

Huts on Ice Island T-3: location of the Escamilla incident.

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State Jurisdiction over Ice Island T-3: The Escamilla Case

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The matter of State jurisdiction over ice islands in the Arctic Ocean is no longer only an academic question raised by professors of international law. A recent incident involving the killing of a member of an American research team on Ice Island T-3 raises that question in a very realistic way. The purpose of this short paper is to review the relevant facts and to offer a few comments on the issue of jurisdiction in the light of the legal nature of the Arctic Ocean and of Ice Island T-3.

THE FACTS

On 16 July 1970, the shooting of the leader of a 20-man joint government-industry research team, one Bennie Lightsey of Louisville, Kentucky, took place in a hut on Ice Island T-3 (the third ice island sighted as a radar target, hence its name T-3), floating in the Arctic Ocean at 84° 47' North latitude and 106° 28' West longitude, within the so-called Canadian sector. Lightsey had gone to the hut to attempt to settle an argument over a jug of wine when he was shot with a rifle by one Mario Escamilla, a Mexican-born American citizen from California. Following a radio report about the incident, an American investigation team, composed of Naval and Coast Guard Intelligence officers and an Assistant U.S. Attorney, flew to Thule, an American Air Force Base in Greenland, and then to the ice island in question. Upon completion of the investigation, Escamilla was brought to the United States, after a change of plane at Thule, and landed at Dulles airport in Virginia. He was initially charged with murder in the first degree before a magistrate in the District Court for the Eastern District of Virginia, within which Dulles airport is located, and was subsequently indicted by a grand jury for the lesser offence of second degree murder.

THE ISSUE OF JURISDICTION

The issue raised is whether the United States or Canada, or both, had jurisdiction over the alleged crime committed on Ice Island T-3. The complaint stated that the ice island was floating on the high seas within the special maritime and territorial jurisdiction of the United States of America and out of the jurisdiction of a particular State. The only other State which could have claimed jurisdiction, since the incident took place well within its arctic sector, was Canada. The latter,

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however, chose to refrain from interfering in any way in the matter. A spokesman from the Department of External Affairs is reported to have stated that they wanted to avoid putting Canada in a position of seeming to interfere with the course of justice for the sake of clarifying a very complicated point of international law. The fact that Canada did not choose to exercise jurisdiction over the incident, even if it was convinced that it had the right to do so, is quite understandable, since both the accused person and the victim were American nationals, and the floating research station was under the exclusive control of American authorities. If Canada, however, were serious about claiming sovereignty over the "ice pack" within its sector, it was important to make it clear to the United States that it had refrained from exercising its jurisdiction without prejudice to its claim. The reason is that, if the claim made by Canada is one equivalent to that of territorial sovereignty, the jurisdiction covers all persons and things within the area claimed and, in principle, is exclusive of that of any other State. These various aspects of the issue of jurisdiction warrant some analysis.

A COMMENTARY

Any significant discussion of the jurisdictional issue raised must encompass at least three considerations: the various bases of state jurisdiction, the legal status of an ice island and that of the Arctic Ocean.

Legal Status of the Arctic Ocean

The basic question here is whether the Arctic Ocean may be considered in international law as an ordinary ocean to which the principle of the freedom of the high seas is applicable. If so, it is open to all nations and no state may validly purport to subject any part of it to its sovereignty. This is a well-established principle of international customary law, and it was embodied in the Convention on the High Seas in 1958. The answer to the question depends essentially on the possibility of navigation, since this is the underlying reason for the very existence of the principle itself. The extent of this possibility in turn is related to the presence and nature of the ice. Some international lawyers have characterized the arctic polar ice as immobile ice, glacial territory, permanent ice, polar ice cap, quasi-land and quasi-fixed mass. They maintain either that the acquisition of territorial sovereignty is possible over ice in somewhat the same way as over land, or that some form of national jurisdiction and control should be exercised by the coastal states. In other words, the pack ice in the Arctic Ocean should be considered as land rather than water. Such a view does not take sufficient account of the fact that the Arctic Ocean, with the North Pole resting on 4,300 metres of water, is basically no different than any other ocean. True, there is an undersea mountain extending from the New Siberian Islands to Ellesmere Island, and the sea floor reveals a physiographic complex of basins and ridges, but there is nonetheless a displacement of water masses as in other oceans, though perhaps to a lesser degree. As for the presence of ice, the so-called "ice cap" consists of ice floes or fragments of ice averaging about 3 metres in thickness; it is far from being compact, permanent or immobile. The ice is not compact since the polynyas or "water

openings" account for roughly 10 per cent of the area covered by the pack ice and, during the summer at least, the Arctic Ocean is predominantly marine in character. The ice is not permanent in the sense that it does not melt. Observations have shown that melting and freezing take place at both the top and bottom of the ice; in summer, there is ablation by melting of the upper surface and, in winter, there is accretion of the lower surface by freezing. Finally, the ice is actually quite mobile, since the ice floes are not only in constant motion locally but move about all over the Arctic Ocean; a considerable portion is carried outside completely, mainly through the Greenland Sea and the numerous sounds of the Canadian Archipelago.

Having regard to the above characteristics of the ice, some navigation is actually possible. The Arctic Ocean has witnessed three types of navigation: drift surface, sub-surface, and conventional surface navigation. Drift surface navigation is accomplished by drifting in an icebound vessel or on an ice floe (or ice island such as T-3) and permits various scientific investigations such as those relating to the ice, the water and the ocean floor. The possibility of sub-surface navigation across the Arctic Ocean has been well established by the *Nautilus* and the *Skate* in 1958, the *Seadragon* in 1960, and a British submarine in March 1971. The possibility of using sub-surface navigation to transport oil across the Arctic Ocean is a real one, and General Dynamics has already made proposals to a number of oil companies to build 170,000-ton nuclear-powered submarine tankers for that purpose. In so far as conventional surface is concerned, it has been practised in the peripheral seas of the Arctic Ocean for a long time and, with the development of icebreakers, northings of over 80° have been attained in various parts of the Arctic Ocean itself. Moreover, now that we have the valuable data obtained during the two voyages of the *Manhattan* in the Northwest Passage, there is nothing to prevent the development of huge icebreaking tankers possessing the necessary shaft horsepower which the *Manhattan* lacked to make its way through M'Clure Strait. If a surface ship can navigate through the polar ice of the M'Clure, there is an excellent chance that it can manage the same kind of polar ice in the Arctic Ocean.

The foregoing should indicate that it is not possible to assimilate the pack ice of the Arctic Ocean to land, that some navigation is already taking place and that the extent of such navigation is bound to increase as the need for marine transportation in that Ocean develops. Consequently, the principle of the freedom of the high seas ought to apply.

Legal Status of Ice Island T-3

T-3 is one of a number of ice islands which have been located in the Arctic Ocean and which appear to have originated from ice shelves off the north coast of Ellesmere Island. The northern part of this large island resembles Greenland and the antarctic continent, in that it is partly covered with glaciers projecting ice lobes deep in the fiords and into the sea, thus forming the landward part of the ice shelves; the seaward projection is believed to be the result of an accumulation of snow on sea ice held in position by the projecting glaciers for a long period of years. Ice shelves used to front many of the fiords of Ellesmere but most of them have broken up into large fragments and are now floating among the ordinary

ice floes of the Arctic Ocean. As long as those huge ice-tongues are joined to the land and the glaciers which produced them — in other words, as long as they remain ice shelves — they are generally considered as land, since their thickness and immobility make them as effective a barrier to navigation as land itself. The question arises, however, as to what happens when those ice shelves give birth to ice islands. Due to their size and thickness, they are capable of occupation by research expeditions with greater facility and security than ordinary ice floes. T-3 is the largest and sturdiest ice island to have been occupied in the Arctic Ocean. It was originally described as measuring 31 miles in circumference, having 5 miles across in the narrowest part, and being about 200 feet thick. Colonel Joseph Fletcher, U.S.A.F., first landed on it in March 1952, and a camp was established in the same year; American scientists have been in quasi-permanent occupation of the island ever since. Except for the couple of years during which it was grounded on the Alaskan slope, T-3 has been slowly circling the Beaufort Sea in a clockwise trajectory between the North Pole and the Canadian Arctic Archipelago. At the time of the Escamilla incident, T-3 was reported as measuring approximately 7 miles long and 4 miles wide. Except for isolation, life for the personnel on the island presents no great problem, since supply can easily be made by aircraft. The life of the island itself does not seem to be in danger either, although there is always the possibility of its being caught by the transpolar drift whenever it gets close to the North Pole; it would then terminate its existence in the Greenland Sea, as did another ice island (ARLIS II) in 1965.

The legal question which now arises is whether ice islands such as T-3 may be considered as floating pieces of territory, ships or something else. To consider ice islands as floating pieces of territory would present an element of logic, since they are but fragments of ice shelves which are legally assimilated to land. If that is so, all ice islands in the Arctic might have to be considered as coming under Canadian sovereignty, since they all seem to have originated from Ellesmere Island. However, does not an ice shelf fragment become a *res nullius* once detached and subject to territorial acquisition by the first occupant? If so, does the new territorial sovereignty continue as long as the ice island is occupied, regardless of the drift path which it follows? Pursuing this kind of reasoning soon reveals that it is somewhat unrealistic to continue considering ice shelf fragments as land after they have become movable and have drifted away from their place of origin onto the high seas. *A fortiori*, the same observation applies to ordinary ice floes, which are not of territorial origin. Ice islands do not have the qualities of permanency and stability which are basic characteristics of any piece of territory. Even if an ice island could somehow be anchored in the Arctic Ocean or grounded in a shallow sea, the consequences of considering it as territory of the occupying state would be unacceptable in international law; such action would be contrary to the Convention on the High Seas which provides that no state may validly purport to subject any part of the high seas to its sovereignty.

But, if ice islands cannot be assimilated to land, can they perhaps be considered as ships? These natural scientific platforms are indeed used very much the same way as research ships to study the ocean floor, the current and the winds. They could also conceivably be used as aircraft carriers and warships. Although no

means have yet been devised to control the movements of those ice islands, they do constitute a new mode of navigation. Consequently, the suggestion is that, once ice shelves have fragmented themselves into ice islands and floated away onto the high seas, they have ceased to come under the sovereignty of the State of origin. They have lost their immobile and quasi-land character and have acquired a mobile ship-like nature. They constitute a special kind of *res nullius*, subject to appropriation by the first occupant. The result of this appropriation, however, is more in the nature of the acquisition of ownership of a chattel than of sovereignty over a territory, even if the occupant is acting on behalf of a State. For these reasons, it is submitted that ice islands ought to be considered as ships rather than land.

Bases for State Jurisdiction and the T-3 Incident

It is generally agreed that there are four possible bases for the exercise of state jurisdiction: territory, nationality, protection of special state interests such as security, and protection of certain universal interests permitting jurisdiction over crimes such as piracy. The first two bases are involved here and will be considered briefly in relation to the T-3 incident. Jurisdiction based on sovereignty over territory gives a State exclusive jurisdiction — subject to agreements to the contrary and to diplomatic immunities recognized by international law — to all persons and things found on its territory. The exclusiveness of jurisdiction is such that a State's forcible removal of a person from another State's territory is a violation of the latter's territorial sovereignty and involves the international responsibility of the former. The question which arises here is whether Canada's territorial sovereignty may be considered as extending to the T-3 incident since it took place within the Canadian arctic sector. More specifically, is the Sector Theory invoked by Senator Pascal Poirier in 1907, in support of Canada's claim to arctic islands north of the mainland, to be relied upon now to claim sovereignty right up to the Pole. True, such an assertion of sovereignty has sometimes been made in the House of Commons, but there also have been statements to the contrary. As recently as March 1969, Prime Minister Trudeau stated in reply to a question in the House that, in his opinion, the Sector Theory did not apply to water and ice. It is suggested that this opinion is quite consistent with the physical realities of the Arctic Ocean as briefly described above. Of course, the Prime Minister was merely expressing his own personal opinion and there does not seem to be any definite government policy on the question. Mr. J. A. Beesley, head of the Legal Division of External Affairs, was probably quite correct when he stated in front of the Standing Committee of the Department of Indian Affairs and Northern Development, in April 1970, that Canadian governments have neither affirmed nor disaffirmed the Sector Theory in unequivocal terms. He did add, however, that they did not intend to abandon the theory. This reservation is difficult to understand. The Sector Theory has never been recognized in international law as a valid basis for the acquisition of sovereignty over territory and has never been invoked — not even by the U.S.S.R. — as a means of acquiring sovereignty over the pack ice of the Arctic Ocean. This does not mean that the Sector Theory could not be used eventually as a basis of agreement to delimit the

arctic regions for the purpose of pollution control by the coastal States or for some other specific purpose. It does mean, however, that the theory in question — and it remains only a theory — cannot be invoked to claim territorial jurisdiction, the main reason being that it would be contrary to the well-established principle of the freedom of the high seas.

Jurisdiction based on nationality extends to all nationals, regardless of whether they are inside or outside a State's territory. In practice, however, States usually refrain from exercising jurisdiction over their nationals in respect of acts committed on the territory of another State and, in case of conflict, territorial jurisdiction is generally recognized as taking precedence over personal jurisdiction. But, who has jurisdiction over offences committed by nationals in places not under the sovereignty of any State, such as on a ship on the high seas? In such a case, jurisdiction over criminal offences generally belongs to the State of the flag. The rule that the State of the flag has jurisdiction over everything which takes place aboard ship is so well established that a coastal State cannot exercise its criminal jurisdiction on board a foreign ship passing through its territorial waters to arrest a person for a crime committed on board during passage, unless the consequences of the crime extend to the coastal State. It is on the basis of the State of the flag rule that the United States exercised jurisdiction over the T-3 incident. More specifically, it acted under its special maritime jurisdiction which is defined in the United States Code as including the high seas and any vessel belonging to the United States or any of its citizens, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State. The Code further provides that the more serious crimes, such as murder and manslaughter, shall constitute federal crimes and that the trial of offences committed on the high seas shall take place in the district where the accused is arrested or first brought. In the present case, Escamilla was brought to Dulles airport and reportedly arrested there also; consequently the District Court for the Eastern District of Virginia was the proper judicial authority effectively to exercise jurisdiction on behalf of the United States.

The above reasoning is based, of course, on the assumption that Ice Island T-3 may properly be assimilated to a ship. However, even if this assimilation is rejected and, by the same token, the national character of the vessel, it is submitted that the United States would still have had jurisdiction based on the nationality of the accused person and the national character of the research station. The principle of personal jurisdiction has been extended to apply to places such as the Antarctic and outer space, and it does seem to be the only logical and practical solution to settle the question of jurisdiction over acts done in places out of the jurisdiction of any particular State.

CONCLUSION

Having examined the possible bases for state jurisdiction in international law, the conclusion is that the United States has properly exercised its personal jurisdiction over the T-3 incident. It is submitted that the legal status of the Arctic Ocean is essentially the same as for any other ocean and that Ice Island T-3 may,

for the present purposes at least, be assimilated to a ship. Consequently, the incident may be deemed to have taken place on an American ship on the high seas. It might be added, however, that a further question may arise under American domestic law, as distinguished from international law, whether the term "vessel" in the United States Code is capable of a sufficiently liberal construction as to include an ice island. If it is not, the United States should be able to assume its personal jurisdiction on the basis of the nationality of the accused person and the national character of the research station.

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