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Ukraine v. The Russian Federation:
Navigating Conflict over Sovereignty
under UNCLOS

Nilüfer Oral

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* Director of the Centre for International Law, National University of Singapore, Member of the International Law Commission; Member of the Law Faculty at Istanbul Bilgi University. The author wishes to express her gratitude to the valuable assistance of Ms. Tutku Bektas (BA Oxford; LL.M NYU Law) in the preparation of this article, and also to Jiang Zhifeng (Yale–NUS Law '23).

I. INTRODUCTION

On September 16, 2016, Ukraine served Russia with notification it had instituted a case for arbitration under Article 287 and Annex VII of the United Nations Convention for the Law of the Sea (UNCLOS)¹ for events occurring in the Black Sea, Sea of Azov, and the Kerch Strait.² Arising from a separate incident, but linked directly to the conflict over Crimea, on April 1, 2019, Ukraine filed arbitral proceedings against Russia under Annex VII for its detention of three Ukrainian naval vessels and their crews³ and on April 16 filed an application for provisional measures before the International Tribunal for the Law of the Sea (ITLOS) pursuant to Article 290 of UNCLOS.⁴ The common thread in these three cases is the conflict between Ukraine and Russia over sovereignty in Crimea. The simmering tensions over Crimea date back to the USSR's dissolution in 1991, which later erupted in 2014 with Russia's military intervention and annexation of Crimea. The conflict has now found its way to international tribunals, adding a new legal dimension to the history of the Black Sea and Crimea.

Conflict and power struggle in the Black Sea has a long history. It has given the Black Sea a rich history in international law dating back to early treaties concluded between the Ottoman and Russian empires that have shaped the region. The most influential treaty adopted during the twentieth century is, without doubt, the 1936 Montreux Convention.⁵ It creates a unique regime that imposes restrictions on the size and type of warships allowed in and out of the Black Sea and imposes limits on the duration of the stay of warships of non-Black Sea States. The Black Sea regime created under

1. United Nations Convention on the Law of the Sea art. 287, annex VII, Dec. 10, 1982, 1833 U.N.T.S. 397.

2. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, PCA Case Repository, Preliminary Objections, Award, ¶¶ 2, 8, (Perm. Ct. Arb. 2020) [hereinafter Dispute Concerning Coastal State Rights Award].

3. Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Order of May 25, 2019, at 2, ¶ 1, ITLOS Rep.

4. Immunity of Three Ukrainian Naval Vessels and the Twenty-Four Servicemen on Board (Ukr. v. Russ.), Case No. 26, Request for Provisional Measures Submitted by Ukraine (Apr. 16, 2019).

5. Convention regarding the Régime of the Straits, July 20, 1936, 173 L.N.T.S. 213 [hereinafter 1936 Montreux Convention].

the Montreux Convention has roots in the ancient rule of the Ottoman sultans and the Soviet legal doctrine of “closed sea.”⁶ The Montreux Convention reflects the view, especially that of the USSR, that the Black Sea is legally a closed sea, at least to foreign warships. The Soviet Union took this position during the 1923 Lausanne Treaty negotiations on the regime to govern the Turkish Straits⁷ and later during the Montreux Convention negotiations.⁸ The closed sea doctrine reflected Russia’s geopolitical interest in the Black Sea. The existing conflictual situation in the Black Sea is very much a consequence of the geopolitical power structure of the Black Sea, which for centuries was shared between the two major Black Sea empires, later replaced by the USSR and Turkey.

While the USSR’s dissolution may have raised hope for a new era of geopolitics turning the Black Sea into a Euro-NATO sphere of influence, this was dashed by the 2008 Russia-Georgia conflict, followed by the Russian-Ukraine conflict that began in 2014. It is Russia’s historic geopolitical interest in the Black Sea that is an underlying reason for the present conflicts with Ukraine, which, in turn, led to the three cases.

In the next Part, this article traces the history of the Black Sea and Crimea from the period of empires through the Cold War era. Part III examines the shifting of influence in the Black Sea that took place following the 1991 dissolution of the USSR, the changed status of the Black Sea Fleet, and the early kernels of tension over Crimea between Russia and Ukraine, including NATO and the European Union’s growing influence in the Black Sea. Part IV focuses on the unsettled navigation and delimitation issues between Russia and Ukraine in the Sea of Azov, and the events in Crimea in 2014 between Russia and Ukraine, which eventually lead Ukraine to bring the two arbitration cases under Annex VII of UNCLOS and a request for provisional orders before ITLOS. Part V examines the legal issues raised by the Russian Federation’s preliminary objections on the jurisdictional competence of the arbitral tribunal to decide the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* case, followed by an analysis of the tribunal’s award of provisional measures in the *Detention of Three Ukrainian Naval Vessels*

6. See Joseph J. Darby, *The Soviet Doctrine of the Closed Sea*, 23 SAN DIEGO LAW REVIEW 685 (1986).

7. Convention Respecting the Regime of the Straits, July 24, 1923, 28 L.N.T.S. 115, reprinted in 18 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 53 (1924) [hereinafter 1923 Lausanne Straits Treaty].

8. See NILUFER ORAL, REGIONAL CO-OPERATION AND PROTECTION OF THE MARINE ENVIRONMENT UNDER INTERNATIONAL LAW 28–29 (2013).

case decided by ITLOS. The real issue in these cases is whether Ukraine or Russia has sovereignty over Crimea, but the legal analysis is skillfully couched within the language of UNCLOS.

This article will not analyze the events themselves but rather trace the evolution of the conflict from the period of the empires through the Cold War and post-Cold War period. Ukraine has taken a bold step in taking the power rivalry of the Black Sea and Crimea before international tribunals for arbitration, adding a new legal dimension to the Black Sea region's complex history.

II. THE REGIME OF THE BLACK SEA FROM THE OTTOMAN EMPIRE TO THE USSR

The Black Sea is rich in legal history, providing an important context to the current conflict in the Black Sea, Crimea, the Sea of Azov, and Kerch Strait. For some three centuries, the Black Sea was under the Ottoman Empire's sole control (1452–1774). While Russian Tsar Peter the Great was the first to pierce the walls of the “Ottoman Black Sea,”⁹ it was Catherine the Great who left a lasting legacy for Russia, especially in Crimea. The 1774 Treaty of Küçük Kaynarca between the Russian and Ottoman governments¹⁰ marked a historical precedent. For the first time, the Ottomans allowed foreign-flagged merchant vessels free and unhindered navigational rights in the Black Sea and what are now known as the Turkish Straits, as well as free access to Ottoman ports.¹¹ The Treaty ceded to Russia in perpetuity the fortresses of Yeni Kale and Kerch along the coast of the Crimean Peninsula. It also gave

9. Tsar Peter the Great captured the fortress of Azov following the war of 1695–96, also known as “the Azov campaigns,” and established a naval base at the city of Taganrog. The tsar's access to the Black Sea was limited, however. As the Ottomans still controlled the Kerch Strait, the tsar's ships were confined to the Sea of Azov. BRIAN L. DAVIES, *WARFARE, STATE AND SOCIETY ON THE BLACK SEA STEPPE, 1500–1700*, at 186–87 (2007).

10. Treaty of Perpetual Peace and Amity, Russ.-Ottoman Empire, July 10, 1774, 45 Consol. T. S. 349. The provisions were far-reaching, making the Crimean khanate independent of the Ottoman Empire. It granted territorial rights to Russia by advancing the Russian frontier southward, assigned Russia rights of protection of the rights of Christians and of the Church in the Ottoman Empire, and gave Russia the right to maintain a fleet on the Black Sea.

11. *Id.* at 392 (“For the convenience and advantage of the two Empires there will be free and unobstructed navigation for the merchant vessels, belonging to the two contracting powers.”) Translation taken from M.L. Harvey, *The Development of Russian Commerce on the Black Sea and its Significance* 17 (1938) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with the University of California, Berkeley library).

Russia the right to maintain a fleet in the Black Sea. Thus, Russia had gained a permanent foothold in the Black Sea and inaugurated its new role as a Black Sea power. The Ottoman power in the Crimean Peninsula having waned allowed Catherine the Great to annex Crimea in 1783 when she also had General Potemkin create the Black Sea fleet in Akhtiar, which would later be named Sevastopol.¹² In 1792, Crimea, in its entirety, would formally pass to Russia under the Treaty of Jassy¹³ following the Ottoman Empire's defeat in the Russo-Turkish War of 1792. Since then, Russia has retained a considerable presence in the Black Sea.

Under the USSR's rule, the Soviet position regarding the Black Sea was reflected in the closed sea doctrine, namely that in semi-enclosed or enclosed seas, coastal States should enjoy superior legal rights over non-coastal States.¹⁴ This meant that passage rights of foreign ships were to be established exclusively by the littoral States' concurrence. Non-contiguous States would have no legal rights of access unless expressly granted by the coastal States.¹⁵ The doctrine was put forth by the well-known Soviet jurist, F.I. Kojevnikov, a former judge at the International Court of Justice (ICJ), who, in 1948, wrote that a distinction had to be made between the high seas and closed seas such as the Black Sea and only the littoral States could determine the legal regime of closed seas.¹⁶

12. MUNGO MELVIN, SEVASTOPOL'S WARS: CRIMEA FROM POTEMKIN TO PUTIN 60, 64–65 (2017); ROBERT WEINBERG, THE REVOLUTION OF 1905 IN ODESSA: BLOOD ON THE STEPS 2 (1993).

13. Treaty of Peace between Russia and Turkey, signed at Jassy, Jan. 9, 1792, 51 C.T.S. 279. The Treaty was signed at the end of the Russian-Turkish war of 1787–91 and confirmed the annexation of Crimea and Kuban to the Russian Empire and established the Russian-Turkish border along the Dniester River.

14. Richard E. Bradshaw, *The Politics of Soviet Maritime Security*, 10 JOURNAL OF MARITIME LAW AND COMMERCE 411, 422–23 (1978–79).

15. Darby, *supra* note 6, at 690.

16. “[I]l faudrait également distinguer de la haute mer les mers fermées parmi lesquelles on range par exemple la mer Noire dont le régime juridique ne doit évidemment être déterminé que par les seuls états riverains.” “[I]t should also distinguish from the high seas the closed seas among which we include, for example, the Black Sea, whose legal regime must obviously be determined only by the riparian States.” Cited in FRANCE DE HARTINGH, LES CONCEPTIONS SOVIÉTIQUES DU DROIT DE LA MER [SOVIET CONCEPTIONS OF THE LAW OF THE SEA] 28 (1960).

The closed sea doctrine was evoked as early as the 1921 Treaty of Friendship concluded between Turkey and the USSR.¹⁷ The Treaty expressly supports the distinction between littoral and non-littoral States and includes a provision for the Black Sea littoral States to meet at a future date to jointly agree upon the legal status of the Black Sea and Turkish Straits.¹⁸ It also illustrates that, despite their historical rivalry, Turkey and Russia shared a common position in maintaining the closure of the Black Sea to foreign naval powers. This policy was formally codified in the Lausanne Treaty on the Straits.¹⁹ That Treaty was subsequently replaced by the Montreux Convention, which continues in effect today.²⁰ Both negotiations were marked by the Soviet policy to make the Black Sea a “closed sea.”²¹ During the 1923 Lausanne Treaty negotiations, the Soviet Union, as expressively declared in the Soviet counter draft, insisted on having the Black Sea recognized as a closed sea.²² The Soviet representative at the Lausanne negotiations, Foreign Minister Maxim Litvinov, argued forcibly in favor of keeping the straits closed to foreign warships for the security of the entire Black Sea, pointing out that the Black Sea was a closed sea and did not provide a transit route to other countries.²³

The Soviets reiterated this view at the Montreux Convention negotiations when Russian Foreign Minister Chicherine referred to the Black Sea as a closed sea and “cul de sac.”²⁴ The Convention regulates the passage of both

17. Treaty of Friendship, Russ.-Turk, Mar. 16, 1921, *reprinted in* 1 SOVIET TREATY SERIES 1917–1928: A COLLECTION OF BILATERAL TREATIES, AGREEMENTS AND CONVENTIONS, ETC., CONCLUDED BETWEEN THE SOVIET UNION AND FOREIGN POWERS 100 (Leonard Shapiro ed., 1950).

18. In the Treaty of Friendship, the parties agreed to “entrust the final elaboration of an international agreement concerning the Black Sea to a conference composed of the delegates of the *littoral states*.” *Id.* art. V (emphasis added).

19. 1923 Lausanne Straits Treaty, *supra* note 7.

20. *See* 1936 Montreux Convention, *supra* note 5.

21. *See* ORAL, REGIONAL CO-OPERATION AND PROTECTION OF THE MARINE ENVIRONMENT, *supra* note 8, at 26–27.

22. Kazimierz Grzybowski, *The Soviet Doctrine of Mare Clausum and Policies in Black and Baltic Seas*, 14 JOURNAL OF CENTRAL EUROPEAN AFFAIRS 339, 341 (1955). The author observed that it was during the 1923 Lausanne Conference on the status of the Black Sea that the Russians for the first time invoked the closed sea doctrine. *Id.* at 344.

23. SEHA L. MERAY & OSMAN OLCAY, MONTREUX BOGAZLAR KONFERANSI: TUTANAKLAR, BELGELER [MONTREUX STRAITS CONFERENCE: MINUTES, DOCUMENTS] 40 (1976).

24. FERENC A. VALI, THE TURKISH STRAITS AND NATO 32 (1972). Chicherine rejected Curzon’s view that the Turkish Straits (the Straits of Çanakakle and Istanbul) were

merchant and warships through the Turkish Straits. However, its most important function is the regulation of the passage of warships into and out of the Black Sea. These are the qualities that make the Black Sea a *quasi*-closed sea. While allowing merchant vessels freedom of navigation, the Convention imposes conditions and restrictions on the warships' passage, including submarines, of both Black Sea and non-Black Sea States through the Turkish Straits. However, as control over the straits under the Montreux Convention remains exclusively with Turkey, the closed sea doctrine does not apply in the Black Sea. Still, some aspects of it are present because of the restrictions on passage.

Since the Black Sea remains an open sea for all foreign merchant vessels but not warships,²⁵ the Montreux Convention regime can be described as a closed sea or semi-closed sea regarding the right of access of foreign warships. The Convention imposes unique limitations on access to the Black Sea by warships of non-Black Sea littoral States. It significantly limits the type of vessels, tonnage, and the number of foreign warships allowed entry at any one time.²⁶ Prior notification to Turkey is required during peacetime, and visits of foreign warships are limited to twenty-one days.²⁷ During the Crimea crisis of 2014, Russia had protested, claiming that Turkey had violated the Montreux Convention by allowing the USS *Taylor* to stay eleven days over the twenty-one-day limit, on the grounds of a mechanical breakdown.²⁸

III. SHIFT IN THE SPHERE OF INFLUENCE OVER THE BLACK SEA FOLLOWING THE DISSOLUTION OF THE USSR

With the USSR's dissolution in 1991, the Black Sea's historical two-power structure between the Ottoman and Russian empires and later Turkey and the USSR was replaced by five new independent Black Sea littoral States: the Russian Federation, Bulgaria, Romania, Ukraine, and Georgia. The historic

similar to other straits. He pointed out that they did not provide a passage between two *high seas* but served only as an exit and entry into a *closed sea*. In support of his argument Chicherine quoted from a book written in French which described the Black Sea as a *cul de sac* and internal sea. See also MERAY & OLCAY, *supra* note 23, at 165.

25. 1936 Montreux Convention, *supra* note 5, art. 10.

26. *Id.* art. 14.

27. *Id.* art. 18.

28. *Turkey Urges Russia to Drop Montreux Off the Agenda*, DAILY NEWS (Apr. 13, 2014), <http://www.hurriyetdailynews.com/turkey-urges-russia-to-drop-montreux-off-the-agenda.aspx?pageID=238&nid=64988>.

Belovezha Accords of December 8, 1991, formally ended the USSR's existence and created the Commonwealth of Independent States.²⁹ The Russian Federation asserted its claim as the successor State to the USSR and informed other States with whom the USSR had concluded multilateral treaties that it would continue to exercise the rights and fulfill the obligations of the USSR.³⁰

The dissolution of the USSR brought major changes to the world. This included the Black Sea region that was changing quickly and seemed to be transitioning into the Western orbit. Previously, Turkey was the only State bordering the Black Sea in NATO, a collective defense alliance against the USSR and expansion of communism created under the 1949 North Atlantic Treaty.³¹ With the dissolution, the European Union and NATO were quick to open membership to former members of the USSR, including Black Sea littoral States.³² Currently, three of the six Black Sea littoral States, Turkey, Bulgaria, and Romania, are full NATO members. Georgia and Ukraine participate in NATO's Partnership for Peace Program,³³ and Georgia is an official candidate for NATO membership.

29. Agreement Establishing the Commonwealth of Independent States pmb., Bel.-Russ.-Ukr., Dec. 8, 1991, 31 INTERNATIONAL LEGAL MATERIALS 143 (1992) [hereinafter Belovezha Accords] ("the USSR as a subject of international law and a geopolitical reality no longer exists"). Article 1 provided, "The High Contracting Parties shall constitute the Commonwealth of Independent States (CIS)." It was followed by the signing of the Alma ATA Protocol on December 21, with Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan, and Uzbekistan as parties. Protocol to the Agreement Establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 INTERNATIONAL LEGAL MATERIALS 147 (1992) [hereinafter Alma ATA Protocol].

30. The Russian Federation also continued to exercise the USSR's rights and obligations in international organizations, including its permanent membership in the Security Council of the United Nations. See AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW, PRELIMINARY DRAFT REPORT ON THE PILOT PROJECT OF THE COUNCIL OF EUROPE ON STATE PRACTICE REGARDING STATE SUCCESSION AND ISSUES OF RECOGNITION 41 (1998), <https://rm.coe.int/168004a360>.

31. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. The signatory countries were Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States. Turkey became a member in 1952. The Treaty provided for the collective security of the member countries in accordance with the U.N. Charter.

32. The European Union moved quickly to open membership to Bulgaria and Romania, which were admitted in 2004.

33. See *Partners for Peace Programme*, NATO, <https://www.sto.nato.int/Pages/partnership-for-peace.aspx> (last visited Feb. 10, 2021).

During this period, the opening up of the Black Sea region to Western influence through NATO and the European Union resulted in changes to the delicate balance of power drawn by history and the 1936 Montreux Convention. From a legal perspective, one of the limits on NATO's activities in the Black Sea is the existing legal regime under the Montreux Convention on naval ships of non-Black Sea littoral States. A second limitation is a diplomatic one—the Russian response to NATO's increased activity in the Black Sea, which it views as a threat to the existing regional stability.³⁴

The tensions were only exacerbated by the annexation of Crimea and events during the Russia-Georgia conflict. In the latter, in early August 2009, during the localized conflict in South Ossetia and Abkhazia, Russia sent armed forces to support South Ossetia and Abkhazia and the Russian Black Sea Fleet established a so-called “maritime security zone” to deny access to Georgian ports.³⁵ In the 2016 Warsaw Summit, the NATO members agreed to “deepen [NATO's] focus on security in the Black Sea region” and support Georgia's territorial integrity and security.³⁶

Similarly, in April 2019, the NATO foreign ministers decided to enhance their practical support to Ukraine, including cooperation with its navy.³⁷ Consequently, several non-Black Sea NATO members, including the United States, stepped up their presence in the region.³⁸ This followed NATO's condemnation of the events of November 25, 2018, where vessels of the Russian Coast Guard fired upon and captured three Ukrainian Navy vessels attempting to pass from the Black Sea into the Sea of Azov through the Kerch Strait on their way to the port of Mariupol.³⁹

34. *Russia to Respond in Kind to NATO Plans in Black Sea—Diplomat*, TASS, (Apr. 14, 2019), <https://tass.com/politics/1053577>.

35. 2 REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 212 (2009).

36. Press Release, Warsaw Summit Communiqué, Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Warsaw, 8–9 July 2016, ¶¶ 112–13, NATO Press Release (2016) 100 (July 9, 2016).

37. Press Release, Statement of the NATO-Ukraine Commission, ¶ 8, NATO Press Release (2019) 111 (Oct. 31, 2019).

38. For example, two U.S. warships conducted maritime security operations in the Black Sea in June 2020. *NATO Allied Ships Patrol in the Black Sea*, NATO (June 18, 2020), https://www.nato.int/cps/en/natohq/news_176708.htm#:~:text=The%20United%20States%20Navy%20dock,the%20Black%20Sea%20on%20Wednesday.

39. NATO Secretary General Jens Stoltenberg, Press Conference (Nov. 26, 2018), https://www.nato.int/cps/en/natohq/opinions_160789.htm.

IV. CURRENT CONFLICTS IN THE BLACK SEA REGION

A. *Crimea and Control of the Black Sea Fleet*

The Russian annexation of Crimea—or according to Russia, its accession following a referendum⁴⁰—in addition to the obvious sovereignty questions, created uncertainties as to the ultimate control of the Black Sea Fleet by the Russian Federation and Ukraine.⁴¹ Historically, the Russian presence in the Black Sea is intimately linked with the creation of the first Black Sea Fleet in the port of Sevastopol, a city and naval base on the southwest of the Crimean Peninsula, established by Prince Potemkin in 1783.⁴² In 1954, President Khrushchev “gave” Crimea to Ukraine to celebrate the three hundredth anniversary of Ukrainian and Russian relations.⁴³ The 1991 Belovezha Accords recognized the territorial integrity and the inviolability of the existing borders within the Commonwealth.⁴⁴ At the time, Ukraine’s borders included the Crimea. However, in 1992 the Russian Federation, while claiming not to challenge Ukraine’s sovereignty, stated that the transfer of Crimea by Khrushchev in 1954 was invalid as it had not been recorded.⁴⁵

40. *Ukraine Crisis: Putin Signs Russian-Crimea Treaty*, BBC (Mar. 18, 2014), <http://www.bbc.com/news/world-europe-26630062>.

41. Rasmus Nilsson, *Russian Policy Concerning the Black Sea Fleet and its Being Based in Ukraine, 2008–2010: Three Interpretations*, (2013) 65 EUROPE-ASIA STUDIES 1154 (2013); Victor Zaborksy, *Crimea and the Black Sea Fleet in Russian-Ukrainian Relations* (Belfer Center for Science and International Affairs, Harvard Kennedy School of Government, Harvard University, CSIA Discussion Paper 95-11, 1995), https://www.belfercenter.org/sites/default/files/legacy/files/disc_paper_95_11.pdf.

42. *Sevastopol*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/places/commonwealth-independent-states-and-baltic-nations/cis-and-baltic-political-geography/sevastopol> (last visited Feb. 10, 2021).

43. Adam Taylor, *To Understand Crimea, Take a Look Back at Its History*, WASHINGTON POST (Feb. 27, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/02/27/to-understand-crimea-take-a-look-back-at-its-complicated-history/>.

44. Belovezha Accord, *supra* note 29, art. 5.

45. Kendall Butterworth, *Successor States - Property Rights - Russia and Ukraine Agree to Share Control of the Former Soviet Union’s Black Sea Fleet*, 22 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 659, 661 n.7 (1992); Calamur Krishnadev, *Crimea: A Gift To Ukraine Becomes A Political Flash Point*, NPR (Feb. 27, 2014), <https://www.npr.org/sections/parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point>; Carey Goldberg, *Giving Crimea to Ukraine Was Illegal, Russians Rule: Commonwealth: Parliament’s Vote Brings Tensions between the Two Powers Close to the Boiling Point*, LOS ANGELES TIMES (May 22, 1992), <https://www.latimes.com/archives/la-xpm-1992-05-22-mn-278-story.html>.

From the onset, control over the Black Sea Fleet was a source of tension between Ukraine and Russia, each vying to control the Black Sea Fleet.⁴⁶ The two parties concluded three major agreements in May 1997, where they partitioned the Black Sea Fleet between themselves in order to create independent national fleets.⁴⁷ Under the terms of the agreements, Russia maintained control over most of the fleet and the right to use the port of Sevastopol for twenty years until 2017. In 2010, the two parties further agreed to extend the Russian navy stay in Crimea to 2042.⁴⁸

The previous legal arrangements over the Black Sea Fleet were put aside in 2014, with the eruption of a new crisis when the pro-Russian Ukrainian President Viktor Yanukovich fled mass public protests in Ukraine. In March 2014, Russia took military control of Crimea on the grounds it was protecting Russians, then held a referendum for the local population to determine Crimea's status as Russian or Ukrainian.⁴⁹ Consequently, decades after Khrushchev had "gifted" Crimea to Ukraine, Crimea, together with the port of Sevastopol and the Black Sea Fleet, returned to Russia. The ramifications of Crimea falling under Russian control were particularly significant for the status of the Black Sea Fleet. In April 2014, Russia unilaterally terminated the 1997 and 2010 agreements.⁵⁰ Shortly after that, Russia announced plans to expand its fleet by adding thirty new warships during the next six years,

46. Butterworth, *supra* note 45, at 661, 665–66.

47. There were a total of three agreements: Parameters of the Division of the Black Sea Fleet, Russ.-Ukr., May 28, 1997; Partition Treaty on the Status and Conditions of the Russian Federation Black Sea Fleet's Stay on the Territory of Ukraine, Russ.-Ukr., May 28, 1997; Payments Associated with the Division of the Black Sea Fleet and Its Presence on the Territory of Ukraine, Russ.-Ukr., May 28, 1997.

48. Agreement between the Russian Federation and Ukraine on the Presence of the Russian Federation Black Sea Fleet on the Territory of Ukraine, Russ.-Ukr., Apr. 21, 2010.

49. Following a referendum held on March 16, 2014, on March 17, President Putin signed an executive order recognizing the Republic of Crimea as a "sovereign and independent state, whose city of Sevastopol has a special status." *Putin Formally Recognizes Crimea as an Independent State*, iPOLITICS (May 17, 2014), <https://ipolitics.ca/2014/03/17/u-s-eu-announce-expanded-sanctions-following-vote-in-crimea/>. Crimea was officially admitted into the Russian Federation on March 18. *See* Contract Between the Russian Federation and Republic of Crimea, Mar. 18, 2014. For a partial unofficial English translation, see <https://cis-legislation.com/document.fwx?rgn=67094>.

50. Federal Law of the Russian Federation on Termination of the Agreements Governing the Presence of the Russian Federation Black Sea Fleet in the Territory of Ukraine, Russian Federation Collection of Legislation 2004, No. 38-FZ. For an unofficial English translation, see <https://cis-legislation.com/document.fwx?rgn=66199> (last visited Feb. 10, 2021).

contrary to the previous agreements, which only allowed Russia to do ship-for-ship swaps.⁵¹ It was also reported that during the annexation, Russian flags were raised on some Ukrainian naval vessels and personnel and equipment of Ukrainian military units taken over by Russia.⁵²

B. Unresolved Issues of Navigation and Delimitation in the Sea of Azov and the Kerch Strait

Following Russia's military intervention in Crimea in 2014, the legal status and delimitation of the Kerch Strait and the Sea of Azov remained unresolved and are currently disputed by the parties.⁵³

The Sea of Azov is a small shallow body of water connected to the Black Sea through the Kerch Strait. Until 1991, it was accepted as the internal waters of Russia. It was only after the 1991 dissolution of the USSR and the emergence of Ukraine and the Russian Federation as independent States that that status was questioned.⁵⁴

Following the dissolution, Ukraine and Russia failed to reach an agreement on the drawing of boundaries in the Sea of Azov, including those of the Kerch Strait. An agreement on cooperation on the use of the Sea of Azov and the Kerch Strait concluded in December 2003 did not settle the delimitation question but did recognize that the Sea of Azov and the Kerch Strait

51. John C.K. Daly, *Hot Issue: After Crimea: The Future of the Black Sea Fleet*, JAMESTOWN FOUNDATION (May 22, 2014), <https://jamestown.org/program/hot-issue-after-crimea-the-future-of-the-black-sea-fleet/>.

52. Peter Roudik, *Russia; Ukraine: Legislature Adopts Law on Dissolution of Black Sea Fleet Treaties*, LIBRARY OF CONGRESS (Apr. 3, 2014), <https://www.loc.gov/law/foreign-news/article/russia-ukraine-legislature-adopts-law-on-dissolution-of-black-sea-fleet-treaties/>.

53. Alexander Skaridov, *The Sea of Azov and Kerch Straits*, in NAVIGATING STRAITS: CHALLENGES FOR INTERNATIONAL LAW 220 (David D. Caron & Nilufer Oral eds., 2014). Valentin J. Schatz & Dmytro Koval, *Russia's Annexation of Crimea and the Passage of Ships Through Kerch Strait: A Law of the Sea Perspective*, 50 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 275, 278 (2019).

54. Skaridov, *supra* note 53, at 221.

were *historically* internal waters of Russia and Ukraine.⁵⁵ The agreement provided the right of *freedom of navigation* for Ukraine and Russian vessels,⁵⁶ but not third-party merchant vessels. Foreign merchant vessels could only pass through the Kerch Strait if navigating to ports of Ukraine or Russia.⁵⁷ Foreign military and State vessels could only enter the Sea of Azov upon invitation or by permission.⁵⁸ However, the agreement did not indicate the responsible authority for granting such permission and other conditions of navigation, such as the duration of the stay and number of vessels permitted to be present.⁵⁹

Therefore, the 2003 cooperation agreement left uncertainties as to the regulation of navigation in the Sea of Azov and the delimitation of the boundaries in the region.⁶⁰ The incident on November 25, 2018, in which the Russian Coast Guard fired upon and captured three Ukrainian navy vessels passing through the Kerch Strait on their way to the port of Mariupol in the Sea of Azov brought these issues back to light. The Kerch Strait is the only waterway connecting the Sea of Azov with the Black Sea and separates Crimea in the west from the Taman Peninsula in the east.⁶¹ As discussed below, the legal status of the Sea of Azov under UNCLOS is crucial to determine the legality of the Russian actions. Thus, the question of whether the waters of the Sea of Azov are internal waters outside the scope of the UNCLOS or a semi-enclosed sea under Article 122 would be one of the many

55. Agreement between the Russian Federation and the Ukraine on Cooperation in the use of the Sea of Azov and the Strait of Kerch art. 1, Russ.-Ukr., Dec. 24, 2003, http://www.fao.org/fishery/shared/faolextrans.jsp?xp_FAOLEX=LEX-FAOC045795&xp_faoLexLang=E&xp_lang=en [hereinafter Agreement on Cooperation]. For an unofficial translation, see <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien-valentin/agreement-sea-of-azov>. See Schatz & Koval, *supra* note 53, at 278. Those authors are of the view that under the agreement and subsequent statements the Sea of Azov was recognized as internal waters.

56. Agreement on Cooperation, *supra* note 55, art. 2(1). See also Schatz & Koval, *supra* note 53, at 285. The authors opine that the use of the term “freedom of navigation” was likely accidental and not meant to reflect the freedom of the high seas under Article 87 of UNCLOS.

57. Agreement on Cooperation, *supra* note 55, art. 2(2).

58. *Id.* art. 2(3).

59. Schatz & Koval, *supra* note 53, at 285.

60. Skaridov, *supra* note 53; Schatz & Koval, *supra* note 53.

61. Skaridov, *supra* note 53.

issues presented for international adjudication.⁶² To address those, the tribunals before which the three cases were filed must tackle the overarching question of sovereignty over the Crimean Peninsula.

V. THE BLACK SEA CASES BEFORE ITLOS AND THE ARBITRAL TRIBUNALS

Legal issues concerning the Black Sea have been at the forefront of international courts and tribunals for over a decade. The first case to be brought was Georgia's institution of proceedings on August 12, 2008, before the ICJ against the Russian Federation, contending that Russia's actions in Georgia were in breach of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.⁶³ While the application did not directly concern legal issues regarding the Black Sea and did not proceed beyond the preliminary objection stage, the case nevertheless marked a precedent that would be followed by Ukraine against Russia for its actions in the Black Sea, Sea of Azov, and Kerch Strait.

Then, on January 16, 2017, Ukraine instituted proceedings against Russia before the ICJ, alleging violations of the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination.⁶⁴ The claims relate to events taking place in eastern Ukraine and the situation in Crimea. Ukraine contended that the Russian Federation had failed to take all practicable measures to prevent and counter the commission of terrorism financing offenses committed in eastern Ukraine that began in the spring of 2014 and had engaged in a campaign to deprive the Crimean Tatars and ethnic Ukrainians in Crimea of their political, civil, economic, social, and cultural rights, and pursued a policy and practice of racial discrimination against

62. Skaridov, *supra* note 53, at 224–25; Schatz & Koval, *supra* note 53, at 277–78.

63. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. Rep. 70 (Apr. 1).

64. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. Rep. 558 (Nov. 8) [hereinafter Application of the ICSFT and CERD]. See also Iryna Marchuk, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation) (Preliminary Objections)* (I.C.J.), 59 INTERNATIONAL LEGAL MATERIALS 339 (2020).

those communities.⁶⁵ The Court found it had jurisdiction and rejected all of Russia's preliminary objections.⁶⁶

On September 16, 2016, Ukraine served a notification and statement of claim under Annex VII of UNCLOS on the Russian Federation.⁶⁷ More recently, on March 31, 2019, Ukraine provided notification under UNCLOS Article 287 and Annex VII Article 1 that it was instituting arbitral proceedings for the capture and detention of the three Ukrainian naval vessels and the twenty-four servicemen on board that had occurred on November 25, 2018.⁶⁸ At its core, the case concerns the coastal State rights of Ukraine and Russia in the Black Sea, Sea of Azov, and Kerch Strait. Ukraine also filed a request for provisional measures under Article 290(5) before ITLOS pending establishment of the arbitral tribunal.⁶⁹

A. *The Dispute Concerning Coastal State Rights Arbitral Case*

In its notification and statement of claim in the *Dispute Concerning Coastal State Rights* arbitration, Ukraine presented the tribunal with a long list of requests to adjudge, including, *inter alia*, recognizing Ukraine as having exclusive rights to engage in, authorize, and regulate exploration and exploitation of the natural resources, including drilling-related to hydrocarbons, and to authorize and regulate fishing in those areas of the Black Sea and Sea of Azov where Russia had not challenged Ukraine's sovereignty before February 2014.⁷⁰ In addition, to declare that the "Russian Federation shall refrain from preventing Ukrainian vessels from exploiting in a sustainable manner the living resources in the areas of the Black Sea and Sea of Azov," again in those areas Russia had not challenged Ukraine's sovereignty before February 2014⁷¹ and that Ukraine had the right of passage through the Kerch Strait.⁷²

Ukraine's memorial provided another long list of violations of UNCLOS provisions allegedly committed by the Russian Federation. These included, *inter alia*, interference with Ukraine's rights to hydrocarbon resources and living resources in the Black Sea, Sea of Azov, and Kerch Strait, and

65. Application of the ICSFT and CERD, *supra* note 64, ¶ 18.

66. *Id.* ¶ 134.

67. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶¶ 2, 8.

68. Detention of Three Ukrainian Naval Vessels, *supra* note 3, pmbl.

69. Immunity of Three Ukrainian Naval Vessels, *supra* note 4.

70. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 9(a), (c).

71. *Id.* ¶ 9(d).

72. *Id.* ¶ 9(f).

Ukraine's UNCLOS rights and duties concerning underwater cultural heritage.⁷³ It further alleged that Russia had embarked on a campaign of illegal construction in the Kerch Strait that threatened navigation and the marine environment and had violated its duty to cooperate with Ukraine to address pollution at sea.⁷⁴

The Russian Federation contested the arbitral tribunal's jurisdiction on the grounds that the dispute, in essence, concerned Ukraine's claim to sovereignty over Crimea and was therefore not a dispute concerning the interpretation or application of UNCLOS.⁷⁵ Russia also asserted that UNCLOS did not regulate internal waters, such as the Sea of Azov and the Kerch Strait.⁷⁶ In addition, Russia invoked the military activities and law enforcement exceptions⁷⁷ under UNCLOS Article 298(1)(b), which creates an exception for States from compulsory dispute settlement mechanisms for "disputes concerning military activities, including military activities by government vessels . . . in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction."⁷⁸ It also argued that certain matters relating to fisheries, the protection and preservation of the marine environment, marine scientific research, navigation, and the living resources were excluded from the tribunal's jurisdiction.⁷⁹

The tribunal to date has only issued its preliminary objections award. Yet, on the overarching issue of sovereignty over Crimea, the award contains important points about the tribunal's approach to the scope and application of UNCLOS on the arguments raised by Ukraine should the case proceed to the merits phase. In responding to the preliminary objections, as discussed below, the tribunal has attempted to strike a balance that acknowledges this reality but also preserves the case for the next phase. The ultimate question is what influence will the final award have over unresolved issues surrounding the sovereignty of Crimea, the legal status of the Sea of Azov and the

73. *Id.* ¶ 17(a)–(h).

74. *Id.* ¶ 17(j)–(p).

75. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, PCA Case Repository, Preliminary Objections of the Russian Federation, ¶ 47 (Perm. Ct. Arb. 2019) [hereinafter Dispute Concerning Coastal State Rights Preliminary Objections]

76. *Id.* ¶ 117.

77. *Id.* ¶ 137.

78. UNCLOS, *supra* note 1, art. 298(1)(b).

79. Dispute Concerning Coastal State Rights Preliminary Objections, *supra* note 75, ¶¶ 149, 213.

Kerch Strait, and the definition of military activities conducted in the Black Sea.

1. Sovereignty

According to Russia, the core issue underlying Ukraine's claims was sovereignty over Crimea, which is precluded under UNCLOS Article 288(1).⁸⁰ Ukraine countered by alleging that as Russia had acted unlawfully against Ukraine and Crimea, there was no sovereignty dispute.⁸¹ In the alternative, Ukraine argued that even if the case did entail a sovereignty dispute, it was ancillary to the dispute concerning the interpretation or application of Article 288(1).⁸²

In examining the case, the tribunal recognized the relationship between Ukraine's claims and Crimea's legal status. It concluded the dispute over sovereignty was not ancillary to the dispute concerning the interpretation and application of UNCLOS.⁸³ It understood that sovereignty and the question of whether Russia or Ukraine was the "coastal State" was a prerequisite to its decision on a significant number of Ukraine's claims.⁸⁴ This issue arose because Ukraine's claim to be the coastal State was premised on its sovereignty over Crimea, a premise the tribunal found could not be taken at face value.⁸⁵ The question then was whether that precluded it from exercising jurisdiction over the case.

In deciding the question, the tribunal followed the approach of the tribunal in the Chagos arbitration, which stated

80. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 161; Dispute Concerning Coastal State Rights Preliminary Objections, *supra* note 75, ¶ 47.

81. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 161.

82. *Id.*

83. *Id.* ¶ 195. The tribunal followed the approach of the tribunal in the Chagos case, which had also raised conflicting claims of sovereignty over the Chagos archipelago by the United Kingdom and Mauritius. In that case, Mauritius had challenged the right of the United Kingdom to establish a marine protected area in the archipelago because it was not the coastal State. The United Kingdom, in turn, challenged the tribunal's jurisdiction under Article 288(1)(a)(i) on the grounds that "sovereignty over the Chagos Archipelago constitutes 'the real issue in the case'" and not a dispute concerning the interpretation and application of UNCLOS. Chagos Marine Protected Area (Mauritius v. U.K.), Case No. 2011-03, PCA Case Repository, Award, ¶ 164 (Perm. Ct. Arb. 2015) [hereinafter Chagos Arbitration].

84. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 195.

85. *Id.* ¶¶ 152, 154.

a dispute over sovereignty does not definitively answer the question of jurisdiction. There remains the question of the extent to which Article 288(1) accords the Tribunal jurisdiction in respect of a dispute over land sovereignty when, as here, that dispute touches in some *ancillary* manner on matters regulated by the Convention.⁸⁶

The tribunal ultimately agreed with the Russian Federation's position that it did not have jurisdiction over Ukraine's claims.⁸⁷ The tribunal found that the territorial sovereignty dispute over Crimea was "not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention."⁸⁸ However, this was not a wholesale rejection of its jurisdiction. The tribunal qualified its finding only "to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily requires it to decide, directly or implicitly, on the sovereignty of either Party over Crimea."⁸⁹ Evidently unwillingly to make a final disposition of the case and based on the interest of procedural fairness, the tribunal maintained jurisdiction but required Ukraine to revise its memorial "so as to take full account of the scope of, and limits to, the Arbitral Tribunal's jurisdiction as determined in the present Award."⁹⁰

There is no doubt that the core of this case concerns the disputed sovereignty over Crimea. So, as was the case in the Chagos case, the tribunal cannot decide which country is the coastal State without determining sovereignty questions. However, this does not prevent the tribunal from deciding associated matters under dispute that don't transgress into sovereignty issues.

86. Chagos Arbitration, *supra* note 83, ¶ 213 (emphasis added). The South China Sea arbitration raised similar issues of territorial sovereignty issues that possibly precluded the exercise of jurisdiction by the tribunal. The South China Sea is an area with a complex array of disputed claims of sovereignty over a number of offshore features among multiple States and overlapping claims to maritime zones. Nonetheless, in that case, the arbitral tribunal was able to uncouple sovereignty issues over disputed offshore features from the question of the status of such features under UNCLOS Article 121. The tribunal found violations of the environmental protection provisions of UNCLOS without determining sovereignty, implicitly recognizing such obligations as *erga omnes*. South China Sea Arbitration (Phil. v. China), Case No. 2013-19, PCA Case Repository, Award, ¶ 927 (Perm. Ct. Arb. 2016). See also Nilufer Oral, *The South China Sea Arbitral Award, Part XII of UNCLOS, and the Protection and Preservation of the Marine Environment*, in SOUTH CHINA SEA ARBITRATION 223 (S. Jayakumar, Tommy Koh, Robert Beckman, Tara Davenport & Hao Duy Phan eds., 2018)

87. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 492.

88. *Id.* ¶ 195.

89. *Id.* ¶ 197 (emphasis added).

90. *Id.* ¶ 198 (emphasis added).

2. The Status of the Sea of Azov and the Kerch Strait as Internal Waters

At this preliminary stage, the tribunal had to determine whether its jurisdiction over alleged disputes concerning the Sea of Azov and the Kerch Strait was precluded because they constituted internal waters (or historic bays). According to Russia, internal waters and historic bays fell outside the scope of UNCLOS; therefore, the tribunal would lack jurisdiction under Article 288(1) as it was not a dispute calling for the interpretation or application of UNCLOS.⁹¹ Ukraine rejected Russia's claims that the Sea of Azov and the Kerch Strait are internal waters. According to Ukraine, "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."⁹²

As discussed above, the substance of the issue involves a complicated history of the transition from USSR republics to independent States in 1991. Ukraine and Russia agree that the Sea of Azov and the Kerch Strait were once internal waters of the USSR. Russia takes the position that status continued following the transition. The question is whether the status changed in 1991 when the USSR was replaced by two independent States bordering the Sea of Azov and Kerch Strait. This was a source of ongoing discussions between Ukraine and Russia, and the question was only partially resolved under the 2003 agreement on the Kerch Strait and Sea of Azov.⁹³ In the agreement, both Ukraine and Russia recognized the Sea of Azov and Kerch Strait as historically internal waters.⁹⁴ But what does "historically" mean? According to Russia, at least for purposes of the arbitration case, it marked an acknowledgment that the status of the Sea of Azov and Kerch Strait, including their status as internal waters, remained unchanged after the dissolution of the USSR and the independence of Ukraine. Therefore, UNCLOS was applicable. Russia also referred to the ICJ's *Land, Island and Maritime Frontier Dispute* judgment⁹⁵ in support of its argument that, like the Gulf of Fonseca,

91. Dispute Concerning Coastal State Rights Preliminary Objections, *supra* note 75, ¶ 132.

92. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 200.

93. Agreement on Cooperation, *supra* note 55.

94. See *supra* note 55 and accompanying text.

95. *Land, Island and Maritime Frontier Dispute* (El. Sal./Hond., Nicar. Intervening), 1992 I.C.J. Rep. 351 (Sept. 11).

the Sea of Azov is an example of pluri-State internal waters,⁹⁶ a view that Ukraine contests.

While Ukraine does not contest that in the past the Sea of Azov and Kerch Strait were internal waters of the USSR, according to Ukraine, their status changed after USSR's dissolution and that they no longer constitute internal waters,⁹⁷ arguing that the 2003 agreement acknowledged this change of status. Ukraine's position is that the Sea of Azov is a semi-enclosed or enclosed sea under UNCLOS Article 122, within which there are territorial seas and exclusive economic zones of the two States.⁹⁸ Ukraine also argued that under UNCLOS, seas bordered by more than one State could not be internal waters.⁹⁹ It disputed Russia's reliance on the "exceptional" notion of pluri-State internal waters (the Gulf of Fonseca). Further, it argued that even if this were possible, the Sea of Azov did not fulfill the requirements for such recognition.¹⁰⁰

Finally, Ukraine disagreed with Russia that internal waters fall outside the scope of UNCLOS. Ukraine also put forth the view, citing the jurisdictional award in the *South China Sea* arbitration,¹⁰¹ that Russia's reliance on the status of the Sea of Azov and Kerch Strait as internal waters, or in the alternative historic waters, should be deferred to the merits stage of the proceedings.¹⁰² Specifically, the South China Sea tribunal stated its jurisdiction would be "dependent on the nature of any historic rights . . . and whether they are covered by the exclusion from jurisdiction over 'historic bays or titles'" in Article 298.¹⁰³ It held that the nature and validity of any historic rights

96. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 208. In addition, Russia cited Arbitration Between the Republic of Croatia and the Republic of Slovenia (Croat. v. Slovn.), Case No. 2012-04, PCA Case Repository, Final Award, ¶ 209 (Perm. Ct. Arb. 2017). In that case, the tribunal found that the Bay of Piran, bordered by Croatia and Slovenia, which formerly constituted the internal waters of the Socialist Federal Republic of Yugoslavia, retained its status after that State's dissolution.

97. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 212.

98. *Id.* ¶ 213.

99. *Id.* ¶ 216.

100. *Id.* ¶ 218.

101. During the jurisdictional phase of the South China Sea arbitration, the tribunal found that questions pertaining to the historic rights claimed by China were determinations to be made on the merits. South China Sea Arbitration, PCA Case No. 2013-19, PCA Case Repository, Jurisdiction and Admissibility, Award, ¶ 398 (Perm. Ct. Arb. 2015).

102. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 285.

103. South China Sea Arbitration, *supra* note 101, ¶ 171.

claimed by China was a merits determination and that the possible jurisdictional objections concerning the dispute “therefore do not possess an exclusively preliminary character.”¹⁰⁴

Ukraine alleges the Kerch Strait is a strait used for international navigation under UNCLOS Article 37.¹⁰⁵ Russia, however, claims exclusive sovereignty over the Kerch Strait subject to the rights granted to Ukraine, such as freedom of navigation for Ukrainian ships and a right to free passage for foreign non-military vessels sailing to and from Ukrainian ports under the 2003 cooperation agreement.¹⁰⁶ In other words, Russia appears to have taken the position that the agreement entailed Russia granting specific rights to Ukraine and that it was not a mutual agreement on shared sovereignty over the Kerch Strait and Sea of Azov.

In its award on jurisdiction, the tribunal reaffirmed that the legal status of the Sea of Azov and Kerch Strait is “interwoven with the merits of the present dispute” that have not yet been pleaded.¹⁰⁷ The tribunal found that the determination depended “to a large extent, on how the Parties have treated them in the period following the independence of Ukraine,”¹⁰⁸ indicating the positions of the parties would come from subsequent agreements between them, their actual practice in the areas concerned, and their actions vis-à-vis third States. The tribunal emphasized that “[i]n particular, this would require the arbitral tribunal to scrutinize the conduct of the Parties with respect to such matters as navigation, exploitation of natural resources, and protection of the marine environment in the Sea of Azov and Kerch Strait.”¹⁰⁹

The tribunal was not entirely convinced by Russia’s argument that UNCLOS does not include a regime regulating internal waters and that a dispute relating to events occurring in internal waters does not concern the interpretation or application of UNCLOS.¹¹⁰ Moreover, in perhaps a preview of its decision on the issue, the tribunal referred to ITLOS’s *Sub-Regional Fisheries Commission* advisory opinion¹¹¹ when stating the “obligation to protect and preserve the marine environment under Article 192 [of UNCLOS] applies

104. *Id.* ¶ 164(H).

105. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 215.

106. *Id.* ¶ 211.

107. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 293.

108. *Id.* ¶ 291.

109. *Id.*

110. *Id.* ¶ 294.

111. Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion of Apr. 2, 2015, ITLOS Rep. 4.

to all maritime areas,” which would, according to the Black Sea tribunal, “undoubtedly include internal waters.”¹¹² Indeed, the tribunal made it quite clear that it was more concerned with whether the dispute involves conduct of the parties that implicates or raises questions on the interpretation and application of UNCLOS.¹¹³ That the events took place in internal waters is irrelevant to the tribunal. Thus, it is the conduct giving rise to the dispute and not its location in a specific maritime area that determines the applicability of Article 288(1) according to the tribunal. This position offers additional clues to how it will analyze the issues without entering into the controversy of sovereignty over Crimea.¹¹⁴

UNCLOS provides little guidance on whether the dispute concerns the “interpretation or application of this Convention,” the prerequisite for jurisdiction under UNCLOS’s compulsory dispute settlement procedures.¹¹⁵ UNCLOS does not provide a regime of rights and obligations for internal waters as it does for other maritime zones. Although the *Sub-Regional Fisheries Commission* advisory opinion and the *South China Sea* arbitral award strongly suggest that internal waters fall within UNCLOS for jurisdictional purposes, it is likely that when this case proceeds to the merits, the tribunal will focus more on the conduct of Russia and Ukraine between 1991 and 2014 rather than make substantive pronouncements on defining internal waters, historic bays, or semi-enclosed seas.

3. The Military Activities and Law Enforcement Activities Exception under UNCLOS Article 298(1)(b)

Russia invoked the opt-out provision of Article 298(1)(b) excluding military and law enforcement activities from compulsory dispute resolution procedures when ratifying UNCLOS.¹¹⁶ In this case, Russia asserted the military

112. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 295.

113. *Id.* ¶ 296.

114. This would be very consistent with the approach taken by the tribunal in the South China Sea arbitration in which it objectively assessed maritime features and China’s claim to historic title without determining sovereignty. And likewise, the tribunal in that case determined whether China had violated provisions related to protection and preservation of the marine environment as an obligation *erga omnes* that applied in all maritime zones.

115. UNCLOS, *supra* note 1, art. 288(1).

116. *United Nations Convention on the Law of the Sea*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en (last visited Feb. 10, 2021) [hereinafter Russian Declaration].

activities exception through a somewhat derivative fashion against the background of the 2014 conflict with Ukraine. In addition, Russia relied on Ukraine's claim that Russia's military vessels had used physical force to exclude it from access to hydrocarbon fields and fisheries.

The tribunal was clear in its rejection of the Russian arguments. The tribunal stated that the military activities exception was not triggered simply because the actions took place against the broader background of an alleged armed conflict. The standard the tribunal applied was "whether 'certain specific acts subject of Ukraine's complaints' constitute military activities."¹¹⁷ The tribunal stated "a mere 'causal' or historical link between certain alleged military activities and the activities in dispute cannot be sufficient to bar an arbitral tribunal's jurisdiction under Article 298, paragraph 1, subparagraph (b) of the Convention."¹¹⁸ Moreover, the tribunal stated the "mere involvement or presence of military vessels alone" is not sufficient "to trigger the military activities exception," and referred to the *South China Sea* arbitral award.¹¹⁹

The tribunal discarded Russia's invocation of military activities based on Ukraine's claim that physical force had been used to deny it access to hydrocarbon and fisheries resources. According to the tribunal, the alleged use of force was not enough to give rise to the military activities' exception. It looked to the "broader context" of where the activities took place and took into consideration the civilian nature of the hydrocarbon commercial activities and the civilian legal framework for regulating fisheries.¹²⁰ Explaining its approach, the tribunal found that "the use of physical force alleged by Ukraine does not turn the dispute into one concerning military activities; rather such alleged force appears to have been directed towards maintaining civilian activities such as the exploitation of hydrocarbons and fisheries."¹²¹ Additionally, regardless of the type of vessels involved, the tribunal focused

117. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 331.

118. *Id.* ¶ 330.

119. *Id.* ¶ 334. In that case, while China had directly used military vessels and personnel to engage in land reclamation activities, the Tribunal did not find that this constituted military activities within the meaning of Article 298(1)(b). *South China Sea Arbitration*, *supra* note 101, ¶ 1203(A)(6)(b). Of course, an important aspect was that China had itself characterized its island-building activities as having a civilian and non-military character. Keyuan Zou & Qiang Ye, *Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal*, 48 OCEAN DEVELOPMENT & INTERNATIONAL LAW 331, 340 (2017).

120. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶ 336.

121. *Id.*

on the nature of the activities and concluded that they could not be “objectively classified as military in nature.”¹²²

Authors have been critical of previous decisions by tribunals that have given very limited, and according to some, conflicting applications of Article 298(1)(b). Zou & Ye note this conflicting interpretation in the *South China Sea* award in which the tribunal excluded application of the military activities exception for Chinese military vessels used in land reclamation activities but then applied the exception where Chinese non-military vessels attempted to prevent Philippines military vessels from resupplying its military personnel stationed at Second Thomas Shoal.¹²³

The *Dispute Concerning Coastal State Rights* award provides no clarification, instead indicating there is no common standard for determining the scope of military activities, the tribunal stating,

there is no consistent practice as to the scope of activities that are to be regarded as being exercised by “military” vessels, aircraft and personnel. Forces that some governments treat as civilian or law enforcement forces may be designated as military by others, even though they may undertake comparable tasks. In addition, many States rely on their military forces for non-military functions, such as disaster relief, evacuation, or the reestablishment of public order.¹²⁴

It seems that in recent cases, tribunals appear to be against a *stricto sensu* interpretation for the application of the military activities’ exception, instead preferring a case-by-case approach based on the combination of objective criteria.¹²⁵

The tribunal rejected Russia’s invocation of the law enforcement exception for activities related to the exercise of sovereign rights of a State in its declared exclusive economic zone.¹²⁶ The overarching issue here was the dispute over sovereignty between Ukraine and Russia over Crimea. According to the tribunal, because it had already declined to exercise jurisdiction over

122. *Id.* ¶ 338.

123. Zou & Ye, *supra* note 119, at 340.

124. *Dispute Concerning Coastal State Rights Award*, *supra* note 2, ¶ 335.

125. *See also* *Detention of Three Ukrainian Naval Vessels*, *supra* note 3, separate opinion by Gao, J., ¶ 22 (“Evaluation of military activities should be based on a combination of factors, such as the intent and purpose of the activities, taking into account the relevant circumstances of the case, such as the manner in which the Parties deployed their forces and the way in which the Parties engaged one another at sea.”).

126. *Dispute Concerning Coastal State Rights Award*, *supra* note 2, ¶ 358.

questions related to determining the coastal State, “[i]t follows that entitlements to adjacent maritime zones generated by the coast of Crimea, including any exclusive economic zones, cannot be determined.”¹²⁷ Given the uncertainty concerning whether Ukraine or Russia had sovereignty rights over the exclusive economic zone where the incident took place, the tribunal decided the conditions for the application of Article 298(1)(b) had not been met.¹²⁸

4. Delimitation and Historic Bays or Titles Exception

On the question of the application of the sea boundary delimitation exception to compulsory dispute resolution under Article 298(a)(i) claimed by Russia, the tribunal found it inapplicable because it would require a decision implicitly or explicitly on sovereignty over Crimea.¹²⁹ The tribunal reserved Russia’s historic bays or titles objection to the tribunal’s jurisdiction for the merits stage, stating the disputes relating to historic bays or titles are “closely intertwined with the Russian Federation’s arguments concerning historical title in support of its internal waters objection.”¹³⁰ Thus, for the tribunal, deciding this objection was not an exclusively preliminary matter and involved the merits.

5. Fisheries, Protection and Preservation of the Marine Environment, and Navigation

The USSR’s declaration when ratifying UNCLOS opted for a special arbitral tribunal under Annex VIII for the consideration of matters related to fisheries, protection and preservation of the marine environment, marine scientific research, and navigation, including pollution from vessels and dumping.¹³¹ A similar declaration was made by the Ukrainian Soviet Socialist Republic when signing UNCLOS and again in its ratification on July 26, 1999.¹³²

127. *Id.* ¶ 357.

128. *Id.* ¶¶ 356–58.

129. *Id.* ¶ 382.

130. *Id.* ¶ 388.

131. *Id.* ¶ 414. *See also* Russian Declaration, *supra* note 116.

132. Dispute Concerning Coastal State Rights Award, *supra* note 2, ¶¶ 405–6.

Russia argued that the tribunal had no jurisdiction over these matters since they belonged to the “jurisdictional domain” of Annex VIII tribunals.¹³³ To date, there has been no Annex VIII special arbitral tribunal constituted, and it is unlikely one will be constituted in the near future. The reason provided by the tribunal in rejecting the Russian objection was to avoid the possibility of inconsistent outcomes should more than one tribunal be deciding different aspects of the same case.¹³⁴ It noted that this was especially the case since it did “not consider each of Ukraine’s submissions made in the Notification and Statement of Claim and the Memorial to constitute a distinct and separate dispute, but rather to be *part of a single, unified dispute*.”¹³⁵

The tribunal reasoned it would not be in the interest of justice for the tribunal to hear parts of the case and not others. In addition to its concerns about fragmentation, the tribunal also considered the parties’ increase in costs and litigation time.¹³⁶

B. *Detention of Three Ukrainian Naval Vessels case*

As discussed above, since the annexation of Crimea by the Russian Federation in 2014, the legal status of the Kerch Strait, which connects the Black Sea and the Sea of Azov, has been disputed by the parties. Against this background, the arrest and detention of three Ukrainian naval vessels and their twenty-four servicemen by Russian authorities on November 25, 2018, brought international adjudication to the question of the legal status and respective rights of the parties in the Kerch Strait.¹³⁷

Pending the constitution of an Annex VII arbitral tribunal, Ukraine filed a request for provisional measures pursuant to Article 290(5) of UNCLOS, asking ITLOS to order the Russian Federation to promptly release and return the Ukrainian vessels, and suspend any criminal proceedings against the servicemen, refrain from initiating new proceedings, and release and allow them to return to Ukraine. In doing so, Ukraine argued that the seizure and detention of the Ukrainian naval vessels by the Russian Federation constituted a breach of its obligation under UNCLOS to accord foreign naval vessels complete immunity under Articles 32, 58, 95, and 96 of UNCLOS.¹³⁸ In

133. *Id.* ¶ 408.

134. *Id.* ¶ 442.

135. *Id.* ¶ 441 (emphasis added).

136. *Id.* ¶ 442.

137. Detention of Three Ukrainian Naval Vessels, *supra* note 3.

138. *Id.* ¶ 22.

addition, Ukraine asserted that the twenty-four crewmembers' detention amounted to a breach of Russia's obligations under those articles. Notably, the Russian Federation did not participate in the proceedings before the tribunal but transmitted a memorandum that explained its position.¹³⁹

In its May 25, 2019 Order, ITLOS granted provisional measures, which were approved by a vote of nineteen to one, requiring the Russian Federation to (i) immediately release the Ukrainian naval vessels and return them to the custody of Ukraine and (ii) release the twenty-four detained Ukrainian servicemen and allow them to return to Ukraine.¹⁴⁰ In addition, the tribunal required both Ukraine and the Russian Federation to refrain from taking any action that might aggravate or extend the dispute submitted to the Annex VII arbitral tribunal.¹⁴¹

With respect to the basis on which the jurisdiction of the Annex VII arbitral tribunal could be founded, the tribunal initially had to determine whether the dispute was a "dispute concerning the interpretation or application" of UNCLOS.¹⁴² Ukraine argued that Articles 286 and 288 provided the basis of the tribunal's jurisdiction.¹⁴³ The tribunal, while observing that the memorandum of the Russian Federation "did not directly respond to this argument,"¹⁴⁴ determined that the arrest and detention of the vessels and their crews demonstrated that the parties were positioned differently with regard to whether there had been a breach of the obligations under Articles 32, 58, 95, and 96.¹⁴⁵

In concluding that the Annex VII arbitral tribunal would have prima facie jurisdiction as required under Article 290(5) of UNCLOS, the tribunal considered that there was a dispute concerning the interpretation or application of UNCLOS.¹⁴⁶ However, it should be noted that since the order was

139. ITLOS noted that "Ukraine should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings and that the Tribunal 'must therefore identify and assess the respective rights of the Parties involved on the best available evidence.'" *Id.* ¶ 29. It cited the order in the *Arctic Sunrise* case. *Arctic Sunrise* (Neth. v. Russ.), Case No. 22, Provisional Measures, Order of Nov. 23, 2013, ITLOS Rep. 230, ¶¶ 56–57.

140. *Detention of Three Ukrainian Naval Vessels*, *supra* note 3, ¶ 118. The tribunal did not consider it necessary to order Russia to suspend criminal proceedings or to refrain from initiating new proceedings. *Id.* ¶ 119.

141. *Id.* ¶ 120.

142. UNCLOS, *supra* note 1, art. 288(1).

143. *Detention of Three Ukrainian Naval Vessels*, *supra* note 3, ¶ 37.

144. *Id.* ¶ 41.

145. *Id.* ¶ 44.

146. *Id.* ¶¶ 36, 45.

for provisional measures, this finding of prima facie jurisdiction does not definitively fulfill the jurisdictional requirements to be met by the Annex VII arbitral tribunal.¹⁴⁷

As a secondary question on the issue of jurisdiction, the Russian Federation asserted that the case must be excluded from the jurisdiction of the arbitral tribunal under the military and law enforcement Article 298(1)(b) exception,¹⁴⁸ just as it had done in the *Dispute Concerning Coastal State Rights* arbitration case.¹⁴⁹ In response, Ukraine asserted that “the dispute does not concern military activities, but rather law enforcement activities, and that the declarations, therefore, do not exclude the present dispute from the jurisdiction of the Annex VII arbitral tribunal.”¹⁵⁰ The tribunal set out the issue to be “whether the dispute . . . concerns military activities,”¹⁵¹ and based on the information and evidence available to it, concluded that Article 298(1)(b) did not apply.¹⁵²

This order became the first time ITLOS interpreted Article 298(1)(b).¹⁵³ In reaching its conclusion, the tribunal noted that the distinction between military and law enforcement activities “must be based primarily on an objective evaluation of the nature of the activities in question, taking into account the relevant circumstances in each case.”¹⁵⁴ The tribunal employed a case-by-case approach. Three circumstances were relevant to the tribunal’s evaluation.¹⁵⁵ First, the underlying dispute related to the passage of naval vessels, but the tribunal avoided a general statement that passage of naval vessels was per se a military activity.¹⁵⁶ Second, the tribunal noted that the core dispute arose from the parties’ differing interpretations of the Kerch Strait’s legal status, and this was not military in nature.¹⁵⁷ Third, the tribunal

147. *Id.* ¶ 36. *See also* ARA Libertad (Arg. v. Ghana), Case No. 20, Provisional Measures, Order of Dec. 15, 2012, ITLOS Rep. 332, ¶ 60.

148. Detention of Three Ukrainian Naval Vessels, *supra* note 3, ¶ 50.

149. *See* Dispute Concerning Coastal State Rights Award, *supra* note 2.

150. Detention of Three Ukrainian Naval Vessels, *supra* note 3, ¶ 50.

151. *Id.* ¶ 63.

152. *Id.* ¶ 77.

153. The second half of Article 298(1)(b) concerning activities in the exercise of sovereign rights or jurisdiction was interpreted in the *Arctic Sunrise* case. *Arctic Sunrise*, *supra* note 139.

154. Detention of Three Ukrainian Naval Vessels, *supra* note 3, ¶ 66.

155. James Kraska, *Did ITLOS Just Kill the Military Activities Exemption in Article 298?*, EJIL:TALK! (May 27, 2019), <https://www.ejiltalk.org/did-itlos-just-kill-the-military-activities-exemption-in-article-298/>.

156. Detention of Three Ukrainian Naval Vessels, *supra* note 3, ¶ 68.

157. *Id.* ¶ 72.

observed that the context in which the Russian Federation employed force in the process of the arrest and detention of the Ukrainian naval vessels was particularly relevant. It noted that the Ukrainian vessels had apparently given up their attempt to transit the Kerch Strait, had turned around, and were sailing away when force was used. Under those circumstances, the force was characterized as having taken place in a law enforcement operation rather than a military operation;¹⁵⁸ thus, Article 298(1)(b)'s military activities exception did not apply.¹⁵⁹

The decision is not without its critics. It has been pointed out that the distinction drawn between military and law enforcement activities by ITLOS is at odds with the interpretation and distinction made by the arbitral tribunal in the *South China Sea* arbitration.¹⁶⁰ In this regard, the application and interpretation of these exceptions in the merits stage in this case, as well as in the *Dispute Concerning Coastal State Rights* arbitration, in addition to their importance to the future of international law in the Black Sea, will (hopefully) bring much-needed clarity to the law.

VI. CONCLUSION

This article seeks not merely to provide a legal overview of the cases concerning the Black Sea, the Sea of Azov, and Kerch Strait but to examine them within the lens of history. The current legal disputes concerning the Black Sea should be seen in the context of a clash between two competing visions of the applicable legal regime. On the one hand, the Soviet doctrine

158. *Id.* ¶ 74

159. *Id.* ¶ 77.

160. The common understanding among the commentators is that the scope of the military activities exception under Article 298(1)(b) has been interpreted narrowly. According to Kraska, the tribunal diminished the exception under UNCLOS in reaching its conclusion. Kraska, *supra* note 155. Ishii believes the ITLOS's distinction between military activities and law enforcement is quite weak in two aspects. First, since the concept of military broadly refers to a State's national security interests, the interpretation of the scope and nature of such activities is reserved to the States, which consequently should involve the evaluation of the intent and purpose of the activities. Second, Ishii draws from the declaration of Judge Kittchaisaree, where he commented that the military activities and law enforcement activities concepts are not mutually exclusive. Yurika Ishii, *The Distinction between Military and Law Enforcement Activities: Comments on Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)*, EJIL:TALK! (May 31, 2019), <https://www.ejiltalk.org/the-distinction-between-military-and-law-enforcement-activities-comments-on-case-concerning-the-detention-of-three-ukrainian-naval-vessels-ukraine-v-russian-federation-provisional-measures-order/>.

of closed seas has historically described the Russian policy, ensuring regional stability and placing significant limitations on the freedom of navigation of warships of non-littoral States in the Black Sea. On the other hand, the changes brought about by the dissolution of the USSR in 1991 opened the Black Sea to the increasing presence of Western powers, especially NATO, which has close relations with five Black Sea States and provides military support to Georgia and Ukraine. In this background, the conflict over Crimea in 2014 can be better understood, although it does not justify unlawful actions under international law.

The cases brought by Ukraine against Russia all stem from events flowing from the annexation of Crimea in 2014. There is no doubt that Ukraine is utilizing UNCLOS and its compulsory dispute settlement mechanism to gain recognition of its sovereignty, even if implicitly, over Crimea through the international adjudicative process. However, while UNCLOS provides the compulsory dispute settlement mechanism, Ukraine still had to overcome the legal hurdles of jurisdiction and exceptions aptly raised by Russia.

The *Dispute Concerning Coastal State Rights* tribunal correctly recognized that the dispute over sovereignty was the crux of the matter. In this regard, the tribunal would not be in a position to adjudge and declare Ukraine's rights in maritime zones as this would entail determining the coastal State. The tribunal, however, kept the case alive and placed the responsibility on Ukraine to revise its memorial. Past cases have demonstrated that such revision is quite feasible, especially in relation to questions concerning the protection and preservation of the marine environment and the determination of the status of maritime features.¹⁶¹

Ukraine's claims arising from Russia's construction of the Kerch Bridge raises and interference with its navigational rights would provide the first opportunity to revisit the regime of straits under international law since the ICJ's order in the 1991 *Passage through the Great Belt* case.¹⁶² However, the tribunal will likely focus on the 2003 agreement and not venture into the broader context of the regime of straits under Part III of UNCLOS.¹⁶³ On the other hand, the allegation that Russia failed to protect the environment and to cooperate with Ukraine would directly implicate rights and obligations under Part XII of UNCLOS.¹⁶⁴ These are issues that can be divorced from sovereignty questions, as was seen in the *South China Sea* case.

161. See *South China Sea Arbitration*, *supra* note 101; *Chagos Arbitration*, *supra* note 83.

162. *Passage through the Great Belt (Fin. v Den.)*, Order, 1991 I.C.J. Rep. 12 (July 29).

163. UNCLOS, *supra* note 1, pt. III (Straits Used for International Navigation).

164. *Id.* pt. XII (Protection and Preservation of the Marine Environment).

These Black Sea cases present an important addition to the recent trend of cases with underlying disputed sovereignty matters being brought under the UNCLOS dispute resolution procedures. In the *Chagos* and the *South China Sea* arbitrations, the tribunals, while acknowledging UNCLOS's limitations in relation to sovereignty issues, provided decisions on the merits. The same promises to be the case for the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, which awaits the revised version of Ukraine's memorial. Through UNCLOS, these unresolved legal disputes pending before the international tribunals seek answers that could influence the future of the Black Sea, Crimea, and the Sea of Azov.