

Introduction

Territorial integrity has in the past decades been facing tremendous challenges. Self-determination claims have dramatically increased and led very often to civil wars. Some states have even been disintegrated. External interventions have put severe stress on territorial sovereignty. Old doctrines such as humanitarian intervention have been revived by some global and regional powers in order to achieve their own political goals. Last but not least, globalization has weakened the states to the extent that some have started to lose their congruence with their own nations, which has in fact led to the emergence of ethnonationalism and the radicalization of nationalistic movements claiming purely and simply their own independence. In all these situations, International Law has not been of great help to the states in order to meet these challenges. It was so because International Law does not provide for any particular protection to territorial integrity, although the latter is a cornerstone of that law.

We know that one of the recurrent interrogations about International Law is related to its primitive character which makes of it a fragile, uncertain and ineffective instrument in establishing durable peace and cooperation between states and peoples. Many explanations have been given to the primitive nature of International Law, but the most largely shared one is the decentralized character of International Law which has allegedly durably acted as a major obstacle to the emergence of a central authority. In fact, no system can exist without at least a minimum of central authority. Now, contrary to the conventionally shared perception, authority has never been absent from the international system, but it has a Janus faces or a twofold character, a formal one as authority belongs individually to every single state in the form of the traditional *de jure* principle of sovereignty and an effective by oligopolistic one which is a *de facto* collective absolute sovereignty held by a limited number of powerful states. It is that dual character of sovereignty which has made the functioning of the international system dependent on a recurrent remodeling of the configuration of forces. Being ultimately based on the unequal sharing of force, International Law has obviously mainly functioned at the detriment of the weakest states which constitute the bulk of the international society

and whose sovereignty has been very often a pure “hypocrisy”.¹ But the greatest hypocrisy of the Westphalian states’ system has been to declare, on the one hand, that all the states are equally sovereign polities, and to continue, on the other hand, making of force the only one factor which can guarantee the existence of states, while knowing that the dissemination of force within the international system is disproportionate. All over the long human history, the states have been able to exist as political entities because their first function was to ensure the protection of their citizens. The famous legitimate monopoly of violence has no other justification or foundation than states’ duty to protect every individual member of their own societies. Hence, the most serious weakness of International Law and which makes of it a primitive law lies in the fact that the latter does not possess a similar system by which it can protect the right of the existence of the states, that is their territorial integrity.

The issue of ensuring states’ protection is all the more crucial as the main problem the states have been durably confronted with since their emergence thousands years ago has been their possible own disintegration. Being the result of internal as well as external factors, states’ territorial integrity has been consequently under permanent threat of internal and external character.

The internal threat was, one can say, inscribed in state’s own gens as the state has emerged out of the division of the society not only in classes but also in ethnicities. The latter division has durably been the most dangerous threat to state’s existence. The state has addressed such division by constantly adapting its territoriality to changing social contexts. Indeed, one of the major characters of territoriality is its flexibility which indeed helps the state to adjust to changing local configurations of power. States collapsed in particular when they were no longer able to adjust to the rise of new internal situations and convince every segment of their populations that their “raison d’être” is to ensure their protection and well being. For millennia, International Law has been kept away from the internal dimension of territoriality. But, when it started to be involved in this issue, it was in order to render the state more fragile and facilitate its eventual disintegration as a result of the transformation of territorial integrity. Indeed, the latter has witnessed a major transformation in so far as it has started, further to the emergence at the end of the eighteenth century of popular sovereignty, that is self-determination, to integrate a potential of self-disintegration. It is that potential of self-destruction that has pushed early European nation-states, first, to constantly work on the homogenization of their societies, second, to accept to enlarge the civil and political rights of their citizens and, third, to consent to the welfare state. It is also that potential of self-destruction which has been exploited by powerful states to expand their hegemony and influence abroad by, under the guise of the right to self-determination, disintegrating rival empires and states and creating new polities. It is that potential which has been behind the “deep tectonic movement”² stretching across more than two

¹Krassner (1999).

²Anderson (1992, p. 193).

centuries which has witnessed, from one hand, the “disintegration of the great polytechnic, polyglot, and often polyreligious monarchical empires”³ built up so painfully in medieval and early modern times and, from another hand, the creation of many new states. Illustrative of this phenomenon is the dramatic increase in the number of the states which rose up from 23 states in 1826 to more than 195 today! Furthermore, territorial integrity’s potential for self-destruction has been aggravated by the exacerbation of ethnic conflicts which has almost systematically resulted from the implementation of the right to self-determination and the very frequently fractured states to which that right has given rise. “It is the very process of the formation of a sovereign civil state”, notes Clifford Geertz,⁴ “that, among other things, stimulates elements of parochialism, communalism, racialism, and so on, because it introduces into society a valuable new prize over which to fight and a frightening new force with which to contend”. Lastly, territorial integrity has been weakened by globalization as the latter plays a compounding role in the increasing disjuncture between the state and the nation. However, the crisis of territoriality seems to be pushing today towards the rise of a new paradigm where self-determination is increasingly requested to preserve state’s territorial integrity through the implementation of democracy. A new understanding of self-determination is indeed being advanced thanks to which state’s territorial integrity can be protected from internal threat but only if the concerned state can testify that it is a real democratic state that represents its whole population.

As to the external threat, it was also almost congenial to the state. State’s power has its own dynamic which is to expand as far as it can even if such a move requires the conquest of new communities. The expansion of power has very often led not only to the conquest of new territories but also to the creation of new states. In fact, most of the pre-modern states had come into existence not as pristine but as secondary states mainly as a result of territorial conquests. International Law made its first appearance when it recognized state’s right to use force in order to preserve its own existence. But, it authorized also the state to conquer other territories, that is to destroy other states and annex their territories. Such situation has, as is well known, completely changed with the creation of the United Nations, whose Charter has prohibited the use of force between states. However, the UN Charter did not put in place a system guaranteeing state’s territorial integrity by the international community. Indeed, the UN Charter did not even consider establishing a system similar to the one created by the famous Article 10 of the League of Nations’ Covenant. True, that Article had lost its credibility as the international community had never been able to make use of it. This may be considered as the biggest failure of the international community in establishing an international order guaranteeing the right of the existence of its members. It is that failure which makes of International Law a primitive law. In internal law, the right of individuals to existence and security is protected by the state. This is the “raison d’être” of the

³Idem.

⁴Geertz (1963, p. 120).

state. It is that *raison d'être* which justifies state's legitimate monopoly of violence. The biggest ambiguity of International Law is that it has proclaimed the prohibition of the use of force, but it has never been able to complement such prohibition by establishing a system guaranteeing territorial integrity, that is the existence of the states. True, the UN Charter has established a system of collective security, but the implementation of such system has very often been blocked and neutralized by the rivalry between powerful states.

In the past decades, many states have disintegrated and disappeared from the world map. Although external factors have played a key role in such disintegration, the international community has remained indifferent to a situation affecting some of its own members. Such a reaction reflects if any the biggest flaw of International Law: the lack of any obligation to protect the existence of the states members of the international community. Astonishingly, International Law has shown its limits even when confronted with the issue of fixing the international borders of the new states which emerged from the collapse of Yugoslavia and the Soviet Union.

However, while the famous Article 10 of the League of Nations' Covenant had never been implemented by the international community, it gave rise in states' practice to the obligation of non-recognition of territorial changes made by force. This has so far been the only major progress made by International Law in protecting territorial integrity although the latter is a fundamental principle if not the founding principle of that law.

The tremendous challenge to which states' territorial integrity has been faced with in the past decades requires therefore a rethinking of that major principle of International Law. Unfortunately, the doctrine has given little attention to the principle of territorial integrity, although it does consider territory of paramount importance for states' existence as well as International Law's formation. Focusing more on territory than on territorial integrity, the legal doctrine has been aware of the crucial importance of the former to the formation of International Law. Hence, it has been pertinently said that "if sovereignty had not been associated with the proprietorship of a limited portion of the earth, had not, in other words, become territorial, three parts of the Grotian theory, would have been incapable of application".⁵ It has also been admitted that territory is "perhaps the most fundamental concept of International law".⁶ Likewise, some authors have, when dealing with the concept of state's territorial sovereignty, admitted that the latter was a major principle from which are drawn many other International Law principles. Thus, according to Judge M. Huber, territorial sovereignty is "the point of departure in settling most questions that concern international relations".⁷ Likewise, Malcolm N. Shaw is of the opinion that "The concept of territorial sovereignty is concerned with the nature of authority exercised by the state over its territory. The ideas of territory and sovereignty are closely linked in international law, since the concept of

⁵Maine ("Ancient Law", 1861, 61) quoted by Shaw (2005, p. 15).

⁶"International Law", London, Stevens, 1970, vol. 1, 2nd edition, p. 403.

⁷Palmas Island Case, 1928, 2 United Nations Reports of International Arbitration Awards, 829.

territory itself is concerned with those geographical areas over which sovereignty or sovereign rights may be exercised. Territorial sovereignty is, therefore, centered upon the rights and powers coincident upon territory in the geographical sense. As such it has provided the basis for modern international law”.⁸ But in fact, territorial sovereignty is nothing other than the legal expression of the phenomenon of the territoriality whose legal institutionalization has given rise to the principle of territorial integrity.

The rise of the principle of territorial integrity can be associated with the emergence of the state phenomenon thousands years ago. It has its origin in the phenomenon of territoriality. The latter has been, further to the emergence of the state, subjected to a process of institutionalization and broadening of its meaning and scope to the extent that it became consubstantial to the territorial sovereign right of the existence of the state. That process has led not only to the legalization of territoriality but also to the creation of major principles of International Law the objective of which was to protect the right of existence of the state. The latter, as modern anthropology has rightly shown, is not a phenomena which would have emerged primarily in Europe starting from the sixteenth century. The state is rather a very old and universal institution, but its form can differ from one historical context to another. The determination of the process which has led to the emergence of the principle of territorial integrity requires therefore a deep exploration of the conditions which have led to the emergence of the state itself. Such task is not easy as there is no institutional memory of the issue since International Law has been formalized or codified only starting from the seventeenth century and more systematically all along the nineteenth century. Hence there is a compelling need for a journey deep in the very old past of political collectivities. However in order to do so, one has to depart from mainstream international lawyers’ scholastic routine which in this case consists in “not touching upon within the framework of a given science a question the solution of which pertains to another branch of science”.⁹ One cannot either count a lot here on political scientists as from their perspective “inquiry into the circumstances surrounding the origin of state belongs largely to the realm of theory and speculation”.¹⁰ Consequently one has to mainly solicit various scientific disciplines including anthropology. However, if an interdisciplinary approach can help us understand all the human, political and historical elements which have played a decisive role in the emergence of the state entity and consequently the principle of territorial integrity, it goes without saying that it is only the positive International Law which will be the ultimate logical guide and the only relevant criteria in the final formulation of a definition and consequently an understanding of the principle of territorial integrity.

Therefore, the present analysis aims, first, at rethinking the principle of territorial integrity as the cornerstone of the legal structure of the statehood and International

⁸“Territory in International Law”, op.cit., p. 15.

⁹de Libera (2000).

¹⁰Garner (1910, p. 86).

Law as well. It aims, second, at showing that International Law does not provide for an appropriate protection of the principle of territorial integrity, that is the protection of the right of the existence of the states. It is that lack of protection of territorial integrity which has made the use of force the ultimate means for every state to ensure its own survival. This has been a durable rule in international relations since the emergence of early states thousands years ago. Such rule has not been abrogated by the UN Charter as the latter has made of self-defense an exception to the prohibition of the use of force. More gravely, it was that lack of international protection that has aggravated the difference between strong and weak states whose survival is very often dependent upon the “monnayable” protection that the former can provide to the latter. It is also not a surprise that military interventions within weak states’ territories have continued to flourish despite the general prohibition of force. It is true that the United Nations have in the past decades devoted tremendous efforts to strengthen the prohibition of the use of force. However, this has not prevented powerful states from trying to circumvent that prohibition through the exhumation under a new packaging of old doctrines such as the so-called doctrine of humanitarian intervention. Hence, one of the key ideas which will be argued in this study is that peace and stability cannot become a reality in international relations unless an adequate protection is guaranteed by the international community to every state whether weak or strong. It is believed that it is time for the international community to bring back to reality Woodrow Wilson’s dream of guaranteeing the territorial integrity of every recognized state which has adopted a democratic regime and shown great respect of human rights as this can dramatically help in making peace and stability prevail between nations.

Peace and stability require also putting an end to the manipulation of self-determination. But one of the findings of this book is that we are presently witnessing a shift towards a new paradigm where democratic self-determination is replacing self-determination/independence, hence dramatically reducing the occasions for such manipulation and therefore making an end, in particular through the implementation of territorial autonomy, to the emergence of non-viable states which have become in the past years serious sources of international insecurity.

Thus, a comprehensive and profound rethinking of the principle of territorial integrity is needed before showing how International Law remains powerless in helping states to address the increasing external and internal challenges that territorial integrity, that is states’ right of the existence, is being faced with.

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