

State Responsibility in Territorial Disputes before the ICJ

Enrico Milano^{*}

1. Introduction

The topic of this paper is State responsibility in territorial disputes before the International Court of Justice (ICJ). What I will assess is the possibility of applying the law of State responsibility to territorial disputes, in particular looking at the question of State responsibility for the adverse occupation of another State's territory. This latter is often the most contentious political issue considered by States in disputes over territories. I will propose some solutions on how to fill a rather unexplored gap in one of the traditional areas of public international law, which can inspire a sound approach to State responsibility for different kinds of illegal territorial occupations, whether or not dealt with by an international tribunal and within the context of a territorial dispute.

2. Precedents at the ICJ

Whereas the last few years have seen a tremendous increase in territorial disputes referred to the ICJ, not a single decision by the Court has dealt with the question of State responsibility for illegal occupation. This is certainly due to the fact that these disputes tend to be construed by States, and consequently by the Court, as being exclusively concerned with the determination of title, rather than with the more general issue of preservation and protection of territorial sovereignty. Also, this is due to the fact that territorial disputes are normally submitted to the Court by special agreement exclusively asking the delimitation of the land boundary. Yet, interestingly enough, in one case recently decided by the Court and brought unilaterally by one of the countries under Art. 36(2) of the Court's Statute– the *Land and Maritime Boundary Dispute* between Cameroon and Nigeria –, Cameroon asked the Court to determine that Nigeria, by illegally occupying the Bakassi peninsula and the Lake Chad area, had incurred State responsibility and had an obligation to provide reparation for the injury caused – including monetary compensation.¹ With respect to compensation, Cameroon requested that this should cover the military equipment destroyed during the Nigerian military actions, the damage suffered by the civilian infrastructures such as roads, the losses of physical property and profits due to the abandonment of economic activities related to oil and fisheries exploitation, and the damage caused in general to Cameroon's potential economic development due to the downfall in

^{*} LL.M. (Nottingham); Ph.D. (LSE). Post-doctoral researcher in international and human rights law at the University of Maastricht. An extended version of this paper can be found in 'Territorial Disputes, Unlawful Territorial Situations and State Responsibility', (2004) n. 3 *The Law and Practice of International Courts and Tribunals*.

¹ *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea Intervening)*, Cameroon's Memorial (1995), 609-613, in http://www.icj-cij.org/icjwww/idocket/icn/icnpleadings/icn_ipleadings_19950316_memoire_cameroon_chp6.pdf.

economic activities and to the military effort required.² Compensation shall also be provided for the moral injury caused to Cameroon.³

The Court in its para. 316 decided to lay aside Cameroon's claims. It declared that, by the very fact that it had fixed the boundary in those regions according to Cameroon's claims, the injury suffered was sufficiently addressed, and it did not consider it necessary to decide 'whether and to what extent Nigeria had incurred international responsibility as a result of that occupation.'⁴ In other words, the Court considered that a standard declaratory judgment, followed by an order directed to Nigeria to withdraw from the disputed areas, was a sufficient remedy for the injury caused to Cameroon. This remedy is hardly a novelty in the history of territorial disputes litigated before the ICJ.⁵

However, it is the history of State responsibility in territorial disputes which is far from eventful. As said, this can be imputed to the fact that nearly all territorial disputes considered by the ICJ and other judicial bodies have been referred to by *ad hoc* agreements, which did not refer to the Court any issue of State responsibility, but only asked for a final delimitation of the boundary. The present case was almost unique because it was brought unilaterally by Cameroon under Art. 36(2).⁶ It is telling that the other two territorial litigations which involved *prima facie* issues of State responsibility were cases brought unilaterally by one of the parties to the dispute. In 1932, in the case between Denmark and Norway on the *Legal Status of the South-Eastern Territory of Greenland*, Denmark in its application reserved the right to ask the Permanent Court of International Justice for reparation due to the Norwegian violation of the existing legal status of South-Eastern Greenland.⁷ The proceedings were discontinued the year after due to Denmark's withdrawal of its application.⁸ In the *Temple of Vihear* case, Cambodia successfully claimed the return by Thailand of cultural property taken during the occupation of the Temple's area.⁹ However, as argued by Nigeria in *Land and Maritime Boundary Dispute*, it is true that in that case Cambodia did not raise a claim of State responsibility as such, but it claimed the return of specific items as an ancillary of Thailand's withdrawal.¹⁰ In the current case *Territorial and Maritime Dispute* brought by Nicaragua against Colombia under Art. 36(2) of the Statute and the Pact of Bogotá, Nicaragua has reserved 'the right to claim compensation for elements of unjust

² *Ibid.*, 640-641.

³ *Ibid.*

⁴ *Ibid.*, Decision of 10 October 2002, para. 316, in http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF.

⁵ E.g. *Sovereignty over Frontier Land (Belgium v. The Netherlands)*, ICJ Reports (1959), 209; *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*, ICJ Reports (1986), 554; *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras, Nicaragua intervening)*, ICJ Reports (1992), 351; *Territorial Dispute (Libya v. Chad)*, ICJ Reports (1994), 6.

⁶ *Land and Maritime Boundary Between Cameroon and Nigeria*, Application Instituting Proceedings, 29 March 1994, in <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm>.

⁷ *Legal Status of the South-Eastern Territory of Greenland*, Application Instituting Proceedings from the Danish Government, 18 July 1932, PCIJ Series C (1933), n. 69, 12.

⁸ *Ibid.*, Order of 11 May 1933, PCIJ Series A/B (1933), n. 55.

⁹ *Temple of Vihear (Cambodia v. Thailand)*, ICJ Reports (1962), 6, at 11 and 37.

¹⁰ *Land and Maritime Boundary*, Nigeria's Rejoinder (2001), para. 15.57, in <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm>.

enrichment consequent upon Colombian possession of the Islands of San Andres and Providencia as well as the keys and maritime spaces up to the 82 meridian, in the absence of lawful title'.¹¹ In conclusion, the judicial practice of States is very scanty in this respect. However, the three cases mentioned prove that the demands inherent in a claim for State responsibility are not incompatible with a territorial litigation, and in fact they characterise most of the few territorial disputes brought unilaterally before the ICJ.

3. No Obstacle Exists in Theory to the Application of the Law of State Responsibility to Territorial Disputes

After all, there is in existence no theoretical obstacle to the application of the law of State responsibility to territorial disputes. Leaving aside, for the sake of brevity, the responsibility of the occupant for violations of other sets of norms such as norms of *ius ad bellum*, international humanitarian law or international environmental law, which often provide for special rules of State responsibility, I shall only focus on the responsibility resulting from the occupation *per se*. To rule out from the very outset any special regime for territorial occupations, it is worth quoting the ILC in its Commentary to the 2001 Articles on State Responsibility, which provides among the examples of continuing wrongful acts 'the unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent'.¹² The 2001 Articles then spell out the secondary obligations deriving from a determination of State responsibility, namely a duty of cessation of the wrongful conduct and reparation for the moral or material injury caused in the form of restitution, compensation or satisfaction in order of priority.¹³ Being the obligation to respect another State's territorial sovereignty, an obligation to abstain and being the violation a continuing one, the secondary obligation to cease the wrongful conduct overlaps with the continuing duty of performance of the obligation breached. In other words, one of the typical remedies ordered by tribunals with regard to territorial disputes, that is the withdrawal from the occupied territory, is both resulting from the continuing duty of performance related to the primary obligation and from the secondary obligation to cease the wrongful conduct. Withdrawal is also part of the secondary obligation of restitution, which in some cases will provide a full reparation. In other cases, however, reparation may theoretically involve restitution of property – for instance cultural property – removed from the occupied territory, and above all monetary compensation for the destruction of public and private property, the use of natural resources and the depletion of the environment.

4. An Interpretation of the Primary Norms Protecting States' Territorial Sovereignty from Wrongful Occupations

The most important point I want to make from a doctrinal perspective is that *Cameroon/Nigeria*

¹¹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application of Nicaragua, 6 December 2001, in http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_iapplication_20011206.html.

¹² ILC Articles on State Responsibility and Commentary, in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 136.

¹³ *Ibid.*, at 211-241.

shows that despite the fact that illegal territorial occupations are one of the enduring problems of the international society, and territorial sovereignty is one of the main legal attributes of States under international law, very little academic and jurisprudential elaboration has been devoted to the legal consequences of the breaches of territorial sovereignty resulting from an illegal occupation. I submit that this situation is not the result of an intrinsic difficulty in applying the law of State responsibility to issues of territorial sovereignty – and in fact I have just shown how such rules can be applied –, but rather the uncertainty behind the exact definition of the primary norms protecting States’ territorial sovereignty. In particular, I would argue that whereas the legal protection to States’ territorial sovereignty provided by the prohibition of forcible territorial change can be easily defined, and the rules of the *jus ad bellum* will be largely sufficient to determine the legality or illegality of an ensuing occupation,¹⁴ the *uti possidetis* principle and the principle of self-determination present a normative complexity related to the level of negligence and fault by the occupying State required to substantiate a claim for State responsibility.

Kohen supports this view when, after having denied the significance of good faith in adverse possession as by itself giving title to territory, he states that ‘[t]outefois, la conscience d’agir contrairement au droit du titulaire de la souveraineté ou, au contraire, la conviction d’être le titulaire pourront avoir des conséquences dans le domaine du contenu et des formes de la responsabilité internationale’.¹⁵ It was also made clear by the counsel for Nigeria Sir Arthur Watts in the defence to Cameroon’s claim, when discussing the content of the primary norm protecting States’ territorial sovereignty. His argument was that, even if the Court had found the *uti possidetis* and therefore the territorial title over the Bakassi peninsula and the Lake Chad area to belong to Cameroon, Nigeria might have had to withdraw from those areas – but should not have been held responsible for an occupation undertaken in the genuine, reasonable and honest belief of being the lawful sovereign over those areas.¹⁶ By analogy, it is possible to refer to the *Corfu Channel* case, insofar as the Court, in that case, was engaged in determining the content of due diligence obligations and the responsibility incurred by States for the breach of such obligations.¹⁷ Particularly significant is the passage where the Court stated that ‘it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetuated therein [...]. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.’¹⁸ The lesson we can draw from the passage and that decision is that, to the extent that Albania’s responsibility for mine-laying was not triggered as a result of its exercise of jurisdiction over those waters, the mere adverse occupation or control over a territory does not *per se* entail the responsibility of the occupying State. However, inasmuch as Albania’s responsibility was determined by the Court on the basis of its lack of due diligence in preventing unlawful activities, by analogy, in a case such as *Cameroon/Nigeria*, we should expect that the

¹⁴ Any occupation resulting from the use of force shall inevitably entail a lack of due diligence in respecting another State’s territorial sovereignty. The real legal test for an occupation produced by a forcible action lies in the compliance with the *jus ad bellum* rules, that is whether it can be justified on the grounds of a proportionate and necessary exercise of individual or collective self-defence, or of a specific authorisation by the Security Council.

¹⁵ M. Kohen, *Possession contestée et souveraineté territoriale* (1997), at 384.

¹⁶ *Land and Maritime Boundary*, Oral Pleadings of Nigeria, Watts, CR 2002/20, 26-30, in http://www.icj-cij.org/icjwww/idocket/icn/icncr/icn_icr200220_20020315.pdf.

¹⁷ *The Corfu Channel Case (UK v. Albania)*, ICJ Reports (1949), 4.

¹⁸ *Ibid.*, at 18.

threshold of international responsibility is reached when the occupying State must have known, or reasonably should have known, that it was occupying territory beyond the *uti possidetis* line and that the other State was contesting it. In other words, it is not the very fact of the adverse occupation that makes the occupying State responsible, but also a faulty conduct – or, even better, a lack of due diligence – in occupying another State’s territory. Furthermore, *Corfu Channel* shows how evidence of the State’s fault might be found not only in direct evidence of its ‘mental belief’ such as a clear statement by the executive, but also in indirect evidence that indicates that the State should reasonably have known that the rights of another State were affected. For the sake of brevity I cannot enter into the details of *Cameroon/Nigeria*, but on that account and with respect, I believe that the choice of the ICJ not to properly consider Cameroon’s demands for State responsibility fell short of a satisfactory solution, at least as far as the Bakassi peninsula was concerned, because of the direct and indirect evidence presented by Cameroon with regard to Nigeria’s awareness of the *uti possidetis* line.¹⁹

The same concept of due diligence liability can be applied to cases of denials of self-determination of people. Whereas State practice shows that South Africa in the 1970s and in the 1980s was consistently held responsible for the unlawful occupation of Namibia – and the same position, albeit only in passing, was also held by the ICJ in its 1971 Advisory Opinion – this was normally taken as a case of serious violation of a peremptory norm.²⁰ That is confirmed by the ILC Commentary when it deals with the system of enhanced consequences envisaged by Art. 41 of the 2001 Articles on State responsibility.²¹ Yet I would submit that the threshold of State responsibility for the occupation of a self-determination unit does not necessarily require the level of magnitude and malicious conduct characterising serious violations of peremptory norms, but can encompass non-serious, that is standard violations of peremptory norms as well, such as is probably the case with the Israeli occupation of the Palestinian territories or the Moroccan occupation of Western Sahara. What again should be considered in these cases, is the lack of due

¹⁹ It is difficult to accept the idea that Nigeria’s occupation of Bakassi originated from a reasonable mistake or honest belief. It should have been manifest to Nigeria that Bakassi had been considered part of the Cameroons during the British Mandate and Trusteeship Administration. Furthermore, Nigeria had recognised the *uti possidetis* according to the 1913 Treaty in 1961, and it continued to negotiate its maritime boundary with Cameroon under that assumption until 1975. These negotiations even resulted in the signing of a formal instrument, the 1975 Maroua Declaration. After 1975, Nigeria’s actions and presence in Bakassi were the object of a limited but significant number of protests and actions by Cameroon. Even if it doubted the validity of certain provisions of the 1913 Treaty because of the encroachment on Old Calabar’s rights – this being a reasonable doubt – it should have been evident to Nigeria that because of Old Calabar’s inaction until 1961 and its inaction until 1975, Cameroon had title to Bakassi. Furthermore, the qualification of ‘honest belief’, even if established, should apply only for the areas under established peaceful control, and not for the areas of the peninsula acquired in 1993-1994 through military action. As argued by Nigeria herself (Oral Pleadings, Abi-Saab, CR 2002/20, 22), a peaceful *status quo* is protected against forcible measures when not resulting from military action.

²⁰ SC Res. 216 (1965); SC Res. 276 (1970). See also *Legal Consequences for States of the Continued Presence of South-Africa in Namibia notwithstanding Security Council Resolution 276*, Advisory Opinion, ICJ Reports (1971), 3, at 54.

²¹ Crawford, *supra* note 12, at 251-252.

diligence of the occupying State in allowing a smooth and peaceful process of free expression of the will of the people, and, when it is the will of the people, the creation of viable independent States.

5. Conclusion

In conclusion, despite the long-standing history of the rules concerning States' territorial sovereignty and their enduring crucial importance, and despite the level of sophistication of the norms and principles regulating territorial disputes, it is very surprising to find that so little attention has been paid to the question of the violation of those norms and the consequences in terms of State responsibility. There are virtually no judicial precedents dealing with claims of State responsibility in territorial disputes. The best opportunity to deal with this issue has been possibly offered to the ICJ in *Cameroon/Nigeria*, yet the Court has unanimously decided, with the only exception being Cameroon's Judge *ad hoc* Mbaye, to limit itself to render a standard declaratory judgment and put aside the question of State responsibility. Such large consensus is consistent with the standard construction by the Court of a territorial dispute being merely a dispute over titles, and the emphasis put on co-operative measures in the implementation of the judgment, as an alternative to overburden Nigeria - and possibly Cameroon, considering the number of Nigeria's counter-claims related mostly to border incidents - with very costly damage awards. The Court did not envisage a subsequent phase related to the assessment of reparation in the context of an already very lengthy and complex litigation, but, rather, elaborated a decision with a view to creating a less confrontational environment between the two countries on such a sensitive issue as States' territorial sovereignty, and to addressing the interests of the local populations affected by the dispute.²² The Court was taking into account its broader role within the UN system of body also responsible for promoting an overall settlement of disputes.

²² See para. 316 of the Decision: ' [...] the implementation of the present Judgment will afford the Parties a beneficial opportunity to co-operate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently enjoys. Such co-operation will be especially helpful, with a view to the maintenance of security, during the withdrawal of the Nigerian administration and military and police forces.'