

# An International Governance Framework for the Arctic: Challenges for International Public Law – A Danish Perspective

by *Thomas Winkler\**

Let me begin with an important introductory point of geography. There are a number of geographical definitions of the Arctic and the Arctic Ocean.<sup>1</sup> We, as legal experts, have to start out by making certain which area we are in fact talking about, as this has both legal and political implications. This conference focused on the Arctic, but it is no coincidence when I, in the following, primarily refer to the Arctic Ocean. It was likewise no coincidence that the Ilulissat Conference in May of last year was an “Arctic Ocean Conference” and not an “Arctic Conference”. The part of the Arctic that I will focus on is thus the part of the Arctic which is bordered by the five coastal States of Norway, Canada, the United States, the Russian Federation and Denmark/Greenland. The purpose of this definition is not to exclude anybody. At the same time, it cannot be denied that the five coastal States from a legal perspective have common rights and obligations in regard to the Arctic Ocean. It is therefore both natural and necessary that these five coastal States also work closely together.

The issue for discussion in this paper is to determine what challenges for international public law the Arctic region entails and whether an “International Governance Framework for the Arctic” should be established. In my view, this issue can be broken down into three specific questions:

- A general legal need assessment, i.e. do we need a new legal regime in the Arctic Ocean?
- A specific legal need assessment, i.e. how can we ensure implementation at national level of appropriate measures within the existing legal framework?
- And lastly, how should the coastal States and non-coastal States work together in the future?

In short, my answer to those questions would be that the Arctic Ocean faces many challenges, but only very few that public international law does not already offer the right instruments to deal with. In the following I will explain why this is the case seen from the perspective of the governments of Denmark and Greenland.

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<sup>1</sup> On Arctic terminology and definitions see Roach ‘International Law and the Arctic: A Guide to Understanding the Issues’ *Southwestern Journal of International Law* 15 (2009) 302 ff.

In recent years the Arctic Region has been climbing ever higher up on the political agenda. Not least due to the highly visible consequences of climate change.<sup>2</sup> Quoting from the Ilulissat Declaration: “The Arctic Ocean stands at the threshold of significant changes. Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities, and the potential exploitation of natural resources”.<sup>3</sup> The general sentiment is that the challenges that lie ahead for the Arctic Ocean must be addressed politically and through public international law.

As to the current international political agenda, I feel it necessary to underline that Denmark does not see a looming conflict in the Arctic Ocean. It has become very popular to interpret any move by any coastal State as a prelude to armed conflict. This is, however, very far from reality and one should all be extremely careful not to let those focusing on conflict prevail. The reality on the ground is that all coastal States are committed to the peaceful settlement of any disputes. This was the clear message to the world from the Ilulissat Conference in May of last year and the core content of the Ilulissat Declaration.<sup>4</sup>

The five coastal States are committed to cooperating with all interested parties. The Ilulissat Declaration states this in no uncertain terms. At the same time, it is disturbing when interested parties from outside the Arctic Ocean ignore the interests of the coastal States as expressed in the Ilulissat Declaration. It is even more disturbing when some seem to ignore the fact that the five coastal States are fully aware of their responsibilities and take those responsibilities extremely seriously.

Another issue which needs to be addressed up front is the parallels which many like to draw between Antarctica and the Arctic Ocean.<sup>5</sup> One argument often heard is that since we already have a special treaty for Antarctica,<sup>6</sup> we also need one for the Arctic<sup>7</sup> – or to use the local language in Berlin: “So ein Ding müssen wir auch haben.”

There is, however, one profound and crucial difference between the two polar regions: Antarctica is land – the Arctic is sea. This has far-reaching legal and political implications. The international legal systems governing sovereignty of and access to land territory and to maritime territory are, as you all know, fundamentally different.

<sup>2</sup> Cf. Notz ‘Arktis und Antarktis im Klimawandel’ APuZ 47 (2007) 27–32.

<sup>3</sup> Ilulissat Declaration, Arctic Ocean Conference, Greenland, 27–29 May 2008 <<http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>> (16 June 2009) para 2.

<sup>4</sup> Cf. Winkelmann ‘Fixed Rules of Play for Dividing up the Arctic Ocean: The Ilulissat Declaration of the Arctic Coastal States’ SWP Comments 18 (2008) 1–4.

<sup>5</sup> See e.g. Holmes ‘Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty’ Chicago Journal of International Law 9 (2008) 346 ff.; Koivurova ‘Alternatives for an Arctic Treaty – Evaluation and a New Proposal’ RECIEL 17 (2008) 17 ff.

<sup>6</sup> Cf. Antarctic Treaty (signed 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

<sup>7</sup> Smith ‘Time for an Arctic Convention?’ WWF Arctic Bulletin 1 (2004) 3; Nowlan *Arctic Legal Regime for Environmental Protection* (IUCN Gland 2001).

The Arctic Ocean is subject to the sovereignty and resource-related rights of each individual coastal State. A comprehensive international legal regime governing these issues has already been put in place with the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>8</sup>

In my view there is, at this stage, no general legal uncertainty in the Arctic Ocean and therefore no need to develop a new legal regime. Any comparison to Antarctica is simply not legally valid. The law of the sea and the other relevant legal systems already contain the necessary rights and obligations to face the challenges that lie ahead for the Arctic Ocean.<sup>9</sup>

From the Danish perspective, the five coastal States are in a unique position to take up the current challenges as far as the Arctic Ocean is concerned. This is the reason why the Russian Federation, the United States, Norway, Canada and Denmark convened in Ilulissat in Greenland in May of last year by invitation from the Danish Foreign Minister and the Premier of Greenland and agreed on the Ilulissat Declaration. This document confirms the commitment of the five coastal States to the international legal framework that applies to the Arctic Ocean, most notably the law of the sea. It underlines the commitment of these States to the orderly settlement of any possible disputes. And it provides a solid foundation for a responsible management of the Arctic Ocean.

The key word is cooperation. And the five coastal States do cooperate. Regular contact is established within the respective networks<sup>10</sup> and, as a more specific example, Denmark and Greenland work closely together at the technical level with Canada and Russia in the mapping of the continental shelf.

It is, however, important to stress that the existence already of a comprehensive legal framework for dealing with the Arctic issues does not imply that further efforts are not needed. Quite the opposite is true. The five coastal States and other users of the Arctic region should continue to implement appropriate measures at both national and international level and apply relevant provisions of the existing legal framework. Hence, the key challenge is to implement appropriate measures within the existing legal framework and to carefully consider whether further implementation measures are relevant and practicable. This is especially pertinent with regard to the protection of the fragile environment in the Arctic Ocean.

One example of how the international community may contribute to a sustainable development in the Arctic Ocean is urgent need to agree on transforming the

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<sup>8</sup> United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396.

<sup>9</sup> See e.g. H o e l 'Do We Need a New Legal Regime for the Arctic Ocean?' *International Journal of Marine and Coastal Law* 24 (2009) 443-56; Proelss/Müller 'The Legal Regime of the Arctic Ocean' *ZaöRV* 68 (2008) 651-87; S t o k k e 'A Legal Regime for the Arctic? Interplay with the Law of the Sea Convention' *Marine Policy* 31 (2007) 402-408.

<sup>10</sup> E.g. the Arctic Council and the Barents Euro Arctic-Council; cf. Ilulissat Declaration (note 3) para. 8.

IMO Polar Code<sup>11</sup> into a binding legal instrument. This is clearly illustrated by the political slogan “Never an Exxon Valdez in the Arctic”.<sup>12</sup> Cruise ships are another area of acute concern. It has to be ensured that cruise ships are adequately equipped to navigate in the area and to protect passengers and crews in case of accidents. One may argue that this is in fact the most urgent matter at hand, as these ships are already sailing further and further north along the west coast of Greenland. Many States and international organizations have pledged their support to a sustainable development in the Arctic Ocean. The truth of the matter is, however, that when it comes to search and rescue in the Arctic, the victims will look to the Arctic States for assistance. Again, other States and international organizations will make a true difference if they support the work being undertaken by expert bodies to ensure that cruise ships in the region fulfill certain standards.

In this regard I would also like to touch on one legal issue of special interest for the Danish government with regard to national implementation of the international legal framework, namely the role that Art. 234 UNCLOS could play in the Arctic. Art. 234 provides a right for coastal States to “adopt and enforce ... regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone ...”.<sup>13</sup> In order for Art. 234 to be applicable to an area, it is a condition that “severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance”.<sup>14</sup> The Arctic Ocean clearly passes this test.

The notion of all five coastal States implementing Art. 234 in a way that imposes high and strict safety standards on vessels in the Exclusive Economic Zones (EEZs) is very interesting from the point of view of protecting the fragile environment in the Arctic Ocean. A simple look at the map shows us that if all five coastal States impose high safety standards on vessels in their EEZs, these standards will constitute a solid “fence of safety”/safety net around the Arctic Ocean, as no ship may enter the Arctic Ocean except through the EEZ of one of the coastal States.

Such a measure, based on existing international law, would have tremendous potential implications for improving the safety of navigation in the Arctic Ocean and, hence, save lives at sea and protect the marine environment, without attempting to create new comprehensive international legal frameworks or structures. This is one example of how the coastal States, based on the existing legal framework, may protect the Arctic Ocean and thus our common heritage.

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<sup>11</sup> International Maritime Organization ‘Guidelines for Ships Operating in Arctic Ice-covered Areas’ IMO doc. MSC/Circ.1056 and MEPC/Circ.399 (23 December 2002).

<sup>12</sup> On 24 March 1989 the Exxon Valdez oil spill took place in Alaska. It constituted one of the world’s largest oil spills and caused major environmental harm.

<sup>13</sup> United Nations Convention on the Law of the Sea (note 8).

<sup>14</sup> *Ibid.*

In conclusion, let me just underline that the five coastal States are committed to the existing cooperation between the States in the Arctic Region. The Arctic Council and the Euro-Arctic Barents Council are at the forefront of this development.

While recognizing the unique position of the five coastal States and the special role of the cooperation between States in the Arctic Region, all States and relevant international organizations, including the European Union and the International Maritime Organization, should work closely together with the Arctic States to ensure the necessary implementation of existing international law. This, however, is not the same as a call for a new institutional framework for the management of the Arctic and the Arctic Ocean. There is a framework already in place and therefore no need to invent a new one.

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