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INTERNATIONAL LAW AND SECURITY POLICY PERSPECTIVES IN NORWAY'S NORTHERN SEA AREAS

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Some fear that new policy framework conditions for the Arctic and the interest in natural resources and unresolved jurisdictional issues may take on a military character. On the other hand, it must be questioned whether concepts like 'conflict' and 'a race' are in fact appropriate in connection with developments in the High North. Will we find ourselves facing a new cold war if competition for the potential resources of the Arctic waters intensifies apace with the receding polar ice? Which is more likely – that foreign-policy tensions will escalate into military confrontation, or a scenario of more restrained conflict solution?

A new threat picture?

Let us take as our point of departure Norway – a small state, NATO ally, and with maritime and territorial borders with Russia. The Arctic is on top of the Norwegian foreign policy agenda, and the government's 2007 High North Strategy has identified utilization of the possibilities of the North as a major priority for the years to come. Primary focal areas are promoting good-neighbourly relations with Russia, the administration of marine resources, and the Barents Sea as a new energy province. However, among the unresolved issues are national jurisdiction and the final demarcation of maritime borders in Northern waters. At least the former still appears to be causing headache to Norwegian policymakers.

We may well ask: what security-policy challenges is Norway actually facing in this connection? Does Norway have reason to fear a security policy crisis? Is the threat real – and growing? True, there have been recent observations of increased Russian military activity, including the resumption of strategic flights along the Norwegian coast and several fleet exercises in the region. And at times the Russian rhetoric has been decidedly high-key. In Norway, more and more voices have been advocating a clearer military footprint in the North. For their part, the Norwegian authorities have been cautious in interpreting Russia's stepped-up military activity as a direct pressure against national interests. This is all turn of a return to 'normalcy', they have maintained.

All the same, we hold that developments in the High North are not without security-policy relevance to Norway. Here it should be noted that the very concept of security policy has been expanded, making it less meaningful to view the 'Northern Renaissance' solely in narrow military-strategic terms. We should instead speak of a broader range of *strategic interests,* especially with reference to marine resource management and energy security. The trans-Atlantic dimension – continental Europe and the Russian Federation – is central, with Norway incorporated into a power-policy triangle. Or should we speak of a 'quadrangle,' or even a 'pentagon'? The conflict level in the Middle East, developments in Asia, with China as an emerging economic and military superpower – these are not irrelevant to Norwegian foreign policy, which has become part of a *global* reality. And although we cannot analyse all conceivable extremities and frameworks to see what might influence the threat picture for Norway, we can – against the backdrop of such an understanding – begin by stating that the international distribution of economic and military power is bound to affect Norwegian security policy, also in the High North.

Pending jurisdictional issues

A purely *Realpolitik* approach, however, is inadequate for understanding the current security-policy challenges facing Norway in the High North. For a more nuanced picture, it is not enough to focus solely on strategic interests of potential importance to Norway or other foreign policy actors. We need an approach based on the recognition that, whenever we speak of pending maritime borders and jurisdictional issues, this touches on an *international legal order* – 'international' in the sense of applying to all foreign policy actors, and truly a 'legal order'

in which, especially as regards the law of the sea, fundamental developments have occurred in recent decades.

What, then, are the legal issues facing Norway? Firstly – with the exception of an agreement concerning the Varanger Fjord – Norway and Russia have not yet formally finalized the agreement on delineating the continental shelf and the Exclusive Economic Zones (EEZs)/fishery zone in the Barents Sea. However, a "Joint statement on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean" has been signed by the Foreign Ministers of Norway and the Russian Federation.[1] Today the United Nations Convention on the Law of the Sea serves as the international legal basis in the question of delineation between Norway and Russia, whereby the parties are to strive to reach agreement aimed at an equitable solution.

Secondly, the Svalbard Treaty presents several problems, not least in connection with the legal status of the archipelago's adjacent waters and seabed beyond its territorial sea. According to the Treaty, Norway has sovereignty over Svalbard, but there is to be no discrimination against citizens of the other parties to the Treaty as regards their exercise of certain specified rights. However, the Treaty is so worded as to apply only to the territory of Svalbard (and the specifically named islands), and, in certain cases, to the adjacent territorial waters. Both the continental shelf and the EEZ are legal concepts established long after the Svalbard Treaty was signed in 1920. Thus the Treaty contains no explicit reference to these.

This has given rise to the question of whether Norway can, in line with the provisions of the law of the sea, claim sovereign rights to the sea areas and sea floor around the archipelago, or whether the Treaty's rules as to equal treatment are applicable here as well. The Norwegian view is clearly that these rules are *not* to apply to the continental shelf or the adjacent waters.

Few states have expressed themselves on these issues, and we should point out that most of the ratifying parties to the Svalbard Treaty have not said anything explicit concerning the geographical areas to which its provisions are to apply. It is thus somewhat misleading to claim that Norway stands 'alone' in these matters – but until now the issue has remained one of academic interest. For one thing, the continental shelf around Svalbard has not been opened to commercial activity. Secondly, where questions of the application of the Svalbard Treaty *have* had practical importance – i.e. in relation to fisheries – Norway has established a non-discriminatory fisheries protection zone.

Security policy relevance

Starting with the Barents Sea, in our view it would appear rather unlikely that conflicting interests as to the delineation of the continental shelf and EEZs/fisheries zone – no matter how illusory they appear to be given the recent agreement between Norway and Russia – would lead to direct military confrontation between the involved states. An important point concerns the nature and extent of material rights and obligations in question. When we speak of maritime areas under national jurisdiction, in the legal sense this refers to a limited form of the exercise of rights. Of course we should not underestimate the practical and economic importance of the exclusive right of a coastal state to, e.g., oil and gas deposits, or fish. However, it is also important to bear in mind that Norway's – or Russia's – EEZ or continental shelf is 'Norwegian' (or 'Russian') only within the framework prescribed by the material regulations of the law of the sea: in other words, that the state has positively defined rights as well as obligations. In navigating from the Norwegian EEZ to that of Russia, crossing a maritime demarcation line in the Barents Sea, one is not navigating from 'Norway' to 'Russia'. One is moving from waters where Norway has jurisdiction, to waters where Russia has corresponding authority. With the exception of the territorial waters of coastal states, we cannot, in international law, speak of 'sovereignty' or 'supreme authority' of any state – not regarding the sea floor or the superjacent water column – whether in the Arctic Ocean or other waters. And so, except for the case of the territorial waters of a state, we cannot speak of infringement of *sovereignty* in such areas, in the sense applied to conflicts over land territories.

True enough, there have been cases of 'gunboat diplomacy' in strained situation also in the Barents Sea, where the aim has been to display presence and ownership rights to resources. However, even using a *Realpolitik* approach as the point of departure, and assuming basically rational behaviour on the part of the actors, a cost-benefit analysis would be unlikely to predict any particular degree of escalating use of power. The relationship between military risk and political gain would indicate an extreme situation – such as a Russian invasion of Norwegian territory – as being highly unlikely to erupt because of unresolved jurisdictional issues in the Barents Sea. The parties have had far more to gain by letting the issue remain a question of foreign policy and diplomacy, to be dealt with under the rules of international law. It is also

1 Statement of 27 April 2010, available at the web-pages of the Norwegian Ministry of Foreign Affairs:
http://www.regjeringen.no/nb/dep/ud.html?id=833

difficult to see how a state would be able to distance itself from existing political and legal frameworks by resorting to brute force in trying to achieve its preferred solution. Logically enough, that is relatively inconceivable, in both practical and formal terms. If we in addition take into consideration the legal point of departure in such cases – that delineation of sea and seafloor areas requires reaching mutual agreement on a fair and equitable line of demarcation – there exist far more convenient alternatives. The recently adopted joint statement on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean supports this assumption.

Let us then direct our attention to the management of living resources in the Barents Sea area. Ever since the mid-1970s, Norway and Russia/the USSR have managed important fish stocks in the resource-rich Barents Sea. The two coastal states have reached agreement on the distribution of quotas as well as how to manage their fisheries resources. For the most part, fisheries have remained outside the logic of security-policy thinking, and cooperation has functioned well. Also in times when security-policy temperatures were running high, the parties were able to establish and maintain sustainable, bilateral management regimes.

And so it might very well be that the chances for civilized conflict resolution are greater than the risk of military escalation in other, related areas as well – take oil and gas, for instance. In terms of security policy we can distinguish between several sets of challenges. Perhaps the most important aspect, in our view, is how inter-state cooperation can raise the threshold for conflict and crisis. Norway is admittedly a minor actor in international politics. On the other hand, there are certain areas – petroleum in particular – where Norway is a great power, not least with regard to technological capacities. What might this combination have to say for Norwegian security policy in the waters of the High North? Do technology and a relatively considerable resource endowment – in parallel with limited military capacities – make Norway especially vulnerable? Or, conversely, could this position be exploited to Norway's advantage? Norway has declared its ambition of delivering technology in order to promote the integration of the Norwegian and Russian economies. According to the theory of mutual dependence, such integration would serve to raise the threshold for conflict.

In any case, on the basis of actual experience – and not predictions – it is important to recall that the unresolved border dispute between Russia and Norway has to very little degree led to what might be called military tensions. The Grey Zone Agreement has functioned smoothly, and there have also been no extraction of petroleum resources in the area.

When it comes to resource management around Svalbard, the challenges have been bigger and – not least – the legal issues more complex. Might conflicts about the current fisheries management regime escalate? For example, in a scenario where the Norwegian Coast Guard boards a Russian trawler and encounters armed resistance, the situation could indeed become serious. The *Elektron* case in 2005 involved rhetoric that was harsh indeed, and in a scenario like the one sketched out above, the diplomatic channels between Norway and Russia could certainly suffer. Such a case would involve security policy consequences.

However, we should generally be able to expect that such issues would find a peaceable solution. Despite the high temperature and tensions in such cases in the past, they remain an expression of what many would count as 'low politics'. And, in the end, these confrontations have found resolution through peaceful and diplomatic channels.

Turning to the development of petroleum resources, we can follow a similar line of reasoning. The problem is a relevant one to consider, since the continental shelf around Svalbard is assumed to contain deposits, although the extent is not known. It would hardly be a desirable situation for the Norwegian authorities if, for example, a Russian company should wish to conduct petroleum extraction on the shelf around Svalbard, holding that this could be done without taking any note whatsoever of Norwegian regulations. If this should happen with the approval of the state in question (be it Russia or other countries) then of course there would be a security policy problem, or at least a situation with possible foreign policy consequences. Still, we hold, the most important point is that, in the long run, all states should recognize that they will be best served by having such activity on the continental shelf – also that around Svalbard – placed under some form of regulation. That is a different story, but in terms of a realistic legal framework, it is Norway that enjoys such authority according to international law.

Concluding remarks

It is difficult to imagine that the challenges sketched above would – in combination with conflicts of interest – escalate into security policy crises. States – even under assumptions of limited rationality – will weigh political gains against military risks. It would be counter-productive for a state to

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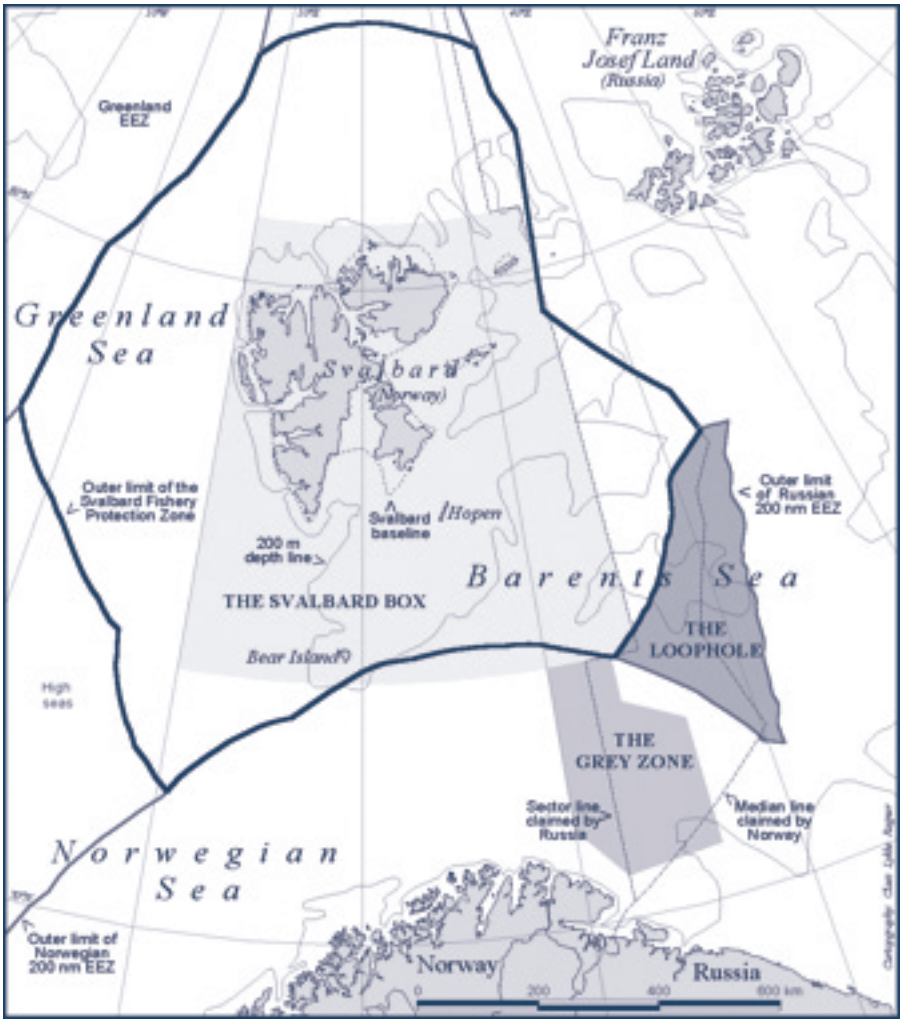

employ excessive use of force in order to achieve limited gains. In addition to this comes the fact that a purely *Realpolitik* approach to the security policy challenges facing Norway in the High North – seeing relations between states as determined mainly by the balance of power between them – is worse than inadequate. Such a methodological approach might possibly have some advantages in a power-policy analysis of 'great powers' and 'small states'. However, the relationship between power and right, and power and politics, is in fact far more nuanced. International law serves the crucial function of providing the premises for what aims and actions a state may find politically opportune in connection with its foreign policy affairs. Moreover, international law is an important component in actual power relations. And furthermore, we must never lose sight of the fact that many of the conditions often held to create security policy challenges for Norway in the High North are already subject to comprehensive regulation within a specific discipline of international law – one that is well developed and which most states see themselves best served by respecting. Events regarding the delimitation between Norway and Russia in the Barents Sea support such a conclusion.

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