

Current developments: battleground Arctica and lawfare opportunities

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INTRODUCTION

The free and legitimate access to resources, the factual control of lines of communications and the visible military advantage in the Arctic region have been an object of desire for coastal states - territory and waters above 60th parallel, ie Canada, Denmark, Finland, Iceland, Norway, Sweden, Russian Federation and United States - and non-coastal states alike and, as a consequence, the region is subject to a latent or dormant conflict. However, due to the heavy ice access to the region has been impeded for military and commercial routes (North-west passage, Northern Sea Route, Transpolar Sea Route, and Arctic Bridge Route), and has created a peculiar, maybe precarious, legal architecture. This opens the gate to affirmative and negative “lawfare” – a term which refers to the use of law as a weapon.

Since 2009 the fast melting of ice in the High North is evident – see B Smith-Windsor, “Putting the ‘N’ back into NATO: A High North policy framework for the Atlantic Alliance?”, NATO Defense College Research Paper 94 (2013), p 6. Coastal and non-coastal states have identified opportunities, which will search to materialise their stated objectives based on their individual and, for some, collective interests. Russia is positioning itself to go ahead with its Arctic interests against other states in the High North. Like in Ukraine, and pre-and post Crimea where Russia used lawfare extensively, and in its different approaches/forms in order create an ex novo and Russian-centred legal framework to justify its illegal actions, it appears that the same is happening or about to happen in the High North. “During the Ukraine conflict, Russia’s public endorsements of international law and co-operation vis-à-vis the Arctic have co-existed with bolder rhetoric about the region’s territorial value for Russia.” see Kämpylä, Harri Mikkola, T Martikainen, ‘Moscow’s Arctic Dreams Turned Sour. Analysing Russia’s Policies in the Arctic’, FIIA Briefing Paper 192 (March 2016), pp 6-7.

This would mean that current precarious Arctic legal framework runs the risk of entering into the same swirl of interpretation of applicable hard or soft law in a circumstantial, partial and self-interest manner, and, as in the case of Crimea,

to amount to *abus de droit*, which can trigger state responsibility (see “1075th Meeting”, Yearbook of the International Law Commission 1970, vol.1 (New York: United Nations, 1971) 181 at para. 40. See also the Articles on Responsibility of States for Internationally Wrongful Acts 2001, <legal.un.org/avl/ha/rsiwa/rsiwa.html>, and the Articles on the Responsibility of International Organizations New York, 9 December 2011, <legal.un.org/avl/ha/ario/ario.html>, 19 August 2015.

The existing or potential Arctic lawfare thrives on legal ambiguity and exploits legal thresholds and fault-lines. Applied by Russia, which feels free from the need to comply fully with Arctic applicable international law and the rule of law, lawfare can exploit the disadvantages of legal restrictions or legal vacuums in place for the compliant actor, leading to the emergence of “asymmetric warfare by abusing laws”: for the term and related discussions see <http://www.thelawfareproject.org/what-is-lawfare.html>. Moreover, lawfare can be used as both a “time bomb”, by developing legislation to create situations or expectations, or/and an immediate privilege, by claiming others to comply with self-accepted legal obligations.

This article intends to highlight briefly the precarious and fragmented Arctic legal architecture and notes its faultlines, which appear to have given opportunities to Russia to adapt the successful Hadesian lawfare pattern applied in Crimea (and to a certain extent in Syria) for its Arctic ambitions: see A Abdulhamid, “Russia’s Holy War in Syria” (2015) in <https://www.lawfareblog.com/russias-holy-war-syria>. Hadesian lawfare is used to distort the rule of law’s leading principles and underpinnings, while in contrast lawfare qualifies as Zeusian if used to reaffirm and strengthen the principles of law.

Russian lawfare has demonstrated a superb pre-planning legal process and the use of key legal elements which are otherwise hidden in the “shadows”, archives and odd pages of Federal and regional official legal gazettes and codifications. These contribute silently to establishing a false legitimacy to Russian initiated situations and can be presented as faits accomplis to external and external stakeholders and audiences. It is fair to say that Russia’s plans have created lawfare.

THE PRECARIOUS ARCTIC LEGAL ARCHITECTURE: A LAWFARE SACRIFICIAL VICTIM?

Arctic applicable law is extremely complex and fragmented. The Arctic legal architecture is a tributary of domestic, regional and international law, hard and soft law, and it “involve[es] several legal disciplines including environmental indigenous, regulatory, energy, and land use law”: see E Canuel, “The Four Arctic Law Pillars: A Legal Framework”, *Georgetown Journal of International Law*, vol 46, p 737, and also E Gladun, “Environmental Protection of the Arctic Region: Effective Mechanisms of Legal Regulations”, 3(1) *Russian Law Journal* (2015), p 92.

While this portrays a discouraging legal landscape, the reality is that it offers many opportunities for Zeusian lawfare: see B Munoz Mosquera, Sascha Dov Bachmann ‘Understanding Lawfare in a Hybrid Warfare Context’ (2016) *Nato Legal Gazette*, 37, pp 27-28. However, the same goes for Hadesian lawfare too.

Manjeet Kumar Sahu argues in “Arctic Legal System: A New Sustainable Development Model”, *Russian Law Journal* (2016), vol IV, 2, at p 93 that “[t]he Arctic legal system is nothing more than the conflict between common heritage of mankind and the territory of Arctic states ... the dispute [is] not over exploitation of oil and gas [nor on controlling routes] in the Arctic; rather, it [is] over the jurisdiction of the Arctic Region”. Be that as it may, lawfare manifests better and makes itself visible in conflict[ual] environments regardless of their nature, object, intensity and form.

This conflictual situation advances chances for legislators in order to create law for the Arctic, which can be used as tool [as a weapon] for affirmative or negative purposes lawfare as a means of non-lethal weapon can be applied in the Arctic in four legal domains. First, treaty law; the United Nations Convention of the Law of the Sea (UNCLOS), its evolving nature and customary law transpiring from its implementation based on pre-UNCLOS treaties, and other related treaties and domestic procedures; second, soft law and its moral obligations; third, states’ domestic law; and fourthly, existing private international law.

The Arctic, contrary to the Antarctic (see The Antarctic Treaty in <http://www.gc.noaa.gov/documents/1959-Antarctic-treaty.pdf>), has no dedicated treaties, and in a partial and sectorial manner the “hard law” of international *treatise* applies. The UNCLOS applies, as well as the Montreal Protocol on Substances that Deplete the Ozone Layers; the United Nations Framework Convention on Climate Change; the Convention for the Protection of the Marine Environment of the North –East Atlantic; the Espoo Convention on Environmental Impact Assessment in a Transboundary Context; the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic; and the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic. This hard law can be applied also as a form of evolving customary law of state practice, as the United States does, since the US is not a party to the UNCLOS. However, this hard law lacks any enforceable

mechanism. The International Tribunal for the Law of the Sea has jurisdiction over all disputes submitted to it in accordance with the UNCLOS and extends to matters provided for in any other agreement, which gives it jurisdiction. Article 298 allows nations to opt out (all Arctic nations except Norway have exercised this option) of the binding dispute resolution provisions for disputes under Article 83.

Soft law appeared to have worked relatively well to a certain extent until now. Soft law evolved around the (past) willingness of the relevant states and stakeholders to institutionalize their relationships and align them with Arctic common interests. In 1996, the Ottawa Declaration established the Arctic Council in an attempt to institutionalise international relations in the High North with the aim to promote cooperation, coordination, and interaction among Arctic actors on common Arctic issues. The Arctic Council works based on consensus and includes not only states but also Arctic indigenous peoples and observers.

Domestic Arctic law shows the particularities of each state, their sovereign interests, the states’ obligations towards their populations, as well as social and economic developments. Russia’s increasing developments and strides in terms of resources, transport and military capabilities for the Arctic region within their respective legal context provoke concerns among the other Arctic stakeholders. Russia’s domestic law for the development of these capabilities generates legal issues for neighbouring states.

Finally, as trade and future resource opportunities loom on the Arctic horizon, private international law is of ever-growing importance and requires more interaction among the different States’ jurisdictions and a much better and cooperative implementation of affected States’ legislations, which may end up being transplanted.

The precariousness of the Arctic legal framework due to the lack of a solid and seamless *corpus legis*, the existence of changing objects in terms of legislative necessities (melting ice, potential new lines of communications, milder temperatures for permanent military activities and bases) of that framework, and the increasing numbers of regional, domestic, and international institutions with interest in the region may prepare the grounds for a repeat of pre-Crimean occupation Russian lawfare.

PRE-PLANNED RUSSIAN HADESIAN LAWFARE? FOUR SCENARIOS

Russia has found opportunities for applying lawfare in the High North at least since the 1990s. The Northern Sea Route (NSR) and Russia’s corridor comprising the sea areas of the north of the Federation regardless of the distance from the coastline, including the Exclusive Economic Zone (EEZ), territorial and internal waters have been regulated by Russia’s domestic law. The Federal Law on the EEZ and the Adjacent Zone of 1998 refers expressly to the NSR as part of Russian internal waters by using straight lines like Canada: see “Legal Aspects of Arctic Shipping. Summary report”, European Commission, Directorate-General for Maritime Affairs and Fisheries (MRAG Ltd, London, 2010), p 16.

It has to be submitted that if straight baselines were to be upheld, they would have absolute coastal state authority in internal waters or the extensive coastal state authority in territorial waters. The Russian Federation has enacted laws and regulations that are significantly more stringent than GAIRES (generally accepted international rules and standards). This lawfare already affect negatively other states' navigation of warships and other government vessels and questions Grotius's fundamental principle of *mare liberum* (freedom of the seas – see H Grotius, *The Freedom of the Seas* (Latin and English version, Magoffin trans) (1608) in <http://oll.libertyfund.org/titles/grotius-the-freedom-of-the-seas-latin-and-english-version-magoffin-trans>).

For the Russian Federation, the notion of the NSR as a national asset is well established and a specific body of legal rules has been developed for navigation through its Arctic waters. Also, in reliance on Article 234 of the UNCLOS, these rules establish international standards, which tightly regulate the passage along the NSR and may become more so by issuing new NSR law by blurring the distinction line between the territorial sea and the EEZ, which may end up impeding de facto the use of the NSR and still applying Article 234 of the UNCLOS. This amounts to preemptive lawfare by Russia.

In February 2013, Russia issued “The Strategy of Development of the Arctic Zone of the Russian Federation and ensuring National Security up to 2020” with the goal “to enforce Russia’s sovereignty, and reinforce its military capabilities, in the Arctic”. This strategy has manifested in an unprecedented and unilateral military build-up in the High Sea. In 2014 the Defence Minister, Sergey Shoygu, said: “a constant military presence in the Arctic and a possibility to protect the state’s interests by military means are regarded as an integral part of the general policy to guarantee national security... One of the Ministry’s prioritized areas is development of military infrastructure in the region.” He went on to describe that the creation of Russia’s Arctic force and the distribution of “equipment with weapons for the whole Arctic” will be completed by 2018 ... “Military troops deployment in Chukotka will make it possible to enhance safety of the Northern Sea Route’s traffic and respond timely to potential military threats in the area.”: see A Poulin, “5 Ways Russia is Positioning to Dominate the Arctic” in <http://intpolicydigest.org/2016/01/24/5-ways-russia-is-positioning-to-dominate-the-arctic/>, and also A Kuersten, “Imagining the Arctic: International Law, Governance, and Relations in the High North”, *Michigan State International Law Review* (2016), vol 24.3, pp 621-22.

As a result of this new Russian lawfare and doctrinal approach, Russia created in December 2014 the Joint Strategic Command North (JSCN) and has already established several bases in the region. The regulations passed by Russian legislators to create and finance these resources must be considered a “time bomb” lawfare, as any counter-action by Western authorities to these Russian activities will now be considered an interference in Russian internal affairs and even as a breach of international law. On the other hand, if no claim is made, any “clash” with Russian assets/interests in the zone after 2018 would also be considered a breach of Russian domestic law

by Western States. Like in Crimea, Russia has created a fully operational legal catch-22 situation for the free-world and NATO where any action or inaction has dire consequences.

Russian recent lawfare in the Arctic has culminated in the August 2015 Russian appeal to the UN for the recognition of a large expanse of approximately 460,000 square miles of the Arctic Sea, including the North Pole, as forming part Russia’s EEZ, which directly conflicts with claims from other countries. There is a similar Russian precedent in 2002, which was rejected based on insufficient evidence (see *The Wall Street Journal*, Russia Files Revised Claim for Arctic Territory with UN, in <http://www.wsj.com/articles/russia-files-revised-claim-for-arctic-territory-with-u-n-1438719346>). In the summer of 2007, Russia sent a team of scientists to survey the Arctic region, who planted the Russian flag on the seabed under the North Pole and took samples from the sea floor to “prove” the extent of Russia’s continental shelf. Russia, based on these geologic samples, claimed that the Lomonosov Ridge, a mountain ridge under the North Pole, and the Mendeleev Ridge, were Russian as they were a natural extensions of the Eurasian continent. These Russian activities bear a striking resemblance of China’s aggressive activities and lawfare in the South China Sea.

The Arctic Council allows other non-Arctic states, international organisations and non-governmental organisations (NGOs) to participate (see Arctic Council Rules of Procedure, annex 2, September 17–18, 1996; see also “Nine Intergovernmental and Inter-Parliamentary Organizations have an approved observer status” in <http://www.arctic-council.org/index.php/en/about-us/arctic-council/observers>). NGOs concerned with Arctic issues get together, exchange ideas and perspectives and develop common strategies to influence policy makers (through the Arctic NGO Forum in <http://arcticngoforum.org/about.aspx>). On 20 January 2015, the Russian Duma approved a draft law that amended several legislative acts regulating the activities of foreign and international organisations working in Russia, including religious ones. The criteria is if those organisations “threaten the constitutional system of the Russian Federation; defence of the country, state security, public order or morals; or the rights or interests of other people.” The decision will be made by the Office of the Prosecutor General based on information received from law enforcement authorities and in coordination with the Ministry of Foreign Affairs. This is a legal tool Russian can use to avoid “undesirable” NGOs in the Arctic Council making contributions at the level of working groups or propose projects with financial contributions, making statements, presenting written statements, submitting relevant documents, providing views on the issues under discussion, and submitting written statements at Ministerial meetings.

Russia’s propensity to lawfare in the Arctic can become more evident after the success lawfare operations for annexing Crimea and its claims over East Ukraine. Käpylä and others (see above) summarise the nature of the current situation:

Although Russia has every need to maintain the Arctic as a zone of cooperation and dialogue, its consistent commitment to international law has been anything but clear under the current regime. The occupation of Crimea and the conflict in

Ukraine highlight the fact that, if need be, Russia is prepared to dismiss many of the international norms and commitments it has previously endorsed. It has become more uncertain whether or not – or under what conditions – one should expect Russia to remain consistently committed to its legal and diplomatic obligations also in the Arctic.

IS THERE ANY CHANCE OF ZEUSIAN LAWFARE?

Although the purpose of this article is to highlight Russia's lawfare opportunities to use the Hadesian lawfare pattern applied in Crimea for its Arctic ambitions, it is worth briefly pointing out that there also appears to be room in the Arctic legal arena for the implementation of Zeusian lawfare. Some of the existing conflicts referred to above can be mitigated or rendered "legally inert" through treaties. Zeusian lawfare would act as Mendez suggests through a prospective Arctic Treaty signed by North American States:

A treaty could adjudicate sovereignty, postpone territorial disputes, and foster cooperation amongst signatories. One option is a limited treaty involving the North American countries. The other option is an expansive treaty involving all Arctic nations. In the wake of the aggressive Russian maneuvering that took place in 2007, some called for the United States, Canada, and Denmark/Greenland ... This treaty could be designed to counteract Russian control over the region, and would allow the free passage of vessels from the United States through the Northwest Passage ... Moreover, a treaty of this kind would offset or even stop Russian expansionism and afford Canada and Greenland protection under the United States military (Mendez, 'Thin Ice, Shifting Geopolitics: the Legal Implications of Arctic Ice Melt', Denver Journal of International Law and Policy, vol 38.3, (Summer 2010) p 544).

Manjeet Kumar Sahu (see above at p 88) argues that a multilateral Arctic treaty fashioned based on the Antarctic Treaty, and in spite of fundamental regional differences, may bring out joint development agreements, which "would empower [Arctic States] to commonly impart the restrictive rights with natural resources in the contested areas without abandoning their claims and without the requirement for a final resolution of all legal issues. Additionally, joint development agreements may simply offer important adaptability when confronting such a multitude of complex claims."

Regardless if an Arctic Treaty starts with a handful states promoting peaceful resolution of conflicts in the High North and later expanded, à la Antarctic, to all states, coastal or not, interested in the region, this inclusive technique must be considered to be applying lawfare in a Zeusian manner. This would have the potential to regulate sovereignty disagreements as successfully achieved in the southern polar region.

CONCLUSION

The Arctic is a promising dominion for Zeusian lawfare to counter the Russian use of Hadesian lawfare. There is a strong need to "encourage" Russia through the application of diplomatic and other means to comply with international

obligations and to discourage its "solo adventures" in the legal unknowns of the Arctic region. Lawfare appears in the Arctic case to be an exceptional tool to be exploited via extensive pre-planning through exploring the Antarctic and other related cases (such as the present South China Sea dispute – see UN Permanent Court of Arbitration Case No 2013-19 in the matter of the South China Sea arbitration) and the contours not only of the "four pillars", but also the prospect of an Arctic Treaty.

Once more in history, democratic societies in times of conflict have to promote the rule of law and govern their acts by the "apparent weakness" of using the rule of law's available tools. By opting for Zeusian lawfare in the Arctic, regardless self-imposed legal constraints by Arctic particularities, the multifaceted nature of Arctic issues can be addressed by comprehensive, dynamic, and adaptable dedicated legal frameworks.

- The topic of this article is a particular application to the Arctic of a general Lawfare topic originally presented at the University of Exeter's Strategy and Security Institute Workshop during the "The Legal Framework of Hybrid Warfare and Influence Operations" seminar, which took place on 16-17 September 2015. Both authors expanded on the subject in various subsequent presentations at NATO and state level. This article is a summary of their findings.

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