

Global Polar Law?

Rachael Lorna Johnstone

These brief, personal reflections are based on an intervention at the 15th Polar Law Symposium in Reykjavík, on 14th October 2022 on the panel “10 Years of Current Developments in Arctic Law: Arctic Law is an Academic Discipline” organised by Kamrul Hossain.

The geophysical interconnections of the polar regions to the rest of the world are well-recognised. The phrase, “What happens in the Arctic does not stay in the Arctic” has become so commonplace at Arctic events that it has become a cliché. Meanwhile, the Russian aggression in Ukraine in 2022 demonstrated beyond any doubt that polar affairs cannot be fully sheltered from international tensions elsewhere.

Polar law is, inter alia, part of international law and there is no doubt that international law applies at the Poles. These are not Wild-West¹ awaiting discovery, colonisation and exploitation despite the regular clickbait headlines.

The preamble to the Antarctic Treaty points to global interests:

Recognizing that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.²

And article 10 of the same treaty sees the states parties, especially the consultative parties, as self-appointed stewards who determine the rules for the benefit of the whole world.

Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present treaty.³

Meanwhile, in the North, the eight Arctic States, and sometimes the five States that border the Central Arctic Ocean, consider

¹ Not that the Wild West was not an empty land, devoid of Peoples or Law before the arrival of Europeans.

² Antarctic Treaty, December 1, 1959, United Nations Treaty Series 402 (1960): 71, Preamble.

³ Ibid, Article X.

themselves as stewards, or even guardians of the Arctic Ocean.⁴

But how global are the influences that create the body that we call polar law?

In the Arctic, the eight States with territory above Arctic Circle jealously guard their sovereignty and sovereign rights – even if one fundamentally violates the sovereignty of its neighbouring state in the most egregious and brutal way.⁵ The rules for observers to the Arctic Council make it clear that while they welcome *support* from non-Arctic States, intergovernmental organisations and fora and non-governmental organisations, only the Arctic States and permanent participants have a say (quite literally) at the ministerial and Senior Arctic Official meetings.⁶ Even the structure of the meetings ensures the

deference of observer States and institutions.

In the Antarctic, the Asian States, possibly excepting Japan, are viewed as interlopers on the “white continent” (pun intended).⁷ The resistance to China’s proposals for the Dome A Antarctic Specially Managed Area (AMSA) around Kunlun station epitomises the fear that this is a cover to restrict access to other States’ missions or even that it is a preliminary “land grab,”⁸ even while the claimant States play with area management in their sovereignty games. The claimant States are behind 2/3 of all the Antarctic Specially Protected Areas and AMSAs in the Antarctic, nearly all within their own “claim” while there is no protected area in the unclaimed sector. Ferrada describes this succinctly as “putting

⁴ Foreign Ministers of Canada, Denmark, Norway, Russia, and the United States of American, *The Ilulissat Declaration*, May 28, 2008.

⁵ Ibid.

⁶ Arctic Council Rules Of Procedure, as adopted by the Arctic Council at the First Arctic Council Ministerial Meeting, Iqaluit, Canada, September 17-18, 1998 and Revised by the Arctic Council at the Eighth Arctic Council Ministerial Meeting, Kiruna, Sweden, May 15, 2013, especially Annex 2, <https://oaarchive.arctic-council.org/handle/11374/940>; and Arctic Council Observer Manual for Subsidiary Bodies, as adopted by the Arctic Council at the Eighth Arctic Council Ministerial Meeting, Kiruna, Sweden, May 15, 2013 and Addendum, Approved by the Senior Arctic Officials at the Meeting of the Senior Arctic Officials, Anchorage, US, October 20-22, 2015 and Portland, Maine, US, October 4, 2016, para 7.3, <https://oaarchive.arctic-council.org/handle/11374/939>.

⁷ Elizabeth Leane, “Fictionalizing Antarctica” in *Handbook on the Politics of Antarctica*, Klaus Dodds, Alan D Hemmings and Peder Roberts, eds. (Cheltenham: Edward Elgar, 2017); see also Anne-Marie Brady, *China as a Polar Great Power* (Cambridge: Cambridge University Press, 2017).

⁸ Sakiko Hataya, “Legal Implications of China’s Proposal for an Antarctic Specially Managed Area (ASMA) at Kunlun Station at Dome A,” *Yearbook of Polar Law* 12 (2020): 75, 76. See also Dodds, “Sovereignty Watch,” 238 on similar reactions to China’s earlier plans to build a research station at the same location.

stewardship to work for sovereignty purposes.”⁹

Apartheid South Africa was a founding member of the Antarctic Treaty and welcomed through the decades, notwithstanding the racist regime that was a pariah in other international fora. Sixty years later, South Africa remains the only State party from the African continent. The research requirements in order to become a consultative party effectively preclude any developing State from obtaining decision-making power. It is not surprising that they do not bother to join the treaty at all.

Amongst the “thinkers” of polar law, there is a great deal of talking at other regions and not so much listening to. The “Third Pole Process” under the *Arctic Circle* banner is described as:

A comprehensive effort to introduce the Arctic model of collaboration to the Third Pole region.¹⁰

People of experience who have played an important role in Arctic collaboration will submit articles and

papers offering insights and analysis, as will officials, scientists, and people of experience from the Third Pole region.¹¹

Lessons learned from collaboration in the Arctic present many useful examples for other parts of the world and can serve as an inspiration for and find application in the Third Pole and Himalaya region.¹²

Glacial melt and sea-level rise is not the only thing now exported from the Poles to other regions; now Arctic institutions offer advice about how they should govern themselves.

Yet perhaps in current times, polar scholars should be asking what the Himalayan can teach us. The region boasts three nuclear-armed States with disputed borders who have survived seven decades of on-off skirmishes, four outright Indo-Pakistani wars and a Sino-Indian war. The Himalayan region may have something to say about managing international relations in times of hot conflict and hotter rhetoric.

⁹ Luis Valentin Ferrada. “Five Factors that will Decide the Future of Antarctica,” *Polar Journal* 8(1) (2018): 84, 99.

¹⁰ “The Arctic Circle UAE: Third Pole Process,” Arctic Circle, accessed November 7, 2022, <https://www.arcticcircle.org/third-pole-process>.

¹¹ United Arab Emirates Ministry of Climate Change and Environment and Arctic Circle, “The Arctic, Third Pole and COP28: Launch of the Arctic Circle – United Arab Emirates: Third Pole Process,” Press Release, TP process press release (n.d.) https://prismic-io.s3.amazonaws.com/arctic-circle-www/07e98c8f-20f1-4c39-b242-6d8e9a21dae4_TP+Process+Press+Release+2.pdf.

¹² Ibid.

Within the more traditional academe, structural barriers to a global scholarship remain. Much of this can be attributed to lack of funding: research requires investment and this is heavily weighted towards large institutions with access to national and EU grants (as well as those institutions with strong grant-machine support offices). Scholars from developing countries are locked out.

Participation in keystone events like the *Polar Law Symposia* and contributions to the *Yearbook of Polar Law* and the *Current Developments in Arctic Law* series also fail to represent voices from all regions of the world. Since the first volume of the *Yearbook of Polar Law* was published in 2009, nearly all the contributions have come from citizens of Arctic States and Antarctic Consultative Party States.

When it comes to our research projects, established polar law scholars should consider diversity when seeking partners and in allocating limited – often very limited – funds. Can we support participation in our conferences and seminars? Can we offer support with copy-editing for scholars writing in a second or third language?

Similarly, when considering the next generation of polar lawyers, efforts might be stronger to build a truly global discipline. In fourteen years of the polar law masters programmes at the University of Akureyri, Iceland, only three African students have taken the programmes and the first Indian student began only in 2021.

The perspectives they bring from post-colonial independent nations fundamentally enrich our discussions and challenge our assumptions about decision-making in the polar regions. Yet many more promising applicants have been denied by our immigration laws – and in one case by the Danish immigration authorities at Copenhagen airport notwithstanding a valid study permit for Iceland!

A global discipline requires diversity: not only in representation of different persons from different places; but also different perspectives. Literature on polar law reveals a dominance of western legal-thinking, especially positivist approaches to international law. There is extensive focus on treaties and instruments of international organisations (especially the United Nations). But there is a shortage of critical voices questioning the very structures of international law at the Poles.

- *Who gets to make law?*
- *Why does international law have authority over communities that never accepted it?*
- *What about the other “civilised nations” in the Arctic?*

The polar law academic community rightly seeks to centre the law of Indigenous Peoples in its work in the Arctic context. However, most of the *Yearbook's* articles are on the law *about* Indigenous Peoples, laws approved *by States*, and not the laws *of* Indigenous Peoples – and most of it is written by outsiders like the present author.

Scholars including John Borrows, Mariano Aupilaarjuk, Marie Tulimaaq, Lisa Qiluqqi Koperqualuk, Christina Allard and Susan Funderud Skogvant are all mapping their legal systems. This is undoubtedly *polar law* - but are we doing enough to welcome them to the polar law network? In the south, Māori explorers probably knew of the Antarctic continent hundreds of years before Bellingshausen.¹³ Yet where are the Indigenous Māori, Australian and native Patagonian scholars? If the Chilean and Argentinian territorial claims are based – in part – on proximity and continental continuity, then the much older sovereignty of the Indigenous of Patagonia

and Tierra del Fuego should equally give rise to a claim.

Polar law is no longer an emerging discipline; it is an established discipline. But it is not a *mature* discipline and will not be until it is more inclusive – of different regions and different, critical perspectives. That requires the old guard of polar law to step outside the comfort of our familiar networks and reach out. To be realised, it will require outreach and support to be directed towards new or underrepresented voices. And it may even require us to challenge our states' own immigration laws and policies that prevent ambitious students from studying in our countries.

¹³ Priscilla M Wehi, et al, "Transforming Antarctic Management and Policy with an Indigenous Māori lens," *Nature Ecology & Evolution* (2021), <https://doi.org/10.1038/s41559-021-01466-4>.