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BOOK REVIEW

THE EASTERN GREENLAND CASE IN HISTORICAL PERSPECTIVE

By Oscar Svarlien. University of Florida Monographs: Social Sciences, No. 21. Gainesville: University of Florida Press, Winter 1964, PP. 74. Price $2.00

This excellent re-examination of the *Eastern Greenland Case*[1] is more than a mere "case study" of outdated litigation, rendered inoperative by later decisions. Rather, a thousand-year-old controversy, finally resolved by the Permanent Court of International Justice in 1933, is presented in a modern setting. Specifically, the law of territorial acquisition in Arctic regions, as applied and developed by The Hague Tribunal, has assumed tremendous importance today because of its possible application to the claims over polar regions and outer space.[2] Interterritorial law has assumed a new importance since 1933. Far from being "dead" the underlying Roman doctrine of *terra nullius,* as incorporated into classical international law, was carried forward by the PCIJ; furthermore, it is still the basis of the present legal norm governing the possible acquisition—or even further use—of unoccupied regions. *Terra nullius* may be defined as territory incapable of effective occupation by any nation. That is to say, no nation can realistically exercise sovereignty over a region remaining in a state of nature. As a wild animal, it is incapable of being reduced to possession. Indeed, "*terra nullius*" is at the heart of the "new" legal standards being developed by the United Nations in its series of declarations relating to "The Peaceful Uses of Outer Space."[3]

By setting forth the above hypothesis in his Preface, Dr. Svarlien clearly recognizes the increasing strategic importance of the northern ice-cap. Though Greenland was the first portion of the Western Hemisphere known to Europeans, its legal status remained in doubt for many centuries, largely because of the fact that no clear line of sovereignty existed. In fact, there is some evidence that Greenland was abandoned by the

[1] Legal Status of Eastern Greenland, P.C.I.J., ser. A/B, No. 53 (1933); 3 Hudson, World Court Reports 149 (1935).

[2] *Cf.* Goedhuis, *Conflicts of Law and Devergencies in the Legal Regimes of Air Space and Outer Space,* 109 RECUEIL DES COURS 258 (1963 II), especially his use of the Greenland case, *id.* at 284 and the sources cited therein. *Cf.* Svarlien, *International Law and the Individual,* 4 J. PUBLIC L. 138 (1955).

[3] *E.g.*: Lachs, *Space Law,* to be published in—RECUEIL DES COURS—(1964). Previously Svarlien dealt with this general area. See in particular *The Sector Principle in Law and Practice,* 10 THE POLAR RECORD 255 (1960).

See also, *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,* 13 December 1963, RESOLUTION NO. 1962 (XVIII), and *International Co-operation in the Peaceful Uses of Outer Space,* 13 December 1963, RESOLUTION NO. 1802 (XVII).

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various ruling Scandinavian sovereigns for long periods of time. Clearly, there were long periods in which each of the three Scandinavian ruling houses lost interest in this overseas possession. Despite its uncertain history, one basic truism must be recognized; namely, the Greenland Icecap possesses considerable strategic and economic value not only to the controlling power but to the entire free world. In this regard, it is only necessary to mention the continued occupation by American military forces, including the construction of major air bases. Even in 1933 the Arctic Continent had an importance far beyond its economic value to the governing power—Norway or Denmark. For example, during the last fifty years, climatic changes in its coastal waters have resulted in a rapid development of fisheries utilized by several major powers; some significant mining activity is being undertaken; and the strategic location of the ice continent renders such possession by friendly powers imperative if the western alliance is to remain in undisputed control of the "North Atlantic Life Line." Of course, other facets, such as the fur trade and the importance of its location for meteorological studies, have added to its importance.

Against this economic background, the specific purpose of the book is to re-examine the territorial law of nations, including its "intertemporal" aspects. Consequently, the author attempts to prove the specific thesis that,

> [T]he Permanent Court of International Justice did not apply, in a strict sense, the territorial law as generally understood in 1933, but resorted to a modification of that law. Indications from both historical facts and from the law are that Denmark's case at The Hague was rather shaky, but the same historical analysis also shows that Norway's case was even less firm, as it rested on an unsteady posture over centuries. Though the principle of *corpus possessionis* was not denied by the Court in this case, its content was reduced to an ill-defined minimum. With respect to the principle of "effective occupation," very little was required according to the Court to establish valid territorial claims in the Arctic. The rationale for the reduction of a cardinal principle of the law was here based upon the physical nature of the land itself, and upon the absence through long ages of claims by other powers to sovereignty over Greenland. Thus, the conclusion may be drawn that Denmark through her greater activity in Greenland had thereby acquired prescriptive rights which tended to becloud the Norwegian claim (p. iii).

In order to lay the essential background for this thesis, Dr. Svarlien demonstrates considerable ability as an outstanding historian, along with his well recognized competence as a legal scholar, in the first half of the monograph. By relying on both European and American sources, particularly original Scandinavian documents, the author has given the reader far more than a mere understanding of a case presented to the World Court; rather, a clear insight is provided into the importance of the region under dispute, during the ancient and modern periods of its history. His use of archeological and historical data clearly evidences the tremendous

amount of research (originally financed by the Rockefeller Foundation) that has been devoted to this relatively short book. By relying upon original Scandinavian sources, a unique contribution to knowledge has been made, in that the background data has been assembled for the purpose of presenting the facts leading up to the actual litigation. Such material, while presented to the court, is little known to the average international lawyer or jurisconsult. Most of us know relatively little concerning Greenland, its population, resources, exports, or even its very interesting history, which is of special significance to both North America and Scandinavia. The historical facts become very important to this case because the legal status of Greenland was ultimately to be determined according to the rise and fall of Norway, during those centuries in which that nation was dominated by Danish or Swedish kings.

One additional observation cannot be avoided by the reviewer; Dr. Svarlien is very conscious of the applicable bilateral treaties and multilateral conventions, which agreements were ultimately to play such an important role in supporting the Danish position. Such reliance upon primary legal materials provides a firm basis for subsequent conclusions.

Aside from some unfortunate actions by the Norwegian Government, to be discussed below, one very obvious finding emerged before the court; Norway as a conquered vassal for so many centuries was not in a position to claim colonial status on behalf of its alleged overseas territories. The obvious judgment to be reached by the PCIJ was never seriously in doubt, largely because of the weak historical evidence relied on by Norway; threfore, its case was doomed from the start.

Unfortunately, this very interesting historical background cannot be recounted here. Suffice to state that the first ten chapters provide the required understanding into the conflict between Denmark and Norway, a continuing dispute lasting for over two hundred years in the modern period.

The immediate cause of the friction between these two states is to be found in the growing economic importance of Greenland, primarily its fishing and even earlier its abundance of furs. Therefore, these economically poor states were desperately in need of additional natural resources, unobtainable within their own borders. [Many additional factors can be cited for the increase in the value of Greenland. Aside from the increase in the fish population, Norway was forced to seek new areas of the coastal seas for its fishing fleets because of the exclusion of its ships from large areas of the Arctic fishing zones by Soviet authorities.] While both nations had exploited the coastal regions to some extent, had sent several significant scientific expeditions, and had established a few permanent colonies, no real sovereignty was ever exercised over the entire region. Even today, the major portion of the land mass has yet to be visited or mapped.

Instead of being able to resolve their dispute by either diplomatic negotiation or arbitration, both powers sought to gain exclusive control of the entire island. In the ancient period from 982 to 1261 Norway had exercised nominal control, later jointly with the Roman Church, and still later with the Swedish kings. However, following the Treaty of Keil, 1814, the Norwegian position deteriorated while Denmark through a long series of action, supported by diplomatic maneuvers, established her claim. After 1814 the Danes adopted their forceful diplomatic efforts (though not strictly aggressive) in order to strengthen their legal claims largely because of the very valuable hunting, trapping, and fishing found in Greenland. Moreover, Denmark feared the "ever-present danger . . . that alien settlements in the area might be made and felt that this could be averted only if the region were recognized as part of the Danish state." (p. 29).

At the conference leading up to the Treaty of Keil, "Greenland within the meaning of the law of nations had become a Danish possession . . ." (p. 64). Repeatedly, the Danish Government secured recognition of its claims from other major powers but never from Norway.[4] For example, on August 4, 1916, at the time the Danish West Indies (Antilles) were sold to the United States, the Danes obtained a declaration from the U. S. Government to the effect that no objection would be raised to the Danish exercise of political and economic sovereignty over Greenland. Furthermore, at the Paris Peace Conference in 1919 assurances were given by the major states that Danish sovereignty would be recognized. From 1380 to 1931 there was no claim by any power, other than Denmark, to sovereignty over Greenland. Indeed, before 1921 no nation had disputed the Danish rights.

In spite of the Danish "campaign," Norway began to assert authority. Thus, an impasse was reached in the diplomatic efforts by the two foreign offices in that the question of sovereignty,[5] in turn dependent on the law of territorial acquisition as it existed in 1933, was finally presented to The Hague Tribunal for final determination.

The second half of the book is devoted primarily to an analysis of the case and fundamental issue concerning the interpretation of traditional international law governing territorial acquisition. However, in the *Eastern Greenland Case,* as Dr. Svarlien argues in Chapter 14,[6] a unique question had to be determined that had not arisen in prior arbitrations, especially

[4] See Ch. 10 *Danish Activities* 25-30.

[5] Korowicz, *Some Present Aspects of Sovereignty in International Law,* 102 RECUEIL DES COURS 1 (1961 I), and KOROWICZ, INTRODUCTION TO INTERNATIONAL LAW: PRESENTS CONCEPTIONS OF INTERNATIONAL LAW IN THEORY AND PRACTICE (1964 ed.).

[6] Ch. 14 *Proceedings and Judgment* 41-49 in connection with Ch. 13 *Denmark Makes Application to the Court* 39-41.

Island of Palmas Case.[7] The primary issue before the PCIJ became: Was the exercise of Danish control over some portions of Greenland sufficient to support its claim to exclusive sovereignty over the entire land mass? Likewise, did the subjugation of Norway and its possessions, forcing that country to abandon its colonizing efforts for a period in excess of four centuries, result in Greenland's reverting to the condition of *terra nullius*? On the other hand, could sovereignty be claimed *only* over those portions of the Continent effectively occupied, as was argued by counsel for Norway?

The law governing the acquisition of territory is clear. Such legal claim to sovereignty, originally stemming from discovery, was based on the rule that *title must be found on a peaceful and continuous display of authority*. This basic point of "continuous display of authority"—presently being raised in connection with the possible conquest of areas in outer space—had been clearly enunciated only five years earlier in the *Island of Palmas Case*.[8] Consequently, the Court had to determine if the Danish Government had in fact exercised a sufficient degree of state authority to support its claim over the entire icecap. Prior cases and the general principles of international law recognized by civilized nations did not provide a ready answer.[9] Although clear on the surface, the doctrines of international territorial law could not be applied to the instant case without some modification and adaptation for the reason that Denmark did not base her claim on a single act but rather on "the peaceful and continuous display of state authority over the island." Reduced to its most fundamental principle, the Danish case rested on the fact that Norway had lost her ancient rights, while ruled by Denmark. As of the crucial date at which the action commenced in The Hague, July 10, 1931, any subsequent assertion of Norwegian domination was illegal. Furthermore, the Danish position was strengthened by the ill-advised Ihlen Declaration in which the Norwegian foreign minister had tacitly recognized the Danish position. Even though clearly acting beyond the scope of authority, his remark proved to be one of the most costly in modern history.

[7] The Island of Palmas (United States v. Netherlands), Permanent Court of Arbitration, 1928; Scott, The Hague Court Reports 126 (2d Ser. 1926).

One of the special features of the East Greenland controversy was that in the period from 1380 to 1931 there was no claim by any other power, other than Denmark, to sovereignty over Greenland. Indeed, before 1921 no nation had disputed the Danish claim to sovereignty. Thus, the Permanent Court of International Justice, in adjudicating the case found that: "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of soverign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." *Id.* at 43 citing Eastern Greenland *supra* note 1 at 45-46 (footnotes omitted).

[8] Island of Palmas, *ibid.*

[9] See the definition by OPPENHEIM, 1 INTERNATIONAL LAW 557-558 (Lauterpacht ed., 8th ed. 1955) cited at 27. See especially SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 169 (1955).

The Norwegian case rested on ancient claims as reinforced by its actions during the period between 1921-1933. But the strongest contention was: those portions of the Continent not effectively occupied by Denmark were still in a state of *terra nullius* and were, therefore, available to seizure and exploitation.

The court in upholding the Danish claim to all of Greenland ruled: it was only necessary to establish proof of a reasonable exercise of sovereignty over the area immediately prior to July 10, 1931. It was further held that the conditions upon which Denmark based its claim were realistic.

> It is quite certain that in the tenth century when the first colonies were founded in Greenland, the conditions required for the claiming of territorial sovereignty were not the same as those of a later date. It may be said with fair accuracy that as the earth's surface became better known and its limits more fully comprehended, the conditions required for the claim to sovereignty became more stringent and more competitive (p. 43).

Consequently, it could not feasibly be demanded that such occupation extend to the entire area of Greenland as would be required in a more accessible region; hence, prior cases could be distinguished.[10] Therefore, the right of sovereignty over Greenland was not limited to the colonized areas as had been argued by Norway.

In analyzing the decision, Dr. Svarlien presents the most fascinating portion of the book,[11] for the law of territorial acquisition as it is governed by the concept of *intertemporal law* is re-examined. Five years prior to the *Greenland* verdict, Max Huber, in the *Island of Palmas Case*, defined intertemporal law as involving two distinct parts.

> Thus, there are two parts to intertemporal law: one, the principle that the legal validity of acts must be ascertained in terms of the law contemporaneous with their undertaking; and two, these rights however validly created in the light of contemporaneous law, may be lost if not maintained through the passage of time in accordance with the changes in the law. Therefore, rights validly acquired may be significantly limited or lost altogether, unless they are continually maintained in the light of developing law (p. 49).

In short, under this doctrine a distinction must be made between the

[10] In addition to the Island of Palmas Case, *supra* note 7, the author compares the situation existing in uninhabitated territory. Svarlien, as did the PCIJ, distinguishes the Clipperton Island Arbitration (France v. Mexico) 26 AM. J. INT'L L. 390 (1932). See *supra* note 7 and the text contained therein.

[11] Ch. 15 *Applicable Principles of Territorial Law* 49-53.

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creation of rights and the continued existence of these same rights. "The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestations, shall follow the conditions required by the evolution of law" (p. 49).

The first element set forth above, would not be open to dispute; however, the second is less widely accepted for the reason that "when a norm in international law is followed by another regarding the same matter, the latter norm is not only superceding but also retroactive in effect" (p. 50).[12] In other words, the norms of international law are changed and modified.

> It is submitted, therefore, that it would be more correct to regard those rights to which the intertemporal law applies as being conditional upon performance in accordance with any changes in the law that may take place with the passage of time. It would seem safe to conclude that intertemporal law is not likely to be applied in cases where changes in the law have come about in short periods of time, such as in response to an international convention. It is more reasonable to assume that intertemporal law will apply in cases where the customary law of nations has been changing gradually over long periods of time. Therefore, the principle of intertemporal law could be applied in an analysis of the *Eastern Greenland Case,* as indeed it was in the *Island of Palmas Case* .... (p. 51).

Accordingly, Svarlien maintains—and correctly so—that in the formative period of classical international territorial law, great reliance was placed on Roman property law.[13] Likewise, as international law developed throughout the Middle Ages, the doctrine of effective occupation was reinforced both by the Roman Church and civil law. In Chapter 16, the author states: "The requirement that a nation claiming territory must show 'effective possession' to make good its title is a principle that has been recognized from the earliest times" (p. 53). Also recognized is the corollary that mere discovery, conquest, or temporary settlement does not fulfill the absolute requirement of effective and continuous occupation. Nonetheless, it is also true that during the great explorations of the fifteenth and sixteenth centuries the rule of continuous occupation became a bit less certain. That is to say, the law was modified by practice. "But at no time was discovery alone (that is the mere sighting of land or brief landing) capable of producing more than an inchoate title" (p. 55). It was essential that effective occupation, usually colonization, take place within a reasonable time; and, the author concludes that this requirement was never lost as a norm of international law, even though it was relaxed.

[12] Citing KELSEN, PRINCIPLES OF INTERNATIONAL LAW 95 (1952) *id.* at 51.

[13] WESTLAKE, INTERNATIONAL LAW 98 (1910) *id.* at 51.

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Even as to uninhabited territory, the principle was sound, as was demonstrated in the *Clipperton Island Case*,[14] although the degree of control demanded was considerably less stringent.[15] Similarly, under the corresponding doctrine of continuity such exercise of sovereignty must be continuous and without interruption.

In the *Eastern Greenland Case* the Permanent Court of International Justice found that Denmark had complied with the requirements of this basic norm, despite the fact that not all of the hinterland was occupied. Under the circumstances peculiar to the arctic there had been a sufficient control and assertion of authority. Nonetheless, the norm was modified in that the PCIJ held that sufficient authority had been exercised to a degree sufficient to give the Danish king a valid claim over the entire Continent and not merely the colonized areas along the coast.[16]

> Thus, because of the special circumstances indicated the Court, without departing from the general principle of effective occupation, merely changed its content. The rationale for this change of content in the doctrine was in the Court's own words: "the Arctic and inaccessible character of the uncolonized parts of the country . . ." (p. 63).

The Danish diplomatic offensive, dating from the Treaty of Keil in 1814, along with its activities on the soil of Greenland, when considered together, fulfilled the legal requirement. "The Court found that these activities in concert constituted a display of Danish sovereignty in the island and that the state authority involved extended beyond the colonized areas" (p. 65). Particularly in the eighteenth and nineteenth centuries and up until 1931, Denmark had done everything possible to assert her claim, whereas Norway did not begin to contest the position of the Danes until the 1920's. By this time, the "case" had been lost. Svarlien's main conclusion is that the PCIJ actually modified and developed Classical International Law in order to meet this unique situation.

> A basic generalization may be drawn from the *Eastern Greenland Case*: The minimum requirement to sustain territorial claims in the polar regions is likely to be less than in more hospitable and accessible places; yet, the grounds sustaining the judgment in this case clearly affirm that state activity is of the greatest importance, but that this activity may take forms other than a real or physical occupation. Furthermore, if for a prolonged span of time a potential claimant to territory in polar regions remains relatively inactive with respect to the demonstration of an *animus occupandi*, a title once regarded as sufficient to meet the requirements of law is dissipated by inactivity and the afflux of time (p. 73).

[14] Clipperton Island Arbitration, *supra* note 10 cited *id.* at 57.
[15] Ch. 17 *Distinction Between Inhabited and Uninhabited Regions* 57-59.
[16] Eastern Greenland case, *supra* note 1 at 175 *id.* at 63 n. 214.

But, because of the physical nature of Greenland, "very little was required" by way of occupation.

"We may venture the conclusion, therefore, that in the polar regions territorial claims may be sustained on the basis of very little more than an *animus occupandi*; provided, of course, no other claimant can furnish a better ground for claiming sovereignty in the same area" (p. 69).

Admittedly, the Danish claim was not as definite and certain as would have been required in other situations,[17] but it had a much stronger legal position than Norway, whose position was quite uncertain.

> The primary reason Denmark won the process at The Hague in 1933 was not so much that her case was unassailable in every respect, as it was due to the fact that on the whole Norway's claim to sovereignty over the so-called Eirik Raudes Land found even less support in the contemporary law (p. 69).

Primarily, the Norwegian argument was undermined by the fact that the state had ceased to be independent for many centuries, with the result that overseas possessions also passed under the domination of Swedish and Danish kings. Norway, as a vassal, could not prevent her own colonies from passing under the sovereignty of the controlling power for the reason that Norway(as an ignored "Northern Kingdom," lost its identity as a subject of international law. Norway's subservient position in respect to the other Scandinavian kingdoms resulted in the stifling of that nation's development. It was merely a province administered through foreign functionaires. Sadly, this condition of subservience, lasting over four hundred years, had doomed its case from the outset. And during this period Greenland had been transferred by the King of Sweden to the King of Denmark. In addition, the *Ihlen Declaration,* plus the inactivity of Norway until the 1920's after she had been forced to seek new fishing grounds because of Soviet expansion in the Northern Polar region, coupled with the continual Danish diplomatic offensive, resulted in final victory. The Danish Government had realistically evaluated the strength of its case. "[T]here is little doubt that many of the better legal minds of Norway regarded the outcome at The Hague in 1933 as a foregone conclusion" (p. 74).

Perhaps the reader will excuse such an extensive review of a relatively small monograph dealing with a thirty year old case; however, this reviewer is of the opinion that greater attention should be given this very excellent analysis because the legal principles clarified and developed by the PCIJ are still significant to the law governing discovery and occupation in the polar regions and outer space, now being regulated by the United Nations. One speculation cannot be avoided at this point: the court helped develop Roman Law and classical international law so that they

[17] *Supra* notes 7 and 10.

could be carried forward into the space age. It would, therefore, not be invalid to conclude that the PCIJ actually codified (as well as clarified) basic principles of international territorial law.

As a final comment, it is to be regretted that this small book did not go even further and devote considerably more attention to the future of the *Eastern Greenland* decision and in an additional chapter show more clearly its future application, since such basis had been set forth in the Preface. In fact, the Preface is broader in scope than the concluding chapter, A partial answer has been provided by the author, who must at this point be identified as a good friend of the reviewer. Precisely, this monograph is part of a series of studies dealing with this legal question;[18] consequently, we can all look forward to additional publications. It would be tragic if Dr. Svarlien did not follow up this entire line of investigation, because of the potential importance of territorial law to the United Nations.

Relatively few persons ever have the opportunity to witness a proceeding before the International Court of Justice; however, this type of material helps to fill such gap for the reason that the case is "brought to life." In effect, the case has emerged as a living dispute (fortunately resolved) rather than a mere holding of law. In producing this fine work, *Dr. Svarlien has made a distinct contribution to the jurisprudence of the World Court by re-examining an older case in a contemporary environment.*

One final postscript might be added to which the author may not object too strongly. Following the favorable decision at The Hague, the Danish Government presented a large ornamental fountain decorated with life-size white polar bears and seals made of fine Royal Copenhagen porcelain. Today, this beautiful fountain stands in the enclosed courtyard of the Peace Palace as a tribute to the Danish victory. Yet, one interesting fact should be noted. These fine ceramic pieces cannot withstand even the relatively mild Dutch winters, with the result that each year the entire structure must be dismantled and removed to more secure winter quarters It seems ironic that this gift, given only after a favorable decision, should be so delicate in view of the fact that the decision has withstood the test of time and did prevent prolonged hostilities between the two States.

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18 Svarlien, *Territorial Sea: A Quest For Uniformity*, 15 U. FLA. L. REV. 333 (1962).