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The Historical Legal development of Artificial Islands in the Laws of the Sea

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ABSTRACT

This paper presents the historical legal development of artificial development of artificial islands in the law of the sea with the evolution of the topic dating from The 1930 Hague Codification Conference, to the 1982 United Nations Conference on The Law of the Sea. The study follows with an examination of the status of „natural islands, " as well as that of „ships and vessels" in relation to artificial islands. This is of importance in order to discern those elements which are common to the particular nature of artificial islands. The process of assimilation, however, leaves much to be desired and an attempt is made to take advantage of this investigation as well as the study of the 1982 Law of the Sea Convention so as to recommend the creation of a separate legal category for artificial islands. The focus of this research is the international legal documentation which has shaped the present position of the LOSC. Before tracing the origins of artificial islands in legal history, a general background of the international law in the relevant context is given. This chapter attempts to demonstrate how international law has never been static in nature. Whilst focus shifts progressively to the present LOSC, one can appreciate that the principles of international law retain a form of derivative significance, even in the most recent and topical issues such as that of artificial islands.

BACKGROUND

Towards the end of the fifteenth century, Spain and Portugal were the two most powerful nations in Europe since they excelled in navigation technology and had slowly begun to conquer lands and build their own empires. Efforts to achieve absolute power inevitably led to conflict between these two nations over the dominion of the high seas. Freedom of navigation was crucial at the time, not only to acquire and conquer, but also to maintain power. In the face of this rivalry, Pope Alexander VI divided the Atlantic Ocean into distinct zones between the two imperialist powers. In 1493, changes in the relationship among nations sharing the World"s Sea brought about the need for the first edict to govern the use of international ocean space. The delimitation of the maritime zones as we know it today was greatly determined by these first steps towards regulating the seas.[1]

At the beginning of the sixteenth century, with further advancement in technology, the power shifted from Spain and Portugal to the navies of the Netherlands and Great Britain. Artillery gun fire replaced the methods of boarding by force as used by the Spanish and Portuguese navies. Great Britain"s naval power on the high seas was firmly established in 1588, after the defeat of the Spanish Armada in the English Channel. Their authority to navigate the high seas continued unchecked without threat from any other nation. In time, the legislation imposed by Pope Alexander VI was no longer applicable.[2]

It was then that the era of the „freedom of the seas" as advocated by Grotius brought with it a general idea of the sea as being inexhaustible in nature and open to the usage of all States.[3] The ocean by its very nature was proclaimed beyond the legitimate jurisdiction of any nation. A corollary concept that developed alongside the freedom of the seas was the concept that a coastal State could exert special jurisdiction in the waters contiguous to its shores.

This is the principle which has developed into the modern concept of the territorial sea. Once more, it was Grotius who first enunciated what for several centuries was to be regarded as the definition regulating the territorial sea. Grotius wrote that the sea under the jurisdiction of the coastal State should be controllable by guns placed on the shore.

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[1] Adam Starchild, The Ocean Frontier, University Press of the Pacific, Hawaii 2002, 106.
[2] Ibid. 107-108.
[3] John Selden, Of the dominion, or ownership of the sea, ARNO Press reprinted 1972.

Another Dutchman, Cornelius Van Bynkershoek, turned this into what became known as the „cannon shot rule"; that a coastal State held under its sovereignty all water that it could control by cannon on the shore.[4] Thomas Jefferson later established this to be three miles which became the width of the territorial sea claimed by many nations.

For over three centuries, the law of the sea was divided into two zones: the territorial sea limited to three nautical miles and the high seas, which was the zone beyond the territorial sea where the freedom of the seas applied. Although modern international law has indeed surpassed the theoretical writings of these early jurists, the constantly evolving international law of the sea retains its significance based on these foundations.

THE HAGUE CODIFICATION CONFERENCE 1930

The mid twentieth century achieved a development in the utilization of sea space and this anticipated a general enthusiasm for the progression of a worldwide concurrence on the purview of States on the sea. This intrigue happened especially with respect to the broadness of the regional ocean and an exceptional reason adjoining zone. The ramifications of this was the waterfront State would have the capacity to practice the vital control all through a zone on the high sea bordering to the regional ocean to keep the encroachment of its traditions or clean directions or impedance with its security, by outside vessels. Such control could not be exercised for more than twelve nautical miles from the coast.[5]

The foreseen issue as to simulated islands was for the most part worried about whether the waters encompassing a artificial structure on the high sea would or would not have the juridical status of regional waters. Establishments were likewise included as a major aspect of this downright inquiry. Under the auspices of the League of Nations, a Conference for the Codification of International Law took place at The Hague in 1930.

At The Hague Codification Conference, the rules adopted by Sub-Committee No. II of the Second Committee were as follows:

(i) "Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high water-mark."[6]

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[4] Cornelius Van Bynkershoek, De Dominio Maris (1721).

[5] American Society of International Law, Supplement to the American journal of International Law, Vol. 24 (1930): 235.

[6] Acts of the Hague Conference, 1930, Vol. III,212. Article 1 of the Draft Convention prepared by the Second Committee.

(ii) "Elevations of the seabed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base-line of the territorial sea."[7]

At The Hague Conference, there was contradiction in the matter of whether the occupation and utilize or even "capacity of compelling occupation and utilize" were required keeping in mind the end goal to give a high tide height of the ocean bed the juridical status of an island. At last, the definition dictated by Sub-Committee No. II did not demand these prerequisites. The accompanying perception was added to the meaning of an island introduced by Sub Committee No. II: the meaning of the term 'island' does not reject simulated islands gave that these are genuine segments of the region and not simply drifting works, secured floats, and so forth. The instance of an artificial island raised close to the line of division between the regional waters of two nations is excluded.

At the 1930 Conference, the situation of numerous Government agents was that for an island to have regional waters, it must be equipped for occupation and of utilization. The Conference did not prevail with regards to embracing a Convention since concession to the significant inquiry of the broadness of the regional ocean couldn't be come to. Firm opposition of the three-mile rule came from the representatives of Norway, Sweden, and Finland who were resolute that a wider territorial belt was essential to their national interests.[8]

Although the three mile limit was accepted by the majority of States attending The Hague Codification Conference, there was a firm opposition to this limit being recognized as the maximum limit of the territorial sea.[9] Yet the Conference did reach some agreement on the legal status of the territorial sea and the determination of the baseline from which the territorial sea is to be measured.

A second factor which was an obstacle to the determination of a Convention based on the discussions of the Conference was that representatives of certain States, notably Great Britain and France, were uncompromising with regard to the contiguous zone.

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[7] Ibid, 213 Article 2.
[8] Sweden (1779), Norway (1812), and Finland (1920) laid claims to territorial belts of four miles.
[9] J.S. Reeves, The Codification of the Law of Territorial Waters, 24 AJIL (1930): 846,494.

A number of jurists wrote their opinions and formulations on the subject matter, as a result of the fact that the nature of an island was not given enough elaboration at The Hague Codification Conference. Among these, the famous jurist Gidel did not accept the Committee's definition which made no distinction between natural and artificial islands and he proposed his own definition.

After the Conference, Gidel wrote that an island is a natural elevation of the earth"s sea- bed, which is surrounded by water and which is placed permanently above the sea, where natural conditions allow for the permanent establishment of a human population. Natural islands, according to Gidel, can be assimilated to artificial islands so long as the latter satisfy the same conditions. These conditions include those instances where the formation of islands has occurred through the action of natural phenomena or has been accelerated by means of works.[10] Gidel, however, specified that the interchangeable status of artificial islands to natural islands only applies to those islands which are found at least partially in the territorial sea of a State.

Another jurist, Oppenheim, in his report to the Institute of International Law made reference to the Fur Seal Arbitration (1893) whereby the Attorney-General, Sir Charles Russell, presented the view that lighthouses, wherever they are built, are an extension of the State's sovereignty and territoriality and in such respect should be given the right to a territorial sea.[11] This was the first time that the question of artificial islands was raised. Oppenheim opposed and criticized this view. He stated that if Sir Charles Russell"s view were to be adopted, it would be necessary to give all States a right of sovereignty on the territorial sea surrounding a lighthouse. According to Oppenheim, such action could no longer be justified.

Oppenheim believed that the comparison of lighthouses to islands is in its nature giving an erroneous treatment and that it would be better if lighthouses were placed on the same footing as that of anchored vessels in this way,[12] a State would not have the right to claim sovereignty on the territorial sea surrounding a lighthouse.[13] On the same fact, Gidel pointed out that the juridical status of a lighthouse does not depend on the existence of the same lighthouse but on the natural elevation on which it is built.

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[10] Gidel, Le Droit International Public de la Mer, Vol. III, Paris, 1934.
[11] Moore, International Arbitration, Vol. I, 900-1.
[12] D.H.N Johnson, Artificial Islands, ILQ, Vol. 4 1951, 207-208.
[13] Ibid. 208-209.

Oppenheim was supported by Jessup who writes that: "It would be a dangerous doctrine in many parts of the world to allow States to appropriate new areas of waters by means of structures on hidden shoals."[14] Gidel strongly advocated the principle that semi- submerged rocks on the high seas have no territorial waters. He adhered to such a position strongly even in the case where installations could be built on rocks.[15]

In the deliberations by these eminent jurists following The Hague Conference, of primary importance was whether any object exposing a surface above the level of the sea at high tide qualifies or does not qualify for the juridical status of an „island".

Despite the fact that no codification came about because of The Hague Codification Conference of 1930, the estimation of the preliminary work filled in as a solid reason for future discourses. On the off chance that, at this stage, it was an acknowledged rule that artificial islands could have regional waters, there stayed to be disentangled which kind of artificial islands would qualify as developments and which did not. On the off chance that a simulated island is to be an island in a similar sense that a characteristic island is an island it must be "encompassed by water'", be "for all time above high-water check" and show "a proper surface over the ocean unmistakable in ordinary climate conditions". Another capability set at the time was that it must be "of the idea of region". This nature is what is related firmly with the perpetual quality of artificial islands. On the other hand, installations were considered to be temporary in nature.[16]

Huge political events occurred after The Hague Conference which formed the development of the law of the ocean. In October 1939 and especially because of the event of World War II, the Foreign Ministers of the American Republics issued the Declaration of Panama making a security zone going from 300 to 500 nautical miles from its drift.

This was designed to insulate the western hemisphere from foreign aggression.[17] This was the first dramatic extension to the concept of the contiguous zone as discussed at The Hague Conference. It was trailed by another huge augmentation in the Truman Proclamation of 28 September, 1945. The United States continued singularly to lay cases to the seaward normal assets of the ocean informal lodging of the mainland retire underneath the high sea however adjoining to its coasts. This without a doubt energized the Governments of Mexico, Argentina, Chile, Peru, Ecuador, Costa Rica and El Salvador to trust that their seaward claims, like that made by the United States,

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[14] Jessup P.C., The Law of Territorial Waters and Maritime Jurisdiction, New York, 1927, 69.
[15] Gidel, Le Droit International Public de la Mer, Vol. III, Paris, 1934, 696.
[16] ibid
[17] F.A. Garcia – Amador, The Exploitation and Conservation of the Resources of the Sea, Leyden 1959, 5965.

were not conflicting with the creating international practice. Not exclusively was the opportunity of the high sea being tested however significance was being set on different zones of the ocean which required control.

In 1945, the League of Nations was replaced by the United Nations (UN) and the International Law Commission (ILC) was thereby established. At this time, the UN ensured that the necessary directions were undertaken to avoid further unilateral actions in favor of international negotiation.[18] the draft articles prepared by the ILC to convene subsequent Conferences were greatly influenced by The Hague Codification Conference articles on the issues of the territorial sea and high seas.

In 1956, the ILC produced a report which covered all aspects of significance with regard to the law of the sea. This was the official source for the United Nations Conference on the Law of the Sea held in Geneva in 1958 (UNCLOS I).

UNCLOS I & II

The tasks confronting the negotiations in 1958 were far simpler than the task previously faced by the international community. The resulting Geneva Convention on the Law of the Sea covers four Conventions of international law, namely: The Convention on the

Territorial Sea and Contiguous Zone; the Convention on the Continental Shelf; The Convention on the High Seas; and The Convention on Fishing and the Conservation of Living Resources of the High Seas. These four Conventions formalized existing customary law which previously governed the use of the seas.

The Convention on the Territorial Sea and Contiguous zone defines an „island" in Article 10 as "a naturally formed area of land, surrounded by water, which is above water at high tide". Furthermore, "where a low-tide elevation is wholly situated at a distance exceeding the breath of the territorial sea from the mainland or an island, it has no territorial sea of its own."[19]

This differs from the definition presented by the Committee at The Hague Codification Conference. An „island" under the Geneva Convention was attributed with the feature of being „natural," thus categorically excluding artificial islands. Furthermore, low-tide elevations which

[18] Adeoye Akinsanya, The Law of the Sea Unilateralism or Multilateralism?, Lagos University Press 1980, .

[19] The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, Art. 10

could be aided in their formation by works were not considered as islands and were excluded a territorial sea of their own.

At UNCLOS I, the issue of artificial islands, installations and structures was addressed in the context of the continental shelf. The coastal State was entitled to construct, maintain and operate on the continental shelf, installations and other devices necessary for the exploration and exploitation of its natural resources.[20]

The approach previously advocated by President Truman was applied when allocating sovereign rights for the purpose of exploring and exploiting the continental shelf resources. However, the water above the continental shelf remained part of the regime of the high seas.

Interference with navigation, fishing or conservation of living resources, oceanographic or scientific research was forbidden.[21] the entitlement of the coastal State to control artificial islands was made, subject to the establishment of safety zones around such Islands" which are necessary for their protection.[22] the safety zones surrounding artificial islands and installations could extend to a distance of 500 meters. It was made clear that installations do not possess the status of islands, they have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea of the coastal State.[23] It was established that due notice must be given with regard to the construction of any installations and necessary permanent means of giving warning of their presence must be established.

These mentioned requisites must be maintained properly. Installations which are abandoned or disused must not be entirely removed.[24] Furthermore, the installations, nor could the safety zones around them cause interference with international navigation.

Article 2 of the 1958 Convention on the High Seas reads as follows:

The high seas being open to all nations no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law.

- It comprises inter alia both for Coastal and non-Coastal State:
- Freedom of navigation
- Freedom of fishing

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[20] The Geneva Convention on the Continental Shelf, 1958, Art. 5. Para. 2.
[21] Ibid. Art. 5. Para. 1.
[22] Ibid. Art. 5. Para. 2.
[23] Ibid. Art. 5. Para. 4.
[24] Ibid. Art. 5. Para. 5.

- Freedom to lay submarine cables and pipelines
- Freedom to fly over the high seas

These freedoms and others which are recognized by the general principles of international law shall be exercised by all States in their exercise of the freedom of the high seas.

The text emphasizes that the exercise by a State with regard to the freedom of the high seas carries with it certain obligations. The 1958 Convention used the words „inter alia" to show that its list of freedoms on the high seas is not exhaustive.[25] It was generally accepted that artificial islands were another freedom of the high seas. Although the Commission had specified four main freedoms – excluding artificial islands - in its Commentary it is held that other freedoms are acknowledged, such as the freedom to undertake scientific research, as well as the freedom to explore and exploit the high seas.[26] This had not been included for the purpose that such exploitation had not assumed "sufficient practical importance to justify special regulation".[27]
Additionally, it was held that the Commission did not intend to limit the exploitation of the subsoil of the high seas. In fact, it was explicitly held that the exploitation of the subsoil of the high seas was not subject to legal limitations.
UNCLOS I, however, still did not reach a conclusion with regard to the establishment of the breadth of the territorial sea, an issue which had long required settlement. It was specifically for this purpose that The United Nations Conference on The Law of the Sea 1960 (UNCLOS II) was convened. Nonetheless, final agreement of the breadth of the territorial sea had to await the preparation of the Convention drawn up by the United Nations Conference on The Law of the Sea 1982 (UNCLOS III).

UNCLOS III

In 1971, discussions leading to the formation of the LOSC commenced. At the first session of the Sea-Bed Committee, suggestions were made to include discussions on the "jurisdiction over artificial islands, or artificial installations on the high seas", "stationary or mobile installations",

[25] The Geneva Convention on the High Seas, 1958, Art. 2.
[26] Year Book of the International Law Commission, 8th session of the International Law Commission 1956, Volume II, Articles concerning the Law of the Sea with Commentaries 1956.
[27] Ibid.

"construction maintenance and operation of artificial islands, floating harbors and other installations". Proposals were made by a majority of States to eliminate State interests in the high seas.

Additionally, at the 1971 session of the Sea-Bed Committee, Article 5 of Malta"s Draft Ocean Space Treaty provided for a basic right for all States to utilize „ocean space" and also specified that such a right was to be exercised with "reasonable regard" to the interests of the "international community". That proposal replaced the freedom of fishing with the freedom of scientific research on the high seas.[28]

During the 1973 session of the Sea-Bed Committee, Belgium presented a text relating to artificial islands on the continental shelf. A proposal was made "for purposes other than exploitation or exploration" on the continental shelf.

The following main points emerged: A coastal State may authorize the construction of an artificial island on the continental shelf for all purposes except exploration and exploitation of natural resources; structures should be under the jurisdiction of the coastal State or State which constructs them; all artificial islands have to be surrounded by safety zones of not more than 500 meters and artificial islands or installations have no territorial sea of their own.

Latin American States made proposals concerning artificial islands in the territorial sea during the same session. The United States of America proposal on "off-shore installations in the coastal sea-bed economic area" was based on the statement that safety zones were relevant, so long as they relate solely to the nature of the installation.

During the second session in 1974, concern was expressed by El Salvador with regard to the broad interpretation of the freedom of the high seas. It was suggested that an exhaustive list of freedoms should be created.

At this same session, the representative of Belgium, Mr. Van Der Essan, held that the question of artificial islands raised two separate problems. Mainly the jurisdiction to which they were to be subject and, secondly, the right of States to construct artificial islands and installations, as well as, the conditions which they must observe when doing so.

[28] Draft Ocean Space Treaty: Working Paper submitted by Malta, U.N. Doc. A/AC 138/53 (Aug. 23 1971

CONCLUSION

The author of this paper has attempted to analyze the salient legal issues which are likely to be the cause for concern and uncertainty in the future resulting from the current legal structure. She has drawn up findings which she considers as necessary to be addressed in order to overcome the various shortfalls in the current legal framework of the LOSC with reference to artificial islands. It has been observed that the initial pronouncements leading to the formulation of the law of the sea have not distinguished artificial islands from natural islands. The need to make this distinction was not felt due to the fact that the construction of artificial structures was until recently not a realistic proposition and recent innovations were not envisaged.

Although the issue of artificial islands was given greater importance in the agenda of UNCLOS III, many suggestions relating to their legal status and jurisdiction were not implemented. The issue of artificial islands was covered by one general provision as made applicable in the context on the Convention, and was thus not given specific importance by the endorsement of a separate legal regime. The inadequacy of the present legal mechanism governing artificial islands is reflected in these past decisions.

With regard to the definition of „ships and vessels" it was recognized through the study made that ships pertain of a international quality, which makes them different in nature. It was found that what distinguishes an artificial island from a ship is an essential physical characteristic and a recognized international quality i.e. their hollow structure and their attribute of navigating the seas.