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Four Principles to Justify Claims to Jurisdiction and to Natural Resources in Antarctica

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Abstract

Global pressure over Antarctic resources will mount in the course of the coming decades. Three factors are likely to motivate states to claim jurisdictional rights or rights to natural resources in Antarctica: climate change, dwindling natural resources in the rest of the world, and the fact that – by virtue of Article IV of the Antarctic Treaty – the question of sovereignty remains unresolved. It is high time to think about the moral dimensions that should shape Antarctic claims in the future. Is there any state or group of states more entitled than others to make such claims? What does sound management of natural resources require? How should environmental concerns factor into decisions about jurisdictional control and appropriation of natural resources?

With these broad questions in the background, in this article I examine four principles of justice that figure prominently in current theories of territorial rights and rights over natural resources in political philosophy: connection, capacity, fair distribution, and need. I show how these principles have been used by states, alone or in tandem, to justify claims to jurisdiction and claims to natural resources in Antarctica. After pointing to their main strengths and weaknesses, I suggest that they may be necessary, but insufficient to build a just framework for jurisdiction and appropriation of resources in the White Continent.

Keywords

Antarctica – Antarctic Treaty System – capacity – fair distribution – historic claimants – jurisdiction – natural resources – territorial rights

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1 Preliminaries

Global pressure over both living and non-living natural resources in Antarctica is mounting and will continue to mount in the course of the coming decades. News about the dramatic effects of climate change in the Antarctic landscape and marine fauna are ever more common.¹ At the same time, record numbers of humans are visiting Antarctica. In 2017, for the first time, more than 50,000 tourists went to Antarctica (more than 90 per cent of them in cruise ships).² That same year, there were 76 permanent stations in use, with an estimated number of 4,491 scientists and associated personnel over the summer.³

Fishing activities are also on the rise in the Southern Ocean. There is a growing interest in krill oil for health supplements like Omega-3 pills, as well as for krill meal used for fish farming and pet food. The demand for Patagonian toothfish is also slowly growing, while experts advocate for a more precautionary approach.⁴

Furthermore, the possibility of towing icebergs to lands suffering from drought is now being examined as a serious undertaking worth exploring further. Compression-melting and freshwater-collection directly from glacial

1 Among others, see Jasmine R Lee et al, 'Climate Change Drives Expansion of Antarctic Ice-Free Habitat' (2017) 547 *Nature* 49; and NASA, 'Sea Ice Extent Sinks to Record Lows at Both Poles' (Nasa.gov, 22 March 2017) <<https://www.nasa.gov/feature/goddard/2017/sea-ice-extent-sinks-to-record-lows-at-both-poles>> accessed 12 November 2018.

2 IAATO, 'IAATO Overview over Antarctic Tourism: 2017–18 Season and Preliminary Estimates for 2018–19 Season' (XLI Antarctic Treaty Consultative Meeting, Buenos Aires, Argentina, 13–18 June 2018) <<https://iaato.org/documents/10157/2398215/IAATO+overview/bc34db24-e1dc-4eab-997a-4401836b7033>> accessed 7 February 2019.

3 The online catalogue of the Council of Managers of National Antarctic Programs (COMNAP) provides information on Antarctic stations run or operated by COMNAP member National Antarctic Programs, and does not contain every facility in the Antarctic. The data are reported by the National Antarctic Programs themselves, and is probably not one hundred percent accurate, but it gives the best available estimate. See COMNAP, 'Antarctic Station Catalogue' (COMNAP 2017) <https://www.comnap.aq/Members/Shared%20Documents/COMNAP_Antarctic_Station_Catalogue.pdf> accessed 12 November 2018.

4 Interest in krill fisheries was decisive in the recent decision by CCAMLR not to turn the Weddell Sea into a Marine Protected Area: The Organization for World Peace, 'Proposal to Protect Antarctic Waters Scrapped' (*The Organisation for World Peace*, 4 November 2018) <<http://theowp.org/proposal-to-protect-antarctic-waters-scrapped/>> accessed 12 November 2018. See also Greenpeace, *Licence to Krill: The Little-Known World of Antarctic Fishing* (Greenpeace International 2018). Regarding toothfish, see Peter A Abrams, David G Ainley, Louise K Blight, Paul K Dayton, Joseph T Eastman, and Jennifer L Jacquet, 'Necessary Elements of Precautionary Management: Implications for the Antarctic Toothfish' (2016) *Fish and Fisheries* 1152.

waterfalls are other water-harvesting techniques that are being evaluated.⁵ And even though the Environmental Protocol (EP) established a moratorium on mineral prospection and extraction, the fact that there is an abundance of mineral resources, and that it is a matter of time and technology to make their extraction cheaper should not be disregarded.⁶

There are, in sum, increasing economic, scientific and environmental pressures over Antarctica that will impact its political future and make it necessary to reassess the foundational assumptions around it.⁷

Today, Antarctica is a prima ballerina dancing *en pointe*. It balances itself over Article IV of the Treaty, which put in abeyance all existing and potential territorial claims by states.⁸ Leaving the question of sovereignty on hold was,

5 Julia Jabour, 'The Worth of Water: Designing a Legal Regime to Regulated Iceberg Harvesting' (11th Polar Law Symposium, Arctic University of Norway, Tromsø, 2–4 October 2018).

6 Protocol on Environmental Protection to the Antarctic Treaty, 4 October 1991, 2941 UNTS 2. The "walkout clause" of the EP (Article 25(2)), moreover, makes the moratorium on mining subject to review at the end of the 50-year period: William Welch, 'The Antarctic Treaty System: Is It Adequate to Regulate or Eliminate the Environmental Exploitation of the Globe's Last Wilderness?' (1992) 14 *Houston Journal of International Law* 597, 641.

7 It is not gratuitous that, just before the beginning of the 2018 Conference of the Scientific Committee on Antarctic Research, in Davos, the journal *Nature* devoted a whole issue to Antarctica. A similar diagnosis was given in its editorial: 'Pressure on the Antarctic Treaty from geopolitics can only increase, as demand for the continent's stocks of fish and expected reserves of minerals rises with the depletion of resources elsewhere', 'Reform the Antarctic Treaty' (2018) 558 *Nature* 161. See also SL Chown, 'Antarctic Treaty System Past Not Predictive' (2013) 339 *Science* 141. An even grimmer picture is that of contemporary Antarctica as "a proto-war zone, preserved under a treaty that has the potential to expire in 2048 and whose enforcement is largely de facto and voluntary", Elena Glasberg, 'Scott's Shadow: "Proto Territory" in Contemporary Antarctica' in Peder Roberts, Adrian Howkins, Lize-Marié van der Watt (eds), *Antarctica and the Humanities* (Palgrave Macmillan 2016).

8 A scarier metaphor is that "the Treaty must be preserved like a mummy: the balance it establishes between the participants is so fragile that it's better ... not to remove its bandages to see what's inside, lest it may turn into ashes", Antonio Remiro Brotons, 'El Tratado Antártico' (Aula de Estudios Antárticos, Madrid, 1987), my translation. Article IV reads thus:

1. Nothing contained in the present Treaty shall be interpreted as: a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica; b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

The Antarctic Treaty, 1 December 1959, 402 UNTS 71, Article IV.

according to some, a brilliant diplomatic move that in the context of the Cold War saved faces and preserved peace. At the same time, it allowed for a process of international scientific cooperation that has been more or less successful for over six decades now.⁹ According to others, however, putting the question of sovereignty on hold came at a high price: that of postponing the inevitable, turning issues of management and control into problems that are harder and harder to solve given the limited set of political tools available in the face of growing challenges.¹⁰

It is high time to think about the moral dimensions that should shape Antarctic claims in the future. Is there any state or group of states more entitled than others to make such claims? What does sound management of natural resources require? How should environmental concerns feature into decisions about jurisdictional control and appropriation of natural resources?

While policy-makers have deflected rather than answered these questions, the growing field of Antarctic humanities has mostly taken a descriptive/critical approach, exposing what actors there are, what strategic goals they have, and how they work to achieve their goals.¹¹ In this article, and with these questions in the background, my aim is to examine four principles of justice central to some of the main contemporary theories of territorial rights, and theories of rights over natural resources in political philosophy. I show how they have been invoked by states, alone or in tandem, to justify their claims over Antarctica. I assess their main strengths and weaknesses, and conclude that they may be necessary, but not sufficient for building a just framework for jurisdiction and appropriation of resources in Antarctica. This analysis is a necessary step to

9 Julia Jabour and Melissa Weber, 'Is It Time to Cut the Gordian Knot of Polar Sovereignty?' (2008) 17 *Review of European Community & International Environmental Law* 27; and Gillian Triggs, 'The Antarctic Treaty System: A Model of Legal Creativity and Cooperation' in Paul Arthur Berkman, Michael A Lang, David WH Walton, and Oran R Young (eds), *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces* (Smithsonian Institution Scholarly Press 2011).

10 Alan Hemmings, 'From the New Geopolitics of Resources to Nanotechnology: Emerging Challenges of Globalism in Antarctica' (2009) 1 *The Yearbook of Polar Law* 56; and Klaus Dodds, 'Governing Antarctica: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty' (2010) 1 *Global Policy* 108.

11 This approach sees the Antarctic Treaty as "an attempt by a privileged group of nation-states to create a system of governance informed by their interests and wishes, and empowered by a belief and investment in Western science and modernity more generally", Alan D Hemmings, Klaus Dodds, and Peder Roberts, 'Introduction: The Politics of Antarctica' in Alan D Hemmings, Klaus Dodds, and Peder Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar Publishing 2017). For two pioneering works exploring how states have shaped Antarctica as a space in world politics, see Sanjay Chaturvedi, *Dawning of Antarctica: A Geopolitical Analysis* (Segment Books 1990); and Klaus Dodds, *Geopolitics of Antarctica: Views from the Southern Oceanic Rim* (Wiley-Blackwell 1997).

take, I submit, if present and future discussions about the continent's territorial status are to be productive and conducive to peaceful and fair resolutions.

Some clarifications are in order before proceeding.

First, regarding the limits of my inquiry, I will understand Antarctica as the area south of 60° South Latitude.¹²

Second, I will understand the four principles of justice here presented within a broad contractualist framework, as reasons that are purported to be morally acceptable to all interested parties, insofar as they consider them as equals and treat them on reciprocal terms. Informing others that one will hold control over an area based on one's expansionist aims and greater military capacity will thus not count, according to this account, as a principle of justice. Neither will it count to simply communicate to others that one will extract resources based on one's more advanced technological means. The starting assumption of this article is that politics is not only about the exercise of brute power and rhetoric, but also about the fulfilment of some basic moral desiderata.¹³ In thinking about Antarctica, I contend, we should thus be pointing to what John Rawls called a "realistic utopia": a set of institutional arrangements that take into account how the world and humans actually are, but are yet the best we can hope for.¹⁴

Third, regarding "claims to jurisdiction" and "claims to natural resources", I will understand them respectively as claims to control what happens within a certain geographic space (which may or may not include full claims to territorial rights), and claims to the appropriation of specific natural resources. To use the philosophical jargon, I understand claims to natural resources as claims to first-order rights, that is, legal rights over those resources. Claims to jurisdiction, instead, are claims to second-order rights, ie legal rights to shape and modify first-order rights.¹⁵ The use of the term "jurisdiction" may sound odd to those who would rather use the language of international governance and regimes to discuss the Antarctic question.¹⁶ Another assumption of this

12 The problem of overlapping jurisdictions between the United Nations Convention on the Law of the Sea (UNCLOS) and the Antarctic Treaty is contentious, and for the purposes of this article I will leave it aside.

13 In this sense, it is revealing that even those acting on purely strategic reasons have claimed the moral high ground when justifying their conduct in Antarctica.

14 Political philosophy is realistically utopian, according to Rawls, "when it extends what are ordinarily thought of as the limits of practical political possibility", John Rawls, *The Law of Peoples* (Harvard University Press 1999) 6.

15 Leif Wenar, 'Rights' (*The Stanford Encyclopedia of Philosophy*, 2015) <<https://plato.stanford.edu/archives/fall2015/entries/rights/>> accessed 12 November 2018.

16 See, for example, Oran R Young, *Governance in World Affairs* (Cornell University Press 1999); and Olav Schram Stokke and Davor Vidas (eds), *Governing the Antarctic: The*

article, however, is that what looms in the background of all discussions regarding jurisdiction and resource appropriation in Antarctica is the need for a common authority; an authority with the power to regulate what happens on the ground and, crucially, with the power to enforce those regulations and sanction those who fail to comply with them. There are three areas where this need is evident and will become more evident over time.

To begin with, tourism is the economic activity that currently brings more people to Antarctica – many more than science or fishing. With a record number of 50,000 visitors in the 2017–18 season, and only a self-regulating International Association of Antarctica Tour Operators (IAATO) overseeing both their own conduct and that of their customers, it is no wonder that tourists' misconduct has become a recurrent topic in Antarctic Treaty Meetings (ATMs).¹⁷ Although almost all activities taking place in Antarctica are regulated by the domestic legislation of the contracting parties, supervision and enforcement are difficult due to practical and legal reasons (for example, in getting sufficient proof). This means that tourists can easily get away with violating some of the core regulations of the EP and its five associated annexes, with no consequences whatsoever – except, maybe, lasting fame on YouTube.¹⁸ More seriously, with

Effectiveness and Legitimacy of the Antarctic Treaty System (Cambridge University Press 1996).

- 17 In particular, yachts without permit are a growing problem. In the 2016–2017 season, five yachts were known to have travelled to Antarctica with no corresponding notification from a competent authority. The number of actions taken in response by competent authorities was believed to be quite low: Secretariat of the Antarctic Treaty, 'A Practical Approach to Antarctic Tourism Management', ATCM XLI CEP XXI (2018), ATCM 7b. The most high-profile case so far has been that of the Norwegian skipper, Jarle Andhøy, whose ship, *Berserk*, sailed to the Ross Sea with no permit and no insurance, capsizing and causing the death of three crew members. After years battling with the Norwegian Polar Institute, Andhøy received a 30-day suspended sentence and was fined \$7,000 by a local court, but refused to pay: Blair Braverman, 'The Polar Expedition that Went Berserk' (*Outside Magazine*, 15 September 2017) <<https://www.outsideonline.com/2237381/rough-passage>> accessed 30 January 2019.
- 18 Here is just the tip of the iceberg (forget the pun): 'How Penguins React to Opera: UNBELIEVABLE!' (*YouTube*, 27 December 2017) <<https://www.youtube.com/watch?v=PxwQJ9yt5ao>> accessed 6 September 2018. Tourists do occasionally get sanctioned. For instance, in 2014 the skipper of the French yacht *Esprit d'Equipe* was found guilty of having undertaken activities in Antarctica without any prior authorisation and for causing damage to a hut called Wordie House Hut. As a result, the skipper was sanctioned with a fine of 10,000 EUR. The judgment was a historical first in French law: Secretariat of the Antarctic Treaty, 'Judgment of the Regional Court of Paris dated 6 February 2014 Regarding the Carrying out of Undeclared and Unauthorised Non-governmental Activities in the Area of the Treaty and the Damage Caused to the Wordie House Hut (HSM no 62)', ~~ATCM XXXVII CEP XVII (2014), ATCM 11, ATCM 16, CEP XVII.~~

Annex VI of the EP (on Liability Arising from Environmental Emergencies) still not in force, any environmental disasters happening in the area will remain unsanctioned.¹⁹

One could object here that the same practical and legal difficulties would arise even if one had a sole, undisputed Antarctic authority. But there are two important differences. First, the incentive for states to sanction their own nationals for breaking Antarctic law may not be as strong as the incentive that an independent Antarctic authority would have to supervise and enforce the law within its jurisdictional domain. Second, it is costly for states to engage in supervision and enforcement of the law in Antarctica, which is why this happens mostly on a casual, rather than a systematic basis: there is no such a thing as an “Antarctic police” or “Antarctic rangers”. On the contrary, an Antarctic authority with the mandate to ensure that the EP is respected would be devoted to this cause. How would this be financed?

So far, tourists travelling in luxury to one of the most expensive and exclusive places on earth leave not a cent for the protection, maintenance and restoration of the place itself. And even though some parties have sensibly advocated for the establishment of a fee for visitors, the initiative keeps being pushed back by individual countries that cannot agree on who would administer the funds and decide on their use.²⁰ An Antarctic body – independent of the interests of the individual countries – could play this role and use those resources for more effective protection, supervision and enforcement.

A second area where a common authority is needed is when it comes to the environmental planning, functioning and regulation of bases, especially in intensively used areas like the Fildes Peninsula in King George Island, in the South Shetlands. A display of autarkic urbanism, the six year-round stations each function independently, with their own energy systems, sewage and garbage disposal. One of the conclusions of two projects conducted there between 2003 and 2012 on the environmental situation was that this was “a paradigm for inadequate implementation of [the] well-intentioned provisions codified in the Madrid Protocol or earlier Antarctic Treaty and subsidiary instruments and practices,” and that “the lessons provided ... are that

19 As was the case with the Canadian tourist ship, *MS Explorer*, which capsized in 2007 while navigating under the Liberian flag, and created a one square nautical mile oil spill in the vicinity: Emma J Stewart and Dianne Draper, ‘The Sinking of the MS Explorer: Implications for Cruise Tourism in Arctic Canada’ (2008) 61 *Arctic* 224.

20 See the French delegation’s proposal at the ATM in 2016 to require tourists to pay a fee “that could be used to enhance environmental protection and study the environmental impacts of tourism”, Secretariat of the Antarctic Treaty, Final Report of the Thirty-Ninth Antarctic Treaty Consultative Meeting, ATCM XXXIX CEP XXI (2016) 70.

environmental management measures are inefficient as long as there are no consequences in cases of non-compliance with existing regulations.”²¹ This is especially worrisome considering that the level and range of human activities there will conceivably further increase in the years to come, and that the effects are cumulative.

A third area is that of prospecting for, and exploiting of mineral resources. Although the mineral ban was the high point of the EP and, arguably, its *raison d'être*, it suffices to read the news and the most recent articles and books to realize that the possibility of extracting these resources from Antarctica has never been forgotten. Quite the contrary, it is being seriously considered, and sometimes quite openly and explicitly.²² Moreover, as 2048 approaches, some speculate about a new era where preservation of the Antarctic environment will give way to a new era of exploitation.²³ The question of who should have control over Antarctic mineral resources thus becomes pressing, especially considering that the issue of fair access to those resources was never satisfactorily addressed.

21 Christina Braun, Fritz Hertel, and Hans-Ulrich Peter, 'Environmental Management: The Fildes Peninsula Paradigm' in *Handbook on the Politics of Antarctica* (n 11) 362 and 363. There is, of course, the further question whether the Protocol itself is sufficient as a framework for the provision of much needed administrative tools. I leave this aside for the purpose of the discussion.

22 See, for example, Anne Marie Brady's study of China's Antarctic policy revealing, among other things, that the Chinese Polar Research Institute produced in 2009 'a book-length study investigating the full range of Antarctic mineral resources and their legal status, stating that "when all the world's resources have been depleted, Antarctica will be a global treasure house of resources"', Anne-Marie Brady, *China as a Great Polar Power* (Cambridge University Press 2017) 89. In recent years, the Russian Federation has also signaled its interest in conducting more research on minerals and hydrocarbons: 'Scientific Results of Russian Studies in the Antarctic in 2011' (2012), ATCM XXXV, <http://www.ats.aq/documents/ATCM35/bp/ATCM35_bp037_e.doc> accessed 26 January 2019. Ukraine also has an increased presence in Antarctica, sending in 2019 its largest scientific expedition in 18 years. The leader of The National Antarctic Center of Ukraine, Evgeny Dikiy, expressed hope that the mining ban will be lifted after 2048, and that Ukraine might be able to search for minerals in Antarctica once it does: 'For the First Time in Many Years, Ukrainian Women Scientists Have Been Sent to Antarctica' (*TSN Ukraina*, 17 January 2019) <<https://ru.tsn.ua/ukrayina/vpervye-za-mnogo-let-v-antarktidu-otpravlyayutsya-ukrainskie-zhenschiny-uchenye-1282185.html>> accessed 7 February 2019, translation by Hannah Monsrud Sandvik.

23 One such futuristic narrative is SR Rintoul et al, 'Choosing the Future of Antarctica' (2018) 558 *Nature* 233, 237.

2 Justifying Claims to Jurisdiction and to Natural Resources in Antarctica

Four principles of justice underlying the main contemporary philosophical approaches to territorial rights and to rights over natural resources are connection, capacity, fair distribution, and need. While connection and capacity are mainly used to justify jurisdictional, second-order rights, fair distribution and need tend to focus on the right to appropriate, ie first-order rights.²⁴ These four principles figure prominently in the different political discourses that states (on their own or collectively) have used to justify their claims to Antarctica since interest in the White Continent started growing, towards the end of the nineteenth century.

2.1 Connection

The most common way of justifying territorial jurisdiction is to underline the historic presence of a people in a place, the particular mode in which this long-standing relationship has shaped both the people and the place in question, and the values (material and symbolic) that the place has acquired through that ongoing presence. These connection-based theories are past, but also present-oriented: they look at what has been done, but also at what is being done in order to justify control by a collective over a specific area.²⁵ The notion of desert often (but not always) underlies these theories: there is merit in what the claimant has done, and the way to recognize it is to grant control over the territory.²⁶

24 On connection, see David Miller, 'Territorial Rights: Concept and Justification' (2012) 60 *Political Studies* 252; Cara Nine, 'A Lockean Theory of Territory' (2008) 56 *Political Studies* 148; and Margaret Moore, 'Which People and What Land? Territorial Right-Holders and Attachment to Territory' (2014) 6 *International Theory* 121. On capacity, see Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press 2004); and Anna Stilz, 'Why Do States Have Territorial Rights?' (2009) 1 *International Theory* 185. On fair distribution, see Hillel Steiner, 'Left Libertarianism and the Ownership of Natural Resources' (2009) 1 *Public Reason* 1; and Charles Beitz, 'Justice and International Relations' (1975) 4 *Philosophy and Public Affairs* 360, 368. On need, see Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd edn, Polity Press 2008) chapter 8.

25 See each of Miller, Nine and Moore (n 24).

26 What has to be done in order to deserve territorial claims can be cashed out in different ways, but investment in terms of time and resources (human, financial, logistical, etc.), as well as visible results of the presence of the agent in the territory normally count as key factors.

“We got there first.” “We put Antarctica on the map.” “Our nationals conducted economic activities there from early on.” “We managed the area and its resources before anyone else.” These statements were made – in a more sophisticated form – by the seven countries that, between 1908 and 1940, made unilateral claims over most of Antarctica, some partly overlapping with each other.²⁷ They were also made by the two potential claimants (the USA and the Soviet Union), which reserved for themselves the right to make a claim in the future. They all appeal, in one way or another, to the central idea of connection-based theories. What matters, they say, is that they have had a historical trajectory in the claimed space, which has left an imprint in it and in its resources – to be seen, for example, in the remains of old buildings, and the survival of species that might have otherwise been hunted to extinction.²⁸ It is also frequently added that this historical trajectory has also left an imprint on the claimant’s culture, and has been incorporated as a part of its national identity.²⁹ Even though there has never been a native population of Antarcitians, the claimant has left a mark on the area, and the area has left a mark on the claimant that is deep enough to be acknowledged by others. Given the geographic, climatic and meteorological conditions of the place in question, these marks – subtle as they may seem to the outsider – are as good as they can get to ground territorial rights in such an extreme environment.

There is a different kind of connection-based argument that relies on official documents rather than physical acts. That the agents had a legal entitlement over the territory is a claim of this type. In the case of Antarctica, Argentina and Chile contend that, just as they inherited the territorial borders from the times when they were Spanish colonies (by virtue of the principle of

27 The first claim was made by the United Kingdom in 1908, when it issued its first Letters Patent, which included a slice of Argentinian and Chilean Patagonia and therefore had to be reissued in 1917. It was followed by New Zealand (1923), France (1924), Australia (1933), Norway (1939), Argentina (1940) and Chile (1940). The claims of the UK, Argentina and Chile are partly overlapping.

28 See, for example, the United Kingdom’s Whaling Ordinance of 1908 referenced in *United Kingdom v Argentina; United Kingdom v Chile*, 1CJ, Application Instituting Proceedings [16] (1956).

29 Here is a part of the passionate speech of the Argentinian delegate in a meeting with other claimant states: “Argentina is a country with Antarctic vocation ... A vocation is something which has an origin, a genesis, that eventually becomes embodied in the individual, and also in a people, and which leads necessarily to an externalization ... A vocation recognizes causes and has objectives. It imposes at the same time some imperious necessities, and frustrates those who have it and cannot manifest it”, Alberto L Daverede, ‘Política y Actividades Antárticas de la República Argentina’ (Aula de Estudios Antárticos, Madrid, 1987) [3](#).

uti possidetis iuris), they also inherited the lands that were yet to be discovered by Spain in the Southern Hemisphere and were promised to her under the Treaty of Tordesillas of 1494.³⁰ According to the South-American claimants, the legal titles inherited from the Spanish Crown gave them a right of priority that was then “perfected” through administrative acts, actual occupation, and so on and so forth.³¹

Connection-based reasons are probably the most intuitive when it comes to arguing for territorial claims. We normally accept that countries should be ruled by their inhabitants based on their continuous residency in the land, the value they have added to it, and the ways in which the land has shaped their development. Here, analogously, it sounds plausible to say that whoever came to Antarctica and developed some sort of relationship with the territory should have a *pro tanto* claim to it – especially in the absence of competing claims.

There are, however, limits to what connection may justify in the case of Antarctica. By using the sector principle as a delimiting method, the claimants pretty much divided the whole continent among themselves, from the coastal areas all the way to the South Pole.³² I have discussed elsewhere the sheer mismatch between the huge wedges claimed and the areas where the claimants actually had a presence, and suggested that the extent of the claims should be revised accordingly.³³ Maybe the message to take home is that of a German chief who said to the Romans in the time of Nero that “desert countries are common to all”, so that the Romans “had no right to reserve and appropriate to themselves a country which they left desert”.³⁴ If that was a position

30 By adopting the legal principle of *uti possidetis iuris*, the newly independent South American states agreed to keep the territorial demarcations from the time when they were subject to Spanish rule: Ian Brownlie, *Principles of International Law* (7th edn, OUP 2008).

31 See, for example, Oscar Pinochet de la Barra, *Chilean Sovereignty in Antarctica* (Editorial del Pacífico 1954) 48ff.

32 Canadian Senator Pascal Poirier proposed the “sector principle” in 1907 to sort out territorial claims in the Arctic. Simply put, it stipulates that countries that are adjacent to the polar region have a right to the lands extending toward the North Pole. The sector is delimited by drawing lines from the extreme ends of the circumpolar territories that converge at the pole.

33 Alejandra Mancilla, ‘The Moral Limits of Territorial Claims in Antarctica’ (2018) 32 *Ethics & International Affairs* 339.

34 Emer De Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Béla Kaposy and Richard Whatmore (eds), Liberty Fund 2008) 306. Or, as the international legal scholar Charles Salomon expressed it four years after the Berlin Conference: “We reject the idea that, due to the real possession of a specific point, a right arises over a different portion of the territory than that over which the state has really been established. We reject the theory of the natural limits of

worth taking two millennia ago, when around 170 million people inhabited the earth, it makes all the more sense now, with nearly seven and a half billion and counting.³⁵

Another problem with connection-based claims in the Antarctic context relates to their origin and their underlying logic. This is not the place to launch a critique of colonialism and imperialism as the default practices of Western powers in the last five centuries, but it is necessary to make the point that the discovery and later use (and purported appropriation) of Antarctica must be understood within that framework. As has been repeatedly pointed out, Antarctica was no exception, but part and parcel of the colonialist enterprise. This objection may be equally held against connection-based claims based on physical acts and legal entitlements.³⁶

If connection-based reasons have any force in Antarctica, it is probably in those coastal areas which were first visited in the past, mostly by whalers and sealers, and many of which are currently populated by scientific stations. King George Island, Deception Island, and Ross Island are places where appealing to historic ties seems somewhat plausible. Beyond them, connection-based claims look far-fetched and extravagant.

2.2 *Capacity*

Rather than grounding jurisdictional control on the special link between a claimant and a place, function-based theories ask why an authority is needed in the first place, and who might be the best suited agent to perform that role. Depending on their answers to the question of the need for an authority, these theories come in two main types. On the one hand, there is the classic utilitarian approach exemplified by Henry Sidgwick. Here the focus is on the importance of keeping order and peace, therefore contributing to the well-being of those residing in a territory.³⁷ On the other hand, neo-Kantian theories focus on the clear delimitation, protection and enforcement of rights (and of property rights especially) as the main mission of the jurisdictional agent.³⁸ What

occupation: the rights of vicinity, priority, preemption and enclave cannot result but from a freely consented treaty between the interested states", Charles Salomon, *L'Occupation des Territoires sans Maître, Étude de Droit International* (A Giard, Libraire-Editeur 1899) 328, my translation.

35 Colin McEvedy and Richard Jones, *Atlas of World Population History* (Allen Lane 1978) 342.

36 Among the critics, see Shirley V Scott, 'Three Waves of Antarctic Imperialism,' and Klaus Dodds and Christy Collis, 'Post-Colonial Antarctica,' in *Handbook on the Politics of Antarctica* (n 11); and Ben Maddison, *Class and Colonialism in Antarctic Exploration, 1750–1920* (Pickering & Chatto 2014).

37 Henry Sidgwick, *The Elements of Politics* (Cosimo Classics 2005) 34–36.

38 See each of Buchanan and Stilz (n 24).

unites function-based theories is their answer to the question as to the choice of agent, namely, that states are the best able to perform these functions.

While so far these theories have only been applied to inhabited places, the relevant question for our purposes concerns a totally uninhabited (and mostly yet uninhabitable) place. Some reasons for why a jurisdictional agent is needed have been already mentioned above: as economic, scientific and environmental pressures over Antarctica grow, and as the number of visitors to the continent keeps rising, the need to establish a common authority to decide on and regulate the different uses of the place, and to enforce those regulations becomes manifest. But, who is the appropriate agent to perform this task?

In the literature on international governance and regimes, the Antarctic Treaty System (ATS) is often quoted as a paradigm, a system that has been slowly growing in terms of complexity, while gaining in terms of political legitimacy and effectiveness.³⁹ In 60 years, it has built a whole legal apparatus of decisions, measures and resolutions about different Antarctic matters including the EP, hailed by some as establishing the “toughest and most comprehensive environmental regulations ever drawn up for any region of the world in an international agreement”.⁴⁰ It has grown from 12 to 53 signatories (29 of which are Consultative Parties), and it has allowed peaceful use and scientific cooperation, keeping Antarctica demilitarized and as a nuclear-weapon and nuclear-waste free zone. The main world powers are moreover all active participants within the system, giving it stability. Much of the criticism against the ATS relates to the very tight confines within which it works so as not to raise sovereignty worries among the historic claimants. Put differently, one could say that over the years the ATS has demonstrated its capacity to organize, regulate and manage a growing number of activities in Antarctica, and that much of what it has failed to do is a failure not of the system itself, but of the restrictions to its functioning demanded by the unresolved question of sovereignty.⁴¹

From a function-based perspective, as a multi-state authority, the ATS may thus be thought to be a well-positioned candidate to hold jurisdictional control over Antarctica. However, there are at least two issues that have to be addressed before this point can be convincingly made. First, with 29 consultative parties, the consensus approach to law-making in the ATS should be revised

39 Oran R Young, *Governance in World Affairs* (n 16) 7–8 and 115.

40 ‘Protocol on Environmental Protection to the Antarctic Treaty’ (*Umwelt Bundesamt*, 27 January 2016), <<https://www.umweltbundesamt.de/en/protocol-on-environmental-protection-to-the>> accessed 12 November 2018; cf Justine D Shaw et al, ‘Antarctic Protected Areas are Inadequate, Unrepresentative, and at Risk’ (2014) *PLOS Biology* 12, e1001888.

41 Stokke and Vidas (n 16) 440–443.

and a more efficient decision-making procedure should be sought.⁴² Second, it is an open question whether only states should be consultative parties to the treaty. Instead, one could argue that better-informed measures for administering the continent could be achieved if some of the current “observers” and “invited experts” were allowed not just the right to be heard, but also to vote.⁴³

2.3 *Fair Distribution*

The thought that the distribution of natural resources across the globe is morally arbitrary and should thus be subject to some sort of redistribution among people has received increasing attention from political philosophers in the last decades.⁴⁴ It seems unjust, some theorists have argued, that only because some countries happen to sit over valuable pools of resources, the life-prospects for their inhabitants are much better than for those living in resource-deprived regions. This idea has been contested on several scores. Among them, that there is no tight correlation between being a rich and a resource-rich country; and that resources can be a curse as much as a blessing, depending on the underlying institutional and political culture.⁴⁵ But there is an important insight to be salvaged from these theories that seems relevant for our case: namely, that insofar as we are not responsible for creating natural resources, while still needing them, there is a sense in which we should all own them collectively.⁴⁶ It seems moreover particularly plausible that natural resources in areas which are not yet occupied by people and which do not fall under anyone’s recognized sovereignty (like Antarctica) should be distributed according to some global egalitarian principle.

This point was made in a less philosophical and more political tone by Mahathir bin Mohamad, the Prime Minister of Malaysia, in his famous speech

42 Such a call is made in ‘Reform the Antarctic Treaty’ (n 7).

43 Since the mid-1980s, the annual ATMs are attended by observers such as the Scientific Committee on Antarctic Research (SCAR), the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), and COMNAP. Among the invited experts, IAATO and the environmental NGO Antarctic and Southern Ocean Coalition (ASOC) have been constantly attending. In years to come, one would expect that bodies like the Intergovernmental Panel on Climate Change (IPCC) played a more relevant role, given the global implications of climate change for and in Antarctica.

44 See each of Steiner and Beitz (n 24).

45 For a thorough analysis, see Leif Wenar, *Blood Oil: Tyrants, Violence and the Rules That Run the World* (OUP 2016).

46 Mathias Risse, *On Global Justice* (Princeton University Press 2012) 108ff.

to the General Assembly of the United Nations, in 1982.⁴⁷ In the context of advocating for a stronger rule of the United Nations in world affairs at the time, he suggested that areas beyond the jurisdiction of states should be for the benefit of humanity as a whole:

Like the seas and the seabed, those uninhabited lands belong to the international community ... At present the exploitation of the resources of Antarctica is too costly and the technology is not yet available, but no doubt the day will come when Antarctica can provide the world with food and other resources for its development. It is only right that such exploitation should benefit the poor nations as much as the rich.⁴⁸

The idea gained traction over the years and became a counterpoint to the traditional ATS status quo. In fact, Mohamad's speech marked the beginning of the Question of Antarctica in the United Nations, which persisted until 2005 and triggered a post-colonial critique of Antarctic politics.⁴⁹

What a fair distribution of resources would demand and how it could be realized in Antarctica, however, is likely to remain a heated issue. If one really thinks that literally everyone has a claim over Antarctic resources, one has to start by deciding who *everyone* is, given that this will determine how shares should be divided: only currently existing humans, or future generations also, and maybe nonhumans as well? A second question is what is to count as a *resource*. Given that resources depend on the context, there will always be an element of uncertainty in determining how to classify and regulate them on a long-term basis.⁵⁰ A third point of contention is what it means to have an *equal claim*. Presumably, it is not about giving each a slice of Antarctica for them to own and administer, but rather to have everyone benefit equally from its resources. Some could say here that the place to look for guidance is the International Seabed Authority (ISA), an international body set by UNCLOS to regulate the use of deep seabed mineral resources, applying the principle of

47 UNGA Official Records (29 September 1982) A/37/PV10. Before Mohamad, the same point had been made in 1967 by Maltese ambassador, Arvid Pardo, in relation to the seabed: UNGA Official Records (1 November 1967), A/C.1/PV1516.

48 UNGA 1982 (n 47).

49 For an overview, see Peter J Beck, "Twenty Years on: The UN and the "Question of Antarctica," 1983–2003' 40 Polar Record 205.

50 As Mathias Risse puts it, how valuable a resource is "depends on what people can and want to do with the substance. So it depends on what technology is available that requires these materials; on how people choose to integrate it into their lives; and on what specific property rules determine what they can do with resources and technology", Risse (n 46) 123.

Common Heritage of Mankind. Unfortunately, the ISA is only now becoming more operational, and it is hard to say how it will actually decide on the redistribution of benefits and technology transfer when companies start drilling in the areas under its administration.⁵¹

But most problematic of all is the fact that the fair distribution principle – at least, as far as it has been instrumentalized by states – starts from the assumption that Antarctica is there to be used and to profit from. It is no coincidence that it was actually when resource extraction came closest to becoming a reality through the negotiations for a mineral regime that the rationale of fair distribution was strongest. But even if this has in fact been the default view of states when it comes to the treatment of the natural world, a lot more needs to be said to justify it, especially if confronted with the position that places like Antarctica should be preserved rather than exploited.⁵² Furthermore, under very much changed global circumstances, the language of “shares for consumption” should probably be replaced by the language of “shared responsibilities in consumption.” In other words, it is no longer obvious that talk of equal shares is going to be helpful to achieve a fairer access ~~of states~~ to Antarctica’s resources today and in the future.⁵³

2.4 *Need*

A different take on the idea that the global distribution of natural resources is morally arbitrary and may thus be subject to redistributive principles focuses on need. The thought is that, instead of dividing the proceedings from such resources equally, the worst-off should be given priority. This is what underlies Thomas Pogge’s proposal for a Global Resources Dividend (GRD), to be paid by resource-rich countries to the world’s neediest when exploiting those resources, thus “ensuring that all human beings can meet their own basic needs with dignity.”⁵⁴

If one takes into account that many of the poorest countries are resource exporters, it is no surprise that the GRD has been criticized as adding insult to

51 See, for example, Michael W Lodge, Kathleen Segerson, and Dale Squires, ‘Sharing and Preserving the Resources in the Deep Sea: Challenges for the International Seabed Authority’ (2017) 32 *The International Journal of Marine and Coastal Law* 427; and Luc Cuyvers, Whitney Berry, Kristina Gjerde, Torstein Thiele, and Caroline Wilhem, *Deep Seabed Mining: A Rising Environmental Challenge* (IUCN and Gallifrey Foundation 2018) 35.

52 A classic defence of this position is found in Christopher C Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection* (University of South Carolina Press 1998).

53 I thank Davor Vidas for pushing me to clarify this point.

54 Pogge (n 24) 203.

injury: to ask developing countries to redistribute part of their gains to other developing countries does not seem such a fair deal.⁵⁵ However, the GRD would easily avoid these criticisms in the Antarctic case, where mostly developed states (and, with them, their scientists and businesses) can afford to use and exploit its resources. In this sense, one could well think of redirecting some of the proceeds from tourism, fishing, bioprospecting and, eventually, mining, to those who need it most. One could also think of redirecting some of the fresh water (if it is ever harvested) directly to drought-stricken areas.⁵⁶

While it was Malaysia that advocated for equal access both of rich and poor countries to Antarctica's treasure trove of resources, it was a Bolivian delegate in the course of one of the sessions of the Third UNCLOS Conference who came closest to defending need as a guiding distributive principle in Antarctica. There, the suggestion was that the continent ought to be "reserved for the most geographically disadvantaged states."⁵⁷ Unfortunately, it was neither specified what was meant by "to reserve", nor why "geographically" disadvantaged states (rather than disadvantaged states full-stop) should be given priority.

As with fair distribution, the need principle faces similar challenges. On the one hand, it must get a clearer grip on who its beneficiaries should be; what resources should be included in the list, and how the benefits should be delivered. On the other hand, it must also say something about why it is exploitation rather than preservation that should guide our thinking of the present and future of Antarctica.

55 See, for example, Tim Hayward, 'Thomas Pogge's Global Resources Dividend: A Critique and an Alternative' (2005) 3 *Journal of Moral Philosophy* 317.

56 One can also think of need as the basis for the relocation of people to Antarctica's inhabitable areas. Rather than a claim to redistribute resources to the worst-off, this would be a claim to redistribute land to those who need it most. Here are two such proposals. Before the signature of the Treaty, the British diplomat EW Hunter Christie speculated that "it is not perhaps too fantastic to consider the Eskimo as a future inhabitant of these regions, since, in parts of Greenland at any rate, climatic changes and the depletion of stocks of native animals are causing a revolution in his habits, involving many of the smaller communities in considerable suffering," EW Hunter Christie, *The Antarctic Problem* (George Allen & Unwin 1951) 297. In 2016, in the midst of the European "migration crisis", Doaa Abdel-Motaal suggested that 'the world should be asking not only what "will" happen to Antarctica in 2048, but what "should" happen, because policy-makers need to start to include the Antarctic actively in the climate refugee equation', Doaa Abdel-Motaal, *Antarctica: The Battle for the Seventh Continent* (Praeger 2016) 152–153.

57 Quoted in Keith Suter, *World Law and the Last Wilderness* (Friends of the Earth 1979) 37.

3 Maybe Necessary, but Sufficient?

Connection, capacity, fair distribution and need are the principles of justice that have been used by states or groups of states to ground claims to jurisdictional control and to the appropriation of natural resources in Antarctica. They all find support in mainstream theories in political philosophy that deal with these questions. That those entitled to jurisdiction should be those who are and have been in a place, or those most capable of performing certain key functions, are the respective rationales behind connection and capacity. When it comes to claims to natural resources, that everyone should have equal claims to them, or that the worse-off should get priority access, underlie the principles of fair distribution and need respectively.

In this section, I suggest that all of these principles may be necessary when thinking of the current and future status of Antarctica, so that each should have a role to play. However, they are not sufficient – at least, not in the way they have been rendered so far.

Regarding connection, its use by the seven claimant states (and the two who have reserved their rights to make claims of their own) seems acceptable only within very limited geographical areas. Even if one granted their claims, then, the question of how to think about most of the remaining continent would still be open. Moreover, depending on how one interprets “connection” and when the baseline is set, the claims of more recent actors may also have to be considered; for example, the claims of those countries with established bases in the continent, or with long-term scientific projects. Indeed, scientific institutions themselves may invoke connection as a ground for having continued presence and greater influence over Antarctic matters.⁵⁸

Regarding capacity, it is the principle that resonates best in a continent that seems in need of an undisputed and efficient jurisdiction more than anything else – certainly much more than a host of agents demanding their rights without necessarily acknowledging their duties. To a great extent, the ATS has performed more or less successfully during six decades the different functions that its members have cared to assign to it. As mentioned above, however, when it comes to thinking who the interested parties are in Antarctica, the ATS has begged the question: interested parties are those who already take part, and taking part must be done in the prescribed manner – ie by showing

⁵⁸ Some may object here that, within the framework of the Treaty, this is a non-starter. After all, Article IV (n 8) ensures that, while in force, no activities done in Antarctica will count as grounds for claims. But there is no reason to deny the possibility that this might be questioned or revised in the future.

scientific merits. Moreover, membership is limited to states and states only. But if it is those best suited who should be making the decisions, it is at least arguable that some of the non-state agents who currently occupy the limited role of observers and invited experts should also become active participants in Antarctic political deliberations. Another possibility that has not been examined is that stand-alone, well-functioning states may claim jurisdiction on the basis of capacity. One could think, after all, of states with decent track records when it comes to fulfilling the same functions that might be desirable to fulfil in Antarctica – for example, environmental protection or sustainable resource extraction. That no states have yet made such claims does not mean that one should not consider this as a realistic alternative or complement to the current arrangement.⁵⁹ Furthermore, as already mentioned, the way in which decisions are made also needs to be revised: consensus might have been a sensible method when the Treaty had 12 signatories; it is hard to defend at 29 Consultative Parties and counting.

Regarding fair distribution and need, their most problematic aspect is their underlying assumption; namely, that Antarctic resources are there to be divided and exploited. Outside the context in which they were made (where it was thought that mineral resource exploitation in Antarctica was imminent, with Non-Aligned countries wishing to take part in the share-out), they also beg the question: whether Antarctica should be seen as one more pool for resource extraction or as a world reservoir for present and future generations is precisely what needs to be discussed. However, if one thinks of the fairness principle in particular as applying not to the distribution of natural resources, but of decision-making power (which will in turn determine whether and how resources should be used), then it seems indispensable for a more just jurisdictional framework. For one thing, although every world state is “free” to join the Treaty, in practice this is nothing more than a Hohfeldian privilege or liberty: namely, the opposite of a duty and the correlative of a no-claim, which in this case merely means that ~~they~~ have no duty to stay away.⁶⁰ For another thing, if one adds to this that to become a consultative party one needs to conduct “substantial research activity” in the continent, it is no wonder that some have criticized the ATS for being an elitist club for the richest countries only.⁶¹ In

59 I thank Cara Nine for bringing up this point.

60 Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16, 32.

61 The “substantial research activity” requirement can be found in Antarctic Treaty (n 8) Article IX, paragraph 2, 25. For its critics, see, for example, Sanjay Chaturvedi, ‘India and the Antarctic Treaty System: Realities and Prospects’ (1986) 42 *India Quarterly* 351.

short, the question of extending membership to ensure a fairer representation is pressing.⁶²

Furthermore, despite their differences, there are three features that are common to the above principles as they have been interpreted and used so far by states in Antarctica. They all need to be questioned, I submit, in a global context where the politics of the continent can no longer be deemed to be exceptional and detached from the rest of the world order.

First, these principles are anthropocentric when it comes to defining their ends, and state-centric when it comes to defining their means. In other words, they see humans as the only subjects of direct concern, and states as the international agents with the monopoly to realize their goals and aims. It merits further discussion whether these are the right assumptions to make in a world where the value of nonhumans has begun to be taken seriously, and where the monopolistic agency of states is increasingly questioned.⁶³

Second, and implied by the former, these principles view the nonhuman world as mainly instrumental for humans. Granted, the EP recognizes in its Article 3 that the intrinsic value of Antarctica will be taken into account when planning activities in the Continent.⁶⁴ However, what “intrinsic value” means, and what it requires parties and private actors to do are left unexplained.

Third, and perhaps most crucially, these principles tackle questions of jurisdiction and rights over natural resources as they have been traditionally tackled; that is, assuming that controlling what happens within a limited geographic space is enough to control what actually happens within that limited geographic space. The problem with this assumption is that Antarctica today is the best exemplar of the Anthropocene at play. On the one hand, it is much more affected by the human activities that take place beyond, rather than within, its limits. On the other hand, changes happening in Antarctica (starting with the collapse of the WAIS) will affect the human activities that take place beyond it to an extent that we have not yet fully grasped.⁶⁵ Antarctica, in short, makes one realize that thinking about jurisdictional control in finite,

62 Moreover, it would be pragmatically advisable. As Don Rothwell has put it: “The greater the number of states [participating], the stronger the system can theoretically become,” Don Rothwell, ‘An Exchange of Views on the History and the Future of Polar Law’ (11th Polar Law Symposium, Arctic University of Norway, Tromsø, October 2018).

63 I thank Kees Bastmeijer for bringing the implied anthropocentrism of the principles to my attention.

64 Protocol on Environmental Protection (n 6) Article 3.

65 If the West Antarctic Ice Sheet (WAIS) rapidly disintegrates, leading to rising sea-levels, many coastal communities will be subject – to put it mildly – to “nontrivial risk”, Alexander RM Bakker et al ‘Sea-Level Projections Representing the Deeply Uncertain Contribution of the West Antarctic Ice Sheet’ (2018) 7 *Scientific Reports*.

discrete terms (as has been done for centuries) is an illusion in a world in which it has become manifest that global actions have local impacts. The most capacious jurisdiction south of 60° South Latitude is no guarantee that what will happen to the territory and resources south of 60° South Latitude will go according to plan.

4 Concluding Remarks

The starting assumption of this article was that politics is not just about the exercise of brute force and rhetoric, but also about the realization of certain minimal moral criteria. In thinking about Antarctica, I contended, we should be aiming at a “realistic utopia” which recognizes human limitations yet aspires for the best possible institutional arrangements.⁶⁶ In this vein, here are two concluding thoughts.

First, while thinking through what a more just jurisdictional framework and a more just access to natural resources in Antarctica would look like, keeping peace and stability should be a requisite. In this sense, rather than discarding what has already been constructed, any discussion regarding the future status of Antarctica should uphold what the ATS – despite its shortcomings – has already achieved. Most notably: 60 years of peaceful cooperation among the international scientific community; an ecosystem, precautionary-based approach to fisheries that, despite its remaining uncertainties and shortcomings, is yet one of the most environmentally ambitious at the global level; an EP with ambitious preservation goals; and a political system which has slowly grown in terms of participation, complexity, and legal scope.

Second, in developing this framework, none of the principles mentioned above should be applied monolithically and across the board. Instead, they should all play some role in the discussion, so long as they are re-evaluated under current global conditions. While international law and political philosophy emerged and developed in a context where the stability of the natural world was taken for granted, this is no longer a tenable assumption.⁶⁷ How this should be reflected in our thinking about Antarctica – and the rest of the

66 Rawls (n 14).

67 For an excellent example of how this plays out in the legal regulation of the world's oceans, see Davor Vidas, ‘The Anthropocene and the International Law of the Sea’ (2011) 369 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences*, 909.

world, for that matter – has been a neglected question, but one to which we will have to pay increasing attention.

The goal of this article has been to show that the principles of connection, capacity, fair distribution and need as they have been rendered so far by states may be necessary, but not sufficient to construct a realistic Antarctic utopia, at least not as they have been interpreted so far. To let the prima ballerina rest her feet on the floor (at least for a while), they would have to be re-evaluated and probably supplemented by other principles. I leave the question open as to which principles these should be and what role they should play in the discussion.

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