

Permit-Based Passage v. Transit Passage in an Occupied Area

The 2018 Kerch Strait Incident and the 2022 Ukraine-Russia Naval Warfare

4.1 The Kerch Strait Incident and Its Implications for the Passage Regime in the Sea of Azov

Geopolitical developments in the Black Sea region in the past decade have exerted considerable pressure on the stability of passage regimes owing to a shift in the coastal States' security considerations, particularly in the light of the occupation of Crimea in February 2014 by the Russian Federation.¹ This has triggered multiple arbitral proceedings between Ukraine and the Russian Federation, including, the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* and the *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, both before Annex VII Arbitral Tribunals.² They were preceded, in May 2019, by the prescription of provisional measures by the International Tribunal for the Law of the Sea (hereafter ITLOS) in response to the seizure of three Ukrainian naval vessels and detainment of their crew by the Russian Federation in the Kerch Strait on 25 November 2018.³

The roots of the Kerch Strait incident lie in the annexation of Crimea by the Russian Federation in 2014, as a result of which it now controls both the eastern and western coasts of the Kerch Strait. The overwhelming majority of States consider the occupation and annexation of Crimea as a manifest breach of

1 For a historical account of the legal regime of the Black Sea from the Ottoman Empire to the Soviet Union and its dissolution, see N Oral, 'Ukraine v. The Russian Federation: Navigating Conflict over Sovereignty under UNCLOS' (2021) 91 *International Law Studies*, 481–486.

2 See Annex VII Arbitral Tribunal, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, Case No. 2017–06, available <https://pca-cpa.org/en/cases/149/>; accessed 5 April 2021. Annex VII Arbitral Tribunal, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. the Russian Federation)*, Case No. 2019–28, available <https://pca-cpa.org/en/cases/229/>; accessed 5 April 2021.

3 International Tribunal for the Law of the Sea, *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures*, Order of 25 May 2019, available <https://www.itlos.org/en/main/cases/list-of-cases/case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures/>; accessed 5 April 2021.

international law, particularly the rules governing the use of force and territorial integrity. The UN General Assembly has stressed by a vote of 100 in favour, 11 against, with 58 abstentions the importance of a policy of non-recognition towards the Russian Federation's occupation and annexation of Crimea and the need to refrain from any action or dealing that might be interpreted as recognizing any such altered status.⁴

However, in the current *Dispute Concerning Coastal State Rights* before the Annex VII Arbitral Tribunal, the determination of Crimea's status under international law is not the object of the proceedings. The Arbitral Tribunal has clearly concluded, pursuant to Article 288(1) of LOSC, that "it lacks jurisdiction over the dispute as submitted by Ukraine to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea."⁵ Nevertheless, this does not preclude the Arbitral Tribunal from deciding on the legality of the Russian Federation's various activities in the Sea of Azov and the Kerch Strait,⁶ including on the alleged harassment of Ukrainian vessels and impediments to their navigation through the Kerch Strait.⁷ Notably, the rights of third States in the Sea of Azov and the Kerch Strait are also excluded from the scope of the dispute, although the Arbitral Tribunal's determination of the applicable passage regime inevitably affects the rights of third States who may, in principle, submit another claim against Ukraine or the Russian Federation (or both) in the future.

By contrast, the Annex VII Arbitral Tribunal has not yet decided on its jurisdiction in another case brought before it by Ukraine in *the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, which addresses the legality of the Russian Federation's activities in the Kerch Strait on 25 November 2018.⁸ In this case, Ukraine submitted its memorial to the Arbitral Tribunal on 22 May 2020, in response to which the Russian Federation raised preliminary

4 UN General Assembly Resolution 68/262, adopted 27 March 2014 available https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/262; accessed 5 April 2021.

5 Annex VII Arbitral Tribunal, *Dispute Concerning Coastal State Rights*, Award 21 February 2020, para 197.

6 *Ibid.*, para 297.

7 *Ibid.*, paras. 338–339.

8 Annex VII Arbitral Tribunal, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, *Procedural Order No. 1*, 22 November 2019, paras. 1–4. See also The Russian Federation's Ministry of Foreign Affairs, 'Comment by the Information and Press Department on Ukraine filing an arbitration memorandum regarding the Kerch Strait incident', 26 May 2020, available https://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJEo2Bw/content/id/4138495; accessed 5 April 2021.

objections and contended that the Arbitral Tribunal does not have jurisdiction because, *inter alia*, Ukraine's claims relate to a dispute concerning military activities (the Russian Federation made the same preliminary objection earlier in the *Dispute Concerning Coastal State Rights*, as explained below). The Arbitral Tribunal decided in October 2020 that the Russian Federation's preliminary objections will be addressed in a preliminary phase and suspended proceedings on the merits.⁹

The Kerch Strait incident involved three Ukrainian naval vessels that were on their journey half-way around Crimea and intended to transit the Kerch Strait in order to enter the Sea of Azov. The *Berdyansk* and the *Nikopol* – two artillery boats – and the *Yani Kapu* (a naval tugboat) were heading from the Ukrainian Black Sea coastal city of Odesa to a Ukrainian port¹⁰ in the Sea of Azov. The Ukrainian ships carried onboard 24 naval personnel.

The Kerch Strait (Russian: *Керченский пролив*; Ukrainian: *Керченська протока*) connects the Sea of Azov and the Black Sea. It lies between the Crimean Peninsula and the Taman Peninsula.¹¹ The strait is 41 km long and, at its narrowest point, only 4 km wide.¹² The Russian Federation constructed a bridge over the Kerch Strait after its annexation of Crimea. The Crimean Bridge comprises a road bridge (used since 2018) and a railway bridge (used since 2019) that run in parallel from the Russian mainland coast to Crimea. On Ukraine's request, the Annex VII Arbitral Tribunal is expected to rule in the *Case Concerning Coastal State Rights* on the legality of the Crimean Bridge over the Kerch Strait.¹³ Thus, the Arbitral Tribunal's award is expected to serve

9 Annex VII Arbitral Tribunal, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Procedural Order No. 2, 27 October 2020, paras. 1–5.

10 The ITLOS provisional order refers to the port of Berdyansk, whereas Ukraine's diplomatic notes to the UN claim that the ships were heading to Mariupol Port. See the *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*, ITLOS Order of 25 May 2019, para 31. See also Annex to the letter dated 27 November 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc. A/73/605-S/2018/1053, (30 November 2018), available <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

11 See maps 2 and 3.

12 Internet Encyclopedia of Ukraine, 'Kerch Strait', available <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CK%5CE%5CKerchStrait.htm>; accessed 5 April 2021.

13 Ukraine argues that the construction of the bridge, the laying of the submarine cables and pipelines in the Kerch Strait "are not compatible with the Convention and constitute internationally wrongful acts for which the Russian Federation bears international responsibility". *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, paras. 9, 492.

as the first judgment which addresses the compatibility of the construction of a bridge with the legal regime of straits.¹⁴

The Russian Federation, which claims sovereignty over Crimea and its adjacent territorial sea,¹⁵ is required, under Articles 17 and 24(1) of LOSC and in conformity with the 1989 Jackson Hole statement,¹⁶ to respect the innocent passage of Ukrainian ships in the Black Sea. While the Russian Federation was required to respect the Ukrainian ships' right of innocent passage off the western and southern coast of Crimea, the applicable navigation regime changed in time as the Ukrainian ships reached the maritime area leading to the Kerch Strait (south-east of Crimea). Passage through the Kerch Strait is regulated under Article 2 of the Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (*2003 Kerch Treaty*).¹⁷ Article 2(1) of the 2003 Kerch Treaty stipulates that Ukrainian and Russian warships enjoy freedom of navigation in the Sea of Azov and the Kerch Strait. Thus, Ukraine's ships ought to have enjoyed the freedom of navigation in the entrance to the Kerch Strait since the freedom of navigation in the Kerch Strait, as stipulated in Article 2 of the 2003 Kerch Treaty, would be devoid of any practical effect if it did not apply in the waters leading to the Kerch Strait.

14 Notably, the construction of a bridge over a strait has served as a source of dispute between the user State and strait State in the past, as demonstrated by the proceedings initiated by Finland in 1992 before the International Court of Justice. This case concerned a Danish bridge over the Great Belt, the construction of which was prejudicial to the Finnish navigation interests. However, Finland discontinued the case after reaching a settlement with Denmark pursuant to which Denmark paid Finland monetary compensation. See *Case concerning Passage through the Great Belt (Finland v. Denmark)*, Order of 29 July 1991, Provisional Measures, ICJ Reports 1992, p. 12. See also M Koskenniemi, 'Case Concerning Passage Through the Great Belt' (1996) 27 *Ocean Development & International Law*, 255–289. AG Oude Elferink, 'The Regime of Passage Through the Danish Straits' (2000) 15 *The International Journal of Marine and Coastal Law*, 555–566.

15 See *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 211.

16 Joint Statement by the United States of America and the Union of Soviet Socialist Republics: Uniform Interpretation of Rules of International Law Governing Innocent Passage, 23 September 1989 Jackson Hole, 4, 14 *Law of the Sea Bulletin* 12, available http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE14.pdf (accessed 5 April 2021). See also, e.g., K Hakapää, EJ Molenaar, 'Innocent Passage – past and present' (1999) 23 *Marine Policy*, 143.

17 Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait, adopted 24 December 2003, entered into force 5 May 2004. Available in Ukrainian: https://zakon.rada.gov.ua/laws/show/643_205?lang=en#Text; accessed 5 April 2021. For an unofficial English version of the treaty, see: <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien-valentin/agreement-sea-of-azov>; accessed 5 April 2021.

The transit of the Ukrainian vessels in the entrance to the Kerch Strait was obstructed by Russian Coast Guard and navy vessels, which commenced a pursuit after the three Ukrainian ships had turned around and headed to the Black Sea proper.¹⁸ The Russian Federation has submitted its description of the Kerch Strait incident to the Annex VII Arbitral Tribunal, according to which:

[I]t is undisputed that Russian forces used force against the Ukrainian Military Vessels and the Ukrainian Military Servicemen. Specifically, the Russian forces rammed the “*Yani Kapu*”, and subsequently opened fire (with first warning, then target, shots) on the “*Berdyansk*”. That use of force resulted in the wounding of three Ukrainian military personnel on board and caused damage to the Military Vessel. The use of force was deployed pursuant to the Decree of the Government of the Russian Federation No. 80 of 24 February 2010 “On Approving the Rules of Use of Weapons and Military Equipment When Protecting the State Border of the Russian Federation, the Exclusive Economic Zone, and the Continental Shelf of the Russian Federation” (the Decree applies to both military personnel of the Russian Armed Forces and the FSB when defending and protecting Russia’s State border).¹⁹

While the Russian Federation characterises the Kerch Strait incident as “a prolonged stand-off between the Ukrainian military force and the Russian combination of military and paramilitary forces”,²⁰ Ukraine has disputed this claim before the Annex VII Arbitral Tribunal and argues that Russia did not resort to military activities, but instead used law enforcement measures.²¹ Presumably, Ukraine’s reasoning is influenced by the limitations to the jurisdiction of international courts and tribunals under Article 298(1)(b) of LOSC, since both Ukraine and the Russian Federation have made an optional declaration to exclude all disputes that concern military activities from compulsory dispute settlement.²² Ukraine maintains in the arbitral proceedings that:

18 ITLOS 25 May 2019 Order on Provisional Measures, *op. cit.*, 31. Annex VII Arbitral Tribunal, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Preliminary Objections of the Russian Federation, 24 August 2020, paras. 2, 40.

19 Preliminary Objections of the Russian Federation, *op. cit.*, 24 August 2020, para 44.

20 *Ibid.*, para 43.

21 Annex VII Arbitral Tribunal, *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, Observations of Ukraine on the Question of Bifurcation, 7 September 2020, para 13.

22 UN Treaty Collection, United Nations Convention on the Law of the Sea, status at 10 December 2021. The Russian Federation’s declaration upon signing the LOSC on 10

[T]he Ukrainian vessels communicated with and followed the instructions of Kerch Traffic Control as they waited to transit the Strait; received clearance from Kerch Traffic Control to wait at the anchorage point; were “periodically” requested by Russian coast guard vessels to “leave the Kerch Strait and go beyond the 12-mile zone”; and, upon confirmation that the Kerch Strait was closed to navigation, departed the area as they had been requested to do.²³

Nonetheless, on the same day of the Kerch Strait incident, Ukraine alleged before the UN that: “Ships of the Russian Federation, in violation of freedom of navigation, unlawfully used force against the ships of the Ukrainian Naval Forces.”²⁴ During the pursuit, the Russian ships fired at *Berdyansk*, wounding three members of the Ukrainian crew, after which the Ukrainian ships were seized and the crew detained by the Russian Federation.²⁵

In response to Ukraine’s request for provisional measures, the ITLOS Order of 25 May 2019 required the Russian Federation to release the Ukrainian vessels and servicemen and to allow them to return to Ukraine.²⁶ The ITLOS considered that the continuing detention of the Ukrainian servicemen and naval ships would irreparably prejudice their immunity.²⁷ The seized Ukrainian navy ships and their crew have since been returned to Ukraine. The ITLOS found in its Order that “at the core of the dispute was the Parties’ differing

December 1982 and ratifying it on 12 March 1997. Ukraine’s declaration upon signing the LOSC on 10 December 1982 and ratifying it on 26 July 1999.

23 Ibid.

24 Annex to the letter dated 25 November 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc A/73/601-S/2018/1052, 28 November 2018, available <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

25 ITLOS 25 May 2019 Order on Provisional Measures, *op. cit.*, paras. 31–32. According to the memorandum submitted by the Russian Federation to ITLOS, the Ukrainian Navy servicemen were apprehended under Article 91 of the Code of Criminal Procedure of the Russian Federation as persons suspected of having committed a crime of aggravated illegal crossing of the State border and were placed in detention.

26 ITLOS 25 May 2019 Order on Provisional Measures, *op. cit.*, paras. 8, 118. The Russian Federation did not participate in the ITLOS hearing on provisional measures as it considered that the dispute concerned its military activities which are exempted from the ITLOS’ jurisdiction. It also did not immediately respond to the ITLOS order. Nonetheless, the Russian Federation freed the servicemen under a prisoner exchange deal in September 2019. The seized navy ships were returned to Ukraine in November 2019.

27 Ibid., para 111. This follows from the fact that warships and other government ships operated for non-commercial purposes are entitled to sovereign immunity in a foreign territorial sea and EEZ under Articles 32 and 95–96 in combination with Article 58 of LOSC.

interpretation of the regime of passage through the Kerch Strait²⁸ and concluded that “what occurred appears to be the use of force in the context of a law enforcement operation rather than a military operation”.²⁹ The Annex VII Arbitral Tribunal will likely clarify in *the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen* whether the Kerch Strait incident of 25 November 2018 concerned a law enforcement (rather than a military) operation against Ukrainian sovereign immune vessels.³⁰ The incident also raises questions about the extent of navigational freedoms that Ukraine and the Russian Federation enjoy in the Kerch Strait and the Sea of Azov.

This case study explores the passage regime(s) applicable to the Kerch Strait and its adjacent maritime areas. It asks how the law of the sea and general international law can contribute to ensuring the rule of law and legal certainty in the shipping routes in the Black Sea, the Sea of Azov and the Kerch Strait that are affected by the conflicting sovereignty claims over Crimea. The Kerch Strait incident is used as a case study and as a basis for a critical analysis of the Ukrainian and Russian perspectives on navigational rights in the Kerch Strait while focusing on both the international legal framework as well as the domestic rules on navigation in the Kerch Strait. It also scrutinizes how Ukraine and the Russian Federation have interpreted the applicable law in their current arbitration proceedings and the implications of this for passage rights of ships and aircraft in the Kerch Strait. This chapter investigates the possibility that navigation through the Kerch Strait and its adjacent maritime areas might be subject to parallel legal regimes, pursuant to which, the regimes of transit passage and authorisation-based passage may simultaneously apply to the Kerch Strait under the law of the sea and general international law, thereby creating a fertile ground for further hybrid conflicts in this maritime area. This chapter concludes by examining the Kerch Strait incident from the perspective of the legal regime of a belligerent strait subject to the rules of *jus in bello*.

4.2 Freedom of Navigation of Ukrainian and Russian Ships in the Kerch Strait

Article 2 of the 2003 Kerch Treaty stipulates the passage rights of Ukrainian, Russian and foreign ships in the Sea of Azov and the Kerch Strait. Article 2(1)

28 Ibid., para 72.

29 Ibid., para 74.

30 The significance of this distinction for hybrid naval conflicts is discussed below, see *infra* Chapter 5 of Part 2.

of the 2003 Kerch Treaty provides that merchant ships and warships, as well as other State vessels flying the flag of the Russian Federation or Ukraine, operated for non-commercial purposes, enjoy freedom of navigation in the Sea of Azov and the Kerch Strait. By contrast, warships and other State vessels of third States operated for non-commercial purposes may enter the Sea of Azov and pass through the Kerch Strait if they are visiting a port in Ukraine or the Russian Federation with the permission of both parties (Article 2(3) of the 2003 Kerch Treaty). The right of passage of commercial ships of third States is more liberal since under Article 2(2) of the Treaty such vessels “may enter the Sea of Azov and pass through the Kerch Strait if they go to or return from a Russian or Ukrainian port.” Yet the 2003 Kerch Treaty does not stipulate the conditions under which foreign commercial ships may enter the Sea of Azov. This might be explained by the fact that under the 2003 Kerch Treaty, foreign commercial ships’ access to the Sea of Azov is dependent on their visiting a Ukrainian or Russian port. Thus, under the terms of the 2003 Kerch Treaty, their right of navigation through the Kerch Strait is presumably intertwined with the conditions for entering ports.

The freedom of navigation granted by Article 2(1) of the 2003 Kerch Treaty is applicable in the Kerch Strait only to the ships of coastal States of the Sea of Azov, i.e. Ukraine and the Russian Federation, and not to the ships of third States.³¹ The freedom of navigation is a high seas freedom guaranteed under Article 87(1)(a) of LOSC and is also applicable to all ships in an EEZ (Article 58(1) of the Convention). It is not clear whether the entire regime of freedom of navigation as laid down in LOSC is applicable to ships registered in Ukraine and the Russian Federation in the Sea of Azov and the Kerch Strait.³² In general, however, there seems to be no good reason why States should not enjoy a broad navigational freedom in waters under their sovereignty.

It is not unprecedented for the freedom of navigation to be made applicable by an agreement among the strait States in respect of a territorial sea. Under Article 5(2) of the 1979 Peace Treaty between Egypt and Israel, the two parties agreed that they “consider the Strait of Tiran and the Gulf of Aqaba to be international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight.”³³ If the coastal States of the Strait of

31 Notably, Article 2(1) of the 2003 Kerch Treaty grants only the freedom of navigation and does not explicitly provide for the freedom of overflight.

32 Schatz, Koval, *op. cit.*, 285.

33 Peace Treaty between Israel and Egypt, adopted 26 March 1979, entered into force 25 April 1979, 1138 UNTS 59. This is reiterated in Article 14(3) of the Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan, adopted 26 October 1994, entered into force 10 November 1994, 2042 UNTS 351.

Tiran had not agreed on the applicability of such a liberal transit regime, then passage through the Strait of Tiran would be subject to the regime of non-suspendable innocent passage under Article 45(1)(b) of LOSC. Although navigation through the Strait of Tiran would therefore be safeguarded under international law, the passage regime would be more restrictive for flag States in comparison to freedom of navigation and would not include the freedom of overflight.³⁴

By contrast, the passage regime stipulated in the 2003 Kerch Treaty is based on the premise that the Sea of Azov and the Kerch Strait comprise internal waters of Ukraine and the Russian Federation. Article 1 of the 2003 Kerch Treaty stipulates that the Sea of Azov and the Kerch Strait have historically been internal waters of the Russian Federation and Ukraine. This allowed the coastal States of the Sea of Azov to agree that only their ships enjoy the freedom of navigation, whereas the ships of third States need to request prior authorisation to enter the Sea of Azov via the Kerch Strait.³⁵

Nonetheless, while the Russian Federation maintains that “it has been exercising exclusive sovereignty over the waters of the Kerch Strait since it has been exercising its sovereignty on both sides of the strait”,³⁶ it claims that the Kerch Strait is still open for transit for Ukrainian ships and commercial ships of other States entering Russian or Ukrainian ports in the Sea of Azov. The Russian Federation argues that, pursuant to the 2003 Kerch Treaty, Ukrainian ships enjoy freedom of navigation and foreign non-military vessels sailing to and from Ukrainian ports are entitled to ‘free passage’ in the Kerch Strait.³⁷

It is not clear what the reference to ‘free passage’ means. It holds connotations with legal concepts such as the freedom of navigation or transit passage. Yet, as analysed above, all ships, including Russian-flagged as well as foreign ships, need to apply for a prior permit from the Russian authorities to transit the Kerch Strait according to the terms of the Kerch Strait vessel traffic service (hereafter VTS). It is thus questionable whether, in practice, foreign commercial ships have ‘free passage’ to enter the Sea of Azov.

Notably, the 2003 Kerch Treaty does not refer to ‘free passage’. Instead, it uses, in Article 2(2), more general terms: “Commercial vessels flying the flags

34 See further, e.g., EJ Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer, The Hague/Boston/London, 1998), 319.

35 Notably, the 2003 Kerch Treaty does not grant the freedom of overflight to Ukraine or the Russian Federation, nor to any other State.

36 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 211.

37 *Ibid.*

of third states may enter the Sea of Azov and pass through the Kerch Strait if they go to or return from a Russian or Ukrainian port.” Therefore, foreign commercial ships that intend to cross the Kerch Strait, not for the purpose of visiting Ukrainian or Russian ports, are, in any case, not entitled to enter the Sea of Azov under Article 2 of the 2003 Kerch Treaty.

Article 2(2) of the 2003 Kerch Treaty does not exclude the possibility that strait States may exercise considerable control over the passage of ships of third States in the Kerch Strait. In principle, this provision appears to allow for an authorisation-based passage regime in respect of commercial vessels flying the flags of third states. Moreover, this provision explicitly makes foreign commercial ships’ access to the Sea of Azov dependent on whether they are seeking access to either Ukrainian or Russian ports. Under international law, coastal States have considerable discretion to regulate a foreign ship’s access to ports (see, Articles 25(2), 38(3) and 211(3) of LOSC). A general right of foreign ships to enter ports is absent from LOSC and States have retained their freedom to close ports,³⁸ subject to the exception relating to instances requiring humanitarian assistance, as well as to conditions of proportionality and the prohibition of discrimination. The ICJ has concluded, with regard to the contemporary State practice, that it is “*by virtue of its sovereignty that the coastal State may regulate access to its ports*”.³⁹ Therefore, the coastal State has a wide discretion in deciding whether to allow foreign ships to enter its ports.⁴⁰ Hence, the Russian Federation may arguably exercise its permit-system in relation to foreign commercial ships that seek access to the Sea of Azov for the purpose of entering its ports under Article 2(2) of the 2003 Kerch Treaty.

In respect of ships that seek to enter the Sea of Azov not for the purpose of visiting ports, the Russian Federation’s permit-based passage regime could be lawful if it meets the conditions of Article 311(2) of LOSC which provides that: “This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.” These conditions could be satisfied if the maritime area of the Kerch Strait and the Sea of

38 Narrowly, Article 255 of LOSC stipulates an obligation of means according to which States shall endeavour to facilitate, subject to the provisions of their laws and regulations, only research vessels’ access to their harbours.

39 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, para 213.

40 Molenaar 1998, *op. cit.*, 101. RR Churchill, AV Lowe, *The Law of the Sea* (Manchester University Press, Manchester, 1999), 52.

Azov constitutes a historic bay owing to which no passage rights would apply therein, as discussed further below.

The Russian Federation's authorisation-based Kerch VTS rules clearly hinder the transit of those commercial ships that seek access to Ukrainian ports in the Sea of Azov. Therefore, the Russian Federation's claim in the judicial proceedings about the applicability of 'free passage' in the Kerch Strait to foreign non-military vessels sailing to and from Ukrainian ports appears to contradict both the Russian Federation's previous practice and its domestic rules. The Russian Federation presumably cannot apply the permit requirement in relation to commercial ships that seek access to Ukrainian ports in the Sea of Azov under Article 2(2) of the 2003 Kerch Treaty. Furthermore, Ukraine contests *in toto* the legality of the Russian Federation's permit-based passage regime on the grounds that, instead, the regime of transit passage is applicable to the Kerch Strait, as discussed below.

4.3 A Critical Analysis of Ukraine's Arguments about the Applicability of Transit Passage to Ships and Aircraft in/over the Sea of Azov and the Kerch Strait

Ukraine maintained in the *Coastal State Rights Case* that: "[T]he Sea of Azov and the Kerch Strait are not internal waters; rather, the Sea of Azov is an enclosed or semi-enclosed sea within the meaning of the Convention, containing a territorial sea and exclusive economic zone, and the Kerch Strait is a strait used for international navigation."⁴¹ Ukraine also stated that: "[T]he Kerch Strait is an international strait [...] connecting "one part of [...] an exclusive economic zone" in the Sea of Azov to "an exclusive economic zone" in the Black Sea."⁴² On this interpretation, the regime of transit passage would apply in the Kerch Strait. The regime of transit passage would grant *grosso modo* the freedom of navigation but also the freedom of overflight to all ships and aircraft of all States in the Kerch Strait, thereby rendering the 2003 Kerch Treaty incompatible with LOSC by virtue of Article 311(2) of the Convention.

Thus, the passage regime under Article 2 of the 2003 Kerch Treaty could not restrict the passage rights of ships and aircraft by virtue of the Treaty if, instead, the regime of transit passage is applicable to the Kerch Strait under LOSC. This position finds support from the legal literature.

41 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 200.

42 *Ibid.*, para 215.



MAP 2 The maritime zones in the Sea of Azov
 SOURCE: ANNEX VII ARBITRAL TRIBUNAL, *DISPUTE CONCERNING COASTAL STATE RIGHTS*, WRITTEN OBSERVATIONS AND SUBMISSIONS OF UKRAINE ON JURISDICTION, 27 NOVEMBER 2018, PARA 73. THE MAP DEPICTS THE INTERNAL WATERS, TERRITORIAL SEA AND EEZ OF UKRAINE AND THE RUSSIAN FEDERATION PURSUANT TO THE UKRAINIAN POSITION IN THE ARBITRAL PROCEEDINGS. BY CONTRAST, THE RUSSIAN FEDERATION MAINTAINS THAT THE ENTIRE SEA OF AZOV FALLS UNDER THE REGIME OF INTERNAL WATERS.

López Martín considers that the regime of internal waters as declared in the 2003 Kerch Treaty is not consistent with international law and argues that:

[I]t does not seem that there are any of the parameters required for the proclamation of historic waters, therefore, such a declaration, subjecting the passage of foreign military vessels to the consent of the coastal States, is a clear infringement of the right of passage in transit which should be in force in the Kerch Strait in accordance with the provisions in article 37 of the Convention of 1982, which both States are parties to.⁴³

43 AG López Martín, *International Straits: Concept, Classification and Rules of Passage* (Springer, Heidelberg/Dordrecht/London/New York, 2010), 71.

Alexander Skaridov shares López Martín's critique in connection with the legal implications of the reference to 'internal waters' in the 2003 Kerch Treaty and finds that this reference does not have much legal significance, but rather, has more general and historic implications.⁴⁴ Skaridov opined in 2014, that the regime of transit passage should be applicable to the Kerch Strait in order to preserve the freedom of navigation of merchant vessels.⁴⁵

Similarly, Ukraine has downplayed the legal value of the reference to internal waters in Article 1 of the 2003 Kerch Treaty and Article 5 of the Agreement between the Russian Federation and Ukraine on the Russian-Ukrainian State Border⁴⁶ which provides: "Questions pertaining to contiguous maritime waters shall be settled by agreement between the Contracting Parties in accordance with international law. Nothing in this Treaty shall prejudice the positions of Ukraine and the Russian Federation regarding the status of the Sea of Azov or the Kerch Strait as internal waters."⁴⁷ In the *Coastal State Rights Case*, Ukraine contends that after the dissolution of the Soviet Union, the Sea of Azov and the Kerch Strait "no longer qualify as internal waters",⁴⁸ as only bays, the coasts of which belong to a single State under the terms of Article 10 of LOSC, can be potentially categorized as internal waters.⁴⁹ Yet, as pointed out by the Russian Federation, this position ignores the opposite conclusion reached by the ICJ in the *Gulf of Fonseca case* and Arbitral Tribunal in the arbitration between Slovenia and Croatia.⁵⁰

Ukraine claims that the Sea of Azov comprises the following maritime zones as provided for in LOSC: internal waters, territorial sea, EEZ and continental shelf (see Map 2). It follows from this that Ukraine's contiguous zone,

44 A Skaridov, 'The Sea of Azov and the Kerch Straits', in Caron and Oral (eds), *op. cit.*, 234–235.

45 *Ibid.*, 237.

46 Agreement between the Russian Federation and Ukraine on the Russian-Ukrainian State Border, adopted 28 January 2003, entered into force 23 April 2004, available <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/54132/Part/I-54132-0800002803fe18a.pdf>; accessed 5 April 2021.

47 *Ibid.*, Art 5.

48 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 212.

49 *Ibid.*, para 214.

50 Final Award of 29 June 2017 pursuant to the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, paras. 883–885. *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment, ICJ Reports 1992, p. 351, para 399.

which was established by the Contiguous Zone of Ukraine Act in December 2018,⁵¹ also exists in the Sea of Azov and extends up to 24 NM as measured from the baselines in conformity with Article 33(2) of LOSC. The Act does not however, explicitly include or exclude the Sea of Azov from its application. In this context, the Russian Federation has maintained that:

With regard to the adoption of the Contiguous Zone of Ukraine Act, it is the understanding of the Russian Federation that the geographical area to which this Act applies is the part of the Black Sea that is contiguous to the coast of Ukraine. The Sea of Azov, we recall, is part of the internal waters of Russia and Ukraine. Therefore, the provisions on contiguous zones of the United Nations Convention on the Law of the Sea of 1982 do not apply to it, nor, consequently, does the Act establishing the contiguous zone of Ukraine under the Convention.⁵²

If the Sea of Azov is included in Ukraine's normal maritime zones as provided in LOSC, then the Kerch Strait satisfies the criteria of Article 37 of LOSC for the regime of transit passage, as shown below.

Ukraine also asserts that, in practice, it has invoked the right of transit passage in the Sea of Azov.⁵³ In support of this claim, in the *Dispute Concerning Coastal State Rights*, Ukraine referred to the 2001 *note verbale* of its Ministry of Foreign Affairs that explicitly refers, in the context of the passage regime in the Kerch Strait, to the provision of LOSC which regulates the designation of sea lanes and traffic separation scheme (hereafter TSS) in international straits.⁵⁴

51 Law about adjacent zone of Ukraine of December 6, 2018 No. 2641-VIII, signed by the President of Ukraine on 29 December 2018, available in Ukrainian at <https://zakon.rada.gov.ua/laws/show/2641-VIII>; accessed 5 April 2021. Available in English at <https://cis-legislation.com/document.fwx?rgn=112881>; accessed 5 April 2021.

52 Annex to the letter dated 7 March 2019 from the Permanent Representative of the Russian Federation to the United Nations, Position of the Russian Federation in connection with the adoption of the Contiguous Zone of Ukraine Act, UN Doc A/73/802, 20 March 2019, available <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

53 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 242.

54 Ukraine has alleged that the Russian Federation breached Article 41(4)-(5) of LOSC, which provides that before designating or substituting sea lanes or TSS, strait States are required to draft these proposals in close consultation with each other and the International Maritime Organization (hereafter IMO) as the competent organization, before referring them to the IMO with a view to their adoption. The strait States may designate, prescribe or substitute the sea lanes or TSS if the IMO has first approved them. Only then may such sea lanes or TSS in a strait where the regime of transit passage applies be considered as



MAP 3 The maritime zones in the Black Sea

SOURCE: MARINEREGIONS.ORG, 'OVERLAPPING CLAIM UKRAINIAN EXCLUSIVE ECONOMIC ZONE', FLANDERS MARINE INSTITUTE (VLIZ) 2020, AVAILABLE [HTTP://WWW.MARINEREGIONS.ORG/EEZDETAILS.PHP?MRGID=5695](http://www.marineregions.org/eezdetails.php?MRGID=5695); ACCESSED 5 APRIL 2021. THE MAP IS MODIFIED BY THE AUTHOR TO INCLUDE THE NAMES OF, *INTER ALIA*, THE STATES, PENINSULAS AND PORTS MENTIONED IN THE CHAPTER. THE MAP DEPICTS THE INTERNAL WATERS, TERRITORIAL SEA AND EEZ OF UKRAINE AND THE RUSSIAN FEDERATION IN THE SEA OF AZOV PURSUANT TO THE UKRAINIAN POSITION IN THE ARBITRAL PROCEEDINGS. BY CONTRAST, THE RUSSIAN FEDERATION MAINTAINS THAT THE ENTIRE SEA OF AZOV FALLS UNDER THE REGIME OF INTERNAL WATERS.

"generally accepted international regulations" which ships in transit passage are required to respect (Art 39(2)(a) of LOSC). By contrast, in international straits where innocent passage applies, sea lanes and TSS can be adopted by the strait State(s) by only taking into account the recommendations of the IMO (Art 22(3)(a) of LOSC). Despite the Ukrainian petitions and claims that the new rules are dangerous for mariners, the Russian Federation established the new navigation conditions between the fairways in the allegedly Ukrainian part of the internal waters of the Kerch Strait. Soon after, on 5 September 2002, the Russian-flagged oil tanker *Lidiya* collided with another ship in the Kerch Strait. It was found during the investigation that the accident was partly caused by the new Russian navigation rules between fairways Nos. 50 and 52 which, the Ukrainian Ministry of Foreign Affairs believed, "could have resulted in human fatalities and an oil spill from the tanker *Lidiya*". Ukraine reiterated the importance of Article 41(4)-(5) of LOSC and called for the revocation of the new navigation rules that were established unilaterally by the Russian agencies in respect of the Kerch Strait's area between fairways Nos. 50 to 52. UA-516, Ministry of Foreign Affairs of Ukraine, 'For the attention of the Ministry of Foreign Affairs of the Russian Federation', No. 72/22-446-2110, 15 September 2002, 3-4, available <https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/01.%20Exhibits/>; accessed 5 April 2021. UA-515, Ministry of Foreign Affairs of Ukraine, 'For the attention of the Ministry of Foreign Affairs of the Russian Federation', No. 21/20-410-747, 24 May 2001, 4, available <https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/01.%20Exhibits/>; accessed 5 April 2021.

Yet the instances referred to by Ukraine, in the arbitration proceedings, in support of the claim that it previously invoked the transit passage regime in the Kerch Strait occurred in 2001 and 2002, and thus preceded the conclusion of the 2003 bilateral treaties. Ukraine also referred to a 1992 treaty with the Russian Federation on cooperation in the fisheries sector in the Black Sea and Sea of Azov, and claimed that the treaty makes no reference to the Sea of Azov having any status other than a semi-enclosed sea comprising normal maritime zones.⁵⁵ In addition, Ukraine points to its “List of geographical coordinates of points defining the baselines for measuring the breadth of the territorial sea, exclusive economic zone and the continental shelf in the Sea of Azov”,⁵⁶ which it deposited with the UN in 1992.⁵⁷

In conclusion, the State practice invoked by Ukraine in support of its claim that the regime of transit passage applies to the Kerch Strait, precedes the conclusion of the 2003 bilateral treaties, which stipulate that the Sea of Azov and the Kerch Strait are internal waters of the Russian Federation and Ukraine, and establish a restrictive passage regime in the Kerch Strait which is clearly incompatible with the right of transit passage. In a similar vein, the 2002 draft law on internal waters, the territorial sea and the contiguous zone of Ukraine, which provided for a Ukrainian territorial sea in the Sea of Azov,⁵⁸ was never adopted, and instead was followed by the conclusion of the 2003 bilateral treaties, which expressly applied the internal waters regime to the Sea of Azov. Therefore, neither treaty law nor Ukraine’s State practice prior to the arbitral proceedings necessarily supports Ukraine’s claim that the Kerch Strait is subject to the transit passage regime.

55 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 237.

56 *Ibid.* See also Ukraine, ‘Legislation’, Division for Ocean Affairs and the Law of the Sea, available <https://www.un.org/depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

57 See Ukraine’s ‘List of geographical coordinates of points defining the baselines for measuring the breadth of the territorial sea, exclusive economic zone and the continental shelf in the Sea of Azov’, Division for Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin*, No. 36, (UN, 1998).

58 See ВЕРХОВНА РАДА УКРАЇНИ, Проект Закону про внутрішні води, територіальне море та прилеглу зону України (draft law on internal waters, the territorial sea and the contiguous zone of Ukraine), No. 2605, від 30.12.2002 року, available in Ukrainian at https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2605&skl=5; accessed 5 April 2021.

4.4 The Significance of 2003 Bilateral Treaties for the Passage Regime of the Kerch Strait

Ukraine's position that the regime of transit passage applies to the Kerch Strait is somewhat ambiguous particularly due to the fact that it explicitly agreed in Article 5 of the 2003 State Border Treaty that the Sea of Azov and the Kerch Strait constitute internal waters within Ukraine and the Russian Federation. Likewise, Article 1 of the 2003 Kerch Treaty stipulates that the Sea of Azov and the Kerch Strait "have historically been internal waters of the Russian Federation and Ukraine". Moreover, under Article 2 of the Kerch Treaty, Ukraine consented to apply a restrictive passage regime to the Kerch Strait, which is clearly incompatible with the rights of transit passage and of innocent passage. This passage regime restricts the access of foreign merchant vessels to the Sea of Azov and prohibits the entrance of foreign warships to the Sea of Azov unless both Ukraine and the Russian Federation explicitly give their prior permission. Furthermore, the 2003 Kerch Treaty does not guarantee the right of foreign aircraft to fly over the Kerch Strait, a right that would be applicable under the transit passage regime for the purpose of entering the EEZ in the Sea of Azov.

Therefore, it is doubtful that the regime of transit passage was applicable to ships and aircraft in the Kerch Strait after Ukraine became a party to the 2003 Kerch Treaty. However, Ukraine could argue that the Sea of Azov and the Kerch Strait were internal waters, as agreed in the 2003 bilateral treaties, but that legal regime changed as a result of the Russian Federation's occupation and annexation of Crimea. The Russian Federation's aggression against Ukraine would have provided, arguably, sufficient grounds for suspending or terminating the 2003 bilateral treaties to the extent that they set out the internal waters regime and regulate passage rights in the Sea of Azov and the Kerch Strait. Notably, pursuant to Article 3 of the ILC Draft Articles on the Effects of Armed Conflicts on Treaties, the 2003 bilateral treaties should not be considered as *ipso facto* terminated or suspended owing to the outbreak of hostilities between Ukraine and the Russian Federation in 2014, even assuming that this dispute constitutes an armed conflict.⁵⁹ The 2003 Kerch Treaty has not been suspended or terminated by its States Parties.

59 General Assembly Resolution 66/99, adopted 9 December 2011, 2, available <https://undocs.org/en/%20A/RES/66/99>; accessed 5 April 2021. Pursuant to its Article 18, the Draft Articles on the Effects of Armed Conflicts on Treaties are in any case without prejudice to the termination, withdrawal or suspension of treaties as a consequence of a fundamental change of circumstances.

Nonetheless, Ukraine could invoke the Kerch Strait incident of 25 November 2018 as a material breach of the freedom of navigation within the terms of Article 2(1) of the 2003 Kerch Treaty. The transit of Ukrainian ships through the strait was blocked by the Russian Federation by means of placing a tanker under the Crimean Bridge and using force which resulted in casualties amongst the Ukrainian crew and were subsequently charged with the crime of aggravated illegal crossing of a border and detained in breach of sovereign immunity of warships and government ships. Thus, the Kerch Strait incident potentially constitutes a material breach of the 2003 Kerch Treaty within the meaning of Article 60(1) of the Vienna Convention on the Law of Treaties⁶⁰ (VCLT), which would entitle Ukraine to terminate the treaty or suspend its operation in whole or in part. The Russian Federation's unilateral imposition of restrictions on the passage of ships in the Kerch Strait have arguably precluded the enjoyment of freedom of navigation by the Ukrainian ships. It can be argued that these freedoms are essential to the accomplishment of the object or purpose of the 2003 Kerch Treaty in terms of Article 60(3) of the VCLT.

In this context, it is also possible for Ukraine to invoke the *rebus sic stantibus* clause under Article 62 of the VCLT to terminate or suspend the operation of the 2003 Kerch Treaty on the grounds that the Russian Federation's annexation of Crimea and other actions that have hampered the freedom of navigation of Ukrainian ships for the purpose of accessing the Sea of Azov have fundamentally changed the circumstances based on which Ukraine initially consented to be bound by the treaty.⁶¹ The 2003 Kerch Treaty does not regulate the procedure for withdrawing from it. Thus, pursuant to Articles 65(1) and 67 of the VCLT, Ukraine would have to notify the Russian Federation in writing of its claim and indicate the measure proposed to be taken with respect to the treaty and the reasons thereof.

In recent years, the possible termination of the 2003 Kerch Treaty has been extensively debated in the Ukrainian parliament and by the government. In July 2015, a draft law for the denunciation of the 2003 Kerch Treaty was submitted to the Ukrainian parliament by its future chairman (2016–2019) Andriy Parubiy, but the representatives of the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of Justice, the Ministry of Infrastructure and the Security Service decided in a special meeting that the current national interests

60 Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

61 Notably, Art 62(2) of the VCLT does not exclude the possibility of invoking the *rebus sic stantibus* clause as the 2003 Kerch Treaty does not establish a boundary.

of Ukraine did not necessitate its denunciation.⁶² Subsequently, Ukrainian parliamentarians have made petitions for the denunciation of the 2003 Kerch Treaty to the President of Ukraine and the Minister of Defence in which they argue for the establishment of an EEZ in the Sea of Azov as they claim that this would, *inter alia*, allow the entrance of NATO warships to the Sea of Azov.⁶³ Currently, such visits require the consent of the Russian Federation under Article 2(3) of the Kerch Treaty.

Furthermore, shortly after the Kerch Strait incident of 25 November 2018, the Ukrainian Minister of Foreign Affairs claimed on television that “with its actions, the Russian Federation has confirmed that bilateral agreements on the Kerch Strait and the Sea of Azov are null and void. We understand that Russia has never had any intention to follow them.”⁶⁴ Nonetheless, this declaration has apparently not been supplemented with any actual steps for terminating or suspending, either in whole or in part, the 2003 bilateral treaties. Ukraine has not initiated the procedure set forth in section 4, Part V of the VCLT for terminating or suspending the operation of the 2003 bilateral treaties.

Owing to domestic political considerations, Ukraine might be tempted to terminate or suspend the 2003 bilateral treaties if the Annex VII Arbitral Tribunal supports the position of the Russian Federation that the Sea of Azov comprises internal waters based on the concept of historic bay and Ukraine's alleged acceptance of that regime in the light of the 2003 bilateral treaties. The Kerch Strait would then connect unambiguously a Ukrainian EEZ in the Sea of Azov with EEZs in the Black Sea. This would imply the applicability of the right of transit passage to the Kerch Strait, which would conflict with the Russian Federation's potential claim that the Kerch Strait would still constitute a strait falling under the category of Article 35(a) of LOSC, as discussed below.

Rather than terminating the 2003 bilateral treaties, Ukraine maintains, as argued in the *Coastal State Rights Case* that, notwithstanding the conclusion of the 2003 bilateral treaties, it has not reached a final agreement with the Russian Federation regarding the status of the Sea of Azov, as any final agreement would be contingent on maritime boundary delimitation.⁶⁵ Notably,

62 RB Urcosta, ‘Russia's Strategic Considerations on the Sea of Azov’, *Warsaw Institute* (3 December 2018), 34. See also ВЕРХОВНА РАДА УКРАЇНИ, Голова Комітету, До реєстр. No. 0051, від 16.07.2015 року, available in Ukrainian at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=56077&pf35401=364420>; accessed 5 April 2021.

63 Urcosta, *op. cit.*, 34–35.

64 Anonymous, ‘Ukraine-Russia sea clash: Who controls the territorial waters around Crimea?’, *BBC News* (27 November 2018).

65 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, 239–240.

Ukraine has not fixed a maritime boundary with the Russian Federation in the Sea of Azov. Yet this claim ignores the fact that a maritime boundary is not a prerequisite for the existence of an internal waters regime in a historic bay. As will be discussed below, the ICJ made it clear in the *Gulf of Fonseca* case that sovereignty over internal waters of a historic bay may be exercised jointly by its coastal States.

4.5 The Sea of Azov as a Potential Historic Bay and Its Implications for the Regime of Passage in the Kerch Strait under Article 35(a) of LOSC

As examined above, Ukraine clearly rejects the Russian Federation's argument that the Sea of Azov and the Kerch Strait comprised solely internal waters throughout the 1990s. For that reason, Ukraine has requested the Annex VII Arbitral Tribunal to declare that the Sea of Azov comprises its EEZ, as a result of which, the regime of transit passage would apply to ships and aircraft crossing the Kerch Strait (Article 37 of LOSC). Even if the Arbitral Tribunal accedes to this request, then the scope of applicability of the regime of transit passage in the Kerch Strait could still, irrespective of the Arbitral Tribunal's findings, remain unclear and subject to debate. One may expect the Russian Federation to continue to deny the applicability of the right of transit passage in the Kerch Strait, as discussed next.

For those States interested in retaining the passage regime of the Kerch Strait that is stipulated in the 2003 Kerch Treaty, it is important that the Arbitral Tribunal supports the claim that the Sea of Azov constitutes a historic bay. The Kerch Strait would then potentially fall under the exception stipulated in Article 35(a) of LOSC: "Nothing in this Part affects: (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such". This implies that the legal regime of straits used for international navigation does not affect any areas of internal waters within a strait if such maritime areas had been considered as internal waters prior to the first establishment of the relevant straight baselines (hereafter referred to as *long-standing internal waters*).⁶⁶ However, in the existing case law, the question of whether a strait

66 See SN Nandan, DH Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982' (1989) 60 *The British Yearbook of International Law* 173. Caminos, Cogliati-Bantz, *op. cit.*, 66–67.

that meets the geographic and functional criteria of a strait can be classified as internal waters, including by reason of historic title, has not yet received a clear answer.⁶⁷ Thus, the Annex VII Arbitral Tribunal has the potential to clarify this question in the current proceedings between Ukraine and the Russian Federation.

The States that are interested in the application of the regime of transit passage to the Kerch Strait may espouse a different reading of Article 35(a) of LOSC. Pursuant to an interpretation supporting this position, Article 35(a) of LOSC merely clarifies that Part III of the Convention affects areas of internal waters within an international strait to the extent that the otherwise applicable innocent passage regime would be replaced with that of transit passage if the strait meets the conditions of Article 37 of the Convention.⁶⁸

Clearly, the latter interpretation of Article 35(a) of the Convention would support the position of Ukraine in the determination of the passage regime applicable to the Kerch Strait. The Russian Federation could adopt the opposing reading of the same provision by claiming that the passage rights of foreign ships are not safeguarded under international law in the Article-35(a)-category of straits, where the area constitutes long-standing internal waters. For example, in the Baltic Sea, this exception has particular relevance in connection with the Sea of Straits in Estonia, Kalmarsund in Sweden and the multiple straits in the Åland region of Finland. All these areas constituted the internal waters of the relevant coastal State, probably since 1938 under the Nordic neutrality rules,⁶⁹ and well before Estonia, Finland, and Sweden first established their system of straight baselines.⁷⁰ This exception could also have significance for the passage regime of some straits in the Northern Sea Route.⁷¹

67 CR Symmons, *Historic Waters in the Law of the Sea: A Modern Re-Appraisal* (Martinus Nijhoff, Leiden/Boston, 2008), 33.

68 H Caminos, 'The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea', in *Recueil des cours de l'Académie de droit international de la Haye 1987* (Martinus Nijhoff, Dordrecht/Boston/Lancaster, 1989), 130.

69 Declaration between Denmark, Finland, Iceland, Norway and Sweden for the Purpose of Establishing Similar Rules of Neutrality, 27 May 1938 Stockholm, available http://www.hist.doc.net/history/nordic1938_en.html; accessed 5 April 2021. See also: 'Denmark-Finland-Iceland-Norway-Sweden: Declaration Regarding Similar Rules of Neutrality' (1938) 32 *The American Journal of International Law*, 141–163. The northern countries Denmark, Finland, Iceland, Sweden, Norway and the Baltic States adopted analogous domestic legal acts on neutrality on the basis of the above-mentioned 1938 declaration.

70 See further Lott, *op. cit.*, 25, 213–221.

71 See further on the Russian Federation's claims in, e.g., JJ Solski, 'Russia' in RC Beckman, T Henriksen, KD Kraabel, EJ Molenaar and JA Roach (eds), *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and User States* (Brill, Leiden/Boston, 2017), 192–197.

A restrictive interpretation of Article 35(a) of LOSC is functionally equivalent to the exception provided for in Article 8(2) of LOSC but it addresses, specifically, navigational rights in straits, whereas Article 8(2) is more generally applicable to internal waters.⁷² Such a reading of Article 35(a) of LOSC serves as a potential legal basis for establishing a passage regime that may entail a permit-based system in a strait even if the strait would otherwise be subject to the regime of transit passage. This is significant, particularly if the Annex VII Arbitral Tribunal finds in support of the Russian Federation that the Sea of Azov is a historic bay and constitutes internal waters and that Ukraine has accepted that regime in light of the 2003 bilateral treaties. If such a finding were made, Ukraine might be tempted to terminate the 2003 bilateral treaties altogether, consequently triggering the applicability of the transit passage regime in the Kerch Strait, as discussed above. The scope of Article 35(a) arguably covers the Sea of Azov, which it is argued is a historic bay and for which the straight baseline segment at the entrance of the Kerch Strait was established in 1985.⁷³ Pursuant to a teleological interpretation of Article 35(a) in combination with customary international law, the exception is potentially also applicable in cases where the coastal State has not (yet) established a system of straight baselines, but its relevant maritime area has been recognized as constituting a historic bay.

In the case of the Sea of Azov and the Kerch Strait, the legitimacy of the Russian Federation's claim to long-standing internal waters rests on the recognition of this maritime area as a historic bay. LOSC does not directly regulate historic bays (Article 10(6) of the Convention),⁷⁴ as their status is instead governed by customary international law. Should the Annex VII Arbitral Tribunal conclude that the Sea of Azov and the Kerch Strait do not (any longer) comprise long-standing internal waters that meet the criteria of Articles 8(2) and 35(a) of LOSC, then there appears to be no other legal basis for the restrictive passage regime that currently applies in the Kerch Strait and Sea of Azov under Article 2 of the 2003 Kerch Treaty. General international law cannot provide a legal basis for other historic passage regimes that are incompatible with LOSC.

⁷² On the interpretation of Article 35(a), see further Lott, *op. cit.*, 21–27.

⁷³ The Decree no. 4450 of the Council of Ministers of the Soviet Union on the Confirmation of a List of Geographic Coordinates Determining the Position of the Baseline in the Arctic Ocean, the Baltic Sea and Black Sea from which the Width of the Territorial Waters, Economic Zone and Continental Shelf of the U.S.S.R. is Measured, 15 January 1985.

⁷⁴ Except for the possibility for a State to declare, pursuant to Article 298(1)(a)(i) that it does not accept compulsory procedures entailing binding decisions with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 involving historic bays or titles.

This conclusion follows from the Annex VII Arbitral Tribunal's South China Sea award where it was emphasized that:

[T]he prohibition on reservations is informative of the Convention's approach to historic rights. It is simply inconceivable that the drafters of the Convention could have gone to such lengths to forge a consensus text and to prohibit any but a few express reservations while, at the same time, anticipating that the resulting Convention would be subordinate to broad claims of historic rights.⁷⁵

For the Sea of Azov to be recognized as a historic bay, the claim needs to be accepted by other States and based on a long and consistent assertion of dominion over the bay which includes the coastal State's right to exclude foreign vessels entering the bay without its permission.⁷⁶

The Russian Federation asserts that the Sea of Azov and the Kerch Strait were historically internal waters of the Russian Empire, and, later, the Soviet Union, and, since 1991, the common internal waters of Ukraine and the Russian Federation, the status of which has not been protested by other States.⁷⁷ Notably, although there appears to be no explicit protests by States against the internal waters status of the Sea of Azov prior to the change in the Ukrainian Government's position on this matter after the annexation of Crimea, the United States, in its announcements and official documents has consistently refrained from using the term *juridical bay* for the waters of the Sea of Azov that were enclosed by the straight baseline pursuant to the Decree no. 4450 of the Council of Ministers of the Soviet Union in 1985.

It can possibly be argued that characterizing the Sea of Azov as a historic bay is *per se* contrary to customary international law. The Sea of Azov includes an extensive maritime area which falls outside the 12-NM-limit of territorial sea as measured from the baselines. The maritime area which spans the Sea of Azov outside the 12-NM-limit is relatively large as it has a maximum length of over 60 NM and maximum width of over 90 NM. Consequently, it may be argued that the Sea of Azov does not lie in the immediate vicinity of Ukrainian and Russian coasts and thus cannot be considered as a historic bay under customary international law. This claim, however, is somewhat weakened by the

75 South China Sea Arbitration (the Philippines v. China). Award of the LOSC Annex VII Tribunal, 12 July 2016, para 254.

76 Churchill, Lowe, *op. cit.*, 44. Caminos, Cogliati-Bantz, *op. cit.*, 60–61.

77 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, paras. 199, 202.

fact that State practice includes examples of much larger historic bays, e.g., Hudson Bay,⁷⁸ as compared to the maritime area of the Sea of Azov. In 1934, Johnston commented that:

In 1906, however, notwithstanding the assumptions of the world as to the status of Hudson Bay, the Government of Canada placed on its statute books a statute declaring the waters of Hudson Bay to be territorial waters of Canada. That statute is still in force in Canada, without, so far as is known, any protest having been made by any foreign government. This statute has been and presumably still is being actively enforced in Canada and in Hudson Bay as part of Canada. The Government of Canada, therefore, has appropriated and continues to appropriate Hudson Bay and presumably Hudson Strait as Canadian national waters, as much a part of Canada as Toronto or Montreal. Furthermore, Canada's predecessor in title to this whole area, the Hudson's Bay Company, maintained for a century and a half exclusive title and possession, not only to the territories surrounding the Bay and Strait, but also to the Bay and the Strait.⁷⁹

The Russian Federation refers to the 1992 judgment of the ICJ in the *Gulf of Fonseca case*, according to which: "A State succession is one of the ways in which territorial sovereignty passes from one State to another; and there seems no reason in principle why a succession should not create a joint sovereignty where a single and undivided maritime area passes to two or more new States."⁸⁰ A similar question was recently addressed in the arbitration between Slovenia and Croatia where the Arbitral Tribunal found, referring to the *Gulf of Fonseca case*, that the Convention's framework on bays under Article 10 does not exclude "the existence of bays with the character of internal waters, the coasts of which belong to more than one State."⁸¹ Thus, the current case law accepts the possibility that a historic bay falls under the joint sovereignty of its coastal States.

78 BB Jia, *The Regime of Straits in International Law* (Clarendon Press, Oxford, 1998), 76.

79 K Johnston, 'Canada's Title to Hudson Bay and Hudson Strait', *British Year Book of International Law* (1934) 15, 2. Notably, the United States has protested against the Canadian claims declaring its waters in the Arctic archipelago, including in the Hudson Strait, as its internal waters where the regime of international straits under Part III of the LOSC does not apply. See J Kraska, 'The Law of the Sea Convention and the Northwest Passage' (2007) 22(2) *The International Journal of Marine and Coastal Law*, 263, 268. However, Kraska still refers to the Hudson Bay as a historic bay. See *Ibid.*, 271.

80 *Land, Island and Maritime Frontier Dispute*, Judgment, *op. cit.*, para 399.

81 *Slovenia v. Croatia Arbitration*, 2017 Award, *op. cit.*, paras. 883–885.

The Russian Federation claims that it exercises sovereignty over the Sea of Azov jointly with Ukraine. It argues that the historic bay status of the Sea of Azov dates back to the Soviet era and the Russian Empire,⁸² and that “any waiver or renunciation of a State’s rights must either be express or unequivocally implied by the conduct of the State”.⁸³ According to the Russian Federation, the internal waters status of the Sea of Azov and the Kerch Strait has remained unchanged and this is confirmed in Article 1 of the 2003 Kerch Treaty and Article 5 of the 2003 State Border Treaty.⁸⁴

In this respect, Ukraine’s State practice is relevant to an assessment of the legality under customary international law of the regime of internal waters as stipulated in the 2003 bilateral treaties. Pursuant to the findings of the ICJ in the *Gulf of Fonseca case*, both Ukraine and the Russian Federation need to recognize the continuous historical status of the bay.⁸⁵ In that regard, Ukraine argues that after its restoration of independence, it “made clear its position that the Sea of Azov was subject to the normal rules of the international law of the sea”.⁸⁶ Ukraine seems to imply that the historic bay regime was disrupted after Ukraine deposited its “List of geographical coordinates of points defining the baselines for measuring the breadth of the territorial sea, exclusive economic zone and the continental shelf in the Sea of Azov” with the UN in 1992. If the Annex VII Arbitral Tribunal finds that the historic bay regime of the Sea of Azov was interrupted in the 1990s, then this could undermine the legality of the legal regime of the Sea of Azov as stipulated in the 2003 bilateral treaties *in toto*. Thus, a broad interpretation of Ukraine’s arguments in the *Coastal State Rights Case* is that it rejects the position that it has continuously recognized the Sea of Azov as a historic bay.

If Ukraine had unequivocally made it clear that it did not accept the joint sovereignty over the Sea of Azov as a historic bay in the 1990s, then one could argue that the exercise of the coastal States’ dominion over the Sea of Azov has not been continuous as it was interrupted during the 1990s and prior to the conclusion of the 2003 treaties. If this was the case, then Ukraine would have vetoed the Russian Federation’s endeavours to continue to apply the historic bay regime to the Sea of Azov. Similarly, Estonia rejected, in the 1990s, the Gulf

82 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 205.

83 *Ibid.*, para 206.

84 *Ibid.*

85 *Land, Island and Maritime Frontier Dispute*, Judgment, *op. cit.*, para 394.

86 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, para 237.

of Riga as a historic bay as proposed by Latvia on the basis of the centuries-long practice of the Russian Empire and the Soviet Union.⁸⁷ Yet Ukraine's position towards the Sea of Azov as a historic bay has been ambiguous. On the one hand, Ukraine has claimed in the arbitral proceedings that the Sea of Azov includes its EEZ, on the other hand however, it has not terminated or suspended, in whole or in part, the 2003 bilateral treaties, which both declare that the Sea of Azov constitutes the internal waters of Ukraine and the Russian Federation. This reluctance may be explained by the recognition of freedom of navigation of Ukrainian ships in the Kerch Strait and the Sea of Azov under Article 2 of the 2003 Kerch Treaty.

4.6 The Importance of the Obligation of Non-recognition for the Passage Regime of the Kerch Strait

Even if the Arbitral Tribunal finds that the Sea of Azov does not (any longer) constitute entirely internal waters and, instead, comprises other maritime zones, including an EEZ, then the Russian Federation might, in response, connect Crimea with its system of straight baselines from the Taman Peninsula. This would have the effect to maintaining the maritime area in and adjacent to the Kerch Strait as internal waters from the perspective of those States that recognize the Russian Federation's sovereignty over Crimea. In support of this, the Russian Federation could cite Article 1 of the 2003 Kerch Treaty and Article 5 of the State Border Treaty, which stipulate that the status of the Kerch Strait is internal waters, and refer to the fact that these treaties have remained in force and that the passage regime stipulated therein has been so far, largely respected by other States.

Continuing this hypothetical scenario, after the potential establishment of a system of straight baselines around Crimea, the Russian Federation might potentially claim that the Kerch Strait still constitutes an Article 35(a)-category of non-international strait⁸⁸ as it comprises internal waters which were considered as such prior to the establishment of the system of straight baselines around Crimea (see Articles 7 and 8(2) of LOSC). It is not impossible that the Russian Federation would thereby strive to exclude the applicability of the regime of transit passage to the Kerch Strait. The Russian interpretation of the

87 On the comparisons with between the Gulf of Riga and the Sea of Azov in the context of the historic bay see also the *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, paras. 224, 233, 252.

88 For an explanation on the use of the term *non-international strait*, see Lott, *op. cit.*, 7–8.

applicable law would be based on its sovereignty claim over Crimea. Deciding on the legality of the Russian Federation's potential internal waters-claim in respect of the Kerch Strait is unlikely as it would require the Arbitral Tribunal to decide on the legality of the Russian Federation's alleged sovereignty over Crimea. The Arbitral Tribunal has already expressly excluded questions of sovereignty over land territories from the scope of its final award and will not address any claims of Ukraine on the premise of Ukraine being sovereign over Crimea.⁸⁹

Hence, should the Arbitral Tribunal support the position of Ukraine that the Kerch Strait is an international strait which is subject to the regime of transit passage, then this ruling would not be able to take into account the Russian Federation's claim to sovereignty over the whole maritime area of the Kerch Strait which, from the Russian Federation's perspective, would possibly entitle it to categorize the Kerch Strait as a non-international strait under Article 35(a) of LOSC.

If, by the time the Arbitral Tribunal delivers its award, the passage regime stipulated in Article 2 of the 2003 Kerch Treaty should hypothetically be devoid of any legal effect, then the Russian Federation would likely consider Ukrainian ships as foreign ships that need to comply with its restrictive passage regime in the Kerch Strait. This would cause further tension and serve as a potential basis for the escalation of the conflict in the Sea of Azov region. In the light of this sophisticated legal and geopolitical perspective, Ukraine's restraint towards the potential termination or suspension of the 2003 bilateral treaties, as examined above, may be considered a balanced approach. One may even wonder if the passage regime as stipulated in the 2003 Kerch Treaty could, in principle, still serve as a compromise between the parties' otherwise conflicting approaches to the passage regime of the Kerch Strait. Had the Russian Federation not hampered the passage of merchant vessels to and from Ukrainian ports in the Sea of Azov and had respected the freedom of navigation of Ukrainian naval vessels navigating through the Kerch Strait, then the parties to the current dispute might still potentially regard the legal regime of the 2003 Kerch Treaty as a pragmatic solution that effectively accommodates the parties' main interests.

Nonetheless, the compatibility of the Russian Federation's potential claim with the Convention is doubtful. Pursuant to a restrictive interpretation of Article 35(a) of LOSC,⁹⁰ the legal regime of straits used for international

89 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections *op. cit.*, para 197.

90 A liberal interpretation of Art 35(a) of LOSC would not entitle the Russian Federation to restrict passage through the Kerch Strait in any case, see the discussion above.

navigation does not affect any areas of internal waters within a strait if such maritime areas were considered internal waters prior to the establishment of straight baselines. The notion of “not previously been considered as such” in Article 35(a) of the Convention does not grant the coastal State an unlimited discretionary right to restrict passage rights in straits under its domestic legal acts. The coastal State’s internal waters also need to have been “considered as such” by other States. Thus, the main criterion under Article 35(a) of LOSC which the coastal State needs to satisfy if it seeks to declare a particular strait as its non-international strait, is recognition by other States of such a passage regime and the relevant domestic legal acts which, e.g., establish the relevant straight baselines or declare the area as the coastal State’s historic bay. In that regard, the majority of States that follow the policy of non-recognition in respect of the annexation and occupation of Crimea do not recognize the Russian Federation’s sovereignty over the internal waters in the western part of the Kerch Strait.

Therefore, the obligation of non-recognition could serve as the key factor in determining whether or not the right of transit passage applies in the Kerch Strait. The obligation of non-recognition is stipulated in Article 41 of the ILC Articles on State Responsibility,⁹¹ according to which no State shall recognize as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. From Ukraine’s perspective, Crimea’s status as an integral part of Ukraine is ‘settled’ and the Russian Federation’s claim to Crimea is devoid of any legal effect.⁹² In the event that the Annex VII Arbitral Tribunal reaches the conclusion that the Sea of Azov does not comprise internal waters based on the historic bay concept, then flag States should presumably avoid consenting to the current restrictive passage regime in the Kerch Strait and instead claim the right of transit passage. This follows from the rationale that the Russian Federation will continue to claim sovereignty over both coasts of the Kerch Strait. If they recognize the Russian Federation’s restrictive passage regime in the Kerch Strait in such circumstances, then this might, arguably, constitute an implicit recognition of the Russian Federation’s sovereignty over Crimea. In practice, access of foreign merchant vessels to the Sea of Azov would likely be hampered even more as compared to the situation so far, leading to further complications for international shipping and the development of the coastal regions of the Sea of Azov.

91 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, A/56/10, Art 41.

92 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, paras. 99, 144.

The significance of geopolitical considerations, particularly the policy of non-recognition, to the passage regime in the Kerch Strait somewhat resembles the situation in the Sea of Straits in the Estonian Western Archipelago.⁹³ Under its domestic legislation, Estonia does not recognize the right of transit passage (nor fully, the right of innocent passage) to the Sea of Straits, notwithstanding that the Sea of Straits connects the EEZs between the Gulf of Finland and the Baltic Sea proper with the Latvian EEZ in the Gulf of Riga. Third States, including neighbouring States Finland and Latvia, recognize the Estonian restrictive passage regime in the Sea of Straits. Similar to the legal framework applicable to the Kerch Strait, the legal basis for such State practice can be found in Article 35(a) of LOSC, since the Sea of Straits can be considered among such internal waters recognized prior to the establishment of straight baselines by Estonia after its restoration of independence in 1991. Yet the Article 35(a)-exception is applicable to the Sea of Straits only if one recognizes Estonia as a continuous State. This is because Estonia established its internal waters in accordance with the 1938 Nordic Rules of Neutrality under Section 2(3) of its 1938 Neutrality Act pursuant to which the whole maritime area of the Sea of Straits was considered as internal waters.⁹⁴ A State which does not recognize Estonia's State continuity, could, in principle, claim that it is not bound with the exception stipulated in Article 35(a) of LOSC and thus retain its right of transit passage for crossing the Sea of Straits.⁹⁵

Similarly, should the Arbitral Tribunal find that the current *sui generis* regime no longer applies to the Kerch Strait and it is replaced instead with the regime of transit passage, then the Russian Federation's approach to the applicable passage regime in the Kerch Strait could potentially be diametrically opposed to the approach of those States and entities that pursue a policy of non-recognition towards the occupation and annexation of Crimea, including

93 The obligation of non-recognition was used by, *inter alia*, the United States and numerous European States in response to the unlawful occupation and annexation of the Baltic States by the Soviet Union. Strict non-recognition policy was consistently used, e.g., by Belgium, Spain, Germany, Portugal, Ireland and Vatican. See S Talmon, *Recognition of Governments in International Law* (Clarendon Press, Oxford, 1998), 103.

94 See Lott, *op. cit.*, 207–223.

95 In such hypothetical case, the right of transit passage would nonetheless be inapplicable as it would be replaced, pursuant to the Messina exception, with the regime of non-suspendable innocent passage, as provided in Articles 38(1) and 45(1)(a) in combination with Article 45(2) of LOSC. This right could be considered applicable to the ships of other protesting States, including the United Kingdom and Germany, as they submitted protests against some of the sections of the Estonian Waterways Act and the Neutrality Act of 1938, just as they did with other Nordic States that adopted the uniform neutrality acts of 1938. See further Lott, *op. cit.*, 223–228.

Ukraine, the EU and the United States. The Russian Federation could consider the strait as a non-international strait subject to the exception of Article 35(a) of LOSC, whereas the policy of non-recognition implies that most States would rather consider the Kerch Strait as an international strait subject to the right of transit passage.

From the perspective of the majority of States, the maritime area in the Kerch Strait is generally not considered as comprising entirely the Russian Federation's internal waters. Instead, the policy of non-recognition entails that most States regard the western part of the Kerch Strait as comprising Ukrainian internal waters. Therefore, if the Arbitral Tribunal respects Ukraine's request and finds that the Sea of Azov and the Kerch Strait include Ukraine's normal maritime zones, then any unilateral declaration of the Kerch Strait as a non-international strait by the Russian Federation after the establishment of a system of straight baselines around the Crimean and Taman peninsulas would fail to meet the conditions of Article 35(a) of LOSC primarily owing to the lack of recognition by the international community.

Based on a systemic interpretation of LOSC, the potential for the categorization of the Kerch Strait as a non-international strait is summarized in the table below (see Table 2). The table also debates the perceived positions of the Russian Federation and Ukraine in relation to the legal categorization of the Kerch Strait as a non-international strait.

4.7 Parallel Legal Regimes vs *Sui Generis* Regime of the Kerch Strait

The legal regime of the Kerch Strait continues to be determined by such factors as the outer limits of maritime zones of the Russian Federation and Ukraine, their bilateral treaties, as well as their domestic law on internal waters and baselines. In addition, the key determinant lies in geopolitical factors, particularly the obligation of non-recognition.

These primary determinants enable States to approach the legal regime applicable to the Kerch Strait from diametrically opposing perspectives, possibly even after the final award of the Annex VII Arbitral Tribunal. In the *Coastal State Rights Case*, Ukraine has alleged that the regime of transit passage is applicable to the Kerch Strait, whereas the Russian Federation rejects this claim and, instead, finds that the passage regime is governed by the 2003 Kerch Treaty. Should the Annex VII Arbitral Tribunal decide that the Sea of Azov constitutes a historic bay, which comprises internal waters as stipulated in the 2003 bilateral treaties concluded between Ukraine and the Russian Federation, then one option for Ukraine would be to terminate the 2003 bilateral treaties

TABLE 2 Potential classification of the Kerch Strait as a non-international strait and the perceived positions of the Russian Federation and Ukraine

Kerch Strait's classification as a non-international strait	The Russian Federation's perceived position	Ukraine's perceived position
<i>Long-standing internal waters exception (Art 35(a))</i>	Potentially affirmative based on the restrictive reading of Art 35(a): entitled to enclose the strait with its straight baselines; stressing that the Kerch Strait has previously comprised entirely internal waters based on the 2003 bilateral treaties that have been respected also by third States.	Rejective based on the liberal reading of Art 35(a) which merely clarifies that Part III of LOSC affects areas of internal waters in an international strait to the effect that the otherwise applicable passage regime of innocent passage would be replaced with that of transit passage if the strait meets the conditions of Art 37.
<i>Not used for international navigation</i>	N/A: the strait is frequently used by foreign ships.	N/A: the strait is frequently used by foreign ships.

and establishing normal maritime zones in the Sea of Azov. The transit passage regime would then be applicable to the Kerch Strait as it would connect Ukrainian EEZ in the Sea of Azov with EEZs in the Black Sea.

To counter this or in a situation where the Annex VII Arbitral Tribunal favours Ukraine's claim on the applicability of the regime of transit passage to the Kerch Strait, the Russian Federation could enclose the Kerch Strait with its system of straight baselines and declare that the Kerch Strait is a non-international strait. Consequently, the maritime area of the Kerch Strait would form internal waters which had been previously considered as such, based on the historic bay concept, provided that the Russian Federation substantiates this claim with a solid legal basis pursuant to Article 35(a) of LOSC. For example, the Russian Federation could cite Article 1 of the 2003 Kerch Treaty and

Article 5 of the State Border Treaty, which stipulate that the status of the Kerch Strait is internal waters, and refer to the fact that these treaties have remained in force and the passage regime stipulated therein has been thus far, largely respected by other States. Hence, the Russian Federation would potentially be able to exclude the right of transit passage in the Kerch Strait in accordance with a restrictive interpretation of Articles 35(a) and 8(2) of LOSC.

This would certainly conflict with Ukraine's approach to the applicable law and that of States that do not recognize the Russian Federation's alleged sovereignty over Crimea. They could adopt a diametrically opposing interpretation of Article 35(a) of LOSC, arguing that it serves merely to clarify that Part III of LOSC affects areas of internal waters in the Kerch Strait to the extent that the otherwise applicable passage regime in internal waters is replaced with that of transit passage. States that follow the obligation of non-recognition in respect of the annexation and occupation of Crimea could also claim that even if one adopts the restrictive reading of Article 35(a) of LOSC, then its conditions are not met in relation to the Kerch Strait as most States do not recognize the Russian Federation's sovereignty over the internal waters of the western part of the Kerch Strait.

Therefore, the previously mentioned determinants of the legal regime of the Kerch Strait create further instability regarding the Kerch Strait's passage regime, exacerbated by the possible exercise of coastal State unilateral discretion even after the arbitral proceedings. In this context, navigation through the Kerch Strait and its adjoining maritime areas might potentially be subject to parallel passage regimes. Based on the previous analysis, the table below debates the asserted positions of the Russian Federation and Ukraine in relation to the legal categorization of the Kerch Strait as an international strait (see Table 3).

Nonetheless, the determinants of the legal regime of the Kerch Strait also provide a broad set of means for Ukraine and the Russian Federation to reach a compromise on the applicable passage regime. In particular, the 2003 Kerch Treaty establishes a passage regime which is compatible with LOSC in terms of Article 31(2) of the Convention if the Annex VII Arbitral Tribunal upholds the Russian Federation's claim that the Sea of Azov constitutes a historic bay. In this situation, the 2003 Kerch Treaty stipulates a more liberal passage regime as compared to the one which would otherwise be applicable to the Kerch Strait under LOSC. Under Articles 8(2) and 35(a) of LOSC, foreign commercial ships would not be entitled to enter the waters forming the historic bay without the coastal State's prior permission, whereas Article 2(2) of the 2003 Kerch Treaty stipulates that commercial ships flying the flags of third States may enter the Sea of Azov and pass through the Kerch Strait if they are going to or returning from a Russian or Ukrainian port (notably, for entering the port,

TABLE 3 Potential classification of the Kerch Strait as an international strait: the asserted positions of the Russian Federation and Ukraine

Kerch Strait's classification as an international strait	The Russian Federation's perceived position	Ukraine's perceived position
Strait links two parts of an EEZ or the high seas (Art 37)	Rejective: transit passage is not applicable in the Kerch Strait; the Sea of Azov forms a historic bay.	Affirmative: transit passage applies in the Kerch Strait; the Sea of Azov is no longer a historic bay.
Strait connects an EEZ or the high seas with the territorial sea of a foreign State (Art 45(1)(b))	Rejective: foreign warships cannot enjoy the right of non-suspendable innocent passage.	Rejective: the Kerch Strait connects two EEZs (Art 37); Ukraine is a strait State, not a foreign State; Ukraine rejects non-suspendable innocent passage.
Strait includes an EEZ or high seas corridor (Art 36) ^a	Rejective: freedom of navigation and overflight are not applicable in the Kerch Strait; the Sea of Azov forms a historic bay.	Potentially affirmative: freedom of navigation and overflight could be applicable in the Kerch Strait; the Sea of Azov is no longer a historic bay.
<i>Sui generis</i> strait (Art 311(2))	Affirmative: the Kerch Strait is regulated by the 2003 Kerch Treaty which is compatible with the LOSC.	Potentially affirmative: Ukraine has not terminated the 2003 Kerch Treaty which stipulates the passage regime.

a Technically, it is possible for the Russian Federation to stipulate under its domestic legal acts that there are no/only marginal belts of territorial sea or internal waters in the Kerch Strait (which has a minimal width of approx. 3 NM), thereby creating a narrow EEZ/high seas corridor in the strait.

ships may eventually still be required to seek a clearance). Thus, the Kerch Strait currently can be categorized as a *sui generis* strait in terms of Article 311(2) of LOSC.

This shows potential for reaching a compromise between the otherwise conflicting claims of the Sea of Azov coastal States over the legal classification of the Kerch Strait. The *sui generis* regime could allow, similarly to the passage regime under the 2003 Kerch Treaty, unimpeded passage of all commercial ships, freedom of navigation for all Ukrainian and Russian ships, but significant restrictions on the passage of foreign warships and other non-commercial ships in the Sea of Azov and the Kerch Strait. This *sui generis* regime has not raised any objections prior to the measures taken in recent years by the Russian Federation, which hampered the passage of commercial ships and Ukrainian naval vessels through the Kerch Strait. Moreover, Ukraine has not terminated nor suspended, in whole or in part, the 2003 Kerch Treaty.

Should the parties to the dispute not reach a compromise, then a final award of the Annex VII Arbitral Tribunal that upholds either Ukraine's or the Russian Federation's claims could potentially lead to the application of parallel legal regimes of transit passage and permit-based passage to the Kerch Strait, causing increased legal uncertainty for international shipping. Such instability regarding the applicable passage regime could also constitute a fertile ground for any potential future conflict between Ukraine and the Russian Federation and likely hinder the economic development of the Sea of Azov region.

Reaching a compromise solution on the applicable passage regime in the Kerch Strait would not necessarily require new treaty negotiations between the parties to the dispute. It follows, from the discussion above, that the law of the sea and general international law is already clearly able to reconcile the conflicting interests of the coastal States and to ensure the rule of law and legal certainty in the shipping routes of the Sea of Azov. Therefore, it is rather a matter of *pacta sunt servanda* that the rights and freedoms stipulated in the 2003 Kerch Treaty are guaranteed by its States parties towards each other and third States.

So far, the Kerch Strait incident was assessed from a peacetime legal perspective. However, it is also possible that the Kerch Strait incident occurred within the frames of an armed conflict between the two States.

4.8 The Kerch Strait as a Belligerent Strait

4.8.1 *Was the Kerch Strait a Belligerent Strait in 2018?*

Ukraine initially claimed that the seizure of its warships *Berdyansk* and *Nikopol* and the naval tugboat *Yani Kapu* in the approaches of the Kerch Strait and detention of the crew not only violated LOSC, which grants immunity to warships and members of their crews, but also the Third Geneva Convention relative to

the Treatment of Prisoners of War (1949).⁹⁶ Ukraine explicitly referred to the crew as prisoners of war.⁹⁷ On 29 November 2018, Ukraine alerted the Annex VII Arbitral Tribunal of the Kerch Strait incident, noting that “Russia’s latest actions, including firing and seizure of Ukrainian naval vessels, mark a serious escalation of a months’-long pattern, in which vessels flagged both to Ukraine and to third states have repeatedly faced obstacles to navigation”.⁹⁸

In that context, it is possible to approach the Kerch Strait incident from the perspective of *jus in bello*. James Kraska has argued that the legal framework of humanitarian law applies to the Kerch Strait incident rather than LOSC, since Ukraine and the Russian Federation are engaged in an international armed conflict.⁹⁹ Indeed, it is possible to approach the Ukraine-Russia relations in the past decade from the perspective of a prolonged international armed conflict that started with the occupation and annexation of Crimea and war in East Ukraine and that continues to date in the light of, for example, repeated clashes in East Ukraine and the Russian Federation’s invasion of Ukraine in 2022.¹⁰⁰ Reportedly, from 2014 to 2021, over 5000 members of the armed forces and civilians died or were injured in the Donbas region.¹⁰¹ It is estimated that the Russian invasion of Ukraine in 2022 has caused many thousands of fatalities among belligerent fighters and civilians.¹⁰²

96 Annex to the letter dated 18 April 2019 from the Permanent Representative of Ukraine to the United Nations, UN Doc A/73/844-S/2019/334, 23 April 2019, available <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

97 Annex to the letter dated 10 December 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc A/73/659-S/2018/1112, 14 December 2018, available <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

98 Annex to the letter dated 29 November 2018 from the Permanent Representative of Ukraine to the United Nations, UN Doc A/73/619-S/2018/1079, 5 December 2018, available <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; accessed 5 April 2021.

99 J Kraska, ‘The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?’ 3 December 2018, *EJIL: Talk!*, available <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/comment-page-1/>; accessed 5 April 2021.

100 See, e.g., S Harris, P Sonne, ‘Russia planning massive military offensive against Ukraine involving 175,000 troops, U.S. intelligence warns’, *The Washington Post* (3 December 2021). H Cooper, E Schmitt, ‘Biden Weighs Deploying Thousands of Troops to Eastern Europe and Baltics’, *The New York Times* (23 January 2022).

101 Anonymous, ‘Ukraine: AOV’s data on harm to civilians by explosive weapons’, *Action on Armed Violence* (1 March 2022).

102 S Nebehay, ‘Civilian death toll in Ukraine now 474 but more casualties reported -U.N.’, *Reuters* (8 March 2022). K Korobtsova, L King, ‘Putin vs. the web: Russia tries to hide casualties and searing war images’, *Los Angeles Times* (4 March 2022).

Albeit at the time of the Kerch Strait incident in November 2018 there had not been any significant hostilities between the Ukrainian and Russian forces in or near the Crimean Peninsula for four years, the hostilities in the Donbas Region in eastern Ukraine had not ceased and continue to date. The ICTY has concluded that:

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there. ... Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close.¹⁰³

By the time of the Kerch Strait incident, Ukraine and the Russian Federation had not concluded peace in relation to the international armed conflict that commenced in February 2014 with the occupation of Crimea by the Russian Federation and continued with the Russian Federation's direct support to the separatist forces in East Ukraine. Furthermore, in a letter to the UN, Ukraine claimed that the Russian Federation's actions in the Kerch Strait incident "constitute an act of armed aggression ... undermining the peaceful settlement of the Ukrainian-Russian armed conflict".¹⁰⁴

Yet, notably, in the arbitration proceedings in *the Coastal State Rights Case*, neither Ukraine nor the Russian Federation have referred to the Kerch Strait incident as being governed by the rules of naval warfare. They debate whether the occupation of the Crimean Peninsula in 2014 constitutes use of force.¹⁰⁵

103 ICTY, *Prosecutor v Tadić*, Decision of 2 October 1995, *op. cit.*, para 70.

104 Annex to the letter of 10 December 2018 from Ukraine to the UN, *op. cit.* As a reaction to the Kerch Strait incident, the United States carried out a freedom of navigation operation in the Peter the Great Gulf in the Russian maritime area of the Sea of Japan and, in support of Ukraine, sent a United States warship to the Black Sea. See J Johnson, 'U.S. warship conducts Sea of Japan operation in challenge to Russia's 'excessive maritime claims'', *The Japan Times* (6 December 2018). HL Smith, 'US sends warship into Ukraine's Black Sea crisis', *The Times* (6 December 2018).

105 *Dispute Concerning Coastal State Rights*, 2020 Award on Preliminary Objections, *op. cit.*, paras. 6, 49, 79, 305, 310, 328.

The Kerch Strait incident of 2018 has not been brought to the attention of the Arbitral Tribunal by Ukraine as a clear example of an alleged use of force, but rather, the Ukrainian claims are based on the impediments imposed by the Russian Federation on the passage of ships in the Kerch Strait and the Sea of Azov.¹⁰⁶ It was also the view of the Arbitral Tribunal in response to the Russian Federation's preliminary objections that "the fact that some of the Ukrainian vessels whose navigation was impeded belonged to Ukraine's navy does not cause the dispute to concern military activities."¹⁰⁷ However, this decision does not necessarily preclude the Arbitral Tribunal from reaching a different conclusion in *the Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen*, the object of which is specifically the Kerch Strait incident of 25 November 2018.

With the Kerch Strait incident serving as a primary reference point, Chapter 5 of this part of the book focuses on the legal aspects of hybrid naval warfare from the perspective of *jus ad bellum*, *jus in bello*, law enforcement measures, and the laws of State responsibility.

4.8.2 *The Kerch Strait as a Belligerent Strait in 2022: Russia's Blockade of the Sea of Azov*

On 24 February 2022, the Russian Federation launched an invasion of Ukraine. The UN General Assembly adopted on 2 March 2022 the resolution "Aggression against Ukraine" (141 States voted in favor, 5 States against) condemning the Russian aggression in violation of article 2(4) of the Charter and demanding the full withdrawal of Russian forces from Ukraine.¹⁰⁸ Two days after the launch of the invasion, Ukraine instituted proceedings against the Russian Federation at the ICJ and requested the Court to "[a]djudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide".¹⁰⁹ The ICJ stressed in its order of 16 March 2022 on Ukraine's request for the indication of provisional measures that:

The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international

106 Ibid., paras. 250, 311.

107 Ibid., para 338.

108 General Assembly Resolution ES-11/1, adopted 2 March 2022.

109 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, ICJ, Order of 16 March 2022, paras. 1–2.

law. ... It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law.¹¹⁰

The ICJ issued almost unanimously the following provisional measures:

The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine; The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations...; Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.¹¹¹

However, the Russian Federation continued its invasion of Ukraine contrary to the ICJ's order. In two weeks after the launch of the invasion, approximately two and a half million Ukrainian refugees were forced to relocate mostly to European Union Member States.¹¹² At the same time, hundreds of thousands Ukrainian civilians did not have a possibility to evacuate from besieged cities of eastern Ukraine. According to media reports, the worst humanitarian situation was found in the port city of Mariupol that has a strategic location on the coast of the Sea of Azov separating the Russian-annexed Crimean Peninsula from the Russian-controlled breakaway regions of Donetsk and Luhansk.

Mariupol's population of over 400 000 was subject to constant shelling that caused a humanitarian crisis.¹¹³ According to the International Committee of the Red Cross (hereafter ICRC) spokesperson, the situation in Mariupol in March 2022 was 'apocalyptic'.¹¹⁴ Civilians of Mariupol were cut off from heat while suffering from freezing temperatures, and they were deprived from water, electricity, medical, and food supplies. In this context, this subchapter

110 Ibid, para 18.

111 Ibid, para 86.

112 The UN Refugee Agency, 'Refugees fleeing Ukraine (since 24 February 2022)', available: <https://data2.unhcr.org/en/situations/ukraine>; accessed 11 March 2022.

113 J Gunter, 'Mariupol under siege: 'We are being completely cut off'', *BBC News* (3 March 2022).

114 M Francis, 'Aid workers describe 'apocalyptic' scenes in Mariupol, a Ukrainian city under siege', *Yahoo News* (9 March 2022).

debates Russia's blockade of the Sea of Azov and the obligation to allow free passage of foodstuffs and other essential supplies to a blockaded port.

It is a matter of debate whether Russia's suspension of shipping in the Sea of Azov amounted to a blockade. Blockade is a legal concept which, according to Wolff Heintschel von Heinegg, has been unjustly deemed by some scholars to be obsolete.¹¹⁵ During the negotiations of the San Remo Manual, there reportedly was an "extensive discussion on the issue of whether the practice of blockade was, on the one hand, entirely archaic or, on the other, remained a viable method of naval warfare".¹¹⁶

The Russian invasion of Ukraine showed that the laws of blockade are still relevant today. In the wake of its invasion of Ukraine, at 4am of 24 February 2022, the Russian Federation suspended commercial navigation in the Sea of Azov until further notice.¹¹⁷ Under Article 2(3) of the 2003 Kerch Treaty, the access of neutral States' warships and other State vessels operated for non-commercial purposes to the Sea of Azov was closed during the war as it was dependent on Russia's and Ukraine's mutual prior permission. The Russian Federation also controlled the airspace above the Sea of Azov that, according to the 2003 Kerch Treaty, are the internal waters of the Russian Federation and Ukraine (Art 1(1)). Belligerents' government ships and warships, as well as merchant vessels flying their flag provided that they meet certain conditions,¹¹⁸ serve as military objectives under the rules of naval warfare. Thus, they can be attacked by force.

In effect, it appears that since 24 February 2022 the Russian Federation implemented a blockade against the Ukrainian cities Berdyansk and Mariupol that are located on the coast of the Sea of Azov. Blockade is left undefined in positive law (see, e.g., Art 42 of the UN Charter, Art 3(c) of the General Assembly Resolution 3314 *Definition of Aggression*).¹¹⁹ The Commander's Handbook on the Law of Naval Operations defines blockade as "a belligerent operation to prevent vessels and/or aircraft of all States, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas

115 W Heintschel von Heinegg, 'Naval Blockade' (2000) 75 *International Law Studies*, 213.

116 'Methods and means of warfare at sea', in L Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press, Cambridge, 1995), 176.

117 Anonymous, 'Russia confirms suspension of movement of commercial vessels in the Azov sea – Interfax', *Reuters* (24 February 2022).

118 San Remo Manual, *op. cit.*, Rules 41, 59–60.

119 General Assembly Resolution 29/3314, adopted 14 December 1974, Annex 'Definition of Aggression'.

belonging to, occupied by, or under the control of an enemy State.”¹²⁰ A blockade does not have to cover the whole coastline of a belligerent State and may cover just some part of it.¹²¹

A valid blockade must be declared and notified to all belligerents (Rule 93 of the San Remo Manual). It is unclear to what extent Russia’s announcement of the suspension of commercial shipping in the Sea of Azov can be seen as a declaration of a blockade. Frostad comments that: “No specific form is needed for the notification of a blockade. What is important, however, is the effectiveness of the notification ... Traditionally, notification often took the form of diplomatic notes, but the issuing of Notices to Airmen or Notices to Mariners will suffice today.”¹²² The suspension of commercial navigation in the Sea of Azov was ordered by the Russian Ministry of Defence and announced by the Federal Agency for Maritime and River Transport.¹²³

The Russian Federation did not *expressis verbis* announce a blockade of the Sea of Azov.¹²⁴ But, arguably, this formality is not decisive for the legal classification of Russia’s announcement. During the negotiations of the San Remo Manual, it was held that the rules of naval blockade “were applicable to blockading actions taken by States regardless of the name given to such actions.”¹²⁵

One might even raise the question if the requirement that a State needs to declare a blockade for it to be legally binding still serves as a *conditio sine qua non* in the context of contemporary armed conflicts. The issuance of a declaration of war lost long ago its significance for the determination of the existence of an international armed conflict. If an aggressor State denies that it has waged a war against another State and brands its aggression as, e.g., “military

120 *The Commander’s Handbook on the Law of Naval Operations* (US Navy, US Marine Corps, US Coast Guard, Norfolk, 2017), 7–10.

121 M Frostad, ‘Naval Blockade’ (2018) 9 *Arctic Review on Law and Politics*, 203.

122 *Ibid.*, 202.

123 Anonymous, ‘Rosmorrechflot confirms suspended navigation in Sea of Azov’, *Interfax* (24 February 2022).

124 The question is even more complex in the general context of Russia’s blockade of the Black Sea outside the Sea of Azov basin. There appear to be no announcements by which the Russian Federation had declared a general blockade of Ukraine’s coast in the Black Sea. Yet as noted by, for example, the British Ministry of Defence, Russia as a matter of fact has established a distant blockade of Ukraine’s whole Black Sea coast. Russia’s declaration of 10 February 2022 of naval exercises in the Black Sea is likely the closest to a declaration of blockade of Ukraine’s coast in the Black Sea, but it is certainly unclear if it amounts to an actual declaration of belligerent blockade in law. See Anonymous, ‘Российские военные проведут учения с корабельными группами в Черном море’, *Interfax* (10 February 2022).

125 Doswald-Beck, *op. cit.*, 177. See also Frostad, *op. cit.*, 200.

exercises” or a “special military operation”, then such State will also likely deny the existence of naval warfare and intentionally avoids issuing a declaration of a naval blockade. Pursuant to the *bona fide* interpretation of the laws of war, such manipulations with the law by an aggressor State should not prevent the objective determination of the existence of a blockade in law. A so-called “unofficial blockade” does not serve the interests of the victim State, nor legal certainty in respect of the laws of naval warfare in general.

In the case of the Russian Federation’s aggression against Ukraine, a clear declaration of blockade would have been somewhat incompatible with Russia’s official position that it is not in a war with Ukraine and instead has launched a so-called “special military operation”.¹²⁶ In this context, a strict interpretation of the requirements of declaration and notification for determining the existence of a naval blockade in law appears to favour the phenomenon of hybrid naval warfare. Instead, as the law has adapted to the reality of undeclared wars by determining the existence of an armed conflict based on the objective facts, the same approach should be adopted for determining the existence of a naval blockade. It would be useless to wait for the aggressor State to declare a blockade when it clearly has no intention to do so, but still harasses and attacks neutral international navigation in the relevant maritime area.

Pursuant to Rule 95 of the San Remo Manual a blockade must be effective and this is a question of fact. The blockade of the Sea of Azov was effective as the Russian Federation exerts complete control over the Kerch Strait. According to data received from ships’ automatic identification system,¹²⁷ the access of commercial ships to the Sea of Azov was blocked in the Kerch Strait and a significant number of merchant ships remained anchored either in the Kerch Strait or at its approaches. In March and April 2022, the present author did not notice any crossings of the Sea of Azov by commercial ships based on the data received from ships’ automatic identification system.¹²⁸

According to Article 2 of the 1909 London Declaration¹²⁹ concerning the Laws of Naval War, the effectiveness of a blockade means that it must be maintained by a force sufficient to prevent access to the enemy coastline. The Russian Federation fulfilled that requirement in respect of the Ukrainian coastline since the start of the hostilities on 24 February 2022. Still, Martin Fink has

126 See ‘Full text: Putin’s declaration of war on Ukraine’, *op. cit.*

127 Marine Traffic, ‘Sea of Azov’, available <https://www.marinetraffic.com/en/ais/home/centerx:37.7/centery:45.7/zoom:8>; accessed 11 March 2022, 1 April 2022, 21 April 2022, and 27 April 2022. Screenshots are on file with the author.

128 *Ibid.* The present manuscript was sent for production in the end of April 2022.

129 Declaration concerning the Laws of Naval War, London, adopted 26 February 1909.

concluded that: “[A]lthough different factors have effectively minimized maritime traffic into and from the Ukrainian ports in the Sea of Azov, Russia has not established a naval blockade in the Sea of Azov ... Apart from an unspecified announcement of suspension, nothing more indicates that Russia has established a blockade that might give Russian naval and air forces enforcement powers against merchant vessels.”¹³⁰ In support of this argument, Fink refers to the press announcement of the Russian Federal Agency for Maritime and River Transport of 24 February 2022, according to which: “Navigation in the Kerch Strait can take place; it was not suspended; however, traffic is minimal there because vessels have nowhere to go after navigation in the Sea of Azov was temporary suspended.”¹³¹ Yet the announcement made it explicitly clear that the Russian Federation only permits the marginal cross-strait navigation between the Kerch Strait’s two coasts on Crimea and the Russian mainland coast.¹³² Thus, that announcement did not concern passage between the Sea of Azov and the Black Sea.

In addition, even if the Russian Federation allowed some commercial ships to leave – but not to enter – the Sea of Azov in the end of February 2022, as claimed by some reports,¹³³ then it did not have a real impact on the overall effectiveness of the blockade against the Ukrainian coast on the Sea of Azov that lasted for months. Moreover, it is a standard practice that upon the commencement of a blockade, the blockading force provides a period of grace for neutral ships to leave the blockaded area.¹³⁴

Furthermore, in case the Russian Federation, hypothetically, allowed some ships to enter or leave its ports in the Sea of Azov and navigate through the Kerch Strait, then this does not render the blockade against Ukraine’s coast on the Sea of Azov ineffective. It is doubtful that any ships from the Ukrainian ports of Berdyansk or Mariupol were allowed to leave the Sea of Azov as the war progressed, but even if such exceptional instances occurred, then it would not render the blockade ineffective. Article 7 of the 1909 London Declaration stipulates that: “In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and

130 M Fink, ‘Ukraine Symposium – The War at Sea: Is there a Naval Blockade in the Sea of Azov?’, *Articles of War* of Lieber Institute, West Point (24 March 2022).

131 Anonymous, ‘Navigation in Kerch Strait not suspended - Russian agency’, *Interfax* (24 February 2022).

132 Ibid.

133 M Juliano, ‘Bulkers Cluster Off Bosphorus And Kerch Straits Amid Russia-Ukraine Conflict’, *TradeWinds* (1 March 2022). J Wallace, ‘Ukraine / Russia - Port update’, *Standard Club* (25 February 2022).

134 See Art 16 of the 1909 London Declaration. Heintschel von Heinegg 2000, *op. cit.*, 209.

subsequently leave it, provided that she has neither discharged nor shipped any cargo there.” Furthermore, Frostad has commented that:

In the San Remo Manual, reference is made to a reasonable risk of effectively preventing ingress and egress of the blockaded coastline, and the main issue is always whether there is a real risk of being captured, but not destroyed, if one seeks to break the blockade. As a consequence, the occasional breach of a blockade does not prove that the blockade is ineffective, although it may be hard to identify when the number of breaches is sufficient to lift the blockade.¹³⁵

One should not avoid calling Russia’s blockade of Ukraine’s coast in the Sea of Azov by its name in fear of acknowledging the blockading party’s rights under the laws of blockade to capture and, where necessary, ultimately attack ships that breach the blockade. When enforcing its blockade against Ukraine’s coast, the Russian Navy reportedly launched numerous attacks against neutral merchant ships without issuing a prior warning, as examined below.

Therefore, pursuant to a *bona fide* interpretation of the law, Russia’s practice in the Sea of Azov following its declaration of 24 February 2022 appears to meet the main requirements of naval blockade (declaration, notification, impartiality and effectiveness). Rule 100 of the San Remo Manual stipulates that a blockade must be applied impartially to the vessels of all States. At the same time, the Russian Federation as the blockading party was obliged to provide for free passage of foodstuffs and other essential supplies to the Mariupol Port, including ‘medical supplies for the civilian population or for the wounded and sick members of armed forces’, since sufficient help did not reach Mariupol via land (see San Remo Manual, Rules 103–104). This obligation has particular significance at a time when the fighting in Mariupol stopped humanitarian convoys to reach the city.¹³⁶ The humanitarian corridors leading to other areas of Russian-controlled parts of Ukraine were ineffective as they were targeted, even on the agreed day-long ceasefire on 9 March, by the Russian artillery and were full of land mines.¹³⁷

135 Frostad, *op. cit.*, 206.

136 A Prentice, ‘Aid convoy to Ukraine’s Mariupol turns back due to fighting - deputy PM’, *Reuters* (10 March 2022).

137 Anonymous, ‘Ukraine: Safe passage for civilians from Mariupol halted for a second day; ICRC calls on parties to agree to specific terms’, *ICRC* (6 March 2022). L Harding, J Borger,

It is also possible that the blockade in the whole maritime area of the Sea of Azov is in general unlawful under the laws of naval warfare. Ukraine maintains in the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait that the regime of transit passage applies to the Kerch Strait (see *supra* Chapter 4.3 of Part 2). If correct (this claim is disputed by the Russian Federation, see *supra* Chapters 4.5–4.7 of Part 2), then according to Rule 27 of the San Remo Manual the regime of transit passage continued to apply during the war and the Russian Federation was required to ensure safe passage through the Kerch Strait to neutral ships and aircraft not heading to the blockaded area.¹³⁸ This follows from the ICJ's judgment in the *Corfu Channel case* as well as from the San Remo Manual (Rules 27–28).¹³⁹ In this case, Russia's suspension of all commercial navigation in the Sea of Azov from 24 February 2022 was not lawful. Notably, the Annex VII Arbitral Tribunal is yet to decide whether it respects Ukraine's above-referred request to establish that the Sea of Azov and the Kerch Strait include Ukraine's normal maritime zones, which would imply that the regime of transit passage applies to the Kerch Strait (Art 37 of LOSC).

Irrespective of the outcome of Ukraine's request to the Arbitral Tribunal, the Russian Federation was required to respect the right of the civilians and armed forces in Mariupol to receive foodstuffs and other essential supplies, including medical supplies, via a sea route. After its extraordinary session on 10–11 March 2022, the IMO Council 'underscored the need to preserve the security of international shipping and the maritime community, and the supply chains that sustain other nations, as well as supply chains providing necessary food and medicines to the people of Ukraine' and 'encourage[d] the establishment, as a provisional and urgent measure, of a blue safe maritime corridor to allow the safe evacuation of seafarers and ships from the high-risk and affected areas in the Black Sea and the Sea of Azov to a safe place in order to protect the life of seafarers, ensure the mobilization and commercial navigation of vessels intending to use this corridor by avoiding military attacks and protecting and securing the maritime domain.'¹⁴⁰ The ICRC and neutral States could have facilitated the deployment of such relief shipments for the Mariupol Port. Such a mission could have been launched also from the Mediterranean as ships carrying humanitarian

J Henley, 'Russian bombing of maternity hospital 'genocide', says Zelenskiy', *The Guardian* (9 March 2022).

138 Heintschel von Heinegg 1998, *op. cit.*, 265–266. Frostad, *op. cit.*, 203.

139 The Corfu Channel Case, *op. cit.*, 29.

140 Decisions of the International Maritime Organization (IMO) Council, Extraordinary session 10–11 March 2022, C/ES.35, para 8, 'Blue Safe Maritime Corridor'.

aid to Mariupol were allowed to pass through the Turkish Straits which were closed under the Montreux Convention only to belligerent warships (see *infra* Chapter 4.8.3 of Part 2).

While the humanitarian corridors around the besieged coastal city of Mariupol proved ineffective, establishing one on the sea would have potentially enabled to provide humanitarian relief to its civilian population and members of the Ukrainian armed forces. Yet this would have caused direct risks to ships carrying humanitarian aid. To minimize the risks to neutral ships carrying humanitarian relief to the Port of Mariupol, it would have been possible to first seek guarantees from the Russian Federation that it grants protection to ships carrying humanitarian cargo to the Port of Mariupol. The importance of seeking such an assurance is underlined by the fact that, in February and March 2022, numerous attacks targeted neutral merchant ships in the western part of the Black Sea. According to media reports, on 1 March 2022, the Russian Navy seized in the Odesa Port a Panama-flagged 80-metres long cargo ship *Helt* that was owned by an Estonian company.¹⁴¹ The Russian Navy reportedly forced the ship to enter a dangerous zone off Odesa Port and used it as a sort of human shield to cover the movement of its warships off Odesa.¹⁴² *Helt* sunk on 3 March 2022 after an explosion had caused damage below the ship's water-line, approximately 16 NM off Odesa Port, while its six members of the crew were rescued.¹⁴³

There were no grounds to assume that *Helt* had made an effective contribution to Ukraine's military action in terms of Rule 67 of the San Remo Manual and as a consequence of which it could have lost its status as a neutral merchant ship giving rise to the Russian Navy's right to attack and seize it on 1 March 2022 and deploy it for advancing its military objectives off Odesa. After seizing the neutral ship against the laws of neutrality and prize, the Russian Navy used *Helt* in a manner that stripped it from its status as a neutral merchant ship, since it made an effective contribution to the Russian Navy's military action by way

141 Anonymous, 'Estonian-owned cargo ship sinks off Odesa after Russian action', *ERR News* (3 March 2022). K Kivil, 'Odessa lähedal läks põhja Eesti firmale kuuluv kaubalaev', *ERR Uudised* (3 March 2022).

142 M Santora, 'What Happened on Day 6 of Russia's Invasion of Ukraine', *The New York Times* (2 March 2022). M Starr, 'Russian navy using civilian ships as human shields, Ukraine claims', *The Jerusalem Post* (3 March 2022).

143 J Saul, 'Cargo ship sinks off Odessa after explosion, crew members missing -ship manager', *Reuters* (3 March 2022). *ERR News, op. cit.*, 3 March 2022. Anonymous, 'Ukraine: Estonian cargo ship sinks after blast in Black Sea', *BBC News* (4 March 2022).

of offering cover to the Russian warships that were expected to launch their amphibious landing operation in Odesa.¹⁴⁴

In addition, during the first days of the Russian invasion of Ukraine, many other neutral merchant ships sailing in the Black Sea were targeted by missile strikes. The first such attack occurred in the evening of 23 February 2022, i.e. a day before Russia's declaration of its invasion of Ukraine.¹⁴⁵ An explosion occurred on-board a Turkish-owned bulk carrier *Yasa Jupiter* sailing under the flag of the Marshall Islands as it was *en route* to Romanian maritime area off Odesa.¹⁴⁶ On 25 February 2022, a Moldova-flagged, but Ukrainian-owned chemical tanker *Millennial Spirit* was shelled off Odesa allegedly by Russian forces and the crew had to abandon the ship equipped only with life jackets.¹⁴⁷ On the same day, a Panama-flagged merchant ship was shelled at Odesa Port.¹⁴⁸ On 2 March 2022, a missile hit a Bangladeshi-flagged bulker ship *Banglar Samriddhi* at Olvia Port in Ukraine leaving one member of the crew dead.¹⁴⁹ According to the above-referred media reports, Ukraine claims that the Russian Federation is responsible for these attacks.¹⁵⁰ The Council of the IMO issued a statement on the situation in the Black Sea and Sea of Azov, according to which it, *inter alia*, 'deplored the attacks of the Russian Federation aimed at commercial vessels, their seizures, including Search-and-Rescue vessels, threatening the safety and welfare of seafarers and the marine environment'.¹⁵¹

The ships that were attacked were flying the flags of Bangladesh, the Marshall Islands, Moldova, and Panama. Whatever the ownership of a commercial ship that is attacked, the right of self-defence rests on the flag of the State with whom the attacks on the commercial ships can be equated.¹⁵² None of those States invoked their right of self-defence under Article 51 of the UN Charter in response to the unlawful use of force that Ukraine alleges was carried out by

144 San Remo Manual, *op. cit.*, Rule 67.

145 Anonymous, 'Full text: Putin's declaration of war on Ukraine', *The Spectator* (24 February 2022).

146 D Bush, 'Turkish bulker hit by bomb off Odessa', *Lloyd's List* (24 February 2022).

147 J Payne, 'Ukraine says two commercial ships hit by Russian missiles near Odessa port', *Reuters* (26 February 2022).

148 *Ibid.*

149 Anonymous, 'Bangladeshi Ship Hit in Attack Near Mykolaiv, Killing One Engineer', *The Maritime Executive* (2 March 2022).

150 *Ibid.* Payne, *op. cit.*

151 IMO Council decisions of 10–11 March 2022, *op. cit.*, para 5.

152 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p. 161, para 64.

the Russian Federation. Had Russian forces, hypothetically, launched attacks against neutral merchant ships carrying humanitarian relief to the Port of Mariupol, then the risk would have existed of a different response.

In the *Oil Platforms Case*, the ICJ did not clearly decide on whether the use of force against a single commercial ship can amount to an armed attack under Article 51 of the UN Charter on the flag State. The ICRC has also left the question somewhat open in relation to whether an armed conflict would come into existence.¹⁵³ Under Article 3(d) of the General Assembly Resolution 3314 *Definition of Aggression*, an act of aggression includes “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State”. How many attacks on a single flag State would suffice, however, is difficult to determine. Yet the ICJ has found that cases of low-intensity use of force against ships can amount to an armed attack when assessed cumulatively.¹⁵⁴

The United States claimed in the *Oil Platforms Case* that Iran’s attack in 1987 against its commercial ship during the Iran-Iraq war amounted to an armed attack,¹⁵⁵ but the ICJ disregarded the United States’ claim based on the lack of evidence of Iran’s responsibility and the conclusion that the missile was not specifically aimed at that particular commercial ship, “but simply programmed to hit some target in Kuwaiti waters.”¹⁵⁶

Distinct from the episodes of attacks against the commercial ships flying either Israeli or Irani flag in the recent Israel-Iran ‘shadow war’ (see *infra* Chapter 6 of Part 2), the attacks against neutral ships in the Black Sea in 2022 did not target systemically any particular State. Furthermore, it is unclear if there is sufficient evidence of Russia’s direct involvement in these attacks and it is equally possible that these attacks were indiscriminate as the missiles were simply aimed to hit some target in the relevant area.¹⁵⁷ The clear exception to this is the attack against the Panama-flagged *Helt* as it was specifically selected for boarding by Russian soldiers and its crew was reportedly forced to follow the orders from the Russian Navy in its naval operations off Odesa.

153 ICRC 2016 commentary, *op. cit.*, on Common Article 2, para 227. ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd edition, 2017, para 249.

154 *Oil Platforms Case*, Judgment, *op. cit.*, para 64.

155 ICJ, *Oil Platforms Case*, Counter-Memorial and Counter-Claim Submitted by the United States of America, 23 June 1997, para 4.10. ICJ, *Oil Platforms Case*, Rejoinder Submitted by the United States of America, 23 March 2001, para 5.22.

156 *Oil Platforms Case*, Judgment, *op. cit.*, para 64.

157 *Ibid.*

If the humanitarian corridor via the Sea of Azov had been created for Mariupol and the Russian forces, hypothetically, had violated the rules of naval warfare and systemically attacked neutral ships carrying humanitarian relief to the Port of Mariupol, there would likely have been increased public pressure for neutral States to intervene militarily in the conflict. This risk could have been mitigated by seeking assurances from the Russian Federation that its forces respect the right to deploy humanitarian relief to the civilians and members of the Ukrainian armed forces in Mariupol in accordance with the rules of blockade to the extent that these rules are applicable in the Sea of Azov.

4.8.3 *The Closure of the Turkish Straits to Warships during the Ukraine War*

In the context of belligerent hostilities in and around the Black Sea during the Russian invasion of Ukraine in 2022, Turkey closed the Istanbul Strait (Bosporus) and the Çanakkale Strait (Dardanelles) to warships. This calls for an examination of the legal basis of the Turkish decision from the perspective of the law of the sea.

Passage through the Turkish Straits is regulated under the 1936 Montreux Convention.¹⁵⁸ In addition to the Danish Straits, Åland Strait, and the Strait of Magellan, the Istanbul Strait (Bosporus) and the Çanakkale Strait (Dardanelles) are generally recognised as falling under Article 35(c) of the LOSC.¹⁵⁹ Article 35(c) stipulates that nothing in Part III of the LOSC on straits used for international navigation affects the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.

The Montreux Convention grants extensive rights for the passage of warships through the Turkish Straits to the coastal States of the Black Sea. The passage of warships from other States not littoral of the Black Sea through the Turkish Straits and their stay in the Black Sea is limited by the number of ships (up to 9 warships at a time), the temporal scope of their stay in the Black Sea (up to 21 days) and their tonnage (aggregate tonnage of up to 45 000 tons).¹⁶⁰

158 Convention regarding the Régime of the Straits, adopted 20 July 1936, entered into force 9 November 1936, 173 LNTS 213. See further on the Montreux Convention, in E Briël, *International Straits. A Treatise on International Law, vol. 11. Straits Comprised by Positive Regulations* (Sweet & Maxwell, London, 1947), 380–424.

159 N Ünli, *The Legal Regime of the Turkish Straits* (Martinus Nijhoff, Dordrecht, 2002), 54. Caminos, Cogliati-Bantz, *op. cit.*, 77. LM Alexander, 'International Straits', in HB Robertson, Jr. (ed), *The Law of Naval Operations* (Naval War College Press, Newport, 1991), 101.

160 See Arts 14(2), 18(1)(b), 18(2) of the Montreux Convention.

In addition, States are required to give a prior notification to Turkey for their warships to enter the Turkish Straits. According to Article 15 of the Montreux Convention, the normal period of notice is eight days, while 'it is desirable that in the case of non-Black Sea Powers this period should be increased to fifteen days.'

In addition, under Article 11 in combination with Annex II to the Montreux Convention, the passage of aircraft carriers through the Turkish Straits is prohibited. This applies irrespective of whether the aircraft carrier flies the flag of the Black Sea coastal State or not. Hence, when France's aircraft carrier *Charles De Gaulle* was tasked to patrol the airspace above and around the Black Sea during the Russian invasion of Ukraine in 2022, it carried out its operations from the Mediterranean.¹⁶¹

Thus, the Montreux Convention in general grants special rights of passage through the Turkish Straits to the warships of the Black Sea coastal States. Nonetheless, their passage is prohibited if they are belligerents in a war in respect of which Turkey acts as a neutral State (Art 19 of the Montreux Convention). According to Article 19 of the Montreux Convention, the exceptions to this rule include 'cases of assistance rendered to a State victim of aggression in virtue of a treaty of mutual assistance binding Turkey' and warships of belligerent States that have become separated from their bases and that may return to their base.

The Russian Federation and Ukraine are in a prolonged international armed conflict. In essence, since February 2014, the Russian Federation has been the aggressor State in a war with Ukraine, the main elements of which are the occupation and annexation of Crimea and the ongoing hostilities in Donbas that erupted in 2014, the Kerch Strait incident in 2018, and the Russian full-scale invasion of Ukraine in 2022. In the wake of the escalation of the armed conflict on 24 February 2022, Ukraine requested Turkey to close the Turkish Straits to Russian warships.¹⁶²

On 27 February 2022, Turkey announced that it deems that Ukraine and the Russian Federation are at 'war', thus triggering the application of Article 19 of the Montreux Convention and prohibiting the passage of Russian warships to the Black Sea.¹⁶³ This assessment of the nature of the Russian invasion

161 P Suci, 'French Flagship to Support NATO Mission as Tensions Rise in Europe', *The National Interest* (2 March 2022).

162 R Michaelson, 'Kyiv piles pressure on Ankara to close straits to Russia's warships', *The Guardian* (26 February 2022).

163 E Erkoyun, T Gumrukcu, 'Turkey to implement pact limiting Russian warships to Black Sea', *Reuters* (27 February 2022).

of Ukraine was contrary to the claims of the Russian Federation according to which it launched a 'special military operation' against Ukraine that did not reach the threshold of a 'war'.¹⁶⁴ In accordance with Article 15 of the Montreux Convention, the Russian Federation had notified Turkey in advance that it intends to send on 27 and 28 February 2022 four warships to the Black Sea, of which only one was registered to Russia's Black Sea base, but following Turkey's decision, the Russian Federation cancelled their planned transit through the Turkish Straits.¹⁶⁵

The Turkish Foreign Minister referred to Article 19 of the Montreux Convention when explaining the decision to close the Turkish Straits and commented that:

When Turkey is not a belligerent in the conflict, it has the authority to restrict the passage of the warring states' warships across the straits. If the warship is returning to its base in the Black Sea, the passage is not closed. We adhere to the Montreux rules. All governments, riparian and non-riparian, were warned not to send warships across the straits.¹⁶⁶

However, as stressed by many commentators,¹⁶⁷ Article 19 of the Montreux Convention prohibits the passage of belligerent warships and does not grant Turkey the authority to close the Turkish Straits to the warships of neutral States. Such a right is vested with Turkey under Article 21 of the Montreux Convention provided that Turkey as a neutral State considers herself being threatened with imminent danger of war in case of which the right of passage of warships through the Turkish Straits is left entirely to the discretion of the Turkish Government.

Turkey has not indicated that it considers herself threatened with imminent danger of war in the context of the 2022 Russian invasion of Ukraine. Hence, Turkey's decision of 27 February 2022 may be interpreted as resulting in the closure of the Turkish Straits to the warships of the Russian Federation and Ukraine in accordance with Article 19 of the Montreux Convention, while

164 See 'Full text: Putin's declaration of war on Ukraine', *op. cit.*

165 E Erkoyun, T Gumrukcu, 'Turkey says Russia cancelled Black Sea passage bid upon its request', *Reuters* (2 March 2022).

166 T Ozberk, 'Turkey Closes The Dardanelles And Bosphorus To Warships', *Naval News* (28 February 2022). See also Anonymous, 'Turkey warns against passing of warships from its straits', *AlJazeera* (1 March 2022).

167 See, e.g., Ozberk, *op. cit.* C Overfield, 'Turkey Must Close the Turkish Straits Only to Russian and Ukrainian Warships', *Lawfare* (5 March 2022).

other (non-warring) States were issued a legally non-binding warning of dangers to navigation in the Black Sea due to the outbreak of hostilities in the region. Alternatively, it has been suggested that Turkey could invoke Article 21 of the Montreux Convention by claiming that it is threatened with imminent danger of war given its collective self-defense obligations under Article 5 of the Northern Atlantic Treaty¹⁶⁸ in the context of the danger of escalation of the Russia-Ukraine war and its impact on the territories (including the cyber domain) of NATO Member States, especially the ones bordering Ukraine.¹⁶⁹

4.8.4 *The Closure of Ports to Russian Ships*

While Turkey closed its straits to Russian warships due to the war in Ukraine, other NATO Member States – all being neutral States in the Russia-Ukraine armed conflict – responded to Russia's aggression against Ukraine in 2022 by, *inter alia*, closing their ports to Russian ships. The United Kingdom decided to prohibit Russian owned, operated, controlled, chartered, registered or flagged ships from entering its ports.¹⁷⁰ On the same day that the United Kingdom's ban came into force, the Canadian Government announced that it 'intends to ban Russian-owned or registered ships and fishing vessels in Canadian ports and internal waters' under the Special Economic Measures (Russia) Regulations.¹⁷¹ Section 3.4 was added to these Regulations which now stipulates that: "It is prohibited for any person to dock in Canada or pass through Canada any ship that is registered in Russia or used, leased or chartered, in whole or in part, by or on behalf of or for the benefit of Russia, a person in Russia or a designated person, unless such docking or passage is necessary to safeguard human life or to ensure navigational safety."¹⁷² Likewise, in the beginning of the Russian invasion of Ukraine, the European Parliament called 'for access to all EU ports to be refused for ships whose last or next port of call is in the Russian Federation,

168 The North Atlantic Treaty, adopted 4 April 1949, entered into force 24 August 1949, 34 UNTS 243.

169 A Aliano, R Spivak, 'Ukraine Symposium – The Montreux Convention and Turkey's Impact on Black Sea Operations', *Articles of War* of Lieber Institute, West Point (25 April 2022).

170 The Russia (Sanctions) (EU Exit) (Amendment) (No. 4) Regulations 2022, Part 111, adopted 1 March 2022, entered into force 1 March 2022.

171 Government of Canada, 'Government of Canada prohibits Russian ships and fishing vessels from entering Canadian ports and internal waters', *Press Release* (1 March 2022). Special Economic Measures (Russia) Regulations, SOR/2014-58, adopted 17 March 2014, last amended 6 March 2022.

172 Regulations Amending the Special Economic Measures (Russia) Regulations, adopted 6 March 2022, entered into force 6 March 2022.

except in the case of necessary justified humanitarian reasons'.¹⁷³ In April 2022, the Council of the EU decided to prohibit to provide access to ports in the territory of the EU to any vessel registered under the flag of Russia and extended the scope of this prohibition so that it also applied to vessels that changed their Russian flag or their registration, to the flag or register of any other State after 24 February 2022.¹⁷⁴

Under international law, coastal States have a considerable discretionary right to regulate foreign ships' access to ports. A general right for foreign ships to enter ports is absent from LOSC as it merely stipulates in Article 255 an obligation of means according to which States shall endeavour to facilitate, subject to the provisions of their laws and regulations, only research vessels' access to their harbours. Thus, States have retained their freedom to close ports, subject to the conditions of proportionality and prohibition of discrimination. Nevertheless, in order to foster maritime commerce, many States have either unilaterally in their domestic acts or under bilateral and multilateral treaties stipulated the right of foreign ships to enter their ports on the basis of reciprocity.¹⁷⁵

International case law on foreign ships' right to enter ports is inconsistent. In the *Aramco case*, the arbitral tribunal recognised such a right and found that ports may be closed to foreign ships only if the vital interests of the coastal State so require.¹⁷⁶ Yet this conclusion has triggered opposing views from eminent scholars.¹⁷⁷ Churchill and Lowe have commented that although it is generally right to assume that international ports are open to foreign merchant ships, it is nevertheless highly doubtful that such a practice has acquired the status of a right in customary law.¹⁷⁸ State practice was at the time of the arbitral award in the *Aramco case* controversial as most ports in numerous States, e.g. the Soviet Union, were not open to foreign ships.¹⁷⁹

173 European Parliament resolution (2022/2564(RSP)), of 1 March 2022, On the Russian aggression against Ukraine, para 17.

174 Council Decision (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Art 1, para 18.

175 See, e.g., Convention and Statute on the International Régime of Maritime Ports, adopted 9 December 1923, entered into force 26 July 1926, 58 LNTS 285.

176 *Saudi Arabia v. Arabian American Oil Co. (Aramco)*, Arbitration Tribunal (1958), 27 International Law Reports 117 (1963), p. 212.

177 See L Sohn, JE Noyes, E Franckx, K Juras, (eds) *Cases and Materials on the Law of the Sea* (Brill, Leiden, Boston, 2014), 353–354.

178 RR Churchill, AV Lowe, *The Law of the Sea* (Manchester University Press, Manchester, 1992), 52.

179 A Uustal, *Rahvusvaheline õigus v: rahvusvaheline mere- ja ilmaruumiõigus* (Tartu State University Press, Tartu, 1977), 43.

At the time of the *Aramco case*, uniform State practice that could confirm the existence of a customary right to the openness of ports was thus lacking. Similarly, the ICJ has concluded with regard to the contemporary State practice that it is “*by virtue of its sovereignty that the coastal State may regulate access to its ports*”.¹⁸⁰ On the basis of international treaties and State practice, Molenaar has found that a general right for foreign ships to enter ports does not exist.¹⁸¹ The coastal State thus has a wide discretion in deciding over whether to close its ports.¹⁸²

Indeed, in the Russian Federation, for example, foreign ships may only call in such seaports that are opened for calls by foreign ships.¹⁸³ Furthermore, ports may be closed to foreign ships on grounds of, *inter alia*, maintaining public order. For example, in 2018, the Estonian Ministry of Foreign Affairs did not grant on three occasions its permission to Russian government-operated ships to stay in the Estonian territorial sea.¹⁸⁴ The Estonian Foreign Intelligence Service has cautioned against the activities of the Russian Federation’s government-operated and civilian ships in the territorial sea, internal waters and ports of Estonia by claiming that all ships sailing under the Russian flag can be used to gather information, to pursue military objectives, or to carry out covert operations, and therefore it should be better examined under which conditions the Russian Federation’s non-governmentally operated ships are allowed to enter the territorial sea and stay in foreign ports.¹⁸⁵ The Estonian Foreign Intelligence Service has listed the following controversial activities of the Russian-flagged non-governmentally operated ships: attempts to enter the naval training areas of other countries or to access areas closed to ship traffic (testing areas for new military technology, surroundings of naval bases, etc) and areas that are not normally used for navigation but pose an interest for strategic reasons.¹⁸⁶

180 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.*, para 213.

181 Molenaar 1998, *op. cit.*, 101.

182 Churchill and Lowe 1992, *op. cit.*, 52.

183 See Arts 5(2) and 6 of the Federal Act on the internal maritime waters, territorial sea and contiguous zone of the Russian Federation, adopted 16 July 1998, entered into force 31 July 1998.

184 S Punamäe, ‘Eestisse mittelastud purjelaev pani Vene meedia kihama’, *Postimees* (11 April 2019).

185 Estonian Foreign Intelligence Service, *International Security and Estonia 2019* (Tallinn, 2019), 14.

186 *Ibid.*, 12.

In 2019, Estonia did not allow the Russian Federation's four-masted barque and the world's biggest sailing ship *STS Sedov*, which was *en route* to the Port of Tallinn to enter the Estonian territorial sea, since her crew included cadets from the Kerch State Maritime Technological School which was seen as problematic from the perspective of the Estonian non-recognition policy towards the annexation of Crimea by the Russian Federation.¹⁸⁷ The Russian Ministry of Foreign Affairs and media reacted strongly to this decision.¹⁸⁸ Poland refused *STS Sedov's* entry to its port two days later on the same ground.¹⁸⁹

187 A Whyte, 'Estonia bars Russian vessel entering waters, on Crimea annexation issue', *ERR News* (12 April 2019).

188 See, e.g., Anonymous, 'Estonia, Poland deny entry to Russian ship over Crimea cadets', *RTL Today* (12 April 2019).

189 Anonymous, 'Ka Poola keelas Vene purjelaeval oma vetesse sisenemise', *Postimees* (12 April 2019).