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RUSSIAN PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov

Part II: Ukraine's Rights of Passage through Kerch Strait

DMYTRO KOVAL — VALENTIN J. SCHATZ — 12 January, 2018



In [our previous post](#), we have taken a look at the legal status of the Sea of Azov and concluded that there are two possible Scenarios involving either a shared bay regime of internal waters or a “standard” situation in which the Sea of Azov is divided into the territorial seas of Russia and Ukraine in addition to a high seas pocket in the centre (see Picture 3). Based on these conclusions, the present post undertakes a preliminary review of Ukraine's rights of passage through Kerch Strait in light of recent restrictions imposed by Russia.



Picture 3: Maritime boundaries in the Sea of Azov in accordance with a normal territorial sea regime (potential contiguous zone/EEZ /continental shelf claims remain undelimited) (Source: <http://opennauticalchart.org/>).

Russian Restrictions on Passage related to the Construction of Kerch Strait Bridge

From 2015 onwards it was reported that Russia, which now controls both banks of Kerch Strait, made Ukrainian vessels subject to an authorization requirement for passage through the Kerch Strait. The situation escalated further after the adoption of an Order of the Russian Ministry of Transport of 7 July 2017 which enables the competent Russian authorities to deny any vessels except Russian warships access to the Sea of Azov during certain specified time spans. Russia explains the ban with the ongoing construction of Kerch Strait Bridge (see video [here](#)). On 25 August 2017, Kerch Port Authority announced a closure based on the new Order for a period of time between 27-30 August 2017, which was cancelled on 29 August 2017. It applied to all ships except Russian military ships and ships involved in the construction works. Another closure was announced on 9 October 2017 for a time period between 11-14 October 2017 and cancelled on 13 October 2017.

In addition, Kerch Strait Bridge will impose physical restraints on

navigation. Reportedly, the maximum measurements of vessels wanting to pass underneath the bridge are 160 m (length), 31 m (width) and 33 m (height), with a maximum draft of 8 m. The administration of the sea ports of Ukraine claims that the average measurements of vessels that visit the largest Ukrainian port in the Sea of Azov, namely, the port of Mariupol, which is important for the Ukrainian metal industry, are 175 m (length) and 27 m (width), with a maximum draft of 9.6 m. Allegedly, there used to be frequent visits by Panamax type ships as big as 225 m (length), 32.5 m (width) and 37.5 m (height), with a maximum draft of 14 m (the largest vessel which ever entered the port of Mariupol reportedly measured 235 m (length), 38 m (width) and 49 m (height), with a maximum draft of 14.5 m). This data, if correct, would show that the construction of Kerch Strait Bridge will likely restrict access to Ukrainian ports in the Sea of Azov. As a result, the Ukrainian economy is expected to suffer considerable losses.

Unsurprisingly, Ukraine protested against these measures and considers Russia's unilateral change of navigational rules in Kerch Strait and denial of access to the Sea of Azov for Ukrainian ships as a violation of international law. On 25 November 2016, Ukraine and Georgia (for background, see here) submitted a document concerning "Safety and security of navigation in the North-Eastern part of the Black Sea" to the Maritime Safety Committee of IMO, which has since agreed to monitor the situation. Ukraine reportedly also intends to submit further complaints to IMO about the temporary closures of Kerch Strait in 2017.

Warship 'Azov' sails under section of new Crimean bridge



“Warship ‘Azov’ sails under section of new Crimean bridge” (Source: [RT, Youtube](#)). Embedded for visualization only.

Ukraine’s Rights of Passage

This begs the question whether the Russian measures violate any rights of Ukraine concerning passage through Kerch Strait. If no such rights existed for the vessels of Ukraine (and third States), all Ukrainian ports in the Sea of Azov would effectively be “locked in” (if not, strictly speaking, “land-locked”) and lose much of their economic potential. There appear to be at least four issues which deserve attention: (1) Ukraine’s rights in its internal waters or territorial sea, (2) the Cooperation Agreement, (3) the [1997 Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation \(FCN-Treaty\)](#), and (4) passage rights under Part III of UNCLOS and/or customary international law. The following analysis takes note of both possible Scenarios for the legal status of the Sea of Azov and Kerch Strait introduced in Part I of this contribution (Scenario 1: internal waters; Scenario 2: territorial sea and high seas/EEZ).

First, assuming that the territorial status of Crimea as part of Ukraine remains unchanged, any exercise of coastal State rights by Russia in the internal waters or territorial sea of Crimea in Kerch Strait is an illegal usurpation of Ukraine’s sovereignty as the coastal State. In Scenario 2, Ukraine’s coastal State rights in its territorial sea arise directly from Part II of UNCLOS. In Scenario 1, however, the situation is more complex. Despite Article 2(1) UNCLOS, which acknowledges the coastal State’s sovereignty in its “land territory and internal waters”, the [predominant view](#) (which has been [challenged](#)) is that “internal waters in principle are not covered by [UNCLOS] but by customary international law” ([ITLOS, The “ARA Libertad” Case \(Argentina v. Ghana\), Joint Separate Opinion of Judges Wolfrum and Cot, paras. 23 ff.](#)). It arguably follows that this is a violation of customary international law only. Interestingly, claims based on Ukraine’s coastal State rights would most closely align with the title under which the PCA registered the dispute (“Dispute [Concerning Coastal State Rights](#) in the Black Sea, Sea of Azov, and Kerch Strait”).

Second, the Cooperation Agreement affords Russian and Ukrainian merchant vessels, warships, and State ships flying the flag of Russia or Ukraine “freedom of navigation” in the Sea of Azov and in Kerch Strait (Article 2(1)). While this terminology resembles Article 87(1)(a) UNCLOS, this similarity is probably accidental as this wording is a common feature of treaties of friendship, navigation and commerce and is not usually intended to grant a right of navigation as broad as that on the high seas. However, in the case of the Cooperation Agreement, it clearly encompasses a right of passage, be it similar to innocent passage or transit passage. Foreign flagged commercial vessels, on the other hand, are granted a right of passage through Kerch Strait and the Sea of Azov only to navigate to a Russian or Ukrainian port (Article 2(2)). Foreign flagged warships and government vessels may only pass through Kerch Strait and the Sea of Azov upon invitation or permission of Russia or Ukraine, subject to agreement by the other State (Article 2(3)). Assuming that the Cooperation Agreement is still in force, Ukraine seems to have – irrespective of the territorial status of Crimea – treaty-based passage rights both for commercial and non-commercial vessels. These rights also appear to exist irrespective of whether Scenario 1 or Scenario 2 applies for the legal status of Kerch Strait and the Sea of Azov.

Third, in accordance with Article 17 FCN-Treaty, Russia and Ukraine “shall ensure the freedom of transit [...] across each other’s territory in accord with generally recognized norms of international law. The conveyance of freight and passengers by [...] sea [...] between the two Parties, and by transit across their territories, including operations through sea [...] are effected in the manner and according to the conditions provided by separate agreements”. However, as is also confirmed by the preamble of the Cooperation Treaty, the FCN-Treaty provides a framework for co-operation rather than passage rights of its own and would arguably only be breached if Russia infringes Ukraine’s rights of passage under the Cooperation Treaty. (There is also a third bilateral treaty, namely the 2012 Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on Measures to ensure the Safety of Navigation in the Sea of Azov and the Kerch Strait, of which we provide an unofficial translation [here](#). However, does not grant passage rights but contains a number of obligations concerning co-operation, publicity of laws,

notification, and data-exchange.)

Finally, the question arises whether there are any passage rights through Kerch Strait under UNCLOS and/or customary international law. Under Scenario 1, the regime of transit passage pursuant to Articles 37 ff. UNCLOS is not applicable. This is because “straits connecting high seas or EEZ to internal waters do not come within the ambit of Part III”. The exception of Article 35(a) does not apply here as a bay closing line under Article 10 is not a straight baseline within the meaning of Article 8(2) UNCLOS (see [here](#) and [here](#)). This also excludes non-suspendable innocent passage under Article 45(1)(b) UNCLOS, because that right only applies to straits which connect high seas/EEZ and the territorial sea of a foreign State. The provision does not contemplate the *sui generis* situation of a multi-State bay of shared internal waters. Thus, the only avenue left is that of customary international law. A common view is that “straits [which] in fact lead to bays bordered by several States [are a] category of straits in which the right of passage has long been recognized by customary law”. This view, however, usually refers to multi-State bays which are not internal waters (i.e. cases of Article 45(1)(b) UNCLOS). On the other hand, reference can once again be had to the ICJ’s 1992 judgment in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, which stated that despite the status of the waters of the Bay of Fonseca was as shared internal waters of El Salvador, Honduras and Nicaragua, there was an “existing right of innocent passage” both because of “historical reasons” and “practical necessities”. Again, the facts of that case were quite peculiar and uncertainty remains with regard to a right of passage under Scenario 1. But it could be argued that the Cooperation Agreement merely acknowledges pre-existing passage rights based on consistent practice.

Under Scenario 2, however, the geographical criterion of a strait under Article 37 UNCLOS or at least Article 45(1)(b) UNCLOS is fulfilled. This is because there would be a high seas or EEZ patch in the Sea of Azov, surrounded by the Ukrainian and Russian territorial sea (see Picture 3). However, there is also a functional criterion which requires that Kerch Strait is “used for international navigation”. The exact meaning of that criterion remains somewhat obscure. It is recalled, in the context of Kerch Strait, that “the fact that certain straits provide access to

important ports, in itself, does not mean that these straits necessarily attract the legal regime of international straits” (Bing Bing Jia, Article 37 UNCLOS, in: Alexander Proelss (ed.), United Nations Convention on the Law of the Sea: A Commentary, 2017, MN. 12). Whether Kerch Strait, which is mainly used by Ukrainian and Russian ships, is “used for international navigation” within the meaning of Article 37 UNCLOS, is debatable. Nonetheless, it has been argued that the Cooperation Agreement, with its restricted access for warships of third States, is a “clear infringement of the right of passage in transit which should be in force in the Kerch Strait”. If both the geographical and functional criteria are met, Ukraine can claim a right of transit passage (Article 38(1) UNCLOS) or non-suspendable innocent passage (Article 45(1)(b) UNCLOS) through Kerch Strait.

Preliminary Conclusion

It may be concluded that, under Scenario 1, Ukraine could potentially invoke violations of its customary rights of coastal State sovereignty in Crimea’s internal waters, as well as its rights of navigation under the Cooperation Agreement (and perhaps additionally the FCN-Treaty) and customary international law. Under Scenario 2, Ukraine can potentially invoke, in addition to the Cooperation Agreement, its coastal State rights in the territorial Sea of Crimea (Part II of UNCLOS) and, potentially, rights of transit passage or non-suspendable innocent passage through Kerch Strait under Articles 38(1) or 45(1)(b) UNCLOS. As we will show in Part III of this contribution, it is less clear whether this multitude of potential claims as a matter of substantive law will find its way into the jurisdiction *ratione materiae* of the Annex VII tribunal.

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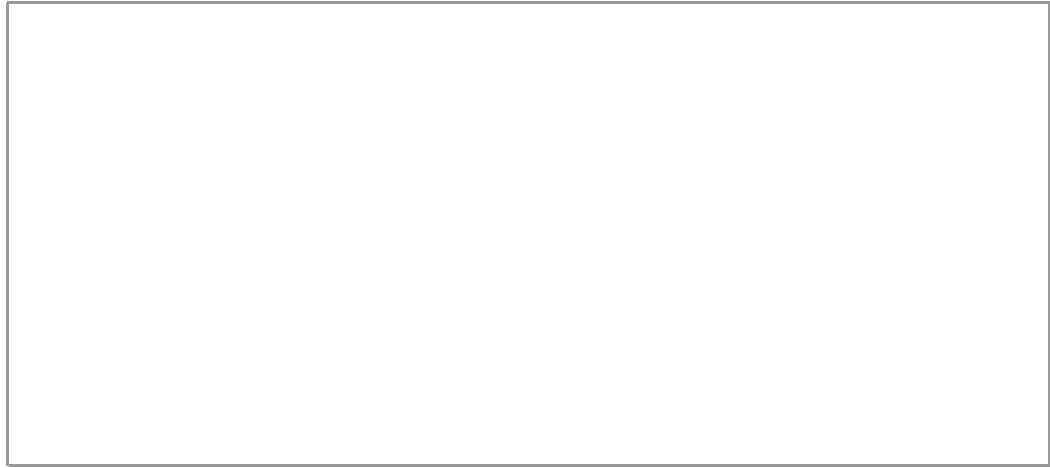
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