

Juss i nord: Hav, fisk og urfolk

*En hyllest til Det juridiske fakultet ved
Universitetet i Tromsø 25-årsjubileum*

Tore Henriksen og Øyvind Ravna (red.)



GYLDENDAL
JURIDISK

En diskusjon om statens folkerettslige ansvar vil fortsette, her hjemme og internasjonalt. Statens plikt til å verne det materielle kulturgrunnlag er rettslig sett en resultatforpliktelse. Utviklingen de siste generasjoner viser at sjøsamisk kultur har vært på sterkt voksende front. Dette har flere årsaker, men en viktig faktor gir tallene for nedgang i antall fiskere og antall fartøy i sjøsamiske områder. Statens regulering av fiskeriene har hatt negative virkninger i disse områder. En langt mer aktiv anerkjennelse av retten til fiske vil være hva kulturansvaret krever innenfor fiskerinæringen.

10 MOT EN VERDENSDORDEN

Man ser ikke sjelden at menneskerettighetene fremheves som et av grunnelementene i vårt samfunn. Samme dag jeg skriver dette, leser jeg disse ord av en ledende politiker:³⁴

«Norge er bygget på et verdifundament vokst frem gjennom mange år, bygget på demokrati, rettsstat, menneskerettigheter, likestilling og likeverd.»

Et slikt utsagn vil sikkert få allmenn tilslutning fra alle partier og de aller fleste mennesker i landet. Men menneskerettighetene viser sin karakter av rettigheter – på samme måte som våre gamle borgerrettigheter – nettopp når myndighetene misliker de konkrete virkninger. Det vil kunne skyldes en avgjørelse av vår egen Høyesterett, Den europeiske menneskerettsdomstol eller et traktatorgan ifølge FNs menneskerettskonvensjoner. Det sentrale spørsmål vil da være hvor langt et flertall er villig til å binde seg til å tåle konkrete resultater som går dem imot. Binde seg for å fremme menneskerettighetene som samfunnets verdifundament. Også det internasjonale samfunn.

Det sies i vår hjemlige rettsdebatt at argumentasjonen i favør av menneskerettighetenes virkefelt kan ha et preg der noen mister den nøkterne og realistiske vurdering. Til dette er å si at vi ganske visst må handle som fagjurister også når det er menneskerettigheter det gjelder. Men jussen er et humanistisk fag, der selv fagjuristen må kunne hente kraft fra den gamle tanken gjennom historien om en verdensorden styrt ved lov og rett. De universelle menneskerettigheter er i vår tid et hovedelement i en slik visjon.

34 Raymond Johansen, partisekretær Arbeiderpartiet, kronikk i *Aftenposten* 30. oktober 2011.

The future of Arctic Governance

[personal reflections]

Timo Koivuvrova*

1 INTRODUCTION TO THE COMPLEX LANDSCAPE OF ARCTIC GOVERNANCE

The Arctic is, of course, in many ways a total opposite to the other Pole, the Antarctica. The Arctic consists of an ocean surrounded by continents whereas the Antarctica is an icy continent surrounded by the Southern Ocean. More importantly from the viewpoint of governance, the Arctic differs from the other Pole in that much of the region is under the sovereignty and sovereign rights of states. There are three large federal states – Canada, the Russian Federation and the United States – with their own internal power-sharing arrangements with provinces, states and subjects. The European part of the Arctic is even more complex from the governance perspective. Finland and Sweden are member states of the European Union (EU), as is Denmark. Yet, the Arctic part of Denmark, Greenland, opted out from the then European Economic Community in 1985, and is thus not part of the EU.¹ Iceland has ongoing negotia-

* Timo Koivuvrova is doctor of laws and research professor and director in the Northern Institute for Environmental and Minority Law (Arctic Centre / University of Lapland). He has had the privilege of working with colleagues in the faculty of law of the University of Tromsø for several years. His main field of expertise is international law, in particular international environmental law, the law relating to indigenous peoples and law of the sea. The article here is based on the presentation the author gave in the Australian National University (ANU, Canberra, Australia) on 2 June 2011 during his visiting professorship at the University of New South Wales (Sydney).

¹ Greenlandic Inuit may choose to establish their own independent State as a people at some point in time. The timing of this possible secession from Denmark is very much connected with how quickly and effectively Greenland can exploit its vast offshore hydrocarbon deposits. The more revenues the Inuit receive, the less financial transfers they receive from Denmark – a deal which was struck when reaching the latest compromise and the ensuing Self-governance Act. If the Inuit will establish their own State, they are no longer an indigenous people from the international legal perspective, as they no longer need protection of indigenous legal standards against a State. Yet, Greenlandic Inuit would probably in any case remain part of the ICC, and continue to be represented as an indigenous people in the institutions of Arctic governance and on the UN level. See Statsministeriet, Act on Greenland Self-Government (No. 473 of 12 June 2009) at http://www.stm.dk/multimedia/GR_Self-Government_UK.doc.

ons of accession to the EU, but is currently still a European Free Trade Agreement (EFTA) state together with Norway, both of which are members to the European Economic Area (EEA) Agreement – an agreement that has the effect of making much of EU legislation applicable in Norway and Iceland. Moreover, even though Svalbard Islands are under the sovereignty of Norway, Svalbard Islands are excluded from the EEA agreement.

Much of the Arctic waters and Arctic Ocean is under the maritime jurisdiction of the Arctic states, under their exclusive economic zones or continental shelves. Yet, from the perspective of activities that may become economically accessible when the sea ice recedes even more due to climate change, the Arctic waters look very promising. There is a vast high seas zone in the central Arctic Ocean, altogether 2.8 million square kilometers, enabling distant fishing fleet operations if fish stocks are to move there with the warming waters. There is even more space for navigation when the Arctic Ocean's sea ice gradually melts, given that even in territorial sea, the other states' vessels have innocent navigation rights.

2 CHANGING IMAGE OF THE ARCTIC

have in another article argued that there was a fundamental shift in the way we perceive the Arctic as a politico-legal region, especially when the consequences of dramatic climate change in the region were scientifically established.² The Arctic was for a long time seen as a «frozen desert», an inhospitable and inaccessible region, with very little need for international governance. The region was a major military-strategic frontier during the Cold War – a place where the two rivaling camps of the Cold War were closest to each other. Yet, when the Cold War was coming to an end, Secretary-General Gorbachev's speech in Murmansk in 1987 paved the way to an examination of possible areas for international co-operation. On the basis of a Finnish initiative, the eight states of the region – the five Nordic states, Canada, the United States and the Russian Federation) concluded the 1991 Arctic Environmental Protection Strategy (AEPS),³ which focused mostly on long-range pollutants transported from outside the region into the Arctic via prevailing wind patterns, ocean circulation or through rivers.

The AEPS was merged to the Canadian initiative the Arctic Council during 1996–1998.⁴ The fundamentals of the co-operation remained the same – soft-law body, ad hoc funding and no permanent secretariat – but two things changed: Indigenous peoples

were accorded an unprecedented status in an inter-governmental forum as permanent participants that must be consulted before any consensus decision-making by the Arctic states. Moreover, with the founding of the Arctic Council (AC), sustainable development became the other pillar of the co-operation. Yet the core of the work remained the same, as the working-groups established under the AEPS continued under the AC. The Council has mainly served as a platform for Arctic actors to discuss Arctic policy issues, with occasional soft-guidance documents adopted. The AC has played an important role in sponsoring major scientific assessments, which have made an impact even in global and regional international environmental treaty-making processes. Overall, however, the AC was developed for a region that requires a minimum of governance.

2.1 Gradual Change from Frozen Desert to the Dramatically Changing Region

During the US chair-period of the Arctic Council, 1998 to 2000, the Arctic Climate Impact Assessment (ACIA)⁵ – the first ever regional climate change assessment – was commenced. ACIA established the Arctic as an early warning region of climate change as it showed that the consequences of climate change in the region had manifested from the 1960s onwards and that these consequences will be twice as intense as compared to the rest of the world. Yet, even if ACIA started to change the image of the Arctic from a «frozen desert» to «the dramatically changing region», it did not have strong consequences on policy. It had a clear impact on the internal functioning of the AC and it did provide important scientific information for the Inter-Governmental Panel on Climate Change (IPCC), but ACIA was not a trigger for major actors to change their Arctic policies. Why? ACIA was fairly conservative in its projections. For instance, ACIA projected that the Arctic Ocean will likely be seasonally ice-free by the end of this Century. It was hence no wonder that it did not cause any great revisions of Arctic policies.

It was two almost simultaneous events that finally triggered a series of Arctic policy developments. First, the Russians went ahead and planted their flag on the sea bed beneath the North Pole in August 2007 in Lomonosov ridge, causing diplomatic reactions and vast media uproar. Second, the sea cover of the Arctic Ocean dropped dramatically in September 2007, manifesting very graphically how quickly the climate change was affecting the region. These two events acted as triggers for the Arctic governance issues to enter the halls of power from NGO and academic discussions. Most importantly, these two events made it possible for the media to come up with a very powerful story-line, what is referred to here as a «race to resources». According to this media narrative, climate change

See T. Koivurova, «Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance», 46 Polar Record (2010), pp. 146–156.

See the Arctic Environmental Protection Strategy (AEPS), Rovaniemi, Finland, 14 January 1991, 30 I.L.M., 1624. Declaration on the Establishment of the Arctic Council. (Ottawa Declaration), Ottawa Canada, 19 September 1996. Joint Communiqué and Declaration on the Establishment of the Arctic Council, 35 I.L.M. 1382. For an overview and analysis, see T. Koivurova and D. VánderZwaag «The Arctic Council at 10 Years: Retrospect and Prospects» in *University of British Columbia Law Review* 40:1 (2007), pp. 121–194.

5 «Impacts of a Warming Arctic», ACIA Overview Report (Cambridge: Cambridge University Press, 2004) [ACIA Synthesis Report]; see generally the «Arctic Climate Impact Assessment Final Scientific Report» (Cambridge: Cambridge University Press, 2005), at <http://www.acia.uaf.edu/>.

opens up a new ocean, the seabed of which contains plenty of safe hydrocarbons to be exploited. And, as shown by the Russian flag planting, race is now on between Arctic Ocean coastal states to occupy most of the seabed for their own companies to exploit.⁶

Many facts seemed to support this explanation. Increasing amount of empirical evidence suggested that the Arctic Ocean is opening up much quicker than projected by the ACIA.⁷ And there was also plenty of evidence that the Arctic Ocean coastal states were busy in mapping and claiming the Arctic sea-bed. Some commentators and military analysts suggested that since there are no rules governing the region, even military conflicts may erupt when states protect their hydrocarbon interests in the Arctic. In the 2008 issue of *Foreign Affairs*, Scott G. Borgerson, International Affairs Fellow at the Council on Foreign Relations and a former Lieutenant Commander in the U.S. Coast Guard, argued:

«The situation is especially dangerous because there are currently no overarching political or legal structures that can provide for the orderly development of the region or mediate political disagreements over Arctic resources or sea-lanes. The Arctic has always been frozen; as ice turns to water, it is not clear which rules should apply. The rapid melt is also rekindling numerous interstate rivalries and attracting energy-hungry newcomers, such as China, to the region. The Arctic powers are fast approaching diplomatic gridlock, and that could eventually lead to the sort of armed brinkmanship that plagues other territories, such as the desolate but resource-rich Spratly Islands, where multiple states claim sovereignty but no clear picture of ownership exists.»⁸

2.2 Rapid Policy Development

Even if many «facts» seemed to support the media narrative, it was clearly incorrect. Media and many international relations scholars were fully unaware of the obligation in the United Nations Convention on the Law of the Sea (LOS Convention) that states must submit – within 10 years from becoming parties to the Convention – scientific-technical data to the UN Commission on the Limits of Continental Shelf (CLCS) if they perceive

that their legal continental shelf exceeds 200 nautical miles.⁹ This is what the Arctic Ocean coastal states were doing, observing their LOS Convention duties, given that the Convention entered into force at the end of 1994. Media confused this orderly process of obtaining technical-scientific information from the seabed to make a submission to the CLCS with the idea that states were racing to occupy as much of the seabed as possible.

Yet, even if this media attention was based on wrong premises, it did effect rapid changes among policy actors, testifying to the fact that perceptual changes matter irrespective of whether they are true or not. As already argued, many policy-makers and the general public are fully under the influence of media as to what unfolds in the Arctic.

Many things started to happen after these two events (Russian flag planting and the detection of a vast drop in sea ice of the Arctic Ocean) that took place in August and September 2007, respectively. First of all, the predominant Arctic inter-governmental forum, the Arctic Council, had to adapt to these developments. Second, the Arctic Ocean coastal states held their first meeting in Ilulissat, Greenland in May 2008. The meeting between the five Arctic Ocean coastal states was mainly organized simply to convey a rightful picture of what is unfolding in the Arctic, not a race to resources but an orderly development to examine the outer limits of the continental shelves of the coastal states. Yet, the Arctic Five also issued the so-called Ilulissat Declaration where they outlined an agenda for action in various policy areas, and identified the Arctic Council as only one of the forums in which they conduct their joint policies.¹⁰

This caused a lot of consternation among those member states of the Arctic Council that were not invited to the meeting – Finland, Sweden and Iceland – but also among the permanent participants. Despite requests to also invite other Arctic actors to the coastal state meetings, this did not happen when the next meeting of the Arctic Ocean coastal states was held in March 2010 in Canada. Outside interests to gain a seat in Arctic governance discussions also increased by the day. Gradually, major states and the EU have tried to apply for observer status in the Arctic Council and the queue has grown. Now, China, South-Korea, the EU Commission and Japan have filed their observer applications and Brazil and India are contemplating the same. This will pose a challenge to the structure of the Arctic Council because it will juxtapose small international indigenous peoples organizations – which are normally regarded as NGOs – with major nation-states such as China.

Another change was the «legalization» of the discourse among relevant policy actors. The Arctic Ocean coastal states defined themselves as stewards of the dramatically changing region as well as the region's sovereigns in the Ilulissat Declaration. Since they – in fairly paternalistic terms – stated that they will take care of the region's ecosystems, indigenous

6 For an analysis, see T. Koivurova, «The Actions of the Arctic States Respecting the Continental Shelf: A Reflective Essay», *Ocean Development & International Law*, 42:3, 211–226 (2011).

7 See, e.g., Arctic Council's (AMAP working-group's programme) SWIPA, which projected the Arctic Ocean to be seasonally ice-free as soon as 2030 to 2040. «Snow, water, ice and permafrost in the arctic», Swipa 2011 Executive Summary by the Arctic Monitoring and Assessment Programme, p. 7, at <http://amap.no/swipa/SWIPA2011ExecutiveSummaryV2.pdf>.

8 S. Borgerson, «Arctic Meltdown: The Economic and Security Implications of Global Warnings», *Foreign Affairs* March/April (2008), at <http://www.foreignaffairs.com/articles/63222/scott-g-borgerson/arctic-meltdown>.

9 For an in-depth analysis country by country see Ted L. McDorman, «The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean» in *Journal of Transnational Law and Policy* 18:2 (2009), pp. 155–194, at 176–183.

10 See the Ilulissat Declaration, available at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>.

and other populations,¹¹ it was no wonder that the Inuit Circumpolar Council (ICC) representing Inuit in four Arctic states reacted to the Declaration and issued its own Declaration during the April 2009 ministerial meeting of the Arctic Council called the Circumpolar Declaration on Sovereignty.¹² There, the Inuit affirm that they have self-determination guaranteed under international law that translates also to rights to participate in international policy-making, not only in the Arctic Council but also in Arctic Ocean coastal state meetings. The European Parliament, which nowadays is a co-legislator in the EU, issued two resolutions where it argued that the Arctic should be governed by a more inclusive governance arrangement, modeled after the Madrid Protocol to the Antarctic Treaty.¹³

3 PRESENT CONSENSUS

Despite all these policy developments, including almost all the Arctic states revising their Arctic policy documents,¹⁴ by the end of 2009 consensus seems to have been reached between all the relevant policy actors, even the European Parliament.¹⁵ This consensus is built on the idea that there are already plenty of rules applicable in the region and if there is not, the Arctic states are ready to take regulatory action before any problems should materialize. Hence, the Law of the Sea (USA) and LOS Convention (for other Arctic Ocean coastal states) are seen as forming the major overarching regime governing the Arctic Ocean and

11 The Ilulissat Declaration states, e.g. that «By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges [...] The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities», *supra* note 11.

12 See <http://www.itkk.ca/circumpolar-inuit-declaration-arctic-sovereignty>.

13 The European Parliament urged first the Commission to contemplate initiating Arctic treaty action and then in April 2009 it did the same for the Council. The wording of the October 2008 resolution is as follows (15): «Suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean.» Neither The European Commission nor the Council saw this goal as worth pursuing. European Parliament resolution of 9 October 2008 on Arctic governance, at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0474&language=EN> and the European Parliament resolution on the opening of international negotiations with a view to adopting an international treaty for the protection of the Arctic, at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOT-ION&reference=B6-2009-0163&language=EN>.

14 For a good overview of the recent Arctic littoral State Arctic policy documents see H. Børdasc, «Consistencies and Inconsistencies in the National Strategies of the Arctic Littoral States» (LLM thesis for the polar law masters programme, University of Akureyri, Iceland), available at http://skemman.is/stream/get/1946/5645/1/Harry_Final.pdf.

15 See the 2011 Resolution by the Parliament, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0024+0+DOC+XML+V0//EN&language=EN>.

waters, coupled with various International Maritime Organisation (IMO) Conventions applicable in the region. The Arctic states have also pointed out that there are many existing multilateral environmental agreements (MEA) applicable in the region and that the Arctic Council serves as the predominant inter-governmental forum.

The recent ministerial meeting of the AC in Nuuk Greenland on 12th May 2011 confirmed that the Arctic Council is on the right path. The ministers established a permanent secretariat based in Tromsø, Norway and adopted the first legally binding treaty negotiated under the auspices of the AC, the much needed Agreement on Cooperation on Aeronautical and Maritime Search and Rescue (SAR).¹⁶ Moreover, they established a task-force to examine the possibility to draft an international instrument on Arctic Marine oil pollution, preparedness and response, and promoted strongly the current process in IMO to make the 2009 Polar Code mandatory.

The Scientific assessments sponsored by the Arctic Council are making influences in various international environmental processes. As is well-known, the preamble to the global Stockholm 2001 Persistent Organic Pollutant (POP) Convention mentions the Arctic and its indigenous peoples as particularly affected by long-range transports of POPs. ACIA had a clear impact on the 2007 fourth assessment report of the IPCC, and AMAP has produced important scientific information to the current UNEP lead negotiations over a convention on mercury. Arctic biodiversity assessment, which will be completed by 2013, is likely to influence the workings of the Biological Diversity regime, and the Arctic Marine Shipping Assessment (AMSA) came up with very strong negotiated policy recommendations to IMO and the Arctic states. From a marine governance perspective, it will be interesting to see the impact of the Arctic Ocean Review project. This project will examine gaps in Arctic marine governance and come up with recommendations on how to respond to these by early 2013.¹⁷

4 FUTURE CHALLENGES

There will likely be various drivers of Arctic change in the future. For quite some time it has been the global economic forces that have driven the Arctic change the most, given the region's plentiful natural resources. Yet, in the longer run the biggest driver of policy change will be climate change that already has clear consequences in the region. From the viewpoint of policy developments, one of the clear triggers for policy development will be

16 See the text at http://arctic-council.org/filearchive/Arctic_SAR_Agreement_EN_FINAL_for_signature_21-Apr-2011.pdf.

17 The Arctic Ocean Review (AOR) will result in a review of the global and regional measures that are in place for the protection of the Arctic marine environment. This project will address both sea and land-based activities influencing the state of the Arctic marine environment, and will result in a phase-1 report on existing measures in 2011 and a final report with recommendations in 2013. See AOR Project Plan (2009).

the extent of the Arctic Ocean sea ice coverage. When next there is a vast drop in sea ice extent, such as the one in 2007, this will likely have immediate consequences on policy.

Moreover, the role of media is likely to be crucial. Media has continued to report on Arctic issues in an erroneous manner. My recent experience is from two simultaneous conferences that took place in October 2010. I was one of the presenters in the conference organized in Cambridge titled «NATO: Advanced Research Workshop on *Environmental Security in the Arctic Ocean*» where there was one scholar arguing that the Cold War never left the Arctic. Colleagues from the Arctic Centre were in the so-called Territories of Dialogue conference in Moscow headed by Prime Minister Putin, where one scholar argued that the race to resources in the Arctic poses a threat to the peaceful development in the region. In these two conferences, practically all other participants agreed that if there is a place in the world where peaceful orderly development proceeds, it is in the Arctic.

Yet, what the Guardian and the BBC reported from those two conferences was what these two single scholars argued, resulting in the general public getting the message that there is indeed a possibility of war in the Arctic. When the WikiLeaks of Arctic policy discussions were released, I was interviewed by Al Jazeera over whether military confrontation seems likely, and responded that there is no indication of such a development, at least so far. The way Al Jazeera placed my comment was that I was the only person of all the interviewed experts that did not see a threat of military conflict arising.¹⁸ If this is what decision-makers and the general public get to hear of the Arctic, we cannot rule out the possibility that issues begin to be viewed in this light, provoking a vicious cycle of «militarization» of the discourse and actions in the region.

Even if the Arctic states have clearly taken a responsible policy stance over Arctic governance, there remain difficult questions for the future. Depending on the pace of sea ice retreat, there may emerge a large high seas portion of the central Arctic Ocean that can be used by all distant fishing fleets of the world. The US Congress already proposed a

negotiation of a regional fisheries management organization¹⁹ on the basis of the Straddling Stocks Convention²⁰ to which all Arctic maritime states are parties, but there were no reactions from other states to this proposal. The US has also closed its fisheries off the coast of Alaska in Beaufort and Chukchi Seas until there is more scientific evidence that fishery can be done sustainably. The existing science on this subject is very uncertain, since ACIA seems to suggest that with warming waters the fish stocks may move into high seas, while other research indicates that stocks are likely to stay within the confines of the Exclusive Economic Zone's of the Arctic Ocean coastal states.

Perhaps the biggest single issue to be resolved is how to effectively control shipping, since there is a lot of maritime space for navigation for various purposes in the Arctic waters. As was mentioned, there is a process in motion in IMO to translate the IMO voluntary Polar Code into a legally binding agreement by 2012. Yet, all the evidence suggests that this timeline is too ambitious. The Polar Code was mainly about construction and design standards, that is, what types of ships can navigate in polar waters. Yet, ambitions have grown by the day from the mandatory Polar Code, and now also the environmental protection measures are addressed in the process. This will be very difficult to take forward in IMO since its structure has two separate sub-committees dealing with maritime safety and environmental protection. My recent experience from the above-mentioned NATO conference is illustrative of this. When I delivered my presentation in which I had expressed doubts as to whether the Polar Code will be made mandatory by 2012, the IMO spokesperson immediately stood up and said that they are writing it as we speak. Yet, in her own presentation the next day she evaluated that the Polar Code will be completed probably between 2016 and 2018.

After the Gulf Spill, also the Arctic Council has commenced work on how to effectively handle oil emergencies. Yet, at the moment, there is only one instrument that deals with controlling the offshore oil and gas operations: the Arctic Council's Offshore Oil and Gas Guidelines.²¹ This is a soft-guidance document, which has been revised twice, but there is no monitoring of whether it will make its way into national legislation or practice. Hence, it is difficult to say whether the adopted standards are effective.

Given that all these economic activities have already or are about to enter the region, various attempts are being made to introduce cross-sectoral ecosystem-based management in the region, that is, policy measures to ensure that various activities can be done

19 1st Session of US 110th Congress. s. J. RES. 17. Online: www.fakr.noaa.gov/npfmc/current_issues/Arctic/SJRes17%20as%20of%200cr%2002007.htm.

20 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Agreement for the Implementation, 1995), New York, 4 August 1995. In force 11 December 2001.

21 Protection of Arctic Marine Environment Working Group of the Arctic Council. (2009). Arctic Offshore Oil and Gas Guidelines 29 April, 2009.

18 The news story titled «WikiLeaks: A battle to 'carve up' the Arctic» continues «[...] In a 1987 speech, Mikhail Gorbachev, leader of the former USSR, described the 'threatening character' of NATO in the far north. Today, NATO's role in the Arctic is unclear. 'There is no reason for NATO to have a strong Arctic profile,' says Timo Koivurova, a visiting professor specialising in northern issues at the University of New South Wales in Australia. 'All the Arctic Ocean coastal states have behaved exactly as the Law of the Sea dictates.' But plenty of other people, from scholars to diplomats and military officials, do not entirely share Koivurova's optimistic view. 'The very best case scenario [for peace in the arctic] is that we move beyond fossil fuels,' says American University's Paul Wapner. 'The best case scenario is that we have cooperative institutions – with representatives of indigenous people – who use peaceful and cooperative means to ensure fair access to these resources. The doomsday would be competitive resource wars. As climate change gets worse, people will be pushed to get more resources to run their air conditioners and so forth. My prediction is that we are still going to be addicted to oil [when the main icecaps melt] and these resources are going to be extracted by the most powerful lot – which would include Russia, the US and China', see <http://english.aljazeera.net/indepth/features/2011/05/201151713273937174.html>.

in a co-ordinated way without sacrificing ecosystem functions, especially in the Arctic where ecosystems are very vulnerable to human-induced change. There is soft-work on this in the Arctic Council, in particular in the PAME working group. PAME has drawn large marine ecosystem maps that were used in AMSA and there was a project called Best Practises in Ocean Ecosystem Based Management (BepoMar).²² Moreover, ecosystem based management as a concept was picked up by Sweden, the current chair of the Council, as a tool they will develop in their chair term.

The question that puzzled me and a colleague from the Netherlands Institute for the Law of the Sea (also professor II in Tromsø University) Erik Molenaar is how all this can be done without any legal foundation and without any governance institution making it possible to co-ordinate between various sectoral initiatives. Currently there seems to be a fragmented set of regimes without any overall policy and law-setting process. For this reason, we looked at gaps in marine governance and regulations in the Arctic and possible policy responses, and came up with elements for a possible legally binding instrument for the region.²³

5 CONCLUSIONS: HOW DID I RESPOND?

During all these stages of Arctic governance, I have had to revise my own thinking as to how it should be done. During the «frozen Arctic» period, I was conducting my doctoral dissertation within the confines of libraries and data sets in the University of Lapland Finland. I was a typical ivory tower scholar, ending up with the conclusion in my doctoral dissertation that the Arctic Council is as good an inter-governmental forum as is possible for a region that has the US and Russia as its members.

By the time the policy changes started in August 2007, I had already led numerous international research projects and was giving policy and legal advice nationally and internationally. When the media began to rage over Arctic Ocean coastal states occupying the Arctic Ocean seabed, I – together with international law colleagues that took part in the first Polar Law symposium in September 2008 in Akureyri, Iceland – were able to respond to this media narrative. We were almost united in our message to the media that the recent continental shelf «claiming» activity by the Arctic Ocean coastal states should not be interpreted as «race to the resources» but an orderly development on the basis of the law of the sea and LOS Convention.

Yet, gradually I started to feel uneasy about this Law of the Sea and the LOS Convention being enough for the region. I began to see more foreign ministry lawyers in these

Arctic conferences delivering a message that the Arctic is fully governed by Law of the Sea and the LOS Convention, other conventions and the Arctic Council. Yet, my own thinking started to turn against the emerging consensus. First, I wrote an academic piece arguing for a legally binding instrument for the region²⁴ and then Erik Molenaar and I composed the three part report to the WWF Arctic International.²⁵ For us and to me personally, Law of the Sea and the LOS Convention provide only base rules of the game and almost no operational regulation. In fact, the LOS Convention itself sees regional implementation as the ideal way to implement its general provisions. Moreover, I had difficulties in seeing how this fragmented sectoral policy confusion called Arctic governance could respond to anything without legal foundation and, in particular, without any institution mandated to provide clear politico-legal guidance for the development of the region.

Erik and I have had to defend our arguments on many occasions. I have to admit that I have personally been surprised how quickly the Arctic Council has been able to come up with stronger governance capability. Yet, I tend to still ask whether this incremental and largely soft-law approach – without any clearly mandated institution behind it – can counter the vast challenges ahead.

²² See http://arctic-council.org/workarea/~/media/arctic_meetings_tromso_april_2009/files/archive/sdmg-pame_best_practices_in_ecosystems_based_oceans_management_final_report.pdf.

²³ T. Koivurova and E. Molenaar, «International Governance and Regulation of the Marine Arctic», http://wwf.panda.org/what_we_do/where_we_work/arctic/what_we_do/reforming_arctic_marine_governance/.

²⁴ T. Koivurova, «Alternatives for an Arctic Treaty – Evaluation and a New Proposal» in *European Community & International Environmental Law*, RECIEL 17:1 (2008), Special International Polar Year Issue, pp. 14–26.

²⁵ Supra note 24.