PART I · INTRODUCTION

1 Introduction

I. Preliminary observations

Territoriality, it is well known, stands at the very heart of statehood.[1] Both in law and in fact, it is difficult, but not impossible, to conceptualise a State without territory. The Montevideo Convention on the Rights and Duties of States,[2] concluded in 1933, gave due weight to this when it recognised, in Article 1, that territory was one of the four component elements of an entity claiming statehood. It was this primacy which prompted Jennings to write: 'The whole course of modern history testifies to the central place of State territory in international relations.'[3] An important aspect of territoriality and of statehood is the fact that they are primarily notions of law. They do, of course, have a corresponding political and

[1] Generally, on the notion of territory, territoriality and statehood, States, see De Visscher, *Theory and Reality in Public International Law*, trans. P. E. Corbett, Princeton, 1968, pp. 204–27; Verzijl, *International Law in Historical Perspective*, Part Three, *State Territory*, Leyden, 1970, pp. 1–13; Kelsen, *Principles of International Law*, 2nd edn, New York, 1966, pp. 177–82 and 307–20; Olivier, 'Aspects of the Establishment of Sovereignty and the Transfer of Authority', 14 (1988–9) *South African Yearbook of International Law* 85, especially pp. 112 *et seq*.; Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963, Chapters I and V; Crawford, *The Creation of States in International Law*, Oxford, 1977, pp. 36–40; Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, Chapter 1, pp. 1–16, and Chapter 4, pp. 145–79; Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations General Course of Public International Law', 255 (1995) *Hague Recueil* 9, Chapters IV, XI and XII; Schwarzenberger, *International Law*, vol. I, *International Law as Applied by International Courts and Tribunals*, London, 1957, pp. 289–309; Andrews, 'The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century', 94 (1978) LQR 408; and Hill, *Claims to Territory in International Law and Relations*, Oxford (Westport Reprint), 1945. For a polemical essay, see Strydom, 'Self-Determination: Its Use and Abuse', 17 (1991–2) *South African Yearbook of International Law* 90.

[2] 165 LNTS 19; 137 BFSP 282.

[3] Supra (note 1), p. 1. Generally, see Shaw, 'Territory in International Law', 13 (1982) NYIL 61.

factual reality, but from time to time a hiatus between law and reality can arise and create anomalies of various kinds. Thus, where a State is occupied by illegal armed force and is subsequently annexed by the occupying State, the State illegally occupied will continue in law to exist,[4] not unlike the situation of Kuwait when it was invaded, occupied and annexed by Iraq in August 1990.

Nonetheless, it cannot be doubted that the ideal of territorial sovereignty guides and informs the foreign relations of States at the most fundamental of levels. While even the slightest possibility of territorial loss or detriment is vigilantly monitored and, where necessary, opposed, no opportunity to gain or maximise territory by lawful means is passed over. It is this centrality of territory for States which helps to explain, for example, the rapid evolution of a simple municipal law declaration into a fully formed principle of customary international law. There is no doubt that the engaging prospect of gaining title to large tracts of submarine territory adjacent to the coast, once known exclusively to geographers as the continental shelf, was a catalytic agent, as it were, in the crystallisation of the 1945 United States Proclamation on the Subsoil and Seabed of the Continental Shelf[5] into a right sanctioned by international law.

In this politico-legal climate, then, a territorial or boundary dispute can almost never be welcome. Where States are unhappy with the location of a boundary line or dissatisfied with the territorial *status quo* because of its claims to territory on the other side of the alignment, the maintenance of a dispute is a necessary evil; and, for the opposing State, the existence of a claim to the whole or a part of its territory by way of a territorial or boundary dispute is an obvious source of tension. The *degree* of tension, however, is a different matter, for that is a function of several factors, including the nature and significance of the territory in dispute, and the overall cordiality of relations, or lack thereof, between the disputing States.

Although a good number are quite intractable and destined perhaps to simmer on, many disputes are relatively more manageable and at times even amenable to settlement by way of one or more of the recognised dispute resolution methods. Accordingly, it is not uncommon for disputing States to turn to adjudication or arbitration as a sensible way out of a troublesome diplomatic impasse. While the International Court of Justice has done its duty when called upon by States to resolve their territorial

[4] Cf. Oppenheim, *International Law*, 7th edn by H. Lauterpacht, London, 1955, p. 451; and, generally, see pp. 451–60. Further, see Lawrence, *The Principles of International Law*, 7th edn by P. H. Winfield, London, 1928, p. 136; and Shaw (note 3), p. 61. See also the text to note 21; and Chapter 2, section II.c.

[5] 10 Fed. Reg. 12303.

and boundary disputes, both land and maritime, some States have turned to the Permanent Court of Arbitration. Others have relied simply on *ad hoc* arbitral tribunals, not uncommonly designated by the disputing States simply as a 'Court of Arbitration' or 'Arbitral Tribunal'.

In most cases, especially where there are no controversies about consent to jurisdiction, the act of referring the matter to an international tribunal will come as a source of consolation to the litigating parties, a characteristic legitimate expectation of which is that the dispute is finally coming to an end. By agreeing to submit the dispute to an international tribunal, the disputing parties can rightly be optimistic that a period of unease, or indeed an era of tension, will disappear; and, where States are burdened by several territorial issues, a judgment by the International Court of Justice or an *ad hoc* arbitral tribunal will constitute an important step towards the ultimate narrowing of differences between them. The fact, however, is that, at times, a judgment or an award may prove to be less a source of comfort and more a basis for new or continuing conflict. Nor, indeed, can the longevity of such disputes be underestimated. The dispute between Canada and the United States regarding the Dixon Entrance is a direct result of conflicting interpretations of an award given over 100 years ago.

On many occasions, litigating parties, dissatisfied with the territorial outcome of the proceedings, may seek to challenge such unfavourable decisions in whole or in part. The dispute, thus, acquires a new layer of difficulties. The nature, extent and reasons for issuing a challenge to an arbitral or judicial decision will vary according to the law, facts and circumstances of the case, but the common thread uniting them is the fact that a serious challenge to a decision will almost always be based on law, even if it is a flawed or misconceived statement and application thereof. Indeed, one of the more enduring facts of international political life is that even the most fanciful or controversial of claims to territory are usually dressed up in the finest legal vestments. It stands to reason, then, that, because issues of territory are involved, States will not hesitate, whenever they reasonably can, to grasp at every opportunity to secure a more favourable judgment on title, or a judicial delimitation which gives them more territory, even if the territorial gains are relatively modest.

The claims States make with respect to decisions returned by tribunals are many and varied, and an account of some of these difficulties is presented in sections III.b.3, IV.c and IV.d of Chapter 2 below. It will suffice here to observe that one of the more common sources of dissatisfaction is the claim of jurisdictional *ultra vires*, that is, that the tribunal has managed to exceed the scope of its jurisdiction and that the award or judgment is

therefore null and void. In other circumstances, States may choose to rely on another well-received rule of international law relating to judicial and arbitral settlement, namely, that a decision is without legal effect where an adequate statement of reasons is not provided. While the existence of serious or essential errors in the decision is also regarded as a ground for nullity of the decision to the extent of the essential error, it is the case that tribunals, upon request of the parties, may, without much ado, rectify minor clerical errors in their decisions. In any event, the precise remedy or remedies which litigating States seek to claim with respect to impugned decisions will, no doubt, depend on the law and facts of the case.

Thus, where the contention is *excès de pouvoir* or lack of a motivated decision, a State could be heard to argue that, because the entire decision is null and void, the tribunal is obliged to re-examine the case, and, by doing so, the objecting State will hope to secure a new, more favourable judgment. It may, for completeness, be added that unilateral allegations of nullity do not automatically make such decisions void, nor do they enable the objecting State to commence new proceedings. Where such allegations are resisted by the other State, it will be for an international tribunal, for which in general further consent would be needed, to examine the allegations of nullity; and until such time the decision will stand.

Be that as it may, not every plea with respect to a decision is predicated on allegations of nullity and the initiation of fresh proceedings before a different tribunal. The point here is that, at times, States will seek to contend that errors in the decisions be deleted in order to make the decision conform to the relevant principles of the law. Similarly, in certain circumstances, States may find some parts of the decision ambiguous or difficult to implement in practice; they may also find themselves unable to agree on the meaning to be attributed to certain passages therein.

Problems of this kind are known to originate in a variety of ways, including geographical uncertainties, as, for example, confusion or controversy over the location of natural features on the ground, including the source of a river or the contours of a watershed. It is evident that States are wont to dispute not only the salient *geographical effects* of a boundary award, but also some of the broader issues such as the status of the line. Discontentment for the objecting State could also be occasioned by the discovery of a new fact unknown to the tribunal at the time of the decision, leading it to request a reopening of the case with a view to a redrawing of the boundary consistent with the new fact. Thus, the discovery, say, of the 'real' source of a river, or the correct course thereof, or the determination of

more precise or accurate termini of the boundary, may give a State the opportunity to request the tribunal to revise the judgment.

The common underlying theme of all these issues is that of a perceived need on the part of one State (or both States, for that matter) to secure a more favourable readjustment, for one legal reason or another, of the judgment on title to territory or the judgment boundary, and it is this fact which is of crucial significance to this study, for international law does accommodate the re-examination of judgments and awards, provided always that all the substantive and procedural criteria therefor are met. Eschewing the rules of law dealing with allegations of nullity and the existence of material or essential errors, this investigation is confined to the study of two kinds of judicial remedies, namely, the interpretation of judgments and awards and the revision of decisions on proof of discovery of a fact crucial to a decision. Firmly anchored in both customary international law and the Statute of the International Court of Justice, the remedies of interpretation and revision are ancillary modes of dispute settlement and, under the Statute, constitute part of the incidental jurisdiction of the Court. They are, therefore, available, in principle, in every kind of case before all tribunals, consent permitting. Indeed, the jurisprudence of both permanent international tribunals and *ad hoc* arbitral bodies is substantial enough to indicate that this is a rapidly developing body of law.

In order, however, to keep the study within manageable proportions, this investigation is confined to the interpretation and revision of judgments, arbitral awards and quasi-arbitral decisions[6] given by tribunals,

[6] For the purposes of this work, a quasi-arbitral decision is one which is akin to the Final Report of the Iraq–Kuwait Boundary Demarcation Commission issued in 1994, where the Commission was conscious of and took into consideration a variety of rules of international law in its decision-making process, the main object of which was to demarcate the border delimited by the Iraq–Kuwait Agreed Minutes of 1963, on which see the text to notes 24–7 below. Note, however, that the Decision of 28 July 1920 adopted by the Conference of Ambassadors regarding the Polish–Czech frontier was seen by the Permanent Court of International Justice in the *Jaworzina Boundary* advisory opinion as '[having] much in common with arbitration' insofar as the Supreme Council of the Conference of Ambassadors was 'guided by sentiments of justice and equity'. PCIJ Reports, Series B, No. 8 (1923), p. 6, at p. 29. Similarly, the *Mosul Boundary (Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne)* advisory opinion (PCIJ Reports, Series B, No. 12 (1925), p. 6) is relevant insofar as the Permanent Court of International Justice gave two alternative meanings to the term 'arbitration' and opted for the narrower interpretation 'if the intention were to convey a common and more limited conception of arbitration, namely, that which has for its object the settlement of differences between States by *judges* of their own choice and *on the basis of respect for law*'. See *ibid*., p. 26 (emphasis in original). The Court noted that 'the arguments put forward on both sides before the Council [of the League of Nations], the settlement of the dispute in

some national but mostly international, in territorial and boundary disputes. The precise range of such decisions is described in section III below. Doctrinal extent, however, is not the only reason for limiting this work to such disputes. As indicated above, litigating parties frequently use these two judicial remedies as another chance, or as a 'last chance', to gain or regain the boundary or territory they believe they are 'entitled' to acquire or retain, as the case may be, but were unable so to do in the original proceedings; and, because a number of territorial and boundary disputes and decisions have been subject to such remedies, a body of case law relevant to interpretation and revision has emerged out of disputes involving problems of title to territory. The principles of interpretation and revision are typically applied in cases dealing with such problems.

The third reason for this relatively confined review is that it has afforded an opportunity to scrutinise certain cases which normally do not receive the same level of attention as do judgments and awards dealing directly with the merits of the case, that is, the substantive issues of title and location of the boundary. This is understandable as far as it goes, given the fact that the emphasis is usually on eliciting the finer points of law on these matters. Even so, it is believed that cases concerned with the interpretation and revision of judgments and awards can hardly be relegated to secondary status.

For one thing, issues going to or involving the merits of the dispute are not unknown in litigation generally, and are regarded as incidental to the main case, and the resolution of such issues can indeed provide valuable insights into the central problems confronting the disputant parties. At times, however, issues before the tribunal are presented as those of revision and interpretation of a judgment, but effectively constitute the main case itself, a matter discussed below. Where this is so, it is hardly appropriate to consider the decision only as an ancillary judgment, and as such deserving of greater attention. For another, this study has enabled the examination of certain cases from an altogether different perspective,

question depends, at all events for the most part, on considerations not of a legal character; moreover, it is impossible, properly speaking, to regard the Council, acting in its capacity of an organ of the League of Nations . . . as a tribunal of arbitrators'. See *ibid*. It went on to decide that the decision to be taken by the Council for the boundary between Iraq and Turkey was a definitive determination of the frontier (but not necessarily an arbitral award): p. 33. Where, therefore, law constitutes the basis for the decision it is arbitration, as for example the Decision of 13 April 2002 issued by the Eritrea–Ethiopia Boundary Commission in the matter of the *Eritrea–Ethiopia Border Delimitation* process.

occasioning a fresh look at the law. In short, a good range of legal issues has been thrown up for consideration by this study.

Finally, as far as the basis on which these two judicial remedies have been selected for scrutiny is concerned, the defining criterion is the fact that both interpretation and revision are predicated on a continuation of the judgment or award, whereas allegations of nullity are put forward as a legal escape from obligations arising from the impugned decision. Where consent can be secured, the latter category of claims serves as a basis for a rehearing *de novo* of the merits of the case, while the opposite is true for the two processes under consideration here. Certainly, it is true that claims of material errors also constitute a basis for interpretation and revision, as opposed to the wholesale negation of the boundary or territory awarded by the tribunal, and to that extent such issues cannot be ignored. In some cases, even essential errors can serve to provide a basis for continuing the judgment and where relevant these matters are investigated. By and large, however, it has been found necessary to exclude errors and mistakes from detailed consideration here.

It remains to point out that the fundamental premise of this work is grounded in the proposition that two essential vectors are at play in this sphere of international politics and that they pull in opposite directions. On the one hand, there is the basic need in both law and politics to eradicate or minimise tension and friction between States, and it is obvious therefore that one of the main sources of tension in international political life, namely, territorial and boundary disputes, needs vigorously to be discouraged as far as possible. One expression of this is the principle of stability, finality and continuity of boundary and territorial settlements, a principle which plays an axiomatic role in the international legal order.

On the other hand, there is also the need to provide relief and remedies to States which have *bona fide* grievances about a territorial or boundary disposition or location. This includes at times challenges to the very existence of a State or an international entity. The situation, therefore, becomes one in which the need for stability and finality requires States and the legal system itself to preserve the territorial *status quo* against a situation in which opposing States are loath to forego territory which they are convinced rightfully belongs to them. In short, while one vector reaches forward towards stability and continuity, the other reaches backwards in search of new, more just or more appropriate territorial or boundary arrangements.

While the doctrine of finality and continuity has been examined in other works and studies,[7] it is now appropriate to scrutinise some of the legal aspects of the difficulties and dissatisfaction attending the definitive closure to boundary and territorial disputes.[8] The examination of such issues below is predicated in the fact that the settlement of territorial and boundary disputes is inherently a difficult task not only in terms of seeking acceptable terms of compromise, especially where any gain for one party constitutes a corresponding loss for the other. The fact is that in many cases a fully satisfactory discontinuance of the dispute is difficult to achieve. This study attempts to investigate the role international law plays in situations where, despite the existence of arbitral awards and judicial decisions in the matter of territorial and boundary disputes, States seek to revisit the issues in one form or another, bringing, thus, the earlier settlements on the matter under scrutiny. It seeks, accordingly, to understand the way international law has approached these problems, and it does so by isolating and identifying the relevant rules of international law and by examining the precise remedies available to States.

The work is divided into four broad parts, the first of which is a study predicated in supplying essential legal perspectives to facilitate the examination of the central themes of this work. Accordingly, Part II is a brief examination of the salient legal aspects of and problems connected with territorial settlements emerging after the conclusion of armed conflict between States and their effect on the notion of self-determination. Reference is also made to difficulties which continue despite the peaceful settlement of disputes by way of boundary treaties and other kinds of legal methods and techniques, including internal administrative arrangements. Parts III and IV constitute the main focus of the enquiry: they deal sequentially with the law relative to the interpretation and revision of judgments and awards, as discussed above. While it is the case that the rules applicable to these two remedies are relatively well developed, it is also true that they have not been explored by writers to any great depth. Nor have they been isolated and scrutinised in the context of territorial

[7] See, generally, Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester, 1967, Chapter V; Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia*, London, 1979, pp. 5–12; Shaw, 'Peoples, Territorialism and Boundaries', 3 (1997) EJIL 478; and Kaikobad, 'Some Observations on the Doctrine of Continuity and Finality of Boundaries', 54 (1984) BYIL 119. See also the text to note 225 below.

[8] See, generally, Shaw, 'The International Law of Territory: An Overview', in Shaw (ed.), *Title to Territory*, Dartmouth, 2005, p. xi, at pp. xxvi–xxix; and Anyangwe, 'African Border Disputes and Their Settlements by International Judicial Process', 28 (2003) *South African Yearbook of International Law* 29, at pp. 29–35.

and boundary disputes. It is important, however, to note that it is one thing to claim that well-developed rules of law exist on the matter; it is quite a different thing to show success in resolving such disputes by reference to such principles of the law. A study dealing with that aspect of the matter goes into a different plane of enquiry and cannot be investigated here. Part V rounds off the investigation, providing as it does some general themes of discussion ensuing from the legal issues examined.

II. Fundamental parameters and perspectives

The law relating to interpretation and revision is examined below, with the former taking the lead. The analysis is based on the view that there are two aspects to the interpretative process and, although there are many overlapping features, such a distinction is indeed useful. One of the more fundamental issues in interpretation is the requirement of consent, that is to say, the requirement that States must agree to submit the decision to an international tribunal for the purposes of interpretation. The significance of this is somewhat underestimated in the literature, as are the various ways in which consent can manifest itself. The role of the admissibility of pleas for the interpretation of judgments and awards is also a crucial issue meriting discussion, not least because it constitutes the doctrinal threshold for this judicial remedy. At the heart of the substantive aspects of interpretation lies a number of interesting questions, the most important of which is the role of the *res judicata* principle and its effect on the interpretation of decisions.

This matter is of importance because, wherever interpretation has the effect of modifying a judgment boundary, there arises the potential for conflict with the *res judicata* rule. Insofar as the need for interpretation of judgments has to be a *bona fide* one, international law must also provide effective guidance as to the circumstances in which it will permit a tribunal to re-examine by way of interpretation a decision, and, to that end, it is appropriate to take into account the tests for interpretation followed by reference to some interesting features thereof. Another salient aspect of the law on the matter, which also fails to feature conspicuously in the literature, is the body of rules of law governing the actual interpretation of decisions, and, although the case law here is not extensive, it is interesting to scrutinise the principles by which tribunals guide themselves for the purposes of interpreting their own or other tribunals' decisions. Their approach to the interpretation and application of one of the more essential doctrines of title to territory, namely, acquiescence and estoppel, is a matter worthy of note.