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Bowett: The Law of the Sea

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THE LAW OF THE SEA. By *D. W. Bowett.* Dobbs Ferry, N.Y.: Oceana. 1967. Pp. 117. $5.

Dr. Bowett's book, which comprises his Melland Schill Lectures delivered at Manchester, is a worthy examplar of the British tradition. The ability to discuss complex subjects in concise, readable prose is a significant attribute of many outstanding British works in public international law in general, such as Brierly,[1] and in the law of the sea particularly, as in Professor H. A. Smith's earlier valuable contributions to this subject.[2] In this brief and useful book on recent developments and current problems in the international law of the sea, Dr. Bowett has wisely chosen to use the four Geneva Conventions now in force[3] as a basis for further discussion. This permits both a concise conspectus of the problems which those Conventions largely settled and an extensive analysis of the problems left unsettled or, indeed, created by the Conventions. Under the latter topic, developments in Europe since the adoption of the Conventions are examined as illustrative of the less than universal efforts that have been made to resolve unsettled problems. The law of the sea in time of war has been deliberately excluded from this survey.

In the first introductory chapter, the author raises the basic question of the proper criterion for evaluating the law of the sea as a system for the resolution of the conflicting interests of states. He cites Professor McDougal's[4] thesis of the "common interest" as an appropriate standard, and compares it with Sorensen's criticism[5] of that concept. He opts essentially for the McDougal view, redubbing it as the "community interest," and employs it as the criterion for judgment in subsequent chapters. As with McDougal, however, the elusive problem of identifying what in fact is the common or community interest remains somewhat obscure.

Although chapter 2 is entitled "The Geneva Conferences of 1958 and 1960," the focus is on the major problems left unresolved by those Conferences—that is, the breadth of the territorial sea and of exclusive fishery limits. Dr. Bowett points out the deleterious effects of confusing these essentially separate issues and of consequently fail-

1. THE LAW OF NATIONS (5th ed. 1955) (the last edition written by Professor Brierly).

2. THE LAW AND CUSTOM OF THE SEA (3d ed. 1959).

3. Convention on the Territorial Sea and the Contiguous Zone; Convention on the High Seas; Convention on Fishery and Conservation of the Living Resources of the High Seas; and Convention on the Continental Shelf. The four Conventions are reproduced in apps. 1-4, at 64-91. The United States and the United Kingdom have ratified each of the above Conventions. The U.S.S.R. has ratified all but the Fisheries Convention.

4. M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS (1962). For reasons unknown to this reviewer, McDougall is the spelling consistently used in citations throughout Dr. Bowett's book.

5. Sorensen, *Law of the Sea,* INTERNATIONAL CONCILIATION No. 520, at 199 (1958).

ing to consider adequately the different major interests at stake. The first of these he identifies as the security interests of the coastal state, and here conflicts arising out of the cold war presage no general agreement.[6] The other major interest in the territorial sea identified by Dr. Bowett is the economic one. Here the greatest conflict at the Conferences was over fishing rights: at odds were the demands of coastal states for as much exclusivity as possible in as broad an area as possible, and the counter demands of the "long-range fishing states" for a narrow territorial sea, which would admittedly be exclusive. The compromise proposals of the latter states, which failed of adoption at Geneva, provided first for a division of the territorial sea into zones: a six-mile inner zone of exclusive territorial sea was coupled with an additional six-mile outer, basically exclusive, fisheries zone subject to preservation of existing fishing rights of non-coastal states for a limited period of time. The second aspect of the proposed compromise was recognition of the principle that coastal states had a special and even preferential right in the conservation of fisheries off their coasts.

Although no agreement was reached on either aspect of proposed compromise at Geneva, these proposals have borne fruit in subsequent more particularized developments. Thus, in regard to the extension of territorial water limits, the author notes the trend toward unilateral claims of a twelve-mile limit,[7] and expresses the view that such a limit would not now be held illegal per se by an international tribunal. His conclusion is surely not weakened by the subsequent adoption by the United States of an exclusive nine-mile outer fishery zone, subject to such existing fishery interests "as may be recognized by the United States."[8]

Parallel developments with respect to fishery zones have mainly taken the form of regional and bilateral agreements, most of which, in substance, reflect the Geneva ideas on the subject. In fact, the European Fisheries Convention of 1964,[9] which has been the only regional agreement, adopted the zone idea. This Convention, however, departs from the Geneva proposals in so far as it limits the "phasing out" of existing non-coastal rights to the "inner zone" of six miles, while in the "outer zone" of six miles existing rights are to continue indefinitely. The Convention does not deal with conservation or territorial water limits, and, of course, only applies between the parties.

6. Dr. Bowett disagrees with McDougal's view that recognition of a coastal state's interest in security in a twelve-mile contiguous zone would have been desirable. As is well known, such an "interest" was not included in the Convention article on the contiguous zone, and its omission could create serious difficulties in the future.

7. This trend is evidenced by a list of such claims as of February 24, 1964, which was compiled by the United States Department of State and reprinted in 3 INT'L LEGAL MATERIALS 551-52 (1964).

8. 5 INT'L LEGAL MATERIALS 1103 (1966).

9. The text of the Convention is reproduced in app. 5.

There is an interesting protocol[10] providing for provisional application prior to entry into force. Aside from this Convention, with respect to the outer zone, European bilateral arrangements have generally applied the Geneva phasing-out formula to the rights of nonparties. Thus, even in Europe, there is no consensus on exclusive fishery limits, but differing forms of settlement have been reached throughout most of the area. Elsewhere, only the Japanese-Korean dispute has been settled by agreement.[11] Many other countries, however, have legislated unilaterally both before and after the Geneva Conferences.[12]

The third chapter is concerned with high seas fisheries and the increasing emphasis on conservation of fishery resources. The classic concept of freedom of fishing for all states on the high seas rested on the assumption of inexhaustible resources. However, particularly in areas of the high seas adjacent to coastal states, this assumption has been challenged in practice, and various measures have been taken by coastal states to curb this freedom. The Rome Conference of the Food and Agricultural Organization in 1955 recognized the need for conservation, but failed to come to grips with the essentially economic claims of coastal states for preference or exclusive rights rather than scientific conservation. This underlying clash of interests also was ignored in the 1958 Geneva Fisheries Convention in which the main emphasis was on scientific conservation. According to Dr. Bowett, failure of this Convention to recognize the basically economic character of the coastal states' claims is the primary reason for its receiving the fewest ratifications[13] of any of the substantive Geneva Conventions. With this inability to reach a meaningful consensus, states have turned again, as with the question of the territorial seas, to arrangements that attempt to cope with the problem either by area or by stocks of fish. These range from the creation of research bodies, to conservation conventions containing specific obligations on the parties, and finally to agreements that attempt the more difficult task of allocating fishery resources. The latter agreements are further complicated when the resources are not confined to the high seas as is usually the case. This fact highlights the claims to preference of the coastal state. Although the Geneva Fisheries Convention

10. The text of the Protocol is reproduced in app. 5.

11. Portions of the text of the agreement are reproduced in app. 6, and a map delineating the agreement appears at 109.

12. In addition to the earlier 200-mile claims of Chile, Ecuador, and Peru, Argentina claimed a 200-mile exclusive fishery zone. 6 INT'L LEGAL MATERIALS 663 (1967).

13. As of January 1, 1967, the four Geneva Conventions have each respectively been ratified by the following number of states: High Seas Convention—40; Continental Shelf Convention—36; Territorial Sea and Contiguous Zone Convention—33; Fisheries Convention—25. Treaties in Force, Department of State Publication 8188. As of August 14, 1967, the Department of State Bulletin reports no additional ratifications.

gave a certain priority of claim to coastal states, it was subject to eventual adjudication by "expert" tribunals under standards which did not recognize coastal states' demands for preference or exclusivity. The related concept of "abstention," proposed by the United States and Canada,[14] was likewise rejected at Geneva. Thus, state claims and the Convention are at odds, and hopes for a satisfactory resolution await community agreement. The author concludes that the ultimate solution in terms of community interest calls for the just allocation of resources by a tribunal composed of "experts" on the subject.

Chapter 4 on the continental shelf analyzes the resolution by the Geneva Convention of the principal issues and the subsequent development of state practice. The Convention's definitions pose two main problems. The first is the adequacy of the "exploitability" criterion[15] as a limit to the shelf's extension from the coast, a criterion which Dr. Bowett approves. The second is the Convention's inclusion,[16] within the exclusive "natural resources" of the coastal state, of sedentary species of living resources as well as mineral resources. Although the author acknowledges that the extension reflects economic rather than logical considerations, he criticizes the artificiality of the distinction which is thus drawn between sedentary and free-swimming species. Such criticism would seem justified, since the difficulty of drawing such an arbitrary line has already resulted in a "lobster-war" between France and Brazil.

The Convention gives notable recognition to the exclusivity claim of the adjacent coastal state. Dr. Bowett discusses the necessary resolution of the conflict between this claim and the claims of other states to such historic rights as those of free navigation, cable-laying, and the installation of pipelines.[17] He concludes that the Convention's provisions achieve a fair balance, but regrets the failure to include in the Convention acceptance of the compulsory jurisdiction[18] of the International Court of Justice for future resolution of the many disputes that will inevitably develop out of the language of the Convention. This omission detracts from what is otherwise "a remarkable achievement in the field of codification" (p. 40). In the last section of chapter 4, Dr. Bowett describes subsequent developments, with particular emphasis on those in the North Sea where concentrated shipping makes the problems of adjustment of competing claims especially acute.

14. The substance of the joint proposal appears at 30. *See also* 31-32, discussing the position of a "newcomer" to a fishery.

15. Convention on the Continental Shelf, art. 1.

16. *Id.* art. 2(4).

17. *See id.* art. 3, 4, & 5.

18. See, however, the subsequent submissions to the International Court by Special Agreements of Continental Shelf Disputes Between the Federal Republic of Germany and Denmark and The Netherlands, 6 INT'L LEGAL MATERIALS 391 (1967).

In the next chapter, entitled "The Community Interests and Abuse of Rights," the author examines a number of interesting situations in which abuses have occurred in recent years, and then discusses the solutions that have been or might be reached in light of "community interests." Prevention of pollution of the sea by oil has been the object of a number of conventions[19] which have attempted to prevent the abuse. The exceptions to effective prohibitions have been progressively narrowed, but the problem remains critical, as the Torrey Canyon disaster dramatically illustrated.[20] The Geneva High Seas Convention dealt more specifically with the dangers of pollution from radioactive wastes,[21] and steps have been taken to implement the obligation of prevention. But devising adequate means of compulsion remains a problem, as does developing sufficient scientific knowledge to cope with the problem. An equal threat is posed by accidents, and even more danger stems from nuclear weapons testing. The author briefly discusses the legality of the United States hydrogen bomb tests in the Pacific and concurs in general with the "reasonableness" criterion of McDougal in balancing freedom of the seas against the need for self-defense.[22]

The question of a right of access to the sea by landlocked states, the subject of a special previous conference of such states, received recognition in the High Seas Convention,[23] but, as the author points out, the "victory" of the landlocked states was moral, not legal. A subsequent Convention,[24] sponsored by the United Nations Conference on Trade and Development, purporting to put the force of law behind the moral gains, is noticeably lacking in ratifications by major non-landlocked states, so that no real solution to the problem has been achieved.

A third type of abuse discussed by Dr. Bowett is "pirate" broadcasting from the high seas. Attempts have been made both by national legislation and international agreement to deal with this problem. The national legislation has been based on a "protective" theory of jurisdiction, and prosecutions thereunder have taken place without international protest.[25] The author queries whether the contigu-

19. The basic convention is the International Convention for the Prevention of Pollution of the Sea by Oil of 1954 [1958] Gr. Brit. T.S. No. 56 (CMD. 595). Because of this Convention, article 24 of the Geneva High Seas Convention is in general terms only.

20. For the Liberian Report on the Stranding of the Torrey Canyon, *see* 6 INT'L LEGAL MATERIALS 480 (1967). The report found the ship's master solely responsible and recommended the revocation of his license.

21. Convention on the High Seas, art. 25.

22. McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648 (1955).

23. Convention on the High Seas, arts. 2, 3.

24. The text of this Convention may be found in 6 INT'L LEGAL MATERIALS 957 (1965).

25. *See The Lucky Star*, 2 INT'L LEGAL MATERIALS 343 (1963).

ous zone concept would support this jurisdictional assertion. The European Agreement for the Prevention of Broadcasts from Stations Outside National Territories,[26] on the other hand, is based on the exercise by the contracting parties of their traditionally recognized jurisdiction over their nationals and territory, including prohibitions against doing business with the "pirate" stations; indeed, the latter sanction might even be effective against nationals of noncontracting states. The over-all effectiveness of this Agreement will depend, however, on its being ratified by most, if not all, of the contracting states.

The question of whether resort to "flags of convenience" constitutes an abuse of rights is the fourth special area of abuse discussed. The author challenges the common assumption that the utilization of such national "flags" by owners of another nationality does in fact abuse the public order of the oceans.[27] His analysis is a realistic and objective one. He points out that the alleged lowering of safety standards has not been documented, and that the real conflict of interests is economic, primarily based on differential taxation. Article 5 of the High Seas Convention,[28] which purported to solve the supposed abuse in terms of the "genuine link" requirement derived from the *Nottebohm* case,[29] provides no effective sanction. As a result, Dr. Bowett concludes that the Convention has failed in its efforts to proscribe the practice, and in any case that it is doubtful that the "community interest" calls for such a proscription.

In his final chapter, the author notes that while his survey has revealed basic conflicts, progress *has* occurred, although principally in terms of partial rather than universal solutions. The separation of the breadth question from the fishery zone problem is characterized as the major contribution of the Geneva Conferences, and, as has been seen, this differentiation has provided the framework for regional and local solutions. The major problem of the "just" allocation of fishery resources needs more adequate data as well as an agreement on priorities. Progress has been made in the creation of "expert" tribunals but there are important gaps. Thus, what has emerged in the fisheries area is a consensus on desirable procedure

26. The text of this Agreement is reproduced in app. 7.

27. The assumption had previously been the subject of a vigorous attack. *See* McDOUGAL & BURKE, *supra* note 4, at ch. 8.

28. Article 5 reads as follows:

1. Each state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. Each state shall issue to ships to which it has granted the right to fly its flag documents to that effect.

29. [1955] I.C.J. 4.

rather than on substance. On the other hand, significant agreement on substance has been achieved with respect to the continental shelf, but adequate procedures are lacking.

Somewhat similar conclusions apply to the problems considered under the rubric of abuse of rights. The existence of and solution for an abuse of rights must be determined on the basis of "community interest," a criterion necessarily vague and one that requires concrete implementation in both international agreement and national legislation along uniform lines. Moreover, both municipal and international enforcement procedures must be available to curb such abuses when they are found. Yet, as Dr. Bowett points out, there is sometimes a failure to agree on the proper solution, and, where there is agreement, there is frequently a lack of compulsory international enforcement procedures. The necessity of establishing a pattern of solution for existing problems and an effective means of enforcement is enhanced by the challenge of probable future technological developments, such as the manipulation of weather and the harnessing of tides, which will require similar solutions and procedures.

Dr. Bowett's stimulating discussion of the law of the sea demonstrates once more that this "branch" of international law presents many interesting and challenging problems in itself.[30] It also furnishes an appropriate setting for consideration of basic issues of international law as a system of law for regulating conflicts in the world community.

One of these fundamental questions concerns methods of international lawmaking. In this area, unlike in the field of space law, General Assembly Resolutions—a relatively new technique for achieving consensus and developing "quasi-legal" rules—have not been utilized.[31] Diplomatic conferences, a traditional method,[32] produced the four Geneva Conventions now in force.

The Conventions, as previously noted, formed the starting point for Dr. Bowett's analysis of the law of the sea. Although the author does not assess the efficacy of the Conventions as a whole, his discussion of the Territorial Seas and Fisheries Conventions reveals some of the difficulties of formulating solutions based on community interest at such diplomatic conferences. Despite the failure to achieve agreement on territorial water limits in the Territorial Seas Conven-

30. A more extensive demonstration may be found in McDOUGAL & BURKE, *supra* note 4.

31. For fuller discussion, *see* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); O. SCHACHTER, THE RELATION OF LAW, POLITICS AND ACTION IN THE UNITED NATIONS, 1 HAGUE ACADEMY OF INT'L LAW, *Receuil des Cours* (1963).

32. These particular conferences, however, were convened on the basis of the prior extensive preparatory work of the International Law Commission, a new United Nations organ created for the purpose of the codification and progressive development of international law.

tion, subsequent developments did show the mark of ideas developed at Geneva. In the Fisheries Convention, on the other hand, there was a marked failure to resolve the competing economic claims at stake, and the Convention's provisions and state practice remain at variance.

The Continental Shelf Convention, which the author regards as a significant achievement in codification, is nevertheless subject to criticism for its failure to agree on the compulsory settlement of disputes arising out of application of the Convention. Indeed, this failure to achieve agreement on adequate procedures for third-party settlement, with the notable exception of the 1964 European Convention, is a general weakness of the Geneva Conventions[33] as well as of the regional and bilateral agreements that followed.

The author's conclusions with respect to the law of the sea can thus be extrapolated to the international legal system as a whole. Better methods of lawmaking must be developed so that solutions based on the community interest can be more effectively achieved. In addition, nation-states must exhibit a greater willingness to submit their disputes to third-party settlement. Progress in both areas will necessarily be slow. Nonetheless, books such as Dr. Bowett's help lead the way, and it is the task of international lawyers to persevere in the quest for a world public order adequate for the times and the immense problems that challenge its resources.

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33. It should be noted that the 1958 Geneva Conference adopted an Optional Protocol for the compulsory settlement of disputes, which has not yet entered into force for the United States, although the Protocol itself has been in force since September 30, 1962.