

The Arctic: An Opportunity to Cooperate and Demonstrate Statesmanship

Address by

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ABSTRACT

The Article discusses in four distinct parts disputes relating to maritime boundaries in the Arctic; “gaps” in the legal regime in the Arctic; environmental and security concerns; and the administration of the Arctic.

Regarding the first item, the Article maintains that the point of departure is that the United Nations Convention on the Law of the Sea applies also in the Arctic. Overlapping claims by the coastal states are perfectly legitimate and thus should not be dramatized. What matters is how such differences are resolved.

Referring to suggestions that there are “gaps” in the Arctic legal regime and that a new regime is needed, the Article asserts that this argumentation is misleading as UNCLOS already applies. However, the regime needs strengthening.

Several conclusions are presented concerning the environment and security, partly based on experiences from a conference organized by the Nordic Council of Ministers on September 9–10, 2008 at Ilulissat in Greenland: “Common Concern for the Arctic.”

With respect to the administration of the Arctic, the Article maintains that the Arctic Council should be maintained and further developed as an indispensable tool for the coordination of policy decisions.

The Article concludes by suggesting that the Arctic actually offers an opportunity for states concerned and in particular the Arctic coastal states to demonstrate that they

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are able to cooperate actively in a constructive manner. One way of ascertaining that added political impetus is injected into the process would be to organize the 2011 Arctic Council meeting at the level of heads of state and government.

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I. INTRODUCTION

Distinguished participants,

First of all, I would like to thank the *Vanderbilt Journal of Transnational Law* for inviting me to address you on this occasion. The panel in which I am participating is to address boundary claims as well as environmental, social, and security concerns.

I have chosen to entitle my address *The Arctic: An Opportunity to Cooperate and to Demonstrate Statesmanship*. The purpose of choosing this title is not only to rebut the many ominous statements about upcoming conflicts relating to the Arctic but also to emphasize that the issues that undoubtedly emerge in the Arctic, not least because of climate change, actually offer an opportunity for the states concerned to demonstrate how such matters should be dealt with by responsible actors on the international arena. My address consists of four distinct parts: (1) disputes relating to maritime boundaries; (2) “gaps” in the legal regime; (3) environmental and security concerns; and (4) the administration of the Arctic. I will conclude with a few remarks as to why I believe that the Arctic actually offers an opportunity to cooperate and demonstrate statesmanship.

II. DISPUTES RELATING TO MARITIME BOUNDARIES

The point of departure in discussing disputes relating to maritime boundaries in the Arctic is that the United Nations Convention on the Law of the Sea (UNCLOS) applies in the Arctic. This point has been made over and over again in the

debate, and I do not intend to dwell upon it now. I refer to my earlier *Reflections on the Possibilities and Limitations of a Binding Legal Regime*.¹

It should also be noted that on May 28, 2008, the five coastal states bordering on the Arctic Ocean—Canada, Denmark, Norway, the Russian Federation, and the United States of America—adopted the Ilulissat Declaration.² The following quote is of particular interest in this context:

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.³

The reason for the conspicuous absence of a clear reference to UNCLOS is of course that the U.S. has not yet ratified the Convention.⁴ Despite the fact that both the Clinton and Bush administrations have advocated ratification of this treaty, the matter still lingers in the U.S. Senate.⁵ Some of the arguments advanced against ratification of the treaty are so ignorant of the factual situation that they represent an almost surrealistic reading.⁶

The latest news in this matter appears in the directive on Arctic Region Policy issued by President Bush on January 9, 2009

1. See Hans Corell, *Reflections on the Possibilities and Limitations of a Binding Legal Regime*, 37 ENVTL. POL'Y & L. 321, 321–24 (2007), available at <http://www.havc.se/res/SelectedMaterial/20070604corellarcticlegalregenvpolicy1.pdf> (arguing that the United Nations Convention on the Law of the Sea applies in the Arctic).

2. Arctic Ocean Conference, Ilulissat, Green., May 27–29, 2008, *Ilulissat Declaration* (May 28, 2008), in DANISH FOREIGN POLICY YEARBOOK 2009 154, 154 (Danish Inst. for Int'l Studies ed., 2009).

3. *Id.*

4. See Directive on Arctic Region Policy, 45 WEEKLY COMP. PRES. DOC. 47, 49 (Jan. 9, 2009), available at <http://www.gpoaccess.gov/wcomp/search.html> (select “2009 Presidential Documents” then search “Directive on Arctic Region Policy”; then follow PDF link) (suggesting that the U.S. Senate act favorably on the U.S. accession to UNCLOS).

5. *Id.*; see Letter of Transmittal from William J. Clinton, President, U.S., to U.S. Senate (Oct. 7, 1994), available at <http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1995/html/Dispatchv6Sup1.html> (“I therefore recommend that the Senate give early and favorable consideration to the Convention and to the Agreement and give its advice and consent to accession to the Convention and to ratification of the Agreement.”).

6. See, e.g., Oliver North, *Trojan Horse Sea Law*, WASH. TIMES, Apr. 2, 2005, available at <http://www.washingtontimes.com/news/2005/apr/02/20050402-111012-7230r/> (arguing that ratification of UNCLOS would be “an invitation to an assault on [U.S.] sovereignty and security”); David A. Ridenour, *Ratification of the Law of the Sea Treaty: A Not-So-Innocent Passage*, 542 NAT'L POL'Y ANALYSIS 1 (2006), available at <http://www.nationalcenter.org/NPA542LawoftheSeaTreaty.html> (arguing that UNCLOS, if ratified, would undermine U.S. military interests by outlawing important naval capabilities and would possibly cause the U.S. to “lose control of their environmental laws”).

(the U.S Arctic Policy directive).⁷ According to this directive, “[t]he Senate should act favorably on U.S. accession to [UNCLOS] promptly, to protect and advance U.S. interests, including with respect to the Arctic.”⁸ Let us hope that this question will now be moved forward in the Foreign Relations Committee of the Senate under the chairmanship of Senator John F. Kerry. In the meantime, the U.S. will no doubt apply UNCLOS anyway; most of the Convention is customary international law.⁹

In a region like the Arctic Ocean, it is obvious that there might be overlapping claims with respect to maritime delimitation. These may relate to the territorial sea, the exclusive economic zone, or the continental shelf. Such overlapping claims are perfectly legitimate and should not be dramatized. On the contrary, claims of this nature can be expected as a natural consequence of the applicable law. What matters is how such differences are resolved. The first step is, of course, that the parties do their homework—collect and analyze relevant geographic and geomorphologic data. Thereafter the parties should compare those data and try to resolve any differences through negotiations. If the parties cannot settle the differences through negotiations, there is always the option of resorting to third party dispute settlement. The International Court of Justice has dealt with many such cases,¹⁰ and the International Tribunal for the Law of the Sea is now also competent to deal with such matters.¹¹ This question is also addressed in the U.S Arctic Policy directive, which encourages the “peaceful resolution of disputes in the Arctic region.”¹²

In the past, I had the privilege of chairing the Swedish delegation in three negotiations relating to the maritime delimitation in the Baltic. I always think of these negotiations as a positive experience. The work was constructive and highly interesting. However, since I have developed my thinking on these issues in the past, notably the questions relating to the continental shelf, I do not intend to dwell further upon them now, particularly since other participants will address them.¹³

7. Directive on Arctic Region Policy, *supra* note 4.

8. *Id.* at 49.

9. See Peter Buxbaum, *U.S. Administration Pushes UNCLOS*, ISN SECURITY WATCH, Aug. 24, 2007, <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail?ots591=4888CAA0-B3DB-1461-98B9-E20E7B9C13D4&lng=en&id=53665> (“US policy since the Reagan administration has held that UNCLOS reflects customary international law and asserted navigational rights based on the treaty’s provisions.”).

10. See, e.g., *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, 2009 I.C.J. (July 13), available at <http://www.icj-cij.org/docket/files/133/15321.pdf> (addressing a dispute between two countries over navigation rights on the San Juan River).

11. United Nations Convention on the Law of the Sea Annex VI, Dec. 10, 1982, 1833 U.N.T.S. 397 available at <http://www.itlos.org>.

12. Directive on Arctic Region Policy, *supra* note 4, at 49.

13. See Hans Corell, *The North Is Not the Wild West*, GLOBE & MAIL (Toronto), Apr. 28, 2008, at A.15, available at <http://www.theglobeandmail.com/news/opinions/article682229.ece> (arguing that delimitation in the Arctic is

III. "GAPS" IN THE LEGAL REGIME

I now come to the second part of my presentation: "gaps" in the legal regime. In January 2009, I had the privilege of co-chairing a conference organized by Arctic Frontiers at Tromsø in Norway entitled "The Age of the Arctic."¹⁴ A specific issue raised at this Conference, in particular by the World Wide Fund for Nature (WWF), was the question of "gaps" in the international governance and regulation of the marine Arctic. A distinction was made between "governance gaps" and "regulatory gaps." The former concept refers to gaps in the international institutional framework, including the absence of institutions or mechanisms at a global, regional, or sub-regional level, and inconsistent mandates of existing organizations and mechanisms. The latter refers to substantive and/or geographical gaps in the international legal framework—issues which are currently unregulated or insufficiently regulated at a global, regional, or sub-regional level. At the Conference, reference was made to an Overview and Gap Analysis that the WWF had commissioned.¹⁵

Based on this analysis, representatives of WWF challenged the Ilulissat Declaration and argued that we need a "new legal regime" for the Arctic. With reference to my earlier writings in this matter, it will come as no surprise that I find this argumentation confusing. Also, as I will explain further, I do not agree with the conclusion that the Arctic Council in its present form should be viewed as creating a "gap." However, even if I do not agree with some of the conclusions, the Overview and Gap Analysis is nevertheless an excellent paper on a very complex subject. I believe that WWF and the authors of the analysis should be commended for this valuable contribution to a very important discussion, and I definitely recommend that all concerned study the analysis.

As I have maintained in the past, there is already a binding legal regime that applies in the Arctic, namely UNCLOS. Rather than focusing on new regimes, we should concentrate our resources on working with what we have and examining whether the present legal regime is sufficient. I believe that the conclusion today is that it is not; therefore, we must work towards

governed by the rules set forth in the United Nations Convention on the Law of the Sea and noting that established international law has been very useful in past delimitation negotiations). *But cf.* Corell, *supra* note 1, (arguing that the United Nations Convention on the Law of the Sea is the governing legal regime in the Arctic).

14. See Arctic Council, Arctic Frontiers—The Age of the Arctic, http://arctic-council.org/meeting/arctic_frontiers_-_the_age_of_the_arctic (last visited Sept. 26, 2009).

15. See TIMO KOIVUROVA & ERIK J. MOLENAAR, INTERNATIONAL GOVERNANCE AND REGULATION OF THE MARINE ARCTIC: OVERVIEW AND GAP ANALYSIS (2009), available at <http://www.wwf.se/source.php/1223579/International%20Governance%20and%20Regulation%20of%20the%20Marine%20Arctic.pdf>. This report was prepared for the WWF International Arctic Programme by Timo Koivurova and Erik J. Molenaar and was published by WWF in January 2009.

strengthening it. As a first step, we should ensure that the existing regime is implemented and that states that have not yet acceded to or otherwise accepted elements of this regime do so. We should also work to build political support to achieve the necessary protection of the Arctic. Having studied the analysis commissioned by WWF and presented at the Tromsø Conference, I am even more convinced that this is the right way to proceed.

It is a fact that the U.S. has not yet ratified UNCLOS.¹⁶ The analysis also identifies other relevant treaties that have not yet been ratified by one or more of the Arctic states. Whether these omissions should be described as “gaps” is a question of semantics. The rules are there and may even be in force. It then becomes a question of convincing the states that have not yet ratified or acceded to the treaties to do so.

An important point that I have made in the past, and which clearly emerges from the analysis referred to, is that the constituencies are completely different depending on the subject matter regulated or to be regulated. UNCLOS is a case in point. The rules that govern the territorial sea, the exclusive economic zone, and the continental shelf are laid down in that Convention.¹⁷ Those rules mainly concern the Arctic coastal states. However, if the Arctic Ocean, because of climate change, becomes navigable part of the year, then the high seas regime in UNCLOS comes into play.¹⁸ In such matters, all states have a legitimate interest.

These two features of UNCLOS could serve as an illustration of the complexity of the legal regime that applies in the Arctic. In between, we find a variety of subjects that are regulated by other conventions. Some of these treaties are global, while some of them are regional or bilateral. One example is the collective instruments elaborated by the International Maritime Organisation (IMO) that apply worldwide. With respect to the Arctic, reference should be made to the guidelines for ships operating in Arctic ice-covered waters approved by the Maritime Safety Committee and the Marine Environment Protection Committee in 2002 to apply in addition to the mandatory and recommendatory provisions contained in existing IMO instruments.¹⁹ Furthermore, the IMO is presently engaged in

16. See United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, United Nations Convention on the Law of the Sea n.2, available at <http://treaties.un.org/Pages/Treaties.aspx?id=21&subid=A&lang=en> (last visited Sept. 26, 2009) (follow link for “United Nations Convention on the Law of the Sea”) (stating that UNCLOS was signed by the United States on December 10, 1982 but containing no record that UNCLOS was ever ratified by the United States).

17. See United Nations Convention on the Law of the Sea, *supra* note 11 (establishing the legal framework and rules that now govern the sea).

18. See *id.* art. 86 (introducing Part VII of UNCLOS as governing the high seas).

19. Int’l Maritime Org. [IMO], *Guidelines for Ships Operating in Arctic Ice-Covered Waters*, IMO Doc. MSC/Circ.1056 – MEPC/Circ.399 (Dec. 23, 2008).

elaborating a regulatory regime on the reduction of greenhouse gases from shipping. Obviously, such a regime would have to apply worldwide.²⁰

In addition, some of the treaties that apply worldwide or with respect to regions are administered by designated organizations. There are also cases where such organizations actually supervise treaty compliance. Against this background, it would be counter-productive to start elaborating “a new legal regime” for the Arctic. I will revert to this matter in addressing the administration of the Arctic.

As a matter of fact, an analysis of the legal regime in the Arctic points to a problem that exists on a global scale; a broadened analysis of the kind commissioned by WWF would indicate that the same “gaps” appear in other regions as well. This is also partly demonstrated in the analysis. In a sense, this is quite natural. The need for new rules will always be there as a consequence of new phenomena, new discoveries, and new techniques. One hundred years ago, who would have dreamt of a Moon Treaty?²¹ Treaties will have to be concluded as the need arises. Consequently, what is needed is research, scientific data, information provided to the general public and their representatives, and, not least, political will to address, in a systematic manner, the questions that must be dealt with. Surely, there are many such questions relating to the Arctic.

IV. ENVIRONMENTAL AND SECURITY CONCERNS

The focus of the third part of my presentation is the environment and security. In this context, I will address fisheries and extraction of hydrocarbons as part of the environment. These questions were extensively attended to at a conference organized by the Nordic Council of Ministers and held September 9–10, 2008, at Ilulissat in Greenland, entitled “Common Concern for the Arctic.” I had the privilege of chairing this conference and was also asked to present conclusions. From the Conference Report, it

available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D6629/1056-MEPC-Circ399.pdf.

20. See IMO, Marine Env't Prot. Comm. (MEPC), 58th Sess. (Oct. 6–10, 2008), http://www.imo.org/About/mainframe.asp?topic_id=109&doc_id=9932 (last visited Sept. 27, 2009) (noting that any regulatory regime aimed at reducing greenhouse gas emissions from ships would not be effective for the purpose of combating climate change unless it applied to all countries, not just those listed in Annex I of the United Nations Framework Convention on Climate Change).

21. See Agreement governing the Activities of States on the Moon and Other Celestial Bodies, *opened for signature* Dec. 18, 1979, 1363 U.N.T.S. 3 (outlining agreement among the state parties for the exploration and use of the moon).

appears that many questions that are referred to as “gaps” in the WWF analysis were discussed.²²

In particular, it was concluded that mechanisms must be developed which can provide for regulated access to new fisheries, whether in new areas that become accessible or in areas where new fish stocks appear due to climate change.²³ It was also concluded that methods and tools need to be developed to effectively enforce such management regimes.²⁴ Since there is a risk that non-regulated fisheries will develop in the Arctic, it was noted specifically that instruments are urgently needed to effectively prevent illegal, unregulated, and unreported fishing, so-called IUU fishing.²⁵ Another conclusion was that the EU ecosystem approach to marine management must be strengthened, extended, and made operational through a legal basis for international cooperation in the Arctic Ocean as a whole.²⁶

It was also stressed that activities related to oil and gas in the Arctic Ocean must be prudent.²⁷ This would require high environmental standards adapted to the sensitivity of the Arctic. The following elements were mentioned: ecosystem based management; rigorous environmental and strategic impact assessment; effective prevention, preparedness, and response to accidents, including clean-up of pollution incidents; and advanced monitoring and research.²⁸ With respect to production and transport of oil and gas in and through ice-affected waters, it was concluded that it should be carefully regulated.²⁹ The safety issues, including environmental protection, must be further analyzed.

It was also noted that tourism shipping appears to be the biggest short- to medium-term challenge within the maritime transport sector in the Arctic and should be addressed with urgency.³⁰

A particular issue that was discussed at Ilulissat was maritime safety in Arctic waters.³¹ It was felt that governments should bring their concerns to the attention of the IMO so that Member States could consider them with a view towards finding internationally agreed-upon solutions.³² It was specifically

22. Common Concern for the Arctic Conference, Ilulissat, Green., Sept. 9–10, 2008, *Conference Report*, available at http://www.norden.org/da/publikationer/publikationer/2008-750/at_download/publicationfile.

23. *Id.* at 25, 88–90.

24. *Id.* at 25, 97.

25. *Id.* at 25, 89.

26. *Id.* at 25, 88–89, 93.

27. *Id.* at 27.

28. *Id.* at 27, 104.

29. *Id.* at 27, 100, 108, 110. *But see id.* at 107 (“Production and transport of oil in and through ice-affected waters has to be halted, as no technology currently exists to clean up spills under these conditions.”).

30. *Id.* at 27.

31. *Id.* at 110, 115–16.

32. *Id.* at 27, 118.

pointed out that unilateral regional action should be avoided.³³ The Conference Report provides a detailed examination of these conclusions.³⁴

The conclusions from the Ilulissat Conference in September 2008, and the Conference at Tromsø in January 2009, point in the same direction. Whether you define certain elements as “gaps” or not, it is necessary to address them. In most cases, the need is urgent. This brings me to the last and main part of my presentation: the administration of the Arctic.

V. THE ADMINISTRATION OF THE ARCTIC

On this subject, I would like to take as a point of departure the fact that the WWF-commissioned analysis identifies as a “gap” that the Ottawa Declaration on the Establishment of the Arctic Council does not impose legally binding obligations on any of its participants and that the Arctic Council is also not empowered to impose such obligations.³⁵ However, in my view, because of the way in which the Arctic Council is designed and meant to operate, the Council is simply not suited for such tasks. Nor should the Council be redesigned and entrusted with such tasks. Rather, the Council should be maintained and further developed as an indispensable tool for coordination of policy decisions.

This means that I tend to agree with the views expressed by Professor Oran Young at the Conference at Tromsø. He suggests that the Arctic Council, particularly when it convenes at the ministerial level, may have a role to play in addressing problems arising from the interplay between various issue-specific regulatory arrangements.³⁶ Using as examples commercial shipping in the Arctic and a fisheries regime relating to stocks that are not confined to the exclusive economic zones of individual states, and suggesting that the IMO and the FAO may not be able or willing to take steps on their own to iron out these differences, Young puts forward:

What is required in such cases is a higher level policy forum that can address the relevant issues in comprehensive terms and without any crippling bias that undermines its ability to resolve such problems in a constructive fashion. The relevant skills in such cases are those of a facilitator rather than a regulator, and this is a role that the Arctic Council may well be able to perform, despite its lack of decision making authority and material resources.³⁷

33. *Id.* at 27, 112–13.

34. *Id.*

35. KOIVUROVA & MOLENAAR, *supra* note 15, at 5, 35.

36. Oran R. Young, *Whither the Arctic? Conflict or Cooperation in the Circumpolar North*, 45 POLAR REC. 73, 81 (2009).

37. *Id.*

Consequently, and with specific reference to my analysis in the foregoing, it is imperative that the mandates entrusted to the various bodies established by the conventions that apply in the Arctic are not compromised by competing institutions. At the same time, the Arctic Council, with its relatively informal rules and opportunities for participation, offers a venue where different actors can participate and discuss a broad range of issues that, in many cases, cut across administrative borders.³⁸ In this way, the work of existing and maybe additional institutions can actually be enhanced.

I have, in another context, pointed to a dilemma that increasingly will emerge when states engage in treaty making, namely the difficulty of establishing a coherent system of rules at the international level.³⁹ The dilemma can be illustrated as follows. Every organ entrusted with a mandate to negotiate international agreements, in particular international conferences, has a tendency to believe that it is sovereign and might be reluctant to look at instruments adopted in other forums. An additional problem is that instructions to national delegations in such negotiations often emanate from different ministries at the national level. The lack of coordination often starts here.

My conclusion is that an increasing number of international agreements will pose the risk of contradictory obligations. This will, in turn, lead to difficulties when the obligations are to be implemented and applied. If the system becomes too inconsistent, there will be negative effects on the respect for the norms agreed upon. I believe that the Arctic Council provides an excellent forum for coordination so that such consequences can be avoided in the Arctic as far as possible.

Against this background, the Ilulissat Declaration is of particular interest:

The Arctic Council and other international fora, including the Barents Euro-Arctic Council, have already taken important steps on specific issues, for example with regard to safety of navigation, search and rescue, environmental monitoring and disaster response and scientific cooperation, which are relevant also to the Arctic Ocean. The five coastal states of the Arctic Ocean will continue to contribute actively to the work of the Arctic Council and other relevant international fora.⁴⁰

At the Ilulissat Conference in September 2008, it was believed that possible options for enhancing environmental

38. See, e.g., ARCTIC COUNCIL R.P. 36, available at <http://arctic-council.org/filearchive/official%20rules%20and%20procedures.pdf> (enabling the Arctic Council to grant "observer status" to non-member states, intergovernmental organizations and nongovernmental organizations); ARCTIC COUNCIL R.P. 38, available at <http://arctic-council.org/filearchive/official%20rules%20and%20procedures.pdf> (allowing observers to make statements at the discretion of the chair and submit relevant documents to Council meetings).

39. Hans Corell, Keynote Address at the Hertie School of Government Conference: International Law in Flux 5 (Sept. 8, 2006), available at <http://www.havc.se/res/SelectedMaterial/20060908corellintlwinfluxfinal.pdf>.

40. Ilulissat Declaration, *supra* note 2, at 155.

governance of the Arctic should be considered. Such options might include an UNCLOS implementing agreement for environmental issues; a regional sea agreement (along the lines of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)); further development of multilateral environmental agreements at the global or regional level; strengthening and broadening the role of the Arctic Council; ensuring participation by a broader range of stakeholders; more engagement by the EU and use of the tools it has to offer (research, European Environment Agency, funding via, e.g., Northern Dimension Environmental Partnership, participation in the Arctic Council, etc.); or a combination of these solutions.⁴¹

With respect to the European Union, it is interesting to note that matters relating to the Arctic have been brought more into focus lately. On October 9, 2008, the European Parliament adopted a resolution in which it expressed its concerns over the effects of climate change on the sustainability of the lives of the indigenous peoples in the region.⁴² This was in terms of “both the . . . environment (melting icecap and permafrost, rising sea levels and flooding) and the natural habitat (the retreating icecap poses problems for polar bears' feeding habits).”⁴³ The Parliament “underlin[ed] that any international decisions on these issues must fully involve and take account of all peoples and nations of the Arctic.”⁴⁴ The Parliament also stated that it “await[ed], with great interest, the forthcoming Commission communication on Arctic policy, and it [expressed the] hope[] that the communication would lay the foundations for a meaningful EU Arctic policy.”⁴⁵ In particular, the Parliament called on the Commission to address, at least, the following issues in its communication:

- a) the state of play in relation to climate change, and adaptation to it, in the region;
- b) policy options that respect the indigenous populations and their livelihoods;
- c) the need to cooperate with its Arctic neighbours on cross-border issues, in particular maritime safety; and
- d) options for a future cross-border political or legal structure that could provide for the environmental protection and sustainable orderly development of the region or mediate political disagreement over resources and navigable waterways in the High North;⁴⁶

41. Common Concern for the Arctic Conference, *supra* note 22, at 27, 104–06.

42. European Parliament Resolution of 9 October 2008 on Arctic Governance, EUR. PARL. DOC. P6_TA(2008)0474 para. M (2008).

43. *Id.* at para. N.1.

44. *Id.*

45. *Id.* at para. N.7.

46. *Id.* at paras. N.7(a)–(d).

The Parliament expressed “particular[] concern[] over the ongoing race for natural resources in the Arctic, which may lead to security threats for the EU and overall international instability.”⁴⁷ In this context, it is also important to note that the Parliament “urge[d] the Commission to take a proactive role in the Arctic by at least, as a first step, taking up ‘observer status’ on the Arctic Council.”⁴⁸

On November 20, 2008, the European Commission adopted a communication from the Commission to the European Parliament and the Council entitled “The European Union and the Arctic Region.”⁴⁹ The communication points to “the role of climate change as a ‘threats multiplier’” and maintains that “the Commission and the High Representative for the Common Foreign and Security Policy have pointed out that environmental changes are altering the geo-strategic dynamics of the Arctic with potential consequences for international stability and European security interests calling for the development of an EU Arctic policy.”⁵⁰ It continues:

On the whole, Arctic challenges and opportunities will have significant repercussions on the life of European citizens for generations to come. It is imperative for the European Union to address them in a coordinated and systematic manner, in cooperation with Arctic states, territories and other stakeholders. This Communication sets out EU interests and proposes action for EU Member States and institutions around three main policy objectives:

- Protecting and preserving the Arctic in unison with its population
- Promoting sustainable use of resources
- Contributing to enhanced Arctic multilateral governance⁵¹

In this context, the U.S. Arctic Policy document deserves particular attention. The directive, which is to be implemented in a manner consistent with (1) the Constitution and laws of the United States; (2) the obligations of the United States under the treaties and other international agreements to which the United States is a party; and (3) customary international law as recognized by the United States, including with respect to the law of the sea, states that it is the policy of the United States to:

1. Meet national security and homeland security needs relevant to the Arctic region;
2. Protect the Arctic environment and conserve its biological resources;
3. Ensure that natural resource management and economic development in the region are environmentally sustainable;

47. *Id.* at para. N.13.

48. *Id.* at para. N.14.

49. *The European Union and the Arctic Region*, COM (2008) 763 final (Nov. 20, 2008).

50. *Id.* at 2.

51. *Id.* at 2–3.

4. Strengthen institutions for cooperation among the eight Arctic nations (the United States, Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, and Sweden);
5. Involve the Arctic's indigenous communities in decisions that affect them; and
6. Enhance scientific monitoring and research into local, regional, and global environmental issues.⁵²

This directive can actually be read as another inventory of issues relating to the Arctic that need to be addressed.

Of particular interest with respect to the administration of the Arctic is the statement that “[a]s the Arctic changes and human activity in the region increases, the U.S. and other governments should consider, as appropriate, new international arrangements or enhancements to existing arrangements.”⁵³ It is also said that the competent authorities should “[s]eek to develop ways to address changing and expanding commercial fisheries in the Arctic, including through consideration of international agreements or organizations to govern future Arctic fisheries.”⁵⁴

The position of the U.S. with respect to the Arctic Council is that it “should remain a high-level forum devoted to issues within its current mandate.”⁵⁵ It should not, however, be “transformed into a formal international organization, particularly one with assessed contributions.”⁵⁶ The U.S. “is nevertheless open to updating the structure of the Council, including consolidation of, or operational changes to, its subsidiary bodies to the extent that such changes can clearly improve the Council's work and are consistent with the general mandate of the Council.”⁵⁷

As regards the Russian Federation, there are many aspects that could be mentioned. One is the tendency to view the Arctic as a matter essentially for the coastal states. However, let me, in this context, focus on the question of an ecosystem-based ocean management with respect to the Russian Arctic. Professor V. Denisov addressed this question at Tromsø with reference to a presentation that he had prepared with two colleagues.⁵⁸ Their conclusions were “that integrated ecosystem-based approaches to ocean management in Russia remain poorly recognized and accepted among both the majority of administrative circles of all levels (federal, regional, and local) and other stakeholders (businesses, local populations, voluntary organizations) [to whom] participation in the decision-making process is of critical

52. Directive on Arctic Region Policy, *supra* note 4, at 48.

53. *See id.* at 49.

54. *Id.* at 54.

55. *Id.* at 49.

56. *Id.*

57. *Id.*

58. Vladimir Denisov, et al., Ecosystem-Based Ocean Management Practices in the Russian Arctic (Jan. 21, 2009), in 2009 ABSTRACTS: ARCTIC MARINE ECOSYSTEMS IN AN ERA OF RAPID CLIMATE CHANGE 9 (University of Tromsø et al. eds., 2009) (Nor.), available at http://www.arctic-frontiers.com/index.php?option=com_docman&task=cat_view&gid=60&Itemid=155.

importance.”⁵⁹ They further concluded that “Russia’s coastal and sea activities still continue to be managed on the basis of a sectoral or departmental approach.”⁶⁰ In their view, “[d]evelopment and application of integrated ecosystem-based approaches to coastal and sea management in Russia largely depends on personal motivation and social responsibility of key managers at regional and local levels”; in other words, “subjective factors still play a substantial role.”⁶¹ Another negative factor identified by Professor Denisov and his colleagues is “gaps in the current legislation regulating coastal and sea activities in Russia.”⁶²

These issues are also on the agenda in the other Arctic states. But the conclusion must be that there remains a lot to be done to enhance the administration of the Arctic. Maybe a strengthened Arctic Council is the appropriate venue for the overarching policy discussions that obviously are necessary.

VI. CONCLUDING REMARKS

Let me conclude by suggesting that the Arctic actually offers an opportunity for states concerned—in particular the Arctic coastal states—to demonstrate that they are able to cooperate actively in a constructive manner. As a matter of fact, the Arctic could be seen as an opportunity for the Arctic states to set an example by demonstrating how responsible actors on the international arena should interact. Basically, this was the idea when the Arctic Council was established.

But the Arctic must also be seen in a global context, including from the viewpoint of international peace and security. What is most worrying is that some major players on the international arena did not see the opportunity when the Berlin Wall came down in 1989. In summing up at the Arctic Frontiers meeting at Tromsø, I expressed regret that, in particular, the West did not remember the lesson from the end of World War II. At that time, positive development was generated by the way in which the former enemy states were treated, paving the way for what is now the European Union. From that lesson it was evident that greater efforts should have been made to develop a true and trustful partnership with the Russian Federation when the Soviet Union broke up. Instead, major players, in particular the U.S., started going it alone. The damage that the misnomer “War on Terrorism” has done to the U.S. and the world at large will take a long time to repair. The illegal attack on Iraq in March 2003 is another deplorable demonstration of disrespect for international law, especially the Charter of the United Nations. So is the

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

attack on Georgia in the summer of 2008. This has raised tensions in international relations in general and between the two major powers among the Arctic states in particular, the Russian Federation and the United States.

Let us hope that the new U.S. administration can make a move to reverse this development. And the Russian Federation must respond, including by greater efforts to establish democracy and the rule of law at the national level, as so convincingly argued by the President of the Constitutional Court of the Russian Federation.⁶³ Good relations between Moscow and Washington are imperative for a more positive development in the field of international peace and security. The unfortunate tensions that have developed between the two major powers bordering the Arctic simply must be removed, and this can be achieved only through a demonstration of statesmanship on both sides. This should also be seen as an opportunity.

This is where I believe that the Arctic could serve as a catalyst and a steppingstone. The interaction with the other six Arctic states, all democracies and states under the rule of law, should provide a setting for close cooperation in matters that, in effect, concern the entire state community.

In order to bring about the necessary action and achieve results, it is necessary that matters relating to the Arctic are addressed at the highest political level. For this reason, the Arctic states may wish to review how their national agencies responsible for the Arctic are organized and whether the interaction between those agencies and political leaders could be enhanced. One way of ascertaining that added political impetus is injected into the process—and this would be my respectful suggestion—would be to organize the 2011 Arctic Council meeting at the level of heads of state and government.

Finally, it should be pointed out that there is a clear connection between the work to protect the Arctic and the work necessary to develop an effective post-2012 climate regime, expected to be agreed upon at the Climate Change Conference in Copenhagen in December 2009.

It is in this broad political context that the Arctic should be seen as an opportunity rather than a problem.

63. Valery Zorkin, President, Russian Fed'n Constitutional Court, Rule of Law and Legal Awareness (July 6, 2007), in *THE WORLD RULE OF LAW MOVEMENT AND RUSSIAN LEGAL REFORM* 46, 55–61 (Francis Neate & Holly Nielsen eds., 2007).