

The contribution of ITLOS to the development of the Law of the Sea

OC - (ILA-14172) - LIMITS ON THE USE OF FORCE AT SEA IN THE JURISPRUDENCE OF THE ITLOS: FROM M/V SAIGA TO UKRAINE/RUSSIA

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Abstract

The lack of variety in the types of cases brought to the International Tribunal for the Law of the Sea (ITLOS) in the early years of its constitution echoed doubts raised during the negotiations of the Third United Nations Conference on the Law of the Sea, on the wisdom, economy, and legitimacy of introducing additional specialized bodies and modes for the peaceful settlement of maritime disputes, to those that then existed under international law.

More than twenty years later, however, the growing majority of such cases requesting the prompt release of arrested vessels and/or detained crew, and those requesting the prescription of provisional measures pending the constitution of the proper tribunal vested with jurisdiction under Annex VII of the Law of the Sea Convention (LOSC), have also produced valuable insight on the character of, and limitations on, the use of force at sea by a variety of state actors, whether against their counterparts or when faced with non-state actors. The judgment on the very first case brought to the ITLOS by Saint Vincent and the Grenadines following Guinean authorities' arrest of the vessel M/V Saiga (Case No. 1 and 2) has yielded oft-cited guidelines on what constitutes excessive force and endangerment of human life in the conduct of law enforcement operations at sea. Most recently, and almost two decades since M/V Saiga, the very jurisdiction of the ITLOS to prescribe provisional measures hinged, in *Ukraine v. Russia* (Case No. 26), on the determination of whether the use of force by Russian authorities against three Ukrainian Navy vessels had the character of maritime law enforcement or military activities. Both states, as it turns out, have availed of the right, under Article 298 of the LOSC, to declare such military activities as excepted from jurisdiction under Part XV compulsory procedures entailing binding decisions.

This research thus surveys the wealth of ITLOS jurisprudence for insight not only on the aforementioned limitations on the use of force at sea, but also their possible utility for drawing the dividing line between maritime law enforcement and military operations at sea. Such observations obtain particular relevance given the increasing employment of non-state actors of uncertain linkage or doubtful attribution to state sponsors, as part of strategies for gray zone campaigns (ex. use of maritime militias). Questions also arise relating to the quickly solidifying normalcy of the conduct of joint civil-military operations at sea. Finally, such jurisprudence shall be examined vis-a-vis those of other international courts and tribunals, particularly those under Part XV of the LOSC, on the subject of the use of force.

Palavras-chave : ITLOS, Use of Force, maritime law enforcement