CHAPTER 3

STATEHOOD AND TERRITORIAL SOVEREIGNTY: THE TRADITION OF CONCRETENESS AND REALISM

1. Introduction

The theoretical discussion surrounding the concept of effectiveness and its definition show how effectiveness lies at the core of the existential and foundational questions of international law. That is apparent if we consider one of the key legal concepts of international law, that of territorial sovereignty, whose understanding is crucial to a proper conceptualisation and analysis of unlawful territorial situations. Territorial sovereignty normally denotes a political and legal expression, which designates a relationship of power, supremacy or independence between an actor, the state, and an object, the territory. The qualitative expression of the relationship between state and territory, together constitute what is called territorial sovereignty. This chapter investigates the significance of effectiveness in the legal definition of statehood, and how the concept of state in international law is transposed to the relationship of sovereignty that the state may have with a certain territory. In other words, the implications of the concept of effectiveness for international law issues concerning the question of unlawful territorial situations will be considered, namely statehood, territorial sovereignty and military occupation.

Specifically, this chapter examines the material concept of state in its theoretical and jurisprudential elaboration, by looking at effectiveness in its internal and external dimensions. It assesses how effectiveness discourse has been transposed in the legal definition of territorial sovereignty. In particular, the chapter deals with the notion of territory and the classic modes of acquisition of territory, and how these aspects of international law have been affected by the concept of effectiveness. It is submitted that the material concept of territorial sovereignty defines itself in the colonial encounter, in particular in the institution of occupation of terra nullius. Despite the attempt of positivist jurisprudence to differentiate forms of legal encounter with the non-European world, the analysis highlights both the inconsistencies of such differentiations, and also how the standard of civilisation made in fact such world a terra nullius. The Cameroon-Nigeria ICJ litigation proves that effectiveness also played a legally dominant role in cases of agreements with local populations, and that the ICJ is still keen on recognising such role. Furthermore, the predominant role of a material or objective element in the institution of occupation of terra nullius, rather than a subjective requirement, according to the original scheme of the Roman law
institute of *occupatio*, is described. Finally, the concept of military occupation is considered; effectiveness heavily impacts on its legal definition, and shows in a paradigmatic manner the ambiguity between the ‘concrete’ and the ‘normative’ in the nature of international law, as it relates to matters of territorial sovereignty. The legal determination of the powers of the occupants is often crucial to the understanding of the legal dimension of territorial situations, and it is often one of the most contentious issues in the underlying political dispute.

2. Statehood and effectiveness

By considering the role of effectiveness in determining legal issues related to statehood and sovereignty, we can fully appreciate its significance *vis-à-vis* the idea of positive legality. It is instructive to recall Martti Koskenniemi’s analysis that the discourse on sovereignty in international law has been dominated by two contrasting positions on the nature of the state, the ‘pure fact’ approach, and the ‘legal approach’, which have created a spectrum within which every writer and tribunal have ‘moved’ their arguments. The view, defined as ‘Schmittian’ by Koskenniemi, presupposes the sociological nature of the state to the legal one - like a person, its physical existence is *conditio sine qua non* to its legal existence -, whereas the view, defined as Kelsenian, sees the state as a legal order *tout court*, whose social and political elements must be distinct from its ‘pure’ legal form, and do not influence its legal existence. The question of governmental and territorial competencies does not escape this dualism, and therefore it is fundamental to examine those theories for a fuller understanding of the issue concerned.

Kelsen’s normativist theory of the state inevitably walks a tightrope. Kelsen’s principle of effectiveness, which represents the *Grundnorm* of the domestic legal system, is presented, on the one hand, like that degree of coercive power on which the validity of every norm is based, on the other hand, as a positive norm of international law from which every national constitution is based. Kelsen begins by defining effectiveness in the former sense. However, in order to avoid a charge of presupposing a sociological axiom to a juristic one, he describes it as a ‘general norm of the international legal order’. At this stage, the author seems to maintain that the *Grundnorm* is a positive rule that because of its general character finds its foundation in the practice of states. But if state behaviour is a source of the *Grundnorm*, then it seems that either: a) the principle of effectiveness is not the

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