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International law and governance of the arctic in an era of climate change

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Introductory chapter

BACKGROUND

During the Cold War, the strategic rivalry between East and West also played out in the Arctic. This changed drastically from the early 1990s. The Arctic entered a period marked no longer merely by rivalry but equally by cooperation founded on common interests and a sense of shared purposes. At the same time, the Arctic was marginalized in the new global geopolitics and overshadowed by emerging threats and crises, notably the wars in the Balkans, the Great Lakes region and Afghanistan, and the fight against international terrorism.

By the turn of the millennium, however, evidence emerged suggesting the North Pole would experience fundamental change. Two main drivers of change can be identified. First, there were increasingly clear signs of the impact of global warming in the Arctic, notably the rapid reduction of the ice cap that would, at least seasonally, open up new areas to human activity. Second, a reassessment of the oil and gas resource potential of the North held out the prospect of massive untapped resources at a time when pessimism over petroleum's finite nature – the “end of oil” argument – was prevalent. The Norwegian government was among the first to respond when, in 2005, it declared the High North to be Norway's most important strategic priority in the years ahead. The public at large was told that the world was at the threshold of a major transformation: “In the years to come,” the Norwegian foreign minister said, “the High North will be one of the most important strategic areas in the world.”¹ Other countries would soon follow, although they viewed the Arctic as a foreign policy issue with varying degrees of urgency.

A further trigger of international attention to the Arctic was the planting of a small titanium Russian flag on the seabed of the North Pole in August

1 J.G. Støre [Norway], “The High North”-Top of the World- Top of the Agenda, Center of the Strategic and International Studies, Washington DC, June 15, 2006, available online at https://www.regjeringen.no/en/dokumenter/meld.-st.-7-20112012/id663433/?docId=STM201120120007000EN_EPIS&ch=1&q=Jonas%20Gahr%20Store%202006%20Washington%20DC&redir=true&ref=search&term=Jonas%20Gahr%20Store%202006%20Washington%20DC.

2007.² This act by the Russian scientist Arthur Chilingarov became the key symbol in the perception of the Arctic as a disputed region. Predictions abounded of impending conflicts over boundaries and rights to resources. There were numerous references to “the race for the Arctic”, “the scramble for the Arctic”, and “the great game in a cold climate”.³ This notion of conflict was nurtured by the emergence of a newly self-confident Russia under President Vladimir Putin – a Russia clearly moving in a more authoritarian, anti-liberal and anti-Western direction.

AIM OF THE THESIS

This Thesis will provide a comprehensive scholarly analysis of contemporary international law, geopolitics and international security in the North. It also traces historical lines, helping to make sense of where we stand today. Many recent publications hasten to conclude that the Arctic is experiencing a rush for resources and increased geopolitical rivalry.⁴ The key aim of this Thesis is to identify the application and implementation of contemporary international law and its role in shaping the conditions for cooperation, stability and peace in the Arctic.

2 Please find the relevant factual information at some of the world's most accurate media: <https://www.theguardian.com/world/2007/aug/02/russia.arctic>; <https://www.cbc.ca/news/world/russia-plants-flag-staking-claim-to-arctic-region-1.679445>; <http://news.bbc.co.uk/2/hi/europe/6927395.stm>.

3 Charlie Duxbury, *The 5 most important races for the Arctic*, Politico Magazine, January 1st 2020, available at: <https://www.politico.eu/article/5-races-for-the-arctic-trade-resources-supremacy-tourism-salvation/>; Evangelos Meliopoulos, *Scramble for Arctic: The Potential for Conflict and Great Power Rivalry*, The Geopolitics, June 9 2018, available at: <https://thegeopolitics.com/scramble-for-arctic-the-potential-for-conflict-and-great-power-rivalry/>.

4 A. Anderson, *Can we keep up with Arctic Change?*, in *The Fast-Changing Arctic: Rethinking Arctic Security for a Warmer World* 17 (Barry Scott Zellen, Calgary, Alberta eds., 2013); M M. Byers, J. Baker, *International law and the Arctic*, Cambridge University Press (2013); R. Howard, *The Arctic gold rush : the new race for tomorrow's natural resources*, Continuum London Publishing Group (2009); C. Emmerson, *The future history of the Arctic*, Bodley Head (2010); Mathew Gross, *Geopolitical Competition in The Arctic Circle*, Harvard International Review, December 2 2020, available at: <https://hir.harvard.edu/the-arctic-circle/>; Christian Perez, *ARCTIC COMPETITION PART ONE: RESOURCE COMPETITION IN THE ARCTIC*, Foreign Policy, October 13 2020 available at: <https://foreignpolicy.com/2020/10/13/arctic-competition-resources-governance-critical-minerals-shipping-climate-change-power-map/>.

RESEARCH QUESTIONS

- *how does contemporary international law respond to the massive changes that are underway in the Arctic?*
- *Is the existing legal framework effective and efficient in its response to the current complex and multilevel problems of the Arctic area?*
- *What is the geopolitical significance of the Arctic, regionally and globally?*
- *Which are the key stakeholders and how can their interests and policies impact on the development and implementation of international law?*
- *Is the Arctic Council as the primary forum for regional co-operation in the Arctic up to its task?*
- *What are the main characteristics of governance in the Arctic, and how can institutions and regimes promote stability and security in the region?*
- *What are the security challenges in the region?*

These are broad questions primarily of legal nature. I have found it appropriate to structure the analysis by assuming that conflict and instability in the North may erupt at two levels – the regional and the global. The first source of conflict relates to dynamics *within the Arctic*: what is the potential for regional conflict over issues concerning boundaries and access to resources? To what extent are the Arctic States militarizing the region? The second source of conflict relates to how *global developments* – or events in other parts of the world – impact interstate relations in the Arctic. To what extent should we expect security conflicts and tensions at the global level, or outside the North, to affect relations in the Arctic? At both levels, Russia plays a major role. Because of its size and stature, Russia is the biggest stakeholder in the North, but it is often perceived by the people in the West to be something of a “wild card” in Arctic affairs. Is it always in Russia’s interest to prioritize cooperation over confrontation? At both levels, the question arises whether the potential for conflict can be mitigated by shared interests and institutions? These political issues are the inseparable background of the effort to find the answers to the research questions as posed above.

GEOGRAPHICAL

Where is the Arctic? What is the Arctic? In order to study the region, first a common understanding must be established as regards the characteristics, location and extent of the Arctic. Many debates about the Arctic become confused because multiple definitions are applied – or no definition at all. There are essentially three ways of defining the north: by geography, by function and by narrative.

One broad *geographical* approach is to say that the Arctic is an ocean surrounded by continents. This gives a core of five littoral or coastal nations –

the United States, Canada, Denmark/Greenland, Norway and Russia. Since the adoption of the Ilulissat Declaration of May 2008, they have been known collectively as the Arctic five.⁵ Iceland wants to be recognized as a coastal State within the Arctic region, and would prefer “Arctic six” to be used as the collective noun.⁶

The most common and basic geographical definition of the Arctic is the area north of the Arctic Circle (66° 32'N). Eight countries have territory north of that circle: the Arctic five, Iceland, Sweden and Finland. They are the member States of the Arctic Council, the leading intergovernmental forum of the North. Other geographic definitions are the areas north of the 10°C isotherm for July, and areas beyond the tree line in northern countries. The various definitions of the region by Arctic Council working groups show clearly how they can vary according to themes of interest. The definition used by the Arctic Monitoring and Assessment Programme (AMAP), a working group of the Arctic Council, constitutes a compromise between various definitions:

“The “AMAP area” essentially includes the terrestrial and marine areas north of the Arctic Circle (66° 32'N), and north of 62°N in Asia and 60°N in North America, modified to include the marine areas north of the Aleutian chain, Hudson Bay, and parts of the North Atlantic Ocean including the Labrador Sea.”⁷

These are the areas that are deemed to be of interest to the AMAP, which centers on research and monitoring activities. Other working groups of the Arctic Council apply different definitions according to their focus areas.

FUNCTIONAL

Functional definitions spring from usage of the region rather than specific boundaries. Areas located south of the Arctic Circle but with Arctic-like operating conditions are sometimes included in a functional definition of the region. For example, military planners often define the area according to operational requirements. From the 1970s, the missile range of Soviet strategic submarines enabled them to target the United States from the Arctic Ocean and Sea of Okhotsk. These strategic points were called “bastions” by the Soviets. In order to protect their “bastion” in the European part of the Arctic,

5 The Declaration can be found online at: <https://www.jstor.org/stable/26995399>.

6 Iceland 2011: A parliamentary Resolution on Iceland's Arctic Policy online available at: <https://www.government.is/media/utanrikisraduneyti-media/media/nordurlandaskrifstofa/A-Parliamentary-Resolution-on-ICE-Arctic-Policy-approved-by-Althingi.pdf>; K. Dodds, V. Ingimundarson, Territorial nationalism and Arctic Geopolitics: Iceland as an Arctic Coastal State, 2(1) *The Polar Journal* 21 (2012).

7 Available online at <http://www.amap.no/documents/doc/amap-assessment-report-arctic-pollution-issues/68>.

the Soviet Union established forward defence in the North Atlantic. Similarly, the United States Geological Survey, published in 2000,⁸ included the East Siberian Basin in its estimates of Arctic undiscovered oil and gas resources, although the entire province lies south of the Arctic Circle. Because this area is covered by ice for large parts of the year, it made sense to include it in a functional definition of the Arctic. Moreover, the Arctic is crucial because it helps keep our world's climate in balance. Arctic sea ice acts as a huge white reflector at the top of the planet, bouncing some of the sun's rays back into space, helping to keep the Earth at a sustainable temperature. However, one of the most important impacts of climate change is visible in the Arctic: refers to the Arctic's its over-warmth during the past few decades is about twice as much as the global average. As the sea ice melts, there is less ice to reflect the rays, and more heat is absorbed by the ocean, magnifying the warming effect.

NARRATIVE

The third method for defining the Arctic is to take cues from the key *narratives* of the North. Four narrative strains deserve particular mention: the Arctic as homeland to indigenous peoples; the European Arctic; the North American Arctic; and the Circumpolar Arctic. Indigenous peoples have inhabited the North for thousands of years. Their history, culture and economy are very diverse, and most of them have traditionally seen themselves as part of a local, rather than a wider northern or Arctic, community. The indigenous populations were largely disregarded when rim land powers began to explore, exploit and occupy the North. Recent years have seen the rise of indigenous cooperation in the North as well as growing recognition of their cultures and knowledge.⁹

In common usage, "the High Arctic", "the North", "the Far North" and "the High North"¹⁰ refer to either the American or the European portions of the Arctic. The expressions suggest different physical, historical, national and political characteristics. The European Arctic has a long and rich history of polar expeditions, and its identity is embedded in Norwegian and Russian history and culture. Generally speaking, the European Arctic is seen as more accessible than the North American. It is rich in living marine resources,

8 The maps and more specific details can be found on the website of the USGS available online at <http://water.usgs.gov/watuse/data/2000/>.

9 The increased recognition of the existence and rights of indigenous peoples is reflected in the United Nations Declaration on the Rights of Indigenous Peoples, adopted on 2 October 2007, A/RES/61/295 (UNDRIP) available online at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

10 Some reference to the common usage of various terms can be found in the following article: <https://www.adventurecanada.com/canadian-high-arctic-and-greenland/the-brave-and-shameful-history-of-high-arctic-sovereignty-in-canada>.

particularly in the Barents Sea, and was subject to great power rivalry during the Cold War. The Kola Peninsula is a militarized region, with a power asymmetry between Russia on the one hand and Norway on the other. For some years, the Norwegian government has used the term “High North” in international communications, intending it to be a synonym for the Norwegian term *nordområdene* (i.e. “the northern areas”), with reference to the European parts of the Arctic, including northern Russia.¹¹

The North American Arctic also has a long and rich history of polar expeditions, but the area is less accessible, less well developed and less densely populated than the European North. While the Arctic is fundamental to Canada’s identity, the historical and political narratives of the United States focus little on the region. Awareness of the North in the United States is largely confined to Alaska and imaginative notions involving wilderness, the “gold rush” of the 1890s, and the “oil boom” from the late 1960s.¹² The United States and Canada have a close partnership that includes protecting North America from external threats, but the countries disagree over straits and boundaries.¹³ Periodically, their disputes spark strong Canadian manifestations of nationalism and assertions of sovereignty in its Arctic territories. However, while promising to stand guard over the “True North, strong and free”, Canadian governments have often been reluctant to display extensive and practical political commitment to the North.¹⁴

The “Circumpolar Arctic” is more of a recent political concept; we can call it “the new Arctic”. It is closely associated with environmental challenges and climate change, notably the impact of the rapid melting of the ice. The Arctic Council, established in 1996, is today the main institution and most important symbol of this narrative. The use of the term “Arctic” in this Thesis, refers to the Circumpolar Arctic. The term “High North” denotes the European land and sea areas in the Far North. The Thesis focuses generally on the Arctic, while paying particular attention to the European High North. The reasons for focusing on the European Arctic are twofold. First, Russia deserves special attention due to its size and significance. Second, a greater increase in activity in the European North is foreseeable due to its accessibility, compared to the North American Arctic.

11 O.G. Skagestaed, *The High North. An elastic concept in Norwegian Arctic Policy*, FNI Report, Oslo (2010).

12 M. Nuttal, *People, Environment, and the Arctic Energy Frontier*, 2010, p19, available at: https://www.iwgia.org/images/publications/0451_Pipeline_dreams.pdf.

13 *Ibid.* at p. 20.

14 K.S. Coates, P.W. Lackenbauer, W.R Morrison, G. Poelzer, *Arctic Front: Defending Canadian the Far North*, Toronto Thomas Allen (2008).

GEOPOLITICS, SECURITY AND INSTITUTIONALISM

This Thesis is inspired by both international law and geopolitics in its broadest sense. Geopolitics concerns the connections between geographic space, power politics and of course international law. Since geographical parameters typically influence the dynamics of State interaction, geopolitics is often invoked to describe and analyse the pursuit and management of clashing national interests within a specific geographical context. Geographical analysis is closely associated with the realist strand in the study of international relations. According to realists, the highest-ranking national interest is State survival, a view that manifests itself in a principal preoccupation with security.¹⁵ The primary tools for maintaining security in an anarchical international system are military capability and economic wealth. Since all States attempt to wield these tools to amass power, competition and rivalry are likely to ensue, sometimes escalating into conflict.¹⁶

In this respect, any analysis of geopolitics and conflict must include the question of security. The concept of security has been considerably broadened in recent decades. It is no longer reserved for State survival and State security, often labelled traditional or “hard security”. Scholars have broadened the concept to include topics such as economic security, social security and human security, commonly referred to as “soft security”.¹⁷ In this Thesis, security is categorized as follows. State security traditionally refers to the protection of territorial integrity, but also comprises the protection of State authorities’ political sovereignty. State security may be challenged by political and military pressure and intimidation, from State and non-State actors and in the form of conventional military action or non-conventional forms such as concerted cyber or terrorist attacks (aimed at forcing the State into political submission). In situations where their security interests are at stake, States have traditionally legitimized the use of all their available resources in their defense, and been willing to bear considerable casualties and costs. Societal security concerns the protection of the population and infrastructure in a situation where the State’s security, sovereignty and territorial integrity are not at stake.¹⁸ Threats against societal security can be man-made and intentional, such as (smaller-

15 Kevin Bloor, *Theories of Global Politics*, May 15 2022, available at: <https://www.eir.info/2022/05/15/theories-of-global-politics/>.

16 Hence I would reiterate that while my understanding rests upon classical geopolitics, the concept is used very broadly. Today there is a wide array of perspectives on geopolitics among the so-called critical geopolitics, which focused on spatial construction of social identity, see G. Tuatkail, Dalby, P. Routledge, *The Geopolitics Reader*, Routledge (2nd ed., 2006). These various approaches and wider theoretical debates are refreshing, but far beyond the scope of this research.

17 *Supra* note 10.

18 Maria Mazzanti. *From state sovereignty to responsibility to protect*. Political science. Institut d’études politiques de Paris - Sciences Po, 2022.

scale) terrorist attacks, organized crime or human induced environmental degradation; but natural disasters, grave accidents and catastrophes can also threaten societal security. Human security relates to the protection and well-being of individuals and peoples and is also deeply entrenched in contemporary international law.

INSTITUTIONALISM

One school of international relations, whose impact on the scholarly debate about the Arctic has been considerable, is institutionalism. This approach acknowledges that while geopolitics and security matter, institutional structures bring a degree of governance and stability to international society. This is through mechanisms such as norms and standard operating procedures that tame potential conflicts emerging from the clash of national interests. With his 1998 book *Creating Regimes: Arctic Agreements and International Governance*, Oran Young was among the first scholars to conduct theoretically oriented study into the role of international institutions in solving various problems, using the Arctic as a case study.¹⁹ Young, and other institutionalists with an interest in the Arctic, are debating whether conflict or continued cooperation is likely to be the hallmark of Arctic relations in the years to come.

The main argument in support of cooperation is that institutions enhance stability and help to prevent disagreement from emerging or escalating. First, institutions and regimes are important meeting places and instruments that engage actors under a common cooperative structure. The longstanding cooperation on nuclear safety by a number of States and institutions illustrates this point. Secondly, institutions and regimes define the rules concerning the use of Arctic resources and sea lanes. Most importantly, the Arctic States have committed themselves to respecting the law of the sea, manifested in the Ilulissat Declaration of 2008. Thirdly, institutions and regimes tend to insulate specific issues from other issues on which the actors might disagree. The effective and sustainable fisheries management in the Barents Sea illustrates this point.

At this point, an initial reference to the Arctic Council has to be made.²⁰ The Arctic Council is an intergovernmental forum established in 1996 to promote cooperation, coordination and interaction among the Arctic States, with the involvement of Arctic indigenous communities and other Arctic inhabitants on issues of common importance. Originally focused primarily on environmental protection and sustainable development, it has evolved into

19 O.R. Young, *Creating Regimes: Arctic Agreements and International Governance*, Ithaca NY, Cornell University Press (1998).

20 There is a more in-depth and analytical discussion on the role of the Arctic Council and its key role in Arctic Governance at the relevant chapter 4 of this thesis.

a forum which also addresses social, cultural and economic issues with both regional and global implications. This broadening of the Council's agenda coinciding with the rising geopolitical importance of the Arctic and the onset of climate change has resulted in the Council becoming a focus of increasing interest from both inside and beyond the Arctic.²¹

This has resulted in new demands placed on the Council, attracted an increasing number of participants and instigated a period of transformation as Arctic States work to find a way to balance conflicting demands for improving the effectiveness of the Council and taking care of national interests. The failure of the Foreign Ministers of the Arctic States for the first time in the history of the Council to agree upon a Declaration at the 2019 Arctic Council Ministerial underlines the challenges being faced.²² For the purposes of this Thesis the Arctic Council is not considered as a competent international organization governed by the applicable principles and rules of international law, making the organization's functioning mandatory for its member States. The Arctic Council does not include mandatory processes for its member States and does not have competence by its mandate to the management of living and non-living natural resources of the Arctic Ocean. Its governing bodies mainly operate as a round table for discussion and exchange of views amongst the stakeholders rather than organs competent to make decisions binding for its member States. Chapter 4 of this Thesis analyzes the role of the Arctic Council within the broader scope of Arctic governance where the Council does have a crucial role to play.

INTERNATIONAL LAW

Contemporary international law plays the central role in this Thesis. Before stating what is included, I must first explain what is not. There is a discussion among the international community as to whether the Arctic should be characterized as a self-contained regime²³ and whether the law of the sea, as codified in the 1982 United Nations Convention on the Law of the Sea

21 Knecht, S., 2017. The politics of Arctic international cooperation: Introducing a dataset on stakeholder participation in Arctic Council meetings, 1998–2015. *Cooperation and Conflict* 52 (2), 203–223.

22 Koivurova, T 'Is this the end of the Arctic Council and Arctic governance as we know it? The Polar Connection', 2019, available at: <http://polarconnection.org/arctic-council-governance-timo-koivurova>.

23 D. French, K. Scott, International Legal Implications of climate Change for the Polar Regions: too much, too little, too late?, 10 *Melbourne Journal of International Law* 631 (2009), O. Ferrajolo, Protecting Polar Regions from Persistent Organic Pollutants: Some remarks in the Light of the 2001 Stockholm Declaration, in *The Antarctic Legal System-The protection of the Environment of The Polar Regions* 55 (G. Tamburreli, G. Editore eds., 2008), at 68-70.

(UNCLOS),²⁴ is the only means of addressing maritime disputes. This statement includes many problematic aspects that will be addressed in the first part of this Thesis. My contention is that the Arctic cannot be characterized as a self-contained regime. There are three important reasons for this. The first is that under international law²⁵ and in accordance with the jurisprudence of the International Court of Justice (ICJ),²⁶ self-contained regimes are legal systems, like the law of the World Trade Organization (WTO) or the law of the European Union, and not geographical areas.²⁷ Second, a holistic approach to Arctic management cannot take place with a “closed” legal system, which is limited to a specific region. This is the case with the Antarctic legal system, which practically prevents all activities except for scientific research.²⁸ On the contrary, effective governance regimes are built upon rules of law that are accepted and imposed generally without efforts to create “special circumstances” that are not always so special. Third, main points of disagreement on UNCLOS exist, including as regards the method for delineating the extended continental shelves in the Arctic, the non-participation status of the US to UNCLOS, and the mineral rights in the international seabed.

Reference must be made to recent developments in the field of international law. There has been a gradual build-up of Arctic-related issues which increasingly pose challenges to be addressed within the framework of international law. International law, both customary and conventional, applies to the Arctic.²⁹ The legal status of the Arctic Ocean is determined by the international law of the sea, which is embodied in UNCLOS.³⁰ In particular, UNCLOS provisions dealing with the territorial sea, continental shelf, exclusive economic zone, navigation, fisheries, and other high seas freedoms, are most pertinent to the Arctic as its ocean space becomes increasingly accessible. UNCLOS also contains a special article about ice-covered waters of the Exclusive Economic Zone (EEZ).³¹ Furthermore, the dispute settlement provisions in the Convention also apply to the Arctic. Likewise, the Convention on Biological Diversity and

24 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 396, entered into force November 16, 1994. (hereinafter: UNCLOS).

25 B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) EJIL 483 (2006), at 484-485.

26 *S.S. Wimbledon*, 1923 PCIJ (Ser. A) No. 1, at 23; *United States Diplomatic and Consular Staff in Tehran Case*, 1981 ICJ Rep. 45.

27 The Antarctic Treaty, which is considered as a self-contained regime is a *per se* case and not the rule. On the concept of self-contained regimes in international law, see B. Simma, *Self-Contained Regimes*, XVI Netherlands Ybk (1985) 111.

28 M. Weber, *Power Politics in the Antarctic Legal System*, in *Polar Oceans Governance in an Era of Environmental Change* 86 (T. Stephens ed., 2014), at 90-93.

29 D. Rothwell, *The Polar Regions and the Development of International Law*, Cambridge University Press (1996).

30 Supra Note 18, UNCLOS.

31 UNCLOS Art. 233.

the UN Framework Convention on Climate Change³² and the Paris Agreement on Climate³³ are applicable to the Arctic.

Melting of ice in the Arctic, linked to the impact of climate change, raises pertinent legal issues. Important Arctic legal issues include the claims of Arctic States to an outer continental shelf over the seabed of the Arctic Ocean, the exploration and exploitation of natural resources both in the seabed and in subsoil, new navigational routes that are now ice-covered, potential new fisheries areas, species and opportunities, and conservation of the Arctic and the major global ecological functions it performs.

THE 2022 WAR IN UKRAINE

On 24 February 2022 President Putin proclaimed in an extensive public statement his decision to order the Russian military troops to invade Ukraine on various grounds that all seem to lack any kind of legitimacy.³⁴ The impact of his decision on the Arctic became soon clear since the Arctic Council paused all of its work and that of its subsidiary bodies until further notice, only a few days after the beginning of the illegal invasion in Ukraine.³⁵

Despite the Arctic Council's previous efforts to prevent conflicts elsewhere from affecting its work, it suspended its activities shortly after Russia's invasion in 2022. Russia had only assumed its two-year chairmanship of the organisation in May 2021. It had planned an ambitious programme of activities focusing on four areas: Arctic inhabitants and indigenous peoples, environmental protection and climate change, socio-economic development, and strengthening the Arctic Council. Despite tensions between Russia and the West reaching new heights, in 2021 experts and diplomats expected that Arctic cooperation would prevail, and that the Russian chairmanship would be fruitful.

However, it was not to be. On 3 March 2022, the other seven Arctic states issued a statement condemning Russia's invasion of Ukraine.³⁶ They wanted to make a stand and, more pragmatically, they were no longer in a position to travel to Russia for meetings and decided to pause all Arctic Council cooperation until further notice. Russia considered this to be an irrational step and feigned surprise and incomprehension: after all, the Arctic was supposed to be the unique area where cooperation was possible regardless of what was

32 1771 U.N.T.S. 107, 165; S. Treaty Doc No. 102-38 (1992).

33 U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015).

34 The full text of his speech can be found at: <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine>.

35 The announcement of the Council can be found on the official web page of the Council at: <https://www.arctic-council.org/>.

36 Joint Statement on Arctic Council Cooperation following Russia's Invasion of Ukraine, March 3 2022, available at: <https://www.state.gov/joint-statement-on-arctic-council-cooperation-following-russias-invasion-of-ukraine/>.

happening elsewhere in the world. Moscow argued that the Arctic Council exists to foster environmental protection of this fragile region and socio-economic development and should therefore prevail despite confrontation elsewhere.

This notice has been given at the second half of 2023. The eight Arctic states – Norway, Canada, the US, Denmark, Iceland, Finland, Sweden, and Russia – agree on a critical first step forward for the Arctic Council: New guidelines allow the working groups and the expert group, where the council's main work takes place, to resume their activities.

The agreement has been reached in consultation with the six indigenous organizations that are permanent participants of the council. In more detail, the new guidelines say that the working groups can initiate decision-making processes and resume existing projects, as well as suggest new ones. This also includes that the groups may revitalize cooperation with observers and external parties that contribute to their project work. The resuming of activity of the Arctic Council does not apply to meetings at a political level or Senior Arctic Official meetings.

No-one can predict how this war is going to end but should someone look what happened in the Arctic in 2014 when Russia invaded Crimea, it would be more than obvious that despite the fact that this war is not about the Arctic, the Arctic will be highly affected. In 2014 – the same year that Russia annexed the Crimean Peninsula from Ukraine – the Northern Fleet became the main component in a strengthened military presence in the north. To international observers, Russia's military activities in the Arctic took on an increasingly aggressive stance, raising the stakes for other Arctic States. In the words of Katarina Zysk: "[t]he major thrust of NATO's interests in the Arctic came after the annexation of Crimea. Ukraine was a game changer, because even though Russia had been generally cooperative and predictable in the Arctic, NATO could not detach what Russia was doing in Ukraine from its military expansion in the Arctic."³⁷

This meant also increasing NATO's presence in the Arctic to ensure that if Article Five were triggered by a Russian attack in the region, the group could provide the required collective defence.³⁸ From 2016 onwards, it upped the frequency of its military exercises in the Arctic, even displaying an ability to project power beyond its Arctic waters and assert maritime control. The current war in Ukraine has raised the stakes once again. Sweden and Finland have decided to join NATO which would make all the Arctic States except Russia

37 Katarina Zysk, Professor of International Relations and Contemporary History at the Norwegian Institute for Defense Studies, SciencePro, 15 March 2022, available at: <https://www.sciencespo.fr/ceri/en/content/russian-military-strategy-and-power-projection-arctic-war-ukraine-interview-katarzyna-zysk> at xx.

38 *Ibid.*; Please see also the NATO Summit 2021: The Arctic Can No Longer Be an Afterthought, available at: <https://www.heritage.org/defense/report/nato-summit-2021-the-arctic-can-no-longer-be-afterthought>.

part of the military alliance. NATO is conducting a strategic re-evaluation of how the Arctic sits within the alliance and NATO decisions will determine the future relationship.³⁹ Given the war threat from Russia about this NATO expansion, tensions could escalate in this respect.

Among Western allies, too, the war in Ukraine may prove to be a turning point for political relations in the Arctic, but not necessarily a rupture. The Arctic Council has paused its work temporarily, but hopefully it is not breaking apart due to the fact that the main reason of its establishment, the cooperation among Arctic States, has been seriously damaged. It is quite unclear whether the Arctic States would be willing to re-establish them in the post-war era and, if so, on which basis. More than anything, trust has been severely broken in relationships with Russia, so Arctic States are rethinking how they can move forward.

This Thesis acknowledges that the impact of the Ukraine war on the Arctic cannot be predictable on that new landscape that is going to be created on the post war era. Arctic cooperation has been on the spotlight for many years and has been constantly challenged especially in the aftermath of the invasion in Crimea and during the Donald Trump presidency as it will be further explained in the relevant Chapter of this Thesis. The future of Arctic cooperation is directly linked with the end of the War in Ukraine and the relationship that will be established between Russia/China and the West. It is very difficult to predict the immediate effects of any war, due to its very nature. Especially of a War that is held indirectly between the most powerful States of the planet and will definitely redefine the balance of power and influence among its parties. However, due the complexity and the depth of the overlapping interests and the absolute need for cooperation among the Arctic States, it will be crucial to find a *modus operandi* and a *modus vivendi* based on the desire to restore and maintain peace and respect the most fundamental rules and principles of the UN Charter. Therefore, despite the fact that some suggestions presented in this thesis may look slightly optimistic for the current state of play, I consider that the present war will act as a catalyst to rebuild the damaged relations on a more stable and cooperative basis in due course. The Arctic States seem to be very reluctant to extend the present conflict to the Arctic or to consider a new conflict in the Arctic as an option. Humanity cannot afford it.

METHODOLOGY

This thesis follows primarily a public international law approach. This approach is largely prompted by the character of the subject-matter itself,

39 *Ibid.*

involving questions of sovereignty, consent and authority. This thesis bases its analysis, firstly, on the traditional sources of international law as incorporated in Article 38(1) of the ICJ Statute.⁴⁰ This provision states that the ICJ, which is entrusted with the task of deciding disputes in accordance with international law, shall apply treaties, customary international law and general principles of law as its main sources. Moreover, the Court shall also draw on decisions of courts and tribunals and on the writings of the most prominent scholars in the field of international law as evidence of rules of law. These various sources interact closely and influence each other as international law is not a static system but rather a living system and in part also a decision-making process.

TREATIES

Many of the general rules and standards examined in this thesis are incorporated in treaties, one of the primary sources of international law as listed in Article 38 of the ICJ Statute. One of the primary aims of this thesis is to determine the extent to which these existing rules of international law can effectively address problems connected to the complex and multilevel disputes arising in the Arctic. However, the existing rules are part of different subsystems, which to a large extent operate independently from each other. International law is widely known as a fragmented field of law. Furthermore, in order to address the problems connected with multilevel international governance in a comprehensive manner, it is necessary to bring these fields closer together. One of the principal methods used in this thesis to achieve this is through treaty interpretation. In this respect, reference must be made to the established rules on treaty interpretation as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.⁴¹

According to the basic rule for treaty interpretation formulated in Article 31(1) of the 1969 Vienna Convention:

“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

⁴⁰ Statute of the International Court of Justice, Art. 38(1), 33 UNTS 993, UKTS 67 (1946).

⁴¹ 1969 United Nations Convention on the Law of the Treaties, 1155 UNTS 331, entered into force January 27, 1980. (hereinafter: VCLT); These rules are generally considered to represent customary international law. See, e.g. the judgment of the International Court of Justice in *Oil Platforms (Iran v. U.S.)*, 2003 ICJ Reports 16, at para 41, in which the Court refers to “the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties”. Also see the earlier judgment of the International Court of Justice in the *Libya v. Chad Case*, 1994 ICJ Rep. 64, at para 41.

This basic rule is developed using the rules formulated in the other subsections of Article 31.⁴² Article 31 (3) of the Vienna Convention is particularly relevant in this respect. It lists the other elements to be taken into account together with the context of the treaty. These include subsequent agreements and practice as well as “any relevant rules of international law applicable in the relations between the parties” to the treaty.⁴³

Both Article 31(1) and (3) of the Vienna Convention contain elements that permit an interpretation of the provisions of a treaty in the light of the broader system of international law. First, rules of international law that are not part of the framework of the treaty can be taken into account when determining the “ordinary meaning” of the terms of treaty provisions in their context and in the light of their object and purpose in accordance with Article 31(1) of the Vienna Convention, including rules from different subsets of international law. The WTO Appellate Body’s reference in the *Shrimp/Turtle* case to environmental treaties for the interpretation of the term “exhaustible natural resources” as used in the 1947 GATT is a well-known example.⁴⁴

Secondly, rules from different subsets of international law as well as general international law can be considered to be “any relevant rules of international law applicable in the relations between the parties” for the interpretation of the substantive obligations. This is often referred to as the systemic method of interpretation. In the *Oil Platforms* case, for example, the International Court of Justice referred to this method in order to interpret the obligations of the parties to a bilateral treaty in the light of their obligations under general international law.⁴⁵

42 See the Commentary to the ILC draft Articles on the Law of Treaties, which indicates that “the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule”. Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, UN Doc A/6309/Rev.I, Yearbook of the International Law Commission 1966, Vol. II, p. 220.

43 VCLT, Art. 31 (3) states that “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules applicable in the relations between the parties”.

44 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, 12 October 1998,.

45 *Oil Platforms (Iran v. U.S.)*, 2003 ICJ Reports 161, at para. 41. The Court stated in relevant part: “under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account “any relevant rules of international law applicable in the relations between the parties” (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force...”.

a) *Customary international law*

Customary international law constitutes an important source for this study, first, because it is capable of binding all States, irrespective of their adherence to a particular treaty regime.⁴⁶ In view of the near absence of specific global and regional treaties on the Arctic customary international law is important since it reflects the *opinio juris* and the practice of the relevant States on the management of the Arctic. In this sense, customary international law obligations are therefore basic obligations that are binding on the large majority of states. Furthermore, customary international law obligations play an important role in the interpretation of treaty provisions, because by their very nature they constitute “relevant rules that are applicable in the relations between the parties” according to Article 31 of the Vienna Convention. Moreover, a major advantage of customary rules over treaty obligations is related to their operation in situations of legal uncertainty. In contrast, the continued applicability of treaty obligations is largely dependent upon the operation of the treaty of which they are part. Treaties can be suspended or their operation can be affected in other ways, which also affects the applicability of the individual obligations contained in the treaty, unless these treaty obligations represent customary international law as well.⁴⁷ Of course, obligations under customary international law do not operate in the same manner irrespective of the circumstances in which they apply. For example, the customary international law obligation to conduct an environmental impact assessment for economic projects that are likely to cause damage to the environment does not necessarily give rise to the same procedural obligations in situations of armed conflict as it does in situations of peace.⁴⁸ In order to determine the existence of a rule of customary international law, Article 38 (1) (b) of the ICJ Statute requires “evidence of a general practice accepted as law”. Therefore, it must be demonstrated that there is an established State practice (objective requirement) and that States are convinced that this behaviour is required under international law (subjective requirement). In an often-quoted paragraph of the ICJ judgment in the *North Sea Continental Shelf* cases, the Court explains the subjective requirement as follows:

“[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or to be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need

⁴⁶ As discussed in chapter II, it should be noted that the US is not a party to UNCLOS.

⁴⁷ On the relationship between treaty law and customary international law, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, 1986 ICJ Rep. 14, at paras 173-179. Also see Y. Dinstein, *The Interaction between Customary International Law and Treaties*, 322 *Recueil des Cours* 243 (2006).

⁴⁸ This obligation is discussed in more detail in Chapter 4 of this study.

for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitates*”.⁴⁹

Consequently, rules of customary international law can be considered to provide a general legal framework applicable to the exploitation of natural resources in line of what is provided in multilateral treaties or in the absence thereof. This legal framework applies to the large majority of States and it operates even when specific treaty obligations do not, or when States have not become parties to these treaties. For these reasons this thesis devotes considerable attention to establishing the customary legal status of rules and principles, even when they have been recognised in treaty law as well.

b) *Soft law*

‘Soft law’, in particular principles and standards formulated in non-binding documents, constitutes an important reference point for this thesis.⁵⁰ Although soft law comes in many different forms, most instruments referred to in this thesis can be classified in one of the two following categories. The first consists of non-binding instruments adopted by States, either directly or through their representation in an intergovernmental organization, while the second consists of non-binding instruments adopted by other actors with the purpose of influencing State behavior.

The work of the UN International Law Commission is relevant in this respect. This Commission was established by the UN General Assembly in 1947 as an independent expert body with the specific mandate to promote “the progressive development of international law and its codification”.⁵¹ Furthermore, reference can be made to the work of the International Law Association

49 *Continental Shelf Cases*, 1969 ICJ Rep. 3, at para 77.

50 The phenomenon of ‘soft law’ is broader and is also referred to in relation to soft norms in otherwise binding treaties. However, this book focuses on soft law in the sense of non-binding documents. For discussions on the notion of soft law, see, eg A. Boyle, C. Chinkin, *The Making of International Law*, Oxford University Press (2007); D. Shelton, *International Law and ‘Relative Normality’*, in *International Law 137* (M. Evans ed., 2014); H. Hillgenberg, *A Fresh Look at Soft Law*, 10 EJIL 499 (1999); J.J. Kirton, M.J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, Routledge (2004); J. Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25 *Leiden J. Int’l L.* 313 (2012); M. Goldmann, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 *Leiden J. Int’l L.* 335 (2012). For a critical analysis of the notion of soft law, see J. Klabbers, *The Redundancy of Soft Law*, 65 *Nordic J. Int’l L.* 167 (1996); J. d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford University Press (2011).

51 Statute of the International Law Commission, UN General Assembly Resolution 174 (II) of 21 November 1947, last amended by resolution 36/39 of 18 November 1981, Art. 1. Cf. also UN Charter Art. 13. Refer also to the recent book by the United Nations on Seventy years of the International Law Commission.

and especially to the New Delhi Declaration of Principles of International Law Relating to Sustainable Development.⁵² The second category of soft law also contains instruments adopted by independent treaty bodies, such as the General Comments, recommendations and case law adopted by human rights treaty bodies.

The principal question that arises in relation to the concept of soft law is what value – if any – these instruments have for international law. The concept of soft law is subject to an intense debate in the academic literature between authors who attribute legal value to soft law documents and those who adhere to a strictly binary – or positivist – approach to international law.⁵³ This thesis does not regard soft law as a direct source of international legal rights or obligations. For an important distinction between soft law and law proper is that soft law does not have an immediate legal effect. It cannot be directly relied on in court or in inter-State relations in general, nor does the violation of soft law trigger the application of the secondary rules of international law, such as those relating to state responsibility. In other words, soft law does not create rights or obligations for States and it can be “set aside” without any legal consequences.

Nevertheless, soft law is important for international law in a number of ways. Specifically, for the purposes of this book, it performs two important functions. First, soft law is used in this book as a means to interpret and clarify obligations under international law. For example, it is used as a source of information to determine the ordinary meaning of vague or open-ended treaty terms, in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. Furthermore, soft law documents are also used in a more general way to give substance and meaning to obligations under international law. The General Comments and case law made by human rights treaty bodies, for example, are used to interpret the provisions of the relevant treaties and clarify the substantive obligations of parties to these treaties in a contemporary context.

In addition, soft law documents are relied upon in this thesis as a source of information to indicate the direction in which international law is developing (or one hopes it will be developed (*lex ferenda*)). This is especially true for soft law that falls into the first category, i.e., non-binding documents adopted by States. The declaration on the indigenous peoples of the Arctic adopted by the Arctic Council serves as an example. Although soft law documents cannot create *opinio juris* as such, soft law documents can be regarded as a form of recognition by States of the importance of certain principles and standards. These documents represent an initial agreement between States to take certain principles or standards as guidelines for their future behavior and as a basis for future legal development.

52 UN Doc. A/57/329, 31 August 2002.

53 See *supra* for literature on the notion of soft law.

In many cases, the initial proclamation of principles or standards in non-binding documents has subsequently resulted in a formal endorsement of these principles or standards, either through their incorporation in a formal treaty or through their gradual acceptance as norms of customary international law. Soft law is used for these purposes in this Thesis.

THE STRUCTURE OF THE THESIS

This research is divided into two parts; the first explores the contemporary international law of the sea applicable to the Arctic and consists of three chapters. The first chapter is referred to as Arctic territorial and resources claims that have been developed since 2012 in the light of the effects of climate change in the area. Special emphasis is given to the legal status of the commitment on behalf of the United States, and whether or not it is bound by UNCLOS in relation to the delimitation of maritime borders. Attention is paid to the outer limits of the continental shelf delineation pursuant to Article 76 of UNCLOS and its applicability in the relations of the Arctic States *vis-à-vis* United States.

The second and third chapters focus on the sea itself and the regimes regulating economic activity in the area. The second chapter discusses the new navigational routes that are already available or that will be very soon, with the potential to change the global navigational map. The details of the regimes already in force are to be analyzed, explaining potential gaps and legal vacuums. The third Chapter deals with fisheries management and protection. Fishing currently constitutes the largest economic activity in the Arctic Ocean. An understanding of its regulation is crucial to explain the importance of the sustainable management of living resources. Fishing regulation impacts not only the economic activity of States, but also the financial viability and physical existence of indigenous peoples. It is crucial for protecting the sustainability and the feasibility of the marine ecosystem itself.

This thesis does not directly deal with hydrocarbon exploration and exploitation as a special activity for two main reasons. First, at least for now, there is no prospect of exploration and exploitation of gas and oil in areas outside national jurisdiction. Second, even if such exploration and exploitation will be possible in the future, UNCLOS has already created a regime for the areas existing within the extended continental shelf and for the ones existing in the international seabed (the so-called Area) that is discussed in the relevant chapters.

The second part of the thesis deals with Governance issues. The first Chapter of this part (Chapter 4) examines and rejects the idea that the current framework for Arctic governance follows the “conventional wisdom”. It examines the function of the Arctic Council as the primary consultative forum on the exercise of governmental authority in the Arctic and aims to underline

its weaknesses and points for improvement either through transforming the current Council or by replacing it with a more effective regional organization. The second chapter of this part (Chapter 5) deals with the idea of the creation of a new Arctic Treaty as a substantive means of governance. The ideas presented reject the prospect of a regime similar to the Antarctica regime due to the lack of a major environmental agreement that would be binding and relevant for all Arctic States as well as the special interested States, whose number is growing rapidly. The third chapter of Part II (Chapter 6) discusses the issues of adaptation to the effects of climate change in the Arctic. Moreover, it tests the mitigation theories, analyses the relevance of the 2015 Paris Agreement on Climate Change and examines the status of indigenous peoples, using the Land Claims of First Nations in Canada as a model example of incorporation of indigenous interests within a State. The penultimate Chapter of this thesis (Chapter 7) examines issues of security in the Arctic Region in terms of diplomatic and military importance and in its energy dimensions, since the amounts of untapped hydrocarbons are amply sufficient to change the energy map of the world. The final Chapter contains concluding observations and provides answers to the research questions posed in this introductory Chapter.