 CHAPTER 7

CONCLUSIONS: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY

This concluding chapter recaps the main points developed in the book, and it examines the broader implications of the findings of the book for the current state of international law. More specifically, it reflects on the effectiveness of international law towards unlawful territorial situations, by reverting Jellinek’s maxim die normative Kraft des Faktischen and looking at die faktische Kraft des Normativen. It finally presents some additional considerations on the possible reconciliation between effectiveness, legality and legitimacy in international law and on the enduring vitality of the concept of effectiveness.

1. The state of unlawful territorial situations in the 21st century

The present book has provided some answers to the fundamental questions regarding the state of international law on unlawful territorial situations in the 21st century. Unlawful territorial situations represent an enduring problematic phenomenon in the international community of the 21st century, albeit hardly ever studied in a systematic manner by international lawyers. More and more often, unlawful territorial situations are not related to classic conflicts over borders and territory in the narrow sense, but they tend to underlie disputes over the way in which territorial sovereignty is exercised. This is witnessed by the fact that, despite the existence of numerous instances of territorial occupations, the language of formal status and of the inviolability of international frontiers is fashionable nowadays, sometimes even among occupying powers. The book has shown that the language of ‘sovereignty and territorial integrity’, rather than being in radical opposition to the language of effectiveness as one may expect, tends to enhance the role of the latter in the way international law ‘regulates’ – or, sometimes, does not regulate - territorial issues. In fact, such concepts of sovereignty and territorial integrity are deprived more and more often of their original and substantive meaning of exercise of a legal right and competence, to become a bargaining chip to be negotiated, and often sacrificed in the overall political solution of disputes. The cases of Kosovo and Western Sahara stand out in this respect, insofar as both the USM and POLISARIO are currently deprived
of a territorial competence, and even their future entitlement risks being undermined in the process of reaching a political solution.\footnote{See supra Ch. 5, section 6.4 and Ch. 6, section 4}

On the other hand, international law does not lack the instruments to go beyond formal designations and effectiveness, and to assess the legality of territorial situations. An assessment of legality of territorial situations should entail a clear conceptual framework on the existing applicable law. To assess the legality of a foreign military and/or civil presence within the territory of a country is a separate exercise from assessing the scope and extent of the applicability of international humanitarian law, or of the legality of the military intervention leading to the occupation. These are legal questions which are often intertwined with the legality or illegality of the occupation, but that are, and should be kept, conceptually differentiated. This separation is often ignored, which leads to the conclusion that international law is irrelevant to the choice to establish and maintain a territorial occupation. Such misconception is as serious as claiming that a state has no legal restraint in the choice to invade a country in the first place, or in the way it acts towards the civilian population once the occupation is established. It is hoped that the present book will contribute to a broader re-appraisal of the role of international law and international institutions with regard to territorial occupations.

The present work has identified and explored the confines of the principles of legality that limit effectiveness in the exercise of territorial sovereignty: these are the prohibition to use force to modify the status of a territory, the principle of \textit{uti possidetis}, the principle of self-determination and the principle of territorial integrity. Despite to different degrees being inconsistently enforced, and for all the uncertainties surrounding the way the \textit{uti possidetis} and self-determination protect states’ and peoples’ territorial sovereignty, these primary norms have been regularly re-asserted and quite consistently applied by states and international organisations throughout the post-1960 era. In particular, the actions of the GA and the SC in terms of non-recognition of territorial situations established in defiance of these norms has been crucial for the emergence of a clear territorial dimension to these principles. It has been shown how the application of these legal principles to territorial situations can render international law effective with regard to issues of territorial sovereignty. On the one hand, it can render it effective, insofar as it enables a determination of legality or illegality of a territorial situation by any observer, overcoming the vicious circle of evading any assessment by vacillating between looking at the formal status or, alternatively, recognising a \textit{status quo}. This may contribute to a positive and constructive role played by civil society in putting pressure on governments and governmental organisations in acting in accordance with international law, and in taking

\footnote{See supra Ch. 5, section 6.4 and Ch. 6, section 4}