

Sovereignty and Navigational Rights. Legal Challenges in the Kerch Strait and the Sea of Azov

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1. Introduction

The Kerch Strait is located in Eastern Europe and links the Black Sea with the Sea of Azov. It separates Crimea's Kerch Peninsula to the west and Russia's Taman Peninsula in Krasnodar Krai to the east.¹ Following Russia's annexation of Crimea in 2014 and the subsequent invasion of Ukraine in February 2022, the Kerch Strait and the Sea of Azov geopolitical significance have increased, impacting global trade routes and military strategies.²

The article examines the legal frameworks of the Kerch Strait and the Sea of Azov, focusing on sovereignty disputes and the complexities of maritime jurisdiction and navigation rights amid geopolitical conflicts. It reviews key incidents in the region, the applicable law of the sea provisions, relevant bilateral treaties and international courts' rulings. It aims to answer the primary question, which is: How effectively can international maritime law address sovereignty and navigation disputes in the Kerch Strait and Sea of Azov during geopolitical disputes?

¹ P. Tatyana, *The Kerch Traffic Interchange: A Geopolitical Dimension*, "Central Asia and the Caucasus" 2015, vol. 16, issue 2, p. 54.

² N. Vasilyeva, K. De Pury, N. Price, *Russia prosecutes Ukrainians after confrontation at sea*, "Florida Times Union" 2018, p. 1.

The first part of the article evaluates navigational challenges in the Kerch Strait and the Sea of Azov. The second part of the article presents a legal analysis of sovereignty disputes, with a focus on the 2017 Kerch Strait dispute. The third part delves into the interplay between the Law of the Sea and the International Humanitarian Law, employing the 2018 Kerch Strait incident as a case study. The last part assesses navigational rights concerning the Kerch Strait and the Sea of Azov. In conclusion, it is argued that the Kerch Strait and the Sea of Azov exemplify the tensions regarding sovereignty claims, highlighting the need for solid legal frameworks and enforceable mechanisms to resolve maritime disputes effectively while safeguarding navigational rights.

2. Navigational Challenges in the Kerch Strait and the Sea of Azov

2.1. Historical Context and Sovereignty Claims

Maritime zones are shaped by state practices and governed by international law, specifically, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which, *inter alia*, impacts coastal state sovereignty. Incidents like the Kerch Strait dispute, analysed in section three of the article, highlight the complex jurisdictional conflicts between coastal and flag states. Determining the legal status of the Kerch Strait is critical in resolving disputes regarding navigational rights.

Historically, during the Soviet era, the Sea of Azov was considered internal waters of the Union of Soviet Socialist Republics (USSR). Article 7 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone permitted coastal states to draw straight baselines along deeply indented coastlines or islands. Russia used this provision to designate the Sea of Azov as its internal waters while Ukraine was part of the USSR. Following Ukraine's independence in 1991, its sovereignty extended to the western shores of the Sea of Azov, including Crimea, leading to disputes over its delimitation with Russia.³

In 2003, Russia and Ukraine entered the Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait (2003 Agreement), a bilateral treaty designed to enhance navigation safety and environmental protection within these regions.⁴ The Sea of Azov was recognised as internal waters of both states. Thus, the 2003 Agreement conferred upon both states the right to freely navigate the Kerch Strait and the Sea of Azov.

³ O. Zadorozhnii, *The Case of Crimea: Self-Determination and Exercise of the Right to Secession or Annexation*, in: W. Czapliński, S. Dębski, R. Tarnogórski, K. Wierczyńska (eds.), *The Case of Crimea's Annexation under International Law*, Warsaw 2017, p. 71.

⁴ S. Katuoka, S. Klumbytc, *Kerch Strait Incident in the Light of UNCLOS*, "Problems of Legality" 2019, no. 145, p. 235.

However, Ukraine is strengthening its maritime sovereignty and security amid recent escalating geopolitical tensions. Thus, in February 2023, the Verkhovna Rada, Ukraine's parliament, formally denounced all treaties with Russia considering the Sea of Azov, including the 2003 Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait, as part of its response to the 2014 annexation of Crimea and the 2022 Russia's aggression.⁵ In June 2023, Russia's Federation Council withdrew from the agreement unilaterally, asserting exclusive jurisdiction over the Sea of Azov and the Kerch Strait, claiming Ukraine had lost its status as a coastal state.⁶

Although the 2003 Agreement is no longer in force, its historical provisions remain pivotal for understanding the region's legal and geopolitical complexities. The agreement established mechanisms such as the Joint Maritime Delimitation Commission to address boundary disputes. Although the Commission failed to delineate a definitive maritime boundary in the Sea of Azov,⁷ the agreement's framework for joint navigation and cooperative use of the Kerch Strait and the Sea of Azov laid a foundation for subsequent legal and strategic discourse. Despite the denunciation, the agreement's provisions continue influencing both states' positions in ongoing disputes, as analysed further in this article.

2.2. Navigational Rights and Legal Challenges Post-Crimea Annexation

Since the 2014 Crimea's annexation, navigational and jurisdictional challenges have emerged in the Kerch Strait and the Sea of Azov.⁸ The Sea of Azov has been regarded as a historic bay,⁹ with a recognised historical title of internal waters dating back to the pre-Soviet and Soviet periods. This status was reaffirmed by the 2003 Agreement between Russia and Ukraine, which designated these maritime zones as shared internal waters of the coastal states. However, post-annexation of Crimea, Russia has exercised unilateral control, complicated maritime delimitation and infringed upon Ukraine's rights. This evolving situation led to

⁵ TASS, *Federation Council Denounces Russian-Ukrainian Treaty on Cooperation in Sea of Azov*, 7 June 2023, retrieved 29 November 2024, <https://tass.com/politics/1628899>.

⁶ Y. Lyashenko, *Ukraine's Role in the Black Sea: Navigating Geopolitical Crossroads*, Middle East Institute, 5 November 2024, retrieved 29 November 2024, <https://www.mei.edu/publications/ukraines-role-black-sea-navigating-geopolitical-crossroads>.

⁷ O. Gorbun, *The Azov Sea and the Kerch Strait in the Light of Exceptions Under Article 298(1) UNCLOS Regarding Disputes Concerning Maritime Delimitation and Historical Titles*, Riga 2023, p. 140.

⁸ F. D. Farmaş vel Król, *Navigational Entitlements in the Vistula/Kaliningrad Lagoon in the Light of Comparative Cases*, "Case Study" 2019, p. 28.

⁹ T. Kamiński, *Status zatok historycznych: studium prawnomiędzynarodowe*, Warszawa 2018.

an international dispute before the Permanent Court of Arbitration (PCA). On February 21, 2020, the PCA issued its Preliminary Objections Award regarding Ukraine's claims under Annex VII of UNCLOS, questioning whether Russia's transit restrictions violated its obligations under UNCLOS.¹⁰ This Award is extensively analysed in section three of this article.

The Sea of Azov could be classified as a semi-enclosed sea under Article 122 of UNCLOS, and Article 123 encourages bordering states to cooperate in managing their rights and duties within such a maritime area. However, this contrasts with its designation as internal waters under the 2003 Agreement, complicating jurisdictional clarity. While UNCLOS provides guidelines for delineating baselines, which determine the extent of a coastal state's internal waters, it does not address the delimitation of maritime boundaries between states, leaving such matters to be resolved by the parties involved. This gap was highlighted by the International Tribunal for the Law of the Sea (ITLOS) in the *ARA Libertad* case,¹¹ where distinctions between maritime zones were brought to the forefront. Specifically, Ghana's legal counsel emphasised that ports and internal waters are treated differently from territorial seas under international law, underscoring the nuanced legal regimes governing each zone.¹²

Similarly, the legal status of the Kerch Strait remains a complex issue under the law of the sea. Its classification under UNCLOS is contested; some scholars argue it does not qualify as a strait used for international navigation under Article 37, as it links the internal waters of the Sea of Azov with the territorial sea of the Black Sea rather than connecting parts of the high seas or exclusive economic zones¹³ (EEZs). In such cases, Churchill and Lowe argue that customary international

¹⁰ Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, pp. 2–3, para. 9.

¹¹ The *ARA Libertad* case involves a legal dispute that began in 2012 when the Argentine naval vessel was seized in Ghana due to a court order from a financial creditor. Argentina argued that this seizure violated its sovereign immunity and claimed the warship should be immune from arrest. ITLOS ordered Ghana to release the *ARA Libertad* and allow its return to Argentina. This case raised important legal issues about sovereign immunity, the status of warships, and the enforcement of financial claims against sovereign states, impacting international law regarding warship rights and immunities in maritime contexts. G. A. Sarpong, E. Y. Benneh, *The Doctrine of Sovereign Immunity in International Law: The ARA Libertad Case (Argentina v. Ghana)*, "University of Ghana Law Journal" 2015, vol. 28, p. 138.

¹² *Argentina v. Ghana, The ARA Libertad Case*, ITLOS/PV.12/C20/3/Rev.1, 30 November 2012, International Tribunal for the Law of the Sea, p. 19, lines 22–28.

¹³ A. Lott, *The Passage Regimes of the Kerch Strait – To Each Their Own?*, "Ocean Development & International Law" 2021, vol. 52, issue 1, p. 67.

law governs navigation in straits connecting internal waters or multi-state bays, where UNCLOS may not apply directly.¹⁴ This view is supported by the International Court of Justice (ICJ) in the Land, Island and Maritime Frontier Dispute, which emphasised that recognised passage rights must be upheld for practical and historical reasons.¹⁵ The ICJ cautioned against outcomes that restrict navigability in geographically enclosed areas, concerns directly relevant to the Kerch Strait. Accordingly, some legal scholars have classified the Kerch Strait as a dead-end strait.¹⁶ In such configurations, transit passage under UNCLOS does not apply, but a non-suspendable right of innocent passage may continue to exist under customary international law.¹⁷

Finally, the annexation of Crimea and Russia's enactment of domestic regulations favouring its vessels have undermined the 2003 Agreement between Russia and Ukraine, designed to ensure equal navigational rights and joint responsibilities. Russia's unilateral actions restrict Ukrainian access, contravening UNCLOS Articles 17 and 38, which protect innocent and transit passage.¹⁸ Legal scholars have also noted that these actions violated the obligation to act in good faith under Article 26 of the Vienna Convention on the Law of Treaties.¹⁹

Thus, clarifying the Sea of Azov's legal status, whether as internal waters, beyond UNCLOS' scope, or a semi-enclosed sea under Article 122, is critical for resolving these disputes and ensuring stability. Without addressing these ambiguities, the conflict poses a threat to both regional security and the principles of international law.

¹⁴ R. Churchill, V. Lowe, A. Sander, *The Law of the Sea*, in *The Law of the Sea*, Manchester 2022.

¹⁵ Judgment of 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, I.C.J. Reports 1992, p.13, para. 26.

¹⁶ A. G. López Martín, A. G. L. Martín, *The Standardised Catalogue of International Straits Presented in Part III of the 1982 United Nations Convention on the Law of the Sea*, in: *International Straits: Concept, Classification and Rules of Passage*, Berlin–Heidelberg 2010, p. 91.

¹⁷ A reader interested in further analysis of this topic may consult the following sources: D. R. Bugajski, *Kształtowanie statusu Morza Azowskiego*, in: M. Szuniewicz (ed.), *Mare Nostrum. Księga jubileuszowa prof. dr hab. Leonarda Łukaszuka*, Gdańsk 2015, pp. 89–102; D. R. Bugajski, *Maritime Disputes Involving Poland*, in: T. Kamiński, K. Karski (eds.), *40 Years of the United Nations Convention on the Law of the Sea. Assessment and Prospects*, London 2023.

¹⁸ V. Socor, *Azov Sea, Kerch Strait: Evolution of Their Purported Legal Status (Part One)*, "Eurasia Daily Monitor" 2018, vol. 15, issue 169.

¹⁹ *Ibidem*.

3. Sovereignty Disputes: A Legal Perspective

3.1. Sovereignty Disputes under UNCLOS

The 2017 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait between Ukraine and Russia prompted discussions about the jurisdiction of tribunals under UNCLOS to address maritime sovereignty. Thus, in the above-mentioned Preliminary Objections Award of February 21, 2020, regarding the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, the PCA did not solely examine Ukraine's claims under Annex VII of UNCLOS related to the procedural framework for arbitration as a means of resolving disputes concerning the interpretation or application of the Convention. Indeed, the PCA detailed its interpretation of UNCLOS regarding Crimea's sovereignty and the legal status of the Sea of Azov and Kerch Strait.

Russia asserted that its sovereignty over Crimea²⁰ was crucial to determining the Tribunal's jurisdiction under Article 288(1) of UNCLOS.²¹ Ukraine, on the other hand, argued that Russia's unlawful annexation of Crimea invalidated any legitimate sovereignty dispute.²² As an alternative, Ukraine contended that even if a sovereignty dispute were present, it would be secondary to the interpretation and application of Article 288(1). Upon review, the PCA noted the relationship between Ukraine's claims and the legal status of Crimea, ultimately determining that the sovereignty dispute was not ancillary to the UNCLOS interpretation dispute. The Tribunal found that determining sovereignty was essential to adjudicating Ukraine's claims.²³

This issue arose from Ukraine's assertion that it is the coastal state based on its authority over Crimea, a claim the PCA could only partially address²⁴ as sovereignty disputes fall outside UNCLOS's scope. The central question was whether

²⁰ Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, pp. 25–26, paras. 78–82.

²¹ Article 288(1) of UNCLOS grants courts and tribunals jurisdiction over disputes concerning the interpretation or application of the Convention, provided they are submitted per UNCLOS procedures.

²² Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, p. 26, para. 86.

²³ *Ibidem*, p. 142, para. 492.

²⁴ *Ibidem*.

this affected the Tribunal's jurisdiction. Referring to the Chagos Marine Protected Area Arbitration,²⁵ the PCA affirmed that disputes concerning the interpretation or application of UNCLOS fall within Article 288(1) jurisdiction. This allows tribunals to make factual and legal determinations, even when sovereignty claims are indirectly involved, provided the dispute substantially relates to matters regulated by UNCLOS.²⁶

While the PCA acknowledged that territorial issues might sometimes be ancillary, it ultimately concluded that the sovereignty dispute over Crimea was beyond its jurisdiction.²⁷ However, the decision was nuanced: resolving Ukraine's claims regarding Russia's unlawful annexation of Crimea would require addressing the sovereignty question over Crimea, which the Tribunal could not do.²⁸ To ensure procedural fairness, the PCA retained partial jurisdiction and directed Ukraine to revise its memorial to reflect "the scope of, and limits to fully, the Arbitral Tribunal's jurisdiction as determined in the present Award."²⁹ Scholars like Oral observed that the PCA, similarly to the Chagos arbitration, could not identify the coastal state without first resolving the sovereignty question.³⁰

3.2. Resolving Jurisdictional Challenges in the Sea of Azov

During the preliminary stage, the PCA also examined the issue of whether the Sea of Azov and the Kerch Strait should be classified as internal waters, thus excluded from the applicability of UNCLOS. Russia argued that the Tribunal lacked

²⁵ The Chagos Marine Protected Area Arbitration (*Mauritius v. United Kingdom*) was conducted under Annex VII of UNCLOS and addressed the legality of the UK's establishment of a Marine Protected Area around the Chagos Archipelago. The PCA's award on 18 March 2015 clarified jurisdictional principles, including the treatment of sovereignty disputes as ancillary to UNCLOS-related claims. See Final Award of 18 March 2015, *Mauritius v. United Kingdom, Chagos Marine Protected Area Arbitration*, Permanent Court of Arbitration Case No. 2011-03.

²⁶ United Nations, *Award in the Arbitration Regarding the Chagos Marine Protected Area Between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, Reports of International Arbitral Awards 2015, vol. XXXI, p. 460.

²⁷ *Ibidem*.

²⁸ Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, p. 142, para. 492.

²⁹ *Ibidem*, p. 59 para. 198.

³⁰ N. Oral, *Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS*, "International Law Studies" 2021, vol. 97, issue 1, p. 494.

jurisdiction because internal waters are excluded from UNCLOS's provisions on navigation.³¹ Additionally, Russia cited Article 288(1) of UNCLOS to assert that the Tribunal has no authority over internal waters disputes.³² In contrast, Ukraine argued that the Sea of Azov qualifies as an enclosed or semi-enclosed sea under UNCLOS Article 122, and the Kerch Strait serves as a strait for international navigation.³³ Although both states acknowledged the historical status of these waters as internal to the USSR, the question arose as to whether this status transformed post-USSR dissolution in 1991. As previously analysed in section two, the 2003 Agreement between Ukraine and Russia, in its Article 1, partially addressed this matter by recognising the Sea of Azov and Kerch Strait as historically internal waters.³⁴ Russia maintained that this recognition affirmed their status as internal waters, unchanged since the agreement³⁵. Referencing the ICJ's Land, Island, and Maritime Frontier Dispute judgment, Russia labelled the Sea of Azov as an example of pluristate internal waters.³⁶ Ukraine disputed Russia's claim that internal waters are outside UNCLOS's jurisdiction, citing precedents like the South China Sea Arbitration Award,³⁷ where the PCA reinforced UNCLOS's primacy over unilateral assertions of sovereignty. This precedent underscores that even waters claimed as internal or historic must still adhere to the framework and obligations established under international maritime law, particularly where navigational rights and freedom of passage are concerned.

³¹ Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, p. 21, para. 65.

³² *Ibidem*, p. 111, para. 385.

³³ *Ibidem*, p. 60, para. 200.

³⁴ V. J. Schatz, D. Koval, *Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective*, "Ocean Development & International Law" 2019, vol. 50, issues 2–3, p. 278.

³⁵ Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, pp. 61–62, para. 206.

³⁶ *Ibidem*, p. 62, para. 208.

³⁷ The South China Sea arbitration represents a landmark ruling between the Philippines and China, focusing on sovereignty and maritime boundaries. During the jurisdictional phase, the PCA determined that China's purported historic rights should be addressed in the merits phase. T. L. A. Nguyen, *Award of the Republic of Philippines v. the People's Republic of China: Legal Implications on the South China Sea Disputes*, "Asian Yearbook of International Law" 2017, vol. 21.

Ukraine stated that the Kerch Strait falls under Article 37 of UNCLOS, which defines it as an international navigation strait.³⁸ Conversely, Russia asserts exclusive sovereignty over the Kerch Strait. Still, it allows Ukraine freedom of navigation for its ships and passage for foreign non-military vessels to Ukrainian ports, per the 2003 Agreement. Russia argued that this does not imply shared sovereignty. In its Award, the Tribunal determined that it has the authority to hear the dispute while affirming the legal status of the Sea of Azov and Kerch Strait.³⁹ The Tribunal dismissed Russia's argument regarding UNCLOS's applicability to internal waters, asserting the dispute relates to the parties' actions regarding the understanding and implementation of UNCLOS rather than the geographic location of incidents.⁴⁰ Consequently, the applicability of Article 288(1) is contingent upon the parties' conduct, allowing the Tribunal to analyse the case without delving into the sovereignty issue over Crimea.⁴¹

4. Navigational Rights and Sovereign Immunity: Lessons from the 2018 Kerch Strait Incident

Legal scholars Kraska and Elferink have analysed Russia's actions in the Kerch Strait, emphasising the legal ambiguities in UNCLOS that can be used to bolster territorial claims.⁴² A similar strategic application of international law was seen in the aforementioned South China Sea Arbitration between the Philippines and China, where both states invoked legal provisions to assert sovereignty over contested maritime areas. In its 2016 Award, the PCA invalidated China's "Nine-Dash Line" under UNCLOS, clarifying that features, such as Mischief Reef and Johnson Reef, do not qualify as islands capable of generating EEZs.⁴³ Despite this ruling, China continued activities like constructing artificial islands and

³⁸ Award of 21 February 2020, *Ukraine v. Russian Federation, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Permanent Court of Arbitration Case No. 2017-06, Concerning the Preliminary Objections of the Russian Federation, p. 64. para. 215.

³⁹ *Ibidem*, pp. 85–86. paras. 290–298.

⁴⁰ *Ibidem*, pp. 85–86, para. 294.

⁴¹ N. Oral, *op. cit.*, p. 499.

⁴² J. Kraska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?*, "EJIL: Talk!" 2018, p. 3.

⁴³ Award of 12 July 2016, *The Republic of Philippines v. The People's Republic of China*, Permanent Court of Arbitration Case No. 2013-19, pp. 50–51, para. 132.

deploying maritime assets,⁴⁴ underscoring the challenges of enforcing international law based on voluntary compliance.

The Kerch Strait poses comparable challenges for maritime governance. Although it connects the Black Sea and the Sea of Azov, it does not meet the criteria for transit passage under Articles 38–39 of UNCLOS, making its navigational regime a matter of legal dispute. Additionally, the 25 November 2018 Kerch Strait incident marked a sharp escalation in tensions between Russia and Ukraine. Russian Coast Guard vessels intercepted, fired upon, and seized three Ukrainian naval vessels attempting to transit the strait, injuring crew members and detaining 24 sailors. Russia justified its actions by alleging that Ukrainian vessels unlawfully entered Russian territorial waters,⁴⁵ while Ukraine accused Russia of obstructing navigation and using excessive force, violations of UNCLOS.⁴⁶ This incident triggered international condemnation and sanctions against Russia.⁴⁷

4.1. Navigational Rights and Proportionality in the Use of Force

In 2018, Russia unilaterally imposed pilotage requirements on the Kerch Strait, citing the need to ensure maritime traffic safety.⁴⁸ These requirements compel vessels to use Russian pilots, consolidating Russia's control over the strait and reinforcing its authority over the waters surrounding Crimea.⁴⁹ However, such requirements may only apply to foreign-flagged ships if adopted by member states of the IMO. Under UNCLOS Article 19, the right of innocent passage generally applies within a territorial sea. Despite this, Ukrainian naval vessels were allegedly denied transit through the Kerch Strait without a Russian pilot.

⁴⁴ Chinese Society of International Law, *The South China Sea Arbitration Awards: A Critical Study*, "Chinese Journal of International Law" 2018, vol. 17(2), pp. 207–748.

⁴⁵ *Ibidem*.

⁴⁶ Chinese Society of International Law, *op. cit.*, pp. 207–748.

⁴⁷ S. Katuoka, S. Klumbytė, *Kerch Strait Incident in the Light of UNCLOS*, "Проблеми законності" 2019, no. 145, pp. 225–243.

⁴⁸ Russia's mandatory pilotage in the Kerch Strait could violate Article 42 of UNCLOS, prohibiting coastal states from enacting regulations that effectively deny or hinder transit passage through international straits. Nonetheless, IMO Assembly resolution A.159 (ES.IV) affirms that states can establish maritime pilotage where necessary. P. Amižić Jelovčić, *Legal Framework on Pilotage in Croatia Concerning 2021 Amendments to the Ordinance on Sea Pilotage*, "Pomorstvo" 2022, vol. 36, issue 2, p. 381; J. Kraska, *The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?*, "EJIL: Talk!" 2018, p. 3.

⁴⁹ S. Lewis, *Russia's Continued Aggression Against Ukraine: Illegal Actions in the Kerch Strait and Sea of Azov*, "The RUSI Journal" 2019, vol. 164, issue 1, p. 20.

Russia further obstructed navigation by anchoring a large cargo vessel beneath the Kerch Strait Bridge, blocking access to the Sea of Azov.⁵⁰ This action violated UNCLOS Articles 39 and 42, which mandate freedom of navigation and prohibit unjustifiable obstructions in international straits. By disrupting maritime traffic, Russia breached its obligation to uphold unimpeded navigation and raised concerns about the potential seizure of critical ports vital to trade between eastern Ukraine and Europe. These concerns were later underscored by Russia's invasion of Ukraine in February 2022, resulting in a disruption of foreign shipping access to the Black Sea via the Volga–Don Canal, the Sea of Azov, and the Kerch Strait.⁵¹ Declaring counterterrorist operations, Russian authorities suspended navigation in the Sea of Azov and closed the Kerch Strait to unauthorised vessels, creating a maritime exclusion zone (MEZ).⁵² Although belligerents in an international armed conflict may lawfully establish MEZs to protect active military operations, Russia's unilateral actions curtailed transit rights recognised under UNCLOS. This highlights how, in practice, tensions can override or suspend treaty-based navigational freedoms and underscores the vulnerability of international shipping routes when a single belligerent exerts exclusive control over key maritime chokepoints.

Legal scholars such as Lott⁵³ and Kraska⁵⁴ have also noted that Russia's actions violated Ukraine's rights to freedom of navigation and the sovereign immunity of warships, principles safeguarding the unimpeded operation of state vessels. Under UNCLOS Articles 29 and 32, warships, defined as state-commissioned vessels operating under disciplined military command, are guaranteed immunity from interference or capture by other states. However, the Kerch Strait incident demonstrates how Russia exploited legal uncertainties and operated in the "grey zone" of hybrid conflict to complicate accountability and challenge these protections.⁵⁵ By attacking and detaining Ukrainian sailors, Russia not only contravened these legal safeguards but also blurred the line between law enforcement and military operations, further exacerbating legal ambiguities. This is particularly evident as Russia deployed warships and heavily armed Coast Guard units

⁵⁰ A. Lott, *The Passage Regimes of the Kerch Strait – To Each Their Own?*, "Ocean Development & International Law" 2021, vol. 52, issue 1, p. 67.

⁵¹ R. P. Pedrozo, *Russia-Ukraine Conflict: The War at Sea*, "International Law Studies" 2023, vol. 100, no. 1, p. 15.

⁵² *Ibidem*, p. 25.

⁵³ A. Lott, *Use of Force against Sovereign Immune Vessels: Law Enforcement v. Humanitarian Law Paradigm*, in: *Hybrid Threats and the Law of the Sea*, Leiden 2022, pp. 93–116.

⁵⁴ J. Kraska, *op. cit.*

⁵⁵ A. Lott, *op. cit.*, pp. 93.

typically associated with military rather than civilian maritime enforcement. ITLOS, in its 2019 order on provisional measures, acknowledged the seriousness of the incident and reaffirmed the immunity of naval vessels under international law.⁵⁶ Scholars such as Makowski have further examined how Russia's hybrid use of force in the Kerch Strait incident challenges the legal boundaries between maritime law enforcement and armed conflict.⁵⁷ His analysis highlights the deliberate ambiguity in Russia's operational posture and vessel selection, which complicates the application of peacetime legal norms and weakens the protections afforded to sovereign immune vessels.⁵⁸ Such actions undermine international norms, erode the legal safeguards that stabilise contested maritime regions, and weaken protections for sovereign immune vessels in hybrid conflicts.

4.2. International Humanitarian Law and the Treatment of Detained Sailors

Thus, the Kerch Strait incident underscores the complexities of these aforementioned hybrid conflicts, where military actions intersect with geopolitical and legal ambiguities. Russia framed the incident as a border security matter⁵⁹ to avoid recognising it as an International Armed Conflict (IAC), which would activate International Humanitarian Law (IHL).⁶⁰ However, the Tadić ruling by the International Criminal Tribunal for the Former Yugoslavia establishes that an IAC exists whenever armed force is used between states, irrespective of formal war declarations or territorial disputes.⁶¹ Under this framework, the Kerch Strait incident qualifies as an IAC, triggering IHL.

With the conflict classified as an IAC, the legal frameworks governing naval warfare, particularly the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, apply.⁶² The Manual, rooted in customary international

⁵⁶ *Ukraine v. Russian Federation*, The Detention of Three Ukrainian Naval Vessels, ITLOS/PV.19/C26/1/Rev.1, 10 May 2019, International Tribunal for the Law of the Sea, p. 11, lines 1–7.

⁵⁷ A. Makowski, *Incydent w Cieśninie Kerczeńskiej 25 listopada 2018 roku a Konwencja o prawie morza*, „Prawo Morskie” 2021, vol. XL, pp. 50–53.

⁵⁸ *Ibidem*.

⁵⁹ J. Kraska, *op. cit.*, p. 3.

⁶⁰ *Law of Armed Conflict Deskbook*, The United States Army Judge Advocate General's Legal Center and School, Charlottesville, VA, 2016.

⁶¹ R. Bartels, *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*, “International Criminal Law Review” 2020, vol. 20(4), p. 602.

⁶² H. Raina, *Legal Aspects of the 25th November 2018 Kerch Strait Incident*, National Maritime Foundation, December 12, 2018, retrieved December 6, 2024, <https://maritimeindia.org/legal-aspects-of-the-25th-november-2018-kerch-strait-incident/>.

law, permits hostile actions in the territorial seas, internal waters, and EEZs of belligerent states (Rule 10(a)).⁶³ Ukrainian artillery gunboats qualify as legitimate military objectives under Rules 40 and 41 of the San Remo Manual, provided they actively contributed to military action. While classified as an auxiliary vessel under Rule 13(h), the Ukrainian tugboat could be subject to attack under Rule 47 if it were directly supporting military operations at the time. However, such attacks must adhere to the principles of necessity, proportionality, and distinction as required by international humanitarian law.⁶⁴

Thus, even if Russia's actions may align with naval warfare principles, compliance with IHL is paramount. IHL mandates proportionality, necessity, and the prevention of unnecessary suffering, ensuring that military operations minimise harm to combatants and civilians.⁶⁵ Russia's failure to adhere to these principles raises concerns about its conduct during the Kerch Strait incident.⁶⁶

In this context, the detention of Ukrainian sailors highlights additional violations under IHL. Scholars argue that the armed engagement and subsequent detention of Ukrainian naval personnel meet the criteria for an IAC, thereby activating protections under the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War. The sailors, categorised as Prisoners of War (POWs) under Article 4, were entitled to humane treatment as per Article 13, protection from coercive interrogation under Article 17), and the right to correspond with their families per Article 71. Allegations of psychological pressure and inadequate legal representation continue to suggest violations of these provisions.⁶⁷ Russia's failure to recognise the sailors as POWs not only breached IHL but also weakened the framework for enforcing accountability in hybrid conflicts like this one. The Kerch Strait incident highlights the need for a greater international consensus on navigating conflicts that blur the distinction between peace and war, as well as robust mechanisms to ensure compliance with both peacetime and war-time obligations.

⁶³ *Ibidem*.

⁶⁴ *Ibidem*.

⁶⁵ D. T. Lee, *The Principle of Proportionality in Maritime Armed Conflict: A Comparative Analysis of the Law of Naval Warfare and Modern International Humanitarian Law*, "Southwestern Journal of International Law" 2021, vol. 27, p. 119.

⁶⁶ J. Kraska, *op. cit.*, p. 3.

⁶⁷ *The Fight for Justice: Ukraine's Legal Steps in Its Defence Against Russian Aggression*, Polish Institute of International Affairs (PISM), retrieved 3 December 2024, from <https://pism.pl/publications/the-fight-for-justice-ukraines-legal-steps-in-its-defence-against-russian-aggression>.

5. Concluding Remarks: Navigational Entitlements in the Sea of Azov Considering the Kerch Strait

The analysis of the Kerch Strait from various legal perspectives, such as passage regime, naval warfare law, and sovereignty issues, indicates that since UNCLOS's implementation, navigational rights and freedoms need more clarity than initially intended by its drafters. Despite UNCLOS emphasising traditional freedoms and navigation rights, coastal states continue imposing regulations restricting or modifying these rights in adjacent waters. The ongoing conflict between Russia and Ukraine over the Kerch Strait and the Sea of Azov stems from coastal states seeking control while maritime nations pursue freedoms. Despite the efforts of UNCLOS to mitigate such divergences, a persistent progression towards greater control by coastal states continues.⁶⁸

Given these challenges, several recommendations arise to improve the Kerch Strait's passage regime and enhance maritime security in the Sea of Azov:

Firstly, clear and consistent regulations governing the strait's passage regime must be established. Clarifying the legal framework, particularly concerning bilateral treaty obligations and UNCLOS provisions, is vital. The Dispute Concerning Coastal State Rights arbitration can provide additional insights into these legal complexities.

Secondly, beyond legal clarification, fostering cooperation among regional states is equally critical to mitigating disputes. Establishing a Joint Maritime Coordination Centre and conducting joint training exercises could enhance regional security, as successful bilateral programs in other maritime regions show.⁶⁹ These diplomatic initiatives could inspire similar measures in the Kerch Strait despite current geopolitical tensions and the suspension of EU cooperation with Russia.⁷⁰

Thirdly, examining the Kerch Strait underscores the complexities of navigational entitlements in the Sea of Azov. The 2003 Agreement between Ukraine and Russia, which established a framework for shared navigation and cooperative management, was foundational in regulating these waters. However, as noted earlier, the mutual denunciation of the agreement in 2023 has dissolved this bilateral mechanism, leaving the region needing a clear framework for joint governance. Without such agreements, the regulation of navigational entitlements depends

⁶⁸ P. Drew, *The Law of Maritime Blockade: Past, Present, and Future*, Oxford 2017.

⁶⁹ E. Kropinova, *Transnational and Cross-Border Cooperation for Sustainable Tourism Development in the Baltic Sea Region*, "Sustainability" 2021, vol. 13, issue 4, p. 2111.

⁷⁰ European Commission, *Commission Suspends Cross-Border Cooperation and Transnational Cooperation with Russia and Belarus*, Press Release, 4 March 2022.

on international legal principles, particularly those established under UNCLOS, to address the region's legal and geopolitical challenges.

Finally, as bilateral relations between Russia and Ukraine have deteriorated, establishing the applicable law for international straits has become crucial.⁷¹ This involves distinguishing between straits bordering states in armed conflict and those adjacent to neutral states.⁷² Article 38 of UNCLOS guarantees transit passage through international straits, ensuring unobstructed navigation in both peace and conflict. This right applies to all vessels, including those from belligerent or neutral states, and prohibits impediments to the transit rights of enemy vessels in straits overlapping territorial seas. Neutral states also play a vital role in maintaining navigational freedoms during hostilities, per Articles 37–44 of UNCLOS. Article 41 requires neutral states to prevent belligerents from exploiting their status to undermine neutrality or facilitate hostilities. Neutral states must not impose restrictions that interfere with lawful transit passage, thereby upholding impartiality while adhering to their international law obligations.

Balancing the interests of neutral and belligerent states is essential to maintaining the integrity of the legal regime established by UNCLOS.⁷³ Any assertion of jurisdiction by coastal states that undermines the right to transit passage contradicts the foundational principles of international maritime law.⁷⁴ A consensus exists regarding the legal status of neutral international straits, which shield neutral states from hostilities while permitting belligerents essential mobility for naval operations.⁷⁵ To sustain this balance, states must adopt effective measures under international law, opposing restrictions on freedom of navigation and overflight.⁷⁶

To conclude, protecting the international legal status of straits, such as the Kerch Strait, necessitates establishing definitive legal frameworks, implementing effective cooperative governance, and executing coordinated collective measures. By ensuring that national legislation conforms to established international law, the global community is better positioned to safeguard maritime traffic and maintain the principle of freedom of navigation.

⁷¹ B. Stępień, *Legal Status of International and Internal Waterways*, in: R. Kwiecień, M. Fitzmaurice (eds.), *The Legacy of the Wimbledon Case: Centenary of the First Judgment of the Permanent Court of International Justice*, Leiden–Boston 2025, pp. 219–242.

⁷² H. Raina, *Legal Aspects of the 25th November, 2018 Kerch Strait Incident*, National Maritime Foundation 2018, p. 3.

⁷³ A. Mayama, *The Influence of the Straits Transit Regime on the Law of Neutrality at Sea*, “Ocean Development & International Law” 1995, vol. 26, issue 1, p. 2.

⁷⁴ B. Spanier, O. Shefler, E. Rettig, *UNCLOS and the Protection of Innocent and Transit Passage in Maritime Chokepoints*, Haifa 2021.

⁷⁵ P. Drew, *op. cit.*

⁷⁶ *Ibidem.*

Abstract

The Kerch Strait and the Sea of Azov exemplify the complex intersection of sovereignty disputes and international maritime law, with heightened significance following Russia's annexation of Crimea in 2014 and its invasion of Ukraine in 2022. This article examines legal and geopolitical challenges in these waterways, focusing on the erosion of bilateral frameworks such as the 2003 Agreement between Russia and Ukraine, which used to govern navigation and jurisdiction in the region. By analysing the 2017 Permanent Court of Arbitration case on the Dispute Concerning Coastal State Rights and the 2018 Kerch Strait incident involving the seizure of Ukrainian naval vessels by Russia, the article highlights the limitations of UNCLOS in addressing sovereignty disputes and enforcing navigational rights. It underscores the critical role of international adjudication, such as arbitration mechanisms, and advocates for clear legal frameworks and cooperative governance to uphold maritime stability, navigational freedoms, and adherence to international law.

Key words: Kerch Strait, Sea of Azov, Sovereignty Disputes, Navigational Rights, International Arbitration, Geopolitical Conflicts

Suwerenność i prawa żeglugowe: wyzwania prawne w Cieśninie Kerczeńskiej i na Morzu Azowskim

Streszczenie

Cieśnina Kerczeńska i Morze Azowskie stanowią przykład złożonego splotu sporów dotyczących suwerenności oraz międzynarodowego prawa morskiego, który nabrał szczególnego znaczenia po aneksji Krymu przez Rosję w 2014 roku oraz inwazji na Ukrainę w 2022 roku. Artykuł analizuje wyzwania prawne i geopolityczne na tych akwenach, ze szczególnym uwzględnieniem erozji dwustronnych mechanizmów, takich jak porozumienie rosyjsko-ukraińskie z 2003 roku, które wcześniej regulowało kwestie żeglugi i jurysdykcji w regionie. Przez pryzmat sprawy przed Stałym Trybunałem Arbitrażowym z 2017 roku dotyczącej sporu o prawa państw przybrzeżnych oraz incydentu w Cieśninie Kerczeńskiej z 2018 roku, w którym Rosja zatrzymała ukraińskie jednostki wojskowe, artykuł ukazuje ograniczenia Konwencji Narodów Zjednoczonych o prawie morza (UNCLOS) w zakresie rozwiązywania sporów o suwerenność i egzekwowania praw do swobodnej żeglugi. Podkreśla także kluczową rolę mechanizmów międzynarodowego orzecznictwa, takich jak arbitraż, oraz postuluje potrzebę przejrzystych ram prawnych i współpracy w celu utrzymania stabilności morskiej, wolności żeglugi i poszanowania prawa międzynarodowego.

Słowa kluczowe: Cieśnina Kerczeńska, Morze Azowskie, spory o suwerenność, prawa żeglugowe, arbitraż międzynarodowy, konflikty geopolityczne