CHAPTER 4

DEFINING THE BOUNDARIES OF LEGALITY: UNLAWFULNESS OF TERRITORIAL SITUATIONS

1. Introduction

International law should not reduce itself to recording reality. If effectiveness, that is the adherence of the law to the world of facts, was the dominant principle of international law, we would have to question the normativity of the international legal system, and the capacity of international law to influence the behaviours of international actors. This would be particularly true of territorial situations, where the divide between lawful and unlawful would only rely on procedural restrictions on the ‘legalisation’ of effectiveness. The domination of concreteness over normativity was characteristic of pre-League of Nations international law, and, consequently, one of the main preoccupations of 19th century international lawyers was to prove the juridical nature of international law. Legality was at best defined in procedural terms.

The Covenant of the League of Nations represented a turning point in this sense. Despite its weakness and ineffectiveness, the League of Nations developed the first series of legal principles to limit war in international relations and the legal effects of waging war. Among other important changes, conquest as a mode of acquisition of territory began to be seen as unlawful. The principle of non-recognition of territorial aggrandisement by means of war was then confirmed in 1945 by the creation of the UN and by the entry into force of the UN Charter. In the following decades, in particular during the 1960s and the 1970s, two other substantive principles of unlawfulness of territorial situations developed as a result of political de-colonisation: on the one hand, the right of individuals to be ruled by a representative leadership, on the other hand, the right of the individuals as a group to freely determine their own political and territorial status without foreign or colonial interference.

This chapter outlines the way principles of substantive legality influence and determine territorial situations, completing a preliminary theoretical framework based on the dialectical tension between effectiveness and legality. The chapter defines the unlawfulness of territorial situations with respect to four legal principles and corresponding norms: a) the prohibition of the use of force as a mode of acquisition of territory or change of territorial status of a certain region; b) the principle of *uti possidetis*; c) the right to self-determination; d) the principle of territorial integrity. Despite arguing for the objectivity of the concept of legality, the chapter concludes by identifying some of the inconsistencies and difficulties that characterise legality discourse with respect to territorial situations.
2. Normative standards: the prohibition of the use of force as a means of modification of territorial status

The first principle of legality considered is that concerning the unlawfulness of a territorial situation established through the use of force. This question has been comprehensively dealt with in the legal literature.1 Traditionally, the enunciation of this principle is traced back to the so-called Stimson doctrine of 1931, when the US Secretary of State Stimson, in two identical notes transmitted to China and Japan, declared the illegality of the Japanese occupation of Manchuria and the US willingness not to recognise any legal effect or instrument deriving from it.2 However, restrictions on how the use of military force could modify the territorial formal status of a certain region are not a 20th century development in international law. The 18th and the 19th centuries saw the development of norms regulating the way sovereignty could be transferred through the use of force. For instance, the Treaty of Utrecht of 1713 represented a turning point in the history of the legal institution of conquest, by requiring that the transfer of sovereignty would be legitimised by a peace treaty and not only by military occupation or annexation.3 These norms can be at best defined as procedural, but did not substantially impinge on the freedom of states to go to war in order to expand their own territory.

The principle of unlawfulness of territorial situations brought about through the use of force was developed first in Latin America, and it can be considered as the other side of the coin of another important principle of international law, that of \textit{uti possidetis}. The principle prohibiting forcible annexations found expression in Article 11 of the Rio de Janeiro Treaty on Non-Aggression and Conciliation of 1933 and in Article 11 of the Montevideo Convention on Rights and Duties of

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1 E.g. Langer, \textit{Seizure of Territory} (1945); Jennings, \textit{The Acquisition of Territory in International Law} (1963); more recently see Korman, \textit{The Right of Conquest: the Acquisition of Territory by Force in International Law and Practice} (1996).

2 This is the text of the note: ‘In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it cannot admit the legality of any situation \textit{de facto} nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial or administrative integrity of the Republic of China, or to the international policy relative to China, common known as the open-door policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well the United States, are Parties.’ Cit. in Langer, \textit{supra} n. 1, 58. On the Stimson doctrine see also Meng, ‘Stimson Doctrine’, in Bernhardt (ed.), \textit{EPIL} (1982) (Vol. IV), 690.

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