

## Briefing Note

# From Ice Law to ICE LAW: Constructing an Interdisciplinary Research Project on the Political-Legal Challenges of Polar Environments

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This briefing note reports and reflects on the ICE LAW Project (the Project on Indeterminate and Changing Environments: Law, the Anthropocene, and the World), a venture convened by IBRU, the Centre for Borders Research at Durham University with the support of the UArctic Thematic Network on Arctic Law. In June 2014, twenty-two scholars with expertise in cultural anthropology, state theory, political geography, and legal studies gathered to consider the challenges that ice – and particularly the sea ice of the polar regions – poses to regulatory norms and political institutions based on a Western legal framework that assumes a clear, permanent, and experienced division between solid land and liquid water. In this briefing note, we describe the process of constructing an interdisciplinary research project based on the geophysical complexities of ice, report on the results of the 2014 workshop, describe the interdisciplinary methodological approach constructed, and outline further research endeavours. In addition, we reflect on a number of research challenges posed by the project: How can one examine general characteristics of polar environments while acknowledging the specificity of inhabited (i.e. Arctic) regions? How can a research focus on one element (sea ice) be paired with acknowledgment of the complex ways in which livelihoods cross between polar surfaces? How can one identify regulatory gaps and inform practical solutions while advancing conceptual understanding? How can a focus on the Arctic be used to address broader global challenges amidst unprecedented anthropogenic transformation of the global environment?

## Introduction

Although the United Nations Convention on the Law of the Sea (UNCLOS) (United Nations, 1982) is universally recognised as providing the fundamental governing framework for the ocean that lies at the centre of the Arctic region (e.g. Ilulissat Declaration, 2008), only one of its 320 articles acknowledges that parts of the ocean are, for at least part of the year, not liquid. Article 234 gives coastal states exceptional environmental powers in portions of their exclusive economic zones where the persistence of “ice-cover” for “most of the year” poses a hazard to navigation. However, even this article contains lacunae that complicate effective implementation: What is meant by “ice-cover”? At what point would melting due to climate change render an area not “ice-covered” for “most of the year”? How do these provisions relate to other provisions in UNCLOS, such as those governing international straits? Can Article 234 inform legal practice in other areas where UNCLOS implementation is complicated by the presence of ice (e.g., the role of ice edges in determining baselines)? How does Article 234 reflect (or fail to reflect) the concerns of users other than commercial shipping interests, such as indigenous inhabitants, for whom ice is not a hazard but an enabler of livelihoods? (Aporta, 2011; Byers, 2013; Kay, 2004; Steinberg *et al.*, 2015).

For all these reasons, it is apparent that UNCLOS provides, at best, a starting point for regulating activities in ice-covered maritime regions. But if UNCLOS is not fully up to the task, how might it be supplemented, or interpreted, or replaced to better reflect the activities that transpire on a frozen ocean? And, equally significantly, what does the failure of UNCLOS to adequately account for frozen ocean tell us about the underpinning principles of state sovereignty and international law, in the Arctic and elsewhere?

In 2014, these questions led researchers at IBRU, Durham University’s Centre for Borders Research, to form the Ice Law Project.<sup>1</sup> The Project’s first event was the Workshop on International Law, State Sovereignty, and the Ice-Land-Water Interface, held in June 2014 in Durham, England, with support from the University of the Arctic’s Thematic Network on Arctic Law.

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## The Workshop on International Law, State Sovereignty, and the Ice-Land-Water Interface

The workshop was designed to address sea-ice related questions at a number of overlapping levels. At the most practical level, the workshop sought to identify gaps resulting from UNCLOS' failure to recognise sea ice and suggest ways that these gaps might be filled through new legal instruments. At a somewhat more conceptual level, the workshop sought to explore how the absence of a comprehensive regime for sea ice was reflective of a systemic disjuncture between, on the one hand, temperate-zone-derived legal and political principles and, on the other hand, the realities of the ways in which indigenous peoples, non-indigenous residents, and outside investors and states encounter the Arctic environment. This inquiry, although conceptual, was also of practical import because, as the workshop's programme noted, "As the imprint of state institutions intensifies in the Arctic, these ruptures between ideals of state sovereignty and the actual territories that are constructed by those who would control, live in, invest in, or pass through them are likely to become more apparent and more problematic for all parties involved" (IBRU, 2014). Finally, in organizing the workshop, we hoped that it and its follow-up projects would contribute to far-reaching understanding of how "legal, political, and regulatory systems are faced with the need to adapt to the uncertainties and instabilities associated with dynamic notions of 'territory' amidst climate change and geophysical flux" (IBRU, 2014).

To meet its more 'practical' goals, the workshop sought to join anthropological expertise in the uses of ice in Arctic livelihoods with legal expertise in how ice was being regulated in national and sub-national jurisdictions to identify how international law's blindness to the specificities of sea ice might be overcome. We recognized from the start that any attempt to implement recommendations emerging from this exercise would face formidable political hurdles. The modern state system is based on a fundamental distinction between solid land (which is divided into state territories) and liquid ocean (which is beyond territory) (Steinberg, 2001, 2009). The history of preliminary efforts to conceptualise an 'Arctic Treaty' has made it clear that any effort to implement a legal regime based on any other understanding of the relationship between geophysics and geopolitics in the Arctic would face a chilly reception in diplomatic circles (e.g. Bellinger, 2008; Ilulissat, 2008).

Nonetheless, we felt that 'blue sky' thinking was needed to begin a conversation that could become highly relevant should the political opportunity emerge. To encourage this 'blue sky' thinking, we attempted to bracket questions of political practicability to the greatest extent possible. The programme sent to participants prior to the workshop made this intent clear:

As an academic grouping without sponsorship from any policy-implementing body, the collection of anthropologists, legal scholars, and political theorists being brought together for this workshop will have the freedom to consider options that address the concerns and practices of peoples and institutions that encounter the specificities of Arctic and sub-Arctic landscapes and seascapes. (IBRU, 2014)

The politics that might hinder implementation would be considered later, if at all.

We also sought to prevent the discussion from being overly constrained by considerations of political practicality by pairing the 'practical' goal with the workshop's more 'conceptual' goals: to use sea ice as a lens for exploring more generally the ways in which geophysical categorisations fail to reflect experiences of space 'on the ground'. Such an inquiry would address a broader trend within political geography and international relations toward querying the material basis of political categories and institutions and, in particular, the relationship between geophysical and geopolitical binaries (e.g. Clark, 2010; Coole & Frost, 2010; *Millennium*, 2013).

To ensure that both the conceptual and practical goals were continually engaged, twelve invited Arctic scholars were joined by ten invited scholars *without* any particular Arctic expertise but with strong research profiles in related areas of law, political theory, anthropology, and geography. As might be expected, the Arctic experts, and in particular the anthropologists and lawyers among them, focused more on the practical goals. Conversely, the non-Arctic experts, and in particular the political theorists and

geographers among them, focused on the more conceptual goals. However a surprising diversion of priorities emerged as the conversation proceeded. Notwithstanding the project's origins in the identification of a specific gap in UNCLOS (and the need to suggest ways to fill it), 'practical'-oriented Arctic experts consistently argued that the remit of the project should expand beyond sea ice. If, they asked, the goal was to investigate how actual encounters with the environment resist the categorisations of modern law, then should the remit of the project not be expanded to Arctic waters regardless of their frozen state? Should it not also include ice-covered land, which also confounds the idealized land-sea binary of modern law? Indeed, if the goal was to create legal frameworks that reflect the livelihoods of northern peoples, should the focus not be the entire Arctic environment? To do otherwise, the argument went, would be to reproduce the binaries that the project was aiming to transcend.

Likewise, just as the practical-minded participants objected to the focus on ice (and, especially, sea ice), some among them also objected to the focus on law. It was noted that law, by its very nature, divides space (and uses of space) into generalizable categories that deny the possibility for change over time, and thus some argued that the focus on law was inconsistent with the project's objectives. Some workshop participants suggested that the legal focus needed to be abandoned entirely if we were to maintain an understanding of Arctic space and its uses as dynamic and unstable. Others suggested that these problems could be addressed by expanding the legal focus to include international soft law (e.g. regulatory mechanisms that operate by means not directly connected with the control of territory) or by adopting a legal pluralist perspective that recognized how state-based legal systems and practices are interwoven with community-based regulatory norms.

In short, several of the participants who were more directly engaged in applied Arctic advocacy and research, questioned both the focus on ice (and particularly sea ice) and the focus on law (and particularly formal public international law). These were potentially damning critiques for an initiative called the Ice Law Project. After all, if the Ice Law Project was not to be about either ice or law, then what was to be its focus?

## The aftermath

During the final day of the workshop, participants agreed that we had begun a creative and potentially fruitful conversation that joined scholars studying human encounters with icy environments, other scholars examining the adaptations and frustrations that occur when Western law is applied to those environments, and still others theorizing what these experiences tell us about the relationship between state and space. However, many in the group acknowledged that the initially chosen vehicle for that conversation – the development of a model law for sea ice (Article 234a, as it came to be called at the workshop) – might not be well suited for the task. The general consensus was that the goal of constructing a model public international law of sea ice was too constrained by the formality of law, the temporal and spatial restrictions mandated by the category of sea ice, and the impracticality of its realization. Nonetheless, participants retained a commitment toward addressing the broader question of how Western law is and is not suited to frigid environments. They also retained a commitment toward exploring how answers to that question might enhance both the development of Arctic regulatory institutions and our understanding of the geophysical underpinnings of modern state institutions.

To that end, in the year since the workshop occurred, the Ice Law Project has taken on four tasks that have sought to pursue its research agenda through a more distributed approach. The first, and most simple, has been to rename the Ice Law Project as the ICE LAW Project, with the acronym standing for 'Indeterminate and Changing Environments; Law, the Anthropocene, and the World'. This name change signifies that the project is not *solely* about understanding the intersection between ice and law (and perhaps developing a new set of legal mechanisms for regulating human uses of ice). It also announces our intent to use our understanding of that intersection for making broader insights about the relationship between a dynamic geophysical world undergoing unprecedented, human-generated climate change and a political-legal system that imagines static and absolute boundaries among land-based, territorial states and between solid land and liquid sea. Some of these insights will likely be of especial relevance for understanding the Arctic, but some may well be oriented toward increased understanding of global processes and institutions.

The second task has been to solicit brief 'reflection' pieces from workshop participants. As the project website notes:

Participants were asked to submit 500-1,000 word reflections on the mismatch between, on the one hand, the assumed division of the world into solid land and liquid water and, on the other hand, space as it is experienced and produced in polar regions. Participants were asked to reflect on the opportunities that this mismatch provides for:

- a) Understanding historic and potential relationships between the perceived physicality of the earth and notions/practices of territory, and/or
- b) Developing legal/regulatory mechanisms that are suited to address the challenges that the physicality of the region poses to actors there. (Ice Law Project, 2014)

Thirteen participants have provided 'Reflection' pieces that continue the conversation beyond the confines of the meeting room.<sup>2</sup>

Thirdly, the different foci and priorities that emerged during the project suggested that the best route forward was to continue a conversation among diverse individuals stimulated by overlapping questions and perspectives rather than by working toward a single scholarly or practical product. To this end, discussion during the final day of the workshop identified four coherent themes where more research was needed regarding the challenges and disjunctures that emerge when Western norms are applied in icy environments: Territory, Legal Instruments, Resources, and Mobilities.<sup>3</sup> These were subsequently joined by three other themes: Local and Indigenous Perspectives, Migrations, and Global Connections. A International Network grant funded by the Leverhulme Trust will facilitate sub-project workshops as well as information-sharing and networking among sub-project leaders, and a second major grant proposal to expand the research network is pending as of this writing (July 2015).

Fourthly, the ICE LAW project has fostered follow-up research within its individual subprojects, with two funding proposals presently pending. One, within the Territory subproject, proposes to examine sea ice relative to three other (non-Arctic) spaces where dynamic geophysical processes are also confounding the idealized binary between land and sea. The other, which cuts across the Legal Instruments, Local and Indigenous Perspectives, and Mobilities subprojects, seeks to investigate how local and indigenous communities are mobilizing to build hazard response capabilities in response to the region's changing environment. Other projects are likely to follow.

From Ice Law to ICE LAW, the project's one-year journey sheds light on the pitfalls and possibilities that emerge when one engages the Arctic as a region that is both exemplary and exceptional. On the one hand, using the Arctic as a *lens* or, worse yet, as a *laboratory* for understanding the world is highly problematic. When one adopts this approach, the Arctic's unique attributes are either elided or oversimplified, and the actual experiences and needs of Arctic peoples and social institutions are forgotten. On the other hand, the tendency to frame the Arctic as solely a place for practical problem-solving is equally problematic as it relegates the region to the margins of social thought and, ultimately, social power. In its effort to approach the Arctic as *both* a space of practical solving and as an exemplar for exploring processes that transcend the region the ICE LAW Project continues to negotiate the tensions and possibilities that emerge from these two conflicting objectives.

## Coda: 'Blue Sky' vs 'Blue Water'

As of this writing, we have before us an announcement for the Norwegian Scientific Academy for Polar Research's August 2015 summer school in Svalbard: Arctic Ocean Governance as a Multifunctional Challenge. At first glance, the programme announcement looks oddly familiar:

A circumpolar system of governance is in the making for the Arctic Ocean, both when it comes to regime and structure. Among the eight Arctic states there is broad agreement (*Ilulissat-declaration of 28 May 2009*) that the *United Nations Convention on the Law of the Sea of 1982* (UNCLOS) and other global ocean conventions is to be applied as the basic regulatory foundation of the Arctic Ocean. At the same time, the fact is that the UNCLOS mostly was developed to regulate the challenges of "blue water" Oceans. Out of the 320 articles of the UNCLOS, only one - Article 234 - deals specifically with ice-covered waters. Issues specific to Arctic natural conditions, such as sea ice, environmental fragility/sensitivity, polar darkness etc. are not fully or sufficiently addressed in UNCLOS. (Norwegian Scientific Academy for Polar Research *et al.*, 2015).

A closer reading reveals, however, that this gathering will be very different from the Durham workshop. The Durham meeting sought to temporarily bracket practical political considerations so as to encourage 'blue sky' thinking regarding what the problems of regulating ice can tell us *both* about the Arctic and about the geophysical basis of the modern state. The Svalbard school, by contrast, is resolutely grounded in practical possibility. The focus will be on identifying and discussing soft law mechanisms that could fill the gaps left by UNCLOS' 'blue-water' focus. These include mechanisms that have been already agreed to, such as the International Maritime Organisation's Polar Code and the Arctic Council-negotiated Arctic Search and Rescue Coordination Agreement, and potential future mechanisms. The organisers of this gathering have identified specific problems and they are bringing together policy experts and engaged students in an effort to explore possible solutions.

We find both efforts exciting. Both potentially could affect the livelihoods of Arctic residents as well as how the Arctic is perceived by outsiders. And yet we find the differences in the two meetings' orientation intriguing as well, as they are indicative of a broader tension that has characterised the Ice Law / ICE LAW Project since its inception and that echo broader tensions within the discipline of Arctic studies: How can one merge the critical study of law and society with the imperative to develop workable solutions for a distinct region beset by a wide range of social, political, legal, and economic challenges, some of which are regionally unique? The different, but complementary approaches of the Durham and Svalbard groups demonstrates the exciting potential of the Arctic for generating new ways of thinking about global legal, political, and environmental challenges *and* the need to draw from a wide range of perspectives so as to develop practicable solutions for the region. We look forward to reading a report from Svalbard in next year's Arctic Yearbook.

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<sup>1</sup> For more information on the project, see its website, <http://www.icelawproject.org>.

<sup>2</sup> The 13 participant reflections can be viewed at <http://icelawproject.org/reflections-2/>.

<sup>3</sup> The project's four themes are detailed further at <http://icelawproject.org/subprojects/research-phases/>.