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Borders of Convenience: European Legal Measures and the Migration Crisis

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Abstract: The migration crisis has posed fundamental questions for European institutions. Amongst these are whether EU human rights reality matches its rhetoric. The answer is a resounding no. The reaction of the EU to the crisis has entailed an abdication of responsibility, in part through adopting convenient new external 'borders'. One response to this development has been a jurisdictional extension of human rights protection by the European Court of Human Rights (ECtHR). This chapter exposes both the EU response to the crisis and the attempts by the ECtHR to re-impose responsibility on European states.

Keywords: borders, European Union, migrants, human rights, jurisdiction

1. Introduction

> "Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human-rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights: 'We should not close our ears to it.'"(Hirsi Jamaa v Italy, 2012)

In 1998, a resident of Melilla (a Spanish enclave in North Africa) found a child sleeping in his rubbish bin. The eleven-year old had been living rough by himself in the city for three years, having entered illegally over the border fence between Melilla and Morocco (Davies 2010). This episode from over twenty years ago reminds us that the so-called Migration Crisis engulfing the European legal and political discourse is less of a crisis and more correctly categorised as a condition of long standing (Borg-Barthet and Lyons 2016). Border breaches in Melilla continue to be one of the lesser-known flashpoints of the European migration impasse. In late 2017, the European Court of

Human Rights (ECtHR) judged Spain to have breached the European Convention on Human Rights (ECHR) in its handling of the collective expulsion of those who attempt to cross the border fence from Morocco into Melilla (ND and NT v Spain 2017). Judgments such as this, emanating from Europe's highest human rights court, are a significant dimension of the European legal response to the migration crisis. Spain, Italy, Greece and Malta[1] have all been exposed by the ECtHR as violating European human rights standards in their treatment of migrants over the last five years. However, this recognition of failings has to be seen against the background of divergences in Europe in the context of the migration upheavals which first critically impacted Europe in 2015.

On the one hand, the Council of Europe institutions and courts monitor and adjudicate human rights breaches in the context of migration and asylum practices by 47 European states. On the other hand, the 28 state European Union (EU) has been widely seen as having failed in its lack of effective, humane response to the migration crisis, both as an entity and also by individual state actions. Moreover, the EU can be said to have contributed to the crisis to some extent and, more generally, to have adopted a global approach which prioritises security, "push back" and the strengthening of the EU's external border.

This paper discusses both of these responses; the litigation in the ECtHR arising from the actions of European states relating to the crisis, and the policies and legal measures adopted by the EU to manage irregular external migration. The analysis focuses on the extent to which the concept and reality of borders have pervaded European legal responses to the migration crisis. The human rights Court in Strasbourg has willingly re-invented and reconceptualised the very essence of "border" in considering the scope and nature of human rights protection applicable to migrant treatment. The EU, on the other hand, having prioritised border abolition internally has resorted to increasingly harsher external border measures in the continuing efforts to manage external migration. This paper aims to expose some of the tensions present in the conflation of border policy choices and legal approaches, which the migration crisis has exposed and heightened. The EU talks values, human rights and solidarity yet acts according to a security-based script, which focuses on pushing the migration problem away from the EU, effectively creating a de facto EU frontier far beyond its physical borders. In contrast, the European human rights court has used the migration crisis to extend the reach of European human rights standards outside the territorial borders of European states.

[1] See for example *Aden Ahmed v. Malta*, ECHR App. No. 55352/12 (23 July 2013); *Suso Muso v. Malta*, ECHR App. No. 42337/12 (23 July 2013); *Louled Massoud v Malta*, ECHR App. No. 24340/08 (27 July 2010), and *Khlaifia and Others v. Italy* (no. 16483/12) 1 September 2015.

2. Borders of Convenience – and Inconvenience – in Europe

Borders and the migration crisis are inextricably linked. In one sense, specific border zones have been a contributing cause of the humanitarian tragedies highlighted since 2015. Border areas such as Calais, Lesbos and Lampedusa (Davies 2013), for example, have all become infamous for being flash-points in the European migration crisis. In another sense, a change in the very nature of borders has been an effect of the crisis in that they have been strengthened, resurrected, reconceptualised and even moved in response to the 2015 surge in external migration.

The story of the European response to the crisis is, in the main, one of failures, divisions and lack of action.[2] The very notion of a fixed border – whether that be jurisdictional or territorial – has been eroded in the course of the evolution of the current migration problem in Europe. This has occurred firstly in the EU context with the incremental outwards shift in EU external border arrangements such as those with Turkey and Libya (European Council 2018). Managing migrant influxes has been "outsourced" to non-EU states so that the actual EU external border is not impacted directly, as it was in 2015. Secondly, almost all European states have individually adopted new border and migration control mechanisms and policies such that migrants do not reach state borders – for example, the UK's Vulnerable Persons Resettlement Programme 2015 and Hungarian barbed wire fences (The Guardian 2016). Many EU states have actively engaged in "push-back" and collective expulsion strategies in order that migrants do not enter state territories and thus engage the protection of state laws and rights. In short, actions by both individual EU states and the EU itself can be categorised as the employment of "borders of convenience" - the generation of new or different borders to deflect the migrant problem away from actual EU borders.

In contrast the ECtHR has, in a more positive vein, developed new concepts as to where the limits of a state may lie in relation to its treatment of migrants. The Strasbourg Court has extended the reach of EU states such that their human rights responsibility is engaged outside their own borders. In other words, European states have had what might be termed as "inconvenient borders" imposed on them in order to increase human rights protection for migrants. In short, since the peak of the migration crisis in 2015, we have become accustomed to a lack of traditional fixity and certainty in legal and territorial borders in Europe. European attempts to respond to external migratory pressures have led to the erosion of established notions of where borders lie and to an acceptance that borders will be moved and adjusted if deemed convenient. We explore how this has occurred in both the EU and the ECtHR.

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[2] The multi-lateral international response appears to be been more positive. This includes the UN General Assembly's New York Declaration 2016, which *inter alia* committed states to work to agreeing two global compacts in the area, one on refugees and one on migrants, see http://www.refworld.org/docid/57ceb74a4.html. The work is continuing.

3. The European Union: The Fall and Rise of Borders

The 1998 Melilla episode was to foreshadow something on a much larger scale which erupted in 2015, and which has shaken European integration to its core. The mass movement of more than a million refugees and migrants (many fleeing conflicts in Syria, Afghanistan and Iraq) into European countries during 2015 (Eurostat 2015) generated an extreme level of disruption and disunity in the EU and its member states as they attempted to deal with the arrivals (European Commission 2015). This migration scenario is a humanitarian catastrophe of a sort unseen in Europe since the 1930s and 40s (The Guardian 2018). Images from Lesbos, Lampedusa and Calais among others, bore witness to the magnitude of the human cost of the crisis. As the EU and its Member States struggled with the pressures of the mass movement of displaced people, the treatment of those people exposed serious shortcomings in the application of European fundamental human rights, humanitarian law and EU neighbourhood policy.

What was first conveniently categorised as a "peripheral glitch" (Caruso 2014) and a merely local issue confined to the Mediterranean extremes of fortress Europe, had been evolving over several years before it reached a crescendo during 2015. Already in 2014, Daniela Caruso spoke of the "lost generation" of those who had been lost, drowned in the waters of southern Europe (Caruso 2014). Such losses, however, were to be eclipsed by the extent of the arrivals in 2015 (European Commission 2018), when an EU level response became inescapable. That response is still being worked out, years later (European Council 2018). In the delayed and protracted efforts to produce a rights-based and coordinated position to the catastrophes at its borders, the EU has been exposed as unable to live up to its core values and human rights. The issue of border management and movability has become central to the EU's evolving migration stance. This is observable through the following phases of EU border strategy:

i. The eradication of internal borders and the creation of "the great border-free zone" – the Schengen Agreement
ii. Reinforcement of internal borders through increasing control of external borders – the Dublin Regulation
iii. First response reactions to the 2015 crisis; pushing the problem away from EU borders – the EU-Turkey Agreement
iv. Reconceiving the limits of Europe; bolstering EU external borders with buffer zones in Africa

The establishment of the European integration project in 1957 was predicated upon the furtherance of free movement within the EU and the attendant abolition of internal borders to facilitate such freedom. The global objective was trade facilitation and

economic improvement. However, this border-free zone could not function in isolation from the rest of the world, or from those millions of people historically and geographically linked to the EU who could gravitate, willingly or involuntarily, towards Europe. From the 1950s to today, there has been a dichotomy at the heart of European integration which reached a crisis point in 2015 and which the EU is still attempting to navigate. The original Schengen Agreement of 1985 which provided for the gradual abolition of internal borders in the then EEC was largely influenced by the demands of a free moving trading community within parts of the EEC; trade, for now, trumped tight territorial control. Having concretised a borderless free trade zone under the Schengen mechanisms, the EU was inexorably led to protecting the latter through co-ordination of those not entitled to entry. Soft internal borders essentially generated hard external frontiers as "fortress Europe" was incrementally constructed. The 1990 Dublin Convention led to an agreement in 2003 on the handling of asylum claims - the Dublin Regulation. On paper, Dublin was an ideal mechanism for European collaboration on the handling of asylum seekers. The fall in internal borders essentially gave rise to a border-related restriction for those seeking refuge in Europe; they could only claim asylum at the first point at which they crossed an EU border. Before the futility of Dublin manifested in 2015, the EU border free edifice appeared to be functioning, at least from the perspective of the EU, with conveniently managed border crossings by asylum seekers. To complement the procedural agreements on borders, Frontex was established for the control of the Union's external borders in 2004. In 2013, Eurosur was created, in an attempt to deflect illegal migrants from EU external borders. The whole package for "managing" non-EU migrants coming to and within the EU was, or certainly seemed to be, a sleek, polished system, a modern bureaucratic success with its organisational efficiency, keeping non-Europeans at bay and furthering economic success and progress within.

In 2013, controversial rules were introduced in response to the upheaval resulting from the Arab spring (Peers 2004). By way of exception to the general rule, the new legislation allowed EU states to reinstate internal border controls in the event of a failure to control the outer borders of the Schengen area. This has allowed certain states to erect razor fences to impede the flow of migrants from one state to another, thereby localising and exacerbating a suite of problems that would have been better shared and resolved in common.

Since 2015, there has been an extreme rupture in the heretofore carefully cultivated border structure. The EU and its member states have resorted to new notions of where "Europe" begins in their attempt to stem illegal entry onto EU territory. The Dublin regulation had envisaged that asylum seekers would cross an EU external border. This proved to be unacceptable when around one million tried to do so in 2015. The EU response was to push the limits of the EU away from its actual physical borders. This was first engineered by the EU-Turkey Agreement of 2016, under which the EU effectively paid Turkey to manage those escaping from the Syrian conflict so that they did not penetrate EU borders (Amnesty International 2017). More recently, push backs

and buffer zones have been conceived for several African states so that, once again, the actual EU border is protected from breaches and migrants are managed and controlled many miles away from European frontiers (European Council 2018). Perceived from this perspective, the EU can be seen to have exploited its power to manipulate and manage borders to create borders of convenience which render the migration crisis not directly a European crisis.

Effectively, therefore, the response to the needs of migrants was to reinstate the powers of EU member states, to negate the principle of EU solidarity and produce a migration laissez-faire approach in which whoever builds the highest fence or stops the most asylum claims is the short term winner. All of the carefully crafted, vital loadbearing structures of EU migration and border policy, Schengen, Dublin, Frontex and came crumbling down spectacularly throughout 2015/16 in the face of the crisis which is still ongoing and which has yet been resolved by the EU (CMLRev editorial 2015).

4. ECtHR Judgments: Inconvenient Borders

A distinct consequence of the migration crisis has been the emergence of a body of case law from the ECtHR addressing aspects of the responses by European states. These judgments include cases where borders have been reconceptualised, and human rights law has been applied in a transnational and extra-territorial sense. This is notable for two main reasons. Most importantly, this is because states have been held to account for certain of their actions outside of their borders. Further, this development ill-accords with orthodox understandings of law and borders. Law is normally constrained by nation-state borders, applying on an intra-territorial basis alone. Exceptionally, law is applied across or outside physical borders. Here, jurisdictional borders become separated from fixed, orthodox physical and cartographical borders. This detachment and movement of borders occurs in two ways, transnationally and extra-territorially. Both of these are illustrated by the migrant-related human rights jurisprudence of the ECtHR.

The humanitarian effect of the application of human rights law across borders is, of course, more important than its legal exceptionalism. This is simply because the law has acted to hold states to account for their response to the crisis. An adverse judgment of the ECtHR, legally binding under article 46 of the European Convention on Human Rights (ECHR), is one of the most damming statements that the law can make of a sovereign state. Being found to have violated the human rights of an individual within their jurisdiction, be it one's right to be free from inhuman and degrading treatment

under article 3 or right to family life under article 8, has a serious impact upon a state's reputation and standing. The ECtHR, a supra-national court of judges from the 47 state parties of the Council of Europe, has been the locale of migration crisis response evaluation on several occasions. Three such judgments will be considered. These are MSS v Belgium and Greece, Hirsi Jamaa and Others v Italy and ND and NT v Spain. These cases illustrate the separation and movement of borders in distinct ways and, at the same time, tell stories of human lives caught up in Europe's modern shame.

MSS v Belgium and Greece is an instance of a border being moved and the law being applied in a transnational sense. The case was decided in January 2011. MSS was an Afghan asylum seeker who had left Kabul in 2008. He entered the European Union via Greece in December of that year. In February 2009 he arrived in Belgium and applied for asylum. Under the then applicable Dublin Regulation the Belgium authorities sought to return him to Greece so that his asylum application could be considered. The gist of the Dublin Regulation is that asylum claims should be processed by the state in which the claimant first enters the EU; it represents an attempt by the EU to manage the crisis and, in part, stop persons entering it from 'shopping' for the most 'migrant-friendly' state. Accordingly, Belgium authorities ordered MSS to leave the country. The position in such cases is that Belgium acts under the assumption that is no reason to believe that Greece would not adhere to their legal obligations under EU law, the ECHR and the Geneva Convention relating to the Status of Refugees 1951. MSS challenged his removal in Belgian courts and failed. He was sent to Greece in June 2009 where he was detained, imprisoned and ill-treated.

While in Greece, MSS complained to the ECtHR of a violation of articles 2, 3, and 13 against both Greece and Belgium. Article 2 protects the right to life, and article 13 guarantees the right to a remedy. Reports by EU institutions, the UNHCR and various NGOs on the conditions of asylum seekers in Greece were considered by the ECtHR. These evidenced the systematic practices of the detention of asylum seekers upon arrival in Greece including overcrowding, dirt and limited access to care.

MSS's complaint was against Belgium as well as Greece. The conditions in Belgium were not at the root of the complaints, however. Rather, it was Belgium's transfer of MSS to Greece that gave rise to the possible liability of Belgium. This is the element of the case that will be described (the liability of Greece will not be discussed). Belgium's jurisdictional borders have been moved, and in effect found to encompass parts of Greece. MSS's arguments against Belgium centred upon the deficient asylum system, detention and living conditions there. The ECtHR held that the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters. The ECtHR found that Belgium was wrong to assume that its fellow party to the ECHR, and a fellow EU member state, was adhering to its international legal obligations. The ECtHR stated that Belgium knew, or ought to have known, that it was possible that MSS's asylum application would not be seriously examined in Greece. There was freely ascertainable

information that detention conditions of asylum seekers in Greece were degrading. The legal principle underlying the possible liability of an expelling state was then affirmed – this is that, in effect, jurisdictional borders are movable. The ECtHR said that it was "well-established case law [that] the expulsion of an asylum seeker by a contracting state may give rise to an issue under article 3… where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to inhuman treatment in the receiving country". Accordingly, Belgium was responsible for a violation of article 3 for transferring MSS to Greece in light of the deficient asylum system and the detention and living conditions in Greece. The jurisdictional border of Belgium had been moved, and its human rights obligations applied in a transnational sense.

An example of a state's jurisdictional borders being moved and the law being applied in a wholly extra-territorial sense occurred in Hirsi Jamaa and Others v Italy. At its roots was an attempt to cross the Mediterranean from Libya to Italy by 200 people in three vessels in May 2009. While en route, on the high seas, the vessels were intercepted by the Italian authorities. The occupants of the vessels were transferred to the Italian ships, their personal effects and documents were confiscated, and the migrants were all returned to Libya. Subsequently, the Italian Minister of the Interior said the operation was carried out pursuance to bilateral agreements with Libya, and that this "push-back policy was very effective in combating illegal immigration" (Hirsi Jamaa p 13). After being returned to Libya, 11 Somali and 13 Eritrean nationals applied to the ECtHR. They complained that they had been exposed to the risk of a violation of article 3 in Libya, and in Eritrea and Somalia, as a result of being returned by Italy. They also alleged a violation of article 4 of the Protocol 4 to the ECHR, which provides that the collective expulsion of aliens is prohibited. Finally, they alleged a violation of their right to an effective remedy under article 13. The ECtHR referred to some sources describing Italy's 'push back' activities and the situations in Libya, Somalia and Eritrea, including those of the UNHCR, the Council of Europe's Committee for the Prevention of Torture and Amnesty International.

In applying the law to the facts of the case, the ECtHR firstly dealt with the issue of jurisdiction – in this sense meaning the law's borders. Article 1 of the ECHR obliges parties to secure to everyone within their jurisdiction the rights and freedoms within it – it does not refer to a state's territory. Italy argued that the applicants were outside its jurisdiction because it did not have absolute and exclusive control over them. While the ECtHR noted the only in exceptional cases would acts committed by states performed or producing effects outside of their territories constitute an exercise of jurisdiction within article 1, this was such a case. Italy's jurisdictional borders and human rights responsibilities, in other words, transcended its cartographical borders. In coming to this conclusion the ECtHR referred to the long-established rule, now found in the Law of the Sea Convention, that a flag state has exclusive jurisdiction over its vessels on the high seas – Italy's borders surrounded its vessels. As to the violation of article 3, the applicants argued that they had been exposed to the risk of torture or inhuman treatment

in Libya and their respective countries of origin. The ECtHR examined each separately, being called upon to "… assess the situation in the receiving country" (Hirsi Jamaa para 40). As to Libya, it concluded that the required substantial grounds had been shown, and by transferring the applicants to Libya, Italy acted in violation of article 3.

The ECtHR similarly held that the risk of arbitrary repatriation to Eritrea and Somalia violated article 3. This movement of borders is even more exceptional; here Italy's jurisdictional limits extended firstly to its vessels, then to Libya, and finally to Eritrea and Somalia. As to the latter, the ECtHR held that the indirect removal of an alien does not annul the responsibility of the state party to ensure that the person would not face a real risk of treatment contrary to article 3. The ECtHR held that the Italian authorities knew, or should have known, that insufficient guarantees were protecting the applicants from being arbitrarily returned to Eritrea and Somalia. The ECtHR held that the removal of aliens carried out in the context of interceptions on the high seas constitutes an exercise of jurisdiction which engages the responsibility of the state party under article 4 of Protocol 4. It went on to hold that since the removal was collective there was a breach of that article. Overall, Hirsi Jamaa and Others v Italy illustrates a movement of borders that is considerably more pronounced than that in MSS v Belgium and Greece. Here, Italy's jurisdictional borders extended to the high seas, the original destination of the individuals, Libya and beyond, to Eritrea and Somalia – all of these areas outside, of course, the orthodox borders of Italy.

A final case that affirms the divergence of territorial and jurisdictional borders in the context of the migrant crisis is ND and NT v Spain. This case is neither transnational nor extraterritorial – the people and circumstances giving rise to it took place at the physical border itself. Here, again, the ECtHR considered the borders, "push back" and the collective expulsion policy of an EU Member State. The border at issue in this judgment was in North Africa, between Morocco and Melilla, referred to above. The two people concerned, ND and NT, had tried to enter Spain (i.e. its territory in Melilla) in 2014. They had climbed over one of the three border fences and were immediately detained by Spanish forces and returned to Morocco with a group of about 80 others, without being given an opportunity to claim asylum. They argued that their human rights had been violated, including that they were subject to a collective expulsion contrary to article 4 of Protocol. Spain argued that its actions did not fall under the purview of the Convention as they had occurred outside its jurisdiction by being outside the borders of Melilla. Spain asserted it had no jurisdiction over the applicants as they had only climbed over the first border fence and were therefore not within Spanish territory and, thus, Spanish law did not apply to them. However, in response, and as in the Hirsi Jamaa case, the ECtHR detached the jurisdictional border from the physical border. The Strasbourg judges held that a state's jurisdictional border is founded upon the exercise of its authority rather being set by its physical, territorial border. Accordingly, the precise location of the border fences between Morocco and Melilla was deemed irrelevant to the establishment of Spanish human rights responsibility; once the border guards "pushed back" those who had climbed over the fence, the jurisdiction (and human rights responsibility) of Spain was engaged. The ECtHR held

it was not "… necessary to establish whether or not the border fence erected between Morocco and Spain is located on the latter's territory. [The Court] observes that, as it has found in the past, where there is control over another this is de jure control exercised by the State in question over the individuals concerned… that is to say, effective control by the authorities of that State, whether those authorities are inside the State's territory or on its land borders" (ND and NT para 54).

In sum, the three cases of MSS, Hirsi Jamaa and ND and NT illustrate the different ways the law can be applied when jurisdictional borders are moved. They establish that a state's border is not solely that which is territorial, physical and cartographical. It also includes a detachable element, a moveable border, which extends to wherever the state exercises authority and control over an individual. This persistent approach from the ECtHR implies that the borders or limits of a state are not pre-determined but rather established according to the circumstances of the exercise of a state's authority. This is a significant advance in the extent of the human rights responsibility of states within and beyond Europe. It holds that, in effect, a state's borders move with its agents. The ECtHR has, in effect, created "borders of inconvenience" for those states which choose to indirectly or directly violate the human rights of persons outside their physical borders. As seen, this position stands in stark contrast to developments by both the EU and individual EU states in their continued efforts to both "push back" individual migrants and more generally to shove the whole migration crisis issue as far away as possible from European (physical) borders (European Council 2018).

5. Conclusion

From 2015 onwards, the migration "crisis" in Europe underwent pronounced turbulence. This led to migration discourse coming to dominate the European political sphere in an acute manner, for example in summer 2018: the Aquarius episode, the passing of the so-called Soros legislation in Hungary, the invocation of the EU sanctions process against Hungary, German political unravelling due to Bavaria's stance on borders and migrants and the new Italian government's openly anti-migrant and anti-migration position. The EU special summit on migration on 28 June 2018, set against this heightened focus on the European migration problem, was an attempt to resolve an issue which has divided Europe since 2015. Strikingly, although the migration crisis currently had an extreme stranglehold on European politics, the substantive nature of the crisis has become considerably reduced and under control with far fewer migrants even reaching European borders (European Commission 2018). This is mainly as a result of the border protection and "push back" measures which both European states and the EU have put in place over the last four years. As this paper has shown, border management and control have become the dominant concern of the

hitherto borderless EU. The migration crisis is leading to an unravelling of the boundaries of European concepts of human rights, justice and solidarity as EU states struggle to reconcile their primordial dedication to border removal and free movement with mass migration influx and the resultant anti-migrant attitudes. The ECtHR continues to develop a concept of moveable borders which, in principle, implicates state responsibility outside territorial limits. In contrast, developments in EU legal and political spheres evidence an increasing imperative to manipulate borders to remove the migration crisis and migrants themselves far away from the EU.

The stance of the ECtHR is laudable in its progressive recognition that fixed, physical borders are, effectively, an outdated means of determining where state responsibility ends. However, this has to be put into the context of the increasing irregularity in border creation and control within and by the EU. This ranges from internal barbed wire fences and walls to legal arrangements with Turkey, to the suggestion of handling centres at Libya's southern borders, there is no longer in place the predictability and certainty usually associated with the very notion of a border for the EU. As Daniel Trilling suggests, the European migration crisis is far better categorised as the European border crisis (Trilling 2018). The very notion and nature of European borders are challenged in the legal responses to the migration crisis. The "inconvenience" of the biggest mass movement of people into Europe since WWII has generated a febrility in the theory and practice of borders in Europe such that border establishment and functioning is now a matter of capricious convenience rather than being characterised by the certainties traditionally inherent in the concept of a border.

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