**The general principles of international law concerning the acquisition of territory apply to the Arctic and to Antarctica.**

Introduction

*There are postmasters with no mails to handle, Royal Magistrates with no cases to try, brass plaques that look out over windswept mountains where men have visited but once. The flags, claim sheets, and other emblems dropped from the planes of various nations lie congealed into the crust over the continent. To those who have seen the vastness of the Antarctic ice sheet, the stark splendour of its mountains, the incredible fury of its winds, these displays of national rivalry around its fringes seem strangely absurd.[[1]](#footnote-1)*

Here Walter Sullivan, in his 1957 book *Quest for a Continent*, ridiculed various states’ attempts to evidence their purported acquisition of Antarctic territory.[[2]](#footnote-2) In so doing, he challenged the very notion of territorial acquisition in an inaccessible polar landscape, at least through traditional displays of sovereignty. As this essay will show, Sullivan raised doubts that remain pertinent today.

How, and whether, territory in the polar regions can be acquired are questions of geopolitical and ecological importance. For instance, one can imagine a situation where the large-scale extraction of natural resources in the polar regions has become economically viable, causing states to scramble for claims of territorial acquisition. Given the benefits of title to potentially vast resource deposits, the validity of such claims would require scrutiny. This essay’s chief purpose is to determine whether the general principles of international law concerning the acquisition of territory would apply to such claims.

This essay begins by elucidating the general international legal principles concerning territorial acquisition. It then addresses each polar region in turn. Despite their obvious commonalities, the Arctic and Antarctic are remarkably different; the Arctic is an ocean encircled by continents, whereas Antarctica is a continent encircled by ocean. Further, whilst the vast majority of Arctic territory belongs undisputedly to the Arctic nations, no nation currently holds uncontested title to Antarctic land. The systems of supranational governance to which the two regions are subject also differ considerably in sophistication.[[3]](#footnote-3) Accordingly, they require separate analysis. In relation to Antarctica, I conclude that the general principles of international law *do not* apply and posit three justificatory arguments. Conversely, I conclude that the general principles of international law *do* apply to the Arctic, although whether disputes would actually be settled according to these principles is unlikely. In reaching these conclusions, I reveal how the problems of territorial acquisition in the polar regions expose the limits of international law and reflect its inherently political nature.

General Principles of International Law

International law has traditionally countenanced only five methods of territorial acquisition: occupation, prescription, accretion, cession, and conquest.[[4]](#footnote-4) Given that Antarctica is unappropriated territory, the only method applicable to the continent is occupation. As will be established, all five methods apply to the Arctic. The only method meriting extensive discussion, however, is occupation.

Occupation refers to the acquisition of *terra nullius* (hitherto unappropriated land), following a process of discovery, symbolic annexation, and ‘effective’ occupation.[[5]](#footnote-5) The law concerning occupation evolved through three key decisions: the *Island of Palmas Case*[[6]](#footnote-6), the *Clipperton Island Award*[[7]](#footnote-7), and the *Legal Status of Eastern Greenland* *Case*[[8]](#footnote-8). The facts in each are somewhat esoteric; therefore, only the resulting principles are expounded.

*Palmas* concerned a dispute between the United States and the Netherlands over which had acquired title to a tiny island in the Philippines. The dispute was referred to arbitration, with Max Huber as sole arbitrator. Huber decided in the Netherlands’ favour and, in so doing, established three key principles. First, mere discovery is insufficient for establishing sovereignty, although it does create ‘inchoate’ title. Secondly, continuous, actual displays of sovereignty amounting to ‘effective’ occupation are necessary to consolidate title. Thirdly, claims to title based on contiguity have no legal force.

*Clipperton Island* concerned a dispute between France and Mexico over another tiny island. The dispute was decided in France’s favour because, unlike Mexico, France had exhibited the will to act as sovereign. France had, for example, protested the raising of an American flag on the island. The decision suggests that traditional displays of sovereignty, such as settlement, are generally unnecessary provided states exhibit, as France had, an *animus occupandi*.[[9]](#footnote-9) As Myhre noted, this means that an *animus occupandi* need only be demonstrated as much as a territory requires.[[10]](#footnote-10) Thus, the decision is particularly pertinent to polar regions, where displays of sovereignty are rarely necessary.

*Eastern* *Greenland*, adjudicated by the Permanent Court of International Justice, involved a dispute between Denmark and Norway over which had acquired title to Eastern Greenland. Norway argued that Eastern Greenland, unoccupied by Denmark, was *terra nullius*. However, the court decided in Denmark’s favour which, having colonised the Western Greenland Coast, had continuously exercised sovereignty over Greenland for a significant timeframe.[[11]](#footnote-11) The court so found because Denmark’s claim had previously been uncontested, and Norway had itself recognised Danish sovereignty in an earlier treaty. Crucially, the court held that because of Greenland’s remote, inhospitable environment, Danish sovereignty extended over the entire island.[[12]](#footnote-12) As Myhre noted, the decision suggests that where acts of sovereignty amounting to ‘effective’ occupation are unfeasible, such as in harsh landscapes, an *animus occupandi* is sufficient.[[13]](#footnote-13) Consequently, the decision has obvious implications for the Arctic and Antarctic.

These decisions leave the law concerning occupation frustratingly vague; for example, precisely how one establishes ‘effective’ occupation is unclear. Moreover, contiguity is not recognised by international law; however, *Eastern Greenland* acknowledges the possibility of acquiring adjacent territory without any meaningful presence or activity there. The principles emanating from these decisions comprise the key tenets of international jurisprudence concerning occupation; in reality, however, the decisions do not lend themselves to general abstraction.

Antarctica

A preliminary clarification needs to be made. It has been suggested that Antarctica represents a legal vacuum. But this is mistaken. Although one of its primary contentions is that general international legal principles concerning territorial acquisition do not apply to Antarctica, this essay maintains that Antarctica is demonstrably *not* a legal vacuum. The reasons are twofold. First, Antarctica has been successfully administered by a legal regime since 1961, namely the Antarctic Treaty and its attendant agreements, together forming the Antarctic Treaty System (ATS). Whether the ATS should be considered an ‘objective’ regime with validity *erga omnes* (binding on the whole world) is considered later. It is fair to state, however, that the ATS is, at minimum, a regional legal system with international juridical effects. Secondly, Antarctica is a continental landmass; therefore, it is capable of acquisition. Antarctica is currently the object of seven longstanding, albeit disputed, claims to territorial sovereignty and, as one American official remarked, “territorial sovereignty; and a sovereign claim, be it valid or dubious under international law, is nonetheless the grist of the international law mill.”[[14]](#footnote-14) Accordingly, just because Antarctica poses a singularly difficult legal conundrum, this does not mean it represents a lacuna in the jurisdiction of international law.

There are three reasons why the general principles of international law concerning territorial acquisition do not apply to Antarctica. First, existing claims to Antarctic sovereignty, which rely on the aforementioned decisions, reflect precedential misunderstandings. Secondly, doctrines have since evolved; concepts such as *terra nullius* are, for example, undergoing rapid obsolescence. Thirdly, without superseding general principles, the ATS nevertheless affects their applicability to Antarctica.

Seven states maintain claims to Antarctic territory; Britain, France, Australia, New Zealand, Norway, Argentina, and Chile. Each maintains that it has demonstrated ‘effective’ occupation in accordance with *Palmas*, *Clipperton*, and *Eastern Greenland*. However, they overestimate these decisions’ precedential value. For example, the requirements of ‘effective’ occupation were originally established in relation to a tiny tropical island; achieving ‘effective’ occupation must be more onerous in Antarctica. Further, the claimant states argue that, because Greenland and Antarctica are geographically similar, the lack of extensive activity excused in *Eastern Greenlan*d should likewise be excused in Antarctica.[[15]](#footnote-15) As Greig noted, however, crucial to *Eastern Greenland* was the fact that it concerned territory in which no other states were interested.[[16]](#footnote-16) This is not true of Antarctica. Indeed, all three decisions concerned islands which were, at least at the time, of minor significance.[[17]](#footnote-17) Moreover, unlike *Eastern Greenland*, the Antarctic claims are highly contested and have never been recognised by third-parties.

Therefore, the key decisions concerning occupation are largely inapplicable to Antarctica. Ultimately, for as long as Antarctica remains inaccessible, ‘effective’ occupation may be practically impossible; Higgins even suggested that, “as sovereignty cannot be effectively exercised in the polar regions, claims to its possession are necessarily invalid.”[[18]](#footnote-18)

**2.**

The presuppositions undergirding claims to Antarctic territory derive from a Westphalian worldview, particularly the belief that all territory is capable of state acquisition. This is the fundamental assumption behind the concept of *terra nullius*. As Collis remarked, “it assumes that un-owned space is not beyond possession; it is simply awaiting transformation into a possession.”[[19]](#footnote-19)

Increasingly, this worldviewis perceived as antiquated, and its associated concepts arcane.[[20]](#footnote-20) In 1996 Charney said, “it is increasingly clear that a consensus of the international community is that Antarctica is and cannot be within the territorial jurisdiction of any State.”[[21]](#footnote-21) Honnold similarly claimed that territorial acquisition in Antarctica is “barred by contemporary principles of international law.”[[22]](#footnote-22)

Driving these assertions was a faith in emerging doctrines, namely the Common Heritage of Mankind Principle (CHP), the global commons, and equitable sharing. All these share the idea that certain unappropriated territories are not *terra nullius*, but instead *res communis* (shared by everyone). Some believe that Antarctica should be so considered, reasoning that international cooperation in Antarctic affairs evidences a widespread recognition of Antarctica as *res communis.* This logic is sound; after all, customary international law is formed by traditional state practice.[[23]](#footnote-23) If Antarctica were *res communis*, this would mean that it could not be acquired, for, as Buck noted, Antarctic property rights would already belong to the global population.[[24]](#footnote-24) Antarctica would ideally be treated analogously to the deep seas, free from the constraints of national sovereignty.[[25]](#footnote-25)

Unfortunately for their advocates, however, these doctrines are still relatively nascent.[[26]](#footnote-26) Indeed, whilst concepts like the CHP and *res communis* have garnered traction in recent decades, for example in shaping the law of the sea, their applicability to Antarctica is not universally accepted. Although logical, the view that a *res communis* treatment of Antarctica has crystallised into customary international law is also untenable. It underappreciates that the ATS, by acknowledging existing territorial claims, is incompatible with a *res communis* conception of Antarctica. According to Herber, just “the presence of a governance arrangement…complicates the application of the CHP to Antarctica.”[[27]](#footnote-27) Antarctica cannot, therefore, be considered *res communis*; however, nor can it be considered *terra nullius*, an anachronism in modern legal vocabulary. Antarctica is thus “in a state of geographical tension as something as between the two.”[[28]](#footnote-28)

Jurisprudential evolution compels us to consider territorial claims in light of the law as it stood when they were advanced. According to the doctrine of intertemporal law, whether the claimant states hold title to Antarctic territory depends on whether they acquired it according to the requirements of the time.[[29]](#footnote-29) If territory was validly acquired at some point, any failure to abide by contemporary standards could not justify the extinguishment of title. Intertemporal law’s relevance to the Antarctic claims is negligible, however, because the claims could never have been perfected, for, as was established, they do not even correspond to the precedents they rely upon.

Therefore, emergent concepts, whilst not yet universally accepted as law, have fundamentally altered the conceptual lens through which unappropriated territories are perceived. New norms and expectations suggest that any future adjudication of territorial claims will not be made with reference only to the existing principles of international law.

1.

The ATS has successfully regulated international behaviour in Antarctica since 1961 and has kept “the lid closed upon a veritable Pandora’s box of difficulties,” primarily through operation of Article IV of the Antarctic Treaty, which regulates claims to territorial sovereignty.[[30]](#footnote-30) Article IV acknowledges the existing claims without commenting on their validity. It also places a moratorium on the enlargement of existing, or the assertion of new, claims to Antarctic territory.[[31]](#footnote-31) The problem of territorial acquisition in Antarctica is thereby frozen in legal limbo.

Crucial to the problem of territorial acquisition in Antarctica is whether the ATS, which has only 54 parties (ATPs), is an ‘objective’ regime with *erga omnes* effect. If so, the ATS would effectively supersede the general principles of international law as Antarctica’s governing legal architecture, and Article IV would become the default position concerning territorial acquisition. The International Law Commission believes that treaties can, through historical consolidation, recognition, and acquiescence, develop *erga omnes* effects, and some believe this has happened with the ATS.[[32]](#footnote-32) This position wrongly assumes, however, that non-ATPs have, through silence, tacitly accepted that the ATS imposes legal obligations upon them. Under the Vienna Convention on the Law of Treaties, third-parties’ silence cannot be taken as assent.[[33]](#footnote-33) Further, de Aréchaga noted that non-ATPs, “remained legally unconcerned by what constituted for them *res inter alios acta,* retaining their freedom to take a position…only if and when the need to do so arose”.[[34]](#footnote-34) Finally, the ATS is only a temporary preservation of the status quo, not a determinative legal resolution. And, Simma noted, it is nonsensical to suggest silence regarding a temporary arrangement amounts to submission to a customary law regime.[[35]](#footnote-35) The ATS should not, therefore, be considered an ‘objective’ regime binding on third-parties.

One might, therefore, think that territorial acquisition in Antarctica is *legally* still governed by general principles and not the ATS. On further evaluation, however, this may be too simplistic. Indeed, the ATS highlights the divergence between international law and actual state practice. This is because, although the ATS is not an ‘objective’ legal regime, it *does* govern practically all activities in Antarctica which carry legal significance. Indeed, whilst the ATS is not ‘binding’ on third-parties, third-party activities in Antarctica could not be effectively protected by the general principles of international law. As Burton noted, the international legal system, lacking effective enforcement powers, relies on the assent of affected states. Given, then, the prominence of the ATS in Antarctic affairs and the fact that it is comprised of the world’s leading nations, any attempt by non-ATPs to maintain an incompatible legal position would likely falter.

The ATS thus reveals the precariousness of international law and the inapplicability of general principles to territorial acquisition in Antarctica. The ATS, instead, highlights the advantages of dispute management between interested parties over dispute resolution by independent bodies, and the following of ‘suggestive’ norms as opposed to legally determinative norms.[[36]](#footnote-36)

The Arctic

The Arctic situation is significantly less complex and, accordingly, warrants less extensive discussion.

The Arctic is predominantly ocean, not territory. Further, the vast majority of Arctic territory is already state-owned. This territory, already appropriated, is acquirable through cession, accretion, prescription, and conquest, but not occupation. Hypothetically, Canada could, in accordance with general principles, cede parts of Nunavut to Russia by treaty agreement. This is because these four modes of acquisition are not complicated by harsh, polar landscapes, as occupation is in Antarctica. The general international legal principles concerning acquisition, therefore, apply to the overwhelming majority of Arctic territory.

It is worth emphasising that the Arctic ice-cap is incapable of territorial acquisition; it is ocean governed by UNCLOS. Indeed, “ideas of sovereignty have assumed a basic elemental distinction between land, recognized as amenable to sedentarization and hence territorialisation, and water”.[[37]](#footnote-37)

Currently, the only dispute in the Arctic concerning unappropriated territory is that between Denmark and Canada over Hans Island, a rocky outcrop in the Nares Strait. Denmark’s claims are based on discovery, contiguity with Greenland, and the island’s use by Greenland Inuit. Canada’s claim is based on ‘effective’ occupation, supposedly evidenced by temporary scientific bases. If the dispute were adjudicated by an independent body, it would likely be resolved using general international legal principles because the key decisions concerning occupation would *here* be suitable precedents. Like *Palmas* and *Clipperton*, the Hans Island dispute concerns a tiny island, the ‘effective’ occupation of which is realistic. And, like all three decisions, the dispute concerns territory of little significance except to the parties involved.

It is unlikely that new land worth acquisition will be found in the Arctic. However, if land were discovered, any subsequent disputes over title could be resolved under the general principles of occupation. As with Hans Island, such disputes would involve analogous circumstances to the aforementioned decisions. Further, unlike Antarctica, unappropriated Arctic territory would not be subject to an extensive legal regime.

Clearly, therefore, the general principles of international law concerning territorial acquisition apply to the Arctic. The likely solution, however, to any territorial situation which engendered significant regional tension would *not* be found using general principles, but instead through an arrangement, similar to the ATS, which prohibits territorial acquisition yet bestows degrees of ‘sovereignty’ determined by the extent of the concerned state’s regional involvement. This approach is favoured because ‘winning’ a determinative legal resolution requires performative displays of ‘sovereignty’, whereas multilateral arrangements protect states’ interests whilst avoiding interstate acrimony. Such is the situation concerning Hans Island, which is dealt with not dissimilarly to Antarctica; both nations decided that, “without prejudice to [our] legal claims, [we] will inform each other of activities related to Hans Island. Likewise, all contact…with Hans Island will be carried out in a low key and restrained manner.”[[38]](#footnote-38)

Conclusion

Therefore, the applicability of the general international legal principles concerning territorial acquisition is highly dependent on geographic and political circumstances. The general principles of occupation, formulated with small islands in mind, breakdown when applied to territories so vast and inhospitable as Antarctica. Further, the general international legal principles concerning territorial acquisition are best suited to resolving two-party disputes of global inconsequence. The archetypal Arctic situation, which involves a two-party dispute over small territories of global unimportance, lends itself neatly to adjudication according to general principles. Conversely, Antarctica, a region of strategic importance to multiple nations, and of global ecological importance, does not. Both regions, however, have witnessed a transition from determinative legal solutions to geopolitical cooperation — there has been no legally adjudicated territorial dispute in either region since the 1930s.

1. Walter Sullivan, *Quest for a Continent* (Secker and Warburg 1957) 357. [↑](#footnote-ref-1)
2. ibid. [↑](#footnote-ref-2)
3. Tim Stephens, ‘The Arctic and Antarctic Regimes and the Limits of Polar Comparison’ (2011) 54 *German Y.B. International* 316. [↑](#footnote-ref-3)
4. Surya Prakash Sharma, *Territorial acquisition, disputes, and international law* (Martinus Nijhoff Publishers 1997) 35-36. [↑](#footnote-ref-4)
5. ibid. [↑](#footnote-ref-5)
6. *Island of Palmas Case* (Netherlands v. USA.)(1928) Scott, Hague Court Reports 2d 83 (1932)

2 U.N. Rep. Intl. Arb. Awards 829 (Perm. Ct. Arb.). [↑](#footnote-ref-6)
7. Emmanuel V ‘Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island’ (1932) 26 *The American Journal of International Law* 390. [↑](#footnote-ref-7)
8. *Legal Status of Eastern Greenland* (Den. v. Nor.) (1933) ser. A/B No.53 (P.C.I.J.) 71. [↑](#footnote-ref-8)
9. Jeffrey Myhre, *The Antarctic Treaty System: politics, law and diplomacy* (Routledge 2019) 10. [↑](#footnote-ref-9)
10. ibid. [↑](#footnote-ref-10)
11. *Eastern Greenland* (n 8). [↑](#footnote-ref-11)
12. ibid. [↑](#footnote-ref-12)
13. Myhre (n 9) 11. [↑](#footnote-ref-13)
14. Leigh Ratiner, Statement, “Earthscan”, Press Briefing Seminar on the Future of Antarctica, London, 27 July 1977. [↑](#footnote-ref-14)
15. Donald W. Greig, ‘Sovereignty, Territory and the International Lawyer’s Dilemma’ (1988) 26 *Osgoode Hall Law Journal* 127. [↑](#footnote-ref-15)
16. ibid 168. [↑](#footnote-ref-16)
17. ibid. [↑](#footnote-ref-17)
18. T. McKitterick, ‘The Validity of Territorial and Other Claims in Polar Regions’ (1939) 21 *J. Comp. Legis. & International L* 89, 93. [↑](#footnote-ref-18)
19. Christy Collis, ‘Territories Beyond Possession? Antarctica and outer space’ (2017) 7.2 *The Polar Journal* 287, 291. [↑](#footnote-ref-19)
20. Edward Honnold, ‘Thaw in International Law? Rights in Antarctica Under the Law of Common Spaces’ (1978) 87 *Yale Law Journal* 804. [↑](#footnote-ref-20)
21. Jonathan Charney, ‘The Antarctic System and Customary International Law’ in Francesco Francioni & Tullio Scovazzi (eds), *International Law for Antarctica* (Martinus Nijhoff Publishers 1996) 57. [↑](#footnote-ref-21)
22. Honnold (n 20) 806-807. [↑](#footnote-ref-22)
23. ibid 808. [↑](#footnote-ref-23)
24. Susan Buck, *The Global Commons* (Routledge 2017) 28. [↑](#footnote-ref-24)
25. Charney (n 21) 57-58. [↑](#footnote-ref-25)
26. Bernard Herber, ‘The Common Heritage Principle: Antarctica and the developing nations’ (1991) 50.4 *American Journal of Economics and Sociology* 399. [↑](#footnote-ref-26)
27. ibid 395. [↑](#footnote-ref-27)
28. Collis (n 19) 300. [↑](#footnote-ref-28)
29. Peter Beck, *Who owns Antarctica?: governing and managing the last continent* (Ibru 1994) 9.  [↑](#footnote-ref-29)
30. ibid 9. [↑](#footnote-ref-30)
31. The Antarctic Treaty (1 December 1959, 23 June 1961) 402 UNTS 71. [↑](#footnote-ref-31)
32. Bruno Simma, ‘The Antarctic Treaty as a treaty providing for an objective regime’ (1986) 19 *Cornell International LJ* 189, 202. [↑](#footnote-ref-32)
33. ibid 197. [↑](#footnote-ref-33)
34. Jiménez de Aréchaga (1964) Vol.1 Yearbook of the International Law Commission 101 [↑](#footnote-ref-34)
35. Simma (n 32) 204. [↑](#footnote-ref-35)
36. Beck (n 29) 11-12. [↑](#footnote-ref-36)
37. Hannes Gerhart, Sandra Fabiano, Rob Shields, Philip Steinberg, and Jeremy Tasch, ‘Contested Sovereignty in a Changing Arctic’ 100 (2010) *Annals of the American Association of Geographers* 992, 996. [↑](#footnote-ref-37)
38. Canada-Demark Joint Statement on Hans Island, September 19, 2005, New York.

<http://byers.typepad.com/arctic/canadadenmark-joint-statement-on-hans-island.html> [↑](#footnote-ref-38)