

Seasteads, Sovereignty, and International Law

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WRITER'S COMMENT: For many people, the word "law" conjures up boring images of men in suits, thick volumes of statutes and codes, and the idea that "fair and impartial" is equivalent to impersonal. And while, yes, law occasionally can be these things, it is more often complex, dynamic, and unique to every situation. In the case of international law, I have found this to be especially so. When asked to apply international law to a recent event in POL 122, I immediately knew this would be no easy task. After weeks of research into different topics, I finally settled upon seasteads—a rather niche subject with a relatively small body of academic literature behind it. Despite my initial reservations about writing on such a specialized topic, it quickly became apparent that the idea of seasteads is only likely to grow in the coming years, especially as climate change and rising sea levels threaten the lives of millions of people around the globe. Instead of shying away from this challenge, I decided to embrace it, and used this opportunity to dive deep into a topic I previously knew nothing about.

INSTRUCTOR'S COMMENT: The final essay assignment for POL 122 is simple: Explain how international law applies to some recent global event. Executing this assignment, however, turns out to be anything but simple. The subject matter of international law is dense, nebulous, and often unwieldy. There exist few unambiguous legal standards. Seemingly routine international disputes may be governed by multiple imbricated treaties, agreements, and unwritten customs.

Navigating these complex waters is a daunting task. Aislinn's essay succeeds not merely because she has dutifully addressed each of the assignment's requirements, but because she has managed to cogently unpack the many nuances of a highly complex topic. "Seasteading"—the idea of building permanent settlements at sea—is a modern practice with ancient roots, and yet its status in international law remains opaque. With meticulous clarity, Aislinn moves from a discussion of Law of the Sea, to issues of jurisdiction and criminal law, to questions about sovereignty and statehood. Ultimately, the reader is left with a clear, accurate understanding of the precarious legal status of a political trend that promises to become increasingly prevalent in coming years.

—Brandon J Kinne, Department of Political Science

Introduction

On April 15, 2019, Thai authorities boarded and searched a “seastead”—a home built on a platform in the middle of the sea—in response to the claim that the couple living on board were violating Thailand’s sovereignty. Chad Elwartowski, an American, and his partner Nadia Supranee Thepdet, a Thai national, had been living there since February. Facing either life imprisonment or the death penalty for violation of the country’s Immigration Act, Elwartowski and Thepdet fled hours before the platform was seized by Thai authorities (Picheta and Olarn 2019).

Though the concept of building settlements on the high seas has intrigued many, Elwartowski and Thepdet are the first to turn idea into reality, attempting to navigate the various legal entanglements that come with uncharted territory. This latest development has prompted a number of inquiries into the legality of seasteads, begging the question: what international law applies to seasteads, specifically with regard to jurisdiction and sovereignty?

Prior to delving into the realm of law, it is first essential to understand the background of the seastead movement. This movement has become increasingly popular in recent years primarily due to the creation of The Seasteading Institute (TSI), a nonprofit founded by Patri

Friedman, the grandson of famed economist Milton Friedman, and Peter Thiel, Silicon Valley mogul and co-founder of PayPal. Seasteading, as defined by Friedman, is “the establishment of permanent, autonomous communities on the ocean—homesteading on the high seas” (Friedman 2012). The main goals of TSI, as well as the broader seastead community, are to experiment with new forms of governance, and eventually gain recognition as a sovereign state (Fateh 2013). In the case of Elwartowski and Thepdet, their seastead was intended to be the first of a community of 20 units built off the Thai coast. Though not directly affiliated with TSI, the success or failure of Elwartowski and Thepdet’s seastead holds implications for seastead hopefuls around the globe.

Jurisdiction

Territorial Sea and Contiguous Zone

The most obvious authority regulating seasteads is the United Nations Convention on the Law of the Sea (UNCLOS). Having been ratified by 168 parties and signed (but not yet ratified) by another 14, UNCLOS reflects the general consensus and customs of the international community. As a party to UNCLOS, Thailand is therefore bound by the rules and regulations set forth by the convention and could be found in violation of international law if it does not comply.

UNCLOS divides each nation’s waters into four primary zones: the territorial sea, the contiguous zone, the exclusive economic zone, and the high seas (UNCLOS 1982). Ocean Builders, the company who built Elwartowski and Thepdet’s home, initially stated that the seastead was located 12 nautical miles off the coast of Phuket, Thailand, which would appear to place it within Thailand’s territorial sea (Ocean Builders 2019). However, following its seizure by Thai authorities, the company insisted that the platform was actually located 13 nautical miles from Thailand, placing it within Thailand’s contiguous zone (Picheta and Olarn 2019). Given that there is no consensus on the exact location of the seastead, it is necessary to examine the rights of the Thai government within both the territorial sea and the contiguous zone.

UNCLOS defines the territorial sea as 12 nautical miles from the baseline of a nation’s coast. Within the territorial sea, a nation has full sovereignty over everything from the seabed and subsoil to the air space above it (UNCLOS 1982). As per this definition, if Elwartowski

and Thepdet's seastead was found to be within the territorial sea, the Thai authorities would have full jurisdiction over the couple and could prosecute them for violations of immigration law. The only limitation to the exercise of sovereignty within the territorial sea is the right of innocent passage, defined as "continuous and expeditious," providing for stopping and anchoring only in cases of "ordinary navigation" or distress (UNCLOS 1982). Since Elwartowski and Thepdet's seastead was stationary for multiple months, they clearly do not meet the standards for innocent passage and the exception does not apply.

If Elwartowski and Thepdet's seastead were stationed 13 nautical miles offshore, however, it would be located within the contiguous zone, a region extending 12 nautical miles beyond the territorial sea. Within this contiguous zone, nations have the right to "prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations" or to "punish infringement of the above laws and regulations" (UNCLOS 1982). Given that the Thai government's accusations against Elwartowski and Thepdet involved violations of immigration law, it is apparent that Thailand still has jurisdiction over the couple within this zone, giving the government lawful claim to attempt to arrest the couple.

Exclusive Economic Zone

Though it is clear that Thailand has jurisdiction over Elwartowski and Thepdet due to the *location* of the seastead, the *actions* of the couple whilst living upon the seastead could offer further justification of the jurisdiction of Thai authorities. Under UNCLOS, a nation has exclusive sovereign rights to natural resources located within 200 nautical miles from the baseline of its coast, including living and nonliving resources, and energy production (UNCLOS 1982). If the two were extracting natural resources in any way, such as through fishing or water/wind/solar energy production, they would be infringing upon Thailand's sovereign rights.

Additionally, UNCLOS grants nations "the exclusive right to construct and to authorize and regulate" artificial islands, installations, and structures within its exclusive economic zone (UNCLOS 1982). A cursory glance of this clause would suggest that seasteads fall squarely within these categories and thus fall under the purview of the sovereign state's regulation. However, the terms "artificial islands," "installations," and "structures" are not defined within UNCLOS and a generally agreed

upon definition does not exist in broader international law. It does appear that most scholars believe all three of these categories involve various substances piled upon the seabed to build an area of land, a definition which seems to include permanence as a factor (Oude Elferink 2013). Elwartowski and Thepdet's seastead, however, was a floating platform, entirely separate from the seabed. The freely floating nature of the seastead delineates it from this category, opening the door for future seasteads to work around this clause in UNCLOS.

Given these restrictions, legal scholar Ryan Fateh notes that seasteads can only exist autonomously within a nation's exclusive economic zone under the following criteria:

- 1) if they are ships or freely floating platforms;
- 2) if they are not engaged in any type of resource extraction; and
- 3) if they are not harnessing energy from water, wind, or solar sources.

Fateh goes on to note that fulfilling all of these criteria would be virtually impossible for seasteads since they rely upon natural resources to be self-sufficient (Fateh 2013). Therefore, seasteads within any nation's exclusive economic zone would be subject to the jurisdiction and regulation of that nation. For Elwartowski and Thepdet, even if they were located outside of Thailand's contiguous zone, they could still be subject to Thai rules and regulations over their seastead.

Criminal Jurisdiction

Beyond potential violations of UNCLOS, seasteads pose an interesting dilemma in the realm of criminal jurisdiction. Though charged with violations of immigration law, not criminal law, additional charges are a concern for Elwartowski and Thepdet, especially as the Thai government investigates the case further. Should these charges materialize, most certainly there will be a discussion of handling criminal jurisdiction over Elwartowski, who is American, and Thepdet, who is Thai.

In international law, there are five recognized principles for criminal jurisdiction: territorial, national, protective, passive personality, and universal (Balloun 2012).

The principle of territoriality allows states to exercise jurisdiction over crimes that occur within their territory, including the territorial sea and possibly extending through the contiguous zone. Given the location of Elwartowski and Thepdet's seastead, either 12 nautical miles offshore within the territorial sea or 13 nautical miles offshore within the

contiguous zone, the Thai authorities do have criminal jurisdiction over the couple based upon this principle. However, territoriality would not extend beyond the contiguous zone into the remaining portion of the exclusive economic zone. UNCLOS is clear that the only enforcement of laws and regulations within this zone is that which pertains to the management of natural resources, not criminal acts (UNCLOS 1982).

The principle of nationality gives nations jurisdiction over its own citizens, even when those citizens are not within their home country's territory. This is particularly relevant in Elwartowski and Thepdet's case as the two are citizens of different states. As a Thai national, Thepdet falls under the national jurisdiction of Thailand; Elwartowski, an American citizen, falls under that of the U.S. This carries heavy implications for the larger seastead community as it allows seasteaders to be prosecuted by their home nation regardless of their residency on a seastead. Moreover, the nationality principle also applies to ownership, licensure, or registration by both individuals and corporations (Mendenhall 2012). Therefore, seasteads owned by American citizens or companies headquartered in the U.S. may fall subject to U.S. jurisdiction were they to engage in criminal activity, even if none of the residents are American citizens themselves (Balloun 2012).

As to the principle of protective personality, it is not likely to be relevant in Elwartowski and Thepdet's case. Protective personality allows states to interfere in criminal activity abroad that has a potential to harm their national interest, as in the case of drug manufacturing and trafficking. Though it is possible for future seasteads to be used in this capacity, there is no evidence that Elwartowski and Thepdet were engaged in such activities, especially not to the scale at which protective personality would be triggered.

Similarly, the principle of passive personality is also not at issue in this case. Passive personality only applies in cases in which a nation's citizens were harmed or killed abroad, most notably in instances of terrorist attacks. This principle clearly does not apply to Elwartowski and Thepdet and is thus irrelevant.

Lastly, the principle of universal jurisdiction grants any nation jurisdiction over any person anywhere for crimes against humanity. Again, this principle does not apply to Elwartowski or Thepdet. However, there is concern that, should seasteads increase in size and number, they will become safe havens for fugitives and outlaws. Given that the proliferation

of seastead communities will likely not occur for many years, the validity of this concern remains to be seen, but should be kept in mind.

Sovereignty

Territorial Sea and Contiguous Zone

In arguing for the modern seastead movement, Patri Friedman, co-founder of The Seasteading Institute, set out these goals for the legal status of seasteads within the international community: “while *de jure* sovereignty may be desirable in the long term, the medium-term goal is simply *de facto* autonomy” (Friedman 2012). Elwartowski and Thepdet might not have been able to attain either of these goals in their brief stay on the open seas, but their success in building their seastead and sustaining themselves for ten weeks without government interference certainly opens the door for others to attempt the same; at the very least, they showed the global community that living on the ocean is possible. In establishing seasteads as a *possibility* for future settlements, the question now shifts to the *legality* of seasteads in acquiring statehood.

The long-held authority on the establishment of states is the Montevideo Convention. This convention laid out four criteria for statehood: people, territory, government, and legal capacity (Montevideo 1933).

As to the first two criteria, the Montevideo Convention sets neither a minimum population nor minimum territory size to be considered a state. As such, seastead communities could consist of as few as two people, as in the case of Elwartowski and Thepdet, or as many as a thousand people or more. Similarly, the territory could range in size from a single seastead, to the community of 20 seasteads Elwartowski and Thepdet were attempting to establish, to hundreds of seasteads all linked together. And although Montevideo requires states to have a defined territory, the borders do not have to be strict (Fateh 2013). This would allow for flexibility within any given seastead community as new homes and structures are added and old ones are torn down or moved to new locations.

Government will also not be an issue for seastead communities. As mentioned by Friedman, the driving motivation behind the seastead movement is the experimentation of new forms of governance (Friedman 2012). Governments may differ widely from community to community,

but descending into a state of anarchy is not the goal.

The most challenging criterion for seasteads to fulfill will be that of legal capacity. In the case of Montevideo, legal capacity refers to the ability “to enter into relations with the other states” (Montevideo 1933). Historically, the process of acquiring legal capacity can be either quick and easy, as with South Sudan in 2011, or long and laborious, as with Kosovo in 2008. Seasteads are likely to take the course of the latter as they are not characterized by the types of movements shown to garner international support: oppressed or subjugated groups, self-determination movements, or colonized peoples. Although seasteads are likely to find themselves fighting an uphill battle, it is not one entirely without precedent. For guidance on this matter, we look to the Principality of Sealand.

The Principality of Sealand is a former British anti-aircraft platform off the coast of Great Britain inhabited by the Bates family since 1966. In 1975, Roy Bates declared Sealand a sovereign state and proceeded to create a national flag, issue currency, and issue passports. Though Sealand has not been formally recognized by any sovereign nation, it has engaged in relations with other states numerous times including a visit by a German embassy official, official correspondence with 13 embassies, and the recognition of its passport in numerous countries (Lyon 2015). Sealand thus sets a precedent for future seasteads that establishing legal capacity according to the Montevideo Convention is possible.

Conclusion

While the concept of seasteads has existed for thousands of years, it is only in recent years that this idea has materialized into a reality. Due to factors such as technological advancements, the threat of climate change, and increased financial backing, the world is increasingly looking to seasteads as an alternative to traditional land-based communities (Mohammed 2019). Elwartowski and Thepdet have shown the world that although seasteads are a possibility, there are still a host of legal challenges to navigate. Given the UN Convention on the Law of the Sea, it is apparent that, in most cases, seasteads will fall under the jurisdiction and regulation of a sovereign nation when located within that nation’s territorial sea, contiguous zone, or exclusive economic zone. Therefore, it is not likely that seasteads will be able to practice full political and economic autonomy unless established at least 200 nautical miles from

any nation's coastline (UNCLOS 1982, Fateh 2013). This location would also likely be optimal for seasteading communities looking to establish themselves as sovereign states, which would require fulfilling the criteria delineated in the Montevideo Convention. Seasteading communities will easily fulfill the first three criteria—people, territory, government—but will encounter significant challenges in acquiring the legal capacity to enter into relations with other states (Montevideo 1933). However, history has shown that although this criterion may not be fulfilled easily, it is possible, as in the case of the Principality of Sealand (Lyon 2015).

As the first to put seasteading to the test in the real world, Chad Elwartowski and Nadia Supranee Thepdet have shed light on the current state of the international law apparatus and its ambiguity with regard to seasteading or other man-made structures on the open seas. As the seasteading movement evolves and potentially gains more support in the coming years, international law must change with it and become better equipped to handle the kinds of disputes Elwartowski and Thepdet have evoked.

Works Cited

- Balloun, O. Shane. 2011-12. "The True Obstacle to the Autonomy of Seasteading: American Law Enforcement Jurisdiction over Homesteads on the High Seas." *U.S.F. Maritime Law Journal* 24(2): 409-463.
- Fateh, Ryan H. 2013. "Is Seasteading the High Seas a Legal Possibility? Filling the Gaps in International Sovereignty Law and the Law of the Seas." *Vanderbilt Journal of Transnational Law* 46(899): 899-931.
- Friedman, Patri and Brad Taylor. 2012. "Seasteading: Competitive Governments on the Ocean." *Kyklos* 65(2): 218-235.
- Lyon, Andrew H.E. 2015. "The Principality of Sealand and its Case for Sovereign Recognition." *Emory International Law Review* 29(2015): 637-671.
- Mendenhall, Allen. 2012. "My 'Country' Lies over the Ocean: Seasteading and Polycentric Law." *Studies in Emergent Order* 5(2012): 137-156.
- Mohammed, Amina. 2019. "UN Deputy Secretary-General's Remarks." *High Level Round Table on Sustainable Floating Cities*. New York,

2019.

“Montevideo Convention on the Rights and Duties of States.” 1933. *Seventh International Conference of American States*. Montevideo, Uruguay. 1933.

Ocean Builders. 2019. “First seastead has been set up in international waters.” *Ocean Builders*, 4 February 2019. <https://ocean.builders/first-seastead-has-been-set-up-in-international-waters/>.

Oude Elferink, Alex G. 2013. “Artificial Islands, Installations and Structures.” *Max Planck Encyclopedia of Public International Law*. Oxford Public International Law, Oxford University Press: 2013.

Picheta, Rob and Kocha Olarn. 2019. “US Bitcoin Trader and Girlfriend Could Face Death Penalty over Thai ‘Seastead.’” CNN, 20 April 2019.

“United Nations Convention on the Law of the Sea.” 1982. *Third United Nations Conference on the Law of the Sea*. New York, USA. 1973-1982.