

NAVIGATING LEGITIMACY AND AUTHORITY: THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA PROVISIONAL MEASURES IN UKRAINE V. RUSSIA

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Abstract

International maritime disputes involving geopolitical tensions test the legitimacy and authority of tribunals like the International Tribunal for the Law of the Sea (ITLOS). This article examines ITLOS' provisional measures order in Ukraine v. Russia (2019) to assess how the Tribunal balances procedural fairness with enforcement challenges in politically charged disputes. Employing qualitative legal analysis, the study dissects ITLOS' reliance on state consent and procedural integrity as pillars of its normative legitimacy, while evaluating its de facto authority through state participation and compliance. The article argues that ITLOS' strict adherence to UNCLOS provisions reinforces its normative legitimacy, yet gaps in enforcement—exemplified by Russia's partial compliance—reveal the limits of its authority in high-stakes conflicts. By contextualizing the case within broader debates on international adjudication, the analysis demonstrates how ITLOS' procedural rigor mitigates non-participation risks but struggles to overcome power asymmetries. The study concludes with pragmatic reforms, including clarified jurisdictional guidelines, advisory opinions, and collaborations, to bolster ITLOS' role in maritime dispute resolution. These findings illuminate the evolving challenges faced by international courts in reconciling legal principles with geopolitical realities.

Keywords: *Authority; International Tribunal for the Law of the Sea; Legitimacy; Maritime Dispute*

MENAVIGASI LEGITIMASI DAN OTORITAS: TINDAKAN SEMENTARA *THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA* DALAM UKRAINA V. RUSIA

Intisari

Sengketa maritim yang melibatkan ketegangan geopolitik menguji legitimasi dan otoritas lembaga peradilan seperti Pengadilan Internasional untuk Hukum Laut atau *the International Tribunal for the Law of the Sea* (ITLOS). Artikel ini menganalisis tindakan sementara ITLOS dalam *Ukraina v. Russia* (2019) untuk menilai bagaimana Pengadilan menyeimbangkan keadilan prosedural dengan tantangan penegakan hukum dalam sengketa politis. Melalui analisis hukum kualitatif, studi ini mengkaji ketergantungan ITLOS pada persetujuan negara dan integritas prosedural sebagai pilar legitimasi normatif, sekaligus mengevaluasi otoritas de-facto-nya melalui partisipasi dan kepatuhan negara. Artikel ini berargumen bahwa kepatuhan ITLOS pada UNCLOS memperkuat legitimasi normatifnya, tetapi celah penegakan—ditunjukkan oleh kepatuhan parsial Rusia—mengungkap batasan otoritasnya dalam konflik berisiko tinggi. Dengan mengkontekstualkan kasus ini dalam debat peradilan internasional, analisis menunjukkan bahwa ketelitian prosedural ITLOS mengurangi risiko ketidakhadiran pihak, namun belum mampu mengatasi asimetri kekuasaan. Studi ini merekomendasikan reformasi pragmatis, termasuk panduan yang mengklarifikasi yurisdiksi, pandangan hukum, dan kerjasama, untuk memperkuat peran ITLOS. Temuan ini menyoroti tantangan yang dihadapi pengadilan internasional dalam memadukan prinsip hukum dengan realitas geopolitik.

Kata Kunci: *Legitimasi; Otoritas; Pengadilan Internasional untuk Hukum Laut; Sengketa Maritim; Ukraina v. Rusia*

A. Introduction

International maritime disputes present significant challenges to the global legal order, particularly in cases involving politically charged conflicts and questions of sovereignty. The United Nations Convention on the Law of the Sea (UNCLOS) provides a comprehensive framework for addressing such disputes, with the International Tribunal for the Law of the Sea (ITLOS) playing a pivotal role in adjudicating disputes. Provisional measures, which ITLOS can order under Article 290 of UNCLOS, serve as an interim remedy to protect the rights of parties and prevent further escalation of disputes while the merits of the case are being adjudicated, even outside the means of ITLOS.

This article explores the significance and impact of ITLOS' provisional measures order in *Ukraine v. Russia*. The request arose from the arbitral proceedings under Annex VII about the detention of Ukrainian naval vessels and crews by Russia following the Kerch Strait incident.¹ The Kerch Strait incident (2018) marked a critical escalation in Russia-Ukraine tensions when Russian coastguard vessels fired on and seized three Ukrainian naval ships attempting to transit the strait, injuring crew members and detaining 24 servicemen.² Russia justified the act as enforcing its claimed territorial waters near annexed Crimea, while Ukraine—backed by UNCLOS provisions on innocent passage—denounced it as an unlawful use of force and a violation of navigational freedoms.³ The incident blurred the lines between peacetime maritime law and naval warfare, raising questions about the applicability of international humanitarian law and exposing the strategic use of legal ambiguity in hybrid conflicts.⁴ In response, Ukraine sought provisional measures from ITLOS under Article 290(5) of UNCLOS, urging Russia's immediate release

1 International Tribunal for Law of the Sea, *Request of Ukraine for the Prescription of Provisional Measures under Article 290 Paragraph 5 of the UNCLOS*, 16 April 2016, para. 4-5 (Ukraine v. Russia Federation, Request of Ukraine).

2 James Marson and Thomas Grove, "Russia-Ukraine Standoff Intensifies Over Captured Vessels," *The Wall Street Journal*, November 25, 2018, <https://www.wsj.com/articles/russia-ukraine-standoff-intensifies-over-captured-vessels-1543236677>.

3 James Kraska, "The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?," *EJIL: Talk!*, 2018, <https://www.ejiltalk.org/the-%0Akerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>.

4 Kraska, "The Kerch Strait."

of the detained vessels and servicemen to prevent further irreparable harm.⁵

By focusing on this case, this article highlights ITLOS's approach to balancing procedural consistency with the need to address urgent legal humanitarian concerns. It also situates the case within the frameworks of legitimacy, offering insights into how ITLOS' actions reinforce or challenge the rule of law in international maritime disputes. Finally, this article argues that while ITLOS faces significant challenges in securing its authority through compliance from states like Russia, its commitment to legal principles and procedural integrity strengthens its legitimacy.

To analyze these issues, this article employs a qualitative legal research method, focusing on case law, legal instruments, and scholarly commentary. The analysis is structured around two key frameworks: (i) legitimacy, assessed through state consent and procedural integrity, and (ii) authority, evaluated through participation in judicial proceedings and compliance with outcomes. These frameworks provide a lens to examine ITLOS' role in politically sensitive disputes and its broader implications for international maritime law. Before its concluding section, this article offers recommendations for strengthening ITLOS' effectiveness, proposing practical ways forward to address the challenges identified in the *Ukraine v. Russia* case.

B. Legitimacy: State Consent & Procedural Integrity

Legitimacy in international law refers to the justified claim to exercise authority in a manner that is perceived as rightful, fair, and binding by those subject to it.⁶ Unlike authority, which concerns the moral, legal, and social acceptance of power, legitimacy denotes the formal power to make and enforce decisions. This distinction is crucial: while authority is a *de facto* condition that depends on ongoing recognition and validation by states, legal communities, and other stakeholders, legitimacy is a *de jure* attribute that is derived from treaties, statutes, or state consent.

The legitimacy of international courts is a cornerstone of their ability to function effectively within the decentralized and consent-based framework of

⁵ *Ukraine v. Russia Federation*, Request of Ukraine.

⁶ Chris Thomas, "The Concept of Legitimacy and International Law," *LSE Legal Studies Working Paper No. 12/2013*, 2013, 7–11.

international law. Unlike domestic systems, which operate within a hierarchical legal order backed by state enforcement mechanisms, international bodies like courts rely primarily on their perceived legitimacy to ensure compliance with their rulings and sustain their long-term relevance.⁷ Legitimacy, in this context, refers to the “normative acceptance” of a court’s right to adjudicate disputes and issue binding decisions, grounded in its conformity with shared principles of justice, procedural fairness, and institutional integrity.⁸ When a court is perceived as legitimate, its judgments are more likely to be regarded not merely as coercive impositions but as authoritative interpretations of international law, deserving of respect by states and other stakeholders.⁹ This voluntary compliance is critical in a system where enforcement mechanisms are weak, and adherence often depends on political goodwill and reciprocal respect among states.¹⁰

Beyond securing compliance, legitimacy plays a pivotal role in shaping the broader “normative influence” of international courts. A legitimate court contributes to the development of international law by issuing rulings that are cited as persuasive precedents, thereby gradually crystallizing customary norms or clarifying treaty obligations.¹¹ Conversely, a loss of legitimacy—whether due to perceptions of bias, procedural unfairness, or overreach—can undermine a court’s ability to perform this function, possibly leading to skepticism about its rulings or even withdrawal of state support. Thus,

7 Elena Katselli Proukaki, “Countermeasures in the Name of Community Interests in State Practice,” in *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (London: Routledge, 2010), 93–96.

8 Henrik Palmer Olsen and Patrick Capps, “International Courts and The Building of Legal Authority Beyond the State,” in *Legal Authority Beyond the State* (Cambridge: Cambridge University Press, 2018), 83–87.

9 Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions,” *Ethics & International Affairs* 20, no. 4 (2006): 408–12.

10 Buchanan and Keohane, “The Legitimacy of Global,” 90; For state’s political goodwill and respect in compliance to international courts see Karen J. Alter, “The New Terrain of International Law: Courts, Politics, Rights,” *Northwestern Law & Economics Research Paper No. 13-11*, 2013.

11 For more about the role of international courts in shaping international law, see Vladyslav Lanovoy, “Customary International Law in the Reasoning of International Courts and Tribunals,” in *The Theory, Practice, and Interpretation of Customary International Law*, ed. Panos Merkouris, Noora Arajärvi, and Jörg Kammerhofer (Cambridge: Cambridge University Press, 2022), 231–55.

legitimacy is not merely a static attribute but a dynamic condition that must be continually reinforced through transparent processes, equitable outcomes, and responsiveness to the expectations of the international community.

In this context, legitimacy can be broadly understood as “the right to rule,” signifying that a legitimate court possesses a justifiable right to issue judgments, decisions, or opinions that those subject to them are normatively obliged to obey or, at the very least, consider with due care.¹² One approach is normative legitimacy or objective legitimacy, which focuses on whether an institution’s authority aligns with established, legal, political, or philosophical criteria.¹³ Its evaluations rely on theoretical benchmarks. Meanwhile, sociological legitimacy or subjective legitimacy is stemmed from collective perception or belief that the court holds a right of governance.¹⁴ It is often assessed through observable indicators such as public support or institutional trust.¹⁵

Many argue these are two separate approaches, suggesting the former to be more theoretical (legal, political, philosophical, or other standards) and the latter leaning towards empirical.¹⁶ However, it is plausible that normative legitimacy could influence the sociological one. For instance, if international actors view the court as illegitimate, they may show it in their actions by withdrawing funding, disregarding its decisions, or undermining the relevance of its rulings.¹⁷

For this article, the analysis on ITLOS’ legitimacy in adjudicating the *Ukraine v. Russia* case will depart from the normative approach and link i the sociological approach. There are many factors enhancing the legitimacy of a

12 Cesare P. R. Romano, “Legitimacy, Authority, and Performance: Contemporary Anxieties of International Courts and Tribunals,” *American Journal of International Law* 114, no. 1 (2020): 149–63.

13 Harlan Grant Cohen et al., “Legitimacy and International Courts - A Framework,” in *Legitimacy and International Courts*, ed. Nienke Grossman et al., 1st Editio (Cambridge: Cambridge University Press, 2018), 4.

14 Nienke Grossman, “Legitimacy and International Adjudicative Bodies,” *George Washington International Law Review* 41, no. 1 (2009): 107–80.

15 Grossman, “Legitimacy and International.”

16 Kraska, “The Kerch Strait.”

17 Nienke Grossman, “The Normative Legitimacy of International Courts,” *Temple Law Review* 86 (2013): 61–105.

proceeding by an international court. Nevertheless, scholars have generally agreed the main factors that reflect a court's legitimacy include: (i) state consent; and (ii) procedural integrity.¹⁸

1. State Consent

As a conventional perspective on normative legitimacy, state consent presents the idea that international courts derive legitimacy from the consent of states to their jurisdiction.¹⁹ The state consent theory grounds legitimacy in the origins or sources of authority, emphasizing procedural validity over substantive outcomes.²⁰ It can be inferred that authority is deemed legitimate when voluntarily accepted by sovereign states. Given the foundational principle of state sovereignty, international adjudicative bodies lack justification to exercise jurisdiction over disputes absent prior state consent.²¹ This consent-based logic reflects the Westphalian paradigm, wherein state autonomy “trumps” supranational authority.

As the product of international politics, it is common for international courts to encounter different perceptions. Critics contend that submitting to international courts risks eroding state sovereignty by “transferring” authority to external judicial entities to shape law autonomously.²² Alternatively, parallel critiques frame the international judiciary, operating without a global democratic mandate, which imposes Western-centric norms perceived as often marginalizing non-Western societies.²³

In establishing its jurisdiction, ITLOS had to determine both Ukraine and Russia's consent by answering layers of relevant procedural requirements within the UNCLOS provisions. ITLOS took the approach of asserting *prima facie* jurisdiction of the arbitral tribunal for Article 290(5) of UNCLOS, in which it observed the dispute to concern the interpretation or application

18 Grossman, “The Normative Legitimacy.”; Peter Tzeng, “Ukraine v Russia and Philippines v China: Jurisdiction and Legitimacy,” *Denver Journal of International Law & Policy* 46, no. 1 (2017): 1–19.

19 Ukraine v. Russia Federation, Request of Ukraine, 65.

20 Ukraine v. Russia Federation, Request of Ukraine.

21 Ukraine v. Russia Federation, Request of Ukraine, 66.

22 Neus Torbisco-Casals, “The Legitimacy of International Courts: The Challenge of Diversity,” *Journal of Social Philosophy* 52, no. 4 (2022): 491–515.

23 Torbisco-Casals, “The Legitimacy of International Courts.”

of UNCLOS.²⁴ However, the conclusion was not as simple as fulfilling the requirement stipulated in Article 290(5). Since Russia made an argument according to its declaration to exempt military activities based on Article 298(1)(b) of UNCLOS, ITLOS also needed to assess whether the dispute concerned military activities that could exclude the case from the arbitral tribunal's jurisdiction.²⁵ ITLOS then found that the relevant circumstances were in the context of a law enforcement operation rather than a military operation.²⁶ The "reservation" made by Russia is inapplicable to preclude the state from giving its "contractual" consent in this particular case, thus rendering ITLOS the jurisdiction to prescribe the provisional measures.

Such a conclusion has become the landmark of ITLOS' first interpretation on Article 298(1)(b) of UNCLOS. Nonetheless, there is a consequence that ITLOS perhaps did not foresee for states that have invoked or may invoke the military activities exemption. Critique comments that these states must now grapple with its implications for proceedings under Part XV of UNCLOS as the order carries the weight of precedent for future cases.²⁷ By extending its jurisdiction to address Russia's actions, ITLOS perhaps has risked discouraging states that have made or may make such a declaration from fully participating in dispute resolution procedures within Part XV.²⁸

ITLOS claimed its conclusion on the question regarding the military activities' exemption was based on an objective evaluation of the relevant facts.²⁹ However, this objectivity may be called into question due to the absence of established standards in existing jurisprudence. Ukraine contended that the military activities exemption did not apply since Russia had itself classified the actions in question as non-military in nature.³⁰ It referenced the

24 International Tribunal for Law of the Sea, *The Detention of the Three Ukrainian Naval Vessels (Ukraine v. Russia Federation)*, Case No. 26, Order of 25 May 2019, para. 36, 45.

25 Ukraine v. Russia Federation, Order of 25 May 2025, para. 50.

26 Ukraine v. Russia Federation, Order of 25 May 2025, para. 63-77.

27 James Kraska, "Did ITLOS Just Kill the Military Activities Exemption in Article 298?," EJIL: Talk!, 2019, <https://www.ejiltalk.org/did-itlos-just-kill-%0Athe-military-activities-exemption-in-article-298/>.

28 Kraska, "Did ITLOS Just."

29 Olsen and Capps, "International Courts and The Building of Legal Authority Beyond the State.", 66.

30 Olsen and Capps, "International Courts and The Building of Legal Authority Beyond the State.",

South China Sea Arbitration case, where ITLOS determined such exemption did not apply, as China had consistently claimed the activities were intended for civilian purposes and had not rejected the characterization of the activities for not being military in nature.³¹ Meanwhile, Russia, in this case, persistently counterargued on the characterization of the activities.³²

The absence of any explicit objection of the military activities exception by China in *South China Sea Arbitration* case was interpreted by ITLOS as China's implicit consent of its jurisdiction.³³ Despite that, there is a tendency in international courts and tribunals to maintain that it is their role to decide on the characterization or subject of a dispute based on relevant factors when a respondent state disputes it.³⁴ It appears that the way the parties characterize a dispute is merely one of several factors ITLOS considers when making its determination.

Regardless of how ITLOS eventually came to such a conclusion to establish Ukraine and Russia's consent to its jurisdiction, it has created a possibility of a decline in interest in fulfilling their obligations in settling disputes within the framework of Part XV of UNCLOS for states that have made reservations or declarations on the provisions therein. It is because there is now a precedent risking these states from not being able to utilize their declaration under Article 298(1)(b) even without a clear parameter from ITLOS. While ITLOS has managed to obtain both disputing states' consent to the jurisdiction to support its normative legitimacy in the *Ukraine v. Russia* case, it can be inferred that ITLOS might have put its sociological legitimacy at risk for having to face potential negative reactions from states in the future.

2. Procedural Integrity

Procedural integrity factor assesses legitimacy based on the procedures a

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31 Permanent Court of Arbitration, *Arbitration between the Republic of the Philippines and the People's Republic of China*, Final Award, July 12, 2016, , Case No. 2013-19 para. 1026–1028.

32 Olsen and Capps, "International Courts and The Building of Legal Authority Beyond the State.", 50-54.

33 Xinxiang Shi and Yen-Chiang Chang, "Order of Provisional Measures in Ukraine v Russia and Mixed Disputes Concerning Military Activities," *Journal of International Dispute Settlement* 11 (2020): 278–94.

34 Shi and Chang, "Order of Provisional Measures."

court employs to reach its decisions. The underlying premise is that decisions made by a court with fair and impartial adjudicators and processes deserve respect, whereas those issued by biased judges or through unfair processes do not.³⁵ Consequently, the international community considers a court or tribunal that upholds procedural fairness and ensures equal opportunities for disputing parties more legitimate than one that exhibits bias or fails to provide equal opportunities for them to present their cases.

The traditional way to evaluate a court's fairness and impartiality is to take a look at the composition of judges. ITLOS is composed of 21 judges, elected from among individuals with recognized expertise in the law of the sea, maritime affairs, and related fields, thereby ensuring ITLOS' competence in resolving disputes.³⁶ Since there are already Judge Kulyk from Ukraine and Judge Kolodkin from Russia, ITLOS does not necessarily have to appoint *ad hoc* judges.

Furthermore, the Dissenting Opinion of Judge Kolodkin shows how he attempted to make an objective observation, regardless of his state of origin's foreign policy at that time. Judge Kolodkin opined that the activities conducted by Russia were military operations by arguing the navigational activities of a state's warships are inherently military.³⁷ His view is different from Russia's stance, objecting to the classification of relevant circumstances to be not of military nature (despite also rejecting the inapplicability of military activities exemption under Article 298(1)(b) of UNCLOS). It appears that such ambiguous stance is in line with Russia's strategy to prevent both the categorization of "armed conflict" on the on-going hostilities and in result, the implementation of international humanitarian law.³⁸ This demonstrates

35 Ukraine v. Russia Federation, Request of Ukraine.

36 "Members of the Tribunal," International Tribunal for the Law of the Sea, accessed January 25, 2025, <https://www.itlos.org/en/main/the-tribunal/members/>.

37 International Tribunal for Law of the Sea, *The Detention of the Three Ukrainian Naval Vessels (Ukraine v. Russia Federation)*, Case No. 26, Dissenting Opinion of Judge Kolodkin, para. 9. Similar opinion that is shared by Judge Gao who argued "a warship is an expression of the sovereignty of the state whose flag it flies,". See International Tribunal for Law of the Sea, *The Detention of the Three Ukrainian Naval Vessels (Ukraine v. Russia Federation)*, Case No. 26, Separate Opinion of Judge Gao, para. 33.

38 This article will not discuss the impact of concluding the incidents as military operations towards the application of international humanitarian law at sea. For in-depth analysis on this subject, see

how an ITLOS judge could prioritize the importance of formulating a legal and fact-based assessment on top of their state's political viewpoint.

Moreover, it is noteworthy that Russia decided not to participate in the hearing,³⁹ but such situation did not impede ITLOS from ensuring the equality between disputing parties. As Judge Lucky regretted, the non-appearance of Russia made the job of ITLOS difficult, adding to the issues of absence of oral submissions and witnesses' testimony.⁴⁰ Nevertheless, a party's absence does not automatically result in favorable treatment for the requesting party, as the proceedings must still be conducted in the usual manner.⁴¹

Article 28 of Statute of the ITLOS (Statute) stipulates that if a party fails to appear to defend its case, ITLOS may proceed at the other party's request, provided it secures jurisdiction and that the claim is substantiated in fact and law. ITLOS not only refers to Article 28 of the Statute to move forward with the case, but it also recalled a similar situation in *Arctic Sunrise* case, where Russia notified the Netherlands by *note verbale* that it did not intend to participate in the proceedings.⁴² In giving sufficient opportunity to present its observation on the case for Russia, ITLOS transmitted all relevant communications to Russia and took into account the memorandum submitted by Russia before the oral proceedings closed.⁴³ Thus, despite Russia's absence in the proceedings, ITLOS made its best effort in fairly observing both disputing parties to conclude the claim well-founded both in fact and law.

The principle that non-participation does not invalidate judicial decisions is grounded in the broader framework of international procedural law, which prioritizes the integrity of the adjudicative process over unilateral obstruction. This approach reflects the concept of "default jurisdiction,"

Kraska, "The Kerch Strait."

39 Olsen and Capps, "International Courts and The Building of Legal Authority Beyond the State.", 25.

40 International Tribunal for Law of the Sea, *The Detention of the Three Ukrainian Naval Vessels (Ukraine v. Russia Federation)*, Case No 26, Separate Opinion of Judge Lucky, para. 11-12.

41 Tafsir Malick Ndiaye, "Non-Appearance before the International Tribunal for the Law of the Sea," *Indian Journal of International Law* 53 (2013): 545-64.

42 International Tribunal for Law of the Sea, *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)*, Case No. 22, Order, 22 November 2013, para. 48.

43 Olsen and Capps, "International Courts and The Building of Legal Authority Beyond the State.", 28.

wherein international courts and tribunals retain the legitimacy to render binding decisions even when one party refuses to engage, provided that jurisdictional requirements are met.⁴⁴ The rationale behind this principle is twofold: first, it prevents a party from unilaterally derailing proceedings by withholding participation, thereby preserving the judicial function; and second, it upholds the equality of parties by ensuring that a respondent's absence does not unfairly disadvantage the claimant.⁴⁵

On the other hand, there is an argument that such non-participation may be a factor in “delegitimizing” an international court in making a decision. The ground of this argument is based on the idea that the rules of the court permitting a state not to appear in the proceeding have become an indicator of how an international court cannot exert its power in “obligating” such a state to participate.⁴⁶ Nevertheless, the fact that the decision rendered by the court is binding to all disputing parties, regardless of their presence, shows how an international court still retains its legitimacy even without one's participation in the proceeding.

From a jurisprudential standpoint, this principle also aligns with the consensual nature of international adjudication. States, by ratifying treaties like UNCLOS or accepting compulsory jurisdiction, implicitly consent to the tribunal's competency to decide cases, even in their absence. As elaborated in the previous sub-section, this consent-based theory ensures that the legitimacy of judgments derives not from procedural participation but from the prior agreement to be bound by the tribunal's rulings. Allowing non-participation to invalidate decisions would undermine the very purpose of compulsory dispute resolution, incentivizing tactical absences and eroding trust in international legal institutions.⁴⁷ Thus, the enforceability of decisions like those of ITLOS

44 Stanimir A. Alexandrov, “Non-Appearance before the International Court of Justice,” *Columbia Journal of Transnational Law* 33, no. 2 (1995): 63-67.

45 Fabian Simon Eichberge, “Informal Communications to the International Court of Justice in Cases of Non-Appearance,” *The Law & Practice of International Courts and Tribunals* 22, no. 1 (2023): 17-20.

46 Eichberge, “Informal Communications.”, 20-22.

47 Eichberge, “Informal Communications.”, 21; James Crawford, “Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture,” *Journal of International Dispute Settlement* 1, no. 1 (2010): 3.

rests not on procedural symmetry but on the foundational *pacta sunt servanda* principle, which obligates states to honor their treaty commitments in good faith.⁴⁸

C. Authority: Proceeding and Enforcement Challenges

There is divergence in the definition of authority among scholars, but “power” seems to be the most suitable term to describe it. The power in question should be understood as an ability of eliciting obedience to commands instead of imposing will against resistance.⁴⁹ Authority entails that international actors are expected to “obey” even when substantive agreement is lacking. International courts obtain *de jure* authority from the mandate given as codified in the constitutive legal instruments.⁵⁰ On the other hand, *de facto* authority represents the authority from real world practices of international community which are shaped through influence, leadership, or persuasion by the international courts.⁵¹

It can be argued that when it comes to a court dealing with political-driven cases, its *de facto* authority plays bigger role than *de jure* authority. Considering *Ukraine v. Russia* case is a highly-political one and how ITLOS’ *de jure* authority is clearly prescribed in UNCLOS,⁵² this article will focus on discussing elements reflecting ITLOS’ *de facto* authority in adjudicating the case. Such authority is analyzed based on relevant actors’ behaviors, whether or not their actions project obedience to ITLOS, during the proceeding and after the decision was ordered.

1. Participation in Judicial Proceedings

Although it is widely recognized among international lawyers that respondent states are not legally obligated to participate in judicial proceedings, non-participation is still often viewed as a significant concern, posing a

48 See Vienna Convention on the Law of Treaties 1969, signed in Vienna on May 23 1969, entered into force on 27 January 1989, United Nations, Article 26, (Vienna Convention).

49 Ingo Venzke, “Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction,” *Theoretical Inquiries in Law* 14, no. 2 (2013): 381–410.

50 Romano, “Legitimacy.”

51 Romano, “Legitimacy.”

52 *United Nations Convention on the Law of the Sea Part XV*, signed in Jamaica on December 10 1982, entered into force on November 16 1994, 1833 U.N.T.S. 397 (UNCLOS Part XV); *Statute of the International Tribunal for the Law of the Sea*, signed in Jamaica on December 10 1982, entered into force on November 16 1994, 1833 U.N.T.S. 56, Article 1, (The Statute).

substantial challenge to the authority and effectiveness of international courts and tribunals.⁵³ Many reasons have caused states' decisions to not participate in judicial proceedings which ranges from concerns about jurisdiction, preference for self-judgment, criticism against distorted framing, doubts about the impartiality of adjudicators, and to the most extreme—distrust in the court or tribunal as an institution itself.⁵⁴ Each of these reasons carries different background as a response to a court or tribunal's authority, thus a state resorting to one reason does not automatically mean it completely rejects such authority.

Russia has made distorted framing as justification for its non-participation in both *Ukraine v. Russia* and *Arctic Sunrise* which led to objection to ITLOS' jurisdiction over the cases. As discussed above, Russia refused to appear in the proceeding because it rejected Ukraine's allegation that the subject matter should fall under ITLOS' jurisdiction as it concerned the lawfulness of Russia's exercise in law enforcement. Similar approach is found in Russia's previous dispute with the Netherlands, where Russia explained that the case should be excluded from ITLOS' jurisdiction as it fell into the category of "law-enforcement activities in regard to the exercise of sovereign rights or jurisdiction."⁵⁵ Additionally, Russia mentioned its commitment to pursue a mutually acceptable solution addressing the situation with the Netherlands.⁵⁶

A state's frequent absence in judicial proceedings may give the notion of distrust towards the court or tribunal's authority, refusing to abide by the institution's authority. However, it seems that this was not the intention of Russia's repeated non-participation before ITLOS' proceedings. From strategic point of view, the decision not to take full participation in proceedings may be due to the consideration that selectively or partially participating is sufficient to serve the interests of Russia.⁵⁷ In *Ukraine v. Russia* case, Russia might view

53 Ying Sun, "Why States Refuse to Participate in Judicial Proceedings: Uncovering Key Reasons and Historical Evolution," *Journal of International Dispute Settlement* 14, no. 4 (2023): 451–68.

54 Sun, "Why States Refuse."

55 *Ukraine v. Russia Federation*, Order of 25 May 2025, para. 9.

56 *Ukraine v. Russia Federation*, Order of 25 May 2025, para. 9.

57 Peter Tzeng, "A Strategy of Non-Participation before International Courts and Tribunals," *The Law & Practice of International Courts and Tribunals* 19 (2020): 5–27.

that it was more strategic to not be entirely present in the hearing and submit a memorandum instead. Moreover, a state may opt not to participate where its most compelling legal argument in judicial proceedings is inconsistent with its stated rhetoric and political stance.⁵⁸ Russia was left with no choice but to admit the tensions with Ukraine escalated into an armed conflict (triggering the application of international humanitarian law) if it continued countering on the characterization of disputed circumstances by saying these were of military nature. For instance, in the context of the ongoing Russia-Ukraine war—which escalated into a full-scale armed conflict in 2022—Russia faced a dilemma: to counter Ukraine’s legal arguments, it would need to acknowledge the armed conflict’s existence (triggering international humanitarian law obligations), a position at odds with its political narrative framing the war as a “special military operation.” Hence, non-participation allowed Russia to avoid legal concessions that could undermine its foreign policy objectives while maintaining consistency with its domestic and international rhetoric.

2. Compliance with the Outcome

The states’ lack of participation in judicial proceedings may underscore the nuanced perception towards a court or tribunal’s authority. Nonetheless, this absence does not preclude the possibility of eventual compliance with the final judgment or order issued. In fact, there are cases where states that initially refrained from participating later demonstrated their acknowledgment of the court’s authority by adhering to its rulings, whether to avoid political isolation, maintain international credibility, or comply with binding international obligations.⁵⁹ A state’s decision to comply with a final decision, even after refusing to engage in the judicial process, implicitly reflects how the court possesses the authority to rule an order binding on such state.⁶⁰

In the *Arctic Sunrise* case, Russia ultimately complied with ITLOS’ order for the release of the Greenpeace activists and their vessel upon the posting of a bond by the Netherlands to be posted with Russia in the form of a bank

58 Tzeng, “A Strategy.”

59 Andrew T Guzman, “A Compliance-Based Theory of International Law,” *California Law Review* 90 (2002): 1823–87.

60 Guzman, “A Compliance-Based.”

guarantee.⁶¹ In contrast, Russia's response to the provisional measures issued in the *Ukraine v. Russia* case has been less forthcoming. Ukraine reported that Russia requested Ukraine to offer "written guarantees" instead of releasing the naval vessels Berdyansk, Nikopol, or Yani Kapu and the 24 detained servicemen, a response considered to further aggravate the dispute.⁶²

The differing levels of compliance between these two cases underscore the influence of political context in determining whether a state will fully comply with international judicial orders. Russia's non-compliance, particularly in this politically sensitive and high-stakes case, suggests that geopolitical interests and national security considerations could outweigh the pressure to adhere to a court's rulings. In this instance, Russia's strategic interests in the Black Sea and its broader territorial claims in Crimea appeared to take precedence over compliance with ITLOS' order.⁶³ These instances highlight that while international tribunals may issue binding orders, states may choose to comply selectively depending on the circumstances, signaling a nuanced relationship between international court's authority and national interests.

Furthermore, Russia's status as a permanent the United Nations Security Council (UNSC) member with veto power and a nuclear-armed state fundamentally shapes its approach to international adjudication. Unlike smaller states vulnerable to coercive measures, Russia's structural position "insulates" it from meaningful enforcement of adverse rulings. This dynamic reflects international judicial imbalance: while international courts like ITLOS derive legitimacy from states' consent to binding jurisdiction, their effectiveness ultimately depends on power asymmetries.⁶⁴ As a veto-wielding

61 International Tribunal for The Law of The Sea, *The Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation)*, Case No 22, Report on Compliance with the Provisional Measures Prescribed Submitted by the Netherlands, 2 December 2013; John Vidal, "Arctic 30: Russia to Release Greenpeace Ship Arctic Sunrise," *The Guardian*, 2014, <https://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship>.

62 International Tribunal for The Law of The Sea, *The Detention of the Three Ukrainian Naval Vessels (Ukraine v. Russia Federation)*, Case No 26, Report on Compliance with the Provisional Measures Prescribed Submitted by Ukraine, 26 June 2019.

63 For more about Russia and Ukraine's international litigation strategy as lawfare amidst the turmoil, see M Gapsa, "On the Importance of Provisional Measures in Ukraine's Cases Against Russia," *Baltic Yearbook of International Law Online* 22, no. 1 (2024): 113–46.

64 Powerful states actively shape international society's perceptions of acceptable conduct, using their influence to normalize behavior that might otherwise violate established norms. Through

P5 member, Russia can block any UNSC action to enforce compliance under Article 94(2) of the UN Charter rendering UNCLOS's "final and binding" provisions (Article 296) politically negotiable. Theoretically, this aligns with realist critiques of international law as the side effect to power politics,⁶⁵ where great powers treat legal rulings as instruments of diplomacy rather than constraints. In the Black Sea and Crimea disputes, Russia's non-compliance thus exemplifies how structural privilege enables selective adherence—a pattern seen historically with other P5 members (e.g., the United States' rejection of the ruling for its case against Nicaragua).

D. Ways Forward for ITLOS

The *Ukraine v. Russia* case underscores both the strengths and limitations of ITLOS in addressing politically sensitive maritime disputes. While ITLOS demonstrated its ability to uphold procedural integrity and assert jurisdiction in the face of non-participation, the case also revealed challenges in securing compliance and maintaining sociological legitimacy, particularly when dealing with powerful states. To strengthen its role and effectiveness, ITLOS must address these challenges and adapt to the evolving landscape of international maritime disputes. Below are key strategies for ITLOS to consider:

1. Participation in Judicial Proceedings

The *Ukraine v. Russia* case highlighted ambiguities in ITLOS' jurisdiction, particularly concerning the military activities exemption under Article 298(1)(b) of UNCLOS. ITLOS' interpretation of this provision, while groundbreaking, risks alienating states that rely on such exemptions to protect their strategic interests. To mitigate this, ITLOS should develop clearer guidelines or issue advisory opinions, subject to Articles 159 and 191 of UNCLOS along with the Statute and Rules of the Tribunal,⁶⁶ to clarify the

this process, they effectively rewrite the standards of compliance in international law to accommodate their actions. The result is a dual system where powerful states enjoy modified expectations while weaker states remain bound by stricter rules - a reality the international community must pragmatically accept despite its theoretical commitment to equal sovereignty. For more about power asymmetries in international legal order, see Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order," *European Journal of International Law* 16, no. 3 (2005): 369–408.

⁶⁵ Krisch, "International Law in Times."

⁶⁶ The Statute, Article 40; *Rules of the Tribunal*, signed in Germany on October 28 1997, entered into force March 1 1998, Section H.

scope of its jurisdiction, ensuring that states have a predictable framework for engaging with ITLOS. This would enhance both normative and sociological legitimacy by addressing concerns about overreach and fostering trust among member states.

2. Leveraging Advisory Opinions

Advisory opinions offer a proactive way for ITLOS to clarify legal uncertainties and guide state behavior without the adversarial nature of contentious cases. It is commonly presumed that the advisory procedures lend itself more readily to judicial activism compared to the contentious procedure.⁶⁷ Even in cases where advisory opinions arise from a contentious context, the questions posed to international courts in their advisory role often adopt a more theoretical and abstract, almost scholarly, framing. Most have the tendency to perceive judges in their capacity entrusted with the task of articulating legal principles in a general sense, free from the constraints of applying their rulings to the specific circumstances of a concrete case.⁶⁸ This unique dynamic arguably provides judges with an additional layer of legitimacy, granting them greater latitude to engage in judicial innovation and the progressive development of the law.⁶⁹

Increasing the use of this mechanism could help prevent disputes and promote a more cooperative approach to maritime governance. For instance, ITLOS could issue advisory opinions on the interpretation of Article 298(1) (b) or other contentious provisions, providing much-needed clarity for states and reducing the risk of jurisdictional disputes.

Strengthening Compliance Mechanism

One of the most pressing challenges for ITLOS is ensuring compliance with its orders, especially in politically charged cases. While ITLOS lacks

67 Judicial activism refers to a judicial approach where judges extend beyond mere interpretation of the law, actively shaping or redefining legal principles to address societal needs or perceived injustices. This often involves expansive interpretations of legal texts, innovative reasoning, or challenging established precedents, sometimes raising concerns about the separation of powers. See Fuad Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis," *Journal for International Dispute Settlement* 3, no. 2 (2012): 249–54.

68 Zarbiyev, "Judicial Activism," 271–272; See also John P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968).

69 Gapsa, "On the Importance," 272.

direct enforcement powers, it can strengthen its authority by collaborating with other international bodies, such as the United Nations organs (e.g., General Assembly (UNGA) and UNSC) or regional organizations, to exert diplomatic and economic pressure on non-compliant states.

While the UNSC holds formal authority to enforce ITLOS rulings under Chapter VII of the UN Charter, its utility is inherently limited when a permanent member like Russia is the non-compliant party. However, ITLOS can still harness the UNSC as a platform for political shaming and procedural escalation. Even if Russia vetoes coercive measures, public debates in the UNSC can amplify reputational costs. Alternatively, ITLOS may encourage member states to shift enforcement discussions to the United Nations General Assembly (UNGA)—where no veto exists—to adopt symbolic resolutions or recommend collective countermeasures. This strategy has been used by Nicaragua in *Nicaragua v. United States* by turning to the UNGA which persuaded the council to pass four resolutions requesting the United States's compliance with the judgment.⁷⁰ Though such efforts may not compel immediate compliance, they may isolate violators politically and legitimize third-party sanctions, gradually eroding their international standing.

Beyond the UNSC, ITLOS can strengthen compliance by mobilizing regional organizations and indirect state-led measures. For instance, the European Union (EU) has demonstrated the efficacy of restrictive measures in response to Russia's annexation of Crimea. The EU imposed a series of escalating sanctions including diplomatic measures, targeted asset freezes and travel bans, economic restrictions on Crimea and Sevastopol, sectoral sanctions, and limitations on bilateral cooperation.⁷¹ These measures coincided with severe contraction in Russia's economy in mid-2014, suggesting a

70 Lan Nguyen, "The South China Sea Arbitral Award: Not 'Just a Piece of Paper,'" *Maritime Issues*, 2021, <https://www.maritimeissues.com/politics/the-south-china-sea-arbitral-award-not-just-a-piece-of-paper.html>; Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (New York: Oxford University Press, 2004).

71 Efe Siviş, "The Crimean Annexation Crisis and Its Economic Consequences: EU Sanctions, U.S. Sanctions and Impacts on the Russian Economy," *Marmara Journal of European Studies* 27, no. 1 (2019): 64-66." Efe Siviş, "The Crimean Annexation Crisis and Its Economic Consequences: EU Sanctions, U.S. Sanctions and Impacts on the Russian Economy," *Marmara Journal of European Studies* 27, no. 1 (2019)

correlation between the sanction's regime and the economic downturn during the Crimean annexation.⁷² Regional courts, such as the European Court of Human Rights (ECtHR), may also adjudicate parallel claims under human rights law, as seen in *Ukraine v. Russia (re: Crimea)*, compounding legal pressure.⁷³

Additionally, ITLOS could explore innovative mechanisms, such as establishing compliance monitoring committees or leveraging third-party guarantees, to incentivize adherence to its rulings. In 2020, the International Court of Justice (ICJ) has adopted a new Article 11 of its Internal Judicial Practice, establishing an *ad hoc* committee which is aimed to assist in monitoring the implementation of the provisional measures.⁷⁴ These decentralized approaches mitigate the UNSC's structural constraints and ITLOS's mandate while fostering a coalition of enforcement actors, thereby enhancing ITLOS' *de facto* authority even against powerful states.

3. Enhancing Procedural Fairness in Non-Participation Cases

The non-participation of Russia in *Ukraine v. Russia* posed significant challenges to ITLOS' ability to ensure procedural fairness. To address this, ITLOS could adopt more robust procedures for handling non-participation, such as appointing independent experts to present the absent party's potential arguments or requiring written submissions even in cases of non-appearance. These measures would reinforce ITLOS' commitment to impartiality and procedural integrity, even in the face of non-cooperation. For instance, the ICJ has ensured fairness by appointing independent experts to evaluate evidence and considering written submissions from the United States as the absent party in *Nicaragua v. United States*.⁷⁵ These steps would reinforce ITLOS'

72 Siviş, "The Crimean Annexation," 68-70.

73 European Court of Human Rights, *Ukraine v. Russia (re Crimea)*, Grand Chamber Admissibility Decision, 14 January 2021, Applications nos. 20958/14 and 38334/18, (ECHR, *re Crimea*).

74 ICJ, Adoption of a new Article 11 of the Resolution concerning Internal Judicial Practice of the Court, On Procedures for Monitoring the Implementation of Provisional Measures Indicated by The Court, 000-20201221-PRE-01-00-EN, December 21, 2020; Christian J. Tams, "Monitoring Provisional Measures at the International Court of Justice: The Recent Amendment to the Internal Judicial Practice," EJIL: Talk!, 2023, <https://www.ejiltalk.org/monitoring-provisional-measures-at-the-international-court-of-justice-the-recent-amendment-to-the-internal-judicial-practice/>.

75 International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, 27 June 1986, I.C.J. Reports 1986, paras

commitment to impartiality and procedural integrity, even in the face of non-participation.

4. Fostering Collaboration with Stakeholders

ITLOS cannot operate in isolation. Strengthening partnerships with other international organizations, such as the International Maritime Organization and the Intergovernmental Oceanographic Commission, as well as engaging with non-state actors like non-governmental organizations and academia, will enhance its ability to address complex, interdisciplinary issues. Collaborative efforts can also help ITLOS build a broader consensus around its decisions, increasing the likelihood of compliance.⁷⁶ This is particularly necessary for ITLOS in adjudicating a dispute concerning security and humanitarian issues during an armed conflict since the underlying principles drafted in UNCLOS are predominantly presumed on the situation of peace.⁷⁷ Such collaboration should be able to help the judges in understanding contextual elements of the dispute.

5. Ensuring Inclusivity and Representation

To maintain legitimacy, ITLOS must ensure that its composition reflects the diversity of international community. This includes equitable geographic representation and the inclusion of judges with expertise in emerging areas of maritime law, such as environmental law and technology. By fostering inclusivity, ITLOS can strengthen its sociological legitimacy and ensure that its decisions are perceived as fair and representative.

Judge Kolodkin's Dissenting Opinion in the case underscores the importance of judicial independence and the ability of judges to rise above their state's political positions, offering objective and fact-based legal assessments. Despite Russia's official stance rejecting the classification of the disputed activities as military, Judge Kolodkin independently argued that navigational activities by warships are inherently military in nature. This

59-73 (Nicaragua).

76 For further elaboration on how a third-party such as non-governmental organizations can have a role in international judicial proceedings, see Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings," *American Journal of International Law* 88, no. 4 (1994).

77 James Krask, "The Obligation of 'Due Regard' in the EEZ During Armed Conflict at Sea," *International Law Studies* 106, no. 116 (2025): 119.

example highlights how equitable geographic representation and diverse expertise among judges can enhance ITLOS' sociological legitimacy. By fostering inclusivity and ensuring that judges prioritize legal principles over state-driven agendas, ITLOS can strengthen its credibility and ensure that its decisions are perceived as fair, representative, and reflective of the broader international community.

E. Conclusion

In conclusion, the *Ukraine v. Russia* case before ITLOS exemplifies the complex interplay between legitimacy and authority in the realm of international adjudication, particularly when geopolitical tensions are at play. ITLOS' commitment to procedural rigor and its principled interpretation of UNCLOS provisions reinforced its normative legitimacy, despite facing significant constraints due to Russia's partial non-participation and subsequent non-compliance. The Tribunal's careful navigation of jurisdictional hurdles—especially its interpretation of the military activities exemption—underscored its resolve to uphold legal consistency, even as such interpretations risk diminishing trust among states with strategic reservations.

Nevertheless, the case revealed the limitations of ITLOS' *de facto* authority, highlighting that even well-grounded legal decisions may struggle to secure full obedience from powerful states shielded by geopolitical influence and institutional privilege. While ITLOS' procedural fairness and legal coherence remain its strength, the broader effectiveness of its rulings depends on the international community's willingness to reinforce compliance through diplomatic, regional, and institutional mechanisms. As such, the Tribunal must continue evolving—through clarifying jurisdiction, expanding the use of advisory opinions, and deepening inter-institutional collaboration—to bridge the gap between principled adjudication and political reality. This case, ultimately, serves as a pivotal lesson in the enduring challenge of asserting the rule of law within a fragmented and often asymmetrical international order.

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