Abdelhamid El Ouali

Territorial Integrity in a Globalizing World

International Law and States' Quest for Survival

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For Soumaya,
Mehdi,
Sara and
Nacer

"*All societies face the problem of how to survive in the face of uncertainty, the never-ending challenges, dilemmas and crises*"

Douglass C. North, John Joseph Wallis and Barry R.Weingast "Violence and Social Orders. A Conceptual Framework for Interpreting Recorded Human History", Cambridge University Press, 2009,133

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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

[1] Krassner (1999).

[2] Anderson (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

[3]Idem.

[4]Geertz (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

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

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

[7]Palmas 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.

[9]de Libera (2000).

[10]Garner (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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Part I
Rethinking Territorial Integrity

It is generally agreed that the principle of territorial integrity is a positive norm of a paramount importance in the contemporary international society.[1] The principle of territorial integrity has been sanctioned by key international instruments, legal or political ones: treaties, old[2] or new,[3] fundamental charters, universal[4] or regional,[5] international jurisprudence,[6] International Organizations resolutions,[7] political declarations,[8] etc... However, contemporary International law does not paradoxically seem to explicitly offer any definition of the principle of territorial integrity. Yet the invocation of the principle is a bit of a ritual. But curiously that invocation is systematically made in a negative way. Thus we frequently come across statements that the principle of territorial integrity forbids "violation of a territory", "intervention against foreign territories", "use of force against a territory", "dismemberment of a territory", etc. This is no surprise as territorial integrity has been commonly approached in a very particular way.

In fact, the international community has traditionally approached the principle of territorial integrity in an indirect manner. Thus, with the exception of the Covenant of the League of Nations which has, thanks to the tremendous efforts deployed by President Woodrow Wilson, attached special importance to the principle of

[1] Dinh (1980, p. 356).

[2] See for instance, the clause on respect of the territorial integrity inserted in some treaties signed between Greek cities and mentioned by Ténékides (1956, p. 499).

[3] With regard to Morocco, for instance, see the preamble of the 1906 Algeciras Act or the 3 October 1904 French-Spanish declaration related to its territorial integrity.

[4] Art. 2.4 of the United Nations Charter.

[5] Art. 1 and 9 of the 1948 Bogota Charter; Art. 3.3 of the OAU Charter.

[6] ICJ, The Corfou Detroit case, ICJ Rep.,1949, 35.

[7] Para 6 of the 1514 (XV) resolution dated 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and People; the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States.

[8] The territorial integrity principle is one of the principles of pacific coexistence adopted by the Bandung Conference. See also the Helsinki Final Act.

territorial integrity, the latter has been intertwined with other principles such as the prohibition of the use of force (the famous art. 2.4 of the UN Charter) and self-determination (in particular the 1960 UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States). These principles have overshadowed the principle of territorial integrity to the extent that almost no mention of it can be found in the related travaux préparatoires, particularly those which have led to the adoption of the UN Charter.

Contemporary International Law doctrine has also shown very little attention to the principle of territorial integrity.[9] A reified approach of the state and the territory has condemned that doctrine to at best have a truncated interpretation of the principle of territorial integrity or at worst to confuse the latter with other principles such as the principle of the final and stable character of the borders or more gravely the principle of the sanctity of borders.

It is generally rightly said that the principle of territorial integrity prohibits dismemberment of states, violation or use of force against their territory, intervention and interference in internal affairs, etc. But the principle of territorial integrity is more than that. In fact in essence the principle of territorial integrity is intimately linked to the state as a legal entity the main objective of which is to ensure its perennial existence within a specific territory whose borders have been established in accordance with International Law. The principle of territorial integrity is as such at the core of the state system. Its emergence as a legal principle is associated with the emergence of the state system itself. Furthermore, it has a constitutive character in so far as it has right from its inception not only given to the state its legal armature but has also generated other major international principles such as the principle of sovereignty, the principle of the exclusivity of state's jurisdiction and the principle of non-interference in internal affairs. Territorial integrity has also, as set out in the second part of this book, given rise to legal principles which are directly related to territory such as the necessary consent of the state when delimiting its territory, a principle which has been obviously called into question by the proponents of the uti possidetis or recently by the Security Council in some few instances, the most important being the unilateral delimitation of the Iraqi borders. Territory integrity has also given rise to the principle of the necessary consent of the state to territorial changes in compliance with the requirement of Constitutional law. Such requirement, which has been extensively discussed by traditional doctrine, has gained prominence in the past decades further to the development of self-determination and democracy.

[9] The same can also be said about non legal scholars. Thus J.G. Ruggie, for instance, though he regretfully notes that "It is truly astonishing that the concept of territoriality has been so little studied by students of International politics; its neglect is akin to never looking at the ground that one is walking on", he also neglects to define the notion of territoriality, although the latter is central in his study. Ruggie (1993, p. 174).

In fact, the principle of territorial integrity is nothing other than the territorial sovereign right to the existence of the state. However, such a right has been put under stress since the emergence of the state thousands years ago. It is so because the state has an inherent drive to disintegration. Meanwhile, the state has been able to remain the main form of social organization as it has shown a great ability to survive despite changing political and socio-economic situations and the transformation of human societies and their increasing complexity.

The present part will attempt to show, first, that the principle of territorial integrity is nothing other than the right to existence of the state, and, second, that the latter has been able to survive over thousands of years as the main form of social organization as a result of its great ability to adapt, thanks to what can be called the flexibility of territoriality, to changing historical contexts and situations.

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Chapter 1
The State's Sovereign Right to Existence

Modern International Law doctrine has a reified approach to territorial integrity. This has led to the perception that territorial integrity is the completeness/unity of state territory. Such an approach has proven to be irrelevant in understanding the real nature, content and legal consequences of territorial integrity. Amazingly International legal and political scholars as well as political geography specialists have never enquired about the link between territorial integrity and territoriality. In fact, territorial integrity is in essence the elaborated and sophisticated legal expression of territoriality. It is intimately linked to the state as a legal entity the main objective of which is to ensure its perennial existence within a specific territory whose borders have been established in accordance with International Law. Therefore, a new approach is needed in order to better understand territorial integrity, a principle that can be considered as the cornerstone of International Law.

1.1 The Need for a New Approach to Territorial Integrity

Territorial integrity is fundamentally the result of the institutionalization or legalization of territoriality. Before showing that, there is first, a need to de-reify the legal approach to territorial integrity.

1.1.1 The De-Reification of the Legal Approach of Territorial Integrity

Contemporary legal doctrine has devoted no particular attention to the principle of territorial integrity. It appears to have confined itself to a reified approach regarding the question of the state, territory and borders. Though it sees the territory as "an

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important chapter of International Law and the general theory of state",[1] the doctrine has mainly focused on the material elements that constitute the state, the legal nature of territory, the competences and the exclusive jurisdiction that the states are entitled to exert over their own territory, and so forth.[2]

It is certainly the above approach that has led to the common opinion that territorial integrity reflects the completeness, entirety/totality or unity of the state territory. Thus, it has been said that the expression territorial integrity indicates that "a state has remained and must remain *intact*, that it has not been subject and must not be subject to any dismemberment",[3] that territorial integrity is "the character attached to the territory of every state, which should not be subjected to any kind of grip aiming at subtracting it, durably or momentarily, from the authority of the state"[4] or that "the notion of territorial integrity refers to the material elements of the state, namely the physical and demographic resources that lie within its territory (land, sea and airspace) and are delimited by the state's frontiers and boundaries."[5]

The tendency of the International Law doctrine to focus on the competencies exerted by states over their territories, which is usually called "territorial sovereignty", has pushed Malcolm M. Shaw to base his own judgment on the latter and then in a very rapid manner define territorial integrity.[6] Shaw's attempt deserves to be mentioned as it is extremely difficult, as I have said earlier, to find a contemporary author showing interest in the definition of the principle of territorial integrity. The author starts by recalling the importance of the territorial sovereignty by stating: "The territorial definition of states is a matter of the first importance within the international political system. It expresses in spatial terms the dimensions and sphere of application of *authority* (emphasis added) of states and provides the essential framework for the operation of an international order that is founded upon strict territorial division. In terms of International Law specifically, the territorial delineation raises and determines issues ranging from the nationality of

[1] Barberis (1999, p. 132).

[2] See, for instance, Schoenborn (1929, pp. 85–189), Delbez (1932, pp. 705–738), Dembinski (1975, pp. 71–96), Shaw (1982, pp. 69–91); for other bibliographical references, see Barberis (1999, p. 132 and seq.).

[3] Translation of "un Etat reste, est resté ou doit rester *entier*, ne subit, n'a subi ou ne doit subir aucun démembrement", "Dictionnaire de la Terminologie du Droit International" (J. Basdevant) publié sous le patronage de l'Académie du Droit International, Sirey, Paris, 1960, p. 340.

[4] "Dictionnaire de Droit International Public" sous la direction de J. Salmon, Bruylant, Bruxelles, 2001, p. 592.

[5] "Encyclopedia of Public International Law", published under the auspices of the Max Planck Institute for Comparative Public law and International Law under the direction of R. Bernhardt, Elsevier, North-Holland, 2000, p. 813.

[6] A total confusion between territorial integrity and territorial sovereignty is made by Korva Gombe Adar who peremptorily states that "The term "territorial integrity is used here to refer to the power of a sovereign state to exercise supreme authority over all persons and things within its territory" (Adar 1986, p. 425).

inhabitants to the applications of particular norms and it is the essential framework within which the vital interests of states are expressed and with regard to which they interact and collide. Many of the fundamental norms of both classical and modern international law are predicated upon, and defend, such spatial division … the territorial definition of states is the spatial context for the application of state competence. . ..” And then jumps to say that: “the principle of territorial integrity sustains the territorial definition of sovereign independent states … (it) protects the territorial definition of independent states.”[7]

Similar remark can be made with regard to Marcello G. Kohen’s approach of the principle of territorial integrity which is in his opinion related to the respect of the exercise of the prerogatives of the sovereign state on its territory. But he adds that the principle of territorial integrity is also related to the inviolability of the state territory and the guaranty against any dismemberment of the same state territory.[8] However by adding these two elements, the author creates some confusion between the essence of the principle and its legal implications.

In reality, territorial sovereignty is one of the elements involved in the definition of the principle of territorial integrity. If seen in isolation, territorial sovereignty means nothing more than the competencies exerted by a state over, or within, its territory. Many crucial elements are ignored, including territory itself. Moreover, territorial integrity is a major concept which stands by itself and is not an auxiliary of any other principle.

Yet the confusion does not stop there, as some lawyers do liken the principle of territorial integrity to the principle of stability of territories and borders.[9] Others, more categorically, are of the opinion that the principle of territorial integrity is nothing other than the principle of *uti possidetis*.[10] Furthermore, still others liken the proscription of the use of force against territorial integrity with the latter.[11]

In essence territorial integrity is intimately linked to the state as a legal entity the main objective of which is to ensure its perennial existence within a territory that is limited by international borders duly recognized by International Law. On the contrary stability of territories or borders is the form which the latter can take as a result of their establishment in accordance with International Law. With regard to

[7] Shaw (1997, pp. 76 and 124).

[8] Kohen (1997, pp. 369–377).

[9] See for instance Shaw (1997, p. 151). See also Lalonde (2002, p. 143), who, although rightly adheres to the opinion that “the territorial principle is the foundation stone upon which rests the entire legal order”, confines the same principle to a simple “manifestation” amongst others of the doctrine of stability of boundaries.

[10] See, for instance, Borella (1964, p. 29), Bedjaoui (1972, p. 95), Yakemtchouk (1975, p. 51), Bipoum-Woom (1970, pp. 127–128), Touval (1972, p. 90 and seq.), Antonopoulos (1996, pp. 34–35), Nesi (1998, p. 9), Kohen (1997, p. 453), Sanchez-Rodriguez (1997), Shaw (1999, p. 499). Similar confusion is also made by the I.C.J. See Burkina Fasso-Mali case, ICJ Reports, 1986, 554 at 565 para 22; Case Concerning the Territorial Dispute (Libya-Tchad), ICJ Reports, 1994, 6, at 38 para 75.

[11] See in particular Zacher (2001, p. 215).

the uti possidetis, as we will see later on, it is only a way among others to settle territorial disputes and, what is more cofusing, a means which is very controversial. As to the assimilation between the proscription of the use of force against territorial integrity and the latter, it actually consists of confusion between the instrument to protect a norm and the norm itself.

The principle of territorial integrity refers not only to the materiality of territory (i.e. its unity and completeness) but also to an immaterial element, which is the right to the existence of state within a given territory, the borders of which are well defined and recognized by International Law. Astonishingly enough, the classical doctrine of International Law has explicitly highlighted this matter. Moreover, it has conceived the right of the territorial existence of state as the supreme right from which all the other rights derive. Thus, reflecting the state of the classical doctrine of International Law in the nineteenth century which shared the opinion that the right to territorial existence of the state was the supreme right, H. Bonfils was able to recall that:

> "In fact, there is for the states, natural and necessary persons, *only one primary right, only one fundamental right*, the right to existence. From this really crucial and essential right, derive, as necessary corollaries, linked one to another by way of successive deductions, links of the same chain, all the other rights considered as *essentials, innate, absolute, permanent and fundamental*. From the right to existence derives the right to *conservation* and *freedom*. The right of conservation implies the right of *perfectibility, defense, and security*. From the right to freedom are inferred the right to *sovereignty and independence*, etc... But under these diverse denominations, it is the *same* right which moves and makes itself felt and which is the only fundamental right, the right to *existence*. The others, ineluctable consequences, partake of the character of absolutism and permanence of the paramount right, of which they are only emanations and developments (italics are emphasis made by the author)."[12]

Wheaton, one of the most influential writers in the classical period, wrote also that "One of the absolute international rights of states, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other state, but a duty with respect to its own members, and the most solemn and important duty which the states owes

[12] Our translation of: "En réalité, il n'y a pour les Etats, personnes naturelles et nécessaires, *qu'un seul droit primordial*, un *seul droit fondamental,* le droit à l'existence. De ce droit réellement primordial et essentiel, découlent, comme corollaires nécessaires, se rattachant les uns aux autres par voie de déductions successives, comme les chainons d'une unique chaine, tous les autres droits classés comme *essentiels, innés, absolus, permanents, fondamentaux*. Du droit à l'existence découlent le droit de *conservation* et celui de *liberté*. Le droit de conservation engendre le droit de *perfectibilité*, de *défense, de sûreté*. Du droit à la liberté se déduisent le droit de *souveraineté* et celui d'*indépendance,* etc.

Mais sous ces diverses dénominations, c'est un *même* droit qui se meut et s'exerce, le seul droit fondamental, le droit a l'*existence*. Les autres, inéluctables conséquences, participent au caractère d'absolutisme et de permanence du droit primordial, dont ils ne sont que des émanations et des développements", Rousseau (1912, p. 142).

to them. The right necessarily involves all other incidental rights, which are essential as means to give effect to the principle end".[13]

Among many authors of the same period, Amos S. Hershey has also indicated that:

> "There exist certain essential or fundamental rights and duties of states which underlay the positive rules and customs of International Law. These rights (to which are attached corresponding duties) are usually described as primary, inherent, absolute, fundamental, essential, permanent, etc. . . The most important of these fundamental rights of states is that of existence, which involves the rights of self-preservation and defense. To this right there is attached the corresponding duty of respecting the existence of other states."[14]

Similarly, the American Institute of International Law adopted, at its first session held in 1916, a "Declaration on the Rights and Duties of Nations" in which it highlighted in its first paragraph that: "Every nation has the right to exist, and to protect and conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states".[15] A similar statement can also be found in the Article 3 of the Convention on the Rights and Duties of States adopted by the Conference of American States held at Montevideo on 23 December 1933.

Writing in 1922, that is at a time when the expression "right to existence of the state" started to disappear from the International Law vocabulary to the benefit of the expression "territorial integrity", P. Fauchille was able to stress that the famous Article 10[16] of the Covenant of League of Nations did nothing else – when calling upon the states to respect and preserve the territorial integrity of the members of the League – but recalling the obligation to respect the right to the existence of the states.[17] But paradoxically, the semantic change has over time led some lawyers, as shown above, to adopt a reified approach of a concept which is crucial to International Law.

Paradoxically, although the right to existence of the states was expressly referred to by international scholars in the classical period that led to the foundation of modern International Law, the reference to that right started to disappear at the beginning of the twentieth century. One of the very few scholars representing the old tradition in International Law and who, to our knowledge, was one of the last international lawyers to recall the state of the positive law by referring to the comprehensive meaning of the principle of territorial integrity and its foundational role in contributing to the emergence of other principles of International Law was M. Sibert who did recall that:

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[13] Phillipson (1916, p. 87).

[14] Hershey (1927, pp. 230–231).

[15] See on that Declaration Root (1916, pp. 211–221).

[16] On the crucial importance of Article 10 of the League Covenant, see Part Two Chapter IV, I, B.

[17] Fauchille (1922, p. 408).

> "The right to existence is a fundamental right, and maybe the only fundamental right (here a footnote referring to the principle of territorial integrity) from which derive, as necessary corollaries, all the other rights considered as fundamental ones. Thus, from the right to existence derives the right to conservation and freedom. The right to conservation generates in turn the right to perfectibility, to defense and to security. From the right to freedom is deduced the right to sovereignty or independence, which, in turn, implies, internally, the rights of legislation, jurisdiction and property, and externally, the rights to equality, mutual respect and freedom of commerce. Under these diverse denominations, it is the same right which manifests itself, the only fundamental right: the right to existence."[18]

Among present scholars, M. Walzer, ironically a non lawyer, has been among the very few authors who have been able to establish a link between the right of existence to the state and territorial integrity. Thus, he believes that the state's rights to territorial integrity and sovereignty are simply the collective form of individual rights to life and freedom[19] and that consequently "territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty."[20]

Having a reified approach to International Law, some lawyers have attempted to refute the validity of the concept of the right of existence of the state in well defined and recognized borders. In their analysis, these lawyers conclude to the "impossible construction of the right to existence"[21] as the state is not eternal, it appears, vanishes and comes back to life again. This conclusion is not relevant as International Law takes into consideration the spatial as well as the temporal existence of the state. H. Kelsen has in this respect clearly shown that the state has not only spatial but also temporal existence, that time must be considered as an element of the state just as much as space and that "it is general International law which determines the spatial and temporal sphere of validity of the national legal orders, delimits them against each other, and thus makes it legally possible that states exist beside each other in space and follow each other in time."[22]

[18] Our translation of: "le droit à l'existence constitue un droit fondamental, et peut-être le seul droit fondamental (a footnote referring here to the principle of territorial integrity) d'où découlent, comme corollaires nécessaires tous les autres droits classés comme fondamentaux. Ainsi du droit à l'existence découlent le droit de conservation et celui de liberté. Le droit de conservation engendre à son tour le droit de perfectibilité, de défense, de sûreté. Du droit à la liberté se déduit le droit de souveraineté ou d'indépendance qui, à son tour, entraine avec lui, à l'intérieur, les droits de législation, de juridiction, de domaine, et à l'extérieur, ceux d'égalité, de respect mutuel, de libre commerce. Sous ces diverses dénominations et selon différentes manifestations, c'est un même droit qui s'exerce, le seul droit fondamental: le droit à l'existence", Sibert (1951, p. 230).

[19] Walzer (2006, pp. 53–55).

[20] Idem, p. 54.

[21] Scelle (1948, p. 92).

[22] Kelsen (1934/1989, p. 289).