

## RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

### REVIEW ESSAY

#### INTERNATIONAL LAW AND GOVERNANCE IN A CHANGING ARCTIC

*International Law and the Arctic.* By Michael C. Byers. Cambridge: Cambridge University Press, 2013. Pp. xviii, 314. Index. \$99, £65.

*Ice and Water: Politics, Peoples, and the Arctic Council.* By John English. Toronto: Penguin Canada/Allen Lane, 2013. Pp. xxx, 332. Index. Can\$34, cloth; Can\$20, paper.

The Arctic is changing. The steady decline in the extent of summer ice cover has prompted scientists to conclude that the Arctic has shifted to “a new normal”: one in which increasing swaths of the Arctic Ocean are ice free for a few months a year, with profound consequences for native species and the four million people who live there, not to mention the global climate.<sup>1</sup> As the ice melts, awareness at lower latitudes grows. The polar bear is an iconic ambassador to the popular imagination—images of Earth’s largest land predator adrift serve to personify the existential threats that a warming climate and increased human activity create for the Arctic’s unique flora and fauna. Global headlines are replete with forecasts that a warming Arctic presents economic opportunities in the form of newly accessible hydrocarbon resources and shipping routes, and that these emerging opportunities foreshadow competition and conflict. Observer status in the once-obscure

Arctic Council has become a must-have ticket for distant global powers.

At this time of dramatic change, newly contemplated opportunities, and heightened global salience, talk of Arctic governance can be heard in the halls of government and in the academy, in boardrooms of multinational corporations and environmental nongovernmental organizations. Governments within and beyond the region have issued Arctic strategies in recent months, articulating national interests and approaches to an increasingly accessible Arctic.<sup>2</sup> Commercial concerns such as Lloyd’s have commissioned assessments of the business opportunities and risks of operating in the region.<sup>3</sup> A diverse and growing range of stakeholders is seeking to understand the complex latticework of international legal and governance frameworks relevant to the Arctic. More particularly, they are asking whether existing law and institutions are equipped for the challenges presented by a changing Arctic: to moderate an optimal balance of the opportunities and risks; to equitably balance the interests of states within

<sup>2</sup> On May 10, 2013, President Obama signed the National Strategy for the Arctic Region, which supplements National Security Presidential Directive 66 of January 9, 2009. A compilation of Arctic states’ national Arctic strategies is available at <http://www.arctic-council.org/index.php/en/document-archive/category/12-arctic-strategies>. States beyond the region have also adopted Arctic policies, such as the United Kingdom’s Arctic policy framework, *Adapting to Change*, published October 17, 2013, at <https://www.gov.uk/government/publications/adapting-to-change-uk-policy-towards-the-arctic>. The Arctic Council’s extensive Document Archive, at <http://www.arctic-council.org/index.php/en/document-archive>, contains all of the council’s documents cited in this review essay.

<sup>3</sup> CHARLES EMMERSON & GLADA LAHN, ARCTIC OPENING: OPPORTUNITIES AND RISK IN THE HIGH NORTH (2012).

<sup>1</sup> Martin O. Jeffries, James E. Overland & Donald K. Petrovich, *The Arctic Shifts to a New Normal*, 66 PHYSICS TODAY 35 (2013).

and beyond the region; and to maintain the region's high-cooperation, low-conflict character, along with its unique ecosystems and cultures, in the face of drastic change. For those seeking answers to these questions, there is much to recommend in the works under review.

## I. INTRODUCTION TO INTERNATIONAL LEGAL AND GOVERNANCE LANDSCAPES AT THE TOP OF THE WORLD

Unlike the opposite pole, "the Arctic" is the subject of neither a uniform legal definition nor all-embracing international governance.<sup>4</sup> By its most basic geographic definition—the area above the Arctic Circle, 66° north latitude—the Arctic region encompasses land territory of Canada, Denmark, Finland, Iceland, Norway, Sweden, the Russian Federation, and the United States. These eight "Arctic states" are the members of the Arctic Council, the high-level intergovernmental forum for issues of common interest in the Arctic. Five of the Arctic states—Canada, Denmark (via Greenland), Norway, Russia, and the United States—have coastal frontage in the Arctic Ocean, and thus sovereignty, sovereign rights, and jurisdiction in maritime zones extending well into the Arctic Ocean. However defined, the Arctic region comprises land territory of the eight Arctic states, maritime zones of the five Arctic Ocean coastal states, and high seas areas. As such, the international law of the sea significantly shapes the governance landscape of the Arctic: it defines where and how the coastal states may exercise their jurisdiction, elaborates the rights and obligations of other states in various parts of this ocean, and informs the division of labor between regional governance institutions (such as the Arctic Council) and global institutions (such as the International Maritime Organization (IMO)).

It would be difficult to capture the legal and governance landscape of the Arctic Ocean more

<sup>4</sup> This situation is to be contrasted with the Antarctic Treaty, which serves as the legal framework for international governance of the area below 60 degrees south latitude.

succinctly than in the 2008 Ilulissat Declaration by the five Arctic Ocean coastal states:

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. In this regard, we recall that an extensive international legal framework applies to the Arctic Ocean . . . . Notably, the law of the sea provides for important rights and obligations concerning the delimitation 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.

This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions. We therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean.<sup>5</sup>

The singularly unremarkable legal proposition that much of the Arctic Ocean is within national jurisdiction nevertheless contrasted starkly with calls from some quarters for a comprehensive governance arrangement in the image of the Antarctic Treaty.<sup>6</sup> Conversely, some commentators reacted to the declaration by questioning not that the law of the sea is the applicable legal framework, but rather that this framework is sufficient for the responsible management of the Arctic Ocean.<sup>7</sup> To form one's own opinion requires, of course, a

<sup>5</sup> Ilulissat Declaration, Arctic Ocean Conference, May 28, 2008, 48 ILM 362 (2008).

<sup>6</sup> See, e.g., European Parliament Resolution of 9 October 2008 on Arctic Governance, para. 15, EUR. PARL. DOC. P6\_TA(2008)0474.

<sup>7</sup> See, e.g., Donald Rothwell, *The Arctic in International Law: Time for a New Regime?* (Australian Nat'l Univ. Coll. of Law Research Paper No. 08-37, 2008), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1314546](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314546).

familiarity with the international law and institutions that guide international relations in a changing Arctic. A good place to begin is *International Law and the Arctic* by Michael Byers.

Byers, Canada Research Chair in Global Politics and International Law at the University of British Columbia and the author of *Who Owns the Arctic?*,<sup>8</sup> is a familiar voice on the international legal issues relating to Canada's Arctic coastline, including the Northwest Passage. With *International Law and the Arctic*, Byers has written a more comprehensive survey of the international legal landscape of Arctic. Eminently accessible and engaging, it serves as an excellent introduction to the central environmental, political, and legal issues in the past, present, and future of the Arctic.

## II. INTERNATIONAL LAW, CONFLICT, AND COOPERATION IN THE ARCTIC

Revelations about the extent of undiscovered resources<sup>9</sup> beneath the Arctic Ocean and prospects for their accessibility in a warming Arctic have fueled persistent speculation about a "race for resources" among powerful states within and beyond the region.<sup>10</sup> The Ilulissat Declaration would seem to be a powerful antidote to this conflict narrative. In it the Arctic Ocean coastal states reminded the world of their sovereignty, sovereign rights, and jurisdiction in much of the Arctic Ocean and its seabed, and they reaffirmed their commitment to the international legal framework that underpins these rights and jurisdiction—and also, notably, "to the orderly settlement of any possible overlapping claims." Simply put, there are generally applicable rules and processes for answering any and all questions about rights and jurisdiction in the Arctic Ocean. Which state, if any, controls the seabed resources beneath the geo-

graphic North Pole will be determined by routine application of these rules and processes, just as in any other ocean. Writing in 2009, Thomas Winkler, who was legal adviser of the Danish Ministry of Foreign Affairs and among the negotiators of the Ilulissat Declaration, expressed his belief that the Declaration "should quell any fear or theory on conflict looming just around the corner in the Arctic."<sup>11</sup>

Notwithstanding the concerted message of the states bordering the Arctic Ocean, some commentators consider it at least an open question whether international relations in the Arctic will unfold smoothly according to international law, or whether states—within or beyond the region—will challenge this legal framework or act outside of it in pursuit of their interests.<sup>12</sup> Not Byers. His assessment is unequivocal: "In short, there is no state-to-state competition for territory or resources in the Arctic, and no prospect for conflict either. Instead, the Arctic is becoming a region marked by cooperation and international lawmaking, during a period of significant geopolitical, environmental, and economic change" (p. 5).

Byers marshals the facts that suggest Arctic seabed resources are unlikely to become the object of international conflict, including that "most of the Arctic's offshore oil and gas is within the uncontested jurisdiction of one or another coastal state" (p. 6). And what of the seabed beyond two hundred nautical miles from shore (the limits of states' exclusive economic zones)? In pulling back the curtain on the process through which the coastal states are delineating rights to exploit the resources of the extended continental shelf (ECS), Byers reveals not a "race for the North Pole" but, instead, a highly cooperative, science-driven process that turns on arguments about tectonic history rather than historic title.

Certainty in the outer limits of the Arctic Ocean coastal states' ECS is more than a decade away, in

<sup>8</sup> MICHAEL BYERS, *WHO OWNS THE ARCTIC? UNDERSTANDING SOVEREIGNTY DISPUTES IN THE NORTH* (2010).

<sup>9</sup> U.S. GEOLOGICAL SURVEY, *CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE* (2008).

<sup>10</sup> See, e.g., Scott Borgerson, *Arctic Meltdown: The Economic and Security Implications of Global Warming*, 87 FOREIGN AFF. 63 (2008).

<sup>11</sup> Thomas Winkler, *Danish Interests in the Arctic, in CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA* 482 (Myron H. Nordquist, John Norton Moore & Thomas H. Heidar eds., 2010).

<sup>12</sup> See, e.g., Rob Huebert, *Cooperation or Conflict in the Arctic?*, in *CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA*, *supra* note 11, at 30.

view of the long queue of submissions to the Commission on the Limits of the Continental Shelf (CLCS), coupled with the foreseeable need for boundaries to delimit overlapping ECS. That said, Denmark and Russia are expected to make submissions to the CLCS in 2014,<sup>13</sup> and Canada could potentially make its submission for the Arctic region by 2015. Collectively, these submissions will provide the raw material for educated predictions about what parts of the Arctic seabed will be under national jurisdiction, and where boundary delimitation may be necessary. In that context, Byers's concise explanations of the legal framework for ECS set out in Article 76 of the UN Convention on the Law of the Sea<sup>14</sup> (UNCLOS), of relevant practice of the CLCS, and of key aspects of the geology and geomorphology of the Arctic seabed are especially timely. Byers explains that the ridge systems that traverse the Arctic Ocean—the Lomonosov and Alpha-Mendelev ridges—are “wildcards” in the Arctic ECS equation, and he ably summarizes the specialized literature and CLCS practice relevant to Article 76's most confounding puzzle: when a ridge-like feature may generate ECS beyond 350 nautical miles from shore. This reviewer, engaged in the day-to-day work of delineating the outer limits of the U.S. continental shelf, was impressed by Byers's distillation of highly technical law and science into an uncommonly accessible presentation. The chapter on Arctic ECS is reason alone to recommend *International Law and the Arctic*.

Byers does not address the possibility that one or more of the Arctic Ocean coastal states will make a claim to seabed beyond two hundred nautical miles outside the applicable international legal framework. Such a possibility seems remote in view of the coastal states' strong interest in maintaining the legitimacy of this framework, which secures their primacy in the Arctic Ocean and places much of its seabed resources within their exclusive control. For one or more of those

states to act outside the legal framework risks undermining its sanctity, perhaps even its stability. In fact, the coastal states are investing significantly in adherence to this framework. For example, in response to unsupportive recommendations by the CLCS in 2002, the Russian ECS program has invested more than a decade in acquiring top-quality data and geological samples to support its revised submission for the Arctic.<sup>15</sup> Quite apart from the “race for resources” narrative prevalent in the press—and occasional stunts to please crowds at home—sovereign rights in the Arctic seabed beyond two hundred nautical miles are being determined according to the painstaking, science-driven process prescribed by UNCLOS.

A separate, perhaps more interesting question is whether any of the Arctic Ocean coastal states, having acted within the legal framework on the front end by submitting their outer limits to the CLCS, might color outside the lines on the back end if they disagree with the commission's recommendations. It is ultimately for each coastal state to establish the outer limits of its continental shelf. UNCLOS provides that the “limits of the shelf established by a coastal State on the basis of [the Commission's] recommendations shall be final and binding.”<sup>16</sup> On the one hand, delineating outer limits contrary to CLCS recommendations deprives the coastal state of the legitimacy and legal certainty that led it to invest millions of dollars in the CLCS process in the first place. On the other, one can imagine significant political pressure in Moscow or Ottawa not to accept CLCS recommendations that do not recognize the Lomonosov or Alpha-Mendelev ridges as part of either state's continental margin, or that limit ECS to 350 nautical miles on these features. Canadian prime minister Harper's apparent move to pull back the Arctic portion of Canada's CLCS submission because it did not encompass the North

<sup>13</sup> See Ministry of Foreign Affairs of the Russian Federation, *Announcement by the Russian Ministry of Foreign Affairs About the Russian Federation's Continental Shelf in the Arctic Ocean* (Jan. 17, 2014), at [http://www.mid.ru/brp\\_4.nsf/english](http://www.mid.ru/brp_4.nsf/english).

<sup>14</sup> UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

<sup>15</sup> See *Announcement by the Russian Ministry of Foreign Affairs About the Russian Federation's Continental Shelf in the Arctic Ocean*, *supra* note 13.

<sup>16</sup> UN Convention on the Law of the Sea, *supra* note 14, Art. 76(8).

Pole<sup>17</sup> reveals the currency of “Arctic sovereignty” in Canadian politics and perhaps even a willingness of elites to gamble international legal certainty for short-term political gain.

### III. BALANCING OPPORTUNITIES AND RISKS OF HUMAN ACTIVITY IN A CHANGING ARCTIC

That the world is not on the brink of conflict over Arctic resources, while perhaps a success story for international law and institutions, only marginally eases the workload of international lawyers. Long before the prospect of an ice-free Arctic was conceivable, environmental challenges facing the region prompted regional and global environmental treaties. From the overharvest of fur seals in the late nineteenth century to the long-range transport of persistent organic pollutants, *International Law and the Arctic* recounts the Arctic’s long history of environmental challenges and international lawmaking to address them.

In the present, the overriding challenge is climate change, and much of the action of the Arctic states is directed at mitigation and adaptation. As one example, the Arctic Council is focusing considerable attention on black carbon and other “short-lived climate pollutants.” Black carbon is a form of particulate matter generated by diesel exhaust, among other sources, that lowers the reflectivity of snow and ice, thereby accelerating melting. Byers’s concise explanation of the role of black carbon in Arctic warming displays his talent for distilling technical subject matter into an intuitive, compelling presentation. *International Law and the Arctic* additionally chronicles the regional and international cooperation to protect the polar bear. Amid the overwhelming stress of climate change on polar bear populations, many Arctic states, including the United States, are seeking to clamp down on stressors that they can control within the framework of the 1973 Agreement on

the Conservation of Polar Bears. Likewise, the United States has repeatedly proposed to “up-list” the polar bear to Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

On the horizon is an influx of human activity: shipping, fishing, tourism, and exploitation of seabed resources. The prospect of such activities in a newly accessible Arctic has at once inspired excitement about their economic promise and fear about their risks. Byers reminds readers that the seasonal accessibility of Arctic waters to vessels beyond icebreakers does not make these activities free of risk—to participants, to Arctic ecosystems, or to the livelihoods of Arctic residents. In this vast, remote, and frequently harsh environment, search and rescue, as well as response to environmental emergencies, is enormously challenging, and the icy water exacerbates and prolongs the harmful effects of pollution. The Arctic coastal states therefore have a special interest that activities in Arctic Ocean be conducted according to the highest standards of safety and environmental protection. But non-Arctic states likewise assert their interests in fishing and shipping routes, and thus the regulation of Arctic waters. An Arctic increasingly accessible to human activities presents questions not only about the balance to be struck between opportunities and risks, but about *who* is competent to strike this balance.

Against this backdrop, Byers contends that long-running disputes about coastal state jurisdiction to regulate foreign vessels transiting the Arctic may come to a head. He traces the international controversy over unilateral coastal state regulation of Arctic waters back to the voyage of the SS *Manhattan*, a U.S. tanker, through the Northwest Passage in 1969 and the Canadian Parliament’s adoption of the Arctic Waters Pollution Prevention Act in 1970, amid understandable concern for the catastrophic consequences of an oil spill in the icy waters abutting Canada’s Arctic coastline. In asserting Canadian jurisdiction to regulate shipping one hundred nautical miles from Canada’s Arctic coastline, the Arctic Waters Pollution Prevention Act extended coastal state regulation of foreign vessels well into what were then the high seas, which elicited a prompt protest by the United

<sup>17</sup> See Steven Chase, *Harper Orders New Draft of Arctic Seabed Claim to Include the North Pole*, GLOBE AND MAIL, Dec. 4, 2013, at <http://www.theglobeandmail.com/news/politics/harper-orders-new-draft-of-arctic-seabed-claim-to-include-north-pole/article15756108/>.

States questioning the international legal basis for the act. Canada, for its part, revised its acceptance of the International Court of Justice's compulsory jurisdiction to shield this measure from adjudication. Byers charts the evolution of Canada's international legal justifications for its regulation of foreign vessels along its northern coast (including its present claim that the waters of the Canadian Arctic archipelago constitute "historic internal waters," a claim Byers contends is bolstered by the historic use of the islands and the sea ice adjoining them by the Inuit) and for its enclosure of the islands with straight baselines in 1985, which again resulted in protests by the United States and European Union, among others.

*International Law and the Arctic* likewise traces the history of Russian regulation of the Northern Sea Route—which skirts Russia's northern coast between the Pacific and Atlantic Oceans—and U.S. objections that such regulations impermissibly impede navigational freedoms. Byers finds similarity in the controversies about the status of the Northwest Passage and that of the Northern Sea Route, with the United States maintaining that certain waters claimed as internal by Canada and Russia, respectively, are straits used for international navigation and thus subject to the regime of transit passage. Given these parallels and common cause, Byers suggests that "the two countries would be wise to pursue a joint Russian-Canadian position on the legal status of the Northern Sea Route and Northwest Passage" (p. 153). Such an effort, he contends, would strengthen both states' leverage vis-à-vis the United States and any other state that opposes the respective Canadian and Russian positions on internal waters.

As is evident from Byers's earlier academic work and op-ed writing,<sup>18</sup> he is a passionate, outspoken advocate for Canada's legal position on the status of the Northwest Passage and also for what he contends is a policy rationale for the United States and others to acquiesce to it. Both the legal and policy analysis with respect to the Northwest Passage will

be familiar to those acquainted with his prior writing on the subject. In particular, Byers continues to argue that, in light of the United States' concern about threats from nonstate actors, it would be in its national security interest to accept Canada's legal position, recognizing unfettered Canadian jurisdiction to stop and inspect vessels in the Northwest Passage as a means of preventing the entry of terrorists or weapons of mass destruction into North America. Byers further argues that Canada's incentive to invest in "policing, search and rescue, oil spill response" (p. 154) and other coastal state functions is diminished by the position of the United States and others that a right of transit passage exists through the Northwest Passage; he suggests that the United States should recognize Canada's internal-waters position in exchange for Canadian commitments on access, infrastructure, and services. Though sympathetic to the safety and environmental protection challenges of managing vessel traffic in the Northwest Passage, this reviewer was not persuaded by Byers's arguments that these challenges are cause for the United States to abandon its global legal positions on international straits and coastal baselines. The governments' respective legal positions are anchored in broader interests than navigational safety and pollution prevention in the Northwest Passage—namely, for the United States, worldwide freedom of navigation, and in Canada, an intense politics of "Arctic sovereignty."<sup>19</sup>

One respect in which *International Law and the Arctic* goes beyond Byers's prior writings<sup>20</sup> on the subject is in its consideration of multilateral alternatives (or complements) to the internal-waters justifications for regulating the Northwest Passage and Northern Sea Route. Byers summarizes the provisions of UNCLOS establishing the duties of vessels engaged in transit passage through a strait and enabling states bordering a strait to enact laws and regulations for the safety of navigation and for pollution prevention. He likewise introduces

<sup>19</sup> See Ted L. McDorman, *The Northwest Passage: International Law, Politics and Cooperation*, in CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA, *supra* note 11, at 227, 246–50.

<sup>20</sup> See BYERS, *supra* note 8, at 82–83; Michael Byers & Suzanne LaLonde, *Who Controls the Northwest Passage*, 42 VAND. J. TRANSNAT'L L. 1133, 1170 (2009).

<sup>18</sup> See, e.g., Michael Byers, *Canada Can Help Russia with the Northern Sea Route*, MOSCOW TIMES (June 9, 2012), at <http://www.themoscowtimes.com/news/article/canada-can-help-russia-with-northern-sea-route/460127.html>.

UNCLOS Article 234, which augments a coastal state's jurisdiction to prescribe and enforce pollution-prevention laws in ice-covered waters. Ultimately, Byers concludes that these UNCLOS provisions offer a "strait state" uncertain, and likely insufficient, authority to enforce its laws at sea. In particular, Byers observes that "it is unclear whether [Article 234] would allow Canada or Russia to interdict noncompliant vessels in an international strait, at least until a pollution incident occurs" (p. 164), though he does not undertake an analysis of the enforcement jurisdiction conferred by that provision.<sup>21</sup> It is a shame that Byers did not further analyze the circumstances in which Article 234 might permit proactive enforcement of environmental laws in the Northwest Passage or Northern Sea Route, or explore how Canada and Russia might utilize Article 234 in concert with other accepted multilateral mechanisms—such as ship-routing measures and ship-reporting systems established pursuant to Chapter V of the Convention on the Safety of Life at Sea.<sup>22</sup> Such analyses would facilitate a fuller assessment of the sufficiency of international legal mechanisms in relation to Arctic straits.

Of course, shipping is not the only emerging activity in a changing Arctic that necessitates a balancing of opportunities and risks. The tantalizing opportunity of abundant hydrocarbon resources, the elevated risks of petroleum production in Arctic conditions, and the catastrophic consequences of a spill may present the most difficult balancing act. Unlike international shipping, petroleum production on the continental shelf is subject to the exclusive jurisdiction of the coastal state.<sup>23</sup> But neither oil pollution nor the marine life affected by it respect national boundaries, and there are opportunities to enhance both the prevention of,

and response to, oil pollution incidents through international cooperation.

*International Law and the Arctic* provides a useful introduction to the unique risks and consequences of oil pollution in the Arctic Ocean. In surveying a subset of national standards applicable to offshore petroleum production across the region, Byers focuses on whether an operator must demonstrate the capability to drill a relief well to "kill" an out-of-control well in the same drilling season. Such capability is especially important—and onerous—in Arctic waters. Given the short window in which the drilling sites are accessible each year, response efforts can be delayed for hundreds of days, with disastrous consequences.

Byers's policy prescription for oil pollution prevention is for the Arctic states to "eliminat[e] the liability caps on Arctic oil exploration, development, and shipping" (p. 211) so that industry may internalize the true cost of activities in the Arctic. With respect to petroleum production, in particular, Byers submits that

what is really needed is an Arctic-wide treaty that focuses on oil spill prevention, and this might involve forcing companies to internalize the full costs of offshore drilling in the region. Oil companies will develop and implement the enhanced safety measures needed in the Arctic, but only if they are forced to bear the full risk and cost of damage caused by spills. (P. 213)

This is a bold prescription, and one that Byers likely recognizes is against the grain of powerful political realities. He notes, for example, that even in May 2010, before the Macondo well in the Gulf of Mexico was under control, a bill in the U.S. Congress to raise the liability caps of the Oil Pollution Act failed.

A more likely near-term course for international cooperation on Arctic petroleum production involves relatively informal coordination of standards and best practices. An international agreement among the Arctic states is an unlikely vehicle for harmonization of petroleum production standards. Industry plays a prominent role in the development of standards within the regulatory frameworks of several Arctic states, and many such standards are specific to the conditions of each

<sup>21</sup> For a detailed analysis of Article 234 in relation to the Northwest Passage, see Kristin Bartenstein, *The "Arctic Exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?*, 42 OCEAN DEV. & INT'L L. 22 (2011).

<sup>22</sup> International Convention for the Safety of Life at Sea, Ch. V, Regs. 10, 11, Nov. 1, 1974, 1184 UNTS 278.

<sup>23</sup> UN Convention on the Law of the Sea, *supra* note 14, Art. 60.

jurisdiction (for example, water depths and seasonal ice extent). Arctic states have sought to collectively improve their national standards through collaboration among oil and gas regulators, who have shared experience and expertise on the common challenge of preventing oil pollution in Arctic waters. Consider, for example, *Barents 2020*, a bilateral initiative of Norway and Russia for the harmonization of health, safety, and environmental standards for petroleum production in the Barents Sea.<sup>24</sup> In May 2013, the Arctic Council established a Task Force on Arctic Marine Oil Pollution Prevention with a mandate to “identify how best the Arctic Council can contribute to marine oil pollution prevention in the Arctic, to recommend a concrete plan of action, and, as appropriate, to develop cooperative arrangements to implement the Action Plan.”<sup>25</sup> The task force met for the first time in January 2014 and began to explore establishing a mechanism for enhanced collaboration among Arctic oil and gas regulators, as well as a range of potential areas for cooperation among the Arctic states to complement existing and contemplated IMO measures on oil pollution from ships.

Common to much of the international cooperation to address human activities in the Arctic that are still many years in the future is an understanding that by the time they become a reality, the window for responsible management may have closed. Byers makes a compelling argument that such is the case with commercial fishing in the high seas area of the central Arctic Ocean. He sets the stage with a discussion of the 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea—negotiated after overfishing precipitated a population collapse—and concludes that “impressive as it is, the Convention came too late for the pollock stocks” (p. 179). Byers heeds the call by a number of scientists that, for the high seas area of the central Arctic Ocean, “there still exists an opportunity to obtain data and create management prior to high levels of fishing and ‘before precautionary man-

agement is no longer an option.’” (p. 180). And he describes the initiative taken by the United States in this regard, including a 2008 joint resolution of Congress urging the executive to negotiate international agreements to manage fish stocks in the high seas areas of the Arctic Ocean,<sup>26</sup> and a 2009 fishery management plan for waters under U.S. jurisdiction in the Chukchi and Beaufort Seas that prohibits commercial fishing until sufficient information is available to support sustainable fisheries management.<sup>27</sup>

Byers makes the case that effective fisheries management for the central Arctic Ocean will require the participation not only of the five Arctic Ocean coastal states but also of commercial-fishing flag states, such as China, Japan, and South Korea, and the European Union. Indeed, representatives of the five states whose exclusive economic zones border the high seas area in the central Arctic Ocean are meeting to explore the possibility of an international agreement to manage fish stocks in that area. Those five states “acknowledge that other States may have an interest in this topic and that they should be included in talks at some point in the future as appropriate.”<sup>28</sup>

#### IV. THE ARCTIC COUNCIL AND ITS PLACE IN ARCTIC GOVERNANCE

That much of the Arctic Ocean and its seabed are subject to some degree of national jurisdiction does not obviate the imperative for international cooperation and coordinated governance to manage the shared challenges and opportunities of a changing Arctic. As outlined above, cooperation among the Arctic states to address common environmental challenges is nothing new. But as the

<sup>26</sup> S.J. Res. 17, 110th Cong. (2008).

<sup>27</sup> North Pacific Fishery Management Council, *Fishery Management Plan for Fish Resources of the Arctic Management Area* (Aug. 2009), at <http://www.npfmc.org/wp-content/PDFdocuments/fmp/Arctic/ArcticFMP.pdf>.

<sup>28</sup> See Press Statement, U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, Chairman’s Statement at Meeting on Future Arctic Fisheries (May 1, 2013), at <http://www.state.gov/e/oes/rls/pr/2013/209176.htm>.

<sup>24</sup> See Det Norske Veritas GL, *Barents 2020 Reports*, at <http://www.dnvusa.com/resources/reports/barents2020.asp>.

<sup>25</sup> Arctic Council, *Senior Arctic Officials’ Report to Ministers, Kiruna, Sweden 32–33* (May 15, 2013).



ice melts, this imperative for regional cooperation intensifies, and a growing number of stakeholders beyond the region are articulating their interests in Arctic governance. From concerns that range from rising sea levels to shipping and fishing, those stakeholders are asserting that the Arctic states are not the only ones with interests in how an increasingly accessible Arctic is governed.<sup>29</sup> Growing perceptions of the global economic relevance of the Arctic have given it a new prominence and have imbued the Arctic Council with a newfound celebrity.

In all of nine operative paragraphs, the 1996 Declaration on the Establishment of the Arctic Council (Ottawa Declaration) lays the foundation for what has become a remarkably dynamic forum in which representatives of the Arctic states—staff scientists, foreign ministers, and Arctic indigenous representatives alike—tackle common opportunities and challenges. The quasi-constitutional Ottawa Declaration establishes the Arctic Council as “a high level forum to provide a means for promoting cooperation, coordination, and interaction among the Arctic states, with the involvement of Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”<sup>30</sup> A footnote clarifies that the “Arctic Council should not deal with matters related to military security.” The declaration further provides that the members of the Arctic Council are the eight Arctic states and that decisions of the Arctic Council are to be by consensus. It also establishes the category of “Permanent Participant” in order “to provide for active participation and full consultation with Arctic indigenous representatives within the Arctic Council.” The six Permanent Participant organizations represent either “a single indigenous peo-

ple resident in more than one Arctic State,” such as the Inuit Circumpolar Conference or Saami Council, or “more than one Arctic indigenous people resident in a single Arctic State,” such as the Russian Association of Indigenous Peoples of the North.

For all the recent attention on the Arctic Council in the press and academic literature, its nature and role in Arctic governance are frequently misunderstood. The international law literature, in particular, has at times placed a misguided emphasis on legal form—of the council itself, and its output—which is a poor proxy for substance in the case of the Arctic Council. It has been suggested, for example, that the recent establishment of a standing secretariat has “arguably transform[ed] the Arctic Council from an inter-governmental forum into an international organization”<sup>31</sup> and that the negotiation of legally binding agreements among the Arctic states under the auspices of the Arctic Council marks a shift from “soft” to “hard” cooperation.<sup>32</sup> Greater attention to substance—to the carefully delineated functions in secretariat’s terms of reference,<sup>33</sup> for example, or to the commitments embodied in agreements—would enable more reliable assessment of the Arctic Council’s evolving role and efficacy.

In fairness, the Arctic Council is difficult to characterize. The council’s role in the Arctic governance landscape is not readily ascertainable from its sparse constitutive documents. Nor do binary concepts of legal form—binding versus nonbinding, intergovernmental forum versus international organization—adequately measure its influence or evolution. A complete understanding of the Arctic Council—what it is, and where it might go—is greatly assisted by a knowledge of where it has been, and how it got here. Such is the value of

<sup>29</sup> See, e.g., Sanjay Chatuverdi, *Geopolitical Transformations: ‘Rising’ Asia and the Future of the Arctic Council*, in *THE ARCTIC COUNCIL: ITS PLACE IN THE FUTURE OF ARCTIC GOVERNANCE* 225 (Thomas Axworthy, Timo Koivurova & Waliul Hasnat eds., 2012).

<sup>30</sup> Declaration on the Establishment of the Arctic Council, Sept. 19, 1996, 35 ILM 1387. For an excellent contemporaneous account of the Arctic Council’s establishment, see Evan T. Bloom, *Establishment of the Arctic Council*, 93 AJIL 712 (1999).

<sup>31</sup> MICHAEL C. BYERS, *INTERNATIONAL LAW AND THE ARCTIC* 8–9 & n.36 (2013).

<sup>32</sup> See, e.g., Nikolas Sellheim, *The Establishment of the Permanent Arctic Council Secretariat: Challenges and Opportunities*, in *THE ARCTIC COUNCIL: ITS PLACE IN THE FUTURE OF ARCTIC GOVERNANCE*, *supra* note 29, at 60, 67–68.

<sup>33</sup> Arctic Council Secretariat, *Terms of Reference* (adopted at the May 15, 2012, Deputy Ministers’ Meeting in Stockholm).

*Ice and Water: Politics, Peoples, and the Arctic Council*, by Canadian historian John English.

*Ice and Water* is a history of the Arctic Council, from the events leading to its establishment through the completion of the first cycle of chairmanships in May 2013. With a note of caution “about placing the past’s imprint carelessly on the present,” English submits that “a historian of the Arctic Council must recognize that the institution reflects particular fundamental and enduring characteristics of the history of the Arctic and of international organizations” (p. xxvi). Accordingly, English locates the Arctic Council within the broader historical contexts that take in the Arctic and its peoples, the shifting political currents associated with the end of the Cold War and a growing awareness of climate change, and a global consciousness of the Arctic that has been rising in sync with the melting ice. *Ice and Water* is a far more engaging, enjoyable read than one would expect a history of an intergovernmental institution to be. In addition to the strong characters—not least of which Mary Simon, the former president of the Inuit Circumpolar Conference and the Arctic Council’s first chair—English maintains a brisk pace and displays a keen eye for irony. The book is also timely and policy relevant. The audience seeking to understand the Arctic Council has never been larger or more diverse. And the rotating Arctic Council chairmanship—coupled with the fact that many of the “Senior Arctic Officials” who represent the Arctic states belong to their governments’ foreign service—results in frequent turnover of the council’s leadership. For diplomats parachuting into the stream of Arctic Council history, *Ice and Water* is perhaps the next best thing to having been present at the creation of the council and during its first sixteen years—and probably more entertaining.

Of the many historical insights presented in *Ice and Water*, this reviewer was most struck by the accounts bearing on two of the most basic questions for any governance arrangement: *what* and *who*. What is to be governed, and by whom? In English’s telling, the *what* question was so divisive that it nearly sank the initiative and was never fully resolved. He contrasts the vision of the council’s Canadian initiators, which were focused foremost

on issues affecting Northerners’ quality of life and on practical measures for economic development in the North, with the environmental protection focus of the United States and Nordic states, which conceived of the council as an extension of the Arctic Environmental Protection Strategy. Whereas the Canadians favored a political forum, the Americans favored a more science-driven technocratic body. The brevity of the Ottawa Declaration represents not a tidy agreement, but papers over the absence of a consensus on what the Arctic Council is to do. In the words of a Canadian journalist present at the signing of the Ottawa Declaration: “what the newly-formed body is supposed to do depends on which country’s leader is talking” (p. 223).

Trace elements of the competing visions recounted in *Ice and Water* are evident in the Arctic Council today. The rotating chairmanship is one outlet for each Arctic state to style the Arctic Council according to its vision for two years at a time. While decisions on new initiatives are by consensus, and the chairmanship is not a license to radically remake the council, the incoming chair’s priorities are accorded a certain degree of deference, and the chair’s “bully pulpit” provides an additional lever to shape the agenda. For example, “development for people of the North”—the overarching theme for second Canadian chairmanship (2013–15)—is very much in line with English’s description of the Canadian vision for the Arctic Council at its founding. In furtherance of this focus on economic development, Canada proposed a task force to establish a Circumpolar Business Forum during its chairmanship.

The Ottawa Declaration answers two fundamental *who* questions: which states, and what actors within each state, are to participate? Membership and decision making in the Arctic Council are for the eight Arctic states. Present at the table with the representatives of the eight national governments are the six Permanent Participant organizations representing Arctic indigenous peoples. *Ice and Water* recounts the instrumental role of Arctic indigenous organizations, such as the Inuit Circumpolar Conference, in the establishment of the Arctic Council, but also reveals that the robust role for indigenous representatives—perhaps the

council's most distinctive feature—was far from assured in the negotiations leading up to the Ottawa Declaration. Viewed through the lens of hindsight, this controversy over indigenous participation is striking, as the immeasurable value of Permanent Participants has long since been established. For the government officials who formulate policy in national capitals far from the Arctic, the Permanent Participants offer a vital window into the human dimensions of policy choices. The influence of the Permanent Participants in the Arctic Council belies their lack of a formal “vote”; in the fluid manner in which many decisions are made in the council's working groups and task forces, it is seldom clear when a formal decision is being taken. Moreover, many of the Permanent Participant heads of delegation have been involved in the council much longer than their government counterparts, affording the former a valuable institutional memory and subject matter expertise, and enabling them to be highly effective—and influential—participants in the Arctic Council.

The *who* question that has attracted the most attention of late concerns the participation of states from beyond the region as “Observers.” At the May 2013 ministerial in Kiruna, Sweden, ministers admitted China, India, Japan, the Republic of Korea, and Singapore as Observers, and adopted amendments to the Rules of Procedure establishing procedures and criteria for admitting Observers and clarifying their privileges and responsibilities. These amendments, along with the *Arctic Council Observer Manual for Subsidiary Bodies* adopted on the same day, were the culmination of several years of work to open the council to a wider group of stakeholders while preserving its culture—including the unique role of the Permanent Participants—as meetings grow larger. The amendments direct that Observers shall be invited to all meetings and activities of the Arctic Council unless the Senior Arctic Officials decide otherwise by consensus, and that Observers may, at the discretion of the chair, make statements and offer views on items under discussion in working group and task force meetings. In these meetings, where the substance of much of the council's work takes shape, Observers that can

offer relevant expertise are well placed to be influential participants.

Does Observer status enable non-Arctic states to adequately represent their interests? The answer lies in the Arctic Council's place in the multilayered governance landscape for the Arctic. The Arctic Council is not the exclusive forum for addressing the challenges and opportunities of a changing Arctic, and the law of the sea's division of jurisdiction assures that it never will be.<sup>34</sup> It is not the forum where standards for Arctic shipping—ship design, discharge restrictions, and so on—are fixed. That is the province of the IMO, a global body. Nor does the Arctic Council manage Arctic fisheries. That is for regional fisheries management organizations. Particularly in view of the other forums that make up the Arctic governance landscape, in which all users of the Arctic Ocean may participate on an equal footing, the Arctic Council's provision of Observer status seems an appropriate balance between Arctic states' interest in regional coordination on issues of common concern and other states' interests in the subset of issues that the council addresses.

## V. COOPERATION AND CREATIVITY

Together, *International Law in the Arctic and Ice and Water* tell a story of the Arctic's recent history in which the Arctic states' overriding interest in cooperation has generally prevailed over differences among them. A shared interest in cooperation on environmental protection and sustainable development through an Arctic Council ultimately overcame differences as to its form and the modalities of its work. At the height of tensions between Canada and the United States over the legal status of the Northwest Passage, the two neighbors concluded the 1988 Agreement on Arctic Cooperation, a pragmatic agreement to disagree that enables both parties to put aside the legal issue and focus on cooperation in a challenging, ecologically sensitive environment. Arctic Ocean

<sup>34</sup> See, e.g., Erik J. Molenaar, *Current and Prospective Roles of the Arctic Council System Within the Context of the Law of the Sea*, in *THE ARCTIC COUNCIL: ITS PLACE IN THE FUTURE OF ARCTIC GOVERNANCE*, *supra* note 29, at 139.

coastal states that will one day be on opposite sides of the negotiating table to delimit overlapping extended continental shelf have cooperated extensively in gathering the data necessary to delineate their respective ECS; as one notable example, during four field seasons the Canadian Coast Guard icebreaker *Louis St. Laurant* and the U.S. Coast Guard icebreaker *Healy* took turns breaking ice while the other collected seafloor data.

Byers observes that some of this “cooperation is manifested through a growth of international law, more and more of which is specific to the Arctic, and these rules are helping countries to avoid and resolve what might otherwise be difficult disputes” (p. 281). Indeed, the law of the sea helps to align the interests of the coastal states in favor of cooperation in delineating continental shelf limits and delimiting maritime boundaries; such cooperation nurtures the stability of the framework that underpins the coastal states’ primacy in the Arctic Ocean. With a coordinated push by the Arctic states, the IMO is progressing toward a mandatory Polar Code with safety and pollution-prevention requirements tailored for polar waters. And the Arctic states have recently structured their cooperation on search and rescue and on oil pollution preparedness and response around international agreements. The enthusiastic reception of these agreements in many corners as reflecting a new-found seriousness of the Arctic Council has created a certain momentum toward international agreements as the cooperative mechanism of first resort.

Not every challenge in a changing Arctic calls for international lawmaking. The Arctic Council’s working groups have identified numerous opportunities for international cooperation to improve quality of life in the region and to manage the effects of ever-increasing human activities. In engineering this international cooperation, international lawyers should carefully weigh the tradeoffs between form and substance—and time—and pursue international agreements only where they would best facilitate effective cooperation, not distract from it.<sup>35</sup> With so many challenges necessitating cooperation, success should

<sup>35</sup> On identifying when an international agreement is an optimal mechanism for cooperation, see Brian Israel,

be measured not simply by the making of new law, but by achieving successful cooperative outcomes through the creative use of existing legal frameworks. For creative international lawyers, the extensive latticework of global and regional agreements and institutions relevant to the Arctic offers a wealth of opportunities.

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### BOOK REVIEWS

*Humanizing the Laws of War: Selected Writings of Richard Baxter.* By Richard Baxter. Edited by Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel, and Charles Keever. Oxford, New York: Oxford University Press, 2013. Pp. viii, 380. Index. \$60.

This truly fine book is composed of nineteen articles dealing with various aspects of the laws of war that were written and published by the late professor Richard Baxter between 1950 and 1977. During those years, and until his untimely death in 1980, Dick Baxter became the preeminent American academic authority on that part of international law. These nineteen articles demonstrate both his knowledge of and practical insights into that body of law as well as his continual efforts to improve it in ways that would both benefit war victims and be feasible and acceptable for military forces. By republishing these articles in this book, the editors and Oxford University Press have rendered a valuable service for everyone concerned with the further development of the laws of war subsequent to the Geneva Conventions of 1949.

The introduction to the book contains background information that will be helpful in understanding Baxter’s career and his great contributions to the law. A brief biography of Baxter by

*Help from Above: The Role of International Law in Facilitating the Use of Outer Space for Disaster Management, in THE INTERNATIONAL LAW OF DISASTER RELIEF* (David Caron, Michael Kelly & Anastasia Telesetsky eds., forthcoming 2014).

\* The views expressed are personal and do not necessarily reflect those of the U.S. government.