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A REVIEW OF FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA

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FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA. By Maria Gavouneli. Leiden and Boston: Martinus Nijhoff Publishers. 2007. Pp. xviii, 286.

In this book a brilliant and young Greek scholar addresses a number of issues that characterize present international law of the sea. Emphasis is devoted to the general question of the interplay between the three most common bases of jurisdiction; namely "territoriality,"[1] "nationality,"[2] and "universality."[3] The author first elaborates on the allocation of powers established under the 1982 United Nations Convention of the Law of the Sea (UNCLOS) that determines a variety of exclusive, concurrent, parallel, or overlapping forms of jurisdiction. She subsequently addresses the question of whether the jurisdictional framework set forth by UNCLOS is final or if further changes are possible. Indicative issues that are identified include the balance of rights and obligations within the exclusive economic zone, the regime of fisheries on the high seas, the challenges posed by new activities and risks, including the exploitation of genetic resources, as well as the need to ensure security at sea and prevent the illegal transportation of weapons of mass destruction.

The author's answer is that UNCLOS is "a living instrument, capable both of change in order to accommodate new challenges and of construing novel associations of existing provisions, both in the text itself and in other international conventions, to support the evolving needs of the international community."[4] In other words, UNCLOS has stood the test of time and has

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1. Represented by coastal State jurisdiction in the territorial sea and the other coastal zones.

2. Represented by flag State jurisdiction on the high seas.

3. Represented by every State jurisdiction against piracy and, perhaps, other international crimes at sea.

4. MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA 146 (2007).

"provided a solid foundation on which individual States and the world community as a whole were able to explore new approaches to emerging challenges."[5]

I personally do not fully share this conclusion. In my view, while being a monumental achievement for the codification of international law, UNCLOS, as any legal text, is linked to the period when it was negotiated and adopted.[6] Being itself a product of time, it cannot stop the passing of time. Yet international law of the sea is subject to a process of natural evolution and progressive development that is linked to States' practice. It is not possible to elaborate in this review on the instances not only where changes with respect to the original UNCLOS regime have been integrated into UNCLOS itself (i.e., evolution by integration), or where different interpretations of the relevant UNCLOS provisions are in principle admissible and States' practice may be important in making one interpretation prevail (i.e., evolution by interpretation), but also where the relevant legal regime is to be inferred only from States' practice.[7]

In addition, my personal impression is that the conclusions of the book could have been different if other subjects had been added to those selected by the author. These subjects could have included areas where UNCLOS does not say anything, such as the delimitation of maritime zones, or where UNCLOS regime appears even counterproductive, such as the protection of the underwater cultural heritage. However, even though the volume overestimates the role of UNCLOS, this does not detract from the high quality of the research endeavour undertaken and from the fact that all the opinions exposed in it are thoroughly developed and almost always persuasive.

Apart from its general purpose, the study is full of thought-provoking remarks which confirm the critical and dialectical inclination of the author. In certain cases one can also find an ironical vein that, while not frequent, can only be welcome in legal books.[8] For example, the description of the attempt to understand the extent of the European Union's competence in the field of law of the sea is rightly qualified by the author as an "uphill

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5. *Id.* at 178.

6. Negotiations for the 1982 United Nations Convention on the Law of the Sea (UNCLOS) began in 1973 and it was adopted in 1982.

7. This occurs when UNCLOS does not provide any clearly defined regime (i.e., evolution in another context) or where, due to the fact that UNCLOS regime is clearly unsatisfactory, a new instrument of universal scope has been drafted to avoid the risk of undesirable consequences (i.e., evolution by further codification).

8. *See, e. g.*, the sweeping beginning of chapter two: "The casual reader of the Law of the Sea Convention—assuming that such a rare beast exists . . . ." *Id.* at 33.

battle . . . [where] [i]llumination must therefore be sought."[9] The results are "clearly not conducive to legal certainty" and "solace" can hardly be found[10] in a "jurisdictional conundrum of Herculean proportions."[11] Here the author should be appreciated for taking an orientation different from the plethora of hagiographical comments commonly reserved in many legal books to all the European Union's manifestations. Another strong, but fully justified, criticism is devoted by the author to Article 94, paragraph 6, of UNCLOS,[12] a provision that, by "coyly" prescribing a notification procedure,[13] can in fact be turned into a means to support the practice of flags of convenience. Also noteworthy are some progressive positions taken by the author, in particular where she does not think it is inconceivable that within the exclusive economic zone, "under specific circumstances, the need to safeguard the marine environment, a customary obligation binding upon every State on the planet, would necessitate the suspension of navigation, certainly temporarily but also permanently . . . ."[14] Lastly, the author points out that the traditional freedom to fish on the high seas is essentially converting itself into "a right of access to fisheries conditional upon the adoption of coordinated measures of fisheries conservation and management.[15]"

Another rare quality of the book is the quotation in the footnotes and bibliography of works written in languages other than English, such as French, Spanish, Italian and, of course, Greek. This can only enlarge the scope of the analysis and provide the reader with references that are not easily available elsewhere. Some perplexity is, on the contrary, raised by a few quotations which do not seem strictly relevant to the subject matter.[16]

In conclusion, this is a work that immediately attracts the attention and the interest of the reader and can only be recommended as a source of thought, reflection, agreement and, sometimes, disagreement.

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9. GAVOUNELI, *supra* note 4, at 52.

10. *Id*.

11. *Id.* at 58.

12. United Nations Convention on the Law of the Sea art. 94, para. 6, Dec. 10, 1982, 1833 U.N.T.S. 397.

13. GAVOUNELI, *supra* note 4, at 37.

14. *Id.* at 69.

15. *Id.* at 131-32.

16. For example, I am not convinced that there is a need to recall the *Nottebohm*, *Barcelona Traction*, or *Elettronica Sicula* cases to explain the flag State jurisdiction and the concept of genuine link in international law of the sea. *See id*. at 34-39.