International law without terminus?

Reflections on delimitation[1]

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> "A century before the time of the celebrated treaty of Westphalia, a Pope (…) published the famous bull which divided between the Spaniards and the Portuguese those territories which the enterprising genius of discovery had already given, or might afterwards give, to the two nations, in the Indies and in America. The finger of the Pontiff traced a line on the globe, which the two nations agreed to consider as a sacred boundary, which ambitions should respect on either side."
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> Joseph de Maistre, *The Pope, Considered in His Relations with the Church, Temporal Sovereignties, Separated Churches, and the Cause of Civilization.* Transl. Rev. Æneas McD. Dawson (1850), London, C. Dolman, chap. XIV, 'The Bull Inter Cætera', p. 215.

Limitation is a somewhat misleading subject. One sets about it with the feeling of having food for thought served up by numerous treaties, abundant practice, and no less abounding precedent; a quite easily identifiable topic, then. These first intuitions encourage one to imagine a dissertation on the delimitation of borders drawn from the hoped-for harvest of future readings on the classical doctrine of the law of nations, from which one does not *a priori* rule out including some comparison with contemporary conceptions. It promises to be a journey of a reasonable length, one thinks, with the eagerness of beginnings, when promises have not yet been dulled by actual achievements. Disillusion comes quickly, for the scales struggle to tip under the weight of the would-be facts that had seemed so promising at the beginning. First, one totters under historical monographs – there are some for almost every border – and one plies beneath the burden of studies on territory, territorial titles, and the delimitation of maritime areas. Yet, on the *act* of delimitation, studied for itself more than through the contribution it makes to theories of territory, of borders, or

even of the State, sources become significantly scarcer, particularly as the *methods* of delimitation of borders have been excluded from the subject as proposed to the present author. Second, borders fade as one goes back in time. The multiple bounds of the past that we did not think of are compounded or superseded by those of today, which we do not really know what to do with, with the result that the naive clarity of our initial suppositions blurs painfully: among the many kinds of spatial divisions evoked in a jumble of texts of all sorts (diplomatic archives, political philosophies, mythologies, anthropologies, religions, doctrines of the law of nations, etc.),[2] which are the ones that ought to be selected for a subject proposed to a reader of international law?

That reader will reply without hesitation that one need only look at what is relevant *today*, namely the delimitation of borders. And how could he be wrong? And yet, there may be a few drawbacks in holding to this view alone. What can one hope to get out of the history of doctrines when such doctrines appear to have hardly concerned themselves with borders and their delimitation over the long term? The question calls for a few remarks on delimitation in general before turning to those aspects more specific to international law.

I - On the question of limits and delimitation in general

A. Two Old stories

A certain mythological tradition holds that, in early times, fields were not bounded and everything was common land. Men did not know individual property until, over the course of time, they lost their primal wisdom and gave free rein to their baser passions. From then on, the greed of what had now become harsh and selfish men doomed the world to disorder and strife to the point that Ceres interceded, ordering each landowner to bound his field with trees or stones. As evidence of the frequent transition from the world of mythology to that of religious institutions, this boundary marker was thereafter honoured as a god, who was named *Terminus*, first worshipped it is said by Numa Pompilius towards the end of the eighth century BC. At first a plain stone, the statue of the god subsequently took on the form of a footless, often armless man set on a pyramid-shaped marker. Terminus, he who does not move. Ancient engravings of these statues often have bases with the inscription *nulli cedo* or *concedo nulli*. Terminus, he who does not yield his place.

In the ancient Mesopotamian room of the Richelieu wing of the Louvre Museum, visitors can admire a stele dating from 2450 BC, known as the ‘Vulture stele’, of which Victor Hugo supposedly said on contemplating it that it came from a time when the Earth ‘was still wet and soft from the flood’.[3] Engraved on it are scenes recounting a battle between the Sumerian cities of Lagash and Umma, a battle for irrigated fields on the boundaries of their two territories.[4] No one will ever know if that war had as its *cause* the indeterminacy of the bound or if its *effect* was to fix that bound (to the victor’s advantage as always), or the two at once. However, the fragments of this account sculpted in stone tell us that war and ‘bounds’ tied the closest bonds imaginable. As Lord Curzon said, ‘Frontiers are indeed the razor’s edge on which hang suspended the modern issues of war or peace, of life or death to nations’.[5]

More broadly still, these age-old representations stretching into a past in which history is steeped in mythical times[6] – in which can be evoked the founding of Rome by the tracing of a furrow, the inaugural and foundational bound that Remus fatally failed to observe – remind us that while delimitation may be a cause of war, there can be no peace without delimitation .

B. On Different manners of studying things

Perhaps there will quite naturally be doubts about the relevance of such evocations for inaugurating learned and technical work on delimitation in public international law. Two reasons might prompt us to set aside such natural doubt, at least provisionally.

The first reason pertains to how difficult it would be to justify even at length the ambit within which to enclose 'doctrine' to be drawn on here. Not just because generally no reference could be made to 'doctrine' without some more or less arbitrary choices, but also for substantive reasons. It proves difficult to confine ourselves to the very terms (delimitation/frontier) in which the subject presents itself to us *today* because the term 'frontier' is historically marked, its meaning has changed, as has the interest shown in it. In other words, since the frontier is only a particular species of a much broader genus, that of *bound*, it is important to not be overly specialised in thinking, at least initially, if only to determine at what point, why, and in what circumstances this bound that has become a 'frontier' appears as an operative (and fundamental) concept of public international law. Consequently, anyone wanting to set about in-depth work on the subject should probably be invited to extend their research beyond the mere political border as it is understood today and beyond the doctrine that is roughly marked down as 'foundational' for the law of nations.[7]

The second reason draws on the very style and methods of doctrine. While it is certainly no longer contemporary fashion to invite the humanities overly into the reflection of jurists, things were long otherwise. There is no doubt at all that, as we shall see below, Grotius found it natural and relevant to call on the goddess Ceres to illustrate the subject of the division of the land in his celebrated *De jure belli ac pacis* of 1625, which also contains nearly a dozen or so allusions to Romulus. Although his book is not strictly a treatise on international law, as has been masterfully demonstrated,[8] even so the method of exposition and argument specific to Grotius, and truth to tell, to a whole bygone era, explains the legitimate feeling of strangeness that a contemporary international jurist may have about certain references.[9] Such a jurist is quite reasonably given to consider that Cicero, Homer, Saint Ambrose, Seneca, Saint John Chrysostom, Virgil and Aristotle do not belong to the circle of authorities and sources specifically essential for forming an opinion on so precise a subject as frontiers and their delimitation.

It is possible both to share this feeling and to try to see whether what is slightly dated literature can still, in some respects, provide lessons for a contemporary understanding of these matters. This at any rate is the perilous task that has fallen to me and that shall be taken up here merely, it should be emphasised from the outset, by evoking a few avenues of enquiry.

C. Bound, division of space and law

There is no property whether public or private without a division of space, without an outline called ‘delimitation’. Law, the essential function of which is to stylize the real world, to divide it up into conceptual categories by those other delimitations that constitute the operations of characterisation, is both the instrument and the outcome of spatial divisions. There is debate – as shall be seen below with respect to the bounds formed by certain rivers – about whether the delimitation of property and the delimitation of borders between peoples come down to the same thing, but the connection between delimitation (in general) and law is unanimously upheld.

An investigation into ‘bound’ and ‘delimitation’ in the whole of Grotius’ *On the Law of War and Peace* leads us straight to Book II, chapter II entitled ‘Of things which belong to men in common’. Eager to show how the question of ‘bound’ is coextensive with the question of property, our venerable author explains in what way the question of bounds arose by referring largely to a corpus of ancient mythology and Bible stories:

‘Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature. […] In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act […] Men did not, however, continue to live this simple and innocent life […] Finally, with increase in the number of men as well as of flocks, lands everywhere began to be divided, not as previously by peoples, but by families […] From these sources we learn what was the cause on account of which the primitive common ownership […] was abandoned […] At the same time, we learn *how things became subject to private ownership*. This happened not by a mere act of will […] but rather by a kind of *agreement, either expressed*, as by a division, or implied, as by *occupation*. And when the ancients called Ceres a ‘lawgiver’ and named her sacred rites the Thesmophoria, they implied that out of the division of lands a new law had arisen.’[10]

A later variant is to present this same argument negatively; man’s failure to recognise the Earth’s *natural divisions* and their replacement by artificial bounds is supposedly the source of contention, dispute and ultimately war. This is expressed by the geographer Buache de La Neuville : ‘Nature had herself divided out the earth from its origins. She had divided its surface into an infinity of parts and had separated them by barriers that neither the passage of time nor any human inventions shall ever be able to destroy. But Man failed to recognise this natural division; he shared out the earth as his ambition saw fit; he settled the bounds of his possessions according to his strength and power […] Hence the origins of contention between neighbouring peoples […] This natural and unvarying division that will last until the end of time, being applied to the division of states, would remove all matters of contention and forever ensure the tranquillity of peoples’.[11]

The human introduction of bounds, derived from the sharing out of geographical space, therefore has an inaugural function. It takes us from the time of the community (or as may be for peoples from the natural geographical division) to that of the bound,[12] it is akin to the creation of political society and its system of law. This is what is to be understood, of course, in Rousseau’s famous cry (of despair, but that is another story) uttered in 1754 in his *Discourse on Inequality*: ‘The first man who, having enclosed a piece of ground, bethought himself of saying This is mine, and found people simple enough to believe him, was the real founder of civil society.’ There were many ‘foolish’ enough to believe the fence was legitimate whereas people should continue to think that ‘the fruits of the earth belong to us all, and the earth itself to nobody’.[13] These texts and many

others of the same kind staging the dividing up of space and the first dramatic events arising from outlines and delimitations may well be regarded as forms of *conjecture*. Even so they have a sure function in the history of representations. The themes they convey belong to a sort of cultural invariant, from the Bible down to the Moderns.

It is possible to become persuaded of this by thinking over a text by Kant that is fairly gripping in many respects and entitled *Conjectural Beginning of Human History*. Kant invites us to follow him in his reading of Genesis and conjecture about the time when labour and discord emerged simultaneously because of the rivalry between herders and cultivators. The hard life of farmers required 'permanent dwellings, ownership of the land and sufficient power to defend the latter. *The shepherd hates this ownership, however, as it limits his freedom of pasture.*'[14] In this way, Kant went on, the ploughman was probably the first to use force to protect his land against damage done by more or less nomadic herders, with the result that – it is tempting to add – the murder of the herder Abel by the cultivator Cain records a structuring figure of consideration of warfare related to two irreconcilable representations of the use of space arising from opposing relations in the working of nature: the representation of freedom and passage, even if detrimental to others, and the representation of the boundary and cordoning off in the defence of a territory, even if it means land grabbing.[15]

Of this attitude, Kant too says, 'But above all a civil constitution and public justice began to be instituted.'[16] So after mythology and the law of nations, delimitation draws us once more towards a fundamental theme of political philosophy from Hobbes to Schmitt by way of Locke and the French revolutionaries: the birth of the city and its law, conveying discrimination between the citizen and the foreigner, separation between the 'country' and 'foreign lands', as the fundamental requisite for the existence and cohesion of the city, an ensemble implying drawing its geographical perimeter, inscribing it in space.

More broadly still, it can be said that being, thought and bound are absolutely inseparable. As Lévi-Strauss recalled, any identity, any thought, is an identity and a thought of limits, those that separate – empirically or discursively – one thing from another, one city from another and self from other. Does not our judgment operate via an activity of discrimination, there again, between a being, real or ideal, and another, which requires outlines and bounds?[17] 'The self becomes aware of itself when it comes into contact with non-self' said the founder of the French school of geography, Vidal de la Blache of Alsace-Lorraine.[18]

Plainly, the subject of delimitation is drawn up to such heights that it is lost from sight! To keep it closer to us, we must try to enclose it within bounds that are reasonable without being too anachronistic.

II - Limits and the delimitation of frontiers as central parameters of public international law

It is pointless returning to the times and the style of legal humanism to observe that the very general views that precede apply to international law with a relevance that its very subject intensifies: organising and subjecting some of the relations maintained by entities – primarily states – to the very distinction from which international law draws it reason for being.

A. The world cordoned off into states

The *political* divisions of space date back to the earliest of ancient times, as attested to by Egyptian boundary markers and treaties on the delimitation of frontiers between Assur and Babylon in the fifteenth and fourteenth centuries BC. It might be thought that their function had scarcely any reason to differ markedly from what is expected of our contemporary borders. However, historical research into these questions calls for nuances because it seems that the practices of drawing bounds 'proved […] *diverse depending on the types of contact and state apparatus in action*'.[19] The frontier and its delimitation as such matter less than what is encircled: empire, polity, state, city. In other words, the characteristics of frontiers derive from the nature of the political objects that they delimit; 'Such and such a type of state, such a bound, and, where appropriate, such a frontier in the military and political sense of the word', Febvre wrote in a foundational article.[20] And so the universalization of the state political model necessarily marks a decisive stage in apprehending and delimiting frontiers. This is why some authors have emphasised this turning point in history when the division of the world into state-ruled areas becomes generalised, this point in time that humanity has gradually come to and of which Rousseau gives a nightmarish description: 'It is easy to see how the establishment of one community made that of all the rest necessary, and how, in order to make head against united forces, the rest of mankind had to unite in turn. Societies soon multiplied and spread over the face of the earth, till hardly a corner of the world was left in which man could escape the yoke, and withdraw his head from beneath the sword which he saw perpetually hanging over him by a thread.'[21] The reign of these highly specific bounds that political borders form is supposedly the end-result of this grim evolution. Rousseau claims that the complete political delimitation of the world spawned the worst of evils – war, which, by replacing one-to-one conflicts and making a virtue of the duty to slit one's neighbour's throat, cast humanity into an incomparably more dire misfortune than the one it hoped to escape from through becoming sociable. From this perspective, political delimitation supposedly enshrined the universal rule of Ares definitively.

Addressing things less philosophically than Rousseau, it can be said that power and jurisdiction over geographical space have been divided on an 'international' scale factually, that is, they have been shaped by the balance of power, with the result that international law emerged as a historical necessity and the map and the conditions for its deployment have drawn themselves. As the International Court of Justice said, to determine areas over which states are authorised to exercise their sovereign rights, 'It is therefore necessary to establish the boundary or boundaries between neighbouring States, that is to say, to draw the exact line or lines where the extension in space of the sovereign powers and rights of [Greece] meets those of [Turkey].'[22] Boundaries and their delimitation are therefore, at first sight at least, the conditions for international law – which they underpin – coming about and developing. It has recently been argued in the International Court of Justice that 'territory is the essential framework for the exercise of State sovereignty and constitutes the spatial context for the very existence of the State', it being specified that 'the foundational norm of respect for the territorial integrity of States' links 'the very essence of international law as a State-focused system with the notion of binding international regulation of the most serious issues as mandated by the Security Council of the United Nations.'[23] In his lectures on terrestrial borders, Bardonnet emphasised that 'The inviolability of borders is the application of the non-use of force in terms of territorial integrity.'[24] Under such circumstances, how could borders encompassing the territory of states not be absolutely central parameters of public international law, to the extent that it would be legitimate to speak of them as an 'obsession'?

B. ***Obsession***

Obsession: this is the term sometimes used to characterise the relation between the state and 'its' territory.[25] And yet – as just briefly mentioned – delimitation in general is far more than a simple 'historical obsession'. There is every reason to think that the delimitation of boundaries in the current sense (for example as it results from the quotation from the Court of The Hague above) is – if the term had to be kept – a contemporary 'obsession'.

It is not pointless demonstrating at length why some speak of the delimitation of borders as a contemporary 'obsession'. Michel Foucher's excellent book, *L'obsession des frontières*, leaves no room for doubt on this. The author provides some revealing figures: in the last twenty years political boundaries have been increasing constantly: more than 28,000 kilometres (17,500 miles) of new international borders have been established since 1991, a further 24,000 kilometres (15,000 miles) have been the subject of delimitation and demarcation agreements, and still only 30 per cent of potential maritime borders have been the subject of negotiated delimitation treaties.[26] It can be added that certain international organisations have originated out of the intent to settle border and territorial disputes; this is the case of the 'Shanghai Five', an association set up in 1996 to determine the former borders between the USSR and China, and that became the Shanghai Cooperation Organisation in 2001, with competency now extending beyond border issues.

All international jurists are aware of the growing international litigation over these issues,[27] countless PhD theses, colloquia and studies have been given over to them, and it would be pointless emphasising or expounding anew the part played in these matters by the emergence of new states, the fall of the Berlin wall, demands for self-determination and the right of peoples to self-determination when those people aspire to form a state,[28] the race for militarily strategic spaces and resources of all kinds. On the question of resources, it can be observed that the dynamic of land-grabbing has led to ever growing demands in the degree of precision of delimitations made or to be made, above all for cross-border reserves,[29] bringing an end to an ancient international practice whereby zones were deliberately left out of any delimitation.[30] All of this is proven and incontrovertible.

And yet it is not sure that this obsession is 'historical' if this is to be understood as meaning it has always existed and is to continue indefinitely. An attempt might be made to supplement or even nuance this presentation in some respects for historical and doctrinal reasons calling first for some degree of relativisation and next for practical and contemporaneous reasons, when it is realised that sometimes the delimitation of their borders becomes a secondary concern of states.

III - The historical mark of concern with the delimitation of boundaries

As Nietzsche well showed, history is the grave of certainties. Our subject is no exception. The idea that states might always have had a thing about (not to say been obsessed with) delimiting their borders runs aground there, like so many other ideas. To underscore this aspect of things is not to deny that there have long been delimitations. The outstanding and quite complex example of the 1493 attribution by the papal bull of Alexander VI, *Inter Cætera* (followed by the 1494 treaty of

Tordesillas) must be cited but would require developments that cannot be allowed here for a precise appreciation of its contribution to the question of the delimitation of frontiers.[31] Even so, this example and somewhat sporadic practice apart, it is only in a relatively recent past that delimitation has become the ardent concern that we know today. In scholarship, before a turning point that can be situated roughly in the middle of the eighteenth century (and partly under the impetus of the policy of the French monarchy), the delimitation of borders was not a major preoccupation, except from the rather peculiar angle of border rivers that have been much emphasised.

A. Historical emergence of concern with the delimitation of frontiers

'Whoever has made the least study of the frontiers of the Empire, in Africa or in the Orient for example, would be in a quandary if asked point blank to say where the Roman frontier ran exactly and to point with map in hand to the limit to which the *imperium romanum* extended […] more still than the location of the *termini imperii*, it is the very concept of Roman frontier, in the sense in which we ordinarily understand the term, that is in question […] the frontier, as it is universally meant at present – that of the nation-state […] makes it difficult to grasp this odd historical object that has become for us the outer envelope of a universal empire, a world-empire, and so a multinational one and that is supposed to be conflated with the *oecumenia*, [the known world].'[32] This point, already made in Momsen's *Le droit public romain* or the works of Lapradelle[33] does not imply that we must here go back as far as the Romans, but it is enough to suggest how relative the idea of border is. It also emphasises a trend that the contemporary world is far from having discredited: every empire's aversion for national political borders.

It so happens that, having begun with very fuzzy and then – from the seventeenth century on – cautious conceptions related to the doctrine of its 'natural' frontiers, France played a particular role in this development – quite contrary to those imperial conceptions – of the language and practices of boundaries because of a gradually asserted political will to delimit – as an act of separation of public authorities – the kingdom in an increasingly precise manner, to the extent that, to emphasise its role in elaborating the modern national frontier, the nation has been characterised as a '*traceuse de frontières*', a 'draughter of boundaries'.[34] But even so it was a movement that was relatively late in coming and it took more than four centuries for the word '*frontière*' to take on its contemporary meaning of a boundary between states. As Lapradelle summarises, from the monarchic conception of the frontier there 'results up until the end of the seventeenth century, the complete absence of treaties on boundaries. The non-delimitation stems in part from the monarchy's dislike for any limit other than a natural one and from the difficulty in setting out boundary markers when there was such confusion over estate rights, and, to some degree, so many shortcomings in map-making knowledge'.[35]

The development of French terminology on frontiers helps in situating the word 'within the vast range of bounds';[36] *borne*, *confins*, *marche*, *limite*, *marque*, *démarcation*, *front*, *terme*, *frontière*… A mid-eighteenth century thesaurus, although very precise, makes no mention of the word 'frontière' and notably not under the heading '*Termes*, *Limites*, *Bornes'* : « Le *terme* est où l'on peut aller. Les *limites* sont ce qu'on ne doit point passer. Les *bornes* sont ce qui empêche de passer outre. On approche ou l'on éloigne le *terme*. On resserre ou l'on étend les *limites*. On avance ou l'on recule les *bornes*. Le *terme* et les *limites* appartiennent à la chose ; ils la finissent. Les *bornes* lui sont étrangères ; elles la renferment dans le lieu qu'elle [la chose] occupe, ou la

contiennent dans sa sphère […] On a dit avec plus d'éloquence que de vérité que les *limites* de l'Empire romain étoient celles du monde ».[37] The *frontière*, related to '*front*' has a military connotation that neither *limite* nor *marche* had.[38] The old definitions of *frontière* – a term replete with the '*front*' from which it stems – present it as a variety of *limite* that had to be well guarded. A reading of the abbé de Mably confirms that occurrences of '*frontière'* are almost invariably military references, and they also indicate – which is surprising and probably somewhat odd in the late eighteenth century – that the author continues to think that the precision of the limits to the territory are of interest only to the inhabitants of border regions, as this passage shows: 'The different treaties that have been concluded between France and the Court of Turin not having fixed in a precise enough manner the limits of the two states, the kings of France and of Sardinia viewed with equal pain the quarrels which arose from time to time *between their subjects* and that sometimes even caused assaults, as contrary to the intention of their majesties as to the ties of blood and friendship that unite them, and to the perfect understanding they wish to maintain and perpetuate between the peoples subject to their dominion. To prevent any such discussions, the respective limits of the two states of the two powers have been fixed exactly and definitively; and consequently they have agreed that the Rhône henceforth forming by the middle of its greatest course a natural limit and without enclave… Were I to follow here, with the greatest exactness, all the lines, all the bounds, all the tributaries that separate the lands of Savoy or of Piedmont from those of France, I would certainly not be understood by my readers; it would be necessary to lay before their eyes the very map on which the commissioners of the two powers laboured. *Fortunately these objects are too unimportant to give rise to quarrels that might interest anyone other than the inhabitants of the frontiers* […] I shall observe only that the limits are generally established by the course of rivers or the summits of mountains and that the two powers have agreed to a semi-partition for all the portions of rivers, tributaries, streams, islands, bridges, valleys, cols and summits that remain or become bordering through the settlement of their limits'.[39]

We should not go and imagine it was just an evolution in terminology because in actual fact borders were long not completely immobile: located where there were fortifications, more often than not they were not fixed narrow zones, nor an unbroken line, but rather a series of locations, forts and castles, strongholds. The border was for a very long time a 'grainy, discontinuous space with no fixed structure, dissociated by gaps through which armies passed to and fro' as Daniel Nordman[40] put it so outstandingly. It should be emphasised that before the sixteenth century, the kings of France, concerned as they were with their authority, were unable to picture the extent of their kingdom.[41] An institutional clue, that is, a change in the internal administrative organisation of the state, reveals a change that came about gradually in the eighteenth century, attesting to the growing attention to the delimitation of borders. While, according to circumstances, the issue of borders within the departments of the French monarchy fell within the ambit of one or other administration, they gradually came to be thought of as part of specialist administration and knowledge (linguistic, cartographic, etc.). France set up a fund for *Limites* of foreign affairs: documents pertaining to matters of delimitation and frontiers were collated in the *Limites* series and filed by country and province: notes and memoranda, inventories and copies of titles, copies or excerpts of treaties, records of delimitation and the status of boundary markers, records of transfers and takings of possession, sketch maps, plans, charts covering the years 1687–1902. In 1775 a topographical Bureau was established for the demarcation of limits reporting directly to the minister.[42] A similar movement is to be observed in other countries. In the Netherlands, Maria-Elisabeth set up a *Jointe des terres contestées* to examine territorial disputes between the Austrian Netherlands and the principality of Liège, a body that subsequently extended its jurisdiction to all matters of the kind.[43] But in any event, the drawing of a linear border is a *spatial reflection* of the nation state model, a political, military, ideological, fiscal, and customs limit (but not religious or linguistic) whose hoped-for virtues (consistency, precision, stability, etc.) derived not from itself

but from the political organisation that it has the function of encompassing[44] and, it should be added, the relations that political organisation maintains with its neighbours. 'The era of congresses', when lines were drawn on so many maps, is a perfect illustration of this.

Vattel echoes this new concern in his chapter on 'The Effects of Territorial Domain as Between Nations' in which he observes: 'Since the least encroachment upon the territory of another is an act of injustice, in order to avoid being guilty of it, and to remove all occasion for strife and dispute, the boundary lines of territories should be clearly and precisely determined. If the men who drew up the Treaty of Utrecht had given to this important matter the attention it deserved we would not find France and England in arms to decide by a bloody war the extent of their possessions in America.'[45] Even so, for a long time there was little doctrine in international law on the matter of the delimitation of borders.

B. Doctrine of frontier rivers

There is a noteworthy exception to this relative long-term indifference suggested by the scant attention from authors for the delimitation of frontiers as such before the eighteenth century; the question of streams and rivers, one of the manifestations of the debate on 'natural' frontiers and the huge question of boundary marking in general. Back in the fourteenth century, Bartolo, struck by the Tiber's meanders, reflected on rivers being both natural and shifting bounds. With the help of a theologian and expert in geometry, he composed a work in 1355 in which he proposed practical and legal solutions based on Roman law and geometry to questions such as the share-out of alluvial deposits, the islands that arise along the course of rivers and changes to their courses ('divagations'); he recommended making figures to help settle disputes.[46]

While virtually silent on frontiers and their delimitation, Grotius' *On the Law of War and Peace* has long pages on the question that rivers raise for delimitation,[47] with much the same thing for Textor,[48] Wolff and others.[49] Vattel, whose *Law of Nations* says no more on the delimitation of frontiers, gives over an entire chapter to 'Rivers, Streams, and Lakes'.[50] On the delimitation of property, Grotius refers to the Greek geographer Strabo on the difficulties of delimiting land close to the shifting Nile: 'The Egyptians handled these matters rather well, and in regard to them we find the following in Strabo: "There was need of an accurate and minute division of fields for the reason that the Nile, adding and taking away by its overflows, changes the appearance of the surface and the landmarks, and confuses the boundaries by which the land of one is distinguished from that of another. On this account the surveying of the land had often to be done over".'[51]

There are several reasons for particular attention being paid to boundary rivers in cases of delimitation. It arises in part from Grotius, like many others, probably not attributing equal value to artificial boundaries and natural (arcifinious) boundaries.[52] The former are precarious, the latter perfect (as if that which nature marked out had the virtue of dividing people less!). But here is a natural boundary that shifts on its own (contrary to mountains, of which virtually nothing is said, and for good reason[53]): 'a river by gradually changing its course changes also the borders of the domain' Pufendorf says.[54] A prosaically military and legal explanation for this delectation for boundary rivers is that nature fortunately sets such obstacles against the malicious-minded; like Grotius before, Pufendorf emphasises: 'areas called arcifinious, the boundaries of which are formed for the special purpose of warding off enemies […] une rivière marque très clairement les bornes

d'un pays et elle lui sert en même temps de rempart' [a river marks a country's bounds very clearly and serves as a rampart for it at the same time]. [55] The same idea can be found in Vattel.[56] Lastly, it seems that another source of this insistence on the question of rivers must be added to these considerations: they make ownership dependent on natural changes. Observing this obvious fact that rivers change their courses, carry sediment and are subject to change, some authors reflect at length on the legal consequences of this. Thus, in dealing with the delimitations of *territories* among *peoples*, some authors are also (and sometimes primarily) thinking of the problems of delimitation of *property* among *individuals* posed by the meanderings of water courses. This is Grotius' position, who addresses the question in both cases by way of a relation of ownership.

The resort to Roman law, and especially the law of alluvial deposits drawn from Ulpian,[57] to simultaneously resolve conflicts of ownership and sovereignty (our authors speak rather of 'jurisdiction') reinforces an impression of the perspectives of public and private law being brought closer together, we would say nowadays: 'Let us now come to the fluvial additions of land, to which the ancient jurists devoted many rescripts, and modern jurists even entire commentaries […] For most of their definitions rest on this basic principle, that […] the river banks belong to the possessors of the nearest estates […] The resulting inference is that islands where are formed in the stream belong to the same owners. […] For the Roman jurists themselves concede that an island which floats in a river […] is public property; in fact an island formed in a river ought to belong to the person who has a title to the river.'[58] 'The surveyors tell us that there are three kinds of lands: […] *divided* and *allotted* land, which the jurist Florentinus calls *delimited* […]; land *allotted as a whole*, or designated by measure as by hundred-acre parcels and by acres; and land having natural frontiers (*arcifinium)'*.[59] The way in which Grotius explains this point deserves some attention. For Grotius, even if it is sovereign, the state is the 'owner' of its territory;[60] the right of individual ownership is presented from a perspective to which Roman law still owes a lot, in a relationship of derivation of 'public' property that can be 'distributed' by the state among individuals, thereby instigating private ownership.[61] So it is a matter in all cases of delimiting *properties* and the principles in matters of delimitation of private properties have no reason to differ markedly from those applicable among peoples. Grotius is explicit about the reasons why for him the question of rivers can be dealt with in terms of the delimitation of private property as well as that of the delimitation of areas of jurisdiction between peoples: 'For if we take into consideration that which generally happens, peoples have taken possession of lands not only with sovereignty, but also with property ownership, before the fields have been assigned to individuals. Seneca says: "We designate as territories of the Athenians, or of the Campanians, those lands which afterward neighbours divide among themselves by private boundaries." […] Dio of Prusa says […] "Many things can be found which, as a whole, the state considers its own, but which have been divided among individual owners." […] Consequently, whatever was originally occupied by the people and has not since been distributed, must be considered the property of the people. As an island formed in a privately owned river, or the bed of such a river that has dried out, is the property of individuals, so in the case of a public stream both belong to the people, or to him to whom the people has granted it. […] As regards alluvial deposits, that is, the addition of soil particle by particle, these can be claimed by no one because the place of origin is unknown; otherwise, according to the law of nature, they would not change ownership. It ought to be considered certain that such deposits also belong to the people, if the people owned the river, as must be believed in case of doubt; otherwise such accretion would belong to the first occupant. […] But as the people can grant to others the right to such lands, so also it can grant the same right to the possessors of the nearest estates. The people seems indeed without doubt to have so granted this right in case the lands have no boundary on that side except the natural boundary, that is, the river itself.'[62] The meanders and alluvial deposits of rivers draw Grotius and certain authors to civil law and explain their interest in it and the transposition to relations 'among peoples' is not in doubt for them.[63]

This point of view is not always shared. Vattel's position on the matter is unclear. He writes, in paragraph 278: 'The sovereignty or jurisdiction over lakes and rivers follows the same rules as ownership'[64]. But on alluvial deposits, he notes: 'As between individuals, the civil laws have provided for the decision of the case; they should combine equity with the welfare of the State and a care to prevent litigation.'[65] And on lakes, Vattel seems to contradict paragraph 278 outright: 'we are here treating the questions as between States; other principles are needed to decide cases which arise between owners who are citizens of the same State.'[66] Pufendorf in a chapter VII entitled 'On the Acquisition of Accessions' largely on cases of private individuals distinguishes between private individuals and states as relating to different circumstances.[67] Bluntschli takes a nuanced view that 'here by analogy we can apply the Romans' *judicium finium regundarum*, allowing for the difference between the private nature of property ownership and the public nature of territory'.[68] Lastly, somewhat hastily attributing paternity of the transposition to an early nineteenth-century author,[69] Paul de La Pradelle on the third page of his book dismisses any origins of the frontier as a deriving from questions of delimitation of property and gives contemporary examples of dissociation between ownership and sovereignty.[70]

How far can sovereignty extend? The authors provide very similar answers but they need not be mentioned in a discussion of delimitation as such rather than techniques for effecting it. It is worth observing simply that a form of tension arises in some of these seventeenth- and eighteenth-century doctrines between the theory of historical rights (those of the earliest occupier[71]) which is an invitation to delve into remote history – this time without limits – and the idea that this quest is vain, that an equitable solution is to be arrived at by negotiating and reaching a transaction. This already suggests that, when it comes to delimitation, historical explanations designed to make rights emerge from history are a *bargaining counter*. This may explain why there has been little theorizing in the doctrine on frontiers as such ('delimitation, the tracing of the bound is but one aspect of the problem of the frontier '[72]); everything comes down to agreement, and, unless an impartial and disinterested third party intervenes, it would be hard to find substantive rules that do not come apart in this agreement.[73] It is striking to observe that, at the point when France is setting about a policy of delimitation, towards the middle of the eighteenth century, a document from the ministry of foreign affairs entitled 'Memorandum on the operation of establishing the limits of the kingdom' dated 22 April 1746 that purports to signal a determination to engage in 'newly establishing the limits of all the kingdom's frontiers', invites a break with long-standing practice: 'These commissions [on limits] have always been governed by questions of law, as can be seen from all the minutes […] By proceeding in this way, things became caught up in a host of questions often foreign to the purposes to hand which lengthened the task and meant that conferences broke up after several years leaving several items undecided […] Things that could ensure the security of the frontier, ease trade and procure peace and quiet for subjects were overlooked. The records were swollen by a host of quotations of law and pleas filled with sophism that befogged matters.'[74] As Grotius again observes: 'It less often happens that states have boundaries set off by an artificial line of demarcation, or designated in terms of extent; but such cases arise less frequently from primary acquisition than from a grant made by another […] the matter had been settled in such a way by agreement'.[75] As this author wrote, more generally 'The […] method is by agreement to arbitrate'.[76] Hardly unfamiliar ground for the contemporary international law scholar.

IV - When the delimitation of borders takes a back seat

As said, the delimitation of borders is preeminent in public international law and no one doubts it is a central issue there. Yet it is not a 'primary' systematic concern for states. It often has a largely declaratory character dependent on relations that come ahead of delimitation. Moreover, it is not uncommon for states to manage without delimiting their borders when, for some reason or other, those borders remain indeterminate.

A. ***Declarative aspects of the delimitation of borders***

The definition in the *Dictionnaire de droit international public* states that delimitation is a 'legal operation consisting in fixing the line of the boundary between two states, *based on rights of title* attributing respectively to them sovereignty over the territories divided between them'.[77] The distinction runs clearly in the direction of the declaratory character of the act of delimitation, but it seems to be weakened in practice.

The distinction between disputes over *attribution* and *delimitation* of territory was set out by the International Court of Justice in its landmark 1969 decision concerning the *North Sea Continental Shelf Cases* in which it posits 'its task […] relates essentially to the delimitation *and not the apportionment of the areas* concerned […] Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area'. True, the Court did go on immediately to add that 'even though in a number of cases the results may be comparable or even identical'.[78] When the Court casts doubt on the relevance of the distinction, it simultaneously emphasises the declaratory character of the legal decision establishing a frontier, whether the decision is made in a conflict of attribution of territory or a conflict over delimitation.[79] In this domain of maritime delimitations – which are only partly comparable with the domain of land borders[80] – case law, as is known, has gradually abandoned the declaratory conception developed in the 1969 decision but because of its connection with doctrine of the continental shelf as a natural extension of the territory over which its rights were exercised *ab initio*.[81] Because natural givens have been set aside in such matters, the connection between title and delimitation has changed since delimitation can no longer be understood as the observation of 'natural'[82] spatial distributions, calling the initial distinction into question. This remains, though, theoretically consistent with the declaratory character of delimitation, which is invariably the consequence of an interpretation of a state of affairs ahead of that point: no longer exclusively nature but the political and legal relations of the parties at cause. In reality, the third-party intervention must not conceal the part of the problem that is behind the matter being brought before it in the first place, namely either a dispute over bounds (which presupposes an agreement over titles and a dispute over interpretation of the exact extent of the areas concerned by the title) or the persistence of a dispute between the states in question over their titles *and* over the bounds of the areas at issue. It is certain that if, precisely for want of an agreement over title, a court or arbitrator is asked to draw a line, it is difficult to see without a legal fiction a declaratory operation in the award finally made; the two operations are combined in the same decision. The source of litigation is a dispute as to title, which impedes delimitation. Whenever states decide to turn to a third party to determine the title and delimit things, a close but procedural connection is instigated between title and delimitation: 'The legal basis of that which is to be delimited, and of entitlement to it, cannot be other than pertinent to that delimitation.'[83] In any hypothesis, it is plain that states submitting their border disputes is sufficient cause for their judicial settlement, as recalled by *Chief Justice*

Baldwin reasoning in a case in which the United States Supreme Court had to respond to an argument that a court could not adjudicate (political) questions of frontier delimitation.[84]

With respect to borders in general and not just maritime boundaries, when states do not resort to a third party, which means most cases, the delimitation of areas over which they exercise sovereignty is necessarily the *consequence* of their relations as to the title they mutually recognise. In this sense delimitation is indeed secondary, declaratory, it is less delimitation that 'obsesses' states than titles. While we must speak of the 'declaratory' character of the delimitation of borders with caution and nuance, this declaratory character even so enables us to understand that it comes second, as a derived formalisation reflecting a certain state of relations between the entities involved. So while the border separates sovereignties or rather the spaces over which state jurisdiction is exercised, its delimitation does not *constitute* those spaces properly speaking.[85] This is meant to indicate that the delimitation of borders is overshadowed by the question of titles, of agreement or disagreement over them, of which delimitation is only the result.

Part of the same idea is the fact that the delimitation of borders is often the ex post formalisation of forces in confrontation. As the definition of 'canon' amusingly notes in Ambrose Bierce's *Devil's Dictionary* (1906): 'An instrument employed in the rectification of national boundaries'. Many a peace treaty has in one way or other drawn the boundaries of belligerent states at the close of hostilities. If recent close studies of peace treaties are to be believed, they often contain implicit recognitions, resulting from clauses by which the parties waive claims, or undertake to abide by their territorial integrity.[86] In this case, as in the case of more explicit 'delimiting' clauses,[87] however imprecise they may be,[88] the spatial dimension of the peace treaty reflects a state of affairs prior to the delimitation they refer to or which they implement. It is significant in this respect that the most recent peace treaties simply refer back to earlier delimitations, which largely explains their belated but growing recourse to geographical maps.[89]

Before becoming befuddled with boundaries and their delimitation, it is important to be alert to the fact that more often than not they are first an *outcome* and the materialisation of a negotiation or balance of power *ahead* of the delimitation. In other words, delimitation of a boundary is both what is at stake and the spatial translation of realities that extend far beyond it. This idea can be found in the geopolitical views inspired by Ratzel reducing states to a territorial dimension subject to the two concepts of 'Position' (*Lage*) and 'Space' (*Raum*) and making the boundary a straightforward expression of the growth or decline of the state as measured by its territory;[90] but it is found equally in the French school of geography where humanity is reintegrated in geography, where it is people and not borders that are the origins of clusters that have adapted to the natural environment. The two perspectives make the border the bound on a certain human activity, a border that 'shapes itself on what goes on inside, not on the facility or obstacles it meets in establishing itself […] it is not the frame that matters but what is framed […] The frontier cannot be studied *per se*, but in relation to the groups it separates'.[91]

B. States without delimited borders

The (common) fact that borders have *not* been delimited, that they consequently remain indeterminate and disputed, is not an obstacle to the existence or recognition of the states concerned or to the fact that they develop relations subject to international law to exactly the same extent as

states with well-delimited borders. Where need be, states relegate the delimitation of borders to the background because they manage to overcome serious and persistent uncertainty on this subject for the purpose of maintaining relations, cooperating, being part of international organisations and concluding undertakings subject to international law.

It is true that the very idea of the state in international law seems related in some essential way to having clearly defined borders. But it would be a serious mistake to confuse this ideal with a requirement of international life; without mentioning certain long-standing decisions of the United States Supreme Court,[92] international precedent and practice are evidence to the contrary.

The *dictum* of the Permanent Court of International Justice in *Jaworzina* that 'the immediate recognition of the sovereignty of the States concerned over the territories' presupposes 'the existence of a territory *defined and delimited'* does not alter this conclusion. The case shows that, far from stating a general principle, the Court's assessment relates very specifically to particular stipulations, to clauses that in the case in point related *by treaty* the recognition of sovereignty to the condition of a territory 'defined and delimited in all respects'.[93] Outside of such specific stipulations, it is clear that even if the state has a territory, even if the territory is necessarily limited, it does not have to be fully delimited. In other words, precedent and practice show that a delimited border is not a condition for the recognition of the sovereignty or the existence of a state. In an award roughly contemporaneous with the case concerning *Jaworzina*, the German-Polish Mixed Arbitral Tribunal put this very clearly: 'Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatsoever. The practice of international law and historical precedents points to the contrary. In order to say that a State exists and can be recognized as such […] it is enough that this territory has a sufficient consistency, *even though its boundaries have not yet been accurately delimited* […] and that the State actually exercises independent public authority over that territory.'[94] Thus, as the International Court of Justice stated, 'uncertainty as to boundaries [cannot] affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (*Monastery of Saint Naoum, Advisory Opinion, 1924, P.C.I.J., Series B No. 9, at p. 10*) '.[95]

Close scrutiny should reveal a significant number of cases in which states *do not wish to delimit* their territory or are unable to do so for quite varied reasons.[96] In Bardonnet's study cited above, the principle is clearly shown to comply with practice: although the Belgian state existed since 1831, its border with the Netherlands was not fixed until 1839, and similar mismatches can be found for Saudi Arabia and for Niger's various borders.[97] The contemporary example of India's borders is also striking from this point of view, be they with China or Pakistan.

China and India share a 4,000 km (2,500 mile)-long border that has not been defined because of long-standing disagreements over large stretches of it.[98] One of the disputed sectors is in the Indian state of Arunachal Pradesh where China lays claim to some 90,000 km^2 (35,000 sq. miles). Elsewhere, the Aksaï Chin of 38,000 km^2 (15,000 sq. miles) is occupied by China and claimed by India. India also claims part of Kashmir ceded by Pakistan to China under the 1963 Sino-Pakistani border treaty (approximately 5,000 km^2 (2,000 sq. miles)). India argues the border should follow the 1865 Johnson line, while China invokes a path closer to the 1899 MacCartney-MacDonald line. Despite various attempts, the border has therefore never been delimited after official negotiations between the two states.

It is particularly interesting to see how states go about things when in a situation of the sort, how they resort to 'substitute solutions' for the delimitation of frontiers. Being unable to delimit their *border*, and for good reason, India and China are therefore separated by what is meaningfully called a Line of Actual Control, a cease-fire line and demilitarised zone dating from the 1962 Sino-Indian conflict (caused by a border incident like so many since). For want of delimitation, India and China have resorted to expedients sometimes termed 'confidence-building measures – CBMs', of which the creation of the Line of Actual Control in 1962 is one form. Further to diplomatic discussions, various measures were developed to offset the drawbacks of there being no delimitation: six-monthly meetings between officers, establishment of lines of communication between headquarters, prior notification of troop movements, etc. The two states concluded an agreement in 1993 on maintaining peace and quiet, providing for limitation of military forces and exercises along the Line of Actual Control – the existence of which was thereby legally recognised – and consultations over possible restrictions of aerial exercises in areas close to the said line. Verification and supervision agreements were planned. In 1996 an agreement on confidence building measures was reasserted and it extended the commitment to limit military deployment along the line of control, fixed precise restrictions for large-scale military air and land exercises and further developed the provisions on communication. In 2013, China and India signed an agreement on border defence cooperation to ensure patrolling incidents along the Line of Actual Control did not degenerate into armed conflict.[99] This agreement seeks to codify good practices derived from experience and lay down guidelines. It reasserts that the two parties must not mobilise their military capabilities against one another and that they undertake to continue to uphold peace, stability and quiet in the areas around the Line of Actual Control. It further specifies the scope and mechanism for cooperation between the two parties, and the means for bolstering exchanges between the two countries' border defence troops and armies. It is true that these mechanisms have proved powerless to prevent the constant multiplication of border incidents over the decades,[100] but it remains striking to see that at the same time China and India have developed economic exchanges and cooperation, which are constantly expanding.[101]

As for the separation between India and Pakistan over which the two states have been at loggerheads since 1947 (when India was partitioned), especially with respect to Kashmir,[102] again two states resort to a line of control corresponding to the cease-fire line of the 1949 Karachi agreement, amended in 1971 after one of the conflicts opposing the two states.[103] This is no more of a border than the Line of Actual Control but a demilitarised zone, which some commentators have pointed out is akin to the Roman *limes*. Photographs of the line are impressive; they show what often *replace* borders when they cannot be established and the disadvantage that this represents from the standpoint of international life is glaring. Whereas borders are meant to be crossed while materialising a state's territorial control, on the contrary these aggressive lines are literally un-crossable.[104] An astonishing feature that can be seen on all available maps is the incomplete character of the Line of Control itself in the eastern part of Kashmir: the final location specified is a point NJ9842; thereafter the cease-fire line is defined by the vague terms 'and from there on northwards to the glaciers'.[105] It can be noted that India and Pakistan have observer status within the Shanghai Cooperation Organisation.

These examples provide strong incentive to see in the act of delimitation an often declarative operation of prior situations or titles, further indicating that although the lack of delimitation of borders undoubtedly entails serious drawbacks (the uncertain, disputed, military, hazardous border zone), it is overcome even so by the needs of international life.

V - Conclusion: In praise of frontiers

While recalling that frontiers are obviously at the core of public international law, the foregoing observations have underscored certain aspects of them that relativise the importance of their delimitation. First, there are historical aspects: the scant importance, barring exceptions, long attributed to the precise tracing of borders defined as outlines, or lastingly accorded to doctrine on the question, and the interference, or even sometimes the confusion – especially over the question of border rivers – between the delimitation of political borders and boundaries of private property. Then there are aspects that are structurally attached to contemporary international relations, when it is recalled that frontiers and their delimitation are *outcomes* of the interplay of various forces and influences, or when it is observed that states may do without delimited borders with the result that unrest arising from the persistent contradictory claims on this matter does not infringe their existence as states or their recognition as such by others, nor the expansion of their reciprocal trade.

And yet, no mistake should be made about the doctrine that has guided this exposition: the evocation of what can or could have relegated the delimitation of frontiers to the background and the emphasis on their historical fragility were meant solely to draw attention to the reasons for according importance to frontiers and defending them.

This is why the supposedly derisory aspects of the best delimited frontiers confronted with phenomena that naturally disregard them have not been evoked: pollution, climate, cyberspace or epidemics call for reinforced cooperation or even international regulation, but obviously do not allow any cosmopolitan solution to the effectiveness of frontiers that were admittedly not drawn in the forlorn hope of setting up an impediment to them.

If the delimitation of borders does have something to do with the precious identity that it outlines, it is not a fence for all that. What is delimited is porous, it is a controlled crossing point: below a certain level of control, the frontier is just a word; above a certain level, it is an intolerable act of forcible enclosure.

Now, the frontier and its precise delimitation are not only the subject of contention over titles or lines, they are also the target of various shifting spheres hoping if not for their official abolition at least for their practical neutralisation. ‘Without borders’ – as in the strange seal of approval that now applies to all manner of things[106] – indicates which side progress is meant to lie on. With the result that, despite their incontrovertible dynamism, there is nothing exaggerated in worrying about borders.

It is in this sense that I speak here ‘in praise of frontiers’, as already done by others, for a wide range of ideas.[107] Certain constructions are opposed to frontiers in appearance or superficially only: the complex ‘abolition’ of internal borders within the European Union comes down pretty

much to shifting the related questions to a fully delimited external border.[108] In other words, it has only been possible to conceive of the experience of the European Union, which is often cited as meaning the removal of borders as a condition for success and progress, by erecting a border in due form on its outer edges, superseding the member states' borders in the EU's areas of competence. Far from denying the utility of frontiers, the EU limits the effects of them within its territory but recognises their essential character by establishing borders of its own, without fully clearing up the question of how an EU area fits in with member states' competence for delimiting their own borders.

Other ideologies that are paved with good intentions call for legitimate transgressions of borders; this is how some analyse the duty of interference and the responsibility to protect.[109] The flows of migrants with which Europe has been faced recently put its frontiers in the centre of the debate again with no one thinking, so it seems, to propose they be purely and simply abolished.[110] But borders still have to fear other indirect attacks, such as those from liberal imperialism that seeks to void their essential functions of content while leaving their outline intact.

Hardly any mention is made nowadays of divine providence's division of the planet's resources in a deliberately unequal way in order to justify international trade to which borders should not theologically be an obstacle, as Vitoria did in his day. The alibi today is freedom and competition, that drive both ultra-liberalism and imperialism. Let us re-read Marx *On the question of free trade*: 'Let us assume for a moment that there are no more Corn Laws or national or local custom duties; in fact that all the accidental circumstances which today the worker may take to be the cause of his miserable condition have entirely vanished, and you will have removed so many curtains that hide from his eyes his true enemy. He will see that capital become free will make him no less a slave than capital trammelled by customs duties. Gentlemen! Do not allow yourselves to be deluded by the abstract word "freedom".'[111] Nowadays the commissioners of the great market travel the 'globalised world' in business class to shower standardised products upon a seamless world market for tamed and uniform consumers from one end of the Earth to the other.[112] Rome in its time had shown the way; imperial and universalist constructions are poorly reconciled with territoriality: often recalcitrant to marker posts, they see in the frontier a contradiction with the revealed truth of the caliphs, the religious, the Napoleons and human rights.[113] At a time when major new free-trade instruments are being negotiated,[114] the movement for world trade liberalisation does not even need to tackle political boundaries head on: this can well be termed 'imperialism' for want of a technical definition of 'empire' but it is certainly no 'fantasy'.[115]An aggressive political and economic ideology constructed under the impetus of very powerful multinational groups conceals itself without difficulty beneath globalisation, which spreads under the pressure of phenomena over which political will has little hold;[116] this bad alchemy could eventually reduce our political borders to mysterious geoglyphs. Here I fall in with Professor Charvin's appraisal: 'Financial capitalism, the world over, cosmopolitan and transnational in character, is self-serving. The state is merely a potentially useless auxiliary for it […] Yet the nation-state has not exhausted its historical role. It remains the most conducive framework for social emancipation and democracy'[117] It is a sad paradox: the cosmopolitan aspiration to a borderless world leads the humanitarian ideals of the universal and intervention down the aisle on the arm of ultra-liberalism, but for the sole benefit of the big winners of ultra-liberalism.

If there must be an 'obsession'[118] with delimitation, then let frontiers remain, or they will be superseded by dangerous limits. When borders no longer do their job, all too often walls go up instead.[119]

[1] First published as ‘Le droit international sans Terminus ? Réflexions sur la délimitation’, in *Droit des frontières internationales* (SFDI, Pedone, 2016) pp. 7-41.

[2] See A. Buchanan and M. Moore (eds), *States, Nations and Borders. The Ethics of Making Boundaries* (Cambridge University Press, 2003).

[3] See Hugo, ‘Booz endormi’, *La légende des siècles*.

[4] ‘Enlil, the king of all countries, father of all the gods, through his firm speech, delimited the frontier […] Mesalim, king of Kish, measured it with the surveyor’s rope [and] erected a stele there […] Entemena, prince of Lagash, sent messengers in vain to Ila about this levee, Ila, prince of Umma, thief of estates, utterer of villainy, declared: “the levee is mine” ’, account of the archivist of Entemena cited by M. Foucher, *Fronts et frontières. Un tour du monde géopolitique*, Fayard, 1991, p. 60. People were already fighting 4500 years ago on the borderlands of what are now Iraq and Iran…

[5] Lord Curzon of Kedleston, *Frontiers*, The Roman Lectures (1907), Clarendon Press, 1908, p. 7.

[6] An enquiry into these ‘origins’ has been proposed recently by S. Elden, *The Birth of Territory*, University of Chicago Press, 2013, esp. p. 21-96.

[7] See a few observations on this *in* D. Alland, ‘Qu’est-ce qu’un « fondateur » du droit international ?’, preface to the new edition of A. Pillet (ed.), *Les fondateurs du droit international* (1904), Editions Panthéon-Assas, 2014, p. 7-20.

[8] P. Haggenmacher, *Grotius et la doctrine de la guerre juste*, PUF, 1983.

[9] See also the remarks by C. Leben *in* ‘Les sources hébraïques dans la doctrine du droit de la nature et des gens au XVIIe siècle’, *Droits* n° 56/2012, p. 205: ‘De la façon dont procèdent les auteurs du droit des gens’ (an abridged version can be found *in* D. Alland, V. Chetail, O. de Frouville & J.E. Vinuales (eds), *Unité et diversité du droit international. Ecrits en l’honneur du professeur Pierre-Marie Dupuy*, Nijhoff, 2014, p. 217); ‘Hebrew sources in the doctrine of the law of nature and nations in early modern Europe’ *Eur. J. Int. Law* (2016) 27 (1): 79-106.

[10] H. Grotius, *On the Law of War and Peace* [1625], Classics of International Law, The Carnegie Endowment for International Peace, transl. Francis W. Kelsey (Oxford, The Clarendon Press, 1925), Book II, chap. II, paras I–II (emphasis added). As shall be recalled below, there is a connection between saving seed for sowing new crops and the emergence of property – and therefore its spatial delimitation – and of law. ‘Civilising’ or ‘law-giving’ are Demeter’s epithets who, through Triptolemus, is supposed to have given grain to mankind, taking humanity from a wild to a civilised lifestyle; the ‘thesmophoria’ to which Grotius alludes were the feasts of Demeter, see A.B. Stallsmith, ‘The Name of Demeter Thesmophoros’, *Greek, Roman and Byzantic Studies* 2008, p. 115. This explanation is also found in Vitoria who makes it the source of a universal duty of hospitality having survived the division of lands.

[11] J.-N. Buache de La Neuville (1741–1825), *Essai d'une nouvelle division politique, ou moyen d'établir d'une manière fixe et invariable les bornes des possessions entre les différentes puissances*, manuscript cited by D. Nordman, *Frontières de France. De l'espace au territoire, XVIe-XIXe siècle*, Gallimard, 1998, p. 111-112.

[12] 'Before Jove's time no settlers brought the land under subjection; Not lawful even to divide the plain with landmarks and boundaries', Virgil, *The Georgics*, I, transl. C. Day Lewis, Oxford World's Classics, [1940] (2009), p. 55.

[13] J.-J. Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1754)*, Œuvres complètes*, t. III, Gallimard, Pléiade, 1964, p. 164. *Discourse on Inequality*, transl. G.D.H. Cole (www.aub.edu.lb). A similar presentation is found in Ch. Wolff, *Principes du droit de la nature et des gens*, éd. S. Formey (1758), Livre II, chap. II, § XXVIII.

[14] I. Kant, 'Conjectural Beginning of Human History' (1786)*, Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, P. Kleingeld (ed). transl. D.L. Colclasure, Yale University Press, 2006.

[15] It is impossible here to expand on this fundamental theme (and its nuances, see the major study by J. Dauvillier, 'Aux origines des notions d'Etat et de souveraineté sur un territoire', *Mélanges offerts à Paul Couzinet*, Université des sciences sociales de Toulouse, 1974, p. 153-221) that would involve an exposition of how agricultural peoples came to dominate non-agricultural peoples (often by exterminating them), precisely by way of a doctrine steeped in territoriality arising from sedentary agriculture. An origin of it can be found in the instrumentalisation by part of the doctrine of the law of nations of the 'Ansibarian' argument, relating to an unedifying passage in Tacitus (*Annales*, III, LV, trad. Dureau de Lamalle, Michaud, 1817, tome III, p. 363-364) the passage indicates that empty *eas publicas esse* and that God did not create the world to be void; it can be found in Gentili, *De Iure Belli* (1612)*,* L. I, ch. XVII §131 ('Classics of International Law', Carnegie Institution of Washington, Oxford, The Clarendon Press, 1933, transl. J.C. Rolfe) who concludes: 'And therefore the seizure of vacant places is regarded as a law of nature'; Grotius takes the self-same passage from Tacitus (without citing Gentili, *On the Law of War and Peace* (n. 10), Book II chap. II, § XVII) to confirm 'uncultivated land ought not to be considered as occupied'. In this way, despite Christian defences of the rights of non-agricultural peoples as found before in the fifteenth and sixteenth centuries in Cajetan, Vitoria or Soto, uncultivated land has been counted as vacant land, which gives whole new scope to the Ansibarian argument and subsequently the concept of *terra nullius*. Even before Locke, who linked sedentary agriculture to the right of ownership, Robert Gray, in *A Good Speed to Virginia* (Kyngston, 1609) took up this idea to justify the occupation of Virginia: the savage do not have property but a sort of general residence comparable to that of wild beasts in forests; they have no other guide than their concupiscence and their sensuality, no not mine and thine among them, and so no one could complain of land being take from them. On North American Indians having no 'determined geographical frontiers' and the progression of the agricultural argument to the benefit of an increasing 'colonial' American doctrine at the expense of the Indians (which is to say little for a genocide), see the observations of Th. Fleury, *Etat et territoire en droit international. L'exemple de la construction du territoire des Etats-Unis (1789–1914)*, Pedone, 2013, p. 62 and the ways boundaries were fixed by treaties with them, p. 160 ff. As shown by the illuminating study of R. Tuck, 'The Making and Unmaking of Boundaries from the Natural Law Perspective', *in* A. Buchanan & M. Moore (ed.), *States, Nations, and Borders*… (n. 2), esp. p. 154 ff, it is a recurrent argument in the seventeenth century; Tuck mentions a debate in 1630 between John Cotton and Roger Williams in Massachusetts, which seems like the North American equivalent of the Valladolid controversy between Las Casas and

Sepulveda for South America; on this last point see D. Alland, 'Conquête espagnole des Indes, jugements sur les indiens d'Amérique et doctrine de la guerre juste', *Droits* 2007, n° 46, p. 19-40 and 'L'esclave par nature d'Aristote au temps de la Seconde scolastique espagnole', *Droits* 2009, n° 50, p. 59-87 with the references cited.

[16] I. Kant, 'Conjectural Beginning' (n. 14), p. 33.

[17] R. Debray, *Éloge des frontières*, Gallimard, 2010, p. 46.

[18] Anticipating a French victory, the government asked the Barresian Paul Vidal de La Blache - influenced by F. Ratzel's *Géographie politique* – to form a team to prepare the future new drawing of the maps of Europe. His pupil and then son-in-law Alfred Martonne came to play a decisive part in drawing the borders between the wars. His preparation of the treaties of Versailles and Trianon as advisor to the prime minister Georges Clémenceau was most important; particularly the part he played in drawing the new borders of Romania at the expense of the Hungarians, and the contours of the famous 'Danzig corridor' to the detriment of the Germans so that Poland should have an outlet on the Baltic pursuant to Wilson's thirteenth point; see Y. Lacoste, *La géographie ça sert d'abord à faire la guerre*, La Découverte 2014, p. 106-120 and A.-L. Sanguin, *La géographie politique*, PUF, 1977.

[19] On all these aspects, see M. Foucher, *Fronts et frontières*… (n. 4), p. 61 ff (emphasis added).

[20] L. Febvre, 'Frontière, le mot et la notion', *Bulletin du Centre international de synthèse*, 1928, p. 31, repr. *in Pour une histoire à part entière*, S.E.V.P.E.N., 1962, p. 18.

[21] J.-J. Rousseau, *Discours sur l'origine et les fondements de l'inégalité* ... (n. 13), p. 30. Rousseau gets ahead of himself since the political division of the world into nation states was not completed until the late nineteenth century.

[22] ICJ, 19 December 1978, *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, § 85. See also ICJ, 12 July 2005, *The Frontier Dispute (Benin/Niger)*, § 124: 'a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air' and again SA, 7 September 1910, *North Atlantic Coast Fisheries*, *RSA*, vol. XI, p. 180: 'considering that 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-terminous with the Sovereignty… ' (while critical of this award, J. Basdevant unreservedly approves this point on page 500 of his compendious commentary in *RGDIP* 1912).

[23] Written proceedings, written comments of the Government of the Republic of Serbia (15 July 2009), § 228, p. 102, ICJ, Advisory Opinion, 22 July 2010, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*.

[24] D. Bardonnet, 'Les frontières terrestres et la relativité de leur tracé', *RCADI* 1976 (153), p. 68.

[25] This pejorative term was applied to territory in an article by Georges Scelle that remained famous because it was so provocative (more so - those who are more affrighted than won over by his enthusiasm will think - than for other eminent qualities), G. Scelle, 'Obsession du territoire', *Symbolæ Verzijl*, Nijhoff, 1958, p. 347-361.

[26] M. Foucher, *L'obsession des frontières* (2007), Perrin 2012. See the comments by L. Caflisch, 'Les frontières, limites et délimitations internationales - Quelle importance aujourd'hui ?', *RCADI* 2013, t. 368, p. 9 ff.

[27] See among a very abundant literature M. Kohen, *Possession contestée et souveraineté territoriale*, PUF, 1997; A. Abou-El-Wafa, 'Les différends internationaux concernant les frontières terrestres dans la jurisprudence de la Cour internationale de Justice', *RCADI* 2007 (343), p. 42 ff.

[28] The right of peoples to self-determination is not necessarily materialised by the creation of a state, or else there would be no free choice on the part of the people in question, which would be tantamount to denying there was any right to self-determination; other solutions can be envisaged such as attachment to some other state, as shown by René-Jean Dupuy's pleading for the State of Morocco in the case concerning the Western Sahara, *Mémoires, plaidoiries et documents, Sahara occidental*, vol. IV, p. 169 ff. As for the aspiration to create a state, it would be better to speak of a 'state-territory' obsession which, if it were to become universal, would have to be met in accordance with the claims of even finer regional micro-solidarities by the creation of ever more ethnically 'pure' states. This would be an unending and unrealistic programme worthy of condemnation as rightly shown by B. Badie, *La fin des territoires. Essai sur le désordre international et sur l'utilité sociale du respect*, CNRS, 2013; according to Badie, Yugoslavia or Somalia show that the territorial remedy is applied by the international community much like the prolongation of life by medical means: endless divisions are made to make communities match territories while territory is a construct, one representation among others that relates first to a history but is obviously powerless to provide any systematic response to the 'contemporary proliferation of identity claims and as an answer to globalisation'. B. Badie also accepts that territory is the cornerstone of public international law but he argues that the new international stage is subject both to 'a-territorial movements' *and* 'competition from contradictory territorial rationales'. It seems to me that we can only bow to his conclusion on the 'end' of territories without for all that accepting it.

[29] As for example the Touadeni basin between eastern Mauritania and north-western Mali, or the Termit basin and Lake Chad in south-eastern Niger that oil exploration has updated, M. Foucher, *L'obsession des frontières* (n. 26), p. 51; or the delimitation of boundaries between Lake Chad and the Gulf of Guinea to be made from the ICJ decision of 10 October 2002 in the case concerning *The Land and Maritime Boundary between Cameroon and Nigeria*, a 150 page decision that, incidentally, rarely uses the word 'oil' .

[30] For example the 1777 treaty of San Idelfonso between Spain and Portugal over borders in the Americas, art. 5: 'between the territories of the two crowns the areas of Merim and Manguiera and the spits of land between them and the sea coast shall be reserved; without either of the two nations occupying them, they shall serve merely as a separation', J.HW. Verzijl, *International Law in Historical Perspective*, tome III, Sijthoff, 1970, p. 530 (our translation).

[31] The *Inter Cætera* bull of 1493 was meant to promote the apostolic mission and to do so set about a donation in which it may be possible to see a sort of 'blank' delimitation, as shown by the excerpt below (see the French text translated by S. Zavala, *Amérique latine : philosophie de la conquête,* Mouton, 1977, p. 127-132): 'all islands and mainlands found and to be found, discovered and to be discovered towards the west and south, by drawing and establishing a line from the Arctic pole, namely the north, to the Antarctic pole, namely the south, no matter whether the said mainlands and islands are found and to be found in the direction of India or towards any other quarter, the said line to be distant one hundred leagues towards the west and south from any of the

islands commonly known as the Azores and Cape Verde. […] by this our grant, gift and assignment' (www.nativeweb.org/pages/legal/indig-inter-caetera.html). See among the abundant literature T. Filesi, 'Significato e validità delle bolle alessandrine di fronte al fenomeno d'espansione d'oltremare dell'evo moderno', *Annuario di diritto internatiozionale* 1966, p. 197-228; A. Garcia Gallo, *Las bulas de Alejandro VI sobre el Nuevo Mundo descubierto por Colon*, Testimonio Compania Editorial, 1992; E. Nys, *Etudes de droit international et de droit politique*, Fontemoing, 1896, p. 193-210, 'La ligne de démarcation d'Alexandre VI'.

[32] P. Trousset, 'La frontière romaine et ses contradictions', Y. Roman (ed.), *La frontière*, Travaux de la maison de l'Orient, de Boccard, 1993, p. 25; see also S. Elden, *The Birth of Territory* (n. 6), chap. 2, 'From *Urbis* to *Imperium*', esp. p. 88 ff and L. Benton, *A Search for Sovereignty. Law and Geography in European Empires, 1400–1900*, Cambridge University Press, 2010, esp. p. 10 ff.

[33] P. de Lapradelle, *La frontière. Etude de droit international*, Les éditions internationales, 1928, p. 21 ff. He argues that Carolingian delimitations were an important juncture in the history of spatial divisions, but in that they were a way of sharing out fictitious rights under private law and not jurisdiction over real property and so were a long way from being delimitations among states.

[34] P. Trousset, 'La frontière romaine… ' n. 32); see the clarification by M. Foucher, *Fronts et frontières*... (n. 4), p. 74: 'It is said […] that it was on the Russo-Turkish confines that the use of modern negotiated boundary delimitation between states was invented in Europe '. That does not mean, of course, that there was never any precise delimitation of boundaries before the eighteenth century.

[35] P. de Lapradelle, *La frontière*... (n. 33), p. 34; readers will find it worth looking at the gripping examples the author gives. The major work by J.R.V. Prescott, *Political Frontiers and Boundaries*, Unwin Hyman, 1987, p. 58 ff concurs with the historical division restated here.

[36] See L. Febvre, 'Frontière, le mot et la notion', (n. 20), p. 12 ff and D. Nordman, *Frontières de France*… (n. 11). Some of the examples that follow are from these works.

[37] Abbé Girard, *Synonymes françois, leurs signification et le choix qu'il en faut faire pour parler avec justesse*, 3ème édition, Lebreton, 1769, V° « Termes, Limites, Bornes », p. 116, § 83, (http://gallica.bnf.fr/ark:/12148/bpt6k506281/f161.image).

[38] 'Marche' was not initially a military term but became one: the *marches communes* were parishes separating provinces; their inhabitants fell under the jurisdiction of both with the result that an action brought under the one excluded any under the other. For '*limite/limiter*', the *Dictionnaire de l'Académie* of 1786 says that the term is barely used for the *frontières* of a state but for a price, a space of time, and for power. It was not until the mid eighteenth century that it extended from time to space, and the 1814 edition recorded 'délimitation de frontières' and 'commissaires chargés de délimiter la frontière de deux Etats', D. Nordman, *Frontières de France*… (n. 11), p. 31 ff.

[39] Abbé de Mably, *Le droit public de l'Europe, Œuvres complètes*, Delamollière & Falque, Lyon, 1796, tome VII, p. 338 (emphasis added).

[40] D. Nordman, *Frontières de France*… (n. 11), p. 45.

[41] Henri IV then Louis XIII asked for maps of the frontiers to be drawn, M. Foucher, *Fronts et frontières*... (n. 4), p. 82.

[42] I. Richefort, 'La direction des archives et le service géographique du ministère des affaires étrangères', http://www.lecfc.fr/new/articles/187-article-2.pdf. On the history of the central administration of Foreign Affairs, see J. Baillou (ed.), *Les affaires étrangères et le corps diplomatique français,* tome I, *De l'Ancien Régime au Second Empire*, CNRS, 1984, p. 54 ff.

[43] D. Nordman, *Frontières de France*… (n. 11), p. 301.

[44] M. Foucher, *Fronts et frontières*... (n. 4), p. 89 ff.

[45] E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains* The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, transl. C.G. Fenwick (1916) (1758), Book II, chap. VII, § 92, 'Classics of International Law', Carnegie Institution of Washington, 1916. See G. Distefano, 'Les compétences territoriales' *in* V. Chetail & P. Haggenmacher (eds), *Le droit international de Vattel vu du XXIème siècle*, Nijhoff, 2011, p. 232.

[46] Bartole da Sassoferrato (1313 or 1314–1357), *La Tiberiade di Bartole sa Sasferrato. Del modo di dividere l'alluvioni, l'isole et gl'alvei* con l'annotationi et espositioni di Claudio Tobaldutii da Montalboddo, Rome, 1587. This 1355 work was reproduced in many manuscripts and incunabula and then in some ten editions in the sixteenth century and was widely disseminated from the fourteenth to sixteenth centuries on boundary marking, see P. Portet, *Bertrand Boysset : la vie et les œuvres d'un arpenteur médiéval, 1355-1416*, publication and commentary of the Provençal text of *La siensa de destrar* et de *La siensa d'atermenar*, tome 1, Le Manuscrit, 2005, p. 246-247 (in fourteenth-century Provençal *atermenar* means 'terminer, donner ou prendre des termes, borner' [mark out boundaries], H.P. de Rochegude, *Essai de glossaire occitanien pour servir à l'intelligence des poésies des troubadours*, Bénichet-Cadet, 1819, and *destrar* means 'donner la main, mener' [give one's hand, lead] but *destra* is 'mesure de superficie' [a measurement of surface area], P. Casado, *Recueil lexicographique de mots occitans et français tirés de textes administratifs du XIVe au XVIIe siècles (Gard et Hérault)*, Université Montpellier 3, 2012, [http://crises.upv.univ-montp3.fr/files/2013/01/recueil-lexicographique.pdf] and gives us 'arpenter' [survey]). It will be seen below that Roman law obviously confirms that the historical core of reflection on delimitation is composed of matters of boundary marking and surveying in property law.

[47] H. Grotius, *On the Law of War and Peace* (n. 10): Book II, chap. II, § XII; chap. III, §§ I–XIX; chap. VIII, §§ VIII–XVII.

[48] J.W. Textor, *Synopsis juris gentium* (1680), 'Classics of International Law', Carnegie Institution of Washington, 1916, chap. VIII, § 28- § 37, p. 70-72.

[49] Ch. Wolff, *Jus methodo scientifica pertractatum* (1767), 'Classics of International Law', Carnegie Institution of Washington, 1934: a five-line paragraph on the determination of frontiers (chap. III, § 284) and five substantial paragraphs on rivers separating territories (chap. I, § 106- § 110). In the *Principes du droit de la nature et des gens* (n. 13), Wolff says succinctly 'tout ce qu'on assujettit à un domaine, doit avoir des bornes, ou limites ; et ce qui n'est pas susceptible de limites, rejette le domaine', trad. S. Formey, Amsterdam, 1758, Book II, chap. II, § XL and devotes paragraphs XC to CXVIII to streams and rivers in relations among individuals, but nothing on the subject in book IX on the law of nations. Significantly, in the much later book by A.G. Heffter, *Le droit international public de l'Europe*, transl. J. Bergson, Cotillon, 1866, p. 135-136, the paragraph on 'limites des territoires' relates almost exclusively to rivers.

[50] Vattel, *The Law of Nations*… (n. 45), Book I, chap. XXII, p. 233-242.

[51] H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. VIII, § X, 1.

[52] The little used word 'arcifinie' (arcifinium) – which oddly does not figure in the *Dictionnaire universel contenant généralement tous les mots françois tant vieux que modernes, & les termes de toutes les sciences et des arts* by Antoine Furetières, Arnout & Reinier Leers, 1690 while it is found in the later *Dictionnaire universel raisonné de justice naturelle et civile* by M.A. Bouchaud, P.T. Durand de Maillane, De Felice, 1777, V° « Alluvion » – is defined by Grotius in Book II, chap. III, § XVI (*On the Law of War and Peace* (n. 10)): '(*arcifinium)*, land having natural frontiers, which is so called, as Varro says, because it has boundaries suitable for keeping off enemies, that is, natural boundaries, as rivers and mountains.' The term is used by S. Pufendorf, *The Law of Nature and of Nations*, transl. Barbeyrac 1732, Book IV, chap. VII, § XI, and E. de Vattel, *The Law of Nations* … (n. 45), Book I, chap. XXII, § 268, but not by Ch. Wolff, *in Principes du droit de la nature et des gens* (1772), trad. S. Formey, Amsterdam, 1758, II, chap. II, § XLI . In one of the numerous footnotes that enhance his translation of Grotius, P. Pradier-Fodéré points out that it comes from *agri arcifinii* referring to fields whose extent had not been determined and included within fixed bounds and had only natural boundaries, such as mountains, woods or rivers (*Le droit de la guerre et de la paix*, transl. Pradier-Fodéré, Guillaumin, 1867, tome I, p. 458-459). The term sometimes recurs, e.g. SA, 15 juin 1911, *Chamizal Case*, *RSA* vol. XI, p. 309-347, p. 320: 'copious references have been made to the civil law distinguishing between lands whose limits were established by fixed measurements *(agri limitati)* and arcifinious lands, which were not so limited (*agri arcifinii*). These two classes of lands were sometimes contrasted by saying that arcifinious lands were those which had natural boundaries, such as mountains and rivers, while limited estates were those which had fixed measurements. As a consequence of this distinction the Roman law denied the existence of the right of alluvion in favor of the limited estates which it was the custom to distribute among the Roman generals, and subsequently to the legionaries, out of conquered territory'; Reply of the Government of the Republic of Honduras of 12 January 1990, vol. II, chap. II, § 27, p. 585, ICJ, 11 September 1992, affaire du *Land, Island and Maritime Frontier Dispute [El Salvador/Honduras, Nicaragua intervening)*: 'La distinction entre les *agri limitati*, œuvre de l'arpentage des hommes, et les *agri arcifinii*, délimitées par un accident géographique - fleuve ou chaîne de montagne - découle du droit romain' (French version only). [The distinction between *agri limitati*, the work of human surveying, and *agri arcifinii*, delimited by a geographical feature – a river or mountain range – derives from Roman law].

[53] This does not mean that mountains are not chosen as boundary markers, far from it. See the many examples listed by J.H.W. Verzijl, *International Law in Historical Perspective*, vol. III (n. 30), p. 530 ff and Lord Curzon *Frontiers* (n. 5) p. 17 ff.

[54] S. Pufendorf, *De Jure Naturae et Gentium, The Law of Nature and Nations* (transl. C.H. Oldfather and W.A. Oldfather, Oxford Clarendon Press, 1934), Livre IV, chap. VII, § XI.

[55] S. Pufendorf, *ibid.* Grotius notes: 'sovereign states which border on a river must be considered as having a boundary set off by a natural frontier (arcifinium); nothing, in fact, is more suitable for separating such states than a boundary which is not easily crossed.' *On the Law of War and Peace* (n. 10), Book II, chap. III, § XVII, 2.

[56] E. de Vattel, *The Law of Nations*… (n. 45), Book I, chap. XXII, § 268.

[57] The Roman origins of all these rules are traced in *Traité de droit d'alluvion ou Examen des droits de l'Etat et des riverains* by M. Chardon, Librairie de jurisprudence de Cotillon, 1840.

[58] H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. VIII, § VIII and § IX, 3. Reference is also made to Roman law in Pufendorf, but with respect to individual situations, S. Pufendorf, *The Law of Nature and of Nations* (n. 52), Book IV, chap. VII, § XII.

[59] H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. III, § XVI, 1. For an idea of how much is borrowed from Roman law on this point, see the thesis by A. Barbe, *De l'action* Finium regundorum *en droit romain : Du bornage et des actions en délimitation et en déplacement de bornes en droit français*, Caillol & Baylac, 1868. The author shows that in Rome, the territory of the polity was divided into three: one for worship, one for the state, and one distributed to the citizens. So land ownership was initially in Rome by concession from the state. Ownership of land of the *ager publicus* was not invalidated by lapse of time; the distinction between state land and private property is fundamental for rules on delimitation. To limit the extent of a concession, both religion and the authority of the polity were involved, and gave the boundaries a sacred character. The *agrimensores* (surveyors) superseded the soothsayers in the job of delimiting land; there were first two lines, the *maximae*, crossing at right angles (*cardo* for west/east and *decumane* for south/north), then other lines were drawn parallel to them, with passageways between properties (for access and turning carts around), the widest being those of the fifth line, the intermediate lines being termed *limites*. The intermediate space – *finis* [controversy over its location and extent was the *controversia de fine*] – between lots was imprescriptible by the effect of the lex Mamilia, remained uncultivated and taken from the area left to colonists. Undistributed land belonged to the state. It was clearly posited that the limited estate could not be extended by way of alluvial deposits, that the island formed in a public river did not belong to the owner of a limited estate. Where there was confusion as to limits, each owner could end the confusion by the action of *finium regundorum* which as the implementation of the obligation to mark out land. It was a personal (and not a real) action, by which the plaintiff argued he had a right of claim; a real action would have related to the existence of a real property right (challenge to a right of ownership); but here the plaintiff acknowledged the defendant was owner of the estate; even if the shift in the dividing line altered the bounds for each of them, it was a right of claim that was invoked. At the point of intersection of the line, a marker was set on which the name of the colonist and the area of the land were marked. The furrow that ran between two marker posts was the *rigor*, a term implying the straight line from one marker to the next, while the bound of a non limited estate was called the *flexus*. The *agrimensores* were a well-respected corporation: men of a higher breed, seemingly mad but actually wise, criss-crossing the fields in incomprehensible movements, full of intuition, turning up erased traces, reconstructing destroyed limits. They drew the limits of the colony lands and established descriptive plans filed in the state archives. In a footnote Grotius quotes Cassiodorus who says of the land surveyor: 'After the fashion of a great river, he takes away territory from some and grants rights to others', H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. VIII, § X, 1.

[60] See also the remarks by J. Basdevant, 'Hugo Grotius', A. Pillet (ed.), *Les fondateurs du droit international*, Sirey, 1904, p. 244, republished by Editions Panthéon-Assas, 2014.

[61] Harmonising these views with the *primitive* establishment of ownership in the style of Jean-Jacques Rousseau (referred to above) would require other analyses.

[62] H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. VIII, § IX, 1, § XI and § XII.

[63] ‘When a river has changed its course frequently strifes arise *between neighbouring states* over the question whether at the same time the *limits of jurisdiction* are changed, and whether any additions made by the river belong to those to whose territories they have been added. Disputes of this sort should be settled according to the nature and mode of acquisition. […] In the case of lands having *natural frontiers* [arcifinium], a river by gradually changing its course changes the *boundary* also, and whatever the stream adds to either side becomes subject to the *jurisdiction* of the state to whose territory it is added; it is in fact believed that *both states* originally took possession of their *territories* with the intention that the river lying between should separate them as a natural boundary. […] What has been said will be applicable only in case the river has not changed its bed. For a river, even *where it serves as a boundary between countries*, is not considered to be merely where the water is, but where the water flows in a certain channel, and is confined by certain banks. Wherefore the addition or removal of particles, or such a change as leaves the former appearance of the stream substantially unchanged, permits the river to seem the same. If, however, the appearance of the river as a whole be at the same time changed, the case will be different. As a river which has been blocked by a dam in the upper part of its course ceases to exist, and a new river is formed in the excavated channel into which its water is conducted, so if a river, abandoning its old course has burst through in a different channel, it will not be the same as it was before, but a new river, the former river having ceased to be. In such a case *the boundary of a country* would remain in the middle of the channel which had last existed, just as if the river had dried up. For it must be held that *the purpose of the peoples* was to accept the river as a natural boundary between them. If, then, the river had ceased to exist, in that case each would retain what he had previously possessed. In like manner, when the channel changes, the same rule ought to be observed. ’, H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. III, § XVI, 1 and 2, § XVII, 1 (emphasis added). These principles, taken largely from Roman law, as said, were invariably taken up in all subsequent literature on the question.

[64] E. de Vattel, *The Law of Nations*… (n. 45), Book I, chap. XXII, § 278.

[65] E. de Vattel, *The Law of Nations*… (n. 45), Book I, chap. XXII, § 268.

[66] E. de Vattel, *The Law of Nations*… (n. 45), Book I, chap. XXII, § 275.

[67] S. Pufendorf, *The Law of Nature and of Nations* (n. 52), Book IV, chap. VII, § XII.

[68] J.K. Bluntschli, *Le droit international codifié*, trad. C. Lardy, Guillaumin, 1874, p. 181, § 286. For J. Finnis, this may be referred to as analogy, ‘Natural Law and the Re-Making of Boundaries’, *in* A. Buchanan & M. Moore (ed.), *States, Nations, and Borders*… (n. 2), p. 173.

[69] F. Delaisi, *Les contradictions du monde moderne*, Payot, 1925, p. 201 ff.

[70] P. de Lapradelle, *La frontière*… (n. 33) p. 11 and p. 237 ff.

[71] ‘La Dame au nez pointu répondit que la terre/Etait au premier occupant. /C’était un beau sujet de guerre/Qu’un logis où lui-même n’entrait qu’en rampant./Et quand ce serait un Royaume/Je voudrais bien savoir, dit-elle, quelle loi/En a pour toujours fait l’octroi/A Jean fils ou neveu de Pierre ou de Guillaume/Plutôt qu’à Paul, plutôt qu’à moi./Jean Lapin allégua la coutume et l’usage./Ce sont, dit-il, leurs lois qui m’ont de ce logis/Rendu maître et seigneur, et qui de père en fils,/L’ont de Pierre à Simon, puis à moi Jean, transmis./Le premier occupant est-ce une loi plus sage ?’, J. de La Fontaine, ‘Le Chat, la Belette et le petit Lapin’. The sharp-nosed lady made reply, / That she was first to occupy. / The cause of war was surely small /A house where one could only

crawl / And though it were a vast domain, /Said she, 'I'd like to know what will / Could grant to John perpetual reign, / The son of Peter or of Bill, / More than to Paul, or even me.' / John Rabbit spoke--great lawyer he-- /Of custom, usage, as the law, / Whereby the house, from sire to son, / As well as all its store of straw, / From Peter came at length to John. / Who could present a claim, so good /As he, the first possessor, could? /*The cat, the weasel and the young rabbit* (Lafontaine.net/lesFables/fableEtr.php?id=850)

[72] P. de Lapradelle, *La frontière*… (n. 33), p. 14. On frontiers more generally Lord Curzon observed in 1907 the paradox that this crucial question for states had never come in for comprehensive study, Lord Curzon, *Frontiers* (n. 5), p. 4.

[73] J.-M. Sorel rightly points out: 'Determining a terrestrial border is essentially a political operation that does not comply with any rule of international law but is usually materialised by a treaty. It has often been emphasised in this respect that there was no uniformly applicable international law of terrestrial delimitation. Admittedly, there are "guidelines", general principles, that can be used to delimit a border, but each is the outcome of its own specific history and no generalisation can be made. For instance, it may be a "natural" limit, a division decided on between sovereigns or the point enshrined by a conquest or conflict', 'La frontière comme enjeu de droit international', CERISCOPE Frontières, 2011, http://ceriscope.sciences-po.fr/content/part2/la-frontiere-comme-enjeu-de-droit-international.

[74] Cited by D. Nordman, *Frontières de France*… (n. 11), p. 306. See also *Mémoire pour l'établissement général des limites du Royaume* repr. *in* P. de Lapradelle, *La frontière*… (n. 33), p. 317.

[75] H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. III, § XVII.

[76] H. Grotius, *On the Law of War and Peace* (n. 10), Book II, chap. XXIII, § VIII.

[77] 'Délimitation', J. Salmon (ed.), *Dictionnaire de droit international public*, Bruylant, 2001. On maritime areas, see also J. Combacau, *Le droit international de la mer*, PUF, 1985, p. 30: 'The distribution of maritime areas cannot therefore raise any question of attribution, that is, of constitution of titles, but only questions of delimitation, an operation that consists in determining, with declaratory effect, what already belongs to the State'.

[78] ICJ, 20 February 1969, *North Sea Continental Shelf Cases*, § 18. See also, for example, ICJ, 11 September 1992, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, § 97: 'the Chamber's task is to declare what areas are, and what are not, *already* part of the one State and the other'(original emphasis).

[79] ICJ, 22 December 1986, *The Frontier Dispute (Burkina Faso/Republic of Mali)*, § 17: 'The Parties have argued at length over how the present dispute is to be classified in terms of a distinction sometimes made by legal writers between "frontier disputes" or "delimitation disputes", and "disputes as to attribution of territory". According to this distinction, the former refer to delimitation operations affecting what has been described as "a portion of land which is not geographically autonomous" whereas the object of the latter is the attribution of sovereignty over the whole of a geographical entity. Both Parties seem ultimately to have accepted that the present dispute belongs rather to the category of delimitation disputes, even though they fail to agree on the conclusions to be drawn from this. In fact, however, in the great majority of cases, including this one, *the distinction outlined above is not so much a difference in kind but rather a difference of*

degree as to the way the operation in question is carried out. *The effect of any delimitation*, no matter how small the disputed area crossed by the line, *is an apportionment* of the areas of land lying on either side of the line. […] Moreover, the effect of any judicial decision rendered either in a dispute as to *attribution of territory* or in a *delimitation dispute*, is necessarily *to establish a frontier*. It is not without interest that certain recent codifying conventions have used formulae such as a treaty which "establishes a boundary" or a "boundary established by a treaty" to cover both delimitation treaties and treaties ceding or attributing territory […] In both cases, a clarification is made of a given legal situation *with declaratory effect* from the date of the legal title upheld by the court.' (emphasis added). M. Kohen, *Possession contestée*… (n. 27) p. 121 ff shows that the practical scope of the two categories of disputes is quite small. Lapradelle's pages on the distinction between 'territorial arbitration' and 'boundary arbitration' do not point either to the operations being wholly independent: 'In both instances, the determination of a bound, if it is involved, is merely the supplement, the logical follow-up of the territorial arbitration proper. The arbitrator describes it only as a consequence, where such description is required', P. de Lapradelle, *La frontière*… (n. 33), p. 141.

[80] J.R.V. Prescott, *Political Frontiers and Boundaries* (n. 35), p. 14 ff.

[81] See P. Weil, *Perspectives du droit de la délimitation maritime*, Pedone, 1988, p. 29 ff.

[82] D. Alland, 'Les représentations de l'espace en droit international public', *Archives de philosophie du droit* 1987, t. 32, *Le droit international*, p. 163-178.

[83] ICJ, 3 June 1985, *The Continental Shelf (Libyan Arab Jamahiriya/Malta)*, § 27.

[84] *State of Rhode Island v. State of Massachusetts* (1838), 37 US 657, 737-738: 'There is neither the authority of law, or reason for the position, that boundaries between Nations or states, is, in its nature, any more a political question than any other subject on which they may contend'; *State of Florida v. State of Georgia* (1854), 58 US 458, 494: 'under our government, a boundary between two states may become a judicial question to be decided in this Court', and in *State of Virginia v. State of West Virginia* (1870) the Court specifies: 'This Court has original jurisdiction under the Constitution of controversies between states of the Union concerning their boundaries. This jurisdiction is not defeated because, in deciding the question of boundary, it is necessary to consider and construe contracts and agreements between the states, nor because the judgment or decree of the Court may affect the territorial limits of the jurisdiction of the states that are parties to the suit', cited by Th. Fleury, *Etat et territoire en droit international*… (n. 15), p. 248-250.

[85] It might be tempting to see in the ICJ order of 8 March 2011 in *Certain Activities Carried Out by Nicaragua in the Border Area* the example of a sort of *creation* of a well delimited space within which questions of sovereignty had been set aside, as it were, since the Court prohibited the states parties to the dispute from entering it. See also Th. Fleury, 'L'ordonnance de la Cour internationale de Justice dans l'affaire *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* (Mesures conservatoires)', *AFDI* 2011, p. 180. However, the temporary character of the situation so created by the provisional measures and the possibility for Costa Rica's agents to enter the area in the event of an imminent irreparable damage to the environment somewhat reduce the scope of this example from the point of view concerned here.

[86] R. Le Bœuf, *Le traité de paix en droit international public*, PhD thesis., Paris X, 2014, p. 122 ff from which the following examples are taken.

[87] For example the peace treaty of Utrecht of 11 April 1713 between France and Portugal, after recalling that 'Divine Providence having borne the hearts of […] Prince Louis XIV […] and […] Prince Dom Jean V […] of Portugal […] to contribute to the repose of Europe by putting a halt to the war between their subjects', states in its article X: 'His Very Catholic Majesty recognises by the present Treaty that the two banks of the river of the *Amazones*, both *southern and northern*, belong in full ownership, domain and sovereignty to his Portuguese Majesty', J. Dumont, *Corps universel diplomatique du droit des gens*, Brunel & Wetstein, 1726-1731, tome VIII-1, p. 353-354 (original emphasis, our translation), or the peace treaty of Neustadt of 30 August 1721 between Sweden and Russia, whose article VIII describes the 'following limits' that the 'two Empires shall have as of now and for ever', ibid., tome VIII-2, p. 37.

[88] The imprecision of the clauses delimiting the borders is interesting as it too reflects a certain state of affairs prior to the treaty, R. Le Bœuf, *Le traité de paix* ... (n. 85), p. 123.

[89] R. Le Bœuf, *Le traité de paix* ... (n. 85), p. 125.

[90] F. Ratzel (1844–1904), *La géographie politique. Les concepts fondamentaux* (1897), transl. M. Korinman, Fayard, 1987.

[91] J. Ancel, 'Les frontières, étude de géographie politique', *RCADI* 1936 (55), p. 208. Although inevitably out-dated in some respects, this very fine course is still full of teachings.

[92] *Cherokee Nation v. Georgia* (1831) 30 US 1, 55: 'The Cherokee territory being within the chartered limits of Georgia does not affect the question. When Georgia is spoken of a State, reference is had to its political character, and not the boundary'. See also *Elk v. Wilkins* (1884), 112 US 94, 99, cited by Th. Fleury, *Etat et territoire en droit international*... (n. 15), p. 51.

[93] PCIJ, 6 December 1923, *Jaworzina (Polish-Czechoslovakian Frontier)*, Series B, No. 8, p. 32. It was a question of articles III to VIII of the decision of 28 July 1920 from an international organ, the Supreme Council, on which representatives of the main allied powers sat with the task of ensuring recognition of the frontiers of the new states and settling disputes.

[94] MAT, 1 August 1929, *Deutsche Continental Gas-Gesellschaft v. Polish State*, A.D. (1929). Vol. 5 p. 11 at 15 (emphasis added).

[95] ICJ, 20 February 1969, *North Sea Continental Shelf Cases*, § 46. See also the award of 19 February 1968, *Rann de Kutch*, *RSA* vol. XVII, admitting there is no historically recognised and established border in the western part between India and Pakistan, J. J.A. Salmon, 'La sentence du 19 février 1968 du tribunal d'arbitrage dans l'affaire de la frontière occidentale entre l'Inde et le Pakistan (Affaire du Rann de Kutch)', *AFDI* 1968, p. 217; C. De Visscher, *Problèmes de confins en droit international public*, Pedone, 1969, p. 32-34. For an affirmation of a 'right to delimitation', see the declaration of the Association de la Paix par le Droit de 1919: 'Every Nation has a right to a territory surrounded by clearly defined borders and to exercise exclusive sovereignty over that territory', cited by P. de Lapradelle, *La frontière*… (n. 33), p. 69.

[96] For example, art. 4 of the treaty of Lalla Maghnia [Marnia] of 18 March 1845 between France and Morocco (the preamble of which announces the wish to trace 'exactly and definitively' the 'limit of sovereignty between the two countries'): 'In the Sahara (desert), there is no territorial bound to establish between the two countries, since the land is not for ploughing and it serves only for grazing for the Arabs of the empires that come to camp there to find the pasture and water they

need. The two sovereigns shall exercise as they shall see fit their full rights over their respective subjects in the Sahara', [http://figuignews.com/wp-content/uploads/2009/10/Lalla-Maghnia.pdf], See also the French diplomatic memorandum in *Documents diplomatiques français 1963,* tome 2, Imprimerie nationale, 1999, p. 509-510. J.R.V. Prescott, *Political Frontiers and Boundaries* (n. 35) explains why 'it is during the delimitation stage that many of the seeds of future boundary disputes are sown', p. 74.

[97] D. Bardonnet, 'Les frontières terrestres…. ' (n. 24), p. 35-36.

[98] See L. Lucchini, 'Aspects juridiques de la frontière sino-indienne', *AFDI* 1963, p. 278 and C. De Visscher, *Problèmes de confins*… (n. 94), p. 19-20.

[99] M. Bassan, 'Les relations sino-indiennes entre coopération et méfiance stratégique', *China Analysis. Les Nouvelles de Chine* n° 47, février 2014 , p. 18.

[100] The specialist Indian and Chinese on-line press report constant incursions every year. In 2013, after three weeks of confrontation 30 km south-west of Daulat Beg Oldi, troops withdrew in exchange for India's promise to destroy some military infrastructures over a distance of 250 km south of Chumar that the Chinese consider a threat. The Indian press reports more than 155 Chinese spy drone incursions. Another recent example: between 10 and 15 September 2014, Chinese and Indian troops exchanged fire (cautiously referred to as *border skirmish* in the Indian press, plainly eager not to make matters worse) further to yet another Chinese incursion at Chumar in the east of Ladakh 2 kilometres over the 'border': two hundred personnel of the Chinese liberation army were busy levelling a river and building a road with bulldozers. The road was partially demolished by Indian troops. The Indian press estimated 42 Chinese intrusions since January 2014 against 'just' nine over the same period in 2013. 'Chronique des faits internationaux', *RGDIP* 2013, p. 710, says the two states have undertaken to redraw the exact line of the border.

[101] I. Saint-Mézard, 'Les relations sino-indiennes. Tendances récentes et évolutions en cours', *AFRI*, 2006, p. 298 and 'Inde-Chine : quels équilibres en Asie ?', *AFRI* 2008, p. 59; J.-F. Huchet, 'Vers l'émergence d'une relation pragmatique entre l'Inde et la Chine', *Perspectives chinoises*, 2008, n° 104, p. 53.

[102] M. Foucher, *L'obsession des frontières* (n. 26), p. 84.

[103] Simla agreement of 3 July 1972 by Ali Buttho and Indira Gandhi; article 4 (2): 'In Jammu and Kashmir, the line of control resulting from the ceasefire of December 17, 1971, shall be respected by both sides *without prejudice to the recognized position of either side*. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this line.' (emphasis added). Available on India's ministry of foreign affairs website http://mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972.

[104] The 740 km *Line of Control* includes 550 km of double rows of barbed wire between 2.4 and 4 m high in places, often electrified; the zone between the two rows of barbed wire is mined and soldiers patrol on both sides. Some 350,000 Indian soldiers are reportedly deployed along the line and it is estimated that the various incidents since 1989 have resulted in 50–70,000 victims.

[105] 'NJ9842' designated a point east of the river Shylok, at the foot of the Saltoro mountains. To the east lies a frozen and mountainous zone rising to between 5,000 and 7,000 metres and covered

in part by a glacier. As often this inaccuracy, a consequence of the dispute between the states at cause, has itself been a source of dispute; further to a conflict between the two states in 1984, India has set up a position on the glacier.

[106] From television channels to doctors by way of a riding club lost in the Pyrenees, observes H. Dorion, *Eloge de la frontière*, Fides, 2006.

[107] M. Foucher, *Fronts et frontières*… (n. 4), conclusion, p. 531 : 'Critique des fronts, éloge des frontières'; H. Dorion, *Eloge de la frontière* (n. 106); R. Debray, *Eloge des frontières*, Gallimard, 2010; O. Freysinger, *De la frontière*, Xénia, 2013, J. Esnouf, *Un monde sans frontières ?*, Abeille et Castor, 2013, esp. p. 110 ff.

[108] It is interesting to recall that the removal of internal customs barriers (*ferme générale*, *traites foraines*) led to demands (in the *cahiers de doléances* of border populations) to clarify borders in 1789, P. de Lapradelle, *La frontière*… (n. 33) p. 49. Evaluating the EU experience is complex: true an internal market presupposes the abolition of internal borders, but it is the attribution of commerce among states that, like the US *inter-state clause*, is supposed to trigger the applicability of EU law. This compels the Court of Justice to provide a meaning of this condition that is more detached from the crossing of a border and closer to a sensitivity threshold; moreover, the removal of tax borders – with as a corollary a race to the 'lowest tax bid', has compelled the EU lawmakers to imagine complex solutions (as with VAT) to reconcile the removal of tax borders and the maintaining of twenty-eight national budgets. On borders and the European Union, see Ch. Baechler & C. Fink (eds.), *L'établissement des frontières en Europe après les deux guerres mondiales*, Peter Lang 1996, E. Balibar, *Nous, citoyens d'Europe ? Les frontières, l'Etat, le peuple*, La Découverte, 2001, G. Pécout (ed.), *Penser les frontières de l'Europe du XIXe au XXIe siècle*, PUF 2004 (a rich and well-documented historical perspective), and, with less benefit for the present subject C. Blumann (ed.), *Les frontières de l'Union européenne*, Bruylant, 2013 and J.-C. Martin (ed.), *La gestion des frontières extérieures de l'Union européenne*, Pedone, 2011.

[109] Let us add that humanist cosmopolitism that drops so many bombs cannot readily be thought seductive and peace-loving, see J.-B. Jeangène Vilmer, *La guerre au nom de l'humanité. Tuer ou laisser mourir*, PUF, 2012 and the studies collected in two issues of the journal *Droits* : *Après la Libye - avant la Syrie ? L'ingérence. Le problème*, n° 56/2012 and n° 57/2013.

[110] These questions are certainly not all unrelated – especially when certain migratory flows are driven by noble-minded interventions and interference.

[111] K. Marx, 'On the Question of Free Trade', Public Speech Delivered by Karl Marx before the Democratic Association of Brussels, 9 January 1848. (marx.eserver.org/1848-free.trade/frtade.speech.txt). It is true that Marx also announces a remote withering away of the state, involving, it can be assumed, that of borders and their delimitation.

[112] H. Pena-Ruiz, 'Préface', J. Esnouf, *Un monde sans frontières ?* (n. 107), p. 5-29.

[113] B. Badie, *La fin des territoires*… (n. 28), p. 20 ff.

[114] The Transatlantic Trade and Investment Partnership (TTIP), the Comprehensive Economic and Trade Agreement (CETA) and their Investor State Dispute Settlements (ISD).

[115] E. Tourme-Jouannet, ‘La disparition du *concept* d’empire’, *Liber amicorum en l’honneur de Serge Sur*, Pedone, 2014, p. 177.

[116] See M. Anderson, «‘Les frontières : un débat contemporain’, *Cultures & Conflits*, 26-27, automne 1997, [http://conflits.revues.org/359].

[117] R. Charvin, *Le droit international et les puissances occidentales. Tentatives de liquidation*, CETIM, 2013, p. 73.

[118] G. Scelle, ‘Obsession du territoire’ (n. 25). The author emphasises without nuances the ‘unthinkable’ character of ‘the coexistence of two or more territorial sovereignties’ (p. 348) and caresses the hope of ‘the merger of state and non-state territories in a single *substratum* of oecumenical society and the universal legal order’ (p. 351) which, it must be recognised, would greatly simplify questions of delimitation. A better idea of the conceptions of the early twentieth century is to be had from W. Schoenborn, ‘La nature juridique du territoire’, *RCADI* 1929 (30), esp. chap. III, ‘Développement des idées à l’égard des frontières du territoire’, p. 126 ff.

[119] See, for example, C. Quétel, *Histoire des murs. Une autre histoire des hommes*, Perrin, 2012, M. Foucher, *L’obsession des frontières* (n. 26), p. 75-115 and the contributions in J.-M. Sorel (ed.), *Les murs et le droit international*, Pedone, 2010.