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# To Blockade or Not To Blockade? The Legal Status of Russia's Suspension of Shipping in the Sea of Azov

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## Abstract

This article explores the legal situation relating to the Sea of Azov in the light of the Russian suspension of shipping on 24 February 2022. While this act received little scholarly or political attention, there is a debate concerning the legality of the suspension of shipping, mainly whether it is governed by the law of naval blockade under the laws of naval warfare. The article analyses the situation from the perspectives of both international humanitarian law (IHL) and the law of the sea (LOS) and examines how the interaction between the two legal regimes affects the analysis. The article supports the conclusion that the Russian conduct does not constitute a naval blockade but may be an accepted practice within the legal regime of naval warfare. In addition, it holds that LOS affects both the laws of naval warfare and the status of the Sea of Azov. Furthermore, the article raises doubts as to the relevance and applicability of the legal concept of naval blockade in modern international law.

**Keywords:** law of the sea; naval warfare; blockades; Ukraine; Russia

## 1. Introduction

The Sea of Azov is a closed sea, bordered by Ukraine, the Russian Federation, and the purportedly Russian-annexed Crimean Peninsula. It is connected to the Black Sea through the Kerch Strait.<sup>1</sup> The Sea of Azov is about 210 miles

<sup>1</sup> The Kerch Strait lies between the Crimean Peninsula and the Taman Peninsula; it is 41 km long and at least 4 km wide. The Kerch Strait falls entirely within the limits of territorial sea and/or

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long and 85 miles wide.<sup>2</sup> Therefore, both the Russian Federation and Ukraine have maritime zones, such as territorial seas, and potential exclusive economic zones (EEZ)<sup>3</sup> in the Sea of Azov. Ukraine has proclaimed an EEZ in the area, but Russia views the same region as part of its historic internal waters.<sup>4</sup>

On 24 February 2022 the Russian Federation launched a military attack and invaded Ukraine. On the same day the Russian Federation suspended shipping in the Sea of Azov.<sup>5</sup> This action has had a negative impact on the global economy, causing a rise in food, fuel, and fertilizer prices.<sup>6</sup> From an international legal perspective, although this act received little attention, there is some debate about whether it constitutes ‘naval blockade’ as defined by the laws of naval warfare.<sup>7</sup>

This article explores the legal status of the suspension of shipping by the Russian Federation and the legal status of the Sea of Azov under international humanitarian law (IHL), specifically the laws of naval warfare, and the law of the sea (LOS). The article also explores whether the legal concept of naval blockade is still relevant today. The analysis below supports the conclusion that the Russian Federation’s conduct does not fall under the legal regime of naval blockade, although it may fall under other accepted practices within the legal regime concerning naval warfare. In addition, LOS significantly affects the legal status of the Sea of Azov, the relationship between the Russian Federation and Ukraine, and the legality of the Russian Federation’s suspension of shipping.

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internal waters: see Alexander Lott, ‘The Passage Regimes of the Kerch Strait—To Each Their Own?’ (2021) 52(1) *Ocean Development and International Law* 64, 65–66.

<sup>2</sup> See, eg, ‘Sea of Azov’, *Encyclopedia Britannica*, 8 July 2009, <https://www.britannica.com/place/Sea-of-Azov>.

<sup>3</sup> The EEZ is an area beyond and adjacent to the territorial sea, which extends up to 200 nautical miles. The EEZ includes both the seabed and the waters superjacent to it: United Nations Convention on the Law of the Sea (entered into force 16 November 1994), 1833 UNTS 397 (UNCLOS), arts 55 and 56(1)(a); see also art 3 concerning the territorial sea.

<sup>4</sup> See the Ukraine page on the UN Division for Ocean Affairs and the Law of the Sea (DOALOS) website, <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/UKR.htm>; Permanent Court of Arbitration, *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine and the Russian Federation)*, PCA Case No 2017-06, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para 242. This proclamation conflicts with the latter Kerch Treaty, which provides that the Sea of Azov constitutes internal waters of both Ukraine and Russia: see Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch (2004) 54 *Law of the Sea Bulletin* 131; see also Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General (7 March 2019), UN Doc A/73/802, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/079/55/PDF/N1907955.pdf?OpenElement>.

<sup>5</sup> Alexander Lott, ‘Russia’s Blockade in the Sea of Azov: A Call for Relief Shipments for Mariupol’, *EJIL:Talk!*, 14 March 2022, <https://www.ejiltalk.org/russias-blockade-in-the-sea-of-azov-a-call-for-relief-shipments-for-mariupol>.

<sup>6</sup> See UN Conference Trade and Development report on the impact on trade and development of the war in Ukraine (16 March 2022), UN Doc. UNCTAD/OSG/INF/2022/1, <https://unctad.org/webflyer/impact-trade-and-development-war-ukraine>.

<sup>7</sup> See, eg, Martin Fink, ‘The War at Sea: Is There a Naval Blockade in the Sea of Azov?’, *Lieber Institute Articles of War*, 24 March 2022, <https://lieber.westpoint.edu/war-at-sea-naval-blockade-sea-of-azov>.

Section 2 explores the legal situation in the Sea of Azov and the legality of the suspension of shipping under IHL and specifically the laws of naval warfare, providing an overview of the legal concepts that may apply to the Russian Federation's actions under IHL. Section 3 focuses on the legal situation in the Sea of Azov and the conduct of the Russian Federation from the perspective of LOS and how LOS affects the application of the laws of naval warfare, if at all. Section 4 examines the relevance of the concept of naval blockade in modern international law. Section 5 concludes.

## 2. The legal status of the Sea of Azov under IHL

On 24 February 2022 the Russian Federation suspended shipping in the Sea of Azov, ostensibly in accordance with the 2003 Agreement between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Kerch Strait (Kerch Treaty).<sup>8</sup> This section examines whether the suspension of shipping falls under the legal regime of naval blockade or other concepts of naval warfare and, if so, whether it was lawful.

### 2.1. The regime of naval blockade

There is no single legal definition of a naval blockade. However, the accepted approach is that a naval blockade is a 'belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy nation'.<sup>9</sup> The purpose of a naval blockade is to prevent the enemy from achieving its goals by cutting off its own maritime traffic or that of neutral parties.<sup>10</sup>

The rules concerning the establishment and enforcement of naval blockades, as well as other rules on naval warfare, are entrenched in the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea (the Manual).<sup>11</sup> The Manual, as its name suggests, is not an international treaty, but an instrument drafted by experts and scholars, and therefore is

<sup>8</sup> Lott (n 5). For an unofficial translation of the Kerch Treaty: <https://www.jura.uni-hamburg.de/die-fakultaet/professuren/proelss/dateien-valentin/agreement-sea-of-azov>. Article 2(3) of the Kerch Treaty provides that neutral states' warships and other states' vessels operated for non-commercial purposes may enter the Sea of Azov and pass through the Kerch Strait if they have the authorisation of one of the parties with the agreement of the other party. This means that, in times of war between the parties, access to the Sea of Azov is closed as it depends on the authorisation of both parties.

<sup>9</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, Part One, January 2010, para 35, [https://www.gov.il/BlobFolder/generalpage/downloads\\_eng1/en/ENG\\_turkel\\_eng\\_a.pdf](https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_a.pdf) (Turkel Commission); Wolff Heintschel von Heinegg, 'The Current State of the Law of Naval Warfare: A Fresh Look at the San Remo Manual' (2006) 82 *International Law Studies* 269, 276.

<sup>10</sup> Magne Frostad, 'Naval Blockade' (2018) 9 *Arctic Review on Law and Politics* 195, 195.

<sup>11</sup> San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=5B310CC97F166BE3C12563F6005E3E09&action=openDocument>.

not in itself a formal or legally binding source of international law.<sup>12</sup> However, while some elements of the Manual reflect new or progressive developments, the content of most of its provisions is considered to be customary international law, and thus binding.<sup>13</sup> The principles concerning naval blockade are entrenched in other instruments that are regarded as customary international law, such as the London Declaration of 1909, and in state practice.<sup>14</sup> Thus, this article's point of departure is that these principles constitute part of customary international law.

The Manual provides several conditions for the establishment and enforcement of a naval blockade to be lawful:<sup>15</sup>

- the blockade must be declared publicly;<sup>16</sup>
- the declaration must include information such as the duration, location, and extent of the blockade;<sup>17</sup>
- the blockade must be effective;<sup>18</sup>
- enforcement of the blockade must be through legitimate methods and means of warfare;<sup>19</sup>
- the blockade must be applied impartially to the vessels of all states;<sup>20</sup> and
- the blockade must not deprive the civilian population of means essential for their survival.

The blockading party must provide for free passage of foodstuffs and other essential supplies if the civilian population of the blockaded territory is inadequately provided with such means.<sup>21</sup>

### *2.1.1. Does the suspension of shipping fit the criteria of naval blockade?*

Some scholars have argued that the suspension of shipping did not constitute a naval blockade under the laws of naval warfare, primarily because it did not

<sup>12</sup> Statute of the International Court of Justice (entered into force 24 October 1945) 1 UNTS XVI, art 38(1).

<sup>13</sup> Turkel Commission (n 9) para 33; see also US Department of the Navy and Department of Homeland Security, 'The Commander's Handbook on the Law of Naval Operations', August 2017, <https://www.hsdl.org/?abstract&did=806860> (US Commander's Handbook). For further details on other customary sources of naval warfare see Turkel Commission (n 9) para 32; Wolff Heintschel von Heinegg, 'Naval Blockade' (2000) 75 *International Law Studies* 203.

<sup>14</sup> *ibid.* See also Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995) 67–68.

<sup>15</sup> See also UN Human Rights Council, 'Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance' (27 September 2010), UN Doc A/HRC/15/21; Turkel Commission (n 9) para 32.

<sup>16</sup> San Remo Manual (n 11) r 93.

<sup>17</sup> *ibid* r 94. Although there are doubts as to the requirement to indicate the duration of a blockade at the beginning of the situation; see, eg, Turkel Commission (n 9) para 59; Frostad (n 10) 202.

<sup>18</sup> San Remo Manual (n 11) r 95.

<sup>19</sup> *ibid* r 97.

<sup>20</sup> *ibid* r 100.

<sup>21</sup> *ibid* rr 102–03.

meet the conditions for a naval blockade in the Manual.<sup>22</sup> For example, there is no indication that the Russian Federation formally or publicly declared a blockade.<sup>23</sup> Some scholars argue that the declaration of a naval blockade need not be in the form of a diplomatic note; a notice to mariners would suffice. Furthermore, such a declaration need not explicitly express the words announcing the naval blockade.<sup>24</sup> Thus, the notification of the Federal Agency for Maritime and River Transport could be considered as fulfilling the requirement of declaration and publication.<sup>25</sup>

While neither the Manual nor other relevant sources specify how the declaration should be made, the Manual does state that such a declaration must include information such as the commencement, duration, location, and extent of the blockade.<sup>26</sup> There is nothing in the Russian announcement that indicates the establishment of a blockade, other than the suspension of shipping.<sup>27</sup> Therefore, while the Russian notification may be sufficient in form, it may not fulfil this requirement in terms of its content.

In addition, the suspension of shipping may not be effective and impartial as shipping has not been suspended entirely. The effectiveness of a blockade is a question of fact.<sup>28</sup> The Manual does not define what constitutes an 'effective blockade'; however, the interpretation of the customary norm indicates that 'effectiveness' requires the blockade to be maintained by a force sufficient to prevent access to the coast of the enemy.<sup>29</sup> This interpretation does not seem to apply to the situation in the Sea of Azov since February 2022. Though significantly reduced, shipping is still permitted in and out of the Sea of Azov, including near the coasts of Ukraine.<sup>30</sup> On the other hand, the requirement of effectiveness seems to relate to the operation of the blockading party rather than the effects of the blockade on shipping.<sup>31</sup>

In any case, ships flying the flag of several states were allowed to pass to and from the area, thus also violating the requirement of impartiality.<sup>32</sup> It is noteworthy that, in practice, states have developed a concept of a 'period of grace' – a short time frame during which neutral ships in blockaded harbours

<sup>22</sup> See, eg, Fink (n 7). However, for an opposite opinion that there is a Russian blockade in the Sea of Azov: Borys Kormych and Tetiana Averochkina, 'Ukrainian Maritime Industry under Fire: Consequences of Russian Invasion' (2022) 8(2) *Lex Portus* 7, 8, 15.

<sup>23</sup> Fink (n 7).

<sup>24</sup> Lott (n 5); Frostad (n 10) 202; US Commander's Handbook (n 13) s 7.7.2.2.

<sup>25</sup> See link in Lott (n 5).

<sup>26</sup> Text at n 17; see also US Commander's Handbook (n 13) s 7.7.2.1.

<sup>27</sup> Fink (n 7).

<sup>28</sup> San Remo Manual (n 11) r 95.

<sup>29</sup> See Von Heinegg (n 13) 207–08.

<sup>30</sup> Fink (n 7). See also France24 with AFP, 'Shipping Movement Continues in the Black Sea Despite Ukraine War, Sanctions', *France* 24, 5 June 2022, <https://www.france24.com/en/europe/20220605-maritime-trade-continues-in-the-black-sea-despite-ukraine-war-sanctions>; Shane Harris, 'U.S. Intelligence Document Shows Russian Naval Blockade of Ukraine', *The Washington Post*, 24 May, 2022, <https://www.washingtonpost.com/national-security/2022/05/24/naval-blockade-food-supply-ukraine-russia>

<sup>31</sup> See in general Von Heinegg (n 13).

<sup>32</sup> Text and sources at n 30.

are allowed to leave.<sup>33</sup> However, the above indicated that ‘continuous shipping’ occurred long after the period of grace was supposed to have ended, thus still supporting the argument concerning lack of effectiveness and impartiality.

Finally, while the suspension of shipping in the area was neither effective nor impartial, the civilian population was denied food and other means essential for survival as a partial result of the Russian Federation’s suspension of shipping. The Russian Federation has not provided effective humanitarian corridors.<sup>34</sup> As many non-governmental organisations and states provided humanitarian relief,<sup>35</sup> it can be argued that Russia was not required to provide for the passage of supplies through the maritime route.<sup>36</sup> However, the fighting has prevented humanitarian aid reaching civilians.<sup>37</sup> In addition, the effects of the suspension of shipping may have violated the principle of ‘proportionality’ based on the damage suffered by the civilian population.<sup>38</sup> The violation of the principle of ‘proportionality’ is evident not only from the damage within Ukraine but also from the global economic and food crisis resulting from the Russian conduct.<sup>39</sup>

### 2.1.2. *Does the suspension of shipping fit the definition of naval blockade?*

The Russian Federation’s conduct in the Sea of Azov does not fit the definition of a naval blockade, primarily as the Federation operates in coastal areas some of which may not strictly belong to Ukraine. It is noteworthy that this analysis does not address areas the classification of which as Ukrainian territory is not debated. Such areas may fall within the definition of a naval blockade, subject to the analysis above on the establishment and enforcement of the blockade.

As mentioned above, the definition of blockade refers to actions to prevent access to areas belonging to the enemy.<sup>40</sup> However, in 2014 Russia invaded and ultimately annexed the Crimean Peninsula, which borders the Sea of Azov.<sup>41</sup> In addition, in September 2022 Russia declared the annexation of four regions of

<sup>33</sup> Frostad (n 10) 201, 209.

<sup>34</sup> Lott (n 5).

<sup>35</sup> See, eg, ICRC, ‘Humanitarian Crisis in Ukraine and Neighbouring Countries’, <https://www.icrc.org/en/humanitarian-crisis-ukraine>; UN High Commissioner for Refugees, ‘Ukraine Emergency’, <https://www.unhcr.org/ukraine-emergency.html>.

<sup>36</sup> See San Remo Manual (n 11) r 103.

<sup>37</sup> See, eg, Lott (n 5).

<sup>38</sup> San Remo Manual (n 11) r 102(b); Turkel Commission (n 9) para 36.

<sup>39</sup> *ibid.* For information on the effects of the situation in Ukraine on the global food crisis see, eg, Diane Desierto, ‘The Human Right to Food, Freedom from Hunger, and SDG 2: Global Food Crisis and Starvation Tactics from the Russian Invasion of Ukraine’, *EJIL:Talk!*, 9 June 2022, <https://www.ejiltalk.org/the-human-right-to-food-freedom-from-hunger-and-sdg-2-global-food-crisis-and-starvation-tactics-from-the-russian-invasion-of-ukraine/>; Aleksandar Brezar, ‘Global Food Crisis Looms as Ukraine Struggles to Export Its Grain after Russian Invasion’, *Euronews*, 19 June 2022, <https://www.euronews.com/2022/06/19/global-food-crisis-looms-as-ukraine-struggles-to-export-its-grain-after-russian-invasion>.

<sup>40</sup> Text and sources at n 9.

<sup>41</sup> Text and sources at n 71; Lott (n 5) 70.

Ukraine: Donetsk, Luhansk, Zaporizhzhia, and Kherson; the latter two are located on the coast of the Sea of Azov.<sup>42</sup>

If Crimea, Zaporizhzhia, and Kherson are indeed Russian-annexed territories, Russia's actions may not be governed by the regime of naval blockade as defined above.<sup>43</sup> It is true that while annexation used to be an accepted method of gaining territory, it is no longer accepted in modern international law.<sup>44</sup> Some scholars argue that annexation could be lawful in certain circumstances, such as self-defence, the conclusion of a peace treaty, or tacit acceptance by the international community.<sup>45</sup> Following the last criterion, there have been cases in practice where the international community did not make a clear position and can be considered a tacit acceptance of annexation.<sup>46</sup>

However, Russia's annexation of Crimea was rejected by the international community, which recognises the situation as belligerent occupation under IHL.<sup>47</sup> The international community also rejected the annexation of Donetsk, Luhansk, Zaporizhzhia, and Kherson, viewing the act as belligerent occupation.<sup>48</sup>

<sup>42</sup> See Eleanor Knott, 'Russia's Attempt to Annex Kherson, Zaporizhzhia, Donetsk, and Luhansk Has Undermined Its Claim on Crimea', *LSE Blog*, 14 October 2022, <https://blogs.lse.ac.uk/europpblog/2022/10/14/russias-attempt-to-annex-kherson-zaporizhzhia-donetsk-and-luhansk-has-undermined-its-claim-on-crimea>. However, from the beginning of November 2022, reports indicated that Russia withdrew from Kherson: Paul Kirby, Frank Gardner and Jeremy Bowen, 'Kherson: Russia to Withdraw Troops from Key Ukrainian City', *BBC Online*, 9 November 2022, <https://www.bbc.com/news/world-europe-63573387>.

<sup>43</sup> It is noteworthy that Russia denies that Crimea is annexed territory, claiming that Crimea declared independence and acceded to Russia: *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (n 4) para 4.

<sup>44</sup> See, eg, UNSC Res 242 (1967) (22 November 1967), UN Doc S/RES/242; UNSC Res 662 (1990) (9 August 1990), UN Doc S/RES/662; Rainer Hofmann, 'Annexation' (2020) 1376 *Max Planck Encyclopedia of International Law*.

<sup>45</sup> Hofmann (n 44) Section D.

<sup>46</sup> See, eg, the Goa conflict, the Tibet case, and Western Sahara: Hofmann (n 44) paras 26, 36–37. With regard to Western Sahara see also Christine Chinkin, 'The Security Council and Statehood' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press 2015) 155, 160. See also the case of East Timor: Indonesia annexed the territory in 1976. While the UN Security Council did initially call for Indonesia's withdrawal, it did not address the question of East Timor again until 1999 – the international community was silent for 23 years; see, in detail, Markus Benzing, 'Midwifing a New State: The United Nations in East Timor' (2005) 9 *Max Planck Yearbook of United Nations Law* 295, 302.

<sup>47</sup> See *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (n 4) para 6; Hofmann (n 44) para 40.

<sup>48</sup> Council of European Union, 'EU Adopts Its Latest Package of Sanctions against Russia over the Illegal Annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson Regions', Press Release, 6 October 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/10/06/eu-adopts-its-latest-package-of-sanctions-against-russia-over-the-illegal-annexation-of-ukraine-s-donetsk-luhansk-zaporizhzhia-and-kherson-regions>; see also Reuters' report on the United States' opinion: 'Reaction to Putin Proclaiming Annexation of Ukrainian Lands', 30 September 2022, <https://www.reuters.com/world/europe/reaction-putin-proclaiming-annexation-ukrainian-land-2022-09-30>; Report on the General Assembly's resolution that condemns the Russian Federation's annexation of four Eastern Ukraine regions: Reliefweb, 'With 143 Votes in Favour, 5 Against,



If the suspension of shipping does not constitute a blockade, the rights of the belligerents do not apply. For example, if there is a legally valid naval blockade, the blockading party may seize vessels in breach of the blockade.<sup>49</sup> In this case, as the above analysis indicates that there is no naval blockade, at least in parts of the Sea of Azov, Russian vessels may not seize foreign vessels in the area, neutral or otherwise.<sup>50</sup>

However, if the legal position of the Sea of Azov is indeed one of belligerent occupation, then the Russian Federation, as the occupying power, may take measures to ensure public order and safety.<sup>51</sup> Thus, seizing neutral or enemy vessels may be lawful even outside the framework of naval blockade.<sup>52</sup> Still, private property cannot be confiscated under the law of occupation;<sup>53</sup> therefore, Russia's actions with regard to Ukrainian and neutral vessels may be unlawful.

## 2.2. Other concepts of naval warfare

Some scholars argue that Russia's suspension of shipping in the Sea of Azov may fall within the legal concept of a maritime exclusion zone (MEZ) or a maritime operational zone (MOZ).<sup>54</sup> The legal status of these concepts, generally referred to as 'maritime zones' (MZs),<sup>55</sup> is not clear. Nevertheless, MZs are commonly applied in IHL, including in the Falklands/Malvinas situation, the Iraq-Iran conflicts, and during the First and Second Gulf Wars.<sup>56</sup>

General Assembly Adopts Resolution Condemning Russian Federation's Annexation of Four Eastern Ukraine Regions', 12 October 2022, <https://reliefweb.int/report/ukraine/143-votes-favour-5-against-general-assembly-adopts-resolution-condemning-russian-federations-annexation-four-eastern-ukraine-regions>.

<sup>49</sup> See discussion in Andrew Clapham, 'Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law' (2021) 97 *International Law Studies* 1200, 1249, 1255.

<sup>50</sup> See reports on such seizure, eg, Jonathan Saul, 'Russian Separatists Seize Cargo Ships', *Reuters*, 5 July 2022, <https://gcaptain.com/russian-separatists-seize-cargo-ships>; Gary Dixon, "'Violation': Ukraine Claims Russia Seized Two Bulk Carriers in Sea of Azov", *TradeWinds*, 2 February 2022, <https://www.tradewindsnews.com/bulkers/-violation-ukraine-claims-russia-seized-two-bulk-carriers-in-sea-of-azov/2-1-1175433>.

<sup>51</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461, reg 43.

<sup>52</sup> See, eg, Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2019) 102. See also the possibility of destroying private property where it is necessary for military operations: *ibid.*, 211. These provisions may apply to the situation in the Sea of Azov; see discussion on "counterterrorist operation" at text at n 61.

<sup>53</sup> Hague Convention (IV) (n 51) reg 46; Dinstein (n 52) 243. For limitations on the prohibition of confiscation of private property, although not applicable in the situation of the Sea of Azov, see Dinstein (n 52) 244.

<sup>54</sup> US Commander's Handbook (n 13), s 7.9; Fink (n 7); Raul (Pete) Pedrozo, 'Ukraine Symposium – Maritime Exclusion Zones in Armed Conflicts', *Lieber Institute Articles of War*, 12 April 2022, <https://lieber.westpoint.edu/maritime-exclusion-zones-armed-conflicts>.

<sup>55</sup> Not to be confused with maritime zones under LOS, which regulate coastal states' entitlement to and rights in defined areas at different distances from the coast.

<sup>56</sup> Fink (n 7); Pedrozo (n 54); Raul (Pete) Pedrozo, 'Maritime Exclusion Zones in Armed Conflicts' (2022) 99 *International Law Studies* 526, 526–27. For analysis of the use of the concept in the



The customary laws of naval warfare recognise the possibility of establishing MZs to manage areas of naval warfare, primarily to control foreign ships' access to a particular area.<sup>57</sup> Though Russia's declaration of the suspension of shipping in the Sea of Azov may not fulfil the criteria to establish and enforce a blockade, it may be considered a declaration of an MZ.<sup>58</sup> However, within these zones belligerents are still bound by the general rules of IHL. Thus, attacks on foreign or enemy merchant vessels in the Sea of Azov and the Black Sea would violate the principle of distinction because of the presence of civilians.<sup>59</sup>

In addition, some of Russia's actions in the Sea of Azov and the Black Sea may fall within the right of belligerents to control the immediate area of naval operations.<sup>60</sup> For example, Russian naval vessels have demanded that merchant vessels evacuate the Odessa and Danube areas on the grounds of 'counterterrorist operations'.<sup>61</sup> Even in such circumstances, belligerents are still obligated by general principles of IHL, which prohibits such actions against civilian vessels, Ukrainian or otherwise.<sup>62</sup>

Therefore, the Russian Federation's suspension of shipping in the Sea of Azov does not constitute a naval blockade, which in turn limits the rights and actions of the Russian Federation in the area. Though the situation in the Sea of Azov may be governed by other, more vague legal regimes concerning naval operations in the context of IHL, these regimes impose more limitations on Russia, thus rendering its actions unlawful.

### 3. The legal status of the Sea of Azov under LOS

The legal position of the Sea of Azov and the legality of the Russian Federation's suspension of shipping are also greatly limited by LOS, which may impose other, sometimes conflicting, obligations on belligerents with regard to naval operations in different maritime zones. To evaluate the influence of LOS on the situation in the Sea of Azov, one needs to enquire whether LOS applies during armed conflicts, specifically at sea.

#### 3.1. The applicability of LOS during naval operations

Some argue that the United Nations Convention on the Law of the Sea (UNCLOS), the main legal instrument that regulates uses of the oceans, applies

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Falklands/Malvinas case see, eg, Kieran Tinkler, 'Understanding the Use of Zones and the Concept of Proportionality: Enduring Lessons from the Falklands War', *EJIL:Talk!*, 13 December 2017, <https://www.ejiltalk.org/understanding-the-use-of-zones-and-the-concept-of-proportionality-enduring-lessons-from-the-falklands-war>. This concept was even employed in the naval situation in Gaza before the flotilla incident: Turkel Commission (n 9) para 25.

<sup>57</sup> eg, San Remo Manual (n 11) r 108; US Commander's Handbook (n 13); see also Fink (n 7); Pedrozo (n 54). For elaboration on enforcement measures in MZs see in general Pedrozo (n 56)

<sup>58</sup> Pedrozo (n 56) 527.

<sup>59</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3, art 51; Fink (n 7); Pedrozo (n 54); Pedrozo (n 56) 528.

<sup>60</sup> eg, US Commander's Handbook (n 13) s 7.8. See also Pedrozo (n 54).

<sup>61</sup> Pedrozo (n 54).

<sup>62</sup> Text and source at n 59.

only in peace time,<sup>63</sup> and thus does not apply during armed conflict or naval warfare. It is argued that the laws of naval warfare may be considered the *lex specialis*, which prevails over other general rules of international law.<sup>64</sup>

However, as I have analysed in a previous article, LOS and IHL apply simultaneously for several reasons. First, international law does not exclude the application of UNCLOS during armed conflict. Second, in cases of conflict of rules, one solution is that the more recent norm prevails. However, in this case this rule does not resolve the conflict as both LOS and IHL reflect customary law. Third, the *lex specialis* principle is difficult to apply in cases of naval warfare as both LOS and IHL can be considered the specific law.<sup>65</sup> Lastly, many of the UNCLOS provisions continue to apply under IHL; the parties to UNCLOS do not lose their rights just because an armed conflict is taking place.<sup>66</sup>

So, the current literature accepts the simultaneous application of both legal regimes.<sup>67</sup> Furthermore, the laws of naval warfare as reflected in the Manual subject themselves to LOS regulation. Thus, there is a need to explore the interaction of LOS and IHL and its influence on the situation in the Sea of Azov.

### 3.2. The influence of LOS on belligerents' rights and obligations at sea

As mentioned above, the main legal instrument that regulates the rights and obligations of coastal states in their maritime zones is UNCLOS.<sup>68</sup> Both the Russian Federation and Ukraine are parties to UNCLOS.<sup>69</sup> As discussed in the introduction, both parties have several potential maritime zones in the Sea of Azov in accordance with UNCLOS, and a judicial decision determining the parties' maritime zones in the area is forthcoming.

Since 2018, two cases have been submitted for international judicial dispute settlement under UNCLOS concerning unauthorised Russian activities in the Sea of Azov.<sup>70</sup> Some activities relate to the 2014 occupation (or annexation)

<sup>63</sup> See, eg, James Kraska, 'Military Operations' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 866. See also UNCLOS (n 3) Preamble.

<sup>64</sup> Shani Friedman, 'The Application of the Law of Occupation in Maritime Zones and Rights to "Occupied" Marine Resources' (2021) 36 *The International Journal of Marine and Coastal Law* 419, n 10. On the primacy of *lex specialis*, see United Nations General Assembly, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (13 April 2006), UN Doc A/CN.4/L.682.

<sup>65</sup> See Friedman (n 64) 421–22.

<sup>66</sup> Kraska (n 63) 875.

<sup>67</sup> See Friedman (n 64) 422. See also Steven Haines, 'War at Sea: Nineteenth-Century Laws for Twenty-First-Century Wars?' (2016) 98 *International Review of the Red Cross* 419, 420–21.

<sup>68</sup> UNCLOS (n 3).

<sup>69</sup> For the list of parties to UNCLOS see UN Treaty Collection (UNTC), [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en).

<sup>70</sup> *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (n 4); Permanent Court of Arbitration, *Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v Russian Federation)*, Case No 2019-28, Award on Preliminary Objections, 27 June 2022.

of the Crimean Peninsula and consequent Russian operations in the area.<sup>71</sup> In both cases the Russian Federation has argued for lack of jurisdiction on the ground that the disputes concern military activities.<sup>72</sup>

It is notable that in both cases the International Tribunal for the Law of the Sea (ITLOS) and the UNCLOS Annex VII Arbitral Tribunal decided that the exception of 'military activities' was not triggered as the background to Russia's conduct is broader than the armed conflict; the Russian vessels were not part of the armed forces and were not engaged in military activities.<sup>73</sup> Further, in the second case, the Annex VII Arbitral Tribunal decided that it did not have jurisdiction in respect of some of the activities based on the exception of 'military activities', as Ukrainian vessels were engaged in military activities, and Russia defined the situation as military confrontation.<sup>74</sup>

In neither case did the Tribunal accept objections to its jurisdiction, asserting jurisdiction in both cases. It is even more significant that the Arbitral Tribunal is expected to give judgment on the parties' maritime zones in the Sea of Azov, as this decision may affect the legality of Russia's suspension of shipping in the area. This is because in certain aspects the laws of naval warfare subject themselves to regulation of LOS.

First, the Kerch Strait can be considered an international strait under UNCLOS, through which every state has the right of transit passage.<sup>75</sup> International straits are those used for international navigation between different parts of the high seas or EEZs.<sup>76</sup> This definition applies to the Kerch Strait and the Sea of Azov, parts of which may constitute an EEZ or the high seas, depending on the decision of the Annex VII Arbitral Tribunal.<sup>77</sup> The Kerch Strait connects the Sea of Azov to the Black Sea, which also includes parts that may constitute an EEZ or the high seas.<sup>78</sup> Thus, the Kerch Strait can be considered an international strait.

<sup>71</sup> Kormykh and Averochkina (n 22) 10; *Detention of Ukrainian Naval Vessels and Servicemen* (n 70) para 110. See also discussion in Section 2 above.

<sup>72</sup> *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (n 4) para 300; *Detention of Ukrainian Naval Vessels and Servicemen* (n 70) para 76. UNCLOS allows coastal states to exclude disputes relating to military activities from its dispute-settlement mechanism: UNCLOS (n 3) art 298(b). See also the Russian Federation's declaration concerning UNCLOS art 298 on the UNCTC website (n 69).

<sup>73</sup> *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (n 4) paras 336–41; ITLOS, *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation)*, Case No 26, Request for the Prescription of Provisional Measures, Order, 25 May 2019, paras 68, 74, 77.

<sup>74</sup> *Detention of Ukrainian Naval Vessels and Servicemen* (n 70) paras 115, 118, 122, 125. While this decision refers to activities that occurred before 24 February 2022, the decision was given in June 2022, well after the current war started; the language of the decision is interesting in the light of these events.

<sup>75</sup> UNCLOS (n 3) art 38; Lott (n 5).

<sup>76</sup> UNCLOS (n 3) art 37.

<sup>77</sup> See n 2 and n 4. As there is no decision yet regarding the parties' maritime zones in the Sea of Azov, for now it contains areas that are considered as high seas. See also Lott (n 5).

<sup>78</sup> See n 2. See also, eg, ICJ, *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment (2009) ICJ Rep 61.

While coastal states that border such straits can regulate the transit passage (i.e., other states' navigation in the strait),<sup>79</sup> there are two limitations on the rights of coastal states to regulate transit passage: first, the regulation must be indiscriminate; second, the navigation cannot be suspended.<sup>80</sup> These limitations may render the suspension of shipping in the Sea of Azov unlawful under UNCLOS.<sup>81</sup>

In addition, within an EEZ, coastal states have sovereign rights that relate only to exploring and exploiting, conserving and managing natural resources.<sup>82</sup> Other states have freedom of navigation and overflight.<sup>83</sup> Coastal states have a duty not to interfere with freedom of navigation or other internationally lawful uses of the sea,<sup>84</sup> freedoms that also apply to the high seas.<sup>85</sup> Given these conditions, the Russian Federation's suspension of shipping can be considered unlawful under the legal regimes concerning the EEZ and the high seas in accordance with UNCLOS.

Under UNCLOS, incidents that occur in parts of the Sea of Azov that are within the territorial sea of Ukraine or Russia may violate states' rights of innocent passage.<sup>86</sup> However, vessels that are prejudicial to the peace, good order or security of the coastal state may not be considered to be engaging in innocent passage.<sup>87</sup> Additionally, coastal states may temporarily suspend the right of innocent passage for security reasons,<sup>88</sup> though such suspension must be without discrimination; this may not be the case in the Sea of Azov as shipping is still allowed via the Kerch Strait.<sup>89</sup> Thus, the Russian Federation's suspension of shipping in the Sea of Azov, even in its territorial sea, may be unlawful.

Further, the 2003 Kerch Treaty itself may be inconsistent with international law, as it determines that in times of conflict non-commercial shipping is

<sup>79</sup> UNCLOS (n 3) arts 41–42; Yoshifumi Tanaka, 'Navigational Rights and Freedoms' in Rothwell and others (n 63) 536, 551.

<sup>80</sup> UNCLOS (n 3) art 42(2); Tanaka (n 79) 551.

<sup>81</sup> See also discussion on impartiality and discrimination at nn 30 and 89.

<sup>82</sup> UNCLOS (n 3) art 56(1).

<sup>83</sup> *ibid* art 58.

<sup>84</sup> Kraska (n 63) 885.

<sup>85</sup> UNCLOS (n 3) art 87.

<sup>86</sup> *ibid* art 17; James Kraska, 'The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?', *EJIL:Talk!*, 3 December 2018, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare>. The right of transit passage is broader than the right of innocent passage: Yoshifumi Tanaka, *The International Law of the Sea* (2nd edn, Cambridge University Press 2015) 104–05.

<sup>87</sup> UNCLOS (n 3) art 19. UNCLOS does not address the right of innocent passage of foreign warships, which to date is a contentious issue. The International Court of Justice (ICJ) in the *Corfu Channel* case recognised the right of innocent passage of foreign warships in international straits but did not directly address the question of foreign warships' right of innocent passage in the territorial sea: ICJ: *Corfu Channel Case*, Merits, Judgment, 9 April 1949 (1949) ICJ Rep 4. While other provisions may indicate that warships have the right of innocent passage, state practice is divided and may indicate the opposite: see Tanaka (n 79) 545–46.

<sup>88</sup> UNCLOS (n 3) art 25(3).

<sup>89</sup> See discussion on the effectiveness and impartiality of the suspension of shipping under IHL at n 30.

suspended on the ground of lack of consent of both parties to the passage of third states in the area. The treaty provides that Ukrainian and Russian vessels maintain freedom of navigation, while third-state commercial vessels can 'enter the Sea of Azov and pass through the Kerch Strait' only to reach a port of one of the parties.<sup>90</sup> These provisions are inconsistent with freedom of navigation and the right of transit passage. It can be argued that in this case the 2003 Kerch Treaty may prevail over UNCLOS, being the later treaty or the *lex specialis* treaty.<sup>91</sup> However, as the 2003 Kerch Treaty affects the rights and freedoms of non-party states, UNCLOS should prevail.<sup>92</sup>

The status of the Kerch Strait and the Sea of Azov under LOS also affects the legal status of Russia's suspension of shipping in the Sea of Azov under the laws of naval warfare, as analysed in Section 2 above. First, although Russia contests this claim, if the Kerch Strait is an international strait, the regime of transit passage applies even under the laws of naval warfare; Russia cannot suspend shipping,<sup>93</sup> and neutral vessels can exercise the right of innocent passage.<sup>94</sup> Thus, Russia's actions in the Sea of Azov are unlawful under both LOS and IHL.

Second, LOS also affects the rights of belligerents within MZs established in accordance with the laws of naval warfare. As discussed above, it is argued that the suspension of shipping in the Sea of Azov may be lawful in accordance with the legal regime of MZs under the laws of naval warfare.<sup>95</sup> As the Sea of Azov is more than 24 nautical miles wide, parts of the area may be considered as EEZ or high seas, depending on the forthcoming decision of the Annex VII Arbitral Tribunal.<sup>96</sup> Under UNCLOS, all states have freedom of navigation in these areas.<sup>97</sup> The Manual provides that the same body of law applies both inside and outside the MZ.<sup>98</sup> Therefore, all states have freedom of navigation inside and outside the MZ, and belligerents are obligated to respect neutral states and even the freedom of navigation of other belligerents within MZs. This analysis strengthens the notion that the laws of naval warfare in this context are subject to LOS, limiting the actions of belligerents in maritime zones during naval operations and rendering Russia's conduct in the Sea of Azov unlawful.

However, a judicial decision on the parties' maritime zones in the Sea of Azov is still pending. Meanwhile, Russia maintains that the area, including the Kerch Strait, is part of its historic internal waters.<sup>99</sup> If the Annex VII

<sup>90</sup> Kerch Treaty (n 8) art 2. See also Lott (n 1) 74.

<sup>91</sup> See n 64; Vienna Convention on the Law of Treaties (entered into force 27 January 1980), 1155 UNTS 331 (VCLT), art 30(3). See also UNCLOS (n 3) art 311(3).

<sup>92</sup> VCLT (n 91) art 30(4). See also UNCLOS (n 3) art 311(3), which allows states to conclude agreements that suspend the operation of provisions of the Convention, *only* between the agreeing states. Agreements that affect other states' rights are not permissible.

<sup>93</sup> San Remo Manual (n 11) rr 27–29; Lott (n 5).

<sup>94</sup> San Remo Manual (n 11) r 32.

<sup>95</sup> See text at n 54.

<sup>96</sup> See text at n 77.

<sup>97</sup> UNCLOS (n 3) arts 58, 87.

<sup>98</sup> San Remo Manual (n 11) r 106; see Tinkler (n 56).

<sup>99</sup> See text at n 4.

Arbitral Tribunal supports the claim that the Sea of Azov constitutes historic internal waters, the legal regime of transit passage would not apply to the Kerch Strait,<sup>100</sup> and other states would not have freedom of navigation in the Sea of Azov. Such a decision, in turn, would influence analysis of the rights and obligations of belligerents in MZs. However, it would be difficult to define the Sea of Azov as Russian historic waters, as such definition requires the acceptance of other states based on long and consistent practice to support such a claim. Currently there is neither explicit protest nor overt acceptance that the Sea of Azov constitutes Russian historic waters. Ukraine's practice concerning the Sea of Azov and the Kerch Treaty may indicate that it cannot be considered historic waters.<sup>101</sup>

#### 4. The relevance of the concept of naval blockade

As analysed above, the suspension of shipping in the Sea of Azov cannot constitute a naval blockade, because the Russian actions do not fit the definition of a blockade or meet the criteria for establishing and enforcing a blockade. LOS poses further restrictions and obligations that may hinder the applicability and implementation of naval blockades in certain maritime areas. In the light of the analysis above and the emergence of new concepts concerning naval operations, one might question the relevance of the concept of naval blockade in modern international law (since 1945). To answer this question, this section addresses the practice of naval blockades, as well as changes in the concept of naval blockades in the light of developments in LOS.

Naval blockades are rarely practised in modern international law.<sup>102</sup> The only agreed examples of naval blockade are Israel's naval blockade of the Gaza Strip,<sup>103</sup> and the Indian blockade of the coast of Bangladesh in 1971.<sup>104</sup> Most cases of purported naval blockades do not meet the criteria or fit the definition of a blockade.<sup>105</sup>

For example, it is argued that a blockade was declared during the Korean War in the 1950s; yet all foreign ships, except North Korean ships, were allowed to pass to and from the 'blockaded' area.<sup>106</sup> This violated the impartiality requirement and thus may not be considered a blockade. In addition,

<sup>100</sup> UNCLOS (n 3) art 35(a); Lott (n 1) 82.

<sup>101</sup> See Lott (n 1) 84–87.

<sup>102</sup> See also in Frostad (n 10) fn 48.

<sup>103</sup> Turkel Commission (n 9) para 26. Although there is debate over whether the concept applies in non-international armed conflict; see, eg, Frostad (n 10) 199; Wolff Heintschel von Heinegg, 'Blockade' (2015) 252 *Max Planck Encyclopedia of Public International Law*.

<sup>104</sup> Frostad (n 10) 198; Von Heinegg, *ibid*.

<sup>105</sup> For a review of other cases of 'naval blockade', which would not fall within the strict legal concept, see Turkel Commission (n 9) para 29. See also Von Heinegg (n 13) 211–12, 215, although the interpretation of the cases mentioned indicates the opposite view. See also Haines (n 67) 429. While supporting the arguments that many cases may not fall within the definition of 'naval blockade', it is argued that it is not enough to challenge the existing law. See also other cases in recent history that do not fall within the concept of naval blockade in Bruce A Elleman and SCM Paine (eds), *Naval Blockades and Seapower: Strategies and Counter-Strategies, 1805–2005* (Routledge 2006).

<sup>106</sup> Frostad (n 10) 198.

some scholars argue that Egypt blockaded Eilat and the Gulf of Aqaba in 1967.<sup>107</sup> However, given that the so-called blockade included the closure of the Suez Canal and Tiran Straits,<sup>108</sup> it did not fit the definition of a blockade, as both the Suez Canal and Tiran Straits were under Egyptian sovereignty or control at the time.<sup>109</sup>

There is debate regarding other cases. For example, although in the Taiwanese situation in 1949 and in North Vietnam in 1972 a formal blockade was not declared and there was a question concerning the applicability of the concept, the relevant rules were applied.<sup>110</sup> Scholars also dispute whether the Iranian 'blockade' in Shatt-al-Arab in 1980 was a blockade under the laws of naval warfare or whether it should have been classified as a MZ.<sup>111</sup>

Ultimately, in general, the practice of naval blockade has been replaced by economic sanctions or 'economic warfare at sea',<sup>112</sup> or the concept of MZs, especially since the 1970s. Such rare practice may indicate that states downplay the concept of naval blockade, preferring to deploy the softer and less clear concept of MZs.

The practice of naval blockades is also affected by developments in LOS. As discussed in Section 3, LOS imposes additional restrictions on belligerents operating at sea. The impact of LOS on the laws of naval warfare prompted changes in the concept of naval blockade, which may also have affected its relevance in modern international law, specifically post-UNCLOS.<sup>113</sup> LOS has limited the areas of naval warfare, including naval blockade. First, belligerents may not operate in the territorial waters of neutral states, and a blockade must not prevent access to neutral states' territory. The expansion by UNCLOS of the zone from 6 to 12 nautical miles increased the size of restricted areas. Second, the laws of naval warfare impose restrictions on operations in the EEZs of

<sup>107</sup> *ibid* 198; Thomas David Jones, 'The International Law of Maritime Blockade: A Measure of Naval Economic Interdiction' (1983) 26 *Howard Law Journal* 759, 769.

<sup>108</sup> Jones (n 107) 769; Ruth Lapidot, 'The Strait of Tiran, The Gulf of Aqaba, and the 1979 Treaty of Peace Between Egypt and Israel' (1983) 77 *American Journal of International Law* 84.

<sup>109</sup> See also Von Heinegg (n 103). For a discussion of the definition of naval blockade see Section 2.1.2 above.

<sup>110</sup> Frostad (n 10) 198; Von Heinegg (n 13) 211. See also views that the situation in North Vietnam in 1972 was indeed a blockade: Haines (n 67) 428. However, opposing views argue that this did not constitute a blockade because of the controversial use of mines as the method of blockade, which may not be an accepted method of warfare and also may not be considered as effective; see Phillip Drew, *The Law of Maritime Blockade: Past, Present, and Future* (Oxford University Press 2017) 54–55; Jones (n 107) 772. It should also be noted that the term 'blockade' was not used; see Von Heinegg (n 103).

<sup>111</sup> For views that it was a naval blockade see Frostad (n 10) 198, although see some doubts in Von Heinegg (n 103). For views that it was an 'exclusion zone' see Ross Leckow, 'The Iran-Iraq Conflict in the Gulf: The Law of War Zones' (1988) 37 *International and Comparative Law Quarterly* 629; Sandesh Sivakumaran, 'Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice' (2016) 92 *International Law Studies* 153, 182. See also Section 2.2 above.

<sup>112</sup> See, eg, Haines (n 67) 435; Lance E Davis and Stanley I Engerman, *Naval Blockades in Peace and War: An Economic History since 1750* (Cambridge University Press 2006) 383; James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff 2013) 859. See also several examples in Elleman and Paine (n 105).

<sup>113</sup> Kraska and Pedrozo (n 112) 860.



neutral states.<sup>114</sup> Third, LOS prohibits certain actions that further limit the areas of naval warfare, such as suspension of shipping in international straits.<sup>115</sup>

As discussed above, the laws of naval warfare provide that belligerents must have due regard for the rights and duties of the coastal states in the EEZ and continental shelf of neutral states.<sup>116</sup> In the light of the rights and duties applicable in these zones, it may be argued that ‘due regard’ indicates that belligerents must preserve freedom of navigation and lawful uses of the sea, at least for neutral states.<sup>117</sup> These restrictions on belligerents may conflict with the objectives of naval blockade: if the purpose of a blockade is to prevent an enemy from achieving its goals by cutting off all maritime traffic,<sup>118</sup> one might argue that the influence of LOS on the laws of naval warfare poses challenges to this aim. This, in turn, might conflict with the basic principle of ‘necessity’ in IHL.<sup>119</sup> If a blockade cannot achieve its purpose, then it may not be necessary, which may affect its status as a legitimate method of warfare. The lack of practice and the emergence of new concepts of naval warfare described above strengthen this argument.

## 5. Concluding remarks

This article has explored the legal status of the Sea of Azov and the legality of the suspension of shipping by the Russian Federation on 24 February 2022, in accordance with IHL, and specifically the laws of naval warfare, and LOS. The Russian Federation’s suspension of shipping cannot be considered a naval blockade, as it neither fits the definition of a naval blockade nor meets the legal criteria to establish such a regime. However, Russia’s actions may fall within other concepts of naval warfare, such as MZs or other customary concepts; however, these actions still violate the basic rules of IHL, mainly the principle of distinction.

This conclusion is also supported by the application of LOS, which significantly affects the legal position in the Sea of Azov and increases limitations on belligerents during naval operations. First, the Kerch Strait can be considered an international strait, through which all states have the right of transit passage, which cannot be suspended. In addition, the parties’ maritime zones in the Sea of Azov may influence the rights and obligations of belligerents within MZs, as all states have freedom of navigation inside and outside an MZ when located within the high seas or the EEZ of coastal states. Thus, Russia’s actions in the Sea of Azov can be considered unlawful under both LOS and IHL.

The analysis presented in Section 3 highlights that the laws of naval warfare are subject to LOS regulation, certainly with regard to maritime ‘battle spaces’.

<sup>114</sup> San Remo Manual (n 11) rr 10, 12; Kraska and Pedrozo (n 112) 865–66, 886.

<sup>115</sup> See discussion in Section 3.

<sup>116</sup> San Remo Manual (n 11) r 34.

<sup>117</sup> See also Kraska (n 63) 866, 884–85.

<sup>118</sup> See text at n 10.

<sup>119</sup> The principle of ‘necessity’ requires that force must be necessary to enforce the law or perform some other lawful act; see *Turkel Commission* (n 9) para 188.

Thus, the view that IHL is the *lex specialis* of naval warfare and therefore prevails over other rules of international law<sup>120</sup> may not be accurate, and may hinder a comprehensive analysis of belligerents' rights and obligations at sea. To understand fully the legal situation concerning naval operations, the analysis should consider both LOS and IHL.

Some scholars have suggested that there is a need to create a new legal framework for hybrid naval warfare that would combine LOS and IHL. Others advocate the development of international case law rather than a new international treaty.<sup>121</sup> However, there are currently very few, if any, adjudicated cases that specifically address naval warfare. The two cases before the Annex VII Arbitral Tribunal are solely under UNCLOS jurisdiction, and the Tribunal has no competence to consider questions of IHL, including the laws of naval warfare.<sup>122</sup>

Section 4 explored whether the legal concept of naval blockade is still relevant today. While the concept still formally exists under IHL, in practice it has not been applied in recent decades. In most cases, the so-called 'blockade' did not meet the strict criteria for establishing and enforcing a naval blockade. Instead, in recent naval conflicts states have preferred to invoke other concepts such as economic warfare at sea, as well as MZs, although their legal status is unclear. Furthermore, LOS may also contribute to the irrelevance of naval blockades in modern international law, as it poses challenges for the definition and purposes of this regime.

The relative irrelevance of the concept of naval blockade in modern international law might support two additional arguments. First, given that the practice might be inconsistent with the current formal legal regime, one might argue that the practice has changed the legal regime and the criteria for the establishment and enforcement of naval blockades. If enough states were to act similarly, with the intention that the new practice would become the new legal regime and with no objections, we might have new customary law regarding naval blockades that would replace the San Remo Manual.

A second alternative argument is that the practice concerning naval blockades deviates from the formal legal regime, and such conduct may indicate that states downplay or ignore the legal rules concerning naval blockades, which are not implemented in practice. One might argue in this situation that the legal concept of naval blockade is essentially void or irrelevant in international law, as legal rules that are not applied in practice may not be considered legal rules at all, in accordance with the notion of the rule of law and other concepts of legal theory.<sup>123</sup>

<sup>120</sup> See discussion at n 64; Friedman (n 64) 421; Turkel Commission (n 9) para 31. See also Haines (n 67) 420.

<sup>121</sup> Alexander Lott, *Hybrid Threats and the Law of the Sea* (Koninklijke Brill 2022) 237–39.

<sup>122</sup> See UNCLOS (n 3) art 298(b). However, as discussed in Section 3, international tribunals might still assert jurisdiction even in cases concerning naval warfare, despite the provisions of UNCLOS; see text at 73.

<sup>123</sup> See, eg, 'The Rule of Law', *Stanford Encyclopedia of Philosophy*, 22 June 2016, para 5.1, <https://plato.stanford.edu/entries/rule-of-law>.

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