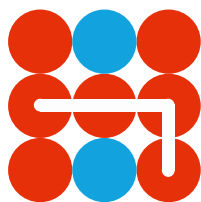


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The Kerch Strait skirmish: a Law of the Sea perspective

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“The November 25 naval skirmish between Russian and Ukrainian forces in the Kerch Strait highlighted the fraught legal status of the strait and the Azov Sea, a status that Russia has been exploiting in recent months to exert political and economic pressure on Ukraine”. -writes Dmitry Gorenburg, a Senior Research Scientist in the Strategy, Policy, Plans, and Programs division of CNA.

The November 25 naval skirmish between Russian and Ukrainian forces in the Kerch Strait was significant first and foremost as an open military confrontation between the two countries' armed forces. But **it also highlighted the fraught legal status of the strait and the Azov Sea, a status that Russia has been exploiting in recent months to exert political and economic pressure on Ukraine.**

A slow march to confrontation

The confrontation began months before the recent events that brought the conflict to worldwide attention. In March 2018, Ukrainian border guard vessels detained a Russian fishing vessel in the Azov Sea for violating exit procedures from the “temporarily occupied territory of Ukraine”, namely from Crimea. The crew of that vessel remained in detention for several months, until they were exchanged in October for Ukrainian sailors. The captain of the Russian ship remains in Ukraine and is facing prosecution for illegal fishing and “violation of the procedure for entry and exit from the temporarily occupied territory of Ukraine”. Since that incident, Russia has retaliated by detaining several Ukrainian fishing vessels.

In May, Russia also began to regularly hold Ukrainian commercial ships for inspection before allowing them to pass through the Kerch Strait. The initiation of this inspection regime largely coincided with the opening of a road and rail bridge across the strait. Russia claimed that the inspections were required to ensure the safety and security of the bridge at a time when some Ukrainians had publicly threatened to attack the bridge. The delays caused by the inspection regime, together with ship height restrictions caused by the bridge, have led to a 30 percent reduction in revenues at Ukraine's commercial ports of Mariupol and Berdyansk, raising fears that Russia is trying to strangle the economy of eastern Ukraine.

In the same period, Russia also began to build up its naval presence in the Azov Sea, with at least three missile ships based there since summer 2018. **Reports indicate that Russia plans to set up a full-fledged flotilla in the Azov in the near future. Ukraine has also strengthened its naval presence in the region, placing several armoured boats in Berdyansk and seeking to expand the base there.**



The transfer of ships from Odesa to Berdyansk that caused the skirmish was part of this effort. Ukraine had moved naval ships through the Kerch Strait as recently as September 2018, but these ships were not armed. In that case, the ships were allowed to pass through without incident, although they were closely followed by Russian border guard vessels. The passage of two armoured boats through the strait in late November was thus the first attempt by the Ukrainian Navy to bring armed ships through the Kerch Strait since tensions began to mount and the bridge was completed in spring 2018.

The legal background

The status of the Azov Sea and the Kerch Strait is regulated by a bilateral treaty that was signed by Russia and Ukraine in 2003. **According to the terms of the treaty, the sea is considered to be internal waters for both countries, and both Ukrainian and Russian commercial and military ships have the right of free passage through the strait. Furthermore, the treaty does not specify any particular advance notice procedures for passage through the strait.** Foreign commercial ships are allowed to pass through the strait and enter the sea if they are heading to or from a Ukrainian or Russian port. Military ships belonging to other countries may be allowed passage if they are invited by one of the signatories to the treaty, but only with the agreement of the other signatory. **In 2015, Russia unilaterally adopted a set of rules requiring ships passing through the strait to give advance notification to the Russian authorities, ostensibly to assure safety of navigation. These rules have not been accepted by Ukraine.**

Immediately prior to the naval confrontation, Ukrainian ships gave the Russian authorities notice that they were planning to pass through the strait, although this notice was not given sufficiently ahead of time to satisfy Russia's unilateral rules on passage. In response, the Russian authorities notified the Ukrainian ships that the strait was temporarily closed to foreign vessels and that they could not pass through at that time. According to the Russian point of view, the Ukrainian side knew the procedure for innocent passage and did not go through the proper channels to receive a place in line to pass through the strait. From the Ukrainian point of view, the notification that their ships gave was sufficient for safety of navigation. **Given that there was no international notice regarding the closure of the strait, the terms of the treaty clearly allowed the Ukrainian ships to pass through unmolested.**

There is no question that Russia violated the terms of the 2003 bilateral treaty on the status of the Azov Sea, since it clearly states that warships of both countries have full freedom of navigation through the strait, with no advance notification procedure mentioned in the treaty. Ukraine has argued that although its ships have notified the Russian authorities in the past in order to ensure safety of navigation, it has repeatedly rejected any notion that they need Russian permission to pass through the strait. Russia, in turn, sees this situation as a violation of its territorial sovereignty. At the same time, the argument can be made that Ukraine also violated the treaty in March by charging the captain of the detained Russian ship with illegal fishing, given that the treaty considers the entirety of the Azov Sea as the internal territorial waters of both countries.

The Kerch Strait skirmish from a legal perspective

To briefly recap the events of the confrontation itself, after announcing that the strait was closed to foreign ships, the Russian authorities ordered the Ukrainian ships to halt. The ships refused to comply with this order. As they attempted to pass through the strait, Russian ships sought to block their passage and a series of dangerous manoeuvres culminated in the Ukrainian navy tug being rammed. Recordings also make it clear that Russian border guard ships sought to ram the Ukrainian armoured boats, but these vessels proved too fast and manoeuvrable and evaded the Russian ships. During this time, two of the Russian ships evidently collided with each other, according to both audio recordings and photographs of damage on one of the ships. To resolve the situation, Russia called in air power reinforcements consisting of two Ka-52 helicopters and two Su-25 strike aircraft and blocked the strait with a tanker. A standoff ensued for several hours, after which the Ukrainian ships tried to return to the Black Sea. At this point, the ships were chased and fired on by Russian ships and were eventually captured in international waters.

From a legal point of view, it seems quite clear that the Russian side was in violation of not only the Azov Sea Treaty, but also of bedrock principles of maritime law as enshrined in the UN Convention on the Law of the Sea (UNCLOS). It appears that although Ukrainian ships did violate undisputed Russian territorial waters (i.e. waters off the mainland Russian coast, not just those of the

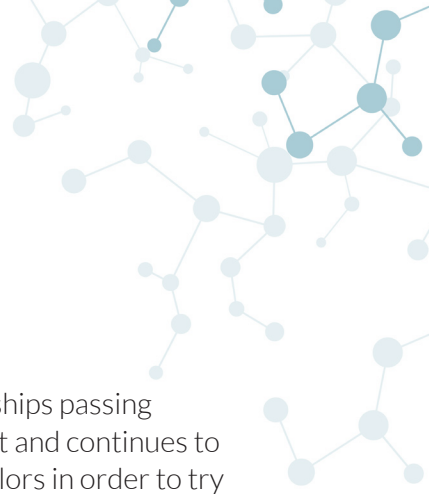
disputed territory of Crimea), they only entered the twelve-mile territorial zone within the Kerch Strait. As already noted, passage through the strait is governed by the Azov Sea Treaty and its waters are therefore not subject to the twelve-mile territorial zone limit.

Furthermore, even if a violation of Russian territorial waters did occur, the proper response according to maritime law is for the border guard to escort the violating ships out of the territorial zone, not to fire on them. According to maritime law, attack or capture would be permitted only if the adversary's ships were engaged in hostile action, not just for a violation of the territorial waters. **This incident thus highlights that Russia's lack of concern about violating international norms of behaviour now extends to such bedrock principles of international law as the Law of the Sea.**

Assessing the outcome

In the aftermath of the naval skirmish, some questions remain as to why Russia chose to prevent the Ukrainian ships from passing through the strait on this occasion after having allowed them through in the recent past, and why Ukraine chose to force the issue of passage through the strait?

The Russian side apparently did not expect the Ukrainian Navy to send its ships through the strait in September. According to some reports, it was after that incident in September that Russian officials ordered local authorities to prevent Ukrainian military ships from passing through the strait in the future.



Their passage without Russian authorization may have been viewed as an affront to Russian sovereignty claims over the Kerch Strait (and thereby indirectly a claim against Russian sovereignty over Crimea). At the same time, some Russian analysts believe that the escalation of tensions in the Azov is entirely the result of Ukraine's seizure of the Russian fishing vessel in March. According to this view, if the Ukrainians returned the boat and its captain and agreed to refrain from similar actions in the future, Russia would end its ship inspection regime in the Kerch Strait and would allow Ukrainian Navy ships to pass through as well.

Ukraine sought to contest the emerging increasingly unfavourable status quo in the Azov Sea, and lost. Ukrainian officials saw that regardless of the rules in place according to the 2003 treaty, in practice Russia controlled passage through the strait and was using that control to slowly strangle the economy of eastern Ukraine. **From one perspective, Ukraine was essentially facing a lose-lose scenario. If it did nothing, it would gradually de facto lose access to the Azov Sea and face serious economic damage. If it forced the issue, it would inevitably lose a maritime military conflict with a much stronger adversary. But at the same time, Ukrainian leaders could see a win-win scenario. If they forced the issue and Russia did not respond, Ukraine would enforce its sovereignty rights in the strait, and if Russia did respond, it would be seen as the aggressor and Ukraine could push for greater Western assistance.**

The situation in the area remains tense. After a brief hiatus, Russia has resumed

inspecting commercial ships passing through the Kerch Strait and continues to detain the Ukrainian sailors in order to try them for illegal border crossing. Ukraine has announced that it will build new armoured boats to be placed in the Azov Sea.

It appears that neither side is keen on exacerbating the conflict in the short term, and European leaders have also pushed for negotiations to settle the dispute. There is some possibility that the EU will press both sides to exchange detained sailors and vessels, although a larger settlement that includes an agreement over passage through the strait is unlikely. Neither side is prepared to make the concessions that would be necessary for a lasting settlement, so the conflict can be expected to continue into the indefinite future. **Some have referred to it as a new frozen conflict, yet the incident last month shows that it is not likely to freeze any time soon. While a large-scale confrontation such as the mythical Russian invasion of southern Ukraine in order to create a land bridge to Crimea is highly unlikely, Russia will continue to use the conflict to maintain pressure on Ukraine.**

The confrontation will also play a role in prolonging the heightened tensions between Russia and NATO, especially as Russia continues to show that it sees many bedrock international norms as part of an international order that it is keen to modify or replace. Western states must remain alert to potential triggers for new confrontations, which might come from either the Russian or the Ukrainian side. They can duly prepare for a potential confrontation while deterring both from succumbing to provocations from all sides.



Author

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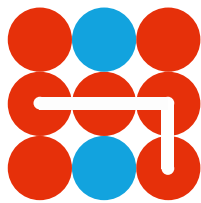
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