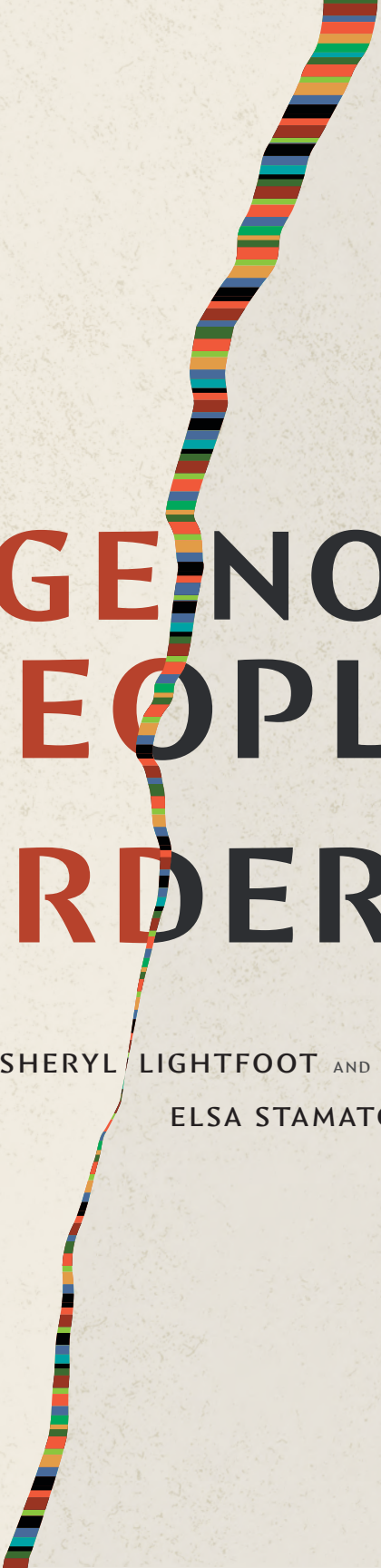




INDIGENOUS PEOPLES AND BORDERS

EDITED BY SHERYL LIGHTFOOT AND

ELSA STAMATOPOULOU

INDIGENOUS PEOPLES AND BORDERS

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INDIGENOUS PEOPLES

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**UNIVERSITY
PRESS**

AND BORDERS

EDITED BY SHERYL LIGHTFOOT AND

ELSA STAMATOPOULOU

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As this book is published one hundred years after the 1923 historic visit of Haudenosaunee Chief Deskaheh to the League of Nations in Geneva, we devote the book to the memory of this extraordinary leader, who crossed visible and invisible borders to plead the cause of his people for sovereignty and dignity.

Sheryl Lightfoot, Elsa Stamatopoulou
Coeditors

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TONE BLEIE, SHERYL LIGHTFOOT,
AND ELSA STAMATOPOULOU

Introduction

The constructed names and borders of colonization cannot
break the human bond of sacredness which binds us still today
as Original Nations of Indigenous Peoples of Mother Earth.

» GAEN HIA UH, Betty Lyons (Onondaga Nation/Snipe Clan),
American Indian Law Alliance

Colonization has often served as a backdrop to Indigenous Peoples' experiences with borders, migration, and displacement.¹ Through the process of colonization, states and others have asserted domination over Indigenous Peoples' lands, resources, governments, and cultures.² Nonstate actors have been supported or tolerated by states. The legacy of colonization, whether imperial- or settler-based, has often turned Indigenous Peoples into "migrants" by drawing international and internal borders through their homeland and realms.³ Additionally, the socioeconomic and cultural effects of colonization have displaced Indigenous ways of life with industrialization and globalization, including development projects that threaten their homes and livelihoods, often impelling Indigenous Peoples to migrate internally and across international borders.⁴ In short, the legacies of colonization are far reaching.⁵ Indigenous Peoples on the move, suffering displacement, discrimination, violence, and even death, are currently experiencing the consequences of historical policies in many ways that are poorly understood in migration law, politics, and international relations.⁶

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It is not only interstate borders that affect the cultural, political, economic, and social integrity of Indigenous Peoples in terms of their rights to land, territory, and resources, and threats to ancestral material and immaterial heritage. This issue is also relevant within states where reservations exist for Indigenous Peoples. Such realities are often linked to gradations of recognition that are apportioned by the state, as it sees fit, to serve and perpetuate domination, and in many cases, these are contested by Indigenous Peoples. Citizenship rights are part of these state-imposed systems. Indigenous Peoples' struggles to exercise their right to self-determination at the political, juridical, and other levels have achieved not only the proclamation of strong international norms through the UN Declaration on the Rights of Indigenous Peoples but also significant case law in both national and international courts. Political breakthroughs, practical examples of Indigenous governance, and the positive effects of the same in their lived experiences indicate possible answers to the negative impacts of borders on Indigenous Peoples' fundamental rights.

Indigenous Peoples' sovereignty, cultural integrity, connection to the land, and overall well-being continue to be threatened, defined, and constrained by borders. Examining the intriguing shifts in the history of border studies and relating them to the Indigenous rights agenda, we have found a striking convergence in knowledge shifts on the one hand and rather limited direct intellectual exchange on the other hand, making us firmly believe that there is much to be gained by bringing together these practice communities and their knowledge. Indigenous Peoples and scholars have also contributed to significant discourse concerning their borders, both state-related and not. Some of the recent theoretical advancements in border studies may not only stimulate novel insights into the intellectual sources (epistemology) underpinning key international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (abbreviated hereafter as the Declaration or the UNDRIP), but also contribute to determining the scope for successful political and juridical entrepreneurship at the regional, subregional, and local levels. This book provides Indigenous Peoples' critical perspectives on physical, social, and cognitive borders, and it presents often novel ways of looking at borders, beyond statist and other common approaches. It is meant as a contribution to Indigenous studies, comparative political studies and law, border studies, environmental politics, human rights, and the study of international organization and transnationalism.

This collection is the result of an increasingly broadening intellectual journey. The long gestation period from a strategic idea to a symposium to

its realization opened many opportunities to expand and refine the concept. The earliest discussions between Elsa Stamatopoulou of Columbia University and Tone Bleie of the Arctic University of Norway took place during Bleie's stay as a visiting scholar at the Center for the Study of Ethnicity and Race at Columbia University in 2015, where she raved about the recent reinvigoration of border studies or "borderology." The topical affinities between this burgeoning interdisciplinary field and Indigenous studies intrigued us as much as the paucity of specialized science-policy literature on the topic. As we shared our thoughts over time, feedback became refreshingly engaged. By 2018/2019, new partners came aboard as collaborators and funders, including Sheryl Lightfoot of the University of British Columbia, whose background in international relations and Indigenous politics further expanded our collaborative work.

Our initial ambition for the symposium involved reaching out to sections of the academy and the Indigenous rights practitioner community to invite contributions that could be enriched through contact with border studies research. We challenged contributors to examine recent theoretical innovations in Indigenous studies and border studies on two accounts: first, in terms of how these fields could stimulate novel insights into the epistemology underpinning key international instruments such as the UNDRIP; and second, to clarify the scope for successful political, cultural, and judicial entrepreneurship at the regional, subregional (territorial), and local levels. The symposium that we held in November 2019 at Columbia University was a success in these respects, and this collection is one of the results, with additional authors having joined the effort.

We shall briefly outline the key theoretical and analytical approaches that have framed and stimulated the concepts that informed the symposium and this volume: border studies, international relations and Indigenous politics, and international law.

Border Studies in Retrospect

Geography was one of the earliest disciplines to study the problem of borders, both natural and human-established.⁷ In recent decades, political geography as well as cultural anthropology and geography have shown renewed interest in the multilevel politics and meanings of borders, including interior, invisible, and imaginary borderscapes as rich repositories of public memory of history and prehistory.⁸ This perspective represents quite

significant opportunities for reorientation in ethnic studies and Indigenous studies and rights lenses.

Early border studies in the late nineteenth and early twentieth centuries engaged in mapping based on the historical-geographical and political science approaches to the evolution of international borders, including delimitations of colonial possessions in Asia, the Americas, Africa, and the Middle East. Numerous studies were devoted to the classification of borders as imposed barriers and the nature of contact across them; at the time, the European concept of borders as physical and political realities along strictly fixed lines was a relatively uncontested paradigm. It took decades before new insights in border studies exposed fully the often-conflicting geopolitical realities and interests of states.

Following World War II, functional approaches to transboundary interactions were in vogue, and the understanding of border phenomena became multifaceted and broadly informed by a wider range of disciplines, most notably political science and law, which produced useful insights for border cooperation and the delimitation of more recent late colonial and postcolonial political borders.

With the rapid rise of world-systems theory in the late 1970s, border studies came under its influence as well, and studies of nested hierarchical relations between center and periphery as well as the political economy of integration (including transboundary) processes gained credence. More often than not, these processes were argued to reproduce or exacerbate economic, social, and cultural inequalities and discrimination. State boundaries' permeable nature due to economic and political globalization, most notably the expansion of the Bretton Woods institutions, became another locus of inquiry. In anthropology, the study of ethnic boundaries and ethnic relations produced novel insights into sub- and transnational armed and peaceful ethnic movements as well as related overarching (supraethnic) political and cultural territorial formations. Sociology, geography, and political science contributed to a growing body of literature exposing critical gaps and omissions in dominant state- and world-systems-centric approaches. Political entrepreneurship, which mobilized ethnic identity as a pivotal resource in the politics of belonging, the willingness of some states to accommodate heterogeneity, and ethnonationalist formations became important subjects of inquiry.

The study of secessionism, including self-proclaimed republics and demands for sovereign recognition, developed in the 1980s as a promising subfield of inquiry, and the ambitious reintegration project of creating a

European supranational political identity attracted attention from a range of social sciences. Scholars also debated whether or not the intellectual history and the concept of nation-states was largely a Western European nineteenth-century legacy. The Eurocentrism of assuming a congruence between states and nation-building in the Global South became increasingly apparent. Theoretical and policy introspection called for a new emphasis on “context” in studying the interrelations between social, political, and natural borders and the state. Many studies started interrogating the (non)accommodation of claims to cultural and political recognition in terms of self-rule, accommodative migration, and other border-crossing policies.

Although the influence of Immanuel Wallerstein’s center-periphery theory declined in the 1980s, the theoretical and methodological insights of the grand theory concerning the nested dynamic nature of borders and border regions did not become obsolete. Law, the humanities, and the social sciences insisted on a partly distinct, partly overlapping focus on reterritorialization from below, invigorating border studies from the late 1980s onward.⁹ In fact, as the formulation of policies and the drafting of the UNDRIP progressed, the rising Indigenous Peoples’ movement and its experts made quite liberal use of these insights, which had become an intellectual common good.

Studies on reterritorialization have examined challenges to state sovereignty and border management, particularly those from historically ancient, resurging semisovereign formations of borderland peoples as well as recent ethnonationalist movements.¹⁰ These movements were theorized as entrepreneurial identity projects in the making as reterritorialization of borderlands occurred through the opening up of market spaces, production zones, commodity chains, the commodification of land, mass tourism, visa-free zones, and the destruction of ancient cultural landscapes. These processes were largely the result of neoliberal globalization policies and their alluring slogans of borderless societies; the free flow of people, goods, and services; and market-led growth as the engines of human well-being. The era of free-market capitalism paradoxically engendered new material and social borders in the form of gated production zones and residential communities as well as differentiated citizenship (rural migrants versus permanent urban residents, sedentary populations versus nomads, majority versus minority) in expanding metropolies and transformed border villages. Scholars were intrigued by how reterritorialization shifted the bargaining power between states’ legitimate use of force and nonstate armed actors. These blurred boundaries, the privatization of violence, and proxy wars in urban and rural borderlands have increasingly received scholarly attention.

The postmodern turn in border studies in the 1990s sought to reexamine decades of anthropological, sociological, and cultural geography inquiries, bringing new and more rigorous theoretical attention to the political, social, and cultural dimensions of formal and informal borders and bordering processes. In summary, the last few decades have mainly brought increased attention to two interrelated areas of research. The first concerned the processual aspects of territorial imaginations, claims, and new instruments of state control, often involving securitization practices.¹¹ These caused anything from resistance to support for diverse Indigenous and non-Indigenous border populations. The second involved examining the world of everyday life, writing as a practice (fiction and nonfiction), and their constructions of inner and outer social borders, border-controlling and transcending practices, and territorial realms.¹² Such investigations were inspired by and central to the politics of recognition from below and above—that is, the articulation of collective and individual rights claims.

Indigenous Politics and International Relations

In international relations, borders are contested spaces that are receiving renewed attention in contemporary debates. Overcoming the static and geographical conception of a border that is directly related to the modern conception of the European state as a social contract, attempts have been made to introduce a dynamic and process-oriented conception of borders instead.¹³ In the prevailing conception, it is the principle of sovereignty that is used to define a border as the legal delimitation of one autonomous state from the other, but this understanding of borders is undermined in a globalized world.¹⁴ In particular, the modern conception of the state views borders as fixed entities.¹⁵

The dominant approach suggests that borders should be drawn around people sharing similar nationalistic sentiments to avoid conflict and bestow a sense of common identity.¹⁶ Within the existing debate in international relations, there have not been many attempts to dwell on the normative significance of borders. Therefore, there is a need to situate the discussion about borders on a global stage where the state is losing its power as a political entity that has absolute autonomy over the life of the individual within its borders. The conception of borders is thus being transformed from one that was once purely geographic into one that is interdisciplinary, not least owing to the international relationships between states.¹⁷

After the end of the Cold War, it was argued that borders should not be merely approached internally but that their international significance needs to be scrutinized.¹⁸ During this period, the advent of regionalism and regional cooperation had a subsuming effect on the relative stability of borders. Moreover, globalization revolutionizes existing human relations and gradually restructures existing borders.¹⁹ In a rapidly changing world, borders are increasingly constituted by discursive and economic factors.

As mentioned, the dominant approaches to the theory of borders are state-centered and static. Although they are informed by diverging ideological orientations, both liberal and nonliberal conceptions of borders fail to make sense of the role of borders in international relations, which has led to the absence of border theory.²⁰ In international relations theories, there is an interest in the understanding of frontiers but not of the dynamism between borders and identities. The implications of borders for the issues of citizenship and identity have not been sufficiently explored in the dominant approach. Furthermore, the study of interborder relations also did not lead to an understanding of borders themselves, as dominant theories saw borders as self-contained units.

The liberal conception of borders has most recently been undermined by communitarians and multiculturalists as a view that does not account for the changing nature of a community and the rights of marginalized groups.²¹ Liberals have tried to respond to such criticism by declaring that equality before the law is a principle that equally recognizes the rights of all individuals. Besides the liberal perspective, the nature of borders could also be understood by taking a pragmatic approach, identifying the practical utility of borders in contested territories. Borders could also be defined from a discursive point of view as spaces that normalize particular forms of subjectivity and create hierarchical relations. Besides their obvious political functions, borders also serve other functions, such as economic and social, and their fluctuating character needs to be affirmed for the concept to remain useful.²²

The question of borders has also been approached from the point of view of power and marginalization. Within postcolonial discourse, borders have been seen as spaces of marginalization and structural othering, arbitrary lines that limit the free movement of people.²³ In poststructuralist thinking, borders are analyzed discursively and understood as spaces that alienate and marginalize subjectivities.²⁴ Alternatively, the Marxist approach denies the role of borders in internationalization altogether, as Marxism disavows nationalism and state sovereignty.²⁵ The defenders of cosmopolitanism also

oppose the idea of closed borders, arguing that the very constitution of societies is being reorganized in a globalized world and that this has significant ramifications for the idea of fixed borders in international relations. There is a need to develop an understanding of borders focusing on change, mobility, and new parameters that encompass the lives of individual citizens.²⁶

The conventional approaches in international relations are typified by neoliberalism, neorealism, and pragmatism, operating within a territorialist epistemology that limits the significance of borders to modern states. The existing state-centered approach treats borders as ways of ensuring the safety of the citizens within a state. International relations theorists have therefore not paid sufficient attention to borders, as they are seen only in relation to activities of the state. In the world of today, the technologization and globalization of human relations has affected the idea of closed borders in a number of ways. First, such processes bestow a new sense of identity that is not necessarily conferred by the state. Second, as overarching forces whose impact is not limited to particular boundaries, they erode the classical power given to the state. The spatial treatment of borders is totally indifferent to the role played by transborder forces.

The analysis of borders predominantly occurs in reference to territoriality, leading to the shortsighted view of borders as mere instruments that separate one state from another. This conception has been undermined by factors such as the demise of the Soviet Union, the penetration of forces of globalization into domestic markets, and the growing influence of political movements that are not necessarily delimited within the boundaries of the state. Borders always go through a process of domestication whereby, once they are arbitrarily established, they begin to exert a normative hegemony over the life of individuals.²⁷ The attempts to fixate political borders in an essential form are grounded in the assumption that political borders are founded on a material physicality.²⁸ Such an insistence overlooks the fact that borders are artificially created ways of separating identities. In a world of many different visions of modernity and the good life, contemporary borders must be understood in terms of the clash of civilizations and the rise of populism and conservatism all over the world as well as the newest border-affirming reality that is the global pandemic of 2020.²⁹

In recent scholarship, there have been attempts to introduce a nonspatial understanding of borders and abandon the quantifiable geographical understanding. The social sciences rely on a static picture of borders that has resulted in a state-centric conception of them. Existing approaches do

not account for the movement of people, temporality, or other dynamic processes.³⁰

The threat of globalization to the Westphalian order manifests in the re-definition of borders. However, arguments are also being made that states are not completely disappearing but are merely diversified in such a world. Because their power is being threatened, states are beginning to adapt new strategies of bordering that recognize the role of transboundary actors in the lives of citizens.³¹ One observes that the major attempts to make sense of borders in international relations involve efforts to universalize the linear understanding of borders that emerged in Europe in the twentieth century.³²

The nonspatial conception of borders mainly focuses on four major areas of analysis. First, there is a focus on economic relations and the distribution of resources. Second, there is a study of policies that have significance across borders. Third, there is an investigation into political communities and relations of symbiosis. Fourth, there is a study of the value orientations found in borderlands.

Borders are not monolithic or one-sided, as they involve relations of mutuality and adaptability. In an age in which the fluidity and the artificial nature of borders is emphasized, however, borders remain a key feature of the global system.³³ As a discipline, international relations tends to consider borders as relevant only to the relationships between states.³⁴ The most important factor in the recent study of borders is the relationship between politics and economy. The future of borders is a movement toward a borderless world driven by processes of liberalization and economic development.

The study of borders is also occurring from an interdisciplinary perspective, although it has not necessarily resulted in the exploration of their significance at the international stage.³⁵ In contrast to the existing approach, recent discussions have focused on the role of borders in displaying the change and dynamism found beyond nations.³⁶ There is a need to understand international relations within new parameters. This could be made possible through the approaches of processism, relationalism, and verbing. *Processism* contrasts the fleeting nature of boundaries against the static conception of the relationships between states. *Relationalism* primarily focuses on the relativized nature of borders found in multiple spaces. Finally, *verbing* focuses on the movement of people across delimited boundaries.

The discussion of Indigenous Peoples in the discipline of international relations is even more scant, typically overlooking or completely silencing them or otherwise collapsing them, without their consent or input, into domestic ethnicities.³⁷ However, Indigenous Peoples' experiences with borders

can problematize and disrupt existing assumptions on the matter. Despite this, only a handful of Indigenous and non-Indigenous scholars have thus far suggested Indigenous politics as a noteworthy area of study for both domestic and international politics.³⁸

Most existing literature on Indigenous Peoples and borders is either historical in nature or focused on the problems of borders.³⁹ However, some scholars have made the case for an expanded and more comprehensive approach to borders, especially in the Western Hemisphere.⁴⁰ More recently, a few have specifically examined Indigenous Peoples' innovations or assertions of sovereignty in spaces fully outside border zones as well as some pushback against the colonial imposition of borders.⁴¹ These and other positive examples have the potential to invigorate an important emergent area in international relations research.

Understanding the Term *Indigenous Peoples*: Who Are the Indigenous Peoples?

The use of the terms *indigenous*, *native*, or *aborigine* in international documents before World War II referred to colonized populations under foreign domination to non-Westerners, regardless of whether or not they had been born there or were newcomers.⁴² The meaning of the terms after World War II, especially through the work of the International Labour Organization (ILO), changed to what its new understanding is today.

During the many years of drafting the Declaration, the UN decided not to adopt a formal definition of the term *Indigenous Peoples*. The prevailing view today is that no universal definition is necessary for the recognition and protection of their rights. It should be pointed out that other terms, such as *peoples*, *minorities*, *family*, or *terrorism*, have not been formally defined internationally either, yet considerable international law and policy attention covers these issues. Indigenous Peoples participating at the UN over the decades had asked that there be no definition, while countries that opposed the adoption of the Declaration insisted on having an international definition of the term *indigenous* first.⁴³

One of the most commonly referenced understandings of the term *Indigenous Peoples* is the one articulated in the famous UN Study on the Problem of Discrimination against Indigenous Populations (1972–1982, also known as the Martínez Cobo study).⁴⁴ After long consideration of the issues involved,

the author of the above-mentioned study expressed a number of basic ideas, which included the right of Indigenous Peoples themselves to define who is indigenous.⁴⁵ The working definition or, better, understanding of the term reads as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- a. Occupation of ancestral lands, or at least of part of them;
- b. Common ancestry with the original occupants of these lands;
- c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general, or normal language);
- e. Residence on certain parts of the country, or in certain regions of the world;
- f. Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.⁴⁶

In other words, one fundamental element is that the Indigenous group exercises agency and *considers itself* distinct and that *the group itself is determined* to preserve, develop, and transmit to future generations their territory and culture. Another fundamental element is that the group forms at present a *nondominant* sector of society.

Article 9 of the UN Declaration on the Rights of Indigenous Peoples provides that Indigenous Peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned, and that no discrimination of any kind may arise from the exercise of such a right. Article 33 confirms that Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions.

Similar elements of understanding the term *indigenous* also appear in the ILO's 1989 Convention 169 on Indigenous and Tribal Peoples.⁴⁷

Article 1 of ILO Convention 169 contains a statement of coverage rather than a definition, indicating that the Convention applies to

- a. tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b. peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Self-identification of a group as Indigenous or tribal is considered a fundamental criterion in both above-mentioned international instruments. At the level of the individual, self-identification and acceptance by the group as such are the decisive criteria.

Self-identification is the practice followed in the United Nations system and other intergovernmental organizations as well, a practice that is especially important when it comes to accrediting Indigenous representatives in Indigenous-related meetings, such as the UN Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples or other relevant international meetings, such as those around the Convention on Biological Diversity and the World Intellectual Property Organization.⁴⁸

A distinction between the concept of Indigenous Peoples and the concept of minorities is also made, due to the different historical and political origins of the two terms. This distinction has resulted in different international legal regimes, respectively reflected in the UN Declaration on the Rights of Indig-

enous Peoples and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Indigenous Peoples have always pointed out, since their first contacts with the UN, that they should not be equated to minorities, as they are majorities in some countries, or, in any case, they are majorities in their traditional lands where they live.⁴⁹

The term *indigenous* has prevailed as a general term. In some countries, there may be preference for other terms such as tribes, first peoples, aboriginals, ethnic groups, *adivasi*, or *janajati*, or for occupational and geographical terms, such as hunter-gatherers, nomads, peasants, hill people, or rural populations, that, for all practical purposes, are used interchangeably with *Indigenous Peoples*. In some parts of Asia and Africa the term *ethnic groups* or *ethnic minorities* is used by states, although some of these groups have identified themselves as Indigenous.

Based on the Declaration, ILO's work, and the conceptual work on Indigenous Peoples by the African Commission on Human and Peoples' Rights, Albert Barume points to the human rights-based understanding of the term *indigenous* in current times — namely, the need for protection of people who suffered discrimination, injustice, and dispossession.⁵⁰ Focusing more on the African context, Barume underlines that the concept of Indigenous Peoples is indeed a human rights construct aimed at redressing specific violations of rights linked to cultural identities, livelihoods, and cultural existence as community.⁵¹ Robert Nichols sees indigeneity as a political identity, based on historic and current experiences and institutionalized systems of dispossession.⁵² Indigeneity may also be seen as a contemporary political construct, in that it is used by certain communities as a way to claim specific rights denied to them — rights proclaimed internationally in recent times, thanks to the mobilization of Indigenous Peoples from around the world.

In conclusion, the prevailing and most fruitful approach is to identify, rather than define, Indigenous Peoples in a specific context, most importantly based on the fundamental criterion of self-identification as underlined in a number of international human rights documents.

International Law

The title of this book, *Indigenous Peoples and Borders*, brings together fundamental categories of the international legal system, including issues of classical international law, contemporary international law, and international human rights law, particularly regarding the rights of Indigenous Peoples.

Below, we will discuss these three broad domains of international legal space that relate to the issues of borders and Indigenous Peoples.

CLASSICAL INTERNATIONAL LAW

In terms of classical international law, borders raise questions around the legal regimes that delineate the territorial expanse between sovereigns and outline the geographical area of their jurisdiction. What are the applicable legal regimes, and how have they developed over time? Who are the sovereigns whose territory is to be delineated? What is the role of treaties in setting borders? What is the position Indigenous Peoples claim in the crossroads of these legal regimes?

The emergence of European-based modern international law in the wake of the Peace of Westphalia had as one of its building blocks the principal assumption that the geographical boundaries that define the state are established prior to any theory of justice.⁵³ The fact that Indigenous Peoples had different systems of organizing and governing themselves from those of the European state model, with decentralized political structures and shared and overlapping spheres of territorial control, marked them as “uncivilized” in the eyes of European powers. In the liberal doctrine of international law, there was no place for group rights, so Indigenous Peoples had no legal personality, whereas states did. In this ideological system, with its concept of *terra nullius*, Indigenous Peoples had no legal capacity to own land either as political entities or as individuals.⁵⁴

Originally created by European powers, international law was considerably informed by the experiences of colonization and efforts to dominate Indigenous Peoples. In the international law of colonialism, the doctrine of discovery, one of its primary principles, ostensibly authorized European Christian powers to explore and claim the lands of peoples outside of Europe.⁵⁵ Only the European model of political and social organization, characterized by exclusive territorial domain and hierarchical centralized authority, qualified as a nation proper, and the concept of “nation” came to mean the aggregate population of a state.⁵⁶ The concept of *terra nullius*, meaning that a land that is void or empty is open to discovery claims, was part of the ideology of colonialism that was made into law. “Emptiness” was defined by the colonizing powers. If lands were not possessed or occupied by any person, or if they were not being used in a fashion that European legal systems recognized or approved, the lands were considered to be “empty” in this sense.⁵⁷ Consequently, as European colonizing powers made Indigenous

Peoples legally invisible, they felt at liberty to erect borders between themselves that would divide Indigenous Peoples' lands and obstruct their movement, whether intentionally or incidentally.⁵⁸

CONTEMPORARY CONCEPTS OF INTERNATIONAL LAW, HUMAN RIGHTS LAW, AND THE RIGHTS OF INDIGENOUS PEOPLES

Informed by the post-World War II era of decolonization and the emergence of new states, questions arise as to contemporary concepts of self-determination and the parameters that shape the laws on borders. What are the limits or tensions between self-determination and borders? In particular, what is the role of acquiescence and protest? Is there today a notion of superimposed or overlapping borders with multiple recognized sovereigns?

The recognition of human rights as one of the three aims of the United Nations and its rich human rights standard-setting in subsequent decades have created a revolution in international relations and international law. The sovereign state is no longer considered an absolute actor in its territorial domain because human rights have been elevated into a matter of international concern, legally enabling the international community, mainly via international treaties, to question the state's treatment of persons and groups. From 1945 onward, especially after the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the concept of absolute sovereignty of the state within its borders, in terms of the treatment of its people, gave way to a new regime. Advances in human rights have involved increasing international accountability and elevating individuals, groups, and peoples, including Indigenous Peoples, to subjects of international law. By becoming parties to international human rights instruments, states cede parts of their sovereignty to the international community.

In this new era, borders have also gained new significance, closely linking state responsibility to human dignity. Part of this state responsibility is ensuring freedom of movement within borders, the right to leave any country, and the right to return to one's own country (Article 13 of the UDHR). Individual human beings and groups, namely *peoples*, have been recognized as subjects of international law, having international legal personality imbued with rights that can be claimed before international bodies. The recognition of self-determination as a human right in Article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights in 1966 shed new light on the rights of Indigenous Peoples, paving the road not only toward the acceptance of their identities

by states but also toward the strengthening of those identities.⁵⁹ We should recall that, before the UN era, Indigenous Peoples were viewed by states as having some legal personality, including international legal personality, even if imperfectly so. Moreover, Indigenous Peoples' sense of themselves as sovereign nations, in parity with the other nations of the world, has always been strong. The fact that states—namely, the colonizing powers—concluded treaties with many Indigenous Peoples is a testimony that Indigenous Peoples were viewed as sovereign both internally and externally.

Despite the UN's instigation of an era of decolonization, vestiges of colonialism, even if contested or contradicted by modern legal norms, remain.⁶⁰ The borders dividing Indigenous Peoples today and the contemporary state practices of ignoring the human rights of Indigenous Peoples seem to echo the practice of the doctrines of discovery and *terra nullius*.⁶¹ It is crucial to weigh and assess where the balance lies today based on international legal norms and precedent. Most evidence points to the fact that, even though such vestiges remain in practice, they are explicitly considered illegal under contemporary international law.

Some consideration of the international law concepts of acquiescence and protest is relevant to a modern legal examination of the issues of Indigenous Peoples and borders. In international law, the term *acquiescence* (from the Latin *quiescere*, to be still) denotes a specific kind of consent tacitly conveyed by a state, “a silence that speaks,” which has legal effects.⁶² In interstate relations, acquiescence or lack thereof—namely, consistent protest—is especially important when it comes to territorial claims. Protest “has been described as ‘a formal objection by subjects of international law, usually a state, against a conduct or claim purported to be contrary to or unfounded in international law.’ The primary ‘function of a protest is the preservation of rights, or of making it known that the protestor does not acquiesce in . . . certain acts.’ Put another way, ‘A protest aims at rebutting any presumption of acquiescence in a particular claim or conduct.’”⁶³

After the former colonies gained independence, the doctrine *uti possidetis* in international law complemented that of *terra nullius*, implying that the new states were entitled to rely on the colonizers’ “just wars” against Indigenous Peoples to legitimize the borders drawn by the colonizers.⁶⁴

The contradiction in international norms became apparent from the moment that Indigenous Peoples were explicitly recognized as subjects of international law via ILO Conventions Nos. 107 and 169, the UNDRIP, the American Declaration on the Rights of Indigenous Peoples, and relevant provisions in various other treaties, declarations, resolutions, and policy documents, as

well as decisions of international human rights courts. As subjects of international law and as peoples with the right to self-determination, Indigenous Peoples have continued to resist colonial and neocolonial impositions, including the limitation of their self-governance, their lands and territories, and their movement across state borders. Indigenous Peoples have continued to assert authority over (1) the borders of their lands, territories, and resources within one state or across states, (2) cultural borders in terms of access to sacred sites and other culturally significant locations that may lie outside the lands they use, and (3) making claims for crossing state borders. These continuing protestive practices create a legal effect.

Indigenous Peoples' consistent active refusal to acquiesce, analyzed in the seminal work of Audra Simpson, has had implications in both modern international law and state law.⁶⁵ One example is the historic 2020 US Supreme Court decision in *McGirt v. Oklahoma*, in which the validity of the 1866 Treaty with the Creek Nation that set the boundaries of the reservation was upheld, and the Court reaffirmed that Eastern Oklahoma remains an Indian reservation for the purposes of federal criminal law.⁶⁶

Another factor in relativizing international borders is the existence of regional arrangements and organizations such as the European Union as well as various trade agreements. In other words, legally speaking, borders can be "owned" simultaneously by various actors, states, regional organizations, and, we should add, Indigenous Peoples. The jurisdiction of states and interstate organizations as simultaneous "owners" of borders is regulated by treaties, and the same can be the case when Indigenous Peoples are involved.

INTERNATIONAL HUMAN RIGHTS LAW IN PARTICULAR

Turning now to international human rights, the emphasis on persons and groups as subjects of international law imbued with international legal agency and rights raises the question of what borders mean for them, how borders impact the enjoyment of their internationally recognized human rights, and what options international human rights law provides them with.

The human rights dimension of the collective right to self-determination of Indigenous Peoples relates to how they participate in defining borders in terms of their lands and territories, their self-determined governance systems, and their cultural systems.⁶⁷ What James Anaya has emphasized as the remedial effect of the right to self-determination for Indigenous Peoples is broadly accepted.⁶⁸ It has also been pointed out that the right of self-determination expressed in the UNDRIP is the crystallization of a new right

for Indigenous Peoples as distinct peoples within states rather than merely the right to participate in political life as part of the whole population of the state.⁶⁹

A rich body of international human rights law provides the background to an analysis of Indigenous Peoples and borders from a human rights perspective. As expressed by the International Criminal Tribunal for the former Yugoslavia, “the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the UDHR, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually, the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”⁷⁰

The 2019 study of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) on Indigenous Peoples’ rights in the context of borders, migration, and displacement provides an analysis of three main areas: (1) the legal framework, describing the international legal norms that are relevant for this topic, especially an analysis of the UNDRIP; (2) reasons and factors behind the migration of Indigenous Peoples; and (3) challenges following migration.⁷¹ Following the study, the EMRIP issued “Advice no. 12 on the causes and consequences of migration and the displacement of Indigenous Peoples within the context of states’ human rights obligations.”⁷²

The 2019 study interlinks the various provisions of the Declaration in relation to borders.⁷³ The right to self-determination (see Articles 3, 4, and 5 of the Declaration) is recognized as a foundational right on which all other rights of Indigenous Peoples are dependent.⁷⁴ The right of self-determination is recognized also in Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Moreover, according to the Human Rights Committee, Article 1 is interrelated with other provisions of the Covenant and rules of international law.⁷⁵

The link between human rights and borders is expressly recognized in the UNDRIP. Article 36 stipulates that

- 1 Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and co-operation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

- 2 States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

This provision is closely linked to all three major pillars of the Declaration — namely, the right to self-determination; the right to lands, territories, and resources; and the cultural rights of Indigenous Peoples.

Moreover, Article 32 of the Indigenous and Tribal Peoples Convention (ILO Convention 169) states that “governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual, and environmental fields.” This article emphasizes not only the importance of transborder cooperation and management but also border peoples as borderscape heritage custodians, as political and physical borderscapes do cross through Indigenous Peoples’ ancestral lands, undercut their governance systems, and undermine their economies, well-being, and cultures.

The Declaration and ILO Convention 169 are concerned not only with the issue of physical and political borders but also with the very conditions for crossing and transcending borders through political, social, and cultural cooperation, and other forms of mobility, as well as transcending borders through public memory, border poetics, and other ways.

The UN Permanent Forum on Indigenous Issues conducted a study, led by its member Megan Davis, on “cross-border issues, including recognition of the right of indigenous peoples to trade in goods and services across borders and militarized areas,” realizing that this right presupposes some form of mobility, an intrinsic part of the lives and cultures of some Indigenous Peoples.⁷⁶ Rights in the UNDRIP that are linked to the right to self-determination and of particular relevance in the context of borders, migration, and displacement include the recognition of the right to land, the right not to be forcibly removed from their lands or territories, and the right not to be relocated without their free, prior, and informed consent (Arts. 10, 25, 26, 27, 30, and 32); the right to a nationality (Art. 6); the rights to freedom from discrimination, to human rights, and to fundamental freedoms as individuals and peoples (Arts. 1 and 2); the right to enjoy economic, social, cultural, and labor rights (Arts. 17, 20, 21, 23, and 44); the right not to be subjected to forced assimilation or destruction of their culture (Art. 8); the right to participate in decision-making and to have their free, prior, and informed consent in the conservation and protection of their environment (Arts. 10, 11, 19, 28, 29, and

32); the right to the protection of and access to historical and cultural sites (Arts. 11 and 12); the right to determine their own identity (Art. 33); and the right to restitution and compensation (Art. 28).

The EMRIP study provides a further analysis of the main norms in international human rights instruments, as indicated below.

Article 27 of the International Covenant on Civil and Political Rights recognizes the right of minorities to enjoy their own culture or to profess and practise their own religion and to use their own language in community with the other members of their group. The Committee has linked that right to the right to internal self-determination, to political participation (article 25 of the Covenant) and to other rights in the Declaration, observing that article 27 “enshrines an inalienable right to indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development.” Article 27 confers rights on indigenous peoples who “exist” in a State: they do not need to be nationals, citizens or permanent residents, and respect for their rights is not dependent upon their recognition by the State. Thus, indigenous migrant workers or even visitors in a State cannot be denied the exercise of the rights under article 27. Those rights are also recognized in the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights and the American Declaration on the Rights of Indigenous Peoples.⁷⁷

For many Indigenous Peoples, moving across landscapes and crossing what has come to be state borders has been a way of life since time immemorial and part of their cultural integrity. From the Sámi reindeer herders in the Nordic countries to the Amazigh of North Africa, migrating is a way of life, an expression of their identity, culture, and livelihood. These Indigenous ways of life, which far predate modern nation-states, often transcend the worldview and territorial lines of settled communities.⁷⁸ These and other long-standing Indigenous migration patterns may be associated with subsistence hunting, fishing, and gathering practices; animal husbandry, in which humans and herds travel together to feeding, breeding, and birthing grounds; and religious or ceremonial cycles requiring individuals to be present at certain sites for ritual practices. The EMRIP study points out that the voluntary movement of Indigenous Peoples internally and across international borders is supported by the Declaration, in particular Articles 3, 4, and 5 on self-determination and Article 36 on the right to maintain their cultural ties with their communities and to trade in goods and services across borders.⁷⁹ Articles 12 and 27 of the International Covenant on Civil and Political

Rights, on the right to movement within the state and Indigenous Peoples' right to enjoy their own culture, religion, and language in community with the other members of their group, read in conjunction with the right to self-determination in Article 1, also reinforce the view that the specificities of Indigenous Peoples' way of life and culture often require some level of mobility, for which there may be multiple reasons.

Displacement of cultural heritage from Indigenous Peoples' traditional lands through radical transformations of landscape brought on by so-called development projects and other external interventions is another cause of culture loss and violation of cultural rights. For example, Australian Indigenous delegates at the 1992 session of the UN Working Group on Indigenous Populations pointed out that it is not only people that can be displaced from the land but also cultural property and heritage. The land, it was said, has become "empty" without this heritage: "We got to bring [cultural heritage] back to the country. We got no wickety, no bush bananas, and no honey ants. We are traditional owners of this country, and we need that Tjuringa [sacred wood or stones], many of which are today exhibited in ethnographic museums throughout the world] to fix the country up. Homeland is empty."⁸⁰ In conclusion, in terms of international law, the UNDRIP has built a new foundation for the rights of Indigenous Peoples and is the most universal, comprehensive, and fundamental instrument on Indigenous Peoples' rights. It forms a part of universal human rights law, and its basic principles are identical to those of the main human rights covenants. In this way, the Declaration affirms, in Article 3, the right of Indigenous Peoples to self-determination in terms that restate the common provisions of Article 1 of the two 1966 International Covenants. The Declaration is a general instrument of human rights, a "standard elaborated upon the fundamental rights of universal application and set in the cultural, economic, political, and social context of Indigenous Peoples."⁸¹

The three pillars of the Declaration, namely the right to self-determination; the right to lands, territories, and resources; and cultural rights, provide the three interrelated normative clusters through which each human rights issue faced by Indigenous Peoples in the context of borders can be adequately analyzed so that solutions can be reached that conform to international law.

As the above review of international law aimed to show, the Declaration and its precepts are not on a lonely path, being instead supported by a robust body of contemporary international law (human rights law, specifically), norms, and case law. Together, this body of law has rendered illegitimate the

doctrine of discovery and the concept of *terra nullius* as they pertain to Indigenous Peoples. This significant development in international law becomes particularly relevant in discussions of Indigenous Peoples and borders.

Indigenous Peoples and Borders

While no state in the world currently stands in official opposition to the UNDRIP, Indigenous Peoples' rights pertaining to borders are widely and routinely violated or ignored by nation-states through their existing policies, laws, and practices. Indigenous Peoples, who are often the poorest and most marginalized groups in society, struggle to assert their rights across borders. Indigenous Peoples' epistemologies of social and material borders, embodied in public and esoteric ceremonies and material culture, tend to be overlooked, diminished, and misrepresented.

Some states, such as Canada and the Nordic countries, which are generally committed to implementing Indigenous rights, still struggle to adequately comprehend and recognize Indigenous borderscapes and find appropriate policy solutions, especially when a country with which they share a border does not share those same commitments. Scholars of Indigenous rights, politics, and policy, spanning multiple disciplines in the social sciences, are also keenly interested in this issue. Indigenous Peoples' organizations and both Indigenous and non-Indigenous nongovernmental organizations have been meeting and mobilizing for years in an attempt to find stronger and more effective policy solutions as well as to pressure nation-states to better respect Indigenous rights. However, connections and conversations between academics, the United Nations, and grassroots Indigenous organizations are rare.

This volume aims to connect the fields of border studies, human rights studies, international relations, and Indigenous studies. The approach of the book is multidisciplinary and embraces a multidimensional notion of borders. The book brings together a diverse range of international voices from academia, policymaking, and civil society, combining theoretical and practical points of view.

In part 1, "Rethinking Borders, Sovereignty, and Power in Indigenous Spaces," authors contend with the reality that Indigenous Peoples' lived experiences prompt a rethinking of conventional understandings of inner and outer borders, how border practices demarcate and evoke ancestral legacies and challenge the jurisdictional authority of modern states.

In her chapter on transnational Santals or Hq̄r Hq̄p̄on, Tone Bleie argues that a theory of transmigratory cosmopolitanism, sustained for millennia in the borderlands of India, Nepal, and Bangladesh, can inform the emerging comparative study of Indigenous cosmopolitanisms. Such border studies of deep (pre)history, Bleie argues, must engage with ethnoarchaeology, ethno-linguistics, cognitive science, and genetics. She outlines the challenges that would be posed by a less exclusive focus on the state-centric and territorially demarcated understandings of borders in favor of more attention on Indigenous cosmopolitanism and ancient transboundary migratory formations.

Melissa Z. Patel notes that governments throughout the world are increasingly employing internet communication technology (ICT) to enhance public service delivery, to create new participatory channels, and to make public and administrative data more widely accessible, including data and metrics on internal operations. These self-proclaimed moves toward open government are intended to increase efficiency, transparency, and accountability and manifest in wide-ranging forms. She argues that meaningful Indigenous data and technology governance is integral to the success of ICT implementation despite purported utilities fortified by the discourses of technological determinism. In order to demonstrate this, she builds on previous Indigenous data sovereignty and governance frameworks while fashioning a more systematic critique of the prevailing (neoliberal) approach to ICT governance in the Kurdish Region of Iraq.

In his chapter on Anglo settler states' relations with Indigenous Peoples, David B. MacDonald argues that neither settler states, especially Anglo settler states, also known as the CANZUS (Canada, Australia, New Zealand, USA) group, nor Indigenous Peoples operate in accordance with the logics of sovereignty that would be expected in mainstream international relations theory. Rather, both work far beyond the borders of the state, through bonds of friendship, a relationship that has been extremely undertheorized in international relations. MacDonald observes that the settler CANZUS states have developed and used a set of norms and rules pertaining to borders and sovereignty, which he refers to as "global settler lines," that serve to deepen the friendship bonds between these nations while also using settler borders both within and between themselves to constrain the political power of Indigenous Peoples. At the same time, he notes, Indigenous Peoples also have their own bonds of transborder and international friendship that help them mobilize in global space to advance Indigenous human rights in the face of the constraining behavior by settler states. As he deftly notes, both settler states' and Indigenous Peoples' transborder behaviors present a challenge

to Indigenous Relations theory, indicating that a territorially bounded state need not be so central to the discipline, as other collaborative communities of allies and friends are very overlooked sites of power in international space.

In part 2, “Borders as Obstructions to Indigenous Peoples’ Rights,” authors grapple with multiple ways that the Westphalian state system of territorially bounded sovereign states has and continues to separate and bifurcate Indigenous Peoples, leaving them marginalized and vulnerable to a host of violences, both direct and indirect.

The borders of Northeast India, which is now a major world theater of armed violence and trafficking, have deep colonial roots, argues Binalakshmi Nepram, with Indigenous Peoples of the region paying the highest costs. The eight Indian states now referred to as India’s Northeast did not exist prior to British colonization, and in its postcolonial state, the region now finds itself highly isolated, being surrounded by five countries yet only connected to India through a short fourteen-kilometer strip of land. Nepram notes that this region, which is home to 272 Indigenous groups, is also one of the world’s most violent, in terms of ethnic-based insurgent conflicts, now also coupled with arms and narcotics trafficking. Indigenous Peoples in the region suffer tremendously as a result of armed violence and trafficking in the border regions, and Indigenous women, as they have in past political movements in the region, are mobilizing to stop the armed violence.

Liubov Suliandziga and Rodion Sulyandziga bring us to the Russian Arctic. While historically detached from global politics and largely considered as consisting of peripheral and marginal borderlands, today’s Arctic has become a hotly contested region, as climate change has brought an increased human presence in pursuit of the natural resources of the region. Indigenous rights advocacy and capacity, including transborder mobilization, have increased steadily since the 1970s in most of the Arctic region, with the notable exception of Russia. In Russia, Indigenous Peoples enjoyed a brief period of growth following the Soviet collapse, but this was short-lived as Putin’s Russia has returned to a heavy-handed extractive resource model of economic growth, where the Arctic is viewed as a central resource base for Russia. As a result, the forty groups of Indigenous Peoples in the Russian Arctic have been unable to mobilize domestically and transnationally in the same way as other Arctic Indigenous Peoples.

Hana Shams Ahmed describes how, even though the armed conflict in the Chittagong Hill Tracts has officially ended, the Jumma people of that region continue to live under surveillance, militarization, and constant threat of violence. She examines how documents, in the form of governmental direc-

tives, create a problematic, fear-inducing relationship between the Bangladeshi state and the Indigenous communities living in the militarized area. These documents, she argues, serve as a tool of biopolitics that help the state maintain its power over the Jumma people, casting them as a national “other,” which, in turn, helps normalize the military occupation of the border region.

Borders have had varied impacts for Indigenous Peoples during the COVID-19 pandemic, Rauna Kuokkanen argues. Many Indigenous Peoples exercised their self-determination early in the pandemic by closing their borders in order to protect their own people from COVID-19, even in the face of sometimes heavy state resistance to the practice. At the same time, for Indigenous Peoples whose territories cross national borders, prolonged pandemic-related border restrictions created extreme hardship. Drawing on Giorgio Agamben’s “state of exception,” Kuokkanen argues that borders can simultaneously serve to exercise self-determination or undermine it, depending on context.

Part 3, “Globalization and Economic Integration’s Impacts on Cross-Border Indigenous Peoples,” considers how global and regional projects to relax state borders can actually have highly detrimental side effects for Indigenous Peoples.

Andrea Carmen describes how the North American Free Trade Agreement has enabled the cross-border transport to Mexico of toxic pesticides that are banned in the United States, along with the unregulated use of these pesticides through aerial spraying. The health impacts of these toxic chemicals on Yaqui Indigenous women and children have been devastating. Yaqui women from Sonora, Mexico, have been mobilizing in international spaces to document and change this cross-border practice, which is legal under US law.

The borderless problem of climate change, Jacqueline Gillis argues, sits at the intersection of Western political, cultural, and economic systems and is a clear remnant of industrialization and colonization. She explores geo-engineering, intended to manipulate the environment to offset impacts of climate change, and Indigenous responses to it before offering an alternative governance framework for geoengineering, which may help better respect Indigenous sovereignty.

Elifuraha Laltaika closes out this section with his argument that the East African Community regional integration project, which aims to allow for the free movement of goods and services across the borders of six states, remains a neoliberal one at heart. He finds that while the project is often held up as a model for regional integration in Africa, it instead falls short of addressing the challenges caused by colonial borders. For Maasai Indigenous

pastoralists, who have lived nomadically in the region since time immemorial, rangelands remain fragmented and communities disconnected.

In part 4, “Indigenous Peoples Exercising Self-Determination across Borders,” authors present some of the innovative ways that Indigenous Peoples are pushing back against some of the constraints of colonial borders by using forms of resistance that center Indigenous experiences and expressions of self-determination.

Yifat Susskind describes how MADRE, an international women’s human rights organization, has built a powerful international solidarity movement in support of Indigenous Peoples on the US-Mexico border. These cross-border exchanges, simultaneously grassroots and global, serve as a transformative strategy that builds solidarity and strengthens advocacy in defending the rights of Indigenous women and girls and is instructive of how such networks can be built and sustained.

Taking us to the borderlands of Colombia and Ecuador, Toa Maldonado Ruiz explores how the A’i Cofán People have historically experienced the effects of colonization, the exploitation of natural resources in their territories, the imposition of the border, the Colombian armed conflict that forcefully got them involved in a war, and the governments’ lack of interest in the well-being of the Indigenous populations. Their story represents the situation that other cross-border Indigenous Peoples of Ecuador are living through. She demonstrates how they are developing new strategies to cope with the complex realities the border has presented historically.

Erika M. Yamada and Manoel B. do Prado Junior provide a detailed description of how Indigenous Peoples throughout South America have been severely impacted by colonial borders and how they are actively resisting the borders that divide them. They focus especially on the potential for regional human rights systems and national supreme courts to recognize Indigenous rights as expressed in the UN Declaration on the Rights of Indigenous Peoples. They conclude that proper respect of Indigenous Peoples’ self-determination in transborder cases necessitates the creation of mechanisms to enhance dialogue between states and Indigenous Peoples.

Finally, Sheryl Lightfoot closes out this section with the case of the Haudenosaunee Confederacy’s passports. After exploring how tightly tied passports are to the rise of the modern state form and how their use is an embodiment of state power and control that all too often works against Indigenous Peoples’ right to self-determination, especially in transborder contexts, she finds that the Haudenosaunee Confederacy pushes back against these norms in multiple ways, including the use of their own passports. By

rejecting and refusing either Canadian or US passports, the Haudenosaunee both refuse to accept that level of state authority over themselves and assert their nationhood—that is, their self-determination rights. She further argues that the regular, quiet use of these passports is actively cracking the hard shell of state power in the realm of passports and controls over movement, potentially helping to reshape the concept of self-determination into forms that can more readily accommodate plural sovereignties, in practice.

Indigenous Peoples are affected at all levels by borders imposed upon and within their communities. These borders, enforced and policed by the Westphalian nation-state, take on physical, social, spiritual, cultural, and metaphorical dimensions, extending into all aspects of Indigenous life and identity.

Intersectionality, as both a theory and a practice, acknowledges that human experiences are shaped by multiple dimensions, including gender, race, and class, and cannot, therefore, be fully understood through the analysis of only one of these dimensions. Intersectionality examines “the ways in which the social categories of gender, ability, age, race, sexuality, nationality and class symbiotically reinforce one another to produce marginalized subjects.”⁸² When considering Indigenous Peoples’ experience with borders, we draw special attention to the multiple oppressions and marginalizations of Indigenous women. Most of our authors are women, and often, Indigenous women. Through their voices, we not only see that Indigenous women are victims of the inherent violence of borders, but also come to appreciate the critical link between gender and self-determination as Indigenous Peoples, and particularly, Indigenous women exercise their self-determination across borders. As Sámi scholar Rauna Kuokkanen reminds us, “Indigenous gender justice and restructuring all relations of domination form a framework of analysis that any conception of Indigenous self-determination must take as a starting point if it is not to succumb to colonial co-optation.”⁸³

This project brought various intellectual and practitioner communities together not only to deepen academic understanding but also to identify some good practices and directions that can have positive impacts on the vexed political, legal, environmental, economic, and cultural issues at hand. The various stakeholder groups represented among the authors in this volume have previously had minimal interaction with one another, so it has been our hope that knowledge can be better shared and disseminated across sectors and disciplines. We have also encouraged dialogue across geographic regions that rarely interact with one another, from North, Central, and South America to the Arctic, including both Russia and Sápmi (transcending the

borders of Norway, Sweden, Finland, and Russia), Kurdistan, and East Africa, as well as the border regions of India, Bangladesh, and Myanmar.

Authors in this volume have discussed the far-reaching impact of borders on Indigenous Peoples with the intent of examining existing issues, positive trajectories, and steps to take moving forward. Informed by universal human rights frameworks and the minimum standards of the UNDRIP, this volume has begun to construct an understanding of borderologies as they apply to Indigenous cosmopolitanism, sovereignty, self-determination, and the lived experiences of Indigenous Peoples around the globe. It is our sincere hope that this volume sparks further dialogue within and between academic disciplines that is deeply informed by Indigenous Peoples' needs and advocacy on the ground.

Notes

1. UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), Study on Indigenous Peoples' Rights in the Context of Borders, Migration and Displacement, UN Doc. A/HRC/EMRIP/2019/2/Rev. 1, para 5 (September 18, 2019).
2. A/HRC/EMRIP/2019/2/Rev. 1, para 5.
3. A/HRC/EMRIP/2019/2/Rev. 1, para. 5, citing Wolfe, "Settler Colonialism."
4. A/HRC/EMRIP/2019/2/Rev. 1, para 5.
5. A/HRC/EMRIP/2019/2/Rev. 1, para 5.
6. A/HRC/EMRIP/2019/2/Rev. 1, para 5.
7. Van Houtum, "Geopolitics of Borders and Boundaries"; Horsti, *Politics of Public Memories*; Kasperson and Minghi, *Structure of Political Geography*.
8. Hirst, *Space and Power*; Ramutsindela, "Placing Subnational Borders in Border Studies"; Migdal, *Boundaries and Belonging*; Odgaard, "Geography and Community of Territorial Borders"; Prescott and Triggs, *International Frontiers and Boundaries*; Wilson and Donnan, *Companion to Border Studies*.
9. Robinson, "Globalization and the Sociology of Immanuel Wallerstein"; Wallerstein, "American Dilemma of the 21st Century?"
10. Bleie, "Extended North-East"; van Schnedel and Abraham, *Illicit Flows and Criminal Things*; Kolossov and Scott, "Selected Conceptual Issues in Border Studies."
11. Amooore and Hall, "Border Theatre"; Dijstelbloem and Broeders, "Border Surveillance"; McDuie-Ra, "India-Bangladesh Border Fence"; Kindt, "Having Yes, Using No?"
12. Dell'Agnese and Amilhat Szary, "Borderscapes"; Schimanski, "Border Aesthetics"; Schimanski and Wolfe, *Border Aesthetics*.
13. Balibar, *Politics and the Other Scene*, 75.
14. Hudson, "Beyond Borders," 94.
15. Korf and Raeymaekers, "Introduction," 4.

16. Carter and Goemans, "Making of the Territorial Order," 278.
17. Moraczewska, "Changing Interpretation of Border Functions."
18. Buchanan and Moore, "Introduction."
19. Paasi, "Border Theory."
20. Brown, "Borders and Identity."
21. Rudanko, "Traversing the Borders of Liberalism."
22. Agnew, "Borders on the Mind."
23. Hoehne and Feyisa, "Centering Borders and Borderlands."
24. Salter, "When the Exception Becomes the Rule."
25. De Genova, "'Crisis' of the European Border Regime."
26. Rumford, "Theorizing Borders."
27. Carter and Goemans, "Temporal Dynamics of New International Borders."
28. Fall, "Artificial States?"
29. Bayeh and Baltos, "From a Culture of Borders to Borders of Cultures."
30. Konrad, "Toward a Theory of Borders in Motion"; Little, "Complex Temporality of Borders."
31. Parker and Adler-Nissen, "Picking and Choosing the 'Sovereign' Border."
32. Goettlich, "Rise of Linear Borders in World Politics."
33. Axford, "Dialectic of Borders and Networks in Europe."
34. Anderson, "Towards a Theory of Borders."
35. Laine, "Historical View on the Study of Borders."
36. Lapid, "Nudging International Relations Theory in a New Direction."
37. Beier, *International Relations in Uncommon Places*; Wilmer, "Where You Stand Depends on Where You Sit."
38. Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Addendum — The Situation of Indigenous Peoples in Canada, UN Human Rights Council, UN Doc. A/HRC/27/52/Add.2 (July 4, 2014); Lightfoot, *Global Indigenous Politics*; Lightfoot and MacDonald, "Treaty Relations between Indigenous Peoples"; Kuokkanen, *Restructuring Relations*.
39. Examples of historic literature are Hogue, *Metis and the Medicine Line*, and Sadowski-Smith, *Border Fictions*. For literature focused on the problem of borders, see Luna-Firebaugh, "Border Crossed Us"; Jaskoski, Sotomayor, and Trinkunas, *American Crossings*; and Maddison, "Indigenous Peoples and Colonial Borders."
40. Feghali, "Border Studies and Indigenous Peoples."
41. Simpson, *Mohawk Interruptus*; Norman, *Governing Transboundary Waters*.
42. Barume, *Land Rights of Indigenous Peoples in Africa*. Barume provides an excellent account of the work of the International Labour Organization since 1936, the first such organization to use the term "indigenous," and how, through the decades, the use of the term in ILO treaties changed to what is today's understanding.
43. An example of the position of Indigenous representatives is quoted in the 1996 report of the Working Group on Indigenous Populations (UN Doc. E/CN.4/Sub.2/1996/21) as follows: "We, the Indigenous Peoples present at the Indigenous

Peoples Preparatory Meeting on Saturday, 27 July 1996, at the World Council of Churches, have reached a consensus on the issue of defining Indigenous Peoples and have unanimously endorsed Sub-Commission resolution 1995/32. We categorically reject any attempts that Governments define Indigenous Peoples. We further endorse the Martínez Cobo report (E/CN.4/Sub.2/1986/Add.4) in regard to the concept of 'indigenous.' Also, we acknowledge the conclusions and recommendations by Chairperson-Rapporteur Madame Erica Daes in her working paper on the concept of indigenous peoples (E/CN.4/Sub.2/AC.4/1996/2)." Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, *Discrimination against Indigenous Peoples*, Report of the Working Group on Indigenous Populations on Its Fourteenth Session, UN Doc. E/CN.4/Sub.2/1996/21, para. 31, (August 16, 1996). See also Stamatopoulou, "Indigenous Peoples and the United Nations," 72.

44. José R. Martínez Cobo (Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination against Indigenous Populations: Volume 5, Conclusions, Proposals and Recommendations*, UN Doc. No. E/CN.4/Sub.2/1986/7/Add.4, paras. 379–382 (March 1987). The conclusions and recommendations of the study, in Addendum 4, are also available as a United Nations sales publication (UN Sales No. E.86.XIV.3). The study was launched in 1972 and was completed in 1986, thus making it the most voluminous study of its kind, based on thirty-seven monographs. The various volumes of the study are available at <https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/martinez-cobo-study/#more-7242>.
45. Tribute and respect must be paid to the late Augusto Willemsen Diaz, the substantive drafter of the study, who was a staff member of the then UN Center for Human Rights and who handled the drafting process with extraordinary sensitivity, wisdom, and courage for innovation within the UN Secretariat. The ideas are expressed in the paper, Secretariat of the UN Permanent Forum on Indigenous Issues, Background Paper on the Concept of Indigenous Peoples, UN Doc. PFII/2004/WS.1/3 (January 2004).
46. PFII/2004/WS.1/3, sec. 2.
47. ILO Convention 169 can be found at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.
48. For example, at CBD Working Group on Article 8(j), and at WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
49. Elsa Stamatopoulou's observations from servicing and attending the Working Group on Indigenous Populations over many years as UN staff. The distinction between Indigenous Peoples and minorities has been affirmed on various occasions at the international level. Among them is a paper prepared in 1985 by Judge Jules Dechenes, Canadian Expert of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Doc. E/CN.4/Sub.2/1985/31). This was also the case at the 1989 UN Seminar on the effects of racism and racial

- discrimination on the social and economic relations between Indigenous Peoples and states (UN Doc. E/CN.4/1989/22, para. 40).
50. African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*; Barume, *Land Rights of Indigenous Peoples in Africa*, 30–34.
 51. Barume, *Land Rights of Indigenous Peoples in Africa*, 34. On the approach to indigeneity in Africa, see also Elifuraha Laltaika's chapter in this book.
 52. Nichols, *Theft Is Property!*
 53. Åhrén, *Indigenous Peoples' Status*, 13.
 54. Åhrén, *Indigenous Peoples' Status*, 13, citing Martti Koskenniemi.
 55. Miller, "International Law of Colonialism," 848–89.
 56. Åhrén, *Indigenous Peoples' Status*, 9.
 57. Åhrén, *Indigenous Peoples' Status*, 7–8.
 58. Jacoby, "History of Indigenous Peoples along the U.S.-Mexico Border."
 59. Stamatopoulou, "Indigenous Peoples and the United Nations." See, for example, the 1975 Advisory Opinion by the International Court of Justice in the Western Sahara Case (ICJ Reports 1975, 12, October 16), summarized at <https://www.icj-cij.org/en/case/61/summaries>.
 60. This era is epitomized in UN General Assembly Resolution 1514 (XV) of December 14, 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV), also known as the Declaration on Decolonization.
 61. Tonya Gonella Frichner, Special Rapporteur of the UN Permanent Forum on Indigenous Issues, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, UN Doc. E/C.19/2010/13 (February 4, 2010), www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf; Newcomb, *Pagans in the Promised Land*.
 62. Oxford Public International Law, s.v. "acquiescence," by Nuno Sérgio Marques Antunes, *Max Planck Encyclopedia of Public International Law* module, last modified September 2006, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1373>.
 63. Lewis, Modirzadeh, and Blum, "Quantum of Silence," 17, quoting *Max Planck Encyclopedia of Public International Law*, s.v. "protest," by Christophe Eick, 2006.
 64. Åhrén, *Indigenous Peoples' Status*, 19.
 65. Simpson, *Mohawk Interruptus*.
 66. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). See slip opinion, docket no. 18-9526, https://www.supremecourt.gov/opinions/19pdf/18-9526_9okb.pdf.
 67. Hannum, *Autonomy, Sovereignty and Self-Determination*. In this important monograph, written before the adoption of the UNDRIP, Hannum points out (on p. 98) that "rights such as that of effective popular participation in governmental decision-making might also be relevant, particularly where indigenous peoples have asserted rights to autonomy or self-government based on, *inter alia*, international human rights norms."
 68. Anaya, *Indigenous Peoples in International Law*.

69. Coulter, "Law of Self-Determination."
70. Prosecutor v Tadić (Jurisdictional Phase), case no. IT-94-1-I, Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 97, International Criminal Tribunal for the former Yugoslavia, October 2, 1995, www.icty.org/x/cases/tadic/acdec/en/51002.htm.
71. A/HRC/EMRIP/2019/2/Rev.1.
72. Advice no. 12 is included as an annex in A/HRC/EMRIP/2019/2/Rev.1.
73. A/HRC/EMRIP/2019/2/Rev.1, paras. 10–11.
74. Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, Human Rights Council, UN Doc. A/HRC/12/34 (July 15, 2009).
75. See Human Rights Committee, CCPR General Comment No. 12: Article 1 (Right to Self-Determination), the Right to Self-Determination of Peoples, para. 2 (March 13, 1984), <https://www.refworld.org/docid/453883f822.html>.
76. UN Permanent Forum on Indigenous Issues, UN Doc. E/C.19/2015/9, para. 3 (February 17, 2015).
77. A/HRC/EMRIP/2019/2/Rev.1, para 14.
78. A/HRC/EMRIP/2019/2/Rev.1, paras. 17–18.
79. A/HRC/EMRIP/2019/2/Rev.1, para. 22.
80. Bruce Tilmouth, Central Land Council, Australia, at the UN Working Group on Indigenous Populations in 1992, quoted in Muehlebach, "‘Making Place’ at the United Nations," 431.
81. Commentary of the UN Permanent Forum on Indigenous Issues on Article 42 of the Declaration, including on the legal validity of the Declaration, UN Doc. E/C.19/2009/14, Annex, para. 8 (2009).
82. Okolosie, "Beyond ‘Talking’ and ‘Owning’ Intersectionality," 90.
83. Kuokkanen, *Restructuring Relations*, 235.

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