

## The International Law of the Sea, by D. P. O'Connell, Edited by I. A. Shearer

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### Recommended Citation

Martin I. Glassner, *The International Law of the Sea*, by D. P. O'Connell, Edited by I. A. Shearer, 9 Md. J. Int'l L. 279 (1985).  
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol9/iss2/19>

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**THE INTERNATIONAL LAW OF THE SEA**, 2 Volumes. By D.P. O'Connell, edited by I.A. Shearer. Oxford, England: The Clarendon Press, Vol. I, 1982, 634 pp., Vol. II, 1984, 567 pp., \$74.00.

Just twenty years ago, the American geologist John Mero published *The Mineral Resources of the Sea*, which for the first time described in detail the nature and composition of the polymetallic nodules dredged from the bottom of the sea by H.M.S. Challenger nearly a century earlier. He wrote of their great potential value and became a vocal advocate of their exploitation. This activity led directly to Arvid Pardo's celebrated "Maltese initiative" in 1967, which led to the Third United Nations Conference on the Law of the Sea, convened only fifteen years after the first UNCLOS had essentially codified the then-existing law of the sea. That Conference produced the 1982 United Nations Convention on the Law of the Sea,<sup>1</sup> which in many respects amounts to the first constitution for the sea.

These twenty years have seen a "sea change" in marine and maritime activities around the globe, and revolutionary changes in the law of the sea. Most of these changes are incorporated into the volumes under review, the capstone of the late Professor O'Connell's brilliant career. In the deluge of literature on the subject that has spewed forth from nearly every part of the world during the last two decades, O'Connell's work will remain afloat for a very long time, long after most of the rest has been inundated and consigned to Davy Jones' Locker.

In the Editor's Preface, Ivan Shearer, Professor of Law at the University of New South Wales, points out that O'Connell died in mid-1979, that "[a] complete draft of each chapter had been completed by Professor O'Connell by the end of 1978 . . ."<sup>2</sup> and that as editor of O'Connell's manuscript, he had updated the material in Volume I through the Revised Informal Composite Negotiating Text of 27 August 1980. He does not, therefore, include the many changes that have taken place in the law of the sea during the last five years, changes within, outside and since the Third United Nations Conference on the Law of the Sea (UNCLOS III). Volume II was completed early in 1983 and thus utilizes the final version of the Law of the Sea Convention. It should be noted also that while Shearer, like this reviewer, was attached to a small country's delegation to UNCLOS III, unlike this reviewer he seldom—if ever—attended the Conference. This

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1. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U. N. Doc. A/CONF. 62/122 (1982) [hereinafter cited as 1982 Convention], *reprinted in* 21 I.L.M. 1261 (1982) *and in* UN CONVENTION ON THE LAW OF THE SEA 1982 (K. R. Simmonds ed. 1983).

2. 1 D. P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* at vii (1982).

may account in part for his incomplete understanding of the political context within which the law of the sea is evolving. But more on this later.

The Author's Preface leads off with a footnote: "The author had not prepared a preface at the time of his death. What appears here are extracts from an address the author gave to the Fifth Commonwealth Law Conference at Edinburgh in 1977, which may serve as a summing up of his perspective. . . ."<sup>3</sup> Some portions of the preface may be useful in understanding this perspective.

For the past two hundred years there have been two main streams of doctrine respecting the ultimate nature of the international legal system: There has been the Grotian tradition of moral order, whereby the rules of international law have been elucidated by reference to what the society of mankind requires for its regular development; and there has been the Vattelian tradition of acquiescence and consent, whereby these rules have been promulgated by reference to the practice of States.

The difference between the two has been obscured in practice by the common doctrine of *opinio juris*, that is, the doctrine that supposes that governments act respecting legal conviction and not from motives of power and gain. This supposition enabled jurists to bridge the gap between describing what States do and indicating what they ought to do—so raising the analysis from the level of anecdote to the level of the normative.

The doctrine of *opinio juris* provided international lawyers with a workable methodology which was, in past ages, best observable in the case of maritime law: practice established the freedom of the seas and the nature of the territorial sea, although admittedly it did not establish its geographical extent. But the methodology has now collapsed with the doctrine that prompted it. Governments in the matter of the Law of the Sea no longer act by reference to what they think the law is: they set out deliberately to break with the traditional rules in order to bring about the changes which they seek . . . .<sup>4</sup>

O'Connell goes on to explain this new methodology of governments, describing their differing geographical, economic and political situations and the problem of reconciling these differences in a lawmaking conference. He concludes with this observation, more prescient than it appeared to be when first uttered:

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3. *Id.* at ix n.1.

4. *Id.* at ix.

For practising lawyers it is clear that these new trends in the Law of the Sea are of the greatest practical importance. Prosecutions for violations of the law applicable to the maritime domain will increase and defence counsel will become more expert in the evidentiary problems raised by proof of the location of the offence as well as its nature. The interaction of international law and municipal law is today one of the main issues of legal action.<sup>5</sup>

Volume I contains the background material and discussions of the territorial sea, archipelagos, international straits, internal waters, bays, historic waters, the seabed, the continental shelf, fishery zones and the exclusive economic zone (EEZ). Volume II covers maritime boundaries; delimitation of the territorial sea, continental shelf and EEZ; jurisdiction over shipping on the high seas, over navigation and port access, in civil and criminal cases, over marine scientific research and over the contiguous zone; enforcement of the law; the law of belligerency at sea; and economic warfare at sea. Each volume thus contains both theoretical and case materials and both international and municipal law. In Volume II there is much that lies outside the law of the sea as expressed in the Convention, including elements of admiralty law and the law of war. On the other hand, some topics covered extensively in the Convention are given short shrift in this work or omitted altogether.

Each volume begins with a list of abbreviations used and ends with a bibliography, a table of cases, an index of conventions and international agreements, an index of authors cited and a general index. These reference tools are all extensive, carefully done and of great value to the novice and the specialist alike. It should be noted, however, that the bibliographies contain only "the general works and specialized monographs to which reference is made" in the book. No journal articles or other sources are included, although the footnotes contain numerous references to such sources. Also, a personal complaint about a distressing practice which causes unnecessary problems for researchers: the bibliographies list only the author's surname, initials of given names, title of the work and date of publication; no given names, place of publication or publisher are provided.

Chapter 1, "The History of the Law of the Sea," covers the subject in only twenty-eight pages, beginning with the Papal Bull of Alexander VII. There is no mention whatever of attempts by ancient Greece and Rome to exert jurisdiction over portions of the sea and only a passing reference to "the shadowy instance of Venice in the Adriatic."<sup>6</sup> The subsequent encap-

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5. *Id.* at xii.

6. *Id.* at 3.

sulation of history is fleshed out a bit in Chapter 2, "The General Principles of the Law of the Sea," in which O'Connell introduces historical evidence to strengthen his presentation of various theories and principles. He also elaborates on the theme offered in the preface: the demise of *opinio juris* in the law of the sea. In one sentence, in fact, he describes the essence of the radical change we have seen in the evolution of the law of the sea since the Second World War: "State practice has thus become less the embodiment of old rules than the vehicle for producing new ones quickly."<sup>7</sup> In the case of the continental shelf doctrine, in fact, it was widely accepted so rapidly that one wag referred to it over a decade ago as "instant custom."

After this, follow three chapters on the territorial sea, comprising 176 pages altogether. This constitutes one of the most elaborate recent treatments of the subject, organized into chapters on its juridical nature, its extent and its measurement. Then, after interruption by a chapter on archipelagos, there is a chapter on innocent passage in the territorial sea. Throughout the discussion, O'Connell is generally sure-footed in discussing the history, general principles and cases but omits a good deal and stumbles occasionally when considering contemporary developments, especially in UNCLOS III. One example is his section on "the criterion of evaluation" of the territorial sea, which ends with speculation on the nature of the sea beyond twelve nautical miles from the baseline. "Broader claims," he says, "even if expressed to be tantamount to territorial sea claims, are likely to degenerate in practice into *nothing more than economic zones, leaving the sea outside the limit of twelve miles equivalent to*, if not actually characterized as, *high seas*."<sup>8</sup> Even in his subsequent discussion of the juridical nature of the EEZ,<sup>9</sup> he twice mentions but in neither case accepts as valid the concept of the EEZ as *sui generis*. Yet this very concept had already been accepted by UNCLOS III at the time of writing and is expressed clearly in Article 55 of the Convention: "The exclusive economic zone is an area beyond and adjacent to the territorial sea, *subject to the specific legal régime established in this Part . . .*"<sup>10</sup> It remains to be seen whether this definition is an obstacle or an invitation to the conversion by state practice of the EEZ into a broader territorial sea.

The chapters on archipelagos and straits are relatively short and, on the whole, well done. The treatment is thorough in the three chapters on the related matters of internal waters: "Bays, Ports and Straits"; "The Conventional Rules on Bays"; and "Historic Waters." Of all the topics in-

7. *Id.* at 31.

8. *Id.* at 169. Emphasis added.

9. *Id.* at 575-79.

10. 1982 Convention, *supra* note 1, art. 55. Emphasis added.

cluded, only historic waters is at present controversial, largely because of the lack of any precise definition of the term and the general murkiness of the whole matter. The 1982 Convention on the Law of the Sea says only in Article 10 on bays, "The foregoing provisions do not apply to so-called 'historic' bays . . ." and in Article 298 that states signing, ratifying or acceding to the Convention may refuse to accept specified dispute settlement procedures with respect to disputes "involving historic bays or titles." Recent disputes over the Gulf of Fonseca, Peter the Great Bay and the Gulf of Sidra are only indicators of how difficult a concept this is to apply in any given situation. O'Connell wisely points out that the notion has become entangled with the separate and equally vague concept of "vital interests" of states. We may expect many more disputes to arise over the juridical character of waters in many parts of the world because of these loopholes in the otherwise reasonable and well-constructed definitions of jurisdictions that emerged from UNCLOS III.

Chapter 12, "The Legal Regime of the Seabed," is far too short for such a complex and important topic. In fact, only nine pages are devoted to the question of deep seabed mining, a topic which dominated the latter half of UNCLOS III, looms large in the United Nations Convention on the Law of the Sea and was the principal reason (or excuse) for the refusal of the United States, the United Kingdom and the Federal Republic of Germany to sign the Convention. This chapter constitutes essentially a preliminary background essay on the subject rather than a coherent and useful analysis of it. The current literature on the subject is replete with far better treatments of it.

O'Connell's treatment of the continental shelf is better. It does not explain the origin of the relevant Truman Proclamation of 1945<sup>11</sup> in the long-standing dispute between the federal government and the states of California, Texas, Louisiana and Florida about jurisdiction over so-called "tidelands oil," but it does explain the precursors of the proclamation in the United States and elsewhere, and reactions to it around the world. Some useful material is also included on the security of continental shelf installations and on control of production from the United Kingdom's continental shelf. The major contemporary shelf issue—its outer limit—is adequately handled, although the discussion is not up to date.

Separate chapters are devoted to fishery zones and to exclusive economic zones, a reasonable approach especially since fishery zones still survive despite the adoption of EEZs by most coastal states. The former topic is treated more extensively than the latter but, considering its newness the

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11. Proclamation No. 2667, Sept. 28, 1945, 10 Fed. Reg. 12,304 (1945), *reprinted in* 59 Stat. 884.

EEZ is handled adequately. The major exception to this assessment is O'Connell's failure to explain the *sui generis* nature of the EEZ, as noted above. Like the chapter on seabed mining, it must be considered as tentative, whereas the treatment of fishery zones is more definitive.

While Volume I presents primarily theoretical, historical and analytical material, Volume II contains chiefly technical material which supplements that in Volume I. The contents of this volume may be divided into three parts. The first part contains three chapters on boundaries, delimitation of the territorial sea and delimitation of the continental shelf and the EEZ. In each instance, there is some theoretical and historical background, but the emphasis is on technical matters. In general, these chapters constitute a useful compilation, though hardly a definitive one, of material on such matters as techniques of drawing boundaries on different types of charts, special problems of delimitation and the relationship between customary law, the Geneva Convention on the Continental Shelf and the shelf provisions of the 1982 Convention. The discussions of maritime boundaries in both volumes would have been greatly enhanced by diagrams and maps.

The second part contains nine chapters on jurisdiction and one on enforcement. It is here that O'Connell appears to be most confident, most thorough and least open to criticism. Throughout are interwoven the theoretical and practical, historical and contemporary, domestic and international, public and private international law. As might be expected, there is more detailed treatment of the more traditional topics—shipping, navigation and port access, civil and criminal jurisdiction, the high seas, pollution and the contiguous zone—and rather less on marine scientific research. The chapter on enforcement is quite good but is likely to need revision—or at least expansion—before long, in view of onrushing developments.

The final two chapters, on armed and economic warfare, are generally quite good, even recognizing the practical difficulties of applying traditional rules under contemporary circumstances. The Falkland Islands war of 1982 is discussed in this context. The more recent cases of attacks on neutral shipping in the Persian Gulf by both Iraq and Iran, and the mining of Nicaraguan ports by the United States comes also to mind. Nevertheless, even these acts have been limited ones and the international community has invoked traditional rules to contain them. O'Connell's material will remain useful for some time.

An overall assessment of the work by O'Connell and Shearer remains. First, it should be emphasized that this is one book in two parts, not two separate books. They are quite interdependent and to use one without the other would be to do an injustice to both. Second, it should be noted that this work and the United Nations Convention on the Law of the Sea are not coextensive. O'Connell includes much material not covered by the Convention, as noted above, but omits much that is included in the Convention.

Among these topics are: Part IX, "Enclosed or Semi-enclosed Seas"; Part X, "Right of Access of Land-locked States to and from the Sea and Freedom of Transit"; Part XIV, "Development and Transfer of Marine Technology"; and Part XV, "Settlement of Disputes." Any contemporary treatise on the law of the sea should at least recognize the existence of these topics, even if they are treated as superficially as some of the other topics have been in this book.

A third observation is that Shearer's updating of O'Connell's draft is spotty and uneven, even in Volume I. At various times the latest reference on a topic may be given as the 1978, 1980 or final (1982) version of the Convention. Finally, overall, it can be said that this book is strongest in the area of historical development, especially cases and state practice, and weakest in the political context of contemporary developments. That is, it is at its best in discussing the evolution of the law of the sea through 1958 and in discussing those elements of the law of the sea that have changed little since then.

Professor Shearer would have rendered an even greater service than he did by editing O'Connell's work if he had added a chapter of his own summarizing the current state of the law of the sea, especially in light of developments outside UNCLOS III and the refusal of some major powers to sign its Convention. A summary chapter could have served to integrate the two volumes, update the whole work and clarify many issues for the benefit of students, scholars and practitioners.

Despite the criticisms directed at the book in this review, it is overall a very fine work, a worthy successor to McDougal and Burke, *The Public Order of the Oceans*,<sup>12</sup> as a basic text and reference on the law of the sea. Its weaknesses should be borne in mind, however, and anyone using it would be well advised to supplement it with some of the newer material on UNCLOS III, on the United Nations Convention on the Law of the Sea and on developments since 1982.

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12. M. S. McDUGAL & W. T. BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962).

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