prehensive work to appear on the law of stamp, death and gift duties in this country" is true, and Mr. Hill is to be congratulated on his scholarship and effort.

N. M. MACPHILLAMY*

International Law (2nd ed.), by D. P. O'CONNELL, LL.D. (Cantab.), Professor of International Law in the University of Adelaide. (Stevens & Sons, London 1970.) 2 vols. Vol. 1, pp. i-xxxii, 1-595, index 1-35. Vol 2, pp. i-xxiii, 596-1309, index 1-35. Australian price $48.10.

The second edition of Professor O'Connell's omnibus work on international law has appeared a mere five years after the first, a fact which must speak a great deal for the attractiveness of the book. The publisher's own assessment of what the reader may expect includes the following text:

> Full research has been made into, and reference is made to, the wide range of sources, documentation and codification, which have become available over the last two decades, through case reports and treaty series, statements of government practice and opinions, and learned writings.
>
> Nearly two thousand five hundred of the leading cases from many domestic jurisdictions, over seven hundred international cases, and over seven hundred treaties, are referred to in the text, and all the important items discussed. This depth of treatment represents a new departure from all previously published writings in the field; to which full references, and guidance, are given throughout.
>
> In short, this work represents a modern restatement of the application of international law rules in domestic and international courts and tribunals, and no lawyer practising in any field affected can afford to be without it.

In much the same theme as the publishers, Lord McNair writes in the foreword to the new edition:

> 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.

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Whether or not 2,500 decisions of municipal courts provide striking evidence that international law is developing out of the history of international relations into hard law is a matter of opinion. The hard law seems to emerge more from the increasing number and range of multilateral conventions than anything else. Anyone reading Professor O'Connell's work will acknowledge that it is the product of learning and of labour, but it is open to doubt whether the bill of fare that the current work offers fulfils the claims of the book. It is a task of enormous dimension for a single author to write a comprehensive text in depth on international law and digest to general satisfaction 2,500 cases dealing with the laws of many disparate and unrelated jurisdictions. It is suggested that most readers will be quite unable to evaluate, from the point of view of contribution to rules of international law, the many decisions of municipal courts of foreign countries. Too often the cases cited in the work appear only, without explanation, as footnotes seeking to justify some proposition. Professor O'Connell writes from Adelaide and it is therefore reasonable to test these observations by reference to the Australian cases included in the two volumes.

Most Australian lawyers consider *The King* v. *Burgess; Ex-parte Henry*,[1] as the starting point for the consideration of the Commonwealth in relation to external affairs. This case appears in its principal reference in the book as footnote 50 in the following paragraph dealing with federal states in international law:

> The federal government may be incompetent constitutionally to implement treaties internally, and in the absence of co-operation from the States may be inhibited with respect to contracting them. The extreme in this respect is probably Australia,[50] which does not ratify ILO conventions, save those which can be implemented within the constitutional powers of the Federal Parliament. (Page 296.)

In *Goya Henry*[2] some judges of the High Court stated that they were not prepared to subscribe to the view that, merely because the executive government undertook with some other country that the conduct of persons in Australia should be regulated in a particular way, the federal legislature thereby obtained a power to enact a law which related to a matter of internal concern to the States. At the same time all members of the Court were agreed that the Commonwealth Parliament at least had capacity fully to implement by its own legislation an international agreement indisputably international in character. The Court held that the Paris Convention of 1919 was such an agreement. Further, it has not yet been held that the Commonwealth Parliament cannot fully implement the ILO conventions. So far as it is suggested that Australia has only ratified those ILO conventions which may be implemented within the constitutional powers of the federal Parliament

[1] [1936] A.L.R. 482.
[2] *Ibid.*

this is not a correct description of the situation. The Commonwealth has also ratified ILO conventions when it has been satisfied that State laws have met the requirements of the particular convention.

Volume Two contains Professor O'Connell's sixty-eight page table of municipal cases. In the Australian list is *Bonser* v. *La Macchia*.[3] So far as can be ascertained, the use of this case in the text is confined to the observation that there was a disagreement in the High Court in 1969 as to what was decided in the case of *R.* v. *Keyn*[4] about the English territorial sea. *Bonser* v. *La Macchia*[5] is of greater interest because it contains a range of judicial observations on the question, vital in international law, as to how and when Australia emerged as a member of the community of nations in its own right and the effect that its emergence had on the status of the territorial sea adjacent to the Australian coastline. Chapter 11 in Part Four of the book deals with the evolution of the Commonwealth and it is incomplete in the absence of any reference to this case. Again, in reference to the evolution of dominion status out of the British colonial system, Professor O'Connell draws attention to *Sickerdick* v. *Ashton*[6] to support an opinion that the competence of the dominions to control their armed forces was held to be an exception to the doctrine of colonial incompetence. The High Court said no such thing. It merely held that the defence power enabled the Commonwealth to make laws having an extra-territorial operation, leaving it open for other legislative powers to be similarly construed. Moreover, there are several more recent decisions in which State laws having an extra-territorial operation have been upheld, for example, *Munro* v. *Lombardo*.[7]

Cases as remote from international law as *Marks* v. *Forests Commission*[8] are included in the list of thirty-four Australian cases but unfortunately other cases dealing directly with Australia's subscription to multilateral conventions are not included, or as far as can be ascertained, discussed in the text, for example, *Roche* v. *Kronheimer*,[9] *Goya Henry [No. 2]*,[10] and the two *Airlines of New South Wales* cases of 1964[11] and 1965.[12] If the cases on the domestic "Shield of the Crown" doctrine, such as *Marks* v. *Forests Commission*,[13] are important in discussing sovereign immunity in international law, then much more definitive and

[3] (1969) 43 A.L.J.R. 275.
[4] (1876) 2 Ex.D. 63.
[5] (1969) 43 A.L.J.R. 275.
[6] (1918) 25 C.L.R. 506.
[7] [1964] W.A.L.R. 63.
[8] [1936] A.L.R. 476.
[9] (1921) 29 C.L.R. 329.
[10] (1938) 61 C.L.R. 1.
[11] *Airlines of New South Wales Pty Ltd* v. *The State of New South Wales* (1964) 113 C.L.R. 1.
[12] *Airlines of New South Wales Pty Ltd* v. *The State of New South Wales [No. 2]* (1965) 113 C.L.R. 54.
[13] [1936] A.L.R. 476.

authoritative Australian decisions are available, for example, *The Commonwealth* v. *Bogle*;[14] the *Wynyard Investments* case.[15]

Pursuing the Australian content a little further for sources of authority and evaluation of the Australian position, one reads, in a section dealing with the international standard with respect to contractual performance, the following:

> In the early 1930's the Government of New South Wales defaulted on a loan and contended that the loan was unenforceable under the law of New South Wales as involving governmental discretion. Since then, all loans by the Australian States must be negotiated through the Federal Government, which thus undertakes the international responsibility. (Page 989.)

New South Wales certainly defaulted on a State loan in 1932 but by agreement with the States in 1928, made effective by inserting the well-known section 105A in the Constitution, the Commonwealth had already assumed responsibility for satisfying existing State debts and agreed to undertake all future borrowing on behalf of the States. The events are described in *The State of New South Wales* v. *The Commonwealth [No. 1]*,[16] and, in fact, the High Court held in this case not only that the State could be held to its obligations under the loan but that the Commonwealth could garnishee the revenues of the State to meet the commitment. As the third *Garnishee* case[17] showed, the Commonwealth took this step.

This reviewer has already said, in effect, that there are so many developments in international law, through the media of multilateral conventions on an increasingly wide range of subjects, that they call for treatises of a much greater standard of accuracy, depth and assessment than would have sufficed even a decade ago. International lawyers are familiar with Professor O'Connell's specialised work, such as his justly praised work on state succession and his more recent labours on the law of the sea, which find adequate expression in the second edition of the volumes under review. There is also a rewarding discussion of general principles in connection with the formation of international law and the relationship between international law and municipal law, but there are specialised areas of international law in which there have been rapid and incisive developments which are dealt with in the text in far from satisfactory fashion. The chapter on air and space law is an example of a branch of international law where the absence of specialised knowledge is apparent. According to the preface, this chapter has taken account of manifold developments, and undoubtedly international air and space law is an area for which there is no rival

[14] (1953) 89 C.L.R. 229.
[15] *Wynyard Investments Pty Ltd* v. *Commissioner for Railways (N.S.W.)* (1955) 93 C.L.R. 376.
[16] (1932) 46 C.L.R. 155.
[17] *State of New South Wales* v. *The Commonwealth* (1932) 46 C.L.R. 246.

measured in terms of the number of multilateral conventions negotiated since 1944.

The chapter commences with a short account of early views concerning the juridical character of the airspace. Fauchille is mentioned as the proponent of the theory of the freedom of the air and Westlake as the apostle of exclusive state sovereignty in the airspace. Unfortunately, the references to Fauchille are to his earlier and not his later modified views, and Westlake was never an exponent of complete sovereignty since he always conceded a right of innocent passage for aircraft. The principal advocates of complete state sovereignty at the time were Hazeltine, of England, and Nijeholt, of Holland; whilst the major contender for the complete freedom of the airspace was Nys, of Belgium. The section concludes by validly asserting that in federal states, now that state sovereignty is conceded by the Chicago Convention, there is an additional problem of state versus federal sovereignty in the airspace, but the author incorrectly states that in the U.S.A. the courts have upheld state, as distinct from federal, sovereignty. A line of cases, beginning with the Supreme Court decision in *Causby*,[18] makes it plain that in the U.S. airspace above the immediate reaches of the soil is regarded as being part of the public domain in which Congress may proclaim navigable airspace, and Congress has in fact done so. The author states that the U.S. Air Commerce Act 1926 asserts sovereignty in the airspace. The Act was replaced by the Federal Aviation Act 1958.

In the next section, Professor O'Connell attempts to classify aircraft "for the purposes of regulation" into public aircraft and private aircraft, mainly in reference to the Chicago Convention 1944, which he concedes refers neither to public nor private aircraft but to state and civil aircraft. This leads him to state that under the Convention "all aircraft (except unscheduled) require permission to fly over foreign territory, but such permission is more readily presumed in the case of private than in that of public aircraft". (Page 521). As reference to the Air Navigation Act 1920-1966 (Cth), implementing the Chicago Convention in Australia, will show, the distinction is irrelevant. The Chicago Convention does not purport to apply to aircraft used in military, customs and police services. That being so, the question of overflight depends only on whether the aircraft to which the Convention applies is engaged on a scheduled or a non-scheduled international flight. If it is engaged in a non-scheduled flight it has a right of overflight by virtue of article 5; if it is engaged on a scheduled flight it has no such right and it is of no consequence whether the aircraft is public or private as long as it is a civil aircraft within the meaning of the Convention. The description of the operation of article 5 is also bedevilled by phraseology which has no relevance to its interpretation, for example, that it applies to "sports and other non-scheduled air service planes" but that some

[18] *Causby* v. *The United States* [1945] U.S.Av.R. 1.

states have required permission for "competitive landings". Article 5 grants the first two freedoms of the air to the non-scheduled international air services of contracting states but traffic rights may only be exercised by such services subject to conditions which the contracting state of landing may impose. The two difficulties that have arisen are, first, that there is no definition in the Convention distinguishing between a non-scheduled and a scheduled service, and, secondly, that many contracting states, in fact, with the connivance of ICAO, require permission for a non-scheduled service to exercise third, fourth or fifth freedom traffic privileges.

We are then told that article 6 of the Chicago Convention, dealing with scheduled international air services, requires prior authorisation to overfly another contracting state but that in practice this is presumed from the notification of schedules. Reference to the Air Navigation Act 1920-1966 (Cth) will show that there is no presumption of this kind. In fact, the first two freedoms of the air, namely the right of overflight and the right to make a stop in the territory of a non-contracting state for non-traffic purposes, are usually granted by the relevant bilateral air services agreement according traffic rights for the designated airlines of the two countries which are parties to the agreement. Where they are not, this is because the two countries are parties to the Air Services Transit Agreement. Later, Professor O'Connell refers to the negotiation of bilateral air service agreements observing that countries commonly adopt the so-called Bermuda principles, one of the features of which is that they limit general commercial rights only with respect to fifth freedom traffic. It is specifically stated in the Bermuda formula that third and fourth freedom traffic, that is, end-to-end traffic between two party states, shall bear a close relationship to the requirements of the public and that the capacity mounted by each designated airline should have as a primary objective the provision of capacity adequate to meet the requirements of end-to-end traffic. An excess capacity situation entitles either party to a Bermuda-type bilateral air services agreement to seek an adjustment. At the time of writing, a dispute between the civil aeronautical authorities in the U.S.A. and Australia, over capacity being provided by the designated airlines of the two countries in Pacific air services, illustrates that neither state can pursue an unfettered commercial policy. The failure of states to give effect to the Bermuda formula has been largely responsible for the present situation of excess capacity on most major international routes.

The discussions at Chicago in 1944 provide an absorbing story of the failure of proposals to create a multilateral open-skies policy for international civil aviation as the U.S. advocated; also, of the rejection of an Australia-New Zealand proposal to establish an international air transport authority to operate air services on major trunk routes. These decisions provide the background of article 6 and at the same time help to explain article 5 as a provision left in from an earlier draft almost by

accident. Air law cannot be adequately explained in terms of legal rules because it is manifestly one of those specialised areas of international concern in which law, politics and economics are interwoven.

Quite properly, in later sections Professor O'Connell discusses some international private law conventions beginning with the Warsaw Convention of 1929 which regulates the legal relationships of the air carrier on the one hand and the passenger or consignor of cargo on the other in international air carriage but, once again, the description breaks down. There are errors, for example, the statement that the Warsaw Convention has no application to non-contracting carriers. The Guadalajara Convention of 1961, described as supplementing Warsaw by applying to carriage by an operator who is not a party to the agreement to carry was designed to cover particular cases of actual carriage not covered by the Warsaw Convention. The Convention came about mainly because of problems arising from the international operations of freight-forwarders who themselves arranged contracts of carriage with air carriers. One looks in vain for something about the financial limits of liability under the Warsaw Convention or the amending Hague Protocol of 1955. The limits of liability have given rise to much concern, particularly in the U.S., and that country was sufficiently significant in world aviation to induce airlines operating to and from the U.S.A. to agree in 1966 to much different limits of liability in spite of the fact that the airlines concerned were the designated airlines of member states of the Warsaw Convention. Article 25 allows an action for unlimited damages against a carrier if damage is caused by wilful misconduct and, according to Professor O'Connell, the article lays the burden of proof on the plaintiff if he wishes to recover more than the carrier has ordinarily insured. This is a misconception. The Convention creates a set of legal rights and obligations as between the parties and is not concerned with insurance. As to the meaning of wilful misconduct, the book states that this has been held to be conduct which the pilot should know gives rise to a strong probability that harm may result, and a footnote quotes *Berner* v. *BCPA*[19] as the relevant authority. Actually, in that case, Ritter J. referred to reckless disregard of consequences and not to a strong probability that harm may result, and, in any event, as the footnote to the case in the book fails to reveal, his judgment on the basis of wilful misconduct was reversed by the U.S. Court of Appeals. More authoritative definitions may be found in such cases as *Horabin* v. *BOAC*[20] and *KLM* v. *Tuller*,[21] both mentioned in footnotes, and the decision of the Tribunal Civil de la Seine in *Missirian* v. *Air France*.[22] The description of the Warsaw Convention concludes with a subsection on judicial jurisdiction under it. Again, an important

[19] 219 F. Supp. 289 (1963).
[20] [1952] 2 All E.R. 1016.
[21] 292 F. 2d. 775 (1961).
[22] (1956) 23 *Journal of Air Law and Commerce* 235.

feature escapes attention, namely that several decisions in the U.S. have established that the Convention in granting jurisdiction, for example, to the courts at the place of destination, has regard only to national boundaries and not to the fact that a federal state may contain several separate jurisdictions. Thus if a passenger flies from Sydney to New York his place of destination is not the State of New York but the U.S.A., and he may, therefore, generally speaking, bring an action in any state of the U.S.A.

The Geneva Convention of 1948, on the recognition of rights in aircraft, is neither discussed nor listed in the useful table of multilateral conventions in Volume Two. The Geneva Convention has attracted wider adherence than the Rome Convention, which is discussed.

The concluding part of the chapter relates to outer space, a subject dealt with in less than six pages. Probably the most interesting question canvassed is the dividing line between sovereign airspace and outer space, declared by the 1967 Outer Space Treaty as not being subject to claims of national sovereignty. The volume of writing on this question is immense but, presumably for reasons of space, Professor O'Connell's text refers only to the views of the late John Cobb Cooper, proposing the division of the area above states into three zones—a zone of full sovereignty to the limits of airspace, a contiguous zone up to 300 miles, and a third space zone which would be entirely free. These were the views which Cooper expressed in 1955 to the American Society of International Law but he discarded them in 1960. Cooper then advocated a single boundary between sovereign airspace and outer space, being the lowest altitude above the earth's surface at which an artificial satellite could be put into orbit. His later views appear in various publications.

General works of international law may perform the invaluable function of serving to introduce an invariably interesting subject to the reader. If they have greater pretensions, as Professor O'Connell's treatment of air and space law discloses, they can easily run into difficulties with the result that they fail to satisfy the needs of either the scholar or the student.

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The Courts and Criminal Punishments by SIR JOHN V. W. BARRY, Judge of the Supreme Court of Victoria, Australia (A. R. Shearer, Government Printer, Wellington, New Zealand 1969), pp. 1-91. New Zealand Price $1.50.

The late Sir John Barry held a distinctive position in the development and teaching of criminology in Australia. His most important work,

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