TERRITORY TAKING CENTRE STAGE IN INTERNATIONAL LAW: SOME PRELIMINARY THOUGHTS ON THE RISE OF TERRITORIALITY TO THE BEDROCK OF MODERN STATEHOOD

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There is convincing evidence that the modern term "territory" does not, as widely assumed, find its etymological roots in the word "terra"[1], but rather derives from the Latin "terreor" – to frighten, via "territor" – one who frightens, to "territorium – that is, a place from which people are frightened off.[2] It is indeed somewhat disquieting news that, in all probability, the word territory must hence be considered as a close etymological relative of the word "terrorist".

However, it is even more disquieting that the etymological proximity of the two terms is apparently not entirely unjustified: In fact, if we try for a moment to mind the merciless vigilance by which even our territory, the territory of the European Union[3] – a self-proclaimed beacon of liberty, humanity and solidarity[4] – is guarded at its outer margins, what will probably appear before our inner eye are highly "terrifying", if not to say "terrorizing" images: Images of barbed wire at the EU/Hungarian external borders towards Serbia and elsewhere, of heavily guarded towers, walls and fences, military vessels, of hundreds and thousands of desperate individuals storming Europe's shamefully sophisticated High-Tech African Fortress Melilla,[5] and of the uncounted and uncountable dead bodies of

[*] The original oral character of the paper has been retained to a considerable degree.

[1] Otherwise the term should in fact spell „terratorium", as the Oxford English Dictionary rightly observes.

[2] T. BALDWIN, "The Territorial State", in: Gross/Harrison (eds.), Jurisprudence. Cambridge Essays (Clarendon Press, Oxford 1992), 209/210.

[3] *Cf.* Article 52 Treaty on European Union.

[4] See only the Preamble of the Charter of Fundamental Rights of the European Union "… Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity …" (OJ 2000/C 364/01).

[5] For various attempts to conceptualize the concept "Fortress Europe" and a detailed account of the reality of the fences see: J.-C. PINOS, "Building Fortress Europe? Schengen and the Cases of Ceuta and Melilla" (Working Papers Series in Border Studies CIBR/WP18 Queen's University Belfast: Centre for International Borders Research 2009) http://www. qub.ac.uk/research-centres/Centrefor InternationalBordersResearch/Publications /WorkingPapers /CIBRWorking Papers/ Filetoupload, 174398,en.pdf (last visited: 30 June 2015). See also S. SADDIKI, « Les clotûres de Ceuta et de Melilla. Une frontière européenne multidimensionnelle », Revue Études internationales 43 (2012), 49-65.

men, women and children who have tried in vain to conquer via *mare nostrum*[6] the territory of the promised land – our land, not theirs: To claim territory is to deny it to others – this very essence of the concept of territoriality does in fact not only apply in inter-se relations between States or other claimants of supreme political authority in and over territory,[7] but also demonstrates its all too often gruesome rigour when it comes to decide upon access *vel non* for individuals to a certain portion of the globe. Unfortunately enough, the list of terrifying images from the backyard of our "well rounded building", the tower of Europe, is by no means exhaustive. The mission statement of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), too, is unmistakably clear:[8] This executive body of the European Commission, created in 2004, is by no means an immigration, not to speak of a "welcome" agency, but a means to combine forces within the European Union to frighten off entry by third State nationals rather than to encourage people in need to do so.[9]

Indeed, a second and somewhat supplementary hypothesis regarding the origin of the term territory considers 'torium' as the root from which derived words such as 'tower', 'tour' and 'torre', which conveyed in Medieval English, Old French, Italian and Spanish the meaning of both 'a well-rounded building' and 'a position of strength'.[10] However, this and the previous interpretative attempt – deterrence by at times even 'terrifying' means and methods – are not at all contradictory, but rather complementary to each other: Control by some sort of stronghold ('torre') over a specific geographic area provides a community with a position of (economic) strength,[11] the maintenance of which necessitating

[6] There are in fact some striking similarities between the present EU aspirations and activities in the Mediterranean Sea and the respective (ancient) Roman claim for dominance ("Empire centré sur une mer intérieure, pendant la seule période où la Méditerranée était unifiée sous un pouvoir unique, au point qu'un Romain pouvait la dire justement: Mare nostrum", M. REDDÉ, *Mare Nostrum. Les infrastructures, le dispositif et l'historie de la marine militaire sous l'empire romain*, Paris, Boccard, 1986), 8), a dominance which was rather power-political than strictly juridical in nature (*cf.* P.T. FENN, "Justinian and the Freedom of the Sea", American Journal of International Law 19 (1925), 726: "Yet there is no record of such a Power [in particular the Roman empire] attempting to set up a claim of ownership of the sea under the form of law. Neither the exercise of maritime jurisdiction nor the possession of naval supremacy carried with it a legal right to abridge the freedom of the seas ...").

[7] For a brief account (with further references) of the predator competition launched by the modern territorial State against all others who lay claim for title to territory see D.E. Khan, "Territory and Boundaries", in: Fassbender/Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford 2012), 234 *et seq*.

[8] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004, 349/1 of 25.11.2004.

[9] Recent attempts to provide FRONTEX, in the wake of a number of refugees tragedies in the Mediterranean, with an enormous loss of human lives, with a somewhat more "humanitarian face", cannot alter this overall picture of an agency with mission which is basically of a deterrent character.

[10] J. Gottmann, *The Significance of Territory* (The University Press of Virginia, Charlottesville 1973), at 11.

[11] In a more general, anthropological perspective, it is hardly deniable that controlling people and things territorially simply saves efforts and thus provides the 'territory owner' with a clear evolutionary advantage (See *e.g.* R. SACK, *Human Territoriality. Its Theory and History* (Cambridge, Cambridge University Press, 1986), at 22: It is certainly easier to supervise one's livestock by

a constant and rigid vigilance in order to deter or at least control potential intruders: 'Terri-torium'.[12]

To add a third, and final etymological consideration: It may be significant to note that medieval treaties and other legal documents of the time did indeed, at least with respect to smaller political entities,[13] make frequent use of the term 'teratorium' or 'terratorium' and not (yet) of the term 'territorium' with its decisively deterrent connotation. With respect to cities and towns, control over a defined piece of land was thus primarily associated 'merely' with the concept of dominium (possession), not imperium. The position of power of larger kingly or princely entities in Europe, instead, deeply rooted in the Christian-Medieval theological-political cosmos, was still considered to rest primarily on allegiance of individuals and organizations, not territory.

It was only in the late 15th century that, seconded and driven by the Renaissance critique of hierarchy,[14] the dominant model of juridico-political power of a vertical, highly complex and heterogeneous hierarchical character began to be superseded, slowly and gradually, by the concept that political spaces are to be ordered along a horizontal plane, something which placed 'territory' central stage in political thought – at least potentially.[15] Indeed, this paradigmatic shift paved the way for exclusive control over a distinct

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fencing it than to follow each cattle around, and the most efficient way to control and protect human and natural resources of a given area is probably to patrol its outer margins.

[12] Interestingly enough, the etymological issue was already discussed at some length by Hugo Grotius (*De Jure Belli ac Pacis* 1625 (On the Law of War and Peace) Book III Chapter 6, IV.2: "The origin of the Word *territory* as given by Sicculus Flaccus, from 'terrifying the enemy' (*terrendis hostibus*) seems not less probable than that of Varro, from the word for ploughing (*terendo*), or of Frontinus from the word for land (*terra*), or of Pomponius the jurist from 'the right of terrifying' (*terrendi jure*), which is enjoyed by the magistrates." (SCOTT (ed.), *The Classics of International Law*, Oxford, Clarendon Press, 1925).

[13] See *e.g.* Enfeoffment by King Ladislaus of Hungary and Bohemia of the Counts of Sternberg with the city of Cottbus (1454): "... in et super media civitate et Castro Cotbus posita in marchionatu nostro Lusaciae cum teratorio (emphasis added), castris, munitionibus...., redimendi aliam medietatem dictae civitatis et castri cum terratorio, castris, munitionibus et pertinentiis suis …" (F. PALACKY (ed.), *Urkundliche Beiträge zur Geschichte Böhmens und seiner Nachbarländer im Zeitalter Georg's von Podiebrad (1450-1471), Fontes Rerum Austriacarum, Diplomataria et Acta*, Vol. XX, Wien 1860), No. 75; and from the 12th century practice of territorial transactions by Italian City States: "castrum et curiam de Rudiano et teratorium" (cited in: A. SALA, Fra Bergamo e Brescia. Una famiglia Capitaneale nei Secoli XI e XII. I 'De Martinengo' (Ateneo di Scienze Lettere et Arti, Brescia 1990), 67).

[14] Illuminative explanations by J. LARKINS, *From Hierarchy to Anarchy. Territory and Politics Before Westphalia* (Palgrave Macmillan, New York 2010), 101 *et seq*.

[15] Territory and its limitations have of course already been important elements in the tool-box of political actors in the European Middle Ages and the most powerful of them aspired indeed to some status of 'final authority'. However, these aspirations were not essentially territorial in character (for a detailed discussion: S. SASSEN, *Territory, Authority, Rights. From Medieval to Global Assemblages* (Princeton University Press, Princeton 2006) at 31 *et seq.*). For the crucial role the Post-Glossators, and in particular Bartolus de Sassoferrato, played in this transitional process from "terries ecclesiae" to "alieno territorio", which on its part "paved the way for the modern conception of territorial sovereignty" (F. MAIOLO, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon, Delft 2007), 234) see with further references S. ELDEN, *The Birth of Territory* (The University of Chicago Press, Chicago/London 2013), 218 *et seq.*

geographical area to become not only an indispensable, but probably the most distinctive or even axiomatic feature[16] of the new ideal of exercising political authority – and, as a consequence, the rigid protection of its outer margins a primary concern of 'Lo Stato'.[17] With lasting effect, *Niccolò Machiavelli* in his seminal work *Il principe*,[18] along with other participants in Renaissance legal discourse,[19] added to the Latin word 'dominium' with its firmly established Roman private law connotation[20] a second, public law meaning: Territory over which single and superior authority is exercised, thus heralding the modern concept of sovereign territoriality.[21] Quite literally, dismissing 'the ancient [Augustinian] doctrine by which the ruler … existed for the realization of … a superior moral purpose',[22] Machiavelli limited politics to the terrestrial world. Hence, it is probably correct to assume that an intrinsic and probably inextricable link exists between the shift of spelling (from 'terratorium' to 'territorium') on the one hand, and a fundamental change in the perception and eventually organization of political power, which gave birth to the territory-focussed concept of the modern State on the other.

The all too often grim reality of a government of territory rather than of a government of people, stands in striking contrast to our intellectual perception of today's world order: "Globalization" having become one of the most fashionable buzzwords in recent political and academic debate,[23] the concept of a bounded territory may indeed appear an antagonistic remnant from a remote past – a somewhat outlandish phenomenon: Territory and boundaries so to say as some kind of antipodes to modernity, which appears "inherently globalising".[24] Time and again, more or less relevant actors on the international plane evoke the

[16] See also I. BROWNLIE, *Principles of Public International Law* (Oxford University Press, Oxford 7th ed. 2008), 70 *et seq*.
[17] *Sassen* (*supra* note 16), 123 *et seq*.
[18] Published posthumous (1532); unpublished Latin version (*De principatibus*) 1513.
[19] *Inter alia Claude Seyssel*, La grant monarchie de France (1515), which played an important role in the development of political thought both in France and Italy.
[20] For a recent, concise discussion of the law of territory's Roman heritage see A. HARRINGTON, "Is there a Right to Territory in International Law?", in: *Smith* (ed.), *Property and sovereignty. Legal and Cultural Perspectives* (Ashgate, Farnham2013), 561 *et seq.*
[21] See also with succinct clarity D. PHILPOTT, "Sovereignty", *The Stanford Encyclopedia of Philosophy* (Summer 2014 Edition), *Zalta* (ed.), http://plato.stanford.edu/archives/sum2014/entries/sovereignty (last visited 30.9.2015): "Supreme authority within a territory - this is the general definition of sovereignty." However, it must be noted that *Machiavelli* himself never used the Italian word "territorio" in his writings, and the frequent appearance of the term 'territory' in scholarly debate is hence primarily due to a somewhat confusing and inconsistent translation of the word "lo stato" (for a detailed discussion *cf.* S. ELDEN, *The Birth of Territory* (*supra* note 16), 247 *et seq*).
[22] F.H. HINSLEY, *Sovereignty* (Cambridge University Press, Cambridge 2nd ed. 1986), at 110.
[23] The definition and interpretative contours of this notion are still very much disputed: See only with comprehensive references: N. AL-RODHAN/G STOUDMANN (Geneva Center for Security Policy – Program on the Geopolitical Implications of Globalization and Transnational Security), *Definitions of the Globalization: A Comprehensive Overview and a Proposed Definition* (2006) – http://www.wh.agh.edu.pl/other/materialy/678_2015_04_21_22_04_13_Definitions%20of%20Globalization_A%20Comprehensive%20Overview%20and%20a%20Proposed%20Definition.pdf (last visited 30.09.2015).
[24] A. GIDDENS, *The Consequences of Modernity* (Stanford University Press, Stanford 1990), 63.

international community, the universality of several generations of human rights, the right of self-determination, the common heritage of mankind, various concepts of "global responsibility"[25], and a whole number of "emerging" global principles of humanity, solidarity and others. But does this bundle of certainly nice-to-haves really draws a true picture of the essence of the framework of world order provided for by international law and politics in the early 21th century? No, it does not.[26]

I rather submit that, *de lege lata*, the most distinctive feature of the international legal and political order is still a very traditional 'territory owner ethos'. International law still serves primarily 'to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other'.[27] Thus one may well compare the international system to some sort of giant 'Schrebergartenkolonie'[28] – a somewhat distinct Germanic concept, maybe best, though not entirely fitting, translated as an 'allotment garden area' or 'un ensemble des jardins familiaux'. In this very specific neighbourly environment every plot owner is bound by certain basic rules of behaviour *vis-à-vis* each other and towards the plants he or she grows – no barbecue and no herbicides for example. A second distinctive feature of a *Schrebergarten* is that most 'propriètaires' love to be admired for his or her flourishing green – but please only from beyond the jealously protected fence, invariably surrounding the ridiculously small plot of land. No doubt, the most important rule in this global *Schrebergartenkolonie* is: No trespassing! At least regarding its basic legal and political structure, the design of today's world order, still very much focussed on the coexistence of sovereign territorial States,[29] bears indeed striking similarities to this rather simplistic and somewhat archaic organizational model.

The Ukraine crisis, which, during the last couple of months, has sent shock waves through the political and scholarly debate all around the globe, reminded me of the implicit leitmotif of Germany's pleadings before the International Court of Justice in the *LaGrand Case* some 15 years ago – admittedly unfolded

[25] 464.000 hits in Google search (last visited 30.9.2015).

[26] The paradoxical, if not to say cynical gap between rather ritualistic lip-services of a humanitarian character on the one hand and territory and border Realpolitik on the other may probably best be illustrated by the signing, in November 2006, by the Spanish Prime Minister of the "Comunicado especial de la XVI Cumbre Iberoamericana de Jefes de Estado y de gobierno contra la construcción de un muro en la frontera México" (http://scm.oas.org/pdfs/2006/ CP17127s-9.pdf – last visited 30.06.2015). In this document the Ibero-American summit expressed its profound preoccupation with the erection on the part of the US Government of physical barriers towards its southern neighbor Mexico, holding that the "building of walls is incompatible with friendship relationships and cooperation between states" and that "walls do not stop migration [...] but encourage discrimination and xenophobia." This solemn declaration, however, coincided with the construction on the part of Spain of a third, highly-effective and most innovative fence in the shape of a tridimensional towrope between the two existing fences in order to protect its exclaves Ceuta and Melilla from immigration.

[27] P. ALLOT, *Eunomia. New Order for a New World* (Oxford University Press, Oxford 1990), 324.

[28] The allotment garden movement in Germany is named after Daniel Gottlob Moritz Schreber (1808 – 1861), a German physician and university teacher at the University of Leipzig.

[29] No doubt, the 1991 dictum of *Martii Koskenniemi* of "the continuing vitality of statehood as the ultimate value of the international legal system" ("The Future of Statehood", *Harvard International Law Journal* 32 (1991), at 397) remains as viable today as it was 25 years ago.

in an entirely different legal setting: This case, it was argued at the time at The Hague, is not about the death penalty … but it's all about the death penalty.[30] In effect, it seems to me that territory and boundaries are a bit like the death penalty: Let's better not talk too much about it – a concept, hopelessly outdated and discredited, deeply associated with the grim reality of flight and expulsion, and so difficult to reconcile with our firm commitment to the global village with all its lovely common values. But, truth be told, behind the broad smokescreen of values, ethics and principles in the very end it's still (almost) all about the question of who is right to "claim the monopoly of legitimate use of physical force within a given territory" – to synthesize a famous definition by *Max Weber*.[31] Beyond all, sometimes rather ritualistic lip services to the right of self-determination and other human-centred concepts, what really is at issue are square kilometres, lines and buffer zones, in short: Control over territory – in the Crimean and the East Ukraine crises, in the Middle East, the Far East and elsewhere all around the globe.[32]

No doubt, this somewhat terrifying physical substratum, called territory, still holds a pivotal role within the identity kit of modern statehood.[33] The past and present agenda of the International Court of Justice (and of other courts and tribunals, too) bears witness of the fact that territory does indeed constitute the bedrock of modern Statehood[34] – and will, in all likelihood, continue do so in the

[30] *Gerhard Westdieckenberg* (Agent for Germany): "As I have already said and as we have emphasized in our Memorial, the present case is not about the death penalty in general or its application in any particular country. However […]" (Oral Pleading on Nov 13, 2000, CR 2000/26, para. 6).

[31] *The Theory of Social and Economic Organisation* (First Free Press, New York 1964), 154-156.

[32] See *e.g.* (with comprehensive references and insightful empirical findings) M. DUFFY TOFT, "Territory and War", *Journal of Peace Research* 51 (2014), 185 *et seq*.

[33] See only recently M. SHAW, "The International Court of Justice and the Law of Territory", in: Tams/Sloan (eds.), *The Development of International Law by the International Court of Justice* (Oxford University Press, Oxford 2013), 152-176, at 152: "The law relating to territory remains the bedrock of both classical and modern international law."

[34] A major share of cases brought before the ICJ were and are in fact directly concerned with territory and/or boundary issues (see only for the last 25 years): 2014: Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*) – Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (*Costa Rica v. Nicaragua*); 2013: Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*) – Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (*Nicaragua v. Colombia*) – Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v. Chile*); 2011: Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v. Costa Rica*) – Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (*Cambodia v. Thailand*) (*Cambodia v. Thailand*) 2010: Certain Activities carried out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*) – Frontier Dispute (*Burkina Faso/Niger*); 2008: Maritime Dispute (*Peru v. Chile*); 2005: Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*); 2004: Maritime Delimitation in the Black Sea (*Romania v. Ukraine*): 2003: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (*Malaysia/Singapore*); 2002: Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (*El Salvador v. Honduras*) – Frontier Dispute (*Benin/Niger*); 2001: Territorial and Maritime Dispute (*Nicaragua v. Colombia*); 1999: Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*); 1998: Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia/Malaysia*) – Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and

foreseeable future. And, no doubt, the fundamental axiom of the existence of an intrinsic and inextricable bond between the State and its territory finds ample support in the various devices in the tool-box of our discipline: Its treaty law, jurisprudence and doctrine. It is very much in this spirit that a seminal article on the subject opens with a rather categorical statement: "*It seems clear* that the notion of statehood occupies a central place in the structure of international law and relations"[35] and "*It is evident* that States are territorial entities."[36] *Crawford locuta, causa finita*? Who would dare to disagree? And in fact – apart from some critical grumbling, such as *George Scelle's* 1959 dictum on the State's "obsession du territoire"[37] – to this day, the territorial assumption, that is the territory focused perception of international law, has gone virtually unquestioned – at least in the realm of our, the legal discipline.

Yet, despite repeated rumors of the forthcoming end of traditional Statehood,[38] the so-called "Westphalian territoriality" is probably even more alive than ever before: Old and most new actors on the international scene alike do indeed not strive for new "de-territorialized" forms of governance, but rather to establish territory as the sounding board for the exercise of their authority over people on a well-defined portion of the globe: The hopefully futile attempts of ISIS terrorists to establish their caliphate may serve here as but one current and certainly most deplorable example, others are provided by Stuart Elden, who rightly observes: "Territory continues to matter today in a whole range of registers."[39]

According to an insightful remark by *Sir Robert Jennings*, the concept of territory entails another, rather specific and somewhat wondrous fact: "It is part of the mystique of the notion of territory", he observes, "that boundary lines are, even by the most cynical, strongly associated with the idea of legal rights. Governments, even when they are being unreasonable are always intensely legalistic about the boundaries of their territory."[40] Today's worldwide conflict

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Nigeria (*Cameroon v. Nigeria*), Preliminary Objections (*Nigeria v. Cameroon*); 1996: Kasikili/Sedudu Island (*Botswana/Namibia*); 1994: Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria: Equatorial Guinea intervening*); 1991: Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) – Maritime Delimitation between Guinea-Bissau and Senegal (*Guinea-Bissau v. Senegal*); 1990: Territorial Dispute (*Libyan Arab Jamahiriya/Chad*).

[35] J. CRAWFORD, "The Criteria for Statehood in International Law", *British Yearbook of International Law* 48 (1976-1977), at 93.

[36] *Ibid.*, at 111.

[37] In: *Symbolae Verzijl* (Martinus Nijhoff, La Haye 1958), 347-361.

[38] See *e.g.* the insightful considerations by O. HÖFFE, *Democracy in an Age of Globalisation* (Springer, Dordrecht 2007), who, however, on his part comes to the conclusion that "[t]he end of statehood is neither empirically called for nor legitimatorily desirable" (at 117). More pessimistic in the early 1980s already: M. DONELAN, "A Community of Mankind", in: *Mayall* (ed.), *The Community of States* (George Allen & Unwin, Boston 1982): "the present problems, face all men in all countries; they are common problems [which] … are beyond the capacity of 150 separate states. The old political organisation of the world corresponds no longer to the technological abilities and appetites of modern man and the consequent dangers." (at 140 and 142).

[39] *The Birth of Territory* (*supra* note 16), 2 *et seq.*

[40] *General Course on Principles of International Law* (Sijthoff, Leyde, Recueil des Cours 121, 1967-II), at 429.

scenarios provide ample evidence for the correctness of this assertion: Holy warriors and self-proclaimed freedom fighters may have no scruples whatsoever to ignore international human rights in a most blatant and atrocious way (*e.g.* by beheading innocent civilians). But once having consolidated supreme control over territory, there is no doubt whatsoever that the same pernicious people will claim the international rules of territory and boundaries to work in their favor and expect their territorial sovereignty to be strictly observed!

No doubt, under modern international law, holding effective control over territory is a most attractive objective for potentates of all kind – including holy warriors. The merger of the whilom distinct concepts of dominium (possession of territory) and imperium (somewhat simplified used here as a synonym for sovereignty) to the all-embracing concept of territorial sovereignty provides indeed a most comfortable umbrella of protection for anybody who happens to be in effective control over a piece of the globe. And, by virtue of the legal concept of the so-called "de facto regime",[41] this comfort-zone has – irrespective of any considerations of legitimacy – even been extended to long-standing occupants of territory, so to say, some kind of modern squatter approach in international law. But can a legal concept, which may eventually even be employed to legitimize the existence and offer its protection to the establishment of a tyrannical and inhuman caliphate, really go entirely unchallenged? Is it not time also for us international lawyers to seriously engage in the search for an answer to the time-honored question of *St. Augustine*: "Justice being taken away, then, what are kingdoms but great robberies?"[42] Or, in other words, does our conventional reading of Article 2 para 1 of the UN-Charter (sovereign equality of States) with all its well-established emanations (territorial integrity, prohibition of the use of force, non-intervention)[43] really provide an adequate answer to the present-day challenges, namely the existence of an ever-growing number of (more or less failed) States which are either unwilling or unable (or even both these alternatives) to perform the original tasks and responsibilities, which constitute the *raison d'être* of the very existence of this specific type of political organization. In the classical words of *Thomas Hobbes*: "This is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence. For by this authority, given him by every particular man in the Commonwealth, he hath the use of so much power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad."[44] The core message of this famous dictum is that, despite all its power and strength, in the very end the Sovereign State is nothing

[41] *Cf.* only the seminal contribution by J. FROWEIN, Das de facto-Regime im Völkerrecht. Eine Untersuchung zur Rechtsstellung „nichtanerkannter Staaten" und ähnlicher Gebilde (Carl Heymanns Verlag, Köln/Berlin 1968).
[42] The City of God (426, engl. translation Marcus Dods, 1886), Book IV, Chapter IV.
[43] For details B. FASSBENDER, Commentary on Article 2 (1), in: SIMMA/KHAN/NOLTE/PAULUS (eds.), *The Charter of the United Nations. A Commentary* (3rd ed., Oxford University Press, Oxford 2012), 135 *et seq.*
[44] T. HOBBES, *Leviathan* (London 1651), Second Part, Chapter XVII.

but a *mortal* God – whose right to exist is inextricably bound to its capacity to guarantee "peace at home, and mutual aid against their enemies abroad". If we are ready to admit that the umbrella of protection granted by international law to the sovereign nation State and its territorial substratum does not constitute an end in itself, a serious debate of the "when, under which circumstances and to which extent" a territorial organization may forfeit the attributes and privileges associated with the label "statehood" is indeed overdue. The "unwilling and unable approach", promoted for example most recently in relation to ISIS by the United States,[45] should therefore not be discarded *a priori*, but rather be taken serious as a valuable element for a general debate on the scope and limits of territorial sovereignty, going even beyond the traditional argumentative patterns revolving around the issue of self-defense.

And, to add another, albeit not less pressing contemporary challenge to our conventional understanding of the spatiality of power: Does a territory focused, or even "obsessed", perception of international law still provides adequate answers in the digital age, the age of cyberspace and cyberwar? Or, in somewhat more concrete terms: Is the concept of "a bounded territory" really a suitable matrix to successfully cope with ever more likely threats from the worldwide web? And – to allude to a last and also highly topical scenario – what is with so-called de-territorialized terrorist organizations and the likewise de-territorialized "global war" against such organizations? Definitely: the relationship between territory and sovereignty is under siege.

"Why do states have territorial rights"?,[46] "Why must the production of security be based on a coerced geographic monopoly?"[47], "Is there a Right to Territory in International Law?"[48] or – even more radical – "Is the territorial state itself an illegitimate institution, since human rights transcend national boundaries?"[49] In fact, these and other questions are rather high on the agenda of the intellectual discourse – almost exclusively, however, in branches of social sciences other than the law.

Lawyers and legal scholars are no dreamers, and most of the time they are even no visionaries. The most important trait of our professional self-conception is probably, and for very good reasons indeed, to develop and administer viable concepts for modes of social organization. And the territorial State has certainly served as such a viable concept, and still does so – at least to a large extent.

[45] The relevant passage in the "Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (S 2014/995) reads as follows: "States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself."
[46] A. STILZ, *Why do states have territorial rights?, International Theory 1* (2009), 185.
[47] C. WATNER, "The territorial assumption: Rational for conquest", *Journal of Libertarian Studies* 22 (2010), 247, at 249.
[48] A. HARRINGTON, *Is there a Right to Territory in International Law?* (*supra* note 21), 59 *et seq.*
[49] L. BRILMAYER, *Justifying International acts* (Cornell University Press, Cornell 1989), 30 *et seq.*

However, as challenges just sketched aptly demonstrate the existing territorial structure of the international state system point to a possible need for a "more flexible, multilayered approach to political-territorial governance in the 21th century."[50] Nonetheless, and interestingly enough, the territorial assumption is still a most powerful and virtually undisputed narrative in our discipline: Territory and State are considered to have entered a durable reciprocal benefit arrangement; in the words of *Paul Alliès*: « Le territoire semble toujours lié à de possibles definitions de l'Etat ; il le crédite d'un facteur physique qui semble le rendre inévitable et éternel. »[51]

No doubt: We are certainly all well aware that in a wider historical perspective "there have been very few societies which revolved primarily around relatively fixed and clearly defined territorial units", as *Edward Soja* rightly observed in the early 1970s already.[52] However, the truth is that even the traditional view according to which this arrangement dates back to the mid-17th century Peace of Westphalia has been unmasked as one of the many myths of 1648.[53] Not only have spatially overlapping layers of authority continued to exist far into the 18th and in many instances well into the 19th century and it was only with the 1815 General Treaty of the Congress of Vienna that a purely spatial conception became widely accepted in treaty practice, too. It is probably even more significant to recall that, as far as the spatial element as a *conditio sine qua non* for Statehood is concerned, *Georg Jellinek's* seminal "three-element-theory" (territory, population, ultimate ruling power[54]) and similar definitions from that period – e.g. proposed by *Albert Rivier*[55] – find no equivalent whatsoever in earlier, 17th and 18th century post-Westphalian writings. Still very much obliged to a social contract theory approach, both *Hugo Grotius* ("a perfect society of free men, united for the promotion of right and the common advantage"[56]) and *Emer de Vattel* ("political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security"[57]) laid emphasis rather on population, collective will and government than on territory. With regard to the State's scope and target of power, too, for *Grotius* territory only came second place, the exercise of supreme and exclusive power

[50] A. MURPHY, "The sovereign state system as political-territorial ideal: historical and contemporary considerations", in: BIERSTECKER/WEBER (eds.), *State Sovereignty as Social Construct* (Cambridge University Press, Cambridge 1996), at 111.
[51] *L'invention du territoire* (Presses universitaires de Grenoble, Grenoble 1980), at 9.
[52] The Political Organization of Space (Washington, D.C., Association of American Geographers 1971), 3. In the same vein C. SCHREUER: "A look at history, however, tells us that conceptions of world order have by no means always been shaped by the model of sovereign co-equal actors with a territorial basis", "The Waning of the Sovereign State: Towards a New Paradigm for International Law?", *European Journal of International Law* 4 (1993), at 447.
[53] B. TESCHKE, *The Myth of 1648. Class, Geopolitics, and the Making of Modern International Relations* (Verso, London/New York 2003). C. SCHREUER, *ibid*., is entirely right in this context to speak of an „oversimplification".
[54] *Die Lehre von den Staatenverbindungen* (Alfred Hölder, Wien 1882), 22.
[55] *Principes du Droit des Gens*, vol 1 (A. Rousseau, Paris 1896), 45-51.
[56] *De Jure Belli ac Pacis* (*supra* note 13), Book I Chapter 1, XIV.1.
[57] *Le Droit des Gens* 1758 (*The Law of Nations*), Preliminaries § 1 (*Scott* (ed.), The Classics of International Law, Carnegie Institution, Washington 1916).

over territory being in no way axiomatic for the State's very existence.[58] And *Thomas Hobbe's* Commonwealth ("One Person, of Whose Acts a great multitude, by mutual Covenants one with another, have made themselves every one the Author"[59]) is not territorial by definition, neither.[60] Although these authorities and their contemporaries did of course not abstain from treating various territorial and boundary issues, the fixation on territory as the predominant guiding and organising principle of policy making must thus be deemed to be a rather recent, 19th century only phenomenon. Hence, regarding the "upgrading" of territory, too, Westphalia did certainly not constitute a cataclysm but only one instalment in the on-going and century-long transitional process from medieval to modern Statehood. It is significant to note in this respect that still in the late 19th century[61] the issue of the international legal personality of wandering tribes or societies was still subject of serious scholarly debate. And it has even been suggested with some persuasiveness that it was the 19th century ideology of nationalism only which gave our today's sovereign territorial ideal its final touch: This ideology – it is said – was premised on the link between people and territory: "The histories, songs, poetry, and paintings of Romantic nationalists were replete with territorial imagery."[62]

One cannot but conclude that the gradual shift from the complex authorities of the Middle Age to the claim for territorial exclusivity of the State only came to an end in the 19th century, which brings our specific territory based model of Statehood in its comprehensive unfolding to an age of barely 150 years.

My conclusion is rather simple: We should not, at least intellectually, imprison ourselves within the alleged imperatives of the current politico-legal territorial order – the domination of which in world affairs constitutes but a heartbeat in the course of the history of social organization in general and of our discipline in particular. In this respect, too, we have certainly not reached the end of history, and we are well advised not to cede reflection on alternative models to other disciplines alone. Can we imagine an international legal system without physical boundaries separating sovereign entities? Probably not yet.[63] But we should at least constantly remind ourselves of the fact that the old Leviathan, we

[58] „… two subjects, primarily persons, and that alone is sometimes sufficient …. secondarily the place [locum], which is called territory [territorium]." (*De jure Belli ac Pacis* (*supra* note 13) Book II Chapter 3, IV.1).
[59] T. HOBBES, *Leviathan* (*supra* note 45), chapter XVII.
[60] T. BALDWIN, *The Territorial State* (*supra* note 3), 212.
[61] See *e.g.* W.E. HALL, *A Treatise on International Law* (Clarendon Press, Oxford 2nd ed. 1884), 19: "That the possession of a fixed territory is a distinct requirement must be looked upon as the result of more general, but not strictly necessary, circumstances. Abstractedly there is no reason why even the wandering tribe or society should not feel itself bound as stringently as a settled community by definite rules of conduct towards other communities …".
[62] A. MURPHY, *The sovereign state system as political-territorial ideal* (*supra* note 51), at 97.
[63] However, utopian reflection of a borderless world and its practical impacts on world order is already an integral part of the intellectual debate in a number of other disciplines, see eg. the (interdisciplinary) urban geographer, cultural anthropologist and social theorist *N De Genova*: "If there were no borders, there were no migrants – only mobility" ('We are of the Connections': migration, methodological nationalism, and 'militant' research, Postcolonial Studies 16 (2013), 250).

have so much gotten accustomed to, is but a mortal god. Its center stage position in world order is anything but granted and should thus be continuously subjected to a critical review. Thus, in order to foster the lasting legitimacy of this model of sovereign Statehood in an age of a "Humanisation of international law"[64] on the one hand and the emergence of territorial entities, their self-proclaimed leaders brutally trampling on even the core values of the international community on the other, it is obviously overdue to seriously scrutinize the hitherto exclusively formal definition of Statehood and to substantially enrich its recipe with qualitative elements: Recognition and adherence to the basic standards of civilization should be considered to constitute a first minimum yardstick in this respect. No doubt, Luxemburg and the (so-called) Islamic State of Iraq and the Levante share certain common features: A population, a territory, and a government – but apart from these famous three elements[65] these politico-juridical entities have little in common, and accordingly should not – at least in all respects – be treated as equals under international law, too.

In it undeniable that even from a 'realist' postmodern early 21th century perspective, the concepts of territorial sovereignty and territorial integrity do still constitute the "beating heart of international law".[66] However, at the age of approximately 150, this heart is probably in high need of some bypass surgery, as already suggested by *Georges Scelle* more than half a century ago. There is indeed still little to add to *Scelle's* conclusive remarks to his "tour d'horizon" on various aspects of the relationship between the state and its territory: « [L]'ensemble de la planète […] forme un tout indivisible [et] c'est aller contre le progrès et la paix qui s'identifie à lui, que de s'hypnotiser sur le territoire étatique et la souveraineté territorial, jusqu'à en faire la préoccupation obsédante et passionnée des gouvernants et des énergies nationales. »[67]

[64] Notion coined by *Theodor Meron* ("The Humanization of International Law", *American Journal of International Law* 94 (2000), 239 et seq; developed and expanded in in the General Course on Public International Law delivered by the author at the Hague Academy of International Law in 2003 [International Law in the Age of Human Rights, Receuil des Cours vol. 301).

[65] See Jellinek's influential 'doctrine of the three elements' (Drei Elemente Lehre), *Allgemeine Staatslehre (General Theory of the State)* O Häring, Berlin 1900, 250-258.

[66] M. SHAW, *The International Court of Justice and the Law of Territory* (*supra* note 34). See also Max Huber: "[T]his principle of the exclusive competence of the State in regard to its own territory [is]… the point of departure in settling most questions that concern international relations." (Island of Palmas Case (Netherlands, United States of America), Award 4 April 1928, Reports on International Arbitral Awards II (1949), 829 *et seq.*, at 838.

[67] *Obsession du Territoire* (*supra* note 38), at 361.