

The Swedish Defence University
Seminar on
The Arctic - Climate, Culture and Security

The Legal Regime in the Arctic

Address by

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Introduction

Thank you very much for inviting me to address this full-day seminar on the Arctic. As you can see from the program, I believe that knowledge about the legal regime in the Arctic is very important. I will therefore focus on the most important treaty here, namely the United Nations Convention on the Law of the Sea (UNCLOS) that now has 168 States Parties.¹ But I will also mention some other treaties that apply in the Arctic. In this context, I will also focus on two organs, the Arctic Council and Arctic Frontiers, both based in Tromsø, Norway.

However, needless to say, since I only have 30 minutes at my disposal, my presentation will be very brief. I therefore refer to the material about the Arctic available on my website.² I also refer to a very useful map “Maritime jurisdiction and boundaries in the Arctic region”, prepared by the International Boundaries Research Unit at Durham University.³

The United Nations Convention on the Law of the Sea

The United Nations Convention on the Law of the Sea entered into force on 16 November 1994. At this time, I was the Legal Counsel of the United Nations. One of the divisions in the Legal Office was and is the Division for Ocean Affairs and the Law of the Sea (DOALOS).⁴ This meant that I was personally involved in the establishment of the three main organs under the convention, namely the International Seabed Authority in Kingston, Jamaica;⁵ the

¹ See https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm

² See <https://www.havc.se/SelectedMaterial2004.htm>

³ See <https://www.durham.ac.uk/research/institutes-and-centres/ibru-borders-research/maps-and-publications/maps/arctic-maps-series/> and scroll down to “Maritime jurisdiction and boundaries in the Arctic region”

⁴ See https://legal.un.org/ola/div_doalos.aspx?section=doalos

⁵ See <https://www.isa.org.jm/about-isa/>

International Tribunal for the Law of the Sea in Hamburg, Germany;⁶ and the Commission on the Limits of the Continental Shelf that works in New York.⁷

UNCLOS is the overriding legal instrument that governs the order in the oceans in the world – about 70 per cent of the surface of the globe. This means that it applies also in the Arctic Ocean, which is an ocean of some 14 million square kilometres surrounded by continents. All Arctic States except the United States of America are parties to this convention.

The missing U.S. ratification is of course very sad. At the same time, it is important to emphasise that the U.S. recognizes and respects the Convention. In this context, I always refer to the so-called Ilulissat Declaration, adopted on 28 May 2008 by the five coastal states bordering on the Arctic Ocean.⁸ The following sentences in the declaration are of particular interest here:

Notably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims.

Of particular importance here is that UNCLOS governs the territorial sea, the exclusive economic zone (EEZ) and the continental shelf of the five Arctic Coastal States: Canada, Denmark (Greenland), Norway, the Russian Federation, and the United States of America (Alaska).

This means that the Coastal States may exercise sovereignty over their territorial sea which they have the right to establish up to a limit not exceeding 12 nautical miles from the shore. An important rule here is that foreign vessels are allowed "innocent passage" through those waters.

With respect to the Arctic it is also important to note that ships and aircraft of all countries are allowed "transit passage" through straits used for international navigation while States bordering the straits can regulate navigational and other aspects of passage.

With respect to the EEZ, Coastal States have sovereign rights in a 200-nautical mile zone from the shore with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection. At the same time all other States have freedom of navigation and overflight in the EEZ, as well as freedom to lay submarine cables and pipelines.

When referring to UNCLOS it is important to refer also to the "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982", which was adopted on 28 July 1994 and entered into force on 28 July 1996.⁹ It consists of 10 articles dealing mainly with procedural aspects such as signature, entry into force and provisional application. Its Article 2 deals with the relationship between the Agreement and Part XI of the Convention and it provides that the two shall be interpreted

⁶ See <https://www.itlos.org/en/>

⁷ See https://www.un.org/depts/los/clcs_new/commission_purpose.htm

⁸ See <https://arcticportal.org/images/stories/pdf/Ilulissat-declaration.pdf>

⁹ See https://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm

and applied together as a single instrument. In the event of an inconsistency between the Agreement and Part XI, however, the provisions of the Agreement shall prevail.

The Agreement has an annex, divided into nine sections, dealing with the various issues that were identified as problem areas during the informal consultations. These include costs to States Parties and institutional arrangements; decision-making mechanisms for the Seabed Authority; and future amendments of the Convention.

The Commission on the Limits of the Continental Shelf

Furthermore, Coastal States have sovereign rights over the continental shelf outside the EEZ for exploring and exploiting it. The shelf can extend at least 200 nautical miles from the shore. The outer limits of the continental shelf on the seabed shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

And this is where the Commission on the Limits of the Continental Shelf (CLCS) comes into the picture. The CLCS shall make recommendations to States on the shelf's outer boundaries when it extends beyond 200 nautical miles. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding. However, if there are overlapping claims, these have to be settled by the parties. See below.

In this context it is interesting to refer to the submissions that have been made by Canada – in respect of the Arctic Ocean; Denmark – in respect of the Northern Continental Shelf of Greenland; and the Russian Federation – in respect of the Arctic Ocean with three revisions, the latest on 14 February 2023.¹⁰ Here there are overlapping claims in the Arctic Ocean. But it is important to stress that the States are following the rules in UNCLOS.

Coastal States share with the international community part of the revenue derived from exploiting resources from any part of their shelf beyond 200 miles. Depending on the development in the Arctic Ocean, this rule may be of great importance in the future. When the icesheet diminishes, parts of the Arctic Ocean will be navigable high seas; the regime will be the same as in the Atlantic Ocean and the Pacific Ocean. In this context it is important to mention that areas beyond national jurisdiction, which is nearly two-thirds of the oceans, belong to all States. It is a global common.

This means that all States enjoy the traditional freedoms of navigation, overflight, scientific research and fishing on the high seas, often referred to as “the common heritage of mankind”. They are obliged to adopt, or cooperate with other States in adopting, measures to manage and conserve living resources.

Land-locked States have the right of access to and from the sea and enjoy freedom of transit through the territory of transit States. Furthermore, States are obliged to prevent and control marine pollution and are liable for damage caused by violation of their international obligations to combat such pollution.

¹⁰ See https://www.un.org/depts/los/clcs_new/commission_submissions.htm

All marine scientific research in the EEZ and on the continental shelf is subject to the consent of the Coastal State. But in most cases a Coastal State is obliged to grant consent to other States when the research is to be conducted for peaceful purposes and fulfils specified criteria.

The International Tribunal for the Law of the Sea

States Parties are obliged to settle by peaceful means their disputes concerning the interpretation or application of UNCLOS. And this is where the International Tribunal for the Law of the Sea comes into the picture. However, disputes can also be submitted to the International Court of Justice, or to arbitration. Conciliation is also available and, in certain circumstances, submission to it would be compulsory. The Tribunal has exclusive jurisdiction over deep seabed mining disputes.

The International Seabed Authority

The International Seabed Authority is the organization through which States Parties to UNCLOS organize and control all mineral-resources-related activities in the sea area outside national jurisdiction for the benefit of humankind as a whole. In so doing, the Authority has the mandate to ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed-related activities.

One of the latest achievements related to the Seabed Authority is the result of the work of the “Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction (2018-2023)”.¹¹ After several years they managed to negotiate an international legally binding instrument under UNCLOS for the conservation and sustainable use of marine biodiversity beyond national jurisdiction (BBNJ Treaty). At present, I am not able to make a reference to the final document adopted by the conference for the simple reason that it needs further technical adjustments before it can be finalised. However, I have been told that the following text is the final document that was adopted on 3 February 2023 on the condition that it needed final technical adjustment.¹² The final approval is expected to take place in June this year.

The Svalbard Treaty

In describing the legal regime in the Arctic, it is very important to mention the legal regime that applies with respect to Svalbard north of Norway.¹³ Here “The Svalbard Treaty” applies.¹⁴ This Treaty was adopted in Paris on 9 February 1920 and entered into force on 14 August 1925. The Svalbard Treaty recognizes Norway’s sovereignty over Svalbard. Reference is made in particular to Articles 1-3 in the Treaty. In addition to the eight Arctic States, there are almost 40 High Contracting Parties to the Treaty.

At the time the Treaty entered into force, Norway had territorial sea extending to four nautical miles. And there were no rules about EEZ and continental shelf. However, when UNCLOS

¹¹ See <https://press.un.org/en/highlights/BBNJ>

¹² See [draft agreement advanced unedited for posting v1.pdf](#) and a letter from the President of the Conference https://www.un.org/bbnj/sites/www.un.org.bbnj/files/igc-5_oeiwg_letter_to_delegations_27-03-23.pdf

¹³ See north of Norway on the map.

¹⁴ See <https://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>

entered into force and the territorial sea was extended to 12 nautical miles, there were several questions that came to the forefront in relation to the Svalbard Treaty.

In the Treaty, the High Contracting Parties undertake to recognise subject to the stipulations of the Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen (now Svalbard). At the same time, ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters. The rights also include maritime, industrial, mining, and commercial operations.

When UNCLOS entered into force, several questions arose. Norway has accepted that the rights of the High Contracting Parties under the Treaty will apply in the extended territorial waters of 12 nautical miles. However, the question whether these rights should apply also in the EEZ and on the continental shelf is more complex. The question is really whether the concept of “territorial waters” in the Treaty shall be interpreted to include also the 200-mile zone and the continental shelf. This is a very complex subject, and I refer to a few writings where these issues are discussed.¹⁵

The Arctic Council

Let me now focus on the Arctic Council.¹⁶ Since its establishment in 1996, the Arctic Council has provided a space and mechanism to address common concerns across Arctic States. A special emphasis has been on the protection of the Arctic environment and sustainable development. Over the years, the Council has emerged as the pre-eminent high-level forum of the Arctic region to discuss these issues and has turned the region into an area of unique international cooperation.

The Arctic Council is the leading intergovernmental forum promoting cooperation, coordination and interaction among the Arctic States, Arctic Indigenous Peoples and other Arctic inhabitants on common Arctic issues, in particular on issues of sustainable development and environmental protection in the Arctic. All Arctic Council decisions and statements require consensus of the eight Arctic States.

Since its establishment the interest in the Council among others has grown. This can be seen on the List of Arctic Council Observers, which contains several Non-Arctic States, Intergovernmental and Interparliamentary Organizations, and Non-Governmental Organizations.¹⁷

On three occasions, the Arctic States have negotiated legally binding agreements under the auspices of the Arctic Council. These aim at enhancing international cooperation on issues

¹⁵ See e.g.

Svalbard — Meld. St. 32 (2015–2016) Report to the Storting (white paper)

<https://www.regjeringen.no/en/dokumenter/meld.-st.-32-20152016/id2499962/sec3?q=snow+crab>

Øystein Jensen The Svalbard Treaty and Norwegian Sovereignty

<https://arcticreview.no/index.php/arctic/article/view/2348/4675>

UiO : Faculty of Law University of Oslo The legal regime of the maritime zones around Svalbard An analysis in light of recent developments in international law

<https://www.duo.uio.no/bitstream/handle/10852/87820/1/221.pdf>

¹⁶ See <https://arctic-council.org/> and <https://arctic-council.org/about/>

¹⁷ See <https://arctic-council.org/about/observers/>

related to maritime search and rescue, marine oil pollution, and Arctic scientific cooperation respectively. The agreements can be found here.¹⁸

But the situation in the Arctic Council is presently very problematic because of Russia's aggression against Ukraine. On 8 June 2022, the governments of Canada, the Kingdom of Denmark, Finland, Iceland, Norway, Sweden, and the United States issued the following Joint Statement:¹⁹

In response to Russia's full-scale invasion of Ukraine, a flagrant violation of the principles of sovereignty and territorial integrity, based on international law, the other Arctic Council founding states – Canada, Finland, Iceland, the Kingdom of Denmark, Norway, Sweden, and the United States – on March 3 announced a pause in their participation in the Arctic Council. Since March 3, representatives from these States have examined modalities to allow a resumption of the work in the Arctic Council.

We remain convinced of the enduring value of the Arctic Council for circumpolar cooperation and reiterate our support for this forum and its important work.

We intend to implement a limited resumption of our work in the Arctic Council, in projects that do not involve the participation of the Russian Federation. These projects, contained in the workplan approved by all eight Arctic States at the Reykjavik ministerial, are a vital component of our responsibility to the people of the Arctic, including Indigenous Peoples.

We continue to examine additional modalities to allow us to further continue the Council's important work.

Next month, on 11 May, Norway will assume the chairmanship in the Arctic Council after Russia. But the situation is still very problematic.²⁰

The Arctic Climate Impact Assessment

A very important step was taken when, in October 2000, the Ministerial Meeting of the Arctic Council endorsed, adopted, and established the Arctic Climate Impact Assessment (ACIA). This organ was requested to evaluate and synthesize knowledge on climate variability and change and increased ultraviolet radiation, and support policy-making processes and the work of the Intergovernmental Panel on Climate Change (IPCC). It was also requested to address environmental matters, human health, social, cultural and economic impacts and consequences, and to make policy recommendations.

¹⁸ See <https://arctic-council.org/explore/work/cooperation/>

¹⁹ See “Joint Statement on Limited Resumption of Arctic Council Cooperation” at <https://www.state.gov/joint-statement-on-limited-resumption-of-arctic-council-cooperation/>

²⁰ See “Arctic Council under pressure as Norway readies for handoff from Russia” at <https://www.reuters.com/world/europe/arctic-council-under-pressure-norway-readies-russian-handoff-2023-03-28/>

The ACIA presented its first report in November 2004.²¹ When I read this assessment, I realised that it was a significant document representing the first effort to comprehensively examine climate change and its impacts in the Arctic region.

The Assessment identified two questions that are very relevant to the legal regime in the Arctic. First, climate change will have great impacts in the Arctic. Second, and most importantly, these impacts are generated from outside the Arctic and their effects will also occur outside the Arctic. This means that there is a direct connexion between the regime in the Arctic and obligations that apply all around the world.

The Polar Code

In this context reference should also be made to the International Maritime Organization's International Code for Ships Operating in Polar Waters (Polar Code), which entered into force on 1 January 2017.²² This Code is mandatory under both the International Convention for the Safety of Life at Sea (SOLAS)²³ and the International Convention for the Prevention of Pollution from Ships (MARPOL).²⁴ The Polar Code covers the full range of design, construction, equipment, operational, training, search and rescue and environmental protection matters relevant to ships operating in the waters surrounding the two poles.

Arctic Frontiers

As I said, I would also make a reference to Arctic Frontiers, which started its activities in 2006.²⁵ This was the first global scientific conference on economic, societal and environmentally sustainable growth in the north. Since then, yearly conferences have been organised, and I have had the pleasure of participating in several of them. It is a catalyst for decision-making and network building by mobilizing key voices of science, policy, business, and local Arctic communities. One important purpose is to rapidly turn knowledge into actions.

Through outreach activities and with competent and committed partners on Arctic issues, Arctic Frontiers sets the agenda for a responsible and sustainable development of the Arctic.

The Arctic Frontiers partnership network consists of some of the world's leading actors in the Arctic. The competence and interdisciplinarity of the partner network is unique in both national and international contexts.

The Arctic Frontiers Administration is located at the Fram Centre in Tromsø, Norway. The Administration is responsible for day-to-day operations and for the organisation of the annual conference, and reports to the Board of Arctic Frontiers.

²¹ See <https://www.amap.no/documents/download/1105/inline>

²² See <https://www.imo.org/en/MediaCentre/HotTopics/Pages/polar-default.aspx>

²³ See [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)

²⁴ See <https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-%28MARPOL%29.aspx>

²⁵ See <https://www.arcticfrontiers.com/> and <https://www.arcticfrontiers.com/about-us/>

The Importance of the Rule of Law

In closing, let me emphasise that the Arctic is actually an excellent example when it comes to explaining the importance of the rule of law at the national and international level. There is a detailed legal regime in the Arctic. At the same time, this regime is now threatened by the fact that one of the Arctic States, the Russian Federation, is violating some of the most fundamental rules in international law.

Democracy and the rule of law are prerequisites for international peace and security. And the rule of law is not a question for lawyers only. On the contrary: everyone in a society should have an idea about what the rule of law means. Therefore, education about the rule of law should be started in schools as early as possible. Of particular importance is that politicians understand their responsibility for the rule of law. I am therefore closing by referring to a publication entitled “Rule of Law – A guide for politicians”.²⁶ It is a brief guidebook of some 40 pages freely available on the web for downloading and printing in 26 languages. Please, read it and spread the message!

Thank you for your attention!

²⁶ See *Rule of Law – A guide for politicians*. A Guide elaborated under the auspices of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden, and the Hague Institute for the Internationalisation of Law (HiIL), the Netherlands
<https://rwi.lu.se/publications/rule-law-guide-politicians/>