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Walled Borders, Territoriality and Sovereignty: A Typology

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ABSTRACT

Legal scholarship has so far paid little attention to the concept of border, which is one of the reasons for the lack of clarity regarding the characteristics of public borders at the present time. This paper aims to contribute to fill this gap by looking at an apparently eccentric phenomenon regarding the contemporary transformation of state borders: the so-called border walls. At a first sight, border walls seem to reiterate the traditional functions of state borders. But their rising up as physical uncrossable barriers signifies a strong change in their function and institutional nature. In the light of this, a question arises: Does the proliferation of border walls simply indicate a revival of the territorial sovereignty of the states, or is it a phenomenon with quite different characteristics? To answer this question the paper proceeds by first considering the distinctive features of modern public borders from a historical and theoretical point of view, and then distinguishing different types of border walls on the basis of their functional characteristics. This will help clarify whether border walls are an eccentric phenomenon compared to traditional state borders, and whether the analysis of their features leads us to reframe the traditional concept of state border.

Keywords: state border, fences, migrations, state territory, state sovereignty, international law, philosophy of law

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1. Introduction

Territoriality has traditionally been a neglected aspect of state sovereignty. Although sovereignty is unanimously defined as the supreme authority within a territory, political and legal philosophy have mainly focused their attention on the first two components of this definition. Under what conditions do state institutions exert legitimate authority, i.e., “have the right to command and correlatively the right to be obeyed” (Wolff 1990, 20)?¹ And what limitations, if any, are placed on the state’s superiority over citizens and other political institutions? If these questions continue to stimulate a number of debates and scholarly reflections, the same cannot be said with regard to territoriality, which actually specifies a salient condition for being a subject of the supreme authority of the state: the spatial location within a set of boundaries.

Indeed, territoriality is a privileged point of view for those who are interested in exploring the transformations of sovereignty in the current political scenario, and their impact on social and political relations. To show this, in this paper I will draw attention on an apparently eccentric phenomenon related to the way in which states exert their authority over a certain territory. I refer to the so-called border walls, i.e. the construction of physical barriers between the United States and Mexico, Israel and Palestine, India and Pakistan, Saudi Arabia and Yemen, Botswana and Zimbabwe, Uzbekistan and Kyrgyzstan, Spain and Morocco, as well as the new walls being built in the Sinai desert, in the south of Thailand, just beyond the borders between the Arab Emirates and Oman, between Kuwait and Iraq, in the tribal territories of Afghanistan, between Greece and Turkey, etc. At a first sight, border walls seem to reiterate the traditional functions of state borders. They simply set the spatial extension of the right to create and enforce state law. Furthermore, their progressive diffusion go

¹ For a discussion of this definition see also Raz (2009, 11 ff).

on a par with the increasing sovereignty claims over state territory that characterises contemporary international relations, fed by migration pressure, global terrorism, or by the protectionist implications of economic crisis.

Border walls, however, have peculiar characteristics. Very often, they do not correspond to state borders but rather are built inside a state territory or on the edges of the territory of several states. Moreover, they have an immediate physical consistency which tends to determine a break away from the institutional character of modern public borders, which were conceived as imaginary lines delimiting the territory of the state. Obviously, also in the past fortified borders represented an instrument widely used to defend territory, but this did not influence their institutional characteristics in any way, as we will see later. Nowadays, it is the exterior aspect of border walls, their rising up as physical uncrossable barriers, that apparently signifies a change in their function and institutional nature. In the light of all this, a question arises quite spontaneously: Does the proliferation of border walls simply indicate a revival of the traditional sovereignty claims over state territory, or is it a phenomenon with quite different characteristics?

To answer this question the paper proceeds as follows: I will first consider the distinctive features of modern public borders from a historical and theoretical point of view. This will help clarify whether border walls are an eccentric phenomenon compared to traditional state borders, and whether the analysis of their features leads us to reframe the traditional concept of state border. To do this, I will distinguish different types of border walls on the basis of their functional characteristics.

2. The Traditional Function of State Borders

From a conceptual point of view, state borders have a complex and troubled history. Their origins can be traced back to Roman law provisions governing ownership and possession, but the concept of border has been

strongly reinterpreted in modern legal and political thought. The theoretical reflection on state borders reaches a high level of elaboration the 19th century, with the affirmation of state law as an autonomous branch of legal knowledge. Then the interest for the institutional nature of state borders declined sharply after the First World War, a decline that has continued right up to today.² According to the traditional view in state law, state borders are totally different from the boundaries of private property. The boundaries of private property are used to subdivide the land into units of ownership, and thereby to assign things to persons, to confer control over physical objects and to exclude others to their use. On the contrary, public borders establish the spatial extension of the exclusive authority of the state over human individuals and relations (Preuss 2010, 26, Miller and Sohail 2001, 4).³ Thanks to public borders, the state exercises control over the access to or the departure from its territory, over the use of the resources available there, and over the individual conducts and social interactions that take place in that area. More precisely, state borders identify the territory of the state on the basis of three distinct assumptions: as an area under sovereign powers, as an area ruled by the law of the state, as a place where a people, a race, a nation has its roots (cf., respectively, Jellinek 1921, 489, Kelsen 1945, 210, Schmitt 1974, 18). Which of these three assumptions was the most important in identifying state borders depended on the historical and geopolitical contexts (Howland and White 2009, 1, Taylor 1994). This paper is not going to trace the history of the concept of state border, but will concentrate more on a particular function of state borders which remains constant throughout modern history: the neutralization of personal differences both inside and outside the territory of the state.

To understand this function it is worth considering the institutional nature

² A historical reconstruction of the functions and conceptualizations of borders is provided by Kratochwil (1986).

³ According to the Lockean theory of state borders, the boundaries of the state are coextensive with the boundaries of property of the individual property holders. As to the implication of this standpoint with regard to the justification of public borders, see Simmons (2001).

of borders in public law and international law. Tracing a public border in the modern age means establishing a relationship between two spaces of land, the territory of the state and its “exterior,” i.e. what lies outside it (Smith 1995, 475, Smith and Varzi 2000). On the one hand, by establishing state borders a territory is determined as a state: it becomes a territorial legal institution in its own right. On the other hand, the drawing of state boundaries affects the legal status of the “exterior,” i.e. the territory that does not belong to the state. Whatever lies beyond the state border becomes, in time, *res nullius* to occupy, enemy territory to conquer, another state to recognize, an ally to collaborate with, in short: a case of international law whose institutional basis is the creation of the border itself.

It must be made clear that this function of state borders is independent from their physical substrate. That a border is designed by nature, as Joseph Calmette points out when referring to the Pyrenees (Calmette 1947, 27), or corresponds to a line randomly placed on a map, as in the case of the American North-West Ordinance States drawn by Thomas Jefferson, is of little concern. Just as it is of no importance that a border is indicated either by signs, barbed wires, walls or any other kind of barrier. Modern public borders are *de dicto* entities, not *de re* entities: they are an institutional reality which result from a conventional agreement among legal authorities. Considering, therefore, the conventional nature of modern public borders, how can the two spatial areas separated by them be characterised from a conceptual point of view? Let us examine this in more detail.

2.1. *Border Inside*

As far as the territory of the state is concerned, the border marks off the area within which the state exercises its sovereign powers and claims exclusive control of the means of coercion.⁴ This implies that individuals are *formally* equal in the territory of the state since they are equally subject to the rules

⁴ As Max Weber famously argued, the modern state is the only human association which successfully claims the monopoly of the use of force within a defined territory. Cf. Weber (1964, 1043).

enacted by who exercises sovereign powers over that territory. This does not mean that the members of the states necessarily have the same liberties and rights, but simply that whatever individual right and obligation results from what the sovereign provides, irrespective of the fact that sovereignty powers are exercised by a democratically elected representative body, an enlightened king, or a despotic dictator. In this way, modern public borders realise the first relevant form of neutralisation: any personal status which differentiates human individuals on the basis of their ethnical, religious, linguistic, social, economic or cultural characteristics, is made irrelevant with regard to the validity and authority of law. If these differences were *themselves* sources of rights and obligations, the attribution of these rights and obligations would not be based on sovereignty powers but on the contingent characteristics of flesh and blood human beings. Such characteristics can certainly justify, from a political point of view, the unequal treatment of the people living *in* the state, but only as a result of a deliberation of the sovereign. In the same way, in the prospective of international law, the status of refugee or migrant is a title to claim rights only in so far as it is ascribed to individuals by the law. Merely existing as a human being is not sufficient to justify the enforcement of personal rights within the state or any other institutional entity. In this sense, the neutralisation of personal differences within state territory is a precondition of the supremacy of state authority, that characterizes the concept of sovereignty in the modern age.

Observations such as these should be a warning to anyone who is quick to associate the inclusive character of modern public borders with the notion of national state, in relation to which the border assume an identity connotation that depends on those personal statuses which state borders tend to neutralise. If considered in an identity sense, public borders do not simply separate what lies inside the state territory from what lies outside it; they also warrant the unity of the nation and its constitutive connection with

a certain geographical area.⁵ In reality, as Georg Jellinek (1921, 489) reminded us, state border give spatial extension to sovereignty and not to the nation. They are formal tools whose purpose is to establish the area where state law is enforceable; they are not thought of as a means to protect the ethnical, religious, linguistic, cultural identity of social groups. The relationship between state borders and national borders has a contingent character. This is shown, firstly, by the fact that individuals of several different national identities can live together within the territory of the same state. As Benedict Anderson (2006, 6) has correctly pointed out, nation states are “imagined communities,”⁶ which aim at producing a political and social identity rather than reflecting it. Furthermore, it must not be forgotten how attempts to define the concept of public border on the basis of national or nationalistic claims contributed, at the beginning of the 20th century, to determine the crisis of state institutions in Europe and the inadequacy of the post-Westphalia international law.

2.2. Border Outside

Also as far as the space which extends beyond the territory of the state is concerned, drawing a public border implies, from a conceptual point of view, the neutralisation of “personal” differences; differences which, in this case, concern not human beings in flesh and blood but rather the actors of international law: the legal persons of the states. As the individuals of the internal territory are formally equal, so are the individuals acting in the external space. Anything outside the state border is an actor of international law only if it is recognised as a state by other states. Contrarily to what we are tempted to believe, the modern state knows no “outside” but only multiple “insides”: when a human being crosses a border he simply moves from one state to another (Crawford 2005, 47, Sack 1986, 31, Lindahl 2013, 43). Recalling Leibniz’s metaphor of the pond and the fish, it could be said

⁵ On the nationalist conceptions of territorial rights, see Miller (1995, 2012).

⁶ On the use of communitarian identities for the political control of populations, see Schiff and Berman (2012, 61).

that in the global territory there are certainly some big states and small states, some strong states and weak states, some warlike and some pacific; what is important is that there are states everywhere (Leibniz 2009, 21).

The peculiar connotation that a state border attributes to external space land provides an interesting solution to one of the dilemmas which have always troubled border theorists. Just like any entity that occupies space or time, also the territory of the state is characterised by the geometry of the continuous. There are no two adjacent territorial states in the strict sense of the word; either two territories coincide or they are separated by other territories. According to Bolzano's classic theory, it follows that when two regions are adjacent to one another, one of them is "closed" and the border is contained within it, while the other is "open" and it is not possible to determine how far it extends (Bolzano 1851, par. 66). In the institutional logic of international law, such a problem is resolved by reducing the open space to a group of closed spaces with the same functional characteristics, which are positioned in such a way that they tend to occupy the whole spherical surface of the earth (Rosenzweig 1984, 331). In this way, the modern *ius gentium* acquires a two-dimensional geometry which does not allow overlapping or vertical layers. This brings about, among other things, a drastic reduction in the various meanings that the term "*gens*" had in the legal language in the early modern age. As far back as the start of the 17th century, for example, this term was still used by German speaking jurists to refer to peoples, intended as races, clans, tribes, nations as well as to autonomous towns, sovereign states, religious authorities and their dominions, empires, etc. (see, e.g., Knipschild 1740, 192). The new institutional geometry established by public borders marks the end of this multiform and multi-layered *ius inter gentes*, in favour of a common and homogeneous *ius gentium*.

This explains why modern public borders are not simply boundary lines establishing the territorial scope of state jurisdictions, but also a place of *transit*. In fact, in the external space the states mutually recognise

international and supranational law and this favours relations between them under the rule of law. In this sense, the role of modern public borders is not necessarily to prevent or limit the transit of the foreigner on the basis of, for example, their personal status, but rather to *regulate* and *guarantee* his safety. The crossing of a border does in fact generate reciprocal obligations on the part of the states, obligations based on mutual agreement. Obviously, this is not to say that in the modern age state borders did not take sometimes the form of physical barriers which impeded the transit of people and goods, nor I want to argue that modern state borders do not generate forms of social exclusion. The point I want to make here is that physical consistency and insuperability were not *necessary* features of state borders but contingent characteristics of them, depending on the political function that state borders were to carry out.

Even though the characteristics of public borders mentioned above are usually considered pretty obvious, it is worth emphasizing that the very idea of public border was first set out by modern legal thought as a re-elaboration of the legacy of Roman law. Previous to the modern age the concept of public border, as outlined so far, did not exist at all (Scattola 1997, 37). We only have to think of how borders were thought of in the ancient world, evidence of which can be found in the sources of Roman law. Roman law knew no public border in terms of territorial boundaries, recognised by two or more states (*civitates*), which set up mutual agreements on the basis of a common *ius gentium*. In classic Roman law, crossing an external border lead to nowhere. In fact, only internal private boundaries, functional to each individual's *proprium*, were conceivable and legally relevant.⁷ It could be argued here, however, that already at the beginning of the third century Ulpiano distinguished private borders (*finis privati*) from public borders (*finis publici*), a distinction which still holds true today. Nevertheless, with the expression "finis publici," Ulpiano was referring to borders which

⁷ Inst. 4,17,6; D. 17,1,5 (Paulus); D. 20,1,24 (Modestinus); Cod. 8,44,45,10. On this see Scattola (2003, 9).

separated public property from private property, and not state borders.⁸ In the same way, when describing the content of the *ius gentium* Hermogenianus did not attribute to territorial borders any role in the formation of a people or the foundation of a kingdom.⁹ Also in this case, territorial borders assume a privatistic relevance, connected with the delimitation of land owned by citizens (*cives*). This is confirmed by the fact that the *ager arcifinius*, i.e. the piece of land disputed by two belligerent peoples, is considered borderless as long as there is hostility with the enemy. As Siculo Flacco points out, once hostilities end and the occupation of the land is completed, the occupied land becomes public property and a boundary is drawn up not to mark it off from the “outside” but to prevent further occupation.¹⁰ Beyond the *limes* of *civitas*, there are no other *civitates*, whether friends or enemies, but only “non-communities,” “non-citizens,” the “non-men,” in other words the negative, the undetermined, what is radically excluded from the domain of law.

3. A New Kind of State Borders?

In the light of these considerations, how should contemporary border walls be characterized? Are they public borders in the modern sense, or do they have different basic features?

The *historical* analysis proposed in the last paragraph can help us to answer these questions. It allows us to establish under what conditions a border wall is a new institutional entity whose characteristics set it apart from traditional state borders. The two conditions that we will examine here are individually necessary and jointly sufficient to identify a new kind of public border. Therefore, if an institutional entity satisfies one of these conditions but not the other, we are faced with a hybrid entity which points to significant changes in the function of state borders, even though it cannot

⁸ D. 50,10,5,1 (Ulpianus).

⁹ D. 1,1,5 (Hermogenianus).

¹⁰ Siculo Flacco: Sic. Flacc. grom. p. 138.3-10 Lachmann = p. 2.12-14 Thulin. On the concept of “occupation” in Roman law and international law, see Lasaffer (2005, 38 ff).

be conceived as a brand new institutional entity.

The two conditions can be outlined as follows. A border wall is a new kind of public border if:

- (1) It does not neutralise the personal differences in the internal territory;
- (2) It does not neutralise the personal differences in the external territory.

Let us examine the first condition in more detail, with particular reference to the current debate on globalisation. The diffusion of border walls seems to signal the re-emergence of the political and legal relevance of the ethnic, religious, linguistic and cultural differences which the modern state attempted to neutralise to allow the full exercise of sovereignty powers. Border walls can be used as a means of controlling migration, of preventing ethnic or religious conflicts, of fighting organised crime, of defeating terrorism, of limiting the spread of endemic diseases; in short, it acts as a means to govern populations. If it acquires this public function, a border wall does not mark off the territorial space in which sovereignty powers neutralise personal differences, but the space where these differences are set up and marked off. Border walls typically carry out this function in two different ways depending on the personal statuses involved.

The first way in which border walls are used to govern populations concerns those personal statuses which possess *ab origine* a territorial dislocation based on the ethnical, religious, linguistic or social characteristics of the involved human beings. In other words, these personal statuses depend on the fact that a certain population has shaped the territory that it occupies, and its identity and culture are mixed with the physical characteristics of the land (Miller 2007, 217 ff.). Here border walls are used to separate a population of this sort from the other people living in the same territory. The second use of border walls concerns those personal statuses which are not originally connected to a certain territory but are “territorialised” by the law. The human beings to whom such status is attributed are forcibly placed in an area surrounded by border walls. In this way border walls carry out two public functions: a status is ascribed to a

determined group of individuals (those who are located or transferred to a certain area) and full control over these individuals is guaranteed. This is the case of border walls that mark off institutional entities such as detention camps, refugee camps, humanitarian camps, emergency temporary locations, etc.¹¹ Transfer into a camp signifies that an individual, on the one hand, is labelled with a status, that of migrant, clandestine, refugee, etc., which determines her rights and obligations. On the other hand, the wall prevents individuals from leaving the assigned territory and consequently the alleged pernicious effects that this is supposed to bring about. Under this profile, the fact that a border wall is a physical, uncrossable barrier assumes a *conceptual* relevance. Unlike traditional state borders, border walls cannot carry out their function independently from their *physical* characteristics. Their institutional nature, therefore, depends strictly on empirical properties: the fact that border walls cannot be physically overcome.

The second condition mentioned at the beginning of the paragraph, which goes back to the neutralisation of personal differences in the external space, is equally relevant. A border wall cannot be considered the same as a state border if it is not recognised, *de facto* or *de iure*, by international or supranational law. Without this, the two-dimensional geometry of space territory in international law, which is at the basis of modern *ius gentium*, is no longer in place. Furthermore, in the case they are not recognised as boundaries dividing two institutional entities of the same kind, border walls do not carry out one of the basic functions of modern public borders, i.e. the function of providing legal protection to the transit of people and goods from one jurisdiction to another based on the mutual obligations of the states. This occurs, for example, when the wall is built to prevent those individuals with a certain personal status from coming in or getting out of a certain territory. In this case, the function of the barrier is to confine certain individuals in a given space by suspending their movement rights. The

¹¹ On the notion of “camp” see Davidson (2003), Edkins and Pin-Fat (2004), Cornelisse (2010). In Agamben’s terms, a camp is a “space that opens up when the state of exception starts to become the rule” (Agamben 2000, 39).

possibility to cross the border wall becomes a residual circumstance, subject to strong limitations, and justified only by the temporary or definitive loss of the status which imposed confinement in the first place, both in an inclusive sense (no way in) and an excluding sense (no way out).

Even though we might be tempted to think otherwise, the fact that a border wall is built in correspondence with the borders of a state is not sufficient to determine its institutional character. A distinctive feature of the so-called legal globalisation, often referred to in the literature, is the gradual disassociation of the multiple institutional functions carried out by public borders, functions which can now be ascribed to a number of territorial borders which do not necessarily coincide (Sassen 2007, 190). There are cases, for example, where the border which regulates the flow of goods between states does not coincide geographically with the border that controls the flow of people, in the same way that the border controlling the passage of durable goods is different to that which regulates the passage of financial goods. In much the same way, a barrier built close to a state border does not necessarily carry out functions that are connected to those traditionally attributed to state borders. On the other hand, a border wall may carry out one or more functions linked to the prerogatives of a state even if it is situated inside the territory of the state or is located between two or more states. It can be said then that even if a border wall and a state border are situated in the same place, this says nothing about the institutional character of the first nor the function of the latter.

4. Border Walls: A Typology

So far, our analysis has led us to distinguish four kinds of border walls which are worth looking at briefly.

(a) *Walled Boundaries*. Firstly, we have walls or barriers which *do not* satisfy the two conditions mentioned previously: they do not aim at territorialising a personal status and are regulated in accordance with

international law. In this case, we are not really looking at authentic “border walls” but rather “walled boundaries,” i.e. physical barriers which allow the border of a state to carry out its traditional functions. An example of this are the artificial barriers which separate the United Arab Emirates and Oman, as well as South Africa, Mozambique and Zimbabwe. Walled boundaries are the result of agreements between neighbouring states to pursue a common goal (control of the movement of people, regulation of trade, the fight against organised crime, etc.). These barriers merely make state borders visible, tangibly demonstrating the intention of the state to control its territory. In this sense, it can be argued that “walled borders” contribute to the process of de-globalisation by limiting the free movement of people (Dowty 1989, 181). Yet, they do not constitute a new kind of institutional entity.

(b) *Internal Border Walls*. Of greater interest are the barriers which satisfy the first condition but not the second, in other words those border walls that allow the territorialisation of one or more personal statuses within the internal space territory but which relate to the external space in much the same way as traditional state borders. An example of these are the fences built to block the flow of immigrants from one state to another, to fight terrorism, to calm inter-ethnic conflicts. The most well-known examples are the walls and fences that separate the United States from Mexico, Macedonia from Greece, India from Bangladesh, Botswana from Zimbabwe, Saudi Arabia from Yemen, Uzbekistan from Afghanistan, Thailand from Malaysia, Spain from Morocco. These barriers are usually built on the basis of a unilateral initiative of one state and are situated inside the territory of this state or can even close off geographically a portion of it, in such a way that a “no go area” is created between the official state border and the wall. The basic function of these barriers is to govern populations by banning a certain group of people (migrants, terrorists, members of a given ethnic or religious group, etc.) from the territory of the state. Under this profile, the building of the barriers does not have the effect of neutralising

the personal differences inside a determined territorial space as modern public borders do, but rather transforms these differences into a criterium for separation and territorial segregation.¹² Nonetheless, these institutional entities are built and administered on the basis of sovereign prerogatives recognized by other states. This kind of border walls reveals, therefore, a hybrid institutional nature which, on the one hand, highlights some relevant functional changes compared to traditional state borders while, on the other, remains strictly connected to the traditional forms of legitimization that characterize state law and international public law.

(c) *External Border Walls*. The considerations just proposed can be extended to those territorial barriers which, unlike internal border walls, satisfy the second condition but not the first one. Their function is to neutralise personal differences in the space territory that lies outside the border, but not in the internal space territory. An emblematic example of this kind of walls are the fortified barrier created by India in the Kashmir regions, that set up by Turkey on the island of Cyprus, and also the barriers that divide Hungary and Serbia, North Korea and South Korea, Uzbekistan and Kyrgyzstan. Even though the geopolitical situations of each of the examples just mentioned are different, border walls carry out the same function. Let us take the case of Kashmir (Kadain 1992, 128, Farrell, 2003). Pakistan has always considered the regions of Kashmir, annexed to India in 1947, as a disputed territory. Therefore, it does not recognise the line of control, set down in the 1972 Simla agreement, as a state border. On the contrary, India, on the basis of the principle of state secularism, continues to

¹² According to the US Congress, however, the border wall between the USA and Mexico is simply meant to enhance state border controls for security and humanitarian reasons. See, e.g., *Secure Fence Act 2006* (Pub.L. 109-367), sec. 2; *Build the Wall, Enforce the Law Act 2018* (H.R. 7059). In the Presidential Proclamation 9844 of February 15, 2019, the president of the US claimed that “The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency.” This disputed declaration has formally enabled the president to divert funds from the Department of Defence (and other agencies) to be used for the construction of the wall. Under this perspective, therefore, the wall between the USA and Mexico should be qualified as a Walled Border and not as a Internal Border Wall. See, however, Heyman and Ackleson (2006, 37), Hattery, Embrick and Smith (2008), Morales (2009, 23).

refuse Pakistan's proposal to re-establish the frontiers of the region on an ethno-religious basis. In order to transform *de facto* the line of control into a border line, the Indian government organised in 2001 the building of a fence with the aim of neutralising, from a political and legal point of view, the ethno-religious differences present in the area, also at the cost of serious violations of human rights (Kaul and Teng 1992, 175, Wirsing 1998, 128, Gopalan 2007). However, the process of "statalisation" of the territory that lies inside the wall is not the result of a mutual recognition between neighbouring state entities. The Kashmir wall forbids the crossing of goods and people while, towards the exterior, functions as an exclusion mechanism on an ethno-religious basis. In all these cases, therefore, we find ourselves before a hybrid form of public border. External Border Walls maintain the traditional characteristics of state borders as far as the internal space territory is concerned, since they identify the space in which all individuals are subject to the same territorial jurisdiction. However, the way in which these border walls relate the external space territory seems to evoke the pre-modern dimension of radical exclusion and non-recognition which is at odds with International Law.

(d) *Full-fledged Border Walls*. The final kind of walls to be considered is that which satisfies both conditions enunciated above and could therefore be defined as border walls in a full sense. Like in the case of the physical barriers which mark off refugee camps and detention camps, here we find public borders whose function is to localise personal statuses both on the inside and the outside, so that these statuses can be ascribed to individuals on the basis of their exclusion or inclusion in a bordered territory. These walls appear, to all effects, as a new kind of public border which, conceptually speaking, cannot be traced back to the modern tradition of state law and international law. As far as the internal space is concerned, they are physical barriers which act as emergency administrative instruments independent of democratic deliberation and constitutional control. They are erected by government agencies to pursue a political goal which often cannot be

submitted to deep judicial scrutiny. The government need only show that this administrative measure is rationally related to serving a legitimate state interest. With regard to the external space, moreover, full-fledged border walls are not the result of an agreement between international law actors with legal personality and mutual obligations. They are built on the basis of an unilateral decision of the government although they can affect some prerogatives of other international law actors. Finally, this kind of walls tend to remove any fruitful relationship between individuals and institutions, because they bring about the territorial isolation of different groups of people.¹³ In this sense, border walls highlight the inability of political institutions to find a way of mediating between the interests at stake in global conflicts.

It goes without saying that the classification above should not be considered too rigidly. In fact, there are cases in which it is difficult to determine whether a border wall has the distinctive characteristics of one or other of those looked at. A clear example of this is given by the wall between Israeli and Palestinian West Bank, whose declared purpose is not to strengthen the border between two states but rather to defend Israeli citizens from terroristic attacks. According to some commentators, this would be a case of Full-fledged Border Wall that was built in breach of international law in order to put the population of the Palestinian occupied territories under control (cf., e.g., Gross 2006, Bekker 2005). However, others outline the wall in question as a case of Internal Border Wall which aims at protecting conflicting interests and values. On this view, the construction of the Israeli wall is not in breach of international law and is justified by a proportionality test between national security and human rights protection.¹⁴

¹³ “Contemporary [border] walls, especially those around democracies, often undo or invert the contrasts they are meant to inscribe. Officially aimed at protecting putatively free, open, lawful, and secular societies from trespass, exploitation, or attack, the walls are built of suspended law and inadvertently produce a collective ethos and subjectivity that is defensive, parochial, nationalistic, and militarized” (Brown 2010, 40).

¹⁴ Cf. *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces* (HCJ 2056/04). See also Barack (2006, 287); Kattan (2007).

In this paper it is not possible to address controversial issues like this. The conceptual framework outlined here may simply serve as a guide to understanding the phenomenon of border walls and to explaining its different manifestations. As a matter of fact, border walls signal a significant change in contemporary legal reality which cannot be easily reconciled with the traditional categories of state law and international law. At the same time, border walls may carry out different functions and have different characteristics. Distinguishing these features, therefore, is the first step to a better understanding of this phenomenon and a reasoned evaluation of it.

References

- Agamben G. (2000). *Means without Ends: Notes on Politics* (University of Minnesota Press).
- Anderson B. (2006). *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso Books).
- Barack A. (2006). *The Judge in a Democracy* (Princeton University Press).
- Bekker P.H.F. (2005). The World Court's Ruling Regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective, in *Cornell International Law Journal*, n. 2.
- Bolzano B. (1851). *Paradoxien des Unendlichen* (C.H. Reclam).
- Brown W. (2010). *Walled States, Waning Sovereignty* (Zone Books).
- Calmette J. (1947). *La question de Pyrénées at la Marche d'Espagne au moyen age* (J.B. Janin).
- Cornelisse G. (2010). Immigration, Detention and the Territoriality of Universal Rights, in N. De Genova, and N. Peutz (eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press).
- Crawford J. (2005). *The Creation of States in International Law* (Oxford University Press).

- Davidson R.A. (2003). Spaces of Immigration “Prevention”: Interdiction and the Nonplace, in *Diacritics*, n. 3/4.
- Dowty A. (1989). *Closed Borders. The Contemporary Assault on Freedom of Movement* (Yale University Press).
- Edkins J., and Pin-Fat V. (2004). Introduction: Life, Power, Resistance, in V. Pin-Fat and M.J. Shapiro (eds.), *Sovereign Lives: Power in Global Politics* (Taylor & Francis).
- Farrell B.R. (2003). The Role of International Law in the Kashmir Conflict, in *Penn State International Law Review*, vol. 21.
- Gopalan S. (2007). From Darfur to Sinai to Kashmir: Ethno-religious Conflicts and Legalization, in *Buffalo Law Review*, n. 2.
- Gross A.M. (2006). The Enforcement and Limits of Humanitarian Law and the Structure of Occupation, in *Leiden Journal of International Law*, n. 3.
- Hattery A., Embrick D.G., and Smith E., eds. (2008). *Globalization and America: Race, Human Rights, and Inequality* (Rowman & Littlefield).
- Heyman, J. McC., and Ackleson, J. (2006). United States Border Security after 9/11, in J. Winterdyk, and K. Sundberg (eds.), *Border Security in the Al-Qaeda Era* (CRC Press).
- Howland D., and White L., eds. (2009). *The State of Sovereignty. Territories, Laws, Populations* (Indiana University Press).
- Jellinek G. (1921). *Allgemeine Staatslehre. Dritte Auflage* (Springer).
- Kadain R. (1992). *The Kashmir Tangle: Issues and Options* (Routledge).
- Kanhia K., and Kanhia T.M.K. (1992). Human Rights Violations of Kashmiri Hindus, in T.G.C. Raju (ed.), *Perspectives on Kashmir: The Roots of Conflict in South Asia* (Routledge).
- Kattan V. (2007). The Legality of the West Bank Wall: Israel’s High Court of Justice v. The International Court of Justice, in *Vanderbilt Journal of Transnational Law*, vol. 40.
- Kelsen H. (1945). *General Theory of Law and State* (Harvard University Press).
- Knipschild P. (1740). *Tractatus Politico-Historico-Juridicus de juribus et*

privilegiscivitatum imperialium, vol. I (J. Beck).

Kratochwil F. (1986). Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System, in *World Politics*, n. 1.

Lasaffer R. (2005). Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription, in *European Journal of International Law*, n. 1.

Leibniz G.W. (2009). Leibniz to Antoine Arnauld. Hannover, 28. November/8. Dezember 1686, in *Sämtliche Schriften und Briefe*, sec. II, vol. II (De Gruyter).

Lindahl H. (2013). *Fault Lines of Globalization: Legal Order and Politics of A-Legality* (Oxford University Press).

Miller D.L. (1995). *On Nationality* (Oxford University Press).

Miller D.L. (2007). *National Responsibility and Global Justice* (Oxford University Press).

Miller D.L. (2012). Territorial Rights: Concept and Justification, in *Political Studies*, n. 2.

Miller D.L., and Sohail H.H., eds. (2001). *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press).

Morales D.I. (2009). In Democracy's Shadows. Fences, Raids and the Production of Migrant Illegality, in *Stanford Journal of Civil Rights & Civil Liberties*, vol. 5.

Preuss U.K. (2010). Disconnecting Constitutions from Statehood. Is Global Constitutionalism a Viable Concept?, in P. Dobner, and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press).

Raz J. (2009). *The Authority of Law. Essays on Law and Morality* (Oxford University Press).

Rosenzweig F. (1984). *Globus. Studien zur weltgeschichtlichen Raumlehre* (1917), in *Gesammelte Schriften*, vol. III (Springer).

Sack R.D. (1986). *Human Territoriality: Its Theory and History* (Cambridge University Press).

Sassen S. (2007). *A Sociology of Globalization* (Norton & Co.).

- Scattola M. (1997). Die Grenze der Neuzeit. Ihr Begriff in der juristischen und politischen Literatur der Antike und Frühmoderne, in M. Bauer, and T. Rahn (eds.), *Die Grenze. Begriff und Inszenierung* (De Gruyter).
- Scattola M. (2003). *De finibus imperii Germanici*. Die frühneuzeitliche Diskussion über die Grenzen des Heiligen Römischen Reiches, in *Mitteilunge. Institut für Europäische Kulturgeschichte der Universität Augsburg*, n. 11.
- Schmitt C. (1974). *Das Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot).
- Simmons J.A. (2001). On the Territorial Rights of States, in *Philosophical Issues*, n. 1.
- Smith B. (1995). On Drawing Lines on a Map, in A.U. Frank, and W. Kuhn (eds.), *Spatial Information Theory. Proceedings of the Third International Conference* (Springer).
- Smith B., and Varzi A. (2000). Fiat and Bona Fide Boundaries, in *Philosophy and Phenomenological Research*, n. 2.
- Taylor P.J. (1994). The State as Container: Territoriality in the Modern World-system, in *Progress in Human Geography*, n. 2.
- Weber M. (1964). *Wirtschaft und Gesellschaft: Studienausgabe. Zwei Halbbände* (Kiepenheuer & Witsch).
- Wirsing R.G. (1998). *India, Pakistan and the Kashmir Dispute: On Regional Conflict and Its Resolution* (Palgrave Macmillan).
- Wolff R.P. (1990). *The Conflict Between Authority and Autonomy* (Blackwell).