Elisabeth Mann Borgese, **UNCLOS**, and the Arctic: The Power of Normative Thinking and Her Legacy

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In a volume dedicated to the memory Elisabeth Mann Borgese, it is fitting to reflect upon the impact that the focus of her life’s work has had on the international system. Those who have had the privilege of knowing her can attest to the power of her ideals and her vision for the future. Coming out of the ravages of the Second World War, she dedicated her life to making the world a better place. To that end, she concentrated on the study and promotion of the 1982 United Nations Convention of the Law of the Sea (**UNCLOS**). It was her core belief that the facilitation of an equitable sharing and sustainable utilization of the world’s oceans would be a fundamental component of international cooperation and peace. Her commitment and drive in supporting the development of the Third United Nations Conference on the Law of the Sea and the implementation of **UNCLOS** was an important element of the treaty’s ultimate success. She is rightly referred to by many as the ‘mother’ of the Convention (alongside its ‘father’, Arvid Pardo, her good friend and colleague).

I had the privilege of being both her Ph.D. student and, for a time, her dog-sitter. (Throughout her life she was an avid dog lover and usually had at least five dogs in her household at any one time.) This gave me the unique opportunity to spend extensive time with her discussing and debating her thoughts and plans regarding ocean governance. As both her writings and our conversations made clear, she believed that the true value of **UNCLOS** was in its development as a ‘constitution’ of the ocean which established a set of rules and procedures that would ensure the sustainable and orderly use of the oceans. But equally important, Elisabeth believed that it provided for the development of an international set of norms promoting international cooperation that went beyond its specific provisions. In effect, she understood that the development of a robust and comprehensive set of rules established by **UNCLOS**

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1 Elisabeth Mann Borgese was very prolific in her writings. Two of my favorites are *The Future of the Oceans: Report to the Club of Rome* (Montreal: Harvest House, 1986) and *Oceanic Circle: Governing the Seas as a Global Resource* (Tokyo: United Nations Press, 1998).
would have ramifications well beyond ocean governance and would ultimately promote greater co-operation on both land and sea. And she was right!

As important as UNCLOS was in the improvements in the world’s ocean governance system, its significance went beyond marine matters. This has become abundantly clear in regards to the developing governance of the Arctic. While the Arctic is essentially an ocean with five coastal state regions that encircle it, it was a frozen ocean that remained largely inaccessible. With the exception of the so-called Canadian clause in UNCLOS, Article 234 on ‘ice-covered waters’, there was little attention given to the Arctic during the negotiation of the Convention because few thought of the international nature of the region. However as the impacts of climate change now opens the region in ways previously thought impossible, it is clear that the strength of UNCLOS both in terms of its substance and its normative framework allows for the peaceful and co-operative development of a system of rules, organizations, and practices in the Arctic region.

In the late 1990s and early 2000s, many began to fear that the opening of the Arctic waters would unleash a rush to claim and exploit its resources in a lawless ‘new’ international region. Several commentators—myself included—suggested that there was a need to create a new international treaty specific to the Arctic that would replicate the benefits of UNCLOS. But by the end of the first decade of the 2000s, it became clear that this would have been redundant.

2 Regardless of the challenges faced to reach this location, there are several international disputes in the region. The United States disagrees with Russia and Canada over the international status of the Northeast Passage and the Northwest Passage (internal waters versus international strait). Canada and Denmark disagree over the ownership of Hans Island. The United States and Canada disagree over the delimitation of the maritime boundary of the Beaufort Sea.

3 There is a huge literature on this, see, e.g., A. Anderson, *After the Ice: Life, Death, and Geopolitics in the New Arctic* (New York: Smithsonian Books, 2009); M. Byers, *International Law and the Arctic* (Cambridge: Cambridge University Press, 2013); C. Emmerson, *The Future History of the Arctic* (London: The Bodley Head, 2010).

4 Among the academic literature, see R. Howard, *The Arctic Gold Rush: The New Race for Tomorrow’s Natural Resources* (London and New York: Continuum, 2009); R. Sale and E. Potapov, *The Scramble for the Arctic: Ownership, Exploitation and Conflict in the Far North* (London: Frances Lincoln, 2010). In the media, see “The Arctic: Gold Rush Under the Ice,” *The Economist* (3 August 2007); W. Underhill, “The North Pole Heats Up,” *Newsweek International* 42 (5 December 2005).

5 R. Huebert and B. Yeager, *A New Sea: The Need for a Regional Agreement on Management and Conservation of the Arctic Marine Environment* (Oslo: WWF International Arctic Programme, October 2006); T. Koivurova, “Alternatives for an Arctic Treaty: Evaluation and a New Proposal,” *Review of European, Comparative & International Environmental Law* 17, no. 1 (2008): 14–26, doi.org/10.1111/j.1467-9388.2008.00580.x.
and potentially resulted in fragmentation and legal uncertainty. The terms of UNCLOS are as applicable to the Arctic as they are to any other region. The framework of ocean governance on specific issues such as the determination of the outer limits of the continental shelf is the same for the Arctic coastal states as they would be for any other region. More importantly, the normative strengths of having established international rules has created a determination by the Arctic states and other members of the international community to build on the existing framework and go beyond UNCLOS on specific issues on a co-operative basis.

UNCLOS has provided the backbone of much of the international governance system emerging for the Arctic in three ways. First, there has been a direct application of the rules established by the Convention to the region. The Arctic may have been frozen, but it still is an ocean. Secondly, articles of UNCLOS have shaped further rules and agreements governing activities in the region. Third, the norms established for international co-operation have allowed the region to develop in a peaceful and collaborative manner even as the most powerful Arctic coastal states have faced disagreements and conflicts elsewhere. Space does not allow for a comprehensive and detailed consideration of these three major impacts, but it is possible to note the most important elements of these three forces.

The best example of the direct application of UNCLOS to the Arctic is demonstrated by the efforts of the coastal Arctic states to determine the outer limit of their continental shelves under Part VI, the continental shelf. Russia was in fact the first country to submit co-ordinates to the Commission of the Outer Limits of the Continental Shelf in 2001 (the Commission).<sup>6</sup> When the submission was returned to them with a request for additional research, Russia accepted this request and further developed and strengthened its original submission.<sup>7</sup> Canada, Denmark, Norway, and the United States have also dedicated extensive resources to this task.<sup>8</sup> Meeting in Ilulissat, Greenland, in May 2008, they agreed in the final declaration to follow the terms of UNCLOS regarding

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6 United Nations, “Commission on Limits of Continental Shelf Receives it first Submission: Russian Federation First to Move to Establish Outer Limits of Its Extended Continental Shelf,” Meetings Coverage and Press Releases SEA/1729 (21 December 2001), http://www.un.org/press/en/2001/sea1729.doc.htm.

7 M. Webber, “Defining the Outer Limits of the Continental Shelf across the Arctic Basin: The Russian Submission, States’ Rights, Boundary Delimitation and Arctic Regional Cooperation,” *The International Journal of Marine and Coastal Law* 24 (2009): 659–665.

8 Even though the United States is not a party to UNCLOS, T.L. McDorman, “The Continental Shelf Beyond 200 NM: Law and Politics in the Arctic Ocean,” *Journal of Transnational Law & Policy* 18, no. 2 (Spring 2009): 155–194.
the determination of their respective continental shelves. The importance of this meeting lies in two factors. First, even though the United States is not party to **UNCLOS**, it still agreed to attend the meeting and signed the final declaration. The declaration let the rest of the world know that the Arctic was not an ungoverned zone and that the international ocean governance regime applied there as in any other location.

Further, **UNCLOS** has been applied to domestic policies adopted by the Arctic states. One of the best known examples is the use of Arctic 234 by Canada and Russia. It was introduced by the Canadian government during the negotiations to gain better protection and control over international navigation in the Northwest Passage. Both governments have utilized this article to support their regulatory regime in their Arctic waters. Admittedly, there is a considerable debate over whether or not each or both state are exceeding its provisions. Nevertheless, Article 234 has been instrumental in how these states have approached navigation in their northern waters.

It is also becoming evident that the Arctic coastal states, along with other states with Arctic interests such as China, are applying many of the core cooperative norms established by **UNCLOS** to emerging issues. The best example of this is potential commercial fishing in their respective exclusive economic zones (EEZ) and the high seas areas of the Arctic. The five Arctic coastal states have readily agreed to accept the norm of protecting living resources within their EEZ and to apply the precautionary principle to any possible emerging commercial fisheries. There has been a willingness of certain non-Arctic states to enter into negotiations to provide for a cautious and scientifically informed approached to the exploitation of any new fisheries that may develop in the Arctic high seas area as the ice cover retreats. Even more impressive was the subsequent agreement reached in December 2017 to forbid commercial

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9 K. Dodds, “The Ilulissat Declaration (2008): The Arctic States, ‘Law of the Sea,’ and Arctic Ocean,” *Sais Review of International Affairs* 33, no. 2 (2013): 45–55. doi.org/10.1353/sais.2013.0018.
10 D. McRae, “The Negotiations of Article 234,” in *Politics of the Northwest Passage*, ed., F. Griffiths (Montreal: McGill-Queen’s University Press, 1987), 98–114.
11 See A. Chircop et al., “Course Convergence? Comparative Perspectives on the Governance of Navigation and Shipping in Canadian and Russian Arctic Waters,” *Ocean Yearbook* 28 (2014): 291–327.
12 E.J. Molenaar, “The Oslo Declaration on High Seas Fishing in the Central Arctic Ocean,” in *Arctic Yearbook 2015*, eds. L. Heininen, H. Exner-Pirot and J. Plouffe (Akureyri: Northern Research Forum, 2015), 426–431; G. Dickie, “International Accord Bans Fishing in Central Arctic Ocean, Spurs Science,” *Oceans Deeply* (4 December 2017), https://www.newsdeeply.com/oceans/articles/2017/12/04/international-accord-bans-fishing-in-central-arctic-ocean-spurs-science.
fishing in the central Arctic for the next 16 years. Countries such as Russia, the United States, and China were able to put aside their differences elsewhere to reach this agreement. This clearly indicates the desire on the part of all actors to deal with this difficult issue in a co-operative and sustainable manner.

It is important to note that the fishing ban initiative was ultimately led by the United States, because it is not party to UNCLOS. One of the greatest challenges of the application of UNCLOS within the Arctic remains the United States’ refusal and/or inability to accede to the treaty. While the United States invested extensively in the negotiations of UNCLOS and played a major role in its creation, the administration under President Ronald Reagan refused to sign the treaty until elements of Part XI dealing with the deep-sea mining provisions were changed. The United States’ demands were subsequently met through the negotiations of a supplementary arrangement. However, this did not lead to the United States agreeing to be bound by UNCLOS and there remain significant domestic political challenges to consideration of the treaty.

As a result, the United States is unable to participate in any of the bodies created by UNCLOS. However the strength and normative power of the treaty as international law has been demonstrated by the extent to which the United States has continued to use both the terms and the norms established by UNCLOS in their consideration of Arctic issues. Specifically, as described above, the United States led the efforts to develop a precautionary approach to the possibility of commercial fishing in the Arctic. It has also proceeded with the scientific determination of the outer limits of its Arctic continental shelf even though it will not be able to submit the findings to the Commission. Nevertheless, they have co-operated extensively with Canada to determine their co-ordinates.

13 US Department of State, Meeting on High Seas Fisheries in the Central Arctic Ocean, 28–30 November 2017: Chairman’s Statement, Washington, DC, 30 November 2017, https://www.state.gov/e/oes/ocns/opa/rls/276136.htm.
14 J. Norton Moore, “UNCLOS Key to Increasing Navigational Freedom,” Texas Review of Law & Politics 12, no. 2 (Spring 2008): 459–468.
15 E.L. Richardson, “The Politics of the Law of the Sea,” Ocean Development and International Law 11, no. 1–2 (1982): 9–24.
16 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 16 November 1994, 1836 U.N.T.S. 3.
17 P. Bonner, “Neo-isolationists Scuttle UNCLOS,” The SAIS Review of International Affairs 33, no. 2 (2013): 135–146.
18 S.G. Borgerson, The National Interest and the Law of the Sea (Washington, DC: Council on Foreign Relations, May 2009).
19 J. Verhoef, D. Mosher, and S. Forbes, “Defining Canada’s Extended Continental Shelves,” Geoscience Canada 38, no. 2 (2011): 92.
The ability to proceed on all of these fronts, even though relations on a geopolitical level have deteriorated between the key Arctic coastal and other states since 2014 is notable. The Russian intervention in Ukraine has seriously hurt relations between it and the five Arctic coastal states as well as Sweden and Finland.\textsuperscript{20} There has been a significant movement towards the expansion of military capabilities in the region, and relations between the eight Arctic states are difficult.\textsuperscript{21} Yet, this did not prevent the five Arctic coastal states from developing the 2017 agreement to limit fishing in the region. It has also not prevented the five coastal states from further developing their respective continental shelf submissions on a peaceful and co-operative basis under Article 76 of UNCLOS.\textsuperscript{22}

These initiatives in the Arctic point back one of the core principles that Elisabeth firmly believed. Even though she dedicated her entire life in the pursuit of what many characterized as utopian dreams, she always retained a clear understanding of power and a realistic understanding of the international system. She understood that the major powers will have significantly different interests at different times. However, she also understood that with the creation of a fair and equitable system of governance, even enemies can come together when it suits their interests. Furthermore, she understood that the more these states behaved in a co-operative fashion, the more they would find it in their interests to continue to behave co-operatively. Thus it would not be surprising to her that both Russia and the United States and the other Arctic coastal and other states are continuing to co-operate in the Arctic. That was precisely, why she was such a visionary in truly understanding and promoting the constitutional power of UNCLOS and why it has been so important to the Arctic.

\textsuperscript{20} See J. Rahbek-Clemmensen, “The Ukraine Crisis Move North. Is Arctic Conflict Spill-over Driven by Material Interests?” \textit{Polar Record} 53, no. 1 (January 2017): 1–15.

\textsuperscript{21} R. Gramer, “Here’s What Russia’s Military Build-Up in the Arctic Looks Like,” \textit{Foreign Policy} (25 January 2017), http://foreignpolicy.com/2017/01/25/heres-what-russias-military-build-up-in-the-arctic-looks-like-trump-oil-military-high-north-infographic-map/.

\textsuperscript{22} A. Sergunin, “Is Russia Going Hard or Soft in the Arctic?” \textit{The Wilson Quarterly} (Summer/Fall 2017), https://wilsonquarterly.com/quarterly/into-the-arctic/is-russia-going-hard-or-soft-in-the-arctic/.