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## The Public Order of the Arctic: Problems and Prospects

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THE PUBLIC ORDER OF THE ARCTIC: PROBLEMS  
AND PROSPECTS

*Charles H. Norchi\**

INTRODUCTION  
I. ORDER  
II. PROSPECTS  
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## INTRODUCTION

This special issue of the *Ocean and Coastal Law Journal* (OCLJ) appraises the present and future of a region that is critically important for our planet: the Arctic.<sup>1</sup> It is where climate change is intensely observed, the effects experienced, and no part of the planet remains untouched.<sup>2</sup> The Arctic is also the world's smallest ocean, surrounded by the territories of nation-states, of which the largest is Russia. The proximity of NATO to Russian assets and bases underscores the region's geostrategic significance. As the sea ice melts, navigation becomes more feasible, extractive resources more exploitable while wildlife and traditional lifestyles become threatened. And the nearest American territory to the European Arctic is Maine, which is forging linkages in education, research, shipping, and commerce.<sup>3</sup> And uniquely among American law schools the University of Maine School of Law offers a teaching and research program in Arctic Law, some fruits of which are presented in this volume of the *Ocean and Coastal Law Journal*.

## I. ORDER

Since the emergence of the Westphalian system of nation-states and international law, Arctic territory was considered *terra nullius*, land belonging to no one and thus upon discovery, susceptible to sovereign claim.<sup>4</sup> The news in 1909 that the North Pole had been reached generated intense interest among the international lawyers of the day. James Brown Scott observed:

The announcements of the discovery of the pole by Dr. Cook and Commander Peary have aroused much discussion in the press as to the title acquired by discovery. In considering this interesting question it must be borne in mind that title by discovery applies to land, not to water, for it cannot be maintained that the discovery of an open sea conveys ownership of the water or indeed to the

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1. The organizers gratefully acknowledge the support of the U.S. Russia Foundation.

2. NATIONAL RESEARCH COUNCIL, ARCTIC MATTERS: THE GLOBAL CONNECTION TO CHANGES IN THE ARCTIC 15 (2015).

3. Charles H. Norchi, *Maine Will be Valuable Partner to an Independent Greenland*, PORTLAND PRESS HERALD (Oct. 7, 2023), <https://www.pressherald.com/2023/10/07/commentary-maine-will-be-a-valuable-partner-to-an-independent-greenland/> [https://perma.cc/GDY9-MG3A].

4. The modern nation-state system is traced to the 1648 Peace of Westphalia which "marked the acceptance of the new political order in Europe." J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 5 (6th ed. 1963).

lands washed by it, as it is universally held that the open seas, beyond the limit of territorial waters, are insusceptible of appropriation.<sup>5</sup>

Hence the mostly ice-covered Arctic Ocean was not subject to appropriation and was hence a free sea—*mare liberum*. But what of the land surrounding that ocean? Scott wrote further, “It would therefore appear that Arctic discovery as such vests no title, and that the [A]rctic regions, except and in so far as they have been occupied, are . . . no man’s land.”<sup>6</sup> Needless to say, much Arctic territory was hardly *terra nullius*—the lands were mostly occupied by people indigenous to the Arctic.

Ice, darkness, and storms limited external Arctic access minimizing navigation, trade, and conflict. As 20<sup>th</sup> century technology accelerated, polar areas were increasingly accessible to distant governments, companies, traders, and scientists. By the 21<sup>st</sup> century, dramatic climate change was transforming sea ice thereby affecting livelihoods, the environment, commerce, and international security. A 2005 *New York Times* article highlighted Arctic waters as an emerging arena of international competition in a High North version of the “Great Game.”<sup>7</sup> External demands for access and control have centered the once remote Arctic in the wider arena of the Public Order of the World Community.<sup>8</sup>

The Public Order of the Arctic is a function of the international system and it is a critical component of international law. Order, that “pattern of activity that sustains the elementary or primary goals of the society of states”<sup>9</sup> is the scaffolding of international relations and law. But across time there has been no continuity to what Stanley Hoffmann called “patterns of order” in the international system.<sup>10</sup> History reveals variations of order from the Kantian ideal of peace<sup>11</sup> to a near-Hobbesian state of

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5. James Brown Scott, *Arctic Exploration and International Law*, 3 AM. J. INT’L L. 928, 938 (1909).

6. *Id.* at 941.

7. Clifford Krauss et al., *As Polar Ice Turns to Water, Dreams of Treasure Abound*, N.Y. TIMES (Oct. 10, 2005), <https://www.nytimes.com/2005/10/10/science/as-polar-ice-turns-to-water-dreams-of-treasure-abound.html> [<https://perma.cc/H2ZX-FTKZ>].

8. Indeed, “our world is composed of a series of community contexts beginning with the globe as a whole and diminishing in territorial range and scope.” Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 10 (1959).

9. HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 8 (COLUMBIA UNIV. PRESS 1977).

10. *See generally* STANLEY HOFFMANN, *PRIMACY OR WORLD ORDER: AMERICAN FOREIGN POLICY SINCE THE COLD WAR* (1978).

11. *See generally* IMMANUEL KANT, *PERPETUAL PEACE* (Lewis White Black ed., The Liberal Arts Press, Inc. 1957) (1795).

nature.<sup>12</sup> But any impression of the international system as a near Kantian picture of tranquility was shattered when Russia invaded Ukraine—and the Arctic was not immune.<sup>13</sup>

Russia accounts for the dominant Arctic land mass, possesses a substantial and resource-rich coastline, and borders a crucial sea route with significant regional military assets including nuclear submarines. As a consequence of the war in Ukraine, the Russian Federation was suspended from the Arctic Council, regional militarization accelerated, and the Public Order of the Arctic, those features of social process protected by law,<sup>14</sup> eroded. The same international law that applies generally to other regions of the world applies to the Arctic. Thus, States are under an obligation to refrain “from the threat or use of force against the territorial integrity or political independence of any state”<sup>15</sup> and to “settle their international disputes by peaceful means.”<sup>16</sup> The law of treaties, the law of state responsibility, the law of armed conflict, the law of the sea, and every other branch of international law applies in the Arctic in the same manner as to other regions of the world.<sup>17</sup> Legal systems work when law and power are

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12. *See generally* THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., Oxford, Basil Blackwell 1947) (1651).

13. World events appeared to confirm Henry Kissinger’s observation that “[n]o truly global ‘world order’ has ever existed.” HENRY KISSINGER, *WORLD ORDER 2* (Penguin Books 2014).

14. World public order is defined as “those features of the world social process, including both goal values and implementing institutions, that are protected by law.” MYRES MCDUGAL & ASSOCS., *STUDIES IN WORLD PUBLIC ORDER X* (NEW HAVEN PRESS 1960).

15. U.N. Charter art. 2, ¶ 4.

16. *Id.* ¶ 3.

17. General international law applicable to the Arctic includes the United Nations Charter, the United Nations Convention on the Law of the Sea, the Universal Declaration of Human Rights, the Declaration on Indigenous Peoples Rights Treaties, the UN Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity, the International Convention for the Prevention of Pollution from Ships, the London Dumping Convention of the Prevention on Long-Range Transboundary Air Pollution, the Convention on International Civil Aviation, and the Svalbard Treaty. *See generally* U.N. Charter; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res 61/295 (Sept. 13, 2007); United Nations Framework Convention on Climate Change, June 12, 1992, 1771 U.N.T.S. 107; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; International Convention for the Prevention of Pollution of Ships, Nov. 2, 1973, 1973 U.S.T. 322; Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217; Chicago Convention on International Civil Aviation, opened

in relative equilibrium. International law, a decentralized legal system, is especially reactive to the application of power detached from authority. The persistent deployment of Russian power untethered from law portends a re-calibration of World Public Order including that of the polar regions.

## II. PROSPECTS

The contributors to this *OCLJ* Symposium appraise the contemporary Public Order of the Arctic, including conditions shaping that order: climate change, sovereign claims, indigenous rights, and adherence to international law.

In his Article, Kenneth Høegh, Head of Representation, Representation of Greenland to the United States and Canada, considers the past and present of Greenland's foreign policy emphasizing that "it is particularly important to ensure Greenland the greatest possible decisive influence on the Kingdom of Denmark's foreign and security policy in relation to Greenland and the Arctic."<sup>18</sup> Mr. Høegh underscores that "Greenland is the very reason for the Kingdom's involvement in Arctic politics" and thus "full equality and respect in the foreign policy decision-making processes regarding the Arctic is thus a strong wish from the Greenlandic side."<sup>19</sup> This is fundamental to the 2024 Arctic Strategy, "Greenland in the World: Nothing About Us Without Us."<sup>20</sup> And as a further indication that the order of the Arctic is in flux, for the first time a Greenland diplomat will join Denmark's representation on the North Atlantic Council, the decision-making body of NATO.<sup>21</sup>

Since 1920 an international agreement has cloaked Svalbard with a veil of sovereignty thus presumably settling claims to the archipelago adjacent to the coast of Norway.<sup>22</sup> The preamble of the Svalbard Treaty states that a principal purpose of that instrument is to assure the

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for signature, Dec. 7, 1944., 61 Stat. 1180, 15 U.N.T.S. 295; Treaty Concerning the Archipelago of Spitsbergen, Feb. 9, 1920, 43 Stat. 1892, 2 L.N.T.S. 7 [hereinafter Svalbard Treaty].

18. Kenneth Høegh, *Greenland's Foreign Policy, Past and Present: From the Merchants' Message to Bilateral Agreements*, 29 OCEAN & COASTAL L.J. 181, 182 (2024).

19. *Id.* at 189.

20. Government of Greenland, *Greenland in the World, Nothing About Us Without Us*, NAALAKKERSUISUT (Feb. 2024), [https://naalakkersuisut.gl/Publikationer?sc\\_lang=da](https://naalakkersuisut.gl/Publikationer?sc_lang=da) [<https://perma.cc/KWU2-FUYN>].

21. Mie Olsen, *Greenland Gets First NATO Envoy Amid Rising Tensions in Arctic*, COURTHOUSE NEWS SERVICE (Mar. 31, 2023), <https://www.courthousenews.com/greenland-gets-first-nato-envoy-amid-rising-tensions-in-arctic/> [<https://perma.cc/VUS3-PZTW>].

22. Svalbard Treaty, art. 1, Aug. 14, 1925.

development and peaceful utilisation of the archipelago.<sup>23</sup> However the Soviet Union, later Russia, has promoted the view that Svalbard is a demilitarised area, while Norway has advocated an alternate interpretation. Dr. Eda Ayaydin in *Under the Shadow of Absolute Sovereignty: Exploring Conditional Sovereignty in the Case of Svalbard Geopolitics*, explores whether the archipelago is truly a demilitarised area, or whether only certain elements of demilitarisation are applicable.<sup>24</sup> She posits the problem of conditional sovereignty as a feature of the Public Order of the Arctic.

Climate change is the *sine qua non* condition of Arctic marine accessibility and hence navigation. The Arctic is the sole ocean surrounded by continents and possessing only one major high seas point of access—through the Greenland and Norwegian seas.<sup>25</sup> In their piece, *Projections for Arctic Marine Accessibility: Risks Under Climate Change*, Dr. Xueke Li and Professor Amanda Lynch reveal “the emergence of a new route regime in response to the evolving context of climate change and human pressures . . . which presents opportunities for Arctic exploration and maritime trade, as well as risks for marine ecosystems and coastal communities.”<sup>26</sup> Their implicit question is how the projected conditions will affect Arctic Ocean access and the applicable international law of the sea?

Dr. Li’s Arctic maritime accessibility projection bears on a critical provision of the United Nations Convention on the Law of the Sea (UNCLOS) considered by Professors Amanda Lynch and Charles Norchi. Article 234 of UNCLOS affords additional coastal state competence over waters which are ice-covered for most of the year. The authors write “the stability of this prescription is threatened by anthropogenic climate change . . . and the myth of Article 234 will ultimately align with the complexities of the phenomenon of disappearing ice.”<sup>27</sup> These complexities, they go on to describe, include rapid retreat of ice in the Russian sector and continued ice coverage in the Canadian sector, underpinned by profound uncertainties regarding the future trajectory of

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23. *Id.* at preamble.

24. Eda Ayaydin, *Under the Shadow of Absolute Sovereignty: Exploring Conditional Sovereignty in the Case of Svalbard Geopolitics*, 29 OCEAN & COASTAL L.J. 265, 267 (2024).

25. Donald R. Rothwell, *International Straits and Trans-Arctic Navigation*, 41 OCEAN DEV. & INT’L L. 266, 271 (2012).

26. Xueke Li & Amanda H. Lynch, *Projections for Arctic Marine Accessibility: Risk under Climate Change*, 29 OCEAN & COASTAL L.J. 353, 354 (2024).

27. Amanda H. Lynch & Charles H. Norchi, *Sea Ice and the Law of the Sea: The Myth of Article 234*, 29 OCEAN & COASTAL L.J. 367, 368 (2024).

seasonal ice cover.<sup>28</sup> They conclude “it is in the dynamic nature of international law that prescriptions do not remain constant and neither does ice.”<sup>29</sup>

The law of the sea guarantees continental shelf rights to coastal States, and UNCLOS provides for an Extended Continental Shelf (ECS) claim subject to procedures stipulated in the Convention.<sup>30</sup> Professor James Kraska, in *Strategic Minerals and the U.S. Continental Shelf*,<sup>31</sup> writes that:

[a]fter twenty years of collecting the data for its claim, the United States released coordinates of its ECS in December 2023. Alaska is featured prominently in the U.S. claim, and the seabed around the largest state holds the promise of vast quantities of strategic minerals and [rare earth elements] . . . . As the United States and its partners and allies pursue a global security strategy grounded in economic and supply chain security informed by the new realities of military and geopolitical risk, the resources of the continental shelf will become increasingly important.<sup>32</sup>

He examines plausible U.S. Arctic extended continental shelf claims, the stakes, and the consequences for national security.

The interactions and activities of the Arctic Ocean depend upon a robust international law of the sea. In his Article, *Russia’s Arctic Maritime Claims*, Professor Raul Pedrozo underscores that the Russian Federation has extensive maritime claims in the polar region.<sup>33</sup> After reviewing the applicable legal regime in the Arctic, he examines Russian claims to determine their consistency with international law.<sup>34</sup> The question is adherence to the international law of the sea—including maritime boundary agreements, straight baseline claims, the regulation of maritime traffic in the Northern Sea Route (NSR), and Russia’s extended continental shelf claim in the Arctic.

The Arctic is home to vast numbers of indigenous peoples with distinct customs, traditions, and modes of decision-making through transnational organizations such as the Inuit Circumpolar Council

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28. *Id.* at 385.

29. *Id.* at 391.

30. UNCLOS, art. LXXVI, § 1-10 *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

31. See James Kraska, *Strategic Minerals and the U.S. Arctic Continental Shelf*, 29 OCEAN & COASTAL L.J. 235, 247 (2024).

32. *Id.* at 237.

33. See Raul Pedrozo, *Russia’s Arctic Maritime Claims*, 29 OCEAN & COASTAL L.J. 197, 199 (2024).

34. *Id.*



(ICC) and the Sami Council. Ten percent of the Arctic population, roughly ten million people, are indigenous.<sup>35</sup> Their prominence is recognized by the Arctic Council (AC), the paramount regional institution which is a forum of governments with indigenous people as permanent participants. Dr. Vera Solovyeva, in *Climate Change in Arctic and Indigenous Peoples: Challenges and Solutions*, explains how environmental change stresses society, especially people who maintain traditional lifeways and depend on agricultural and livestock production.<sup>36</sup> She underscores that although indigenous people have contributed very little to climate change, global warming affects their health, food security, livelihoods, and shelter.<sup>37</sup> Dr. Solovyeva underscores that “stressing factors rooted in their recent history and current politics challenge their ability to adapt to changing conditions.”<sup>38</sup> For the Russian Federation, Arctic strategic interests have been a high priority—now intensified. In that context, Dr. Pavel Sulyandziga and Dmitry Bareshkov consider the problem of indigenous peoples as instruments of Russian Arctic propaganda.<sup>39</sup> The geopolitics of the moment renders their analysis especially pertinent.

This Symposium issue includes Comments authored by three University of Maine School of Law students—all candidates for a 2024 Juris Doctor. Mason Brewer argues that legal analysis of the Scottish claim to external self-determination under international law would include Arctic considerations.<sup>40</sup> He reviews the Arctic policy priorities of the U.K. and Scottish governments and plausible roles in self-determination and succession claims of Scotland. Lee Foden explains how international trade in icebergs can become an equitable remedy to be employed by the Paris Agreement in the global response to climate change.<sup>41</sup> Natalie Nowatzke

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35. *Arctic Peoples*, ARCTIC COUNCIL, <https://arctic-council.org/explore/topics/arctic-peoples/> (last visited Mar. 31, 2024) [<https://perma.cc/4P2M-4Z45>].

36. See Vera Solovyeva, *Climate Change in Arctic and Indigenous Peoples: Challenges and Solutions*, 29 OCEAN & COASTAL L.J. 317, 324 (2024).

37. *Id.* at 350.

38. *Id.* at 351.

39. Pavel Sulyandziga and Dmitry Bareshkov, *Indigenous Peoples as a Tool for Russia’s International Publicity in the Arctic Region*, 29 OCEAN & COASTAL L.J. 285, 287 (2024).

40. Mason M. Brewer, *Arctic Policy Considerations for Scottish Independence*, 29 OCEAN & COASTAL L.J. 415, 417 (2024).

41. Lee A. Foden, *A Greater Purpose for Icebergs: Iceberg Trade to Combat the Effects of Climate Change*, 29 OCEAN & COASTAL L.J. 393, 395 (2024).

explains how the Loss and Damage Fund of the United Nations Framework Convention on Climate Change could leave out Greenland.<sup>42</sup>

### III. FUTURES

The authors in this volume grapple with a range of Arctic problems—clarifying goals, evaluating trends, analyzing conditions, future developments, and the alternatives. The subtext is that norms, including in the Arctic, can change with conditions and global events. They can erode over time. And the persistent deployment of Russian power untethered from law portends a re-calibration of world public order.

Arctic decisionmakers engage in that “process of human beings making choices” that we know as law.<sup>43</sup> The challenge is to balance exclusive interests to insure a greater common interest of the Arctic for people and States.<sup>44</sup> Effect and inclusive decision outcomes require legal instruments and institutional arrangements that ensure robust and responsive regional governance in an environment affected by the consequences of thawing land and sea and geopolitical flux, accelerating Arctic events. And as Michael Reisman observed, “legal arrangements must also include credible commitments to apply the resources necessary to make them effective, as the expectation that there are such commitments and that they will be applied in the event of deviance from the arrangement is an important factor in compliance.”<sup>45</sup>

This Symposium collectively appraises how the Public Order of the Arctic, driven by an ever-intensifying process of demands and claims, will evolve in a context shaped by new conditions that include climate change and war.<sup>46</sup> In the Arctic, time, ice, and the power of states are interconnected. The fundamental question remains, “[w]ho gets what,

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42. Natalie L. Nowatzke, *The Loss and Damage Fund: Will It Leave Greenland Behind?*, 29 OCEAN & COASTAL L.J. 439, 441 (2024).

43. W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW: CASES, READINGS, AND COMMENTARY 595, 595 (1987).

44. “How the regional regime for the marine Arctic will develop depends in part on how the balance will be struck between the interests and roles of the many actors that claim equities in the region.” Betsy Baker, *The Developing Regional Regime for the Marine Arctic*, in THE LAW OF THE SEA AND THE POLAR REGIONS, 36 (Erik J. Molenaar, et al., eds., 2013).

45. W. M. REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 83 (2013).

46. See Charles H. Norchi, *The Public Order of the Arctic*, 16 OCEAN & COASTAL L.J. 5, 6 (2017).

when, how?"<sup>47</sup> That is the underlying unknown addressed in this Symposium, *The Public Order of the Arctic: Problems and Prospects*.

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47. Harold Lasswell used this question to define politics in his classic book: *Politics: Who Gets What, When, How*. See HAROLD D. LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW v-vii (McGraw-Hill Book Company, Inc. 1950) (1936).