
the
legal regime
of islands in
international
law

by derek w. bowett

the legal regime of islands in international law

By

DEREK W. BOWETT Q.C. LL.D

Honorary Bencher of the Middle Temple;

President of Queen's College, Cambridge;

Reader in International Law in the

University of Cambridge

1979

OCEANA PUBLICATIONS, INC.

Dobbs Ferry, New York

SIJTHOFF & NOORDHOFF

Alphen aan den Rijn, Netherlands

Library of Congress Cataloging in Publication Data

Bowett, D.W.

The legal regime of islands in international law.

Includes index.

I. Islands—Law and legislation. I. Title.

JX148.B68 341.44'8 78-23571

ISBN 0-379-20346-4 (Oceana)

90-286-09687 (Sijthoff)

© Copyright 1978 by Oceana Publications, Inc.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, xerography, or any information storage and retrieval system, without permission in writing from the publisher.

Manufactured in the United States of America

CONTENTS

Part One

	Page
CHAPTER ONE. <i>THE DEFINITION OF AN ISLAND</i>	1
1. Definition for the purpose of generating a territorial sea	1
(a) "Natural formation"	2
(b) Emergence at high-tide	6
(c) Alternative criteria now rejected	7
2. Definition for the purpose of drawing base-lines from which the territorial sea is measured	9
3. Methods of drawing base-lines involving islands	16
(a) Situations where the normal, low-water mark is used	16
(b) Situations where the straight base-lines method is used	18
(c) Situations where the island lies within a Bay	28
4. Definition for the purpose of generating a continental shelf or exclusive economic zone	33
5. The Effect of Islands on Territorial Sea boundaries with adjacent or opposite States	34
(a) Islands proximate to their own mainland coast	37
(b) Islands in the "median" zone	40
(c) Islands proximate to a "foreign" mainland	41
CHAPTER TWO. <i>SOVEREIGNTY OVER ISLANDS</i>	45
1. Islands lying within the Territorial Sea of a State	48
2. Islands lying in the High Seas	50
(a) The degree and kind of sovereign authority required	50
(b) The requirement that acts be performed with <i>animus occupandi</i> or in order to assert sovereignty	54
CHAPTER THREE. <i>ISLANDS AND THEIR RELATION TO BOUNDARIES IN NAVIGABLE RIVERS</i>	61
1. The location of the boundary in the river	61
2. The location of islands and the attribution of sovereignty over islands by reference to the thalweg	63

	Page
3. The consequences of changes in the course of a river	65
4. The effects of such changes on Islands	68
CHAPTER FOUR. <i>ARCHIPELAGOS</i>	73
1. Introduction	73
2. The Anglo-Norwegian Fisheries Case	75
3. The work of the International Law Commission	78
4. State Practice	81
(a) Coastal Archipelagos	84
(b) Oceanic Archipelagos	90
(i) Variety of forms	90
(ii) The issues involved	90
(a) Security	98
(b) Economic	103
5. The resolution of the problems of archipelagos at the Third U.N. Law of the Sea Conference	105
(a) Definition of an Archipelagic State and rules on base-lines	105
(b) The status of archipelagic waters	109
CHAPTER FIVE. <i>ARTIFICIAL ISLANDS</i>	115
1. Authority to establish such islands or installations	118
2. Restrictions on the construction and operation of such islands and installations	126
3. Jurisdiction and Control	131
4. Responsibility for artificial islands and installations	134
5. The effect on base-lines	129
CHAPTER SIX. <i>ISLANDS AND THE CONTINENTAL SHELF</i>	139
1. Entitlement of Islands to a Continental Shelf	139
2. The Allocation of an appropriate share of the Shelf	142
3. The Effect of Islands on Shelf Boundaries	143
(a) Under the 1958 Geneva Convention on the Continental Shelf	143
(i) The scope of Article 6	144
(ii) The relationship between 'agreement', the median or equidistance line, and 'special circumstances'	148

	Page
(iii) The meaning of 'special circumstances' and their effect on the boundary	151
(iv) The practice of the Parties	156
(α) Agreements between 'opposite' States	157
(β) Agreements between 'adjacent' States	159
(b) Under Customary International Law	161
(i) Agreements between 'opposite' States	170
(ii) Agreements between 'adjacent' States	179
4. The Technical problems of using the equidistance method	183
5. The rules for delimitation of continental shelf boundaries in the Informal Composite Negotiating Text	185

Part Two

CHAPTER SEVEN. <i>THE ENGLISH CHANNEL AND THE SOUTHWESTERN APPROACHES</i>	193
1. The facts as to the Geography and Geology of the area	194
(a) The Channel Islands	194
(b) The Atlantic Area	195
2. The Law applicable: Article 6 of the 1958 Convention, its meaning and its relation to customary law	196
3. The application of the law to the Channel Islands area	201
4. The application of the law to the Southwestern Approaches or Atlantic area	209
5. A tentative evaluation of the implications of the Award	215
(a) The interpretation of Article 6 and the predictability of maritime boundaries	216
(b) The relative weight of geographical, geological and other relevant factors	220
(c) The relevance of the Award to other "island" situations	225
(d) The Court's use of State practice as evidence of the rules of international law	228
(e) The Court's adoption of legal arguments <i>proprio motu</i>	230
(f) The technique of giving reduced effect to islands	231

6. The interpretation of its Award by the Court of Arbitration in its subsequent decision of 14 March, 1978	240
(a) The limits of the Court's power of interpretation	241
(b) The substance of the contradictions alleged by the United Kingdom and the Court's decision in relation to them	243
 CHAPTER EIGHT. <i>THE AEGEAN SEA</i>	249
1. Introduction	249
2. The Base-lines from which maritime limits are drawn	255
(a) Turkey	255
(b) Greece	256
3. The Effect of islands on the Territorial Sea	256
4. The Effect of islands on the Continental Shelf	259
(a) The criterion of the "natural prolongation" of the landmass	262
(b) The division of areas that 'overlap'	265
(c) Subsidiary factors	266
5. Comparable State Practice	271
6. The implications of the U.K./France Award over the English Channel for the Aegean dispute	277
 CHAPTER NINE. <i>THE CHINA SEA</i>	283
1. Introduction	283
2. The Base-lines from which maritime limits are drawn	286
(a) China	286
(b) The Republic of Korea	293
(c) Japan	294
(d) The Philippines	295
3. Disputed Islands	295
(a) The Tiao Yu Tai Islands (the Senkaku Islands)	295
(b) The Islands of Takeshima	297
(c) The Paracel Islands (Hsisha Islands)	297
(d) The Spratly Islands (Nansha Islands)	299

	Page
4. Maritime Boundaries	300
(a) Agreed Boundaries	301
(i) Japan/Republic of Korea	301
(ii) Indonesia/Malaysia	303
(b) Areas not regulated by Agreements	304
(i) The Yellow Sea	304
(ii) The East China Sea	305
(iii) The South China Sea	307

CHAPTER TEN. *THE GULF OF VENEZUELA*

1. Introduction	313
2. Base-lines and the Territorial Sea	315
3. The effect of islands on the continental shelf	319
(a) The criterion of "natural prolongation"	320
(b) The general configuration of the coasts of Parties, as well as the presence of any special or unusual features	321
(c) The physical and geological structure, and natural resources, of the shelf areas involved	323
(d) The proportionality factor	323
INDEX	327

DIAGRAMS AND MAPS

Fig. A. Islands, base-lines and the territorial sea	15
Fig. B. Straight base-lines off N.W. coast of Scotland	26
Fig. C. Islands in a Multi-mouthed Bay	29
Fig. D. Islands screening mouth of a Bay	32
Fig. E. Diagrammatic illustration of islands and Continental Shelf boundaries	171
Diagram A. Half-Effect to an Island	
Diagram B. Mid-way, reciprocating islands (opposite States)	
Diagram C. Mid-way, reciprocating islands (adjacent States)	
Diagram D. Island proximate to foreign coast	
Fig. F. Boundary Chart of Channel Arbitration Area	205

	Page
Fig. G. Diagrammatic illustrations of half-effect to islands	234
Diagram I. Opposite Mainlands	
Diagram II. Adjacent Mainlands	
Diagram III. Adjacent Mainlands	
Fig. H. Map of North Aegean	253
Fig. I. Map of South Aegean	254
Fig. J. Geological Map of China Seas	285
Fig. K. Base-lines of China (Yellow Sea)	288
Fig. L. Base-lines of China (East and South China Seas)	289
Fig. M. Map of Japan/ Korea Shelf Boundary	302
Fig. N. Map of Gulf of Venezuela	316

Numerous terms are used in common parlance to connote an elevation from the seabed which either approaches or breaks the surface of the sea: islands, islets, rocks, reefs, cays, banks, shoals, etc. The problem is to determine which of these features has legal significance, and under what conditions, and for this purpose account must be taken of considerations which go far beyond those with which the geographer or cartographer are concerned. Moreover, a legal definition must take account of the purpose for which it is used. Thus, it cannot be assumed that the definition used for the purpose of determining whether a particular feature generates its own territorial sea is necessarily the same as that used for the purpose of drawing base-lines, or generating a continental shelf, or an exclusive economic zone.

1. Definition for the purpose of generating a territorial sea

The two predominant criteria developed over the past fifty or so years are that the feature must be naturally-formed and must emerge from the sea at high tide. Thus, Article 10 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides:

- "1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide." 1

It will be convenient to comment separately on these two criteria.

1 The text of Article 121 (1) of the Informal Composite Negotiating Text (ICNT), now before the U.N. Third Conference on the Law of the Sea is identical.

(a) "Natural formation"

The contemporary doctrine is well established that a territorial sea is not generated by an artificial installation (lighthouse, beacon, oil-platform, defence-tower, etc.) or an island artificially formed by engineering works which, building from the seabed, provide an emerged land-mass.

Whilst a claim was made by Sir Charles Russell as Attorney-General for Great Britain in the Behring Sea Arbitration² that lighthouses did generate a territorial sea, this view has been consistently rejected by the Institut de Droit International,³ by various writers,⁴ by the 1929 Harvard Research Draft on Territorial Waters,⁵ by the work of the 1930 Hague Codification Conference,⁶ and by State practice.⁷

2 1 Moore's Int. Arbitrations, 901.

3 Annuaire, 1913, p.409, 411 (Report by Oppenheim).

4 Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), 69-70; Gidel, Le Droit de la Mer (1934), Vol.III, 676-679; Colombos, The International Law of the Sea (1959), 108-111.

5 23 A.J.I.L. (1929), Spec. Suppl., p.276.

6 See Report of Sub-Committee II of the Second Commission: C.230. M.117. 1930.V., p.13.

7 Great Britain did not advance any claim to territorial waters surrounding Eddystone, Bell Rock or the Seven Stones: Colombos, op.cit., 111. For the Opinion of the Law Officers, advising against the claim in practice (though they favoured it in principle) see F.O. Confidential Print 9263, Opinion No.12, Public Record Office Ref.834/22. However, by 1965 the United Kingdom did show Eddystone on its charts as having a territorial sea and fishery limits. The status of Eddystone Rock subsequently became a matter of acute controversy in the Anglo/French Channel Arbitration in 1977. The U.K. argued that the lighthouse was built on an island, and therefore though not strictly a base-point, affected the ... Cont.

The International Law Commission was emphatic in maintaining this rejection of any territorial sea for lighthouses and in its Commentary to the final Report stated:

"Even if an installation is built on such an elevation [low-tide elevation] and is itself permanently above water - a lighthouse, for example - the elevation is not an "island" as understood in this article;" 8

At an earlier stage,⁹ Professor Francois had identified other "artificial" installations, apart from lighthouses, namely

- (i) islands formed artificially by accumulation of sand or rubble
- (ii) other technical installations, such as a meteorological station or those used for the exploitation of the seabed
- (iii) dwellings built on piles erected in the sea, such as are found in South East Asia.

7 Cont.

... drawing of a median-line continental shelf boundary. France argued that it was a low-tide elevation and that this was confirmed by the fact that the U.K. had not traditionally claimed a territorial sea for Eddystone. The Court of Arbitration did not find it necessary to decide the legal status of Eddystone, but held that in 1964-65 negotiations on fisheries and in the 1971 negotiations over the shelf boundary France had accepted the use of Eddystone as a base-point (Award of 30 June, 1977, Paras. 139-144).

8 Report of the I.L.C. covering the work of its eighth session, 1956: Yearbook of the I.L.C., Vol.II, p.270, Commentary to Article 10.

9 A/CN.4/SR.260, Yearbook of the I.L.C., Vol.I, 1954, p.91.

This third category was removed from the draft after criticism in the Commission¹⁰ and, as to the first two categories, the Commission dealt with them in its final Report by the following statement in its Commentary:

"Technical installations built on the seabed, such as installations used for the exploitation of the continental shelf (see Article 71). The Commission nevertheless proposed that a safety zone around such installations should be recognised in view of their extreme vulnerability. It did not consider that a similar measure is required in the case of light-houses." 11

The position was endorsed in its entirety at the 1958 Geneva Conference. Indeed, to eliminate any possible doubt that the rejection of a territorial sea applied to both "technical installations" and "artificial islands", the United States moved an amendment¹² to insert the adjective "naturally-formed" before "area of land", explaining that to allow artificial islands a territorial sea would constitute an encroachment on the freedom of the high seas. This was adopted and gave rise to no discussion.¹³ As we shall see,¹⁴ the Third Law of the Sea Conference has maintained this position.

It should be added that many islands are in fact coral islands, formed over centuries, by the gradual accretion of

10 See Yearbook of the I.L.C. 1954, Vol.I, p.93.

11 Yearbook of the I.L.C., 1956, Vol.II, p.270.

12 A/CONF.13/C.1/L.112.

13 A/CONF.13/39, p.163. (52nd. Mtg).

14 Post, Chapter Five.

skeletons of the coral polyp in temperate waters, creating first reefs and then, by further elevation, islands. Although such islands are in no sense geologically part of the seabed, they are nevertheless "naturally formed" and it has never been doubted that they generate a territorial sea as do normal islands.

The provision of safety-zones for "installations" was, of course, expressly made in Article 5 of the Continental Shelf Convention. They were not necessary for lighthouses for the evident reason that the light is itself a safety-device, warning of the danger of proximity. However, for all other technical installations, whether connected with the exploitation of the seabed or not, a safety-zone would be permissible.

It may also be noted that, whilst "sovereignty" was not to be created by such installations (a fortiori if they did not generate a territorial sea, since maritime territory without a territorial sea was regarded as anathema), it was never doubted that they were property which could be in the possession of a private entity or a State. Thus, an action for trespass would lie in respect of direct damage to the installation or unlawful possession of it or, on the international plane, a State might bring a claim for damage caused by another State to such an installation. Equally, there was no ostensible reason why a State should not exercise jurisdiction over such an installation: jurisdiction has never been co-extensive with sovereignty.¹⁵

15 Harvard Research, 23 A.J.I.L. (1929), Spec. Suppl., 276.

(b) Emergence at high-tide

Although at the 1930 Hague Conference a number of delegations favoured treating elevations emerging at low-tide as islands, on exactly the same basis as high-tide elevations, the International Law Commission rejected this from the outset.

In essence, the I.L.C. followed the compromise suggested in the report of the Second Commission at the 1930 Conference,¹⁶ that only high-tide elevations counted as islands but that low-tide elevations lying within the territorial sea might be taken into consideration for the purpose of determining the outer limit of the territorial sea.¹⁷

The problem of exceptional high-tides covering an elevation which would normally be emerged at high-tide was met by the insertion of the words "in normal circumstances".¹⁸ This position was adopted without difficulty or even much discussion at the 1958 Geneva Conference (although on the basis of a U.S. proposal¹⁹ rather than the I.L.C. text) and,

16 C.230.M.117.1930.V., p.11.

17 Post, p. 16. The Commission's earlier work had used the term "drying rocks and shoals" (fonds couvrants et découvrants) which were to be distinguished from "rocks awash", i.e. rocks which never really dried but were visible at low tide: for doubts about the clarity of these terms see Lauterpacht's comments in Yearbook of the I.L.C. 1954, Vol.I, p.95.

18 The proposal came from Lauterpacht and was adopted by the Commission during its fourth session in 1954: Yearbook of the I.L.C., 1954, Vol.I, pp.92-93.

19 A/CONF.13/C.1/L.112, adopted by First Committee 37-6-4.

clearly, places no requirement of any particular size or area for the elevation before it qualifies as an island.

(c) Alternative criteria now rejected

It will be recalled that whilst, in the event, the Report of the Second Commission (Territorial Waters) of the 1930 Hague Conference adopted the same basic criterion of emergence at high-tide,²⁰ the replies of Governments in 1930 had suggested other criteria: some suggested that emergence at low-tide sufficed,²¹ others that no emergence at all was required provided navigation above the feature was impracticable, and others that the possibility of effective occupation or habitation was essential.²²

The criterion of the island's capacity for occupation, use or habitation was, of course, proposed as one

20 "Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark": Report of Second Commission, C.230. M.117.1930.V., p.13.

21 For example, the U.S.A., following the view taken in Harvard Research, Territorial Waters, 23 A.J.I.L. (1929), Spec. Supp., 275-276.

22 See the proposed amendment by Great Britain to Basis of Discussion No.14, C.351 (b).M.145 (b).1930.V., p.188. For a rejection of the habitation criterion by municipal courts see Middleton v. U.S. 32 F.2d.239,240 (C.C.A.5th. 1929) where, for the purposes of the U.S. Immigration Act, 1917, an offence was held to be committed within three miles of an uninhabited island. Also, Ministère Public v. Mallegni, France, Criminal Court of First Instance, Ajaccio 15 I.L.R. (1948), 71. In the case of The Anna 5 C.Rob.(1805), pp.373, 385 in 1805 the British High Court of Admiralty, adjudicating the capture of an American vessel by a British privateer, held this to be illegal because within territorial waters: the point of capture was 5 miles from the mainland but within 3 miles of uninhabited islands.

complementary to that of emergence at high tide: it was not an alternative criterion. Although not adopted by the Second Commission in 1930, it had powerful advocates and Gidel, for example, continued to maintain this criterion: his definition in his classic **monograph**, published in 1934, ran as follows:

"Une île est une élévation naturelle du sol maritime qui, entourée par l'eau, se trouve d'une manière permanente au-dessus de la marée haute et dont les conditions naturelles permettant la résidence stable de groupes humains organisés." 23

It may be noted that, for Gidel (and unlike the British proposal in 1930) habitability was to be proven as a question of fact, thus avoiding argument about an island's capacity for habitation where this was hypothetical and not accomplished fact. Moreover, occasional habitation, for example by seasonal fishermen or visiting survey teams would not have sufficed, for he demanded "la résidence stable de groupes humains organisés".

Clearly, this criterion of actual habitation was not aimed simply at ensuring that only islands of a certain size counted for the purpose of generating a territorial sea: that aim could have been secured by a simple requirement of surface area.

In the course of the discussion of Professor Francois' Third Report to the International Law Commission in 1954, an attempt was made by Lauterpacht to introduce the requirement

23 Gidel, Le Droit International Public de la Mer (1934). Vol.III, p.681.