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THE STATUS OF THE KERCH STRAIT

Master thesis

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In state practice there were numerous attempts to claim vast areas of oceans on the basis of an historical title. Usually those claims are highly contentious and are met with strong opposition from other states. Having in mind the inconsistency in the position of Ukraine itself, it is necessary to analyze in depth whether Ukraine and Russia are entitled legitimately to claim the entire Azov Sea and the Kerch Strait as their internal waters. For the purposes thereof, firstly, the bilateral agreements between Ukraine and Russia will be examined. Secondly, the norms of the general international law will be employed.

3.2.1. The Status of the Azov Sea as Established in Bilateral Agreements between Ukraine and Russia

From 1917 till 1991 the status of the Azov Sea was determined by the USSR. In this regard the Azov Sea was treated and considered as internal waters of the USSR. As it has been already mentioned, after the breakup of the USSR in 1991, Ukraine advocated for the Azov Sea to be treated as the enclosed sea having all the maritime zones established in UNCLOS while Russia aimed to maintain the status of the internal waters shared between two coastal states.

After numerous rounds of negotiations, Ukraine and Russia managed to agree in the Treaty on the Ukrainian-Russian State Border, which was signed on January 28, 2003¹²⁸, that the Sea of Azov and the Kerch Strait are their internal waters. Despite the fact that the treaty is a framework document determining mostly the land border between the two countries, including rivers and lakes, it also gives the fundamental approach to the issues related with the Azov Sea and the Kerch Strait. Article 5 of this Treaty for the first time officially defined the Azov Sea and the Kerch Strait as internal waters of the two states, namely declaring that “nothing in this Treaty is detrimental to the positions of Ukraine and the Russian Federation regarding the status of the Sea of Azov and the Kerch Strait as the internal waters of the two states”.

On December 24, 2003, Ukraine and Russia entered into the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait that was ratified by Verhovna Rada on April 20, 2004¹²⁹. Article 1 of this Agreement repeats Article 5 of the Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border and proclaims “the Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation”. On the same day the President of Ukraine Leonid Kuchma and the President of the Russian Federation

¹²⁸ “Договір між Україною і Російською Федерацією про українсько-російський державний кордон від 28.01.2003”, accessed 2018 April 15, http://zakon1.rada.gov.ua/laws/show/643_157

¹²⁹ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed 2018 April 15, http://zakon5.rada.gov.ua/laws/show/643_205, “Ратифікація від 20.04.2004, підстава Закон України Про ратифікацію Договору між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 20.04.2004 № 1682-IV”, accessed 2018 April 15, <http://zakon5.rada.gov.ua/laws/show/1682-15>

Vladimir Putin presented a Joint Statement regarding the Sea of Azov and the Kerch Strait to the UN¹³⁰.

In this Statement it was emphasized that “the Azov – Kerch area of water is preserved as an integral economic and natural complex used in the interests of both states”, that “historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia, and settlement of matters relating to the said area of water is realized by agreement between the Ukraine and Russia in accordance with international law.”¹³¹

Majority of the scholars interpret the provisions of the aforementioned documents as establishing that the Azov Sea and the Kerch Strait are considered to be internal waters of Ukraine and Russia. However, a few others have different opinion. For example, Alexander Skaridov by analyzing provisions in the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait concluded:

Article 1 of the Russian-Ukraine Agreement on Cooperation in using the Sea of Azov and Kerch Strait stated that . . . historically the Azov Sea and Kerch Strait appears to be internal waters of Russian Federation and Ukraine. In the author’s view, “appears to be . . .” cannot be interpreted as legal definition, moreover no further explanations were provided in the following provisions of the Agreement. This provision is more declarative than legal, otherwise the Parties should have stated that they consider the Azov Sea waters to be internal waters within the meaning of international law or UNCLOS. That is why “internal” may be explained as inland waters from a geographical, economical, historical or any other perspectives, but not legal¹³².

Before analyzing the texts of the Agreement on Cooperation on the use of the Sea of Azov and the Kerch Strait in Ukrainian and Russian language it should be noted that at the end of this agreement it is stated that “the Agreement was done [. . .] in the Ukrainian and Russian languages, both texts being equally authoritative”. This complies with Article 33 of Vienna Convention on the Law of Treaties which provides that “when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”¹³³

Russian version of Article 1 of the Agreement states that “*Азовское море и Керченский пролив исторически являются внутренними водами Российской Федерации и Украины*”. Such wording might be translated into English as “**appears to be** internal waters...” However, Ukrainian version does not leave space for any ambiguities – “Азовське море та Керченська

¹³⁰ “Спільна заява Президента України і Президента Російської Федерації щодо Азовського моря і Керченської протоки, Керч, 24 грудня 2003 року”, accessed 2018 April 15, http://zakon5.rada.gov.ua/laws/show/643_206.

¹³¹ Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, *Bulletin № 54, Law of the Sea*, Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, 24 December 2003, United Nations, New York, (2004): 131, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf.

¹³² Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits : Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 234.

¹³³ “Vienna Convention on the law of treaties (with annex)”, Vienna, May 23, 1969, <https://treaties.un.org/doc/publication/unts/volume%a201155/volume-1155-i-18232-english.pdf>.

протока історично є внутрішніми водами України і Російської Федерації”. Ukrainian version could only be translated as – “The Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation”. Furthermore, Russian word “являются” has two meaning in Ukrainian language: “є” (as “is/are) or “являються” (as “appears to be”). Having in mind that Russian word “являются” does not necessarily mean “appears to be” and taking into consideration that Ukrainian text is very clear in that respect, it should be concluded that Russian version of the Agreement also establishes that the Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation rather than they only “appear to be such”.

This leads to the conclusion that by signing the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait, Ukraine and Russia meant and stated that according to this Agreement the Azov Sea and the Kerch Strait are historically the internal waters of Ukraine and the Russian Federation and the issues with wording of this document does not have any legal ground for further discussion.

In support thereof both countries made the Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003, which was also presented to the UN. By this bilateral statement Ukraine and Russian Federation claimed that the Sea of Azov and Strait of Kerch are historic, internal waters of these two states.

Since 2003 the Ukrainian-Russian relations have changed a lot. After annexation of the Crimea in 2014 the tremendous disagreements arose between those two countries. These disagreements led to revision of the bilateral treaties concluded between these two states.

According to the statement of Olena Zerkal, Deputy Minister of Foreign Affairs of Ukraine for the European Integration: “Until 2014 Ukraine and the Russian Federation concluded 451 international treaties. After the beginning of the armed aggression, Ukraine began to inventory the legal framework of bilateral relations with Russia. As of April 2018, all the necessary domestic procedures were implemented and a decision was taken to suspend or suspend the operation of one interstate treaty, 25 intergovernmental agreements (20 on the initiative of Ukraine, 5 to Russia), and 18 inter-agency agreements”.¹³⁴

Nevertheless, the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait still remains in force. In the webpage of the Ministry of Foreign Affairs of the Russian

¹³⁴ “Дружба с Россией: в МИД Украины поставили точку”, *Obozrevatel.UA*, April 4, 2018, <https://www.obozrevatel.com/politics/druzha-s-rossiej-v-mid-postavili-tochku.htm>.

Federation it is stated that the agreement entered into force on April 23, 2004, and is still valid¹³⁵. The same information is given on the webpage of the Ukrainian legislation¹³⁶.

Thus, it seems that despite the disagreements between Ukraine and Russian Federation over Crimea both countries still consider the Azov Sea and the Kerch Strait to be their internal waters. However, it should be emphasized that these waters are considered as internal based on historical title. The mere fact that both states bordering the Azov Sea agree on the historical title over those waters does yet make their claims legitimate. Therefore, it is necessary to examine general international law for the purposes of establishing whether Ukraine and Russia have valid grounds to claim the entire basin of the Azov Sea and the Kerch Strait as their internal waters.

3.2.2. International Legal Requirements for Historic Waters

In conventional international law there is no definition of ‘historical sea, strait or bay’. UNCLOS only refers to historical bays in para 6 of Article 10. Nevertheless, as it will be demonstrated later on, the customary international law allows recognition as historical also other maritime areas, seas included.¹³⁷

The requirements for historic waters crystallized in customary international law by the beginning of 1950s. The ICJ's decision in the *Anglo-Norwegian Fisheries* case denotes the moment when the doctrine of the historic waters was consolidated into a coherent institute of customary maritime law¹³⁸. Moreover; ICJ endorsed in this case the statements made by the United Kingdom and Norway that the doctrine of “historic waters” was not limited only to bays. It also established a new approach for assessing the claims to the historical waters. This test of legitimacy of the claims over the maritime areas was benefited the interests of each maritime state.¹³⁹

In the *Anglo-Norwegian Fisheries case* the Court analyzed the exercise of authority and its continuity over the area by the State claiming the historic right. More precisely, it was stated that “the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.” Regarding the attitude of foreign states the Court pointed out that “from the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States.” By taking into the account the exercise of authority and its continuity as well as attitude of the attitude of foreign states “the Court [was] thus led to conclude

¹³⁵ “Bilateral agreements”, *Ministry of Foreign Affairs of the Russian Federation*, accessed 2018 April 1, 12, http://www.mid.ru/foreign_policy/international_contracts/2_contract.

¹³⁶ “Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки від 24.12.2003”, accessed 2018 April 12, http://zakon5.rada.gov.ua/laws/show/643_205.

¹³⁷ Olga Romanukha, “Делімітація Азовського моря та Керченської протоки”, *Visnyk Mariupol's'koho derzhavnoho universytetu. Seriya: Istoriya. Politolohiya*, 15 (2016):99-100, http://nbuv.gov.ua/UJRN/Vmdiu_ip_2016_15_14.

¹³⁸ Christopher Mirasola, “Historic Waters and Ancient Title: Outdated Doctrines for Establishing Maritime Sovereignty and Jurisdiction”, *Journal of Maritime Law and Commerce* 47, 1 (January 2016): 41-44.

¹³⁹ C. H. M. Waldock, “The *Anglo-Norwegian Fisheries Case*”, *British Year Book of International Law* 28 (1951): 114.

deemed “continuous exercise of authority”? However, even before adoption of the abovementioned agreement, the Azov Sea was actually treated by these two countries as their internal waters – after becoming independent in 1991 they kept regulating the Azov Sea domestically as their internal waters without granting any navigational rights or freedoms to third countries. Before 1991 the Azov Sea was part of internal waters of USSR, Ukraine and Russia exercised control over the Azov Sea as the republics of the USSR: the Ukrainian SSR and the Russian Soviet Federative Socialist Republic. Furthermore, both states were constituent republics of the USSR which in its turn was the successor of the former Russian Empire. So the effective, continual exercise of sovereignty on the Azov Sea was constantly held by Ukraine and Russia.

According to the Study on Juridical Regime of Historic Waters including historic bays “there seems to be practically general agreement that besides this national usage, consideration must also be given to the international reaction to the said exercise of sovereignty. It is sometimes said that the national usage has to develop into an “international usage”. This may be a way of underlining the importance of the attitude of foreign States in the creation of an historic title; in any case, a full understanding of the matter requires an analysis of the question how and to what extent the reaction of foreign States influences the growth of such a title.”¹⁶⁸

So there is a need to go further and analyze the attitude of foreign States in respect of Ukraine’s and Russia’s attempts to claim the Azov Sea as their historic waters.

The attitude of foreign States

Basically, this requirement refers to the so-called acquiescence of foreign States. “The State which claims “historic waters” in effect claims a maritime area which according to general international law belongs to the high seas. As the high seas are *res commnnis omnium* and not *res nullius*, title to the area cannot be obtained by occupation [. . .] Title to “historic waters”, therefore, has its origin in an illegal situation which was subsequently validated. This validation could not take place by the mere passage of time; it must be consummated by the acquiescence of the rightful owners.”¹⁶⁹

During the Soviet period, some scholars doubted the status of the Azov Sea as internal waters. Although in literature it is possible to find different opinions on the status of the Azov Sea¹⁷⁰, however, the state practice suggests that the waters of this sea was treated as internal waters and none of the States objected it.

¹⁶⁸ “Juridical Regime of Historic Waters, including Historic Bays,” *United Nations Yearbook of the International Law Commission* 2, (1962): 15-16, para 105, http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf.

¹⁶⁹ *Ibid* 16, para 106.

¹⁷⁰ Alexander Skaridov, “The Sea of Azov and the Kerch Strait” in *Navigating Straits : Challenges for International Law*, David D. Caron, Nilufer Oral, (Leiden: Brill Nijhoff, 2014): 220-221.

In preparatory documents for the UN Conference on the Law of the Sea, the Azov Sea was referred among the examples of historic bays in the practice of states as a bay the coasts of which belong to a single State:

The Sea of Azov is ten miles across at its entrance. It is situated entirely within the southern part of the territory of the Union of Soviet Socialist Republics and extends a considerable distance inland, its dimensions being approximately 230 by 110 miles. [. . .] A. N. Nikolaev regards the Sea of Azov as part of the “internal waters of the USSR” [. . .] Gidel is of the opinion that certain maritime areas — of which the Sea of Azov is one — should not be treated as falling within the category of historic waters “because, pursuant to the rules of the ordinary international law of the sea, these areas are in any case internal waters”.¹⁷¹

The Azov Sea provides access to the Ukrainian and Russian vessels via the Kerch Strait to the Black Sea and to further water areas. It also provides access to the foreign vessels going to Ukrainian and Russian port through the Kerch Strait. However, the construction of the canal between the Volga River and Don River in 1954 gave the possibility of transportation between the Caspian Sea and the Black Sea through the Sea of Azov¹⁷². Therefore, the vessels under the flag of Azerbaijan, Kazakhstan, Turkmenistan and Iran should have been concerned about the status of the Azov Sea and specifically about their rights of navigation through the mentioned sea. Nevertheless, none of them objected the status of the Azov Sea as historical waters. Up to 1991, there were no protests on behalf of third states that would aim at challenging the historic title of the USSR over the Azov Sea.

In opinion of Adam Eberhard, “up to the break-up of the USSR, the legal status of the Sea of Azov and the Kerch Strait did not give rise to any doubts whatsoever—these were internationally acknowledged internal waters under complete and exclusive Soviet authority. It was only when the independent Russia and Ukraine arose that controversies were incited over exercising control over the basin.”¹⁷³

In 2003 Joint Statement was made by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch under which it was claimed that “historically the Sea of Azov and the Strait of Kerch are internal waters of Ukraine and Russia”¹⁷⁴. This statement was also published by the UN Division for Ocean Affairs and the Law of the Sea

¹⁷¹ “Historic Bays: Memorandum by the Secretariat of the United Nations”, United Nations Conference on the Law of the Sea Geneva, Switzerland 24 February to 27 April 1958, document: A/CONF.13/1. Extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Volume I (Preparatory Documents, 2009): 3, accessed 2018 April

26, http://legal.un.org/docs/?path=/diplomaticconferences/1958_las/docs/english/vol_1/a_conf13_1.pdf&lang=E

¹⁷² Abbas Maleki, “Getting Out of the Caspian Sea is Still Difficult”, 18 August 2010,

<http://irdiplomacy.ir/en/page/1453-Getting-Out-of-the-Caspian-Sea-is-Still-Difficult.html>.

¹⁷³ Adam Eberhardt, “The Common Border Issue in Russian-Ukrainian Relations,” *The Polish Foreign Affairs Digest*, 3, 2(7), (2003):227.

¹⁷⁴ “Спільна заява Президента України і Президента Російської Федерації щодо Азовського моря і Керченської протоки, Керч, 24 грудня 2003 року,” accessed 2018 May 12, http://zakon5.rada.gov.ua/laws/show/643_206.

Office of Legal Affairs in its Bulletin¹⁷⁵. Despite that none of the states lodged any formal protest as regards the status of the Azov Sea.

For example, in case when Cambodia and Vietnam made a claim to consider the Gulf of Thailand as “historic waters” their position was met with strongly worded international protests, notably from Thailand and the United States¹⁷⁶. It is obvious that the opposition must be expressed in some kind of action. However, none has been present in case of the Azov Sea.

Up to 1991, there were no protests on behalf of third states that would aim at challenging the historic title of the USSR over the Azov Sea. Moreover, after the 2003 Joint Statement of Ukraine and Russia regarding the status of the mentioned waters, the attitude of foreign states did not change either.

So, as there were no any opposing remarks from any state, it means that foreign states do recognize that the Azov Sea is historically internal waters of Ukraine and Russia. Probably the attitude of the international community is based on the fact that the Azov Sea had been considered to be internal waters of one or another state for more than two centuries and that the mere fact that sea is now bordered by two instead of one state does not change that fact.

In regard to the Sea of Azov it seems reasonable to apply the ideas mentioned about multi-State bays as these bays are the very similar from the geographical and legal point of view.

Therefore, “neither the ILC[International Law Commission], the UNCLOS I [the First UN Conference on the Law of the Sea], nor the UNCLOS III [the Third UN Conference on the Law of the Sea] presented any definite answer to the question of the legal status of bays surrounded by two or more States. This is why no provision on multi-State bays exists either in the TSC [the Convention on the Territorial Sea and Contiguous Zone] or the LOSC [UNCLOS].”¹⁷⁷

According to the opinion of McDougal and Burke the absence in the content of the international conventions of the law of the sea provisions that could regulate multi-State bays leads

¹⁷⁵ “Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch,” UN Law of the Sea Bulletin (54), December 2003, United Nations, 2004: 131, http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf.

¹⁷⁶ “On 7 July 1982, the Agreement on Historic Waters of Vietnam and Kampuchea [Cambodia] was signed. This agreement provides for a joint Cambodian and Vietnamese claim to “historic waters”, which are “placed under the juridical regime of ... internal waters,” over a roughly oblong-shaped area of maritime space projecting into the Gulf of Thailand offshore the parties' respective mainland territories.” Cited from Clive Schofield; May Tan-Mullins, “Maritime Claims, Conflicts and Cooperation in the Gulf of Thailand,” *Ocean Yearbook* 22 (2008): 92. “Thailand made a Statement dated 9 December 1985 by the Ministry of Foreign Affairs of Thailand concerning Viet Nam's territorial waters and the drawing of baselines. By this statement Thailand said that regarding the claims to the so-called “historic waters”, which purport to appropriate and subject certain sea areas in the Gulf of Thailand and in the Gulf of Tonkin (Gulf of Bac Bo) to the regime of internal waters, the Government of Thailand is of the view that such claims cannot be justified on the basis of the applicable principles and rules of international law.” Cited from UN Law of the Sea Bulletin 7, April (1986): 111, http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE7.pdf. “United States made a Note from the Permanent Representative of the United States to the United Nations which refers to an accord entitled “Agreement on the historical waters of the Socialist Republic of Viet Nam and the People's Republic of Kampuchea” of 7 July 1982 . By this note they pointed out that the United States has not acquiesced in this claim, nor can the community of States be said to have done so. Given the nature of the claim first promulgated in 1982, such a brief period of time would not permit sufficient acquiescence to mature.” Cited from UN Law of the Sea Bulletin 10, November (1987): 23, http://www.un.org/depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulE10.pdf.

¹⁷⁷ Farhad Talaie, “Delimitation of Multi-State Bays in International Law of the Sea”, *University of Tasmanian Law Review*, 18, 1, (1999): 38.

to the idea that “the several states indented by a bay are not regarded as authorized jointly to claim these areas as internal waters as a single State could do in the same circumstances”.¹⁷⁸

Farhad Talaie concluded that as there is no any codification of the rules in regard to the bays surrounded by two or more States this leads to the uncertainty who should define the status of such bays. In his viewpoint, it should be done either by the coastal States interested in it, or there should be provided international rules that can determine the status of these bays.¹⁷⁹

The mainstream opinion is that the bays surrounded by two or more States may not be enclosed and claimed as internal waters. The criterion of it is their size. In this regard it is necessary to take into account the width of the each particular multi-plural bay: whether it is more extensive than double the breadth of the territorial sea (24 nautical miles) or not.¹⁸⁰

So not only in the legislative level but also according to the scientists opinions, the situation with multi-State bays resulted in uncertainty to whether the determination of the status of waters within these bays should be left to the littoral States concerned, or whether there should be international rules for delimitation of these bays, the same happened to the Sea of Azov situation as well. However, having in mind that the Azov Sea is bordered by two states, it might be helpful to look into the example of the Gulf of Fonseca as an historic bay with three coastal states.

In the case *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) about the Gulf of Fonseca the ICJ stated that “the particular historical régime established by practice must be especially important in a pluri-State bay; a kind of bay for which there are notoriously no agreed and codified general rules of the kind so well established for single-State bays.”¹⁸¹

The peculiarity of the Azov Sea is that this sea is considered as internal waters of two States. It is reasonable to have a look on example of the Gulf of Fonseca as an historic bay with three coastal States. In this case the Chamber constituted by the Court determined the legal status of the islands in the Gulf of Fontseca and made delimitation of the maritime zones within and outside the closing line of that Gulf.¹⁸²

In this decision the ICJ analyzed whether the Gulf of Fonseca could be considered “in terms of the modem law [. . .] “internal waters”¹⁸³ and reached the conclusion that “the essential juridical

¹⁷⁸ Cited from Ibid.

¹⁷⁹ Ibid. 63.

¹⁸⁰ Ibid. 63-64.

¹⁸¹ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 386-387, para 42, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

¹⁸² Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, case concerning land, island and maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment of 11 September 1992, <http://www.icj-cij.org/files/case-related/75/6673.pdf>.

¹⁸³ *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 604 – 605, para 412, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

status of these waters is the same as that of internal waters, since they are claimed *à titre de souverain* and, though subject to certain rights of passage, they are not territorial sea".¹⁸⁴

In the decision it was stated that the Gulf of Fonseca is an historic bay the waters whereof were succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua as successors of Spain and the Federal Republic of Central America, jointly, and continue to be so held. According to the decision the joint use established by the ICJ does not affect some areas of this Gulf.¹⁸⁵

First of all, it does not affect the belts which are in the exclusive sovereignty of the coastal State that were established from the shore of each of the three States. Secondly, there is 3-mile belt where these states must respect the existing rights of innocent passage. And only the waters at the centre of the Gulf that are not covered by two previous mentioned belts are the subject to the joint entitlement of all three states of the Gulf.¹⁸⁶

Regarding the legal situation of the waters outside the Gulf the court decided that the Gulf of Fonseca being an historic bay with three coastal States, the closing line of the Gulf constitutes the baseline of the territorial sea; the territorial sea, continental shelf and exclusive economic zone entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua; and that any delimitation of the relevant maritime areas is to be effected by agreement on the basis of international law.¹⁸⁷

Comparison of the Azov Sea with the Gulf of Fonseca leads to the conclusion that in both cases there is joint use of the area in question, however, the regulation of such use in the Gulf of Fonseca is resolved by the decision of the ICJ while in case of the Azov Sea there is no clarity in how this joint use should be exercised between Ukraine and Russia. It also leads to conclusion that ICJ believes that amount of coastal states does not prevent from claiming the historical title over their adjacent waters. So it does not matter how many states are bordering the Azov Sea if previously these waters were recognized as internal waters of the one state that officially got divided into a few ones.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, 616 – 617, para 432.

¹⁸⁶ "... the legal situation of the waters of the Gulf of Fonseca is as follows : the Gulf of Fonseca is an historic bay the waters whereof, having previously to 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras, and the Republic of Nicaragua, jointly, and continue to be so held, as defined in the present Judgment, but excluding a belt, as at present established, extending 3 miles (1 marine league) from the littoral of each of the three States, such belt being under the exclusive sovereignty of the coastal State, and subject to the delimitation between Honduras and Nicaragua effected in June 1900, and to the existing rights of innocent passage through the 3-mile belt and the waters held in sovereignty jointly; the waters at the central portion of the closing line of the Gulf, that is to say, between a point on that line 3 miles (1 marine league) from Punta Amapala and a point on that line 3 miles (1 marine league) from Punta Cosiguina, are subject to the joint entitlement of all three States of the Gulf unless and until a delimitation of the relevant maritime area be effected." Cited from Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 616 – 617, para 432, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

¹⁸⁷ Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) General List, No. 75, (11 September, 1992): 617, para 432, <http://www.icj-cij.org/files/case-related/75/075-19920911-JUD-01-00-EN.pdf>.

To sum up, there is no doubt that the Sea of Azov and the Kerch Strait are historic waters of two states – Ukraine and Russia. Based on the research made it should be concluded that there was not only the exercise of authority over the Azov Sea by both states together but also this exercise of authority has continuous character due to the fact that the Azov Sea being as a part of internal waters of USSR was under the control of former Ukrainian SSR (Ukraine) and the former Russian Soviet Federative Socialist Republic (Russia). Additionally, none of states had made any objection regarding the status of the Azov Sea.

Based on the foregoing it should be concluded that the Kerch Strait connects relevant part of the exclusive economic zone on the Black Sea with the internal waters on the Azov Sea. In this case, the legal regime applicable in this strait depends on the maritime zones covering that Strait.

3.3. Maritime Zones Covering the Strait

As it has been mentioned before, after the break-up of the USSR Ukraine treated the Azov Sea as the enclosed sea under UNCLOS and called for delimitation of the territorial sea and exclusive economic zone with Russia.

If these zones were established and delimited, the Kerch Strait would have connected relevant part of the exclusive economic zone of the Black Sea with the relevant part of the exclusive economic zone of the Azov Sea. Furthermore, in such case the Kerch Strait would have been covered entirely by the territorial seas of Ukraine and Russia since due to its narrowness it would not have any exclusive economic zone. Additionally, as there is no any alternative navigation route on the exclusive economic zone or high seas and there is no long-standing international convention specifically relating to such strait, section 2 of Part III would have been applicable to such strait and the ships of all states would have enjoyed the right of transit passage in this strait.

However, in 2003 the Treaty on the Ukrainian-Russian State Border and the Agreement on Cooperation on the Use of the Sea of Azov and the Kerch Strait were concluded. These agreements declared that both the Azov Sea and the Kerch Strait historically are the internal waters of Ukraine and Russia.

Some scholars interpret the change in Ukraine's position and conclusion of those agreements as unlawfully impairing the right of transit passage in the Kerch Strait. In this regards, according to the view point of Ana G. Lopez Martin:

Ukraine and Russia have claimed that "historically the Sea of Azov and the Kerch Strait are internal waters of Ukraine and Russia" and, consequently, "military vessels flying the flags of other States can only enter the Sea of Azov and cross the Kerch Strait by invitation of Ukraine or of Russia