DISTINCTION BETWEEN A BOUNDARY DISPUTE AND A TERRITORIAL DISPUTE - AN INTERNATIONAL LAW PERSPECTIVE*

Is a dispute concerning title to territory distinguishable from the so-called boundary dispute? There is a great deal of confusion in the current opinion of scholars and others about this matter, and it warrants close examination. Whether or not there is any meaningful distinction between the two categories of dispute is especially important because it figured recently in two cases before the ICJ, one decided by the full Court and the other by a Chamber of the Court. In the former case, *ie Case Concerning Territorial Dispute*,[1] the disputant parties were Libya and Chad. Libya claimed that the case concerned a dispute regarding attribution to territory (territorial dispute), while in Chad's view it concerned a dispute over a location of a boundary, which, according to her, already existed under a Treaty of Friendship and Good Neighbourliness concluded by France and Libya on 10 August 1955. Libya denied that there was an existing boundary. It did not question the validity of the 1955 Treaty, but argued that that Treaty did not determine the particular boundary in question. Since Libya maintained that the case concerned a territorial dispute, not a boundary dispute, it relied as a basis of its claim, upon coalescence of rights and titles of the indigenous inhabitants, the Senoussi Order, the Ottoman Empire, Italy and Libya itself. Having found that the boundary between the two countries was defined by the 1955 Treaty, the Court observed that if the treaty did result in a boundary, this furnished the answer to the issues raised by the parties: it would be a response at one and the same time to the Libyan request to determine the limits of the respective territories of the parties and to the request of Chad to determine the course of the frontier.

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[1]*Case Concerning Territorial Dispute* (Libyan, Arab Jamahiriya/Chad), ICJ Communique No 94/4, 3 February, 1994.

The second case was *The Frontier Dispute* case between Burkina Faso and the Republic of Mali, decided by a special Chamber of the ICJ.[2] In this case both sides presented their respective viewpoints as to the category in which the dispute would fall. They ultimately agreed that the dispute between them would belong rather to the class of boundary or delimitation disputes.[3] The Chamber, in the course of assessing the claims of the parties, took the position that a distinction between a frontier (or a delimitation) dispute and a dispute as to the attribution of territory is not so much of a difference in kind but rather a difference of degree as to the way the operation in question is carried out.[4] Moreover, the nature and extent of its task and functions in the case, in any event, the Chamber concluded, were to be determined not so much by the nature and qualification of the dispute as by the Statute of the Court and the terms of the Special Agreement.[5]

It is the author's contention that some of the assumptions underlying its central thesis may not be valid and whether a dispute is a boundary/delimitation dispute or a territorial dispute may have a great deal to say in specific contexts about the nature and task of an adjudicatory body. Before commenting more upon the Chamber's opinion, the basic issue may be discussed and views of scholars may be gleaned.[6]

The present confusion primarily arises from the fact that problems and policies in regard to the two types of dispute are manifestly similar. Consequently, no meaningful distinction between them may be found on the surface. Broadly speaking, both boundary and territorial questions are part of the larger question of territorial sovereignty[7] and they involve comparable set of claims and counter-claims and legal policies. Whether it be a boundary issue or a territorial issue, both sides would advance arguments and counter-arguments invoking frequently the evidence of long and effective sovereignty and jurisdiction in the disputed area;

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[2]*Case Concerning The Frontier Dispute* (Burkina Faso/Republic of Mali) 1986 ICJ 554. (22 Dec. 1986), (hereafter cited as the "Frontier Dispute case").

[3]They, however, failed to agree on the conclusions to be drawn from this. *Ibid* at 563.

[4]*Ibid.*

[5]*Ibid.*

[6]Consult, SP Sharma, *International Boundary Disputes and International Law* (1976) at 4-7.

[7]Cf *The Island of Palmas* case (Neth v USA), II RIAA at 829 (Award of 4 April 1928).

the past and continuing validity of international agreements as proof of the location of boundary or claimant's authority or control; certain distinctive (such as natural or geographical) features of the contested boundary or territory; prescriptions regarding prohibition of the use of force for resolving boundary and territorial disputes. Corresponding legal policies will also be invoked.[8]

However, if the entire problem is more realistically viewed, it will be seen that factual problems involved in two types of dispute, the kind of events from which they arise, and the detailed application of legal policies in two situations are different. 'Boundary issues arise', as stated elsewhere by the author, 'where two (or more) governmental entitles contend about the line to be drawn between their respective territorial domains.'[9] In such cases it is agreed that both (or more) states have lawful claims to adjacent territory. Here the bone of contention is how this territory can be divided between them. On the other hand, territorial disputes arise when one state by drawing boundary seeks to supersede or eliminate another in relation to a particular area of land. Such disputes may not involve the drawing of lines between adjacent territorial entities. For instance, the territory of Gibraltar is claimed by both Spain and Great Britain who do not share any land boundary. Similarly, in the Falkland Islands dispute, Argentine and Great Britain do not have a common land boundary. Thus, one can say that whereas the dispute about the acquisition of territory is competitive between the claimants, in the sense that one must lose completely, the boundary dispute may or may not involve the complete supersession by one entity of another in relation to particular land area.

As to the detailed application of international law rules, it has been noticed that while territorial questions involve traditional rules regarding modes of acquisition of title (*eg* discovery, occupation, conquest, cession or prescription), the boundary questions involve those rules which are relevant to specifying functions performed in the fixation and maintenance of boundaries (*eg* determina-

[8]Basic policies include the promotion of stability in expectations created by long-term territorial possession, honouring commitments under relevant international agreements, protecting expectations derived from the traditional view that boundaries should conform to most distinct geographic and 'natural' features, minimizing coercion in the settlement of boundary and territorial claims.

[9]Sharma, *supra* n 6 at 4-5.

tion, delimitation, demarcation and administration), though in particular instances, traditional rules about 'title' may also bear relevance.

There is abundant authority to support the above formulations. Publicists have generally stressed the need to make a distinction between boundary and territorial disputes. JRV Prescott draws a distinction between a territorial dispute resulting as it does from some quality of the borderland and positional dispute concerning the actual location of the boundary, and which usually involves a controversy over the interpretation of terms used in defining the boundary at the stage of allocation, delimitation or demarcation.[10] Friedrich Kratochwil *et al* have stated that while territorial questions address the mode of acquiring title, boundary questions deal with issues concerning the demarcation and administration.[11] Distinguishing the two categories of disputes, AN Allott has observed that boundary disputes are about where the line is to be drawn.[12] He further observes that just because in certain instances as a result of a territorial dispute a redrawing of a boundary may be required it will not alter the essential character of that dispute as a territorial dispute. Rather it will be 'a secondary consequence of that particular dispute'.[13] LS Tagil has remarked that a boundary dispute is not always identical with a dispute over territory and gives an example that the territorial conquest of an entire state cannot reasonably be counted as a boundary dispute, since the result is instead the elimination of a boundary.[14] N Hill has also made a distinction between the two categories of dispute.[15] Disputes over the possession of large area lying between two states, with an identity of their own, have been characterized as territorial disputes. He says:

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[10]JRV Prescott, *Boundaries and Frontiers* (1978) at 90. He has discussed these two types of disputes under the general framework of boundary disputes.

[11]Kratochwil *et al, Peace and Disputed Sovereignty - Reflections on Conflict over Territory* (1985) at 1.

[12]AN Allott, "Boundaries and the Law in Africa," in *African Boundary Problems* ed by CG Widstrand (1969) at 9.

[13]*Ibid* at 9.

[14]LS Tagil, "The Study of Boundaries and Boundary Disputes," in *African Boundary Problems*, *supra* n 12 at 24.

[15]N Hill, *Claims to Territory in International Law* (1945) at 25.

> Not all territorial disputes are mere boundary problems relating to the character of location of a line. The most complicated disputes usually occur over the possession of large areas that may lie between two states. The distinction between the two types of controversies cannot be too arbitrary, for there is no accepted definition of the size or structure of the area that is too large to be designated a boundary problem. Certainly areas that have an identity of their own ... cannot be regarded as boundary disputes; they are territorial disputes in a different and larger sense.[16]

He also includes controversies over islands in the category of territorial disputes.[17] Other scholars who have defended the distinction between boundary disputes and territorial disputes include Sir RY Jennings[18] and AO Cukwurah.[19]

Writers have also clearly expressed their view that the two categories of dispute generate the applicability of an altogether different set of prescriptions of international law. AO Cukwurah has noted that the relevant rules of international law in the case of title to territory 'are to be found in the traditional prescriptions relating to the acquisition of territorial sovereignty, for example, discovery, occupation, conquest, cession or prescription'.[20] Acting on similar assumption that territorial questions involve the modes of acquisition of title, Sir RY Jennings observes that boundary questions may also involve the modes of acquisition of title, nevertheless, it is a problem of its own, 'with its special rules and conventions'.[21] Friedrich Kratochwil *et al* have stated that while territorial questions involve modes of acquiring title such as discovery, occupation, cession etc, the boundary disputes raise largely issues concerned with boundary-making (delimitation, demarcation and enforcement).[22]

The above discussion aside, it may still be noted that there is no absolute dichotomy between boundary disputes and territorial questions which in measure are inseparable and interdependent. Indeed, there is room for them to overlap in specific situations. As AN Allott has concisely stated:

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[16]*Ibid.*
[17]*Ibid.*
[18]Sir RY Jennings, *The Acquisition of Territory in International Law* (1963) at 14.
[19]AO Cukwurah, *The Settlement of Boundary Disputes and International Law* (1966) at 6.
[20]*Ibid.*
[21]Jennings, *supra* n 18 at 14.
[22]Kratochwil *et al*, *supra* n 11 at 18.

> Sometimes a claim to territory involves a precise claim to given boundaries; sometimes boundary definition has been a subsequent exercise and one may be able legitimately to distinguish between the claim to the territory and the claim to the boundaries which define it.[23]

There is a great deal of support in arbitral and judicial decisions confirming the interdependent nature of the two categories of dispute. *The Island of Palmas*[24] case, according to the explicit terms of reference of the parties - the United States and the Netherlands - had all the essential features of a territorial (sovereignty) dispute.[25] However, the actual reading of the decision reveals the arbitrator making cross references to rules and policies governing both boundary and territorial questions - in sum, territorial sovereignty - which establishes the interdependent significance of the two types of dispute. The main requirement of peaceful and continuous display of sovereignty in regard to the disputed territory so typical to a territorial dispute was considered to be of very great importance to boundary questions also. At the center of the dispute between Cambodia and Thailand in the *Temple of Preah Vihear* case were conflicting claims to sovereignty over the temple region, but in order to decide this question, the ICJ addressed at length issues concerning the boundary lines between the two states in this area.[26] *The Frontier Land* case was not different.[27] It began as a sovereignty dispute between Belgium and the Netherlands in respect of certain enclaves, but later on, as the judgment of the ICJ unfolded, it shaded into a boundary dispute.

In contrast, the India-China boundary dispute involves beyond the issue of boundary adjustments, conflicting claims of title to vast areas of land territory.[28] Similarly, The *Frontier*

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[23]Allott, *supra* n 12 at 13. For contra see, Widstrand, *African Boundary Problems*, *supra* n 12 at 169.
[24]*Supra* n 7.
[25]*Ibid* at 838 and 840.
[26]*Case Concerning the Temple of Preah Vihear* (Cambodia v Thailand)(Merits), 1962 ICJ 6 at 14 (15 June 1962).
[27]*Case Concerning Sovereignty Over Certain Frontier Land* (Belgium v Netherlands), 1959 ICJ at 209 (20 June 1959).
[28]See SP Sharma, "The India-China Boundary Dispute: An Indian Perspective" (1965) 59 *Am J Int'l L* 16.

Dispute case, which was treated by the parties as a boundary dispute case, involved territorial claims as well, but the Chamber noted that the distinction between the two categories was only of a degree and not of nature.[29]

The interdependent importance of the disputes in question may not be seen in terms of their being automatically converted into each other. Interdependence between a boundary dispute and territorial claim can be illustrated by observing that reference to certain detail of the latter in a particular region, as AO Cukwurah observes, may help in explaining or illustrating essential features of its boundaries.[30] There is also a possibility that as a consequence of a territorial dispute a redrawing of a boundary is required, but this being a secondary consequence of the dispute will not of itself convert it into a boundary dispute.[31] Similarly, in a particular instance of a boundary dispute, there is some territory over which disputants lay opposed claims[32] but this would not, as AO Cukwurah observes, convert what is in essence a boundary claim into a territorial dispute.[33] Accordingly, the formulation of the Chamber of the ICJ in *The Frontier Dispute* case, that the effect of any boundary delimitation, no matter how small the disputed area crossed by the line, is an apportionment of the area of land lying on either side of the line[34] may be true as a general statement of facts which may occur in many contexts and cases. But there are, on the other hand, cases wherein the object of the dispute may be just to effect some boundary adjustments or to rectify an error in previous delimitation. These would not change the character of the dispute from a boundary dispute to a dispute regarding territory. Likewise, another statement of the Chamber that the effect of any judicial decision rendered in a dispute as to attribution of territory or in a delimitation dispute is necessarily to establish a frontier[35] is equally questionable. In a case where the two

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[29]*Supra* n 2.
[30]Cukwurah, *supra* n 19 at 6.
[31]Cf Allott, *supra* n 12 at 9.
[32]SW Bogse, *International Boundaries* (1940) at 31.
[33]Cukwurah, *supra* n 19 at 6.
[34]*Supra* n 2.
[35]*Ibid.*

states do not share a boundary, there is no question of establishing a frontier, whether it be a result of an adjudication or mutual agreement. For example, disputes in regard to sovereignty over Falkland Islands or Gibraltar fall in this category. There is, however, a possibility that a settlement of a territorial dispute may result in redrawing or readjustment of boundaries between the two claimants. Such disputes belong to the category of mixed disputes entailing questions regarding territorial sovereignty as well as boundary delimitation. As far as the application of rules and policies is concerned, the dispute of a mixed nature involves appropriate traditional rules of acquisition of territory as well as technical rules of boundary delimitation.[36] With respect to disputes of exclusive category, whether they be related to a boundary or a territory, the relevant legal policies and factual problems underlying them which a decision-maker has to take into account may not be identical.

Thus, there is enough authority in support of the view that there does exist a sustainable distinction between boundary delimitation disputes and disputes involving the acquisition of territory. However the scope of boundary dispute is extensive in view of overlapping or interminacy in claiming process. In addition to covering the clear cases of boundary adjustments or drawing of boundary lines, it includes in specific instances claims of acquisition of territory.[37] This is true in respect of those situations where the dispute regarding title to territory is intended to change the boundary location, or if its solution is dependent upon the change in location. Similarly, a territorial dispute, except in a context in which the two states do not have a common boundary, may assume an extensive form involving claims of boundary adjustment or redrawing of the boundary as well. What comes out from the above as a common point is that there is a category of mixed disputes, occurring frequently, attracting the applica-

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[36]In the *Frontier Dispute* case, the Chamber seems to have used the term "frontier dispute" in its broad sense covering both the boundary delimitation and territorial questions, which is evident in its ruling that the difference between the two is of degree only and not of kind. See SP Sharma, "Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) - A Critique", (1985-86) XI and XII *Kurukshetra Law Journal* 152, (released in 1989). Thus, the Chamber was right in applying, in some measure, rules and policies pertaining to both delimitation and territorial disputes. *Ibid.*

[37]Cukwurah attributes extensive nature of boundary disputes to "relation or derivation". *Supra* n 19 at 89.

tion of a set of mixed principles and rules. This is an acceptable position, and is fundamental to the present state of law of boundaries and territories.

The mixed nature of disputes should not be allowed to obscure the significance of the disputes of exclusive nature - boundary and territorial. For achieving clarity in thought and rationality in decision, it is important to keep in view the basic character of a particular dispute. It helps decision makers select a right combination of factors and apply appropriate legal rules leading to a rational decision. There have been cases where the World Court had shown inclination to go beyond the strict limits imposed by the *compromis* for determining the scope of its task, and in *The Frontier Dispute* case too the Chamber of the ICJ would not have been blamed for going astray if it had really drawn to the extent necessary on the nature and qualifications of the dispute in order to determine the nature and extent of its task, beyond merely citing the Statute of the Court and the terms of the special agreement in this regard.

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