

# Floating Territories

By Giorgos Lagoudakis

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By nature, the concept of law is inextricably bound up with the concept of space (territory). Law is most often defined as a system of rules enforced by a set of institutions - these institutions being either sovereign states (national and international law) or a supranational legal framework (ex the European Union law). In both cases, the application of these rules is limited to the territorial boundaries of the said institutions. It is however possible that the existence of "floating territories" and territories oscillate between two or more sets of legal rules.



The T-3 camp on Fletchers Ice Island.

## 1. The Escamilla Case. Floating Territories or Landmade Ships?

In the 1970s, a US citizen was killed by another US citizen on an ice island floating in the Arctic Ocean where they were both working as members of a research team. The incident took place while the ice island was floating in the Canadian Arctic Sector. A US investigation team was sent to bring the offender back to the United States. The plane carrying him first landed in the state of Virginia, where the offender was charged with murder.

The issue that is raised with this case is whether the US, or Canada, or both national entities, have jurisdiction over this crime. Canada did not want to interfere with the course of justice in a case that concerned two US nationals. However, nor did it want its lack of involvement in this specific case to have any repercussions on its claim over the specific territory. The complexity of the issue consists in the fact that the territorial sovereignty claimed by Canada forms the basis of exclusive jurisdiction.

The ice island in question, called T-3, originated from ice shelves off of the Northern Coast of Ellesmere island, which is part of the Canadian territory of Nunavut. As long as these ice shelves are connected to the land through glaciers, they are generally considered to be land. The question of their status as land arises when these ice shelves break into large fragments floating on the Arctic Ocean. As mentioned above, Canada considered these ice islands to be Canadian territory at the time of the incident. Therefore, even though the

incident concerned two US nationals, the forcible removal of one of them from the island on the basis of the United States' jurisdiction over its nationals, should have been considered as a violation of Canada's sovereign rights over its territory.

In order to avoid addressing the issue of sovereignty directly, the US court preferred to apply jurisdiction by relying upon the State of the Flag Rule. According to the aforementioned rule, a coastal state cannot exercise criminal jurisdiction on board of a foreign ship passing through territorial waters. The court considered the ice island as a ship. In other words, the ice island, literally a floating space, was considered in the same manner as an object. The importance of this territory's floatation is striking when one considers the following implication: once away from the ice island/ship, the US national would be subjected to the jurisdiction of whichever state the plane carrying him first landed. If this state applied the capital punishment for such crimes, as opposed to Canada which did not enforce the death penalty, then the territory's floatation between legal systems could mean the difference between life and death.

## 2. The United Nations Convention on the Law of the Sea (UNCLOS)

### TERRITORIAL SEA AND CONTIGUOUS ZONE

*Article 2. Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil*

1. The sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

*Article 3. Breadth of the territorial sea*

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

### ARCHIPELAGIC STATES

*Article 46. For the purposes of this Convention:*

- (a) 'Archipelagic State' means a State constituted wholly by one or more archipelagos and may include other islands;
- (b) 'archipelago' means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

*Article 47. Archipelagic baselines*

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.
2. The length of such baselines shall not exceed 100 nauti-

cal miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles. [...]

*Article 49. Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil*

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein. [...]

## CONTINENTAL SHELF

*Article 76. Definition of the continental shelf*

1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. [...]

*Article 77. Rights of the coastal State over the continental shelf*

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

*Article 78. Legal status of the superjacent waters and air space and the rights and freedoms of other States*

1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.

2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.

## HIGH SEAS

*Article 87. Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI;

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2;

(f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

*Article 88. Reservation of the high seas for peaceful purposes*

The high seas shall be reserved for peaceful purposes.

*Article 89. Invalidity of claims of sovereignty over the high seas*

No State may validly purport to subject any part of the high seas to its sovereignty.

If there is an instrument of law dealing with spaces that extend beyond the stereotypical definition of the term, then it is the United Nations Convention on the Law of the Sea.

The idea of the Free Seas was first advocated by the famous Dutch Jurist Grotius in his book *Mare Liberum*, which was published in 1609 as an ideological justification for the Dutch nation's rejection of the long established trade monopolies by surrounding countries. According to Grotius, the sea was international territory and all nations were free to use it for seafaring trade. At the other end of the spectrum, England's claim for sovereignty over the waters around the British Isles was reflected in John Selden's work *Mare clausum* (1635). Even though we have come a long way since then, the issue of dominion over the sea has become even more complex. An elaborated set of rules has been created to set the basic guidelines along which such dominion should be exercised. However, the very nature of the envisaged "territory" is often legally paradoxical and serves as a source of tension between neighbouring states.

Even though, they technically form part of one state's territory according to the UNCLOS, the territorial sea and continental shelf are not automatically subject to such states' sovereignty. It is often the case that the exercise of any dominion over such "territories" (or the non exercise of it) is the result of intensive bilateral negotiation between states, or even stem from war conflicts. The case of the Greek territorial waters is a typical example. It is well known that the Greek territory includes a number of islands, many of which are located within swimming distance from the Turkish coasts. According to the UNCLOS, Greece has the right to extend its territorial sea to 12 miles from the shores of these islands (subject to the limitation that when the distance between Greek territory and Turkish territory is less than 24 miles then the territorial water of each state is proportionally resized). Turkey, however, denies that such a right exists due to the particularity of the situation, and insists that extending the territorial waters from 6 miles (as they are today) to 12 miles constitutes a *casus belli*. Unquestionably, both parties have valid arguments to support their position. What is interesting is that a negotia-

tion between two states, which envisages the threat of war conflict, has led to the non-dominance of a space considered to be territory under international law.

Another interesting point arising from the concept of space as arranged by UNCLOS is that it is possible for two jurisdictions to coincide at the very same point of a territory. Indeed, let us consider the case of a company, incorporated under French law, which is drilling oil from a platform installed in the sea-bed of an area situated 180 nautical miles away from the baselines of France. On the surface, at the very same point, a German ship is performing a scientific research. While the Platform is on French "territory" and any activity therein is subject to French law, the German ship is in High Sea, which is considered to be international "territory".

Both the Escamilla Case and the UNCLOS deal with the issue of redefining space not according to our empirical knowledge but to policy reasons. Fluidity, however, is inherent to such reasons. A switch in policy goals could amount to a change in the recognition of a space as territory subject to sovereignty or not. In the first case the territory is actually floating and two legal systems are seeking application. In the second case, it is the legal status that floats while space remains immobile.