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International Organizations and the Law of the Sea: Documentary Yearbook, 1985

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Book Reviews

International Organizations and the Law of the Sea: Documentary Yearbook 1985. Ed. The Netherlands Institute for the Law of the Sea. Dordrecht: Martinus Nijhoff, 1987. Pp. viii, 645. US$ 132.50. ISBN 90-247-3488-6.

It was only to be expected that upon the adoption of the 1982 United Nations Convention on the Law of the Sea, there would be a plethora of publications, academic and otherwise, on various aspects of the law of the sea. What is perhaps not generally known is the number of international organizations that have occasion to issue documents relating to the law of the sea, and, even when it is known, these are in such a variety of places that it is almost impossible for any but the most determined researcher to seek them out. The Netherlands Institute for the Law of the Sea is to be congratulated, therefore, for instituting an annual publication devoted to such documentation. Even the Institute has found that "It proved very difficult to gain sufficient access to documents issued by other [than United Nations-related] organizations; indeed, this sometimes proved very difficult even for [such] organizations" (p.vii).

The first volume in this new series is, therefore, devoted to materials issued by the United Nations and the specialised agencies, and the collection shows the significance of the editorial comment that, "although this volume deals with law of the sea documents, this should not be interpreted as implying that the focus is only on legal materials. Indeed, such a narrow approach will simply not do for the law of the sea in its present stage of development. Therefore, non-legal documents — such as those involving technical studies or policy analysis — are also included, provided they have a bearing on the law of the sea" (p.viii). Thus, we find the text of the UNESCO/IOC *Comprehensive Plan for a Major Assistance Programme to Enhance the Marine Science Capabilities of Developing Countries* issued by UNESCO in January 1985. There is also Part III of the 1985 *Report of the Committee of Experts on the Application of Conventions and Recommendations* issued by the International Labour Conference at its 71st Session. The relevant portion relates to the application of conventions to offshore industrial installations. In addition there are the relevant portions of documents concerning seafarers' welfare, including social security and health protection. From the legal office of the Food and Agriculture Organization there is the portion of a legislative study on coastal state requirements for foreign fishing that deals with national legislation on licensing and control of foreign fishing operations in coastal waters.

From this brief selection it should be clear what a wealth of material is to be found in this *Documentary Yearbook* and those concerned with any aspect of the law of the sea are bound to make constant use of this new series.

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A Guide to Maritime Boundary Delimitation, by D.C. Kapoor and Adam J. Kerr, Toronto: Carswell, 1986. Pp. xiv, 123. $30.00 (Hardcover)

This is not a book for lawyers. This is not a book written by lawyers. It is a book written by hydrographers for hydrographers. However, because the book deals with maritime boundary delimitation it is a book of interest to an audience far beyond hydrographers, since ocean boundaries concern lawyers, political scientists, economists, sociologists, fishermen, resource-specialists and a wide range of other professionals.

Any book on maritime boundaries is of interest to Canadian ocean lawyers because of the numerous ocean boundary problems that exist for Canada. Canada has been partially successful in delimiting ocean boundaries with our neighbours in four cases. The most celebrated Canadian ocean boundary is the one with the United States in the Gulf of Maine, which was the product of litigation before a Chamber of the International Court of Justice.[1] Left unresolved, however, was the ocean boundary adjacent to the coasts of New Brunswick and Maine around Machias Seal Island to which both Canada and the United States claim sovereignty.[2] The Gulf of Maine boundary is also incomplete seaward of the Court-drawn line, which ends at the outer limit of the 200-nautical-mile zone, since the geological continental shelf extends beyond this limit.[3] On the west coast, Canada and the United States have accepted the 1846 Oregon Treaty[4] as defining the ocean boundary between Washington State and British Columbia in the Georgia Strait and the Strait of Juan de Fuca. Seaward of Vancouver Island, however, no agreed-upon ocean boundary exists. This has posed no difficulty between the two states until the recent discoveries of polymetallic sulfides near the outer limit of the 200-nautical-mile zone.[5]

The other two boundary agreements involved the Danes and the French. In 1973 Canada and Denmark reached an accord regarding the continental shelf between Greenland and the Canadian Arctic. It is not complete as the agreement does not delimit the waters in the Arctic

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1. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States),* [1984] International Court of Justice Rep. 245.
2. *Id.,* at 23-24. *See generally:* R.R. Baxter and M.J. Horwitz, "Opinion in Support of the Sovereignty of the United States of America over Machias Seal Island and North Rock" (1975, unpublished manuscript submitted to the Marine Resources Commission, State of Maine).
3. *Id.,* at 266.
4. Treaty Establishing the Boundary in the Territory on the Northwest Coast of America Lying Westward of the Rocky Mountains. Done at Washington, 15 June 1846. Came into force 5 August 1846. Reprinted in C. Parry, ed. *The Consolidated Treaty Series,* vol. 100 (Oceana Publications: Dobbs Ferry, N.Y., 1969), at 39.
5. *See:* J.I. Charney, "The Law of the Deep Seabed Post UNCLOS III" (1984), 63 Oregon L. Rev. 19, at 42, footnote 145.

Ocean. Moreover, there is a dispute between the two countries over the sovereignty of an island in the Far North with the result that there is a small gap in the agreed-upon boundary line.[6] In 1972 Canada and France reached a boundary agreement regarding the territorial sea between St. Pierre and Miquelon and Newfoundland.[7] However, the boundary issues raised by continental shelf and 200-nautical-mile economic zone claims for these small French Islands remain unresolved. In January, 1987 Canada and France signed an accord agreeing "to initiate negotiations with a view to concluding . . . a Compromis which shall submit to compulsory third-party settlement" these ocean boundary issues.[8] Hence, Canada will soon be involved in its second adjudicative process to settle an ocean boundary.

Unresolved ocean boundary issues exist with the United States in the Beaufort Sea[9] and between Alaska and British Columbia.[10] In neither case are there immediate plans to undertake negotiations. At an earlier stage it had been hoped that all the boundary issues with the United States could be settled at one time but this ultimately failed.[11]

As well as these bilateral ocean boundary issues, Canada is faced with problems respecting the delimitation of the outer limit of the continental shelf on the east coast where it extends beyond 200-nautical miles, and regarding the straight baselines employed along much of Canada's coastline and most recently announced respecting the Canadian Arctic.[12]

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6. Agreement between the Government of Canada and the Government of the Kingdom of Denmark Relating to the Delimitation of the Continental Shelf between Greenland and Canada. Done at Ottawa, 17 December 1973. Entered into force 13 March 1974. *Canada Treaty Series* 9 (1974). *See:* S.J. Rolston and T.L. McDorman, "Maritime Boundary Delimitation in the Arctic Region" in D.M. Johnston and P. Saunders (eds.), *Ocean Boundary Making: Regional Issues and Developments* (Croom Helm: London, 1987) (forthcoming).

7. Agreement between Canada and France on Their Mutual Fishing Relations. Done at Ottawa, 27 March 1972. Entered into force 27 March 1972. Reprinted in U.N. Legislative Series, *National Legislation and Treaties Relating to the Law of the Sea* (New York, 1974), at 570-572.

8. *See generally:* C.R. Symmons, "The Canadian 200-Mile Fishery Limit and the Delimitation of Maritime Zones Around St. Pierre and Miquelon" (1980), 12 Ott. L. Rev. 145-165.

9. K. Lawson, "Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary" (1981), 22 Virginia J. of Int'l L. 221-246. Canada recently protested U.S. plans to issue drilling rights in waters in dispute. "U.S. plan for Beaufort fuels territorial dispute", 10 December 1986, *Toronto Globe and Mail.*

10. C.B. Bourne and D.M. McRae, "Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-examined" (1976), 14 Cdn. Ybk. of Int'l L. 175-223. The United States has sought negotiations with Canada on this boundary but reportedly Canada has declined. "Canada won't negotiate B.C.-Alaska border", 29 August 1986, *Toronto Globe and Mail.*

11. Erik B. Wang, "Canada-United States Fisheries and Maritime Boundary Negotiations: Diplomacy in Deep Water" (1981), 38 No. 6 Behind the Headlines 23.

12. Territorial Sea Geographical Coordinates (Area 7) Order, P.C. Order 1985-2739, 10 September 1985, SOR/85-872. Concerning Canada's Arctic baselines and their conformity

Unfortunately, other than some comments on the *Gulf of Maine Case, A Guide to Maritime Boundary Delimitation* does not deal with Canadian problems. The text concerns itself with interpreting and commenting upon, from a hydrographer's perspective, those provisions of the 1982 United Nations Convention on the Law of the Sea[13] which deal directly with or have an impact upon boundary delimitation. The L.O.S. Convention is not as yet in force. It will come into force one year following the deposit of the 60th ratification, which is now expected to take place in the early 1990s.[14] The question of whether Canada will ratify the L.O.S. Convention, despite the obvious benefits it has given to Canada, is by no means certain.[15]

The review of the L.O.S. Convention undertaken by the authors is largely textual, although there is an appendix that deals with state practice. As a matter of style it might have been less cumbersome to deal with the treaty provisions and state practice in one place, and from a practical point of view it might have been useful to include more references to state practice.

One of the most difficult and interesting issues that arises from the L.O.S. Convention concerns the determination of the outer limit of the legal continental shelf. Where the geologic continental shelf does not extend beyond 200-nautical miles then 200-nautical miles is the limit. However, where the geologic limit extends beyond 200-nautical miles a very complicated set of a criteria are established in Article 76 that the coastal state must apply. On Canada's west coast the geologic continental shelf does not extend beyond 200-nautical miles. In the arctic Canadian scientists in 1983 conducted surveys of the Alpha Ridge to determine if it was continental or oceanic in origin. The results indicated that the Alpha Ridge was oceanic;[16] therefore Canada would not be able to claim jurisdiction beyond 200-nautical miles. It is on the east coast where the Article 76 criteria will be applicable since the geologic continental shelf extends approximately 550-nautical miles. Kapoor and Kerr generally discuss the application of Article 76 and the various criteria utilized. They

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with international law, see: Donat Pharand, *The Waters of the Canadian Arctic Archipelago in International Law* (Cambridge Univ. Press, 1987) (forthcoming).

13. Done at Montego Bay, 10 December 1982. Not yet in force. Reprinted in (1982), 21 Int'l L. Mat. 1261-1354.

14. Based on a survey of representatives to the Preparatory Commission done by Australia as noted in L. Kimball, "Turning Points in the Future of Deep Seabed Mining" (1986), 17 Ocean Development and Int'l L.J. 367, at 381.

15. *See:* T.L. McDorman, "Will Canada Ratify the Law of the Sea Convention" (1988) San Diego L.R. (forthcoming).

16. H.R. Jackson, D.A. Forsyth and G.L. Johnson, "Oceanic Affinities of the Alpha Ridge, Arctic Ocean" (1986), 73 Marine Geology 237-261.

point out that two of the key criteria to be employed, the foot of the slope and thickness of sediment, are at best vague notions and the authors are of the view that the establishment of the facts to substantiate the use of these criteria will be difficult and impracticable. The authors suggest that states intending to utilize Article 76 prepare their claims well in advance since the survey work required to support such claims will be considerable. Although states have ten years following the coming into force of the L.O.S. Convention to determine their continental shelf outer limit, the authors' advice should be heeded by a country like Canada which will wish to take advantage of Article 76. It is of interest that Iceland, which is the only Western state to have ratified the L.O.S. Convention, has already made a claim to the continental shelf based explicitly upon Article 76.[17] Ecuador and Chile have also made extensive shelf claims that appear to rely on Article 76.[18]

Kapoor and Kerr make brief mention of the Commission on the Limits of the Continental Shelf to be established by the L.O.S. Convention, which will assist and consider the claims made by states on the basis of Article 76. The Commission on Limits will consist of 21 members drawn from the fields of geology, geophysics and hydrography. Obviously it will be hydrographers and these other specialists, not lawyers, who will be influencing the boundary determination for the continental shelf. The Commission is to be a technical body, not an advocacy forum. The L.O.S. Convention, however, is ambiguous respecting the actual role of the Commission on Limits. Canada has expressed the view that the Commission is to be advisory only and not a body that can impose its own opinions on the location of the outer limit of national jurisdiction.[19] The authors express no opinion on their view of the role of the Commission or on how the Commission will operate.

Discussing Articles 74 and 83, the provisions of the L.O.S. Convention regarding bilateral delimitation of the 200-nautical mile exclusive economic zone and the continental shelf, the authors also have little to say. The provisions are virtually identical and provide little guidance to parties seeking to delineate a bilateral boundary. There are no references

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17. Regulation No. 196, 9 May 1985, concerning the Delimitation of the Continental Shelf to the West, South and East, reprinted in Novembver 1986, Vol. 8. *Law of the Sea Bulletin,* at 10-13. *See:* C.R. Symmons, "The Rockall Dispute Deepens: An Analysis of Recent Danish and Icelandic Actions" (1986), 35 Int'l and Comp. L.Q. 344, at 360-367.

18. *See:* K. Ramakrishna, R.E. Bowen and J.H. Archer, "Outer Limits of Continental Shelf: A Legal Analysis of Chilean and Ecuadorean Island Claims and U.S. Response" (1987), 11 Marine Policy 58-68.

19. T.L. McDorman, "The New Definition of 'Canada Lands' and the Determination of the Outer Limit of the Continental Shelf" (1983), 14 J. of Maritime L. and Comm. 195, at 206-207.

to any specific criterion, such as equidistance, which could guide states in determining ocean boundaries. For this reason the provisions have been described by others as being largely meaningless. The provisions merely state that the results of a boundary agreement must be equitable. The International Court of Justice in the *Libya-Malta Continental Shelf Case* commented:

> The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to courts, to endow their standard with specific content.[20]

The authors concur with the view of the Court in the *Libya-Malta Case* that the various Court and Arbitration decisions are and will continue to be important regarding the rules for and approaches to bilateral boundary delimitation, and in Appendix One of their book they provide some brief comments on several of the important boundary decisions. Moreover, the book discusses some of the geometric methods that have been employed in boundary agreements and decisions. The comments are of great interest but unfortunately they are quite brief.

As a book not designed for lawyers it is difficult for a lawyer to evaluate it. However, for lawyers and individuals involved in ocean policy it is an interesting and important perspective on maritime boundary delimitation issues.

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20. *Case Concerning the Continental Shelf (Libya/Malta),* [1985] Int'l Court of Justice Rep. 13, at 30-31.

The Legal Chapter in the Jin-Shu, by Robert Heuser. Original title in German: *Das Rechtskapitel im Jin-Shu. Ein Beitrag zur Kenntnis des Rechts im fruehen chinesischem Kaiserreich.* Muenchen: J. Schweitzer Verlag 1987. 201 pp.

Relatively little is still known of law and legal thinking in ancient China. This recent book by Robert Heuser sheds some light on this era.

The book, published in German, draws upon a chapter of the Jin-Shu dynastic chronicle which surveys the events in the Chinese Empire of the first centuries, A.D.

Due to the lack of other sources, most information on early Chinese legal history is to be found in the chapters on law and justice which are part of 13 out of 26 existing dynastic chronicles. Heuser adds a further chronicle to the eight relevant chronicles which were already published in European languages. He provides a brief introduction to and synthesis of the law-related chapter and, as the core of his work, presents its translation.

In their legal chapters the chronicles, which from private or semi-private family projects evolved into more and more official compilations, dealt mostly with substantive criminal law, procedural rules and legal policy in a broad sense.

The Jin-Shu is considered the most important source of information on Chinese legal history from the first century A.D. to the end of the fourth century A.D. It covers the events from the end of the Han Dynasty (25-211 A.D.) to both Jin Dynasties (265-419 A.D.). It was compiled between 646 and 648 A.D. to replace and consolidate preceding annals. Among the items covered in its chapters are subjects as diverse as astronomy, geography, rites, music, and clothing.

The centuries preceding the Jin-Shu's compilation had witnessed a series of unsettling events. The dismemberment of the Great Chinese Empire at the end of the Han era was followed by a period of chaos which was governed by the efforts to reunify the Empire. Yet the reunification was not to be achieved until 589 A.D. and the preceding centuries were not only under the impact of the Empire's division, but also a resurgence of feudalism further weakening the central powers.

These events are well mirrored in the Jin-Shu. While the Han era had been strongly influenced by an archaic conception of a universal order as well as reason of state, a gradual loss of strictly general and equal application of law (Confucianism) can be identified.

Heuser highlights the continuous character of the process of reviewing existing law. The changing dynasties brought with them changes in

perception and thus a never-ceasing adaptation of the law to the new era's needs.

These reforms, leading to new legislation, were usually set in motion by the petition of one of the Emperor's advisors. The advisors were civil servants; the only legal specialist, however, was the Minister of Justice who, apart from the Emperor, was the Supreme Judge. Upon a petition, the Emperor would summon a legislative commission consisting of several advisors to draft a new code. If the draft was accepted by the Emperor it was promulgated as new law.

The repeated reforms led to some gradual changes such as the humanization of criminal proceedings. Experience derived from precedents helped to simplify the system of crimes and punishments in the codes as well as their interpretation.

Interestingly, these reforms were charcterized by some recurring themes.

One of these themes, central to the era's legal thinking, was the relation between laws and moral rules. While moral rules were designed to honor the good, laws were implemented to prevent the bad. In the final analysis, criminal law was to deter and protect the moral rules. As a result it was considered crucial that the law mirror the people's views and be clear to them. Heuser quotes a passage from the Jin-Shu according to which the law had to be ". . . corresponding to the intention of heaven as well as the heart of the people . . .". Morals had to be protected by the laws which, in turn, were fortified by punishments.

In order to inspire trust in the law the reformers were in a constant struggle to find a compromise between too many and too few laws as well as too severe and too lenient punishments.

With a view to the aforementioned *aim* of ancient Chinese law a further constant theme of discussion was its equal and predictable *application.* Inspite of frequent trouble with arbitrary case-to-case decisions it was generally thought that the law and not the personal opinion of an individual applying it should be relevant. In this context Heuser highlights a passage from the Jin-Shu according to which ". . . whenever one gives way to human emotions, the legal system will be changed arbitrarily; this means to use emotions to destroy the law . . .".

Heuser also brings the conflict between legalism and Confucianism to the reader's attention. The followers of Confucius strongly opposed the application of criminal laws regardless of social status and earlier merit of the accused. The legalists, on the other hand, called for uniform application of concise laws. Heuser understands the legal system as described by Jin-Shu as a synthesis of Confucianism and legalistic

thought. In spite of the aspired predicable application of law, the proceedings themselves varied according to the accused's background (high-ranking civil servants, lower-ranking officials, ordinary people).

Finally, all through the era covered by the Jin-Shu, the reformers were discussing the merit of a reinstallation of mutilation as a punishment. This type of punishment had already been abolished under the Han Emperor Wen (179-156 B.C.). Heuser underlines that the confrontation as to its re-establishment was central to all legal and political considerations of the era. Many petitions demanded the re-introduction of mutilation as a punishment and the Jin-Shu is evidence of cycles of more lenient or more severe views depending on the degree of order or disorder the different dynasties perceived.

The proponents of this type of punishment, which was never re-installed, considered only capital punishment and mutilation as sufficiently deterring. Yet, since the war-shaken Empire could not afford to lose citizens through capital punishment, they suggested mutilation so that the punished could return to support their families. The opponents, however, pointed out that the mutilated would be of no further use to the Empire.

One of the merits of Heuser's work lies in the fact that he brings to the reader's attention the advanced state of legal culture in the early Chinese Empire. He suggests that, while since the end of the 19th century European legal cultures has served as the model in East Asia, Chinese criminal codes had been substantively and formally superior to European ones until well into the 19th century.

He provides several examples, one of them being mutilation as a punishment. Having disappeared in China since the end of the second century B.C., such punishments were still numerous under one of the most famous continental criminal codes of the Middle Ages: the *Karolina* of 1532.

The most fascinating revelation of Heuser's book, however, is the fact that many of the principles familiar to the modern lawyer had already been the basis of the early Chinese legal system.

Not only did the Chinese consider guilt or fault a requirement for punishment; they also distinguished various types of guilt/fault such as intention, negligence or error. According to the degree of guilt or fault the Chinese knew three extenuating causes (ignorance/unconsciousness, lack of intention, weakness of mind); three reasons of pardon (for infants, the elderly over 70 and for imbeciles); and three aggravating circumstances for criminal acts considered especially immoral.

As well, the Chinese perceived the "rule of law" to be clearly in contrast to the "rule of men". The principle was closely linked to the

importance attached to having an exhaustive yet concise system of written rules. According to the Jin-Shu one had to apply law and other provisions to a given crime whenever possible.

This principal, applied in China early-on, did not become famous in Europe until the "Age of Enlightenment" and was thenceforth referred to as the principle of "*nullum crimen sine lege*" (no punishment without law).

Notable to the continental European lawyer is the fact that the ancient Chinese codes also comprised so-called "general parts" dealing with questions such as the various elements of an offense, its modalities, aggravating or mitigating circumstances and the distinction between committing a crime and mere participation.

All these aspects introduced by Heuser provide the reader with the necessary tools to explore the translation of the Jin-Shu. The translation reveals interesting additional details. It describes, for example, th types of punishments applied in the era. It highlights conceptions alien to modern legal systems. For example, a code of 234 A.D. discussed in the Jin-Shu grouped into a so-called "law of violence" provisions on fraud, forgery, trespass and cutting of trees.

As well, the translation makes accessible to the reader the great wealth of almost poetic legal language of the time. The following passage is a good example:

> The amorphous is called "nature of things"; that which has taken shape is called the "objective"; that which changes and makes suitable is called "model". Capital punishment is a phenomenon like the terrible (coldly shining) sunlight of winter; the punishment of close-cropping a head resembles the changes of fall of the falling (leaves); the punishment of financial redemption of mistakenly committed crimes is like the sun in spring and is for little misdeeds regretted by the delinquent.

Heuser himself addresses his book to Sinologists and comparative lawyers. While the book, as shown in the preceding summary, is of general interest, it requires some time and careful reading. Without prior knowledge of Chinese thought and history it is not easily accessible in its wealth of Chinese expressions (which are annotated) and historical references. However, those who take the time to explore the book and to consult the chronological table for guidance will be rewarded by interesting insights into an era otherwise hidden from the non-specialist.

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