



GW Law Faculty Publications & Other Works

Faculty Scholarship

2023

Book Review of Donald R. Rothwell, *Islands and International Law* (Oxford: Hart Publishing, 2022)

Sean D. Murphy

George Washington University Law School, smurphy@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Murphy, Sean D., Book Review of Donald R. Rothwell, *Islands and International Law* (Oxford: Hart Publishing, 2022), forthcoming in *Cambridge Law Journal*.

This Book Review is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Book Review of Donald R. Rothwell, *Islands and International Law*
(Oxford: Hart Publishing, 2022)

SEAN D. MURPHY

MANATT/AHN PROFESSOR OF INTERNATIONAL LAW

GEORGE WASHINGTON UNIVERSITY

(forthcoming in *Cambridge Law Journal*)

In recent years, international rules concerning islands have increasingly featured as a part of inter-State relations, whether with respect to Chinese activities in the South China Sea, the decolonization of the Chagos Archipelago in the India Ocean, the effects of tiny features on delimitation in the Black Sea or the Bay of Bengal, or the plight of low-lying Pacific nations in the face of sea-level rise. A single article (Article 121) amongst the 320 articles that comprise the 1982 U.N. Convention on the Law of the Sea Convention (LOSC) is dedicated to the “regime of islands,” providing some important guidance, but leaving much unsaid. As such, the law in this area is deeply informed by other sources: other provisions of the LOSC; other treaties; State practice (including national laws); decisions and declarations at international organizations; jurisprudence by international courts and arbitral tribunals; and the writings of scholars.

Thus, it is to be welcomed that a leading scholar in the field of international law, Donald Rothwell of Australia National University, has taken up the task of surveying these various sources so as to produce a book-length treatment of islands and international law. Rothwell is a highly-regarded expert in the law of the sea, perhaps best-known for his treatise with Tim Stephens entitled *The International Law of the Sea* (2nd ed, 2016). In the volume under review, Rothwell turns his attention to a systematic consideration of how international law operates in the context of islands. In doing so, he identifies not a stand-alone or specialized sub-field of international law but, rather, ways that international law grapples (or fails to grapple) with a unique type of geographic feature, one that is sprinkled across the vast oceans that cover two-thirds of our planet.

Rothwell leaves few stones unturned. He sets the stage by first addressing the physical aspects of islands and their legal classification, with particular attention to the fact that, under LOSC Article 121, some islands are capable of possessing the full range of maritime zones, while other islands (“Rocks which cannot sustain human habitation or economic life of their own”) cannot possess an exclusive economic zone or a continental shelf (Chapter 1). That distinction between types of islands has been a source of uncertainty since its emergence in the LOSC, and Rothwell does a fine job of tracing its origins in the LOSC negotiations and the practice and

jurisprudence relating to it since 1982, most notably the extensive 2016 analysis by the tribunal in the *South China Sea Arbitration (Philippines v. China)*.

Rothwell then turns to the important distinction between a juridical island (a naturally-formed area of land, surrounded by water, which is above water at high tide) and artificial islands, with that distinction somewhat clouded by the possibility of extensive coastal construction and “land reclamation,” whereby a natural feature is artificially enhanced (Chapter 2). Once a juridical island exists, a threshold issue is who possesses sovereignty over that island, for it is that State (and only that State) who will be able to exercise sovereignty or sovereign rights in any maritime zones associated with the island (Chapter 3). Sovereignty over islands comes in many different flavors, such as an island State, an island associated with a continental State, or an island within a group of islands forming an archipelagic State (Chapter 4). Indeed, the complex rules on what clusters of islands may declare themselves as an archipelagic State were a highly innovative aspect of the LOSC, producing the unique concepts of archipelagic baselines, waters and sea-lane passage (Chapter 5).

An especially interesting chapter (Chapter 6) addresses “dependent archipelagos,” meaning an archipelago associated with a continental State (such as the Galapagos islands of Ecuador). Given that association, such archipelagos cannot constitute, in and of themselves, an “archipelagic State” under the LOSC, but under customary international law may they nevertheless establish a single around the archipelago (rather than around each of the islands)? The LOSC would seem best interpreted as prohibiting any such de facto archipelagic baselines, but Rothwell sees State practice in this regard as inconsistent.

In any event, once baselines have been established for an island, it is capable of possessing maritime zones in much the same way as any coastal State, except for the situation of “rocks” as noted above) (Chapter 7). A more challenging question is how islands should feature when two States agree to or adjudicate a maritime boundary; should islands be allowed to “bend” an equidistance line? Should they be enclaved? When delimiting between a mainland and an island (or island group), should a median line be adjusted, giving the islands only a “half” or smaller effect on the line? The interest of States since adoption of the LOSC in exploiting their sovereign rights in their exclusive economic zones (largely related to fishing) and continental shelves (largely related to oil, gas and minerals) has led to a significant amount of maritime boundary agreements and jurisprudence over the past four decades, which Rothwell ably organizes and analyzes (Chapter 8).

Rothwell turns to the most poignant contemporary issues concerning islands in Chapters 9 and 10, which concern respectively human rights and sea-level rise. While global human rights operate universally without regard to the location of persons, Rothwell persuasively shows that certain rights—notably the right of self-determination—are and will be squarely at issue for certain islands, such as Bougainville and New Caledonia. The effects of climate change are already being felt by many island and low-lying coastal States, destroying reefs, disrupting marine eco-systems, forcing migration, and, over long term, possibly inundating entire States. The LOSC is ill-equipped to respond to such consequences and international law generally is ill-

equipped to address the existential threat. Rothwell identifies the legal challenges that have arisen but, given the evolving situation, provides only preliminary thoughts as to possible responses.

As in any book, there are some glitches if not errors. U.S. lawyers would find curious the categorization of Hawaii as not “integrated” into the United States and only having “a form of legal and political association” with it (pp. 76-77). At best, this misunderstands that Hawaii is a fully incorporated territory of the United States (no different than California, Texas or Florida), with the same federal law, judges, enforcement, and electoral representation as any other U.S. state. At worst, it elides the key difference between Hawaii and those U.S. islands that are permanently inhabited and yet *unincorporated* U.S. territories (American Samoa; Guam; the Northern Mariana Islands; Puerto Rico; U.S. Virgin Islands), whose inhabitants generally do not enjoy U.S. constitutional rights, have no representation in Congress, and do not vote in the presidential election. Even so, a real strength demonstrated throughout the book is the gathering up and explanation of State practice on various issues, rather than a simple recitation of treaty rules or jurisprudence. In addition to ample narrative descriptions of such practice, Rothwell presents information in well-crafted tables and an appendix. Thus, Table 2.1 on pages 30-32 provides a useful synthesis of South China Sea features of the Spratly Islands that have been subject to artificial island construction and/or land reclamation; Table 5.1 on pages 116-18 lays out salient information about archipelagoes, including national legislation and proclamations of archipelagic status; and Appendix 1 compiles information on the political status of some 60 islands or island groups.

One missed opportunity (one hesitates to say failure) of the volume is that Rothwell often stops short of himself taking a position on the *lex lata* or *lex ferenda* in difficult areas. For example, Rothwell succinctly describes the 2016 *South China Sea* arbitral tribunal’s analysis of how to determine whether certain features are Article 121 “islands” and, if so, whether they are Article 121(3) “rocks” (pp. 15-16, 28), but does not address criticisms of that methodology, and whether he supports the analysis or the criticisms. Similarly, Rothwell does not take a firm position on whether States may draw baselines around a dependent archipelago; while he recognizes that international tribunals have indicated they are not prepared to support States “drawing the equivalent of archipelagic baselines around their dependent archipelagos,” he sees State practice as possibly leading to an “evolution of the law of the sea” that “cannot be ignored” (p. 161). Likewise, he recognizes a growing trend by States to support a “freezing” of baselines and maritime zones when coastlines recede due to sea-level rise induced by climate change, but Rothwell does not take a position on whether such action is consistent with the LOSC, which has historically been understood as calling for ambulatory baselines. Of course, in situations where the law is less-than-clear, it is reasonable for a candid scholar to say as much. Yet even in controversial areas or in times of evolution, there is typically a center of gravity to the law that must guide policy-makers, and volumes such as this are ones that are often relied upon in that regard.

In a concluding chapter (Chapter 11), Rothwell ponders whether at present there is a “regime of islands” that has its foundations in various areas of international law, but that

possesses its own distinctive elements. He correctly surmises that no such regime (at least as that term is commonly understood) currently exists, but Rothwell believes that one may well be emerging. In any event, he considers “that international law has entered an age of islands,” in which these features demand our attention (p. 261). After reading this volume, it is hard to imagine reaching a contrary conclusion.