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978-0-521-56182-2 - The Polar Regions and the Development of International Law

Donald R. Rothwell

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This book deals with international law in Antarctica and the Arctic. It reviews how each region is managed by the individual legal regimes, and how the specific international laws developed to deal with unique polar conditions have contributed to the development of international law. It considers relevant aspects of the international law of the sea, international environmental law, and resource management law as applied in the polar regions. Consideration is also given to how international relations regime theory provides a framework for understanding the development of the polar legal regimes, and how polar international relations will impact on future legal developments. The conclusion assesses the impact of the polar regions upon the development of international law.

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# **The polar regions and the development of international law**

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Donald R. Rothwell

*University of Sydney*



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## Preface

The polar regions have always occupied a unique place in international law. During early expeditions to the poles various territorial claims were made which raised difficulties for the application of traditional principles of territorial sovereignty. The adoption of the 1959 Antarctic Treaty sought to 'freeze' territorial sovereignty for the Treaty's duration. In the Arctic there have been continuing disputes over maritime boundaries and claims based on geographic sectors. More recently, both polar regions have been dominated by concerns over resource management and environmental protection. In Antarctica the debate over whether mining should take place resulted in the rejection of a negotiated Convention and its replacement with a Protocol to the Antarctic Treaty prohibiting mining and implementing new Antarctic environmental protection standards. The eight Arctic states have also recently entered into an arrangement to deal with existing and emerging environmental problems.

These examples demonstrate that general principles of international law and existing international law regimes have been considered inadequate for the polar regions and that instead states with interests in the region have developed their own responses to these legal issues. The polar regions may not in this regard seem any more different from other regions of the world where special legal regimes have been adopted. Discrete areas in need of international regulation have also been subject to international law regimes. What is different in the polar regions is their size compared to other regions, the unique problems they face, the interest of the whole international community in their management and resource potential, and the means that have been adopted to deal with management problems.

This work does not seek to undertake a comparative analysis of the

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## xiv PREFACE

legal regimes of the polar regions. While some comparison will be inevitable, the major goal will be to discuss how the legal regimes which exist in the polar regions deal with similar issues and in doing so make an important contribution to international law. Perhaps the most important contribution they make to an appreciation of international law is that they demonstrate the effectiveness of regional management of international problems. The Antarctic Treaty partly grew out of a recognition that traditional principles of state sovereignty were inappropriate and increasingly Arctic states are also coming to the same recognition. The polar regions therefore present interesting contrasts to other traditional management mechanisms which the international system has relied upon. As such the polar regions are important prototypes for regional management in a world which is increasingly becoming concerned about the effectiveness of global management regimes at all levels.

The work is divided into four parts. Part I reviews the international law and international relations framework in the polar regions (chapter 1) before assessing the environment and resources of the polar regions (chapter 2). Part II reviews the legal regimes in place in the two polar regions. In the case of Antarctica (chapters 3 and 4), attention is given to the Antarctic Treaty System and the legal mechanisms which have been adopted to deal with ongoing problems in Antarctic management which have emerged subsequently to the negotiation of the Antarctic Treaty. For the Arctic (chapters 5 and 6), the existing legal regime is reviewed, with emphasis placed upon various mechanisms adopted under the law of the sea. The developments towards a more integrated Arctic legal regime are also assessed with emphasis given to the Arctic Environmental Protection Strategy and proposals for an Arctic Council.

Part III is a consideration of four discrete areas in which the polar regions demonstrate their unique contributions to the development of international law. The law of the sea (chapter 7), management of resources (chapter 8), international environmental law (chapter 9) and international relations regime theory (chapter 10) have been selected for consideration. In each one of these areas, the polar regions have contributed to a greater understanding of certain international law issues and also demonstrated how they have contributed to certain aspects of international law. To ensure a balanced approach, only areas common to both polar regions have been selected. As a result, specific issues which only arise in one polar region and have no

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comparable application in the other are not addressed in this study. Accordingly, the right to self-determination of Arctic indigenous peoples is not considered as there is no equivalent issue in the Antarctic. An emphasis is also placed upon polar responses to management and resources issues rather than global mechanisms. The efforts of the International Whaling Commission to regulate whaling globally are therefore not considered in any detail.

Part IV concludes the work (chapter 11) with a consideration of the relationship between the polar regions and international law. It will be demonstrated that the polar regions have made a significant contribution to the development of international law. How international law has been applied, and the mechanisms which have been adopted to deal with management problems in the polar regions demonstrate the unique contributions which the polar regions have made to a greater understanding of how international law operates and its relationship with questions of international cooperation.

The law is stated at 1 January 1995.

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- Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent, done at Helsinki, 8 July 1985, in force 2 September 1987, (1988) 27 ILM 707
- 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, done in Vienna, 26 September 1986, in force 26 February 1987, (1986) 25 ILM 1,377
- Convention on Early Notification of a Nuclear Accident, done in Vienna, 26 September 1986, in force 27 October 1986, (1986) 25 ILM 1,370
- Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, done at Sofia, 31 October 1986, in force 1 February 1991, (1989) 28 ILM 212
- 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, done in Montreal, 16 September 1987, in force 1 January 1989, (1987) 26 ILM 1,541
- Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd, done in Ottawa, 17 July 1987, in force same day, [1987] CTS 31
- 1988 Agreement between the Government of Canada and the Government of the United States of America on Arctic Cooperation, done in Ottawa, 11 January 1988, in force same day, [1988] CTS 29
- Polar Bear Management in the Southern Beaufort Sea. An Agreement Between Inuvialuit Game Council, Inuvik, NWT, Canada and North Slope Borough Fish and Game Management Committee, Barrow, Alaska, USA, done on 29 January 1988 at Inuvik, NWT, Canada, reprinted in Ian Stirling, *Polar Bears* (Ann Arbor, 1988) 212.
- Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Mutual Fisheries Relations, done in Moscow, 31 May 1988, in force 28 October 1988, TIAS 11,442
- Convention on the Regulation of Antarctic Mineral Resource



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- Activities, done in Wellington, 2 June 1988, not yet in force, (1988) 27 ILM 868
- 1989 Hague Declaration on the Environment, done in The Hague, 11 March 1989, (1989) 28 ILM 1,308
- Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, done at Basle, 22 March 1989, in force 5 May 1992, (1989) 28 ILM 657
- Agreement between the Government of Canada and the Government of the Union of Soviet Socialist Republics on Cooperation in the Arctic and the North, done in Moscow, 20 November 1989, in force same day, [1989] CTS 21
- 1990 Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, done in Washington, 1 June 1990, (1990) 29 ILM 941
- International Convention on Oil Pollution Preparedness, Response and Co-operation, done in London, 30 November 1990, not yet in force, (1991) 30 ILM 733
- Bergen ECE Ministerial Declaration on Sustainable Development, done in Bergen, 15 May 1990, reprinted in Harold Hohmann (ed.), *Basic Documents in International Environmental Law* (Vol. I) (Graham & Trotman: London, 1992) 558
- 1991 Convention on Environmental Impact Assessment in a Transboundary Context, done in Espoo, 25 February 1991, not yet in force, (1991) 30 ILM 800
- Arctic Environmental Protection Strategy, done in Rovaniemi, 14 June 1991, (1991) 30 ILM 1,624
- Protocol on Environmental Protection to the Antarctic Treaty, done in Madrid, 4 October 1991, not yet in force, (1991) 30 ILM 1,455
- Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, done in Geneva, 18 November 1991, not yet in force, (1992) 31 ILM 568
- 1992 Framework Convention on Climate Change, done at New York, 9 May 1992, in force 21 March 1994, (1992) 31 ILM 849
- Convention on Biological Diversity, done at Rio de Janeiro, 5 June 1992, in force 29 December 1993, (1992) 31 ILM 818
- The Rio Declaration on Environment and Development, done at Rio de Janeiro, 14 June 1992, (1992) 31 ILM 874
- Agreement between the Government of Canada and the

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- Government of the Russian Federation on Cooperation in the Arctic and the North (with Annex), done in Ottawa, 19 June 1992, in force same day, [1992] CTS 18
- Convention for the Protection of the Marine Environment of the North-East Atlantic, done in Paris, 22 September 1992, not yet in force, (1993) 32 ILM 1,069
- 1993 The Nuuk Declaration on Environment and Development in the Arctic, done in Nuuk, 16 September 1993
- 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea Area, done in Washington, 16 June 1994, not yet in force, (1994) 34 ILM 67
- Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, done in New York, 28 July 1994, (1994) 33 ILM 1,309
- Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, done in Oslo, 14 June 1994, (1994) 33 ILM 1,540

## Abbreviations

AAT	Australian Antarctic Territory
AEPS	Arctic Environmental Protection Strategy
AJIL	American Journal of International Law
ASOLPO Paper	<i>Antarctic and Southern Ocean Law and Policy Occasional Paper</i>
ATCM	Antarctic Treaty Consultative Meeting
ATCP	Antarctic Treaty Consultative Party
ATS	Antarctic Treaty System
AYIL	Australian Yearbook of International Law
Bush	Bush, W. M. <i>Antarctica and International Law: A Collection of Inter-State Documents</i> (4 vols. and binder). Oceana: London. vol. I/II – 1982; vol. III/IV 1988; binder – 1990
BYIL	British Yearbook of International Law
CalWILJ	California Western International Law Journal
CanBR	Canadian Bar Review
Case WRJIL	Case Western Reserve Journal of International Law
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCAS	Convention on the Conservation of Antarctic Seals
ConTS	Consolidated Treaty Series
Cornell ILJ	Cornell International Law Journal
CRAMRA	Convention on the Regulation of Antarctic Mineral Resource Activities
CTS	Canada Treaty Series
CYL	Canadian Yearbook of International Law
DallJ	Dalhousie Law Journal
EEZ	Exclusive Economic Zone

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<i>Handbook</i>	<i>Handbook of the Antarctic Treaty System. (8th) (2 vols.). US Department of State: Washington. 1994</i>
IASC	International Arctic Science Committee
ICC	Inuit Circumpolar Conference
ICJ Reports	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
IGY	International Geophysical Year
IJEC	International Journal of Estuarine and Coastal Law
ILM	International Legal Materials
ILR	International Law Reports
IntJ	International Journal
IntOrg	International Organization
IUCN	International Union for the Conservation of Nature and Natural Resources (The World Conservation Union)
IWC	International Whaling Commission
JMLC	Journal of Maritime Law and Commerce
LNTS	League of Nations Treaty Series
MARPOL	1973/1978 International Convention for the Prevention of Pollution by Ships
MPA	Multiple-Use Planning Area
MULR	Melbourne University Law Review
NatResJ	Natural Resources Journal
Nordic JIL	Nordic Journal of International Law
NSR	Northern Sea Route
ODIL	Ocean Development and International Law
Ottawa LR	Ottawa Law Review
PCIJ Reports	Permanent Court of International Justice Reports
ProcAmSocIL	Proceedings of the American Society of International Law
ReDC	Recueil Des Cours
RIAA	Reports of International Arbitral Awards
SC	Statutes of Canada
SCAR	Scientific Committee on Antarctic Research
SPA	Specially Protected Area
SRA	Specially Reserved Area
SSSI	Site of Special Scientific Interest
Stanford JIL	Stanford Journal of International Law
TexILJ	Texas International Law Journal
TIAS	Treaties and other International Acts Series

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ABBREVIATIONS    xxxi

U Miami LR	University of Miami Law Review
UBCLR	University of British Columbia Law Review
UNCLOS	United Nations Convention on the Law of the Sea
UNTS	United Nations Treaty Series
VaJIL	Virginia Journal of International Law
YIEL	Yearbook of International Environmental Law
YILC	Yearbook of the International Law Commission