

Territorial Disputes and State Responsibility on Land and at Sea*

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1. *Introduction*

Our paper seeks to sketch out some relevant legal principles concerning the application of the law of State responsibility to territorial disputes both on land and at sea. Traditionally, the law of territory (we use the term in a broad sense, comprising not only land and sea areas subject to the sovereignty of a State, but also maritime areas subject to the jurisdiction of a State) and the law of State responsibility have hardly interacted, yet, in recent times, judicial litigation has shown that the interplay between the two is far from unproblematic and it certainly needs further analysis. We also identify the commonalities and differences in terms of applicable primary rules and how the application of these rules may affect determinations of State responsibility in each of the two territorial contexts.

According to well-established principles and norms of international law, a State exercises sovereignty over its land territory and its territorial sea and sovereign rights and jurisdiction in adjacent maritime zones. Sovereignty involves the possibility of acting upon a territory and of excluding other States from acting thereupon. Sovereign rights at sea entail exclusiveness as to the exploration and exploitation of resources, thereby preventing other States from exercising such activities (though not from the maritime space where such activities take place). Consequently, whenever a State acts on the territory or in the maritime zones of another State without the latter's permission, it is in breach of the latter's territorial sovereignty or its exclusive rights, necessarily

* A preliminary study on the subject of territorial disputes on land and State responsibility in the case law of the International Court of Justice can be found in E. Milano, "Territorial Disputes, Unlawful Territorial Situations and State Responsibility: Should the ICJ Go the Extra-Mile?" 3 *The Law and Practice of International Courts and Tribunals* (2004), 509-541.

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entailing the former international responsibility and a duty to provide full reparation for the injury caused.

Such simple scheme, however, has hardly found application in cases of territorial and boundary disputes, both on land and at sea, and we believe that the reason is threefold. Firstly, the settlement of boundary disputes normally requires the drawing of a boundary or a line of delimitation, whether effected through diplomatic means or through judicial means. Claims of State responsibility will be considered in the ancillary at best, at worst an impediment to the settlement of the dispute. Secondly, most boundary disputes on land derive from the lack of demarcation and from the diverging views on the interpretation of an existing boundary. An *ex post facto* characterization of a territorial situation as “adverse occupation” will not automatically lead to a determination of State responsibility for wrongful occupation or for acts related to the occupation prohibited under international law. Thirdly, with regard to territorial disputes at sea, the question is even more intricate. Most of the times, delimitation with regard to maritime zones by the parties or by a judicial body will not be simply declaratory of an existing boundary, but it will draw that boundary “from scratch”. Till their delimitation, disputed sea areas may be considered as belonging to either of the parties to the dispute, without there being one with a stronger claim. In such a legal context, it is even harder to substantiate a claim of State responsibility for acts prohibited by international law. On the other hand, unlike for territorial disputes on land, UNCLOS may provide some guidance through arts. 74(3) and 83(3) concerning the rules regulating States’ conduct pending a final delimitation agreement on the EEZ and on the continental shelf respectively.

2. *Territorial and Boundary Disputes on Land*

As mentioned, issues of State responsibility have hardly arisen in the context of boundary or territorial dispute settlements, which makes a reading of the interplay between the law of territory and the law of State responsibility particularly complex. The only two cases in which claims related to State responsibility have been considered by an international judicial body in that context are quite recent – we are referring to the 2002 judgment of the International Court of Justice in the Cameroon/Nigeria boundary dispute (ICJ Reports 2002, p. 303) and some awards of the Eritrea/Ethiopia claims commission (available at http://www.pca-cpa.org/showpage.asp?pag_id=1151) – but they are not free from ambiguities. State practice is not of much help either: diplomatic means of dispute settlement normally involve a determination or demarcation of the boundary and issues of State responsibility are left aside for the sake of a speedy implementation of the settlement.

The first task we have endeavoured to accomplish is that of identifying the most important primary rules regulating the actions of States and the legal consequences deriving from breaches thereof. We have identified four sets of relevant primary rules.

The first set of rules relates to the protection of the State's territorial sovereignty, generally put, the right that every State enjoys to freely act upon its land territory and to exclude others from doing so. In the 2002 Cameroon/Nigeria judgment, the ICJ determined that the injury suffered by Cameroon as a result of the occupation by Nigeria of parts of its territory, including the Bakassi peninsula and areas in the Lake Chad region, was sufficiently addressed by the very fact of the delimitation effected by the Court and by the order made to Nigeria to withdraw its troops and administration behind the newly delimited international boundary. The Court did not feel necessary to ascertain whether and to what extent Nigeria's responsibility had been engaged as a result of that occupation, despite a number of requests advanced by Cameroon with regard to the destruction of properties and the despoliation of the environment (para. 316). The most sensible interpretation of the Court's approach is that the judges were mostly concerned with the formulation of a remedy that would generally satisfy the overall demands of the prevailing party, without overburdening the other party with excessive costs: in other words, the Court tried to contribute to the creation of a non-confrontational environment in which the parties could move to a speedy implementation of the judgment and settle the dispute once for all (without opening a new phase of proceedings concerning the calculation of due compensation). While the Court's approach may be considered wise from the perspective of the overall settlement of a complex dispute, it does not address the content of the primary norm protecting State's territorial sovereignty and the consequences of the breach thereof: to put it in a question, when does an adverse occupation result in a breach of the State's territorial sovereignty? What are the legal consequences of such a breach? A hint to the answer may be found in Nigeria's oral pleadings, where the counsel argued that if the Court had assigned those disputed areas to Cameroon, that still should not have led to a determination of State responsibility, as Nigeria was administering those territory in good faith and in the honest belief that those areas were under its sovereignty. In other words, in territorial disputes we should identify a threshold of fault liability on the wrongdoing State.

According to that proposition, we may identify two scenarios. In the first, adverse occupation is effected in good faith – take for example the case of an international boundary lacking clear demarcation – hence the occupying State is under a duty to withdraw behind the line determined by the tribunal and restitute movable goods seized during the occupation (see *Temple of Preah Vihear* judgment, ICJ Reports 1962, p. 6, where Cambodia claimed the return of pieces of cultural property as an ancillary to Thailand withdrawal following the attribution by the Court of the contested area). It is, in other words, a form of strict, objective liability for acts not prohibited by

international law. In the second scenario, adverse occupation results from lack of due diligence or malicious conduct. Hence the occupying State is responsible under international law, and should provide full reparation for the injury caused to the sovereign State through its occupation, including exploitation of natural resources and damages to properties. That is without prejudice to the effect that an uncontested, peaceful display of authority may have on the consolidation of a title over a given territory.

Contested occupations often result from the use of force by the occupying State, which may be in breach of a second category of primary rules, those under the UN Charter and customary international law, which are commonly known as *jus ad bellum* rules. The partial award on the *jus ad bellum* of 19 December 2005 by the Ethiopia/Eritrea Claims Commission is interesting in that respect. Eritrea had argued that the military action of May 1998 in the area of the border town of Badme was justified as an effort to regain control over territory which belonged to it, as confirmed by the decision of the Ethiopia/Eritrea Boundary Commission of 13 April 2002. The Commission rejected that claim responding that self-defence cannot be invoked to settle territorial disputes, and that “border disputes are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law” (para. 10). That is a well-established principle of general international law and it was reaffirmed in the 1970 General Assembly Declaration on Friendly Relations. State practice is supportive of that principle: when Argentina acted in 1982 to forcibly regain the Malvinas from Britain, condemnation of that action was widespread, even by those States that supported Argentina’s territorial claim. While the proposition that the threat or use of force as a means of settling territorial disputes is contrary to international law is unassailable, it should not constitute a recipe for immobility. Indeed, States still retain the right to act in self-defence under strict conditions of necessity, proportionally and immediacy without prejudice to their claims and positions related to their territorial title: for example, Britain’s action to retake the Falkland islands seems to have satisfied those conditions; Eritrea’s action did not as the area around Badme had been under Ethiopia’s peaceful administration for years. As for reparation, violations of *jus ad bellum* rules in the context of border disputes may normally take the form of compensation for damages directly caused by the military action – sweeping forms of reparation have been rarely imposed upon a State and they refer to instances of aggressive wars seeking the annexation of parts or the entire territory of other States, namely the reparations imposed against Germany after WWI and those imposed against Iraq after the First Gulf War. In its decision n.7 of 27 July 2007, the guidance regarding *jus ad bellum* liability, the Ethiopia/Eritrea Claims Commission has identified the connection of “proximate cause” as the most relevant – in other words, whether the damage produced should have been foreseeable to an actor committing the wrongful act in question. It will

be interesting to see how the Commission will put into practice such test – as State practice in this respect is scanty and driven by extra-judicial settlements with little or no reference to principles of general international law.

Moreover – and here we identify a third set of relevant rules of international law – when occupation of contested areas is effected in the context of an armed conflict the law of military occupation will apply, especially the Hague Regulations and the Fourth Geneva Convention, regardless of any subsequent determination of the boundary. Again, that has been reaffirmed by the Ethiopia/Eritrea Claims Commission in its *jus in bello* partial awards. The commission has drawn an important line between territorial status and the applicable law in occupied territories (see Partial Award on the central Front, Ethiopia’s claim 2, of 28 April 2004, para. 27, where the Commission has stated that “under customary international humanitarian law, damage unlawfully caused by one Party to an international armed conflict to persons or property within territory that was peacefully administered by the other Party to that conflict prior to the outbreak of the conflict is damage for which the Party causing the damage should be responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be”). The Commission has found a number of violations of international humanitarian law by both parties with regard to their respective areas of occupation, including looting and destruction of properties and the failure to prevent crimes such as rape against the local population, also – and this is very important – with regard to events that were subsequently found, after the award of the Boundary Commission, to have occurred within “their territory”. Such violations entail a duty of compensation for the damage and injury produced by the unlawful conduct.

Finally, one should assess whether in cases of disputed territory, administering or occupying States are under an obligation of due diligence to prevent the aggravation of the dispute and hamper the final settlement. As already mentioned, such obligation is codified at arts. 74(3) and 83(3) UNCLOS and it characterizes territorial disputes at sea. No such express obligation can be found in treaty instruments applicable to territorial or border disputes on land. However, *de lege ferenda*, one may infer such obligation from the general duty to settle disputes peacefully and in good faith under art. 2(3) of the UN Charter. One may object to the need to infer such rule in the first place by arguing that, after all, abidance by the law of occupation, including the obligation not to alter the status of the territory and its inhabitants, the obligation to use only for the sake of usufruct the natural resources, etc. will most of the times prevent aggravating the dispute. The problem with that objection is that States are normally reluctant to apply the law of occupation, *a fortiori* in cases of boundary disputes, as that may be perceived as diminishing their claim to exercise territorial sovereignty over that land; moreover, not all contested territorial situations are established in the context of an armed conflict. Such an obligation of due diligence is perhaps less precise and it has

considerable scope for further definition, on the other hand it is flexible enough to provide a blueprint for good conduct in border disputes, that is disputes involving a contested claim over the course of the boundary, and it is instrumental to their settlement. In concrete, a conduct of due diligence by the administering State will imply avoiding the taking of unilateral measures such as: changing the status of the disputed territory; conferring nationality *en masse* to its inhabitants and/or promote significant settlements of own citizens; conducting excessive exploitation of exhaustible natural resources beyond the needs of usufruct and the benefit of the local population; creating physical barriers aimed at predetermining the future delimitation of the boundary; diverting the course of a river for the sake of controlling water resources or altering the course of a natural boundary.

Reparation due for such violations may vary from simple declaratory reliefs, to forms of restitution and compensation (the latter, for instance, when the unlawful conduct has involved the excessive use of exhaustible natural resources).

3. *Contested Maritime Areas*

We shall now turn to territorial disputes at sea in order to identify the main analogies and differences with disputes on land.

Disputes relating to contested maritime areas present differences with respect to those on land. Maritime zones, in fact, are a recent concept. While the claim of States to a territorial sea may be traced back to the first period of law of the sea (XV-XVI centuries), most maritime zones (namely the continental shelf and the exclusive economic zone) date back to the second half of the XX century and are the result of the process of expansion of the coastal States' rights, codified by the 1958 and 1973-1982 United Nations Conferences on the Law of the Sea. These zones therefore extend over areas that were previously regarded as part of the high seas, open to all States, and the exclusive rights that may be exercised therein by the coastal State are attributed to it not on the basis of occupation but as a consequence of the proximity of the areas considered to its land territory (on the basis of the well established principle "the land dominates the sea"). The consequence is that in almost all maritime delimitation disputes the parties are called upon to delimit a previously *undelimited* area, where their maximum claims overlap. Notwithstanding the elaboration of a body of principles and rules relating to maritime delimitation, mostly through the decisions of international tribunals, there still is a margin of appreciation (for the judge or the parties) as regards the final boundary line. As long as their claims are reasonable, both States parties to a maritime boundary dispute could have a good chance of getting the maritime area they claim (or at least a part of it).

It is therefore rare that a State would incur in international responsibility for violating primary rules relating to title to territory (in the sense of maritime zones) because most of the times, until the final maritime boundary is settled, there is no clear allocation of maritime space. Cases in which a State has violated an agreed maritime boundary by “occupying” the maritime zones of another State or by exercising exclusive jurisdiction instead of the State that has this right under international law are also very rare; most of the times, such a situation will be the direct result of a disputed land occupation. In other words, in the case of occupation of an area of land abutting to the sea the claim to the maritime zones will not arise out of direct occupation of the relevant maritime area, but out of the occupation of the land territory the coast of which generates maritime zones.

It is indeed much more frequent for a State to incur into international responsibility by breaching primary rules relating to action in areas where the claims of two States overlap, pending final delimitation of the maritime boundary. According to UNCLOS and customary international law, a State exercises full and exclusive sovereignty or sovereign rights in its maritime zones, thus excluding all other States from the exercise of these powers or rights (though not from navigation in that area). In the case of maritime boundary disputes, however, the two States maintain that they can exercise the same, exclusive, right on a certain portion of the sea (the area of overlapping claims). It is evident that this duplication of the subject entitled to exercise an exclusive right in a specific sea area could lead (and indeed, often leads) to disputes and sometimes to unilateral acts by the States involved. The question put with respect to territorial disputes on land (“when does an adverse territorial occupation represent a violation of territorial sovereignty”) could be reframed in the following way to adapt to maritime disputes: when does a State action in a contested maritime area represent a violation of the rules on the coastal State’s powers in its maritime zones?

As already mentioned, international responsibility arises out of the violation of a rule of international law. The question is therefore whether there exist rules of international law specific to contested maritime areas. We are not going to deal, in fact, with acts that, wherever committed, entail the international responsibility of the State (such as, for example, the violation of fundamental human rights); nor are we considering controversies between the coastal State and third States concerning matters that would be debatable even if the entitlement to that area were undisputed (such as eventual claims for prior authorisation for passage through the territorial sea). We propose instead to consider issues of State responsibility with respect to those acts that would be legal if carried out on a maritime area appertaining undisputedly to the acting State, but whose legality may be challenged in the case they are carried out in a non delimited marine area.

While land boundaries are (or are considered to be) for the most part defined, maritime boundaries do not exist *ipso iure* but have to be agreed by the States whose potential areas overlap. Pending the final agreement of all maritime boundaries, disputes concerning maritime delimitation

and therefore entitlement to maritime areas are very frequent, especially since the extension seawards of maritime areas. It is probably having this picture in mind that States have included in the UNCLOS provisions applying to non delimited areas. According to Arts. 74(3) and 83(3) UNCLOS, framed in identical terms, “Pending agreement as provided for in paragraph 1 [on the basis of international law], the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation”. This provision contains two obligations for States that are parties to a disputed concerning maritime boundaries. The first is a positive one: the States shall endeavour to enter into provisional arrangements to address the situation of competing claims. State practice shows that such provisional arrangements may assume the form of formal agreements or may consist in informal *modus vivendi* and they may endorse different solutions, such as joint development zones, provisional boundaries, the creation of joint commissions or other means of cooperation. The second is a negative one: States involved in the maritime delimitation dispute shall refrain from acting in such a way that would prejudice the final settlement of the dispute. The text of Arts. 74(3) and 83(3) UNCLOS, while not limiting *de iure* the powers of each State in a contested area that still has to be delimited (which thus remain those generally attributed to the coastal State by the relevant UNCLOS provisions and customary international law), poses a double condition for their exercise in that area (and provided that each claim is a reasonable one). Therefore, if a State exercises a right granted to it (under the UNCLOS regime applicable to the coastal State) without at the same time complying with the requirements of Arts. 74(3) and 84(3), it will incur into international responsibility. If, for example, a State exploits unilaterally the non renewable resources of the seabed, it is evident that this will prejudice the final settlement of the dispute. The same conclusion applies in the case of non-sustainable exploitation of renewable resources, such as fish stocks.

In practice, it seems that three situations are more likely to occur. Firstly, cases in which a State enforces its national legislation in areas not yet delimited, which it considers as falling under its sovereignty/jurisdiction. If this action raises the protests of another State, which also claims that maritime area as its own, will the first State be responsible for illicit threat/use of force? Secondly, cases in which a State gives licenses for the exploration (or even exploitation) of resources in an area that it considers as its own but where no agreed boundary exists: will that State be responsible for exploring/exploiting resources that are not its own? And if the company carrying out such activities is hampered by the navy of another State, which also claims that the area falls under its own jurisdiction, will this latter State be responsible for intervening in an area that is not its own? Thirdly, cases in which scientists carry out “pure” scientific research (that is, research that does not

fall under the provisions of Art. 246(5) UNCLOS) in a disputed area, on the basis of the authorization obtained by one of the claimant States. If the other State hampers such activities claiming that it has not granted permission for scientific research in its own maritime areas, will the first State responsible for authorizing scientific research in maritime areas that do not fall under its jurisdiction?

While such incidents occur at a certain rate in State practice, so far only one relevant case has been decided by an international judge. It is the recent Guyana/Suriname case (decision available at http://www.pca-cpa.org/showpage.asp?pag_id=1147), decided in 2007 by an Arbitral Tribunal constituted pursuant to Art. 287 UNCLOS, with respect mainly to the CGX incident (described in paras. 150-152 of the Award). The Tribunal decided that both Suriname and Guyana had violated their obligation to make every effort to enter into provisional arrangements: Suriname because it did not try to solve the CGX problem through negotiations but made recourse to what the Tribunal defined as “threat of the use of force in breach of the [UNCLOS], the UN Charter and general international law” (par. 2 of the dispositif), and Guyana because it did not inform Suriname about its proposed activities in the contested area and did not try to involve Suriname in the projected activity. Furthermore, the Tribunal also considered that both States had violated the obligation to make every effort not to hamper or jeopardize the reaching of the final agreement, Guyana by undertaking activities that cause a physical change to the marine environment and Suriname by its threat to use force to respond to Guyana’s exploratory drill.

The Guyana/Suriname Award, finally, reiterated the practice of the ICJ mentioned above in considering that reparation for the violations of the relevant rules – including reparation for the injury suffered by Guyana as a result of Suriname’s breach of the relevant *jus ad bellum* rules – was sufficiently addressed by the declaratory relief of the tribunal (Guyana/Suriname Award, para. 486).

There is a final point to be made. It is not possible to impose on States an absolute obligation not to make any claim and not to undertake any act in the contested area. State acts, including statements of claim and legislative action by the State’s organs have in fact often been used in order to reinforce a claim. As such, they are not only admissible, but also necessary in order not to lose entitlement to a maritime area. Nonetheless, it is important to establish the boundary between State action reinforcing a claim and State action that goes beyond what is permitted under law of the sea provisions, thus entailing the international responsibility of the State.

4. *Conclusions*

In concluding this brief overview, we would like to draw some conclusions. As a preliminary matter, we would like to remind that the law of State responsibility is a single body of

law; its application, nonetheless, to each of the two cases (disputes on land/at sea) presents its own peculiarities because of the different primary rules applicable. Nonetheless, we also consider that there are some similarities between issues of State responsibility concerning territorial disputes and issues of State responsibility relating to maritime delimitation disputes. This conclusion is strengthened in the light of judicial practice: decisions by international tribunals relative to maritime delimitation contain in fact references to decisions relating to territorial disputes on land, as in the case of the 2007 Guyana/Suriname Award, which makes reference to the 2002 Cameroon/Nigeria judgment.

The following conclusions seem to apply to all territorial disputes, whether relating to land or sea boundaries.

Firstly, Arts. 74(3) and 83(3) UNCLOS seem of great relevance: they could be considered as expression of a rule of international customary law applicable to all maritime boundary disputes. In addition, one could argue that the second part of these provisions (obligation not to hamper or jeopardize the final settlement) endorses a general principle of due diligence that might be applied to land disputes as well.

Secondly, there is a need to establish some limits to enforcement activities that can be carried out in contested territories, or in contested maritime areas. In the first case, there is a need to consider the legality of the occupation as well as the good faith of the occupant, but also the need to reconcile them with the necessity to maintain order in the territory. In the case of disputes in the sea, the concept of reasonable claim could help to establish some guidance.

Thirdly, another distinction that can be drawn is the one between activities that are permitted as a means to reinforce the State's claim to a territory (or maritime area) and activities that are prohibited because they would hamper or jeopardize the final settlement, giving – or being perceived to give – an advantage to one party by prejudging the other party's position.

Finally, the distinction between responsibility and strict liability for acts not prohibited by international law could be relevant in establishing the consequences of acts committed by States in contested territories or contested maritime areas.