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THE HANS ISLAND DISPUTE AND THE DOCTRINE OF OCCUPATION

The world's media attention focused on the Arctic issues again, at least for a blink of an eye, when the Kingdom of Denmark announced its claim to a large portion of the Arctic continental shelf, overlapping the previously notified claims of other Arctic nations[1] and again one and a half years later, when the Russian Federation did basically the same thing[2]. This event reminds us of other unsettled territorial disputes in the Arctic. The struggle for a little rock called Hans Island is particularly important in this context. Firstly, in this case as well, Denmark is one of the claimants. Secondly, the Hans Island issue is the latest sovereignty dispute over a piece of land in the whole Arctic. As such, unlike than the continental shelf claims, it cannot be decided according to the UN Convention on The Law of The Sea. It is often suggested that the Hans Island dispute should be concluded as a compromise between Canada and Denmark[3], yet it is worth

[1] O. Mikkelsen, *Denmark to claim slice of continental shelf in Arctic Ocean*, "Reuters", December 15, 2014, accessed at http://www.reuters.com/article/2014/12/15/us-denmark-arctic-idUSKBN0JT0S620141215 (visited October 9, 2016); *Frozen Conflict. Denmark claims the North Pole*, "The Economist", December 20, 2014 accessed at http://www.economist.com/news/international/21636756-denmark-claims-north-pole-frozen-conflict (visited October 9, 2016); P. Barkham, *Why does Denmark think it can lay claim to the north pole?*, "The Guardian", December 16, 2014, accessed at http://www.theguardian.com/world/shortcuts/2014/dec/16/why-denmark-thinks-it-can-lay-claim-to-north-pole (visited October 9, 2016).

[2] A. E. Kramer, *Russia Stakes New Claim to Expanse in the Arctic*, "The New York Times", August 4, 2015, accessed at http://www.nytimes.com/2015/08/05/world/europe/kremlin-stakes-claim-to-arctic-expanse-and-its-resources.html (visited October 9, 2016); *Russia laiys claim to vast area of Arctic*, "The Guardian", August 4, 2015, accessed at https://www.theguardian.com/world/2015/aug/04/russia-lays-claim-to-vast-areas-of-arctic-seabed (visited October 9, 2016); R. Garver, *Move Over, Santa: Putin Claims the North Pole*, "The Fiscal Times", August 6, 2015, accessed at http://www.cnbc.com/2015/08/06/move-over-santa-putin-claims-the-north-pole.html (visited October 9, 2016).

[3] Ch. Stevenson, *Hans off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution*, "Boston College International & Comparative Law Review" 2007, Vol. 30, p. 274; J. Ibbitson, *Dispute over Hans Island nears resolution. Now for the Beaufort Sea*, "Globe and Mail", January 26, 2011, accessed at http://www.theglobeandmail.com/news/politics/dispute-over-hans-island-nears-resolution-now-for-the-beaufort-sea/article563692/

considering whether the claims of the contesting nations have any value under the traditional doctrines of international law. The purpose of this article is therefore to analyze how the doctrine of occupation applies to the case of Hans Island. Such a formulation of the topic derives from a simple historical intuition. As the whole concept of occupation was designed in the epoch of great discoveries as a legal title to newly discovered lands, it seems clear that there is a possibility that it should apply to an uninhabited islet discovered barely 140 years ago.

1. HISTORICAL AND THEORETICAL BASIS OF THE DOCTRINE OF OCCUPATION

As one of the timeless classics of the international law stated, "occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as it is at the time not under the sovereignty of another state"[4]. This mode of acquisition of state territory was derived directly from Roman law[5]. The discovery of the New World changed the European perspective in many aspects, particularly in their understanding of international legal issues[6]. European legal scholars of the early modern age sought for an institution suitable to justify the claims laid by European powers to the lands discovered and conquered by them. They found an inspiration in the Roman private law concept of *occupatio* – a mode of acquiring ownership of the ownerless thing merely by taking it into possession[7]. This idea was abstracted from the private law context and placed on the international level by such authors as Vitoria, Grotius or Vattel. The main doctrinal dispute that arose concerned the mode of taking the *terra nullius* into possession. Scholars seem to agree that the fact of discovery alone was never regarded as granting more than the right to later appropriation[8]. In other words, the mere discovery can give only an inchoate title[9]. The question concerning the

(visited October 9, 2016); M. Byers, J. Baker, *International Law and the Arctic*, Cambridge University Press 2013, p. 16; M. Byers, *Creative thinking on sovereignty*, July 3, 2014, accessed at http://byers.typepad.com/arctic/2014/03/creative-thinking-on-sovereignty.html#more (visited October 9, 2016).

[4] L. Oppenheim, H. Lauterpacht, *International Law. A Treatise*, London−New York−Toronto 1958, p. 555.

[5] R. Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, "The European Journal of International Law" 2005, Vol. 16, pp. 25–58.

[6] A. Truyol y Serra, *The Discovery of the New World and International Law*, "University of Toledo Law Review" 1971, No. 43, p. 309.

[7] Justinian's "Digest" (D. 41.1.3.pr) and "Institutions" (I. 2.1.12).

[8] F. A. von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectivenes in International Law*, "The American Journal of International Law" 1935, Vol. 29, No. 3, p. 452.

[9] M. N. Shaw, *International Law*, 5th ed., Cambridge University Press 2003, pp. 425–426.

appropriation was whether a symbolic act of taking into possession would be considered as sufficient, or whether the effective control over the territory was necessary. Finally the latter seemed to prevail, both in scholarly thinking and in state practice. Yet it is of crucial importance for this analysis to determine what "effective occupation" actually means.

A classic case of effective occupation can be done by a settlement on the territory, accompanied by some formal acts announcing the intention of keeping the territory under the sovereignty of the occupying state, e.g. a proclamation or hoisting of a flag[10]. Yet it is rather clear that such firm requirements are not necessary in every particular case. All geographical factors such as location, climate etc. are relevant and have been regarded as such by both international courts and arbiters. As Shaw emphasises, "the effectiveness of the occupation may indeed be relative and may in certain rare circumstances be little more than symbolic"[11]. To go even further, it can be stated that in certain cases purely symbolic actions were considered to suffice in creating a valid title. The 19th and 20th century practice of some states gives us some strong examples. Firstly, during the late 19th century race for uninhabited Pacific islands, both Great Britain and the United States acquired such pieces of land by performance of symbolic acts, either an act of possession or a declaration of protectorate. Many of such actions have not been followed by any actual occupation for years, but there is no case for denying the sovereign rights of one of the two competitors by the other[12]. Such practice concerning uninhabited small islands was confirmed by the result of arbitration between France and Mexico, awarded by the King of Italy in the Clipperton Island Case[13]. Another crucial element of argumentation for the thesis that occupation may in particular circumstances "be little more than symbolic" was provided by circumpolar territorial issues, which clearly relate strongly to the discussed topic.

2. OCCUPATION AND THE POLAR AREAS

Due to obvious geographical and climatic conditions, the polar areas were the last to attract the attention of modern states as potential territories to take any political or economical advantaged of. Prior to the second half of the 19th century, famous efforts to discover the North Western Passage and whaling activities

[10] F. A. von der Heydte, *Discovery...*, pp. 452–453; L. Oppenheim, H. Lauterpacht, *International Law...*, pp. 557–558.

[11] M. N. Shaw, *International Law...*, p. 434.

[12] B. Orent, P. Reinsch, *Sovereignty over Islands in the Pacific*, "The American Journal of International Law" 1941, Vol. 35, No. 3 , p. 450.

[13] *Judicial Decision Involving Questions of International Law. France–Mexico*. "The American Journal of International Law" 1932, Vol. 26, No. 2, pp. 390–394.

were probably the only significant economical and political issues in the Arctic. It is therefore not surprising that "a number of Arctic islands held ambiguous jurisdictional status at the start of the 20th Century: Svalbard, Greenland, Jan Mayen, Franz Josef Land, and Wrangel Island were generally considered to be *terra nullius*"[14]. In the context of the doctrine of occupation the case of Eastern Greenland seems to have particular importance simply because it is the only case involving a territorial question in the Arctic to be decided by an international tribunal[15]. Shortly before it was decided, Norwegian scholar G. Smedal argued in his renowned article that even in polar regions effective occupation should be needed to establish a sovereignty title[16], but it should be remembered that the author was notably committed to the Norwegian efforts to acquire sovereignty over, the so-called, Erik the Red's Land[17] and the opposite theory spoke for Denmark, which claimed sovereignty over the eastern shores of the largest island in the world although it was rather obvious that it exercised hardly any effective control. Smedal was therefore determined to prove that Denmark possessed no sovereignty title to Eastern Greenland since it could be derived from effective occupation only. This political aim was the main concern of his analysis. Nevertheless, the final judgment of the Permanent Court of International Justice of April 5, 1933, showed – nearly contrary to the traditional views on occupation – "not only how very small a part, if any, actual control or possession played in the creation of what was deemed to be an ancient and basic right of sovereignty, but also how small an amount of control, measured geographically or otherwise, sufficed, under the circumstances, to yield to the modern inheritor and existing possessor of that right of sovereignty, a vast and unoccupied and unclaimed island"[18]. Referring more directly to the problem of occupation it should be underlined that this judgment confirms that international law permits a flexible standard of acquiring sovereignty, depending upon the circumstances of the territory, particularly in remote polar areas[19]. This "flexibility" is of special importance for Hans Island which can undoubtedly be described as a "remote polar area".

The Eastern Greenland case concerned the lands that bear resemblance to Hans Island due to climatic conditions and geographical proximity, yet there are

[14] A. Grydehøj, A. Grydehøj, M. Ackrén, *The Globalization of the Arctic: Negotiating Sovereignty and Building Communities in Svalbard, Norway*, "Island Studies Journal" 2012, Vol. 7, No. 1, p. 100.

[15] J. Cavell, *Historical Evidence and the Eastern Greenland Case*, "Arctic" 2008, Vol. 61, No. 4, pp. 433–441.

[16] G. Smedal, *Acquisition of Sovereignty over Polar Areas*, "Skriften om Svalbard og Oshavet" 1931, Vol. 36.

[17] F. Skarstein, *Erik the Red's Land: the land that never was*, "Polar Research" 2006, Vol. 25, No. 2, pp. 173–179.

[18] Ch. C. Hyde, *The Case Concerning the Legal Status of Eastern Greenland*, "The American Journal of International Law" 1933, Vol. 27, No. 4, pp. 736–737.

[19] J. Cavell, *Historical Evidence...*, pp. 433–434.

obviously many differences as well. Primarily the islet discussed in this article is a separate piece of land and not a portion of a land mass on which any of the competing parties has already established its colonies. Therefore this issue requires reference to more examples. Von der Heydte[20] indicates another, perhaps the most relevant to the Hans Island case. Norwegian annexation of the remote and icy Bouvet Island in the southern Atlantic was performed solely by symbolic actions, but, after initial dispute, was finally recognized by Great Britain (the British had hoisted the Union Jack on its shores before any Norwegian actions), which decided to abandon its claim to this piece of land.

Other territorial disputes in polar regions, while complex and interesting by themselves, seem to have less resemblance to Dano-Canadian dispute. At the beginning of the 20th century the vast Svalbard archipelago was claimed by many European powers. Their arguments were mostly based on historical discoveries and activities on these arctic islands[21]. The case of Svalbard was finally resolved by the Spitsbergen Treaty, so these arguments seem to have no importance for the eventual universal recognition of Norway's sovereignty. If not for the treaty, the competing claims would have been decided, probably, on the basis of the doctrine of occupation and historical arguments, reaching back many centuries, such as in the Eastern Greenland case. Nevertheless, occupation still constitutes the Norwegian title to Svalbard in relation to states not parties to the Treaty[22], while the peaceful exercise of sovereignty by Norway is today beyond any doubt.

3. HANS ISLAND AS A *TERRA NULLIUS*

To decide whether the doctrine of occupation applies at all in a particular case, it must be determined if the relevant territory could ever have been considered as a territory that belongs to no one (*terra nullius*). Canadian authors sometimes seem to suggest that Hans Island was intended to be included within the entire Arctic Archipelago that Britain handed over to Canada[23], yet there is hardly any evidence for that in the text of the relevant Order-in-Council of July 31, 1880, nor in the later proclamations of the Canadian government. Moreover, "what Britain had transferred with regard to the islands discovered by its own explorers

[20] F. A. von der Heydte, *Discovery*..., p. 463.

[21] A. Grydehøj, *Informal Diplomacy in Norway's Svalbard Policy: The Intersection of Local Community Development and Arctic International Relations*, "Global Change, Peace & Security" 2013, Vol. 26, No. 1.

[22] G. Ulfstein, *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty*, Scandinavian University Press, Oslo 1995, p. 169.

[23] G. Killaby, *"Great Game in Cold Climate". Canada's Arctic Sovereignty in Question*, "Canadian Military Journal", Winter 2005–2006, p. 32.

was not a perfected title. Rather, it was an 'inchoate' title, based on discovery and proclamations of ownership only. To perfect Canada's claim, the British acts of possession would have to be followed up by acts of occupation"[24]. During the following decades, Canada did a lot to substantiate its claims, but Hans Island seems not to have been taken into consideration for a long time. The crucial Canadian documents that concern Arctic sovereignty from the first half of the 20th century did not mention this island at all[25]. The Kennedy Channel was mentioned many times in those documents as a part of the eastern border of Canadian interest, yet it would be hard to deduce how those records refer to a tiny island located directly in the middle of this strait.

The Danes, on the other hand, tend to suggest that the Island was discovered "with the participation of the famous Greenlander Hans Hendrik of Fiskenæsset"[26]; yet such a fact has no legal relevance at all. Firstly, since it is obvious that Henddrik, whose first name the Island bears until today, without a doubt a Danish subject, was only an individual taking part in an American polar expedition. Secondly, as was emphasized above, it is widely agreed that the mere fact of discovery does not create any title to territory. Another Danish thesis of geological and geomorphologic evidence for the connection of Hans Island to Greenland was, in my opinion, rightly countered by the Canadians as irrelevant with respect to an island that lies within sight of opposing coastlines[27]. Finally, the last Danish argument is based on the past presence of the Inuit from Greenland, who supposedly had been visiting the Islet and used it "as an ideal vantage point to get an overview of the ice situation and of the hunting prospects, especially for polar bears and seals"[28]. The Canadians tend to consider this argument as the strongest one, but still hardly decisive due to the fact that same Inuit often travelled far more into the territories that are now universally regarded as Canadian[29]. Some of the Canadian

[24] J. Cavell, *Sector Claims and Counter-Claims: Joseph Elzéar Bernier, the Canadian Government, and Arctic Sovereignty*, *1898–1934*, "Polar Record" 2014, Vol. 50, issue 3, p. 294.

[25] The islet is never mentioned in any of the documents included in a complex collection made by P. Kikkert, P. W. Lackenbauer, *Legal Appraisals of Canada's Arctic Sovereignty. Key Documents 1905–56*. Centre for Military and Strategic Studies, University of Calgary; Centre of Foreign Policy and Federalism, St. Jerome Univeristy 2014, No. 2.

[26] P. E. D. Kristensen, *Ambassador of Denmark, Letter to the Editor*, "Ottawa Citizen", July 28, 2005, accessed at http://byers.typepad.com/arctic/2009/02/hans-island-denmark-responds.html (visited October 9, 2016).

[27] M. Byers, J. Baker, *International Law...*, p. 12.

[28] T. Høyem, *Mr. Graham, you should have told us you were coming*, "Globe and Mail", July 29, 2005, accessed at http://byers.typepad.com/arctic/2008/11/mr-graham-you-should-have-told-us-you-were-coming.html#more (visited October 9, 2016). See also: K. Harper, *Give it to Denmark*, "The Globe and Mail", July 27, 2005, accessed at http://www.theglobeandmail.com/globe-debate/letters/give-it-to-denmark/article4119567/ (visited October 9, 2016); R. Boswell, *Hans Island was ours first, Greenland says*, "Ottawa Citizen", May 29, 2008, accessed at http://byers.typepad.com/arctic/2008/12/hans-island-was-ours-first-greenland-says.html (visited October 9, 2016).

[29] M. Byers, J. Baker, *International Law...*, p. 12.

authors even indirectly suggest that this Danish argument is unreliable, since the indigenous inhabitants of the Thule region – the Inughuit – had their historic hunting grounds extending from Cape York in the south to the Humboldt Glacier in the north, which is quite far south from Hans Island[30].

Thus leaving all such arguments aside, it should be stated after Stevenson[31] and Breyer[32] that Hans Island was not an issue until the discussion to determine the maritime boundary between Canada and Greenland in the early 1970s. No activity prior to that time aimed on establishing a title to Hans Island of either of the states has been reported. Danes and Canadians seem not to agree whether any geological Canadian activity really took place on the Island in the 1950s[33]; but if the doctrine of occupation is to be considered as being applicable, it is only the direct action of the state with a clear intention to establish sovereignty rights over a territory that matters. Since neither of the contesting parties had ever pointed out any direct action that could be regarded as such, it can be presumed with a high degree of certainty that no such action ever took place before the dispute arose on the occasion of establishing the maritime border in the Nares Strait. Similar opinion was expressed by Byers, who stated that it is possible that neither state has perfected its title and that Hans Island might never have been colonized[34]. Therefore it seems justified to think that, at least until that time, Hans Island was in fact a small portion of land under no sovereign power. Byers suggested that it was the Inuit who arguably retain any pre-existing, pre-colonial rights[35]. However, according to the long-established approach to the doctrines concerning acquisition of sovereign rights[36], this does not imply the exclusion of such a territory from the possibility of occupation by a state.

Another important question arises from what happened during the negotiations prior to the signing of the delimitation of the continental shelf agreement on December 17, 1973. Since both states couldn't agree on the status of the Island, it is rather clear that they both considered it as their possession. In other words it can be stated that both Canada and Denmark did not, and furthermore, do not consider Hans Island to be *terra nullius*. However, this fact should not have any influence on recognizing the Island as belonging to no-one, since, as was justi-

[30] J. Cavell, J. Noakes, *Acts of Occupation. Canada and the Arctic Sovereignty 1918–25*, University of British Columbia Press, Vancouver 2010.

[31] Ch. Stevenson, *Hans off!...*, p. 265.

[32] M. Byers, J. Baker, *International Law...*, pp. 11–12.

[33] P. R. Dawes, T. Tukiainen, *Hans Ø, celebrated island of Nares Strait between Greenland and Canada: from dog-sledge to satellite mapping*, "Geological Survey of Denmark and Greenland Bulletin" 2008, Vol. 15, p. 77.

[34] M. Byers, *Creative thinking...*

[35] *Ibidem*.

[36] L. Oppenheim, H. Lauterpacht, *International Law...*, p. 555; G. von Glahn, *Law Among Nations. An Introduction to Public International Law*, New York–London 1981, p. 316.

fied above, no actions happening before the realisation of the disagreement seem to establish any title to it.

4. CONDITIONS OF HANS ISLAND AND THEIR RELEVANCE TO THE PROBLEM OF OCCUPATION

Hans Island (80°49'35'N, 66°27'35'W), a rock with an area of just 1.3 square km, lies almost exactly in the middle of the Kennedy Channel – a narrow passage considered to be the part of a wider geographical entity, which is the Nares Strait, separating Greenland from Canadian Ellesmere Island. It is uninhabited and there is no evidence that it was ever inhabited at all. Only abovementioned Inuit hunters may have made some occasional visits there, allegedly naming the islet Tartupaluk, meaning "kidney shaped place"[37]. The weather conditions on the Island are as harsh as can be expected in that part of the Arctic and the tiny surface makes it rather pointless to establish any permanent settlement. Thinking about the climate of the discussed area we should bear in mind that the short analyses of Greenland's climate was a part of the PCIJ's reasoning in the Eastern Greenland case[38].

All these facts combined justify a thesis, that the circumstances of this case can be seen as "certain and rare" of that kind that the occupation of such territory could be "little more than symbolic"[39]. From all the examples given to support the thesis that in some cases merely symbolic occupation could be almost just enough to establish a valid title, the one of Bouvet Island seems to be relevant. In both cases we are dealing with relatively small, uninhabited circumpolar islands. The fact that Bouvet Island is more than 40 times bigger does not hamper this comparison. Moreover, Hans Island as a piece of rock is in this aspect even less likely to be suitable for any settlement purposes. The more crucial difference is the unique remoteness of the Bouvet Island, which is the piece of land the farthest from any other land on the entire Earth. That very special condition above all justifies the possibility of occupying this territory by purely symbolic action. To the contrary, Hans Island lies very close to two great islands and relatively close to permanent settlements on Greenland and on Ellesmere Island as well. The whole population of the latter consists of only c. 140 men, so it is clear that the closest more considerably populated places are under Danish sovereignty. All these conditions have

[37] J. P. Wilkinson, Gudmandsen P., Hanson S., Saldo R., Samelson R. M., *Hans Island: Meteorological Data From an International Borderline*, "Eos" 2009, Vol. 90, issue 22, p. 190.

[38] PCIJ (Permanent Court of International Justice) 1933. Series A/B Judgments, orders and advisory opinions. Fascicule No. 53, Legal Status of Eastern Greenland.

[39] As cited above (note 9) after M. N. Shaw.

crucial importance for finding whether the case of Hans Island could be considered as special like the Clipperton or Bouvet Islands. If we acknowledge such a similarity, a consequence should be the recognition of a possibility to occupy Hans Island by means of a symbolic action conducted by a government with the clear intention of gaining sovereign rights.

5. POSSIBILITY OF THE SYMBOLIC OCCUPATION

In the delimitation agreement of 1973 Hans Island was simply treated as a whole in the map and seeking the solution to the dispute was postponed. Nothing significant happened on or around the Island until the early 1980s, when, Canadian company, Dome Petroleum made a series of research trips, for which it was granted permission from the Canadian government[40].

The first governmental action with a very clear intension of establishing or confirming the sovereignty took place on July 28, 1984 when Denmark's minister for Greenland Tom Høyem flew to the Island on board a helicopter and hoisted a Danish flag[41]. This action should not be undervalued due to at least two reasons. Firstly, the action was performed by the official undoubtedly competent to present the position and intentions of the Danish government. Secondly, the hosting of a national flag has traditionally been considered as an evident demonstration of state's intention towards no man's land. Erection of national or dynastic symbols was a method of taking a piece of land into possession at least since the times of Henry the Seafarer and has been present in the states' practice ever since. As in the Clipperton Island arbitration, in which the winning claim was based on the facts of the hoisting of a French flag and publication of the proclamation of sovereignty, it could in special circumstances be considered as sufficient to establish a valid title. A more recent example of hoisting a flag as a means of creating a sovereignty title would be that of the island of Rockall and its annexation by the United Kingdom in 1955[42]. The case of this islet, even smaller than Hans Island, also bears strong resemblance to it. Although Britain is the only power that has ever performed any occupying actions on this rock, her title is contested by at least Denmark, Iceland and – probably most often – by Ireland[43]. Nevertheless, if the fact of waving the Union Jack by Royal Marines may be considered as sufficient to create British title to Rockall,

[40] Ch. Stevenson, *Hans off!...*, pp. 266–267.

[41] Supra note; M. Byers, J. Baker, *International Law...*, p. 13.

[42] S. A. Royle, *"This Mere Speck in the Surface of the Waters": Rockall Aka Waveland*, "Shima: The International Journal of Research into Island Cultures" 2014, Vol. 8, No. 1, p. 73.

[43] See: B. Heffernan, *Our Navy's show of force off Rockall*, "Independent.ie", October 13, 2012, accessed at http://www.independent.ie/irish-news/our-navys-show-of-force-off-rockall-28892820.html (visited October 9, 2016).

then the fact of waving the Dannebrog by minister Høyem in certain circumstances could be considered as an act of symbolic occupation as well.

Obviously, it is not the purpose of this article to firmly state that by this very act Denmark gained sovereign right to Hans Island. Firstly, it should be presumed that Hans Island was suitable for merely symbolic occupation. Secondly, there are some serious doubts surrounding this event. As was described above, Denmark seem to express the view that it holds the title to the Island "since always", which means at least since the time when its sovereignty over the whole Greenland was finally and indisputably recognized due to the judgment of the PCIJ. If so, the act of July 28, 1984 shall be considered not as being committed with an intention to occupy, but with just an intention to demonstrate the already existing rights. Minister Høyem himself seems to regard his helicopter trip as such[44] and we can assume that the Kingdom of Denmark has never intended to recognize this event as an act of occupation of no-man's land. The second blow to potential interpretation of minister's Høyem's visit as such an act was delivered by a subsequent Canadian protest. Such a responding action can be sufficient to prevent the acquisition of sovereign rights by another country, yet it should be emphasised that various manifestations of subsequent conduct may have various consequences in different situations. Finally, the crucial issue of the critical date should be considered as well. In international law, the critical date is the point of time at the end of the period within which the material facts of a dispute are said to have occurred and after which the actions of the parties to a dispute can no longer affect the issue[45]. In Hans Island case it is most likely that the date of starting the negotiations prior to the signing of the delimitation of the continental shelf agreement would be considered as the critical date. If so, it would be clear that any action performed by any of the parties afterwards could not be considered of having any legal value.

6. CONCLUSION

When Christopher Stevenson thoroughly examined the Hans Island dispute from the legal point of view, he focused mostly on the issue of effective control[46]. My point is to emphasise that in certain circumstances searching for evidence of exercising effective control is unnecessary. Analyzing Hans Island's situation with reference to all the cases cited above leads to at least one firm conclusion. I would like to emphasise that this islet, due to its location, climate and unsuitabil-

[44] T. Høyem, *Mr. Graham...*

[45] L. F. E. Goldie, *The Critical Date*, "International and Comparative Law Quarterly" 1963, Vol. 12, issue 4, pp. 1251–1284.

[46] Above cited: Ch. Stevenson, *Hans off!...*

ity for settlement, possesses those certain rare characteristics that determine the possibility of symbolic occupation. The question, whether such symbolic occupation ever occurred remains open, yet the most plausible answer is negative. Its finalization should be supported by an accurate and comprehensive analysis of actions of the contesting parties, including those that are currently unknown to the public and hidden in the shadows of diplomatic offices. Conducting such analysis is of course far beyond aim of this paper and the competence or purpose of its author. Moreover, if the Hans Island dispute was ever to be resolved by the International Court of Justice or by means of arbitration, it is clearly possible that the ruling would be based, as Stevenson suggests, on equitable principles. Furthermore, it would be difficult and rather pointless to argue with the widely expressed expectations for a Dano-Canadian compromise.

Nevertheless, it is still worth realizing that legal doctrines and institutions do not simply vanish. Occupation by symbolic act is at first glance something archaic. It is reminiscent of the long-gone world of Portuguese sailors raising wooden and stone *padrões* on the coasts of Africa and Brazil or Abel Tasman carving pompous proclamations in the rocks of Australia. Indeed, every textbook of international law tells about the effective exercising of sovereignty. Yet Friedrich von der Heydte highlited that "as a matter of fact sovereign rights can be exercised only over human beings, in inhabited lands. It would be a misconstruction of the doctrine of effectiveness to say that sovereignty over completely uninhabited lands presupposes in every case actual occupation"[47]. These words were right and accurate not only seven years after Norwegian anexation of Bouvete Island, but can be still applicable today in the very up-to-date context of Arctic disputes. Even if we do not find a possibility to aply the doctrine in the discussed case, it is still possible that it would be handy in the context of some other remote piece of land in the northern circumpolar zone.

THE HANS ISLAND DISPUTE AND THE DOCTRINE OF OCCUPATION

Summary

The tiny Hans Island, claimed by both Canada and Denmark, is the latest disputed land in Arctic. The aim of this article is to analyse whether this sovereignty question can be resolved by referring to the doctrine of occupation. The methods used are historical analysis and the dogmatics of international law.

[47] F. A. von der Heydte, *Discovery*..., p. 463.

The historical examples and doctrinal views lead to the first level conclusion that in certain circumstances a land that belongs to no one can be occupied by a state merely by means of symbolic actions. Further considerations focus on the questions of whether Hans Island should be considered as possessing such certain qualities and if so, whether any of the contestants has ever performed any actions that can be interpreted as taking it into its possession. The conclusion points out that although it is very unlikely that analyzed solutions would be used to determine the fate of the Island, it is still crucial to realise that doctrines of international law, which may seems archaic, are to some extent still applicable and could be used in the Arctic disputes.

BIBLIOGRAPHY

Anonymous, *Russia laiys claim to vast area of Arctic*, "The Guardian", August 4, 2015, accessed at https://www.theguardian.com/world/2015/aug/04/russia-lays-claim-to--vast-areas-of-arctic-seabed (visited October 9, 2016)

Anonymous, *The Arctic. Frozen Conflict. Denmark claims the North Pole*, "The Economist", December 20, 2014, accessed at http://www.economist.com/news/international/21636756-denmark-claims-north-pole-frozen-conflict (visited October 9, 2016)

Barkham P., *Why does Denmark think it can lay claim to the north pole?*, "The Guardian", December 16, 2014, accessed at http://www.theguardian.com/world/shortcuts/2014/dec/16/why-denmark-thinks-it-can-lay-claim-to-north-pole on (visited October 9, 2016)

Boswell R., *Hans Island was ours first, Greenland says*, "Ottawa Citizen", May 29, 2008, accessed at http://byers.typepad.com/arctic/2008/12/hans-island-was-ours-first-greenland-says.html (visited October 9, 2016)

Byers M., Baker J., *International Law and the Arctic*, Cambridge University Press 2013

Byers M., *Creative thinking on sovereignty*, July 3, 2014, accessed at http://byers.typepad.com/arctic/2014/03/creative-thinking-on-sovereignty.html#more (visited October 9, 2016)

Cavell J., *Historical Evidence and the Eastern Greenland Case*, "Arctic" 2008, Vol. 61, No. 4

Cavell J., *Sector Claims and Counter-Claims: Joseph Elzéar Bernier, the Canadian Government, and Arctic Sovereignty, 1898–1934*, "Polar Record" 2014, Vol. 50, issue 3

Cavell J., Noakes J., *Acts of Occupation. Canada and the Arctic Sovereignty 1918–25*, University of British Columbia Press, Vancouver 2010

Dawes P. R., Tukiainen T., *Hans Ø, celebrated island of Nares Strait between Greenland and Canada: from dog-sledge to satellite mapping*, "Geological Survey of Denmark and Greenland Bulletin" 2008, Vol. 15

Frozen Conflict. Denmark claims the North Pole, "The Economist", December 20, 2014 accessed at http://www.economist.com/news/international/21636756-denmark-claims-north-pole-frozen-conflict (visited October 9, 2016)

Garver R., *Move Over, Santa: Putin Claims the North Pole*, "The Fiscal Times", August 6, 2015, accessed at http://www.cnbc.com/2015/08/06/move-over-santa-putin-claims-the-north-pole.html (visited October 9, 2016)

Goldie L. F. E., *The Critical Date*, "International and Comparative Law Quarterly" 1963, Vol. 12, issue 4

Grydehøj A., Grydehøj A., Ackrén M., *The Globalization of the Arctic: Negotiating Sovereignty and Building Communities in Svalbard, Norway*, "Island Studies Journal" 2012, Vol. 7, No. 1

Grydehøj A., *Informal Diplomacy in Norway's Svalbard Policy: The Intersection of Local Community Development and Arctic International Relations*, "Global Change, Peace & Security" 2013, Vol. 26, No. 1

Harper K., *Give it to Denmark*, "The Globe and Mail", July 27, 2005, accessed at http://www.theglobeandmail.com/globe-debate/letters/give-it-to-denmark/article4119567/ (visited October 9, 2016)

Heffernan B., *Our Navy's show of force off Rockall*, "Independent.ie", October 13, 2012, accessed at http://www.independent.ie/irish-news/our-navys-show-of-force-off-rockall-28892820.html (visited October 9, 2016)

Høyem T., *Mr. Graham, you should have told us you were coming*, "Globe and Mail", July 29, 2005, accessed at http://byers.typepad.com/arctic/2008/11/mr-graham-you-should-have-told-us-you-were-coming.html#more (visited October 9, 2016)

Hyde Ch. C., *The Case Concerning the Legal Status of Eastern Greenland*, "The American Journal of International Law" 1933, Vol. 27, No. 4

Ibbitson J., *Dispute over Hans Island nears resolution. Now for the Beaufort Sea*, "Globe and Mail", January 26, 2011, accessed at http://www.theglobeandmail.com/news/politics/dispute-over-hans-island-nears-resolution-now-for-the-beaufort-sea/article563692/ (visited October 9, 2016)

Judicial Decision Involving Questions of International Law. France–Mexico, "The American Journal of International Law" 1932, Vol. 26, No. 2

Justinian, "Digest" (D. 41.1.3.pr) and "Institutions" (I. 2.1.12)

Kikkert P., Lackenbauer P. W., *Legal Appraisals of Canada's Arctic Sovereignty. Key Documents 1905–56*, Center for Military and Strategic Studies, University of Calgary; Center of Foreign Policy and Federalism, St. Jerome Univeristy 2014, No. 2

Killaby G., *"Great Game in Cold Climate". Canada's Arctic Sovereignty in Question*, "Canadian Military Journal", Winter 2005–2006

Kramer A. E., *Russia Stakes New Claim to Expanse in the Arctic*, "The New York Times", August 4, 2015, accessed at http://www.nytimes.com/2015/08/05/world/europe/kremlin-stakes-claim-to-arctic-expanse-and-its-resources.html (visited October 9, 2016)

Kristensen P. E. D., *Ambassador of Denmark, Letter to the Editor*, "Ottawa Citizen", July 28, 2005, accessed at http://byers.typepad.com/arctic/2009/02/hans-island-denmark--responds.html (visited October 9, 2016)

Lesaffer R., *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, "The European Journal of International Law" 2005, Vol. 16

Mikkelsen O., *Denmark to claim slice of continental shelf in Arctic Ocean*, "Reuters", December 15, 2016, accessed at http://www.reuters.com/article/2014/12/15/us-denmark-arctic-idUSKBN0JT0S620141215 (visited October 9, 2016)

Oppenheim L., Lauterpacht H., *International Law. A Treatise*, London–New York–Toronto 1958

Orent P., Reinsch P., *Sovereignty over Islands in the Pacific*, "The American Journal of International Law" 1941, Vol. 35, No. 3

PCIJ (Permanent Court of International Justice) 1933. Series A/B Judgments, orders and advisory opinions. Fascicule No. 53, Legal Status of Eastern Greenland

Royle S. A., *"This Mere Speck in the Surface of the Waters": Rockall Aka Waveland*, "Shima: The International Journal of Research into Island Cultures" 2014, Vol. 8, No. 1

Russia laiys claim to vast area of Arctic, "The Guardian", August 4, 2015, accessed at https://www.theguardian.com/world/2015/aug/04/russia-lays-claim-to-vast-areas-of--arctic-seabed (visited October 9, 2016)

Shaw M. N., *International Law*, 5th ed., Cambridge University Press 2003

Skarstein F., *Erik the Red's Land: the land that never was*, "Polar Research" 2006, Vol. 25, No. 2

Smedal G., *Acquisition of Sovereignty over Polar Areas*, "Skriften om Svalbard og Oshavet" 1931, Vol. 36

Stevenson Ch., *Hans off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution*, "Boston College International & Comparative Law Review" 2007, Vol. 30

Truyol y Serra A., *The Discovery of the New World and International Law*, "University of Toledo Law Review" 1971, No. 43

Ulfstein G., *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty*, Scandinavian University Press, Oslo 1995

von der Heydte F. A., *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, "The American Journal of International Law" 1935, Vol. 29, No. 3

von Glahn G., *Law Among Nations. An Introduction to Public International Law*, New York–London 1981

Wilkinson J. P., Gudmandsen P., Hanson S., Saldo R., Samelson R. M., *Hans Island: Meteorological Data From an International Borderline*, "Eos" 2009, Vol. 90, issue 22

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SŁOWA KLUCZOWE

Wyspa Hans, okupacja, prawo międzynarodowe, suwerenność w Arktyce, Dania, Kanada