International Law

by

D. P. O'CONNELL, LL.D.(Cantab.)

Professor of International Law
in the University of Adelaide,
Associé de l'Institut
de Droit International

SECOND EDITION

With a Foreword by
Lord McNair, Q.C., C.B.E.

Volume One

LONDON
STEVENS & SONS
1970

First edition 1965
Second edition 1970

Published by Stevens & Sons Ltd. of 11 New Fetter Lane, London
and
Filmset in Great Britain by Richard Clay (The Chaucer Press), Ltd., Bungay, Suffolk, and printed by Fletcher & Son, Ltd., Norwich, Norfolk

SBN 420 42890 9

Foreword

I HAVE read the Foreword which I wrote for the first edition of this book (1964) and have very little to add beyond expressing my satisfaction that my forecast of its success has been amply justified. My belief is that the feature of this edition which will impress most users of it is the evidence that it affords of the very great part being played in the development of the law by judicial decisions, both national and international, and arbitral awards. Oppenheim in the first edition of his *International Law* (vol. I, 1905, and vol. II, 1906) found it necessary to cite 231 decisions and incidents. Professor O'Connell's *first* volume under review cites over 2,000. This is not a completely fair comparison because perhaps Oppenheim, who came to England in 1895, had not fully adopted the attitude of English lawyers towards decisions. Nevertheless the contrast is significant and illustrates the present trend of international law in a striking manner. It is steadily developing out of the history of international relations into hard law.

I have every reason to think that this edition will repeat the success of the first.

February 1970 McNAIR

Preface to the Second Edition

THE rate at which international law is evolving may be gauged from the fact that this edition contains references to forty-four additional multilateral treaties, sixteen additional bilateral treaties and four hundred and ninety-two additional cases. To keep the work within a reasonable compass and price it has been found necessary to sacrifice certain parts of the text of the first edition. Consistently with the policy in the first edition, emphasis is placed on those areas of contemporary interest in international law, and the change in the balance of topics in this edition reflects the changes that have occurred politically and technologically in this decade. The chapter on the Legal Concept of the State has been substantially rewritten to take account of developments in the United Nations. The section on the Mandate and Trusteeship Systems has been reduced, and the emphasis shifted to the role of the United Nations in the field of self-determination. Protectorates deserve much less detailed treatment than formerly, and such institutions as Free Cities have been omitted. The chapter on the Commonwealth has been greatly abbreviated as much of the material in it has now taken permanent form in my *State Succession in Municipal Law and International Law*. The section on Alien Enemies has also been abbreviated.

The chapters which have required rewriting or substantial addition are the indices of those areas of the law which are expanding. Those on Treaties have incorporated the Vienna Convention and many new judicial decisions. State Succession has been substantially revised to give effect to the reconsideration of this topic prompted by decolonisation. The chapter on Territory incorporates the analysis of boundary problems in several recent judicial decisions and awards. The chapters on the Law of the Sea have been expanded and altered, particularly to express the conviction that the continental shelf is now an institution of customary international law. In the matter of the rapidly evolving law of the seabed it is difficult to stabilise the text so that the due emphasis can be given to the current state of thought without endowing the statements of law with an ephemeral character. The chapter on Air and Space has taken account of manifold developments, and the rules of international law relating to nuclear power have been examined in the context of obligations in respect of foreign territory, which is an addition to Rights in Respect of Foreign Territory. A section has been included on telecommunications. In the field of Jurisdiction the problem of flags of convenience has required more detailed treatment, and the question of Act of State has been to some extent trans-

formed by the *Sabbatino* case. Criminal jurisdiction has expanded, and peace-keeping by the United Nations, both in the matter of jurisdiction and in the matter of responsibility has called for examination. The Vienna Convention on Consuls and the enactments to give effect to the Vienna Convention on Diplomatic Privileges and Immunities have required modifications to the chapter on Diplomatic and Consular Privileges and Immunities.

There are few pages of the first edition that have not been revised or added to, which indicates that the pressures of contemporary society are felt in almost every topic of international law. At the theoretical level further consideration has been given to the way international law is made, particularly through the action of international organisations.

The aim of this, as of the first edition, is to present contemporary international law in a way helpful to the practitioner, judge, researcher or honours student. This means being selective about the materials, giving prominence to those areas of the law which are of practical importance and providing ample direction as to literature and cases. To cut the length of footnotes, and therefore the cost, the practice is continued of giving only the title, volume and year of books and articles cited. The role played by precedent, and therefore by judicial decisions, is making international legal method ever more analogous to the methods of the common lawyers, but the role played by international organisations and by multilateral treaties in developing international law is not underestimated.

There have been significant additions to the literature and basic materials on international law since the first edition, and this has involved taking into consideration not only new periodicals but the information in the collections of Parry, Whiteman, Kiss and others, and in the *International Legal Materials*. The International Law Reports are cited by volume number since 1957, the last volume to be used in the first edition. It has been found to be impossible to change the earlier volumes from a chronological to a numerical sequence because of the disturbance of the footnotes that would result, and consequent imposition upon my and the publisher's resources, both of which have been fully stretched to bring this work up to date.

The effective date of the information in this edition is June 30, 1969.

Adelaide D. P. O'CONNELL

Extract from Preface to the First Edition

THE political and economic transformation of the world which is occurring in the second half of the twentieth century necessarily affects the role and the content of international law, and gives the subject a new and more practical importance. Traditional institutions, consecrated by philosophical systems whose momentum is largely spent, and formed by political situations that are unlikely to be repeated, are called in question, and their historical evolution has been subjected to an analytical scrutiny that is unprecedented in legal scholarship. The legal practitioner, whether he be a government adviser concerned with national decisions, or a barrister called upon for an opinion on the effects on private rights of these decisions, is now confronted by an intimidating literature, not all of it, even the most important, accessible save in a few specialist libraries, and a great deal of it discoverable only after extensive bibliographical enquiry. Since courts and lawyers find themselves increasingly called upon to make decisions upon issues of international law it might be suggested that one urgent need has been to digest the scholarship which has remodelled international law, and present it in coherent and systematic form. The need is, perhaps, the greater in newer countries whose academic resources are inadequate for a fully informed judgment upon many of the problems of international law, but who are taking a leading role in the work of many conferences, and in the drafting of many conventions which influence the solution of these problems.

The perspective of international law has also been altered for the practitioner by a wider dissemination of judicial decisions on the subject, and by a systematic collection of them. The *Annual Digest of Public International Law Cases* and the *International Law Reports*, now running into many volumes, the collection by the United Nations Secretariat of the major international arbitrations which have occurred since the Venezuelan claims of 1903, and the wider diffusion of the national law reports, particularly those of the United States, have thrust the emphasis in international legal practice upon comparative analysis of judicial decisions, and made readily available a vast, and rapidly accumulating, source of authority, to which, even before 1939, only scant attention was paid. A real cosmopolitanism in international legal practice is not only evident but is increasingly exacted, and the public international law practitioner has had to become something of a comparative lawyer, and had to acquire those subtle skills of analysis, distinction and conceptual selection which the conflict lawyers have long since developed. It

is, perhaps, important that his research should be assisted by an up-to-date system of references to cases which have been newly collected and re-published.

The aggregation of diplomatic documents, and the extending geographical spread of the practice, which has resulted from the publication of national archives, also complicates the task of analysis. Any investigation of a problem of international law which is at all thorough must involve looking at the Wharton, Moore and Hackworth *Digests*, the Moore *Arbitrations*, the *Fontes Juris Gentium*, and the documentation in the *American Journal of International Law*, the *International and Comparative Law Quarterly*, and the various Continental journals, particularly *Clunet*, and the invaluable *chronique des faits* in the *Revue générale de droit international public*. To these must be added the important Law Officers' Opinions collected by Lord McNair and by other writers who have examined the Public Records Office deposits. The forthcoming *British Digest* will add immeasurably to this volume of material. The practitioner might also welcome references to the basic material found in this extensive revelation of practice, and also to the vast accumulation of treaties now widely available in the *League of Nations* and *United Nations Series*, the national treaty series, the *British and Foreign State Papers*, and the *Martens Treaty Series*, which are in process of republication.

The extent of the documentation and the number and variety of the journals, monographs and theses now available in several languages imposes certain practical conditions upon a work which aims to digest contemporary scholarship and expound its results systematically to the practitioner. The first condition is one of restriction of the subjects to be discussed. In these two volumes an attempt is made at the exposition of the "common law" of the international community, and of the "legislation" which affects it, leaving for subsequent or other treatment what might be described as the administrative law of international organisation. Hence a decision had to be made to treat of the constitutions of international organisations, and the action taken under them, only when these affect institutions of customary law. The general functions and the internal rules of international organisations do not fall within the present framework. Needless to say, the line of distinction is not easy to maintain, and when discussing domestic jurisdiction, monetary sovereignty, human rights, personality and immunities, an examination of some of the functions of international organisations has been found necessary. But had any more elaborate treatment of the activities of some fifty organisations been attempted this would have greatly extended the present work. For the same reason, systematic exposition of treaties not immediately related to customary legal institutions, such as the detailed ILO Conventions, or the International Sanitary Regulations, has had to be postponed, and mention of treaties restricted to those which deal with more general subjects. Here again, the line of distinction has been difficult to maintain, and treaties such as the Warsaw Convention on Air Carriage have been included because the practitioner

might welcome a brief introduction to a topic which affects his client's rights and is not within the scope of text-books on other legal subjects.

The second decision that had to be made was to organise the subject-matter in the manner and sequence in which the practitioner is likely to be implicated. Hence an approach from the point of view of diplomacy has been avoided, and topics such as international disputes have been organised under the conception of litigation rather than under that of negotiations. This is believed to be justified on the conception of the role of the government legal officer as one of adviser on justiciability rather than upon settlement, which is the role of the political officer. In consequence the work proceeds in the sequence of theory, functions, jurisdiction, responsibility and litigation, which is the sequence presented to the practitioner called upon to examine a complex international issue.

A third decision has been with respect to citation. There are now so many general treatises upon international law that it would greatly extend the footnoting if references were to be given to every book which discusses the instant point. Accordingly, it has been assumed that the practitioner will, if he wishes, consult other general works, and for his guidance a list of these has been included in the tables. (The list is prepared from my own university library holding and is only as complete as the holding itself.) No further reference is made in the footnotes unless the author of a general treatise has expounded a view calling for special discussion. References are thus generally limited to specialist monographs and articles, and, subject to inevitable omissions in my own university library's holding, these are comprehensive. On each point, then, the primary literature is cited for further reference. The fact that very few libraries in the world contain complete sets of national reports had dictated a policy of multiple citation of judical authorities and treaties, and the tables contain the principal alternative references so that the most convenient report can be consulted.

The fourth decision affects the balance of the work. The limits of two volumes required the emphasising of subjects which are of contemporary importance to the practitioner, and the discursive treatment of others which are not. This involves the omission at this stage of the law of war, save where it has continuing impact on other legal institutions, such as treaties and alien property, and of the problems of peaceful settlement of disputes by international action as distinct from judicial process, and this decision is justified by the existence of adequate works on the subject. (Attention has been paid to the subject of enemy aliens because, although formal war, we hope, will not recur, Commonwealth countries can expect to be involved in analogous "confrontation" situations, and the law may have to take these into account.) The division between topics of importance to the general practitioner, and those of limited interest does not, however, correspond with the distinction between the practical and the theoretical. The topic of acquisition of territory, which one might regard as of theoretical interest now that there is little territory remaining to be acquired, is likely to become of topical importance when new

States attempt to undo the territorial settlements of their predecessors, and an exhaustive re-examination of the theory underlying territorial sovereignty might be found to be significant. Or the theory underlying a practical subject such as treaty making may greatly influence the procedures in new Foreign Offices which may be impatient with the conservative practices of their predecessors, but unaware of the implications of departure from them.

International law today is not so much a description of what States have done as a complex intellectal construction, and it thus exhibits more affinity with the integrated exposition of the Grotian period than with the empiricism of the nineteenth century. The legal practitioner who is unaware of the theoretical structure of the subject is likely to be misled into supposing that the rules of international law are more concrete and more absolute than they really are. A practitioner's work on international law may not, therefore, avoid penetration into speculative realms which technical works on civil law or common law are entitled to overlook. The oil company adviser drafting a contract of investment with a foreign State, and seeking to shelter his client from the hazards of an abusive exercise of sovereign power, is engaged in one of the most exacting intellectual struggles of our time, and is involved in a conceptual difficulty which the fathers of international law would appreciate more readily than would the pragmatic writers of sixty years ago. And in devising techniques for judicial consideration of issues arising out of what is today called "doing business abroad" he is required to develop a facility with abstract ideas not ordinarily expected of the practising lawyer.

The practitioner must also avoid being misled into generalising from the experience of his own national legal system. There has been a tendency, most marked in the treatment of the topic of recognition, to enlarge municipal decisions on the internal effects of diplomatic activity into principles of international law, and a not unrelated tendency, illustrated by the case of *Luther* v. *Sagor* to borrow institutions from alien municipal systems where the context and the history are quite different, to justify a decision as one dictated by these principles.

These considerations of theory led to decisions on the organisation of this work. Each topic is prefaced by a theoretical exposition, the elaboration of which varies depending upon whether the subject-matter is sufficiently explored by description and analysis of practice and legal instruments, as in the case of air law, or whether it is dependent upon an involved structure of juristic logic, as in the case of responsibility. Where the structure is particularly complex, and the analysis extensive, as in the case of reservations to multilateral conventions, a summary of conclusions is offered to bring the problem fully in focus. Whereas some topics can be expounded analytically, others demand illumination by speculative methods. An attempt has been made to pursue a consistent philosophy throughout the whole work, though it must be conceded that much of the material, inspired by contradictory basic attitudes, is intractable and resistant to coherent exposition.

Following the theoretical discussion, where relevant an analysis is

attempted of the English law on the subject, followed by law of the United States, the two being equally balanced, and concluding with a briefer mention of the conclusions reached by the civil law systems. Recognition, alien status, and diplomatic and sovereign immunity are topics adapted to such comparative exposition, and, apart from making the work useful to lawyers of more than one national system, this method may have the merit of highlighting the distinction between international law principles and municipal solutions, and the additional merit of spreading the geography of the subject-matter in a more cosmopolitan fashion than hitherto. Where relevant, decisions of India, Canada or Australia are utilised to extend the logic of English law, and in the future, no doubt, decisions of African courts will become equally indicative of the English rule.

The practitioner concerned with the legal aspects of international activity, whether it be diplomatic or commercial, is often presented with situations in which the strands of public international law and the conflict of laws are inextricably interwoven. It is believed that the conflict of laws, though municipal law, is a construction confined by the larger construction of public international law, and that mutual isolation of the two disciplines can only result in a distortion of the issues and an unsatisfying analysis of concrete problems. Topics such as recognition, expropriation of alien property and cognisance thereof, extraterritorial legislative activity and monetary policy cannot be examined completely unless the interaction of public international law and the conflict of laws is appreciated. Hence in the treatment of these topics and boundary artificially imposed on the subject-matter by the separation of the disciplines is frequently, and it is believed necessarily, transgressed.

International law is the discipline which gives ultimate form to diplomatic activity, and the legal adviser to a Foreign Office, and other government departments engaged in foreign activity, such as immigration, police, trade or air, is an indispensable element in the formulation of national policy. But he does justice to his role only when he maintains a strict juristic integrity in his reasoning, for the makers of political decisions want the lawyer to confine for them the area of permissible action: the final decisions may owe far less to considerations of law than to considerations of politics or economics, but they are likely to be made with conviction and from positions of strength only when the cogency of the legal factors have been fully recognised. Every serious international issue crystallises in juristic form, and the value of a legal opinion is that it exposes certain of the logical difficulties and pitfalls which many political attitudes involve. Even administrative actions by government departments, such as publication of a treaty list, may have implications that only the lawyer can appreciate.

Adelaide D. P. O'CONNELL

Contents

VOLUME ONE

2. The Relationship between International Law and Municipal Law

4. Proof of International Fact

Part Two

RECOGNITION

5. The Theory and Modes of Recognition