CHAPTER 5

CONSEQUENCES OF UNLAWFULNESS

1. Introduction

The present chapter considers the normative impact of a definition of unlawfulness of a certain territorial situation. Firstly, it looks at the meaning of ‘unlawful’ in terms of general theory of invalidity. It tries to spell out the difficulties involving a satisfactory and comprehensive theory of ‘invalidity’ of territorial situations, with particular reference to the legal consequences of such invalidity. As relevant cases highlighting the limits inherent in the concept of invalidity of territorial situations, the jurisprudence of the ICJ with respect to Namibia and of the ECHR with respect to the Turkish Republic of Northern Cyprus will be considered. Secondly, the analysis reviews the way a determination of unlawfulness can influence the application of other relevant norms regulating the underlying political disputes, in particular the norms concerning the use of force, the law of belligerent occupation, the creation of states. Thirdly, the chapter examines another important legal consequence of a situation of territorial unlawfulness, the question of international responsibility, which helps us define the exact borders of the primary norms protecting states’ and peoples’ territorial sovereignty considered in the previous chapters. Finally, it considers the concept of legitimacy and its crucial relevance to the legal description of unlawful territorial situations, in particular its relevance for the ‘legalisation’ of effectiveness.

2. Consequences of unlawfulness: the ‘invalidity’ of unlawful territorial situations

Even overcoming the difficulties in ascertaining the unlawfulness of a territorial status thanks to uncontroversial political and judicial decisions, there remains the problem of conceptualising the consequences of such unlawfulness from a legal perspective. The first fundamental legal consequence is that of invalidity. If a certain juridical act is vitiated, that is, one of its elements does not satisfy a certain set of criteria spelled out by the legal system, normally this will attach a series of legal consequences intrinsically linked to that act, which can be summed up under the concept of invalidity. This area has been relatively under-investigated by the international doctrine, probably due to the fact, as correctly argued by Sir Robert Jennings some decades ago, that a coherent system of invalidity requires a centralised system of judicial enforcement that can ascertain
the unlawfulness of a certain act, and decide on the consequences of that invalidity.\(^1\) Further, the issue has found conventional regulation only in the area of treaty law, namely through the 1969 VCLT, which has also allowed the elaboration of a differentiation between relative and absolute nullity.\(^2\) Yet, treaties are not the only juridical acts which can be vitiated. Very often in the unlawful territorial situations the kind of act whose validity is at stake is an unilateral act, such as an act of annexation or act of secession. The rules of invalidity of these acts must be sought in customary international law.

A preliminary point relates to the exact meaning of the concept of invalidity as it relates to unlawful territorial situations. The concept of validity or invalidity can only concern legal acts, and we cannot relate it to an unlawful territorial situation as such, as the latter only designates a factual *status quo* which is found to be in violation of applicable international law. However, the relevance of invalidity with regard to unlawful territorial situations can be appreciated with regard to those juridical acts which are associated to a territorial regime, e.g. an act of secession, an act of annexation, a treaty concerning the occupied territory, a legislation enacted by the unlawful occupant. In respect of these latter, we can indeed apply the concept of invalidity.

Guggenheim, in one of the few studies on the concept of nullity in international law, explains the traditional differentiation between wrongful act and invalid act.\(^3\) In the latter case the act lacks some fundamental elements provided by the legal system, thus the same legal system attaches to it some consequences as to the production of its legal effects. Such elements would be a competent party, a proper object, free consent and valid form. For instance, in the traditional laws of war a case of null act is the ineffective blockade or a declaration of independence of a political entity missing the minimum criteria of statehood. The differentiation between invalid and wrongful act is proposed by Judge Anzilotti in his dissenting opinion in the *Eastern Greenland* case. The occupation of *terra nullius* by Norway was considered by the PCIJ as non-existent and invalid, since Greenland was already occupied by Denmark, thus depriving it of its purported character of uninhabited land. Anzilotti contested this finding on

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1 Jennings, ‘Nullity and Effectiveness in International Law’, in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1957), 64.
2 1969 Vienna Convention on the Law of Treaties. The theory of invalidity of treaties has been effected through a ‘transfer’ of domestic principles on the invalidity of contracts to international law. Thus the validity of a certain conventional rule can be affected because of defects related to the object of the treaty (i.e. object contrary to *ius cogens*) and defects related to the formation and manifestation of a certain will (i.e. treaty concluded because of error or fraud). See, however, the difference between concepts of relative and absolute nullity in municipal law and international law. Rozakis, ‘The Law on Invalidity of Treaties’ 16 *Archiv des Völkerrechts* (1973), 150.
3 Guggenheim, ‘La validité e la nullité des actes juridiques internationaux’ 74 *Recueil des Cours* (1949), 195.