

Aspects regarding the Svalbard demilitarisation in relation
to Norway joining the Atlantic Alliance in 1949, and reflections
on the Åland Islands' demilitarised and neutralised status in
the event of a Finnish NATO accession

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Abstract

The article strives to explore certain aspects regarding the Svalbard demilitarisation in relation to Norway joining the Atlantic Alliance, which could be of interest in relation to the Åland Islands' status as demilitarised and neutralised in a situation where Finland would decide to join NATO – although the Svalbard and the Åland Islands' legal regimes are sui generis regimes, differing for a number of fundamental reasons, as parts of a two larger regimes that differ historically, of dissimilar construction and disparate in nature. Taking a closer look at the state of the Svalbard legal regime around the time when Norway joined the Atlantic Alliance in 1949 leads to the conclusion that there were threats towards it from 1944–1947, followed by a reconfirmation of the security provisions in the Svalbard Treaty. Arguably the Åland Islands' legal regime of today is more robust. Seemingly, the application of 'NATO's' arts. 4 and 5 have so far not had any ties to Svalbard. The leeway for interpretation of treaty provisions is arguably of wider scope in the Svalbard case than in the Ålandic one. Any kind of reservation for the Svalbard status at the time of Norway joining the Atlantic Alliance was not considered. The article discusses whether an acknowledgement of the Åland Islands' status would be feasible in the event of a Finnish NATO membership, and finds that a number of issues are still not explored.

Keywords

Svalbard, the Åland Islands, demilitarisation, neutralisation,
North Atlantic Treaty Organization, NATO

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1. Introduction

References to Svalbard's status as demilitarised seem almost inevitable in discussions on possible effects of a Finnish NATO¹ accession on Åland's status, and have been pronounced both in political contexts and by academics.² A common statement is that Norway joining the Atlantic Alliance has not affected Svalbard's status and therefore the conclusion could be drawn that a Finnish NATO accession would not severely affect Åland's demilitarised and neutralised status, implying that a comparison of the legal regimes can be made. These assertions constitute the rationale for this contribution. However, no detailed analysis of the two legal regimes, or direct comparison of them, will be made. That would presumably (if at all feasible) require a comprehensive study, including a discussion of theoretical and methodological issues, which is not possible to include in this limited and tentative contribution. It could perhaps even be argued that it is futile to explore the two regimes in parallel at all, asserting that foreign reactions to the Svalbard regime are specific to the Svalbard context, and reflect peculiarities of that regime and the strategic circumstances of the surrounding areas. Such a standpoint could imply that already at the outset lessons learned from Svalbard may at best have little, or, at worst, no relevance for the Åland Islands. The Åland Islands' and Svalbard legal regimes are indeed *sui generis* regimes. They do differ for a number of fundamental reasons including being parts of a two larger, historically differing, regimes of dissimilar construction and disparate in nature. However, that brings us back to the initial assertion: the rhetorical comparison between the Åland Islands and the Svalbard legal regimes in a NATO context. The author's aim is to examine that assertion, albeit in a limited manner. In order to achieve this aim, the author chooses to explore certain aspects regarding the two legal regimes in parallel, without any pretension of being exhaustive. The focus is on the Svalbard regime, combined with a brief account of the 'corresponding' aspects of the Åland Islands demilitarisation and neutralisation regime. Furthermore, it should be emphasised that this contribution is written from an international law perspective,³ focusing on the legal regimes. For the purpose of this article, legal regime connotes a set of norms and institutions generally adhered to by the major actors in a policy issue.⁴

1 The creation of a military organisation was not a treaty commitment and had not been planned for from the start. The basic military structures for the Alliance in Europe and the political decision-making machinery, with the North Atlantic Council (NAC) at its centre, were in place by mid-1951, and the entity has been known since then as the North Atlantic Treaty Organization/NATO, see e.g. the Finnish Government 2016d, p. 27. For the sake of readability "NATO" is used in this article as if the organisation was already in place ab initio.

2 E.g. Tiilikainen 2006, p. 353; Rainne, 2008, p. 48; The Åland Islands Government 2015, p. 28; The Finnish Government 2016d, p. 34.

3 There is no intention to compare vast historical events as such, which differ fundamentally for a number of reasons. The issues in the present contribution are assessed on the basis of a traditional legal dogmatics method.

4 Nye 1975, p. 31. It is of interest to note that Spiliopoulou Åkermark, Heinikoski and Kleemola-Juntunen (2018) describe the demilitarisation and neutralisation of the Åland Islands as a regime involving a series

The legal regimes discussed in the article constitute multilateral security arrangements applied to territories. The concepts demilitarisation and neutralisation are somewhat elusive. Using a traditional definition, by demilitarisation it is meant that the territory in question is free from permanent military installations and forces, while neutralisation implies the additional obligations to keep the territory outside war operations in time of armed conflict (but with a possible right of the state exercising sovereignty over the neutralised territory to bring in troops as a defensive measure).⁵ Commonly academics have denoted Svalbard's status, based on art. 9 in the Svalbard Treaty, as demilitarised and, in most cases, neutralised.⁶ Ulfstein seems to hold a view of a more limited concept regarding the Svalbard demilitarisation, and states for instance that Svalbard is only partly demilitarised.⁷ The Norwegian Government does not use these concepts. This author has chosen to use the denotation demilitarisation to describe Svalbard's status. The Åland Islands' status is commonly denoted as demilitarised and neutralised.

A primary objective of this article is to explore how the Svalbard legal regime was viewed at the time when Norway joined the Atlantic Alliance, and what the challenges to it were. In order to determine what kind of challenges it is crucial to examine state practice⁸ around that time. An attempt is made to identify state practice related to the Svalbard legal regime, and assess whether such state practice was accepted or contradicted by other states. There is a focus on the time period 1944–51, a choice made by the author, since it seems relevant to examine events around the time of the formal Norwegian decision to join NATO by the Norwegian Parliament on 29 March 1949. Events related to the Svalbard legal regime that took place in this time period were inter alia the Norwegian contacts with the Soviet Union to revise the Svalbard demilitarised status during the crisis 1944–1947, the definite impasse in the negotiations on a Nordic defence union in the beginning of 1949, the Norwegian decision in March 1949 to join NATO, and the Norwegian decision 1951 to confirm the NATO command for Norway. The period 1944–51 is being described in a relatively detailed manner in the article, the purpose being to clarify the 'Svalbard-NATO' circumstances of that time.

of regulations, institutions and processes at various levels, national as well as international, p. 21, and; “..the complex regime applying to the Åland Islands is a paradigmatic example of multilevel governance where local (Ålandic), national, international and European norms and institutions co-exist, co-operate, collide and compete and where legal, political, diplomatic and military realities run parallel.”, pp. 21–22.

5 Hannikainen 1994, p. 616; Rosas 1997, p. 23.

6 E.g. Hannikainen 1994, p. 649; Ahlström 1997, p. 46; Rainne 2008, p. 48. Ulfstein (1995) states that state practice has supported that Svalbard is neutralised, pp. 366–367.

7 Ulfstein 1995, pp. 388–389, 478.

8 Traditionally, the starting point for discussing sources of international law is art. 38(1) of the Statute of the ICJ. A concept based on art. 38(1)(b) is state practice (or *usus* or *diuturnitas*). State practice is a rather wide term and its exact scope is not clear. Brownlie, 2003, lists certain state actions and statements that may qualify as state practice, though admitting that their value may vary depending on the circumstances; p. 6. In this article Brownlie's view is the point of departure. A simplified summary of that position would be that both activity of states and their statements are regarded as state practice.

However, the intention is to examine also a few other aspects for the purpose of drawing at least preliminary conclusions on these topics. Against the above background, the research questions are the following: first, what conclusions can be drawn as concerns the state of the Svalbard demilitarised regime around the time when Norway joined NATO during the period 1944–51? Second, are there any conclusions to be drawn concerning Svalbard in connection with application so far of the ‘consultation art. 4’ and the ‘collective defense art. 5’ in NATO’s 1949 North Atlantic Treaty (commonly known as the Washington Treaty)? Third, what possible conclusions does an exploration of the main military-strategic⁹ assessments of the Svalbard legal regime, limited above all to the time period until 1951, lead to? Fourth, is it possible to draw any conclusions as regards the leeway of interpretation of the provisions in question, where above all Norway’s and Finland’s respective leeway of interpretation is assessed as of interest? On these four points brief accounts and reflections regarding ‘corresponding’ aspects of the Åland Islands demilitarised and neutralised regime will be made – in relation to the first research question, focus is on the current state of the Åland Islands regime since that is the issue of interest in relation to a Finnish NATO accession.

A mix of primary and secondary sources has been used for the article. Many of the issues have already been examined by experts and academics,¹⁰ but it is relevant to have a closer look at known facts for the purpose of this contribution. First, the origins of the Svalbard legal regime, some aspects regarding NATO, and Norway’s stance on Svalbard at the time of becoming a NATO member, will be examined. Second, certain aspects of the Svalbard and Åland legal regimes will be discussed, namely military-strategic aspects and the leeway of interpretation. Third, a background and introduction to the discussions so far on the Åland Islands in connection with a possible Finnish accession to NATO will be given. Finally, some conclusions will be drawn.

9 In this contribution the term military-strategic is used to denote reasonings based on operational analyses, see Holtsmark 1993, p. 23, note 27. The term geopolitical, not used commonly in this contribution, could be seen as on a higher level of generalisation than military-strategic reasoning. See also Spiliopoulou, Heinikoski, Kleemola-Juntunen 2018, p. 20: “Geopolitical thinking implies that the world is understood as being comprised of competing powers with a focus on hard security, that is, use of military.”

10 Concerning Svalbard, sources used are e.g. (in chronological order): Riste 1979, Tamnes 1987, Eriksen 1989, Tamnes, Holtsmark 1993, Ulfstein 1995, Sverdrup 1996, Holtsmark 2004, Ulfstein and Churchill 2010. Holtsmark, 1993 and 2004, has examined the issue based on Soviet material the Ministry for Foreign Affairs of the Russian Federation, with a focus on Soviet policy, encompassing the period from 1920 to 1953. The Norwegian path to NATO has been analysed in detail by Sverdrup 1996.

2. Svalbard and NATO

The purpose of this section is to explore the state of the Svalbard legal regime until around 1951, focusing on the time period when Norway joined the Atlantic Alliance. A ‘corresponding’ brief account of some aspects of the Åland Islands regime of today is found in section 4.

2.1 The Svalbard Treaty: Developments to 1944

The origins of the Svalbard Treaty¹¹ have been described and analysed extensively by academics,¹² so only a summary will be given here. The history of Svalbard is connected with the exploitation of resources.¹³ During the 17th and 18th centuries there was an extensive degree of hunting in Svalbard and the surrounding waters, especially whale hunting, and at the beginning of the 20th century the coal mining industry was expanding.¹⁴ There were a number of sovereignty claims advanced over Svalbard, but the region’s ‘no-man’s land’ status (*terra nullius*) was widely accepted among interested states up until the 19th century. However, in 1871, the Swedish-Norwegian government proposed the establishment of a permanent settlement together with placing Svalbard under Norwegian sovereignty, but the Russian Czarist government opposed this.¹⁵ After gaining independence from Sweden in 1905, in a notification to relevant parties, Norway suggested the establishment of a new legal regime based on Svalbard’s *terra nullius* status.¹⁶ However, negotiations before World War I did not result in any solution. Norway requested in 1919 that the Paris Peace Conference should examine the legal status of Svalbard and that Norway be granted sovereignty. The conference established the Spitsbergen Commission where representatives of the USA, Great Britain, France, Italy and Japan considered a draft presented by Norway and agreed on a treaty text which would become the Svalbard Treaty. The Treaty was based on Norwegian sovereignty, while preserving earlier *terra nullius* rights by allowing equal rights for other states to access, hunting and fishing, mining, etc. The peaceful utilisation

11 Treaty of 9 February 1920 relating to Spitsbergen (Svalbard) (hereinafter the Svalbard Treaty).

12 The information in this paragraph builds in particular on Ulfstein 1995; Churchill and Ulfstein 2010. For other sources on Svalbard, see also *supra* note 10. Holtsmark 1993, p. 8 in note 3, has listed sources for different aspects of the Svalbard issue. Ulfstein states (1995) that there were three main purposes of the Svalbard Treaty; to establish an effective management of the archipelago, the preservation of former *terra nullius* rights, and facilitating peaceful utilisation of Svalbard, p. 343.

13 Svalbard is an Arctic archipelago lying in the Barents Sea, midway between Norway and the North Pole, and includes all the islands situated between 74° and 81°N and 10°E and 35°E.

14 Holtsmark 1993, p. 29.

15 Responding to Sweden-Norway’s query whether Russia would object to the former’s assertion of sovereignty over Spitsbergen, the Russians responded in a diplomatic note 15 of May 27, 1871, that the Russian government wanted Svalbard to continue to be, by tacit agreement, a territory with an undecided status open to all states, Ulfstein 1995, p. 37 (note 53).

16 Churchill and Ulfstein 2010, p. 553.

of Svalbard was to be ensured through the stipulations of art. 9 of the Treaty, which reads: “Subject to the rights and duties resulting from the admission of Norway to the League of Nations, Norway undertakes not to create nor to allow the establishment of any naval base in the territories specified in Article 1 and not to construct any fortification in the said territories, which may never be used for warlike purposes.”

The Svalbard Treaty was signed on 9 February 1920 and entered into force on 14 August 1925.¹⁷ A separate Norwegian act of law entered into force the same day, the Act of 17 July 1925 No. 11, known as the Svalbard Act.¹⁸ The Svalbard Treaty’s founding signatory states were the US, the UK, France, Italy, Japan and Norway. The Treaty is open to accession, and more than 40 parties have acceded to the Treaty to date.¹⁹

For the purpose of this article the Soviet Union/Russia’s positions and actions are crucial, since the interest for Svalbard and the Svalbard issue were becoming increasingly bilateralised between Russia and Norway already from 1920.²⁰ Russia took no part in the negotiations and was not among the signatory states of the Svalbard Treaty. Initially there were Russians protests against the 1920 Treaty. The new regime in Russia tried for a while to obstruct the implementation of an arrangement which had been negotiated without Russian participation,²¹ but in February 1924 Norway received a declaration from the Soviet Union government that it accepted the 1920 Svalbard Treaty: the Soviet Union declared that it did not object to the stipulations of the Treaty, and the Norwegian government undertook to solicit the signatory powers’ agreement to Soviet adherence.²² Around the time of the 1924 Declaration Svalbard was not considered to be of much interest to the Soviet Union,²³ but soon after that the Soviet government started to develop an Arctic policy.²⁴

Basically because the United States refused to recognise the Soviet Union, the Soviet Union was only allowed to accede to the Treaty in May 1935.²⁵ The Soviet accession in 1935 was motivated by economic and legal arguments, not military-strategic ones,²⁶ and the increased Soviet activity on Svalbard in the 1930s did not mean that the area had been given priority in Soviet foreign policy or strategic thinking.²⁷ The Arctic did not play any

17 Ibid.

18 Ibid. Furthermore, according to the first paragraph of art. 8 in the Svalbard Treaty, Norway is under a duty to adopt what is known as a mining code. The Mining Code was laid down by the Royal Decree of 7 August 1925.

19 The Norwegian Government 2015, p. 17.

20 Tamnes 1991, p. 8.

21 Holtsmark 1993, p. 17 ff.

22 Ibid., p. 14. Danielsen 1964.

23 Holtsmark 1993, p. 24.

24 Ibid., p. 26.

25 Ibid., p. 22.

26 Ibid., p. 156.

27 Ibid., p. 30.

important role in Soviet military-strategic thinking prior to the outbreak of the Second World War (see section 3.1).²⁸

A brief account of some NATO aspects follows below. Thereafter key events from 1944–1951 will be described, with a focus on the status of the Svalbard legal regime.

2.2 NATO

In particular three ‘NATO issues’, explored below, are assessed as being of interest for this contribution in relation to Svalbard, and the Åland Islands of today: first, the application of art. 4²⁹ and the core art. 5³⁰ of the founding Washington Treaty³¹ and the consensus requirement attached to these articles, second, the assistance given to states subject of an armed attack, and third, the issue of possible reservations, or similar, to the Washington Treaty.

Any member state can formally invoke art. 4, which provides for a consultation process. As soon as the article has been invoked, the issue is discussed and can potentially lead to some form of joint decision or action on behalf of NATO. The decision is to be taken by consensus. Since NATO’s creation in 1949, art. 4 has been invoked several times.³² Art. 4 is commonly seen as a step on the ladder to art. 5, which helps explain why it is invoked relatively rarely: the invocation of art. 4 should be given careful consideration, since the possible connection to art. 5 gives art. 4 significant weight.

Art. 5 has only been applied once, after the attacks in the United States in 2001. Legally, there is arguably no need for an attacked state to invoke art. 5 – it operates automatically.³³ However, in 2001 there were seemingly several actors involved.³⁴ Art. 5 does not contain an automatic obligation for the states parties to come to the assistance of an attacked party, or to do so with military means: this choice is left to each individual member state – although politically there would presumably be a pressure to assist.³⁵ In the North Atlantic Council

28 Ibid., p. 31.

29 Art. 4: “The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened.”

30 Art. 5 begins: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all...”.

31 The North Atlantic Treaty 1949, commonly known as the Washington Treaty.

32 Recent examples are the request on 26 July 2015 by Turkey that the North Atlantic Council convene under art. 4 in view of the seriousness of the situation following terrorist attacks, and Poland’s invocation of art. 4 on 3 March 2014 following increasing tensions in its neighbour Ukraine. See the NATO website https://www.nato.int/cps/su/natohq/topics_49187.htm%20 (visited 2.1.2018).

33 Siedschlag (2001) states that “Artikel 5 beinhaltet eine unbedingte politische (wenngleich nicht notwendigerweise auch militärische, das bleibt jedem einzelnen Staat überlassen) Beistandsverpflichtung: Sie greift automatisch, wenn ein NATO-Staat angegriffen wird und muss nicht erst noch diplomatisch festgestellt werden.”, p. 86. Reichard 2006, p. 190.

34 Two accounts of how the initiative to invoke art. 5 started off are given by Assistant Secretary General for Defence Planning and Operations (1999–2003) Edgar Buckley 2006, and Martin Reichard 2006.

35 Reichard 2006, p. 183.

meeting on 12 September 2001 the application of the decision-making was discussed. It was confirmed by the NATO legal adviser that each member state would deem for itself what was “necessary”, as stipulated in art. 5, although such action should be appropriate to the scale of the attack, the means of each country, and the steps necessary to restore peace and security.³⁶ Furthermore, any collective action taken by the NATO, for example military action by NATO forces, would not be launched without specific additional consultation and decision in the Council.³⁷

Art. 5 states that an “armed attack” triggers the application of the article. In practice one of the most difficult challenges today is perhaps defining what is, and is not, an armed attack.³⁸ In 2001, the conclusion was reached that the attacks in the United States were to be seen as armed attacks. The decision to invoke art. 5 was historical, but the concrete measures³⁹ taken in its implementation were limited compared with the massive military capacity at NATO’s disposal.⁴⁰ The contributions of Norway after the invocation are of particular interest:⁴¹ Norway supported the mission in Afghanistan with a number of measures, but arguably none of the Norwegian measures were connected to Norwegian territory, at least not in a direct and legal sense.⁴²

For states joining the NATO of today, consideration would presumably also be given to NATO’s other activities, and the way they are handled and decided on, as well as other aspects, such as the enlarged membership, that make NATO a different organisation than

36 Buckley 2006.

37 Buckley 2006. It is of interest that decision-making in non-article 5 combat operations, legally based on for instance UN Security Council resolutions, is much more flexible. Since substantive decisions are not taken by a straight yes or no vote, those who do not want to participate in a given non-article 5 initiative opt out, without preventing others from moving forward. There are limits to this flexibility, but the 2011 Libyan case indicates that they are very broad, see The Finnish Government 2106d, p. 33.

38 The International Court of Justice has used Resolution 3314 of the United Nations General Assembly, adopted in 1974 and listing all acts which can be qualified as acts of aggression, as the point of departure in its analysis of the notion ‘armed attack’, see inter alia *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US) (Merits)* 1986.

39 Eight measures were decided on by the member states, see a statement by NATO Secretary-General George Robertson 2001 (only the last two measures are of the kind of response classically understood under collective self-defence).

40 Reichard 2006, pp. 189–190: Criticism regarding the 2001 invocation of art. 5 includes that the United States was from a military point of view not really in need of any help and that NATO’s ‘war against terrorism’ in general went very far and was not checked at every instance against the strict requirements of self-defence in international law. The meeting on 2 October 2001 which produced the “evidence” remains classified.

41 The measures by the contributing state as listed by the United States, see the Department of State webpage; <https://2001–2009.state.gov/coalition/cr/fs/12753.htm> (visited 5.1.2018).

42 Reichard 2006, p. 189: Seemingly, from a legal standpoint, the invocation of art. 5 after the terrorist attacks 2001 per se was endorsed by most of the scholarship. But the more fundamental question (on which the invocation was legally contingent) whether the attacks really constituted a case justifying self-defence under international law has provoked debate, particularly, if the question was answered in the affirmative, whether the action taken in Afghanistan 2001 conformed with the legal limits of immediacy, proportionality and necessity.

the Atlantic Alliance that Norway joined in 1949 – despite the fact that art. 5 and collective self-defence is back at the centre of NATO.⁴³

For Norway, the defence of the Norwegian territory was the focus of considerations preceding the decision to join the Atlantic Alliance. The consensus requirement regarding art. 5 and collective self-defence issues was stressed.⁴⁴ In relation to Svalbard, as Ulfstein has pointed out, even though the consensus rule means that Norway is formally in control of the defence of the Norwegian territory, there is reason to pose the question if Norway also has the necessary control in practice, taking into account confidential NATO defence plans and the discretionary powers of the NATO command in time of war.⁴⁵

The issue of assistance to Norway in art. 4 and, above all, art. 5 scenarios, and how such assistance would relate to Svalbard's legal regime, was not considered in the political discussions (cf. the Åland Islands and the French request in 2015, see sec. 4.2). The art. 4 consultations and the art. 5 invocation that have occurred so far have not in any way had ties to Svalbard, so on this point there is seemingly limited (at least based on what is emanating from public sources) experience at hand from an Ålandic perspective.

The Norwegian position in relation to NATO has been described as self-imposed restrictions, with no nuclear weapons, no foreign bases, and “non-provocative” defence of Finnmark, with limited allied military activity eastward of 24° East longitude.⁴⁶ It is not a ‘NATO tradition’ that reservations be made to the founding treaty by states parties; there are no reservations made to the Washington Treaty. The issue of reservations is a sometimes thorny and technical matter.⁴⁷ Legally, a state wishing to make a reservation ‘of some kind’ cannot be ‘stopped’ – although the reservation and aspects related to it could later be subject to a legal process. Interestingly, in connection with the decision by the

43 The Finnish Government 2016d, p. 29. For a description of the term collective self-defence, see Dinstein 2017, pp. 301–327.

44 The Norwegian Storting's Special Committee 1949, p. 93. Other issues underlined in the Committee's opinion was that the treaty did not in any way create obligations for Norway to accept military bases on Norwegian territory, p. 93. Ulfstein (1995) has concluded that the substantive obligation established in art. 5 in the Washington Treaty does not violate art. 9 in the Svalbard Treaty, p. 372.

45 Ulfstein (1995) has discussed the consensus rule vis-à-vis Norway and Svalbard, pp. 372 ff.

46 The Finnish Government 2016d, p. 34. It can be noted that the concept ‘national caveats’ is used within NATO, but according to its definition by NATO, as for instance referred to in Resolution 336 on Reducing National Caveats by the NATO Parliamentary Assembly 2005, it is defined as “restrictions placed on the use of national military contingents operating as part of a multinational operation”.

47 The International Law Commission (ILC), 2011: The ILC worked on the topic 1993–2011 when a Guide (with its commentaries encompassing more than 600 pages) on the issue of reservations was agreed. See Milanovic and Sicilianos 2013: The rigid system requiring unanimous acceptance of reservations by all treaty parties had already been softened to a more flexible one that would facilitate as broad a membership of multilateral treaties as possible without sacrificing their object and purpose, by the International Court of Justice in the 1951 Advisory Opinion Reservations to the Genocide Convention. The 1969 Vienna Convention on the Law of the Treaties codified the Court's innovation, adding a few more rules here or there, but the Convention was far from being a comprehensive regulatory framework for reservations. The ILC arrived at a kind of “Vienna Convention plus”.

United States Senate to ratify the Washington Treaty there were proposals for reservations debated by the Senate, but none of them were agreed on.⁴⁸ There is also information about an Icelandic ‘attempt’ at a reservation, but no such reservation is recorded.⁴⁹ Against such a ‘NATO tradition of no reservations’ it would most likely be seen as difficult politically to insist on any kind of reservation, perhaps to a certain extent depending on the matter – despite the fact that in general, under international law, it would be feasible. Rather, ‘self-imposed restrictions’, as for instance those by Norway described above, seem to be the ‘tradition’ followed by NATO.

2.3 Norway’s stance on Svalbard when joining NATO, 1944–1951

The purpose of this section is to attempt to assess what the Norwegian concerns were regarding the Svalbard-NATO issue from 1944–1951, how the Svalbard status was taken into account, and what the state of the legal regime was around that time.

Norway was one of the states that signed the Washington Treaty on 4 April 1949. The decision by Norway to join was preceded by intense debates in Norway, influenced by the realities of the Cold War. Until the end of January of 1949 the alternative, a Nordic defense union, comprising Sweden, Denmark and Norway, was discussed in Norway. Svalbard was not to be covered by the Nordic defence union, since Sweden did not wish to include it,⁵⁰ which was a concern for Norway, but still seemingly not decisive. However, the three Nordic states could not agree on crucial issues, above all whether the Nordic union in any way could or should be linked to the West – a requirement for Norway, but unthinkable for the neutral Sweden. Early in 1949 it became clear that the negotiations had reached a definite impasse.

No known official written references to the status of Svalbard were made when Norway decided to join the Atlantic Alliance and ratify the Washington Treaty. However, Svalbard was brought up behind closed doors in, for instance, Norwegian contacts with the United States at a crucial point in time in February 1949: on 10 January 1949 Foreign Minister Lange informed the Special Committee⁵¹ that the issue of whether Svalbard should be included in the Atlantic Alliance, should Norway choose to become a member of it, had

48 White 1949.

49 Njarðarson and Már Magnússon 2016.

50 See inter alia Eriksen 1989, p. 151.

51 Meeting of the Norwegian Storting Special Committee for Certain Foreign Affairs and Contingency Issues (“Spesialkomité for særlige utenrikspolitiske spørsmål og beredskapssaker”) (hereinafter the Special Committee) on 10 January 1949, pp. 9–10. The stenographic reports from the Committee meetings 1948–49 have been received by the author in personal communication from the Storting. The Special Committee existed 9 April 1948–27 January 1950. For a background to the creation of the Special Committee, see Lövdal 2002, pp. 89, 92 f. See also Sverdrup 1996, p. 295. In June 1996 the Storting declassified the 1948–49 stenographic reports from the Special Committee, see the Storting decision, p. 35.

not been clarified yet. Svalbard had not been brought up specifically, asserted Lange, who referred to the fact that Svalbard had not been excluded in the replies that Norway had received from the West.⁵² But, asserted Lange, as regards a Nordic defence union, the answer was: Svalbard would not be included.⁵³ However, in later discussions with the US, Svalbard was discussed: Lange informed the Special Committee on 16 February 1949 that the question was posed to the civil servants at the State Department and the Secretary of State Acheson.⁵⁴ Acheson replied that his view was that the entire Norwegian territory was included, and protected by the Alliance.⁵⁵ Lange and the Norwegian delegation inquired whether it was possible that some kind of declaration on the issue could be issued by the US, by the Congress or the President. However, President Truman and Acheson's views were that such a measure was hardly possible politically. The membership in the Alliance should be sufficient: if there was an attack on a member state's territory, the US would see that as "a matter of very grave concern", an expression repeated by Lange at home in the Special Committee.⁵⁶

Available official sources that are of interest to examine are those connected to the Storting, including the relevant Committees, not least since the Storting had the last formal say on the ratification of the Washington Treaty. In the Special Committee the issue of whether Norway should join NATO or not was dealt with behind closed doors, without participation of representatives of the Communist Party (NKP). Lövold asserts that the main purpose of setting up the Committee was to exclude the Communist party representatives from taking part in it, since these persons allegedly had created a distrustful relationship between the Government and the Storting.⁵⁷ The Communist Party was the fourth largest part in the Storting at the time, but the Norwegian Labour Party (later the Labour Party) (Arbeiderpartiet)⁵⁸ had an absolute majority in the Norwegian parliament (from 1945 to 1961). The issue of whether Norway should join NATO or not was debated behind closed doors in the Special Committee. However, in principle the important standpoints regarding the Norwegian NATO membership can be found in open fora, except for the more or less closed internal Labour Party discussions, or deliberations by the Government.⁵⁹

52 The Special Committee on 10 January 1949, p. 17.

53 Ibid.

54 The Norwegian Storting Special Committee on 16 February 1949, p. 11. For a description of the meetings in the United States, see also Sverdrup 1996, p. 329 ff.

55 Ibid. Eriksen sees it from another perspective: he asserts that neither the US, nor Norway, were considering to set aside the demilitarisation of Svalbard at the time when Norway joined the Atlantic Alliance, Eriksen 1989, p. 151.

56 The Norwegian Storting Special Committee on 16 February 1949, p. 11.

57 Lövold 2002, p. 91. See also footnote 51.

58 The Labour Party is a social democratic party which has had a strong, sometimes dominating, position in Norway.

59 For a detailed analysis of Norway's path to NATO, see Sverdrup 1996.

The ‘sovereignty issue’ regarding Svalbard (1944–47, see subsection 2.3.1) had earlier been dealt with by the enlarged Committee for Foreign and Constitutional Affairs (hereinafter the enlarged Foreign Affairs Committee).⁶⁰

An opinion elaborated by the Special Committee,⁶¹ and a Government Bill, dated 22 March 1949,⁶² on the issue of whether Norway should join the Atlantic Alliance, were presented to the Storting. Neither of these documents mention Svalbard. The Bill that was presented to the Storting to obtain the Parliament’s acceptance of Norway’s ratification of the Treaty is quite brief, around 11 pages, and half of that consists of the treaty text.

Already on 3 March 1949 the Storting had taken the decision that Norway should take part in the drafting of the treaty that was being negotiated in Washington.⁶³ This step can be regarded as constituting the decision for Norway entering the Alliance.⁶⁴ From 4 March Norway was represented in the drafting work by its Norwegian Ambassador Morgenstjerne in Washington.⁶⁵ On 18 March a draft of the Treaty was finalised.⁶⁶

The debate in the Storting took place on 29 March 1949, and the Storting took the formal decision that Norway should join the Atlantic Alliance.⁶⁷ Svalbard was not mentioned in the debate, according to the Storting report.⁶⁸

In 1951 the issue of Norway, including Svalbard, being included in the area of responsibility of the newly created NATO Atlantic command, SACLANT, was considered.⁶⁹ The Government proposed to the Storting in a Government Bill that Norway should accept to be included under the command.⁷⁰ Neither the Bill nor the Opinion by the Parliamentary Enlarged Foreign Relations, Constitutional and Military Committee⁷¹ mention Svalbard. According to Meyer there was a discussion whether it should be mentioned in the Committee opinion that Svalbard was included under the joint command, but only a minority supported it so it was left out.⁷² (Interestingly, Holtsmark states that the Soviets had been informed by Jakob Friis, one of the Labour Party’s left-wingers, that there was

60 Lövold 2002, pp. 88–89: The enlarged Foreign Affairs Committee played an important role 1945–48. Sverdrup 1996, p. 243: Foreign Minister Lange took care to keep the enlarged Foreign Affairs Committee informed.

61 The Norwegian Storting’s Special Committee’s Opinion 1949.

62 Norwegian Government Bill St. prp. Nr. 40. (1949).

63 *Ibid.*, p. 3.

64 Sverdrup 1996, p. 337.

65 *Ibid.*

66 *Ibid.*

67 The Storting report 29 March 1949, pp. 655–712.

68 *Ibid.*

69 For an overview of the NATO commando structure 1951–2009, see Pedlow 2009.

70 Norwegian Government Bill: St.prp.nr.20 (1951).

71 The Norwegian Storting enlarged Foreign Affairs Committee Opinion 1951. The Committee made reference to the enclosed statements by the Justice Ministry and professor Castberg and professor Andenaes, p. 70. The statements by the Justice Ministry and the two professors focused on sec 1 and 25 in the Constitutional Act (“Grunnloven”) and did not touch on Svalbard.

72 Meyer 1987, p. 97. (Cf. Tamnes 1991, p. 76.)

opposition within the Storting's Foreign Affairs Committee to the inclusion of Svalbard in the Allied command.⁷³) In the debate in the Storting on 12 March 1951⁷⁴ Svalbard was not touched on, although there were references in the debate to certain disagreements in the Committee, for instance by Friis.⁷⁵

As can be seen from this overview, the official Norwegian documents referred to above in these years did not mention Svalbard. However, Svalbard was brought up in the 1951 diplomatic notes exchanged with the Soviet Union in these years, see further below, where a closer look will be taken at the events and states' measures in the period 1944–51.

2.3.1 1944 until early 1947

In a sudden move, as it was perceived by Norway, on 12 November 1944, the Soviet Union presented Norway with extensive proposals for a change in the international legal status of Svalbard.⁷⁶ The Soviet Commissar for Foreign Affairs Vjatjeslav M. Molotov met with the Norwegian Foreign Minister Trygve Lie and demanded inter alia that the Svalbard Treaty should be declared void, and that the Spitsbergen archipelago should be administered as a Soviet-Norwegian condominium, i.e. that it should come under joint Soviet-Norwegian control.⁷⁷

Initially the Norwegians tried to take the initiative,⁷⁸ and presented a Norwegian counter proposal for a solution: a joint declaration by the Soviet Union and Norway. This policy culminated in the Norwegian draft declaration of 9 April 1945.⁷⁹ The UK and the US was kept informed, but they were not consulted as treaty parties.⁸⁰ The Norwegian proposal for a joint declaration would have paved the way for the joint Norwegian-Soviet defence of Svalbard.⁸¹ However, the intention was that the states parties would be heard, as stated in the declaration.⁸²

73 Holtmark 1993, p. 149.

74 The Storting report 12 March 1951, pp. 397–417.

75 Ibid., p. 410, by Jakob Friis, who was very critical to a Norwegian NATO membership, but voted “yes” in the Storting.

76 Holtmark 1993, pp. 5–6.

77 Ibid.

78 The initial handling of the Svalbard issue was kept within the Government and among a few additional advisers, such as Rolf Andvord, H.C. Berg, Frede Castberg, C.J.Hambro, Arne Ording and Arnold Raestad, see Eriksen 1989, pp. 112–162, p. 117. According to Eriksen, the Norwegian Ambassador in Moscow, Rolf Andvord, was the main influence in the political handling of the Svalbard issue, and the military was not involved in the discussions, *ibid.*, p. 118.

79 Ibid., p. 6. The wording of the declaration can be found in for instance the Storting enlarged Foreign Affairs Committee meeting report 16 January 1947, p. 21.

80 Holtmark 1993, pp. 5–6. Statement by Foreign Minister Lange in the enlarged Foreign Affairs Committee 8 May 1946, p. 30.

81 Eriksen 1989, p. 119, 124.

82 For details on the Lange-Molotov meeting, see Sverdrup 1996, p. 269–271. Molotov wanted to avoid mentioning some of the States Parties in the declaration (in discussions in November 1946), and there was no agreement reached on that point. According to Eriksen, 1989, p. 119, the initiative to keep the

The Norwegian policy from November 1944 to April 1945 of “keeping the initiative” proved successful, although it was a policy of enormous risks and could have ended in disaster if the Soviets had demanded immediate implementation of the draft declaration of 9 April 1945 – but this did not happen.⁸³ The period May 1945–February 1946 has been characterised as a wait-and-see period.⁸⁴ Foreign Minister Halvard Lange succeeded Trygve Lie in February 1946, which opened for a change of direction regarding the Svalbard issue.⁸⁵ There were some attempts towards reorientation by the Norwegian Government in 1946, but not successful ones.⁸⁶

Formally, the discussions in the period 1944–47 about Svalbard’s international status were a Norwegian-Soviet bilateral affair. The US did not seem to find the Soviet initiative too disturbing.⁸⁷ The British were not that interested in Svalbard either.⁸⁸ The Western powers did not put pressure on Norway to resist the Soviet demands, and the Norwegian government did not seek their support.⁸⁹ Svalbard was not the subject of discussions between the Soviets and the British or the Americans.⁹⁰ Holtsmark asserts that lower and middle level bureaucrats in the Soviet foreign policy apparatus were the driving force behind the attempts in the years 1944–47 to alter Svalbard’s international status.⁹¹

In the period February 1946–January 1947 the Norwegian Foreign Relations Committee and the Storting did not discuss the matter in detail or reach any definite decisions.⁹²

issue initially between Norway and the Soviet Union, without involvement of other treaty parties, was Norwegian. Olav Riste has described the negotiations in detail in *London-regjeringa II, 1979*, in particular pp. 315–339.

83 Holtsmark 1993, pp. 161–162. The Soviets were led to believe that there was no need to hasten the conclusion of the talks, which was reinforced by Soviet perceptions of Norwegian attitudes, strengthened by Foreign Minister Trygve Lie’s repeated efforts to convince the Soviets that Norway wanted a solution which was “satisfactory” to the Soviet Union.

84 Eriksen 1989, p. 126 ff.

85 *Ibid.*, p. 132.

86 *Ibid.*, pp. 132–135. There were occasional Soviet reminders that the Svalbard issue was still not solved, and in the discussions with Molotov in November 1946, Lange agreed that bilateral negotiations would continue early 1947, although Prime Minister Einar Gerhardsen and Defence Minister Jens Chr. Hauge had wanted to take steps away from the joint defence line. For details on the Lange-Molotov meeting, see Sverdrup 1996, pp. 269–271.

87 Holtsmark 1993, p. 126: “The underlying American attitude was highlighted by the President’s Chief of Staff, Admiral William D. Leahy, who stated that it was difficult for him to see that there were any military implications in the acquisition by Russia of bases in Bear Island and the Spitsbergen Archipelago.”

88 *Ibid.*, p. 127.

89 *Ibid.*, pp. 162–163.

90 *Ibid.* Holtsmark has argued that the US was still a decisive actor. From the outset of the discussions, Soviet policy on Svalbard increasingly reflected Soviet perceptions of American interests vis-à-vis Iceland and Greenland: “The Soviet fear of supplying the Americans with additional arguments in support of their plans for bases in Iceland and Greenland was the single most important external factor which restrained the Soviets from forcing through their original demands of November 1944.”

91 *Ibid.*, p. 160.

92 Eriksen 1989, p. 131 ff.

2.3.2. *Change of direction early 1947*

The driving forces behind the reorientation of the Svalbard politics in early 1947 were several.⁹³ Above all, foreign policy aspects were seen as crucial: Norway should be free from alliances. A strategy of bridge-building between East and West was the right choice for Norway. The fact that Foreign Minister Halvard Lange took over from Trygve Lie played a role.⁹⁴

Also, military and economic arguments were heard in the debate.⁹⁵ The military arguments against the joint defence of Svalbard weighed in.⁹⁶ Early in January 1947 the Norwegian Government had reached the decision that it would try to get an approval of the enlarged Foreign Affairs Committee and the Storting for a reoriented Svalbard policy.⁹⁷ The decision of the Norwegian Storting to reject the idea of a Norwegian-Soviet common defence of Svalbard was taken during a closed session on 15 February 1947.⁹⁸

There are no indications that the Storting's decision in February was the result of American and British pressure,⁹⁹ despite the fact that the US and the UK had become more critical towards any changes being made in the Svalbard Treaty.¹⁰⁰ In fact, Foreign Minister Lange informed the Foreign Relations Committee on 15 January 1947 that the Western powers had had a strangely passive attitude regarding the Svalbard issue.¹⁰¹ The most preferred outcome for the West was the status quo: Norwegian sovereignty and a continued demilitarisation of Svalbard. A 'denial strategy' – to prevent other states from establishing military bases on Svalbard – also became the main track for the Soviet Union.¹⁰²

93 Ibid.

94 Ibid., pp. 131–132.

95 Ibid., p. 140 f.

96 Ibid., p. 141 and note 57: Forsvarsstabens og Forsvarssjefens notat 15.juli 1946 og brev til Forsvarsminister 5. Oktober 1946. Mappe III 36.6/10A. Ut.dept., and Eriksen 1989, p. 142: A common defence of Svalbard would give rise to immense complications regarding sovereignty, military and foreign policy issues. However, Soviet military bases as such seemed less problematic for the military authorities. After all, Svalbard was not of significant importance strategically for Norway, and, was the reasoning, if it really came to it, it would be impossible for Norway to hinder a great power to establish a military foothold on Svalbard.

97 Ibid., p. 137.

98 Holtmark 1993, p. 122. The decision can be found in Holst 1967, pp. 63–64. Eriksen 1989, p. 143. It was discussed whether legal arguments could be used to reject the idea of a common defence, such as certain articles in the UN Charter, but in the final decision by the Storting the formal legal arguments were not stressed. Instead, the non-alliance and bridge-building arguments were emphasized.

99 Holtmark 1993, p. 126. Eriksen 1989, p. 144.

100 Eriksen 1989, p. 144, and p. 129: There were disagreements internally in both the US and the UK on the Svalbard issue – the political and military leadership had diverging views – and also between the governments of the US and the UK.

101 The enlarged Foreign Relations Committee 15 January 1949, pp. 34–35. Eriksen 1989, p. 157. It is conceivable that had the Soviet Union sought to establish (rented) military bases on Svalbard, under continued Norwegian sovereignty, this would have been accepted by the West in 'exchange' for Western bases on Greenland and Iceland.

102 In the words of Eriksen 1989, p. 157 f.

There were no strong Soviet reactions to the Storting decision in February 1947.¹⁰³ After the Storting's decision of 15 February 1947,¹⁰⁴ and Lange's letter to Molotov which followed two days later, the Soviet Union made no serious attempts to revive the Norwegian-Soviet negotiations on a change in Svalbard's international status.¹⁰⁵ Foreign Minister Lange stated in Parliamentary Committee meetings in 1947 and 1949 that there had not been any Soviet reactions to the decision by the Storting.¹⁰⁶

2.3.3 After the reorientation in 1947 – joining the Atlantic Alliance in 1949

In spring 1947 the reorientation seemed to be more or less a success for the Norwegian Government also domestically.¹⁰⁷ From spring 1947 until 1951 the Svalbard issue did not give rise to any demands or protests from the Soviet side.¹⁰⁸ On the Norwegian side, efforts were made to refrain from acting in any way that would draw the Soviet attention to the Svalbard issue. Locally on Svalbard there were efforts to keep a low profile: the small military contingent of 26, left from the days of war, was withdrawn in July 1947.¹⁰⁹

Interestingly, criticism by Norwegian actors towards the Svalbard Treaty, and art. 9, was voiced occasionally. One example is that Foreign Minister Lange in the enlarged Foreign Affairs Committee on 16 January 1947 stated that “we” have never been of the view that the Svalbard Treaty is satisfactory; it is a weak and inadequate document.¹¹⁰ Another one is that in 1948 the Norwegian military side clearly stated that it was desirable that art. 9 in the Svalbard Treaty should be repealed.¹¹¹

In the aftermath of the war the issue of the defence of the Norwegian territory was discussed increasingly, taking into the account the weak status of the Norwegian defence, including the lack of defence equipment.¹¹² It is clear from Foreign Minister Lange's information to the Foreign Affairs Committee and the Special Committee that an important issue that he often brought up with his international interlocutors was the supply of defence equipment.¹¹³

103 Ibid., p. 146..

104 The Norwegian Storting report 15 February 1947.

105 Holtsmark 1993, p. 124.

106 Foreign Minister Lange stated in an enlarged Foreign Relations Committee meeting (behind closed doors) on 1 September 1947 that there had not been any Soviet reactions to the decision by the Storting, p. 30. He asserted the same in a Special Committee meeting (behind closed doors) on 10 January 1949, p. 16.

107 Eriksen 1989, p. 146.

108 Ibid., p. 149.

109 Ibid., pp. 149–50. Tamnes 1991, p. 61.

110 The enlarged Foreign Relations Committee on 16 January 1947, p. 11.

111 Eriksen 1989, p. 150 and note 80: Forsv.dept til Ut.dept. Uttalelse fra Forsvarsstaben 20. Mars 1948. Mapp V 36.6/10A. Ut.dept.

112 See Sverdrup 1996, on the issue of defence equipment, inter alia p. 126.

113 One example is the meeting of the Special Committee on 4 December 1948, where Foreign Minister Lange informed the Committee about his meetings with the Swedish Foreign Minister Undén and the US Secretary of State Marshall.

In May 1948 Norway received a visit by the Swedish Minister Undén, who brought a proposal for a Nordic defense union with him.¹¹⁴ In subsequent discussions with Sweden and Denmark it was explored whether a Nordic defense union would be desirable and feasible. On 15 October 1948 a joint defence committee was established with the mission to produce an opinion on the feasibility of a Nordic defence union and also on the possibilities and forms for a cooperation in peacetime without an agreement was included.¹¹⁵ On 14 January 1949 the joint defense committee delivered its opinion. However, it did not exert any decisive influence on the decisions made in relation to a Nordic defence union.¹¹⁶

Sweden made it clear at an early stage that it could not take on a defence of the island Jan Mayen (not part of the Svalbard archipelago) and Svalbard and that was also the point of departure for the joint defence committee.¹¹⁷ The fact that Svalbard would be excluded in a Nordic defence union was in fact seen as a major problem in Norway, with far-reaching implications, also constitutional.¹¹⁸ For Norway, it was a goal that Svalbard be covered by a defence alliance, be it Nordic or a Western pact.¹¹⁹ Nevertheless, Svalbard never really became decisive in the negotiations, since the crucial issue of a link to the West led the negotiations to an impasse.

The three states held final meetings on 22–24 January in Copenhagen and in Oslo on 29–30 January 1949, when it became clear that there was an unsurmountable obstacle for the realisation of a Nordic defence union. In the Storting on 3 February 1949, Foreign Minister Lange informed the Storting that a Nordic defense union would not be explored anymore and gave inter alia the following the reasons. It had been crucial that Sweden could only accept a defence union that in every regard was free and independent vis-à-vis other states not parties to the union.¹²⁰ But for Norway it was not a feasible solution not to be able to have any kind of relations regarding the security situation with those to whom Norway had to turn to obtain material to rebuild its defence forces. Norway could not at this stage, beforehand, stay outside the work that was being done to establish a more encompassing solidarity for the states around the Atlantic. Svalbard was not mentioned in Foreign Minister's presentation to the Storting.

114 Sverdrup 1996, p. 303 ff.

115 Norwegian Government Bill 1949, p. 2. See also the debate in the Storting on 3 February 1949, p. 174.

116 Sverdrup 1996, p. 319 ff. The opinion of the joint defence committee discussed issues from a military perspective and was positive towards increased military cooperation between the Nordic states.

117 Eriksen 1989, p. 151. Defence Minister Jens Chr. Hauge in the meeting of the Special Committee on 10 January 1949, p. 2.

118 Foreign Minister Lange in the meeting of the Storting Special Committee on 10 January 1949, p. 11, and discussed in the meeting of the Storting Special Committee on 18 January 1949, p. 9.

119 Tamnes 1991, p. 72.

120 The debate in the Storting on 3 February 1949, pp. 174–176.

Foreign Minister Lange had been approached for the first time in March 1948 regarding a future Atlantic security alliance,¹²¹ eventually to become the Washington Treaty, but the Norwegians had managed to postpone any definite answer for the purpose of exploring the Nordic track first.

There were two Soviet notes of 29 January and 5 February 1949 which warned against Norway joining the Atlantic Alliance – they did not mention Svalbard.¹²² The Norwegian reply notes contained assurances that there would be no foreign military bases on Norwegian territory in time of peace and when Norway was not under threat of attack, and Svalbard was not mentioned.¹²³

2.3.4 1951 and the Soviet notes

In January 1951 the Norwegian government decided to accept Norway's inclusion in the area of responsibility of the newly created Atlantic command, SACLANT. The Norwegian Storting was informed about the decision.¹²⁴ Norway was of the view that the measure to subordinate Norway, including Svalbard, to SACLANT was taken in accordance with international law. After having examined the issue in 1950 and 1951, the conclusion was reached that the wording in art. 9 in the Svalbard Treaty – not to let it be used for warlike purposes – was not an obstacle for Svalbard to be subordinated SACLANT.¹²⁵ The conclusion was drawn that the Svalbard Treaty did not hinder an armed defence of Svalbard or preparations for an armed defence to take place, if that would be necessary.¹²⁶

The Soviet idea of protesting against increasing allied military activity in Norway developed gradually from early 1950.¹²⁷ The decision by the Norwegian government in January 1951 prompted the Soviets to start preparing of a note of protest. A first draft was ready in early March 1951.¹²⁸ Finally, in two notes of 15 October and 12 November 1951, the Soviet Union used art. 9 of the Svalbard Treaty to warn the Norwegian government

121 Sverdrup 1996, p. 296 ff.

122 Holtsmark 1993, pp. 142–43. The Soviet notes of 29 January and 5 February, and the Norwegian responses of 1 February and 5 March, 1949, can be found (in Norwegian translation) in Holst 1967, pp. 65–70. The Norwegian notes, which contained assurances that there would be no foreign military bases on Norwegian territory in time of peace and when Norway was not under threat of attack.

123 Ibid.

124 Holtsmark 1993, p. 148.

125 Tamnes 1991, p. 7.

126 Ibid.: The international law expert Frede Castberg stated that the Svalbard Treaty allowed for a defence of Svalbard “with weapons in hand and also for preparations of such a defence” (in Norwegian: ”.. hevdet også at traktaten ga rom for forsvar av Svalbard med våpen i hånden for å kunne forberede en slik eventualitet rent praktisk.”). Ulfstein states that collective self-defence of Svalbard should be accepted in the case of attacks on Svalbard, and such defence of Svalbard under allied command should also be accepted, p. 373.

127 Holtsmark 1993, p. 146 f.

128 Holtsmark 1993, p. 148.

against taking measures which would change the status quo in the area.¹²⁹ The Soviet notes was discussed behind closed doors in the Foreign Affairs Committee on 17–19 October, 29 October and 15 November 1951, and a draft reply elaborated.¹³⁰

In the Norwegian reply note of 30 October 1951 to the Soviet Union, the prohibition against establishing naval bases or constructing fortifications was made clear, reading as follows: “In accordance with the obligations Norway has undertaken through the (Svalbard) Treaty, the Norwegian Government has not established, nor will it establish, any military fortification or base whatsoever on the Svalbard archipelago or Bjørnøya. Nor will it allow any other state to do so.”¹³¹

2.4 The state of the Svalbard legal regime 1944–1951

As has been shown, during the chosen period 1944–51 there was a fair amount of diplomatic correspondence involving the Svalbard Treaty, in particular art. 9, between the Soviet Union and Norway. There were contacts also with other states, but the Svalbard Treaty’s states parties were formally not involved in the initiatives regarding the Svalbard Treaty. Without performing a detailed examination of the form and content of each measure mentioned above, some general conclusions can still be drawn:

There were clearly challenges to the Svalbard Treaty in the period 1944–47, namely the extensive demands by the Soviet Union in 1944, and the Norwegian counter proposal of 9 April 1945. The Svalbard Treaty was under pressure, although from a legal perspective still not that grave: it did not come to a stage where also other state parties to the Treaty were involved – but politically the threat towards the Treaty seemed real.¹³²

129 Ibid., p. 152. Holtsmark has in detail analysed the Soviet reasoning that resulted in the two notes, see Holtsmark 1993, p. 145 ff. Ulfstein 1995, p. 349; for the Note of 12 November see Norwegian Ministry for Foreign Affairs 36 6/10 A VI (1940–49).

130 On 27 October 1951, Foreign Minister Lange told the British Ambassador in Oslo that “the Soviet Government had given the Norwegian Government to understand through the usual channels of the Soviet embassy in Stockholm that the Soviet Note was really aimed not at Norway but at the United States, whom the Soviet Government credited with plans for establishing bases in Spitsbergen as they had done in Iceland” (Tamnes 1991, p. 84). Furthermore, Foreign Minister Lange informed the enlarged Foreign Affairs Committee in a meeting behind closed doors on 29 October that he had received information that the real addressee for the note was the US, which was planning similar military footholds on Svalbard as on Iceland (the enlarged Foreign Affairs Committee meeting 29 October 1951, pp. 3–4). However, the US did not have any such known plans for Svalbard, which did not acquire a place in US doctrines or strategic planning comparable to that of Iceland and Greenland. American analyses from June 1948, August 1949 and January 1952 concluded that the United States had no interest in establishing “facilities” on Svalbard, but that on the other hand it was important to deny use of the island to any hostile power (Holtsmark 1993, p. 28).

131 The Norwegian Government 1999, sec. 4.1.4; Ulfstein 1995, p. 349; for the Note, see Norwegian Ministry for Foreign Affairs 36 6/10 A VI (1940–49).

132 However, perhaps the threat towards the Treaty was not that grave: Holtsmark asserts (1993, p. 9) that in the early post-Second World War period Soviet efforts to alter Svalbard’s international status were checked by the possible adverse effects an offensive policy might have had on far more important Soviet foreign policy goals, and that Soviet policy with regard to Svalbard was basically static, and aimed at the

After the Norwegian reorientation in February 1947 there were no known planned Soviet reactions that contradicted that decision. The Soviet position turned to being a defender of the status quo, of the Svalbard Treaty in general, and of the Treaty's art. 9 in particular.¹³³

There have been challenges to the Svalbard Treaty after the time period focused on here,¹³⁴ and outright breaches during World War II (as assessed by academics, see sub-section 3.1), and disagreements on a number of issues have surfaced. One of them concerned the building of an airport in 1971. Norway made a declaration in 1971 to all the contracting parties in connection with the decision to build the airport. According to the declaration, the airport is to be "reserved exclusively for civil aviation".¹³⁵ But the challenges and disagreements in question have not been directly related to the application of the Washington Treaty or NATO forces.¹³⁶ However, within the confines of this contribution is not possible to examine the later challenges in detail.

It would also be of interest to make an assessment of perceptions on the NATO side. This meets with certain challenges, not least since initially, the Alliance was very much a body made up of its member states. There were no specific joint policy statements or decisions that would have been suitable for a statement on Svalbard, had that been assessed as suitable. Later, policy instruments have been elaborated within the structures established, but Svalbard's status has not been included in any such official statements. One public statement was made in 1983 by vice admiral P H Speer, Chief of staff SACLANT; "...due

perpetuation of the status quo. The initiatives from 1944–47 failed to alter this pattern permanently. Also, Tamnes (1987, p. 5 and 1991, p. 76) asserts that in the postwar period Svalbard was at the periphery of the Cold War and super powers tensions.

133 Holtsmark 1993, pp. 144–145. The new and legalistic attitude of the Soviets was displayed in 1950. In June the Norwegians informed the Soviets about a radar station which had been erected at Cap Linne for the use of civilian shipping. Holtsmark has shown that there was an internal Soviet discussion whether the building of the radar station constituted a breach of art. 9 of the Svalbard Treaty because it could also serve military purposes. It was decided not to deliver a protest to the Norwegian government. The Soviet notes of October and November 1951 mark the culmination of this complete turnabout. From then on there was a high degree of symmetry between Soviet and Western (US-UK) evaluations of Svalbard's role: Both sides were basically more concerned with barring the other side from establishing itself on the archipelago than with creating their own bases.

134 E.g. Koivurova and Holiencin 2017.

135 The Norwegian Government 1999, sec. 4.1.4. In practice, the Norwegian authorities have interpreted this to mean that the purpose of the flight is decisive. Aircraft involved in military missions have not been permitted to use the airport. On the other hand, the declaration does not preclude registered military aircraft from using the airport in connection with civil assignments. In 1974 Norway and the Soviet Union concluded an agreement on the use of the airport by Soviet aircraft. This agreement is still in force between Norway and Russia after the dissolution of the Soviet Union.

136 Nilsen 2017; The NATO Parliamentary Assembly met in Longyearbyen in 2017, which was organised in cooperation with the Storting. The Russian Foreign Ministry protested against the holding of the meeting, stating that "We strongly believe that there are no problems in the Arctic region that require NATO participation to solve, let alone militarily". In May 2012, 26 NATO parliamentarians spent four days in Svalbard to learn more about how strategic changes are affecting the Arctic region.

to treaty restrictions, no forces can be allocated in peacetime for the specific purpose of defending the Spitzbergen Archipelago to the enemy...".¹³⁷

There are incidental mentions of the issue in nowadays declassified documents that are available from within the NATO structure. Seemingly, the Svalbard status was known and referred to at least in some of these accessible examples.¹³⁸ The issue of contingency planning for Svalbard was mentioned in the context of the work of the Military Committee.¹³⁹

According to the declassified account of the North Atlantic Council meeting in Rome on 24 November, 1951, Foreign Minister Lange gave a longer presentation about the recent two Soviet notes, and he informed the Council members quite extensively about Svalbard's status.¹⁴⁰ He also stated that: "In our replies to the Soviet Government, we have re-affirmed our intention to respect the provisions of the Spitzbergen Treaty and, I quote 'the Norwegian Government will not establish any military base or fortification within the Spitzbergen Archipelago, or on the Bear Island and will not allow any other State to do so'."¹⁴¹

Finally, as concerns EU aspects (certain EU aspects will be dealt with below in section 4.4.2 regarding the Åland Islands), those are not assessed as relevant regarding Norway-Svalbard for the purpose of this article, above all since 'EU events' in Norway are of a much later date than Norway's ratification of the Washington Treaty. Consequently, there were no EU aspects influencing the Norwegian decision and stance on Svalbard in relation to the Atlantic Alliance. Nevertheless, it can be noted that Norway, so far not an EU member, is a party to the European Economic Area (EEA) Agreement which entered into force in 1994.¹⁴² Norway decided to exclude Svalbard: the EEA Agreement applies to the territory

137 Tamnes 1991, note 104, where he quoted John C. Ausland, *Nordic Security and the Great Powers* (Westview Special Studies in International Security, Westview Press/Boulder and London, 1986), pp. 175–76.

138 NATO International Planning Team of the Standing Group, PT 131/36-DRAFT REV, 11 March 1957, p. 27: "...All the islands in the North Atlantic and the Norwegian and Greenland Sea areas of the Arctic Ocean belong to NATO nations, or to those likely to be allied in time of war. Except for Svalbard, which is governed by the terms of the Treaty of 1920, they can all be fortified or developed in peacetime. ...".

139 Memorandum for the Members of the Military Committee. Subject: Contingency Plans, Excluding General War References (meetings held 15 September 1965, and 10 November 1965), p. 3: "Areas Suitable for Contingency Plans 8. In considering whether Major NATO Commanders should be instructed to produce further contingency plans it will be necessary to consider suitable areas or sectors for such plans. Possible suggestions are given below: a. Northern Sector (1) Northern Norway as far south as Trondheim (2) Jan Mayen Island (3) Spitzbergen (Svalbard) (4) Bornholm (5) Baltic Straits".

140 According to the verbatim record (p. 30), Lange stated *inter alia*: "It may perhaps be useful. Mr. Chairman, in this connection to say two words about the international position, of the Spitzbergen Isles. By a Treaty signed in 1920, Norwegian sovereignty over these islands was recognized. However, considerable limitations in the exercise of Norwegian sovereignty were provided for in the Treaty, the key to which is contained in Article IX. Under Article IX of the Treaty, no fortifications or naval bases may be built in the islands which are never to be used for warlike purposes."

141 *Ibid.*, p. 30.

142 Ulfstein (1995) has analysed the Norwegian stance on Svalbard in relation to the EU and the EEA, pp. 299 ff.

of the Kingdom of Norway, but not to Svalbard.¹⁴³ Also, the EU Accession Treaty that was negotiated and signed in June 1994 contained a protocol excluding Svalbard – however, following the Norwegian referendum on 28 November 1994, EU membership was rejected by Norway.

3. The Svalbard and Åland Islands legal regimes

The purpose of this section is to examine, first, military-strategic¹⁴⁴ aspects, and second, the leeway for interpretation of treaty provisions concerning Svalbard, and, more briefly, the Åland Islands.

The effects of war on treaties is a difficult subject under international law, often with uncertain answers.¹⁴⁵ Brief references to events in Svalbard and the Åland Islands during the two world wars will be made below, without any pretention of giving definite answers to questions related to possible breaches of the regimes.

3.1 Military-strategic aspects until around 1951

The origins of the Svalbard regime have been dealt with in the previous section which had a certain focus on the period 1944–51. In addition to what has been referred to above, the following assessments are of interest: with only some minor disturbances, the Svalbard Treaty did not attract much interest until the outbreak of the Second World War, when there was a rising interest by some Soviet actors.¹⁴⁶ The outbreak of the war in September 1939 was behind the first attempts within the Soviet diplomatic community to initiate a policy on Svalbard based on military-strategic considerations.¹⁴⁷ However, the war did not demonstrate the strategic importance of Svalbard. Rather the opposite, Holtmark asserts; Svalbard played a minor role in Allied or German strategy, and was far outside the operational range of the shore-bound Soviet Northern Fleet.¹⁴⁸ Ostreng states regarding Svalbard's military importance during the war that in a wider context Svalbard did not play any important part.¹⁴⁹ Ulfstein's view is that it must be assumed that the strategic importance of Svalbard is limited, whereas the surrounding waters remain of great strategic interest.¹⁵⁰

143 Art. 26.

144 On the use of the term military-strategic, *supra* note 9.

145 Brownlie 2008; Ulfstein 1995, 360 ff.

146 *Ibid.*, pp. 25–34.

147 *Ibid.*

148 *Ibid.*

149 Ostreng 1977, p. 49, see also Mathisen 1954, p. 44.

150 Ulfstein 1995, pp. 344–345, p. 386.

As concerns the events in World War II, Ulfstein has analysed art. 9 of the Svalbard Treaty in that context.¹⁵¹ Ostreng has described the events during the war.¹⁵² Norway placed a military contingent on Svalbard during the war and held that this was not in violation of the Svalbard Treaty since it was Norway's task to prevent other states from using Svalbard for military purposes.¹⁵³ There have not been any permanent Norwegian military forces on Svalbard after World War II.¹⁵⁴ The German actions on Svalbard during World War II – inter alia establishment of a small garrison in Longyearbyen 1941–42 and installations in the Western part of Svalbard¹⁵⁵ – are assessed for instance by Ulfstein as violations of arts. 1 and 9 of the Svalbard Treaty.¹⁵⁶ Also the never realised joint plan by the Soviet Union and Great Britain to occupy Svalbard,¹⁵⁷ without informing Norway, would violate arts. 1 and 9, Ulfstein states. The Allies also used Svalbard in different ways, such as for weather reporting and refuelling of vessels,¹⁵⁸ which can be seen as Allied collective self-defence not in breach of the Svalbard Treaty.¹⁵⁹

When focusing on military-strategic aspects it does not seem far-fetched to formulate the conclusion that in principle it was feasible to set up the Svalbard legal regime since there was not any great interest for Svalbard for military-strategic reasons by powers, and the lack of such military-strategic interest made it possible to establish the regime, and for the same reason it could also be upheld without creating a tense situation for the involved states.

Turning to the Åland Islands, the Islands' legal regime is arguably more robust than the Svalbard regime.¹⁶⁰ The conventions containing the provisions on the demilitarisation and neutralisation of the Åland Islands are the 1856 Convention on the demilitarisation of the Åland Islands (hereinafter the 1856 Convention),¹⁶¹ annexed to the Treaty of Paris, the 1921 Convention on the Demilitarisation and Neutralisation of the Åland Islands, concluded between ten states (hereinafter the 1921 Convention)¹⁶², the bilateral treaty between

151 1995, pp. 343–389. In this context it is of interest that Ulfstein notes a certain discrepancy between the English text and the French art. 9 text (p. 375). The final clauses of the Svalbard Treaty state that both the French and the English texts are authentic, the implications of which Ulfstein discusses on p. 73 ff, p. 361 and p. 376 ff. Ulfstein's conclusion is that on the basis of a harmonisation of the precise French text and the ambiguous English text, the context and the restrictive principle, the prohibition against using Svalbard for warlike purposes does not preclude military activities short of war (p. 378).

152 Ostreng 1977, pp. 46–54.

153 Ulfstein 1995, pp. 353–354, p. 362; Norwegian Government 1975, p. 9.

154 Ulfstein 1995, p. 154.

155 Ostreng 1977, p. 48; Steen 1954, p. 231–48.

156 Ulfstein 1995, p. 359.

157 Ostreng 1977, p. 46 ff.

158 *Ibid.*, p. 49 f.

159 Ulfstein 1995, p. 362.

160 Regarding the term legal regime see *supra* note 4.

161 The parties were France, Great Britain and Russia.

162 Ten states ratified the 1921 Convention: Finland, Sweden, Britain, Germany, France, Denmark, Poland, Italy, Estonia and Latvia, but Russia (the Soviet Union) is not a party to it.

Finland and the Soviet Union of 1940 (hereinafter the 1940 Bilateral Treaty), and the 1947 Paris Peace Treaty.¹⁶³

The 1856 Convention established the original basis for the demilitarisation in one operative article. The Convention does not refer to peace and war time, and is valid during both.¹⁶⁴ The much more detailed 1921 Convention is the most comprehensive treaty text on the regime: it contains nine operative articles on the demilitarisation and neutralisation as well as certain exceptions. Stipulations include that Åland is not to be fortified and, in war time, “a neutral zone”.¹⁶⁵ For a brief overview of the core international provisions, see sub-section 3.2.

As regards the origins of the Åland Islands’ legal regime, the islands’ location has commonly been assessed as implying that they may be of strategic military significance, defensive for Sweden and Finland, but otherwise for greater military powers.¹⁶⁶ In an early assessment from 1928, Söderhjelm underlines the military-strategic importance of the Åland Islands.¹⁶⁷ In an analysis from 1992, Gardberg discusses the Åland Islands’ strategic value from varying perspectives and for different states and actors.¹⁶⁸

For the purpose of the present article the following can be noted: the 1856 Convention was in force without any threatening challenges for it until the beginning of the twentieth century, when ‘the Åland Islands issue’ became a focus of attention again.¹⁶⁹ One of the main reasons for this was a renewed Russian interest in its Western borders, after having encountered obstacles in the East.¹⁷⁰ During World War I, Russia fortified Åland and informed the convention parties France and Great Britain about it, as well as Sweden.¹⁷¹

163 The regime has been analysed by many scholars, e.g. Söderhjelm 1928, Björkholm and Rosas 1990; Hannikainen 1994; Rosas 1997; Hannikainen 1997; Ahlström 1997; Spiliopoulou Åkermark 2007; Spiliopoulou Åkermark 2010, Spiliopoulou Åkermark 2017a, Spiliopoulou Åkermark 2017b, Spiliopoulou Åkermark, Heinikoski, Kleemola-Juntunen 2018.

164 E.g. Spiliopoulou Åkermark 2017b, p. 105.

165 Art. 3 in the 1921 Convention contains the core obligation: “No military or naval establishment or base of operations, no military aircraft or base of operations, and no other installation used for war purposes shall be maintained or set up in the zone described in Article 2.” (In the original French version: “Aucun établissement ou base d’opérations militaires ou navales, aucun établissement ou base d’opération d’aéronautique militaire, ni aucune autre installation utilisée à des fins de guerre ne pourra être maintenue ou créée dans la zone décrite à l’article 2.”) In art. 6 conditions applying at time of war are explained.

166 E.g. Hannikainen 1994, p. 615.

167 Söderhjelm 1928. In chapter V, pp. 80–84, Söderhjelm assesses the importance of the Åland Islands from a military perspective, see pp. 80–84. Söderhjelm asserts that the islands do not constitute a danger to the foreign powers anymore after Finland has gained sovereignty over them. Nevertheless, the islands could play a strategic role again if a foreign power would get hold of them, as this would threaten Finland and Sweden (in the original French version: “... la seule éventualité à craindre serait qu’un Etat muni d’une flotte puissante les enlevât à la Finlande et s’en servît pour menacer la Finlande et la Suède...”)

168 Gardberg 1992, pp. 5–9, 40–50.

169 Söderhjelm 1928, p. 118.

170 Ibid.

171 Ibid., p. 126 ff.

The events on Åland in 1918, such as the Swedish and German interest and expeditions to the Islands, have been much discussed and are still subject of research.¹⁷² Within the confines of the present article this will not be elaborated on. The fortifications on the Åland Islands were demolished in 1919 by Finland, the new sovereign of Åland following Finland's secession from Russia in late 1917, and by Sweden. The issue of Åland during World War II (the Winter War and the Continuation War) is still being discussed and is subject of research.¹⁷³ For the purpose of this article the following brief reflections are made: during World War II at least both Germany and the Soviet Union had plans to occupy the Islands.¹⁷⁴ Finland resorted to military preparations, including fortifications, to ensure the neutrality of Åland, and informed the parties to the 1921 Convention of its military preparations, and these did not express criticism.¹⁷⁵ In the decades following World War II the demilitarised and neutralised status of Åland has been in existence without any particular difficulties.¹⁷⁶

It is not assessed as necessary – or possible – to elaborate on the above events or assessments any further within the framework of the present article; that there was a perception of the Åland Islands as military-strategically important at least until after World War II is supported by expert assessments. When focusing on military-strategic aspects, it does not seem far-fetched to formulate the conclusion that in principle the demilitarisation and neutralisation were established because fortifications on the Åland Islands would constitute a severe military-strategic challenge for other states with strategic interests in the Baltic Sea.

However, the situation of today cannot be assessed based on the same criteria, since the security environment keeps changing, as discussed by experts and academics. For instance, Rotkirch asserted in 1986 that the Åland Islands had lost a great deal of their previously important strategic status.¹⁷⁷ In the final section below, such developments will be touched on.

3.2 Leeway of interpretation

This section is a tentative attempt to explore the margin of interpretation of some of the treaty provisions, with Norway's and Finland's respective margin of interpretation of the regimes particularly in mind.

Regarding Svalbard, art. 9 states quite laconically that the establishment of any naval base, and the construction of any fortification, is not allowed, and that territories may

172 Gustavsson 2012.

173 Gustavsson 2014a, Gustavsson 2014b..

174 Gardberg 1995, pp. 14–15, Tiilikainen 2006, pp. 352–353.

175 Hannikainen 1994, p. 618.

176 Hannikainen 1994, pp. 617–18.

177 Rotkirch 1986, p. 357.

never be used for warlike purposes.¹⁷⁸ The provision is indeed not very detailed compared to the provisions in the Åland case, as has been seen above, and leaves room for discretion. The preparatory works do not at all discuss the wording of art. 9.¹⁷⁹ From 1948 there were signs that the interpretation of art. 9 was expanded, according to Eriksen.¹⁸⁰ Politicians and civil servants were beginning to think through which defence measures were allowed in Svalbard, and politically and militarily possible, in peace and war time.¹⁸¹

When taking a closer look at how the regime practice has developed, the Norwegian Government's reports to the Storting seem to play a role: the Norwegian Government has reported at regular intervals to the Storting on Svalbard. The three latest reports on Svalbard were handed over in 1999, in 2009 and in 2016.¹⁸² In the 1999 Svalbard Report it is stated (sec 4.1.4) that "Norwegian policy has been designed to ensure proper compliance with the Treaty and a restrictive practice as regards Norwegian military activities on Svalbard. In dealing with this question in practice, particular emphasis has been placed on factors such as frequency and duration, the nature of the units and whether there is a real need for carrying out the operation". This reinforces the impression that there is a margin of discretion when interpreting art. 9. In fact, when taking a closer look at the three latest Svalbard reports to the Storting, certain developments can be discerned.

One example is that in the 2009 and 2016 Svalbard Reports new formulations referring to the preamble have been inserted. It is stated that the limitations in the Svalbard Treaty, in particular the prohibition against use for warlike purposes, "must be interpreted in light of the preamble of the Treaty".¹⁸³ Another example is that in the 1999 report it is stated (sec. 4.1.4) that "Norway is not precluded from implementing *defence measures in time of war* [emphasis added]. Moreover, the principle of Norway's full and absolute

178 Art. 9: "Subject to the rights and duties resulting from the admission of Norway to the League of Nations, Norway undertakes not to create nor to allow the establishment of any naval base in the territories specified in Article 1 and not to construct any fortification in the said territories, which may never be used for warlike purposes."

179 Ulfstein 1995, p. 366.

180 Eriksen 1989, p. 158.

181 Ibid.

182 The three latest reports on Svalbard from the Norwegian Government are the 1999 Svalbard Report, the 2009 Svalbard Report, and the 2016 Svalbard Report. Before that, the 1975 Svalbard Report provided a general review of the Svalbard Treaty and the 1925 Mining Code for Spitsbergen (Svalbard), and the 1986 Svalbard Report gave a more detailed account of legal questions relating to the territorial scope of the Svalbard Treaty.

183 P. 22 in the 2009 Svalbard Report ("must be viewed in light of the preamble of the Treaty") and p. 21 in the 2016 Svalbard Report ("must be interpreted in light of the preamble of the Treaty). However, in the original Norwegian language versions the same expression have been used: On p. 22 in the Norwegian version of the 2008 Svalbard Report: "...må ses på bakgrunn av den såkalte fortalen («preambelen») i traktaten", and p. 21 in the Norwegian version of the 2015 Svalbard Report: "Disse begrensningene, og da særlig forbudet mot bruk i krigsøyemed, må ses på bakgrunn av den såkalte fortalen («preambelen») i traktaten"

sovereignty over Svalbard applies to foreign military activity on Svalbard, cf. Article 1”¹⁸⁴ In the 2009 Svalbard report it is stated that: “However, the provision is not a prohibition against all military activity. It addresses acts of war or activities for the purpose of waging war. Thus, *defensive actions and other such military measures* [emphasis added] are not covered by the wording”¹⁸⁵ In the 2016 Svalbard report it is stated (p. 21): “It pertains solely to acts of war or activities for the purpose of waging war, and to constructing naval bases or infrastructure that can be classified as fortifications. *Defensive measures and other military measures* [emphasis added] are permitted. The archipelago is covered by provisions of the North Atlantic Treaty, *including Article 5 concerning collective self-defence* [emphasis added]. Norway may individually and collectively implement defensive measures in wartime or under the threat of war.” Thus, it seems that a formulation in 1999 on “defence measures in time of war” has developed somewhat into “defensive measures and other military measures”, and an explicit sentence on NATO’s art. 5 has been added in 2016. The impression is that the Svalbard Reports to a certain extent are used as an instrument in setting practice for the application of art. 9. However, there are not any details in the report, for instance as to approximate number of visits by naval vessels or Coast Guard vessels.¹⁸⁶

Turning to Åland, the provisions of the regime, in particular in the 1921 Convention, are much more detailed than art. 9 in the Svalbard Treaty (as stated in sub-section 3.1). The single operative article in the 1856 Convention stipulates that the Åland Islands “shall not be fortified, and that no military or naval establishments whatsoever shall be maintained or created there”¹⁸⁷ In the much more detailed 1921 Convention arts. 2 to 7 specify the demilitarisation and neutralisation of Åland. Several authors have summarised the exceptions and clarifications to the demilitarisation and neutralisation regime contained in

184 In the original Norwegian version, p. 29: ”Norge er ikke avskåret fra å iverksette forsvarstiltak i krig. Med hensyn til utenlandsk militær virksomhet på Svalbard, gjelder for øvrig prinsippet om Norges fulle og uinnskrenkede suverenitet, jf. artikkel 1.”

185 In the original Norwegian version, p. 22: “Bestemmelsen er imidlertid ikke et forbud mot all militær aktivitet. Det retter seg mot krigshandlinger eller aktivitet som har krigsformål. Forsvarstiltak og andre defensive militære tiltak omfattes derfor ikke av ordlyden.”

186 The Norwegian Government 2016, pp. 21–22: “Visits by Norwegian naval vessels, Coast Guard vessels, Armed Forces’ aircraft or Norwegian military personnel do not infringe the Treaty and are in keeping with long-established practice. Norwegian policy has been designed to ensure proper compliance with the Treaty and restrictive activities in Svalbard. Consideration of the issue of military visits to the archipelago has placed particular emphasis on aspects such as frequency and duration, type of unit, and the need to carry out operations. For example, frequent calls by Norwegian Coast Guard vessels are deemed natural, given the nature of their duties in the waters surrounding Svalbard practice with regard to Norwegian military.”

187 Art. 1: “... declares that the Åland Islands shall not be fortified, and that no military or naval establishments whatsoever shall be maintained or created there.” (In the original French version: “... déclare que les Iles d’Åland ne seront pas fortifiées, et qu’il n’y sera maintenu ni créé aucun établissement militaire ou naval.)

arts. 4–7 in the 1921 Convention and in the other international provisions.¹⁸⁸ The following is a brief overview of the 1921 Convention. The core art. 3 states that the zone defined in art. 2 must be free from military establishments and bases of operation (including naval and air bases) as well as from any other installations used for war purposes (a similar provision is contained in art. 1 of the 1940 Bilateral Treaty).¹⁸⁹ As a general rule, the 1921 Convention also prohibits visits by military (including naval and air) forces as well as the production, import and transit of weapons or other war material (art. 4, para. 1). Arts. 4, 6 and 7 of the Convention provide for certain rights and obligations of Finland in the event of crisis or war.¹⁹⁰ Art. 6 provides that Åland is to be a neutral zone in war time.¹⁹¹ Art. 7 stipulates that if the neutrality of Åland is imperilled by an attack, Finland shall take the necessary measures in the neutralised zone to check and repulse the aggressor until such time as the parties to the Convention shall be in a position to intervene to enforce respect for this neutrality – a collective defence of Åland.¹⁹² For an overview of the core treaty obligations of all the relevant conventions of the Åland regime, see for instance Spiliopoulou Åkermark’s account in 2017.¹⁹³

It can be noted that there is no Finnish government report or similar on the Åland Islands to the Finnish Parliament, such as the above-mentioned Svalbard reports to the Storting. Nevertheless, Finland seems to have some leeway in interpreting the 1921 Convention.¹⁹⁴

In sum, the relevant provisions, in particular the 1921 Convention, are much more detailed regarding the Åland Islands regime than the security provisions in the 1920 Svalbard Treaty – but there is room for interpretation also regarding ‘the Ålandic provisions’.¹⁹⁵

188 E.g. Hannikainen 1994, pp. 620–621; Rosas 1997, p.31; Spiliopoulou Åkermark 2007, p 10. See also supra note 163. For an overview of core treaty based obligations of the regime in Spiliopoulou Åkermark 2017b, p. 100.

189 Art. 3 in the 1921 Convention, supra note 165.

190 For an analysis see Rosas 1997, p. 34.

191 Art. 6: “In time of war, the zone described in Article 2 shall be considered as a neutral zone and shall not, directly or indirectly, be used for any purpose connected with military operations.” (In the original French version: “En temps de guerre, la zone décrite à l’article 2 sera considérée comme zone neutre et ne sera, directement ni indirectement, l’objet d’une utilisation quelconque ayant trait à des opérations militaires. ...”).

192 Hannikainen 1994, p. 650. For an analysis of collective self-defence and Åland, see Spiliopoulou Åkermark 2017a.

193 Spiliopoulou Åkermark 2017b, p. 100.

194 Rosas 1997, p. 32 ff; Heinikoski 2017, p. 30.

195 Rosas, 1997, has listed a number of problems of interpretation, p. 32 ff.

4. The Åland Islands and NATO

The purpose of this section is to provide a brief account of certain ‘NATO factors’ of interest from an Ålandic perspective of today as a slightly ‘corresponding’ section to the account of the Svalbard regime around the time when Norway joined (in section 2).

First, it is discussed to what extent Finland, Åland and academics have examined or drawn any conclusions regarding the Åland Islands’ legal regime in the event that Finland would join NATO.

Second, an account of the Åland Islands’ status vis-à-vis the EU is made, since official references to the EU acknowledgement of that status as constituting ground for an acknowledgment of the Ålandic status also in a NATO context (should Finland decide to join the Alliance) have been made.¹⁹⁶ Also, the experience of international assistance in the EU (France 2015) in the event of an attack on an EU member state context will be described, since that is of relevance for the possible provision of ‘NATO assistance’.

4.1 Finland

First, it is of interest to examine what can be discerned in official documents of the Finnish view on the ‘Åland-NATO’ issue. The current Finnish stance on a NATO membership is summarised in 2016 in the latest Government Report on Finnish Foreign and Security Policy: “While carefully monitoring the developments in its security environment, Finland maintains the option to seek NATO membership.”¹⁹⁷ The Report also mentions, using a ‘traditional’ formulation, that: “The Province of Åland Islands has a recognised status under international law. This does not prevent Finland from intensifying defence cooperation within the European Union, with international organisations and in the Nordic context.”¹⁹⁸

The ‘option formula’ in relation to NATO is used also in the 2016 “Report on the Effects of a Possible Finnish NATO Membership”, commissioned by the Finnish Foreign Ministry.¹⁹⁹

196 The Åland Islands Government 2015, p. 28.

197 The Finnish Government 2016a, p. 24. The ‘option language’ is included also on p. 14 in the 2017 Finnish Defence Report. In 2016, the foreign and security report was separated from the defence report and the latter was presented in February 2017. The Finnish stance on NATO has been formulated along these lines for quite some time. The Government Report on Security Policy delivered to the Parliament in 1995 contained language to this effect, as did subsequent defence policy white books published in 1997, 2001, 2004 and 2009. For details on the Finnish stance, see Forsberg 2017, pp. 97–127, p. 104 ff. Finland joined NATO’s Partnership for Peace (PfP) from the start and has also been a full participant in the PfP’s planning and review process (PARP) from 1995, when PARP was launched. The Ålandic Government has assessed that the PfP agreement is not of the character that it affects the Åland Island’s status as demilitarised and neutralised, see The Åland Islands Government 2015, p. 27.

198 The Finnish Government 2016a, p. 12. For an analysis of the latest Government Reports, which have used slightly varying wordings regarding Åland, see Heinikoski 2017, pp. 31–32.

199 The Finnish Government 2106d, p. 24.

The NATO Report does not cover the consequences of possible NATO membership of Finland for the Åland Islands.²⁰⁰ Also in this Report it is highlighted that Åland has a special status, but that this does “not prevent Finland from intensifying defence cooperation within the European Union, with international organisations and in the Nordic context.”²⁰¹

A previous report on the effects of Finland’s possible NATO membership was published by the Foreign Ministry in 2007.²⁰² The 2007 Report states that: “Any decision on accession would also have to take account of the [1920] Convention relating to the NonFortification and Neutralisation of the Åland Islands ... and the [1940] Agreement between Finland and the Soviet Union on the Åland Islands.”²⁰³

If Finland would decide to join NATO, highly complex diplomatic and political processes would be involved. Such an accession would probably also take place in a more charged international atmosphere than earlier enlargements.²⁰⁴ However, the purpose of this section is not to discuss aspects of Finland’s possible decision to join NATO. Instead, the aim is to summarise what has been expressed so far by Finland and Ålandic authorities on Åland and its status in relation to a Finnish NATO membership. As transpires from the quotations above, Åland’s recognised or special status under international law has been highlighted in the latest Finnish policy documents, but how it should be taken account for in the event of a Finnish NATO accession is not spelled out.²⁰⁵

Second, as concerns Ålandic official positions the following can be noted: In a policy document from the Government of Åland in 2015, it is made clear that the Ålandic Government is of the view that Finland should ensure that the Åland Islands’ status is not affected if Finland joins NATO, since Finland in connection with the EU accession and the acceptance of the Lisbon Treaty required that the status of Åland should be recognised and confirmed.²⁰⁶ (It is clarified in the policy document that an accession to NATO by Finland would not require the approval by the Ålandic Lagting.)

A report is compiled every year by the Ålandic Government and handed over to the Lagting (Parliament of Åland) on issues related to the autonomy of the Åland Islands.²⁰⁷ In the 2017 report (covering 2016), the Ålandic Government reiterates the view that a possible

200 Ibid., p 4.

201 Ibid., p 12.

202 Sierla 2007.

203 P. 48.

204 The Finnish Government 2016d, p 7.

205 Indications as to a possible Swedish stance are also highly interesting. In a Swedish Government Report, published in 2016 (p. 151), a Swedish NATO membership was discussed in relation to Finland. The conclusion was that an assessment of a Swedish NATO membership must be made from a regional perspective, since a security policy solution that benefits the whole region must also benefit Finland. The Åland Islands are not mentioned in the Report.

206 The Ålandic Government 2015, p. 28.

207 As required in sec. 36 in the procedural rules for the Lagting.

Finnish NATO membership must be construed so that the Åland Islands' demilitarisation and neutralisation are not affected.²⁰⁸

Third, the Åland Islands' status in relation to NATO has been discussed to a certain extent by academics. Tiilikainen wrote in 2006²⁰⁹ that "[t]his author believes that after assessing the political situation NATO would eventually decide not to alter the historical arrangement and leave Åland's international position unchanged."²¹⁰ Rainne asserted in 2008 that Åland's special status should be taken into account in the accession negotiations and that there should be a clear common understanding that the Islands' status remains unchanged.²¹¹ Heinikoski stated in 2017 that Finland, if joining NATO, has to make a reservation that no military equipment or personnel could access the demilitarised Ålandic zone, and demand commitment from other states parties to maintain the Ålandic demilitarisation and neutralisation.²¹²

4.2 Åland and the EU

The special status of the Åland Islands in the EU has been described and analysed by academics.²¹³ A fundamental feature is that the "special status that the Åland Islands enjoy under international law" became a part of primary EU law through Protocol No 2 of the Finnish Accession Treaty. Furthermore, in the 2008 Finnish Government Bill on the ratification of the 2007 Lisbon Treaty it was asserted that the new provisions of the Common Foreign and Security Policy (CFSP) did not affect the international legal status of the Åland Islands.²¹⁴ At a meeting of the Permanent Representatives in Brussels in December 2010, Finland made a unilateral declaration in connection with the ratification of the Lisbon Treaty, confirming once again the validity of the demilitarisation and neutralisation of the Åland Islands.²¹⁵

The new CFSP provisions in the Lisbon Treaty encompassed commitments for mutual assistance within the EU: the solidarity clause (TFEU, art. 222)²¹⁶ and the mutual defence

208 The Ålandic Government 2017a, p. 10. (In the original Swedish language: "Landskapsregeringen vidhåller den uppfattning som tidigare framförts, att ett eventuellt finländskt Natomedlemskap måste konstrueras så, att Ålands demilitarisering och neutralisering inte påverkas.")

209 Tiilikainen 2006, pp. 352–353.

210 Ibid., pp. 352–353.

211 Rainne 2008, pp. 48–49.

212 Heinikoski 2017, p. 33–34.

213 On the issue of Åland when Finland joined the EU, see the detailed analysis by Fagerlund 1997, pp. 189–256. For a discussion of a more recent date, see Spiliopoulou Åkermark 2017a, 268 ff.

214 The Finnish Government 2008, p. 103.

215 Spiliopoulou Åkermark 2017a, p. 269.

216 Treaty on the functioning of the European Union, art. 222: "1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster."

clause (TEU, art. 42.7).²¹⁷ The provisions came into focus after the terrorist attacks in Paris in November 2015. France decided to utilise the mutual assistance clause under art. 42(7) TEU.²¹⁸ The option to choose that provision instead of art. 222 (TFEU) has been explained in various ways, one being the preference of dealing bilaterally with the other EU governments without involving the EU institutions.²¹⁹ The attacks and the French request triggered the finalising of drafting of legislation on granting and receiving international assistance in Finland. The legislation included the acts proposed in Government Bills 72/2016 on international assistance and 107/2016 on the provision and acceptance of international assistance in matters falling under the competence of the Ministry of Interior.²²⁰ Initially, the Ålandic Government was not content with the lack of references to Åland's status regarding the issue of the provision and acceptance of international assistance, but after references to the Åland Island's status were included the Ålandic Government declared in an opinion to the Finnish Parliament in February 2017 that it was content with the changes made.²²¹ The legislation came into force in July 2017.

However, in its opinion of February 2017, the Ålandic Government declared that it wished to add that the Ålandic Government and the Finnish Government should examine how situations occurring on the Åland Islands will be handled in practice, and that instructions should be given to authorities.²²²

5. Conclusions

The aim of this contribution was to look closer at certain aspects regarding the assertion that the Norwegian joining of the Atlantic Alliance has not affected Svalbard's status and therefore the conclusion is close at hand that a Finnish NATO accession would not severely affect Åland's demilitarised and neutralised status, implying a comparison of the two legal regimes. The attempt to examine that assertion has been made with the reservation that the Åland Islands and the Svalbard legal regimes are *sui generis* regimes, differing for a number of fundamental reasons, including being part of two larger regimes that differ historically, are of dissimilar construction, and are disparate in nature.

In order to achieve the aim, the author chose to carry out a parallel exploration of certain aspects related to the two legal regimes, without any pretension of performing a direct

217 Treaty on the European Union, art. 42.7: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States."

218 For an analysis, see Spiliopoulou Åkermark 2017a, p. 270 ff.

219 European Parliament Think Tank 2015.

220 The Finnish Government 2016b; Bill RP 72/2016 rd, and The Finnish Government 2016c; RP 107/2016 rd and their limited scope have been critically analysed by Spiliopoulou Åkermark 2017a, p. 270 ff."

221 The Ålandic Government 2017b.

222 *Ibid.*, p. 3.

comparison or in-depth examinations of both of the regimes. A primary objective was to explore the state of the Svalbard legal regime around the time when Norway joined the Atlantic Alliance. Second, the question was posed whether there are any conclusions to be drawn concerning Svalbard in connection with the application so far of ‘the consultation art. 4’ and ‘the collective defense art. 5’ in NATO’s Washington Treaty. Third, it was asked which conclusions could possibly be drawn based on an exploration of main military-strategic assessments of the Svalbard regime, limited above all to the time period until around 1951. Fourth, the question concerned what possible conclusions could be drawn as regards the leeway of interpretation of the legal regimes, where above all Norway’s and Finland’s respective leeway of interpretation was assessed as of interest. The focus has been on Svalbard, but ‘corresponding’ aspects regarding the Åland Islands regime have been briefly examined or reflected on.

First, concerning the state of the Svalbard legal regime, there were clearly challenges to the Svalbard Treaty in the period 1944–47, followed by a reconfirmation of art. 9 in the Svalbard Treaty. At the time of the Norwegian preparations to join a military alliance, the challenges in question were apparently overcome. Turning to the Åland Islands, without trying to assess, or perform any comparison of the ‘strength’ of regimes, including over time, the Åland Islands’ legal regime of today is arguably more robust than the Svalbard regime at the time when Norway joined the Atlantic Alliance. The Åland Islands’ status is assessed by several in academics as constituting regional, or European, customary law,²²³ and the Åland Islands’ status has been recognised by the EU in its primary law. In this context it can also be noted that at times some legal experts have questioned the remaining in force of the 1921 Convention, because the supervisor and guarantor of the Convention – the League of Nations – has been dissolved and the UN has not become the successor of the League of Nations as the supervisor and guarantor of the Convention.²²⁴ However, no state has questioned the demilitarised and neutralised status of Åland.²²⁵

Second, the art. 4 consultations and the art. 5 invocation in the cases that have occurred so far have not had ties to Svalbard (the contributions of Norway after the art. 5 invocation in 2001 were arguably not connected to Norwegian territory, at least not in a direct and legal sense), so on that point there is seemingly limited experience at hand from the Åland Islands’ perspective, at least not based on what is available from public sources. The only

223 Rosas 1997, p. 29: “... rather than labelling the Åland arrangement an “objective regime” or “permanent settlement”, we would regard it as part of a European international legal order which is ultimately grounded in customary rather than treaty law. We have argued elsewhere that this regime includes not only the main principles of demilitarisation as they are expressed in the 1921 Convention and the 1940 Bilateral Treaty, but also the basic principle of neutralisation.”; Hannikainen 1994, p. 626: “Instead, it can be safely concluded that the demilitarisation and neutralisation of Åland has the status of regional customary law in the Baltic Sea area. Perhaps it is even a European regional customary norm.”.

224 Hannikainen 1994, p. 618.

225 Ibid.

invocation of art. 5 so far, in 2001, was not a 'typical' case, so it seems difficult to draw any general or definite conclusions as to possible future art. 5 invocations. The consensus rule was indeed, as far as is known, upheld – but the political pressure should not be underestimated.

Third, an issue present throughout this study has been military-strategic aspects. It is not an easy – perhaps impossible – exercise to assess such aspects – *inter alia* since they are difficult to isolate. The regimes in question are presumably affected by contextual factors and the sovereignty issues that have influenced developments in Svalbard and the Åland Islands. The conclusions above were formulated as follows: as concerns Svalbard, in principle it was feasible to set up the legal regime since there was not any great interest for Svalbard for military-strategic reasons by powers, and the lack of such military-strategic interest made it possible to establish the regime; for the same reason it could also be upheld without creating a tense situation for the involved states. As regards the Åland Islands, the conclusion formulated was that the demilitarisation and neutralisation were in principle established because fortifications on the Åland Islands would constitute a severe military-strategic challenge for other states with strategic interests in the Baltic Sea. However, an assessment of military-strategic aspects is in a sense a moving target, for a number of reasons. Looking at the situation of today, military forces operate in a completely different manner today than when the Åland Islands and Svalbard legal regimes were agreed between powers. Security aspects are different. New threats have emerged, and the perception of threats has changed, and keeps changing. Extensive new technologies have been developed and changed the ways of defence and warfare and are problematic to define and handle in a demilitarisation context. The military-strategic value of territories in warfare often has to be redefined. Assessment of military-strategic aspects over time is complicated. The security environment keeps changing and new ways of defence and warfare give new meaning to the term military-strategic. Nevertheless, the upholding of such regimes as the Svalbard and Åland Islands regime can still be assessed as contributing to the military-strategic stability in a region, even though the original military-strategic reasons are no longer at hand. The evolving security environment gives rise to the question why the Svalbard and Åland Islands regimes are still seen as valid and legitimate. It is clear that they have a legal validity for the parties concerned, but this is also the case more generally in regard to public international law.²²⁶ Furthermore, both the Svalbard and the Åland Islands multilateral security arrangements are part of larger legal regimes, and can therefore be perceived as valuable also for other reasons than demilitarisation and neutralisation.

226 As discussed by Koivurova and Holiencin 2017.

Fourth, concerning the leeway for interpretation, there is room for interpretation also regarding ‘the Ålandic provisions’, in particular the 1921 Convention – and historical developments and evolving international law have influenced interpretation – but undeniably they are more detailed than the Svalbard security provisions. Thus, the leeway for interpretation for the Norwegian Government is arguably larger than for the Finnish Government, and it springs to mind that the upholding of a comparatively extensive dialogue with representatives of an autonomy (sometimes ‘even’ lacking in formal standing), as in the Ålandic case, can influence the scope of the interpretation. The local interlocutor is stronger in the Åland Islands than in Svalbard, *inter alia* since the Ålandic autonomy includes far more competences (upheld by more resources) than those conferred upon the authorities in Svalbard. A further element to take into account in this context is that both regimes are examples of multilevel governance, an aspect not explored within the scope of this contribution.

One important issue of interest regarding the Åland Islands is whether a measure acknowledging the Åland Islands’ status, should or could be taken in the event of a Finnish NATO membership. As has been described, that issue was not on the agenda at all in relation to Svalbard. Rather, the concern was that Svalbard would be defended also by the alliance in question. The Ålandic position is to advocate that a Finnish NATO membership must be construed so that the Åland Islands’ demilitarisation and neutralisation are not affected. The fact that the Åland Islands’ status has been recognised by the EU in its primary law seems to speak in favour of a similar path also in a NATO context, not least because the CFSP has been widened through the Lisbon Treaty. However, as concerns reservations, it is seemingly not a ‘NATO tradition’ that reservations be made to the founding treaty by states parties, and there are no reservations made to the Washington Treaty. Against such a ‘NATO tradition of no reservations’ it would most likely be seen as difficult politically to insist on any kind of reservation, perhaps to a certain extent depending on the nature of the matter, despite the fact that in general, under international law, it would be feasible. The issue of self-imposed restrictions could perhaps be further examined from different perspectives. Strategic planning is not public, but it would be of interest to analyse these issues further.

The overview in this tentative and limited contribution indicates that the issue of consequences for the Åland Islands’ status in the event of a Finnish NATO membership to a certain extent has not been explored. No comprehensive analysis has been made. This is perhaps understandable since implications and consequences will be the result of a number of factors, not least political, which are difficult to assess and politically sensitive as long as there is not a Finnish decision to join. The feasibility of an acknowledgement of the Åland Island’s status in particular in relation to art. 5 – how the Åland Island’s special status can

be upheld and how a possible acknowledgement is feasible vis-à-vis the NATO command structure – and the issue of Finland receiving international assistance in relation to the Åland Islands' status could be further explored and different scenarios analysed.

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