

Legal Aspects of the 25th November, 2018 Kerch Strait Incident

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Figure 1: Moscow-Russia Naval Clash; Source: news.com.au

What Happened on the 25th November

On November 23, 2018, three Ukrainian Navy ships set sail from the port of Odessa to the port of Mariupol. This voyage required them to pass from the Black Sea via the Kerch Strait into the Sea of Azov. On November 24, the commander of the Ukrainian naval group was notified by the Russian authorities about the closure of navigation in the Kerch Strait area. On November 25, the Ukrainian naval contingent requested the Russian maritime control services for passage through the Kerch Strait. On the same morning, a Russian coastguard vessel rammed the Ukrainian tugboat *YanuKapu*, damaging it.¹ As the Ukrainian ships continued their voyage, Russia blocked the entrance to the Sea of Azov by positioning a freighter length wise in front of the entrance under the 12 mile bridge across the Kerch Strait and Russian Ka-52 attack helicopters and Su-25SM's started patrolling the strait.² In the evening, Russian ships opened fire on the Ukrainian Gyurza M class artillery gunboats (the *Berdyansk* and the *Nikopol*). Six Ukrainian servicemen were wounded, all 3 Ukrainian navy vessels were seized and the crew of 23, including 2 intelligence officers of Ukraine's SBU security service were taken captive.³ Russia temporarily closed navigation to non-Russian traffic, before reopening it on November 26th (Monday).⁴ On 27th November, the Verkhovna Rada (Ukrainian Parliament) backed a presidential plan to declare martial law for 30 days in the 10 regions bordering Russia, Crimea and the Sea of Azov.⁵

Russia stated that the Ukrainian ships were in violation of the rules of peaceful passage in the territorial waters of Russia.⁶ According to Russia, the Ukrainian ships attempted to carry out illegal manoeuvres in Russia's territorial waters. Owing to the failure of the Ukrainian ships to stop immediately and end their manoeuvres, Russian vessels used force to stop and detain the ships in Russia's territorial waters.⁷ Ukraine states that Russian ships have unlawfully used force in violation of the United Nations Charter and the United Nations Convention on the Law of the Sea (UNCLOS).⁸ Ukraine says that in doing so, Russia has committed an act of aggression⁹ as defined in Article 3, paragraph 3 (blockade) and 4 (attack on the sea forces of a state) of the United Nations General Assembly resolution 29/3314.¹⁰

The Legal Implications

The incident has given rise to a number of legal questions. The commission of an armed attack, Ukraine's right to respond as per Article 51 of the U.N Charter, Russia having

purportedly engaged in an act of aggression and the status of the detained Ukrainian sailors are some of them. However, only two specific issues are addressed herein. First, relates to passage rights as enshrined in a 2003 Russian-Ukrainian treaty.¹¹ Ukraine provided the Russian authorities an advance notice of their intention to traverse the strait, but this notice was not provided sufficiently in advance as required by the Russian authorities. The Russian perspective is that the Ukrainians did not go through the proper channels to receive a place in line to cross the strait despite being aware of the procedure for innocent passage. The Ukrainian position is that their notification of intent to transit the Strait of Kerch was sufficient and that in any case there was no international notice regarding the closure of the strait to maritime traffic.¹² Second, were Russia's actions in attacking, boarding and seizing the Ukrainian naval ships justified?

The legal consequences will differ depending on the applicable legal regime. If Russia and Ukraine are not in a state of war/armed conflict, then the UNCLOS will be applicable. If, however, Russia and Ukraine are in a state of war/International Armed Conflict, then the law of naval warfare will largely displace the UNCLOS and act as the governing law.

The Law of War

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has held that there exists an international armed conflict in between Russia and Ukraine.¹³ Apropos the first issue, the relevant question is whether a Russia-Ukraine bilateral treaty of 2003 which recognizes Ukraine's treaty-based passage rights, can be suspended owing to the existence of an armed conflict. There exists no presumption in international law that hostilities will necessarily have the effect of terminating or suspending the operation of treaties between the parties to the conflict.¹⁴ Article 7 of the Draft articles on the effects of armed conflicts on treaties refers to an indicative list of treaties, the subject matter of which involves an implication that they continue in operation during an armed conflict. The Russia-Ukrainian bilateral treaty of 2003 could certainly be read into clause b (Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries) or clause h (Treaties relating to international watercourses and related installations and facilities of the indicative list) of the indicative list referred to in Article 7.¹⁵ The application of treaties concerning the status of certain waterways may indeed be subject to the exercise of the inherent right of self-

defence.¹⁶ The Russian intervention in Ukraine has been justified under various legal doctrines. Self defence as recognized by Article 51 of the United Nations Charter however, is not one of them.

Apropos issue 2, if it is presumed that there exists a state of armed conflict between Russia and Ukraine, then the law of naval warfare (a restatement of which is found in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea) will be applicable (while not binding on states, the Manual is a codification of customary international law). Rule 10(a) recognizes that hostile action by naval forces may be conducted in the territorial seas, internal waters and the exclusive economic zones of the belligerent states. The Ukrainian artillery gunboats qualify as military objectives as defined in Rules 40 and 41 and therefore constitute belligerent forces. The Ukrainian tugboat is an auxiliary vessel as defined in Rule 13(h) and therefore cannot claim to belong to the class of vessels exempt from attack as defined in Rule 47. Russia, would then be well within its rights to attack the Ukrainian naval contingent and its decision to use force would not, be illegal. However, Russia's actions would still have to comply with the requirements of International Humanitarian Law as they relate to proportionality, distinction, necessity and preventing unnecessary suffering.¹⁷ It is to be noted however, that the OHCHR document characterizing the Russian-Ukrainian conflict as an international armed conflict was supported by only 70 States. 77 States abstained and 26 chose to vote against it (including India and China).¹⁸

The Law of Peace

Apropos the first issue, by virtue of a 2003 bilateral treaty, Ukraine does indeed have treaty-based passage rights through the Kerch Strait. As per Article 3 of the same treaty, Russia and Ukraine, both undertook to cooperate and jointly regulate shipping and navigation.¹⁹ Further, in 2012, both nations entered into an Agreement on measures to ensure the safety of navigation in the Sea of Azov and the Kerch Strait. By virtue of Article 8 of the 2012 agreement, amendments may be made to the agreement with the consent of both parties.²⁰ Whether, Russia, in drawing up and implementing such laws and regulations²¹ has been in violation of its international law obligations is not explored herein, as that is concerned with the violation of bilateral legal obligations as opposed to maritime law. It is sufficient to note that the unilateral adoption of rules on the advance notification of passage through the Kerch Strait by Russia in 2015 is probably not in consonance with its bilateral treaties of 2003 and 2012 with Ukraine.²²

Prior to commenting on the second issue, a preliminary inquiry needs to be made. This enquiry relates to whether or not the incident in question happened in Russian territorial waters. This is a question of both fact and law. As for the factual question, coordinates offered by both sides suggest that the vessel was in Crimean waters.²³ The legal question pertains to the territorial status of Crimea. This is important as the fundamental principle governing the law of the sea is that ‘the land dominates the sea’. The implication of this proposition is that the territorial situation on land constitutes the starting point for the determination of the maritime rights of a coastal State. The image below represents Russian and Ukrainian maritime zones in the Black Sea prior to the annexation of Crimea by Russia in 2014:



Figure 2: Russian and Ukrainian claims in the Black Sea and the Sea of Azov before March 2014; Source: Lamont-Doherty Earth Observatory of Columbia University

The image below represents Russian and Ukrainian maritime zones in the Black Sea following the annexation of Crimea by Russia:



Figure 3: Russian maritime claims following the annexation of Crimea; Source:intellinews.com;

The prevailing international consensus as embodied in the United Nations General Assembly resolution 68/262 is that the referendum held in the Autonomous Republic of Crimea in March 2014 has no validity.²⁴ This would have adverse consequences for Russia's extended claims, as the exercise of coastal state rights by Russia would be an usurpation of Ukraine's rights. Regardless, Russia has asserted that the seizure of the Ukrainian vessels occurred in territorial waters that belonged to Russia even prior to the assimilation of Crimea with Russia.²⁵ It has been independently verified that Ukrainian ships did indeed enter Russian waters (of both Crimea and mainland Russia).²⁶

At this early stage, it would be fruitless to seek to determine whether or not Russia's actions were actually in consonance with the law, given that the facts are still unclear or contested. However, were it to be assumed that the waters in question were indeed a part of its territorial seas, it is worth examining whether international law even permits Russia to engage in the actions that it resorted to. This is important so as to be able to counter narratives which suggest that one party's (Russia's) actions are illegal irrespective of which version of events is true.²⁷

Article 95 of the UNCLOS states that a warship operating on the high seas enjoys immunity from the jurisdiction of any State other than the flag State. This immunity is absolute. Article 32 of the UNCLOS provides that a warship operating in the territorial sea also enjoys immunity, but this immunity is not absolute. It is subject to two exceptions. The first exception is found in Article 30 of the UNCLOS, which states that a warship which does not comply with the coastal State's regulations concerning passage through the territorial sea may be required to leave the territorial sea immediately by the coastal State. The second set of exceptions are found in Articles 17-26 of the UNCLOS. Article 17 recognizes that all ships have the right of innocent passage through territorial seas. Article 19 defines innocent passage as passage that is not prejudicial to the peace, good order or security of the coastal State and provides a detailed list of activities that would be considered prejudicial to the peace, good order or security of the coastal State. Article 21 requires that all foreign ships exercising innocent passage through the territorial sea are required to conform with the coastal State's laws in respect of the safety of navigation and the regulation of maritime traffic. Article 22 further allows the coastal State to require foreign ships exercising the right of innocent passage through its territorial sea, to use such sea lanes and traffic separation schemes as it may designate or prescribe. Article 25(1) gives the coastal State the right to take the necessary steps to prevent passage which is not innocent. Specifically, Article 25(3) states that in the case of ships proceeding to internal waters (which is the legal status of the Sea of Azov), the coastal state has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

What though will be the legal position should a warship fail to comply with the coastal State's demand that that the warship leave its territorial sea? The UNCLOS does not elaborate as to what are the 'necessary steps' that may be taken to prevent passage which is not innocent. The right to employ force is, however, a logical and reasonable derivation of state sovereignty over the territorial sea.²⁸ Such a use of force would however, have to be tempered by the customary international law requirements of necessity and proportionality.²⁹ Russia has relied upon these provisions to defend its actions.

Some of the arguments advanced by Ukraine are, however, quite inconsistent or not founded in fact at all.³⁰ For instance, Ukraine's assertions that Russia's actions constituted a violation of Articles 38 and 44 of the UNCLOS are not founded in fact at all.³¹ These articles talk about the right of transit passage and the duty of States that border a strait to ensure that they do not hamper transit passage. Article 37 of the UNCLOS however, specifies that these articles are applicable only to a strait that is used for international navigation between one part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or an EEZ. The Sea of Azov however, contains no high seas nor any exclusive economic zones. It is an enclosed or semi-enclosed sea as defined in Part IX of the UNCLOS.³² As per Article 123 of the UNCLOS, States bordering enclosed or semi-enclosed seas are to cooperate in the exercise of their rights and the performance of their duties. Prior to the USSR's dissolution in 1991, the Sea of Azov and the Kerch Strait were the USSR's internal waters.³³ While, Ukraine and Russia have not finished delimiting the area, they have recognized the Sea of Azov and the Strait of Kerch as the inland waters of Russia and Ukraine³⁴ through two bilateral treaties in 2003 (January³⁵ and December³⁶). Hence, no question arises of there existing any high seas or an EEZ within the Sea of Azov, which is why the Strait of Kerch cannot constitute a strait used for international navigation as envisaged in Part III of the UNCLOS. In July 2015, certain members of the Ukrainian parliament had submitted a Draft Law on the Denunciation of the Treaty between Ukraine and the Russian Federation on Cooperation in the Use of the Azov Sea and the Kerch Strait.³⁷ This draft law was not adopted. For Ukraine to argue that the Kerch Strait is an international strait is quite puzzling as Ukraine relies upon its 2003 bilateral treaty with Russia for both its opposition to the construction of the Kerch Strait bridge by Russia and its passage rights.

Similarly, Ukraine's assertion that Article 95 of the UNCLOS (which grants immunity to warships on the high seas) is relevant in the matter at hand³⁸ is quite puzzling. This is so, as while it is contested whether or not the Ukrainian navy ships were in the territorial seas when attacked by Russia, it is not contested that they were in Crimean territorial waters. Consequently, Article 95 is completely inapplicable to the case at hand.

The Wider Geopolitical Context

Negotiations between Russia and Ukraine on the status of the Sea of Azov and the Kerch Strait have been ongoing since 1995. Following the Tuzla island crisis of September 2003, a bilateral agreement was signed in December 2003. Many benefits accrued to Russia from this treaty. For instance, Russian vessels no longer had to pay Ukraine for passage as they could now use the Kerch-Enikale canal freely. Further, foreign warships could no longer enter the sea without its permission. Most importantly, Ukraine also recognized the Sea of Azov as internal waters. Following the Orange Revolution of 2004 in Ukraine however, Kiev has been insisting on a revision of the agreement. As per the 2003 agreement Ukraine legally controlled 62 percent of the Sea of Azov's area and Russia controlled 38percent. Following the Crimean annexation of 2014 however, Russia controls 75percent of the Sea of Azov.³⁹

The present incident is indeed a 'dramatic' escalation as it marks the first time that the Russian armed forces have openly attacked the Ukrainian armed forces and claimed responsibility for the same.⁴⁰ Despite the ongoing violence on land since Russia's military intervention in Ukraine in 2014, the Sea of Azov had thus far been free of clashes. Tensions escalated in March 2018 when Ukraine seized a Russian-flagged fishing vessel in the Sea of Azov.⁴¹ While the crew was released, the vessel still remains in Ukrainian custody. Following this incident, Russia began stepping up the inspection of Ukrainian vessels. In May 2018, Russia also completed the construction of the Kerch Strait bridge (construction on which began in 2015 without taking the Ukrainians on board first). This 19km bridge linking the Krasnodar region of Russia with Crimea, is the sole landroute to mainland Russia. Citing the need for enhanced security, Russia scaled up the deployment of armed ships in the region. Cargo ships headed to Ukrainian ports now found themselves subject to increasingly frequent inspections and lengthy delays (at times as a long as a week).⁴² Additionally, the Kerch Strait bridge has imposed physical restraints on navigation. Ukrainian port administration authorities stated that the average measurements of vessels visiting the Ukrainian ports were 175 m (length) and 27 m (width), with a maximum draft of 9.6 m. Panamax type vessels that visited the Mariupol port had dimensions of 225 m (length), 32.5 m (width) and 37.5 m (height), with a maximum draft of 14 m. With the Kerch bridge now in place, the dimensions of ships that may pass through are restricted to 160m (length), 31m (width), 33m (height) and maximum draft of 8m.⁴³ Trade to Ukrainian ports has fallen by 30 percent since Russia has started interfering with its shipping.⁴⁴

Ukraine has already initiated legal proceedings against Russia under Annex VII of the UNCLOS for the infringements of its rights as a coastal State by these developments.⁴⁵ That the recent incident followed Ukraine's first ever attempt to bring naval ships through the Kerch Strait following the completion of the bridge may well be no coincidence.

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