THE UNITED STATES CLAIM TO WRANGEL ISLAND: THE DORMANCY SHOULD END

At the base of international law lies the notion that a State occupies a defined part of the earth's surface.[1] Upon this foundation international law prescribes the legal modes of territorial acquisition,[2] among which discovery, occupation, conquest, cession, accretion, assimilation, and prescription have been accepted under customary international law.[3] The rules governing these modes are derived from two considerations: the prior legal status of the territory, and the way in which the claimant state obtained its possession and control.[4]

This Comment evaluates the competing United States and Soviet claims to Wrangel Island. Wrangel Island is located eighty nautical miles north and 160 nautical miles west of the Siberian coast.[5] It is a habitable island surrounded by frozen seas. Presently the island hosts a small Russian colony engaged in scientific research.[6] It is hoped that the legal arguments presented here will facilitate a reconsideration of the presently dormant United States claim to the Island.

As far back as 1925 Wrangel Island was considered by explorers to be a strategic site for an air base, as the shortest air routes between the industrial centers of the world cross through the Arctic Circle.[7] For years conflicting claims to this island by the world's two super-powers have been unresolved. The Soviet's have maintained possession since 1924 when they forcibly removed a United States colony, and for the past fifty-six years the United States' claim to the island has remained dormant. In light of recent United

1. J.L. BRIERLY, THE LAW OF NATIONS 163 (1963).

2. 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 3916 (1940).

3. C. RHYNE, INTERNATIONAL LAW 102 (1971); J. L. BRIERLY, LAW OF NATIONS, 91-102 (6th ed. 1963); W. BISHOP, INTERNATIONAL LAW 400-21 (1971); 2 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1028-1231 (1971); G. VON GLAHN, LAW AMONG NATIONS 273 (1976).

4. M. SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 321 (1968).

5. 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 464 (1940) [hereinafter cited as HACKWORTH].

6. V. STEPHANSSON, THE FRIENDLY ARCTIC 693-96 (1969); Y. SEMYONOV, SIBERIA 385 (1963).

7. D.M. LE BOURDAIS, NORTHWARD ON THE NEW FRONTIER 16 (1931) [hereinafter cited as LE BOURDAIS]. *See also* ASIA MAGAZINE 291 (April 1925).

States-Soviet confrontations and Soviet nuclear deployment, the island has acquired a mounting strategic significance supporting a reexamination of claims to this territory.

United States-Soviet concern over the dangers of nuclear development and deployment have been manifested by the negotiation of a SALT II Treaty.[8] Although SALT II has an uncertain future, the issues discussed during negotiations illustrate the potential utility of United States sovereignty over Wrangel Island.[9] Throughout the United States Senate ratification hearings opponents of the treaty contended that verification arrangements were inadequate.[10] They emphasized that the loss of the United States' listening post in Iran, where Soviet missle deployment had been monitored, greatly reduces United States verification capabilities.[11] This loss of the Iranian listening post provides the impetus for the United States to reassess its verification capabilities and a unique opportunity to reevaluate the United States policy towards Wrangel Island.

Article XV of the Salt II Agreement enumerated the various methods for verifying compliance with the Treaty's terms.[12] The technical means of verification consist of photo-reconnaissance satellites, land based radar, and other intelligence systems based on ships and aircraft.[13] An integral part of United States verification procedures consists of land based radar stations.[14] Geographically,

8. Secretary of State Cyrus Vance, Letter of Submittal June 21, 1979, *reprinted in* 18 INT'L LEGAL MATS. 1119 (1979). "I firmly believe that SALT II Treaty will measurably strengthen strategic stability and help reduce the risk of nuclear war. It is a major contribution to the national security of the United States."

9. Secretary of State Cyrus Vance, Letter to President of Submittal of SALT II Agreement, June 21, 1979, United States Department of State Publication 8984, SALT II Agreement, Vienna, June 18, 1979, Selected Documents No. 12A, at 3-50, *reprinted in* 18 INT'L LEGAL MATS. 1119 (1979) [hereinafter cited as Salt II Selected Documents]. "Article XV sets forth important rules which facilitate verification of compliance with the provisions of the Treaty. To verify compliance, each party will use intelligence gathering capabilities known as national technical means. These include highly sophisticated technical equipment such as photo-reconnaissance satellites, land based radars, radar and other intelligence systems based on ships and aircraft which we use to monitor Soviet missile tests."

10. Lall, *Salt and the Coming Public Debate*, 65 WOMAN LAW. J. 29 (1979). *See also* Lodal, *SALT II and American Security*, 57 FOR. AFF. 245 (1978-79).

11. Lall, *supra* note 10, at 29.

12. Salt II Selected Documents, *supra* note 9, at 1155-56. Article XV of the SALT II Treaty states that: "For the purposes of providing assurance of compliance with the provisions of the Treaty, each party shall use national technical means of verification at its disposal in a manner consistent with the generally recognized principles of international law."

13. *See* note 9 *supra*.

14. *Id.*

Wrangel Island penetrates 160 miles into the Russian territorial sphere.[15] An American radar station here would increase the United States' ability to monitor nuclear deployment in the Soviet Union and reduce the risk of nuclear war.[16]

In examining the United States' rights to Wrangel Island this Comment utilizes the classical analysis of territorial acquisition under international law. First, the historical background of Wrangel Island will be discussed and the competing claims to the Island will be identified. The body of the Comment will analyze these claims in connection with the accepted modes of territorial acquisition. The United States and Soviet claims will then be evaluated for their strengths and weaknesses under international law. The reasons for examining the United States title to Wrangel Island will be reiterated before concluding with suggestions on implementing the United States claim.

I. HISTORICAL BACKGROUND OF WRANGEL ISLAND

The first recorded mention of Wrangel Island came in 1823 when Baron von Wrangell, a Russian explorer postulated the existence of the Island.[17] First sighted in 1849 by a British ship,[18] the island was later named after the Russian explorer by the captain of an American whaling ship in 1867.[19] During this same year, the United States and Russia entered into a treaty which ceded the Alaskan territory to the United States. However, there was no mention of Wrangel Island in the treaty.[20]

It was not until 1881 that the first recorded landing and claim to Wrangel Island was made by Captain Calvin Hooper of the United States Revenue Cutter Service (now the United States Coast Guard).[21] Hooper was captain of the *Corwin* and commander of

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15. *See* note 5 *supra*.

16. *See* note 8 *supra*.

17. Hooper, *The Discovery of Wrangel Island*, *reprinted in* 24 OCCASIONAL PAPERS OF THE CALIFORNIA ACADEMY OF SCIENCES 24 (February 21, 1956) [hereinafter cited as Hooper].

18. Letter by William Phillips for the Secretary of State to the Ambassador to Great Britain, Sept. 12, 1922, *reprinted in* 1 FOREIGN RELATIONS DOCUMENTS 281 (1923).

19. *Id.*

20. Cession of Alaska, *done*, June 20, 1867, 15 Stat. 539, T.S. No. 301 [hereinafter cited as Cession of Alaska].

21. "As soon as the official shore party had completed the formalities of discovery, a careful search was made along the shore in each direction for evidences of a landing of any kind. After several hours of searching it became impossible to remain at anchor any longer. Leaving an American flag flying and a complete record of their visit the *Corwin* now worked

the Bering Sea Patrol. The United States Congress acknowledged Hooper's discovery by publishing his submitted report as Senate Executive Document No. 204.[22] Three weeks later another United States vessel, the *Rodgers*, landed at Wrangel Island and found the American flag left by Hooper. The crew occupied the Island for three weeks and carried out an extensive geographic survey, making the only map of the Island available for the next thirty-three years.[23]

No other landing on Wrangel Island was recorded until 1911[24] when the crews of two Russian ice-breakers, the *Taimuir* and *Vaigach* went ashore. After constructing a thirty-five foot beacon, the Russians abandoned the island.[25]

In 1914 the crew of the *Karluk*, one of the three boats in a Vilhjalmur Stephansson geological expedition, was marooned on Wrangel Island[26] when the ice trapped their boat and carried it to the island's shores.[27] The captain, an American citizen, travelled by foot to Siberia for help. The remaining crew members were Canadian, and during their six-month wait they claimed the Island for the British Empire.[28] They did, however, voluntarily leave when an American ship came to their rescue.[29]

In 1916 the Russians issued a diplomatic proclamation in which they claimed sovereignty over certain Arctic regions under a "sector" theory. Wrangel Island was within one of the regions they claimed.[30]

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her way out to the lead . . . outside the Soviet Union, geographers and historians agree that an American Calvin L. Hooper, commanding the United States Revenue Cutter, Corwin, was the first to set foot on this arctic wasteland and claim it in the name of his country." Hooper, *supra* note 17, at 6-7.

22. *Id.* at 11.

23. V. STEPHANSSON, THE ADVENTURE OF WRANGEL ISLAND 20 (1925) [hereinafter cited as STEPHANSSON].

24. *Id.* at 395; GEOGRAPHICAL JOURNAL OF THE ROYAL GEOGRAPHICAL SOCIETY OF LONDON (Dec. 1923).

25. STEPHANSSON, *supra* note 23, at 22.

26. *Id.* at 24.

27. *Id.*

28. *Id.* at 25.

29. *Id.*

30. *Id.* at 22-23.

> The Imperial Government takes this occasion to set forth that it considers as making part of the empire the islands Henriette, Jeanette, Bennett, Herald and Oujedinenia, which with the New Siberian Islands, Wrangel and others situated near the Asiatic coast of the Empire, form an extension toward the north of the continental shelf of Siberia.

Id.

Ignoring the Russian claims the *Silver Wave*, an American sloop, landed at Wrangel Island in 1921. This expedition, promoted by Stephansson, set out to further explore the resource and airbase potential of Wrangel Island.[31] Unfortunately, heavily frozen waters surrounding the Island delayed their supply ship, the *Donaldson*, until September, 1923, at which time the only survivor of the *Silver Wave* expedition was an Eskimo woman. The *Donaldson* left ashore a group of American whites and American Eskimos to colonize the Island.[32] This colony, another Stephansson enterprise, began trapping, hunting, and prospecting for a profit.[33] Early in 1924 Stephansson sold the Arctic Exploration and Development Company along with his economic rights on Wrangel Island to Carl Lomen, an American citizen. Lomen, who became the new employer of the American colony on Wrangel Island, re-asserted America's claims, assumed supervision over the fur trapping, and began planning for walrusing and sealing operations.[34] In an attempt to provide supplies for the colony[35] three American Coast Guard vessels tried in vain to penetrate the frozen waters and reach the Island early in the summer of 1924.[36] Later that summer a Soviet gunboat, the *Red October*, arrived at Wrangel Island and forcibly removed the American colony.[37] The United States government did not immediately object to or confront the Soviet Union concerning the incident. Four years later, however, the United States government expressly rejected the Soviet "sector" theory as a basis for acquiring Arctic territory.[38]

The next recorded expedition to Wrangel Island was made in 1935 by a Soviet ship, the *Krasin*, led by Captain Katmanov.[39] By

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31. *Id.* at 67-90.
32. *Id.* at 298.
33. *Id.*
34. *Id.* at 302.
35. New York Times, Oct. 18, 1924; STEPHANSSON, *supra* note 23, at 307.
36. *Id.*
37. *Id.*
38. HACKWORTH, *supra* note 5, at 464, contains excerpts from a letter from Secretary of Navy Adams to Secretary of State Stimson, Sept. 23, 1929, regarding the Department of the Navy's reaction to the "Sector Theory"; partitioning the Arctic region into sectors of five contigous countries: United States, Canada, Denmark, Norway, Russia. It stated

> The course of action proposed . . .
> (b) contains no justification for claiming sovereignty over large areas of the world's surface
> (c) violated the long recognized custom of establishing sovereignty over territory by right of discovery.

39. "He succeeded in passing into difficult waters surrounding Wrangel and Herald Islands. The expedition covered areas west and east of Wrangel. Better knowledge of

1941 the Soviets had set up scientific laboratories on the Island and it has been occupied by a small colony of Eskimos, Chukchi, and White Russians ever since.[40]

Both the Soviet Union and the United States may look to historical events in support of their claims to Wrangel Island. Consequently, each nation's claims will be analyzed for their legal significance under the modes of territorial acquisition in customary international law.[41]

The events on which the Soviet Union may base their claim are the 1822-1823 Arctic expeditions of Baron von Wrangell, the Alaskan Treaty of 1867, the 1911 landing of the *Taimuir* and the *Vaigach*, a 1916 territorial proclamation, and Russian influence over the Island since 1924.

The United States may justify its claim to Wrangel Island through the discovery by Captain Hooper in 1881, the subsequent landing of the *Rodgers*, the marooning of the *Karluk* in 1914, the American occupation in 1923, the purchase of property and economic rights in 1924, and the United States rejection of the "sector" theory in 1928.

II. APPLICATION OF INTERNATIONAL LAW TO THE CLAIMS MADE BY RUSSIA AND THE UNITED STATES

The foundations and sources of international law utilized in this context are enumerated in Article 38 of the Statute of the International Court of Justice.[42] These sources consist of treaties, customary international law, principles of international law, judicial writing, and state practice.[43]

Wrangel and Herald Islands as well as of the waters surrounding them was the result of the undertaking." T.A. TARACOUZIO, SOVIETS IN THE ARCTIC 100 (1938).

40. *See* note 6 *supra*.

41. The accepted modes of territorial acquisition have been discovery, occupation, accretion, cession, conquest, assimilation, and prescription. *See* note 3 *supra* and accompanying text.

42. Statute of the International Court of Justice, Annexed to the Charter of the United Nations, *done* June 26, 1945, 59 Stat. 1055, T.S. No. 993 25 (June 26, 1945), Article 38 states:

> 1. The Court whose function is to decide in accordance with international law such disputes that are submitted to it shall apply:
> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) international custom, as evidence of a general practice accepted as law;
> c) general principles of law recognized by civilized nations;
> d) subject to the provisions of Article 59, judicial decisions and teaching of the most highly qualified publicists of various nations, as subsidiary means for determination of rules of law.

43. *Id.*

In the absence of a treaty the accepted means of territorial acquisition come under customary international law.[44] An analysis at this level must include considerations of the legal status of the territory and the way in which possession was obtained.[45] In addition, the longevity of some of the claims to Wrangel Island makes it necessary to apply the legal doctrines of several time periods. In other words, when discussing a particular claim, its significance must be appreciated in light of the law contemporary with the claim, as well as with present legal doctrine.[46]

A. Discovery

There are no treaties between the Soviet Union, the United States, or any other nation which clarify the discovery rights over Wrangel Island. Customary legal doctrine must therefore be examined to determine the legitimacy of proposed claims. Historically and customarily discovery has been given legal significance in territorial claims[47] and the formal taking of possession—the symbolic act[48]—has generally been regarded as being sufficient to establish an immediate right of sovereignty over areas claimed.[49] This was an accepted principle under this customary mode of territorial acquisition.[50]

As far back as the sixteenth century Portuguese discoveries were characterized by the construction of physical signs of possession, usually without any formal recorded declarations.[51] In 1523 Charles V of Spain, in a letter to the Spanish Ambassador in Portugal, stated that taking possession of discoveries by explorers called in practice for nothing more than symbolic formalities. Effective occupation or control was unnecessary.[52] In France, the erection of a cross or pillar bearing a metal plate with some suitable inscription

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44. *See* note 3 *supra*.

45. *See* note 4 *supra*.

46. 1 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 290 (1957).

47. A. KELLER, O. LISSITZYN, & F. MANN, CREATION OF RIGHTS OF SOVEREIGNTY THROUGH SYMBOLIC ACTS 4 (1938) [hereinafter cited as KELLER, LISSITZYN & MANN]. Discovery consists of a purposeful act of exploration or navigation accompanied by a visual apprehension, a landing, and some other marking or recording such visit, but not acts expressive of possession.

48. *Id.* at 148.

49. *Id.*

50. *Id.*

51. *Id.* at 28-32. *See also* Republication of the Ambassador of Portugal (June 7, 1562) GREAT BRITAIN CALENDAR OF STATE PAPERS, Foreign Series, at 75 (1562).

52. KELLER, LISSITZYN & MANN, *supra* note 47, at 34.

was deemed quite sufficient to establish valid title to a claimed area.[53] In 1776 Captain Cook received secret instructions from his superiors to take possession of any lands he might discover for England. In uninhabited areas he was instructed to leave "proper marks and inscriptions as first discoverers and possessors."[54]

Recent writers have maintained that these acts of discovery gave an 'inchoate' title to territory; during the time necessary to establish effective possession after discovery, other states are legally excluded from occupying the territory concerned.[55] Historically, discovery gave an immediate title to territory, whereas modern principles postulate an uninterrupted right to acquire title after discovery.

The first chronological claim to Wrangel Island originates with the Russian Polar Seas expedition led by Baron von Wrangell in 1822-1823. However, Baron von Wrangell neither landed on, nor sighted the Island on this voyage.[56] Under customary acts of discovery and European state practice the activities of Baron von Wrangell would appear insufficient to support a legal claim to Wrangel Island.[57] Wrangell conceded this by his own admission that "with a painful feeling of the impossibility of overcoming the obstacles with which nature opposed us, our last hope vanished of discovering the land which we yet believe to exist."[58]

The next claim to Wrangel Island, again a Soviet one, is based upon their theory that the Island was implicitly granted to them under the terms of 1867 Treaty ceding Alaska to the United States. There is, however, no language in the treaty which could be construed as expressly or impliedly granting Russia dominion over the

53. *Id.* at 131.

54. *Id.* at 96. *See also* "Secret Instructions For Captain James Cook, Commander of His Majesty's Sloop and Resolution," Navy Records Society III, 357-61.

55. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 214-15 (1952).

56. Hooper, *supra* note 17, at 24. Many years later the Soviets claimed that Lieutenant Wrangell had actually discovered the island but unfortunately for their claim, Wrangell himself in his book, THE NARRATIVE OF A VOYAGE TO THE POLAR SEAS IN THE YEARS 1821, 1822, AND 1823, wrote:

> with a painful feeling of the impossibility of overcoming the obstacle with which nature has opposed us, our hopes vanished of discovering the land which we yet believe to exist. . . we had done what duty and honor demanded, further attempts would have been absolutely hopeless and I decided to return.

57. Accepted modes of territorial acquisition consist of: discovery occupation, conquest, cession, accretion, and prescription. Baron von Wrangell's expedition did not satisfy any of these modes. *See* note 3 *supra* and accompanying text.

58. *See* note 56 *supra*.

lands in the vicinity of Wrangel Island.[59] Article I of the treaty, the pertinent provision, merely sets forth the limits of the territory expressly ceded to the United States.[60] Russia was not then advocating any claim to Wrangel Island nor was the United States yielding any rights to subsequently claim the Island. This treaty, which solely concerns the possession of the Alaskan Territory, is still in force today.[61]

The first United States claim to Wrangel Island was established by the landing of Captain Hooper in 1881.[62] Hooper, upon discovery, claimed the Island as a United States possession by manifesting the symbolic formalities accepted under both customary international law and the historic practices of European nations.[63] His acts of discovery consisted of planting the American flag, making a proclamation of United States possession, and leaving a complete record of the landing.[64]

In 1931 discovery was held to give valid territorial title in the international community when a dispute between France and Mexico concerning the possession of Clipperton Island was arbitrated by the King of Italy.[65] The King ruled in favor of the French, supporting their territorial claim on the basis of discovery.[66] The facts are as follows: in 1851 a French naval officer sailed by the coast of Clipperton Island and drew up an instrument claiming the island for France. Crew members landed on the island and recorded their findings. No record of any other occupation was made until 1897 when the island became inhabited by Mexicans claiming an ancient right to the island. The Mexicans contended that the island was first discovered by the Spanish and that the title passed to Mexico as the successor of Spain.[67] After years of dispute between Mexico and France the question of sover-

59. Cession of Alaska, *supra* note 20.

60. *Id.* Article I: The western limit within which the territories and dominion conveyed, are contained, pass through a point in Behring's [sic] straits on the parallel of sixty-five degrees thirty minutes north latitude. . . ."

61. *Id.*

62. Hooper, *supra* note 17, at 4-6. "Captain Hooper's sailing instructions, his preparations, and the details of the voyage which led to the discovery of the new land in the Arctic." *See also* notes 21 and 22 *supra*.

63. *See* notes 47-54 *supra*.

64. *See* note 18 *supra*.

65. Arbitral Award of His Majesty the King of Italy on the Subject of the Differences Relative to the Sovereignty over Clipperton Island (France-Mexico) Jan. 28, 1931, *reprinted in* 26 AM. J. INT'L L. 390 (1932).

66. *Id.*

67. *Id.*

eignty over the island was submitted for arbitration by the King of Italy.[68]

When the Mexicans could not bring forth any proof of the Spanish discovery, the King ruled in favor of France. In his decision the King stated: "From the first moment when a state makes its appearance in an uninhabited territory the taking of possession must be considered as accomplished and the occupation thereby completed."[69]

The facts surrounding the claims to Clipperton Island are analagous to those relating to the discovery of Wrangel Island. Hooper's landing on Wrangel Island constituted an "appearance" on an uninhabited territory; his landing represented the first taking of possession of the island. The fact that he and his crew subsequently left the Island does not diminish the United States claim, just as the French departure from Clipperton Island did not diminish their claim. According to this judicial application of customary international law, Hooper's discovery of Wrangel Island in 1881 would give the United States legal title to the Island.

The Soviet Union also accepts custom as a primary source of international law.[70] Tunkin, the prominent Russian jurist points out that customary international law is constantly being referred to in interstate relations[71] and that Soviet jurists support the custom of discovery as an accepted means of acquiring territory.[72] This is exhibited in the Soviet claim to Antarctica which is based on discovery and exploration.[73] According to Tunkin, when "recognizing a norm of international law, a state takes upon itself the obligation of observing that rule of conduct."[74] Since the Soviets have accepted the custom of discovery and have implemented it in their own state

68. *Id.*

69. *Id.* at 393.

70. R. ERICKSON, INTERNATIONAL LAW AND THE REVOLUTIONARY STATE 27 (1972) [hereinafter cited as ERICKSON].

71. G.I. TUNKIN, THEORY OF INTERNATIONAL LAW 113 (1974) [hereinafter cited as TUNKIN].

72. ERICKSON, *supra* note 70, at 260, *quoting from* Akademii nauk SSSR, Institut gosvdarstva; prava.

73. *Id.* at 127, *reprinted from "Russians Discovered Antarctica,"* Komsmolskaya Pravda (Komosomo Truth), Jan. 28, 1950, at 4. In 1950 the Komsomsolskaya Pravda (Komosomo Truth) stated the Russian claim to Antarctica:

> Our country is the lawful heir to the outstanding Russian geographical discoveries made in the South Polar Seas at the beginning of the 19th Century. Historically, the right of priority in the discovery and exploration of a number of Antarctic lands remains eternally with Russia and, by succession, with the U.S.S.R.

74. TUNKIN, *supra* note 71, at 124.

practice, they are expected to extend this custom to other nations as well. This includes accepting the United States claim to Wrangel Island on the basis of discovery.

Other nations, including the United States have also accepted discovery as a valid means of territorial acquisition. An example of this is the Guano Islands Act of 1856, in which the United States claimed certain islands in the Jamaica Strait.[75] Although the United States has never occupied some of the islands, it still maintains its rights on the basis of discovery.[76]

The French have claimed part of Antarctica (Adelie Land) based on its discovery in 1840 by French explorer Dumont d'Urville.[77] This claim was formally announced to the United States in 1939 through a dispatch from the French foreign office to the Department of State.[78] Canada presently claims sovereignty over many islands north of mainland North America. Some claims are based on occupation, others are based on discovery and exploration.[79]

A United States claim to Wrangel Island based on discovery is consistent with, and supported by, principles of international law, judicial awards and historic European, French, Canadian, Russian, and United States state practices.

B. Occupation/Abandonment

States can expect that if they first discover and then peacefully occupy a piece of territory with the intent of claiming it, that they have a legal right to subject it to their sovereignty.[80] The United States claim to Wrangel Island was therefore strengthened by the

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75. The Guano Island Acts of 1856, 48 U.S.C. § 1411 (1976):

> Whenever any citizens of the United States discovers a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof and occupies the same, such island, rock, or key, may at the discretion of the President, be considered appertaining to the United States.

76. 1975 DIG. U.S. PRAC. INT'L L. 93. A memorandum by Gordon B. Baldwin Counselor on International Law Department of State, Aug. 7, 1975.

> The question of what evidence suffices to show continuing claims to an island claimed in the 'Guano Act' has arisen in connection with Navassa Island an uninhabited isle in the Jamaica Straits. In 1906 the State Department insisted that; internationally speaking the United States retained its claim despite the failure to exploit or physically occupy it.

77. HACKWORTH, *supra* note 5, at 460 (taken from a letter from Counselor of Embassy (Wilson) to Secretary Hull no. 3896 Feb. 24, 1939).

78. *Id.*

79. J. SATUR, THE ARCTIC BASIN 10 (1969) (Artic Institute of North America).

80. ERICKSON, *supra* note 70, at 128. *See also* notes 49-54 *supra*.

1881 landing and occupation by the crew of the *Rodgers*, an American naval ship.[81]

Under customary international law a state may extend its sovereignty by the effective occupation of territories not under the jurisdiction of any other subject of international law.[82] Thus the United States, which maintained legal jurisdiction over Wrangel Island based on its discovery claim, was the only nation legally capable of extending its sovereignty on the basis of occupation. In 1933, the Permanent Court of International Justice adjudicated a territorial dispute between Norway and Denmark in a case denoted as the *Legal Status of Eastern Greenland* (*Eastern Greenland Decision*). In that case the Court indicated that territorial title based on occupation involves two elements: the intention and will to act as sovereign, and some actual exercise or display of authority.[83]

The degree of "effectiveness" required in occupation varies with the size, climate, and extent to which the territory is inhabited.[84] For example, it has been asserted that the necessity of permanent settlements in the polar regions should be relaxed.[85] This approach was expressed by the Court in its award of territorial rights to Denmark in the *East Greenland Decision*.[86] Another instance in which the requirements of occupation were relaxed is the *Island of Palmas* case. In awarding the Island to Holland, Max Huber, the arbitrator, stated:

> Manifestations of territorial sovereignty assume different forms according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact, at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily

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81. STEPHANSSON, *supra* note 23, at 20.

82. G. SCHWARZENBERGER, THE MANUAL OF INTERNATIONAL LAW 115 (1976) [hereinafter cited as SCHWARZENBERGER].

83. Legal Status of Eastern Greenland, [1933] P.C.I.J., *cited in* 6 H. LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 97 (1931-1932) [hereinafter cited as ANNUAL DIGEST].

84. SCHWARZENBERGER, *supra* note 82, at 115.

85. O. SVARLIEN, AN INTRODUCTION TO THE LAW OF NATIONS 177 (1955) [hereinafter cited as SVARLIEN]; concerning the relaxing of requirements for territorial claims in the polar regions.

> The relaxation should be confined to the waiving of settlements as a necessary condition for the perfecting of a right of sovereignty, provided a claimant state may establish that by some other process it is in a position to exercise control over what it claims to own.

ERICKSON, *supra* note 70, at 128, states that minimum control plus discovery under international law yields a valid claim.

86. ANNUAL DIGEST, *supra* 83, at 99.

> differ accordingly as inhabited or uninhabited regions are involved.[87]

Wrangel Island is surrounded by frozen seas and before airflight was barely accessible. For this reason, the fact that the Island had not been continuously occupied by the United States after its discovery should not diminish the United States' sovereign rights established by Hooper's landing. Additional support for the United States' claims to Wrangel Island based on a limited occupation after discovery can be found in the Clipperton Decision.[88]

In a 1922 memorandum from their Embassy, the Soviets specified what they believed to be the occupational requirements for sovereignty over Wrangel Island. They contended that the region was dangerous and inaccessible and unfit for permanent habitation. They further held that acquisition of unoccupied territory through "use or settlement"[89] need not be applied to this Island.[90] The Soviet policy towards Antarctica is consistent with the views expressed in the 1922 Memorandum and the Soviet interpretation of international law. Due to the climate of the South polar region, Soviet scholars have rejected the notion that "effective occupation" is necessary to maintain title to Antarctica.[91] These Soviet policies and statements support the United States claims to Wrangel Island based on the limited occupation by the crews of the *Corwin* and the *Rodgers*.

The State practice of Norway in the polar region also supports territorial title based on limited occupation. In 1927 the Norwegian Government by Royal Decree, claimed Boviet Island in the South Atlantic.[92] The claim is based on a brief Norwegian occupation and the hoisting of the Norwegian flag.[93] Another example of "limited occupated" yielding territorial title in the polar regions comes from the British Empire's claims in 1923 to a large number of Islands in the Ross Sea.[94] They based these South Atlantic

87. Island of Palmas Arbitration case, (United States-Netherlands) (Perm. Ct. Arb. 1928) *cited in* 4 H. LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 105-06 (1927-1928). Wrangel Island, which is surrounded by frozen seas and maintains a harsh climate made it difficult to reach and inhabit during the late 19th and early 20th centuries.

88. *See* notes 65-69 *supra* and accompanying text.

89. 1 DEPT. OF STATE, FOREIGN RELATIONS DOCUMENTS 279 (1923).

90. *Id.*

91. ERICKSON, *supra* note 70, at 127.

92. HACKWORTH, *supra* note 5, at 468.

93. *Id.*

94. *Id.* at 462, *quoting from* the London Gazette, July 31, 1923, at 5211.

claims on their having a few settlements in the region, reasoning that this entitled them to much of the surrounding territory.[95]

Although Wrangel Island remained uninhabited until 1911, the *Clipperton Island Decision*, the *Island of Palmas Arbitration*, the *East Greenland Decision*, and British, Norwegian, and Russian State practice support the United States "limited occupation" claim.

The Russian landing in 1911 gives rise to another Soviet claim to Wrangel Island. The Soviets cannot designate this landing a discovery because that mode had already been exercised by the United States. Nor was there an attempt by the Russian to occupy the Island.[96] Moreover, the United States had already acquired vested rights based on the limited occupation made by the crews of the *Corwin* and the *Rodgers* in 1881.

The Soviets might support that claim by arguing that the United States had abandoned Wrangel Island. However, it is an accepted principle of international law that apparent abandonment does not imply extinguishment of a sovereign right.[97] Abandonment occurs not merely upon simple neglect or desertion,[98] but upon a positive intention to relinquish rights. In a 1922 memorandum to the American Ambassador in Great Britain, acting Secretary of State William Phillips stated that the United States was "reserving" its claim to Wrangel Island. There is no evidence here or in any other record of a positive intention by the United States to abandon its claim to Wrangel Island.[99] The Soviet landing in 1911 would therefore appear insufficient to establish legal title or to denigrate the previously established rights of the United States.

In 1914 the *Karluk* was marooned on Wrangel Island for six

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95. *Id.*

96. STEPHANSSON, *supra* note 23, at 395. *See also* note 24 *supra*.

97. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 137 (1966).

98. 1 DEPT. OF STATE, FOREIGN RELATIONS DOCUMENT 65 (1895); I J. MOORE, DIGEST OF INTERNATIONAL LAW 299-300 (1906). Letter from Mr. Carralho, Brazilian Minister of Foreign Affairs to Mr. Phipps, July 21, 1895. In 1895, the occupation by Great Britain of the island of Trinidad was protested by the Brazilian Government, on the ground that the latter had never given up its right to ownership. It was stated by the Brazilian Minister of Foreign Affairs:

> Abandonment depends on the intention of relinquishing or on the cessation of physical power over the thing, and must not be confounded with simple neglect or desertion. A proprietor may leave a thing deserted or neglected and still retain his ownership. The acts on the part of Brazil indicating the continuance of its assertion of dominion over the island, justified the concession of its rights therein by Great Britain.

1 C. HYDE, INTERNATIONAL LAW 393 (1923).

99. 1 DEPT. OF STATE, FOREIGN RELATIONS DOCUMENTS 283 (1923).

months while the American captain went for help.[100] During this time the Island was occupied by the Canadian crew which claimed the Island for the British Empire. This brief occupation alone, although more significant than the Russian landing in 1911, is insufficient to establish a claim for the British Empire since the United States still had not abandoned its claim to the Island.[101] The 1881 United States' claim to the Island based on discovery and occupation remained intact.[102] The whole crew voluntarily left the Island when they were rescued by an American ship.[103] By voluntarily leaving the Island the Canadian crew abandoned any possible future title claims based on adverse possession (prescription).[104] Fulfilling the legal criteria for a valid prescriptive title may have diminished the initial United States discovery-occupation claim. Nevertheless, the British Empire subsequently relinquished any claims to Wrangel Island in 1924.[105] If the United States had lost their rights to Wrangel Island due to "abandonment," any Soviet or British "occupation based" claim would have been extinguished by abandonment as well. Under those circumstances the United States discovery claim would still have been the dominant claim to the island.

In 1916 the British Secretary of Foreign Affairs received from the Soviet Ambassador in London an official notification that "the territories and islands situated in the Arctic Ocean and discovered by Captain Vilkitski in 1913-1914 had been incorporated in the Soviet Empire."[106] The Soviet Union proclamation of territorial sovereignty was based on either discovery or contiquity (when a state maintains that islands relatively close to their shores belong to them by virtue of their geographical situation).[107] Under customary means of territorial acquisition the Soviet proclamation is of no legal significance. The United States had, in fact, already discovered Wrangel Island. Further, claims based on contiquity have been ex-

100. STEPHANSSON, *supra* note 23, at 24.

101. *See* notes 97-99 *supra*.

102. *See* notes 48-55 and 85 *supra*.

103. STEPHANSSON, *supra* note 23, at 61.

104. SVARLIEN, *supra* note 85, at 180. Prescription in international law may be defined as the acquisition of territory by adverse possession over an extended period.

105. Y. SEMYONOV, SIBERIA 385 (1963). At the time the Soviets occupied Wrangel Island in 1924 the Labor party was in power in England. His Majesty's government announced that it abandoned all claims to the distant island.

106. *See* note 30 *supra*.

107. H. BRIGGS, THE LAW OF NATIONS 244 (2d ed. 1952).

pressly rejected by legal jurists.[108] In the dispute surrounding the *Island of Palmas Arbitration*, Max Huber, the noted arbitrator, held that a title of contiquity, understood as a basis of territorial sovereignty, has no foundation in international law because it is arbitrary and lacks precision.[109]

The 1921 landing of the *Silver Wave* and the subsequent rescue in 1923 of its sole survivor also has no effect on United States' rights as no conflicting national claims were asserted.[110] The rescuing ship the *Donaldson* did, however, set ashore an American colony under the employment of British citizen Vilhjlmur Stephansson.[111] Stephansson himself was not on the Island. This became the first successful attempt at colonizing the Island for economic purposes and American citizens again occupied Wrangel Island. During the year that Stephansson held an economic interest in the Island, the British failed to proffer a territorial claim.[112] Early in 1924 Stephansson sold his economic interests in the Island to an American citizen, Carl Lomen of Alaska.[113] Along with its economic benefits, Lomen intended this transaction to be a reassertion of United States sovereignty over Wrangel Island.[114]

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108. Arbitral Award in the Island of Palmas Case, (United States-Netherlands), (Per. Ct. Arb. 1928) 39-40; Scott Hague Court Reports, at 83, 111-12, (2d Ser. 1932).

109. *Id.* "Nor is the principle of contiguity admissable as a legal method of deciding the question of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results . . . The title of contiquity, understood as a basis of territorial sovereignty, has no foundation in international law."

110. In addition to the lack of claim made by a nation, the United States discovery and limited occupation based claim was still superior for the same reasons discussed in the Karluk landing of 1914.

111. STEPHANSSON, *supra* note 23, at 28.

112. 1 FOREIGN RELATIONS DOCUMENTS 286 (1923). A letter from the Chargé in Great Britain (Wheeler) to the Secretary of State, London, Aug. 28, 1923:

> Asked as to whether the claims of Russia and the fact that the crew of an American vessel had landed on the island in 1881 and taken possession in the name of the United States had been noted, Mr. Sperling replied in the affirmative, adding that he personally felt the Russians had the weakest claim of all. It will be seen from the above that no definite reply can yet be given to the Department's inquiry concerning the attitude of the British Government in the premises.

A footnote to this letter states:

> Apparently no further statement was received directly from the British Foreign Office but in a letter dated May 27, 1925, Mr. Vilhjalmur Stephansson wrote that 'Ponsonby,' acting as the official spokesman of the British Foreign Office, assured the Russians during the tenure of the Labor Government that Great Britain would never make a claim to Wrangel Island.

113. STEPHANSSON, *supra* note 23, at 299-300. "I was anxious that America should profit by our work if Britain did not care to do so. My friend Carl Lomen, owner of large reindeer interests in Alaska, had told me the Americans were greatly interested in Wrangel Island, and he was especially interested." *See also* LEBOURDAIS, *supra* note 7, at 16.

114. Letter from Carl Lomen to Viljhalmur Stephansson Jan. 29, 1925:

As previously discussed, the Soviet interpretation of the customary mode of occupation allows for "limited occupation" in the polar regions.[115] Again, this is supported by both the Soviet claim to Antarctica and the Soviet comments concerning the occupation of Wrangel Island.

The United States has also accepted limited occupation as a basis for territorial claims. As far back as 1890, in *Jones v. United States*,[116] the Supreme Court set forth the legal foundation for Lomen's territorial claim on behalf of the United States. In that case the court stated that incurring even a menial type of useful possession (such as a base for catching and curing fish) would be sufficient for a claim based on occupation.[117] Lomen's use of Wrangel Island for fur and seal trapping, and his plans to establish a reindeer business on the Island,[118] can surely be given the same legal significance as "catching and curing fish." More recently, the *Jones* case was cited in *U.S. v. Curtiss-Wright Export Co.*,[119] to support the Court's emphasis of the United States' right to acquire land by discovery and occupation.

Additionally, significant support for Lomen's United States claim at the international level comes from Judge Carneiro's concurring opinion in the *Minquiers and Ecrehos Case*.[120] In that case Carneiro stated that a private individual occupying a territory may

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> You ask me to state briefly my reasons for purchasing your interests in Wrangel Island . . . As an American citizen I was anxious to take a step which would further strengthen American claims. I consider that I can maintain fur trapping establishments in Wrangel Island at a profit.

STEPHANSSON, *supra* note 23, at 302.

115. ERICKSON, *supra* note 70, at 128, discusses the Soviets views concerning the South Pole:

> Although Russia supports occupation to validate a sovereign claim, 'effective' occupation is not required. Because of the nature of the South Polar Region only a minimum control over the region is necessary.

116. Jones v. United States, 137 U.S. 202, 212 (1890). "When citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual continuous and useful possession (although only for purposes of carrying on a particular business, such as catching and curing fish or working mines) of a territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such a period it sees fit over territory so acquired."

117. *Id.*

118. STEPHANSSON, *supra* note 23, at 302.

119. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

120. The Miniquiers and Ecrehos Case (United Kingdom-France) [1953] I.C.J. 104-05. "In certain circumtances the presence of private persons who are nationals of a given state may signify or entail occupation by that state . . . such individual actions are particularly important in respect of territories situated at the border of two countries which both claim sovereignty to that region."

claim the territory on behalf of his nation.[121] Further support for the legal significance of Lomen's claim comes from *Jacobsen v. Norwegian Government*. There the Norwegian Supreme Court held that an individual may undertake a legal occupation of an uninhabited island if the person pursued economic activities and exploitation of the land.[122]

Thus, the United States occupation of Wrangel Island is consistent with international law and the state practices of Denmark, Britain, Netherlands, Norway, the Soviet Union, and the United States.

C. Possession by Force

In January, 1924, the Soviet Union complained that the United States was sailing too close to their territory and alleged a violation of a universally recognized rule governing the entrance of warships into foreign ports.[123] In August, 1924, the Soviets totally disregarded the principles of international law they had espoused earlier that year[124] and dispatched a gunboat, the *Red October*, to take possession of Wrangel Island. The Soviet crew forcibly removed Lomen's colony from the Island.[125] Forcible removal of occupants from a territory is not an accepted mode of territorial acquisition under international law[126] and claims based on such actions need not be recognized.

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121. *Id.*

122. Jacobsen v. Norwegian Government, *reprinted in* 7 H. LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF INTERNATIONAL LAW CASES 109-11 (1933).

123. I FOREIGN RELATIONS DOCUMENTS, at 681 (1944). The Soviet Deputy Commissar for Foreign Affairs (Litinov) to the Secretary of State, Moscow, Jan. 31, 1924, concerning the entrance of an American warship the *Bear*, into Kolyuchin Bay without permission of Soviet authorities:

> In view of the fact that the circumstances under which the above mentioned ships entered Soviet harbors constitute a violation of the universally recognized rules governing the entrance of warships into foreign ports, the Government of the Soviet Socialist Republics finds itself obliged to protest against such action under the direct control of the United States Government, professing the necessity of strict observation of international laws, will take proper measures to avert the repetition of such incidents in the future.

124. *See* notes 35-37 *supra*.

125. Y. SEMYONOV, SIBERIA 375 (1963).

126. *See* notes 2 and 3 *supra*, and notes 128-29 *infra*. *See also* STEPHANSSON, *supra* note 23, at 300. After his sale to Lomen but before the Russian invasion of Wrangel Island in 1924, Stephansson postulated:

> If the Russian then planted a rival colony it would be a later on than the American . . . It is a well established principle of international law that actual occupation is the only thing after discovery and exploration which gives a national ownership. If they took the American colony prisoners and carried them off, the Russian claims would not be strengthened thereby legally.

Any Soviet contention that the removal of Lomen's colony from Wrangel Island was in fact a "conquest" would fail. Although conquest is an acceptable mode of acquiring territory,[127] in the *East Greenland Decision* the ICJ stated that conquest operates as a loss of territory "when there is a war between two states and by reason of the defeat of one of them sovereignty passes from the loser to the victorious state."[128] The United States and the Soviet Union were not at war in 1924. The Soviet invasion of Wrangel Island was an isolated, unprovoked act, and according to both the *East Greenland Decision* and customary international law this forceful subjugation of territory by the Soviets is not an acceptable mode of territorial acquisition.[129] Accordingly, the United States rights to Wrangel Island were not altered by the Soviet invasion.[130]

In 1926 the Soviet Union issued a decree in which it claimed sovereign rights to all the discovered and undiscovered territory north of its territorial boundaries.[131] This "sector" theory of territorial control was rejected by the United States in 1928,[132] thereby impliedly denying an inherent Soviet right to Wrangel Island. The United States emphasized in its rejection of the "sector" theory in the Arctic that acquisition of territory based on contiguity is not an accepted principle of international law.[133] Today the "sector" theory is of doubtful validity in light of the fact that most of the territorial claims have been settled by using the "accepted" criteria for territorial acquisition.[134]

In 1947 the United Nation's General Assembly passed a resolution stating that territorial rights should be denied to those nations who have acquired possession of territory in violation of international law. This included the use of force against the territorial integrity of another state.[135] In 1970 this same body adopted a

127. It would be inappropriate to describe the forcible subjugation of such territories as conquest, 'for conquest only operates as a cause of loss of sovereignty when there is a war between two states and by reason of the defeat of one of them sovereignty passes from the loser to the victorious state.' Legal status of Eastern Greenland Decision, (Netherlands-Denmark) [1933] P.C.I.J., ser. A/B No. 53 at 46, III Hudson World Court Reports, at 171 (1938).

128. *Id.*

129. *Id.*

130. *See* notes 69, 126-29 *supra*.

131. HACKWORTH, *supra* note 5, at 461, *quoting from* Under Secretary Crew, memoranda of conversation with Norwegian Minister (Bryn), June 4, and June 12, 1926.

132. *See* note 38 *supra* and accompanying text.

133. *See* notes 38 and 109 *supra* and accompanying text.

134. J. SATUR, THE ARTIC BASIN 10 (1969).

135. Declaration on Rights and Duties of States, Report of the International Law Commission, June 9, 1949, U.N. Doc. A/92J; Official Records of the Fourth Session of the Gen-

Declaration on the Principles of International Law reiterating the prohibition against force as a means of acquiring the territory of another state.[136] Both the United States and the Soviet Union supported this Declaration.[137] Soviet writers agree that the United Nations Charter, as an international treaty, is a present day source of international law.[138] They contend that the principles and purposes of the United Nations are important, and that observance of resolutions can serve international cooperation.[139] A state violating the basic principles of the United Nations or its resolution places itself beyond the pale of the organization.[140]

In accord with the general principles of international law, state practice, judicial rulings, and the subsequent United Nations Resolutions, the 1924 Soviet intrusion on Wrangel Island did not effectuate a legal Soviet right to the Island. The Soviet Union's act of aggression was a violation of international law in 1924 and remained a violation in 1947 and 1970. The United States' legal claim to Wrangel Island has not been lost.

D. Prescription

The final Soviet claim to Wrangel Island would be based on prescription. Prescription is defined under international law as the acquisition of territory by adverse possession over an extended period of time.[141] The Soviet Union has exercised dominion over Wrangel Island since 1924. Prescription as a means of acquiring title to territory, however, is so vague a concept that some writers deny its validity altogether.[142] The main objection to its recognition is the impossibility of resolving the question of the time neces-

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eral Assembly, Supp. No. 10, at 7-10. General Assembly of the United Nations at its 123rd meeting on 21, November 1947, adopted this resolution 178 (II):

> Article 9
> Every state has the duty to refrain from resorting to war as in instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another state, or in any other manner inconsistent with international law and order.
> Article II
> Every state has the duty to refrain from recognizing the territorial acquisition by another state acting in violation in Article 9.

136. TUNKIN, *supra* note 71, at 53.

137. *Id.*

138. *Id.* at 118.

139. G.I. TUNKIN, CONTEMPORARY INTERNATIONAL LAW 120-21 (1969).

140. *Id.* at 123.

141. SVARLIEN, *supra* note 85, at 180, states "prescription in international law may be defined as the acquisition of territory by adverse possession over an extended period."

142. J.L. BRIERLY, THE LAW OF NATIONS 167 (1963).

sary to perfect a valid title by prescription.[143]

In asserting a claim based on prescription the Soviet Union will have to overcome the obstacles of prior United States claims based on discovery and occupation, the illegal invasion of 1924, and a sufficient time of possession.

There are situations in which an inference of acquiescence to a claim cannot be justifiably drawn from the absence of protest.[144] This was exemplified in 1895 when the Brazilian Government successfully retained its claim to Trinidad despite British occupation.[145] It must be remembered that the United States citizens did not abandon Wrangel Island in 1924; they were forcibly removed by the Soviets.[146] The *Clipperton Island Decision* supports the contention that without the animus of abandoning the Island, the fact that the United States has not exercised authority there does not imply the forfeiture of an acquisition already perfected.[147] In the *Eastern Greenland Decision* the Court indicated that a definite renunciation is needed for construing an abandonment.[148] Actual consent must be given; mere passivity in the face of inevitable facts is not enough.[149]

The United States has officially "reserved" its right to claim territories in the polar regions.[150] Thus far there has been no strategic necessity for the United States to assert its claim to Wrangel Island.[151] Nor has there been an abandonment or disclaimer of the United States' rights to the Island.[152] In fact, Senator Robert K. Reynolds of North Carolina, Chairman of the Military Affairs Committee of the Senate in 1941, urged the United States to re-assert its rights to Wrangel Island.[153] This effort to re-assert United States' rights to Wrangel Island was obscured however, by the bombing of Pearl Harbor in December of 1941.[154]

Another problem with a Soviet claim of prescription is that the

143. M. SØRENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 324 (1968).
144. Y. BLUM, HISTORIC TITLES IN INTERNATIONAL LAW 131 (1965).
145. *See* notes 98-99 *supra*.
146. *See* note 35 *supra*.
147. Clipperton Island Arbitration, *reprinted in* 26 AM. J. INT'L L. 390, 394 (1932).
148. *See* note 84 *supra*.
149. C. ROSS, TEXTBOOK OF INTERNATIONAL LAW 244 (1947).
150. 1 C. HYDE, INTERNATIONAL LAW 333-35 (1947).
151. Hooper, *supra* note 17, at 7.
152. Franklin & McClintock, *The Territorial Claims of Nations in the Arctic: An Appraisal*, 5 OKLA. L. REV. 46 (1952).
153. V. STEPHANSSON, THE FRIENDLY ARCTIC 63 (1945).
154. *Id.*

Soviets acquired dominion over Wrangel Island in violation of International Law.[155] They acquired physical possession of the Island by violating the rights of the United States.[156] In the *Island of Palmas Arbitration*, Max Huber made clear that it was necessary to investigate the origin of possession in a prescriptive claim. Although he found that Dutch possession was of legal origin, Huber indicated that his decision might have been altered if the Dutch had originally taken possession of the Island by transgressing international law.[157]

The Guatemala-Honduras Treaty of 1930 further illustrates the importance of the manner in which possession is acquired when justifying a prescriptive claim. In Article V of the treaty the two parties agreed that an arbitral tribunal would establish their mutual borders in accordance with the legal boundary created in 1821 when the countries received their independence from Spain.[158] The treaty further provided that prescription should not be invoked to obscure either party's property rights. Part of the criteria used in fixing the boundary was whether territory had been acquired by one party in express violation of the other party's rights.[159] If this occurred, it could be required that the territory or compensation be transferred to the prior sovereign.[160] In cases where there was no extreme hardship, the transfer of land took place.[161]

A Soviet prescriptive claim faces challenges based on United Nations Resolution 178(II) adopted in 1947[162] and the Declaration

155. *See* notes 123-30 *supra*.

156. *Id.*

157. "Finally it is to be observed that the question whether the establishment of the Dutch on Talautse Isle in 1667 was in violation of the Treaty of Munster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of state authority need not be examined since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore suzerain right of the Netherlands over Tobukan Miangas." The question was not examined because the violation of international law when gaining dominion had not been established. Arbitral Award in the Island of Palmas Case, *supra* note 108, at 60.

158. 1 C. HYDE, INTERNATIONAL LAW 388 (1947). Criteria used by the Tribunal:

> In fixing the boundary, the Tribunal must have regard to the facts of (1) actual possession: (2) the question whether possession by one party has been acquired in good faith, and without invading the right of the other party and (3) to relation of territory actually occupied to that which is as yet unoccupied. In light of the facts thus asserted, questions of compensation may be determined.

Guatemala-Honduras Boundary Arbitration, [1933], *cited in* 7 H. LAUTERPACHT, ANNUAL DIGEST REPORTS AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 115-27 (1933-1934).

159. *Id.* at 122.

160. *Id.*

161. *Id.*

162. L. SOHN, CASES AND MATERIALS ON WORLD LAW 272 (1973). *See also* Report of

on the Principles of International Law adopted in 1970,[163] which postulate non-recognition of territorial rights over possessions acquired in contravention of international law.[164] Since the Soviet's acquisition of Wrangel Island was made in violation of international law, United Nations policy warrants a denial of the Soviet's sovereignty over the Island.

Another widely discussed problem with prescription in international law is the amount of time actually necessary for a prescriptive claim to vest. Hugo Grotius maintained that "a possession beyond memory, not interrupted nor disturbed by appealing to an arbitrator transfers dominion."[165] Certainly the United States claim to Wrangel Island is still within memory. Although Grotius' comments are 300 years old, jurists today agree that no fixed rules exist as to the length of possession necessary to create a valid title.[166] Max Sorenson asserts that prescription is a controversial mode of territorial acquisition because of the impossibility of resolving the question of required time limits.[167]

The Guatemala-Honduras Treaty of 1930 provided that the newly defined boundary be consistent with the legal boundary created in 1821 when the countries received their independence. This Treaty exemplifies the fact that one-hundred ten years of adverse possession do not necessarily establish legal title to territory.[168] The Soviet presence on Wrangel Island has existed for fifty-six years; this period of time may be legally insufficient.

In 1957 a dispute between Belgium and The Netherlands concerning the rightful possession of two territories in Baerle-Duc[169] was brought before the International Court of Justice.[170] The Court awarded the territories to Belgium based upon a legal title established in 1843.[171] The court ruled in favor of Belgium despite

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the International Law Commission, June 9, 1949, U.N. Doc. A/925; Official records of the Fourth Session of the General Assembly, Supp. No. 10, at 7-10.

163. TUNKIN, *supra* note 71, at 53.

164. *See* notes 135-36 *supra*.

165. SVARLIEN, *supra* note 85, at 180.

166. J. L. BRIERLY, THE LAW OF NATIONS 157 (1963); *see also* G. VON GLAHN, LAW AMONG NATIONS, at 278 (1976).

167. M. SØRENSON, MANUAL OF PUBLIC INTERNATIONAL LAW 324 (1968).

168. *See* Guatemala-Honduras Treaty of 1930 and Guatemala-Honduras Boundary Arbitration of 1933 [1933] *reprinted in* 7 H. LAUTERPACHT ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 115-27 (1933-1934).

169. Case Concerning Sovereignty Over Certain Frontier Land (Belgium-Netherlands), [1957] I.C.J. 209-58.

170. *Id.*

171. *Id.* at 213. The Court determined that under the Boundary Convention of 1843

The Netherlands prescriptive claim based on over one-hundred years of adverse possession.[172] Although Belgium had not actively opposed the authority exercised by the Dutch officials over the disputed plots, it never expressly yielded its own rights.[173]

It has been asserted that "a protest at the time of the occurence of the delinquency [of a claim] is held to prevent time from running against the claim for its redress."[174] In other words, even if a prescriptive title has recently accrued in favor of the Soviets, the United States would still have the right to redress. In a letter written in 1843 by Mr. Uplhur, United States Secretary of State, addressed to Mr. Everett, Minister to England,[175] the Secretary contended that under international law mere lapse of time, independent of legislation or positive agreement, cannot itself either give or destroy title.[176]

If prescription is to be accepted as a proper mode of territorial acquisition by a Tribunal, the Soviets will have to (1) show the United States acquiesed to Soviet jurisdiction; (2) overcome the obstacle of their transgression of international law when acquiring do-

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between Belgium and the Netherlands that the sovereignty of the territory in Baerle-Duc resided in Belgium. "Having examined the situation which, in respect of the disputed plots and relied upon by the two Governments, the Court reaches the conclusion that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished."

172. *Id.* at 227-29. The Netherlands contended that if sovereignty over the disputed plots was vested in Belgium by virtue of the Boundary Convention, act of sovereignty exercised by the Netherlands since 1843 have established sovereignty in Netherlands.

(1) Belgium had struck one of the two plots from their maps from 1852 until 1890.
(2) The Dutch Government had used and changed the land several times from 1860.
(3) Not until 1921, following examination by the Belgian Ministry that the Minister at the Hague drew attention to the Netherlands that the territory was Belgian and that Dutch Government should strike the land from their survey documents.
(4) Netherlands relied in addition to the incorporation of the land in the Dutch survey, the entry in its registers of land transfer deeds and registrations of births, deaths, and marriages in the communal register of Baerle-Nassau. It also relied on the fact that it collected Dutch land tax on the two plots without any resistance or protest on the part of Belgium.
(5) Netherlands also relied on the proposed sale of a large area of the heathland over which the commune of Baerle-Duc had certain rights to. The sale was publically announced in 1953 without any protest by Belgium.

173. *Id.*

174. L. OPPENHEIM, INTERNATIONAL LAW 349-50 (Lauterpacht ed. 1955).

175. I J. MOORE, DIGEST OF INTERNATIONAL LAW 293 (1906). "Mere lapse of time, independent of legislation or positive agreement cannot of itself either give or destroy title . . . It creates a presumption equivalent to full proof. But it differs from proof in this, that proof is conclusive and final, whereas presumption is conclusive only until it is not met by counterproof, or a stronger counter presumption."

176. *Id.*

minion over Wrangel Island; and (3) demonstrate a sufficient time of possession.

The legality of a prescriptive claim is not actually determined until it supercedes the claim of the prior sovereign in an international legislative body or by diplomacy.[177] The United States' claim to Wrangel Island retains its legal significance until otherwise adjudicated in a mutually accepted tribunal, or until the United States expressly relinquishes its claim.

III. APPROACH FOR IMPLEMENTING THE UNITED STATES CLAIM

First, the United States must decide to pursue its claim to Wrangel Island. Then, the following procedures might be employed to attempt to reassert control over the island.

The Soviet Union has consistently asserted that only voluntary negotiation and/or adjudication will suffice in the settlement of disputes among nations.[178] In 1961 at the meeting of the International Law Association the Soviets favored diplomatic negotiation as the most appropriate method of settling disputes.[179] Thus, diplomatic negotiations with the Soviets should be the initial step for the United States in asserting their rights to Wrangel Island.

The Soviet Union expressly rejects the idea of compulsory third-party judgment as a principle of international law[180] and it has continually refused to submit to the compulsory jurisdiction of the Statutes of the ICJ.[181] It would therefore be unduly optimistic to expect the Soviet Union to honor an unfavorable judgment by the Court. Although the United States has accepted the jurisdiction of the ICJ, there were some reservations.[182] One reservation to compulsory jurisdiction provided that jurisdiction shall not apply to "disputes, the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence."[183] The United States and the Soviet Union created such an agreement in 1914 which is still in force today.[184] The treaty provides that any

177. *Id.*

178. ERICKSON, *supra* note 70, at 140.

179. *Id.* at 141.

180. *Id.* at 140.

181. *Id.* at 144; *see also* Statute of the I.C.J. *supra* note 42, art. 36.

182. United States Declaration under Article 36(a) of the Statute of the I.C.J., [1965-1966] I.C.J.Y.B. 67 (1966).

183. *Id.*

184. Treaty for the settlement of disputes, signed at Washington October 1, 1914; *entered*

differences arising between the United States and Russia, "of whatever nature, shall, when diplomatic proceedings have failed, be submitted for examination and report to a Permanent International Commission."[185] It is an equitable plan for resolving disputes.

The United States initiation of this secondary method for redressing its territorial claim with the Soviet Union is consistent with Article 33 of the United Nations Charter.[186] Although Article 33 does not provide an enforceable set of procedures, its content implies an international consensus in favor of implementing the U.S.-Russian agreement of 1914. A decision rendered by the selected Permanent International Commission is not binding upon either party, but noncompliance with the decision could have negative ramifications in the international community. Economic, technological, or social sanctions might be considered. It was asserted by Rosenne, at the ICJ in 1957, that any national court whose internal constitution requires it to apply international law must apply any authentic judgment.[187]

If the procedures under this treaty were invoked and the Commission decided in favor of the Soviets based on prescription, the United States could go to the United Nations to attempt to gain world support for its claim based on Resolution 178(II). If the United Nations is not successful in removing the Soviets from Wrangel Island then the United States might resort to another form of arbitration. The United States and the Soviets might agree to set up a Tribunal which draws its members from the ranks of chiefs of state, chief justices of national Supreme Courts, or other eminent jurists.[188] If an attempt at arbitration is unsuccessful, the United

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into force March 22, 1915; 39 Stat. 1622; T.S. 616; *reprinted in* 11 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 1776-1949, at 1239-41 (1974).

185. BEVANS, *supra* note 184, at 1239. *See also* Treaty for the Settlement of Disputes, *supra* note 184. Concerning succession of treaties, it has been held that "In interest of international order, treaty rights and obligation should be observed under normal circumstances." W. TUNG, INTERNATIONAL LAW IN AN ORGANIZING WORLD 61 (1968).

186. Charter of the United Nations, *done* June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 33, para. 1.

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

187. M. REISMAN, NULLITY AND REVISION 816 (1971).

188. *Id.* at 108.

States would have exhausted its legal remedies and should rest its claim.

If the Commission decided in favor of the United States and the Soviets ignored the ruling, political and economic sanctions would be the means of redress available to the United States.

Wrangel Island appears to be in an ideal strategic position for monitoring Soviet nuclear deployment and compliance with SALT Treaties. In a time of intricate geopolitical balance in the world, the United States needs to take full advantage of its strategic assets.

IV. CONCLUSION

An examination of the claims to Wrangel Island within the international legal framework reveals that the United States has a legitimate legal claim to the island based on discovery and occupation. The *Clipperton Island Decision*, along with European, Soviet, and United States state practices sustain the claim of a vested United States right in the Island since 1881. The claim's continued superiority is further supported by the *Palmas Island Arbitration* and the *Eastern Greenland Decision*. Carl Lomen's economic activity on Wrangel Island in 1924 was a reassertion of the United States' intention to continue and expand its occupation. European, Soviet, and United States state practices, along with Judge Carneiro's interpretation of international law, concede a further United States legal right to the Island.

The Soviet Union has exercised dominion over the Island since 1924, despite violations of international law in its acquisition. There was no abandonment, nor was there a subsequent acquiescence by the United States in the Soviet claim to Wrangel Island. In fact, the United States impliedly rejected Soviet authority in its 1928 statement on the Soviet "sector" theory. The viability of a Soviet prescriptive claim remains questionable under international law. The lack of United States acquiescence, the illegal origin of Soviet possession and the length of possession are all obstacles with which the Soviet Union must contend.

Until adjudicated, the United States claim to Wrangel Island continues to have legal significance. At the very least, the United States can use its legal claim as a political lever in diplomatic negotiations with the Soviet Union and in the future SALT discussions. The United States may also use the claim to magnify world apprehension of Soviet expansionism, an issue of great concern after the recent Soviet invasion of Afghanistan.

This comment has attempted to demonstrate the legal viability of a United States claim to Wrangel Island. The United States has nothing to lose by asserting its claim and there will never be a better time than the present to do so.

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