The International Law of the Sea
Second Edition

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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'. 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 'regime 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, 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. 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 'regime 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

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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,\textsuperscript{158} these declarations creating vast areas as internal waters had no precedent in inter-
national 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 archi-
pelagic 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 accord-
ance 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 pas-
sage 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 inter-
nal 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 territori-
also access internal waters,\textsuperscript{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

\textsuperscript{158} See the discussion in ch 8.
\textsuperscript{159} LOSC, art 18(1).