Conclusions of the Aurora Conference: "The limits and possibilities of sovereignty, as both the organizing logic and the central legal principle underpinning Law of the Sea and Ocean Governance (LOSOG)"

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1. Introduction

The law of the sea is facing fundamental challenges, including material challenges, epistemic challenges, and challenges relating to ocean justice and geopolitical dynamics. To address these challenges, the Norwegian Centre for the Law of the Sea (NCLOS) has been engaged with several projects, one of which focuses on problematizing the logic of sovereignty and investigating how sovereignty could be redefined, adapted, and rethought to respond to such systemic challenges. To that end, the Centre organized a two-day conference (Aurora Conference), from 25-26 November 2021 to assess: *'The limits and possibilities of sovereignty, as both the organizing logic and the central legal principle underpinning Law of the Sea and Ocean Governance (LOSOG)'*. The purpose of the Conference was to facilitate a discussion on the research done/in progress, and to identify issues and questions for further research. The Conference consisted of three sessions. Session 1 focused on the theme: *'Problematizing sovereignty (in a LOSOG context) – evolution and critique'*. Session 2 dealt with the topic *'Sovereignty challenged and under transformation*. Session 3 examined the theme of *'Sovereignty across spaces'*. The conference presentations and discussions brought forth new insight and questions on various aspects of sovereignty.

This blog post summarizes the main findings of the Conference. The post is structured following the order of the three sessions of the Conference. Finally, the post offers overall concluding remarks.

2. Problematizing sovereignty (in a LOSOG context): evolution and critique

Session 1 of the conference grouped together three presentations and discussions on rethinking sovereignty – respectively, by way of genealogy, ocean kinesis, and the work of Georges Scelle.

Vito De Lucia linked the modern concept of sovereignty to a transformative movement in human understanding that followed the death of St Francis. In the effort to reconcile St Francis´ injunction that monks should live in absolute poverty with the contemporaneous juridical framework of dominium (ie, that food had to be owned in order to be eaten), a new concept emerged over the 12th and 13th centuries: *simplex usus facti*, or, basic factual use. This concept, as it emerged apart from and with transformative effect on the existing juridical order, allowed monks to lawfully consume food from charity (Aurora Conference Report, p. 4). With reference to genealogy, Foucault, biopolitics, and Roberto Esposito´s work on modernity, sovereignty, and biopolitics (tracing the emergence of modernity with that of sovereignty and the modern subject, from the bonds of community to "immunity", a sphere of individual property, autonomy, and will), De Lucia illustrated how this conceptualization of *simplex usus facti* put

the subject at the centre of legal production and of the world (including, notably, above nature), a logic now always present in the idea of sovereignty at any level (ibid, p. 5).

Apostolos Tsiouvalas´presentation problematized the way sovereignty interacts with oceanic space, focussing on the way that territory is measured and designed in reliance on land-territorializing technology and logic (line-drawing, based on adjacency to land) with little or no recognition of, but troubled by, ocean mobility. Tsiouvalas relied on the concept *kinēsis* (from the Greek κινέω/κινῶ: 'movement, motion'), specifically in its Aristotelian sense: encompassing not only living beings (Hobbes) but also changes of quality, quantity, place, and being (ibid, p. 7). Tsiouvalas proposed that kinesis complicates the territorial projection of sovereignty in the seas (among many examples, as in a changing Arctic, where the particular phenomenology of ice as a dynamic form destabilizes conventional understandings of sovereignty and geopolitics, and even of conceptual dichotomies between land and sea). In contrast, ocean management (manifested in, for example, UNCLOS' zoning, MPAs, Marine Spatial Planning, and even the Straddling Fish Stocks Agreement) may perpetuate the conceptualization of oceans as inert and static and reduce complex oceanic processes to borders based on state sovereignty and jurisdiction. Tsiouvalas concluded that the reconceptualization of ocean space as kinetic could provide a guiding ethos for thinking differently about 'ocean commons', and could include non-Western and Indigenous systems of knowledge and ways of practicing 'space' (ibid, p. 7-8).

Yoshifumi Tanaka approached the issues of international community and the protection of common interests and oceans through the work of Georges Scelle (1878-1961), focussing on two key concepts. The first, the concept of '*domaine public international*' (DPI), reflects Schelle's conceptualization of the ocean as unified and for all (ibid, p. 8). Tanaka relied on DPI in his consideration of international community and common interests, and to propose a nexus between obligations *erga omnes*, the modern concept of DPI, and marine environmental protection under international law. The second key concept was the law of *dédoublement fonctionnel* (DF), on the basis of which, in an inter-state order, state organs perform both as national and as international organs (ibid, p. 9). Thus, the law of DF can be applied *individually* on behalf of the international community (as in LOSC Arts 24(2) and 44 on the obligation to give publicity to any danger to navigation, Art 98(1) on the duty to render assistance, Art 105 on the suppression of piracy, and Art 218(1) on the protection and preservation of the marine environment) and *institutionally* (as with the high seas MPAs, and as by the OSPAR Commission). Tanaka presented two models for protecting common interests on the basis of individual and institutional applications of the law of DF: a decentralized model in which community interests are protected by individual states (which could give rise to problems related to legitimacy, abuse of rights, incentive, and co-ordination) and an institutional-communitarian model (relying on international institutions and third-party compliance supervision) (ibid, p. 10).

Discussion centred heavily on the question of defining such concepts as international community, common interests, and obligations in relation to these. However, there was also

discussion of the ocean kinesis model (various, but repeatedly about the question of doing without lines all together) and the concept of *simplex usus facti* (ibid, p. 10-15).

3. **Sovereignty challenged and under transformation**

Session 2 of the Aurora Conference reflected upon the transformative nature of sovereignty by examining how and why it needs to change with time. This session focused on the concept of stewardship as an alternative model for governance, the use of new approaches to resolve ongoing sovereignty-related disputes, and future potential challenges that may come forth due to advancements in science and technology.

Richard Barnes' presentation explored the concept of stewardship. In the face of global challenges, a different understanding of sovereignty based on the idea of responsibility is required, therefore we need to frame sovereignty differently, i.e., as stewardship. In the context of the law of the sea, the concept of stewardship may be a more useful way of exploring sovereignty. Sovereignty is an intellectual construct and can be understood from a variety of perspectives including legal, historical, and political. To understand how sovereignty functions, it becomes important to understand various jural relations attributed to the concept (Aurora Conference Report, p. 16). The understanding of sovereignty has adapted and changed over time; thus, demonstrating that sovereignty is a very dynamic notion which moves with time. Sovereignty may be conceptualized in terms of property, and considering the deep relationship between the two, a detailed unpacking is required (ibid, p. 16). The concept of stewardship allows us to understand sovereignty as associated with responsibility. Current literature on stewardship shows that it has a long historical and theoretical heritage, which seems to be overshadowed by the pro-dominium approach to property. The idea of stewardship as a form of holding, which generates the right to use, is subject to the overarching obligation of responsibility, including conservation and preservation. Therefore, the nature of the stewardship concept is broad, but there is a need to explore more meaningfully the actual parameters of the concept (ibid, p. 17).

Irene Dahl examined sovereignty in the context of the Svalbard region situation. The Svalbard situation is the result of the Norwegian practice of sovereignty in the region which conflicts with EU regulations. The intended idea behind the Svalbard treaty was the peaceful utilization of natural resources in the region, but the ongoing lawsuit in the local Norwegian courts tells a different story. The new approaches an alternative way of solving this traditional dispute regarding the Svalbard region were discussed and deliberated upon (ibid, p. 18). The new approach suggests that rather than trying to solve the traditional dispute we should focus on resolving the three main underlying issues, namely oil and gas, snow crab, and the issue regarding Norway's jurisdiction in the fishery protection zone. The most important takeaway would be that new approaches may be used to resolve the underlying issues of the Svalbard region. This can be done without conclusively answering the more complex and politically charged question pertaining to the applicability of the Svalbard treaty outside the territorial waters (ibid, p. 18-19).

Maria Madelena das Neves' presentation on offshore wind farms on the high seas attempted to tease out the sovereignty-related issues that could come forth in setting up such projects. The offshore wind energy sector is important for the decarbonization of economies, and it may also help in attaining sustainability goals. Additionally, the climate change mitigation obligations under the Paris agreement will also get a push with such projects. Setting up offshore wind farms on the high seas would raise questions relating to the applicable legal regime, and other issues, which in the current literature are divided into different perspectives ranging from sovereign claims, creeping appropriation, functional territorialization, and privatization of areas that are considered common to all (ibid, p. 19). Offshore wind farm projects on the high seas could raise opportunities for states to cooperate, as they could benefit the international community by contributing to climate change mitigation. Even though the feasibility and the desirability of using a common area for problem-solving may be in the interest of the international community, but such use could lead to further complex sovereignty-related issues. Here it becomes imperative to raise questions about the status of the international community, energy justice, and the role of public participation in regulating and managing such activities amongst other things (ibid, p. 21).

The deliberations at the roundtable discussion after the presentations focused on the concept of stewardship as a means for reframing the concept of sovereignty which offers an alternative regime for regulation of common spaces embracing the obligation of responsibility. Further, the applicability of the new approaches to resolve sovereignty-related disputes was pondered. Finally, advancements in technology, the potential issues, and the transformative potential of sovereignty to resolve such issues were discussed. The important role of cooperation amongst states when dealing with sovereignty-related issues was stressed by the participants and the presenters (ibid, p. 21-26).

4. **Sovereignty across spaces**

Session 3 of the Aurora Conference explored the limits and possibilities of sovereignty in dealing with existing and novel challenges across spaces in three instances: namely in protecting the movement of wildlife in straits, in regulating navigation in ice-covered areas pursuant to Article 234, and in regulating marine autonomous surface ships (MASS).

Straits are essential passageways that facilitate the movement of not only humans but also marine species and birds from one marine ecosystem to another. As part of its sovereignty over straits, a coastal State can undertake various activities in straits, including, for example, detonation of naval mines, and the construction of causeways and overhead power transmission lines. These activities have become significant barriers to the movement of marine organisms and birds in and above straits in several areas (Aurora Conference Report, p. 27). Considering this, the first panelist, Alexander Lott, claimed that the legal regime of straits is largely anthropocentric and insufficient to remove the 'sovereignty barriers' or 'barrier effects' to wildlife movement; and he argued that the regime should be supplemented by 'wildlife-centric rules' that would enable the unimpeded movement of wildlife (ibid, p. 28). Along another line, the deliberation at the roundtable discussion that followed underlined that other rules of

international law dealing with protection of the marine environment – such as the [Convention on the Conservation of Migratory Species of Wild Animals (CMS)](), the [Convention on Biological Diversity (CBD)](), and the regime of Environmental Impact Assessment (EIA) – impose limits to the sovereignty of the coastal State in erecting barriers to wildlife movement. Thus, an integrated approach that looks at the regime of straits under the LOSC together with these environmental norms helps to mediate the exercise of sovereign powers, i.e. to balance the undertaking of various human activities and protection of wildlife movement ([ibid](), p. 38).

The second panelist, Jan Solski, examined the limits of the legislative competence of a coastal State in regulating navigation in ice-covered areas under Article 234 of the LOSC, as required by the term 'due regard', through the lens of sovereignty. 'Due regard' imposes a normative standard of reasonableness, which requires the coastal State to accommodate, and draw an appropriate balance between, the freedom of navigation and the protection and preservation of the marine environment; and any regulatory measure that would likely impair navigational rights of other States should be supported by the best scientific evidence ([ibid](), p. 29). Article 234 also gives rise to two other essential issues, namely the spatial scope of its application and the substantive scope of coastal State competence in regulating navigation. Literally, Article 234 seems to apply only in the EEZ, but such a narrow interpretation would lead to an absurd and unreasonable result. Therefore, a broad interpretation of the spatial scope of Article 234 that includes the territorial sea would be better fit to achieve the intended purpose and object of the provision; and, in fact, the state practices of Canada, Russia, and US conform to such interpretation ([ibid](), p. 29). The ambiguous articulation of geographical scope in Article 234 also allows one to draw the substantive scope of coastal State competence to regulate navigation in ice-covered areas from a parallel competence of a coastal State in the territorial sea in regulating innocent passage. Nonetheless, the competence of coastal States to unilaterally adopt different routing measures in the territorial sea is not straightforward. Neither the LOSC provisions dealing with regulation of innocent passage, nor the SOLAS-based legal regime, nor state practice of coastal States adopting various routing measures – ship reporting systems, pilotage, no anchorage, and areas to be avoided – for ships in innocent passage offer a clear distinction between complete coastal State competence and cooperative (with the International Maritime Organization (IMO) or other actors) legislative competence ([ibid](), p. 30). Such unclarity and absence of uniform practice indicates that sovereign jurisdiction does not preclude, and indeed at times requires, deliberation and cooperation with the IMO, as when international law is imprecise and the exercise of such jurisdiction impacts the rights of others. Such collective action helps to alleviate tensions surrounding controversial measures, would promote community values by relocating the locus of attention from individual States to the collective interest, and is also goal-oriented as it focuses on addressing the outstanding problem rather than power – an outcome expected from genuine stewardship ([ibid](), p. 30).

The third panelist, Iva Parlov, problematized sovereignty in the context of regulating marine autonomous surface ships (MASS). The introduction of new technologies, such as MASS, in the marine environment brings several benefits, but also poses new challenges to the existing law of the sea framework. The first challenge relates to the possible incompatibility of MASS with the existing legal framework applicable to conventional ships. The remotely operated ships

may largely be subject to constructive interpretations, and in this respect, regulations concerning ship's routing, ship reporting, and Vessel Traffic Service (VTS) are examples since these regulations mostly give rise to the question of the definition of the ship's master. The issue of compatibility, however, mostly arises as regards fully autonomous ships, not least in the context of a back-and-forth radio communication with the VTS ([ibid](), p. 31). MASS also have the potential to generate new types of risks (alongside standard safety and pollution risks) considering that MASS will always have to navigate side-by-side with conventional ships ([ibid](), p. 31). The novelty of risks may trigger coastal States' desire to regulate traffic in a more robust way, especially in congested areas with limited spaces for maneuvers. This may open the question of sovereignty in terms of whether and to what extent the coastal State may unilaterally regulate traffic in its territorial sea. Depending on the robustness of the desired measures to address novel risks, the need for a new regulatory framework that would accommodate safe coexistence of MASS and conventional ships could potentially challenge the way we traditionally think of sovereignty through the already-established jurisdictional powers at sea ([ibid](), p. 31).

5. **Concluding remarks**

The outcome of the conference showcased how sovereignty may be theoretically deconstructed while problematizing the foundational underpinnings of the concept. Different approaches may be adopted to study and develop a better understanding of sovereignty in the context of oceans, which are in a constant state of motion. Such approaches may help explore theoretical or philosophical issues, for instance in the genealogical sense or when viewed through the lens of ocean kinesis. Similarly, using a pragmatic approach, oceans must be treated as space used by the international community for the achievement of the international common interest, protection of which can be considered an obligation *erga omnes*, in fulfilment of which state organs can perform a dual role, national and international (*dédoublement fonctionnel*). Problematizing sovereignty from different vantage points also helps us underscore connected issues, for instance, the relationship between sovereignty and private property, and understandings of community interest and international community and or 'mankind'.

Keeping in mind the above, the concept of sovereignty may be reframed to make it more suited to the present time and needs. One such formulation is the idea of stewardship, which seems to be useful and suitable for addressing the challenges faced by oceans today, even if it lacks clarity at the conceptual level. The necessity of reframing the concept of sovereignty may be understood by considering ongoing disputes (the Svalbard situation) and by considering issues which may come forth in the future, due to the development of science and technology, for instance, in the context of wind farms on the high seas and MASS.

In addition to exploring possible ways of reframing sovereignty, the discussions touched on issues relating to international cooperation, geopolitics, international resource management, and international dispute resolution. Further, the evolving nature of the concept of stewardship was highlighted, considering present ocean-related challenges. It was also pointed out that cooperation with the IMO and other actors in regulating navigation is more conducive as it

helps toalleviate tensions surrounding controversial measures and focuses on addressing the outstanding problem rather than gathering of power by the coastal State. The importance of synergy between different international instruments was emphasized and the role of various stakeholders was discussed, including international organizations.