

Book Reviews

Montserrat Gorina-Ysern (ed.): *An International Regime for Marine Scientific Research*

Transnational Publishers, 2003. XL + 668 pages, ISBN 1-57105-213-5

With her book on an international regime for marine scientific research *Gorina-Ysern* has delivered the first comprehensive¹ and thoroughly researched description of international regulations governing transnational marine scientific research and their implementation on the national level as well as an analysis of modern challenges for marine scientific research.² The book covers the historical development of rules on and practice of marine scientific research as well as modern approaches to regulating bioprospecting and enhancing cooperation on issues relating to marine scientific research in a globalized world. Concerning the national implementation of a marine scientific research regime the au-

¹ This summarizing judgment shall be made despite the fact that the author herself states in her conclusions that “the preceding survey [...] is by no means comprehensive”, 599.

² So far articles by other authors have either focused on specific problems, see e.g. L. Glowka, “Genetic Resources, Marine Scientific Research and the International Seabed Area”, *RECIEL* 8 (1999), 56 et seq. or specific regions, see e.g. Z. Keyuan, “Governing Marine Scientific Research in China”, *Ocean Dev. Int. Law* 34 (2003), 1 et seq.; E.D. Gomez, “Marine Scientific Research in the South China Sea and Environmental Security”, *Ocean Dev. Int. Law* 32 (2001), 205 et seq. The book by A.H. Soons, *Marine Scientific Research and the Law of the Sea* (1982) is outdated insofar as it was published when the UN Convention on the Law of the Sea was just being adopted and long before it entered into force and, hence, before states gained practical experience with the legal issues concerning modern forms of marine scientific research. In the only publication dealing with legal rules and practice in different states, T. Treves (ed.), *The Law of the Sea – The European Union and its Member States* (1997), not all contributions even deal with marine scientific research.

thor supports her description of legal frameworks and implementation efforts with statistical data on research requests and their approval or denial in different areas of the world. Such a compilation is, in this form, unprecedented.³

The book is divided into four thematic parts and consists of six chapters. Part I deals with the practice of states regarding the implementation of what *Gorina-Ysern* calls “the marine scientific research regime” (pp. 3-206). This part of the study with its roughly 200 pages is given particular weight, yet, for reasons stated below, it might have been more suitable to publish this part as a separate book. Part II focuses on the legal development of marine scientific regulation (pp. 209-350), part III concerns “the new marine biogenetic frontier” (pp. 353-524) and the last part deals with the legal framework for international ocean science co-operation (pp. 527-618). The book closes with the author’s conclusions (pp. 599-618). An extensive bibliography including references to international treaties and other agreements, a table of cases and an index are attached to the survey.

The general premises from which the author starts to develop her treatise is that marine scientific research is a valuable and important activity that finds itself pressed into different frames of regulations. In this sense, marine scientific research is a particularly sensitive issue that requires the balancing of its own interests with national security and public order interests as well as with environmental considerations. While marine scientific research can contribute to the adoption of sound policies owing to a better understanding of conservation or management requirements, it may find itself restrained by restrictions imposed for environmental purposes. In this context, the author concludes that limitations on research in European waters due to strict environmental laws are a major problem for research in this area. In general, the author seems to favor a flexible regime of scientific research.

While part I only briefly outlines the relevant regulations by the UN Convention on the Law of the Sea (UNCLOS), it deals extensively with regional implementation. All subsections on the different regions covered by the study are structured the same way: 1) boundaries and claims; 2) jurisdiction over marine scientific research; 3) marine scientific research statistics; 4) coastal state marine scientific research capacity; 5) implementation of marine scientific research regime; 6) marine

³ The author restricts her study to the survey of requests by US institutions. Tables with data on US research requests are annexed to chapter one, see 184 et seq.

scientific research regime implementation problems; 7) implementation patterns; 8) implied consent; 9) information and post-cruise obligations; 10) enforcement and post-cruise obligations; 11) publication of result; 12) international cooperation. By adhering to this pattern, the author enables the reader to easily compare rules in different regions. To conclude her description of marine scientific research in the different regions the author states that the regime on marine scientific research established by UNCLOS lacks practical implementation in many regions.

The approach and structure of this part of the study give it a manual – or handbook – like quality. The largely descriptive character of the first chapter is certainly an advantage for the practitioner or the legal scholar who wants to get an overview of regulations but leaves room for analytical considerations and proposals for a more effective regime on marine scientific research concerning its transformation into national practice.

The first chapter of part II, i.e. chapter 2, deals with the development of scientific research of the oceans from ancient times until today. The historical foundations and the change of interest that can be recognized if comparing scientific interest for navigational purposes with modern bioengineering objectives would have been a worthy introduction into the issue of marine scientific in general. To begin the book with this chapter on the historical development of marine scientific research and the legal difficulties related thereto would have given it the more prominent position it deserves.

Chapter 3 provides for a detailed description and analysis of marine scientific research provisions in UNCLOS. Here the author puts into perspective the issues she touched upon only briefly in chapter 1. The chapter bridges the early foundations described in the preceding chapter with the difficulties experienced in relation to modern biotechnology, which are subject to the following chapter. What distinguishes the study from other publications on the regime for marine scientific research established by UNCLOS is the emphasis that is put on state practice filling the legal framework. *Gorina-Ysern* makes use of her survey on state practice in chapter 1 to assess whether certain rules have reached the status of customary international law. By this method, the usual speculation on the status of certain rules undertaken by legal scholars is founded with empirical evidence. The author provides the reader with a knowledgeable examination of the interpretation of different provisions applicable to marine scientific research taking into account the Vienna Convention on the Law of Treaties, state practice, international conferences and opinions of legal scholars. *Gorina-Ysern*

gives a detailed account of the activities that are allowed in the different maritime zones and what conditions have to be met. In this context the author makes useful references to the historical development of rights and obligations of coastal states e.g. in their territorial sea.

In her introduction to chapter 1 *Gorina-Ysern* already raises the issue of intellectual property rights, an issue that is highly relevant for researchers but hardly dealt with by legal writers and on which she has also published one further article.⁴ The issues of genetic resources existing on the deep seabed or in the high seas and their commercialization have only relatively recently been addressed by publications in the field of international law.⁵ According to *Gorina-Ysern*, most marine scientific research projects continue to be concerned with fundamental oceanographic research and do not bear directly on the exploration or exploitation of natural resources in the seas. However, the collection of data and samples that are relevant to a potential commercialization of marine products or to intellectual property rights leads marine scientific research to enter into a new dimension. Accordingly, chapter 4 deals with legal title to results of marine scientific research. The author illustrates the new challenges for biomedical research in a transnational context with a case study involving the difficulties of obtaining clearance for a US research cruise in the waters of Ecuador. She also covers university, industry and government approaches to disseminate data and research results and the importance of partnerships between these sectors for commercialization of academic research.

In this chapter, *Gorina-Ysern* examines the different rules applicable to intellectual property rights over data, samples and results from marine scientific research. She covers not only *inter alia* UNCLOS, the Convention on Biological Diversity (CBD) and the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) but also other patent treaties and she clarifies their interrelation. The practice of the requirement of collection permits is discussed as one element of implementing the CBD and other treaties.

In chapter 5, the author focuses on those agreements that complement marine scientific research clearance communications, i.e. private

⁴ See M. Gorina-Ysern, "Marine scientific research activities as the legal basis for intellectual property claims?", *Marine Policy* 22 (1998), 337 et seq.

⁵ See Glowka, see note 2; N. Matz, "Marine Biological Resources – Some Reflections on Concepts for the Protection and Sustainable Use of Biological Resources in the Deep Sea", *Non-State Actors Int. Law* 2 (2002), 279 et seq.

law transaction agreements and standard international agreements for samples and data. By this approach, the author – again – supports her legal analysis with insights into the practical dimension. In this context, particular emphasis is put upon the element of good faith in *pacta de contrahendo* or *pacta de negotiando* and the applicable case law. The author goes on to discuss different types of agreements that are illustrated with many examples from research practice. In conclusion, one must consider part III to be the most innovative part of the book and the one with the greatest potential influence on the discussion of solutions to current difficulties with marine scientific research.

International cooperation for marine scientific research under different legal frameworks is the focus of part IV. Although various forms of cooperation between numerous types of institutions are a subject of growing awareness in times of globalization, the specific marine scientific research context is of particular relevance for policy makers dealing with the management of the oceans. *Gorina-Ysern* describes the capacity of different cooperation mechanisms and analyzes the legal preconditions.

The description of state practice in all different parts of the world concerning cooperation on issues related to marine scientific research in a wider sense gives a good overview on participation in different cooperative regimes. In the opinion of *Gorina-Ysern*, practice demonstrates that most states are engaged in extensive international and regional efforts to incorporate ocean science into their policies. However, the issue of effectiveness of cooperation could have been further elaborated upon, since the mere number of different networks and institutions is no guarantee of success in achieving the aims. Maybe some of the activities described by the author could be streamlined for the benefit of collaboration that is more effective.

The combination of its four broader issues makes the book, as already mentioned, the most comprehensive collection available and of interest for different groups of readers. At the same time this perhaps makes it more difficult to handle e.g. for the practitioner mainly concerned with the relevant data or the legal scholar more interested in the legal analysis than in empirical evidence for practice. The effort to cover different aspects of marine scientific research comprehensively is an advantage of the book, since it is unique, yet it is also a reason for criticism.

The range of issues dealt with would have justified separation into two shorter books: one, consisting of the first chapter with its almost 200 pages and a second one, covering the historical foundations and

modern challenges. The first part is thematically quite independent of the rest. The fact that the UNCLOS regime is described in little more than one paragraph in the first chapter supports this judgment. The superficial description of UNCLOS and its predecessors, the Geneva Conventions, is sufficient as a background to describing national implementation. However, when the book dedicates chapter 3 to an in-depth analysis of UNCLOS after describing the historical background of regulating marine scientific research, this, in turn, seems strangely unrelated to chapter 1.

Chapter 1 also addresses a different group of readers. While this part may be better suited for the practitioner⁶ who is interested in the comparison of research requirements in all parts of the world – particularly because, according to *Gorina-Ysern* practice is quite diverse –, the rest of the publication will prove more useful for legal scholars and ocean policy makers who are interested in the legal frameworks.

Apart from this, it would have seemed more consistent to dedicate a first chapter to historical foundations, then analyze the regime established by UNCLOS before dealing with national implementation as a step that logically follows the establishment (and description) of the overarching international regime. Despite this critique, the book will prove suitable for practitioners searching for information on preconditions for or regulations on marine scientific research in a specific region as well as for legal researchers interested in marine scientific research.

Gorina-Ysern's opinion that the oceanographer has to defend the advancement of knowledge for the benefit of humankind against the odds of international law is a view probably shared by many working in this profession. However, it may not give enough credit to the objective of, in particular, environmental treaties and implementing legislation. The answer cannot be either unrestricted marine scientific research or strict environmental protection but a reasonable balance between the two that has yet to be achieved.

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⁶ Although the focus on practice concerning US requests indicates a specific relevance of the survey for US research institutions, the comparison of practice is very likely to prove useful to practitioners from other parts of the world as well.

Andr s Saj  (ed.): Militant Democracy

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The concept of militant democracy, conceived by Karl Loewenstein, is at the heart of this collection of essays debating the question of how to balance democratic and liberal values against the need to defend democracy against its enemies. Particularly relevant after September 11, 2001, several contributions address the problem of changes in anti-terrorism legislation. Kent Roach, for example, compares responses in Asia and the West and remarks that countries which have long been criticized for their human rights record such as Malaysia, Indonesia, or Pakistan, find their laws suddenly in tune with Western demands to act decisively against terrorist networks. Roach criticizes much of US and British anti-terrorism legislation and even argues that some measures put in effect in both regions make it difficult to uphold the distinction between Western liberal individualism and Asian authoritarianism. Still, he does point out that while Western defensive mechanisms do represent cases of true militant democracy, the Asian countries he refers to cannot easily be called democracies and their militancy may pursue different aims.

Chantal Mouffe concerns herself with a related aspect: the 'moralization' of politics which she sees in the Bush Administration 'war on terror' and its presentation as a war against 'evil'. In the international arena, categories like 'good' and 'evil' can lead to the establishment of 'lesser' evils, such as authoritarian regimes acting against terrorism, and are likely to be self defeating in the end. However, her chief concern are the consequences such a tendency to moralization could have within established democracies. Mouffe's analysis points to the combined effect of a non-differentiated middle consensus in French party politics and the potential for moralizing populism pushing young Muslim immigrants towards Islamic fundamentalism. A possible solution, Mouffe argues, would be to strive for an 'agonistic' rather than an 'antagonistic' view of politics which need not be consigned to national politics.

Otto Pfersmann, writing about post-war West-German constitutional history, asks the poignant question to what extent constitutional provisions can be expected to counterbalance social attitudes negative to democracy. His conclusion is that constitutional and legal instruments are merely the last resort and cannot alone rescue an endangered democracy. Without a democratic culture, he writes, democracy cannot survive, and, therefore, democracy has to take on the character of an educational and cultural project.

Interestingly, these ideas are further elaborated by Günter Frankenberg, who introduces the term of the 'learning sovereign' and thus establishes a reciprocal relationship between the institutions of a democracy and the people as the bearer of sovereignty. Central to his argument is the role of the Constitutional Court in the banning of both right wing and left wing extremist political parties and its reasoning which, he writes, has moved from 'anti-extremism' to 'negative republicanism'. According to Frankenberg, this constitutes an act of sovereign learning, reflecting a particular historical experience. His general conclusion is that a learning sovereign cannot apply his powers without due regard to changing social realities and varying perceptions of threat. This, however, would also include the possibility of 'de-militarisation' in a militant democracy if a particular threat is no longer perceived as virulent.

The question remains whether basic rights should be curtailed on a universal basis (and to what extent) as a defensive strategy against an amorphous threat from globally acting terrorists. David Dyzenhaus points at the dilemma when he asks how far a democracy would be able to go in protecting itself without compromising its democratic nature.

Amidst continuous debate on legislation against terrorism and its problematic implication in terms of civil rights, this Volume successfully endeavors to apply a political and legal concept, made prominent by constitutional legal discourse, especially within Germany, after the Weimar experience, to the 'war on terror' as a global phenomenon. It cannot be held against the contributors to this Volume that no general solution emerges since the focus of many articles is on the problem of banning anti-democratic political parties. Still, the theoretical points raised are relevant and the reader of this insightful collection of essays is invited to transfer them to the post-September 11 world and exercise a measure of sovereign learning.

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