

*MARITIME FLAG AND INTERNATIONAL LAW*

By Nagendra Singh

Leyden: Sijthoff, 1978, xxiii and 161 pp. \$35.77

*THE INFLUENCE OF LAW ON SEA POWER*

By D.P. O'Connell

Annapolis: Naval Institute Press;  
Manchester: Manchester University Press, 1975,  
xv and 204 pp. \$15.50

*LEGAL REGIME OF THE SEA-BED AND  
THE DEVELOPING COUNTRIES*

By R.P. Anand

Leyden: Sijthoff, 1976, xi and 287 pp. \$23.25

*THE INTERNATIONAL LEGAL REGIME OF  
ARTIFICIAL ISLANDS*

By Nikos Papadakis

Leyden: Sijthoff, 1977, xvii and 277 pp. \$23.25

L. C. GREEN\*

Perhaps one of the most widely accepted concepts of international maritime law has been that of the freedom of the seas, construed as providing for freedom of navigation upon the high seas, with the right not to be interfered with by any state vessel other than one possessing the same nationality as that of the vessel interfered with. However, in *The Asya: Molvan v. Attorney General, Palestine*,<sup>1</sup> the Privy Council made it clear that, in the view of the state that has probably contributed most to the development of international maritime law, this right of non-interference belonged not to the vessel, nor to its master, but to the flag state. Since *The Asya* was not entitled to any state flag, she was liable to condemnation by the courts of the authority seizing her on the high seas. This principle was confirmed at the Geneva Convention on the High Seas (1958), with its requirement that all ships possess a nationality evidenced by the flag they fly.

The short monograph by Judge Nagendra Singh of the World Court is the text of a lecture honouring the memory of M.A. Master, who did much for the establishment of an Indian merchant marine, with the right to fly the Indian as distinct from the Imperial flag. Therefore, it is not surprising that,

---

\* University Professor, University of Alberta.

1. [1948] A.C. 351 (P.C.).

2. N. Singh, *Maritime Flag and International Law* (1978) 29-30.

to some extent, the text reflects British, as well as Indian practice and law, though it is not confined thereto. Judge Singh also shows how the law has developed so that now even a non-coastal state may be entitled to a maritime flag.<sup>2</sup> This fact plus the existence of flags of convenience, have contributed to the realisation that although international law recognises the principle of flag equality,<sup>3</sup> it does not forbid flag discrimination, especially as between the rights of shipping vessels flying the flags of coastal and non-littoral states.<sup>4</sup> This latter fact leads Judge Nagendra Singh to suggest the adoption of an international standard, at least insofar as allocation of cargoes is concerned,<sup>5</sup> although this proposal clearly runs counter to the views often expressed in the United States Congress, for example, the view in favour of national goods in national bottoms. For those who seek an interesting short survey of the law concerning the maritime flag, this monograph will prove useful.

It was the pressure of some of the newer states that led the 1958 Geneva Conference to concede the right of the non-coastal state to possess a maritime flag and maintain a fleet. Since then, there have been numerous conflicts between the older shipping countries and some of the new states which are particularly nervous and possessive of their sovereignty, particularly insofar as foreign capital ships are concerned. The controversies that the Third Law of the Sea Conference has seen resulting from such attempts to limit the right of innocent passage through straits lying in territorial waters, for example, reflect this confrontation, which has produced the new concept of "transit passage," subject to coastal regulation.

Professor O'Connell's *The Influence of Law on Sea Power*, based on his Schill lectures at the University of Manchester, helps to explain some of the realities behind this fear. For example, he points out that between 1945 and 1969 there had been no less than 80 incidents involving the use of sea power, affecting 37 navies, 24 of which involved the application of force.<sup>6</sup> He even suggests that there might be a major war at sea, possibly involving the use of nuclear weapons, even though such a war would be unacceptable on land, for he suggests that such hostilities could be "insulated both physically and psychologically."<sup>7</sup> It is respectfully submitted that this view is somewhat unrealistic in the light of present day political power confrontations. Equally, it is difficult to agree, in view of recent disclosures, with the contention that the Beira patrol, established in accordance with a United Nations Resolution, made it "clear that sea power can express and sustain legal decisions that could not be represented even remotely credibly in any other way; and it has revealed the peculiar capacity of navies to manifest the concept of law and order among nations."<sup>8</sup> Practice would indicate that whatever the law as indicated by United Nations Resolutions might be, its effectiveness depends purely on the will of the states primarily concerned to

---

3. *Id.*, at 50-51.

4. *Id.*, at 115 ff.

5. *Id.*, at 124.

6. D.P. O'Connell, *The Influence of Law on Sea Power* (1975) 2.

7. *Ibid.*

8. *Id.*, at 1.

give effect to it. Moreover, the implication that maritime states respond to the law tends to be based on the developmental history of the 18th and 19th centuries, when the leading maritime powers, especially Great Britain, were formulating a system that they required others to observe and which they were strong enough to enforce. In fact, this appears to be the lesson to be derived from Chapter 2 of this small book.

It is interesting to note how the author brings legal considerations into account in such exercises of naval power as the Battle of the River Plate.<sup>9</sup> If his exposition of the law is correct, his own account of the *Altmark* incident serves to emphasize how unimportant the law is in time of maritime warfare.<sup>10</sup> The views of the Nuremberg Tribunal in this area of the law<sup>11</sup> merely serve to emphasize this.

The larger part of this book is devoted to an examination of the idea of self-defence, and here again, practice shows the importance of auto-interpretation, bearing in mind that the only naval powers that can, at present, really threaten the peace as possessed of a veto in the United Nations that would enable them to preclude any condemnation of themselves as acting illegally. Nevertheless, Professor O'Connell's idealism prevails and the lesson of his writing is that international law enforcement is a feasibility and that in any such exercise there is a major role for maritime forces to play. Insofar as total war between the powers is concerned, it is essential to localize

the areas of tension . . . avoiding . . . recourse to higher levels of threat which would have the effect of concentrating tension in vital theatres. From this it follows that the initial response and the reinforcement must be available globally, and notably in extra-European waters, where the causes of tension are likely to arise.<sup>12</sup>

One cannot help but ask what the reaction of the non-European majority in the United Nations is likely to be to such a suggestion.

Where there can be no dispute with Dr. O'Connell's views is in his last sentence, the suggestion in which is already found in the provision of Protocol I (Geneva, 1977) on Humanitarian Law in International Armed Conflict<sup>13</sup> with regard to the role of legal advisers. The author

calls for a continuing dialogue between lawyers who know enough of what goes on in the operations room of a warship and naval officers who have sufficient awareness of the advantages and inhibitions of the law to bring the necessary professional insight into the influence of law on sea power.<sup>14</sup>

It is not only the idea of security and sovereignty which causes the developing countries to disagree fundamentally with established views of the older countries regarding the law of the sea, and so contribute fundamentally to the difficulty in bringing the Third Law of the Sea Conference to a satisfactory conclusion. There is also a confrontation between

9. *Id.*, at 39.

10. *Id.*, at 41, 42.

11. *Id.*, at 50.

12. *Id.*, at 188.

13. Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, (1977), 16 Int'l. Legal Materials 1391.

14. *Supra* n. 6, at 189.

the two worlds based on technology, with the developing world claiming a right to share in the "common heritage of mankind," which to a great extent exists on and under the deep seabed and which is, almost exclusively, exploitable only by or on behalf of the developed nations. Dr. Anand examines this confrontation in his *Legal Regime of the Sea-Bed and the Developing Countries*. He correctly points out that all law, including international law, is a vital and dynamic force which must respond to changes and developments, and that

[d]etermined to get rid of the old law [and he explains this, and the reasons and means of its formulation], the smaller, newly independent, and underdeveloped countries are taking full benefit of this opportunity to question some parts of the traditional system, and challenge some of the old practices which, they believe, have become obsolete. Thus, they seriously question the value of the "freedom of the seas" doctrine *which might have served a useful purpose at a particular period of history but has now become outmoded and tyrannical*. Similarly, they believe that the so-called freedom of fishing could no longer be accepted as a general practice accepted as law and should not be placed on the same footing as freedom of navigation and other freedoms over the high seas. Indeed, there is nothing sacred about the existing international law, including the Geneva Conventions of 1958, which have been accepted only by a minority of states.<sup>15</sup> (emphasis added)

This comment, and particularly the italicised section, is highly reminiscent of the explanation put forward by Prime Minister Trudeau when expounding Canada's new approach to off-shore rights and the limitation of the role of the International Court of Justice insofar as any dispute affecting those rights.

For those who desire a survey of the criticisms by the new states of what was considered to be customary international maritime law, together with the proposals that have been put forward to accommodate these states, while at the same time providing a basis which would be acceptable to the older states, there is no need to go further than this paragraph. It has a lesson that extends beyond maritime law, for there is constant conflict between the new and the older states on a variety of what were considered to be well-established principles of international law. Many of these apparently insoluble issues might prove less so, if the representatives of both sides recognize

that progress can be achieved only through the cooperation of all states. It is no use feeling sorry for the emergence of the new states or decrying their growing influence. Even if weak and underdeveloped, their interests can no longer be ignored. Nothing will be achieved by treating them as 'incompetent, reckless eternal mendicants'. Nor, it must be said, can the developing countries dare to ignore the interests of the developed countries or their powerful influence in the international society. Their pre-eminence, if not predominance, must be recognized in any future international regime and machinery. Indeed, neither group can ignore the other. It will require the cooperation of all the states — big or small, rich or poor, coastal or landlocked — to make any system work. An international regime must, therefore, be developed with patience and understanding of each other's problems. It is only through such understanding, faith, and trust in

---

15. R.P. Anand, *Legal Regime of the Sea-Bed and the Developing Countries* (1976) 267.

each other that we can hope to progress and succeed . . . International law must develop beyond the old concept of co-existence to a new law of cooperation.<sup>16</sup>

Intensification of methods of exploitation of deep-sea resources, and particularly the increasing number of oil rigs which require platforms and security zones, makes the issue of the existence of artificial islands one of legal, as well as purely scientific, interest. As long ago as 1918, an American citizen approached the Department of State inquiring whether an artificial island in the Gulf of Mexico established for oil recovery purposes could be brought under United States jurisdiction and protection. The Department replied that it had no jurisdiction over the ocean bottom 40 miles off shore, but that it had no objection to such an island being established. By 1930, the League of Nations Codification Conference envisaged the possibility of including artificial islands within the definition of island, but these establishments on the seabed were never dealt with in any formal treaty.

In his *The International Legal Regime of Artificial Islands* Dr. Papadakis examines the whole phenomenon, including underwater cities, submarine tourist facilities, military and weather installations, artificial islands for economic use and the like. He points out, that insofar as internal waters and the territorial sea are concerned, since these are within the littoral sovereignty, the coastal state has every right to construct artificial islands therein, so long as there is no unreasonable interference with innocent passage.<sup>17</sup> As to the contiguous zone, however, since this is strictly not within coastal sovereignty and under local jurisdiction for very limited purposes only, and since he considers the erection of artificial islands within the high seas not to be forbidden,<sup>18</sup> he is of opinion that the coastal state would enjoy certain rights insofar as the zone may overlap its continental shelf.<sup>19</sup> However, this view is seriously affected by the developments in respect of an exclusive economic zone.

The author points out that, by the Revised Single Negotiating Text of the Third Law of the Sea Conference, within this zone the coastal state will have the exclusive right to "construct and to authorize and regulate the construction, operation and use of artificial islands . . ."<sup>20</sup> Dr. Papadakis considers that since they differ from both natural islands and ships, rather than regulating their legal position by analogy, a special convention should be prepared dealing with this matter, and he feels that a distinction should be drawn "between artificial islands erected and used for urban purposes — Sea-Cities — and any other artificial structures, platforms, and floating or fixed installations in general."<sup>21</sup> Recognizing that many of these installations are likely to be established by non-state entities — either individuals or corporations — and that such entities do not possess the right to claim sovereignty, he reminds us that "[u]ltimately . . . the establishment of new sovereign states by private individuals and/or corporations may be

---

16. *Id.*, at 269.70.

17. N. Papadakis, *The International Legal Regime of Artificial Islands* (1977) 52.

18. *Id.*, at 60.

19. *Id.*, at 54.

20. *Id.*, at 77.

21. *Id.*, at 104.

22. *Id.*, at 114.

legitimized through general recognition by the existing subjects of international law.'<sup>22</sup> We may well see a development in this field by companies in North America and the Far East, although it must be remembered that the attitude of the commissioning states was that these companies acquired sovereignty on behalf of their rulers (see, Huber's arbitral award in the *Island of Palmas* case<sup>23</sup>).

The second half of this work is not of such jurisprudential interest as that already referred to. Here, the author is concerned with installations connected with Ocean Data Acquisition Systems (ODAS). He provides a detailed account of the problems connected therewith, covering such matters as the proposed Convention, the establishment and deployment of ODAS, their registration, jurisdiction over them, the recovery and return of ODAS found in the maritime zone of a foreign state, safety rules and the like. While this discussion is of interest and concerns the realities of control over specific installations, from the point of view of the student, it is the first part of the volume dealing with the issue at large, which will prove of greater interest and value.

It is to be anticipated that the number of books concerning aspects of the international law of the sea is likely to increase as the Third Conference continues unfinished. With its hopefully successful conclusion and the propounding of an entirely new and comprehensive Convention, we can anticipate that the present literary stream will become a flood. The works under review make a contribution to the general discussion, and it is to be hoped that in due course each of the authors concerned will make available an up-to-date version of his own monograph, illustrating how the subject-matter has been changed and expounding to us the significance of the new law for his particular field.

---

23. (1928), 2 U.N.R.I.A.A. 829.