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Boundaries under International Law

From Theory to Contemporary Forms of Borders

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Abstract

In seguito agli ultimi avvenimenti dello scorso secolo, tra i quali la caduta del muro di Berlino rappresenta un emblema fra tutti, la comunità internazionale sembrava poter assistere ad una nuova epoca di globalizzazione in cui i confini tra stati sarebbero apparsi ridondanti, se non addirittura obsoleti. Alcuni studiosi di quegli anni avevano immaginato un sistema di relazioni internazionali in cui allo stato come istituzione avrebbe perso parte della sua centralità nel sistema di relazioni internazionali e, talvolta sovranità, a favore di moderni sistemi di cooperazione tra stati, come ad esempio l'Unione Europea. Tuttavia, in seguito agli attacchi terroristici dell'11 settembre 2001 e ad un conseguente esacerbarsi delle misure di sicurezza implementate dagli stati, possiamo affermare che l'utopia di un mondo senza confini, di un "borderless world" come è stato definiti da molti, risulta una visione totalmente differente rispetto alla struttura contemporanea del sistema delle relazioni internazionali.

È possibile affermare che viviamo in un mondo dove il confine risulta essere ancora un'istituzione assai presente e rilevante. Il tema del confine è spesso argomento centrale di molti dibattiti, discussioni e notizie riguardanti questioni come dispute internazionali, migrazioni, commercio e sfruttamento di risorse naturali.

Più precisamente, per quanto concerne il diritto internazionale, uno dei quattro requisiti necessari alla determinazione della personalità giuridica internazionale di uno Stato secondo la Convenzione di Montevideo sui diritti e i doveri degli Stati (1933) è quello di possedere un territorio *definito*. Da qui deriva la rilevanza del concetto di "confine" secondo il diritto internazionale. Il confine rappresenta infatti la linea che determina l'area soggetta alla sovranità territoriale di un certo Stato. Tale linea confinaria è di fondamentale importanza in quanto legittima e definisce l'esercizio della sovranità territoriale degli Stati.

L'obiettivo del seguente elaborato è quello di illustrare innanzitutto quali sono le caratteristiche di questa istituzione internazionale, la sua storia e le sue evoluzioni contemporanee.

La tesi esplora in primo luogo il significato di confine secondo il diritto internazionale attraverso un'analisi della sua evoluzione storica, del processo di delimitazione e delle norme e trattati che proteggono la sua stessa esistenza. Da questo primo capitolo si comprende l'attuale importanza del confine secondo il diritto internazionale. Nonostante alcuni studiosi ne abbiano teorizzato il suo declino, la sua posizione emblematica all'interno del diritto internazionale contemporaneo è prova della sua evidente rilevanza soprattutto per quanto riguarda il suo stretto rapporto con la definizione di sovranità nazionale. Inoltre, esistono diverse e fondamentali norme e convenzioni che proteggono la stabilità e protezione degli stessi confini.

Il secondo capitolo è incentrato sulla relazione tra migrazioni e confini. In questa parte, il confine viene esaminato come strumento di controllo della mobilità delle persone: il confine si trasforma in filtro che seleziona il flusso degli individui che lo attraversano. Successivamente l'attenzione viene posta sulle modalità e i casi in cui gli stati possono escludere oppure espellere stranieri dal proprio territorio nazionale. Inoltre si analizzeranno alcuni casi in cui il confine territoriale corrisponde anche con la presenza di un muro. A questo proposito, numerose sono le sfide del diritto internazionale per quanto riguarda il rispetto dei diritti umani nei confronti degli individui che tentano di attraversare queste "border zones" con un elevato rischio di subire violenze e altre forme di atrocità.

Nel terzo ed ultimo capitolo, viene parzialmente abbandonato il punto di vista del diritto internazionale, a favore di più flessibili e evolute forse di confini che sono emerse nel corso degli ultimi decenni. In questa parte, verranno esaminati quei confini che non rispettano la definizione data dalla Convenzione di Montevideo sui diritti e i doveri degli Stati (1933): i confini sono mutati, hanno modificato la loro posizione, forma e persino significato. I confini si sono evoluti, si sono spostati dalle classiche linee di demarcazione: gli individui ogni giorno percepiscono il confine al di là e al di qua della linea territoriale convenzionale. In particolar modo, viene analizzato un caso in cui un gruppo di potenziali richiedenti asilo entra in contatto, seppur virtuale, con il confine dello stato di destinazione preventivamente, ovvero ancora prima di creare

un vero e proprio contatto con il confine. I confini contemporanei inoltre possono essere definiti come polisemici in quanto talvolta assumono significati differenti per diversi gruppi di individui che tentano di attraversarli. In particolare la parte conclusiva del capitolo di occuperà di cercare di illustrare come il confine viene vissuto diversamente dalle donne, come categoria di genere. L'esame di queste nuove forme di confine risulta in un'ulteriore prova del sull'impossibilità di assistere alla creazione di un "mondo senza confini" dato il sistema odierno delle relazioni tra Stati. Il confine convenzionale non è destinato ad estinguersi, anzi, viene affiancato da nuove evoluzioni altrettanto rilevanti e sempre più presenti nella quotidianità degli individui.

CHAPTER 1: BOUNDARIES UNDER INTERNATIONAL LAW

The aim of this chapter is to examine how the border has traditionally been conceived and defined in international law. Firstly, an historical overview of the development of the concept of border will be presented. Secondly, this chapter will analyze the pivotal position boundaries occupy in international law. Lastly, the final section of this chapter will deal with the phases related to the creation of boundaries.

1.1 Definitions

In *Oppenheim's International Law,* international boundaries are defined as "the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea".[1] In this first statement, it results that boundaries are *imaginary lines*, hence artificial constructions created by the international legal system. Shaw further explains that these imaginary lines are the inescapable "product of political events [and] human action" and for their very nature, they are all artificial.[2]

Aside from this more geographical definition, boundaries are considered of crucial relevance in international law as they represent the limits within which states can exercise their exclusive jurisdiction. Thus boundaries delineate "the territorial framework within which [the state] sovereignty may be exercised exclusively".[3] The relation between state sovereignty and territorial boundaries will be explained further on in this chapter.

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[1] R. JENNINGS AND A. WATTS (eds), "Oppenheim's International Law" (9th edition), 1992.
[2] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 77. Available at https://doi.org/10.1093/bybil/67.1.75
[3] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 140.

Before going into further details, the following terms should be clarified. Boundary, border and frontier are often improperly employed by media and usually considered as synonyms for one another. The following distinction is the most widely accepted among border scholars but there still exist minor differences. Conventionally, when scholars use the term *boundary*, they precisely refer to a sharp, unambiguous and clearly definite line. On the other hand, border and frontier identify different kind of areas. More precisely, a *border* (or *borderland*) is a zone that form the peripheral part of the state and that is limited on the outer side by the national boundary. There is no set limit for the extent of any particular borderland: they can exist on one side of the border but not on the other, they may extend for large distance on one side but are much more limited on the other.[4] Whereas the term *frontier* is commonly used to describe a zone of variable width, where one state ends and another begins but the exact limit is not precisely fixed.[5] In the past, when clear boundaries and a modern state system were not risen yet, frontiers separated tribes, then kingdoms and empires. Since they were not under the direct control of either side, they were often inhabited by outlaws and refugees. In particular, during the creation and expansion of the United States of America, the term was employed to describe that fringe settlement within the country itself, or better the "distinction between occupied and controlled land and unoccupied and uncontrolled land".[6]

When thinking about international boundaries, most people typically envision lines running through lands and dividing states, i.e. territorial boundaries. However, it is worth mentioning that there exist international boundaries on sea too, also called *maritime boundaries*, that present distinct characteristics. For example, land boundaries are constituted of one single line whereas in the sea, the 1982 Convention on the Law of the Sea allow states to delimit internal waters, territorial waters, and seabed boundaries. Moreover, maritime boundaries are considered as more permeable than land boundaries. In fact, the master of a vessel has the right of

[4] DORIS WASTL-WALTER (ED), "Ashgate Research Companion to Border Studies", Ashgate Publishing limited, 2001, p.37-38.
[5] J. S. REEVES, "International Boundaries", The American Journal of International Law, Vol. 38, No. 4, 1944, p. 533.
[6] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p.12.

innocent passage through the territorial waters of a different country. When crossing a land boundary instead, there would be some kind of procedures to overcome before entering the foreign country. Finally, unlike land boundaries, maritime boundaries have never been the cause of wars, even if they might have triggered some incidents. On the other hand, states often went to war in order to achieve territorial adjustments.[7]

1.2 Historical Development of International Boundaries

A recurrent misconception about the contemporary model of organization of political space, which is based on independent states possessing sovereignty over populations and resources within their territory, is often assumed to have always been the norm. Though boundaries as we know them today did not exist since the beginning of civilization, or, rather, there existed different forms of territorial delimitation.

Reeves found the first description of a "primordial international boundary" in the work of Pausanias, the ancient Greek geographer and writer. Pausanias wrote in his *Description of Greece* that Theseus had erected a column with two inscriptions in order to divide Peloponnesus and Attica: on one side he ordered to inscribe "This is not Peloponnesus, but Ionia" and on the other side "This is the Peloponnesus, but not Ionia". This column can be considered as an international boundary that marked the division between Greek states.[8]

When we come to the Roman Empire, we imagine it to have been a highly centralized structure with a clear vision of what their external borders would be. The famous Hadrian's Wall, composed by a network of towers and walls in Northern England, could be interpreted as boundary that marked the external border of the Roman Empire. However, this wall together with China's Great Wall were more likely used by the imperial troops as a platform for controlling territory (on both sides of

[7] Ibid p.13-14.
[8] J. S. REEVES, "International Boundaries", The American Journal of International Law, Vol. 38, No. 4 1944, p. 534.

the wall) and regulating the movement of people and goods. Thus, it is more accurate to think that these empires had more "fluid" territories rather then clearly fixed boundaries.[9]

In the Middle Ages a completely different form of organizing and controlling territory emerged. During this time, Europe was not formed by different sovereign states but, rather, it was organized around feudalism: "a series of personal relationships, together with land holding as a basis for personal service".[10]In other words, the feudal system was a form of political organization working on privileges and responsibilities between the king, or the lord, and vassals. Kings assigned to their vassals the right to a portion of the king's land and, in exchange, vassals pledged their allegiance to the king and promised their military support. [11]Rather than definite boundaries, these period was characterized by the presence of frontiers, zones situated in the outmost part of the kingdoms.[12] Thus the feudal system, based on overlapping jurisdictions and indefinite boundaries, did not need sharp limits "so long as taxes were collected, services rendered, and oaths fulfilled, especially in sparsely populated areas"[13]. Reeves added that once centralized authorities of sovereign states emerged in Europe they started to make provisions in order to protect their frontiers.[14]

It is then correct to date the birth of international boundaries to the establishment of the modern state system. During this time, the previous form of organizing political territory were gradually substituted by more rigid notions of territorial delimitation. Conventionally, the Peace of Westphalia in 1648 represented one of the most significant event for international law first, and consequently for the creation of conventional boundary lines. By signing this treaty, the major European

[9] A. C. DIENER AND J. HAGEN, "Borders: A Very Short Introduction", Oxford University Press, 2012, pp. 33-34.
[10]J. S. REEVES, "International Boundaries", The American Journal of International Law, Vol. 38, No. 4 1944, p.536.
[11]A. C. DIENER AND J. HAGEN, "Borders: A Very Short Introduction", Oxford University Press, 2012, p. 38.
[12]J. S. REEVES, "International Boundaries", The American Journal of International Law, Vol. 38, No. 4 1944, p.536.
[13]See note 12.
[14]J. S. REEVES, "International Boundaries", The American Journal of International Law, Vol. 38, No. 4 1944, p. 538.

states at that time (Spain, France, Sweden, The Holy Roman Empire and the Dutch Republic) agreed to recognize their exclusive sovereignty over specific territories. Thus, this mutual recognition obliged monarchs to mark the defined boundaries of their territories in order to better differentiate resources and populations under their authority from those who were not. [15]With colonialism, the modern state system which was born in Europe, was subsequently exported to the rest of the world. From the peace of Westphalia to the present day, the definition of sovereign state that emerged from this treaty still survive, even if sometimes challenged, as one of the pivotal concept of international law.

1.3 The Importance of Boundaries in International Law

1.3.1 Boundaries, States and Sovereignty

The concept of boundaries resides at the very core of the international legal system. First of all, boundaries constitute one of the main characteristics a state should be endowed with in order to be recognized as person of international law. As provided by article 1 of the Montevideo Convention on Rights and Duties of States (1933):

> *"The state as a person of international law should possess the following qualifications:*
> *(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states".*

Even though this is a convention which has been ratified by no more than 16 countries, in fact, it codifies principles and norms belonging to customary law and, for this reason, the treaty under exam does not merely apply to states parties, but to all

[15]A. C. DIENER AND J. HAGEN, "Borders: A Very Short Introduction", Oxford University Press, 2012, p.41.

the other subjects of international law.[16] From this treaty we understand that, under international law, boundaries have the function to identify which entities are states from those that are not. Besides this simple identifying function, boundaries are deeply connected to the concept of sovereignty. As Kesby powerfully stated, in our current international system, based on sovereign equality and independence of states, boundaries are "integral to sovereignty"[17]. Before proceeding on the analysis of the connection between boundaries and sovereignty, the following concepts should be clarified.

The characteristics of statehood mentioned in the Montevideo Convention on Rights and Duties of States (1933) do not constitute an exhaustive list of all the requirements to be met for an international entity to be identified as a state. Over and above the aforementioned qualifications, the concepts of sovereignty and independence are equally considered as essential requirement of statehood.

Sovereignty can be intended in two distinct ways. Externally, sovereignty means a state's independence from and legal impermeability in relation to foreign powers and that a state is able to enter into relations (treaty making, receiving diplomats, enjoys immunities) with other states.[18] In other words, state sovereignty in contemporary international law denotes the legal status of a state that is independent from the jurisdiction of a foreign state or from foreign law, with the exception of public international law. In the event a foreign government exercises power over the state's territory, that would be considered as an internationally wrongful act under international law. Even though the state possesses sovereignty inside its territory, it can be possible that the territorial sovereign grants consent to another subject of international law to exercise jurisdiction on the territory (or in part of it) concerned.[19] This is the case of the creation of military basis outside a state's

[16] M. MIYOSHI, "Sovereignty and International Law", IBRU Conference on The State of Sovereignty, 2009, retrieved from https://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf.
[17] A. KESBY, "The Shifting and Multiple Border and International Law", Oxford Journal of Legal Studies, Vol. 27, No. 1, 2007, p.108.
[18] See note 16.
[19] R. BERNHARDT, "Encyclopedia of Public International Law, States, Responsibility of States, International Law and Municipal Law", Elsevier Science Publishers, 1988, p.425.

territory, but also that of the United Nations transitional authorities in Cambodia (1992) and Kosovo (1999), to cite a few.

On the other hand, internally, the concept of sovereignty stands for the supreme "authority possessed by a State to enact and enforce its law with respect to all persons, property and events within its borders"[20]. Obligations coming from public international law may sometimes restrain a state's freedom of action, without depriving it of its sovereignty as a legal status. Some of these obligations derive from international customary law in regard to the treatment of aliens[21]. For instance, there is the right to life and security of the person, including freedom from arbitrary arrest or detention. These norms form the so-called international minimum standard that, together with international human rights principles (which have almost entirely absorbed the minimum standards norms), regulate the behavior states adopt towards aliens.

Moreover, sovereignty ca be conferred to states only, in contrast with other subjects of international law or international organizations.[22]

Since the birth of the modern state system international law has highly priced the concept of independence referred to states. In particular, as it was stated by judge Huber in the international arbitral award regarding the *Island of Palmas Case*:

> *"Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."*[23]

Turning to boundaries, their importance lies in the fact that, in the international legal system, they have the purpose of demarcating the internal

[20] Retrieved from: https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/5-a-state-as-a-subject-of-international-law

[21] An alien is an individual who is not a national of the state in which he/she is residing.

[22] R. BERNHARDT, "Encyclopedia of Public International Law, States, Responsibility of States, International Law and Municipal Law", Elsevier Science Publishers, 1988, p. 408.

[23] Island of Palmas (the Netherlands v. United States) vol. 2, Reports of International Arbitral Awards 1928, p.838.

territory over which a state exercises its authority, that is, its territorial sovereignty.[24] The tight connection between boundaries and territorial sovereignty as also been stressed by the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case* (1910) with the following words:

> *"One of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminus with sovereignty"*.[25]

Since boundaries demarcate the territorial framework within which jurisdiction is established and exercised, act of state sovereignty are territorially entrenched and so restricted. The Chamber of the International Court better simplified this connection by stating that "to define a territory is to define its frontiers". [26]

1.3.2 The Protection of Boundaries in International Law

The current international legal system finds its basis in the concept of independent sovereign states. Notwithstanding the increase of importance of international organizations and despite the growth of human rights and environmental law, it is undeniable that the international law is still deeply rooted in the notion of territorial sovereignty. Thus, in a system constituted by hundreds of sovereign, independent and equal states, the stability of the international territorial order is of prominent importance.[27] This notion was reaffirmed in the Corfu Channel Case by the International Court of Justice declaring that "between independent

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[24] A. KESBY, "The Shifting and Multiple Border and International Law", Oxford Journal of Legal Studies, Vol. 27, No. 1, 2007, p.108.
[25] North Atlantic Coast Fisheries Case (United Kingdom V. United States), Permanent Court of Arbitration, vol. 11, Reports of International Arbitral Awards (1910), p.180.
[26] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 77.
[27] Ibid at 81.

States, respect for territorial sovereignty is an essential foundation for international relations".[28]

The international order which came into existence after the Second World War was based on the inviolability of national territory, so as to maintain international peace. The core principle characterizing this order is the prohibition of the use of force against the territorial integrity or political independence of a state.[29] This principle is described at article 2 of the United Nations Charter as follows:

> *"The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.*
> *1. The Organization is based on the principle of the sovereign equality of all its Members.*
> *[…]*
> *4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."*[30]

Since boundaries mark the lines beyond which the afore-mentioned principle of non-intervention will be breached[31], the protection of the inviolability of boundaries represent a pivotal aspect for the international system. Furthermore, the General Assembly of the United Nation introduced in its Declaration of Principle of International Law (1970) the duty of states to "refrain from the threat or the use of force to violate the existing international boundaries of any state".[32] It must be underlined that a violation of the boundaries of a state could appear as an act of aggression. More precisely, according to the General Assembly Resolution on the

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[28] ICJ Report 1949, 4 at 35.
[29] R. MCCORQUODALE, R. PANGALANGAN, "Pushing Back the Limitations of Territorial Boundaries", European Journal of International Law, Vol. 12, No. 5, 2001, p. 870.
[30] UN Charter, Article 2.
[31] See note 24.
[32] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), 1970.

Definition of Aggression (1974), an aggression is defined as the use of armed forced by a state against the sovereignty, territorial integrity or political independence of another state.[33]

It cannot be denied then that the international legal system highly prizes the stability and the protection of boundaries. Moreover, international law overflows with principles, treaties and norms aiming at reinforcing boundary stability. First of all, once created with the consent of the relevant States and in accordance to international law, boundaries are protected and assumes finality and permanence. As Shaw explains, "what is established on the basis of the consent of the States concerned can only be undone or modified by the exercise of such consent". He then specifies that modifications can happen, provided that the change takes place in a regulated manner and that it is not so easily accomplished for territorial modifications may cause political disruption. [34] In this context, the Court of Arbitration affirmed that "the re-opening of the legal status of the boundaries of a State may give rise to very grave consequences, which may endanger the life of the State itself".[35]

Another corollary deriving from the principle of the stability of boundaries is that once boundaries are established or confirmed in a treaty, an objective reality is formed and that will survive the demise of the treaty itself. This principle called by Shaw the "principle of the objectification of boundaries" is extremely peculiar as it allows for the effect of a treaty to continue beyond the treaty itself.[36] In the Libya/Chad case, the International Court established that the Franco-Libyan Treaty of 1955 defining the boundary between Chad and Libya was a fact that had legal life of its own, regardless of the fate of the Treaty itself.[37] It also reiterated that "a boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy".[38] In addition to that, two other principles are related to the

[33] R. BERNHARDT, "Encyclopedia of Public International Law, States, Responsibility of States, International Law and Municipal Law", Elsevier Science Publishers, 1988, p. 484.
[34] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p.82-83.
[35] Dubai v. Sharjah Border Arbitration (1981), 91 ILR 543, 578.
[36] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 88.
[37] M. N. SHAW, "People, Territorialism and Boundaries", European Journal of International Law, No. 8, 1997, p. 490.
[38] Territorial dispute Libya v. Chad, ICJ Reports (1994) 6, at 37.

objectification of boundaries aiming at the protection of the inviolability of boundaries. Firstly, article 62 of the Vienna Convention on the Law of Treaties (1969) provides that a party to a treaty cannot invoke as a ground for terminating or suspending the operation of a treaty the *rule of res sic stantibus*[39] if the treaty in question establishes a boundary. Secondly, Article 11 of the Vienna Convention on Succession of States in Respect to Treaties states that "a succession of a state does not as such affect: (a) a boundary established by treaty"[40].

The principle of stability can also serve as a balancing norm aiming at individuating which competing norms may be applicable to a given situation.[41] It can be affirmed that, under public international law, the principle of stability of boundaries possesses some kind of primacy over other principles. The crucial importance of the need for stability in international relations has been confirmed in the jurisprudence of international tribunals by their preference for protecting boundaries established through the principle of uti possidetis over the colliding right of self-determination.[42] At this rate, it is necessary to offer a brief explanation of the principles cited above.

The principle of self-determination is enshrined in Articles 1 and 55 of the UN Charter as a fundamental concept for the developing of friendly relations between states. It was originally applied during the process of decolonization, where new states gradually emerged as independent from the previous colonial empires. Self-determination was defined as the right of all people to "freely determine their political status and freely pursue their economic, social and cultural development".[43] The principle contributed to the decolonization process by imposing the obligation to

[39] It literally translates into 'in these circumstance', and in public international law refers to the doctrine that considers a treaty as being no longer obligatory if there is a material change in circumstances. Collins Dictionary of Law. (2006). Retrieved from https://legaldictionary.thefreedictionary.com/rebus+sic+stantibus

[40] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 90.

[41] Ibid at 93.

[42] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 144.

[43] Common Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966, No. 14531, 993 UNTS (1976) 3 (ICESCR).

colonial powers to grant independence to decolonized states.[44] The right of self determination fuelled the idea that the acquisition of territory by conquest was illegal and not in the interest of states. In the arbitral award of the Island of Palmas case, it is declared that sovereignty can be acquired by "effective occupation" as an evidence of peaceful and continuous displays of actual sovereign powers within the boundaries of the territory, and not by the original method of acquisition of territory represented by conquest.[45] Moreover, the principle was also applied to reject the treatment of indigenous people as having being of no consequence for sovereignty. In the Western Sahara Opinion of the International Court of Justice, the Court found that Western Sahara was inhabited by peoples, though being nomadic, who were socially and politically organized in tribes and under chiefs competent to represent them and thus, the territory was not *terra nullius* at the time of colonization by Spain.[46] In the East Timor case, the International Court of Justice recognized the erga omnes character of self-determination principle and added that it represented "one of the essential principle of contemporary international law".[47]

The principle of uti possidetis is of prominence importance for the determination of territorial boundaries. It was applied during the period of decolonization first to south America, but then employed in other cases of states emerging from colonial control. In particular, the principle provides that new States will come to independence with the same borders established by the prior colonial administration.[48] In fact, when the process of decolonization began in Latin American, those states adopted this principle in order that the dismantling of the Spanish empire would not leave any *terra nullius*[49] that could have become the object of further

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[44] M. N. SHAW, "People, Territorialism and Boundaries", European Journal of International Law, No. 8, 1997, p. 480.
[45] R. MCCORQUODALE, R. PANGALANGAN, "Pushing Back the Limitations of Territorial Boundaries", European Journal of International Law, Vol. 12, No. 5, 2001, p. 874.
[46] Ibid. and Western Sahara (Advisory Opinion) in Max Planck Encyclopedia of Public International Law, retrived from http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e233.
[47] See note 44.
[48] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 97.
[49] The term refers to the principle by which a nation may assert control of an unclaimed territory. This concept was employed as a justification for the conquest mode of acquisition

territorial disputes. [50] In article 3 of the 1963 Charter of the Organization of African Unity, members supported for the principle of uti possidetis by promising "respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence." After being codified in the Resolution 16 of the OAU Conference of Heads of State and Government at Cairo in 1964, the African Union later adopted the concept of uti possidetis as one of its core principles.[51]

It is clear from this description that the fundamental aim of the principle of uti possidetis is to achieve the stability of state boundaries and thus maintain international peace and security. This is because the very international system's underlying concern still focuses on the the preservation of the state and its boundaries. The pivotal importance of the principle of stability in international law has led to a submission of other principle (such as self-determination principle) to the former. As a result, the principle of self-determination was forced to yield repeatedly to the primacy of the principle of stability with the purpose of preserving inter-state peace and security.[52] So, as powerfully described by McCorquodale and Pangalangan:

> *"when the principle of uti possidetis collides with the right of self-determination, or, stated otherwise, when the claims of peace among states clashes with the claims of justice by peoples, then the international legal system has consistently allowed the claims of peace to prevail".* [53]

In the Declaration of Principles of International Law, the same international instrument that proclaimed the right to self-determination of people, also restricted its application by placing the principle in a hierarchically inferior position in respect to territorial integrity:

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of territory. States invoking this principle would assume the absence of any legal sovereign or "owner" of a given territory.

[50] See note 44.

[51] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 143.

[52] See note 45.

[53] R. MCCORQUODALE, R. PANGALANGAN, "Pushing Back the Limitations of Territorial Boundaries", European Journal of International Law, Vol. 12, No. 5, 2001, p. 875.

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[54]

Furthermore, the International Court of Justice recognized the principle of *uti possidetis* in the Frontier Dispute Case (Burkina Faso/Mali) (1986) as a general principle of international law and also presented the following observation:

> *"At first sight [uti possidetis] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice."*

And the the Court added:

> *"The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples".*[55]

The international jurisprudence did not allow the principle of self-determination to dethrone the principle of stability and remove it from its position of supremacy. So the Court, as illustrated in these cases, has once again preferred peace over justice, or, to put it in another way, boundaries over people. [56]However, this preference of international law did not go unnoticed by some of the affected states and it

[54] See note 32 and 43.
[55] Frontier Dispute Case (Burkina Faso/Mali), ICJ Reports (1986) 554, at 566-567.
[56] See note 53.

consequently generated criticism with regard to the application of the *uti possidetis* principle. This position is all the more justifiable since the application of such principle, whose focus is the maintenance of peace, has not prevented the diffusion of wide-scale armed conflicts over boundaries in Africa and elsewhere. In this respect, President Nyerere of Tanzania criticized the Organization of African Unity's adoption of this principle of uti possidetis stating that : 'we must be more concerned about peace and justice in Africa than we are about the sanctity of the boundaries we inherit. [57] Some critics have also found that *uti possidetis* is a retrospective principle because the consequences of the adoption of this principle operate inequitably and in favor of the colonial power's divisions of territory. Furthermore, the delimitation of those previous colonial boundaries occurred almost entirely in the ignorance of the cultural and geographical knowledge of the territories concerned. [58]

Even though uti possidetis has been occasionally considered a backward-looking principle, there have been relatively recently application of the concept beyond the colonial context. In particular, the principle has served as an international instrument for protecting stability in the context of the dismantling of the former USSR and, more recently, in the collapse of former Yugoslavia.[59] In the second case, the European Community Arbitration Commission on Yugoslavia (Badinter Commission) employed the concept with regard to to the right of the Serbian population of Croatia and Bosnia-Herzegovina to self-determination. In Opinion n. 2, adopted in 1992, the Commission proclaimed that "the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise".[60] The question was once again addressed in Opinion n. 3, where the Commission was asked whether the internal boundaries between Serbia and Croatia and Bosnia-Herzegovina

[57] R. MCCORQUODALE, R. PANGALANGAN, "Pushing Back the Limitations of Territorial Boundaries", European Journal of International Law, Vol. 12, No. 5, 2001, p. 876.
[58] Ibid. at 876-877.
[59] From the breakup of the former Yugoslavia, the following seven state were created in different times: Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia and Slovenia.
[60] Badinter Commission, Opinion n. 2, (1992), 92 ILR at 168.

respectively constituted boundaries in terms of public international law.[61] The Badinter Commission gave the following response:

> *"Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principles of respect for the territorial status quo and, in particular, from the principle of uti possidetis. Uti possidetis, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Curt of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali."*[62]

The decision of the Badinter Commission must have considered necessary to apply the principle in a strict way so as to prevent the attacks by one part of the former Yugoslavia upon another.[63]

Notwithstanding all that has been described so far, it is worth mentioning that stability, as was put by Shaw, can never be the sole or even the dominant principle in international affairs. This is because new principle arises in response to contemporary challenges that constantly occur in the international system. However, the principle of territorial stability will remain at the very core o the international system until the system itself ceases to be founded on the fundamental concept of sovereign states. [64]

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[61] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 109.
[62] Banditer Commission, Opinion n. 2, (1992), 92 ILR at 171.
[63] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 144.
[64] M. N. SHAW, "The Heritage of States: The Principle of Uti Possidetis Juris Today", British Yearbook of International Law, Vol. 67, Issue 1, 1997, p. 84.

1.4 The Establishment of Boundaries

With very few exceptions,[65] almost the entire land areas of the world belong to the territory of states. The world's territorial surface has been divided by states through the process of drawing of boundaries. However, the conditions and the times through which the distribution of those territories had occurred varied from state to state, but also, and even more prominently, from continent to continent. In broad terms, the history of the creation of boundaries is extremely different when considering European boundaries as opposed to American or African boundaries. The former resulted from a long and complex process of changing territorial allocation characterized by the presence of wars, inheritance or consensual agreements. In respect to crucial agreement in the history of the creation of boundaries, the following multilateral peace agreements are worth mentioning: the treaty of Utrecht (1713), the Vienna Congress (1815), the Paris Peace Treaty (1856), the Berlin Congress (1878), the Treaties after World War I and World War II. The current boundaries of Africa and America, are for the most part a product of the delimitations originated during the period of European colonial expansion and, for this very reason, their existence is relatively brief in contrast to that of European boundaries. In Asia, on the contrary, the current international boundaries are the outcome of both the influence of colonial conquest and that of historical roots and traditions of ancient Asian political organization and religious or ethnic divisions. [66]

1.4.1 The Legal Basis for the Establishment of Boundaries

There are few important rules in international law that govern the drawing of international boundaries. The first one is constituted by the principle providing that

[65] Unclaimed territories in Antarctica are still considered as *terra nullius*, which means a territory which has never been subject to the sovereignty of any state.
[66] R. BERNHARDT, "Encyclopedia of Public International Law, States, Responsibility of States, International Law and Municipal Law", Elsevier Science Publishers, 1988, p. 17.

the determination of a boundary falls within the exclusive sphere of jurisdiction of the bordering States. The corollary stipulates that boundaries are created by agreement between bordering states which usually translates into an international treaty.[67] As previously explained, the treaties establishing boundaries are protected by international law through different instruments. For example, article 62 of the Vienna Convention on the Law of Treaties (1969) provides that a party to a treaty cannot invoke the rule *of res sic stantibus* if the treaty in question establishes a boundary.

In current international law, the delimitation of the territory of states is usually the product of a treaty (or treaties) between adjacent states. Before proceeding in analyzing the stages of the creation of a boundary with the instrument of an international treaty, the following situation must be taken in consideration. Firstly, in the absence of a treaty, the delimitation of international boundaries can derive from rulings by international courts or from arbitral awards. In the majority of cases, concerning states demand the solution of territorial disputes that are not easily resolved through negotiations. Always in a case of absence of a treaty, the delimitation of boundaries may be produced, even if it is extremely rare, by a binding decision of the UN Security Council. [68]

In respect of boundaries established by an international agreement, some scholars suggested that when two states resolve to create an international boundary, they will do so on the basis of two possible relationships. If, between the states, there is a relationship of equivalent power (political, economical, military), then this implies that neither state can coerce the other to accept an arrangement that disadvantages one of them. This, however, does not signify that the results in the division of territory and resources are always equal. It means instead that the parties in any negotiation regarded the outcome as being satisfactory. On the other hand, if the states possess unequal strengths, the state in the inferior position may be already prepared to accept results that will minimize the concessions it is obliged to make. In these case of disproportional powers, the proposal for boundary negotiations might even come from the "weaker" country. For example, in 1848 Mexico proposed boundary

[67] Ibid at 18.
[68] A. GIOIA, "Diritto Internazionale", Giuffrè Editore, 2015, p. 177.

negotiations to the United States with the hope that this would halt any further confiscation of Mexican territory. [69]

1.4.2 The Process of Boundary Making

> *"We have been engaged […] in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were."*[70]

These words pronounced by Lord Salisbury in 1890 are peculiar of the time when territorial boundaries were being drawn across the colonized world with little or no regard for preexisting different cultures or original modes of governance of the territories under exam.[71] This was, first of all, a sign of the lack of geographical knowledge of those who created them. As articulated by Reeves, American boundaries (as well as African ones) and their development depart from European boundaries because the former were delimited and agreed upon in the absence of accurate geographical information with regard to the territory through which those boundary lines passed.[72] This explains why those territory are characterized by a distinctive presence of boundary lines following lines of longitude or latitude. This concept is exemplified by Reeves who concluded that "the straight line boundary based upon latitude and longitude never follows, but always precedes, geographical knowledge. [73]

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[69] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 57-58.
[70] Lord Salisbury, speaking in 1890, as quoted in the Separate Opinion of Judge Ajibola, in Territorial Dispute (Libya v. Chad), ICJ Reports (1994) 6, at 53.
[71] R. MCCORQUODALE, R. PANGALANGAN, "Pushing Back the Limitations of Territorial Boundaries", European Journal of International Law, Vol. 12, No. 5, 2001, p. 867.
[72] J. S. REEVES, "International Boundaries", The American Journal of International Law, Vol. 38, No. 4, 1944, p. 541-542.
[73] Ibid.

It is commonly accepted that overwhelmingly the allocation of boundaries is achieved through diplomatic negotiations that are subsequently reflected in international treaties.[74] The negotiations will involve a team from each country. Before the negotiations begin, members of the team will be required to identify, as far as possible, all the information that will be useful to the case being presented, and all the facts that might assist the arguments of the other country. Such information includes, for example, comprehensive accounts of the borderlands' history, detailed population distributions of both countries, mineral deposits, settlements and defensive and offensive emplacements. It should be the responsibility of a map-librarian or cartographer to compile an atlas of all relevant maps produced by both countries and third parties. In addition, copies of all treaties related to territory in the vicinity of the area under consideration should be prepared. [75]

The procedure necessary for the creation of an international boundary is articulated in four steps: allocation, delimitation, demarcation and administration. It must be underlined that each one of these phases require the states interested in drawing the boundary to fully cooperate. Allocation refers to the political decision with regard to the distribution of territory. Then delimitation refers to the selection of a boundary site and its definition. This first two stages involve the actual drawing of lines on maps.[76]Demarcation instead, represent the actual marking on the ground[77]or the construction of boundary markers on the territory concerned. In 1907, Lord Curzon clarified the difference between these terms as follows:

> *"I use the word [demarcation] intentionally as applying to the final stage and the marking out of the boundary on the spot. Diplomatic agents and documents habitually confound the meaning of the two words 'delimitation' and 'demarcation', using them as if they were interchangeable terms. This is not the case. Delimitation signifies all the earlier processes for determining a*

[74] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 138.
[75] Ibid at 57.
[76] Ibid at 60.
[77] R. BERNHARDT, "Encyclopedia of Public International Law, States, Responsibility of States, International Law and Municipal Law", Elsevier Science Publishers, 1988, p. 20.

boundary down to and including its embodiment in a Treaty or Convention. But when the local Commissioners get to work it is not delimitation but demarcation on which they are engaged."[78]

Finally, the phase of administration consists of the maintenance of those boundary markers for as long as the boundary exists. [79] Moreover, this four stages are not to be passed through by all international boundaries. Sometimes, the original allocating line can be demarcated with no intervening delimitation. Then, in some cases, there could be more than one delimitation before demarcation occurred. There are also many international boundaries that have never been demarcated.[80]

In conclusion, in public international law several consequences flow once a boundary is established. Since boundaries define the internal territory over which a state exercise its authority, it follows that a clear delimitation of the very boundaries is necessary for the prevention of the stability of the international order. To cite Vattell (1758), "To remove every subject of discord, every occasion for quarrel, one should mark with clarity and precision the limits of territories".[81]

[78] Lord Curzon as cited in V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 59.
[79] V. PRESCOTT, G. D. TRIGGS, "International Frontiers and Boundaries: Law, Politics and Geography", Martinus Nijhoff Publishers, 2008, p. 12.
[80] Ibid at 60.
[81] Ibid at 56.

CHAPTER 2: BOUNDARIES AS TOOLS FOR REGULATING MOBILITY

The following chapter is going to analyze the role played by international boundaries of states in regulating the international movement of goods, but more specifically, of people. At the very beginning of this chapter, a review of the international norms that currently govern the transnational flow of individuals is going to be presented. Subsequently, the second and third sections offer a display of different policies employed by states to control contemporary migration streams. Lastly, the final part of the chapter is going to illustrate some consequences produced by border management practices.

2.1 Regulation of Mobility

In his fairly recent work, Newman has vividly stated that boundaries represent the "agents through which processes of inclusion and exclusion are practiced" and through which the state is able to exercise its power.[1] More interestingly, it has also been noticed that boundaries are more likely to control mobility rather than territory.[2] In fact, boundaries are no longer conceived as mere lines created to secure the territory of a state, but they have grown into sorts of "manageable conduit[s], speeding up transit where necessary, blocking passage when required".[3] In that respect, there are several international

[1] D. NEWMAN, "Borders and Conflict Resolution", in *A Companion to Border Studies*, Chichester, Wiley-Blackwell, 2012, pp. 249-2.
[2] J. DÜRRSCHMIDT AND G. TAYLOR, "Globalization, Modernity and Social Change", Palgrave, 2007, p. 56.
[3] A. AMILHAT SZARY, "Placing the Border in Everyday Life", Border Region Series, Ashgate, 2014, p. 18.

conventions and national measures that are to be taken into account when states try to introduce new border management policies.

2.1.1 Failure of the "Right to Freedom of Movement"

To date, it is safe to affirm that international law has not yet recognized nor formulated a *right to mobility* or, as other visionaries have suggested and dreamed about, the "right to freedom of movement". Indeed, it is commonly known that people are not able to freely cross international boundaries of states and that national and international rules apply. However, according to some scholars, it is improper to completely exclude the existence of a right to freedom of movement. Instead, it is more correct to state that under international law it has emerged an *incomplete* form of the right to freedom of movement. It is considered as an incomplete, unaccomplished and defective right because in international law freedom of movement is understood as occurring within the borders of a state and exclusively as the right to leave any country and to return to one's own.[4] According to art. 13 of the Universal Declaration of Human Rights:

> *"(1) Everyone has the right to freedom of movement and residence within the borders of each state.*
> *(2) Everyone has the right to leave any country, including his own, and to return to his country".*[5]

From the article, it is evident that this very restricted form of the right to freedom of movement included in the Universal Declaration of Human Rights does not coincide with a wider right to cross all international boundaries or to be welcomed to whatever country one asks to be admitted to. On the other hand,

[4] A. KESBY, "The Shifting and Multiple Border and International Law", Oxford Journal of Legal Studies, Vol. 27, No. 1, 2007, p. 109.
[5] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.htm.

"it establishes a right to be free from arbitrary departure restrictions and an affirmative duty on states to provide travel documents".[6] Also, this does not represent an absolute right as a state has the power to preclude departure to its citizens under certain circumstances.[7] Accordingly, art. 13 undoubtedly enshrines the right to emigrate, but there is no evidence of the existence of a corresponding right to immigrate. This disproportionate relation between immigration and emigration reflects in what many human rights law scholars have called "the failure of the right to freedom of movement".[8] It is indeed a failure because, from the perspective of the individual, having the right to leave his own country is pointless as long as he or she is not able to easily enter another state. Thus, in practice, the right to leave one's own state is granted to individuals but, this same right to emigrate could be infringed as people may not be accepted by others countries.[9] In conclusion, since there is no right to enter a state other than one's own, persons who find that door closed or who seek to depart their home state but can find no other state to admit them, will not have the possibility to exercise their right to depart (or the right to emigrate), except, through unlawful channels. In particular, an individual will be able to exercise his right to emigrate only if he is able to individuate a country who is willing to admit him.[10]

Therefore, emigration and immigration are believed to "inextricably complement each other", but the Universal Declaration of Human Rights has ultimately failed to recognize a complete right to move.[11]

2.1.2 Exclusion of Aliens

[6] T. A. ALEINIKOFF, "International Dialogue on Migration N°3, International Legal Norms and Migration: An Analysis", International Organization for Migration (IOM), 2002, p. 26.
[7] Ibid at p. 26, "States may prevent departure, for example, to enforce criminal sanctions, the payment of taxes, military service requirements, and attendance at legal proceedings".
[8] See note 4.
[9] A. PECOUD AND P. DE GUCHTENEIRE, "International migration, border controls and human rights: Assessing the relevance of a right to mobility", Journal of Borderlands Studies, vol. 21, n. 1, 2006, p. 75.
[10] See note 6, p. 27.
[11] See note 9.

As it is commonly understood, it is an incidence of sovereignty that a state enjoys the discretion to exclude aliens from its territory, or otherwise stated, is not under a duty to admit aliens.[12] In fact, the reception of aliens is a matter of discretion of states: each state "is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory".[13] Oppenheim further underlines that every state is to be considered as a "master in his own house" and this mastership is of the most importance and relevance in the case of the admission of aliens to its own territory.[14] So, under international customary law, states have the power to control the entry and residence of alien inside their territory. Being states the "masters" in their own houses is a clear reference to the principle of sovereignty and territorial supremacy which establish that immigration laws, and, as a consequence, the question of the admission of aliens, both fall under national jurisdiction.

Despite the absence of an internationally recognized duty for states to admit aliens, it can be asserted that nowadays a state cannot completely exclude aliens willing to cross its boundaries. It is worth noticing that restrictions to a complete exclusion of aliens may be applied, even though these limitations may be suitable to limited cases only. First of all, under customary international law, certain categories of people like diplomats, consuls and international officials are either exempt from control on entry or possesses privileges when entering foreign territory.[15] Other than international obligations, states occasionally decided to admit alien for humanitarian reasons, such as abuse of rights, non-discrimination cases.[16]

Even if a general treaty on the admission of aliens has not been reached at an international level, some states have ratified different bilateral and

[12] A. KESBY, "The Shifting and Multiple Border and International Law", Oxford Journal of Legal Studies, Vol. 27, No. 1, 2007, p. 109.
[13] L. OPPENHEIM, International Law. A Treatise Volume 1, Peace, Outlook Verlag, 2018, p. 295.
[14] Ibid.
[15] H. LAMBERT, "The position of aliens in relation to the European Convention on Human Rights", Council of Europe Publishing, 2007, p. 16.
[16] Ibid. A case of non discrimination was represented by the Bosnian war, when "European countries were imposing visa requirements on persons fleeing certain areas of the former Yugoslavia".

multilateral agreement which establish rights of admission for the citizens of the contracting states.[17] A case in point is represented by the Treaty on European Union which establish a particular legal order, according to which all European citizens are granted the freedom of movement and the right of establishment within the member states of the European Union. Moreover, other rights of admission and residence can be retrieved from human rights treaties. For example, the European Court of Human Rights, when asked to decide on the topic of family reunion, has stated that "States may be obliged, under particular circumstances, to grant spouses or children of aliens entry and residence for the purpose of family reunion, if the unity of the family cannot reasonably be established in the State of origin of the family member seeking admission, or in a third State".[18]

2.1.3 Expulsion of Aliens

According to the drafts article on the expulsion of aliens, the very term "expulsion" refers to "a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State".[19] The term differentiate itself from the one of *exclusion* as the latter refer to a "non-admission of an alien to a State".[20] In addition to the rights of states relative to the admission of aliens, states have the power (under their territorial sovereignty) to remove aliens from their territory. Consequently, as it was described in the previous paragraphs, the

[17] K. HAILBRONNER AND J. GOGOLIN, "Max Planck Encyclopedia of Public International Law", 2013, retrieved from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e744.

[18] Aristimuño Mendizabal v France, Merits and just satisfaction, App No 51431/99, ECHR 34, 17 January 2006, European Court of Human Rights in "Max Planck Encyclopedia of Public International Law", 2013, retrieved from: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e744.

[19] "Draft articles on the expulsion of aliens", 2014, Adopted by the International Law Commission at its sixty-sixth session and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/69/10, para. 44).

[20] Ibid. According to the draft, an alien is defined as "an individual who does not have the nationality of the State in whose territory that individual is present".

state of the nationality of the alien must take the individual concerned back into its territory. In fact, under international law, nationality has two-fold consequences: on the one hand the state have the duty to protect its nationals against other states, and, on the other hand, in the event that another state decide to expel them, it must receive its nationals back to its territory.[21]

Despite the expulsion of aliens is considered to be a question almost exclusively pertaining to national law, international law has made a significant difference in the limitations applicable to the arbitrary expulsion. In general, according to international law, states are prohibited to expel individual "if there is no sufficient reason to assume that public order or, in some cases, morality is endangered".[22] Moreover, other principle pertaining to the human rights sphere come into play in the restriction of the right of expulsion of states. For instance, if an expulsion is considered as violating human rights protected under international or regional treaty (be it the European Convention on Human Rights or the International Covenant on Civil and Political Rights), the expulsion would result in a violation of the treaty itself for the ratifying state. [23]

It is worth mentioning that the principle of non-refoulment also constitutes a restriction on the right of sovereign states to expel. As it is defined in art. 33 of the Convention relating to the Status of Refugees:

> *"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*[24]

This article defining the principle of non-refoulment conveys protection from expulsion to refugees, starting from the moment in which they are admitted

[21] See note 15, p.17
[22] See note 17.
[23] Ibid.
[24] UN High Commissioner for Refugees (UNHCR), Art 31 of the Convention Relating to the Status of Refugees, 1951.

to the territory of a State to the moment in which they have been granted asylum.[25] However, an individual may still be expelled, as long as the other state in which he or she will be sent is considered a safe country. In fact, the Convention relating to the Status of Refugees and other human rights treaties provide that individuals seeking for asylum may not be returned, expelled or deported to a *persecuting* country. However, these legal instruments, do not specify that refugees are able to decide their state of protection.[26]

Another example of convention that contrast the right to expulsion of states is represented by art. 3 of the European Convention on Human Rights establishing that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".[27] This article seems to suggest that States parties are cannot expel individual to other states in which he or she would be the subject of torture, inhuman or degrading treatment.

In conclusion, the permanent Court of International Justice in several cases established that the power of states to admit and exclude aliens exists within the rule of law[28], thereby this power is not completely an arbitrary falling exclusively under the national jurisdiction of states. For these reasons, it can be assumed that "in the absence of general international law and treaty obligations, a state is free to admit or expel an alien from its territory" even if this is not always the case, since human rights treaties have, albeit partially, limited this right of states.[29]

2.1.4 Nationality as a Filtering Instrument for Territorial Movement

[25] See note 17.
[26] Ibid.
[27] Council of Europe, art. 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.
[28] See note 15, p. 17. This means that "*it must be in conformity with basic standards, such as fairness and non-discrimination, and it must not clash with other individuals' basic human rights, such as family reunion, non-refoulement, and prohibition of torture or degrading treatment*".
[29] Ibid.

In these contemporary system of international law, where state have the power (although narrowed by human rights law for example) to exclude and expel aliens, the concept of citizenship becomes a pivotal aspect. As previously stated, there is a universally recognized right of emigration that is not mirrored by a corresponding right of entry (or immigration).

In this context, some migration scholars have noticed that citizenship could be interpreted as a filtering device for territorial movement because of the following reasons. In the first place, states must admit (or readmit) their nationals to their territory. I must be underlined that nationals in this case are also those born abroad and that they have inherited the country's nationality from their parents. Secondly, states have the power to perpetrate particular restrictions to certain group of nationals (with the application of visa requirements) but, on the other hand, they may decide to open their boundaries for others. The latter is the case of the European Union citizens who are free to migrate to other member states.[30] As Bauböck vividly stated, it is in fact "citizenship [that] marks a boundary between insiders and outsiders".[31]

2.1.5 A Critique: Rights and Duties Are Coextensive with the Location of the Individual

Moria Paz, a fellow researcher in International Law at Stanford Law School, has recently brought forward a particular but rather interesting view on the work of human rights courts and quasi-judicial bodies. The scholar suggested that these courts have narrowed their jurisdiction "only to those individuals who have either established a territorial presence in the host state or have otherwise come within the effective control of the state or its agents".[32] Therefore, Paz

[30] R. BAUBÖCK (editor), "Migration and Citizenship: Legal Status, Rights and Political Participation", Amsterdam University Press, 2006, p.17-18.
[31] Ibid. p. 19.
[32] M. PAZ, "The Law of Walls", The European Journal of International Law Vol. 28 n. 2, 2017, p. 606.

believes that these rights of individual are “access-based”, with the term access considered as “the ability for an individual to establish a territorial presence in the state (strong territoriality) or to come within the effective control of the state or its agents (neo-territoriality)”.[33]

The consequence of this statement is that the individuals experience their right in dependence of their physical location and, in the case of the protection of asylum seeker for instance, in order to be protected, an alien must physically reach the boundaries of the state he or she wishes to enter. However, if the asylum seeker finds himself just outside the shores of the state, his tragic condition is of no legal concern for the state. If, on the other hand, the individual is located inside the boundaries of the state concerned (with or without the state’s permission), then the same state must take into account the individual’s rights. [34]

In Paz analysis of the work of human rights courts and quasi-judicial bodies, it is also underlined that these bodies may actually lead states to “exercise some control over the duties it owes to a non-national by controlling access to its territory”[35], promoting the emergence of dangerous border management practices. One emblematic example of a perilous border management practice is represented by the construction of walls at he borders of states aimed at managing migration. Paz explains that the position of the individual outside the border wall means that the person is in fact beyond the state’s responsibility. In conclusion she affirms that, to some extent, walls may “insulates the state from human rights duties”.[36] The focus of the courts on access (the location of the individual and possible plaintiff) overshadow more fundamental questions (for example, the priority according to which individual must be protected).

[33] Ibid. at 602.
[34] Ibid. at 609.
[35] Ibid at 606.
[36] Ibid at 603.

2.2 Walls at the Borders

With the end of the Cold War and the abolition of the Berlin Wall, new assumptions about the process of globalization spread around the world. Firstly, it was believed that this new era of international relations would have generated a "borderless world" where wall would gradually disappear. Then, according to the borderless world theorists, the world would assist to a free flow of capital, goods and people. Until the terrorist attacks of 9/11, this view was partially mirrored in the international landscape of the time.

In the wake of the terrorist attacks of 11 September 2001, the situation immediately changed. Rather than a progressive opening of border, we assisted to an "hardening" of those same borders.[37] Rosière and Jones have defined the term "hardening" as the construction of any kind of closure system, including all kind of walls or fences aimed at preventing unwanted immigration flows.[38] They also specify that hardening does not refers to a complete closing of the border but to all the actions and attempts to control movements across boundaries.

The following images shows the escalation of the number of walls erected around the globe.

Fig. 1 The increasing number of walls in the globalized international system (1945-2010). Credits: Élisabeth Vallet and Charles-Philippe David.

[37] S. ROSIÈRE AND R. JONES, "Teichopolitics: Re-considering Globalisation Through the Role of Walls and Fences", in Geopolitics, 2012, 17:1, p. 218.
[38] Ibid.

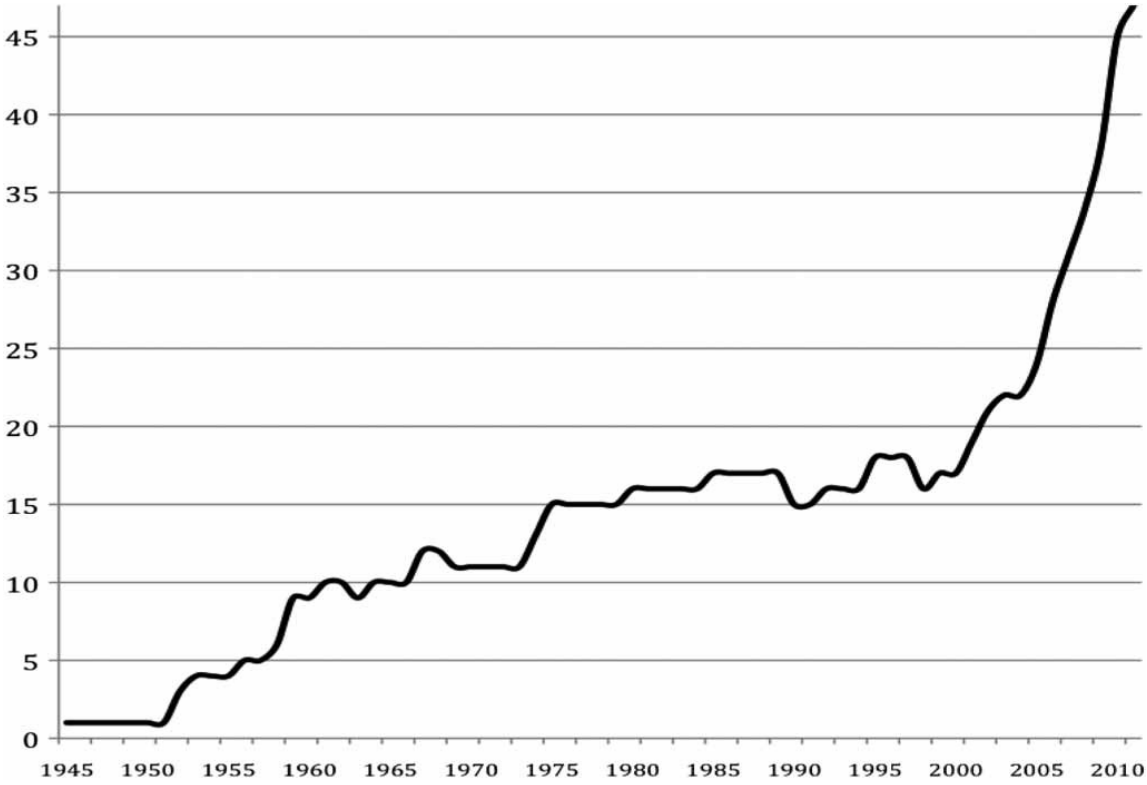
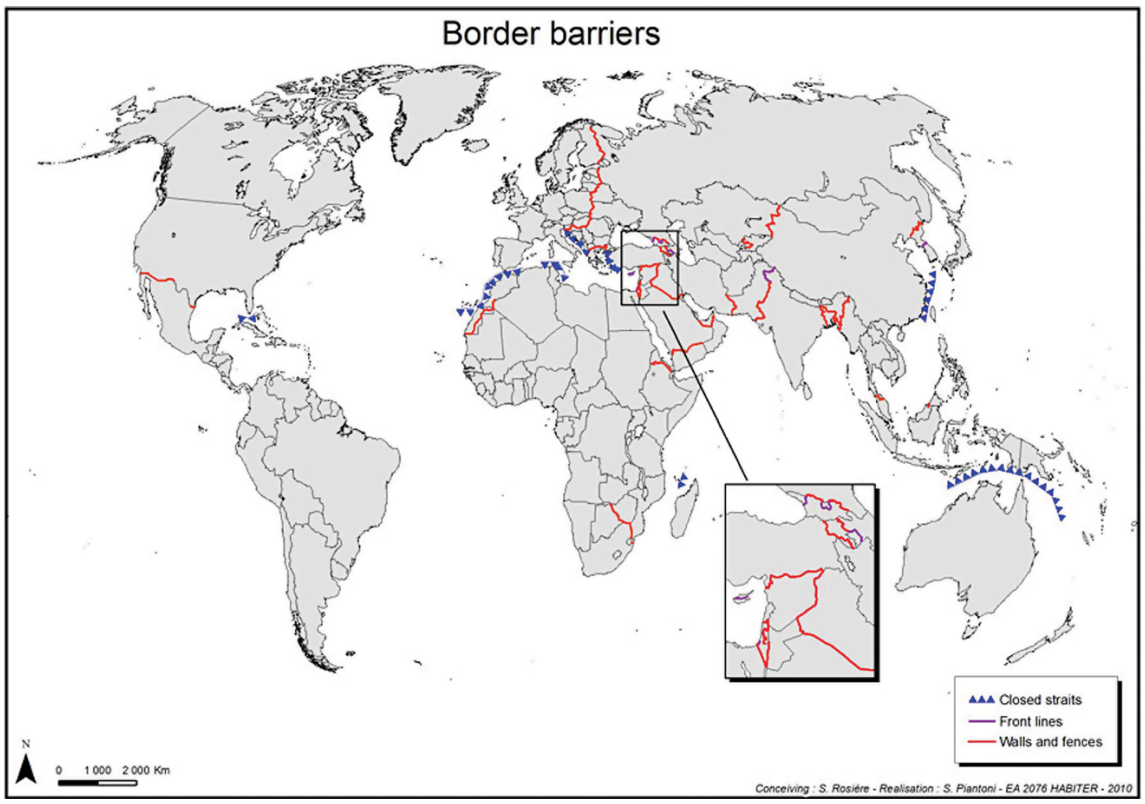


Fig. 2 A world map of border barriers (walls, closed straits, fences). Credits: S. Rosière and R. Jones.



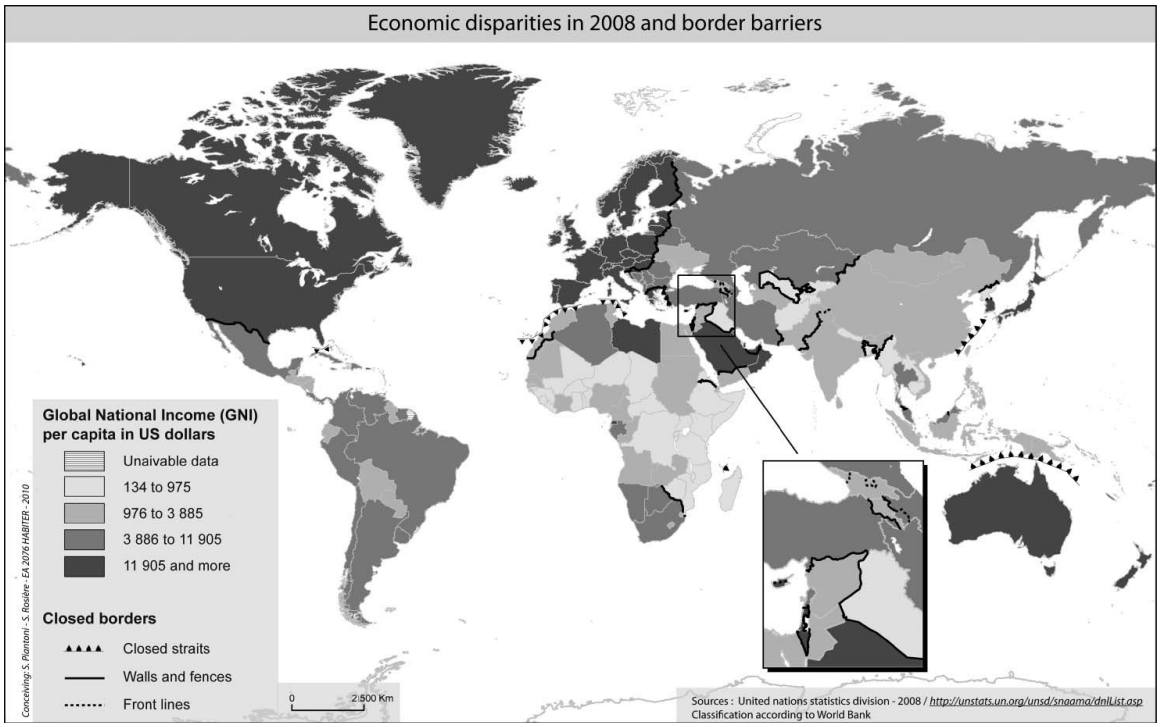
2.2.1 Teichopolitics

Recently, some scholars have coined the term teichopolitics to refer to this growing tendency of the building new border walls and the hardening of existing boundaries. The term was coined by Ballif and Rosière (2009) and it is now employed to describe "the politics of building barriers on borders for various security purposes".[39] The word teichopolitics derives from the ancient Greek word τειχος (teichos) meaning "city wall".

Some commentators have noticed that this new border policies, identified now as teichopolitics fuel discrimination at borders. The hardening of the border makes it easier for border guards to filter out unwanted individuals (and sometimes also goods) and giving instead a priority access to supposedly preferred categories of migrants.[40] For example, Pécoud underlines that while skilled workers are able to circulate quite easily, "those who do not belong to this elite have little access to migration opportunities, at least within a legal framework".[41] Moreover, according to Rosière and Jones, these new barriers are erected on borders and that results in a sharpened differentiation between different economic, political and cultural areas. In fact, most of the cases of teichopolitics are characterized by "a strong wealth discontinuity "[42].

Fig. 3 Walls and fences in relation to wealth discontinuities (GNI per capita in 2008). Credits: S. Rosière and R. Jones.

[39] See note 37, p. 219.
[40] See note 37, p. 218.
[41] A. PECOUD AND P. DE GUCHTENEIRE, "International migration, border controls and human rights: Assessing the relevance of a right to mobility", Journal of Borderlands Studies, vol. 21, n. 1, 2006, p. 69.
[42] See note 37, p. 220.



From the image above, we can observe that the most important border barriers are actually constructed over boundaries which individuate the greatest wealth discontinuities. The persistence of these wealth discontinuities can be explained by the fact that some wealthier states voluntary chooses the politics of teichopolitics to maintain their privileges and advantages instead of putting forward new policies aimed at contrasting the inequalities. [43] As a consequence, this choice leads to an emergence of "teichoeconomics", which, in turn, continues to fuel the migration of people from poorer to wealthier countries. This is inevitable result, as, for the poorer people, migration represent the only way out of a life of misery and their only hope for a better future. [44]

In conclusion, these new walls at the borders of states are to be considered not only as physical barriers but also as "gateways, for they are punctured by official and unofficial openings through which people can cross from one side to the other".[45] We should speak more generally of a border system, a

[43] See note 37, p. 230
[44] Ibid.
[45] É. VALLET AND C. DAVID, "Introduction: The (Re)Building of the Wall in International Relations", in Journal of Borderlands Studies, 2012, vol.27, n. 2 p. 112.

legal construct rather than a construction of physical barriers through which states control flows of goods and people.

2.2.2 Border Violence

According to Reece Jones, more than half the victims at borders in the past decade occurred at the shores of the European Union. These data make this border the deadliest border of the world. [46] In fact, the increasingly growing number of hardened boundaries does not come without a corresponding escalation of violence around them.

The institution of the border itself may produce different forms of violence. In particular, at a state boundary violence may manifest in two different forms: direct and structural violence. One might suppose that direct violence (for example the actual killing of migrants by border agents) cause the lower number of deaths at the border. On the contrary, nowadays, it is what Johan Galtung called structural violence that claims more victims. In his "Violence, Peace, and Peace Research", Galtung describes it as a kind of violence that harms individuals because of the presence of some social structures or institutions that prevent people from meeting their basic needs.[47] If we take into consideration the number of deaths at the US-Mexican border, starting from 1990s, more than 6000 bodies have been collected along the border and all of these deaths are attributable to construction of the wall and to the strong presence of Border Patrol agents.[48] This tragedies occurs because the hardening and militarization of this border have led migrants to walk through more dangerous locations and undertake more hazardous journey in order not to be stopped at the border wall (in the same way as migrants at the European border fight for their survival at sea,

[46] R. JONES, “Refugees and theright to move”, Verso, 2016.
[47] J. GALTUNG, "Violence, Peace, and Peace Research", in Journal of Peace Research, Vol. 6, No. 3 (1969), pp. 167–191.
[48] See note 46.

or in Libya). These migrants usually leave their lives in the hands of human smuggler and they usually die during the journey.

2.2.3 Walls and Human Rights

As Moria Paz have noticed in her article, the regulation of walls under human rights law poses a peculiar jurisdictional challenge. When human rights courts are asked to adjudicate cases concerning border walls, these bodies may follow two different interpretation of the wall itself, which represent two jurisdictional choices about the significance of the wall.

According to a first interpretation more on the part of the individual, each person enjoys a minimal set of right thanks to their human nature. The presence of these rights does not depend on the compliance of the individual with the state's immigration policy.[49] In this view, the border has the same meaning of the wall: "both are legally permissible to the extent that they are porous enough to allow procedural justice".[50] In this situation, a court could decide that the border wall is illegal if it prevent the expression of procedural rights for migrants. On the contrary, states should give the asylum seeker located outside the border the chance to hear their procedural claims. In summary, according to this individualistic vision, "both border and border wall should be [considered as] porous enough to allow due process".[51] However, this claim is not sustainable as, if we envisage an extreme situation, it suggests the presence of almost open border in order for the state to hear any asylum seeker in need of protection. For this reason, states may decide to withdraw from the jurisdiction of international human rights courts altogether.[52]

[49] M. PAZ, "The Law of Walls", The European Journal of International Law Vol. 28 n. 2, 2017, p. 612.
[50] Ibid.
[51] Ibid. at 615.
[52] Ibid.

In contrast to the first one, the second claim, the one that can be placed more on state's side, provides that a state does not have to recognize rights of entry to individuals outside its territory. Consequently, the state is also able to build border walls in order to keep non-nationals out of its territory. This way, the wall becomes the emblem of state sovereignty. However, even this extreme view cannot be sustained as it would mean for the state that he does not have to respect human rights of asylum seekers, rights pertaining to them by virtue of their human nature.

In conclusion, Paz suggests that human rights courts and quasi-judicial institutions are likely to regulate physical features of border walls rather than adopting a view that is too individual-sided or state-sided. In particular, they are more likely to analyze whether the wall was properly constructed or not, and by doing so, "they will continue to support the traditional, statist concept of a non-porous border, only carving out a few exceptions when dealing with the most vulnerable".[53]

[53] Ibid. at 617.

CHAPTER 3: THE CHANGING NATURE OF BOUNDARIES

This final chapter is going to shade some light on unusual, unconventional and subtle forms and developments of boundaries that have been emerging in the last few decades. This outgrowth in the field of boundaries is the result of their evolution in space, form, and meaning. As it will be illustrated in the following pages, contemporary boundaries can be encountered in different locations other than at the perimeter of States. The forms and characteristics they have now assumed are far from the traditional standard. Moreover, their meaning may differ depending on the subjects that experience them.

3.1 Mobile Boundaries

In contrast to what was expected after the end of the Cold War, it seems that we are witnessing an overgrowth of boundaries. The advent of globalization did not turn into a disappearance of the classical international boundaries but, rather, into a shift of their conventional characteristics. It is now obvious by current events of our every day's news that we are not facing a decline of boundaries but we are seeing their proliferation, differentiation and multiplication.[54] As it is vividly summarized in the words of Johnson and Jones, "Contrary to expectations at the end of the cold War, the current era of globalization has resulted in the most intensive and extensive period of bordering in the history of the world".[55]

[54] P. CUTTITTA, "Territorial and Non-territorial: The Mobile Borders of Migration Controls", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 242.

[55] A. Szary, "Placing the Border in Everyday Life", R Jones and C. Johnson (ed.), Ashgate, Border Region Series, 2014, pp. 4-5.

While in the past centuries it was rather uncommon for an individual to cross or, more generally, to experience the boundary, nowadays these territorial institutions are parts of our daily lives. In fact, these days the boundary is more and more experienced in different locations and, more interestingly, in places far away from traditional international borderlines. Furthermore, it can be argued that the boundaries of a certain state can be encountered beyond as well as before the physical limits of the given state. In other words, states' border practices are no longer to be found exclusively on territorial borders as they have been externalized, internalized and even outsourced.

3.1.1 Externalized Boundaries

When an individual is subjected to some kind of bordering practice that stretches outward the conventional international boundaries of a state, we assist to a case of externalization of borders. Alison Kesby finds that the phenomenon of the externalization of boundaries is what Etienne Balibar defined as "transporting of the actual borders beyond the borderline".[56] It follows that a person's admission to a foreign community is no longer examined only at the state's territorial boundary: the boundary itself is being exported, shifted outwards.

First of all, airports train stations and maritime ports are easily identifiable as externalized boundaries locations. An emblematic situation is described in the case *R v Immigration Officer at Prague Airport*[57]. This case was about an English immigration officer who operated controls to a group of Czech nationals trying to get on a flight to the UK in order to apply for asylum. The case actually was focused on a discrimination basis: most of the applicants, even if Czech nationals, were actually Roma. Other than the discrimination issue, it is relevant to underline the fact that those people

[56] A. KESBY, "The Shifting and Multiple Border and International Law", Oxford Journal of Legal Studies, Vol. 27, No. 1, 2007, p. 115.
[57] Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004.

experience the English boundary even if they were still in the territory of the Czech Republic. This was possible according to an agreement between the UK and Czech Republic which allowed UK officials to conduct controls over passengers directed to the UK in order to establish who is granted the right to entry the country and who isn't. This case will be examined again later on this chapter as a example of "*polysemic boundaries*". For now, *R v Immigration Officer at Prague Airport is* a clear evidence of the discrepancy which exists between where the conventional international boundary is located (in this case would be the English territory) and where it is actually experienced.[58]

According to the same principle, the UK has been trying to spread offshore borders across the world. Another example is represented by the controls that take place at Gare du Nord, in Paris, where the Eurostar trains has accorded the UK to create "juxtaposed" boundaries in order that passport controls could preliminary occur in France.[59]

Some other locations that at a first glance would not be recognized as conventional sites of bordering are, for example, travel agencies or embassies or any type of visa offices. This is easily comprehensible since at these premises, individuals' documents are subjected to preliminary controls and according to the receiving country's laws, they received a visa or the requested authorization to entry the country or not. These offices can be seen as "temporally anticipated, spatially delocalized, fixed punctiform manifestations of territorial borders", where would-be migrants enter into contact with the boundary without concretely crossing it.[60]

3.1.2 Outsourced Boundaries

As I have previously stated, contemporary borders are not to be considered merely as lines that separates states anymore, but rather as mobile boundaries that

[58] See note 56 p. 102.
[59] A. Szary, "Placing the Border in Everyday Life", R Jones and C. Johnson (ed.), Ashgate, Border Region Series, 2014, p. 18.
[60] See note 54 p. 244.

people are able to perceive far away from the limits of the state. A particular subcategory of externalized boundaries is the one of outsourced boundaries.

It can be asserted that the most emblematic case of this evolution of the boundary is the one of the extra-territorial asylum processing policy introduced by the Australian government. In particular, according to Migration Act of 1958 the Australian boundaries can be withdrawn from the territorial limit (de facto excising some territories from Australia's migration areas) in order to move the boundaries at different location for different purposes. The effect is that asylum seeker arriving in these excised Australian territories are not able to make a visa application unless the Australian government express a different opinion in their favor. In other words, this act states that these offshore territories are still part of the sovereign territory of Australia but under the Migration Act, they excluded from Australia's international legal obligations. [61] The fact that Australia has the tendency externalized the asylum processing can be seen as a way to prevent refugees from reaching its territory. But the outsourcing aspect comes into play in the subsequent stages that those asylum seekers go through. In compliance with another Australian law, specifically the "Pacific Solution", these asylum requests are examined in centers of neighboring countries such as Papua New Guinea or Nauru for fear that migrants who do not obtain the refugee status might stay in the Australian mainland territory even after their requests are processed. [62] In conclusion, under this law, offshore applicants are moved to those third countries (declared as "safe" by the Australian government) and there, they either received the status of refugee and thus enter Australia, or, on the contrary, they are resettled in other countries.[63]

Another case of outsourcing of boundaries is represented by the third-party agreements signed by the European Union and the creation of detention policies which fall under those policies that constitute what Van Houtum have called "Fortress Europe". [64] This kind of policy regarding the delocalization of asylum follows the concept of the "safe third country" according to which "destination countries claim

[61] See note 56 pp. 115-116.
[62] See note 54 p. 244.
[63] Ibid at 61.
[64] A. BURRIDGE, N. GILL, A. KOCHER AND L. MARTIN, "Polymorphic borders", in Territory, Politics, Governance, 2017, p. 242.

that they are not responsible for granting protection to refugees who have transited countries where they could have found refuge". [65] In this way, the EU and also its member states by negotiating these agreements with neighboring states such as Turkey, Libya or Morocco, just to name a few, are in fact creating a buffer zones in the south of the Mediterranean region.[66] Moreover the EU aims at helping those buffer states at establishing their own national asylum systems. This way, it can declared that those states have become to a certain degree "Safe Countries of Origins (SCO)" and consequently return them those unwanted would-be refugees.[67] To summarize, it has been observed that

> "the management of southern and eastern borders is subcontracted to neighboring countries, which aspire to become members of the European Union (EU) or be integrated to the European market within the framework of the EU Neighborhood Policy".[68]

However, in order for a third state to be considered as safe for the purpose of the asylum process by the EU member states it has to meet several criteria which are listed in as follows: [69]

> "Member states are to show that "no persecution (...), no torture (...) and no threat by reason of indiscriminate violence" exists in the country of origin by taking into account (a) relevant laws, (b) rights and freedoms as laid out in the European Convention on Human Rights (ECHR), the International

[65] See note 54 p. 245.
[66] N. LAMBERT AND O. CLOCHARD, "Mobile and Fatal: The EU Borders", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 121.
[67] P. CUTTITTA, "Territorial and Non-territorial: The Mobile Borders of Migration Controls", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 245.
[68] O. J. WALTHER AND D. RETAILLÉ, "Rethinking Borders in a Mobile World: An Alternative Model", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 121
[69] H. RUHRMANN AND D. FITZGERALD, "The Externalization of Europe's Borders in the Refugee Crisis, 2015-2016", Working Paper No. 194, Center for Comparative Immigration Studies, University of California-San Diego, 2016, p. 7-8.

Covenant on Civil and Political Rights (ICCPR), and the United Nations Convention Against Torture (CAT), (c) respect for the non-refoulement principle, and (d) remedies against rights violations". [70]

If we consider the case of the Joint Action Plan between the EU and Turkey, it must be admitted that actually the EU had a concrete interest in transforming Turkey in a "Safe Countries of Origins" and consequently in a partner in order to limit irregular border crossings and to regulate the passage of asylum seekers. At the same time, these plans would result in a diffusion of rights-based policies in Turkey, which was also a condition for a possible accession of Turkey to the EU. By engaging in those sorts of agreements, the EU committed to financially support Turkey in the management of Syrian refugees, and, in turn, Turkey agreed to help the EU in preventing irregular migration and to provide for the correct registration of refugees and for their access to public services.[71]

3.2 Internalized Boundaries

In so far, there have been presented some unconventional sites of bordering practice which mostly tend to go beyond, stretch across the classical lines of demarcation that are international boundaries. However, some other "inward-stretching" forms of boundaries can be identified in the contemporary range of international borders.

First of all, controls have been conducted at different locations even within the national bounded territories of a state. More and more frequently, these controls are based on racial or ethnic bases and they result in a tightening and hardening of the possibilities of undocumented migrants to the access to work, housing or social welfare. So, these exacerbated and sometimes racially based control have

[70] European Parliament and Council of the European Union. Directive 2013/32/EU, Pub. L. No. OJ L 180 (2013), retrieved from http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032 , art. 37 I.
[71] See note 69 p. 11-14.

transformed places like hospitals, banks, schools into "border dots" inside a state's territory.[72] They represent the proof that even "inward flexibilizations"[73] of boundaries are possible.

3.2.1 The Human Body as "Walking, Talking Border"

An additional situation in which we are able to identify a form of internalized boundary is the one represented by the individual's body itself. We can even suggest that the body has become another location where bordering practices and controls are perpetrated. Maybe, in a more dramatic view, some scholars have found that the border has been incorporated inside the human body and, that same body has turned into the border itself: "the individual is a walking, talking border".[74]

In the words of another theorist, "migrants are themselves mobile border manifestations, insofar as they are the personification of the status they hold".[75] This means that statuses like citizenship, financial conditions, religious faith and others actually act in the same way of a border: for certain individuals, these statuses, be it individual or collective characteristics, may make the crossing of an international boundary easier or harder, but also impossible. For example, when applying for a visa, the financial status and the economic condition of an individual might be crucial for the obtained of the permission to entry the country. But also, the simple imposition of visa obligation limited to certain nationals and not others is yet another example of how collective statuses like citizenship can act as a nuanced form of border. [76]

3.2.2 Biometric Borders

[72] P. CUTTITTA, "Territorial and Non-territorial: The Mobile Borders of Migration Controls", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 246.
[73] Ibid at 244.
[74] G. POPESCU, "Controlling Mobility: Embodying Borders", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 104.
[75] See note 72 at 248.
[76] Ibid.

It has previously been exemplified why individuals' identities are crucial to the process of the transformation of the human body into a border. At the basis of this reasoning lies the assumption that individual's statuses are good predictor signs for risks that might threaten a country's society. [77] This has led to the emergence of a series of sophisticated technologies (biometrics technologies) that are able to detect and collect "measurements of a person's unique physiological characteristics to verify or establish their identity". [78] The functioning of biometric technologies is based on the employment of cameras or scanners that acquire and subsequently store in centralized databases and individual's physical data. This information may also be included in a person passport or identity document under the form of an encrypted chip that is scanned at the premises of international boundaries. The data collected and analyzed varies from facial geometry to fingerprints but also from voice traits and signature. Moreover, biometrics may also include technologies coming from the military fields such as heartbeat and CO2 emission detectors or even heat radars. [79]

The risk for the application of these technologies according to international law is to fall under the case of racial profiling. This may happen because of course police officers too may judge people in the same way they judge a book's cover. As a consequence, those random checks might not be de facto random because they are conducted by officers, who might decide for themselves the criteria to determine who look suspicious and deserved a meticulous control and who do not. This kind behavior falls under the issue of racial profiling because if states allow to conduct identity checks on the ground of prejudice, then this is said to be violating the basic principle, namely that everyone is equal before the law. Patrick Hönig in this regard, underlined that "if being or looking 'different' becomes the rationale for police action society condones biopolitics and moves away from any commitment to what Hannah Arendt called the right to have rights". [80]

[77] See note 74.
[78] Ibid.
[79] Ibid.
[80] P. HÖNIG, States, Borders and the State of Exception: Framing the Unauthorised Migrant in Europe, Etnofoor, Vol. 26, No. 1, Borders, 2014, p. 135.

3.3 The Polysemic Character of Boundaries

If we are to analyzed the changing nature of contemporary boundaries, we should also take into consideration the fact that the same boundaries may mean different things for people that experience them. Some theorists find that border is actually designed to separate and filter. In his recent book, Wastl-Walter consider the example of a brick-wall-boundary, much similar to those reviewed in the second chapter. He suggests that this kind of boundary is at the same time considered as a security institution for some (those that might find themselves inside that walled border) and as a symbol of oppression for other (those that are trying to pass that wall but they are unable to do it). [81] So, the same boundary might assume different meaning for different people: walls or bridges, security or oppression, possibility or impossibility of a new future.

This peculiar polysemic characteristic of contemporary borders lies under the fact that borders are actually permeable instruments for filtering both goods and individuals: on the one hand they leave the "desirable" pass through and block the "undesirable". The border of the case *R v Immigration Officer at Prague Airport* analyzed beforehand is easily identified as polysemic. In fact, while apparent "trusted" travelers were not subjected to meticulous identity check by the UK official, others, who looked more suspicious in the eye of the official underwent through controls that finally led them to block their journey to the UK. In the end, the Curt actually ruled in favor of those migrants even if the asylum argument failed. In fact, the House of the Lords did not challenge the operation of externalization of the asylum processes as the procedures themselves were not illegal. The problematic issue was that those procedures were considered against the law as they were conducted in a racial discriminatory manner. We could also argue that this ruling avoids facing the question of the externalization of the border. More precisely, the House of the Lords sentenced that the UK was not obliged by the Refugee Convention to accept the group od asylum seekers since their location (at Prague airport) was not

[81] A. Szary, "Placing the Border in Everyday Life", R Jones and C. Johnson (ed.), Ashgate, Border Region Series, 2014, p. 17

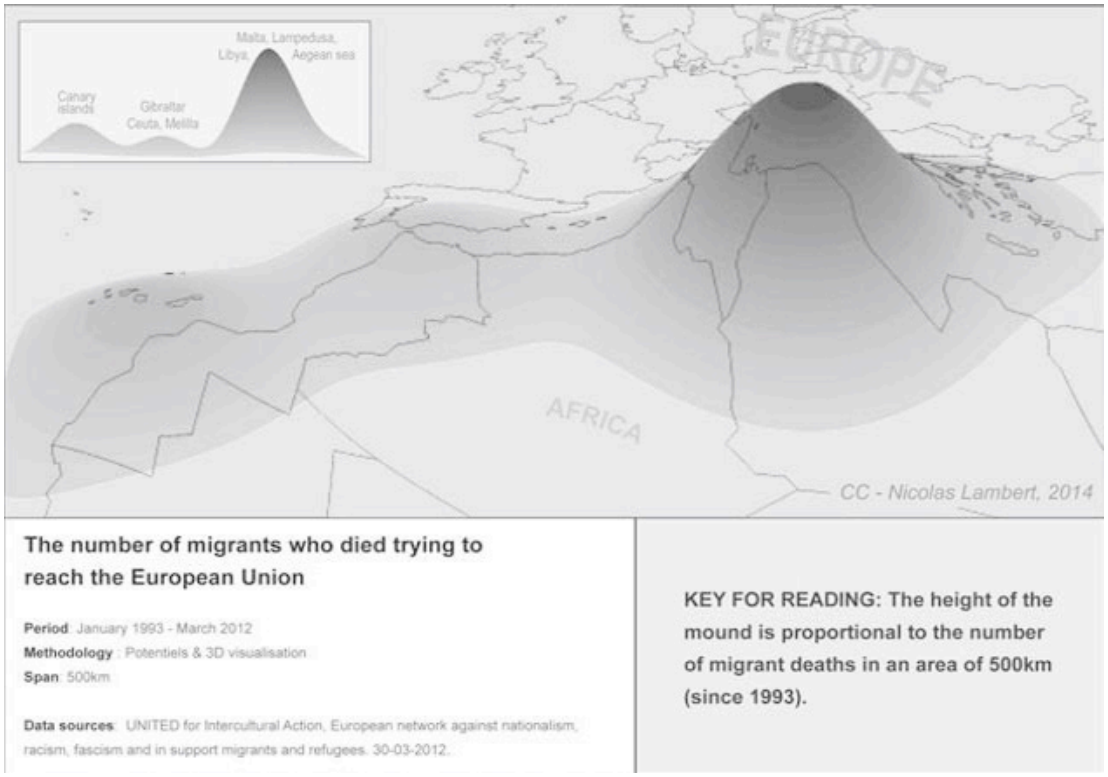
outside their country of origin. The Refugee Convention in fact applies to those that are outside their country of origin, but even though those Roma were in the proximity of a sort of boundary (represented by UK officials) and they had experienced the bordering practice of control, according to classic international law, this kind of boundaries, ("metaphorical" in the words of Lord Bingham) are ignored. As Kesby stated in her essay,

> "Whilst the state border is being externalized, international law retains the fiction that the place at which the border is experienced remains unified and reduced to the territorial frontier".[82]

A further example of polysemic border is constituted by the Mediterranean Sea. Once again, depending on the status of the individual who passes through it, it assumes divergent meaning: location for holidays for tourists, commercial route for transportation companies and place of death and despair for thousands of migrants drown each year trying to cross it. [83]

[82] A. KESBY, "The Shifting and Multiple Border and International Law", Oxford Journal of Legal Studies, Vol. 27, No. 1, 2007, p. 116.
[83] N. LAMBERT AND O. CLOCHARD, "Mobile and Fatal: The EU Borders", in Borderities and the politics of contemporary mobile borders, Palgrave Macmillan, 2015, p. 135.

Fig. 4. The migratory red mound. Credits: N. Lambert and O. Clochard.



3.3.1 Boundaries Experienced by Women

In the previous paragraphs it has been illustrated that different categories of people may perceive and experience boundaries in different ways. If we considered the gendered categories of women in this situation, we assist to at least two different outcomes when it comes to their experience with the boundary.

Bosworth, Fili and Pickering wrote about the condition that migrant women faces after they have crossed the Greek-Turkish border. In their paper, they have collected multiple testimonies of those women and tried to give voice to their journey of struggles. First of all, compared to men, women are considered to belong to a more vulnerable category. For this reason, almost all of them rely on human smuggler in the hope of making a safer journey. However, during their exodus, women are actually more likely then men to become victim of sexual violence. Then, once they manage to finally reach the Greek boundary and they are detained in detention facilities, they

have to face gendered prejudices and treatments. In fact, as it is stated in the above cited essay,

> "While the women did not talk about their intention to work in the sex industry, […] officers routinely demonized and ridiculed them on this basis and evidently perceived them as criminals due to their assumed or actual involvement in sex work".[84]

Unfortunately, as Brennan have stated before, while migrant women free themselves of traditional gender constrains in their home country, they then have to face new gendered prejudices[85] and expectations once they arrive at the destination country. Moreover, after the crossing of the border it is likely that women are finally safe, but, instead, the become even more vulnerable. This is because they lose their points of orientation, they may be victims of sexual abuse and more generally they lack the knowhow. [86]

However, on the other hand, this same vulnerability that characterizes the experience of women across border can sometime be seen at their advantage when it comes to legal matters related to asylum and granting of refugee status. Gender is a category that is always taken into account when the applicant's position is being assessed. In fact, when sometime the refugee status is not recognized, women might be given subsidiary protection status on the basis of the risk of serious harm that women would face if they were to be returned to their home country.[87]

3.4 Boundaries Shapes Identity

[84] M. BOSWORTH, A. FILI AND S. PICKERING, "Women and Border Policing at the Edges of Europe", in Journal of Ethnic and Migration Studies, 2017, pp. 7-10.
[85] Ibid.
[86] S. SHEKHAWAT AND E. DEL RE (ed), "Women and Borders: Refugees, Migrants and Communities", I. B. Tauris, London, 2018, pp. 26-27.
[87] Ibid at 34.

In previous paragraphs we have underlined how individuals internalize borders and actually become a "walking and talking border". However, it is worth noticing that boundaries are not just incorporated within the human body but they have an active role in shaping people's identity.

Kesby powerfully writes that "to draw a border is to establish an identity, and to establish an identity is to draw a border".[88] With these words, the scholar tried to explain how the border is considered as an instrument thanks to which people are categorized. Citizenship represents the crucial category because it connects people to both a territorial space and the political institutions which govern it. [89] Moreover, a consequence of the creation of this collective identity, the external territorial boundary almost dissipates the differences existing between individuals within the territory considered by putting the accent rather on the differences that exist between the same citizens and other foreigners.[90] Here Kesby seems to echo what Balibar wrote in his "Politic and the Other Scene": the external border of the state turns into an inner border, or, an inward stretching boundary as we defined it above, that, at his turn, shapes communal identity. [91]

In conclusion, state boundaries should be regarded not only as markers and symbols of state sovereignty, but also as instruments aimed at governing and defining individuals' identity. [92]

[88] See note 82 at 109.
[89] Ibid at 110.
[90] Ibid.
[91] Ibid.
[92] A. Szary, "Placing the Border in Everyday Life", R Jones and C. Johnson (ed.), Ashgate, Border Region Series, 2014, p. 140.

CONCLUSION

In the wake of the Cold War, with the advent of a more prominent globalization border scholars tended to theorize the imminent end of the boundary as it was considered before. The multiplication of liberal economies, the progress in communication technologies and in the methods of transportation seemed to anticipate, the removal of the barriers within the EU led the theorist to think that we could assist to a progress disappearance of boundaries and to witness the possibility of a borderless world.

Others instead claimed that with globalization a multiplication of borders occurred and this idea was also married by the famous theorist Etienne Balibar when he talked about the ubiquity of border, an institution that could then be found in everyday life. He supported the view of a bordered world as he proved in numerous essays that “borders are everywhere”.

Rather than a complete disappearance or a total invasion and multiplication of borders, our contemporary system of international relation assisted to an evolution, diversification and also to a displacement of the traditional boundary. This mitigated view is now widely supported by many scholars. On the one hand, it is extremely unlikely to assist to a complete disappearance of the traditional territorial boundary as it is still at the core of international laws and conventions On the other hand, it is also true that recently boundaries have spread spatially and their number have increasingly risen (as it is illustrated above in chapter III). . However, in order not to fall under the “territorial trap” discourse, which means to incorrectly conceive boundaries as fixed, everchanging institutions, there is a need in international law for a reconceptualization of the concept of international boundary.

In her article, Kesby advance the proposal of a development a more comprehensive and complex understanding of borders that would surpass the classical territorial border. This is necessary because even if territorial borders are still a persistent institution in international relations, some more complex or nuanced, unconventional form of border have risen. International law’s focus on the territorial

border must be shifted in order not to render other kinds of border, equally significant, invisible. Moreover, some observers suggested that even those boundaries that we thought they had been disappeared, maybe they have simply transformed into a more “liquid”, permeable form of border. In conclusion, international boundaries are still rather contemporary institutions, they have rather changed, mutated, following social, cultural and political change. Indeed, they are “here to stay” and we are far from witnessing their decline.

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