

# After Russia's invasion of Ukraine in 2022: Can we still cooperate with Russia in the Arctic?

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## Research Article

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### Abstract

Russia's war against Ukraine in February 2022 was the end of the Arctic cooperation between states and others as we knew it, despite the fact that Russia's illegal actions are not occurring in the Arctic region. Russia's attack on Ukraine caused pronounced security fears and responses, particularly from the European and North American countries, including the other Arctic states. This naturally affected Arctic cooperation because it is precisely in the Arctic region that Russia is such a vastly central actor. For example, the region's pre-eminent inter-governmental forum, the Arctic Council, is struggling to continue its activities in full, as the seven western Arctic states paused participating in meetings held in and activities involving Russia. On the other hand, the first in-person meeting of the Conference of the Parties (COP) under the Central Arctic Ocean (CAO) fisheries agreement in late November 2022 successfully adopted its COP Rules of Procedure by consensus, including Russia. The purpose of this article is to investigate how adversely Arctic international cooperation in inter-governmental forums and treaties has suffered due to the Ukraine war, utilising a qualitative research methodology to collect internal and sensitive information from key informants. In particular, the article aims to find an answer to the following question: In which types of Arctic inter-governmental structures have the states been able to continue the cooperation and for what reasons? The hypothesis that will be tested in this article is whether treaty-based cooperation has fared better than cooperation founded on soft law. This article will flesh out the current state of Arctic cooperative frameworks and actual cooperative activities under them, analysing three soft law-based cooperative frameworks, including the Arctic Council and several treaty-based cooperative frameworks, such as the CAO fisheries agreement and Arctic Science Cooperation Agreement. This article is based on the facts as of 22 February 2023.

## Russia's aggression against Ukraine and "Arctic exceptionalism"

Russia's war of aggression against Ukraine at the end of February 2022 was also the end of Arctic cooperation as we knew it. The attack and its continuing use of armed force against Ukraine violates one of the most foundational rules of international law, *jus cogens* norms, that is the prohibition of the use of force against territorial integrity or political independence of another State, as stipulated in Article 2 (4) of the United Nations (UN) Charter. The way in which Russia is trying to justify the invasion is alarming to the core value of the international rule of law. Russia has also been openly declaring to the world and to its own domestic audience that there is a special operation going on and that Russia is not at war against anyone; only very recently, Putin has used the term "war" for what is happening in Ukraine. The legal justifications of Russia have ranged from vague ideas of humanitarian intervention to individual and collective self-defence and are shown to be manifestly invalid in international law (Cavandoli & Wilson, 2022). Of special concern has been that Russian leadership has already spoken openly, in 2021, via the language of power politics, for instance, how Russia needs spheres of influence in its neighbourhood.

The Arctic itself has long been celebrated as an area where states and even major powers can cooperate, even if they have broader tensions; this state of affairs in the Arctic has been referred to as "Arctic exceptionalism" (Exnet-Pirot & Murray, 2017). Many perceived the region to manifest exceptionalism after the Cold War but especially after the 2014 Russian annexation of Crimea and its support provided to the East Ukraine War. However, Russia's 24 February invasion of Ukraine ended what we had called the "Arctic exceptionalism," although the actual military activities are occurring outside of the Arctic and the direct victim of aggression not being an Arctic state. In fact, it turned it on its head. Since Russia's attack on Ukraine caused more pronounced security fears and responses from the European and North American countries, including the other Arctic states, it was these countries that reacted most strongly to Russia's illegal act of aggression. Because of this, most of the European and North American countries took the war in Ukraine very seriously, which led to significant changes in their long-term Russian policy, most conspicuously in Germany (Liik, 2022; Scholz, 2023). This

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naturally also affected Arctic cooperation, because it is precisely in the Arctic region that Russia is such a vastly central actor: the country is half of the Arctic region, and within it, there lies the majority of the region's military forces, people and industry; it is also an extremely important place for climate and other scientific research. Hence, due to the tensions between the Arctic states caused by the war in Ukraine, the region was suddenly considered a place where it was extremely difficult to cooperate, as any Arctic cooperation naturally involves Russia. This could be seen as manifested when the seven western Arctic states on 3 March 2022 decided to pause participation in all meetings and activities of the Arctic Council, the predominant inter-governmental forum for Arctic cooperation in which Russia was the chair since May 2021, or when the five Nordic States and the European Commission - members of the Barents Euro-Arctic Council - on 9 March 2022 suspended their activities involving Russia.

This article aims to find an answer to the following question: In which Arctic inter-governmental structures have the states been able to continue the cooperation and for what reasons? Many non-governmental activities with Russia have also faced severe difficulties, such as much of the scientific cooperation through various organisations (Berkman, Baseman & Shibata, 2022). However, this article will focus on inter-governmental cooperation with Russia in the Arctic region.

### Hypothesis: Arctic cooperation based on treaties more resilient than that on soft law

The hypothesis of this article is that because of the political shock waves that Russian aggression in Ukraine has set, especially for Arctic cooperation processes between Russia and the western states, it presumes that it is mostly treaty-based cooperation that is more resilient even in the face of an extraordinary case of aggression by an Arctic state. This article defines "treaty-based cooperation" as those cooperative activities, namely joint actions by two or more countries to achieve a common objective, which take place within a framework established by a legally binding treaty (Wolfrum, 2010). This hypothesis is due to the fact that according to international law, more specifically the Vienna Convention on the Law of Treaties (VCLT, 1969), which generally codifies customary international law, there has to be an internationally recognised legal justification for terminating or suspending the operation of a treaty in relation to a state party to that treaty. According to VCLT, suspending a treaty operation in regard to a particular party would be allowed in conformity with an explicit provision of the treaty or by consent of all the parties (Art.54). For example, the cessation of Russian membership in the Council of Europe decided on 16 March 2022 was in accordance with the explicit provision and procedures provided in the treaty establishing the Council (Council of Europe, 2022; Buscemi, 2022). VCLT also provides a legal possibility of suspending the operation of a treaty in regard to a state party that has committed a material breach of the treaty (Art.60). Such a right to invoke termination or suspension in response to a material breach can be exercised either by the agreement of all other parties except the violating party, by parties specially affected by the violation and by any party other than the violating party if the material breach radically changes the position of every party with respect to the further performance of its obligations under the treaty. A material breach of a treaty consists of a repudiation of the treaty or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. The threshold is high

(Simma & Tams, 2011). Thus, it is not enough for other states' parties to refer only to Russian breach of non-use of force rule, which clearly is a serious breach of one of the more fundamental rules of international law, known as *jus cogens* rules. Yet, Russia's breach of this rule does not generally mean it had also committed a material breach of a particular treaty.

To verify whether the above working hypothesis is valid, this article conducts a preliminary review of state practice as to what kind of cooperation has continued with Russia and what has not, and then it will draw some conclusions.

At the same time, it should be noted that many Arctic and Northern cooperative forums are soft law-based, in which the cooperative activities take place within frameworks established by non-legally binding instruments. VCLT applies to treaties, namely agreements between states governed by international law, and these soft law instruments are generally considered not governed by international law. Thus, on the face of it, regarding those soft law cooperative frameworks, VCLT and its rules regarding their termination or suspension of the operation would not be applicable. For this reason, this article hypothesises that these soft law-based cooperation functioning in the Arctic are more vulnerable to suffer from the overall dramatic worsening of the geopolitical environment – a hypothesis that this article tries to verify by looking at state practice.

In order to answer the above main research question, the authors of this article needed to locate those persons who were in professional positions where they would have information about international cooperation with Russia. These are persons in qualitative research known as key informants who have special knowledge of the particular issue. What is crucial to understand is that these persons needed to be approached with sensitivity, given that we were asking questions about how international cooperation with Russia was progressing during a very sensitive time. For this reason, the authors of this article promised all the interviewees absolute anonymity, which enabled them to speak more openly about issues that are extremely sensitive. The authors of this article have conducted many of the interviews as part of a report to which Timo Koivurova was the lead author (Koivurova et al., 2022), but further interviews and communications have been undertaken to focus and deepen the analysis. All interviewees are national or international civil servants or working with these issues in their daily work. The interviews were conducted in a semi-structured manner, focusing on the main questions but in a loose conversational manner: Is cooperation with Russia moving forward or not, and if it is, how it is progressing? The communication with persons has varied from case to case: in some instances, the interviewees were not open to an interview, but provided only an email response, and in other cases, an online interview also resulted in the person engaging in thinking of future perspectives to the cooperation with Russia. Obviously, document research was also important, given that most multilateral treaty processes nowadays publish their official statements, and the list of participating delegations in the treaty meetings can be found on their websites.

This article will progress as follows. First, it reviews how the Arctic and Northern inter-governmental cooperative frameworks established by non-legally binding instruments have been able to continue cooperation with Russia. Next, it will investigate whether treaty-based cooperation has continued in the Arctic region with Russia. The treaty practices examined in this article are those more directly relevant to the Arctic cooperation, without trying to be exhaustive. By going through these cooperative processes, it is

possible to draw conclusions as to whether treaty-based cooperative frameworks have been more resilient to geopolitical challenges, as this article hypothesises. It is also important to examine how the cooperative activities under these treaty-based frameworks are actually functioning, given that it is very difficult to imagine that any actual government-level cooperative activities with Russia are currently progressing, as they were before the Ukraine invasion.

### Soft law-based cooperation with Russia in the Arctic

There has been a lot of celebratory discussion of the benefits of soft law as a basis for inter-state cooperation (Shelton, 2000). It is argued that it is more flexible and enables better adjustment to the ever-changing reality within which any inter-governmental cooperation needs to navigate. It is also argued that a soft law format, such as establishing an inter-governmental cooperation process via a non-legally binding declaration, remains better open to actors other than states. This is visible, for instance, in the unique status that the Arctic Council has been able to carve out for the region's indigenous peoples. They participate in the work of the Council as its Permanent Participants and have the factual power to influence any decision-making by states (Koivurova & Heinämäki, 2006). They also sit at the same tables and attend foreign ministers' meetings, just like Arctic state representatives.

Yet, the downside of soft law frameworks for any inter-governmental cooperation is that VCLT does not generally provide guidance as to the interpretation, the application and, more generally, the operation of the cooperative framework, even if soft law processes also exert a compliance pull for their participating members. It is often argued that soft law induces compliance from its addressees, including governments. However, particularly during high political tensions such as the current crises, the decision-makers need to identify the obligations that are legally required to comply, and the soft laws would not assist them in doing so.

When Russia invaded Ukraine on 24 February 2022, it soon became clear why there was a problem with cooperative frameworks established by soft law instruments that are relevant in the Arctic and the North. There are no clear foundational rules regulating the operation of these soft law instruments, such as those in VCLT for treaties. For instance, if other members wanted to suspend Russia's participation from the cooperative framework and isolate it, there were no rules regulating such actions when the framework was established by a soft law instrument. If it were a treaty, the VCLT would have required high-threshold legal justifications for such actions, as explained above.

### The Barents Euro-Arctic Council

The Barents Euro-Arctic Council was established by the Kirkenes Declaration in 1993. The regional level cooperation involves the northernmost municipalities from Norway, Sweden, Finland and the northwest of Russia, while at the national level, members of all five Nordic countries, Russia and the European Commission, participate.

After the Russian attack on Ukraine, the Nordic countries and the EU issued a joint statement on 9 March 2022 in which they declared that they "have no other option than to suspend activities involving Russia in the Barents Euro-Arctic cooperation" (Finland, 2022). In reply, Russia stated that without Russia, this form of cooperation loses its meaning (Russia, 2022). Currently, it is not known whether the Barents cooperation can survive the crisis, given that the focus of this cooperation has been to engage

Russia's North-Western regions in European regional cooperation. It should also be noted that the above joint statement is carefully restrained in its normative nature and scope. First, it is a unilateral declaration of intent, albeit jointly issued, of certain Council members, rather than as a formal institutional decision of the Council. Second, the intent of those members is to suspend the "activities involving Russia" within the framework of the Council, rather than a suspension of Russian participation in the Council itself. This carefully drafted joint statement, at least on the face of it, tries to maintain the soft law-based cooperative framework of the Council. Yet, the actual cooperative activities, namely many of the joint actions by the members to achieve the common objective of the Council involving Russia, would be suspended "in light of Russia's blatant violation of international law, breach of rule-based multilateralism and the principles and objectives of the Barents Euro-Arctic Council" (Finland, 2022).

### The Council of the Baltic Sea States

An even more serious encounter was witnessed within the Council of the Baltic Sea States (CBSS), a soft law forum created in 1992 via a declaration to promote democratic and economic development in the Baltic Sea Region (Koivurova & Rosas, 2018). The scope and fields of cooperation that the CBSS seeks to achieve, both geographically and functionally, go far beyond the Arctic. The members of the CBSS are Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Poland, Russia, Sweden and the European Commission. Rule 22 of the Council's Term of Reference (adopted in 1992, latest revision 2020) provides that the decisions within the CBSS are taken by consensus.

On 3 March 2022, the foreign ministers of its 10 members and the High Representative of the European Commission, except Russia, issued a declaration on participation by the Russian Federation and Belarus, an Observer, in the work of the Council (Norway, 2022). This declaration refers to the founding decision, the 1992 Copenhagen Declaration, emphasising cooperation within the Council based on the principles laid down in the UN Charter as well as in the Helsinki Final Act, and other "subsequent political decisions" confirming the Council's aim of peace, cohesion and democracy. It then goes on to state that "these fundamental principles and aims have now been dramatically violated by the unprovoked and illegal military attack and aggression committed by Russian Federation." For this reason, the 10 foreign ministers and the High Representative "see no possibility to continue our cooperation as envisaged with the Russian Federation within the framework of the CBSS." More specifically, they state that "Russia should not enjoy the benefits of, and participation in, any CBSS-led cooperation" and that they "will ensure the suspension of Russia from the proceedings, work and projects of the CBSS and its working bodies until cooperation under the fundamental principles of international law has become possible again." The 10 foreign ministers and the high representative also suspended "the participation in activities of the Republic of Belarus as a CBSS Observer state." Russia decided to withdraw altogether from the CBSS on 17 May 2022.

It should be noted that the Council's Terms of Reference does not explicitly provide for the option and/or the procedures for the withdrawal of a member from the Council. On 25 May 2022, at the regular meeting of the Council being represented by the 10 members (except Russia) and the high representative, the Council noted the fact of Russian decision to withdraw as a member of the CBSS and declared that the "Council's relations with Russia and Belarus

will remain severed until cooperation under the fundamental principles of international law has become possible again” (CBSS, 2022).

### *The Arctic Council*

The most important form of soft law-based cooperation in the region is clearly the Arctic Council that was established through the Ottawa declaration in 1996 and involves all eight Arctic states. The Council’s work covers all common issues facing the Arctic, in particular those related to environmental protection and sustainable development, excluding military security issues, and the work has gradually expanded to many other fields, such as climate change mitigation and adaptation, search and rescue and management of accidents. The Council’s practical work is carried out in projects of the six standing working groups, of which there were almost 130 at the beginning of 2022. As mentioned above, the region’s indigenous peoples – their representative organisations – have a unique standing in the Council as its Permanent Participants. The interest in Arctic issues has also led to more and more states and others trying to join the Council as its Observers: there are currently 38 Observers in total, of which 13 are non-Arctic states.

Russia’s attack on Ukraine on 24 February 2022 quickly had an impact on the Arctic Council. On 3 March, the seven western Arctic states condemned Russia’s illegal attack on Ukraine and declared “not to travel to Russia for meetings of the Arctic Council.” Additionally, their “states are temporarily pausing participation in all meetings of the Council and its subsidiary bodies.” However, these measures are taken “pending consideration of the necessary modalities that can allow (those seven states) to continue the Council’s important work in view of the current circumstances” (United States, 2022a). It should be noted that the Council at the time was chaired by Russia (until the spring of 2023). This also had the effect of paralysing the working groups of the Arctic Council, where a large part of the practical work is taking place. Russia resented the announcement from the seven western Arctic states, stressing that the Arctic Council’s cooperation should be isolated from tensions elsewhere and announced that it would continue to promote its chairmanship programme domestically. Even if the seven western Arctic member states discontinued their activities, they also emphasised that cooperation in the Arctic Council is important to continue for many reasons. This they also stressed in their second statement on 8 June, with which they resumed those projects of the Council, which had been approved in 2021 as the Reykjavik work plan for the Russian presidency – and where Russians had not been involved (United States, 2022b).

Thus, it is clear that, on both sides of the controversy, there had been certain restraints on the normative nature and scope of the measures taken regarding the cooperative activities under the Arctic Council. First, the declaration of non-participation in and pausing of the Council’s cooperative activities was made as a unilateral declaration of intent, albeit jointly issued, of certain of the Council’s members, rather than as a formal institutional decision of the Council. Without Russia as its chair convening a meeting and with the consensus decision-making in the Council, such an institutional decision could not have been taken if they tried to comply with the existing Rules of Procedure of the Council. Second, as such, the statements and behaviour of the seven western members as well as Russia have shown their intent not to collapse the soft law-based cooperative framework of the Arctic Council altogether. Non-participation and pausing occur in the actual cooperative activities of the Council, namely joint actions involving Russia.

Currently, it is unclear what will happen with the Arctic Council. There are serious diplomatic efforts to continue the Arctic Council’s cooperative framework, as well as the actual cooperative activities under it, but there are also doubts as to whether this can be done. Russia is currently the Council’s chair, who, according to its Rules of Procedure, should be able to organise the next ministerial meeting and pass the chairmanship to Norway. It is difficult even to imagine that a ministerial meeting could be organised in Russia with participation from other Arctic states. As a result, it seems obvious that an alternative plan somehow needs to be identified. In the two statements released by the western Arctic states, they have expressed that they value Arctic Council cooperation and that they continue supporting the continuation of this cooperation. Yet, at the end of the day, no one really knows what will happen with the Arctic Council, as two long-term observers of the Council argue (Exner-Pirot & Bloom, 2022). A recent survey of Arctic experts found that most Arctic experts do not foresee that the Arctic Council can resume its operations (Landriault & Minard, 2022).

### *Treaty-based cooperation with Russia in the Arctic*

As mentioned above, the hypothesis of this article is that treaty-based cooperation with Russia in the Arctic should proceed, given that Russia, by attacking Ukraine, has not violated most of its other legal commitments under the relevant treaties. Yet, it is easy to imagine that the situation between Russia and the other seven western Arctic states is precarious. Provoked by the Russian aggression in Ukraine, Finland and Sweden have both made an application to become a member of the North Atlantic Treaty Organization (NATO), resulting in that if they are accepted as members of NATO, all the Arctic states other than Russia are members of NATO – an organisation that Russia considers a security threat.

### *Climate change and the International Maritime Organization (IMO)*

There are several levels of Arctic-relevant international cooperation with Russia – global, regional and bilateral – and we will examine some prominent examples each in turn, without trying to be exhaustive. Global governance frameworks are important in the Arctic, as well as in other regions, but some global governance frameworks are particularly important in the Arctic. As the Arctic warms four times the rate as the global average, it is evident that the UN climate regime based on a treaty, namely the UN Framework Convention on Climate Change (UNFCCC), is particularly important in the region. Another good example is the IMO, also established by its founding treaty, which has for long worked to make shipping in the Arctic safer and environmentally sounder (Nishimoto, 2022). The IMO has adopted the legally binding Polar Code, in force from 2017, which is being further developed. Russia is participating in this work, although it seems that the overall atmosphere for developing the Code has deteriorated after the invasion, as one interviewee remarked. It is important to first understand how global governance in general has been impacted by Russian aggression in Ukraine and then how these particular governance processes relevant for the Arctic have been impacted.

Overall, even if the majority of the world’s countries condemned Russia’s attack as illegal at the UN General Assembly and demanded that it ends its illegal invasion (141 votes for, 5 against, 35 abstaining), Russian aggression has not caused great upheavals in global treaty processes or inter-governmental organisations. Russia is

participating in UN climate regime meetings as well as IMO meetings. The only real impact in these institutions has been the speeches made in the plenary by Ukraine, Russia and the strong condemnation, in particular from the European and North American states and their allies, of Russian action in Ukraine. One interviewee evaluated that even if Russia continues to participate in relevant IMO Polar Code meetings, it is also the case that the atmosphere of cooperation with Russia has suffered. However, this informant also said that the work on developing the Polar Code moves forward.

### *The Svalbard Treaty*

The 1920 Svalbard Treaty applies to the archipelago of Svalbard wholly situated above the Arctic Circle and is an oldest Arctic-specific multilateral treaty with over 40 state parties, including Russia and all other Arctic states (Svalbard Treaty, 1920; Ulfstein, 1995; Jensen, 2020). The treaty accorded full sovereignty over the archipelago to Norway but provided many non-discrimination rights to its state parties and, importantly for this article, preserved acquired rights over land properties of Russian nationals (Art.6). The treaty prohibits Norway from creating or allowing the establishment of any naval base or constructing any fortification used “for warlike purposes” (Art.9). The treaty does not contain any provisions on termination of the treaty or withdrawal by its parties; hence, these legal issues are governed by the customary law of treaties, including those enunciated in VCLT. It does not even establish a meeting of the parties, leaving it mostly for Norway to ensure that the treaty obligations are upheld.

Besides Norway, the Russian Federation has been the most active amongst the treaty parties in the archipelago via its mining operations, which have been reduced to one, and more recently its tourism and fisheries interests in the area. Even if there were suspicions that the war in Ukraine would destabilise the operation of the Svalbard Treaty regime, at least so far Norway and other state parties have respected the treaty obligations (High North News, 2022a,b).

### *The International Council for the Exploration of the Sea*

The International Council for the Exploration of the Sea (ICES) has gained its legal status as an inter-governmental organisation through its 1964 treaty, with its main aim of promoting research and investigations for the study of the sea particularly related to living resources, and its main area of interest being the Atlantic Ocean, which extends also to the Arctic region. Currently, 20 states are full members of ICES, with all Arctic states as well as many European states, such as France, Germany, Poland, Spain and the United Kingdom. ICES has been cooperating closely with the Arctic Council as its Observer since 2017 and has provided scientific information during the discussion on the Joint Program of Scientific Research and Monitoring (JPSRM) under the Central Arctic Ocean fisheries agreement (CAOFA) (see below). The decisions of the ICES can normally be taken by a simple majority of Council members, and its Rules of Procedure can be adopted by a two-thirds majority (ICES Convention, 1964, Arts. 8 & 9). A member which has not paid its contribution for two consecutive years shall not enjoy any rights under the treaty (Art.14). There are no other explicit provisions in the treaty as regards the suspension of rights, expulsion or withdrawal.

On 30 March 2022, the ICES Council of Delegates held a vote to place “a temporary suspension of all Russian Federation delegates, members and experts from participation in ICES activities.” According to a short news announcement, a number of member

countries, including the Baltic Sea coastal states, have instructed their scientists and representatives to either boycott or avoid engagement in activities where Russian representatives are present, and, in order to ensure “broad participation of essential experts” in its activities, ICES had made such a decision, until further recommendation for “a reversal of this suspension” (ICES, 2022). The founding treaty of ICES does provide the right of all member states, including Russia, to be represented and to have one vote at Council meetings (Arts. 6 & 8). Consequently, the 30 March ICES decision, albeit “temporary,” would legally be characterised as a suspension of participatory rights of Russia under the treaty (Shibata, 2022). At the same time, as will be discussed below, since the majority decision-making is allowed under ICES Rules of Procedure, such an institutional decision to temporarily suspend the participation of a member was actually taken according to such procedural rules (Buscemi, 2022). The authors of this article have not been able to obtain ICES’s official legal opinion on this point.

### *The Central Arctic Ocean fisheries agreement (CAOFA)*

The CAOFA was developed by the five Arctic Ocean coastal states along with four potential distant fisheries states, namely China, Iceland, Japan and the Republic of Korea; and the EU. The CAOFA has its objective of preventing unregulated fishing in the Arctic Ocean’s high seas portion, and the agreement entered into force in June 2021 with ratification by all its 10 parties. The email responses and documents that we received from responsible officials and persons who participated in CAOFA meetings confirm that Russia participated in the online meetings of the CAOFA on May 31 and August 31, 2022, that discussed the Rules of Procedure of its COP and the Terms of Reference for the Scientific Coordinating Group (SCG). According to one informant, those virtual meetings proceeded “as if nothing has happened.” The Provisional Scientific Coordinating Group, established at the first preparatory meeting of the Agreement in May 2019, held three meetings, one in-person in February 2020 and two virtual meetings in March and September 2022, to discuss the Joint Program of Scientific Research and Monitoring under the Agreement. Russian participation was sporadic, because, according to an informant, Russia was traditionally not very interested in such scientific discussions. Yet, it seems clear from these responses that Russian behaviour in these meetings was not very constructive. The first in-person meeting of the Conference of the Parties of the Agreement was held at Incheon, the Republic of Korea, on 23–25 November 2022, with full participation of Russia, and the 10 parties were able to agree by consensus on the Rules of Procedure of the COP and the Terms of Reference for the SCG (CAOFA, 2022).

### *Treaties under the auspices of the Arctic Council*

There are already several legally binding treaties between the Arctic states on circum-wide Arctic issues. The three legally binding agreements that were negotiated under the auspices of the Arctic Council focus on search and rescue (SAR Agreement, 2011), oil spill preparedness and response (Oil Spills Agreement, 2013) and international scientific cooperation (Science Cooperation Agreement, 2017), and they are all legally in force for all eight Arctic states, including Russia (Koivurova, Kleemola-Juntunen & Kirchner, 2020). The customary international law and the UN International Law Commission’s (ILC) codification exercise on the “Effects of Armed Conflicts on Treaties” (ILC, 2011)

tells us that these treaties would not automatically be terminated or suspended as a consequence of the Ukraine war.

What about the actual implementation of these Arctic-specific treaties after the Ukraine War? At the first review meeting under the science cooperation agreement in March 2019, it was decided that the Chair of the Arctic Council would host all meetings under the agreement. Accordingly, the second meeting was held in April 2021 under the chairmanship of Iceland, Chair of the Arctic Council at that time. Then, the chairmanship of the science cooperation agreement was successfully transferred to Russia from May 2021 (Sergunin & Shibata, 2023). Russia had presented major plans as the Arctic Council chair to develop this treaty, but these were halted when the Ukraine War induced the seven western member states of the Arctic Council to temporarily suspend their own participation in Arctic Council activities. This interviewee stated that the science cooperation agreement will remain in force, but that currently it is difficult to foresee how it is being developed, implemented and applied in reality. Although the institutional link established in 2019 between the science cooperation agreement and the Arctic Council was with good intent, “unfortunately, ... [u]ntil the Arctic Council chairmanship changes and/or ‘the necessary modalities that can allow [the seven Arctic States] to continue the Council’s important work’ are installed, the work of the Implementation Meeting under the Agreement will also be suspended” (Sergunin & Shibata, 2023).

A similar response came from those interviewees who were dealing with search and rescue and oil spill preparedness and response agreements in their daily work. There is now a wait-and-see attitude, given that much of the operational work related to these agreements was done through one of the working groups of the Arctic Council: Emergency Prevention, Preparedness and Response and its expert groups. Yet, all the interviewees confirmed that they did expect that these agreements would continue in existence, even if it was unclear what would happen if the Arctic Council did not endure.

### *The Polar Bear Agreement*

The Polar Bear Agreement was concluded in 1973 between the five Arctic polar bear range states, namely Canada, Denmark (Greenland), Norway, the United States and Russian Federation. Its main objective is to protect the polar bear and its habitat, the sea ice (Polar Bear Agreement, 1973). Given the intense warming caused by climate change in the Arctic, the range states decided in their meeting in Shepherdstown, United States, in 2007 to convene biennial meetings to evaluate progress in achieving the objectives of the Agreement, even if the original agreement did not clearly establish any meetings of the parties. They also drafted the Circumpolar Action Plan for Polar Bear 2015–2025; the current implementation plan extends until 2023. The next meeting of the parties will be organised by Canada in May 2023, and the expectation is that Russia will also be invited (Polar Bear Agreement, 2022). The authors of this paper were not able to receive a formal confirmation of this from the responsible official.

### *Bilateral border cooperation in the Arctic with Russia: Agreements with Finland and Norway*

During periods of geopolitical tensions, it is often the concrete bilateral issues that require immediate attention and constant decision-making that have to continue. Here, we will focus only on Finland’s and Norway’s relations with Russia in the Arctic region,

as examples of bilateral cooperation with Russia moving forward despite the war in Ukraine.

Bilateral treaties with Russia concluded by Finland that have relevance in Arctic cooperation remain legally in force but are also functioning after the Ukraine invasion. For example, Finland has continued bilateral cooperation in connection with the border water agreements with Russia (Haapala & Keskinen, 2022). The 1964 agreement between Finland and the Soviet Union regarding frontier watercourses established a special commission for the use and management of transboundary waters (Frontier Watercourses Agreement, 1964). The commission meets annually, and in 2022, it was also planned to celebrate its 60<sup>th</sup> anniversary meeting. Due to Russia’s war in Ukraine, it was decided that no celebrations would be held. The interviewee said that this also led to a decision to deal with only the very basic issues at the annual meeting in October 2022, and the meeting was organised virtually. Cooperation between the parties under the agreement regarding technical and hydrological information exchange has been continuing, as the interviewee confirms. A similar type of regular technical cooperation is ongoing as regards the 1959 agreement concluded amongst Finland, Norway and Russia concerning the regulation of Lake Inari situated in Finland in the Arctic region by means of a dam in Russia (Lake Inari Agreement, 1959). The interviewee confirms that the meetings of the parties will also go forward but, for the time being, as online meetings only and with the idea that the agenda covers only the most important issues. This agreement gives Russia a right to regulate Lake Inari by means of the Kaitakoski hydroelectric power station and dam within a specified water level of the lake, whereas Finland has the obligation not to carry out measures that will affect the regime of Lake Inari. Norway acts as a neutral monitoring party. All three parties are required to keep the relevant logs of water level graphs, which are communicated to the other parties.

A similar type of policy underlies Norway’s approach. Norway has chosen a policy of continuing bilateral cooperation with Russia in their bilateral relations regarding their land and maritime border areas. For instance, such bilateral relation is reflected in their ongoing communication and contacts over border cooperation and coordination. This cooperation covers many areas of activities, including search and rescue, oil spill protection preparedness, shipping monitoring and countering threats to the shared environment (High North News, 2022c). One particularly important area is fisheries management, which also seems to continue. For instance, on 4 November 2022, it was announced that the fisheries quotas for each country in the Barents Sea had been agreed upon after a virtual meeting of the Joint Norwegian Russian Fisheries Commission, a body that has been established via a treaty (High North News, 2022d; Norway-USSR agreement, 1975).

From the above preliminary review of state practice, it can be concluded that many of the cooperative frameworks established by global, regional and bilateral treaties relevant to the Arctic having Russia as their contracting party remained legally in force, meaning they have not been terminated or their operation suspended as regards Russia. One prominent opposite case was ICES, a treaty-based full-fledged inter-governmental organisation for marine research cooperation in the Atlantic Ocean with its majority decision-making rule composed of western European states and the Baltic Sea coastal states. These observations seem to confirm the working hypothesis presented above that treaty-based cooperation is less affected by Russia’s illegal war in Ukraine. Yet, it is also clear that even if Russia formally participates in those cooperative frameworks, it does not seem to implement

their actual cooperative activities under the treaties at the present time.

While the 10 parties to the CAOFA, including Russia and China, were able to agree by consensus on the Rules of Procedure of its COP and the Terms of Reference for SCG, there are complaints that Russia has problems in contributing positively to its work. The three treaties negotiated under the auspices of the Arctic Council, even if formally independent from the Arctic Council, are operationally connected to the work of the Arctic Council, which is currently on a temporary chairmanship transition, and it is not yet known whether its work can be continued. It is the bilateral border cooperation agreements and the Svalbard Treaty regime that are most clearly in constant operation. As stated above, bilateral cooperation with Russia moves forward, as these are dealing with daily issues and are seen as immediate importance also for Finland and Norway.

### Discussion

Understandably, most discussion on what will happen with Arctic international cooperation with Russia has centred on the future of the Arctic Council, as it is the only standing inter-governmental forum working on all common issues of the whole region (excluding military security issues), with all the stake- and rightsholders. Even if the Arctic Council, with its seven Members' joint statements on 3 March and 8 June 2022, is not at a complete standstill as of today (22 February 2023), its future is very much uncertain. Yet, there are also other cooperative frameworks relevant in the Arctic, and, as demonstrated above, most treaty-based cooperative frameworks are still legally in force, with Russia remaining as a state party. This article argues that this is because terminating or suspending the operation of a cooperative framework established by a treaty regarding Russia would require high-threshold legal justifications in conformity with the relevant rules of international law. Even in a very geopolitically contentious area, such as the Arctic is at present, we can witness the stabilising effect of treaty-based cooperative frameworks and their underlying international law in the relations between Russia and the other Arctic states. It seems evident that the direct consequences from the Ukraine war have more clearly impacted the soft law-based cooperation in the Arctic.

It is also important to focus on what is actually happening. As mentioned above, the three legally binding agreements that were negotiated under the auspices of the Arctic Council are still in effect, but they are not being implemented. This is largely due to the fact that there is a strong factual interdependence between the Arctic Council and these three treaties. This article has also addressed some other problems that Russia faces in meeting its full treaty obligations relevant to Arctic cooperation. However, it is also important to pay attention to the fact that these treaty-based cooperative frameworks will continue to legally bind their state parties, even if there are occasional problems for one party to meet in full the treaty commitments. Treaty-based cooperative frameworks generally assume the possibility of continuing cooperative activities, in full, in the future.

Hence, it is important to emphasise that the legal form of Arctic cooperation has clear policy implications when geopolitical tensions are high. Breaching one of the most fundamental rules of international law, the prohibition against aggression, and, at the same time, exposing the world to the possibility of a nuclear war, obviously will influence almost all inter-governmental cooperation with Russia, one way or the other. In these circumstances, legal offices of foreign

ministries and inter-governmental organisations have been busy in giving advice to various governmental processes as to how to go about with cooperation as regards Russia. If particular cooperative activities relevant to the Arctic are undertaken under a treaty framework, the advice would be that Russia may not be suspended or excluded from such cooperative activities without the other treaty parties demonstrating that Russia has materially breached the same treaty and that the unanimous agreement of the parties other than Russia had been obtained. In the case of ICES, the decision to temporarily suspend Russian participation in all its activities was taken by a majority decision of 18 in favour, one against and one abstention (Buscemi, 2022), which is possible under the Rules of Procedure of ICES. If this case were to be legally justified as a suspension of Russian right under the treaty, such measure must have satisfied the high threshold provided in the VCLT, as described above. At the same time, since the treaty establishing ICES has the characteristic of a constituent instrument of an international organisation, the VCLT rules would apply "without prejudice to any relevant rules of the organisation" (Art.5). Thus, the legality of the ICES measure must also be examined in light of those relevant rules of the ICES, if there were any. In any event, under international law, in suspending Russian participation from the Arctic cooperative framework established by a treaty, it is not enough to say that Russia has violated the non-use of force principle, a fundamental *jus cogens* norm, because it does not generally translate into Russia's material breach of that specific treaty. For this reason, most treaty-based cooperative frameworks will continue in the Arctic, even if they will likely not be ideally implemented during the time of the Ukraine war. They will still remain in existence and will likely be gradually restored in compliance when the geopolitical setting calms down.

This article has simultaneously demonstrated the normative, if not legal, restraints exercised amongst the members of soft law-based Arctic cooperative frameworks such as the Arctic Council and the Barents Euro-Arctic Council. Because both forums are operated by consensus of all members, including Russia, the other members have restrained themselves from making institutional decisions in compliance with the internal rules of the existing cooperative frameworks. The joint statements by all the members except Russia carefully declared their unilateral intention not to participate in the meetings and activities involving Russia rather than to suspend Russia's participation in them.

The declaration of the 11 members of the CBSS and the subsequent confirmation by the Council's regular meeting in 2022 were of a different normative nature, as it was an institutional decision to suspend Russian participation from its meetings and activities. Indeed, in response, Russia expressed its intention to withdraw from CBSS. It should be noted, however, that the cooperative mandate of CBSS goes far beyond the Arctic, including cooperation in democratic institution building and humanitarian assistance.

As a pure thought experiment, it can be pondered where it would be now if the Arctic states had negotiated an inter-governmental organisation, as Canada had proposed, back in 1996 (Bloom, 1999); or if the members of the Arctic Council had reacted differently to a proposal from Finland back in 2013 (Finland, 2013). Finland proposed to other members of the Arctic Council that it might be time to negotiate a treaty foundation for the Arctic Council; the other members rejected the proposal outright, as an interviewee confirmed. If the Arctic Council had had a treaty foundation when the Russian invasion took place on 24 February 2022, it is at least debatable that things would have been quite different than

now, when both the Arctic governments and scholars are seriously discussing whether the Arctic Council as a cooperative framework can survive at all. This is particularly relevant, as there are some who see Arctic cooperation moving in two directions: western states establishing their own “Arctic Council” and Russia with China and others the other one (Landriault & Minard, 2022).

If a treaty-based cooperative framework had been created for the Arctic Council back in 1996 or in 2013, most likely, there would not have been a serious debate over whether the Council could survive this crisis or dissolve. The treaty-based cooperative framework for the Arctic would have remained intact, but the discussion among the seven western Arctic states would have likely focused more on legal reasoning for suspending some or all cooperative activities within it. Of course, much depends on the specific legal structure and procedures of this treaty-based Council, but the foreign offices of the seven western Arctic states would have been pondering whether they could come up with appropriate legal justifications to overcome the high threshold provided by the VCLT to possibly suspend the operation of the Arctic Council’s activities as regards Russia.

If the Arctic Council were treaty-based, policy-makers and scholars would have considered it as an Arctic cooperative framework that could continue despite the Russian aggression as its operations were cemented on firm legal foundations, and thus deliver on its objectives. This is not the case today, and the policy-makers and scholars must strive to find ways to save the cooperative framework as we know of as the Arctic Council in order for it to survive.

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