



Universiteit
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The Netherlands

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

Sarris, A.

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Summary

1 AIM OF THE THESIS AND RESEARCH QUESTIONS

This Thesis provides a comprehensive scholarly analysis of contemporary international law, geopolitics and international security in the Arctic. 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. 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.

The Thesis aims to answer the following 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?*

The abovementioned questions constitute the basis of the analysis throughout the whole text of the Thesis and are answered in the concluding Chapter.

2 THE LEGAL FRAMEWORK

The Arctic does not have a legal system of its own, as the region does not enjoy any unique recognized legal status. Instead, it is a geographic space within and beyond the jurisdiction of several circumpolar countries, generally referred to as the Arctic states. Of the Arctic states, five are considered Arctic coastal (or littoral) states because they share maritime areas in the Arctic Ocean. These

are Canada, Denmark (through Greenland), Norway, Russia, and the United States. The other three, Iceland, Finland, and Sweden, have Arctic territories but do not have coastlines on the Arctic Ocean.

The Arctic Ocean encompasses a maritime area of fourteen million square kilometers, an expanse that includes areas within as well as beyond national jurisdictions. Because of this fragmented jurisdictional configuration, the Arctic legal order is a complex set of national, international and transnational regulations. While national regulations apply to the Arctic within the sovereign jurisdiction of each Arctic state, international law is binding on all the nations, including the Arctic states, that have agreed to abide by that law. In other words, the countries are bound by specific international rules they ratify following the procedures referred to in international law, such as those in the 1969 Vienna Convention on the Law of Treaties (VCLT). Furthermore, the United Nations Convention on the Law of the Sea (UNCLOS) is an international regulation containing comprehensive mechanisms for governing the world's oceans and seas. It is often referred to as the "Constitution of the Oceans"; it is binding on all the Arctic nations except the United States, which has not ratified the instrument. Because the US has not ratified UNCLOS, the rules of the Convention do not strictly control its behavior in the Arctic marine area. Nevertheless, the United States is bound to follow customary international law, a set of norms or rules observed by states consistently and continuously based on the belief that such behavior is law – the so-called customary international law. Most articles in UNCLOS are a codification of the rules of customary international law, whereby those provisions are binding on the United States as part of the law of the sea. The law of the sea, including UNCLOS, provides an overarching legal framework for governing the Arctic Ocean. While the framework applies to all actors from within and beyond the Arctic, UNCLOS, pursuant to its Article 234 on ice-covered areas, grants Arctic coastal states some prerogatives, such as the right to adopt special legal measures on frozen areas.

Similarly, the United Nations Framework Convention on Climate Change (UNFCCC) – a global regulatory scheme for mitigating and adapting to the impacts of climate change – applies to all parties to the Convention, including all the Arctic states. The Convention and its follow-up processes impose a global legal responsibility, shared by the Arctic states, to reduce the emission of greenhouse gases. Alongside the set of international regulatory mechanisms that apply to the Arctic are regionally focused regulations that are also binding on the region's actors. The latest instrument of this sort of regulation is the FAO (Food and Agriculture Organization) Fisheries Agreement (Agreement to Prevent Unregulated High Seas Fisheries in the central Arctic Ocean). The parties include all five Arctic coastal states (Canada, Denmark (for the Faroe Islands and Greenland), Norway, Russia, and the United States) as well as other actors having a stake in Arctic fisheries, such as China, the European Union, Iceland, Japan and the Republic of Korea. The FAO Agreement did not mark the first time Arctic states came together to create regional regulations.

The 1973 Polar Bear Agreement (Agreement on the Conservation of Polar Bears) was the first legally binding treaty that brought all five Arctic coastal states together under one umbrella.

Cooperation continued under the auspices of the Arctic Council, an inter-governmental forum of the eight Arctic countries. Within this framework, the Arctic states have adopted a set of regulatory instruments that legally bind them. Examples of such regulatory arrangements are the 2011 Arctic Search and Rescue Agreement (Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic), the 2013 Arctic Oil Spill Agreement (the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic) and the 2017 Arctic Scientific Cooperation Agreement (the Agreement on Enhancing International Arctic Scientific Cooperation). An additional aspect of the Arctic legal system is intensive involvement on the part of non-state actors, such as the region's Indigenous peoples, in policy shaping, which eventually influences the law-making process in the regional setting. For example, certain Indigenous groups have been designated "permanent participants" in the Arctic Council. This gives them a role in the decision-making process, providing inclusivity in the making of soft law. The Arctic legal system thus recognizes the involvement of both state and nonstate actors at various levels.

Finally, Arctic states' national regulations cover the Arctic territory within their domestic boundaries. These regulations are often influenced by and sometimes adjusted to comply with the rules of several international legal instruments with transnational effects. For example, the laws of many countries contain regulations on environmental impact assessments. While implemented nationally, these also apply to actions which states propose within their Arctic jurisdictions, highlighting regional specificity. In sum, the Arctic legal system includes laws that apply to the individual countries either as part of national law or international law, as well as those adopted and enforced by all states as part of international law, these pertaining primarily, but not exclusively, to the environmental governance of the Arctic region as a whole.

3 INDIGENOUS PEOPLE AND ARCTIC GOVERNANCE

Indigenous knowledge refers to the wisdom, practices, specific skills and techniques, social interactions, rituals, spirituality and worldview found among Indigenous peoples. This knowledge has been developed over long histories and with the experiences of interaction between Indigenous communities and their surrounding natural and social environment. The knowledge is often known as "traditional knowledge" despite its crucial value in providing insights into social-ecological processes and interactions that today serve to supplement science-based Western knowledge. Given the knowledge value of Indigenous peoples on sustainable land use behavior, natural resource

practices and the functioning of ecological processes and biodiversity, a part of Indigenous knowledge is referred to as “Indigenous ecological knowledge” or “Traditional Ecological Knowledge” (TEK). In a nutshell it is a system of knowledge which, in most cases, is transmitted orally from generation to generation, yet is dynamic and has proven its validity.

The knowledge is context-specific, collective, holistic, and adaptive. Society transforms due to its internal and external stressors, and so its knowledge systems, including Indigenous knowledge, that adapt to such transformation. For Indigenous peoples, this knowledge informs decision-making about fundamental aspects of their livelihood. It provides the basis for locally managed forms of environmental governance and “sustainable development”. However, the knowledge suffers from a lack of strict legal protection in the prevailing Intellectual Property Rights framework because of its subjective existence, as a result of which it lacks proper documentation that would identify the knowledge and its owner.

Yet the knowledge is well-recognized as a fundamental resource, especially in environmental governance. Recognition was first given in the 1992 Rio Declaration on Environment and Development. Principle 22 of the Declaration stressed the value of Indigenous knowledge in environmental decisionmaking for achieving sustainable development. The renovated interest in recognizing Indigenous knowledge is evident in the international legal framework, such as in the Convention on Biological Diversity (CBD). The Preamble of the Convention and particularly Article 8(j) reflect such acknowledgement. State parties to the Convention are encouraged to respect, preserve and maintain the knowledge, innovations and practices developed by their Indigenous and other local communities for the conservation of biological diversity and sustainable use of the environment.

The 2010 Nagoya Protocol on Access to Genetic Resources and Benefit Sharing under the CBD later undertook to operationalize the use of Indigenous knowledge, particularly that concerning the use of genetic resources associated with traditional knowledge. One aim of the Protocol is to create a system that will protect Indigenous knowledge from biopiracy, misappropriation and misuse. The Preamble and Article 31 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – a universally agreed international instrument – refer to Indigenous knowledge as an essential element not only for sustainable development but also for equitable development and proper management of the natural environment. Indigenous knowledge plays an integral part in the fight against climate change. The climate change regime calls for integrating Indigenous knowledge in climate governance because of the deep interconnection between Indigenous peoples and the environment, and their profound respect for the planet Earth. Article 7(5) of the 2015 Paris Agreement stressed that adaptation actions to fight against the impacts of climate change should take advantage of the knowledge that Indigenous and other local communities possess.

In this regard, an emphasis has been put on community-driven, participatory and transparent processes. Today, Indigenous peoples participate in climate negotiation processes through their representative organizations, such as the International Indigenous Peoples' Forum on Climate Change (IIPFCC), and thereby influence the international climate law-making process. Indigenous knowledge forms an integral part of the Arctic governance framework. The peoples have inhabited the region for thousands of years, living in harmony with its pristine natural environment. They have experienced the changes that have affected the Arctic for many generations from time immemorial and have developed survival techniques allowing them to adapt. In their land- and nature-based livelihood practices, such as hunting, fishing, reindeer and caribou herding, Arctic Indigenous peoples have elaborated unique practices. These offer fundamental lessons to promote our understanding of the Arctic's ecological support systems, nature conservation and human-animal interactions in the specific Arctic context.

However, because of the disproportionate impacts on the Arctic driven by climate change, the knowledge held by its Indigenous peoples lacks the predictability it once had. Nevertheless, their knowledge is crucial in Arctic-related legal and policy processes. Such processes are reflected in the Arctic's governance structure, such as in the Arctic Council.

4 THE ARCTIC AND THE WAR IN UKRAINE

The damage done by Russia's full-scale invasion of Ukraine is hard to quantify. To stalled grain shipments, world hunger, soaring energy prices, and rampant inflation must be added the baleful effects for one of the most remote and uninhabitable regions of the world, the Arctic. The war has essentially frozen the region's preeminent governing body, the Arctic Council.

For decades, the Council has been a shining star of light-touch, collaborative governance. Driven by its mandate of sustainable development and environmental protection, its work has informed some of the most significant legally binding international agreements and treaties like the International Maritime Organization's Polar Code and the Arctic section of the annual Intergovernmental Panel on Climate Change report.

This work ground to a halt in March 2022, as the other seven Arctic States – the United States, Canada, Denmark, Norway, Sweden, Finland, and Iceland – “paused” their cooperation with Russia. In a joint statement in June, the “Arctic 7” announced in a Joint Declaration on Limited Resumption of Arctic Council a “limited resumption of our work in the Arctic Council, in projects that do not involve the participation of the Russian Federation.” However, without data from Russia's roughly 45% share of the Arctic, the Council's working groups cannot possibly function at full capacity. Having forsaken its traditional “leave politics at the door” policy by excluding Russia,

the Council must now evolve to compensate for today's realities. The Arctic has changed significantly since the Council's inception in 1996 and according to Boulègue, the traditional "High North – low tension" paradigm in the region has been replaced by a "high-octane" environment of geopolitical competition and crisis.

The climate crisis has arrived and is hitting the Arctic especially hard. Interest in new shipping lanes and potential natural resource extraction has sparked competition between non-Arctic states, and the rapid militarization of the region by both Russia and NATO has raised tensions. Employing doom-filled phrases like "the Arctic Council is dead," some Arctic experts have suggested that the events of 2022 indicate there is no chance of a revival. In this view, the Arctic 7 should focus its attention on other mechanisms of High North governance and security like the Barents Euro-Arctic Council, the Arctic Security Forces Roundtable, and the Northern Group. This perspective eschews the importance of the political function of the Council to the Arctic's roughly 4 million inhabitants, who are some of the most vulnerable to climate change and environmental degradation. It does not resolve the significance of the work done by the Council's six active Working Groups in shaping global Arctic policies, nor does it address the importance of the Council as a forum for discussion on the future of the Arctic with non-Arctic states. Another approach is to push for the full resumption of Arctic Council operations. From this perspective, the benefits of the Arctic Council's style of apolitical, collaborative governance are worth preserving. The challenge is to keep the process alive in the hope of a future, less aggressive Russia which is of course impossible while the Kremlin occupies large swaths of Ukraine.

5 STRUCTURE OF THE THESIS

This Thesis 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 (Chapter 1) investigates Arctic territorial and resources claims that have been developed since 2012 in the light of the climate change effects in the area. Special emphasis is given to the legal status of the commitment on behalf of the United States, and whether 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 the United States. The second and third chapters (Chapters 2 and 3) focus on the sea itself and the regimes regulating economic activity in the area.

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 "conventional wisdom". The next chapter (Chapter 5) deals with the idea of the creation of a new Arctic Treaty as a

substantive means of governance. The following chapter (Chapter 6) discusses adaptation to the effects of climate change in the Arctic. The penultimate chapter (Chapter 7) examines issues of security in the Arctic Region in terms of diplomatic and military importance, including its energy dimensions, since the amounts of untapped hydrocarbons are amply sufficient to change the energy map of the world. The final chapter (Chapter 8) contains concluding observations and provides answers to the research questions posed in the introductory chapter.

6 CONCLUSION

National borders are often seen as alien by the indigenous peoples of the circumpolar north, both in Europe and in North America. Sápmi is divided in four parts. In Greenland, which is part of Denmark, and in Canada's Nunavut, different approaches to autonomy can be seen. The move towards regional autonomy can include a few first steps towards the reconstitution of the original sovereignty over these lands and waters. But the borders in the Arctic hurt all who live there. Today, the Arctic is not united. The dominant role of two large powers, the United States and Russia, and the relatively small stature enjoyed by the other Arctic countries in international politics (although they regularly punch above their weight) means that it is unlikely that this situation will change anytime soon. If Arctic communities want to decide the future of the Arctic, at least as far as they can do so today, they need to harness the spirit of international cooperation which for the time being still prevails in the Arctic. After the end of the Cold War, the Arctic has become a space of international cooperation across political divides, but there is no guarantee that the *status quo* will endure forever. Some fault lines already emerged during the 2019 ministerial meeting in Rovaniemi, others are likely to emerge in the future – unless the Arctic finds a unifying project which concentrates the forces of the Arctic nations and excites the people of the Arctic driving them to greater cooperation. The fight against climate change will not be the topic around which the Arctic people will rally, simply because the current leaderships in Moscow and Washington D.C. at best do not believe in climate change and at worst want to accelerate it for personal or national gain.

The law is in the service of society, in particular of the most vulnerable members of society. Article 38 of the Statute of the International Court of Justice reminds international legal scholars that the work of even the best of us is only a “subsidiary means for the determination of rules of law”. The same applies to Arctic law. The question for the international community today is whether the people who live in the Arctic will be given the chance to make decisions for their home region. This is particularly urgent for the Central Arctic Ocean, which is increasingly free of the sea ice (which was long thought to be eternal) or whether the Arctic Ocean will be regulated by the inter-

national community at large just like all other seas. Closer to shore and on land, the rights of local communities will be even more affected by international legal norms. Climate change and globalization have already fundamentally changed the Arctic and made it more similar to the rest of the global north. It remains to be seen whether Arctic law will remain a tool for Arctic communities to defend regional interests. This choice should be in the hands of the people who live in the Arctic.

It is the task of the Arctic legal researcher to empower the people of the Arctic by creating and sharing knowledge about the international legal system and the place of the Arctic within it. Arctic law, therefore, is the sum total of the norms of public international law which are or can become relevant for the Arctic and the people who live here. Legal research in this field has to have a practical aim and is not an end in itself. The research of Arctic law is by necessity practical and centered on the Arctic and all who live there. Arctic law cannot be limited to philosophical or theoretical considerations, nor can it be only *l'art pour l'art*. The task of the modern international legal scholar is to give a voice to those who do not have one, be it for those who are in need of protection of human rights or for those who, for lack of being part of human society, cannot speak on their own behalf, such as animals, nature or future generations. At a time when international law is more needed than ever before but also ignored by those in power, the task of the academic writers in this field is no longer theoretical. Instead, legal research in the Arctic has to inform the practice of law and speak to the practical problems encountered by people in the Arctic – just as, *vice versa*, the practice of law might benefit from the service provided by legal researchers. As a practice-oriented field of legal research, Arctic law can help erode the artificial distinction between academia and legal practice because, at the end of the day, both aspects serve the protection of the people of the Arctic and their wellbeing.