

New Chances and New Responsibilities in the Arctic Region: An Introduction

by Georg Witschel*

The Arctic and its ocean present us with challenges that can be grouped according to three topics: the environment including society and research; economic matters including resource exploitation and maritime traffic; and finally, international law.

All three topics are included in the declaration that was issued by the five coastal States bordering on the Arctic Ocean, which agreed on a general set of rules at a high-level Arctic conference in Ilulissat at the end of May 2008.¹ They noted that the international law of the sea provides a solid foundation for the “responsible management” of issues relating to the continental shelf, protection of the marine environment, freedom of navigation and marine scientific research. In order to protect the unique ecosystem of the Arctic Ocean, there is to be “cooperation among the five coastal states and other interested parties”.² There is also talk of cooperation when it comes to search and rescue activities. Safety at sea is to be effected through bilateral or multilateral arrangements between “relevant” States. There is also mention of cooperation among the coastal States and with other interested parties when it comes to the collection of scientific data concerning the continental shelf.³

These statements are important and fundamental. They confirm the validity of the international law of the sea, particularly in the form of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁴ and reflect the five coastal States’ desire to cooperate with third parties. All non-coastal States should honor this desire and understand it as an offer which they should take up constructively.

Because this desire to cooperate is expressed in necessarily general terms, it is up to us to consider the form such cooperation could take. I would be happy if we could take up these issues in our discussions. What instruments and what institutions can meet the challenges posed by the Arctic in the three areas previously mentioned?

These spheres serve as a “pole star” to help guide us in our discussions.

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¹ Proelss/Müller ‘The Legal Regime of the Arctic’ ZaöRV 68 (2008) 652.

² Ilulissat Declaration, Arctic Ocean Conference, Greenland, 27-29 May 2008 <<http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>> (16 June 2009) para. 5.

³ Ibid. para 7.

⁴ United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

Allow me to reiterate several of the areas Minister of State Gloser identified yesterday⁵ as of major importance for our deliberation:

The environment: Part XII of the UN Convention on the Law of the Sea regulates the protection and preservation of the marine environment. However, in many cases its provisions are very general and open to interpretation. With the exception of a single provision, the one on ice-covered areas,⁶ they do not apply specifically to the Arctic. Other environmental aspects are regulated in a host of multilateral agreements – again, these are not specific to the Arctic.⁷

Is this ambivalent foundation really sufficient for getting to grips with the Arctic's pressing environmental issues? As the German and British Foreign Ministers stated in a joint article in March 2008: "It is vitally important for European Security to implement governance structures for the Arctic region based on international law, aiming at a cooperative and peaceful management of resources and preserving the ecological heritage of mankind".⁸

Could this stated task perhaps be mastered with the help of an accompanying implementing agreement to the UN Convention on the Law of the Sea? It would not be the first implementing agreement of its kind.⁹

The common heritage of mankind: The high seas of the Arctic Ocean has to date been an area regarded by the Convention on the Law of the Sea as part of the "common heritage of mankind".¹⁰ This is particularly relevant as far as sea-bed resources are concerned. If future recommendations by the Commission on the Limits of the Continental Shelf should bring about a substantial enlargement of the outer continental shelf of coastal States, which would reduce the size of the Area regarded as the common heritage of mankind,¹¹ then how can we make sure environmental interests and other international concerns are taken into account?

Research: Polar research is of immense interest to the international community and to numerous research countries – not least because the Arctic is an early indicator of climate change. So there must be as broad a scope as possible for such research. How can we ensure that future polar research is not jeopardized either by

⁵ See article by G. Gloser (in this volume).

⁶ Art. 234 UNCLOS.

⁷ Winkelmann 'Arktische Ressourcen nutzen und arktische Umwelt schützen: Quadratur des Kreises?' in: Simonis et al. (eds.) *Lob der Vielfalt, Jahrbuch Ökologie 2009* (Hirzel Stuttgart 2008) 38-39.

⁸ Steinmeier/Miliband 'Europe Has to Face Up to the Security Policy Impact of Climate Change – Joint Contribution by Frank-Walter Steinmeier and His British Counterpart David Miliband' Federal Foreign Office, Press Communication 088/08 (13 March 2008) para. 10.

⁹ See e.g. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (done 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

¹⁰ Art. 136 UNCLOS.

¹¹ For a definition of the "Area" see Art. 1 (1) UNCLOS: "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

enlarged national outer continental shelves or by newly accessible shipping routes? How can the relevant guarantees be anchored?

Fisheries: There is no overall management of fisheries in the Arctic Ocean at present, there are only partial solutions. Around Spitzbergen there are unilaterally determined fishery and preservation zones. It would seem desirable to arrive at Arctic-specific regulations and control mechanisms for the Arctic Ocean, too.

Institutional framework: One of the most important institutions dealing with the Arctic is the Arctic Council with its eight Member States and numerous observers. The Council's achievements are many and various. They do not need to be listed here.¹² The Council functions intergovernmentally, and has neither a secretariat supported by all members nor its own secure budget. Its decisions and the drafts produced by its six working groups¹³ are not legally binding.

Against this background, one could ask: how can the Arctic Council retain the advantages of its current way of working and at the same time help bring about an intensified and more binding cooperation among all involved? Several States are applying to become observers at the Council, as is the European Union (EU). Would there be any justification, for instance with an eye to the comparable Antarctic treaty system, in making such qualified States voting members of the Council with no territorial claims in the Arctic?

Cooperation with third parties: Important UN bodies and authorities, international organizations like the International Maritime Organization (IMO), the EU and third countries are involved in – sometimes vital – Arctic issues. I should mention the Commission on the Limits of the Continental Shelf, the United Nations Environment Programme (UNEP), the EU Commission¹⁴ and countries with a high degree of polar engagement. Without false modesty I include the Federal Republic of Germany in the latter.¹⁵ How can the general international cooperation mentioned in the Ilulissat Declaration be organized and institutionalized?

Security: Can security issues in the Arctic really be dealt with without an institutional framework in the long term? We all know that the Arctic Council explicitly does not have a security mandate.¹⁶ I doubt that this is the ideal solution. The Arctic Ocean is precious to the whole of humanity. We are currently seeing an in-

¹² Stokke 'A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention' *Marine Policy* 31 (2007) 402 ff.

¹³ Arctic Contaminants Action Program (ACAP), Arctic Monitoring and Assessment Programme Working Group (AMAP), Conservation of Arctic Flora and Fauna (CAFF), Emergency Prevention, Preparedness and Response Working Group (EPPR), Protection of the Arctic Marine Environment Working Group (PAME), Sustainable Development Working Group (SDWG); in greater detail: Stokke (ibid.) 404.

¹⁴ Commission of the European Communities 'Communication from the Commission to the European Parliament and the Council – The European Union and the Arctic Region' COM (2008) 763 final (20 November 2008).

¹⁵ See e.g. Deutsche Kommission für das Internationale Polarjahr 2007/2008 (ed.) *Polarjahr – Der deutsche Beitrag. Polarforschung in globaler Verantwortung* (2009).

¹⁶ Bloom 'Current Developments. Establishment of the Arctic Council' *AJIL* 93 (1999) 712 ff.

crease in military activity and options. Is there not a need for appropriate platforms to deal with these matters too?¹⁷

Settlement of legal issues: Numerous legal issues in the Arctic remain outstanding even today. These include, for example

- the actual extent of the outer continental shelf of the coastal States of the Arctic Ocean;
 - the legal binding effect of recommendations made by the Commission on the Limits of the Continental Shelf (and decisions based on these recommendations);¹⁸
 - sections of the maritime borders in the Barents and Beaufort Seas;
 - the legal nature of the Northwest Passage;¹⁹
 - the territorial status of Hans Island;
 - the concrete implications of the so-called Canadian clause in Art. 234 UNCLOS regarding times of melting ice;
- and many other issues.

Some very definite and very confident positions have been held on some of these questions for many years. A number of these legal questions are rather bilateral issues and it is right to deal with them bilaterally. But would it not be a good idea sometimes to get a judgment or at least an advisory opinion from the International Tribunal for the Law of the Sea? This might also help to further consolidate and build on what the Ilulissat Declaration calls the “solid foundation” provided by the international law of the sea.

The melting ice in the High North seems not only to raise the water levels, but also quite a number of questions, which need to be discussed. Chance and responsibility have to go hand in hand when further exploring the Arctic and exploiting her resources.

¹⁷ See Holtsmark ‘Towards Cooperation or Confrontation? Security in the High North’ NATO Defence College, Research Paper No. 45 (February 2009) 1-12.

¹⁸ Art. 76 (8) UNCLOS (“... final and binding.”).

¹⁹ See Byers ‘Internationales Recht und internationale Politik in der Nordwestpassage: Konsequenzen des Klimawandels’ ZaöRV 67 (2007) 145-57.