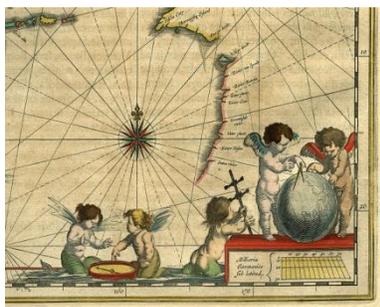


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The Deterritorialization of International Law

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In concluding a recently published writing on the significance of territory and boundaries in the evolution of international law, Daniel-Erasmus Kahn has observed that “[...] in recent years there are increasing signs that the traditional and rather categorical symbiosis between territory and power may no longer lay a legitimate claim for exclusivity.”^[1] Kahn’s observation invites a reflection on those “increasing signs” and on the extent to which international law has been affected by and has contributed to new forms of power exercise detached from territory: in other words, whether international law itself is in a process of “deterritorialization”.

“Deterritorialization” as a conceptual tool able to grasp significant evolutive trends in the international society and in its normative architecture is not unknown to legal doctrine. It finds its main exponent in Carl Schmitt and in his landmark book *The Nomos of the Earth* published in 1950. Writing in the immediate aftermath of WWII, Schmitt exposed the crisis of the Euro-centric system of international law, of what he called the *Ius Publicum Europaeum*, namely a spatial order of the Earth based on the European balance of power and on the common legal norms and traditions which had characterised the co-existence post-Westphalia until the beginning of the 20th century. According to Schmitt, the European order had not been replaced by another spatial, political order, but only by the universalist, immaterial and powerless principles and values of the League of Nations and by an American tentative vision of the world based on the very same universal values and on the division between the (private) economic dimension and the (public) political dimension, with a prevalence of the former in the creation of a new, “a-spatial”, global order. Quite interestingly, Schmitt noted how that transformation had gained ground in the continental doctrine, with some German authors already making the distinction between *Völkerrecht* and *Internationales Recht* at the turn of the century.

The Nomos of the Earth was prophetic in that it precisely identified the seeds of the new order - or disorder for some - to be realised after 40 years with the end of the Cold War. The Cold War only managed to freeze latent trends, by guaranteeing the centrality of the Westphalian State and of the legal principle of sovereign equality in a system of international relations, which was largely based on ideological spheres of influence trespassing national boundaries.

James Carville's famous catchphrase "It's the economy, stupid", which characterised Bill Clinton's successful bid for the US Presidency, dates back to 1992 – by no coincidence to the immediate aftermath of the end of the Cold War. The catchphrase ably captures the story of international law in the Post Cold War Period, exactly in the sense prophesized by Schmitt. The crisis of the territory as a central concept in international law has gone hand in hand with the phenomenon of globalization and with the displacement of the State, as a territorially bound political organization, as the protagonist of international law as we knew it, mainly induced by a factual lack of sovereignty, especially in the economic field.

In of the few attempts to systematically address the concept of deterritorialization in international law, Catherine Brölmann has observed that "deterritorialization is meant to refer to the detachment of regulatory authority from a specific territory".^[2] Brölmann has identified three different levels at which the deterritorialization of international law has taken place in the age of globalization: norm-setting authority, normativity and norms' addressees. The first one is the proliferation of *normative regimes*, either established by an international norm-setting authority or created by informal, often private, transnational networks, regulating phenomena such as the internet, international commerce or the civil aviation. What these international regimes and transnational networks have in common is that they have set norms next or in place of the State and that they are not linked to a territory. To state it with Teubner and Korth, "[t]he traditional differentiation in line with the political principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves."^[3] Secondly, as a consequence of the latter process, next or in place of the classic *sources* of international law we have seen the emergence of a plurality of relevant legal sources and instruments creating the normative framework in which international actors make their choices and optimise their interest, ranging from soft law instruments, to self-regulations, to regulatory decisions of international organizations, with some authors referring to the phenomenon as "regulatory hybridization". This is particularly the case for international economic law, where writers have argued that a source-based approach to international economic law, meant as a system of mainly treaty-based relations among States, is conducive to a necessarily limited understanding of the law of the global economy.^[4] Thirdly, diversification has extended to the *addressees of legal norms*, including non-territorially based and non-state actors even in traditional areas of international law such as

sanctions, the use of force or the regulation of foreign investments. In sum, globalization has led to the diversification and proliferation of legal regimes - many of them non-territorially based, non-territorially made and non-territorially aimed – rather than to their convergence and unity.

But the dissociation between legal order (*Ordnung*) and its localization (*Ortung*) is not only evident in the new legal realities of globalization escaping the standard accounts of international law, but also if we take as standpoint the sovereignty of States and the way the latter is modelled and regulated in contemporary international law. *Pace* Schmitt, territory is no more up for grabs in contemporary international law due to the emergence of peremptory norms, such as the prohibition to use force to acquire territory and the principle of self-determination. The *uti possidetis juris* principle is nowadays considered a principle of general international law and the territorial configuration of the earth is determined by borders established mainly by colonial powers in the 19th century and by multinational States in the course of the 20th century. Evidence of that is that most territorial disputes before the ICJ concern the interpretation of colonial treaties and colonial administrative boundaries.

Even in the creation of new sovereign States, international law's diminished concern for territory, is matched by an increasing preoccupation with the governance of people. For instance, the 61 pages of the Ahtisaari Plan for the Comprehensive Settlement of Kosovo detail to an unprecedented extent the democratic and pluralist governance of Kosovo, but feature one paragraph only dealing with the territory of the new State - with an entire annex devoted to the internal borders among municipalities. Today the territorial question revives in Kosovo "on the ground", with the northern municipalities still seeking *Enosis* with Belgrade, but international law does not provide answers apart from the ritual reiteration of the principle of territorial integrity (leading local actors to play a zero-sum game oscillating between the territorial integrity of Serbia and the territorial integrity of Kosovo). Even the recent admission of Palestine as non-member State in the UN shows in the resolution adopted by the General Assembly the tentative promotion of a State based on the right to self-determination of the Palestinian people, rather than the recognition of a territorially bound political community, still undermined by internal divisions and by Israel's occupation of the West Bank. The General Assembly seems to recognize the sovereignty of the Palestinian people, rather than the sovereignty of the State of Palestine. Rolando Quadri's writings are, in this respect, visionary and worth undusting: he conceived territory neither has an object, nor as an essential attribute of state sovereignty, but as one of the (spatial) ambits in which sovereignty displays its functions and it is hence protected by international law.^[5]

Also the evolution of the notion of jurisdiction in international human rights regimes points to the increasing deterritorialization of international law. This evolution is particularly interesting as international human rights law is one of the distinctive features

of contemporary international law, though an area which is not *per se* characterised by “fuzzy normativity” and where traditional concepts of public international law are heavily used, for instance in matters of treaty interpretation, or in matters of attribution of wrongful conduct. Furthermore, the State maintains a prominent role in setting and implementing international human rights standards; as cogently argued,^[6] the protection of fundamental human rights has become one of the distinctive attributes of State sovereignty in contemporary international law.

The notion of jurisdiction for the purpose of Art. 1 of the ECHR and the way it has been interpreted by the ECtHR in relation to the extraterritorial application of the Convention exactly shows the shift from territorially-defined legal competence to functional competence. The case law has moved away from a territorial, spatial notion of jurisdiction, which found its celebration in the concept of *espace juridique* elaborated in *Loizidou* and confirmed in the controversial *Bankovic* decision, to a functional notion of extraterritorial jurisdiction. Namely, the ability and power of the State, regularly and not occasionally exercised, to affect the enjoyment of rights under the Convention.^[7] Most illustrative of the latter development is the *Al-Skeini* judgment, where the Court has determined the British jurisdiction for the purpose of the ECHR over a number of Iraqi insurgents active in Basra on the basis that “the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the *public powers normally to be exercised by a sovereign government* and [...] *through its soldiers engaged in security operations in Basrah during the period in question*” (emphasis added). A functional notion of jurisdiction is also evident in the case law of the Court concerning Transdniestria. In the *Ilascu* case, the Court has identified a number of positive obligations of Moldova towards its citizens resident in Transdniestria, despite the lack of territorial control over the region; in the more recent *Catan* case, the Court has ascertained Russia’s responsibility for violations of Art. 2 of Protocol I, despite the admission of Russia’s diminished control and influence over Transdniestria. The point here is made not to deny the ambit of jurisdiction as an attribute of state sovereignty, which remains under normal circumstances territorially-presumed, nor that international law is necessarily making room for new permissive rules expanding the freedom of action of the State outside its borders; but that the spatial model is unable to explain and capture the most important respect, that of extraterritorial activities, in which the notion of jurisdiction for the purpose of the Convention becomes central (and controversial) to mechanisms of accountability for alleged violations of human rights.

In sum, the shift from territorial boundaries to functional boundaries in contemporary international law is increasingly evident. Of course, this should not detract us from equally observing that territory retains in international law great importance for developing countries, whose natural capital is inextricably linked to their exercise of territorial sovereignty and key to their development. Moreover, despite the fact that the earth is not up for grabs as it was 200 years ago, an interesting revival in territorial claims may be seen in the Arctic region, with the Ilulissat Declaration issued by the Arctic Council in 2008 manifesting interesting similarities with the Berlin Final

Declaration of 1885, through which European States undertook to carve up Central Africa. In addition to that, international law as we knew it, typical of the territorially-based Westphalian system, has an important judicial stronghold in the International Court of Justice. Of the 12 contentious cases currently pending before the ICJ, eight are characterized by a clear territorial dimension. One could possibly argue that the ICJ is one of the few places left where the Westphalian model of international law survives and the Court's state-centric views expressed in the *Wall* and *Kosovo* advisory opinions reinforce that argument. But the overall impression is that the ICJ's central influence over the elaboration of international law is diminishing and today its contribution is just one of the contributions to the sedimentation of a pluralist international legal order.

While the present remarks wish to highlight a tentative description of a significant evolution of contemporary international law, the normative agenda that lies behind such process needs further elaboration. Schmitt may have been a visionary in detecting the seeds of deterritorialization in the heydays of the nation State; but, to put in Hegelian terms, he missed the "spirit" of the history to come in believing that the political dimension should be realized within a model similar to that that had brought wars and misery to the peoples of Europe and oppression to non-European peoples. The distinctive challenge for contemporary international law is not return to a territorial order serving the interests of a group of States and of their elites, but to adequately pursue a functional, global order, which, on the one hand, protects and promotes basic public goods and fundamental human values, on the other, accommodates constitutional pluralism and cultural diversity. The debate between constitutionalist visions, pluralist theories and the GAL project has touched upon the significance of territory in contemporary international law, only to stress that the era in which territory was one of the organizing concepts of international law is long gone. Yet the question of the legitimacy of an international law without or with little anchorage to territory remains largely unanswered.

* The present Reflection is based on a paper presented under the title "Deterritorializing International Law: some Introductory Remarks" at the 10th Young International Lawyers Research Forum, "A Lackland Law: Territory, Effectiveness and Jurisdiction in International and European Law", held in Catania, Italy, 24-25 January 2013.

^[1] D. Kahn, "Territory and Boundaries", in Fassbender, Peters (eds.), *The Oxford Handbook of the History of International Law*, OUP, 2012, 225-249.

^[2] C. Brölmann, "Deterritorializing International Law: Moving Away from the Divide between National and International Law", in Nollkaemper, Nijman (eds.), *New Perspectives on the Divide between National and International Law*, OUP, 2007, 84-109.

^[3] G. Teubner, P. Korth, "Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society", in Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, OUP, 2010, 23-54.

^[4] F. Ortino, M. Ortino, "Law of the Global Economy: In Need of a New Methodological Approach?", in Picker, Bunn, Arner (eds.), *International Economic Law: the State and Future of the Discipline*, Hart Publishing, 2008, 89-106.

[5] R. Quadri, *Diritto internazionale pubblico*, Liguori ed., 5th ed., 1968.

[6] A. Peters, "Humanity as the A and Ω of Sovereignty", 20 *EJIL* (2009), 513-544.

[7] Legal doctrine on the extraterritorial application of the ECHR has considerably grown in the last few years. For an early elaboration of the functional notion of jurisdiction, see P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Giappichelli, 2002.