

The International Law of the Sea

Second Edition

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2016

Published in the United Kingdom by Hart Publishing Ltd
 16C Worcester Place, Oxford, OX1 2JW
 Telephone: +44 (0)1865 517530
 Fax: +44 (0)1865 510710
 E-mail: mail@hartpub.co.uk
 Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
 Hart Publishing
 c/o International Specialized Book Services
 920 NE 58th Avenue, Suite 300
 Portland, OR 97213-3786
 USA
 Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
 Fax: +1 503 280 8832
 E-mail: orders@isbs.com
 Website: <http://www.isbs.com>

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First edition published by Hart Publishing Ltd, 2010

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British Library Cataloguing in Publication Data
 Data Available

Library of Congress Cataloging-in-Publication Data

Names: Rothwell, Donald, 1959– author. | Stephens, Tim (Law teacher), author.

Title: The international law of the sea / Donald R. Rothwell and Tim Stephens.

Description: Second edition. | Oxford ; Portland, Oregon : Hart Publishing, 2016. | Includes bibliographical references and index. | Description based on print version record and CIP data provided by publisher; resource not viewed.

Identifiers: LCCN 2015042683 (print) | LCCN 2015042535 (ebook) | ISBN 9781782256854 (Epub) | ISBN 9781782256847 (pbk. : alk. paper)

Subjects: LCSH: Law of the sea. | Maritime law.

Classification: LCC KZA1145 (print) | LCC KZA1145 .R68 2016 (ebook) | DDC 341.4/5—dc23
 LC record available at <http://lcn.loc.gov/2015042683>

ISBN: 978-1-78225-684-7

Typeset by Compuscript Ltd, Shannon
 Printed and bound in Great Britain by
 CPI Group (UK) Ltd, Croydon CR0 4YY

was careful in its considerations not to suggest the development of a distinctive regime for this area. Accordingly, internal waters were addressed in a rather low key fashion, even extending to the inclusion of the definition of internal waters within the 'High Seas' part of the ILC's draft articles and commentary. Draft Article 26(2) simply provided that 'Waters within the baseline of the territorial sea are considered 'internal waters' and in the accompanying Commentary the ILC observed that the state exercises its sovereignty over this area in the same way as it does over the land 'subject to the provisions of international law limiting the rights of the State'.¹⁵⁵ The ILC did make clear that large stretches of water entirely surrounded by dry land known as 'lakes' or 'seas' were not bodies of water to which the regime of high seas, and by implication that of the developing law of the sea, was applicable. Draft Article 5 also made clear that waters which fell on the landward side of a straight baseline would be subject to the 'régime of internal waters'. No comment was made as to the extent of that regime, other than in the proposal found in draft Article 5(3) that when straight baselines had the effect of enclosing as internal waters, areas which were previously considered to be territorial sea, then a right of innocent passage would be recognised within those waters.

B. Convention on the Territorial Sea and Contiguous Zone

In the Convention on the Territorial Sea and Contiguous Zone the provisions proposed by the ILC dealing with internal waters were consolidated in Article 5 of the Convention. This article made clear that waters on the landward side of the baseline of the territorial sea formed part of the internal waters of the state,¹⁵⁶ and that where the establishment of straight baselines had the effect of enclosing as internal waters areas previously considered to be a part of the territorial sea, then a right of innocent passage existed within those waters.¹⁵⁷ However, whilst not in any way attempting to define the regime of internal waters, the Convention did provide some further indications as to the extent of the regime, so that Article 1(1) refers to the sovereignty of a state extending beyond the land territory and internal waters to encompass the territorial sea. This reference by implication acknowledges coastal state sovereignty over internal waters, which in Article 4(2) is referred to as a 'régime of internal waters' in the context of waters enclosed within baselines as being sufficiently linked to the land domain. The Convention therefore primarily concerned itself with the delimitation of the territorial sea in instances where the territorial sea and internal waters abutted, and whilst acknowledging the sovereignty of the coastal state over internal waters, did make that right subject to innocent passage by foreign ships in instances where straight baselines enclosed waters previously considered territorial sea.

C. LOSC

When the issue of internal waters was considered at UNCLOS III, one of the immediate issues which confronted the conference were the claims made by Indonesia and the

¹⁵⁵ ILC, 'Articles Concerning the Law of the Sea' (n 34) 277.

¹⁵⁶ Convention on the Territorial Sea and Contiguous Zone, art 5(1).

¹⁵⁷ *Ibid* art 5(2).

Philippines that all of the waters which fell within the limits of the straight baselines they had proclaimed around the outer limits of their archipelagos were internal waters. Whilst Indonesia had made a concession that the right of innocent passage existed within these waters,¹⁵⁸ these declarations creating vast areas as internal waters had no precedent in international law. Ultimately, this potentially divisive issue for the regime of internal waters was dealt with at UNCLOS III by recognition accorded to 'archipelagic waters' within the archipelagic baselines proclaimed by recognised archipelagic states, including Indonesia and the Philippines. This compromise did, however, require a minor adjustment to the regime of internal waters recognised in the Convention on the Territorial Sea and the Contiguous Zone and the LOSC provides in Article 8(1) that except as provided for in Part IV of the Convention dealing with archipelagic states, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state. Nevertheless, the Part IV Archipelagic State regime also recognised that within archipelagic waters an archipelagic state may be able to draw closing lines for the delimitation of internal waters in accordance with Articles 9, 10 and 11 of the LOSC. Therefore, an archipelagic state may have internal waters within the islands which make up the outer limits of the archipelago and directly face the territorial sea, and also have internal waters within islands encompassed by archipelagic baselines. One consequence of these circumstances is that in some instances ships would transit from internal waters to territorial sea, and in other instances from internal waters to archipelagic waters. Another minor adjustment to the regime of internal waters appears in Article 8(2), which was extended so as to permit a right of innocent passage though all waters previously not considered as internal waters, thereby extending the operation of the exception originally found in the Convention on the Territorial Sea and Contiguous Zone to include the contiguous zone and EEZ. In all other respects, the LOSC duplicates the relevant provisions of that convention with respect to internal waters, with Article 2 noting that the sovereignty of the coastal state extends beyond its internal waters to the territorial sea, and Article 7(3) referring to the need for a close linkage between the land domain and waters within baselines that are subject to the regime of internal waters. Importantly, with the exception of a right of innocent passage being enjoyed within internal waters previously considered territorial sea until straight baselines had been drawn, or when the right of innocent passage by foreign ships is being exercised through the territorial sea to access internal waters,¹⁵⁹ the LOSC does not in any way seek to interfere with the regime of internal waters.

D. State Practice

The development of the contemporary international law of the sea since World War II assisted with the delimitation of internal waters from those maritime zones which fall on the seaward side of the baselines, which in most cases will be the territorial sea and in the case of internal waters situated within archipelagic baselines, archipelagic waters. The regime of internal waters is therefore all of those waters which fall on the landward side

¹⁵⁸ See the discussion in ch 8.

¹⁵⁹ LOSC, art 18(1).