

**Law of the Sea, Environmental Law
and Settlement of Disputes**

Liber Amicorum Judge Thomas A. Mensah

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MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN/BOSTON

2007

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN 978 90 04 16156 6

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PRINTED IN THE NETHERLANDS

SEA BOUNDARY DELIMITATION AND INTERNAL WATERS

Budislav Vukas

I. Internal Waters and the Law of the Sea

Since the very beginning of my interest in the law of the sea, I have had the impression that the international community has avoided dealing systematically with the regime of internal waters.¹ Even today, after the adoption in 1982 of the United Nations Convention on the Law of the Sea (LOS Convention), the relation between international law and internal waters is as defined by Professor Vladimir Ibler in 1965:

"This regime [internal waters] has mostly been determined by national legal rules, and only roughly by international law. This section of international law has not been codified. In fact, the codification up to now has not even seriously been tried. The 1958 Geneva Codification has left out internal waters."²

Quoting a 17th-century opinion concerning internal waters, R.R. Churchill and A.V. Lowe agree that:

"This view of internal waters as an integral part of the coastal State remains unaltered today, and for this reason they are not the subject of detailed regulations in the Law of the Sea Conventions."³

¹ Even after the First United Nations Conference on the Law of the Sea (UNCLOS I), John Colombos does not even use the term "internal waters", but "interior", "inland" or "national" waters; C.J. Colombos, *The International Law of the Sea*, 4th revised edn, Longmans, London, 1959, p. 148.

² V. Ibler, *Sloboda mora (Freedom of the Seas)*, Narodne novine, Zagreb, 1965, p. 85. Anyway, this author gives one of the best and most comprehensive analyses of the trends adopted by coastal States in the treatment of foreign ships in their internal waters; Ibler, *op. cit.*, pp. 83-88. See also: V.D. Degan, "Internal Waters", *NYIL*, Vol. 17, 1986, pp. 3-44.

³ R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 2nd edn, Manchester University Press.

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The texts, not only of the 1958 Convention on the Territorial Sea and the Contiguous Zone,⁴ but also of the LOS Convention,⁵ prove the correctness of the above statements. In both Conventions it has been referred to internal waters only in order to clarify some issues relevant to the territorial sea. Thus, in defining the legal status of the territorial sea, the Third United Nations Conference on the Law of the Sea (UNCLOS III) was obliged to admit that the sovereignty of a coastal State extends not only to its territorial sea, but also to its internal waters and, in the case of an archipelagic State, to its archipelagic waters (art. 2(1)).⁶ In respect of the location of internal waters, the LOS Convention states that internal waters are "waters on the landward side of the baseline of the territorial sea" (art. 8(1)).

Indirectly, several articles dealing with the baselines from which the breadth of the territorial sea is measured refer to internal waters. The only provision dealing with the regime of internal waters is the one exceptionally recognising the right of innocent passage in those waters. Innocent passage in internal waters exists only "[w]here the establishment of a straight baseline ... has the effect of enclosing as internal waters areas which had not previously been considered as such ..." (art. 8(2)).

Besides these scarce rules in the LOS Convention, the only other multilateral instrument dealing with internal waters is the Convention and the Statute on the International Regime of Maritime Ports, adopted in Geneva, on 9 December 1923.⁷ Due to the small number of ratifications, commentators doubt whether the rules contained in the Geneva Statute can be considered as general customary international law.⁸ Anyhow, the Conference for the Codification of International Law, held at The Hague in 1930, adopted the Recommendation that the 1923 Convention on International Maritime Ports be completed by provisions on the jurisdiction of States in respect of ships in their internal waters.⁹

1978, p. 51. See also: L. Lucchini and M. Voelckel, *Droit de la mer*, Vol. 1, Editions A. Pedone, Paris, 1990, pp. 141-142.

⁴ UNTS, Vol. 516, p. 205.

⁵ UNTS, Vol. 1833, p. 3.

⁶ As at the time of UNCLOS I, the special legal status of the archipelagic States and the archipelagic waters was not yet recognised, art. 1(1) of the Convention on the Territorial Sea and the Contiguous Zone mentioned the extension of the sovereignty of coastal States, in addition to the territorial sea, only to their internal waters.

⁷ LNTS, Vol. 58, p. 287. The Convention entered into force on 26 July 1926.

⁸ Churchill and Lowe, *op. cit.*, p. 53; see also: G.P. Pamborides, *International Shipping Law, Legislation and Enforcement*, Kluwer Law International, The Hague/London/Boston, 1999, pp. 26-30.

⁹ See: Annexe III (II. *Voeu concernant les eaux intérieures*), in: G. Gidel, *Le droit international public de la mer, le temps de paix*, Tome III, Paris, 1934, p. 798.

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The Institute of International Law (*Institut de Droit international*) has also not shown a systematic interest in the location and regime of internal waters. They were only sporadically and indirectly referred to in relation to territorial waters and the legal regime of ships in foreign ports. Thus, a resolution adopted by the Institute at its 1894 Paris session ignores the waters between the coast and the territorial waters:

"L'Etat a un droit de souveraineté sur une zone de la mer qui baigne la côte ..." (art. 1(1)); "La mer territoriale s'étend à six milles marins ... de la laisse de basse marée sur toute l'étendue des côtes" (art. 2).¹⁰

Four years later, at its 1898 Hague session, in the resolution "*Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers*", without using the term "internal waters", the Institute mentioned several parts of coastal waters which have the equal regime as sea ports, and thus they belong to the territory of the coastal State:

"Les dispositions du présent Règlement sont applicable non seulement aux ports, mais encore aux anses et rades fermées ou foraines, aux baies et havres qui peuvent être assimilés à ces anses et rades" (art. 1); "Les dites ports, havres, anses, rades et baies, non seulement sont placés sous un droit de la souveraineté des Etats dont ils bordent le territoire, mais encore font partie du territoire de ces Etats" (art. 2).¹¹

At the 1928 Stockholm session, in determining the regime of the territorial sea in time of peace, the Institute does not indicate any areas of coastal waters that could be treated differently from the general regime of the territorial sea.¹²

It was only at its 1957 Amsterdam session, several months before UNCLOS I, that the Institute adopted a resolution trying to codify the distinction between the regime of internal waters and that of the territorial sea.¹³ However, this resolution deals only with the treatment of foreign ships in these two parts of "the maritime spaces over which a State exercises its territorial competence" (art. 1).

In this brief contribution to these essays in honour of my dear friend and colleague, Thomas Mensah, I will not deal generally with the legal regime of

¹⁰ Règles sur la définition et le régime de la mer territoriale, in: Institut de Droit international, *Tableau général des résolutions (1873-1956)*, Bâle, 1957, p. 121.

¹¹ *Ibid* p. 89.

¹² Projet de règlement relatif à la mer territoriale en temps de paix, *ibid.* pp. 123-126.

¹³ The resolution "The Distinction between the Régime of the Territorial Sea and the Régime of Internal Waters" was adopted on 24 September 1957 (Rapporteur: Frede Castberg); Institut de Droit international, *Tableau des Résolutions adoptées (1957-1991)*, Editions A. Pedone, Paris, 1992, pp. 4-10.

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internal waters. I will dedicate these few pages to a specific question which has been avoided even more than the general analysis of the regime of internal waters. I will discuss sea boundary delimitation in cases where, in some manner, internal waters are involved. The reasons for this choice are primarily the problems the Republic of Croatia and some other States successors of the Socialist Federal Republic of Yugoslavia (SFRY) have in the delimitation of the waters on the eastern coast of the Adriatic Sea. In the delimitation of Croatia with the Republic of Slovenia, Bosnia and Herzegovina, and Montenegro, internal waters of the former Federation have to be delimited between Croatia and the other three mentioned States, successors of Yugoslavia.

II. UNCLOS III and the Sea Boundary Delimitation

The international community, and particularly the leading politicians and diplomats, as well as the generally obedient lawyers dealing with international law, should not be proud of the relevant developments and the existing rules on the delimitations of marine areas between States with opposite or adjacent coasts. Let us just mention the results of UNCLOS III in this field:

- (a) Internal waters have not been mentioned in connection with the problem of delimitation;
- (b) The rather vague provision on the delimitation of the territorial sea from the 1958 Convention on the Territorial Sea and the Contiguous Zone (art. 12) has been reproduced in the LOS Convention with two minor drafting changes (art. 15);
- (c) The 1958 rule on the delimitation of the contiguous zone (art. 24(3)) has been omitted from the new law of the sea: the LOS Convention does not include any rule on the delimitation of the contiguous zone;
- (d) The rule on the delimitation of the continental shelf from the 1958 Convention (art. 6) has been replaced by a vague new rule (art. 83); and
- (e) The new rule on the delimitation of the continental shelf has been reproduced also for the delimitation of the new regime, the exclusive economic zone (art. 74).

Such a fragmentary and confusing "system" of rules on delimitation is one of the segments of the LOS Convention badly needing an efficient system of rules on the settlement of disputes concerning the interpretation or application of the rules on delimitation. This has been confirmed even by the LOS Convention itself: paragraph 2 of articles 74 and 83 obliges States Parties to resort to the procedures on dispute settlement provided in Part XV if they cannot reach an

agreement on delimitation "within a reasonable period of time". However, contrary to this situation, the LOS Convention permits States Parties not to accept the procedures entailing binding decisions (Part XV, section 2) with respect to disputes concerning the interpretation or application of the articles relating to sea boundary delimitation (articles 15, 74 and 83)!

Naturally, in this brief text we can discuss neither the history, nor the mentioned developments and its results, nor the problems caused in the delimitation of States at sea. Recalling the obsession of the Conference with the "activities in the Area", and the imposed compromises concerning the majority of the "classical" law of the sea issues, I increasingly share E.D. Brown's evaluation of the LOS Convention rules on delimitation:

"Both as regards the criteria of delimitation and the settlement of delimitation disputes, it must be said that the provisions of the Draft Convention are abominably bad."¹⁴

III. Internal Waters and the Problem of Delimitation

All the rules on delimitation in the LOS Convention concern "delimitation between States with opposite or adjacent coasts".¹⁵ As neither the 1958 Convention on the Territorial Sea and the Contiguous Zone, nor the LOS Convention mention the delimitation of internal waters, Lucius Calfish concludes that the delimitation of internal waters of States with opposite coasts should be resolved applying the rules on the delimitation of the territorial sea:

"La question devra ainsi être résolue en recourant par analogie, voire *a fortiori*, aux règles relatives à la délimitation de la mer territoriale entre États qui se trouvent dans l'une ou l'autre situation géographique ..."¹⁶

These conclusions seem logical, due to the close link of internal waters and the territorial sea, and the fact that both areas are under the sovereignty of the

¹⁴ E.D. Brown, "Delimitation of Offshore Areas – Hard Labour and Bitter Fruits at UNCLOS III", *Marine Policy*, Vol. 5, No. 3, 1981, pp. 172-184, at p. 181.

¹⁵ Article 15, dealing with delimitation of the territorial sea; article 74 on the exclusive economic zone, and article 83 on the continental shelf.

¹⁶ L. Calfish, "Les zones maritimes sous juridiction nationale, leurs limites et leur délimitation", in: *Le nouveau droit international de la mer*, D. Bardonnnet and M. Virally, eds, Editions A. Pedone, Paris, 1983, pp. 40-41; *id.*, "The Delimitation of Marine Spaces between States with Opposite or Adjacent Coasts", in: *A Handbook on the New Law of the Sea*, R.-J. Dupuy and D. Vignes, eds, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1991, p. 442.

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coastal State. Yet, taking into account the rules on the baselines from which the breadth of the territorial sea is measured, in practice the delimitation of internal waters will only exceptionally be a problem to be resolved between neighbouring States. Namely, all the coasts are surrounded by baselines determined in order to delimit internal waters from the territorial sea of the coastal State. The effect of the application of the rules on normal baselines (art. 5) as well as straight baselines (art. 7) is that: "(the) waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State" (art. 8(1)).

Thus, internal waters in the case of normal baselines are the waters landward of the "low-water line along the coasts" (art. 5), which means that they belong to the coastal area which in some periods may even represent land domain of the coastal State. Therefore, the normal baseline, according to the LOS Convention, has to be considered as the line which, without any exceptions, delimits the land domain from the coastal sea areas. It is therefore almost impossible in the case of normal baselines to imagine the situation in which the delimitation of the internal waters of two States with opposite or adjacent coasts would be necessary or possible.

On the other hand, the LOS Convention permits the application of the method of straight baselines "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity ..." (art. 7(1)).

Although the provisions of article 7 permit even significant coastal sea areas to be considered as "internal waters", all these provisions and possibilities concern areas belonging to a single coastal State. In this sense the International Law Commission stated in its 1956 Report on the Law of the Sea:

"Straight baselines may be drawn only between points situated on the territory of a single State. An agreement between two States under which such baselines were drawn along the coast and connecting points situated on the territories of different States, would not be enforceable against other States."¹⁷

The position, the legal regime of internal waters, and the above-mentioned rules on the baselines from which the breadth of the territorial sea is measured, confirm the claim that the delimitation of internal waters will rarely be a problem between neighbouring countries. Such a problem with opposite coasts is difficult to imagine, and States with adjacent coasts mostly avoid this problem by laying down a single maritime boundary, without distinguishing different zones of their

¹⁷ Para. 7 of the Commentary on article 5, *Report of the International Law Commission, Covering the work of its eighth session 23 April - 4 July 1956*, GAOR 11th Sess., Suppl. No. 9 (A/3159), United Nations, New York, 1956, p. 15.

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coastal waters.¹⁸ Thus, for example, at Quito on 27 August 1975, Ecuador and Colombia signed the Agreement on the Delimitation of Marine and Submarine Areas and Maritime Co-operation, where they agreed:

"To define as the boundary between their respective marine and submarine areas, as they now are or may hereafter be established, the geographical parallel running through the point at which the international land boundary between Ecuador and Colombia touches the sea" (art. 1).¹⁹

Similarly, article V(B) of the Treaty to Resolve Pending Boundary Differences and Maintain Rio Grande and Colorado River as the International Boundary between United Mexican States and the United States of America, done at Mexico City on 23 November 1970, provided that:

"B. The international maritime boundary in the Pacific Ocean shall begin at the westernmost point of the mainland boundary; from there it shall run seaward on a line the delimitation of which represent a practical simplification, through a series of straight lines, of the line drawn in accordance with the principle of equidistance established in articles 12 and 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone. This line shall extend seaward to a distance of 12 nautical miles from the baselines used for its delineation along the coast of the mainland and the island of the Contracting States."

However, notwithstanding this simplified delimitation, the two parties agreed that:

"D. The establishment of these new maritime boundaries shall not affect or prejudice in any manner the positions of either of the Contracting States with respect to the extent of internal waters, of the territorial sea, or of sovereign rights or jurisdiction for any other purpose."²⁰

IV. Delimitation of the Eastern Adriatic Coastal Waters

The last-quoted provision of the 1970 Treaty between Mexico and the United States indicates that, notwithstanding the simplified delimitation, the status of the coastal waters of neighbouring States may cause problems. One of the situations where such problems arise out of the blue is the dissolution of a

¹⁸ Churchill and Lowe, *op. cit.*, p. 153.

¹⁹ United Nations Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea*, UN Doc. ST/LEG/SER.B/19, United Nations, New York, 1980, p. 398.

²⁰ *Ibid.* UN Doc. ST/LEG/SER.B/18, United Nations, New York, 1976, p. 418.