.

20. UNCLOS, *supra* note 8, art. 298(1)(b).

21. *Id.* art. 22.

22. *Id.* art. 95.

high seas, ships falling under Article 29 or Article 95 enjoy "complete immunity from the jurisdiction of any State other than the flag State."[23] As the text of Articles 95 and 96 make clear, these ships enjoy immunity when they are on the high seas. Part II of the Convention concerns the territorial seas and the contiguous zone. Here, Article 32 provides that "[w]ith such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."[24] These UNCOS articles require an examination of the question of whether the detained vessels fall within the scope of warships under Article 29 or governmental ships under Articles 96 and 32. In this connection, the applicability of Article 32 to internal waters must also be addressed.

The third issue pertains to the urgency of the situation and the ordering of provisional measures. The objective of provisional measures is the preservation of the respective rights of the disputing parties pending the final decision of a court and the court's ability to effectively exercise its judicial functions.[25] If the preservation of rights was not urgent, no action was required until a judgment was rendered. Hence, urgency can be thought to be an essential requirement for prescribing provisional measures.[26] The issue at point is whether or not the release of a detained foreign warship and its crew constitutes an urgency of the situation requiring the prescription of provisional measures.

Focused on the above three issues, this article examines provisional measures regarding the release of a detained foreign warship and its crewmembers in the jurisprudence of ITLOS. Part II addresses the interpretation of military activities under UNCLOS Article 298(1)(b). Part III examines the issue of the immunity of a detained ship under UNCLOS Articles 29, 32, 95, and 96. Part IV considers the question of urgency in ordering provisional

23. *Id.* arts. 95, 96.

24. *Id.* art. 32.

25. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear* (Cambodia v. Thai.), Provisional Measures, Order, 2011 I.C.J. Rep. 537, ¶ 33 (July 18); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Provisional Measures, Order, 1984 I.C.J. Rep. 169, ¶ 32 (May 10); *see also* ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 616 (2013).

26. Southern Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan), Case No. 3 and 4, Provisional Measures, Order of Aug. 27, 1999, ITLOS Rep. 280, 316, ¶ 2 (separate opinion by Treves, J.); *see also* Tullio Treves, *Article 290*, *in* THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1866 (Alexander Proelss ed., 2017).

measures concerning the release of a detained ship and its crew, before offering conclusions in Part V.

II. THE INTERPRETATION OF MILITARY ACTIVITIES UNDER UNCLOS ARTICLE 298(1)(B)

A. Distinction between Military and Law Enforcement Activities

This Part examines the interpretation of the military activities exception to compulsory dispute settlement under UNCLOS Article 298(1)(b). This was the subject of extensive debate in the *Ukraine v. Russia* case.[27]

When ratifying the Convention, both Ukraine and the Russian Federation declared they did not accept the compulsory procedures of international dispute settlement pursuant to Article 298(1)(b) for disputes concerning military activities.[28] In this case, the issue that arose was whether the arrest and detention of the three Ukrainian naval vessels and their crews by Russian Federation authorities were military activities or law enforcement activities.

Referring to the *dictum* of the 2016 *South China Sea* arbitral award, the Russian Federation maintained, "[i]t is manifestly a dispute concerning military activities."[29] Ukraine countered that "Russia's invocation of the military activities exception is misplaced."[30] Thus, ITLOS had to decide whether the military activities exception set out in Article 298(1)(b) was properly invoked.[31] This required the Tribunal to examine two issues: first, the relevance of the type of vessels, and second, the characterization of the activities in question by Ukraine and the Russian Federation.

1. Type of Vessels

The first issue is whether the nature of military activities can be decided based on the type of vessels involved. Ukraine argued that "it is not the type

27. The military activities exception set out in Article 298(1)(b) did not apply to the *ARA Libertad* case because neither Argentina nor Ghana had precluded disputes concerning military activities from the Convention's compulsory dispute settlement procedures.

28. Ukraine v. Russia Order, *supra* note 2, ¶¶ 48–49.

29. *Id.* ¶¶ 51–52.

30. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, at 18 (May 10, 2019).

31. Ukraine v. Russia Order, *supra* note 2, ¶ 63.

of vessel, but rather the type of activity the vessel is engaged in, that matters."[32] ITLOS supported this view, stating: "[T]he distinction between military and law enforcement activities cannot be based solely on whether naval vessels or law enforcement vessels are employed in the activities in question."[33]

In the view of the Tribunal, even though the type of vessels—whether naval vessels or law enforcement vessels—may be a relevant factor, "the traditional distinction between naval vessels and law enforcement vessels in terms of their roles has become considerably blurred."[34] Further, the Tribunal noted, "it is not uncommon today for States to employ the two types of vessels collaboratively for diverse maritime tasks."[35] In considering the validity of the Tribunal's view that the applicability of the military activities exception under Article 298(1)(b) cannot be decided by the type of vessels alone, three cases merit discussion.

The first is the 2007 *Guyana v. Suriname* arbitration. In this case, a question arose as to whether there was a threat of force by gunboats from the Surinamese navy when it expelled Guyana's drill ship *C.E. Thornton* from a maritime area claimed by both Suriname and Guyana. Primarily based on the testimony of a witness to the incident, the Annex VII arbitral tribunal held that "the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity."[36] It accordingly found that "Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law."[37] In so deciding, the arbitral tribunal seemed to focus on "Suriname's action" rather than the type of a ship.

The second case is the 2016 *South China Sea* arbitration. In this case, the Philippines requested the Annex VII arbitral tribunal to declare:

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32. *Id.* ¶ 58.

33. *Id.* ¶ 64. By contrast, Judge Kolodkin seemingly considered the vessel type as a criterion. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Dissenting Opinion of Judge Kolodkin, ¶ 9. However, this interpretation was not supported by ITLOS.

34. Ukraine v. Russia Order, *supra* note 2, ¶ 64.

35. *Id.*

36. Delimitation of the Maritime Boundary (Guy. v. Surin.), 30 R.I.A.A. 1, 126 (Perm. Ct. Arb. 2007).

37. *Id.*

> (14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
> (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
> (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
> (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
> (d) conducting dredging, artificial island-building and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef.[38]

Paragraphs (a)–(c) concerned China's interactions with units of the Philippines armed forces at Second Thomas Shoal.[39] In 2006, China had declared that it "does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a), (b) and (c) of Article 298 of the Convention."[40] An issue thus arose as to whether this dispute concerned military activities for the purposes of Article 298(1)(b).[41]

On this issue, the Annex VII arbitral tribunal concluded that it lacked jurisdiction to consider the Philippines' Submission No 14(a), (b), and (c).[42] The tribunal's reasoning was summarized in the following statement:

> [T]he essential facts at Second Thomas Shoal concern the deployment of a detachment of the Philippines' armed forces that is engaged in a stand-off with a combination of ships from China's Navy and from China's Coast Guard and other government agencies. In connection with this standoff, Chinese Government vessels have attempted to prevent the resupply and rotation of the Philippine troops on at least two occasions. Although, as far as the Tribunal is aware, these vessels were not military vessels, China's

38. South China Sea Arbitration (Phil. v. China), Case No. 2013–19, PCA Case Repository, Award, ¶ 1110 (Perm. Ct. Arb. 2016) (citing Philippines Submission No. 14). The Philippines' submission concerned the obligation of restraint. For an analysis of the South China Sea arbitral award on this subject, see YOSHIFUMI TANAKA, THE SOUTH CHINA SEA ARBITRATION: TOWARD AN INTERNATIONAL LEGAL ORDER IN THE OCEANS 151–61 (2019).

39. South China Sea Arbitration, *supra* note 38, ¶ 1111.

40. *Id.* ¶ 203.

41. *Id.*

42. *Id.* ¶ 1162.

> military vessels have been reported to have been in the vicinity. In the Tribunal's view, this represents a quintessentially military situation, involving the military forces of one side and a combination of military and paramilitary forces on the other, arrayed in opposition to one another.[43]

The arbitral tribunal focused on two elements. The first was the conduct of the Chinese vessels; the second was the situation in which the incidents occurred. Concerning the latter, the arbitral tribunal considered that the existence of China's military vessels in the vicinity represented a "quintessentially military situation," even though the Chinese government vessels that attempted to prevent the resupply and rotation of the Philippine troops were not military vessels. The tribunal's *dictum* suggests that the military nature cannot be decided solely on the basis of the type of vessels *directly* involved in an incident.

The third case is the *Ukraine v. Russia* arbitration concerning coastal State rights in the Black Sea, Sea of Azov, and Kerch Strait.[44] In this case, the Russian Federation raised a preliminary objection concerning the military activities exception under Article 298(1)(b).[45] The Annex VII arbitral tribunal, however, did not consider that "mere involvement or presence of military vessels is in and by itself sufficient to trigger the military activities exception."[46] Further, it found that "the mere involvement of military vessels or personnel in an activity does not *ipso facto* render the activity military in nature."[47]

Taken together, the jurisprudence suggests that whether a dispute concerns military activities under Article 298(1)(b) cannot be decided only by the type of vessels involved. Rather, as was addressed in the *Ukraine v. Russia* case, the type of vessels involved constitutes only one of the relevant factors.

2. The Characterization of the Activities by the Parties to a Dispute

The second issue concerns the relevance of the characterization of the activities in question by the parties to a dispute. In the *Ukraine v. Russia* case, the two countries were sharply divided. According to the Russian Federation,

43. *Id.* ¶ 1161.

44. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, PCA Case Repository, Award (Perm. Ct. Arb. 2020).

45. *Id.* ¶ 303–13.

46. *Id.* ¶ 334.

47. *Id.* ¶ 340.

"Ukraine has, in statements made outside the confines of the claim, including before the United Nations Security Council and in subsequent formal communications with the Russian Federation, repeatedly characterized the incident as concerning military activities."[48] In contrast, Ukraine maintained:

> Russia has repeatedly and consistently stated that its actions that provide the basis for Ukraine's claims were not military in nature. In particular, Russia has maintained that its arrest and detention of the Ukrainian vessels and imprisonment and prosecution of the servicemen are solely matters of domestic law enforcement.[49]

Ukraine further stressed "neither the involvement of the Russian Navy in the incident nor the use of force alone converts a law enforcement activity into a military one."[50]

On this issue, ITLOS took the view that the distinction between military and law enforcement activities cannot be based solely on the characterization of the activities in question by the parties to a dispute since "such characterization may be subjective and at variance with the actual conduct."[51] In fact, ITLOS, in its Order of May 25, took little account of the intent of the parties, even though the Tribunal accepted that the characterization of the activities in question by the parties "may be a relevant factor, especially in case of the party invoking the military activities exception."[52]

In this context, the *South China Sea* arbitration is relevant. When determining whether Chinese land reclamation activities at seven reefs were military in nature, the Annex VII arbitral tribunal took note of "China's repeated statements that its installations and island-building activities are intended to fulfill civilian purposes."[53] It thus held that the arbitral tribunal would not "deem [Chinese] activities to be military in nature when China itself has consistently and officially resisted such classifications and affirmed the opposite at the highest levels."[54] While the context differed from that of the *Ukraine v. Russia* case, in the *South China Sea* arbitral award, the tribunal seemed to give much greater weight to China's intent.

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48. Ukraine v. Russia Order, *supra* note 2, ¶ 53.

49. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Verbatim Record, ITLOS/PV.19/C26/1/Rev.1, at 20 (May 10, 2019); *see also id.* at 18.

50. Ukraine v. Russia Order, *supra* note 2, ¶ 60.

51. *Id.* ¶ 65.

52. *Id.*

53. South China Sea Arbitration, *supra* note 38, ¶ 935.

54. *Id.* ¶ 938.

In light of the limited number of cases on this subject, it is difficult to draw any general conclusion regarding the question of whether, and to what extent, the characterization of the activities in question by the parties to a dispute is relevant. While, as ITLOS stated, the nature of activities concerned cannot be decided on the basis of the characterization by the parties alone, there may be scope to consider that this element constitutes one of the relevant factors to be taken into account.[55]

In sum, ITLOS jurisprudence indicates that neither the type of vessels nor the characterization of the activities in question by the parties to a dispute provides a decisive criterion for distinguishing military activities from law enforcement activities. As ITLOS, in the *Ukraine v. Russia* Order, stated, "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."[56] Accordingly, further consideration must be given to those relevant circumstances that need to be taken into account in making an objective evaluation of the nature of the activities.

B. Three Elements for Evaluating the Nature of the Activities

1. Conduct, Cause, and Context

ITLOS, in its Order of May 25, 2019, evaluated the nature of the activities by focusing on three elements: conduct, cause, and context. The Tribunal's view can be summarized as follows.

First, as regards the conduct of the parties in dispute, ITLOS held that "the underlying dispute leading to the arrest concerned the passage of the Ukrainian naval vessels through the Kerch Strait."[57] Continuing, the Tribunal found, "it is difficult to state in general that the passage of naval ships *per se* amounts to a military activity."[58] Curiously, the Tribunal then also stated,

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55. In this regard, Judge Gao considered that

> [e]valuation of military activities should be based on a combination of factors, such as the intent and purpose of the activities, taking into account the relevant circumstances of the case, such as the manner in which the Parties deployed their forces and the way in which the Parties engaged one another at sea.

Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Separate Opinion of Judge Gao, ¶ 22.

56. Ukraine v. Russia Order, *supra* note 2, ¶ 66.

57. *Id.* ¶ 68.

58. *Id.* (emphasis added).

"Under the Convention, passage regimes, such as *innocent* or transit passage, apply to *all ships*."[59] As this statement was made in the context of the dispute between Ukraine and the Russian Federation, caution will be needed in interpreting this *dictum* to mean that the right of innocent passage can apply to foreign warships in general. Even so, Judge Jesus clearly stated, "under the Convention, States are not required to inform the coastal State or to request prior authorization from it when its ships, including warships, plan to make use of their right of innocent passage through the territorial sea of the coastal State."[60] Given that to this date, State practice is sharply divided concerning the right of innocent passage of foreign warships in the territorial sea,[61] the statement of this learned judge is noteworthy.

Second, when considering the cause of the incident, ITLOS focused on two reasons highlighted by the Russian Federation: the failure of the Ukrainian naval vessels to comply with the "relevant procedure in the 2015 Regulations" and the temporary suspension of the right of innocent passage for naval vessels.[62] In light of this development, the Tribunal took the view that "at the core of the dispute was the Parties' differing interpretation of the regime of passage through the Kerch Strait" and that "such a dispute is not military in nature."[63]

Third, concerning the context of the incident, it was undisputed that force was used by the Russian Federation in the process of the arrest of the Ukrainian naval vessels.[64] According to the facts provided by the parties, the Ukrainian naval vessels sailed away from the Kerch Strait. The Russian Coast Guard ordered them to stop and pursued them when the vessels ignored the order and continued their navigation. It was in this context that the Russian Coast Guard used force.[65] The Tribunal thus considered that the use of force was a law enforcement operation rather than a military operation and that "the arrest and detention of the Ukrainian naval vessels by the Russian Federation took place in the context of a law enforcement operation."[66] ITLOS therefore concluded that prima facie Article 298(1)(b) of the Convention did

59. *Id.*

60. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Separate Opinion of Judge Jesus, ¶ 19.

61. YOSHIFUMI TANAKA, THE INTERNATIONAL LAW OF THE SEA 110–11 (3d ed. 2019).

62. Ukraine v. Russia Order, *supra* note 2, ¶ 71.

63. *Id.* ¶ 72.

64. *Id.* ¶ 73.

65. *Id.*

66. *Id.* ¶ 75.

not apply[67] and that prima facie the Annex VII arbitral tribunal would have jurisdiction to deal with the dispute.[68]

Under the Tribunal's approach, the nature of the dispute in question is to be decided by considering all relevant circumstances, including conduct, cause, and context. While this approach has certain merit since it can flexibly take relevant circumstances into account on a case-by-case basis, it can be questioned as to whether an international court or tribunal can make an objective evaluation on this matter. Different interpretations may occur, for instance, with the characterization of the conduct of the parties in dispute. Furthermore, the activities of the parties may be multifaceted. In this regard, Judge Kittichaisaree observed, "[c]ertain incidents may comprise a mixture of both military and law-enforcement aspects."[69] Thus, further consideration must be given to the evaluation of a combination of military and law enforcement activities occurring at the same time.

2. Evaluation of the Mixed Activities

Judge Gao, in his separate opinion, discussed the issue of mixed activities in some detail. He considered that "the dispute in question has, at least, a mixed nature of both military and law enforcement activities or, in other words, it is a mixed dispute involving both military and law enforcement elements."[70] This analysis raises the issue of the proportion between the military element and the law enforcement element. On that issue, Judge Gao's view seemed to be that the incident was primarily characterized by military activities.[71] Nonetheless, eventually, Judge Gao accepted the prima facie jurisdiction of the Annex VII arbitral tribunal. In the words of the learned judge, "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."[72]

According to Judge Gao's approach, in the case of a mixed dispute, some elements of law enforcement may be adequate to characterize the dispute as one concerning law enforcement activities when establishing the prima facie

67. *Id.* ¶ 77.

68. *Id.* ¶ 90.

69. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Declaration of Judge Kittichaisaree, ¶ 4.

70. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Separate Opinion of Judge Gao, ¶ 50.

71. *Id.* ¶ 33.

72. *Id.* ¶ 51.

jurisdiction.[73] If this approach is possible at the provisional measures stage of the proceedings, however, it is not suggested that it also applies to the subsequent arbitral proceedings themselves. At that point, the application of a preponderance test merits consideration. That test seeks to decide which element, military or law enforcement, is predominant. When applying the test, a threshold for evaluating predominant elements is of critical importance. In that regard, Judge Gao pointedly observed, "A legally sound and viable approach to the issue in question should endeavour . . . to avoid introducing and applying either a very low or a very high threshold for the military activities exception."[74]

On the one hand, a very high threshold will significantly narrow the scope of Article 298(1)(b)'s military activities exception.[75] On the other hand, a very low threshold may broaden the scope of the military activities exception and may unduly restrict the jurisdiction of adjudicatory bodies. Thus, as Judge Gao remarked, it is necessary to establish a reasonable threshold that avoids the two extremes. Such a threshold can be formulated only through further development of the jurisprudence on this issue.

C. Interpreting the Military Activities Exception Summarized

Three key points emerge for interpreting the military activities exception. First, according to ITLOS, neither the type of vessels nor the characterization of the dispute by the parties provides a decisive criterion for distinguish-

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73. In this regard, Judge Lucky considered that "it could be both military and law enforcement, but in the light of the evidence before the Tribunal, it seems to me that the events of 25 November reveal a law enforcement exercise." Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Separate Opinion of Judge Lucky, ¶ 21.

74. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, Separate Opinion of Judge Gao, ¶ 55.

75. In this regard, Judge Gao expressed his misgivings that:

> A high threshold for the military activities exception may serve as an incentive for States to escalate rather than de-escalate a conflict by deploying a great numbers [sic] of naval vessels and increasing the level of forces in order to qualify for the military activities exception to compulsory dispute settlement jurisdiction.

Id. ¶ 45. Similarly, Kraska noted his concern with the holding, arguing, "the military activities exemption has been significantly weakened" and concluding that this outcome will "thereby weaken trust in ITLOS." James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in Article 298?*, EJIL:TALK! (May 27, 2019), https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/.

ing military activities from law-enforcement activities. The distinction between the two must be made objectively, taking into account the relevant circumstances in each case.

Second, when evaluating the nature of the activities in question in the *Ukraine v. Russia* case, ITLOS focused on the conduct of the parties, the cause of the dispute, and the context of the dispute. These three elements constitute the relevant circumstances for characterizing the dispute in question.

Third, a dispute may concern both military and law enforcement activities occurring at the same time. In the case of such mixed activities, the application of a preponderance test merits consideration. When applying the test, there is a need to establish a reasonable threshold, avoiding one that is either extremely low or extremely high.

III. IMMUNITY OF WARSHIPS

A. Immunity of Warships, Naval Auxiliary Vessels, and Their Crew

1. Plausibility of Claims by Ukraine

In the *Ukraine v. Russia* case, an issue arose as to whether the detained vessels enjoyed immunity as warships under UNCLOS Articles 32 and 96. UNCLOS Article 29 defines warship 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.[76]

Ukraine claimed that the *Berdyansk* and the *Nikopol* were warships within the meaning of Article 29 and that as a naval auxiliary vessel, the *Yani Kapu*, was entitled to immunity under Articles 32 and 96 of the Convention and general international law.[77]

76. UNCLOS, *supra* note 8, art. 29.
77. Ukraine v. Russia Order, *supra* note 2, ¶ 92.

Notably, on this issue, ITLOS distinguished between the *Berdyansk* and the *Nikopol* and the *Yani Kapu*. ITLOS considered the *Berdyansk* and the *Nikopol* to be "warships within the meaning of article 29 of the Convention."[78] In contrast, it took the view that the *Yani Kapu* was "a ship owned or operated by a State and used only on government non-commercial service, as referred to in article 96 of the Convention."[79] While ITLOS did not refer to Article 32, a naval auxiliary would also fall within the scope of "government ships operated for non-commercial purposes" under this provision.[80] Eventually, the Tribunal held that the rights claimed by Ukraine based on Articles 32, 58, 95, and 96 of UNCLOS were *plausible* under the circumstances.[81]

A related issue concerns the immunity of the Ukrainian crews. Ukraine maintained that the immunity provided for in UNCLOS protects the crews of warships and naval auxiliary vessels. In this regard, ITLOS noted that the twenty-four servicemen on board the vessels were military and security personnel. It thus held that the Ukrainian claim of their immunity was *plausible*.[82] However, the Tribunal immediately added that "the nature and scope of their immunity may require further scrutiny."[83] In so stating, ITLOS seemed to take a nuanced approach to the rights of the immunity of the Ukrainian servicemen.

2. Standard of the Plausibility Test

The issue here is the standard for deciding the plausibility of the claims of the parties to a dispute. Originally the plausibility test was introduced in the jurisprudence of the International Court of Justice (ICJ) regarding provisional measures.[84] Subsequently, this test was first introduced in ITLOS jurisprudence in the Tribunal's Order of April 25, 2015 regarding the maritime

78. *Id.* ¶ 97.

79. *Id.*

80. *See also* Richard Barnes, *Article 32*, *in* THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY, *supra* note 26, at 250, 253.

81. Ukraine v. Russia Order, *supra* note 2, ¶ 97.

82. *Id.* ¶ 98.

83. *Id.*

84. The ICJ, in its order in the Belgium v. Senegal case, referred to the plausibility test in connection with the link between the right to be protected and the measures requested. *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures, Order, 2009 I.C.J. Rep 139, ¶ 57 (May 28). Subsequently, in the 2011 Costa Rica v. Nicaragua case, the Court considered the plausibility requirement as a distinct requirement for indicating provisional measures. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measures, Order, 2011

boundary dispute between Ghana and Côte d'Ivoire. In that case, the ITLOS Special Chamber considered that it needed to satisfy itself that the rights Côte d'Ivoire claimed on the merits and sought to protect were at least plausible.[85] That same year ITLOS applied the plausibility test in the *Enrica Lexie* case.[86] In both cases, one can find the influence of the ICJ jurisprudence on the development of ITLOS jurisprudence.[87]

Still, the standard of the plausibility test is not well established in the jurisprudence of either the ICJ or ITLOS. In the April 25, 2015 Order, for instance, the ITLOS Special Chamber provided no precise criterion for determining the plausibility of the alleged rights of Côte d'Ivoire.[88] Likewise, ITLOS, in the *Enrica Lexie* order, found that "both Parties have sufficiently demonstrated that the rights they seek to protect regarding the *Enrica Lexie* incident are plausible,"[89] without clarifying the standard the Tribunal applied. In the *Ukraine v. Russia* case, ITLOS remained mute on the standard.

Similarly, the standard of the plausibility test remains controversial in the jurisprudence of the ICJ.[90] Accordingly, Judge Koroma gave his misgivings in this regard, stating:

> [T]he ambiguity or vagueness inherent in the English-language meaning of "plausible" makes it unreliable as a legal standard that parties must meet to obtain relief from this Court in the form of provisional measures, especially

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I.C.J. Rep. 6, ¶ 57 (Mar. 8); *see also* YOSHIFUMI TANAKA, THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES 193 (2018).

85. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Case No. 23, Order of Apr. 25, 2015, Provisional Measures, ITLOS Rep. 146, 158, ¶ 58. The Special Chamber ruled that Côte d'Ivoire had presented enough material to show that the rights it seeks to protect in the disputed area are plausible. *Id.* at 159, ¶ 62.

86. Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, Provisional Measures, ITLOS Rep. 182, 197, ¶ 85.

87. Yoshifumi Tanaka, *The Impacts of the ITLOS Jurisprudence on the Development of International Law*, *in* THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE RULE OF LAW: 1996–2016, at 161, 170–71 (International Tribunal for the Law of the Sea ed., 2017).

88. Yoshifumi Tanaka, *Unilateral Exploration and Exploitation of Natural Resources in Disputed Areas: A Note on the* Ghana/Côte d'Ivoire *Order of 25 April 2015 before the Special Chamber of ITLOS*, 46 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 315, 319 (2015).

89. Enrica Lexie, *supra* note 86, ¶ 85.

90. For an analysis of the plausibility test in the ICJ jurisprudence, see Massimo Lando, *Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice*, 31 LEIDEN JOURNAL OF INTERNATIONAL LAW 641 (2018); CAMERON MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 194–201 (2017).

> since the binding force of orders indicating provisional measures has been confirmed by the Court. The standard may even inadvertently offer parties an opportunity to submit specious claims which, at a superficial glance, may appear credible but could mislead the Court to indicate provisional measures.[91]

The standard for the plausibility test can significantly influence the prescription of provisional measures in a particular case. An illustrative example is the 2017 Order of the ICJ in a case brought by Ukraine against Russia for interference in Ukrainian affairs.[92] In this case, the ICJ, for the first time in its jurisprudence, declined the request for the indication of provisional measures because of the absence of plausibility.[93] Yet the Court's view was challenged by Judge Owada who emphasized that "the standard of plausibility is, and must be, fairly low."[94]

Furthermore, the level of the standard is linked to the distinction between provisional measures and an interim judgment. As the Permanent Court of International Justice stated in *Factory at Chorzów*,

> Considering that the request of the German Government cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application above mentioned; That, consequently, the request under consideration is not covered by the terms of the provisions of the Statute and Rules cited therein.[95]

Nonetheless, the examination of the plausibility of the alleged rights at the stage of provisional measures may risk dealing with matters that should be examined on the merits and, consequently, the order of provisional measures may effectively constitute an interim judgment. In this connection, Judge Sepúlveda-Amor expressed his concern:

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91. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measures, Order, 2011 I.C.J. Rep. 6, 29, ¶ 8 (Mar. 8) (separate opinion by Koroma, J.).

92. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, Order, 2017 I.C.J. Rep. 104 (Apr. 19).

93. *Id.* ¶¶ 75–76.

94. *Id.* ¶ 20; *see also id.* ¶ 16.

95. Factory at Chorzów (Indemnities) (Ger. v. Pol.), Order, 1927 P.C.I.J. (ser. A) No. 12, at 10 (Nov. 21).

> [T]he imprecision surrounding the 'plausibility requirement' and the unwarranted emphasis placed upon that in this Order might ultimately encourage States seeking interim protection to over-address the substance of the dispute at an early stage and, as a result, overburden proceedings under Article 41 of the Statute with matters that should actually be dealt with by the Court when adjudicating on the merits.[96]

Similarly, Judge Owada expressed his misgivings, stating, "If . . . this standard were too high, a determination on whether the right is plausible could risk resulting in a prejudgment of the merits of the dispute."[97] A high standard for the plausibility test may risk making the distinction between provisional measures and prejudgment less clear. Hence, there may be room for the view that the standard for the plausibility test should be relatively low.

B. The Applicability of UNCLOS Article 32 to Internal Waters

1. Negative View

Another issue relating to the immunity of warships is the applicability of UNCLOS Article 32 to internal waters.[98] This was a matter of extensive debate in the *ARA Libertad* case. Although it was beyond doubt that the frigate *Libertad* was a warship of the Argentine Navy,[99] Argentina contended that its detention violated the rights recognized by UNCLOS.[100] More specifically, the dispute between Argentina and Ghana turned on the interpretation and application of UNCLOS Articles 18(1)(b), 32, 87(1)(a), and 90.[101] Among those provisions, Argentina contended that Article 32 confirmed the well-established rule of general international law according warships a special and

96. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Provisional Measures, Order, 2011 I.C.J. Rep. 6, 35, ¶ 15 (Mar. 8) (separate opinion by Sepúlveda-Amor, J.).

97. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, Order, 2017 I.C.J. Rep. 104, 142, ¶ 10 (Apr. 19) (separate opinion by Owada, J.); *see also* TAKANE SUGIHARA, KOKUSAI SHIHO SAIBAN SEIDO [INSTITUTION OF THE INTERNATIONAL COURT OF JUSTICE] 285 (1996) [JAPANESE].

98. UNCLOS, *supra* note 8, art. 32. On this issue, see Tanaka, *supra* note 1, at 384–85.

99. Request for Provisional Measures Submitted by Argentina, *supra* note 3, ¶ 3.

100. *Id.* ¶ 23.

101. *Id.*; ARA Libertad (Arg. v. Ghana), Case No. 20, Verbatim Record, ITLOS/PV.12/C20/1, at 21 (Nov. 29, 2012); ARA Libertad, *supra* note 1, at 341, ¶ 39.

autonomous type of immunity that provides for the complete immunity of these ships.[102] It also contended that Article 32 determines the immunity of warships "with respect to the entire geographical scope of the Convention" and that the "immunity accorded to warship is identical in internal waters as it is in the territorial sea."[103] However, Ghana countered that since there was no dispute between Ghana and Argentina on the interpretation or application of UNCLOS, ITLOS had no jurisdiction to order the provisional measures requested by Argentina.[104] Ghana also contended that the Annex VII arbitral tribunal had no prima facie jurisdiction in this case since none of those provisions—Articles 18(1)(b), 32, 87(1)(a), and 90—applied to acts occurring in internal waters.[105]

On this issue, Judges Wolfrum and Cot took the view that prima facie Article 32 was meant to apply only in the territorial sea since it is placed in the section on innocent passage in the territorial sea.[106] In their view, the immunity of warships relies on customary international law, not on UNCLOS,[107] and Article 32 did not indicate that it incorporated customary international law into UNCLOS.[108] Accordingly, Judges Wolfrum and Cot concluded, "there are valid considerations which would preclude the Tribunal from deciding that *prima facie* the arbitral tribunal under Annex VII would have jurisdiction."[109]

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102. ARA Libertad, *supra* note 1, at 341, ¶ 44.

103. *Id.* at 342, ¶ 46; *see also id.* at 342, ¶ 50; ARA Libertad (Arg. v. Ghana), Case No. 20, Verbatim Record, ITLOS/PV.12/C20/3, at 3–5 (Nov. 30, 2012).

104. ARA Libertad, *supra* note 1, at 342, ¶ 51; ARA Libertad (Arg. v. Ghana), Case No. 20, Verbatim Record ITLOS/PV.12/C20/2, at 5 (Nov. 29, 2012); ARA Libertad (Arg. v. Ghana), Case No. 20, Verbatim Record ITLOS/PV.12/C20/4, at 11 (Nov. 30, 2012).

105. ARA Libertad, *supra* note 1, at 342, ¶ 52; ARA Libertad (Arg. v. Ghana), Case No. 20, Verbatim Record ITLOS/PV.12/C20/2, at 13 (Nov. 29, 2012); *id.* at 18.

106. ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, 363, ¶ 45 (separate opinion by Wolfrum, J. and Cot, J.).

107. *Id.* at 373, ¶ 43.

108. *Id.* at 376, ¶ 50.

109. *Id.* at 376, ¶ 51. Even so, Judge Wolfrum and Judge Cot eventually accepted that the prima facie jurisdiction of the Tribunal for Ghana was estopped from presenting any objection on the provisional measures filed by Argentina. *Id.* at 381, ¶ 69. However, Judge Rao concluded that the doctrine of estoppel may not have a bearing on the prima facie jurisdiction of the Annex VII arbitral tribunal in this case. *See* ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, 357, ¶¶ 12–14 (separate opinion by Rao, J.).

2. Positive View

The ITLOS majority took a different view, noting that Article 32 provides that "nothing in this Convention affects the immunities of warships," without specifying the geographical scope of its application.[110] According to the Tribunal,

> although article 32 is included in Part II of the Convention entitled "Territorial Sea and Contiguous Zone", and most of the provisions in this Part relate to the territorial sea, some of the provisions in this Part may be applicable to all maritime areas, as in the case of the definition of warships provided for in article 29 of the Convention.[111]

Arguably, the *dictum* can be interpreted to imply that Article 32 applies to internal waters.[112] The Tribunal, in its December 15 Order, limited itself by observing only that a difference of opinions existed between the parties as to the applicability of Article 32 and that a dispute appeared to exist between the parties concerning the interpretation or application of the Convention.[113] Accordingly, it found that Article 32 afforded a basis on which prima facie jurisdiction of the Annex VII arbitral tribunal might be founded.[114] While this issue should have been decided at the merits stage of the case, the out-of-court settlement terminated the arbitral proceedings. Thus, the applicability of Article 32 to internal waters was not decided.

It is beyond question that in international law, a warship enjoys immunity in internal waters. In the *ARA Libertad* case, ITLOS stated, "in accordance with general international law, a warship enjoys immunity, *including in internal waters*, and that this is not disputed by Ghana."[115] The *dictum* of the Tribunal was echoed by Judge Paik, stating: "[A]mong the rights at issue is that of

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110. ARA Libertad, *supra* note 1, at 344, ¶ 63.

111. *Id.* at 344, ¶ 64.

112. In this regard, Judge Lucky, clearly stated:

> [I]nternational law and the relevant articles in the Convention should be considered as a whole and in these circumstances article 32 can be deemed to include internal waters; not only because it does not explicitly exclude the immunity of warships in internal waters, but because it should be read in congruence with other rules of international law which guarantee such immunity.

ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, 382, ¶ 38 (separate opinion by Lucky, J.).

113. ARA Libertad, *supra* note 1, at 344, ¶ 65.

114. *Id.* at 344, ¶ 66.

115. *Id.* at 348, ¶ 95 (emphasis added).

Argentina to enjoy the immunity of a warship in the port of a foreign State. This right is clearly established in international law, and, in fact, constitutes one of the most important pillars of the *ordre public* of the oceans."[116] Article 32 makes clear that nothing in UNCLOS affects the immunities of warships and other government ships operated for non-commercial purposes. In light of this, the application of Article 32 to internal waters resolves any issue concerning the inconsistency between the treaty provision's language and a rule of customary international law.

C. Immunity of Warships Summarized

The above considerations can be summarized in three points. First, ITLOS regarded a naval auxiliary, the *Yani Kapu*, as a vessel used only on government non-commercial service. It follows then that vessels ancillary to warships fall within the scope of UNCLOS Articles 32 and 96.

Second, the plausibility of rights asserted by the applicant State is a requirement for ITLOS to prescribe provisional measures. Nonetheless, the standard of the plausibility test is not well established in the jurisprudence of ITLOS. Given that a high standard may blur the distinction between provisional measures and an interim judgment, the better view is that the standard for the plausibility test should be relatively low.

Third, in the *ARA Libertad* case, opinions of the members of ITLOS were divided regarding the applicability of Article 32 to internal waters. In light of the phrase "nothing in this Convention," however, there is scope to consider that Article 32 may also apply to other marine spaces, including internal waters.[117]

116. ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, 352, ¶ 2 (declaration by Paik, J.).

117. Barnes echoes this interpretation. *See* Barnes, *supra* note 80, at 252.

IV. THE URGENCY OF THE SITUATION

A. The Urgency of the Situation Regarding the Release of a Detained Warship and Its Crew

1. The *ARA Libertad* Case

As noted, urgency is a prerequisite for an international court or tribunal to prescribe provisional measures.[118] UNCLOS Article 290(5) clarifies this requirement, providing that "the urgency of the situation so requires."[119] Article 89(4) of the ITLOS Rules also requires that a request for the prescription of provisional measures must indicate 'the urgency of the situation."[120] The issue at point is whether the release of a detained foreign warship and its crew can be regarded as a matter of urgency.

In the *ARA Libertad* case, Ghana maintained that "there is no real or imminent risk of irreparable prejudice to Argentina's rights caused by the ongoing docking of the vessel"[121] and that "there is no urgency such as to justify the imposition of the measures requested, in the period pending the constitution of the Annex VII arbitral tribunal."[122] However, Argentina maintained that Ghana's action was producing irreparable damage to the immunity that the *Libertad* enjoys, the exercise of its right to leave the territorial waters of Ghana, and its freedom of navigation.[123] It also claimed, "[f]urther attempts to forcibly board and move the Frigate without the consent of Argentina would lead to the escalation of the conflict and to serious incidents in which human lives would be at risk."[124] In its order, ITLOS accepted that "the urgency of the situation requires the prescription by the Tribunal of provisional measures that will ensure full compliance with the applicable

118. For an analysis of the requirement of urgency in ITLOS jurisprudence, see Yoshifumi Tanaka, *The Requirement of Urgency in the Jurisprudence of ITLOS Concerning Provisional Measures*, *in* INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 107 (Angela Del Vecchio & Roberto Virzo eds., 2019).

119. UNCLOS, *supra* note 8, art. 290(5).

120. International Tribunal for the Law of the Sea, Rules of the Tribunal, 2009 ITLOS/8, at 33 (Sept. 25, 2018).

121. ARA Libertad, *supra* note 1, at 346, ¶ 79.

122. *Id.* at 347, ¶ 88.

123. *Id.* at 345, ¶ 75.

124. Request for Provisional Measures Submitted by Argentina, *supra* note 3, ¶ 60; ARA Libertad, *supra* note 1, at 347, ¶ 82.

rules of international law, thus preserving the respective rights of the Parties."[125]

Here, a key issue is the standard for deciding the existence of the urgency of the situation. In the ICJ jurisprudence, there is a clear trend indicating that the Court examines the risk of irreparable prejudice and urgency at the same time.[126] While ITLOS jurisprudence is not consistent on this issue,[127] in some cases, the Tribunal linked the urgency requirement to irreparable prejudice. For instance, in the 2002 *MOX Plant* case, ITLOS ruled that provisional measures may be prescribed "if the Tribunal considers that the urgency of the situation so requires in the sense that action prejudicial to the rights of either party or causing serious harm to the marine environment is likely to be taken before the constitution of the Annex VII arbitral tribunal."[128] In its *Ghana/Côte d'Ivoire* Order, the ITLOS Special Chamber made this point clearly, stating, "urgency is required in order to exercise the power to prescribe provisional measures, that is to say the need to avert a real and imminent risk that irreparable prejudice may be caused to rights at issue before the final decision is delivered."[129] The same standard was applied in the 2019 *M/T San Padre Pio* case.[130] Under this standard, the temporal element (urgency) is incorporated into the concept of a "real and imminent risk."

The application of this standard depends on how the conduct of the respondent State affected the rights of the applicant State. In this regard, in the *ARA Libertad* case, ITLOS concluded, "actions taken by the Ghanaian authorities that prevent the ARA Libertad . . . from discharging its mission

125. ARA Libertad, *supra* note 1, at 349, ¶ 100.

126. Karin Oellers-Frahm, *Article 41*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1026, 1047 (Andreas Zimmerman, Christian Tomuschat, Karin Oellers-Frahm & Christian Tams eds., 2d. 2012); SUGIHARA, *supra* note 97, at 280; TANAKA, *supra* note 84, at 196.

127. Tanaka, *supra* note 118, at 109–14.

128. MOX Plant (Ir. v. U.K.), Case No. 10, Provisional Measures, Order of Dec. 3, 2001, ITLOS Rep. 95, 108, ¶ 64.

129. Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Case No. 23, Order of Apr. 25, 2015, Provisional Measures, ITLOS Rep. 146, 156, ¶ 42.

130. M/T San Padre Pio (Switz. v. Nigeria), Case No. 27, Provisional Measures, Order of July 6, 2019, ITLOS Rep., ¶ 111. Please note that the analysis in this article relies on the electronic version of the Tribunal's Order of July 6, 2019, available at the ITLOS website. *See* INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, CASE NO. 27, https://www.itlos.org/en/cases/list-of-cases/case-no-27/.

and duties affect the immunity enjoyed by this warship under general international law."[131] The Tribunal expressed its concern as such:

> [A]ttempts by the Ghanaian authorities on 7 November 2012 to board the warship *ARA Libertad* and to move it by force to another berth without authorization by its Commander and the possibility that such actions may be repeated, demonstrate the gravity of the situation and underline the urgent need for measures pending the constitution of the Annex VII arbitral tribunal.[132]

This statement contains temporal elements relating to the past, present, and future: the attempted boarding by Ghanaian authorities on November 7 (the past), and the possibility of this could be repeated (the present and future). The temporal elements were clarified by Judge Paik, stating, "In the present case, the alleged violation of Argentina's rights has *already occurred* and the state of infraction *continues*. Moreover, further violations are *likely to occur* . . . ."[133] As will be discussed below, the temporal elements are crucial to identifying the urgency of the situation.

2. The *Ukraine v. Russia* Case

In the *Ukraine v. Russia* case, ITLOS examined the existence of the urgency of the situation in the context of irreparable prejudice, concluding:

> Pursuant to article 290, paragraph 5, of the Convention, the Tribunal may prescribe provisional measures if the urgency of the situation so requires. Accordingly, the Tribunal may not prescribe such measures unless it considers that there is a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal.[134]

Accordingly, the Tribunal assessed whether there was a real and imminent risk creating irreparable prejudice to the rights of the parties.[135]

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131. ARA Libertad, *supra* note 1, at 349, ¶ 98.

132. *Id.* at 349, ¶ 99.

133. ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, 352, ¶ 6 (declaration by Paik, J.) (emphasis added).

134. Ukraine v. Russia Order, *supra* note 2, ¶ 100.

135. *Id.* In this regard, the Russian Federation claimed that there was no urgency. Russian Memorandum, *supra* note 15, at 16–17, ¶¶ 38–40.

Referencing the *dictum* of the *ARA Libertad* order,[136] ITLOS took the view that "any action affecting the immunity of warships is capable of causing serious harm to the dignity and sovereignty of a State and has the potential to undermine its national security."[137] According to the Tribunal, the Russian actions could irreparably prejudice Ukraine's rights regarding the immunity of its naval vessels and their servicemen if the Annex VII arbitral tribunal adjudged those rights to belong to Ukraine, and that "the risk of irreparable prejudice was real and ongoing."[138] Moreover, ITLOS held "the continued deprivation of liberty and freedom of Ukraine's servicemen raises humanitarian concerns."[139] It thus accepted the existence of a real and imminent risk of irreparable prejudice to Ukraine's rights.[140]

In that determination, one can identify the three temporal elements. First, the alleged violation of Ukraine's rights had already occurred (the past). Second, the risk of irreparable prejudice was "ongoing" (the present). Third, the expression "the *continued* deprivation of liberty and freedom of Ukraine's servicemen" show the risk may continue (the future). From this finding, it can be concluded that interlinked temporal elements constitute the key factors when identifying the existence of a real and imminent risk that may cause irreparable prejudice to rights at issue.

B. Discussion

1. Timeframe for Deciding the Urgency of the Situation

When considering the urgency of the situation, the timeframe set out in paragraphs 1 and 5 of UNCLOS Article 290 must be examined. In this regard, two different interpretations exist.[141]

Under a restrictive interpretation of Article 290(5), ITLOS is to determine whether the urgency of the situation requires provisional measures "pending the constitution of the arbitral tribunal." It follows that the requirement of urgency under paragraph 5 is stricter than the same requirement in

136. ITLOS, in the *ARA Libertad* case, stated, "a warship is an expression of the sovereignty of the State whose flag it flies." ARA Libertad, *supra* note 1, at 348, ¶ 94.

137. Ukraine v. Russia Order, *supra* note 2, ¶ 110.

138. *Id.* ¶ 111.

139. *Id.* ¶ 112.

140. *Id.* ¶ 113.

141. Tanaka, *supra* note 118, at 120–21.

paragraph 1,[142] an interpretation supported by some ITLOS members. For example, according to Judge Heider, in the case of provisional measures under Article 290(1), these measures are to apply pending the final decision.[143] Under Article 290(5), however, any provisional measures shall apply only pending the constitution of the arbitral tribunal to which a dispute is to be submitted. Hence, Judge Heider indicates the temporal dimension of the requirement of urgency is much more stringent under paragraph 5 than under paragraph 1.[144] Judge Paik[145] and Judge Rao[146] echoed this view.

Under a broad interpretation of Article 290(5), the assessment of the urgency of the situation is not confined to the period before the constitution of an arbitral tribunal. This interpretation appears to be supported by ITLOS itself. In the *Land Reclamation* case, the Tribunal stated, "there is nothing in article 290 of the Convention to suggest that the measures prescribed by the Tribunal must be confined to that period."[147] Further the Tribunal concluded:

> [T]he said period is not necessarily determinative for the assessment of the urgency of the situation or the period during which the prescribed measures are applicable and that the urgency of the situation must be assessed taking into account the period during which the Annex VII arbitral tribunal is not yet in a position to "modify, revoke or affirm those provisional measures.[148]

142. The court or tribunal may prescribe provisional measures "to preserve the respective rights of the parties . . . or to prevent serious injury to the marine environment pending the final decision." UNCLOS, *supra* note 8, art. 290(1).

143. Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, Provisional Measures, ITLOS Rep. 182, 287, ¶¶ 6–7, 12 (dissenting opinion by Heider, J.).

144. *Id.*

145. ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, 352, ¶ 3 (declaration by Paik, J.).

146. Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, Provisional Measures, ITLOS Rep. 182, 240, ¶ 6 (dissenting opinion by Rao, J.). According to a study, in the cases submitted under Article 290(1) the whole procedure took up to a maximum of fifty-seven days. In contrast, the cases submitted under Article 290(5) were dealt with by ITLOS between twenty-five and thirty-four days. *See* P. CHANDRASEKHARA RAO & PHILIPPE GAUTIER, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW, PRACTICE, AND PROCEDURE 228 (2018).

147. Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), Case No. 12, Provisional Measures, Order of Oct. 8, 2003, ITLOS Rep. 10, ¶ 67.

148. *Id.* ¶ 68.

ITLOS confirmed this view in the *Arctic Sunrise* order, stating, "there is nothing in article 290, paragraph 5, of the Convention to suggest that the measures prescribed by the Tribunal must be confined to the period prior to the constitution of the Annex VII arbitral tribunal."[149]

But, in the *Ukraine v. Russia* case, the Tribunal referred to the *Enrica Lexie* case,[150] and held, "the Tribunal may not prescribe such measures unless it considers that there is a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute *before the constitution and functioning* of the Annex VII arbitral tribunal . . . ."[151] The Tribunal also found, "there is a real and imminent risk of irreparable prejudice to the rights of Ukraine *pending* the constitution and *functioning* of the Annex VII arbitral tribunal."[152]

While the language of the two statements seems inconsistent, the expression "pending the constitution and functioning of the Annex VII arbitral tribunal" can be interpreted to mean that a real and imminent risk of irreparable prejudice to the rights of Ukraine exists during the period that the Annex VII arbitral tribunal is functioning. If this is the case, it seems that the timeframe under Article 290(5) is not limited to the period that an arbitral tribunal is being constituted.[153] According to the broad interpretation, the difference between the timeframes of paragraphs 1 and 5 of Article 290 is narrow.

2. Humanitarian Considerations and the Urgency of the Situation

Finally, attention must be given to the implications of humanitarian considerations or concerns for the prescription of provisional measures.[154] In the *Ukraine v. Russia* case, Ukraine highlighted the urgent need for provisional

149. Arctic Sunrise (Neth. v. Russ.), Case No. 22, Provisional Measures, Order of Nov. 23, 2013, ITLOS Rep. 230, ¶ 84.

150. Enrica Lexie, *supra* note 86, at 197, ¶ 87.

151. Ukraine v. Russia Order, *supra* note 2, ¶ 100 (emphasis added).

152. *Id.* ¶ 113 (emphasis added).

153. In the *M/T San Padre Pio* case, ITLOS considered the existence of the urgency of the situation "pending the constitution and functioning of the Annex VII arbitral tribunal." M/T San Padre Pio, *supra* note 130, ¶ 131.

154. For the concept of considerations of humanity in ITLOS jurisprudence, see Francesca Delfino, *'Considerations of Humanity' in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals*, *in* INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 118, at 421.

In the present article, the terms "humanitarian considerations," "humanitarian concerns," and "considerations of humanity" are used interchangeably.

measures in light of "practical and humanitarian considerations."[155] As noted above, ITLOS also expressed "humanitarian concerns" about "the continued deprivation of liberty and freedom of Ukraine's servicemen."[156] As the Tribunal stated, "[c]onsiderations of humanity must apply in the law of the sea, as they do in other areas of international law."[157] However, an issue that needs further examination is whether "humanitarian concerns" should be regarded as a distinct element requiring the prescription of provisional measures.[158]

The implications of humanitarian considerations for the prescription of provisional measures remain unclear in ITLOS jurisprudence. For example, in the *Arctic Sunrise* case, ITLOS prescribed a provisional measure ordering the Russian Federation to "immediately release the vessel Arctic Sunrise and all persons who have been detained, upon the posting of a bond or other financial security."[159] However, in this order, ITLOS did not refer to humanitarian considerations. In the *Enrica Lexie* case, Italy requested ITLOS prescribe a provisional measure ordering that India's restrictions on the liberty, security, and movement of the two Italian marines concerned be immediately lifted to enable them to remain in Italy throughout the duration of the proceedings before the Annex VII Tribunal.[160] Italy stressed that the urgency was "both humanitarian and legal."[161] However, ITLOS did not prescribe the provisional measures requested by Italy, nor did it refer to humanitarian considerations or concern.[162] In contrast, in the *M/T San Padre Pio* case, ITLOS considered that "the threat to the safety and security of the Master and the three officers of the *M/T 'San Padre Pio'*, and the restrictions on their

155. Ukraine v. Russia Order, *supra* note 2, ¶ 105.

156. *Id.* ¶ 112.

157. M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, ¶ 155. This view was confirmed by the Tribunal in the *Enrica Lexie* case. *See* Enrica Lexie, *supra* note 86, at 204, ¶ 133.

158. On this issue, see Yoshifumi Tanaka, *Dual Provisional Measures Prescribed by the ITLOS and Annex VII Arbitral Tribunal: Reflections on the* 'Enrica Lexie' Incident *Case*, *in* THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2017, at 265, 279–84 (Giuliana Ziccardi Capaldo ed., 2018).

159. Arctic Sunrise (Neth. v. Russ.), Case No. 22, Provisional Measures, Order of Nov. 23, 2013, ITLOS Rep. 230, ¶ 105(1)(a).

160. Enrica Lexie, *supra* note 86, at 189, ¶ 29(b).

161. *Id.* at 199, ¶ 99.

162. However, Judge Jesus referred to the considerations of humanity. *See* Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, Provisional Measures, ITLOS Rep. 182, 226, ¶ 11 (separate opinion by Jesus, J.).

liberty and freedom for a lengthy period, raise humanitarian concerns."[163] Yet the Tribunal provided no further precision with regard to the concept of humanitarian concerns.

The *Enrica Lexie Incident* arbitration stands out as an exceptional case on this matter.[164] When prescribing provisional measures, the arbitral tribunal gave particular weight to considerations of humanity. In fact, in its April 29, 2016 order, it clearly stated that "its decision should seek to give effect to the concept of considerations of humanity, while preserving the respective rights of the Parties."[165] It thus prescribed a provisional measure ordering Italy and India to cooperate to "achieve a relaxation of the bail conditions of Sergeant Girone so as to give effect to the concept of considerations of humanity, so that Sergeant Girone . . . may return to Italy during the present Annex VII arbitration."[166] As discussed elsewhere, the arbitral tribunal's approach was contested.[167]

The normative content of the concept of humanitarian considerations remains vague.[168] Due to this vagueness, it is open to debate whether humanitarian considerations provide an independent legal basis for prescribing provisional measures. There is nothing in the jurisprudence of ITLOS indicating humanitarian considerations are a separate basis for the prescription of provisional measures, and here, the statement of the ICJ in its 1966 *South West Africa* judgment warrants consideration:

> Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.[169]

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163. M/T San Padre Pio, *supra* note 130, ¶ 130.

164. Enrica Lexie Incident (It. v. India), Case No. 2015-28, PCA Case Repository, Provisional Measures, Order of Apr. 29, 2016 (Perm. Ct. Arb. 2016).

165. *Id.* ¶ 106.

166. *Id.* ¶ 132(a); *see also id.* ¶ 124.

167. *See* Tanaka, *supra* note 158, at 281–84.

168. *Id.* at 283.

169. South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. Rep. 6, ¶ 49 (July 18).

Further, the ICJ concluded, "Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law."[170] Based on those statements, the concept of humanitarian considerations arguably should be regarded as an element that should be taken into account in the interpretation of the urgency of the situation or a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute, but not as an independent legal rule.[171]

C. Urgency, Timeframe, and Humanitarian Concerns Summarized

In the *ARA Libertad* and *Ukraine v. Russia* cases, ITLOS examined whether there was a real and imminent risk that irreparable prejudice may be caused to the rights at issue. According to this approach, the temporal element (urgency) is incorporated into the concept of a real and *imminent* risk.

Second, ITLOS members are divided about the impact of the textual differences of paragraphs 1 and 5 of Article 290(1) concerning the timeframe for ordering provisional measures. In the *Ukraine v. Russia* case, the Tribunal seemed to take a broad interpretation that narrowed the differences.

Third, in the *Ukraine v. Russia* case, ITLOS expressed humanitarian concerns about the continued deprivation of liberty and freedom of the Ukrainian servicemen. Yet the implications of humanitarian concerns for the prescription of provisional measures remains uncertain. In light of the modest normativity that the concept of humanitarian concerns or humanitarian considerations evinces, this concept can be regarded as an element of the interpretation of the urgency of the situation or a real and imminent risk, but not as an independent legal rule.

V. CONCLUSION

This article examined the release of a detained foreign warship and its crew through ITLOS's ordering of provisional measures by analyzing the *ARA Libertad* and *Ukraine v. Russia* cases. These two cases shed light on three murky issues regarding the interpretation or application of relevant provisions of UNCLOS, even though they do not completely resolve these issues.

170. *Id.* ¶ 50.

171. Tanaka, *supra* note 158, at 284.

First, the *Ukraine v. Russia* case highlighted the importance of the interpretation of military activities provided in UNCLOS Article 298(1)(b). According to ITLOS, the question of whether a dispute concerns military activities is to be decided after taking account of various relevant circumstances, including the type of vessels, the characterization of a dispute by the parties, the conduct of the parties, and the cause and context of the dispute.

This approach has merits since it enables the Tribunal the flexibility to decide the nature of a dispute on a case-by-case basis. In practice, however, as was the situation in the dispute between Ukraine and Russia, the distinction between military and law enforcement activities may not be clear-cut since elements of both activities may be present. When there are mixed military and law enforcement activities, a threshold for deciding the preponderance of military or law enforcement elements is of critical importance. A very high threshold for invocation of the military activities exception entails the risk of significantly reducing the scope of the exception. By contrast, a very low threshold may enlarge the scope of the military activities exception, thereby restricting the jurisdiction of adjudicatory bodies under the Convention. Thus, there is a need to establish a reasonable standard, avoiding an extremely low or high threshold. Further accumulation of case law will be needed to formulate this threshold.

Second, the *Ukraine v. Russia* case resolved the question of whether vessels ancillary to warships can be considered "ships owned or operated by a State and used only on government non-commercial service" referred to in UNCLOS Article 96. Such vessels also fall within the scope of or "government ships operated for non-commercial purposes" under Article 32 of the Convention. In the *ARA Libertad* case, ITLOS members were divided on the applicability of Article 32 to internal waters. However, even if in the future it were to be determined that Article 32 is inapplicable, it will not affect the immunities of warships in customary international law.

Third, a temporal element, urgency, is an essential requirement to prescribe provisional measures. According to ITLOS's approach in both the *ARA Libertad* and *Ukraine v. Russia* cases, the requirement of urgency is incorporated into the concept of a real and imminent risk that irreparable prejudice may be caused to rights at issue. When identifying the existence of a real and imminent risk, it is necessary to examine three temporal elements: the alleged breach of the rights of the applicant State that has already occurred (the past), the existence of ongoing risk (the present), and the possibility of repetition or continuity of the risk (the future). As urgency is a time-sensitive element, it is logical that temporal elements must be examined when

considering the existence of a real and imminent risk. Here one can find the implication of temporal elements for the prescription of provisional measures. While the passage of time can affect the interpretation and application of many rules of international law, the consideration of time sensitive elements is particularly important in the jurisprudence concerning provisional measures.